12. A Frith and M Tehan

Australian Law Reform Commission: Review of the *Native Title Act 1993* – Issues Paper

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1. Angus Frith is a barrister with over 18 years in native title practice across Australia. He has recently completed a PhD titled 'Getting it Right for the Future: Aboriginal Law, Australian Law and Native Title Corporations'. He was a member of the recent Taxation of Native Title and Traditional Owner Benefits and Governance Working Group. Maureen Tehan is an Associate Professor in the Melbourne Law School, with nearly 30 years' experience in legal practice and teaching property law and native title. With Professor Lee Godden, they are both associated with the Agreements, Treaties and Negotiated Settlements project.
2. This submission addresses some of the questions raised in the 'Review of the *Native Title Act 1993* – Issues Paper' ('Issues Paper') published by the Australian Law Reform Commission ('ALRC') in March 2014 in respect of its Review of the *Native Title Act 1993* ('Inquiry') pursuant to Terms of Reference dated 3 August 2013 ('Terms of Reference'). The submission also comments on some of the content of the Issues Paper that is not directly referred to in the questions. It follows the same order as the Issues Paper.

Defining the Scope of the Inquiry

Key Concepts

3. Both the Issues Paper and the Terms of Reference refer to 'connection requirements relating to the recognition and scope of native title'. On its face, this reference to 'connection requirements' limits the scope of the Inquiry to just one arm of the definition of native title in s 223 of the *Native Title Act 1993* (Cth) ('*NTA*'): s 223(1)(b)'s reference to connection with land or waters by traditional laws acknowledged and traditional customs observed. The Terms of Reference could just as relevantly referred to the acknowledgement and observance of those laws and customs and to the recognition of native title rights and interests by the common law, which are referred to in ss 223(1)(a) & (c).
4. While paragraph 13 of the Issues Paper does define 'connection requirements' as 'what must be established in law for native title to be recognised' and to determine the nature and content of native title rights and interests, use of this term tends to limit the scope of attention of the Inquiry to issues other than the evidence of traditional law and custom and of the recognition of native title rights and interests by the common law. Care should be taken to ensure that the Inquiry addresses these issues as well as connection within the meaning of s 223(1)(b).

Question 1: Guiding Principles

5. Principle 1: We strongly agree that acknowledging the importance of the recognition and protection of native title is significant in any reform of the *NTA*.
6. However, native title recognition is integral to the rights of Aboriginal and Torres Strait Islander peoples, rather than merely to the rights of Aboriginal and Torres Strait Islander people more generally, since native title is based on a communal right that inheres in particular native title groups defined in accordance with traditional laws and customs.
7. Further, the recognition of native title is even more significant given that the form of the *NTA* as agreed in 1993 was only part of a broader settlement, which also included the Indigenous land fund and the social justice package. The Indigenous land fund was implemented as the Indigenous Land Corporation, but the social justice package was never given effect. Accordingly, the other elements of the settlement, including the recognition of native title rights and interests, have acquired more significance for Aboriginal and Torres Strait Islander peoples than might be obvious from the terms of the *NTA*.
8. Principle 2: The use of the word 'stakeholders' tends to reduce the importance of native title parties and of native title rights and interests in the native title system. Equating them with other stakeholders in this context emphasises agreement-making to the potential detriment of important native title rights and interests and the groups that hold them.
9. Principle 3: 'Aboriginal and Torres Strait Islander' should be used instead of 'Indigenous' wherever it appears. Using the more specific term helps reinforce the particularity of native title rights and interests, the traditional laws and customs that give rise to them, and the native title groups that hold them.
10. Care should be taken with emphasising timeliness, potentially to the exclusion of sustainable and effective outcomes. For native title groups, the outcome of a native title determination application is not just the determination, but also the registered native title body corporate ('RNTBC') that is to manage the native title for generations into the future. The particular content of a native title determination provides the basis for recognised native title rights and interests to be managed and exercised by future generations. Therefore, achieving just outcomes may require substantial amounts of time to be devoted to achieving a successful litigated or agreed determination and a sophisticated and effective RNTBC that can engage successfully and sustainably with both the native title group and with government and industry.
11. Principle 4: While the *United Nations Declaration on the Rights of Indigenous Peoples* may not create any international obligations binding on Australia, it does provide a statement of standards and principles agreed by the international community and by Australia to which it should aspire in its dealings with Aboriginal and Torres Strait Islander peoples. Accordingly, the ALRC should ensure that its recommendations are consistent with the provisions of the Declaration.
12. Principle 5: The principle that reform should promote sustainable, long term social, economic and cultural development for Aboriginal and Torres Strait Islander peoples should be expressed in terms that acknowledge that native title rights and interests are held by particular native title groups. They should not be

used or derogated from for the benefit of Aboriginal and Torres Strait Islander peoples more generally without the free prior and informed consent of the native title groups that hold them.

