Australian Government

Australian Law Reform Commission

Connection to Country: Review of the *Native Title Act 1993* (Cth)

FINAL REPORT

ALRC Report 126

April 2015

This Report reflects the law as at 31 March 2015

The Australian Law Reform Commission (ALRC) was established on 1 January 1975 by the *Law Reform Commission Act 1973* (Cth) and reconstituted by the *Australian Law Reform Commission Act 1996* (Cth).

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Australian Government

Australian Law Reform Commission

Senator the Hon George Brandis QC
Attorney-General of Australia
Parliament House
Canberra ACT 2600

30 April 2015

Dear Attorney-General

Review of the Native Title Act 1993

On 3 August 2013, the Australian Law Reform Commission received Terms of Reference to undertake a review of Commonwealth native title laws and legal frameworks. On behalf of the Members of the Commission involved in this Inquiry and in accordance with the *Australian Law Reform Commission Act 1996*, I am pleased to present you with the Final Report on this reference, *Connection to Country: Review of the Native Title Act 1993* (Cth) (ALRC Report 126, 2015).

Yours sincerely,

Professor Rosalind Croucher AM
President

Professor Lee Godden
Commissioner in Charge

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Terms of Reference

REVIEW OF THE NATIVE TITLE ACT 1993

I, Mark Dreyfus QC MP, Attorney-General of Australia, having regard to:

- the 20 years of operation of the *Native Title Act 1993* (the Act)
- the importance of the recognition and protection of native title to Indigenous Australians and the broader Australian community
- the importance of certainty as to the relationship between native title and other interests in land and waters
- Australia's statement of support for the United Nations Declaration on the Rights of Indigenous Peoples
- the need to ensure that the native title system delivers practical, timely and flexible outcomes for all parties, including through faster, better claims resolution
- significant and ongoing stakeholder concern about barriers to the recognition of native title
- delays to the resolution of claims caused by litigation, and
- the capacity of native title to support Indigenous economic development and generate sustainable long-term benefits for Indigenous Australians.

I REFER to the Australian Law Reform Commission for inquiry and report, pursuant to subsection 20(1) of the *Australian Law Reform Commission Act 1996*, Commonwealth native title laws and legal frameworks in relation to two specific areas, as follows:

- connection requirements relating to the recognition and scope of native title rights and interests, including but not limited to whether there should be:
    - a presumption of continuity of acknowledgement and observance of traditional laws and customs and connection
    - clarification of the meaning of ‘traditional’ to allow for the evolution and adaptation of culture and recognition of 'native title rights and interests'
    - clarification that ‘native title rights and interests’ can include rights and interests of a commercial nature
    - confirmation that ‘connection with the land and waters’ does not require physical occupation or continued or recent use, and

  - empowerment of courts to disregard substantial interruption or change in continuity of acknowledgement and observance of traditional laws and customs where it is in the interests of justice to do so.
- any barriers imposed by the Act's authorisation and joinder provisions to claimants', potential claimants' and respondents' access to justice.

In relation to these areas and in light of the Preamble and Objects of the Act, I request that the Commission consider what, if any, changes could be made to improve the operation of Commonwealth native title laws and legal frameworks.

Scope of reference

In performing its functions in relation to this reference, the Commission should consider:

(a) the Act and any other relevant legislation, including how laws and legal frameworks operate in practice

(b) any relevant case law

(c) relevant reports, reviews and inquiries regarding the native title system and the practical implementation of recommendations and findings, including the Taxation of Native Title and Traditional Owner Benefits and Governance Working Group, the Review of Native Title Organisations and the Productivity Commission inquiry into non-financial barriers to mineral and energy resource exploration

(d) the interests of key stakeholders, and

(e) any other relevant matter concerning the operation of the native title system.

Consultation

In undertaking this reference, the Commission should identify and consult with key stakeholders, including:

(a) relevant Commonwealth, State, Territory and local governments, departments and agencies

(b) the Federal Court of Australia and the National Native Title Tribunal

(c) Indigenous groups, Native Title Representative Bodies and Native Title Service Providers, and Prescribed Bodies Corporate

(d) industry, including the agriculture, pastoral, fisheries, and minerals and energy resources industries, and

(e) any other relevant groups or individuals.

Timeframe for reporting

The Commission is to report by March 2015.

Dated 3 August 2013

Mark Dreyfus QC MP

Attorney-General

Participants

Australian Law Reform Commission

President

Professor Rosalind Croucher AM

Commissioner in Charge

Professor Lee Godden

Part-time Commissioner

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Dr Valerie Cooms, Quandamooka (Chair of the Prescribed Body Corporate) and former Chief Executive Officer of QSNTS

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Professor Mick Dodson AM, Director, National Centre for Indigenous Studies, Australian National University

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Dr Jonathan Fulcher, Partner, HopgoodGanim

Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission

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Graeme Neate, former President, National Native Title Tribunal (1999–2013)

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Executive Summary

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Review of the *Native Title Act 1993* (Cth)

On 3 August 2013, the then Attorney-General of Australia, the Hon Mark Dreyfus QC MP, requested that the Australian Law Reform Commission (ALRC) conduct an Inquiry into Commonwealth native title laws and legal frameworks in the following areas:

- connection requirements relating to the recognition and scope of native title rights and interests; and
- any barriers imposed by the Act's authorisation and joinder provisions to claimants', potential claimants' and respondents' access to justice.

The Report is informed by 20 years of the operation of the *Native Title Act 1993* (Cth) ('*Native Title Act*') and the contribution made by High Court and Federal Court jurisprudence. The Inquiry marks the first major review of the law governing 'connection' in native title claims since the introduction of the Act. 'Connection' is the relationship that Aboriginal and Torres Strait Islander peoples have with their traditional lands and waters. It is necessary for connection to be established for native title to be recognised and a determination of native title to be made.

The *Native Title Act* is an important part of building the relationship between Aboriginal and Torres Strait Islander peoples and other Australians. The Act drew upon *Mabo v Queensland [No 2]* ('*Mabo [No 2]*').[1] Recognition of native title holds

1 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

great significance for Aboriginal and Torres Strait Islander peoples. This significance is reflected in the Preamble of the Act, which states the intention to

> ensure that Aboriginal peoples and Torres Strait Islanders 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.[2]

The legislation was enacted against the backdrop of international human rights developments that had been incorporated into Australian law.[3] The objects of the *Native Title Act* state the need to recognise and protect native title, but also affirm that certainty is required for other members of the Australian community affected by a native title determination. The need to balance a range of considerations, while promoting an effective and efficient system, has framed the development of the native title claims process (determination of native title), as it has evolved since the inception of the Act. A significant part of that evolution has been the move toward a larger number of claims being resolved as consent determinations.

The definition of native title and the laws for determining native title sit at the heart of the native title claims process. It is these 'connection requirements' for proving native title that are the central focus for enquiry by the ALRC. The laws governing connection not only set the requirements for whether native title is proved, but also the scope or content of native title and ultimately who are the holders of native title.

The native title rights and interests that are determined reflect the rights and interests that are possessed under the traditional laws and customs that have their origins in the period prior to European settlement. As part of its Inquiry into the scope of native title rights, the ALRC was asked to consider whether there should be clarification that native title could include native title rights of a commercial nature. Shortly after the ALRC received the Terms of Reference, the High Court of Australia handed down *Akiba v Commonwealth* ('*Akiba HCA*'),[4] recognising that a native title right to access and take resources could be exercised for any purpose—commercial or non-commercial. The ALRC has undertaken a detailed examination of *Akiba HCA* and the subsequent decision in *Western Australia v Brown* ('*Brown*')[5] in developing its recommendations around the scope of native title rights and interests.

Across the Inquiry, the ALRC had to consider reforms which would effectively recognise and protect native title rights and interests in accordance with the beneficial purposes of the *Native Title Act*, while having regard to the wide range of other interests in the native title system and the interaction of the Act with many other statutory frameworks. Effective and fair provisions governing parties and joinder of parties to native title proceedings play an important function in this regard.

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2 *Native Title Act 1993* (Cth) Preamble.
3 Ibid.
4 *Akiba v Commonwealth* (2013) 250 CLR 209.
5 *Western Australia v Brown* (2014) 306 ALR 168.

As establishing connection is central to a native title determination, it is important that the traditional owners as 'right people for country' are identified in the native title claims process—particularly where there may be overlapping claims. The *Native Title Act* is unique in that the Aboriginal and Torres Strait Islander peoples who may ultimately hold native title cannot be precisely determined until the claim is resolved. In the interim, it is the applicant who brings the native title claim on behalf of a claim group. The authorisation process determines who will be the members of the applicant, and it is central to important decision-making processes within the claim group. The applicant is also the entity with which the courts and third parties, such as industry, will deal in relation to the native title claim and associated matters. Authorisation has the potential to build governance capacity within the native title claim group, and into the future—the next phase of native title—as progressively more claims are determined.

Background

Native title is defined in s 223 of the *Native Title Act* as 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 traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
>
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
>
> (c) the rights and interests are recognised by the common law of Australia.

A determination of native title is a determination 'whether or not native title exists', and is made by the Court in accordance with s 225 of the *Native Title Act.*

The ALRC also examined other relevant provisions of the *Native Title Act* and legal frameworks covering general aspects of the claims process, such as expert evidence on connection and connection reports. The ALRC, in making its recommendations, was asked to examine what changes, if any, could be made to improve the practical operation of the native title system.

The native title claims process necessarily interacts with other provisions of the *Native Title Act*. The Report canvasses the interaction of the claims process with these other areas, such as the future acts regime, as necessary to an understanding of the relevant law, but only where necessary to properly examine connection requirements, authorisation and joinder. This may have the effect of truncating consideration of issues, but is necessary given the scope of the Terms of Reference.

The Terms of Reference asked the ALRC to examine connection requirements generally, but specifically to examine four options for reform in how native title is proved and determined. These were:

- a presumption of continuity of acknowledgment and observance of traditional laws and customs and connection;

- clarification of the meaning of 'traditional' to allow for the evolution and adaptation of culture and recognition of 'native title rights and interests';
- confirmation that 'connection with the land and waters' does not require physical occupation or continued or recent use; and
- empowerment of courts 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.

In examining the law concerning the recognition and scope of native title rights and interests, the ALRC has taken a perspective, consistent with the *Native Title Act*, but it has also situated the law in a broader context of the common law, international law and the law in comparative jurisdictions. *Mabo [No 2]* and the introduction of the *Native Title Act* should not be understood in isolation. The doctrines of continuity and recognition that sit behind the current 'test' for connection in s 223 of the *Native Title Act* have a long history and have been reframed over time.[6] The law that now governs connection requirements was not made in a single moment or a single decision, although the *Native Title Act* now is the starting point for interpreting that law.

In the latter part of the 20th century, Indigenous peoples across the globe sought legal rights to their ancestral lands and waters. The responses to these claims have taken different legal shape in different places, but share many commonalities. In Australia, Canada and New Zealand, customary rights to traditional territories have been recognised at common law.[7] The recognition doctrines were developed from a shared jurisprudential basis but with some divergences due to the specific circumstances in each country. Robust law reform is enhanced by a consideration of comparable law as it operates in common law countries.

International law has been significant for the development of native title. The most recent development at international law is the *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP'). The UNDRIP is seen as a contextualised elaboration of general human rights principles 'as they relate to the specific historical, cultural and social circumstances of indigenous peoples'.[8] The Law Council of Australia has adopted the position that:

> The UNDRIP, whilst lacking the status of a binding treaty, embodies many human rights principles already protected under international customary and treaty law and sets the minimum standards for States Parties' interactions with the world's indigenous peoples.[9]

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6 See Ulla Secher, *Aboriginal Customary Law: A Source of Common Law Title to Land* (Hart Publishing, 2014).

7 For a general discussion of these trends in common law countries see Paul G McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford University Press, 2011). For the importance of the comparative perspective see AIATSIS, *Submission 36*.

8 S James Anaya, 'Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People' (UN Doc A/HRC/9/9, 11 August 2008) 24 [86].

9 Law Council of Australia, 'Policy Statement on Indigenous Australians and the Legal Profession' (Background Paper, February 2010) 6.

Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda has indicated the need to build a constructive partnership around the Declaration. He said:

> I believe approaching the challenge of implementation through the principles rather than addressing each article individually will provide an analysis that is better understood by a broader cross section of Government and the community.[10]

The ALRC considers that a principled approach to developing best practice standards having regard to the Declaration is an important consideration in a review of the *Native Title Act*. Its recommendations are developed in the light of the beneficial purposes of the Act, including its underpinning framework of international obligations referred to in the Preamble. The ALRC's recommendations also reflect, where appropriate, emerging international best practice standards.

As well as looking to developments historically and comparatively, in undertaking the Inquiry the ALRC sought evidence from the many people in Australia involved in the native title claims system, or affected by its operation, to gauge whether the current native title system is meeting its objectives, and if the specified options for reform would improve the operation of the system.

The ALRC was guided in its analysis by reference to the Preamble and objects of the Act and the following five guiding principles derived from the contextual factors identified in the Terms of Reference. The principles include: acknowledging the importance of the recognition of native title; acknowledging all interests in the native title system; encouraging the timely and just resolution of native title claims; reflecting Australia's international obligations; and promoting sustainable, long-term social, economic and cultural development for Aboriginal and Torres Strait Islander peoples.

Why reform is needed

Since the introduction of the *Native Title Act*, native title determinations and agreement-making have become, in many contexts, 'a way of doing business'.[11] To sustain and build relationships around native title within the Australian community requires an approach that can accommodate the many interests involved. As Justice Barker, writing extra-curially, notes there is a need for

> constructive change to a system that is often characterised by formulaic approaches to dispute resolution, slowness and expense in arriving at outcomes; outcomes which sometimes are considered of limited or no utility by some indigenous groups and frustrate other parties.[12]

Reforms to connection requirements, authorisation and joinder are important to ensure that native title law and legal frameworks achieve efficiencies, but that the law has some flexibility consistent with the beneficial purposes of the Act.

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10 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Social Justice and Native Title Report 2013' (Australian Human Rights Commission) 92.

11 Minerals Council of Australia, *Submission 8*; Western Australian Fishing Industry Council, *Submission 23*.

12 Justice Barker, *Alternative Pathways to Outcomes in Native Title Anthropology* (12 February 2015) <http://www.fedcourt.gov.au/publications/judges-speeches/justice-barker/barker-j-20150219>.

The native title system is highly resource intensive. Costs are borne by a range of governments, public institutions, industry, and private persons—and most acutely by Aboriginal and Torres Strait Islander peoples. These costs may be compounded by long time frames for the resolution of native title claims and determinations. On the other hand, the growing number of native title determinations across Australia is a positive trend—facilitating the conciliation and negotiation objectives of the Act and containing costs. Nonetheless, the law relating to connection requirements remains complex to navigate for all parties, and variable in its outcomes for Aboriginal and Torres Strait Islander peoples across Australia.[13]

Major constraints in proving native title increase transaction costs for all in the system; reduce the basis for 'full' recognition of rights; and confine the scope of native title rights and interests. Accordingly, the Inquiry sought to reconcile requirements for orderly interaction in the native title system, with the principles of equality and non-discrimination that are stated in the Act. The ALRC has focused on ensuring that the existing native title system is efficient, fair and equitable and that the recommendations in this Report are directed to that end.

Reforming the law on connection, authorisation and joinder

Moving from the general systemic considerations, the ALRC directed its attention to the consideration of the substantive aspects of the law. Given the breadth of interests involved, it is perhaps inevitable that native title law is complex and technical. The technicality of law may be viewed as necessary, rather than simply counterproductive, but technicality should not impede the achievement of broader legislative purposes.

In this light, the 'laws and customs' model for recognising and determining native title fulfils the important function of recognising native title, but it contributes to a complex legal test for connection in the *Native Title Act* that calls for considered reform. In addition, statutory construction of s 223 of the *Native Title Act* has expanded the requirements for proof of native title beyond the elements contained in the actual definition in the Act.[14]

The ALRC's recommendations retain the framework of native title derived from *Mabo [No 2]* but address entrenched difficulties in the proof of native title. The recommendations are directed to a specific range of connection requirements in order that the 'test' for proving native title better accords with the Preamble and guiding objectives of the *Native Title Act.*

A significant contemporary challenge in native title law is the question of change and adaptation in indigenous communities. The extent to which traditional laws and customs can evolve or adapt is set against a system of proof that requires 'tradition' and a continuous connection to a pre-sovereign past as the basis for entitlement.

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13 Law Council of Australia, *Submission 35*.
14 See the analysis in Chs 4–8.

Further, as the ALRC's Report demonstrates, there has been a longstanding pre-occupation in the Australian legal system and its colonial forebears with determining the factual existence and legal character of Aboriginal peoples and Torres Strait Islanders' traditional laws and customs. This has led to an emphasis on gathering a large amount of evidence to support connection. In turn, this requires considerable time and effort in assessing this evidence. The recommendations in Chapter 5 acknowledge that linking between the pre-sovereign laws and customs and their modern counterpart is necessary, but the targeted recommendations are directed to reducing the impact of those requirements where they have introduced more stringency than may be evident from the text of the definition of native title in s 223(1) of the Act.

The current legal model can be contrasted with the growing acknowledgment in practice that Aboriginal and Torres Strait Islander peoples and their relationships with land and waters, can and do adapt to changing circumstances—the influence of European settlement makes that inevitable.[15] It is also important to see native title as an important component of the future for Aboriginal and Torres Strait Islander peoples.

Nonetheless, this Inquiry has not disturbed the basic proposition that native title rights and interests that are recognised must be possessed under laws and customs with origins in the pre-sovereign period. That proposition is now fundamental to the *Native Title Act* and its judicial interpretation. The ALRC's Inquiry has engaged with the question of the degree of permissible evolution and development of laws and customs. The Terms of Reference for this Inquiry required such reflection.

The authorisation process is often costly, and at times protracted and disputed. Reforms must ensure the authorisation process is robust, transparent, and able to reduce potential conflict and build governance capacity in the claim group. The authorisation provisions of the Act are intended to ensure that the application is made with the consent of the claim group.[16] The group is also given the power to remove and replace an applicant, thus contributing to the ongoing legitimacy of the applicant.

The party and joinder provisions in the *Native Title Act* raise a number of issues around the balance of interests in the native title system. Such factors may influence how readily a native title determination is reached, whether the proceedings are lengthy, and if they involve administrative burdens for the parties and the institutions administering the native title claims process.

As a practical matter of access to justice, third parties, whose interests may be affected by a native title determination, are provided with an opportunity to be involved in the proceedings through the party and joinder provisions. There is a potential for there to be a large number of parties to a native title claim. Once a person becomes a party, that person will be required to participate in proceedings, often at some time and cost, and in most circumstances, that person's consent is necessary for a consent determination.

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15 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2012' (Australian Human Rights Commission, 2012).

16 *Strickland v Native Title Registrar* (1999) 168 ALR 242, [57].

Different considerations apply to claimants and potential claimants as respondent parties. There may be a mix of reasons for claimants or potential claimants to seek to join native title proceedings. The existence of overlapping claims or disaffection within claim groups may precipitate applications for joinder. Other Aboriginal and Torres Strait Islander peoples may seek to assert their own claims to land and waters, and see the courts as an avenue for redress. The issues that lead to claimant and potential claimant applications often are symptomatic of wider disputes arising in the claims process. Other measures for resolution would be preferable to joinder, but access to justice remains an important value.

The ALRC Inquiry found the current law and procedure is generally effective in allowing adequate representation of respondent interests. The existing law administered by the Federal Court will be the most appropriate way to balance the considerations arising in joinder applications. The ALRC, however, has made some targeted recommendations.

Summary of recommendations

This Report makes 30 recommendations for the reform of the *Native Title Act*.

Connection requirements

The ALRC has concentrated on clarifying the highly complex law around connection requirements centred on s 223 and s 225 of the *Native Title Act*. The recommendations take into account the development of native title law since the enactment of the Act and the degree of legal certainty achieved as a result of major native title litigation.

The ALRC does not propose that there should be comprehensive redefinition of native title under the Act. This may exacerbate the uncertainties experienced by all participants and prolong claims resolution. Nor does the ALRC suggest replacement of the current recognition-based process for native title determinations. The underpinning model of native title and the claims process is retained, while seeking to refocus on the core elements of native title law to facilitate an effective determination process.[17]

In *Members of the Yorta Yorta Aboriginal Community v Victoria* (‘*Yorta Yorta*’), Gleeson CJ, Gummow and Hayne JJ noted that the *Native Title Act* does not create new rights and interests in land called ‘native title’.[18] Instead,

> the native title rights and interests to which the *Native Title Act* refers are rights and interests finding their origin in pre-sovereignty law and custom, not rights or interests which are a creature of that Act.[19]

As a result, the meaning of ‘traditional’ refers to:

- the means of transmission of a law or custom: a ‘traditional’ law or custom is one which has been passed from generation to generation of a society;[20]

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17 See *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 2.
18 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [45].
19 Ibid.
20 Ibid [46].

- the age of the laws and customs: as the origins of the content of the law or custom concerned are to be found in the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown;[21] and
- continuity: the 'normative system'—that is, the traditional laws and customs—under which rights and interests are possessed must have had a continuous existence and vitality since sovereignty.[22]

From this approach to traditional laws and customs has arisen a focus on two issues:

- the extent to which laws and customs can change over time and still be considered traditional; and
- the degree of continued acknowledgment of traditional laws and the observance over time that is required.

In this context, and after careful examination, the ALRC makes five central recommendations in relation to the definition of native title in s 223(1) of the *Native Title Act*. Statutory amendment clarifying the definition of native title is the preferable approach, in line with the beneficial purposes of the legislation.

Recommendations around s 223(1)

First, the ALRC recommends that there be explicit acknowledgment in the *Native Title Act* that traditional laws and customs under which native title rights and interests are possessed may adapt, evolve or otherwise develop.

Second, the ALRC recommends that the definition of native title be amended to clarify that it is not necessary to establish either that:

- the acknowledgment of traditional laws and the observance of traditional customs have continued substantially uninterrupted since sovereignty; or
- traditional laws and customs have been acknowledged and observed by each generation since sovereignty.

The ALRC observes that the generation by generation requirement is particularly stringent. The test for connection in s 223(1)(b) remains 'substantially maintained'.

Third, the ALRC recommends that the definition of native title be amended to clarify 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 sovereignty.

Finally, the ALRC recommends that the definition of native title clarifies that rights and interests may be possessed by a native title claim group where they have been transmitted or transferred between groups, or otherwise acquired in accordance with traditional laws and customs.

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21 Ibid.
22 Ibid [47].

The law for proving connection

Beyond the first package of recommendations, the ALRC considered the law governing how connection to land and waters is proved, and whether evidence of physical occupation or continued or recent use is required. The ALRC considers that the law is already clear in this regard,[23] and no confirmation is necessary. Two provisions of the *Native Title Act*—dealing with the claimant application[24] and the registration test[25]—refer to 'traditional physical connection' with land and waters. As these appear in potential conflict with the substantive law regarding connection, the ALRC recommends the repeal of these provisions.

The ALRC also considered the feasibility of reframing the definition of connection in s 223(1) of the *Native Title Act*. The ALRC gauged support for a redefinition that gave priority to the present connection 'as a relationship with country', while retaining the need for the origins of the laws and customs to be found in the pre-sovereign period. The redefinition of connection was intended to operate in conjunction with either an amended definition of 'traditional', or with the removal of 'traditional' from s 223 of the *Native Title Act* and its substitution by the phrase, 'in the period prior to the assertion of sovereignty'.

There was limited stakeholder support for these proposals and therefore no recommendation was made. The ALRC endorses the importance of giving primacy to Aboriginal and Torres Strait Islander peoples' expressions of their understanding of connection, in line with best practice international standards under the UNDRIP. However, no express recommendation is made to amend s 223(1)(b).

Empowering the courts to disregard substantial interruption

A detailed analysis was also undertaken as to whether the *Native Title Act* should allow for the 'empowerment of courts to disregard substantial interruption or change in the continuity of acknowledgment and observance of traditional laws and customs where it is in the interests of justice to do so'. The ALRC examined related questions about the revitalisation of traditional laws and customs. While the UNDRIP principles support indigenous rights to revitalisation of culture,[26] the ALRC considers that its recommendation that traditional laws and customs may adapt, evolve and develop will provide an effective measure to allow for revitalisation of culture as appropriate to the particular factual circumstances.

The ALRC also examined whether the reasons for the displacement of Aboriginal peoples or Torres Strait Islanders should be a relevant factor in the interpretation of s 223 of the *Native Title Act*. This is a sensitive matter. The reasons leading to the physical removal from country or other changes in the manner of connection to country

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23 *De Rose v South Australia (No 2)* (2005) 145 FCR 290, 306; see also *Dale v Moses* [2007] FCAFC 82 (7 June 2007) [306]; *Moses v Western Australia* (2007) 160 FCR 148, 222.

24 *Native Title Act 1993* (Cth) s 62(1)(c).

25 Ibid s 190B(7).

26 *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st Sess, 107th Plen Mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) arts 11, 13(1).

for Aboriginal peoples and Torres Strait Islanders are many and varied. These considerations inform the test for whether the continued acknowledgment of traditional laws and customs has been substantially uninterrupted.[27]

Given the many complexities involved, while the ALRC supports the position that a finder of fact should be able to take into consideration the reasons for any change in the continuity of acknowledgment of traditional laws and the observance of customs, in terms of whether such laws and customs may adapt, evolve and develop, it makes no recommendation for statutory amendment to that effect. The ALRC considers that its Recommendations 5–2 and 5–3—regarding the 'substantially uninterrupted' and the 'generation by generation' thresholds for proof of native title—will better allow scope to consider factors that may have changed the nature of how Aboriginal and Torres Strait Islander peoples maintain their connection.

While the ALRC saw merit in the general proposition that there should be reform directed to allowing the courts to disregard substantial interruption or change in continuity of acknowledgment and observance of traditional laws and customs, it had some concerns around how 'an empowerment of courts' might be implemented. After careful consideration, the ALRC has concluded that direct legislative amendment of the definition in s 223 of the *Native Title Act* is a more targeted measure.

A presumption of continuity

The ALRC carefully examined whether there should be a 'presumption of continuity of acknowledgment and observance of traditional laws and customs and connection'. The time elapsed between the assertion of sovereignty, and the Australian legal system's recognition of native title in 1992, means that evidencing the survival of those rights over 200 years presents significant challenges of evidence.[28] Discharging the burden of proving that native title exists, therefore, is a significant undertaking. In *Yorta Yorta*, the High Court acknowledged that 'difficult problems of proof' face native title claimants when seeking to establish native title rights and interests over a long period of time.[29]

A presumption in relation to proof of native title is perceived as one response to the difficulty of establishing the existence of native title rights and interests. There has been stakeholder support for this option for reform over a number of years. It was first proposed by Justice French in 2008.[30] Justice French suggested that a presumption may

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27 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [87]–[90] (Gleeson CJ, Gummow and Hayne JJ); *Bodney v Bennell* (2008) 167 FCR 84, [97].

28 See generally, Anthony Connolly, 'Conceiving of Tradition: Dynamics of Judicial Interpretation and Explanation in Native Title Law' in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (Federation Press, 2005) 118, 134–35.

29 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [80].

30 Justice Robert French, 'Lifting the Burden of Native Title—Some Modest Proposals for Improvement' (Speech Delivered at the Federal Court Native Title User Group, Adelaide, 9 July 2008). The model proposed by Justice French has been largely adopted by a series of Native Title Amendment (Reform) Bills: Native Title Amendment (Reform) Bill 2011; Native Title Amendment (Reform) Bill (No 1) 2012; Native Title Amendment (Reform) Bill 2014. See also Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Native Title Amendment (Reform) Bill 2011* (2011).

'lighten some of the burden of making a case for a determination' by lifting some elements of the burden of proof from native title claimants.[31]

The ALRC considers that the extent of evidence required to establish native title, is in tension with the object of the *Native Title Act* to recognise and protect native title,[32] especially given an often incomplete historical and anthropological record. However, the ALRC concludes that, rather than introducing a presumption—a reform affecting how facts in issue in native title matters are proved—it is preferable to amend the requirements for proof of native title.

On balance, the ALRC considers that it is not necessary to introduce such a presumption given its recommendations to amend the definition of native title in s 223 of the *Native Title Act*. However, the ALRC does recommend that there be guidance in the Act regarding when inferences may be drawn in the proof of native title rights and interests.

Nature and content of native title

The scope of native title rights and interests that are recognised depends on two factors. First the judicial interpretation of the nature of native title—currently the prevailing view is that native title is a bundle of rights. Second, the content of the rights and interests is determined by reference to the traditional laws and customs under which such rights and interests are possessed. The content of native title is established by reference to the evidence in each native title claim. In this context, the ALRC was asked to examine whether the *Native Title Act* should be clarified to provide that native title rights and interests 'can include rights and interests of a commercial nature'.

In *Akiba HCA*, French CJ and Crennan J held 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.[33]

Adopting the principles from *Akiba HCA*, the ALRC recommends that s 223(2) of the *Native Title Act* should be amended. The amendment is not intended to limit the operation of s 223(1) or affect the operation of s 211 of the *Native Title Act*. The recommended new s 223(2)(a) adopts language that reflects the concept of a widely-framed right that may be exercised for any purpose (commercial and non-commercial), while allowing for future application of the principles to specific claims, and for determinations to turn on the specific evidence adduced in each case.

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31 Justice Robert French, 'Lifting the Burden of Native Title—Some Modest Proposals for Improvement' (Speech Delivered at the Federal Court Native Title User Group, Adelaide, 9 July 2008).

32 *Native Title Act 1993* (Cth) s 3(a).

33 *Akiba v Commonwealth* (2013) 250 CLR 209, [21].

The ALRC consulted widely regarding whether clarification of the Act was necessary following *Akiba HCA* and the later case of *Brown*.[34] There was a spectrum of views as to whether statutory clarification was necessary. On balance, the ALRC recommends statutory clarification, while noting that judicial evolution of the law will continue, and that each claim will turn on its evidence. Recommendation 8–1 seeks to assist certainty in the law—particularly in relation to connection reports and consent determinations.

Currently, s 223(2) of the *Native Title Act* states that native title rights and interests include, but are not limited to, hunting, gathering, or fishing, rights and interests. The ALRC recommends express inclusion of a right to trade in the list. A right to trade has been recognised in principle.[35] The ALRC recommends that the terms 'commercial purposes' and 'trading' should not be defined in the Act. The ALRC also considered other potential native title rights and interests. Cultural knowledge (traditional knowledge) is considered in some detail due to the volume of existing research in this field. The ALRC considers that a specific review of this area would be appropriate.

Adopting the principles from *Akiba HCA* that native title rights may be broadly defined and may be exercised for any purpose, including commercial purposes, provides a platform to start to align the native title system more closely with the increasingly widely adopted policy position that native title should be a component in supporting long term sustainable futures for Aboriginal and Torres Strait Islander peoples.

Authorisation provisions

The recommendations regarding authorisation are designed to reduce costs, streamline the procedures, and support robust decision-making structures. Authorisation maintains its important function in respect of overlapping claims.[36] Typically, claim groups do not invest full decision-making authority in the applicant, but expect the applicant to bring important decisions back to the group and to follow the directions of the group. Some groups establish separate decision-making bodies, such as steering committees or working groups.

Recommendations are made for amendments to the *Native Title Act* regarding the choice of a decision-making process, limits on the scope of the authority of the applicant, and the applicant's capacity to act by majority. Recommendations are also made to address the situation where a member of the applicant dies or is unable to act, and where the authorisation provides for the replacement of a person with another specified person.

These recommendations are intended to support claim groups as they develop their own governance structures, work within the requirements of Australian law and negotiate with third parties.

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34 *Western Australia v Brown* (2014) 306 ALR 168.

35 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [153], [155].

36 *Daniel v Western Australia* [2002] FCA 1147 (13 September 2002) [11].

The *Native Title Act* and some state and territory legislation create opportunities for the applicant to receive funds that are intended for the native title group. The *Native Title Act* should be amended to provide that a member of the applicant must not obtain an advantage or benefit at the expense of the common law holders of native title.

Joinder and party provisions

The party and joinder provisions in the *Native Title Act* raise a number of issues around the balance of interests in the native title system which may affect how readily a native title determination is reached, as well as whether the proceedings are protracted and involve administrative burdens for all parties, and the institutions administering the native title claims process (the National Native Title Tribunal and the Federal Court). In this regard the ALRC has considered the role of Commonwealth, state and territory governments as primary respondents in native title claims.

The joinder provisions may need to accommodate Aboriginal and Torres Strait Islander respondents—for example, where there are overlapping claim groups or disaffected members of the claim group.[37] Access to justice may involve considerations distinct from, and potentially in conflict with, the considerations of equity for the primary claim group.

After extensive consultations and review, the ALRC considers the joinder provisions are operating effectively. There is a diversity of interests in any native title claim.[38] In most instances, the Federal Court's existing discretion conferred under s 84 of the *Native Title Act*, in combination with robust case management,[39] will be the most appropriate way to balance the considerations involved in an application for a determination of native title. However, the ALRC makes several targeted recommendations—to allow respondent parties to elect to limit their involvement in proceedings to representing their own interests; to provide Aboriginal Land Councils in NSW with notice of native title proceedings; to clarify the law regarding joinder of claimants and potential claimants; and to clarify the law regarding dismissal of parties.

The ALRC recommends that the *Federal Court Act 1976* (Cth) be amended to allow appeals from joinder and dismissal decisions in native title proceedings, and for consideration to developing principles governing the circumstances in which the Commonwealth will become a party to, or intervene in, native title proceedings.

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37 See, eg, *Far West Coast Native Title Claim v South Australia (No 5)* [2013] FCA 717 (30 July 2013); *Bonner on behalf of the Jagera People #2 v Queensland* [2011] FCA 321 (6 April 2011); *Combined Dulabed & Malanbarra/Yidinji Peoples v Queensland* [2004] FCA 1097 (25 August 2004).

38 A native title proceeding brings before the Court 'all parties who hold or wish to assert a claim or interest in respect of the defined area of land [in order to] bring about a decision which finally determines the existence and nature of native title rights in the determination area, and which also identifies other rights and interests held by others in respect of that area': *Western Australia v Ward* (2000) 99 FCR 316, [190]. See also *Gamogab v Akiba* (2007) 159 FCR 578, [60]: 'It is fundamental that an order which directly affects a third person's rights or liabilities should not be made unless the person is joined as a party'.

39 See, eg, *Watson v Western Australia (No 3)* [2014] FCA 127 (24 February 2014).

Claims resolution

The ALRC did not undertake a comprehensive review of the claims resolution process. It focused on those aspects most relevant to connection requirements, authorisation and joinder. The relevant recommendations should be viewed in that light. The ALRC makes recommendations to facilitate the use of the native title application inquiry process,[40] and recommends that the Australian Government give further consideration to options for voluntary specialist training schemes to build capacity for the effective operation of the native title system and to build the capacity of people engaged in native title claims.

Conclusion

The *Native Title Act* is far-reaching and complex legislation which affects many people. The Act is Commonwealth legislation, but it operates across all state and territory jurisdictions. The extent to which native title is recognised, and may be recognised, varies across Australia due to historical factors. Parties in the native title system have ordered their practices and interactions with other parties and with native title institutions as the law has evolved over a 20 year period since the introduction of the *Native Title Act*. Stability and certainty are important matters.

Rigorous testing of connection requirements is also important to secure transparency for governments and third parties, to ensure the integrity of the claims system and to facilitate identification of the appropriate members of a claim group.

In that context, the ALRC's recommendations for amendment to s 223(1) acknowledge that linking between the pre-sovereign laws and customs and their modern counterpart is necessary, but carefully targeted recommendations are directed to reducing the impact of the connection requirements where they have introduced more stringency than may be evident from the current definition of native title in s 223(1). The capacity for traditional laws to adapt, evolve and develop and that requirements for continued acknowledgment of laws and customs not be unduly onerous, is an important means of addressing the challenge of change in Aboriginal and Torres Strait Islander communities, while still reflecting the significance of the recognition of traditional connection to land and waters.

The *Native Title Act* is invested with many aspirations for the future of Australia's Indigenous peoples. It has brought opportunities and challenges for the wider Australian society. Native title has the capacity to contribute to the improvement of the circumstances of Aboriginal and Torres Strait Islander peoples. If native title is to provide an effective platform for future development, then a prerequisite is ensuring an equitable process within the law governing connection requirements.

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40 *Native Title Act 1993* (Cth) ss 138A–138G.

The need for a longer term perspective also was stressed to the ALRC during the Inquiry. There were calls for more attention to be paid to how native title groups can effectively manage their determined native title rights and interests. The authorisation recommendations are framed in that context.

In summary, the recommendations are intended to

- address the complexities of proving native title and the amplified requirements for connection, relating to the definition in s 223 of the *Native Title Act*;
- acknowledge that, while retention of a focus on traditional laws and customs is important, the law should be flexibly applied to allow evolution, adaptation and development of those laws and customs and succession to native title rights and interests;
- expedite the claims process by removing 'substantially uninterrupted continuity' and the 'normative society' requirements as a strict necessity and refocusing on the core elements of the definition of native title;
- facilitate the drawing of inferences of fact in defined circumstances, while recognising that the extent of evidence required to establish native title is in tension with the object of the Act to recognise and protect native title;
- provide statutory reflection of the principles developed by the High Court that recognised that a native title right may be exercised for any purpose—commercial or non-commercial and to include a native title right to trade in a non exhaustive list of native title rights and interests;
- strengthen the internal governance of the claim group by clarifying the functions, powers and duties of the applicant;
- streamline the process of removing a member of an applicant who is unable or unwilling to act;
- ensure access to justice for parties whose interests may be affected by a native title determination, while recognising the need for efficient and fair administration of justice; and
- ensure that native title claims are resolved in a fair and efficient manner.

An Inquiry into connection requirements for recognising native title rights and interests; the scope of native title rights and interests; and the authorisation and joinder provisions of the *Native Title Act* raises matters of significance and sensitivity. For Aboriginal and Torres Strait Islander peoples, it engages questions about their traditional laws and customs and the nature of their relationship to traditional lands and waters. It canvasses matters that go to the founding of the Australian nation and the course of European settlement over 200 years. It touches upon the many interrelationships between Aboriginal and Torres Strait Islander peoples, who hold, and may hold native title rights and interests, and the Australian community. The Inquiry, under its Terms of Reference, was also asked to reflect upon the question of the evolution and development of Aboriginal and Torres Strait Islander peoples' laws and customs—a perspective that looks to the future.

The ALRC was assisted in its Inquiry by the generous contribution of the many people and organisations that are identified in the Report, who afforded unparalleled access to information about how the *Native Title Act* claims system is operating. The insights offered, including the strong divergence of views, provided a significant information resource for the Report. The ALRC acknowledges that the Report draws on the extensive and considered jurisprudence of the High Court and the Federal Court in its interpretation of the Act. The ALRC makes its contribution to native title law, in the knowledge of an evolving jurisprudence.

Recommendations

5. Traditional Laws and Customs

Recommendation 5–1 The definition of native title in s 223 of the *Native Title Act 1993* (Cth) should be amended to provide that traditional laws and customs may adapt, evolve or otherwise develop.

Recommendation 5–2 The definition of native title in s 223 of the *Native Title Act 1993* (Cth) should be amended to clarify that it is not necessary to establish that the acknowledgment of traditional laws and the observance of traditional customs have continued substantially uninterrupted since sovereignty.

Recommendation 5–3 The definition of native title in s 223 of the *Native Title Act 1993* (Cth) should be amended to clarify that it is not necessary to establish that traditional laws and customs have been acknowledged and observed by each generation since sovereignty.

Recommendation 5–4 The definition of native title in s 223 of the *Native Title Act 1993* (Cth) should be amended to clarify 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 sovereignty.

Recommendation 5–5 The definition of native title in s 223 of the *Native Title Act 1993* (Cth) should be amended to provide that rights and interests may be possessed by a native title claim group where they have been:

(a) transmitted or transferred between Aboriginal or Torres Strait Islander groups in accordance with the traditional laws and customs of those groups; or

(b) otherwise acquired in accordance with traditional laws and customs.

6. Connection with the Land or Waters

Recommendation 6–1 Section 62(1)(c) of the *Native Title Act 1993* (Cth) provides that a claimant application may contain details of any 'traditional physical connection' that a member of the native title claim group has, or had, with the land or waters claimed. This subsection should be repealed.

Recommendation 6–2 Section 190B(7) of the *Native Title Act 1993* (Cth) provides 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. This subsection should be repealed.

7. Proof and Evidence

Recommendation 7–1 The *Native Title Act 1993* (Cth) should provide guidance regarding when inferences may be drawn in the proof of native title rights and interests. The Act should provide that the Court may draw inferences from contemporary evidence that the claimed rights and interests are possessed under the traditional laws acknowledged and traditional customs observed by the native title claim group.

8. The Nature and Content of Native Title

Recommendation 8–1 Without limiting s 223(1) of the *Native Title Act 1993* (Cth), this recommendation is intended to give effect to the principle of a broadly defined native title right as recognised in *Akiba v Commonwealth* (2013) 250 CLR 209 and *Western Australia v Brown* (2014) 306 ALR 168; to reflect that a native title right can be exercised for any purpose (including commercial purposes); and to provide a non-exhaustive list of native title rights and interests.

Section 223(2) of the *Native Title Act 1993* (Cth) should be repealed and substituted with a subsection that provides:

> Without limiting subsection (1), native title rights and interests in that subsection:
>
> (a) may comprise a right that may be exercised for any purpose, including commercial or non-commercial purposes; and
>
> (b) may include, but are not limited to, hunting, gathering, fishing, and trading rights and interests.

Recommendation 8–2 'Commercial purposes' and 'trading' should not be defined in the *Native Title Act*.

10. Authorisation

Recommendation 10–1 Section 251B of the *Native Title Act 1993* (Cth) requires a claim group to use a traditional decision-making process for authorising an applicant, if it has such a process. If it does not have such a process, it must use a decision-making process agreed to and adopted by the group.

Section 251B of the *Native Title Act 1993* (Cth) should be amended to provide that a claim group may authorise an applicant *either* by a traditional decision-making process *or* a process agreed to and adopted by the group.

Recommendation 10–2 Section 251A of the *Native Title Act 1993* (Cth) requires persons holding native title to use a traditional decision-making process for authorising an indigenous land use agreement (ILUA), if they have one. If they do not have one, they may use a decision-making process agreed to and adopted by the persons.

Section 251A of the *Native Title Act 1993* (Cth) should be amended to provide that persons holding native title may authorise an ILUA *either* by a traditional decision-making process, *or* a decision-making process agreed to and adopted by the group.

Recommendation 10–3 Regulation 8 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) provides that common law holders must use a traditional decision-making process in relation to giving consent for a native title decision, if they have one. If they do not have one, they must use a decision-making process agreed to and adopted by the common law holders.

Regulation 8 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) should be amended to provide that common law holders may give consent to a native title decision using *either* a traditional decision-making process *or* a decision-making process agreed on and adopted by them.

Recommendation 10–4 Section 203BC(2) of the *Native Title Act 1993* (Cth) provides that a native title holder or a person who may hold native title must use a traditional decision-making process to give consent to any general course of action that the representative body takes on their behalf, if they have one. If they do not have one, they must use a decision-making process agreed to and adopted by the group to which the person belongs.

Section 203BC(2) of the *Native Title Act 1993* (Cth) should provide that a native title holder or a person who may hold native title may give consent to any general course of action that the representative body takes on their behalf using *either* a traditional decision-making process *or* a decision-making process agreed to and adopted by the group to which the person belongs.

Recommendation 10–5 The *Native Title Act 1993* (Cth) should be amended to clarify that the claim group may define the scope of the authority of the applicant.

Recommendation 10–6 The *Native Title Act 1993* (Cth) should be amended to provide that the applicant may act by majority, unless the terms of the authorisation provide otherwise.

Recommendation 10–7 Section 66B of the *Native Title Act 1993* (Cth) should provide that, where a member of the applicant is no longer willing or able to perform the functions of the applicant, the remaining members of the applicant may:

(a) continue to act without reauthorisation, unless the terms of the authorisation provide otherwise; and

(b) apply to the Federal Court for an order that the remaining members constitute the applicant.

Recommendation 10–8 The authorisation of an applicant sometimes provides that if a particular member of the applicant becomes unwilling or unable to act, another specified person may take their place.

Section 66B of the *Native Title Act 1993* (Cth) should provide that, in this circumstance, the applicant may apply to the Federal Court for an order that the member be replaced by the specified person, without requiring reauthorisation.

Recommendation 10–9 The *Native Title Act 1993* (Cth) should be amended to provide that a member of the applicant must not obtain an advantage or benefit at the expense of the common law holders.

11. Parties and Joinder

Recommendation 11–1 Section 66(3)(a) of the *Native Title Act 1993* (Cth) should be amended to provide that the Registrar must notify the NSW Aboriginal Land Council and Local Aboriginal Land Councils, established under the *Aboriginal Land Rights Act 1983* (NSW), of a native title application.

Recommendation 11–2 Federal Court of Australia practice notes (or similar mechanisms) should provide for a person who becomes a party to proceedings under s 84(3) or s 84(5) of the *Native Title Act 1993* (Cth) to elect to participate only in respect of the matters listed in s 225(c) and s 225(d) of the Act.

Recommendation 11–3 This recommendation is intended to make clear that a claimant or potential claimant may join native title proceedings as a respondent under s 84(5). However, such a person would be required to demonstrate a 'clear and legitimate objective' to be achieved by joining the proceedings.

The *Native Title Act 1993* (Cth) should be amended to clarify that, for the purposes of s 84(5):

(a) a member of a claim group or other person who claims to hold native title 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 such a person, the Federal Court should consider whether they can demonstrate a clear and legitimate objective to be achieved by joining the proceedings.

Recommendation 11–4 The *Native Title Act 1993* (Cth) 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).

Recommendation 11–5 Section 24(1AA) of the *Federal Court of Australia Act 1976* (Cth) should be amended to allow an appeal, with the leave of the Court, from a decision of the Federal Court:

(a) to join or not to join a party under s 84(5) of the *Native Title Act 1993* (Cth); or

(b) to dismiss or not to dismiss a party under s 84(8) of the *Native Title Act 1993* (Cth).

Recommendation 11–6 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 of the *Native Title Act 1993* (Cth); or

(b) seek intervener status under s 84A of the *Native Title Act 1993* (Cth).

12. Promoting Claims Resolution

Recommendation 12–1 The amendments recommended to s 223 of the *Native Title Act 1993* (Cth) (Recommendations 5–1 to 5–5, and 8–1) should only apply to determinations made after the date of commencement of any amendment.

Recommendation 12–2 The amendments recommended regarding authorisation (Recommendations 10–1 to 10–9) and joinder (Recommendations 11–1 to 11–6) should only apply to matters that come before the Court after the date of commencement of any amendment.

Recommendation 12–3 The Australian Government should explore options for specialist training schemes for professionals in the native title system.

Recommendation 12–4 Section 138B(2)(b) of the *Native Title Act 1993* (Cth), which provides that the Federal Court may only direct that a native title application inquiry be held if the applicant agrees to participate, should be repealed.

Recommendation 12–5 Section 156(7) of the *Native Title Act 1993* (Cth), which provides that the National Native Title Tribunal's power to summon a person to appear before it or produce documents does not apply to a native title application inquiry, should be repealed.

1. Introduction

Contents

Review of the *Native Title Act 1993* (Cth)

Connection to Country: Overview

1.1 This Report marks the first major review of the law governing 'connection' in native title claims since the introduction of the *Native Title Act 1993* (Cth) ('*Native Title Act*'). In tandem it examines authorisation of persons bringing claims and joinder of parties to a native title claim. The recognition of native title in *Mabo v Queensland [No 2]* ('*Mabo [No 2]*'),[1] and the introduction of the *Native Title Act*, marked a significant shift in Australia's relationship with Aboriginal and Torres Strait Islander peoples. It is important that the claims process for determining native title effectively recognises and protects native title rights and interests, while balancing the wide range of other interests that are affected by a native title determination.

1.2 On 3 August 2013, the then Attorney-General of Australia, the Hon Mark Dreyfus QC MP, requested that the Australian Law Reform Commission (ALRC) conduct an Inquiry into, and report on Commonwealth native title laws and legal frameworks in the following areas:

- connection requirements relating to the recognition and scope of native title rights and interests; and
- any barriers imposed by the Act's authorisation and joinder provisions to claimants', potential claimants' and respondents' access to justice.

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1 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

1.3 'Connection' generally refers to the relationship that Aboriginal peoples and Torres Strait Islanders have with their traditional lands and waters. Reform to the law governing connection requirements under the *Native Title Act* poses significant challenges. The definition of native title in the *Native Title Act* draws on *Mabo [No 2]*, but the requirements to prove native title under s 223 of the Act have been reinterpreted over time. Parties, subsequently, have ordered their practices, including negotiation of consent determinations on this basis—'in the shadow of the law'.

1.4 For Aboriginal and Torres Strait Islander peoples, the recognition of native title has immense significance as acknowledging their first occupation of Australian land and waters, and it brings the potential for tangible benefits. The recognition and protection of native title is a central object of the *Native Title Act*—and the Preamble identifies the beneficial purposes of the Act. Reforms of connection requirements, authorisation and joinder are important to ensure that native title law and legal frameworks achieve efficiencies but remain consistent with such beneficial purposes.

1.5 The law for determining native title is complex. The *Native Title Act* requires that Aboriginal peoples and Torres Strait Islanders must prove they have maintained a connection since before European settlement. Difficulties in the proof of native title stem from two sources. First are the inherent problems of establishing rights and interests that area possessed under traditional laws and customs with origins from the pre-sovereign period.

1.6 Second, these difficulties are increased by the amplification of requirements for proving native title, such as the need for a 'normative society'.[2] The ALRC considers that an approach to the law defining native title that more fully acknowledges that traditional laws and customs may adapt, evolve and develop, while still retaining the core elements of native title 'connection', is in keeping with the beneficial objectives of the legislation. While it remains important for claims to assess whether Aboriginal peoples and Torres Strait Islanders have substantially maintained their connection to land and waters, the requirements for proof should be more flexible, and facilitate an efficient and equitable claims resolution system.

1.7 While it is important that native title claims are rigorously tested, the extensive requirements may result in an involved claims process for determinations. Such considerations, however, must be balanced by the acknowledgment that it is necessary to invest sufficient time and resources to secure enduring outcomes for all parties.

1.8 The claims process also must accommodate the wide range of interests in the Australian community 'affected' by a native title determination. Effective and fair provisions governing parties and joinder of parties to native title proceedings play an important function in this regard.

1.9 It is important that the 'right people for country' are identified in the claims process and that the Aboriginal and Torres Strait Islander peoples bringing the native title claim (the 'applicant') are duly authorised by the claim group. The authorisation

2 Law Council of Australia, *Submission 35*.

process is costly. The role of the applicant can generate conflict, but it can also be the basis for building governance and capacity within the native title group. Reforms are needed to ensure the authorisation process is robust, transparent and able to reduce potential conflict.

1.10 Consideration should also be given to considering the impacts of reform upon the native title system as a whole, especially as native title operates across many sectors in Australian society. Certainty is an important consideration for third parties who may deal with native title claimants.

1.11 In this context, the ALRC, in formulating its recommendations, has had regard to the development of the law, procedure and practice over the 20 years since the Act was introduced, as well as the significant policy and economic arena in which native title is implemented.

1.12 Native title has the capacity to contribute to the improvement of the economic circumstances of Aboriginal and Torres Strait Islander peoples. If native title is to provide an effective platform for future development, then a prerequisite is ensuring an equitable process within the law governing connection requirements.

1.13 The Inquiry has also looked to the future and how native title law might develop over the next 20 years and beyond. In 2007 the *United Nations Declaration on the Rights of Indigenous Peoples* provided international standards upon which to base a 'constructive partnership' between nations and their Indigenous peoples to employ best practice principles in a range of legal and policy areas.

The law reform brief

The scope of the Inquiry

1.14 The ALRC examined four areas of the *Native Title Act.* Broadly, these areas included: the legal requirements for recognising native title rights and interests; the nature and content (scope) of native title rights and interests; the Act's provisions for authorisation of an applicant; and the Act's provisions governing when persons become parties to an application for a determination of native title. The ALRC also considered ancillary aspects of these areas, such as expert evidence and connection reports.

Connection requirements

1.15 Connection requirements relate to how native title is established and proved under the *Native Title Act*. 'Connection' is not specifically defined in the legislation but the term appears in s 223(1)(b) of the Act.[3] More generally, it refers to s 223 which defines native title and to s 255 which sets out what is required for a determination of native title. Section 61 governs the originating process for an application for a determination of native title. Connection requirements relate to both the factual matters relevant to Aboriginal peoples' and Torres Strait Islanders' laws and customs, as well

3 *Native Title Act 1993* (Cth) s 223(1)(b).

as the legal rules that govern how native title is proved. This legal architecture owes much to *Mabo [No 2]*.[4]

1.16 Aboriginal peoples or Torres Strait Islanders may bring an application for a determination of native title rights and interests (a claim) under the *Native Title Act*. Section 223 of the Act defines native title:

> (1) 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 traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
>
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
>
> (c) the rights and interests are recognised by the common law of Australia.

1.17 In regard to connection, the ALRC was asked to consider the following four options for reform:

- a presumption of continuity of acknowledgment and observance of traditional laws and customs and connection;
- clarification of the meaning of 'traditional' to allow for the evolution and adaptation of culture and recognition of 'native title rights and interests';
- confirmation that 'connection with the land and waters' does not require physical occupation or continued or recent use; and
- empowerment of courts 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.

Nature and content of native title

1.18 The nature and content (scope) of native title rights and interests is determined by reference to the factual circumstances of each native title claim.[5] The court in making a determination of native title must set out

> (a) who the persons, or each group of persons, holding the common or group rights comprising the native title are; and
>
> (b) the nature and extent of the native title rights and interests in relation to the determination area; and
>
> (c) the nature and extent of any other interests in relation to the determination area; and
>
> (d) the relationship between the rights and interests in paragraphs (b) and (c) (taking into account the effect of this Act).[6]

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4 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.
5 *Native Title Act 1993* (Cth) ss 223(2), 225.

1.19 The ALRC was asked to consider the scope of native title rights and interests, and it considered this question generally, as well as specifically, in relation to examining whether there should be clarification that 'native title rights and interests' can include rights and interests of a commercial nature.

1.20 The Terms of Reference indicated that the ALRC could also consider any other improvements to the law and legal frameworks for connection requirements.

Authorisation

1.21 In the native title claim process, it is necessary to identify which Aboriginal peoples or Torres Strait Islanders are the native title claimants, and the claimants must validly authorise persons in the group (the 'applicant') to bring an application for a determination (claim). Authorisation forms an initial step in bringing an application for a determination (claim) under the *Native Title Act*. The Act establishes a process for authorisation in s 251B. The applicant can deal with matters arising in relation to the claim.[7] In a successful claim, the court determines who holds native title.[8] The ALRC was asked to consider any potential barriers to access to justice.

1.22 There is an important meeting point between the law concerning 'connection and recognition of native title' and questions of claim group membership.

> It is a matter of simple justice that native title determinations should be made only in favour of the traditional owners of each area of land … Just as importantly, the ongoing demands of governance and decision-making in relation to native title lands require a clear and shared understanding of how different groups and subgroups fit together. These two considerations highlight the paramount importance of identifying the 'right people for country'.[9]

Parties and joinder

1.23 Native title intersects with many other interests in the Australian community. The *Native Title Act* contains provisions that set out the persons and organisations that are parties to a native title claim. The applicant is always a party. Relevant state and territory governments and, at times, the Commonwealth government, are respondents to a native title claim. Other persons holding interests in the claim area, such as a mining lease, may also be a party.

1.24 Most persons become parties at the initial notification stage of a claim. Other persons whose interests are affected by a native title determination may seek to become a party after this stage. Aboriginal peoples or Torres Strait Islanders, as well as other persons affected by a native title determination, may seek joinder. Joinder raises issues about potential barriers to access to justice, and the good ordering and productive relationships between all participants—Indigenous and non-Indigenous—within the native title system.[10]

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6 Ibid s 225.
7 Ibid s 62(1)(iv).
8 Ibid s 225.
9 Nick Duff, 'What's Needed to Prove Native Title? Finding Flexibility Within the Law on Connection' (Research Discussion Paper 35, AIATSIS, June 2014) 17.
10 Association of Mining and Exploration Companies, *Submission 19*.

1.25 The ALRC was asked to consider any barriers to access to justice imposed by the Act's joinder provisions for claimants, potential claimants and respondents.

Claims resolution and legal frameworks

1.26 The *Native Title Act* is a detailed statute that is underpinned by a multifaceted institutional and decision-making structure. The Federal Court and National Native Title Tribunal play an important role. Legal frameworks include the practices of parties to native title determinations, such as the preparation of connection reports, together with policy and administrative guidelines integral to the operation of the *Native Title Act* in respect of connection requirements, authorisation and joinder. Many institutions and professionals, such as anthropologists and historians, will be involved at various stages of a native title claim.

1.27 The *Native Title Act* intersects with other Commonwealth, state and territory legislation,[11] including resource and land management laws. The Terms of Reference ask the ALRC to consider other legislation, case law and other relevant matters, concerning the operation of the native title system.

Other reviews

1.28 There have been many reviews, consultations and proposed amendments to the *Native Title Act.*[12] The outcomes have been a modest series of largely technical and procedural amendments to the Act, since 1997.[13] Since 2011 a number of amendments to the *Native Title Act* have been proposed. In 2011, the Native Title Amendment (Reform) Bill was introduced into the Federal Senate. The 2011 Bill was revised following an Inquiry by the Senate Standing Committee on Legal and Constitutional Affairs, and reintroduced as the Native Title Amendment (Reform) Bill (No 1) 2012. This Bill lapsed. At the time of writing, the Native Title Amendment (Reform) Bill 2014 (Cth) was before the Senate of the Federal Parliament. The content of this Bill is substantially the same as that of the lapsed 2012 Bill.

Why reform is needed

1.29 The *Native Title Act* is invested with many aspirations for the future of Australia's Indigenous peoples. It has brought opportunities and challenges for the wider Australian society. The law regarding the recognition and scope of native title raises fundamental questions about the nature of native title within the Australian legal system. Authorisation procedures are of concern to claim group members and for third parties. The party and joinder provisions reflect a critical point in the interaction between Aboriginal people and Torres Strait Islanders, the courts and third parties in the native title claims process.

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11 See, eg, *Federal Court of Australia Act 1976* (Cth).

12 Nick Duff, 'Reforming the Native Title Act: Baby Steps or Dancing the Running Man?' (2013) 17 *Australian Indigenous Law Reporter* 56, 56.

13 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Social Justice and Native Title Report' (Australian Human Rights Commission, 2013) 78; Duff, above n 12, 58–61.

1.30 The Act has been in operation for 20 years. Since the introduction of the Act native title determinations and agreement-making have become, in many contexts, 'a way of doing business'.[14] To sustain and build relationships around native title within the Australian community requires an approach to law reform that can balance the many interests involved. As Justice Barker noted, there is a need for

> constructive change to a system that is often characterised by formulaic approaches to dispute resolution, slowness and expense in arriving at outcomes; outcomes which sometimes are considered of limited or no utility by some indigenous groups and frustrate other parties.[15]

1.31 There are diverse views about native title law. Mick Gooda, the Aboriginal and Torres Strait Islander Social Justice Commissioner, has said:

> The process of recognising native title itself has also been frustrating from the start for Aboriginal and Torres Strait Islander peoples. While on the one hand, it brings hope and expectation of the return of country, on the other hand it can also be a process fraught with difficulties that opens up tensions and wounds around connections to country, family histories and community relationships. These instances of 'lateral violence' fragment our communities as we navigate the native title system and sadly diminish the unique opportunity native title can and should deliver to overcome disadvantage.[16]

1.32 Other stakeholders stressed the need for certainty in the native title process while noting the importance of engaging with Aboriginal and Torres Strait Islander peoples. The Minerals Council of Australia, for example, stressed that the minerals industry

> is committed to working with Indigenous communities within a framework of mutual benefit, which respects Indigenous rights and interests. It supports reforms that are consistent with these principles and which promote certainty and timely, equitable and efficient outcomes.[17]

1.33 The growing number of native title determinations across Australia is a positive trend.[18] The law relating to connection requirements, however, remains complex to navigate for all parties and variable in its outcomes across Australia.[19]

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14 Minerals Council of Australia, Submission to the Australian Attorney-General's Department, Review of the *Native Title Act 1993*—Draft Terms of Reference, 2013; Association of Mining and Exploration Companies Inc, Submission to the Australian Attorney-General's Department, Review of the *Native Title Act 1993*—Draft Terms of Reference, 2013; Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2012' (Australian Human Rights Commission, 2012).

15 Justice Barker, *Alternative Pathways to Outcomes in Native Title Anthropology* (12 February 2015) 1 <http://www.fedcourt.gov.au/publications/judges-speeches/justice-barker/barker-j-20150219>.

16 As quoted in Law Society of Western Australia, *Submission 9*.

17 Minerals Council of Australia, *Submission 8*.

18 See Queensland Government, *Submission 28*; Western Australian Government, *Submission 20*; South Australian Government, *Submission 34*. Note also that Victoria has developed the *Traditional Owner Settlement Act 2010*.

19 Law Council of Australia, *Submission 35*.

1.34 The native title system is highly resource intensive.[20] Costs are borne by a range of governments, public institutions, industry, and private persons—and most acutely by Aboriginal and Torres Strait Islander peoples—for example, in the need for detailed evidence relating to connection to be brought by claimants.[21]

1.35 Major constraints in the processes for proving native title increase transaction costs for all in the system, reduce the basis for 'full' recognition of rights and confine the scope for native title rights and interests to serve as a platform for the future development for Aboriginal and Torres Strait Islander peoples.[22]

1.36 The ALRC considers that native title claims should not be unnecessarily prolonged. Long time frames have repercussions for the viability of current and future native title communities, and in terms of commercial certainty.[23] Costs for the parties involved and, more generally, within the native title system can escalate. The Federal Court has instituted practice initiatives designed to 'ensure where possible that resolution of native title cases is achieved more easily and delivered in a more timely, effective and efficient way'.[24] Consultations and submissions revealed that the tighter timetable for claims resolution while beneficial in many respects may, at times, place pressure on parties in a time and resource intensive process.[25]

1.37 Similarly, there is a need to reduce complexity and to facilitate focus on the core elements for proving native title. The Law Council of Australia submitted that

> statutory interpretation of s 223(1) of the *Native Title Act* 1993 (Cth) should accord more closely with Aboriginal and Torres Strait Islander peoples' understanding of 'tradition'.[26]

1.38 The reasons for the complexity and problems of proof in native title are examined in detail in the individual chapters assessing the options for reform identified under the Terms of Reference.

1.39 One of the difficult and compelling problems for this Inquiry into connection requirements is how to address the position of those persons who may 'fall outside' the native title system. During the Inquiry these issues surfaced at points around the issues of overlapping native title claims and the processes for determining claim group composition. A related dilemma is captured by the Law Council of Australia:

> It is recognised that in many parts of Australia, native title has been extinguished, with little chance of being revived, due to the passage of time and dispossession of those who held a connection with their ancestral lands. It is a bitter irony for those

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20 See Graeme Hiley and Ken Levy, 'Native Title Claims Resolution Review' (Report, Attorney-General's Department, 31 March 2006).

21 Graeme Neate, 'Resolving Native Title Issues: Travelling on Train Tracks or Roaming the Range?' (Paper Presented at Native Title and Cultural Heritage Conference, Brisbane, 26 October 2009) 11.

22 AIATSIS pointed to the need for a mediated understanding of efficiency that allows access to resources and capacity building: AIATSIS, *Submission 36*.

23 'Principle 3 should also include the aim of providing certainty for future land use in the areas of determined native title': South Australian Government, *Submission 34*.

24 Federal Court of Australia, 'Annual Report 2011–2012' 13.

25 North Queensland Land Council, *Submission 17*.

26 Law Council of Australia, *Submission 35*.

> groups that the heavy impact of European colonisation, particularly in the south-eastern and eastern parts of Australia, has left many of them without any claim to native title. This injustice was recognised at the time the Act was drafted and implemented, and was to be addressed through the creation of a statutory compensation fund, along with other measures.[27]

1.40 The ALRC notes that the initial fund for land purchases for Aboriginal and Torres Strait Islander peoples is an important measure to support land equity. However, as Just Us Lawyers submitted, 'the failure by successive Federal Governments to deliver Paul Keating's "Social Justice Package" has meant that the void created by the inability of the NTA to deliver benefits to certain people has never been filled'.[28] Commentators suggest that this fact has placed considerable strain on the native title claims process.[29]

1.41 The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), in its submission to the Inquiry, noted:

> 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.[30]

1.42 Queensland South Native Title Services (QSNTS) advocated that native title should operate in conjunction with

> an alternative settlements system to build on [native title] recognition status to achieve some real, tangible outcomes in tandem with the native title claims process—outcomes that are of value to and empowering for the traditional owners and, reciprocally, that can provide certainty to and a positive legacy for negotiating governments.[31]

1.43 The ALRC sees merit in considering a wider range of legislative and policy options for addressing opportunities to promote the culturally appropriate social and economic development for Australia's Aboriginal and Torres Strait Islander peoples. The Inquiry, however, is centrally concerned with the *Native Title Act* under its Terms of Reference. Moreover, it is imperative that attention is focused on ensuring that the existing system is efficient, fair and equitable and that reforms are directed to that end.

The question of change

1.44 The ALRC was asked to examine improvements to the practical operation of the native title system—requiring analysis of the effectiveness of proposals in terms of the systemic operation of native title laws and the many interests and areas affected.

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27 Ibid.
28 Just Us Lawyers, *Submission 2*.
29 Western Australian Government, *Submission 20*; Law Society of Western Australia, *Submission 9*.
30 AIATSIS, *Submission 36*.
31 Queensland South Native Title Services, *Submission 24*.

1.45 As French J noted, the *Native Title Act* is sketched upon a large ethical canvas, but also serves

> the pragmatic requirements of an orderly interaction between the recognition of native title and the myriad laws and interests that have settled upon the land and waters of Australia since their progressive annexation by the British Crown.[32]

1.46 This Inquiry sought to balance requirements for orderly interaction in the native title system, with the principles of equality and non-discrimination that are stated in the Act. Australia has obligations under international instruments that help shape its relationship with Aboriginal people and Torres Strait Islanders.[33]

1.47 In line with the Terms of Reference, attention is directed to clarifying and refining the highly complex law around connection requirements centred on s 223 of the Act to ensure that claim resolution is not impeded. In examining improvements to native title law and legal frameworks, the ALRC has, necessarily, included an analysis of the interaction between the *Native Title Act* and its judicial interpretation. The recommendations take into account the development of native title law since the enactment of the *Native Title Act* and the degree of legal certainty achieved as a result of major native title litigation.[34]

1.48 Parties in the native title system have ordered their practices and interactions with other parties and with native title institutions and organisations on this basis. Many submissions have stressed the importance of stability.[35] Some caution was advised to avoid potential disruption,[36] with some submissions advocating an incremental model of change within the *Native Title Act*.[37]

1.49 The Australian Human Rights Commission, however, highlighted the need for an effective reform process as 'reforms to both the *Native Title Act* and the native title system more generally have been ad hoc and only "tinkered around the edges"'.[38] The ALRC, in turn, has limited Terms of Reference that do not allow comprehensive review of the Act.[39]

1.50 The ALRC notes that there may be significant 'reform fatigue' in the native title sector,[40] and that piecemeal reform to date has not dealt with many of the underlying inequities in the native title system.

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32 *Sampi v Western Australia* [2005] FCA 777 (10 June 2005) [938].
33 National Congress of Australia's First Peoples, *Submission 32*.
34 See, eg, *Western Australia v Ward* (2002) 213 CLR 1; *Commonwealth v Yarmirr* (2001) 208 CLR 1; *Wilson v Anderson* (2002) 213 CLR 401; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; *Western Australia v Brown* (2014) 306 ALR 168; *Akiba v Commonwealth* (2013) 250 CLR 209.
35 National Farmers' Federation, *Submission 14*; Pastoralists and Graziers Association, *Submission 3*.
36 Northern Territory Government, *Submission 31*; Association of Mining and Exploration Companies, *Submission 19*.
37 Western Australian Government, *Submission 20*.
38 Australian Human Rights Commission, *Submission 1*.
39 *Submissions to the Draft Terms of Reference* <http://www.ag.gov.au/consultations/pages/AustralianLawReformCommissionnativetitleinquiry.aspx>.
40 Duff, above n 12.

1.51 Nonetheless, the ALRC does not propose that there should be comprehensive redefinition of native title under the Act. This may exacerbate the uncertainties experienced by all participants and prolong claims resolution. Nor does the ALRC suggest replacement of the current recognition-based process for native title determinations by a statutory land rights model. Instead, the underpinning model of native title and the claims process is retained, while seeking to refocus on the core elements of native title law to facilitate an effective determination process.[41]

1.52 The ALRC's recommendations therefore retain the basis of native title law adopted in *Mabo [No 2]* and then in the *Native Title Act*, but seek to redress some of the most egregious problems of proof. The Law Society of Western Australia submitted that the legislation as originally enacted reflected the beneficial purposes consistent with the decision in *Mabo [No 2]*.[42] In association, the ALRC seeks to secure robust and streamlined authorisation and joinder procedures.

1.53 The challenge for the ALRC was to consider reform in the native title system that advances the recognition and protection of native title in accordance with the *Native Title Act*,[43] while ensuring that reforms support a robust and productive relationship between all participants.

Law reform process

1.54 In undertaking the Inquiry, the ALRC sought evidence as to whether the current native title system is meeting its objectives, whether specified options for reform would improve the operation of the system, and whether alternative reform options should be implemented. In particular, the ALRC sought evidence as to whether the reforms recommended in this Report would: advance the recognition and protection of native title; acknowledge the range of interests in the native title system; encourage timely and just resolution of claims; be consistent with international law; and support sustainable futures.

Community consultation

1.55 Law reform recommendations must be built on an appropriate conceptual framework and a strong evidence base. The *Native Title Act* is Commonwealth legislation that operates across Australia and the ALRC undertook extensive consultation with parties involved in the native title system around the country.

1.56 Under the provisions of the *Australian Law Reform Commission Act 1996* (Cth), the ALRC 'may inform itself in any way it thinks fit' for the purposes of reviewing or considering anything that is the subject of an inquiry.[44] While the process for each law reform reference may differ according to the scope of the inquiry, the complexity of the laws under review, and the timeframe in which the inquiry must be completed, the

41 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 2.
42 Law Society of Western Australia, *Submission 9*.
43 *Native Title Act 1993* (Cth) s 10.
44 *Australian Law Reform Commission Act Cth* (1996) s 38.

ALRC usually works within an established framework, outlined in detail on the ALRC website.[45]

1.57 The Terms of Reference for this Inquiry directed the ALRC to consult with relevant stakeholders. Two consultation documents were produced to facilitate consultations and stakeholder input throughout the Inquiry. An Issues Paper was released on 20 March 2014 and a Discussion Paper on 23 October 2014. The Discussion Paper put forward 24 proposals and 24 questions to assist with the consultation process.

1.58 A major aspect of building the evidence base for law reform is consultation. Widespread community consultation is a hallmark of best practice law reform. Two national rounds of consultation meetings were conducted following the release of each of the consultation documents. This Inquiry has analysed evidence from 162 consultations, including consultations with Commonwealth, state, territory and local governments, departments and agencies; with judges and registrars from the Federal Court of Australia; with Indigenous leaders and traditional owners; with Indigenous organisations, including Native Title Representative Bodies, Native Title Service Providers, Prescribed Bodies Corporate and Land Councils; with industry including peak bodies representing the agriculture, pastoral, fisheries, and minerals and energy resources industries; with the National Native Title Tribunal; and with a number of anthropologists and academics. A full list of consultations is included at the end of the Report.

1.59 The ALRC's consultation process was greatly strengthened by the willingness of Indigenous leaders, traditional owners and Indigenous organisations to offer insights into the native title claims process, informed by their experience in representing Aboriginal and Torres Strait Islander communities across Australia. The perspectives on connection to country and traditional laws and customs that they shared with the ALRC were invaluable in building a greater understanding of native title from the position of those people deeply affected by the *Native Title Act*. The consultations also were important in revealing connection as a dynamic and lived experience for Aboriginal and Torres Strait Islander peoples.

1.60 Evidence has also been obtained from 72 thoughtful submissions. These submissions are publicly available on the ALRC website. The ALRC acknowledges the considerable amount of work involved in preparing submissions which can have a significant impact on organisations with limited resources—the input of several pastoral and fishing industry groups is relevant in this regard. In addition, the ALRC notes that its Inquiry placed yet another request for information and consultation upon already overstretched claimants, native title professionals, and court and tribunal personnel.

1.61 The ALRC also appreciates the insights that were offered into the native title claims process by many current and former members of the Federal Court who generously gave of their time and expertise to the Inquiry. The ALRC acknowledges

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45 ALRC, *Law Reform Process* <http://www.alrc.gov.au/law-reform-process>.

the profound contribution made by judges of the High Court and Federal Court to the development of native title jurisprudence over the 20 years since the *Native Title Act* was enacted.

1.62 The ALRC in this manner substantiated recommendations for reform from the many observations of participants in the system—this is at the heart of this Inquiry. The ALRC is grateful for the contribution of all those who participated in consultations and provided submissions. Evidence on the workings of the native title system has also been obtained from published commentary, from previous reports, reviews and inquiries regarding the native title system.[46]

1.63 The ALRC has closely examined the *Native Title Act* itself, associated regulations, and court judgments. The National Native Title Tribunal and the Federal Court Registrar also provided useful statistical data which is discussed in Chapter 3.

1.64 The recommendations for reform made in this Report have been tested by consulting with the most senior and experienced actors within the system, and seeking their views on the likely outcomes of the proposals made. These recommendations are informed by the views of experts and stakeholders, and are based on an independent assessment of the likely outcomes of those reforms.

Appointed experts

1.65 Specific expertise is also obtained in ALRC inquiries through the establishment of Advisory Committees and the appointment by the Attorney-General of part-time Commissioners. In this Inquiry, the ALRC was able to call upon the expertise of the Hon Justice Nye Perram of the Federal Court of Australia as a part-time Commissioner.

1.66 Members of the Advisory Committee are listed at the beginning of the Report. Three meetings of the Advisory Committee were held in Sydney: on 6 February 2014, 14 August 2014 and 5 February 2015. While the ultimate responsibility in each inquiry remains with the Commissioners of the ALRC, the Advisory Committee assists in the identification of key issues, provides quality assurance in the research and consultation effort, and provides invaluable feedback during the development of reform proposals. The ALRC acknowledges the significant contribution made by the Advisory Committee in this Inquiry and expresses its gratitude to members for voluntarily providing their time and expertise.

Matters outside the Inquiry

1.67 In the course of this Inquiry, stakeholders have raised many issues broader than the Terms of Reference. Many matters concerned policy development for Aboriginal and Torres Strait Islander peoples in the fields of business development, health and welfare and social policy. The importance of simultaneously developing sustainable native title outcomes and policies designed to enhance Aboriginal and Torres Strait Islander peoples' economic opportunities has been highlighted. Stakeholders, and

46 For detail see Ch 3.

many of those consulted, called for the development of native title law to be consistent with other indigenous policy settings. Some stakeholders stressed the need for an integrated approach to reform of the *Native Title Act* and that of cognate legislation.[47]

1.68 Clearly, native title has a bearing on these matters, although many issues generating conflict in the native title sphere are not easily resolved through the legal process. The Terms of Reference, however, focus the Inquiry on the native title claims process under the Act.

1.69 This Inquiry raises matters of great significance and sensitivity for Aboriginal and Torres Strait Islander peoples. It engages questions about laws and customs and the nature of their relationship to traditional lands and waters. It canvasses matters that go to the founding of the Australian nation and the impacts of European settlement.[48] It touches upon the many interrelationships between Aboriginal and Torres Strait Islander peoples and the Australian community.

1.70 These are involved questions around which there is much law, scholarship, commentary and debate. This Inquiry proceeds against the backdrop of those challenges, but the brief in this Inquiry is guided by the Terms of Reference, as well as by the role and function of a law reform commission.

Constitutional recognition

1.71 The overarching political relationship between the Australian nation and Aboriginal and Torres Strait Islander peoples and its future development are beyond the scope of this Inquiry. Native title can contribute, however, to strengthening the place of Aboriginal and Torres Strait Islander peoples within Australian society.

1.72 An important issue is the recognition of Aboriginal and Torres Strait Islander peoples in the Commonwealth Constitution.[49] The ALRC notes the introduction of the *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth)[50] and the process of review and report on constitutional recognition that has been instigated.[51] That procedure is the proper forum in which to address broader questions of political and constitutional recognition.

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47 Jon C Altman, 'Reforming the *Native Title Act*' (Topical Issue 10, Centre for Aboriginal Economic Policy Research ANU, 2011).

48 Western Australian Government, *Submission 20*.

49 Expert Panel on Constitutional Recognition of Indigenous Australians, 'Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel' (Commonwealth of Australia, January 2012) <http://www.recognise.org.au/wp-content/uploads/shared/uploads/assets/3446_FaHCSIA_ICR_report_text_Bookmarked_PDF_12_Jan_v4.pdf>.

50 On 27 March 2014, the Minister for Indigenous Affairs appointed a Review Panel under the *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth) to assess Australia's readiness to support a referendum to recognise Indigenous Australians in the Australian Constitution.

51 As a result of this Act, the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples was established. This committee released a progress report in October 2014 and is expected to have completed its final report on or before 30 June 2015.

Aboriginal and Torres Strait Islander laws and customs

1.73 The ALRC acknowledges that the Inquiry has examined only a narrow slice of the range of issues raised by connection to country for Aboriginal and Torres Strait Islander peoples. The Commission readily accepts that it has not dealt extensively with the content of Aboriginal and Torres Strait Islander peoples' laws and customs, as that knowledge is most appropriately given by Aboriginal and Torres Strait Islander peoples themselves. The Commission does acknowledge the deep significance that traditional laws and customs have for Aboriginal and Torres Strait Islander peoples in constituting connection to traditional land and waters. It is not the role of the ALRC, however, to expound upon that law and custom.

The contribution of other disciplines

1.74 Consultations revealed that the work of many professionals was central to the operation of the native title system and the preparation of 'connection reports'.[52] The reports play an essential role in native title determinations in providing the factual material upon which connection is based and in identifying right people for country.[53] Claimants, of course, bring their own knowledge to those questions.

1.75 The report has not canvassed in depth the contribution that other disciplines bring to connection requirements. It deals briefly with expert evidence in establishing connection requirements. The ALRC acknowledges that other disciplines bring much to the understanding of native title, but has not developed comprehensive recommendations in this field.

Other components of the native title system

1.76 The native title claims process necessarily interacts with other components of the *Native Title Act*.[54] The Report canvasses the interaction of the claims process with other areas, such as the future acts regime, as necessary to an understanding of the relevant law, but not otherwise. This may have the effect of truncating consideration of issues, but is unavoidable given the scope of the Terms of Reference.

Resourcing

1.77 The ALRC heard in consultations, and stakeholders raised in submissions, that effective resourcing for parties and institutions within the native title system is of vital importance to timely and just resolution of native title claims. The ALRC acknowledges that law reform alone cannot achieve long-term practical improvements to the native title system. The ALRC, however, does not make any specific recommendations, but acknowledges the importance to all parties and people involved in the native title system of an adequately-resourced native title claims process.

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52 Paul Burke, *Law's Anthropology: From Ethnography to Expert Testimony in Native Title* (ANU E Press, 2011).

53 AIATSIS, *Submission 36*.

54 Association of Mining and Exploration Companies, *Submission 19*.

The guiding principles for the Inquiry

1.78 In examining what, if any, changes could be made to Commonwealth native title laws and legal frameworks, the Terms of Reference direct the ALRC to be guided by the Preamble and objects of the *Native Title Act*.

Preamble and objects of the Act

1.79 The Preamble lists relevant matters for the Parliament of Australia in enacting the law—as it is the 'moral foundation' for the Act.[55] The Preamble captures the Commonwealth Parliament's intention to

> ensure that Aboriginal peoples and Torres Strait Islanders 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.[56]

1.80 The Preamble also identifies that the intention was for the law to take effect according to its terms and be a special law for the descendants of the original inhabitants of Australia … for securing the adequate advancement and protection of Aboriginal peoples and Torres Strait Islanders.[57]

1.81 The recommendations in this Report are intended to promote an interpretation of native title consistent with the beneficial purpose of the *Native Title Act*. This entails an approach that gives the statute a 'fair, large and liberal' construction.

1.82 The objects of the *Native Title Act* include the provision of measures for the recognition and protection of native title, as well as reinforcing the fundamental schema of native title imported from *Mabo [No 2]*.[58]

1.83 The Law Council of Western Australia noted:

> The NTA as originally enacted was intended to be of a more beneficial kind consistent with the Mabo decision as the preamble suggests, rather than one which facilitates the extinguishment of those rights.[59]

1.84 The ALRC Inquiry also was informed by five guiding principles.

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

1.85 The principle that reform should adhere to the importance of the recognition and protection of native title received support in many submissions.[60] The practical significance of native title is captured by the South Australian Government:

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55 *Sampi v Western Australia* [2005] FCA 777 (10 June 2005) [942].

56 *Native Title Act 1993* (Cth) Preamble.

57 Ibid.

58 Hal Wootten, 'Mabo at Twenty: A Personal Retrospect' in Toni Bauman and Lydia Glick (eds), *The Limits of Change: Mabo and Native Title 20 Years On* (AIATSIS, 2012) 431, 441. The interplay between recognition, extinguishment and protection of native title rights and interests are central to understanding the functional structures within the Act.

59 Law Society of Western Australia, *Submission 9*.

60 Law Council of Australia, *Submission 35*; National Congress of Australia's First Peoples, *Submission 32*; North Queensland Land Council, *Submission 17*; Minerals Council of Australia, *Submission 8*; Association of Mining and Exploration Companies Inc, Submission to the Australian Attorney-General's Department, Review of the *Native Title Act 1993*—Draft Terms of Reference, 2013.

> Recognition of native title is significant for the individual native title holders, the native title holding body and the broader Australian community. It will usually also give rise to an entitlement to compensation for some past extinguishment, to exclusive rights in some areas, and to statutory procedural rights, including the 'right to negotiate'.[61]

1.86 Some stakeholders commented that 'recognition' is no longer a barrier to achieving outcomes under the Act.[62] The Chamber of Minerals and Energy of Western Australian questioned the assumption that 'the system established under the NTA for the recognition of native title has somehow failed or is "unduly limiting"'.[63]

1.87 By contrast, there may be very practical constraints introduced by a requirement that laws and customs constituting connection should be substantially uninterrupted. As Warren Mundine, Chair of the Prime Minister's Indigenous Advisory Council, said:

> The requirement of a continuous connection with the land can discourage Indigenous people from moving away from their traditional lands (for example to obtain work) for fear this will prejudice their native title rights.[64]

Principle 2: Acknowledging interests in the native title system

1.88 The ALRC considers that reform should acknowledge the range of interests in achieving native title determinations that support relationships between stakeholders.[65] It is inherent in the nature of native title rights and interests in land and waters that a claim will interact with many other interests.[66]

1.89 This guiding principle also allowed consideration of a wider range of groups—Aboriginal and Torres Strait Islander communities, governments at all levels, the courts, industry and commerce, and community organisations that may be involved in the native title system.

1.90 The interests involved in any native title determination can include overlapping claims or disputed claims by Aboriginal or Torres Strait Islander peoples. Particular issues of access to justice arise for native title claimants and potential claimants.

1.91 'Co-existence' captures the idea that there are complex interrelationships between native title holders and the wider community.[67] Agreement-making has built relationships between all stakeholders in the native title system.[68] Relevant industry

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61 South Australian Government, *Submission 34*.
62 Ibid.
63 Chamber of Minerals and Energy of Western Australia, *Submission 21*.
64 Warren Mundine, 'Australia Day Address' (2014).
65 Chief Justice Robert French, 'Native Title—A Constitutional Shift?' (Speech Delivered at the JD Lecture Series, The University of Melbourne, 24 March 2009).
66 *Native Title Act 1993* (Cth) s 225.
67 Aden Ridgeway, 'Addressing the Economic Exclusion of Indigenous Australians through Native Title' (2005) 2.
68 See, eg, the views expressed by pastoralists, 'that more than any other respondents in the Federal Court, they have to live the longest with outcomes of native title determinations': Pastoralists and Graziers Association, *Submission 3*. The Western Australian government noted the need for 'ensuring consistency and compatibility with the development of Australia's unique political and legal history, including its history of European settlement.

groups acknowledged the importance of fostering relationships. Telstra noted that, at the date of its submission, it was a party to almost 200 native title claims:

> Telstra participates in a high volume of native title claim applications made under the NTA and considered by the Federal Court of Australia. Telstra's participation is as a respondent party who has rights and interests in the area of the claim that may be affected by a determination of native title. Telstra participates to protect its rights and not in opposition to or in defence of the claim.[69]

1.92 It would be unrealistic, however, to expect that all conflict has been resolved since the *Native Title Act* was enacted.[70] Further, the objectives of stakeholders within the native title system are not necessarily congruent.[71] As the Association of Mineral Exploration Companies stated:

> The NTA is of course concerned with more than simply the recognition and protection of native title. It is in effect a compromise between the recognition and protection of native title rights and interests and the provision of certainty to the wider community, which holds or may seek to acquire or exercise non-native title rights.[72]

1.93 The ALRC notes that acknowledging all interests within the native title system will require balance and proportionate responses. The *Native Title Act* is to give precedence to conciliation and negotiation of native title determinations where possible.[73] Chapter 3 outlines the growing emphasis upon consent determination and settlements.

Principle 3: Timely and just resolution

1.94 The ALRC considers that reform should promote timely and practical outcomes for parties to a native title determination through effective claims resolution. These concerns must be balanced by attention to the integrity of the processes and outcomes. There was general stakeholder support for this principle, although AIATSIS noted:

> 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'.[74]

1.95 Promoting the timely and effective resolution of native title claims was relevant to many stakeholders in the system.[75]

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69 Telstra, *Submission 4*.

70 Tim Rowse, 'How We Got a *Native Title Act*' (1993) 65 *The Australian Quarterly* 110, 131.

71 AMEC notes that the Preamble to the *Native Title Act* recognises 'the needs of the broader Australian community require certainty': Association of Mining and Exploration Companies, *Submission 19*.

72 Association of Mining and Exploration Companies, *Submission 19*.

73 *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595, [18]; *Native Title Act 1993* (Cth) Preamble.

74 AIATSIS, *Submission 36*.

75 Telstra, *Submission 4*; Minerals Council of Australia, *Submission 8*; National Farmers' Federation, *Submission 14*; National Native Title Council, *Submission 16*.

1.96 The North Queensland Land Council directed attention to building capacity for all parties to successfully engage.[76] Adherence to international best practice built on human rights standards for negotiation and consultation was identified as another important factor.[77] The balance between timely and practical outcomes, and procedural and substantive integrity, assumes particular significance as native title moves into the 'next phase'. Attention is shifting to governance of native title.[78] The Australian Human Rights Commission explained:

> The Commission also considers it appropriate that any suggested amendments that relate to benefits obtained from either determinations of native title or Indigenous Land Use Agreements (ILUAs), also take into consideration the need to build good governance capacity within the native title system. This is particularly important to enable PBCs to manage native title benefits into the future.[79]

Principle 4: Consistency with international law

1.97 The ALRC considers reform to the *Native Title Act* should reflect Australia's international obligations in respect of Aboriginal peoples and Torres Strait Islanders and have regard to the standards in the *United Nations Declaration on the Rights of Indigenous Peoples*.

1.98 The National Congress of Australia's First Peoples supported the view that ALRC recommendations should be consistent with Australia's international obligations, while stating:

> we are cognisant that despite repeated calls from UN treaty bodies for the Act to be amended to reduce the high evidentiary requirements that prevent many Aboriginal and Torres Strait Islander Peoples from regaining control of their traditional lands, successive Australian governments have failed to move beyond piecemeal amendments.[80]

1.99 The National Congress also called for the *Native Title Act* to comply with 'the international human rights obligations of Australia, acknowledge the Declaration and insert a requirement to have regard to specific principles embodied in the Declaration into the objects of the Act'.[81]

1.100 Within Australia, the Aboriginal and Torres Strait Islander Social Justice Commissioner has advocated a 'principled approach' to implementing the Declaration.[82] Chapter 2 provides a more detailed discussion of international law relevant to native title.

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76 North Queensland Land Council, *Submission 17*.
77 S Bielefeld, *Submission 6*.
78 Valerie Cooms, *Governance, Community Control and Native Title* (Paper presented at the AIATSIS Native Title Conference, Coffs Harbour, 1–3 June 2005).
79 Australian Human Rights Commission, *Submission 1*.
80 National Congress of Australia's First Peoples, *Submission 32*; see also National Native Title Council, *Submission 16*.
81 National Congress of Australia's First Peoples, *Submission 32*.
82 Aboriginal and Torres Strait Islander Social Justice Commissioner, above n 13, 93.

1.101 Standards, such as free, prior and informed consent, have important practical ramifications for how native title will interact with the Australian community. As Bryan Wyatt notes:

> Success on projects, or at least a smooth process from inception to conclusion, depends for a large part on how you build relationships with people along the way. It is critical that you engage Aboriginal people early in the piece. People are keen to be involved—they are very determined to protect their country and sacred sites, but they do not want to stifle development. People want to participate—it's as simple as that.[83]

Principle 5: Supporting sustainable futures

1.102 The ALRC considers reform should promote sustainable, long-term social, economic and cultural development for Aboriginal and Torres Strait Islander peoples.

1.103 Many submissions supported this principle.[84] Some caveats were raised about the capacity of the *Native Title Act*, in itself, to deliver effective social, economic and cultural development.[85] Other submissions emphasised the need for economic development to occur in a culturally appropriate way:

> The Aboriginal and Torres Strait Islander Social Justice Commissioner encourages that outcomes sought be measurable, highlighting the critical importance of economic development occurring in a way that supports and respects Aboriginal and Torres Strait Islander peoples' culture and identity.[86]

1.104 Submissions emphasised that 'recognition and protection of native title under the NTA is a starting point but not a complete answer to the social and economic issues which may face native title holders'.[87]

1.105 Several submissions identified wide variation in native title outcomes.[88] The Kimberley Land Council noted that the *Native Title Act* 'is not a panacea for all of the wrongs of dispossession and colonisation, but is one important device in addressing these wrongs'.[89]

1.106 The need for a longer-term perspective was stressed with calls for more attention to be paid to mechanisms by which native title groups can sustainably and effectively manage their determined native title rights and interests.[90]

1.107 There are expectations that native title can achieve effective economic and cultural outcomes for Aboriginal and Torres Strait Islander peoples in coming years.[91] The identification of native title with sustainable future outcomes suggests that critical

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83 Brian Wyatt, *National Planning Congress*, (Speech Delivered to the Planning Institute Australia, Canberra, 25 March 2013) as quoted in E Wensing, *Submission 13*.

84 See, eg, AIATSIS, *Submission 36*; J Altman, *Submission 27*; Native Title Services Victoria, *Submission 18*.

85 AIATSIS, *Submission 36*; North Queensland Land Council, *Submission 17*.

86 AIATSIS, *Submission 36*.

87 Northern Territory Government, *Submission 31*.

88 Ibid; Western Australian Government, *Submission 20*; North Queensland Land Council, *Submission 17*.

89 Kimberley Land Council, *Submission 30*.

90 A Frith and M Tehan, *Submission 12*.

91 Deloitte Access Economics, 'Review of the Roles and Functions of Native Title Organisations' (Australian Government, March 2014) 3.

components, such as the underpinning rights and governance structures, will be important for long-term development for Aboriginal and Torres Strait Islander peoples.[92]

Structure of the Report

Framework for Review: Historical and International Perspectives

1.108 Chapter 2 places the development of native title law in an historical context to provide an understanding of how difficulties with proof of native title evolved. It discusses recognition of native title in *Mabo [No 2]* and the *Native Title Act*, before considering how international law is relevant to native title.

Context for Reform

1.109 The operation of the native title system is affected by pre-existing land rights regimes and the differential impacts of colonisation and dispossession. Native title is not the only path to land justice, and Chapter 3 considers the role of the Land Account and the Indigenous Land Corporation, social justice responses and alternative settlements. The prevalence of consent determinations, and the increasing number of determinations since 2011 are positive trends, but concerns about cost and delay persist. Efficiency is important but just and sustainable outcomes may take time to achieve.

Defining Native Title

1.110 Chapter 4 sets out the legal requirements to establish native title rights and interests commonly referred to as 'connection requirements'. It outlines the definition of native title in s 223 of the *Native Title Act*, sets out major judicial statements on its interpretation, and provides an overview of the ALRC's recommendations for reform of connection requirements.

Traditional Laws and Customs

1.111 Chapter 5 discusses the requirements of s 223 of the *Native Title Act* in more detail, focusing on the requirement to establish that native title rights are possessed under the 'traditional laws acknowledged and traditional customs observed' by the relevant Aboriginal peoples or Torres Strait Islanders. This chapter outlines how this requirement has been interpreted, focusing on the approach taken to the meaning of acknowledgment and observance of traditional laws and customs. The ALRC makes five key recommendations for reform of this aspect of the definition.

Connection with the Land or Waters

1.112 Chapter 6 discusses how connection to land and waters is proved and whether physical occupation or continued and recent use is required as part of that proof. The ALRC makes two recommendations in this area. The chapter examines the feasibility of reframing connection to better accord with Indigenous peoples' views. The chapter

92 Valerie Cooms, *Governance, Community Control and Native Title* (Paper Presented at the AIATSIS Native Title Conference, Coffs Harbour, 1–3 June 2005).

discusses whether there should be 'empowerment of courts to disregard substantial interruption or change in continuity of acknowledgment of traditional laws and customs'. This is assessed with questions regarding the revitalisation of traditional law and custom. The ALRC examines whether the reasons for displacement of Aboriginal or Torres Strait Islander peoples should be considered. The ALRC concludes that direct legislative amendment of the definition in s 223 better addresses this issue.

Proof and Evidence

1.113 Chapter 7 considers matters relating to the proof and evidence for native title. Central to this examination is whether there should be a presumption of continuity of acknowledgment and observance of traditional laws and customs and connection. The ALRC considers that it is not necessary to introduce such a presumption in light of its recommendations to amend the definition of native title in s 223 of the *Native Title Act*. However, the ALRC does recommend that there be guidance in the Act regarding when inferences may be drawn in the proof of native title rights and interests.

The Nature and Content of Native Title

1.114 Chapter 8 discusses whether the *Native Title Act* should be clarified to provide that native title rights and interests 'can include rights and interests of a commercial nature'. It sets out the nature and content of native title rights and interests before discussing the recommendations about 'commercial native title'. Other sections examine whether 'commercial purposes' and 'trading' should be defined and if other types of interests, such as cultural knowledge, may constitute a native title right or interest.

Native Title: Comparisons with Common Law Jurisdictions

1.115 Sound law reform is enhanced by a consideration of comparable law as it operates in other common law countries. Chapter 9 provides an overview of legal frameworks and jurisprudence in Canada and New Zealand in relation to Indigenous peoples' rights to land and waters.

Authorisation

1.116 Chapter 10 concerns the authorisation process within the native title system. The *Native Title Act* requires a group making an application for a native title determination, or for compensation for extinguishment or impairment of native title, to authorise an applicant. The authorisation provisions of the *Native Title Act* are intended to ensure that the application is made with the consent of the claim group. The recommendations in this chapter are intended to support claim groups as they develop their own governance structures, work within the requirements of Australian law and negotiate with third parties.

Parties and Joinder

1.117 Chapter 11 discusses party and joinder provisions under s 84 of the *Native Title Act*. These provisions specify who is a party to native title proceedings, who may join native title proceedings, in what circumstances they may join, and when they may be

dismissed. The party and joinder provisions ensure that persons with interests affected by a native title determination are adequately represented in native title proceedings.

Promoting Claims Resolution

1.118 Chapter 12 considers the processes involved in native title claims resolution. It looks at the role of the Crown in native title applications; the use of expert evidence in native title proceedings; handling information generated as connection evidence; specialist training schemes; and the native title application inquiry process.

2. Framework for Review: Historical and International Perspectives

Contents

Summary

2.1 The Terms of Reference ask the ALRC to examine the 'connection requirements, relating to the recognition and scope of native title'. In that context, this chapter outlines a framework for review of the relevant provisions of the *Native Title Act 1993* (Cth) ('*Native Title Act*').

2.2 This chapter first places native title law in Australia in an historical context by reference to the derivation of native title in common law jurisprudence. It canvasses the factors leading to the recognition of native title in *Mabo v Queensland [No 2]* ('*Mabo*

[No 2]').[1] The second section discusses the *Native Title Act* and the subsequent interpretation of s 223 of the Act.

2.3 The ALRC considers that the 'laws and customs' model for defining native title fulfils the important function of recognising native title, but it contributes to a complex legal test for connection in the *Native Title Act* that calls for considered reform. Statutory construction of s 223 of the *Native Title Act* has expanded the requirements for proof of native title.[2]

2.4 The ALRC's recommendations retain the framework of native title derived from *Mabo [No 2]* but address entrenched difficulties in the proof of native title. The recommendations are directed to a specific range of connection requirements to better accord with the Preamble and guiding objectives of the *Native Title Act.*

2.5 The recommendations deal with a central problem that faces the native title claims system—how to allow for traditional laws and customs to evolve in response to circumstances brought about by European settlement, while ensuring that the pre-sovereign origins of laws and customs are retained. This problem is reflected in the dissenting judgment of Black CJ in the Full Federal Court in *Yorta Yorta*:

> native title will no longer exist once its foundation has disappeared by reason of the disappearance of any real acknowledgment of traditional law and real observance of traditional customs. Where such circumstances exist, the claimed rights and interests will no longer be possessed under what are truly 'traditional' laws acknowledged and customs observed.
>
> It is wrong, however, to see 'traditional' as, of its nature, a concept concerned with what is dead, frozen or otherwise incapable of change.[3]

2.6 The ALRC acknowledges, however, that rigorous testing of connection requirements is important to secure transparency for governments and third parties, to ensure the integrity of the claims system and to facilitate identification of the appropriate members of a claim group.

Recognition as the foundation for native title

2.7 This chapter traces the development of legal principles which have shaped the 'connection requirements' for determining native title and outlines implications for the proof of native title. [4]

2.8 Recognition of native title holds great significance for Aboriginal peoples and Torres Strait Islanders, as reflected in the Preamble and objects of the *Native Title Act*.

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1 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 58.
2 A more complete analysis is in Chs 4–7.
3 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2001) 110 FCR [34]–[35] (Black CJ).
4 Paul Burke notes that 'some of the problems underlying the specific questions of the inquiry stem back to fundamental choices in the judicial formulation of the legal doctrine of native title': P Burke, *Submission 33*.

2.9 The concept can be thought of as

> the metaphorical result of applying rules whereby rights and interests are defined at common law as having vested, at the time of annexation, in the members of an Aboriginal society by reason of its traditional laws and customs and the way in which they define its relationship to land and waters. It is not a 'mere' metaphor. Its choice reflects a desire to give effect legally to the human reality involved in the ordinary meaning of 'recognition'.[5]

2.10 Submissions to the Inquiry emphasised that *Mabo [No 2]* has been accepted as a principled platform for dealing with historical injustice drawing upon international law.[6] The 'recognition' model for proof of native title adopted from *Mabo [No 2]* however entails particular constraints.[7] Basically, these arise from two sources. First, inherent constraints arise from a recognition and continuity model that emphasises a traditional laws and customs framework for proving pre-existing native title rights and interests. These difficulties are increased as the system of recognition of rights and interests under the *Native Title Act* has been implemented many years after European settlement.

2.11 Secondly, and building on this model, is the construction of the definition of native title under the Act, in a manner which has added or amplified requirements such as 'traditional', 'continuity' and 'society' (see Chapters 4–7) and contributed to increasing specificity in the scope of the native title rights and interests that are recognised (Chapter 8). Under the ALRC's recommended reforms, the central function of recognition is retained to ensure that the basis of native title is maintained. Recognition may be thought of as lying

> at the heart of the common law of native title and the Act … It is embedded in a matrix of rules defining the circumstances in which recognition will be accorded to native title rights and interests and those in which it will be withheld or withdrawn. The idea of recognition operates in a realm of legal discourse. It may be seen as a kind of translation of aspects of an indigenous society's relationship to land and waters into a set of rights and interests which exist under non-indigenous laws.[8]

2.12 Recognition of native title also remains significant, as the common law 'will, by the ordinary processes of law and equity, give remedies in support of the relevant rights and interests to those who hold them'.[9] The *Native Title Act* is the mechanism for the recognition and protection of native title.[10]

Native title in its historical context

2.13 *Mabo [No 2]* and the introduction of the *Native Title Act* cannot be understood in isolation.[11] The decision was framed against British Imperial law, Australia's prior

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5 *Sampi v Western Australia* [2005] FCA 777 (10 June 2005) [948].
6 V Marshall, *Submission 11*; Law Society of Western Australia, *Submission 9*; S Bielefeld, *Submission 6*.
7 Simon Young, *Trouble with Tradition: Native Title and Cultural Change* (Federation Press, 2008) 234–247.
8 *Sampi v Western Australia* [2005] FCA 777 (10 June 2005) [948].
9 *Commonwealth v Yarmirr* (2001) 208 CLR 1, [42].
10 *Native Title Act 1993* (Cth) s 11.
11 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

designation as a 'settled' colony, and the 200 years of European settlement. The decision occurred in the context of a reassessment of the position of Aboriginal and Torres Strait Islander peoples within Australian society, increased momentum towards recognition of indigenous rights in common law countries and developing human rights standards in international law.[12]

2.14 Over time in Australia, there has been significant change in attitudes towards the acknowledgement of the laws and customs of Aboriginal and Torres Strait Islander peoples.[13] In 1986, the ALRC Report on the *Recognition of Aboriginal Customary Laws* noted:

> Indeed, so far as the recognition of Aboriginal culture and traditions is concerned it is possible to discern something of a cyclical process, with periods of tolerance, 'protection' or even qualified approval interspersed with periods of rejection when attempts were made to eradicate traditional ways and to 'assimilate' Aborigines, in the sense of absorbing them and denying them any separate identity.[14]

2.15 The 1986 Report did not make recommendations for the recognition of Indigenous peoples' rights to land and waters. However, it was influential in terms of its reassessment of Aboriginal laws and customs.[15] The Report also noted:

> British settlers who came into contact with the Australian Aborigines came into contact with a people having their own well-developed structures, traditions and laws … In particular, it can be said that mechanisms for the maintenance of order and resolution of disputes, that is, a system of law, existed within Aboriginal groups.[16]

British Imperial law and the doctrine of continuity

2.16 The framework of native title law, based on 'recognition' and 'continuity' of laws and customs, has its origins in earlier legal rules about what occurred upon the acquisition of a colony. According to *Mabo [No 2]* the rights and interests that constitute native title have their origins in those rights and interests acknowledged under traditional laws and customs which pre-existed British sovereignty.[17] Native title, though recognised by the common law, is not an institution of the common law.[18]

2.17 The principle that pre-existing rights can be recognised under a new sovereign therefore pre-dates the decision in *Mabo [No 2]*. It was not uncommon in the British

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12 'Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports': Ibid 42 (Brennan J).

13 See generally Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (1986) Ch 3.

14 Ibid [21].

15 Young, above n 7, 231.

16 Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (1986) 32.

17 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 53.

18 Ibid 59.

Empire for sovereignty to be acquired over territories with existing populations, laws and property rights. The rules for determining which rights would be recognised under the new sovereign were a matter for British Imperial law. In part, the rules depended on the distinction between settled and conquered (ceded) colonies. There are parallel concepts in international law.[19] The original common law rules did not consider the indigenous inhabitants of British possessions,[20] but were subsequently adapted to that purpose.

2.18 In colonies acquired by conquest or cession, local laws remained intact, unless found to be repugnant to the common law (*malum in se*).[21] At the time of the acquisition of New South Wales, the rule for conquered colonies was that local laws remained in place until abrogated or modified by prerogative.[22] A rider against repugnant laws remained.[23] The rules included the presumption that pre-existing property rights were to be respected by the conquering sovereign (doctrine of continuity).[24]

2.19 In a 'settled' or 'desert and uninhabited' colony, the laws of England, if not inconsistent with local circumstances, were imported on acquisition of sovereignty.[25] The doctrine of continuity was thought not to pertain to settled colonies: logically, if there were no local laws then there were no rights of property to respect. The distinction between settled and conquered colonies was of significance in *Milirrpum v Nabalco* ('*Milirrpum*')[26] and *Mabo [No 2]*.

2.20 While much modern discourse assumes that New South Wales was *terra nullius* and a settled colony, it is not clear to what extent the British Colonial Office averted specifically to the status of the colony,[27] or determined it was 'desert and uninhabited'.[28] The settled colony designation is traced to the 1880s Privy Council

19 For why common law rather than international law applied, see Ulla Secher, *Aboriginal Customary Law: A Source of Common Law Title to Land* (Hart Publishing, 2014) 96. The concept of *terra nullius* referred to land that is uninhabited for legal purposes ie 'un-owned' in a legal sense. With respect to Australia, it is the common law rules which govern.

20 PG McHugh, 'The Common Law Status of Colonies and Aboriginal "Rights": How Lawyers and Historians Treat the Past' (1998) 61 *Saskatchewan Law Review* 393, 402.

21 The original rule distinguished Christian rulers, where the laws were to remain in force until altered by the British Crown, but in a country ruled by an 'infidel' all laws were abrogated immediately: *Calvin's Case ('the Post-Nati')* (1608) 7 Co Rep 1a, 17b [77 ER 377, 398].

22 *Campbell v Hall* (1774) 1 Cowp 208 [98 ER 1047].

23 Charles Clark, *A Summary of Colonial Laws* (1834); *Mostyn v Fabrigas* (1774) 1 Cowp. 161.

24 For discussion of the doctrine of continuity see Secher, above n 19, 98–100.

25 For more recent cases, see *Mabo v Queensland [No 2]* (1992) 175 CLR 1; *Ngati Apa v Attorney-General* [2003] 3 NZLR 643; *Paki v Attorney-General* [2014] NZSC 118.

26 *Milirrpum v Nabalco* (1971) 17 FLR 141.

27 Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia*, 1788–1836 (Harvard University Press, 2010).

28 The Colonial Office believed Aboriginal Australians were not numerous. Governor Phillip's instructions were to 'conciliate' with the natives, but otherwise made no provision for them. Ford, above n 27, ch 2.

case, *Cooper v Stuart*.[29] Earlier, in 1847, *Attorney-General v Brown* had held that upon settlement, title to the waste lands of the colony vested in the Crown.[30]

2.21 While early decisions did refer to the distinction between settled and conquered colonies, judges were aware that the distinction pertained to colonists, not to the indigenous inhabitants. Early colonial case law in Australia did not consider indigenous interests in land. Rather, the courts examined whether common law applied to Aboriginal peoples, specifically criminal law, although approaches varied.[31]

2.22 In 1836 in *R v Murrell*, Burton J held that

> although it be granted that the aboriginal natives of New Holland are entitled to be regarded by Civilized nations as a free and independent people, and are entitled to the possession of those rights which as such are valuable to them, yet the various tribes had not attained at the first settlement of the English people amongst them to such a position in point of numbers and civilization, and to such a form of Government and laws, as to be entitled to be recognized as so many sovereign states governed by laws of their own.[32]

2.23 In effect, Burton J applied principles similar to the 'enlarged theory of *terra nullius*', applied by Brennan J in *Mabo [No 2]*. Aboriginal people were understood factually to have been present at sovereignty in Australia, but their social systems and governance were not recognised by British law—it was, in this sense only, 'desert and uninhabited'. By the 1860s, it was increasingly accepted that Aborigines were to be treated as British subjects. Thereafter, only common law would apply to govern Indigenous peoples within Australia.

2.24 The ALRC's 1986 report *Recognition of Aboriginal Customary Laws* noted 'this [ie one unitary system of law], and other governmental policies applied since 1788 at the national, state and local levels, have had a drastic impact on Aboriginal customs and culture'.[33] The recognition of indigenous claims to land did not receive judicial consideration until 1971.

2.25 From this overview, it is apparent that the legal question of whether the pre-existing rights of Australia's Indigenous peoples 'continued', and could be recognised, was closely connected to the status of traditional laws and customs. In turn, this issue hinged on the designation of the colony. The focus on traditional laws and customs requiring recognition has continued in the connection requirements under the *Native Title Act*.[34]

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29 *Cooper v Stuart* (1889) 14 App Cas 286, 291. The Privy Council, in obiter, noted New South Wales was, as 'a tract of territory, practically unoccupied, without settled inhabitants or settled land, at the time when it was peacefully annexed to the British dominions'.

30 *Attorney-General v Brown* (1847) 1 Legge 312. For a discussion of the concept of 'waste lands', see *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 26–28 (Brennan J).

31 Bruce Kercher, 'R v Ballard, R v Murrell and R v Bonjon' (1998) 3 *Australian Indigenous Law Reporter* 410.

32 *R v Jack Congo Murrell* (1836) 1 Legge 72.

33 Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [1].

