MINERALS COUNCIL OF AUSTRALIA

SUBMISSION TO THE ALRC REVIEW OF THE NATIVE TITLE ACT 1993

19 JANUARY 2015

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INTRODUCTION

The Minerals Council of Australia and its members (MCA) would like to acknowledge the Australian Law Reform Commission (ALRC) for the considerable time, effort and resources expended in preparing the *ALRC Native Title Act 1993 Discussion Paper (October 2014)* (Discussion Paper). We thank the ALRC for the opportunity to respond to its review of the NTA.

The MCA is the peak industry association representing exploration mining and minerals processing companies in Australia. Our members account for more than 85 percent of annual mineral production in Australia and a higher proportion of mineral exports. As more than 60 percent of minerals operations in Australia have neighbouring Indigenous communities, members of the MCA are regularly involved in negotiations with native title parties and are at times involved in claim resolution processes. Accordingly, mining and minerals processing entities need certainty with respect to their rights and obligations under the native title claims process.

The MCA is supportive of amendments to the native title system that will improve its efficiency and operability and expedite a determination of native title while providing certainty and security for all parties involved in a claim. It is critical that the system reflects a strong commitment to measures that will reduce the time taken for determinations and provides opportunity for Indigenous Australians to realise the potential social and economic benefits of the recognition of title.

Members of the MCA recognise that industry's engagement with Indigenous Australians needs to be founded in mutual respect and recognition of rights in law, interests and special connections to land and waters. In so doing, the MCA supports approaches that encourage negotiation and mediation in determining agreed outcomes. Reforms should therefore be consistent with these principles including the promotion of timely, equitable and efficient determinations for all parties involved.

EXECUTIVE SUMMARY

Overview

The MCA supports amendments to the *Native Title Act 1993* (Cth) (NTA) proposed in the Discussion Paper that would:

- Reduce delays in the resolution of claims
- Ensure that the native title system delivers practical, timely and flexible outcomes for all parties
- Improve resource efficiency in what is a resource-constrained environment
- Make the native title determination process simpler and easier for all parties.

The MCA would welcome changes to the native title system where they can provide certainty in the determination process for claimants. However, the reforms proposed by the ALRC seek to alter the legal basis for the existence and recognition of native title. Of most concern, some major recommendations proposed run contrary to the precedents established under common law by the Mabo decision. Accordingly, the MCA considers that any reform should focus on practical measures to improve procedural efficiency.

We note with concern also that the draft recommendations in the Discussion Paper are not linked to empirical evidence that has identified the substantive barriers to the processing of claims. In our view, many of the proposed amendments are unlikely to deliver an improved system, and could instead result in increased complexity and instability in the native title system.

For example, the following criteria need to be first considered by the ALRC more broadly to inform change to the NTA:

- Will these reforms adequately address the underlying issues to the framework for claims progression within reason?
- Will these reforms create unintended consequences elsewhere in the native title system?
- Will these reforms deliver a more streamlined system for native title claimants?

While the native title system's administrative processes may benefit from some revision, the case for many of the proposed amendments to the NTA in the Discussion Paper is unclear. The ALRC's own analysis suggests that significant progress has and is being made in native title and there is flexibility in the law as it currently stands.

As a result, the MCA does not supportf proposed changes to the NTA in the Discussion Paper where there is unclear or limited information as to whether stated objectives will be achieved, and where flow-on consequences may be generated that could erode the intended positive impact of reform.

Areas for in-depth consideration

The minerals industry's priority is certainty and stability in the system for all parties, and we therefore question whether some of the proposed areas for legislative change may be equally or more appropriately addressed through the provision of guidance to ensure consistency of approach.

We are concerned with the scope of the review's Terms of Reference (ToR) in focussing solely on the claims determination process. While this is clearly where significant and systematic delays occur, changes in relation to the determination process may impact negatively on the system more broadly and this requires consideration. Importantly, we note

that the proposed changes to the nature of connection may bring into review the range of non-ILUAs of broader native title context made in parallel to the NTA.

The Discussion Paper does not present critical objective analysis (including empirical data) outlining the reasoning for the lengthy periods experienced in native title determinations. This is a missed opportunity. The MCA would prefer an inquiry be undertaken to identify key procedural constraints in the system and appropriate remedies, rather than progressing with significant legislative overhaul.

For example, a key blockage in the native title system is the level of resourcing available to progress claims, including the availability of experts required to progress a claim to determination. In this regard, the MCA is not convinced that progressing with many of the amendments proposed in the Discussion Paper would necessarily alleviate such limitations.

The MCA considers that the NTA needs to be viewed holistically, comprising competing objectives of which the claims process is but one part. The original intent of the Act was to establish recognition of connection to land, which would lead to beneficial agreements and relationships for the associated rights.