13. In addition, more attention should be paid, in terms of sustainable futures, to achieving mechanisms by which native title groups can sustainably and effectively manage their determined native title rights and interests to achieve their long term land justice aspirations. Ultimately, a native title determination is not the only or even the main outcome of the native title process in the *NTA*.

Question 2: Trends in the native title system

14. The native title system is moving away from results being achieved largely through contested litigation to a situation where most determinations are made by consent. Symbolic of this shift are the *Traditional Owners Settlement Act 2010* (Vic) ('*TOS Act*'), which provides a specifically designed system for settling native title applications in Victoria out of court, and the proposed Noongar native title settlement.[1]

15. At the same time, there is a corresponding shift from focussing almost solely on achieving native title determinations to a parallel focus on managing native title rights and interests and the governance of the RNTBCs that are to manage it.

Question 4: Learning from other jurisdictions and approaches

16. In 2010, the Victorian government established an alternative approach to the *NTA* for achieving 'practical and symbolic recognition of traditional owners' rights in Crown lands, and … certainty to land managers, to industry and to developers'.[2] The Second Reading Speech for the *TOS Act* describes the *NTA* as 'a complex legal system that was never intended to address land justice in the more settled regions of Australia', which mandates a 'relatively narrow approach'.[3] In 'Victoria's case [the connection requirements are] almost impossible to meet given the rapid occupation of the land since settlement' and subsequent government policies.[4]

17. Nearly 20 years' experience in working with the *NTA* gave the State Government and traditional owner groups in Victoria a shared determination to avoid some of the inefficiencies and barriers to achieving just and sustainable outcomes imposed by the *NTA*. Consequently, Victoria enacted the *TOS Act* to establish a

> legal framework for a state-based system that enables the government to enter into agreements directly with traditional owner groups, outside any court setting. Through these agreements, the government will recognise traditional owner groups based on their [2751] traditional and cultural associations to certain land in Victoria and recognise their rights in relation to access, ownership, management, use, and development of certain public land. The bill's approach is to put the question of

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1 See, eg, Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Bill 2013 (WA); South West Aboriginal Land Council, *Noongar Native Title Settlement Information* <http://www.noongar.org.au/>.

2 Victoria, *Parliamentary Debates*, Legislative Assembly, 28 July 2010, 2751 (John Brumby, Premier).

3 Ibid 2750.

4 Ibid 2750, 2751.

> native title to one side in exchange for recognition and a range of benefits related to that recognition.[5]

18. This approach shows that it is not necessary to engage with a complex legal process, involving proof of the connection requirements and addressing issues of authorisation and joinder, to achieve substantive outcomes for native title groups.

Connection and recognition concepts in native title law

Question 5: *Section 223 and Aboriginal and Torres Strait Islander peoples' understanding of 'connection'*

19. The wording of s 223 reflects the findings of Brennan J in *Mabo v Queensland (No 2)* ('*Mabo*') to the effect that proof of native title requires proof that there is identifiable group, traditional connection with the land and the group's laws and customs, and the maintenance of connection.[6]

20. This approach disregards other possible approaches to the proof of native title such as those arising from comments made by Deane and Gaudron JJ in *Mabo*, where they require an established entitlement to the occupation or use of land that is of sufficient significance to establish a locally recognised special relationship between the group and the land,[7] and those by Toohey J that proof of a presence amounting to occupancy, which is not random or coincidental, is necessary.[8] It also disregards the approach to proof of Aboriginal rights in land in the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ('*ALR(NT)A*'),[9] and the definition of traditional owner group in the *Traditional Owners Settlement Act 2010* (Vic).[10]

21. The Commonwealth's approach to native title in 1993 is described in the second reading speech for the Native Title Bill:

> … native title is derived from the traditional laws and customs of indigenous people. These may vary considerably across Australia. This bill does not codify native title rights. Rather it provides that, in determining native title claims, the federal or state bodies involved will ascertain the rights in each particular case. Because the foundation of our position is acceptance of the High Court's decision, the bill protects native title to the maximum extent practicable.[11]

22. In 1993, there appears to have been little consideration of other possible definitions of native title. Thus, during the Senate debate, Senator Evans stated that:

> We are not attempting to define with precision the extent and incidence of native title. That will be a matter still for case by case determination ... The crucial element of the common law is the fact that native title as such, as a proprietary right capable of

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5 Ibid 2751–2.

6 (1992) 175 CLR 1, 58.

7 Ibid 85–6.

8 Ibid 188.

9 Section 3, which defines 'traditional Aboriginal owners' in relation to land, as a local descent group of Aboriginals who: (a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and (b) are entitled by Aboriginal tradition to forage as of right over that land.

