Australian Law Reform Commission — Review of the Native Title Act 1993 - Discussion Paper 82

Submission from the South Australian Government

(Attorney General's Department)

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SOUTH AUSTRALIA

Government of South Australia

Introduction

The ALRC has been asked to consider and report on what changes, if any, could be made to improve the operation of Commonwealth native title laws and legal frameworks, focussing in particular on connection requirements relating to the recognition and scope of native title rights and interests, and any barriers imposed by the NTAs authorisation and joinder provisions.[1]

The legislative changes proposed by the Commission appear to be premised on the assumption that they would remove or modify some of the technical evidentiary hurdles faced by applicant groups making native title claims, whilst retaining the basis of native title law adopted in the Native Title Act from *Mabo v Queensland* [No 2].[2] Whilst for the reasons set out below, the State does not support many of the proposed amendments, in our submission they involve questions of policy that could merit further investigation within the context of the broader debate occurring in COAG and elsewhere about the delivery of economic advantages to Aboriginal people.

The State of South Australia (the State) suggests that a number of the proposed changes are unnecessary and may not achieve the outcomes sought, as (and this is acknowledged in the Report) the developing interpretation of the NTA by the Federal and High Courts has already achieved many of those outcomes. In the last few years increased certainty regarding the meaning of s223 coupled with active case management by the Federal Court has led to a significant increase in the number of native title claims being resolved by consent. Any changes to those provisions risk bringing back uncertainty and will almost certainly result in further testing in the courts, slowing the current progress of claims resolution.

If the premise underlying the Discussion Paper is that justice is not being achieved in native title matters due to the difficulties claimant groups have in meeting the evidentiary test of the NTA, that premise is, in the State's submission, not made out in the Report. Nor is it borne out in practice in this State. As set out in the State's previous submission to the Review, it is now long-established policy in South Australia that native title matters are settled by negotiation wherever possible. Since that policy was established in 2004, only one native title matter has proceeded to trial and 47% of the State is now subject to native title determinations.[3] The remaining claims are being negotiated according to the priorities agreed between the Federal Court, the State, and the South Australian Native Title Services (SANTS), the representative body in South Australia.

It is true to say however, that as the State approaches resolution of native title claims in areas where European settlement has had greater impacts on the practice of Aboriginal law and custom, more difficulties will be encountered in achieving resolution by consent. In these areas, the historical and, in often non compensable, extinguishment of native title by inconsistent tenure can greatly diminish the area of a native title determination and any concomitant benefits.

With the large number of claims lodged and the developing jurisprudence over the last 20 years, the focus on achieving non-native title land settlement outcomes has faded, (this despite an acknowledgment at the time that the NTA was enacted that it would not be the

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[1] Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014) 3-4 ('Discussion Paper').

[2] Ibid 32 [2.9].

[3] In excess of a further 20% is Aboriginal land, such as the Anangu Pitjantjatjara Yankunytjatjara Lands, Maralinga Tjaruta lands, etc.

panacea for all aspirations to land settlement) as most groups are focussed on a native title outcome.

A refocussing of this discussion to the possible creation of an alternative land settlement process with a guaranteed, substantial injection of funding from ILC and IBA (as was promised at the enactment of the NTA) would also meet the current focus of the Federal Government on promoting economic benefits for Aboriginal communities and achieving some equity in the system for all Aboriginal people who remain at some level connected to their country.

As acknowledged in the Discussion Paper, it is important that there remains some rigour in the assessment of native title claims. Not only does the recognition of native title under the NTA have significant consequences, including significant procedural rights and compensation entitlements, it is also important in resolving intra-indigenous disputes in relation to land.

In the State's submission, however, a number of the legislative changes proposed by the ALRC, and in particular the changes proposed in chapter 7, change the basis of native title law and are proposed not simply to improve the operation of the NTA, but to broaden the scope of the Act to groups who currently may not be able to meet the evidentiary requirements of s223. These changes would remove the basis for what is now a well-established body of law developed by the courts in numerous cases following the decisions of the High Court in *Mabo, Ward* and *Yorta Yorta*.[4]

In the State's submission, it is entirely open to (and may be appropriate for) the Commonwealth, as a matter of policy, to create a new or an alternative regime for recognition and protection of Aboriginal peoples relationship to land that does not contain the legal and evidentiary requirements or complexities of native title law. Such a policy approach has, for example, been taken in Victoria through enactment of the *Traditional Owner Settlement Act 2010*.

