

Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
PO Box 6100
Parliament House
Canberra ACT 2600

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Submission to the Inquiry into the Native Title Amendment (Reform) Bill 2011

The Australian Institute for Aboriginal and Torres Strait Islander Studies (AIATSIS) welcomes the opportunity to provide submissions on the very important matters regarding the operation of the *Native Title Act 1993* (NTA) that are addressed in the Bill before the Parliament. AIATSIS is one of Australia's publicly funded research agencies and is dedicated to research in Indigenous studies. AIATSIS includes the Native Title Research Unit, established following the *Mabo* decision, which continues to conduct research and provide analysis on the law, policy and practice of native title.

AIATSIS has been integrally involved in debates over reform to the NTA, in particular the problems associated with the requirements and burden of proof. Through events such as the annual National Native Title Conference, AIATSIS has promoted informed discussion and debate on the NTA and its ability to fulfill the objectives set out in the preamble, to recognise and protect the rights of Indigenous peoples to their traditional lands.

This submission will address the proposed amendments according to their item numbers in the Bill and Explanatory Memorandum. The submissions are based on over 15 years of research and practice by AIATSIS researchers in the native title sphere.

Yours sincerely,

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AIATSIS Submission to the Inquiry into the Native Title Amendment (Reform) Bill 2011

Introduction

The Attorney-General stated in his first speech on native title that the negotiation of native title under the *Native Title Act 1993* (Cth) (NTA) has been ‘strangled in litigation and arguments over technical provisions of a complex Act’.¹ The Attorney-General acknowledged that real reform was necessary – ‘not tinkering around the edges’ – to achieve that end. The Minister for Indigenous Affairs agreed that reform was essential to ensure that the native title system was working in the best interests of Indigenous peoples and the nation at large.² The National Native Title Council welcomed the government’s attitude to reform.³ The Minerals Council of Australia welcomed any approach that would shift focus from the courts to negotiation.⁴ And the development of the Joint Working Group on Indigenous Land Settlements revealed a commitment by State and Commonwealth governments to find solutions. The Bill introduced by Green’s Senator Seiwart seeks to address the key legal impediments in the NTA.

AIATSIS commends the aims of this Bill in seeking to address the widely recognised imbalance in the NTA against the interests of Indigenous peoples. There may be different views on the appropriate drafting to achieve these aims, but the Parliament should not be hasty in dismissing the Bill.

Item 1: New s 3A

AIATSIS supports the reference to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as an object of the NTA. By endorsing UNDRIP in 2009, the Australian government accepted an obligation to pursue these principles, including introducing legislative mechanisms to give effect to the rights under the Declaration. Australia has similar obligations in relation to human rights covenants from which the UNDRIP is derived. This Bill is an opportunity for the Commonwealth to make good on its statements to the world and to our own Indigenous peoples on its commitment to recognise and protect the rights of Indigenous peoples over whom they have asserted sovereignty.

The extracted principles of UNDRIP are consistent with the first Main Object of the NTA.⁵ Proposed sub-section 3A(2) is particularly useful, in directing the courts and the executive to take into account these principles in the future interpretation of substantive rights provisions of the NTA. Incorporation of such principles to inform interpretation and implementation of legislation has proved effective in Aotearoa/New Zealand where the Treaty of Waitangi principles are regularly incorporated into legislation. This sub-section could have a substantive impact on the enjoyment of

¹ The Hon Robert McLelland, Attorney-General, ‘The Way Forward’, Negotiating Native Title Forum, 29 February 2008.

² The Hon Jenny Macklin, Commonwealth Minister for Families, Housing, Community Services and Indigenous Affairs, ‘Beyond Mabo: Native Title and Closing the Gap’, Mabo Lecture, 21 May 2008.

³ National Native Title Council, Press Release, 16 July 2008, ‘Four-point plan for making native title system work better’.

⁴ Katherine Murphy, *The Age*, 7 March 2008, ‘Native title shake-up to boost communities’.

⁵ Section 3, NTA.

rights in Australia because, unlike in other jurisdictions, the Australian courts have not, of their own accord, followed a principle of beneficial interpretation in relation to the NTA.⁶

The statutory incorporation of principles for interpretation is practically important in the context of the NTA because of the many discriminatory aspects of the legislation (and common law native title on which it is based) that are not addressed in this suite of proposed amendments.⁷ Many of the substantive rights recognised in the UNDRIP are not fully recognised or protected by native title and many compromises have been made in the legislation in favour of non-indigenous interests.⁸ Utilising the UNDRIP as a touchstone for interpretation would, in the case of any ambiguity, ensure a beneficial interpretation that would not unnecessarily undermine the recognition and protection of native title. It would not affect the clear and plain intentions of the Parliament.

