Australian Government

Australian Law Reform Commission

Emeritus Professor Rosalind Croucher AM
President

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

2 March 2017

Dear Secretary,

Submission to Inquiry into Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 [Provisions]

The Australian Law Reform Commission (ALRC) welcomes the opportunity to make a submission to this Inquiry into the Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 [Provisions] by the Senate Legal and Constitutional Affairs Legislation Committee (the Committee).

The ALRC completed an Inquiry into aspects of Commonwealth native title laws and legal frameworks in April 2015: *Connection to Country: Review of the Native Title Act 1993 (Cth)* (ALRC Report 126). Of particular relevance for this Committee's Inquiry, the ALRC made a number of recommendations relating to the authorisation process for applications for determination of native title and for applications for compensation for the extinguishment or impairment of native title.

In its Inquiry, the ALRC received over 70 submissions from a range of stakeholders and conducted 162 consultations with stakeholders across Australia. The ALRC consulted with: Commonwealth, state, territory and local governments, departments and agencies; judges and registrars from the Federal Court of Australia; Indigenous leaders and traditional owners; Indigenous organisations, including Native Title Representative Bodies, Native Title Service Providers, Prescribed Bodies Corporate and Land Councils; industry, including peak bodies representing the agriculture, pastoral, fisheries, and minerals and energy resources industries; the National Native Title Tribunal; and a number of anthropologists and academics. Public submissions can be accessed on the ALRC's website.

The ALRC drew on five guiding principles to shape the process of law reform. These principles were that reform should:

- acknowledge the importance of the recognition of native title;
- acknowledge the range of interests in the native title system;
- promote timely and just resolution of native title claims;
- be consistent with international law; and

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- promote sustainable, long-term social, economic and cultural development for Aboriginal and Torres Strait Islander peoples.

Amendments to ss 251A and 251B of the *Native Title Act 1993* (Cth)

The amendments made by items 4 and item 6 to ss 251A and 251B of the *Native Title Act* are consistent with recommendations made in ALRC Report 126.

The *Native Title Act* requires that a claim group use a traditional decision-making process, if it has such a process, to authorise the making of a native title determination application or a compensation application.[1] If no such process exists, the native title claim group must authorise the making of an application in accordance with a process of decision-making agreed to and adopted by the group.[2]

The authorisation of Indigenous Land Use Agreements (ILUAs) is similar to authorisation of an applicant. Section 251A provides that, if there is a traditional decision-making process that must be complied with in relation to authorising things of that kind, persons holding native title must use that process to authorise an ILUA. If no such process exists, they must use a process agreed to and adopted by the group.

The ALRC recommended that ss 251A and 251B should be amended to allow a claim group to authorise an applicant, or an ILUA, either by a traditional decision-making process or a process agreed to and adopted by the group.[3]

The ALRC considered that allowing the group to choose its own decision-making process promoted the autonomy of the group and maintained the ultimate authority of the claim group.

The ALRC also noted the following difficulties with the provisions as currently drafted:

- The requirement to use a traditional decision-making process, where it exists, can create problems when it is unclear if such a process exists, and what it is. The lack of clarity is sometimes a result of the community having been denied the opportunity to make decisions about their land for many generations.
- Where the group has a traditional decision-making process, it may not be one that is suited to making decisions in the native title context. Adapting the process for use in native title procedures can be complex and time consuming. The group may wish to change the decision-making process to be more inclusive.
- Where the group does not have a traditional decision-making process, it may be reluctant to declare that fact, when seeking recognition of rights and interests 'possessed under traditional laws and customs'.[4]

Parties to area Indigenous Land Use Agreements

Item 1 of the Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 would amend the Act to allow the native title claim group to nominate which members of the registered native title claimant are required parties to the ILUA, or, if no person or persons are so nominated, provide that a majority of the members of the registered native title claimant must be parties to the ILUA.

The ALRC did not make recommendations about parties to area ILUAs. However, it draws the Committee's attention to its other recommendations relating to the authorisation of the applicant in native title claims. These are relevant because the 'registered native claimant' is defined as 'a person or persons whose name or names appear in an entry on the Register of Native Title Claims as *the applicant* in relation to a claim to hold native title in relation to the land or waters'.[5]

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1 *Native Title Act 1993* (Cth) s 251B(a).
2 Ibid s 251A(b).
3 Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)*, Report No 126 (2015) recs 10–1, 10–2.
4 Ibid [10.51]–[10.53].
5 *Native Title Act 1993* (Cth) s 253, emphasis added. The 'applicant', is a person or persons authorised by the native title claim group to make a native title determination application: Ibid ss 61(2), 253.