However, this should not be achieved by making amendments to fundamental provisions of the NTA that have formed the basis for over 300 native title determinations, and many thousands of land tenure transactions, without also addressing the broader implications for state governments, existing native title holders, and other stakeholders that such amendments will have. Such implications include the potential for a considerably increased compensation liability in state governments, tenure invalidity, existing determinations being re-opened, new and competing claims being lodged and further delays and uncertainty.

If the NTA is amended to change the basis upon which native title may be proved (and for the reasons set out below, it is the State's view that it should not), those amendments must be accompanied by a firm commitment on the part of the Commonwealth that it will take financial responsibility for the changes it has imposed on the states and territories.

The limitations of native title were acknowledged at the time of the enactment of the NTA, as was the need for native title law to be accompanied by other initiatives aimed at redressing past injustices and disadvantage deriving from the progressive dispossession of Aboriginal and Torres Strait Islander people from their traditional lands.

The NTA was an attempt by the legislature to give the High Court's decision in *Mabo* a statutory form and to reach a balance between recognition of remaining native title rights and

[4] *Mabo v Queensland [No 2]* (1992) 175 CLR 1 (*'Mabo'*); *Western Australia v Ward* (2002) 213 CLR 1; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

the need to validate past and future actions by governments in our society. The preamble to the NTA itself stated that:

> "*It is important to acknowledge that many Aboriginal and Torres Strait Islanders, because they have been dispossessed of their traditional lands, will be unable to assert native title rights and interests and that a special fund needs to be established to enable them to acquire land."*

The Indigenous Land Corporation (ILC) was established to compensate Aboriginal and Torres Strait Islander groups who, it was presumed, had lost their native title rights and interests through dispossession or whose rights to land had been extinguished by acts of government. When the *Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act 1995* (Cth) was presented to the Parliament, then Prime Minister Paul Keating said of the legislation:

> *"[S]ignificant as the native title legislation is with its profound symbolic significance, it will not and cannot be of benefit to all indigenous peoples simply because most who have been dispossessed have been unable to maintain the continued association upon which proof of native title depends. As a consequence, we are now ready for another historic step; a step represented by this bill which recognises the injustice flowing from dispossession and goes some way towards redressing it by providing a means for indigenous communities to acquire, manage and maintain land. The facility of the bill and the high order of the funding provided under it will give indigenous Australians a significant and recurring opportunity to re-establish their relationship with the land."*[5]

For various reasons the primary role of the ILC as a vehicle to compensate those who are unlikely to be able to meet the evidentiary requirements of native title has never eventuated, with most of Australia now covered by native title claims or determinations, and the burden of compensating Indigenous Australians now falling almost entirely on the States by virtue of the native title process.

Every native title determination is accompanied by an obligation (usually on the part of the relevant state or territory) to compensate native title holders for the past (and future) extinguishment of their native title rights. It also crystallises future act obligations (including the right to negotiate) on the State and other parties into the future.

As part of the negotiations for passage of the NTA, the Commonwealth offered to contribute to the costs of states and territories of determining and paying native title compensation. Section 200 of the NTA provided for agreements to be made, however, to date the Commonwealth has not contributed any monies to the State's compensation payments, despite regular requests.

The High Court has stressed that native title law now comes exclusively from the terms of the NTA. Where those terms create limitations, obligations and liabilities on the lands and waters of states and territories that would not exist under the common law, questions arise of acquisition of property under s51(xxxi) of the *Constitution*.

The Discussion Paper acknowledges that native title was never intended to be the sole vehicle by which the balance between European and Aboriginal Australia would be

[5] Commonwealth, *Parliamentary Debates,* House of Representatives, 30 August 1994, 587-588 (Paul Keating, Prime Minister).

redressed. Given that currently its consequences mostly fall on the states and territories, it should not be reframed in that manner.

The submissions on particular proposals and questions below should be read in conjunction with the State's Response to Issues Paper 45 dated May 2014.

Framework for Review of the *Native Title Act*

Question 2–1 Should the proposed amendments to the *Native Title Act* have prospective operation only?

In the event that any amendments are made to the NTA, they should be prospective only. For the reasons set out below, it is South Australia's view that few of the proposed amendments are required.

Question 2–2 Should the proposed amendments to s 223 of the *Native Title Act* only apply to determinations made after the date of commencement of any amendment?

