THE LAW SOCIETY OF NEW SOUTH WALES
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Human Rights Committee

Submission to the Australian Law Reform Commission by the NSW Young Lawyers Human Rights Committee

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Australian Law Reform Commission
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About NSW Young Lawyers Human Rights Committee

NSW Young Lawyers (NSWYL) is the largest body of young and newly practising lawyers, and law students in Australia. NSWYL supports practitioners in their early career development in numerous ways, including by encouraging involvement in its 15 separate committees, each dedicated to a particular area of practice. Membership is automatic for all NSW lawyers under the age of 36 and/or in their first five years of practice, as well as law students.

The NSWYL Human Rights Committee (the **Committee**) comprises of a group of approximately 500 lawyers and law students interested in Australian and international human rights issues. The objectives of the Committee are to raise awareness about human rights issues and provide education to the legal profession and wider community about human rights. Members of the Committee share a commitment to effectively promoting and protecting human rights.

The views expressed in this submission are those of the authors and do not represent the views of their employers.

The Committee thanks the Commission for the opportunity to comment on the Review of the Native Title Act 1993 Paper (Issues paper) and would be very pleased to provide further information or submissions as required.

Scope of the Inquiry

Question 1.

The Preamble and Objects of the *Native Title Act 1993* (Cth) provide guidance for the Inquiry. The ALRC has identified five other guiding principles to inform this review of native title law.

(a) Will these guiding principles best inform the review process?

(b) Are there any other principles that should be included?

The Committee supports the view of the Australian Law Reform Commission that one of the guiding principles for the inquiry should be consistency with international law. The Native Title Act was informed by protections of human rights principles, and amendments should focus on further advancement of these protections.

Article 27 of the International Convention on Civil and Political Rights (**ICCPR**) states:

> *In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.*

These rights derive from the inherent dignity of the human person.

Indigenous peoples have previously lodged complaints to the United Nations Human Rights Committee under these provisions, such as in *Ominayak v Canada*[1] where commercial activities undertaken under a Canadian Government lease had the potential to destroy the traditional life of the indigenous group.

Other provisions of the ICCPR have also been used to protect ancestral grounds from inappropriate development. For example, the construction of a hotel on land from which the traditional owners had been dispossessed was found to violate the rights of family life and privacy under the ICCPR Articles 17(1) and 23(1), as it had the potential to destroy burial grounds and disrupt fishing activities.[2] In this decision, the UN Human Rights Committee adopted a broad view of the approach to 'family' and placed significance on the role that visits to ancestral lands play in creating a person's identity. Development that destroyed these ancestral lands was found to be an interference with these rights.

Governments can also take positive measures to protect these rights. The UN Human Rights Committee has noted that 'recognition of indigenous people as minorities protected by Article 27 does not prejudice sovereignty or territorial integrity of states. It is recognised that culture manifests itself in a variety of forms, including livelihood activities including fishing or hunting, in addition to the right to live on reserves protected by law. The right of indigenous peoples to participate in resource development on their traditional land has also been recognised by international law.

The United Nations Declaration of the Rights of Indigenous People[3] (the **UNDRIP**) is a resolution of the General Assembly giving Indigenous Peoples the necessary legal status and 'an evidentiary and persuasive role in stimulating the development of jurisprudence on the rights of indigenous people.'

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[1] *Chief Bernard Ominayak and Lubicon Lake Band v. Canada*, CCPR/C/38/D/167/1984, UN Human Rights Committee (HRC), 26 March 1990, available at: http://www.refworld.org/docid/4721c5b42.html [accessed 20 May 2014].
[2] *Hopu and Bessert v. France*, CCPR/C/51/D/549/1993, UN Human Rights Committee (HRC), 30 June 1994.
3 Resolution adopted by the General Assembly [without reference to a Main Committee (A/61/L.67 and Add.1)] 61/295. United Nations Declaration on the Rights of Indigenous Peoples (UNDRIPS).

Question 2.

The ALRC is interested in understanding trends in the native title system. What are the general changes and trends affecting native title over the last five years?

(a) How are they relevant to connection requirements for the recognition and scope of native title rights and interests?

(b) How are they relevant to the authorisation and joinder provisions of the Native Title Act?

Question 3.

What variations are there in the operation of the Native Title Act across Australia? What are the consequences for connection requirements, authorisation, and joinder?

Question 4.

The ALRC is interested in learning from comparative jurisdictions.

(a) What models from other countries in relation to connection requirements, authorisation and joinder may be relevant to the Inquiry?

(b) Within Australia, what law and practice from Australian states and territories in relation to connection requirements, authorisation, and joinder, may be relevant to the Inquiry?

Connection and recognition concepts in native title law

The Committee makes no submission regarding Questions 2 - 4.

Connection and recognition concepts in native title law

Question 5.

Does s 223 of the Native Title Act adequately reflect how Aboriginal and Torres Strait Islander people understand 'connection' to land and waters? If not, how is it deficient?

The Committee makes no submission regarding Question 5.

Question 6.

Should a rebuttable 'presumption of continuity' be introduced into the Native Title Act?

