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Environment / Law / Economics

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Dear Sir/Madam

Issues paper – Review of the future act regime in the *Native Title Act 1993* (Cth)

Thank you for the opportunity to contribute to the development of the Discussion paper, reviewing the 'future act' regime in the *Native Title Act 1993* (Cth) (Native Title Act). Before I address the issues paper, there is a preliminary issue that requires your attention.

Preliminary issue

Australian's have never properly acknowledged the wrong that was done to Indigenous communities when Australia was colonised. Our efforts to 'justify' the actions taken when we appropriated Indigenous lands have left an unresolved conflict in the Australian psyche. This was evident in Mabo v Queensland[1] and is evident in the Issues paper. The conflict stems from the premise of 'terra nullius' and the clear evidence that Australia was settled. Initially this conflict was rationalised on the basis that Indigenous people were 'primitive'. When this was no longer possible, the rationalisation depended on the acquisition of British sovereignty. The problem with this is that the acquisition of British sovereignty was founded on the concept of 'terra nullius'. By relying on the acquisition of sovereignty, we have decided to ignore the wrongful appropriation of Indigenous land.

The effect of Mabo's case was to acknowledge that Indigenous communities had an interest in their land but that their interests could not interfere with non-indigenous interests. The Native Title Act was a product of this attitude. The history of the developments that resulted in the Native Title Act is outside the scope of these submissions but, within the non-indigenous community, the common perception was that the Mabo decision and the Native Title Act 'bestowed' a benefit on Indigenous communities. With all due respect, the issues paper continues under this misconception.

Mabo's case explicitly prioritised non-indigenous interests over Indigenous interests and the Native Title Act legitimised this by placing it within a legal framework. It has allowed us to confirm the 'legitimacy' of the appropriation of the lands of Indigenous communities, using past and intermediate period acts to do so. It also authorised the States and Territories to do so too. Indigenous communities have a different perspective. In her book , Irene Watson makes the point that:

[1] *Mabo v Queensland (No 2)* [1992] HCA 23; (1992) 175 CLR 1.

> Since the advent of colonisation, First Nations Peoples have been asking the question of the invaders: by what laws have you come to our lands and breached our laws. [2]

We are unable to answer her question because appropriation was not authorised by law, it was an idea that served the needs of the colonisers, which they had the capacity to enforce. Citing Dennis Walker, who was speaking at the ceremony to celebrate the entry of the Aboriginal Tent Embassy onto the register of the Australian Heritage Commission's National Estate in 1995, Watson wrote:

> (Dennis Walker) responded to the common assertion that we had lost our land, stating, 'we didn't lose it anywhere, the land is still here and we have the responsibility to care for country'. (He) highlighted the problem as:
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> > not being given the power in the non-Aboriginal legal system to fulfil that custodial right. Until our Elders in Council decide on these matters through their customary laws and until that consent, which Captain Cook was supposed to get, then we live under bad laws. [3]

Indigenous communities had well established rules for management of their country and the water resources that were a part of it, including rules that identified who was responsible and what they were responsible for. Within Indigenous communities their rules still apply, as noted by O'Donnell in his report to the North Australian Indigenous Land and Sea Management Alliance Ltd (NAILSMA):

> The traditional laws and customs of Indigenous people continue to exist regardless of whether formal legal recognition takes place under Australian law.[4]

Citing Noel Pearson, O'Donnell characterised the relationship between Indigenous law and non-indigenous law as follows:

> Fundamentally, I proceed from the notion that native title is a 'recognition concept'. The High Court tells us in Mabo that native title is not a common law title but is instead a title recognised by the common law. What they failed to tell us, and something which we have failed to appreciate, is that neither is native title an Aboriginal law title. Because patently Aboriginal law will recognise title where the common law will not. Native title is therefore the space between the two systems, where there is recognition.[5]

That 'recognition' is largely interpreted by the non-indigenous legal system and, even with the best will in the world, from a non-indigenous perspective. With all due respect, inevitably it has favoured the imperatives of the non-indigenous community. Unless we weigh the claims of Indigenous communities as if they were equal to the claims of the non-indigenous community injustice will continue to be perpetrated on Indigenous

