

**Joint Select Committee on Constitutional Recognition
Relating to Aboriginal and Torres Strait Islander Peoples
*Melbourne 26 September 2018***

**Submission by the
National Native Title Council**

Background

The National Native Title Council (NNTC) is a company limited by guarantee under the *Corporations Act*. Since 2007 it has operated as the peak body of Native Title Representative Bodies (NTRBs) and Native Title Service Providers (NTSPs) (collectively - NTRB/SPs) recognised under the *Native Title Act* (ss203AD and 203FE).

At present 12 of the 15 NTRB/SPs are members of the NNTC.

In 2017 the NNTC altered its constitution to provide for direct membership of Prescribed Bodies Corporate established under s 55 of the *Native Title Act* and other equivalent Traditional Owner Corporations (TOC) established under parallel legislation such as the Victorian *Traditional Owner Settlement Act*.

Currently there are 14 PBC and TOC members of the NNTC. This figure includes the *Gur A Baradharaw Kod Torres Strait Sea and Land Council* the peak body for the 21 Torres Strait PBCs.

The NNTC is then Australia's peak Native Title Organisation.

The Uluru Statement

The key elements of the Uluru statement can be summarised as the ‘establishment of a First Nations Voice enshrined in the Constitution’ and the creation of a Makarrata Commission ‘to supervise a process of agreement-making between governments and First Nations and truth-telling about our history.’

For reasons discussed below, the NNTC has not developed a formal position in relation to the Uluru Statement proposals. This noted, many of the leadership of Native Title Organisations across Australia were actively involved in the First Nations Constitutional Convention that developed the Uluru Statement. It is the understanding of the NNTC that Native Title Organisations across Australia are broadly supportive of the key elements of the Constitutional Convention.

Despite this broad support for the elements of the Uluru statement there are a number of obstacles to the NNTC formally endorsing it.

- First, seven of the twelve NTRB/SP members of the NNTC are Native Title Service Providers. NTSPs are funded by the Commonwealth to (broadly) prosecute native title applications and act in future act negotiations on behalf of Traditional Owners. They do not have the representative functions or structures of Native Title Representative Bodies or PBCs (and TOCs).
- Second, for the NNTC to adopt a formal position in relation to a matter of such broad and ongoing significance as the matters contained in the Uluru Statement a thorough ongoing consultation would be required with the broad native title sector. The NNTC has not had the opportunity or resources to undertake such a consultation at this stage.

These technical factors noted, it should be restated that the leaders of many Native Title Organisations were participants at the First Nations Constitutional Convention which developed the Uluru Statement and it is understood that beyond this there is broad support within Native Title Organisations for the key elements of the Statement. A review of the transcript of submissions to the Joint Select Committee’s regional consultations supports this conclusion.

Issues Raised in the Interim Report

The NNTC notes that subsequent to the release of the Committee’s Interim Report the Committee’s current deliberations have become more focussed on aspects of the practical implementation of the key elements of the Uluru statement rather than the key initial task of gaining an understanding of the level of support for those elements.

Clearly, for the reasons outlined above in relation to the Uluru Statement in general, the NNTC has not been in a position to adopt a formal position in relation to the more practical implementation issues currently being considered by the Committee.

However, as Chair of the NNTC, Mr Lowe in his oral evidence to the Committee put forward some fundamental principles which all Native Title Organisations are likely to believe should guide the development of the implementation mechanisms behind the key elements of the Uluru Statement. These are as follows:

- The proposition that a National Voice should have effective local and regional structures upon which the National Voice is founded is unarguably correct.
- The attribute that defines Aboriginal and Torres Strait Islander people as the First Peoples and Nations of Australia is the association with land, in accordance with traditional laws, extending prior to the initial assertion of sovereignty of this continent by the British Crown.
- As such, to have legitimacy as the National Voice of Australia's First Peoples, it is necessary for any structure to incorporate recognition of those traditional laws and the association to country upon which they are based.
- These matters of principle are buttressed by the practical reality of the development of Native Title Organisations in Australia since the commencement of the *Native Title Act* in 1993.
- In addition to the existing Native Title Representative Bodies there are currently 187 PBCs in the country. There are currently a number on non-PBC TOCs in addition to this.
- It is estimated that there will ultimately be in excess of 300 PBCs nationally and in combination with the TOCs established under parallel regimes (such as the *Victorian Traditional Owner Settlement Act* and the Noongar settlement) these organisations will have statutory and land management responsibilities in relation to most of the land mass of Australia. In fact, it is estimated that when the current native title determination application process is complete that, in combination with the various statutory land rights regimes, at least 70% of the country's land mass will be the subject of some form of land rights recognition.¹
- A PBC (or TOC or NTRB) is a Traditional Owner organisation representing those Indigenous Australians with proven traditional responsibilities in relation to their relevant land and waters. They constitute legitimate representative institutions for the purposes of the UN Declaration of the Rights of Indigenous Peoples (for example Art 32.2).

