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**AIATSIS submission to
Australian Law Reform Commission Review of the Native Title Act
Issues Paper 45 of March 2014**

The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) welcomes the opportunity to provide input to the Australian Law Reform Commission (ALRC) in its review into the *Native Title Act 1993* (Cth) (NTA).

AIATSIS is one of Australia's publicly funded research agencies and is dedicated to research across the broad spectrum of native title law, policy and practice and where possible, this submission draws on this broad evidence base. AIATSIS includes the Native Title Research Unit (NTRU), established following the *Mabo* decision. Through the NTRU, AIATSIS seeks to promote the recognition and protection of the native title of Aboriginal and Torres Strait Islander peoples through independent research and assessment of the impact of policy and legal developments.

In our response, AIATSIS has sought to promote a principled approach to reform. We have sought to highlight the primary underlying principle that Indigenous peoples have a right to own and inherit their traditional territories; to make decisions about, and benefit from, their traditional territories and resources; as well as to maintain their culture.

The importance of the recognition and protection of native title to Aboriginal and Torres Strait Islander peoples and the broader Australian community cannot be overstated. We appreciate that the ALRC's review of the NTA, and any government response to subsequent recommendations, is intended to enhance the opportunity for addressing and reducing barriers to the recognition of native title while providing greater certainty in the way native title interacts with other interests in land and

waters. It is this interaction that provides the opportunity for sustainable long-term benefits.

Broader issues of intergenerational land justice exist outside the current native title framework and AIATSIS seeks to promote recommendations from this Review that lead to a redesigned legislative scheme, expanded to accommodate and ameliorate some of the existing situations of injustice.

The substance of the discussion provided with the questions, including the thematic distinctions within the Review are well supported by the ALRC's thorough engagement in this most complex area of policy and law. AIATSIS would like to take this opportunity to congratulate the ALRC on their excellent issues paper and we look forward to the release of the upcoming Discussion Paper.

We offer the following comments, and responses against the 35 questions posed by the ALRC in our capacity as the leading legal and policy research organisation in the native title sector. If you would like further information on this submission, please contact me, on 6246 1155 or lisa.strelein@aiatsis.gov.au.

Yours sincerely

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Director of Research



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Synopsis of the ALRC Review of the Native Title Act

This submission addresses the questions, put by the Australian Law Reform Commission (ALRC) in its 2014 Issues paper 45, Review of the Native Title Act (the Review).

The Review sought submissions about the following aspects of the *Native Title Act 1993* (Cth) (the NTA):

1. Connection requirements, with respect to:
 - a. a presumption of continuity;
 - b. the meaning of 'traditional';
 - c. whether native title rights and interests can include interests of a commercial nature;
 - d. confirmation that 'connection' does not require physical occupation or continued or recent use; and
 - e. empowerment of courts to disregard substantial interruption or change in continuity, where it is in the interests of justice to do so.
2. Barriers imposed by authorisation and joinder provisions.

The Review asked 35 questions against these aspects of the NTA in the context of the limitations, opportunities and the significance of native title to Aboriginal and Torres Strait Islander peoples as well as non-Indigenous Australians. The 35 questions fall under the following 10 themes:

1. Defining the scope of the Inquiry;
2. Connection and recognition concepts in native title law;
3. Presumption of continuity;
4. The meaning of 'traditional';
5. Native title and rights and interests of a commercial nature;
6. Physical occupation, continued or recent use;
7. 'Substantial interruption';
8. Suggestions for change with respect to connection;
9. Authorisation; and
10. Joinder.



Attachments

AIATSIS understands that the ALRC's upcoming discussion paper will be informed by written submissions to the Review and by relevant reports and submissions, particularly over the last two to three years, with respect to the NTA.

AIATSIS considers the following work to be of particular relevance to the Review:

1. [AIATSIS Submission to the Native Title Organisations Review](#);
2. [AIATSIS Submission to the Attorney-General's development of the terms of reference for the Review](#), 28 June 2013;
3. [AIATSIS Submission to the Native Title Act \(Reform\) Bill 2011](#);
4. [AIATSIS Submission to the Courts and Tribunals Legislation Amendment \(Administration\) Bill 2012](#);
5. [AIATSIS Comments on Exposure Draft: Proposed amendments to the Native Title Act 1993](#); and
6. Dr Lisa Strelein, 'Right to Resources and the Right to Trade. Native title: a vehicle for change and empowerment?' Paper delivered to UNSW Symposium, 5-6 April 2013. (in press) (At attachment 1).
7. Dr Lisa Strelein, 2014, '[Reforming the Requirements of Proof: The Australian Law Reform Commission's native title inquiry](#)', 8(10) *Indigenous Law Bulletin*, 6-10.
8. Dr Lisa Strelein 2009, '[A captive of statute](#)' (2009) 93 *Australian Law Reform Commission Reform Journal* 48.
9. [Nick Duff, What's needed to prove native title? Finding flexibility within the law on connection, AIATSIS Discussion Paper 35, 2014.](#)

Also relevant, and linked here for ease of reference is:

1. [Native Title Research Unit: Connection Project web page](#)



Defining the 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?

It is most appropriate that the Review be guided by the Preamble and Objects of the NTA, which acknowledge the importance of the recognition of native title. The Preamble to the NTA aims to ensure that Aboriginal and Torres Strait Islander peoples receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire. This shows the NTA's intention that broader considerations of land justice should underpin its application.

AIATSIS supports that the following five principles guide the Review:

1. Acknowledging the importance of the recognition of native title;
2. Acknowledging interests in the native title system;
3. Encouraging timely and just resolution of native title determinations;
4. Consistency with international law; and
5. Supporting sustainable futures.

Principle 1: Acknowledging the importance of the recognition of native title

AIATSIS expressed concern that a narrow definition of 'recognition' would provide an undue focus on legal process.¹ By defining Principle 1 more expansively, as in the Discussion Paper, the Review highlights a commitment to be guided by broader policy considerations for identifying native title rights and interests.

Principle 2: Acknowledging interests in the native title system

AIATSIS considers that the wording in Principle 2 provides an opportunity for applying a useful distinction between actors interested in the native title system, including outcomes, and actors involved in the legal processes of native title, as follows:

1. **legal interest holders**, for example, Aboriginal and Torres Strait Islander applicants and native title holders, their representative organisations, and the Commonwealth and state and territory governments; and
2. **other stakeholders and interested parties**, for example actors with land tenure or primary industry interests that may coexist or compete with native title rights and interests; and
3. **the broader Australian community**.

¹ Australian Institute of Aboriginal and Torres Strait Islander Studies, submission to the Australian Attorney-General's Department, *Review of the Native Title Act 1993 – Draft Terms of Reference*, 2013, p. 2.



The Preamble of the NTA identifies the importance of certainty for the broader Australian community, including enforcement of past acts and the validity of future acts. The law has clearly protected existing interests by giving those interests priority over Aboriginal and Torres Strait Islander legal interests. In this respect, the stakeholder interest held in the native title system is acknowledged. The Preamble and Objects of the NTA also acknowledge the need to recognise and fund Aboriginal and Torres Strait Islander representative bodies, such as Native Title Representative Bodies (NTRBs), Native Title Service Providers (NTSPs) and Registered Native Title Bodies Corporate (RNTBCs). This support is critical to the navigation of native title processes and ensuring an effective native title system.

Many parties to native title matters, characterised here as ‘stakeholders’, are involved in native title processes in order to keep apprised of the progress of individual matters.² There is potential for focussing on stronger information-sharing with interested stakeholders that provides opportunity for their engagement with any particular native title matter, while reducing the burden of stakeholder involvement in legal processes for native title recognition.

Principle 3: Encouraging timely and just resolution of native title determinations

The ALRC states:

Reform should promote timely and practical outcomes for parties to a native title determination through effective claims resolution, while seeking to ensure the integrity of the process.³

In this context, ‘process’ is taken to mean ‘legal process’ as opposed to engagement processes. However, we note that native title legal processes include significant mediation, negotiation and facilitation processes, many of which require time.

AIATSIS supports a principled approach to reform that encourages savings in time and resources; though not at the cost of achieving just recognition of the rights of Aboriginal and Torres Strait Islander peoples. The paramount ‘integrity’ of the system in this context lies in ensuring that measures to improve the timeliness of matters will at least do no harm. An appropriate policy rationale applies considerations of efficiency, only in the context of a focus first on ‘just’ and then on ‘timely’.

It is our position that:

... a strong focus on the policy reasons that underlie the legal architecture is necessary to ensure that the Review’s conclusions and recommendations can inform legislative change directed towards more just and more efficient outcomes.⁴

The inclusion of Principle 3, with its focus on the integrity of the native title process, indicates that a narrow construction of ‘efficiency’ will not be incorporated into the

² See for example Goldfields Land and Sea Council submission to the Review of Native Title Respondent Funding Scheme 2011.

³ The Australian Law Reform Commission, review of the Native Title Act, *Issues Paper 45*, 2014, p 19.

⁴ Above n1, p 3.



system if such changes are likely to do other than promote fair, just and equitable outcomes.

Principle 4: Consistency with international law

AIATSIS supports that Principle 4 guide the Review. We have previously supported the inclusion of a reference to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as an object of the NTA.⁵ The UNDRIP builds on existing human rights standards that, applied in the context of Indigenous peoples, recognises the importance of traditional territories to the cultural and economic survival of Indigenous peoples.⁶

By endorsing UNDRIP in 2009, the Australian government accepted an obligation to pursue its principles, including introducing legislative mechanisms to give effect to the rights set out in the UNDRIP. Ensuring that the NTA operates in a manner that is consistent with the UNDRIP is a critical element of accepting these obligation.⁷ AIATSIS supports the ALRC's aim of ensuring its recommendations are consistent with Australia's international obligations.⁸

The construction of the Preamble of the NTA shows an intention to give effect to accepted international standards. This intention should be reflected within an overarching statement. For example:

The Australian Government has acted to protect the rights of all of its citizens, and in particular its indigenous peoples, by recognising international standards for the protection of universal human rights and fundamental freedoms including through:

- a) the ratification of the International Convention on the Elimination of All Forms of Racial Discrimination and other standard-setting instruments such as the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights; and
- b) the acceptance of the Universal Declaration of Human Rights and the United Nations Declaration on the Rights of Indigenous Peoples; and
- c) the enactment of legislation such as the Racial Discrimination Act 1975 and the Australian Human Rights Commission Act 1986.

⁵ Ibid, p 1-2.

⁶ S James Anaya and Robert A Williams Jr 'The Protection of Indigenous Peoples' Rights over lands and Natural Resources Under the Inter-American Human Rights System, *Harvard Human Rights Journal* 14:33 (2001) cited in jurist.law.pitt.edu/forumy/2007/10/un-declaration-on-rights-of-indigenous.php. Accessed May 2014.

⁷ For example with respect to the 1998 amendments to the NTA, the United Nations Committee on the Elimination of Racial Discrimination found that the Federal Government's native title amendments breach Australia's international human rights obligations in relation to the International Convention on the Elimination of All Forms of Racial Discrimination.

⁸ Above, n3, p 21.

Principle 5: Supporting sustainable futures

In our submission to the review of native title organisations, AIATSIS notes that despite the government's recognition of the connection between country and wellbeing (for example through the Closing the Gap strategy):

there is limited political recognition of the benefit of native title to the economy and to Aboriginal and Torres Strait Islander peoples economic wellbeing. Establishing a regime of native title rights that are clear, strong and economically valuable; can, in turn, provide a resource base for Indigenous social and economic development.⁹

AIATSIS is fundamentally committed to improving legal and non-legal processes that support sustainable long-term social, economic and cultural development outcomes for the benefit of Aboriginal and Torres Strait Islander peoples. The Aboriginal and Torres Strait Islander Social Justice Commissioner encourages that outcomes sought be measurable,¹⁰ highlighting the critical importance of economic development occurring in a way that supports and respects Aboriginal and Torres Strait Islander peoples' culture and identity.¹¹

We support the inclusion of Principle 5, noting however that:

Ideally, processes [in the broader construct than 'legal process'] should consider all the ways in which a community functions, and its systems of relationships, interconnections and governance structures in a co-ordinated approach, in which cross-agency strategies complement and support one another and avoid duplication and the waste of limited resources.¹²

The nexus between durable Indigenous economic development and political structures is the focus of the Harvard Project on American Indian Economic Development (the Harvard Project)¹³ which identifies two contrasting approaches to economic and political development:

1. the 'standard approach'

- responsive to external proposals for economic development and dependent upon government funding

⁹ Australian Institute of Aboriginal and Torres Strait Islander Studies, submission to Review of Native Title Organisations, 2013, p 8.

¹⁰ Ibid, p 112.

¹¹ L Malezer, *Joint Statement by the Indigenous Peoples Organisation Network of Australia on Agenda Item 3: Discussion of the special theme for the year 'Indigenous Peoples: development with culture and identity: articles 3 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples'* (Delivered at the ninth session of the United Nations Permanent Forum on Indigenous Issues, New York, 19-30 April 2010), in Ibid, 149.

¹² T Bauman & F Kingham, 'Native title mediation: issues identified, lessons learnt', *Proceedings and findings of IFaMP workshops with native title mediators, February and March 2005*, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2006, p 13.

¹³ K Guest, the Promise of Comprehensive Native Title Settlements: The Burrup, MG-Ord and Wimmera Agreements. *AIATSIS Research Discussion Paper*, 27, 2009, p 8; and The Harvard Project on American Indian Economic Development, *The Harvard Project on American Indian Economic Development*, John F Kennedy School of Government, Harvard University, 2009, www.hks.harvard.edu/hpaied/, viewed 29 April 2014.

- concepts of Indigenous culture, traditional law and authority systems generally viewed as obstacles (except as tourist opportunity); and
2. the 'nation building model of economic development'
- governance structures that fit the group's contemporary, culturally based standards of what is legitimate;
 - economic developments that have a cultural match by reflecting needs and aspirations of the community as a cultural entity; and
 - culturally legitimate systems of leadership.

Not surprisingly the nation building model evidenced 'more effective use of resources, sustained economic development and effective community structures.'¹⁴

Sustainability, for indigenous peoples, is 'intrinsically linked to the transmission of traditional knowledge and cultural practices to future generations.'¹⁵ Jeff Corntassel and Richard Witmer discuss the distractions from the 'real roots of power' for the Cherokee (and other federally recognised indigenous nations in the US),¹⁶ stating:

Indigenous nations run the risk of seeking only political or economic solutions to challenges that also require the strong cultural and spiritual foundations of *Gadugi* [a spirit of community camaraderie]. Casinos and other forms of economic development being promoted on indigenous homelands tend to have a strong gravitational pull that, despite the best of intentions, can distract leaders from the true powers of indigenous nations. Lobbying activities of indigenous nations reflect the changing community priorities as tax exemptions and compact negotiations slowly displace education, language programs and health care as priorities.¹⁷

The importance of integrating economic activity with social and cultural priorities and effective governance systems is demonstrated within a 1993 study into Aboriginal participation in the East Kimberly economy.¹⁸ This study identified that public funding of Indigenous organisations was the mainstay of the regional economy, but that it was a false economy, with the public investment benefitting primarily non-local people.¹⁹ Furthermore, this funding arrangement could be construed on the basis of the fundamental paradigmatic difference between the societal organisation and governance of an indigenous culture.

¹⁴ K Guest, the Promise of Comprehensive Native Title Settlements: The Burrup, MG-Ord and Wimmera Agreements. *AIATSIS Research Discussion Paper*, 27, 2009, p 8-9.

¹⁵ J Corntassel, Toward Sustainable Self Determination: Rethinking the Contemporary Indigenous-Discourse, *Alternatives* 33 (2008), 105-132, p 118.

¹⁶ The 'real roots of power' are described as 'the protection of homelands, revitalising language, engagement in ceremonial life and reminding others about sacred histories' in J Corntassel and R.C. Witmer, *Forced Federalism: Contemporary Challenges to Indigenous Nationhood*, University of Oklahoma Press, Oklahoma, 2008, p 24.

¹⁷ *Ibid*, p 26.

¹⁸ G. Crough, and C. Christopherson, *Aboriginal People in the Economy of the Kimberley Region*, North Australia Research Unit, Australian National University, Darwin, 1993 in Above n14, p 9.

¹⁹ *Ibid*.



Cultural sustainability involves development choices that support indigenous ways of living and being in the world. For Taiaiake Alfred, the Indigenous model is one founded on an:

economic view that sustainability of relationships and perpetual reproduction of material life are prime objectives, on the belief that organizations should bind family units together with their land, and on a conception of political freedom that balances a person's autonomy with accountability to one's family.²⁰

Taiaiake Alfred contrasts that with the liberal democratic state as one in which:

the primary relationship is among rights-bearing citizens and the core function of government is to integrate pre-existing social and political diversities into the singularity of a state, assimilating all cultures into a single patriotic identity, and in which political freedom is mediated by distant, supposedly representative structures in an inaccessible system of public accountability that has long been corrupted by the influence of corporations.

In supporting Principle 5, AIATSIS considers that a key ingredient of supporting sustainable futures is to support effective Indigenous governance, where 'governance' concerns the cultural sustainability and legitimacy of decision-making power as well as the processes of representation and accountability.²¹

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. Are there any other principles that should be included?

Pursuing effective native title outcomes is impacted by the growing demand on NTRBs/NTSPs to assist in post determination management and use of native title. This trend was acknowledged in the recently released Review of the Roles and Functions of Native Title Organisations.²²

²⁰ G Taiaiake Alfred, *Restitution is the Real Pathway to Justice for Indigenous Peoples*, 184. An essay adapted from the author's discussion of reconciliation in Wasáse:

Indigenous Pathways of Action and Freedom (Peterborough, ON: UTP/Broadview Press, 2005, <http://web.uvic.ca/igov/uploads/pdf/GTA.AHF%20restitution%20article.pdf>. Accessed July 2014.

²¹ Mick Dodson and Dianne E Smith, *Governance for Sustainable Development: Strategic Issues and Principles for Indigenous Australian Communities*, Discussion Paper No. 250, Centre for Aboriginal Economic Policy Research, Canberra, 2003. See also Patrick Sullivan's findings of the central role of cultural mandate and legitimacy in developing durable agreements with Indigenous communities *Strange Bedfellow: Whole-of-Government Policy, Shared Responsibility Agreements and Implications for Regional Governance*, Background Paper, Centre for Aboriginal Economic Policy Research, Canberra 18 October 2005, in Above n14, p 10.

²² Deloitte Access Economics Pty Ltd, review of the *Roles and Functions of Native Title Organisations*, March 2014, p 67.

This environment of increasing and competing demands is also impacted by the need for NTRBs/NTSPs and other relevant actors to propose and inform reform of the native title system. Nick Duff discusses the complex and drawn-out series of Bills and inquiries over a six year period (2007-2013), identifying the following 11 activities:

- *Native Title Amendment Act 2007* (Cth)
- *Native Title Amendment (Technical Amendments) Act 2007* (Cth)
- *Native Title Amendment Act 2009* (Cth)
- *Native Title Act (No 1) 2010* (Cth)
- 2010 release of exposure draft legislation by the Attorney-, dealing with historical extinguishment and introducing a new section 47C of the NTA.
- 2010 release of a joint discussion paper by the Attorney-General and the Minister for Families, Housing, Community Services and Indigenous Affairs 'Leading Practice Agreements: Maximising Outcomes from Native Title Benefits';
- *Native Title Amendment (Reform) Bill 2011*;
- *Native Title Amendment (Reform) Bill 2012*;
- 2012 announcement of native title reform by the Attorney-General;
- 2013 treasury reforms (the *Tax Laws Amendment (2012 Measures No. 6) Act 2013* (Cth) and the *Charities Act 2013* (Cth));
- 2013 announcement of further reform based on recommendations of the Working Group on Taxation of Native Title and Traditional Owner Benefits and Governance; and
- The Australian Law Reform Commission's review of the Native Title Act.²³

While calls for sweeping change may have gone unheeded,²⁴ the resources of actors in the native title system are taxed by the need to respond to changing requirements.

The most significant recent reforms, which were introduced in 2012, saw claim negotiations managed directly by the Federal Court.²⁵ The overarching purpose of the Federal Court's mandate is to facilitate the just resolution of disputes as quickly, inexpensively and efficiently as possible. This includes weighing up the cost of a dispute against the importance and complexity of a matter, in order to determine the proportionate value of its resolution.²⁶

²³ Nick Duff 'Reforming the Native Title Act: Baby Steps or Dancing the Running Man?' *Australian Indigenous Law Review* Vol 17 No 1, 2013, 56-70 pp 57-62.

²⁴ *Ibid*, p 56.

²⁵ As a result of the decision in *Brandy v Human Rights & Equal Opportunity Commission* (1995) 183 CLR 245. Justice Michael Barker, 'Innovation and management of native title claims: what have the last 20 years taught us?' FCA [2013] FedJSchol 14, p 4. <http://www.fedcourt.gov.au/publications/judges-speeches/justice-barker/barker-j-20130603>, Accessed April 2014.

²⁶ Section 37M *Federal Court Act 1976* (Cth)

Note: Section 37(2)(e) provides an overarching purpose of civil practice and procedure is 'the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute'.

Promoting the timely and effective resolution of native title matters is an appropriate concern for any actor in the system. While avoidable delay can be a denial of justice,²⁷ a lapse of time may be necessary for the just and efficient resolution of a matter.²⁸ This is particularly the case in native title matters, which are unique in the Federal Courts jurisdiction, as they are lodged well before the parties are prepared for litigation. This situation is primarily a result of the imperative of the NTA in registering claims to native title in order to facilitate future development (through the future act system). At the time of registration, it is likely that the processes for establishing the evidentiary basis for the claim are only preliminary and that competing claims between claim groups may not be fully resolved. As such, it is possible for the processes that focus on and encourage speedy resolution of matters to themselves inhibit the native title system's capacity to deliver land justice.

Many factors impact on the speed with which a native title matter will be finalised. It is, however, possible that the Federal Court's mandate for efficiency impacts behaviour within the native title system. Resource intensive challenges to native title claims are at times avoided only by the applicant agreeing to enter an arrangement with the respondent, whereby many of the rights that could be gained from a determination are abrogated. This can occur even when the State has agreed connection and the parties are negotiating terms for a consent determination. For example, in *Watson and Ors v State of Western Australia (No 3)*²⁹, Gilmour J identified a potential abuse of native title processes by a respondent party:

It was submitted by the applicant that while OBL was no longer putting connection in issue, its concern was that if OBL were to retain full party status, **under the cloak of mediation OBL would be able to raise issues relevant to connection and ask the applicant to accept a non-native title outcome in relation to various parts of the Permit area** (emphasis added). It was submitted that it would not be fair on the applicant, having had a party completely drop its opposition to the applicant's case on connection to then, in confidential mediation, say that it would not agree to a consent determination unless and until the applicant agrees to a non-native title outcome in relation to their tenure. It was conceded by senior counsel for OBL on 18 July 2013, that [118.2] was something which OBL may wish to do, but which went beyond its Further Amended Notice and Amended Substituted Response.

This manipulation of native title processes also raises the issue of whether the NTA should be amended to remove or reduce a party's capacity to be joined as a respondent party. However, these behaviours can also be exhibited by state respondent parties, who are not amenable to removal.³⁰

²⁷ The Honourable Wayne Martin AC, Chief Justice of Western Australia, 'Timeliness in the Justice System: ideas and innovations', speech delivered to the Australian Centre for Justice Innovation, Monash University Law Chambers, Melbourne, 17 May 2014.

²⁸ Ibid p 21.

²⁹ *Watson v State of Western Australia (No 3)* [2014] FCA 127, at [63].