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[2] Watson, I., (2015), *Aboriginal peoples, colonialism and international law*: Routledge, Oxfordshire, UK, p. 18.
[3] Watson above n. 2, p. 22.
[4] O'Donnell, M., (2011), Indigenous rights in water in northern Australia, NAILSMA – Track Project 6.2, Darwin, Northern Territory, retrieved 15 May 2024 from the NAILSMA website: https://nesplandscapes.edu.au/wp-content/uploads/2016/02/TRaCKPub6.2Final_Mar11-Michael-ODonnel.web_.pdf, p. 23.
[5] O'Donnell, above n. 4, p. 23.

communities. The ‘futures act’ regime, as it is now framed, is an oppressive regime that makes it all too easy to continue the appropriation of Indigenous lands and waters.

Recommendation 1

That the overriding principle governing the conduct of the ALRC’s inquiry is to establish a regime that equitably balances the claims of Indigenous communities and those of non-indigenous communities.

Recommendation 2

That where there is a conflict between the priority to be given to Indigenous and non-indigenous claims, the process for resolving the dispute be skewed to favour of supporting Indigenous rights because of their prior, superior claim.

The Terms of Reference set out 5 questions to address and request consideration of a list of specific things in answering those questions. The matters for consideration include options for reform to:

- rectify any inefficacy, inequality, or unfairness in how the regime currently works, as well as ways to make it work more efficiently;

- support native title holders so they can effectively engage with the future acts regime, as well as supporting fair negotiation and collaboration between native title holders and proponents; and

- strengthen data collection and data transparency to support the operation of the future acts regime into the future.

The questions

Question 1 What are the most important issues to consider for reform in the future acts regime?

Part 2 of the Native Title Act sets out the provisions for recognition of native title. Division 1 deals with ‘Recognition and protection of native title’. Section 10 provides that native title is ‘recognised and protected’ in accordance with the Native Title Act. Section 11 provides that native title can only be extinguished in accordance with the Native Title Act.

Divisions 2, 2A, 2AA and 2B provide a comprehensive regime for validating past and intermediate period acts. The effect of these provisions is that all acts, however perpetrated, that occurred within the nominated period of time, were recognised as valid. This is a substantial injustice to Indigenous communities, who did not have any say in this disposition of their traditional lands. As indicated above, it unequivocally places non-indigenous interests before Indigenous interests, amounting to discrimination. The allocation of land, resulting from past and intermediate period acts, is not the subject of the ALRC’s inquiry. However, it is certainly arguable that the injustice inherent in the arbitrary allocation of traditional lands to the non-indigenous community, should influence the results of this inquiry in favour of proper recognition of Indigenous rights.

Section 15 divides past and intermediate period acts into category A, B, C and D acts. Except for public works, category A acts extinguish native title. Category B acts extinguish

native title to the extent that there is a conflict between those acts and native title interests. Category C acts refer to mining leases which do not extinguish native title and category D acts are a catchall for anything not specifically referred to in the definitions of category A, B and C acts. Future acts are acts that apply to land for which native title was not extinguished by past and intermediate period acts.

Division 3 sets out the requirements for future acts to be valid. Future acts may or may not extinguish native title but section 24AA(1) provides that, to be a future act, an act must affect native title. Conversely, native title is affected by future acts, and the extent to which a future act affects native title, depends on the act.

The starting place for constraints on native title is with the original grant, or in some cases refusal to grant, native title. Native title can be granted for the entire claimed area, for an identified part of the claimed area or for none of it, depending on how readily the Indigenous community lodging the claim, can prove their connection to the land. If native title is granted for all or part of the claimed land, the grant can be further constrained by being allocated on the basis of the Indigenous community having exclusive or non-exclusive possession. To understand exclusive and non-exclusive possession it is necessary to be cognizant of the viewpoint being considered and it is not the viewpoint of Indigenous communities.

Exclusive possession is defined in terms of non-indigenous claims, not in terms of Indigenous claims. Section 23B of the Native Title Act defines ‘previous exclusive possession’ acts. As part of the definition the Act sets out a number of actions that resulted in exclusive possession being granted to the non-indigenous community at the expense of native title claimants. These included granting of freehold estates, commercial leases and exclusive agricultural or pastoral leases. All native title rights were extinguished for lands in relation to which such grants were made, without Indigenous communities being consulted. The only conclusion that can be reached here, is that non-indigenous holders of native title lands, granted to them pursuant to section 23B, have been granted exclusive possession. Consequently, under the Native Title Act native title has been extinguished.

