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AIATSIS submission to

Australian Law Reform Commission Review of the Native Title Act

Discussion Paper 82 (DP 82)

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

We offer these comments in our capacity as the leading proponent of legal and policy research in the native title sector. Through our Native Title Research Unit (NTRU), AIATSIS seeks to promote the recognition and development of native title for Aboriginal and Torres Strait Islander peoples through independent research and assessment of the impact of policy and legal developments.

Our comments and responses against the proposals and questions posed by the ALRC are based upon 20 years of research and practice by AIATSIS researchers in the native title area. We apologise for the delay in providing submission and hope our submission will assist you and your colleagues in further refining the operation of the NTA in to the future.

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

AIATSIS submission to

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Discussion Paper 82 of October 2014

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Introduction:

AIATSIS makes comment against the questions and proposals by the ALRC and seeks to highlight the recent decision by the High Court in *Western Australia v Brown*[1] and what AIATSIS considers an important jurisprudential move toward a more holistic concept of native title.[2] The "bundle of rights" as a key definitional tool in property law remains the basis for explaining the nature and extent of native title. However, the High Court sets out that the recognition of a right only as a fractured or fragmented aspect of that right, in line with the mode of its exercise, should not form the conclusion of any inquiry into the existence, nature and extent of native title.

Recognition of native title rights does not require first that the native title party prove the exercise of those rights.[3] The exercise of a right has evidential value, but the right itself exists and should not be limited by the mode of its exercise.

By this construct, reclaiming or reinvigorating an aspect of traditional law and custom does not mean it previously ceased to be available as a right. The inquiry should be about the existence of the right, not the existence of the modes of its exercise. Where a mode of exercise is altered or no longer undertaken, it may be relevant to consider the reasons for that. Such an inquiry may assist a decision-maker balance the probative value of that evidence with the underpinning beneficial purpose of the *Native Title Act 1993* (Cth) (the NTA). However, such an inquiry should not detract from the fact that proof of the exercise of a right is not required to recognise the existence of that right.

Proposals and Questions in Discussion Paper 82

2. Framework for Review of the Native Title Act – Transitional Arrangements

The ALRC seeks comment on a range of proposed amendments to the NTA and questions. Many of these relate to the definition of native title in s 223 NTA.

The ALRC assumes any amendment to s 223 NTA would operate upon commencement, however, it invites comment about transitional arrangements, as follows:

Question 2-1	should the proposed amendments to the Native Title Act have prospective operation only?

Question 2-2	should the proposed amendments to s 223 of the Native Title Act only apply to determinations made after the date of commencement of any amendment?

[1] *Western Australia v Brown* [214] HCA 8.

[2] French, Justice Robert, *Western Australia v Ward: devils and angels in the detail* (FCA) [2002] FedJSchol 14, www.austlii.edu.au/au/journals/FedJSchol/2002/14.html#fnB32.

[3] *Western Australia v Brown* [214] HCA 8, per French CJ, Hayne, Kiefel, Gaegeller and Keane JJ, at [34].

AIATSIS notes that retrospective application of laws occurs within the Australian polity, sometimes with far reaching implications: notably, tax laws.[4] An instrument or provision that has beneficial effect may commence with retrospective application.[5] However, any instrument or provision will have no effect if it will adversely affect rights or impose liabilities and it is intended to have retrospective application.[6]

A native title determination includes the interaction of the nature and extent of different parties' rights and interests in a determination area.[7] These rights and interests form the basis for negotiating Indigenous Land Use Agreements (ILUAs). The Chamber of Minerals and Energy of Western Australia and the Minerals Council of Australia have already expressed concern that retrospective changes could unsettle existing agreements.[8] This argument relates to the balancing of the:

> … requirements for certainty and orderly interaction in the native title system, with the principles of fairness and equality that are stated in the Act.[9]

As the ALRC points out, s 13 of the NTA provides that an approved determination of native title may be varied or revoked, when circumstances change or the interests of justice so require.[10] Therefore, a determination relating to the content or extent of rights and interests may be amended or revoked where events (such as law reform):

> have taken place since the determination was made which have caused the determination to longer be correct or the interests of justice require the revocation or variation of the determination.[11]

5. Traditional Laws and Customs

Proposal 5-1	The definition of native title in s 223 of the *Native Title Act* should be amended to make clear that traditional laws and customs may adapt, evolve or otherwise develop.

AIATSIS maintains the position expressed in its submission to IP45 that the word 'tradition' and any reference to it when referring to laws and customs should be omitted from s 223 NTA.[12] In the alternative, AIATSIS considers that any definition of 'traditional' or 'traditional laws and

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4 See, eg,*Pratt Mining Holdings Ltd v Commissioner of Taxation* [2013] FCAFC 82; *IOOF Holdings Ltd v commissioner of Taxation* [2014] FCAFC 91.

5 Office of Parliamentary Counsel, *Legislative Instruments Handbook – Release 2.0*, May 2014, 11.

6 *Legislative Instruments Act 2003* (Cth)sub-s 12(2).

7 *Native Title Act 1993* (Cth) sub-s 225(d).

8 Australian Law Reform Commission , above n 2, 45.

9 Ibid 32.

10 *Native Title Act 1993* (Cth) s 13(5) cited in Australian Law Reform Commission, above n 2, 44.

