

23 June 2014



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Dear Professor Godden

**ALRC Inquiry into the Native Title Act**

The Law Council is pleased to provide this submission in response to the Australian Law Reform Commission's Issues Paper on the Review of the *Native Title Act 1993* (Cth).

We apologise for the delay in the lodgement of this submission and appreciate the extension of time given.

Please contact Valerie Perumalla on (02) 6246 3750 or at [valerie.perumalla@lawcouncil.asn.au](mailto:valerie.perumalla@lawcouncil.asn.au) if you have any enquiries.

Yours faithfully

A handwritten signature in black ink, appearing to read "M Hagan".

MARTYN HAGAN  
SECRETARY-GENERAL

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# Review of the Native Title Act 1993 (Cth)

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## Australian Law Reform Commission

**18 June 2014**

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## Introduction

1. The Law Council of Australia welcomes the opportunity to contribute to the Australian Law Reform Commission's (ALRC's) Inquiry into Review of the *Native Title Act 1993* (Cth). This submission responds to Issues Paper No. 44, released by the ALRC on 20 March 2014.
2. As outlined in **Attachment A**, the Law Council is the peak body for the Australian legal profession. Through the law societies and bar associations of the Australian States and Territories, plus the Large Law Firm Group Ltd (the "constituent bodies" of the Law Council), the Law Council speaks on behalf of 60,000 Australian lawyers.
3. The Law Council has been assisted in the development of this submission by a working group, comprised of some of Australia's leading native title practitioners.
4. The Law Council's work has also been guided by its [Policy Statement on Indigenous Australians and the Legal Profession](#) and previous submissions on native title reform.
5. The Law Council's key submissions are as follows:
  - a. occupation of land evidences a particular relationship to land that gives rise to traditional laws and customs, but should not be determinative of whether native title exists or has been extinguished;
  - b. statutory interpretation of s 223(1) of the *Native Title Act 1993* (Cth) (the Act) should accord more closely with Aboriginal and Torres Strait Islander peoples' understanding of 'tradition';
  - c. the requirement for a normative system based in a normative society for establishing traditional laws and customs is artificial and does not accord with Aboriginal and Torres Strait Islander peoples' practice of tradition;
  - d. a presumption of continuity would reduce the considerable burden on traditional owners in proving that their connection with lands, laws, traditions and customs have not been substantially interrupted; and
  - e. regard should be had to re-visiting the social justice package, to ensure those traditional owners whose native title rights are found to have been extinguished are not disenfranchised.

## General Comments

6. The Law Council commends the Commission on its comprehensive Issues Paper, which covers a wide range of important and complex issues in relation to Commonwealth native title laws and legal frameworks.
7. As indicated in the Social Justice and Native Title Report 2013, subsequent decisions made in the Federal and High Courts as well as successive

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amendments to the the Act<sup>1</sup> has mostly resulted in the failure of native title to meet the expectations of Aboriginal and Torres Strait Islander Peoples.<sup>2</sup>

8. In addition, the Law Council notes the complexity in reviewing the Act because of the way it intersects with the common law.
9. In the Native Title Report January-June 1994, the then Social Justice Commissioner, Professor Dodson, remarked:

*A notable feature of the NTA [Native Title Act] is its dependence on the common law to give substance to its provisions. For example, the crucial definition of native title in the Act is open-ended, it picks up the common law as articulated by the judges in Mabo [No.2] but it does not guide or restrict the development of that definition in future judicial decisions.*<sup>3</sup>

10. By contrast, Gleeson CJ, Gummow and Hayne JJ, in *Yorta Yorta Aboriginal Community v Victoria*<sup>4</sup>, observed that 'native title is not an institution of the common law or a form of common law tenure but it is recognised by the common law' and that 'it is important to identify the intersection between the common law and traditional laws and customs by reference to the definition of native title rights and interests in s 223(1) of the Act'<sup>5</sup>.
11. Noting these complexities, this submission will focus on the following matters:
  - Aboriginal and Torres Strait Islander peoples' understanding of Native Title pursuant to s 223(1);
  - the meaning of 'traditional'; and
  - presumption of continuity.