For example, the principle of free, prior and informed consent could be used to interpret provisions under the future acts regime, which requires proponents to engage with Indigenous groups in order to validly do an act that may affect native title rights. However, it would not change the clearly expressed content of the provisions, regardless of whether they may be inconsistent with international law. Contrary to some views put to the inquiry, in the context of the NTA as a whole, the proposed amendment would not, of itself or in combination with other proposed amendments, provide the native title holders or registered claimants with a right of veto.

That being said, the Parliament should continue to look for opportunities to enhance the enjoyment of rights under the UNDRIP, including further beneficial amendments to the NTA in order to continue to fulfill Australia's international obligations.

Item 2: Substitution of s 24MD(1)(c)

AIATSIS supports the amendment to allow for decision-makers and courts to consider the effectiveness of laws protecting Aboriginal and Torres Strait Islander heritage on a case by case basis. It allows circumstances to be considered in relation to the actual effect that a future act is likely to have, and reduces the risk of ineffective or inappropriate legislation allowing the validation of an act that would otherwise not pass the Freehold Test under the NTA.⁹

Item 3: Substitution of s 24MD(2)(c)

AIATSIS supports the amendment to this section to provide that compulsory acquisition does not itself extinguish native title. This proposed amendment would align the impacts of compulsory acquisition with the ILUA and future act regimes in terms of preserving native title where possible.

The provision would have no effect on the ability of the Crown to acquire property or any impact on the right of any party who acquires an interest as a result. To this extent we reject any accusation that such a provision would undermine certainty of non-indigenous rights and interests. However, should the land ever return to the Crown estate, the native title in the land would revive. Importantly, the extinguishment will not occur if the act for which the land is acquired is not ultimately done.

⁶ See L Strelein, 'A Captive of Statute', *Reform* 2010.

⁷ This includes for example, no compensation for extinguishment prior to 1975, no right to minerals, etc.

⁸ see *Griffiths v Minister for Lands, Planning and the Environment* [2008] HCA 20. Generally see L Strelein, *Compromised Jurisprudence* (2nd edn) ASP 2009.

⁹ Contained in subdivision M – Acts passing the freehold test, within Division 3 – Future Acts, NTA.

The Committee should note that the effect of this proposed amendment would be to reduce the Crown's exposure to compensation for permanent extinguishment.

Item 4: Repeal of s 26(3)

AIATSIS supports this proposal to afford the equivalent right to negotiate to inter-tidal coastal country and sea country as to onshore country. As far as native title is concerned, *Yarmirr* suggests that apart from the threshold non-recognition matters (international rights of free passage and fishing) there should be no difference in the treatment of native title in relation to land or sea country, as the burden on the Crown's sovereignty is the same.¹⁰

Items 5 and 6: Good faith

AIATSIS supports the substitution of sub-section 31(1)(b) and the addition of a new sub-section 31(1A) to restore the intention of the Act that the negotiating parties engage in negotiations *in good faith*. The Preamble of the Act states:

In future, acts that affect native title should only be able to be validly done if... wherever appropriate, every reasonable effort has been made to secure the agreement of the native title holders through a special right to negotiate.

Justice French, as he then was, in *Sampi v State of Western Australia* described the Preamble as 'a continuing declaration of the moral foundation of the Act [which] informs its construction'.¹¹

It is crucial to note the significant restrictions that have been placed on section 31 by judicial interpretation. The Full Federal Court decision in *FMG v Cox* effectively reduced the meaning of 'good faith' to the mere absence of outright bad faith or intention to mislead.¹² The effect of this precedent is that both parties to negotiations are aware of the strong likelihood that a future act will be allowed by the Tribunal if no agreement is reached, as long as some steps have been taken by the proponent to appear to be engaging in negotiations. Notwithstanding examples of good industry practice in Australia, this expectation bolsters the bargaining position of proponent parties at the expense of the native title group, placing inequitable pressure on the Indigenous party and, consequently, could influence negotiated outcomes to the detriment of the native title party.¹³ When coupled with the fact that native title parties have no right to walk away from negotiations the agreement-making environment can be more oppressive than empowering.

