ALRC NATIVE TITLE ACT REVIEW

By Lee Godden

What is the ALRC Inquiry about?

The Australian Law Reform Commission (ALRC) is at the halfway point in its Inquiry into the *Native Title Act 1993*. 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. As the native title system has developed over 20 years there have been adjustments, and at times substantial changes. In August 2013, the ALRC was asked to inquire into and report on the Commonwealth native title laws and legal frameworks, including what, if any, changes could be made to improve the operation of native title laws. Under the Terms of Reference the ALRC Inquiry is to focus on two important areas.

1. Connection requirements for the recognition and scope of native title

The first area is connection requirements for the recognition and scope of native title. The ALRC is looking at what the law requires to be proven in a court (or agreed between parties to a native title determination) to establish native title. As part of this process, Aboriginal or Torres Strait Islander people must show a connection to the claimed area of land or waters. The process for establishing native title is complex. Aboriginal or Torres Strait Islander people have to bring sufficient evidence of maintaining a connection with the land and waters since before European settlement; and that they have continuously acknowledged traditional law and observed traditional custom from settlement to the present. That practice of law and custom must be substantially uninterrupted, and referable to a 'normative society'. A determination of native title recognises the nature and scope of the rights and interests held by the native title holders.

The ALRC Native Title Inquiry team, together with Professor Rosalind Croucher, President of the Commission.

2. Authorisation and joinder

The second area relates to the people involved in native title claims. Firstly, the Inquiry is to examine the native title authorisation process for determining the applicant for the claim (including their powers to act in respect of a claim). Also, the ALRC is examining legal procedures and rules around who is able to apply to the court to join a legal action for a native title claim.

The Inquiry process

A brief explanation of the Inquiry process and how it relates to Commonwealth Government procedures in the future may be helpful. The ALRC is an independent Commonwealth authority and this frames the conduct of the Inquiry.

Under the Terms of Reference for the Inquiry, the ALRC must have regard to the Preamble and objects of the NTA. In addition, the Issues Paper identifies further guiding principles. We have asked for comment on their appropriateness. The Issues Paper is available on the ALRC website and we are now reviewing almost 40 submissions. We are grateful to those who prepared these submissions. A final report is to be provided to the Commonwealth Government in March 2015 and will then be tabled in Federal Parliament. The ALRC plays no further role once the report is handed over; however, the ALRC has a reasonably strong record in having its recommendations implemented.

Native title claims – are there difficulties?

The Issues Paper sought to identify major issues with the connection requirements for recognising native title. Our Terms of Reference identified five areas for reform, but was less precise about the actual problems to be addressed. For that reason, we have asked open questions in the Issues Paper to help us identify problems but, also where things are working well. We are interested in hearing from people about their experiences with the native title claim process.

Data on native title: trends and effects

It is important to gather as much information as possible. For example:

- Is there evidence that native title claims are taking a longer time to resolve than in the past? If so, what factors are relevant to these time frames? [1]
- What evidence is there, if any, that overlapping claims and disputes affect connection requirements, authorisation and joinder procedures?
- Do financial and capacity constraints pose a barrier for claimants, potential claimants, and respondents in relation to native title determinations?

There are different views about trends in, problems with, and advantages of the native title system, so the ALRC seeks to canvass a wide range of responses.

Connection: five options for reform

The definition of native title appears in section 223 of the NTA. Native title claimants must address a number of requirements to satisfy section 223, as interpreted by the Courts.[2]

While the ALRC is asked to consider five specific measures, the Inquiry can be more wide-ranging in its suggested measures to improve the native title system. These options for reform are still being examined and the ALRC is yet to determine its final position.