11 Native Title Bill 1993, Explanatory Memoranda, Part 2, p 8.

12 AIATSIS, Submission 36 to the ALRC *Review of the Native Title Act 1993 Issues Paper no 45,* (14 July 2014) 40.

customs' must reflect the dominant anthropological view that societies and cultures develop in a continual process of change and transformation.[13]

AIATSIS considers that the definition of 'traditional laws and customs' should only be interpreted in such a way that allows rights under those laws and customs to be construed broadly and not restricted to the mode of their exercise.

In these contexts, providing a changed definition does not result in the creation of new rights, AIATSIS agrees with this proposal and considers it reflects the Preamble and Objects of the NTA and the five guiding principles of the review.

Proposal 5-2	The definition of Native title in s 223 of the *Native Title Act* should be amended to make clear that rights and interests may be possessed under traditional laws and customs where they have been transmitted between groups in accordance with traditional laws and customs.

Alienability and succession, within and between groups according to traditional law and custom, can be part of native title.[14] AIATSIS, therefore, agrees with this proposal.

Proposal 5-3	The definition of native title in s 223 of the *Native Title Act* should be amended to make clear that it is not necessary to establish that a) acknowledgement and observance of laws and customs has continued substantially uninterrupted since sovereignty; and b) laws and customs have been acknowledged and observed by each generation since sovereignty.

AIATSIS agrees with this proposal and supports the ALRC's position that 'the current degree of continuity of acknowledgment and observance of traditional laws requires claimants to surmount unnecessarily high evidential 'hurdles' to establish native title'.[15]

[13] 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; 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); AIATSIS, Submission to Australian Law Reform Commission, *Review of the Native Title Act 1993 Issues Paper no 45,* (14 July 2014) 32.

[14] L Strelein, *Compromised Jurisprudence: Native title cases since Mabo* (Aboriginal Studies Press, 2nd ed,2009) 18.

[15] Australian Law Reform Commission, above n 2, 109 citing Transcript of Proceedings, *Risk v Northern Territory* [2007] HCA Trans 472 (31 August 2007) (Kirby J).

Proposal 5-4	The definition of native title in s 223 of the *Native Title Act* should be amended to make clear that it is not necessary to establish that a society united in and by its acknowledgment and observance of traditional laws and customs has continued in existence since prior to the assertion of sovereignty.

AIATSIS agrees with this proposal and reiterate the position set out in our submission to IP45 that:

> 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.[16]

AIATSIS also raises for your consideration that the scope of the NTA must restrict any inquiry into the continuity and contemporary observance of traditional laws and customs as that observance relates to land.

6. Physical Occupation

Proposal 6-1	section 62(1)(c) of the Native Title Act should be amended to remove references to 'traditional physical connection'.

Proposal 6-2	section 190B (7) of the Native Title Act should be amended to remove the requirement that the Registrar must be satisfied that at least one member of the native title claim group has or previously had a traditional physical connection with any part of the land or waters, or would have had such a connection if not for things done by the Crown, a statutory authority of the Crown, or any holder of a lease.

Section 223 NTA sets out a definition of native title that does not require physical occupation, or continued or recent use. AIATSIS agrees that s 190B(7) NTA is inconsistent with s 223 NTA. Furthermore, AIATSIS agrees that, although s 62(1)(c) states only that the application ***may*** include details of traditional physical connection, its inclusion in the NTA is an unnecessary over-emphasis. AIATSIS, therefore, supports both proposals.

[16] N 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 2014) 34-6.

7. The Transmission of Aboriginal and Torres Strait islander Culture

Proposal 7-1 The definition of native title in s 223(1)(a) of the Native Title Act should be amended to remove the word 'traditional'.

The proposed re-wording, removing traditional, would provide that:

> The expression ***native title*** or ***native title rights and interests*** means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
>
> a) the rights and interests are possessed under laws acknowledged, and the customs observed, by the Aboriginal people or Torres Strait Islanders; and
>
> b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the lands or waters; and
>
> c) the rights and interests are recognised by the common law of Australia.

AIATSIS supports this proposal, which maintains the position expressed in our submission to IP45 that the word 'traditional' and any reference to 'traditional' when referring to laws and customs should be omitted from s 223 NTA.[17]

If the term were to be retained, AIATSIS considers any definition of the meaning must include acknowledgment that societies and cultures develop in a continual process of change and transformation, as discussed in our response to Proposals 5-1, Question 7-2 and Questions 7-3, 4 and 5.

Question 7-1 should a definition related to native title claim group identification and composition be included in the Native Title Act?

Identifying and determining the native title group membership is not a decision for members outside of the claim group to make.[18] This principle can be traced to *Mabo*, where Brennan J notes:

> But so long as the people remain an identifiable community, the members of whom are identified by one another as members of that community living under its laws and customs, the communal native title survives to be enjoyed by the members according to the rights and interests to which they are respectively entitled under traditionally based laws and customs, as currently acknowledged and observed.[19]

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[17] AIATSIS, Submission no 36, above n 12, 40.

[18] *Aplin on Behalf of the Waanyi People v State of Queensland* [2010] FCA 625, Dowsett J at 267.

[19] *Mabo v Queensland (No 2)* (1992) 175 CLR 1, Brennan J at [68].