³⁰ For example, *Brown v South Australia* [2010] FCA 875 at [38] and *Graham on behalf of the Ngadju People v State of Western Australia* [2014] FCA 516 at [119] the Court rejects the State's contentions about the



The Federal Court's role in making orders pursuant to agreements does not require consideration of the details of an agreement.³¹ However, the Court's role in determining that the agreement has been appropriately negotiated by the State necessarily involves some level of 'looking behind' the agreement. There is a trend away from a focus by the Court on the evidence underpinning agreements, with judges becoming increasingly concerned only with the circumstances of the agreement, that is, that it was freely entered into.³²

Seeking to establish legal precedents is a significant factor in preventing the resolution of claims by agreement, as parties wait for the law to 'settle'. A resurgence of 'pioneering' in native title may well occur as the focus shifts from determinations to compensation. AIATSIS states in our submission to the Native Title Organisations Review that:

developing and prosecuting compensation claims ... remains a latent burden. While native title groups are now beginning to pursue compensation claims, compensation remains a relatively uncharted area for native title law.

AIATSIS agrees with Barker J, that adequate funding of the native title system is required to achieve timely native title outcomes, which he states is 'fundamental to successfully navigating this new phase in the system.'³³

The recognition provided by native title is not absolute. While the courts have recognised that Indigenous peoples' rights to land survived colonisation, the court asserted that the state has power to divest those rights unilaterally, without consent or compensation.³⁴ The extinguishment doctrine is premised on the notion of an underlying title of the state that may be perfected by the exercise of complete dominion.³⁵ ³⁶ The introduction of the *Racial Discrimination Act* in 1975, However provides some protection for native title, to at least ensure that constitutional and legislative protections afforded to other property holders are enjoyed by Aboriginal and Torres Strait Islander peoples. This includes the requirement that compensation be paid on just terms. The nature and extent of compensation and what constitutes

absence of evidence of occupation of an area by the Ngadju people and, at [120] the Court warns the State that it should be a model litigant.

³¹ Sections 87 and 87A of the *Native Title Act 1993* (Cth).

³² Nick Duff, 'What's needed to prove native title? Finding flexibility within the law on connection' *AIATSIS Research Discussion Paper no. 35*, Australian Institute of Aboriginal and Torres Strait Islander Studies Press, Canberra, 2014, pp 5-10. Although we note here that the extent to which agreements are 'freely' entered into is not well developed in Australian law, particular with reference to the UDRIP principles of free prior and informed consent.

³³ Above, n25.

³⁴ *Mabo v Queensland [No. 2]* (1992) 175 CLR 1, at p 64, per Brennan J, relying on *Calder v Attorney General of British Columbia* (1973) 34 DLR (3d) 145.

³⁵ Ibid at pp. 68-74, per Brennan J; pp. 94, 100, per Deane and Gaudron JJ (but compare comments at p. 92); and pp. 194-5, Toohey J. See *Johnson v M'Intosh* 21 US (Wheat.) 543 (1823) at p. 588, *Cherokee Nation v Georgia* 30 US (5 Pet) 1 (1831), at pp. 557-62, *US v Sandoval* 231 US 28 (1913), *United States v Santa Fe Pacific Railroad Co.* (1914) 314 US 339, at pp. 46-7; in Canada, see *St Catherine's Milling and Lumber Co. v The Queen* (1887) 13 SCR 577 but compare the fiduciary duty doctrine in *Guerin v The Queen* [1984] 2 SCR 335.

³⁶ Dr Lisa Strelein, 'Right to Resources and the Right to Trade. Native title: a vehicle for change and empowerment?' Paper delivered to UNSW Symposium, 5-6 April 2013, p 3.



‘just terms’ in the context of Indigenous peoples connection to country remain unexplored by the Courts.

Barker J’s also proposes supporting outcomes during this phase by the development of a tripartite endeavour involving the Federal Court, claim groups and respondent parties.³⁷ This approach has potential to provide additional substance to the shadow that the common law and courts cast over agreements; an important measure in circumstances of such obvious power imbalance. A tripartite endeavour of this nature would require additional consideration to stakeholder interests. As discussed above, these interests could be met by appropriate information-sharing at a State level.

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?

Native title in Australia is a creature of the common law and, by application of the NTA, of federal statute. Native operates within the complexity of the federal system, where various land management regimes, which remain the exclusive jurisdiction of the States, intersect with native title in an intricate interplay across the country. As a result, the NTA does not operate uniformly across Australia. However, even within States, the cost borne by applicants in meeting the requirements of the NTA are not consistent.

The fact is that in areas of Australia where settlement by the British occurred earlier than in other areas, and where it was much more intensive than in other areas, connection has proved more difficult to establish.³⁸

Some States have adopted alternative processes for delivering land justice, for example the *Traditional Owners Settlement Act 2010* (Vic).

The native title system is an application of the Commonwealth jurisdiction over State/Territory jurisdictions and the intersection of that system of law with traditional laws acknowledged by Aboriginal people and Torres Strait Islanders.³⁹ The existence and development of these systems of law are impacted by geographic, historical and cultural circumstances.⁴⁰ The NTA and, in particular, s 223 of the NTA, is where these systems meet.⁴¹

In a contested application for native title, applicants must present evidence sufficient to establish connection, on the balance of probabilities. Precedent and rules of

³⁷ Ibid, p 9.

³⁸ Ibid, p5.

³⁹ S Dorsett and S McVeigh Ch 14: ‘Section 223 and the shape of native title’ in L Ford and T Rowse (Eds) *Between Indigenous and Settler Governance*, Routledge Press, Oxon, (2013) 162-173.

⁴⁰ *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at [79].

⁴¹ Above, n36.

procedure guide the Federal Court in setting the requirements for establishing connection.

Most native title claims are, however, resolved through negotiated consent determinations.⁴² The Court's role is to make orders consistent with the agreement, if and as appropriate. The Court is not required to examine the evidence going to connection. Rather, under ss 87 and 87A NTA, the Court looks to the nature of the consent with respect to whether the agreement is based on free and informed consent and whether the State has given appropriate consideration to material in support of the application.

In the AIATSIS Discussion Paper 'What's needed to prove native title? Finding flexibility within the law on connection',⁴³ Nick Duff sets out multiple cases showing the seriousness with which the courts approach native title determinations,⁴⁴ while identifying the following three distinct approaches judges take in deciding whether a consent determination is appropriate:

1. a mainstream approach where the enquiry is focussed on the circumstances of the agreement;⁴⁵
2. a 'hybrid' category where the enquiry is focussed on the circumstances of the agreement *and* an independent assessment of the evidence⁴⁶ (which Duff identifies as being of significant number but becoming less common as the 'mainstream' approach is increasingly adopted);⁴⁷ and
3. the 'hands-on' approach where the enquiry is focussed on the evidence.

⁴² As of 31 January 2014, 206 out of the 271 native title determinations since 1992 have been made by consent: Native Title Research Unit (2014) *Native title determinations summary*, at p. 2. Available at http://www.aiatsis.gov.au/files/ntru/determinations_summary.pdf. Above, n 32, p1.

⁴³ Ibid

⁴⁴ (Determinations) 'will bind not only the immediate parties but also the world at large' see *Deeral v Charlie* [1997] FCA 1408; *Smith v Western Australia* [2000] FCA 1249 at [26]; *Cox on behalf of the Yungngora People v Western Australia* [2007] FCA 588; *Wik and Wik Way Native Title Claim Group v Queensland* [2009] FCA 789 at [15]; *Rex on behalf of the Akwerlpe-Waake, Iliyarne, Lyentyawel Ileparranem and Arrawatyen People v Northern Territory of Australia* [2010] FCA 911; *Lennon on behalf of the Antakirinja Matu-Yankunytjatjara Native Title Claim Group v South Australia* [2011] FCA 474 at [4]; *Prior on behalf of the Juru (Cape Upstart) People v Queensland (No 2)* [2011] FCA 819; *King on behalf of the Eringa Native Title Claim Group v South Australia* [2011] FCA 1386. Ibid, p 6-7.

⁴⁵ These cases clearly articulate this first approach: *Nangkiriny v Western Australia* [2004] FCA 1156, per North J at [15]; *Munn for and on behalf of the Gunggari People v Queensland* [2001] FCA 1229, per Emmett J at [29]-[30]; *Nelson v Northern Territory of Australia* (2010) 190 FCR 344, per Reeves J at [14]. Ibid, p 7-8.

⁴⁶ French J in *Cox on behalf of the Yungngora People v Western Australia* [2007] FCA 588 at [4], [12] and the following cases which articulate the second approach: *Kaurareg People v Queensland* [2001] FCA 657 per Drummond J; *Ngalpil v Western Australia* [2001] FCA 1140 per Carr J; *James on behalf of the Martu People v Western Australia* [2002] FCA 1208 per French J; *Mervyn, Young and West on behalf of the Peoples of the Ngaanyatjarra Lands v Western Australia* [2005] FCA 831 per Black CJ; *Patta Warumungu People v Northern Territory of Australia* [2007] FCA 1386 Mansfield J; *Adnyamathanha No 1 Native Title Claim Group v South Australia (No 2)* [2009] FCA 359 per Mansfield J; *Prior on behalf of the Juru (Cape Upstart) People v Queensland (No 2)* [2011] FCA 819 per Rares J. Ibid, p 9.

⁴⁷ Ibid, p 9.

Duff notes that the hands-on approach was most generally adopted in the earlier consent determinations and that this approach has continued to be associated with Queensland cases.⁴⁸

In addition to judgments that have different approaches to formalising agreements, variation occurs between States in setting and applying connection requirements. Although the expressed policies of each State have been similar in terms of their preference for mediation and reliance on the established case law and legislation, the way in which these separate regimes were translated to practice varied. For instance, government management in all jurisdictions was identified as vesting in specific units in the Crown Solicitor or the Department of Justice, except for Queensland and Western Australia. These jurisdictions vested government management in the Department of Natural Resources, and the Department of Treasury and Finance.⁴⁹ The philosophical as well as practical factors that drive considerations of the requirements for 'connection'⁵⁰ arguably are seen in the government body managing the processes.

Dr Lisa Strelein argues that the States have not taken up the opportunity to apply the policy objectives of the NTA to reach agreements that are more flexible than could be available to the Courts.⁵¹ States and Territories are required to represent the public interest (including the interests of Aboriginal and Torres Strait Islander people) when negotiating consent determinations.⁵² This requirement sits uneasily against the more strict adherence to unnecessarily narrow constructions of the applicable legal norms displayed by the States and Territories. In other words, to quote Barker J:

There has been a range of experiences as to the requirements of State and Territory governments when it comes to satisfaction of the connection issue. There is a danger they tend to become ritualistic, formulaic, cumbersome and bureaucratic; that they forsake flexibility for form.⁵³

⁴⁸ See *Western Yalanji or 'Sunset' peoples v Pedersen* [1998] FCA 1269 per Drummond J; *Masig People v Queensland* [2000] FCA 1067 per Drummond J; *Congoo v Queensland* [2001] FCA 868 per Hely J; *David on behalf of the Iama People and Tudulaig v Queensland* [2004] FCA 1576 per Cooper J; *Djabugay People v Queensland* [2004] FCA 1652 per Spender J; *Mundraby v Queensland* [2006] FCA 436 in Nick Duff, *Ibid*, p 9.

⁴⁹ R Farrell, J Catlin and T Bauman 'Getting Outcomes Sooner: Report on Native Title Connection Workshop Barossa Valley, July 2007, Aboriginal Press, Canberra, 2007, p 33.

⁵⁰ J Finlayson, 'Anthropology and Connection Reports in Native Title Claim Applications', paper presented at the Native Title Forum, Customs House Brisbane, 2001.

⁵¹ L Strelein 'Reforming the Requirements of Proof: The Australian Law Reform Commission's Native Title Inquiry' *Indigenous Law Bulletin* 8(10) January/February 2014, p 6 and p 9.

⁵² AIATSIS, confidential draft report 'Commonwealth Native Title Connection Policy Research Project, 18 November 2011. *Wilson v Northern Territory of Australia* [2009] FCA 800 at [17]; *Ampetyane v Northern Territory of Australia* [2009] FCA 834 at [19]; *Hayes on behalf of the Thalanyji People v State of Western Australia* [2008] FCA 1487 at [23]; *Wik and Wik Way Native Title Claim Group v State of Queensland* [2009] FCA 789; *Munn v Queensland ('Munn')* [2001] FCA 1229 at [29]; *Mullett on behalf of the Gunai/Kurnai People v State of Victoria* [2010] FCA 1144 at [20]; *Hayes on behalf of the Thalanyji People v State of Western Australia* [2008] FCA 1487 at [23].

⁵³ Above, n25, p 7.

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?

The relevance of comparative law and policy to the recognition of native title in Australia is evident in *Mabo* and in later decisions.⁵⁴ The following discussion on comparative law is limited to potential comparison of connection and authorisation between South Africa, the United States, Canada, Malaysia and New Zealand. AIATSIS also provides some comment on the Traditional Owners Settlement regime in Victoria.

The impact of international and comparative law on Australian native title law has been deliberately limited.⁵⁵ For example, in *Fejo v Northern Territory of Australia*⁵⁶, Kirby J stated:

The ways in which each of the former colonies and territories of the Crown addressed the reconciliation between native title and the legal doctrine of tenure sustaining estates in land varied so markedly from one former territory to the other and were so affected by local considerations (legal and otherwise) that it is virtually impossible to derive generally applicable common themes of legal principle. Still less can a common principle be detected which affords guidance for the laws of this country.⁵⁷

Although all the judgments in *Fejo* argued that decisions in other common law jurisdictions could offer little guidance to the High Court, Kirby J's devaluation of overseas authority based on the delayed inclusion of native title in Australian doctrine is difficult to reconcile. Dr Lisa Strelein expresses disappointment on the basis that:

it suggests that our own political and legal history provides an excuse for a limited response to the claims of Indigenous peoples.⁵⁸

AIATSIS notes in its submission to the Inquiry into the Native Title Amendment (Reform) Bill 2011 that, unlike in other jurisdictions, Australian courts have not, of

⁵⁴ *Mabo v Queensland (No 2)* [1992] HCA 23 (3 June 1992) [42]; *Western Australia v Ward* [2002] HCA 28 (8 August 2002) [566]; Sean Brennan, 'Native title in the High Court of Australia a decade after *Mabo*' *Public Law Review* 14, 2003, p 209; Michael McHugh, 'The Constitutional Jurisprudence of the High Court' 30(1) 2008 *Sydney Law Review*, p 5.

⁵⁵ *Fejo v Northern Territory of Australia* 195 CLR 96, per Kirby J, at [102], discussing other former territories of the Crown, eg West Africa, and the development of native title, from usufructory rights to equal to an estate in fee simple.

⁵⁶ (1998) 156 ALR 721.

⁵⁷ *Ibid* at [103].

⁵⁸ L Strelein, 'From *Mabo* to Yorta Yorta: Native Title Law in Australia' *Washington University Journal of Law and Policy*, 19(225) 2005, p 249.

their own accord, followed a principle of beneficial interpretation in relation to the NTA.⁵⁹ The argument has followed that Australia rejects post sovereignty Indigenous law making authority.⁶⁰ Although traditional laws are recognised in the NTA,⁶¹ these are not enforceable in Australian law. However, Tom Calma referred to the NTA as:

a defining piece of legislation in terms of customary law. As a statute that had its evolution through common law, it is the ultimate recognition that Indigenous Australian societies possessed, and continue to possess, well-developed systems of law.⁶²

The distinctions between international jurisdictions in the recognition of customary law and authority creates difficulty when attempting to compare issues of connection, authorisation and joinder. AIATSIS is therefore focussing on a parallel across international jurisdictions, that is the aim of developing a compromise that recognises Indigenous rights and interests. The successful progress of that compromise is dependent to a very large extent on the willingness of governments to take responsibility for resolving issues with respect to the political position of Indigenous groups. In this sense, it is arguable that Australia does not have a well-developed public law framework to support Indigenous laws.

South Africa

The *Mabo*⁶³ decision was important to the development of the recognition of native title in South Africa where the Constitutional Court went beyond the recognition of communal title and:

...with the aid of constitutional recognition of 'indigenous law', to declare that the customary law of the Indigenous inhabitants of South Africa was not simply recognised by the law of South Africa, but was part of that law.⁶⁴

Indigenous law is recognised within South Africa's Constitution and, since this case in 2003, is accepted as an 'independent source of norms within the legal system'.⁶⁵ This constitutional recognition provides greater authority to Indigenous law than that afforded by the common law doctrine and the legislative response in Australia.⁶⁶

⁵⁹ L Strelein, 'A captive of statute' *Australian Law Reform Commission Reform Journal* 16(93) 48 (2009) p 1. www.austlii.edu.au/cgi-bin/download.cgi/au/journals/ALRCRefJl/2009/16, Accessed April 2014.

⁶⁰ K McNeil 'Land Rights and Self Government' in L Ford and T Rowse (Eds) *Between Indigenous and Settler Governance*, Routledge Press, Oxon, (2013) p 146.

⁶¹ for example in s 223 and s 251B of the *Native Title Act 1993* (Cth).

⁶² T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, speech to the National Indigenous Legal Conference, 'The Integration of Customary Law into the Australian Legal System' 2006. www.humanrights.gov.au/news/speeches/integration-customary-law-australian-legal-system-tom-calma-2006. Accessed June 2014.

⁶³ *Mabo v Queensland* (1992) 175 CLR 1.

⁶⁴ L Strelein, *Compromised jurisprudence: native title cases since Mabo*, 2nd ed, Aboriginal Studies Press, Canberra, 2009, p 127. See *Richtersveld Community and Others v Alexkor Ltd and Another* [2003] (6) BCLR 583 (SCA).

⁶⁵ *Ibid* p 127. See *Alexkor Ltd and Another v Richtersveld Community and Others* [2003] Case CCT 19/03 (14 October 2003).

⁶⁶ *Ibid*.

Although colonisation is taken to have extinguished indigenous sovereignty in South Africa,⁶⁷ its legal system recognised customary law through legislation from 1927. Most of the authority already exercised by indigenous rulers was delegated to them pursuant to the legislation and the President of South Africa was vested with the title of “Supreme Chief”. The Supreme Chief’s powers were to recognise, appoint and depose chiefs, and make regulations prescribing the duties, powers and privileges of chiefs.

Chiefs and headmen preside over courts and determine legal outcomes with respect to crimes (at common and at customary law and under statute, except for very serious crimes, such as murder) and civil law, with respect to claims arising out of customary law only. The chief’s and headmen’s courts also operate according to indigenous procedure.⁶⁸

Dr Bede Harris considered an analysis of customary law by Herbert Coombs in 1994, with respect to its application to the Yirrkala community of East Arnhem Land. Dr Harris states:

The proposal put by that community was that the administration of law within Yirrkala lands would be under the control of a law council composed of clan elders. The council would name members of the community to form a community court to resolve alleged infractions of the law. On the key issue of the jurisdiction of the law council, the Yirrkala proposed that geography would be the essential criterion of jurisdiction, and that anyone resident in or visiting Yirrkala territory would be subject to its laws, and that submission to jurisdiction would be a requirement to obtain a permit to enter the territory. However, the Yirrkala proposal also accepted that in some instances (not precisely defined, but certainly including homicide), State or Commonwealth law would govern, albeit preceded by a preliminary hearing by an indigenous court, which would then advise the magistrate or judge hearing the case under received law.

... Clearly what is needed is a set of rules which can be applied to determine whether indigenous law is applicable when that point is put in issue. In other words, there would have to be some mechanism by means of which parties who dispute the jurisdiction of an indigenous authority could apply to the court system for a determination of which legal system was applicable. In many, perhaps most, cases arising on indigenous lands, the parties would be quite satisfied to have their dispute regulated by customary law, but in some instances, for example where a person of Aboriginal ethnicity no longer chooses to identify

⁶⁷ B Harris, Indigenous Law in South Africa, *James Cook University Law Review*, 5, 1998, p72. Although under the principle in *Campbell V Hall* (1774) 1 Cowper 204 the laws of the inhabitants of lands which were not terra nullius remained in force unless abrogated by the colonising power, the law operating at the Cape upon assumption of British sovereignty in 1806 was assumed to be Roman-Dutch – that is, the law of the previous colonising power, not the law of the indigenous inhabitants.

⁶⁸ B Harris, Legal Pluralism and a Bill of Rights – The South African Experience, *Australian Indigenous Law Reporter* 10(1) 2006. www.austlii.edu.au/cgi-bin/sinodisp/au/journals/AILR/2006/1.html?query=bede%20harris. Accessed June 2014.



themselves as Aboriginal, the opportunity must be given for such a person to adduce evidence as to why Aboriginal law should not be applicable. Clearly much will depend upon what presumptions as to the applicability of indigenous law are in force, and upon whom the onus should rest in arguing that one or other legal system should apply.⁶⁹

United States

The Doctrine of Discovery is the common root of European colonisers' claims to Indigenous peoples territory and assertion of sovereignty. The domestic application of the doctrine by the courts is perhaps most clearly articulated in the series of US Supreme Court cases of the 1820s and 30s:

The Indian nations have always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any European potentate than the first discoverer of the coast of the particular region claimed.⁷⁰

The Indian nations were declared to have lost international status or capacity to form relations with foreign countries.

Their governments and their traditional territories are simply stated to be internal to the United States of America. They are deemed to be 'dependent' in that their authority is subject to some initially undefined power on the part of Congress and the executive branch to trench upon their autonomy.⁷¹

The 'residual sovereignty' held by Indian nations in the United States, includes those nations holding authority with respect to, amongst other things, land management and self-government, including criminal jurisdiction.⁷² Some commentators have equated the principle of residual sovereignty to the concept of extinguishment in Australia.⁷³

Since Congress ended treaty-making with Indian tribes in 1871, relations with Indian groups have been formalised and/or codified by Congressional acts, Executive

⁶⁹ Ibid. See Herbert Coombs, *Aboriginal Autonomy: Issues and Strategies* (1994) 118–30.

⁷⁰ *Worcester v Georgia* 31 US 515 (1832) see also *Johnson v M'Intosh* [1823] USSC 22; 8 Wheat 543 (1823).

⁷¹ 31 US 515 (1832). See also Bradford W Morse, 'Indigenous-Settler Treaty Making in Canada' in Marcia Langton et al (eds), *Honour Among Nations: Treaties and Agreements with Indigenous People* Melbourne University Press, Melbourne, 2004, p 58.

⁷² Above n 57, 136–8. See discussion on *Johnson v M'Intosh* (1823), *Cherokee Nation v Georgia* (1831) and *Worcester v Georgia* (1832), per Marshall CJ (aka "the Marshall Trilogy"); and Newton et al. 2005: 4.01–04.02, *United States v Lara*; *United States v Wheeler*.(322–23) states:

The Indian nations in the United States, therefore have what might be called residual sovereignty, consisting of complete inherent jurisdiction minus whatever authority has been taken away from them.

⁷³ Above, n 69, p 58.

Orders, and Executive Agreements.⁷⁴ American Indian groups may currently only become federally recognised as an Indian tribe:

1. By an Act of Congress;⁷⁵
2. By Federal recognition processes under Regulation 25 C.F.R. Part 83; or
3. By a decision of a United States court.

