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Comments on the draft terms of reference for the ALRC Review of the *Native Title Act 1993*

The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) welcomes the opportunity to provide comment on the draft terms of reference for the Review of the *Native Title Act 1993*(the Act). AIATSIS is one of Australia's publicly funded research agencies and is dedicated to Indigenous research. The Native Title Research Unit (NTRU) was established by AIATSIS in 1993 following the Mabo determination and conducts research and analysis on native title law, policy and practice.

AIATSIS has a central role in facilitating discussion and debate about native title, consistent with the objectives of the Act to recognise and protect the rights and interests of Indigenous peoples to their traditional lands. Through a range of research projects, information services and events such as the annual National Native Title Conference, AIATSIS fosters productive dialogues about the operation and function of the Act. We are fundamentally committed to improving legal processes to ensure better outcomes for Aboriginal and Torres Strait Islander peoples.

AIATSIS considers the proposed Review a timely and necessary opportunity both to revisit some of the underlying assumptions of the native title system and to correct some of the practical difficulties in its operation.

While welcoming the inclusion of connection, authorisation and joinder issues in the terms of reference, AIATSIS would recommend that the scope of the Review be expanded to allow the Commission to also consider:

- Extending the disregarding of historical extinguishment
- Strengthening the right to negotiate
- Clarifying the application of the expedited procedure
- Providing for more coherent interaction between native title rights and interests and statutory regimes for the management of land, water and other natural resources.

Our comments on the draft terms of reference are based upon 20 years of research and practice by AIATSIS researchers in the native title area. We hope they will assist in developing draft terms of reference that would address the full range of potential improvements of the Act.

Yours sincerely,

Dr Lisa Strelein
AIATSIS

AIATSIS comments on the draft Terms of Reference of the Australian Law Reform Commission's Review of the *Native Title Act 1993*

Introduction

Formally recognised native title now covers 20 per cent of the Australian continent.[1] These significant native title land holdings are managed by over 100 Indigenous organisations, known as Registered Native Title Bodies Corporate (RNTBCs), supported by the system of regional native title representative bodies and service providers (NTRBs). With over 440 claims still remaining to be resolved, there is little doubt that in coming years native title groups and their recognised rights and interests will become increasingly central to land management in Australia.[2]

The main objectives of the *Native Title Act 1993* are:[3]

- to provide for the recognition and protection of native title;
- to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings;
- to establish a mechanism for determining claims to native title; and
- to provide for, or permit, the validation of past acts, and intermediate period acts, invalidated because of the existence of native title.

The Act contains specific provisions that address the first-stated objective: to enable recognition. These 'rules of recognition' include the elements that need to be established in order for a positive determination of native title to be made, the provisions that enable native title holders to specify the claim group and access procedural rights as a result of doing so; and rules about how Australian governments can deny native title through creating inconsistent rights and interests or through legislation.[4]As is reflected in the first listed objective of the Act, the aim is to provide for both the recognition *and* protection of native title.

We suggest that there is a need, within the terms of reference for the Review, to consider a broader concept of 'recognition' that covers not only the processes for *identifying* native title rights and interests, but also the way in which they are protected and enforced with respect to non-indigenous rights and interests. If the definition of 'recognition' remains narrow the inquiry will be unable to consider the operation of the legislation with respect to the Act's stated objectives, and it may not be possible to address inequities that currently exist within the Act.

More generally, we would encourage an approach to the Review of native title law that scrutinises the current legal arrangements by explicit reference to policy considerations:

- Given that substantial amounts of time and money are spent on proving or challenging the continuity of cultural practices, is there a convincing policy rationale for this, and are the current legal requirements for establishing connection well-suited to that policy rationale?

[1]National Native Title Tribunal 2012, *National Report: native title*, February 2012.
[2]*Ibid*.
[3] Section 3, *Native Title Act 1993* (Cth).
[4]French, RS (2009) 'Native Title – a constitutional shift?', JD Lecture Series, University of Melbourne Law School, 24 March 2009.