Section 35 provides that an application for arbitration of a future act application cannot be made less than 6 months from the date of notification. However, the passage of 6 months does not always indicate a reasonable period to reach agreement – even where appropriate effort is being made.¹⁴ Particularly where native title groups have little or no experience in negotiating agreements, the establishment of fundamental conditions for entering into negotiations may take much of this period. The proposal to adjust the time reference to *at least 6 months* recognises that

¹⁰ *Commonwealth v Yarmirr* (2001) 208 CLR 1.

¹¹ *Sampi v State of Western Australia* [2005] FCA 777 at [942].

¹² *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49.

¹³ In a frank example, recently made prominent in ABC television program 4 Corners, an FMG negotiator told a Yindjibarndi community meeting: "Fortescue will always use legal avenues to get our mining leases and roads and whatever else. I'm not going to hide that. We will do that every time, because we are in a hurry, in a rush." ABC Television, "Iron and Dust", 18 July 2011, Program transcript accessed at <http://www.abc.net.au/4corners/content/2011/s3272125.htm>.

¹⁴ See examples, consideration by the Tribunal and analysis in S. Burnside, *Negotiation in good faith under the Native Title Act: A critical analysis*, NTRU Issues Paper no.3 of 2009, AIATSIS, 2009.

the real test for good faith negotiations would require the expiry of a *reasonable period* of negotiations in the circumstances. In tandem with the proposal to insert the words '*use all reasonable efforts...*' the amendment would convert the inquiry of the arbitrator into a more fact-specific and less literal one.

Item 6: New s 31(1A)

The proposed guiding provisions in paragraphs 31(1A)(a) to (f) do not create onerous new obligations on proponents, but rather describe some basic elements of a good faith negotiation. These elements are crucial to instilling fairness in future act negotiations. The right to negotiate regime is not like commercial negotiations in which two or more parties come together freely for mutual benefit: the native title party has no choice but to engage with the proponent, whose activities will affect their native title interests. The parties know that the future act will almost always go ahead, despite any opposition by native title holders or registered claimants. In the absence of such express elements in the legislation, the good faith standard is vulnerable to narrow interpretation.¹⁵

The NTA did not create a compulsory negotiation processes with a requirement of 'good faith' merely to create an optional scheme of alternative dispute resolution and a delayed path to arbitration. The benefit of these proposed provisions would be to guarantee that a series of minimum steps are taken, potentially leading to both fairer processes and fairer agreements.

Interpretation of the requirements of good faith, informed by the principle of free, prior and informed consent, should take into account evidence from AIATSIS research carried out for the Indigenous Facilitation and Mediation Project (2003-2006) and the Indigenous Dispute Resolution and Conflict Management Case Study Project conducted with the Federal Court of Australia and the National Alternative Dispute Resolution Advisory Council.¹⁶

These projects found that typically, over many years, Indigenous communities have experienced pressure to accept proposals, often suggested by non-Indigenous agencies, without having the opportunity to understand the details or implications of their decisions, or to consider other solutions. In many meetings, closed questions are put to the floor, such as 'Do you understand?' and 'Everyone agrees?', resulting in Indigenous people leaving the meeting unable to explain what they have agreed to. Inappropriate process can also result in increasing tensions and hostilities between and amongst Indigenous families and individuals.

Both reports highlight the importance of parties' ownership of processes, of careful preparation, and of working with the parties to design processes that can meet their procedural, substantive and emotional needs. As has been identified in at least six other significant reports to governments, they suggest that this ideally would be done by third party community engagement facilitators (or positions with similar functions) with highly specialised communication skills.

AIATSIS recommends that proposed subsection 31(1A) include additional requirements to establish good faith:

- that native title parties having capacity or being prepared for negotiation; and

¹⁵ *FMG Pilbara Pty Ltd x Cox* as discussed above.

¹⁶ T. Bauman and J. Pope (Eds). 2008. '*Solid Work you Mob are Doing: Case studies in Indigenous dispute resolution and conflict management*. Federal Court of Australia, Melbourne; T. Bauman. 2006. *Final Report of the Indigenous Facilitation and Mediation Project July 2003-June 2006: research findings, recommendations and implementation*. IFaMP Report No. 6. AIATSIS, Canberra: The research findings, recommendations and implementation were based on consultations with a wide range of stakeholders including via a number of workshops and case studies. The *Solid Work You Mob are Doing* findings were based on three detailed case studies and a series of snapshot case studies.

- that native title parties have access to process expertise.

