

2 February 2015

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

Via email: nativetitle@alrc.gov.au

Dear Ms Wynn,

SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION DISCUSSION PAPER (DP 82) - REVIEW OF THE NATIVE TITLE ACT 1993

We thank you for the opportunity to provide submission on the Australian Law Reform Commission's (ALRC) Discussion Paper, *Review of the Native Title Act 1993 (Cth)* and the extension of time. We are grateful to have been awarded an extension to the 2nd of February 2015 with regards to this matter and hope that you find the following suggestions valuable.

INTRODUCTION

1. **NTSCORP Limited (NTSCORP)** is funded under section 203FE of the *Native Title Act 1993 (Cth) (NTA)* to carry out the functions of a native title representative body in NSW and the ACT.
2. NTSCORP provides services to Aboriginal People who hold or may hold native title rights and interests in NSW and the ACT, specifically to assist them to exercise their rights under the NTA. In summary, the functions and powers of NTSCORP under sections 203B to 203BK (inclusive) are:
 - a. Facilitation and assistance, including representation in native title matters;
 - b. Dispute resolution;
 - c. Notification;
 - d. Agreement making;
 - e. Internal review; and
 - f. Other functions (s203BJ in particular).

3. A significant part of the work NTSCORP undertakes is to represent Aboriginal claimants in relation to both Native Title Claimant Applications and the procedural rights afforded through the Future Act regime as laid out in the NTA.
4. This submission specifically addresses some of the proposals and questions raised by the ALRC in the Discussion Paper (DP 82) – focusing on the particular issues of ‘connection requirements’ and ‘authorisation and joinder provisions of the NTA affecting the timely and effective resolution of native title claims.’

FRAMEWORK FOR REVIEW OF THE NATIVE TITLE ACT (CHAPTER 2)

5. NTSCORP supports the retrospective operation of any amendments to the NTA and the application of these changes to any determination made before their date of commencement. (See **Q2-1 & 2-2**).
6. While the retrospective operation of any changes may result in further expense in the process to resolve claimant applications, it would be unfair to deny the possible benefits to any native title claimant whether their claim is determined or not.
7. It is clearly the intention of the NTA through s 13 (5)(b), that a determination may be varied or revoked, in the interests of justice. This is particularly important as the court’s ruling in relation to a native title application is a decision *in rem*. Such a decision affects all, not just the native title holders and the immediate parties to the determination.

TRADITIONAL LAWS AND CUSTOMS (CHAPTER 5)

8. NTSCORP supports **proposal 5-1**. The NTA should clearly express that traditional laws and customs may adapt, evolve, be revived or otherwise develop at s 223.
9. NTSCORP supports **proposal 5-2**. The definition of native title in s 223 of the 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.
10. NTSCORP supports **proposal 5-3**. The definition of native title in s 223 of the NTA should be amended to make clear that it is not necessary to establish that:
 - a. 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.

11. We note that these matters are not specifically identified in the NTA as being necessary to prove to establish native title.
12. NTSCORP supports **proposal 5-4**. The definition of native title in s 223 of the NTA should be amended to make clear that it is not necessary to establish that a society united in and by its acknowledgment and observance of traditional laws and customs has continued in existence since prior to the assertion of sovereignty.
13. NTSCORP notes, changes at **proposal 5-1** through **5-4** would alleviate some of the time taken discussing these issues during the mediation processes, prescribed by the Federal Court in the prosecution of native title claims. These changes would also assist in narrowing the substantive issues for mediation.

PHYSICAL OCCUPATION (CHAPTER 6)

14. NTSCORP supports **proposal 6-1**. Section 62(1)(c) of the NTA should be amended to remove reference to 'traditional physical connection'. These provisions are inconsistent with the developing case law regarding what is required to establish native title under s 223 of the NTA.
15. NTSCORP supports **proposal 6-2**. Section 190B (7) of the NTA should be amended to remove the requirement of the registrar being 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 other holder of a lease.
16. NTSCORP agrees, as ALRC outlines, by removing the reference to 'traditional physical occupation' at **6-1 & 6-2**, it would accurately reflect the courts' interpretation of s 223. This would also assist in narrowing the substantive issues for mediation as it removes the need to demonstrate a physical connection, which in the past has caused severe delay in the mediation process.