1. **Presumption:** There have been several proposals put forward for the NTA to include a 'presumption of continuity' in the acknowledgment and observance of traditional laws and customs since pre-sovereignty. Some suggest it may address difficulties for claimants in providing evidence of connection prior to European settlement. Generally speaking, a presumption is a rule of evidence that affects how a fact in issue is proved. If adopted, a presumption could allow continuity to be presumed once basic facts are proven. Some commentators suggest it may have other impacts on claims litigation and consent determinations. The ALRC is considering whether to recommend a presumption. Submissions received so far vary on its formulation and its effectiveness.[3]
2. **Traditional:** Central to the definition of native title, is that native title rights and interests are possessed under 'traditional' laws and customs. Traditional laws and customs are those acknowledged and observed when the British settled Australia. Determining exactly what are the traditional laws and customs for a claim group may be difficult. In turn, the term 'traditional' raises queries about the extent to which laws and customs can evolve and adapt and still be 'traditional'. *Yorta Yorta* requires that traditional law and custom must link to a pre-sovereign 'normative society'.[4] The ALRC is considering whether to recommend setting a statutory definition of 'traditional' or to allow case law to evolve. Again, submissions on the issue vary.[5]
3. **Commercial native title rights and interests:** In *Akiba,*[6] the High Court held that native title rights and interests could comprise a right to take for any purpose resources in the native title claim area. The right could be exercised for commercial or non-commercial purposes. A number of interconnected issues arise: for example, what might 'commercial' mean? The ALRC is asked to consider the utility of amending the NTA to confirm that native title includes commercial rights and interests, and whether 'commercial' should be defined.
4. **Physical occupation and recent use:** The ALRC is considering whether there should be confirmation that claimants' 'connection with the land and waters' does not require physical occupation or continued or recent use. While the High Court has said, 'the connection which Aboriginal peoples have with country is essentially spiritual',[7] the absence of physical occupation is still raised as a challenge to proving native title in some claims.[8] The ALRC is examining the utility of potential codification or, alternatively, whether it is best to simply allow existing law to apply.[9]
5. **Substantial interruption:** Case law requires that claimants must prove that acknowledgment of traditional laws and observance of traditional customs has continued 'substantially uninterrupted' by each generation since pre-sovereignty.[10] Such 'continuous acknowledgement and observance' is not an absolute standard, but can represent a high hurdle in proving native title. The ALRC is asked to consider whether there should be 'empowerment of courts to disregard substantial interruption or change in continuity of acknowledgment and observance of traditional laws and customs where it is in the interests of justice to do so'. There are two suggested components to any reform option: first, is it appropriate to define 'substantial interruption';[11] and secondly, in what circumstances, if at all, should the courts be empowered to disregard 'substantial interruption'. These issues attract a diversity of opinion.[12]

The ALRC will examine proposed options; and other measures in the forthcoming Discussion Paper.

Authorisation

Authorisation involves the process which native title claimants must use to give permission for certain claim group members to be 'the applicant'. The applicant brings the claim on behalf of all the claimants, and the NTA gives the applicant the power to deal with matters arising in relation to that application. Authorisation is necessary for Indigenous land use agreements as well.

From the submissions there remains substantial support for the authorisation process,[13] although they indicate difficulties with various parts of the process, including:

- identifying the claim group and deciding upon 'the applicant';
- cost of authorisation proceedings;
- resolving disputes within the claim group;
- replacement of applicant members; where a member dies or is unable/ unwilling to act; and
- concerns around the scope of authorisation – and consequently the powers of the applicant.

Submissions were helpful in making detailed suggestions.[14] The ALRC notes the broad support for authorisation and will seek to address concerns in draft proposals in the Discussion Paper.

Joinder

Native title proceedings are unique in the range of parties and interests that may be involved in an application for a determination. Basically, there are two ways to join a native title claim:

1. During the initial 3-month notification period in which, under s 84 (3) of the NTA, there is a list of persons who can join including claimants and people 'whose interest, in relation to land and waters, may be affected by a determination'; and
2. At any time, if the Court is satisfied that the person's interests may be affected; and it is in the interests of justice to do so.[15]

There are a range of circumstances in which groups or individuals may seek to join relatively late in the proceedings. Late joinder of parties may impact resolution of native title determinations. Again though, situations are complex. There is the other consideration of the need for parties to be heard by the Court prior to a determination. The ALRC will evaluate these issues and develop proposals that reflect among other things:

- whether the legal system is responding appropriately or are there barriers in place?

- what principles should guide joinder?

Next steps

The Discussion Paper, due for release at the end of September, will:

- provide further examination of connection requirements for the recognition and scope of native title rights and interests, authorisation, joinder, as necessary;
- set out draft proposals in relation to these areas; and
- may request information to clarify legal issues and the operation of the native title system.

