Australian Government
Australian Law Reform Commission

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

SUMMARY REPORT

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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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# 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

# Summary Report

## Contents



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

### Connection to Country

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 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

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

statutory frameworks. Effective and fair provisions governing parties and joinder of parties to native title proceedings play an important function in this regard.

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,

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*.

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]

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

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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.

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

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

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.

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 the 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]

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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>.

13 Law Council of Australia, *Submission 35*.

14 See the analysis in Chs 4–7.

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.

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

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].

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.

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.

# Law reform process

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

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.

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.[17] While the process for each law

17 *Australian Law Reform Commission Act Cth* (1996) s 38.

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 ALRC usually works within an established framework, outlined in detail on the ALRC website.[18]

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.

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.

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.

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.

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

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

gave of their time and expertise to the Inquiry. The ALRC acknowledges 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.

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.[19]

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.

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

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.

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.

## Summary of recommendations

The 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

19 For detail see Ch 3.

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.[20]

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'.[21] 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.[22]

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;[23]
- 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;[24] 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.[25]

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.

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20 See *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 2.
21 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [45].
22 Ibid.
23 Ibid [46].
24 Ibid.
25 Ibid [47].

### *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.

### *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,[26] and no confirmation is necessary. Two provisions of the *Native Title Act*—dealing with the claimant application[27] and the registration test[28]—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

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26 *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.

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

28 Ibid s 190B(7).

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,[29] 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 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.[30]

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

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29 *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).

30 *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].

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.[31] 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.[32]

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.[33] 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.[34]

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,[35] 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.

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31 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.

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

33 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).

34 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).

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

## 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.[36]

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.

The ALRC consulted widely regarding whether clarification of the Act was necessary following *Akiba HCA* and the later case of *Brown*.[37] 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.[38] 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.

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

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

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

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.[39] 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.

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.[40] Access to justice may involve considerations distinct

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

40 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).

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.[41] In most instances, the Federal Court's existing discretion conferred under s 84 of the *Native Title Act*, in combination with robust case management,[42] 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.

### 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,[43] 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.

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41 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'.

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

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

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.

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 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.

# Structure of the Report

### *Introduction*

Chapter 1 provides an introduction to the Inquiry and an overview of the scope of the Terms of Reference. It outlines why reform is needed to the *Native Title Act*, discusses the rationale for reform, and guiding principles. It gives an overview of the law reform process for developing the recommendations, including the extensive consultations that were undertaken across Australia.

### *Framework for Review: Historical and International Perspectives*

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*

Chapter 3 places the operation of the native title system in a wider context. Outcomes in the states and territories are affected by different patterns of European settlement and pre-existing land rights regimes. The Federal Court's management of its native title caseload is evolving, and increasing rates of consent determinations are a positive trend, but some concerns remain. Native title is not the only path to land justice, and this chapter briefly considers other responses.

### *Defining Native Title*

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*

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. The 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*

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 and if there should be 'empowerment of courts to disregard substantial interruption or change in continuity of acknowledgment of traditional laws and customs'. It examines the potential for revitalisation of laws and customs, as well as examining whether the reasons for displacement of Aboriginal or Torres Strait Islander peoples should be part of the law governing connection requirements.

### *Proof and Evidence*

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 a presumption in light of its other

recommendations to amend s 223 of the *Native Title Act* but it 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*

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*

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. It analyses comparable developments in the common law jurisprudence relevant to native title.

### *Authorisation*

Chapter 10 concerns the native title claim group's authorisation of an applicant to make a claim. This chapter makes recommendations for reform regarding the claim group's decision-making process, the scope of the applicant's authority, the replacement of a member of the applicant, and the duty of the applicant to the group. The recommendations are intended to support groups as they develop their internal governance.

### *Parties and Joinder*

Chapter 11 discusses party and joinder provisions under s 84 of the *Native Title Act*, which specify who is a party to native title proceedings, in what circumstances they may join, and when they may be dismissed. It analyses the role of the Crown as a primary respondent, the potential for large numbers of third party respondents, and late joinder. It outlines recommendations including in relation to claimants and potential claimants as respondents, and rights of appeal.

### *Promoting Claims Resolution*

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.

# 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.

# Participants

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The Hon Justice Nye Perram, Federal Court of Australia

### Executive Director

Sabina Wynn

### Senior Legal Officers

Justine Clarke

Professor Shaunnagh Dorsett, December 2014–February 2015

### Legal Officers

Judith Bonner, August 2013–February 2014

Robyn Gilbert

Sonya Kim, August–October 2014

Dr Julie Mackenzie

Dr Steven Robertson, from July 2014

### Advisory Committee Members

Jason Behrendt, Legal Executive, Chalk & Fitzgerald, Lawyers & Consultants

Hans Bokelund, Chief Executive Officer, Goldfields Land and Sea Council

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

Alice Cope, Executive Manager, United Nations Global Compact Network Australia

Professor Megan Davis, Director, Indigenous Law Centre, University of New South Wales

Sally Davis, Senior Lawyer, Australian Government Solicitor

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

The Hon Paul Finn, retired Federal Court Judge

Dr Jonathan Fulcher, Partner, HopgoodGanim

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

Jenny Hart, Assistant Crown Solicitor, Native Title Section, Crown Solicitor's Office, Government of South Australia

Vance Hughston SC, Windeyer Chambers

Dr David Martin, Anthropos Consulting

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

The Hon Justice Anthony North, Federal Court of Australia

Dr Lisa Strelein, Director, Australian Institute of Aboriginal and Torres Strait Islander Studies

Associate Professor Maureen Tehan, Associate Director, Centre for Resources, Energy and Environmental Law, University of Melbourne

Raelene Webb QC, President, National Native Title Tribunal

## Legal Interns

Lidija Bujanovic

Claudia Crause

Martyn Gray

Ellie Greenwood

Anna Holmes

Rosetta Lee

Alisha Mathew

Tim Maybury

Sean Mulcahy

Jack Murray

Laura Neill

Tristan Orgill

Amila Perera

Tali Rechtman

Robert Size

Alison Whittaker

## Visiting Intern

Jessica Uguccioni, Lawyer, The Law Commission of England and Wales

# Consultations

| Name | Location |
|---|---|
| ACT Government roundtable 5 May and 1 December 2014<br>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<br>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<br>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<br>Donna Bagnara; Robert Powrie | Canberra |
| Australian Local Government Association | Sydney |
| The Hon Justice Michael Barker, Federal Court of Australia | Perth |

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| 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<br>Melissa Castan; David Yarrow | Melbourne |
| Central Desert Native Title Services | Perth |
| Centre for Native Title Anthropology, Australian National University<br>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 |

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| Federal Court of Australia<br>Warwick Soden, Chief Registrar; Ian Irving, Native Title Registrar | Sydney |
| Federal Court of Australia<br>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<br>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 |

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| Just Us Lawyers<br>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<br>Association of Mining and Exploration Companies, Atlas Iron, BC Iron, Cameco, Fortescue Metals Group, Herbert Smith Freehills (Perth), Holman Fenwick Willan | Sydney |

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| Minerals and energy resources sector roundtable 31 March 2014<br>BHP Billiton, Buru Energy, Chevron, Herbert Smith Freehills, Rio Tinto | Perth |
| Minerals and energy resources sector roundtable 30 October 2014<br>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<br>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<br>Raelene Webb QC, President; Andrew Luttrell, Native Title Registrar | Canberra |
| Native Title Services Victoria | Sydney<br>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 |

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| 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 |

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| 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<br>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 |

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| Torres Strait Regional Authority | Brisbane |
| University of South Australia<br>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 |