Each native title claim group has its own set of laws and customs and each group has its own cultural and political dynamic. AIATSIS considers that any statutory definition necessarily limits the capacity of the claim group to determine its own makeup. AIATSIS also considers it unnecessary to impose another set of requirements with respect of the constituency of the claim group.

The requirement in s 190B(3) of the NTA, that the Registrar must be satisfied that the persons in that group are described clearly, allows appropriate broad consideration about the constituency of the claim group, including the processes that are used by the claim group for identifying as a member. However, AIATSIS is concerned that the NNTT's general practice to require that descendants of any apical ancestors must be listed clearly for registration to occur, may not align with traditional laws and customs.

Proposal 7-2 The definition of native title in s 223 of the *Native Title Act* should be further amended to provide that:

> The expression ***native title*** or ***native title rights and interests*** means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait islanders in relation to land or waters, where:
>
> a) the rights and interests are possessed under the laws acknowledged, and the customs observed, by the Aboriginal people or Torres Strait Islanders; and
>
> b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a relationship with country that is expressed by their present connection with the land or waters; and
>
> c) the rights and interests are recognised by the common law of Australia.

AIATSIS supports amendments that promotes land justice. However, we consider this proposal and, in particular, the use of the term 'present connection' could result in increased uncertainty rather than provide clarification.

Question 7-2 Should the *Native Title Act* be amended to provide that revitalisation of law and custom may be considered in establishing whether 'Aboriginal peoples and Torres Strait Islanders, by those laws and customs, have a connection with land and waters' under s 223(1)(b)?

AIATSIS supports the intention that the NTA recognise the right of revitalisation, in accordance with Article 13 of the *United Nations Declaration on the Rights of Indigenous Peoples* (2007).[20]

DP82 discusses the merit in investigating a distinction between:

- abandonment of law and custom and substantial interruption of connection; and
- where force of circumstances requires Aboriginal and Torres Strait Islander law and custom to adapt and take different forms over time.

AIATSIS urges caution that this may be a distinction based on an inquiry as to whether the observance of laws and customs and the exercise or enjoyment of rights under those laws and customs are revived or revitalised. This question relates to an enquiry into changes in practice of laws and customs and whether these constitute an interruption in the recognition of laws and customs, sufficient to deny connection. It is our strong position that societies and cultures are not and never have been static.[21] To reiterate our response to IP45:

> 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.[22]

In this context, engagement in the distinction between 'revitalise' and 'revive' may divert the relevant enquiry from the critical consideration of the existence of a right, as now understood by the High Court. As discussed in our introduction, above, the existence of a right is not dependent on its exercise.

Question 7-3	Should the reasons for any displacement of Aboriginal peoples or Torres Strait Islanders be considered in the assessment of whether 'Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters' under s 223 (1)(b)?

[20] *United Nations Declaration on the Rights of Indigenous People,* GA Res 61/295, UN GAOR, 61st Sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007). Article 13 provides:

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.
2. States shall take effective measures to ensure this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

[21] AIATSIS, Submission no 36, above n 12, 32.

[22] 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) 2-3, cited in AIATSIS, Submission no 36, above n 12, 32.

Question 7-4 If the reasons for any displacement of Aboriginal peoples or Torres Strait Islanders are to be considered in the assessment of whether 'Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters' under s 223(1)(b), what should be their relevance to a decision as to whether such connection has been maintained?

Question 7-5 Should the Native Title Act be amended to include a statement in the following terms:

> Unless it would not be in the interest of justice to do so, in determining whether 'Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters' under s 223 (1)(b):
>
> (a) regard may be given to any reasons related to European settlement that has preceded any displacement of Aboriginal peoples or Torres Strait Islanders from the traditional land or waters of those people; and
>
> (b) undue weight should not be given to historical circumstances adverse to those Aboriginal peoples or Torres Strait Islanders.

The inevitable changes brought by European settlement to Aboriginal and Torres Strait Islander law and custom[23] do not necessarily result in the abandonment of law and custom. The same could be said of other transformational events and even about cataclysmic events, including drought, flood, war and the like. Such events may indicate a substantial period of dislocation, but not necessarily the abandonment of law and custom.[24]

AIATSIS is concerned that applying judicial discretion to consider the reasons for displacement is potentially problematic. In particular:

> this approach could result in another wave of judicial interpretation as States seek to define 'wrong doings' or to protect (themselves) from associated claims or to distance themselves politically.[25]

It is AIATSIS' position that the NTA should acknowledge the reality of change and transformation. Accepting this reality reduces the need to examine why law and custom adapted, evolved or otherwise developed. That is not to say that the reasons for change should be ignored. However, an inquiry into underpinning reasons should acknowledge that:

[23] *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58,[89].

[24] AIATSIS, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Native Title Amendment (Reform) Bill* (10 August 2011), 6-7 <www.aiatsis.gov.au/_files/ntru/2011inquiryntab.pdf>.

[25] AIATSIS, Submission no 36, above n 12, 34.