The NTA recognises that not all Indigenous Australians will have customary rights recognised in law. This is undeniably a reality and based on this premise, it was intended for the NTA to be supported by the Indigenous Land Fund and Social Justice Package which is currently outstanding.

The MCA's concern is that the proposed amendments to the definition of native title (including continuity of connection, physical occupation, and the content of native title) may dilute the requirements for determination and further facilitate overlapping or competing claims. These types of claims are resource intensive for both the native title claims system and the future act process. The MCA considers the existing definitions of native title and connection to land in the NTA should remain in their present form.

As a result, it may be more appropriate to explore improvements to the native title system via procedural efficiencies, or the use of State-based regimes which operate in parallel with the NTA (such as the Victorian *Traditional Owner Settlement Act 2010*) in appropriate circumstances. The legislative changes proposed in the Discussion Paper risk compromising the existing integrity and balance of the NTA or simply impairing its functions further.

Overarching recommendation for reform

We propose, therefore that the NTA retain its original intent and improved support is instead provided for the case management process of the court. We recommend this include:

- Identification of weak cases that may be disincentivised from progressing due to the strength of procedural rights (RTN) provided during the pending determination phase
- Increased utilisation of consent determination processes where appropriate.

The MCA considers that following receipt of comments on the Discussion Paper, the ALRC should commission further work to identify and understand the key constraints in the system, and test whether the proposed reforms address the constraints. Further analysis should then be undertaken to ensure that the amendments do not result in unintended consequences more broadly. The findings from this body of work undertaken would provide the empirical business case to inform the procedural reforms needed to improve the native title system for all parties involved.

1. FRAMEWORK FOR REVIEW OF THE NTA 1993

Prospective operation for the proposed amendments (2.1)

The MCA supports the review's purpose to 'balance requirements for certainty and orderly interaction in the native title system, with principles of fairness and equality that are stated in the Act' (2.8). Consistent with this approach the MCA is of the view that the application of any amendments to the NTA should be *prospective* only.

In contrast, a retrospective application of amendments of the nature contemplated in the Discussion Paper could result in:

- The reopening of existing determinations of native title by the holders of that native title (to have additional rights recognised) or others nominating as claimants (to change the group or groups holding native title)
- Additional claims to compensation
- Challenges to broader interests such as ILUAs that were made in reliance on the law as it exists at the time of decision-making.

Application of amendments to s223 for determinations (2.2)

By way of extension, the application of amendments to the NTA should apply to all claims undetermined at the commencement of any reforms (and each future claim).

We note that the adoption of change to the NTA may unintentionally trigger a process of a withdrawal of existing claims for re-lodgement. This would lead to disruption and further delays in the system, and costly administrative churn. As a result, prospective application is the only means by which certainty can be provided for all stakeholders in the system.

Recommendations

- Establish that any amendments made to the NTA are prospective only
- Ensure that any amendments to the NTA apply to claims undetermined at commencement and each future claim only

2. TRADITIONAL LAWS AND CUSTOMS

Definition of native title and rights and interests (5.1 & 5.2)

The minerals industry acknowledges it would be beneficial to the native title system if connection could be more easily demonstrated. However, we are concerned that the the underlying core problems that create delays in determinations would not be addressed by the proposed amendments in the Discussion Paper.

Contrary to what may be intended by the proposed changes to the definition of native title, amending it may lead to increased uncertainty. For example, this could potentially exacerbate competing claims between groups or related issues that can arise, resulting in increased delays and costs in determinations.

Adaptation of culture in some communities can lead to rights being assigned across traditional boundaries creating a tension between traditional custodial rights and competing claims (such as the recognition of matrilineal rights by some groups versus patrilineal rights by others and the transfer of those rights to neighbouring groups where patrilineal lines no longer exist within a group in lieu of transfer to matrilineal descendants). It is not clear how amending the definition of native title as proposed by 5.1 and 5.2 would deal with this type of conflict.

While the MCA agrees with the notion of allowing courts and tribunals sufficient latitude to reflect the reality of a particular claimant group at a certain point in time, the proposed changes in wording to s223 would operate to make the existing claims process more complex. The proposed amendments broaden the scope and number of persons that would need to be engaged over country and would increase the complexity, cost and time involved in the connection process.

The proposed amendments move away from the common law foundations of native title, as established by the Mabo case. The MCA is concerned that such a significant change from the precedents set since 1992 would result in burdensome uncertainty in the system. For example, this could manifest in cases where competing claims against the traditional land holding group that may have otherwise been resolved under traditional law and customs may seek recognition through the proposed changes to connection.

The current definition of native title in the NTA is already flexible to the change and adaptation of cultural customs and traditional law. It enables inferences to connection where the existence of native title can be challenging in some instances to determine. As a result, it may be more effective to improve the Federal Court's case management process to drive beneficial determinations for native title claims than to deviate from the current Act.