## **Aboriginal and Torres Strait Islander peoples' understanding of native title pursuant to s 223(1)**

12. As a general comment, the Law Council considers Commonwealth native title laws and legal frameworks should accord more closely with Aboriginal and Torres Strait Islander peoples' understanding, exercise and practice of their native title rights and interests.
13. The Law Council agrees with the Queensland South Native Title Services' submission that s 223 'remains unnecessarily complicated, fragmented and, inconsistently interpreted and applied in practice'<sup>6</sup>. It is difficult to characterise the application of s 223(1) from one case to another and it remains to be seen to what extent the provision may be said to fully facilitate the recognition of traditional Aboriginal rights and interests in land.

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<sup>1</sup> For example, amendments to the *Native Title Act 1992* (Cth) in 1998 pursuant to the *Native Title Amendment Act 1998* (Cth) is widely considered to have 'seriously undermined the protection and recognition of the native title rights of Aboriginal and Torres Strait Islander people': see *Native Title Report 2009*, Australian Human Rights Commission, at para 1.2.

<sup>2</sup> Social Justice Report 2013, p 76. *Ibid.*,

<sup>3</sup> *Ibid.*, p77.

<sup>4</sup> (2002) 124 CLR 422, at [30]-[31].

<sup>5</sup> *Ibid.*, at [30]-[31].

<sup>6</sup> Queensland South Native Title Services' submission to the Australian Law Reform Commission's Inquiry into the Native Title Act, at para [48]. Available [here](#).

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14. The Law Council considers that the application of s 223(1) should accord with the views of the peoples whose laws and customs are at issue. As the then Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Dodson observed in 1994:

*“...native title is inseparable from the culture which gives it its meaning. As Kulchyski eloquently states: Aboriginal cultures are the waters through which Aboriginal rights swim.”<sup>7</sup>*

15. Former Commissioner Dodson has further noted that:

*“If ‘native title’ is a term conveniently describing the ‘the interests and rights of indigenous inhabitants in land’ then the recognition of native title at common law, and for the purposes of the NTA, must be on terms that are consistent with those laws and customs. A concept of native title which purports to recognise our laws and customs must be consistent with our laws and customs, however they may have developed over time. This means that the content of native title must be determined in accordance with our meanings of land ownership. Recognition in this manner is consistent with the observation in *R v Sparrow* [1990] 3 CNLR 160 that ‘... it is possible, and indeed, crucial to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake.’<sup>8</sup>*

16. The Law Council considers that Commonwealth native title laws and legal frameworks will be more equitable to Aboriginal and Torres Strait Islander peoples if emphasis is given to ensuring that s 223(1) is interpreted and applied in a manner which is consistent with the perspectives of Aboriginal and Torres Strait Islander peoples.

## Physical occupation, continued or recent use

17. Section 223(1) is intended to reflect the common law of native title and to refer to rights and interests derived from Aboriginal laws and customs. As noted by Justice Brennan, “[native title] has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.”<sup>9</sup>
18. Justice Toohey in *Mabo v Queensland (No 2)* considered that traditional title ‘arises from the fact of occupation, not the occupation of a particular kind of society or way of life’.<sup>10</sup>
19. However, in *Western Australia v Ward* the Court discredited physical occupation on its own as a determinative factor in characterising native title. The majority said:

*The fact of occupation, taken by itself, says nothing of what traditional law or custom provided. Standing alone, the fact of occupation is an insufficient basis*

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<sup>7</sup> Dodson, M., “From ‘Lore’ to ‘Law’: Indigenous Rights and Australian Legal Systems”, [1995] Aboriginal Law Bulletin 1 citing Kulchyski, P., *Unjust Relations: Aboriginal Rights in Canadian Courts*, OUP, 1994, p.13.

<sup>8</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report: January – June 1994*, p.54.

<sup>9</sup> *Mabo v Queensland [No 2]* (1992) 175 CLR 1 per Brennan J, at [58].

<sup>10</sup> *Ibid*, at [207].

