Australian Institute of Aboriginal and
Torres Strait Islander Studies

Submission to the Attorney-General,
the Hon Robert McClelland, MP

Proposed Minor Native Title Amendments

Introduction

The Native Title Research Unit (NTRU) at the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) believes the native system can be improved. We support the Attorney-General's statement of 29 February 2008 'that native title negotiations get people talking – people who might otherwise have had no reason to sit around a table together' and that native title negotiations can be 'a vehicle for reconciliation and ongoing positive relationships'. We also view that native title is not an end it itself, but is part of the much bigger project of land justice.

People involved in the native title system grapple daily with the big questions of how to improve the native title system so that it does recognise, protect and permit the free exercise of the rights of Indigenous peoples to their lands and waters, deliver new relationships and resolve claims fairly. As a research institute concerned with native title issues, we consider ourselves very much involved in the system, albeit as an observer. The NTRU has existed since the establishment of the Native Title Act. Hence, our submission is based on professional expertise derived from lengthy observation.

The *Proposed Minor Native Title Amendments Discussion Paper 2008* actually represent major amendments. Firstly, the emphasis on the Federal Court in resolving native title claims and the absence of any mention of the NNTT indicates a major policy deviation from an arbitration role of a Court. To be clear, we do not have a view about whether the Court should or should not adopt a primary mediation role in the native title context, but point to the significance of processes for the determination of native title on the fairness and justice of the final outcomes. Secondly, the proposals to NTRBs might represent major administrative outcomes for NTRBs. Thirdly, the proposals involving evidence will potentially represent major changes to evidence standards for parties. And lastly, the proposal concerning inquisitorial processes could have a major impact on how claims progress. We welcome these major proposed reforms as mostly positive developments, and raise some concerns on others, as set out below.

However, whilst the proposed amendments may benefit process improvement, amendments to the balance of rights between the Crown and Indigenous peoples would dramatically improve the operation of the native title system. There has been no attempt to shift the balance towards a greater recognition of Indigenous peoples' native title rights, despite the NTA preamble stating that its intent is to recognise and protect native title rights. Instead, the wave of judgements and approaches by state governments since 1993 has shrivelled that original intent. It is time for a new balance of rights between the Crown and Indigenous peoples in Australia.

Importantly, native title is a dispute about colonisation between sovereigns – between original sovereign groups (as represented by native title claimants) and arrived sovereign groups (as represented by the Crown). This is certainly how the dispute is viewed in states similar to Australia, such as New Zealand, Canada and the United States of America. And this was the legal philosophy underpinning the decision to override *terra nullius* in the landmark case *Mabo & Others vs the State of Queensland*. However, today in Australia native title is managed as a private property dispute between the original sovereign groups and private property holders. Native title claimants are defending their claims against bee-keepers, mining companies, telecommunications companies, recreational fishing or camping groups and local councils. Native title has become an unmanageable private property dispute with too many respondents. The capability of resolving the colonisation dispute for many native title claimants within the native title system is evaporating.

To a small extent, native title is a dispute between original sovereign groups (native title claimants) and the Crown (Australian and State Governments), but at the enormous disadvantage of the former. Curiously, the arbitrator in the dispute is not an independent Court, but is the Crown itself. The arbitration comes about due to the Crown's role in assessing and giving opinions on connection material. Instead, a fairer way of arbitrating the dispute would be to have the primary role for arbitration rest with the Court. Furthermore, the environment for resolving the dispute would be fairer if the onus for establishing recognition of native title were shared more equally amongst parties. For instance, a system which required claimants to establish proof of a coherent connection (rather than the continuing connection since settlement requirement), and then the Crown (and perhaps other respondents) could establish

how native title rights and other rights could co-exist. Many others have spoken on the possibility of sharing the onus of proof, such as French, J.

1. Enable the Court to rely on a statement of facts agreed between parties

a) *Should the Federal Court be able to rely on a statement of facts agreed between parties in making a consent determination?*

Yes. Relying on a statement of facts means that the Federal Court does not need to conduct its own factual inquiry/determination that native title exists or does not exist must be based on the standards of proof. Reliance on a statement of fact is likely to improve the operations of the native title system.