> 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.[26]

In furthering the interests of justice and ameliorating the harsh effects that state actions have, with respect to connection with land and waters, AIATSIS set out its preferred approach in its submission to IP45. That is:

> 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. 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 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'.[27]

8. The Nature and Content of Native Title

Proposal 8-1 Section 223(2) of the *Native Title Act* should be repealed and substituted with a provision that provides:

> Without limiting subsection (1) but to avoid doubt, ***native title rights and interests*** in that subsection:
>
> (a) comprise rights in relation to any purpose; and
>
> (b) may include, but are not limited to, hunting, gathering, fishing, commercial activities and trade.

Proposal 8-2 The terms 'commercial activities' and 'trade' should not be defined in the Native Title Act.

AIATSIS prefers a stronger reform with respect to s 223 of the NTA, as it is out of step with jurisprudence concerning the nature and articulation of native title rights. Notwithstanding this qualification, AIATSIS agrees with the intent behind proposal 8-1, however we prefer the following wording:

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[26] AIATSIS, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, above n 23, 6-7.

[27] AIATSIS, Submission no 36, above n 12, 49-50.

> Without limiting subsection (1) but to avoid doubt, ***native title rights and interests*** in that subsection comprise rights that may be exercised for any purpose including, but not limited to, personal, communal and economic purposes.

AIATSIS also agrees that the terms 'commercial activities' and 'trade' (or 'economic activity') should not be defined. It is not necessary, as the interpretation of these terms should be driven by the NTA's Preamble and Objects and because secondary material will highlight the current statement of the law in *Akiba v Commonwealth,*[28] without limiting its development.

Question 8-1	Should the indicative listing in the revised s 223(2)(b), as set out in proposal 8-1, include the protection or exercise of cultural knowledge?

AIATSIS acknowledges that current intellectual property laws do not adequately protect Indigenous knowledge and Indigenous cultural and intellectual property. However, we consider that the NTA is not the most appropriate vehicle for formally recognising the protection or exercise of cultural knowledge.

Question 8-2	Should the indicative listing in the revised s 223(2)(b), as set out in proposal 8-1, include anything else?

AIATSIS does not consider a listing in its current form is appropriate. However, any such listing should include the common incidents of native title, such as the right to make decisions about use of resources and the right to control access.

9. Promoting Claims Resolution

Question 9-1	Are the current procedures for ascertaining expert evidence in native title proceedings and for connection reports, appropriate and effective? If not, what improvements might be suggested?

AIATSIS acknowledges that the timely resolution of matters is an important principle underpinning reform. However, we reiterate our comments in our submission to IP45, that the 'integrity' of the native title system lies in ensuring that measures to improve the timeliness of matters will at least do no harm and that considerations of efficiency should focus first on 'just' and then on 'timely'.

When dealing with native title, the various requirements of proof set the agenda for presenting evidence. This arguably intersects with the Federal Court's mandate to facilitate the just resolution of disputes as quickly, inexpensively and efficiently as possible (by application of s 37M *Federal Court Act 1976* (Cth)) and furthering the requirements of the Preamble and Objects of the NTA.

[28] *Akiba v Commonwealth* (2013) 250 CLR 209.

AIATSIS supports the use of expert conferences and concurrent expert evidence. These procedures allow experts to come together and discuss significant issues and present agreed and disputed issues to the court. This contributes to a significant reduction in court time. For example, in *Re Coonawarra Penola Wine Industry Association inc. and Geographical Indications Committee*[29], the use of concurrent expert evidence reduced the hearing time from an estimated six months to just five weeks.[30]

In our submission to IP45, AIATSIS expressed concern about any narrow construction of 'efficiency' in any expeditious handling of native title matters.[31] It is our position that this extends to ensuring applicants have opportunity to access expert advice and evidence. Anthropological evidence is often critical to native title claimants. It forms the basis for proving 'the content of pre-sovereignty laws and customs and the continuous acknowledgement and observance of those laws.'[32]

The practice of native title anthropology is heavily influenced by 'a dynamic operating environment and critical skills shortage'[33] that has prompted calls for a community of practice and, at various times, for professionalising the discipline. However:

> [p]rohibitive costs, arguments over standards and enforceability, complicated legal arrangements, and a fierce sense of independence on the part of some have to date prevented any national accreditation scheme getting beyond the conceptual stage.[34]

Anthropologists work for state and federal governments, native title representative bodies and service providers, individual native title claim groups and resource companies. Dr Pam McGrath argues that this is a major factor in intensifying the political and ethical complexities of working in Aboriginal Australia.[35] McGrath considers that a better community of practice for native title anthropologists requires an engagement with institutions such as the National Native Title Tribunal, the Department of the Prime Minister and Cabinet, the Federal Court of Australia and the Attorney-General's Department, recommending that:

> [a]n outwardly focussed 'professionalisation' agenda has the potential to align these external expectations more closely with those of practitioners as well as Aboriginal collaborators.[36]

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[29] [2001] AATA 844.

[30] TG Downes J, AM, 'Concurrent expert evidence in the AAT: the New South Wales experience', paper presented at the Australasian Conference of Planning and Environment Courts and Tribunals, Hobart, 27 February 2004, 5.

[31] AIATSIS, Submission no 36, above n 12, 4.

[32] Australian Law Reform Commission, above n 2, 175, referring to Vance Hughston and Tina Jowett, 'In the Native Title "Hot Tub": Expert Conference and Concurrent Expert Evidence in Native Title ' (2014) 6 *Land Rights, Laws: Issues of Native Title* 1.