34 See Ch 5.

The first land claim case: Milirrpum v Nabalco

2.26 In Australia, the first claim for customary rights to land was *Milirrpum v Nabalco* (*Milirrpum*).[35] The Yolngu people, in response to bauxite mining on their traditional lands, sought a declaration in the Supreme Court of the Northern Territory that they were entitled to the occupation and enjoyment of their land without interference.[36] Blackburn J held as a matter of fact, that the Yolngu had a

> subtle and elaborate system of social rules and customs which was highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of person whim or influence. If ever a system could be called 'a government of law, and not of men', it is that shown in the evidence before me.[37]

2.27 Blackburn J determined, however, that communal native title was not part of the common law of Australia, as the Court felt bound by *Cooper v Stuart*.[38]

2.28 Further, while finding that there was, as a matter of fact, a system of laws, the Court found the claimants had not shown, on the balance of probability, that their ancestors had the same links to land as the current holders.[39] Some commentators have pointed to a 'converging emphasis on laws and customs' in the pre-*Mabo* period.[40] In case law construing the *Native Title Act*, a similar factual inquiry is framed as to whether 'connection' is established, based on whether acknowledgement of traditional laws and customs has been substantially uninterrupted since pre-sovereignty.[41]

2.29 In *Milirrpum*, Blackburn J also found that 'there is so little resemblance between property, as our law … understands that term, and the claims of the plaintiffs for their clans, that I must hold that these claims are not in the nature of proprietary interests'.[42] The clan failed to show a significant economic relationship with the land.[43] A 'spiritual relationship' was 'well proved',[44] but this relationship was found to be more in the nature of an obligation than of 'ownership'.[45]

2.30 The legal character of native title rights and interests and the relationship between Aboriginal people and Torres Strait Islanders and their traditional lands and waters has continued to reverberate through native title case law. Questions of the

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35 *Milirrpum v Nabalco* (1971) 17 FLR 141.
36 See generally John Hookey, 'The Gove Land Rights Case: A Judicial Dispensation for the Taking of Aboriginal Lands in Australia?' (1972) 5 *Federal Law Review* 85.
37 *Milirrpum v Nabalco* (1971) 17 FLR 141, 267.
38 Ibid 242.
39 *Milirrpum v Nabalco* (1971) 17 FLR 141.
40 See, eg, Young, above n 7, 231.
41 See Ch 6 and 7.
42 *Milirrpum v Nabalco* (1971) 17 FLR 141, 273.
43 Ibid, 270.
44 Ibid, 270.
45 For Blackburn J, the relationship did not display the 'substance' of property: the right to use or enjoy; the right to exclude others and the right to alienate: Ibid, 272.

character of the connection to land and waters were canvassed in detail in *Western Australia v Ward,*[46] and elements have been revisited in *Brown v Western Australia.*[47]

2.31 The exact nature of the connection between native title claimants and the land and waters claimed has continued to be a source of varied jurisprudential characterisation in a native title determination.[48] In turn, whether native title is a *sui generis* right has been widely canvassed in native title case law.[49]

2.32 In *Mabo [No 2]*, for example, Deane and Gaudron JJ stated that 'the preferable approach is … to recognize the inappropriateness of forcing the native title to conform to traditional common law concepts and to accept it as sui generis or unique',[50] whereas Brennan J stated that 'there is no reason why the common law should not recognize novel interests in land which, not depending on Crown grant, are different from common law tenures'.[51]

Statutory land rights

2.33 From the 1970s, attention was directed to securing land rights through legislation.[52] Following *Milirrpum,* Woodward J was appointed to inquire into the possibility of Aboriginal land rights in the Northern Territory.[53] Woodward's report gave rise to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), which established a claims process, predicated upon traditional ownership. The Act was significant as the first extensive land rights scheme in Australia. The influence of *Milirrpum* was apparent in the approach emphasising traditional spiritual attachment to land and the substantial role for anthropological evidence.

2.34 Some states established statutory land rights schemes. Nevertheless, there was resistance to a possible national land rights scheme.[54] Efforts towards a treaty proved inconclusive.[55] Concurrently, the Meriam peoples' claim in *Mabo [No 2]* was making its way through the courts in its 10-year litigation journey.[56]

The recognition and continuity doctrines revisited

2.35 By the time of the Meriam Island peoples' claim for customary rights, a number of clear threads were emerging around the revision of the manner of the recognition of the pre-existing rights of Indigenous peoples. The modern native title doctrine is based

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46 *Western Australia v Ward* (2002) 213 CLR 1. See Ch 7.
47 *Western Australia v Brown* (2014) 306 ALR 168.
48 See further Ch 5.
49 *Commonwealth v Yarmirr* (2001) 208 CLR 1. See further Ch 8.
50 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 89 (Deane and Gaudron JJ).
51 Ibid 49 (Brennan J).
52 Young, above n 7, 15.
53 AE Woodward, *Aboriginal Land Rights Commission: Second Report, April 1974* (AGP, 1975).
54 Maureen Tehan, 'A Hope Disillusioned, an Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the Native Title Act' (2003) 27 *Melbourne University Law Review* 523, 531.
55 For an examination of why no treaty with Indigenous peoples developed in Australia see Sean Brennan, Brenda Gunn and George Williams, 'Sovereignty and Its Relevance to Treaty-Making between Indigenous Peoples and Australian Governments' (2004) 26 *Sydney Law Review* 307, 344.
56 Toni Bauman and Lydia Glick (eds), *The Limits of Change: Mabo and Native Title 20 Years on* (AIATSIS, 2012) Mcintyre 15.

in common law jurisprudence, as well as a body of English customary law.[57] Broadly speaking, it comprised judicial recognition of Indigenous peoples' rights—as a form of communal 'title'—that survived annexation of a colony. [58] Scholarship had confirmed that, in a settled colony, contemporary aboriginal rights were legally cognisable through the principle of continuity without the requirement of an act of recognition by the Crown.[59]

2.36 Concurrently, a re-examination of Indigenous peoples' affairs was gathering momentum within Australia during the late 1970s and 1980s. Pivotal among these developments was the reassessment of the place of Aboriginal laws and customs.[60] The 1986 ALRC Report did not consider customary land rights in any detail but it was influential for later jurisprudence, including *Mabo [No 2]* in providing a 'recognition model' for traditional laws and customs.[61]

The framework: *Mabo [No 2]*

2.37 *Mabo [No 2]* built upon the common law jurisprudence on continuity,[62] pre-*Mabo* precedents[63] and the general attention directed to traditional laws and customs.

2.38 The High Court's decision in *Mabo v Queensland 1988* ('*Mabo [No 1]*')[64] was a necessary precursor to *Mabo [No 2]*. In turn, it relied on developments at international law that had given rise to Commonwealth anti-discrimination laws.[65] After the Meriam Island plaintiffs had lodged their statement of claim, the State of Queensland passed the *Queensland Coast Islands Declaratory Act 1985* (Qld). A majority of High Court justices held that the Queensland Act was inconsistent with s 10 of the *Racial Discrimination Act 1975* (Cth) and by operation of s 109 of the Commonwealth Constitution, thereby invalid.[66] The *Racial Discrimination Act* has continued to have an important role in the protection of native title rights and interests under the *Native Title Act*.

2.39 In *Mabo [No 2]*, the majority of the High Court declared that the pre-existing rights of the plaintiffs survived the annexation of the Meriam Islands by Great Britain.[67] Brennan J held that, although Australia was settled under the doctrine of

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57 Secher, above n 19, 21.
58 For discussion of New Zealand, see PG McHugh, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press), 85.
59 Kent McNeil, *Common Law Aboriginal Title* (Clarendon Press, 1989); cited by Brennan J in *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 39.
60 Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (1986) 86.
61 Young, above n 7, 231.
62 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 55–57.
63 For example, *Milirrpum v Nabalco* (1971) 17 FLR 141; *Walden v Hensler* (1987) 163 CLR 561; *Administration of Papua and New Guinea v Daera Guba* (1973) 130 CLR 353.
64 *Mabo v Queensland [No 1]* (1988) 166 CLR 186.
65 Young, above n 7, 16.
66 *Mabo v Queensland [No 1]* (1988) 166 CLR 186, 214–216.
67 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 75–76 (Brennan J), 115–116 (Deane and Gaudron JJ), 192 (Toohey J). Note that Mason CJ and McHugh J agreed with Brennan J on this point.

terra nullius, it was not 'desert uninhabited' in fact.[68] The notion that Indigenous Australians were 'barbarous' or 'without a settled law' was rejected.[69]

2.40 Brennan J further noted:

> Until recent times, the political power to dispose of land in disregard of native title was exercised so as to expand the radical title of the Crown to absolute ownership but, where that has not occurred, there is no reason to deny the law's protection to the descendants of indigenous citizens who can establish their entitlement to rights and interests which survived the Crown's acquisition of sovereignty.[70]

2.41 The majority in *Mabo [No 2]* thus recognised 'a form of native title which, in cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their law and customs to their traditional lands'.[71] The acquisition of sovereignty did not require that all land vested beneficially in the Crown.[72] Rather, the Crown acquired a radical (or ultimate) title 'burdened' by native title:

> Where a proprietary title capable of recognition by the common law is found to have been possessed by a community in occupation of a territory, there is no reason why that title should not be recognized as a burden on the Crown's radical title when the Crown acquires sovereignty over that territory.[73]

2.42 Brennan J stated that 'a mere change in the sovereignty does not extinguish rights to land'.[74] However, the judgment stressed the co-extensive sovereign power of extinguishment in relation to those pre-existing rights.[75] Toohey J held that the fact of the presence of indigenous inhabitants on acquired land precludes beneficial title in the Crown: 'It is presence amounting to occupancy which is the foundation of the title and which attracts protection, and it is that which must be proved to establish title'.[76] Occupancy as the foundation of native title has not been generally accepted by Australian courts.[77]

2.43 Brennan J held that a clan or group has to continue to acknowledge and observe traditional laws and customs in order that their traditional connection with the land is

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68 For discussion see Gerry Simpson, '*Mabo*, International law, *Terra Nullius* and Stories of Settlement: An Unresolved Jurisprudence' (1993) 19 *Melbourne University Law Review* 195.

69 Accordingly, 'the preferable rule equates the indigenous inhabitants of a settled colony with the inhabitants of a conquered colony in respect of their rights and interests in land': *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

70 Ibid 53.

71 Ibid 15.

72 '[I]f the land were occupied by the indigenous inhabitants and their rights and interests in the land are recognized by the common law, the radical title which is acquired with the acquisition of sovereignty cannot itself be taken to confer an absolute beneficial title to the occupied land': Ibid 48 (Brennan J).

73 Ibid 51.

74 Ibid 57.

75 Ibid 63 (Brennan J); 110 (Deane and Gaudron JJ). See also Melissa Perry and Stephen Lloyd, *Australian Native Title Law* (Lawbook Co, 2003) 14–15.

76 *Mabo v Queensland [No 2]* (1992) 175 CLR 1; Richard Bartlett, 'Common Law Aboriginal Title' 15 *University of Western Australia Law Review* 293.

77 For a discussion of alternative bases see Noel Pearson, 'Land Is Susceptible of Ownership' in Marcia Langton et al (eds), *Honour Among Nations?* (Melbourne University Press, 2004) 83.

substantially maintained.[78] While acknowledging that the proof of such acknowledgement of laws and customs may involve practical constraints, the judgment contained the statement that when 'any real acknowledgment of traditional law and any real observance of traditional customs' has ceased, 'the foundation of native title has disappeared'.[79]

2.44 Sean Brennan, Brenda Gunn and George Williams note:

> *Mabo (No 2)* left the 'settlement' theory for the acquisition of Crown sovereignty undisturbed. But traditional law and custom—an additional source of law in Australia that does not derive from the Crown—was newly recognised as a coherent system. Native title adjudication henceforth would become an 'examination of the way in which two radically different social and legal systems intersect'.[80]

Native title: continuity and proof

2.45 There is an inextricable relationship between the rules of recognition and the rules on proof. Brennan J's judgment as adopted in s 223 of the *Native Title Act* set the initial rules as to what must be proved for a native title determination. In *Sampi*, French J (as he then was) referred to these as the rules of recognition: 'the common law and the Act establish the rules for determining whether native title rights and interests exist under non-indigenous law. These are the rules of recognition'.[81] The rules of recognition determine which of the rights and interests that pre-existed sovereignty will be recognised by the new sovereign. They are the interface between the common law and indigenous laws and customs.

2.46 In *Mabo [No 2]*, Brennan J had indicated that native title 'has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory'.[82] This statement, strongly affirmed in later case law, marks the adoption of the 'laws and customs' approach to 'continuity' in the recognition of native title. As Dr Paul Burke comments,

> the most fundamental choice was to adopt a 'laws and customs' approach in which ideas of 'laws and customs' become universal, cross-cultural means of recognition.[83]

2.47 In *Fejo v Northern Territory*, the High Court stated:

> Native title has its origin in the traditional laws acknowledged and the customs observed by the indigenous people who possess the native title. Native title is neither an institution of the common law nor a form of common law tenure but it is recognised by the common law.[84]

78 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 59.
79 Ibid 60. See also Perry and Lloyd, above n 75, 22–23.
80 Brennan, Gunn and Williams, above n 55, 325.
81 *Sampi v Western Australia* [2005] FCA 777 (10 June 2005), [951].
82 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 58.
83 P Burke, *Submission 33*.
84 *Fejo v Northern Territory* (1998) 195 CLR 96, [46] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

2.48 This was a hybrid model of the doctrine of recognition and continuity.[85] Secher notes that by 'combining aspects of the continuity and recognition doctrines, Brennan J's conclusion on the effect of the change in sovereignty on pre-existing land rights in Australia effectively reconciled these two formerly distinct doctrines and replaced them with a singular doctrine: continuity pro tempore'.[86] The hybrid model meant that English land law did not apply upon sovereignty to the pre-existing rights and thereby placed stronger emphasis on the need to demonstrate continued acknowledgement of laws and customs than the doctrine originally derived from British Imperial law.[87] The doctrine of continuity had originated in the Imperial law context as principles that allowed two legal systems to co-exist, albeit with one system having supremacy. The rules that the existing laws continued until abrogated, had evolved to require positive proof of the factual existence of laws and customs.

> As to proof of native title, there was no presumption of continuance and a requirement was imposed that particular traditional laws and customs must continue to be observed …[88]

2.49 This requirement for factual confirmation of the 'continuity of laws and customs' is embedded in the proof of native title in the *Native Title Act*. Thus, while *Mabo [No 2]* provided an important foundation for recognising native title within Australian law, it set in place a model that was susceptible to introducing particular stringencies with respect to proof. The emphasis on the need for Aboriginal or Torres Strait Islander claimants to provide evidence of the acknowledgment of traditional laws and customs, was to develop into strict requirements for continuity from the pre-sovereign period, and in emphasising 'normativity' in *Yorta Yorta*.[89]

2.50 The jurisprudence also set up an implicit problem of the degree of change or evolution that may be possible in traditional laws and customs. Subsequently, the doctrine of continuity was further reshaped under statutory construction of the *Native Title Act*,[90] which would lead to extensive judicial analysis of what constitutes a substantial interruption to the acknowledgment of law and custom. This reshaping has amplified the requirements for proof of native title. These issues are considered in greater detail in Chapters 4–7.

After the Mabo decision

2.51 The *Mabo [No 2]* decision remains remarkable in that it navigated a path between extremes:

> On the one hand, the implications of sovereignty and the demand for a coherent skeleton of principle in the law prevented a wholesale reappraisal of Australian land

85 Secher, above n 19, 29.
86 Ibid 107. Ch 3 provides an extensive overview of the reception of land law in Australia.
87 Ibid.
88 Richard H Bartlett, *Native Title in Australia* (LexisNexis Butterworths, 3rd ed, 2015) 984.
89 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.
90 Secher, above n 19, 324.

> law. On the other hand, the demands of justice prevented a simple confirmation of the extinguishment of all Indigenous rights to land.[91]

2.52 The decision retained central principles of the Australian land law, resources and property law systems,[92] and the constitutional basis of the Australian nation,[93] while allowing the recognition of Aboriginal and Torres Strait Islander peoples native title rights and interests in lands and waters.

2.53 The Western Australian Government acknowledged its significance in that

> the present concepts of native title derive from *Mabo No 2*, and, in turn, from Australia's unique political and legal history, including its history of European settlement. Any proposed changes to the native title system, especially any changes to s 223(1) of the NTA, must take into account these historical foundations of native title.[94]

2.54 The recognition model drawn from *Mabo [No 2]* and common law jurisprudence but refocused upon traditional laws and customs set the basis for the subsequent development of native title law.[95]

The *Native Title Act*

Negotiating the legislation

2.55 The decision in *Mabo [No 2]* was followed by proposed Australian Government legislation.[96] The High Court's decision was seen by the government of the day as 'a practical building block of change' and the 'basis of a new relationship'.[97] A draft Commonwealth report proposed a statutory framework for native title, with a specialist statutory tribunal to adjudicate claims and the negotiation of settlements.[98] There was a period of intense negotiations between all stakeholders and the Commonwealth government, with various compromises reached.[99]

2.56 Australia's federal system of government has played an important role in the evolution of the law and the institutions under the *Native Title Act*.[100] The Act reflected the need to balance Aboriginal and Torres Strait Islander interests, the proposals for

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91 Alex Reilly, 'From a Jurisprudence of Regret to a Regrettable Jurisprudence: Shaping Native Title from Mabo to Ward' (2002) 9 *E Law Journal: Murdoch University* [21].

92 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 29.

93 See Brennan, Gunn and Williams, above n 55, 314.

94 Western Australian Government, *Submission 20*.

95 Young, above n 7, 234.

96 Maureen Tehan, 'A Hope Disillusioned, an Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the Native Title Act' (2003) 27 *Melbourne University Law Review* 523, 538.

97 The Hon Paul Keating, 'Speech by the Honourable Prime Minister, PJ Keating MP, Australian Launch of the International Year of the World's Indigenous Peoples, Redfern, 10 December 1992' (1993) 3 *Aboriginal Law Bulletin* 4.

98 'Mabo: The High Court Decision on Native Title' (Commonwealth of Australia, Inter-departmental Committee, June 1993). A series of financial measures, such as a justice and economic development package were also proposed in this report.

99 Bauman and Glick, above n 56, chs 7–11.

100 For an outline of the various positions see Tehan, above n 54; Sean Brennan, 'Native Title in the High Court of Australia a Decade after Mabo' (2003) 14 *Public Law Review* 209.

significant state involvement in the processes under the Act, and industry concerns for 'certainty'—all within the overarching Commonwealth framework.[101]

Overview of the Act

2.57 The legislation was seen as an opportunity 'to do justice to the Mabo decision in protecting native title and to ensure workable, certain, land management'.[102] It was, 'enacted against the fabric of the common law'.[103] The *Native Title Act* was passed in late 1993.[104] Broadly, it did four things:

- it validated past grants and legislation to give full effect to Crown grants made before 1 January 1994 or legislation passed before 1 July 1993;
- it enacted a 'future acts regime';
- it gave effect to state and territory jurisdiction; and
- it vested powers to determine native title in the Federal Court and the new National Native Title Tribunal.[105]

2.58 The *Native Title Act* operates within Australia's federal system of government with divided, but at times overlapping, spheres of legislative powers and executive responsibilities between the Commonwealth and state and territory governments.[106] The powers to grant interests of land in the tenure-based system of land law rest with state governments, as the inheritors of the colonial land law structures.[107] In conjunction, state and territory governments have extensive land management, environmental protection, infrastructure provision, land use planning and other responsibilities that interface with native title rights and interests.[108]

2.59 The *Native Title Act* is a valid exercise of the Commonwealth's legislative power pursuant to s 51(xxvi) of the *Constitution.*[109] As valid Commonwealth legislation, pursuant to s 109 of the *Constitution*, it is binding upon the states and territories.[110]

2.60 In 1998 the Act was significantly amended under the 'Wik 10 point plan' that, among other amendments, extended the validation and confirmation regime.[111] Amendments removed the power to make determinations of native title from the

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101 Tehan, above n 54.
102 Commonwealth, *Parliamentary Debates*, House of Representatives, 16 November 1993, 2878 (Paul Keating).
103 Perry and Lloyd, above n 75, 3.
104 For an outline of the various positions see Tehan, above n 54; Brennan, above n 100.
105 *Native Title Act 1993* (Cth) Preamble.
106 Richard H Bartlett, *Native Title in Australia* (Butterworths, 2nd ed, 2004) 88.
107 *Walker v State of South Australia (No 2)* [2013] FCA 700 (19 July 2013) [29].
108 See, eg, Lisa Strelein, *Dialogue About Land Justice: Papers from the National Native Title Conference* (Aboriginal Studies Press, 2010).
109 The relevant power operates in respect of 'the people of any race for whom it is deemed necessary to make special laws' *Commonwealth of Australia Constitution Act* (Cth) s 51 (xxvi).
110 *Western Australia v Commonwealth* (1995) 183 CLR 373, [79].
111 *Native Title Amendment Act 1998* (Cth).

National Native Title Tribunal to the Federal Court.[112] Minor amendments were made to the definition of native title, relating to statutory access rights.[113] Section 225, which outlines matters that must be included in a determination of native title, was amended to require additional precision as to both the holders of the native title and the nature and extent of that native title.

Construing s 223 of the *Native Title Act*

2.61 The definition of native title in s 223 of the *Native Title Act* was not intended to codify common law,[114] but the foundation of the provision was the decision of Brennan J in *Mabo [No 2]*.[115] The High Court later emphasised that a claim for native title is made under the *Native Title Act* for rights and interests defined under the Act. A determination of native title must be made in accordance with the requirements of s 225.[116] In *Yarmirr*, the High Court stated that subsections 223(1)(a) and (b) of the Act must establish that the rights and interests 'do in fact exist'.[117]

2.62 The *Native Title Act* provides the framework in which the facts in the other normative system—Aboriginal and Torres Strait Islander law and custom—must be proved. At the heart of proof in native title, there is a complex, cross-system translation occurring between the legal rules in the legislation that set the 'test' and the facts in the Aboriginal and Torres Strait Islander 'system' that must form the evidence to satisfy that test for recognition. Recognition is now an element of the statutory definition of s 223(1).[118]

2.63 In 2002, French J, writing extra-curially, suggested that the case law of the time, 'foreshadow[ed] limited development of the common law'.[119] Debate remains as to whether the earlier common law centred on *Mabo [No 2]* has been superseded by statutory construction—as well as the consistency of statutory construction with the intent evidenced in the Preamble of the Act. The precise relationship between the interpretation of a statutory provision and the common law may often remain ambiguous. Francis Bennion has stated:

> The common law system of statutory interpretation is not just going by the words alone (literal interpretation) or applying rules of thumb … but something much more difficult and pluralistic.[120]

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112 See *Brandy v Human Rights & Equal Opportunity Commission* (1995) 183 CLR 245.

113 *Native Title Act 1993* (Cth) ss 223(3) and 223(3A).

114 Commonwealth, *Parliamentary Debates*, House of Representatives, 16 November 1993, 2879 (Paul Keating).

115 *Western Australia v Ward* (2002) 213 CLR 1, [16] (Gleeson CJ, Guadron, Gummow and Hayne JJ).

116 Ibid. See also *Western Australia v Commonwealth* (1995) 183 CLR 373; *Fejo v Northern Territory* (1998) 195 CLR 96; *Commonwealth v Yarmirr* (2001) 208 CLR 1.

117 *Commonwealth v Yarmirr* (2001) 208 CLR 1.

118 Ibid; *Western Australia v Ward* (2002) 213 CLR 1; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

119 Justice Robert French, 'Western Australia v Ward: Devils and Angels in the Detail' (Paper Presented at the Native Title Conference 2002, Geraldton).

120 Francis Bennion, 'The Global Method: Statutory Interpretation in the Common Law World' (2000) 82 *Commonwealth Legal Education Association Newsletter* 30, 33.

2.64 The task of construing 'connection' in the *Native Title Act* therefore is a complex one. Gageler J, writing extra-curially, contends that the current approach in Australia to statutory construction is one of 'literal in total context'.[121] This accords to the view that 'connection in this context extends beyond the specific question of connection addressed in s 223(1)(b) and encompasses the whole matter of proving native title rights and interests'.[122]

2.65 The ALRC considers that adopting the literal wording of s 223 of the *Native Title Act* as the starting point for construing native title is important. In turn, the ALRC considers that there remains a role for construing the statute against the 'total context' of its common law jurisprudential heritage, particularly as the Act is beneficial legislation, to be given a liberal interpretation.

Interpretation of s 223(1)

2.66 The approach that proof of native title must begin with the definition in the Act, has not simplified the interpretation of s 223(1). Over time, an expanded set of requirements for determining native title has been articulated beyond the 'elements' contained in the express definition of native title.[123] Commentators have noted the highly technical character of native title law and its complexity.[124]

2.67 Regardless of the underlying jurisprudential position, the practical outcome has been that there are new matters requiring evidence, certainly beyond those indicated either by the judgments in *Mabo [No 2]* or the strict words of s 223(1).

2.68 Several submissions to this Inquiry noted the difficulties for all parties that these additional requirements have imposed.[125] Other submissions suggested that connection requirements in themselves no longer constitute a significant difficulty for claim resolution.[126]

2.69 The precise manner in which amplification of requirements for proof of native title occurs and the ALRC's recommendations that address this are dealt with in detail in later chapters. Here, the ALRC's discussion turns to four general matters related to the interpretation of the definition of s 223 of the *Native Title Act* that reflect the legacy of the laws and customs approach to recognising native title. These areas are the

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121 Stephen Gageler, 'Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process' (2011) 37 *Monash University Law Review* 1, 1.

122 Nick Duff, 'What's Needed to Prove Native Title? Finding Flexibility Within the Law on Connection' (Research Discussion Paper 35, AIATSIS, June 2014).

123 Justice French, in an extra-curial comment, noted that the turn to the statute also involved extensive re-interpretation of the terms within s 223. Justice Robert French, 'Western Australia v Ward: Devils and Angels in the Detail' (Paper presented at the Native Title Conference 2002, Geraldton).

124 Tehan, above n 54, 556.

125 Kimberley Land Council, *Submission 30*; Queensland South Native Title Services, *Submission 24*; A Frith and M Tehan, *Submission 12*; Cape York Land Council, *Submission 7*; Australian Human Rights Commission, *Submission 1*.

126 Northern Territory Government, *Submission 31*; Central Desert Native Title Services, *Submission 26*; Chamber of Minerals and Energy of Western Australia, *Submission 21*; Western Australian Government, *Submission 20*.

subject of the package of recommendations in Chapters 4–8, identified by the ALRC as the most appropriate and clearly targeted of the options for reform.

Traditional laws and customs

2.70 An expanded exposition of the 'connection requirements' for proof of native title culminated in *Yorta Yorta*,[127] centred upon 'traditional'.[128] Recognition cannot be accorded to laws and customs which are not traditional; these must pre-exist sovereignty and only normative rules are 'traditional'.[129] This concept is at the core of a recognition model based upon a 'laws and customs' approach. The emphasis upon discerning the facts about a 'subtle and elaborate system of social rules and customs'[130] can be traced back to *Milirrpum* and its antecedents.[131]

2.71 Yet few stakeholders supported removal of 'traditional' from the definition of native title. 'Traditional' appears firmly embedded in native title law—not surprising, given the long history of its use within the Australian 'laws and customs' framework and its importance for Aboriginal people and Torres Strait Islanders. Accordingly, the ALRC considers it assists certainty in the native title claims process to retain 'traditional', but to confirm that traditional laws may evolve, adapt and develop. Further, the ALRC confirms in Chapter 5 that native title rights and interests may be transmitted, transferred or otherwise acquired between Aboriginal or Torres Strait Islander groups in accordance with the traditional laws and customs of those groups.

2.72 These recommendations address the dilemma of change but allow retention of the pre-sovereign origins for traditional laws and customs in a measured way.

Continuity over an extended time frame

2.73 The Federal Court in *Bodney v Bennell* stated:

> Because it is the normative system that is the source of the rights and interests, it is necessary in order to prove native title that the normative system has had a continuous existence and vitality since sovereignty.[132]

2.74 The strict requirement of continuity of acknowledgment of traditional laws and customs is qualified by the phrase 'substantially uninterrupted'. This phrase is not found in the words of s 223. The word 'substantially' recognises that some interruption is permissible because of the effects of European settlement.[133] The law is discussed in detail in Chapters 4, 5 and 6.

2.75 Under the *Native Title Act*, the legal determination of rights and interests possessed under laws and customs with origins in the pre-sovereign period is deferred

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127 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.
128 Ibid [46]–[47].
129 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.
130 *Milirrpum v Nabalco* (1971) 17 FLR 141.
131 P Burke, *Submission 33*.
132 *Bodney v Bennell* (2008) 167 FCR 84, [47].
133 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [89].

for some 200 years.[134] This poses an acute practical and metaphysical problem of proof for native title claimants.[135] It contributes to the high transaction costs experienced by all parties involved in determining native title 'connection'. There are inherent difficulties in producing evidence of a long-distant past and connecting it to the present.

The scope of native title rights and interests

2.76 The nature of native title under the *Native Title Act* has been framed against the questions of the extinguishment of native title rights and interests.[136] This view has tended towards the susceptibility to extinguishment of native title rights and interests[137] and a narrowing of the scope of native title rights and interests.

2.77 Another view is possible, where extinguishment is the 'obverse of recognition'.[138] In *Akiba*, French CJ and Crennan J held that

> extinguishment of native title rights and interests must be understood as the cessation of the common law's recognition of those rights and interests, not the cessation of those rights and interests under traditional laws and customs.[139]

2.78 This view affirms the continued vitality of rights and interests under traditional laws and customs notwithstanding that these may not have 'translated' across the normative divide. It offers a model for recognition closer to the continuity model where rights and interests in the pre-existing legal system continued until abrogated by the common law.

2.79 As this chapter demonstrates, there has been a long standing pre-occupation in the Australian legal system and its colonial forebears with the factual character of Aboriginal and Torres Strait Islander peoples' laws and customs. The ALRC's recommendations in Chapter 5 acknowledge that linking between the pre-sovereign laws and customs and their modern counterpart is necessary, but the targeted recommendations are directed to reducing the impact of those requirements where they have introduced more stringency than may be evident from the text of the definition of native title in s 223(1).

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134 The date of sovereignty varies in different parts of Australia—for example, it is 1788 for eastern Australia and 1829 for Western Australia. However, it was much later for the Torres Strait, ranging from 1872 to 1879: Bartlett, above n 88, 216–217; Department of Natural Resources and Mines, Queensland, *Guide to Compiling a Connection Report for Native Title Claims in Queensland* (Department of Natural Resources and Mines, Queensland, 2013) 20–22.

135 The metaphysical problem arises in that there can never be an absolute correlation between evidence of the past and that past—a problem exacerbated by such a long interval of time.

136 *Western Australia v Ward* (2002) 213 CLR 1; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; *Akiba v Commonwealth* (2013) 250 CLR 209; *Western Australia v Brown* (2014) 306 ALR 168.

137 *Western Australia v Ward* (2002) 213 CLR 1, [21]. For example, in *Fejo*, it was decided that native title is extinguished by a grant in fee simple, because 'the rights that are given by a grant in fee simple are rights that are inconsistent with the native title holders continuing to hold any of the rights or interests which together make up native title': *Fejo v Northern Territory* (1998) 195 CLR 96, [43].

138 *Akiba v Commonwealth* (2013) 250 CLR 209, [10].

139 *Congoo on behalf of the Bar-Barrum People No 4 v Queensland* (2014) 218 FCR 358, [35] (North and Jagot JJ).

A society united in and by its acknowledgment of laws and customs

2.80 Section 225 of the *Native Title Act* requires that any determination of native title must specify 'who the persons or each group of persons, holding the common or group rights comprising native title are'.[140] This derives from the requirement in *Mabo [No 2]* of an 'identifiable community'.[141] The language of 'normative system' was not used. The term 'society' is neither found in *Mabo [No 2]*, nor the words of s 223.[142]

2.81 In *Yorta Yorta*, the majority held that a 'society is to be understood as a body of persons united in and by its acknowledgment and observance of a body of laws and customs'.[143] Those laws and customs must have a normative quality. The concept of the acknowledgment of law, derived from United States constitutional jurisprudence on the nature of law, has come to govern the laws and customs 'test' for native title.

2.82 This chapter has outlined how pervasive the 'laws and customs' approach has been in Australian native title law. Accordingly, the ALRC has adopted a flexible approach to the concept of a normative society, promoting certainty by allowing the concept to do some useful work in identifying coherent groups at a number of levels, but not treating it as a strict requirement for proof.

2.83 The shift away from recognising native title rights and interests to a focus on a normative society that acknowledges traditional laws and customs is apparent in the current requirements to meet s 223(1):

> [The claimants] are a society united in and by their acknowledgment and observance of a body of accepted laws and customs;
>
> [T]hat the present day body of accepted laws and customs of the society, in essence, is the same body of laws and customs acknowledged and observed by the ancestors or members of the society adapted to modern circumstances; …
>
> [T]hat the acknowledgment and observance of those laws and customs has continued substantially uninterrupted by each generation since sovereignty and that the society has continued to exist throughout that period as a body united in and by its acknowledgment and observance of those laws and customs[; and]
>
> The claimants must show that they still possess rights and interests under the traditional laws acknowledged and the traditional customs observed by them and that those laws and customs give them a connection to the land.[144]

2.84 Perhaps most simply, the above 'test' illustrates the amplified elements for proof that have developed in construing the definition of native title in s 223 of the *Native Title Act*. The definition, however, on one view contains relatively straightforward concepts—rights and interests in land and waters which are possessed under traditional laws and customs; acknowledgment of those laws and observance of customs since the

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140 *Native Title Act 1993* (Cth), s 225(a).
141 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 61 per Brennan J; 86 per Deane and Gaudron JJ.
142 *Bodney v Bennell* (2008) 167 FCR 84, [46].
143 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [51]-[53].
144 *Far West Coast Native Title Claim v South Australia (No 7)* [2013] FCA 1285 (5 December 2013) [38]–[39] as affirmed in *Starkey v South Australia* [2014] FCA 924 (1 September 2014) [40]; *Apetyarr v Northern Territory of Australia* [2014] FCA 1088 (14 October 2014) [17]–[18].

assertion of sovereignty, giving rise to the connection that Aboriginal peoples and Torres Strait Islanders have with land and waters. The rights and interests are recognised by the common law. The High Court in *Ward*, noted that these elements have remained constant in the definition.[145]

2.85 The Law Council of Australia noted in its submission

> that Courts should be able to interpret s 223 of the *Native Title Act* flexibly; rather than in a technical and restrictive manner. Change over time to the pre-sovereignty society should not, of itself, result in the dismissal of a native title application.[146]

2.86 The ALRC considers that in the light of the beneficial purposes of the legislation that it is important to refocus on these core elements of the definition. The ALRC makes recommendations in Chapter 5 that are designed to allow s 233 to be construed flexibly, adopting a 'literal in context' approach to the *Native Title Act*.

Laws, customs and change

2.87 A significant contemporary challenge in native title law is the question of change and adaptation in indigenous communities. The extent to which traditional laws and customs can evolve or adapt is set against a system of proof that requires tradition and a continuous connection to a pre-sovereign past as the basis for entitlement.

2.88 This legal model can be contrasted with the growing acknowledgement in practice that Aboriginal and Torres Strait Islander peoples and their relationships with land and waters, can and do adapt to changing circumstances; the influence of European settlement makes that inevitable.[147]

2.89 This Inquiry has not disturbed the basic proposition that native title rights and interests that are recognised must be possessed under laws and customs with origins in the pre-sovereign period. That proposition is now fundamental to the *Native Title Act*. The ALRC's review has engaged with the question of the degree of permissible evolution and development of laws and customs. The Terms of Reference for this Inquiry require such reflection.

2.90 Further, where legislation is identified as being beneficial, the High Court has stated that such legislation should be given a 'fair, large and liberal' interpretation, rather than one which is 'literal or technical'.[148]

2.91 In summary, the recommendations around connection requirements are designed to:

- accord with the object of the recognition and protection of native title rights and interests under the *Native Title Act*;

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145 *Western Australia v Ward* (2002) 213 CLR 1, [17].

146 Law Council of Australia, *Submission 64*. See also Law Council of Australia, 'Policy Statement on Indigenous Australians and the Legal Profession' (Background Paper, February 2010).

147 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2012' (Australian Human Rights Commission, 2012).

148 *IW v City of Perth* (1997) 191 CLR 1, 12 (Brennan CJ, McHugh J); 39 (Gummow J). See also *AB v Western Australia* (2011) 244 CLR 390, [24].

- give greater attention to how Aboriginal people and Torres Strait Islanders frame their relationship to country;
- reduce the complexity of the law around connection requirements;
- expedite the claims process by a refocus on core elements of the definition of native title;
- provide statutory reflection of the evolving law on the nature and content of native title rights and interests; and
- give closer attention to the common law doctrines that were drawn upon in *Mabo [No 2]* to form the basis for interpretation of the text in s 223.

International law

2.92 A consideration of international law is also useful to examine perspectives on how the rights of Indigenous peoples have changed over time. International law has progressively articulated more tangible human rights and freedoms for Indigenous peoples.

2.93 International law has relevance to native title claims at a number of levels. This provides the context for examining the specific issues in relation to connection requirements and proof of native title, addressed in Chapters 4–8 of this Report.

2.94 Finally, the section explores how international law may provide principles to guide the future evolution of native title law to support sustainable, long-term development for Aboriginal and Torres Strait Islander peoples.

2.95 The ALRC is to have particular regard to international law in its inquiries under its enabling legislation.[149] The Terms of Reference for the Inquiry identified Australia's statement of support for the *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP')[150] as a contextual factor for consideration.

International law and Indigenous peoples

2.96 The acknowledgment of Indigenous peoples as a distinct cultural group and polity at international law has accelerated. In 2009, James Anaya, Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous peoples, noted, 'groups identified as indigenous peoples are now important subjects of concern within the international program to advance rights'.[151]

2.97 Attention to the rights of Indigenous peoples emerged from the earlier platform promoting human rights and freedoms in international law in the mid-20th century.[152] The earliest international instruments focused upon individual political and civil rights.

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149 See Guiding Principle 4, Ch 1.

150 *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st Sess, 107th Plen Mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007).

151 S James Anaya, *International Human Rights and Indigenous Peoples* (Aspen Publishers, 2009) 1.

152 Alexandra Xanthaki, 'Indigenous Rights In International Law Over The Last Ten Years And Developments' (2009) 10 *Melbourne Journal of International Law* 27.

'Second generation' rights encompass economic, social and cultural rights. The protections afforded on a cultural basis in such instruments tend to stress 'rights to culture', such as access to education and cultural expression, rather than rights held as a distinct cultural or collective group.

2.98 'Third generation' rights, which include collectively-held group rights, have expressly included Indigenous peoples' rights.[153] Increasingly, the norms underpinning human rights have been adopted in relation to Indigenous peoples:

> This evolutionary international law and policy has provided virtual ground for a new and still developing regime of international standards and institutional activities specifically concerning the rights of indigenous peoples.[154]

2.99 The UNDRIP was adopted by the United Nations in 2007.[155] As a Declaration of the General Assembly, it is non-binding on state parties, but its significance extends beyond its formal legal status.[156]

2.100 The United Nations also has given emphasis to Indigenous peoples' rights in its administrative machinery. Several bodies have been established that are dedicated to Indigenous peoples, including the Expert Mechanism on the Rights of Indigenous Peoples, the Special Rapporteur and the Permanent Forum on Indigenous Issues.[157]

2.101 Early human rights instruments, such as the *International Covenant on Civil and Political Rights*,[158] remain of importance for Indigenous peoples. The relevance of earlier Conventions has been re-entrenched as matters pertaining to Indigenous peoples have become prominent in United Nations forums. The Committee operating under the auspices of the *International Convention on the Elimination of All Forms of Racial Discrimination*,[159] for example, undertakes specific monitoring of indigenous issues.[160]

Adoption of treaties relevant to native title

2.102 Australia entered into a series of United Nations Conventions in the mid-20th century, which sought to give acknowledgement under international law to civil, political and cultural rights,[161] and to address various forms of discrimination.[162] The

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153 George Williams and David Hume, *Human Rights under the Australian Constitution* (OUP, 2nd ed, 2013) 4.

154 Anaya, above n 151, 2.

155 *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st Sess, 107th Plen Mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007).

156 Megan Davis, 'Adding a New Dimension: Native Title and the UN Declaration on the Rights of Indigenous Peoples' [2009] *Australian Law Reform Commission Reform Journal* 17.

157 Xanthaki, above n 152, 28.

158 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

159 *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

160 Xanthaki, above n 152, 27–28.

161 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

162 *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

ALRC report *Recognition of Aboriginal Customary Laws* in 1986 indicated that the *International Covenant on Civil and Political Rights* put into effect internationally accepted principles of equality and non-discrimination.[163] Australia also signed the *International Covenant of Economic Social and Cultural Rights* ('ICESCR'), ratifying the Convention in 1975 with no reservations.[164]

2.103 Accordingly, Australia has international obligations in respect of Aboriginal peoples and Torres Strait Islanders under a range of binding international law instruments. The use of the external affairs power in the Commonwealth Constitution to support legislation giving effect to international obligations, where the measures are proportionate, has been confirmed.[165] International developments in human rights law have informed Australian law and native title.[166]

2.104 The framework of human rights and international law, such as the monitoring process under the *International Convention on the Elimination of All Forms of Racial Discrimination* ('CERD'), has continued to be of relevance to native title.[167] The CERD Committee has raised concerns about the strict regime of proof under the *Native Title Act*.[168] The UN ICESCR Committee noted the high cost, complexity and strict rules regulating native title claims, and the inadequate protection of indigenous cultural and intellectual property and language, in accordance with art 15 of that Covenant.[169]

Convention on the Elimination of All Forms of Racial Discrimination

2.105 In 1975, the Australian Government ratified the CERD.[170] This Treaty was given domestic effect in the *Racial Discrimination Act 1975* (Cth).[171] In Australian law, treaties do not have the force of law unless they are given effect by statute.[172] Under art 1(4) of the CERD, an allowance is made for '[s]pecial measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or

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163 Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (1986) 95.

164 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

165 Australian Government Attorney-General's Department, 'Australia's Human Rights Framework' (2010).

166 Davis, above n 156.

167 The Committee on the Elimination of Racial Discrimination expressed serious concerns over the major amendments to the *Native Title Act* in 1998: Committee on the Elimination of Racial Discrimination, *Decision No 2(54) on Australia*, UN Doc A/54/18, 18 March 1999.

168 In 2010 the CERD Committee considered the fifteenth to seventeenth periodic reports of Australia in August 2010. CERD's recommendations included amending the *Native Title Act* 1993 to address the high standards of proof required for recognition of the relationship between Indigenous peoples and their traditional lands.

169 UN Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, 42nd Sess, UN Doc E/C.12/AUS/CO/4 (12 June 2009) [32].

170 *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

171 The Act was held to be a valid exercise of the s 51(xxix) (the external affairs power) in *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

172 Treaties must be directly incorporated into domestic law. See *Dietrich v The Queen* (1992) 177 CLR 292, 305.

individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms'.[173]

2.106 Section 8 of the *Racial Discrimination Act 1975* (Cth) imports this aspect of the Convention and allows for the enactment of 'special measures'. The High Court has considered the operation of the *Racial Discrimination Act* in native title cases.[174] Section 10 of the *Racial Discrimination Act* establishes 'equality before the law'.[175]

2.107 The majority judgments in *Mabo [No 2]* drew on international law and evolving human rights precepts, together with concepts of equality and social justice. Brennan J noted that 'it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination'.[176]

2.108 The Preamble of the *Native Title Act* references international law, 'recognising international standards for the protection of universal human rights and fundamental freedoms.[177] The *Native Title Act* was held to be a valid exercise of the race power in *Western Australia v Commonwealth*.[178]

United Nations Declaration on the Rights of Indigenous Peoples

2.109 The *UN Declaration on the Rights of Indigenous Peoples* represented the culmination of over 20 years of negotiations by Indigenous peoples for the acceptance of their distinctive status under international law.[179] Commentators suggest that 'the orthodox view seems to be that they are not new or special rights but an extension of what already exists in the human rights universe'.[180] The UNDRIP is seen as a contextualised elaboration of general human rights principles 'as they relate to the specific historical, cultural and social circumstances of indigenous peoples'.[181]

2.110 The Law Council of Australia has adopted the position that

> The UNDRIP, whilst lacking the status of a binding treaty, embodies many human rights principles already protected under international customary and treaty law and sets the minimum standards for States Parties' interactions with the world's indigenous peoples.[182]

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173 For further detail see Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (1986), 111.
174 See eg *Mabo v Queensland [No 1]* (1988) 166 CLR 186.
175 Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (1986), 113.
176 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 41–2.
177 *Native Title Act 1993* (Cth) Preamble.
178 *Western Australia v Commonwealth* (1995) 183 CLR 373, 460–462.
179 Davis, above n 156.
180 Megan Davis, 'To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On' (2012) 19 *Australian International Law Journal* 17, 27.
181 S James Anaya, 'Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People' (UN Doc A/HRC/9/9, 11 August 2008) 24 [86].
182 Law Council of Australia, above n 146, 6.

2.111 The UNDRIP addresses specific concerns relating to indigenous life, integrity and security and territories.[183] The UNDRIP also includes provisions dealing with the capacity of Indigenous peoples to decide upon the membership of groups and issues of identity, and for the adoption of wide participatory and consultative norms for third parties in their dealings with Indigenous peoples.[184] A range of articles within the UNDRIP relate to indigenous rights to traditional lands and resources.

2.112 The National Congress of Australia's First Peoples in its submission to the Inquiry[185] noted the following Articles:

> Article 25
>
> Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.
>
> Article 26
>
> 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
>
> 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
>
> 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.
>
> Article 27
>
> States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.
>
> Article 32
>
> 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
>
> 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

183 *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st Sess, 107th Plen Mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) arts 3,4.

184 Ibid art 33.

185 National Congress of Australia's First Peoples, *Submission 32*.

> 3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Australia's statement of support on the UNDRIP

2.113 The UNDRIP was adopted by the UN General Assembly in New York on 13 September 2007.[186] Subsequently, the Australian Government issued a formal statement of support for the UNDRIP on 3 April 2009.[187] The prevailing view appears to be that UNDRIP, as a whole, does not have the status of customary international law.[188]

2.114 International law may be used by courts when construing the meaning of a statute or in instances of statutory ambiguity.[189] The High Court has referred to the UNDRIP in recent decisions, but on a fairly narrow basis.[190] Professor Davis advocates a positive role for the UNDRIP in statutory construction. The UNDRIP could, she suggests, 'help to shift the dynamics of disputes so that the burden of proof was not always placed on indigenous peoples but rather on states'.[191]

Standard setting

2.115 The Australian Government and Australian Human Rights Commission delivered a joint statement at the United Nations Permanent Forum on Indigenous Issues in 2013, expressing commitment to

> assisting Aboriginal and Torres Strait Islander peoples to achieve improved outcomes … [and] working with the Australian Human Rights Commission and the National Congress of Australia's First Peoples to increase awareness of, and encourage dialogue about, the Declaration in policy development, program implementation and service delivery as a way to embed the Declaration in how business is done.[192]

2.116 Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda has said:

> I believe the 'principled' approach presents the most opportunities in the Australian context. I believe approaching the challenge of implementation through the principles rather than addressing each article individually will provide an analysis that is better understood by a broader cross section of Government and the community. Over and

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186 Australia was one of four countries to vote against the Declaration in the UN General Assembly (with Canada, New Zealand and the US).

187 The Hon Jenny Macklin, MP, 'Statement on the United Nations Declaration on the Rights of Indigenous Peoples' (Speech Delivered at Parliament House, Canberra, 3 April 2009).

188 See generally Davis, above n 180.

189 *Acts Interpretation Act 1901* (Cth) s 15AB.

190 Patrick Wall, 'The High Court of Australia's Approach to the Interpretation of International Law and Its Use of International Legal Materials in *Maloney v the Queen* [2013] HCA 28' (2014) 15 *Melbourne Journal of International Law* 1, 18–19.

191 Davis, above n 179, 38, quoting *Report of the International Expert Group Meeting on the Role of the Permanent Forum on Indigenous Issues in the Implementation of Article 42 of the United Nations Declaration on the Rights of Indigenous Peoples* E/C.19/2009/2.

192 Joint Statement by the Australian Government and the Australian Human Rights Commission, Agenda Item 7: Implementation of the Declaration on the Rights of Indigenous Peoples, United Nations Permanent Forum on Indigenous Issues Twelfth Session, New York, 20–31 May 2013, 2.

> over I have said that the Declaration is not a program of work, it is a way of doing things or a process based on principles.[193]

2.117 The Commissioner stressed that a key principle was 'participation in decision-making, underpinned by free, prior and informed consent and good faith'.[194]

2.118 Relevantly, the UNDRIP requires that 'States, in consultation and cooperation with Indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration'.[195]

2.119 The ALRC considers that a principled approach to developing best practice standards is an important consideration in a review of the *Native Title Act.* Its recommendations are developed in the light of the beneficial purposes of the Act, including its underpinning framework of international obligations referred to in the Preamble. The ALRC's recommendations also reflect, where appropriate, emerging international best practice standards.

International law and sustainable futures

2.120 Professor Megan Davis argues that in the absence of entrenched rights and protections in Australia for indigenous peoples, 'international standards whether binding or non-binding have had persuasive authority in the Australian legal and political system'.[196] The standards in the UNDRIP may assist the move towards sustainable, long-term social, economic and cultural development for Aboriginal and Torres Strait Islander peoples.

2.121 The UNDRIP principles may also provide the platform for engagement around native title issues, particularly as concepts such as free prior and informed consent and other norms of consultation and participation embodied in the UNDRIP become not only 'a way of doing business', but a principled way of moving forward. International jurisprudence around these aspects of the UNDRIP is developing rapidly.

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193 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Social Justice and Native Title Report 2013' (Australian Human Rights Commission) 92; see also National Congress of Australia's First Peoples, *Submission 32*.

194 See the website of the Australian Human Rights Commission: <https://www.humanrights.gov.au/>.

195 *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st Sess, 107th Plen Mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) art 38.

196 Davis, above n 180, 48.

3. Context for Reform

Contents

Summary

3.1 This chapter outlines the context for the ALRC's recommendations for reform. It identifies some features of the native title system that have been particularly significant in the development of those recommendations. It also identifies some factors outside the native title system that influence the way the system works.

3.2 First, it outlines the claims process, and describes the outcomes of that process thus far. There have been 308 native title determinations, including 248 determinations that native title exists in at least part of the determination area. Of the 60 determinations that native title does not exist, 46 were by consent or unopposed. Only

14 followed litigation. State and territory outcomes vary, partly as a result of pre-existing land rights regimes, and the different impacts of colonisation and dispossession.

3.3 The native title system is still evolving, and in particular, the roles of the National Native Title Tribunal and the Federal Court under the *Native Title Act 1993* (Cth) ('*Native Title Act*') have changed since 1994. The prevalence of consent determinations and the increasing number of determinations since 2011 is a positive trend, but is not sufficient evidence to conclude that the connection requirements of the *Native Title Act* provide for the appropriate recognition and protection of native title.

3.4 Delay and the cost of native title proceedings continue to be of significant concern for stakeholders. The reasons identified for delay include capacity constraints within representative bodies, the collection, assessment and hearing of evidence in relation to connection, overlapping claims, the limited availability of appropriately qualified experts, tenure analysis (in order to identify areas of extinguishment) and the exercise of the right to negotiate. Importantly, just outcomes take time to achieve and time must be allowed to develop sustainable and effective outcomes.

3.5 Finally, native title is not the only path to land justice. The role of the Land Account and the Indigenous Land Corporation, social justice responses and alternative settlements are considered in this chapter. Commonwealth–state financial arrangements may also have an impact.

Claims process

3.6 The Terms of Reference for this Inquiry direct the ALRC to inquire into 'connection requirements', authorisation and joinder—areas principally related to the claims process. The claims process under the *Native Title Act* has some unique features that distinguish it from other litigation. This section of the Report presents a short overview of the claims process.

3.7 As discussed in Chapter 2, a determination of native title is a product of the interaction between the Australian legal system and traditional law and custom; it is that system's way of recognising and protecting the immensely older relationship of Aboriginal and Torres Strait Islander peoples to this country.[1]

3.8 This process is initiated when a native title claim group makes an application to the Federal Court for a determination of native title (a claim) under the *Native Title Act.*[2] There are three types of application for a determination of native title which can be made under the Act: claimant, non-claimant and a revised native title determination application.[3]

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1 See further Ch 2.

2 *Native Title Act 1993* (Cth) ss 13(1); 61(1).

3 Ibid ss 61(1); 253. A revised native title determination application enables parties to apply for revision or revocation of an approved native title determination on certain grounds: Ibid s 13(5).

3.9 The *Native Title Act* prescribes the form and content of an application; for example, a claimant application must be accompanied by an affidavit sworn by the person or persons authorised by the native title claim group to make the application (the 'applicant').[4] The details required in the affidavit are directly aimed at addressing the elements of native title set out in s 223(1) of the Act.

3.10 Once the application has been filed with the Court, a dual process commences, involving the Court on one hand and the National Native Title Tribunal (NNTT) on the other. A copy of the claim is given to the NNTT by the Court,[5] and the NNTT notifies the public and specified persons of the claim.[6] The Registrar of the NNTT applies the registration test—a consideration of whether a claim meets certain merit and procedural conditions.[7] If these conditions are met, the claim must be registered.[8] When a claimant application passes the registration test, the applicant acquires various procedural rights as a 'registered native title claimant'.[9]

3.11 Generally, the applicant and the relevant state or territory Minister will be parties to the proceedings.[10] Other persons who have interests in the land or waters claimed may also become parties to the proceedings.[11] Joinder of parties is discussed in Chapter 11. It is common for there to be a large number of parties.

3.12 Usually, the Court will then refer the application to mediation between the parties.[12] The purpose of mediation is to assist the parties to reach agreement on matters including whether native title exists in the area claimed, who holds the native title, and the nature and extent of the native title rights and interests and of any other interests in the area.[13]

3.13 The ultimate outcome, if the application is pursued, is a determination of native title. A determination that native title exists must identify the persons holding the native title rights, the nature and extent of the native title rights, the nature and extent of any other interests in the area, the relationship between the native title rights and the other interests, and whether the native title rights include the right to exclude others.[14]

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4 *Native Title Act 1993* (Cth) ss 61(2)–(5), 62. See Ch 10 for further consideration of authorisation.
5 Ibid s 63.
6 Ibid s 66.
7 Ibid ss190A–190C.
8 Ibid s 190A(6).
9 Ibid s 253; pt 2 div 3.
10 Ibid s 84. The state or territory Minister will be a party unless notice is given that the Minister does not want to be a party: Ibid s 84(4).
11 *Native Title Act 1993* (Cth) ss 84(3), (5). See Ch 11 for more detail about parties to native title proceedings.
12 Ibid s 86B. However, the Court must order that there be no mediation if it considers that it would be: unnecessary; there is no likelihood that the parties will reach agreement; or the applicant has not provided sufficient detail about certain matters: Ibid s 86B(3).
13 *Native Title Act 1993* (Cth) s 86A.
14 Ibid s 225.

3.14 The Court may make a native title determination where the application is unopposed;[15] where the parties have reached agreement (a 'consent determination');[16] or as a result of a contested hearing.

Outcomes to date

3.15 The *Native Title Act* has been in force since 1 January 1994. On 1 April 2015 there had been 308 native title determinations. Of these, 234 were by consent, 38 were litigated, and 36 were unopposed.[17] There have been 100 determinations that native title exists in the entire determination area, 147 determinations that native title exists in part of the determination area, and 60 determinations that native title does not exist in the determination area.[18] The 60 determinations that native title does not exist include 36 unopposed determinations. There have been only 15 determinations that native title does not exist made in response to a claimant application.

3.16 Map 1, Native Title in Australia, and Table 1 show the area of Australia subject to determinations of native title and registered claims for native title on 30 June 2014.[19] Professor Jon Altman reports that a further 13% of Australia is land granted under land rights legislation—see Map 2, Land Rights and Native Title in Australia, and Table 2.[20]

15 Ibid s 86G.

16 Ibid ss 87, 87A.

17 National Native Title Tribunal, *National Native Title Register*. All of the unopposed determinations were non-claimant applications, and most of them were made by Aboriginal land councils in NSW where a finding of no native title is necessary for an Aboriginal land council to sell land: *Aboriginal Land Rights Act 1983* (NSW) s 42.

18 National Native Title Tribunal, *National Native Title Register*.

19 Data is as at December 2014, provided by the National Native Title Tribunal and used with permission.

20 Map 2 prepared by Jon Altman and Francis Markham: J Altman, *Submission 27*. Data in Table 2: Jon C Altman and Francis Markham, 'Burgeoning Indigenous Land Ownership: Diverse Values and Strategic Potentialities' in Sean Brennan et al (eds), *Native Title from Mabo to Akiba: a Vehicle for Change and Empowerment?* (Federation Press, forthcoming).

Map 1: Native Title in Australia, December 2014

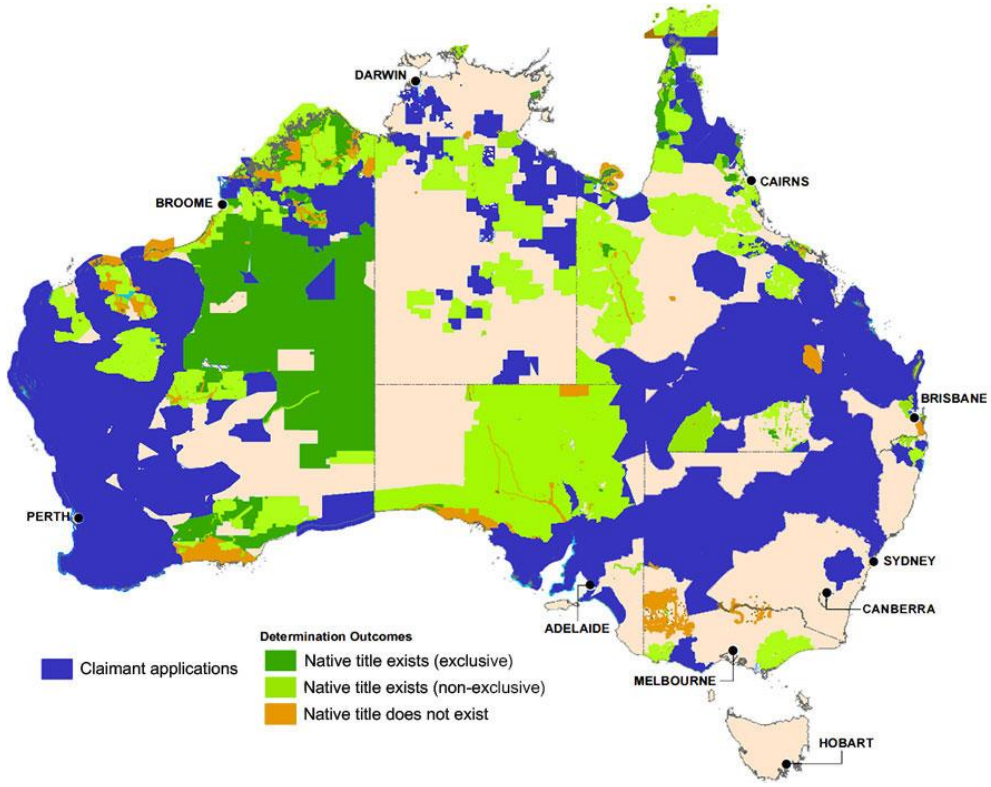

Table 1

Jurisdiction	Area subject to a determination (sq km)			Land subject to an application	
	Native title exists, exclusive	Native title exists, non-exclusive	Native title does not exist	Area (sq km) subject to application	Percent of jurisdiction land area
ACT	-	-	-	-	-
Cth	0.1	20 794.7	14 300.1	-	-
NSW	0.1	1 794.3	868.7	373 113	46.6
NT	1 040.3	200 674.5	964.7	201 520	15.0
Qld	34 715.8	342 02 4.0	12 090.1	718,542	41.5
SA	5 901.3	467 728.5	20915.6	189 155	19.2
Tas	-	-	-	-	-
Vic		15 164.7	11 023.9	24 269	10.7
WA	800 402.5	320 832.9	55 410.2	1 084 815	42.9
Total				2 591 414	33.7

Map 2: Land Rights and Native Title, June 2013

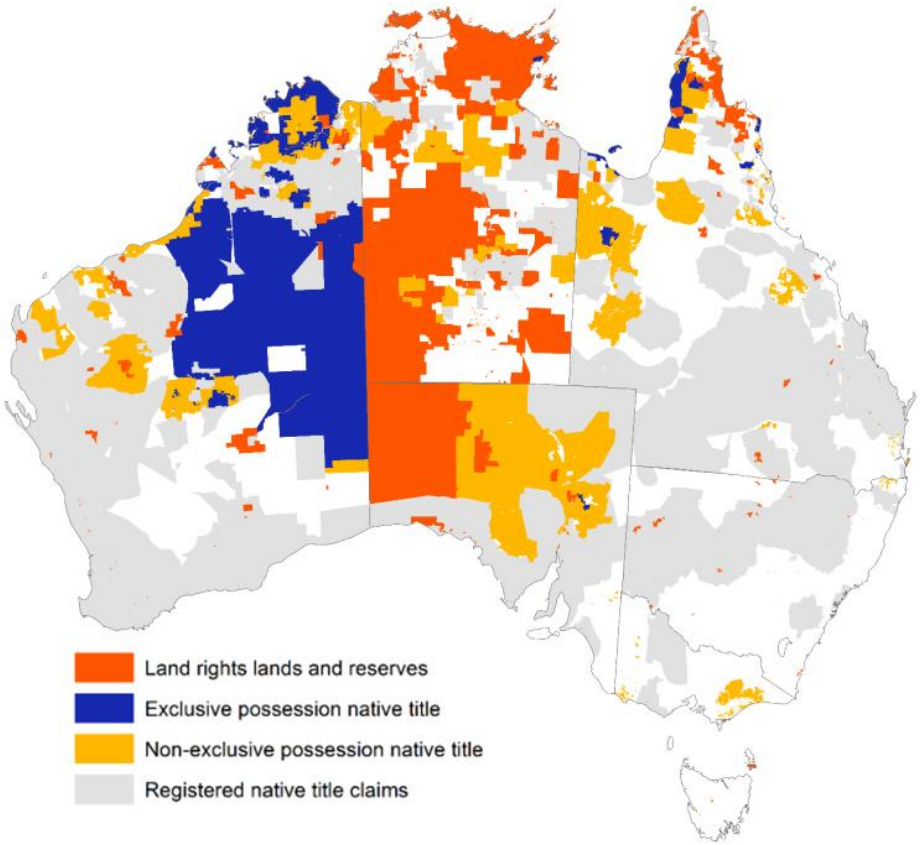

Table 2

Tenure	Area (1000 sq km)	% of Australian landmass
Land rights or Aboriginal reserve	969	12.6
Exclusive possession native title	752	9.8
Non-exclusive possession native title	825	10.7
Registered claims (excluding claims over land rights lands or Aboriginal reserves)	3014	39.2

Applications, past and present

3.17 There have been 2114 native title applications made between 1 January 1994 and 1 April 2015. More than half of those (1155) were dismissed, discontinued or struck out.[21]

3.18 On 1 April 2015, there were 398 native title applications lodged with the Federal Court: 374 claimant applications, 19 non-claimant applications and five compensation applications. There are 273 registered applications. It is expected that many compensation applications will be filed in the future.[22]

Land rights and native title in the states and territories

3.19 Although the *Native Title Act* is Commonwealth legislation that operates across all state and territory jurisdictions, the way in which the native title process operates in each state and territory is affected by the history of the jurisdiction's land rights arrangements. In some jurisdictions, titles to extensive areas of traditional lands were granted before the *Native Title Act* commenced. This section briefly outlines the way each jurisdiction has dealt with the question of Aboriginal and Torres Strait Islander peoples' rights to land.

New South Wales

3.20 Under the *Aboriginal Land Rights Act 1983* (NSW) (ALRA), certain Crown land can be claimed by Aboriginal Land Councils (ALCs) on behalf of Aboriginal people. The ALRA also established the Statutory Investment Fund. For 15 years, from 1984 until 1998, an amount equivalent to 7.5% of NSW Land Tax (on non-residential land) was paid to the NSW Aboriginal Land Council as compensation for land lost by the Aboriginal people of NSW. This fund is used for both administration and land purchase, and the NSW Aboriginal Land Council and the land council network has been self supporting since 1998.[23]

3.21 If an ALC wishes to sell land, it must get a determination under the *Native Title Act* that native title does not exist in the area.[24] There have been 43 non-claimant determinations that native title does not exist in NSW, most brought by ALCs, and 36 of which were unopposed.[25] Because most of the state is subject to extinguishing tenures,[26] there are not extensive areas where native title might be recognised. There have been five positive determinations, including the first determination of native title under the *Native Title Act*, *Buck v New South Wales (Dunghutti People)*.[27] There are 21 registered claims.[28]

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21 National Native Title Tribunal, *Register of Native Title Claims*.
22 AIATSIS, *Submission 36*; Northern Territory Government, *Submission 31*.
23 NSW Aboriginal Land Council, *Our Organisation* <http://www.alc.org.au>.
24 *Aboriginal Land Rights Act 1983* (NSW) s 42.
25 National Native Title Tribunal, *National Native Title Register*.
26 *Wilson v Anderson* (2002) 213 CLR 401.
27 National Native Title Tribunal, *National Native Title Register*.
28 National Native Title Tribunal, *Register of Native Title Claims*.

Queensland

3.22 Under the *Aboriginal Land Act 1991* (Qld) and the *Torres Strait Islander Land Act 1991* (Qld), land that has been reserved for Aboriginal people could be transferred to Aboriginal people as trustees to hold the land for the benefit of Aboriginal and Torres Strait Islander people. The Acts also made provision for claims over specified areas of land to be heard by a Land Tribunal which could make recommendations to the Minister. According to the Queensland Government, 4.5 million hectares of land have been transferred under these Acts.[29]

3.23 The Queensland Government considers that 'native title is arguably at its most complex in Queensland', because of the history of removals of traditional owners from their lands and the decentralised nature of development in that state.[30]

3.24 Despite this complexity, there have been more than 100 determinations that native title exists in Queensland, including 97 by consent.[31] On 1 April 2015, there were a further 63 registered applications, with further applications under preparation.[32]

South Australia

3.25 In 1966, South Australia was the first state to transfer control of land reserved for Aboriginal people to a body controlled by Aboriginal people: the Aboriginal Lands Trust.[33] Land rights were also acknowledged in the *Pitjantjatjara Land Rights Act 1981* (SA) and the *Maralinga Tjarutja Land Rights Act 1984* (SA).

3.26 There have only been two contested native title hearings in South Australia, and since 2004, the State has had a policy of 'resolving claims by consent wherever possible'.[34] There have been 22 consent determinations that native title exists and on 1 April 2015 there were a further 15 registered claims.[35]

3.27 As in most jurisdictions, overlapping claims have been a significant issue in South Australia. In around 2005 'a combined effort by South Australian Native Title Services and the National Native Title Tribunal managed to resolve almost all overlaps that then existed between claims, meaning attention could be focussed on settlements'.[36] However, in recent years there have been more overlapping claims and more intra-Indigenous disputes.[37]

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29 Department of Natural Resources and Mines, *Land Transfers* <http://www.dnrm.qld.gov.au/land/indigenous-land/land-transfers>.

30 Queensland Government, *Submission 28*.

31 The only common law determination of native title occurred in Queensland: *Mabo [No 2]*. All other determinations have been made under the *Native Title Act.*

32 See, eg, Cape York Land Council, *Submission 7*.

33 Thomson Reuters, *The Laws of Australia*, (at 15 June 1997) 1. Aborigines and Torres Strait Islanders '1.3 Land Law' [1.3.359]; *Aboriginal Lands Trust Act 1966* (SA).

34 South Australian Government, *Submission 34*.

35 National Native Title Tribunal, *Register of Native Title Claims*.

36 South Australian Government, *Submission 34*.

37 Ibid.

Tasmania

3.28 The *Aboriginal Lands Act 1995* (Tas) did not establish a claims process, but vested 12 areas, listed in the schedule, in the Aboriginal Land Council of Tasmania to be held on trust for the benefit of Aboriginal people.

3.29 There have been no determinations of native title in Tasmania and at 1 April 2015 there were no registered claims.[38]

Victoria

3.30 There was no claims procedure for land rights in Victoria before the *Native Title Act*, but land was transferred on an ad hoc basis under six separate Acts.[39] The *Traditional Owner Settlement Act 2010* (Vic) (TOSA) provided for 'a recognition and settlement agreement between the State and a traditional owner group entity for an area of public land'.[40] TOSA is discussed further below.

3.31 The Victorian Department of Justice reported that 'the claimable Crown land estate comprises roughly one third of the State's land area', and 'native title has been settled over approximately 40% of that area, by way of a positive or negative native title determination and/or a *Traditional Owner Settlement Act* settlement'.[41] There have been four determinations that native title exists in Victoria, and three that it does not exist.[42] At 1 April 2015 there were two registered claims in Victoria.[43]

Western Australia

3.32 The *Aborigines Act 1889* (WA) empowered the Governor to reserve Crown lands for Aboriginal people. By 1947, 15 million hectares had been set aside.[44] The Aboriginal Lands Trust now holds 27 million hectares of reserved land, but title remains in the Crown. It is intended that 'the control and management or ownership of all the land held by the Trust will be handed back to Aboriginal people'.[45] There was no provision for land claims in Western Australia before the *Native Title Act*.

3.33 The Western Australian Government reports that 'the impact of the *Native Title Act*, including native title claims, determinations, future acts, and compensation liabilities is greater in Western Australia than any other jurisdiction in Australia'.[46] There have been 45 determinations that native title exists in at least part of the determination area, including 34 consent determinations.[47] The Western Australian

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38 National Native Title Tribunal, *Register of Native Title Claims*.
39 Thomson Reuters, *The Laws of Australia*, (at 1 April 1997) 1. Aborigines and Torres Strait Islanders '1.3 Land Law' [1.3.412].
40 Explanatory Memorandum, Traditional Owner Settlement Bill 2010 (Vic).
41 Department of Justice, Victoria, *Submission 15*.
42 National Native Title Tribunal, *National Native Title Register*.
43 Ibid.
44 Thomson Reuters, *The Laws of Australia*, (at 1 September 1997) 1 Aborigines and Torres Strait Islanders, '1.3 Land Law' [1.3.310] 2014.
45 Department of Aboriginal Affairs, WA, *What Land Does the Aboriginal Lands Trust (ALT) Hold for Aboriginal People ?* (19 September 2014) <http://www.daa.wa.gov.au>.
46 Western Australian Government, *Submission 20*.
47 National Native Title Tribunal, *National Native Title Register*.

Government has recently concluded a settlement with the Noongar people that will result in the withdrawal of six native title claims.[48]

3.34 At 1 April 2015, there were 77 registered claims in Western Australia[49] and research is currently being undertaken with the purpose of lodging native title claims in the future.[50]

Australian Capital Territory

3.35 The *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) vested land in the Jervis Bay area in the Wreck Bay Aboriginal Community Council.

3.36 There have been six native title claims made in the Australian Capital Territory, but no determinations, and at 1 April 2015 there were no registered claims.[51]

3.37 In 2001, the ACT Government and the Ngunnawal People entered into a joint management agreement regarding Namadgi National Park, known as the *Agreement Between the Australian Capital Territory and ACT Native Title Claim Groups.*[52]

Northern Territory

3.38 Approximately 47% of land in the Northern Territory is Aboriginal freehold under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). Pastoral leases cover 45% of the Territory, and a further five percent of the Territory is also available for claim under the *Native Title Act*.[53]

3.39 There have been 75 determinations of native title in the Northern Territory, 66 by consent, and at 1 April 2015 there were 97 registered claims.[54]

3.40 The Northern Territory Government has indicated that, 'having litigated a number of test cases to clarify the operation of various provisions of the *Native Title Act*', it now seeks to achieve negotiated resolutions of native title claims.[55] The Territory has set out *Minimum Connection Material Requirements for Consent Determinations* which streamline the resolution of claims.

An evolving system of dispute resolution

3.41 The approach to native title determinations has changed several times since the system was established in 1994. Initially, applications were to be filed in the NNTT and determinations of the NNTT were to be given effect as if they were orders of the Federal Court. Such a scheme was held to be unconstitutional[56] and from 1998

48 Discussed further below.
49 National Native Title Tribunal, *National Native Title Register*.
50 See, eg, Central Desert Native Title Services, *Claims—Unclaimed Areas* <http://www.centraldesert.org.au>.
51 National Native Title Tribunal, *Register of Native Title Claims*.
52 AIATSIS, *ACT Native Title Information Handbook*, 2014.
53 Northern Territory Government, *Submission 31*.
54 National Native Title Tribunal, *Register of Native Title Claims*.
55 Northern Territory Government, *Submission 31*.
56 *Brandy v Human Rights & Equal Opportunity Commission* (1995) 183 CLR 245.

applications have been filed in the Federal Court. However, the Court would refer each application to the NNTT for mediation.[57] From 2007, the NNTT had sole responsibility for mediation, but in 2012, the mediation function was transferred from the NNTT to the Federal Court.[58]

3.42 The Court has shifted away from the referral of entire matters to mediation, and prefers 'intensive case management to identify the issues in dispute … and … referral of particular issues to mediation'.[59] The Court suggests that this approach has contributed to the increased number of determinations in 2012 and 2013.[60]

3.43 In July 2010, the Court established a priority list for case management. Case management is intended to identify the issues in dispute and to assist the parties to reach agreement on those matters, which may include the identity of the persons who hold the rights claimed, the nature and extent of the rights, and most importantly for this Inquiry, whether the requirements of 223 of the *Native Title Act* (known as 'connection requirements') have been established.

3.44 A range of strategies has been used to assist the parties to reach agreement, including:

- case management conferences where experts identify the issues likely to be contentious prior to beginning fieldwork;
- orders timetabling the provision of connection material and the respondent's analysis of that connection material;
- conferences of experts in the absence of lawyers, supervised by a registrar, aimed at narrowing connection issues;
- court-appointed experts, particularly where there is a dispute between Indigenous people;
- mediation on country, where state experts can question claimants; and
- early evidence hearings.[61]

3.45 These initiatives have been generally well received. The Cape York Land Council, for example, said the initiatives have increased the rate of determinations and are generally beneficial.[62]

57 Graeme Neate, '"It's the Constitution, It's Mabo, It's Justice, It's Law, It's the Vibe": Reflections on Developments in Native Title since *Mabo v Queensland [No 2]*' in Toni Bauman and Lydia Glick (eds), *The Limits of Change: Mabo and Native Title 20 Years On* (AIATSIS, 2012) 188, 196.
58 Federal Court of Australia, *Submission 40*.
59 Ibid.
60 Ibid.
61 Ibid.
62 Cape York Land Council, *Submission 7*.

3.46 Central Desert Native Title Services commented that 'native title claims are no longer stuck in a circle of never-ending negotiations with respondent parties', and that:

> Programming matters for trial has also meant that the State of Western Australia, who are the primary respondent to native title claims, has been required to become more articulate in its opposition to native title claims and more pro-active in progressing claims such as with the early provision of tenure information.[63]

3.47 Similarly, the Queensland Government reported that:

> Case management by the Federal Court provides a more disciplined framework within which the parties to claims are required to be more accountable for the prosecution of matters … [and] has ensured that all aspects of claims are dealt with in a professional and timely manner.[64]

3.48 On the other hand, the North Queensland Land Council said:

> It would be desirable for the Court to recognise that its compressed time frames work against some native title groups particularly where the groups have been fractured and widely separated by removal policies as is the case in Queensland.[65]

3.49 Prior to the introduction of intensive case management for native title matters, the Social Justice Commissioner raised concerns that the pressure of court deadlines can distract the parties from negotiating broader agreements and divert resources away from negotiations. The Commissioner suggested that there should be an option for parties to obtain a long-term adjournment of a matter if both parties consent.[66]

3.50 Only 46 determinations occurred during the first 11 years of the *Native Title Act*, and 12 of those were non-claimant applications.[67]

3.51 A series of test cases occurred between 1996 and 2002,[68] and there were significant amendments to the *Native Title Act* in 1998.[69] As the graph and Table 2 below indicate, from 2004 the number of determinations per year moved from single digits to double digits, and from 2011 the number rose significantly again.

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63 Central Desert Native Title Services, *Submission 26*.
64 Queensland Government, *Submission 28*.
65 North Queensland Land Council, *Submission 17*.
66 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2008' 44.
67 National Native Title Tribunal, *National Native Title Register*.
68 *Wik Peoples v Queensland* (1996) 187 CLR 1; *Yanner v Eaton* (1999) 201 CLR 351; *Commonwealth v Yarmirr* (2001) 208 CLR 1; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; *Western Australia v Ward* (2002) 213 CLR 1; *Wilson v Anderson* (2002) 213 CLR 401.
69 *Native Title Amendment Act 1998* (Cth).

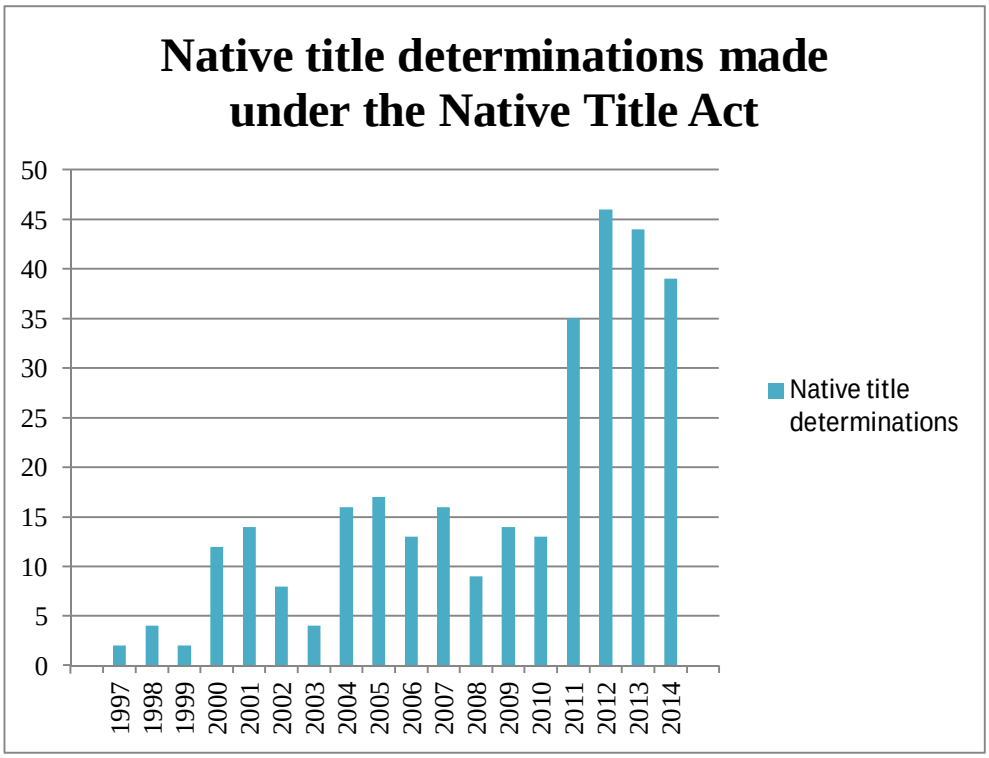

Table 3

Year	Native title determinations	Year	Native title determinations
1997	2	2006	13
1998	4	2007	16
1999	2	2008	9
2000	12	2009	14
2001	14	2010	13
2002	8	2011	35
2003	4	2012	46
2004	16	2013	44
2005	17	2014	39

3.52 The National Native Title Tribunal reported that, between 1 January 1994 and 31 December 2011, the average time taken to reach a consent determination was six years and three months. The average time for a determination after litigation was seven years. These figures do not take into account the common occurrence of claims being

withdrawn, consolidated and relodged.[70] In its 2013–14 Annual Report, the Federal Court reported that:

> The number of native title matters over eighteen months old decreased by twenty per cent from 368 in 2013 to 291 at 30 June 2014. The number of native title matters over two years old decreased from 320 at 30 June 2013 to 257 at 30 June 2014, a clear indication that the innovative case management strategies being employed in this area are working.[71]

The prevalence of consent determinations

3.53 The increasing numbers of consent determinations since 2011 is a positive trend. However the ALRC does not consider this trend, and the small number of 'no native title' determinations, to be sufficient evidence to conclude that the connection requirements of the *Native Title Act* provide for the appropriate recognition and protection of native title.

3.54 Increasing numbers of consent determinations could indicate that in certain areas of Australia, the current connection requirements do not pose any barrier to the recognition of native title. However, those requirements might present significant evidential difficulties in other areas, perhaps areas more affected by the actions of settlers and governments.

3.55 While the *Native Title Act* operates across all states and territories, the extent to which native title is recognised, and the scope of native title rights and interests recognised, varies considerably across Australia.[72]

3.56 Historical factors relating to the timing of British sovereignty and the dispossession or displacement of Aboriginal and Torres Strait Islander people are relevant to that variation.[73] In turn, different patterns of settlement may influence the extent to which evidence of connection is available in any particular part of Australia. Anthropological material and historical records also may vary in availability across the country. Therefore, in some locations, the requirements for connection in s 223 of the *Native Title Act* may be more readily met than in other parts of Australia.[74] These factors have a bearing on whether consent determinations are pursued.

3.57 The prevalence of consent determinations may reflect the willingness of some state governments to enter into consent determinations in situations where claimants would not meet the stringent tests set out in *Yorta Yorta*.[75] However native title holders are entitled to the protection of law, rather than to depend on the good will of

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70 National Native Title Tribunal, 'National Report: Native Title' (February 2012).

71 Federal Court of Australia, 'Annual Report 2013–2014' 24.

72 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Social Justice and Native Title Report' (Australian Human Rights Commission, 2013) 81.

73 See for example the discussion of the settlement of the 'waste lands' of Queensland in *Wik v Queensland* (1996) 187 CLR 1, [136]–[141].

74 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Social Justice and Native Title Report' (Australian Human Rights Commission, 2013).

75 The requirements for proof of native title are discussed in Chs 4 and 7.

governments. It would not be reasonable to leave the protection of native title on this basis. Central Desert Native Title Services said:

> although some governments may take a practical approach with regards to continuity, the actions of government can vary significantly depending on both the particular government, and the people within it.[76]

3.58 Other stakeholders raised concerns about variation in state respondents' policies regarding connection requirements and settling native title claims.[77] Some variation is to be expected, but this variation highlights the need for negotiations to be conducted in the context of law that appropriately recognises and protects native title and sets a fair and reasonable standard of proof of native title.

3.59 Very few native title claimants have received a determination that native title does not exist. The ALRC does not consider this to be evidence that the connection requirements are aligned with the objects of the recognition and protection of native title. Presumably claim groups with claims that might not meet the statutory criteria would not go to a hearing where extensive proof is required, where they would risk having their claims dismissed and determinations made that native title does not exist. Instead, a claimant might enter into a negotiation for a consent determination with the poor bargaining position that comes from the awareness of both sides that the claimant is likely to fail at hearing. Compromises would be likely regarding such things as boundaries, the extent and nature of native title rights and interests, and compensation for extinguishment. AIATSIS reported that

> 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. [78]

3.60 Consent determinations in those circumstances may be less advantageous (from a claimant perspective) than a consent determination reached in the context of a reformed s 223 (as recommended in Chapter 5). The confidentiality associated with negotiations for consent determinations means that these propositions cannot be fully tested. But it is a normal part of negotiations that parties bargain 'in the shadow of the law'.[79]

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76 Central Desert Native Title Service, *Submission 48*.

77 Queensland South Native Title Services, *Submission 24*; North Queensland Land Council, *Submission 17*; Just Us Lawyers, *Submission 2*.

78 AIATSIS, *Submission 36*.

79 Queensland South Native Title Services, *Submission 24*; Robert N Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 *Yale Law Journal* 950. Government respondents have common law model litigant obligations and in some jurisdictions, these obligations are expressed in legislation and policy. Some concerns have been expressed about compliance with these rules and the lack of enforcement options: Productivity Commission, *Access to Justice Arrangements* (2014) 429–440.

Cost and delay

3.61 Concerns about cost and delay have been prominent in discussion of the *Native Title Act* with the claims process identified by many commentators as a significant factor contributing to cost and delay. In 2012, Brian Wyatt, CEO of the National Native Title Council, said that 'we are tired and weary of our old people dying before decisions are made on the native title'.[80] Also in 2012, John Catlin, Executive Director, Native Title Unit, West Australian Department of Premier and Cabinet, noted that 'the failure of the Act to deliver timely and effective outcomes is undeniable'.[81]

3.62 The Productivity Commission recently noted concerns that the 'negotiation process in land subject to a native title claim can be lengthy and complex and can often involve multiple parties, which in turn can lead to significant delays in gaining access to land'.[82]

3.63 Despite the increase in the rate of determinations made by the Federal Court since 2011, stakeholders continue to report that they consider the native title system to be too slow and expensive.[83]

3.64 Traditional Owner, Gumbaynggirr man and Garby Elder, Anthony Clarence Perkins, commented after the determination over his land at Red Rock Beach:

> I never thought it would have an ending, I'll be honest. It's been going a long while. To me we may say it's taking too long to be awarded native title to our property or country or whatever areas. But again we've got to look at the fact that there's a lot to be done in the process. We've been sort of disconnected for lots of years, and we've got to pull all the information back before we can go forward, and that sometimes frustrates a lot of people. But to us it's a step in the right direction.[84]

3.65 The Gumbaynggirr People's claim took 17 years.[85] These very long time frames are not confined to NSW. In September 2014, the Kokatha claim in South Australia was finalised, by consent, after an 18-year proceeding.[86]

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80 Sally Sara, *Indigenous Leaders Want Faster Native Title Process* (6 June 2012) PM with Mark Colvin <http://www.abc.net.au/pm>.

81 John Catlin, 'Recognition Is Easy' in Toni Bauman and Lydia Glick (eds), *The Limits of Change: Mabo and Native Title 20 Years On* (AIATSIS, 2012) 426. See also Graeme Neate in the same collection: 'Concern has been expressed by claimants, judges, political leaders and others about the time it takes to resolve native title applications and the implications of the delay for claim groups' (at 218).

82 Australia and Productivity Commission, *Mineral and Energy Resource Exploration: Productivity Commission Inquiry Report No 65* (2013) 127.

83 NSW Young Lawyers, *Submission 58*; Queensland Government, *Submission 28*; Central Desert Native Title Services, *Submission 26*; Association of Mining and Exploration Companies, *Submission 19*; National Farmers' Federation, *Submission 14*; Minerals Council of Australia, *Submission 8*; Telstra, *Submission 4*.

84 Anthony 'Tony' Perkins, 'TO Comment' (2014) *Native Title Newsletter*.

85 *Phyball on behalf of the Gumbaynggirr People v A-G (NSW)* [2014] FCA 851 (15 August 2014).

86 Helen Davison, 'Indigenous Title Claim Settlement "One of the Most Complex" in SA History' *The Guardian*, 2 September 2014 <http://www.theguardian.com>.

3.66 Stakeholders representing the minerals sector also emphasised the importance of timely and expeditious resolution of native title claims, and certainty for the wider community.[87] As the Chamber of Minerals and Energy said,

> of primary interest to the sector is the expeditious resolution of native title claims to deliver certainty, confirm the validity of non-native title interests, and define the native title holders.[88]

3.67 Some stakeholders considered that the primary goal of this Inquiry should be to address delays in determinations and suggested that more research is needed to identify the causes of 'the native title claim backlog'.[89] While certainty and timeliness are two guiding principles, the recognition and protection of native title is the central object of the *Native Title Act* and of this Inquiry.[90] As the Minerals Council of Australia suggests, reducing time frames may well be addressed via administrative reform.[91] The Federal Court case management processes have clearly produced results. However, if native title is not sufficiently recognised and protected at law, the only response can be statutory change.

Timeliness and just outcomes

3.68 Just, sustainable and effective outcomes may take time to achieve.[92] AIATSIS cautioned against an excessive focus on timeliness, suggesting that the integrity of the process requires justice to be prioritised ahead of timeliness.[93] Concerns were raised in 2008 by the then Social Justice Commissioner, Dr Tom Calma, regarding the priority given to efficiency, rather than the recognition and protection of native title.[94] Again in 2012, the Social Justice Commissioner, Mick Gooda, commented on a 'silent disregard for the fundamental inequalities in the native title system in favour of more efficient outcomes in the rush to finalise settlement of native title'.[95]

3.69 Graeme Neate, former NNTT President, noted that 'broader settlements'—settlements that include grants of land, joint management arrangements, or employment and economic opportunities—take longer to negotiate than a 'bare determination', but 'might be much more satisfactory for all the parties'.[96]

3.70 Claimants value an efficient process, but they also need time to make decisions about their claim group composition, the appropriate boundaries of their claim, and the

87 Chamber of Minerals and Energy of Western Australia, *Submission 21*; Association of Mining and Exploration Companies, *Submission 19*.
88 Chamber of Minerals and Energy of Western Australia, *Submission 21*.
89 Minerals Council of Australia, *Submission 65*.
90 Terms of Reference; *Native Title Act 1993* (Cth) s 3(a).
91 Minerals Council of Australia, *Submission 65*.
92 A Frith and M Tehan, *Submission 12*.
93 AIATSIS, *Submission 36*.
94 'Native Title Report 2007' (Australian Human Rights Commission, 2008) 23.
95 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2012' (Australian Human Rights Commission, 2012) 56.
96 Neate, above n 57, 205; See also Justice Michael Barker, 'Innovation and Management of Native Title Claims: What Have the Last 20 Years Taught Us?' (Paper Presented at National Native Title Conference, Alice Springs, 3–5 June 2013) 6. on the importance of determinations with non-native title outcomes.

rights and interests held under traditional laws and customs.[97] Each group is new to the system and must learn about native title processes and how to work within those processes.

3.71 Daniel O'Dea, a former Member of the NNTT, pointed out that compromising a claim is particularly stressful for claimants, and can be 'highly complex, emotional and confronting':

> Such decisions will often not only involve conflict or disagreement amongst the group, but require time and discussion within a group to consider the complex matters before proper decisions can be made … these things need to be worked through internally, carefully and, consequently, slowly.[98]

3.72 Rushing these decisions can result in conflict emerging at a later stage of the process, in challenges to the authorisation of the applicant, late joinder of Indigenous respondents, or disputes within the prescribed body corporate.

3.73 The ALRC has adopted as a guiding principle that any proposed reforms should encourage timely and just resolution of native title applications.[99] The potential for changes to the *Native Title Act* to delay the resolution of native title claims has been taken seriously. However the value of timeliness must not be placed ahead of the fundamental requirement of justice.[100]

Reasons for lengthy processes

3.74 The ALRC has considered whether the requirements of s 223 of the *Native Title Act* (and associated case law concerning connection) unnecessarily prolong proceedings. The Western Australian Government has suggested that connection requirements 'are not a significant contributor to delays in the resolution of native title claims',[101] and the Chamber of Minerals and Energy of Western Australia has recommended that the ALRC should only make proposals for reform that are based on quantitative, clear and objective evidence.[102] The Minerals Council of Australia suggested that it would be useful to "commission further work to identify and understand the key constraints in the system, and test whether the proposed reforms addressed the constraints".[103]

3.75 This Inquiry has identified multiple reasons for the slow pace of resolution of claims. It is well recognised that data on reasons for delay in court proceedings is difficult to obtain.[104] While the length of proceedings can be accurately identified, the

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97 In other litigation, such decisions would be made before commencing the claim, but native title claims are often lodged in response to a notification by a government of a future act under *Native Title Act* s 29, rather than at a time of the claim group's choosing. If traditional owners wish to speak for country, they must have a claim registered within four months: s 30.

98 Daniel O'Dea, *Negotiating Consent Determination: Co-Operative Mediation – The Thalanyji Experience* (Paper Delivered at the 3rd Annual Negotiating Native Title Forum, Melbourne, 19 February 2009).

99 See Ch 1.

100 See Ch 1.

101 Western Australian Government, *Submission 20*.

102 Chamber of Minerals and Energy of Western Australia, *Submission 21*.

103 Minerals Council of Australia, *Submission 65*.

104 CH van Rhee (ed), *The Law's Delay: Essays on Undue Delay in Civil Litigation* (2004) 4.

reasons for the time taken will not usually be evident from court files. Research on this topic is largely based on qualitative techniques, particularly interviews with participants.[105] The ALRC has also relied on this type of evidence. There are limitations to the information that some participants can disclose, in light of the duty of confidentiality that legal representatives have to their clients. These difficulties are not unique to native title, but are encountered in many areas of civil law where confidential settlements are a frequent outcome.[106]

3.76 The ALRC is satisfied that there is sufficient publicly available information upon which to base recommendations, and does not consider that the collection of further statistical or other data would be necessary or useful. The effect of law reform can never be precisely modelled, as it is not possible to hold any variables constant or to perfectly predict the responses of human actors in the system.

3.77 Importantly, as the Federal Court submitted, the causes of delay have changed over time.[107] In the first 10 years of the Act, there were only 45 determinations of native title.[108] There was uncertainty about the requirements of the Act, and a number of test cases were decided by the High Court before parties could confidently negotiate consent agreements. The South Australian Government suggested that delays were 'in large part reflective of the comparative newness of native title within the Australian legal system at the time the claims were lodged, the developing jurisprudence in this area, and the size and complexity of many of the claims'.[109]

3.78 The registration test and the requirement that a claim be made by an authorised applicant were not introduced until 1998. Prior to this, many overlapping claims were lodged, some without the consent of the claim groups, and some without strong factual foundations. The existence of these claims made resolving matters by consent very difficult.

3.79 It was also necessary for representative bodies, claim groups, expert witnesses, government parties and third party respondents to acquire skills and expertise in the area.[110] There were 223 determinations in the second 10 years of the Act.[111] There is now significantly more certainty around many aspects of the law,[112] and significantly more of the participants in the system have highly developed skills and expertise—although shortages remain in some areas.[113] The following matters (in no particular

105 See, eg, Public Accounts Committee, NSW Parliament, 'Report, Inquiry into Court Waiting Times' (133, June 2002) ch 5.
106 EW Wright, 'National Trends in Personal Injury Litigation: Before and After "Ipp"' (Justice Policy Research Centre, University of Newcastle, 2006) 5.
107 Federal Court of Australia, *Submission 40*.
108 Between 1 January 1994 and 1 January 2004.
109 South Australian Government, *Submission 34*.
110 JA Dowsett, 'Native Title Litigation—an ADR-Free Zone?' (Paper Presented at Mediation Strategies for Native Title Stakeholders, University of Queensland Law School, 8 April 2010) 3.
111 Between 1 January 2004 and 1 January 2014.
112 South Australian Government, *Submission 34*.
113 Justice John Mansfield, *Re-Thinking the Procedural Framework* (Speech Delivered to the Native Title User Group, Adelaide, 9 July 2008).

order) have been identified by stakeholders as present-day factors contributing to the length of proceedings.

- Stakeholders from claimant, respondent and judicial perspectives indicated that capacity constraints in representative bodies were a significant source of delay.[114]
- The collection, assessment and hearing of evidence in relation to connection take significant time and resources.[115]
- There are concerns that one state government's requirement for 'specific' evidence of connection in town and urban areas before settling a claim will require significant further resources and time to satisfy.[116]
- Overlapping claims and intra-Indigenous disputes contribute to the time taken to resolve claims.[117]
- The limited availability of appropriately qualified expert anthropologists contributed to the length and cost of proceedings.[118]
- The analysis of tenure for the purpose of identifying areas where native title has been extinguished is expensive and time consuming.[119] Claimant representatives have called for earlier tenure analysis,[120] or a flexible approach[121] but report that government respondents consider it impractical to conduct tenure analysis until connection has been accepted, which adds to time frames.[122]

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114 Federal Court of Australia, *Submission 40*; NSW Young Lawyers Human Rights Committee, *Submission 29*; Law Society of Western Australia, *Submission 9*; Minerals Council of Australia, *Submission 8*; Cape York Land Council, *Submission 7*. See also Deloitte Access Economics, 'Review of the Roles and Functions of Native Title Organisations' (Australian Government, March 2014) 21; Graeme Hiley and Ken Levy, 'Native Title Claims Resolution Review' (Report, Attorney-General's Department, 31 March 2006) 35.

115 NSW Aboriginal Land Council, *Submission 51*; Northern Territory Government, *Submission 31*; Cape York Land Council, *Submission 7*; Justice Michael Barker, 'Innovation and Management of Native Title Claims: What Have the Last 20 Years Taught Us?' (Paper Presented at National Native Title Conference, Alice Springs, 3–5 June 2013) 7. See Ch 3 for a detailed discussion of what is required to establish native title rights and interests.

116 Queensland South Native Title Services, *Submission 24*.

117 Chamber of Minerals and Energy of Western Australia, *Submission 21*; National Farmers' Federation, *Submission 14*; Law Society of Western Australia, *Submission 9*; Minerals Council of Australia, *Submission 8*; Cape York Land Council, *Submission 7*.

118 Justice Michael Barker, 'Innovation and Management of Native Title Claims: What Have the Last 20 Years Taught Us?' (Paper Presented at National Native Title Conference, Alice Springs, 3–5 June 2013); Minerals Council of Australia, *Submission 65*; Law Society of Western Australia, *Submission 41*; Cape York Land Council, *Submission 7*; Rita Farrell, John Catlin and Toni Bauman, 'Getting Outcomes Sooner: Report on a Native Title Connection Workshop' (National Native Title Tribunal and AIATSIS, 2007) 9; Graeme Hiley and Ken Levy, above n 114, 35.

119 NTSCORP, *Submission 67*; Western Australian Government, *Submission 43*; South Australian Government, *Submission 34*; Western Australian Government, *Submission 20*; Department of Justice, Victoria, *Submission 15*.

120 Yamatji Marlpa Aboriginal Corporation, *Submission 62*; North Queensland Land Council, *Submission 42*.

121 Queensland South Native Title Services, *Submission 55*.

122 North Queensland Land Council, *Submission 42*; Law Society of Western Australia, *Submission 41*.

- Three representative bodies were concerned about delays caused by the state indicating that its connection requirements have not been met, but not specifying what aspects of a connection report are unsatisfactory.[123] There are also concerns that the state respondent sometimes requires a litigation standard of proof to consent to a claim, where the Federal Court has said a lower standard is sufficient.[124]
- Two representative bodies reported that delays were caused by state governments that insisted on an Indigenous Land Use Agreement[125] before entering into a consent determination.[126]
- The right to negotiate may contribute to delay in two ways. First, because the *Native Title Act* gives significant procedural rights to groups with a registered claim, there may be a reduced incentive to speedily progress the claim,[127] particularly if there is a risk the claim will fail. Second, negotiating with proponents can absorb the claim group's time, energy and resources, meaning they are unable to simultaneously undertake the work involved with the claim.

Native title and land justice

3.80 Stakeholders have pointed out that the *Native Title Act* was never intended to be the sole response to *Mabo v Queensland [No 2]* and to Indigenous demands for land justice, or to the economic and social disadvantage that is a consequence of dispossession.[128] It was to be accompanied by a land fund and social justice package, thus providing a comprehensive response.[129]

123 NTSCORP, *Submission 67*; Central Desert Native Title Services, *Submission 26*; Queensland South Native Title Services, *Submission 24*.

124 NTSCorp, Submission to AIATSIS *Commonwealth Native Title Connection Project* 2011.

125 An Indigenous Land Use Agreement is an agreement dealing with a future act—that is, an act that affects native title—made under *Native Title Act* pt 2 div 3.

126 Yamatji Marlpa, Submission to Deloitte Access Economics, *Review of the Roles and Functions of Native Title Organisations* 2014; Queensland South Native Title Services, *Submission 24*. The North Queensland Land Council said: 'Another tactic that is engaged in not just by the State but also other respondents is that of demanding ILUA's being agreed to as the price of consent to the determination': North Queensland Land Council, Submission to Deloitte Access Economics, *Review of the Roles and Functions of Native Title Organisations*, 2013 16. The Law Society of Western Australia argued that the 'whole of government approach' to native title has resulted in 'a substantial slowing of the progress towards arriving at consent determinations': Law Society of Western Australia, *Submission 41*.

127 Chamber of Minerals and Energy of Western Australia, *Submission 21*; Minerals Council of Australia, *Submission 8*; JA Dowsett, 'Native Title Litigation—an ADR-Free Zone?' (Paper Presented at Mediation Strategies for Native Title Stakeholders, University of Queensland Law School, 8 April 2010) 6.

128 See, eg, Law Council of Australia, *Submission 35*; Kimberley Land Council, *Submission 30*; Western Australian Government, *Submission 20*; National Native Title Council, *Submission 16*; Law Society of Western Australia, *Submission 9*; Just Us Lawyers, *Submission 2*.

129 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Social Justice and Native Title Report 2013' (Australian Human Rights Commission) 82–3.

3.81 In 2008, the then Social Justice Commissioner, Dr Tom Calma, commented that 'the other two limbs did not eventuate in the form intended, and this abyss is one of the underlying reasons why the native title system is under the strain it is under today'.[130]

3.82 The Jumbunna Indigenous House of Learning submission to the Senate Committee on Law and Justice said:

> Jumbunna considers that native title should be conceived within a comprehensive land justice framework with restitution at its centre. Such a comprehensive settlement process would deal with traditional and historic land claims, reparation for dispossession, resource management, Indigenous jurisdiction over land and resources, economic development, would deal with the realities and consequences of dispossession and should promote and embody Indigenous peoples' exercise of sovereignty.[131]

The Land Account and the Indigenous Land Corporation

3.83 The Preamble to the *Native Title Act* notes that 'many Aboriginal peoples and Torres Strait Islanders, because they have been dispossessed of their traditional lands, will be unable to assert native title rights and interests and that a special fund needs to be established to assist them to acquire land'. That special fund is the Land Account, administered by the Department of the Prime Minister and Cabinet. The fund received appropriations from consolidated revenue for the first 10 years of its operation, and on 30 June 2014, held nearly $2 billion.[132]

3.84 Since 2010, a minimum of $45 million, indexed for inflation, must be paid to the Indigenous Land Corporation (the ILC), a corporation established to assist Aboriginal and Torres Strait Islander people to acquire and manage land, so as to provide economic, environmental, social or cultural benefits for those people.[133]

3.85 The ILC reported that, in its early years, it focussed on acquiring properties and divesting them to Indigenous corporations. In recent years it has committed a greater proportion of funding to land management assistance rather than land acquisition.[134] The ILC has acquired 5.86 million hectares of land since establishment.[135] It has acquired 250 properties and granted 175 of them.[136]

3.86 Some concerns have been expressed about the focus on land acquisition and management, rather than divestment. In 2008, Dr Calma that the ILC 'does not always provide an effective and accessible alternative form of land justice when native title is not available'. In particular, he noted that Indigenous people are concerned about the

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130 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2008', above n 66, 46.

131 Jumbunna Indigenous House of Learning Research Unit, UTS, Submission No 17 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, July 2011, 2.

132 Aboriginal and Torres Strait Islander Land Account Financial Statement 2014 <www.dpmc.gov.au> accessed 17 April 2015.

133 *Aboriginal and Torres Strait Islander Act 2005* (Cth) s 191B.

134 Indigenous Land Corporation, *Submission 66*.

135 Indigenous Land Corporation, 'Annual Report 2012–13' (2013) 3.

136 Indigenous Land Corporation, 'Annual Report 2013-14' (2014) 32.

ILC's focus on economic gain rather than reparation for dispossession.[137] He called for 'consideration by government … of how the ILC's functions could better complement the native title system'.[138]

3.87 In June 2013, the ILC adopted a policy setting out its commitment to 'contribute to the constructive and flexible settlement of native title claims'.[139] This policy indicates that the ILC

> will consider providing assistance where a proposed native title settlement will facilitate a full and final resolution of claims and improve the quality of native title outcomes for Indigenous parties.[140]

3.88 The policy also indicates that the ILC will

> give preference to working with those States or Territories and Native Title Representative Bodies that have an effective, fair and realistic State or Territory or regional wide framework in place for the settlement of native title claims.[141]

3.89 Also in 2013, the ILC made its first contribution to a native title settlement under the Native Title Policy, when it acquired a property known as Mt Barker, on behalf of the Dja Dja Wurrung Clans Aboriginal Corporation.[142] In 2013-14, it engaged in negotiations on the final settlement of the Single Noongar Native Title Claim, but it does not appear that these negotiations included land acquisition.[143]

3.90 In 2014, Ernst & Young inquired into 'the effectiveness of Indigenous Business Australia and the ILC … in driving economic development'.[144] The authors of the report indicated that their recommendations respect 'the land promise', that is, that the purpose of the ILC is the compensation for the dispossession of land.[145] Their preferred option for reform would require the ILC to refocus its activities on its original compensatory purpose of land acquisition, land management and land divestment.

3.91 The Board is now developing a strategy for divestment of ILC business land holdings.[146]

3.92 Submissions to this Inquiry continued to express concern as to whether the ILC has met expectations.[147] This Inquiry's Terms of Reference do not encompass the Land

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137 'Native Title Report 2007', above n 94, 47.
138 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2008', above n 66, 47.
139 Indigenous Land Corporation, 'Annual Report 2012–13', above n 135, 27.
140 Indigenous Land Corporation, 'Indigenous Land Corporation Board Endorsed Policy on Support for the Resolution of Native Title Claims'.
141 Ibid.
142 Indigenous Land Corporation, 'Annual Report 2013-14', above n 136, 34.
143 Ibid.
144 Ernst & Young, 'Review of the Indigenous Land Corporation and Indigenous Business Australia' (2014) 24.
145 Ibid 7.
146 Indigenous Land Corporation, *Submission 66*.
147 South Australian Government, *Submission 68*; Central Desert Native Title Service, *Submission 48*; Law Society of Western Australia, *Submission 9*; See also Patrick Sullivan, 'Policy Change and the Indigenous Land Corporation' (Research Discussion Paper 25, AIATSIS); Catlin, above n 81, 428; 'Native Title Report 2007', above n 94, 47–49.

Account or the ILC. The ALRC makes no recommendations in this regard, but notes that the native title system needs to be considered in a comprehensive fashion. As Dr Calma noted, if one element of the system is not working, there is increased pressure on other elements.

3.93 In March 2014, the Board released a draft Stronger Land Account Bill, 'aimed at reinforcing the fiduciary principle that the Land Account is held, by the Commonwealth, for, and on behalf of, Aboriginal persons and Torres Strait Islanders'.[148] The Greens introduced the Aboriginal and Torres Strait Islander Amendment (A Stronger Land Account) Bill 2014 to Parliament in June 2014. This Bill includes requirements for the government to consult with Aboriginal people and Torres Strait Islanders in relation to appointments to the ILC Board; any proposed legislative change affecting the Land Account; and the investment policy of the Land Account.[149]

3.94 Again, this matter falls outside this Inquiry's Terms of Reference. However, as was acknowledged in the Preamble to the *Native Title Act*, the dispossession of Aboriginal people and Torres Strait Islanders, and the inability of many of those most severely affected by a European settlement to establish native title, points to the need to maintain a robust Land Account.

The social justice package

3.95 In 1994, the then Prime Minister, the Hon Paul Keating MP, sought the views of the Aboriginal and Torres Strait Islander Commission (ATSIC) on 'further measures that the Government should consider to address the dispossession of Aboriginal and Torres Strait Islander people as part of its response to the 1992 High Court decision on native title'.[150] The Native Title Social Justice Advisory Committee of ATSIC reported that a social justice package should address, among other things, compensation for dispossession of land and dispersal of the Indigenous population.[151] It suggested that the need for compensation and restitution goes beyond the scope of the Land Account, and such compensation should include 'access to revenue derived from the use of land by non-Indigenous Australians'.[152]

3.96 Most other comparable jurisdictions have a major compensation fund that addresses the effect of Indigenous dispossession and the continuing disadvantage of groups affected by colonisation.[153]

148 Indigenous Land Corporation, *Submission 66*.
149 Explanatory Memorandum, Aboriginal and Torres Strait Islander Amendment (A Stronger Land Account) Bill 2014.
150 Native Title Social Justice Advisory Committee, 'Rights Reform and Recognition' (Aboriginal and Torres Strait Islander Commission, 1995) 1.
151 Ibid 4.32.
152 Ibid 4.36, 4.40.
153 See further Ch 9.

3.97 Without a complete response to social justice issues, great pressure is placed on the native title system.[154] There have been continuing calls for a social justice package to complement the native title system[155] and to compensate traditional owners whose native title rights have been found to have been extinguished.[156]

3.98 The ALRC's recommendations for reform to the *Native Title Act* are intended to be consistent with the original understanding of its drafters—that native title could never be a sufficient response to the land justice question, and that land purchase and a social justice package are essential elements of a response. Another approach is alternative settlements (discussed below).

3.99 Agreement making with Indigenous peoples has occurred over many hundreds of years in all parts of the world. Within Australia, it can operate within the native title framework or under alternative regimes. Some stakeholders expressed strong support for the adoption of settlement approaches rather than the current native title claims process which depends on judicially recognised rights and interests.[157]

Alternative settlement

3.100 The Hon Aden Ridgeway, Gumbayyngirr man and former Senator, has called for 'a complete rethinking of the way native title issues are resolved and managed in this country. What we need is to establish comprehensive settlements'.[158] The National Native Title Council has also endorsed such an approach.[159]

3.101 In 2006, the Land Justice Group, a group representing Victorian Traditional Owners, said

> if the land grievances of Indigenous people in this State can be substantially addressed through negotiated agreements (such as Wotjobaluk and Gunditjmara) that resolve native title whilst at the same time providing other benefits through ancillary agreements, then the need for other land justice measures may be relatively minimal.[160]

3.102 Professor Mick Dodson has argued that settlements, or negotiated agreements, can reduce transaction costs, improve working relationships between the state or

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154 A Frith and M Tehan, *Submission 12*.

155 Minerals Council of Australia, *Submission 65*; Law Council of Australia, *Submission 64*; Central Desert Native Title Service, *Submission 48*; Australian Human Rights Commission, *Submission 1*.

156 Law Council of Australia, *Submission 35*; National Congress of Australia's First Peoples, *Submission 32*; Law Society of Western Australia, *Submission 9*.

157 See, eg, Queensland South Native Title Services, *Submission 24*; National Native Title Council, *Submission 16*; Minerals Council of Australia, *Submission 8*; Just Us Lawyers, *Submission 2*.

158 Aden Ridgeway, 'Where We've Come From and Where We're At With the Opportunity That Is Koiki Mabo's Legacy to Australia' (Paper Presented at Native Title Conference, Alice Springs, 3-5 June 2003); cited in Stuart Bradfield, 'Agreeing to Terms: What Is a "Comprehensive" Agreement?' (Land, Rights, Laws: Issues of Native Title 2/26, 2004) 13.