- Similarly, is the level of attention given to identifying the relevant 'society' for native title claims warranted by any identifiable policy concern, beyond the bare proposition that native title rights and interests must derive their existence from a system of Indigenous law and custom?
- Given that historical tenure searches are not only time and resource intensive but also cause grievance and disappointment for native title holders whose rights are extinguished by currently non-existent tenures, can the current rules on historical extinguishment be justified on policy grounds?
- If the existing rules for authorisation and joinder are intended to ensure justice for claim groups while also providing avenues for individuals and minority groups to pursue their own claims, are changes required to improve the realisation of those objectives?
- If the 'right to negotiate' process is intended to ensure that proponents and governments give *bona fide* consideration to the rights, interests and perspectives of native title holders, is that objective well-served by the current state of the law?

It is our view that a strong focus on the policy reasons that underlie the legal architecture is necessary to ensure that the Review's conclusions and recommendations can inform legislative change directed towards more just and more efficient outcomes .

Connection requirements

AIATSIS welcomes the inclusion in the draft terms of reference of issues relating to connection requirements. Judicial interpretations of s 223 have resulted in arguably superfluous and unintended legal requirements as a result of the application of principles of statutory construction.

In *Members of the Yorta Yorta Aboriginal Community v Victoria* the High Court affirmed that the concept of 'continuity' was established as a requirement of the Act's section 223 yet as noted elsewhere; this concept is not explicitly mentioned in the section.[5] The requirement of 'continuity' as interpreted by the courts has a prejudicial application for those Indigenous peoples who have, by choice or otherwise, adapted their cultural practices in response to the profound social and economic impacts of colonisation. Even where evidence of extant laws and customs is produced, the requirement of continuity can deny recognition without any apparent policy justification.

Further, esoteric questions about the demographic or geographic extent of particular 'societies' have occupied parties in both litigation and negotiations, despite the term not appearing in the legislation and despite its anthropological artificiality. Further, the treatment of the 'connection' requirement in s 223(1)(b) as a separate and distinct element of native title has been acknowledged as an anomaly and a source of confusion for parties.[6]

We draw your attention to the *AIATSIS Submission to the Inquiry into the Native Title Amendment (Reform Bill) 2011* which notes the divergence between law and practice with respect to the requirement of s 223(1).AIATSIS submits that it is appropriate for the terms of reference for this

[5] [2002] HCA 58 (12 December 2002). Finn, P 'Mabo into the future' paper presented at the National Native Title Conference 2012, 4-6 June 2012, Townsville.

[6] *De Rose v State of South Australia* [2003] FCAFC 286 at [305];*Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* [2007] FCA 31at [1880]; *Bodney v Bennell* [2008] FCAFC 63 at [165].

inquiry to incorporate sufficient scope to examine the content and operation of section 223. Recent proposals for a 'presumption of continuity' (including by members of the judiciary) should be considered in detail by the Commission. However, the inquiry should go further to address possible changes to the underlying requirements of proof. A review of such aspects of the proof of native title, with particular attention to their policy bases (if any) would help to ensure that the native title regime does not deny justice without cause.

Authorisation and joinder

Authorisation and joinder issues contribute to a significant amount of native title litigation. Some of this litigation was necessary to clarify the meaning and operation of the relevant statutory provisions. Much of it, however, reflects the real political, cultural and personal conflicts that are involved in the sometimes difficult process of determining a single bounded claim group identity.[7] The process of resolving or managing dispute lies in the first instance with the NTRBs and the Review should consider how the management of native title proceedings by the Court can enable rather than hinder the identification of the group, including appropriate timeframes and resourcing of authorisation processes and the significant pre-authorisation groundwork required to build the capacity of the group to make decisions and manage disputes. Legislative provisions for authorisation and joinder must necessarily strike a balance between the efficient progress of claims on the one hand, and the need to ensure that individuals and minority groups are accorded due opportunity to have their voice heard. So while legislative amendment could remove some of the procedural costs and delays created by these issues, any changes need to be directed to ensuring just and equitable access to native title recognition over the efficient disposition of matters before the courts.