[33] P McGrath 'Supporting a community of professional practice for native title anthropologists: Lessons from a short history of the 'professionalisation' of Australian anthropology', Paper delivered to National Native Title Conference,2011,1 <www.aiatsis.gov.au/ntru/nativetitleconference/conf2011/papers/mcgrath.pdf>.

[34] Ibid, 13.

[35] Ibid, 14.

[36] Ibid. 14.

Question 9-2	What procedures, if any are required to deal appropriately with the archival material being generated through the native title connection process?

AIATSIS has established and maintains a cultural resource collection, consisting of materials relating to Aboriginal and Torres Strait Islander studies.[37] AIATSIS has the facility to store connection material in this collection. Material may be provided by deposit (where the depositor retains ownership of the material and can set out conditions of access[38]) or by donation or transfer.

AIATSIS follows sound guidelines for the access and use of material[39] and sometimes a restriction imposed by a depositor may impact on our capacity to meet our obligations of non-disclosure (for example, if access is restricted to particular families, it may be administratively unworkable for AIATSIS to identify who members of those families are, going into the future). In these situations, utilising the collection to ensure long-term security for native title research assets and culturally safe and legally robust access to information assets is not viable.

The future of connection material has generated a range of activity and ongoing research by AIATSIS.[40] The valuable information assets produced by native title research are disparately held in the institutional and personal archives of the thousands of native title claimants, anthropologists, lawyers, bureaucrats, historians and others who have been involved in preparing, writing and critiquing connection reports, affidavits, future act heritage surveys and the like. While AIATSIS welcomes this material into our collection, the NTRU considers that the social and economic potential of these extraordinary assets will not be realised unless native title groups and their representatives are empowered to sustainably hold, manage and provide access to locally relevant information holdings.

This important cultural heritage material must be preserved for future generations of native title holders to maintain, strengthen and renew their traditions and cultural expressions.

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[37] *AIATSIS Act 1989* (Cth), s 5(e).

[38] *AIATSIS Act 1989* (Cth), s 41 provides:

> **41 Certain information not to be disclosed**
>
> (1) Where information or other matter has been deposited with the Institute under conditions of restricted access, the Institute or the Council shall not disclose that information or other matter except in accordance with those conditions.
>
> (2) The Institute or the Council shall not disclose information or other matter held by it (including information or other matter covered by subsection (1)) if that disclosure would be inconsistent with the views or sensitivities of relevant Aboriginal persons or Torres Strait Islanders.

[39] See AIATSIS, *Collection Access and Use Policy* and *Collection Development Policy* at Collection Policies www.aiatsis.gov.au/collections/policies.html.

[40] See for example Ms Grace Koch's work on 'The Future of Connection Material', which aims to establish standards and developing skills towards proper documentation and secure storage for connection material and other original documents generated by the native title process and an analysis of Native Title determinations to locate how songs are used as evidence. See www.aiatsis.gov.au/ntru/futureconnection.html. Also note AIATSIS is organising a 'Managing Native Title Information' workshop for NTRBs and PBCs on 16-17 March 2015.

Question 9-3 What processes, if any, should be introduced to encourage occurrence in the sequence between the bringing of evidence to establish connection and tenure searches conducted by government?

In considering the resources available to the state and the length of time between the notification of native title interests and claims, it is appropriate that native title claimants should expect tenure analysis to be appropriately conducted prior to any coalescing of the terms of consent.

AIATSIS notes that tenure analysis involves an intricate evaluation of information to establish whether each particular act affecting land has occasioned any extinguishment and to what extent. However, it is our position that much of this work is unwarranted and costly.

We refer the ALRC to the consultation by the Attorney-General's Department about issues of historical extinguishment.[41] In response to the Attorney-General's consultation, AIATSIS submitted that it is unnecessary to raise potential disputes over each individual tenure granted over the past 230 years. Regardless of whether these disputes take the form of negotiation or litigation, the time and cost associated with this aspect of the claims is significant.[42] AIATSIS submitted that:

> Tenure analysis constitutes an extremely costly and time-consuming part of settlement processes, and so avoiding the need to check grants of interests back to the assertion of sovereignty would deliver efficiencies to the system. There are cases in which governments negotiating native title consent determinations have resolved to search only current tenures, and not to conduct searches further back into history.[43]

AIATSIS considers this approach should be incorporated into the NTA and, in particular, for provisions that compensate for the anomaly of historical extinguishment (ss 47, 47A and 47B of the NTA). AIATSIS also considers this should be extended to all 'unallocated Crown land'.[44]

Other submissions followed similar argument. A submission by the Queensland South Native Title Services (QSNTS) refers to the 2009 Native Title Report by the Aboriginal and Torres Strait Islander Social Justice Commissioner, where historical extinguishment was identified as 'an unnecessary approach, without a satisfactory policy justification.[45] The QSNTS submission also

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[41] Attorney-General's Department, *Past native title consultations and reforms*, <http://www.ag.gov.au/LegalSystem/NativeTitle/Pages/Pastnativetitlereforms.aspx> .

[42] AIATSIS, Comments on Exposure Draft: *Proposed amendments to the Native Title Act 1993* (19 October 2012), 1 <www.ag.gov.au/Consultations/Documents/Currentnativetitlereforms/The%20Australian%20Institute%20of%20Aboriginal%20and%20Torres%20Strait%20Islander%20Studies%20Submission%20[PDF%201MB].pdf>

[43] Ibid, 5.