In practice, S87 of the NTA has been used by parties and judges to avoid rigorous judicial inquiry in Consent Determinations. However, parties and judges have taken a varied approach towards the operation of S87. Under S87, it is within the Courts power to accept an agreement of the parties if the Court is 'satisfied' and if the Court considers it 'appropriate'. We support any amendment which would create uniformity in the Courts interpretation of S87 in favour of accepting statements of fact. Whilst the proposed amendment will not necessarily alter the attitude of the parties, it could allow or encourage the Court to develop a common approach to accepting statements of fact.

Of course, the Federal Court must be satisfied that the statement of fact is based on legislative requirements. While all parties to the agreement may have negotiated in good faith, the judiciary must be responsible for checking the Consent Determination for justice and equity principles. The statement of fact would be best supported by a short submission by parties, separately or jointly, which assured the Court that the statement of facts accords with the law. The submission could summarise the (i) process of how the parties reached the agreement and (ii) how the information shared between the parties meets legal requirements. Perhaps the Federal Court could guide parties as to the type and level of information required in the supporting submission. As stated above, in practice this approach already occurs, though is dependent upon the parties and the Judge.

Relying on a statement of facts between parties for a Consent Determination would represent a major change to the way native title claims are mediated. For instance, it could alter the type of connection information necessary for a Consent Determination, thereby strengthening the native title system for all parties; by reducing costs, speeding up the resolution of claims and even creating an opening for the development of a more flexible attitude towards the process of establishing connection.

b) Should the agreement of all parties be required or just the agreement of the claimants and the primary respondent (a Government, usually State or Territory)?

Only the signature of the claimants and the primary respondent is required. In responding to this question, it is useful to distinguish between signature to an agreement and participation in mediation.

Properly speaking, native title is a dispute between sovereigns; between the Crown and the native title claimant group. Hence, any statement of facts, particularly about connection to the lands, should be only between those two parties.

However, due to the reality of the operation of the native title system, other parties participate in mediation. Mediators, either the Federal Court or the NNTT, must find innovate ways of running mediations between the state and the respondents. Reducing the need for Claimant attendance at every mediation might be more practical for the state and the respondents and simultaneously save costs for the Claimant. Moreover, limiting the need for Claimant attendance would reduce the unnecessary encumbrance for Claimants to tell and re-tell their stories.

c) What limitations, if any, should be placed on the Court's discretion to accept an agreed statement of facts?

No further comment.

2. Enable the Court to make determinations that cover matters beyond native title

a) *Would it assist the operation of the native title system if the Federal Court was able to make determinations that cover matters beyond native title?*

This question is difficult to answer as it is not clear what sort of matters the Federal Court would determine. However, following are some benefits and costs for consideration.

Benefits

First, a Court Order on a non-native title agreement would create a forum for hearing complaints of the non-implementation of that agreement. Increasingly, parties are making agreements about non-native title issues in the pursuit of resolving a native title claim. These issues include compensation for loss of native title, recognition of Traditional Ownership, funding for PBCs, cooperative land management agreements, transfer of land parcels and others. These agreements create relationships and expectations beyond the Court Order. If a Court were prepared to make determinations on these non native title issues, then it must be prepared to hear complaints when one of the parties views the other party/s as not meeting its obligations under these side agreements. In a extreme circumstance, a party may trigger S13(5) which provides for the variation or revocation of an approved determination of native title in the 'interests of justice'. Perhaps arguably, if a party does not honour a side-agreement, then an associated Consent Determination concerning native title should be varied or revoked. The current air of dissatisfaction surrounding the implementation of the side-agreements between Claimants and States suggests a complaint process, if available, might be triggered by aggrieved parties. In this sense, a potential hearing of a complaint by the Court could act as a deterrent for non-implementation by parties. The Court would fill the present accountability gap in agreement implementation.