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*for concluding that there was what the primary judge referred to as "communal title in respect of the claim area" or a right of occupation of it. If, as seems probable, those expressions are intended to convey the assertion of rights of control over the land, rights of that kind would flow not from the fact of occupation, but from that aspect of the relationship with land which is encapsulated in the assertion of a right to speak for country.*<sup>11</sup>

20. As noted in the Issues Paper, '*physical occupation, and continued and recent use may be relevant to proving the particular rights and interests possessed under traditional laws and customs*' and '*the content of native title is a question of fact, to be determined on a case by case basis*'<sup>12</sup>.
21. The Law Council considers that physical occupation, continued or recent use should not be a determining factor in establishing connection to land and waters. As noted in the Issues Paper, '*many Aboriginal and Torres Strait Islander people do not currently physically occupy the land or waters that are the subject of a native title claim, and may not have continuously or recently used them*'<sup>13</sup>.
22. However, the Law Council is advised that physical occupation, while not being necessary to establish traditional laws and customs, may in some cases evidence a particular relationship with land which, of itself, may give rise to traditional rights and interests that ought to be recognised as native title rights and interests.

## The meaning of traditional

23. As noted in the Issues Paper, tradition plays a central role in the definition of native title in s 223 of the Act.<sup>14</sup> However, 'tradition', or 'traditional' is not defined in the Act.
24. The Australian Oxford Dictionary (2nd Ed) defines 'tradition' as:

*"n. 1 a a custom, opinion, or belief handed down to posterity especially orally or by practice. b. this process of handing down. 2 esp. joc. an established practice or custom..."*

and in the Oxford English Dictionary (2<sup>nd</sup> Ed) as including:

5.a That which is thus handed down: a statement, belief or practice transmitted (esp. orally) from generation to generation.

...

5.b More vaguely: A long established and generally accepted custom or method of procedure, having almost force of a law: an immemorial usage....:
25. It is arguable that a custom is traditional if it is sourced in, or derived from, the past.

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<sup>11</sup> (2002) 213 CLR 1 per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

<sup>12</sup> Issues Paper, at p52 (citing *Western Australia v Ward* (2000) 99 FCR 316, 58; *Yarmirr v Northern Territory* (1998) 82 FCR 533 [16]; *Wik v Queensland* (1996) 187 CLR 1, 169; *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 58, 61.

<sup>13</sup> Issues Paper, at [153].

<sup>14</sup> Issues Paper, at [98].

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26. The Law Council is advised that the statutory requirements for satisfying the requirement of ‘traditional’ pursuant to s 223 are broad, allowing for flexible interpretation. However, the term ‘traditional’ in s 223 has been interpreted to impose a number of additional requirements, including that the rights and interests arise out of a pre-sovereign normative system based in a pre-sovereign normative society.<sup>15</sup> This has created significant difficulties for native title claimants to successfully prove that their native title rights and interests have not been extinguished or substantially interrupted.

### **The requirement for a pre-sovereign normative system of laws and customs based in a pre-sovereign normative society**

27. In *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 (Yorta Yorta) the High Court considered s 223 and identified that it had a number of characteristics, which are summarised by Bennett J in *AB (Deceased) (on behalf of the Ngarla People) v State of Western Australia (No 4)*<sup>16</sup> citing *Fejo v Northern Territory* (1998) 195 CLR 96 at [33] – [35]:

*The rights and interests must have three characteristics (at [33]–[35]):*

- *First, the rights and interests must be possessed under traditional laws acknowledged and the traditional customs observed by the relevant peoples, such that they must find their source in traditional law or custom, not the common law.*
  - *Secondly, the rights and interests asserted must have the characteristic that, by the traditional laws acknowledged and customs observed of the relevant peoples, those peoples have a “connection with” the land. That connection must have as its source traditional law and custom.*
  - *Thirdly, the rights and interests in relation to land must be “recognised” by the common law of Australia.*
28. As illustrated above, Justice Bennett’s summary of the elements required to prove native title rights and interests highlights in the importance of satisfying the requirements of ‘traditional’ pursuant to s223(1) of the Act. In *Yorta Yorta*, as noted in the Issues Paper, the term ‘traditional’ was interpreted in the following way:

*“The first is the means of transmission of laws and customs. Traditional laws and customs are those which have been passed from generation to generation of a society, usually by word of mouth and common practice. The second relates to the age of the laws and customs. Traditional laws and customs must be understood to refer to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty. The third element relates to the requirement that rights and interests be ‘possessed’ under traditional laws and customs. Gleeson CJ, Gummow and Hayne JJ held that this means that the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has a continuous existence and vitality since*

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<sup>15</sup> (2002) 214 CLR 422, at [47].