[44] Ibid, 1-2, 5.

[45] QSNTS, Submission to the Commonwealth Attorney-General's Department, *Proposed amendment to enable the historical extinguishment of Native Title to be disregarded in certain circumstances* (March 2010), 3-4 www.qsnts.com.au/publications/SubmissiononDisregardingHistoricalExtinguishmentProposalsCth.pdf .

referred protracted arguments about tenure history and what Chief Justice French described as ‘arcane arguments over long dead town sites’.[46]

Question 9-4	Should the Australian Government develop a connection policy setting out the Commonwealth’s responsibilities and interests in relation to consent determinations?

Question 9-5	Should the Australian Government, in consultation with state and territory governments and Aboriginal and Torres Strait Islander representative bodies, develop nationally-consistent, best practice principles to guide the assessment of connection in respect of consent determinations?

AIATSIS considers that the Australian Government should develop a connection policy and has provided advice to the Attorney-General’s Department as to how such a policy could be framed and operate.

AIATSIS also considers that nationally-consistent, best practice principles should guide the assessment of connection. Consent determinations are made under ss 87 and 87A of the NTA. The Court may give effect to the parties’ agreement if, *inter alia*, it appears appropriate to do so. In this regard, it is the government respondent who:

> [a]re entrusted with assessing the substantive adequacy of the claimants’ case, and the law does not require them to assess the evidence with the same rigour a court would.[47]

The application of s 223 of the NTA need not be undertaken to the same standard of proof as that required by the Court at trial. While the requirements of proof are the same, the threshold level of evidence required is lower.[48] ‘[T]he Commonwealth and the courts have repeatedly encouraged flexibility in the negotiation of consent determinations’[49] and AIATSIS considers that nationally consistent best practice guidance would usefully maintain the government respondents’ focus on the Preamble and Objects of the NTA when considering the requirements of proof in native title matters.

Question 9-6	should a system for the training and certification of legal professionals who act in native title matters be developed, in consultation with relevant organisations such as the Law Council of Australia and Aboriginal and Torres Strait Islander representative bodies?

[46] Ibid, referring to Justice Robert French, ‘Lifting the burden of native title - some modest proposals for improvement’ (Speech delivered at the Federal Court of Australia, Sydney, 9 July 2008)

[47] 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, p 9.

[48] Ibid, p 14.

[49] L Strelein ‘Reforming the Requirements of Proof: The Australian Law Reform Commission’s Native Title Inquiry’ *Indigenous Law Bulletin* 8(10) January/February 2014, 9.

AIATSIS is concerned that the obligations that bind the conduct of legal officers in NTRBs/NTSPs do not apply to lawyers acting as private agents. In our submission to the Review of Native Title Organisations, AIATSIS recommended:

- that private agent lawyers be required to have an objective level of competency, determined through a registration system akin to the certification of Migration Agents; and
- that private agents be required to adhere to the same legal obligations and service standards that are imposed on NTRBs/NTSPs. Regulating the special ethical considerations applicable in native title matters could be pursued through the introduction of codes of conduct by the various State or Territory Law Societies.[50]

Question 9-7 Would increased use of native title application inquiries be beneficial and appropriate?

AIATSIS supports any undertaking that increases the efficiency and workability of the NTA, pursuant to its Preamble and Objects. AIATSIS considers that increased use of inquiries may assist in disputes, particularly in relation to claim group description, joinder and authorisation.

Question 9-8 Section 138B(2)(b) of the *Native Title Act* requires that the applicant in relation to any application that is affected by a proposed native title application inquiry must agree to participate in the inquiry. Should the requirement for the applicant to agree to participate be removed?

AIATSIS promotes the retention of the requirement for the applicant to agree to participate, as consistent with the beneficial purpose of the NTA.

Question 9-9 In a native title application inquiry, should the National Native Title Tribunal have the power to summon a person to appear before it?

Inquisitorial tribunals with the power to summon persons arguably operate more effectively because the fact finding mission is not dependent on the willingness of parties to engage. Although parties rarely wish to be seen as uncooperative with or obstructive to the arbitral tribunal and usually will wish to comply when they reasonably can,[51] the capacity to compel attendance arguably sets the tribunal apart from dispute resolution activities, such as mediation.

Without the power to compel attendance by persons identified by the tribunal as important to its fact-finding mission, the effectiveness of the tribunal can be subverted. However, it is also

[50] AIATSIS, Submission to the Native Title Organisations Review, (2013), 46-7 <www.deloitteaccesseconomics.com.au/uploads/File/AIATSIS%20Part%20B.pdf>

[51] Peter Megens and Paul Starr, 'Compulsion of evidence in international commercial arbitration', King&Wood Mallesons, June 200, www.mallesons.com/publications/marketAlerts/2006/Documents/8483150w.htm

arguable that compelling attendance may promote a disingenuous engagement by parties that also subverts the effectiveness of its processes.

Question 9-10	Should potential claimants, who are not parties to proceedings, be able to request the Court to direct the National Native Title Tribunal to hold a native title application inquiry? If so, how could this occur?