Item 7: New s 31(2A) – Onus to show good faith

Currently, the respondent party to an application for arbitration of a future act application (invariably the native title party) bears the onus to prove that the other party (the proponent) failed to engage in negotiations in good faith. The substitution proposed in the Bill would provide that that the party seeking an arbitrated decision bears the burden of proving that it has satisfied its obligations and is entitled to the determination it seeks. This will *not* amount to a right of veto. The arbitrator (the Tribunal) would retain the ability to determine that the future act can be done where good faith negotiations have been conducted.

Items 8 and 9

These items work with and clarify the relationships between these subsections. AIATSIS supports them.

Item 10: Substitute s 38(2) – Profit sharing conditions may be determined

AIATSIS supports the proposed amendment to allow the Tribunal to use its power to impose conditions that entitle the native title party to payments by reference to one of the three stated methods of calculation. The three methods are commonly employed by parties in negotiated future act agreements, and the arbitrator will be capable of taking submissions from the parties and considering a variety of evidence in support of or against such a condition.¹⁷ Currently, if the Tribunal is asked to determine a future act application where negotiations under section 31 have not produced an agreement, it cannot arbitrate between the parties on the central matter of financial compensation for the effect on the native title interest, but is restricted to allowing the future act or not, with or without other conditions. As a result, matters before the arbitrator may be misdirected to issues unrelated to the source of the dispute.

The Minister for Indigenous Affairs has expressed the importance of harnessing the potential for Indigenous economic development through native title agreement making in her often cited Mabo Lecture of 2008.¹⁸ There is no doubt amongst native title negotiators and representative bodies that future act agreement making process often fails to provide sustainable economic opportunities for the native title party. These proposals can go some way to improving this. Although there may be some reluctance to altering the existing body of precedent applying to the arbitration and litigation of the right to negotiate, the proposed adjustment will lessen the handicap that native title parties carry in future act negotiations and motivate proponents to reach agreements. This amendment could support agreement making that more accurately reflects the property and resource values of projects, potentially supporting more constructive agreements that can better promote economic development.

¹⁷ For example, a mining company proponent is already obliged to make detailed statements to mining ministries and to the stock exchange about the expected worth of a project, and the three proposed methods enable the Tribunal to utilise the one it finds to be appropriate for the facts of the matter, including appropriate flexibilities inherent in the formulae.

¹⁸ Jenny Macklin, 2008 Mabo Lecture, "Beyond *Mabo*: Native title and closing the gap", James Cook University, Townsville, 21 May 2008 <http://www.jennymacklin.fahcsia.gov.au/speeches/2008/Pages/beyond_mabo_21may08.aspx> at 5 August 2011.

Item 11: New s 47C – Disregarding prior extinguishment

AIATSIS strongly supports the extension of provisions that disregard historical extinguishment, where native title rights and interests would continue to exist, but for those prior acts. Currently, historical tenure that has expired, for example where a pastoral lease has reverted to the Crown, will still have an extinguishing effect to the extent of any inconsistency. In practice, where there are no other present interests in land that would extinguish native title, there is no reason why that land should not be open to a determination of exclusive possession native title. Similarly, where present interest holders are agreeable, this proposed amendment would allow historical tenures to be disregarded and only current interests could be considered to determine the extent of any extinguishment.

This new section would increase the flexibility available to parties in negotiating consent determinations. Again, the amendment would not dramatically change the obligations of the parties, but removes a restriction on potential terms of settlement. In addition, it would save significant costs and time in determining the impacts of historical tenures.

However, it is unclear why there is a need for agreement from the Crown for extinguishment to be disregarded where the Crown is the only other potential interest holder. A further amendment should be introduced that clarifies that any unencumbered Crown land should be treated the same as land under sections 47A and 47B with automatic disregard of historical tenures.

Items 12-13: Presumption of continuity and changes to requirements of proof (s 223)

The proposed presumption of continuity through changes to sections 61 and 223 responds to concerns across the native title sector about the onerous requirements of proof that have grown around the definition of native title under section 223. AIATSIS has fostered debate on this issue, including in partnership with the Federal Court and academic colleagues. Beginning with the national Native Title Conference in Perth in 2008, in the wake of the appeal in the *Bennell* case,¹⁹ former judges Wilcox and Merkel discussed the limitations of the current interpretation of the law. That decision saw the Court impose a requirement that, where contested, the claimants must demonstrate continued vitality of a system of laws and customs, and connection to the land and waters by those laws and customs, *for each generation*.²⁰

Over the ensuing years there has been intense discussion about the increasingly onerous and intricate tests associated with the proof of native title. Every word in section 223 has its own, or even multiple tests associated with it. This has given rise to a painful statutory interpretation exercise that filters down to the processes of negotiating connection for the purposes of entering into consent determinations. While claimant groups continue to meet the weight of materials required by state governments to establish those requirements, the process is expensive and time consuming.