The Committee recommends that a rebuttable 'presumption of continuity' is introduced into the Native Title Act, on the basis that it will address the following issues:

- The forensic burden presently placed on a native title claimant presents financial and time burdens disproportionate to the consequences of successful applications.[4] From 1994 to 31 December 2010, the average time for an opposed application to be determined by consent was six years and two months, while applications determined by litigation averaged six years and eleven months.[5]
- Practical difficulties in proving continuous descent and inter-generational passing of laws and customs arise due to a number of factors. These include the *particular* difficulties in preserving the evidence of the most knowledgeable and authoritative claim group members, who are typically elderly and liable to pass away or are otherwise inhibited from participating in these proceedings over lengthened period of time.[6] In addition, concern has also been raised about the significant social disruption caused to Indigenous communities by the process of authorising, claiming and proving native title.[7]
- Native Title Representative Bodies (**NTRB**s) are essential to recognition, management and proper representation of Native Title applications,[8] but are insufficiently funded to satisfactorily pursue and resolve complex and difficult native title claims in a timely fashion.[9] [10] Both judicial and academic commentary suggest that the funding structure for native title claims favours the interests of third parties and the legal representatives more than it does the Indigenous claimants. [11] [12]
- State Governments, being the default respondent in native title claims, typically require a degree of evidence to be presented by claimants before they will consider negotiation. For example, in NSW, 'credible evidence' must be presented before entering into settlement negotiations – forcing claimants to do a large amount of front-end work and reveal their evidence at an early stage, after which they may still become involved in an unproductive debate as to what constitutes 'credible evidence'.[13]

The Committee submits that introducing a presumption of continuity will reduce delay and upfront financial costs associated with preparing proof of continuity in native title claims. In the absence of contrary evidence, a presumption of continuity would strengthen the position of claimant parties in pre-trial negotiation.[14] This would encourage respondent parties to facilitate quicker resolution of continuity-related issues by either:

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4 Stuart Bradfield and Lisa Strelein, '*The Single Noongar Claim: Negotiating Native Title in the South West*' (2004) 36 Indigenous Law Bulletin.
5 National Native Title Tribunal Report: Native Title, February 2011.
6 *Negotiating comprehensive settlements of native title claims*; LexisNexis Native Title Law Summit 2009; Mr Graeme Neate, President, National Native Title Tribunal, 15 July 2009, pages 9-10.
7 Lisa Strelein, *Dialogue about Land Justice: Papers from the National Native Title Conference,* Aboriginal Studies Press, 2010) 293.
8 Australian Institute of Aboriginal and Torres Strait Islander Studies, *The Limits of Change: Mabo and Native Title 20 Years On* (May 2012) AIATSIS <http://aiatsis.gov.au/_files/ntru/WNMay12.pdf>
9 Ibid.
10 Native Title Report 2007, Australian Human Rights Commission, Chapter 3; *Native title mediation: issues identified, lessons learnt: proceedings and findings of IFaMP workshops with native title mediators* February and March 2005;
11 *Western Australia v Ward* [2002] HCA 28; 213 CLR 1; 191 ALR 1; 76 ALJR 1098 (8 August 2002) at [561].
12 Lisa Strelein, *Dialogue about Land Justice: Papers from the National Native Title Conference* (Aboriginal Studies Press, 2010) 293.
13 McLean, Adam --- "*Frameworks to Settling Native Title*" [2009] IndigLawB 24; (2009) 7(12) Indigenous Law Bulletin 27.
14 Ibid

- presenting evidence they hold relating to substantial interruption at an earlier stage of a claim or potential claim, reducing the cost incurred by claimants before they see such evidence, or
- accepting the applicability of the presumption, and either resolving the claim or challenging it on other grounds.

If so, how should it be formulated:

(a) What, if any, basic fact or facts should be proved before the presumption will operate?

The Committee submits that the basic facts required to trigger a presumption of continuity (the **Basic Facts**) should be largely consistent with the language proposed by Justice French (as he then was) in 2008:[15]

(a) that the claimed rights and interests are found to be possessed under laws acknowledged and customs currently observed by the native title claim group,

(b) that the members of the native title claim group reasonably believe that persons from whom one or more of them was descended, acknowledged and observed laws and customs at sovereignty by which those persons had a connection with the land or waters the subject of the application,

(c) that members of the native title claim group reasonably believe the laws and customs so acknowledged and observed are related to, evolved or adapted from the traditional laws and customs acknowledged and observed at sovereignty in paragraph (b), and

(d) that the members of the native title claim group, by their laws and customs have a connection with the land or waters the subject of the application.

The Committee submits that in particular the test of a reasonable belief held by the present claim group per paragraphs (b) and (c) is the appropriate minimum standard. This substantially reduces the forensic burden placed on the claim group in the initial stages, while still requiring a factual basis to demonstrate that the claim group reasonably holds these beliefs.

In drafting the Basic Facts, the Committee has amended French J's proposed language to remove the requirement of a reasonable belief that laws and customs are "traditional" (the **Traditionality Requirement**). At common law proving the Traditionality Requirement would require proving continuity of acknowledgement and observance of traditional laws and customs[16]. Thus under French J's proposed language, a presumption of continuity may be interpreted as only being triggered by establishing a reasonable belief that continuity existed. Furthermore, the term "traditional" is an ambiguous term forming to a large degree the source of judicial difficulties with section 223 – to add further instances of this term simply invites more interpretative difficulty. The Committee submits that, despite the reduced onus of a "reasonable basis" in the Traditionality Requirement, the associated forensic burden of continuity or the word traditional in general is undesirable for the reasons given above.