Promoting an inquiry as a fact-finding mission, and as an inquisitorial function within an adversarial system, may assist the utility of the native title system. The ALRC identifies this in discussion about the potential for an inquiry as an alternative to joinder.

Native title matters may evolve over many years and the joining of parties as applicants and respondents is interrelated and can be complex. For instance, where an applicant party to a multi-party application withdraws, another party who joined as a respondent to that particular application may then seek to be joined as an applicant. AIATSIS considers that it may well serve the interests of justice and save considerable time and resources if potential claimants could seek an inquiry by approaching the Court.

Question 9-11	What other reforms, if any would lead to increased use of the native title application inquiry process?

AIATSIS provides no further comment.

10. Authorisation

Proposal 10-1	Section 251B of the *Native Title Act* should be amended to allow the claim group, when authorising an application, to use a decision–making process agreed on and adopted by the group.

Proposal 10-2	The Australian Government should consider amending s 251A of the *Native Title Act* to similar effect.

AIATSIS supports the intention of Proposals 10-1 and 10-2 that s 251B (and similarly s 251A) of the NTA provide an option for the claim group to use an agreed decision-making process. However, AIATSIS considers it is important that the NTA acknowledge the validity of decision-making processes under Aboriginal and Torres Strait Islander law and custom and should, therefore, include an option to use such decision-making processes.

Proposal 10-3	The *Native Title Act* should be amended to clarify that the claim group may define the scope of the authority of the applicant.

Question 10-1	Should the *Native Title Act* include a non-exhaustive list of ways in which the claim group might define the scope of authority of the applicant? For example: (a) requiring the applicant to seek claim group approval before doing certain acts (discontinuing a claim, changing legal representation, entering in to an agreement with a third party, appointing an agent); (b) requiring the applicant to account for all monies received and to deposit them in a specified account; and (c) appointing an agent(other than the applicant) to negotiate agreements with third parties.

AIATSIS supports the intention behind proposal 10-3, to provide greater guidance to applicants in the exercise of their duties under the NTA and their relationship to the claim group and common law native title holders.

A non-exhaustive list could usefully direct claim groups and those engaged in negotiating with claim groups. However, secondary materials and direct information sources would be sufficient. Furthermore, providing a list may impute some degree of importance or expectation for the scope of the applicant's authority.

AIATSIS draws the ALRC's attention to the recommendations by the Taxation of Native Title and Traditional Owner Benefits and Governance Working Group, which considers that

> amendment to the NTA is needed to clarify that the native title group is the beneficial owner of funds generated by native title agreements, irrespective of the identity of the legal owner or possessor of those proceeds, and that the named applicant is in a fiduciary relationship with the group.[52]

It may be appropriate to clarify obligations of the applicant either by reference to a statutory duty or by extending the obligations for consultation currently applied to Prescribed Bodies Corporate.

[52] Taxation of Native Title and Traditional Owner Benefits and Governance Working Group, Report to Government 1 July 2013, p 19. www.treasury.gov.au/~/media/Treasury/Publications%20and%20Media/Publications/2013/Taxation%20of%20Native%20Title/Downloads/PDF/Native%20Title%20Working%20Group%20Report.ashx.

Question 10-2	What remedy, if any, should the *Native Title Act* contain, apart from the replacement of the applicant, for a breach of a condition of authorisation?

Issues of agency or constructive trust operate in any relationship where one party is authorised to undertake activity on behalf of another or on behalf of a group. Through principles of agency and constructive trust, the claim group has access to a range of remedies in certain circumstances where the applicant exceeds authority. This includes access to equitable remedies, including against those who take a benefit from the breach.

AIATSIS considers that the applicant should be better supported in undertaking the tasks authorised, rather than face a range of punitive arrangements under the NTA.

Proposal 10-4	The *Native Title Act* should provide that, if the claim group limits the authority of the applicant with regard to entering agreements with third parties, those limits must be placed on a public register.

AIATSIS does not agree with this proposal and considers it would place an unnecessary burden on the native title applicant, in circumstances where most agreements serious enough to warrant notification would be bound by an ILUA.

AIATSIS considers that pursuing this proposal serves a function as notice to any person taking a benefit from a breach of authority. In this context, if registration is to be required, AIATSIS agrees that the Public Register of Native Title Claims would be an appropriate location for this information.

Proposal 10-5	The *Native Title Act* should be amended to provide that the applicant may act by majority, unless the terms of the authorisation provide otherwise.

AIATSIS supports this proposal, noting however that the term 'majority' may have various implications for decision-making within a claim group and membership of the 'applicant'.

Proposal 10-6	Section 66B of the *Native Title Act* should provide that, where a member of the applicant is no longer willing or able to act, the remaining members of the applicant may continue to act without reauthorisation, unless the terms of the authorisation provide otherwise. The person may be removed as a member of the applicant by filing a notice with a court.

AIATSIS supports this proposal.

Proposal 10-7	Section 66B of the *Native Title Act* should provide that a person may be authorised on the basis that, if the person becomes unwilling or unable to act, a designated person may take their place. The designated person may take their place by filing a notice with the court.

AIATSIS supports this proposal and notes that the term 'designated person' should be given a broad meaning.

Dispute Resolution and Options for Reform

AIATSIS takes this opportunity to set out our full support that the ALRC make comment to government about the relevance of establishing a national accredited network of Indigenous facilitators, mediators and negotiators.