One option promoted by Noel Pearson was to delete s223 altogether, to re-enliven the common law definition and development of the requirements of proof for native title. The risk in this approach is that the Courts may continue along the lines they have taken in interpretation of section 223. Justice Tony North noted in response that in order to ensure that the Courts took notice of the change, more direction was required from the legislature. In this vein, Chief Justice Robert French's 'modest proposal for reform', included a presumption in favour of continuity, which would

¹⁹ *Bodney v Bennell* (2008) 167 FCR 84.

²⁰ *Bodney v Bennell* (2008) 167 FCR 84, [70].

effectively 'lift the burden of proof'.²¹ The risk of this approach was immediately obvious, in that the state could actively seek to disprove the claim. The proposal is largely dependent on the state's willingness to reach a consent determination. To this Justice North added an additional proposal, that the state in rebutting a presumption in favour of the claimants, could not use evidence of their own wrong doings.²² The proposed amendments respond to these proposals: first, through a rebuttable presumption in favour of applicants on the registration of their claim; and second, through guidance in the interpretation of section 223.

Item 12: New s 61AA – Presumption relating to applications

The Bill proposes a presumption in favour of the claimants, which takes effect on registration of the application. In theory it should provide support for claimant groups and state governments (and other respondent parties) in reaching consent determinations. The proposed provision relies on traditional common law concepts for establishing custom, in particular the reliance on reasonable beliefs. AIATSIS commends the intention of the provision but we make some observations on its practical implementation.

The proposed amendments allow for the presumption of continuity to be set aside by evidence of substantial interruption in the acknowledgement of the traditional laws or observation of the traditional customs. In this instance, the onus of proof is effectively reversed, and the state will be required to bring evidence.

The first observation is that the amendment would not necessarily make a substantial change to the amount of anthropological and historical research conducted on the applicants' behalf. At present normal practice is that NTRB/NTSPs prepare connection materials on behalf of claimants for consent and litigated determinations. A number of State and Territory governments also carry out significant research for native title claims before entering into negotiations for consent determinations. Under the amendments, NTRB/NTSPs would still carry the primary responsibility for compiling evidence of connection for presentation to respondent parties. While the proposed amendments may take away the need for claimants to demonstrate continuity in minute detail back to sovereignty, it is likely that they would still need to conduct thorough research to establish the right people to claim country as well as to anticipate, or respond to, a rebuttal of continuity. For example, in the state of Queensland, the government prepares a timeline of possible discontinuities that claimants must address. It is not clear whether, in the context of collaborative processes of reaching a consent determination, the States would require a lesser level of information in the face of a relaxed standard of proof.

The second observation is that careful consideration must be given to how any increase in the research burden on states would be resourced. In light of the previous observation, it would be imperative to ensure that resources were not redirected to the States and Territories away from NTRBs.

The third observation relates to practical, ethical and social concerns over the conduct of anthropological research by State-commissioned researchers directed towards establishing

²¹ French CJ suggested three key changes to the NTA:

1. Allow an agreed statement of facts (between state and native title applicants) to be relied upon by the Court in making a consent determination (in particularly this could lift the burden of proof of continuity)
2. provide for a presumption in favour of the existence of native title
3. provide for historical extinguishment to be disregarded over classes of land where agreed by the State and Applicants.

Suggestion 1 was contained in the 2009 Amendment Bill. Suggestions 2 and 3 are contained in this Bill.

²² Justice A M North and T Goodwin 'Disconnection – The Gap Between Law and Justice in Native Title: A Proposal for Reform, Native Title Conference 2009, 3-5 June, Melbourne.

discontinuity. It would be a poor outcome from the amendments if claimants were required to respond to two researchers with different purposes, the one aiming to assist them in preparing their claim and the other aimed at proving disruption. There are questions around whether and how State researchers could access claim groups in a way that would not undermine cohesion within Indigenous communities. In particular, researchers would need to be very careful, in obtaining the free, prior and informed consent of informants, about ensuring that informants had a full understanding of the intended use of the information they might provide.

Similarly, research directed towards rebutting the presumption is likely to have socially disruptive effects. Currently NTRBs/NTSPs have a legislative duty to represent the interests of claimants and native title holders, including dispute resolution assistance functions. By contrast, information-gathering on behalf of respondent parties would tend, intentionally or unintentionally, to pit groups against one another without their understanding the implications of their actions for the success of their own claims. States and other respondents have neither the responsibility nor the capacity to resolve such disputes, or to understand their location within the broader dynamics of a claimant group or its neighbours.