The second process (also known as regulation 83) applies fairly onerous requirements and the process includes forms of notification and a petition supported by extensive proof.⁷⁶ However, this harshness is arguably ameliorated by the equitable/fiduciary obligation on the United States to act in the best interests of Native Americans in all circumstances.⁷⁷

As at 29 January 2014, there were 566 entities recognised as Indian tribes by the Bureau of Indian Affairs.⁷⁸ While nations establish their own requirements for membership, the United States Department of the Interior provides advice to individuals seeking to establish ‘connection’ to a tribe.⁷⁹ This most commonly includes lineal descent from a person named on the tribe’s base roll or relationship to a tribal member who descended from someone named on the base roll. Other requirements can be tribal blood quantum, tribal residency or continued contact with the tribe.⁸⁰ Tribal membership rolls and lists are protected under the United States’ Privacy Act.

Tribes have the inherent right to operate under their own governmental systems. This includes systems of government based on complex to simple organisational structures including heredity, non-heredity authority being vested in one or more members, based on a range of considerations. The United States Justice Department states:

Tribes have the inherent right to operate under their own governmental systems. Many have adopted Constitutions, while others operate under Articles of Association or other bodies of law, and some still have traditional systems of government. The chief executive of a Tribe is generally called tribal chairperson, principal chief, governor, or president. A tribal council or legislature often performs the legislative function for a Tribe, although some Tribes require a referendum of the membership to enact laws. Additionally, a significant number of Tribes have created tribal court systems.⁸¹

⁷⁴ Inter-Tribal council of California, Inc “About Us”. www.itccinc.org (Accessed June 2014).

⁷⁵ **Note:** A Tribe whose relationship has been expressly terminated by Congress may only be restored as a “recognised” tribe by Congress.

⁷⁶ Bureau of Indian Affairs, Department of the Interior, Part 83 Procedures for Establishing an Indian Tribe at <http://www.bia.gov/cs/groups/public/documents/text/idc1-022122.pdf> (accessed June 2014).

⁷⁷ See F Cohen, Handbook on Federal Indian Law 122 (1988) in Kavitha Janardhan ‘Gayanashogowa and the Guardianship: Expanding and Clarifying the Federal-Tribal Trust Relationship’, 36 *Environmental Law Review* 36:10, Harvard University, 2006, p 10793.

⁷⁸ See notice in the Federal Register Vol 79 No 19, 29 January 2014 p 4748-53.

⁷⁹ US Department of the Interior “Guide to Tracing Your American Indian Ancestry”, www.bia.gov/idc/groups/public/documents/text/idc002656.pdf (Accessed June 2014).

⁸⁰ Ibid p 3-4.

⁸¹ United States Department of Justice. www.justice.gov/otj/nafaqs.htm (Accessed June 2014).



Native title in the United States (Indian title) as a form of common law is also recognised in the United States and it does not depend on established treaty rights.⁸² However, agreement making processes are not included as an aspect of native title law.

Canada

Canadian courts were slower than those in the United States to acknowledge the continuance of First Nation's⁸³ governance authority, but recent jurisprudence is moving in that way⁸⁴ and Canadian cases from the 1970s confirm the existence of Aboriginal rights and title, regardless of whether government recognises them.⁸⁵

In 1982, Canada's Constitution Act included s 35 to recognise and affirm the inherent right of self-government and that the right may find expression in treaties.⁸⁶ These include historic Treaties made between 1701 and 1923 and comprehensive land claim settlements, also known as "modern-day treaties".

Section 35 of the Constitution Act affirmed 'existing Aboriginal and treaty rights', but did not define these rights. Determining the nature and scope of these rights has, therefore, fallen to the courts,⁸⁷ which have found that:

(a)n existing aboriginal right cannot be read so as to incorporate the specific manner in which is regulated before 1982. The phrase "existing Aboriginal rights" must be interpreted flexibly so as to permit their evolution over time'.⁸⁸

'Existing Aboriginal rights' are recognised through prior occupation of land and also from:

the prior social organisation and distinctive cultures of Aboriginal peoples on that land. In considering whether a claim to an Aboriginal right has been made out, courts must look at both the relationship of an aboriginal claimant to the land and at the practices, customs and traditions arising from the claimants distinctive culture and society. Courts must not focus so entirely on the relationships of Aboriginal peoples with the land that they lose

⁸² *Clark v Smith* 13 Pet 195 (1893); *Buttz v Northern Pacific Railroad* 119 US 55 (1886).

⁸³ "Aboriginal peoples" is a collective name for the original peoples of North America and their descendants. The Canadian constitution recognizes three groups of Aboriginal people: Indians (commonly referred to as First Nations), Métis and Inuit. These are three distinct peoples with unique histories, languages, cultural practices and spiritual beliefs. More than one million people in Canada identify themselves as an Aboriginal person, according to the 2006 Census. Government of Canada Aboriginal Affairs and Northern Development website <https://www.aadnc-aandc.gc.ca/eng/1100100031843/1100100031844> Accessed June 2014.

⁸⁴ Above n 57, p 146, citing *Campbell v British Columbia*, per Williamson J.

⁸⁵ L Beherendt 'The Protection of Indigenous Rights: Contemporary Canadian Comparisons', *Australian Parliament House Research Paper* 27 (1999-2000).

⁸⁶ See "The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government" on Government of Canada Aboriginal Affairs and Northern Development website www.aadnc-aandc.gc.ca/eng/1100100031843/1100100031844. Accessed June 2014.

⁸⁷ M Hurley 'Aboriginal Title: The Supreme Court of Canada Decision in *Delgamuukw v. British Columbia*' Background Paper, Parliamentary Research Branch, Library of Parliament, p 2.

⁸⁸ *Sparrow v R* [1990] 3 CNLR 161.

sight of the other factors relevant to the identification and definition of Aboriginal rights.⁸⁹

The Crown's fiduciary relationship with and obligations toward Aboriginal peoples has legal and Constitutional scope in Canada⁹⁰. In *Van der Peet*,⁹¹ the Supreme Court of Canada commented that:

the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact ... above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status. (emphasis in original)

In 1997, the Canadian Supreme Court drew on the jurisprudence of *Mabo* in the *Delgamuukw*⁹² decision, looking to aboriginal title as a reconciliation of prior occupation by Indigenous peoples with the assertion of Crown sovereignty. Justice Lamer said the courts must 'take into account both perspectives and accord due weight to Indigenous perspectives. ... but the ... fundamental compromise of Indigenous rights maintains its place at the center of the doctrine.'⁹³

In Canada:

Aboriginal title is a *sui generis* right in land, something between fee simple title and a personal and usufructuary right (57). Aboriginal title is inalienable, except to the Crown (58). Aboriginal title has its legal source in prior occupation of the land (58). Aboriginal title is held communally, not by any one member of an Aboriginal Nation (59). Although Aboriginal title is a right in land, and not tied to any particular 'Aboriginal use', there is an inherent limit on the possible uses that can be made of the land: "... if a group claims a special bond with the land because of its ceremonial or cultural significance, it may not use the land in such a way as to destroy that relationship" (63). Finally, Aboriginal title may be infringed on by either provincial or federal governments if the infringement satisfies a compelling legislative objective, including for example the development of agriculture, forestry, mining, hydroelectric power, ... general economic development, ...the protection of the environment or endangered species, the building of infrastructure, and so on (78). If there is to be an infringement on Aboriginal title the government must recognize its fiduciary relationship with Aboriginal people, and ensure that there is as little infringement as possible, that fair compensation is made

⁸⁹ *R v Van der Peet* [1996] 2 SCR 507.

⁹⁰ M Hurley, *The Crown's Fiduciary Relationship with Aboriginal Peoples*, Library of Parliament, 10 August 2000, Revised 18 December 2002.

⁹¹ *R v Van der Peet* [1996] 2 SCR 507.

⁹² *Delgamuukw v British Columbia* [1997] 3 SCR. 1010.

⁹³ *Ibid* at 81-82; *R v Van der Peet* [1996] SCR. 507.



available and that the Aboriginal group has been consulted (78-9).the courts must consider equally the perspectives of the common law and of Aboriginal people themselves in assessing the evidence given.⁹⁴

The Chief Justice set out a three prong test for proving native title (Aboriginal title)⁹⁵:

1. **occupancy at the time of sovereignty;**
Prior to this decision, the applicant had to prove the practice or custom being claimed as an Aboriginal right was integral to their distinctive culture at the time of contact.
2. **continuity with present and pre-sovereignty occupation; and**
This means proving that the present occupancy is rooted in the past, not conclusive proof of an unbroken chain of continuity. Evidence may include existence of houses, enclosed fields, and Aboriginal laws.
3. **occupancy is exclusive to the group claiming the land.**
Although others may be on the land, that will be through trespass or by permission.

The *Delgamuukw* decision is also important because it clarifies that oral histories (as being the only record of the past for many Aboriginal Nations) are acceptable evidence for a claim to Aboriginal title.⁹⁶

A paternalistic approach is promoted in Canada where “status Indians” are wards of the Canadian federal government, which undoubtedly impacts on the exercise of power in dealings between Indigenous peoples and the State.⁹⁷

Modern-day treaties are negotiated between the Aboriginal group, Canada and the province or territory and implemented through legislation, which then receives Constitutional protection. Negotiations focus heavily on governance arrangements, which can also be the subject of separate agreement and, as of March 2014, there were about 100 comprehensive land claim and self-government negotiation tables across the country.⁹⁸ There is concern about the pace in which these claims are being progressed. Since 1973, Canada and its negotiation partners have signed 26 comprehensive land claims and three self-government agreements⁹⁹ and, in response, the Government of Canada states it is:

⁹⁴ B Thom, ‘Aboriginal Rights and Title in Canada After Delgamuukw: Part One, Oral Traditions and Anthropological Evidence in the Courtroom’ *Native Studies Review*. 14(1) 2001, pp1-26, p 5.

⁹⁵ Ibid, p 6.

⁹⁶ Ibid, p 4.

⁹⁷ K Croy and Erin Hanson ‘Indian Status’ Indigenousfoundations.arts.ubc.ca at indigenousfoundations.arts.ubc.ca/home/government-policy/the-indian-act/indian-status.html (Accessed June 2014).

⁹⁸ ‘Comprehensive Claims’ at www.aadnc-aandc.gc.ca/eng/1100100030577/1100100030578. Accessed June 2014.

⁹⁹ Ibid.



Moving toward a results-based approach to its participation in treaty and self-government negotiations. This new approach responds to past calls for change. The goal is to create results-based negotiations by focusing resources on the most productive tables, promoting alternative measures, when appropriate, and streamlining processes.¹⁰⁰

Although negotiation is the preferred course for resolving a modern day treaty, administrative remedy or court action is also available.¹⁰¹ Negotiation takes place between “Chief Negotiators” at a “Main Table”.¹⁰²

Leadership selection in First Nations is undertaken in one of four ways:

1. According to requirements under the Indian Act.

This process is an election of chief and councillor positions. The *Indian Act* was amended following the decision in *Corbiere*,¹⁰³ and now provides for voting to be conducted by non-resident members of the Nation.

Of the 617 First Nations in Canada, 238 hold elections under the Indian Act.

2. According to Community or Custom Election Codes.

The chiefs and councillor positions are chosen according to customised processes that are not under the Indian Act election rules. Codes vary.

Of the 617 First Nations in Canada, 343 select their leadership according to their own community or custom election codes.

3. Decisions are made under laws and policies of self-governing First Nations.

Laws and policies are established in a broad range of matters internal to communities and integral to cultures and traditions, including leadership selection.

Of the 617 First Nations in Canada, 36 are self-governing.

4. Through the First Nations Elections Act

This legislation received Royal Assent on 11 April 2014. It is described as an “opt-in” system, intended to support business investment, planning and relationship building, with a view to increased economic development and job creation.¹⁰⁴

¹⁰⁰ See ‘Results-Based Approach’ on Government of Canada Aboriginal Affairs and Northern Development website www.aadnc-aandc.gc.ca/eng/1346437606032/1346437640078. Accessed June 2014.

¹⁰¹ Loans must be repaid from proceeds of the eventual settlements. See ‘Resolving Aboriginal Claims: A Practical Guide to Canadian Experiences’ Minister of Indian Affairs and Northern Development, Ottawa, 2003, p 17.

¹⁰² Ibid.

¹⁰³ *Corbiere v Canada* [1999] 2 SCR 203.

¹⁰⁴ Information Factsheet – *Understanding First Nation Elections* current as at 10 April 2014. Government of Canada Aboriginal Affairs and Northern Development website www.aadnc-aandc.gc.ca/eng/1323193986817/1323194199466. Accessed June 2014.

Criticism of the *First Nations Elections Act* includes that it ‘comes up short in its attempt to shed government paternalism from First Nations elections’¹⁰⁵ including concern expressed by the Standing Senate Committee on Aboriginal Peoples about a more expensive and time consuming court-based appeal system. Of potentially greater concern, are the powers granted to the Minister to add First nations to the schedule of participating First Nations. In particular:

...there is great potential for significant dissension, and as First Nation communities, provincial governments and private sector organizations try to negotiate agreements, there likely will be protracted leadership disputes in First Nation communities.¹⁰⁶

Indian status can be sought by way of government decision under the *Indian Act*. Membership is listed on the Indian Register and the Status Indian is issued a status card, containing information about their identity, their band and their registration number. The requirements are complicated and have become narrower over time.¹⁰⁷ Certain Indians face penalties for “marrying out”, or marrying (and subsequently having children with) a non-status person. Indian status is widely acknowledged as a government invention, a legal definition rather than a true representation of Aboriginal ancestry.¹⁰⁸

First Nations membership can also be sought through First Nations who have their own membership criteria, under s 10 of the *Indian Act*. However the concept of Status is linked with membership through the registration process.¹⁰⁹

New Zealand

Te Tiriti o Waitangi (or the Treaty of Waitangi) was signed in 1840, by the Crown and about 540 Māori rangatira (chiefs). Under this treaty, Maori rights cannot be extinguished without consent.¹¹⁰ A number of New Zealand’s Acts of Parliament require the principles in the Treaty of Waitangi to be followed and the New Zealand courts now consider it is a significant political and constitutional document for New Zealand.¹¹¹

¹⁰⁵ J Douglas Shanks and JRD Lester, ‘Bill S-6 and the First Nations Election Act: The Modernization/Paternalization of Voting under the Indian Act’, *Ontario Bar Association*, 2012, p 1. www.oba.org/en/pdf/sec_news_abo12_sha_FNE.pdf. Accessed May 2014

¹⁰⁶ Ibid, Quoting Senator Lillian Eva Dyck.

¹⁰⁷ *First Nations Registration (Status) and Membership Research Report* AFN-INAC Joint Technical Working Group, July 2008. p 4.

¹⁰⁸ Karmen Crey and Erin Hanson ‘Indian Status’ indigenousfoundations.arts.ubc.ca at indigenousfoundations.arts.ubc.ca/home/government-policy/the-indian-act/indian-status.html (Accessed June 2014).

¹⁰⁹ Above n104, 34.

¹¹⁰ In *R v Symonds* (1847) N.Z.P.C.C. 387 the Court recognised a ‘modified dominion’. The validity of rights under the Treaty has been debated, for example: *Wi Parata v Bishop of Wellington* (1877), *Te Heuheu Tukino v Aotea District Maroi Land Board* (1938), *New Zealand Maori Council v Attorney General* (1987), *New Zealand Maori Council v Attorney General* (1990). In *Te Runanganui o Te Ika Whenua Inc Society v Attorney General* [1994] 2 NZLR 20, the Court of Appeal reaffirmed the place of Aboriginal title in the common law of Aotearoa/New Zealand in National Film and Sound Archive Digital Learning Resource, www.nfsa.gov.au/learning/digital-learning/ Accessed June 2014.

¹¹¹ The Treaty of Waitangi was written in two languages which conveyed very different messages. Calls for the terms of the Treaty to be honoured resulted in the Waitangi Tribunal being established in 1975. It is a

Traditional Maori land tenure was largely communal in nature and based on rights of occupancy and use (a system known as papatupu).¹¹² However, Maori lands suffered significant fragmentation following the establishment of the Māori Land Court in 1865.¹¹³ Initially, the Land Court translated customary land claims into legal title recognisable under English Law,¹¹⁴ with individual blocks registered to no more than 10 individuals (the blocks could be awarded to a hapū (sub-tribe) as a whole, but this happened only once or twice)¹¹⁵.

To identify as Māori today is an individual choice, regardless of whether the individual has the appropriate identification markers. However, this does not mean automatic acceptance within a Māori community, iwi (tribe), or hapū (sub-tribe). In order to be accepted within these realms a person is required to conform to all or some combination of the following features:

- Knowledge of whakapapa [genealogy];
- Knowledge of mātua tīpuna [ancestry];
- Knowledge of connections to whānau [family], hapū and iwi;
- Connections to tūrangawaewae [place to stand and belong];
- Acknowledgments by iwi, hapū and whānau of reciprocal kinship connections;
- Shareholdings in Māori land;
- Upbringing;
- Facility with te reo Māori [Māori language];
- Understanding of tikanga-ā-iwi [customs or practices of the people];
- Active participation in Māori organizations;
- Commitment to fostering Māori advancement;
- Freedom of choice.¹¹⁶

Individuals can apply to be registered on the Whakatohea Maori Trust Board Beneficiary Register, based on lineage to at least one Whakatohea hapū.¹¹⁷

permanent commission of inquiry charged with making recommendations on claims brought by Māori relating to actions or omissions of the Crown that potentially breach the promises of the Treaty Waitangi Tribunal – Department of Justice, New Zealand. <http://www.justice.govt.nz/tribunals/waitangi-tribunal> Accessed June 2014.

¹¹² I H Kawharu *Maori Land Tenure: Studies of A Changing Institution*, Oxford University Press, Oxford, 1977 p56; and M Morad and M Jay, 'the Reform of Maori Land Tenure and the Quest for Sustainability in New Zealand', *Development Bulletin*, Vol 41, 1997, p 48.

¹¹³ Initially called the Native Land Court, its name was changed to the Māori Land Court under the *Māori Purposes Act 1947*.

¹¹⁴ See information on the Land Court at www.justice.govt.nz/courts/maori-land-court/about-us/past-present-future-of-the-maori-land-court (Accessed June 2014).

¹¹⁵ Background to the Māori Land Court Minute Book, in the University of Auckland Māori Land court Minute Books Index, magic.lbr.auckland.ac.nz/mlcmbi/guide/comp_guide.htm (Accessed June 2014).

¹¹⁶ Māori scholar, A Durie (1997, p.159) In E Newman 'Challenges of Identity for Māori Adoptee's *Australian Journal of Adoption* Vol. 3, No. 2, 2011, p 2-3.

¹¹⁷ New Zealand Electoral Commission "Māori Representation" www.Elections.Org.Nz/Voting-System/Maori-Representation. Accessed June 2014.



Malaysia

Malaysia consists of several states on the Malayan Peninsula and the two East Malaysian states of Sarawak and Sabah in Borneo.¹¹⁸ Malaysian native title rights and interests are recognised for the Malays and in Sarawak and Sabah as *sui generis* and protected under Articles 153 and 161A of the Constitution. However, different legislative schemes operate in the different states.

Malaysian Peninsula: Customary land tenure is recognised and protected under various instruments.

The Orang Asli are ‘descendants of the earliest known inhabitants who occupied the Malaysian Peninsula before the establishment of the Malay kingdoms’.¹¹⁹ The 1997 decision in *Adong bin Kuwau v Kerajaan Negeri Johor*¹²⁰ (*Adong*) confirmed that only the Malays (who lived along the coast and rivers) and the aboriginal people who lived in the interiors were acknowledged as holding Indigenous status by the Malaysian government and the judiciary.

The Indigenous people of the Malaysian states in Borneo (Sabah and Sarawak) form an ethnic majority in those states and have greater autonomy and political influence in those areas than the Orang Asli of the Malaysian Peninsula. The legislatures in Sabah and Sarawak have enacted laws quite separate from the Malaysian Peninsula in relation to Indigenous land rights.¹²¹

Ramy Bulan considers the common law rights of the Orang Asli to their ancestral lands were recognised in *Adong*, but their interests were met by the creation of Aboriginal reserves.¹²² However, Amy Denison states:

While the current situation has a falsehood reminiscent of the terra nullius doctrine that prevailed in Australia prior to 1992, Government recognition of the Indigenous status of the Orang Asli appears unlikely given the challenge this would constitute to the grounds of the Malays’ constitutionally enshrined ‘special treatment’.¹²³

Sarawak¹²⁴ was ceded to the British Crown in 1946, subject to existing private rights and ‘native customary rights’.¹²⁵ The colonial government instituted a system of land

¹¹⁸ Alexandra Xanthaki, *Land Rights of Indigenous Peoples in South-East Asia*, Melbourne Journal of International Law Vol 4 2003, (<http://bura.brunel.ac.uk/bitstream/2438/2429/1/Land%20rights%20of%20indigenous%20peoples%20in%20Southeast%20Asia.pdf>) Accessed June 2014.

¹¹⁹ S Gray, ‘Skeletal Principles in Malaysia’s Common Law Cupboard: the Future of Indigenous Native Title in Malaysian Common Law’ *LAWASIA Journal* 99, 2002, p 106 in A Denison ‘Evolving Conceptions of Native Title in Malaysia and Australia – A Cross Nation Comparison’ *Australian Indigenous Law Review*, 11(1) 2007, pp 79-91, p 81.

¹²⁰ [1997] 1 MLJ 418.

¹²¹ Above n116, p 82.

¹²² R Bulan ‘Native Title in Malaysia: A complementary Sui Generis Right Protected by the Federal Constitution’, *Indigenous Law Review* 5:54 11(1) 2007 <http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/AUIndigLawRw/2007/5.html?stem=0&synonyms=0&query=native%20title%20in%20Malaysia> (Accessed July 2014).

¹²³ Above n116, p 81.

¹²⁴ One of two Malaysian states on the Island of Borneo.

classification, based on zones,¹²⁶ and requiring for native title through the creation of licences which:

advanced the presumption that natives had only a usufructuary right with no kind of ownership, and underpinned the colonial 'tendency, operating often at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law'.¹²⁷

This system continued after Sarawak joined Malaysia in 1963 however, it inhibited Indigenous peoples from dealing in land with non-Indigenous people. The system recognised that each native community has an exclusive right to the occupation, use and exploitation within a general territory. Also, each member of the community has a customary right, including as against their native community, to entitlements. For example:

A person who clears virgin jungle has exclusive rights to cultivate and re-cultivate cleared land; that right is passed to his heirs and descendants. ... Once it reverts to forest fallow, it is available to the community ... nevertheless, the pioneer household retains the pre-emptive right over the land for re-cultivation.¹²⁸

There are various legislative schemes governing the Indigenous peoples of Malaysia that interact with native title rights and interests.

The native customary rights of indigenous peoples recognised in Sabah and Sarawak conflict with the open system of land ownership under which any person may apply for and own land.¹²⁹ This system leads to confusion, as evidenced by the following statement by a Malaysian government Minister:

to the people [natives] in the villages, all land occupied by them belongs to them but to the Government all such land are state

¹²⁵ R Bulan, 'Native Customary Land: The Trust as a Device for Land Development in Sarawak' Ch 3 in Fadzilah Majid Cooke (Ed) *State, Communities and Forests in Contemporary Borneo*, ANU Press, Canberra, 2013, p 47. http://press.anu.edu.au/apem/borneo/mobile_devices/index.html

¹²⁶ Above n122, p47-8. Note: These zones are:

1. Mixed Zone (may be held by any citizen);
2. Native Area (registered document of title over the land, but held only by natives);
3. Native Communal Reserve (declared use for any native community, regulated by customary law);
4. Reserved Land (reserved for public purposes);
5. Interior Area (land that is not Mixed Zone); and
6. Native Customary (land in which customary rights have been created).

¹²⁷ Above n122, p 48. See *Amodu Tijani v Secretary of State, Nigeria*, Appeal Cases 1921(2).