<sup>16</sup> [2012] FCA 1268 at [74].

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sovereignty.”<sup>17</sup>

29. Further, Gleeson CJ and Gummow and Hayne JJ in *Yorta Yorta*,<sup>18</sup> held that this meant that there must be a normative system of traditional laws and customs in a normative society:

*“... because what must be identified is possession of rights and interests under traditional laws and customs, it is necessary to demonstrate that the normative system out of which the claimed rights and interests arise is the normative system of the society which came under a new sovereign order when the British Crown asserted sovereignty, not a normative system rooted in some other, different, society. To that end it must be shown that the society, under whose laws and customs the native title rights and interests are said to be possessed, has continued to exist throughout that period as a body united by its acknowledgment and observance of the laws and customs”.*<sup>19</sup>

30. The Law Council notes that the judicial approach to the evolution and adaptation of traditional laws and customs, which includes a level of flexibility shown towards ascertaining a pre-sovereign normative system of laws and customs and a pre-sovereign normative society, has been varied.

31. As noted by the Jumbunna Indigenous House of Learning Research Unit, in *Bodney v Bennell*, the Full Federal Court took into account the ‘the absence of spearing as punishment for transgression of marriage rules [as] a relevant consideration in assessing the continuity of traditional laws and customs’<sup>20</sup>. Finn, Sundberg and Mansfield JJ observed:

*Another significant change is in the punishment of transgressors of marriage rules, there being no evidence that the traditional spearing punishment is still practised today.*

32. The Law Council agrees with Dr David Martin’s criticism, noted in the Issues Paper, that the requirement to demonstrate traditionality is at odds with Indigenous peoples’ contemporary lives:

*Regardless of the fact that in various ways, and to varying degrees, the contemporary lives of native title claimants involve multiple forms of engagement with the wider society ... their identities as Indigenous people—as well as those of their groups—must be constructed for the purposes of claiming native title in a singular and traditionalist modality.*<sup>21</sup>

33. A more flexible approach to ‘traditional’ was taken by Finn J in ascertaining the relevant society in *Akiba v Queensland (No 2)*:

*There is a single Torres Strait Islander society to which the native title claim group belongs. Under that society’s traditional laws acknowledged and traditional customs observed, the claim group in **aggregate** holds native title rights and interests in the waters of Torres Strait, with which I am presently*

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<sup>17</sup> Issues Paper, at [103].

<sup>18</sup> *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at [89].

<sup>19</sup> *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at [89].

<sup>20</sup> 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 at [54].

<sup>21</sup> Issues Paper, at [120].

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*concerned, save in those parts specified in these reasons.* [Emphasis added]

*As the present proceeding does not involve the entirety of the native title claim area, it is **inappropriate that I make a finding that the claim group alone constitutes the relevant society.** It may be the case – and I express no view on this – that when the balance of the claim is heard and determined in relation to those areas where it overlaps other claims, the evidence **may establish that one or both of the Kaurareg and Gudang peoples also belongs to the society for NT Act purposes.***<sup>22</sup> [Emphasis added]

34. The Law Council notes, that the term normative systems or normative society does not appear in the wording of s 223(1) or elsewhere in the Act.
35. The Law Council is advised that it is not immediately apparent why rights and interests need to be derived from a normative system or that a normative society needs to have existed. For example, as noted in the Issues Paper, the Federal Court in *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* ('Alyawarr') stated that the term 'society' does not require 'arcane construction':

*It is not a word which appears in the NT Act. It is a conceptual tool for use in its application. It does not introduce, into the judgments required by the NT Act, technical, jurisprudential or social scientific criteria for the classification of groups or aggregations of people as 'societies.'*<sup>23</sup>