10 Section 3.

11 Commonwealth, *Parliamentary Debates*, House of Representatives, 16 October 1993.

> being recognised and enjoyed, and excluding other competing forms of proprietary claim, is recognised as part of the common law of the country.[12]

23. Further, s 12 of the *NTA* provided that, subject to the *NTA*, 'the common law of Australia in respect of native title has … the force of a law of the Commonwealth'. This provision was later found to be unconstitutional.[13]

24. Thus, it is apparent that it was assumed in 1993, when the *NTA* was being drafted, that connection requirements would develop in line with developments in the common law.[14] Pearson argues that it was intended that native title was whatever the common law decided it was.[15] As McHugh J observed in Yorta Yorta: 'Parliament intended native title to be determined by the common law principles laid down in *Mabo*, particularly those formulated by Brennan J'.[16]

25. However, since the enactment of the *NTA*, the High Court has 'given the concept of "recognition" a narrower scope than … Parliament intended, … [which] must now be accepted as settling the law'.[17] This has 'transformed the Act from a vessel for the development of the common law into a cage for its confinement'.[18]

26. This means it is likely that less attention was paid in 1993 to the definition of native title and its elements of proof than might have been the case if it was then understood that s 223 rather than the developing common law would be seen as the sole source of the definition of native title. In hindsight, it is apparent that s 223 does not adequately reflect how Aboriginal and Torres Strait Islander peoples understand their connection to land and waters.

27. It is likely, however, that no statutory construction can adequately reflect Aboriginal and Torres Strait Islander peoples' understandings of their connection. As WEH Stanner put it in his Boyer Lectures in 1968,

> No English words are good enough to give a sense of the links between an Aboriginal group and its homeland. Our word 'home', warm and suggestive though it be, does not match the Aboriginal word that may mean 'camp', 'heart', 'country', 'everlasting home', 'totem place', 'life source', 'spirit centre', and much else all in one. Our word 'land' is too spare and meagre. We can now scarcely use it except with economic overtones unless we happen to be poets. The Aboriginal would speak of 'earth' and use the word in a richly symbolic way to mean his 'shoulder' or his 'side'. I have seen an Aboriginal embrace the earth he walked on. To put our words 'home' and 'land' together into 'homeland' is a little better but not much. A different tradition leaves us tongueless and earless towards this other world of meaning and significance. When we took what we call 'land' we took what to them meant home, the source and locus of life, and everlastingness of spirit. At the same time it left each local band bereft of an essential constant that made their plan and code of living intelligible. Particular pieces of territory, each a homeland, formed part of a set of

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12 Commonwealth, *Parliamentary Debates*, Senate, 16 December 1993, 5097.

13 *Western Australia v Commonwealth* (1995) 183 CLR 373.

14 See also *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 244, McHugh J.

15 Noel Pearson, 'Land Is Susceptible of Ownership', in Marcia Langton et al (eds) *Honour among Nations: Treaties and Agreements with Indigenous People* (Melbourne University Press, 2004) 83, 87.

16 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 244, McHugh J ('*Yorta Yorta*').

17 *Yorta Yorta* (2002) 214 CLR 244, McHugh J.

18 Justice Robert French, 'A Moment of Change—Personal Reflections on the National Native Title Tribunal 1994–1998', (2003) 27 *Melbourne University Law Review* 488, 521.

> constants without which no affiliation of any person to any other person, no link in the whole network of relationships, no part of the complex structure of social groups any longer had all its co-ordinates. What I describe as 'homelessness', then, means that the Aborigines faced a kind of vertigo in living. They had no stable base of life; every personal affiliation was lamed; every group structure was put out of kilter; no social network had a point of fixture left.[19]

28. Notwithstanding such limitations, this Inquiry now provides an opportunity to do some of the thinking that, in retrospect, ought to have been done in 1993.

Presumption of continuity

Question 6: Form of a presumption of continuity

29. This question is not addressed specifically. See below, regarding the discussion of the effects of introducing a presumption and other options for proving native title.

Question 7: Possible effects of a presumption of continuity

30. Difficulties with introducing a presumption of any sort include that it is likely to spark litigation directed towards settling the new parameters of what is required to prove native title given the changed standard of proof. Such litigation is likely to further delay outcomes that might otherwise have been achieved by agreement.

31. In addition, some respondents are likely to turn their minds to ways of contesting native title applications rather than resolving them by agreement. This change of attitude may have long term ramifications for the process of resolving native title applications.

32. Given these potential problems with introducing a presumption at this stage in the process, when it appears that most of the easier resolutions of native title applications have been achieved, the potential benefits for native title applicants, and for the native title system, of any presumption introduced must be substantial, in order to outweigh the potential disadvantages.

Proof of native title

33. Given the difficulties with presumptions outlined above and those adverted to at paragraphs 76–81 and 88 of the Issues Paper, a better approach might be to remove one or more of the elements of proof of native title. This would mean that particular proofs need not even be addressed in native title litigation.

34. An obvious example would be to remove the requirement to prove that the native title claim group has, by its traditional laws and customs, a connection with the land or waters. Another possibility, which is not inconsistent with this example, would be to remove the requirement to establish that particular native title rights and interests are possessed under those laws and customs. Yet another example would be not to require proof that they are recognised by the common law. Each of these changes might be achieved by amending s 223.