In accordance with usual principles, it is appropriate that determinations should reflect the state of the law at the time they are made. However, it is clear that if amendments fundamentally change the requirements of the NTA there is the possibility that matters already determined (or dismissed) by the Courts may have been adjudged differently under the NTA as amended. Pressure is then likely to be brought for matters already determined, at great expense to the parties, to be re-opened under section 13 of the NTA. This must be a relevant consideration in this process.

Traditional Laws and Customs

Chapter 5 adopts the approach of applying a "fair, large and liberal" approach to the interpretation of s223 NTA, which it submits is consistent with the beneficial purpose of the NTA.[6] Section 233 NTA is at the heart of the NTA and has formed the basis for all jurisprudence since the *Mabo* decision on the requirements to prove native title. The State agrees that the NTA is a piece of beneficial legislation and should be interpreted accordingly, whilst retaining the fundamental principles of native title as set out in *Mabo*. This, indeed, is the approach that has, in recent decisions, been taken by the Court.

However, in the State's view, amending the definition of native title to broaden its application from that originally intended (based very closely on *Mabo*) is a matter of policy and not one of legal interpretation.

Proposal 5–1 *The definition of native title in s 223 of the NTA should be amended to make clear that traditional laws and customs may adapt, evolve or otherwise develop.*

The proposed amendment is, in the State's submission, unnecessary. The courts have long accepted that traditional law and custom can evolve without affecting the entitlement to native title rights. The proposal would not address the real difficulty for all parties which is to determine where such evolution has gone so far as to represent a break with the traditional laws and customs in place at Sovereignty that provided the legal basis for the recognition of

[6] ALRC Discussion Paper, above n 1, 95 [5.2].

the native title.[7] That can only be answered on the basis of each unique set of facts attaching to each claim.

The term 'traditional' is one of broad interpretation and has been found to permit a substantial element of adaptation.[8] The courts are seeking to identify contemporary expressions of ancient traditions. That traditional laws and customs do adapt is accepted by all parties to the process and native title rights do not vanish simply because the claimants adopt a modern way of life.[9]

The inclusion of the proposed amendment also has the potential, in the State's submission, to introduce further uncertainty rather than clarity. The inclusion of the words could be viewed as being intended to do more than simply reflect existing case law. The discussion at paragraph 5.36, that any adaptation, evolution or development should not be limited by any requirement that such changes be of a kind contemplated by the laws and customs, suggests the potential for a significant broadening of the definition of native title in a manner not currently contemplated by the case law.

If such an amendment is contemplated, in the State's view any such amendment should also clarify that the laws and customs must still have their origins in tradition.

Proposal 5–2 *The definition of native title in s 223 of the Native Title Act should be amended to make clear that rights and interests may be possessed under traditional laws and customs where they have been transmitted between groups in accordance with traditional laws and customs*.

The proposed amendment is unnecessary. Where a pre-sovereignty mechanism existed for the transmission of rights between related groups (for example between groups within the Western Desert Bloc) then the common law can recognise transmission of rights between those groups.

Insofar as the question contemplates rights in land being transmitted between unrelated groups post-sovereignty, it should not be considered. Such transmission could lead to the creation of new native title rights, not only after the assertion of British sovereignty but potentially into the present day and future. Such a process would require the acceptance that native title is a parallel legal system that continues to evolve alongside the common law and this would contravene the ideal, first elucidated in *Mabo* and emphasised in *Ward* and *Yorta Yorta*, that native title should not fracture the skeleton of the Australian legal system.

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:*

1. *acknowledgment and observance of laws and customs has continued substantially uninterrupted since sovereignty; and*
2. *laws and customs have been acknowledged and observed by each generation since sovereignty.*

The courts readily acknowledge the impact of British settlement on Australia's Indigenous cultures. As stated above, substantial adaptation of traditional laws and customs is rarely regarded as a break in the observance of traditional law and custom.[10]

[7] Ibid 98 [5.17], 102 [5.32].
[8] Ibid 100.
[9] Ibid.
[10] *Mabo* 110.

The ALRC acknowledges the practical developments that have occurred in the approach taken to the evidence of continuity, particularly the use of inferential reasoning to fill gaps in continuity where appropriate.[11] The danger in making an amendment of the kind proposed is the scope for it to be interpreted broadly, thus, in effect, overcoming the requirement currently at the heart of native title that the laws and customs which give rise to the protection of rights and interests under Australia law are based in tradition.