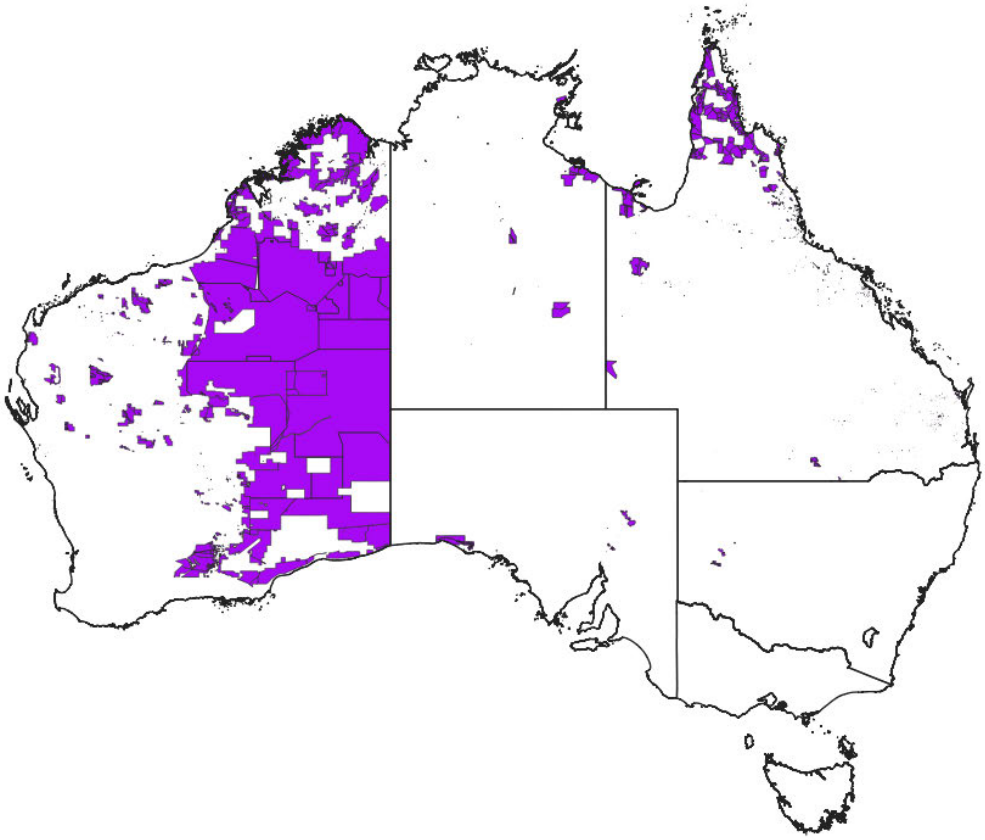
Land for which exclusive possession had been granted to the non-indigenous community was withdrawn from the pool of land available to Indigenous communities. The land that remained could be claimed by the Indigenous community under the Native Title Act. However, some parts of these remaining lands had been made available for ongoing use by the non-indigenous community. Claims could be made for that land but only for use of it because of the non-indigenous interest in it. Only a grant of non-exclusive title was possible.

Non-exclusive possession is also defined in terms of non-indigenous claims, not in terms of Indigenous claims. Section 23F of the Native Title Act defines ‘previous non-exclusive possession’ acts. Again, there are a number of actions which, when carried out, vested an interest in the land in members of the non-indigenous community. These included the grant of non-exclusive agricultural and pastoral leases. Where non-exclusive possession has been granted to non-indigenous parties, Indigenous communities can only be granted limited rights to use the land. The National Native Title Tribunal describes those rights as:

> … the native title bundle is most likely to be a set of non-exclusive rights (which means there is no right to control access to, and use of, the area). Examples may include the right to live on the area, hunt, fish, gather food or teach law and custom on country.

Even where these rights are potentially available, they are subject to the superior title granted to the non-indigenous holder of the native title land, pursuant to section 44H of the Native Title Act.

