THE AUSTRALIAN LAW REFORM COMMISSION AND ITS CURRENT REVIEW OF THE NATIVE TITLE ACT

A brief explanation of the Australian Law Reform Commission's inquiry process and a discussion on the meaning of some of the terms in its current review of the *Native Title Act*

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The Native Title Act 1993 (NTA) represented an important step in building the relationship between Aboriginal and Torres Strait Islander people and other Australians. For Aboriginal and Torres Strait Islander people, the recognition of native title has great significance.

Over its life, the NTA has been the subject of amendments and proposals for change and reform. For instance, the NTA was amended in 1998, with the introduction of the Howard government's controversial 10 point plan. In 2007, the Howard government made other changes to the NTA. These were not without their own controversy, particularly with respect to administrative and funding arrangements for native title representative bodies and service providers.[2] Changes to the function of the National Native Title Tribunal were enacted in 2009 and amendments expanding the future acts regime were introduced in 2010. Other laws have been amended which have impacted on native title. For instance legislation dealing with the taxation treatment of native title and the applicability of charitable trusts were enacted in 2013.[3]

Amendments to the NTA and other pieces of legislation are only one aspect of the many proposals, inquiries and other engagement with the legislative regime surrounding native title.

The Australian Law Reform Commission (ALRC) is currently conducting an inquiry of the NTA (the Review) and, in October 2014, called for submissions to its Discussion Paper. Submissions are due on 18 December 2014 and the ALRC's Final Report is to be submitted to government in March 2015. It must be tabled in Parliament, but any action with respect to the ALRC's findings and recommendations will be at the government's discretion.

By providing brief descriptons and discussions about the review process and the key areas of the Review, I hope to offer a simplified (if not simplistic) explanation about the need for reform.

AIATSIS, through the NTRU promotes the recognition and protection of the native title of Aboriginal and Torres Strait Islander Peoples. The NTRU uses the quality, independence and ethics of its research to influence thinking and practice and has been involved with the Review in the following ways:

- AIATSIS' Director Research Strategy, Dr Lisa Strelein, is a member of the advisory committee to the Review;
- AIATSIS publications are helping to inform the Review;
- the ALRC Review team consulted with staff from the Native Title Research Unit at AIATSIS;
- the ALRC presented and engaged with stakeholders at the 2014 Native Title Conference in Coffs Harbour; and
- AIATSIS provided submissions to the ALRC's Issues Paper and will be providing a submission to the ALRC's Discussion Paper.

The ALRC Inquiry Process

The ALRC was established in 1975 as an independent government body to conduct inquiries into areas of law reform. These inquiries are initiated at the request of government.

The ALRC may only begin any inquiry/review if the federal government asks. Through the Attorney-General, the government will give the ALRC terms of reference that set out the subject and goals of any inquiry.

The ALRC will then look at the terms of reference and scope its inquiry. After that, the ALRC's process is usually to:

1. undertake initial research (this can include consultation with identified stakeholders and setting up an advisory committee or a panel of experts);
2. prepare an issues paper and invite stakeholders to provide submissions;
3. review submissions to the issues paper and undertake further consultation;
4. prepare a discussion paper and invite stakeholders to provide submissions;
5. review submissions to the discussion paper and undertake further consultation; and
6. provide a final report to government (through the Attorney-General).

The ALRC's final report must be tabled in Parliament and then it may be made available to the public. After the final report is tabled in Parliament, it is up to the Government what it does with the ALRC's findings and recommendations.[4]

ALRC Review of the NTA – Terms of Reference

In early June 2013, the Attorney-General gave three weeks' notice to the public to comment on draft terms of reference for a review of the NTA.

AIATSIS' submission on the draft terms of reference was one of many amongst the

22 submissions that strongly encouraged that the terms of reference extend beyond issues to do with the recognition of native title. For example, AIATSIS asked that the Review look at the extent to which native title rights and interests, once recognised, can be regulated by statutory regimes for the management of land and water.[5]

The Attorney-General gave the final terms of reference to the ALRC in August 2013. The draft and the final terms of reference were substantially the same, in the sense that the aspects of the NTA to be reviewed remained the same. However, the Attorney-General did provide a broader set of parameters, or 'scope', under which these aspects would be reviewed.