THE TRANSMISSION OF ABORIGINAL AND TORRES STRAIT ISLANDER CULTURE (CHAPTER 7)

17. NTSCORP does not support **proposal 7-1** which states that 'the definition of native title in s 223(1)(a) of the NTA should be amended to remove the word 'traditional'.
18. Whilst NTSCORP acknowledges the use of the word traditional has been problematic, the suggested changes at Chapter 5 would go a long way to alleviating some of the difficulties faced by parties in the past. As suggested in the discussion paper, and it is our experience, native title claimants themselves identify the expression of 'traditional' to hold meaning about the right people for country and

the right laws and customs for country. The removal of this expression would likely confuse issues about associations to country, particularly in areas where there has been significant displacement of Aboriginal people throughout history.

19. **Question 7-1** asks: 'Should a definition related to native title claim group identification and composition be included in the NTA'? NTSCORP would not support the inclusion of a definition. Any suggested guidelines for identifying the right people for country would not adequately allow for the claim group to define the bounds of its own group through their own laws and customs.
20. NTSCORP does not support **proposal 7-2** which alters the expression of s 223(1)(b) from 'the Aboriginal and Torres Strait Islanders, by those laws and customs, have a connection with the land and waters' to 'the Aboriginal and 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'.
21. Whilst NTSCORP acknowledges the intention is to clarify the definition of connection and bring focus to the importance of current connection, there is a need to ensure that traditional owners and their traditional connections to country are recognised by the native title process. The change to the wording might be interpreted in such a way as to create a whole new set of issues where people with more recent relationships to country make claims under the NTA.
22. **Question 7-2** asks whether the NTA should 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 the land and waters' under s 223(1)(b).
23. NTSCORP does not agree there is any merit in making a distinction between revitalisation vs a revival of law and custom. Altering s 223 as discussed at Chapter 5 would allow for sufficient scope to include the way laws and customs may have changed due to many varying circumstances over time including, where appropriate, the revitalisation of laws and customs.
24. **Question 7-3** asks: 'Should the reasons for any displacement of Aboriginal peoples or Torres Strait islanders be considered in the assessment of whether Aboriginal people or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters under s 223(1)(b)?'
25. NTSCORP believes there is merit in the intention of providing a basis for understanding how and why Aboriginal and Torres Strait Island peoples have been displaced and its impact on their ability to prove native title as a result of this. Existing case law has held that the reasons for displacement are not to be considered. This can and has had the perverse effect that Aboriginal groups who

have been forced off their land by governmental or other Anglo-European intervention can be disentitled from the native title process, despite later continuing the physical aspect of their association with their Country. This is true no matter how strongly they have resisted that dislocation or maintained their non-physical connection to their Country, nor how short the duration of the dislocation. Such outcomes are disproportionately likely in NSW due to the long history of repeated forced dislocation due to the government's Mission programs.

26. However NTSCORP maintains that practically it is difficult to foresee how this will affect the native title claim process. An amendment which either listed events in history or gave the court discretion to consider the issue would likely amount to further litigation to resolve these issues. It is likely changes of this kind would create just as many questions as answers and will further delay the resolution of native title claims. It is possible the suggested amendments at Chapter 5 provides enough scope to accept there may have been changes/development/ evolution to laws and customs without the added layer of why some of these changes/developments/ evolution took place.
27. **Question 7-4 and 7-5.** Question 7-5 proposes a draft amendment to achieve the aim of question 7-3. NTSCORP supports this proposed amendment, and believes it strikes a good balance between directing the Court to a consideration of the reasons for dislocation in reaching decisions on the existence of native title, but allowing the Court discretion to develop principles of for how this consideration would be undertaken in practice. It would also give a similar indication to the State governments in the claims mediation process.