¹²⁸ Above n119.

¹²⁹ J Lasimbang 'Juridical Rights of Indigenous Peoples and Their Relations to the State and Non-Indigenous Peoples: The Case of Sabah' in Christian Erni (ed), '...Vines That Won't Blind ...' *Indigenous Peoples in Asia* (1996) 109, 111, in Alexandra Xanthaki, *Land Rights of Indigenous Peoples in South-East Asia*, Melbourne *Journal of International Law* Vol 4 2003, (<http://bura.brunel.ac.uk/bitstream/2438/2429/1/Land%20rights%20of%20indigenous%20peoples%20in%20Southeast%20Asia.pdf>) Accessed June 2014.

land’ ... ‘How do we reconcile this statement so that both parties will understand each other in terms of the legal implications?’¹³⁰

Although the recognition of customary rights in Sabah and Sarawak is a positive step, these interests are lower in a ‘hierarchy of rights to land’, with the state holding the power to restrict or extinguish them¹³¹ and are, therefore, discriminatory.

In 2002, the High Court of Malaysia recognized the land interests of the Orang Asli Aboriginal peoples in *Sagong Bin Tasi v. Government of Malaysia*.¹³² Following the decision in Mabo, The Court overturned earlier jurisprudence, which recognized only usufructuary rights.¹³³ Justice Mohd Noor Ahmed concluded: ‘Therefore, in keeping with the worldwide recognition now being given to aboriginal rights, I conclude that the proprietary interest of the orang asli in their customary and ancestral lands is an interest in and to the land.’

Inter-American Court of Human rights

The Commission may wish to also review decisions of the Inter-American Court of Human Rights. From the earliest decision in *Awas Tingi v Nicaragua*,¹³⁴ through to recent litigation in the United States and Canada, an emerging jurisprudence links domestic legal frameworks for recognition and extinguishment of Indigenous peoples rights to lands in the context of contemporary international human rights frameworks, in particular rooting the protection of title to land to the enjoyment and survival of Indigenous peoples’ cultures and their wellbeing.

The Court observed:

Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.

It continued:

¹³⁰ Above n119. Referring to a statement by the Second Minister of Resource Planning and Management, Malaysia, as reported in the *Sarawak Tribune*.

¹³¹ Above n 126.

¹³² *Sagong Bin Tasi v Malaysia* [2002] M.L.J. at 591. The decision was upheld on appeal: *Malaysia v. Sagong Bin Tasi* (unreported judgment, no. 8-02 419-2002, Jun. 14.

¹³³ *Id.* at 615; see also *Adong bin Kuwan v. Kerajaan Negeri Selangor*, [1997] M.L.J. 418

¹³⁴ *The Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001). In that case, the people of Awas Tingni brought an action before the Inter-American Court of Human Rights to protect their territories from the Nicaraguan government’s grant of logging concessions and sought recognition of their proprietary rights in their territories.. The people of Awas Tingni sought a declaration that the State must establish a process for the demarcation of Indigenous property rights, the cessation of grants over natural resources until community land tenure had been resolved, and compensation for damages suffered by the Community. See generally S. James Anaya & Claudio Grossman, ‘The Case of *Awas Tingni v. Nicaragua*: A New Step in the International Law of Indigenous Peoples’, 19 *Arizona Journal of Internatioanl and Comparative Law* 1 (2002)

Indigenous peoples' customary law must be especially taken into account for the purpose of this analysis. As a result of customary practices, possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration.¹³⁵

Australian alternative frameworks

Alternative systems to native title that seek to recognise title to traditional lands of Aboriginal and Torres Strait Islander peoples include:

- State Land rights legislation: *Aboriginal Land Grant (Jervis Bay Territory) Act* 1986 (Cth), *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth), *Aboriginal Land Rights Act* 1983 (NSW), *Aboriginal Land Act* 1991 (Qld), *Torres Strait Islander Land Act* 1991 (Qld), *Aboriginal Land Trusts Act* 1966 (SA), *Aboriginal Lands Act* 1995 (Tas), *Aboriginal Land Act* 1970 (Vic) (re Lake Tyers and at Framlingham).¹³⁶
- Native title settlement Acts and the *Traditional Owner Settlement Act* 2010 (Vic)

State Land Rights Legislation

Land rights schemes differ from native title in that they are constituted by a grant from the Crown and therefore depend on recognition and transfer of title by state or territory government, although in the Northern territory and Queensland, an independent inquiry is undertaken to provide recommendations to the Minister. Generally, land must be identified as claimable or transferrable by the Crown before a claim can be made. Land rights can be removed by the government and conditions of the title can be changed by legislative change.

Some land rights regimes provide alternative bases for granting title beyond traditional association, including historical association.¹³⁷ Land rights are normally in the form of an inalienable freehold or leasehold, usually for the benefit of Aboriginal people generally, but may have a more specific association. While land rights and native title are generally understood to be co-existing titles, there can be conflict in the group of beneficiaries and in the rights granted under the land rights title. As a result, for example, there are a number of non-claimant applications being brought in NSW by Local Aboriginal Land Councils to determine that native title does not exist in the area over which they hold statutory titles.

The Northern Territory Land Rights scheme is recognised as providing the strongest protection. In *Gumana*¹³⁸, the Yolngu people and the Northern Land Council sought, and obtained at first instance, a declaration of the Council's power to exclude others than the traditional owners from their land and waters in a substantial part of Blue

¹³⁵ *Awais Tingni*, 2001 Inter-Am. Ct. H.R. 79-80 [149-151].

¹³⁶ Attempts at national land rights in the early 1980s failed, largely due to opposition for the Western Australian government.

¹³⁷ See Queensland legislative scheme eg *Aboriginal Land Act* 1991 (Qld) s55.

¹³⁸ *Gumana v Northern Territory of Australia* (2005) 141 FCR 457 and Above n98 and Above n104.

Mud Bay (to the west of the Croker Island seas). The declaration was overturned on appeal to the Full Federal Court,¹³⁹ a decision which the High Court in its turn overruled¹⁴⁰ in key aspects. It held that the freehold title conferred by the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) prevailed over the *Fisheries Act* (NT). While abrogating the common law right to fish, the latter Act could not authorise interference with the freehold rights conferred by the ALR (NT) Act (Cth).

The nature and security of the title granted under the Act again fell for consideration in the recent decision of the High Court in the Northern Territory intervention case, *Wurridjal v The Commonwealth*²³. By its intervention legislation the Commonwealth created five year statutory leases over townships and other areas in land covered by grants made under the *Land Rights Act*. One of the questions that arose was whether the Commonwealth had thereby acquired property from the Land Trust which held the title, whether it was required to provide just terms compensation pursuant to s 51(xxxi) of the Constitution and whether, if so, the intervention legislation had provided just terms.

Alternative Settlements

In seeking to resolve native title claims or to facilitate large scale future acts, a number of state governments have entered into alternative settlements that may or may not include recognition of native title over part of their claim but also involve other settlement outcomes, including land transfers, joint management of conservation reserves, cash payments, among other things. These settlements occur largely under the framework of the NTA and therefore have the same issues in relation to connection and authorisation.

In Victoria, the State government has taken a statewide approach to alternative settlements that are negotiated outside of the native title system and require Aboriginal groups to opt out of the native title system. Under the Act, a settlement package can include:

- a Recognition and Settlement Agreement to recognise a traditional owner group and certain traditional owner rights over Crown land
- a Land Agreement which provides for grants of land in freehold title for cultural or economic purposes, or as aboriginal title to be jointly managed in partnership with the state
- a Land Use Activity Agreement which allows traditional owners to comment on or consent to certain activities on public land
- a Funding Agreement to enable traditional owner corporations to manage their obligations and undertake economic development activities

¹³⁹ *Arnhem Land Aboriginal Land Trust v Northern Territory of Australia* (2007) 157 FCR 255 (FC).

¹⁴⁰ *Northern Territory of Australia v Aboriginal Land Trust* (2008) 236 CLR 24. The plurality, at 65-66, clarified the plurality view in *Risk v The Northern Territory of Australia* (2002) 210 CLR 392 that 'land' in the *Aboriginal Land Rights (Northern Territory Act 1976* (Cth) did not include *sea-bed* in ss 50(1) and 3(1), which had meant it was not open for native title claims.



- a Natural Resource Agreement to recognise traditional owners' rights to take and use specific natural resources and provide input into the management of land and natural resources generally¹⁴¹

The focus of the *Traditional Owner Settlement Act 2010* (Qld) (TOSA) is on identifying the 'right people for country', rather than a laborious connection requirement. The Right People for Country approach is focused on building effective decision-making and sustainable agreements, first among and between Indigenous peoples and then with the State government.¹⁴²

The TOSA and the Right People For Country project represent the most significant attempt to overcome the problems presented by the connection process, particularly for Indigenous peoples in more settled areas. AIATSIS refers the Commission to the submissions and public documents of the Victorian government, Native Title Services Victoria and the Victorian Traditional Owner Land Justice Group.

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?

Section 223 of the *Native title Act* requires that Aboriginal and Torres Strait Islander peoples establish their connection to land and waters through traditional laws and customs. This wording reflects the problematic nature of the interpretation and ambiguity surrounding concepts such as 'tradition', 'continuity' and 'change' that an inquiry requires in order to establish connection.

In *Yorta Yorta*¹⁴³ 'traditional' was given a narrower interpretation than had previously been the case.¹⁴⁴ While a significant number of the claimant group were descended from the Aboriginal inhabitants of the area in 1788, the requisite 'traditional' character was not found in the Yorta Yorta's relationship to the area. 'Traditional' in this sense meant the connection 'must have continued substantially uninterrupted since sovereignty'.¹⁴⁵ The laws and customs must be traditional, in the ordinary sense of that word, yet they must also have vital normative force since the time of sovereignty.¹⁴⁶

In *Neowarra v Western Australia*,¹⁴⁷ native title was determined to come from the normative rules of the societies that existed in the claim area before 1829. In

¹⁴¹ <http://www.justice.vic.gov.au>

¹⁴² Report of the *Right People for Country* Project Committee, March 2011

¹⁴³ *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

¹⁴⁴ S Brennan *Native title in the High court of Australia a decade after Mabo*, 14 PLR 209, p 211.

¹⁴⁵ *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at [87] Gleeson CJ, Gummow and Hayne JJ.

¹⁴⁶ D Lavery 'The Recognition of the Native Title Claim Group: A Legal and Policy Perspective Land, Rights', *Laws: Issues of Native Title*, Issues paper 30:2, December 2004.

¹⁴⁷ *Neowarra v Western Australia* [2003] FCA 1402.

Bennell,¹⁴⁸ Wilcox J applied a broader and more flexible approach; incorporating considerations about dispossession and other social impacts to explain the context of the change.¹⁴⁹ The Full Federal Court rejected any suggestion that the reason for the changes could be relevant to the inquiry – either the change was so substantial as to permanently disrupt the connection, or it was not. In these and later cases,¹⁵⁰ the Federal Court acknowledged that laws and customs do change over time, thus allowing for a relatively flexible and inclusive interpretation of ‘traditional’, with the emphasis is on the origin of the laws, not the nature of their exercise, but still one that requires substantial evidence of acknowledgement, generation by generation.¹⁵¹

The long-held dominant view in anthropology is that societies and cultures are not and never have been static, but that they are developing in a continual process of change and transformation. Over the last few decades, much anthropological research concerning Aboriginal and Torres Strait Islander culture has focused on the process of cultural change and ‘creative adaptation to change consistent with the continuity of aspects of traditional beliefs and practices’.¹⁵² Laws and customs do not exist in a static past and to impose that deprives Aboriginal and Torres Strait Islander people of the right to interpret and re-interpret the meaning and content of their evolving laws and customs in line with changing conditions and environments.¹⁵³

Meanings and practices are ever evolving and emerge out of the conditions in which they are embedded. They are subject to a range of influences including the process of native title recognition itself, which transforms Indigenous practices that are part of traditional law and custom.¹⁵⁴ Furthermore, as some scholars and legal experts argue that any perception of ‘legitimate’ rights as only those that existed pre-contact is ethnocentric, and discriminatory and perpetuates colonial practice and dispossession.¹⁵⁵

The ambiguity of ‘connection’ is further reflected in s 223(1)(b) of the NTA where ‘connection’ must be established by ‘those (i.e., traditional) laws and customs’. In this context, the ‘connection’ is seen as a *condition* for the existence of native title rights and interests – as something that must be proved as well as determined by the content of the rights and interests under traditional law and custom. On the other hand, the concept of ‘connection’ becomes a descriptive term of an *outcome* or *effect* of the laws and customs. In other words, Courts must first identify the content of

¹⁴⁸ *Bennell v State of Western Australia* [2006] FCA 1243.

¹⁴⁹ Samantha Hepburn ‘Social Continuity and Forced Change: The Noongar Case; *Bennell v State of Western Australia*’, *Deakin Law Review* 11:2, 2006, p173-8.

¹⁵⁰ *De Rose v State of South Australia* [2003] FCAFC 286; *Jango v Northern Territory of Australia* [2006] FCA 318; *Griffiths v Northern Territory* [2007] FCAFC 178.

¹⁵¹ P Seidel, Native Title: The struggle for justice for the Yorta Yorta Nation. *Alternative Law Journal* Vol 29 2 April 2004, 69-74, p 70.

¹⁵² D Trigger, ‘Anthropology and the Resolution of Native Title Claims: Presentation to the Federal Court Judicial Education Forum, Sydney 2011’, in T Bauman and G. Macdonald (Ed) *Unsettling Anthropology: the Demands of Native Title on Worn Concepts and Changing Lives*, 142-160 Australian Institute of Aboriginal and Torres Strait Islander Studies Press, Canberra, 2011.

¹⁵³ United Nations Declaration on the Rights of Indigenous Peoples.

¹⁵⁴ T Bauman, ‘Dilemmas in applied native title anthropology in Australia: An introduction’, in T Bauman (Ed) *Dilemmas in Applied Native Title Anthropology in Australia*, Aboriginal Studies Press, 2010, p 2-3.

¹⁵⁵ A Eisenberg, ‘Reasoning about the Identity of Aboriginal People’ in S Tierney (Ed), *Accommodating Cultural Diversity*. Aldershot: Ashgate Publishing, 2007, 80-1.



traditional laws and customs, and secondly characterise the effect of those laws and customs as constituting a ‘connection’ between the Aboriginal or Torres Strait Islander people and the land and water.

The further uncertainty related to the current sub-section is its lack of clearly articulated function or rationale. Is its purpose to capture what was Justice Brennan said in *Mabo* (No2):

Native title to particular land ..., its incidents and the persons entitled thereto are ascertained according to the laws and customs of the indigenous people who, *by those laws and customs, have a connection* with the land. *It is immaterial that the laws and customs have undergone some change* since the Crown acquired sovereignty provided the general nature of the connection between the indigenous people and the land remains’.

It appears that the meaning of the word ‘connection’ in that context was intended to be equivalent to the phrase ‘in relation to’, which defines the principles of connection or relationship between people and their land in general way. That is, the concept of ‘connection’ is merely descriptive of the effect of the laws and customs. Therefore, it would appear to be an error to treat ‘connection’ as some additional element of proof about the occupancy or particular activities of the claimant group.

If ‘connection’ is seen to require some additional facts to be established, beyond the content and effect of the relevant laws and customs, careful consideration must be given to the rationale for this added requirement. Why should an otherwise successful claim fail because of an ‘inability’ to establish ‘connection’, if it be established that the claimants possess rights and interests in relation to the land under their traditional laws and customs? An additional amendment to clarify this position would be useful.

Presumption of Continuity

Question 6 Should a rebuttable ‘presumption of continuity’ be introduced into the Native Title Act? If so, how should it be formulated:

- a. What, if any, basic fact or facts should be proved before the presumption will operate?
- b. What should be the presumed fact or facts?
- c. How could the presumption be rebutted?

AIATSIS supports the inclusion into the NTA of a rebuttable presumption of continuity, but wishes to qualify that support.

In discussing ‘connection’ under Q 5, AIATSIS criticises the requirements that claimants show, not only a current day vitality of law and custom referenced to its historical underpinnings, but to prove that current day law and custom is substantially uninterrupted from well over 100 years ago. In this context, an allowance for evolving laws and custom and changing environments has not been applied in a way



that takes into account the nature of societal change. The current legal requirements not only ignore an extensive body of scientific work, but impose a structure that social scientists must reinterpret their findings to fit. Furthermore, to quote Les Malezer, it is one of the ‘fundamentally discriminatory aspects’ of the NTA (a view that is shared by the United Nations committee on the Elimination of Racial Discrimination).¹⁵⁶ AIATSIS therefore supports Bauman’s argument that any introduction of a ‘presumption of continuity’ should be underpinned by an acknowledgement of the reality of ‘transformation’.¹⁵⁷

Notwithstanding this concern, AIATSIS supports the reversal of the onus of proof. However, to reiterate concerns expressed in our submission to the Inquiry into the Native Title Amendment (Reform) Bill 2011,¹⁵⁸ the success of the presumption, as constructed by French CJ, depends to a very large extent on the States’ and Territories’ willingness to reach consent determinations. There is a risk that little will be gained by a presumption that States actively seek to rebut, by adducing evidence that supports an argument of discontinuity and to which claimants would then be forced to mount proof of continuity in any event.

In response to this problem, and the debate in *Bennell* regarding the reason for change in acknowledgement or observance of laws, North J proposed the additional requirement ‘that the state in rebutting a presumption in favour of the claimants, could not use evidence of their own wrong doings’.¹⁵⁹ While intending to limit the number of contested claims, this approach could result in another wave of judicial interpretation as States seek to define ‘wrong doings’ or to protect or from associated claims or to distance themselves politically. However, the principle behind North J’s proposal cannot be ignored. Any reversal of the onus of proof that becomes contested by the States, rather than utilised to facilitate consent agreements, could degenerate into an exercise in proving discontinuity that would result in native title groups having to answer the rebuttable in similar terms to the current burden of proving connection.

a) The basic fact or facts that should be proved before the presumption will operate

AIATSIS considers the presumption (whether of continuity or of transformation) should be triggered upon the applicant meeting the Registration test in s 190B of the NTA.

b) The presumed fact or facts

Upon the applicant meeting the Registration test, the following presumptions should be triggered:

¹⁵⁶ Les Malezer, 2009 Mabo Lecture, in Human Rights commissioner’s Native Title Report 2009, p 80.

¹⁵⁷ T Bauman ‘Serendipity is not enough! State and territory native title connection processes’ in T Bauman (Ed) *Dilemmas in Applied Native Title Anthropology in Australia* Aboriginal Studies Press, Canberra, 2010, p 124-46.

¹⁵⁸ AIATSIS Submission to the Senate Standing Committee on Legal and Constitutional Affairs inquiry into the Native Title Amendment (Reform) Bill 2011, p 6-7. www.aiatsis.gov.au/files/ntru/2011inquiryntab.pdf, Accessed April 2014.

¹⁵⁹ Ibid, p 7. See discussion of Justice A M North and T Goodwin ‘Disconnection – The Gap Between Law and Justice in Native Title: A Proposal for Reform, Native Title Conference Melbourne, 3-5 June 2009.



- a society of Aboriginal or Torres Strait Islander people was in occupation at the time of sovereignty; and
- the Registered applicant group is linked through cultural history to that society; and
- interruption of physical connection will not, of itself, extinguish native title rights and interests.

c) Rebutting the presumption

It is appropriate that any presumption be open to rebuttal. This could be done by the respondent proving, on the balance of probabilities, that:

- a society of Aboriginal people were not in occupation at the time of sovereignty; or
- the Registered applicant group is not linked through its cultural history to that society; or
- that the group no longer has a system of law and custom in place that can sustain an entitlement to the area claimed.

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, or a presumption framed in a similar way, will impact on practices in native title proceedings. However, before arriving at a predicted conclusion (the testing of the terminology in the Federal Court), other considerations and strategies are available. To borrow from Canada's Supreme Court in *Van der Peet*,¹⁶⁰ when the British laid claim to Australia, Aboriginal and Torres Strait Islander peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. This fact above all others should separate Aboriginal and Torres Strait Islander peoples from all other citizens and groups in Australia and mandate a special legal and equitable status.

As discussed under our answer to Q 3, there is disparity in Australia's jurisdictions for proving connection. Also, as discussed under our answer to Q 4, there is no recognised fiduciary obligation to direct the State's willingness to support beneficial outcomes for Aboriginal and Torres Strait Islander people. AIATSIS considers that the Crown, in a fiduciary (or a type of *trustee don sort*) capacity, should be required by the NTA to engage in native title claims from a position that seeks best outcomes for and on behalf of the Registered applicant group. That is not to say that the State should not attempt to rebut a presumption of native title. However, the State ought not attempt to rebut the presumption for the purposes of benefitting itself or other citizens at the expense of Aboriginal and Torres Strait Islander peoples. Furthermore, the State ought not adduce any evidence to rebut the presumption of native title where the action of the State caused an interruption to connection.¹⁶¹

¹⁶⁰ *R v Van der Peet* [1996] 2 SCR 507.

¹⁶¹ A non-exhaustive list of examples could be provided in the NTA (updated from time to time) and include events such as: forced removal of children; and the relocation of communities onto missions. See Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2009', p 87 in Above, n3, p 58.

In considering the impact on practices of parties, AIATSIS refers the Review to our submission to the Inquiry into the Native Title Amendment (Reform) Bill 2011. In particular, we highlight the following points, summarised from statements at pages 7-8 of our Submission:¹⁶²

Regardless of whether the presumption exists, thorough research will still be required to establish the right people for Country.

Claimants will likely be asked to respond to anthropological research by State-commissioned researchers directed towards rebutting presumptions. This is in addition to engagement with anthropological research by the NTRB/NTSP aimed at assisting the preparation of an application.

State researchers could undermine cohesion within Indigenous communities. In particular, researchers would need to be very careful, in obtaining the free, prior and informed consent of informants, about ensuring that informants had a full understanding of the intended use of the information they might provide.

The parties best placed to manage research, including information gathering on behalf of the State, are the NTRBs/NTSPs, who have a legislative duty to represent the interests of claimants and native title holders. To assist the State potentially puts NTRB/NTSP in a position of conflict. Without the expert assistance of the NTRB/NTSP, parties will engage with applicants without responsibility or capacity to resolve disputes or to understand their location within the broader dynamics of a claimant group or its neighbours.

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?

Under the current regime, or a regime where a presumption exists, should an overlapping native title claim occur, parties are entitled to register a determination application.¹⁶³ Although parties to an overlapping claim may meet the Registration test, only one determination can be made for each geographical area.¹⁶⁴

There is no doubt that overlapping claims are potentially very contentious with resolution attempts being described as 'extremely volatile and emotional.'¹⁶⁵ Burnside suggests that:

intra-Indigenous agreements between overlapping claim groups can provide for the reduction of claims and access to disputed areas.

¹⁶² Above n152, p 7, 8.

¹⁶³ *Edward Landers v South Australia* [2003] FCA 264 at [38].

¹⁶⁴ Section 68, *Native Title Act 1993* (Cth).

¹⁶⁵ National Native Title Member Dan O'Dea in S Burnside, 'Outcomes for all? Overlapping claims and intra-indigenous conflict under the NTA' *Australian Indigenous Law Review* 16(1): 2, 2012, p 7.

