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Australian Law Reform Commission

# Review of the *Native Title Act 1993*

**National Native Title Conference  
Living with Native Title from the Bush to the Sea**

Coffs Harbour 2014

(Artwork courtesy of [Gilimbaa](#))



# Terms of Reference

The ALRC is to consider Commonwealth native title laws and legal frameworks in two areas.

1. **Connection requirements** relating to the recognition and scope of native title rights and interests.
2. Any barriers imposed by the Act's **authorisation** and **joinder** provisions to claimants', potential claimants' and respondents' access to justice.
  - Authorisation - working out who will be the applicant for a claim; and
  - Joinder - applying to the court to join a claim.





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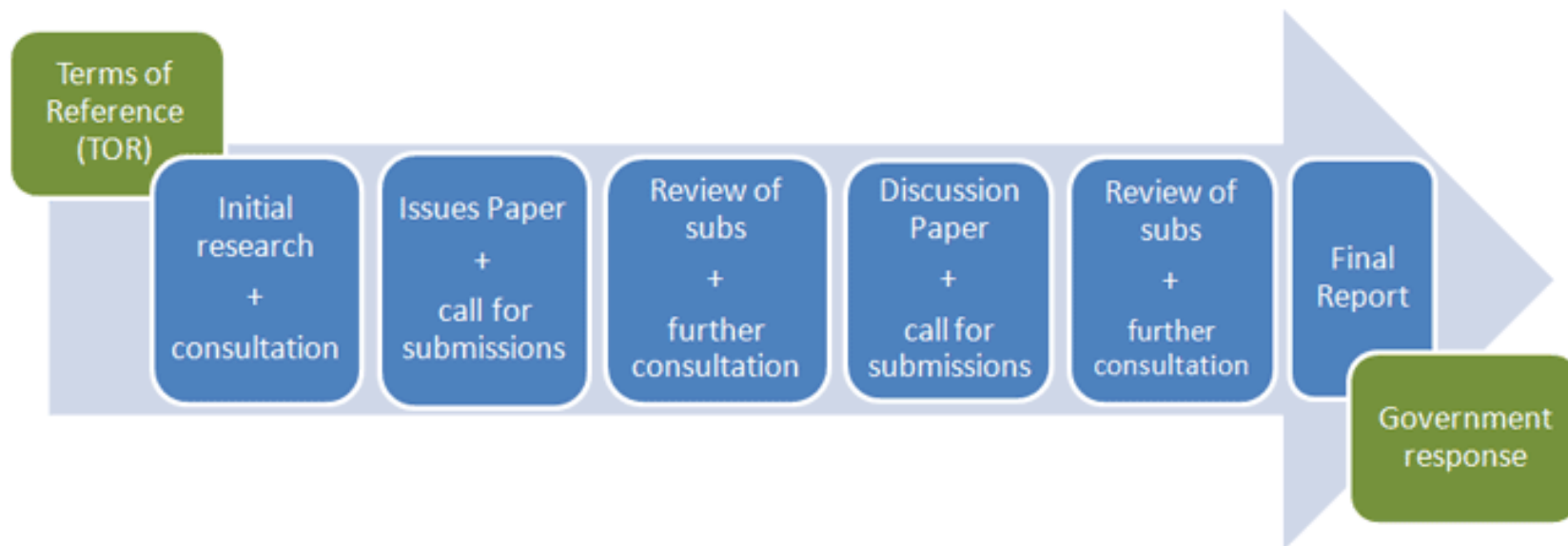
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# The Inquiry Process

**March 2014:** Issues Paper released

**September 2014:** Discussion Paper released

**March 2015:** Final Report provided to C'th Attorney-General





# Native Title Claims

‘Connection’ requirements:

Onerous & limiting for indigenous people, esp. if extensive dispossession or displacement.

What other difficulties may exist in satisfying connection?

Native title proceedings:

Complex, lengthy & difficult for all parties?





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# Data on Native Title Trends and Effects



What are the trends in the native title system over the last five years?



Do native title claim processes have different impacts and outcomes in different places across Australia?

- What factors contribute to that variation?



How do we best obtain information about trends/differential impacts?