Finally, the retention of the word ‘tradition’ imports the contested notions of ‘continuity’ and ‘change’ that have been so problematic. The interpretation of such terms in native title jurisprudence does not reflect anthropological thought, nor claimant realities – particularly those in southern and coastal areas of Australia. Changing thinking around the meaning of native title is not only a matter of goodwill; it also requires informed understandings of culture and change in identifying the nature of contemporary Indigenous societies relevant to native title. We say more on this in relation to proposed changes to section 233 below.

Item 12: New s 61AB – Continuing Connection

Section 61AB partially responds to Justice North’s observations, and addresses comments in *Bennell* that the reasons for change are irrelevant.²³ Sub-section 61AB(2) requires the Court to take in to account whether any interruption or significant change was the result of the acts of a State or Territory or person who is not an Aboriginal person or Torres Strait Islander. It does not, however, suggest that such interruptions or changes be disregarded. Therefore the problem identified by North J is only partially addressed.

Further, these qualifications themselves may also become a matter for contestation. It may not always be possible to prove a direct correlation between a demonstrated interruption or change and the effect of government policies and individual behaviour on the movements of individuals or families.²⁴ Indigenous agency in responding to such forces is not always easily articulated and reasons for certain actions may form part of the implicit rather than explicit knowledge of claimants. In these circumstances, respondent rebuttal might argue that a particular move was voluntary as the subtleties and long terms effects of policies remain invisible. There are also many other factors, such as cataclysmic events, drought, flood, war and the like, which could, prima facie, indicate a substantial period of dislocation, but which might fall outside the protection of s 61AB(2).

These difficulties are evidence of the problematic nature of the NTA’s focus on continuity and failure to deal adequately with the realities of change.

Item 13: New s 223(1A) and (1B) – Traditional laws and customs

²³ *Bodney v Bennell* (2008) 167 FCR 84, at [81], reiterated at [97]

²⁴ In the context of establishing fiduciary duties owed to individuals removed from their families, see Kruger

Taking into account our comments above regarding the problematic nature of the interpretation of tradition, change and continuity in the NTA, the proposed subsections 223(1A) and (1B) would be valuable in clarifying the somewhat contradictory and ambiguous case law on the definition of 'traditional'.

In the High Court's *Yorta Yorta* decision, there were at least two senses of 'traditional' employed:²⁵

- One meaning of 'traditional' referred to laws and customs which are *rooted* in the laws and customs existing at sovereignty, but not necessarily the same as them;²⁶
- The other meaning of 'traditional' referred to laws and customs which are *the same laws and customs* as were acknowledged and observed at the time of the assertion of the Crown's sovereignty.²⁷

In *Neowarra*, any ambiguity was resolved in favour of that the former sense: The Court simply satisfied itself that 'the *origins* of the content of the laws and customs relied on by the claimants are to be found in the normative rules of the societies that existed in the claim area before 1829'.²⁸ This latter view places less emphasis on a direct comparison of the content of the present-day law and custom against the pre-colonial law and custom.

There has been a clear line of case law in the Federal Court (both at trial and appellate levels) in which alterations and adaptations to law and custom have been found not to break the connection with the past which marks those laws and customs out as 'traditional'.²⁹ Despite this, there have been judges as well as parties who continue to treat 'traditional' as requiring a process of matching present-day laws and customs with laws and customs from the 18th century. Or, to the extent that change and adaptation is seen as 'acceptable', this is determined by a comparison between 'now' and 'then', rather than an inquiry into the historical processes of transmission that link contemporary law and custom with pre-colonial law and custom.³⁰

AIATSIS Research Fellow, Toni Bauman, has recently written that rather than a presumption of continuity, as proposed in s61AA, the assumption should be one of 'transformation'. That is, the law must embrace the fact that societies 'change in form, appearance, nature, or character'.³¹ Continuity might be better viewed in terms of continuous processes of socio-cultural transformation that includes processes of fission and fusion in group formation and processes of succession. Some judgements of the Federal Court have dealt better with societal change than others.³² But misinterpreted and de-contextualised accounts of continuity can 'include the implication that change is bad'. The process of determining whether native title exists must move away from contestations of what is 'acceptable' and 'unacceptable' change³³ to a non-controversial acceptance of change as a constant. It is the descent of title and the descent of rights which should provide the focus for any discussion of continuity and succession.