These agreements, entered into in a spirit of mutual respect, may well constitute a preferable alternative to a legal battle.¹⁶⁶

However, conflict is often unavoidable given the legal nature of the native title system. Notwithstanding the distinctive characteristics of native title that render conflict particularly problematic,¹⁶⁷ Burnside emphasises that:

native title is by no means unique in stimulating disagreement. Further, to state that conflict is inevitable is not to conclude that it is harmless or benign, but merely to acknowledge the realities of the adversarial legal system.¹⁶⁸

The identification of connection to country under traditional law and custom, and the accurate representation of estate groups and wider societies, is a crucial dispute management resource.¹⁶⁹ Alternative resolution is also provided by way of compulsory mediation and NTRBs are required to attempt to resolve overlaps.¹⁷⁰ There are a number of problems for the groups if the overlaps are not resolved. However, if there can be no mediated outcome the Court will set the applications down for trial.¹⁷¹

If it can, the Court will make orders to ensure that overlapping native title applications which cover the same area are dealt with in one proceeding¹⁷² where parties will be put to the proof of their native title application. While this may involve refuting another party's claim, the process should focus on proving a superior claim.

Question 9 Are there circumstances where a presumption of continuity should not operate? If so, what are they?

As discussed above, the presumption of continuity should not operate when parties to an overlapping native title claim engage in litigation.

AIATSIS has not identified other circumstances where the presumption should not operate. However, there may well be other procedural instances when a presumption of native title works against the best interest of native title determination applicants.

¹⁶⁶ Ibid, p 6.

¹⁶⁷ Overlapping native title claims raises the issue of lateral violence. Mick Gooda states native title in and of itself does not necessarily cause lateral violence. Nor is native title the only forum within which lateral violence occurs for Aboriginal and Torres Strait Islander peoples. Rather, lateral violence is created by experiences of power and oppression, and can manifest in many different community and family situations.

M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2011*, p 80.

¹⁶⁸ Above n 158, p 2.

¹⁶⁹ Above, n49, p 25 & 109.

¹⁷⁰ See ss 203BC(3)(b) and 203BF *Native Title Act 1993* (Cth).

¹⁷¹ C Jones 'Aboriginal boundaries: The Mediation and Settlement of Aboriginal boundary Disputes in a Native Title Context' *National Native Title Tribunal Occasional Papers Series*, No.2 2002, National native Title Tribunal, p 9.

¹⁷² Federal Court of Australia, Native Title Guide, <http://www.fedcourt.gov.au/law-and-practice/areas-of-law/native-title>. Accessed June 2014.

It may be worth noting that native title and land rights can sometimes exist in the same land. In some cases, a dealing may require a native title determination from the Federal court, before a land dealing can proceed under the *Aboriginal Land Rights Act 1983* (NSW). For example, a Local Aboriginal Land Council with an Aboriginal freehold title to the land may seek a non-claimant application for a determination of native title.¹⁷³ However, in this case, an application for native title will not be sufficient to meet the Registration test and the presumption will not arise.

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?

In response to Q 5 and Q 6, AIATSIS provided supported argument discussing the problems associated with the imposition on Aboriginal and Torres Strait Islander peoples to demonstrate connection with traditional laws and customs.

Furthermore, the judiciary’s treatment of provisions within the NTA, notably s 223, has ‘added numerous interpretive layers to the terms of the provision.’¹⁷⁴ In her 2009 journal article ‘A Captive of Statute’, Dr Lisa Strelein analyses the interpretation of ‘traditional’ in *Yorta Yorta*¹⁷⁵ and later cases:

Yorta Yorta was concerned with the proof of native title, but again affirmed the primacy of the NTA. Focusing on s 223(1)(a), the Court embarked on a painful statutory interpretation exercise that, beginning with the word ‘traditional’:

A traditional law or custom is one which has been passed from generation to generation of a society, usually by word of mouth and common practice. But in the context of the *Native Title Act*, ‘traditional’ carries with it two other elements in its meaning.¹⁷⁶

¹⁷³ National Native Title Tribunal, *Non-Claimant applications in NSW: Resolution of native title issues over land and waters*. Information Sheet. www.nntt.gov.au/Applications-And-Determinations/Documents/Non-claimant%20applications%20in%20NSW%20Information%20Sheet.pdf. Accessed June 2014.

¹⁷⁴ Above, n56.

¹⁷⁵ *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

¹⁷⁶ *Commonwealth v Yarmirr* (2001) 208 C LR 1, 53 [52], citing *New South Wales v Commonwealth* (1975) 135 CLR 337, 479 (Jacobs J) in Above, n56.

Dr Strelein explains the additional two elements, focused on continuity, as:

1. the laws and customs must trace their origins prior to the assertion of British sovereignty; and
2. the current observance and continuous existence and vitality of the laws and customs must be substantially uninterrupted, since sovereignty.

In *Bennell*, the Full Federal Court added the proviso that continuity be demonstrated ‘for each generation’.¹⁷⁷

This approach sets a test that is, not only difficult to achieve, but that is logically inconsistent, because:

1. native title rights and interests must have their source in traditional law and custom;
2. from the introduction of the new sovereign power, no other law making system is recognised;
3. the rights and interests claimed must have been brought into existence when the normative society now claiming native title was able to validly create new rights, interests and duties;
4. the rights and interests created by a society coming into existence after the introduction of the new sovereign power that were not recognised by the common law and were not sourced in the new legal order, could not be given legal effect.¹⁷⁸

Therefore, the ongoing ‘generation to generation’ practice of rights and interests that must exist for recognition under the NTA, cannot be recognised.

Therefore:

the notion that Indigenous peoples’ traditional laws and customs are operating in a realm distinct to and outside of the Australian legal system and colonial administration is unsustainable (Weiner 2003: 99). Indigenous and non-Indigenous histories and lives are so intertwined that a ‘profound syncretism’ has occurred (Smith 2003: 28). Today, Indigenous peoples’ cultural life and traditions are a part of contemporary intercultural Australia (Merlan 2005), and engagements over native title are no exception. Despite this, the influence of native title has been to continue an emphasis on the separateness of Indigenous traditions that are unchanged by ‘civilisation’ (Smith 2005: 223).¹⁷⁹

¹⁷⁷ Ibid.

¹⁷⁸ Above, n62, p 134. See also above, n55, p 255.

¹⁷⁹ J Weir and S Ross, ‘Beyond native title: the Murray Lower Darling Rivers Indigenous Nations’ 185-201 in B Smith and F Morphy (Eds) *the Social Effects of Native Title: Recognition, Translation, Coexistence*, CAEPR Monograph No. 27, ANU Press, 2007, p 185-6.

With respect to the Review's discussion of 'Society', AIATSIS supports Dr Strelein's assertion that this is 'a fundamental threshold question for native title claimants'¹⁸⁰ and draws the Review's attention to our recently released Discussion Paper on Connection. Nick Duff explores the definition and application of 'society' in *Akiba*¹⁸¹ and *Wongatha*¹⁸² finding:

there is no separate requirement (whether a procedural requirement in the Act or a legal requirement implied by the jurisprudence) that a single, clearly defined society be identified. 'Society' is both a vehicle for continuity (allowing the recognition of rights and interests under laws and customs that have been adapted since pre-colonial times) and a potential site for the loss of native title (for example, where a society has 'ceased to exist'). If the contemporary acknowledgment and observance of law and custom can be established, and if there has been continuity in that acknowledgment and observance since pre-colonial times, then there is no further need to establish definitively the boundaries of that system of law and custom.¹⁸³

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?

AIATSIS notes the Native Title Amendment (Reform) Bill 2014 proposed amendments to s 223 NTA. However, we consider there should not be a definition of tradition or traditional laws and customs in s 223 of the NTA. Given that the courts appear increasingly willing to accept a less rigid definition of tradition, acknowledging that Indigenous laws and customs do evolve, change over time and adapt to new circumstances, and considering the fact that the meaning of the term 'tradition' needs to be re-evaluated in every case before the courts, the word 'tradition' and any reference to it when referring to laws and customs should be omitted from s 223 of the NTA.

Notwithstanding this first position, AIATSIS considers that any definition of traditional or traditional laws and customs in s 223 of the NTA should specifically recognise the transformational nature of societies, or at least recognise that the content of laws and

¹⁸⁰ Above, n55, pp259–60.

¹⁸¹ *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v Queensland (No 2)* [2010] FCA 643.

¹⁸² *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* [2007] FCA 31.

¹⁸³ Above n32, 34–6. Duff states, the approach taken by the Full Court in *Bodney* implies that the proper focus is on acknowledgment and observance rather than 'society' per se: *Bodney v Bennell* [2008] FCAFC 63 at [70]–[124]. This distinction is perhaps informed by a suggestion that the trial judge in *Bennell* treated 'society' as having a broader meaning than a group of people united in and by their acknowledgment and observance of law and custom.

customs acknowledged and observed by the claimant group is likely to have been modified since sovereignty, without necessarily impacting on native title.¹⁸⁴

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?

AIATSIS strongly supports that native title rights and interests include rights and interests of a commercial nature.

The inclusion of rights and interests of a commercial nature goes beyond the construction of ‘traditional’, although there is strong evidence of Aboriginal and Torres Strait Islander commercial activity being widespread, if not universal, in pre and post sovereignty Australia. This is discussed further at Q 13.

Dr Lisa Strelein, Director of Research at AIATSIS, detailed a number of arguments in support of the inclusion of commercial rights in a determination of native title,¹⁸⁵ as well as setting out the jurisprudential and doctrinal underpinnings of the current state of native title law. We attach a copy of Dr Strelein’s paper and request the Commission have regard to the discussion contained in that paper.

There has also been considerable debate about the need to ‘unlock the potential of native title’. It has been argued by a number of people that native title of itself does not allow sufficient opportunity for Aboriginal and Torres Strait Islander peoples to benefit from any economic possibilities. The inclusion of economic rights will help unlock some of the potential for native title holders to freely pursue the aspirations they hold for their traditional lands and waters.

Question 13 What, if any, difficulties in establishing native title rights and interests of a commercial nature are raised by the requirement that native title rights and interests are sourced in traditional law and custom?

We refer again to Dr Strelein’s paper¹⁸⁶ which also deals with the difficulties in establishing commercial rights as being sourced in traditional law and custom. These difficulties are due in large part to the nature of the current process for establishing the existence of native title rights and interests.

We also note that much of the discussion on commercial rights has tended to concentrate on fishing and water rights. However, this ignores the large body of research on terrestrial trade and commercial activity.

Professor John Altman deals with the issue of the link between marine and terrestrial country. He states:

¹⁸⁴ Above n49, p120.

¹⁸⁵ Above n 135.

¹⁸⁶ Ibid.



In similar vein, the NTA makes a neat distinction between terrestrial and marine estates in relation to the operations of the right to negotiate framework as if such a distinction is logical either on ecological or cosmological grounds. Indigenous people who live in the coastal zone have always asserted that their terrestrial and marine interests are interlinked and so it makes sense to extend the right to negotiate offshore in situations where there has been an offshore native title registered claim or determination. Some of the issues that have arisen in relation to the intertidal zone in the Blue Mud Bay High Court decision (2008) are instructive here.¹⁸⁷

To deny the existence of commercial activity in ‘traditional’ Aboriginal culture, denies a large body of research on the nature and extent of this commercial activity. Dale Kerwin has outlined the extensive trade routes and market places that existed at sovereignty some of which continue to the present day.¹⁸⁸ Kerwin, amongst others, has detailed extensive trade, including in pituri, ochre, furs, stone, shells, songs and stories, and notes the significance of market places/trade centres as being central to large ceremonial gatherings.

Daryl Wesley and Mirani Litster of the Australian National University presented a paper to the Australian Archaeology Association Conference at Coffs Harbour in December 2013 in which they argue that glass beads were received from Macassan traders in exchange for fishing rights in areas off the coast of Arnhem land.¹⁸⁹

There is, in reality, no point to be made in distinguishing between marine and terrestrial rights. If, as in *Akiba*¹⁹⁰, the Court held that a right to take does not require any investigation of the purpose of the take, then the principle is valid irrespective of whether the rights are asserted over land or water. Finn J in *Akiba* noted:

The point to be emphasised is that the fundamental resource-related right of use (cf *Ward HC* at [91]) was the right to take. Use of what was taken was unconstrained, save by considerations of respect, conservation and the avoidance of waste.¹⁹¹

Finn J also noted that:

While the Applicant does not claim explicitly a right to take for trading and commercial purposes, the right it claims would include such purposes and the Applicant does not disavow this.¹⁹²

Finn J rejected the submissions made on behalf of the Commonwealth and the State of Queensland that, in order to assert the right to take, the Applicants had to possess

¹⁸⁷ J C Altman, Reforming the Native Title Act *CAEPR Topical Issue* No. 10/2011, p8
http://caepr.anu.edu.au/sites/default/files/Publications/topical/TI2011_10_Altman%20NTA_Rev.pdf,
Accessed April 2014.

¹⁸⁸ D Kerwin, *Aboriginal Dreaming Paths and Trading Routes: The Colonisation of the Australian Economic Landscape*, Sussex Academic Press, Sussex, 2010.

¹⁸⁹ See Article in ‘ABC Science’ by Anna Salleh, at
<http://www.abc.net.au/science/articles/2013/12/06/3905030.htm>, Accessed May 2014.

¹⁹⁰ *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia* [2013] HCA 33.

¹⁹¹ *Ibid* at [529]

¹⁹² *Ibid* at [751]



a right to exclusive possession. His Honour also concluded that the right to take did not limit the purpose for which it was taken.¹⁹³

The High Court unanimously upheld Finn J's Orders on this point, with French CJ and Crennan J noting that:

A broadly defined native title right such as the right 'to take for any purpose resources in the native title areas' may be exercised for commercial or non-commercial purposes. The purposes may be well defined or diffuse. One use may advance more than one purpose. But none of those propositions requires a sectioning of the native title right into lesser rights or 'incidents' defined by the various purposes for which it might be exercised. The lesser rights would be as numerous as the purposes that could be imagined. A native title right or interest defines a relationship between the native title holders and the land or waters to which the right or interest relates. The right is one thing; the exercise of it for a particular purpose is another. That proposition does not exclude the possibility that a native title right or interest arising under a particular set of traditional laws and customs might be defined by reference to its exercise for a limited purpose. That is not this case.¹⁹⁴

Question 14 If the *Native Title Act* were to define 'native title rights and interests of a commercial nature', what should the definition contain?

We have nothing further to add to the issues raised in the ALRC Issues Paper and discussed above.

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?

We have nothing further to add to the issues raised in the ALRC Issues Paper and discussed above.

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 Review identified important issues with respect to physical occupation, or continued or recent use. This included a discussion that, pursuant to s 62(1)(c) NTA,

¹⁹³ Ibid at [751]-[757].

¹⁹⁴ Ibid at [21].

a claimant application may include evidence of physical connection. Connection is about demonstrating the **existence** of rights, not the **exercise** of rights.¹⁹⁵ However, evidence of the exercise of rights can be adduced to support a claim for the existence of rights. Therefore, AIATSIS considers s 62(1)(c) NTA as not being in conflict with the interpretation of s 223 NTA which excludes any requirement that physical occupation or continued or recent use are elements of ‘connection’.

AIATSIS does, however, consider that the wording in s 190B(7) NTA creates conflict with the interpretation of s 223 NTA. There is a logical inconsistency because:

1. s 223 NTA sets out a definition of native title that does not require physical occupation, or continued or recent use; whereas
2. s 190B(7) NTA places a requirement on the Registrar of the National Native Title Tribunal to only accept an application for registration if, *inter alia*, the applicant can demonstrate ‘traditional physical connection’.

‘At the outset, it is clearly established in the case law that physical occupation, use or visitation is not required by s 223(1)(b).’¹⁹⁶ However, as discussed by the Review, this established approach has occasionally been disregarded. For instance, in *Akiba*¹⁹⁷ the lack of use by the claim group of certain areas of the claim was relied upon as evidence for the absence of connection.¹⁹⁸

An unequivocal statement that physical occupation, or continued or recent use, are not required to demonstrate connection through law is required to ameliorate the illogicality within the NTA and the inconsistency in application of the definition by the judiciary.

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?

AIATSIS strongly supports that the NTA confirms that ‘connection with the land and waters’ does not require physical occupation or continued or recent use.

For the purposes of s 190B(7) NTA, this could be framed by removing reference to ‘physical connection’ in favour of ‘physical presence’ or ‘ties through law or custom’.¹⁹⁹ AIATSIS considers the wording of s 223 NTA, proposed by the Native Title Amendment (Reform) Bill 2011, be extended something like the following:

¹⁹⁵ *Western Australia v Brown* [2014] HCA 8 (12 March 2014) [33].

¹⁹⁶ Above n32, p 47. See *Neowarra v Western Australia* [2003] FCA 1402 at [347]–[358]; *De Rose v South Australia* [2003] FCAFC 286 at [303]–[328]; *Sampi v Western Australia* [2005] FCA 777 at [1079]; *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135 at [92]; *Western Australia v Ward* [2000] FCA 191 at [243] (not dissented from in the High Court on appeal).

¹⁹⁷ *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth* (2013) 300 ALR 1.

¹⁹⁸ See Above, n3, p 52 discussing *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth* (2013) 300 ALR 1.

¹⁹⁹ Above n32, 50.

To avoid doubt, and without limiting subsection (1), it is not necessary for a connection with the land or waters referred to in paragraph (1)(c) to be constituted by physical occupation or continued or recent use.

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?

AIATSIS supports the propositions and arguments presented by the Review in the Discussion Paper on ‘substantial interruption’, and particularly highlights the following as identifying problems 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 greater the adoption of modern technology and life-styles (including education, welfare and health services) the greater the chance that a court will find that traditional laws and customs have been abandoned, and that native title has been lost.²⁰⁰
- the High Court’s decision in *Yorta Yorta* ‘would appear to have reduced the likelihood of success of native title claims located in areas that have been most affected by colonisation’.²⁰¹
- ‘there is little room to raise past injustice as a counter to the loss of, or change in, the nature of acknowledgment of laws or the observance of customs’.²⁰²
- the way in which recognition is conceived as an intersection between two normative systems means that there is ‘no room for a parallel system of Indigenous governance’.²⁰³

We also wish to reiterate previous discussion in this submission, particularly under Q 5, Q 6, Q 10 and Q 11 and raise as relevant issues about a regime that, notwithstanding some ‘acceptable’ level of change, imposes the expression of beliefs and practices as belonging in some static past; a regime that arguably fails to respect the rights of Aboriginal and Torres Strait Islander people to interpret and re-interpret evolving laws and customs in line with changing conditions and environments.

The imposition by the courts on applicants to demonstrate ‘continuity that is not substantially uninterrupted’ has a prejudicial application for those Aboriginal and Torres Strait Islander peoples who have, by choice or otherwise, adapted their cultural practices in response to the profound social and economic impacts of

²⁰⁰ J Basten QC, ‘Beyond Yorta Yorta’ (2003) 2 *Land, Rights, Laws: Issues of Native Title* 6–7. Note that the author was referring to this view, not necessarily expressing an opinion on it. See Above, n3, p 54-5.

²⁰¹ LexisNexis, *Native Title Service* (at Service 91) [1439]. In *Ibid*, p 55.

²⁰² Aboriginal and Torres Strait Islander Social Justice Commissioner, ‘Native Title Report 2009’ p 87. In Above, n3, p 57.

²⁰³ Above, n 94 and *Ibid*.

colonisation. Even where evidence of extant laws and customs is produced, the requirement of continuity can deny recognition. In its comments on the draft terms of reference for the Review, AIATSIS criticised this requirement as leading to injustice without any apparent policy justification.²⁰⁴

Furthermore, evidence from ethno-historical records or other documents are not equally available for all groups. The level of evidence available is highly variable, entirely contingent on a range of interrelated factors including: the number of anthropologists or other persons who documented early traditional laws and customs of the group; the timing of this research in relation to date of first contact and the timing of previous and future research of others; the quality of the information contained in the documents that have survived, including the views and bias of those reporting; and the level of resourcing available to the claimant group to locate and analyse ethno-historical documents held in Australian and international archives.

As a result, some groups are less able than others to prove continuity of traditional laws and customs. This constitutes a form of evidentiary discrimination against those groups who had little or no interaction with non-Indigenous anthropologists and scientists throughout the 19th and 20th centuries. It is worth noting, however, that oral evidence will be accepted, at least as the basis upon which the courts may draw an inference of continuity. In *Gumana*, the Court noted:

Like the evidence called to prove Aboriginal custom, the evidence called to prove the existence of a custom from ‘time immemorial’ for the purposes of the common law was often oral evidence and it was subject to the same difficulties in relating that evidence back – although not just to the 18th century, but to the 12th and 13th centuries. In practice those difficulties were ameliorated by the readiness of the common law courts to infer from proof of the existence of a current custom that that custom had continued from time immemorial ...:

‘It is impossible to prove the actual usage in all time by living testimony. The usual course taken is this: Persons of middle or old age are called, who state that, in their time, usually at least half a century, the usage has always prevailed. That is considered, in the absence of countervailing evidence, to show that usage has prevailed from all time.’²⁰⁵

AIATSIS also considers that a significant problem in requiring that applicants prove their acknowledgement of laws and customs are ‘substantially uninterrupted’ is that it is the result of the exercise of statutory interpretation that is arguably flawed. AIATSIS supports the approach by Dr Lisa Strelein, who proposes that, although the Federal Court’s jurisdiction is ascribed by statute (and its work is almost exclusively in the interpretation and application of Commonwealth legislation), its approach to interpretation of legislation or agreements concerning Indigenous peoples should be guided by common law traditions for interpreting legislation. Dr Strelein states:

²⁰⁴ Above n1, p 3.

²⁰⁵ *Gumana v Northern Territory* (2005) 50 FCA 50 195 per Selway J at [198]. His Honour discussed Jessell MR in *Hammerton v Honey* (1876) 24 WR 603 at 604.



These rules have their roots in the common law protection of the rights of citizens against arbitrary exercises of power by the state, especially in relation to property.²⁰⁶

In affirming the primacy of the NTA over the common law, the courts have ‘embarked on a painful statutory interpretation exercise that added numerous interpretive layers to the terms of the provision...’²⁰⁷ This includes that the courts have read into s 223 NTA a requirement that traditional laws and customs be ‘uninterrupted’, or ‘substantially uninterrupted’. AIATSIS notes in its submission to the Inquiry into the Native Title Amendment (Reform) Bill 2011 that, unlike in other jurisdictions, Australian courts have not, of their own accord, followed a principle of beneficial interpretation in relation to the NTA.

In the 2002 Native Title Report, the Human Rights Commissioner states:

It is now clear that the standard and burden of proof required to establish the elements of the statutory definition of native title are so high that many Indigenous groups are unable to obtain recognition of the traditional relationship they continue to have with their land. In turn, their cultural, religious, property and governance rights, recognised at international law and embodied in this relationship, fail to be recognised and protected under Australian law.²⁰⁸

In the 2013 Social Justice and Native title Report 2013, the Aboriginal and Torres Strait Islander Social Justice Commissioner states:

Despite further amendments to the Native Title Act in 2007, 2009 and 2010 ... none of these amendments have mitigated the onerous burden for us to prove our native title following the *Yorta Yorta* decision or have acknowledged the negative impact on our communities of extinguishing native title post-*Ward*.²⁰⁹

While native title claim groups manage to overcome the burden, with over 238 successful determinations, the time and cost involved is unnecessary.

Furthermore, identifying continuity of connection, ‘substantially uninterrupted’ since sovereignty, necessarily requires the drawing of inferences. While this process of legal reasoning appears to offer relief from the onerous evidentiary burden, the extent to which an inference may be raised is amenable to judicial discretion.²¹⁰ Dr Strelein comments:

²⁰⁶ Above, n56. See *Clissold v Perry* [1904] HCA 12; (1904) 1 CLR 363, 373; *Balog v ICAC* [1990] HCA 28; (1990) 169 CLR 625, 635–36; *Davis v The Commonwealth* [1988] HCA 63; *Coco v the Queen* [1994] HCA 15; (1994) 179 CLR 427, 436–37; *Bropho v Western Australia* [1990] HCA 24; (1990) 171 CLR 1, 18.