Extinguishment

State and territory governments currently have the legal power to deny recognition of Indigenous rights and interests through the grant of inconsistent rights and interests or by legislation. This denial of recognition is known as extinguishment (or, where the non-extinguishment principle applies, 'displacement' or 'suppression'). The underlying rationale for allowing extinguishment is the idea that private rights and interests that are granted by the Crown should continue to be protected in the name of fairness and predictability.

However, where previously granted tenures come to an end or are abandoned (such as in 'ghost towns') or where previously reserved lands were never actually developed, there are no remaining private rights and interests to compete against native title holders'. And where legislation that was inconsistent with the existence or exercise of native title rights and interests is repealed, there are no remaining public policy objectives that compete with native title. In both cases there is no identifiable reason in policy, justice or legal theory to deny full recognition to the rights and interests held under traditional law and custom.

It is currently possible for governments and developers to take advantage of instances of previous extinguishment in order to avoid the necessity of negotiating or compensating in relation to future use of the land. Long-forgotten land uses such as police equestrian exercise yards, which have

[7] *Strickland v Native Title Registrar* [1999] FCA 1530.

reverted to their natural bushland, are seized upon to justify the arbitrary non-recognition of native title. The proposed Review provides an opportunity to investigate the justice of such provisions in circumstances where rights and interests held under traditional law do not interfere with the rights and interests of others.

In *Fejo v Northern Territory*[8] the High Court held that once extinguished, native title rights and interests cannot be revived. Comments by the current Chief Justice of the High Court lend support the idea of legislative amendment to alter the position established in *Fejo.*[9] AIATSIS recommends that the Review give consideration to extinguishment principles and in particular the extension of provisions for disregarding 'historical extinguishment'.

Competition with other rights and interests

The current terms of reference, while aiming to consider potential economic and social benefits of native title, are limited to barriers to recognition rather than considering how native title can be protected or enforced in the 'post-determination' environment. The interaction between the rights and interests of native title holders and other rights and interests is a critical element of how native title is protected into the future and should be covered by the Review.

The intergenerational nature of native title rights and interests needs to be reflected in the way in which the Act treats the withdrawal of recognition. Where there is greater potential for the loss of native title rights and interests there should be corresponding processes and protections available to native title holders to negotiate how their rights and interests can be abrogated. There are several aspects of the current law that are either ambiguous or in need of reconsideration.

The 'right to negotiate' regime– which applies not only to mining but also compulsory acquisition – has a number of problems, explained in detail in AIATSIS' submissions in relation to the *Native Title Amendment Bill 2012*, that undermine the capacity to deliver just outcomes, and which may also cause delays and frustration to other parties. In summary, these include that,

- The National Native Title Tribunal's task in arbitrating future act matters is not well aligned with Australia's commitments under the United Nations Declaration on the Rights of Indigenous Peoples. Even without granting a right of 'veto' to native title parties, the process could be improved to give greater weight to their views and concerns.
- Allowing the Tribunal to impose 'profit-sharing' conditions of the same kind as are frequently the subject of future act negotiations would ensure that arbitration represented a mechanism of last resort, addressing itself to the substance of the actual negotiations rather than a narrower subset of issues.
- In the absence of a right of 'veto', it is important for procedural protections to be built in to the 'right to negotiate' regime, including provision for adequate negotiation capacity, representation and expert advice; mandatory minimum standards of conduct for

[8] [1998] HCA 58 (*Fejo*).

[9] French, RS (2008) 'Lifting the burden of native title – some modest proposals for improvement', address to the Native Title User Group, Adelaide, 9 July 2008; French, RS (2010) 'The role of the High Court and the Recognition of Native Title: Address in honour of Ron Castan QC AM', in Strelein, L (ed) *Dialogue about land justice*, Aboriginal Studies Press, Canberra, 78.

negotiating parties; and a requirement that negotiations have genuinely broken down before arbitration is available.