36. The Law Council is advised that additional requirements for a pre-sovereign normative system based in a pre-sovereign normative society constitutes a gloss on the statutory language of s 223(1) of the Act. Emphasis on these matters risks over-emphasising continuity of laws and customs of pre-sovereignty, such as rules about marriage, initiation and birthing practices, traditional language,<sup>24</sup> which may have little relevance to whether particular customs in relation to land and waters have continued. The exercise of customary practices, such as hunting and fishing at particular times, are more relevant to establishing the existence of traditional customs than the requirement of a 'normative' system of laws and customs practiced by a 'normative' society.
37. Furthermore, Law Council is advised that it is not entirely clear why customary practices such as hunting<sup>25</sup> and fishing<sup>26</sup> rights cannot be recognised as native title rights without the need for establishing the continuity of normative rules of a pre-sovereign society. Indeed the traditional hunting and fishing rights are recognised in a variety of statutory and other contexts without reference to a normative society.<sup>27</sup>

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<sup>22</sup> [2010] FCA 643, at [9].

<sup>23</sup> Issues Paper, at [107] citing *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [78].

<sup>24</sup> See for example *Wyman on behalf of the Bidjara People v State of Queensland (No 2)* [2013] FCA 1229 per Jagot J at [375]-[402].

<sup>25</sup> *Yanner v Eaton* (1999) 201 CLR 351.

<sup>26</sup> *Mason v Tritton* (1994) 34 NSWLR 572.

<sup>27</sup> See for example s 14, *Fisheries Act 1994* (Qld) and *Stevenson v Yasso* [2006] 2 QDR 150 at [139] per McMurdo P at [42] and [47]. That case considered what was required to establish "Aboriginal tradition" which was defined in the *Acts Interpretation Act 1954* (Qld) as:

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38. Certainly, there was no indication in *Mabo [No 2]* (the findings of which were intended to be given a statutory framework by the Act) that the recognition of continuing native title rights and interests was dependent upon the continuity of a normative system of laws and customs in a pre-sovereign normative society.

### Indigenous understanding of ‘tradition’

39. Having submitted that the interpretation of ‘traditional’ should not require that laws and customs be based in a pre-sovereign normative system of a pre-sovereign normative society, the following focuses on the meaning of traditional as understood by Indigenous peoples.
40. The Law Council is advised that the concepts of ‘tradition’ and ‘native title rights and interests’ necessarily incorporate a comprehensive and evolving capacity of groups of Aboriginal and Torres Strait Islander peoples to exercise rights over land and its resources.<sup>28</sup> It comprehends rights and interests as well as duties and obligations which accord most closely with Aboriginal and Torres Strait Islander peoples’ understanding and practice as to what constitutes their title to land and its resources, based on the knowledge which has been passed to them from generation to generation.
41. The Law Council is concerned that the reference to ‘traditional’ in s 223 is being interpreted in a fragmented way that is divorced from Aboriginal and Torres Strait Islander peoples’ understanding and practice of tradition.
42. The requirement under s 223(1)(a) of the Act for native title rights and interests to be possessed under traditional laws acknowledged and traditional customs observed places particular emphasis on ensuring clarity in the statutory interpretation of ‘traditional’. The interpretation of s 223 at common law appears to suggest that native title rights and interests must be based on tradition, however the courts have held that not every practice that is traditional, even if it is in relation to land and waters, will give rise to native title rights and interests.<sup>29</sup>
43. It is acknowledged, as Associate Professor Sean Brennan has noted that ‘*there is undoubtedly a judicial process of translation entailed here, across a cross-cultural divide, including a translation of spiritual or religious connection into legal*

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*“means the body of traditions, observances, customs and beliefs of Aboriginal people generally or of a particular community or group of Aboriginal people, and includes any such traditions, observances, customs and beliefs relating to particular persons, areas, objects or relationships.”*

See also *Chapman v Luminis Pty Ltd (No 4)* (2001) 123 FCR 62 per Von Doussa J who considered the meaning ‘tradition’ as defined in s 3 of *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) ss 3.

<sup>28</sup> In *Yanner v Eaton* (1999) 201 CLR 351, at [17] the High Court said ‘property does not refer to a thing; it is a description of a legal relationship with a thing. It refers to a degree of power that is recognised in law as power permissibly exercised over the thing’.