The legal basis for the continuing existence of native title rights and interests is that they have survived the impacts of European settlement. Where a complete break has occurred at some point in a group's history, and it ceases to transmit knowledge of its customs to the following generations then the connection to the land and waters by the traditional laws and customs of a group is broken. To make a finding of native title in favour of a group of individuals who have revived their culture from non-traditional or external sources would be to completely redefine the basis of native title.

As previously stated, if native title is to be re-defined as a beneficial measure more broadly available to Aboriginal and Torres Strait Islanders who might not have been able to establish a claim at common law, that is obviously a policy decision open to the Commonwealth. However this should be done transparently and in valid Commonwealth legislation that properly addresses the full consequences of this for states and territories.

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*.

In the State's submission the proper identification of all of the native title holders in relation to particular lands and waters is critical to a determination of native title and must require evidence as to the nature of the contemporary group who is asserting rights in land and their relationship to those that were in occupation of the land at the time of sovereignty.

The courts have construed the concept of a society broadly. Respondent parties have on occasion sought to emphasise internal differences in claim groups, suggesting that claims made under the rubric of a single society are in fact made up of several societies. *Akiba*[12] and *Alyawarr*[13] are examples of how the courts have dealt effectively with issues of this nature. The State has also recognised composite societies in a number of consent determinations.[14]

Prior to the inclusion in the NTA of section 84D, there was an argument to be made that a claim group that was not a single society could not properly authorise a claim that covered each of its constituent societies' lands' (*Harrington-Smith*)[15] Section 84D has put an end to that particular mischief.

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[11] ALRC Discussion Paper, above n 1, 109 [5.63].

[12] *Akiba v Commonwealth* (2013) 250 CLR 209.

[13] *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442.

[14] *Far West Coast Native Title Claim v Sate of South Australia (No 7)* [2013] FCA 1285; *Adnyamathanha No 1 Native Title Claim Group v The State of South Australia* [2009] FCA 358; *McNamara on behalf of the Gawler Ranges People v State of South Australia* [2011] FCA 1471; *King on behalf of the Eringa Native Title Claim Group v State of South Australia* [2011] FCA 1386; *King on behalf of the Eringa Native Title Claim Group and the Eringa No 2 Native Title Claim Group v State of South Australia* [2011] FCA 1387.

[15] *Harrington-Smith on behalf of the Wongatha People v Western Australia* [No 9] (2007) 238 ALR 1.

The danger in removing any requirement for an inquiry as to the continued existence of the society or group whose laws and customs give rise to the claimed rights and interests in land is to give greater scope for claims to be brought by persons who have no relationship to those that were in possession of the land at sovereignty, as well as by individual or dissatisfied members of claimant groups. It is South Australia's experience that there are often numerous contemporary socio-political Aboriginal groups that seek to have influence over the same area.

Like the earlier discussions in relation to interruption and adaptation of traditional laws and customs, the question of an ongoing society will always be answered on the facts in each case. The current society may not resemble the pre-sovereignty society, but if there is an underlying traditional structure discernable then the Courts, and States in reaching consent determinations, have tended to find that the society is traditional. The amendment is, therefore, both unnecessary and potentially problematic.

Physical Occupation

The State agrees that there is no need to amend the NTA to clarify "connection".

Proposal 6–1 *Section 62(1)(c) of the NTA should be amended to remove references to 'traditional physical connection'*.

Whilst in the State's submission there is no need for the amendment, the State is not opposed to it so long as there remains a reference to 'traditional connection'.

Section 62(1)(c) is drafted in a permissive manner (i.e., traditional physical connection is not a requirement; it simply may be included as one of the things that might assist the native title narrative). The development of the law has made it clear that present physical connection is not a requirement for a finding of native title, but where it does exist, it is very useful and claimants should be encouraged to give details.

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*.

The State is not opposed to the amendment providing that there remains a requirement that the Registrar must be satisfied that at least one member of the native title claim group has a traditional connection with the land or waters.

The Transmission of Aboriginal and Torres Strait Islander Culture

Proposal 7–1 *The definition of native title in s 223(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:*

1. *the rights and interests are possessed under the laws acknowledged, and the customs observed, by the Aboriginal peoples or Torres Strait Islanders; and*

2. *the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and*
3. *the rights and interests are recognised by the common law of Australia.*

The basis for the recognition of native title by the common law (as explained by *Mabo* and as expressed by the Parliament in the NTA), is its existence as a body of laws at the time when the British Crown asserted its sovereignty in Australia. The continued operation of those laws (with allowable evolution) to current times is what continues the existence of the native title. By definition, therefore, the native title rights and interests *must* be based in long standing tradition.