Once non-exclusive native title is granted to land, it is also withdrawn from the pool of available land. The land that remains is available to be claimed by Indigenous communities, and to be allocated by the Native Title Tribunal to the Indigenous community on the basis that they have exclusive possession. Land for which exclusive possession has been granted to Indigenous communities is shown in purple on the map below.



As is evident, much of that land is land which, up until now was not wanted by the non-indigenous community. It is predominantly in arid and semi-arid areas, does not constitute good arable land and is remote from main centres. However, this is not the end of the story. With the massive support being given to mining, it is no longer the case that the non-indigenous community do not want access to these lands. Increasingly Indigenous rights are being subsumed to mining interests even in remote areas previously deemed unusable by the non-indigenous community. Further constraints, including those associated with promoting mining interests, are placed on Indigenous communities for the use of their lands, even for those lands for which exclusive possession has been granted. Yet again the determinant is non-indigenous requirements. It is not Indigenous rights.

Section 24AA(3) and (4) set out an hierarchy of circumstances in which native title is affected. Section 24AA(6) provides that, in most circumstances, future acts referred to in sections 24AA(3) and (4) do not extinguish native title. Whether they do or not might depend on your perspective, discussed further below. Section 24AA(7) reinforces the provision in section 44H, that:

a valid lease, licence, permit or authority, and any activity done under it, prevail over any native title rights and interests and their exercise.

That the provisions in section 24AA(3) and (4) are hierarchical, is established by section 24AB, which says:

(1) To the extent that a future act is covered by section 24EB, which elaborates indigenous land use agreements, it is not covered by any of the sections listed in paragraphs 24AA(4)(a) to (k).

(2) To the extent that a future act is covered by a particular section in the list in paragraphs 24AA(4)(a) to (k), it is not covered by a section that is lower in the list.

The hierarchy, established by sections 24AA(3) and (4), is as follows

1. Indigenous land use agreements;
2. Acts indicating the absence of native title;
3. Acts permitting primary production on non-exclusive agricultural or pastoral leases;
4. Acts permitting off-farm activities directly connected to primary production activities;
5. Granting of rights to third parties on non-exclusive agricultural or pastoral leases;
6. Acts affecting management of water and airspace;
7. Renewals and extensions of acts;
8. Acts involving public housing;
9. Acts involving reservations and leases;
10. Acts involving facilities for services to the public;
11. Low impact future acts;
12. Acts that pass the freehold test;
13. Acts affecting offshore places.

Each of these categories further constrains native title rights to a greater or lesser extent, from what is already a severely constrained base. It is not productive to review the terms of each of these categories for the purposes of the issues paper. Fully addressing them will more appropriately be undertaken when reviewing the discussion paper. However, it is necessary to understand how each category constrains native title.

1. *Indigenous land use agreement (ILUAs);*

ILUAs are agreements negotiated between entities proposing to carry out activity on native title land, and the native title land holders. There are several types of ILUAs

which incorporate different requirements, but each type requires a negotiation process. For each type of ILUA, sections 24BE, 24CE and 24DF allow the giving of 'any consideration'. Granting of a freehold estate or other interests in the land is expressly permitted. The effect of such a grant may be to extinguish native title, depending on the interest given. The negotiation process can also result in the inclusion of 'any conditions' that the parties agree to, so long as they are lawful. Sections 24BF, 24CF and 24DG allows for an application to the Native Title Tribunal or an equivalent State body, for assistance to negotiate an agreement. It is not clear whether either, or both, parties can apply, however what is clear is that the relevant body does not represent the interests of Native Title holders. There is no other provision for assistance. Representatives of Indigenous communities could negotiate away land rights that belong to the present and future community, without fully comprehending the extent of the rights they are losing. They are negotiating on behalf of present and future holders of native title who do not have a right or the capacity to object. This is a seriously flawed system.

There are real issues with ILUAs, not the least of which is that there is often an imbalance in knowledge, power and resources in favour of the entity seeking concessions, and the native title holders. In theory, ILUA's have the potential for native title holders to negotiate very positive outcomes for their communities. However, without the necessary resources to offset the imbalance in knowledge, power and resources the capacity of native title holders to negotiate successful agreements is very limited.

