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Native Title Unit
Attorney-General's Department
3–5 National Circuit
BARTON ACT 2600

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Dear Sir/Madam

Draft terms of reference for ALRC inquiry into native title system

1 Australian Lawyers for Human Rights (**ALHR**) thanks you for the opportunity to provide comments on the proposed terms of reference for an Australian Law Reform Commission (**ALRC**) inquiry into specific areas of the native title system. Our recommendations on the terms of reference are summarised in [7] below.

2 ALHR commends the initiative and strongly supports the first proposed issue (ie. connection requirements relating to the recognition and scope of native title rights and interests). However we consider that there are two other matters which should be examined in place of the second proposed issue; these matters are: the operation of extinguishment law (see [4]), and the courts' use of historical documents (see [5]).

3 The reason we consider the second proposed issue not as relatively important is that there are already legislative and policy measures which address the objectives of that proposed area of inquiry (ie. claimants', and potential claimants' access to justice, and protection of native title). The second proposed issue would direct the ALRC to examine the authorisation and joinder. The Federal Court already has extensive jurisprudence on both aspects to prevent parties from frustrating the proper course of proceedings,[1] and the *Native Title Act 1993* (NTA) has also been amended to enable the Court to continue hearing a case even where authorisation requirements have not been strictly fulfilled.[2] The Government's restriction of funding for respondent parties (whose interests have *already* legal priority over

1 eg. *Gamogab v Akiba* [2007] FCAFC 74, [50], [63] & [65] (court can place conditions on a party's joinder to proceedings, and control proceedings to prevent irrelevant or inappropriate material or submissions); *Akiba (Torres Strait Regional Seas Claim People) v Queensland (No 1)* [2006] FCA 1102, [29] (the Court may exercise its discretion against joinder if the actual interests relied on are abstract or of limited character – see so similar effect *Buru & Warul Kawa People v Queensland* [2003] FCA 1435, [30]); *QGC Pty Ltd v Bygrave (No 2)* [2010] FCA 1019, [111]-[114] (operation of the authorisation provisions); *Dingaal Tribe v Queensland* [2003] FCA 999, [8] (authorisation does not requiring proof of individual decisions by all or most of the members of the claim group).

2 NTA, s84D (introduced in 2007, following problems identified in the *Wongatha* proceedings); see *Roe v Kimberley Land Council* [2010] FCA 809, [51]-[54].

any asserted native title claims[3]) has also decreased the additional obstructions that that funding sometimes enabled. There are issues other than joinder and authorisation which cause greater injustice for many of native title groups. In our submission, two of these merit inquiry by the ALRC: extinguishment and the use historical documents.

4 The common law's approach to extinguishment of native title is problematic in two key respects: historical extinguishment, and racial discrimination.

a) The problem of 'historical extinguishment' is that the common law adjudges that tenures and activities which no longer exist/occur nevertheless still extinguish native title[4] even where the relevant group maintains cultural connection and practices in relation to the land.[5] There are only few, and limited, instances where the NTA removes the extinguishment from historical tenure;[6] and the Government is aware of the injustices which have arisen from historical extinguishment.[7]

b) Extinguishment is determined on a racially discriminatory basis. The High Court has ruled that, unless modified by parliament, courts use the origin of a right to determine the relationship between a native title right (based on Indigenous custom & belief) and a right granted by government.[8] The non-Indigenous right prevails.[9] The relationship of these rights is not determined by other methods which would be more consistent with human rights and common sense, eg. comparing the importance of each right to its user, comparing the frequency of use, or specifying that the non-Indigenous rights prevail over but do not extinguish the Indigenous rights.

c) The issue is summarised below.

> [T]he common law test for extinguishment is…the inconsistency of incidents test. The most Indigenous people could have asked from the common law was that, where the NTA did not apply directly to effect extinguishment, the common law would adopt an approach which favoured non-extinguishment over extinguishment. That is, an expectation that Indigenous People would be able to enjoy their property rights to the same extent as that enjoyed by non-Indigenous People. Instead the High Court took its lead from the NTA as outlined in *Miriuwung Gajerrong* [*Ward v Western Australia*]. ... In addition to entrenching inequality, the [*Ward*] decision provides an unstable and uncertain basis for traditional owners seeking to utilise the cultural, social and economic values of their land. Uncertainty about which tenures extinguish native title rights and to what extent can be added to the other uncertainties infusing the title; uncertainty about how traditions and customs translate into rights; uncertainty about the extent to which rights can evolve and change; and finally uncertainty at the layers of extinguishment that might have occurred since the assertion of sovereignty. The only generalisation and certainty for native title holders is where a particular tenure is found to extinguish all native title rights, regardless of the nature of the rights asserted, as in the *Wilson v Anderson* decision. ... The human rights principles of equality and non-discrimination can offer a different type of certainty for native title holders, that is, that they are able to enjoy their property with the same protection offered to non-Indigenous title holders.