To this end, there is some undesirable looseness in the language 'identifiable through time'. This may generate more apparent uncertainty than is necessary, and could be remedied by more clearly articulating the relevant characterisation of present-day law and custom. We would recommend the

²⁵ See *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at [31].

²⁶ *Ibid* at [44], [46], [53], [79].

²⁷ *Ibid* at [86], [186].

²⁸ *Neowarra v Western Australia* [2003] FCA 1402, at [335] (emphasis added).

²⁹ Eg *Neowarra v Western Australia* [2003] FCA 1402; *De Rose v State of South Australia* [2003] FCAFC 286; *Griffiths v Northern Territory of Australia* [2007] FCAFC 178.

³⁰ Eg *Jango v Northern Territory of Australia* [2006] FCA 318 at [460]-[507].

³¹ Anthropologist David Trigger also referred to this suggestion, in his presentation to the Federal Court Judicial Education Forum in Sydney in April 2011.

³² *Western Australia v Ward* (2002) 213 CLR 1; *Sampi v Western Australia* [2005] FCA 777.

³³ *Bodney v Bennell* (2008) 167 FCR 84 [74].

use of language emphasising the *linkage* rather than the *similarity* between contemporary and historic law and custom; focusing on the means of transmission and the idea of inherited law and custom. The language from the case law is instructive, for example speaking of a requirement for contemporary law and custom to be ‘rooted in’ or ‘having its source in’ pre-colonial law and custom.³⁴

It would also be beneficial for the legislation to clarify that an application should not fail simply because there has been an internal reorganisation or redistribution of rights within a claimant group, if the group as a whole has continued to hold rights and interests in relation to the land as against outsiders.

Item 13: New s 223(1C) – Connection

This proposed amendment has little legal effect, since it amounts to a re-statement or clarification of current law, but potentially it may have a significant practical benefit for the conduct of consent determination negotiations.

As observed in *Yorta Yorta*, the questions presented by s 223(1) are about *present* possession of rights or interests and *present* connection of claimants with the land or waters. That is not to say, however, that the continuity of the chain of possession and the continuity of the connection are irrelevant.³⁵ It has been clearly established in the case law that physical connection is not required by s223(1)(b).³⁶ Nevertheless some negotiating parties proceed on the opposite basis.

Legislation to this effect would help to overcome this divergence of law and practice.

Further, there is ongoing uncertainty around the meaning of the words ‘by those laws and customs...have a connection.’ On one view, ‘connection’ is seen as a *condition* for the existence of native title rights and interests – a further fact that must be proved in addition to establishing the content of the rights and interests under traditional law and custom.³⁷ On another view, “connection” is descriptive of the *effect* of the laws and customs. That is, Courts must first identify the content of traditional laws and customs, and secondly characterise the effect of those laws and customs as constituting a ‘connection’ between the Aboriginal or Torres Strait Islander people and the land and water.³⁸

Underlying this uncertainty is the absence of a clear articulation of the function or rationale of the current sub-section 223(1)(b). Is its purpose to capture what was said by Brennan J in *Mabo (No 2)*?³⁹

Native title to particular land ..., its incidents and the persons entitled thereto are ascertained according to the laws and customs of the indigenous people who, *by those laws and customs, have a connection* with the land. It is *immaterial that the laws and customs have undergone*

³⁴ *Eg Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at [44], [46], [53], [79]; *Neowarra v Western Australia* [2003] FCA 1402; *De Rose v State of South Australia* [2003] FCAFC 286; *Griffiths v Northern Territory of Australia* [2007] FCAFC 178.

³⁵ *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at [85].

³⁶ *Neowarra v Western Australia* [2003] FCA 1402 at [347]-[358]; *De Rose v State of South Australia* [2003] FCAFC 286 at [303]-[328]; *Sampi v State of Western Australia* [2005] FCA 777 at [1079]; *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135 at [92].

³⁷ *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135 at [93].

³⁸ *Western Australia v Ward* (2002) 213 CLR 1 at [64]; *De Rose v State of South Australia* [2003] FCAFC 286 at [303]-[313].

³⁹ *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at [83] (emphasis added).

some change since the Crown acquired sovereignty provided the general nature of the connection between the indigenous people and the land remains.

If so, it would appear that the meaning of the word 'connection' in that context was intended to be equivalent to the phrase 'in relation to' in the chapeau;⁴⁰ that is, it is merely descriptive of the effect of the laws and customs. Therefore, it would appear to be an error to treat 'connection' as some additional element of proof about the occupancy or particular activities of the claimant group.