Recommendation 3

That the ALRC include consideration of the need for independent legal advice for native title holders responsible for negotiating ILUAs, and for the provision of adequate resources to allow them to fully participate in the negotiation process.

Recommendation 4

That the ALRC include consideration of the need for the provision of adequate resources so that representative/s responsible for negotiating ILUAs can put the terms of the proposed ILUA, and the legal advice given on the meaning and effect of the terms of the proposed agreement, to the community they represent, to approve or not.

2. Validating other interests

Each of the other categories explicitly prioritise non-indigenous interests over indigenous interests. If the land in question is required for non-indigenous uses covered by the respective categories, those uses can be approved for the native title land. In some of the categories, the approval can extend to extinguishing native title interests, or the native title interests can be subsumed to non-indigenous interests for extended periods of time. For example, mining licences and agricultural and pastoral leases can be granted for many years, with renewals of the licences or leases further extending the term of the licence or lease without the need for negotiation of the terms of renewal. For the term of the licence or lease, as already indicated, the non-indigenous interest takes priority over the Indigenous interests, as provided for by section 44H. Discussing the economic principle that an economy will come into equilibrium 'in the long run', John Maynard Keynes said:

> In the long run we are all dead.[6]

In the long run members of Indigenous communities may recover their interest in their native title lands but, for leases and licences that extend for decades or longer the current members of the community will not gain the benefit. As for economic equilibrium, in the long run they will be dead. They will never derive the benefit of being able to regulate the use of their lands in the way they consider appropriate or to fulfil their obligations to the land inherent in their belief system. Where native title is extinguished, there is not even the hope that at some time in the future their community will recover their interest in their native title lands. Section 237A defines 'extinguish' as follows:

> The word extinguish, in relation to native title, means permanently extinguish the native title. To avoid any doubt, this means that after the extinguishment the native title rights and interests cannot revive, even if the act that caused the extinguishment ceases to have effect.

There is no obvious reason why native title should be permanently extinguished and unable to revive where circumstances change.

Recommendation 5

That the ALRC include consideration of the removal of the capacity to extinguish native title from all future act regimes.

Recommendation 6

That the ALRC give consideration to including a requirement that, for all future act regimes, a negotiation process be implemented that includes the relevant, fully resourced, Indigenous community or communities.

Recommendation 7

That the ALRC give consideration to including a requirement that, for all renewals of licences and leases, a negotiation process be implemented that includes the relevant, fully resourced, Indigenous community or communities.

Recommendation 8

That the ALRC give consideration to the removal of the definition of 'extinguish' in section 237A and recognise that land that, for whatever reason, reverts to the Crown, can be the subject of a native title claim.

Question 2 Are there any important issues with how the future acts regime currently operates that we have not identified in the Issues Paper?

Indigenous communities for which a native title claim has not been lodged, have no capacity to participate in the negotiation process established in subdivision P. This is a clear injustice. Native title subsists whether a claim has been lodged or not. The Native Title Act is a process for recognising native title not for establishing it, that is, native title

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[6] Keynes, J. M., (1923), *A Tract on Monetary Reform*: London, Macmillan and co., limited, p. 80.

exists whether or not it has been formally recognised. To exclude communities that have not yet successfully established their connection to their land is to deny their interest.

Recommendation 9

That the ALRC give consideration to including mechanisms within the future act regime that allow the Indigenous communities occupying lands the subject of an application for an non-indigenous interest under the Native Title Act, to participate in any and all negotiation processes.

Question 3 Are there any aspects of the future acts regime that work well?

The Native Title Act is founded on the racist assumption that non-indigenous interests automatically take priority over Indigenous interests. This means that the future act regime cannot function equitably and therefore that there are no aspects that work well.

Question 4 Do you have any ideas for how to reform the future acts regime?

The founding principle informing the Native Title Act must be recognition that Indigenous communities have a prior, superior claim to their native title lands and therefore, the future regime must be based on the principle that Indigenous claims are equally valid as non-indigenous claims.

Question 5 What would an ideal future acts regime look like?

An ideal future act regime would equitably balance native title interests against non-indigenous interests, recognising the prior, superior claim of indigenous communities. It would not permit any further extinguishing of native title and would delete section 44H so that where land is surrendered to the Crown native title interests revive and the land can be the subject of a native title claim.