THE NATURE AND CONTENT OF NATIVE TITLE (CHAPTER 8)

28. NTSCORP supports **proposal 8**. Section 233(2) of the 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:

- a. comprise rights in relation to any purpose; and
 - b. may include, but are not limited to, hunting, gathering, fishing, commercial activities and trade.
29. This proposed amendment would assist in the process of resolving claims by removing the, often circular, discussion about what rights are able to be claimed and limit the issue to which rights can be established by the evidence. This proposed change also supports Aboriginal and Torres Strait Islanders right to be recognised in

the sphere of commercial activities and trade and would like to hold benefits for native title holders and their pursuit in economic development.

30. NTSCORP supports **proposal 8-2**. The terms of 'commercial activities' and 'trade' should not be defined in the NTA. NTSCORP agrees there is no need to limit the type of commercial activities or trade being recognised.
31. **Question 8-1** asks: 'Should the indicative listing in the revised s 223(2)(b), as set out in proposal 8-1, include the protection of cultural knowledge'?
32. NTSCORP supports the listing of the protection of cultural knowledge. The protection of cultural knowledge is an important part of Aboriginal and Torres Strait Islander culture and should be afforded equivalent recognition.
33. **Question 8-2** asks: 'Should the indicative listing in the revised s 223(2)(b), as set out in proposal 8-1, include anything else'? NTSCORP has nothing further to add.

PROMOTING CLAIMS RESOLUTION (CHAPTER 9)

34. **Question 9-1** asks: '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'?
35. NTSCORP understands there are substantial delays in the connection process and trying to find agreement on connection issues with the State and other parties. However, there are different experts and several ways of presenting expert evidence and this is often unique to each case. Prescribing the way or form this evidence should be presented would be unlikely to solve the problems of delay faced in native title claims. In NSW, much of the delay in the process is due to the State and respondent parties being unable or unwilling to specify their concerns with connection material.
36. NTSCORP sees the issues with resolving connection and the use of expert evidence in the process to be a matter of policy and unlikely to be usefully assisted by changes to the NTA. It is also likely that the changes to the NTA discussed in Chapter 5 will reduce the scope and detail required in connection reports thereby alleviating the need for extensive and resource intensive connection reports
37. **Question 9-2** asks: 'What procedures, if any, are required to deal appropriately with the archival material being generated through the native title connection process'?
38. It is NTSCORP's understanding that the material produced during the native title connection process remains the property of the claim group and is only stored for safe keeping until such time as the claim group has an appropriate body to take back

the material. On this basis, NTSCORP considers any public, searchable database would require consultation with the owners of the material, the native title claimants/ holders, and should only be initiated with the express consent of the native claimants/holders.

39. NTSCORP does not believe it appropriate for the State, or any other party to hold materials other than for archival purposes. There should be an absolute prohibition on any respondent party using any material created in support of the native title connection process for any purpose not associated with the claims process.

CONSENT DETERMINATIONS (CHAPTER 9)

40. **Question 9-3** asks: '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'?
41. NTSCORP sees value in trying to make the process of production of connection material and tenure searches concurrent, due to the complex nature of tenure in NSW. However, this would need to be considered on a case by case basis and with due consideration to the resources and priorities of the applicant, State and the Federal Court. NTSCORP also believes consideration should be given to amending legislation to promote speedier tenure analyses process by providing that, where current tenure indicates non-extinguishment of native title, historical tenure analysis should only be undertaken where a specific party asserts an interest relating to previous tenure which may be impacted by a native title determination.
42. There can be significant delay in the preparation of tenure material. Following its production, the consideration of this material by parties is laborious, but it is essential that such analysis is undertaken properly as the rights and interests afforded to native title claimants are largely dictated through this process.
43. NTSCORP notes, that even if an area of land is considered as extinguished native title within a claim boundary, due to acts affecting the tenure, it is still relevant and important to native title claimants that the claim area is recognised as their traditional country.
44. **Question 9-4** asks: 'Should the Australian Government develop a connection policy setting out the Commonwealth's responsibilities and interests in relation to consent determinations?'
45. NTSCORP believes that this is a matter for the Commonwealth but supports processes that would potentially increase efficiency and transparency and speed up the process for approvals required before a consent determination can be made / approved at a Commonwealth level.