(b) What should be the presumed fact or facts?

The Committee submits that the presumed facts should be identical to those suggested by French J:[17]

15 Justice R French, *Lifting the burden of native title – some modest proposals for improvement* (FCA) [2008] FedJSchol 18, para 31.
16 *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (12 December 2002) at [111]-[119].
17 Justice R French, *Lifting the burden of native title – some modest proposals for improvement* (FCA) [2008] FedJSchol 18, para 31.

(a) that the laws acknowledged and customs observed by the native title claim group are traditional laws and customs acknowledged and observed at sovereignty;

(b) that the native title claim group has a connection with the land or waters by those traditional laws and customs;

(c) if the native title rights and interests asserted are capable of recognition by the common law then the facts necessary for the recognition of those rights and interests by the common law are established.

The Committee submits that this can be more simply formulated as:

> "It is presumed that a claim group, in respect of which the [Basic Facts] are demonstrated, possesses native title rights and interests in respect of the lands or waters subject to the [Basic Facts] under section 223(1)."

The Committee submits further that a consequence of the presumption of continuity leads to an express requirement that the court disregard any possibility of substantial interruptions in acknowledgment and observance of traditional law and custom unless and until proof of such interruption is established. Such a provision would avoid uncertainty where an claimant is aware of facts which may amount to a "substantial interruption".

(c) How could the presumption be rebutted?

The Committee submits that proving extinguishment of native title will rebut the presumption in respect of all native title rights a posteriori any act of extinguishment.

The Committee further submits that, subject to the submissions in respect of Questions 11, 20, and 21, evidence sufficient to establish on the balance of probabilities that a "substantial interruption" did occur may rebut a presumption of continuity. The presumption of continuity should be rebutted in respect of that period only. The claimants should be able to re-establish continuity by proving 'substantially uninterrupted' continuity of practice of traditional laws and customs across that period only.

The Committee submits that mere proof of an "interruption" that is not "substantial" should not rebut a presumption of continuity as it would render the presumption toothless. As the ALRC has noted at paragraph 185 of the Issues Paper, it is inevitable that the structures and practices of Indigenous societies will have undergone great changes as a result of European settlement, making proof of some sort of "interruption" a relatively simple task.

Question 7.

If a presumption of continuity were introduced, what, if any, effect would there be on the practices of parties to native title proceedings? The ALRC is interested in examples of anticipated changes to the approach of parties to both contested and consent determinations.

A presumption of continuity will increase the strength of a Native Title claim. Possible respondents to the claim will face the prospect of demonstrating a substantial interruption. This carries with it cost and some risk to the respondents. Therefore, the Committee submits that:

- The position of claimants in negotiations to settle native title applications will be strengthened to a level more appropriate to the financial and practical capabilities available to them;
- Claimants will be advised of the strength of their position and advised to proceed further down the track toward litigation;

- Claimants who are aware of evidence that may relate to substantial interruptions or other possible weaknesses in their claims to continuity will not be required to expend limited funds investigating these issues. Claimants will be more likely to proceed as Respondents must establish compelling evidence of the interruption to dissuade the claimant from continuing.

Question 8.

What, if any, procedure should there be for dealing with the operation of a presumption of continuity where there are overlapping native title claims?

The Committee submits that where multiple claim groups assert rights in respect to the same area of land or water and which are not incompatible, the presumption of continuity in favour of each claim group should continue to operate.

The Committee submits that where multiple claim groups assert native title rights which are incompatible with one another and insufficient evidence is raised to overcome either presumption of continuity, the presumptions should both apply and the overlapping claims should both be recognised. Resolution of how the competing interests should be enjoyed is best resolved by mediation, in order to foster a collaborative relationship between the claim groups.[18]

The Committee appreciates that difficulty may arise with the above solution. However, the Committee submits that a removal of the presumption of continuity would simply result in an unfair detriment to each claimant, and an improvement to the position of non-claim group respondents, without any principled basis for disadvantaging the individual claimants. Furthermore, multiple claims of competing interests will inherently result in more costly and lengthier proceedings - the cost and delay in resolution of these interests cannot be improved by increasing the forensic burden to the claimants by removing the presumption of continuity.

Question 9.

Are there circumstances where a presumption of continuity should not operate? If so, what are they?

The Committee submits that where Basic Facts have been established there are no circumstances under which a presumption of continuity should not operate.

18 *Hunter v State of Western Australia* [2012] FCA 690 (the 'Nyangumarta-Karajarri Overlap Proceeding (Yawinya)'), 25 May 2012, at para [17], quoting *Lovett on behalf of the Gunditjmara People v State of Victoria* [2007] FCA 474 at [36].

The meaning of ‘traditional’

Question 10.

What, if any, problems are associated with the need to establish that native title rights and interests are possessed under the traditional laws acknowledged and traditional customs observed by the relevant Aboriginal or Torres Strait Islander people? For example, what problems are associated with:

(a) the need to demonstrate the existence of a normative society ‘united in and by its acknowledgment and observance’ of traditional laws and customs?

(b) the extent to which evolution and adaptation of traditional laws and customs can occur? How could these problems be addressed?

