28 June 2013

Native Title Unit
Attorney-General’s Department
3-5 National Circuit
Barton ACT 2600

By email native.title@ag.gov.au

Submission to Draft Terms of Reference for a Review of the Native Title Act 1993 (Cth) by the Australian Law Reform Commission

Thank you for the opportunity to provide the following submission in relation to the proposed review of the Native Title Act 1993 (Cth). The CNTA notes and welcomes the increasing interest in reform of the native title process at all stages.

This submission has been drafted in consultation with Board Members from the Centre for Native Anthropology (CNTA) at the Australian National University. The CNTA was established in 2010 in response to an identified shortage of skilled and experienced anthropologists to conduct native title research. The opinions contained in this submission are ours alone, and should not be taken as representative of those of our funding partner, the Attorney General’s Department.

Reflecting CNTA’s stated objectives, our submission is primarily concerned with those aspects of the terms of reference which have particular bearing on anthropological and policy issues as they pertain to the native title process.

1. Do the draft terms of reference capture all of the key issues arising under the Act relating to connection, and authorisation and joinder?

Connection

The CNTA fully supports the inclusion of a review of the processes of establishing connection under the Native Title Act 1993 (Cth).

One of the potential amendments outlined in the Scope of Review is based on a reversal of the evidential burden of proof or more accurately, an underlying acceptance of continuity with respondent parties being required to disprove connection. In 2011, the CNTA provided a submission to the Senate Legal and Constituitive Affairs Legislation Committee’s Inquiry to the Native Title Amendment (Reform) Bill 2011. In that submission, the CNTA were supportive of the proposed changes (which are similar to those contemplated in the Draft Terms of Reference under consideration here) while at the same time detailing a number of concerns about the impacts on both native title representative bodies and Aboriginal and Torres Strait Islander claimants. Some of those concerns remain pertinent to the matters under consideration here, and as such a copy of the prior submission is attached.
There are, however, a small number of other issues relating to the reversing of the evidentiary burden of proof which may require further consideration and are therefore set out in brief here.

The current system for funding of native title representative bodies has facilitated claimants to take a relatively active and pro-active role in the pursuance of their native title rights. This active involvement has contributed to an enhanced understanding among claimants of the rights recognised through native title and the responsibilities associated with maintaining those rights into the future. Also, this involvement has assisted in the establishment of governance structures which may persist in post-determination settings. A fundamental reconfiguring of the processes of establishing connection may have flow on impacts in these areas especially if such changes result in a reduction of funding available to native title representative bodies.

It also appears that reversing the evidentiary burden of proof would have significant impacts on respondent parties, especially State and Commonwealth Governments as the primary respondent to most claims. Should the task of disproving the continuous practice of law and custom fall on these respondent parties, it would seem logical that such parties would be required to become significant commissioners of native title research. Such developments would pose a number of challenges to those parties including to their existing internal professional capacities.

Reversing the evidential burden of proving native title may also result in definitional ambiguity within the Act, triggering legal uncertainty which could lead to the more litigious pursuance of native title and the need to test reforms via the Court. These outcomes may prove to be against the best interests of both claimants and respondent parties.

Across the board, the length of time that such changes could take to design, implement and establish would have the potential to negatively impact on the timeliness of the delivery of native title outcomes for Aboriginal and Torres Strait Islander peoples. A review which is attentive to the form and substance of these potential impacts would be welcome.

Alternatively amendments of the kind proposed for section s223, which while appearing as less wide-reaching, may nevertheless make highly significant gains towards delivering greater access to justice for Aboriginal and Torres Strait Islander people, while maximizing the existing structures within which native title is pursued. This could include the amendments mentioned in the draft Scope of Review being:

1. clarify the meaning of ‘traditional’, to allow for the evolution and adaptation of cultural and recognition of native title rights and interests
2. confirm that ‘connection with the land and waters’ does not require physical occupation or continued or recent use, and
3. empower courts to disregard substantial interruption or change in continuity of acknowledgement and observance of traditional laws and customs where it is in the interests of justice to do so.