²⁰⁷ Ibid.

²⁰⁸ Australian Human Rights commission, ‘Native Title Report 2002: Recognition of native title’. <https://www.humanrights.gov.au/publications/native-title-report-2002-recognition-native-title>, Accessed June 2014.

²⁰⁹ Australian Human Rights Commission, 2013, p 78 (reference to *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; and *Western Australia v Ward* (2002) 213 CLR 1).

²¹⁰ Above n32, pp 28–33. Compare *Sampi v Western Australia* [2005] FCA 777 at [1055]; *Sampi on behalf of the Bardi and Jawi People v Western Australia* [2010] FCAFC 26 at [65]; *Jango v Northern Territory of Australia*

While the courts have acknowledged that certain inferences may be made back beyond living memory,²¹¹ the full court in *Bodney v Bennell* (2008)²¹² (*Bennell*) established a stricter requirement of proof; in particular where written evidence exists that may demonstrate some sort of interruption, proof of continuity in the face of interruption is expected.

It was evident in the appeal in *Bennell* that the judiciary had bogged themselves in a quagmire of proof.²¹³

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?

See our answer to Q 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?

See our answer to Q 21.

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?

If so, should:

- a. any such power be limited to certain circumstances; and
- b. the term ‘in the interests of justice’ be defined? If so, how?

The term ‘substantially’ in *Yorta Yorta* recognises the difficulty in proving oral traditions have been adhered to continuously over such an extended period and recognises that

‘European settlement has had the most profound effects on Aboriginal societies and that it is, therefore, inevitable that the

[2006] FCA 318 at [504]; *Gumana v Northern Territory of Australia* [2005] FCA 50 at [198]–[201] (discussing *Hammerton v Honey* (1876) 24 WR 603 at [604]); and *Griffiths v Northern Territory of Australia* [2006] FCA 903 at [580]–[585].

²¹¹ Reference to *Gumana v Northern Territory* (2005) 50 FCAFC 50 195.

²¹² Reference to *Bodney v Bennell* (2008) 63 FCAFC 70.

²¹³ *Ibid*, n48, p 7.



structures and practices of those societies, and their members, will have undergone great change since European settlement.²¹⁴

A strong argument exists for including a non-exhaustive list of historical events upon which the courts could be guided with respect to disregarding the requirement for continuing connection without substantial interruption.²¹⁵

AIATSIS draws the Reviews attention to our submission to the Inquiry into the Native Title Amendment (Reform) Bill 2011 where we set out, in response to a proposed new provision for continuing connection (s 61AB NTA):

Section 61AB partially responds to Justice North's observations, and addresses comments in *Bennell* that the reasons for change are irrelevant. Sub-section 61AB(2) requires the Court to take in to account whether any interruption or significant change was the result of the acts of a State or Territory or person who is not an Aboriginal person or Torres Strait Islander. It does not, however, suggest that such interruptions or changes be disregarded. Therefore the problem identified by North J is only partially addressed.

Further, these qualifications themselves may also become a matter for contestation. It may not always be possible to prove a direct correlation between a demonstrated interruption or change and the effect of government policies and individual behaviour on the movements of individuals or families. Indigenous agency in responding to such forces is not always easily articulated and reasons for certain actions may form part of the implicit rather than explicit knowledge of claimants. In these circumstances, respondent rebuttal might argue that a particular move was voluntary as the subtleties and long terms effects of policies remain invisible. There are also many other factors, such as cataclysmic events, drought, flood, war and the like, which could, prima facie, indicate a substantial period of dislocation, but which might fall outside the protection of s 61AB(2).

These difficulties are evidence of the problematic nature of the NTA's focus on continuity and failure to deal adequately with the realities of change.²¹⁶

Therefore, while AIATSIS supports the approach endorsed by the Aboriginal and Torres Strait Islander Social Justice Commissioner, we prefer that a presumption of transformation be expressed within the NTA (see submission under Q 6 and Q 7). This, together with an obligation on the State to abstain from adducing any evidence about interruption of connection where the action of the State caused the interruption, addresses difficulties in establishing the recognition of native title rights and interests

²¹⁴ *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at [89], Above n32, p 28.

²¹⁵ Above, n3, p 58. Two examples were provided in Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2009' (Australian Human Rights Commission, 2009) 87:

1. the forced removal of children and
2. the relocation of communities onto missions

²¹⁶ Above n 152, p 8.



where there has been a ‘substantial interruption’. This approach imposes an equitable obligation on the State to act in the best interest of the applicant. In which case, it is not relevant to include a definition of ‘in the interests of justice’.

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?

Each question in the Review is interrelated to some extent. In drafting this submission, AIATSIS is aware of the recurring themes with respect to the inconsistent approach by the Courts in defining the requirements of connection; and the lack of acknowledgement in many judgments to international obligations and standards.

It is appropriate that each case turn on its own facts. However, to reiterate a statement in this paper, ‘it is our position that:

... a strong focus on the policy reasons that underlie the legal architecture is necessary to ensure that the Review’s conclusions and recommendations can inform legislative change directed towards more just and more efficient outcomes.²¹⁷

There are various issues that have been raised in recent consideration of the NTA (see Q 2, highlighting review and reform initiatives the last six to seven years). This includes a wealth of written submissions on topics that are relevant to issues about connection and the recognition of native title.

For instance, calls for reform arise with respect to requirements on native title lawyers. The native title legal processes arise through complex legislative provisions and have been criticised as giving rise to a ‘lawyers picnic’.²¹⁸ AIATSIS wishes to express a particular concern that native title applicants may access legal representatives who carry none of the additional obligations that currently vest in officers of the NTRBs/NTSPs. These obligations exist in order to assist, consult with and have regard to the interests of RNTBCs, native title holders and persons who may hold native title and they also extend to requiring the NTRB to identify persons who may hold native title.²¹⁹

AIATSIS continues to hold the position, expressed in October 2012 in our comments on the Exposure Draft: Proposed amendments to the Native Title Act 1993, that we support the extension of provisions for disregarding ‘historical extinguishment’. The decision in *Western Australia v Brown*²²⁰ challenges the fracturing of native title rights and interests through application of the ‘bundle of rights’ theory, and allows that

²¹⁷ Above n1, p 3 (also see p6).

²¹⁸ D Ritter and M Garnett ‘Building the Perfect Beast: Native Title Lawyers and the Practise of Native Title Lawyering’ in L Strelein (Ed) *Land, Rights, Laws: Issues of Native Title*, AIATSIS Issues Paper No 30, 1999, p 1.

²¹⁹ Above n 158.

²²⁰ [2014] HCA 8.

certain acts will suspend, rather than extinguish native title rights. This is an important consideration that should be included in the Review.

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?

AIATSIS notes that this question is asked in the context of the effectiveness of authorisation provisions with respect to of s 61 of the NTA (native title and compensation applications), not with respect to s 251A of the NTA (authorising the making of indigenous land use agreements). AIATSIS considers that there should not be two authorisation schemes operating within the NTA.

Our comments on the draft terms of reference for the Review are relevant to the effectiveness of provisions where it states:

Legislative provisions for authorisation and joinder must necessarily strike a balance between the efficient progress of claims on the one hand, and the need to ensure that individuals and minority groups are accorded due opportunity to have their voice heard. So while legislative amendment could remove some of the procedural costs and delays created by these issues, any changes need to be directed to ensuring just and equitable access to native title recognition over the efficient disposition of matters before the courts.²²¹

Consistency in the application of authorisation provisions is also relevant to their effectiveness. AIATSIS notes various approaches taken by the judiciary in relation to authorisation, highlighted by the Review's discussion on the rigorous approach to the constituency of the claim group as proposed by Wilcox J in *Moran*²²² compared with the less stringent approach by French J in *Daniel v Western Australia*.²²³

²²¹ Above n1, p 4.

²²² L Strelein 'Authorisation and Replacement of Applicants: *Bolton v WA* [2004] FCA 760' in C Green (Ed) *Land, Rights, Laws: Issues of Native Title, Native Title Research Unit Issues Paper 1:3*, March 2005, p 5. Dr Strelein discusses *Moran v Minister for Land and Water Conservation* (NSW) [1999] FCA 1637 at [49]. Note: Dr Strelein states:

Wilcox J found that neither the person applying to replace the applicant nor the original applicant had sufficient authorisation. His Honour held that in order to demonstrate authority under either s 66B or 251B applicants must either:



AIATSIS considers that the Review has identified and alluded to other relevant issues, including:

- the legal requirement that a claim group be a discrete entity with clear rules for membership is not consistent with the complex nature of Aboriginal and Torres Strait Islander societies;
- the impact of colonisation such as the forcible exclusion from land, confinement on reserves, discouragement of language and the removal of children may result in a group experiencing difficulty identifying all of its membership;
- identifying whether a group comprises a society, with its own laws and customs, or a sub-group, is not always easily answered. Usually a 'sub-group' of a larger community cannot hold native title, but there are exceptions;
- some groups' traditional laws and customs include 'historical people' whereas, in other communities, only those with ancestral connection may be included;
- identification of the members of the claim group is intrinsically linked to the identification of the boundaries of land claimed. The Review discusses this with respect to determining claim boundaries is complex where traditional laws and customs give rise to a 'complex regional relational and networked matrix of rights and interests'²²⁴ which may include shared areas, or may tolerate inconsistent ownership claims; and
- to attract the right to negotiate a proposed future act, claims must be lodged within three months of the notification of the future act. This is problematic, including where anthropologists and historians are required to help identify the claim group to a sufficient standard of proof to be registered.

AIATSIS would like to draw the Review's attention to a discussion paper on authorisation and decision-making in native title, currently being drafted by former AIATSIS researcher Nick Duff, now a lawyer at the Goldfields Land and Sea Council. Although his paper is in an early draft stage, many of the very broad range of issues being identified in considerable detail by Mr Duff may assist the ALRC in examining issues around authorisation. For instance, the Review team may be interested in issues identified within the paper with respect to:

- the lack of clarity under the Act about whether a native title claim group is defined objectively (ie by reference to the ultimate question of who are the native title holders), subjectively (ie by reference to the decisions of the claim group) or formally (ie by reference to the Form 1 description alone) and the ultimate judicial resolution of this issue (ie having regard to the Applicant's

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- a) identify all the members of the claim group by name and have express authority from at least the majority of individuals; or
 - b) identify a collective body or representative group who confer authority, supported by evidence that the body or group exists under traditional law and custom and whose nature and extent of authority under traditional law and custom extend to speaking on behalf of the whole group.

²²³ Ibid, p 6-7, discussing *Daniel v Western Australia* (2003) 194 ALR 278 [17].

²²⁴ T Bauman, 'Whose Benefits? Whose Rights? Negotiating Rights and Interests Amongst Indigenous Native Title Parties' *Land, Rights, Laws: Issues of Native Title* 3:1, 2005, p 6.



‘case’ as a whole, covering the Applicant’s pleadings, submissions and evidence but not those of other parties);

- the related question of whether Courts are being asked to pre-judge the merits of claims by determining whether a particular claim group is merely a ‘sub-group’ of the ‘true’ native title claim group;
- the definition of what constitutes ‘all’ the persons in the native title claim group;
- who is the ‘applicant’ for the purposes of obligations and responsibilities such as cost orders and *res judicata*, as well as the obligations of client privilege held by legal representatives;
- whether there is any possible alternative to the logical circularity of employing a decision-making process in order to adopt a decision-making process (and the problems that arise when the decision to adopt a decision-making process is contentious);
- whether Courts have the power to change the composition of the applicant without resorting to s 66B, and the policy considerations that might inform a statutory resolution to the current diversity of judicial views on the subject;
- the extent of applicant autonomy in decision-making, particularly where there is disagreement between the applicant and members of the claim group.

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 imposition of a decision-making process that accords to an externally determined vision of ‘tradition’ is ethnocentric and inappropriate. AIATSIS addressed this issue in our earlier discussion, including under Q 5, Q 10 and Q 11. However, we observe our earlier comments with regard to the importance of cultural legitimacy in decision making as a key to effective governance.

AIATSIS considers that native title claim groups should adopt decision-making process as appropriate to individual circumstances and ensure that statutory requirements do not inhibit the resurgence of Indigenous governance traditions, nor ignore the need to adapt those traditions in the light of complex legal and commercial environments. However, notwithstanding the unsettled nature of what will prove appropriate decision-making, options and consequences of various processes should be made readily available to claim group members.

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?

See our answer to Q 26.



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?

Authorisation is an aspect of the registration test. Both the registration test and authorisation were:

designed to minimise contested, overlapping claims and claims by persons who were but a subgroup of a larger group generally acknowledged to be the proper claimants. These provisions were also designed to better facilitate the exercise of the right to negotiate under the NTA and to eliminate the potential for the abuse of that right. These provisions, however, have produced their own subset of NTA litigation, with parties, both applicants and respondents, challenging decisions made by or on behalf of the Registrar under the NTA to register a claim or the fact of authorisation of a particular claim. Experience teaches that, while much has been done to minimise contesting claims by different Aboriginal groups to the same land, the circumstance of contested overlapping claims involving rival claim groups remains a feature of the native title system that requires careful management.²²⁵

The seriousness of the contest that authorisation can provoke is a significant issue for the native title system. Noel Pearson referred to disputes between traditional owners at James Price Point, stating:

The differences within Aboriginal communities that are convulsed by arguments such as this produce much psychological and spiritual hurt. Indeed, it physically sickens and kills people.²²⁶

While some disharmony can be somewhat ameliorated or even avoided by negotiation and mediation, those processes take time and they don't always work.²²⁷ AIATSIS discusses the importance of inclusive decision-making processes, that build capability as well as resolve disputes, to the efficient resolution of applications at Q 8. We note, however, that the NTA provides an environment in which disharmony can flourish.

For instance, the NTA imposes a positive obligation on NTRBs/NTSPs to support the identification of members of the claim group and to solicit their involvement in the decisions that affect them.²²⁸ NTRBs have access to a limited pool of experienced lawyers and anthropologists who are usually involved in the proceeding. Some commentators consider this pool requires refreshing.²²⁹ The existing time pressures

²²⁵ Above, n25.

²²⁶ N Pearson, 'When Outsiders Stir Up Tensions in Tribal Societies', *The Australian* (online), 10 September 2011 www.theaustralian.com.au/national-affairs/opinion/when-outsiders-stir-up-tensions-in-tribal-societies/story-e6frgd0x-1226133481670. In S Burnside, 'Outcomes for all? Overlapping claims and intra-indigenous conflict under the NTA' *Australian Indigenous Law Review* 16(1): 2, 2012, p 3.

²²⁷ Ibid.

²²⁸ Above n216, p 11. See for example, ss 203BA, 203BB, 203BC, 203BE, 203BF and 203BH *Native Title Act 1993* (Cth).

²²⁹ Above, n25, p 6.

could be alleviated and a more effective system for supporting Indigenous decision-making or conflict resolution, established through adequately resourcing representative bodies.

Effective and efficient claim processes are supported by getting it right with respect to the right people for country. The processes for identifying the right people for country can sometimes take a long time, as well as being resource intensive. However, the overarching purpose of the native title must be pursued, as a matter of simple fairness for the people who are the traditional owners. This purpose can also provide a dispute management resource, with getting it right alleviating conflict and ultimately make the processes more certain.²³⁰

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?

AIATSIS agrees with the ALRC's proposed alternative to authorising another claim group member, by allowing the applicant to file a notice with the court indicating that a member of the applicant has died or is no longer willing to act.

Currently, Applicant parties to native title applications must be named individuals. There may be options available that support indigenous decision-making processes that are appropriate for that group without unduly impacting the time-frames and certainty required within the legal processes of native title.

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? In practice, what, if any, problems remain?

This provision allows that the application proceed to hearing or consent determination, even though there is a defect in authorisation. This is a broad discretion without the NTA imposing conditions or even considerations that the Court must turn its mind to. However, the exercise of the discretion appears to have

²³⁰ Above, n49, pp 26 and 120



afforded no great controversy. In his research on this subject, Nick Duff has identified that:

judges do not regard the insertion of s 84D(4)(a) as relaxing the general requirement for authorisation so much as allowing departures from the general rule in exceptional circumstances.²³¹ Such exceptional circumstances may include: the discovery or assertion of the defect coming late in the proceedings (particularly if the matter had already come to trial); evidence that the group's authorisation has been given in substance even if the form or evidence is inadequate; lack of any dispute from within the claim group about authorisation.

AIATSIS considers that tests for authorisation should be developed in a way that reflects the constituency of the group and the decision-making processes without being identified as an exceptional circumstance. This is not a simple approach however, particularly when considering the approximate 35,000 people in the membership of the Noongar settlement claim.

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?

This question confronts the reader to consider the economic value of inclusion. While there may be an argument that exclusionary processes may, in some circumstances, lead to efficiencies, such an approach would be much more likely to lead to a greater number of disputes over claim group constituency and authorisation.

Although 'time consuming, expensive and logistically challenging', authorisation and other claim group meetings may be necessary to ensure that a determination, agreement or other settlement is understood and accepted by a community. Time and resources invested at the authorisation stage may serve to establish clear decision-making processes, develop trust between group members and avoid misunderstandings and disputes at later stages of the claim.²³²

The cost of dealing with the results of exclusion could be felt in a higher proportion of litigation and arguably amongst claim group members who are excluded from decisions about their country. It is difficult to consider the cost that would overbalance measures that could obviate or ameliorate the harsh and even fatal consequences of inter-Indigenous disputes discussed under Q 26.

²³¹ For example, *Velickovic v State of Western Australia* [2012] FCA 782 ; *Laing v State of South Australia (No 2)* [2012] FCA 980; *Brown v State of South Australia* [2009] FCA 206; *Hazelbane v Northern Territory of Australia* [2008] FCA 291.

²³² J Southalan, 'Authorisation of Native Title Claims: Problems with a 'Claim Group Representative Body'' *Australian Resources and Energy Law Journal* 29(49), 57–58, (2010) in Above, n3, p 70.



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?

AIATSIS considers that native title claim groups should adopt decision-making process as appropriate to individual circumstances. This includes the extent of the autonomy of the decision-maker. In order to successfully prosecute a claim, the applicant must be at least authorised to undertake the function for which the NTA established those provisions.

These decisions should be left with the claim group. However, the claim group should be appropriately supported with clarity about the consequences of decisions.

Joinder

Question 31 Do the party provisions of the *Native Title Act*—in particular the joinder provision s 84(5) and the dismissal provisions s 84(8) and (9)—impose barriers in relation to access to justice?

Who is affected and in what ways?

A person who was, or could potentially be, a member of the claim group, but who no longer wishes to or may not take part in the original application, should be involved in case management and mediation on the basis that this circumstance is indicative (but not determinative) of problems with authorisation. Following which, if the person wishes, they should be joined to the matter under s 84(3) of the NTA. There is competing precedent for supporting whether to join a party in these circumstances. For example, in the 2003 case of *Button v Champman*²³³ the court considered that a normal circumstance and appropriate outcome would occur where:

the applicant no longer wishes to take part in the original application it has been suggested, to ensure their voices are not denied in the proceedings, the appropriate resolution may be for dissident groups to join as a party to the proceedings.²³⁴

In *Starkey v South Australia*²³⁵ the Court found that a member of the claim group could be joined as a respondent. However, the court warned it would only exercise the discretion to do so in rare cases.

A person with an interest that is amenable to being impacted by a native title determination should be joined to a matter. AIATSIS considers that this approach

²³³ *Button v Chapman on behalf of the Wakka Wakka people* [2003] FCA 861.

²³⁴ Above n216, p 6 (discussing *Button v Chapman on behalf of the Wakka Wakka people* [2003] FCA 861).

²³⁵ *Starkey v South Australia* [2011] FCA 456 (9 May 2011), per Mansfield J at [58], referring to *Combined Dulabed & Malanbarra/Yidinji Peoples v State of Queensland* [2002] FCA 1370 (8 November 2002) and Spender J's comments at [45] that he preferred *Bidjara People #2 v State of Queensland* [2003] FCA 324 to the view in that in *ulkalgal People v State of Queensland* [2003] FCA 163 that s 84(5) left a residual discretion to allow the joinder of a dissentient group member as a respondent in certain circumstances.

serves the interests of justice. However, if the interest is protected, for example if the interest is created pursuant to an instrument that establishes or regulates the interest, then there can be no impact by the native title determination and, therefore, issues of justice or fairness are not enlivened. Furthermore, the unnecessary intrusion by such an interest holder could arguably lead to inefficiencies and waste with respect to legal processes.

This situation is not altered with respect to public thoroughfares or rights of way. These interests attach to the land and are protected at law or in equity. These interests take priority as against native title.

A person interested in a native title outcome should have access to information relevant to the claim, appropriate to any sensitivities. Having a deeper appreciation of the circumstances and progress of a matter may reduce the numbers of s 84(5) NTA joinder applications.²³⁶ See discussion at Q 2.

With respect to dismissal of a joined party, s 84(9) of the NTA sets out factors that the Federal Court **may** consider when deciding to dismiss a party pursuant to s 84(8) of the NTA. The wording within s 84(9) of the NTA could arguably be interpreted as evincing an intention by the legislature that the Federal Court **must** consider the factors. However, in *Watson and Ors v State of Western Australia (No 5)*²³⁷ Gilmour J did not take into consideration the matters in s 84(9) of the NTA in making his decision to dismiss a party. His Honour said, at [9], that the operation of s 84(9) does not constrain the general application of s 84(8) of the NTA. Rather than s 84(9), Gilmour J considered:

- (a) the legislative purpose behind the NTA which is to encourage parties to resolve native title claims by conciliation and negotiation;
- (b) the provisions of s 37M of the Federal Court of Australia Act 1976 (Cth) and the overarching purpose of facilitating the just determination of proceedings before the Court in the most inexpensive and efficient way possible;
- (c) the significant time, money and other resources which have been invested in this application and in the mediation and negotiations with the first respondent and other parties;
- (d) the additional significant time, money and other resources (including scarce judicial resources) which will need to be expended on delaying the determination hearing;
- (e) the significant and non-compensable inconvenience, anxiety and stress on members of the claimant group should the determination hearing not proceed;
- (f) the proximity of the parties, other than (the party being dismissed), to reaching a negotiated, non-litigated settlement and consent determination of native title; and
- (g) the fact that the applicant does not, in this proceeding, challenge the validity of the Permit and accepts that to the extent of any inconsistency, the native

²³⁶ Justice J.A. Dowsett, *Beyond Mabo: Understanding Native Title Litigation through the Decisions of the Federal Court*, speech delivered to the LexisNexis National Native Title Law Summit, Brisbane, 15 July 2009, p 6. www.fedcourt.gov.au/publications/judges-speeches/justice-dowsett/dowsett-j-20090715. Accessed June 2014.

²³⁷ *Watson v State of Western Australia (No 5)* [2014] FCA 650.

title rights and interests must yield to the rights and interests of the Permit holder.²³⁸

AIATSIS considers that this potential ambiguity should be resolved.

Question 32. How might late joinder of parties constitute a barrier to access to justice?

Who is affected, and in what ways?

Parties seeking joinder may apply under s 84(3) or s 84(5) of the NTA. An application under s 84(3) of the NTA will be amenable to time restrictions. Therefore, the only avenue under the NTA for seeking late joinder is under s 84(5) of the NTA. Under this provision, the court must consider whether it is in the interest of justice to join a person to proceedings. This raises an argument that late joinder constitutes a barrier to access to justice through the discretionary application of this provision.