35. Another approach along these lines would be to reformulate the definition of native title in terms not consistent with the judgment of Brennan J in *Mabo*, giving

[19] W E H Stanner, *The Dreaming and Other Essays* (Black Inc, 2009) 206–7.

effect to thinking about that statutory definition that appears not to have been done in 1993, and which has not been done since.

36. For instance, it might be simpler to require proof only of the identity of the native title holders and of the country in respect of which they hold rights in accordance with contemporary laws and customs. This would avoid the issues of substantial interruption to the acknowledgment and observance of traditional laws and customs and their generation to generation transmission that are addressed below in response to questions 10, 11 and 18–21 of the Issues Paper.

37. This approach would require proof only of:

    a. the relevant laws and customs as they are currently acknowledged;

    b. the identity of the native title holding group under those laws and customs; and

    c. the extent of the land and waters in respect of which that group holds rights and interests.

38. In effect, the right people for country under the relevant laws and customs would be deemed to hold exclusive possession native title rights and interests, subject to extinguishment.

39. This approach would remove requirements to prove:

    a. continuity of connection;

    b. that the laws and customs are traditional;

    c. that the acknowledgment and observance of the traditional laws and customs has continued substantially uninterrupted since sovereignty; and

    d. the particular rights and interests arising under the laws and customs.

40. This substantial alteration to the requirements of proving native title would:

    a. reduce the scope of what must be proved in native title litigation;

    b. reduce the number of issues that might be contested in that litigation;

    c. remove the current focus on tradition and the past, which is not a good foundation for the management of native title rights and interests for the economic, social and cultural benefit of determined native title groups in the future.

Question 8: Presumption and overlapping claims

41. The money saved from reduced time and resources spent proving native title under the current definition, should be spent addressing overlapping native title claims through mediation and agreement.

The meaning of 'traditional'

Question 10: Problems with proving traditional laws and customs

42. If, as suggested above in response to Question 7, the definition of native title is amended to only require proof of the relevant laws and customs as they are currently observed, there is no need to establish that native title rights and interests are possessed under 'traditional' laws acknowledged and 'traditional'

customs observed by the relevant group. The problems identified at paragraphs 97–121 of the Issues Paper are thereby avoided.

43. However, if such changes are not made, and 'tradition' must still be addressed, the main problem associated with the need to establish that native title rights and interests are possessed under the traditional laws acknowledged and the traditional customs observed by the relevant group is that the requirement potentially limits the recognition of native title rights and interests. In this way, it limits native title applicants' access to justice.

44. Specifically, the capacity of rights and interests arising under traditional laws and customs to be recognised as native title is limited by:

    a. the number of elements ascribed to the word 'traditional' in s 223, which are described in paragraphs 101–103 of the Issues Paper. Each of these three elements — the means of transmission of laws and customs from generation to generation, their age (back to the time of sovereignty), and the requirement that the normative system under which they are possessed has had a continuous existence and vitality since sovereignty — must be established by the native title applicant. Each of them sets up another hurdle that must be cleared before native title can be proved;

    b. the additional requirement imposed by the High Court in *Yorta Yorta* for proof of a native title society that has continued to exist as a group that acknowledges and observes traditional laws and customs.[20] This requirement has been subject to considerable further judicial exegesis and the associated developments described in paragraphs 106–113 of the Issues Paper. Again, these decisions have generally tended to limit the prospect that native title applicants can establish native title;

    c. the need to address all of the additional requirements demanded by the High Court in its consideration of the meaning of 'traditional'. As noted by Finn J in respect of the requirement to prove a particular society and the considerable amount of evidence and argument needed to do so, this:

        i. requires additional time and resources from each of the parties and the Court; and

        ii. may not, in any event, be determinative of the question whether or not native title rights and interests should be recognised;

    d. the relatively small allowance made for these laws and customs to be able to adapt to changed circumstances over the generations, which include all the effects of colonisation. If the laws and customs change too much over time, native title can no longer be recognised. These limitations mean that native title might not be recognised in the most settled parts of Australia.[21]

45. We agree with the comments of Simon Young and David Martin referred to at Issues Paper, paragraphs 118–20.

46. In addition, this focus on the 'traditional' nature of laws and customs mandated by the *Yorta Yorta* High Court:

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20 *Yorta Yorta* (2002) 214 CLR 422 [50].

21 Sean Brennan et al, *Treaty* (Federation Press, 2005) 114.

a. as suggested by the Jumbunna Indigenous House of Learning Research Unit, 'has imposed a frozen rights approach or a museum mentality' on native title and the recognition process, which limits the scope of the native title rights and interests that otherwise might be recognised;[22]

b. ensures that the litigation parties, particularly the native title group and the State or Territory government, are backward looking, focussed on the laws and customs at the time of sovereignty and at each generation since. When native title is recognised, both the native title group and government must be forward looking if the group is to:

   i. achieve their economic, social and cultural aspirations;

   ii. establish an effective registered native title body corporate to manage the native title rights and interests; and

   iii. deal efficiently with future acts.