Acknowledgement and recognition of laws and customs (5.3 & 5.4)

The MCA acknowledges that some Indigenous groups have been displaced since sovereignty, resulting in interruption to their connection to laws and customs. It is important however to recognise limitations in seeking to broaden the scope and accessibility of the claims process.

The existing acknowledgement and observance of laws and customs provides flexibility for differing modes of interpretation that can exist amongst groups. For example, in some instances, groups have indicated a preference for specificity and not generality when it comes to defining claimants and boundaries. As a result, the MCA does not agree that the definition of native title should be broadened to the extent contemplated by Proposals 5.3 and 5.4 to remove the acknowledgement and observance of laws and customs since sovereignty.

The MCA notes that at the time of drafting the NTA, it was recognised that not all Indigenous Australians would be eligible for recognition, and we consider this can be addressed via a whole-of-system approach (see Chapter 4 for full detail).

Recommendations

- Retain the existing definition of native title in the NTA
- Retain the existing definition of rights and interest in native title in s223 of the NTA
- Maintain the acknowledgement and recognition of laws and customs as stated in the NTA

3. PHYSICAL OCCUPATION

Requirement for connection (6.1 & 6.2)

The MCA recognises that significant resources are expended in demonstrating connection. We support efforts to streamline this process, and consider it essential for all parties to have clarity and certainty regarding the respective claimants they are dealing with.

We support in particular the importance of certainty as to the relationship between native title and other interests in land and water but are concerned that the removal of connection would cause confusion and delay in native title claims. The proposed amendments to the requirement to connection in 6.1 and 6.2 could likely undermine certainty in the system by expanding the scope of claimants and result in:

- Destabilising agreements (excluding registered ILUAs) which have been negotiated in good faith in the context of the existing bases to connection and the assertion of rights by groups
- Splitting claimant groups, resulting in multiple competing groups
- Creating conflicts between members of groups who are reconnecting with their country, which may already be subject to other negotiations with industry
- Increasing the registration of groups leading to overlapping claims and added costs and complexity in the negotiation process.

While we recognise the merit in creating some flexibility for the claim process, broadening the scope to the length of removing connection requirements would lead to ambiguity, delays and competing interests. The proposed amendments run contrary to the objective of certainty underpinning this review.

As raised in our response to the preceding issues paper to this review, we are of the view that the causes of the native title claim backlog are not sufficiently identified and grounded in evidence. We recommend a strengths-based analysis of recent case law and operational improvements should first be investigated before considering legislative change to the NTA.

Recommendation

- Maintain the requirements for connection as stated in the NTA, and instead seek to improve the claims determinations process via administrative reform

4. TRANSMISSION OF CULTURE

Defining native title, and identification and composition (7.1 & 7.2)

The definition of native title in s223 and its sub-sections of the NTA should remain as it is currently worded. The MCA does not support the proposed definitional change as it could undermine the Act's original intent. The MCA considers that the NTA needs to be viewed holistically, comprising competing objectives of which the claims process is but one part.

The purpose of the Act was to establish recognition of connection to land and as a result beneficial agreements and relationships for the associated rights. By deviating from this premise via amending legislative definitions of native title against recent case law findings, claims could experience overlapping and competing interest. This could manifest in the form of intra-competition amongst groups with the opportunity for negotiations and determinations undermined.

The MCA is of the view that there has been insufficient analysis to demonstrate that there is systematic failure of the native title system warranting such significant legislative change. The presumption that the proposed amendments in 7.1 and 7.2 will expedite the claims resolution process is unproven. If implemented, they would only inject uncertainty to:

- Identity — the identity of persons who claim to hold native title over time and confusion to the legitimacy of existing agreements
- Consumer protection — the fiduciary responsibilities of native title applicants to the broader native title holding community
- Post-determination compensation — the requirements for the management of funds generated from native title processes.

These unintended consequences would likely create adversarial climates and ultimately affect effective agreement-making. As a result, it may be more appropriate to explore alternative improvements via administrative options than risk compromising the existing balance and functions of native title system.

We stress the importance of instead undertaking a comprehensive analysis to inform the development of a strategy where priority issues can be addressed through operational change. This would better contribute to improving the native title system whilst simultaneously minimising the potential for excessive contestability (which could be exacerbated under the proposed amendments).

Assessment and protection of connection (7.3, 7.4 & 7.5)

As per our views in Chapter 3 and above, we are concerned by the impacts of the proposed amendments to the definition of connection to land. We recommend that the existing assessment and connection definitions and requirements as stipulated in the NTA should be retained, with reform to the administrative process instead considered as a means to improving the claims process.