‘Justice delayed is justice denied’ is a legal maxim that weaves throughout the Federal Court’s dealings, including with native title matters. While there are undoubtedly situations of disadvantage brought about through delay, there are instances when delaying the process may improve access to justice.

There is flexibility built into the joinder provisions as well as the discretion:

- will joinder cause delay? If so, could that prejudice the other parties and the Court;
- can the person’s interest be protected by a method other than by joining – and causing delay?²³⁹
- The fact that native title is about rights that can be asserted against the world (ie, *in rem*) might sway the Court to consider joinder – but it’s not a decisive determinant.

Question 33 What principles should guide whether a person may be joined as a party when proceedings are well advanced?

AIATSIS considers that the starting point in any consideration by the Court is that late joinder should only apply to applicants with competing or overlapping native title claims.

The principles in the Preamble and Objects of the NTA should be sufficient to guide the court make the decision. The principles provided by the Review, or something

²³⁸ Ibid at [10]. In deciding that s 84(9) does not constrain the operation of s 84(8), Gilmour J followed the reasoning of Logan J in *Butterworth v Queensland* (2010) 184 FCR 397 at [39] and referred to *Starkey v South Australia* (2011) 193 FCR 450 at [42]-[43].

²³⁹ *Akiba on behalf of the Torres Strait Regional Seas Claim People v Queensland (No 1)* [2006] FCA 1102 (18 August 2006) [29].

similar, could supplement or support the underpinning purpose of the legislative scheme. That is:

1. Acknowledging the importance of the recognition of native title;
2. Acknowledging interests in the native title system;
3. Encouraging timely and just resolution of native title determinations;
4. Consistency with international law; and
5. Supporting sustainable futures.

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?

In a 2009 speech, Dowsett J discussed, among other things, delays that are typical in native title litigation and the efforts of the Court to minimise delay.²⁴⁰ His Honour identified challenges to procedure occurring through the paucity of disclosure of evidence (by applicants) in native title matters. He states:

disclosure of family history relevant to the litigation in question has not generally been a ground for suppression of evidence.²⁴¹

Dowsett J explains the automatic joinder of the relevant state as a measure that may be expected to address the wider public interest²⁴² and acknowledges ‘a perception that non-state respondents pose unnecessary complications’.²⁴³

Dowsett J discussed the benefits of the involvement of respondent parties, stating that:

It should be seen as an opportunity to convince respondents that Native Title is not a threat to business, family security or life style. A process in which there is wider, rather than narrower, community involvement is more, rather than less, likely to attract general community support and acceptance, and to produce speedy and effective outcomes.²⁴⁴

His Honour considers that disclosure of the case will reduce the numbers of people who elect to participate, or become ‘unnecessarily involved in native title claims.’²⁴⁵ AIATSIS considered a similar approach, but proposed that the responsibility of

²⁴⁰ Above n230. Note, at p 3, His Honour also considers that native title ‘has been subject to frequent radical amendment.

²⁴¹ Ibid, p 4.

²⁴² Ibid, p 6.

²⁴³ Ibid, p 7.

²⁴⁴ Ibid Dowsett p 7.

²⁴⁵ Ibid.

information sharing should vest in the State, rather than the applicant (see Q 1, Principle 2).

Question 35 What, if any, other changes to the party provisions of the *Native Title Act* should be made?

We have no further changes to propose at this point in time.



The Right to Resources and the Right to Trade

Lisa Strelein

Native title and economic power

In an address to the 2011 Native Title Conference, his Honour, Patrick Keane, then Chief Justice of the Federal Court, remarked that, 'One does not need to delve deeply into the history of engagement between Indigenous peoples and Settler States to find examples of the relationship between land ownership, economic leverage and political power'.¹ The colonisation of Aboriginal and Torres Strait Islander peoples' territories was undertaken for the primary purpose of acquiring lands and resources for economic development. While the recognition of native title was heralded as a 'retreat from injustice' by the High Court, the doctrine of native title itself retains vestiges of colonising intent.

It is important to understand the roots of native title as at once both a colonizing and decolonizing doctrine in order to understand the tensions that arise in considering the potential for economic exploitation of native title by native title holders.² Chief Justice Keane noted that 'Usually, if the economic, and ultimately political, value of land is to be unlocked, it must be able to be made available for commerce or trade'.³ His Honour went on to suggest that, while we have become familiar with the importance of Indigenous Land Use Agreements in 'unlocking' the economic potential of native title, we need to look more closely at the commercial and economic potential that can arise from a determination of native title.⁴ The focus of his argument then was to explore how Indigenous peoples themselves could exploit the commercial and economic potential of their lands, rather than relying on third party proponents.

Successive governments have seen the potential for native title to contribute to the economic development for Indigenous peoples and it is a key aspiration for most native title groups. This paper examines some of the doctrinal obstacles and opportunities that confront native title-holders who wish to benefit from the economic potential of their territories.⁵ I examine the way in which the inquiry into the existence of a right to commercial exploitation of native title has been framed in the law, with

¹ Patrick Keane, 'Opportunity and Responsibility', Native Title Conference 2011: Our Country Our Future, 3-5 June, Brisbane, p.1.

² For an exploration of this tension see L Strelein and T Tran. 2013. 'Building Indigenous Governance from Native Title: Moving away from 'Fitting in' to Creating a Decolonised space', *Review of Constitutional Studies*, vol. 18, no. 1, pp. 19-47.

³ Keane, p.1.

⁴ Keane, p.1.

⁵ My thinking on this issue builds on previous work on the exercise of particular native title rights and interests: L Strelein, Submission to the Inquiry into Indigenous enterprises, House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, July 2008; Lisa Strelein, 2004, 'A Comfortable Existence': The Commercial Use of Marine Resources under Native Title', 5 *Balayi: Culture Law and Colonialism* 94-123; Lisa Strelein, 2004. *Species management and the proof and exercise of native title: Indigenous Participation in South Australian Kangaroo Industry Report to the Sustainable systems for management of commercial kangaroo harvest project* coordinated by Jocelyn Davies and Dana Thomson.

particular reference to the Torres Strait Sea claim,⁶ which brought the issues squarely before the High Court.⁷ I consider the doctrinal choices open to the court to ensure the enjoyment of rights to commercial use of their natural resources as well as options for legislative reform that could clarify and reinforce the economic value of native title for Indigenous peoples.

The doctrine of discovery, inalienability and the crown right of pre-emption

The authority by which the British Crown asserted sovereignty over the territory relied on the 'law of nations', which had its foundations in natural law theory and is the precursor of modern international law.⁸ The law of nations was founded on the equality of nations but it was also formulated to support colonisation of Indigenous peoples' territories.⁹ The doctrine of discovery was central to this justification.¹⁰ Recognition was dependent upon a Eurocentric evaluation of the social and political development of different societies and peoples and was dismissive of Indigenous governmental structures and legal systems.¹¹ The taking of territories from the Indigenous peoples was justified on the assumption of superiority in land use and the 'right' of civilised peoples to cultivate the land.¹²

In *Mabo v Queensland (No 2)*, the Court dismissed the earlier doctrine, which denied the rights of Indigenous peoples based on a supposed scale of social organisation as 'false in fact and unacceptable in our society'.¹³ Although the settled status of the colonies was not contested, the Court was prepared to review the implications of 'settlement' for the recognition of Indigenous law and rights, but only in relation to land. Justice Brennan affirmed the 1921 Privy Council decision in *Amodu Tijani v Secretary Southern Nigeria*, 'that a mere change in sovereignty does not extinguish native title to land'.¹⁴ As a result, the Court removed any distinction between Indigenous peoples of a settled colony and those of a conquered or ceded colony for the purposes of recognising rights and interests in land. Importantly, the

⁶ *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia and Ors* [2013] HCA 33. (Akiba). For a summary of the Akiba case see Gabrielle Lauder and Lisa Strelein 2013 'Native title and commercial fisheries: the Torres Strait sea claim' 118 *Precedent* 13-19.

⁷ On native title in the Torres Straits more generally see L Strelein (forthcoming) 'Native Title Bodies Corporate in the Torres Strait: Finding a place in the governance of a region' in T Bauman, L Strelein and J Weir *Native Title Bodies Corporate: Living with native title*, (AIATSIS Research Publications)

⁸ See S. James Anaya, *Indigenous Peoples in International Law* (2nd edn) Oxford University Press, New York, 2004, p. 26.

⁹ See, for example, early texts such as Bartolome de las Casas, *History of the Indies: Selections*, (Collard trans.) Harper and Row, New York, 1971; and Francisco de Vitoria, '*Des Indes* [1539]', in Anthony Pagden and Jeremy Lawrence (eds), *Francisco de Vitoria: Political Writings*, Cambridge University Press, New York, 1991.

¹⁰ For a history of the legal doctrine of discovery, see Robert A. Williams Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest*, Oxford University Press, New York, 1990.

¹¹ For a summary of the theoretical approaches, see M. F. Lindley, *The Acquisition and Government of Backward Territory in International Law*, Longman, London, 1928, p. 11. The Privy Council in 1889 in *Cooper v Stuart*, asserted a 'scale of organisation' test to distinguish the Australian colonies as consisting 'of a tract of territory practically unoccupied, without settled inhabitants or settled law': *Cooper v Stuart* (1889) 14 App Cas 286, p. 291.

¹² See for example, John Locke, *The Second Treatise of Government*, Blackwell, Oxford, 1956, ss. 31-8. Unfortunately little has changed. On tenure maps we persist in labelling land that is now recognised as native title but absent any other tenure as 'unallocated Crown land' as if it is just awaiting a better use.

¹³ *Mabo v Queensland [No. 2]* (1992) 175 CLR 1, at p. 40-2, per Brennan J, see also per Toohey J, at pp. 182, 187.

¹⁴ *Mabo v Queensland [No. 2]* (1992) 175 CLR 1, at p. 57, per Brennan J, referring to *Amodu Tijani v Sec'y, Southern Nigeria* [1921] 2 AC 399 at p. 407. See also *Adeyinka Oyekan v Musediku Adele* [1957] 1 WLR 876, p. 880; [1957] 2 All ER 785, at p. 788, per Lord Denning for the Privy Council.

Court held that an express act of recognition by the new sovereign was not necessary.¹⁵ Therefore, the laws of the Indigenous peoples, and the rights they give rise to, continue in force until changed by the 'new' sovereign.

To this end, the doctrine of discovery was said to give the 'discovering' nation the exclusive right to extinguish Indigenous peoples' right of occupancy.¹⁶ It is often mistakenly thought that the inalienability of native title stems from the inherent values that Indigenous peoples place on their relationship with land, but in fact, it is an essential element of the doctrine of discovery to enable the orderly redistribution of Indigenous lands and resources by the Crown.¹⁷

Moreover, Justice Brennan summarised his findings that:

The rights and privileges conferred by native title were unaffected by the Crown's acquisition of radical title but the acquisition of sovereignty exposed native title to extinguishment by a valid exercise of sovereign power inconsistent with the continued right to enjoy native title.¹⁸

The recognition provided by native title is not therefore absolute. While the courts have recognised that Indigenous peoples' rights to land survived colonisation, the court asserted that the state has power to divest those rights unilaterally, without consent or compensation.¹⁹ The extinguishment doctrine is premised on the notion of an underlying title of the state that may be perfected by the exercise of complete dominion.²⁰

Extinguishment doctrine in Australia native title law

Sean Brennan has referred to the 'relative harshness' of Australia's extinguishment rules as restricting the contemporary economic value of native title as well as the general recognition of native title. In particular, he notes what I have called elsewhere the readiness of the courts to find extinguishment.²¹ In the *Native Title Act case*, the majority of the High Court confirmed extinguishment as 'a valid exercise of sovereign power inconsistent with the continued or unimpaired enjoyment of native title'.²² Native title, which may once have covered the entire territories now forming Australia, has therefore been

¹⁵ Subject of course to the compromise in favour of Crown power to extinguish: *ibid* 55–7 (Brennan J, with Mason CJ and McHugh J agreeing); 97–9 (Deane and Gaudron JJ); 182–3 (Toohey J); confirmed in *Western Australia v Commonwealth* (1995) 183 CLR 373, 422 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

¹⁶ See *Johnson v M'Intosh* 21 US (Wheat.) 543 (1823) at pp. 547, 573-4.

¹⁷ See David Yarrow in this [volume](#).

¹⁸ *Mabo v Queensland [No. 2]* (1992) 175 CLR 1, 69 (Brennan J, with Mason CJ and McHugh J agreeing). See also 80–3 (Deane and Gaudron JJ), 180–4 (Toohey J).

¹⁹ *Mabo v Queensland [No. 2]* (1992) 175 CLR 1, at p. 64, per Brennan J, relying on *Calder v Attorney General of British Columbia* (1973) 34 DLR (3d) 145.

²⁰ *Ibid.*, at pp. 68-74, per Brennan J; pp. 94, 100, per Deane and Gaudron JJ (but compare comments at p. 92); and pp. 194-5, Toohey J. See *Johnson v M'Intosh* 21 US (Wheat.) 543 (1823) at p. 588, *Cherokee Nation v Georgia* 30 US (5 Pet) 1 (1831), at pp. 557-62, *US v Sandoval* 231 US 28 (1913), *United States v Santa Fe Pacific Railroad Co.* (1914) 314 US 339, at pp. 46-7; in Canada, see *St Catherine's Milling and Lumber Co. v The Queen* (1887) 13 SCR 577, but compare the fiduciary duty doctrine in *Guerin v The Queen* [1984] 2 SCR 335.

²¹ Sean Brennan, 'Native title and the High Court of Australia a Decade after Mabo' (2001) 14 *Public Law Review* 209, 214. See Lisa Strelein, *Compromised Jurisprudence: Native title cases since Mabo*, 2nd Edition, Aboriginal Studies Press 2009, p [pinpoint?]

²² *Western Australia v Commonwealth* (1995) 183 CLR 373, at 439, per Mason CJ, Brennan, Deane, Toohey, Gaudron, and McHugh JJ.

extinguished progressively by legislative intention or executive act granting rights or interests in the land to others.

The High Court's decision in *Western Australia v Ward (Ward)* confirmed that legal recognition by the *Native Title Act 1993* (Cth) (NTA) may cease, even where the facts of Indigenous peoples' continued rights and interests under Indigenous law would continue.²³ The extent of extinguishment or impairment depends on the extent of any inconsistency. This view reaffirmed the decision of the High Court in the *Wik Peoples' case*, in which the High Court clarified that native title can co-exist with other interests granted or uses by the Crown, but that where there was any inconsistency, the High Court preferred the non-native title rights to prevail and the native title rights to yield to that extent.²⁴ The courts have recognised circumstances where an interest granted by the Crown may be so extensive, for example in relation to freehold or a common law lease, as to be fundamentally 'inconsistent with the native title holders continuing to hold any of the rights or interests which together make up native title'.²⁵

In *Ward* the High Court held that native title could be partially extinguished, one right at a time.²⁶ With a formulation of native title vulnerable to partial extinguishment coupled with ... co-existence of rights and interests, has come an obsessive interest in articulating the 'rights and interests that together make up native title'. This is even more pronounced in the negotiations with the state governments leading up to the determination by the Court as parties attempt to reach an agreement, by consent, that native title exists.²⁷

The High Court rejected the idea that native title could be suspended or revived, instead preferring permanent extinguishment.²⁸ Certain provisions of the NTA seek to overcome the harshness of the common law by allowing extinguishment to be ignored where Indigenous people continue to be in possession or occupation of the land.²⁹ The Act also provides for new uses of land to be undertaken by agreement without causing permanent extinguishment, through what we now call the non-extinguishment principle.

The High Court has acknowledged that native title may be regulated without being permanently impaired or extinguished, for example in many forms of environmental and land management legislative frameworks.³⁰ The NTA also recognises that native title rights and interests should not be unnecessarily hampered by regulation, such that commercial licensing of fishing and hunting will not apply to the exercise of native title rights and interests for personal or communal use (although regulation for

²³ *Western Australia v Ward* (2002) 213 CLR 1.

²⁴ *Wik Peoples v Queensland* (1996) 187 CLR 1, 133 (Toohey J with the authority of Gaudron, Gummow and Kirby JJ).

²⁵ *Fejo v Northern Territory* [1998] HCA 58 [43]. An estate in fee simple is said to be the closest thing to absolute ownership that exists in the Australian system of land tenure, by which it allows 'every act of ownership which can enter into the imagination': *Commonwealth v NSW* (1923) 33 CLR 1, 42 per Isaacs J.

²⁶ *Western Australia v Ward* (2002) 213 CLR 1.

²⁷ R Farrell, J Catlin and T Bauman, 2007. *Getting Outcomes Sooner: report on a native title connection workshop Barossa Valley July 2007*. National Native Title Tribunal and Australian Institute of Aboriginal and Torres Strait Islander Studies.

²⁸ Sean Brennan, 'Commercial native title fishing rights in the Torres Strait and the question of regulation versus extinguishment', (2012) 8(2) *Indigenous Law Bulletin* 17, 17.

²⁹ NTA ss 47A, 47B.

³⁰ *Yanner v Eaton* (1999) 201 CLR 351.

environmental, scientific and health and safety purposes does).³¹ We will return to this matter of regulation as it has had an important role in discussions around commercial rights.

The requirements of proof and the fragmentation of native title

In *Mabo* Justice Brennan defined native title as:

[I]nterests and rights of Indigenous inhabitants in law, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the Indigenous inhabitants.³²

This formulation of native title was used as the basis for the definition of native title in section 223 of the *NTA* which now forms the elements of proof required in order to establish native title.³³ Native title was described in *Mabo* as *sui generis*, or unique, because it reflects the rights and entitlements of Indigenous peoples under their own laws. To characterise native title in this way was an explicit acknowledgment that native title should not be understood by reference to common law property concepts, which may inhibit its recognition.

In practice, however the Courts have found that native title is generally equivalent to full ownership, or exclusive possession, except for the impact of extinguishment. For example Justice Sundberg in *Neowarra v Western Australia* stated that, absent extinguishing acts, the right to speak for country, the highest abstraction of the native title holder's claim over their territory, would sustain a right to exclusive possession native title.³⁴

But the High Court in *Ward* specifically held this presumption in check, rejecting an approach to native title as a simple possessory title, maintaining the centrality of the laws and customs in determining the nature and extent of native title in each case.³⁵ This creates a unique framework for the requirements of proof of native title that relies on the existence of a parallel system of law that determines the allocation of rights and interests inter se, but at the same time invites an inquiry into the nature of the laws and customs and the rights and interests they give rise to.

While requiring the proof of a system of law and custom, Gleeson CJ, Gummow and Hayne JJ in *Yorta Yorta* were adamant that the introduction of a new legal order '*necessarily* entailed ... that there could thereafter be no parallel law-making system in the territory'.³⁶ Thus the body of law and custom before the Court in a native title application must have its roots in that pre-existing system.³⁷ 'However', they

³¹ *NTA* s 211.

³² *Mabo v Queensland [No.2]* (1992) 175 CLR 1, per Brennan J at p. 57.

³³ *Ward v WA* (HC) at 19 [25], see also, *De Rose* FCAFC at 51 [158] [note to editor: 2003 case not 2005], Indigenous peoples are not required to seek a formal determination of native title under the Act. They may instead rely on the existence of their title under the common law. However, most have chosen to pursue the application for a determination under the *NTA* because of the procedural notification and negotiation rights available to registered applicants, as well, no doubt, because of the perception of actively asserting their rights and their title. Registered applicants may also enter into binding agreements that will stand regardless of the eventual outcome of the determination process.

³⁴ *Neowarra v Western Australia* (2003) 134 FCR 208, [382]. Sundberg J suggested that even in *Ward* the High Court had accepted that absent extinguishing acts, the trial judge's finding of exclusive possession would have been sufficiently described by the form 'possession, occupation, use and enjoyment' [380-1].

³⁵ *Western Australia v Ward* (2002) 213 CLR 1.

³⁶ *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 443-4 [44] (original emphasis).

³⁷ *ibid.*, [38].

said, 'change or adaptation in traditional law and custom or some interruption of enjoyment or exercise of native title rights is not necessarily fatal to that continuity', unless the interruption is so substantial that it results in the creation or requires the re-creation of an altogether different normative society.³⁸

Nevertheless, the inquiry into particular rights and interest that the focus on traditional law and custom gives rise to, is reinforced by s225 of the *NTA*, which requires a determination of native title to include details of whether or not native title exists; and if so, who holds the rights, the nature and extent of the rights, and the relationship with any other interests in the area. Section 225 has been described as non-exhaustive but there is a question hanging over the import of the rights and interests articulated in a determination. Is a determination of exclusive possession native title limited in any way by the list of rights and interests that are described, for example, in a 2002 determination in favour of the Karajarri people of the West Kimberley:

- i. the right to live on the land;
- ii. the right to make decisions about the use and enjoyment of the land and waters;
- iii. the right to hunt, gather and fish on the land and waters in accordance with their traditional laws and customs for personal, domestic, social, cultural, religious, spiritual, ceremonial and communal needs;
- iv. the right to take and use the waters and other resources accessed in accordance with their traditional laws and customs for personal, domestic, social, cultural, religious, spiritual, ceremonial and communal needs;
- v. the right to maintain and protect important places and areas of significance to the Karajarri people under their traditional laws and customs on the land and waters; and
- vi. the right to control access to, and activities conducted by others on, the land and waters, including the right to give permission to others to enter and conduct activities on the land and waters on such conditions as the Karajarri people see fit.³⁹

Writing extra-curially, Justice Paul Finn referred back to the discussion in *Yorta Yorta* and *Ward* and the requirements of s225 to criticise the development of practice in native title that has led to the fragmentation of native title rights and interests. He argued, that '[i]t results, in my view, in the overdefinition, and subdivision of, individual rights and interests and in the dilution of a proprietary conception of native title'.⁴⁰ He was critical of the overemphasis on the bundle of rights metaphor, which is posited as imperative rather than interpretive.

The question of commercial rights

The recognition of native title and measure of protection afforded by the *NTA* have no doubt provided Indigenous groups with economically valuable rights and interests. The right to exclude, the right to make decisions about the use of land and resources, the right to take and use resources, are all hallmarks of the economic value of property. However, the presumption of inalienability and Crown right of pre-emption have a significant effect on the economic value by restricting the extent to which native title can be fully engaged in the economy through assignment or mortgage as occurs with estates and tenures. And while the roots of inalienability under the common law may be problematic,

³⁸ Ibid [89].

³⁹ *Nangkiriny v Western Australia* (2002) 117 FCR 6, pp. 12-13.

⁴⁰ Paul Finn, 'Mabo into the Future' Native Title Conference 2012: Echoes of Mabo, Honour and determination, Townsville, 6 June, p.7.

alienability would not necessarily be embraced by Indigenous groups seeking to rebuild their estate. Therefore, the capacity to use the land to produce economic return is important if Indigenous peoples are to realise their aspirations to use their native title lands as a springboard for economic development.

A number of early Torres Strait consent determinations included specific reference to the use and enjoyment of the determination area and the resources for economic purposes.⁴¹ But these were unusual. Others such as the Karajarri determination illustrated above, articulate a range of purposes that do not explicitly exclude commercial or economic purposes but do not include them in the list. Similarly, the Gunditjmara consent determination in Victoria only explicitly limited commercial rights in relation to water, leaving implicit commercial rights in relation to all other rights and resources.⁴² In circumstances where commercial purposes are not specifically excluded, it could be assumed that the economic development needs of the society or group are caught within the notion of communal needs. This should satisfy any requirement for a direct link or a tether to the list of rights and interests.