47. These problems might be addressed without removing all reference to 'traditional' laws and customs, by limiting the impact of these elements of the word as far as possible. Options include:

    a. removing the word 'traditional' from s 223(1)(a), with the aim of limiting the Court's consideration of the native title claim group's laws and customs to those currently acknowledged and observed. This would potentially also have the effect that consideration of the group's society would be limited to its contemporary definition as a 'a body of persons united in and by its acknowledgement and observance of a body of laws and customs',[23] and would render the native title determination process much less backward looking; and

    b. inserting a definition of 'traditional' that specifically removes various of the elements referred to at Issues Paper, paragraphs 101–04. This is addressed below under Question 11.

48. The first of these two options is preferable to the second. Pursuing the second option runs the risk of unduly narrowing the definition through statutory interpretation as has occurred with the current s 223.

Question 11: Definition of the meaning of traditional

49. If s 223 is not amended, some of the problems identified above and in the Issues Paper might be addressed by defining 'traditional' with a relatively limited meaning in terms of these problems. However, doing so is not likely to address all these issues. Such a definition might apply generally in the *NTA* or might be limited to s 223 in its application.

50. Any definition of 'traditional' should limit the historical aspect of its meaning, refocusing it on the contemporary situation.

51. In s 223, 'traditional' is used to qualify both laws and customs. It is the only adjective used to qualify these terms, which gives it particular significance, which

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22 Jumbunna Indigenous House of Learning Research Unit, UTS, Submission No 17 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, July 2011, quoted in Issues Paper, paragraph 117.

23 *Yorta Yorta* (2002) 214 CLR 422 [49].

is tempered neither by other adjectives or its use as a noun, which would have been more likely to be understood in a contemporary sense.

52. In contrast, in other legislation 'traditional' is used as part of a compendium with other terms that give the word a more contemporary focus. For instance, the *ALR(NT)A* and the *Aboriginal Land Act 1991* (Qld) ('*ALAQ*') both use the term 'Aboriginal tradition' which is defined by reference to a body of terms referring to matters that govern Aboriginal people's contemporary relationships with land and waters, thus:

> the body of traditions, observances, customs and beliefs of Aboriginals or of a community or group of Aboriginals, and includes those traditions, observances, customs and beliefs as applied in relation to particular persons, sites, areas of land, things or relationships;[24] and
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> the body of traditions, observances, customs and beliefs of Aboriginal people generally or of a particular group of Aboriginal people, and includes any such traditions, observances, customs and beliefs relating to particular persons, areas, objects or relationships.[25]

53. Using 'tradition' as a noun in the *NTA* would shift its meaning towards those laws and customs that are the contemporary expression of historic laws and customs, rather than focussing on the manner in which those laws and customs have been transmitted from the past into the present. Such a contemporary focus would help meet some of the problems identified above.

54. An appropriate approach to defining 'traditional' would be to define the compendium term 'the traditional laws acknowledged and the traditional customs observed' as:

> the laws and customs arising out of Aboriginal tradition, being the body of traditions, observances, laws, customs and beliefs of the Aboriginal peoples or Torres Strait Islanders, that includes any such traditions, observances, laws, customs and beliefs relating to particular persons, areas, objects or relationships.

<u>Native title rights and interests of a commercial nature</u>

55. **Question 12**: The *NTA* should be amended to state that native title rights and interests can include rights and interests of a commercial nature. Doing so would help native title groups that have achieved native title determinations become more future-focussed and better able to achieve their economic aspirations.

56. While the recent decisions in *Akiba*[26] and *Brown*[27] do support arguments that native title rights and interests should be sufficiently broadly conceived to encompass rights to use land and waters subject to native title for commercial purposes, they may not suffice to ensure that native title rights and interests recognised in the future do enable commercial activities.

57. The High Court has stated that if rights exist they can be exercised in the manner that the native title group wants to exercise them subject to regulation or

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24 *ALR(NT)A* s 3.

25 *ALAQ* s 7.

26 *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth* (2013) 300 ALR 1 ('*Akiba*').

27 *Western Australia v Brown* [2014] HCA 8 (12 March 2014) [34].

extinguishment.[28] However, there is no necessary implication that native title rights and interests can be exercised in a commercial manner. This should be made explicit in the *NTA.*

58. Further, the NTA should provide that, notwithstanding any statement to the contrary, all existing native title determinations should be amended to specify that the recognised native title rights and interests can be exercised in a commercial manner. These determinations would still be subject to extinguishment and regulation; only the scope of the recognised rights would change.

59. **Question 14**: The proposal at cl 19 of the Native Title Amendment (Reform) Bill 2014 to amend s 223(2) to specify that 'rights and interests' in s 223(1) includes 'the right to trade and other rights and interests of a commercial nature' is appropriate.