Recommendation

- Retain the existing definitions of native title as stipulated in s223 of the NTA and where it relates more broadly in the Act

5. NATURE AND CONTENT OF NATIVE TITLE

Defining rights and interests, and actions for commercial activities (8.1 & 8.2)

The MCA is concerned by the insufficient justification to link commercial activities and trade to native title rights and interests in s223 and more broadly in the Act. In our view, the law regarding this area is not unambiguous and commercial activities are not a 'right' as deemed under the proposed amendments.

The benefits from identifying the intent, intended benefits or outcomes being sought from these amendments are unclear. Commercial activities are a use to which land may be put in exercise of a right, and the amendments would likely only conflate rights with use and create considerable confusion. The NTA currently reflects the Akiba decision which recognises commercial native title interests where the facts support such interests. Yet, the proposed amendments do not demonstrate a clear case for the need for change.

We are of the view that surface resource rights would be negatively impacted by any increased ambiguity. We are concerned by the uncertainty the proposed amendments may create for the holders of existing commercial rights in land and minerals, including water rights which many companies are dependent upon for their operations. They could also generate confusion as to how a 'use' is compensated and extinguished.

We caution that minerals and some natural resources ownership — and related economic investment — is vested in the Crown in Australia imposing limits on the extent to which commercial rights and interests are able to be recognised. The MCA supports the recognition of commercial rights where they can be established under existing law and therefore recommend Proposals 8.1 and 8.2 are not proceeded with.

Recommendation

- Retain the existing definitions of native title in the NTA

6. PROMOTING CLAIMS RESOLUTION

Procedures for evidence and preservation of material (9.1 & 9.2)

The MCA does not have a specific position as to the effectiveness and appropriateness of existing procedures for the compilation of evidence in native title proceedings. We note however that the availability of experts to assist the connection process can materially affect the timely resolution of claims. We would welcome practical measures that would:

- Streamline the gathering and assessment of information to establish native title
- Simplify this aspect of claims assessment and therefore reduce processing constraints.

The MCA agrees that the safe storage and preservation of archival material is an important issue, and we support the protection of this material with appropriate privacy and confidentiality arrangements. Importantly, we wish to iterate that any increased costs associated with these types of administrative changes will need to be borne by government (and not claimants) as a general principle.

Standard programming (9.3)

The MCA agrees that the lack of concurrence in the sequence between the bringing of evidence to establish connection and tenure searches conducted by governments is a key constraint in the native title system. In particular, this was experienced in the Ngadju case in Western Australia where leases were granted but then found to be invalid as the State was unable to demonstrate the existence of historical grants for the lease areas.

Presently, there is no common set of programing orders for a native title claim. This results in all claims evolving differently, and we welcome the proposal for reform. Changes must deliver a commonality of approach (including predictability and systemisation) to the process. At this same time, tenure information must also be comprehensively and accurately provided.

For example, a key way of minimising costs in proceedings is to hear the question of connection first and, once established, consider third party interests. This separation of extinguishment from connection is not universally achieved across the states, and we recommend this be addressed.

If standard programing could be adopted, it would reduce the costs of claims and assist with their sequencing. Equally, it would benchmark timing for each step and generate empirical evidence to identify occurrences taking place and those that are being achieved on time.

Consistency in guidance and training for legal professionals (9.5 & 9.6)

The MCA is supportive of steps that would make the native title claim process more uniform between the states, both in connection and processes adopted by the Federal Court.

We also concur with the idea of a system for the training of legal professionals who act in native title matters, with experts consulted to inform its development. The MCA considers that the creation of a specialist program would assist registered practitioners in maintaining a level of proficiency and understanding of the native title system.

We caution that this program should not be burdensome to the legal profession which is already heavily regulated. It could focus on ensuring professionals can efficiently and effectively navigate a complex system. We also note that this program should not be at the exclusion of all practitioners who are involved or specialise in native title. We recommend it be made available to practice area experts who may wish to reinforce their knowledge.

Introducing a program for professionals acting in native title would assist claimants with identifying appropriate alternative counsel should they not elect to be represented by their designated Native Title Representative Body (NTRB). Those in the legal profession who are

found to be operating in a manner inconsistent with legal norms would also be more easily subject to review and possibly deregulation.

Recommendations

- Introduce procedural changes that would simplify claims assessment
- Ensure the safe storage and preservation of archival material
- Establish standard programing for native title claims
- Consider developing guidance material for a more uniform claims process between the states
- Develop a system for the training of legal professionals involved in native title matters

7. AUTHORISATION

Claim group decision-making processes (10.1 & 10.2)

The MCA supports Proposals 10.1 and 10.2 to amend s251(A) and (B) of the NTA to permit claim groups, when authorising an application, to use a decision-making process agreed on and adopted by the group. We agree that that there should be no requirement for the processes outlined in s251(A) and (B) of the NTA to be the same, only that they are transparent.