The Attorney-General appointed Professor Lee Godden to lead the inquiry and report on Commonwealth native title laws in relation to:

1. Connection; and
2. Authorisation and Joinder.[6]

Professor Godden explains the parameters of the terms of reference as follows:

Under the Terms of Reference for the Inquiry, we were to be guided by the Preamble and the Objects of the Native Title Act. In addition, the Inquiry has developed five guiding principles to underlie reforms: acknowledging the importance of the recognition of native title; acknowledging the many interests in the native title system; encouraging timely and just resolution of determinations; consistency with international law; and supporting sustainable futures. Our proposals seek to improve the operation of the Native Title Act within this principled framework.[7]

ALRC Review of the NTA – Research, Consultation and an Issues Paper

The ALRC Review team undertook initial research and consultation in late 2013. Then, on 20 March 2014, the ALRC released its Issues Paper.

The Issues Paper asked 35 questions against the following aspects of the NTA in the context of the limitations, opportunities and the significance of native title to Aboriginal and Torres Strait Islander peoples as well as non-Indigenous Australians:

1. Connection requirements, with respect to:
   a. a presumption of continuity;
   b. the meaning of traditional;
   c. whether native title rights and interests can include interests of a commercial nature;
   d. confirmation that connection does not require physical occupation or continued or recent use; and
   e. empowerment of courts to disregard substantial interruption or change in continuity, where it is in the interests of justice to do so.
2. Barriers imposed by authorisation and joinder provisions.

The ALRC's Issues Paper was widely circulated and made publicly available on the ALRC website. The ALRC Review team also undertook face to face consultations with stakeholders from around Australia to discuss the Issues Paper or any relevant matter. These consultations offered the ALRC Review team and stakeholders the opportunity for open dialogue. The integrity of this process was supported by the ALRC referencing only written submission, published by the ALRC, in the development of its Discussion Paper.

The value of this process is highlighted by the ALRC in its annual report as follows:

Speaking to Indigenous communities, aboriginal land councils, mining companies, agriculturalists, fisheries, local councils, judges and lawyers who work in the native title area, has made an invaluable contribution to our thinking, and again we are extremely grateful for the time that stakeholders have given us in this process.[8]

ALRC Review of the NTA – Discussion Paper

On 23 October 2014, the ALRC released its discussion paper. This contains a range of proposals and questions, building on all elements of the Review, including ALRC's engagement with submissions to the Issues Paper.

The ALRC have called for submissions, which may be in response to specific proposals and questions within the Discussion Paper or to background material and analysis. Submissions are due by 18 December 2014.

AIATSIS will be making a submission to the Discussion Paper.

Connection

A simple explanation of 'connection' is not possible and it is much easier to describe the term than define it. It's about evidence to prove a native title claim, it's about

a complex set of statutory provisions in the NTA and associated case law, policy and practices, such as connection reports.[9]

However, 'connection' is about much more than a set of legal requirements and evidence.

When using the NTA to have native title recognised, Aboriginal and Torres Strait Islander claim groups are asked to prove connection to land and waters. Proving 'connection' is about demonstrating a relationship with land and waters based on the native title claim group's laws and customs. Native title will not be recognised unless the observance of those laws and customs is proven to have been continuously acknowledged from settlement to the present.

The law on connection is complex and has not been made clearer by the courts. To quote Dr Lisa Strelein:

… the words 'connection' and 'traditional' have resulted in torturous and costly research focused on establishing the continued observance of laws and customs, which have their roots in the pre-existing normative systems and have remained vital through 'each generation' since the assertion of British sovereignty. To complicate matters, each state and territory has imposed different guidelines for 'proving' native title.[10]

Authorisation

Under the NTA, a person may only apply for a determination of native title if they are authorised by all the members of the native title claim group. In this context, authorisation is the empowerment of an individual or a group of individuals to make decisions and represent their interests.

The NTA requires that authorisation be an outcome of a traditional process of decision-making. It is only where there is no such process that authorisation may take place using a process agreed by all the members of the native title claim group.