46. **Question 9-5** asks: '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 determination'?
47. NTSCORP agrees a nationally consistent, best practice principles approach would be key in assisting the timely and efficient progression of matters to determination. It would also limit the delays currently experienced in the mediation process outlined at paragraph [35]. The NTA is Commonwealth legislation and the Australian Government should take a more active role in ensuring that it is administered according to Commonwealth policy. It is entirely appropriate, and in many cases essential, that State or Territory governments give effect to the Federal legislation.
48. **Question 9-6** asks: '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'?
49. NTSCORP strongly supports a system of training and certification of legal professionals acting in, both native title claim matters and future act matters. The prevalence of lawyers acting for personal financial gain, without proper knowledge or experience in the area of native title is on the rise. This arguably has a negative impact on the process of matters, increasing the time and money spent by all parties ensuring the ethical administration of justice and allocation of limited resources. Furthermore, adding the requirement of specialised training and certification would lead to fairer outcomes for native title claimants and reduce the number of private agents. The involvement of 'rogue agents' has, in many cases, caused confusion and conflict within groups. Certification and regulation can go a long way to weeding out unscrupulous or inappropriate representation.
50. **Question 9-7 – Question 9-11** are inquiries NTSCORP cannot answer as they have not been involved in these processes.
51. NTSCORP has not had experience with the inquiry process. We therefore neither object nor support the options identified in the discussion paper.

AUTHORISATION (CHAPTER 10)

52. NTSCORP supports **proposal 10-1**. Section 251B of the NTA should be amended to allow the claim group, when authorising an application, to use a decision making process agreed and adopted by the group. Self-determination is key and native title claim groups must be able to determine their own decision making methods.

53. For the purposes of consistency, NTSCORP supports **proposal 10-2**. The Australian government should consider amending s 251A of the NTA to similar effect.
54. NTSCORP supports **proposal 10-3**. The NTA should be amended to clarify that the claim group may define the scope of the authority of the applicant.
55. Following on from proposal 10-3, Question 10-1 asks: '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'? NTSCORP considers the proposal may be useful to include a non-exhaustive list to inform the native title claim group of ways in which it might define the scope of the authority of the applicant.

Question 10-2 asks: 'What remedy, if any, should the NTA contain apart from replacement of the applicant, for a breach of a condition of authorisation'? NTSCORP does not believe there should be any further remedy, other than replacement of the applicant. The NNTC have expressed concerns in the past, which NTSCORP agrees with, that any suggested remedy would likely add more complexities, delays and further expense to the process.

56. NTSCORP supports **proposal 10-4** where the authority of the applicant has been limited in relation to entry into third party agreements, placing this on a public register, would be a positive step. This provides a public and transparent space for third parties to ensure they are negotiating with the correct party with authority from the claim group.
57. NTSCORP supports **proposal 10-5** that the NTA should be amended to provide that the applicant may act by majority, unless the terms of the authorisation provide otherwise. This seems to be a practical suggestion which still provides for the claim group to manage their decision making process with an alternative process if preferred by them. However, caution needs to be exercised to ensure that this does not become a means by which dominant factions within a claim group can override the interests of minority interests within the group.
58. NTSCORP partially supports **proposal 10-6 (see para 60 below)** to amend the NTA at s66B to reflect *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 re-authorisation, 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.*
59. NTSCORP partially supports **proposal 10-7 (see para 60 below)** to amend the NTA at s66B to reflect *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.* However, NTSCORP

would prefer the drafting to make clear that the designated person must be chosen at the time of authorisation to assist in avoiding internal politics and pressures which may affect the processes of the claim group over time.

60. NTSCORP notes, the current s 66B process can be costly and frustrating when the reasons for changes to the applicant are due to a member passing away or becoming incapacitated in such a way they can no longer act. However, there are also circumstances where the robust requirements of an s 66B application have ensured the integrity of the claim process for the wider membership of the native title claim group. NTSCORP is concerned about undermining the robust nature of the s 66B application under these circumstances.