We are concerned however by the following two issues regarding the proposal to include a non-exhaustive list of ways in which a claim group might define the scope of the authority of the applicant, specifically:

- The scope of the Applicants' authority as conferred by the claim group
- Whether third parties can rely upon representations by the applicants.

Importantly, third parties need certainty that the applicants representing their claim have been appropriately authorised by the group to act. However, we are of the view that third parties such as the Federal Court, the National Native Title Tribunal (NNTT), and respondent parties should not be required to review a separate instrument to verify an applicant's authority.

Therefore, we are not supportive of s251 being amended to include a non-exhaustive list defining the scope of applicant authority as outlined in Question 10.1. We instead recommend that matters such as those contemplated in the Discussion Paper should more likely form part of an educational process on the roles and responsibilities of applicants.

An alternative to the proposed amendment could include the Commonwealth Minister being awarded the option to promulgate guidelines under the NTA to assist claim group functions. It is noteworthy that there are many company director courses but limited training provided to applicants in circumstances where the cash flow of claim groups can exceed small businesses.

Defining applicant scope and authority (10.3 & 10.4)

The MCA does not support Proposal 10.3 to amend the NTA to clarify that a claim group could define the scope of an applicant's authority. From our perspective, the practical way of conducting dealings with native title claimant groups is for third parties to be entitled to assume that the applicant has appropriate authority when they make a representation.

Third parties should not hold responsibility for an applicant's authority as it would run contrary to the current principles of contract and corporations law. Such a process would prevent certainty as third parties would be required to interpret a separate instrument that would confer the authority prior to understanding any action or activity.

The MCA considers that the system would be better assisted by applicants having a better understanding of their rights and responsibilities. To achieve this, specific training could be provided to both build capability and achieve a clearer and more transparent framework for applicant authority.

The MCA agrees that replacement of an applicant for a breach of condition of authorisation is appropriate, and this is consistent with the laws of directors and associations. Consideration could be given to creating a register which could include a disqualification process that limits the capacity of a person to act as an applicant for a period of time.

Defining application decision-making, authorisation and representation (10.5, 10.6 & 10.7)

The MCA supports the concept of Proposal 10.5 that the NTA should be amended to better define how decisions among the applicants may be made (such as the *Corporations Act 2001*

(Cth)). This would mean that when the applicant does act, third parties are entitled to rely on the decisions of the applicant as being authorised.

The MCA does not support Proposal 10.6 that s66(B) should provide where a member of the applicant is no longer willing or able to act that the remaining members of the applicant may continue to act without reauthorisation, unless the terms of the authorisation provide otherwise. As it currently stands, applicants can seek to remove a member of the application by filing a notice with the court.

Although s66(B) is a detailed process for the native title claimant group, its role is to establish a procedurally important set of standards regarding the removal of authorisation. We recognise that s66(B) may contain complex steps, but it requires claimants to assess any areas of concern before entering the Court process.

We acknowledge the proposed reform may not contain sufficient checks and balances in the instance where an applicant does not align with the group and may be removed by the group as a result. However, we also recognise that in the event a member is unaligned or ceases to be involved in a group, that the group is not unnecessarily prevented from continuing the application.

The MCA's view is that s66(B) provides a form of natural justice, and it should remain as it currently exists in the NTA with a requirement that re-authorisation should be sought within a nominated period of time. If this does not occur, claims could be then be subject to review for deregistration or a court may intervene for a dismissal.

As part of this, we consider that applicants should be encouraged to establish reasonable terms of authorisation at the beginning of a claim. These foundations could serve as circuit-breakers in the event group un-alignment occurs and hence mitigate the need for court proceedings.

The MCA supports in principle the concept of Proposal 10.7 to permit authorised alternative representation where a person is unwilling or unable to act. We are of the view that this could work only if the native title claim states clearly the nominated alternative applicant including the order for appointment.

Equally, the person no longer willing to act would need to cease to be an applicant before the first alternative could become an applicant. There would also need to be a notice process through the court so the National Native Title Tribunal's (NNTT) register could be updated and third parties are provided notice.

Recommendations

- Allow for claim groups, when authorising an application, to use a decision-making process agreed on and adopted by the group with the requirement for transparency
- Retain the existing wording of s251(A) as stipulated in the NTA and consider introducing an education process on applicant authority as part of the claims system
- Reinforce alignment with contracts and corporations law by not including permission for claim groups to define the scope of applicant authority
- Establish consistency with the laws of directors and associates by allowing for applicant replacement
- Amend the NTA to better define how decisions among the applicants may be made
- Refrain from permitting that remaining members of the applicant may continue to act without authorisation

- Retain s66(B) as it is currently stipulated in the NTA with a specified time period included for re-authorisation
- Introduce the requirement for alternative authorised representation that the nominated applicant should be stated on the native title claim with the order for appointment included

8. JOINDER

Parties to a proceeding and joining a native title application (11.1, 11.2 & 11.3)

The MCA does not support Question 11.1 that suggests amending s84(3) of the NTA to permit those only with a legal or equitable estate or interest in the land or waters claimed to become parties to a proceeding.