159 National Native Title Council, *Submission 16*.

160 Bob Nicholls, Graham Atkinson, Mark Brett, 'Native Title and Land Justice' (Paper Presented at Native Title Conference, Darwin, 26 May 2006).

territory and traditional owners, and produce better outcomes for traditional owners with regard to economic development and self-sufficiency.[161]

3.103 In jurisdictions outside Australia, 'settlement' implies not only the resolution of native title claims, but the resolution of broader issues.[162] Agreements could include settlement of native title claims, provision for Aboriginal control of land use and development on land they own, resource royalties, participation in planning, development and environmental management in the area, joint management agreements, service delivery arrangements and measures to strengthen Aboriginal local government.[163]

3.104 Agreement making has proceeded rapidly in Australia, some using the ILUA provisions of the *Native Title Act* and some under alternative legislative regimes.[164]

3.105 At the Native Title Minister's Meeting in 2008, Ministers acknowledged that the potential of the native title system had been 'constrained by technical and inflexible legal practices'. The Ministers agreed to work towards negotiated settlements and established a Joint Working Group on Indigenous Land Settlements (Joint Working Group) 'to develop innovative policy options for progressing broader and regional land settlements'.[165]

3.106 The Joint Working Group produced *Guidelines for Best Practice, Flexible and Sustainable Agreement Making*. The Guidelines note that a 'broader land settlement' can include both native title and non-native title outcomes.[166]

3.107 The *Traditional Owner Settlement Act 2010* (Vic) (TOSA) provides for non-native title settlements between the Victorian Government and traditional owner groups in Victoria. Settlements are to be made on the basis that traditional owners must withdraw native title claims and agree not to make a claim in the future. Settlements may include recognition of the group and certain traditional owner rights over Crown land, grants of land either as freehold title or 'Aboriginal title', funding for traditional owner corporations, and the right to comment on or consent to certain activities and provide input into the management of land and natural resources.[167] The Social Justice Commissioner described this agreement as setting 'the benchmark for other states to meet when resolving native title claims'.[168]

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161 'Report of the Steering Committee for the Development of a Victorian Native Title Settlement Framework' (Department of Justice, Victoria, 2008) 1.

162 Bradfield, above n 158, 2–3. See further Ch 9.

163 Mick Dodson, 'Indigenous Social Justice Strategies and Recommendations' (Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, 1995); See also Neate, above n 57, 204–205.

164 Many agreements are listed on the Agreements, Treaties and Negotiated Settlements website: atns.net.au.

165 *Native Title Ministers Meeting Communique* 2009.

166 Joint Working Group on Indigenous Land Settlements, *Guidelines for Best Practice: Flexible and Sustainable Agreement Making*, August 2009, 5.

167 Department of Justice Justice, *Traditional Owner Settlement Act* <http://www.justice.vic.gov.au/home/your+rights/native+title/traditional+owner+settlement+act>.

168 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2011' (Australian Human Rights Commission, 2011) 4; See also Law Council of Australia, *Submission 64*; AIATSIS, *Submission 36*.

3.108 The first settlement under the TOSA was with the Gunaikurnai people, in 2010.[169] In 2013, a comprehensive settlement was made with the Dja Dja Wurrung, which included the transfer of two freehold properties; hunting, fishing and gathering rights; a Land Use Activity Agreement (a simplified ILUA); transfer of parks and reserves as 'Aboriginal title' and joint management of those lands.[170]

3.109 In Western Australia, the Western Australian Government and the South West Aboriginal Land and Sea Council, representing six native title claim groups—Yued, Gnaala Karla Boodja, South West Boojarah, Wagyl Kaip, Ballardong, and Whadjuk—have concluded a settlement which will not include native title, but will be implemented by way of an ILUA under the *Native Title Act*. The settlement includes recognition of the Noongar people as traditional owners, the transfer of land, funding, joint management of the conservation estate and processes for the protection of heritage.[171] The settlement was authorised in six meetings held between 31 January 2015 and 28 March 2015.

3.110 The South Australian Government reports that six of 11 consent determinations in that State have included agreements that address 'broader issues such as compensation, sustainability of the Prescribed Body Corporate, and future act issues'.[172] However it also indicated that 'the focus on achieving non-native title land settlement outcomes has faded … as most groups are focussed on a native title outcome'.[173] This Government suggested that an 'alternative land settlement process with a guaranteed, substantial injection of funding from ILC and Indigenous Business Australia' would be a possible way forward.

3.111 Some efforts have been made to achieve regional agreements in Queensland, but they do not appear to have been successful.[174] Queensland South Native Title Services has suggested that an alternative settlement framework, similar to the Victorian TOSA, should be discussed.[175] The return of 3.2 million hectares of land, including national park and former pastoral land, to traditional owners under the Queensland Government's Cape York Peninsula Tenure Resolution Program is an important step. Under the Program, land owned and acquired by the State is converted to Aboriginal freehold land, while nature refuges and jointly managed national parks are created over areas with high conservation significance. The Program is intended to create economic development opportunities for Aboriginal people, provide environmental benefits, and

169 Department of Justice, Victoria, *Submission 15*.
170 Dja Dja Wurrung Clans Aboriginal Corporation, *Settlement of the Dja Dja Wurrung Native Title Applications under The* Traditional Owner Settlement Act 2010.
171 Western Australian Government, *The South West Native Title Settlement* Land, Approvals and Native Title Unit <http://www.dpc.wa.gov.au>.
172 South Australian Government, *Submission 34*.
173 South Australian Government, *Submission 68*.
174 Graeme Neate 'Negotiating Comprehensive Settlements of Native Title Claims' (Paper Presented at LexisNexis Native Title Law Summit, 2009) 26.
175 Queensland South Native Title Services, *Submission 24*.

contribute to the resolution of native title claims.[176] These transfers are in addition to the transfers made under the *Aboriginal Land Act 1991* (Qld) and the *Torres Strait Islander Land Act 1991* (Qld), discussed earlier.

3.112 The Law Council of Australia supports alternative settlements, and suggested that state and territory governments should be encouraged to establish frameworks.[177] However the Council considered that settlements should not be used to induce Aboriginal people and Torres Strait Islanders to accept lesser rights than they would be entitled to in a native title determination.[178]

Commonwealth-state financial arrangements

3.113 The ALRC has not been asked to inquire into compensation for the extinguishment of native title. However state governments have pointed out that compensation is relevant to the consideration of the connection requirements of the *Native Title Act*. Concerns arise on two related fronts.

3.114 First, two state governments raised concerns that changes to the *Native Title Act* could increase the liability of state and territory governments for compensation.[179] The South Australian Government reported that 'virtually all determinations of native title are followed by negotiations or claims for significant compensation for historical extinguishment'.[180] The Western Australian Government advised that 'the impact of the *Native Title Act*, including … compensation liabilities is greater in Western Australia than any other jurisdiction in Australia'.[181] The Northern Territory Government also indicated that it is expecting compensation claims in the future.[182]

3.115 The *Native Title Act* provides that where an act extinguishing native title is attributable to the Commonwealth, compensation is payable by the Commonwealth,[183] while the states and territories are liable for compensation when their acts extinguish native title.[184] The South Australian Government noted that 'the financial assistance package promised by the Commonwealth at the time of the *Native Title Act* and since is still yet to come to fruition, leaving the bulk of the cost of native title recognition with the states and territories'.[185] The Commonwealth has entered into discussion with the

176 Correspondence, Georgianna Fien, Department of Aboriginal and Torres Strait Islander Partnerships, 14 April 2015. See also Oliver Milman, 'Righting a Wrong: Huge Land Handover to Traditional Cape York Owners' *The Guardian*, 23 September 2014 <http://www.theguardian.com>.

177 Law Council of Australia, *Submission 64*. The Minerals Council of Australia also suggested it would be appropriate to explore state based regimes: *Submission 65*.

178 Ibid.

179 South Australian Government, *Submission 34*; Western Australian Government, *Submission 20*.

180 South Australian Government, *Submission 68*; South Australian Government, *Submission 34*.

181 Western Australian Government, *Submission 20*.

182 Northern Territory Government, *Submission 31*.

183 *Native Title Act 1993* (Cth) ss 17, 22A.

184 Ibid ss 20, 22G.

185 South Australian Government, *Submission 34*.

states and territories regarding a Commonwealth contribution to state and territory compensation liabilities, but no final agreement has been reached.[186]

3.116 Secondly, one state government has expressed concerns about the absence of a commitment from the Commonwealth Government to contribute to funding for alternative settlements. In 2013, the Western Australian Attorney General said that, without such a contribution, there is 'a disincentive for the states/territories to adopt more progressive native title policies'. [187]

3.117 At the 2008 Native Title Ministers' Meeting, Ministers agreed to negotiate on 'Commonwealth financial assistance that could better facilitate state and territory settlement of native title issues'.[188] In 2010, the Commonwealth entered into a written agreement with Victoria under s 200 of the *Native Title Act* for the provision of financial assistance to that State 'to enable benefits to be provided to native title claim groups under settlement agreements'.[189] The Commonwealth's financial contribution will not exceed the state's financial contribution.[190] The agreement notes that 'the Commonwealth will determine any contribution it makes to Settlement Agreements with States and Territories on a case-by-case basis and extend this Agreement accordingly'.[191]

3.118 The Commonwealth Government also made a substantial contribution to the acquisition of three pastoral properties purchased and transferred to the Olkola people under the Cape York Peninsula Tenure Resolution Program discussed above.[192]

3.119 The Western Australian Government has sought a Commonwealth contribution to the proposed settlement with the Noongar community.[193]

3.120 Alternative settlements, and the respective contributions of governments to their funding, are policy matters and the ALRC does not make recommendations in this regard. However, it is important to note that both Indigenous leaders and the government Ministers have indicated that alternative settlements are preferable to a continued reliance on litigation.[194] Some progress is being made towards alternative settlements, and further progress will allow native title litigation to be just one of a range of means for achieving land justice for traditional owners and certainty for other parties.

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186 Western Australian Government, Submission No 18 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, August 2011.

187 Michael Mischin, 'Improving the Native Title System' (paper Presented at National Native Title Conference, Perth, 14 June 2013) 12.

188 Joint Working Group on Indigenous Land Settlements, 'Report to the Native Title Ministers' Meeting 2008-09'. The ALRC is not aware that such an agreement has been finalised.

189 COAG, *National Partnership Agreement on Native Title* cl 27 <www.federalfinancialrelations.gov.au>.

190 Ibid cl 31.

191 Ibid cl 4.

192 Correspondence, Georgianna Fien, Department of Aboriginal and Torres Strait Islander Partnerships, 14 April 2015.

193 Department of the Premier and Cabinet, Western Austrlaia, *The South West Settlement: Questions and Answers* (February 2014) Department of Premier and Cabinet <www.dpc.wa.gov.au>.

194 *Native Title Ministers Meeting Communique* 2009; National Native Title Council, *Submission 16*.

Policy development

3.121 In the course of this Inquiry, stakeholders have raised issues that are broader than the Terms of Reference and concern policy development more generally. They have called for the development of native title law to be consistent with other policy settings, and for a systematic approach to law reform.

Consistency with other policy settings

3.122 The National Indigenous Reform Agreement (Closing the Gap) was made in 2008 between the Commonwealth of Australia and all states and territories, and has bipartisan support. It committed those governments to effort in seven areas, one of which is economic participation. The Agreement notes that 'access to land and native title assets, rights and interests can be leveraged to secure real and practical benefits for Indigenous people'.[195]

3.123 AIATSIS has argued that native title is significant for achieving the Closing the Gap targets:

> 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.[196]

3.124 On the other hand, obtaining a determination of native title does not guarantee economic opportunity.[197] Much depends on whether the area is rich in minerals,[198] whether the group has an effective body corporate and good governance,[199] and the content of the rights themselves.[200]

3.125 Aboriginal leaders have emphasised the importance of using native title for economic development. Warren Mundine, Chair of the Prime Minister's Indigenous Advisory Council, said that native title rights, as well as compensation for loss of land, 'can and should be used to generate commercial and economic development for Indigenous people through a real economy, real jobs and real for-profit businesses owned and operated by Indigenous people'.[201] Similarly, Wayne Bergman, CEO of Kred Enterprises, said:

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195 COAG, 'National Indigenous Reform Agreement' 7.

196 AIATSIS, Submission to the Review of Native Title Organisations, 2013. See also AIATSIS, *Submission 36*; J Altman, *Submission 27*; Native Title Services Victoria, *Submission 18*.

197 Western Australian Government, *Submission 20*; Graeme Neate, 'Using Native Title to Increase Indigenous Economic Opportunities' (paper Presented at 5th Indigenous Recruitment and Training Summit, Brisbane, 6 December 2010) 19.

198 Graeme Neate, 'Using Native Title to Increase Indigenous Economic Opportunities' (paper Presented at 5th Indigenous Recruitment and Training Summit, Brisbane, 6 December 2010).

199 Western Australian Government, *Submission 20*.

200 J Altman, *Submission 27*.

201 Warren Mundine, 'Australia Day Address' (2014).

> Aboriginal culture cannot survive without an economy to support it. And to build a viable indigenous economy, we must be allowed to control our land and sea country and to use the leverage it gives us to build an economic foundation for our future.[202]

3.126 The ALRC has adopted as a guiding principle that 'reform should promote sustainable, long-term social, economic and cultural development for Aboriginal peoples and Torres Strait Islanders'.[203]

A systematic approach to reform

3.127 A number of stakeholders pointed out that the ALRC's Inquiry is just one of a number of inquiries into different aspects of the native title system, and suggested that this is both wearying for participants in the system, and not conducive to systematic reform.

3.128 The ALRC has had regard to previous reports, reviews and inquiries, particularly the reports by the *Taxation of Native Title and Traditional Owner Benefits and Governance Working Group* and the *Review of Native Title Organisations*, which are discussed in Chapter 10, and the Productivity Commission's *Mineral and Energy Resource Exploration* report, mentioned earlier.

3.129 Nick Duff identified 11 native title law reform activities since 2007.[204] This places a significant burden on stakeholders, particularly native title representative bodies and service providers. Central Desert Native Title Services said:

> Participation by native title parties in multiple and sometimes overlapping reviews or consultations is time consuming and costly and often without any positive outcome. It creates a feeling of cynicism and pessimism within the native title sphere and a reluctance to participate in 'another review'. [205]

3.130 Professor Richard Bartlett has suggested that amendments to the Act have been largely directed to 'efficiency, efficacy, timeliness, streamlining, and improving the operation of the native title system', rather than to addressing inequality.[206]

3.131 The Association of Mining and Exploration Companies raised a broader concern about the lack of clear strategic direction by governments, and said there is a 'need for Government to develop and articulate an overarching native title strategy including a coherent long term plan for legislative and regulatory reform in this area'.[207]

3.132 The National Congress of Australia's First Peoples noted that the ALRC Inquiry addresses 'limited issues'. It supports 'a comprehensive review of the Act by the

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202 Dan Harrison, 'Call to Link Native Title to Aboriginal Economy' *The Sydney Morning Herald*, 28 June 2012.
203 See Ch 1.
204 AIATSIS, *Submission 36*; See further Nick Duff, 'Reforming the Native Title Act: Baby Steps or Dancing the Running Man?' (2013) 17 *Australian Indigenous Law Reporter* 56.
205 Central Desert Native Title Services, *Submission 26*.
206 Richard H Bartlett, *Native Title in Australia* (LexisNexis Butterworths, 3rd ed, 2015) 126.
207 Association of Mining and Exploration Companies, *Submission 19*.

Attorney-General's Department, designed to achieve implementation of the rights set out in the UN Declaration of the Rights of Indigenous People'.[208]

3.133 In 2010 and 2011 the Aboriginal and Torres Strait Social Justice Commissioner called for a comprehensive and independent review of the native title system, considering the burden of proof, extinguishment, the future act regime and other matters.[209]

3.134 Goldfields Land and Sea Council said that there are 'a range of issues demanding attention that have not been included in the terms of reference for the current review, including extinguishment and the right to negotiate'.[210]

3.135 There are also significant post-determination challenges to be addressed, including the effectiveness and funding of prescribed bodies corporate (PBCs). The Deloitte *Review of Native Title Organisations*[211] and the *Taxation Working Group*[212] were significant in raising these issues and indicating some ways forward.

3.136 The ALRC appreciates and acknowledges the calls for a systematic approach to reform, but is bound by the Terms of Reference for this Inquiry, the scope of which is outlined in Chapter 1.

208 National Congress of Australia's First Peoples, *Submission 32*.
209 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2011', above n 168, 19–20; Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2010' (2010).
210 Goldfields Land and Sea Council, *Submission 22*.
211 Deloitte Access Economics, above n 114.
212 Australian Treasury, 'Taxation of Native Title and Traditional Owner Benefits and Governance Working Group: Report to Government' (2013).

4. Defining Native Title

Contents

Summary

4.1 This chapter sets out the legal requirements to establish native title rights and interests—commonly referred to a 'connection requirements'. It outlines the definition of native title in s 223 of the *Native Title Act* (Cth) ('*Native Title Act*') and sets out major judicial statements on its interpretation. Satisfying the definition of native title has been said to impose an 'onerous' burden of proof on claimants, particularly in light of jurisprudence interpreting what is required to satisfy the definition.[1]

4.2 This has led to calls for reform that relate to both the means of proving native title, and the substantive legal test for establishing native title. The ALRC was directed to consider both of these issues under its Terms of Reference. The ALRC considers that aspects of the definition of native title should be reformed to better align it with the beneficial purpose of the Act. This chapter identifies these aspects, and summarises the ALRC's recommendations for reform. Justifications for these recommendations are fully developed in subsequent chapters.

4.3 Briefly, the ALRC recommends that there be explicit acknowledgment in the *Native Title Act* that traditional laws and customs may adapt, evolve or otherwise develop. The ALRC also makes recommendations addressing the degree of continuity of acknowledgment and observance of traditional laws and customs that is required to establish native title. Additionally, the ALRC recommends that the definition of native title be amended to make clear that native title rights and interests may be succeeded to by another Aboriginal or Torres Strait Islander group, where these rights and interests have been transmitted, transferred or otherwise acquired in accordance with traditional laws and customs. In relation to the nature and content of native title rights and

1 Richard H Bartlett, *Native Title in Australia* (LexisNexis Butterworths, 3rd ed, 2015) 232.

interests, the ALRC recommends that it be made clear that native title may comprise a right that may be exercised for any purpose, including commercial purposes, and that the native title may include a right to trade.

Establishing native title rights and interests

Recognition of native title in *Mabo [No 2]*

4.4 In *Mabo v Queensland [No 2]* (*'Mabo [No 2]'*), the High Court found that pre-existing rights and interests in land held by Aboriginal and Torres Strait Islander peoples—native title—survived the assertion of sovereignty by the Crown.[2]

4.5 As noted in Chapter 2, native title has its source in the traditional laws and customs of the relevant Aboriginal and Torres Strait Islander peoples. In *Mabo [No 2]*, Brennan J stated that native title 'has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory'.[3]

4.6 Brennan J set out the conditions for the continuation of native title after the assertion of sovereignty, stating that native title will survive or continue after sovereignty where:

- a clan or group has continued to acknowledge and observe traditional laws and customs whereby their traditional connection with the land has been substantially maintained;[4] and
- it has not been extinguished by the valid exercise of sovereign power.[5]

4.7 However, where 'any real acknowledgment of traditional law and any real observance of traditional customs' has ceased, 'the foundation of native title has disappeared'.[6]

4.8 As discussed below, the question of what claimants must establish to demonstrate that the foundation of native title remains has become pivotal to the jurisprudence of native title. In particular, issues of continuity of acknowledgment and observance of laws and customs and the extent of adaptation of laws and customs have been considered at length in determinations of native title, and are a focus of this Report's recommendations in relation to connection requirements.[7]

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2 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 57, 69 (Brennan J, Mason CJ, McHugh J agreeing); 100–01 (Deane and Gaudron JJ); 184 (Toohey J). The history of the recognition of native title in Australia is discussed in Ch 2.

3 Ibid 58.

4 Ibid 59.

5 Ibid 63 (Brennan J); 110 (Deane and Gaudron JJ). See also Melissa Perry and Stephen Lloyd, *Australian Native Title Law* (Lawbook Co, 2003) 14–15.

6 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 60. See also Perry and Lloyd, above n 5, 22–23.

7 See Chs 5, 6 and 7 for further discussion.

Defining native title in the *Native Title Act*: s 223(1)

4.9 Following *Mabo [No 2]*, the *Native Title Act* was enacted to provide, among other things, a mechanism for determining native title.[8]

4.10 Section 223 of the *Native Title Act* provides a definition of native title, based on Brennan J's judgment in *Mabo [No 2]*.[9] Section 223(1) provides that

> (1) 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 traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
>
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
>
> (c) the rights and interests are recognised by the common law of Australia.

4.11 To establish that they hold native title, Aboriginal or Torres Strait Islander peoples must satisfy the definition of native title in s 223(1). In other words, they bear the onus or burden of proving each of the elements of s 223(1).

4.12 The ultimate outcome of a native title claim is a native title determination. A determination of native title is a determination 'whether or not native title exists', and is made by the Court in accordance with s 225 of the *Native Title Act*:

> A ***determination of native title*** is a determination whether or not native title exists in relation to a particular area of land or waters and, if it does exist, a determination of
>
> (a) who the persons, or each group of persons, holding the common or group rights comprising the native title are; and
>
> (b) the nature and extent of the native title rights and interests in relation to the determination area; and
>
> (c) the nature and extent of any other interests in relation to the determination area; and
>
> (d) the relationship between the rights and interests in paragraphs (b) and (c) (taking into account the effect of this Act); and
>
> (e) to the extent that the land or waters in the determination area are not covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease—whether the native title rights and interests confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others.

8 *Native Title Act 1993* (Cth) s 3(c).
9 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 70.

4.13 The High Court has emphasised repeatedly that the *Native Title Act* is the starting point for considering a determination of native title.[10] However, the interpretation of the Act has been informed by the basis upon which native title was first recognised in *Mabo [No 2]*.[11]

4.14 In *Members of the Yorta Yorta Aboriginal Community v Victoria* ('*Yorta Yorta*'), Gleeson CJ, Gummow and Hayne JJ begin their discussion of s 223 by emphasising that, upon the Crown's acquisition of sovereignty over a particular part of Australia, native title—rights and interests in relation to land or waters that owed their origin to the traditional laws and customs of the relevant Indigenous peoples—survived or continued.[12] As they later noted,

> The native title rights and interests which are the subject of the Act are those which existed at sovereignty, survived that fundamental change in legal regime, and now, by resort to the processes of the new legal order, can be enforced and protected. It is those rights and interests which are 'recognised' in the common law.[13]

4.15 It is thus possible to distinguish between the subject and the product of legal recognition in native title law. The *subject* of recognition is the set of Indigenous relations ordered by traditional laws and customs. The *product* of legal recognition is 'native title', a set of rights and interests enforceable within the Australian legal system.[14] The concept of recognition is considered in more detail in Chapter 2.

4.16 This basis for the recognition of native title has consequences for the construction of the definition of native title in the *Native Title Act*.[15] The following is a short overview of major judicial statements on the various elements of the definition of native title.

Section 223(1)(a): Traditional laws and customs

4.17 Section 223(1)(a) requires that rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the relevant Aboriginal or Torres Strait Islander peoples. Satisfaction of s 223(1)(a) is a question of fact.[16] In *Yorta Yorta*, the High Court elaborated on how s 223(1)(a) should be construed, in particular, the significance to be attributed to the term 'traditional'.[17]

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10 *Commonwealth v Yarmirr* (2001) 208 CLR 1, [7]; *Western Australia v Ward* (2002) 213 CLR 1, [16], [25]; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [32], [70], [75].

11 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [37]–[45] (Gleeson CJ, Gummow and Hayne JJ). See Ch 2 for further discussion of the relationship of *Mabo [No 2]* to the *Native Title Act*.

12 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [37].

13 Ibid [77]. See also *Akiba v Commonwealth* (2013) 250 CLR 209, [9] (French CJ, Crennan J).

14 Christos Mantziaris and David Martin, *Native Title Corporations: A Legal and Anthropological Analysis* (Federation Press, 2000) 10.

15 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [45] (Gleeson CJ, Gummow and Hayne JJ).

16 *Western Australia v Ward* (2002) 213 CLR 1, [18] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *De Rose v South Australia (No 1)* (2003) 133 FCR 325, [161].

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

'Traditional' laws and customs

4.18 Section 223(1)(a) is in the present tense, directing attention to the present possession of rights and interests.[18] However, in *Yorta Yorta*, Gleeson CJ, Gummow and Hayne JJ noted that the *Native Title Act* does not create new rights and interests in land called 'native title'.[19] Instead,

> the native title rights and interests to which the *Native Title Act* refers are rights and interests finding their origin in pre-sovereignty law and custom, not rights or interests which are a creature of that Act.[20]

4.19 The reference to 'traditional' laws and customs in the definition of native title must be understood in light of this. As a result, Gleeson CJ, Gummow and Hayne JJ construe the meaning of 'traditional' to include a number of aspects:

- it refers to the means of transmission of a law or custom: a 'traditional' law or custom is one which has been passed from generation to generation of a society;[21]
- it refers to the age of the laws and customs: the origins of the content of the law or custom concerned are to be found in the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown;[22]
- the 'normative system'—that is, the traditional laws and customs—under which rights and interests are possessed must have had a continuous existence and vitality since sovereignty.[23]

4.20 From this approach to the meaning of traditional laws and customs has arisen a focus on two major issues:

- change: the extent to which laws and customs can change over time and still be considered traditional; and
- continuity: the extent of continuity of acknowledgment and observance of laws and customs over time that is required.

4.21 Both of these issues arise for consideration under the Terms of Reference for this Inquiry.

4.22 In relation to change to laws and customs, Gleeson CJ, Gummow and Hayne JJ stated that some change to, or adaptation of, traditional laws and customs was not necessarily fatal to a native title claim.[24] The key question in relation to this was

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18 Ibid [85] (Gleeson CJ, Gummow and Hayne JJ), [101] (Gaudron and Kirby JJ).
19 Ibid [45].
20 Ibid.
21 Ibid [46].
22 Ibid.
23 Ibid [47]. See also Perry and Lloyd, above n 5, 22–23.
24 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [83]. See Ch 9 for a consideration of evolution and adaptation in other jurisdictions.

whether the laws and customs can still be seen to be traditional, in the sense of having origins in pre-sovereign laws and customs.[25]

4.23 In relation to continuity, Gleeson CJ, Gummow and Hayne JJ considered that acknowledgment and observance of the traditional laws and customs must have continued 'substantially uninterrupted' since sovereignty. If this were not the case, the laws and customs presently acknowledged and observed could not properly be described as traditional. Instead,

> they would be a body of laws and customs originating in the common acceptance by or agreement of a new society of indigenous peoples to acknowledge and observe laws and customs of content similar to, perhaps even identical with, those of an earlier and different society of the peoples concerned.[26]

4.24 The Full Federal Court has summarised this requirement as 'whether the laws and customs have continued to be acknowledged and observed substantially uninterrupted by each generation since sovereignty'.[27]

4.25 The ALRC acknowledges that traditional laws and customs are properly construed as those laws and customs that were acknowledged and observed at sovereignty. However, in Chapter 5 the ALRC recommends amendments to the definition of native title in the *Native Title Act* to:

- provide explicitly that the traditional laws and customs under which native title rights and interests are possessed may adapt, evolve or otherwise develop;[28] and
- clarify that it is not necessary to establish that the acknowledgment of traditional laws and the observance of traditional customs have continued substantially uninterrupted by each generation since sovereignty.[29]

Laws and customs

4.26 The reference in s 223(1)(a) to laws *and* customs means that there is no need to distinguish between matters of law and matters of custom. However, rights and interests must be possessed under a set of rules with normative content, for 'without that quality, there may be observable patterns of behaviour but not rights or interests in relation to land or waters'.[30]

4.27 In *Harrington-Smith v Western Australia (No 9)*, Lindgren J elaborated on what is required for rules to have normative content, and quoted the following passage from Professor HLA Hart:

> What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in

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25 Ibid.
26 Ibid [87].
27 *Bodney v Bennell* (2008) 167 FCR 84, [73]. See also *Risk v Northern Territory* (2007) 240 ALR 75, [78]–[98].
28 Rec 5–1.
29 Recs 5–2, 5–3.
30 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [42] (Gleeson CJ, Gummow and Hayne JJ). See also *Akiba v Queensland (No 3)* (2010) 204 FCR 1, [171]–[174].

> criticism (including self-criticism), demands for conformity, and in acknowledgments that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of 'ought', 'must', and 'should', 'right' and 'wrong'.[31]

Society

4.28 In *Yorta Yorta*, Gleeson CJ, Gummow and Hayne JJ said that there is an inextricable link between a society and its laws and customs. Laws and customs cannot exist in a vacuum, so if a society—understood as a body of persons united in and by its acknowledgment of a body of laws and customs—ceases to exist, the laws and customs (and rights and interests possessed under them) also cease.[32]

4.29 Subsequent Federal Court judgments have considered the approach to society taken in *Yorta Yorta*. A number have emphasised that 'society' is not found in the words of the Act, but may be utilised as a 'conceptual tool' to illuminate the central question of acknowledgment and observance of traditional laws and customs.[33] Nevertheless, it has been considered clear 'that *Yorta Yorta* stands for the proposition that s 223(1)(a) requires proof of the continued existence of a "society"'.[34]

4.30 In determining whether a group of people constitutes a society, the central consideration is whether the group acknowledges the same body of laws and customs relating to rights and interests in land and waters.[35] This can be so, 'notwithstanding that the group was composed of people from different language groups or groups linked to specific areas within the larger territory which was the subject of the application'.[36]

4.31 The concept of society 'does not introduce, into the judgments required by the NT Act, technical, jurisprudential or social scientific criteria for the classification of groups or aggregations of people as "societies"'.[37]

4.32 Claimants need not establish that there exists a body of laws and customs that unite people as a society. Rather, the society is required to be united in and by its acknowledgment and observance of a body of law and customs.[38] The question of whether a particular aspect of a society has been lost or retained since sovereignty is

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31 *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* (2007) 238 ALR 1, [996] quoting HLA Hart, *The Concept of Law* (Oxford University Press, 2nd ed, 1994) 57.

32 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [51]–[53].

33 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [78]. See also *Banjima People v Western Australia (No 2)* (2013) 305 ALR 1, [394]; *Dempsey on behalf of the Bularnu, Waluwarra and Wangkayujuru People v Queensland (No 2)* [2014] FCA 528 (23 May 2014) [721]; *Akiba v Queensland (No 3)* (2010) 204 FCR 1, [162].

34 *Croft on behalf of the Barngarla Native Title Claim Group v South Australia* [2015] FCA 9 (22 January 2015) [61].

35 *Sampi on behalf of the Bardi and Jawi People v Western Australia* (2010) 266 ALR 537, [51].

36 Ibid [71]. See, eg, *Neowarra v Western Australia* [2003] FCA 1402 (8 December 2003); *Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory* (2004) 207 ALR 539; *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442; *Akiba v Queensland (No 3)* (2010) 204 FCR 1.

37 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [78].

38 *Akiba v Queensland (No 3)* (2010) 204 FCR 1, [169].

relevant only if that question helps determine whether the laws and customs of the present-day society are traditional.[39]

4.33 The boundaries of a society need not coincide with the native title claim group. A native title claim group may assert that it holds individual or group rights under the traditional laws and customs of a larger society or community of which they are a part.[40]

4.34 The question of 'society' has been described as a 'problematic and quite time consuming distraction' in native title litigation.[41] The ALRC considers that the *Native Title Act* should be amended to clarify that society is not an independent element of proof in native title.[42] Rather, it is only relevant insofar as it helps answer the central definitional question of whether rights and interests are possessed under traditional laws acknowledged, and traditional customs observed, by the native title claim group.

4.35 Related to this, the ALRC also recommends that the definition of native title be amended to make clear that native title rights and interests may be succeeded to by another Aboriginal or Torres Strait Islander group, where those rights and interests have been transmitted, transferred or otherwise acquired in accordance with traditional laws and customs.[43]

Content of native title rights and interests

4.36 In *Western Australia v Ward* ('*Ward*'), the High Court noted that s 223(1)(a) requires both:

- the identification of laws and customs said to be traditional; and
- the identification of rights and interests possessed under those laws and customs.[44]

4.37 The content of native title rights and interests is defined by traditional laws and customs. That is, native title rights and interests are those that find their origin in traditional (pre-sovereign) law and custom. This is because:

> What survived [the Crown's acquisition of sovereignty] were rights and interests in relation to land or waters. Those rights and interests owed their origin to a normative system other than the legal system of the new sovereign power; they owed their origin

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39 *Croft on behalf of the Barngarla Native Title Claim Group v South Australia* [2015] FCA 9 (22 January 2015) [640].

40 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [80]; *Bodney v Bennell* (2008) 167 FCR 84, [145]–[146]. This was the case in *De Rose*, in which the claim group did not assert that they constituted a discrete society or community. Instead, they asserted that they held rights and interests under the traditional laws and customs that they shared with a wider society of Aboriginal people of the Western Desert Bloc: *De Rose v South Australia (No 1)* (2003) 133 FCR 325, [275].

41 Paul Finn, '*Mabo* into the Future: Native Title Jurisprudence' (2012) 8 *Indigenous Law Bulletin* 5, 6.

42 Rec 5–4.

43 Rec 5–5.

44 *Western Australia v Ward* (2002) 213 CLR 1, [18] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

> to the traditional laws acknowledged and the traditional customs observed by the indigenous peoples concerned.[45]

4.38 This means that native title rights and interests 'may not, and often will not, correspond with rights and interests in land familiar to the Anglo-Australian property lawyer'.[46] It also means that, as Gummow J noted in *Wik Peoples v Queensland*, the 'content of native title, its nature and incidents, will vary from one case to another'.[47] Claimants are required to establish on the evidence the content of native title rights and interests.[48]

4.39 The High Court in *Ward* used the metaphor of native title as a 'bundle of rights' in this context, to draw attention 'first to the fact that there may be more than one right or interest and secondly to the fact that there may be several *kinds* of rights and interests in relation to land that exist under traditional law and custom'.[49]

4.40 Section 223(2) provides that such rights and interests include hunting, gathering or fishing rights and interests. However, native title rights and interests may comprise a range of other rights and interests, and may extend to possession, occupation, use and enjoyment of land or waters to the exclusion of all others.

4.41 In *Yorta Yorta*, Gleeson CJ, Gummow and Hayne JJ also pointed out that the relevant statutory inquiry is into the possession, not the exercise, of rights and interests:

> Evidence that at some time, since sovereignty, some of those who now assert that they have that native title have not exercised those rights, or evidence that some of those through whom those now claiming native title rights or interests contend to be entitled to them have not exercised those rights or interests, does not inevitably answer the relevant statutory questions.[50]

4.42 The nature and content of native title rights and interests is considered further in Chapter 8. In that chapter, the ALRC distinguishes between a right and its exercise and recommends that it be made clear in the *Native Title Act* that native title may comprise a right that may be exercised for any purpose, including commercial or non-commercial purposes.

Section 223(1)(b): Connection with land or waters

4.43 Section 223(1)(b) has been held to require that claimants demonstrate that they have a connection, by their traditional laws and customs, with the land or waters claimed. That is, the phrase 'by those laws and customs', in s 223(1)(b) is taken to refer

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45 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [37] (Gleeson CJ, Gummow and Hayne JJ).
46 Ibid [40] (Gleeson CJ, Gummow and Hayne JJ).
47 *Wik Peoples v Queensland* (1996) 187 CLR 1, 169.
48 Perry and Lloyd, above n 5, 14.
49 *Western Australia v Ward* (2002) 213 CLR 1, [95] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
50 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [84].

to the traditional laws and customs referred to in s 223(1)(a).[51] Satisfaction of s 223(1)(b), like s 223(1)(a), is a question of fact.[52]

4.44 Thus, ss 223(1)(a) and (b) are interrelated. However, the High Court in *Ward* stated that a separate inquiry from that required by s 223(1)(a) is demanded by s 223(1)(b).[53] This is so even though the inquiry may depend on the same evidence used to establish s 223(1)(a).[54]

4.45 The drafting of s 223(1)(b) has been described as 'opaque'.[55] Its origin lies in the judgment of Brennan J in *Mabo [No 2]*, but the Full Federal Court has noted that it 'appears to have been applied in the statute somewhat out of context'.[56] The Full Federal Court has given consideration to what is required for connection to be established, stating in *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* ('*Alyawarr*') that:

> 'connection' is descriptive of the relationship to the land and waters which is, in effect, declared or asserted by the acknowledgment of laws and observance of customs which concern the land and waters in various ways. To observe laws and acknowledge customs which tell the stories of the land and define the rules for its protection and use in ways spiritual and material is to keep the relevant connection to the land.[57]

4.46 When traditional laws and customs confer rights and responsibilities in relation to land, that creates connection as required by s 223(1)(b).[58] The connection, or relationship, between people and country includes the obligation to care for country and the right to speak for country.[59]

Connection and continuity

4.47 Like s 223(1)(a), s 223(1)(b) is expressed in the present tense, and requires inquiry into the present connection of claimants with land or waters. However, the connection must be shown to be 'by' the claimants' traditional laws and customs.[60] The Full Court of the Federal Court has observed that this means that connection involves

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51 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [46], [86] (Gleeson CJ, Gummow and Hayne JJ); *Western Australia v Ward* (2002) 213 CLR 1, [18] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Bodney v Bennell* (2008) 167 FCR 84, [165].

52 *Gumana v Northern Territory* (2005) 141 FCR 457, [146]–[147].

53 *Western Australia v Ward* (2002) 213 CLR 1, [43] (Gleeson CJ, Gaudron Gummow and Hayne JJ).

54 Ibid [18].

55 *Bodney v Bennell* (2008) 167 FCR 84, [163]; *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [87].

56 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [87].

57 Ibid [88].

58 *De Rose v South Australia (No 2)* (2005) 145 FCR 290, [113].

59 *Western Australia v Ward* (2002) 213 CLR 1, [14] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

60 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [86] (Gleeson CJ, Gummow and Hayne JJ).

an element of continuity, deriving from 'the necessary character of the relevant laws and customs as "traditional"'.[61]

4.48 Connection can be maintained by continued acknowledgment and observance of traditional laws and customs.[62] In *Bodney v Bennell*, the Full Federal Court noted that the acknowledgment and observance of traditional laws and customs providing the required connection must have continued substantially uninterrupted since sovereignty, and the connection itself must have been 'substantially maintained' since that time.[63] In *Sampi v Western Australia*, French J expressed the continuity aspect of the connection inquiry as involving the 'continuing internal and external assertion by [a claimant community] of its traditional relationship to the country defined by its laws and customs'.[64]

4.49 As noted above, and as set out in Chapter 5, the ALRC recommends that the Act clarify that it is not necessary to establish that acknowledgment and observance of traditional laws and customs has continued substantially uninterrupted by each generation since sovereignty.[65] The ALRC considers that it follows from this recommendation that a commensurate approach should be taken to establishing connection for the purpose of satisfying s 223(1)(b).

Establishing connection

4.50 Evidence that connection with land is a 'continuing reality' to the claimants must be produced to establish connection:

> the connection inquiry requires … demonstration that, by their actions and acknowledgement, the claimants have asserted the reality of the connection to their land or waters so made by their laws and customs.[66]

4.51 Evidence of presence on the land and the exercise of rights in relation to the land amounts to evidence of the maintenance of connection with land.[67] However, lack of physical presence does not necessarily mean a loss of connection.[68] The ALRC was asked whether there should be 'confirmation that "connection with the land and waters" does not require physical occupation or continued or recent use'. The ALRC has concluded that such confirmation is unnecessary as the law in this area is clear. The

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61 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [88]. The Federal Court has suggested that Brennan J's use of the term connection in *Mabo [No 2]* was intended to encompass an element of continuity of connection: *Sampi v Western Australia* [2005] FCA 777 (10 June 2005) [1079]; *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [92].

62 *Bodney v Bennell* (2008) 167 FCR 84, [48]; *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [92].

63 *Bodney v Bennell* (2008) 167 FCR 84, [168].

64 *Sampi v Western Australia* [2005] FCA 777 (10 June 2005) [1079]; *Bodney v Bennell* (2008) 167 FCR 84, [174]; *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [92].

65 Recs 5–2, 5–3.

66 *Bodney v Bennell* (2008) 167 FCR 84, [171].

67 *Western Australia v Ward* (2000) 99 FCR 316, [243] (Beaumont and von Doussa JJ).

68 *Bodney v Bennell* (2008) 167 FCR 84, [172].

significance of physical occupation, or continued and recent use, is discussed further in Chapter 6.

4.52 Other ways of demonstrating observance of law and custom in relation to land and waters, and thus connection, can be found in knowledge of ceremony, song, dance and body painting[69] and knowledge of the land and the Dreamtime beings that created the land.[70] For example, in *Western Australia v Ward*, the Full Federal Court stated that:

> Acknowledgment and observance may be established by evidence that traditional practices and ceremonies are maintained by the community, insofar as that is possible, off the land, and that ritual knowledge including knowledge of the Dreamings which underlie the traditional laws and customs, continue to be maintained and passed down from generation to generation. Evidence of present members of the community, which demonstrates knowledge of the boundaries to their traditional lands, in itself provides evidence of continuing connection through adherence to their traditional laws and customs.[71]

4.53 The *Federal Court Rules 2011* (Cth) make specific provision for the giving of evidence by way of singing, dancing and storytelling.[72]

4.54 Using language is a way of observing law and custom, and may connect people with country.[73] Language is sometimes said to have been 'deposited in the landscape by Dreamtime figures', and it becomes 'possessed by the Aboriginal people connected with the land'.[74]

4.55 The connection inquiry can have a particular topographic focus within the claim area, but connection to an area may be inferred from the evidence as a whole and from evidence of connection to surrounding or neighbouring areas.[75] In *Bodney v Bennell*, the Full Federal Court stated that, where connection to a particular part of a claim area is in issue, there is a need to:

- examine the traditional laws and customs for s 223(1)(b) purposes as they relate to that area; and
- demonstrate that connection to that area has, in reality, been substantially maintained since the time of sovereignty.[76]

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69 Grace Koch, 'We Have the Song, So We Have the Land: Song and Ceremony as Proof of Ownership in Aboriginal and Torres Strait Islander Land Claims' (AIATSIS Research Discussion Paper 33, AIATSIS, July 2013) 8–10.

70 Graeme Neate, '"Speaking for Country" and Speaking About Country: Some Issues in the Resolution of Indigenous Land Claims in Australia' (Paper presented at Joint Study Institute, Sydney, 21 February 2004) 65–68.

71 *Western Australia v Ward* (2000) 99 FCR 316, [243] (Beaumont and von Doussa JJ).

72 *Federal Court Rules 2011* (Cth) r 34.123. See, eg, *Akiba v Queensland (No 3)* (2010) 204 FCR 1, [317]; *Hughes (on behalf of the Eastern Guruma People) v Western Australia* [2007] FCA 365 (1 March 2007) [11]; *Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory* (2004) 207 ALR 539, [24].

73 Koch, above n 69, 38; *Ward v Western Australia* (1998) 159 ALR 483.

74 *Ward v Western Australia* (1998) 159 ALR 483, 525.

75 *Bodney v Bennell* (2008) 167 FCR 84, [175]; *Moses v Western Australia* (2007) 160 FCR 148, [312].

76 *Bodney v Bennell* (2008) 167 FCR 84, [179].

Section 223(1)(c): Recognised by the common law

4.56 Sections 223(1)(a) and 223(1)(b) indicate that native title rights and interests derive from the traditional laws and customs of Aboriginal and Torres Strait Islander peoples—not the common law. In *Ward*, the High Court noted that the common law is accorded a role in the statutory definition of native title by virtue of s 223(1)(c), in that the rights and interests are 'recognised' by the common law.[77] The concept of recognition is considered in detail in Chapter 2.

4.57 In *Yorta Yorta*, Gleeson CJ, Gummow and Hayne JJ stated that this requirement emphasises that native title is a product of an intersection between legal systems: the rights and interests 'recognised' by the common law are rights and interests that existed at sovereignty, survived that change in legal regime, and can now be enforced and protected under the new legal order.[78]

4.58 The High Court has elsewhere noted that the requirement that the claimed rights and interests are recognised by the common law 'requires examination of whether the common law is inconsistent with the continued existence of the rights and interests that owe their origin to Aboriginal law or custom'.[79] If there is no inconsistency, the common law will 'recognise' the rights and interests by giving remedies in support of the relevant rights and interests to those who hold them.[80] If there is inconsistency, recognition by the common law will be 'withdrawn'.[81]

4.59 Inconsistency may arise, and recognition may be refused, because the claimed rights and interests are in some way 'antithetical to fundamental tenets of the common law',[82] or 'clash with the general objective of the common law of the preservation and protection of society as a whole'.[83]

4.60 Recognition may also cease because native title rights and interests have been 'extinguished'.[84] Rights and interests will be extinguished where there have been acts done by the executive pursuant to legislative authority, or grants of rights to third parties, that are inconsistent with the claimed native title rights and interests.[85]

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77 *Western Australia v Ward* (2002) 213 CLR 1, [20] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

78 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [77] (Gleeson CJ, Gummow and Hayne JJ).

79 *Commonwealth v Yarmirr* (2001) 208 CLR 1, [76] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

80 Ibid [42]; *Akiba v Commonwealth* (2013) 250 CLR 209, [9] (French CJ, Crennan J).

81 *Western Australia v Ward* (2002) 213 CLR 1, [82] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

82 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [77] (Gleeson CJ, Gummow and Hayne JJ).

83 *Western Australia v Ward* (2002) 213 CLR 1, [21] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

84 Ibid [21]. For example, in *Fejo*, it was decided that native title was extinguished by a grant in fee simple, because 'the rights that are given by a grant in fee simple are rights that are inconsistent with the native title holders continuing to hold any of the rights or interests which together make up native title': *Fejo v Northern Territory* (1998) 195 CLR 96, [43] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

85 *Western Australia v Ward* (2002) 213 CLR 1, [26], [78] (Gleeson CJ, Gaudron Gummow and Hayne JJ); *Western Australia v Brown* (2014) 306 ALR 168, [33]; *Akiba v Commonwealth* (2013) 250 CLR 209, [31]–[35] (French CJ and Crennan J); [52], [62] (Hayne, Kiefel and Bell JJ). See also *Native Title Act 1993* (Cth) pt 2 div 2B; s 237A.

4.61 Extinguishment is, in this sense, the 'obverse' of recognition.[86] However, native title rights and interests are not extinguished 'for the purposes of the traditional laws acknowledged and customs observed by the native title holders'.[87] That is,

> extinguishment of native title rights and interests must be understood as the cessation of the common law's recognition of those rights and interests, not the cessation of those rights and interests under traditional laws and customs.[88]

4.62 Questions of continuity of acknowledgment and observance of traditional laws and customs,[89] or of a traditional community,[90] pertain to s 223(1)(a), and not s 223(1)(c).[91]

Reforming the requirements for establishing native title

4.63 The following four chapters consider in detail the requirements for establishing native title rights and interests, and develop the ALRC's case for reform of the *Native Title Act*. Chapter 5 makes a number of recommendations for reform to the definition of native title. Chapter 6 considers the concept of 'connection' with land and waters. Chapter 7 considers how native title is proved, and recommends that there be guidance in the *Native Title Act* regarding when inferences can be drawn in proof of native title. Chapter 8 considers the nature and content of native title rights and interests, and recommends that it be made clear in the Act that native title may comprise a right that may be exercised for any purpose, including commercial or non-commercial purposes.

86 *Akiba v Commonwealth* (2013) 250 CLR 209, [10] (French CJ, Crennan J).
87 Ibid [10]. See also *Western Australia v Ward* (2002) 213 CLR 1, [21] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
88 *Congoo on behalf of the Bar-Barrum People No 4 v Queensland* (2014) 218 FCR 358, [35] (North and Jagot JJ).
89 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [92] (Gleeson CJ, Gummow, Hayne JJ).
90 Ibid [111] (Gaudron and Kirby JJ).
91 Ibid [92] (Gleeson CJ, Gummow and Hayne JJ).

5. Traditional Laws and Customs

Contents

Summary

5.1 To establish that they hold native title rights and interests, for the purposes of a determination of native title under the *Native Title Act* (Cth) ('*Native Title Act*'), native title claimants must satisfy the definition of native title in s 223(1) of the *Native Title Act*. Section 223(1)(a) requires that the claimed rights and interests are possessed under the traditional laws acknowledged and traditional customs observed by the relevant Aboriginal peoples or Torres Strait Islanders. This chapter outlines how this requirement has been interpreted, focusing on the approach taken to the meaning of acknowledgment and observance of traditional laws and customs.

5.2 The ALRC makes recommendations for reform of this aspect of the definition. First, the ALRC recommends that there be explicit acknowledgment in the *Native Title Act* that traditional laws and customs under which native title rights and interests are possessed may adapt, evolve or otherwise develop.

5.3 Second, the ALRC recommends that the definition be amended to clarify that it is not necessary to establish either that:

- the acknowledgment of traditional laws and the observance of traditional customs have continued substantially uninterrupted since sovereignty; or

- traditional laws and customs have been acknowledged and observed by each generation since sovereignty.

5.4 Third, the ALRC recommends that the definition of native title be amended to clarify 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.

5.5 Finally, the ALRC recommends that the definition of native title clarifies that rights and interests may be possessed by a native title claim group where they have been transmitted or transferred between groups, or otherwise acquired in accordance with traditional laws and customs.

5.6 These recommendations address the technicality and complexity of establishing the existence of native title rights and interests. In many respects, the recommendations endorse the movement in case law and in negotiations towards flexibility in the evidentiary requirements to establish native title.[1] However, they keep in place the doctrinal foundation for native title. That is, they preserve the position that native title rights and interests are those possessed under laws and customs that have their origins in laws and customs acknowledged and observed at sovereignty. As such, they are consistent with the ALRC's guiding principles for reform: acknowledging the importance of the recognition of native title rights and interests; achieving greater efficiency in the claims process; and providing a sound platform for use of native title rights and interests into the future.[2]

Approach to statutory construction of s 223

5.7 One of the guiding principles for this Inquiry is that reform should recognise the importance of recognition of native title to Aboriginal and Torres Strait Islander peoples and the Australian community.[3] Additionally, ordinary principles of statutory interpretation dictate the consideration of the purpose of the legislation.[4] The language of the Preamble and objects of the *Native Title Act*—referring to, among other things, an intention to rectify the consequences of past injustices and that the law be a special measure for the advancement of Aboriginal and Torres Strait Islander peoples—suggests that its purpose is beneficial.[5]

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1 Such flexibility is evident in *Croft on behalf of the Barngarla Native Title Claim Group v South Australia* [2015] FCA 9 (22 January 2015).

2 See Ch 1.

3 Guiding Principle 1: see Ch 1.

4 *Acts Interpretation Act 1901* (Cth) s 15AA. In 2014, the High Court commented that this provision reflected a 'general systemic principle [of statutory construction]': *Thiess v Collector of Customs* (2014) 306 ALR 594, [23].

5 In *Alyawarr*, the Full Court of the Federal Court described the Preamble as the Act's 'moral foundation': *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [63]. See also Justice Robert French, 'Lifting the Burden of Native Title—Some Modest Proposals for Improvement' (Speech Delivered at the Federal Court Native Title User Group, Adelaide, 9 July 2008) [7]. A number of submissions also referred to the beneficial purpose of the *Native Title Act*: see, eg, Queensland Government, *Submission 28*; Central Desert Native Title Services, *Submission 26*; Native Title Services Victoria, *Submission 18*; North Queensland Land Council, *Submission 17*; Law

5.8 Where legislation is identified as being beneficial and remedial, the High Court has stated that it should be given a 'fair, large and liberal' interpretation, rather than one which is 'literal or technical'.[6]

5.9 As noted in Chapter 4, native title rights and interests cannot be recognised when either:

- they cannot be established as a matter of fact, because claimants cannot establish that they possess rights and interests under traditional laws and customs; and a connection, by those laws and customs, with the land or waters claimed;[7] or
- they cannot be established as a matter of law, because the rights and interests are not recognised by the common law of Australia, as they are inconsistent with them.[8]

5.10 This chapter considers the requirements for establishing native title as a matter of fact. It makes recommendations intended to promote an interpretation of the definition of native title consistent with the beneficial purpose of the *Native Title Act*. An approach that promotes a 'fair, large and liberal' interpretation of the definition of native title, rather than a 'literal or technical' one, also accords with the ALRC's guiding principles for reform—promoting efficiency in the native title system.[9] Reducing technicality in interpretation of the definition will produce a concomitant reduction in the resources and time involved in bringing evidence to establish the existence of native title.

5.11 Some submissions to this Inquiry argued that the reforms recommended in this chapter[10] would increase uncertainty in native title law, and promote overlapping claims.[11] However, if recommendations in this chapter are adopted, claimants will still need to demonstrate that they are the 'right people for country'.[12] Native title claimants will still be required to establish that they possess rights and interests under laws and customs presently acknowledged and observed by them. Further, those present-day laws and customs must have their origins in laws and customs acknowledged and observed at sovereignty. The ALRC acknowledges that not all Aboriginal and Torres

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Society of Western Australia, *Submission 9*. For further discussion of the Act's status as beneficial, see Sean Brennan, 'Statutory Interpretation and Indigenous Property Rights' (2010) 21 *Public Law Review* 239, 252.

6 *IW v City of Perth* (1997) 191 CLR 1, 12 (Brennan CJ, McHugh J); 39 (Gummow J). See also *AB v Western Australia* (2011) 244 CLR 390, [24] (French CJ, Gummow, Hayne, Kiefel and Bell JJ).

7 *Native Title Act 1993* (Cth) s 223(1)(a), (b).

8 Ibid s 223(1)(c). For further discussion of the concept of 'recognition', see Ch 2.

9 Guiding Principle 3: see Ch 1.

10 These reforms were proposed in substantially the same form in: Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014) Proposals 5–1 to 5–4.

11 Northern Territory Government, *Submission 71*; Minerals Council of Australia, *Submission 65*; National Farmers' Federation, *Submission 56*; Association of Mining and Exploration Companies, *Submission 54*; The Chamber of Minerals and Energy of Western Australia, *Submission 49*; Western Australian Government, *Submission 43*.

12 Victoria Department of Premier and Cabinet, *Right People for Country Project* <www.dpc.vic.gov.au>.

Strait Islander peoples will be able to establish that they hold native title under the *Native Title Act*.[13]

5.12 There are existing mechanisms to screen claims that have an insufficient factual basis,[14] and to limit overlapping claims.[15] The ALRC considers that the modest changes recommended in this chapter, coupled with these mechanisms, will not result in a proliferation of claims.

Section 223(1)(a)

5.13 Section 223(1)(a) of the *Native Title Act* provides that native title rights and interests are rights and interests possessed under the traditional laws acknowledged and traditional customs observed by the relevant Aboriginal peoples or Torres Strait Islanders. In *Members of the Yorta Yorta Aboriginal Community v Victoria* (*'Yorta Yorta'*), the High Court stated that the laws and customs that can properly be described as 'traditional' are those that find their origin in the laws and customs acknowledged and observed at sovereignty.[16]

5.14 As a result, the term 'traditional' in s 223(1)(a) was held to involve a number of aspects:[17]

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13 The Preamble to the *Native Title Act* acknowledges that 'many Aboriginal peoples or Torres Strait Islanders, because they have been dispossessed of their traditional lands, will be unable to assert native title rights and interests'. A number of submissions to this Inquiry highlighted this aspect of the Preamble: see, eg, Queensland Government, *Submission 28*; Western Australian Government, *Submission 20*; National Farmers' Federation, *Submission 14*. See also Ch 3.

14 A native title claim is subjected to a 'registration test': a consideration, by the Registrar of the National Native Title Tribunal, of whether a claim meets certain merits and procedural conditions: *Native Title Act 1993* (Cth) ss 190A–190C. Among the merits conditions that must be satisfied are that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion, and that there is a prima facie case for establishing at least some of the native title rights and interests claimed: ss190B(5)–(6). The Court may dismiss a claim that has not been accepted for registration, when satisfied of certain matters, including that avenues for review of the decision have been exhausted, and that the application has not been amended and is not likely to be amended in a way that would lead to a different outcome once considered by the Registrar: ss 190F(5), (6). Strictly, the registration test is not a screening mechanism for access to the Federal Court—it is the Court's power under s 190F(6) which provides this screening mechanism. However, 'satisfaction of the registration test has ramifications for whether an application should be allowed to *remain* on the Court's list': *Christine George on behalf of the Gurambilbarra People v Queensland* [2008] FCA 1518 (10 October 2008) [50]. See also *Little on behalf of the Djaku:nde People v Queensland* [2015] FCA 287 (31 March 2015) [43].

15 For a native title claim to be registered, the Registrar must be satisfied that no member of the claim group has also been part of a previous application over part of the same claim area unless that entry onto the register of the previous application has now been removed: *Native Title Act 1993* (Cth) s 190C(3). Native Title Representative Bodies (NTRBs) must make all reasonable efforts to minimise the number of claims covering land or waters within its area: ss 203BC(3)(b); 203BE(3)(a)–(b). An NTRB also has dispute resolution functions, including to assist in promoting agreement among native title holders in its area about the making of native title applications: s 203BF(1)(a). If two or more proceedings before the Federal Court relate to native title claims that cover the same area, the Federal Court must make such order as it considers appropriate to ensure that, to the extent that the applications cover the same area, they are dealt with in the same proceeding: s 67(1).

16 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [46] (Gleeson CJ, Gummow and Hayne JJ).

17 Ch 2 discusses approaches to the term 'traditional' prior to the High Court's decision in *Yorta Yorta*.

- the means of transmission of a law or custom: a 'traditional' law or custom is one which has been passed from generation to generation of a society;[18]
- the age of the laws and customs: the origins of the content of the law or custom concerned are to be found in the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown;[19]
- continuity: the 'normative system'—that is, the traditional laws and customs—under which rights and interests are possessed must have had a continuous existence and vitality since sovereignty.[20]

5.15 The interpretation of 'traditional' has been criticised as productive of restrictive and technical approaches to establishing native title rights and interests. This chapter details some of these criticisms, and makes a number of recommendations to address them.

Accommodation of change to laws and customs

Recommendation 5–1 The definition of native title in s 223 of the *Native Title Act 1993* (Cth) should be amended to provide that traditional laws and customs may adapt, evolve or otherwise develop.

5.16 The ALRC recommends that there be explicit acknowledgment in the *Native Title Act* that traditional laws and customs may adapt, evolve or otherwise develop.[21]

5.17 Legislative acknowledgment in the *Native Title Act* of adaptation, evolution and development of laws and customs provides explicit recognition of the cultural vitality of Aboriginal and Torres Strait Islander peoples.

5.18 Such legislative acknowledgment of change is arguably in keeping with the approach envisaged upon first recognition of native title in *Mabo v Queensland [No 2]* (*'Mabo [No 2]'*). That native title rights will continue notwithstanding cultural change was repeatedly adverted to by the High Court in *Mabo [No 2]*. For example, Brennan J noted that 'of course in time the laws and customs of any people will change and the rights and interests of the members of the people among themselves will change too'.[22] Deane and Gaudron JJ stated that traditional laws and customs are not

> frozen as at the moment of establishment of a Colony. Provided any changes do not diminish or extinguish the relationship between a particular tribe or other group and

18 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [46] Gleeson CJ, Gummow and Hayne JJ).
19 Ibid [46] (Gleeson CJ, Gummow and Hayne JJ).
20 Ibid [47] (Gleeson CJ, Gummow and Hayne JJ). See also Melissa Perry and Stephen Lloyd, *Australian Native Title Law* (Lawbook Co, 2003) 22–23.
21 This chapter focuses on evolution, adaptation and development of *traditional laws and customs*. The question of evolution of the manner of exercise of a native title right is considered further in Ch 8.
22 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 61.

> particular land, subsequent developments or variations do not extinguish the title in relation to that land.[23]

5.19 Toohey J was also of the view that 'an indigenous society cannot … surrender its rights by modifying its way of life'.[24]

5.20 It is also consistent with a non-discriminatory approach to Aboriginal and Torres Strait Islander peoples' rights and interests in land and waters. As Kirby J noted in *Commonwealth v Yarmirr*, an adherence to the principle of non-discrimination

> must include a recognition that the culture and laws of indigenous peoples adapt to modern ways of life and evolve in the manner that the cultures and laws of all societies do. They do this lest, by being frozen and completely unchangeable, they are rendered irrelevant and consequently atrophy and disappear.[25]

5.21 Further, the *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP') recognises the right of Indigenous peoples to 'practise and revitalize their cultural traditions and customs'. This includes the 'right to maintain, protect and develop the past, present and future manifestations of their cultures'.[26]

5.22 An approach that explicitly acknowledges that laws and customs can evolve, adapt and change also facilitates Aboriginal and Torres Strait Islander peoples' ability to utilise their native title rights to promote future development.[27] As Dr Angus Frith and Associate Professor Maureen Tehan submitted, there is merit in promoting an approach to native title that allows native title holders to 'achieve their economic, social and cultural aspirations'.[28]

5.23 This recommendation will also promote clarity in native title legislation, particularly in assisting those affected by the legislation to understand how the law applies to them.[29]

Criticisms of tradition

5.24 A number of stakeholders supported amending the *Native Title Act* to provide that traditional laws and customs may adapt, evolve or otherwise develop.[30] Many of

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23 Ibid 110.

24 Ibid 192. Toohey J makes this statement in the context of his position that traditional rights exist 'so long as occupation by a traditional society is established now and at the time of annexation': 192.

25 *Commonwealth v Yarmirr* (2001) 208 CLR 1, [295].

26 *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st Sess, 107th Plen Mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) art 11. The National Congress of Austrlaia's First Peoples drew attention to this aspect of UNDRIP in its submission: National Congress of Australia's First Peoples, *Submission 32*.

27 This accords with Guiding Principle 5: Supporting sustainable futures. See Ch 1.

28 A Frith and M Tehan, *Submission 12*. See also National Native Title Council, *Submission 16*.

29 Australian Government Office of Parliamentary Counsel, *Causes of Complex Legislation and Strategies to Address These* <www.opc.gov.au/clearer/docs/ClearerLaws_Causes.PDF>.

30 AIATSIS, *Submission 70*; National Congress of Australia's First Peoples, *Submission 69*; NTSCORP, *Submission 67*; Indigenous Land Corporation, *Submission 66*; Law Council of Australia, *Submission 64*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; D Wy Kanak, *Submission 61*; National Native Title Council, *Submission 57*; Queensland South Native Title Services, *Submission 55*; A Frith and M Tehan, *Submission 52*; Central Desert Native Title Service, *Submission 48*; Native Title Services Victoria, *Submission 45*; S Jackson and PL Tan, *Submission 44*; North Queensland Land Council, *Submission 42*.

these stakeholders were critical of the present interpretation of the meaning of 'traditional' laws and customs, or supported better recognition of evolution and adaptation to laws and customs.[31]

5.25 For example, Goldfields Land and Sea Council ('GLSC') argued that focusing on tradition can 'ingrain and incentivise a cultural conservatism in Indigenous communities, effectively discouraging (even punishing) processes of cultural change and renewal that might otherwise occur'.[32] Professor Simon Young has argued that this is

> inconsistent with the continuing … external pressure on Indigenous communities to adapt and participate. Contemporary communities face irresistible western influence and an increasingly urgent need to engage in the politics, law and economy of the non-Indigenous society. Yet they are met in the courts with detailed, doctrinally authorised and inevitable stylised preconceptions and a rule that calls on them to demonstrate, within that frame of reference, their cultural stagnancy.[33]

5.26 Other stakeholders noted the injustice of requiring Aboriginal people to establish the existence of a system of traditional laws and customs 'when former generations of European settlement have contrived to repress those laws and customs'.[34] Professor Francesca Merlan has identified this as a 'basically anachronistic' demand:

> After all these decades of non-recognition and, indeed, state attempts to erase Indigenous relations to land, one might ask: why should recognition depend on the capacity for land courts and tribunals, and Indigenous and other participants, to produce collectively what is essentially an 'as if ' story: we (in a position to decide these things) accord you (Indigenous people) recognition to the extent you can show you are traditional in your relations to land?[35]

5.27 AIATSIS argued that tradition is a limiting concept:

> 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

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31 See, eg, National Congress of Australia's First Peoples, *Submission 32*; NSW Young Lawyers Human Rights Committee, *Submission 29*; Queensland South Native Title Services, *Submission 24*; Goldfields Land and Sea Council, *Submission 22*; North Queensland Land Council, *Submission 17*; National Native Title Council, *Submission 16*; A Frith and M Tehan, *Submission 12*; Cape York Land Council, *Submission 7*; Just Us Lawyers, *Submission 2*; Australian Human Rights Commission, *Submission 1*. See also Native Title Amendment (Reform) Bill 2014 cl 18, and the submissions to the Senate Committee on Legal and Constitutional Affairs, Parliament of Australia Inquiry into Native Title Amendment (Reform) Bill 2011: Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Native Title Amendment (Reform) Bill 2011* (2011). Tradition has also been the focus of academic commentary critical of its centrality in native title law. See, eg, Simon Young, *Trouble with Tradition: Native Title and Cultural Change* (Federation Press, 2008); Kent McNeil, 'Judicial Treatment of Indigenous Land Rights in the Common Law World' (CLPE Research Paper 24, 2008) 27–28; Francesca Merlan, 'Beyond Tradition' (2006) 7 *The Asia Pacific Journal of Anthropology* 85. See also the position in other jurisdictions, discussed further in Ch 9.

32 Goldfields Land and Sea Council, *Submission 22*.

33 Young, above n 31, 364.

34 North Queensland Land Council, *Submission 17*. See also Goldfields Land and Sea Council, *Submission 22*.

35 Merlan, above n 31, 86.

> cultural change and 'creative adaptation to change consistent with the continuity of aspects of traditional beliefs and practices'. 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.[36]

5.28 In the Discussion Paper, the ALRC proposed, as an alternative to clarifying that traditional laws and customs may adapt, evolve or otherwise develop, that the term 'traditional' be removed from the definition of native title.[37] After consideration, the ALRC has not proceeded with this approach.

5.29 The proposal did not receive widespread support, even from those critical of aspects of the tradition requirement.[38] For example, Queensland South Native Title Services ('QSNTS') identified the tradition requirement as one of the 'inherent deficiencies' with the definition of native title. It pointed to limitations and injustice in

> the notion that upon settlement, all that the introduced law could and can ever recognise was a master copy of an indigenous legal system that existed at that point, from which successive generations of Aboriginal peoples across time have to be imprinted against.[39]

5.30 Nonetheless, QSNTS advocated that the word 'traditional' be retained, with 'some statutory clarification around its meaning'.[40]

5.31 Generally, other submissions in favour of reform also preferred an amendment clarifying that traditional laws and customs may change over time to removing the term

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36 AIATSIS, *Submission 36*.

37 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014) Proposal 7–1. The ALRC also sought comment on two associated matters. The first was whether another term should be substituted for traditional in the definition of native title, to ensure that the *Native Title Act* recognised only those rights and interests that have their origins in pre-sovereign laws and customs: [7.29]–[7.31]. The second matter on which feedback was invited was whether a definition related to claim group composition should be included in the *Native Title Act:* Question 7–1. The majority of submissions did not support such a definition: South Australian Government, *Submission 68*; NTSCORP, *Submission 67*; Minerals Council of Australia, *Submission 65*; Law Council of Australia, *Submission 64*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; National Native Title Council, *Submission 57*; A Frith and M Tehan, *Submission 52*; Central Desert Native Title Service, *Submission 48*; Western Australian Government, *Submission 43*. Most preferred that claim group composition be defined through a group's own laws and customs: see, eg, NTSCORP, *Submission 67*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; A Frith and M Tehan, *Submission 52*.

38 AIATSIS supported this proposal: AIATSIS, *Submission 70*. The Indigenous Land Corporation offered provisional support for the removal of 'traditional': Indigenous Land Corporation, *Submission 66*. The North Queensland Land Council stated that it would not object to its removal: North Queensland Land Council, *Submission 42*. The following submissions did not support the proposal: Northern Territory Government, *Submission 71*; South Australian Government, *Submission 68*; NTSCORP, *Submission 67*; Minerals Council of Australia, *Submission 65*; Law Council of Australia, *Submission 64*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; National Native Title Council, *Submission 57*; National Farmers' Federation, *Submission 56*; Queensland South Native Title Services, *Submission 55*; Association of Mining and Exploration Companies, *Submission 54*; Central Desert Native Title Service, *Submission 48*; Native Title Services Victoria, *Submission 45*; Western Australian Government, *Submission 43*.

39 Queensland South Native Title Services, *Submission 24*.

40 Queensland South Native Title Services, *Submission 55*.

'traditional' from the definition of native title.[41] Native Title Services Victoria ('NTSV') submitted that 'it is not the word "traditional" but its interpretation that is at issue'.[42]

5.32 Concern to ensure that the *Native Title Act* recognises only the rights and interests of peoples with a relationship to country that has endured since sovereignty was shared by Aboriginal and respondent interests who made submissions to the Inquiry.[43] The Western Australian Government argued that removal of the word traditional 'explicitly contemplates rights and interests which did not exist at sovereignty'.[44] Native Title Representative Bodies and Native Title Service Providers were similarly concerned that if 'traditional' were removed, the *Native Title Act* could recognise those with more recent connections to country as native title holders. Yamatji Marlpa Aboriginal Corporation suggested that the 'danger of removing the word "traditional" … is that it may suggest that native title claims could be supported by mere "historical" (namely, post-settlement) connection and/or newly invented laws and customs'.[45]

5.33 This would bring with it the potential for intra-Indigenous conflict. For example, Central Desert Native Title Services ('CDNTS') suggested:

> removal of the requirement for laws and customs to be 'traditional' could also lead to an increase in intra-indigenous disputes over country including disputes relating to historical versus traditional connection. This would particularly be the case where people of long historical occupation held different laws and customs to those observed by those people with a traditional connection to the area concerned.[46]

5.34 QSNTS argued:

> re-defining the parameters around this element might give 'historical people' (people not traditionally associated or affiliated with the area) a 'leg up' to gain native title or a boon to those who would not have otherwise been traditionally entitled to the land. It is submitted that this is cause for the creation of conflicts within claim groups and/or lateral violence.[47]

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41 NTSCORP, *Submission 67*; Law Council of Australia, *Submission 64*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; National Native Title Council, *Submission 57*; Queensland South Native Title Services, *Submission 55*; A Frith and M Tehan, *Submission 52*; Law Society of Western Australia, *Submission 41*.

42 Native Title Services Victoria, *Submission 45*. See also Yamatji Marlpa Aboriginal Corporation, *Submission 62*.

43 See, eg, South Australian Government, *Submission 68*; NTSCORP, *Submission 67*; Minerals Council of Australia, *Submission 65*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; National Farmers' Federation, *Submission 56*; Queensland South Native Title Services, *Submission 55*; Central Desert Native Title Service, *Submission 48*.

44 Western Australian Government, *Submission 43*. See also South Australian Government, *Submission 68*; Minerals Council of Australia, *Submission 65*; Law Council of Australia, *Submission 64*; National Farmers' Federation, *Submission 62*.

45 Yamatji Marlpa Aboriginal Corporation, *Submission 62*.

46 Central Desert Native Title Service, *Submission 48*.

47 Queensland South Native Title Services, *Submission 55*.

5.35 NTSV argued that 'the term "traditional" is one of importance to Aboriginal people, denoting their unique relationship with particular land and waters through the concept of traditional ownership'.[48] The National Native Title Council ('NNTC') submitted that 'traditional' functions in native title to recognise a 'longstanding relationship with land and waters that is more significant than other more recent connections with country'.[49]

How much change?

5.36 The current interpretation of the requirement that native title rights and interests are possessed under traditional laws and customs allows for some change in those laws and customs.[50] To be designated traditional, the content of contemporary laws and customs need only have their 'origins' in pre-sovereign laws and customs.[51] This means that contemporary laws and customs may not be identical to those at sovereignty. They may still be considered traditional so long as the origin, or source, of their content, can be found in laws and customs acknowledged and observed before the assertion of sovereignty.

5.37 In *Yorta Yorta*, the High Court addressed the question of evolution and adaptation of laws and customs. Gleeson CJ, Gummow and Hayne JJ stated that some change to, or adaptation of, traditional laws and customs was not necessarily fatal to a native title claim.[52] They stated that there was no 'bright line' test that could be offered to judge the significance, in a particular case, of change and adaptation to law and custom.[53] The key question remained 'whether the law and custom can still be seen to be traditional law and traditional custom'.[54]

5.38 Gaudron and Kirby JJ also considered that laws and customs may adapt and still be considered traditional:

> What is necessary for laws and customs to be identified as traditional is that they should have their origins in the past and, to the extent that they differ from past practices, the differences should constitute adaptations, alterations, modifications or extensions made in accordance with the shared values or the customs and practices of the people who acknowledge and observe those laws and customs.[55]

5.39 A number of submissions to this Inquiry argued that the existing approach to the meaning of 'traditional' sufficiently allows for evolution and adaptation of laws and

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48 Native Title Services Victoria, *Submission 45*.
49 National Native Title Council, *Submission 57*.
50 A number of submissions to this Inquiry noted this: Law Society of Western Australia, *Submission 41*; Law Council of Australia, *Submission 35*; South Australian Government, *Submission 34*; Northern Territory Government, *Submission 31*; Kimberley Land Council, *Submission 30*; Queensland South Native Title Services, *Submission 24*; Law Society of Western Australia, *Submission 9*; Cape York Land Council, *Submission 7*.
51 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [46] (Gleeson CJ, Gummow and Hayne JJ).
52 Ibid [83].
53 Ibid [82]–[83].
54 Ibid [83].
55 Ibid [114].

customs.[56] For example, the South Australian Government submitted that the 'the term "traditional" is one of broad interpretation and has been found to permit a substantial element of adaptation'.[57]

5.40 In a number of determinations of native title, the Federal Court has recognised adapted laws and customs as retaining a traditional character. For example, in *Neowarra v Western Australia*, Sundberg J found that the claimants' laws and customs were traditional notwithstanding that they were 'modified and to some extent diluted by the changed circumstances of the older applicants and their forebears'.[58] Other examples of adapted laws and customs have included changes to:

- descent rules: from patrilineal to cognatic;[59] or a shift over time involving an increase in reliance on matrilineal descent;[60]
- laws allowing images relating to country to be painted on canvas rather than on country, and the sale of these artworks;[61]
- the location of initiation rituals,[62] or a cessation of initiation ceremonies on the claimed area;[63] and
- social organisation associated with particular parts of the claimed area—with a number of smaller groups 'coalescing' into larger groupings.[64]

5.41 Notwithstanding that some scope exists to accommodate evolution and adaptation of traditional laws and customs within the interpretation of s 223, the ALRC

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56 South Australian Government, *Submission 34*; Northern Territory Government, *Submission 31*; Queensland Government, *Submission 28*; Western Australian Government, *Submission 20*.

57 South Australian Government, *Submission 68*.

58 *Neowarra v Western Australia* [2003] FCA 1402 (8 December 2003) [346].

59 *Griffiths v Northern Territory* (2006) 165 FCR 300, [501]; *Western Australia v Sebastian* (2008) 173 FCR 1, [121]–[122]; *Banjima People v Western Australia (No 2)* (2013) 305 ALR 1, [507].

60 *Bodney v Bennell* (2008) 167 FCR 84, [116].

61 *Neowarra v Western Australia* [2003] FCA 1402 (8 December 2003) [140]–[141].

62 *Dempsey on behalf of the Bularnu, Waluwarra and Wangkayujuru People v Queensland (No 2)* [2014] FCA 528 (23 May 2014) [693]–[694].

63 *Graham on behalf of the Ngadju People v Western Australia* [2012] FCA 1455 (21 December 2012) [146]. See also *Croft on behalf of the Barngarla Native Title Claim Group v South Australia* [2015] FCA 9 (22 January 2015) [644]–[645].

64 *Banjima People v Western Australia (No 2)* (2013) 305 ALR 1, [400], [695]–[696]. See also *AB (deceased) (on behalf of the Ngarla People) v Western Australia (No 4)* [2012] FCA 1268 (21 November 2012) [784]–[785]. However, in *CG (Deceased) on behalf of the Badimia People v Western Australia* [2015] FCA 204, Barker J inferred that at sovereignty, it is probable that some form of local group organisation operated that gave rise to a primary native title right to speak for parts of Badimia country: [422]. He inferred that the estate or local group organisation likely to have existed at sovereignty collapsed, but was not prepared to infer that the contemporary rule that all Badimia people have rights to speak for country was an evolution of the sovereignty rule: [430], [425]. In *Bodney v Bennell*, the Full Court stated that the significant change from pre-settlement land-holding systems—from a system of 'home areas' and 'runs', to an identification with larger areas known as 'boodjas'—pointed against continuity with pre-sovereignty laws and customs, but did not make any conclusions on this issue: *Bodney v Bennell* (2008) 167 FCR 84, [79]–[83]. The Full Court noted that the primary judge did not make any finding as to whether this change was a 'permissible adaptation' of pre-sovereignty land holding systems: Ibid [83]. However, it did not suggest that this finding was not open to the primary judge.

considers that the *Native Title Act* should explicitly provide for this. The ALRC agrees with those submissions that argue for keeping the word 'traditional' but providing guidance as to how it ought to be interpreted, in a manner beneficial to Aboriginal and Torres Strait Islander peoples.

5.42 The ALRC acknowledges that, if Recommendation 5–1 is adopted, 'difficult questions of fact and degree' will continue to arise in determining whether the content of contemporary laws and customs can be characterised as having their origins in pre-sovereign laws and customs.[65] These are essentially matters of evidence and the inferences to be drawn from the evidence.

5.43 Establishing that the content of contemporary laws and customs have their origins in laws and customs acknowledged and observed prior to sovereignty will, in most cases, rely on the Court (or a respondent in a consent determination) being willing to draw inferences from other evidence. As discussed in Chapter 7, in *Gumana v Northern Territory*, Selway J usefully identifies the evidence that may found such an inference, akin to the proof of custom at common law. Selway J considered that, where there is:

- a clear claim of the continuous existence of a custom or tradition that has existed at least since settlement;
- supported by credible evidence from persons who have observed that custom or tradition; and
- evidence of a general reputation that the custom or tradition had 'always' been observed;

then, in the absence of evidence to the contrary, there is an inference that the tradition or custom has existed at least since the date of settlement.[66]

5.44 In a consent determination in favour of the Dieri people, Mansfield J remarked:

> The Determination can be made without the necessity of strict proof and direct evidence of each issue as long as inferences can legitimately be made. In consent determination negotiations, it is the State's policy to focus on contemporary expressions of traditional laws and customs and pay less regard to laws and customs that may have ceased. The State can reasonably infer that such contemporary expressions are sourced in the earlier laws and customs. So can the Court.[67]

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65 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [82] (Gleeson CJ, Gummow and Hayne JJ). The South Australian Government emphasised that determining where 'evolution has gone so far as to represent a break with the traditional laws and customs in place at Sovereignty … can only be answered on the basis of each unique set of facts attaching to each claim': South Australian Government, *Submission 68*.

66 *Gumana v Northern Territory* (2005) 141 FCR 457, [201].

67 *Lander v South Australia* [2012] FCA 427 (1 May 2012) [42]. See also Bennett J's acceptance of the submission that 'the Court is entitled to draw inferences about the content of the traditional laws and customs at sovereignty from contemporary evidence and that if the evidence establishes a contemporary normative rule': *AB (deceased) (on behalf of the Ngarla People) v Western Australia (No 4)* [2012] FCA 1268 (21 November 2012) [724].

5.45 The ALRC considers that, when assessing whether or not laws and customs are 'traditional', adaptation, evolution and development of laws and customs should be treated as the norm rather than the exception. In this regard, the ALRC notes QSNTS's submission that, implicit in 'the recognition established at the time of acquisition of sovereignty is an acceptance that the indigenous normative system of law was and is inherently capable of dynamism'.[68] As AIATSIS argued, Aboriginal and Torres Strait Islander peoples should not be deprived 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'.[69] Moreover, as the Law Society of Western Australia noted in its submission, 'the requirement for adaptation from an original source does not require that adaptation to have occurred without the outside influence of European interaction'.[70]

5.46 The ALRC also considers that recognition that traditional laws and customs may adapt, evolve or develop should not be limited by any requirement that such changes be of a kind contemplated by the laws and customs.[71]

5.47 The ALRC further considers that significant weight should be accorded to claimants' perspectives as to the traditional character of their contemporary laws and customs. As French J stated in *Sampi v Western Australia*, claimants' 'testimony about their traditional laws and customs and their rights and responsibilities with respect to land and waters, deriving from them, is of the highest importance. All else is second order evidence'.[72] The NSW Young Lawyers Human Rights Committee argued that, in assessing whether laws and customs are traditional, 'the degree to which the claim group genuinely acknowledges and observes the laws and customs as a reflection of their traditions and customs' should be taken into account.[73] Such an approach would be in keeping with according the 'highest importance' to the testimony of Aboriginal and Torres Strait Islander witnesses.[74]

5.48 The High Court in *Western Australia v Ward* suggested that native title determinations have an indefinite character, reflecting

> the requirement for the continuing acknowledgment and observance of traditional laws and customs and continuing connection with land implicit in the definition of 'native title' in s 223(1) of the NTA.[75]

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68 Queensland South Native Title Services, *Submission 24*.
69 AIATSIS, *Submission 36*.
70 Law Society of Western Australia, *Submission 9*.
71 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [44] (Gleeson CJ, Gummow and Hayne JJ). See also *Rubibi Community v Western Australia (No 5)* [2005] FCA 1025 (29 July 2005) [266].
72 *Sampi v Western Australia* [2005] FCA 777 (10 June 2005) [48]. The Full Federal Court agreed with this view: *Sampi on behalf of the Bardi and Jawi People v Western Australia* (2010) 266 ALR 537, [57].
73 NSW Young Lawyers Human Rights Committee, *Submission 29*. See also S Bielefeld, *Submission 6*; Jason Behrendt, 'Changes to Native Title Law Since Mabo' (2007) 6 *Indigenous Law Bulletin* 13.
74 *Sampi v Western Australia* [2005] FCA 777 (10 June 2005) [48]; *Sampi on behalf of the Bardi and Jawi People v Western Australia* (2010) 266 ALR 537, [57].
75 *Western Australia v Ward* (2002) 213 CLR 1, [32] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

5.49 Explicit recognition that traditional laws and customs may evolve, adapt or develop is also appropriate to ensure that adaptation or evolution of laws and customs following a determination does not provide grounds for arguments to be raised for variation or revocation of a determination of native title.[76]

5.50 Recognition that traditional laws and customs may adapt, evolve or otherwise develop is also relevant to consideration of whether there has been continuity of acknowledgment and observance of traditional laws and customs. If there is recognition that a law or custom adapts, evolves or otherwise develops, there should be similar recognition that the manner in which the law is acknowledged and the custom is observed may also adapt, evolve or otherwise develop.

Continuity of acknowledgment of traditional laws and customs

Recommendation 5–2 The definition of native title in s 223 of the *Native Title Act 1993* (Cth) should be amended to clarify that it is not necessary to establish that the acknowledgment of traditional laws and the observance of traditional customs have continued substantially uninterrupted since sovereignty.

Recommendation 5–3 The definition of native title in s 223 of the *Native Title Act 1993* (Cth) should be amended to clarify that it is not necessary to establish that traditional laws and customs have been acknowledged and observed by each generation since sovereignty.

5.51 The ALRC recommends that there be explicit acknowledgment in the *Native Title Act* that there is no independent legal requirement to establish that the acknowledgment of traditional laws and observance of traditional customs has continued substantially uninterrupted since sovereignty. Further, there should be no additional refinement of that requirement so that traditional laws and customs must have been acknowledged and observed by each generation since sovereignty. A number of stakeholders supported the ALRC's approach to reform in this regard.[77]

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76 *Native Title Act 1993* (Cth) s 13(5). A number of submissions drew particular attention to the importance of the recommendation in this regard: Yamatji Marlpa Aboriginal Corporation, *Submission 62*; National Native Title Council, *Submission 57*; Central Desert Native Title Service, *Submission 48*.

77 Rec 5–2 and Rec 5–3 are substantially the same as was proposed in the Discussion Paper: Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014) Proposal 5–3. Proposal 5–3 in the Discussion Paper was supported by AIATSIS, *Submission 70*; National Congress of Australia's First Peoples, *Submission 69*; NTSCORP, *Submission 67*; Indigenous Land Corporation, *Submission 66*; Law Council of Australia, *Submission 64*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; National Native Title Council, *Submission 57*; Queensland South Native Title Services, *Submission 55*; A Frith and M Tehan, *Submission 52*; Central Desert Native Title Service, *Submission 48*; Native Title Services Victoria, *Submission 45*; North Queensland Land Council, *Submission 42*. While Yamati Marlpa gave in principle support, it preferred different wording, see: Yamatji Marlpa Aboriginal Corporation, *Submission 62*. NSW Young Lawyers Human Rights Committee also suggested a different way of amending the Act so as to limit the requirement: NSW Young Lawyers Human Rights Committee, *Submission 29*.

5.52 The ALRC recommends the removal of this legal requirement.[78] The requirement stems from the courts employing what may be considered an overly technical approach to the statutory construction of s 223(1). Interpretation of the word 'traditional', in the context of s 223(1)(a), has relevantly been held to require that the acknowledgment and observance of those laws and customs has continued substantially uninterrupted by each generation since sovereignty.

5.53 In making these recommendations, the ALRC is responding to the Terms of Reference which asked the ALRC to inquire into, and report on, connection requirements relating to the recognition and scope of native title rights and interests. Specifically, the ALRC was directed to consider whether there should be empowerment of courts 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. In Chapter 6, the ALRC discusses various models for accommodating change in, and interruptions to, continuity of acknowledgment and observance of laws and customs, including allowing judicial discretion to disregard substantial interruption. Having considered the issues and reform options, the ALRC has concluded that Recommendations 5–2 and 5–3 are the best way to approach the problems caused by the legal requirement. The ALRC considers that, because the requirement arises from the statutory construction that has been given to s 223(1), the most effective way to address problems stemming from the requirement is to clarify that it is not necessary to establish it. That is, to remove the requirement for the continuity of the acknowledgment of traditional laws and observance of traditional customs to be at the high 'substantially uninterrupted' and 'by each generation since sovereignty' thresholds.

5.54 The ALRC considers that the reforms outlined in this chapter should be implemented as a package. However, in the event that only part of the reform is implemented, the ALRC makes two separate recommendations with respect to continuity of acknowledgment and observance of traditional laws and customs. The ALRC considers that the need for traditional laws and customs to have been acknowledged and observed by 'by each generation since sovereignty' is a particularly high threshold.

The idea of 'continuity'

5.55 The word 'continuity' does not appear in the definition of native title in the *Native Title Act*. However, in *Yorta Yorta*, Gleeson CJ, Gummow and Hayne JJ stated that 'continuity of acknowledgment and observance is a condition for establishing native title'.[79] They derived a requirement for continuity of the acknowledgment of traditional laws and observance of traditional customs (together, 'the normative

78 The 'generation by generation' requirement in Rec 5–3 may be conceived as a further refinement of the broader continuity requirement referred to in Rec 5–2.

79 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [90].

rules')[80] from their interpretation of the qualifier 'traditional', in respect of laws and customs, in s 223(1)(a).[81] They stated that

> acknowledgment and observance of those laws and customs must have continued substantially uninterrupted since sovereignty. Were that not so, the laws and customs acknowledged and observed *now* could not properly be described as the *traditional* laws and customs of the peoples concerned. That would be so because they would not have been transmitted from generation to generation of the society for which they constituted a normative system giving rise to rights and interests in land …[82]

5.56 Later, they stated that

> continuity in acknowledgment and observance of the normative rules in which the claimed rights and interests are said to find their foundations before sovereignty is essential because it is the normative quality of those rules which rendered the Crown's radical title acquired at sovereignty subject to the rights and interests then existing and which now are identified as native title.[83]

5.57 That is, these members of the High Court insisted on 'continuity' so as 'to ensure that the court does not recognise any parallel lawmaking entity subsequent to the Crown's initial assertion of sovereignty'.[84] In consequence, where there is no continuity of acknowledgment of laws and observance of customs, the laws and customs cannot be revived for the purposes of establishing native title. Revival is discussed in Chapter 6.

5.58 The need for traditional laws and customs to have been acknowledged and observed continuously from sovereignty to the present imposes a considerable burden of proof on native title claimants. It has also been criticised for not according with 'universal principles as to the respect due [to] existing rights of a society'.[85]

The requirement for the acknowledgment and observance of traditional laws and customs to have continued 'substantially uninterrupted' since sovereignty

5.59 The High Court has acknowledged that continuity in acknowledgment and observance of laws and customs from sovereignty to the present need not be absolute. To that end, the qualification 'substantially' is important in 'substantially uninterrupted'.[86] Two reasons were given for this in *Yorta Yorta*. First, the qualification was said to recognise the great difficulty of proving continuous acknowledgment and

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80 Ibid [88].
81 Ibid [87].
82 Ibid.
83 Ibid [88]. In *Commonwealth v Yarmirr* (2001) 208 CLR 1, the majority of the High Court described the concept of radical title as a legal tool of analysis, explaining that 'when the Crown acquired sovereignty over land it did not acquire beneficial ownership of that land … What the Crown acquired was a "radical title" to land': Ibid [47] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
84 Nick Duff, 'What's Needed to Prove Native Title? Finding Flexibility Within the Law on Connection' (Research Discussion Paper 35, AIATSIS, June 2014) 27.
85 Richard H Bartlett, *Native Title in Australia* (LexisNexis Butterworths, 3rd ed, 2015) 100. Earlier Bartlett had referred to 'the principles of recognition of existing rights at common law or international law': Ibid 97.
86 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [89] (Gleeson CJ, Gummow and Hayne JJ).

observance of oral traditions over the many years since sovereignty. Second, it recognises the 'most profound effects' of European settlement on Aboriginal societies. This means that it is 'inevitable that the structures and practices of those societies, and their members, will have undergone great changes'.[87] While there is stated acknowledgment that the European settlement of Australia brought about great changes to Aboriginal and Torres Strait Islander societies, it is arguable that insisting that the acknowledgment and observance of law and custom must have continued substantially uninterrupted by each generation since sovereignty effectively counters any real acknowledgment of the ensuing, and in many cases insurmountable, difficulties.

5.60 In *Yorta Yorta*, Gleeson CJ, Gummow and Hayne JJ stated that 'the inquiry about continuity of acknowledgment and observance does not require consideration of why, if acknowledgment and observance stopped, that happened'.[88] If the requirement is not met, then 'examining why that is so is important *only* to the extent that the presence or absence of reasons might influence the fact-finder's decision about whether there was such an interruption'.[89] Consideration of the reasons for interruption is discussed in Chapter 6.

Further refinement of the requirement: that, since sovereignty, each generation must have acknowledged and observed the traditional laws and customs

5.61 In *Yorta Yorta*, Gleeson CJ, Gummow and Hayne JJ stated that 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'.[90] In *Risk v Northern Territory*, Mansfield J summarised the *Yorta Yorta* continuity requirement as the requirement to establish that 'acknowledgment and observance of the laws and customs has continued substantially uninterrupted *by each generation* since sovereignty'.[91] Such a requirement has significant implications in terms of the evidence to be produced by claimants.

5.62 The 'generation by generation' test was also discussed in *Bodney v Bennell*. The Full Federal Court stated that the correct question was 'whether the laws and customs

87 Ibid.

88 Ibid [90].

89 Ibid. See also *Bodney v Bennell* (2008) 167 FCR 84, [97].

90 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [46]. The 'generation by generation' requirement appears to stem from dictionary definitions of 'traditional' and 'tradition'. See *Risk v Northern Territory* (2007) 240 ALR 75, [124], [127] (Branson and Katz JJ).

91 *Risk v Northern Territory* [2006] FCA 404 (29 August 2006) [97], emphasis added. On appeal the Full Court considered Mansfield J's statement of the law to be accurate: *Risk v Northern Territory* (2007) 240 ALR 75, [78]–[98]. Justice Mansfield has ameliorated somewhat the stringency of this requirement in *Croft on behalf of the Barngarla Native Title Claim Group v South Australia* [2015] FCA 9 (22 January 2015). His Honour stated, 'it is clear that s 223(1)(a) will be fulfilled only where there is proof that a society acknowledges and observes rules under which rights and interests in land are possessed that have normative content and that find their real origins in the same pre-sovereignty society. The acknowledgment and observance of those normative rules must have continued substantially uninterrupted from the time of sovereignty. However, the qualification indicated by the use of the adverb "substantially" recognises both the difficulty of proving continuous acknowledgment and observance of oral traditions and the inevitability of change to the structures and practices of Aboriginal societies in the light of European settlement': Ibid [69].

have continued to be acknowledged and observed substantially uninterrupted by each generation since sovereignty'.[92]

Regional variation

5.63 The requirement for native title claimants to establish that the acknowledgment of their traditional laws and the observance of their traditional customs have continued substantially uninterrupted by each generation since sovereignty has caused particular difficulty for claimants in some parts of Australia.[93] For example, in *CG (Deceased) on behalf of the Badimia People v Western Australia*, the Federal Court concluded that 'the claimants have not proved that the Badimia people, since sovereignty, and in each generation, have continued to acknowledge traditional laws and observe traditional customs to the present day in respect of the claim area'.[94]

5.64 In a number of instances where claimants have not been able to establish this requirement, the claims are in closer proximity to areas of concentrated settlement.[95] Professor Richard Bartlett has expressed the view that the decision in *Bodney v Bennell* 'affirmed the nigh impossibility of proving native title in urban areas irrespective of consideration of extinguishment'.[96]

5.65 By contrast, there are other cases where the traditional laws and customs observed by the claimants were found to have continued substantially uninterrupted since sovereignty because the 'evidence to that effect was strong'.[97] This was the situation in *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group*, which was a claim for land and waters south-east of Tennant Creek in the Northern Territory. Also, in *Banjima People v Western Australia (No 2)*, which concerned a claim over land and waters in the east Pilbara region of Western Australia, the Federal Court found that there had been continuity of the acknowledgment and observance of the traditional laws and customs.[98]

The rationale for reform

5.66 The ALRC heard divergent views about whether reform of the requirement was needed. A number of stakeholders considered the requirement for the acknowledgment and observance of traditional laws and customs to have continued substantially

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92 *Bodney v Bennell* (2008) 167 FCR 84, [73].

93 See, eg, *CG (Deceased) on behalf of the Badimia People v Western Australia* [2015] FCA 204 (12 March 2015); *Sandy on behalf of the Yugara People v State of Queensland (No 2)* [2015] FCA 15 (27 January 2015); *Wyman on behalf of the Bidjara People v Queensland (No 2)* [2013] FCA 1229 (6 December 2013); *Bodney v Bennell* (2008) 167 FCR 84; *Risk v Northern Territory* (2007) 240 ALR 75; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

94 *CG (Deceased) on behalf of the Badimia People v Western Australia* [2015] FCA 204 (12 March 2015) [495].

95 See, eg, *Sandy on behalf of the Yugara People v State of Queensland (No 2)* [2015] FCA 15 (27 January 2015); *Bodney v Bennell* (2008) 167 FCR 84; *Risk v Northern Territory* (2007) 240 ALR 75.

96 Bartlett, above n 85, 106.

97 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [25].

98 *Banjima People v Western Australia (No 2)* (2013) 305 ALR 1, [399].

uninterrupted by each generation since sovereignty to be problematic.[99] Some stakeholders called for the 'substantially uninterrupted' threshold to be removed,[100] or its application otherwise limited.[101] However, a number of state and territory governments submitted that they considered that discharging the onus in respect of the requirement for substantially uninterrupted continuity of acknowledgment and observance of traditional laws and customs is not unduly problematic for native title claimants, or for the resolution of claims.[102] Governments and other stakeholders representing respondent interests, such as industry groups in the minerals sector, opposed the reform as proposed in the Discussion Paper.[103]

5.67 Some governments expressed the view that the requirement for continuity of acknowledgment and observance of traditional laws and customs already incorporates appropriate flexibility,[104] noting that the qualification 'substantially' essentially 'makes allowances for the impacts of European settlement upon Aboriginal societies'.[105] To this end, the Western Australian Government submitted:

> It is … the State's experience from a broad range of consensual and contested matters that Aboriginal groups may compellingly and successfully establish that they hold native title rights and interests notwithstanding profound social and demographic changes since European settlement.[106]

5.68 However, there are examples in Western Australia where this has not been the case.[107]

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99 See, eg, Yamatji Marlpa Aboriginal Corporation, *Submission 62*; AIATSIS, *Submission 36*; Goldfields Land and Sea Council, *Submission 22*; North Queensland Land Council, *Submission 17*; S Bielefeld, *Submission 6*; Just Us Lawyers, *Submission 2*.

100 See, eg, Native Title Services Victoria, *Submission 45*; Queensland South Native Title Services, *Submission 24*; A Frith and M Tehan, *Submission 12*. Some stakeholders did not specify removal of the requirement but it seems clear that this was their intent, or not something they opposed: Goldfields Land and Sea Council, *Submission 22*.

101 See, eg, NSW Young Lawyers Human Rights Committee, *Submission 29*; North Queensland Land Council, *Submission 17*; Cape York Land Council, *Submission 7*.

102 Northern Territory Government, *Submission 71*; South Australian Government, *Submission 34*; Northern Territory Government, *Submission 31*; Western Australian Government, *Submission 20*.

103 South Australian Government, *Submission 68*; Minerals Council of Australia, *Submission 65*; National Farmers' Federation, *Submission 56*; Association of Mining and Exploration Companies, *Submission 54*; The Chamber of Minerals and Energy of Western Australia, *Submission 49*; Western Australian Government, *Submission 43*; Queensland Government, *Submission 28*.

104 South Australian Government, *Submission 34*; Queensland Government, *Submission 28*; Western Australian Government, *Submission 20*. The South Australian Government submitted that it was a 'flexible doctrine that in recent years has generally been interpreted by the Courts (and in the State's consent determination process) in favour of claimant groups'. See also Minerals Council of Australia, *Submission 65*.

105 Western Australian Government, *Submission 20*. See also South Australian Government, *Submission 68*: 'The courts readily acknowledge the impact of British settlement on Australia's Indigenous cultures'. However, Frith and Tehan argued that the exception for 'substantially uninterrupted' acknowledgment and observance of laws and customs 'does not go far enough': A Frith and M Tehan, *Submission 12*.

106 Western Australian Government, *Submission 20*. See also Queensland Government, *Submission 28*: 'The difficult problems of proof that are inherent in the concept of native title have, on the evidence of the rates of resolution of claims, been adequately addressed by the jurisprudence and the attitudes and skills of the participating parties'.

107 *CG (Deceased) on behalf of the Badimia People v Western Australia* [2015] FCA 204 (12 March 2015); *Bodney v Bennell* (2008) 167 FCR 84.

5.69 The Northern Territory Government submitted that the 'substantially uninterrupted' threshold for continuity of acknowledgment and observance of traditional laws and customs has been 'uncontroversial' in that jurisdiction.[108] Some Native Title Service Providers and Native Title Representative Bodies acknowledged that meeting the requirement may not pose a problem in their particular regions of Australia, although they expressed concern that this may not be the case elsewhere.[109] Cape York Land Council ('CYLC') submitted that the State in Queensland has 'generally been willing to accept continuity in circumstances where there has been some interruption for reasons beyond the group's control'.[110] However, it also submitted:

> it is extremely difficult and often distressing for Cape York Traditional Owners to participate in a process which in practical terms requires them to effectively deny the devastating effects of their dispossession and displacement.[111]

5.70 Further, governments referred to a willingness, by both the Court and respondent parties, to draw inferences.[112] For example, governments draw inferences in relation to reaching agreed facts for connection. The use of inferences is discussed in Chapter 7. The South Australian Government submitted that, in its consent determination process,

> inferences tend to be drawn based on genealogical and anthropological information that link 'snapshots' in time periods. The question of interruption is rarely raised without some other (usually historical) evidence suggesting that interruption may be relevant and it is then discussed with the applicant.[113]

5.71 CDNTS acknowledged its experience that the Western Australian government was usually willing to infer continuity of the acknowledgment of traditional laws and customs by the relevant claimant group since prior to first contact. However, it considered that approach to be 'arguably the result of the particular factual situation of native title claims in our region'.[114] It explained that those native title claim groups have had 'relatively little' post-sovereignty disruption.[115]

5.72 Some stakeholders expressed reservations about the extent of practical extenuation provided by the qualification 'substantially' and the use of inferences.[116] CDNTS submitted that,

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108 Northern Territory Government, *Submission 71*.
109 Central Desert Native Title Service, *Submission 48*; Cape York Land Council, *Submission 7*.
110 Cape York Land Council, *Submission 7*.
111 Ibid. The Australian Human Rights Commission argued that 'requiring "literal continuous connection" ignores 'the reality of European interference in the lives of Indigenous peoples': Australian Human Rights Commission, *Submission 1*.
112 South Australian Government, *Submission 34*; Northern Territory Government, *Submission 31*; Queensland Government, *Submission 28*; Western Australian Government, *Submission 20*.
113 South Australian Government, *Submission 34*. See also *Lander v South Australia* [2012] FCA 427 (1 May 2012) [48].
114 Central Desert Native Title Service, *Submission 48*.
115 Central Desert Native Title Services, *Submission 26*.
116 See, eg, Central Desert Native Title Service, *Submission 48*; AIATSIS, *Submission 36*.

> although some Governments may take a practical approach with regards to continuity, the actions of government can vary significantly depending on both the particular government, and the people within it. Consequently, the extent to which 'substantially interrupted' provides sufficient flexibility in favour of native title groups depends significantly upon the government assessing the merits of the claim.[117]

5.73 With respect to the use of inferences by the courts, AIATSIS submitted that 'the extent to which an inference may be raised is amenable to judicial discretion'.[118]

5.74 In contrast to what was submitted by governments, AIATSIS submitted that the requirement for acknowledgment and observance of traditional laws and customs to have continued substantially uninterrupted by each generation since sovereignty is logically inconsistent, difficult to meet and leads to injustice.[119] Duff has argued that there are inherent difficulties of proof, including because native title claimants must prove a 'negative proposition', namely 'the absence of substantial interruption in acknowledgment and observance of law and custom'.[120] Some submissions argued that the requirement for substantially uninterrupted acknowledgment of traditional laws and observance of traditional customs is inherently unconscionable or unjust given the history of colonisation.[121]

5.75 GLSC submitted that it 'does not consider that "substantially uninterrupted" acknowledgment and observance of traditional law and custom should be a legal requirement for the proof of native title'.[122] While submissions expressed various views on how limitation of the requirement should be achieved,[123] a number preferred a statutory amendment to limit the application of the requirement to other possible reform options, such as a statutory definition of 'substantial interruption'.[124] In Chapter 6, the ALRC analyses the feasibility of providing a definition of substantial interruption and outlines the difficulties of adopting a definition that could comprehensively cover a range of circumstances given the diverse factual origins for native title.

5.76 The ALRC acknowledges the practical developments that have occurred in the approach taken to evidence and the use of inferential reasoning to fill gaps in the facts where appropriate given the absence of relevant records and claimant evidence.[125] However, notwithstanding these developments and the fact that the modifier 'substantially' provides a qualification not requiring absolute continuity, the ALRC

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117 Central Desert Native Title Service, *Submission 48*.
118 AIATSIS, *Submission 36*. AIATSIS referred to Duff, above n 84, 28–33.
119 AIATSIS, *Submission 36*.
120 Duff, above n 84, 57.
121 See, eg, Native Title Services Victoria, *Submission 45*; Kimberley Land Council, *Submission 30*; North Queensland Land Council, *Submission 17*; A Frith and M Tehan, *Submission 12*; S Bielefeld, *Submission 6*.
122 Goldfields Land and Sea Council, *Submission 22*.
123 See, eg, NSW Young Lawyers Human Rights Committee, *Submission 29*; North Queensland Land Council, *Submission 17*; A Frith and M Tehan, *Submission 12*; Cape York Land Council, *Submission 7*.
124 See, eg, NSW Young Lawyers Human Rights Committee, *Submission 29*; Cape York Land Council, *Submission 7*.
125 See Ch 7.

considers that legislative reform is needed. The ALRC considers that reform is warranted for the following reasons.

Recognising and protecting native title

5.77 First, acknowledging the importance of the recognition of native title,[126] the ALRC considers that the recommendation will facilitate the recognition and protection of native title.[127] The ALRC considers that the requirement that acknowledgment and observance of law and custom must have continued substantially uninterrupted by each generation since sovereignty is an unnecessary stricture on the recognition of native title. The requirement 'undermines' the foundation for native title rights.[128] For example, it renders native title claims excessively vulnerable to a finding that the factual basis for recognising rights and interests is no longer in existence.[129]

5.78 Demonstrating substantially uninterrupted continuity of acknowledgment and observance of laws and customs requires a high level of factual evidence. It is resource intensive to demonstrate and quite unrealistic for many native title communities affected by dislocation, removal of members and discrimination, that at times prohibited exercise of cultural practices.[130]

5.79 Recognition of native title is significant for native title holders as well as the broader Australian community.[131] However, the current degree of continuity required in the acknowledgment of traditional laws and observance of traditional customs—particularly the requirement for it to be 'generation by generation'—acts as an unnecessary barrier to the recognition of native title. The NSW Young Lawyers Human Rights Committee submitted that the requirement 'operates contrary to the aim of repairing and supporting Indigenous cultures to encourage further development'.[132] As CDNTS put it, the 'generation by generation' requirement is 'unduly harsh and unjust'.[133]

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126 Guiding Principle 1.

127 Law Council of Australia, *Submission 64*. AMEC expressed concern that the recommendation 'appear[s] to lower the threshold to prove that native title exists': Association of Mining and Exploration Companies, *Submission 54*.

128 NSW Young Lawyers Human Rights Committee, *Submission 29*.

129 Central Desert Native Title Service, *Submission 48*; Australian Human Rights Commission, *Submission 1*. Central Desert Native Title Services agreed with this statement whereas the Australian Human Rights Commission submitted that '[t]he claim of the Larrakia people illustrates the vulnerability and fragility of native title'.

130 See, eg, Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2008' 54–55: 'As it has been stated in many native title reports, providing such evidence generation by generation, while being subject to the strict rules of evidence, is a herculean task for people of an oral culture with a history of dispossession and generations of children that were removed from their parents'.

131 See Ch 1.

132 NSW Young Lawyers Human Rights Committee, *Submission 29*. Native Title Services Victoria noted that '[t]he State of Victoria declined to include continuity of connection as one of the requirements traditional owners are required to establish for a settlement under the Settlement Framework': Native Title Services Victoria, *Submission 45*.

133 Central Desert Native Title Service, *Submission 48*.

5.80 A number of submissions expressed the view that the requirement serves no useful purpose.[134] The Law Society of Western Australia was of the view that 'there is no reason why a temporary failure to observe laws and customs should automatically disqualify a native title claim'.[135] GLSC went further, submitting that '[e]ither the Indigenous rights exist under Indigenous law and custom or they do not; the question of whether that law and custom has been practised continuously since colonisation is for all policy purposes irrelevant'.[136]

5.81 The ALRC considers the requirement to represent an extension of the literal wording of s 223(1) has unnecessarily narrowed the foundation of the test for proving native title. Stakeholders agreed with this approach in that:

- it requires claimants to surmount unnecessarily high evidential 'hurdles'[137] to establish native title;[138]
- it 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 colonisation';[139] and
- it 'operates as a strong incentive for applicants to settle for consent determinations below their expectations lest they risk losing at trial because of "substantial interruption"'.[140]

5.82 The first point was addressed frequently in submissions. Dr Shelley Bielefeld, for example, submitted that '[t]he standard of proof is set so high that attaining a successful outcome for many Aboriginal claimants is more onerous than it should be if rectifying injustice is the aim'.[141] Some stakeholders noted that United Nations treaty bodies—such as the Committee on the Elimination of Racial Discrimination—have

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134 National Native Title Council, *Submission 57*; AIATSIS, *Submission 36*; Goldfields Land and Sea Council, *Submission 22*. Others have also criticised the requirement in this respect. 'Particularly around the issue of the continuous observance and acknowledgment of traditional custom and law … the Australian legal system imposes technical requirements that may be irrelevant to questions of intra-Indigenous justice and, arguably, questions of justice in relation to the broader Australian society too': Duff, above n 84, 17.

135 Law Society of Western Australia, *Submission 41*.

136 Goldfields Land and Sea Council, *Submission 22*. The Western Australian Fishing Industry Council was also of the view that 'the integrity of traditional law and custom' is the 'key issue'. However, it submitted that continuity is also relevant: Western Australian Fishing Industry Council, *Submission 23*.

137 Transcript of Proceedings, *Risk v Northern Territory* [2007] HCATrans 472 (31 August 2007) (Kirby J).

138 See, eg, AIATSIS, *Submission 70*; AIATSIS, *Submission 36*; Queensland South Native Title Services, *Submission 24*; Native Title Services Victoria, *Submission 18*; North Queensland Land Council, *Submission 17*; A Frith and M Tehan, *Submission 12*; S Bielefeld, *Submission 6*.

139 AIATSIS, *Submission 36*. 'The inevitable changes brought by European settlement to Aboriginal and Torres Strait Islander law and custom do not necessarily result in the abandonment of law and custom. The same could be said of other transformational events and even cataclysmic events, including drought, flood, war and the like': AIATSIS, *Submission 70*. See Ch 6.

140 Just Us Lawyers, *Submission 2*. Others have written of 'the shadow that potential litigation casts on parties' negotiations' and expressed the view that 'negotiations should not take place under the misapprehension that native title is harder to prove at trial than it really is': Duff, above n 84, 5, 57.