11. Joinder

Question 11-1	Should s 84(3)(a)(iii) of the *Native Title Act* be amended to allow only those persons with a legal or equitable estate or interest in the land or waters claimed, to become parties to a proceeding under s 84(3)?

Many parties to native title matters are involved in native title processes in order to keep appraised of the progress of individual matters.[53] The law protects the interests of a party who holds an estate or interest in the claim area by way of arrangements and agreements with the state. Native title interests must give way to these interests. Furthermore, the interest or estate is bound by the parameters of the arrangement with the state. AIATSIS considers that the state is well equipped to discuss its position about native title with those parties whom it has made arrangements and agreements, while more than adequately meeting the obligations of its role as *parens patriae*.

AIATSIS supports amending s 84(3)(a)(iii) so that only persons with a legal or equitable estate or interest in the land or waters claimed may apply to be joined as a party, we prefer that a person claiming a legal or equitable estate or interest be included as a category of person who may apply to the Federal Court, under s 84(5).

Question 11-2	Should ss 66(3) and 84(3) of the *Native Title Act* be amended to provide that Local Aboriginal Land Councils under the *Aboriginal land Rights Act 1983* (NSW) must be notified by the Registrar of a native title application and may become parties to the proceedings if they satisfy the requirements of s 84(3)?

AIATSIS defers to the relevant native title organisations in New South Wales. We otherwise consider that the intersection of the NTA with the *Aboriginal Land Rights Act 1983* (NSW) (the

[53] AIATSIS Submission to IP45, p 3, referring to the Goldfields Land and Sea Council submission to the Review of Native Title Respondent Funding Scheme 2011.

ALRA) should not operate to unduly disadvantage Aboriginal people seeking any form of land justice and, noting the operation of s 36(1d) of the ALRA, suggest that it seems appropriate that LALCs are notified about a native title claim in New South Wales.

Proposal 11-1	The Native Title Act should be amended to allow persons who are notified under s 66(3) and who fulfil notification requirements to elect to become parties under s 84(3) in respect of s 225(c) and (d) only.

AIATSIS agrees with this proposal. This would ameliorate many situations where joinder parties unnecessarily impact detrimentally on the progress of native title matters.[54]

Proposal 11-2	Section 84(5) of the Native Title Act should be amended to clarify that: (a) a claimant or potential claimant has an interest that may be affected by the determination in the proceedings; and (b) when determining if it is in the interests of justice to join a claimant or potential claimant, the Federal Court should consider whether they can demonstrate a clear and legitimate objective to be achieved by joinder to the proceedings.

AIATSIS agrees with the proposal. However we do not agree where the Discussion Paper notes, at 11-45, that existing case management powers may alleviate any difficulties in regard to the possible increase in intra-indigenous disputes in native title proceedings, brought about by this proposal.[55]

While AIATSIS agrees with the submission by the Department of Justice Victoria, at 11-40, that this avenue 'remains one of a fairly limited number of avenues for disaffected or competing claimants or native title parties to seek to have their interests taken into account', AIATSIS considers that resolution of issues relating to intra-indigenous disputes should require alternative dispute resolution. AIATSIS does not agree that the system in its current state can adequately address intra-indigenous disputes and refers the ALRC to the discussion in its Discussion Paper 82, paragraphs 10-60 to 10-67, and call for a nationally supported dispute resolution service.

Proposal 11-3	The *Native Title Act* should be amended to allow organisations that represent persons, whose 'interest may be affected by the determination' in relation to land or waters in the claim area, to become parties under s 84(3) or to be joined under s 84(5) or (5A).

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

[55] Discussion Paper, p 214

AIATSIS notes the importance of providing access to justice to individual persons who may not necessarily have the capacity to actively participate in proceedings. However, by providing for an organisation representing that party's interests to become a party themselves, the NTA opens the door for broader interests to be canvassed, beyond the parameters of the matter at hand. AIATSIS does not consider it necessary or appropriate that an organisation supporting the interests of a party become a party or be joined.

Proposal 11-4 The *Native Title Act* should be amended to clarify that the Federal Court's power to dismiss a party (other than the applicant) under s 84(8) is not limited to the circumstances contained in s 84(9).

AIATSIS supports this proposal.

Proposal 11-5 Section 24(1AA) of the *Federal Court of Australia Act 1976* (Cth) should be amended to allow an appeal, with leave of the Court, from a decision of the Federal Court to join, or not to join, a party under s 84(5) or (5A) of the *Native Title Act*.

Proposal 11-6 Section 24(1AA) of the *Federal Court of Australia Act 1976* (Cth) should be amended to allow an appeal, with leave of the Court, from a decision of the Federal Court to dismiss, or not dismiss, a party under s 84(8) of the *Native Title Act*.

As stated in our response to Proposal 9-1, that measures to improve the timeliness of matters will at least do no harm and that considerations of efficiency should focus first on 'just' and then on 'timely'. Therefore, AIATSIS supports these proposals.

Proposal 11-7 The Australian Government should consider developing principles governing the circumstances in which the Commonwealth should either:

a) become a party to a native title proceeding under s 84; or

b) seek intervener status under s 84A.

AIATSIS supports this proposal.