Other determinations, however qualify the rights to exclusive possession, that is 'an entitlement as against the whole world to possession, occupation, use and enjoyment of the land and waters of that part to the exclusion of all others', by explicitly excluding commercial use. For example, in the recent determination of native title of the Ngurrara People:

The native title rights and interests are subject to and exercisable in accordance with ... the traditional laws and customs of the Native Title Holders for personal, domestic and communal purposes (including social, cultural, religious, spiritual and ceremonial purposes) but not for commercial purposes.⁴³

In the context of consent determinations, in particular, these rights and interests may have been carefully negotiated. I have a significant concern about state governments seeking concessions in the negotiation of consent determinations that restrict the rights to exploit resources to non-commercial uses, particularly where this practice is based on a presumption that the jurisprudence requires evidence of pre-contact trade or commerce. Such formulations of native title could have long term impact on the sustainability of native title estates.

Despite the various arguments put to the courts during the hearing of the *Yarmirr* case,⁴⁴ there seems to be little support for the idea that the common law is incapable of recognising commercial aspects of native title because of an inherent limit within the common law itself or by some misplaced notion that commercial industry is somehow un-Aboriginal.⁴⁵ In *Yanner*, the High Court stated that the recognition of native title is not inconsistent with the Crown's power to manage scarce resources and is not extinguished by regulation of resource exploitation.⁴⁶ Therefore, commercial aspects of native title do not fail at the point of recognition and are not extinguished by regulation of commercial exploitation.

⁴¹ For example, *Poruma People v State of Queensland* [2000] FCA 1066. Every native title claim does not need to go to full trial before the Court. The Court may issue a determination based on an agreement by consent of the parties (known as a consent determination): *NTA* s 87. The Court must be satisfied that 'an order in, or consistent with, those terms would be within the power of the Court': s 87(1)(c).

⁴² *Lovett on behalf of The Gunditjmara People v State of Victoria* [2007] FCA 474.

⁴³ *May v State of Western Australia* [2012] FCA 1333.

⁴⁴ *Yarmirr v Commonwealth* [2001] 56 HCA. (11 October 2001).

⁴⁵ For a more detailed discussion see Lisa Strelein, 2004, 'A Comfortable Existence': The Commercial Use of Marine Resources under Native Title', 5 *Balay: Culture Law and Colonialism* 94-123.

⁴⁶ *Yanner*, per the majority, at [28].

The orthodox approach in contested determinations has considered whether the evidence established a right to trade as a matter of fact.⁴⁷

To this end, in relation to establishing whether particular rights and interests can be exercised for commercial purposes, some judges have been tempted to inquire whether there had in fact been pre-contact trading activity (assuming this was required by the definition of ‘traditional’).⁴⁸ Even as a matter of fact, perceptions of aboriginal society can impact upon the ability to accept commercial rights. To illustrate, Justice Olney at first instance and Branson and Katz JJ on appeal in *Yarmirr* interpreted ‘traditional’ as meaning ‘untouched’ by foreign influence.⁴⁹

The evidence in *Yarmirr* was presented in a way that tied the right to trade as a necessary incident of the exclusive title claimed. That is, the right to exclude all others and to determine access and use of resources meant the right to exclusively trade in the resources. Olney J, at first instance dealt with the matter as a question of fact. He considered that the right to trade was potentially recognisable under native title, independent of the exclusive title, although the evidence in that case did not support such a right.⁵⁰ Given the trial judge’s finding of fact, the majority of the full Federal Court presumed that the effective assertion of exclusivity would be necessary to establish an effective right to trade and thus the right to trade failed with the finding of non-exclusivity. The majority did not engage beyond the narrow question before them and thus on their reasoning a right to trade would only be precluded by a non-exclusive title if an *exclusive* right to trade is proposed. Unfortunately the majority in the High Court did not consider the issue.⁵¹

The issue has been faced squarely again by the Federal Court and the High Court in the Torres Strait Sea Claim (*Akiba*).⁵² The primary judge, Finn J, found that the claim group had established native title to approximately 37,800 square kilometres of sea between the Cape York Peninsula and Papua New Guinea.⁵³ He found that the claimants’ native title interests included the non-exclusive right to ‘access resources and take for any purpose resources in the native title area’, subject to the laws of the State of Queensland and the Commonwealth of Australia. This determination did not affect the validity of other interests in relation to the native title areas, including the rights and interests of holders of licenses, permits, authorities, resource allocations and endorsements issued under State and Commonwealth fisheries legislation. To the extent of any inconsistency, native title rights and interests were to yield to common law public rights and customary rights.

⁴⁷ Justice Olney himself in *Yarmirr*, and Justice Lee in *Ward*, both considered the question.

⁴⁸ *Yarmirr appeal* at [122]. There should not be any suggestion that a distinction could be made between trade on the one hand and commerce on the other. The High Court has found that these are not terms of art and have used them interchangeably with respect to Constitutional interpretations: *W&A McArthur Ltd v Queensland* (1920) 28 CLR 530 at 546.

⁴⁹ *Yarmirr determination*, at [85]; *Yarmirr appeal* at [66]

⁵⁰ *Ibid.*

⁵¹ *Yarmirr v Commonwealth* [2001] 56 HCA. (11 October 2001). Kirby J did consider the right to trade and the impact of regulation at [284].

⁵² *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v State of Queensland (No 2)* [2010] FCA 643; *Commonwealth of Australia v Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group* [2012] FCAFC 25; *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia and Ors* [2013] HCA 33.

⁵³ For a detailed case summary see Strelein, L. and Lauder, G., ‘*Commonwealth of Australia v Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group*’, *Native Title Newsletter*, Number 2/12 (March/April 2012), Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, p. 8.

The decision at first instance was important in that Finn J held that once a determination had been made that law and custom supported the right to take resources, the use made of those resources was irrelevant (unless restricted by law and custom, which is a matter internal to the group). That is, where the laws of the society in question support a right to take for any purpose available at the time sovereignty was asserted, there is no barrier to the development of new modes of use and taking advantage of new opportunities and purposes that may arise.

Writing extra-curially, Justice Paul Finn questioned the need for proof of pre-sovereign trading relationships:

The Torres Strait Islanders were traders for centuries and so succeeded in establishing a right pre-sovereignty to take marine resources *for trading or commercial use*. But should this matter? Why should the date of sovereignty freeze for the future the manner of exercise of the right to take?⁵⁴

His reasoning was further explained:

I can understand how the right to take resources from a claim area must be a right possessed under traditional laws acknowledged and customs observed. Section 223(1)(a) requires this. I equally can understand why, if those laws prescribe the allowable use of what is taken or proscribe what is not allowable, then the enjoyment of the rights themselves is circumscribed. A simple example of such circumscribed rights are those governing the taking of turtle and dugong by Torres Strait Islanders. Such rights can properly be said to be 'traditional rights' in that sense. But merely because other rights have been used in particular ways in the past, for example, for subsistence because there was no opportunity otherwise to exploit them, that should not of itself preclude newer modes of taking, i.e. using new technologies, or newer purposes in taking, i.e. for commercial purposes, because the opportunity presents itself to do so *after* sovereignty.⁵⁵

It is simply unnecessary to suggest that a right to trade and to exploit natural resources in a modern economy must have existed at the time of sovereignty and could not evolve as a natural and appropriate mode of enjoying of native title.

Regulation and extinguishment

In *Akiba*, the primary judge had held that although statutory licensing regimes had regulated the native title right to take fish or other marine resources for commercial purposes, they had not extinguished that native title right. This was based on the reasoning in *Yanner v Eaton* that native title rights will not be extinguished by legislation unless the legislation demonstrates a clear and plain intention to do so.⁵⁶ In this case, as in *Yanner*, the judge held that the primary purpose of the legislation was to regulate the use of scarce resources, and the extinguishment of native title rights was not necessary to this purpose. The principle that emerges from *Yanner* in this regard is that '*regulating* the way in which rights and interests may be exercised is not inconsistent with their continued existence'.⁵⁷

⁵⁴ Finn, p. 8.

⁵⁵ Finn, p. 7.

⁵⁶ *Yanner v Eaton* (1999) 201 CLR 351. This was reinforced by Kirby J in *Yarmirr v Commonwealth; NT v Yarmirr* [2001] 56 HCA. (11 October 2001).

⁵⁷ *Yanner v Eaton* (1999) 201 CLR 351, [37] (original emphasis).

On appeal, the Commonwealth argued that previous regulatory regimes have extinguished native title rights to commercial fisheries and although the current *Torres Strait Fisheries Act 1984* (Cth) and the *Fisheries Act 1994* (Qld) protect Islanders' traditional fishing rights, they do not have the effect of reviving or reinstating native title rights previously extinguished by legislative regimes. Queensland first legislated to prohibit the taking of fish without a statutory licence in 1887. The *Fisheries Act 1952* (Cth), which the Commonwealth argued had introduced a 'new species of statutory entitlement', placed prohibitions on the unlicensed taking of fish for commercial purposes in proclaimed waters.

In the Full Federal Court, the majority judgment of Keane CJ and Dowsett J argued that the orthodox approach to the extinguishment of native title is to assess whether the native title rights under question are consistent with legislation regulating that activity. The majority held that although the licensing regimes do not explicitly extinguish native title, they manifest a clear intention to extinguish all common law rights. Extinguishment leaves no room for revival, unless expressly provided for by statute. Justice Mansfield dissented, largely agreeing with the reasoning of the trial judge. In the High Court, French CJ and Crennan J held there was no logical reason to conclude that a conditional prohibition on taking fish for commercial purposes was directed to native title rights.⁵⁸ Similarly, the joint judgement of Hayne, Kiefel and Bell JJ held that regulating particular aspects of the usufructuary relationship with traditional waters does not sever the connection with those waters or the existence of that right.⁵⁹

Importantly, the High Court held that native title rights are not as freely amenable to abrogation as public rights derived from common law.⁶⁰ The High Court, like the trial judge, was critical of the over-fragmentation of native title. Hayne, Kiefel and Bell JJ stated that 'It was wrong to single out taking those resources for sale or trade as an "incident" of the right that has been identified.'⁶¹ Focusing on the activity rather than focusing upon the relevant native title right was apt to lead to error.⁶² 'The lesser rights', French CJ and Crennan J observed, 'would be as numerous as the purposes that could be imagined'.⁶³

French CJ and Crennan J clarified the rules of construction in relation to legislative impacts on native title:

Put simply, when a statute purporting to affect the exercise of a native title right or interest for a particular purpose or in a particular way can be construed as doing no more than that, and not as extinguishing an underlying right or an incident thereof, it should be so construed.⁶⁴

The High Court drew a clear distinction between inconsistency of rights on the one hand and uses on the other.⁶⁵ The idea that an activity can be characterised as an 'incident of native title or a lesser native title right was categorically rejected.⁶⁶

Regulation and prioritisation

⁵⁸ *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia and Ors* [2013] HCA 33 at [24].

⁵⁹ *Ibid* at [54], [63-4].

⁶⁰ *Ibid* at [38].

⁶¹ *ibid* at [66].

⁶² *ibid* at [67].

⁶³ *Ibid* at [21].

⁶⁴ *Ibid* at [29].

⁶⁵ *Ibid* at [35].

⁶⁶ *Ibid* at [65].

In *Akiba*, the primary judge held that the common law's public right to navigate and to fish within the claim areas co-exists with native title rights, and that the Islanders have those public rights in addition to native title rights in those areas. The majority judgment of the Full Federal Court rejected the argument by the Torres Strait Islanders that this finding should be specified in the determination. Indeed, the majority went further to argue that this would leave open the possibility of a practical collision between two sets of rights. The law, they said, establishes priorities between two types of rights and native title rights in this circumstance must yield.

The Torres Strait Islanders also made claims under section 211, which preserves certain non-commercial rights from such arrangements. Pursuant to this provision, fishing, as an exercise of native title rights and interests, for non-commercial purposes is exempted from laws prohibiting or restricting fishing activity by licensing regimes, unless for research, environmental protection or public health. This raises an important question about testing the legitimate objective of legislation to meet these purposes.

In *Western Australia v Commonwealth (the Native Title Act case)*, the High Court explained the operation of s211, saying that it removes such licences or other instruments as a legal condition on the exercise of native title. The provision thus creates a statutory priority for native title rights over state legislation.⁶⁷ As a result, the relevant law's validity is unimpaired but its operation is suspended in relation to the exercise of native title rights and interests.⁶⁸ In *Akiba*, the majority of the Full Court held that section 211 can only operate on existing legislation and could not revive rights that had been extinguished by previous legislation.⁶⁹

It is perhaps unsurprising that the High Court failed to consider comparative case law when they examined this aspect of the appeal in *Akiba*, as Australian native title jurisprudence has been persistently parochial.⁷⁰ Canada in particular has a long tradition of Aboriginal rights cases concerning rights to fish for subsistence, communal or ceremonial purposes as well as rights to trade in fish stocks and commercial fisheries.⁷¹

Prior to the well-known *Delgamuukw* decision in 1997,⁷² *R v Sparrow* was considered a high water mark of Aboriginal rights jurisprudence.⁷³ That case established two important propositions concerning Aboriginal rights that are consistent with the development of Australian law.⁷⁴ First, Aboriginal rights are not frozen in time, such that modern techniques could not be used in the exercise of fishing rights. Secondly, the Court held that regulation of resources should not be confused with extinguishment of rights. *Sparrow* also considered commercial exploitation and the relative prioritisation of Indigenous rights to manage resources of their territories. The Court in *Sparrow* agreed that the right of the

⁶⁷ *WA v Cth* (1995) 183 CLR 373. And the same principle presumably applies to Commonwealth legislation unless later legislation which is clearly inconsistent and overriding the Native Title Act.

⁶⁸ *WA v Cth* (1995) 183 CLR 373 at 474.

⁶⁹ *Commonwealth of Australia v Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group* [2012] FCAFC 25, [83].

⁷⁰ See Kirby J in *Fejo*. See further, L Strelein, *Compromised Jurisprudence* [pinpoint or chapter?]

⁷¹ *R v Marshall* [1999] 4 CNLR 161, at [7].

⁷² *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193. Most recently see *Ahousaht Indian band and Nation v Canada (A-G)* 2013 BCCA 300.

⁷³ [1990] 1 SCR 1075. For a critique of the *Sparrow* jurisprudence see John Borrows 'Frozen rights in Canada: Constitutional Interpretation and the Trickster' (1997-8) 22 *American Indian Law Review* 37.

⁷⁴ *Yanner v Eaton* (1999) 201 CLR 351.

Musqueam people to fish could be exercised according to their discretion, including for commercial purposes.

In Canada these principles are supported by a fiduciary duty upon the Crown, which arises from the Crown's power to regulate and extinguish rights. The honour of the Crown demands that the legislative objective be justified in order to warrant the impairment of the exercise of Aboriginal rights. It is recognised that Indigenous non-commercial rights are prioritised above all non-Indigenous interests but are subject to legitimate environmental and conservation measures. A doctrine of 'legitimate purpose' has developed to test the effect of legislation.

The Canadian Supreme Court in *Sparrow* recognised the difficulty of assessing the objective of legislation in relation to fisheries between, on the one hand, the conservation of heavily burdened fisheries and the efficient allocation and management of scarce and valuable resources on the other. This led the court to clearly establish a link between justification for regulation and the allocation of priorities in the fisheries.

It was held that conservation measures could be justified to take priority over Aboriginal fishing rights because they are inherently consistent with the protection of native title for future generations. However the justification was based on a requirement that the title holders had been consulted (and not just informed) and were unable or unwilling to implement appropriate measures themselves. In addition, the test assumes that conservation objectives could only be achieved by restricting the rights of Indigenous peoples and not by restricting other users. The principles articulated in *Sparrow* are not dependent on the constitutional protection of aboriginal rights enjoyed in Canada. In *Jack v R*, a case which predates the enactment of s35 of the Canadian Constitution, the Court suggested that 'priority ought to be given to the Indian fishermen subject to the practical difficulties occasioned by international waters and the movement of the fish themselves'.⁷⁵

Under the common law, native title rights are subordinated to non-indigenous interests that have been granted over native title country and are susceptible to extinguishment by the Crown. Section 211 recognises the legitimate priority of Indigenous interests relative to other interests in relation to non-commercial use but we must also consider how native title groups can achieve a higher priority in the exploitation of economic potential of their lands. Whether the Courts will be willing to adopt an approach similar to the Canadian courts over time we can only guess. In the immediate term, the High Court has at least heeded the need to play greater regard to the importance of interpreting legislation in a beneficial manner to preserve the rights of Indigenous peoples and the honour of the Crown.

The future act process and management of future economic and commercial activity

The *NTA* pays significant attention to the future exploitation of native title lands by other parties. The future acts regime regulates activities that may impact on native title rights and interests such as infrastructure development and land management. The *NTA* makes it illegal for a government or private party to engage in an activity that may impair native title rights without complying with the requirements of the future act regime. Depending on the severity of the impact, the *NTA* may require

⁷⁵ [1980] 1 SCR 294 at 313. Section 35 of the Canadian Constitution provides a stronger sanction than the common law in relation to the infringement of Aboriginal rights, which would make legislation that did not meet this test invalid rather than merely affording compensatory damages. It is important to note however, that s 35 is not the source of the priority: see *R v Denny* (1990) NSCA approved in *Sparrow*.

that the native title holders be notified, consulted or negotiated with. But, the *NTA* does not give the native title holders the right to refuse permission for an act to go ahead.

The future act process is, in effect, an adaptation of the Crown's rights of pre-emption. The inclusion of a 'non-extinguishment principle' provides for most acts to be made possible without any permanent legal extinguishment. Government is required to be a party to an agreement only where extinguishment is required. As a result of the operation of the future act regime and the non-extinguishment principle, then, the Crown's duty to consult is effectively delegated to private companies.⁷⁶ While statutory royalties and taxes flow to the federal and state governments, native title groups must rely on negotiating a share of the development against a backdrop of compulsion. There is no right to walk away from a negotiation or to choose with whom they do business. Should negotiations falter,⁷⁷ parties will default to arbitration where there has been almost a guarantee that the act will go ahead.⁷⁸ The honour of the Crown and the fiduciary responsibilities that play such an important role in Canadian law have not emerged in Australian law because of the framework created by the *NTA* which draws native title into a more private law sphere.

Others have written, and are presenting in this volume, on the economic potential of agreements reached through negotiating future act and Indigenous Land Use Agreements.⁷⁹ My concern here is to secure pathways for Indigenous people to utilise economic opportunity from their territories for themselves. In the remainder of this paper I want to explore briefly the potential opportunities that arise from the 'privatisation' or 'corporatisation' of native title by the *NTA*.⁸⁰ The requirement of native title holders to establish a corporate body to hold or manage the native title rights and interests is central to this private law framework. Chief Justice Keane made an interesting contribution to this debate in his 2011 address to the Native Title Conference. His Honour argued that the Prescribed Bodies Corporate (PBC) provisions of the *NTA* and the PBC regulations expressly provide a framework for commercial dealings with native title lands and resources regardless of the common law position. The *NTA*, section 56(4)(c), allows a trustee PBC to 'surrender, transfer or otherwise deal with native title rights and interests'. He argues that 'even if land is not alienable in the terms of being sold or mortgaged or leased, these PBC provisions may empower the [native title] holders to deal with the native title in ways that can unlock economic potential'.⁸¹ Keane called for legislative amendment to clarify the mandate for PBCs to deal with land in ways that bring native title into the broader economy. This would overcome much of the legal complexity and uncertainty currently hampering native title holders.

⁷⁶ In contrast the Canadian Supreme Court has specifically held that the Crown can not delegate its duty to consult. See *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511.

⁷⁷ Note the *NTA* contains a requirement of 'good faith' in negotiations (although this has been less than effective, prompting the federal government to introduce amendments to clarify the requirements of good faith negotiations: *Native Title Amendment Bill* 2012).

⁷⁸ Corbett, A & O'Faircheallaigh, C 2006, 'Unmasking Native Title: The National Native Title Tribunal's Application of the *NTA*'s Arbitration Provisions', 33(1) *University of Western Australia Law Review*, 153.

⁷⁹ See Marcia Langton and Ciaran O'Faircheallaigh in this symposium NEED TO CHECK AT END OF EDITING PROCESS

⁸⁰ That is, in contrast to recognising the governmental or public law nature of native title groups, in accordance with the idea of a normative society. The idea that the right of self-government is inherent in the concept of Aboriginal title has been implied in various Canadian cases. See for example *Campbell v. British Columbia (Attorney General)*, 2001 BCSC 1400, (2000), 189 D.L.R. (4th) 333 (B.C.S.C.).

⁸¹ Keane p.7.

Conclusion

The tension between the public and private nature of native title plays out in the management of the distribution of rights and benefits among the group, which is recognised by the common law as a matter of law and custom internal to the group. The complexity involved in commercial exploitation of rights and interests or land and resources under a communal title involves careful consideration of decision making and dispute resolution processes. The issues are the same as those confronting native title groups entering into agreements that affect native title and in the management of benefits that flow from such agreements, which others have addressed in this volume. While I do not want to ignore the complexity of such arrangements, that in itself is no reason to deny Indigenous peoples the full enjoyment of the rights to their territories, to their natural resources and their right to develop according to their aspirations and potential. Keane noted the importance of preserving the choice of the native title holders as to whether and how they use their native title rights:

to the extent that trustee PBCs do afford a vehicle whereby native title may be brought into the broader economy, the issue is whether the relevant native title group chooses to use it for that purpose: responsibility and opportunity must rest with the native title holders for whose benefit the trustee PBC holds the title.⁸²

There is a legitimate policy objective to achieve greater certainty for Indigenous peoples in utilising their native title rights and interests to engage in the economy consistent with their traditional laws and contemporary aspirations. The *Akiba* decision has provided a strong basis for the clarification of the common law to ensure the law does not unnecessarily intrude upon the enjoyment of Indigenous peoples' rights. As the Canadian jurisprudence demonstrates, it is also possible to achieve greater priority for Indigenous rights to some degree through the common law. However, it is likely in Australia that we will also need to examine a legislative formulation to ensure economic and commercial purposes are recognised as inherent to the enjoyment of native title rights and interests.

The clarification could be achieved by extending section 223(2), which makes clear that native title rights and interests include 'hunting, gathering, or fishing, rights and interests'. It has been suggested by others that section 223(2) should make reference to trade and commerce.⁸³ Although, it could be that the appropriate approach, building on the formulation of right by Finn J in *Akiba*, is to clarify that the enjoyment of native title rights are not limited by purpose. There is no policy risk in this recognition as native title remains subject to regulation by the laws and customs of the native title group and the laws and regulations of Australia and would be governed by the normal rules of extinguishment. Coupled with the clarification suggested by Justice Keane to the powers of Prescribed Bodies Corporate, the *Native Title Act* could provide a sound basis for economic empowerment of native title holders and ensure they have the capacity to develop their lands in ways that best meet their aspirations.

If the Courts or the legislature choose, among the alternatives available, to constrain the economic rights of Indigenous peoples, native title tilts toward its colonising influences and away from its potential to decolonize Australian law.

⁸² Patrick Keane, 'Opportunity and Responsibility', Native Title Conference 2011: Our Country Our Future, 3-5 June, Brisbane, p. 7.

⁸³ This proposed reform - the Native Title Amendment (Reform) Bill 2011 (Clause 13) - was introduced to parliament in a Private Senator's Bill by Senator Siewert of the Greens, but not passed by the Parliament. For discussion see, for example, Aboriginal and Torres Strait Islander Social Justice Commissioner, 2010, *Native Title Report 2009*, Australian Human Rights Commission.