The ALRC observed in its Report that the purpose of the authorisation provisions, in relation to claims, is to ensure that an application is brought with the authority of the claim group, allowing the group to supervise proceedings and thus giving legitimacy to the proceedings.

The ALRC considered that it would further this purpose to allow the claim group to define the scope of the authority of the applicant, and recommended that the *Native Title Act* should be amended to provide for this.[6] The ALRC argued that this approach would allow flexibility to accommodate differences between claim groups, and ensure that the claim will only be dealt with in accordance with the claim group's wishes.[7]

The ALRC also recommended that the Act be amended to provide that, where the terms of the authorisation are silent, the applicant may act by majority.[8] This recommendation was intended to address the situation where the claim group has directed the applicant to take some action under the Act, but only some members of the applicant are willing to act on the direction. The ALRC considered that a minority of members of the applicant should not be able to frustrate the will of the claim group overall.[9] The full list of recommendations in relation to authorisation is extracted at Appendix A.

We hope this submission is of assistance to your Committee. If you require any further information, please do not hesitate to contact the ALRC.

Yours sincerely,

Emeritus Professor Rosalind Croucher AM

6 Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)*, Report No 126 (2015) rec 10-5.
7 Ibid [10.69].
8 Ibid rec 10–6.
9 Ibid [10.81]–[10.83].

Appendix A

Connection to Country: Review of the Native Title Act 1993 (Cth) (ALRC Report 126): Authorisation recommendations

Recommendation 10–1 Section 251B of the *Native Title Act 1993* (Cth) requires a claim group to use a traditional decision-making process for authorising an applicant, if it has such a process. If it does not have such a process, it must use a decision-making process agreed to and adopted by the group.

Section 251B of the *Native Title Act 1993* (Cth) should be amended to provide that a claim group may authorise an applicant *either* by a traditional decision-making process *or* a process agreed to and adopted by the group.

Recommendation 10–2 Section 251A of the *Native Title Act 1993* (Cth) requires persons holding native title to use a traditional decision-making process for authorising an indigenous land use agreement (ILUA), if they have one. If they do not have one, they may use a decision-making process agreed to and adopted by the persons.

Section 251A of the *Native Title Act 1993* (Cth) should be amended to provide that persons holding native title may authorise an ILUA *either* by a traditional decision-making process, *or* a decision-making process agreed to and adopted by the group.

Recommendation 10–3 Regulation 8 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) provides that common law holders must use a traditional decision-making process in relation to giving consent for a native title decision, if they have one. If they do not have one, they must use a decision-making process agreed to and adopted by the common law holders.

Regulation 8 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) should be amended to provide that common law holders may give consent to a native title decision using *either* a traditional decision-making process *or* a decision-making process agreed on and adopted by them.

Recommendation 10–4 Section 203BC(2) of the *Native Title Act 1993* (Cth) provides that a native title holder or a person who may hold native title must use a traditional decision-making process to give consent to any general course of action that the representative body takes on their behalf, if they have one. If they do not have one, they must use a decision-making process agreed to and adopted by the group to which the person belongs.

Section 203BC(2) of the *Native Title Act 1993* (Cth) should provide that a native title holder or a person who may hold native title may give consent to any general course of action that the representative body takes on their behalf using *either* a traditional decision-making process *or* a decision-making process agreed to and adopted by the group to which the person belongs.

Recommendation 10–5 The *Native Title Act 1993* (Cth) should be amended to clarify that the claim group may define the scope of the authority of the applicant.

Recommendation 10–6 The *Native Title Act 1993* (Cth) should be amended to provide that the applicant may act by majority, unless the terms of the authorisation provide otherwise.

Recommendation 10–7 Section 66B of the *Native Title Act 1993* (Cth) should provide that, where a member of the applicant is no longer willing or able to perform the functions of the applicant, the remaining members of the applicant may:

(a) continue to act without reauthorisation, unless the terms of the authorisation provide otherwise; and

(b) apply to the Federal Court for an order that the remaining members constitute the applicant.

Recommendation 10–8 The authorisation of an applicant sometimes provides that if a particular member of the applicant becomes unwilling or unable to act, another specified person may take their place.

Section 66B of the *Native Title Act 1993* (Cth) should provide that, in this circumstance, the applicant may apply to the Federal Court for an order that the member be replaced by the specified person, without requiring reauthorisation.

Recommendation 10–9 The *Native Title Act 1993* (Cth) should be amended to provide that a member of the applicant must not obtain an advantage or benefit at the expense of the common law holders.