Ambiguity exists under relevant statues and case law which suggest that mining tenements may not be a legal or equitable interest in land in all cases (see (see section 10 of the *Queensland Minerals Resources Act 1989*, and Tec Desert Pty Ltd v Commissioner of State Revenue [2010] 241 CLR 576). As a result, proceeding with Question 11.1 may diminish existing rights.

We are supportive however of the concept in Proposal 11.1 for parties who elect to join a proceeding where this is agreed to by the court can choose to limit their participation to their interests only. In our view, it would be efficient to allow parties to select the issues they would wish to be involved in for a proceedings. Yet, Proposal 11.1 is too narrow as it applies only at the time a party elects to join a proceedings.

It can be challenging to understand all concerns that may impact a party at the outset of joining a proceedings, as it is often when matters evolve that some issues become clearer. There may therefore be reluctance for parties to limit their participation early on.

We would also be concerned by the restriction Proposal 11.1 may place on the making of submissions in response to native title claims. If adopted, Proposal 11.1 could prevent those with interests to provide submissions in relation to the nature and content of a native title application, or seek mediation to address concerns.

As a result, we are of the view that the choice for parties to represent their interests in this manner should be retained. This is particularly important in instances where rights or interests can be contested, such as claims to exclusive use or ownership of non-mineral resources or water. We recommend a broader approach be adopted in 11.1 to allow parties that elect to join a proceedings to choose their level of involvement at any point in time.

The MCA supports the idea proposed in Question 11.2 that ss66(3) and 84(3) of the NTA 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 s84(3).

We are in favour of Proposal 11.2 to amend s84(5) of the NTA to clarify that:

- A claimant or potential claimant has an interest that may be affected by the determination in the proceedings
- When determining if it is in the interests of justice to join a claimant or potential claimant, the Federal Court should consider whether the claimant can demonstrate a clear and legitimate objective to be achieved by joinder to the proceedings.

The MCA also supports Proposal 11.3 to amend the NTA 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 s84(3) or to be joined under s84(5) or (5A). This is particularly beneficial where there is no current application for title or current holding for tenure. For the same reasoning as stated above, Question 11.2, Proposals 11.2 and 11.3 would increase simplicity in the claims process and reduce costs.

Party dismissal and appeal mechanisms (11.4, 11.5 & 11.6)

The MCA supports:

- Proposal 11.4 to better clarify that the Federal Court's power to dismiss a party (other than the applicant) under s84(8) is not limited to the circumstances contained in s 84(9)
- Proposal 11.5 to amend s24(1AA) of the *Federal Court of Australia Act 1976* (Cth) 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 s84(5) or (5A) of the NTA
- Proposal 11.6 to amend s24(1AA) of the *Federal Court of Australia Act 1976* (Cth)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 s84(8) of the NTA.

Principles for the Commonwealth (11.7)

The MCA supports the idea that the Australian Government should consider developing principles governing the circumstances in which the Commonwealth should either:

- Become a party to a native title proceeding under s84, or
- Seek intervener status under s84(A).

However, this amendment should require that the focus of the proposed guidelines is on providing claimant parties with advance notice as to when the Commonwealth intends to become a party to an application without limiting the Government's right to participate.

Recommendations

- Retain the existing requirements in s84(3) and (3)(A)(iii) of the NTA for those who wish to become a party to a proceeding
- Do not restrict persons who are notified under s66(3) and who fulfil notification requirements to elect to become parties under s84(3) in respect of s225(C) and (D) only, and instead allow persons at any time in a proceedings to elect to limit their participation
- Amend ss66(3) and 84(3) of the NTA 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 s84(3)
- Amend s84(5) of the NTA to clarify that:
  - A claimant or potential claimant has an interest that may be affected by the determination in the proceeding, and
  - When determining if it is in the interests of justice to join a claimant or potential claimant, the Federal Court should consider whether the claimant can demonstrate a clear and legitimate objective to be achieved by joinder to the proceedings
- Reinforce that the Federal Court's power to dismiss a party (other than the applicant) under s84(8) is not limited to the circumstances contained in s84(9)
- Amend s24(1AA) of the *Federal Court of Australia Act 1976* (Cth) 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 NTA
- Amend s24(1AA) of the *Federal Court of Australia Act 1976* (Cth)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 s84(8) of the NTA
- Consider developing principles governing the circumstances in which the Commonwealth should either become a party to a native title proceeding under s84, or seek intervener status under s84(A) provided claimant parties receive advance notice of when the Commonwealth intends to become a party to an application