<sup>29</sup> See for example, regarding intellectual property rights: *Western Australia v Ward* [2002] HCA 28; 213 CLR 1 at [57]-[64]; *Bulun Bulun v R & T Textiles Pty Ltd* [1998] FCA 1082; (1998) 86 FCR 244 at 256; status based reciprocal rights: *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia* [2013] HCA 33 at [40]-[45]; *Commonwealth v Akiba* (2010) 204 FCR 260, at [129]-[133]; *Akiba v Queensland (No 3)* (2001) 205 FCR 1, at [510]; status based rights or permission to enter : *State of Western Australia v Graham on behalf of the Ngadjju People* [2013] FCAFC 143 at [129]; *AB (deceased) (on behalf of the Ngarla People) v State of Western Australia (No 4)* [2012] FCA 1268 at [540], [543], [547], [548], [570], [664], [665], [675], [876]; and fishing other resource related rights to take: *Mason v Tritton* (1994) 34 NSWLR 572; *Wilkes v Johnsen* [2000] IndigLawB 6; (2000) 4(26) Indigenous Law Bulletin 18.

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language.<sup>30</sup>

44. Further, Professor Brennan, referring to the majority's statement in *Western Australia v Ward* (2002) 213 CLR 1, notes that s 223 'requires a fragmentation of an integrated view of the ordering of affairs into rights and interest which are considered apart from the duties and obligations which go with them'<sup>31</sup>:

*Is there really, in the words of s 223, the compulsion apparently felt by the plurality [in Western Australia v Ward (2002) 213 CLR 1] to further fragment what is holistic by translating it into Western legal terms in a diffuse rather than organically cohesive way?*

45. By way of contrast Canadian jurisprudence has favoured recognition of a comprehensive 'Aboriginal title'. As Lamer CJC said in *Delgamuukw v British Columbia*:

*Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may themselves be Aboriginal rights. Rather it confers the right to use land for a variety of activities, not all of which need to be aspects of practices, customs and traditions which are integral to the distinctive cultures of Aboriginal societies.*<sup>32</sup>

46. In addition, the Law Council considers that an exhaustive or prescriptive definition of the term traditional in common law or statute is undesirable given that the substance in the definition of traditional will vary on a case by case basis. Flexibility in the use of the term, as it evolves and adapts over time to various cultural, social and economic circumstances, is important and it is suggested that this be expressly provided for in the Act.

## Traditional laws and customs said not to give rise to native title rights and interests

47. In *Western Australia v Brown*<sup>33</sup> it was held that the identification of the relevant native title rights and interests is an objective inquiry.<sup>34</sup> In addition, the majority added:

*It is important to recognise that particular considerations apply to the definition of native title rights and interests. In examining the "intersection of traditional laws and customs with the common law" (or, in this case, the intersection with rights derived from statute), it is important to pay particular attention to the content of the traditional law and customs.*<sup>35</sup>

48. Rights and interests under traditional laws and customs that have been held not to give rise to 'native title rights and interests' within the terms of the Act despite giving rise to rights and interests under traditional law and custom. These include:

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<sup>30</sup> Brennan S, *Statutory interpretation and indigenous property rights*, (2010) 21 PLR 239, p 259.

<sup>31</sup> *Western Australia v Ward* (2002) 213 CLR 1 at 65.

<sup>32</sup> (1997) 153 DLR (4<sup>TH</sup>) 193 at 240-1. Discussed by Simon Young in *The Trouble with Tradition, Native title and cultural change*: The Federation Press 2008, p 143 *et seq*.

<sup>33</sup> [2014] HCA 8 (12 March 2014).

<sup>34</sup> *Ibid*, at [34].

<sup>35</sup> *Ibid*, at [36].

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- status based reciprocal rights between individuals;<sup>36</sup>
  - status based rights or permission to enter;<sup>37</sup> and
  - intellectual property rights.<sup>38</sup>
49. The Law Council notes, as held in *Western Australia v Brown*<sup>39</sup>, that traditional laws and customs will only give rise to native title rights and interests if recognised by the Act.
50. The Law Council considers that the Act should be amended in order for the rights and interests referred above to be recognised as native title rights and interests.