With regard to point (1) there remains a strong argument for a revised definition of the concept of ‘tradition’ to be embedded in the Act. Such changes would have the potential for the definition to be more in-step with current anthropological understandings of the concept as it relates to Aboriginal and Torres Strait Islander people. It would appear that there are a number of previous native title case outcomes which provide a solid legal foundation for such a clarification to occur.

The amendments suggested in points (2) and (3) are also worthwhile and are particularly pertinent for those Aboriginal and Torres Strait Islander people who have been forcibly removed from their traditional land and waters and/or otherwise had periods of substantial interruption or change in the continuity of their law and custom. This is particularly the case for those raising claims in more settled areas of Australia, who arguably face greater challenges in meeting the requirements of the Act as currently set out.
The CNTA also wish to note the increasing frequency of consent-determinations as a means for resolving claims. Although no mention has been made of this in the current Scope of the Review, there may well be issues relating to the establishment of connection and recognition of rights under consent-determination negotiations.

As has previously been stated, changes to the establishment of connection have perhaps the greatest potential to impact on the carriage of native title. The CNTA fully endorses the inclusion of connection as a key area for consideration within the Terms of Reference for the ALRC’s Review.

**Authorisation**

Sections of the Act relating to authorisation can have impacts on the longer term viability of a claim group and also on their post-determination governance. Requiring native title representative bodies and claimants to hold claim group meetings to effect a revised authorisation places a heavy burden on those parties to achieve such outcomes, often within relatively short periods of time.

The CNTA supports the inclusion of authorisation as an issue within the scope of the review.

Of particular concern is s66B of the Act which sets out the criteria under which a claimant may be removed as a named applicant. This is particularly the case in situations where an applicant:

- no longer wishes to act; or
- has died or become incapacitated.

Given the duration of the native title claims process, these are likely to be relatively common occurrences and hence should not place an undue burden on either the native title representative bodies or the claimants. Further consideration of addressing this section of the Act would be welcomed.

**Joinder**

The timely progression of native title claims in a number of states is now heavily impacted by the increasing frequency with which parties seek to be joined to claims. Although not the only kind of potential respondents, Aboriginal and Torres Strait Islander parties (be they ‘dissident members of the claim group’ or other Aboriginal and Torres Strait Islander parties concerned about the impact of the progression of the claim on their native title rights), now anecdotally form a significant proportion of those seeking to be joined.

While in the longer term these processes may not impact on the capacity of the claimant group to have their rights recognised, these processes can hinder and substantially increase the timely resolution of a claim, particularly when other respondent parties indicate a willingness to enter into negotiations towards a consent-determination.

That being said, the capacity to have issues heard as a potential respondent party is nonetheless key to the realisation of justice for all involved. Striking the appropriate balance between the rights of those wishing to progress their native title claim and those who wish to be joined to the claim might be seen to be an area within which the Court is increasingly being required to intervene.

The CNTA supports a review which considers the processes around respondent parties seeking to be joined to claims, and particularly:

- the operation of existent relevant provisions within the Act (such as s84(8)),
- the Court’s current role and capacity, and
- the existence of appropriate case law.
2. Are there any additional issues that should be included in the terms of reference?

The CNTA also recognises the potential efficacy of a Terms of Reference which show attentiveness to the following issues within the broader native title landscape.

- A consideration of issues relating to the historical extinguishment of tenure, particularly in instances where the claimant group have maintained connection to the lands and waters in question.

The CNTA understands that other organisations may provide submissions which give more in-depth consideration to these issues in view of the Draft Terms of Reference.

- Governance and sustainability of native title outcomes, particularly as it relates to the management of derived benefits and the carriage of fiduciary duties by applicants. These issues pose barriers to the realisation of fairness and access to benefits both within current claim groups and also across generations.

The CNTA notes that the Government has appointed a Working Group to provide feedback on this issue and that the findings of the Working Group will be considered as part of this review.