JOINDER (CHAPTER 11)

61. **Question 11-1** asks: 'Should s 84(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 s 84(3)?' NTSCORP partially supports this proposal. NTSCORP believes that there should only be three categories of respondent parties: the State, the Commonwealth and indigenous respondents. Only the State or the Commonwealth has the power to effect changes to land tenure. In the vast majority of cases only the State has that power, however, the Commonwealth does have limited capacity in this regard. The State is primarily responsible for granting interests in land. NTSCORP submits that any interest in land granted to a member of the public is created by legislative instrument or by a contractual arrangement. The interest thereby created extinguishes native title to the extent contained within that instrument/document, nothing more, nothing less. The interests thus created are picked up during the tenure analysis process and those interests are noted in the determination. To this extent we argue that any person with an interest in land cannot under the operation of the NTA be affected in any way by the determination of native title. If that party does consider their/its interests may be affected then they are at liberty to raise their concerns with the State who are able to ensure those interests are accommodated in any determination. It is not uncommon to have multiple respondent parties to the litigation in some cases exceeding 100 respondents. The administrative burden on the legitimate interests is oppressive.
62. Subject to our comments in the preceding paragraph, should this submission not be accepted then NTSCORP submits, the proposed amendments would nonetheless be a positive change and in the best interest of resolving native title matters efficiently, as it avoids unnecessary time and expense in the assessment and negotiations with parties not affected by the native title claim.
63. **Question 11-2** asks: 'Should ss 66(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 s 84(3)? NTSCORP believes this amendment would assist in ensuring that relevant parties are joined to the proceedings earlier on in the process and may assist in a more efficient native title process. Late joinder of respondent parties, particularly Local Aboriginal Land Councils, has caused significant problems at the eleventh hour of several claim resolution process in NSW.

64. NTSCORP supports **proposal 11-1** to limit the participation of respondent parties by amending the NTA to allow persons who are notified under s 66(3) and who fulfil notification requirements to elect to become parties under s 84(3) in respect of s 225(c) and (d) only. This amendment would assist in a more timely resolution of native title claims by limiting the discussion to matters relevant to respondent parties' interests.
65. NTSCORP supports **proposal 11-2** which seeks to amend s84(5) 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.
66. NTSCORP supports **proposal 11-3** to amend the NTA to allow organisations that represent persons, whose 'interests may be affected by the determination' in relation to land or waters in the claim are, to become parties under s 84(3) or to be joined under s 84(5) or (5A).
67. NTSCORP supports **proposal 11-4** to amend the NTA 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).
68. NTSCORP supports **proposal 11-5** that section 24(1AA) of the *Federal Court of Australia Act 1976 (Cth)* should be amended to allow an appeal, with leave of the Court to join, or not to join, a party under s 84(5) or (5A) of the NTA.
69. NTSCORP supports **proposal 11-6** that section 24(1AA) of the *Federal Court of Australia Act 1976 (Cth)* should be amended to allow an appeal, with leave of the Court to dismiss, or not to dismiss, a party under s 84(8) of the NTA.
70. NTSCORP supports **proposal 11-7** to make a recommendation to the Australian Government to develop principles governing the circumstances in which the Commonwealth should either:

- a. Become a party to a native title proceeding under s84; or
- b. Seek intervener status under s84A.

Once again, thank you for the opportunity to make a submission in relation to the ALRC Discussion Paper (DP 82) Review of the *Native Title Act 1993* (Cth) . NTSCORP considers the above submission to support the timely and effective resolution of claimant applications, which ultimately would serve and advance the interest and administration of justice.

If you require any further information in relation to this submission please do not hesitate to contact Laurelea McGregor on (02) 9310 3188 or alternatively via email lmcgregor@ntscorp.com.au.

Yours faithfully,

A handwritten signature in blue ink, appearing to read "N. Rotumah".

Natalie Rotumah
Chief Executive Officer
NTSCORP Limited