APPENDIX: TABLE OF RECOMMENDATIONS

ALRC Discussion Paper Reference	Detail of Proposal/ Question	MCA Recommendation
Framework for review of the Native Title Act 1993		
Question 2-1	Should the proposed amendments to the NTA have prospective operation only?	Establish that any amendments made to the NTA are prospective only.
Question 2-2	Should the proposed amendments to s223 of the NTA only apply to determinations made after the date of commencement of any amendment?	Ensure that any amendments to the NTA apply to claims undetermined at commencement and each future claim only.
Traditional Laws and Customs		
Proposal 5-1	The definition of native title in s223 of the NTA should be amended to make clear that traditional laws and customs may adapt, evolve or otherwise develop.	Retain the existing definition of native title in the NTA.
Proposal 5-2	The definition of native title in s223 of NTA 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.	Retain the existing definition of rights and interest in native title in s223 of the NTA.
Proposal 5-3	The definition of native title in s223 of the NTA should be amended to make clear that it is not necessary to establish that: • Acknowledgement and observance of laws and customs has continued substantially uninterrupted since sovereignty • Laws and customs have been acknowledged and observed by each generation since sovereignty.	
Proposal 5-4	The definition of native title in s223 of the NTA should be amended to make clear that it is not necessary to establish that 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.	Maintain the acknowledgement and recognition of laws and customs as stated in the NTA.

ALRC Discussion Paper Reference	Detail of Proposal/ Question	MCA Recommendation
Physical occupation		
Proposal 6-1	Section 62(1)(C) of the NTA should be amended to remove references to 'traditional physical connection'.	Maintain the requirements for connection as stated in the NTA, and instead seek to improve the claims determinations process via administrative reform.
Proposal 6-2	Section 190B(7) of the NTA should be amended to remove the requirement that the Registrar must be satisfied that at least one member of the native title claim group has or previously had a traditional physical connection with any part of the land or waters, or would have had such a connection if not for things done by the Crown, a statutory authority of the Crown, or any holder of a lease.	
Transmission of Culture		
Proposal 7-1	The definition of native title in s223(1)(A) of the NTA 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: – The rights and interests are possessed under the laws acknowledged, and the customs observed, by the Aboriginal peoples or Torres Strait Islanders – The Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters – The rights or interests are recognised by the common law of Australia.	Retain the existing definitions of native title stipulated in s223 of the NTA.

ALRC Discussion Paper Reference	Detail of Proposal/ Question	MCA Recommendation
Proposal 7-2	The definition of native title in s223 of the NTA 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: – The rights and interests are possess under the laws acknowledged, and the customs observed, by the Aboriginal peoples or Torres Strait Islanders – 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 – The rights and interests are recognised by the common law of Australia.	*[See above.]*
Question 7-1	Should a definition related to native title claim group identification and composition be included in the NTA?	
Question 7-2	Should the NTA 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 s223(1)(B)?	
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 s223(1)(B)?	
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 s223(1)(B), what should be their relevance to a decision as to whether such connection has been maintained?	

ALRC Discussion Paper Reference	Detail of Proposal/ Question	MCA Recommendation
Question 7-5	Should the NTA 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 s223(1)(B): – 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 – Undue weight should not be given to historical circumstances adverse to those Aboriginal peoples or Torres Strait Islanders.	*[See above.]*
Nature and Content of Native Title		
Proposal 8-1	Section 223(2) of NTA 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: – Comprise rights in relation to any purpose – May include, but are not limited to, hunting, gathering, fishing, commercial activities and trade.	Retain the existing definitions of native title in the NTA.
Proposal 8-2	The terms 'commercial activities' and 'trade' should not be defined in the NTA.	
Question 8-1	Should the indicative listing in the revised s223(2)(B), as set out in Proposal 8-1, include the protection or exercise of cultural knowledge?	
Question 8-2	Should the indicative listing in the revised s223(2)(B), as set out in Proposal 8-1, include anything else?	

ALRC Discussion Paper Reference	Detail of Proposal/ Question	MCA Recommendation
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?	Introduce procedural changes that would simplify claims assessment.
Question 9-2	What procedures, if any, are required to deal appropriately with the archival material being generated through the native title connection process?	Ensure the safe storage and preservation of archival material.
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?	Establish standard programing for native title claims.
Question 9-4	Should the Australian Government develop a connection policy setting out the Commonwealth's responsibilities and interests in relation to consent determinations?	*[Note: The MCA does not have a specific position/ recommendation for this issue.]*
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?	Consider developing guidance material for a more uniform claims process between the states.
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?	Develop a system for the training and certification of legal professionals involved in native title matters.
Question 9-7	Would increasing use of native title application inquiries be beneficial and appropriate?	*[Note: The MCA does not have specific positions/ recommendations for these issues.]*
Question 9-8	Section 138B(2)(B) of the NTA 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?	