The State strongly opposes removal of the word "traditional" from the NTA. In the State's submission the removal of any requirement that the laws and customs be traditional would fundamentally alter the requirements of native title.

The State agrees with submissions[16] that to remove the requirement that laws and customs are 'traditional' is to remove the basis for legitimating claims to country by indigenous people, and to remove a key differentiator between different kinds of assertions of indigenous relationships to country.

Again, in the State's submission it is open to the Commonwealth as a matter of policy to create a new or alternative regime for recognition of contemporary Aboriginal relationships to land. This, however, is not native title. Again, if this is the intent of the Commonwealth it must be done transparently and must properly address the implications for all stakeholders, including existing native title holders.

The ALRC has alternatively suggested that the term 'traditional' could be replaced by a phrase that locates the origins of law and custom in the period prior to the assertion of sovereignty,[17] however this appears to make no change to the enquiry to be made by the court.

The courts have never interpreted 'traditional' as requiring that the laws and customs of present day groups replicate those of their pre-sovereignty forebears. Such an approach would be impractical; there is no requirement that traditions be frozen in time.[18] The courts acknowledge that traditions adapt to face the modern world.[19] Nevertheless, there must remain a link that enables the adapted traditions to continue to be regarded as based in the original native title that gives rights to the land claimed. The word 'traditional' therefore is more than adequate to found the necessary enquiry. It includes the necessary historical element but is not suggestive of the cultural rigidity apparently complained of.

Any change to such a fundamental requirement that has been the subject of substantial jurisprudence to date is bound to give rise to many more cases seeking interpretation of the new provision.

Question 7–1 *Should a definition related to native title claim group identification and composition be included in the NTA*?

[16] ALRC Discussion Paper, above n 1, 128 [7.21]-[7.22].
[17] Ibid 125 [7.9].
[18] *Yarmirr v Northern Territory* (2001) 208 CLR 1, 295 (Kirby J).
[19] *Mabo [No 2]* 192 (Toohey J); *Yarmirr v Northern Territory* (2001) 208 CLR 1, 295 (Kirby J).

The State is unclear as to the context for this question. If this question presupposes the removal of the word 'traditional' from the NTA, then it is opposed for the reasons set out above.

In any event the State considers such an amendment to be unnecessary and potentially confusing. Section 61 (4) NTA requires that a native title determination application clearly identify the members of the native title claim group, being all the persons who, according to their traditional laws and customs, hold the common or group rights and interests comprising the native title claimed, and section 225 of the NTA requires any determination to describe who the persons or groups of persons are who hold the common or group rights comprising the native title. The members of the native title holding group in each particular claim will turn on the facts, and will be governed by the particular laws and customs of the claim group. As stated above, to remove any requirement that the laws and customs governing group membership be traditional is likely to make the process of identifying the appropriate claim group members more, and not less, difficult.

The State recognises the importance of defining the native title holders properly and, more importantly, of ensuring the registered native title body corporates are properly established, governed, resourced and trained as they have an important ongoing role with regard to the native title land and waters.

Proposal 7–2 *The definition of native title in s 223 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:*

1. *the rights and interests are possessed under the laws acknowledged, and the customs observed, by the Aboriginal peoples or Torres Strait Islanders; and*
2. *the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a relationship with country that is expressed by their present connection with the land or waters; and*
3. *the rights and interests are recognised by the common law of Australia.*

The result of the analysis of "connection" in the Discussion Paper merely emphasises the need for a general term to be used so as to capture all possibilities from the facts of each case. It is entirely unclear how the suggested new wording improves the situation. Once again, there is a large body of jurisprudence on the current definition - any attempt to change it will merely introduce further uncertainty and promote more litigation.

The suggested deficiencies in the historical record in places are not a problem in practice where the courts and the State are very open to making appropriate inferences to jump temporal gaps. The above suggested definition, with the removal of any requirement that the laws and customs be traditional, and a requirement only for a contemporary connection to the land or waters claimed, is to re-define native title into something completely different.

The State again repeats that if this is the intent, there must be transparency around it and the consequences of that must be met by the Commonwealth (including resources to resolve the inevitable intra-Indigenous disputes between "traditional" and "historical" peoples). In the State's view this would be better achieved through alternative legislation, and not through amendments to 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 s 223(1)(b)?*

No. The amendment might be appropriate in circumstances where a determination of native title was merely symbolic in nature, however, a determination of native title in favour of a group has wide-ranging financial and other implications. For example, native title holders are entitled to compensation for the past extinguishment of their native title and to procedural rights for those areas where it still exists (whether able to be exercised or not).