141 S Bielefeld, *Submission 6*.

expressed concerns about the high evidential burden on claimants to prove native title.[142]

5.83 As a number of submissions pointed out, the requirement for proof of continuity of the acknowledgment and observance of laws and customs is problematic because the evidence may be limited[143] or have limitations.[144] The Law Society of Western Australia argued that cases where acknowledgment and observance of laws and customs were not found to have continued substantially uninterrupted have reflected, 'either a disproportionate focus on some evidence over other available evidence, or a gap in the evidence of observable acknowledgment and observance of laws and customs, rather than an abandonment of that acknowledgment and observance'.[145]

5.84 A lack of evidence to meet the requirement continues to be a problem for some native title claimants.[146] In the Yugara People's claim, in respect of the need to demonstrate that acknowledgment and observance of traditional laws and customs had continued substantially uninterrupted, the Federal Court observed:

> crucially, the evidence does not cover anything more than a fraction of the period with which the court must be concerned: even to go back to the grandparents of the oldest of the Yugara applicants, there remains the better part of a century with respect to which the court does not have any relevant evidence.[147]

5.85 AIATSIS argued that the need to meet the requirement in circumstances where there is limited or no evidence 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'.[148]

5.86 Some stakeholders referred to the limitations of historical records.[149] Frith and Tehan submitted that historical documents that were produced by the states and

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142 National Congress of Australia's First Peoples, *Submission 32*; Australian Human Rights Commission, *Submission 1*.

143 See, eg, Central Desert Native Title Service, *Submission 48*; Law Society of Western Australia, *Submission 41*; AIATSIS, *Submission 36*; Goldfields Land and Sea Council, *Submission 22*; A Frith and M Tehan, *Submission 12*.

144 See, eg, A Frith and M Tehan, *Submission 12*; Just Us Lawyers, *Submission 2*.

145 Law Society of Western Australia, *Submission 9*. The reference to the former is to the primary judge's preference, in *Yorta Yorta*, to a nineteenth century squatter's writings over the evidence of the Yorta Yorta witnesses: *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 (18 December 1998) [123]. The Society submitted that the Larrakia case is an example of the second point.

146 See Ch 7.

147 *Sandy on behalf of the Yugara People v State of Queensland (No 2)* [2015] FCA 15 (27 January 2015) [153].

148 AIATSIS, *Submission 36*. There was support for this statement from other stakeholders. See, eg, Yamatji Marlpa Aboriginal Corporation, *Submission 62*.

149 See, eg, AIATSIS, *Submission 36*; A Frith and M Tehan, *Submission 12*; Just Us Lawyers, *Submission 2*. Just Us Lawyers submitted that '[i]n many cases, we are left with inferring and extrapolating from the observations of 19th century ethnographers (of various quality), pastoralists, explorers and others whose attitudes towards Indigenous culture does little to assist claimants'.

territories may 'not record instances of the acknowledgment and observance of laws and customs because that is not what the State or Territory was interested in'.[150]

5.87 Submissions and consultations also raised specific concerns about the 'generation by generation test'. Some submissions referred to the judgments in the Larrakia people's claim.[151] There, the Federal Court specifically referred to a lack of evidence about the passing on of knowledge of the traditional laws and customs from generation to generation during much of the twentieth century.[152] Concerns have been expressed about the Larrakia case as '[a] break in continuity of traditional laws and customs for just a few decades was sufficient for the court to find that native title did not exist'.[153]

5.88 The ALRC considers that the requirement for acknowledgment and observance of traditional laws and customs by each generation since sovereignty does not accord with the prevalent view in the literature concerning the transmission of laws in Aboriginal and Torres Strait Islander communities.[154] A strict interpretation of the requirement may not recognise transmission of laws and customs from grandparent to grandchild because of the absence of the intervening generation in the process. The ALRC considers that the requirement insufficiently takes account of the impacts of European settlement. Reform would address historic injustice and facilitate the recognition of rights.

5.89 The ALRC considers that the current requirement of proof, to meet the legal test that acknowledgment and observance of law and custom must have occurred substantially uninterrupted by each generation since sovereignty, is a difficult threshold for establishing native title under the *Native Title Act*.

Encouraging timely and just resolution of determinations

5.90 The second reason the ALRC is recommending this reform accords with the objective of encouraging timely and just resolution of determinations.[155] The ALRC considers that the recommendations will assist with the efficiency of the native title system and the timely, but just, resolution of native title claims. A number of stakeholders shared this view.[156] The requirement, with its need for 'fine-grained

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150 A Frith and M Tehan, *Submission 12*. AIATSIS also mentioned the 'bias of those reporting': AIATSIS, *Submission 36*.

151 *Risk v Northern Territory* [2006] 404, 240 ALR 75. See, eg, NSW Young Lawyers Human Rights Committee, *Submission 29*; Australian Human Rights Commission, *Submission 1*.

152 *Risk v Northern Territory* [2006] FCA 404 (29 August 2006) [823].

153 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2009' (Australian Human Rights Commission, 2009) 86. The Full Court of the Federal Court observed that 'His Honour found that the laws acknowledged and customs observed by Larrakia as a whole were interrupted between the war and the 1970s': *Risk v Northern Territory* (2007) 240 ALR 75, [106].

154 See, eg, Paul Memmott, 'Modelling the Continuity of Aboriginal Law in Urban Native Title Claims: A Practice Example' in Toni Bauman and Gaynor MacDonald (eds), *Unsettling Anthropology: The Demands of Native Title on Worn Concepts and Changing Lives* (AIATSIS, 2011) 122, 130.

155 Guiding Principle 3.

156 NTSCORP, *Submission 67*; National Native Title Council, *Submission 57*; Central Desert Native Title Service, *Submission 48*.

historical enquiries',[157] burdens native title applicants and their representatives in terms of both cost and time.[158] Further, it places resource burdens on state and territory governments and also on the Australian Government, where the Commonwealth is the respondent. Governments must assess voluminous material as well as undertake tenure assessments. The ALRC heard in consultations that there were particular problems for governments in identifying experts with requisite expertise.[159] Additionally, the requirement reduces the timeliness of the overall process.[160]

5.91 NTSCORP Limited ('NTSCORP') submitted that the reform, together with other recommendations in this chapter, would assist mediation processes by reducing the number of issues and the time needed.[161] The ALRC considers that implementation of these two recommendations should reduce similarly the number of issues that might be contested in litigation—working consistently with the Federal Court's case management reforms—and consequently, the time taken in that legal process.

5.92 The ALRC considers that implementation of the recommendations will encourage just resolution of determinations in at least two ways. First, by reconceptualising the continued acknowledgment and observance of traditional laws and customs. At present, the requirement gives pre-eminence to continued acknowledgment and observance of laws and customs in a relatively decontextualised way, which ignores the past impacts of European settlement on Aboriginal and Torres Strait Islander communities. Second, by reducing the extent to which the approach taken to construction of the requirements may vary between governments throughout Australia and between consent determinations and litigated outcomes.[162]

A necessary part of native title law?

5.93 State and territory government submissions contended that substantially uninterrupted continuity of the acknowledgment and observance of traditional laws and customs is an important aspect of native title law.[163] On a practical level, the Queensland Government submitted that 'it is probably not possible to remove evidence of continuing connection without affecting the quality of the evidence required to demonstrate other indicia of the existence of native title'.[164]

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157 Goldfields Land and Sea Council, *Submission 22*.

158 National Native Title Council, *Submission 57*; AIATSIS, *Submission 36*.

159 See Ch 12.

160 National Native Title Council, *Submission 57*.

161 NTSCORP, *Submission 67*.

162 Submissions suggested that there may be regional variation and variation between outcomes that could be achieved by consent or at trial: Central Desert Native Title Service, *Submission 48*; Just Us Lawyers, *Submission 2*.

163 South Australian Government, *Submission 34*; Northern Territory Government, *Submission 31*; Western Australian Government, *Submission 20*. Accordingly, the South Australian Government could not conceive of its application causing injustice. 'It is difficult to conceive of a situation where an injustice could be wrought upon a party seeking native title where a substantial interruption had occurred, if only because it suggests that the basis for any positive native title finding does not exist': South Australian Government, *Submission 34*.

164 Queensland Government, *Submission 28*.

5.94 The Western Australian Government submitted that '[a]ny proposal to remove, or fundamentally alter, the requirement to demonstrate adherence to a continuing normative system based on pre-settlement laws and customs ignores a central tenet of the *Mabo No 2* decision'.[165]

5.95 The ALRC considers that, while the recognition of native title is anchored in traditional laws and customs at sovereignty, such an intensive level of continuity of acknowledgment and observance of laws and customs was arguably not envisaged in *Mabo [No 2]*. There, Brennan J referred to a need for acknowledgment and observance of laws and customs, 'so far as it is practicable to do so'.[166] Similarly, the Law Council of Australia submitted:

> there was no indication in *Mabo [No 2]* (the findings of which were intended to be given a statutory framework by the Act) that the recognition of continuing native title rights and interests was dependent upon the continuity of a normative system of laws and customs in a pre-sovereign normative society.[167]

5.96 As a number of stakeholders noted, the words of s 223 of the *Native Title Act* do not mention a need for 'substantially uninterrupted' continuity of the acknowledgment of traditional laws and the observance of traditional customs.[168] Rather, as has been explained above, the majority of the High Court in *Yorta Yorta* interpreted the word 'traditional', where it occurs in s 223(1)(a), in such a way that it effectively imports an independent requirement for proof of substantially uninterrupted continuity of the acknowledgment and observance of traditional laws and customs. Arguably, the Full Federal Court approved the further refinement of the requirement so that the acknowledgment and observance of the laws and customs must have continued substantially uninterrupted by each generation since sovereignty.[169] The ALRC considers that this so-called continuity requirement has been 'read into'[170] s 223(1) of the Act.

5.97 The Hon Paul Finn has argued that the effect of the interpretation of s 223 in *Yorta Yorta* produced a 'discernible hardening of the arteries of the *Native Title Act*'.[171] AIATSIS submitted that the continuity requirement stems from the 'painful' statutory interpretation of s 223. It saw that interpretation as arguably flawed because it was not based on common law traditions for interpreting legislation where the rules are 'root[ed] in the common law protection of the rights of citizens against arbitrary exercises of power by the state, especially in relation to property'.[172]

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165 Western Australian Government, *Submission 20*.
166 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 60.
167 Law Council of Australia, *Submission 35*.
168 See, eg, NTSCORP, *Submission 67*; National Native Title Council, *Submission 57*; Kimberley Land Council, *Submission 30*; Queensland South Native Title Services, *Submission 24*; North Queensland Land Council, *Submission 17*; Australian Human Rights Commission, *Submission 1*.
169 See *Bodney v Bennell* (2008) 167 FCR 84; *Risk v Northern Territory* (2007) 240 ALR 75. AIATSIS quoted Dr Lisa Strelein who has argued that it was the Full Federal Court in *Bodney v Bennell* that 'added the proviso that continuity be demonstrated "for each generation"': AIATSIS, *Submission 36*.
170 AIATSIS, *Submission 36*.
171 Paul Finn, '*Mabo* into the Future: Native Title Jurisprudence' (2012) 8 *Indigenous Law Bulletin* 5, 6.
172 AIATSIS, *Submission 36* quoting Dr Lisa Strelein.

5.98 The ALRC considers that it is consistent with the promotion of the beneficial purpose of the *Native Title Act*, and a 'fair, large and liberal' approach to statutory construction, to provide explicitly that it is not necessary to establish that acknowledgment and observance of laws and customs has continued substantially uninterrupted by each generation since sovereignty. A number of stakeholders supported this approach.[173] Such an approach accords with international law such as UNDRIP and the International Convention on the Elimination of All Forms of Racial Discrimination ('CERD').[174]

What level of continued acknowledgment and observance is required of laws and customs with origins in the pre-sovereign period?

5.99 As outlined, the ALRC considers that the requirement for 'substantially uninterrupted' acknowledgment and observance of laws and customs since sovereignty, particularly the 'generation by generation' test, is too stringent. It must be emphasised that the ALRC is not proposing change to the requirement, stemming from *Mabo [No 2]*, that the relevant laws and customs must find their origins in the pre-sovereign period.

5.100 This leaves the question of what degree of continued acknowledgment and observance of traditional laws and customs since annexation is required to meet the doctrinal tenets of *Mabo [No 2]* as adopted in the actual wording of s 223(1)(a). That is, what degree of continued acknowledgment and observance of traditional laws and customs is needed to establish that 'the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders'?

5.101 In *Mabo [No 2]*, Brennan J referred to continuity in terms of a substantial maintenance of connection:

> Where a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connexion with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence.[175]

5.102 That is, acknowledgment and observance of laws and customs from prior to the assertion of sovereignty is required to found the common law's recognition of connection, in a broad sense.[176]

5.103 In *Yorta Yorta*, Gleeson CJ, Gummow and Hayne JJ stated that it would be 'wrong' to look only at the laws and customs that are currently observed. They

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173 Indigenous Land Corporation, *Submission 66*; National Native Title Council, *Submission 57*; A Frith and M Tehan, *Submission 52*; Central Desert Native Title Service, *Submission 48*.

174 *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st Sess, 107th Plen Mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969). International law is discussed further in Ch 9.

175 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 59–60.

176 See Ch 3.

continued that it is 'necessary to inquire about the relationship between the laws and customs now acknowledged and observed, and those that were acknowledged and observed before sovereignty'.[177]

5.104 The ALRC similarly considers that there must be some link or 'relationship'[178] between pre-sovereignty origins of the law and custom and the laws and customs presently acknowledged and observed by the claimant group. However, substantially uninterrupted continuity of acknowledgment and observance of laws and customs, in the ALRC's view, puts too high an evidential burden on claimants. The terms 'substantially maintained'[179] or 'identifiable through time'[180] may be more appropriate approaches to the level of continuity required to found the existence of native title.

Continuity of society

Recommendation 5–4 The definition of native title in s 223 of the *Native Title Act 1993* (Cth) should be amended to clarify 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 sovereignty.

5.105 The ALRC recommends that the definition of native title should be amended to make clear that, in the proof of native title, there is no independent requirement to establish continuity of a society united in and by its acknowledgment and observance of traditional laws and customs.

5.106 The High Court in *Yorta Yorta* noted that laws and customs 'do not exist in a vacuum'.[181] Therefore, there is an inextricable link between a society and its laws and customs. If a society—understood as a body of persons united in and by its acknowledgment of a body of laws and customs—ceases to exist, the laws and customs (and rights and interests possessed under them) also cease.[182] Following *Yorta Yorta*, subsequent native title determinations have involved detailed consideration of the native title claim group's membership of a society united in and by its acknowledgment

177 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [56].
178 Ibid [56] (Gleeson CJ, Gummow and Hayne JJ).
179 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 59 (Brennan J). Note that the phrase is used with respect to connection.
180 Native Title Amendment (Reform) Bill 2014 cl 18. The Bill relevantly proposes a new s 223(1A) which would state, 'Without limiting subsection (1), traditional laws acknowledged in that subsection includes such laws as remain identifiable through time, regardless of whether there is a change in those laws or in the manner in which they are acknowledged'. Proposed new s 223(1B) concerns 'traditional customs observed' and is expressed in similar terms.
181 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [49] (Gleeson CJ, Gummow and Hayne JJ).
182 Ibid [51]–[53] (Gleeson CJ, Gummow and Hayne JJ).

and observance of traditional laws and customs, as well as the continuity of that society.[183]

5.107 Recommendation 5–4 makes clear that establishing a society is relevant only as a 'conceptual tool' to assist in answering the central definitional question of whether rights and interests are possessed under traditional laws acknowledged, and traditional customs observed, by the native title claim group.[184] It is intended to promote an interpretation of the definition of native title consistent with the Preamble and objects of the *Native Title Act*. In doing so, the recommendation will further the objective of appropriate recognition of Aboriginal and Torres Strait Islander rights and interests. In overcoming an overly technical approach to statutory construction, it will also reduce complexity and promote efficiency in native title claims resolution.

5.108 The ALRC considers that the focus of the factual inquiry in native title claims should be on the integrity of the laws and customs that found native title rights and interests, and not on finding extensive continuity between a society as it existed at sovereignty and the present day. In this respect, the ALRC agrees with Dr Paul Burke's contention that '"society" is not conceptually distinct, but overlapping with other elements of native title legal doctrine, and there should not be a need to address it separately'.[185]

5.109 A number of submissions supported a recommendation making clear that establishing the existence of a society is not an independent element of establishing native title.[186] Some expressly agreed with the ALRC's analysis that the 'society' requirement has 'imposed an overly technical approach to statutory construction and proof on native title applicants'.[187]

5.110 A number of submissions to this Inquiry were critical of the use of the concept of 'society' in native title law.[188] Frith and Tehan submitted that decisions related to society 'have generally tended to limit the prospect that native title applicants can

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183 See, eg, the discussion of society in *AB (deceased) (on behalf of the Ngarla People) v Western Australia (No 4)* [2012] FCA 1268 (21 November 2012) [159]–[179]. See also the summary of the matters to be addressed to satisfy s 223(1) in *Lander v South Australia* [2012] FCA 427 (1 May 2012) [32]–[34].

184 In *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* the Full Federal Court emphasised that the term 'society' is not found in the words of the Act, and is to be used as a conceptual tool in the application of the words of the *Native Title Act*: *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [78].

185 Paul Burke, 'Overlapping Jural Publics: A Model for Dealing with the "Society" Question in Native Title' in Toni Bauman (ed), *Dilemmas in Applied Native Title Anthropology in Australia* (AIATSIS, 2010) 55, 65–66. See also P Burke, *Submission 33*; Goldfields Land and Sea Council, *Submission 22*.

186 AIATSIS, *Submission 70*; National Congress of Australia's First Peoples, *Submission 69*; NTSCORP, *Submission 67*; Indigenous Land Corporation, *Submission 66*; Law Council of Australia, *Submission 64*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; National Native Title Council, *Submission 57*; Queensland South Native Title Services, *Submission 55*; A Frith and M Tehan, *Submission 52*; Central Desert Native Title Service, *Submission 48*; Native Title Services Victoria, *Submission 45*.

187 A Frith and M Tehan, *Submission 52*. See also National Native Title Council, *Submission 57*.

188 National Native Title Council, *Submission 57*; A Frith and M Tehan, *Submission 52*; Central Desert Native Title Service, *Submission 48*; Law Council of Australia, *Submission 35*; P Burke, *Submission 33*; NSW Young Lawyers Human Rights Committee, *Submission 29*; Goldfields Land and Sea Council, *Submission 22*; Cape York Land Council, *Submission 7*.

establish native title'.[189] GLSC submitted that the 'society issue is a prime example of the unfortunate development of quite unnecessary technicality and legalism in native title'.[190]

5.111 The ALRC considers that limiting such technicality may assist in lessening the time and reducing the resources involved in native title claims. CDNTS supported such a recommendation. It noted:

> a great deal of time and resources are spent obtaining evidence to establish 'societies' when what is, in fact, required under the NTA is the identification of a group who holds rights and interests in relation to land in accordance with law and custom.[191]

5.112 NTSCORP considered that such a recommendation, along with others made in this chapter,

> would alleviate some of the time taken discussing these issues during the mediation processes … in the prosecution of native title claims. These changes would also assist in narrowing the substantive issues for mediation.[192]

5.113 The NNTC argued that the society concept adds considerable delay to the process of establishing native title.[193]

5.114 Some submissions considered that the language of a society 'united in and by its acknowledgment and observance of a body of law and customs' is improperly suggestive of a need to prove the survival of an extensive social system, rather than of the relevant laws and customs relating to land and waters. The Law Council of Australia argued that reference to society

> constitutes a gloss on the statutory language of s 223(1) of the Act. Emphasis on these matters risks over-emphasising continuity of laws and customs of pre-sovereignty, such as rules about marriage, initiation and birthing practices, traditional language, which may have little relevance to whether particular customs in relation to land and waters have continued. The exercise of customary practices, such as hunting and fishing at particular times, are more relevant to establishing the existence of traditional customs than the requirement of a 'normative' system of laws and customs practised by a 'normative' society.[194]

5.115 GLSC pointed to the 'unfairness of having to demonstrate the continuity of cultural practice and social cohesion in the face of a history of dispossession, cultural disruption, forced assimilation and geographical dispersal'.[195] The Young Lawyers Human Rights Committee argued:

> allowing native title to be tested on a concept of society ultimately involves superficial value judgments about Indigenous ways of life, and inappropriately

189 A Frith and M Tehan, *Submission 12*.
190 Goldfields Land and Sea Council, *Submission 22*.
191 Central Desert Native Title Service, *Submission 48*.
192 NTSCORP, *Submission 67*.
193 National Native Title Council, *Submission 57*.
194 Law Council of Australia, *Submission 35*.
195 Goldfields Land and Sea Council, *Submission 22*.

> measures traditional, nomadic society against the legal ideas and institutions of a 'civilised' society.[196]

5.116 It does not follow from Recommendation 5–4 that it will be open to 'non-traditional' contemporary groups to claim native title. The Western Australian Government argued that:

> Absence of a traditional society implies that non-traditional groupings of Aboriginal people may assert rights … This also implies that the laws and customs relied upon to sustain rights and interests need not be those which existed at sovereignty, but, rather, only be those of the contemporary group.[197]

5.117 However, native title claimants will continue to be required to establish that they hold rights and interests under traditional laws and customs acknowledged and observed by them. The recommendations in this chapter do not disturb the meaning of traditional laws and customs as those laws and customs that have their origins in those acknowledged and observed at sovereignty. This will continue to be the case, notwithstanding the explicit provision that such laws and customs may evolve, adapt and otherwise change, as recommended in Recommendation 5–1.

5.118 The South Australian Government correctly pointed out that establishing the identity of native title holders is a critical part of the native title determination process, and requires evidence as to the nature of the contemporary group.[198] It raised concern that Recommendation 5–4 would affect this requirement.

5.119 The ALRC considers that nothing in this recommendation dispenses with the need to identify whether the claim group hold native title rights and interests under presently acknowledged traditional laws and presently observed traditional customs, where traditional laws and customs are understood as laws and customs that have their origins in those acknowledged and observed at sovereignty. The relevant laws and customs are those which found the claimed rights and interests. Beyond this, proof of the survival of a more extensive society should not be relevant to establishing native title.

Recognition of succession

Recommendation 5–5 The definition of native title in s 223 of the *Native Title Act 1993* (Cth) should be amended to provide that rights and interests may be possessed by a native title claim group where they have been:

196 NSW Young Lawyers Human Rights Committee, *Submission 29*.

197 Western Australian Government, *Submission 43*. The Chamber of Minerals and Energy of Western Australia raised similar concerns: The Chamber of Minerals and Energy of Western Australia, *Submission 49*. The South Australian Government also pointed out that there are 'often numerous contemporary socio-political Aboriginal groups that seek to have influence over the same area': South Australian Government, *Submission 68*.

198 South Australian Government, *Submission 68*.

(a) transmitted or transferred between Aboriginal or Torres Strait Islander groups in accordance with the traditional laws and customs of those groups; or

(b) otherwise acquired in accordance with traditional laws and customs.

5.120 There is some uncertainty as to whether a native title claim group can establish that it holds native title rights and interests where those rights and interests were held by a different group at sovereignty. This process is often referred to, in the native title context, as 'succession'.

5.121 The ALRC recommends that the definition of native title be amended to make clear that native title rights and interests may be succeeded to by another Aboriginal or Torres Strait Islander group, where these rights and interests have been transmitted, transferred or otherwise acquired in accordance with traditional laws and customs.

5.122 This recommendation addresses an area of uncertainty in native title law. The ALRC views this recommendation as consistent with the beneficial purpose of the *Native Title Act*. Recognition of succession does not, in the ALRC's view, disturb the basis of recognition of native title—that is, it does not involve a greater burden on the radical title of the Crown than existed at sovereignty.[199] It is also arguably consistent with Aboriginal understandings of the range of ways in which rights and interests in land and waters may be acquired.[200]

Is succession possible under the *Native Title Act*?

5.123 There is a lack of clarity in the case law as to the possibility of succession to native title rights and interests under the *Native Title Act*.[201] Mansfield J, in *Croft on behalf of the Barngarla Native Title Claim Group v South Australia*, stated that

> the question of whether it is permissible for a native title claim group to claim land that was not land to which their apical ancestors possessed any rights and interests to under their laws and customs is a question that has arisen in past cases but has not been authoritatively resolved.[202]

5.124 The judgment of Gleeson CJ, Gummow and Hayne JJ in *Yorta Yorta* may be considered to provide some support for the efficacy of transmission of native title rights and interests from one group to another:

199 *Bodney v Bennell* (2008) 167 FCR 84, [121].

200 See, eg, Peter Sutton, 'Kinds of Rights in Country: Recognising Customary Rights as Incidents of Native Title' (Occasional Papers 2, National Native Title Tribunal, 2001) 6–11; Peter Sutton, *Native Title in Australia: An Ethnographic Perspective* (Cambridge University Press, 2003) 116–118.

201 For an anthropological discussion of the process of succession, see: Sutton, 'Kinds of Rights in Country: Recognising Customary Rights as Incidents of Native Title', above n 200, 6–11.

202 *Croft on behalf of the Barngarla Native Title Claim Group v South Australia* [2015] FCA 9 (22 January 2015) [711].

> The rights and interests in land which the new sovereign order recognised included the rules of traditional law and custom which dealt with the transmission of those interests.[203]

5.125 It appears that succession to native title rights and interests is likely to be accepted as legitimate where both the transferring and transferee groups are considered to be part of the same 'society' for native title purposes—that is, where both groups can be considered to be part of a society 'united in and by its acknowledgment and observance of a body of laws and customs'.[204]

5.126 In *Western Australia v Sebastian*, the Full Federal Court was inclined to the view that succession could occur, in factual circumstances where succession occurred as the numbers of one group had reduced and it was in accordance with the 'common traditional laws and customs' of the two relevant Aboriginal clans.[205]

5.127 However, the Full Federal Court has expressed doubt about the ability to transmit native title rights and interests between different native title 'societies'. In *Dale v Moses*, Moore, North and Mansfield JJ considered the remarks made in *Yorta Yorta* about transmission did not encompass succession. The Full Federal Court considered that the statement in *Yorta Yorta* was

> probably directed to intergenerational transmission of rights and interests under traditional laws within the society possessing rights and interests in the land under traditional laws and customs at the time of sovereignty. The observations of the members of the High Court do not establish a principle of the type … that where the traditional laws and customs of one society provide for the transmission of rights and interests in land recognised by those laws and customs, then transmission to another society can be effected and the acquisition of the transferred rights in interest [sic] can ultimately be recognised as rights and interests of the transferee society for the purposes of the NTA.[206]

5.128 A number of submissions supported a recommendation to explicitly recognise succession to native title rights and interests.[207] CDNTS regarded this as 'a sensible

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203 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [44].

204 Ibid [49] (Gleeson CJ, Gummow and Hayne JJ). See the discussion accompanying Rec 5–4 for a more detailed exposition of the meaning of society in native title.

205 *Western Australia v Sebastian* (2008) 173 FCR 1, [104]. See also *Croft on behalf of the Barngarla Native Title Claim Group v South Australia* [2015] FCA 9 (22 January 2015) [710]–[719]; *AB (deceased) (on behalf of the Ngarla People) v Western Australia (No 4)* [2012] FCA 1268 (21 November 2012) [577]–[579]; *Graham on behalf of the Ngadju People v Western Australia* [2012] FCA 1455 (21 December 2012) [31]–[33]; *Lardil Peoples v Queensland* [2004] FCA 298 (23 March 2004) [127]–[132].

206 *Dale v Moses* [2007] FCAFC 82 (7 June 2007) [120]. Mansfield J has stated that 'in my opinion, there is no inconsistency between the views expressed in *Dale v Moses* and *Western Australia v Sebastian*': *Croft on behalf of the Barngarla Native Title Claim Group v South Australia* [2015] FCA 9 (22 January 2015) [717].

207 AIATSIS, *Submission 70*; National Congress of Australia's First Peoples, *Submission 69*; NTSCORP, *Submission 67*; Indigenous Land Corporation, *Submission 66*; Law Council of Australia, *Submission 64*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; D Wy Kanak, *Submission 61*; National Native Title Council, *Submission 57*; Queensland South Native Title Services, *Submission 55*; A Frith and M Tehan, *Submission 52*; Central Desert Native Title Service, *Submission 48*; Native Title Services Victoria, *Submission 45*; S Jackson and PL Tan, *Submission 44*; North Queensland Land Council, *Submission 42*.

clarification of the law regarding a legitimate practice'.[208] It noted that 'succession between groups in accordance with traditional law and custom is not uncommon, particularly where groups have significantly reduced in number or ceased to exist, often due to the impact of non-Aboriginal settlement activity'.[209] Similarly, NTSV argued that 'the transfer of rights and interests between sub-sets of a society or between different groups is an accepted practice with a traditional basis within Victoria'.[210]

5.129 The ALRC considers that succession, where in accordance with traditional laws and customs, should be recognised by the *Native Title Act* regardless of whether the transferring and transferee groups are considered to be part of one society for native title purposes. This is in keeping with a fair, large and liberal approach to the interpretation of the *Native Title Act*.

5.130 Recommendation 5–5 follows from 5–4, which recommends that it be made clear in the *Native Title Act* 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 sovereignty. Both recommendations suggest that, instead of focusing on notions of 'society', attention should appropriately be directed to whether rights and interests in land and waters are possessed in accordance with traditional laws and customs.

5.131 Succession to native title rights and interests, where they have been transmitted in accordance with traditional laws and customs, was arguably envisaged in *Mabo [No 2]*.[211] In that case, discussing alienability of native title, Brennan J stated:

> a right or interest possessed as a native title cannot be acquired from an indigenous people by one who, not being a member of the indigenous people, does not acknowledge their laws and observe their customs; nor can such a right or interest be acquired by a clan, group or member of the indigenous people unless the acquisition is consistent with the laws and customs of that people.[212]

5.132 Deane and Gaudron JJ stated:

> The enjoyment of the rights can be varied and dealt with under the traditional law or custom. The rights are not, however, assignable outside the overall native system.[213]

5.133 The ALRC notes the objections made to a recommendation of this kind by state governments, as well as from industry stakeholders.[214] The South Australian Government submitted that transmission of rights in land between groups after sovereignty should not be permissible:

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208 Central Desert Native Title Service, *Submission 48*.
209 Ibid.
210 Native Title Services Victoria, *Submission 45*.
211 Justice Robert French, 'Mabo—Native Title in Australia' (2004) 23 *Federal Judicial Scholarship* [27].
212 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 60.
213 Ibid 110.
214 South Australian Government, *Submission 68*; Minerals Council of Australia, *Submission 65*; Association of Mining and Exploration Companies, *Submission 54*; The Chamber of Minerals and Energy of Western Australia, *Submission 49*; Western Australian Government, *Submission 43*.

> Such transmission could lead to the creation of new native title rights, not only after the assertion of British sovereignty but potentially into the present day and future. Such a process would require the acceptance that native title is a parallel legal system that continues to evolve alongside the common law and this would contravene the ideal, first elucidated in *Mabo* and emphasised in *Ward* and *Yorta Yorta*, that native title should not fracture the skeleton of the Australian legal system.[215]

5.134 The Western Australian Government argued that rights and interests that have been succeeded to are,

> by definition, not rights and interests which existed at sovereignty because at sovereignty the relevant rights were held by a different group under different laws and customs.[216]

5.135 The ALRC does not consider such transfer to involve the creation of new rights. Instead, it views this is an example of a change in the distribution of rights, and not a creation of rights. As such it does not 'impose a greater burden on the Crown's radical title' than existed at sovereignty.[217]

5.136 There are precedents for the recognition of the transfer of rights between Indigenous peoples in other jurisdictions. In New Zealand, the *Marine and Coastal Area (Takutai Moana) Act 2011* provides for customary transfer of land.[218] Section 58(3) of that Act provides that

> (a) a transfer is a customary transfer if a customary interest in a specified area of the common marine and coastal area was transferred—
> (i) between or among members of the applicant group; or
> (ii) to the applicant group or some of its members from a group or some members of a group who were not part of the applicant group; and
> (b) the transfer was in accordance with tikanga; and
> (c) the group or members of the group making the transfer—
> (i) held the specified area in accordance with tikanga; and
> (ii) had exclusively used and occupied the specified area from 1840 to the time of the transfer without substantial interruption; and
> (d) the group or some members of the group to whom the transfer was made have—
> (i) held the specified area in accordance with tikanga; and
> (ii) exclusively used and occupied the specified area from the time of the transfer to the present day without substantial interruption.[219]

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215 South Australian Government, *Submission 68*.

216 Western Australian Government, *Submission 43*.

217 *Bodney v Bennell* (2008) 167 FCR 84, [120]. The Full Court suggested that the proposition that there cannot be changes in the distribution of rights after sovereignty paid 'insufficient attention' to what was said in *Yorta Yorta*: [119].

218 *Marine and Coastal Area (Takutai Moana) Act 2011* (NZ) s 58(1).

219 Ibid s 58(3). 'Tikanga' is defined in the Act as 'Māori customary values and practices': s 9.

Factual complexity

5.137 Succession to land or waters often involves complex factual scenarios, as a number of submissions noted.[220] QSNTS submitted:

> succession occurs over a long period and it is never really complete (it is only ever complete in circumstances where the group has completely died out). In most cases, there is an overlap between different interests over the same area. No doubt the issue is very complex.[221]

5.138 Such factually complex scenarios at present are to be resolved under current native title law. The ALRC's recommendation will remove a barrier to recognition of native title rights and interests where succession has occurred in accordance with traditional laws and customs. However, factual complexity, which may be attended by intra-Indigenous conflict, will remain. Cultural sensitivity is needed in approaching questions of succession. As QSNTS argued, these issues require 'a thorough appreciation of the anthropological and genealogical evidence and, culturally appropriate, sensitive management'.[222] QSNTS further advocated that 'culturally tailored alternative dispute resolution processes would need to be built around the negotiation and resolution of these matters'.[223]

5.139 The Law Society of Western Australia submitted:

> Room needs to be left for the analysis of normative systems referable to an existence which preceded colonisation which is fully comprehensive of the reality of how Aboriginal and Torres Strait Islander peoples' normative systems have evolved. It is by no means clear that the courts or the expert witnesses who have informed them in matters of ethnography have developed an entirely satisfactory set of models with which to analyse the range of normative systems which may exist in Australia.[224]

5.140 On a practical level, the question of whether succession to native title rights and interests is by a different 'society', rather than between groups within a single society, may be avoided by framing a claim at the level of a region, or cultural bloc.[225] In such cases, the question of succession to areas of land or waters will largely arise as an issue of succession *within* a society. QSNTS supported this approach, submitting:

> the phenomenon [of succession] might be better explored and explained from a broader or regional perspective where commonalities between cultural blocs particularly if such societies are governed by common nor mative systems can be identified.[226]

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220 See, eg, Minerals Council of Australia, *Submission 65*; Queensland South Native Title Services, *Submission 55*; The Chamber of Minerals and Energy of Western Australia, *Submission 49*; Western Australian Government, *Submission 43*.

221 Queensland South Native Title Services, *Submission 55*.

222 Ibid.

223 Ibid.

224 Law Society of Western Australia, *Submission 41*.

225 For example, in February 2015, an application for determination of native title covering the Cape York region of Queensland was registered by the National Native Title Tribunal: *Cape York United Number 1 Claim v State of Queensland (Cape York United Number 1 Claim) Federal Court no QUD673/2014; NNTT no QC2014/008*.

226 Queensland South Native Title Services, *Submission 55*.

5.141 Contrary to concerns raised by some submissions,[227] the ALRC does not consider that Recommendation 5–4 will allow groups who have moved into an area since sovereignty (sometimes referred to as 'historical' people) to establish that they hold native title rights and interests.[228]

5.142 Dr David Martin explains that the terms 'traditional' and 'historical' people are used by some Aboriginal people to differentiate between types of associations to country. Traditional refers to:

> Those who are recognised as members of the 'tribal' groups whose lands lie within the region … They are the ones who can legitimately 'talk for country' and thus should be consulted about its use. The 'historical' people include those who are living in a particular area now, but who are from elsewhere in this region, and those who have moved here from outside the region entirely.[229]

5.143 'Historical' groups would not be able to show that they have succeeded to rights and interests in accordance with *traditional* laws and customs. For example, groups who have been granted only a revocable permission or a licence to use an area by native title holders would not be able to establish that they have native title rights and interests in an area.[230]

5.144 The ALRC notes the views of some anthropologists that the native title process crystallises distinctions between 'traditional' and 'historical' people, resulting in 'increased levels of conflict and stress' in Indigenous settlements.[231] However, the *Native Title Act*, premised on the recognition of the pre-existing rights of Aboriginal and Torres Strait Islander peoples, is not able to act as the vehicle for recognising 'historical' associations to land and waters. Other mechanisms for land settlements with Aboriginal and Torres Strait Islander peoples may more appropriately recognise the spectrum of associations to land that may exist in an area.[232]

Implications for s 223(1)(b)

5.145 Amendments affecting how s 223(1)(a) is interpreted will have a consequential effect on the construction of s 223(1)(b). Section 223(1)(b) requires that the relevant Aboriginal peoples or Torres Strait Islanders, by 'those laws and customs'—that is, the

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227 Northern Territory Government, *Submission 71*; South Australian Government, *Submission 68*; Minerals Council of Australia, *Submission 65*; The Chamber of Minerals and Energy of Western Australia, *Submission 49*; Western Australian Government, *Submission 43*.

228 See generally David Edelman, 'Broader Native Title Settlements and the Meaning of the Term "Traditional Owners"' (Paper Presented at AIATSIS Native Title Conference, 4 June 2009); David Martin, 'The Incorporation of "Traditional" and "Historical" Interests in Native Title Representative Bodies' in DE Smith and J Finalyson (eds), *Fighting Over Country: Anthropological Perspectives* (CAEPR Research Monograph No 12, 1997) 153.

229 Martin, above n 205, 157.

230 See *AB (deceased) (on behalf of the Ngarla People) v Western Australia (No 4)* [2012] FCA 1268 (21 November 2012) [521].

231 Benjamin R Smith and Frances Morphy, 'The Social Effects of Native Title: Recognition, Translation, Coexistence' in Benjamin R Smith and Frances Morphy (eds), *The Social Effects of Native Title: Recognition, Translation, Coexistence* (ANU E Press, 2007) 1, 12.

232 See, eg, *Aboriginal Land Rights Act 1983* (NSW); *Traditional Owner Settlement Act 2010* (Vic).

traditional laws and customs referred to in s 223(1)(a)[233]—have a connection with the land or waters.[234]

5.146 The Full Federal Court in *Bodney v Bennell* set out the relationship between the level of continuity of acknowledgment and observance of traditional laws and customs required by s 223(1)(a) and the level of continuity of connection required by s 223(1)(b). It stated:

> the laws and customs which provide the required connection are 'traditional' laws and customs. For this reason, their acknowledgment and observance must have continued 'substantially uninterrupted' from the time of sovereignty; and the connection itself must have been 'substantially maintained' since that time.[235]

5.147 The ALRC considers that it follows from Recommendations 5–2 and 5–3 that a commensurate approach should be taken to establishing connection for the purpose of satisfying s 223(1)(b).

233 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [46], [86] (Gleeson CJ, Gummow and Hayne JJ); *Western Australia v Ward* (2002) 213 CLR 1, [18] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Bodney v Bennell* (2008) 167 FCR 84, [165].

234 See Ch 6 for further discussion of connection.

235 *Bodney v Bennell* (2008) 167 FCR 84, [168].

6. Connection with the Land or Waters

Contents

Summary

6.1 This chapter complements Chapters 5 and 7 as part of the set of chapters concerned with 'connection requirements for the recognition of native title rights and interests'. This chapter concentrates on how connection to land and waters is proved. Section 223(1)(b) states that 'the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters'.

6.2 The chapter starts with an overview of the various meanings of 'connection' in native title law as relevant to examining connection requirements generally,[1] and the two specific options for reform that are the focus of this chapter. These two options for reform are whether there should be:

- confirmation that 'connection with the land and waters' does not require physical occupation or continued or recent use; and
- empowerment of courts to disregard substantial interruption or change in continuity of acknowledgement and observance of traditional laws and customs where it is in the interests of justice to do so.[2]

6.3 With respect to the first option for reform, the ALRC considers that the law is already clear in not requiring evidence of physical occupation or recent and continued use in order to establish connection in s 223(1)(b). The ALRC makes no recommendation to confirm this in the *Native Title Act 1993* (Cth) ('*Native Title Act*'). However, two provisions of the *Native Title Act*—dealing with the claimant application and the registration test—refer to 'traditional physical connection' with land and waters and these appear to be causing confusion about the substantive law regarding connection. The ALRC recommends the repeal of these provisions.

6.4 The next section of the chapter considers the feasibility of reframing the definition of connection in s 223(1) of the *Native Title Act*. The ALRC gauged support for a redefinition of connection that gave priority to the present connection 'as a relationship with country'—although retaining origins of the laws and customs in the pre-sovereign period. The ALRC stresses the importance of giving primacy to Indigenous peoples' own expressions of connection in line with best practice international standards.[3] However, no recommendation is made to amend s 223(1)(b).

6.5 The chapter then considers two areas of law relevant to the second option for reform. First, there is discussion of whether revitalisation of traditional law and custom should be a permissible factor for establishing connection in s 223(1)(b). The ALRC considers that Recommendation 5–1, to the effect that traditional laws and customs may adapt, evolve and develop, provides an effective measure.[4] Statutory amendment around revitalisation is not warranted.

6.6 Second, the ALRC examines whether there should be 'empowerment of courts to disregard substantial interruption or change in continuity of acknowledgment and observance of traditional laws and customs where it is in the interests of justice to do so'. The ALRC, after careful consideration of the complex matters involved in this option for reform, has concluded that direct legislative amendment of the definition in s 223 is a more targeted means of law reform; with the expected net effect of

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1 An overview of the law on connection is contained in Ch 4. This chapter includes a more in-depth analysis of that law, as well as discussion of relevant legal frameworks, eg evidence gathered in connection reports.

2 See the Terms of Reference.

3 *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st Sess, 107th Plen Mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) Art 11.

4 See Rec 5–1, discussed in Ch 5.

Recommendations 5–1 to 5–5 better addressing the concerns that gave rise to the suggested option for reform.[5] The ALRC considers that no specific statutory reform is required to empower courts to disregard substantial interruption or change in continuity.

Connection

What is connection?

6.7 *Mabo v Queensland [No 2]* (‘*Mabo [No 2]*’) held that native title is ‘ascertained according to the laws and customs of the indigenous people who, by those laws and customs, have a connexion with the land’.[6] This proposition finds statutory reflection in s 223(1)(b) of the *Native Title Act*—‘the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters’.

6.8 The North Queensland Land Council (‘NQLC’) submitted that:

> Aboriginal and Torres Strait Islander people understand connection to be gained through affiliation with ancestors dating back to a time before sovereignty but this is not necessarily the totality of how connection is viewed because connection is also a social experience and involves interaction with a living group of people associated with a particular area who, in the native title context, identify as native title holders for that area. The possession and speaking of language unique to the group of people, a personal totem linked to a story place, the presence of Elders who are respected decision makers may also constitute elements of connection for Aboriginal and Torres Strait Islander people.[7]

6.9 The term ‘connection’ operates at several formal and informal levels in the claims process for a determination of native title.[8] Connection is often used in a generic way to refer to whether native title has been proved and established.[9] Consultations revealed wide diversity in references made to connection, and in its meaning among stakeholders within the native title system—particularly in relation to consent determinations. NQLC emphasised the diversity of what connection means between claim groups, stating that ‘subtle differences of understandings are very difficult, if not impossible, to capture in a s 223 legal definition’.[10] The Kimberley Land Council emphasised the conflict inherent in understanding native title in terms of common law understandings of interests in land.[11] The eminent anthropologist WEH Stanner wrote:

> No English words are good enough to give a sense of the links between an Aboriginal group and its homeland … A different tradition leaves us tongueless and earless towards this other world of meaning and significance.[12]

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5 See Rec 5–1 to 5–5, discussed in Ch 5.
6 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 70 (Brennan J).
7 North Queensland Land Council, *Submission 17*.
8 See Ch 3 for an overview of the claims process.
9 See, eg, use in Terms of Reference.
10 North Queensland Land Council, *Submission 17*.
11 Kimberley Land Council, *Submission 30*.
12 A Frith and M Tehan, *Submission 12* quoting WEH Stanner.

6.10 Courts have articulated several approaches to the factual ascertainment of 'connection with the land or waters', although guided by specific legal tests as detailed in Chapter 4. In consent determinations, where parties agree on the facts supporting connection, some ambiguity exists about what the factual inquiry entails and how much evidence of connection is necessary.[13] Some governments provide connection guidelines. Nonetheless, the ambiguity presents significant practical difficulties for claimants in bringing evidence in support of the claim.[14] Considerable investment of time and resources is also required in assessing evidence of connection.

6.11 The Federal Court in *Neowarra v Western Australia* ('*Neowarra*'), in reference to the factual circumstances in *Western Australia v Ward*,[15] noted that 'little is required to constitute a continuing connection'.[16] However, the variable meaning of connection has contributed to expanding the scope of the connection inquiry,[17] the range of matters that might be considered, and influenced the extent or 'standard' of evidence considered necessary.[18] This ambiguity is compounded when connection must be established over the extended length of time that is a requirement of the native title recognition model.[19] The practical result is the potential for a broad-ranging connection inquiry.[20]

6.12 In the determination of facts, courts at first instance have dealt with the concept of connection in a variety of ways.[21] In *Neowarra*, the Court set out two sets of factors relevant to establishing connection: first, matters pertaining to land and waters referable to law and custom, such as the languages of the area; and, secondly, factual inquiries about links to specific places in the claim area.[22] The first group referenced matters such as clan estates (areas of land) and the languages of the area—'language countries, not merely languages spoken by people who live on the country'.[23] The second group comprised factual matters that demonstrate the maintenance of a physical, spiritual, economic or cultural link to land and water claimed, such as traditional ceremonies in particular places and ritual knowledge being passed on within the group. *Neowarra* demonstrates the wide variety of factors that may be relevant to establishing connection to the land or waters by laws and customs.

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13 See Ch 4.
14 See Ch 7.
15 *Western Australia v Ward* (2002) 213 CLR 1.
16 *Neowarra v Western Australia* [2003] FCA 1402 (8 December 2003) [350].
17 Nick Duff, 'What's Needed to Prove Native Title? Finding Flexibility Within the Law on Connection' (Research Discussion Paper 35, AIATSIS, June 2014) 50.
18 For a discussion of the approach to evidence to be adopted in consent determinations see, eg, Justice John Mansfield, *Re-Thinking the Procedural Framework* (Speech Delivered to the Native Title User Group, Adelaide, 9 July 2008).
19 See Ch 2.
20 Some submissions noted that other factors, such as overlapping claims and mining tenure research contribute to lengthy timeframes and high costs. See Northern Territory Government, *Submission 71*; Western Australian Government, *Submission 43*.
21 Duff, above n 17, 50.
22 *Neowarra v Western Australia* [2003] FCA 1402 (8 December 2003) [352]–[353].
23 Ibid [352].

6.13 The High Court in *Ward* emphasised that connection pertains to the land and waters claimed and that native title rights and interests therefore must 'relate to land and waters'.[24] In acknowledging the significance of connection to land and waters, it is important that the common law understanding of rights and interests in land and waters should not unduly narrow the perspective upon 'connection' for Aboriginal and Torres Strait Islander peoples.

6.14 Notwithstanding that some boundaries are set by the reference to land and waters, precisely which elements of Aboriginal and Torres Strait Islander peoples' law and custom will give effect to connection in any claim is relatively open.[25] This reflects the need for native title to be determined in accordance with the unique factual circumstances for each claim. At another level, it renders the proof of connection potentially unbounded.

Alternative proof of connection

6.15 These difficulties are compounded by the adoption of a 'laws and customs' model for proof of native title which places so much emphasis on the continuity aspect in establishing connection.[26] In *Mabo [No 2]*, several bases for proving connection with land and waters were canvassed. Justices Deane, Gaudron and Toohey discussed a possessory title drawing on Canadian jurisprudence.[27] A title founded on possession or occupation places less emphasis on the legal inquiry into the traditional laws and customs of Indigenous peoples. The Northern Territory land rights claim process is another potential model of proof that might have been adopted.[28]

6.16 Case law interpreting the *Native Title Act* has not examined alternative bases for structuring evidence to establish native title, although Ch 9 canvasses models from comparative jurisdictions. Some submissions noted advantages in possessory or occupation models.[29] Scholarship has identified other potential models, for example, common law Aboriginal title to land.[30] These models are untested under the *Native Title Act*. Accordingly, the ALRC makes no recommendation in relation to the viability of alternative models for proving connection.

Judicial interpretation of s 223(1)(b)

6.17 Section 223(1)(b) has been held to require that claimants demonstrate that they have a connection, by their traditional laws and customs, with the land or waters claimed. That is, the phrase 'by those laws and customs' in s 223(1)(b) is taken to refer

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24 *Western Australia v Ward* (2002) 213 CLR 1, [61]. See further Ch 8.
25 Sean Brennan, 'Statutory Interpretation and Indigenous Property Rights' (2010) 21 *Public Law Review* 239, 259.
26 See Ch 2.
27 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 83–89.
28 Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [663].
29 See, eg, AIATSIS, *Submission 36* for a discussion of the Canadian approach.
30 Kent McNeil, 'The Onus of Proof of Aboriginal Title' (1999) 37 *Osgoode Hall Law Journal* 775.

to the traditional laws and customs referred to in s 223(1)(a).[31] Satisfaction of s 223(1)(b), like s 223(1)(a), is a question of fact.[32]

6.18 Thus, ss 223(1)(a) and (b) are interrelated, although two separate legal thresholds must be established. The High Court in *Ward* stated that a separate inquiry from that required by s 223(1)(a) is demanded by s 223(1)(b).[33] This is so even though the inquiry may depend on the same evidence as is used to establish s 223(1)(a).[34]

6.19 In construing the provision, the courts have strongly aligned connection with continuity of acknowledgment of laws and observance of custom. The Full Federal Court in *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* ('*Alyawarr*') held connection to be

> descriptive of the relationship to the land and waters which is, in effect, declared or asserted by the acknowledgment of laws and observance of customs which concern the land and waters in various ways. To observe laws and acknowledge customs which tell the stories of the land and define the rules for its protection and use in ways spiritual and material is to keep the relevant connection to the land.[35]

6.20 The Full Federal Court has similarly observed that, because connection must be 'by' traditional laws and customs, connection involves an element of continuity, deriving from 'the necessary character of the relevant laws and customs as "traditional"'.[36]

6.21 Further, the Full Federal Court in *Bodney v Bennell* set out the relationship between s 223(1)(a) and s 223(1)(b) as

> the laws and customs which provide the required connection are 'traditional' laws and customs. For this reason, their acknowledgment and observance must have continued 'substantially uninterrupted' from the time of sovereignty; and the connection itself must have been 'substantially maintained' since that time.[37]

6.22 At other points, the concept of 'recognition' of native title has been associated with 'connection'.[38] The High Court in *Ward* noted:

> An important aspect of the socially constituted fact of native title rights and interests that is recognised by the common law is the spiritual, cultural and social connection with the land.[39]

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31 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [46], [86]; *Western Australia v Ward* (2002) 213 CLR 1, [18]; *Bodney v Bennell* (2008) 167 FCR 84, [165].

32 *Gumana v Northern Territory* (2005) 141 FCR 457, [146]–[147].

33 *Western Australia v Ward* (2002) 213 CLR 1, [43].

34 Ibid [18].

35 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [88].

36 Ibid [87]–[88]. The Federal Court has suggested that Brennan J's use of the term connection in *Mabo [No 2]* was intended to encompass an element of continuity of connection: *Sampi v Western Australia* [2005] FCA 777 (10 June 2005) [1079]; *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [92].

37 *Bodney v Bennell* (2008) 167 FCR 84, [168].

38 *Yanner v Eaton* (1999) 201 CLR 351, [37] (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

39 *Western Australia v Ward* (2002) 213 CLR 1, [41].

6.23 The strong identification of connection in s 223(1)(b) with the continued acknowledgment of traditional law and observance of custom is apparent in these statements. As detailed in Chapter 5, the ALRC recommends that the Act clarify that it is not necessary to establish that acknowledgment and observance of traditional laws and customs has continued substantially uninterrupted by each generation since sovereignty.[40] In relation to s 223(1)(b), the 'substantially maintained' threshold would be retained. Accordingly, as there is a strong interrelationship between the elements of s 223(1), a substantially maintained threshold could potentially apply to both ss 223(1)(a) and (1)(b).

6.24 The high threshold for continued acknowledgement of law and observance of custom to establish connection in current jurisprudence might be contrasted with Brennan J in *Mabo [No 2]*:

> Where a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connexion with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence.[41]

Physical occupation

Evidence of physical occupation, continued or recent use

6.25 The ALRC was asked to consider whether there should be confirmation that 'connection with the land and waters' does not require physical occupation or continued or recent use of the land and waters claimed.[42]

6.26 In *Western Australia v Ward* the Full Federal Court considered whether connection with land and waters could be maintained in the absence of physical presence.[43] The Court concluded that, while actual physical presence provides evidence of connection, it is not essential for establishing native title under s 223(1) of the *Native Title Act*. For example, it was argued by the State respondent that the inundation of parts of the claim area by Lakes Kununurra and Argyle meant that connection had not continued. The Court observed:

> The inundation of the areas by water makes it impracticable to enjoy native title rights and interests insofar as they involve activities ordinarily carried out by physical presence on the land. However, by continuing to acknowledge and observe traditional laws and customs involving ritual knowledge, ceremony and customary practices, the spiritual relationship with the land can be maintained.[44]

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40 Rec 5–2 and Rec 5–3.
41 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 59–60.
42 See Terms of Reference.
43 *Western Australia v Ward* (2000) 99 FCR 316.
44 Ibid [252].

6.27 On appeal, the High Court noted that s 223 'is not directed to how Aboriginal peoples use or occupy land or waters', although the way in which land and waters are used may be evidence of the kind of connection that exists.[45] The Court confirmed that the absence of evidence of recent use, occupation or physical presence does not necessarily mean that there is no connection with the land or waters.[46]

6.28 In *De Rose v South Australia (No 2)* ('*De Rose (No 2*)'), the Full Federal Court held:

> It is possible for Aboriginal peoples to acknowledge and observe traditional laws and customs throughout periods during which, for one reason or another, they have not maintained a physical connection with the claim area. Of course, the length of time during which the Aboriginal peoples have not used or occupied the land may have an important bearing on whether traditional laws and customs have been acknowledged and observed. Everything will depend on the circumstances.[47]

6.29 There have been occasional attempts to characterise connection as either physical or spiritual,[48] or as 'essentially spiritual'.[49] This may have been influenced by the Court's experience with cases under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), which requires claimants to establish 'common spiritual affiliations' to land.[50] However, given that connection for the purpose of the *Native Title Act* can be maintained by the acknowledgment of laws and observance of customs,[51] this distinction between physical and spiritual may be unhelpful.[52] It may also be inconsistent with the relationship of Aboriginal and Torres Strait Islander peoples with land, which was described by Blackburn J in *Milirrpum v Nabalco Pty Ltd*:

> The physical and spiritual universes are not felt as distinct. There is an unquestioned scheme of things in which the spirit ancestors, the people of the clan, particular land and everything that exists on and in it, are organic parts of one indissoluble whole.[53]

Physical occupation and the identification of native title rights and interests

6.30 A determination of native title must include a determination of the nature and extent of the native title rights and interests in the area.[54] Physical occupation and continued or recent use may be relevant to proving the particular rights and interests possessed under traditional laws and customs. The content of native title is a question

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45 *Western Australia v Ward* (2002) 213 CLR 1, 86.
46 Ibid.
47 *De Rose v South Australia (No 2)* (2005) 145 FCR 290, 306; see also *Dale v Moses* [2007] FCAFC 82 (7 June 2007) [306]; *Moses v Western Australia* (2007) 160 FCR 148, 222.
48 See, eg, *De Rose v South Australia* [2002] FCA 1342 (1 November 2002) [911].
49 *Western Australia v Ward* (2002) 213 CLR 1, [14].
50 Richard H Bartlett, *Native Title in Australia* (LexisNexis Butterworths, 3rd ed, 2015) 173–176.
51 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 456; *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, 469.
52 Duff, above n 17, 49.
53 *Milirrpum v Nabalco* (1971) 17 FLR 141, 167.
54 *Native Title Act 1993* (Cth) s 225.

of fact, to be determined on a case by case basis.[55] Evidence of physical possession, occupation and use could be relevant to the question of whether the rights and interests include a right to exclude others,[56] or other rights. For example, in *Banjima People v Western Australia (No 2)*, Barker J said:

> There is ample evidence to show that hunting and the taking of fauna in customary ways continues today. Similarly, the customary practice of gathering and taking flora is well established historically and presently. The right to take fish is the subject of less contemporary evidence, but the right to take fish in the claim area is still exercised and clearly established as a right possessed by the claimants both historically and presently. It is not a right or activity that the evidence suggests has been abandoned. Similarly the right to take stones, timber, ochre and water is another right possessed by the claimants even though the evidence of current exercise of those rights is relatively limited.[57]

6.31 The courts have emphasised that, while the exercise of native title rights and interests is 'powerful evidence' of the existence of those rights, the ultimate question concerns possession of rights, not their exercise.[58]

6.32 In *Akiba v Queensland (No 3)*, the claimant failed to establish connection at the extremities of the claim because there was 'no evidence of use of, or connection to, those areas'.[59] The claim over extremities did not fail because there was no evidence of use of the areas, but because there was no evidence at all regarding *connection* to those areas.[60] The Court did not require evidence of use, but it did require evidence of connection.

6.33 The Court confirmed that:

> Islander knowledge of areas when coupled with the deep and transmitted sea knowledge that many of them possess, is itself a potent indicator of connection, and continuing connection at that, to their marine estates—the more so because under their laws and customs they have, and do exercise, traditional rights to use and forage there …[61]

Clarification of s 223?

6.34 The ALRC considers that it is not necessary to clarify *Native Title Act* s 223 with regard to physical occupation, continued or recent use, as it is a matter of settled law. When codifying, confirming or clarifying an area of settled law, there is a risk of disturbing the settled law, causing uncertainty and unnecessary litigation.

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55 *Commonwealth v Yarmirr* (2001) 208 CLR 1, 39; *Western Australia v Ward* (2000) 99 FCR 316, 338; *Wik Peoples v Queensland* (1996) 187 CLR 1, 169; *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 58, 61.

56 *Banjima People v Western Australia (No 2)* (2013) 305 ALR 1, [686], [693].

57 Ibid [775].

58 Ibid [386]; *Rubibi Community v Western Australia (No 5)* [2005] FCA 1025 (29 July 2005) [21]; *Neowarra v Western Australia* [2003] FCA 1402 (8 December 2003) [40]; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [84] (Gleeson CJ, Gummow and Hayne JJ).

59 *Akiba v Queensland (No 2)* (2010) 204 FCR 1, 168, 172.

60 Ibid 168, 173.

61 Ibid 164.

6.35 Several stakeholders suggested that the *Native Title Act* should be amended for consistency with *De Rose (No 2)*.[62] However, no lack of consistency with *De Rose (No 2)* has been identified, and the ALRC has not been directed to any areas of doubt or uncertainty in the construction of s 223 on this issue. Section 223 does not contain any reference to physical occupation or continued and recent use. The courts have been clear that, while such evidence is relevant, it is not necessary. A number of stakeholders agreed that clarification is not necessary.[63] For example, Goldfields Land and Sea Council said 'the case law clearly and consistently holds that these matters are not necessary elements of proof for establishing native title'.[64]

6.36 One representative body indicated that claim groups 'have experienced difficulties satisfying the State about continuing connection in circumstances where there is no recent evidence of physical presence on particular parts of a claim area'.[65] Just Us Lawyers also reported that 'State governments generally expect physical occupation and ongoing use of at least parts of the claim area to be demonstrated for the purposes of a consent determination'.[66] Because courts have confirmed that such evidence is 'powerful', respondents will continue to seek such evidence, and place weight on it, when it is available. However, to treat such evidence as a necessary element for a consent determination would be to impose a standard higher than that set by Parliament and the courts for a contested determination.

6.37 Even without a requirement to demonstrate physical occupation, or continued or recent use, the requirement to demonstrate connection to land or waters is still a substantial one. Connection must be demonstrated to have been maintained under traditional laws and customs that have been observed, substantially uninterrupted, since pre-sovereignty times.[67] Further discussion of these requirements and the ALRC's recommendations in this regard, are in Chapters 4 and 5.

The affidavit supporting a claimant application

Recommendation 6–1 Section 62(1)(c) of the *Native Title Act 1993* (Cth) provides that a claimant application may contain details of any 'traditional physical connection' that a member of the native title claim group has, or had, with the land or waters claimed. This subsection should be repealed.

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62 Just Us Lawyers, *Submission 2*; Australian Human Rights Commission, *Submission 1*.

63 South Australian Government, *Submission 68*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; South Australian Government, *Submission 34*; Northern Territory Government, *Submission 31*; Queensland Government, *Submission 28*; Goldfields Land and Sea Council, *Submission 22*; Western Australian Government, *Submission 20*; National Farmers' Federation, *Submission 14*; Law Society of Western Australia, *Submission 9*.

64 Goldfields Land and Sea Council, *Submission 22*.

65 Cape York Land Council, *Submission 7*.

66 Just Us Lawyers, *Submission 2*.

67 *Bodney v Bennell* (2008) 167 FCR 84, [168]; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [86]–[89].

6.38 The *Native Title Act* includes two references to physical connection that the ALRC considers may be inconsistent with the courts' interpretation of s 223 concerning connection. The ALRC recommends that these references should be removed.

6.39 Section 62(1)(c) provides that a claimant application may contain details of 'any traditional physical connection' with the land or waters by a member of the native title claim group, or if any member of the native title claim group has been prevented from gaining access, the circumstances in which the access was prevented.

6.40 This section does not require evidence of physical connection. It is consistent with statements of the courts that evidence of the exercise of rights can be adduced to support a claim for the existence of rights.[68] However, the ALRC is concerned that the section specifically refers to physical connection and does not refer to other ways of demonstrating connection, such as observing traditional laws and customs,[69] maintaining traditional customs and ceremonies,[70] maintaining stories and allocating responsibilities,[71] faithfully performing obligations under traditional law[72] and the continuing internal and external assertion by the group of its traditional relationship with country.[73] The inclusion of physical connection in s 62 and the omission of spiritual, social and cultural evidence of connection give an apparent priority to physical connection that does not reflect the case law or the requirements of s 223.

6.41 Stakeholders largely supported the proposed change, on the basis that s 62(1)(c) is inconsistent with the law on connection,[74] or places an overemphasis on this type of evidence.[75] Native Title Services Victoria said that s 62(1)(c) is

> inconsistent with s 223 and the jurisprudence, which does not require physical connection with the land claimed, and recognises the myriad of other ways in which Aboriginal people connect to land.[76]

6.42 The National Native Title Council (NNTC) expressed the hope that

> removing any reference to a requirement for evidence of 'traditional physical connection' may help persuade respondents that they should not treat such evidence

68 AIATSIS, *Submission 36*.
69 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 59–60; *Western Australia v Ward* (2000) 99 FCR 316, 382.
70 *Western Australia v Ward* (2000) 99 FCR 316, 382.
71 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, 469–470.
72 *De Rose v South Australia (No 2)* (2005) 145 FCR 290, 306–307.
73 *Sampi v Western Australia* [2005] FCA 777 (10 June 2005) [1079].
74 AIATSIS, *Submission 70*; National Congress of Australia's First Peoples, *Submission 69*; Indigenous Land Corporation, *Submission 66*; Law Council of Australia, *Submission 64*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; National Native Title Council, *Submission 57*; Queensland South Native Title Services, *Submission 55*; A Frith and M Tehan, *Submission 52*; Central Desert Native Title Service, *Submission 48*; Native Title Services Victoria, *Submission 45*; North Queensland Land Council, *Submission 42*; Law Society of Western Australia, *Submission 41*.
75 AIATSIS, *Submission 70*.
76 Native Title Services Victoria, *Submission 45*.

> as a necessary element in their decision-making about whether to agree to a consent determination.[77]

6.43 The National Native Title Tribunal noted that such a change would not affect the Registrar's functions, as s 62(1)(c) does not make evidence of traditional physical connection a mandatory requirement.[78] The ALRC agrees that the recommended change would not alter the operation of the registration test. However, the use of the term 'traditional physical connection' in the *Native Title Act* has the potential to cause confusion. A number of stakeholders appeared to be of the understanding that the law currently requires evidence of physical connection, and that removing s 62(1)(c) would remove that requirement.[79] For example, one said that

> we are concerned that removal of the requirement to establish a traditional physical connection with the land or water may increase the number of groups wishing to participate in a native title claim.[80]

6.44 The recommended amendment would not change the substantive law on connection. However, removing references to 'physical connection' could help eliminate this confusion.

The registration test

Recommendation 6–2 Section 190B(7) of the *Native Title Act 1993* (Cth) provides 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. This subsection should be repealed.

6.45 Section 190B(7) of the registration test includes a requirement that at least one member of the claim group demonstrate a 'traditional physical connection', except in certain circumstances. The ALRC considers that the registration test should not include a requirement that is additional to what is required by s 223 and the courts' interpretation of that section, and recommends that it should be removed.

6.46 Part 7 of the *Native Title Act* establishes a Register of Native Title Claims and sets out conditions for registration. If a claim satisfies all of the conditions, it must be entered in the Register.[81] The native title claim group is then entitled to certain rights, including the right to negotiate under s 31 of the *Native Title Act*.

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77 National Native Title Council, *Submission 57*.
78 National Native Title Tribunal, *Submission 63*.
79 Minerals Council of Australia, *Submission 65*; Association of Mining and Exploration Companies, *Submission 54*; Cement Concrete and Aggregates Australia, *Submission 47*.
80 Cement Concrete and Aggregates Australia, *Submission 47*.
81 *Native Title Act 1993* (Cth) s 190A(6).

6.47 The registration test requires the Registrar to be satisfied that the factual basis exists to support the assertion that the native title claim group has an association with the area.[82] The native title claim group must show an association with the entire area claimed, but it has been held that the association can be physical or spiritual.[83]

6.48 Section 190B(7) adds a 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.[84] 'Traditional physical connection', in this instance, means that the connection is in accordance with the laws and customs of the group.[85]

6.49 Information about a claim group member's presence on, or use of, the land or waters, is relevant to whether the factual basis exists for a claim. However, the requirement in s 190B(7) that an application include information about 'traditional physical connection' is inconsistent with the case law that has established that physical occupation or use is not required to establish connection. The requirement could result in a claim group with ample evidence of connection being denied registration and the procedural rights that are associated with registration.

6.50 If the s 190B(7) requirement is the only reason a claim is not registered, an applicant may apply to the Federal Court for an order that the claim be registered. However, Professor Richard Bartlett has noted that it would be difficult for an applicant to secure a court order in time to use the right to negotiate.[86]

6.51 When the introduction of this subsection into the *Native Title Act* was being considered, concerns were raised that it did not reflect the common law elements for a native title claim.[87]

6.52 Further, the reference in s 190(7)(b) to 'things done' by the Crown, a statutory authority of the Crown, or a leaseholder suggests that those things are relevant to the question of whether connection has been maintained. However, the courts have indicated that the reasons for an absence of connection are not relevant.[88] There are concerns that this section may elicit evidence that could be used against the claimant group.[89]

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82 Ibid s 190B(5).

83 *Martin v Native Title Registrar* [2001] FCA 16 (19 January 2001) [26]; *Corunna v Native Title Registrar* [2013] FCA 372 (24 April 2013).

84 *Native Title Act 1993* (Cth) s 190B(7).

85 *Gudjala People No 2 v Native Title Registrar* [2007] FCA 1167 (7 August 2007) [89].

86 Bartlett, above n 50, 266–267.

87 Commonwealth Government, Submission to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, *Native Title Amendment Bill 1997*.

88 *Bodney v Bennell* (2008) 167 FCR 84, 104–105; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 456–457. In *Yorta Yorta*, the High Court said that the presence or absence of reasons might be relevant to the question of whether there has been an interruption: at [90], discussed further below.

89 Central Desert Native Title Service, *Submission 48*.

6.53 This element of the registration test is also inconsistent with the reality of the lives of Aboriginal and Torres Strait Islander people who have moved away from their country in order to access employment, health services and education. Queensland South Native Title Services (QSNTS) noted:

> Whilst traditional owners might be physically separated from country, they remain rooted in their identity and their convictions about their connections to their traditional estates. QSNTS's clients managed to stay connected to their traditional life and land in multiple ways. Aside from maintaining traditional practices and beliefs, there is also tourism, preservation actions, government involvement and the use of symbols which maintain strong connections.[90]

6.54 There was wide support for the proposed change regarding s 190B(7) as it would create consistency between the requirements of the registration test and the requirements of s 223 of the *Native Title Act* regarding connection.[91] The Law Society of Western Australia said 'a physical connection is not required for connection or a finding of native title. It should not be required for the registration test'.[92]

6.55 There have been no instances where a claim has been refused registration solely on the basis of s 190B(7).[93] The provision does not appear to serve any independent function, but may be contributing to confusion regarding the substantive requirements for connection. Several stakeholders opposed the repeal of s 190B(7) on the basis that it would amount to 'the removal of connection'[94] or a broadening of the definition of native title.[95]

6.56 Section 190B(7) is one of the few parts of the *Native Title Act* that acknowledges that acts of the Crown, and others, have interfered with the connection between Aboriginal and Torres Strait Islander peoples and their lands and waters. The issue of the reasons for 'substantial interruption' or displacement is discussed later in this chapter. While this acknowledgment in s 190B(7) may have some symbolic value, the ALRC considers that it is important that the registration test is consistent with s 223 and the case law regarding physical occupation and continued and recent use.

Redefining connection

6.57 In the Discussion Paper, the ALRC proposed amendment to the term 'connection' in s 223(1)(b) of the *Native Title Act*.[96] The revised definition sought to re-emphasise the relationship to the claimed land and waters as the primary focus when

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90 Queensland South Native Title Services, *Submission 55*.

91 AIATSIS, *Submission 70*; Indigenous Land Corporation, *Submission 66*; Law Council of Australia, *Submission 64*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; National Native Title Council, *Submission 57*; Queensland South Native Title Services, *Submission 55*; A Frith and M Tehan, *Submission 52*; Native Title Services Victoria, *Submission 45*; North Queensland Land Council, *Submission 42*; Law Society of Western Australia, *Submission 41*.

92 Law Society of Western Australia, *Submission 41*.

93 National Native Title Tribunal, *Submission 63*.

94 Minerals Council of Australia, *Submission 65*.

95 Association of Mining and Exploration Companies, *Submission 54*.

96 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014) Prop 7–2.

connection is interpreted—reflecting the actual text of s 223(1)(b). In this sense, interpretation of connection may permit claimants to assert 'the reality of their connection' to traditional land and waters.[97]

6.58 The Law Council of Australia explained the inadequacy of the current legal model in terms of capturing Indigenous relationships with country,[98] especially as the meaning of the term has become opaque[99] and variable in interpretation.[100]

6.59 The ALRC's suggested redefinition was for connection to describe 'the relationship to the land and waters' claimed.[101] That relationship is expressed in the present form of the acknowledgment of laws and observance of custom, although the origins of the laws and customs must be in the period prior to the assertion of sovereignty.

6.60 It sought to capture the centrality of connection to land or waters as a form of sacred obligation to country.[102] While the expression of connection to land and waters may vary, particularly between Torres Strait Islander peoples and Aboriginal peoples of the Australian mainland, Torres Strait Islander peoples' relationship to land and waters is also interwoven with laws and customs.[103] Some stakeholders queried the phrasing of the redefinition.[104]

Connection—in the present tense

6.61 In *Members of the Yorta Yorta Community v Victoria* ('*Yorta Yorta*'), the High Court noted that:

> it would be wrong to confine the inquiry for connection between claimants and the land or waters concerned to an inquiry about the connection said to be demonstrated by the laws and customs which are shown *now* to be acknowledged and observed by the peoples concerned. Rather, it will be necessary to inquire about the relationship between the laws and customs now acknowledged and observed, and those that were acknowledged and observed before sovereignty.[105]

6.62 Yet the definition in s 223(1)(b) refers to the present tense, 'by those laws and customs, *have* a connection with land and waters'.[106] The focus for an amended

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97 *Bodney v Bennell* (2008) 167 FCR 84, [171].
98 Law Council of Australia, *Submission 35*.
99 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [87].
100 *Sampi v Western Australia* [2005] FCA 777 (10 June 2005) [1077].
101 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [88].
102 Marcia Langton, 'The Estate as Duration: "Being in Place" and Aboriginal Property Relations in Areas of Cape York Peninsula in North Australia' in Lee Godden and Maureen Tehan (eds), *Comparative Perspectives on Communal Lands and Individual Ownership: Sustainable Futures* (Routledge, 2010) 76.
103 For a discussion of Torres Strait Islander law and custom, see Nonie Sharp, *Stars of Tagai: The Torres Strait Islanders* (Aboriginal Studies Press, 1993).
104 National Native Title Council, *Submission 57*; A Frith and M Tehan, *Submission 52*.
105 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [56] (Gleeson CJ, Gummow and Hayne JJ).
106 Emphasis added. See for discussion Gaudron and Kirby JJ Ibid [104]. The plurality make similar comment at [85].

definition would not avoid the need 'to inquire about the relationship between the laws and customs now acknowledged and observed, and those that were acknowledged and observed before sovereignty'. Presumptively, it suggests that a claim group's present connection should be the 'starting point' when considering whether connection is established. That relationship necessarily informs the scope of the laws and customs together with inquiries about right people for country.

6.63 Secondly, the proposal for an amended definition was intended to give 'connection' some meaningful content. In *De Rose v South Australia (No 1)*, the Full Federal Court stated:

> At first glance, it may not be evident what par (b) of s 223(1) adds to par (a). If Aboriginal people possess rights and interests in relation to land under the traditional laws acknowledged and the traditional customs observed by them, it would seem to be a small step to conclude that the people, by those laws and customs, have a connection with the land.[107]

6.64 Some stakeholders suggested an alternative revision of s 223(1)(b). One suggested:

> 223(1)(b)—those laws and customs arise [or derive] from a relationship between the Aboriginal peoples or Torres Strait Islanders and the land or waters, which relationship presently connects them to the land or waters.[108]

6.65 In comparative jurisdictions, the equivalent test to 'connection' does not rely so heavily upon an investigation of pre-sovereign law and custom.[109] While in Canada there is a stronger foundation in occupancy to ground aboriginal title, *Tsilhqot'in Nation* confirmed that

> what is required is a culturally sensitive approach to sufficiency of occupation based on the dual perspectives of the Aboriginal group in question—its laws, practices, size, technological ability and the character of the land claimed—and the common law notion of possession as a basis for title. … [T]he perspective of the Aboriginal group [to possession] … might conceive of possession of land in a somewhat different manner than did the common law.[110]

6.66 The ALRC's intention, in proposing a revised definition of connection, was to align the definition with international standards, specifically with respect to articles 13, 25 and 26(3) of the *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP').[111]

6.67 A few submissions supported redefining s 223(1)(b) but concurrently expressed concerns about drafting[112] or preference for the reforms in Chapter 5.[113] A few

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107 *De Rose v South Australia (No 1)* (2003) 133 FCR 325, [305].
108 Mr Tony Neal QC.
109 See Ch 9.
110 *Tsilhqot'in Nation v British Columbia* 2014 SCC 44 [41].
111 *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st Sess, 107th Plen Mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007).
112 Queensland South Native Title Services, *Submission 55*.
113 A Frith and M Tehan, *Submission 52*.

submissions supported redefinition to focus on present connection.[114] However, the majority of submissions were opposed, for various reasons.[115] The Minerals Council of Australia saw the proposal as calling for 'significant' legislative change, without sufficient foundation.[116] The Law Society of Western Australia held the view that 'a fixed interpretation by the legislature would be more likely to constrain, rather than assist' in the development of relevant concepts.[117]

6.68 A number of submissions were concerned about the uncertainty likely to result from change.[118] The South Australian Government observed that 'there is a large body of jurisprudence on the current definition—any attempt to change it will merely introduce further uncertainty and promote more litigation'.[119] Others felt that 'the addition of new terms to the definition should be limited as much as possible'.[120]

6.69 The proposal to redefine connection was intended to operate in conjunction with either an amended definition of 'traditional', or removal of 'traditional' from s 223 and its substitution by the phrase, 'in the period prior to the assertion of sovereignty'. The pairing of these proposed changes, particularly the suggestion of removal of the word 'traditional', caused a number of stakeholders to raise concerns,[121] including the possibility of increased conflict. The NNTC considered these combined changes 'would undermine native title rights and interests, create confusion amongst native title groups, and completely erode any glimmers of confidence that native title holders might have in the NTA to protect their rights to country'.[122] NTSCORP Limited (NTSCORP) submitted that

> there is a need to ensure that traditional owners and their traditional connections to country are recognised by the native title process. The change to the wording might be interpreted in such a way as to create a whole new set of issues where people with more recent relationships to country make claims under the NTA.[123]

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114 National Native Title Council, *Submission 57*; Native Title Services Victoria, *Submission 45*.

115 AIATSIS, *Submission 70*; South Australian Government, *Submission 68*; NTSCORP, *Submission 67*; Minerals Council of Australia, *Submission 65*; Law Council of Australia, *Submission 64*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; National Native Title Council, *Submission 57*; Central Desert Native Title Service, *Submission 48*; Native Title Services Victoria, *Submission 45*; Law Society of Western Australia, *Submission 41*.

116 Minerals Council of Australia, *Submission 65*.

117 Law Society of Western Australia, *Submission 41*.

118 AIATSIS, *Submission 70*; South Australian Government, *Submission 68*; Minerals Council of Australia, *Submission 65*; Central Desert Native Title Service, *Submission 48*; North Queensland Land Council, *Submission 42*; Law Society of Western Australia, *Submission 41*.

119 South Australian Government, *Submission 68*.

120 A Frith and M Tehan, *Submission 52*. Central Desert Native Title Services raised concerns about use of the word 'relationship', submitting that the word 'implies both rights and obligations; however, the ordinary meaning of the word "relationship" is "a connection or association"': Central Desert Native Title Service, *Submission 48*.

121 South Australian Government, *Submission 68*; NTSCORP, *Submission 67*; Minerals Council of Australia, *Submission 65*; Law Council of Australia, *Submission 64*; National Native Title Council, *Submission 57*; Native Title Services Victoria, *Submission 45*.

122 National Native Title Council, *Submission 57*.

123 NTSCORP, *Submission 67*.

6.70 The Minerals Council of Australia submitted that removal of traditional would cause uncertainty as to 'the identity of persons who claim to hold native title over time and confusion to the legitimacy of existing agreements'.[124]

6.71 The South Australian Government submitted that 'the removal of any requirement that the laws and customs be traditional, and a requirement only for a contemporary connection to the land or waters claimed, is to re-define native title into something completely different'.[125] Only a small number of stakeholders gave any support to the idea of removing 'traditional' from s 223(1).[126]

6.72 Given strong stakeholder comment from diverse perspectives about the uncertainty and conflict that the proposal might generate, the ALRC is not recommending statutory redefinition of connection in s 223(1)(b). The ALRC stresses that the interpretation of connection should adequately reflect Indigenous expressions of connection, in line with relevant standards in the UNDRIP.

6.73 Despite acknowledged difficulties concerning the concept of 'traditional' in native title law,[127] for many it has become integral to the recognition of native title—although the term itself does not appear in s 223(1)(b). While noting the potential for the concept of traditional to lock connection 'to an artificial concept of culture frozen in time at the moment of British sovereignty',[128] the ALRC makes no recommendation for its removal. The ALRC considers that the recommendations in Chapter 5 provide a better balance of legal reform and certainty for stakeholders in the native title system.

6.74 As David Martin noted, 'it is tradition which grounds and legitimates claims to country from the perspective of Indigenous people, not mere connection'.[129]

> [R]emoving the concept of 'tradition'/'traditional' from s 223, while well intentioned, would actually cause more conflict and confusion within claimant groups. … [To do so] ignores the deep significance accorded to traditional connections within Indigenous societies … The legal construction of tradition is, in my view, a translation (if in rather impoverished form) of a set of deeply embedded and highly significant values within much of Indigenous Australia.[130]

Revitalisation of connection?

6.75 The ALRC considered whether the Act should be amended to distinguish between *revival* and *revitalisation*.[131] The approach suggested in the Discussion Paper would allow *revitalisation* of laws and customs but not *revival* of native title. Revival

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124 Minerals Council of Australia, *Submission 65*.
125 South Australian Government, *Submission 68*. See also Minerals Council of Australia, *Submission 65*; Northern Territory Government, *Submission 31*.
126 See, eg, Indigenous Land Corporation, *Submission 66*, which gave 'provisional' support to the idea.
127 See Ch 5.
128 National Congress of Australia's First Peoples, *Submission 32*.
129 David Martin, *Correspondence*, 15 August 2014.
130 Ibid.
131 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014) Q 7–2.

of native title at common law is not possible.[132] The High Court adopted a similar position on revival in construing the *Native Title Act*.[133] The ALRC is not recommending any change to the *Native Title Act* in respect of revival.

6.76 In *Mabo [No 2]*, Brennan J stated:

> When the tide of history has washed away any real acknowledgment of traditional law and real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition.[134]

6.77 In *Risk v Northern Territory*, concerning the Larrakia people's claim, the Federal Court at first instance concluded that there were 'significant' changes in the laws and customs compared to those which existed prior to the assertion of sovereignty. The Court expressed its view that '[t]hose differences and changes stem from, and are caused by, a combination of the historical events which occurred during the 20th Century'.[135] This was despite a finding that '[t]he Larrakia community of today is a vibrant, dynamic society, which embraces its history and traditions. This group of people has shown its strength as a community, able to re-animate its traditions and customs'.[136]

6.78 On appeal, the Full Federal Court remarked that:

> A claimant group that has been dispossessed of much of its traditional lands and thereby precluded from exercising many of its traditional rights will obviously have great difficulty in showing that its rights and customs are the same as those exercised at sovereignty.[137]

6.79 This passage was approved in *Sandy on behalf of the Yugara People v Queensland (No 2)* as 'directly applicable to the circumstances' in that case.[138]

Revitalisation of Aboriginal and Torres Strait Islander culture

6.80 Since early cases were litigated, there is more knowledge about how culture is transmitted in Aboriginal and Torres Strait Islander communities and how laws and customs change over time. The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) submitted:

> 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

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132 The Act now allows for suspension of native title in respect of certain future acts: *Native Title Act 1993* (Cth) s 24AA(6).

133 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [47], [53] (Gleeson CJ, Gummow and Hayne JJ). See Ch 4.

134 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 60. By contrast, Deane and Gaudron JJ felt it unnecessary to decide whether native title rights 'will be lost by the abandonment of traditional customs and ways': 110.

135 *Risk v Northern Territory* [2006] FCA 404 (29 August 2006) [835].

136 Ibid [530].

137 *Risk v Northern Territory* (2007) 240 ALR 75, [104].

138 *Sandy on behalf of the Yugara People v State of Queensland (No 2)* [2015] FCA 15 (27 January 2015) [79].

> 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'.[139]

6.81 AIATSIS has expressed concern about unduly focusing on 'the distinction between "revitalise" and "revive" may divert the relevant inquiry from the critical consideration of the existence of a right'.[140]

6.82 The Federal Court, in *Wyman on behalf of the Bidjara People v Queensland (No 2)*, outlined the opinion of two anthropologists about revitalisation:

> Professor Langton considered that Bidjara songs, dances and stories have continued since sovereignty and that any difference in practices through the generations is explicable and does not amount to a severance of continuity. She acknowledged there had been revitalisation of some traditions, but noted that this did not imply recent invention. Rather, revitalisation is a legitimate means of maintaining Bidjara culture within a contemporary setting. Professor Sutton agreed with this latter point.[141]

6.83 While the Court concluded that the Bidjara people did not meet the requirements of s 223, it stated that 'these conclusions say nothing about the value of Bidjara efforts to continue, revive and protect aspects of Bidjara culture'.[142]

6.84 The issue of whether laws and customs, and therefore connection, have been substantially maintained where there has been some revitalisation as an adaptation to changing circumstances has been addressed in Canadian and New Zealand case law.[143]

6.85 Article 11 of UNDRIP provides, in part, that 'Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures'. Article 13(1) provides that

> 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.[144]

6.86 At the time of writing, the interpretation of s 223 does prevent evidence of revitalisation. Some people view the current interpretation of s 223 of the Act, 'as creating 'insurmountable barriers to cultural resurgence'.[145]

> Where a group has revitalised its culture, laws and customs by actively seeking out and recovering those elements of cultural continuity driven underground by dispossession, forced relocation, or the removal of children—a comparatively

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139 AIATSIS, *Submission 36*. See also AIATSIS, *Submission 70*.

140 AIATSIS, *Submission 70*.

141 *Wyman on behalf of the Bidjara People v Queensland (No 2)* [2013] FCA 1229 (6 December 2013) [370]. Professor Sutton's general views with respect to revitalisation are outlined later in the reasons: Ibid [622].

142 *Wyman on behalf of the Bidjara People v Queensland (No 2)* [2013] FCA 1229 (6 December 2013) [672]. The Court made a similar comment about the Karingbal people's efforts: Ibid [622].

143 See Ch 9.

144 *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st Sess, 107th Plen Mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007).

145 Commonwealth, *Parliamentary Debates*, Senate, 21 March 2011, 1303 (Rachel Siewert).

> minimal interruption to the sharing of that culture across the claimant group should not … prevent recognition of native title.[146]

6.87 Several submissions expressly supported distinguishing between 'revitalisation' and 'revival',[147] with some suggesting the *Native Title Act* recognise a right of revitalisation.[148] QSNTS indicated that revitalisation 'does not necessarily suggest starting from a position where there has been a clean break or abandonment'. It submitted that revitalisation 'simply means that something which had dissipated or lessened in some degree has intensified'.[149]

6.88 Few stakeholders supported amendment of the Act to permit revitalisation of connection.[150] QSNTS and Central Desert Native Title Services Limited (CDNTS) viewed the proposal as addressing 'continuity',[151] but evidence was crucial:

> The difficulty of course is one of evidence. A group may very well be revitalizing law and customs but because of the particular evidence, lack of evidence, or the way it is presented, it could be deemed revival because of what appears to be a 'substantial interruption'.[152]

6.89 Other stakeholders expressed strong concerns[153] or outright opposition.[154] The Western Australian Government's submission, amongst others, was opposed. It argued it would make native title 'available to a multitude of contemporary groupings in respect of a given area'.[155]

Revitalisation as adaptation

6.90 The ALRC, by reference to UNDRIP,[156] supports a distinction between revitalisation and revival (that is, abandonment) although it acknowledges the fine

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146 Ibid.

147 Queensland South Native Title Services, *Submission 55*; A Frith and M Tehan, *Submission 52* (it 'may' be useful); Central Desert Native Title Service, *Submission 48*.

148 AIATSIS, *Submission 70*.

149 Queensland South Native Title Services, *Submission 55*. See also Central Desert Native Title Service, *Submission 48*.

150 Law Council of Australia, *Submission 64*; Queensland South Native Title Services, *Submission 55*; Central Desert Native Title Service, *Submission 48*; North Queensland Land Council, *Submission 42*.

151 As discussed in Chs 4 and 5, currently native title applicants must demonstrate that, since the assertion of sovereignty, acknowledgment of their traditional laws and observance of their traditional customs have continued 'substantially uninterrupted': *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422. Central Desert Native Title Services saw revitalisation as useful in addressing the 'generation by generation' test: Central Desert Native Title Service, *Submission 48*.

152 Central Desert Native Title Service, *Submission 48*.

153 D WYkanak, *Submission 61* (asserting that sovereignty has not been ceded by Aboriginal peoples and Torres Strait Islander peoples and arguably expressing a concern about 'historical' people possibly undermining that claim); A Frith and M Tehan, *Submission 52* ('it should not be central to the definition of native title in s 223').

154 Northern Territory Government, *Submission 71*; South Australian Government, *Submission 68*; Minerals Council of Australia, *Submission 65*; The Chamber of Minerals and Energy of Western Australia, *Submission 49*; Western Australian Government, *Submission 43*.

155 Western Australian Government, *Submission 43*.

156 *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st Sess, 107th Plen Mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) arts 11 and 13.

distinctions required in the evidence and the questions of degree that arise factually in determining these matters.

6.91 The ALRC acknowledges the importance of Indigenous peoples' right to revitalise culture, but it is not recommending direct statutory amendment to allow recognition of revitalisation of laws and customs under s 223(1). The ALRC believes that reform objectives are more effectively achieved by a recommendation that it be made clear that traditional laws and customs may adapt, evolve or otherwise develop.[157]

6.92 Revitalisation can be best accommodated *as an adaptation or evolution in the manner* in which traditional law is acknowledged and traditional customs observed. Any adaptation will be determined by reference to the factual circumstances of each claim. Working in conjunction with other recommendations in Chapter 5 (allowing for succession;[158] not necessary to establish 'substantially uninterrupted' continuity[159] by each generation since sovereignty)[160] should provide sufficient flexibility.[161]

6.93 NTSCORP felt the recommendations, 'would allow for sufficient scope to include the way laws and customs may have changed due to many varying circumstances over time including, where appropriate, the revitalisation of laws and customs'.[162] CDNTS commented:

> The central question that the ALRC appears to be grappling with is, how … one deal[s] with forced abandonment while producing a just outcome and one that does not deter people from reviving or revitalising their culture in any event? … It is arguable that if proper and respectful regard is had to historical factors which cause displacement, then accepting revitalisation of law and custom should necessarily follow.[163]

Empowerment of courts to disregard 'substantial interruption'

6.94 The ALRC, under its Terms of Reference, was directed to inquire and report on whether Commonwealth native title laws and legal frameworks should provide for 'empowerment of courts 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'.[164]

6.95 Several models for disregarding or accommodating change in, or interruptions to, the continuity of acknowledgment and observance of laws and customs were

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157 See Ch 5, Rec 5–1.
158 See Ch 5, Rec 5–5.
159 See Ch 5, Rec 5–2.
160 See Ch 5, Rec 5–3.
161 Some stakeholders also considered these other suggested reforms to be more effective measures: NTSCORP, *Submission 67*; National Native Title Council, *Submission 57*; Native Title Services Victoria, *Submission 45*.
162 NTSCORP, *Submission 67*.
163 Central Desert Native Title Service, *Submission 48*.
164 Terms of Reference, above n 2.

examined. This examination included investigation of the various legal elements comprised in a model for judicial disregard of 'substantial interruption', as well as alternative formulations for 'judicial disregard' that have been proposed.[165]

6.96 Assessment of this option for reform in the Terms of Reference required consideration of many complex factors in the native title claim process, including the role of the judiciary in determining native title and how consent determinations are concluded. Chapter 2 provides context for understanding the doctrine of recognition—its strengths, but also its constraints. In relation to determinations of matters of fact, it required investigation of whether European settlement may be taken into account, and to what degree, when determining if there has been substantial interruption to, or a change in, 'continuity' and thereby loss of connection. The current threshold for establishing connection is that of substantial maintenance.[166]

6.97 The ALRC acknowledges that many submissions and commentators, among them prominent Indigenous leaders,[167] have stressed the importance of addressing the effects of European settlement upon Aboriginal and Torres Strait Islander peoples.[168] The ALRC considers that the solution is best found in the Recommendations 5–1 to 5–5[169] which would act in conjunction to achieve a similar legal effect to the 'option for reform' outlined in the Terms of Reference. Accordingly, the ALRC is not recommending that the *Native Title Act* be amended specifically to empower courts to disregard substantial interruption or change in continuity of acknowledgment and observance of traditional laws and customs.

Relevant law

6.98 The terms 'continuity' and 'substantially uninterrupted' do not appear in the text of s 223 of the Act. The requirement has arisen instead from the statutory construction of s 223(1) of the *Native Title Act.* The requirement that acknowledgment of law and observance of custom must have occurred substantially uninterrupted by each generation since sovereignty is discussed in earlier chapters.[170] Connection, as discussed, must be 'substantially maintained'.[171]

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165 See Native Title Amendment (Reform) Bill 2014 cl 14; Native Title Amendment (Reform) Bill (No 1) 2012 cl 14; Native Title Amendment (Reform) Bill 2011 cl 12.

166 See Ch 4.

167 See, eg, Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2009' (Australian Human Rights Commission, 2009) 87; Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2008' 86–87.

168 This was first acknowledged by the ALRC in its 1986 Final Report *Recognition of Aboriginal Customary Laws*. The ALRC stated that it is against the 'background of deprivation and dislocation that any examination of Aboriginal customary laws must take place': Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [31].

169 A detailed examination of the effect of these recommendations is given in Ch 5.

170 See Ch 4 and Ch 5.

171 *Bodney v Bennell* (2008) 167 FCR 84, [168].

6.99 The qualification of 'substantially' reflects the impacts of European settlement, as the High Court explained in *Yorta Yorta*:

> It is a qualification that must be made to recognise that European settlement has had the most profound effects on Aboriginal societies and that it is, therefore, inevitable that the structures and practices of those societies, and their members, will have undergone great change since European settlement.[172]

6.100 Further, the High Court held that, to describe 'the consequences of interruption in acknowledgment and observance of traditional laws and customs as "abandonment" or "expiry" of native title was apt to mislead', because it involved imputing an intention to abandon law and custom on the part of Indigenous peoples.[173]

6.101 Nonetheless, the High Court emphasised:

> the inquiry about continuity of acknowledgment and observance does not require consideration of why, if acknowledgment and observance stopped, that happened. That is, continuity of acknowledgment and observance is a condition for establishing native title. If it is not demonstrated that that condition was met, examining why that is so is important *only* to the extent that the presence or absence of reasons might influence the fact-finder's decision about whether there was such an interruption.[174]

6.102 Accordingly, the High Court left open the permissibility of examining why acknowledgment and observance may have 'stopped' in confined circumstances.

6.103 However, subsequently, the Full Federal Court in *Bodney v Bennell*, when discussing continuity, stated:

> But if … there has been a substantial interruption, it is not to be mitigated by reference to white settlement. The continuity enquiry does not involve consideration of *why* acknowledgment and observance stopped.[175]

6.104 The law is uncertain as to whether consideration of the reasons why acknowledgment and observance may have 'stopped' is permitted at all. Further, the view has been expressed that *Bodney v Bennell* 'should be treated with caution insofar as it suggests that evidence of European influence is irrelevant to the question of *change*, as opposed to *interruption*'.[176] This caution is relevant in relation to the recommendations made in Chapter 5.

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172 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [89] (Gleeson CJ, Gummow and Hayne JJ).

173 Ibid [90]. As CDNTS put it, it is 'exceptionally rare' that Aboriginal groups 'abandon' law and custom 'willingly': Central Desert Native Title Service, *Submission 48*. AIATSIS expressed the view that transformational events, such as European settlement, and cataclysmic events, such as drought and flood, while bringing changes, do not necessarily result in the abandonment of law and custom: AIATSIS, *Submission 70*.

174 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [90].

175 *Bodney v Bennell* (2008) 167 FCR 84, [97].

176 Duff, above n 17, 29.

Consideration of the reasons for 'substantial interruption'

The case for reform

6.105 A number of stakeholders expressly supported consideration of the reasons for displacement of Aboriginal peoples or Torres Strait Islanders in construing s 223(1)(b).[177] The Law Council of Australia submitted that there should not be 'an inflexible rule against the Court having regard to the reasons for displacement' when assessing connection under s 223(1)(b).[178]

6.106 Two main reasons were given in support. First, some stakeholders submitted that, given the history of colonisation, it was inherently unjust for the reasons for displacement not to be taken into account when assessing connection.[179]

6.107 As NQLC put it, 'European settlement which occurred pursuant to British and Australian law inhibited the observance of traditional laws and customs in areas of closer settlement'.[180] Similarly, others noted that state or settler acts—such as being forced to move off country to missions or reserves—often denied groups 'the right or ability to acknowledge and observe their laws and customs'.[181] Yet, as the Aboriginal and Torres Strait Islander Social Justice Commissioner has observed, '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'.[182]

6.108 The Australian Human Rights Commission (AHRC) submitted that 'native title claimants are effectively frustrated in satisfying the requirements of demonstrating continuous connection in circumstances where the interruption has been caused by colonisation'.[183] The National Congress of Australia's First Peoples (National Congress) submitted that the courts 'must have capacity to take into account displacement, caused by direct or indirect effects of European Settlement, when

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177 The Discussion Paper asked a number of questions in this respect: Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014) Questions 7–3 to 7–5. Submissions in support included: National Congress of Australia's First Peoples, *Submission 69*; NTSCORP, *Submission 67*; Law Council of Australia, *Submission 64*; Queensland South Native Title Services, *Submission 55*; North Queensland Land Council, *Submission 42*; Australian Human Rights Commission, *Submission 1*. Dr Angus Frith and Associate Professor Maureen Tehan submitted that '[a]t the very least, the Court should be given the discretion to consider the reasons for any such interruption in considering its relevance to its determination of whether traditional laws and customs have been acknowledged and observed': A Frith and M Tehan, *Submission 12*. However, in their later submission they expressed the view that a specific reform was unnecessary given other reforms that the ALRC had proposed: A Frith and M Tehan, *Submission 52*.

178 Law Council of Australia, *Submission 64*.

179 National Congress of Australia's First Peoples, *Submission 69*; Queensland South Native Title Services, *Submission 55*.

180 North Queensland Land Council, *Submission 17*.

181 A Frith and M Tehan, *Submission 12*.

182 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2009', above n 167, 87. See also Australian Human Rights Commission, *Submission 1*.

183 Australian Human Rights Commission, *Submission 1*. See also Central Desert Native Title Service, *Submission 48*.

assessing whether Aboriginal and/or Torres Strait Islander Peoples have a connection with land or waters'.[184]

6.109 Several submissions commented on the 'apparent unconscionability of the State or Territory effectively relying on its own actions to the detriment of native title groups' assertion of native title'.[185] Just Us Lawyers submitted that the strict application of 'substantial interruption' effectively downplays the practical impacts of colonisation and dispossession.[186]

6.110 The second, and interrelated, rationale given in support of reform was that a failure to consider the factual reasons may lead to unjust outcomes for some native title claimants.[187] NTSCORP submitted that where the reasons for interruption are not taken into account, it

> can and has had the perverse effect that Aboriginal groups who have been forced off their land by governmental or other Anglo-European intervention can be disentitled from the native title process, despite later continuing the physical aspect of their association with their Country. This is true no matter how strongly they have resisted that dislocation or maintained their non-physical connection to their Country, nor how short the duration of the dislocation.[188]

6.111 NTSCORP indicated that, '[s]uch outcomes are disproportionately likely in NSW due to the long history of repeated forced dislocation due to the government's Mission program'.[189] The South Australian Government acknowledged that 'as the State approaches resolution of native title claims in areas where European settlement has had greater impacts on the practice of Aboriginal law and custom, more difficulties will be encountered in achieving resolution by consent'.[190]

Complexities of reform that would enable consideration of reasons

6.112 A number of stakeholders, including those representing Indigenous interests and respondent interests, did not support specific reform enabling consideration of the reasons for substantial interruption or change in continuity within the native title claims process.[191]

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184 National Congress of Australia's First Peoples, *Submission 69*.

185 See, eg, Queensland South Native Title Services, *Submission 55*; Native Title Services Victoria, *Submission 18*; A Frith and M Tehan, *Submission 12*; Australian Human Rights Commission, *Submission 1*.

186 Just Us Lawyers, *Submission 2*.

187 NTSCORP, *Submission 67*.

188 Ibid.

189 Ibid.

190 South Australian Government, *Submission 68*.

191 Northern Territory Government, *Submission 71*; AIATSIS, *Submission 70*; South Australian Government, *Submission 68*; National Native Title Council, *Submission 57*; A Frith and M Tehan, *Submission 52*; Central Desert Native Title Service, *Submission 48*; Native Title Services Victoria, *Submission 45*; Western Australian Government, *Submission 43*. See also NTSCORP, *Submission 67*. As noted earlier, while NTSCORP supported reform, it listed a number of significant concerns.

6.113 Some stakeholders expressed opposition to any change to s 223, considering such reform to be unnecessary.[192] The Western Australian Government submitted that 'courts have been increasingly willing to recognise native title notwithstanding the ostensibly onerous requirements of the *Yorta Yorta* test'.[193] The South Australian Government submitted that, in practice, courts already consider the reasons for any displacement—specifically when considering the group's efforts to retain connection in situations where they have not been present on the land, and also when considering the adaptation of traditional laws and customs.[194]

> The Federal Court takes into account that extensive loss or modification of traditional law and custom was almost inevitable in the face of colonisation and has, on occasion, found in favour of groups that have long been absent from their lands or whose culturally active membership has, at various times in history, numbered very few individuals.[195]

6.114 The Law Society of Western Australia similarly submitted that there was no need for a change to the law, because 'the Courts have made it clear since the first court determination of native title under the NTA that a connection in accordance with traditional laws and customs did not need to be a physical connection or a continued or recent use'.[196]

6.115 Governments expressed concern lest reform seek to change the basis of native title law. The Western Australian Government considered the ALRC's inquiry to be premised on the 'flawed' assumption that 'a group of Indigenous persons may be able to establish that they hold native title rights and interests in the absence of any "connection" to an area pursuant to traditional law and customs'.[197] The Northern Territory Government expressed its concern at proposals which it considered would likely 'enable a much wider class of Aboriginal persons who, under the NTA, cannot properly establish native title rights and interests, to do so in the future'.[198] Amendment to the Act 'could not overcome the complete loss of a group's traditional laws and customs that related to land from which they had been historically displaced'.[199]

6.116 Some stakeholders qualified their support. The Law Council of Australia submitted that 'having regard to the reasons for displacement should not result in a group of people with no meaningful connection to land or waters being found to have native title on the basis that their displacement explains the lack of connection'.[200] Similarly, QSNTS noted the need for 'agreement on certain minimum threshold

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192 South Australian Government, *Submission 68*; Minerals Council of Australia, *Submission 65*; South Australian Government, *Submission 34*; Northern Territory Government, *Submission 31*; Queensland Government, *Submission 28*; Western Australian Government, *Submission 20*.

193 Western Australian Government, *Submission 20*.

194 South Australian Government, *Submission 68*. 'For example, a group long-removed from its traditional areas may nevertheless maintain knowledge and ceremony in relation to those lost lands. In turn, the maintenance of that knowledge, albeit at a remove, maintains the group's connection with the lands'.

195 South Australian Government, *Submission 34*.

196 Law Society of Western Australia, *Submission 41*.

197 Western Australian Government, *Submission 43*.

198 Northern Territory Government, *Submission 71*.

199 South Australian Government, *Submission 68*.

200 Law Council of Australia, *Submission 64*.

requirements (eg right people, right country; and acknowledgment and observance of laws relating to land and waters)'.[201]

6.117 Conversely, other stakeholders expressed concern that presenting the reasons for displacement 'may be antithetical to obtaining a positive determination of native title',[202] as reform may impose 'unintended prejudicial impacts on groups'.[203] A number of stakeholders submitted that reform would focus on the past rather than the future;[204] and reinforce a 'frozen in time' approach to native title,[205] rather than focusing on the future aspirations of native title groups.[206]

6.118 Other submissions indicated that it may limit 'the recognition of Aboriginal or Torres Strait Islander agency in responding to the particular circumstances of colonisation that they faced'[207] and not recognise that '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'.[208]

6.119 Some submissions expressed concern about unhelpful distinctions.[209] As Native Title Services Victoria (NTSV) put it, '[a] debate about the difference between Traditional Owners forced off country by European colonisation and Traditional Owners leaving "voluntarily" to be closer to education and services, should not be fostered'.[210]

6.120 Other concerns centred on the increased complexity and time that might be introduced into native title proceedings,[211] potentially precipitating 'another wave of judicial interpretation'.[212] The NNTC expressed concern that 'such an inquiry may end up involving an assessment of competing versions of history, which may be difficult for the Court and for claim groups'.[213] NTSCORP, who favoured reform, was

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201 Queensland South Native Title Services, *Submission 55*.
202 Central Desert Native Title Service, *Submission 48*. See also AIATSIS, *Submission 70*; Native Title Services Victoria, *Submission 45*.
203 Central Desert Native Title Service, *Submission 48*.
204 National Native Title Council, *Submission 57*; A Frith and M Tehan, *Submission 52*. See also South Australian Government, *Submission 68*.
205 National Native Title Council, *Submission 57*. See also AIATSIS, *Submission 70*.
206 A Frith and M Tehan, *Submission 52*.
207 National Native Title Council, *Submission 57*.
208 AIATSIS, *Submission 70*.
209 National Native Title Council, *Submission 57*; Native Title Services Victoria, *Submission 45*.
210 Native Title Services Victoria, *Submission 45*. The Western Australian Government acknowledged that 'the reasons for an Indigenous group's displacement from and lack of connection to an area may be multi-faceted—a mixture of choices made by members of the group to migrate from their traditional country': Western Australian Government, *Submission 43*.
211 Northern Territory Government, *Submission 71*; National Native Title Council, *Submission 57*; A Frith and M Tehan, *Submission 52*; Native Title Services Victoria, *Submission 45*; Western Australian Government, *Submission 43*.
212 AIATSIS, *Submission 70*.
213 National Native Title Council, *Submission 57*.

concerned about the likelihood of increased litigation leading to further delay in the resolution of claims.[214]

Suggested model

6.121 The ALRC suggested an amendment to the *Native Title Act* to explore how a measure to take into account the reasons—that is the impact of European settlement—might be formulated.[215] This model drew upon drafting precedents in the *Native Title Act*.[216] Few stakeholders supported this model for reform.[217] NTSCORP submitted that

> it strikes a good balance between directing the Court to a consideration of the reasons for dislocation in reaching decisions on the existence of native title, but allowing the Court discretion to develop principles for how this consideration would be undertaken in practice. It would also give a similar indication to the State governments in the claims mediation process.[218]

6.122 However, a number of submissions expressed concerns and possible improvements.[219] While the ALRC's intention was to preserve judicial discretion, several stakeholders urged deletion of the words 'unless it would not be in the interests of justice to do so'.[220] Some raised concerns about an overemphasis on physical connection implicit in the wording of the suggested text, preferring that a wider range of 'reasons' be considered.[221] Some stakeholders objected to the expression 'undue weight'.[222]

No statutory clarification regarding reasons for 'substantial interruption'

6.123 The ALRC sees merit in the fact-finder having regard to reasons for the displacement of Aboriginal and Torres Strait Islander peoples and some change in the continuity of the acknowledgment and observance of traditional laws and customs in certain circumstances. The ALRC notes the High Court's observation in *Yorta Yorta* that examining 'the presence or absence of reasons might influence the fact-finder's decision about whether there was such an interruption'. The ALRC seeks to mediate the view expressed in *Bodney v Bennell* that it is irrelevant to ask why the

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214 NTSCORP, *Submission 67*. 'It is likely changes of this kind would create just as many questions as answers'.

215 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014) Question 7–5.

216 The provision is similar to s 82(2) of the Act. When considering the current wording, Sackville J remarked, 'that provision permits, but does not oblige, the Court to take account of the cultural and customary concerns of Aboriginal peoples': *Jango v Northern Territory* [2003] FCA 1230 (31 October 2003) [49].

217 NTSCORP, *Submission 67*; D WYkanak, *Submission 61*; Queensland South Native Title Services, *Submission 55*.

218 NTSCORP, *Submission 67*.

219 Yamatji Marlpa Aboriginal Corporation, *Submission 62*; Central Desert Native Title Service, *Submission 48*; Law Society of Western Australia, *Submission 41*.

220 Yamatji Marlpa Aboriginal Corporation, *Submission 62*. See also Law Society of Western Australia, *Submission 41*.

221 Central Desert Native Title Service, *Submission 48*; Law Society of Western Australia, *Submission 41*.

222 Central Desert Native Title Service, *Submission 48*; Law Society of Western Australia, *Submission 41*.

acknowledgment of traditional laws and the observance of traditional customs may have 'changed'. The fact-finder should be able to have regard to the reasons for any change in continuity of the acknowledgment and observance of traditional laws and customs when assessing whether traditional laws and customs have adapted, evolved or developed.

6.124 The ALRC considers that this approach, together with the likely net effect of recommendations made in Chapter 5, should allow greater scope to consider factors relevant to whether there was change in the continuity of acknowledgment and observance of traditional laws and customs. In particular, Recommendations 5–2 and 5–3, which remove the 'substantially uninterrupted' and the 'generation by generation' thresholds, will mean that there may be greater opportunity for the fact-finder to have regard to the reasons in deciding the effect of the interruption or change in continuity of acknowledgment of law and observance of custom. The ALRC considers that this is the best way to enable consideration of the reasons for interruption or change in continuity of acknowledgment of law and observance of custom rather than recommending specific change to the *Native Title Act*.

6.125 This approach also reflects the weight of stakeholder submissions and consultations which were opposed to specific reform to enable consideration of the reasons for any displacement. A number of stakeholders consider specific reform to be unnecessary given the ALRC's preferred approach outlined in Recommendations 5–1 to 5–5.[223] In respect of Recommendation 5–1, NTSV submitted that

> with a suitably flexible and equitable interpretation of the term 'traditional', an inquiry into the extent and effect of historical displacement of Aboriginal people need not be pursued. A definition of 'traditional' should allow for change and adaptation, including whether such changes are made in response to the forces of colonisation or by choice.[224]

6.126 Recommendations 5–2 and 5–3, in addressing the substantive legal test defining native title, provide a more direct way of accommodating the effects of European settlement. The ALRC considers that if a beneficial approach is taken to the construction of s 223, and that the requirement for continuity of the acknowledgment and observance of traditional laws and customs is no longer set at the high 'substantially uninterrupted' and 'by each generation since sovereignty' thresholds, then there will be greater scope, on a case by case basis, for consideration of the circumstances in which connection has, or has not, been substantially maintained.

6.127 By contrast, National Congress was 'adamant' that the ALRC's preferred approach, now reflected in Recommendations 5–1, 5–2 and 5–3, had 'not gone far enough' to address s 223(1)(b) and the effects European settlement may have had in impairing Aboriginal and Torres Strait Islander peoples' ability to continue their

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223 National Native Title Council, *Submission 57*; A Frith and M Tehan, *Submission 52*; Central Desert Native Title Service, *Submission 48*; Native Title Services Victoria, *Submission 45*. The National Native Title Council envisaged that the term 'traditional' would be interpreted in such a way that 'any displacement of Aboriginal peoples or Torres Strait Islanders, whatever its cause, does not give rise to any loss of the relevant connection'.