There are significant issues with the requirements for the processes of authorisation in the NTA. For instance, there is a lack of clarity of the term 'traditional'. There are also issues about the differences in legal systems: that Aboriginal and Torres Strait Islander societies do not all relate the same way to the legal requirements under the NTA. The issues are varied and complex and can make the authorisation process difficult. Added to these difficulties is the fact that there can be serious time pressures on coming to a decision (for example, a claim must be lodged within three months to attract the right to negotiate a proposed future act).

Joinder

The people involved in a court case are called 'parties'. If a court case is started by way of an application (for example, an application for a determination of native title), the parties are called 'applicant' and 'respondent'.

In native title matters, the person or people who have been authorised by the native title claim group will be the 'applicant'.

The 'respondent' will be the State/Territory party and other parties such as mining or pastoral leaseholders or those people or companies holding a fishing licence or a shooting licence. Often electricity provider companies will be respondent parties to ensure their right to access their infrastructure. There is a wide range of interests that might be affected by native title and the number of respondent parties to native title cases can be a significant issue.

Parties can be joined to a native title matter using different legal processes. The effect is that sometimes parties that have very tenuous interests in the native title claim area can become heavily involved in the processes of reaching an agreement that native title exists. Another serious issues with the law on joinder is that parties might be joined very late in the process, which can interrupt and delay outcomes.

However, dismissing parties or refusing to join parties on the basis of the type of interest held may not always be appropriate. For instance, when applying the type of interest recognised at property law, a competing claim group, whose claim is not registered with the National Native Title Tribunal, does not hold as strong an interest as a grazing leaseholder. However, the leaseholder's activity is restricted to the terms of the lease and that may well be dealt with on the paper. Whereas, the competing claim group's interest may require more consideration in order to afford procedural justice.

The issues of connection, authorisation and joinder are the main subject of the Review into the NTA. These issues have been examined in detail in the ALRC's issues paper, in the 40 submissions it received in response and now in the ALRC's discussion paper.

Submissions to the discussion paper close on 18 December 2014. For more information about the review of the *Native Title Act 1993*, visit the Australian Law Reform Commission's website at www.alrc.gov.au or contact them on 02 8238 6333. For more information about AIATSIS' input to the ALRC review, please contact Donna Bagnara on 02 6246 1602.

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1 The Australian Law Reform Commission 'ALRC Native Title Act review', *Native Title Newsletter*, August 2013.

2 See Angus Frith (with Ally Foat), 'The 2007 amendments to the Native Title Act 1993 (Cth): technical amendments or disturbing the balance of rights?' Monograph series (Australian Institute of Aboriginal and Torres Strait Islander Studies. Native Title Research Unit); no. 2008/3.

3 See Nick Duff, 'Reforming the Native Title Act: Baby Steps or Dancing the Running Man? *Australian Indigenous Law Review* Vol 17 No 1, 2013 (56-70).

4 The Australian Law Reform Commission, Review of the *Native Title Act* – at a glance, 12 March 2014, http://www.alrc.gov.au/native-title-act-infosheet Accessed November 2014.

5 The High Court has provided some clarification on the extent that s 211 of the NTA intersects with the operation of Commonwealth and State laws (see Karpany v Dietman [2013] HCA 47 and Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia [2013] HCA 33). However, legislative challenges to native title rights and interests continue (for example, amendments to the North Stradbroke Island Protection and Sustainability Act that extend sand mining leases (currently being challenged in the High Court by the Quandamooka people); and the proposed extension of large agricultural, grazing or pastoral leases in the Land and Other Legislation Amendment Bill 2014 introduced to the Queensland Parliament in March 2014).

6 For more information on the terms of reference and appointment of Professor Lee Godden, see ALRC News and Media at http://www.alrc.gov.au/news-media/media-release/final-TOR-native-title.

7 Australian Law Reform Commission 'Proposals for reform of the native Title Act: ALRC calls for submissions' http://www.alrc.gov.au/news-media/native-title-dp, Published 23 October 2014, Accessed November 2014.

8 The Australian Law Reform Commission, Annual Report 2013-14, p 6

9 The Australian Law Reform Commission, review of the Native Title Act, *Issues Paper 45*, 2014.

10 Dr Lisa Strelein, 2014, Reforming the Requirements of Proof: The Australian Law Reform Commission's native title inquiry', 8(10) *Indigenous Law Bulletin*, 6-10, 7.