The Committee notes the concerted efforts in Canadian case law to avoid concepts of ‘society’ when conceptualising traditional and customary rights.[19]

The Committee submits that allowing native title to be tested on a concept of society ultimately involves superficial value judgments about Indigenous ways of life, and inappropriately measures traditional, nomadic society against the legal ideas and institutions of a ‘civilised’ society.[20]

The Committee notes that Canadian aboriginal title law requires a “test of ‘continuity’ to prove the ‘traditional’ aspect of their practice”, but this does not mean that ‘traditional’ aspects are frozen in time.[21] A ‘legal doctrine of change’[22] has been adopted within this system, such that “some degree of change in the content of an indigenous practice over the period of time since colonisation does not render that practice ineligible for legal recognition and protection”.[23] The changed laws and customs must still be reconcilable with the original use of the land giving rise to the aboriginal title.[24]

The Committee notes South African scholarly work on the implementation of customary land rights, suggesting that customary law should be seen as fluid and dynamic. Custom changes over time, and should change, just as in common law systems legal precepts are continually evolving. Debate regarding "authenticity" of customary land law is thus to some degree irrelevant.

The Committee submits that evolution and adaptation should be allowed broadly to accommodate the reality that cultures change over time, and that cultures subject to the upheaval associated with colonisation can change rapidly. This is consistent with allowing Indigenous societies to “determine their political status and freely pursue their economic, social and cultural development”, per Article 3 of UNDRIP.

The Committee further submits that acceptance of evolution and adaptation should be extended where acts of third parties which have interfered with the acknowledgement and observance of traditional laws and customs. Such extension should be commensurate with the severity of the interference. This is consistent with the moral responsibility of the

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[19] *Tsilhqot’in Nation v British Columbia 2007 BCSC 1700; [2008] 1 CNLR 112 at* paragraph 453..
[20] Ibid.
[21] Gilbert, J, “Historical Indigenous Peoples’ Land Claims: A Comparative and International Approach to the Common Law Doctrine on Indigenous Title” in 56(3) (2007) *The International and Comparative Law Quarterly* 599.
[22] Connolly, A, ‘Judicial Conceptions of tradition in Canadian Aboriginal Rights Law’ (2006) 1 *Asia Pacific Journal of Anthropology, 27.* As highlighted in Gilbert, J, “Historical Indigenous Peoples’ Land Claims: A Comparative and International Approach to the Common Law Doctrine on Indigenous Title” in 56(3) (2007) *The International and Comparative Law Quarterly* 599.
[23] Ibid, Connolly, A, at 33. As highlighted in Gilbert, J, 599.
[24] *Delgamuukw* at para 128.

State to provide redress for such interference, and not to confirm a denial of rights arising out of those actions.[25]

The Committee submits that this analysis applies to the Indigenous Australian context, and that "authenticity" of a traditional or customary system should not be measured not by its "purity" in reference to past practices but by whether it has become socially embedded and has legitimacy in the eyes of those who operate within it.

The judicial requirement that laws and customs can only be “traditional” if they demonstrate continuous, substantially uninterrupted acknowledgement or observance since sovereignty presents a great difficulty to many native title claims. This is considered further in the response to Question 18.

Question 11

Should there be a definition of traditional or traditional laws and customs in s 223 of the Native Title Act? If so, what should this definition contain?

The Committee submits that it is inappropriate to insert an exhaustive definition of ‘traditional’ or ‘traditional laws and customs’ in the Native Title Act. The breadth of laws and customs of Indigenous Australians and the need for the term to be adaptable to the particular practices of each claim group in each particular case motivates against any absolute limits on the term.

The Committee proposes an alternative approach - to list factors which should, may, or may not be considered in determining whether laws and customs are “traditional”.

The Committee submits the following factors which may be appropriate for consideration:

- The degree to which the laws and customs are similar, referable and reconcilable with laws and customs held at sovereignty;
- The degree to which the claim group genuinely acknowledges and observes the laws and customs as a reflection of their traditions and customs.

The Committee notes that its response to Questions 20 and 21 suggest possible limitations of the consideration given to ‘substantial interruptions’ when determining if laws and customs are “traditional”.

Native title and rights and interests of a commercial nature

Question 12.

Should the Native Title Act be amended to state that native title rights and interests can include rights and interests of a commercial nature?

Question 13.

What, if any, difficulties in establishing native title rights and interests of a commercial nature are raised by the requirement that

[25] Op cit UNDRIPS, Page 3.

native title rights and interests are sourced in traditional law and custom?

Question 14.

If the Native Title Act were to define 'native title rights and interests of a commercial nature', what should the definition contain?

Question 15.

What models or other approaches from comparative jurisdictions or international law may be useful in clarifying whether native title rights and interests can include rights and interests of a commercial nature?

The Committee makes no submission regarding Questions 12 – 15.

Physical occupation, continued or recent use

Question 16.

What issues, if any, arise concerning physical occupation, or continued or recent use, in native title law and practice? What changes, if any, should be made to native title laws and legal frameworks to address these issues?