The ALRC welcomes further consultation as the Inquiry proceeds and we look forward to hearing from people. Our contact details are on the ALRC website.

[1] See, e.g. Western Australian Government, *Submission 20;* Queensland South Native Title Services.

[2] For a discussion see *Lander v South Australia* [2012] FCA 427 [32]–[34].

[3] See, e.g., North Queensland Land Council, *Submission 17*; National Farmers Federation, *Submission 14.*

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

[5] See, e.g. National Native Title Council, *Submission 16*; South Australian Government, *Submission 34*.

[6] *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth* (2013) 300 ALR 1.

[7] *Western Australia v Ward* (2002) 213 CLR 1, [14].

[8] See for example, North Queensland Land Council, *Submission* 17.

[9] There are a range of views, e.g. Western Australian Government, *Submission 20*; Northern Territory Government, *Submission 31*; Just Us Lawyers, *Submission 2*.

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

[11] See e.g., Australian Human Rights Commission, *Submission 1;* South Australian Government, *Submission 34.*

[12] See e.g., Northern Territory Government, *Submission 31*; NSW Young Lawyers Human Rights Committee, *Submission 29:* National Congress of Australia's First People, *Submission 32.*

[13] National Native Title Council, *Submission 16:* Western Australian Government, *Submission 20.*

[14] Queensland South Native Title Services, *Submission 24*; Association of Mining and Exploration Companies, *Submission 19*; Kimberley Land Council, *Submission 30*; Cape York Land Council, *Submission 7*.

15 *Native Title Act* 1993 s 84(5).

SECTION 47A - A CASE FOR THE REVIVAL OF NATIVE TITLE RIGHTS

By Christine Deng, Project Officer Legal, NTRU

The recent Federal Court case of *Adnyamathanha People No 3 Native Title Claim v State of South Australia [2014] FCA 101* (the *Adnyamathanha No.3* case) was originally filed to test the limits of s47A of the *Native Title Act, 1993* (Cth) (the NTA). This is because the section has in the past been interpreted and applied differently by a number of Federal Court Judges.

Section 47A operates to enliven native title where it was extinguished in the past. It follows that a successful claim under s47A, also gives the native title holders rights in relation to Future Acts. These rights include the right to be notified and negotiate with mining companies and other stakeholders.

In the *Adnyamathanha No.3* case, Mansfield J applied s47A of the NTA, ruling that the extinguishment of native title rights over a substantial area of land to the north of Hawker in South Australia should be disregarded. Although this decision is seen to have clarified some of the outstanding issues in relation to this section, it also led to media backlash against the NTA.[1] This article will specifically explain the reasoning and the implications of the application of s47A of the *Native Title Act* in the *Adnyamathanha No.3* case.

Section 47A of the NTA

1. This section applies if:
   a. a claimant application is made in **relation to an area;** and
   b. When the application is made:
      i. a freehold estate exists, or a lease is in force, over the area or the area is vested in any person, if the grant of the freehold estate or lease or **the vesting took place under legislation** that makes provision for the grant or vesting of such things only to, in or for the benefit of, Aboriginal peoples or Torres Strait Islanders; or
      ii. the area is held **expressly for the benefit** of, or is held on trust, or reserved, expressly for the benefit of, Aboriginal peoples or Torres Strait Islanders; and
   c. when the application is made, one or more members of the native title claim group **occupy the area.**
2. For all purposes under this Act in relation to the application, any extinguishment, of the native title rights and interests in relation to the area that are claimed in the application, by any of the following acts must be disregarded:
   a. the grant or vesting mentioned in subparagraph (1)(b)(i) or the doing of the thing that resulted in the holding or reservation mentioned in subparagraph (1)(b)(ii);
   b. the creation of any other prior interest in relation to the area, other than, in the case of an area held as mentioned in subparagraph (1)(b)(ii), the grant of a freehold estate for the provision of services (such as health and welfare services).

Section 47A (2) essentially provides that, if all the three requirements in s47A (1) are satisfied, then all prior interests are to be ignored in determining whether native title exists. The type of prior interests would include previous and current freehold grants and leases.