If 'connection' is seen to require some additional facts to be established, beyond the content and effect of the relevant laws and customs, careful consideration must be given to the *rationale* for this added requirement. What is the mischief to which the extra provision is directed? Why ought an otherwise successful claim fail because of a failure to establish 'connection', if it be established that the claimants possess rights and interests in relation to the land under their traditional laws and customs?

An additional amendment to clarify this position would be useful.

Item 13: New s 223(1D) - Continuity

The proposed s223(1D)(c) would not involve any fundamental departure from the existing conceptual basis for native title. Irrespective of whether the law currently requires substantially uninterrupted acknowledgement and observance of traditional law and custom, it is clear that no such requirement applies to 'connection'. Nevertheless, as part of clarifying the purpose and meaning of sub-section 223(1)(b), it may be useful to specify that no 'continuity' requirement applies to it.

Read in conjunction with proposed ss 66AA and 66AB, the proposed s 223(1D)(b) and (c) would seem to reinforce the current position that s 223(1) does not require the establishment of *absolute* continuity, requiring only that there be no substantial interruption. This is to be welcomed.

Further legislative guidance would also be welcome in relation to what this revised notion of 'continuity' realistically and appropriately means, having regard to the objects of the Act and the context of contemporary Aboriginal and Torres Strait Islander communities. In addition, an amendment could usefully specify the nature of the evidence which would be required to establish a substantial interruption in the acknowledgement and observance of law and custom.

Item 14: Substituted s 223(2) – Commercial interests

AIATSIS has argued elsewhere that a provision of this kind is required to ensure that native title facilitates rather than impedes Indigenous economic engagement.⁴¹ The emphasis on 'traditional' in relation to native title has proved a limiting factor on the rights enjoyed as a result of the recognition of native title.

The Crown has advocated against the recognition of commercial rights in litigated determinations, denying Indigenous peoples the right to utilise their property in the same way as any other property owners. Due to the nature of the process, many Indigenous groups have conceded these terms in consent determinations. The classic formulation of a determination of native title rights and interests to include use of resources for personal, communal, ceremonial and non-commercial

⁴⁰ The 'chapeau' is the opening stanza of the section – the umbrella or overarching part of the provision.

⁴¹ HORSCATSIA. 2008. *Open for Business: Developing Indigenous Enterprises in Australia*.

purposes is antithetical to the notions of a proprietary interest. It could result in the perverse situation that while other parties can enter into an agreement to undertake commercial activities on native title land, native title holders themselves cannot.

Minister Macklin has said to the United Nations that:

We support Indigenous peoples' aspiration to develop a level of economic independence so they can manage their own affairs and maintain their strong culture and identity.⁴²

The Liberal Party members of this Committee, in considering the Wild Rivers Bill, pointed to the absurdity of native title holders being unable to make economic decisions about the use of their native title lands. We would suggest that this view supports the proposed Item 14. It is imperative that the Parliament give legislative intent to the stated objective of all parties that native title should be the basis for economic development for Aboriginal and Torres Strait Islander peoples.

There is a need for a provision that specifically states that exclusive possession native title carries with it the full beneficial title to the land and that the rights and interests exercised by native title holders remain a matter internal to the groups, subject to laws of general application.

In Summary

AIATSIS supports particularly the changes proposed to the objects of the NTA (item 1), the removal of the automatic extinguishment provision in compulsory acquisitions (item 3), the removal of the distinction between rights over land and sea country (item 4), the right to negotiate and good faith provisions (items 2, 5-7), the ability for parties to a determination application to disregard historical extinguishment (item 11), and the recognition of native title rights to trade and other commercial rights (item 14).

AIATSIS strongly supports the review of the matters addressed by items 12 and 13, but notes that these matters may require further consultations and more thorough consideration of the drafting and complementary measures required.

Overall we commend the Senator for introducing this important Bill and the Government for referring these important matters to Committee. If some of these proposals are not enacted as a result of the current Parliamentary processes, we encourage the Parliament and the Attorney-General to continue reviewing the Act in light of its most often cited failings and frustrations. AIATSIS urges legislators to consider in particular the experiences of native title holders and claimants, who in many instances feel that the legislation as it currently stands and operates responds to the interests of other parties better than to the foundational rights of Indigenous Australians.

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⁴² Minister Macklin's Statement on the United Nations Declaration on the Rights of Indigenous Peoples, 3/04/2009: http://www.jennymacklin.fahcsia.gov.au/statements/Pages/un_declaration_03apr09.aspx.