The Committee submits that the disruption of physical occupation and use of the land by European settlement and specific government actions cannot operate to preclude native title interests in land. The Committee notes that policies of assimilation and intervention have lead to removal from land and in some cases the compulsory acquisition of land otherwise subject to Native Title claims.[26]

Nomadic Indigenous practices, spiritual beliefs, and responses to uncontrollable environmental events often lead to traditional communities apparently abandoning land for prolonged periods of time. The Committee submits that connection to land can be practiced without physical occupation or continued or recent use.[27]

[26] See Schedules to the Northern Territory National Emergency Response Act 2007 (Cth); Dr Mary Edmunds notes this affected 47 towns on land held under Aboriginal Land Rights Act 1976 and 15 Community Living Areas (excisions granted on pastoral leases under the Pastoral Land Act 1992): Dr Mary Edmunds, The Northern Territory Intervention and Human Rights – An Anthropological Perspective, November 2010.
[27] *Dr Peter Veth, 'Abandonment' or Maintenance of Country? A Critical Examination of Mobility Patterns and Implications for Native Title.*

Question 17.

Should the Native Title Act include confirmation that connection with land and waters does not require physical occupation or continued or recent use? If so, how should it be framed? If not, for what reasons?

The Committee submits that the Native Title Act should include confirmation that connection with land and waters does not require physical occupation or continued or recent use. The Committee notes that judicial commentary has tended towards adopting this viewpoint,[28] and that express confirmation will minimise the precedential impact of inconsistent judgements such as *Akiba*[29]which place an undue emphasis on evidence of physical occupation or use of lands.

Including confirmation may be seen as futile given its incompatibility with or irrelevance to Native Title as spiritual connection does not involve the types of right to land ordinarily recognised as property by Australian law.[30] A simple analysis suggests that spiritual rights will typically be superceded by possessory title. However, spiritual connections with land can allow rights to preservation of sacred sites, and some control over the types of development activities performed on the land. Alternatively, spiritual connection could fall within the definition of 'interest in land'. Suggestions have been made that spiritual practices are part and parcel of the land and form an integral component of Indigenous connection to the land as much as physical presence.[31] [32]

The Committee suggests the formulation in the Native Title Amendment (Reform) Bill 2011 quoted at paragraph 167 of the Issues Paper is slightly flawed in that the sentence is incomplete. An analogous example is the sentence "it is not necessary to complete the test" whereas the complete sentence would be "it is not necessary to complete the test in order to graduate from the school". This can be remedied by the addition of the phrase at the end of the sentence "in order for native title or native title rights and interests to exist".

The Committee submits that the modified formulation is more appropriate and reliable:

> *To avoid doubt, and without limiting subsection (1), the expression "connection with the land or waters" in paragraph (1)(c) is not limited to a physical connection and may include a non-physical connection.*

This formulation contains arguable redundancy in that "not confined to a physical connection" is the equivalent of "may comprise a non-physical connection". The Committee submits that redundancy in this case supports certainty as to the meaning of the provision.

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[28] *De Rose Hill v South Australia* [2002] FCA 1342, particularly at [569]; *WA v Ward* [2002] HCA 28, particularly at [59], Yorta Yorta Aboriginal Community v Victoria (2001) 110 FCR 224, Commonwealth v Yarmirr (2001) 208 CLR 1.

[29] *Akiba v Queensland (No 2)* (2001) 270 ALR 564.

[30] John Basten, 'Recent Developments in Native Title Law and Practice: Issues for the High Court', Native Title Research Unit, Volume 2, Paper 13, 2002.

[31] Mark Gregory, 'Absent Owners', 20 Alternative Law Journal 20, 1995. He based this conclusion on the words of Kingsley Palmer in 'Migration and Rights to Land in the Pilbara' (in Peterson, N. and Langton, M (eds), Aborigines, Land and Land *Rights*, 1983 at page 175):
"Men who have special spiritual talents are believed to be able to make visit to their country in the course of natural sleep. During the course of these dream spirit journeys, men believe they are able to inspect sites and places of importance in their clan estates and report back to their fellows on the state of affairs in their distant and now vacated country."

[32] Shaunnagh Dorsett and Shaun McVeigh, *'Conduct of Laws: Native Title, Responsibility, and some limits of Jurisdictional Thinking'*, Melbourne University Law Journal, Volume 36, 470 (2012), 485; see further *Daniel v Western Australia* (2003) 134 FCR 16, 24 and *Neowarra v Western Australia* [2003] FCA 1402.

Substantial Interruption

Question 18.

What, if any, problems are associated with the need for native title claimants to establish continuity of acknowledgment and observance of traditional laws and customs that has been 'substantially uninterrupted' since sovereignty?

The Court in *Bodney v Bennell* summarised a core reason for the requirement of "substantially uninterrupted" continuity in native title claims, proposing that to allow native title claims in case of substantial interruption would have the effect that:[33]

> "*a great many Aboriginal societies would be entitled to claim native title rights even though their current laws and customs are in no meaningful way traditional*".

The facts involving the Larrakia community in the case of *Risk v Northern Territory of Australia* (hereafter *Larakia*) present a clear counter-point to this analysis.[34] The modern Larrakia community was found to "embrace its history and traditions", and "re-animate its traditions and customs".[35] It is clear that these were meaningfully traditional laws and customs, revived after a period of substantial interruption.

The Committee submits that a "substantial interruption" in the observance of laws and customs should not in itself preclude laws and customs observed in the modern day from meeting the requirement of being "traditional". This approach is inconsistent with recognising Indigenous rights to "practice and revitalize cultural traditions and customs".[36] On revitalization of traditional laws and customs after an "interruption", modern laws and customs may be so distinct from pre-interruption laws and customs that they cannot be said to be "traditional". The Committee submits that this can be determined without simple determination of whether the interruption was "substantial", but rather consideration of the nature and implementation of the laws and customs themselves. These considerations should have been used to determine the outcome in the *Larrakia* appeal.