Question 7–3 *Should the reasons for any displacement of Aboriginal peoples or Torres Strait Islanders be considered in the assessment of whether 'Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters' under s 223(1)(b)?*

In practice, the issue is already considered by the Courts and any proposed amendment is therefore unnecessary. It is accepted that the presence on the land of a claim group is not a necessary requirement to found native title. In each case, those hearing claims tend to consider the reasons for any displacement of the group as part of the broader picture of the group's efforts to retain connection.

In many ways the issue falls to be considered at the same time as the court is considering the adaptation of traditional laws and customs. For example, a group long-removed from its traditional areas may nevertheless maintain knowledge and ceremony in relation to those lost lands. In turn, the maintenance of that knowledge, albeit at a remove, maintains the group's connection with the lands. If all knowledge in relation to an area has been lost, then it would be inappropriate to make a determination of native title in favour of a group whose sole connection to an area was the bare knowledge (based upon, for example, an ethnographic map) that the ancestors of the group may have lived there.

Question 7–4 *If the reasons for any displacement of Aboriginal peoples or Torres Strait Islanders are to be considered in the assessment of whether 'Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters' under s 223(1)(b), what should be their relevance to a decision as to whether such connection has been maintained?*

For the reasons set out above, the issue it is part of the overall picture of the particular claim group's connection with the area.

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 s 223(1)(b):

1. *regard may be given to any reasons related to European settlement that preceded any displacement of Aboriginal peoples or Torres Strait Islanders from the traditional land or waters of those people; and*
2. *undue weight should not be given to historical circumstances adverse to those Aboriginal peoples or Torres Strait Islanders.*

No, for the reasons given above. The proposed amendment would not provide much assistance and may place undue focus on historical events. The amendment could not overcome the complete loss of a group's traditional laws and customs that related to land from which they had been historically displaced.

The Nature and Content of Native Title

Proposal 8–1 *Section 223(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:*

1. *comprise rights in relation to any purpose; and*
2. *may include, but are not limited to, hunting, gathering, fishing, commercial activities and trade.*

The State does not agree with the above proposed amendment. The State submits that the proposition that "*native title rights and interests comprise rights in relation to any purpose*" is misleading and is not an accurate reflection of the *Akiba* decision. It goes beyond being a statutory confirmation of the case law in *Akiba*.

The comments of the High Court were all made on the specific formulation of the nature of the native title rights that had been reached by the trial judge on the evidence before him. The particular right in question was the right to access and take marine resources, a right which the trial judge found not to be circumscribed by the use to be made of the resource taken. Furthermore there was significant and compelling evidence in that claim of extensive trade and bartering of marine resources.

The content and extent of native title rights is a question of fact and will depend upon the evidence in each particular claim.

French CJ and Crennan J, in their joint judgement in Akiba[20], said that:

> A native title right or interest defines a relationship between the native title holders and the land or waters to which the right or interest relates. The right is one thing; the exercise of it for a particular purpose is another. That proposition does not exclude the possibility that a native title right or interest arising under a particular set of traditional laws and customs might be defined by reference to its exercise for a particular purpose.

The proposed amendment to s223(2) adds nothing. Native title rights comprise the rights for which there is evidence and which the common law is capable of recognising (as highlighted by the decision in *Akiba*). The current s223(2) is explicitly unbounded. The section itself suggests that the rights named are just a subset of a broader, potentially more inclusive list. Furthermore it is difficult to characterise "commercial activities" as a native title right in and of itself, rather, it is an incident of the exercise of a right.

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

Agreed. Commercial activities and trade are matters for the evidence in each matter.

Question 8–1 *Should the indicative listing in the revised s 223(2)(b), as set out in Proposal 8–1, include the protection or exercise of cultural knowledge?*

It should not. The proposal would amount to the recognition of a new type of intellectual property unknown to the common law (see *Ward* at [59]).

[20] *Akiba v Commonwealth* (2013) 250 CLR 209, 225 [21] (French CJ and Crennan J).

If a new form of intellectual property is to be recognised, it should be the subject of discrete legislation (or amendment of existing intellectual property legislation) with appropriate checks and balances. To expect individual determinations of native title to address the requirements for the dissemination of culturally sensitive material could lead to an endless variety of requirements for accessing material that had been openly available prior to the determination in question. Such an approach would have the impractical outcome that culturally sensitive material would be the subject of as many regimes as there are determinations.