224 Native Title Services Victoria, *Submission 45*.

connection to land and waters by those laws and customs. It submitted that Proposal 5–3, now Recommendations 5–2 and 5–3, 'only addresses the level or frequency of continuity of acknowledgment and observance of traditional laws and customs under s 223(1)(a)'.[225]

6.128 Recommendations 5–2 and 5–3 are not aimed simply at the frequency of continuity; although this is typically understood to be their main effect. The ALRC's view of the law is that consideration of why acknowledgment and observance may have 'changed' is permissible in certain circumstances, specifically where it 'might influence the fact-finder's decision about whether there was such an interruption'.[226] The ALRC considers that, if the effect of Recommendations 5–2 and 5–3 is to remove the 'substantially uninterrupted' and the 'generation by generation' thresholds, then it allows scope to consider factors that have impaired the ability of Aboriginal and Torres Strait Islander peoples to continue their connection.

The empowerment of courts

6.129 The option for reform for consideration under the Terms of Reference also required examination of the 'empowerment' of courts. The ALRC understood the term 'empowerment' to indicate the statutory conferral of discretion.[227] Judicial discretion is, by its very nature, one to be exercised in relation to the circumstances of an individual case and by construction of the relevant law.[228] Therefore, the circumstances enlivening the discretion will be variable. A general empowerment of courts may therefore be quite uncertain in its effect and operation.[229] Questions may arise whether any such 'empowerment' would operate as a procedural matter or would form part of the substantive area of law interpreting s 223 of the *Native Title Act*.

6.130 A number of submissions expressed support for the empowerment of courts to disregard substantial interruption or change in continuity of acknowledgment of traditional laws and observance of traditional customs, where it is in the interests of justice to do so.[230] National Congress submitted that, '[w]here the effects of colonisation have caused a substantial interruption to connection that our Peoples have with their lands and waters, the Court must have the discretion to disregard such interruptions'.[231] Such a reform would be 'consistent with the beneficial purposes for which the NTA was enacted, particularly where the interruption is caused by

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225 National Congress of Australia's First Peoples, *Submission 69*.

226 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [90].

227 See, eg, Native Title Amendment (Reform) Bill 2014 cl 14; Native Title Amendment (Reform) Bill (No 1) 2012 cl 14.

228 See the discussion on construing s 223 in totality of context in Ch 2.

229 S Bielefeld, *Submission 6*. Note that this submission did not express a view on the desirability of the reform option.

230 National Congress of Australia's First Peoples, *Submission 69*; National Congress of Australia's First Peoples, *Submission 32*; Kimberley Land Council, *Submission 30*; NSW Young Lawyers Human Rights Committee, *Submission 29*; Goldfields Land and Sea Council, *Submission 22*; Native Title Services Victoria, *Submission 18*; North Queensland Land Council, *Submission 17*; A Frith and M Tehan, *Submission 12*; Law Society of Western Australia, *Submission 9*; Cape York Land Council, *Submission 7*; Australian Human Rights Commission, *Submission 1*.

231 National Congress of Australia's First Peoples, *Submission 69*.

circumstances outside the control or intent of the relevant members of the relevant society'.[232] Similarly, AHRC submitted that such a reform would be '[i]n furtherance of the purposes of the Act', and referred to the Preamble to the Act.[233]

6.131 However, a number of stakeholders were opposed to this reform option,[234] with some preferring other options.[235] Concerns were raised that such a model for reform:

- 'would likely place greater emphasis than there is presently on the fact and nature of any substantial interruption';[236]
- would be of uncertain effect;[237]
- may not be in claimants' interests as it may lead to increased debate about issues as well as increased costs and delay;[238] and
- is problematic because of uncertainty about the meaning of 'in the interests of justice'.[239]

6.132 These concerns are largely the same as those expressed in some submissions about considering European settlement and any potential reasons for displacement, substantial interruption and change in continuity in general.

6.133 During consultations, stakeholders raised concerns that any proposed amendment of this nature may be unconstitutional because 'empowering' courts to disregard substantial interruption may amount to the legislature directing the courts as to the exercise of their jurisdiction. That is, usurpation by the legislature of the judicial power of Chapter III courts. However, having investigated the issues, the ALRC considers that this is unlikely to be a problem. Presumably the purpose of such a provision is to empower courts with a discretion as to what they may take into account—rather than a direction as to how they are to exercise that discretion.[240]

6.134 Other submissions queried the phrase 'in the interests of justice' which typically indicates that courts retain discretion.[241] Concerns were expressed about defining it in the Act:[242]

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232 Law Society of Western Australia, *Submission 9*.
233 Australian Human Rights Commission, *Submission 1*.
234 South Australian Government, *Submission 34*; Western Australian Fishing Industry Council, *Submission 23*; Western Australian Government, *Submission 20*; National Farmers' Federation, *Submission 14*; Just Us Lawyers, *Submission 2*.
235 NSW Young Lawyers Human Rights Committee, *Submission 29*; Just Us Lawyers, *Submission 2*.
236 Western Australian Government, *Submission 20*.
237 Some stakeholders also raised this concern in relation to the earlier proposal for a presumption of continuity and substantial interruption. See, eg, Western Australian Government, Submission No 18 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, August 2011.
238 NSW Young Lawyers Human Rights Committee, *Submission 29*; Just Us Lawyers, *Submission 2*.
239 See, eg, NSW Young Lawyers Human Rights Committee, *Submission 29*.
240 See *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1.
241 See, eg, South Australian Government, *Submission 34*.
242 The ALRC had asked a question in the Issues Paper. See Australian Law Reform Commission, *Review of the Native Title Act 1993*, Issues Paper No 45 (2013) Q 21(b).

> The phrase could import considerations of the overall circumstances of the case, including the present circumstances of the Claimants or the Respondents, or difficulties being experienced between multiple claim groups. There is a possibility that a decision may be taken to not disregard 'substantial interruption' in order to assist a poor or disadvantaged respondent due to the 'interests of justice'.[243]

6.135 Some submissions felt some guidance may be useful,[244] or necessary.[245]

6.136 Stakeholders who were opposed to a statutory definition of 'in the interests of justice' considered that it was 'better left to the Court in each case',[246] as this would provide courts with greater flexibility to disregard substantial interruption.[247]

Other models for considering the impact of European settlement

6.137 While stakeholders have certain expectations about what may be achieved by the native title system, dispossession is not necessarily capable of being redressed by a determination of native title.[248]

6.138 Although the ALRC has identified Recommendations 5–1 to 5–5 as its preferred approach, the ALRC sees value in outlining the other models or options for reform that have been offered as they have been the subject of proposed legislative amendment over a number of years and have garnered significant stakeholder support, including in submissions to this Inquiry. The following section sets out responses to these other models for considering the impact of European settlement.

Background

6.139 The Aboriginal and Torres Strait Islander Social Justice Commissioner, in *Native Title Report 2008*, proposed a legislative amendment so that the courts would have capacity to take into account the reasons for interruption to the acknowledgment of the traditional laws and the observance of the traditional customs.[249] In the *Native Title Report 2009*, the Commissioner suggested a proposal in similar terms to the option for reform in the Terms of Reference.[250] Further, the Commissioner suggested that 'a definition or a non-exhaustive list of historical events' could be provided in the *Native Title Act* in order 'to guide courts as to what should be disregarded'.[251] The

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243 NSW Young Lawyers Human Rights Committee, *Submission 29*.
244 NSW Young Lawyers Human Rights Committee, *Submission 29* (suggesting the option put forward by the Aboriginal and Torres Strait Islander Social Justice Commissioner, namely 'a non-exhaustive list of particular circumstances where it is "in the interests of justice" to disregard "substantial interruption"').
245 South Australian Government, *Submission 34*.
246 A Frith and M Tehan, *Submission 12*.
247 North Queensland Land Council, *Submission 17*.
248 See Ch 1 and Ch 3.
249 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2008', above n 167, 86–7.
250 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2009', above n 167, 87.
251 Ibid.

Native Title Amendment (Reform) Bill 2011 proposed amendments broadly consistent with these recommendations.[252]

Native Title Amendment (Reform) Bill 2014

6.140 The Native Title Amendment (Reform) Bill 2014 differed in some key respects from the 2011 Bill,[253] providing for a discretion be conferred on the courts rather than mandating them to 'treat as relevant' particular reasons for the substantial interruption.[254] The 2014 Bill would have inserted a new s 61AB, providing that:

> A court may determine that subsection 223(1) has been satisfied, despite finding that there has been:
>
> (a) a substantial interruption in the acknowledgment of traditional laws or the observance of traditional customs; or
>
> (b) a significant change to traditional laws acknowledged or traditional customs observed;
>
> if the primary reason for the substantial interruption or the significant change is the action of a State or a Territory or a person or other party who is not an Aboriginal person or a Torres Strait Islander.

6.141 The ALRC, after careful assessment of various models and combinations, suggests that allowing courts to disregard substantial interruption or change in continuity of acknowledgment and observance of traditional laws and customs under the Native Title Amendment (Reform) Bill 2014 is the best of the alternative models. In the ALRC's view, it is better than the model suggested in the Discussion Paper or a statutory definition of 'substantial interruption'. It received the most support from stakeholders who favoured other reform options.

Statutory definition of 'substantial interruption'

6.142 While the Aboriginal and Torres Strait Islander Social Justice Commissioner had suggested that a statutory definition of 'substantial interruption' be linked to the

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252 The Bill approached the issue of substantial interruption within a presumption of continuity—that is, by using interlinking provisions: Native Title Amendment (Reform) Bill 2011 cl 12. Proposed new s 61AA provided for presumptions and proposed new s 61AB provided for 'continuing connection'.

253 For example, the provisions for presumptions and with respect to continuing connection are not linked: Native Title Amendment (Reform) Bill 2014 cl 14. See also Native Title Amendment (Reform) Bill (No 1) 2012 cl 14. Note that proposed new s 61AB is in exactly the same terms in both the 2012 and 2014 Bills. The provisions in these latter Bills responded to a number of suggestions that had been made in the course of the Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the Native Title Amendment (Reform) Bill 2011 (the first iteration of the Bill), in particular the Law Council of Australia's submission with respect to the drafting of proposed new s 61AB: Commonwealth, *Parliamentary Debates*, Senate, 29 February 2012, 1238, 1242 (Rachel Siewert).

254 Native Title Amendment (Reform) Bill 2011 cl 12. Proposed new s 61AB(2)(a) provided that the courts 'must treat as relevant' whether the primary reason for any demonstrated interruption in the acknowledgment of traditional laws or the observance of traditional customs is the action of a State or a Territory or a person who is not an Aboriginal person or a Torres Strait Islander.

empowerment of courts to disregard substantial interruption,[255] some submissions conceived of a definition as a separate reform option.[256]

6.143 Several submissions supported a statutory definition of the factual matters related to 'substantial interruption',[257] with a non-exhaustive list held to be important.[258] Supporters of a statutory definition considered a non-exhaustive list necessary as what constitutes a 'substantial interruption' is unsettled.[259]

6.144 Other stakeholders opposed a statutory definition.[260] Governments were opposed,[261] viewing such a reform option as:

- unnecessary;[262]
- 'impractical', given that it is 'a question of fact and degree';[263]
- making the test for recognising native title 'unduly complicated';[264] and
- tending to 'shift the focus of native title inquiries onto historical matters, without necessarily achieving any time savings'.[265]

6.145 A statutory definition of 'substantial interruption' was also opposed by stakeholders who otherwise favoured law reform.[266] AIATSIS, for example, acknowledged that:

> 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.[267]

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255 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2009', above n 167, 87.

256 See, eg, A Frith and M Tehan, *Submission 12*.

257 National Congress of Australia's First Peoples, *Submission 32*; Native Title Services Victoria, *Submission 18*; North Queensland Land Council, *Submission 17*; Australian Human Rights Commission, *Submission 1*. Some of these stakeholders supported express inclusion of the forced removal of children and the relocation of communities onto missions, which were examples that the Aboriginal and Torres Strait Islander Social Justice Commissioner had suggested previously: Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2009', above n 167, 87.

258 South Australian Government, *Submission 34* (who was opposed to such a definition because '[s]uch concepts are ill suited to exhaustive definition'); National Congress of Australia's First Peoples, *Submission 32*; North Queensland Land Council, *Submission 17*; Cape York Land Council, *Submission 7*; Just Us Lawyers, *Submission 2*.

259 Australian Human Rights Commission, *Submission 1*. See also North Queensland Land Council, *Submission 17*.

260 South Australian Government, *Submission 34*; NSW Young Lawyers Human Rights Committee, *Submission 29*; Western Australian Government, *Submission 20*; National Farmers' Federation, *Submission 14*; A Frith and M Tehan, *Submission 12*; Cape York Land Council, *Submission 7*.

261 South Australian Government, *Submission 34*; Northern Territory Government, *Submission 31*; Western Australian Government, *Submission 20*.

262 South Australian Government, *Submission 34*; Northern Territory Government, *Submission 31*; Queensland Government, *Submission 28*.

263 South Australian Government, *Submission 34*.

264 Western Australian Government, *Submission 20*.

265 Ibid.

266 See, eg, NSW Young Lawyers Human Rights Committee, *Submission 29*; A Frith and M Tehan, *Submission 12*.

267 AIATSIS, *Submission 36*.

6.146 However, AIATSIS reiterated its comment to the Senate Inquiry concerning the provisions of the 2011 Bill, that,

> 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).[268]

Other models for reform

6.147 In the Discussion Paper, the ALRC invited comment on other reform options that may be appropriate. Some stakeholders preferred other reforms to those identified by the ALRC.[269] The Law Society of Western Australia and Yamatji Marlpa Aboriginal Corporation ('YMAC') favoured text advanced by the Law Council of Australia in response to Native Title Amendment (Reform) Bill 2011, with a few minor additions.[270] Essentially, this model is similar to new s 61AB(2) as proposed in the Native Title Amendment (Reform) Bill 2014.

6.148 AIATSIS favoured a 'presumption of transformation' to be expressly stated in the *Native Title Act*, 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'. Such an approach would impose 'an equitable obligation on the State to act in the best interest of the applicant'.[271]

6.149 Others saw the native title system as an inappropriate vehicle for an inquiry into the impacts of European Settlement, highlighting the fact that Australia does not have a forum dedicated to reconciliation and compensation.[272] CDNTS stated that, while

> acknowledgment of the impact of displacement is key to starting to address community hurt[,] … native title is not the answer, recognition nor means of redress that Aboriginal people have been seeking. … [T]he NTA should not be the only means by which the impact of colonisation is addressed.[273]

6.150 Similarly, the Law Council of Australia submitted that the *Native Title Act* 'is not, of itself, sufficient to address the injustices caused by the dispossession of Aboriginal peoples and Torres Strait Islanders'.[274] Both stakeholders noted the failure

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268 Ibid.

269 AIATSIS, *Submission 70*; Minerals Council of Australia, *Submission 65*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; Law Society of Western Australia, *Submission 41*. For example, the Minerals Council of Australia called for reform of administrative processes so as to improve the claims process.

270 Yamatji Marlpa Aboriginal Corporation, *Submission 62*; Law Society of Western Australia, *Submission 41*.

271 AIATSIS, *Submission 70*. See Ch 7 for a discussion of presumptions more generally.

272 Several other former Commonwealth colonies have instituted 'Reconciliation Tribunals', eg New Zealand's Waitangi Tribunal, the Truth and Reconciliation Commission of Canada, and the South African Truth and Reconciliation Commission.

273 Central Desert Native Title Service, *Submission 48*.

274 Law Council of Australia, *Submission 64*.

to implement the social justice package which had originally been proposed to compensate Aboriginal peoples and Torres Strait Islanders who had been dispossessed of their land through colonisation.[275] CDNTS also submitted that the Indigenous Land Corporation had 'not delivered what was intended'. It speculated that '[p]erhaps the answer lies more in alternative settlements or regimes'.[276]

Overview of key points

6.151 The ALRC considers that together Recommendations 5–1, 5–2 and 5–3 will allow courts the discretion to take into account more readily the impacts of European settlement on Aboriginal and Torres Strait Islander claimants on a factual basis when determining connection under s 223(1)(b).

6.152 The ALRC considers that the change to be effected by Recommendation 5–1 would necessarily also apply to s 223(1)(b), given the repetition of the phrase 'by those laws and customs' in that provision. Accordingly, changes to traditional laws and customs due to displacement of groups could be accommodated; particularly as the existing law clearly does not require physical presence or continued or recent use to establish connection.

6.153 In Chapter 5, the ALRC raises the possibility that there could be a positive test for the required continuity of the acknowledgment and observance of traditional laws and customs. The terms 'substantially maintained' or 'identifiable through time' were suggested.[277] This suggestion was in response to the removal of the high thresholds of 'substantially uninterrupted' and 'by each generation since sovereignty' in respect of the required continuity of the acknowledgment and observance of traditional laws and customs.[278]

6.154 In addition, the ALRC considers that the recommendation for 'society' to be treated as a conceptual tool, rather than a strict requirement,[279] will ameliorate situations where groups have been dispersed under settlement impacts.

275 Ibid; Central Desert Native Title Service, *Submission 48*.
276 Central Desert Native Title Service, *Submission 48*.
277 See Ch 5.
278 See Rec 5–2 and 5–3.
279 See Rec 5–4.

7. Proof and Evidence

Contents

Summary

7.1 The Terms of Reference for this Inquiry require the ALRC to consider whether there should be a 'presumption of continuity of acknowledgment and observance of traditional laws and customs and connection'. The ALRC considers that it is not necessary to introduce such a presumption in light of other recommended reforms. It considers that issues concerning proof of native title should be addressed by amendments to the definition of native title in s 223 of the *Native Title Act 1993* (Cth) ('*Native Title Act*'). These recommended amendments are detailed in Chapter 5. However, the ALRC does recommend that there be guidance in the *Native Title Act* regarding when inferences may be drawn in the proof of native title rights and interests.

Proof of native title

7.2 The *Native Title Act* is designed to encourage parties to take responsibility for resolving native title claims without the need for litigation.[1] The Preamble indicates the legislative preference for resolving native title claims by negotiation.[2] Nonetheless, native title claims are commenced and conducted as legal proceedings in the Federal Court of Australia—they are proceedings under the *Native Title Act*.[3]

7.3 In those proceedings, claimants bear the persuasive burden[4] of proving all of the elements necessary to establish the existence of native title as defined in s 223.[5] As

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1 *Lovett on behalf of the Gunditjmara People v Victoria* [2007] FCA 474 (30 March 2007) [36].

2 *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595, [18] (Brennan CJ, Dawson, Gaudron, Toohey and Gummow JJ).

3 *Native Title Act 1993* (Cth) ss 13(1), 61(1).

4 In a legal proceeding, a party may bear a 'burden' or 'onus' of proof of different kinds. A 'legal' or 'persuasive' burden of proof is 'the obligation of a party to meet the requirement of a rule of law that a fact in issue be proved (or disproved)': J D Heydon, LexisNexis, *Cross on Evidence*, Vol 1 (at Service

detailed in Chapter 4, native title claimants are required to show that, as a matter of fact, they possess communal, group or individual rights and interests in relation to land or waters under traditional laws acknowledged and customs observed by them, and that, by those laws and customs, they have a connection with the land or waters claimed.[6] Additionally, the native title rights and interests must be able to be recognised by the common law.[7] Whether they can be recognised is a question of law.

7.4 Aboriginal and Torres Strait Islander peoples may also claim compensation for the extinguishment of native title.[8] Doing so requires proving that native title was in existence before being extinguished.[9]

7.5 Native title must be proved in accordance with the rules of evidence, except to the extent otherwise ordered by the Court.[10] The standard of proof required is the civil standard—the balance of probabilities.[11]

7.6 Native title matters may be resolved by consent between parties—in fact, this is the most common means by which a native title determination has been reached.[12] If an agreement between parties to a determination is reached, the Federal Court may, if satisfied that an order consistent with the terms of the agreement would be within the power of the Court[13] and it appears to the Court to be appropriate,[14] make a native title determination order over the whole or part of a determination area without a court hearing.

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164) [7010]. An evidential burden of proof is 'the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue': [7015].

5 *Western Australia v Ward* (2000) 99 FCR 316, [114]–[117] (Beaumont and von Doussa JJ); *Daniel v Western Australia* [2003] FCA 666 (3 July 2003) [146]; *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* (2007) 238 ALR 1, [339]. In a non-claimant application, the party making the application seeks a determination that no native title exists in a particular area. In such an application, the legal burden of establishing that no native title exists lies on the non-claimant applicant: *Worimi Local Aboriginal Land Council v Minister for Lands (NSW) (No 2)* [2008] FCA 1929 (18 December 2008) [49]. A non-claimant applicant may alternatively assert that no native title rights exists in the relevant land because any such rights and interests have been extinguished: *Gandangara Local Aboriginal Land Council v A-G (NSW)* [2013] FCA 646 (3 July 2013).

6 *Native Title Act 1993* (Cth) s 223(1)(a)–(b).

7 Ibid s 223(1)(c).

8 Ibid ss 50(2), 61(1).

9 See, eg, *Jango v Northern Territory* (2006) 152 FCR 150. Not all extinguishing acts can be compensated under the *Native Title Act*. Compensation is dealt with in *Native Title Act 1993* (Cth) pt 2 div 5.

10 *Native Title Act 1993* (Cth) s 82. The *Evidence Act 1995* (Cth) recognises the unique circumstances involved in providing evidence of Aboriginal and Torres Strait Islander laws and customs, and provides exceptions to the hearsay and opinion rules in relation to evidence of the existence or non-existence or the content of such laws and customs: *Evidence Act 1995* (Cth) ss 72, 78A. These exceptions were included in the *Evidence Act* in 2008, implementing recommendations from the joint ALRC, NSWLRC and VLRC Inquiry into Uniform Evidence Law: *Evidence Amendment Act 2008* (Cth); Australian Law Reform Commission; New South Wales Law Reform Commission; Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC Report No 102 (2006) Recs 19–1, 19–2.

11 *Milirrpum v Nabalco* [1972] ALR 65, 119–20; *Mason v Tritton* (1993) 70 A Crim R 28, 42; *Evidence Act 1995* (Cth) s 140.

12 See Ch 3 for an overview of the disposition of claims by consent or contested hearing.

13 *Native Title Act 1993* (Cth) ss 87(1)(c), 87A(4)(a).

14 Ibid ss 87(1A), (2), 87A(4)(b), (5)(b).

Problems of proof

7.7 As discussed in Chapter 2, the basis on which native title was recognised by the Australian legal system brings with it difficulties of proof. Native title involves the recognition that Aboriginal and Torres Strait Islander peoples had rights and interests in land and waters, possessed under Aboriginal and Torres Strait Islander laws and customs, which pre-existed and survived annexation. The time elapsed between the assertion of sovereignty,[15] and the Australian legal system's recognition, in 1992, of the existence of native title means that evidencing the survival of those rights over approximately 200 years presents significant challenges.[16] Sackville J in *Jango v Northern Territory* provides a useful summation of some of these challenges:

> Claimants in native title litigation suffer from the disadvantage that, in the absence of a written tradition, there are no indigenous documentary records that enable the Court to ascertain the laws and customs followed by Aboriginal people at sovereignty. While Aboriginal witnesses may be able to recount the content of laws and customs acknowledged and observed in the past, the collective memory of living people will not extend back for 170 or 180 years.[17]

7.8 The Court has also recognised that what written records do exist may have limitations. As Lindgren J noted,

> early records made by European amateur and professional ethnographers are limited by the ethnocentric views of the writers and by the limits on their understanding of the language and culture of those about whom they wrote.[18]

7.9 In addition, the recognition of native title involves an 'intersection of traditional laws and customs with the common law'.[19] There can be difficulties of translation between these two systems of law. Christos Mantziaris and Dr David Martin have noted:

> It may be difficult or impossible to render comprehensible to a person located in a non-indigenous system of meaning (system A), the meaning of relations defined in the terms and concepts of the system of traditional law and custom (system B). A practical setting for this problem is where a judge is asked to determine the content of native title rights and interests.[20]

7.10 These challenges have been compounded by the approach to construing the statutory requirements for establishing native title. A number of submissions to this Inquiry emphasised the complexity of these requirements. For example, Queensland

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15 The date of sovereignty varies in different parts of Australia: see further Richard H Bartlett, *Native Title in Australia* (LexisNexis Butterworths, 3rd ed, 2015) 216–217.

16 See generally, Anthony Connolly, 'Conceiving of Tradition: Dynamics of Judicial Interpretation and Explanation in Native Title Law' in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (Federation Press, 2005) 118, 134–35.

17 *Jango v Northern Territory* (2006) 152 FCR 150, [462].

18 *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* (2007) 238 ALR 1, [441]. See also *Daniel v Western Australia* [2003] FCA 666 (3 July 2003) [149]; *Risk v Northern Territory* [2006] FCA 404 (29 August 2006) [135].

19 *Fejo v Northern Territory* (1998) 195 CLR 96, [46].

20 Christos Mantziaris and David Martin, *Native Title Corporations: A Legal and Anthropological Analysis* (Federation Press, 2000) 31.

South Native Title Services (QSNTS) argued that s 223 is 'unnecessarily complicated, fragmented and inconsistently interpreted and applied in practice'.[21] Goldfields Land and Sea Council (GLSC) commented upon the 'unnecessary technicality and legalism in native title'.[22]

7.11 However, other stakeholders said that the current legal test for the proof of native title was not unduly onerous and time-consuming.[23] For example, the Western Australian Government submitted that:

> Courts have interpreted the *Yorta Yorta* requirements broadly and generously. In the State's experience, the *Yorta Yorta* requirements have seldom posed a significant barrier to the recognition of native title in a litigated context. In practice, the 'bar' is now low for the recognition of native title.[24]

7.12 Discharging the burden of proving that native title exists is a significant undertaking. In *Yorta Yorta*, the High Court acknowledged that 'difficult problems of proof' face native title claimants when seeking to establish native title rights and interests—particularly in demonstrating the content of traditional laws and customs as required by s 223(1)(a).[25] However, it also noted that 'the difficulty of the forensic task does not alter the requirements of the statutory provision'.[26]

7.13 Native title claimants will rely on a range of sources of evidence to establish native title rights and interests, including, most importantly, evidence from Aboriginal or Torres Strait Islander witnesses.[27] Expert evidence is also routinely adduced, primarily from anthropologists, but also from other experts including linguists and archaeologists.[28] Expert evidence is considered in more detail in Chapter 12.

7.14 The evidence required to establish native title has attracted criticism, as well as calls for reform to ease the burden on claimants. In 2005, the United Nations Committee on the Elimination of Racial Discrimination stated that it was

> concerned about information according to which proof of continuous observance and acknowledgement of the laws and customs of Indigenous peoples since the British acquisition of sovereignty over Australia is required to establish elements in the statutory definition of native title under the *Native Title Act*.… It recommends that the

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21 Queensland South Native Title Services, *Submission 24*. The Law Council of Australia expressly agreed with QSNTS's position: Law Council of Australia, *Submission 35*.

22 Goldfields Land and Sea Council, *Submission 22*. See also AIATSIS, *Submission 36*; National Congress of Australia's First Peoples, *Submission 32*.

23 Northern Territory Government, *Submission 31*; Western Australian Government, *Submission 20*.

24 Western Australian Government, *Submission 20*.

25 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [80] (Gleeson CJ, Gummow and Hayne JJ).

26 Ibid.

27 Such evidence has been described as having the 'highest importance': *Sampi v Western Australia* [2005] FCA 777 (10 June 2005) [48]; *Sampi on behalf of the Bardi and Jawi People v Western Australia* (2010) 266 ALR 537, [57].

28 LexisNexis, *Native Title Service* (at Service 100) [1845].

> State Party review the requirement of such a high standard of proof, bearing in mind the nature of the relationship of Indigenous peoples to their land.[29]

7.15 Submissions from Native Title Representative Bodies and Native Title Service Providers also drew attention to the heavy burden that lies on the claimants in native title proceedings. For example, Native Title Services Victoria submitted that the current burden of proof in the Act is a significant evidentiary barrier faced by all native title claimants'.[30] The Law Council of Australia noted the 'considerable' onus on claimants.[31] The Northern Territory Government submitted that the provision of anthropological evidence was 'enormously resource intensive'.[32]

Evidence in consent determinations

7.16 When a native title claim is resolved by consent, native title claimants do not have to prove their case in a court hearing, although the Court is still involved in making a formal determination of native title. As noted above, if an agreement between parties to a determination is reached, the Federal Court may, if satisfied that an order consistent with the terms of the agreement would be within the power of the Court[33] and it appears to the Court to be appropriate,[34] make a native title determination order over the whole or part of a determination area without a hearing.

7.17 In determining whether such an order is appropriate, the Court has stated that it is not required to embark on its own inquiry into the merits of the claim.[35] Instead, its focus is on whether there is an agreement between parties that was 'freely entered into on an informed basis'.[36] In relation to a state or territory respondent party, this will involve the Court being assured that such a party has 'taken steps to satisfy itself that there is a credible basis for an application',[37] or is 'satisfied as to the cogency of the evidence upon which applicants rely'.[38]

7.18 The Court has considered the appropriate extent of the investigation required by a state or territory respondent party to satisfy itself that there is a credible basis for an application for determination of native title. In *Lovett on behalf of the Gunditjmara People v Victoria*, for example, North J commented that 'something significantly less

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29 Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, 66th Sess, UN Doc CERD/C/AUS/CO/14 (14 April 2005) [17].

30 Native Title Services Victoria, *Submission 18*. See also Goldfields Land and Sea Council, *Submission 22*.

31 Law Council of Australia, *Submission 35*.

32 Northern Territory Government, *Submission 31*. The Northern Territory Government noted that evidence relating to public works and pastoral improvements was similarly resource intensive.

33 *Native Title Act 1993* (Cth) ss 87(1)(c), 87A(4)(a).

34 Ibid ss 87(1A), (2), 87A(4)(b), (5)(b).

35 See, eg, *Lander v South Australia* [2012] FCA 427 (1 May 2012) [12]. In respect of s 87A, see, eg, *Brown (on behalf of the Ngarla People) v Western Australia* [2007] FCA 1025 (30 May 2007) [22]; *Goonack v Western Australia* [2011] FCA 516 (23 May 2011) [24]–[26].

36 *Lovett on behalf of the Gunditjmara People v Victoria* [2007] FCA 474 (30 March 2007) [37].

37 Ibid.

38 *Munn for and on behalf of the Gunggari People v Queensland* (2001) 115 FCR 109, [29]–[30]. Mansfield J considered that similar principles applied in the resolution of compensation claims by consent: *De Rose v South Australia* [2013] FCA 988, [24]–[26].

than the material necessary to justify a judicial determination is sufficient to satisfy a State party of a credible basis for an application'.[39]

7.19 In negotiating consent determinations, state and territory respondent parties have developed a practice of requiring evidence about claimants' connection to an area to be provided to them in the form of a 'connection report'.[40] Formal guidelines regarding the kind of evidence required have been issued by a number of state governments.[41]

7.20 These guidelines largely reflect the governments' understandings of the kind of evidence required to satisfy s 223 of the *Native Title Act*. For example, the Queensland Department of Natural Resources and Mines indicated that its requirements for the content of a connection report draw upon 'the NTA and current Australian native title case law', in setting out 'the broader principles that should be addressed in a connection report to demonstrate the claim group's native title'.[42] The Western Australian Department of Premier and Cabinet states that 'the connection material provided in support of a native title claim must satisfy the requirements of ss 223 and 225 of the NTA and developing case law'.[43]

7.21 The Court has stressed that 'The Act does not intend to substitute a trial, in effect, conducted by State parties for a trial before the Court'.[44] However, as the connection guidelines published by state governments indicate, such assessments are guided by understandings of the requirements of the substantive law in respect of native title. The assessment of connection evidence in consent determinations is considered further in Chapter 12.

A presumption in relation to proof?

7.22 A presumption in relation to proof of native title is perceived as one response to the difficulty of establishing the existence of native title rights and interests. It was first proposed by Justice French (as he then was) in 2008.[45] Justice French suggested that a presumption may 'lighten some of the burden of making a case for a determination' by lifting some elements of the burden of proof from native title claimants.[46]

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39 *Lovett on behalf of the Gunditjmara People v Victoria* [2007] FCA 474 (30 March 2007) [38].

40 LexisNexis, *Native Title Service* (at Service 91) [1804].

41 See, eg, Department of Natural Resources and Mines, Queensland, *Guide to Compiling a Connection Report for Native Title Claims in Queensland* (2013); Government of South Australia Crown Solicitor's Office, *Consent Determinations in South Australia: A Guide to Preparing Native Title Reports* (2004); Department of the Premier and Cabinet, Government of Western Australia, *Guidelines for the Provision of Connection Material* (2012).

42 Department of Natural Resources and Mines, Queensland, above n 41, 5.

43 Department of the Premier and Cabinet, Government of Western Australia, above n 41, 3.

44 *Lovett on behalf of the Gunditjmara People v Victoria* [2007] FCA 474 (30 March 2007) [38].

45 Justice Robert French, 'Lifting the Burden of Native Title—Some Modest Proposals for Improvement' (Speech Delivered at the Federal Court Native Title User Group, Adelaide, 9 July 2008). The model proposed by Justice French has been largely adopted by a series of Native Title Amendment (Reform) Bills: Native Title Amendment (Reform) Bill 2011; Native Title Amendment (Reform) Bill (No 1) 2012; Native Title Amendment (Reform) Bill 2014. See also Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Native Title Amendment (Reform) Bill 2011* (2011).

46 Justice Robert French, 'Lifting the Burden of Native Title—Some Modest Proposals for Improvement' (Speech Delivered at the Federal Court Native Title User Group, Adelaide, 9 July 2008).

7.23 A presumption has a specific meaning in a legal context, distinct from its ordinary meaning as an assumption of something as true, or a belief on reasonable grounds.[47]

7.24 A presumption of law is a rule of evidence that affects how a fact in issue is proved. A presumption of law operates so that when a fact—the 'basic fact'—is proved, it must, in the absence of further evidence, lead to a conclusion that another fact—the 'presumed fact'—exists.[48] In other words, a presumption that a fact exists will arise on proof of a basic fact. The presumption will operate unless rebutted by evidence to the contrary.[49] The amount of evidence required in rebuttal differs between presumptions.[50] Some may require 'some' evidence to be adduced, and 'one way of stating the effect of such presumptions is to say that they shift the evidential burden of proof'.[51] Others may be rebutted only by adducing evidence 'sufficiently cogent to persuade the tribunal of fact of the non-existence of the presumed fact'.[52] In other words, they can be seen as shifting the persuasive or legal burden of proof.[53]

7.25 An inference is distinct from a presumption of law. Presumptions have a formal role in the proof of a particular fact. By contrast,

> An inference is a tentative or final assent to the existence of a fact which the drawer of the inference bases on the existence of some other fact or facts. The drawing of an inference is an exercise of the ordinary powers of human reason in the light of human experience; it is not affected directly by any rule of law.[54]

7.26 When an inference is drawn, it may satisfy a burden of proof, but the 'trier of fact decides whether to draw an inference and what weight to give to it'.[55]

7.27 There can be some imprecision in the distinction between presumptions and inferences. Where a fact in issue may be inferred from the proof of another particular fact in a commonly recurring situation, such an inference is often referred to as a 'presumption of fact'.[56] Unlike a presumption of law, a court is not obliged to draw this inference. A presumption of fact plays no formal role in the allocation of a burden of proof. However, it can be said to cast a provisional, or tactical, burden of disproving the fact on the opponent of the issue.[57] As such, 'the party proving the basic fact is

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47 Macquarie Dictionary (Macquarie Library, Revised 3rd Ed, 2001).
48 J D Heydon, LexisNexis, *Cross on Evidence*, Vol 1 (at Service 164) [7240], [7260].
49 Some presumptions of law are irrebuttable. However, the focus here is on rebuttable presumptions. See generally Ibid [7265].
50 Ibid [7290].
51 Ibid [7295].
52 Ibid [7300].
53 Ibid.
54 Thomson Reuters, *The Laws of Australia* (at 1 September 2011) 16 Evidence, '16.2 Proof in Civil Cases' [16.2.270].
55 Ibid.
56 J D Heydon, LexisNexis, *Cross on Evidence*, Vol 1 (at Service 164) [7215]. Heydon notes that presumptions of fact are 'not true presumptions', but that 'nevertheless this misleading connotation of the term "presumption" used in connection with the ordinary processes of inferential reasoning has become so familiar that in most cases the word is hardly likely to be productive of great confusion': Ibid [7255].
57 Ibid [7300].

likely to win on the issue to which the presumed fact relates, in the absence of evidence to the contrary adduced by the other party'.[58]

7.28 In Justice French's model, the facts necessary to satisfy s 223(1) would be presumed to exist on the proof of certain basic facts, namely, that:

- the native title claim group defined in the application applies for a determination of native title rights and interests where the rights and interests are found to be possessed under laws acknowledged and customs observed by the native title claim group;
- members of the native title claim group reasonably believe the laws and customs so acknowledged to be traditional;
- the members of the native title claim group, by their laws and customs, have a connection with the land or waters the subject of the application; and
- the members of the native title claim group reasonably believe that persons from whom one or more of them was descended, acknowledged and observed traditional laws and customs at sovereignty by which those persons had a connection with the land or waters the subject of the application.[59]

7.29 Justice French considered that the presumption should operate subject to proof to the contrary.[60]

7.30 Many stakeholders supported the introduction of a presumption.[61] A number of proponents of a presumption argued that it would reduce the resource burden on claimants to establish the elements necessary to prove the existence of native title,[62] and would place some of that burden more appropriately on state and territory respondent parties.[63] Related to this, a number of submissions argued that a presumption would reduce delay and speed resolution of claims.[64] The National Native Title Council made both these points, arguing that:

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58 Ibid [7215].

59 Justice Robert French, 'Lifting the Burden of Native Title—Some Modest Proposals for Improvement' (Speech Delivered at the Federal Court Native Title User Group, Adelaide, 9 July 2008).

60 Ibid [30].

61 AIATSIS, *Submission 36*; Law Council of Australia, *Submission 35*; National Congress of Australia's First Peoples, *Submission 32*; Kimberley Land Council, *Submission 30*; NSW Young Lawyers Human Rights Committee, *Submission 29*; Central Desert Native Title Services, *Submission 26*; Queensland South Native Title Services, *Submission 24*; Goldfields Land and Sea Council, *Submission 22*; Native Title Services Victoria, *Submission 18*; North Queensland Land Council, *Submission 17*; National Native Title Council, *Submission 16*; Law Society of Western Australia, *Submission 9*; Cape York Land Council, *Submission 7*; Just Us Lawyers, *Submission 2*; Australian Human Rights Commission, *Submission 1*.

62 NSW Young Lawyers Human Rights Committee, *Submission 29*; Native Title Services Victoria, *Submission 18*; National Native Title Council, *Submission 16*; Cape York Land Council, *Submission 7*.

63 National Congress of Australia's First Peoples, *Submission 32*; National Native Title Council, *Submission 16*.

64 NSW Young Lawyers Human Rights Committee, *Submission 29*; Native Title Services Victoria, *Submission 18*; National Native Title Council, *Submission 16*; Law Society of Western Australia, *Submission 9*.

> the adoption of a rebuttable presumption would help reduce the resource burden on the system (especially where continuity is undisputed), helping facilitate the expeditious resolution of native title claims.
>
> Moreover, by reversing the onus of proof, the evidential burden is placed more appropriately on the State, which, by virtue of its 'corporate memory', is in a better position to elucidate on how it colonised or asserted its sovereignty over a claim area.[65]

7.31 Other submissions argued that a presumption would be appropriate on the basis that it was unjust or discriminatory to require native title claimants to prove their customary connection to their territories.[66] The National Congress of Australia's First Peoples argued:

> the current onus of proof mechanism is racially discriminatory as it rests on Aboriginal and Torres Strait Islander Peoples to claim and prove that we have customary connection to our territories. It also prevents Aboriginal and Torres Strait Islander Peoples from exercising and enjoying our rights and freedoms. This procedural requirement merely serves as a barrier to justice and an ongoing defensive mechanism for shielding the historical theft of lands, territories and resources.[67]

7.32 The ALRC considers that the extent of evidence required to establish native title is in tension with the *Native Title Act*'s object to recognise and protect native title.[68] However, the ALRC concludes that, rather than introducing a presumption—a reform affecting how facts in issue in native title matters are proved—it is preferable to amend the definition of native title itself.

7.33 In this regard, the ALRC makes a number of recommendations for change to the legal test for establishing native title, detailed in Chapter 5. The ALRC recommends that the *Native Title Act* make clear that:

- traditional laws and customs may adapt, evolve or otherwise develop (Recommendation 5–1);
- it is not necessary to establish continuity of acknowledgment and observance of traditional laws and customs substantially uninterrupted by each generation since sovereignty (Recommendations 5–2 and 5–3);
- establishing the existence of a society united in and by its acknowledgment and observance of traditional laws and customs is not an independent element of establishing native title (Recommendation 5–4);
- native title rights and interests may be transmitted, transferred between Aboriginal or Torres Strait Islander groups, or otherwise acquired in accordance with traditional laws and customs (Recommendation 5–5).

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65 National Native Title Council, *Submission 16*.
66 National Congress of Australia's First Peoples, *Submission 32*; Native Title Services Victoria, *Submission 18*.
67 National Congress of Australia's First Peoples, *Submission 32*.
68 *Native Title Act 1993* (Cth) s 3(a).

7.34 The ALRC considers that these changes will contribute to lessening the difficulty of the forensic task for claimants, and produce efficiency gains in the native title process, while maintaining the integrity of the doctrinal basis of native title.

7.35 While a presumption in relation to proof of native title has some merit, particularly in light of the difficulties in evidencing circumstances as they existed at sovereignty, the ALRC considers that the benefits of introducing a presumption do not substantially outweigh potential disadvantages, for a number of reasons.[69] It is not clear what effect a presumption would have on a number of aspects of native title proceedings, including the resolution of claims by consent, the resources involved in native title matters, and claimants' control of evidence. The ALRC also considers that the development of native title jurisprudence, as well as case management in native title proceedings, has rendered the case for a presumption less compelling. The ALRC canvassed these issues in detail in the Discussion Paper.[70]

7.36 However, while the ALRC has not recommended that a presumption in relation to proof of native title be introduced into the *Native Title Act*, it considers that there is utility in providing some guidance in the Act as to when inferences in relation to proof of native title may be drawn. This is detailed further below.

Inferences in relation to proof of native title

Recommendation 7–1 The *Native Title Act 1993* (Cth) should provide guidance regarding when inferences may be drawn in the proof of native title rights and interests. The Act should provide that the Court may draw inferences from contemporary evidence that the claimed rights and interests are possessed under the traditional laws acknowledged and traditional customs observed by the native title claim group.

7.37 The ALRC recommends that the *Native Title Act* provide guidance regarding when inferences may be drawn in the proof of native title. In particular, the Act should provide that the Court may infer from contemporary evidence that the claimed rights and interests are possessed under the traditional laws acknowledged and traditional customs observed by the native title claim group. Such a provision may assist in proof of native title, particularly in circumstances where there are limited historical records in relation to the claim area.

7.38 The kinds of inferences that might be drawn from contemporary evidence include, for instance, that present day laws acknowledged and customs observed by the native title claim group have adapted or evolved from those acknowledged and

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69 This point is made by A Frith and M Tehan, *Submission 12*.

70 These matters were canvassed in detail in the Discussion Paper: see Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014) [4.57]–[4.70]. Some submissions in response to the Discussion Paper reiterated their support for the introduction of a presumption: see National Congress of Australia's First Peoples, *Submission 69*; Law Council of Australia, *Submission 64*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; North Queensland Land Council, *Submission 42*.

observed at sovereignty. The ALRC recommends that the *Native Title Act* make clear that it is not necessary to establish that acknowledgment and observance of laws and customs has continued substantially uninterrupted since sovereignty: Recommendations 5–2 and 5–3. However, if these recommendations are not implemented, Recommendation 7–1 may assist in clarifying that the inference that acknowledgment and observance of laws and customs has continued substantially uninterrupted since sovereignty may also be drawn from contemporary evidence.

7.39 Legislative guidance for the drawing of inferences is consistent with the beneficial purpose of the *Native Title Act*. It is also consistent with acknowledging the importance of the recognition of native title, one of the ALRC's guiding principles for reform. It will operate to provide legislative affirmation of the practice of the Federal Court in drawing inferences in relation to proof of native title. Further, it will indicate to state and territory respondent parties that it is appropriate to draw inferences from contemporary evidence when assessing whether a credible basis exists for an application for determination of native title in negotiating determinations of native title by consent.

Why recommend guidance for inferences rather than a presumption?

7.40 As detailed above, a presumption is a rule of law that requires the trier of fact to draw a conclusion that a fact in issue exists on proof of another fact or facts. An inference, on the other hand, is a conclusion that *may* be drawn by the trier of fact on the proof of another fact or facts. Unlike a presumption, the trier of fact is not *required* to draw this conclusion.

7.41 The ALRC did not make a proposal regarding inferences in the Discussion Paper,[71] so received no submissions on this specific point. However, the Law Council of Australia explicitly submitted that guidance for the drawing of inferences should be provided in the Act.[72] Other submissions to the Issues Paper[73] provided some support for the utility of providing guidance for the drawing of inferences. As noted earlier, there may be evidential 'gaps' that exist when seeking to establish, as required by the substantive law of native title, that the laws and customs under which rights and interests are possessed have their origins in those acknowledged and observed at sovereignty. Submissions highlighted this issue. For example, GLSC drew attention to difficulties in bringing evidence to establish native title, noting that:

> In many parts of Australia there is simply a lack of sufficient ethnographic research and other documentary evidence covering the relevant historical periods. And by the time claims come to trial, key witnesses may have died or be otherwise incapable of giving evidence. This means that native title claimants are at an automatic disadvantage in meeting the legal test, for reasons entirely unconnected with the merits of their claim.[74]

71 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014).
72 Law Council of Australia, *Submission 35*.
73 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Issues Paper No 45 (2013).
74 Goldfields Land and Sea Council, *Submission 22*.

7.42 Central Desert Native Title Services, in a submission supporting the introduction of a presumption, noted that a presumption would be beneficial

> where there are gaps in the documentary evidence but where reasonable evidence of contemporary connection could be extrapolated to continuity of connection since sovereignty, for example where connection of grandparents and great grandparents to a particular area are within claimants' living memories.[75]

7.43 The ALRC considers that legislative guidance for inferences would be similarly beneficial in such instances, in providing explicit endorsement that such facts may found an inference as to the existence of facts satisfying s 223. Indeed, the ALRC considers that drawing an inference from contemporary evidence that the claimed rights and interests are possessed under the traditional laws acknowledged and traditional customs observed by the native title claim group can be seen as a 'presumption of fact'—a fact in issue that may be inferred from the proof of another particular fact in a commonly recurring situation. As such, a provisional burden will fall on respondent parties in native title matters to bring evidence to challenge the drawing of such an inference. However, the formal evidential and persuasive burden of proof remains on claimants.

7.44 The ALRC considers that this recommendation, in conjunction with the recommendations to amend the definition of native title, provide much of the benefit of a presumption. It also accords with developing Federal Court jurisprudence on inferences in native title, detailed further below.

Inferences in native title cases

7.45 In *Yorta Yorta* it was observed that in many—perhaps most—native title cases, claimants will invite the Court to draw inferences about the content of traditional laws and customs at times earlier than those described in the claimants' evidence.[76] It is not possible, however, to offer any 'single bright line test' for deciding what inferences may be drawn or when they may be drawn.[77]

7.46 Since *Yorta Yorta*, the Federal Court has given consideration to circumstances in which inferences may be drawn as to, for example, whether laws and customs are 'traditional', or whether such laws and customs have been continuously acknowledged and observed. In situations where the historical record is limited, or silent, in relation to a claim area, there is, as Barker J noted in *CG (Deceased) on behalf of the Badimia*

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75 Central Desert Native Title Services, *Submission 26*.

76 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [80] (Gleeson CJ, Gummow and Hayne JJ). The Court has been prepared, in some native title cases, to draw an inference of continuity of generational transmission of law and custom, or of the claimant group's descent from the original inhabitants of an area at sovereignty, and that the original inhabitants of an area were a society organised under traditional laws and customs: *Neowarra v Western Australia* [2003] FCA 1402 (8 December 2003) [336]; *Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory* (2004) 207 ALR 539, [103]–[110]; *Sampi on behalf of the Bardi and Jawi People v Western Australia* (2010) 266 ALR 537, [64]–[66] (North and Mansfield JJ).

77 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [82] (Gleeson CJ, Gummow and Hayne JJ).

People v Western Australia, 'a question about what reasonable inferences may be drawn by the Court in respect of key issues from the evidence led at trial'.[78]

7.47 Such difficulties of proof are not unique to native title law. Similar issues arise in proof of customary rights under English common law.[79] To establish the existence of a custom enforceable at common law required, among other things, proof that the custom had existed since 'time immemorial'.[80] The difficulty of establishing the existence of a custom from time immemorial was eased by the courts' willingness to infer from 'proof of the existence of a current custom that that custom had continued from time immemorial'.[81]

7.48 In *Gumana v Northern Territory*, Selway J noted the similarities between proof of the existence of traditional laws and customs for the purposes of establishing native title rights and interests, and proof of custom at common law.[82] He observed:

> There is no obvious reason why the same evidentiary inference is not applicable for the purpose of proving the existence of Aboriginal custom and Aboriginal tradition at the date of settlement and, indeed, the existence of rights and interests arising under that tradition or custom.[83]

7.49 Selway J considered that, where there is

- a clear claim of the continuous existence of a custom or tradition that has existed at least since settlement;
- supported by credible evidence from persons who have observed that custom or tradition; and
- evidence of a general reputation that the custom or tradition had 'always' been observed;[84]

then, in the absence of evidence to the contrary, there is an inference that the tradition or custom has existed at least since the date of settlement.[85]

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78 *CG (Deceased) on behalf of the Badimia People v Western Australia* [2015] FCA 204 (12 March 2015) [17].

79 Such customary rights may include, for instance, the use of an access path to a local church: *Brocklebank v Thompson* [1903] 2 Ch 344; or the playing of sports and other pastimes on a piece of land: *New Windsor Corporation v Mellor* [1975] Ch 380. See also LexisNexis, *Halsbury's Laws of England*, Vol 32 (2012) Custom and Usage.

80 LexisNexis, *Halsbury's Laws of England*, Vol 32 (2012) Custom and Usage. See also Ulla Secher, *Aboriginal Customary Law: A Source of Common Law Title to Land* (Hart Publishing, 2014) 305.

81 *Gumana v Northern Territory* (2005) 141 FCR 457, [198].

82 Ibid [197]–[202].

83 Ibid [201].

84 Selway J stated that 'evidence of a "custom" or tradition including evidence of what is believed about a custom or tradition … can be treated as evidence of "reputation" … Evidence can be given … of the "reputation" of the existence, nature and extent of Aboriginal custom by those subject to Aboriginal custom and by those who have studied it over a long period': Ibid [157].

85 Ibid [201].

7.50 The approach to the drawing of inferences set out in *Gumana* has been adopted in a number of subsequent cases.[86] For example, in *AB (deceased) (on behalf of the Ngarla People) v Western Australia (No 4)*, Bennett J accepted the claimants' submission that

> the Court is entitled to draw inferences about the content of the traditional laws and customs at sovereignty from contemporary evidence and that if the evidence establishes a contemporary normative rule, it may be reasonable to find that such a normative rule existed at sovereignty.[87]

7.51 A similar approach is adverted to by Sackville J in *Jango v Northern Territory*, who noted:

> If the indigenous evidence consistently favoured a particular set of laws and customs, an inference might well be available that the laws and customs described by the witnesses have remained substantially intact since sovereignty, or at least that any changes have been of a kind contemplated by pre-sovereignty norms.[88]

7.52 The ALRC considers that Recommendation 7–1, if implemented, will have a flow-on effect to the approach taken by state and territory respondent parties in assessing connection evidence. Submissions and consultations in this Inquiry have indicated that state and territory respondent parties, in some circumstances, are willing to draw inferences in relation to the existence of certain facts when assessing connection evidence provided with a view to resolving a native title determination by consent. Indeed, John Catlin observed that 'consent determinations invariably are a product of a combination of agreed facts and beneficial inferences about the available evidence'.[89] Recommendation 7–1 will operate to provide further impetus to this approach.

7.53 For example, the South Australian Government submitted that it was willing, where appropriate, to draw inferences relating to information that is:

- genealogical—many asserted relationships are accepted by the State without detailed analysis;
- historical—the State often relies on historical assertions made by applicants where there is no other evidence;

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86 *Sampi on behalf of the Bardi and Jawi People v Western Australia* (2010) 266 ALR 537, [63]–[65]; *Griffiths v Northern Territory* (2006) 165 FCR 300, [580]; *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* (2007) 238 ALR 1, [341]; *Wyman on behalf of the Bidjara People v Queensland (No 2)* [2013] FCA 1229 (6 December 2013) [479]; *Dempsey on behalf of the Bularnu, Waluwarra and Wangkayujuru People v Queensland (No 2)* [2014] FCA 528 (23 May 2014) [132]–[134]; *AB (deceased) (on behalf of the Ngarla People) v Western Australia (No 4)* [2012] FCA 1268 (21 November 2012) [724].

87 *AB (deceased) (on behalf of the Ngarla People) v Western Australia (No 4)* [2012] FCA 1268 (21 November 2012) [724].

88 *Jango v Northern Territory* (2006) 152 FCR 150, [504]. In that case, Sackville J found that this evidence was not consistent: [504].

89 John Catlin, 'Recognition Is Easy' in Toni Bauman and Lydia Glick (eds), *The Limits of Change: Mabo and Native Title 20 Years On* (AIATSIS, 2012).

- anthropological—the State often accepts that contemporary differences from the historical description of a group's traditional law and custom at sovereignty reflect an adaptation rather than a break in those traditions.[90]

7.54 In reasons accompanying a determination of native title by consent in *Lander v South Australia*, Mansfield J agreed with the State of South Australia's assessment that the evidence supported

> the inference that the pre-sovereignty normative society has continued to exist throughout the period since sovereignty, and whilst there has been inevitable adaptation and evolution of the laws and customs of that society, there is nothing apparent in the Evidence to suggest the inference should not be made that the society today (as descendents of those placed in the area in the earliest records) acknowledges and observes a body of laws and customs which is substantially the same normative system as that which existed at sovereignty.[91]

7.55 In relation to the western desert region of Western Australia, Central Desert Native Title Services (CDNTS) noted that Western Australia had generally accepted continuity of connection on the basis of evidence from 'current senior claimants who have living memories of their grandparents and great grandparents'.[92] In this regard, CDNTS submitted, 'there effectively exists an unstated "presumption of continuity" for native title claims in the region'.[93]

7.56 The Northern Territory Government also submitted that 'in practice, a rebuttable presumption operates in the context of resolution of pastoral estate claims'.[94] Additionally, the Northern Territory Government detailed the development of its streamlined process to resolve pastoral estate claims, which includes 'not disputing the existence of native title holding group at sovereignty (subject to extinguishment)'.[95]

7.57 The ALRC considers that an inference from contemporary evidence that the claimed rights and interests are possessed under the traditional laws acknowledged and traditional customs observed by the native title claim group is not prevented from being drawn when there exists any conflicting or equivocal historical evidence.[96] While weight should be attached to such evidence, the ALRC considers that the correct approach is that contended for by the claimants in *CG (Deceased) on behalf of the Badimia People v Western Australia*:

> where the ethnographic record is capable of more than one interpretation and on one interpretation it is consistent with other evidence in the proceeding (here the Aboriginal evidence) but on the other interpretation it is not, then the interpretation which is consistent with the other evidence should be preferred.[97]

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90 South Australian Government, *Submission 34*.
91 *Lander v South Australia* [2012] FCA 427 (1 May 2012) [48].
92 Central Desert Native Title Services, *Submission 26*.
93 Ibid. However, there was also some criticism that state respondent parties were not readily drawing inferences as to continuity of connection: see Queensland South Native Title Services, *Submission 24*.
94 Northern Territory Government, *Submission 31*.
95 Ibid.
96 As contended by the State of Western Australia in *CG (Deceased) on behalf of the Badimia People v Western Australia* [2015] FCA 204 (12 March 2015) [384].
97 Ibid [451].

7.58 The ALRC considers that, similarly to proof of custom at common law, it is appropriate to make clear in the *Native Title Act* that the inference that the claimed rights and interests are possessed under traditional laws and customs is available from contemporary evidence. Such an approach is consistent with the ALRC's guiding principles for reform in this Inquiry, allowing for due recognition of the rights of Aboriginal and Torres Strait Islander peoples, as well as assisting in the resolution of native title claims. Moreover, this approach to the drawing of inferences is increasingly necessary if the beneficial purpose of the Act is to be sustained as the date of Crown assertion of sovereignty grows more distant.

8. The Nature and Content of Native Title

Contents

Summary

8.1 'Native title' and 'native title rights and interests' are defined in s 223(1) of the *Native Title Act 1993* (Cth) ('*Native Title Act*'). The content of native title rights and interests is determined in accordance with the traditional laws and customs of the native title claim group. Section 223(2) of the *Native Title Act* provides a non-exhaustive list of some native title rights and interests. Section 225 of the Act requires a determination of the nature and extent of the native title rights and interests that are recognised.

8.2 The ALRC was asked to examine whether the *Native Title Act* should be clarified to provide that native title rights and interests 'can include rights and interests of a commercial nature'. This chapter outlines the relevant provisions in the *Native Title Act* and case law to provide a context for the recommendations. Recommendation 8–1 draws on the approach to native title rights taken in *Akiba v Commonwealth*

('*Akiba HCA*').[1] It recommends that s 223(2) of the *Native Title Act* be amended to confirm that native title rights and interests may comprise a broadly-framed right that may be exercised for any purpose, including commercial or non-commercial purposes where the evidence supports such a finding.[2] The Act should further provide a non-exhaustive list of kinds of native title rights and interests, including trading rights and interests.[3] The ALRC recommends that the terms 'commercial purposes' and 'trading' should not be defined in the Act.[4]

8.3 The potential for cultural knowledge to be considered as a native title right and interest is discussed, and further examination of the issue is recommended.

Terms of Reference

8.4 The ALRC was directed, under the Terms of Reference, to inquire into and report on Commonwealth native title laws and legal frameworks in relation to 'connection requirements relating to the recognition and scope of native title rights and interests, including … whether there should be … clarification that "native title rights and interests" can include rights and interests of a commercial nature'.

8.5 The Terms of Reference identify a range of factors for the ALRC to consider as context for its examination of 'what, if any, changes could be made to improve the operation of Commonwealth native title laws and legal frameworks'. These factors include the capacity of native title to support indigenous economic development and to generate sustainable long-term benefits for Indigenous Australians, as well as delays to the resolution of claims caused by litigation. The recommendations in this chapter balance these considerations against the need for certainty for other interests in the native title system, and the need to encourage claims resolution.

8.6 The ALRC was asked to consider the Preamble and objects of the *Native Title Act* in making any recommendations.[5] The guiding principles for this Inquiry comprise:

- acknowledging the importance of the recognition of native title;
- acknowledging all interests in the native title system;
- encouraging the timely and just resolution of native title determinations;
- adopting reforms which are consistent with Australia's international obligations; and
- promoting the sustainable, long-term social, economic and cultural development for Aboriginal and Torres Strait Islander peoples.

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1 *Akiba v Commonwealth* (2013) 250 CLR 209.
2 Rec 8–1, see recommended text for s 223(2)(a).
3 Rec 8–1, see recommended text for s 223(2)(b).
4 Rec 8–2.
5 See Ch 1.

The recognition of native title rights and interests of a commercial nature

8.7 The ALRC received a range of submissions that addressed the general question identified in the Terms of Reference as to whether there should be 'clarification that "native title rights and interests" can include rights and interests of a commercial nature' in the *Native Title Act*. The Terms of Reference were given to the ALRC before significant High Court judgments that dealt with relevant issues were handed down. The submissions therefore needed to be framed against the decision in *Akiba HCA*.[6]

8.8 Some stakeholders noted the need for the *Native Title Act* to give substance to the recognition of native title rights and interests. The National Native Title Council ('NNTC') submitted that:

> Whilst the Preamble to the Act states that the legislation is a pathway to the 'full recognition and status' of Indigenous people, this has not been borne out with regard to Indigenous economic aspirations. The proposal would go some way to fulfilling such aspirations, squarely embedding commercial rights and interests within Australia's native title regime.[7]

8.9 Other stakeholders saw native title rights and interests of a commercial nature as assisting native title holders to develop economic opportunities. Central Desert Native Title Services ('CDNTS') submitted that:

> Recognition that there were commercial activities and trade within and amongst Aboriginal groups and outsiders will provide native title groups with expanded opportunities for economic development and partnerships with existing businesses and industry.[8]

8.10 There was general acknowledgment that following *Akiba HCA* native title can comprise rights and interests of a commercial nature.

8.11 The Government of Western Australia indicated that '*Akiba* demonstrates that such [commercial] rights are capable of recognition where the evidence supports a determination of commercial rights'. It cautioned against any clarification that went further than the law in *Akiba HCA*.[9]

8.12 The Queensland Government also noted:

> Given the current rate of resolution of native title claims and the associated outcomes being presently achieved, there is little basis for significant amendments to the NTA on those issues... The Federal Court has confirmed that native title rights may comprise commercial rights..[10]

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6 The Terms of Reference were issued on 3 August 2013, four days before the High Court of Australia handed down its judgments in *Akiba v Commonwealth* (2013) 250 CLR 209.

7 National Native Title Council, *Submission 57*.

8 Central Desert Native Title Service, *Submission 48*.

9 Western Australian Government, *Submission 43*.

10 Queensland Government, *Submission 28*.

8.13 The Minerals Council of Australia ('MCA') supported 'the recognition of commercial rights where they can be established under existing law', but considered statutory clarification as unnecessary.[11]

Relevant provisions in the *Native Title Act*

8.14 The *Native Title Act* contains a number of provisions relevant to the nature and content of native title rights and interests in an application for a determination of native title.[12] These general provisions for recognising native title are the ones which also determine whether native title includes commercial native title rights and interests. An overview of the statutory provisions and relevant case law therefore is provided before discussing Recommendation 8–1, which references that law.

8.15 In commencing an application for a determination of native title, the applicant must file an affidavit which includes 'a description of the native title rights and interests claimed in relation to particular land or waters (including any activities in exercise of those rights and interests)'.[13] A broad description of the rights and interests is generally sufficient.[14]

8.16 Section 223 is the key provision. Section 223(1)—which is discussed in Chapter 4—defines 'native title' and 'native title rights and interests'. Section 223(1) provides that

> (1) 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 traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
>
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
>
> (c) the rights and interests are recognised by the common law of Australia.

8.17 Section 223(1) is the substantive provision, with s 223(2) providing a non-exhaustive list of native title rights and interests:

> Without limiting subsection (1), ***rights and interests*** in that subsection includes hunting, gathering, or fishing, rights and interests.

8.18 Section 223(2) was enacted to provide 'an example of the type of rights and interests that might comprise native title'.[15] Accordingly, native title rights and

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11 Minerals Council of Australia, *Submission 65*.
12 Note that other provisions not discussed will be relevant.
13 *Native Title Act 1993* (Cth) s 62(2)(d). See also Ibid s 62(2)(e), (f).
14 *Strickland v Native Title Registrar* (1999) 168 ALR 242, [60].
15 Explanatory Memorandum, Native Title Bill 1993 (Cth), Part B, 77 (s 223 was originally numbered s 208 in the Bill).

interests may include, but are not limited to, fishing, hunting or gathering rights and interests.

8.19 Section 225 defines a 'determination of native title' and relevantly requires the listing of the nature and extent of the native title rights and interests found to exist in relation to the determination area.[16]

8.20 As well as the substantive provisions for establishing native title, s 211 operates so that certain activities by native title holders—that would otherwise be contrary to a law of the Commonwealth, state or territory—are not prohibited or restricted.

The nature and content of native title rights and interests

8.21 Whether native title includes rights and interests of a commercial nature—including rights to trade and to take resources for commercial purposes—raises central questions about the scope of native title rights and interests. This question goes to both the legal nature of native title rights and interests and the content of native title rights and interests.

8.22 The 'nature' of native title refers to the *legal* nature of the rights and interests.[17] 'The ambit of the native title right is a finding of law'.[18] However, in terms of the 'content' of native title, as noted by Hayne, Kiefel and Bell JJ in *Akiba HCA*:

> Paragraphs (a) and (b) of s 223(1) [of the *Native Title Act*] indicate that it is from the traditional laws and customs that native title rights and interests derive, not the common law.[19]

Accordingly, the content of the native title rights and interests is 'founded upon' the traditional laws and customs of Aboriginal and Torres Strait Islander peoples.[20] This is ascertained by reference to the evidence brought in each claim.

Legal 'nature' of native title rights and interests

8.23 There have been changes in how native title has been understood since the introduction of the *Native Title Act*. In *Mabo v Queensland [No 2]* ('*Mabo [No 2]*'), Brennan J referred to an earlier common law case which had described native title as,

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16 *Native Title Act 1993* (Cth) s 225(b).

17 *Western Australia v Brown* (2014) 306 ALR 168, [34]; *Akiba v Commonwealth* (2013) 250 CLR 209, [61] (Hayne, Kiefel and Bell JJ) citing *Western Australia v Ward* (2002) 213 CLR 1, [468] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

18 *Yanner v Eaton* (1999) 201 CLR 351, [109] (Gummow J).

19 *Akiba v Commonwealth* (2013) 250 CLR 209, [55] citing *Western Australia v Ward* (2002) 213 CLR 1, [20] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

20 *Congoo on behalf of the Bar-Barrum People No 4 v Queensland* (2014) 218 FCR 358, [35] (North and Jagot JJ). 'Native title has its origin in the traditional laws acknowledged and the customs observed by the indigenous people who possess the native title': *Fejo v Northern Territory* (1998) 195 CLR 96, [46] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) citing *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 58 (Brennan J).

'burdening or qualifying' the radical title of the Crown. The radical title of the Crown was held to be qualified by a right of beneficial user.[21]

8.24 The formal order made by the High Court in *Mabo [No 2]* was to declare 'that the Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the [lands of the Murray Islands]', although subject to inconsistent grants of interests and extinguishment by legislative power of the Queensland Government, subject to Commonwealth laws.[22]

8.25 The *Native Title Act* was subsequently enacted. A series of native title cases in 2002 reviewed the position in *Mabo [No 2]*.[23] In *Western Australia v Ward* ('*Ward HCA*'),[24] the High Court strongly emphasised the Act as the 'starting point'.[25] The majority of the Court in *Ward HCA* gave emphasis to ideas of co-existence of native title with other rights and interests. In effect, the majority adopted reasoning that pointed to native title being understood more typically as a bundle of rights, rather than a title to land (beneficial user).

8.26 Thus the *Native Title Act* emerged as the central mechanism for recognition of Aboriginal and Torres Strait Islander peoples' rights and interests in land and waters.[26] Ultimately though, it is the 'rights *only* [that] are recognised'—not the surrounding complex of law, custom and normative society.[27] Disentangling the rights from the surrounding laws and society requires a 'process of translation entail[ing] a complex fracturing of the traditional laws and customs'.[28] While the rights only are recognised,[29] proof of native title requires a more elaborate investigation into laws and customs as reinforced in *Members of the Yorta Yorta Community v Victoria* ('*Yorta Yorta*').[30]

8.27 Courts have indicated that native title is not to be understood in terms equivalent to common law property interests, but they often still tend to draw on these concepts,[31]

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21 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 50 (Brennan J); *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 403 (Viscount Haldane).

22 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 76.

23 Ulla Secher, *Aboriginal Customary Law: A Source of Common Law Title to Land* (Hart Publishing, 2014) 136.

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

25 'Yet again it must be emphasised that it is to the terms of the NTA that primary regard must be had, and not the decisions in *Mabo [No 2]* or *Wik*. The only present relevance of those decisions is for whatever light they cast on the NTA': Ibid [25] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

26 'Native title is recognised, and protected, in accordance with this Act': *Native Title Act 1993* (Cth) s 10.

27 Melissa Perry, 'Characterising Native Title Rights: A Desert Rose by Any Other Name...' (Paper Presented at AIATSIS National Native Title Conference 2014, Coffs Harbour, 4 June 2014) 2.

28 Ibid; *Western Australia v Ward* (2002) 213 CLR 1, [14] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

29 See Ch 2.

30 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422. See Ch 4.

31 'Because native title has its origin in traditional laws and customs, and is neither an institution of the common law nor a form of common law tenure, it is necessary to curb the tendency (perhaps inevitable and natural) to conduct an inquiry about the existence of native title rights and interests in the language of the common law property lawyer': *Commonwealth v Yarmirr* (2001) 208 CLR 1, [11] (Gleeson CJ, Gaudron, Gummow and Hayne JJ). This temptation is not always avoided; see Patricia Lane, 'Native Title—The End of Property As We Know It?' (2000) 8 *Australian Property Law Journal* 1.

using language like 'bundle of rights'. By contrast, the former Aboriginal and Torres Strait Islander Social Justice Commissioner, Professor Mick Dodson, stated:

> The recognition of native title at common law, and for the purposes of the NTA, must be on terms that are consistent with those laws and customs. … This means that the content of native title must be determined in accordance with our meanings of land ownership.[32]

8.28 Regard to the culturally distinct, or sui generis, nature of native title is compelling at one level as giving effect to Aboriginal and Torres Strait Islander peoples' distinctive laws and customs. Commentators suggest, however, that this characterisation of native title rights and interest may make native title a more 'vulnerable right'.[33]

8.29 Dr Sue Jackson and Professor Poh-Ling Tan submitted that '[j]urisprudence in other common law countries provides a wider spectrum of potential legal understanding of the nature of such rights', than has been the case in Australia.[34]

A 'bundle of rights'

8.30 The prevailing view of the nature and content of native title is hybrid, drawing on traditional laws and customs for content, but also at times idiosyncratically adopting common law terms to describe the nature or character of the rights. In *Ward HCA*, the High Court indicated the 'bundle of rights' metaphor for native title was useful for two reasons.[35] The Court explained:

> It draws attention first to the fact that there may be more than one right or interest and secondly to the fact that there may be several *kinds* of rights and interests in relation to land that exist under traditional law and custom.[36]

8.31 The High Court also considered in what circumstances native title might involve a right of exclusive possession or use of land and waters. The Court noted that:

> A determination of native title must comply with the requirements of s 225. In particular, it must state the *nature* and *extent* of the native title rights and interests in relation to the determination area …
>
> It is necessary to recognise that the holder of a right, as against the whole world, to possession of land, may control access to it by others and, in general, decide how the land will be used. But without a right of possession of that kind, it may greatly be doubted that there is any right to control access to land or make binding decisions about the use to which it is put. To use those expressions in such a case is apt to mislead. Rather, as the form of the Ward claimants' statement of alleged rights might suggest, it will be preferable to express the rights by reference to the activities that may be conducted, as of right, on or in relation to the land or waters.[37]

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32 Law Council of Australia, *Submission 35*, quoting Mick Dodson.
33 Maureen Tehan, 'A Hope Disillusioned, an Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the Native Title Act' (2003) 27 *Melbourne University Law Review* 523, 563.
34 S Jackson and PL Tan, *Submission 44*.
35 *Western Australia v Ward* (2002) 213 CLR 1, [76]. (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
36 Ibid [95].
37 Ibid [51]–[52].

8.32 Since that time, native title determinations may include exclusive use and possession, where the court has been satisfied that rights of control of access are found under the relevant traditional laws and customs. More typically, determinations have involved lists of activities which native title holders are able to undertake on the land and waters claimed. The distinction turns on whether the evidence supports exclusive use and enjoyment under laws and customs, and whether there has been extinguishment of the right to control access.[38]

8.33 The identification of the character of the rights and interests in *Ward HCA* was held to be necessary to determine whether native title rights and interests had been extinguished.[39] Native title may be extinguished by the legislative or executive acts of governments.[40] Extinguishment is outside the Terms of Reference for this Inquiry, but whether a native title right is extinguished or merely regulated is relevant to the scope—or character—of native title.[41] The test for extinguishment is if the legislative or executive acts are inconsistent with the claimed native title rights and interests.[42] In *Western Australia v Brown* (‘*Brown*’) the High Court confirmed that ‘inconsistency is that state of affairs where the existence of one right necessarily implies the non-existence of the other’.[43]

8.34 In *Akiba HCA*, the High Court held that a native title right should not be ‘severed or cut down’ into incidents.[44] In the past, the High Court had held that native title may be partially extinguished.[45]

8.35 Commentators suggest that partial extinguishment, together with the shift from a clear and plain intention to an ‘inconsistency test’ for extinguishment, has led to an ‘over-particularisation’[46] of the rights and interests that make up native title, and to ‘definitional over-specificity’.[47] Commentators contend that the ‘bundle of rights’ approach has encouraged the understanding of native title rights and interests as disaggregated.[48]

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38 *Sampi on behalf of the Bardi and Jawi People v Western Australia* (2010) 266 ALR 537, [147]–[153].

39 *Western Australia v Ward* (2002) 213 CLR 1, [94], [468].

40 Ibid [26] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

41 See, eg, *Akiba v Commonwealth* (2013) 250 CLR 209.

42 *Western Australia v Ward* (2002) 213 CLR 1, [26], [78] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Western Australia v Brown* (2014) 306 ALR 168, [33]; *Akiba v Commonwealth* (2013) 250 CLR 209, [31]–[35] (French CJ and Crennan J); [52], [62] (Hayne, Kiefel and Bell JJ). See also *Native Title Act 1993* (Cth) pt 2 div 2B; s 237A.

43 *Western Australia v Brown* (2014) 306 ALR 168, [38].

44 *Akiba v Commonwealth* (2013) 250 CLR 209, [26].

45 *Western Australia v Ward* (2002) 213 CLR 1, [468].

46 Sean Brennan, ‘Statutory Interpretation and Indigenous Property Rights’ (2010) 21 *Public Law Review* 239, 259.

47 Paul Finn, ‘*Mabo* into the Future: Native Title Jurisprudence’ (2012) 8 *Indigenous Law Bulletin* 5, 8 (‘the fragmentation of native title rights and interests … 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’); Simon Young, *Trouble with Tradition: Native Title and Cultural Change* (Federation Press, 2008) 297, 361–2.

48 For discussion see Katy Barnett, ‘Western Australia v Ward: One Step Forwards and Two Steps Back: Native Title and the Bundle of Rights Analysis’ [2000] *Melbourne University Law Review* 462.

8.36 Some stakeholders suggest a 'bundle of rights' is inapplicable:

> The bundle of rights concept of property derives from mainstream Anglo-American legal philosophy and one may well question what place it has in native title, particularly because native title is viewed by Aboriginal and Torres Strait Islander people as being holistic in nature.[49]

8.37 The combined effect has meant that native title is often associated with subsistence-style 'uses', incidents or activities rather than broader rights.[50] However, in *Akiba HCA*, French CJ and Crennan J held 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.[51]

8.38 The 'important jurisprudential move toward a more holistic concept of native title' by the High Court was noted in submissions.[52]

The content of native title rights and interests

8.39 Traditional laws and customs of the claim group provide the content of native title.[53] As these laws and customs are heterogeneous, the content of native title is variable.[54] The identification of native title rights and interests is a question of fact,[55] dependent on the evidence in each claim.

8.40 The importance of evidence was apparent in the Federal Court decision in *Akiba v Queensland (No 3)* ('*Akiba FCA*') where the native title right found was 'to take for any purpose resources in the native title areas'. There was a 'long and well chronicled history'[56] that 'marine products were historically, and are today, taken for the purpose of exchange and sale'.[57] The trial judge, Finn J, commented that 'the evidence

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49 North Queensland Land Council, *Submission 17*.

50 French CJ and Crennan J noted 'that proposition [ie a broadly framed right] 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': *Akiba v Commonwealth* (2013) 250 CLR 209, [21].

51 Ibid.

52 See, eg, AIATSIS, *Submission 70*.

53 See, eg, *Yanner v Eaton* (1999) 201 CLR 351, [72] (Gummow J); *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 58 (Brennan J).

54 *Yanner v Eaton* (1999) 201 CLR 351, [72] (Gummow J).

55 'The … incidents of native title must be ascertained as a matter of fact by reference to those laws and customs': *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 58 (Brennan J).

56 *Akiba v Queensland (No 2)* (2010) 204 FCR 1, [526].

57 Ibid [527]. For discussion, see Lauren Butterly, 'Before the High Court: Clear Choices in Murky Waters: *Leo Akiba on Behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia*' (2013) 35 *Sydney Law Review* 237; and Lauren Butterly, 'Changing Tack: Akiba and the Way Forward for Indigenous Governance of Sea Country' <http://search.informit.com.au/documentSummary; dn=234915685257993;res=IELIND>.

establishes beyond question that the Islanders sold marine resources for money … The Islanders were, and are, trading fish'.[58] The South Australian Government observed that 'there was significant and compelling evidence in that claim of extensive trade and bartering of marine resources'.[59] In other instances the evidence may lead to a different finding. With respect to *Akiba FCA*, the Western Australian Government submitted that 'evidence of that type has not been found to exist elsewhere'.[60]

8.41 In *Banjima People v Western Australia (No 2)* ('*Banjima*'), the trial judge, Barker J, distinguished the evidence before him from that in *Akiba FCA*:

> The situation is not akin to the circumstances in which the claimants in *Akiba (No 3)* were found traditionally to take whatever resources they found at sea and were apt to trade and use it however they could.[61]

8.42 Rather, the Federal Court in *Banjima* found that particular resources were taken for particular uses, with limited evidence of trade in resources.[62] The claimed right 'to manufacture and trade the resources of the land and waters' was not found on the evidence.[63] Similarly, the Northern Territory Government referred to the Federal Court's decision in *Yarmirr v Northern Territory*,[64] where Olney J had concluded that '[t]he evidence does not support the claim that the applicants enjoy a native title right or interest to trade in the resources of the claimed area'.[65]

8.43 The case law at times has conflated a native title right with the evidence of its exercise. As explained in *Yorta Yorta*, by Gleeson CJ, Gummow and Hayne JJ, the 'exercise of native title rights or interests may constitute powerful evidence of both the existence of those rights and their content'.[66] However, they observed that the relevant statutory inquiry is 'directed to possession of the rights or interests, not their exercise'.[67]

8.44 Gaudron and Kirby JJ, who were in the minority in *Yorta Yorta*, expressed the view that 'it is not necessary, pursuant to s 223(1)(a), to establish that those rights and interests have been continuously availed of in relation to land, or even, that they are presently availed of'.[68]

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58 *Akiba v Queensland (No 2)* (2010) 204 FCR 1, [528].
59 South Australian Government, *Submission 68*. See also Northern Territory Government, *Submission 31*: the determination of the right 'was made on the basis of a factual foundation; that is that the traditional laws acknowledged and customs observed by the native title holders evidenced the existence of the right'.
60 Western Australian Government, *Submission 43*.
61 *Banjima People v Western Australia (No 2)* (2013) 305 ALR 1, [783].
62 Ibid [783]–[784].
63 Ibid [788], [799], [802].
64 Northern Territory Government, *Submission 31*.
65 *Yarmirr v Northern Territory [No 2]* (1998) 82 FCR 533, 588.
66 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [84].
67 Ibid.
68 Ibid [103].

8.45 The Federal Court, in the Pilki People's and the Birriliburu People's native title claims, remarked that:

> In many cases, proof of activities undertaken pursuant to laws or customs will assist in proving the existence of the right. But evidence of the activity is not necessary. Thus, if the applicants had not shown that they traditionally accessed and took resources for commercial purposes, they could still show that they had the right to do so if there were traditional laws or customs which gave them such a right. In the same way, the holders of freehold do not need to show that they have leased out their properties to prove that they have the right to do so.[69]

The specification of the right

8.46 Native title rights may be specified across a broad spectrum.[70] Perry J, writing extra-curially, stressed that how a native title right is expressed 'can matter greatly'.[71] Claimants' legal representatives specify the rights claimed on the basis of claimant and expert evidence in an application for a determination of native title.[72] Some submissions suggested that claimants routinely seek to frame rights broadly.[73] The South Australian Government submitted that:

> While many groups currently accept a fairly standard description of their native title rights and interests and the courts are tending towards a more generalised formulation, there are a number that exhibit a novel approach contrary to established jurisprudence.[74]

8.47 In *Akiba FCA*, the relevant native title right claimed was 'a right to access and take marine resources as such—a right not circumscribed by the use to be made of the resource taken'.[75] The High Court found that this right was limited in that it was non-exclusive,[76] and in that it did not exist in respect of minerals and petroleum resources.[77]

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69 *Willis on behalf of the Pilki People v Western Australia* [2014] FCA 714 (4 July 2014) [118]; *BP (Deceased) on behalf of the Birriliburu People v Western Australia* [2014] FCA 715 (4 July 2014) [89]. At the time of writing an appeal by the State of Western Australia in respect of the Pilki People's claim was about to be heard by the Full Federal Court (May 2015). The Western Australian Government submitted that '[i]mportant aspects of the law which require clarification include (a) whether evidence of activities undertaken pursuant to traditional laws and customs is required to establish the right and (b) the relevance of adaptation and change to the recognition of rights of a commercial nature': Western Australian Government, *Submission 43*.

70 See, eg, J Altman, *Submission 27*. He submitted that 'rights and interests in native title determinations can vary considerably, not just between determinations of exclusive or non-exclusive possession, but also within each category and between States and Territories … such an approach makes for a high degree of variability and potential inequity'.

71 Melissa Perry, 'Characterising Native Title Rights: A Desert Rose by Any Other Name...' (Paper Presented at AIATSIS National Native Title Conference 2014, Coffs Harbour, 4 June 2014).

72 Commentators suggest that claiming a broader right rather than highly specific native title rights better reflects 'the relationship of people to country under their laws and customs'. Michael Meegan and Robert Blowes, 'Pleadings, Limited Trials and Extinguishment Principles' (Paper Presented at AIATSIS National Native Title Conference 2014, Coffs Harbour, 4 June 2014) 13.

73 Central Desert Native Title Services, *Submission 26*; Queensland South Native Title Services, *Submission 24*.

74 South Australian Government, *Submission 34*.

75 *Akiba v Queensland (No 2)* (2010) 204 FCR 1, [847]. Note that other rights were claimed in *Akiba FCA* as well: Ibid [512]. Not all were established.

76 *Akiba v Commonwealth* (2013) 250 CLR 209, [1].

77 *Akiba v Queensland (No 2)* (2010) 204 FCR 1, [847].

Native title rights to petroleum and minerals are general exclusions from consent determinations. The native title right set out in the order of the determination was 'the right to access resources and take for any purpose resources' in the determined areas.[78]

8.48 A native title right, 'to take for any purpose resources' of the claim area, was found on the evidence in the later cases of *Willis on behalf of the Pilki People v Western Australia* and *BP (Deceased) on behalf of the Birriliburu People v Western Australia*. Both concerned claims over land.[79]

Clarifying the scope of native title rights and interests

Recommendation 8–1 Without limiting s 223(1) of the *Native Title Act 1993* (Cth), this recommendation is intended to give effect to the principle of a broadly defined native title right as recognised in *Akiba v Commonwealth* (2013) 250 CLR 209 and *Western Australia v Brown* (2014) 306 ALR 168; to reflect that a native title right can be exercised for any purpose (including commercial purposes); and to provide a non-exhaustive list of native title rights and interests.

Section 223(2) of the *Native Title Act 1993* (Cth) should be repealed and substituted with a subsection that provides:

> Without limiting subsection (1), native title rights and interests in that subsection:
>
> (a) may comprise a right that may be exercised for any purpose, including commercial or non-commercial purposes; and
>
> (b) may include, but are not limited to, hunting, gathering, fishing, and trading rights and interests.

8.49 Recommendation 8–1 addresses the Terms of Reference which ask whether there should be 'clarification that "native title rights and interests" can include rights and interests of a commercial nature'. The ALRC recommends repeal of the current s 223(2) of the *Native Title Act* and adoption of a new subsection, without limiting the operation of s 223(1) and s 211 of the *Native Title Act*.

8.50 Section 223(1) is the substantive provision which defines native title and the manner in which native title rights and interests are recognised. The ALRC has retained the original intent of s 223(2) as not limiting the operation of s 223(1).[80] The ALRC considers that native title rights and interests will continue to be recognised pursuant to the substantive provision, and in conjunction with s 225 of the *Native Title Act*. The intention is that s 223(2) continues its clarifying or illustrative function.

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78 *Akiba v Commonwealth* (2013) 250 CLR 209, [1].

79 *Willis on behalf of the Pilki People v Western Australia* [2014] FCA 714 (4 July 2014) [121]; *BP (Deceased) on behalf of the Birriliburu People v Western Australia* [2014] FCA 715 (4 July 2014) [97]. At the time of writing this report, both cases were on appeal.

80 Explanatory Memorandum, Native Title Bill 1993 (Cth), Part B, 77.

8.51 The ALRC considers that s 223(2) should be updated to accord with key principles from the case law. Accordingly, the recommendation draws upon the principles from *Akiba HCA*, in which the High Court sets out general propositions about the nature and content of native title rights and interests of wider application, although it examines a specific native title right.

8.52 The recommended s 223(2)(a) adopts language that reflects the concept of a widely-framed right that may be exercised for any purpose (commercial and non-commercial), while allowing for future application of the principles to specific claims, and for determinations to turn on the evidence adduced.

8.53 The recommended s 223(2)(b) is to continue to provide an indicative, non-exhaustive listing of native title rights and interests but also to clarify that native title rights and interests are not confined to the usufructuary rights currently listed in s 223(2). The list includes a native title right to trade in order to clarify the law on this point.

Commercial native title rights

8.54 There was a spectrum of views expressed as to whether clarification of the statute was necessary following the decision in *Akiba HCA* and the subsequent decision of the High Court in *Brown*.[81] A range of stakeholders supported the position that native title rights and interests can be exercised for commercial benefit.[82] Some stakeholders stated that the current s 223 is 'out of step with jurisprudence concerning the nature and articulation of native title rights'.[83] Further, some noted that such a clarification would align with the the *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP').[84]

8.55 Other stakeholders viewed amendment to the *Native Title Act* as unnecessary,[85] as the case law provides sufficient guidance,[86] and they considered that recognition of commercial rights will depend on the evidence.[87] Some considered that development of

81 *Western Australia v Brown* (2014) 306 ALR 168.

82 AIATSIS, *Submission 70*; National Congress of Australia's First Peoples, *Submission 69*; NTSCORP, *Submission 67*; Indigenous Land Corporation, *Submission 66*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; National Native Title Council, *Submission 57*; Queensland South Native Title Services, *Submission 55*; Native Title Services Victoria, *Submission 45*; Native Title Services Victoria, *Submission 18*.

83 AIATSIS, *Submission 70*.

84 *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st Sess, 107th Plen Mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007). See, eg, National Congress of Australia's First Peoples, *Submission 69*; J Altman, *Submission 27*.

85 South Australian Government, *Submission 68*; National Farmers' Federation, *Submission 56*; The Chamber of Minerals and Energy of Western Australia, *Submission 49*; Chamber of Minerals and Energy of Western Australia, *Submission 21*; Law Society of Western Australia, *Submission 9*.

86 National Farmers' Federation, *Submission 56*; National Farmers' Federation, *Submission 14*; Law Society of Western Australia, *Submission 9*.

87 Northern Territory Government, *Submission 71*; South Australian Government, *Submission 68*; National Farmers' Federation, *Submission 56*; Northern Territory Government, *Submission 31*; Western Australian Fishing Industry Council, *Submission 23*; Chamber of Minerals and Energy of Western Australia, *Submission 21*.

the case law was preferable.[88] Stakeholders suggested the ALRC should 'not unduly limit the interpretation of those rights by future courts'.[89] The Western Australian Government contended that 'the law in relation to commercial rights is not settled'.[90]

8.56 The Chamber of Minerals and Energy of Western Australia ('CME') and the MCA submitted that the impacts of any change must be clearly understood and quantified.[91] Some stakeholders indicated that statutory clarification may itself cause uncertainty and ambiguity requiring further interpretation by the courts,[92] and that amending the Act, 'could lead to further litigation and testing in court. This will negatively impact upon the expediency of claim determinations and create uncertainty within the system'.[93] CME noted:

> The current legislative framework and case law recognises native title rights and interests of a commercial nature can exist, depending on the facts and circumstances of each case. There is a significant risk any amendment may introduce uncertainty into the NTA, and result in unintended consequences.[94]

8.57 The National Farmers' Federation ('NFF') expressed the view that 'the premise of the ALRC's argument for statutory confirmation is the unwillingness of state respondents to consistently accept that native title can include rights and interests of a commercial nature'.[95] The ALRC acknowledges that a state has a 'legitimate interest' in testing claimant applications and the relevant evidence brought to prove native title, including by litigation. The recommended amendment does not preclude evaluation of the evidence for commercial native title rights on a case by case basis.

8.58 In the ALRC's view, however, clarifying the law as recommended should encourage the timely and just resolution of determinations.[96] Some submissions indicated that this may be an expected outcome from reforming the law.[97] A number of stakeholders expressed their support for ensuring more timely resolution through statutory clarification.[98]

> Although there is case law to suggest that the purpose for which a holder of a right may have for exercising that right is not an incident of the right, the practical reality is

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88 See, eg, The Chamber of Minerals and Energy of Western Australia, *Submission 49*; Chamber of Minerals and Energy of Western Australia, *Submission 21*.

89 Law Society of Western Australia, *Submission 41*.

90 Western Australian Government, *Submission 43*.

91 Chamber of Minerals and Energy of Western Australia, *Submission 21*; Minerals Council of Australia, *Submission 8*.

92 Minerals Council of Australia, *Submission 65*; Association of Mining and Exploration Companies, *Submission 54*; Chamber of Minerals and Energy of Western Australia, *Submission 21*; Association of Mining and Exploration Companies, *Submission 19*.

93 Chamber of Minerals and Energy of Western Australia, *Submission 21*.

94 Ibid.

95 National Farmers' Federation, *Submission 56*.

96 Guiding Principle 3.

97 See, eg, NTSCORP, *Submission 67*; Indigenous Land Corporation, *Submission 66*.

98 Yamatji Marlpa Aboriginal Corporation, *Submission 62*; Central Desert Native Title Services, *Submission 26*; A Frith and M Tehan, *Submission 12*; Cape York Land Council, *Submission 7*.

> that without clarification, it is likely that the State will continue to require non-commercial qualifications on non-exclusive native title rights and interests.[99]

8.59 The ALRC considers that the reform should assist in reducing any uncertainties about the current state of the law and thereby ensure that all parties negotiate and proceed on a clear understanding of the law. Recommendation 8–1 seeks to assist certainty in the law—particularly in relation to connection reports and consent determinations.[100]

A 'broadly defined' native title right: refining the principles

8.60 The High Court's reasons for decision in *Akiba HCA* explain the distinction between concepts such as a right, the exercise of a right for any purpose, and an incident and an activity. Since *Akiba HCA*, the law is clear that native title rights and interests may be broadly defined. They define 'a relationship between native title holders and the land or waters to which the right or interest relates'.[101]

8.61 In *Akiba FCA*, the primary judge made a determination of native title that included 'the right to access resources and to take for any purpose resources in the native title areas'.[102] No issue was taken on appeal as to the characterisation of the right in broad terms.[103] The specific question on appeal to the High Court concerned extinguishment.

8.62 The primary judge had accepted that 'an activity carried on in exercising a native title right might be treated as a distinct "incident" of the right for extinguishment purposes when the activity had a discrete and understood purpose'.[104] The Full Federal Court in *Commonwealth v Akiba*[105] also referred to 'the orthodox approach to the issue of extinguishment whereby one looks to see whether the activity which constitutes the relevant incident of native title is consistent with competent legislation relating to that activity'.[106]

8.63 All justices in the High Court agreed that the right to take resources for any purpose was the relevant right in order to determine extinguishment in that case.[107] The right was described as 'broadly defined'.[108] French CJ and Crennan J said that such a right may be exercised 'for commercial or non-commercial purposes', but the 'sectioning of the native title right into lesser rights or "incidents"' was unnecessary.[109] They distinguished between a right and its exercise for a particular purpose,[110] and

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99 Cape York Land Council, *Submission 7*.
100 Dr Paul Burke noted that connection reports and consent determinations operate in the 'shadowlands' of the formal case law: P Burke, *Submission 33*.
101 *Akiba v Commonwealth* (2013) 250 CLR 209, [21] (French CJ and Crennan J).
102 Ibid [1].
103 Ibid [11].
104 *Akiba v Queensland (No 2)* (2010) 204 FCR 1, [847].
105 *Commonwealth v Akiba* (2012) 204 FCR 260.
106 Ibid [63].
107 *Akiba v Commonwealth* (2013) 250 CLR 209, [39], [60].
108 Ibid [21].
109 Ibid.
110 Ibid [21], [23], [25]–[28].

indicated that only the former is relevant for the purpose of extinguishment. This approach is consistent with the statutory non-extinguishment principle, where a restriction on the exercise of a native title right does not affect the existence of the right.[111]

8.64 Similarly, Hayne, Kiefel and Bell JJ said that:

> The relevant native title right that was found to exist was a right to access and to take resources from the identified waters for any purpose. It was wrong to single out taking those resources for sale or trade as an 'incident' of the right that had been identified. The purpose which the holder of that right may have had for exercising the right on a particular occasion was not an incident of the right; it was simply a circumstance attending its exercise.[112]

8.65 French CJ and Crennan J stated that it is possible that a native title right could be limited by purpose if it was so limited by the traditional laws and customs that give rise to the right.[113]

8.66 In light of this jurisprudence, several models could be adopted to clarify that native title rights and interests may include rights and interests of a commercial nature—consistent with the retention of native title doctrine. The ALRC proposed one model in the Discussion Paper, outlining a new s 223(2) of the *Native Title Act* to provide that native title rights and interests 'comprise rights in relation to any purpose'.[114]

8.67 There was some support for the suggested wording,[115] but some significant queries were raised.[116] The ALRC, after further consultation and in light of extensive submissions, adopted the current Recommendation 8–1 to better meet the reform objectives outlined in Chapter 1.

8.68 Some stakeholders raised whether revision to s 223(2) should be qualified to make clear that native title rights and interests are rights and interests 'in relation to land or waters'.[117] The ALRC notes the position taken by the majority of the Full Federal Court in *Western Australia v Ward* ('*Ward FFC*') and affirmed in the High Court, to the effect that native title rights and interests must be in relation to land and waters.[118] The ALRC considers therefore that re-stating this qualification 'in relation to

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111 Ibid [26].
112 Ibid [66].
113 Ibid [21].
114 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014) Prop 8–1.
115 NTSCORP, *Submission 67*; Law Council of Australia, *Submission 64*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; National Native Title Council, *Submission 57*; Queensland South Native Title Services, *Submission 55*; A Frith and M Tehan, *Submission 52*; Central Desert Native Title Service, *Submission 48*; Native Title Services Victoria, *Submission 45*; S Jackson and PL Tan, *Submission 44*; North Queensland Land Council, *Submission 42*.
116 For example, the MCA stated, 'commercial activities are not a "right" as deemed under the proposed amendments': Minerals Council of Australia, *Submission 65*.
117 See, eg, Northern Territory Government, *Submission 71*; Queensland South Native Title Services, *Submission 55*.
118 *Western Australia v Ward* (2000) 99 FCR 316.

land and waters' is unnecessary, as the recommended textual changes to s 223(2) specify that subsection (2) is not to be interpreted as limiting the operation of s 223(1).

Evidence

8.69 The ALRC acknowledges that the evidential basis for establishing the content of native title rights and interests is crucial. The Northern Territory Government emphasised that 'whether native title rights and interests are determined to include commercial rights is a matter for the Court to determine on the evidence of each case'.[119]

8.70 The statement in the recommended s 223(2) will allow flexible application to factual circumstances. The specific native title right determined at first instance in *Akiba FCA*—the right to access resources and to take for any purposes resources in the determination areas—was fact specific. The ALRC's recommendation builds on *Akiba HCA* but is designed to allow for various factual bases across Australia, as the *Native Title Act* is a statute of general application.

8.71 Determinations will still turn on findings based on the evidence adduced. Stakeholders acknowledged this requirement.[120] The recommendation will retain emphasis on the content of the right being derived from Aboriginal peoples' and Torres Strait Islanders' traditional laws and customs.

8.72 CDNTS noted:

> Whether such an amendment makes any real impact in practice is another matter, as it is still up to the native title claim group to assert the particular right and provide evidence as to its existence under traditional law and custom.[121]

8.73 The ALRC notes that the need to establish evidence of the exercise of the right under laws and customs should not require an approach where recognition of native title rights requires the native title claimant to prove in excessive detail, the exercise of the rights.

8.74 The value of statutory clarification was highlighted by the Cape York Land Council ('CYLC'):

> There is evidence that groups across Cape York were involved in trade and barter at the time of sovereignty, but because of the development of case law and Queensland native title determination precedents limiting the exercise of rights to non-commercial uses, that evidence has not been routinely prepared and commercial rights have not been routinely pursued.[122]

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119 Northern Territory Government, *Submission 71*.

120 See, eg, South Australian Government, *Submission 68*; Central Desert Native Title Service, *Submission 48*; Western Australian Government, *Submission 20*; National Native Title Council, *Submission 16*. Central Desert Native Title Service, *Submission 48*.

121 Central Desert Native Title Services, *Submission 26*.

122 Cape York Land Council, *Submission 7*. See also Cape York Land Council, Submission No 5 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, July 2011 ('In our experience, there is ample evidence to support the existence of trade and other commercial rights as part of the traditional laws and customs of Cape York groups').

8.75 On balance, the ALRC considers that statutory clarification is warranted, as the exposition of the law is still evolving—with relatively few Federal Court first instance decisions on point,[123] in addition to the High Court jurisprudence.

Commercial and non-commercial purposes

8.76 In *Akiba HCA* and in *Brown*,[124] the High Court distinguished between a right and its exercise—albeit in the context of discussing extinguishment of native title. In *Akiba HCA*, the High Court stated that the 'right so framed could be exercised in a variety of ways, including by taking fish for commercial or trading purposes'.[125] In *Brown*, the High Court stated:

> The nature and content of a right is not ascertained by reference to the way it has been, or will be, exercised. That is why the plurality in *Ward* said that consideration of the way in which a right has been exercised is relevant only in so far as it assists the correct identification of the nature and content of the right.[126]

8.77 Recommendation 8–1 states that a right may comprise a right that may be exercised for any purpose—including commercial and non-commercial purposes. The intention is to incorporate the principles from *Akiba HCA* and *Brown*, which confirm that it is not necessary to provide evidence of the numerous ways in which a right might be exercised in order to confirm the existence of the right.

8.78 On this point, AIATSIS submitted that:

> 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.[127]

8.79 A number of stakeholders supported an explicit amendment that would ensure that native title rights could be exercised for commercial purposes.[128]

> The NTA must be taken to recognise the existence of broadly stated rights which may be exercised in particular ways or for particular purposes without listing every way in which, or every activity by which, a right may be exercised, for example, the right to take and use resources without specifying how that right is to be, or may be, exercised.[129]

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123 See, eg, *Willis on behalf of the Pilki People v Western Australia* [2014] FCA 714 (4 July 2014); *BP (Deceased) on behalf of the Birriliburu People v Western Australia* [2014] FCA 715 (4 July 2014).

124 The relevant statement that '[t]he nature and content of a right is not ascertained by reference to the way it has been, or will be, exercised' is made in respect of the inconsistency between native title rights and interests and other interest in the claimed area: *Western Australia v Brown* (2014) 306 ALR 168, [34].

125 *Akiba v Commonwealth* (2013) 250 CLR 209, [1] (French CJ and Crennan J).

126 *Western Australia v Brown* (2014) 306 ALR 168, [34].

127 AIATSIS, *Submission 70*.

128 See, eg, AIATSIS, *Submission 36*; J Altman, *Submission 27*; Central Desert Native Title Services, *Submission 26*; Native Title Services Victoria, *Submission 18*; A Frith and M Tehan, *Submission 12*; Cape York Land Council, *Submission 7*; Just Us Lawyers, *Submission 2*; Australian Human Rights Commission, *Submission 1*.

129 Central Desert Native Title Services, *Submission 26*.

8.80 Just Us Lawyers said, 'if native title is to contribute to the improving of Indigenous peoples' lives, it is vital that they be entitled to derive a commercial benefit from the exercise of such rights'.[130]

8.81 The South Australian Government noted that 'the current s 223(2) is explicitly unbounded'.[131] The Northern Territory Government said that, where rights are non-exclusive, 'it will be preferable to express the rights and interests by reference to the activities that may be conducted, as of right, on or in relation to, the relevant land or waters'.[132]

8.82 Stakeholders noted a risk of conflating native title rights with uses.[133] The ALRC has sought to avoid the nomenclature of 'uses' but instead has adopted 'purpose'. In turn, the Association of Mining and Exploration Companies ('AMEC') pointed to a possible confusion over right and purpose. It submitted that,

> rights and interests 'of a commercial nature' defines a category of native title rights by reference to their purpose. This contrasts to the accepted conceptualisation of native title as a 'bundle of rights' which are primarily defined by their content rather than their purpose.[134]

8.83 To avoid such confusion, the ALRC considers that any new s 223(2) should specifically provide that native title rights and interests may comprise a right that may be exercised for any purpose—including commercial or non-commercial purposes.

8.84 AIATSIS supported reform but pressed for a slightly different s 223(2) from that which the ALRC had proposed in the Discussion Paper. The model proposed by AIATSIS was in the following form:

> 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.[135]

8.85 The National Congress of Australia's First Peoples considered excluding commercial native title rights would be 'inconsistent' with UNDRIP.[136] Several stakeholders saw native title rights exercised for commercial purposes as an important 'mechanism' to secure future economic development.[137] Professor Jon Altman noted that allowing commercial exploitation of resources based on rights exercised under traditional laws and customs is particularly important for developing a 'hybrid economy' in remote parts of Australia.[138]

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130 Just Us Lawyers, *Submission 2*.
131 South Australian Government, *Submission 68*.
132 Northern Territory Government, *Submission 71*.
133 Minerals Council of Australia, *Submission 65*; Association of Mining and Exploration Companies, *Submission 54*.
134 Association of Mining and Exploration Companies, *Submission 19*.
135 AIATSIS, *Submission 70*.
136 National Congress of Australia's First Peoples, *Submission 32*. Professor Jon Altman saw it as 'quite appropriate for the *Native Title Act* to be updated to comply as closely as possible with key "property and procedural rights" principles in UNDRIP': J Altman, *Submission 27*.
137 National Native Title Council, *Submission 57*; North Queensland Land Council, *Submission 42*.
138 J Altman, *Submission 27*.

8.86 Over the course of the Inquiry, the ALRC heard concerns of a general nature about clarifying the Act with respect to 'commercial native title rights and interests'. Concerns about the impact on certain resources industries were raised.[139] The South Australian Government submitted that '[s]ome respondent interest holders are particularly concerned at the prospect of there being commercial native title rights over their area of interest'.[140] AMEC, for example, stated that it does not support the recognition of commercial rights in the definition of native title.[141]

8.87 The ALRC notes that any native title rights exercised for commercial purposes would remain subject to general law requirements for permits and licences and subject to relevant regulation.

8.88 The Western Australian Fishing Industry Council noted the need for careful consideration of natural resource management principles when any commercial native title rights and interest are considered. The Council submitted that

> poorly defined 'indigenous' commercial fishing rights are discriminatory against indigenous participants, a dead end for development and corrosive of good resource management outcomes.[142]

8.89 Other stakeholders submitted that more than statutory reform is needed to deliver 'real economic returns' to Aboriginal and Torres Strait Islander peoples.[143] The Western Australian Government stated:

> Recognition of native title alone does not guarantee that practical, social or economic opportunities will follow. While Western Australia supports amendments that deliver such opportunities, it does not support re-engineering native title legislation to provide access to those presently unable to demonstrate native title.[144]

8.90 Other stakeholders pointed to positive changes that also would be needed, including amending the future act regime in the *Native Title Act*;[145] and enacting a comprehensive broader land settlement framework.[146] Both the future act regime and the possibility of the enactment of a land settlement framework are outside the scope of this Inquiry.[147]

Indicative list of native title rights and interests

8.91 Recommendation 8–1 provides that a new s 223(2)(b) should be enacted to clarify that native title rights and interests may include, but are not limited to, hunting,

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139 See, eg, Cement Concrete and Aggregates Australia, *Submission 47*; Western Australian Fishing Industry Council, *Submission 23*.

140 South Australian Government, *Submission 34*.

141 Association of Mining and Exploration Companies, *Submission 54*.

142 Western Australian Fishing Industry Council, *Submission 23*.

143 See, eg, National Farmers' Federation, *Submission 56*; Western Australian Government, *Submission 43*; Northern Territory Government, *Submission 31*; Kimberley Land Council, *Submission 30*; Central Desert Native Title Services, *Submission 26*; Western Australian Government, *Submission 20*; National Native Title Council, *Submission 16*; National Farmers' Federation, *Submission 14*.

144 Western Australian Government, *Submission 43*.

145 Native Title Services Victoria, *Submission 18*; National Native Title Council, *Submission 16*.

146 National Native Title Council, *Submission 16*. See Ch 9.

147 See Ch 1 and Ch 2.

gathering, fishing and trading rights and interests. Currently, s 223(2) states rights and interests includes hunting, gathering, or fishing, rights and interests. The ALRC recommends express inclusion of a right to trade in the list. A right to trade has been recognised in principle.[148]

8.92 Section 223(2) as enacted was intended to provide examples of native title rights and interests.[149] Recommendation 8–1 does not disturb that illustrative function. The inclusion of trading rights in this list indicates that native title rights and interests are not limited to the usufructuary rights that were initially identified in s 223(2).[150] The ALRC considers that the examples listed currently in s 223(2) may unnecessarily confine the scope of native title rights and interests that are recognised.

8.93 CDNTS contended that statutory confirmation of the law in *Akiba HCA* 'may assist in shifting the perception of native title rights in the broader community from being primordial hunter-gatherer rights to being rights and interests that are to be taken seriously'.[151] Native Title Services Victoria ('NTSV') submitted that it 'it would be beneficial to native title holders if the Act were capable of recognising the complex reality of [the] economy, placing a value on resources, trading in the access or use of the right itself'.[152] The ALRC heard concerns, however, particular to certain industries.[153]

Minerals

8.94 Some stakeholders pointed to potential exclusions to the types of native title rights and interests. AMEC submitted that the ALRC's proposed amendment to s 223(2) would not affect mineral ownership rights.[154] The MCA stated that

> minerals ownership (and ownership of some other natural resources including some water rights) is vested in the Crown in Australia imposing limits on the extent to which commercial rights and interests are able to be recognised.[155]

148 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [153], [155].

149 Explanatory Memorandum, Native Title Bill 1993 (Cth), Part B, 77.

150 On occasion, the examples listed in s 223(2) have been described as 'usufructuary rights': *Akiba v Commonwealth* (2013) 250 CLR 209, [9] (French CJ and Crennan J). By contrast, s 211 defines hunting, fishing, and gathering, for the purpose of that section, as separate classes of activity: *Native Title Act 1993* (Cth) s 211(3)(a)–(c).

151 Central Desert Native Title Service, *Submission 48*.

152 Native Title Services Victoria, *Submission 18*.

153 See, eg, Cement Concrete and Aggregates Australia, *Submission 47*, which submitted that it was 'concerned that the broadening of rights associated with native title to include commercial activities and trade will effectively result in significantly higher costs of products to government and the community and will reduce the incentives required to invest in new quarry projects'.

154 Association of Mining and Exploration Companies, *Submission 54*.

155 Minerals Council of Australia, *Submission 8*. Some submissions called for the position to be reviewed: see, eg, J Altman, *Submission 27*; V Marshall, *Submission 11*. Another called for the statute to be amended to include 'a commercial right to take and use minerals wholly owned by the Crown': North Queensland Land Council, *Submission 17*.

8.95 In *Ward HCA*, in relation to the question of a native title right to minerals, and in contrast to the position in *Yanner v Eaton*, the High Court stated:

> the vesting of property in minerals was no mere fiction expressing the importance of the power to preserve and exploit these resources. Vesting of property and minerals was the conversion of the radical title to land which was taken at sovereignty to full dominion over the substances in question.[156]

8.96 The recommendations for reform in this chapter do not seek to disturb the finding on extinguishment in *Ward HCA*. The Terms of Reference for this Inquiry precluded a wider investigation of the operation of the *Native Title Act* with respect to statutory minerals. For example, the Terms of Reference do not extend to consideration of extinguishment, the right to negotiate or the future act provisions necessary to a more comprehensive examination of the issues raised by the MCA.

Water

8.97 While AMEC acknowledged that the ALRC's proposed amendment to s 223(2) would not affect mineral ownership rights,[157] both it and the MCA expressed concern about surface resource rights, specifically water rights.[158]

8.98 The position with respect to the statutory vesting of water under state and territory laws is less settled than for minerals, and it turns on the particular terms under which the vesting is effected. In *Ward FFC* and *Ward HCA* the statutory vesting of water was considered in respect of the *Rights in Water and Irrigation Act 1914* (WA). In *Ward FFC*, Beaumont and von Doussa JJ found that the relevant provision

> is a clear example of a statutory provision where all that is vested in the Crown is only such powers of control and management as are necessary to enable the Crown to discharge the powers and functions arising under the Act. We do not consider that the mere vesting effected under s 4(1) evidenced an intention to extinguish native title rights.[159]

8.99 However, their Honours found the legislation placed restrictions on the diversion and use of water. These restrictions necessarily removed the exclusivity of the native title right to control the use and enjoyment of the water.[160] The High Court in *Ward HCA* affirmed this analysis.[161]

8.100 The Terms of Reference do not extend to comprehensive examination of the *Native Title Act* provisions governing extinguishment. Accordingly, the ALRC makes no recommendations in respect of the extinguishment of native title rights to water, but notes the capacity for non-exclusive native title rights to water to be determined.