## Rights of conferral

51. The Law Council considers that powers to confer traditional law and custom on other Aboriginal and Torres Strait Island peoples should also be recognised as native title rights and interests.
52. In the case of *AB (deceased) (on behalf of the Ngarla People) v State of Western Australia (No 4)*, it was held that the power to give permission to participate in law ceremonies was not a native title right.
53. The Law Council considers that the Act should be amended to ensure rights of conferral are recognised as native title rights and interests.

## Presumption of continuity

54. The Law Council affirms its position on the presumption of continuity as outlined in its Policy Statement on Indigenous Australians and the Legal Profession and submissions to the Senate Legal and Constitutional Affairs Committee on native title reform.
55. The Law Council considers that a presumption of continuity, rebuttable by evidence to the contrary, would significantly reduce the time and cost of reaching determinations of native title claims and reduce the considerable burden on traditional owners, who at present must effectively prove that their connection with their lands, laws, traditions and customs have not been substantially interrupted.
56. The former Aboriginal and Torres Strait Islander Social Justice Commissioner, Dr Tom Calma AO, has pointed out the irony of the system as it presently stands:

*There are countless reasons why the law may have denied their rights. For many, it is because at some point since colonisation, white settlement and*

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<sup>36</sup> *Akiba v Queensland* (No3) (2010) 204 FCR 1, Finn J found that reciprocity based rights are not native title rights for the purposes of s 223(1) of the NTA but that '[t]his conclusion does not deny such rights their character under the Islanders' traditional laws and customs' at [509].

<sup>37</sup> *State of Western Australia v Graham on behalf of the Ngadju People* [2013] FCAFC 143 at [129]; In *AB (deceased) (on behalf of the Ngarla People) v State of Western Australia (No 4)* [2012] FCA 1268, permission-based rights was held not to accord with native title rights under the Act', per Bennett J, at [570].

<sup>38</sup> *Western Australia v Ward* [2002] HCA 28; 213 CLR 1 at [57]-[64]; *Bulun Bulun v R & T Textiles Pty Ltd* [1998] FCA 1082; (1998) 86 FCR 244 at 256.

<sup>39</sup> [2014] HCA 8 (12 March 2014).

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*policy meant that the claimants lost their connection with their land, even if it was just for a moment. The more a community was hurt by government's policies, the less likely they can gain recognition of their rights.*<sup>40</sup>

57. It is suggested that guidance could be offered by the well-documented remarks of French CJ<sup>41</sup> and the *Native Title Amendment (Reform) Bill 2011*,<sup>42</sup> which was introduced but failed to gain sufficient support in Federal Parliament.

## Drawing of inferences

58. Further, consideration should be given as to whether the NTA should provide greater guidance for the drawing of inferences from surrounding facts to fill gaps in evidence. Inferences have been referred to or applied in numerous cases, however, the approach has not been applied consistently. Areas where there is scope for inferences to play a role include:
- (a) inferring that traditional laws and customs that exist at first contact existed at sovereignty;<sup>43</sup>
  - (b) inferring that traditional laws and customs evolved from native title rights and interests as they were likely to have been at sovereignty;<sup>44</sup>
  - (c) inferring that where a certain number of people adhere to laws and customs, that there is a normative society, even though the laws and customs are not adhered to as a whole;<sup>45</sup> and
  - (d) inferring that occupation of land by Aboriginal and Torres Strait Islander peoples at the time sovereignty was in accordance with traditional law and custom and demonstrative of possession.
59. The Law Council considers that the ALRC should look into the advantages and disadvantages of drawing inferences, when it might be appropriate to draw

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<sup>40</sup> Calma, T., *Native Title in Australia: Good intentions, a failing network?*, Reform, Issue 93, 2009, Australian Law Reform Commission.

<sup>41</sup> French CJ, *Lifting the Burden of Native Title: Some modest proposals for improvement*, Reform, Issue 93, 2009, Australian Law Reform Commission.