Physical occupation, continued or recent use

60. **Question 17**: The law has seemed fairly settled that physical occupation or continued or recent use of land or waters is not relevant to the question whether connection with that land or waters under traditional laws and customs has been established. However, this has been thrown into a degree of doubt by the Full Court's acceptance in *Akiba* that the absence of evidence of use of areas at the extremity of the claim area was relevant to the establishment of connection.[29]

61. Accordingly, for the avoidance of doubt, it would be worthwhile amending the *NTA* to confirm that physical occupation or continued or recent use is not relevant to the establishment of connection for the purpose of s 223(1).

62. It would be useful to go further than the Native Title Amendment (Reform) Bill 2011 and specifically address physical occupation or continued or recent use (in accordance with the Full Court's decision) rather than just refer to physical connection.

'Substantial interruption'

63. **Question 18**: A particular problem for native title applicants in establishing continuity of acknowledgement and observance of traditional laws and customs is that in many cases, it is likely that the gap in continuity observed by the Court is due to a lack of evidence rather than a lack of acknowledgment and observance of laws and customs.

64. In many such cases, the Court has found that there was a gap in acknowledgment and observance at a time beyond living memory, often within 20 years either side of the end of the 19th century.[30] In respect of such periods, native title applicants must rely on evidence comprised largely of oral histories going back several generations and documents produced by people who are not members of the native title group. The relevant State or Territory has in fact produced most of these documents. Almost axiomatically, such documents do not record instances

28 *Akiba* (2013) 300 ALR 1, [1].

29 *Commonwealth v Akiba* (2012) 204 FCR 1, [664], [684].

30 See, eg, *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 (18 December 1998) [129]; *Risk v Northern Territory* [2006] FCA 404 (29 August 2006) [812].

of the acknowledgment and observance of laws and customs because that is not what the State or Territory was interested in.

65. In other cases, the gap in the acknowledgment and observance of laws and customs is due to people being moved off country by the State or Territory or to the managers of missions or reserves on which the native title group had been forced to live by the State or Territory denying them the right or ability to acknowledge and observe their laws and customs. It is almost unconscionable for the State or Territory, which has caused such gaps, to later rely on them to deny native title claim groups the rights that would otherwise be recognised.

66. **Question 19**: The exception for 'substantially uninterrupted' acknowledgment and observance of laws and customs does not go far enough to meet this objection.[31] The exception should be significantly broadened to overcome the apparent unconscionability of the State or Territory effectively relying on its own actions to the detriment of native title groups' assertion of native title rights and interests.[32] At the very least, the Court should be given the discretion to consider the reasons for any such interruption in considering its relevance to its determination of whether traditional laws and customs have been acknowledged and observed.

67. However, inserting a definition of 'substantial interruption' in the *NTA* is not likely to go far enough in addressing this issue. The matters that the Court must address when determining this issue are so broad and encompassing of the way of life of a group of people that a particular definition of events that might fall within 'substantial interruption' is not likely to catch all possibilities and could easily be read too narrowly.

68. **Question 20**: One of the inherent difficulties with amending legislation to meet a perceived problem is the potential for the changes to give rise to unintended consequences.

69. However, for the avoidance of doubt, it may be useful to amend the *NTA* to address the difficulties identified in the Issues Paper at paragraphs 169–204 and above in establishing the recognition of native title rights and interests where there has been a substantial interruption to the acknowledgment and observance of laws and customs.

70. Given that any such amendments are to address problems arising from the majority judgement in *Yorta Yorta*, a useful starting point for a consideration of the change that might best address these difficulties is the minority judgment of Gaudron and Kirby JJ in *Yorta Yorta*, which addresses the nature and extent of the necessary continuity.[33] They acknowledge that:

> In the face of the acknowledged history of dispossession, it must be accepted that laws and customs may properly be described as 'traditional' for the purposes of s 223(1) of the Act, notwithstanding that they do not correspond exactly with the laws and customs acknowledged and observed prior to European settlement.[34]

71. They go on to find that:

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31 *Yorta Yorta* (2002) 214 CLR 422 [89].

32 See the above response to question 10.

33 *Yorta Yorta* (2002) 214 CLR 422 [112]–[119].

34 Ibid [113].

> What is necessary for laws and customs to be identified as traditional is that they should have their origins in the past and, to the extent that they differ from past practices, the differences should constitute adaptations, alterations, modifications or extensions made in accordance with the shared values or the customs and practices of the people who acknowledge and observe those laws and customs. …
>
> [A] society must be … sufficiently organised and cohesive to adapt, alter, modify or extend rights and duties if subsequent practices are to be seen as adaptations, alterations, modifications or extensions of laws previously acknowledged …
>
> The question whether there is or is not continuity is primarily a question of whether, throughout the period in issue, there have been persons who have identified themselves and each other as members of the community in question.[35]

72. Amendments to the *NTA* that are consistent with this approach would help refocus the NTA and native title determinations from the past to the future.