The Committee further submits that the "substantial interruption" criterion in its present form is inappropriate. Past actions deprived Indigenous Australians of their integrity as distinct peoples, of their cultural values and ethnic identities, and/or dispossessed them of their lands, territories or resources, all actions which should be the subject of redress by the State under Article 8 of UNDRIP.[37] Requiring "substantially uninterrupted continuity" in the context of such past actions undermines native title rights, and operates contrary to the aim of repairing and supporting Indigenous cultures to encourage further development.

Question 19.

Should there be definition of 'substantial interruption' in the Native Title Act? If so, what should this definition contain? Should any such definition be exhaustive?

The Committee submits that defining the term "substantial interruption" when that term was originally used in the common law is an ineffective method of modifying the operation of the "substantially uninterrupted" criterion. The definition would necessarily need to

[33] *Bodney v Bennell* [2008] FCAFC 63, at [97].
[34] *Risk v Northern Territory of Australia* [2007] FCAFA 46.
[35] Ibid, at [15].
[36] Op Cit UNDRIPS, Page 3.
[37] Op Cit UNDRIPS, Page 3.

supplant the term in existing case law. It is difficult to assess what the consequence of this would be. Furthermore, the phrase is presently applied in a manner that is fairly consistent with its ordinary English meaning, and importing a more technical definition to the term will likely invite further judicial interpretation unless the phrase is very plainly drafted.

The Committee submits that the preferable amendments are either to:

- limit considerations of "substantial interruption" in determining whether modern laws or customs meet the definition of "traditional" in s223 entirely, and shift consideration to other factors, as formulated under Questions 11 and 20, or to
- empower the Court to disregard substantial interruptions where it is in the "interests of justice" as discussed in response to Question 21.

Question 20.

Should the Native Title Act be amended to address difficulties in establishing the recognition of native title rights and interests where there has been a 'substantial interruption' to, or change in continuity of acknowledgment and observance of traditional laws and customs? If so, how?

The Committee submits that the Native Title Act should be amended to limit consideration of "substantial interruption" from the determination of what is "traditional".

In combination with the recommendation submitted under Question 11, the Committee proposes that section 223 of the Native Title Act be amended by inclusion of a subparagraph, which could be number "(5)", as follows:

> (5) A substantial interruption to the acknowledgement of traditional laws and observance of traditional customs by the claim group or ascendants of the claim group, does not, without further reason, preclude presently acknowledged laws and observed customs from being "traditional" within the meaning of subsection (1).

This approach is consistent with the recognition of Indigenous rights to "practice and revitalize cultural traditions and customs".[38] It is also consistent with the "moral responsibility" to provide redress to Indigenous Australians,[39] and the support of an Indigenous right to "freely pursue their economic, social and cultural development".[40] These considerations should have been used to determine the outcome in the *Larrakia* appeal.

If a more narrow amendment is preferred, the Committee proposes that to prevent the substantial interruption requirement from effectively removing rights from claim groups who were subjected to undue interference by external parties, section 223 should be amended to include the following.

> (5) *Where a substantial interruption to the acknowledgement of traditional laws and observance of traditional customs by the claim group or ancestors of the claim group was substantially caused by the interference of a party or parties outside of the claim group, or by factors outside of claim group's control, that substantial interruption does not affect the determination of whether presently acknowledged laws and observed customs are "traditional".*

The phrase "substantially caused" allows for the possibility that where Indigenous societies had essential control of their development, and allowed traditional laws and customs to lapse, the claim of native title is lost.

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[38] Op Cit, UNDRIPS, Page 3.
[39] *Western Australia v Ward* [2002] HCA 28; 213 CLR 1; 191 ALR 1; 76 ALJR 1098 (8 August 2002), at [561].
[40] Op Cit, UNDRIPS, Page 4, Article 3.

The phrase “or by factors outside of claim group’s control” acknowledges the extreme impacts of new diseases and general social upheaval caused by European Settlement, which ought be accounted for even though no active steps were taken by settlers to interfere with the claim group or their ancestors.

The latter formulation provides redress as per Article 8 of UNDRIP, as well as granting Indigenous peoples the “option of return” to lands from which they were forcibly removed as identified in Article 10.

Question 21.

Should courts be empowered to disregard ‘substantial interruption’ or change in continuity of acknowledgment and observance of traditional laws and customs where it is in the interests of justice to do so?

The Committee is concerned that the phrase “interests of justice” is too broad and has been the subject of concern and calls for guidelines where used, for example, in Article 53 of the Rome Statute.[41] The phrases could import considerations of the overall circumstances of the case, including the present circumstances of the Claimants or the Respondents, or difficulties being experienced between multiple claim groups. There is a possibility that a decision may be taken to not disregard ‘substantial interruption’ in order to assist a poor or disadvantaged respondent due to the “interests of justice”. It may be possible to rectify this issue by providing clarifying language. Given that the intention of the amendment is to focus the “interests of justice” on the causes of the “substantial interruption” itself, it is appropriate that the language also focusses on that period.