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3 eg. NTA, ss 23G(1), 44H, 238; *Wik Peoples v Queensland* (1996) 187 CLR 1, 193; *Western Australia v Ward (Miriuwung and Gajerrong People)* [2002] HCA 28, [192].
4 eg. *Western Australia v Ward (Miriuwung and Gajerrong People)* [2002] HCA 28, [222].
5 eg. *Western Australia v Ward (Miriuwung and Gajerrong People)* [2002] HCA 28, [222]; *Gumana v Northern Territory* [2007] FCAFC 23, [127]; *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya* [2005] FCAFC 135, [64].
6 NTA, ss 47-47B (historical extinguishment can be disregarded only where pastoral leases held by native title claimants, or a reserve/unallocated crown land which was occupied by the claimants at the time the claim was lodged).
7 eg. N Roxon MP Attorney-General, *Native Title Amendment Bill 2012*, Second Reading Speech, Hansard 28 November 2012, p13650-13651; and see also the various submissions on the 'Historical extinguishment consultations' on website of the Attorney-General's Department www.ag.gov.au/LegalSystem/NativeTitle/Pages/Pastnativetitlereforms.aspx
8 *Western Australia v Ward (Miriuwung and Gajerrong People)* [2002] HCA 28, [78]-[79] & [82].
9 *Western Australia v Ward (Miriuwung and Gajerrong People)* [2002] HCA 28, [82]; *Fejo (Larrakia People) v Northern Territory* [1998] HCA 58, [43]-[46].

That text is from a 2002 report of the Australian Human Rights Commission, which contains significantly more material and guidance in relation to the reforms needed in relation to extinguishment law.[10]

d) The High Court justifies this result by explaining it as simply an effect of the British imposition of sovereignty over Australia, which the Court and the common law cannot modify.[11] Even if that is correct, the injustices and human rights inconsistencies from the current law of extinguishment make this a most appropriate issue for legislative law reform, and therefore examination by the ALRC. The common law has had many provisions which society grew to consider inappropriate and needing rectification by statute, eg: the lack of appeal from a court decision, that the Crown is immune from statutory law, the executive's ability to dismiss judges, and that *mens rea* is required for every offence (ie. no strict liability offences). There are many examples where governments and parliaments have, and should, act to change what the common law would otherwise provide. This is another such example.

5 Problems in the use of historical documents arise from the authority and precedent of the *Yorta Yorta* jurisprudence.

a) The *Yorta Yorta* decisions dealt with an 1881 'petition', citing it as 'evidence' that the Aboriginal people at that time had foregone their customs and connection to land.[12] The petition had been written by the British colonisers:[13] the trial judge observed it had been prepared with (or by) a missionary who beat Aboriginal women and children 'if they committed offences of a moral or religious nature' and punished people for not attending Christian services or cricket.[14] Notwithstanding that, the judge applied the document as if it were some contract entered on equal terms:

> 'The petition contains a frank acknowledgment that "all land within (the petitioners') tribal boundaries has been taken possession of by the government and white settlers" a state of affairs which no doubt gave rise to their desire to change "our old mode of life" in favour of "settling down to more orderly habits of industry". A number of the signatories, who apparently subscribed to these sentiments were persons who are [Yorta Yorta]…ancestors.'[15]

b) This approach is in stark contrast to the jurisprudence from US, Canadian and NZ courts in dealing with documents from the 18th-early 20th centuries. The highest courts in these countries have repeatedly cautioned against a literal interpretation and application of historic agreements[16] because to do so ignores the power imbalance that existed in most cases.[17] Historic agreements usually documented terms that had been agreed orally (with the writing often not recording the full extent of the oral agreement[18]) and these documents were invariably written in English and rarely

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10 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2002*, Human Rights & Equal Opportunity Commission www.humanrights.gov.au/social_justice/nt_report/ntreport02/index.html (see ch 2 & 3).

11 eg. *Fejo (Larrakia People) v Northern Territory* [1998] HCA 58, [48]; *Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58, [37].

12 *Members of the Yorta Yorta Aboriginal Community -v- Victoria* [1998] FCA 1606, [119]-[12] (first instance decision, affirmed on appeal by High Court in *Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58, [68] & [95]-[96]).

13 The document states: '…The humble petition of the undersigned Aboriginal natives…respectfully showeth: That all the land within our tribal boundaries has been taken possession of .... [and] We have been under training for some years and feel that our old mode of life is not in keeping with the instructions we have received and we are earnestly desirous of settling down to more orderly habits of industry, that we may form homes for our families. ... We hopefully appeal to your Excellency, as we recognise in you, The Protector specially appointed by Her Gracious Majesty the Queen "to promote religion and education among the Aboriginal natives of the colony", and to protect us in our persons and in the free enjoyment of our possessions, and to take such measures as may be necessary for our advancement in civilization. And your petitioners, as in duty bound will ever pray.': *Yorta Yorta* [1998] FCA 1606, [119].

14 *Yorta Yorta* [1998] FCA 1606, [37]-[40].