Insofar as the right is one of recognition, or a right to protect sites, determinations in South Australia already include rights to conduct, participate in and teach all aspects of the native title holders' traditions as well as the right to maintain and protect sites of cultural significance on their native title lands.

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

Unnecessary to answer.

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?*

The process continues to evolve. In relation to court proceedings, the current system of court mediated expert conferences, followed by concurrent evidence at trial (on the rare occasions when trial occurs) works effectively. In relation to connection reports, the State is increasingly working with claimant groups to identify key issues in dispute prior to the commencement of anthropological field work.

The State does have some experience of situations where disagreement between (usually overlapping claimant) parties' experts leads to the serial exchange of reports over extended periods of time, however, the Court has attempted to mediate agreement by case management conferences or conferences of experts where that assists. It is, perhaps an imperfect system, but the State cannot see a clear means to improve matters.

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

There is a suggestion in the Discussion Paper that archival material should be distributed to the parties in an electronic and searchable form. While the State is happy to supply electronic copies of historical materials, and regularly does so, the material in question is often hand written or in a condition where the only way to make it electronically searchable would be to have it all transcribed. Such an approach would be prohibitively costly, time consuming and largely unnecessary.

In relation to connection reports and other evidentiary material generated as a result of the native title process, consideration could be given to the NNTT being a central repository for such material. Where the material is confidential, obviously specific procedures will need to be put in place to ensure restrictions are met.

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?*

South Australia's Consent Determination policy has meant that the tenure analysis is undertaken at the same time as the expert anthropological material is being prepared. The process follows the priorities set by the Court and the State and SANTS. As such, in South Australia there is concurrence unless the balance between the perceived weakness of the connection of the group concerned suggests that expensive analysis of tenure should await confirmation that the group actually holds native title. Also, the State has, on occasion, engaged with the legal representatives for claimants in heavily populated areas for them to gain an impression of the extent of extinguishment in the hope that alternative settlement may avoid costly preparation of connection material.

However, it is important that tenure searches are reasonably current at the time of a determination of native title to ensure that there are not tenure errors in a determination.

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

This is a matter for the Commonwealth. At present the Commonwealth is generally happy to rely on the State's assessment of connection in accordance with the State's Consent Determination policy. The State would be concerned if the adoption of a policy by the Commonwealth lengthened the process for assessing connection, or was significantly at odds with the State's policy.

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?*

Insofar as this question contemplates developing guidelines that are imposed upon the States, that would be misguided. The states and territories all have best practice principles in the assessment of connection that reflect the requirements of each State or Territory jurisdiction and that are consistent with the requirements of the NTA.

On the increasingly rare occasions that matters are not settled by consent, the Federal Court has absolute oversight of the trial process nationally and can only be guided by existing authority.

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?*

The quality of legal (and expert) representation in the native title sphere is extremely varied. The procedural and analytical skills required are different from most other areas of the law.

The State considers that it may be useful to have a Code of Ethics for native title practitioners, and for specific training to be available.

Question 9–7 *Would increased use of native title application inquiries be beneficial and appropriate?*

South Australia has no experience with such inquiries but cannot see any benefit in the proposal in the handling of general claims. Targeted inquiries may be of assistance in resolving intra- or overlapping claimant 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?*

South Australia would support the removal.

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?*

Not currently relevant to native title practice in South Australia.

Question 9–10 *Should potential claimants, who are not parties to proceedings, be able to request the Court to direct the National Native Title Tribunal to hold a native title application inquiry? If so, how could this occur?*

It is arguable as to whether this would in practice decrease the number of applications for joinder received by the Federal Court or the time taken to resolve such applications.

This would add an additional step to the process, where the Court already has the power to refer a matter to an inquiry. The State would caution against diverting resources away from court processes to the NNTT inquiry process in the absence of any strong indication that such inquiries are likely to significantly improve claim resolution processes.

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

The process has, to some degree been supplanted by Court mediation of a more general nature, which in the State's view has been successful in improving and expediting claims resolution. Reform is not necessary in the State's view.

Authorisation

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 on and adopted by the group.*

The State supports the proposed amendment. The idea of a traditional method for authorising a native title claim has always been problematic. Native title claims cannot have been the subject of pre-sovereignty traditions and therefore any process used, even if traditional in nature, will have been co-opted to authorising a native title claim. It would be preferable in the State's view to amend the provision in the manner suggested.