¹ Ian Anderson, Australian Government address to the 17th Session of the UN Permanent Forum on Indigenous Issues, New York, 18 April 2018.

- Accordingly, to have legitimacy, the structure of any National Voice must incorporate a role for Native Title Organisations.
- These matters noted, a National Voice must also include within its structure mechanisms to accommodate the contemporary reality of Indigenous Peoples. Many of whom, while maintaining a connection with their traditional lands, reside elsewhere.
- This duality is currently being explored in discussions with State and Territory Governments. The development of a “Treaty” process is an example of this.

In oral evidence to the Committee Mr Lowe also emphasised that there is a need to ensure appropriate recognition of traditional laws and the association to country upon which they are based through. In addition, the integration of native title institutions in any National Voice structure should not be detracted from by the fact that there are unresolved native title determination applications or areas where there are competing claims for recognition by some Traditional Owner groups.

Process

In addition to these structural principles, the questions posed by the Committee in its Interim Report suggests that some discussion of the appropriate process for consideration of the National Voice structures is also appropriate.

In its Interim Report the Committee poses questions such as:

- What resources would be required for the operation of an effective voice?
- What governance mechanisms should oversee the national voice?
- How are internal disputes resolved?
- How much time should the voice be provided to advise in relation to legislation?
- How does the national body advise on legislation that needs a quick turnaround?
- What resources would be required for effective operation of local or regional voices?
- What is the most cost-effective way the voice can be implemented?

The foregoing is merely some of the over 100 questions posed in the Interim Report solely in relation to the National Voice. A more general question is posed in relation to the proposed Makarrata Commission.

The NNTC appreciates that at the current political juncture, where there is significant either ill-informed or frankly mischievous misinformation being put forward regarding the National Voice proposal, some exploration of possible structures underpinning the National Voice is necessary.

The NNTC submits however that care should be exercised in attempting to, through the processes of the Committee, develop a comprehensive model for the National Voice and Makarrata Commission.

The point to be made is that, the Committee should be alert to the need to focus on the core principles upon which the National Voice and the Makarrata Commission are to be established and not descend overly into the detail of drafting the legislation by which those core principles are to be implemented.

Those core principles might be said to include:

- The need to establish a constitutionally enshrined National Voice with the function of commenting upon legislative and administrative proposals that impact upon Indigenous Peoples
- The need for that National Voice to be built upon local and regional structures that are representative of Australia's First Peoples and have legitimacy under traditional law and custom (as outlined above.
- The need to facilitate agreement making and reconciliation between the First Nations and the Australian Governments through the establishment of a Commission charged with this task.

Rather than developing the detail of the model for a National Voice and Makarrata Commission through the processes of a Parliamentary Joint Select Committee, consideration should be given to developing the mechanisms for implementation of the above core principles through an appropriately resourced national Indigenous consultative process.

The outcomes of this consultative process could then be refined and implemented consequent upon the 'in principle' agreement to incorporation of the core principles within the Constitution. Such an approach corresponds more appropriately with the processes of constitutional development generally applicable to the broader Australian polity.

This last point warrants some expansion. In the original Constitution, the Executive Government of the Commonwealth is established in the ten sections comprised in Chapter II of the Constitution. At least three of those sections can be described as transitional provisions. Even noting that the operative provision of the Constitution describes the familiar model of a Westminster system of Government, the detail of the specific machinery of government structures was not required to be spelt out prior to the adoption of the *Constitution*.

In a similar vein the successful 1946 referendum that introduced s 51 (xxiiiA) of the Constitution considered only the (then novel) notion that the Commonwealth would assume responsibility for the provision of social welfare. The proponents of that referendum were not required to introduce as part of the debate around the proposal a draft of any future *Social Security Act* (which was passed in 1947).

Likewise, the debate around 1967 referendum that led to the amendment of the s 51 (xxvi) "Race Power" was around the general principle of the Commonwealth Government having legislative capacity with respect to Aboriginal people. It was not considered necessary to describe the detail of legislation that may be considered in light of the proposed constitutional amendment.

The NNTC is concerned to ensure that Indigenous people today are not forced into a position of needing to debate the detail of legislative detail in the context of a debate whose legitimate focus is to achieve the long overdue Constitutional recognition of those peoples as the First Peoples of this land.

Closing

The NNTC would like to thank the Committee for the opportunity to make this submission and to offer its assistance in the future in any fashion the Committee considers desirable.