15 *Yorta Yorta* [1998] FCA 1606, [120] (affirmed in [2002] HCA 58, [68] & [95]-[96]).

16 eg. *New Zealand Māori Council v Att-Gen* [1994] 1 AC 466, 475; *New Zealand Māori Council -v- Att-Gen* [1987] 1 NZLR 641, 622.

17 Interpretation must take into account 'the context in which the treaties were negotiated, concluded and committed to writing': *R v Badger* 1996 CanLII 236, [52]; see also *R v Sundown* 1999 CanLII 673, [24] & [25]; *Simon -v- R* 1985 CanLII 11, [27]; *US v Winans* 198 US 371 (1905), 381.

18 Where a written agreement does not reflect all negotiated and agreed aspects, it is unconscionable to ignore oral terms: *R v Marshall* 1999 CanLII 665, [4], [12] & [44].

translated into Indigenous languages[19]. The situation summarised by the US Supreme Court was common in many areas:

> The Indian Nation did not seek out the United States [Government] and agree upon [terms]...in an arm's-length transaction. Rather treaties were imposed upon them, and they had no choice but to consent. As a consequence...treaties with the Indians must be interpreted as they would have understood them and any doubtful expressions in them should be resolved in the Indians' favour[20]

These various cases emphasise the key interpretation of such documents is *the understanding of the indigenous parties at the time the agreement was made.*[21] This is especially so where the group was giving up various rights/entitlements[22] or where there are ambiguous terms,[23] which should be interpreted in favour of the Indigenous party[24].

c) Australia's jurisprudence on this aspect is significantly out of step with many other common law jurisdictions with similar circumstances. Indeed the *Yorta Yorta* approach (of interpreting documents from the 1800s as informed undertakings by the Indigenous people described in such document) is even at variance with the Parliamentary indications subsequent to that 1881 petition.[25] This is, therefore, an appropriate and important issue which the ALRC should examine.

6 We consider the proposed 'Scope of Reference' and 'Consultation' are appropriate.

7 In conclusion, ALHR recommends the only change to the draft terms of reference are those indicated in the following mark up.

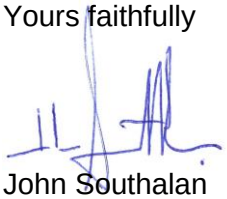
> REFER to the Australian Law Reform Commission for inquiry and report, pursuant to subsection 20(1) of the *Australian Law Reform Commission Act 1996*, the native title system in relation to three~~two~~ specific areas, as follows:
>
> - connection requirements relating to the recognition and scope of native title rights and interests,
> - the extinguishment of native title, particularly:
>   - historical extinguishment by tenures which no longer exist or are actively used; and
>   - the racially discriminatory basis in which extinguishment is determined; and
> - the Courts' approach and use of historical documents and agreements, particularly the authority of the *Yorta Yorta* jurisprudence, that a document from the 1800s constituted 'evidence' that the Aboriginal people at that time confirmed they were giving up their customs.
> - ~~the identification of barriers, if any, imposed by the Act's authorisation and joinder provisions to claimants', and potential claimants':~~
>   - ~~access to justice, and~~
>   - ~~access to and protection of native title rights and benefits~~.

19 Or, in the case of New Zealand's Treaty of Waitangi, the translation into Māori used different meanings to the English versions of the text: *New Zealand Māori Council -v- Att-Gen* [1987] 1 NZLR 641, 670-672.
20 *Choctaw Nation v Oklahoma* 397 US 620 (1970) 631 (citations omitted), referring to authority from earlier decisions of *Jones v Meehan* 175 US 1 (1899), and *Alaska Pacific Fisheries v United States* 248 US 78 (1918).
21 eg. *Nowegijick v The Queen* [1983] 1 SCR 29, 36; *US v Winans* 198 US 371 (1905), 381.
22 eg. *Blueberry River Indian Band v Canada* [1995] 4 SCR 344 (S Ct Canada) [6], [7] & [14].
23 eg. *US v Winans* 198 US 371 (1905), 381.
24 eg. *R v Badger* 1996 CanLII 236, [5] & [41]; see also Bowering, J (2002). 'Certainty and Finality in the Nisga'a Agreement' 11 *Dalhousie J of Legal Studies* 1, 21.
25 eg. in 1883, the Western Australian Attorney General explained that 'in Acts which were made by Europeans dealing with uncivilised persons we ought to proceed with the greatest care, because, first, we are powerful and these people are powerless, and, in the next place, they were not represented; therefore in legislating for them we were acting without their having an opportunity of expressing their views on the matter. This was a necessity of the case.': Hon AP Hensman (Attorney General), *Aboriginal Native Offenders Bill, Second Reading Speech*, 3 August 1883, Hansard, p137.

8 We would like to make this letter available through our website. This is a standard practice for all our work, wherever possible. If you do not want this letter to be made publically available, please can you advise us within 10 business days of receipt of this letter.

9 If you have any questions regarding this matter, please contact me on john@southalan.net .

Yours faithfully



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