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156 *Western Australia v Ward* (2002) 213 CLR 1, [384] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

157 Association of Mining and Exploration Companies, *Submission 54*.

158 Minerals Council of Australia, *Submission 65*; Association of Mining and Exploration Companies, *Submission 54*. The MCA observed that many companies are dependent on water rights for their operations.

159 *Western Australia v Ward* (2000) 99 FCR 316, [400].

160 Ibid [405] (Beaumont and von Doussa JJ).

161 The vesting of waters in the Crown was inconsistent with any native title right to possession of those waters to the exclusion of all others: *Western Australia v Ward* (2002) 213 CLR 1, [263] (Gleeson CJ, Gaudron, Gummow and Hayne JJ). See also [820] (Callinan J).

8.101 Following *Akiba HCA*, a native title right to access and take resources that may be exercised for any purpose, may include water where established on the evidence. In *Akiba FCA*, the right found at first instance was to 'access resources and to take for any purpose resources in those areas'.[162] Resources were held to include water.[163] Water use could also be considered as a necessary ancillary to the exercise of usufructuary rights—again where established on the evidence.

8.102 Dr Sue Jackson and Professor Poh-Ling Tan submitted:

> With respect to water, where the necessary connection and other requirements for native title are currently satisfied, the content of rights to water within a native title claim are generally regarded by the courts as usufructuary in character, and a number of native title determinations have recognized limited, non-exclusive and non-commercial rights to use water without the need for a licence. In a similar vein to the comments above, this narrow definition is having the effect of excluding Indigenous people from valuable markets and is counter to national Indigenous policy. Definitions and interpretations of native title that preclude commercial use will perpetuate and entrench Indigenous disadvantage and marginalization, thus we support the proposal that the definition in s 223 reflect the law in *Akiba v Commonwealth*.[164]

8.103 In *Daniel v Western Australia* a right to take water for drinking and domestic purposes was found as 'it is a necessary incident to life in the exercise of other rights', such as camping.[165] In consent determinations, native title rights and interests to take surface and subterranean water are typically confined to 'personal, domestic and communal purposes'.[166]

8.104 The ALRC notes that if sustainable and culturally appropriate economic development is to occur in many regional and remote indigenous communities, water will be a critical component to that development. Professor Jon Altman contended that 'in the interest of the efficient allocation of resources it would make sense to allocate a customary and tradeable commercial right in fresh water to native title groups'.[167] Jackson and Tan submitted that there is 'a real risk that those indigenous groups whose rights are yet to be recognised through a determination may be locked out of a market approaching full allocation'.[168]

8.105 In light of the many considerations around native title rights and interests in water, the ALRC makes no specific recommendation. Recommendation 8–1 is not intended to limit the evolution of the law on a case by case basis, and as supported by requisite evidence. The ALRC sees merit in a broader review of native title rights in relation to water, in conjunction with state and territory governments and relevant Aboriginal and Torres Strait Islander organisations.

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162 *Akiba v Queensland (No 2)* (2010) 204 FCR 1, [540].
163 Ibid [760].
164 S Jackson and PL Tan, *Submission 44*.
165 *Daniel v Western Australia* [2003] FCA 666 (3 July 2003) [490], [510].
166 Richard H Bartlett, *Native Title in Australia* (LexisNexis Butterworths, 3rd ed, 2015) 890.
167 J Altman, *Submission 27*.
168 S Jackson and PL Tan, *Submission 44*. See also National Water Commission, *Indigenous access to water resources* http://www.nwc.gov.au/nwi/position-statements/indigenous-access.

Trading rights and interests

8.106 In *Yarmirr v Northern Territory*, the Federal Court suggested that the right to trade 'was not a right or interest in relation to the waters or land'.[169] Subsequently, in *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group*, the Full Federal Court stated:

> The right to trade is a right relating to the use of the resources of the land. It defines a purpose for which those resources can be taken and applied. It is difficult to see on what basis it would not be a right in relation to the land.[170]

8.107 A number of stakeholders supported the express inclusion of 'trade' in s 223(2).[171] CYLC submitted:

> It would appear logical that if native title rights and interests were traditionally exercised in a manner which involved trade or barter, then rights and interests of a commercial nature should be afforded to native title claimants. Regulatory regimes would still address matters such as sustainability, safety and protection of the environment.[172]

8.108 The NNTC submitted that '[i]t is common to recognise non-commercial rights to share and exchange "traditional" resources'.[173] 'Commercial' has, however, been linked to rights to take resources for trade or exchange:

> Before settlement, commercial native title activity was conducted in a moneyless society, and over time the activity has acceptably changed and modified to include sea and land based native title resources and products produced from natural resources being taken in a different manner and being sold for money.[174]

8.109 Some submissions referred to anthropological and historical evidence of trade in various parts of Australia,[175] including international trade.[176]

> [Dale] 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.[177]

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169 *Yarmirr v Northern Territory [No 2]* (1998) 82 FCR 533, 587.

170 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [153].

171 National Native Title Council, *Submission 57*; A Frith and M Tehan, *Submission 52*; Native Title Services Victoria, *Submission 45*; North Queensland Land Council, *Submission 42*.

172 Cape York Land Council, *Submission 7*.

173 National Native Title Council, *Submission 16*.

174 North Queensland Land Council, *Submission 17*. See also Native Title Amendment (Reform) Bill 2014 cl 19; Native Title Amendment (Reform) Bill (No 1) 2012 cl 19. The amendment for s 223(2) proposed in these Bills would provide that native title rights and interests include 'the right to trade and other rights and interests of a commercial nature'.

175 AIATSIS, *Submission 36*; North Queensland Land Council, *Submission 17*; Cape York Land Council, *Submission 7*; Just Us Lawyers, *Submission 2*. See also Yamatji Marlpa Aboriginal Corporation, Submission No 8 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, July 2011.

176 AIATSIS, *Submission 36*; North Queensland Land Council, *Submission 17*; Just Us Lawyers, *Submission 2*. See also Kimberley Land Council, Submission No 2 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, June 2011.

177 AIATSIS, *Submission 36*.

8.110 AIATSIS noted 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'. It submitted that '[t]here is, in reality, no point to be made in distinguishing between marine and terrestrial rights'.[178]

8.111 The NNTC referred to early consent determinations in the Torres Strait which included a native title right to engage in trade in the natural resources of the determination area.[179]

8.112 By contrast, the Western Australian Government expressed concern lest the right, as found in *Akiba HCA*, is 'conflated with a native title "right to trade"'. It submitted that it was 'not aware of any instance where the Court has made a determination of a native title right to trade where a right claimed in that form has been put in issue'.[180]

8.113 While acknowledging the need for evidence in each claim to determine a native title right to trade, the ALRC recommends express inclusion of the right to trade in s 223(2) to assist clarity on the point of law.

Commercial activities and economic rights and interests

8.114 In the Discussion Paper, the ALRC proposed amending s 223(2) of the *Native Title Act* to include commercial activities in the non-exhaustive list of native title rights and interests.[181] The ALRC no longer recommends the inclusion of commercial activities in the list in s 223(2).

8.115 Some stakeholders suggested any new s 223(2) should refer to 'economic rights and interests' or 'economic purposes'. The Australian Human Rights Commission supported amendments 'to clarify that native title rights and interests can include commercial or economic rights and interests', to advance the economic development of Aboriginal and Torres Strait Islander peoples and to comply with international law.[182] The UNDRIP refers to the right of Indigenous peoples to 'engage freely in all their traditional and other economic activities'.[183]

8.116 The Victorian Government noted that in the *Traditional Owner Settlement Act 2010* (Vic), the list of traditional owner rights that may be included in an agreement includes 'the maintenance of a distinctive spiritual, material and *economic* relationship with the land and the natural resources on or depending on the land'.[184] The Indigenous

178 Ibid.
179 National Native Title Council, *Submission 16*, citing *Kaurareg People v State of Queensland* [2001] FCA 657 (23 May 2001).
180 Western Australian Government, *Submission 43*.
181 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014) 156, Prop 8–1.
182 Australian Human Rights Commission, *Submission 1*.
183 *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st Sess, 107th Plen Mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) art 20.
184 Department of Justice, Victoria, *Submission 15*.

Land Corporation indicated that 'economic' represents 'a broader scope of activities enabling Indigenous economic development'.[185]

8.117 The ALRC considers that 'economic purposes' or 'economic activities' may more effectively capture the range of activities that may be encompassed by native title rights and interests. However, as the ALRC did not consult on such a proposal, it makes no specific recommendation for adoption of the term 'economic' rather than 'commercial'.

Usufructs, commercial purposes and consent determinations

8.118 Since *Commonwealth v Yarmirr* and *Ward HCA*, native title consent determinations have typically included a right to take resources, such as fishing and hunting for non-commercial purposes.[186] In *Akiba HCA*, the High Court affirmed that the designation of native title rights and interests as usufuctuary rights and interests does not necessarily preclude their exercise for commercial purposes.[187] Recommendation 8–1 confirms that position.

8.119 NTSV drew attention to the *Traditional Owner Settlement Act 2010* (Vic), which enables Traditional Owners, under a settlement, to harvest forest produce and flora for commercial purposes.[188]

The relationship between s 211 and s 223(2)

8.120 It is important to distinguish between the scope of the ALRC's recommendations for s 223(1) and s 223(2), and the operation of s 211 of the *Native Title Act*. Section 211 deals expressly with usufructuary native title rights.

8.121 Recommendation 8–1 is not intended to affect the current interaction between s 223(1) and s 211 of the *Native Title Act.* The ALRC considers that s 211 is narrowly drafted and unlikely to be affected by the recommendation.

8.122 Section 211 operates to render lawful certain activities by native title holders that would otherwise be contrary to a law of the Commonwealth, state or territory, because they were carried on without 'a licence, permit or other instrument'. It has the effect of allowing the exercise of some native title rights and interests, notwithstanding the general requirement for a licence or permit for the activity.[189]

8.123 The High Court, in *Western Australia v Commonwealth*, said:

> If the affected law be a law of the State … its operation is suspended in order to allow the enjoyment of the native title rights and interests which, by s 211, are to be enjoyed without the necessity of first obtaining 'a licence, permit or other instrument'. … [T]he effect of s 211 … [is to] exclude laws made in exercise of that power (inter alia)

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185 Indigenous Land Corporation, *Submission 66*.

186 *Commonwealth v Yarmirr* (2001) 208 CLR 1; *Western Australia v Ward* (2002) 213 CLR 1.

187 *Akiba v Commonwealth* (2013) 250 CLR 209, [21] (French CJ and Crennan J), [60] (Hayne, Kiefel and Bell JJ).

188 Native Title Services Victoria, *Submission 45*.

189 Section 211 'operates to remove prohibitions or restrictions': *Yanner v Eaton* (1999) 201 CLR 351, [122] (Gummow J).

> from affecting the freedom of native title holders to enjoy the usufructuary rights referred to in s 211.[190]

8.124 Section 211 has three elements. First, the exercise or enjoyment of native title rights and interests in doing any of the activities set out in s 211(3); second, the activities are prohibited for all unless permitted by 'a licence, permit or other instrument'; and third, the activity is both for the purpose of satisfying the 'personal, domestic or non-commercial needs' of native title holders and in the exercise or enjoyment of native title rights and interests. All elements must be satisfied for the benefit of the section to flow.

8.125 Subsection (3) sets out separate classes of activity: hunting, fishing, gathering, cultural or spiritual activity and any other prescribed purpose. In the context of s 211, these are the rights collectively described, in *Western Australia v Commonwealth* and *Yanner v Eaton*, as usufructuary rights.[191] The limitation of s 211 to these classes of activity means that not all native title rights and interests in a determination under s 225 will necessarily engage s 211. Gummow J in *Yanner v Eaton*, citing *Western Australia v Commonwealth*, referred to, '[t]he usufructuary rights comprehended by sub-s (3)'.[192]

8.126 Therefore, only the exercise of rights and interests recognised under s 223 can attract the protection of s 211.[193] These rights and interests are further limited by both s 211(2) and (3), namely they must fall into the 'class of activities' in subsection (3) and must be '(a) for the purpose of satisfying … personal, domestic or non-commercial communal needs; *and* (b) in exercise of enjoyment of … native title rights and interests'.[194]

8.127 The application of s 211 as a defence to prosecutions has come before the High Court in two cases: *Yanner v Eaton*[195] and *Karpany v Dietman.*[196] In both cases, the Court first addressed the issue of extinguishment of any native title right by the regulatory regimes in the relevant state legislation.

8.128 In *Yanner v Eaton*, the appellant was charged with the taking of juvenile crocodiles without a permit as required by s 54(1)(a) of the *Fauna Act 1974* (Qld). The appellant argued successfully before the Magistrate that s 211 applied and this finding was ultimately upheld by a majority of the High Court. As the majority said:

> Accordingly, by operation of s 211(2) of the *Native Title Act* and s 109 of the Constitution, the Fauna Act did not prohibit or restrict the appellant, as a native title

190 *Western Australia v Commonwealth* (1995) 183 CLR 373, 474.
191 Ibid [474]; *Yanner v Eaton* (1999) 201 CLR 351, [39].
192 *Yanner v Eaton* (1999) 201 CLR 351, [120] (Gummow J) citing *Western Australia v Commonwealth* (1995) 183 CLR 373, 474.
193 French CJ and Crennan J noted 'The distinction between native title rights and their exercise is made explicit in s 211 and was noted by the plurality in *Yanner v Eaton*': *Akiba v Commonwealth* (2013) 250 CLR 209, [28].
194 Ibid [27].
195 *Yanner v Eaton* (1999) 201 CLR 351.
196 *Karpany v Dietman* (2013) 88 ALJR 90.

> holder, from hunting or fishing for the crocodiles he took for the purpose of satisfying personal, domestic or non-commercial communal needs.[197]

8.129 *Karpany v Dietman* involved a prosecution of Karpany and another, both members of the Narrunga People, for taking undersized abalone contrary to s 72(2)(c) of the *Fisheries Management Act 2007* (SA). It was accepted that the appellants had taken the undersized abalone in accordance with 'traditional laws and customs of the Narrunga People',[198] that the 'relevant native title right was the right to fish which included taking undersized abalone',[199] and that it was for 'bona fide non-commercial, or communal need'.[200]

8.130 There have been a number of other cases in which s 211 has been argued as a defence to prosecutions, with varying outcomes.[201] In summary:

- ss 211 and 223 are linked in that s 211 only operates where activities are undertaken in exercise and enjoyment of 'native title rights and interests' under s 223;
- s 211 does not permit the exercise of *all* 'native title rights and interests' that might exist under s 223 in any particular case;
- the application of s 211 is further limited by the 'class of activity" in s 211(3);
- the application of s 211 is further limited by the purpose set out in s 211(2)(a)—'satisfying their personal, domestic or non-commercial needs'; and
- the range of cases that have been unsuccessful indicates the difficulties in establishing the applicability of s 211 as a defence in prosecutions.

8.131 There is a power in s 211 for further activities to be added by administrative act.[202]

8.132 Leaving aside the operation of s 211, a native title holder in exercising a native title right, including the right to hunt, fish or gather would be able to exercise that right 'for any purpose'—commercial or non-commercial—in terms of Recommendation 8–1 and where established on the evidence.

No statutory definition of terms

Recommendation 8–2 'Commercial purposes' and 'trading' should not be defined in the *Native Title Act*.

197 *Yanner v Eaton* (1999) 201 CLR 351, [40] (Gleeson CJ, Gaudron, Kirby and Hayne JJ).
198 *Karpany v Dietman* (2013) 88 ALJR 90, [1].
199 Ibid [17].
200 Ibid [46].
201 See, eg, *Lewis (Department of Primary Industries-Fisheries) v Wanganeen and Harradine* [2005] SASC 36; *Police v Graeme William Sydney Talbot* [2013] NTMC 033 (17 December 2013).
202 *Native Title Act 1993* (Cth) s 211.

8.133 The ALRC considers that 'commercial purposes' and 'trading' should not be defined in the *Native Title Act*. A statutory definition may be inflexible and unhelpful, given the fact-dependent nature of native title claims. It is unnecessary to define prescriptively the meaning of 'commercial purposes' and the scope of 'trading' rights. The application of terms is most appropriately left to judicial exposition as a question of fact based on the relevant law and custom in each claim.[203]

8.134 In the Discussion Paper, the ALRC proposed that the terms 'commercial activities' and 'trade' should not be defined.[204] Submissions were received on this terminology. Similar considerations apply in respect of the reworded s 223(2) in Recommendation 8–1.

8.135 Several stakeholders agreed that the terms 'commercial activities' and 'trade' should not be defined in the *Native Title Act*.[205] Some stakeholders agreed that definitions would limit flexibility,[206] and 'the type of commercial activities or trade being recognised'.[207] Others preferred the interpretation to be 'driven' by the Act's Preamble and objects.[208]

8.136 CDNTS submitted that 'the content of commercial activities and trade are going to be dependent on the particular group and the relevant law and custom'.[209] This position was echoed in many submissions.[210] Dr Angus Frith and Associate Professor Maureen Tehan submitted that to define the terms would 'inappropriately reduce the significance of the laws and customs'.[211]

8.137 For some stakeholders, trade and exchange 'aligns to [a] general commercial mindset'.[212] The Kimberley Land Council ('KLC') submitted that:

> The understanding of commercial activity should also not be unduly limited by its current operation or understanding in modern secular societies. Traditional Indigenous communities were/are not necessarily 'secular', and as such spiritual or religious obligations could infiltrate almost all undertakings, including transactions, transfers, exchanges and activities undertaken for value or benefit. The fact that an activity may

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203 Melissa Perry and Stephen Lloyd, *Australian Native Title Law* (Lawbook Co, 2003) 3; *Western Australia v Ward* (2002) 213 CLR 1, [20] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

204 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014) Prop 8–2.

205 AIATSIS, *Submission 70*; South Australian Government, *Submission 68*; NTSCORP, *Submission 67*; Law Council of Australia, *Submission 64*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; National Native Title Council, *Submission 57*; Queensland South Native Title Services, *Submission 55*; A Frith and M Tehan, *Submission 52*; Native Title Services Victoria, *Submission 45*; S Jackson and PL Tan, *Submission 44*; North Queensland Land Council, *Submission 42*; Law Society of Western Australia, *Submission 41*.

206 Yamatji Marlpa Aboriginal Corporation, *Submission 62*; National Native Title Council, *Submission 57*; A Frith and M Tehan, *Submission 52*; North Queensland Land Council, *Submission 42*.

207 NTSCORP, *Submission 67*.

208 AIATSIS, *Submission 70*.

209 Central Desert Native Title Service, *Submission 48*.

210 National Native Title Council, *Submission 57*; A Frith and M Tehan, *Submission 52*; Native Title Services Victoria, *Submission 45*.

211 A Frith and M Tehan, *Submission 52*.

212 North Queensland Land Council, *Submission 17*. See also A Frith and M Tehan, *Submission 52*.

> have a spiritual or religious component or derivation should not exclude it from being recognised as a 'commercial' activity, right or interest.[213]

8.138 Most stakeholders who opposed reforms to include commercial native title rights and interests in the *Native Title Act* did not address the issue of statutory definitions of the terms. The South Australian Government stated that native title rights and interests of a commercial nature 'cannot be comprehensively codified, as each example of any ongoing traditional commerce will turn on its own facts'.[214]

Adaptation and commercial native title rights and interests

8.139 Native title rights and interests are possessed under laws and customs with origins in the period prior to annexation. 'It is those rights and interests which are "recognised" in the common law.'[215] There can be some degree of change and adaptation of the traditional *laws and customs*, but there cannot be new native title *rights and interests*.[216] In *Mabo [No 2]*, Brennan J stated:

> 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.[217]

8.140 Activities or practices that constitute the exercise of an established native title right may be exercised in modern form.[218] In *Yorta Yorta*, the majority acknowledged the changing nature of laws and customs.[219] The Law Society of Western Australia noted the greater allowance for adaptation of traditional law and custom set out in the judgment of Gaudron and Kirby JJ 'ought to be sufficient to avoid the approach of laws and customs being "frozen in time"'.[220]

8.141 The implications of an adaptation of laws and customs were elaborated by the Full Court of the Federal Court in *Bodney v Bennell*.[221]

> Proof of the continuity of a society does not necessarily establish that the rights and interests which are the product of the society's normative system are those that existed at sovereignty, because those laws and customs may change and adapt. Change and adaptation will not necessarily be fatal. So long as the changed or adapted laws and customs continue to sustain the same rights and interests that existed at sovereignty, they will remain traditional.[222]

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213 Kimberley Land Council, *Submission 30*. See also P Burke, *Submission 33*: '"Aboriginal law" typically has a unique range of reference inclusive of rituals, songs and sacred objects that have no counterpart in the modern law of the secular constitutional state'.
214 South Australian Government, *Submission 34*.
215 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [77]. See also *Akiba v Commonwealth* (2013) 250 CLR 209, [9].
216 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [43] (Gleeson CJ, Gummow and Hayne JJ).
217 See *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 70.
218 Ibid 192.
219 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [83] [114].
220 Law Society of Western Australia, *Submission 41*.
221 *Bodney v Bennell* (2008) 167 FCR 84.
222 Ibid [74].

8.142 More specifically, the Court stated the 'rights and interests, which are the product of rules and customs which adapt or develop, may themselves change without losing recognition'.[223]

8.143 Despite acknowledgment of the possibility of adaptation, there has often been limited accommodation to modern circumstances. Kirby J in *Ward HCA* stated that 'it would be a mistake to ignore the possibility of new aspects of traditional rights and interests developing as part of Aboriginal customs not envisaged, or even imagined, in the times preceding settlement'.[224]

8.144 In other jurisdictions there are questions about the evolution and adaptation of indigenous rights to land and waters.[225] Major agreements and settlements[226] with Indigenous peoples often include a component that allows for commercial utilisation of land and waters.

8.145 In Chapter 5, the ALRC recommends that the definition of native title in s 223(1) of the *Native Title Act* should be amended to make clear that traditional laws and customs, under which native title rights and interests are possessed, may adapt, evolve or otherwise develop.[227] The recommended revision to s 223(2) expressly states that it is not to 'limit' the operation of s 223(1). Recommendation 5–1 makes it clear that where laws and customs adapt, evolve or otherwise develop, the exercise of rights and interests possessed under traditional laws and customs may similarly adapt, evolve and develop.

8.146 Finn J, writing extra-curially noted,

> 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, ie using new technologies, or newer purposes in taking, ie for commercial purposes, because the opportunity presents itself to do so *after* sovereignty.[228]

8.147 Views vary as to what might constitute such adaptation, evolution and development of traditional laws and customs. North Queensland Land Council submitted that, '[i]f the changes continue to sustain the same native title rights and interests that existed at sovereignty that should be sufficient to demonstrate the adaption or modification is acceptable'.[229]

8.148 For the NFF, the commercial exploitation of activities done in accordance with traditional laws and customs, such as hunting and gathering, is 'one thing', but they see the 'expan[sion of] the range of activities to encompass broad commercial rights' as

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223 Ibid [120].
224 *Western Australia v Ward* (2002) 213 CLR 1, [574].
225 See, eg, *Lax Kw'alaams Indian Band v Canada* [2011] 3 SCR 535. See Ch 9.
226 A well known settlement is the 'Sealords deal', which facilitated purchase of shares in a commercial fishery on behalf of Maori. See Shane Heremaia, 'Native Title to Commercial Fisheries in Aotearoa/New Zealand' (2000) 4 *Indigenous Law Bulletin* 15.
227 See Rec 5–1 in Ch 5.
228 Finn, above n 47, 8.
229 North Queensland Land Council, *Submission 17*.

quite another, and one that they do not support.[230] In the view of the NFF, '[a]part from the commercial exploitation of traditional activities, the creation of general commercial rights would have no source in traditional law and custom'.[231]

8.149 Just Us Lawyers submitted that '[i]f it is still traditional to hunt with a rifle rather than a spear, then the same logic should apply to commercial native title rights and interests. The source of the right to trade is in the ancestral connection to the land from where the commodity is obtained'.[232]

8.150 The KLC submitted that 'native title rights and interests of a commercial nature should be broadly inclusive and accommodate … the current and future commercialisation of previously non-commercial activities such as ecosystem services, carbon farming and bio-banking'.[233]

Expansion of the burden of native title

8.151 As noted, some governments articulated concerns about the Discussion Paper proposal for clarifying whether native title might comprise commercial rights and interests.[234] The South Australian Government expressed the view that such a proposition is 'not an accurate reflection' of *Akiba HCA*. It saw the proposal as going 'beyond' a mere statutory confirmation of the decision in *Akiba HCA*.[235]

8.152 Governments and industry groups in the mining, construction and farming industries expressed concern that the proposal, as drafted, would expand the current law.[236] Some industry sectors considered that the existing case law does not currently extend to recognising commercial activities and trade.[237]

8.153 In respect of the ALRC's proposal in the Discussion Paper, the submissions from the Western Australian and South Australian governments raised the possibility that the proposal, if enacted, may constitute an acquisition of a state's property, otherwise than on just terms, contrary to s 51(xxxi) of the *Australian Constitution*:

> [A]t sovereignty, the State's radical title was not burdened by native title rights 'in relation to any purpose' which would involve commercial rights. It is only by allowable change and adaptation that such rights are now capable of recognition

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230 National Farmers' Federation, *Submission 14*. This view was reiterated in National Farmers' Federation, *Submission 56*.

231 National Farmers' Federation, *Submission 14*.

232 Just Us Lawyers, *Submission 2*. They observed that a 'reasonable' balance will need to be struck.

233 Kimberley Land Council, *Submission 30*.

234 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014) Prop 8–1.

235 South Australian Government, *Submission 68*.

236 Ibid; Minerals Council of Australia, *Submission 65*; National Farmers' Federation, *Submission 56*; Association of Mining and Exploration Companies, *Submission 54*; The Chamber of Minerals and Energy of Western Australia, *Submission 49*; Cement Concrete and Aggregates Australia, *Submission 47*; Western Australian Government, *Submission 43*. The National Native Title Tribunal also expressed the view that Proposal 8–1 would likely be an expansion of the law but it did not specify its opposition, rather noting that '[s]uch an amendment may in turn expand the rights and interests which are capable of being registered and impact on how the Registrar approaches this task at s 190B(6)': National Native Title Tribunal, *Submission 63*.

237 See, eg, Cement Concrete and Aggregates Australia, *Submission 47*.

> (where made out on the evidence). The proposed amendment would expand the scope of that recognition to native title rights generally and thereby increase the burden on the State's radical title. There is also the prospect that the State's property would then be available for commercial exploitation where no such right existed previously.[238]

8.154 The Full Federal Court in *Bodney v Bennell* suggested that rights which originate in traditional laws and customs may change and adapt in accordance with changes in traditional laws and customs, although not so as, 'to impose a greater burden on the Crown's radical title'.[239]

8.155 It is well established in *Mabo [No 2]* that the Crown's radical title is burdened by native title rights. The Crown, at the point of sovereignty, acquired a radical or ultimate title—but not a beneficial interest. Native title rights and interests, as recognised, therefore must necessarily pre-date sovereignty and thus the accrual of any beneficial interest to the Crown.[240]

8.156 If the evidence demonstrates, for example, that there were rights to trade, then this is not a new burden, but one where the rights and interests stem from the traditional laws and customs with origins in the period prior to sovereignty. Recommendation 8–1 adopts the principles from *Akiba HCA*, but still requires that any finding of a right that is exercised for a commercial purpose will be determined on the evidence of traditional laws and customs. Further, for the right to be recognised, it must be possessed under traditional laws and customs which have pre-sovereign origins.

8.157 This position is consistent with the case law that suggests adaptation of laws and customs is permissible.[241] The corollary of the position outlined by Western Australia is that there can be no adaptation to laws and customs. The ALRC confirms, in Recommendation 5–1, that traditional laws and customs may adapt, evolve and develop.

Resolution of claims

8.158 A number of governments submitted that their practice in respect of resolving native title claims was commendable.[242] The Northern Territory Government stated that it has 'a strong record in achieving consent determinations of native title'.[243] The Western Australian Government submitted that its 'consistent record' of recognising native title by consent contradicts the premise that the Act's provisions do not deliver just outcomes for Indigenous Australians.[244] The South Australian Government observed that six of the claims that had been resolved by consent determination in that jurisdiction involved 'comprehensive settlement agreements that address broader issues

238 Western Australian Government, *Submission 43*. See also South Australian Government, *Submission 68*.
239 *Bodney v Bennell* (2008) 167 FCR 84, [120]–[121].
240 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 48.
241 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [83]; *Bodney v Bennell* (2008) 167 FCR 84, [74].
242 South Australian Government, *Submission 34*; Northern Territory Government, *Submission 31*; Queensland Government, *Submission 28*; Western Australian Government, *Submission 20*.
243 Northern Territory Government, *Submission 71*.
244 Western Australian Government, *Submission 20*.

including compensation, sustainability of the Prescribed Body Corporate, and future act issues'.[245]

8.159 The Queensland Government suggested that there was little basis for amendment to the Act because of the current rate of resolution of claims and the associated outcomes being achieved. The Queensland Government pointed to its accelerating number of consent determinations in recent years. It stated that the Federal Court has taken 'a broad and flexible approach' in applying the definition of native title and has confirmed that native title rights may comprise commercial rights.[246]

8.160 In this context, a substantial number of stakeholders opposed statutory amendment on the basis that it would introduce uncertainty.[247] The potential for commercial native title rights and interests also may be a factor that affects the willingness of industry and other third party respondents to enter negotiated consent determinations and agreements.[248]

8.161 Some stakeholders suggested that some governments may start negotiations with a relatively conservative position on whether the native title claim may include rights and interests of a commercial nature.[249] The NNTC observed that 'the recognition of native title rights and interests of a commercial nature in a determination of native title continues to be generally hotly contested by all levels of government'.[250]

8.162 CDNTS noted that in claims for native title rights to take resources, Western Australia had 'attempted to limit the right to take resources for "non-commercial" or "domestic purposes only"'.[251] This precipitated the litigated native title claims of the Pilki People and the Birriliburu People.[252]

8.163 NTSCORP submitted that amending the law 'would assist in the process of resolving claims by removing the, often circular, discussion about what rights are able to be claimed and limit the issue to which rights can be established by the evidence'.[253]

8.164 The ALRC considers that statutory amendment to clarify the position is preferable to increased litigation that may introduce delay and increased costs into the native title system.

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245 South Australian Government, *Submission 34*.

246 Queensland Government, *Submission 28*.

247 See, eg, Minerals Council of Australia, *Submission 65*; Association of Mining and Exploration Companies, *Submission 54*; Chamber of Minerals and Energy of Western Australia, *Submission 21*; Association of Mining and Exploration Companies, *Submission 19*.

248 Western Australian Fishing Industry Council, *Submission 23*.

249 Central Desert Native Title Services, *Submission 26*; Cape York Land Council, *Submission 7*.

250 National Native Title Council, *Submission 16*.

251 Central Desert Native Title Services, *Submission 26*. This may have been an uncommon practice amongst native title representative bodies. See Cape York Land Council, *Submission 7* ('because of the development of case law and Queensland native title determination precedents limiting the exercise of rights to non-commercial uses, that evidence has not been routinely prepared and commercial rights have not been routinely pursued').

252 *Willis on behalf of the Pilki People v Western Australia* [2014] FCA 714 (4 July 2014) [135]; *BP (Deceased) on behalf of the Birriliburu People v Western Australia* [2014] FCA 715 (4 July 2014) [104].

253 NTSCORP, *Submission 67*.

8.165 The Terms of Reference refer to 'the importance of certainty as to the relationship between native title and other interests in land and waters'. The ALRC acknowledges the importance of certainty for all stakeholders and the need to promote an efficient and effective native title system. The intention of the recommendation is to clarify the legal position—particularly in regard to the conclusion of consent determinations.

Other native title rights and interests?

8.166 The ALRC is aware, through consultations and submissions, that claims for other types of native title rights are evolving, for example in respect of reciprocal rights,[254] rights of conferral[255] and for new forms of resource utilisation, such as bio-sequestration that have origins in the traditional use of land and waters under traditional laws and customs. The ALRC has recommended statutory clarification around native title rights to be exercised for commercial or non-commercial purposes. That recommendation is intended to allow for the adoption of principles to facilitate the development of the law on a case by case basis.

8.167 The ALRC is not recommending that any other native title right or interest be expressly included in any revised s 223(2) as set out in Recommendation 8–1. This is not intended to preclude a finding on the evidence of other native title rights and interests that may be recognised in line with the adaptation of laws and customs. The ALRC stresses that the list in s 223(2)(b) is indicative—not exhaustive.

8.168 As CDNTS aptly put it, '[t]here is a danger that too indicative a list will result in native title rights and interests being unintentionally limited by virtue of the fact that an asserted right or interest is "not of the kind" found in the section'.[256] Apart from the issue of cultural knowledge, discussed below, the majority of stakeholders who addressed this issue[257] submitted that there was no need for express inclusion of anything else.[258]

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254 In *Akiba HCA*, in respect of the claim for reciprocal rights, the High Court held that, 'intramural reciprocal relationships between members of different island communities giv[ing] rise to obligations relating to access to and use of resources' are not rights and interests 'in relation to' land or waters within the meaning of s 223 of the *Native Title Act*. Rather, on the basis of the evidence in that case, they were correctly characterised as 'rights of a personal character dependent upon status'. See *Akiba v Commonwealth* (2013) 250 CLR 209, [6], [45] (French CJ and Crennan J); [47] (Hayne, Kiefel and Bell JJ).

255 Law Council of Australia, *Submission 64*.

256 Central Desert Native Title Service, *Submission 48*.

257 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014) Q 8–2.

258 South Australian Government, *Submission 68*; NTSCORP, *Submission 67*; Law Council of Australia, *Submission 64*; Queensland South Native Title Services, *Submission 55*; Law Society of Western Australia, *Submission 41*. North Queensland Land Council called for 'the protection of secular, cosmological and religious knowledge' to be included expressly: North Queensland Land Council, *Submission 42*. AIATSIS submitted that any such listing as is found presently in s 223(2) 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': AIATSIS, *Submission 70*. Some submissions called for the *Native Title Act* to be amended so that reciprocal rights may be recognised as native title rights and interests: Law Council of Australia, *Submission 35*; North Queensland Land Council, *Submission 17*. The Law Council of Australia

Protection or exercise of cultural knowledge

8.169 Cultural knowledge is a core aspect of the law and custom of Aboriginal and Torres Strait Islander communities. The term 'cultural knowledge' signifies an intense affiliation with land and waters, where 'places are discursively acknowledged as being essentially and primarily particular things in place, things that are resonances and signs of the ancestral past'.[259] It can encompass particular forms of expression of the knowledge of places—such as dance, art, stories and ceremonies, to knowledge of the medicinal properties of plants and genetic resources. It includes knowledge that is not to be openly-shared, but which is transmitted through particular genealogically and spatially referenced processes. Cultural heritage is a cognate term also adopted to describe this knowledge, as well as physical expressions of culture, such as paintings.

8.170 Section 223(1) of the *Native Title Act* has been construed as not extending to recognition of rights to protect cultural knowledge.[260] However, determinations of native title rights and interests under s 225 of the *Native Title Act* may, for example, comprise rights of access to sacred sites, and for groups to conduct ceremonies on traditional lands.[261]

8.171 Since the inception of the *Native Title Act*, there has been greater understanding of the links between Aboriginal and Torres Strait Islander laws and customs, as expressed through cultural knowledge, and the relationship with land and waters. The ALRC considered that it was within the scope of the Inquiry to seek views on whether rights related to the protection or exercise of cultural knowledge should be included expressly in the *Native Title Act*. The ALRC also considered the issue may be relevant to what is encompassed by 'commercial purposes'. Could cultural knowledge, for example, be considered as a native title right which could be exercised for a commercial purpose?

8.172 Specifically, the ALRC asked whether the indicative list proposed for a revised s 223(2)(b) should include the right to protect cultural knowledge.[262] The ALRC also asked what stakeholders understand by the phrase 'cultural knowledge'; whether a statutory definition is needed; and what such a definition should contain.

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submitted that the *Native Title Act* should also be amended to recognise status-based rights or permission to enter and intellectual property rights: Law Council of Australia, *Submission 35*.

259 Marcia Langton, 'The Estate as Duration: "Being in Place" and Aboriginal Property Relations in Areas of Cape York Peninsula in North Australia' in Lee Godden and Maureen Tehan (eds), *Comparative Perspectives on Communal Lands and Individual Ownership: Sustainable Futures* (Routledge, 2010) 87.

260 *Western Australia v Ward* (2002) 213 CLR 1, [468].

261 See, eg, for NSW: *Phyball on behalf of the Gumbaynggirr People v A-G (NSW)* [2014] FCA 851 (15 August 2014); for Vic: *Lovett on behalf of the Gunditjmara People v State of Victoria (No 5)* [2011] FCA 932 (27 July 2011); for Qld: *Smith on behalf of the Kullilli People v State of Queensland* [2014] FCA 691 (2 July 2014); for WA: *Watson on behalf of the Nyikina Mangala People v State of Western Australia (No 6)* [2014] FCA 545 (29 May 2014); for SA: *Ah Chee v South Australia* [2014] FCA 1048 (3 October 2014); *Starkey v South Australia* [2011] FCA 456 (9 May 2011); for NT: *Apetyarr v Northern Territory of Australia* [2014] FCA 1088 (14 October 2014).

262 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014) Q 8–1.

8.173 A number of stakeholders supported the inclusion of the protection or exercise of cultural knowledge in the indicative list in a revised s 223(2)(b).[263] CDNTS submitted that 'there exists a great deal of cultural knowledge regarding the use and value of ecological and biological resources, which has the potential to provide economic benefit for groups'.[264] NTSV was supportive but considered that the issue requires further consideration.[265] Queensland South Native Title Services considered that such a reform would be 'problematic and complex', in part because of the interplay with copyright and intellectual property laws. But, in its view, it was 'potentially a huge deal for traditional owners'.[266]

8.174 Other stakeholders were opposed to the suggestion that the right to protect cultural knowledge be included in the indicative list in a revised s 223(2)(b).[267] AIATSIS expressed the view that cultural knowledge would be better dealt with outside of the scheme of the *Native Title Act*.[268]

8.175 A number of stakeholders were of the view that the term 'cultural knowledge' should not be defined in the *Native Title Act*.[269] Few stakeholders provided a definition of 'cultural knowledge'.[270]

8.176 There are complex considerations in respect of protecting cultural knowledge. While cultural knowledge is an integral aspect of the relationship to land and waters, it also has deep free-standing significance for Aboriginal peoples and Torres Strait Islanders. There has been extensive work already around cultural knowledge.[271] A complex balancing of interests is involved.

8.177 The ALRC considers that the question of how cultural knowledge may be protected and any potential rights to its exercise and economic utilisation governed by the Australian legal system would be best addressed by a separate review. An

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263 Arts Law Centre of Australia, *Submission 72*; National Congress of Australia's First Peoples, *Submission 69*; NTSCORP, *Submission 67*; Law Council of Australia, *Submission 64*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; National Native Title Council, *Submission 57*; Queensland South Native Title Services, *Submission 55*; A Frith and M Tehan, *Submission 52*; Central Desert Native Title Service, *Submission 48*; North Queensland Land Council, *Submission 42*; Law Society of Western Australia, *Submission 41*.

264 Central Desert Native Title Service, *Submission 48*.

265 Native Title Services Victoria, *Submission 45*.

266 Queensland South Native Title Services, *Submission 55*.

267 See, eg, Northern Territory Government, *Submission 71*; AIATSIS, *Submission 70*; South Australian Government, *Submission 68*.

268 AIATSIS, *Submission 70*. See also Chuulangun Aboriginal Corporation, Submission No 28 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, June 2011.

269 Yamatji Marlpa Aboriginal Corporation, *Submission 62*; National Native Title Council, *Submission 57*; A Frith and M Tehan, *Submission 52*.

270 See, eg, Queensland South Native Title Services, *Submission 55*: 'this knowledge includes traditional medicines, bush tucker, and aspects related to totemic or conservation responsibilities towards natural resources'.

271 See, eg, IP Australia's Indigenous Knowledge consultation: <www.ipaustralia.gov.au>; World Intellectual Property Organization's two gap analyses on the protection of Traditional Cultural Expressions and Traditional Knowledge: *The Protection of Traditional Knowledge: Draft Gap Analysis: Revision*, UN Doc WIPO/GRTKF/IC/13/5(b) Rev (11 October 2008); *The Protection of Traditional Cultural Expressions: Draft Gap Analysis*, UN Doc WIPO/GRTKF/IC/13/4(b) Rev (11 October 2008).

independent inquiry could bring to fruition the wide-ranging and valuable work that has already been undertaken but which still incompletely addresses the protection of Aboriginal and Torres Strait Islander peoples' cultural knowledge.

Definitions

8.178 In *Ward HCA*, the majority of the High Court noted the 'imprecision' of the term 'cultural knowledge'.[272] In that appeal, the submissions referred to 'such matters as the inappropriate viewing, hearing or reproduction of secret ceremonies, artworks, song cycles and sacred narratives'.[273]

8.179 The World Intellectual Property Organization (WIPO) has undertaken extensive investigation into the protection of indigenous cultural knowledge.[274] WIPO distinguishes between 'traditional knowledge' and 'traditional cultural expressions'.[275]

8.180 Traditional knowledge is conceived of broadly, as the living inter-generational body of knowledge[276] forming part of the spirit and culture of its indigenous community.[277] Traditional knowledge is important in respect of the exploitation of genetic resources;[278] and arises in a wide variety of fields including agriculture, medicine and traditional lifestyles.[279]

8.181 Traditional cultural expressions are

> any form of … expression, tangible or intangible, or a combination thereof, such as actions [such as dance …], materials [such as material expressions of art …], music

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272 *Western Australia v Ward* (2002) 213 CLR 1, [58] (Gleeson CJ, Gaudron, Gummow and Hayne JJ). See also Kirby J at [576] ('The right to protect cultural knowledge was not well defined in submissions before this Court'; 'I agree with the joint reasons that there is a need for a degree of specificity in determining such claims').

273 Ibid [58].

274 WIPO's Intergovernmental Committee has led the development of provisions for the protection of traditional knowledge since March 2004. As at the time of writing, the provisions have been the subject of three rounds of commenting processes, the last of which was between December 2009 and May 2010. The latest draft of the provisions was discussed in July 2014. See *The Protection of Traditional Knowledge: Draft Articles*, UN Doc WIPO/GRTKF/IC/28/5 (2 June 2014).

275 World Intellectual Property Organisation, *Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions: An Overview* (World Intellectual Property Organization, 2012) 8. A submission to this Inquiry used the term 'traditional knowledge' rather than 'cultural knowledge': North Queensland Land Council, *Submission 17*.

276 See *The Protection of Traditional Knowledge: Draft Articles*, UN Doc WIPO/GRTKF/IC/28/5 (2 June 2014).

277 Including the 'know-how, skills, innovations, practices, teachings and learnings' of local and Indigenous communities: Ibid Annex, 5.

278 Genetic resources refer to biological materials like plants or animals, which contain genetic information of value and which are capable of being reproduced. Genetic resources are covered by the *Convention on Biological Diversity*, opened for Signature 5 June 1992, 1760 UNTS 79 (entered into Force 29 June 1993).

279 See also *Convention for the Safeguarding of the Intangible Cultural Heritage*, Opened for Signature 17 October 2003, 2368 UNTS 3 (entered into Force 20 April 2006) art 2; *The Protection of Traditional Cultural Expressions: Draft Gap Analysis*, UN Doc WIPO/GRTKF/IC/13/4(b) Rev (11 October 2008) [4]–[5], [18].

> and sound [such as songs …], verbal [such as stories …] and written … , regardless of the form in which it is embodied, expressed or illustrated …[280]

8.182 Traditional cultural expressions will often embody traditional knowledge.

8.183 In this Report, the ALRC uses 'cultural knowledge' as an umbrella term for all types of indigenous knowledge. Moreover, the concept of protection of cultural knowledge has both positive and negative aspects. 'Positive' protection can encompass giving Aboriginal and Torres Strait Islander communities control over how their cultural knowledge is used—for example, moral rights of attribution—whereas other protection may provide for compensation for misappropriation.

International instruments and models for reform

8.184 Cultural knowledge is discussed in several important international instruments to which Australia is a party. Principal among these is UNDRIP.[281] The Preamble to UNDRIP recognises that 'respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment'. Under art 31, States undertake to 'take effective measures' to recognise and protect the exercise of Indigenous peoples' right to protect their cultural heritage, traditional knowledge and traditional cultural expressions. Cultural knowledge is also protected in the context of particular fields.[282]

8.185 WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ('IGC') oversaw a major project identifying gaps in existing protections for cultural knowledge and strategies to address them.[283] The IGC's work noted that intellectual property systems provide inadequate protection for traditional knowledge. The IGC has developed draft provisions for the protection of traditional knowledge and traditional cultural expressions.[284]

Australian framework

The position under the Native Title Act

8.186 In *Ward HCA*, the majority held that the *Native Title Act* cannot protect 'a right to maintain, protect and prevent the misuse of cultural knowledge' if it goes beyond

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280 *The Protection of Traditional Cultural Expressions: Draft Articles*, UN Doc WIPO/GRTKF/IC/28/6 (2 June 2014) Annex, 5.

281 *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st Sess, 107th Plen Mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007).

282 See, eg, *Convention on Biological Diversity*, opened for Signature 5 June 1992, 1760 UNTS 79 (entered into Force 29 June 1993) Preamble, art 8(j); *International Treaty on Plant Genetic Resources for Food and Agriculture*, Opened for Signature 4 November 2002 (entered into Force 29 June 2004) art 9.2(a); *Convention for the Safeguarding of the Intangible Cultural Heritage*, Opened for Signature 17 October 2003, 2368 UNTS 3 (entered into Force 20 April 2006) arts 13–14.

283 *The Protection of Traditional Knowledge: Draft Gap Analysis: Revision*, UN Doc WIPO/GRTKF/IC/13/5(b) Rev (11 October 2008); *The Protection of Traditional Cultural Expressions: Draft Gap Analysis*, UN Doc WIPO/GRTKF/IC/13/4(b) Rev (11 October 2008).

284 *The Protection of Traditional Knowledge: Draft Articles*, UN Doc WIPO/GRTKF/IC/28/5 (2 June 2014); *The Protection of Traditional Cultural Expressions: Draft Articles*, UN Doc WIPO/GRTKF/IC/28/6 (2 June 2014).

denial or control of access to land or waters.[285] The opening words of s 223(1) of the *Native Title Act* require native title rights and interests to be 'in relation to' land or waters.[286] Section 223(1)(b) requires the Aboriginal peoples or Torres Strait Islanders, by their traditional laws acknowledged and their traditional customs observed, to have a 'connection with' the land or waters.[287]

8.187 The majority of the High Court, stated in a joint judgment:

> To some degree, for example respecting access to sites where artworks on rock are located, or ceremonies are performed, the traditional laws and customs which are manifested at these sites answer the requirement of connection with the land …
>
> However, it is apparent that what is asserted goes beyond that to something approaching an incorporeal right akin to a new species of intellectual property to be recognised by the common law under par (c) of s 223(1). The 'recognition' of this right would extend beyond denial or control of access to land held under native title. It would, so it appears, involve, for example, the restraint of visual or auditory reproductions of what was to be found there or took place there, or elsewhere.[288]

8.188 Native title rights and interests in respect of cultural knowledge—variously described[289]—had been claimed in some early cases. In *Bulun Bulun v R & T Textiles Pty Ltd*, von Doussa J remarked that the pleadings 'appear to assert that intellectual property rights of the kind claimed by the applicants were an incident of native title in the land',[290] 'such that they constituted some recognisable interest in the land itself'.[291] That was not a case for the determination of native title[292] and the claim with respect to native title was not pressed.[293]

8.189 In *Commonwealth v Yarmirr*, the majority of the High Court observed that there was no clarity as to the meaning of the rights and interests 'to visit and protect places within the claimed area which are of cultural or spiritual importance' 'or how effect might be given to a right of access to "protect" places or "safeguard" knowledge'.[294]

8.190 The ALRC is aware that '[f]or Indigenous people there are unbreakable links between their knowledge systems, the land and waters, and its resources'.[295] Further, for such communities, 'spiritual or religious obligations could infiltrate almost all

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285 *Western Australia v Ward* (2002) 213 CLR 1, [468] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

286 Ibid [577] (Kirby J, viewing the key issue as pertaining to the opening words of s 223(1)); *Western Australia v Ward* (2000) 99 FCR 316, [666] (Beaumont and von Doussa JJ, using the language of 'in relation to'). North J did not specify a particular part of s 223(1) as the object of his focus.

287 *Western Australia v Ward* (2002) 213 CLR 1, [19], [60] (Gleeson CJ, Gaudron, Gummow and Hayne JJ, viewing the key issue as pertaining to s 223(1)(b)).

288 Ibid [59] (Gleeson CJ, Gaudron, Gummow and Hayne JJ). Olney J made a similar point in *Yarmirr v Northern Territory [No 2]* (1998) 82 FCR 533, 590.

289 Justice von Doussa used the language of 'traditional ritual knowledge' or 'ritual knowledge' rather than 'cultural knowledge' in his judgment in *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 86 FCR 244.

290 Ibid 254.

291 Ibid 256.

292 Ibid 255–6.

293 Ibid 256.

294 *Commonwealth v Yarmirr* (2001) 208 CLR 1, [2] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

295 Chuulangun Aboriginal Corporation, Submission No 28 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, June 2011.

undertakings, including transactions, transfers, exchanges and activities undertaken for value or benefit'.[296] As noted in Chapter 6, in both *Ward FFC* and *Ward HCA* the majority acknowledged that 'the relationship of Aboriginal people to their land has a religious or spiritual dimension'.[297]

8.191 Different views have been expressed about the appropriate statutory construction of s 223(1) in respect of cultural knowledge in strong dissenting judgments in the High Court[298] and in the Full Federal Court.[299] In *Ward FFC*, North J discussed an extract from the evidence—an anthropologist's report—that showed that the respective cultural knowledge was 'intimately linked with the land':[300]

> The protection of ritual knowledge is required by traditional law. Traditional law treats both elements as incidents of native title. There is no reason why the common law recognition of native title should attach to one incident and not the other. Because common law recognition is accorded to the entitlement to land as defined by traditional laws and customs the contrary conclusion should follow.[301]

8.192 Kirby J, in *Ward HCA*, focused on the 'very broad' phrase 'in relation to' in the opening words of s 223(1).[302] He saw the right to protect cultural knowledge as sufficiently connected to the area to be a right 'in relation to' the land or waters for the purpose of s 223(1).[303] Kirby J concluded:

> Recognition of the native title right to protect cultural knowledge is consistent with the aims and objectives of the NTA, reflects the beneficial construction to be utilised in relation to such legislation and is consistent with international norms declared in treaties to which Australia is a party. It recognises the inherent spirituality and land-relatedness of Aboriginal culture.[304]

8.193 The KLC submitted that the

> 'range of traditional indigenous relationships to country' are not adequately comprehended by common law native title nor, relevantly for the purposes of the Inquiry, section 223. For example, images of country and spirit beings connected to country are afforded no protection whatsoever by the NTA notwithstanding the fact that, from the perspective of the authorised custodians of those images, they are inherently connected to, and part of, country (land and waters).[305]

Intellectual property laws

8.194 Existing intellectual property laws have been successfully used to protect against some forms of misuse and misappropriation of cultural knowledge. Key forms of protection include:

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296 Kimberley Land Council, *Submission 30*.
297 *Western Australia v Ward* (2000) 99 FCR 316, [666]. See also *Western Australia v Ward* (2002) 213 CLR 1, [14].
298 *Western Australia v Ward* (2002) 213 CLR 1, (Kirby J).
299 *Western Australia v Ward* (2000) 99 FCR 316, (North J).
300 Ibid [865].
301 Ibid [866].
302 *Western Australia v Ward* (2002) 213 CLR 1, [577]–[578].
303 Ibid [577], [580].
304 Ibid [587].
305 Kimberley Land Council, *Submission 30*.

- trade marks—which appear relatively unproblematic because they can be used to protect logos and words used by indigenous communities in the course of trade and because others' marks that would be offensive may be opposed;[306]
- copyright—while it has been used to protect some cultural knowledge,[307] the requirements for expressions to be in material form, for authorship, and for originality may serve to limit legal recourse;[308] and
- patents—the scope for protection by way of patents may be relatively limited for a number of reasons.[309]

8.195 There are deep divergences between the perspectives of Indigenous peoples and conventional intellectual property systems:

> [T]he very conception of 'ownership' in the conventional IP system is incompatible with notions of responsibility and custodianship under customary laws and systems. While copyright confers exclusive, private property rights in individuals, indigenous authors are subject to dynamic complex rules, regulations and responsibilities, more akin to usage or management rights, which are communal in nature.[310]

8.196 Other laws that may provide some protection include the equitable doctrine of breach of confidence.[311]

Calls for reform

8.197 The decision in *Ward HCA*, and its approach to cultural knowledge, predates key international developments, including UNDRIP. Contemporary understanding of connection to country is being shaped by a growing body of academic and anthropological literature which is not reflected in the current state of the law. Terri Janke has pointed to a 'paradox' where cultural material is used in native title claims as evidence of continuing connection, but where cultural knowledge is not recognised as a native title right.[312]

8.198 Some stakeholders considered the protections for cultural knowledge under existing law as inadequate. The Arts Law Centre of Australia described existing

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306 Academics have highlighted the advantages of geographical indications of origin as protecting the underlying traditional knowledge: Brad Sherman and Leanne Wiseman, 'Towards an Indigenous Public Domain?' in Lucie Guibault and PB Hugenholtz (eds), *The Future of the Public Domain: Identifying the Commons in Information Law* (Kluwer Law International, 2006) 259.

307 *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 86 FCR 244.

308 See *The Protection of Traditional Cultural Expressions: Draft Gap Analysis*, UN Doc WIPO/GRTKF/IC/13/4(b) Rev (11 October 2008) [35].

309 Terri Janke, 'Our Culture: Our Future, Report on Australian Indigenous Cultural and Intellectual Property' (Australian Institute of Aboriginal and Torres Stait Islander Studies; Aboriginal and Torres Strait Islander Commission, 1998), sections 5.4 to 5.5.

310 *The Protection of Traditional Cultural Expressions: Draft Gap Analysis*, UN Doc WIPO/GRTKF/IC/13/4(b) Rev (11 October 2008) [36]. See also the work of Terri Janke, including Terri Janke, *Biodiversity, Patents and Indigenous Peoples* (26 June 2000) <http://sedosmission.org/old/eng/JankeTerry.htm>.

311 *Foster v Mountford* (1976) 14 ALR 71.

312 Terri Janke, 'Follow the Stars: Indigenous Culture, Knowledge and Intellectual Property Rights' (Speech Delivered at the Mabo Oration 2011, Brisbane, 3 July 2011) 13.

common law remedies as 'deeply complex and costly', as well as ineffective. The Centre stated that

> there are many situations where Aboriginal and Torres Strait Islander people have no effective legal remedies and therefore no absolute right to keep secret their sacred and ritual knowledge or prevent the use of their traditional knowledge and traditional cultural expressions.[313]

8.199 AIATSIS and some Native Title Representative Bodies and Service Providers echoed these sentiments, in particular, pointing to the inadequacies of current intellectual property laws.[314]

8.200 On the other hand, state governments highlighted the progress made using current frameworks.[315] Consent determinations in South Australia and the Northern Territory, for example, already include rights to conduct and participate in cultural activities and practices on their traditional lands.[316] The Northern Territory has agreed consent determinations of native title over the pastoral estate recognising, as part of the suite of non-exclusive native title rights and interests, the rights of native title holders to conduct and participate in cultural activities and practices on the land and waters subject to the determination area.[317]

8.201 Some stakeholders that supported amending the *Native Title Act* to directly cover cultural knowledge stressed the need to connect this with land or waters, as opposed to creating a new form of intellectual property.[318]

8.202 Cultural knowledge has been the subject of numerous government reviews and inquiries.[319] In 2012, IP Australia initiated an Indigenous Knowledge Consultation inviting views about how 'Indigenous Knowledge' can work with the intellectual property system.[320] Stakeholders pointed to positive steps towards protecting cultural knowledge including through voluntary protocols. Protocols cover only specific areas rather than considering the protection of cultural knowledge more generally, leading to a lack of consistency. IP Australia's stakeholders provided strong support for reform, favouring a stand-alone, sui generis framework for the protection of cultural knowledge.

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313 Arts Law Centre of Australia, *Submission 72*.

314 AIATSIS, *Submission 70*; Queensland South Native Title Services, *Submission 55*; Central Desert Native Title Service, *Submission 48*.

315 Northern Territory Government, *Submission 71*; South Australian Government, *Submission 68*; Western Australian Government, *Submission 43*.

316 See, eg, *Lennon on behalf of the Antakirinja Matu-Yankunytjatjara Native Title Claim Group v South Australia* [2011] FCA 474 (11 May 2011).

317 Northern Territory Government, *Submission 71*.

318 See, eg, Yamatji Marlpa Aboriginal Corporation, *Submission 62*; Law Society of Western Australia, *Submission 41*.

319 Terri Janke provided a survey of government reviews and inquiries in Australia from 1975. See Terri Janke, *New Tracks: Indigenous Knowledge and Cultural Expression and the Australian Intellectual Property System* (Terri Janke & Company, 2012) 29, Appendix A.

320 See <www.ipaustralia.gov.au>.

8.203 In summary, the ALRC has raised the potential for a native title right to protect cultural knowledge and for cultural knowledge to be considered in relation to rights to be exercised for any purpose, including commercial purposes. The ALRC does not have a concluded view on whether this would be a desirable development, but has identified the need for an in-depth inquiry that can assess the legal and policy issues.

9. Native Title: Comparisons with Common Law Jurisdictions

Contents

Summary

9.1 In the latter part of the 20th century, Indigenous peoples across the globe sought legal rights to their ancestral lands and waters. The responses to these claims have taken different legal shape in different places but share many commonalities. In Australia, Canada and New Zealand customary rights to traditional territories have been recognised at common law.[1] The recognition of indigenous rights developed from a shared jurisprudential basis in the common law. There were some divergences due to the specific circumstances in each country, for example, the existence of treaties in New Zealand and Canada.[2] As the analysis in this chapter demonstrates, many of the same features have emerged in the development of the law.

9.2 At the same time as Australian courts have fashioned the law of native title, superior courts in other Commonwealth jurisdictions have been establishing principles for the recognition of the rights to land of their own Indigenous peoples.[3] In the period since native title was initially recognised in *Mabo v Queensland [No 2]* (‘*Mabo [No 2]*’), Australia’s jurisprudence has developed with limited reference to these

1 For a general discussion of these trends in common law countries see Paul G McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford University Press, 2011). For the importance of the comparative perspective see: AIATSIS, *Submission 36*.

2 Gummow J noted that in Canada the basic legal framework developed quite differently. *Wik Peoples v Queensland* (1996) 187 CLR 1, 182.

3 A form of native title has been recognised in many former British colonies, eg South Africa and Malaysia.

Commonwealth comparators.[4] Australia has developed a major statutory regime for native title claims resolution, and as Chapter 3 has demonstrated, it has moved forward rapidly with consent determinations for native title.

9.3 Some of the matters identified in Chapter 2 which have led to the necessity to consider reform of the *Native Title Act 1993* (Cth) ('*Native Title Act*') have parallels in other jurisdictions. The frameworks within which jurisprudence has developed in other jurisdictions—most relevantly Canada and New Zealand—differ in some respects from those in Australia. Australian courts have noted the different position in other jurisdictions.[5]

9.4 This remains so, at the level of general principle, whether there is a statutory framework and judicial exposition around that framework (as in Australia and New Zealand) or whether the development of the law is left entirely to judges.[6] In particular, all require some kind of connection to be established between the claimant Indigenous peoples and land, and continuity between pre-sovereign and contemporary practices or uses of land, although the emphasis on the degree of 'continuity' varies in each country. In each situation, tensions have emerged around, whether and how, the question of change to Indigenous societies can be accommodated in the law.

9.5 Robust law reform is enhanced by a consideration of comparable law as it operates in common law countries. Comparisons with the manner in which the law has developed in New Zealand and Canada are particularly relevant due to the initial 'judicial borrowings' between these jurisdictions and the similar common law framework.

9.6 Native title laws in Australia evolved from a shared common law heritage. While the *Native Title Act* is now the starting point for construing the definition of native title, it is important to acknowledge the rich jurisprudence in comparable jurisdictions that grapples with similar complex issues around indigenous rights and title to lands.

9.7 This chapter provides an overview of legal frameworks and jurisprudence in Canada and New Zealand in relation to Indigenous peoples' rights to land and waters.[7] Where particular facets of this comparative jurisprudence are relevant to specific

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4 See, eg, *Fejo v Northern Territory* (1998) 195 CLR 96. In that case, Kirby J argued that 'care must be observed in the use of overseas authority in this context because of the differing historical, constitutional and other circumstances and the peculiarity of the way in which recognition of native title came belatedly to be accepted by this Court as part of Australian law': [111]. See further Simon Young, *Trouble with Tradition: Native Title and Cultural Change* (Federation Press, 2008) 33–35.

5 *Fejo v Northern Territory* (1998) 195 CLR 96, 130.

6 The relevance of whether a colony was regarded as ceded, conquered or settled, to the recognition of Indigenous rights in land is discussed in Ch 2.

7 In Australia, and overseas, Indigenous peoples have entered into agreements which may recognise native title, and which will also provide a range of other outcomes. In Australia, these have largely occurred under the framework of the *Native Title Act* through Indigenous Land Use Agreements. See Ch 3 for further discussion on settlements in Australia. In both Canada and New Zealand, governments have entered into comprehensive agreements with indigenous groups. These are not discussed in this chapter. See further Agreements, Treaties and Negotiated Settlements Project, *Agreement Making with Indigenous Peoples: Background Material* <www.atns.net.au>.

analyses of connection requirements or recommendations they are noted here, and incorporated as relevant in earlier chapters.

Canada

9.8 In Canada, First Nations peoples' rights exist on a continuum between exclusive rights (aboriginal title),[8] and non-exclusive rights (aboriginal rights).[9] Aboriginal title in Canada is based on the recognition of use and occupation pre-sovereignty, while aboriginal rights require the identification of rights integral to culture at the time of sovereignty. The similarities to the idea of 'traditional' in the Australian context are evident.

Recognition of aboriginal title rights and title

9.9 The initial recognition of aboriginal title can be traced to the decision in *Calder v Attorney-General for British Columbia* ('*Calder*') in 1971.[10] However, aboriginal title is now understood to be a subset of the broader category of aboriginal rights protected by s 35(1) of the *Constitution Act, 1982*.[11] Somewhat confusingly these are known as aboriginal title rights to distinguish them from aboriginal rights. Both are a subset of the broader aboriginal rights.

9.10 Section 35(1) of the *Constitution Act, 1982* recognises and affirms aboriginal and treaty rights. This section provides constitutional protection to rights existing at common law, but which remained unextinguished, at the date that provision came into force (17 April 1982).[12] Rights existing at common law in 1982 cannot be extinguished, although they can be infringed by sufficiently justified governmental action.[13]

9.11 While the provision protects *existing* aboriginal rights, the development of, and rationale for, the doctrine of aboriginal rights after 1982 has in turn been affected by the purpose and scope of s 35(1). Aboriginal rights (in a broad sense) protected by s 35(1) comprise a 'spectrum' of rights. They include within their range:

- aboriginal rights: practices, customs and traditions integral to the distinctive culture of the group claiming the right;
- site specific rights to engage in particular activities on particular land; and
- aboriginal title: akin to a possessory title to the land.

The distinction between these rights is the degree of connection to the land. The first two will be founded on activities or practices which fall short of the degree of connection required to found title, but which will nevertheless be recognised and

8 *Delgamuukw v British Columbia* [1997] 3 SCR 1010; *Tsilhqot'in Nation v British Columbia* 2014 SCC 44.
9 *R v Van der Peet* [1996] 2 SCR 507.
10 *Calder v Attorney-General of British Columbia* [1973] SCR 313.
11 *R v Adams* [1996] 3 SCR 101.
12 *R v Sparrow* [1990] 1 SCR 1075.
13 Ibid; *R v Van der Peet* [1996] 2 SCR 507.

affirmed by s 35(1).[14] Where the degree of connection is less than that required to establish aboriginal title, claimants may make a claim of aboriginal rights (in a more restricted sense).

9.12 While both aboriginal rights and aboriginal title are recognised and protected by s 35(1), each has evolved a distinctive test and standard of proof. They are consequentially also characterised by distinctive approaches to the question of evolution of rights and possible economic dimensions.

Establishing aboriginal title

9.13 In the latter part of the 20th century, recognition of a legally enforceable right to land held by indigenous groups can be traced to the decision of the Supreme Court of Canada in *Calder*.[15] According to Judson J in that decision, aboriginal title is sourced in the occupation of land prior to sovereignty. Similarly, in *Guerin v R*, Dickson J confirmed that aboriginal title was an independent legal right, based on historic occupation and possession and 'supported by the principle that a change in sovereignty does not in general affect the presumptive title of the inhabitants'.[16]

9.14 Aboriginal title is a burden on the radical title of the Crown. It is an independent legal interest which gives rise to a fiduciary duty.[17] In light of the enactment of s 35(1), *Constitution Act, 1982*, aboriginal title is now understood as a subset of the broader category of the 'aboriginal rights' protected by this section. While aboriginal rights are generally characterised as activities or practices, aboriginal title is characterised as a possessory right.[18]

9.15 In both *Calder* and the later case of *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* ('*Baker Lake*'), it was noted that the existence of an organised society was required to establish proof of occupation.[19] This requirement might suggest that an inquiry should be made into the laws and customs of that society, as for native title in Australia.[20] However, proof of aboriginal title in Canada has focused on occupation and possession, rather than the customs and traditions of aboriginal law.[21]

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

15 *Calder v Attorney-General of British Columbia* [1973] SCR 313.

16 *Guerin v The Queen* [1984] 2 SCR 335; *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399.

17 *Tsilhqot'in Nation v British Columbia* 2014 SCC 44. For further discussion of the Crown's fiduciary duty, see below.

18 *Delgamuukw v British Columbia* [1997] 3 SCR 1010. The possessory right is however held to be inalienable.

19 *Calder v Attorney-General of British Columbia* [1973] SCR 313; *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* (1979) 107 DLR 3d 513.

20 See further Chs 4 and 5.

21 Kent McNeil, 'The Meaning of Aboriginal Title' in Michael Asch (ed), *Aboriginal Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (University of British Columbia Press, 1997) 135; ibid.

9.16 Significant clarification of the source and nature of aboriginal title was not provided until the decision of the Supreme Court of Canada in *Delgamuukw v British Columbia* ('*Delgamuukw*').[22] In that case, Lamer CJ located the source of aboriginal title in the

> physical fact of occupation, which derives from the common law principle that occupation is proof of possession in law … What makes aboriginal title sui generis is that it arises from possession before the assertion of British sovereignty, whereas normal estates, like fee simple, arise afterward.[23]

9.17 However, Lamer CJ went on to suggest that aboriginal law could be relied on to determine whether there was the occupation necessary to establish possession. The common law perspective relies on physical occupation as proof of possession, but the aboriginal perspective could, for example, look to patterns of land holding, allowable land uses, indigenous laws on trespass or rules on who can reside in the claim area in order to determine exclusive occupation.[24] Aboriginal title does not therefore rely on the content of aboriginal laws as such, but that content is relevant to determining whether there is exclusive occupation such as to point to 'title'.

9.18 Aboriginal title post-sovereignty reflects the fact of aboriginal occupancy pre-sovereignty. It includes all the pre-sovereignty incidents of use and enjoyment that were part of the collective title enjoyed by the ancestors of the claimant group—most notably the right to control how the land is used.[25]

9.19 The 2014 decision of the Supreme Court of Canada in *Tsilhqot'in Nation v British Columbia* ('*Tsilhqot'in Nation*') confirmed that, when considering the question of whether there has been sufficient occupation to ground aboriginal title, a 'culturally sensitive approach' is required.[26] Such a culturally sensitive approach is 'based on the dual perspectives of the Aboriginal group in question—its laws, practices, size, technological ability and the character of the land claimed—and the common law notion of possession as a basis for title'.[27]

9.20 However, the perspective of an Aboriginal group to possession might conceive of possession of land in a somewhat different manner than did the common law.[28] McLachlin CJ stated:

> a culturally sensitive approach suggests that regular use of territories for hunting, fishing, trapping and foraging is 'sufficient' use to ground Aboriginal title, provided that such use, on the facts of a particular case, evinces an intention on the part of the Aboriginal group to hold or possess the land in a manner comparable to what would be required to establish title at common law.[29]

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22 *Delgamuukw v British Columbia* [1997] 3 SCR 1010.
23 Ibid [114].
24 Ibid [156]–[157].
25 *Tsilhqot'in Nation v British Columbia* 2014 SCC 44 [75].
26 Ibid [41].
27 Ibid.
28 Ibid.
29 Ibid [42].

Continuity of occupation

9.21 Continuity between the present and the period prior to sovereignty becomes an issue for aboriginal title when a claimant group seeks to rely on present occupation in support of its claim. If direct evidence is provided of pre-sovereign use and occupation to the exclusion of others, 'such evidence establishes Aboriginal title. There is no additional requirement that the claimant group show continuous occupation from sovereignty to the present-day'.[30]

9.22 If present occupation is relied on as proof of occupation pre-sovereignty, there must be continuity between present and pre-sovereignty occupation. If such evidence is provided, any real need to show continuity—other perhaps than in the sense of showing that the modern group are the descendants of the original holders—is negated.

9.23 In *Delgamuukw*, the Court has recognised the difficulty of proving pre-sovereign occupation, holding that

> an aboriginal community may provide evidence of present occupation as proof of pre-sovereignty occupation in support of a claim to aboriginal title. What is required, in addition, is a continuity between present and pre-sovereignty occupation, because the relevant time for the determination of aboriginal title is at the time before sovereignty.[31]

9.24 The Supreme Court added:

> The occupation and use of lands may have been disrupted for a time, perhaps as a result of the unwillingness of European colonizers to recognize aboriginal title. To impose the requirement of continuity too strictly would risk "undermining the very purpose of s. 35(1) by perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed to respect" aboriginal rights to land.[32]

9.25 In *Tsilhqot'in Nation*, McLachlin CJ elaborated on the notion of 'continuity', stating that 'continuity simply means that for evidence of present occupation to establish an inference of pre-sovereignty occupation, the present occupation must be rooted in pre-sovereignty times'.[33]

9.26 The nature of occupation may change between sovereignty and the present. This will not preclude a claim for aboriginal title as long as—referring to Brennan J in *Mabo [No 2]*[34]—a 'substantial connection between the people and the land is maintained'.[35] Continuity does not require an unbroken chain of continuity between present and prior occupation.[36]

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30 *Tsilhqot'in Nation v British Columbia* (Unreported, BCSC, 20 November 2007) 1700, [548].
31 *Delgamuukw v British Columbia* [1997] 3 SCR 1010 [152].
32 Ibid [153].
33 *Tsilhqot'in Nation v British Columbia* 2014 SCC 44 [46].
34 *Delgamuukw v British Columbia* [1997] 3 SCR 1010 [153].
35 Ibid [154].
36 *R v Van der Peet* [1996] 2 SCR 507 [65]; *Delgamuukw v British Columbia* [1997] 3 SCR 1010 [153]; *Tsilhqot'in Nation v British Columbia* 2014 SCC 44 [46].

Evolution of aboriginal title

9.27 Once aboriginal title has been established, it confers the right to full use of the land, analogous to the rights of the holder of a fee simple at common law. This means that activities on the land are not restricted to those undertaken prior to, or at, sovereignty. In *Tsilhqot'in Nation*, McLachlin CJ stated that, 'in simple terms, the title holders have the right to the benefits associated with the land—to use it, enjoy it and profit from its economic development'.[37] According to Lamer CJ in *Delgamuukw*:

> Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. Rather, it confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies. Those activities do not constitute the right per se; rather, they are parasitic on the underlying title.[38]

9.28 However, the range of uses to which the land may be put is subject to an 'inherent limit': 'they must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group's aboriginal title'.[39]

9.29 The scope of this inherent limit remains unclear. It rests on the importance of the continuity of the relationship of the group with the land. According to Lamer CJ, this 'relationship should not be prevented from continuing into the future'.[40] Thus, land cannot be used in a way which destroys its value for the practices on which occupation is based—for example, strip mining former hunting and fishing grounds, or turning lands with which the group has a special bond for ceremonial purposes into a parking lot.[41] Therefore, the ability of claimant groups to use the land for economic development is not entirely unlimited.

Different sources of title in Canada and Australia: different outcomes

9.30 Although the source of aboriginal title is different from that of native title in Australia (the former based on occupation, the latter based on laws and customs), after *Tsilhqot'in Nation* the facts which found a claim to aboriginal title in Canada and native title in Australia may be similar. It is likely that the facts of *Mabo [No 2]* would have been likely to satisfy the test in *Delgamuukw* and *Tsilhqot'in Nation* to establish a right of aboriginal title.[42]

9.31 However, the different bases for aboriginal title and native title may lead to differences in outcome. In particular, as aboriginal title in Canada is based on occupation, it founds a recognised possessory interest, a fee simple—it is a 'right to the

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37 *Tsilhqot'in Nation v British Columbia* 2014 SCC 44.
38 *Delgamuukw v British Columbia* [1997] 3 SCR 1010 [111].
39 Ibid.
40 *Delgamuukw v British Columbia* [1997] 3 SCR 1010; *Tsilhqot'in Nation v British Columbia* 2014 SCC 44.
41 *Delgamuukw v British Columbia* [1997] 3 SCR 1010.
42 See discussion in Ch 2 of Toohey J's position in *Mabo [No 2]*.

land itself'.[43] In *Delgamuukw*, the Court noted it had taken pains to clarify that aboriginal title 'does not mean that aboriginal title is a non-proprietary interest which amounts to no more than a licence to use and occupy the land and cannot compete on an equal footing with other proprietary interests.'[44]

Establishing aboriginal rights

9.32 To establish an aboriginal right, short of title, the claimants must prove that the practices, uses or customs claimed as aboriginal rights are 'integral to the distinctive culture' of the claimants.

9.33 'Integral' emphasises practices, traditions and customs that are vital to the life, culture and identity of the aboriginal society and therefore excludes practices, traditions and customs that are only marginal or incidental to the aboriginal society's cultural identity.[45] The language used has resonance for the Australian law expounding what is understood as traditional law and custom, (see Chapters 4 and 5).

9.34 The practice, tradition or custom must be a defining feature which made the society what it was.[46] It need not, however, be necessarily the most important defining feature of that society. The test does not require the practice founding the aboriginal right to go to the core of the claimant group.[47] Nor need the culture be shown to be fundamentally altered without this practice.[48]

9.35 The practice, use, or custom must have been integral prior to European contact.[49] Once an integral practice, custom or tradition has been identified, there must also be shown to be a reasonable degree of continuity between that practice and a modern practice or custom and a practice, tradition or custom.[50]

9.36 In contrast to claims made under the *Native Title Act*, aboriginal rights doctrine focuses on activities rather than rights.[51] Thus, what constitutes an aboriginal right might, for example, be the practice of fishing for subsistence purposes, rather than a right to fish. What is important is not the resource itself, but the practice by which it was extracted or harvested.

9.37 The majority of decisions of the Supreme Court of Canada relating to aboriginal rights have arisen in the specific context of rights claimed as a defence to breach of provincial legislation, generally resource legislation. The exception to the instances

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43 *Delgamuukw v British Columbia* [1997] 3 SCR 1010 [140]. See Margaret Stephenson 'Resource Development on Aboriginal Lands in Canada and Australia' (2003) 9 *James Cook University Law Review* 21.

44 Ibid 113. For a discussion in the Australian context, see Noel Pearson, 'Land Is Susceptible of Ownership' (Paper Presented at High Court Centenary Conference, Canberra, 9-11 October 2003).

45 *Mitchell v Minister of National Revenue* [2001] 1 SCR 911, [12]; *R v Sappier; R v Gray* [2006] 2 SCR 686 [37].

46 *R v Van der Peet* [1996] 2 SCR 507 [56].

47 *R v Sappier; R v Gray* [2006] 2 SCR 686 [40].

48 Ibid [41].

49 *R v Van der Peet* [1996] 2 SCR 507 [60].

50 *Mitchell v Minister of National Revenue* [2001] 1 SCR 911, [12].

51 *R v Sappier; R v Gray* [2006] 2 SCR 686.

where aboriginal rights were argued as a defence was *Lax Kw'alaams Indian Band v Canada* ('*Lax Kw'alaams*') which was a claim for a declaration of aboriginal rights.[52]

9.38 As s 35(1) of the *Constitution Act 1982* protects and affirms *existing* aboriginal rights, the demonstration of such a right can be a defence to a regulatory offence. The characterisation of the practice which founds an aboriginal right, and which therefore once proven provides a defence, is thus in part determined by what is required to establish the defence.[53]

9.39 At a practical level, therefore, s 35(1) provides a similar defence to regulatory offences as s 211 of the *Native Title Act*.[54] However, s 35(1) protects and affirms all existing aboriginal rights. By contrast, s 211 is specifically limited to a particular prescribed class of activities found in s 211(3). Section 211 also only protects the class of activities where they are carried out for 'personal, domestic or non-commercial communal needs'.[55]

Proof of continuity

9.40 Aboriginal rights require proof of continuity of the rights claimed. In *Delgamuukw* Lamer CJ discussed,

> difficulties inherent in demonstrating a continuity between current aboriginal activities and the pre-contact practices, customs and traditions of aboriginal societies … the requirement for continuity is one component of the definition of aboriginal rights.[56] Here, the 'continuity' may be physical, but also has a cultural dimension.[57]

9.41 They are based on rights rather than occupation. According to *R v Marshall; R v Bernard*:

> The requirement of continuity in its most basic sense simply means that claimants must establish they are right holders. Modern-day claimants must establish a connection with the pre-sovereignty group upon whose practices they rely to assert title or claim to a more restricted aboriginal right. The right is based on pre-sovereignty aboriginal practices. To claim it, a modern people must show that the right is the descendant of those practices.[58]

9.42 In the case of aboriginal rights, continuity must be shown from pre-contact. According to the trial judge in *Lax Kw'alaams* 'the date of contact should be the date on which occurred the first direct arrival of Europeans in the area of the particular group of aboriginals'.[59] This is a question of fact.

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52 *Lax Kw'alaams Indian Band v Canada* [2011] 3 SCR 535.
53 Ibid. See, eg, *R v Van der Peet* [1996] 2 SCR 507; *R v Pamajewon* [1996] 2 SCR 821.
54 See Ch 8 for further discussion of s 211 of the *Native Title Act*.
55 *Native Title Act 1993* (Cth) s 211(2)(a).
56 *Delgamuukw v British Columbia* [1997] 3 SCR 1010 [83].
57 Paul G McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford University Press, 2011), 140.
58 *R v Marshall; R v Bernard* [2005] 2 SCR 220 [67].
59 *Lax Kw'alaams Indian Band v Canada (Attorney General)* (2008) 3 CNLR 158, [60].

9.43 A 'reasonable degree' of continuity is required. The question is whether the claimed modern right is demonstrably connected to, and reasonably regarded as a continuation of, the pre-contact practice. In determining this, the court should take a generous but realistic approach to matching pre-contact to current practices.[60] A break in connection is not fatal. Inferences can be drawn as to the pre-contact practices based on modern practices.

9.44 With respect to aboriginal rights generally, the courts have noted that 'to impose the requirement of continuity too strictly would risk "undermining the very purpose of s 35(1) by perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed to respect" aboriginal rights to land'.[61]

Evolution of aboriginal rights

9.45 Aboriginal rights may evolve. Claimants must establish that there was some element of the practice prior to contact that supports a modern evolved right (for example, some kind of trade). In addition, there must be proportionality and sufficient continuity between the pre-contact and modern practices.

9.46 The doctrine of continuity was identified in early decisions as the mechanism by which a 'frozen rights' approach could be avoided. The Supreme Court held that '[t]he evolution of practices, customs and traditions into modern forms will not, provided that continuity with pre-contact practices, customs and traditions is demonstrated, prevent their protection as aboriginal rights'.[62] Practices can evolve in terms of both subject matter and manner of exercising the right.[63]

9.47 Canadian courts have consistently allowed evolution in the manner of exercising a right. In *R v Marshall*, McLachlin CJ referred to the possibility of 'logical evolution', stating that this means 'the same sort of activity, carried on in the modern economy by modern means. This prevents aboriginal rights from being unfairly confined simply by changes in the economy and technology'.[64]

9.48 In terms of evolution of the subject matter of a right, the Court has required some degree of proportionality and sufficient continuity between the pre-contact practice and the modern right claimed. Thus, in *R v Sappier; R v Gray*, a right to harvest wood for the construction of temporary shelters was recognised to have evolved into a right to harvest wood by modern means to be used in the construction of a modern permanent home.[65]

9.49 However, in *Lax Kw'alaams*, the claimed aboriginal right to commercial harvesting and sale of all species of fish within their traditional waters was considered to be qualitatively and quantitatively out of proportion to the pre-contact practices.

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60 *Lax Kw'alaams Indian Band v Canada* [2011] 3 SCR 535, [48].
61 *Delgamuukw v British Columbia* [1997] 3 SCR 1010 [153], quoting R v Côté [1996] 3 SCR 139, [53].
62 *R v Van der Peet* [1996] 2 SCR 507 [64].
63 *Lax Kw'alaams Indian Band v Canada* [2011] 3 SCR 535.
64 *R v Marshall; R v Bernard* [2005] 2 SCR 220 [25]. See also *Lax Kw'alaams Indian Band v Canada* [2011] 3 SCR 535, [7], [50].
65 *R v Sappier; R v Gray* [2006] 2 SCR 686.

While the band harvested a wide variety of fish resources, only trade in euchalon grease could be characterised as integral to their distinctive culture. Trade in euchalon grease could not found a modern right to commercially harvest and sell *all* fish species.[66] Binnie J gave the following examples:

> A 'gathering right' to berries based on pre-contact times would not, for example, 'evolve' into a right to 'gather' natural gas within the traditional territory. The surface gathering of copper from the Coppermine River in the Northwest Territories in pre-contact times would not, I think, support an 'Aboriginal right' to exploit deep shaft diamond mining in the same territory.[67]

9.50 The requirement that aboriginal rights be demonstrated to be integral to culture prior to contact operates to significantly limit what can be recognised as a modern right, and the form that right can take. It does not allow for rights that arose as a result of European influence to be recognised, regardless of their antiquity relative to European settlement. This is not dissimilar to the requirement in Australia that laws and customs be sourced in those acknowledged and observed prior to sovereignty, a requirement which has the same inherent limiting factor.

New Zealand

9.51 New Zealand jurisprudence also recognises a distinction between exclusive and non-exclusive rights—usually termed territorial or non-territorial aboriginal title. Each of these is given distinct form by legislation.[68]

9.52 From the outset of formal British colonisation, the settlement of New Zealand proceeded on the basis that beneficial ownership of land remained with Maori and that customary title had to be extinguished by purchase prior to alienation to third parties.[69] However, by the late 19th century there was little Maori customary land left in New Zealand—a result of pre-emptive purchases of land by the Crown, as well as the conversion of customary title to Maori freehold land.[70] The result was that while several court decisions recognised that rights to Maori land could be recognised at common law, there was in practice no land onshore left to claim by way of native or aboriginal title.[71]

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66 *Lax Kw'alaams Indian Band v Canada* [2011] 3 SCR 535, [7], [50].

67 Ibid [51]. See also *R v Gladstone* [1996] 2 SCR 723 [26]–[28].

68 *Foreshore and Seabed Act 2004* (NZ); *Marine and Coastal Area (Takutai Moana) Act 2011* (NZ).

69 For a consideration of the position in Australia, see Ch 2.

70 Shaunnagh Dorsett, 'Aboriginal Rights in the Offshore: Māori Customary Rights under the Foreshore and Seabed Act 2004 (NZ)' (2006) 15 *Griffith Law Review* 74, 76.

71 Compensation may be available for loss and alienation of tribal lands through a claim made to the Waitangi Tribunal. The Tribunal investigates claims by Maori that they have been prejudiced by law, policy, act or omission of the Crown and that such law, policy, act or omission is inconsistent with the principles of the Treaty of Waitangi: *Treaty of Waitangi Act 1975* (NZ) ss 5–6; Office of Treaty Settlements, Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown (''Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown'').

Recognition of aboriginal title

9.53 In the mid-1980s debate arose about the availability of aboriginal title claims in New Zealand.[72] In 1986, Maori customary rights were successfully pleaded as a defence to a charge of possessing undersized paua in tidal waters.[73] In *Te Runanga o Muriwhenua v Attorney-General* and *Te Runanganui o te Ika Whenua v Attorney-General*, Cooke P of the Court of Appeal confirmed that aboriginal title was part of the common law.[74]

9.54 Cooke P, referring to cases including *Mabo [No 2]*, held that the Crown's radical title was subject to native rights, that these are generally, but not invariably communal, and the nature and incidents of aboriginal title are matters of fact dependent on the evidence in any particular case. He noted that they could only be extinguished by the free and informed consent of the holders of the title, although they could be compulsorily acquired with adequate compensation.[75]

9.55 While other cases throughout the 1990s and early 2000s also mentioned the existence of aboriginal title, the first decision to significantly address this matter was the 2003 Court of Appeal decision in *Ngati Apa v Attorney-General* ('*Ngati Apa*').[76] The matter before that Court was not a claim for aboriginal or native title. Rather, the issue in the case was whether the Maori Land Court had jurisdiction to investigate areas below the high water mark. It required a determination as to whether, as a matter of law, Maori customary title could exist with respect to the foreshore and seabed.

9.56 As the matter before the Court was a narrow jurisdictional point, the decision gave little guidance as the nature of aboriginal title, or how it was to be established. The Court of Appeal confirmed that the Crown is not the source of aboriginal title. According to Elias CJ, '[t]he Crown has no property interest in customary land and is not the source of title to it'.[77] The Crown did not acquire full and absolute dominion at the point of sovereignty, but rather radical title. In particular, the Crown did not acquire ownership of the foreshore by prerogative, as that rule was displaced by local circumstance.[78] Radical title was further extended to include the seabed.[79]

9.57 The existence and content of customary property is determined as a matter of the custom and usage of the particular community. These are questions of fact,[80] which may be referred for determination to the Maori Appellate Court.[81] Beyond this, the

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72 McHugh, above n 1, 27; Richard Boast, 'Treaty Rights or Aboriginal Rights?' [1990] *NZLJ* 32; PG McHugh, 'Aboriginal Title in the New Zealand Courts' (1984) 2 *University of Canterbury Law Review* 235.

73 *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680.

74 *Te Runanga o Muriwhenua v Attorney-General* [1990] 2 NZLR 641; *Te Runanganui o te Ika Whenua v Attorney General* 2 [1994] 2 NZLR 20.

75 *Te Runanganui o te Ika Whenua v Attorney General* 2 [1994] 2 NZLR 20 5–6.

76 *Ngati Apa v Attorney-General* [2003] 3 NZLR 643.

77 Ibid [47].

78 Ibid [49].

79 Ibid; Dorsett, above n 70.

80 *Paki v Attorney-General* [2014] NZSC 118 [16].

81 *Te Ture Whenua Maori Act 1993* (NZ) s 61.

Court gave little further direction as to the nature and content of aboriginal title, although the Court unanimously noted that native property continues until lawfully extinguished, and that the onus of proof of extinguishment lay on the Crown.[82]

Statutory responses

9.58 As in Australia following the *Mabo [No 2]* decision, the decision in *Ngati Apa* prompted a legislative response: the *Foreshore and Seabed Act 2004* (NZ) ('*Foreshore and Seabed Act*').

9.59 In the context of this Inquiry—which recommends reform to the test for establishing native title under the *Native Title Act*—the history of legislation relating to customary rights is instructive. The *Foreshore and Seabed Act* was repealed and replaced in 2011 by the *Marine and Coastal Areas (Takutai Moana) Act 2011* (NZ) ('*Takutai Moana Act*'). A central reason for this reform was concern about the restrictive thresholds for recognition of customary rights.

The Foreshore and Seabed Act 2004 (NZ)

9.60 The *Foreshore and Seabed Act* was considered to have codified the common law, and to have been guided by overseas jurisprudence as to the tests for customary rights.[83] The Act went considerably beyond the brief descriptions of aboriginal title in *Ngati Apa*, introducing two types of claims:

- non-exclusive customary rights orders (non-exclusive rights);[84] and
- territorial customary rights (exclusive rights).[85]

9.61 The *Foreshore and Seabed Act* legislatively extinguished all aboriginal title, and replaced the inherent jurisdiction of the High Court with a statutory jurisdiction based on the provisions of the Act.[86]

9.62 The requirements to establish both kinds of claims reflected an amalgam of Canadian and Australian law relating to Indigenous rights and interests in land and waters. The two types of claims may be considered analogous to the Canadian distinction between aboriginal rights and title.

9.63 A territorial rights claim required relevantly, that the claimants show exclusive use and occupation of a particular area, and that the use and occupation be 'substantially uninterrupted' since 1840.[87] The Act expressly limited the evidence of exclusive use and occupation to physical activities and uses.[88]

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82 *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 [34] (Elias CJ), [99] (Gault P), [147]–[148] (Keith and Anderson JJ), [184] (Tipping J).
83 (16 November 2004) 621 NZPD.
84 *Foreshore and Seabed Act 2004* (NZ) ss 50–51.
85 Ibid s 32.
86 Ibid ss 10, 50.
87 Ibid s 32(2).
88 Ibid s 32(3).

9.64 A determination of territorial customary rights did not provide a legally enforceable right, but entitled the applicants to an order referring the matter to the Attorney-General and the Minister for Maori Affairs. This essentially gave a right to negotiate an agreement for some form of redress in recognition of the finding of the Court.[89]

9.65 A customary rights order required the claimants to show a use, activity or practice, integral to 'tikanga Maori' (Maori customary values and practices), which had been carried on in a 'substantially uninterrupted manner' since 1840.[90] Section 51(1) further stated that 'an activity, use, or practice has not been carried on, exercised, or followed in a substantially uninterrupted manner if it has been or is prevented from being carried on, exercised, or followed by another activity authorised by or under an enactment or rule of law'.

9.66 The Act also recognised that the activities, uses or practices might include a commercial component.[91] The effect of a customary rights order was to allow the activity, use or practice to be undertaken, and to be protected in accordance with the provisions of the *Resource Management Act 1991* (NZ).

9.67 The *Foreshore and Seabed Act* was a significant source of controversy and concern for Maori.[92] By 2009, no claims had been brought under the Act, and in that year, a Ministerial Review Panel recommended its repeal. The panel determined that the Act was discriminatory because it removed the ability of Maori to have their claims adjudicated by the common law. Rather they were required to have their claims judged against the definitions in the statutory provisions which 'imposed extremely restrictive thresholds for the recognition of customary rights'.[93] The Panel considered that the Act discriminated on the grounds of race and contravened the *Bill of Rights Act 1990* (NZ).[94]

The Marine and Coastal Areas (Takutai Moana) Act 2011 (NZ)

9.68 The *Takutai Moana Act* replaced the *Foreshore and Seabed Act*. The later Act seeks to balance the rights of Maori and non-Maori in the foreshore and seabed. Section 6 specifically 'restores and gives legal expression to those rights extinguished by the *Foreshore and Seabed Act*.' However, the Act excludes the jurisdiction of the Court to hear and determine any aboriginal rights claim and replaces it with the statutory jurisdiction given under the Act.[95]

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89 Ibid ss 36–37.
90 Ibid s 50(1)(b)(ii).
91 Ibid 52(2), (3).
92 Dorsett, above n 70, 74–75.
93 Ministerial Review Panel, *Pākia Ki Uta Pākia Ki Tai: Report of the Ministerial Review Panel - Ministerial Review of the Foreshore and Seabed Act 2004 - Vol 1* (30 June 2009) 12; see also *Marine and Coastal Area (Takutai Moana) Act 2011* (NZ) preamble.
94 Ministerial Review Panel, *Pākia Ki Uta Pākia Ki Tai: Report of the Ministerial Review Panel - Ministerial Review of the Foreshore and Seabed Act 2004 - Vol 1* (30 June 2009) 139.
95 *Marine and Coastal Area (Takutai Moana) Act 2011* (NZ) s 98(4).

9.69 The *Takutai Moana Act* provides for two claims:

- protected customary rights (non-exclusive rights); and
- customary marine title (exclusive rights).

9.70 These essentially mirror those available under the previous *Foreshore and Seabed Act*. However, the tests have been simplified.

9.71 Claims are filed with the High Court. Alternatively, customary marine title and protected customary rights may be recognised by an agreement made with the Crown.[96] In addition, the Act recognises a 'universal award' of 'mana tuku iho'. This is the relationship 'iwi' (peoples or nations) have with the foreshore and seabed in their 'rohe' (territory) and applies without the need for a claim of any other kind.[97] It entitles Maori to participate in conservation processes under the Act. While it is difficult to make comparisons, 'mana tuku iho' could be likened to the right that Aboriginal and Torres Strait Islander peoples have to speak for country.[98]

9.72 A protected customary right is a right that has been exercised since 1840 and continues to be exercised in accordance with tikanga,[99] regardless of whether it continues to be exercised in exactly the same manner, or a similar way, or evolves over time.[100] Iwi or 'hapu' (clans or descent groups) may derive commercial benefit from exercising protected customary rights.[101]

9.73 There are three significant changes from the earlier *Foreshore and Seabed Act*. First, the Act no longer equates such a right with a 'use, activity or practice'—rather, simply using the term 'right'.[102] Secondly, the requirement for the right to have been exercised in a 'substantially uninterrupted manner' has been removed.[103] Thirdly, the provision specifically allows for evolution or adaption over time.[104]

9.74 The exclusive rights provisions under the *Takutai Moana Act* require that a particular part of the marine and coastal area be held in accordance with tikanga and that the claimant group has exclusively used and occupied it from 1840 to the present day without substantial interruption.[105] Unlike the previous *Foreshore and Seabed Act*, the outcome of this claim is a recognition of customary marine title, rather than a right

96 Ibid ss 94–95.
97 Ibid s 4.
98 *Western Australia v Ward* (2002) 213 CLR 1, [93].
99 The High Court may refer questions of tikanga to the Maori Appellate Court, or appoint a 'pukenga' (court expert) with knowledge of tikanga: *Marine and Coastal Area (Takutai Moana) Act 2011* (NZ) s 99.
100 Ibid s 51.
101 Ibid s 52(4)(b).
102 See Ch 8 for a discussion of the relationship between rights, uses and activities.
103 See Ch 5 for consideration of the requirement for 'substantially uninterrupted' continuity in proof of native title in Australia.
104 See Ch 5 and Ch 8 for a consideration of the relevance of evolution and adaptation in Australian native title law.
105 *Marine and Coastal Area (Takutai Moana) Act 2011* (NZ) s 58(1).

to negotiate an agreement for redress. The new Act also specifically allows for customary transfer of rights between iwi or hapu.[106]

9.75 Certain rights are conferred by, and may be exercised under, a customary marine title order. These include:

- a right to permit or not permit applications for new resource consents, with limited exceptions;
- a right to give or withhold permission for conservation activities;
- a right to the protection of wahi tapu;
- the ownership of minerals other than petroleum, uranium, silver, and gold;
- the right to create a planning document; and
- the prima facie ownership of taonga tuturu (Maori cultural or historical objects).[107]

9.76 The first claims under the *Takutai Moana Act* are due to be heard by the High Court in 2015. A number of applications for customary marine title and protected customary rights through recognition agreements with the Crown have also been lodged.[108]

Crown obligations

9.77 In both New Zealand and Canada it has been recognised that the Crown may owe obligations to Indigenous peoples with respect to dealing with their land. Those obligations are variously described as fiduciary in character, obligations of good faith, or obligations which flow from the honour of the Crown. Although they take different legal forms, the various formulations recognise and emphasise the particular nature of the relationship of the Crown with its Indigenous population and the need to balance the rights of the title holders with wider public interests.

The duty to consult in Canada

9.78 The duty to consult, and where appropriate, accommodate First Nations peoples, arises when the Crown has knowledge, real or constructive, of the potential existence of an aboriginal right or title and contemplates conduct that might adversely affect it.[109] The duty to consult and accommodate, and some aspects of the fiduciary duty, are

106 Ibid ss 58(1)(b)(ii), 58(3). See Ch 5 for a discussion of customary transfer in the Australian context.

107 Ibid s 62.

108 A full list can be found at Ministry of Justice, *Marine and Coastal Area Act Applications* <http://www.justice.govt.nz/treaty-Settlements/office-of-Treaty-Settlements/marine-and-Coastal-Area-Takutai-Moana/current-Marine-and-Coastal-Applications#notified>.

109 *Haida Nation v British Columbia (Minister of Forests)* (2004) 3 SCR 511; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* (2005) 3 SCR 388; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)* (2004) 2 SCR 550; *Beckman v Little Salmon/Carmacks First Nation* 3 SCR 103; McHugh, above n 1; Gordon Christie, 'Developing Case Law: The Future of Consultation and Accommodation' (2006) 39 139.

functionally similar to the protections offered by the future acts regime under the *Native Title Act*.[110]

9.79 The duty has a foundation in the principle of the 'honour of the Crown' and the Crown's unique relationship with Aboriginal peoples. It is necessary that the Crown act with honour in order to achieve the reconciliation of the pre-existence of aboriginal societies with the assertion of sovereignty of the Crown and its control over land and resources that were formerly in the control of that people.[111] The duty to consult and accommodate supports the honour of the Crown, and is part of the process of reconciling the pre-existence of aboriginal societies with the sovereignty of the Crown.[112]

9.80 To further this process of reconciliation, it is necessary for the Crown to recognise and respect indigenous rights. The reality that this may take many years means that the Crown cannot ignore, or fail to treaty fairly, aboriginal rights that are awaiting determination. It must respect potential, but unproved, rights and interests. Once proved, these rights and interests will be protected and affirmed by s 35(1) *Constitution Act, 1982*.[113]

9.81 The content of the duty to consult and accommodate varies with the circumstances. Generally, the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and the seriousness of the potentially adverse effect on the right or title claimed.[114] The duty to consult and accommodate is part of the process of reconciliation which begins with the assertion of sovereignty by the Crown, and thus any efforts to consult and accommodate should be consistent with the objective of reconciliation.[115]

9.82 The duty to consult and accommodate was clarified in the recent decision of the Supreme Court of Canada in *Tsihlqot'in Nation*.[116] The duty owed by the Crown varies depending on whether the rights or title have been established.

9.83 At the claims stage, prior to establishment of title, the Crown is required to consult in good faith with any Aboriginal groups asserting those rights or title about proposed uses of the land and, if appropriate, to accommodate the interests of such claimant groups. If the Crown fails to discharge its duty to consult, various remedies are available including injunctive relief, damages, or an order that consultation or accommodation be carried out.[117]

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110 *Native Title Act 1993* (Cth) pt 2 div 3.

111 *Haida Nation v British Columbia (Minister of Forests)* (2004) 3 SCR 511, [32] (McLachlin CJ).

112 *Beckman v Little Salmon/Carmacks First Nation* 3 SCR 103, [12], [38] (Binnie J).

113 *Haida Nation v British Columbia (Minister of Forests)* (2004) 3 SCR 511, [32] (McLachlin CJ).

114 Ibid [39] (McLachlin CJ); *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)* (2004) 2 SCR 550, [24] (McLachlin CJ).

115 *Haida Nation v British Columbia (Minister of Forests)* (2004) 3 SCR 511, [32] (McLachlin CJ).

116 *Tsilhqot'in Nation v British Columbia* 2014 SCC 44.

117 Ibid [89] (McLachlin CJ); *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council* (2010) 2 SCR 650, [37] (McLachlin CJ); see, eg, *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* (2005) 3 SCR 388.

9.84 After aboriginal title to land has been established, the Crown must seek the consent of the title-holding Aboriginal group to developments on the land.[118]

9.85 If aboriginal title holders do not consent to a government taking action on their lands, it may still be possible if the Crown demonstrates that:

- it has discharged its procedural duty to consult and accommodate;
- its actions are in pursuit of a compelling and substantial objective; and
- the action is consistent with the Crown's fiduciary duty.[119]

9.86 To be consistent with the Crown's fiduciary duty, the government must 'act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations'.[120] Its actions must also be proportional. That is:

- they must be necessary to achieve the government's goal;
- they must go no further than necessary to achieve that goal; and
- the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the aboriginal interest.[121]

9.87 If the duty is breached, 'the usual remedies that lie for breach of interests in land are available, adapted as may be necessary to reflect the special nature of Aboriginal title and the fiduciary obligation owed by the Crown to the holders of Aboriginal title'.[122]

9.88 The overview of the law relating to aboriginal rights and title in Canada and customary rights and claims to the seabed and foreshore in New Zealand reveals that the common law and judicial interpretation of statute has applied quite similar tests to recognise and determine Indigenous Peoples' rights to traditional land and waters to the laws and customs model that have been adopted in Australia. However, there has been a more direct focus on the 'rights' claimed than in establishing the laws and customs under which such rights are possessed.

9.89 In Canada, the occupancy foundation for aboriginal title still requires 'continuity', but it need not be an unbroken chain. There is a stronger reliance upon present occupancy of land and waters by First Nations peoples, as going toward proof of continuity. There is also a clear acknowledgement that aboriginal rights should not be 'frozen'.

9.90 In New Zealand there is a similar trajectory to Australia in the interplay between common law and statute. With respect to claims to the seabed and offshore in New Zealand, judicial recognition of aboriginal territorial title (Maori customary title) was followed by a statutory response. The legislative history of the provisions dealing with

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118 *Tsilhqot'in Nation v British Columbia* 2014 SCC 44, [90] (McLachlin CJ).
119 Ibid [80]–[84].
120 Ibid [86] (McLachlin CJ).
121 Ibid [87] (McLachlin CJ).
122 Ibid [90] (McLachlin CJ).

rights to be exercised in a 'substantially uninterrupted manner' is of particular relevance for the *Native Title Act*. The statutory confirmation that rights may evolve or adapt over time also has relevance for ALRC recommendations in Chapter 5.

9.91 The ALRC notes the view of Kirby J in *Western Australia v Ward* that care must be exercised in the use of authorities from other former colonies and territories.[123] Nevertheless, comparative jurisprudence demonstrates many similar issues in former British colonies, with respect to the accommodation of, and proof of, indigenous rights to land and waters at common law. The ALRC, therefore, considers that there is merit in understanding the parallel development of law between these jurisdictions that can be fostered by a comparative law reform process.

123 *Western Australia v Ward* (2002) 213 CLR 1, 148–9.

10. Authorisation

Contents

Summary

10.1 An application for a native title determination, or for compensation for extinguishment or impairment of native title, can only be lodged by an applicant—that is, a person or group of people who have been authorised by the group to make the application. The authorisation provisions of the *Native Title Act 1993* (Cth) ('*Native Title Act*') are intended to ensure that the application is made with the consent of the claim group. The group is also given the power to remove and replace an applicant, thus contributing to the ongoing legitimacy of the applicant.

10.2 Groups do not generally invest full decision-making authority in the applicant, but expect the applicant to bring important decisions back to the group and to follow

the directions of the group. Some groups establish separate decision-making bodies, such as steering committees or working groups. The recommendations in this chapter are intended to support claim groups as they develop their own governance structures, work within the requirements of Australian law and negotiate with third parties.

10.3 The ALRC recommends that groups should be able to use a traditional decision-making process or a decision-making process agreed to and adopted by the group, to authorise an applicant. The Government should consider amending other provisions of the *Native Title Act* regarding decision-making, consistent with this recommendation.

10.4 Many groups include in their authorisation of an applicant specific directions or constraints on the applicant's authority. The legal status of these directions is not clear. The *Native Title Act* should be amended to clarify that the claim group may define the scope of the authority of the applicant.

10.5 Currently, claim groups may authorise an applicant to act by majority, but where the terms of the authorisation are silent, an applicant must act jointly. The ALRC recommends that this default position should be reversed to provide that, where the terms of the authorisation are silent, the applicant may act by majority. This recommendation is intended to address the situation where the group has directed the applicant to take some action, but only some members of the applicant are willing to act on the direction.

10.6 It is unclear whether an applicant remains authorised to act if a member of the applicant dies or is unable to act. The *Native Title Act* should provide that the remaining members of the applicant may continue to act without reauthorisation, unless the terms of the authorisation provide otherwise, and may apply to the Federal Court for an order that the remaining members constitute the applicant.

10.7 Sometimes an applicant includes a member of each family group, and the authorisation provides for the replacement of a member who is unable to act, with a specified person from the same family. The *Native Title Act* should provide that, in such circumstances, the applicant may apply to the Federal Court for an order that the member be replaced by the specified person, without requiring reauthorisation.

10.8 Finally, the *Native Title Act*, and some state and territory legislation, creates opportunities for the applicant to receive funds that are intended for the native title group. The *Native Title Act* should be amended to provide that a member of the applicant must not obtain an advantage or benefit at the expense of the common law holders.

What is authorisation?

10.9 An application for a determination of native title can only be made by an applicant who has been authorised by all the people who hold the native title claimed.[1]

1 *Native Title Act 1993* (Cth) s 61.

10.10 An applicant for compensation must also be authorised. The *Native Title Act* provides for applications for compensation for the extinguishment or impairment of native title arising from validation of certain past, intermediate or future acts.[2] To make an application for compensation, a person or group of people must be authorised by all the people who claim to be entitled to the compensation. The person or group of people is 'the applicant', and the people who claim to be entitled to the compensation are 'the compensation claim group'. This chapter refers to both native title claims and compensation claims, unless otherwise indicated.

10.11 The *Native Title Act* does not require all members of a claim group to participate in the authorisation of the applicant. It is sufficient if all members have been given an opportunity to participate.[3] The Federal Court has provided guidance as to the correct procedure for giving notice of and conducting an authorisation meeting.[4]

10.12 A claim cannot be registered unless the Registrar is satisfied that the applicant is authorised to make the application, or that the representative body has certified that the applicant is authorised.[5]

Access to justice

10.13 The Terms of Reference ask the ALRC to consider whether any barriers are imposed by the *Native Title Act*'s authorisation provisions to claimants', potential claimants' and respondents' access to justice. Access to justice includes access to courts and lawyers, but also information and support to identify, prevent and resolve disputes.[6] It can encompass both procedural rights and access to the resources necessary to participate fully in the legal system. It may also include the removal of structural inequalities within the justice system and the provision of informal justice and alternative dispute resolution options.[7]

10.14 The Inquiry has not identified widespread concern about barriers to justice imposed by the authorisation provisions, but has identified areas where amendment of the provisions may reduce disputes, confirm the ultimate authority of the claim group and reduce the cost of a native title application.

The purpose of the authorisation provisions

10.15 The authorisation provisions were introduced into the *Native Title Act* in 1998.[8] Before this, any member of a claim group could apply for a determination of native title. This resulted in large numbers of conflicting and overlapping claims. The purpose

2 Ibid pt 2 div 5.
3 *Lawson on behalf of the 'Pooncarie' Barkandji (Paakantyi) People v Minister for Land and Water Conservation (NSW)* [2002] FCAFC 1517 (9 December 2002) [25].
4 *Ward v Northern Territory* [2002] FCA 171 (8 February 2002); *Weribone on behalf of the Mandandanji People v Queensland* [2013] FCA 255 (25 March 2013).
5 *Native Title Act 1993* (Cth) s 190C.
6 Attorney-General's Department, 'A Strategic Framework for Access to Justice in the Federal Civil Justice System' (2009) 3; Productivity Commission, *Access to Justice Arrangements* (2014) 77–78.
7 Attorney-General's Department, above n 6, 3.
8 *Native Title Amendment Act 1998* (Cth).

of the authorisation provisions is to ensure that those who bring applications for determinations have the authority of the group to do so.[9] French J described authorisation as

> a matter of considerable importance and fundamental to the legitimacy of native title determination applications. The authorisation requirement acknowledges the communal character of traditional law and custom which grounds native title.[10]

10.16 The National Native Title Council said the authorisation process is 'fundamentally important to the integrity of the native title claims process' as it ensures that claims are lodged with the consent of the traditional owners.[11] Similarly, Mansfield J noted that 'proper authorisation is fundamental to the legitimacy of native title applications'.[12] The existence of a mechanism to remove the applicant if it exceeds its authority contributes to the ongoing legitimacy of the applicant, as the applicant is 'subject to the ongoing scrutiny of the members of the claim group in respect of the manner of the exercise of that authority'.[13]

10.17 Section 62A sets out the power of applicants, and is discussed further below. The Explanatory Memorandum to the Bill that inserted s 62A indicated that the section 'ensures that all those who deal with the applicant in relation to matters arising under the NTA can be assured that the applicant is authorised to do so'.[14]

10.18 However, in explaining the purpose of s 62A, the courts have focused not on the benefits to third parties, but on the desirability of avoiding overlapping claims. French J made this point in 2002:

> It is of central importance to the conduct of native title determination applications and the exercise of the rights that flow from their registration, that those who purport to bring such applications and to exercise such rights on behalf of a group of asserted native title holders have the authority of that group to do so. Prior to the 1998 amendments there was no requirement under the *Native Title Act* that an applicant have such authority. The absence of that requirement led, in some cases, to conflicting and overlapping claims all carrying with them the statutory right to negotiate in respect of the grant of mineral tenements and the compulsory acquisition by Commonwealth or State Governments of native title rights and interests. Although many aspects of the 1998 amendments were the subject of controversy in the public and parliamentary debates that preceded their enactment, the need for communal authorisation of claims was largely a matter of common ground.[15]

10.19 This passage has been cited at least 17 times in judgments of the Federal Court. Overlapping claims, while still an issue, have significantly reduced since the 1998

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9 Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) [25.16]; *Daniel v Western Australia* [2002] FCA 1147 (13 September 2002) [11].
10 *Strickland v Native Title Registrar* (1999) 168 ALR 242, [57].
11 National Native Title Council, *Submission 16*.
12 *Hazelbane v Northern Territory* [2008] FCA 291 (2008) [13].
13 *Dingaal Tribe v Queensland* [2003] FCA 999 (17 September 2003) [6].
14 Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) [25.41].
15 *Daniel v Western Australia* [2002] FCA 1147 (13 September 2002) [11].

amendments[16] that introduced both the authorisation provisions and the registration test.

