



National Native Title Tribunal

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Data Availability and Use
Productivity Commission
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Dear Commissioners,

Productivity Commission Issues Paper on Data Availability and Use

The National Native Title Tribunal (NNTT) welcomes the opportunity to provide submissions to the Productivity Commission in relation to the matters raised in the *Issues Paper on Data Availability and Use* (April 2016) (the Issues Paper).

This submission provides background information about the roles and functions of the NNTT, and comments on aspects of the inquiry relevant to the management and governance of information about Indigenous peoples' rights and interests in land.

The NNTT notes that increasing the availability and use of public data sets may have different consequences for Indigenous Australians compared to other citizens. I would like to reiterate here our recommendation that the Inquiry address Aboriginal and Torres Strait Islander peoples' unique rights and interests in relation to the management of information about their lives, lands and cultural practices, and highlight the need for the Australian Government to involve Aboriginal and Torres Strait Islander peoples in decisions about how such data should be managed into the future.

We encourage you to consider these submissions as you progress the Productivity Commission's inquiry.

Yours sincerely,

Raelene Webb QC
President – National Native Title Tribunal

NATIONAL NATIVE TITLE TRIBUNAL'S SUBMISSION IN RESPONSE TO THE PRODUCTIVITY COMMISSION ISSUES PAPER ON DATA AVAILABILITY AND USE

I. Introduction

The National Native Title Tribunal

The National Native Title Tribunal (Tribunal) is an independent statutory authority established by the *Native Title Act 1993* (Cth) (NTA) as a special measure for the advancement and protection of Aboriginal and Torres Strait Islander peoples and is intended to advance the process of reconciliation among all Australians. It comprises the President and members. The statutory position of Native Title Registrar is also established by the NTA. For the purposes of this submission, the organization which includes the staff supporting the Tribunal and the Native Title Registrar (Registrar) will be referred to as the NNTT.

Many of the matters that come before the Tribunal relate to third-party use and development in areas where native title rights have been legally recognised, or are being claimed. The Tribunal conducts mediations, inquiries and reviews; assists with agreement making and negotiation of Indigenous Land Use Agreements (ILUAs); and makes arbitral decisions about proposed activity or development on land or waters that has the potential to affect native title (future acts) .

The functions of the Registrar are particularly relevant to issues of digital data use and availability. The Registrar has a number of statutory responsibilities in relation to the management and provision of information about native title, for example: where native title rights and interests exist (and don't exist); the nature of those rights; the identity of the rights holders; and the location of areas covered by ILUAs. The Registrar is responsible for maintaining the National Native Title Register, the Register of Native Title Claims and the Register of Indigenous Land Use Agreements.

The Tribunal's stakeholders

Native title is a significant part of contemporary Australian land tenure, and creating and managing information relationships that enable land users and rights holders to understand each other's interests is crucial to ensuring the successful operation of the system. To date, native title rights have been determined to exist over more than a third of the Australian land mass, and another 30 percent of the country is subject to native title claims that have yet to be determined.

The NNTT has many clients and stakeholders. They include: native title groups; Prescribed Bodies Corporate (PBCs); Commonwealth, state, territory and local governments; mining

and energy companies; pastoralists and graziers; fishers and other primary producers; and water users. These parties are often situated in remote areas; all require reliable and comprehensive information about land tenure in order to negotiate the doing of future acts.

The function and value of data in the native title space

The NNTT is a creator, a custodian and a consumer of large datasets that provide information about the location and nature of native title claims, determined native title rights and native title agreements. It also has a role in facilitating data sharing and ensuring reliable and appropriate relationships between other creators, custodians and users of information about Indigenous land tenure.

Mapping and spatial information play a key role in native title, and the Tribunal's geospatial specialists share large spatial datasets with various Government agencies to support the native title process. We facilitate a number of significant information-sharing relationships between different stakeholders, assisting native title holders, state and territory governments and other land owners and users to build the technology solutions they need to make and sustainably manage native title agreements.

The NNTT publishes extracts from registers of native title claims, determinations and ILUAs online, and these are available to the public through a self-service portal. Much of the NNTT's spatial data is already available as open data and is widely used by stakeholders such as state and territory governments and land developers and owners.

The NNTT plays a significant and long-term role in ensuring the public availability of information about native title in order to facilitate the appropriate management of rights in relation to the doing of future acts. In doing so, the NNTT is guided by the preamble to the NTA, which makes it clear that the purpose of native title is to ensure Aboriginal and Torres Strait Islander peoples receive the full recognition and status within the Australian nation to which their prior rights and interests fully entitle them to aspire, and that the broader Australian society have certainty around the doing of future acts.

II. Submissions

The *Issues Paper on Data Availability and Use* (April 2016) is a broad ranging investigation into the benefits and costs of increasing the availability and use of public and private data by Australian individuals and organisations. The Productivity Commission is to provide recommendations on: increasing data access, standardising the collection, sharing and release of data; and privacy and data security.

It is with these objectives in mind that the NNTT offers the following submissions.