Proposal 10–2 *The Australian Government should consider amending s 251A of the NTA to similar effect.*

For the reasons above, the State supports the proposed amendment.

Proposal 10–3 *The NTA should be amended to clarify that the claim group may define the scope of the authority of the applicant.*

Recent court decisions have already allowed for limits to be placed on the power of applicants when the limit was imposed at the time the claim was authorised. The State supports an amendment reflecting the claim groups' overriding power to limit the power of applicants. It is in the public interest that any limitation on the scope of authority be transparent.

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:*

1. *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);*
2. *requiring the applicant to account for all monies received and to deposit them in a specified account; and*
3. *appointing an agent (other than the applicant) to negotiate agreements with third parties.*

The State has no strong views in relation to this, although considers a non-exhaustive list may be of assistance.

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?*

Ultimately the question is one that should be resolved by the claim group. If the claim group does not view the breach as fatal to the applicant's authorisation, that is a matter for them.

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.*

South Australia supports the proposal. Transparency as to the scope of the applicant's authority is important for both members of the native title holding group, and third parties who are dealing with the applicant. Parties negotiating with named applicants on a claim need to be confident that the applicants are acting within their authority, and that any agreements negotiated bind the claim group in the manner contemplated. The terms of the authorisation must be clearly known to the negotiating parties at the outset of negotiations. Setting them out in full on a public register may fulfil that function.

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.*

The State supports this proposal.

Proposal 10–6 *Section 66B 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.*

This proposal would assist in reducing timely and costly procedures in circumstances where re-authorisation is required. Where amendments assist to streamline the process and ensure effective functioning of the claim, the State is supportive of the amendment.

Proposal 10–7 *Section 66B 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.*

While the State supports the applicant group acting by majority (where that is contemplated in the authorisation) and also supports the removal of an applicant who is unable or unwilling to act, the replacement of that applicant with a new applicant should require consultation with, and the approval of, the claim group as a whole. While there is some merit in a process whereby a representative of one family group is replaced with another member of the same family group (to maintain claim group cohesion), the terms of the authorisation allowing such a change without group consultation would have to be very clear to avoid the provision being abused.

Joinder

Question 11–1 *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)?*

The proposed amendment is unnecessary. The State considers the current powers of the Federal Court and the established law to be adequate in determining whether a party meets the requisite requirements for joinder.

Question 11–2 *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)?*

Not relevant to SA.

Proposal 11–1 *The NTA should be amended to allow persons who are notified under s 66(3) and who fulfil notification requirements to elect to become parties under s 84(3) in respect of s 225(c) and (d) only*.

The State's consent determination process already reflects this in practice. Numerous respondent parties choose to limit their involvement in negotiations to seeking assurances that their interests will be reflected in the wording of the final determination. The State has no objection to the amendment proposed.

Proposal 11–2 *Section 84(5) of the NTA should be amended to clarify that:*

1. *a claimant or potential claimant has an interest that may be affected by the determination in the proceedings; and*
2. *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.*

The proposal is unnecessary as case law on this is well established. In the State's experience the Courts deal adequately with this on a case by case basis.

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 s 84(3) or to be joined under s 84(5) or (5A).*

Insofar as the proposal would circumvent the need for individuals to become parties where their interest might be ably represented by a peak body or corporation, the proposed amendment is supported by the State.

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 s 84(8) is not limited to the circumstances contained in s 84(9).*

The State supports the proposed amendment.

Proposal 11–5 *Section 24(1AA) of the Federal Court of Australia Act 1976 (Cth) should be amended to allow an appeal, with the leave of the Court, from a decision of the Federal Court to join, or not to join, a party under s 84(5) or (5A) of the NTA.*

The provision in the *Federal Court of Australia Act 1976* (Cth) is in place to assist in the timely resolution of matters before the Court. The State generally supports appeal rights but the State would not support the amendment if it could be used to thwart a scheduled consent determination hearing.

Proposal 11–6 *Section 24(1AA) of the Federal Court of Australia Act 1976 (Cth) should be amended to allow an appeal, with the leave of the Court, from a decision of the Federal Court to dismiss, or not to dismiss, a party under s 84(8) of the NTA*.

See answer above.

Proposal 11–7 *The Australian Government should consider developing principles governing the circumstances in which the Commonwealth should either:*

1. *become a party to a native title proceeding under s 84; or*
2. *seek intervener status under s 84A.*

This is a matter for the Commonwealth.