ALRC Discussion Paper Reference	Detail of Proposal/ Question	MCA Recommendation
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?	*[See above.]*
Question 9-11	What other reforms, if any, would lead to increased use of the native title application inquiry process?	
Authorisation		
Proposal 10-1	Section 251(B) of the NTA 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.	Allow for claim groups, when authorising an application, to use a decision-making process agreed on and adopted by the group with the requirement for transparency.
Proposal 10-2	The Australian Government should consider amending s251(A) of the NTA to similar effect.	Retain the existing wording of s251(A) as stipulated in the NTA and consider introducing an education process on applicant authority as part of the claims system.
Proposal 10-3	The NTA should be amended to clarify that the claim group may define the scope of the authority of the applicant.	Ensure alignment with contracts and corporations law by not including permission for claim groups to define the scope of applicant authority.
Question 10-1	Should the NTA include a non-exhaustive list of ways in which the claim group might define the scope of the authority of the applicant? For example: 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) • Requiring the applicant to account for all monies received and to deposit them in a specified account • Appointing an agent (other than the applicant) to negotiate agreements with third parties.	*[As per the recommendation for Proposal 10.1.]*

ALRC Discussion Paper Reference	Detail of Proposal/ Question	MCA Recommendation
Question 10-2	What remedy, if any, should the NTA contain, apart from replacement of the applicant, for a breach of a condition of authorisation?	Establish consistency with the laws of directors and associates by allowing for applicant replacement.
Proposal 10-4	The NTA 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.	Amend the NTA to better define how decisions among the applicants may be made.
Proposal 10-5	The NTA should be amended to provide that the applicant may act by majority, unless the terms of the authorisation provide otherwise.	Refrain from permitting that remaining members of the applicant may continue to act without reauthorisation.
Proposal 10-6	S66(B) of the NTA should provide that, where a member of the applicant is no longer willing or able to act, the remaining members of the applicant may continue to act without reauthorisation, unless the terms of the authorisation provide otherwise. The person may be removed as a member of the applicant by filing a notice with the court.	Retain s66(B) as it is currently stipulated in the NTA with a specified time period included for re-authorisation.
Proposal 10-7	Section 66(B) of the NTA 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.	Introduce the requirement for alternative designated representation that the nominated applicant should be stated on the native title claim with the order for appointment included.
Joinder		
Question 11-1	Should s84(3)(A)(iii) of the NTA 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 s84(3)?	Retain the existing requirements in s84(3) and (3)(A)(iii) of the NTA for those who wish to become a party to a proceeding.
Proposal 11-1	The NTA should be amended to allow persons who are notified under s66(3) and who fulfil notification requirements to elect to become parties under s 84(3) in respect of s225(C) and (D) only.	Do not restrict persons who are notified under s66(3) and who fulfil notification requirements to elect to become parties under s84(3) in respect of s225(C) and (D) only, and instead allow persons at any time to elect to limit their participation rather than only in response to a notice.

ALRC Discussion Paper Reference	Detail of Proposal/ Question	MCA Recommendation
Proposal 11-2	Section 84(5) of the NTA should be amended to clarify that: • A claimant or potential claimant has an interest that may be affected by the determination in the proceedings • 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.	Amend s84(5) of the NTA to clarify that: • A claimant or potential claimant has an interest that may be affected by the determination in the proceeding • 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.
Question 11-2	Should ss66(3) and 84(3) of the NTA 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 s84(3)?	Amend ss66(3) and 84(3) of the NTA 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 s84(3).
Proposal 11-3	The NTA 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 s84(3) or to be joined under s84(5) or (5A).	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 s84(3) or to be joined under s84(5) or (5A).
Proposal 11-4	The NTA should be amended to clarify that the Federal Court's power to dismiss a party (other than the applicant) under s84(8) is not limited to the circumstances contained in s84(9).	Better clarify that the Federal Court's power to dismiss a party (other than the applicant) under s84(8) is not limited to the circumstances contained in s84(9).
Proposal 11-5	Sectopm 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 s84(5) or (5A) of the NTA.	Amend s24(1AA) of the *Federal Court of Australia Act 1976* (Cth) 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 NTA.

ALRC Discussion Paper Reference	Detail of Proposal/ Question	MCA Recommendation
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 s84(8) of the NTA.	Amend s24(1AA) of the *Federal Court of Australia Act 1976* (Cth)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 NTA.
Proposal 11-7	The Australian Government should consider developing principles governing the circumstances in which the Commonwealth should either: • Become a party to a native title proceeding under s84, or • Seek intervener status under s84(A).	Consider developing principles governing the circumstances in which the Commonwealth should either become a party to a native title proceeding under s84, or seek intervener status under s84(A) provided claimant parties receive advance notice of when the Commonwealth intends to become a party to an application.

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