10.20 After the 1998 amendments, there was some initial uncertainty about what the Act required with regard to holding an effective authorisation meeting. However there is now a settled body of law in this respect,[17] and the authorisation requirements are well understood and widely supported by stakeholders. There continues to be challenges to the actions of applicants, and applications for the replacement of applicants. These do not necessarily indicate flaws in the legal framework. Native title claim groups must make a range of important decisions about matters including the correct composition of the group, the boundaries of the area claimed, and the nature and scope of the rights and interests claimed. They may also have to deal with proponents who wish to obtain agreement to future acts—acts that affect (and may extinguish) native title. These decisions can be difficult and contested and it would be unrealistic not to expect conflict within and between groups. Challenges to the authorisation of an applicant may be a symptom of such conflict. Another symptom might be an application by a member of the group for joinder as a respondent.

The powers and duties of the applicant

'Matters … in relation to the application'

10.21 Section 62A of the *Native Title Act* provides that the applicant 'may deal with all matters arising under this Act in relation to the application'.[18] The phrase 'matters arising under the Act' should not be read narrowly,[19] and includes filing the application, applying for leave to amend the application,[20] filing a notice of change of solicitors,[21] and applying for leave to discontinue the claim.[22] Native title claims are representative actions, and therefore require leave of the court to discontinue.[23]

10.22 While the applicant, and only the applicant, may apply for leave to amend or discontinue the claim, the court has an unfettered discretion to grant or refuse leave.[24]

10.23 There has been a trend towards greater scrutiny of the claim group's involvement in native title claims. This can be seen in statutory amendments requiring first, in 1998, that the applicant be authorised by the claim group, and second, in 2007, that the applicant must swear an affidavit setting out details of the process of

16 Western Australian Government, *Submission 43*.
17 See, eg, *Weribone on behalf of the Mandandanji People v Queensland* [2013] FCA 255 (25 March 2013).
18 *Native Title Act 1993* (Cth) s 62A.
19 *Close on behalf of the Githabul People #2 v Queensland* [2010] FCA [32].
20 *Anderson v Western Australia* [2003] FCA 1423 (2003) [48].
21 *Anderson on behalf of the Wulli Wulli People v Queensland* (2011) 197 FCR 404, [49]; *Ankamuthi People v Queensland* [2002] FCA 897 (2002) [7]–[8].
22 *Levinge on behalf of the Gold Coast Native Title Group v Queensland* [2012] FCA 1321 (23 November 2012) [39]–[42].
23 *Federal Court Rules 2011* (Cth) O 22 r 2; *Close on behalf of the Githabul People #2 v Queensland* [2010] FCA [2].
24 *Tucker v Western Australia* [2014] FCA 23 (2014); *Levinge on behalf of the Gold Coast Native Title Group v Queensland* [2013] FCA 634 (3 June 2013).

authorisation.[25] In the courts, early judgments simply asserted that s 62A gave the applicant power to deal with all matters arising under the Act in relation to the application.[26] In later cases the court is more likely to indicate that, in exercising its discretion, the court will take into account whether the applicant has consulted with the claim group, and the views of the claim group.[27]

10.24 While the law does not require the applicant to obtain the consent of the claim group for all dealings in relation to the application, Adjunct Associate Professor John Southalan commented:

> it would be a brave/myopic lawyer who seeks to enact outcomes of significance for the broader group (eg, commence/settle/amend a native title claim) without assurance that the broader group understand, had the opportunity to deliberate, and have specifically agreed to that outcome.[28]

Indigenous Land Use Agreements

10.25 The Note to *Native Title Act* s 62A indicates that this section 'deals only with claimant applications and compensation applications', and that provisions dealing with Indigenous Land Use Agreements (ILUAs) are elsewhere. The applicant is a party to an area ILUA[29] but these agreements cannot be registered, and are therefore not binding, unless they have been authorised by the entire claim group.[30] While it is standard practice for an ILUA to be signed by all members of the applicant, the Federal Court has indicated that the signatures of the members of the applicant are not required.[31]

Future act agreements

10.26 Section 62A makes no reference to future act agreements made pursuant to the *Native Title Act* pt 2 div 3 (sometimes called s 31 agreements or right to negotiate agreements). While it is untested, it is not likely that s 62A is the source of the applicant's authority to enter future act agreements, as future act agreements are not clearly 'matters arising under this act in relation to the application'. The Act provides that the applicant is a negotiation party and must negotiate with a view to reaching agreement to the doing of the act that affects native title.[32] If the negotiating parties reach an agreement, it has the effect of a contract, and is binding on any other person included in the native title claim group.[33]

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25 John Southalan, 'Authorisation of Native Title Claims: Problems with a "Claim Group Representative Body"' (2010) 29 *Australian Resources and Energy Law Journal* 49, 55.

26 *Grant v Minister for Land & Water Conservation for New South Wales* [2003] FCA 621 (2003); *Drury v Western Australia* [2000] FCA 132 (2000).

27 *Tucker v Western Australia* [2014] FCA 23 (2014) [14]; *Levinge on behalf of the Gold Coast Native Title Group v Queensland* [2012] FCA 1321 (23 November 2012); *Close on behalf of the Githabul People #2 v Queensland* [2010] FCA [18]–[20].

28 Southalan, above n 25, 59.

29 *Native Title Act 1993* (Cth) ss 24CD, 253.

30 Ibid s 24CG(3)(b).

31 *QGC Pty Ltd v Bygrave (No 2)* [2010] FCA 1019 (17 September 2010) [103].

32 *Native Title Act 1993* (Cth) ss 30, 30A, 31(1)(b).

33 Ibid s 41.

10.27 The *Native Title Act* does not contain any explicit requirement for the approval of the claim group. However the practice of the National Native Title Tribunal (NNTT) suggests that some level of claim group consent is required.

10.28 Currently, if all of the members of the applicant do not sign a future act agreement, whether because of remoteness, incapacity, dispute or other reason, an application may be made to the NNTT for a consent determination. When the NNTT considers whether consent to a future act has been properly given by the native title party (the applicant, s 30(1)), the NNTT takes into account 'whether the agreement has been endorsed by the wider claim group, or is of a type to which the claim group has previously consented'.[34] The NNTT has also indicated that the consent should be given in accordance with the decision-making procedures of the group:

> the Tribunal will be prepared to act on the consent given by the native title party collectively unless there is some credible suggestion that this is not appropriate. Lawyers acting for the native title party should normally be in a position to advise the Tribunal that the consent has properly been given, based on the established decision making processes of the native title claim group. The fact that a representative Aboriginal and Torres Strait Islander body is involved in assisting the native title party (s 202 NTA) would add weight to a decision that a consent determination is appropriate …
>
> The Tribunal can see no impediment to proceeding to make a consent determination where the consent is given by the native title party collectively in accordance with its agreed procedures (including traditional law and custom).[35] (emphasis in original)

10.29 One representative body advised the ALRC:

> it is generally the case that the applicant, and its individual members, understand the limits of their authority, even if it is not explicitly and formally set out, for example, major future act agreements are not likely to be entered into without express claim group consent or the consent of the relevant common law holders in accordance with traditional law and custom.[36]

10.30 One stakeholder favoured an amendment to allow third parties to make assumptions about the authority of the applicant, such as the indoor management rule, consistent with the assumptions that can be made about the authority of directors under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth).[37] However, the applicant's role is not the same as that of company directors. This approach would not allow claim groups to retain decision-making power within the group or to place that power in a committee or working group, rather than the applicant.

10.31 Another approach would be to amend the Act to require the approval of the claim group for all future act agreements, which would be consistent with the post-determination requirement for claim group approval of native title decisions in the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) reg 8(1)(b). This

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34 *Foster v Copper Strike* (2006) 200 FLR 182, [33].

35 *Monkey Mia Dolphin Resort Pty Ltd v Western Australia* (2001) 164 FLR 361, [19]. See also *Simpson on behalf of Wajarri Yamatji/Western Australia/Skytone Pty Ltd* [2009] NNTTA 113.

36 Central Desert Native Title Service, *Submission 48*.

37 Association of Mining and Exploration Companies, *Submission 54*.

Inquiry's Terms of Reference, which require a focus on authorisation of the applicant, would not encompass such a recommendation. A statutory requirement for claim group approval might more closely approximate the guarantee of free, prior and informed consent required by the UN *Declaration on the Rights of Indigenous People*.[38] On the other hand, such a requirement might be inconvenient for some groups, particularly those whose membership is geographically scattered and who frequently make future act agreements, and for the parties who deal with them.

10.32 The ALRC has not consulted on such an approach and makes no comment on its advisability.

10.33 A number of stakeholders have pointed to the importance of allowing claim groups and their legal representatives the flexibility to tailor arrangements to the specific circumstances of the group.[39] Similarly, Professor Marcia Langton stated 'a "one size fits all" approach is … not tenable for negotiation and agreement-making in Australia'.[40] The ALRC therefore recommends that the claim group should be able to make their own arrangements, either to authorise the applicant to agree to future acts without further approval, with conditions, or to withhold this authority—see Recommendation 10–4 below.

10.34 Regardless of the terms of the authorisation, it is likely that the applicant has fiduciary obligations to the native title group (the duties of the applicant are discussed further below).

Agreements under other statutes

10.35 Other statutes relating to mining and heritage create a role for the applicant (usually described as the 'registered native title claimant').[41] These do not usually require the applicant to have the specific authority of the claim group. Again, in performing these functions, the applicant is likely to have fiduciary obligations.

Can the applicant appoint an agent?

10.36 The Association of Mining and Exploration Companies asked this Inquiry to consider whether an applicant can authorise an agent to act on its behalf, and what powers can be delegated to the agent.[42]

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38 *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st Sess, 107th Plen Mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007).

39 Law Society of Western Australia, *Submission 41*; Kimberley Land Council, *Submission 30*; Cape York Land Council, *Submission 7*.

40 Marcia Langton, 'From Conflict to Cooperation: Transformations and Challenges in the Engagement between the Australian Minerals Industry and Australian Indigenous Peoples' (Public Policy Analysis 7, Minerals Council of Australia, February 2015) 43.

41 *Aboriginal Cultural Heritage Act 2003* (Qld) ss 34, 35; *Aboriginal Heritage Act 2006* (Vic) s 6; *Mineral Resources Act 1989* (Qld) s 10A; *Pastoral Land Act 1992* (NT) s 72C; *Petroleum (Onshore) Act 1991* (NSW) s 69A. *Native Title Act 1993* (Cth) s 253 provides that 'registered native title claimant' means 'a person or persons whose name or names appear in an entry on the Register of Native Title Claims as the applicant'.

42 Association of Mining and Exploration Companies, *Submission 54*.

10.37 The *Native Title Act* specifies that the applicant is to exercise the powers created by ss 29-31, and makes no reference to the possibility of those powers being delegated to another. If, as Reeves J has suggested, the applicant is an agent for the claim group,[43] then the applicant must act personally and not delegate its authority without the express or implied authority of the claim group.[44]

Authorisation, the applicant and governance

10.38 While some native title claim groups have a long history of interaction with government agencies and third parties, and have developed sophisticated structures to manage these interactions, others have had few opportunities to make decisions about matters that affect them, particularly regarding land. For the second group, the authorisation of an applicant is not merely a statutory requirement for a valid application, but is an opportunity for a group to formalise its procedures and develop its governance structures and skills.

10.39 Claim groups do not generally invest full decision-making authority in the applicant, but expect the applicant to bring important decisions back to the group and to follow the directions of the group. A variety of decision-making structures have been adopted.

10.40 Some claim groups establish a decision-making body and require the applicant to carry out the decisions made by that authority. The Social Justice Commissioner described an effective and culturally appropriate decision-making structure adopted by the Quandamooka people:

> This group of twelve family representatives advised the single named applicant during the native title negotiations. Decisions by the applicant required the mandate of the family representatives, who agreed on issues by consensus. Any issues that were disputed and could not be resolved by the group of family representatives were taken to the Council of Elders. The Council of Elders comprises twelve female Elders and twelve male Elders who represent each of the family groups and apical ancestors. Elders must be acknowledged as such by their peers before they are accepted on to the Council of Elders.[45]

10.41 The Githabul people also authorised one applicant and established a steering committee whose role was to 'direct and assist the applicant in the matters relating to the native title proceedings'.[46] The applicant was held to have the authority of the group to discontinue, based on a resolution of the steering committee rather than the entire group.[47]

10.42 In Cape York, a claim known as Cape York United Number 1 Claim, has been made on behalf of nine groups of traditional owners. The applicant was authorised on the basis that the people who make up the applicant do not make decisions with regard

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43 *QGC Pty Ltd v Bygrave (No 2)* [2010] FCA 1019 (17 September 2010) [98].
44 Westlaw, *The Laws of Australia*, Vol 8 (at 1 April 2014) 8. Contracts: Specific, '8.1 Agency' [8.1.770].
45 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2011' (Australian Human Rights Commission, 2011) 110.
46 *Close on behalf of the Githabul People #2 v Queensland* [2010] FCA [11].
47 Ibid [18].

to land or waters. Such decisions are to be made by the traditional owners for the particular area according to law and custom.[48]

10.43 Other groups retain decision-making power for the whole group. A member of the applicant for the Ngarluma and Yindjibarndi People described the relationship between the group to the court this way:

> He said there is always discussion and consultation between members of the claim group both before and during the meeting. He said it is always a group decision. Young people help the old people by explaining 'white fella' laws to them. This, he said, is the way of making decisions under their traditional laws and customs. It is not just up to individual applicants to go their own way and make a separate decision. They must do what the group decides. Community meetings, he said, are accepted by the Ngarluma and Yindjibarndi People as the proper way to make decisions.[49]

10.44 Similarly, in *KK v Western Australia,* the Nyul Nyul claim groups passed resolutions instructing the applicant to discontinue their claims, although the applicant is not obliged to seek the authority of the claim group to do so.[50]

10.45 Also in Western Australia, the Yaburara and Mardudhunera peoples established a corporation to facilitate negotiations with industry. They told the Court that the entire group discusses proposals and informs the corporation's committee of their decision. The committee tells the applicant what to do.[51]

10.46 Queensland South Native Title Services reported that decisions to compromise a claim or endorse a consent determination are dealt with at a claim group meeting, not by the applicant:

> Claim group meetings are, for traditional owners, an important feature of participatory decision-making through the principle of free, prior and informed consent, and inherently linked to the fundamental right of self determination.[52]

10.47 As the National Native Title Council noted:

> A native title application in relation to the recognition of native title includes the pleading of the name and nature of the group, its rules of membership, the rights and interests claimed and the traditional boundaries of the society or group concerned. This assists in the process of self-determination and facilitates a lessening of internal dissension and disputes with neighbouring groups if properly done.[53]

10.48 The recommendations in this chapter are intended to support claim groups as they develop their own governance structures, work within the requirements of Australian law and negotiate with third parties. Establishing structures and skills during the pre-determination stage should leave groups better placed to manage their rights and interests in the post-determination stage.

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48 Personal communication, Adam McLean, Principal Legal Officer, Cape York Land Council Aboriginal Corporation, 31 March 2015.
49 *Daniel v Western Australia* [2002] FCA 1147 (13 September 2002) [27].
50 *KK (deceased) v Western Australia* [2013] FCA 1234 (13 November 2013) [19], [33].
51 *Daniel v Western Australia* [2002] FCA 1147 (13 September 2002) [63].
52 Queensland South Native Title Services, *Submission 24*.
53 National Native Title Council, *Submission 16*.

Decision-making process

Recommendation 10–1 Section 251B of the *Native Title Act 1993* (Cth) requires a claim group to use a traditional decision-making process for authorising an applicant, if it has such a process. If it does not have such a process, it must use a decision-making process agreed to and adopted by the group.

Section 251B of the *Native Title Act 1993* (Cth) should be amended to provide that a claim group may authorise an applicant *either* by a traditional decision-making process *or* a process agreed to and adopted by the group.

10.49 The process for authorising an applicant is set out in s 251B. If the claim group has a traditional decision-making process that must be complied with in relation to authorising 'things of that kind', the group must use that process to authorise an applicant. It may not choose to use a different process.

10.50 If a group does not have a traditional decision-making process for 'authorising things of that kind', it must use a process of decision making that has been agreed to and adopted by the group.[54]

10.51 The requirement to use a traditional decision-making process, where it exists, can create problems when it is unclear if such a process exists, and what it is.[55] The lack of clarity is sometimes a result of the community having been denied the opportunity to make decisions about their land for many generations.[56]

10.52 Where the group has a traditional decision-making process, it may not be one that is suited to making decisions in the native title context. Adapting the process for use in native title procedures can be complex and time consuming.[57] The group may wish to change the decision-making process to be more inclusive.[58]

10.53 Where the group does not have a traditional decision-making process, it may be reluctant to declare that fact, when seeking recognition of rights and interests 'possessed under traditional laws and customs'.[59]

10.54 The ALRC recommends that the group should be able to choose its own decision-making process, without having to declare whether or not it has a traditional decision-making process for things of that kind. Section 251B should simply provide

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54 *Native Title Act 1993* (Cth) s 251B.

55 See, eg, *Butchulla People v Queensland* (2006) 154 FCR 233; *Holborow v Western Australia* 2002 FCA 1428. See also National Native Title Council, *Submission 16*; Cape York Land Council, *Submission 7*; Just Us Lawyers, *Submission 2*.

56 Department of Justice, Victoria, *Submission 15*.

57 Ibid.

58 *Butchulla People v Queensland* (2006) 154 FCR 233, 30. In *Butchulla*, the group changed their decision-making process so that elders no longer had the final say. See also National Native Title Council, *Submission 16*.

59 Susan Phillips, 'The Authorisation Trail' (2000) 4 *Indigenous Law Bulletin* 13.

that a claim group may use a traditional decision-making process or a process of decision making agreed to and adopted by the group. The claim group would still be able to use its traditional decision-making process if it wished. If it did not have such a process, or preferred another process, it could use the other process.

10.55 Allowing the group to choose its own decision-making process promotes the autonomy of the group. It 'maintains the ultimate authority of the claim group or native title holders'.[60]

10.56 For some groups, the process of choosing a decision-making process will always be a difficult one.[61] For example, the choice between one vote per family group (which can disempower members of large families) or one vote per adult (which can disempower members of small families), can be fraught.[62] As AIATSIS noted, there is logical circularity in employing a decision-making process to choose a decision-making process.[63] The ALRC considers that the proposed amendment will remove some, but not all, of the difficulties of choosing a decision-making process. An alternative approach might be to prescribe a decision-making process in the statute. This might remove difficulties for some groups but could create other problems—for example, in some groups, a decision reached by a majority vote rather than by a traditional decision-making process would not be regarded as legitimate, and could fuel disputes. Further, statutory prescription would not promote the autonomy of claim groups.

10.57 Stakeholders, including governments and representative bodies, agreed that claim groups should be able to choose their own decision-making process, including a traditional process.[64]

Recommendation 10–2 Section 251A of the *Native Title Act 1993* (Cth) requires persons holding native title to use a traditional decision-making process for authorising an indigenous land use agreement (ILUA), if they have one. If they do not have one, they may use a decision-making process agreed to and adopted by the persons.

60 Law Society of Western Australia, *Submission 9*.
61 Just Us Lawyers, *Submission 2*.
62 Ibid.
63 AIATSIS, *Submission 36*.
64 AIATSIS, *Submission 70*; South Australian Government, *Submission 68*; NTSCORP, *Submission 67*; Minerals Council of Australia, *Submission 65*; Law Council of Australia, *Submission 64*; National Native Title Tribunal, *Submission 63*; National Native Title Council, *Submission 57*; Queensland South Native Title Services, *Submission 55*; A Frith and M Tehan, *Submission 52*; The Chamber of Minerals and Energy of Western Australia, *Submission 49*; Native Title Services Victoria, *Submission 45*; North Queensland Land Council, *Submission 42*; Kimberley Land Council, *Submission 30*; NSW Young Lawyers Human Rights Committee, *Submission 29*; Western Australian Government, *Submission 20*; North Queensland Land Council, *Submission 17*; Law Society of Western Australia, *Submission 9*; Cape York Land Council, *Submission 7*.

Section 251A of the *Native Title Act 1993* (Cth) should be amended to provide that persons holding native title may authorise an ILUA *either* by a traditional decision-making process, *or* a decision-making process agreed to and adopted by the group.

10.58 Section 251A of the *Native Title Act* regarding the authorisation of ILUAs is similar to s 251B regarding the authorisation of an applicant. Section 251A provides that if there is a traditional decision-making process that must be complied with in relation to authorising things of that kind, persons holding native title must use that process to authorise an ILUA. If no such process exists, the persons must use a process agreed to and adopted by the group. Sections 251A and 251B are interpreted in a consistent way by the courts.[65]

10.59 The Terms of Reference for this Inquiry specify that the ALRC is to consider whether the *Native Title Act*'s authorisation provisions impose barriers to access to justice on claimants, potential claimants or respondents. A person who authorises an ILUA is known as a party, rather than a claimant, so these Terms of Reference do not direct the ALRC to consider the authorisation of ILUAs. However the ALRC considers that it is desirable for the two authorisation provisions to remain consistent. Many stakeholders agreed.[66]

Recommendation 10–3 Regulation 8 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) provides that common law holders must use a traditional decision-making process in relation to giving consent for a native title decision, if they have one. If they do not have one, they must use a decision-making process agreed to and adopted by the common law holders.

Regulation 8 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) should be amended to provide that common law holders may give consent to a native title decision using *either* a traditional decision-making process *or* a decision-making process agreed on and adopted by them.

10.60 Several stakeholders pointed out that the *Native Title (Prescribed Bodies Corporate) Regulations 1999* mirror the current approach in ss 251A and 251B by requiring common law holders to use a traditional decision-making process (if one

65 *Fesl v Delegate of the Native Title Registrar* (2008) 173 FCR 150, [72].

66 AIATSIS, *Submission 70*; South Australian Government, *Submission 68*; NTSCORP, *Submission 67*; Minerals Council of Australia, *Submission 65*; Law Council of Australia, *Submission 64*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; Queensland South Native Title Services, *Submission 55*; The Chamber of Minerals and Energy of Western Australia, *Submission 49*; Native Title Services Victoria, *Submission 45*; North Queensland Land Council, *Submission 42*; Law Society of Western Australia, *Submission 41*.

exists) to give consent to a native title decision.[67] These stakeholders suggested that the regulations should continue to be consistent with ss 251A and 251B. The ALRC agrees. If ss 251A and 251B are amended, the Government should consider amending the regulations also.

Recommendation 10–4 Section 203BC(2) of the *Native Title Act 1993* (Cth) provides that a native title holder or a person who may hold native title must use a traditional decision-making process to give consent to any general course of action that the representative body takes on their behalf, if they have one. If they do not have one, they must use a decision-making process agreed to and adopted by the group to which the person belongs.

Section 203BC(2) of the *Native Title Act 1993* (Cth) should provide that a native title holder or a person who may hold native title may give consent to any general course of action that the representative body takes on their behalf using *either* a traditional decision-making process *or* a decision-making process agreed to and adopted by the group to which the person belongs.

10.61 Finally, s 203BC of the *Native Title Act* has equivalent provisions for the giving of consent by a native title holder or a person who may hold native title to 'any general course of action that the representative body takes on their behalf'. If sections 251A and 251B are amended, the Government should consider amending this provision as well.

Scope of authorisation

Recommendation 10–5 The *Native Title Act 1993* (Cth) should be amended to clarify that the claim group may define the scope of the authority of the applicant.

10.62 As noted earlier, s 62A of the *Native Title Act* provides that, once authorised, the applicant may deal with all matters arising under the Act in relation to the application.[68] Claim groups have been disinclined to hand over all decision-making responsibility to the applicant. Many include in their authorisation specific directions or constraints on the applicant's authority. For example, in Queensland, the Wulli Wulli Native Title Group authorised the applicant on a number of conditions, including:

- that members of the applicant represent the whole group, not just their own family;

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67 National Native Title Council, *Submission 57*; A Frith and M Tehan, *Submission 52*; Law Society of Western Australia, *Submission 41*.

68 *Native Title Act 1993* (Cth) s 62A.

- that the applicant may agree to reduce the area of the claim without further authorisation;
- that the applicant must ensure that cultural heritage work is allocated fairly; and
- that the applicant may negotiate with respect to future acts, but must consult with elders before executing any agreement.[69]

10.63 The legal status of the conditions and instructions included in the authorisation given to an applicant is not clear.[70] If the applicant does not act in accordance with the instructions, the claim group may replace the applicant on the grounds that 'the person has exceeded the authority given to him or her by the claim group to make the application'.[71] The words 'exceeded the authority' suggest that the group may be able to define or limit the scope of the applicant's authority. In *Daniel v Western Australia* (*Daniel*), French J said:

> If the original authority conferred upon an applicant for the purpose of making and dealing with matters in relation to a native title determination is subject to the continuing supervision and direction of the native title claim group, then it may be that an applicant whose authority is so limited is not authorised to act inconsistently with a resolution or direction of the claim group.[72]

10.64 However in this case, the applicant was replaced on the basis that he was no longer authorised by the claim group,[73] not on the basis that he exceeded his authority, so these comments are obiter dicta. This approach has been endorsed in later judgments, but it is arguable that these comments were also obiter.[74]

10.65 In *Weribone on behalf of the Mandandanji People v Queensland*, the claim group had not authorised the applicant to act by majority, and Logan J held that the applicant could not so act. He also said that:

> insofar as the submission carried with it anything of the notion that the native title claim group may in some way direct how the applicant is to carry its business of dealing with 'all matters arising under this Act in relation to the application', I reject that submission.[75]

10.66 On the other hand, in *Anderson on behalf of the Wulli Wulli People v Queensland*, Collier J said:

> I do not consider that s 61(2)(c) ought be interpreted in such a way as to remove the autonomy of the native title claim group itself to place a condition on the manner in which the applicant can make effective decisions.

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69 *Anderson on behalf of the Wulli Wulli People v Queensland* (2011) 197 FCR 404, [7]; *Close on behalf of the Githabul People #2 v Queensland* [2010] FCA [32]–[33]. For another example of a conditional authorisation, see *Coyne v Western Australia* [2009] FCA 533, [7].

70 Darryl Rangiah and Justin Carter, 'The Role of the "Applicant" in Native Title Disputes' (2013) 87 *Australian Law Journal* 761, 772.

71 *Native Title Act 1993* (Cth) s 66B.

72 *Daniel v Western Australia* [2002] FCA 1147 (13 September 2002) [16].

73 Ibid [52].

74 See, eg, *Far West Coast Native Title Claim v South Australia (No 5)* [2013] FCA 717 (30 July 2013) [50]; *KK (deceased) v Western Australia* [2013] FCA 1234 (13 November 2013).

75 *Weribone on behalf of the Mandandanji People v Queensland* [2011] FCA 1169 (6 October 2011) [15].

10.67 In *Anderson*, the claim group had authorised the applicant to make decisions by majority, and the applicant was allowed to so act.[76] Similarly, in *KK (deceased) v Western Australia*, Barker J found that 'the authority of the named applicants to act or refrain from acting in relation to the claim was subject to any direction from the claim group from time to time'.[77]

10.68 There is no Full Court authority on this matter, and it is appropriate for the Act to be clarified on this issue.

10.69 As noted earlier, the purpose of the authorisation provisions is to ensure that the application is brought with the authority of the claim group, allowing the group to supervise proceedings and thus giving legitimacy to the proceedings.[78] It would further this purpose to amend the *Native Title Act* to provide that the claim group may define the scope of the authority of the applicant. Such an amendment may be as simple as inserting the words 'subject to the terms of its authorisation' in s 62A. This approach creates the flexibility to accommodate differences between claim groups, and ensures that the native title claim will only be dealt with in accordance with the claim group's wishes.[79]

10.70 Such an amendment would also be consistent with the general law regarding the principal and agent relationship: 'a principal is only bound by acts of the agent which are within the agent's authority as conferred by the principal'.[80] Reeves J has indicated that (at least when negotiating an ILUA), the applicant is 'in much the same position as an agent concluding a contract on behalf of a principal'.[81]

Scope of authority and the right to negotiate

10.71 The ALRC acknowledges that Recommendation 10–5 may raise concerns for those stakeholders who sought amendments that would allow third parties to make assumptions about the authority of the applicant in the context of agreement making.[82] These stakeholders raised concerns that permitting claim groups to define the scope of the applicant's authority could create uncertainty.[83] However, as discussed earlier, it is not presently certain that the applicant has unfettered authority to enter into future act agreements without reference to the claim group. While the *Native Title Act* requires claim groups to authorise an applicant to act on their behalf in relation to both the claim and future act agreements, it does not require the claim group to delegate all decision-making powers to the applicant. In this respect, the members of the applicant have a different role from that of directors of a corporation.

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76 *Anderson on behalf of the Wulli Wulli People v Queensland* (2011) 197 FCR 404, [60].
77 *KK (deceased) v Western Australia* [2013] FCA 1234 (13 November 2013).
78 *Dingaal Tribe v Queensland* [2003] FCA 999 (17 September 2003) [6].
79 Law Society of Western Australia, *Submission 41*; Kimberley Land Council, *Submission 30*; Law Society of Western Australia, *Submission 9*; Cape York Land Council, *Submission 7*.
80 Westlaw, *The Laws of Australia*, Vol 8 (at 1 April 2014) 8 Contracts: Specific, '8.1 Agency' [8.1.500].
81 *QGC Pty Ltd v Bygrave (No 2)* [2010] FCA 1019 (17 September 2010) [98].
82 Association of Mining and Exploration Companies, *Submission 54*; Minerals Council of Australia, *Submission 65*.
83 Minerals Council of Australia, *Submission 65*; Association of Mining and Exploration Companies, *Submission 54*.

10.72 Clarity and certainty may best be obtained by seeking the disclosure of the limits on the scope of the applicant's authority when entering into negotiations.

10.73 In the Discussion Paper, the ALRC proposed that limits on the authority of the applicant to enter into agreements with third parties should be placed on a public register.[84] There was some support for this approach,[85] on the basis that it would provide transparency for third parties.

10.74 However the ALRC has not proceeded with this proposal. A register would create costs for both government and native title claim groups.[86] Some considered the proposal paternalistic and having the potential to foster distrust.[87] There are other ways of ensuring that third parties are aware of any limits on the authority of the applicant. Third parties wishing to enter into an agreement with a group can seek a letter from the applicant's legal representative, confirming the scope of the applicant's authority, or may use negotiation protocols that outline the authority of each party.[88]

Consequences for breach of authority

10.75 In the Discussion Paper, the ALRC asked if the *Native Title Act* should contain a remedy (other than the replacement of the applicant) for a breach of a condition of authorisation.[89] One stakeholder thought that disqualification from being a member of the applicant might be an appropriate remedy.[90] Stakeholders largely indicated that there should be no statutory remedy,[91] on the basis that the process should not become 'more complex, adversarial, and expensive to administer'.[92] The ALRC considers that while disqualification would sometimes be an appropriate response to a breach, creating a statutory regime would be likely to create complexity and expense. The claim group may, of course, withdraw the authorisation of the person if it wishes.

10.76 This is not to suggest that there would be no consequences for breach of a condition of authorisation. If the conditional authority given to the applicant relates to acts mediated by legal representatives or courts—for example, limits on the applicant's ability to change legal representatives or discontinue a claim—then the legal representative could decline to act, or the court could refuse to exercise its discretion if the applicant does not have the appropriate authority. As the NNTT noted, 'it is the

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84 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014) Proposal 10–4.

85 South Australian Government, *Submission 68*; NTSCORP, *Submission 67*; Law Council of Australia, *Submission 64*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; Queensland South Native Title Services, *Submission 55*; Law Society of Western Australia, *Submission 41*.

86 AIATSIS, *Submission 70*; National Native Title Tribunal, *Submission 63*; A Frith and M Tehan, *Submission 52*.

87 Central Desert Native Title Service, *Submission 48*.

88 North Queensland Land Council, *Submission 42*.

89 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014) Question 10–2.

90 Minerals Council of Australia, *Submission 65*.

91 South Australian Government, *Submission 68*; NTSCORP, *Submission 67*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; Queensland South Native Title Services, *Submission 55*; North Queensland Land Council, *Submission 42*; Native Title Services Victoria, *Submission 45*; National Native Title Council, *Submission 57*; Law Society of Western Australia, *Submission 41*.

92 National Native Title Council, *Submission 57*.

duty of the solicitor on the record to ensure any instructions relating to limitations of authority are complied with'.[93]

10.77 Statutory confirmation that the claim group may define the scope of the applicant's authority would put third parties on notice that they should seek disclosure of the scope of authority. Negotiations would then proceed on an appropriate footing.

10.78 The NNTT indicated that 'clarification of scope of the applicant's authority and any group imposed conditions would assist the Tribunal when conducting inquiries and making determinations on future act matters'.[94]

10.79 The Act already permits an applicant to be replaced on the ground that it has exceeded its authority.[95] This is likely to be the appropriate response when an applicant does not enter into an agreement when directed to do so by the group.[96]

10.80 Some groups have begun to place conditions on the applicant's authority with regard to the applicant's handling of funds. This is a useful way of clarifying the applicant's duties and should serve to inform both the applicant and the claim group. Should the applicant fail to account for funds received, one response would be to remove the applicant. This would not assist in the recovery of funds. Other remedies may be available in both the law of agency and equity, including account of profits and restitution.[97]

Applicant can act by majority

Recommendation 10–6 The *Native Title Act 1993* (Cth) should be amended to provide that the applicant may act by majority, unless the terms of the authorisation provide otherwise.

10.81 The present state of the law is that a claim group may authorise an applicant to act by majority.[98] However, where the terms of the authorisation are silent, an applicant must act jointly.[99] The ALRC recommends that this default position should be reversed to provide that where the terms of the authorisation are silent, the applicant may act by majority.

10.82 This recommendation is intended to address the situation where the claim group (or Working Group, Steering Committee, or other delegated decision-making body)

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93 National Native Title Tribunal, *Submission 63*.

94 Ibid.

95 *Native Title Act 1993* (Cth) s 66B(1)(a)(iv).

96 See, eg, *Daniel v Western Australia* [2002] FCA 1147 (13 September 2002). This problem can also be addressed by allowing the applicant to act by majority, as the cases that reach the courts tend to concern one or two members of the applicant refusing to sign an agreement.

97 AIATSIS, *Submission 70*.

98 *Anderson on behalf of the Wulli Wulli People v Queensland* (2011) 197 FCR 404, [62].

99 *Tigan v Western Australia* (2010) 188 FCR 533, [18]; *Far West Coast Native Title Claim v South Australia* [2012] FCA 733 (2012); *Weribone on behalf of the Mandandanji People v Queensland* [2011] FCA 1169 (6 October 2011) [15].

has directed the applicant to take some action under the Act, but only some members of the applicant are willing to act on the direction. The ALRC considers that a minority of members of the applicant should not be able to frustrate the will of the entire claim group. Most stakeholders agreed with this approach,[100] although some were concerned that a majority approach could cause divisions among members of the applicant,[101] or that majority decision-making is not consistent with s 61 of the *Native Title Act*.[102]

10.83 Currently, if all of the members of the applicant do not sign a future act agreement, whether because of remoteness, incapacity or a dispute, an application must be made to the NNTT for a consent determination. The Tribunal submitted that allowing the applicant to act by majority, in the absence of specific authorisation to do so, 'may assist with the early resolution of future act matters appearing before the tribunals for determination, simply because an individual named applicant refuses to sign an agreement, the claim group has authorised'.[103]

Applicant unable or unwilling to act

Recommendation 10–7 Section 66B of the *Native Title Act 1993* (Cth) should provide that, where a member of the applicant is no longer willing or able to perform the functions of the applicant, the remaining members of the applicant may:

(a) continue to act without reauthorisation, unless the terms of the authorisation provide otherwise; and

(b) apply to the Federal Court for an order that the remaining members constitute the applicant.

10.84 Section 66B provides that a member or members of a claim group may seek an order that the applicant be replaced on the grounds that a person who is the applicant, or is a member of the applicant, consents to his or her removal or replacement, or has died or become incapacitated. Native title claims are usually lengthy, and a group often chooses elders to be members of the applicant. It is not infrequent for a member of the applicant to die, become incapacitated, or to be no longer willing to act.

10.85 In order to bring an application under s 66B, the member or members of the claim group must be authorised by the claim group to do so. Section 66B is 'directed to maintaining the ultimate authority of the native title claim group'.[104]

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100 AIATSIS, *Submission 70*; National Native Title Tribunal, *Submission 63*; National Native Title Council, *Submission 57*; Queensland South Native Title Services, *Submission 55*; A Frith and M Tehan, *Submission 52*; Native Title Services Victoria, *Submission 45*; North Queensland Land Council, *Submission 42*; Central Desert Native Title Services, *Submission 26*.

101 Law Society of Western Australia, *Submission 41*.

102 Northern Territory Government, *Submission 71*.

103 National Native Title Tribunal, *Submission 63*.

104 *Daniel v Western Australia* [2003] FCA 666 (3 July 2003) [16].

10.86 It is unclear whether an applicant remains authorised to act if a member of the applicant dies or is unable to act. As Logan J has noted, 'there is a difference of views on that subject'.[105]

10.87 There are decisions indicating that, in this situation, the applicant may continue to act.[106] These judgments refer to the significant expense and delay associated with further authorisation procedures.[107] There are other decisions indicating that if a member of the applicant dies, the applicant is no longer authorised and must return to the claim group for reauthorisation.[108] The ALRC has been told that claimants generally do not take this approach, but wait for the next meeting to replace the applicant or rely on s 84D, which provides that the court may hear and determine the application, despite a defect in authorisation.

10.88 Cape York Land Council advised that 'it is now common practice for original authorisation processes to include authorisation for the applicant to continue to act, even if one or more of the people constituting the applicant dies or is incapacitated'.[109] The Court has indicated that in this case, no reauthorisation is necessary.[110] However, it is likely that there are many claims in existence where the authorisation does not include that provision. Many stakeholders called for the Act to be amended to clarify that the applicant may continue without reauthorisation.[111] The ALRC recommends that the Act should be amended in this way.

10.89 Further, where the removal of a member of the applicant is not controversial or disputed, a simple and inexpensive procedure should be available to update the Register of Native Title Claims (which includes the name and address for service of the applicant).[112] In the Discussion Paper, amendments were proposed to allow a member of the applicant to be removed by filing a notice with the court.[113] Some stakeholders advised that such an approach may not offer sufficient procedural safeguards,[114] and might be misused by a member wishing to remove another member with whom they

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105 *Weribone on behalf of the Mandandanji People v Queensland* [2011] FCA 1169 (6 October 2011) [18].

106 *Lennon v South Australia* [2010] FCA 743 (16 July 2010) [22]; *Dodd on behalf of the Gudjala People Core Country Claim No 1 v Queensland* [2011] FCA 690 (17 June 2011) [17].

107 *Lennon v South Australia* [2010] FCA 743 (16 July 2010) [11]; *Dodd on behalf of the Gudjala People Core Country Claim No 1 v Queensland* [2011] FCA 690 (17 June 2011) [8]; *Smallwood on behalf of the Juru People v Queensland* [2014] FCA 331 (3 March 2014), [46].

108 *Sambo v Western Australia* (2008) 172 FCR 271, [29]; *Murgha on behalf of the Combined Gunggandji Claim v Queensland* [2011] FCA 1317 (14 November 2011) [4].

109 Cape York Land Council, *Submission 7*.

110 *Coyne v Western Australia* [2009] FCA 533 (22 May 2009) [53]–[56].

111 AIATSIS, *Submission 70* 70; South Australian Government, *Submission 68*; NTSCORP, *Submission 67*; National Native Title Tribunal, *Submission 63*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; National Native Title Council, *Submission 57*; Queensland South Native Title Services, *Submission 55*; A Frith and M Tehan, *Submission 52*; Central Desert Native Title Service, *Submission 48*; North Queensland Land Council, *Submission 42*; Law Society of Western Australia, *Submission 41*; Northern Territory Government, *Submission 31*; Western Australian Government, *Submission 20*; Association of Mining and Exploration Companies, *Submission 19*; Cape York Land Council, *Submission 7*.

112 *Native Title Act 1993* (Cth) s 186(1)(d).

113 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014) Proposal 10–6.

114 Law Council of Australia, *Submission 64*.

are in dispute. Accordingly, the ALRC recommends that a member of the applicant should not be removed until the court makes an order under s 66B of the Act, based on a review of documents filed with the court, such as a certified copy of a death certificate, signed consent from the person to be removed, or evidence of incapacity.

Succession planning

Recommendation 10–8 The authorisation of an applicant sometimes provides that if a particular member of the applicant becomes unwilling or unable to act, another specified person may take their place.

Section 66B of the *Native Title Act 1993* (Cth) should provide that, in this circumstance, the applicant may apply to the Federal Court for an order that the member be replaced by the specified person, without requiring reauthorisation.

10.90 Sometimes an applicant is structured to include a member of each family group, or clan. In this situation, allowing the applicant to continue to act when one member is unable or unwilling to do so would leave a family unrepresented on the applicant.[115] Some claim groups have provided for this eventuality by including a succession plan in the original authorisation. That is, they provide for the replacement of a member who is unable or unwilling to act with another specified person, usually from the same family.[116]

10.91 Even where family groups have nominated individual members of the applicant, the applicant must be authorised by the entire group, and the applicant must act on behalf of the entire group.[117]

10.92 The *Native Title Act* should acknowledge and encourage the use of succession planning. It maintains the authority of the group and the representativeness of the applicant, and reduces the need for expensive and unnecessary authorisations. The ALRC recommends that if a succession plan is in place, the applicant should be able to apply to the Federal Court for an order that the member who is unable or unwilling to act be replaced by the person specified in the original authorisation. The replacement should not be effective until the Court makes an order under s 66B of the Act, based on a review of documents filed with the Court, such as a certified copy of a death certificate, signed consent from the person to be removed, or evidence of incapacity.

10.93 This proposal received support,[118] although stakeholders noted that it would be important for the terms of the authorisation to be very clear,[119] and that the

115 NSW Young Lawyers Human Rights Committee, *Submission 29*.
116 See, eg, *Smallwood on behalf of the Juru People v Queensland* [2014] FCA 331 (3 March 2014) [11].
117 *Native Title Act 1993* (Cth) s 61; *Bidjara People (No 2) v Queensland* [2003] FCA 324 (7 April 2003) [4]; *Noble v Mundraby* [2005] FCAFC 212 (30 September 2005) [16].
118 AIATSIS, *Submission 70*; NTSCORP, *Submission 67*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; National Native Title Council, *Submission 57*; Queensland South Native Title Services, *Submission 55*; North Queensland Land Council, *Submission 42*.
119 South Australian Government, *Submission 68*.

appointment of the replacement person should not be effective until the Court has made an order under s 66B.[120]

Managing and protecting benefits

10.94 The authorisation of an applicant has the predominant purpose of ensuring that a claim is made with the authority of the claim group. It also creates an entity to perform the functions and responsibilities associated with that claim under the *Native Title Act*.[121] However, the Act not only gives the applicant powers to deal with the claim,[122] but also creates opportunities for the applicant to receive funds that are intended for the native title group.[123] For example, the applicant must be a party to an area ILUA[124] and is a negotiation party for future acts.[125] Some state legislation also creates opportunities for an applicant to enter into an agreement on behalf of the group.[126] The Act does not regulate how funds arising from these agreements are held or disbursed. Representation in relation to future acts is sometimes provided by native title representative bodies (NTRBs) or native title service providers (NTSPs), which are not for profit and closely regulated. It may also be provided by lawyers, who are subject to professional regulation, and non-lawyers, who may be unregulated.[127]

10.95 There are some concerns that funds are not always held for the benefit of the entire native title group, particularly when the applicant is represented by private agents rather than representative bodies.[128] The ALRC has not consulted on this issue and does not express a view as to whether there are widespread problems with private agents or applicants dealing inappropriately with the proceeds of future act agreements.

10.96 Two recent inquiries have considered the arrangements for managing benefits, and the ALRC was directed to consider their findings in this Inquiry.[129]

Taxation Working Group

10.97 The Taxation of Native Title and Traditional Owner Benefits and Governance Working Group (the Taxation Working Group) considered 'the adequacy of current arrangements for holding, managing and distributing (native title) benefits' and made

120 Law Society of Western Australia, *Submission 41*.
121 Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) [25.16].
122 *Native Title Act 1993* (Cth) s 62A.
123 The term 'native title group' is used here because, as will be discussed below, there is some disagreement as to whether the funds are intended for the native title *claim* group or the group ultimately determined to be the native title *holding* group.
124 *Native Title Act 1993* (Cth) ss 24CD(1), 24CD(2)(a), 253.
125 Ibid ss 30, 30A, 253.
126 See, eg, *Aboriginal Cultural Heritage Act 2003* (Qld) ss 34, 35.
127 Australian Treasury, 'Taxation of Native Title and Traditional Owner Benefits and Governance Working Group: Report to Government' (2013) 17.
128 Native Title Services Victoria, Submission No 4 to Senate Standing Committee on Legal and Constitutional Affairs, *Native Title Amendment Bill 2012* (2012); Australian Treasury, above n 127, 11; Dan O'Gorman, Submission to Deloitte Access Economics, *Review of the Roles and Functions of Native Title Organisations* 2014; Yamatji Marlpa, Submission to Deloitte Access Economics, *Review of the Roles and Functions of Native Title Organisations* 2014.
129 See Terms of Reference.

recommendations to the Government on those matters in 2013.[130] Its key recommendation was for statutory support for an income tax exempt, not-for-profit entity with deductible gift recipient status, to be known as an Indigenous Community Development Corporation (ICDC). The ICDC would invest in community development and for the long-term economic development of Indigenous people.[131]

10.98 The Taxation Working Group also recommended that the Government:

- 'take urgent steps to regulate private agents … involved in negotiating native title future agreements';
- refer the following matters for consideration by the Review of the Roles and Functions of Native Title Organisations: the establishment of a statutory trust to hold native title agreement funds; and a process for the registration of s 31 future act agreements;
- 'take urgent steps to amend the *Native Title Act* … to clarify that the native title holding community is the beneficial owner of funds generated by native title agreement … and that the named applicant is in a fiduciary relationship to the native title holding group'.[132]

10.99 The Government indicated that it supported these recommendations, and would do further work on the development of an ICDC, a register for s 31 future act agreements and amendments to the *Native Title Act* regarding a fiduciary duty.[133]

Review of Native Title Organisations

10.100 The Review of the Roles and Functions of Native Title Organisations reported in May 2014. It was a policy review, rather than a law reform project.[134] It noted that 'there is no comprehensive evidence base in regard to the level of any unscrupulous behaviour by private agents'.[135] However, the Review found examples of instances where the actions of private agents, engaged by applicants, did not appear to be in the best interests of the claim group.[136] The Review outlined some structural features of the native title system that create vulnerability for native title holders.[137] Five options for reform were proposed for the consideration of Government:

- a registered list of native title practitioners;
- an accreditation system encouraging native title solicitors to gain specialised accreditation;

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130 Australian Treasury, above n 127, 33.
131 Ibid 5.
132 Ibid 6.
133 The Australian Treasury, *Government Response* (15 September 2014) Australian Treasury <http://www.treasury.gov.au>.
134 Deloitte Access Economics, 'Review of the Roles and Functions of Native Title Organisations' (Australian Government, March 2014) 5.
135 Ibid 17.
136 Ibid 18.
137 Ibid 118–122.

- reporting of fees paid to native title service providers over a minimum threshold amount;
- an introduction of an appeals mechanism for unethical behaviour; and
- amendment of the *Native Title Act* to clarify the fiduciary duty of the applicant.[138]

The duties of the applicant

Recommendation 10–9 The *Native Title Act 1993* (Cth) should be amended to provide that a member of the applicant must not obtain an advantage or benefit at the expense of the common law holders.

10.101 Several stakeholders considered that this Inquiry offered an opportunity to give further consideration to the duties of the applicant,[139] and suggested that the Act should be amended to impose an express fiduciary relationship on the applicant.[140] The ALRC supports the recommendations of the Taxation Working Group that there should be statutory clarification of the duties of the applicant, and recommends that the *Native Title Act* should provide that a member of the applicant must not obtain an advantage or benefit at the expense of the common law holders.

10.102 In consultations conducted for this Inquiry, there was widespread agreement that the applicant has fiduciary duties.[141] The Federal Court said that 'the authorisation of an applicant to make a native title application and to deal with matters arising in relation to it under s 251B has hallmarks of a fiduciary relationship',[142] and that 'the native title parties entering into such arrangements ultimately do so for and on behalf of only the true owners of any native title rights and interests that exist'.[143]

10.103 A fiduciary duty forbids the fiduciary from acting 'in any other way than in the interests of the person to whom the duty to so act is owed'.[144] With regard to agents, the duty is said to be 'a general obligation on agents not to profit from their position'.[145] That is, fiduciaries have negative, rather than positive obligations.

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138 Ibid 44. The Government has not yet provided a formal response to this Report.

139 AIATSIS, *Submission 70*; Chamber of Minerals and Energy of Western Australia, *Submission 21*; Native Title Services Victoria, *Submission 18*; National Native Title Council, *Submission 16*; Minerals Council of Australia, *Submission 8*.

140 The Chamber of Minerals and Energy of Western Australia, *Submission 49*; Native Title Services Victoria, *Submission 18*; National Native Title Council, *Submission 16*.

141 See, eg, Queensland South Native Title Services, *Submission 55*.

142 *Weribone on behalf of the Mandandanji People v Queensland* [2013] FCA 255 (25 March 2013) [61]; See also *Weribone on behalf of the Mandandanji People v State of Queensland (No 2)* [2013] FCA 485 (23 May 2013) [44].

143 *Lampton on behalf of the Juru People v State of Queensland* [2014] FCA 736 (11 July 2014) [34].

144 Peter Radan and Cameron Stewart, *Principles of Australian Equity & Trusts* (2010) 181.

145 Roderick Pitt Meagher, Dyson Heydon and Mark Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 4th ed, 2002) 193.

10.104 If an applicant breaches fiduciary duties owed to the native title group, remedies such as declarations, specific performance, injunction, restitution, damages, or account of profits may be available.[146] There may also be liability for third parties who knowingly participate in a breach of fiduciary duty.[147]

10.105 There are difficulties with relying on fiduciary duties to regulate the conduct of applicants. It is not completely clear whether those duties are owed to the claim group (which may change from time to time) or to the native title holders as finally determined, or both.[148] Actions in equity are complex and expensive, and may be beyond the resources of claim groups and NTRBs. The jurisdiction of the court hearing a native title claim to make orders regarding funds received by way of native title agreements has been challenged.[149] The applicant is not a legal entity that is capable of being sued.[150] Only individual members of the applicant can be sued.

10.106 A statutory duty on each member of the applicant to avoid obtaining a benefit at the expense of the native title holders would avoid some of these difficulties. After the registration of a claim, the applicant is known as 'the registered native title claimant',[151] and it is envisaged that the statutory duty would be owed by members of the applicant when they are performing their functions as registered native title claimant.

10.107 The ALRC considers that a statutory duty, like the equitable fiduciary duty, should be framed as a negative obligation. As discussed earlier, many native title claim groups do not delegate full decision-making power to the applicant, but invest this power in a steering committee or retain this power for the entire group. A duty on the applicant to avoid obtaining an improper benefit would be consistent with these governance arrangements. However, a positive duty, for example, to act in the best interests of the claim group, would potentially conflict with these governance arrangements. It might impose decision-making responsibilities on the applicant that the group does not intend the applicant to have. The applicant might have to consider whether to act as directed by the group, or to act in the best interests of the group as the applicant perceives them.

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146 Radan and Stewart, above n 144, pt VI.

147 Ibid 610–613; Meagher, Heydon and Leeming, above n 145, 202.

148 Rares J referred to obligations to 'the actual native title claim group' in *Weribone on behalf of the Mandandanji People v Queensland* [2013] FCA 255 (25 March 2013). However he noted that there are duties owed to the 'true native title holders' in *Weribone on behalf of the Mandandanji People v State of Queensland (No 2)* [2013] FCA 485 (23 May 2013) [46].

149 The orders made in *QGC Pty Ltd v Bygrave (No 2)* were resisted not only by the Mandandanji companies they were made against, but also by the State and Commonwealth. An appeal was lodged against the orders, and withdrawn when the court vacated the orders. See also Anthony Neal, 'Fiduciary Duties of Claimants under the *Native Title Act*?' (2013) 10 *Native Title News* 10.

150 *Butchulla People v Queensland* (2006) 154 FCR 233, [39]; *Anderson on behalf of the Wulli Wulli People v Queensland* (2011) 197 FCR 404, [54]; *Chapman on behalf of the Wakka Wakka People No 2 v Queensland* [2007] FCA 597 (2007) [9]; *Lennon v South Australia* [2010] FCA 743 (16 July 2010).

151 *Native Title Act 1993* (Cth) s 253.

10.108 Further, a duty to avoid obtaining a benefit directly addresses the specific mischief that the reform is intended to address, that is, the potential for applicants to deal inappropriately with the proceeds of future act agreements.

10.109 Other models of statutory duties include a statutory duty on each member of the applicant to act in the best interests of the native title holders. Examples of statutory duties to act in the best interests of another are common in Commonwealth laws.[152] Another model is the duties of directors. Directors of corporations have a statutory duty to exercise their powers with care and diligence, to act in good faith and for a proper purpose, and to avoid using their position to gain an advantage or to cause detriment to the corporation.[153]

10.110 The duty should be owed to the common law holders of the rights and interests claimed, because it is their interests that are at risk of being harmed by an applicant that acts inappropriately. Some stakeholders have indicated a preference for a statutory duty that is owed to the claim group,[154] either because this group is more clearly identifiable prior to a determination, or because it is the claim group that authorised the applicant. However, a person who is in the claim group, but who does not in fact hold native title rights and interests at common law, does not have any interests to be protected by a statutory duty. One advantage of the negative duty, that is, the duty to avoid obtaining a benefit, is that precisely identifying the members of the group to whom the duty is owed is of less relevance. If a positive duty to act in the best interests of the group was being imposed, it would be more important to be able to identify exactly who is in the group.

10.111 While the draft Terms of Reference for this Inquiry included a reference to 'access to and protection of native title rights and benefits', the final Terms of Reference did not. Accordingly, this Inquiry has only considered the protection of benefits insofar as this issue intersects with the authorisation of the applicant. The introduction of a statutory duty is only one way to protect benefits, and should not be seen as resolving the issue. Other methods, including the regulation of private agents, the introduction of an ICDC, the registration of future act agreements and statutory trusts, may well be necessary to complement the statutory duty.[155]

Claim group membership

10.112 Before a claim can be authorised, the claim group must be identified. The native title claim group is all the persons 'who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed'.[156] In the case of a compensation claim, the claim group is 'all the

152 *Life Insurance Act 1995* (Cth) s 48; *National Disability Insurance Scheme Act 2013* (Cth) s 76; *Paid Parental Leave Act 2010* (Cth) s 292; *Social Security (Administration) Act 1999* (Cth) s 123O.
153 *Corporations Act 2001* (Cth) ss 180–182.
154 Native Title Services Victoria, *Submission 18*; National Native Title Council, *Submission 16*.
155 See further Langton, above n 40; Australian Treasury, above n 127; Deloitte Access Economics, above n 134.
156 *Native Title Act 1993* (Cth) s 61(1).

persons … who claim to be entitled to the compensation'.[157] The application for a native title determination or compensation must either name the members of the claim group or 'otherwise describe the persons sufficiently clearly so that it can be ascertained whether any particular person is one of those persons'.[158] The same specificity is not required for a determination, which may name the group that holds the native title rights and interests, and leave the identification of individual members of the group to be determined by the registered native title body corporate.[159]

10.113 Reasons a claim group may have difficulty determining its membership include:

- the registration test requirement for a specific claim group description is not consistent with the complex nature of Aboriginal and Torres Strait Islander societies;
- the impact of colonisation has disrupted the social organisation of Aboriginal and Torres Strait Islander groups;
- in some areas there is uncertainty as to the status of people with a historical connection to land; and
- the time pressure imposed by the hasty lodgement of claims in response to a future act notification.[160]

10.114 Stakeholders agreed that these matters contribute to difficulties identifying the claim group—and to subsequent disputes.[161] Those disputes often result in litigation, and in particular, challenges to the authorisation of an applicant.[162] Disputes, while inevitable in human interactions,[163] can cause great pain within communities.[164] Delays caused by these disputes create a barrier to access to justice.[165] Uncertainty around claim group composition also creates difficulties for third parties who are proposing future acts.

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157 Ibid.

158 *Native Title Act 1993* (Cth) s 61(4).

159 Christos Mantziaris and David Martin, *Native Title Corporations: A Legal and Anthropological Analysis* (Federation Press, 2000) 70; *Western Australia v Ward* (2000) 99 FCR 316, [280]; *Dale v Moses* [2007] FCAFC 82 (7 June 2007) [370]. Where there is a dispute as to claim group membership, the Court will ordinarily deal with the question: *Banjima v Western Australia (No 2)* [2013] FCA 868.

160 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Issues Paper No 45 (2013) 64–66.

161 AIATSIS, *Submission 36*; Law Society of Western Australia, *Submission 9*; Cape York Land Council, *Submission 7*.

162 See, eg, *Davidson v Fesl* [2005] FCAFC 183 (2005); *Weribone on behalf of the Mandandanji People v Queensland* [2013] FCA 255 (25 March 2013); *Carr on behalf of the Wellington Valley Wiradjuri People v New South Wales* [2013] FCA 200 (11 March 2013).

163 Kimberley Land Council, *Submission 30*.

164 Toni Bauman, 'Whose Benefits? Whose Rights? Negotiating Rights and Interests Amongst Indigenous Native Title Parties' (2005) 3 *Land, Rights, Laws: Issues of Native Title* 1, 7.

165 Department of Justice, Victoria, *Submission 15*.

10.115 These difficulties do not necessarily indicate a problem with the law or legal frameworks, but may be symptoms of the very difficult factual and philosophical problems associated with translating Indigenous people's relationships with each other and with land into the western legal system.[166] As Tony McAvoy and Valerie Cooms observed, the *Native Title Act*

> continues to force Indigenous people to fit their own concepts of land tenure into an imposed non-Indigenous conceptualisation of what their societies and traditional laws and customs should be.[167]

10.116 One submission suggested that a group who has lodged a claim in haste in response to a proposed future act should be able to amend the claim without requiring re-authorisation and registration.[168] The ALRC has not proceeded to make such a recommendation, because the authorisation and registration processes (including the notification provisions) serve important functions in the native title system, even where they cause expense and delay. Accordingly, the following discussion focuses on options for improved dispute resolution rather than on amendments to the *Native Title Act*. These are intended to advance the timely and just resolution of claims, as indicated by the guiding principles for this Inquiry.

Current options for dispute resolution

10.117 Representative bodies have statutory responsibility for dispute resolution, including assisting in promoting agreement between its constituents about native title matters.[169] In performing these functions, the representative body may seek the assistance of the NNTT.[170] The North Queensland Land Council reported that it has used this provision of the *Native Title Act* on two occasions and has found it to be very useful.[171]

10.118 In some cases, allowing time in the court processes for research to be completed and for the group to consider the results of the research may prevent disputes from occurring.[172]

Options for reform

10.119 Where the representative body has made a decision that is not in the interests of some native title claimants or potential claimants, it is placed in a position of perceived conflict.[173] One suggestion is for the representative body to fund independent

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166 On the difficulties of translation, see Ch 1.

167 Tony McAvoy and Valerie Cooms, 'Even as the Crow Flies It Is Still a Long Way: Implementation of the Queensland South Native Title Services Ltd Legal Services Strategic Plan' (Native Title Research Monograph No 2/2008, AIATSIS, June 2008) 6.

168 Cape York Land Council, *Submission 7*.

169 *Native Title Act 1993* (Cth) s 203BF.

170 Ibid s 203BK.

171 North Queensland Land Council, *Submission 17*.

172 A Frith and M Tehan, *Submission 12*.

173 Department of Justice, Victoria, *Submission 15*; Law Society of Western Australia, *Submission 9*; Cape York Land Council, *Submission 7*; Just Us Lawyers, *Submission 2*.

mediation, or independent legal representation, for the dissatisfied party.[174] Cape York Land Council suggested that additional funding to representative bodies for the purpose of engaging mediators or legal representation might assist.[175]

10.120 Alternatively, the Law Society of Western Australia said it would be preferable

> for dispute resolution processes to be adopted which are independent of NTRBs entirely (for example, a referral to an independent, accredited mediator), and which are the subject of independent government funding, rather than compelling individual 'constituents' to pursue costly and difficult relief in the courts if the NTRB process is unsatisfactory or not considered sufficiently independent.[176]

10.121 Just Us Lawyers made a similar suggestion, calling for a 'panel of ex-Federal Court judges, assisted by qualified Indigenous mediators' to be resourced by representative bodies. They suggested that the outcome of mediations should be confirmed by court orders to ensure that outcomes are enforceable.[177]

10.122 Culturally appropriate dispute resolution services may not be currently available. In 2006, the AIATSIS Indigenous Facilitation and Mediation Project identified a need for a 'national fully supported and accredited network of Indigenous facilitators, mediators, and negotiators'.[178] The Federal Court of Australia's Indigenous Dispute Resolution and Conflict Management Case Study Project also noted that, in many areas, timely, responsive and effective dispute management services are not available and that there is a need for a national Indigenous dispute management service.[179] Such a service could not only address native title disputes but other family, neighbourhood or community disputes. Some disputes in the native title arena appear to be a continuation of conflict that began elsewhere,[180] and so resolution of non-native title conflict could contribute to improved native title processes.

10.123 Concerns have been raised that, in some proceedings, the anthropologist has 'the last word' in defining the claim group, and there is no avenue for a potential claimant to refute the conclusions of an anthropologist's report, beyond joinder as a respondent.[181] Joinder as a respondent with the aim of addressing disputes about claim group composition is often not an effective measure and may introduce cost and delay

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174 Just Us Lawyers, *Submission 2*.
175 Cape York Land Council, *Submission 7*.
176 Law Society of Western Australia, *Submission 9*.
177 Just Us Lawyers, *Submission 2*.
178 Toni Bauman, 'Final Report of the Indigenous Facilitation and Mediation Project July 2003–June 2006: Research Findings, Recommendations and Implementation' (AIATSIS, 2006) v.
179 Federal Court of Australia, Indigenous, Dispute Resolution and Conflict Management. Case Study Project, 'Solid Work You Mob Are Doing' (2009) xv–xvi.
180 Law Society of Western Australia, *Submission 9*; Graeme Neate, '"It's the Constitution, It's Mabo, It's Justice, It's Law, It's the Vibe": Reflections on Developments in Native Title since *Mabo v Queensland [No 2]*' in Toni Bauman and Lydia Glick (eds), *The Limits of Change: Mabo and Native Title 20 Years On* (AIATSIS, 2012) 188, 206.
181 J Hill, *Submission 37*.

into native title proceedings. An Indigenous dispute resolution process might offer a forum for exploring these issues.[182]

10.124 The ALRC suggests that the Australian Government consider establishing a national Indigenous dispute management service.

182 See also Ch 12, regarding the use of mediation and inquiries into matters including the composition of the claim group.

11. Parties and Joinder

Contents

Summary

11.1 Section 84 of the *Native Title Act 1993* (Cth) ('*Native Title Act*') sets out the party and joinder provisions. These provisions specify who is a party to native title proceedings, who may join native title proceedings, in what circumstances they may join, and when they may be dismissed.

11.2 The Terms of Reference for the Inquiry ask the ALRC to consider any barriers to access to justice for claimants, potential claimants and respondents, imposed by the party and joinder provisions of the *Native Title Act*. In this chapter, the ALRC makes recommendations designed to facilitate access to justice for these groups and to ensure that those persons with an interest affected by a native title determination are adequately represented in native title proceedings. The ALRC notes that the need for access to justice for respondents must be balanced by the need for equity for the native title applicant, and the need for the efficient administration of justice in native title claims.

11.3 In this chapter, the ALRC makes recommendations regarding the party and joinder provisions of s 84 of the *Native Title Act*. These include recommendations to allow respondent parties to elect to limit their involvement in proceedings to representing their own interests, to provide Aboriginal Land Councils in NSW with notice of native title proceedings, to clarify the law regarding joinder of claimants and potential claimants, and to clarify the law regarding dismissal of parties. The ALRC also recommends that the *Federal Court Act 1976* be amended to allow appeals from joinder and dismissal decisions in native title proceedings, and that the Australian Government develop principles governing the circumstances in which the Commonwealth will become a party to, or intervene in, native title proceedings.

Overview of the party and joinder provisions

11.4 A determination of native title rights and interests by the Federal Court takes effect *in rem*.[1] This term means that the determination of native title rights and interests is enforceable against 'the whole world'. A determination therefore results in legal finality.[2] Participation as a respondent in native title proceedings is a means by which a person may represent their interest in a claim area before a determination is reached.

11.5 Section 84 describes who is or may become a party to native title proceedings under the *Native Title Act*, and how parties may withdraw or be dismissed from proceedings. The provisions apply in relation to native title determination applications (including non-claimant applications), revised native title determination applications and compensation applications.[3] The term 'joinder' is often used in relation to native title procedure to describe both the s 84(3) method of becoming a party and s 84(5) applications to the Court to be joined as a party. Discussions about joinder under s 84(5), whether judicial or otherwise, may consider other subsections of s 84.[4]

11.6 Parties to a native title proceeding include the applicant[5] and the relevant state or territory minister.[6] Various third party respondents may also become parties to proceedings under s 84(3) by notifying the Federal Court within a specified time that they wish to participate, or under s 84(5) by applying to be joined to proceedings.[7] Broadly speaking, s 84(3) identifies that certain types of interests will be affected by a native title determination, and provides a mechanism for a person with such interests to become party to proceedings upon compliance with notification procedures. The joinder of a party under s 84(5), however, is subject to the discretion of the Court. These provisions are discussed in detail below.

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1 *Western Australia v Ward* (2000) 99 FCR 316, [190] (Beaumont & von Doussa JJ); *Wik v The State of Queensland* (1994) 49 FCR 1; *Dale v State of Western Australia* [2011] FCAFC 46 (31 March 2011) [92].

2 Subject to possible variation or revocation of a determination: *Native Title Act 1993* (Cth) s 13.

3 *Native Title Act 1993* (Cth) s 61.

4 See for example, *Butterworth v Queensland* (2010) 184 FCR 297.

5 *Native Title Act 1993* (Cth) s 84(2).

6 Ibid s 84(4).

7 See, eg, *Butterworth on behalf of the Wiri Core Country Claim v Queensland* [2010] FCA 325 (26 March 2010).

11.7 Section 225 of the Act provides that a determination must address the interests of third parties, including a determination of:

> (c) the nature and extent of any other interests in relation to the determination area; and
>
> (d) the relationship between the rights and interests in paragraphs (b) [ie the native title rights and interests] and (c) (taking into account the effect of this Act).

11.8 Party status in native title proceedings brings with it the right to participate in negotiations that may lead to a consent determination under either s 87 or s 87A of the Act. Under s 87, a consent determination requires the agreement of all parties to proceedings. As a result of this, 'a person who is a party can veto [a consent determination] and … can continue to do so at every stage so that only a judicial determination can resolve the claim'.[8] Section 87A provides for a consent determination over part of the claim area. This type of consent determination does not require the agreement of all parties, but only the agreement of certain defined parties.[9] If a person has an interest sufficient to become a party under s 84(3), that person's agreement will typically be required for a consent determination under s 87A. However, a consent determination may be possible under s 87A without the agreement of persons who join under s 84(5).[10]

11.9 The party and joinder provisions may need to accommodate Aboriginal and Torres Strait Islander respondents, for example, where there are overlapping claim groups or disaffected members of the claim group. For these respondents, access to justice may involve considerations distinct from, and potentially in conflict with, the considerations of equity for the primary claim group as represented by the applicant.

11.10 The importance of respondent interests being adequately represented in native title proceedings must be balanced against the impact that a large number of respondents may have on the resolution of native title proceedings, and in turn on the members of the claim group. These burdens may be administrative—as the number of parties increases, so too, does the number of persons who must, for example, be served with documents. The interests of claim groups must also be considered, given the context of the beneficial purposes of the *Native Title Act*.

11.11 Section 37M of the *Federal Court of Australia Act 1976* (Cth), which describes the over-arching purpose of civil practice and procedure provisions as the just resolution of disputes according to law 'as quickly, inexpensively and efficiently as possible', may also have decisive weight in a particular joinder case.[11]

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8 *Byron Environment Centre Inc v Arakwal People* (1997) 78 FCR 1, 5 (Black CJ).

9 *Native Title Act 1993* (Cth) s 87A(1)(c).

10 *Kokatha Uwankara (Part A) Native Title Claim v South Australia* [2013] FCA 856 (30 August 2013) [23]. The Court has held that, where a consent determination may be made under either s 87 or s 87A, it is preferable that it be made under s 87A: *Goonack v Western Australia* [2011] FCA 516 (23 May 2011) [21].

11 *Dodd on behalf of the Gudjala People Core Country Claim No 1 v Queensland (No 2)* [2013] FCA 1167 (9 August 2013) [37]–[40].

Participation by notification under s 84(3)

11.12 Most persons, other than the applicant and the Crown (ie, the relevant state, territory or Commonwealth government), become parties to native title proceedings under s 84(3). Section 84(3) provides that certain persons are a party to native title proceedings if that person notifies the Federal Court in writing to that effect within the prescribed time period. These persons include:

- persons who must be notified of a claim by the Registrar under s 66(3)(a)(i)–(vi), such as registered native title claimants, native title bodies corporate, persons with a registered proprietary interest, the Commonwealth Minister, and local government bodies—s 84(3)(a)(i);
- persons who claim to hold native title in relation to land or waters in the area covered by the application—s 84(3)(a)(ii); and
- persons whose interests in relation to land or waters may be affected by a determination in the proceedings—s 84(3)(a)(iii).

11.13 For the purposes of s 84(3)(a)(iii), the phrase 'interests in relation to land or waters' is to be read in conjunction with the s 253 definition of 'interests, in relation to land or waters'.[12] That definition provides:

> ***interest***, in relation to land or waters, means:
>
> (a) a legal or equitable estate or interest in the land or waters; or
>
> (b) any other right (including a right under an option and a right of redemption), charge, power or privilege over, or in connection with:
>
> (i) the land or waters; or
>
> (ii) an estate or interest in the land or waters; or
>
> (c) a restriction on the use of the land or waters, whether or not annexed to other land or waters.

11.14 Proceedings cannot substantively commence until the notification process has concluded and the parties are known.

11.15 Section 84(3) expresses a legislative assumption that the interests of the specified classes of parties will be affected by a determination of native title. The provisions are relatively wide in terms of the nature of an interest affected.

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12 *Kokatha Uwankara (Part A) Native Title Claim v South Australia* [2013] FCA 856 (30 August 2013) [23]. The phrase 'interest in relation to land and waters' was introduced by the *Native Title Amendment Act 2007* (Cth).

11.16 A consent determination under s 87A requires the agreement of specified categories of persons. These categories include many of the categories of person who may become a party under s 84(3).[13] A consent determination under s 87A will therefore require the agreement of most persons who are able to become a party to proceedings under s 84(3).

Joinder of parties under s 84(5)

11.17 If a person does not become a party to proceedings under s 84(3),[14] the person may apply to be joined to proceedings under s 84(5).[15] Section 84(5) provides that the Federal Court may

> at any time join any person as a party to the proceedings, if the Court is satisfied that the person's interests may be affected by a determination in the proceedings and it is in the interests of justice to do so.[16]

11.18 If the threshold questions—whether there is an interest and whether that interest may be affected by a determination—have been resolved in favour of the party making the application, the Court then considers whether it should exercise its discretion to join the person as a party.[17] Legal action may be well advanced when a person seeks to become a party under s 84(5) ('late joinder').

11.19 In exercising its discretion to join a person as a party to proceedings under s 84(5), the Court must first be satisfied that the person's interests may be affected by a determination. Case law suggests that an 'interest', for the purposes of s 84(5), is not limited to a legal or equitable interest, and that it may include some commercial, recreational or other interests.

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13 Section 87A does not require the agreement of a registered native title body corporate in relation to the claim area, or of a person who holds a proprietary interest in relation to the claim area that is registered in public register of interests in relation to land or waters. However, persons in either of these categories are able to become parties under ss 84(3)(a)(i), 66(3)(a)(ii) and 66(3)(a)(iv), respectively. The categories of person whose agreement is required for a s 87A consent determination include: (i) the applicant; (ii) each registered native title claimant in relation to any part of the determination area who is a party to the proceeding at the time the agreement is made; (iv) each representative Aboriginal/Torres Strait Islander body for any part of the determination area who is a party to the proceeding at the time the agreement is made; (v) each person who holds an interest in relation to land or waters in any part of the determination area at the time the agreement is made, and who is a party to the proceeding at the time the agreement is made; (vi) each person who claims to hold native title in relation to land or waters in the determination area and who is a party to the proceeding at the time the agreement is made; (vii) the Commonwealth Minister, if the Commonwealth Minister is a party to the proceeding at the time the agreement is made or has intervened in the proceeding at any time before the agreement is made; (viii) if any part of the determination area is within the jurisdictional limits of a State or Territory, the State or Territory Minister for the State or Territory if the State or Territory Minister is a party to the proceeding at the time the agreement is made; (ix) any local government body for any part of the determination area who is a party to the proceeding at the time the agreement is made: *Native Title Act 1993* (Cth) s 87A(1)(c).

14 This may be because the person does not fall within the categories in s 84(3)(a), or because the person does not notify the Court within the relevant time period.

15 *Kokatha Uwankara (Part A) Native Title Claim v South Australia* [2013] FCA 856 (30 August 2013) [24].

16 *Native Title Act 1993* (Cth) s 84(5).

17 *Far West Coast Native Title Claim v South Australia (No 5)* [2013] FCA 717 (30 July 2013) [26]; *Barunga v Western Australia (No 2)* [2011] FCA 755 (25 May 2011) [162]–[168]; *Jacob v State of Western Australia* [2014] FCA 1106 (14 October 2014) [4].

11.20 The types of interest necessary to be joined to proceedings were considered in *Byron Environment Centre Inc v Arakwal People* ('*Byron*').[18] In that case, the Full Court held that a Deputy President of the National Native Title Tribunal had erred in refusing the Byron Environment Centre party status because it could not demonstrate that it fell within the definition of 'interests in relation to land or waters' in s 253. Unlike s 84(3)(a)(iii), s 84(5) is not limited to interests in relation to land and waters as defined in s 253.[19]

11.21 The interests allowing joinder under s 84(5) may include a 'special, well-established non-proprietary connection with land or waters', but must not be 'indirect, remote or lacking substance'.[20] The interests must be 'capable of clear definition and … be affected in a demonstrable way by a determination in relation to the application'.[21] The interests 'should be greater than that of a member of the general public',[22] although there

> is no reason why persons who have had and continue to have regular and lawful use or enjoyment of areas of land or waters covered by a claim under the Act should not be afforded the opportunity of being heard as a party before losing their 'right' or having it otherwise affected by a native title determination.[23]

11.22 An interest in using the claim area for bushwalking, hunting or camping, for example, would not appear to be sufficient for joinder under s 84(5),[24] but ongoing use over many years may be, particularly where the native title claim is for exclusive possession.[25] A sufficient interest may arise where the person applying for joinder has a number of well advanced applications for mining licences,[26] although a single application for a licence may be insufficient.[27] The way in which a person's interest may be affected is also a relevant consideration.[28] In *Byron*, Black CJ considered that

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18 *Byron Environment Centre Inc v Arakwal People* (1997) 78 FCR 1. *Byron* concerned the *Native Title Act* prior to amendment by the *Native Title Amendment Act 1998* (Cth). In the earlier version of the Act, the joinder provision (then s 84(2)) read: 'A person may seek leave of the Federal Court to be joined as a party to proceedings if the person's interests are affected by the matter or may be affected by a determination in the proceedings'. However, *Byron* has been followed in subsequent cases concerning s 84(5): *Woodridge v Minister for Land and Water Conservation* (2001) 108 FCR 527; *Harrington-Smith on behalf of the Wongatha People v Western Australia* [2002] FCA 184 (11 February 2002).

19 *Byron Environment Centre Inc v Arakwal People* (1997) 78 FCR 1, 6 (Black CJ).

20 Ibid 6.

21 Ibid 7. The principles described in *Byron* continue to be applied: see, eg, *Cheinmora v Western Australia* [2013] FCA 727 (25 July 2013); *Kokatha Uwankara (Part A) Native Title Claim v South Australia* [2013] FCA 856 (30 August 2013).

22 *Byron Environment Centre Inc v Arakwal People* (1997) 78 FCR 1, 6 (Black CJ).

23 Ibid 41 (Merkel J).

24 *Atkinson on behalf of the Gunai/Kurnai People v Victoria (No 3)* [2010] FCA 906 (16 August 2010); *Atkinson on behalf of the Gunai/Kurnai People v Victoria (No 4)* [2010] FCA 907 (16 August 2010). Note that, in both cases, the application for joinder was dismissed due to the non-appearance of the joinder applicant.

25 See, eg, *Combined Mandingalbay Yidinji-Gunggandji Claim v Queensland* [2002] FCA 730 (14 June 2002).

26 *Walker on behalf of the Ngalia Kutjungkatja People v Western Australia* [2002] FCA 869 (10 July 2002).

27 *Yorta Yorta Aboriginal Community v Victoria* (Unreported, Federal Court of Australia, Olney J, 7 June 1996).

28 *Akiba on behalf of the Torres Strait Regional Seas Claim People v Queensland (No 1)* [2006] FCA 1102 (18 August 2006) [32].

the interests of a corporation might be affected if its activities might be 'curtailed or otherwise significantly affected by the determination'.[29] In the same case, Merkel J considered that a determination of exclusive native title might affect regular and lawful use and enjoyment of land, but also that those rights are subject to statute, and drew attention to the need to show 'how they may be actually affected by the determination'.[30]

11.23 Where a person seeking to be joined under s 84(5) has an interest that may be affected merely because the person has a public right of access over, or use of, an area covered by the application, s 84(5A) provides a discretionary power for the Federal Court to limit the number of parties with the same interest.[31] The Court may 'make appropriate orders to ensure that the person's interests are properly represented in the proceedings',[32] but 'need not allow more than one such person to become a party to the proceedings in relation to each area covered by such a public right of access or use'.[33]

11.24 Given the range of interests that may be sufficient for joinder under s 84(5) but which are not strictly 'interests in relation to land or waters', a consent determination under s 87A may not require the agreement of all persons who join under s 84(5).

Dismissal of parties under ss 84(8) and 84(9)

11.25 Section 84(8) allows the Federal Court to dismiss a party. Under s 84(9), the Court is to consider dismissing a party if that party's interests in the claim area arise merely because of a public right of access and if the person's interests are adequately represented by another party, or if the person never had (or no longer has) an interest that may be affected by a determination in the proceedings. A party (other than the applicant) may also withdraw from proceedings by giving written notice before the first hearing,[34] or at any time with the leave of the Court.[35]

11.26 The power to dismiss a party has been used, for example, to remove a party from proceedings who refused a consent determination, apparently without basis.[36]

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29 *Byron Environment Centre Inc v Arakwal People* (1997) 78 FCR 1, 10 (Black CJ).

30 Ibid 42 (Merkel J).

31 An alternative reading of s 84(5A) is that it provides an additional basis for joinder, rather than merely providing a power for the Court to limit joinder of multiple parties with the same interest arising from a public right of access over, or use of, the claim area under s 84(5): *Mamu People v State of Queensland* [2006] FCA 1563 (29 August 2006) [10] (Dowsett J); *Chapman v Minister for Land and Water Conservation for New South Wales* [2000] FCA 1114 (28 July 2000).

32 *Native Title Act 1993* (Cth) s 84(5A)(c). See also *Combined Mandingalbay Yidinji-Gunggandji Claim v Queensland* [2002] FCA 730 (14 June 2002).

33 *Native Title Act 1993* (Cth) s 84(5A)(d).

34 Ibid s 6.

35 Ibid s 7.

36 *Watson on behalf of the Nyikina Mangala People v Western Australia (No 5)* [2014] FCA 650 (20 May 2014).

The need for reform

Balancing considerations in the party and joinder process

11.27 The party and joinder provisions in the *Native Title Act* raise a number of issues around the balance of interests in the native title system which may affect how readily a native title determination is reached, as well as whether the proceedings are protracted and involve administrative burdens for all parties,[37] and the institutions administering the native title claims process (the National Native Title Tribunal and the Federal Court).

11.28 As 'a useful tool of legal analysis', native title is regarded as a burden on the radical title of the Crown.[38] In accordance with this position, the parties to a native title proceeding include the applicant and the relevant state, territory or Commonwealth government. The *Native Title Act*, as noted, provides other persons and organisations in addition to the Crown with an opportunity to be become a party through the notification process and also allows for applications for subsequent joinder of parties.[39]

11.29 As a practical matter of access to justice, therefore, third party respondents whose interests may be affected by a native title determination are provided with an opportunity to be involved in the proceedings.[40] The ALRC notes that this has the practical effect that there can potentially be a large number of parties. Once a person becomes a party, that person will be required to participate in proceedings, often at some time and cost, and in most circumstances, that person's consent is necessary for a consent determination.

11.30 Different considerations apply to claimants and potential claimants as respondent parties. There may be a mix of reasons for claimants or potential claimants to seek to join native title proceedings. The existence of overlapping claims or disaffection within claim groups may precipitate applications for joinder. Other Aboriginal and Torres Strait Islander peoples may seek to assert their own claims to land and waters, and see the courts as the appropriate avenue, notwithstanding that no determination can eventuate through participation as a respondent.

11.31 Given the diversity of interests in any native title claim, the ALRC considers that in most instances active case management by the Federal Court will be the most appropriate way to balance the considerations arising in applications for joinder.

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37 Merkel J in *Byron* noted that '[i]t takes little imagination to conceive of the variety of ideological or conscientious interests or groups that may be genuinely and deeply committed to supporting or opposing native title claims in particular areas of Australia. To afford such interests or groups the standing of a party under the Act is a recipe for promoting, rather than resolving, differences': *Byron Environment Centre Inc v Arakwal People* (1997) 78 FCR 1, 45. *Byron* was decided before the introduction of s 84(5A) into the Act, and the operation of this provision may go some way to addressing the concern expressed by Merkel J.

38 *Commonwealth v Yarmirr* (2001) 208 CLR 1, [49].

39 See Ch 2 for a brief discussion of the history of the *Native Title Act*.

40 See Ch 1, Guiding Principle 2. In law, a legal person can include a corporation and other entities having legal personality.

11.32 The ALRC has not made recommendations about respondent funding, but notes that respondent funding for some parties, especially groups not able to avail themselves of representation by major industry organisations, will be an important means of enabling participation. On principles of equity, consideration might be given to whether potential claimants, unable to avail themselves of funding through other sources, might access such funding in appropriate circumstances. Consideration around the provision of funding in all circumstances should support the conciliation and mediation focus in native title claims resolution, and the beneficial purposes of the *Native Title Act*.[41]

11.33 It is also important, however, to balance access to justice considerations with the need for proceedings not to be unduly long or complicated, so that justice can be efficiently administered.[42] Large numbers of respondent parties have the potential to adversely affect the interests of claim groups. AIATSIS expressed a concern that:

> 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.[43]

11.34 Other stakeholders suggested that the party and joinder provisions in s 84 were operating adequately, and that reform of these provisions was unnecessary. The South Australian Government, for example, considered

> the current powers of the Federal Court to be adequate whereby the interests of justice can be taken into account. The jurisprudence that has developed in this area over the last ten years should not be undermined by making changes to the underlying provisions.[44]

11.35 Although consultations indicated that the party and joinder provisions generally appear to be operating satisfactorily, several issues of concern were identified in the Inquiry. Stakeholders expressed concerns, such as:

- the potential for increased costs and delays arising from participation of non-Crown respondents;[45]
- the impact on parties when a new party is joined late in proceedings;[46]

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41 *Native Title Act 1993* (Cth) Preamble.
42 See Ch 1, Guiding Principle 3.
43 AIATSIS, *Submission 36*.
44 South Australian Government, *Submission 34*. See also Law Council of Australia, *Submission 35*; Northern Territory Government, *Submission 31*; Goldfields Land and Sea Council, *Submission 22*; Western Australian Government, *Submission 20*.
45 Kimberley Land Council, *Submission 30*.
46 See, eg, Central Desert Native Title Services, *Submission 26*; North Queensland Land Council, *Submission 17*; A Frith and M Tehan, *Submission 12*.

- the need for clarity and certainty around the party provisions;[47] and
- the desirability of mechanisms allowing parties to limit their involvement.[48]

11.36 The Federal Court has noted:

> the claims notification and joinder provisions of the Act in their application to both indigenous and non-indigenous prospective parties have the capacity to significantly delay the progress of claims and impose substantial administrative burdens on the Court, National Native Title Tribunal and the parties. For example, while the provisions relating to the joinder outside of the notification period were amended in 2007 to require not only that the applicant for joinder have an interest that may be affected by a determination but also that it be in the interests of justice that they be joined, no similar interests of justice requirement exists in relation to joinder during the notification period. This has frequently meant that parties whose interests the jurisprudence tells us are protected and who have no desire or capacity to participate in the resolution of the claim must be joined. Often these parties are dismissed when a claim approaches resolution without ever having actively participated despite Court orders that they do so. Delay and administrative burden are inevitable with seemingly little, if any, overall benefit.[49]

11.37 Legislative reform may not be the most appropriate way to address all stakeholder concerns, particularly, given the Court's existing powers for managing the participation of parties, joinder and dismissal of parties.

11.38 More generally, recommendations should balance the importance of representation of interests for respondents, claimants and potential claimants in native title proceedings,[50] with timely but just outcomes for claimants.[51]

The Crown as primary respondent

11.39 Where native title is determined to exist, it is held to be a burden on the radical title of the Crown—that power allows the Crown to deal with land and water and to grant interests to third parties. Where native title is found to exist in offshore areas, it is non-exclusive, and must be consistent with Commonwealth sovereignty over those waters and Australia's international obligations.[52] States, territories and the Commonwealth as the holders of the powers and obligations to deal with land, waters and offshore areas, are therefore the 'primary' respondents in native title determination proceedings.

11.40 Section 84(4), which provides that the relevant state or territory minister is automatically a party to proceedings unless the minister opts out by notice, reflects this

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47 Chamber of Minerals and Energy of Western Australia, *Submission 21*; Association of Mining and Exploration Companies, *Submission 19*.

48 Telstra, *Submission 53*; Chamber of Minerals and Energy of Western Australia, *Submission 21*; Telstra, *Submission 4*.

49 Federal Court of Australia, Submission to the Australian Attorney-General's Department, Review of the *Native Title Act 1993*—Draft Terms of Reference, 2013.

50 Guiding Principle 2.

51 Guiding Principle 3.

52 *Commonwealth v Yarmirr* (2001) 208 CLR 1; *Akiba v Commonwealth* (2013) 250 CLR 209, [34] (French CJ and Crennan J).

central role. The Commonwealth may become a party to proceedings if the minister gives notice under s 84(3)[53] and may otherwise join proceedings under s 84(5). The Commonwealth may also intervene in proceedings under s 84A.

11.41 In fulfilling its role as a primary respondent, the Crown is not held to be subject to a qualification of its powers, beyond those of a procedural character required for the proper conduct of proceedings. In other jurisdictions, such as Canada and New Zealand, there are doctrines or treaty obligations that mediate the role of the Crown in its relationship to indigenous claimants. Chapter 9 sets out relevant principles, such as 'Honour of the Crown'.

11.42 On one view, Crown parties should represent all interests that are ultimately derived from a Crown grant for the purposes of ss 225(c) and (d).[54] Persons holding these rights and interests—which may include, for example, holders of certain classes of pastoral leases, holders of mining tenements, and holders of licenses permitting the use of an area such as a national park for recreational or commercial purposes—should generally not be involved in proceedings, on the basis that the Crown, as grantor, may not derogate from the rights granted and thus has a duty to identify and confirm the interests it has created. NTSCORP set out this argument:

> Only the [Crown] has the power to effect changes to land tenure. … NTSCORP submits that any interest in land granted to a member of the public is created by legislative instrument or by a contractual arrangement. The interest thereby created extinguishes native title to the extent contained within that instrument/document, nothing more, nothing less. The interests thus created are picked up during the tenure analysis process and those interests are noted in the determination. To this extent we argue that any person with an interest in land cannot under the operation of the NTA be affected in any way by the determination of native title. If that party does consider their/its interests may be affected then they are at liberty to raise their concerns with the State who are able to ensure those interests are accommodated in any determination.[55]

11.43 A number of stakeholders took this view. Kimberley Land Council submitted that the 'appropriate parties to address connection are Crown parties', since 'recognition of connection is a recognition of an imposition on sovereignty'.[56] Angus Frith and Associate Professor Maureen Tehan argued that

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

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53 The Commonwealth Minister must be notified of a native title application by the Native Title Registrar, and may therefore become a party by notification under s 84(3): *Native Title Act 1993* (Cth) s 66(3)(a)(iv).

54 Queensland South Native Title Services, *Submission 55*; Native Title Services Victoria, *Submission 45*; North Queensland Land Council, *Submission 42*; Kimberley Land Council, *Submission 30*; A Frith and M Tehan, *Submission 12*.

55 NTSCORP, *Submission 67*.

56 Kimberley Land Council, *Submission 30*.

> The respondents themselves are not likely to be able to add very much to the litigation apart from the manner in which they exercise those rights and interests. The Crown is quite capable of asserting and describing the rights and interests it has granted.[57]

11.44 Queensland South Native Title Services (QSNTS) similarly submitted:

> From a principled perspective, native title is fundamentally the resolution of rights and interests relating to three legal systems—Indigenous (including overlapping interests), State/Territories and the Commonwealth. As such, the mandatory parties should be confined to those three categories of parties.[58]

11.45 Other stakeholders, however, expressed concerns about limiting participation to applicants and Crown parties.[59] The Western Australian Government noted:

> The State is not always in a position to identify all interests held by all third parties … The State's tenure records and retrieval systems are extensive and thorough but not perfect. Much historical land tenure information was created at a time before the existence of native title was contemplated. Third parties sometimes hold interests which are not apparent in the State's records for a variety of reasons.[60]

11.46 Concerns were expressed about procedural fairness and the Crown's capacity or suitability for representing commercial, recreational and other interests in relation to the determination area. Ergon Energy, for example, submitted that there may be 'a potential conflict between the State and Ergon Energy's interests particularly where Ergon Energy holds or seeks an interest in State land',[61] and that 'an expectation that the State will represent Ergon Energy's interests in native title proceedings is unrealistic given the capacity of the State and the potential for conflict of interests to arise'.[62]

11.47 The views expressed by stakeholders reflect the different ways in which the representation of 'interests' is understood to be at issue in native title determination proceedings. On the one hand, the Crown (subject to the concerns of the Western Australian Government, set out above) is in a position to represent the interests of third parties that are ultimately derived from the Crown. On the other hand, at a practical level the Crown may not be in a position to know the operational, commercial, or recreational factors that third parties see as part of a broader designation of interests, especially where information about the determination is not readily available from the Crown. These practical factors may generate concerns about a native title determination and may impede negotiations.[63]

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57 A Frith and M Tehan, *Submission 12*.

58 Queensland South Native Title Services, *Submission 55*.

59 The Pastoralists and Graziers Association stated that it was opposed to any reforms which '(i) restrict the joinder of parties to an application for determination from all people with an interest to only the Applicants and State, and/or (ii) limits the involvement of respondents in the proceedings. Pastoral lessees are the most affected by native title determinations and have a legal right to be informed about claims, and to have their positions heard in the Federal Court': Pastoralists and Graziers Association, *Submission 3*.

60 Western Australian Government, *Submission 20*.

61 Ergon Energy Corporation, *Submission 5*.

62 Ibid.

63 Pastoralists and Graziers Association, *Submission 3*.

11.48 The ALRC considers that, as a matter of principle, native title proceedings should ultimately be a matter between the applicant for a determination of native title and relevant Crown parties. However, the *Native Title Act* currently allows for designated persons whose interests are affected by a determination to become parties.[64]

11.49 Under its Terms of Reference, the ALRC was asked to examine access to justice for designated classes of persons rather than broader reforms to the party and joinder provisions of the Act as a whole. The ALRC therefore makes no recommendations about whether wider reforms are required. The ALRC supports further examination of these issues and notes that managing the current broader participation of parties is generally best handled by robust case management.

Effective representation of interests affected

11.50 Native title proceedings differ from many other types of legal proceedings in that very large numbers of parties can be involved and affected by the outcome of the proceedings.

11.51 A native title determination is 'conclusive evidence for the future of the existence or non-existence of the native title … claimed, not only as between the parties to the proceedings under the *Native Title Act* but as against the entire world'.[65] Native title proceedings therefore bring before the Court

> all parties who hold or wish to assert a claim or interest in respect of the defined area of land [in order to] bring about a decision which finally determines the existence and nature of native title rights in the determination area, and which also identifies other rights and interests held by others in respect of that area. As the determination is to be declaratory of the rights and interests of all parties holding rights or interests in the area, the determination operates as a judgment *in rem* binding the whole world.[66]

11.52 Access to justice is a principle which requires that a person is given a full opportunity to represent their interests before the court. The Full Court of the Federal Court noted in *Gamogab v Akiba* that it 'is fundamental that an order which directly affects a third person's rights or liabilities should not be made unless the person is joined as a party'.[67] A number of stakeholders also noted the importance of a person being able to participate in proceedings that may affect their rights or interests. For example, the Association of Mining and Exploration Companies (AMEC) submitted that

> it is in the interests of justice if all parties with interests in a claim area are given the opportunity to participate in the resolution of the claim. This is because the Court is

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64 Merkel J in *Byron* noted however that '[i]t takes little imagination to conceive of the variety of ideological or conscientious interests or groups that may be genuinely and deeply committed to supporting or opposing native title claims in particular areas of Australia. To afford such interests or groups the standing of a party under the Act is a recipe for promoting, rather than resolving, differences': *Byron Environment Centre Inc v Arakwal People* (1997) 78 FCR 1, 45. *Byron* was decided before the introduction of s 84(5A) into the Act, and the operation of this provision may go some way to addressing the concern expressed by Merkel J.

65 *Wik v The State of Queensland* (1994) 49 FCR 1, 3.

66 *Western Australia v Ward* (2000) 99 FCR 316, [190].

67 *Gamogab v Akiba* (2007) 159 FCR 578, [60].

> being asked to make a finding in relation to the nature and extent of third party interests in a claim area, which necessarily includes their validity.[68]

11.53 The Chamber of Minerals and Energy of Western Australia (CME) submitted, as an example of these impacts and consequences, that the validity of mining interests may be challenged through the native title determination process.[69]

11.54 Wide community involvement in native title proceedings may also contribute to general community support and acceptance of the native title process.[70] This is particularly important given the concerns that have been held by various parts of the community about the native title system.[71] AIATSIS made the related observation that many persons may seek joinder in order to have access to information about the progress of the proceedings:

> Many parties to native title matters … are involved in native title processes in order to keep appraised of the progress of individual matters. There is potential for focussing on stronger information-sharing with [such parties] that provides opportunity for their engagement with any particular native title matter, while reducing the burden of [their] involvement in legal processes for native title recognition.[72]

11.55 The ALRC considers that it is important that parties with rights or interests that may be affected by a determination are given the opportunity to participate in native title determination proceedings. It does not follow, however, that any 'right' that intersects with native title should be sufficient to ground a person's participation in proceedings. The Court's existing discretion under s 84(5) is appropriate for balancing these considerations.

Representative organisations

11.56 Representative organisations—recreational groups, industry representative bodies, or sporting bodies, for example—may represent the commercial, recreational or other interests of their members, and the interests of these members may be affected by a native title determination. However, the representative organisation itself will generally not be able to become a party to proceedings unless, separately from its members, it has an interest sufficient to become a party under ss 84(3) or 84(5).[73]

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68 Association of Mining and Exploration Companies, *Submission 54*. See also Western Australian Government, *Submission 20*; Association of Mining and Exploration Companies, *Submission 19*; Ergon Energy Corporation, *Submission 5*.

69 The Chamber of Minerals and Energy of Western Australia, *Submission 49*. The Chamber of Minerals and Energy referred, as an example, to *Graham on behalf of the Ngadju People v Western Australia* [2014] FCA 1247 (21 November 2014).

70 Justice John Dowsett, 'Beyond Mabo: Understanding Native Title Litigation through the Decisions of the Federal Court' (2009) 10 *Federal Judicial Scholarship*.

71 See, for example, Justice Robert French, 'A Moment of Change—Personal Reflections on the National Native Title Tribunal 1994–98' (2003) 27 *Melbourne University Law Review* 488.

72 AIATSIS, *Submission 36*.

73 See, for example, *Harrington-Smith on behalf of the Wongatha People v Western Australia* [2002] FCA 184 (11 February 2002); *Dann on behalf of the Amangu People v Western Australia* [2006] FCA 1249 (18 September 2006).

11.57 The 2006 *Native Title Claims Resolution Review* included a recommendation regarding allowing industry bodies to intervene in proceedings:

> That consideration be given to amending the 'party' provisions of the NTA (section 84) to allow an industry body to intervene in a representative capacity if one or more of its members is or was otherwise entitled to be a party and wishes the industry body to represent him, her or them. This should be subject to the Court's discretion to refuse permission to intervene as appropriate, to allow intervention on terms, and to later remove the industry body if relevant circumstances change.[74]

11.58 In the Discussion Paper, the ALRC proposed a similar reform to the *Native Title Act* to allow a representative organisation to become a party to proceedings if it represented a person with an interest that may be affected by a determination.[75] The proposal would have allowed an organisation—such as a recreational group, sporting body, or industry body—to become party to proceedings, despite the organisation itself not having an interest in the claim area. The proposed reform may have relieved persons who are represented by an organisation from the need to actively participate in proceedings that may be unfamiliar and complex, as well as reducing the numbers of parties, delays and expenses in native title proceedings.

11.59 A number of stakeholders expressed support or conditional support for the proposal. The primary reason expressed for this support was that the reform would result in a reduction in party numbers,[76] particularly if a representative organisation were a party instead of, rather than in addition to, its members.[77] The Minerals Council of Australia (MCA) suggested that the participation of a representative body would be 'particularly beneficial where there is no current application for title or current holding for tenure',[78] while the National Farmers' Federation suggested the participation of a representative body 'would support transition in circumstances such as when pastoral land is transferred land'.[79] Other stakeholders were opposed to the reform, expressing concerns about the introduction of organisations which may represent broader interests than those that would be directly affected by a native title determination in the proceedings.[80]

11.60 The ALRC considers that it would be problematic to restrict the participation of a person on the grounds that the person's representative organisation was party to proceedings. A member may disagree with the position taken by the representative body, and different members may have different or conflicting interests that cannot be adequately represented by a single representative body.

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74 Graeme Hiley and Ken Levy, 'Native Title Claims Resolution Review' (Report, Attorney-General's Department, 31 March 2006) rec 19.

75 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014) Proposal 11–3.

76 See, for example, National Native Title Council, *Submission 57*; A Frith and M Tehan, *Submission 52*; Native Title Services Victoria, *Submission 45*.

77 See, for example, South Australian Government, *Submission 68*.

78 Minerals Council of Australia, *Submission 65*.

79 National Farmers' Federation, *Submission 56*.

80 AIATSIS, *Submission 70*; Queensland South Native Title Services, *Submission 55*; Central Desert Native Title Service, *Submission 48*.

11.61 The proposal must also be considered against the existing s 84B of the *Native Title Act*, which allows a party to appoint 'a society, organisation, association or other body to act as agent on behalf of the party in relation to the proceeding'.[81] That organisation may act for more than one party in the proceeding.[82] The Law Council of Australia noted the relevance of this section of the Act, and submitted that the appointment of an agent under s 84B 'ensures that those whose interests are at stake are properly identified and engaged in the Court process and specifically answerable for their position, in the same way all other parties are'.[83]

11.62 The ALRC agrees that the appointment of an agent, particularly where that agent is representing multiple parties, is preferable to the participation of a representative body as a party in its own right. The possible use of s 84B to appoint a representative body was noted in the Explanatory Memorandum to the Native Title Amendment Bill 1997 (Cth):

> A party may appoint a society, organisation, association or other body as that party's agent in the proceeding [section 84B]. That agent may act for more than one party in the proceeding. For example, a number of pastoralists who are parties to a proceeding and have similar interests could appoint a peak body to act as their agent in the proceeding. The body might also arrange, for example, for a number of parties to be represented by one legal practitioner. The common law rules of agency will apply where an agent acts on behalf of a party to the proceeding.[84]

11.63 Where a representative organisation wishes to raise issues in proceedings but does not have sufficient interest to become a party to proceedings, it may nevertheless seek the Court's leave to appear as amicus curiae or to intervene under r 9.12 of the *Federal Court Rules 2011* (Cth). In either of these roles, a representative body is able to bring matters to the Court's attention without being a party to proceedings.

Increasing efficiency for parties and the Court

11.64 Some native title proceedings involve very large numbers of respondents. In the 2013–2014 reporting year alone, the Federal Court dealt with 781 party applications under s 84(3), and in the 2012–13 reporting year there were 982 party applications under s 84(3).[85] Over the five year period 2009–2013, 220 applications for joinder were made to the Court under s 84(5) after the relevant notification period.[86] As at 31 May 2013, the average number of respondents in Western Australian native title cases was 21.[87] Claims made over geographically large areas, particularly if those areas are relatively closely settled, are likely to have many respondents.

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81 *Native Title Act 1993* (Cth) s 84B(1).
82 Ibid s 84B(2).
83 Law Council of Australia, *Submission 64*.
84 Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) [26.14].
85 Federal Court of Australia, 'Annual Report 2013–2014' 141.
86 Figures provided by the Federal Court of Australia, December 2013.
87 Justice Michael Barker, 'Innovation and Management of Native Title Claims: What Have the Last 20 Years Taught Us?' (Paper Presented at National Native Title Conference, Alice Springs, 3–5 June 2013) 11.

11.65 Large party numbers can complicate proceedings, slow outcomes and place an administrative burden on courts and on other parties. Cape York Land Council noted its experience of

> significant delays and expense incurred because of the behaviour of parties to native title claims, often in circumstances where it is clear that the party's interests will not be negatively affected by a determination because their interests are protected at law.[88]

11.66 Large party numbers may also make it more difficult for parties to reach an agreement in order for the Court to make a consent determination. As noted earlier, a consent determination under s 87 of the Act requires the agreement of all parties to proceedings. As the number of parties increases, it may become more difficult for all parties to reach an agreement. This problem may be mitigated, to some extent, by the possibility of a consent determination under s 87A, which does not require the consent of all parties. A consent determination under s 87A may be made over a part of the claim area, which may allow parties to reach agreement on particular parts of the claim area even if disagreement remains about other parts.[89]

11.67 As noted above, a native title determination may affect the interests of a large number of persons, and it is important that persons who may be affected are given sufficient opportunities to represent their interests in proceedings. This point was made by the Law Council:

> If a party with a substantive interest in relation to that land stands to have that interest adversely affected, then they should be entitled as a matter of procedural fairness to be heard in relation to it.[90]

11.68 Reforms that reduce the number of parties may be undesirable if they result in a person not having a real opportunity to participate in proceedings. The ALRC considers reform is desirable if it leads to increased efficiencies for parties or the Court without restricting access to justice.

11.69 The existing powers of the Federal Court allow the Court to reduce many of the negative impacts that may result from large party numbers. *Watson v Western Australia (No 3)* ('*Watson (No 3)*') provides an example of the way in which orders may be moulded to ensure that a person seeking joinder has an adequate opportunity to participate.[91] Gilmour J directed that a respondent's 'participation in the proceeding be limited to leading evidence and making submissions in respect of the matters listed in ss 225(c) and (d) of the NTA'.[92]

11.70 In *Akiba on behalf of the Torres Strait Regional Seas Claim People v Queensland (No 1)* the Court refused an application for joinder by a local council under s 84(5), taking into account four factors, including the 'very significant and largely

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88 Cape York Land Council, *Submission 7*.

89 If a consent determination is made under s 87A, the application will be taken to have been amended to reduce the area of land or waters covered in the application: *Native Title Act 1993* (Cth) s 64(1B).

90 Law Council of Australia, *Submission 64*.

91 *Watson v Western Australia (No 3)* [2014] FCA 127 (24 February 2014).

92 Ibid [110].

unexplained delay in bringing the motion for joinder'.[93] Other relevant factors included: the 'theoretical and abstract and limited character of the interests relied upon'; that the state respondent could 'be expected adequately to represent the kinds of interests which have been identified and relied upon in this case'; and that the joinder applicant's interests were otherwise sufficiently protected, since any 'native title determination will inevitably be expressed as subject to the valid laws and delegated laws' of the state respondent.[94]

11.71 Such examples suggest that the Court's existing discretion to manage the participation and joinder of parties are sufficient to avoid undue burdens on other parties while ensuring access to justice. The ALRC therefore considers that it is unnecessary to introduce legislative reforms.

Parties to proceedings under s 84(3)

11.72 In order to become a party to proceedings under s 84(3)(a)(iii), a person must have an interest in relation to land or waters, as defined by s 253. This 'very wide'[95] definition includes interests which, at common law, would not be 'interests in relation to land or waters', such as licences or permits.[96] The definition extends to a public right to fish,[97] and to a 'privilege' such as the right of a member of the public to cross a recreational reserve managed by a public charitable trust.[98] Due to the breadth of this definition, the range of persons who may become parties to proceedings under s 84(3)(a)(iii) is, arguably, very wide in terms of identifying persons with appropriate interests that may be affected by native title proceedings.

11.73 In the Discussion Paper, the ALRC asked whether s 84(3)(a)(iii) should be amended to allow only persons with a legal or equitable estate or interest in the land or waters—that is, the first limb of the s 253 definition of 'interest, in relation to land or waters'—to become parties under s 84(3)(a)(iii).[99] Such an amendment would not affect a person's ability to become a party under s 84(a)(i)–(ii), nor the person's ability to make an application for joinder under s 84(5).

11.74 Many stakeholders expressed support for a reduction in the range of s 84(3)(a)(iii).[100] However, others argued that the suggested amendment would result in too great a restriction on the persons who may become parties under s 84(3). The MCA, for example, stated that:

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

94 Ibid.

95 *Western Australia v Ward* (2002) 213 CLR 1, [387].

96 Explanatory Memorandum, Native Title Bill 1993 (Cth), Part B 102–103.

97 *Western Australia v Ward* (2002) 213 CLR 1, [387].

98 *Kanak v Minister for Land and Water Conservation* (2000) 106 FCR 31, [28].

99 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014) Q 11–1.

100 Yamatji Marlpa Aboriginal Corporation, *Submission 62*; National Native Title Council, *Submission 57*; Queensland South Native Title Services, *Submission 55*; A Frith and M Tehan, *Submission 52*; Central Desert Native Title Service, *Submission 48*; Native Title Services Victoria, *Submission 45*; Law Society of Western Australia, *Submission 41*.

> Ambiguity exists under relevant statues and case law which suggest that mining tenements may not be a legal or equitable interest in land in all cases … As a result, [the suggested amendment] may diminish existing rights.[101]

11.75 The MCA observed that s 10 of the *Minerals Resources Act 1989* (Qld) provides that the grant of a mining tenement granted under that Act does not create an estate or interest in land. The MCA also noted the decision of the High Court in *TEC Desert v Commissioner of State Revenue (WA)* ('*TEC Desert*').[102] This case suggests that mining tenements may not be regarded as legal or equitable estates or interests in land.[103] Such examples suggest that a mining company with an interest in a claim area arising from a mining tenement would not be able to become a party under s 84(3)(a)(iii) if that section were limited to persons with a legal or equitable estate or interest in the claim area. Given the importance of persons whose interests may be affected by a determination being able to represent their interests, the ALRC considers that such a restriction would be overly burdensome.

11.76 Telstra noted that it is granted certain access rights under the *Telecommunications Act 1997* (Cth). Schedule 3 of that Act authorises a telecommunication carrier to enter land for the purposes of inspecting the land,[104] installing facilities[105] or maintaining facilities.[106] Similar access rights were granted under the predecessor legislation to the *Telecommunications Act 1997*.[107] Moreover, Telstra's Universal Service Obligation (USO) has, since 1975, required Telstra 'to ensure that standard telephone services are reasonably accessible to all people in Australia … wherever they reside or carry on business'.[108] As a result of these access rights and the USO, there was 'an unprecedented expansion of Telstra's infrastructure throughout urban and regional Australia … installed on land … without the need to obtain formal land tenure'.[109] It would therefore appear that Telstra may not hold 'a legal or equitable estate or interest in the land or waters claimed' if the common law position on 'legal or equitable estate or interest' is accepted for the purposes of s 84(3)(a)(iii).

11.77 Other telecommunication carriers are granted the same access rights under the *Telecommunications Act 1997*, and similar rights of access are granted to utility providers under, for example, the *Electricity Supply Act 1995* (NSW),[110] the *Gas*

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101 Minerals Council of Australia, *Submission 65*.
102 *TEC Desert v Commissioner of State Revenue (WA)* (2010) 241 CLR 576.
103 Ibid [27], [36]. Although this case is primarily concerned with the status of fixtures affixed to land that is the subject of a mining tenement, it raises the possibility that a mining tenement would not be considered a legal or equitable estate or interest in land for the purposes of the *Native Title Act*.
104 *Telecommunications Act 1997* (Cth) sch 3, cl 5.
105 Ibid sch 3, cl 6.
106 Ibid sch 3, cl 7.
107 *Telecommunications Act 1975* (Cth) ss 16–20; *Post and Telegraph Act 1901* (Cth) ss 84–90.
108 *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth) s 9(1)(a). The predecessor to Telstra, the Australian Telecommunications Commission (trading as Telecom), had a similar obligation under *Telecommunications Act 1975* (Cth) s 6.
109 Telstra, *Submission 53*.
110 *Electricity Supply Act 1995* (NSW) ss 54–63A.