73. An appropriate amendment is to add a new s 223(1A) based on the statements of Gaudron and Kirby JJ, as follows:

> For the avoidance of doubt, 'traditional laws acknowledged and traditional customs observed' in subsection (1) includes laws and customs that have been subject to adaptations, alterations, modifications or extensions made in accordance with the shared values or the customs and practices of the people who acknowledge and observe those laws and customs.

74. **Question 21**: Giving the Court a discretion to consider disregarding such substantial interruptions or changes in continuity of acknowledgment and observance of laws and customs where it is in the interests of justice to do so is a preferable approach to inserting a broad definition of 'substantial interruption'.

75. That power should not be limited to certain circumstances. Nor should the term 'in the interests of justice' be defined; its determination should be left to the Court in each case.

<u>Authorisation</u>

76. **Question 23**: The requirement for a native title applicant to be authorised by the native title claim group was introduced in the 1998 amendments to the *NTA*. Its apparent purpose was to reduce the number of conflicting and overlapping native title determination applications. It does so by imposing another barrier to the making of those applications.[36]

77. It also imposes another barrier to the registration of native title applications,[37] thereby limiting the number of registered claimants with future act procedural rights such as the right to negotiate. Both the judicial task of determining a native title application and the administrative task of applying the registration test were affected by the new authorisation requirement.

78. To the extent that the authorisation process reflects demands imposed by the registration test and its application, it limits access to justice for native title applicants. For instance, in theory, an application need not be registered to be dealt with by the Court. However, these two processes are linked first by the fact

35 Ibid [114], [116], [117].
36 *NTA* s 62(1)(a)(iv).
37 *NTA* s 190C(4).

that authorisation is required for both of them and also by the fact that a native title determination application can potentially be struck out for a failure of authorisation.[38] These linkages impose the authorisation law and processes developed for the purpose of the registration test on the litigation process for determining native title rights and interests.

79. The fundamental problem of authorisation in respect of native title applications is its circular nature, since it requires:

    a. ascertaining the identity of all the persons in the native title claim group; and

    b. identifying the traditional laws and customs that determine both the identity of the native title claim group and (potentially) its decision making processes,

    which are both matters that are to be subject to evidence and submissions to the Court at trial and that will be reflected in the final native title determination.

80. Further, as noted at Issues Paper paragraphs 218–24, there are substantial difficulties in determining these matters, particularly at such an early stage of proceedings. As noted at paragraph 224, rushing the process of resolving the membership of the claim group may result in disputes and litigation at later stages of the litigation process. It may also result in flawed and ineffective RNTBCs, which are to manage the native title rights and interests for generations to come. The form and membership of RNTBCs will be based on the description of the native title group determined by the Court and ultimately on the description in the application which has been through the authorisation process.

81. **Question 24**: The *NTA* should be amended to allow a native title claim group, when authorising an application to adopt a decision-making process of its choice, whether agreed or traditional. Technically, there can be no traditional decision-making process in relation to authorising an application to a court for the recognition of the group's rights and interests by another legal system, since this did not occur before sovereignty. However, to avoid groups being troubled by the process, it would be appropriate to clarify that the choice of decision-making process, whether agreed or traditional, is up to them.

82. **Question 25**: Given the usually rushed and potentially flawed process by which native title claim group membership and claim area boundaries are determined, native title groups would be assisted by allowing them more time to decide these issues. The very fact of making an application should not be dependent on the pre-condition of having decided these matters, which really should be treated as subjects of the litigation.

83. One way of dealing with this problem is to remove one or more of the elements of proof of native title, as described above, so that the Court's inquiry is relatively limited. A corollary of this approach would be to require the litigation to be initiated by a fairly simple application, without requiring evidence on affidavit of matters that are ultimately to be determined by the Court, including authorisation. Care should be taken in drafting these changes to ensure compatibility between the application that initiates the judicial determination process and the administrative process of applying the registration test.

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38 *NTA* s 84D.

84. **Question 26**: Section 66B provides a fairly blunt tool for native title claim groups to resolve disputes regarding group membership and boundaries. The evidence required for a successful application under s 66B is substantial and to a large extent is about procedural matters, such as the process by which a meeting was advertised and run, that do not directly assist in the resolution of disputes. There are few other processes under the *NTA* that could assist in such dispute resolution.

85. Further, a s 66B application may not of itself help to resolve a dispute. It can provide a forum by which the parameters of the dispute might be publicly identified, but does not necessarily contribute further to resolving it, since, after all, it is only an interlocutory application. For instance, it is not an appropriate forum for resolution of disputes between appropriately authorised native title claim groups about who holds native title rights and interests in respect of a particular area.[39]

86. The Court should focus on providing assistance to native title groups to help them resolve disputes and other issues that arise in the context of identifying the native title group that is to be subject of the determination. In this context, regard should be had to the work of the Right People for Country project of the Victorian Government.[40]

87. **Question 27**: A simplified procedure should be provided to allow the removal of members of the applicant group who are deceased, incapacitated or wish to be removed, without the need for evidence that the revised applicant is again authorised and the reapplication of the registration test.