# Data on 'Delay'

- Existing high-level data
  - How many claims
    - Contested or consent determinations
- Length of proceedings
  - Contributing factors ?
- What is the source of delay?
- National Native Title Tribunal data and maps
- No consolidated evidence
  - can track some cases;
  - anecdotal evidence of length of proceedings
- Varying perspectives from submissions

# Connection: Options for Reform

- The ALRC is to consider five options:
  - Presumption of continuity in proof of native title
  - Define traditional or traditional law and custom?
  - Amend definition of native title rights and interests to include commercial?
  - Confirm that native title does not require physical occupation; or continued or recent use
  - Empower courts to disregard ‘substantial interruption’ where in the interests of justice.



# Presumption of continuity

Claimants must prove continuity in acknowledgment & observance of traditional laws and customs since pre-sovereignty.

A presumption - a rule of evidence to allow continuity to be presumed upon proof of basic facts.

A presumption may have broader effects on practices of parties to native title proceedings.

**Reform Option:** Adopt presumption ; submissions vary on its formulation and its effectiveness.





# 'Traditional'

- s223 NTA requires that native title rights and interests are possessed under 'traditional' laws and customs.
  - Traditional laws and customs are those acknowledged and observed at sovereignty → questions about extent to which laws and customs can evolve and adapt and still be 'traditional'.
- There is link between a society and its laws and customs → claimants must establish existence of a 'normative society'.

**Reform Option:** Set definition of traditional or allow to evolve?



# Commercial rights and interests

- High Court's decision in *Akiba*: The right to access resources and take for any purpose resources in the native title claim area could be exercised for commercial or non-commercial purposes.
- Evolution and adaptation of native title rights and interests?

**Reform options:** Potential amendment of NTA to confirm that native title includes commercial rights and interests and to define 'commercial'?



# Physical Occupation

- Confirmation that to establish connection - does not require occupation, continued or recent use?
- High Court established connection is 'spiritual not physical'
  - Occupation & use is considered 'good evidence' of connection, and rights and interests possessed.

**Reform Option:** Potential amendment of NTA to confirm that occupation and continued/ recent use not required or allow case law to evolve?





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# Substantial Interruption

Claimants must prove that acknowledgment of their traditional laws and observance of their traditional customs has continued ‘substantially uninterrupted’ by each generation since pre-sovereignty.

Continuous observance; not absolute standard , but a high hurdle for indigenous people?

## **Reform options:**

Define ‘substantial interruption’?

Empower courts to disregard in the interests of justice?



# Authorisation

**Authorisation** – deciding which native title claimants form the applicant and scope of what the applicant is authorised to do.

**NNTC** - ‘The process goes to the integrity of the NTA from an indigenous point of view.’

**WA State Government** – ‘... authorisation requirements for the bringing of native title and compensation claims are a vital component of the native title system that serve a democratic function for native title claimants, and provide certainty for other parties.’



# Authorisation: Issues

- Identifying the claim group and deciding upon 'the applicant'
  - Cost of authorisation proceedings
- Resolving disputes within the claim group – and beyond.
- Replacement of applicant members e.g. where an applicant dies or is unable or unwilling to act
- Defects in authorisation
- Scope of authorisation - powers of the applicant



# Joinder

Two ways

- 1) During 3 month notification period. Persons who can join include
  - people who claim to hold native title
  - people 'whose interest, in relation to land and waters, may be affected by a determination in the proceedings'
  
- 2) At any time, if Court is satisfied:
  - the person's interests may be affected by a determination in the proceedings and
  - it is in the interests of justice to do so.



# Late joinder

Late joinder may be triggered by a range of events including:

- Dispute within the claim group or between competing claim groups or peoples
- Respondents - change in ownership of land and interests within claim area

Is legal system responding appropriately?

What principles should guide the courts re late joinder?





# Joinder—party numbers

Large party numbers can complicate proceedings.

Can the Crown, in some circumstances, adequately represent the interests of non-Crown respondents?





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# Next steps

## Discussion Paper -

- Provides more detailed examination of connection, authorisation, joinder as necessary
- Sets out draft proposals
- May request additional clarification of legal issues
  - We will undertake another round of consultations following DP release.



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# Contact information

[www.alrc.gov.au](http://www.alrc.gov.au)

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