In summary, the CNTA broadly supports the Draft Terms of Reference for the Australian Law Reform Commission's review of the 

Native title Act 1993 (Cth) and look forward to being able to provide further feedback into the review as may be appropriate.

Yours sincerely,

Dr Cameo Dalley
Research Fellow, CNTA

Professor Howard Morphy (Chair of Board, Centre for Native Title Anthropology)
Professor Nicolas Peterson (Director, Centre for Native Title Anthropology)
Ms Toni Bauman (CNTA Board Member)
Mr Simon Correy (CNTA Board Member)
Dr David Martin (CNTA Board Member)
Ms Jodi Neale (CNTA Board Member)
Mr John Southalan (CNTA Board Member)
Attachment One: CNTA Submission into the Senate Legal and Constitutional Affairs Legislation Committee: Inquiry into the Native Title Amendment (Reform) Bill 2011
5 August 2011

Senate Legal and Constitutional Committees
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

By upload to https://senate.aph.gov.au/submissions

Submission to Senate Legal and Constitutional Affairs Legislation Committee:
Inquiry into the Native Title Amendment (Reform) Bill 2011

Thank you for the opportunity to provide the following submission in relation to the Native Title Amendment (Reform) Bill 2011. This submission is made on behalf of Board Members and staff from the Centre for Native Anthropology (CNTA) at the Australian National University. CNTA was established in 2010 in response to an identified shortage of skilled and experienced anthropologists to conduct native title research. All of the individuals who are signatories to this submission are qualified anthropologists with experience acting as expert witnesses in native title claims. The opinions contained in this submission are ours alone, and should not be taken as representative of those of our funding partner, Attorney General’s Department.

Reflecting CNTA’s stated objectives, our submission is primarily concerned with the proposed changes to Items 61AA and 61AB, which introduce a presumption of continuity of traditional laws and customs where connection to lands and waters has been established. The effect of these proposed changes is a shift in the onus of proof to respondent parties who will be required to demonstrate significant rupture of this connection.

Shifting the burden of proof: possible consequences for native title research

CNTA fully supports the main objectives of the Bill as stated in the Explanatory Memorandum, that being to address the barriers claimants face in making the case for a determination of native title rights and interests. In particular, we support the proposed amendments to 61AA and 61AB. We recommend, however, for consideration to be given to the implementation of these changes so as to ensure that they do not in fact
work against the interests of Aboriginal and Torres Strait Islander peoples involved in native title research.

In an environment where the presumption of continuity of traditional laws and customs is uncontested, the proposed changes to the onus of proof may indeed be effective in speeding-up the resolution of claims. Demonstration of ongoing continuous practice of certain laws and customs from “sovereignty” will no longer always be required, potentially vastly reducing the need for Aboriginal testimony about the character of laws and customs in the present. Our concern, however, is primarily about the possible impact of these proposed amendments in circumstances where the presumption of continuity is challenged, and relationships between parties involved in a native title claim (which may include respondent parties who are other Aboriginal people or native title claimants) are hostile.

61AA (1): The need to demonstrate traditional connection to lands and waters remains

We are concerned that the proposed shift in the onus of proof to respondent parties will be assumed by some to mean that the research burden for native title claimants, and therefore in the research workload of native title representative bodies, will be substantially reduced. We draw attention to the fact that native title claimants and their representatives will presumably still have to undertake considerable anthropological and ethno-historical research in order to satisfy the Court that the circumstances listed at 61AA(1) exist. We suggest that this will still require ongoing funding of native title representative bodies’ research activities at existing levels.

61AA (2): Proving against the presumption continuity

Subsection 61AA(2) provides for the presumption of the continuity of laws acknowledged and customs observed where circumstances in 61AA(1) have been proven to exist, in the absence of proof to the contrary. We fully support the presumption of continuity of laws and customs in these circumstances. However, we have a number of concerns about the possible consequences for the native title research process and research outcomes for native title claimants should respondent parties aggressively seek to challenge presumptions of continuity. Most of these concerns arise from the possibility that, burdened with the onus of disproving continuous practice of law and custom, respondent parties may become significant commissioners of native title research. We outline our concerns in more detail below.