88. This was proposed in 2006,[41] but not adopted due to a perceived risk that applications may not be properly authorised if there is such a streamlined procedure.[42] That position should be reconsidered.

89. **Question 28**: see above under the response to Question 23.

90. **Question 30**: The *NTA* should specify that a native title claim group can define the scope of the authority of the applicant and the manner in which it makes decisions on their behalf.

Joinder

91. **Question 31**: It would be useful to extend the right to be joined as a party specifically to RNTBCs holding native title on trust or managing it as agent on behalf of a native title group, members of which would otherwise be seeking to be joined to a native title determination application.

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39 See *Weribone on behalf of the Mandandanji People v Queensland* [2013] FCA 255 (1 March 2013).

40 Victoria Department of Premier and Cabinet, *Right People for Country project* (29 October 2013) <http://www.environment <http://www.dpc.vic.gov.au/index.php/aboriginal-affairs/projects-and-programs/right-people-for-country-project>.

41 Commonwealth Attorney General, *Technical Amendments to the Native Title Act 1993: Second Discussion Paper* (22 December 2006).

42 Angus Frith and Ally Foat, 'The 2007 Amendments to the *Native Title Act 1993* (Cth): Technical Amendments or Disturbing the Balance of Rights?' (Native Title Research Monograph 3, AIATSIS, November 2008) 109.

92. Technically, RNTBCs only have interests that might be affected within the meaning of s 84(5) in the area subject to the relevant determination of native title. They have no interests in any area outside the determination area. However, the native title group on whose behalf they manage native title may have interests under their traditional laws and customs in other areas that might be subject to a native title determination application made by another native title group. While individual members of a RNTBC's native title group may successfully be joined as parties to the native title application, it would be more appropriate in terms of managing all the group's native title rights and interests to allow their RNTBC to be joined on their behalf.

93. **Question 32**: The late joinder of parties constitutes a barrier to access to justice if the joinder confounds the legitimate expectations of the other parties involved in the proceedings that the matter will go to trial or be subject to a consent determination on a particular date, where they have worked to achieve that end over a long time.[43] This prejudice applies to all the parties involved in the litigation, but most particularly to the native title applicant, which may have been waiting for a determination for many years.

94. Another potential prejudice is to the parties and funding bodies that have paid for the trial or consent determination where these costs will be thrown away by reason of the joinder. An example is the figure of about $200 000 plus native title representative body staff time and wages that might have been thrown away if a consent determination set down for the day after the hearing of a joinder application had not proceeded.[44]

95. **Question 33**: The following principles should guide whether a person may be joined as a party when proceedings are well advanced:

    a. Whether the interest asserted can be protected by some other mechanism. For example, a factor in the exercise of the discretion in *Akiba* was that the interests could be protected under the Torres Strait Treaty;[45]

    b. Whether the applicant for the determination would be prejudiced if the party applicant is joined.[46] If the joinder comes so late in the proceedings that a trial or consent determination reached after long negotiations would be affected, such prejudice may be established;[47] and

    c. The history of the proceedings, including the conduct of the party applicant.[48]

96. **Question 34**: In order to ensure access to justice in an adequate and efficient time frame for native title applicants, the number of parties involved in native title litigation should be limited as much as possible. The principles and mechanisms for doing so described in Issues Paper paragraphs 284–90 are all supported.

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43 See, eg, *Barunga v Western Australia (No 2)* [2011] FCA 755 (25 May 2011), [219]–[222] ('*Barunga*').

44 *Barunga* [2011] FCA 755, [222].

45 *Akiba & Others on behalf of the Torres Strait Regional Seas Claim People v Queensland (No 2)* [2006] FCA 1173; (2006) 154 FCR 513, [32].

46 *Worimi Local Aboriginal Land Council v Minister for Lands for New South Wales* (2007) 164 FCR 181; [2007] FCA 1357, [37] ('*Worimi*').

47 See, eg, *Barunga* [2011] FCA 755, [219]–[222].

48 *Worimi* (2007) 164 FCR 181. [2007] FCA 1357, [5], [34]; *Barunga* [2011] FCA 755, [209]–[216].

97. It is strongly arguable that the only parties that should be involved in native title litigation are the applicant, together with any other native title party, and the Crown. All other respondents take their rights and interests from Crown, which, in the native title context, has a duty to protect them.

98. The respondents themselves are not likely to be able to add very much to the litigation apart from the manner in which they exercise those rights and interests. The Crown is quite capable of asserting and describing the rights and interests it has granted. The manner of exercise is increasingly coming to be seen as irrelevant to the determination of native title rights and interests. It should not be relevant to the determination under s 225(c) of the nature and extent of any other interests in relation to the determination area.[49] The exercise should only comprise an examination and comparison of the rights and interests, whether native title rights and interests or those granted by the Crown.

[49] See *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth* (2013) 300 ALR 1; *Watson v Western Australia (No 3)* [2014] FCA 127 (24 February 2014).