An option to clarify this phrase is to utilise a non-exhaustive list of particular circumstances or historical events where it is “in the interests of justice” to disregard “substantial interruption”, as has already been suggested by the Aboriginal and Torres Strait Islander Social Justice Commissioner.[42]

The Committee submits that while the “interests of justice” solution may address some of the concerns discussed under Questions 18 and 20, it is preferable to adopt a better clarified amendment such as those proposed under Question 20. The costs of extensive judicial interpretation and debate have already been felt as a result of the ambiguous terms in s223 of the Native Title Act, and it is preferable to avoid these costs in circumstances where claimants already face substantial problems of cost and delay.

Other changes?

Question 22.

What, if any, other changes to the law and legal frameworks relating to connection requirements for the recognition and scope of native title should be made?

The Committee makes no submission regarding Question 22

[41] The Meaning of "the Interests of Justice" in Article 53 of the Rome Statute Human Rights Watch Policy Paper, JUNE 1, 2005.
[42] Aboriginal and Torres Strait Islander Social Justice Commissioner, ‘Native Title Report 2009’ (Australian Human Rights Commission, 2009) 87.

Authorisation

Question 23.

What, if any, problems are there with the authorisation provisions for making applications under the Native Title Act? In particular, in what ways do these problems amount to barriers to access to justice for:

(a) claimants;

(b) potential claimants; and

(c) respondents?

The purposes of introducing Authorisation appear to be two-fold:

- to ensure that conflicting claims are not made by encouraging applicants to properly identify and communicate with the claim group, and
- to achieve some degree of informed consent of the claim group members in allowing their rights to be affected by an applicant.

Authorisation poses up-front financial burdens and difficulty for potential claimants in ensuring that they have complied with the Authorisation provisions, and preparing sufficient evidence to demonstrate that the Authorisation provisions have been complied with. The Committee submits that such expense is justified in order to achieve the aims described above.

As French J noted in *Bolton v Western Australia*, deficiencies in evidence precipitate doubt in whether an application 'should proceed at all',[43] resulting in a potential barrier to a claimant group accessing justice. This was particularly illustrated in that case where a previously authorised applicant was subject to a deficiently authorised challenge under s66B of the Native Title Act. Although the challenge was deficient, the evidence adduced in respect of various authorisation meetings and the conflict between factions within the claim group was found to demonstrate that the existing applicant was no longer authorised, resulting in a discontinuance of those proceedings. The Committee submits that this may be a deficiency in the Authorisation provisions, while also noting that where there is substantial disagreement within a claim group it may be desirable for the disagreement to be resolved before a determination application is heard.

A serious consequence of Authorisation is that, where the method of decision-making selected is a majority vote or similar, the scheme 'effectively gives a veto right to any significant body of members of a claim group that are understood at the time to hold native title rights and interests'.[44] If such a group does not wish to support the claim of a particular applicant or member of the applicant, their voting power can bring this about.[45]

[43] Ibid 46.
[44] *Bodney v State of Western Australia* [2003] FCA 890, at [40]
[45] Ibid.

Question 24.

Should the Native Title Act be amended to allow the claim group, when authorising an application, to adopt a decision-making process of its choice?

The Committee submits that section 251(a) of the Native Title Act is particularly concerning because, as argued by Phillips,[46] it requires claim groups to determine whether or not a decision-making process which exists under their ***traditional*** laws and customs "***must*** be complied with in relation to authorising things of that kind".

This requires the claim group to engage in two fact-finding missions:

- The first is to determine whether or not their relevant decision-making processes fall under laws and customs which are "traditional" which, assuming an equivalent definition of this word to that found in section 223, imports the extensive judicial interpretation of that term;
- Secondly, of greater concern, is that the section requires the claim group or applicant to determine whether, for the purpose of the statute, the "traditional" process ***must*** be complied with in relation to authorising a person to make a native title determination application or a compensation application, or "things of that kind".

If a claim group wrongly decides that there is no decision-making process falling under traditional laws and customs which "must be complied with" as under s251(a), and elects to use some "non-traditional" decision-making process in order to authorise the Applicant, the wording of the statute suggests that the Applicant will not have been properly authorised. This situation could arise despite complete unanimity of the claim group in purporting to authorize the Applicant under some other decision-making process. This would represent a costly obstacle to accessing justice, particularly so because it would likely not be determined until the near-completion of the hearing of a native title determination, since it would require the content of the traditional laws and customs to be established.

The Committee suspects that the Judiciary, when presented with the argument and situation above, would construe the statute purposively and practically so as not to allow such an unusual outcome.

Despite this, the Committee submits that the appropriate solution to this possibility is to remove section 251(a) entirely, and remove the first words in subsection (b) "where there is no such process".

This solution also addresses circumstances where a claim group comprises a number of subgroups which diverge in aspects of their traditional decision-making process.[47] An opportunity to reach consensus between the subgroups on the decision-making process provides for a cost- and time-efficient dispute resolution process in such cases.[48]

Question 25.

What, if any, changes could be made to assist Aboriginal and Torres Strait Islander groups as they identify their claim group membership and the boundaries of the land claimed?

The Committee makes no submission regarding Question 25.

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[46] *Susan Phillips, of Western Australia* [2003] FCA 890, 403 of the Rome Statute H, 14.
[47] *Holborow v Western Australia* [2002] FCA 1428, 41 and 50.
[48] Ibid.

Question 26.

What, if any, changes could be made to assist claim groups as they resolve disputes regarding claim group membership and the boundaries of the land claimed?