Supply Act 2003 (Qld),[111] and the *Water Act* (NT).[112] While the geographical range of Telstra's infrastructure may be particularly broad due to the USO, many carriers or utility providers with a right of access under statute may own infrastructure installed on land covered by a native title claim without holding 'a legal or equitable estate or interest in the land or waters claimed'. The ALRC considers that such persons and organisations should have an opportunity to participate in proceedings, notwithstanding that the interest may not amount to a legal or equitable estate or interest in the land.

11.78 The ALRC considers that holders of mining tenements, telecommunications carriers, utility providers, and similar third party respondents should not be required to apply for joinder under s 84(5). This would accord with the efficient administration of justice.[113]

11.79 The ALRC remains concerned, however, that s 84(3)(a)(iii) may be too wide and uncertain in application, particularly as claims are made in closely settled areas where respondent party numbers may increase. For example, the terms 'power', 'privilege', and 'restriction',[114] have a potentially broad and uncertain interpretation. It may be appropriate to amend s 84(3)(a)(iii) to apply to a more specific and clearly-defined category of persons. For example, rather than applying to persons with a power, privilege or restriction in relation to the land or waters in the claim area, s 84(3)(a)(iii) could be amended to include those persons with a statutory right in relation to the land or waters in the claim area. This would make clear that interests such as those held by holders of mining tenements or telecommunications providers were sufficient to participate under s 84(3)(a)(iii), and would also extend to other persons with a statutory right, such as persons who hold a licence or permit for commercial fishing.[115]

11.80 An amendment to s 84(3)(a)(iii) would require further consideration that is outside the scope of this Inquiry. Relevant state and territory legislation granting rights or interests in the claim area would need to be assessed to ensure that appropriate persons would be captured. Further consideration would also be required as to whether such an amendment should be made to s 84(3)(a)(iii) directly, or to the underlying definition of 'interest, in relation to lands or waters' in s 253. The s 253 definition is referred to in other provisions of the *Native Title Act*, and amendment of the definition in s 253 may indirectly alter the interpretation and effect of these other provisions. For example, a consent determination under s 87A requires the agreement of, among others, 'each person who holds an interest in relation to land or waters in any part of the determination area at the time the agreement is made, and who is a party to the proceeding at the time the agreement is made'.[116] An amendment of the s 253

111 *Gas Supply Act 2003* (Qld) ss 138–145.
112 *Water Act* (NT) s 20.
113 In particular, when a third party respondent is joining only for the purposes of representing its own interests in the claim area, rather than to challenge a claim: see, eg, Telstra, *Submission 45*.
114 *Native Title Act 1993* (Cth) s 253.
115 One example of such a license can be found in the *Fisheries Management Act 2007* (SA). However, permits and licences for a wide range of activities exist under various state and territory laws.
116 *Native Title Act 1993* (Cth) s 87A(1)(c)(v).

definition of 'interest, in relation to land or waters' would therefore affect the operation of s 87A. However, it may be appropriate to amend s 253 if it were considered that the categories of person whose agreement would be required for a consent determination under s 87A should be varied.

Notification of Aboriginal Land Councils

Recommendation 11–1 Section 66(3)(a) of the *Native Title Act 1993* (Cth) should be amended to provide that the Registrar must notify the NSW Aboriginal Land Council and Local Aboriginal Land Councils, established under the *Aboriginal Land Rights Act 1983* (NSW), of a native title application.

11.81 The ALRC recommends that the *Native Title Act* be amended to explicitly include the NSW Aboriginal Land Council and Local Aboriginal Land Councils (ALCs) among the categories of persons whom the Registrar must notify of a native title application under s 66(3)(a). A further amendment to s 84(3)(a)(i) reflecting the inclusion of ALCs in s 66(3)(a) would ensure that ALCs were able to join native title determination proceedings under s 84(3)(a)(i).

11.82 The *Aboriginal Land Rights Act 1983* (NSW) provides a process for an ALC to make a claim to land independently of the claims process of the *Native Title Act*. Although the two claim processes are distinct, they may interact. An ALC cannot claim land under the *Aboriginal Land Rights Act* that is subject to a native title determination or a registered claim.[117] Where a native title claim is made after a claim under the *Aboriginal Land Rights Act*, the *Aboriginal Land Rights Act* transfer is made subject to any native title rights and interests that exist immediately before the transfer.[118] An ALC may not deal with land that is vested in it subject to native title rights and interests unless the land is the subject of an approved determination of native title.[119] Additionally, extinguishment of native title due to the grant of land to an ALC may be disregarded.[120]

11.83 It will often be appropriate for an ALC to be a respondent party to native title determination proceedings, because title to land may be affected by native title rights and interests in significant and complex ways.[121] Where an ALC holds a fee simple over land it will be able to become a party to proceedings under s 84(3)(a)(iv) of the *Native Title Act*. However, where an ALC has made a claim under the *Aboriginal Land Rights Act* that has not been determined, it has only a statutory, inchoate interest in the

117 *Aboriginal Land Rights Act 1983* (NSW) s 36(1)(d), (e).
118 Ibid s 36(9), (9A). This is subject to the claim under the *Aboriginal Land Rights Act* being made after 28 November 1994: *Native Title Act 1993* (Cth) s 22J(b).
119 *Aboriginal Land Rights Act 1983* (NSW) s 42.
120 *Native Title Act 1993* (Cth) s 47A.
121 The complex interaction of these two systems was also raised by the NSW Aboriginal Land Council: NSW Aboriginal Land Council, *Submission 51*.

land claimed.[122] Such an interest may not amount to a legal or equitable estate or interest in the land.

11.84 Several stakeholders supported the recommended reform.[123] NTSCORP noted that such amendments

> would assist in ensuring that relevant parties are joined to the proceedings earlier on in the process and may assist in a more efficient native title process. Late joinder of respondent parties, particularly Local Aboriginal Land Councils, has caused significant problems at the eleventh hour of several claim resolution process in NSW.[124]

11.85 However, the National Native Title Tribunal submitted that ALCs are already notified of relevant native title proceedings.[125] The Law Council similarly submitted that, in practice, ALCs are able to join native title proceedings 'by virtue of their interest in undetermined claims'.[126]

11.86 If all relevant ALCs are notified of native title claims affecting their claim area under the *Aboriginal Land Rights Act*—including those ALCs with an inchoate interest in the claim area—then amendment of s 66(3)(a) of the *Native Title Act* may be unnecessary. However, given the complex interactions of the *Aboriginal Land Rights Act* and the *Native Title Act*, and the importance of affected parties having the opportunity to participate in native title determination proceedings, the ALRC considers that it is still desirable to ensure that ALCs with an inchoate interest are able to participate in proceedings without being required to apply for joinder under s 84(5).

11.87 Recommendation 11–1 achieves this result—ALCs with interests arising under the *Aboriginal Land Rights Act* would be able to become parties to native title determination proceedings under s 84(3). This would apply once a claim has been determined under the *Aboriginal Land Rights Act*, and the ALRC considers that it should also apply to the inchoate interest arising under the *Aboriginal Land Rights Act* when an ALC has made a claim but that claim has not yet been determined.

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122 *Narromine Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (1993) 79 LGERA 430, 433–434 (Stein J); *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands (Consolidation) Act and the Western Lands Act* (1988) 14 NSWLR 685, 696. See also Jason Behrendt, 'Some Emerging Issues in Relation to Claims to Land under the Aboriginal Land Rights Act 1983 (NSW)' (2011) 34 *University of New South Wales Law Journal* 811.

123 NTSCORP, *Submission 67*; Minerals Council of Australia, *Submission 65*; NSW Aboriginal Land Council, *Submission 51*.

124 NTSCORP, *Submission 67*.

125 National Native Title Council, *Submission 57*.

126 Law Council of Australia, *Submission 64*.

An option for respondents to limit their participation

Recommendation 11–2 Federal Court of Australia practice notes (or similar mechanisms) should provide for a person who becomes a party to proceedings under s 84(3) or s 84(5) of the *Native Title Act 1993* (Cth) to elect to participate only in respect of the matters listed in s 225(c) and s 225(d) of the Act.

11.88 The ALRC recommends that provision be made for parties wishing to formally limit their participation in proceedings to matters relating to ss 225(c) and (d)—that is, the nature and extent of their interests in relation to the determination area and the relationship between those interests and native title rights and interests.

11.89 A person who becomes a party to native title proceedings will be a party to the *entire* proceedings. However, a number of stakeholders argued that it may be of benefit for persons to participate only as far as is needed to represent their interests—namely, in relation to the matters raised in ss 225(c) and (d).[127] A person who elected to participate in this way would be able to represent their interests to the Court and to stay informed about the proceedings, without a need to actively participate in all aspects of the proceedings. The results of respondents electing to target their participation in this way are likely to include reduced costs for the respondents, as well as increased certainty for applicants while retaining access to justice.

11.90 In the Discussion Paper, the ALRC proposed amending the *Native Title Act* to allow a person who becomes a party to native title proceedings to elect to join proceedings only when the proceedings concern matters affecting the party's interests under ss 225(c) and (d). The proposal drew on Telstra's submission that

> legislative reform that permits respondent parties to formally limit their involvement in native title claims while questions of connection are being resolved would be a positive outcome.[128]

11.91 Telstra proposed a 'secondary joinder portal', allowing a person to give notice of an intention to join proceedings once the Federal Court has considered and made a determination on connection. This would have two main benefits:

- a person would have the option of minimising time and resources spent on matters not directly affecting their interests; and
- if there was no determination of connection, or if the claim was withdrawn or dismissed, the person would not have joined proceedings unnecessarily, minimising the costs for all parties.

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127 Section 225(c) refers to 'the nature and extent of any other interests in relation to the determination area'. Section 225(d) refers to the relationship between the rights and interests in s 225(c) and native title rights and interests in relation to the determination area.

128 Telstra, *Submission 4*.

11.92 The proposal was widely supported by stakeholders,[129] with several noting the potential cost and efficiency benefits of allowing parties to formally limit their participation. Under this proposal, the option to participate only in certain aspects of proceedings would remain with the party. It would not prevent a party that wished to participate in the entirety of proceedings from doing so.

11.93 Some stakeholders suggested that further reforms were warranted. The Yamatji Marlpa Aboriginal Corporation, for example, submitted that they

> would prefer … that those who fit within section 84(3)(a)(iii) should only automatically become parties under section 225(c) or (d) … but that leave should be required in relation to section 225(a) or (b).[130]

11.94 This suggestion reflects a recommendation of the 2006 *Native Title Claims Resolution Review* that

> consideration be given to limiting the right of participation of a third party (that is, a non-government respondent party) to issues that are relevant to its interests and the way in which they may be affected by the determination sought.[131]

11.95 The National Native Title Council (NNTC) submitted that the proposal could be extended by either:

> (a) giving the Court the discretion to limit the ability of a person to elect to be party to proceedings to participating in them only in respect of s 225(c) and (d); or
>
> (b) not allowing a person to be a party to the proceedings before the Court has made decisions concerning the identity of the native title holders and connection issues.[132]

11.96 Frith and Tehan similarly submitted that the proposal

> should be extended to expressly give the Court the ability to limit a party's involvement in proceedings to participating in them only in respect of s 225(c) and (d).[133]

11.97 The ALRC notes that the Federal Court has existing powers to manage the participation of a party to proceedings, and that it may limit the participation of a party as appropriate in given circumstances. In *Watson (No 3)*, the Court made orders that a

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129 AIATSIS, *Submission 70*; Minerals Council of Australia, *Submission 65*; Law Council of Australia, *Submission 64*; National Native Title Council, *Submission 57*; Queensland South Native Title Services, *Submission 55*; Telstra, *Submission 53*; A Frith and M Tehan, *Submission 52*; The Chamber of Minerals and Energy of Western Australia, *Submission 49*; Central Desert Native Title Service, *Submission 48*; Native Title Services Victoria, *Submission 45*. The North Queensland Land Council supported the proposal 'provided the parties who have joined for a limited purpose are able to withdraw automatically once their matters of concern have been addressed': North Queensland Land Council, *Submission 42*. The South Australian Government noted that a similar practice was followed in its consent determination practice: South Australian Government, *Submission 68*.

130 Yamatji Marlpa Aboriginal Corporation, *Submission 62*. A similar suggestion was made by the Law Society of WA: Law Society of Western Australia, *Submission 41*.

131 Graeme Hiley and Ken Levy, above n 74, rec 20.

132 National Native Title Council, *Submission 57*.

133 A Frith and M Tehan, *Submission 52*.

respondent's 'participation in the proceeding be limited to leading evidence and making submissions in respect of the matters listed in ss 225(c) and (d) of the NTA'.[134]

11.98 The ALRC considers that such measures exercised by the Court in light of the circumstances in each case, is preferable to mandatory statutory provisions around the participation of parties in respect of ss 225(c) and (d). The ALRC therefore considers that direct statutory amendment governing participation of parties is not required. Recommendation 11–2 would provide a simple mechanism for respondents to elect to limit their participation if they wish to do so, which would operate alongside the Court's existing powers.

11.99 Parties' participation in native title proceedings is already being managed by the Federal Court in designating an 'active' and 'inactive' party list in some matters. Parties asserting interests based on statutory permits or joined pursuant to s 84(5) are not notified of directions hearings or required to join in consent orders while the applicants and the state or territory minister are negotiating the issues of traditional law and custom and connection. This enables the Court to focus on the key parties involved until it is clear that a determination will be sought by consent (in which case the other parties will be brought in to the negotiations concerning ss 225(c) and (d)) or will proceed to trial (and directions will be made for the participation of all parties in the hearing).

11.100 Although the *Native Title Act* could be amended to provide for parties to elect to limit their participation to matters relating to ss 225(c) and (d), in practice there are likely to be many circumstances and contingencies which cannot be adequately dealt with in legislation.[135] The ALRC considers that case management mechanisms allow greater flexibility and the capacity to respond as circumstances change.

11.101 However, as noted by QSNTS, amendment of the schedule to the *Native Title (Federal Court) Regulations 1998* (Cth) may be warranted. QSNTS suggested that the Regulations,

> be amended to provide for an election provision on the Form 5 where parties wishing to join positively indicate from the outset whether they would be involved in the whole claims process including connection assessment or only for the purposes of ss 225(c)–(d). Such details could assist in the culling of the party list by the Court in its case management of the claim once interests that ought to be in the Other Interests schedule of any determination have been identified and extinguishment issues have been resolved between the parties.[136]

11.102 The ALRC agrees that the inclusion of an election provision in Form 5 of the schedule to the Regulations would be of value. The Federal Court might also be assisted in its case management processes if a person seeking to become a party—under s 84(5)—provides a statement that sets out how that interest may be affected if a determination of native title is made.

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134 *Watson v Western Australia (No 3)* [2014] FCA 127 (24 February 2014) [110].
135 Minerals Council of Australia, *Submission 65*.
136 Queensland South Native Title Services, *Submission 55*.

Joinder of claimants and potential claimants

Recommendation 11–3 This recommendation is intended to make clear that a claimant or potential claimant may join native title proceedings as a respondent under s 84(5). However, such a person would be required to demonstrate a 'clear and legitimate objective' to be achieved by joining the proceedings.

The *Native Title Act 1993* (Cth) should be amended to clarify that, for the purposes of s 84(5):

(a) a member of a claim group or other person who claims to hold native title 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 such a person, the Federal Court should consider whether they can demonstrate a clear and legitimate objective to be achieved by joining the proceedings.

11.103 The ALRC recommends that the *Native Title Act* be amended to clarify that a member of a claim group (claimant) or a person who claims to hold native title but who may not have made an application in respect of that claim (potential claimant) has an interest that may be affected by the determination in native title determination proceedings, and so may join proceedings under s 84(5).

11.104 The ALRC also recommends that the *Native Title Act* be amended to require that, in exercising its discretion under s 84(5), the Court should consider whether the claimant or potential claimant can demonstrate a clear and legitimate objective to be achieved by joinder to the proceedings. This requirement will not allow the joinder of persons with vague or unspecified purposes while upholding the principle of access to justice. The ALRC considers that the recommendation will promote efficient native title claims proceedings without introducing unnecessary barriers to justice.

11.105 Claimants and potential claimants have consistently presented in cases concerning s 84(5) or its antecedents.[137] In these cases, a claimant or potential claimant seeks to become a respondent party to proceedings. This typically arises in one of the following situations:

- a member (or members) of the claim group disputes matters, such as who has been authorised as the applicant, or the way in which a claim is being conducted;

137 See, for example, *Far West Coast Native Title Claim v South Australia (No 5)* [2013] FCA 717 (30 July 2013); *Isaacs on behalf of the Turrbal People v Queensland* [2011] FCA 828 (25 July 2011); *Bonner on behalf of the Jagera People #2 v Queensland* [2011] FCA 321 (6 April 2011); *Davis-Hurst on behalf of the Traditional Owners of Saltwater v Minister for Land and Water Conservation (NSW)* [2003] FCA 541 (4 June 2003).

- a person (or persons) asserts that they are a member of the claim group, but that they have been excluded from, or not included in, the claim group; or
- a person (or persons) is a member of a competing claim group or potential claim group, and is seeking to represent their claimed native title interests.

11.106 Recommendation 11–3 comprises two limbs. The first limb would make clear that a claimant or potential claimant in the claim area has an interest that may be affected by a native title determination for the purposes of s 84(5). This limb of the recommendation reflects existing case law. As stated by Mansfield J in *Far West Coast Native Title Claim v South Australia (No 5)* (*'Far West Coast (No 5)'*), it is

> clear … that native title rights and interests (and similar traditional rights-based interests) have been held in some circumstances to be interests capable of satisfying the s 84(5) criteria, and that those native title rights and interests need not have been certainly established in order to qualify under s 84(5) as a person whose interests may be affected by a determination.[138]

11.107 However, earlier cases differed on the question of whether a member of the claim group would not be able to join as a respondent.[139] Recommendation 11–3 would make clear that a member of a claim group has an interest that may be affected for the purposes of s 84(5).

11.108 The Court has previously joined potential claimants to proceedings under s 84(5). In *Bonner on behalf of the Jagera People #2 v Queensland* (*'Jagera #2'*), for example, several persons were joined on the basis that they 'claimed to have native title rights and interests in various parts of the land or waters covered by the Jagera #2 claim that may be affected by a determination of that claim, sufficient to allow them to be joined as respondents to the Jagera #2 proceedings under s 84(5) of the Act'.[140] Whether the evidence for a potential claim is sufficient to permit joinder as a potential claimant will depend on the circumstances, but a prima facie case is necessary and sufficient.[141]

11.109 The second limb of Recommendation 11–3 would require that the Federal Court consider whether a claimant or potential claimant has a clear and legitimate objective in joining when determining whether or not it is in the interests of justice to join that claimant or potential claimant. The joinder of a claimant or potential claimant who does not have a clear and legitimate objective—for example, where the person sought joinder to disrupt an application or in the mistaken belief that joining as a respondent provided an avenue for having a native title claim heard—would be likely to add time and cost burdens to other parties.

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138 *Far West Coast Native Title Claim v South Australia (No 5)* [2013] FCA 717 (30 July 2013) [33].

139 See, eg, *Kulkalgal People v Queensland* [2003] FCA 163 (28 February 2003); *Combined Dulabed & Malanbarra/Yidinji Peoples v Queensland* [2004] FCA 1097 (25 August 2004).

140 *Bonner on behalf of the Jagera People #2 v Queensland* [2011] FCA 321 (6 April 2011) [13].

141 *Jacob v State of Western Australia* [2014] FCA 1106 (14 October 2014); *Pegler on behalf of the Widi People of the Nebo Estate #1 v Queensland* [2014] FCA 932 (28 August 2014); *Wakka Wakka People # 2 v Queensland* [2005] FCA 1578 (4 November 2005).

11.110 The second limb of Recommendation 11–3 reflects the statement of Mansfield J in *Far West Coast (No 5)* that if a joinder applicant 'can point to a clear and legitimate objective that he or she hopes to achieve by being joined, then it will generally be appropriate to exercise the Court's discretion in favour of the application'.[142]

11.111 The Federal Court in *Barunga v Western Australia (No 2)* noted a number of factors relevant to the exercise of its discretion to allow several members of a competing claim group to join proceedings:

> (a) Proceedings for a determination of native title are proceedings *in rem*: they bind non-parties. It is also fundamental that an order which directly affects a third person's rights or liabilities should not be made unless the person is joined as a party …
>
> (b) Consideration of the rights and interests of the party joined would lead to a more accurate definition of the native title rights and interests claimed, including by limiting the scope of the rights and interests of an applicant …
>
> (c) A party joined would also be able to protect the native title rights and interests they claim to hold from erosion, dilution, or discount by the process of the Court determining the claims of an applicant …
>
> (d) Whether the interest asserted can be protected by some other mechanism …
>
> (e) Whether the applicant for the determination would be prejudiced if the party applicant is joined …
>
> (f) The history of the proceedings.[143]

11.112 An applicant for joinder who demonstrated a clear and legitimate objective might nevertheless be denied joinder due to other considerations—for example, where the interests of the applicant for joinder could be protected through other mechanisms. The ALRC considers that whether the person seeking joinder can demonstrate a clear and legitimate objective should be given significant weight, and notes the view of Mansfield J in *Starkey v South Australia* that the

> discretion to join [a member of the claim group] as a respondent party does exist, but in my view its favourable exercise to allow a member of a claim group to become a respondent party will be rare.[144]

142 *Far West Coast Native Title Claim v South Australia (No 5)* [2013] FCA 717 (30 July 2013) [37].
143 *Barunga v Western Australia (No 2)* [2011] FCA 755 (25 May 2011) [201] (citations omitted).
144 *Starkey v South Australia* [2011] FCA 456 (9 May 2011) [68].

11.113 Many stakeholders supported this approach.[145] Frith and Tehan said:

> Requiring the Federal Court to consider whether the claimant or potential claimant has a clear and legitimate objective in joining is likely to reduce the number of parties involved in, and the cost and time of, native title proceedings.[146]

11.114 The recommended reform was opposed by North Queensland Land Council (NQLC) and QSNTS. NQLC submitted that, since the claim group authorises its applicant, 'there should be no reason for a member of the claim group to join as a respondent party in relation to a native title interest'.[147] However, given the problems that may sometimes arise in the authorisation process,[148] the ALRC considers that there may be circumstances in which it is in the interests of access to justice to allow a claimant to join as a respondent.

11.115 QSNTS expressed concerns about the inclusion of potential claimants, suggesting instead that the *Native Title Act* should be amended to provide that only persons who have filed 'a properly authorised native title claim in the Federal Court (which overlaps the application) have sufficient standing to become parties'.[149] QSNTS noted the successful joinder application in *Jagera #2*,[150] and submitted that 'joining a party who merely asserts an interest does little to create an avenue for any real resolution of the party's claims'. Further, the 'likely prejudice to the Applicant in a proceeding where a "potential claimant" is given standing (and the ability to stymie a consent determination) greatly outweighs any prejudice to the rights of a potential claimant'.[151]

11.116 The ALRC acknowledges that joinder of applicants and potential applicants may introduce difficulties into proceedings. Greater numbers of parties in proceedings may increase times and costs for all parties, and once a claimant or potential claimant is joined they may be in a position to prevent an agreement being reached for a consent determination. Nevertheless, the ALRC considers that it will, in some circumstances, be in the interests of justice for claimants and potential claimants with clear and legitimate objectives to be able to participate in proceedings.

11.117 The second limb of Recommendation 11–3 reduces the possibility of a claimant or potential claimant joining proceedings to disrupt or prevent a determination of native title. While the Court may currently join a claimant or potential claimant, the second limb of Recommendation 11–3 introduces an additional requirement for a claimant or potential claimant seeking joinder: an applicant for joinder who does not

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145 AIATSIS, *Submission 70*; NTSCORP, *Submission 67*; Minerals Council of Australia, *Submission 65*; Law Council of Australia, *Submission 64*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; National Native Title Council, *Submission 57*; A Frith and M Tehan, *Submission 52*; The Chamber of Minerals and Energy of Western Australia, *Submission 49*; Central Desert Native Title Service, *Submission 48*; Native Title Services Victoria, *Submission 45*; Law Society of Western Australia, *Submission 41*.

146 A Frith and M Tehan, *Submission 52*.

147 North Queensland Land Council, *Submission 42*.

148 See Ch 10.

149 Queensland South Native Title Services, *Submission 55*.

150 *Bonner on behalf of the Jagera People #2 v Queensland* [2011] FCA 321 (6 April 2011).

151 Queensland South Native Title Services, *Submission 55*.

show a clear and legitimate purpose in joining may have their application dismissed. This requirement is not intended to apply to other parties seeking joinder under s 84(5)—a recreational society need not show that it has a clear and legitimate objective to be achieved by joining proceedings. However, the ALRC considers that this additional requirement is appropriate. Members of a claim group who seek to join as respondents are, by definition, already involved in proceedings, and so their joinder as respondents must be well justified—particularly given concerns such as those expressed by NQLC and QSNTS. Potential claimants who seek to join as respondents have an alternative avenue for representing their interests—they may bring a native title claim—and so their joinder as respondents must be particularly well justified; especially if it is an application for late joinder.

Late joinder

11.118 Several stakeholders noted the particular impact that may be caused by late joinder. For example, Frith and Tehan submitted that late joinder may present a barrier to justice where

> the joinder confounds the legitimate expectations of the other parties involved in the proceedings that the matter will go to trial or be subject to a consent determination on a particular date, where they have worked to achieve that end over a long time.[152]

11.119 In certain cases, however, an application for late joinder may be justified or unavoidable. The NSW Aboriginal Land Council, for example, noted a number of reasons why it may be difficult or impossible for parties to join until later in proceedings. These reasons include, for example, limited resources, remoteness, and the possible lack of awareness of native title proceedings and their potential impact on interests held (or claimed) under the *Land Rights Act 1983* (NSW), until the proceedings are well advanced.[153]

11.120 Several stakeholders noted that it may be difficult for a third party to determine in advance whether that person's interests will be affected by a particular native title determination, and that a third party's interests in the claim area may change over the course of proceedings.[154] AMEC noted that a person's interests may change when the person acquires, transfers, or surrenders an interest, or when an interest expires.[155]

11.121 The ALRC considers that the existing powers of the Court are sufficient to limit the negative impact that late joinder may have on other parties in proceedings,

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152 A Frith and M Tehan, *Submission 12*. See also South Australian Government, *Submission 34*; NSW Aboriginal Land Council, *Submission 25*; Western Australian Government, *Submission 20*; North Queensland Land Council, *Submission 17*; Cape York Land Council, *Submission 7*.

153 NSW Aboriginal Land Council, *Submission 25*.

154 See, eg, NSW Aboriginal Land Council, *Submission 25*; Western Australian Fishing Industry Council, *Submission 23*; Association of Mining and Exploration Companies, *Submission 19*; National Farmers' Federation, *Submission 14*; Telstra, *Submission 4*.

155 Association of Mining and Exploration Companies, *Submission 54*.

while recognising that late joinder may in some cases be in the interests of justice.[156] Examples of the Court exercising its existing powers to limit the negative impact of late joinder can be found in *Watson (No 3)* and *Watson v Western Australia (No 5)* ('*Watson (No 5)*').[157] In *Watson (No 3)*, discussed above, a party was joined late in proceedings, but its participation was limited to matters arising under ss 225(c) and (d). That party was later dismissed in *Watson (No 5)* after it subsequently indicated it would, apparently without basis, refuse its consent to a consent determination. In reaching the decision to dismiss this party, Gilmour J had regard to a range of matters, such as:

- the purpose behind the *Native Title Act*, being to encourage the resolution of native title claims through conciliation and negotiation;
- the time, money, and other resources which had been invested in the application and which would be required if the consent determination were delayed;
- the inconvenience, anxiety and stress on members of the claim group if the consent determination were not to proceed; and
- the proximity of the remaining parties to reaching settlement.[158]

11.122 The ALRC notes that the test recommended in Recommendation 11–3 for claimants or potential claimants seeking joinder—whether the person seeking late joinder can demonstrate a 'clear and legitimate objective' to be achieved by joinder—may also be a useful test where any person seeks late joinder.

Dismissal of parties under s 84(8)

Recommendation 11–4 The *Native Title Act 1993* (Cth) 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).

11.123 Recommendation 11–4 makes clear that the Court, when considering whether to dismiss a party under s 84(8), may consider a wider range of circumstances than those set out in s 84(9). Section 84(8) of the Act provides that the Federal Court may at any time order a person, other than the applicant, to cease to be a party to the proceedings. Section 84(9) provides:

> The Federal Court is to consider making an order under subsection (8) in respect of a person who is a party to the proceedings if the Court is satisfied that:
>
> (a) the following apply:

156 In this respect, the ALRC agrees with the submission from the National Farmers' Federation: National Farmers' Federation, *Submission 14*.

157 *Watson on behalf of the Nyikina Mangala People v Western Australia (No 5)* [2014] FCA 650 (20 May 2014).

158 Ibid [10].

(i) the person's interests may be affected by a determination in the proceedings merely because the person has a public right of access over, or use of, any of the area covered by the application; and

(ii) the person's interests are properly represented in the proceedings by another party; or

(b) the person never had, or no longer has, interests that may be affected by a determination in the proceedings.

11.124 AIATSIS suggested that there may be uncertainty as to whether the Court must take the matters listed in s 84(9) into consideration when making a decision to dismiss a party, or whether those matters were merely possible considerations for the Court. Recommendation 11–4 would make clear that s 84(9) simply provides one set of circumstances in which the Court is to consider making an order under s 84(8).[159] On the other hand, some stakeholders submitted that it was sufficiently clear that the Court's power under s 84(8) is not limited to the circumstances contained in s 84(9), and there are decisions indicating that the Court may take other factors into account.[160] However, these stakeholders did not oppose clarifying the matter in the Act.[161] Stakeholders who commented on this proposal generally supported it.[162]

Appeals from joinder and dismissal decisions

Recommendation 11–5 Section 24(1AA) of the *Federal Court of Australia Act 1976* (Cth) should be amended to allow an appeal, with the leave of the Court, from a decision of the Federal Court:

(a) to join or not to join a party under s 84(5) of the *Native Title Act 1993* (Cth); or

(b) to dismiss or not to dismiss a party under s 84(8) of the *Native Title Act 1993* (Cth).

159 CME also noted that problems associated with large numbers of respondents: 'could be addressed at least in part by amendments to make it easier for respondents to withdraw from claims. Presently, if a claim has been heard or part-heard, a respondent can only withdraw by making a formal application, which can involve significant time and resources. Allowing respondents to withdraw from a claim through a more informal process would reduce costs and help address the problem of having large numbers of respondents to claims': Chamber of Minerals and Energy of Western Australia, *Submission 21*.

160 *Cheinmora v Western Australia* [2013] FCA 727 (25 July 2013); *Butterworth on behalf of the Wiri Core Country Claim v Queensland* [2010] FCA 325 (26 March 2010).

161 Yamatji Marlpa Aboriginal Corporation, *Submission 62*; Law Society of Western Australia, *Submission 41*.

162 AIATSIS, *Submission 70*; South Australian Government, *Submission 68*; NTSCORP, *Submission 67*; Minerals Council of Australia, *Submission 65*; YamatjiMarlpa Aboriginal Corporation, *Submission 62*; National Native Title Council, *Submission 57*; A Frith and M Tehan, *Submission 52*; The Chamber of Minerals and Energy of Western Australia, *Submission 49*; Central Desert Native Title Service, *Submission 48*; Native Title Services Victoria, *Submission 45*; North Queensland Land Council, *Submission 42*.

11.125 The ALRC recommends that appeals be allowed, with the leave of the Court, from a decision of the Federal Court to join, not join, dismiss, or not dismiss a party to native title proceedings. This reform should be implemented by amending s 24(1AA) of the *Federal Court of Australia Act 1976* (Cth).

11.126 Section 24(1AA) of the *Federal Court of Australia Act* provides that an appeal must not be brought from a judgment of the Federal Court if the judgment is

> (b) a decision to do, or not to do, any of the following:
>
> (i) join or remove a party …[163]

11.127 As a result, an appeal cannot be made from a decision to join, or not to join, a person as a party to native title proceedings under s 84(5). Similarly, an appeal cannot be made from a decision to dismiss, or not to dismiss, a party from native title proceedings under s 84(8).

11.128 Section 24(1AA) creates a barrier to justice for participants in the native title system. Due to the operation of s 24(1AA), a person who is not joined to, or is dismissed from, proceedings may have no further opportunity to represent their interests to the Court. Section 24(1AA) similarly imposes barriers to justice for other parties, who have no avenue of appeal if another person is joined or is not dismissed. The limitations imposed by s 24(1AA) are particularly significant given the *in rem* nature of native title proceedings.

11.129 The requirement that an appeal from such decisions be subject to the leave of the Court would be an important way to ensure that the appeals process is expeditious and does not place undue burdens on the applicant or other parties. In the absence of a leave requirement, an appeal on a joinder or dismissal decision could be made that was substantially without merit, simply to delay proceedings.[164]

11.130 Section 24(1AA) was introduced in order to 'ensure the efficient administration of justice by reducing delays caused by appeals from these decisions'[165] by removing the right of appeal for certain 'minor procedural decisions'.[166] The

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163 This section was amended in 2015 by the *Federal Courts Legislation Amendment Act 2015* (Cth). Prior to the amendment, the section provided that an appeal must not be brought against 'a decision to join or remove a party, or not to join or remove a party'.

164 It has been stated, with respect to exercises of judicial discretion relating to practice and procedure—such as the joinder of parties—that 'if a tight rein were not kept upon interference with the orders of Judges of first instance, the result would be disastrous to the proper administration of justice. The disposal of cases could be delayed interminably, and costs heaped up indefinitely, if a litigant with a long purse or a litigious disposition could, at will, in effect transfer all exercises of discretion in interlocutory applications from a Judge in Chambers to a Court of Appeal': *Re Will of F B Gilbert (deceased)* 46 SR(NSW) 318, 323. See generally Bernard Cairns, *Australian Civil Procedure* (Thomson Reuters (Professional) Australia, 8th ed, 2009) [18.400].

165 Explanatory Memorandum, Access to Justice (Civil Litigation Reforms) Amendment Bill 2009 (Cth) 18, 81. See also *Cement Australia Pty Ltd v Australian Competition and Consumer Commission* (2010) 187 FCR 261, [17]–[18].

166 Explanatory Memorandum, Access to Justice (Civil Litigation Reforms) Amendment Bill 2009 (Cth) 18, [81].

Explanatory Memorandum states that the types of decisions referred to in s 24(1AA) are

> minor procedural decisions [that] are interlocutory in nature, from which there should be no avenue of appeal. Clarifying that there is no right to appeal for these types of matters will ensure the efficient administration of justice by reducing delays caused by dealing with vexatious appeals from these decisions.[167]

11.131 The ALRC considers that a decision to join, not join, dismiss, or not dismiss a party in the context of native title determination proceedings should not be considered a 'minor procedural decision', given the nature of native title proceedings. The recommended reform would not affect other areas of law where a decision to join, not join, dismiss, or not dismiss a party might be considered a 'minor procedural decision'—for example, no appeal would be available from a decision to join or remove a party in proceedings under consumer law.

11.132 While allowing appeals from joinder or dismissal decisions in the native title context is consistent with the beneficial purposes of *Native Title Act*, the requirement for seeking leave to appeal ensures the efficient administration of justice. A leave requirement is a matter for serious consideration by courts, and appeals are not granted as a matter of course.[168] However, where there are suitable grounds for an appeal, the ALRC considers that it would be in the interests of justice to allow that appeal.

11.133 This approach was supported by a number of stakeholders.[169] NQLC, however, did not support it, expressing a concern that an appeal right from an interlocutory decision, such as a joinder or dismissal decision, 'has the potential to cause delay and add to the costs of proceedings'.[170] The ALRC considers that the leave requirement will effectively preclude excessive delay in proceedings.

11.134 QSNTS did not support the proposal, noting that it would create a distinction between native title proceedings and other proceedings in the Federal Court. However, the ALRC considers that the nature of native title proceedings justifies a departure from other Federal Court proceedings on this point. Unlike many other types of proceedings in the Federal Court, native title proceedings typically involve large numbers of parties and a final determination of interests.

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167 Explanatory Memorandum, Federal Courts Legislation Amendment Bill 2014 (Cth).

168 Cairns, above n 164, [18.400].

169 AIATSIS, *Submission 70*; NTSCORP, *Submission 67*; Minerals Council of Australia, *Submission 65*; Law Council of Australia, *Submission 64*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; National Native Title Council, *Submission 57*; A Frith and M Tehan, *Submission 52*; The Chamber of Minerals and Energy of Western Australia, *Submission 49*; Native Title Services Victoria, *Submission 45*; Law Society of Western Australia, *Submission 41*.

170 North Queensland Land Council, *Submission 42*. A similar concern—that introducing an avenue for appeal 'may increase the volume of resources directed towards what are, in one sense, administrative matters, rather than towards the securing of a determination'—was raised by Central Desert Native Title Services. However, Central Desert also noted that they did not 'outright oppose' the introduction of an avenue of appeal: Central Desert Native Title Service, *Submission 48*. See also South Australian Government, *Submission 68*.

Participation of the Commonwealth

Recommendation 11–6 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 of the *Native Title Act 1993* (Cth); or

(b) seek intervener status under s 84A of the *Native Title Act 1993* (Cth).

11.135 The ALRC recommends that consideration be given to the development of principles setting out the circumstances in which the Commonwealth will either become a party to, or seek intervener status in, native title proceedings.

11.136 The Commonwealth may become a party to proceedings or join proceedings under the party provisions of s 84. The Commonwealth may also seek intervener status in proceedings under s 84A. The role of an intervener is generally to represent the intervener's own legal interests in proceedings that may affect those interests, without being a party to proceedings.[171] In native title proceedings, the Commonwealth may intervene where consideration is given to the construction and interpretation of the *Native Title Act*.[172] The Commonwealth, as a party or an intervener, may also be able to take a role in ensuring that negotiations are carried out in a manner consistent with the policy goals underlying the *Native Title Act*.

11.137 The development of principles setting out the circumstances in which the Commonwealth would seek to participate or intervene in native title proceedings may provide greater certainty for all parties about the likelihood of Commonwealth involvement in native title proceedings.

11.138 Stakeholders who commented on this proposal were supportive.[173] The NNTC noted that an 'indication from the Commonwealth when it would seek to participate or intervene in native title proceedings would provide greater certainty to other parties'.[174] QSNTS submitted that the 'Commonwealth [Attorney-General] is the custodian of the NTA and should be actively involved'.[175]

11.139 Consideration might also be given as to whether the Commonwealth might elect to be involved only in parts of native title proceedings that deal with specific aspects of s 225 of the *Native Title Act*.

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171 *Levy v Victoria* (1997) 189 CLR 579, 601–602 (Brennan CJ).

172 *Western Australia v Strickland* [2000] FCA 652 (18 May 2000).

173 Minerals Council of Australia, *Submission 65*; Law Council of Australia, *Submission 64*; YamatjiMarlpa Aboriginal Corporation, *Submission 62*; National Native Title Council, *Submission 57*; Queensland South Native Title Services, *Submission 55*; A Frith and M Tehan, *Submission 52*; The Chamber of Minerals and Energy of Western Australia, *Submission 49*; Central Desert Native Title Service, *Submission 48*; Native Title Services Victoria, *Submission 45*; Law Society of Western Australia, *Submission 41*.

174 National Native Title Council, *Submission 57*.

175 Queensland South Native Title Services, *Submission 55*.

12. Promoting Claims Resolution

Contents

Summary

12.1 This chapter considers aspects of the processes involved in the resolution of native title claims, whether this resolution is achieved through litigated proceedings or, as is increasingly the case, through consent determinations. The aspects considered include:

- the role of the Crown in native title applications, and particularly in consent determinations;
- the use of expert evidence in native title proceedings;
- handling information generated as connection evidence;
- specialist training schemes; and
- the native title application inquiry process.

12.2 This chapter includes a recommendation that options for voluntary specialist training for native title practitioners be explored. The ALRC makes two recommendations regarding the native title application inquiry process, intended to facilitate the use of the native title application inquiry process where the Court considers it appropriate. The ALRC also recommends that amendments made to s 223

of the *Native Title Act* should only apply to determinations made after the date of commencement of any amendment.

Efficient resolution of native title claims

12.3 The time and costs needed to resolve native title claims have been noted by commentators including Vance Hughston SC:

> The major problem with the system for resolving native title claims is not hard to identify. It is the significant time and resources needed to resolve those native title claims which are opposed by government and other respondents. The problem is compounded by the limited physical capacity of most representative bodies, the scarcity of financial resources and the small number of experienced lawyers and anthropologists who are available to work on native title claims.[1]

12.4 The ALRC has also received submissions noting the time and costs in native title claims proceedings. In some cases, the factors leading to increased times and costs may be unavoidable. For example, the preparation of anthropological research will, by necessity, take a significant amount of time. Reducing the time taken to reach a determination does not, in itself, guarantee that justice is being achieved in the native title system. As noted by AIATSIS,

> the timely resolution of matters is an important principle underpinning reform. However … 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'. [2]

12.5 In other cases, there may be mechanisms available to manage inefficiencies and ensure that a just outcome is achieved. For example, where conflicting expert evidence is adduced, the Federal Court may make directions for an expert conference to more efficiently identify the areas of disagreement between the parties.

12.6 In many cases, the necessary powers and policies are already in place. For example, there has been significant progress towards resolving native title claims through consent determinations. The Queensland Government noted that

> as at 1 May 2014, 100 determinations of native title have been achieved in Queensland. 90 determinations recorded the existence of native title and, of these, 87 determinations were made by consent.[3]

12.7 Intensive case management also appears to have assisted in the resolution of native title claims. The Federal Court of Australia referred to the establishment, in 2010, of a priority list of claims, which

> has had a significant effect on the rate of resolution of matters with the number of consent determinations jumping from 12 and 10 in 2009 and 2010 respectively to 35 in 2011.[4]

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1 Vance Hughston, 'A Practitioner's Perspective of Native Title' (2009) 93 *Australian Law Reform Commission Reform Journal* 28, 28.
2 AIATSIS, *Submission 70*.
3 Queensland Government, *Submission 28*.
4 Federal Court of Australia, *Submission 40*.

12.8 Given this, the ALRC considers it unnecessary to introduce legislative reforms to improve the claims resolution process. This chapter discusses various mechanisms that are in place in order to highlight emerging best practice.

The commencement of the amendments

Recommendation 12–1 The amendments recommended to s 223 of the *Native Title Act 1993* (Cth) (Recommendations 5–1 to 5–5, and 8–1) should only apply to determinations made after the date of commencement of any amendment.

Recommendation 12–2 The amendments recommended regarding authorisation (Recommendations 10–1 to 10–9) and joinder (Recommendations 11–1 to 11–6) should only apply to matters that come before the Court after the date of commencement of any amendment.

12.9 The usual way for amended legislation to operate is prospectively, that is, it affects matters that come before the court after the date of the amendment. Legislation with prospective operation is consistent with the rule of law, which requires laws to be known and certain at the time of the act affected by the law. Accordingly, the ALRC recommends that the amendments recommended in this Report should only apply to determinations made after the date of commencement of any amendment. The *Native Title Amendment Act 1998*, which included amendments to s 223[5] and s 225,[6] applied to all determinations made after the commencement of the amendment.[7]

12.10 Some stakeholders called for the *Native Title Act* to provide that existing determinations are amended with automatic effect, so that those who have already had a determination of native title could benefit from the proposed reforms with regard to the nature and content of native title rights.[8] While not necessarily retrospective (as it would operate from the date of the amendment), this approach would unsettle many determinations that were made by consent and were a result of negotiations and compromise between the parties.

12.11 There is provision in the Act for revisiting determinations in certain circumstances. Applications may be made under s 13 to revoke or vary an approved determination. Such applications may only be made by the registered native title body corporate, the Commonwealth Minister, the state or territory minister, or the Native Title Registrar.[9] From a claimant perspective, this means that an application to revoke or vary could not be made where there was a determination that native title does not

5 *Native Title Amendment Act 1998* (Cth) sch 1, item 42.
6 Ibid sch 2 item 80.
7 Ibid sch 5 pt 5 item 24. The transitional provisions only refer specifically to the amendments to s 225. In the absence of any specification, the amendments to s 223 can be assumed to operate upon commencement.
8 A Frith and M Tehan, *Submission 12*.
9 *Native Title Act 1993* (Cth) s 61(1).

exist, as in this case there would be no registered native title body corporate.[10] Also, applications may only be made on the grounds that

- events have taken place since the determination was made that caused the determination no longer to be correct; or
- the interests of justice require the variation or revocation of the determination.[11]

12.12 Some stakeholders suggested that, as the *Native Title Act* is beneficial legislation, the proposed reforms should apply to determinations made as a result of an application under s 13 for a variation of a determination.[12] Stakeholders who supported the reopening of past determinations referred to the fundamental requirement of justice[13] and the importance of equity between groups whose claims have been determined and groups whose claims are yet to be determined.[14] Some acknowledged the potential expense and inconvenience that reopening determinations could cause, but indicated that such inconvenience could be dealt with by carefully specifying the circumstances in which determinations could be reopened.[15]

12.13 Other stakeholders indicated that reopening determined claims would be divisive,[16] disruptive,[17] would 'divert resources away from the resolution of outstanding claims and undo years of work'[18] and would result in uncertainty.[19]

12.14 The *Native Title Act* only allows a determination to be varied on the limited grounds outlined above. There has been no judicial determination as to whether statutory amendments to the *Native Title Act* invoke either of these grounds.

12.15 Section 13 does not provide for the variation of a determination by consent. Since the *Native Title Act* is intended to facilitate conciliation and negotiation,[20] it may be useful for s 13 to provide that the consent of the parties is grounds for a variation of a determination.[21]

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10 *Levinge on behalf of the Gold Coast Native Title Group v State of Queensland* [2013] FCA 634 (3 June 2013) [43].

11 *Native Title Act 1993* (Cth) s 13(5).

12 National Native Title Council, *Submission 57*; Queensland South Native Title Services, *Submission 55*; Central Desert Native Title Service, *Submission 48*.

13 National Native Title Council, *Submission 57*; Queensland South Native Title Services, *Submission 55*; A Frith and M Tehan, *Submission 52*; Central Desert Native Title Service, *Submission 48*; Native Title Services Victoria, *Submission 45*; North Queensland Land Council, *Submission 42*.

14 A Frith and M Tehan, *Submission 52*; Native Title Services Victoria, *Submission 45*.

15 Queensland South Native Title Services, *Submission 55*.

16 Yamatji Marlpa Aboriginal Corporation, *Submission 62*.

17 Association of Mining and Exploration Companies, *Submission 54*.

18 Minerals Council of Australia, *Submission 65*.

19 National Farmers' Federation, *Submission 62*; The Chamber of Minerals and Energy of Western Australia, *Submission 49*.

20 *Native Title Act 1993* (Cth) Preamble.

21 Law Council of Australia, *Submission 64*.

The role of the Crown in native title proceedings

12.16 Crown parties—states, territories and the Commonwealth—have specific roles in native title proceedings. States and territories are typically the first respondents to a native title determination application.[22] This reflects the fact that native title is primarily a matter to be determined between native title applicants and the Crown.[23] The Commonwealth may also be a party to proceedings.[24]

12.17 The Commonwealth has an additional role in overseeing the operation of the native title system. The Commonwealth Attorney-General may intervene in proceedings as of right under s 84A of the *Native Title Act 1993* (Cth) (*Native Title Act*). For example, the Attorney-General intervened in *Risk v Northern Territory* in order to 'submit that the course set in Full Court native title appeals determined since *Yorta Yorta* … had departed from what had been laid down in *Yorta Yorta*'.[25]

12.18 Crown parties are subject to model litigant requirements.[26] States, territories and the Commonwealth have published model litigant guidelines that set out how these parties will conduct themselves in proceedings, including in native title proceedings. The South Australian model litigant guidelines, for example, state that the model litigant requirement obliges the State to 'act with complete propriety, fairly and in accordance with the highest professional standards'.[27] The *Legal Services Direction 2005* (Cth) sets out various elements of the model litigant requirement for the Commonwealth:

> The obligation to act as a model litigant requires that the Commonwealth and its agencies act honestly and fairly in handling claims and litigation brought by or against the Commonwealth or an agency by:
>
> (a) dealing with claims promptly and not causing unnecessary delay in the handling of claims and litigation
>
> (b) paying legitimate claims without litigation, including making partial settlements of claims or interim payments, where it is clear that liability is at least as much as the amount to be paid
>
> (c) acting consistently in the handling of claims and litigation
>
> (d) endeavouring to avoid, prevent and limit the scope of legal proceedings wherever possible, including by giving consideration in all cases to alternative dispute resolution before initiating legal proceedings and by participating in alternative dispute resolution processes where appropriate

22 *Native Title Act 1993* (Cth) s 84(4).
23 See Ch 11.
24 See, eg, *Commonwealth v Yarmirr* (2001) 208 CLR 1.
25 *Risk v Northern Territory* (2007) 240 ALR 75, [5].
26 See, for example, *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333, 342. See generally Gabrielle Appleby, 'The Government as Litigant' 37 *UNSW Law Journal* 94.
27 South Australian Crown Solicitor's Office, *Legal Bulletin No 2: The Duties of the Crown as Model Litigant*, 10 June 2011, 2.

(e) where it is not possible to avoid litigation, keeping the costs of litigation to a minimum, including by:

  (i) not requiring the other party to prove a matter which the Commonwealth or the agency knows to be true, and

  (ii) not contesting liability if the Commonwealth or the agency knows that the dispute is really about quantum

(f) not taking advantage of a claimant who lacks the resources to litigate a legitimate claim

(g) not relying on technical defences unless the Commonwealth's or the agency's interests would be prejudiced by the failure to comply with a particular requirement

(h) not undertaking and pursuing appeals unless the Commonwealth or the agency believes that it has reasonable prospects for success or the appeal is otherwise justified in the public interest, and

(i) apologising where the Commonwealth or the agency is aware that it or its lawyers have acted wrongfully or improperly.[28]

12.19 Similar requirements exist in state and territory model litigant policies.

12.20 Once a native title application has been made and the parties ascertained, the Federal Court refers the parties to mediation.[29] Mediation assists the parties to reach agreement on matters including whether native title exists in the area claimed, who holds the native title, and the nature and extent of the native title rights and interests and of any other interests in the area.[30] Where mediation results in an agreement between the parties, the Court may make a determination consistent with, or giving effect to, the terms of that agreement (a 'consent determination') under ss 87 or 87A of the *Native Title Act*. The Court's power to direct parties to mediation and to make consent determinations reflects the importance of negotiation in the native title system.[31]

Consent determinations and connection assessment

12.21 Consistent with the role of the Crown as first respondent in native title determination proceedings, a preliminary step is for the relevant state or territory to assess an applicant's connection evidence to determine whether the state or territory will enter into negotiations. In practice, other respondents will typically rely on the assessment of the relevant state or territory.[32] State and territory governments assess connection evidence in the light of each government's consent determination policies, which must in turn reflect native title law as stated.

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28 *Legal Services Directions 2005* (Cth) app B para 2.

29 *Native Title Act 1993* (Cth) s 86B. However, the Court must order that there be no mediation if it considers that it would be unnecessary; that there is no likelihood that the parties will reach agreement; or the applicant has not provided sufficient detail about certain matters: Ibid s 86B(3).

30 *Native Title Act 1993* (Cth) s 86A.

31 Ibid Preamble.

32 See, eg, *Watson v Western Australia (No 3)* [2014] FCA 127 (24 February 2014).

12.22 Before making a consent determination under ss 87 or 87A, the Court must be satisfied that it is 'appropriate to do so'.[33] This does not require the Court to make its own assessment of the merits of the native title application[34]—the Court 'is not required to examine whether the agreement is grounded on a factual basis which would satisfy the Court at a hearing of the application'.[35] Rather,

> the primary consideration of the Court is to determine whether there is an agreement and whether it was freely entered into on an informed basis.[36]

12.23 The Court does not 'exercise any paternalistic role as to the merits or demerits of the proposed settlement',[37] and does not enter into consideration of the fairness of settlement terms, provided the parties involved have legal representation.

12.24 In considering whether the parties to proceedings have independent and competent legal representation, the Court may consider

> the extent to which the State is a party, on the basis that the State, or at least a Minister of the State, appears in the capacity of *parens patriae* to look after the interests of the community generally. The mere fact that the State was a party may not be sufficient. The Court may need to be satisfied that the State has in fact taken a real interest in the proceeding in the interests of the community generally. That may involve the Court being satisfied that the State has given appropriate consideration to the evidence that has been adduced, or intended to be adduced, in order to reach the compromise that is proposed. The Court, in my view, needs to be satisfied at least that the State, through competent legal representation, is satisfied as to the cogency of the evidence upon which the applicants rely.[38]

12.25 State and territory respondents may indicate to claimants their expectations regarding connection reports and negotiation, such as: the information they require about the claim; the standard of evidence they seek; and the elements upon which they would be willing to make inferences. However, in *Lovett on behalf of the Gunditjmara People v Victoria (No 5)*, North J stated that:

> something significantly less than the material necessary to justify a judicial determination is sufficient to satisfy a State party of a credible basis for an application.[39]

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33 *Native Title Act 1993* (Cth) ss 87(1A), 87A(4)(b), 87A(5)(b).

34 On s 87, see *Owens on behalf of the Tagalaka People v Queensland* [2012] FCA 1396 (10 December 2012) [15]; *Cox on behalf of the Yungngora People v Western Australia* [2007] FCA 588 (27 April 2007) [3]. On s 87A, see *Goonack v Western Australia* [2011] FCA 516 (23 May 2011) [25]; *May v Western Australia* [2012] FCA 1333 (27 November 2012) 13.

35 *Lovett on behalf of the Gunditjmara People v Victoria* [2007] FCA 474 (30 March 2007) [37]; *Owens on behalf of the Tagalaka People v Queensland* [2012] FCA 1396 (10 December 2012) [14].

36 *Lovett on behalf of the Gunditjmara People v Victoria* [2007] FCA 474 (30 March 2007) [37]; *Owens on behalf of the Tagalaka People v Queensland* [2012] FCA 1396 (10 December 2012) [14].

37 *Clarrie Smith v Western Australia* [2000] FCA 1249 (29 August 2000) [26].

38 *Munn for and on behalf of the Gunggari People v Queensland* (2001) 115 FCR 109, [29]; *Watson v Western Australia (No 3)* [2014] FCA 127 (24 February 2014) [6].

39 *Lovett on behalf of the Gunditjmara People v State of Victoria (No 5)* [2011] FCA 932 (27 July 2011) [13].

12.26 Several stakeholders expressed concerns about current consent determination policies and approaches to negotiation. Queensland South Native Title Services (QSNTS) identified a lack of transparency as a concern:

> The State's assessment of the test requirements is not a transparent process with an option of being contested, for example, their standard for what is an acceptable or requisite level of acknowledgement of traditional laws and observance of traditional customs has never been clearly articulated … in the absence of clarity and the possibility of failing to reach agreement on the issues, matters will have to resort to formal litigation.[40]

12.27 Third party respondents may also benefit from a transparent approach to negotiation, particularly where they wish to assess whether or not they should proceed to a consent determination. The Association of Minerals and Energy Companies (AMEC) noted:

> AMEC members, who may find themselves as respondents to native title proceedings, would benefit from greater transparency on the basis on which the primary respondent (the relevant State or Territory Government) accepts connection or refuses to accept.
>
> Clarity on the lead respondent's position and the basis for that position, particularly early in a claim process, would assist third party respondents to more effectively and efficiently participate in claim proceedings.
>
> AMEC members have expressed a need to access connection reports in order to better understand the actual history and customs of the claimant group and their veracity. At significant cost some AMEC members have had to commission their own connection reports to satisfy themselves with the authenticity of claim groups, and individuals within the claim group. This transparency issue should be addressed.[41]

12.28 More generally, concerns have been raised that the 'current method of assessing connection has simply relocated an adversarial evidentiary process from the Federal Court to State and Territory Governments'.[42] Justice Barker, writing extra-curially, has commented that there is a danger that assessment of connection by state and territory respondents can 'tend to become ritualistic, formulaic, cumbersome and bureaucratic'.[43]

Timing of tenure analysis and connection assessment

12.29 As part of native title proceedings, state and territory respondent parties will analyse the tenure in the areas under claim, for the purpose of identifying areas where native title has been extinguished. Although some stakeholders suggested that tenure

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40 Queensland South Native Title Services, *Submission 24*.

41 Association of Mining and Exploration Companies, *Submission 54*.

42 Rita Farrell, John Catlin and Toni Bauman, 'Getting Outcomes Sooner: Report on a Native Title Connection Workshop' (National Native Title Tribunal and AIATSIS, 2007) 8. For an alternative perspective, see Stephen Wright, 'The Legal Framework for Connection Reports' (Paper Presented at National Native Title Conference, Coffs Harbour, 1–3 June 2005).

43 Justice Michael Barker, 'Innovation and Management of Native Title Claims: What Have the Last 20 Years Taught Us?' (Paper Presented at National Native Title Conference, Alice Springs, 3–5 June 2013) [17].

analyses should be prepared earlier in proceedings, the ALRC has concluded that statutory reform in not necessary.

12.30 Commentators and stakeholders have noted that the production of tenure analyses is often a source of delay in native title proceedings. Justice Barker commented:

> It would be extremely useful to the early resolution of all claims if, contrary to the practice currently adopted whereby tenure analysis is usually conducted after connection issues are resolved, States and Territories were to undertake a tenure analysis as soon as possible after a claim has been lodged, if not beforehand. Once a tenure analysis has been made and settled by the parties, realistic assessments can be made on all sides about the extent to which native title is contestable. This would serve to inform the direction of negotiations over a claim made or likely to be made.
> …
>
> This is a conversation that needs to be had, because the approach to tenure analysis usually taken under current approaches consumes an inordinate amount of time and money, comes late in the process and has the real potential to delay the resolution of native title claims or limit the options for their resolution. If, without compromising the outcomes of tenure analysis, a current tenure analysis different from that ordinarily made were capable of serving the purposes of all parties under the NTA, and could be completed more easily, cheaply and quickly, then why would it not be considered? That is the question.[44]

12.31 Stakeholders also expressed concerns about the time taken for the production of tenure analyses. Yamatji Marlpa submitted that Western Australia's

> approach to tenure analysis—deferring it until after connection material has been reviewed in order to form a view about progressing to the next stage of potential consent determination negotiations—has the effect of causing unreasonable delays.[45]

12.32 Similarly, the Law Society of Western Australia submitted that:

> the State's unwillingness to undertake a tenure analysis until it has reviewed connection material and determined that it is willing to proceed to a consent determination unreasonably delays consideration of tenure issues. The open and early dissemination of information by the State would promote the early resolution of claims and a consideration by native title parties of the impact of extinguishment issues on their claims and negotiation position. It would be within the scope of the court's jurisdiction to make programming orders to this effect.[46]

12.33 The impact of tenure analysis timing on respondents was noted by the Minerals Council of Australia (MCA):

> The MCA agrees that the lack of concurrence in the sequence between the bringing of evidence to establish connection and tenure searches conducted by governments is a key constraint in the native title system. In particular, this was experienced in the *Ngadju* case in Western Australia where leases were granted but then found to be

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44 Ibid [13]–[14]. See also Justice Michael Barker, 'Alternative Pathways to Outcomes in Native Title Anthropology' (Paper Presented at Centre for Native Title Anthropology/Native Title Services Victoria, Australian National University, 12 February 2015).

45 Yamatji Marlpa Aboriginal Corporation, *Submission 62*.

46 Law Society of Western Australia, *Submission 41*.

> invalid as the State was unable to demonstrate the existence of historical grants for the lease areas.
>
> Presently, there is no common set of programming orders for a native title claim. This results in all claims evolving differently, and we welcome the proposal for reform. Changes must deliver a commonality of approach (including predictability and systemisation) to the process. At this same time, tenure information must also be comprehensively and accurately provided.[47]

12.34 However, there are several arguments against the introduction of a general requirement for tenure analyses to be prepared concurrently with connection reports.

12.35 First, the Federal Court's existing powers with regard to case management and expert evidence provide a means to manage the sequence of connection reports and tenure analyses. Moreover, the Court's discretion may be exercised on a case-by-case basis, allowing for the specific circumstances in each case. Several stakeholders submitted that the sequence of bringing connection evidence and tenure analyses should be determined using the Court's existing powers, with sequences determined on a case-by-case basis.[48] The Federal Court of Australia noted that it has

> in various matters made orders timetabling the provision of connection material and the outcome of the analysis of that material. The imposition of a Court ordered timetable aims to ensure that the connection process occurs in a timely manner and allows the parties to allocate resources accordingly.[49]

12.36 Secondly, reforms designed to accelerate the production of tenure analysis material may have deleterious consequences if they result in insufficiently considered tenure analyses. NTSCORP made this point, noting:

> There can be significant delay in the preparation of tenure material. Following its production, the consideration of this material by parties is laborious, but it is essential that such analysis is undertaken properly as the rights and interests afforded to native title claimants are largely dictated through this process.[50]

12.37 This argument reflects the observation, made several times throughout this Inquiry, that the speed with which outcomes are achieved is not the only factor to be considered.

12.38 Thirdly, several state governments advised the ALRC that the preparation of a tenure analysis is both expensive and time consuming.[51] The Department of Justice, Victoria submitted that the 'complexity of historical land dealings has given rise to high transaction costs for the required tenure analysis'.[52] The Western Australian Government submitted that 'tenure and extinguishment considerations … are currently

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47 Minerals Council of Australia, *Submission 65*; referring to *Graham on behalf of the Ngadju People v Western Australia* [2014] FCA 1247 (21 November 2014).

48 NTSCORP, *Submission 67*; National Native Title Council, *Submission 57*; A Frith and M Tehan, *Submission 52*.

49 Federal Court of Australia, *Submission 40*.

50 NTSCORP, *Submission 67*.

51 South Australian Government, *Submission 34*; Western Australian Government, *Submission 20*; Department of Justice, Victoria, *Submission 15*.

52 Department of Justice, Victoria, *Submission 15*.

a significant source of delay'.[53] The timing of a tenure analysis will also depend on the consent determination policy of Crown respondents. The South Australian Government submitted that, under its policy,

> the tenure analysis is undertaken at the same time as the expert anthropological material is being prepared. … As such, in South Australia there is concurrence unless the balance between the perceived weakness of the connection of the group concerned suggests that expensive analysis of tenure should await confirmation that the group actually holds native title.[54]

12.39 It emerged from consultations that tenure analyses are often delayed until there is greater certainty about the lands and waters being claimed. By delaying tenure analysis until a connection report has been prepared, state and territory respondents may avoid the unnecessary costs of preparing a tenure analysis for lands over which connection cannot be established. However, early tenure analysis may assist applicants in avoiding the unnecessary costs of preparing connection evidence for an area where native title has been extinguished.[55]

12.40 Overall, the ALRC considers that it is unnecessary to introduce statutory reforms requiring the earlier production of tenure analyses and assessment of connection. As a matter of best practice, however, it may be appropriate for state and territory governments to seek to prepare tenure analyses earlier, where possible.

Best practice principles

12.41 In the Discussion Paper, the ALRC asked whether the Australian Government should develop its own consent determination policy setting out the Commonwealth's responsibilities and interests in relation to consent determinations.[56] The ALRC also asked whether the Australian Government should develop national best practice principles to guide the assessment of connection in respect of consent determinations. The development of such policies, it was suggested, would allow the Commonwealth to clarify its own position, and may provide a leadership role with respect to the development of best practice principles. It may also assist in addressing some of the variations between the consent determination policies of the states and territories. These variations were noted by the North Queensland Land Council:

> [S]ome States and Territories have not published connection guidelines and the observation is made that it may be difficult to determine the exact requirements of their connection policy. Some States do not require connection reports as such. There is no requirement in the [Act] to develop connection guidelines.[57]

12.42 There have been previous documents setting out principles to guide states and territories in native title negotiations. The *Guidelines for Best Practice*, developed by the Joint Working Group on Indigenous Land Settlements for Flexible and Sustainable

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53 Western Australian Government, *Submission 20*.
54 South Australian Government, *Submission 68*.
55 Yamatji Marlpa Aboriginal Corporation, *Submission 62*.
56 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014) Question 9–4.
57 North Queensland Land Council, *Submission 17*.

Agreement Making,[58] set out principles designed to provide practical guidance for government parties to achieve 'flexible, broad and efficient resolutions of native title', particularly with respect to broader land settlements.[59] These guidelines emphasise early negotiation, cultural awareness and sensitivity and adherence to model litigant principles.[60]

12.43 Several stakeholders supported the development of a Commonwealth consent determination policy or national best practice principles,[61] although Central Desert Native Title Services questioned whether a Commonwealth policy or principles would 'have any real and substantive impact on the resolution of native title claims'.[62] The South Australian Government was opposed to the development of national best practice principles, submitting:

> The states and territories all have best practice principles in the assessment of connection that reflect the requirements of each State or Territory jurisdiction and that are consistent with the requirements of the NTA.[63]

12.44 Overall, it was not clear that there were problems with consent determination policies that could reasonably be addressed by Commonwealth policies. Stakeholders' experiences with consent determinations appeared to vary between jurisdictions. For example, while several stakeholders submitted that there were significant delays in consent determinations in Western Australia,[64] South Australian Native Title Services stated that they had 'established positive relationships with successive State Governments and other respondent parties to resolve native title through negotiation and consent'.[65]

12.45 The context of consent determinations also varies between states and territories. Victoria has adopted an approach based on agreement and consent through legislation.[66] In the Northern Territory, a range of processes have been introduced since 2007 to increase the efficiency of claims resolution over pastoral estates, including:

- not disputing the existence of native title holding group at sovereignty (subject to extinguishment);
- progressing claims in 'group clusters' based on geographical and anthropological commonalities;

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58 Joint Working Group on Indigenous Land Settlements, *Guidelines for Best Practice: Flexible and Sustainable Agreement Making*, August 2009.
59 Ibid 4.
60 Ibid 12.
61 AIATSIS, *Submission 70*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; National Native Title Council, *Submission 57*; Queensland South Native Title Services, *Submission 55*; A Frith and M Tehan, *Submission 52*; Native Title Services Victoria, *Submission 45*; Law Society of Western Australia, *Submission 41*.
62 Central Desert Native Title Service, *Submission 48*.
63 South Australian Government, *Submission 68*.
64 Yamatji Marlpa Aboriginal Corporation, *Submission 62*; Central Desert Native Title Service, *Submission 48*; Law Society of Western Australia, *Submission 41*.
65 South Australian Native Title Services, *Submission 10*.
66 *Traditional Owner Settlement Act 2010* (Vic).

- negotiating consent determinations of native title on pastoral leases based on a short-form or truncated supporting anthropological connection report;
- agreeing on templates for 'statement of agreed facts' and 'joint submissions' in support of all pastoral estate consent determinations;
- relying on a generic list of public works existing on pastoral lease areas; and
- streamlining Governmental approval processes of consent determinations of all pastoral estate claims.[67]

12.46 Given the varied experiences and contexts between the states and territories, the ALRC considers that it would be impractical to develop best practice principles that could be applied across all jurisdictions.

Expert evidence

12.47 In a native title proceeding, claimants must provide evidence to establish the elements of native title—ie that they possess communal, group or individual rights and interests in relation to land or waters under traditional laws acknowledged and customs observed by them, and that, by those laws and customs they have a connection with the land or waters claimed.[68] Compiling such evidence typically will require significant resources and the extensive use of experts. Typically, this will be a time-intensive process.[69]

12.48 The establishment of native title under s 223 draws on a wide range of expert evidence:

> The historical reality of an indigenous society in occupation of land at the time of colonisation is the starting point for present day claims for recognition of native title rights and interests. The determination of its composition, the rules by which that composition is defined, the content of its traditional laws and customs in relation to rights and interest in land and waters, the continuity and existence of that society and those laws and customs since colonisation, are all matters which can be the subject of evidence in native title proceedings. Such evidence can be given, most importantly, by members of the society themselves and also by historians, archaeologists, linguists and anthropologists.[70]

12.49 Relevant experts may include, for example, historians, archaeologists, botanists, palaeontologists, cartographers, ethnomusicologists, and anthropologists. The importance of such expert evidence to claimants was noted by AIATSIS:

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67 Northern Territory Government, *Submission 31*.

68 *Western Australia v Ward* (2000) 99 FCR 316, [114]–[117] (Beaumont and von Doussa JJ); *Daniel v Western Australia* [2003] FCA 666 (3 July 2003) [146]; *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* (2007) 238 ALR 1, [339].

69 Graeme Neate, 'Resolving Native Title Issues: Travelling on Train Tracks or Roaming the Range?' (Paper Presented at Native Title and Cultural Heritage Conference, Brisbane, 26 October 2009) 11.

70 *Sampi v Western Australia* [2005] FCA 777 (10 June 2005) [951].

> 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'.[71]

12.50 This expert evidence also has significant value to the Court.[72] Vance Hughston SC and Tina Jowett have observed that expert evidence is of particular importance where the collective memory of a claim group does not extend prior to the assertion of sovereignty:

> the expert evidence of anthropologists will most frequently be relied upon to overcome the inherent forensic difficulties in proving the content of pre-sovereignty laws and customs and the continuous acknowledgment and observance of those laws and customs down to the present day.[73]

12.51 However, Hughston and Jowett identified several concerns with the use of expert evidence:

- concerns have at times been expressed that expert evidence may be partisan or biased, possibly because experts are briefed by only one party and may have a long-standing association with a particular claim group;[74]
- there have been instances of experts giving expert opinion evidence about matters extending beyond their professional expertise;[75]
- expert evidence and anthropological reports may be highly technical and difficult to understand;
- significant time may be required to take each expert through their evidence, particularly in an adversarial setting; and
- the adversarial context may not provide the best way for an expert to assist the court, nor for the court to properly assess experts' competing opinions.[76]

12.52 Many of these concerns were echoed by stakeholders. Issues regarding expert evidence emerging through the ALRC's consultations and in submissions included:

- the limited availability of experts;
- the possible disconnect between anthropological evidence and the legal tests necessary to establish native title; and
- the potential for delays in proceedings resulting from conflicting expert evidence.

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71 AIATSIS, *Submission 70*.
72 *Willis on behalf of the Pilki People v Western Australia* [2014] FCA 714 (4 July 2014) [116] (North J).
73 Vance Hughston and Tina Jowett, 'In the Native Title "Hot Tub": Expert Conferences and Concurrent Expert Evidence in Native Title' (2014) 6 *Land, Rights, Laws: Issues of Native Title* 1.
74 Hughston and Jowett refer to *Jango v Northern Territory* (2006) 152 FCR 150, [315]–[338].
75 Hughston and Jowett refer to *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 7)* (2003) 130 FCR 424, [41]; *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* (2007) 238 ALR 1, [459]–[468].
76 Hughston and Jowett, above n 73, 1–2.

Availability of experts

12.53 There was significant and widespread concern among stakeholders about the availability of experts. The Cape York Land Council said:

> There continue to be difficulties in engaging experts with sufficient expertise to undertake the necessary reports and other procedures in relation to connection requirements.[77]

12.54 The Law Society of Western Australia noted:

> the paucity of availability of Anthropological experts to assist in the preparation of claims and the presentation of the necessary ethnographic evidence to engage with the State in arriving at a consent determination or to present a case at trial. The *Wongatha* case effectively engaged all available Anthropological experts in the country. During the trial the expert for the State of Western Australia passed away and was unable to be replaced. Typically today (as has been the case since 1994), if an Anthropological expert is required, then long time periods need to be allowed to await the availability of the small number of experts who are available to perform the task.[78]

12.55 The Federal Court of Australia also noted that 'the limited number and availability of appropriately qualified expert anthropologists continues to be a significant source of delay'.[79]

12.56 The limited availability of experts cannot be addressed through legislative reform. Some stakeholders suggested that there may be a need for further programs to train and develop anthropologists and other experts with native title expertise. Such programs could be modelled on, for example, the internship program of the Aurora Project.

Expert evidence and legal requirements

12.57 Anthropology and the law are distinct, specialised fields, each with their own specific methodology and terminology. Expertise in one field cannot necessarily be translated directly into the other field. David Martin has suggested:

> Common anthropological ways of thinking and writing in materials contributed to debate within the discipline do not necessarily prove appropriate in the context of preparing 'connection reports' for native title litigation or mediation.
>
> It is crucial that anthropologists and other experts understand the role of expert witnesses as per the Federal Court's guidelines in order that their evidence is given due weight. A reading of the judgments, and practical experience, should encourage an interdisciplinary approach to these issues.[80]

12.58 Dr Paul Burke noted a related problem occurring when the law adopts technical concepts, such as 'society', from anthropology, without necessarily adopting the

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77 Cape York Land Council, *Submission 7*.

78 Law Society of Western Australia, *Submission 9*. The Law Society referred in its submission to *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* (2007) 238 ALR 1.

79 Federal Court of Australia, *Submission 40*.

80 David Martin, 'Capacity of Anthropologists in Native Title Practice. Report to the National Native Title Tribunal 2004' (Anthropos Consulting Services, Canberra, April 2004) 6.

theoretical framework surrounding those concepts. As a result, 'once those concepts appear in legislation or judicial pronouncements the links to their original context is severed'.[81]

12.59 The different expectations of the law and anthropology also emerge with respect to the time taken and methods used for anthropologists and other experts to conduct their research. Dr Kingsley Palmer has made the observation that:

> The issue of the length of time an anthropologist needs to spend in the field and how long might be too long is a matter that has been addressed in other claims. In particular, the matter of the possible over-involvement of the anthropologist and a consequential loss of objectivity has been a matter for comment in a number of claims.[82]

12.60 However, a lengthy research period, and the formation of close relationships with claim groups, may be seen by native title experts as an essential requirement of their work. Dr Palmer has noted:

> a fundamental tenet of the anthropological method is some degree of immersion in the society being studied. This provides for an appreciation and comprehension of the nature of the social relationships and structures of the society that is unavailable to those whose experience of it is cursory and consequently superficial.[83]

12.61 During consultations, it was suggested to the ALRC that there may be benefits in further developing guidance or training for anthropologists to assist them in presenting their expert evidence in a way that may be more readily accessible for native title proceedings. The ALRC considers that the development of such guidance or training may be a useful tool for strengthening and expediting native title litigation and consent determinations. By encouraging experts to prepare their evidence in a way that more directly corresponds to the legal process, there may be a reduction in the time needed for parties and the Court to consider this evidence, and less possibility of differences between the two fields to lead to confusion or misinterpretation.

12.62 Any such guidance or training would need to ensure that the independence of experts in native title proceedings was not compromised, and would need to recognise that an expert witness's 'paramount duty is to the Court and not to the person retaining the expert'.[84] There may be a concern that any guidance or training would not account for variations that may exist between different anthropologists and different native title claim groups. This concern was expressed by NTSCORP:

> NTSCORP understands there are substantial delays in the connection process and trying to find agreement on connection issues with the State and other parties. However, there are different experts and several ways of presenting expert evidence

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81 P Burke, *Submission 33*. See also Paul Burke, *Law's Anthropology: From Ethnography to Expert Testimony in Native Title* (ANU E Press, 2011) 13; Kingsley Palmer, 'Societies, Communities and Native Title' (2009) 4 *Land, Rights, Laws: Issues of Native Title*.

82 Kingsley Palmer, 'Anthropology and Applications for the Recognition of Native Title' (2007) 3 *Land, Rights, Laws: Issues of Native Title* 1, 5.

83 Kingsley Palmer, 'Anthropologist as Expert in Native Title Cases in Australia' (AIATSIS, 2012) 5.

84 Federal Court of Australia, *Practice Note CM 7: Expert Witnesses in Proceedings in the Federal Court of Australia*, 4 June 2013 [1.3].

> and this is often unique to each case. Prescribing the way or form this evidence should be presented would be unlikely to solve the problems of delay faced in native title claims. In NSW, much of the delay in the process is due to the State and respondent parties being unable or unwilling to specify their concerns with connection material.[85]

12.63 The ALRC suggests that further consideration might be given to the development of training programs, which might be conducted through, for example, university anthropology courses or the Australian Anthropological Society.

Conflicting expert evidence

12.64 In the course of native title proceedings, there is potential for experts to provide conflicting evidence. This may occur, for example, where an expert retained for a state or territory party prepares evidence contradicting that of the expert witness for the claim group, or where multiple groups assert native title over the same area.

12.65 The conflicting expert evidence may result in increased time and complexity. The South Australian Government submitted:

> The State does have some experience of situations where disagreement between (usually overlapping claimant) parties' experts leads to the serial exchange of reports over extended periods of time, however, the Court has attempted to mediate agreement by case management conferences or conferences of experts where that assists. It is, perhaps an imperfect system, but the State cannot see a clear means to improve matters.[86]

12.66 The Federal Court has a wide range of powers under the *Federal Court Rules 2011* (Cth), allowing the Court to make a range of directions relating to expert evidence.[87] These directions may include, for example, a direction that the experts confer,[88] or a direction that experts be cross-examined and re-examined in any particular order or sequence.[89] These powers provide a range of mechanisms for addressing the complexities that may arise when conflicting expert evidence is presented.

12.67 Expert conferences (in which experts meet to discuss and prepare a report stating their areas of agreement and disagreement) and concurrent expert evidence (in which experts present and respond to questions about their evidence together) may help avoid some of these concerns. Expert conferences and concurrent evidence may be particularly useful in cases where there is disagreement about, for example, claim group composition or the laws and customs of the group. AIATSIS noted the value 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.[90]

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85 NTSCORP, *Submission 67*.
86 South Australian Government, *Submission 68*.
87 *Federal Court Rules 2011* (Cth) rr 5.04(3), 23.15.
88 Ibid r 23.15(a).
89 Ibid r 23.15(i).
90 AIATSIS, *Submission 70*.

12.68 The Federal Court noted that it has, in particular claims, facilitated case management conferences

> at which the experts for the Applicant and State confer to identify the issues likely to be most contentious prior to the commencement of anthropological field work. The aim of these conferences is for the parties' experts to discuss their knowledge of the relevant anthropological literature and related or neighbouring claims so that scarce research resources may be appropriately focused on areas of particular interest to the State, minimising the need for follow up research and reports.[91]

12.69 The Federal Court also noted that it has

> made orders that the experts confer under the supervision of a Registrar of the Court to identify those matters and issues about which their opinions are in agreement and those where they differ. These conferences have usually taken place in the absence of the parties' lawyers and have been remarkably successful in narrowing connection issues, often resulting in agreement between the experts on all matters.[92]

12.70 Several stakeholders in consultation expressed support for the use of court-appointed experts. Support for court-appointed experts may reflect the perceived advantages of an increased role for inquisitorial processes in native title proceedings, where a less adversarial approach may be appropriate. The potential value of court-appointed experts was noted by the Australian Human Rights Commission:

> Significant time and expense is incurred in the collection of expert evidence. Courts are often faced with multiple and conflicting expert reports and testimony. A mechanism by which the court can deal with particular questions of fact, such as in respect of genealogy, by referring the question to one independent expert referee may therefore prove useful.[93]

12.71 The decision to use a court-appointed expert may be more appropriately made on a case-by-case basis. The use of a court-appointed expert may be problematic, for example, in cases where there is significant dispute about facts relating to connection.[94] The Federal Court has an existing power to make orders for the use of court-appointed experts under the *Federal Court Rules 2011*:

> (1) A party may apply to the Court for an order:
>
> (a) that an expert be appointed (a ***Court expert***) to inquire into and report on any question or on any facts relevant to any question arising in a proceeding …[95]

12.72 Given the Court's existing powers for managing expert evidence, the ALRC considers that legislative reform regarding expert evidence in native title proceedings is unnecessary.

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91 Federal Court of Australia, *Submission 40*.

92 Ibid.

93 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2009' (Australian Human Rights Commission, 2009) 120.

94 For some concerns about the use of Court-appointed experts, see, for example, Justice Garry Downes, 'Expert Evidence: The Value of Single or Court-Appointed Experts' (Paper Presented at the Australian Institute of Judicial Administration Expert Evidence Seminar 2005, Melbourne).

95 *Federal Court Rules 2011* (Cth) r 23.01.

Handling connection materials

12.73 The evidence used in native title proceedings provides information about the laws, customs, histories and cultures of Aboriginal and Torres Strait Islander peoples. This material is of significant value to claimants, and may be of a culturally sensitive, private or confidential nature.

12.74 In the Discussion Paper, the ALRC asked what processes, if any, were needed to handle this material in an appropriate way outside native title proceedings.[96] This material may be of value to Aboriginal and Torres Strait Islander peoples outside proceedings, and for prescribed bodies corporate (PBCs) in identifying common law holders[97] for the purposes of carrying out consultations required under the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth).[98] The information may also be valuable to society generally, contributing to a stronger understanding of Aboriginal and Torres Strait Islander peoples and their history.

12.75 This information is generally not available to persons outside proceedings. Dr Paul Burke notes that this information 'remains inaccessible … because it has been initiated within the legal context of native title and remains confidential'.[99] Just Us Lawyers noted the value of archival information, and suggested that 'archival information should be digitised, indexed and made searchable and available to claimants' legal representatives'.[100]

12.76 Many submissions acknowledged the importance of native title evidence being made available in certain circumstances, while cautioning that privacy, confidentiality and cultural sensitivities must be carefully considered.[101] AIATSIS submitted:

> The future of connection material has generated a range of activity and ongoing research by AIATSIS. 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 [AIATSIS Native Title Research Unit] 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.[102]

12.77 The National Archives of Australia noted that records created by Commonwealth government agencies (including the Federal Court, the National Native

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96 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014) Question 9–2.

97 *Native Title Act 1993* (Cth) s 56. See also Ch 10.

98 *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) regs 8–10. See also *Gumana v Northern Territory* (2005) 141 FCR 457, [138]–[140]. The value of connection evidence to PBCs was also noted by the Yamatji Marlpa Aboriginal Corporation: Yamatji Marlpa Aboriginal Corporation, *Submission 62*.

99 P Burke, *Submission 33*.

100 Just Us Lawyers, *Submission 2*. See also AIATSIS, *Submission 36*.

101 See, eg, Queensland South Native Title Services, *Submission 55*.

102 AIATSIS, *Submission 70*.

Title Tribunal, several land councils and the Torres Strait Regional Authority) are Commonwealth records under the *Archives Act 1983* (Cth). Under the *Archives Act*, these records become public after the expiration of the 'open access period'.[103]

12.78 QSNTS submitted that the appropriate archiving of connection material is

> an important issue and QSNTS acknowledges that material collected and produced through the connection process should be archived for future generational use.[104]

12.79 QSNTS submitted that 'retention by the PBC is ideal but the capacity issues of PBCs to retain the material which requires expert handling and storage for the benefit of future generations is problematic'. AIATSIS may be a suitable organisation to store the information,[105] but would need to be appropriately resourced to carry out this additional function.

12.80 Central Desert Native Title Services submitted that whether, and how, to store connection material should be a matter for each native title group to determine, and that a group may wish to have different types of information stored in different ways or for different purposes (such as for the transmission of law and custom or for public education).[106]

12.81 Yamatji Marlpa questioned how much of the material used for establishing connection should be archived, noting that much of this material may be the property of the claim group or its individual members, and that such material should be returned to its rightful owners on the conclusion of the relevant proceedings.[107]

12.82 The ALRC considers that further consideration of this issue is warranted. However, any requirements of general application—for example, that connection reports be made publically available—would be problematic, given the privacy, confidentiality and cultural issues that may arise. The ALRC agrees that any further use or archiving of connection materials should be at the discretion of claim groups and their members.

Promoting effective representation

Recommendation 12–3 The Australian Government should explore options for specialist training schemes for professionals in the native title system.

12.83 In the Discussion Paper, the ALRC asked whether a scheme for the training and certification of professionals in the native title system should be developed.[108] An

103 At the time of writing, the open access period for this material is 21 years: *Archives Act 1983* (Cth) s 3(7).
104 Queensland South Native Title Services, *Submission 55*.
105 Ibid.
106 Central Desert Native Title Service, *Submission 48*.
107 Yamatji Marlpa Aboriginal Corporation, *Submission 62*.
108 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014) Question 9–6.

accreditation scheme was identified as an option by Deloitte Access Economics in its 2014 *Review of the Roles and Functions of Native Title Organisations*:

> A stronger form of regulation would be to operate a registration system for which native title practitioners require accreditation. Accreditation could be based on a simple test of competencies or qualifications in areas of law or relevant experience. Again, the registration could be voluntary, providing additional information to the market, or mandatory.[109]

12.84 Such a system was considered in this Inquiry as an option for addressing concerns raised by some stakeholders. AIATSIS, for example, expressed

> 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.[110]

12.85 The question drew a range of views from stakeholders. A number of submissions expressed support for a training or certification scheme.[111] The Law Society of Western Australia noted that there may be value in training schemes for non-legal practitioners in the native title system:

> Non-legal practitioners working in native title (who do not provide legal advice) are not otherwise regulated or accountable and there may be some basis for establishing a process of registering and accrediting these persons for work in this area. This would, however, require the establishment of a supervisory body funded and administered so that it was effective and any poor practices could be addressed, including through de-registration.[112]

12.86 Several stakeholders, however, expressed concern about any further regulation of legal practitioners.[113] The MCA submitted that any training and certification program should

> not be burdensome to the legal profession which is already heavily regulated. It could focus on ensuring professionals can efficiently and effectively navigate a complex system. We also note that this program should not be at the exclusion of all practitioners who are involved or specialise in native title. We recommend it be made available to practice area experts who may wish to reinforce their knowledge.[114]

12.87 The Law Council of Australia (in a submission including comments from the Law Society of NSW and the Law Institute of Victoria) opposed any further regulation of legal practitioners, noting that practitioners 'are already subject to comprehensive

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109 Deloitte Access Economics, 'Review of the Roles and Functions of Native Title Organisations' (Australian Government, March 2014) 39. The Terms of Reference for this Inquiry specifically direct the ALRC to consider this report.

110 AIATSIS, *Submission 36*.

111 Yamatji Marlpa Aboriginal Corporation, *Submission 62*; National Native Title Council, *Submission 57*; Queensland South Native Title Services, *Submission 55*; Native Title Services Victoria, *Submission 45*.

112 Law Society of Western Australia, *Submission 41*.

113 See, for example, Minerals Council of Australia, *Submission 65*; Law Council of Australia, *Submission 64*.

114 Minerals Council of Australia, *Submission 65*.

regulation from a range of sources, including statute, regulations, statutory rules, professional conduct rules and supervision by the court'.[115] The Law Council also noted that such a scheme may be impractical, given that:

- clearly delimiting 'native title practice' is difficult—there may be matters relating to native title that require a practitioner with, for example, commercial law expertise; and
- accreditation schemes are typically available for relatively broad practice areas (for example, criminal law) with relatively large numbers of practitioners—for a relatively specialised practice area such as native title, it may be impractical to operate such a scheme.[116]

12.88 The ALRC agrees that mandatory certification would not be advisable. A mandatory certification scheme would have a limited role in building capacity.

12.89 The ALRC considers, however, that further consideration should be given to voluntary specialist training schemes for native title professionals. Specialist training schemes for legal practitioners exist in a range of practice areas. These training schemes assist members of the public in identifying practitioners with experience and additional training in particular areas of law, such as family law or commercial litigation. Such a specialist training scheme was supported by the Law Society of Western Australia. Although opposed to regulation that would require legal practitioners to obtain certification before acting in native title matters, the Law Society was supportive of

> recognition of particular expertise in an area, and the undertaking of advanced training in the area (eg cross-cultural practice, short courses in native title law and anthropology) similar to the approach of recognising specialists in criminal law and family law.[117]

12.90 A specialist training scheme would not prevent a professional from being involved in native title matters without completing the relevant additional training, but would allow those with expertise to differentiate themselves. This may, in turn, encourage other professionals to develop their expertise.

12.91 The ALRC notes that a specialist training scheme for non-legal practitioners in the native title system may be one way to address the limited availability of anthropologists and other experts, discussed earlier in this chapter.

12.92 The ALRC accepts that there may be difficulties in implementing a specialist training scheme. For example, as noted by the Law Council of Australia, the number of professionals involved in the native title system is relatively small compared to other areas of law, and the number of professionals undertaking specialist training may therefore be relatively small. Any such scheme should take into consideration existing regulations relating to native title professionals, and should not be unduly burdensome.

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115 Law Council of Australia, *Submission 64*.
116 Ibid.
117 Law Society of Western Australia, *Submission 41*.

12.93 Consideration should be given to which bodies may be the most appropriate provider of a specialist training scheme. An organisation operating primarily in the native title system, such as the National Native Title Tribunal, may be better placed than professional bodies to operate such schemes.

Native title application inquiries

Recommendation 12–4 Section 138B(2)(b) of the *Native Title Act 1993* (Cth), which provides that the Federal Court may only direct that a native title application inquiry be held if the applicant agrees to participate, should be repealed.

Recommendation 12–5 Section 156(7) of the *Native Title Act 1993* (Cth), which provides that the National Native Title Tribunal's power to summon a person to appear before it or produce documents does not apply to a native title application inquiry, should be repealed.

12.94 Under ss 138A–138G of the *Native Title Act*, the Court may direct the National Native Title Tribunal (the Tribunal) to hold a native title application inquiry into matters or issues relevant to a determination of native title.[118] The outcomes of the inquiry are non-binding, but may provide guidance to the parties or the Court. The inquiry process may be beneficial in native title proceedings. However, the process appears to have been rarely used.[119]

12.95 The ALRC recommends that native title application inquiries not require the consent of the applicant, and that the National Native Title Tribunal be empowered to summon a person to appear before it in a native title application inquiry. These recommendations are intended to facilitate the use of the native title application inquiry.

12.96 The Court may direct the Tribunal to hold a native title application inquiry where proceedings have been referred to mediation under s 86B[120] and the proceedings raise a matter or an issue relevant to the determination of native title under s 225, including:

- the persons or groups of persons holding native title rights;
- the nature and extent of native title rights and interests in relation to the determination area;

118 Native title application inquiries are distinct from other types of inquiries that may be conducted by the Tribunal, including special inquiries under s 137 of the *Native Title Act*. This chapter is concerned only with native title application inquiries.

119 Federal Court of Australia, 'Annual Report 2013–2014' 67.

120 *Native Title Act 1993* (Cth) s 138A.

- the nature and extent of any other interests in relation to the determination area; and
- the relationship between native title and other rights and interests.

12.97 A direction for an inquiry may be made on the Court's own motion, at the request of a party to the proceedings, or at the request of the person conducting the mediation.[121] The Court may only make a direction for an inquiry if:

- the Court is satisfied that resolution of the matter would be likely to lead to: an agreement on findings of facts; action that would resolve or amend the application to which the proceeding relates; or something being done in relation to the application to which the proceeding relates;[122] and
- the applicant agrees to participate in the inquiry.[123]

12.98 An inquiry may cover more than one proceeding[124] and more than one matter.[125] The parties to an inquiry include the applicant, the relevant state or territory minister, the Commonwealth Minister and, with the leave of the Tribunal, any other person who notifies the Tribunal in writing that they wish to participate.[126]

12.99 Following an inquiry, the Tribunal must make a report, stating any findings of fact.[127] The Tribunal may make recommendations in the report, but these recommendations do not bind the parties.[128] However, the Federal Court must consider whether to receive into evidence the transcript of evidence from a native title application inquiry, may draw any conclusions of fact that it thinks proper, and may adopt any recommendation, finding, decision or determination of the Tribunal in relation to the inquiry.[129]

12.100 Native title application inquiries appear to offer a number of benefits. The inquiry process 'can be harnessed to collect and assess evidence and arrive at conclusions capable of being fed into the mediation process and is also capable of being received and adopted by the Court'.[130] Inquiries could be used, for example, in disputes relating to connection, authorisation or joinder. The use of the inquiry power in appropriate circumstances is in keeping with 'the importance placed by the Act on mediation as the primary means of resolving native title applications'.[131]

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121 Ibid s 138B(1).
122 Ibid s 138B(2)(a).
123 Ibid s 138B(2)(b).
124 Ibid s 138G.
125 Ibid s 140.
126 Ibid s 141(5). The state, territory and Commonwealth Ministers may elect not to participate.
127 Ibid s 163A.
128 Ibid.
129 Ibid s 86(2).
130 Chief Justice Robert French, 'Lifting the Burden of Native Title: Some Modest Proposals for Improvement' (2009) 93 *Australian Law Reform Commission Reform Journal* 10.
131 *Lovett on behalf of the Gunditjmara People v State of Victoria* [2007] FCA 474 (30 March 2007) [36].

12.101 Several stakeholders supported an increased role for the native title application inquiry process. Yamatji Marlpa stated that 'the increased use of inquiries would be useful in overlapping claim disputes or with disputes about claim group descriptions'.[132] The Law Society of Western Australia considered that:

> the increased use of inquiries would be useful in overlapping claim disputes or claim group description disputes. This is particularly useful where the courts have been constrained from setting matters down as preliminary issues due to parties being unwilling to agree other facts.[133]

12.102 However, support for the inquiry process was not universal. QSNTS submitted that:

> it would be counter-productive to blur the very clear demarcation that has caused stakeholder confusion in the past. With the Federal Court having greater control in this area, there is no need to have a parallel process. The preference is to keep the NNTT out of the claim process noting that the Native Title Registrar—as opposed to the Tribunal—has important administrative functions around registration testing and notification of native title determination applications that need to be retained.[134]

12.103 Recommendations 12–4 and 12–5 are intended to facilitate the use of the native title application inquiry process, in light of the support for the process from some stakeholders. The use of the inquiry process remains at the discretion of the Court, and the ALRC does not take a position on whether increased use of the process is desirable. The inquiry process will be used in circumstances in which the Court considers it appropriate.

Requirement for an applicant to agree to an inquiry

12.104 Section 138B(2)(b) of the *Native Title Act* provides that the Court may only direct the Tribunal to hold an inquiry if the applicant agrees to participate in the inquiry. This requirement reflects the intent that the inquiry process be voluntary. The Explanatory Memorandum to the Native Title Amendment Bill 2006 (Cth) noted:

> The native title application inquiry process is entirely voluntary. However, the applicant or applicants in an affected application are required … to be a party to the inquiry. Therefore, it is important that the applicants' consent be obtained prior to conducting an inquiry. Furthermore, it is unlikely a native title application inquiry would have an effective outcome if the applicant does not participate in the inquiry process.[135]

12.105 The ALRC recommends that s 138B(2)(b) be repealed. This would not affect s 141(5) of the Act, which provides that the applicant is a party to an inquiry. An applicant may find benefit in the inquiry despite initial reluctance. It has been noted of mediation that 'some persons who do not agree to mediate, or who express a reluctance

132 Yamatji Marlpa Aboriginal Corporation, *Submission 62*.
133 Law Society of Western Australia, *Submission 41*.
134 Queensland South Native Title Services, *Submission 55*.
135 Explanatory Memorandum, Native Title Amendment Bill 2006 (Cth) [4.278].

to do so, nevertheless participate in the process often leading to a successful resolution of the dispute'.[136] The same may be true of parties to the inquiry process.

12.106 Support among stakeholders for the removal of the requirement for the applicant's agreement to the process was mixed. Several stakeholders were opposed to the removal.[137] The Law Society of Western Australia argued that '[n]o effective consequence could be achieved by making the process non-consensual, because … any decision arrived at by the process of inquiry could not bind the parties, so there is no point in compelling them to participate'.[138] QSNTS argued:

> A successful inquiry process can only occur where parties are invested in the process and outcome. Given the conciliation objects of the NTA and the importance of consensual decision-making in the workspace, no party should be compelled to participate if they do not wish to.[139]

12.107 Other stakeholders supported the removal of the requirement.[140] The National Native Title Tribunal submitted that:

> the complexities of many remaining native title determination applications not only mean such applications would potentially benefit from a native title application inquiry but that there may be reluctance on the part of some applicants to agree to participate in an inquiry. The current requirement that the applicant agrees to participate, limits the circumstances in which the Federal Court could direct the Tribunal to undertake an inquiry and removes a potential mechanism to assist in the resolution of an application through mediation, although, it is noted that an inquiry may be limited if unsupported by the applicant.
>
> If amendments were to be made to the Act whereby the Federal Court did not require the agreement of the applicant to direct the Tribunal to conduct an inquiry, the Tribunal would require the appropriate powers to direct parties to attend hearings, and produce documents etc.[141]

12.108 Given that the Court retains the discretion to make a direction that a native title application inquiry be held, the ALRC considers that concerns about an inquiry taking place without the consent of all parties may be overstated. In the event that an applicant does not wish to take part in an inquiry, the Court may decide not to direct the inquiry to be held.

12.109 The ALRC also notes that the Federal Court's power to refer proceedings to alternative dispute resolution does not require the consent of the parties, except in the case of referrals to arbitration, which may result in a binding decision.[142] The native title mediation process itself does not require the agreement of the applicant (or any

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136 James Spigelman, 'Mediation and the Court' (2001) 39 *Law Society of NSW Journal* 63, 65.

137 AIATSIS, *Submission 70*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; Queensland South Native Title Services, *Submission 55*; North Queensland Land Council, *Submission 42*; Law Society of Western Australia, *Submission 41*.

138 Law Society of Western Australia, *Submission 41*.

139 Queensland South Native Title Services, *Submission 55*.

140 South Australian Government, *Submission 68*; National Native Title Tribunal, *Submission 63*; Native Title Services Victoria, *Submission 45*.

141 National Native Title Tribunal, *Submission 63*.

142 *Federal Court of Australia Act 1976* (Cth) s 53A(1A).

other party).[143] Given that these alternative dispute resolution processes are useful despite not requiring the consent of parties, the inquiry process might have value even without the agreement of the applicant.

Evidence gathering powers of the Tribunal

12.110 Under s 156(2) of the Act, the Tribunal has the power to summon a person to give evidence or produce documents. However, under s 156(7), this power does not apply in respect of a native title application inquiry. The ALRC recommends that s 156(7) be repealed.

12.111 The powers of the Tribunal would be strengthened by repealing s 156(7), so that the Tribunal would be empowered to summon a person to give evidence or produce documents in a native title application inquiry, as it is in other types of inquiries.

12.112 The reason for the introduction of s 156(7) into the Act is given in the Explanatory Memorandum to the Native Title Amendment Bill 2006 (Cth):

> Native title application inquiries are intended to be an entirely voluntary process which parties to proceedings may avail themselves of in order to facilitate resolution of the claim. Persons who agree to voluntarily participate may not be compelled to give evidence.[144]

12.113 Empowering the Tribunal to summon a person to give evidence or produce documents would alter the voluntary nature of the native title application inquiry process. If s 156(7) of the Act were repealed, and the Tribunal summoned a person to give evidence or produce documents, a failure of that person to do so would be an offence under ss 171 and 174 of the Act, respectively, unless the person had a 'reasonable excuse'.[145] However, the desirability of retaining an entirely voluntary inquiry process must be balanced against the potential benefits of strengthening the Tribunal's powers.

12.114 Stakeholders who commented on this proposal were generally supportive.[146] AIATSIS, for example, submitted:

> 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, the capacity to compel attendance arguably sets the tribunal apart from dispute resolution activities, such as mediation.

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143 The Court is required to refer an application to mediation unless the Court considers that mediation is unnecessary, that there is no likelihood of the mediation being successful, or that the applicant has provided insufficient information in their application: *Native Title Act 1993* (Cth) s 86B(3).

144 Explanatory Memorandum, Native Title Amendment Bill 2006 (Cth) [4.308].

145 *Native Title Act 1993* (Cth) ss 171(2), 174(2).

146 AIATSIS, *Submission 70*; National Native Title Tribunal, *Submission 63*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; Native Title Services Victoria, *Submission 45*; Law Society of Western Australia, *Submission 41*.

> 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 arguable that compelling attendance may promote a disingenuous engagement by parties that also subverts the effectiveness of its processes.[147]

12.115 The Law Society of Western Australia supported the Tribunal having the power to summon persons for a native title application inquiry, as well as 'the power to draw inferences against any party who does not participate'.[148] The Law Society also suggested, however, that some persons may face 'resourcing issues and the NNTT should be able to take these into account together with any other reasonable excuse (eg cultural obligations)'.[149] Although the ALRC considers that a power to draw inferences against a party who does not participate is unnecessary, the ALRC agrees that the Tribunal should take factors, such as resource constraints or cultural obligations, into account when summoning a person, unless the person has a 'reasonable excuse',[150] and factors such as resource constraints or cultural obligations may provide a 'reasonable excuse' for these purposes. The ALRC also notes that factors such as resource constraints or cultural obligations may provide a 'reasonable excuse' such that the offences for a person's failure to attend the Tribunal or provide required documents under ss 171 and 174 do not apply.

147 AIATSIS, *Submission 70*.
148 Law Society of Western Australia, *Submission 41*.
149 Ibid. See also Yamatji Marlpa Aboriginal Corporation, *Submission 62*.
150 *Native Title Act 1993* (Cth) ss 171(2), 174(2).

Consultations

Name	Location
ACT Government roundtable 5 May and 1 December 2014 Office of Aboriginal and Torres Strait Islander Affairs and other agencies and participants	Canberra
AgForce Queensland	Sydney
Professor Jon Altman, Australian National University	Sydney
Anthropologist round table Donna Bagnara, AIATSIS; Toni Bauman, AIATSIS; Dr Cameo Dalley, Australian National University; Ludger Dinkler, AIATSIS; Professor Nicolas Peterson, Australian National University; Dr Zelko Jokic, AIATSIS	Canberra
Ashurst Jean Bursle; Geoff Gishubl	Perth
Association of Mining and Exploration Companies	Sydney
Australian Government, Attorney-General's Department	Sydney and Canberra
Australian Government, Department of the Prime Minister and Cabinet	Melbourne and Canberra
Australian Human Rights Commission	Sydney
Australian Institute of Aboriginal and Torres Strait Islander Studies Donna Bagnara; Robert Powrie	Canberra
Australian Local Government Association	Sydney
The Hon Justice Michael Barker, Federal Court of Australia	Perth

Professor Richard Bartlett, University of Western Australia	Sydney
Shaun Berg, Berg Lawyers	Adelaide
The Hon Michael Black AC QC, former Chief Justice of the Federal Court of Australia	Melbourne
Robert Blowes SC, Barrister	Sydney
Richard Bradshaw, Johnston Withers	Adelaide
Associate Professor Sean Brennan, University of New South Wales	Sydney
Broome Chamber of Commerce & Industry	Broome
Lauren Butterly, Australian National University	Sydney and Canberra
Cape York Land Council	Cairns
Castan Centre for Human Rights Law Melissa Castan; David Yarrow	Melbourne
Central Desert Native Title Services	Perth
Centre for Native Title Anthropology, Australian National University Professor Nicolas Peterson; Dr Cameo Dalley	Sydney
Chamber of Minerals and Energy of Western Australia	Perth
The Hon Fred Chaney AO	Sydney and Perth
Professor Len Collard, University of Western Australia	Perth
Dr Valerie Cooms, Quandamooka (Chair of the Prescribed Body Corporate) and former Chief Executive Officer of Queensland South Native Title Services	Sydney
Michael Durrant, Kelly & Co Solicitors	Adelaide

Federal Court of Australia Warwick Soden, Chief Registrar; Ian Irving, Native Title Registrar	Sydney
Federal Court of Australia The Hon Justice Berna Collier; the Hon Justice John Dowsett; Christine Fewings, Native Title Deputy Registrar; Nicola Colbran, Native Title Deputy Registrar	Brisbane
Federal Court of Australia The Hon Justice Jayne Jagot; Ian Irving, Native Title Registrar	Sydney
Dr Deane Fergie, University of Adelaide	Adelaide
Christine Fewings, Deputy District Registrar (Native Title), Federal Court of Australia	Sydney
The Hon Paul Finn, former Justice of the Federal Court of Australia	Sydney
Dr Angus Frith, University of Melbourne	Melbourne
Stephanie Fryer-Smith, National Native Title Tribunal	Sydney
Dr Jonathan Fulcher, HopgoodGanim	Sydney
Gerry Georgatos, Aboriginal and Torres Strait Islander Suicide Prevention Evaluation Project	Sydney
Oliver Gilkerson, Gilkerson Legal	Brisbane
Goldfields Land and Sea Council	Sydney
Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission	Sydney
The Hon Justice Graham Hiley, Supreme Court of the Northern Territory	Darwin
IP Australia	Canberra
Indigenous Business Australia	Brisbane
Indigenous Land Corporation	Sydney

Just Us Lawyers Colin Hardie; Ted Besley	Brisbane
Tim Kavenagh, Hunt & Humphry	Perth
Gordon Kennedy, Australian Government Solicitor	Sydney
Kimberley Land Council	Broome
The Hon Michael Kirby AC CMG, former Justice of the High Court of Australia	Sydney
Kred Enterprises Charitable Trust	Broome
Patricia Lane, Barrister	Sydney
Professor Marcia Langton, University of Melbourne	Melbourne and Sydney
Law Council of Australia	Sydney
Michael Maeorg, University of Adelaide	Adelaide
The Hon Justice John Mansfield, Federal Court of Australia	Melbourne, Sydney and Adelaide
Ken Markwell, Wangerriburra/Mununjhali Traditional Owner	Brisbane
Dominic McGann, McCullough Robertson	Brisbane
Greg McIntyre SC, Barrister	Perth
Marshall McKenna, Allens	Sydney
Dr Mark McMillan, University of Melbourne	Melbourne
Minerals and energy resources sector roundtable 23 January 2014 Association of Mining and Exploration Companies, Atlas Iron, BC Iron, Cameco, Fortescue Metals Group, Herbert Smith Freehills (Perth), Holman Fenwick Willan	Sydney

Minerals and energy resources sector roundtable 31 March 2014 BHP Billiton, Buru Energy, Chevron, Herbert Smith Freehills, Rio Tinto	Perth
Minerals and energy resources sector roundtable 30 October 2014 CMEWA, BHP Billiton, Minerals Council of Australia, Newcrest, Newmont, Rio Tinto, SA Chamber of Minerals and Energy	Melbourne
Minerals Council of Australia	Sydney
Wayne Morgan, Australian National University	Canberra
Warren Mundine, Prime Minister's Indigenous Advisory Council	Sydney
NTSCORP	Sydney
National Congress of Australia's First Peoples	Sydney
National Farmers' Federation	Sydney
National Native Title Council	Melbourne
National Native Title Tribunal Raelene Webb QC, President; Stephanie Fryer-Smith, then Native Title Registrar; Dr Debbie Fletcher, Deputy Native Title Registrar; Frank Russo, Deputy Native Title Registrar	Perth
National Native Title Tribunal Raelene Webb QC, President; Andrew Luttrell, Native Title Registrar	Canberra
Native Title Services Victoria	Sydney and Melbourne
Tony Neal QC, Barrister	Melbourne
Graeme Neate, former President, National Native Title Tribunal	Sydney
NSW Aboriginal Land Council	Sydney
NSW Government, Crown Solicitor's Office	Sydney

NSW Government, Department of Trade	Sydney
Professor Dwight Newman, University of Saskatchewan, Canada	Sydney
The Hon Justice Anthony North, Federal Court of Australia	Melbourne
North Queensland Land Council	Cairns
Northern Land Council	Darwin
Northern Territory Cattlemen's Association	Darwin
Northern Territory Government, Department of the Attorney-General and Justice	Darwin and Sydney
Northern Territory Seafood Council	Darwin
Professor Ciaran O'Faircheallaigh, Griffith University	Sydney
Robert Orr PSM QC, Australian Government Office of Parliamentary Counsel	Sydney
William Oxby, Herbert Smith Freehills	Brisbane
Marnie Parkinson, Carpentaria Land Council Aboriginal Corporation	Sydney
Pastoralists and Graziers Association	Perth
Noel Pearson, Cape York Partnership	Sydney
The Hon Justice Nye Perram, Federal Court of Australia	Sydney
The Hon Justice Melissa Perry, Federal Court of Australia	Sydney
Susan Phillips, Barrister	Sydney
Primary Producers, South Australia	Adelaide
Queensland Government, Department of Justice and Attorney-General	Brisbane
Queensland Government, Department of Natural Resources and Mines	Brisbane

Queensland Seafood Industry Association	Brisbane
Queensland South Native Title Services	Sydney and Brisbane
The Hon Justice Steven Rares, Federal Court of Australia	Sydney
Reconciliation Australia	Canberra
Respondents roundtable 25 March 2014 BHP Billiton, Harcourt Petroleum, Herbert Smith Freehills, NSW Minerals Council, QGC, Rio Tinto, Santos, Telstra	Brisbane
Associate Professor Jacinta Ruru, University of Otago, New Zealand	Sydney
Honorary Associate Professor Lee Sackett, University of Queensland	Brisbane
Peter Seidel, Arnold Bloch Leibler	Melbourne
Shire of Broome	Broome
John Sosso, former Deputy President, National Native Title Tribunal	Brisbane
South Australian Government, Crown Solicitor's Office	Sydney and Adelaide
South Australian Native Title Services	Adelaide
South West Aboriginal Land and Sea Council	Perth
Associate Professor Margaret Stephenson, University of Queensland	Sydney
Dr Lisa Strelein, Australian Institute of Aboriginal and Torres Strait Islander Studies	Sydney
Dr Peter Sutton, University of Adelaide	Adelaide
Associate Professor Maureen Tehan, University of Melbourne	Sydney
Telstra	Sydney

Torres Strait Regional Authority	Brisbane
University of South Australia Professor Irene Watson, Tanganekald and Meintangk First Nations People; Professor Peter Buckskin, Narungga People; Dr Suzie Hutchings	Adelaide
Victorian Government, Department of Justice and Regulation	Sydney and Melbourne
John Waters, Barrister	Sydney
Ed Wensing, Australian National University	Canberra
Western Australian Farmers Federation	Perth
Western Australian Fishing Industry Council	Sydney
Western Australian Government, Department of the Premier and Cabinet	Sydney
Western Australian Government, Department of the Premier and Cabinet, Department of Mines and Petroleum, State Solicitor's Office	Perth
Tim Wishart, Queensland South Native Title Services	Sydney
Stephen Wright, Barrister	Perth
Wurundjeri Tribe and Land and Compensation Cultural Heritage Council	Melbourne
Yamatji Marlpa Aboriginal Corporation	Perth
Dr Simon Young, University of Western Australia	Sydney