<sup>42</sup> See

[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Completed%20inquiries/2010-13/nativetitlethree/index](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed%20inquiries/2010-13/nativetitlethree/index)

<sup>43</sup> For example, in *Harrington-Smith on behalf of the Wongatha People v State of Western Australia* (No 9) [2007] FCA 31, Lindgren J was prepared to infer that behaviour recorded at and following first contact would have been there to be observed at 1829. Similarly, in *Lander v State of South Australia* [2012] FCA 427, Mansfield J observed that while *the relevant date of sovereignty for [the] area is 1788. 'The State [was] prepared...to infer connection from the earliest records of contact. That is an appropriate course to adopt'* at [38].

<sup>44</sup> In *Lander v State of South Australia* [2012] FCA 427, Mansfield J was satisfied that satisfied that the 'native title rights and interests granted arise from the traditional laws and customs of the Dieri People and inferences can be made that they have evolved from the native title rights and interests as they were likely to have been at sovereignty' at [59].

<sup>45</sup> Again, in *Lander v State of South Australia* [2012] FCA 427, Mansfield J, agreed 'with the view of the State that the material supports the inference that the pre-sovereignty normative society has continued to exist throughout the period since sovereignty, and whilst there has been inevitable adaptation and evolution of the laws and customs of that society, there is nothing apparent in the evidence to suggest the inference should not be made that the society today (as descendants of those placed in the area in the earliest records) acknowledges and observes a body of laws and customs which is substantially the same normative system as that which existed at sovereignty' at [48].

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inferences, and a framework for respondents to negate inferences with the possibility of amending the Act in order for inferences to be readily made.

## Authorisation

60. The Law Council considers that the provisions in the Act regarding the authorisation of native title claims should be consistent with the authorisation of Indigenous Land Use Agreements (ILUAs) and other agreements relating to native title.

## Joinder

61. The Law Council considers that the provisions in the Act regarding joinder provide the Court with adequate discretion to allow for late joinder if it is in the interests of justice to do so.

## Social Justice Package

62. It is noted that, at the time the Act was introduced, it was intended that it would be accompanied by a Social Justice Package, which would ensure compensation of those Traditional Owners whose native title rights and interests were found to have been extinguished.
63. It is clear further reforms are required to ensure the Native Title Act can meet the intent of the Australian Parliament, as stated in its preamble:

*The law, together with initiatives announced at the time of its introduction and others agreed on by the Parliament from time to time, is intended, for the purposes of paragraph 4 of Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination and the Racial Discrimination Act 1975 (Cth), to be a special measure for the advancement and protection of Aboriginal peoples and Torres Strait Islanders, and is intended to further advance the process of reconciliation among all Australians.*

64. It is recognised that in many parts of Australia, native title has been extinguished, with little chance of being revived, due to the passage of time and dispossession of those who held a connection with their ancestral lands. As noted earlier in this submission, it is a bitter irony for those groups that the heavy impact of European colonisation, particularly in the south-eastern and eastern parts of Australia, has left many of them without any claim to native title. This injustice was recognised at the time the Act was drafted and implemented, and was to be addressed through the creation of a statutory compensation fund, along with other measures.

65. As noted in the Social Justice Report 2013:

*Explaining the impact of never implementing a social justice package, Dr Calma commented in the Native Title Report 2008 that 'this abyss is one of the underlying reasons why the native title system is under the strain it is*

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*under today.*<sup>46</sup>

66. In 2007, the Australian Labor Party indicated in its National Policy Platform that it recognised “that a commitment was made to implement a package of social justice measures in response to the High Court’s Mabo decision, and will honour this commitment,”<sup>47</sup> however, this commitment later disappeared from the Policy Platform and was never implemented. The Law Council would support the implementation of the ‘social justice measures’ developed by ATSIC and the then Social Justice Commissioner, noting that it may be necessary for the Federal Government to revisit the recommendations originally made in 1995 and ensure their present applicability.

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<sup>46</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report 2013*, Australian Human Rights Commission, page 83.

<sup>47</sup> See <http://www.alp.org.au/>.

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## **Attachment A: Profile of the Law Council of Australia**

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The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 26 Directors – one from each of the Constituent Bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12-month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2013 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.