The Committee submits that authorisation does not fully address the resolution of disputes within the claim group. By the definition in section 61 of the Native Title Act, it is possible that any significant body of members of a group that allegedly holds native tittle rights and interests and does not wish to support the claim of a particular applicant has a veto right to making a separate claim.[49] Further legislative provisions could be made to establish or deny such a right to a subgroup, which has not been addressed in the decision.[50] The Court on numerous occasions recognised that section 61 of the Native Title Act 'does not permit the making of a claim by a native title determination application by a subgroup of the native title claim group, the grant of native title to a subgroup of the real native title claim group'.[51]

The Committee submits that a right of a subgroup to make a claim may be necessary in the circumstances of claim settlement over the native title rights,[52] where the agreement favours one part of claim more than the others.

Question 27.

Section 66B of the Native Title Act provides that a person who is an applicant can be replaced on the grounds that:

(a) the person consents to his or her replacement or removal;

(b) the person has died or become incapacitated;

(c) the person is no longer authorised by the claim group to make the application; or

(d) the person has exceeded the authority given to him or her by the claim group.

What, if any, changes are needed to this provision?

The Committee submits that the proposed solution of removing the requirement of a claim group meeting to replace an applicant under s66B(a) or (b) is inappropriate. An example of this inappropriateness is where, due to factionalisation within a claim group, the Applicant is composed of several members, each representing the interests of factions within the claim group. The removal of any one of these members may result in a significantly different makeup of the applicant to that which was agreed upon at authorisation, thereby inviting a conclusion similar to the de-authorisation of the Applicant in certain cases.[53]

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[49] Ob Cit above 44.
[50] Ibid.
[51] See *Landers v State of South Australia* [2003] FCA 264 at 33, *Ward v State of Western Australia* (1998) 159 ALR 483, [541]; *Risk v National Native Title Tribunal* [2000] FCA 1589, [60]; *Tilmouth v Northern Territory of Australia* (2001) 109 FCR 240, *Bodney v State of Western Australia* [2003] FCA 890, per Wilcox J, 41.
[52] *Daniel and Others v Western Australia and Others* [2002] FCA 1147.
53 *Sambo v Western Australia* (2008) 172 FCR 271, [30]; *Murgha on behalf of the Combined Gunggandji Claim v Queensland* [2011] FCA 1317 (14 November 2011) [4].

The Committee submits that these issues are best addressed at the original authorisation stage, and that the definition of authorisation should be modified such that authorisation only occurs if the terms of the authorisation address the procedure to be followed when one or more members of the Applicant:

- Die or become incapacitated so as not to be able to perform their duties;
- Consents to their replacement or removal; or
- Are no longer authorised by the claim group.

The procedures to be followed can of course include the suggested approach of allowing the Applicant to simply file a notice with the court, but might also allow the Applicant itself to select a replacement member, or any other procedure deemed appropriate by the claim group.

The Committee further submits that the terms of authorisation should be flexible and able to incorporate trigger events, such as certain stages of the proceedings being reached, which allow replacement of the Applicant, without expressly removing authorisation of the Applicant. To this end, s66B should be amended to include under (d) a subsection (e) which states:

(d) the terms of Authorisation allow the replacement of the Applicant.

Question 28.

Section 84D of the Native Title Act provides that the Federal Court may hear and determine an application, even where it has not been properly authorised.

Has this process provided an effective means of dealing with defects in authorisation?

Question 29.

Compliance with the authorisation provisions of the Native Title Act requires considerable resources to be invested in claim group meetings. Are these costs proportionate to the aim of ensuring the effective participation of native title claimants in the decisions that affect them?

The Committee makes no submission regarding Questions 28 and 29.

Question 30.

Should the Native Title Act be amended to clarify whether:

(a) the claim group can define the scope of the authority of the applicant?

(b) the applicant can act by majority?

The Committee submits that the Native Title Act should allow the claim group to define the scope of the authority of the applicant, and also to place any other terms and conditions upon the authority that the claim group sees fit. Where the terms of

Authorisation are well laid out and understood the Applicant is more likely to be able to adhere to the desires of the claim group, thereby minimising the probability of further costly claim group meetings which would often be held when there is general disagreement with the actions of the Applicant.

The Committee submits that, in the interests of protecting the rights of any minority groups, the Native Title Act should disallow the Applicant from acting by majority, unless the terms of the authorisation specify otherwise.

Joinder

Question 31.

Do the party provisions of the Native Title Act – in particular the joinder provision s 84(5) and the dismissal provision s 84(8) and (9) – impose barriers in relation to access to justice? Who is affected and in what ways?

Question 32.

How might late joinder of parties constitute a barrier to access to justice? Who is affected, and in what ways?

Question 33.

What principles should guide whether a person may be joined as a party when proceedings are well advanced?

Question 34.

In what circumstances should any party other than the applicant for a determination of native title and the Crown:

(a) be involved in proceedings?

(b) play a limited role in proceedings?

Question 35.

What, if any, other changes to the party provisions of the Native Title Act should be made?

The Committee makes no submission regarding Questions 31 - 35.

The Committee thanks the Australian Law Reform Commission for the opportunity to comment and welcomes the opportunity to participate in future consultations either in person or in writing. Accordingly, please feel free to contact the President or in the alternative the Chair.

Sincerely,

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