The application of the expedited procedure to some resource exploration activities has the potential to allow significant impact to native title holders and their country, without the procedural protections of the right to negotiate regime. One point of particular risk is where the Tribunal makes decisions about the likely impacts of a proposed future act based on what the proponent says they *intend* to do on the land rather than what they will have the *right* to do under the tenement. This leaves native title holders with no legal recourse if the exploration activities ultimately depart from the proponent's originally stated intentions and cause damage to sites or other interferences.

The interaction between native title and statutory regimes for the management of land and water is complex and works against the interests of native title holders. Current High Court litigation is considering the extent to which fishing management legislation interferes with native title, and how s 211 *Native Title Act 1993* operates in relation to the exercise of native title rights.[10]Previous case law recognised that native title rights and interests can be regulated without being extinguished or impaired,[11] but the Commonwealth and some States now argue that this will not always be the case. If the High Court finds that regulatory legislation does extinguish native title, such that s 211 cannot apply, then a fundamental aspect of the recognition and protection of native title would be removed. AIATSIS recommends that the Review consider whether s 211 offers an appropriate mechanism for the exercise of native title rights and interests – particularly in the event that the High Court's forthcoming ruling renders s 211 essentially useless.

AIATSIS also recommends that the Review consider possible expansions to the scope of s 211. At present the section applies to a very limited list of activities, and is explicitly limited to non-commercial purposes. Given the Commonwealth government's focus on expanding opportunities for Indigenous economic development and encouraging Indigenous enterprises, this non-commercial limitation seems counterproductive. And the limited list of 'allowed' activities is artificial in light of the broad range of native title rights and interests that may be recognised – removing subsection (3) entirely would be one possible way of dealing with this.

Finally, we would encourage the Review to consider the interaction between the future acts process and the management of land and water. Current arrangements for the validation of future acts effectively excuse governments from the duty to consult and negotiate with native title holders when making legislative and planning decisions that will affect their rights and interests.[12]Although there are clear provisions requiring compensation for such acts, these do not currently have the effect of bringing governments to the negotiating table. And for many native title holders, the entitlement to compensation payments may be cold comfort for potentially irreversible damage to their spiritual and cultural relationships to country, and to the social harms that may follow. Australia's commitments under the United Nations Declaration on the Rights of Indigenous Peoples are not satisfied by compensation alone; the primary duty is to seek the free, prior and informed consent of Indigenous peoples before making decisions that may affect them. Forthcoming research from AIATSIS analyses the difficulties in practically exercising or enforcing native title rights in the face of State and Territory water legislation. In the United States, the Federal government uses its

[10] Appeals of *Commonwealth of Australia v Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group* [2012] FCAFC 25 and *Dietmen* v *Karpany* [2012] SASCFC 53.
[11] *Yanner v Eaton* (1999) 201 CLR 351.
[12] See ss 24HA, 24MD, 26, *Native Title Act 1993*.

superior legislative powers to ensure that State laws respect and account for the rights of native Americans; in Australia, the *Native Title Act 1993* currently does the reverse, effectively ensuring that States and Territories can ignore native title in legislating for land and water management (subject to the as yet unexplored threat of future compensation liability). AIATSIS would encourage the Review to consider ways of strengthening the future acts regime in its application to land and water management. This may include, for example, the extension of the 'right to negotiate' procedure to more categories of future act.

Conclusion

AIATSIS considers the proposed Review a timely and necessary opportunity both to revisit some of the underlying assumptions of the native title system and to correct some of the practical difficulties in its operation.

We would recommend that the proposed scope of the Review be expanded to allow the Commission to consider:

- Extending the disregarding of historical extinguishment
- Strengthening the right to negotiate
- Clarifying the application of the expedited procedure
- Providing for more coherent interaction between native title rights and interests and statutory regimes for the management of land, water and other natural resources.

Ultimately, if the Review were to be limited to a consideration only of the processes for gaining recognition of native title, and did not also consider how rights and interests will be protected and exercised by future generations of native title holders, then the opportunity to examine a number of crucial areas worthy of reform will be missed.