Submission 1: Special consideration to be given to the needs and perspectives of Aboriginal and Torres Strait Islander peoples in the development of policy relating to the availability and use of public data about rights and interests in land.

Any data asset that pertains to the social and economic circumstances of Aboriginal and Torres Strait Islander peoples—particularly those that include information of a personal or culturally sensitive nature—requires special consideration and consultation with Indigenous stakeholders. Development of policies related to the management of such data assets should be conducted in consultation with relevant Indigenous stakeholders.

The United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP), which Australia has endorsed, makes it clear that Indigenous peoples have inherent and inalienable rights and interests in relation to the gathering, ownership and application of information about their social and economic circumstances, cultural practices and traditional lands. They also have the right to participate in decision-making in matters which would affect their rights. The UNDRIP, while lacking the status of a binding treaty, embodies many human rights principles already protected under international customary and treaty law and sets the minimum standards for States Parties' interactions with the world's indigenous peoples.¹ These minimum standards are applicable to the manner in which the Australian government gathers, uses and makes available data about Indigenous citizens.²

Data assets that contain information about Indigenous property rights require particular consideration because of the many and potentially competing values – cultural, economic, historical, environmental - of Indigenous-owned lands.

Importantly, data about Indigenous rights and interests in land may include information of a culturally sensitive or commercially valuable nature. The risks associated with creating greater public access to publicly-owned data needs to be assessed in dialogue with Aboriginal and Torres Strait Islander land owners and rights holders in order to develop appropriate information governance and management measures.

Submission 2: Increase visibility of Indigenous rights and interests in land by creating better linkages between government-owned datasets

Giving consideration to the above point about the need for consultation with Aboriginal and Torres Strait Islander stakeholders in relation to data availability and use, the NNTT draws attention to the desirability of including information about the location and nature of Indigenous rights and interests in land in mainstream tenure management systems.

Open and accessible data about Indigenous rights and interests in relation to other types of tenure is crucial to ensuring Aboriginal and Torres Strait Islander peoples are able to pursue

¹ Law Council of Australia, Background Paper: Policy Statement on Indigenous Australians and the Legal Profession, (February 2010) p6.

² See UNDRIP, Articles 3, 4, 5, 15(i), 18, 19, 20(i), 23, 31, 32, 33, 38 and 42.

economic development opportunities on traditional lands through the leveraging of their property rights (which include communal, inalienable rights under native title and through state/territory land rights schemes). The inability to access relevant data quickly and easily is a potential barrier that may delay or prevent Indigenous Australians taking full advantage of their rights.³

The NNTT considers that increasing the links between land management, land use and geospatial data held by state and territory governments and the Commonwealth, as well as agencies such as the NNTT, will have a very positive effect on the efficiency of certain native title processes, in particular in relation to understanding tenure, and will be of benefit to all stakeholders involved in the management and use of native title lands.

As it currently stands, there is no single, authoritative view of Indigenous rights and interests in land in relation to other tenure. Multiple, incompatible datasets relevant to understanding tenure are held by various federal and state government departments and agencies. Each jurisdiction has its own titling registrar, different kinds of rights and interests are inconsistently recorded or not recorded at all, and there is no national titles registry.

Furthermore, the metadata standards that are used in the management of tenure data do not necessarily reflect how Aboriginal and Torres Strait Islander groups may wish to approach the categorization and governance of various attributes of their land, and therefore do not enable traditional decision making and management strategies (for example, through documenting of access restrictions by family or group identity or gender).

In some instances, data is not freely available but rather is provided at a cost. The only nationally-aggregated cadastre, published by PSMA Australia Limited, is a pay for use dataset, does not carry attributes to identify indigenous or traditionally owned lands, and does not carry identifiers consistent with the information used in negotiations between the State and Territory governments and native title claimants.

The NNTT has recently been involved in exploring options for aligning state and national cadastral datasets in order to achieve a nationally consistent picture of land tenure and associated rights, responsibilities and restrictions in Australia through the work of *Cadastre 2034*, a project led by the Intergovernmental Committee on Surveying and Mapping (ICSM). While we acknowledge that creating such a picture is a technically challenging and resource intensive proposition, we nevertheless believe that the investments of time and energy required to realise such an ambition will have enormous benefits for all land owners and users, not least among them Aboriginal and Torres Strait Islander communities.

³ In May 2015, the Human Rights Commission convened an Indigenous Leaders Roundtable to discuss options to address challenges to Aboriginal and Torres Strait Islander peoples creating economic development opportunities on the Indigenous Estate, and to identify the barriers that prevent the leveraging of the rights and interests (including communal, inalienable rights under native title and through state/territory land rights schemes). For more information, see: <https://www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/projects/indigenous-property-rights>.

We urge the Productivity Commission to consider the need for greater visibility and mainstreaming of Indigenous land tenure and associated rights and interests within the context of this inquiry, and recommend particularly identifying the inclusion of Indigenous rights and interests in the *Cadastre 2034* strategy as being essential for Aboriginal and Torres Strait Islander peoples to realise the full potential of their rights and interests in land.