Research under conditions of free and informed prior consent

As it stands, native title research involves complex ethical and professional relationships between those commissioning research, those conducting research (usually but not always anthropologists), and the Aboriginal and Torres Strait Islander peoples who are the subjects of native title research. We are concerned that where respondent parties become significant commissioners of native title research, these
relationships may at times be further compromised. In particular, we are concerned that anthropologists and other researchers may be commissioned to undertake research into Aboriginal law and custom in circumstances where free and prior informed consent of the Aboriginal and Torres Strait Islander peoples involved has not been established.

**Loss of control over personal and cultural information**

As it currently stands, the native title process makes extraordinary demands on Aboriginal and Torres Strait Islander peoples to participate in research for native title claims. The provision of expert opinion about a group's traditional laws and customs involves considerable primary research with native title claimants. These investigations are at times of a highly personal or culturally-restricted nature. Questions may be asked about individual's birth, death and marriage practices, their interpersonal relationships with family and friends, employment history, religious ritual and other cultural practices. Much of the information recorded during research (for example genealogies and maps) cannot be immediately returned because of concerns around protecting the confidentiality of evidence. But otherwise, for the most part, this information remains under the control of claimants and their legal representatives.

The proposed changes to the presumption of proof will presumably reduce the existing demands on native title claimants to participate in research. We are concerned, however, that if respondent parties become significant commissioners of native title research, Aboriginal and Torres Strait Islander peoples involved in native title claims may lose the capacity to control the circumstances in which research about their history and culture occurs (including deciding who will do such research), and how it is managed in the future. Gaining access to the products of native title research once the claim has been settled may prove difficult, or even impossible.

**Exposure of vulnerable witnesses to hostile examination**

While we acknowledge the proposed changes to 61AA and 61AB will at times reduce the need for Aboriginal people to give lengthy testimony about the ongoing practice of law and custom, we are concerned that vulnerable witness may still be exposed to examination by respondent parties, and in circumstances that are stressful. It may be that Aboriginal testimony will be required to disprove the presumption of continuity, and therefore that key witnesses will at times be subpoenaed to give evidence. It is widely acknowledged that giving testimony in open court can be a particularly stressful experience for Aboriginal witnesses, particularly when they are elderly or frail, are illiterate, or have English as a second language.

This can and does happen as the legislation currently stands. We are concerned, however, that in circumstances where respondent parties seek to disprove continuity and native title claimants do not consent to participate in primary research to this end, the frequency with which Aboriginal people are subpoenaed to give evidence may in fact increase. We are concerned to see that the proposed legislation is implemented in such a way as to address this risk.
To summarise, we broadly support the changes to the Native Title Act proposed by the Reform Bill. But we are concerned that in some circumstances the proposed changes will not always ameliorate some of the injustices inherent in the process as it already exists. In particular, the implications of burdening respondent parties with proving significant social rupture may at times compromise the capacity of Aboriginal people to control and access significant research about their traditional laws and customs.

In order to guard against these risks, we would like to see consideration given to providing some legislative controls around the circumstances in which the presumption of the continuity of laws and customs can be challenged. Vulnerable witnesses could be protected through measures controlling the issuing of subpoenas by respondent parties against native title claimants. Further exploration of possible measures to reduce the burden of proof without diminishing the capacity of Aboriginal and Torres Strait Islander peoples to participate in anthropological research on their own terms and with full and informed consent, is strongly recommended.

Yours faithfully,

Professor Howard Murphy
Chair of Board, Centre for Native Title Anthropology
Director, Research School of Humanities and the Arts

On behalf of:
Professor Nicolas Peterson (Director, Centre for Native Title Anthropology)
Ms Toni Bauman (CNTA Board Member)
Dr Simon Correy (CNTA Board Member)
Dr William Kruse (CNTA Board Member)
Dr Pamela McGrath (Research Fellow, CNTA)
Ms Jodi Neale (CNTA Board Member)