In addition (or as an alternative), the NNTT might also be a candidate for having a role in the monitoring and implementing of agreements. Looking overseas at how other countries handle the independent review of good faith agreements might prove instructive for guiding policy making. For instance, in NZ an independent Court reviews agreements when it appears that the Crown is not honouring settlements.

Second, a Court Order on non-native title agreements could remove the necessity of Indigenous Land Use Agreements (ILUA). Under a Court Order, not all the consent of the parties is required. Gaining all the parties signature and Indigenous authorisation for an ILUA is laborious. It would be convenient and useful to avoid the ILUA process in resolving native title claims. However, working outside the ILUA process also has its costs.

Costs

First, making a Court Order instead of an ILUA comes at a cost. The notification process of the ILUA is favoured by claimants and parties as it ensures that the agreement represents all Indigenous peoples within the area claimed. In the absence of the ILUA, the Court would need to find another way of assuring itself that the non-native title agreement represents all Indigenous peoples in the area claimed.

Second, adding judicial oversight to non-native matters will introduce a workload which the Federal Court may not be able to meet, in terms of time and skills.

Third, a Court Order on non-native title agreements could be seen as an unwanted intrusion by parties. If it is seen as intrusion, then Federal Court determination could create hostilities among parties towards the Federal Court in native title proceedings and so hinder the operations of the native title system.

Fourth, a Court Order on non-native title matters might make parties cautious in their agreement making. If a party perceives that the Federal Court is likely to comb through every agreement, then parties might seek to minimise their exposure to judicial questioning by minimising agreement making. Conversely, when parties perceive that non-native title agreements are free from Federal Court determination then parties might act with greater flexibility during agreement making.

Fifth, a Court Order may inadvertently diminish local solutions in non-native title agreement making. The contents of non-native title agreements are organic – the contents grow and are specific to the claim. It is possible that a non-native title agreement for one claim is not desirable by, or can even be compared to, another claim. This is the case whether the claims are in two different states or are neighbouring claims in the same state. Different claimant groups want different

outcomes. However, the role of the Federal Court in adjudicating justice can lead to comparison of claims and a search for equality. What might appear to the Federal Court as like-matters, may be considered quite different to the parties. The Federal Court may find it difficult to make determination on non native title matters.

b) *Should an amendment specify the types of matters that could form part of broader determinations? If so, what types of matters? Or should the Court be given a wide discretion?*

No, types of agreements should not be specified. Instead, parties need wide discretion to explore matters. Parties bring new ideas to the agreement making process. It is important that parties continue to have the opportunity to be innovative. Of course, it would be useful if the Court could point to new options that the parties themselves had not considered.

If the Court were to make determinations on non-native title matters, then the Court would naturally need wide discretion due to the wide variety of matters which will come before the Court.

3. Evidence

a) *Do you have any views about the operation of these new evidence provisions in the native title context?*

The Court is best guided by how to get the best evidence to establish the truth of a matter. The new evidence provisions assist the Court getting the best evidence, and so those provisions – in the interests of justice – should be accessed in all native title claims.

It may be inconvenient for parties already in the process of litigation to be required to adopt the new evidence provisions. However, a concern for an outcome of justice is more important that a concern for the inconvenience of revising a litigation or mediation strategy. Furthermore, parties are often required to shift strategy in the context of new judgements, political influences, etc. The new evidence provision in

the context of native title should not be treated differently to any other influence which requires parties to reconsider strategy.

The heart of the Native Title Act is the principle of recognising Indigenous peoples' ongoing connection to their lands. The onus for establishing evidence that proves connection rests with Indigenous people. Regrettably, the evolution of native title judgements set unnecessarily high bars for standards of proof. The evidence requirements prevent, in most cases, the recognition of Indigenous peoples' connection to their lands. If the new evidence provisions can make native title more attainable – for instance by expanding evidence to include a range of narrative statements by members of the claimant group – then the new evidence provisions must be included in the operation of native title. Placing value on Indigenous narratives would represent a welcomed major amendment to the operation of the native title system.

b) If you consider there should be exceptions:

- *What is an appropriate cut off point for the Evidence Act amendments to apply to native title proceedings that have already commenced hearing? For example, should the amendments not apply when hearings are substantially progressed?*

No. Cut-offs are not appropriate. The evidence provisions should be available to every claim.

- *Should the Evidence Act amendments apply to native title cases where early evidence has been heard prior to the commencement of the amendments?*

Yes, for the reasons state above in 3(a).

- *Is a judicial discretion that takes into consideration the views of the parties desirable and/or sufficient as a safeguard?*

Yes, judicial discretion is sufficient.

- *Should the consent of the parties be required?*

No, the consent of parties should not be required. However, it would be appropriate for the parties to apply that the new evidence provisions are accessed.

4. Native Title Representative Bodies

- *Do you consider that the proposed amendments to the NTRB provisions would streamline NTRB processes under the Act?*

We support the principle of increasing the stability and size of resources to NTRBs. The proposals presented appear to promise an increase in resources. But obviously, our view is dependent upon the exact drafting of the amendment.

Periodic recognition of the NTRB makes forward planning extremely difficult, in terms of: attracting and retaining staff; having continuity in claimant representation; unfairly cheery picking the most winnable cases and neglecting the hard cases; and rushing through agreement making. Period recognition diverts NTRB attention and resources from core business objectives and a focus on outcomes. Periodic recognition generates uncertainty and instability for industry, government and native title claimants, to the detriment of all stakeholders and seriously impedes the overall objective of improving the native title system.

If the derecognition provisions operate well, then the periodic three year cycle funding is not necessary.

On the issue of NTRB funding, NTRB's need increased resources to represent native title claimants, particularly under a Federal Court mediation process. Resolving claims cannot happen quickly and easily, and claimant group participation and representation is not inexpensive. The movement of claims will become particularly more expensive as the Federal Court adopts a greater role in mediating claims, as appears to be the trend. Attending Federal Court Case Management Conferences requires an entourage of barristers and solicitors (and very little room for claimant participation). Under Federal Court favoured mediation, NTRBs will require greater levels of funding than under the NNTT. However, improved outcomes will likely validate increased resources.

5. Other changes to improve the conduct of native title litigation

(a) Do you consider that inquisitorial processes, such as the use of referees, can assist to progress native title issues?

Yes, inquisitorial processes should be used by the Court. Court application of inquisitorial processes will place the role of arbitration with the Court, instead of the State. Under the current practice, States fulfil an arbitration role in assessing the connection of Indigenous peoples to their lands and waters.

However, an inquisitorial process must be managed carefully. Sometimes, inquisitorial processes tend to elevate the expert well above other actors in the native title system. Labelling who is an 'expert' creates divisions. For instance, in seeking an expert opinion on claimant group definition would the Federal Court call upon a Doctor of anthropology or an Indigenous Elder? Most commonly the former is called upon, yet the latter is likely to have greater 'expertise' regarding the particular inquiry.

(b) Are there particular aspects of native title where an inquisitorial process would be most useful?

Inquisitorial processes are likely to be of most use providing opinions on connection material. The Federal Court 'hot tubs' is an excellent example of an inquisitorial process progressing claims resolution.

Inquisitorial processes might also be useful in determining if a third party has a valid interest, and whether or not the third party is validly representing that interest in good faith.

Inquisitorial processes might also be most useful in appointing Indigenous mediators to inquire on a range of issues, including claimant group definition, connection material or negotiation of non-native title agreements.

Additional comment on improving the operations of the native title system

The Attorney-General's media release accompanying the release of the Discussion Paper encourages comments on other suggestions about how the Act could be changed to improve the operation of the native title system. Below is one comment.

1. Interest Based Negotiation

There is a lot of talk about promoting 'interest based' negotiation in native title agreement, but there is little knowledge of what interest based negotiation is in the native title context and if it presents a better option than other negotiation styles. What is interest based negotiation? What does it look like? How are interests developed and expressed? It would be beneficial to research interest-based negotiation alongside other styles of negotiation in the native title context in order to develop better understandings and practice of negotiation and mediation.