Australian Government
Australian Law Reform Commission

Review of the Native Title Act 1993

DISCUSSION PAPER

You are invited to provide a submission or comment on this Discussion Paper

Discussion Paper 82 (DP 82) October 2014

This Discussion Paper reflects the law as at 1st October 2014

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).

The office of the ALRC is at Level 40 MLC Centre, 19 Martin Place, Sydney NSW 2000 Australia.

Postal Address:

GPO Box 3708

Sydney NSW 2001

Telephone: within Australia (02) 8238 6333

International:+61 2 8238 6333

Facsimile: within Australia (02) 8238 6363

International:+61 2 8238 6363

E-mail: info@alrc.gov.au

Website: www.alrc.gov.au

ALRC publications are available to view or download free of charge on the ALRC website: www.alrc.gov.au/publications. If you require assistance, please contact the ALRC.

ISBN: 978-0-9924069-6-7

Commission Reference: ALRC Discussion Paper 82, 2014

Making a submission

Any public contribution to an inquiry is called a submission. The Australian Law Reform Commission seeks submissions from a broad cross-section of the community, as well as from those with a special interest in a particular inquiry.

The closing date for submissions to this Discussion Paper is 18 December 2014.

Online submission form

The ALRC strongly encourages online submissions directly through the ALRC website where an online submission form will allow you to respond to individual proposals and questions: https://www.alrc.gov.au/content/native-title-dp82-online-submission Once you have logged into the site, you will be able to save your work, edit your responses, and leave and re-enter the site as many times as you need to before lodging your final submission. You may respond to as many or as few questions as you wish. There is space at the end of the form for any additional comments.

Further instructions are available on the site. If you have any difficulties using the online submission form, please email web@alrc.gov.au, or phone +61 2 8238 6305.

Alternatively, pre-prepared submissions may be mailed, faxed or emailed, to:

The Executive Director
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001
Email: nativetitle@alrc.gov.au
Facsimile: +61 2 8238 6363

Please send any pre-prepared submissions in Word or RTF format.

Open inquiry policy

As submissions provide important evidence to each inquiry, it is common for the ALRC to draw upon the contents of submissions and quote from them or refer to them in publications. There is no specified format for submissions, although the questions provided in this document are intended to provide guidance for respondents.

Generally, submissions will be published on the ALRC website, unless marked confidential. Confidential submissions may still be the subject of a Freedom of Information request. In the absence of a clear indication that a submission is intended to be confidential, the ALRC will treat the submission as public. The ALRC does not publish anonymous submissions.

The ALRC may redact certain information from submissions in order to protect the privacy of submitters or others mentioned in submissions. This may include withholding the name of the submitter. Publication or redaction of information in submissions is at the discretion of the ALRC.

See the ALRC policy on submissions and inquiry material for more information www.alrc.gov.au/about/policies.

Contents

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

Commissioner in Charge

Professor Lee Godden

Part-time Commissioner

The Hon Justice Nye Perram, Federal Court of Australia

Executive Director

Sabina Wynn

Senior Legal Officer

Justine Clarke

Legal Officers

Judith Bonner until February 2014

Robyn Gilbert

Sonya Kim, August—October 2014

Dr Julie Mackenzie

Dr Steven Robertson, from July 2014

Advisory Committee Members

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

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

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

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

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

Ms 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

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

Ms Jenny Hart, Assistant Crown Solicitor, Native Title Section, Crown Solicitor's Office

Mr Vance Hughston SC, Windeyer Chambers

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

The Hon Justice Anthony North, Federal Court of Australia

Dr David Martin, Anthropos Consulting

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

Ms Raelene Webb QC, President, National Native Title Tribunal

Legal Interns

Lidija Bujanovic

Alisha Mathew

Tim Maybury

Sean Mulcahy

Jack Murray

Laura Neill

Amila Perera

Alison Whittaker

Proposals and Questions

* *Note*: Proposals and Questions below refer to the *Native Title Act 1993* (Cth).

2. Framework for Review of the *Native Title Act*

Question 2–1 Should the proposed amendments to the *Native Title Act* have prospective operation only?

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

5. Traditional Laws and Customs

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

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

Proposal 5–3 The definition of native title in s 223 of the *Native Title Act* should be amended to make clear that it is not necessary to establish that

(a) acknowledgment and observance of laws and customs has continued substantially uninterrupted since sovereignty; and

(b) laws and customs have been acknowledged and observed by each generation since sovereignty.

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

6. Physical Occupation

Proposal 6–1 Section 62(1)(c) of the *Native Title Act* should be amended to remove references to ‘traditional physical connection’.

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

7. The Transmission of Aboriginal and Torres Strait Islander Culture

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

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

> The expression ***native title*** or ***native title rights and interests*** means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
>
> (a) the rights and interests are possessed under the laws acknowledged, and the 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.

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

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

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

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

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

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

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

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

8. The Nature and Content of Native Title

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

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

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

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

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

9. Promoting Claims Resolution

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

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

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

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

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

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

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

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

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

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

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

10. Authorisation

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

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

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

Question 10–1 Should the *Native Title Act* include a non-exhaustive list of ways in which the claim group might define the scope of the authority of the applicant? For example:

(a) requiring the applicant to seek claim group approval before doing certain acts (discontinuing a claim, changing legal representation, entering into an agreement with a third party, appointing an agent);

(b) requiring the applicant to account for all monies received and to deposit them in a specified account; and

(c) appointing an agent (other than the applicant) to negotiate agreements with third parties.

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

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

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

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

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

11. Joinder

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

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

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

Proposal 11–2 Section 84(5) of the *Native Title Act* should be amended to clarify that:

(a) a claimant or potential claimant has an interest that may be affected by the determination in the proceedings; and

(b) when determining if it is in the interests of justice to join a claimant or potential claimant, the Federal Court should consider whether they can demonstrate a clear and legitimate objective to be achieved by joinder to the proceedings.

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

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

Proposal 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 to join, or not to join, a party under s 84(5) or (5A) of the *Native Title Act*.

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

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

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

(b) seek intervener status under s 84A.

1. Introduction

Contents

Review of the *Native Title Act*

What is this Inquiry about?

1.1 This Inquiry into the *Native Title Act 1993* (Cth) focuses on the legal requirements for recognising native title rights and interests and proving connection; the nature and content (scope) of native title rights and interests; the legal processes for authorisation of an applicant to bring a native title claim; and the procedures governing when persons become parties to an application for a determination of native title.

1.2 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.

1.3 In summary, native title has origins in the laws acknowledged and the customs observed by Aboriginal peoples or Torres Strait Islanders.[1] Aboriginal peoples or Torres Strait Islanders must prove that they have maintained a connection with their land and waters since before European settlement.

1.4 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 to bring a claim. In a successful claim, the court determines who holds native title.[2]

1.5 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. 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. The Act has provisions setting requirements for persons seeking to join a native title claim.

Why is reform needed?

1.6 The recognition and protection of native title is a central object of the *Native Title Act*. The Preamble identifies the beneficial purposes of the Act. Reforms around connection requirements, authorisation and joinder are important to ensure that the native title law and legal frameworks effectively achieve such purposes.

1.7 Currently, due to a combination of factors, the law for determining native title is very complex. Contributing to this complexity is the progressively technical interpretation of the definition of native title, under the *Native Title Act*. Aboriginal peoples or Torres Strait Islanders must establish a number of requirements that do not appear in the text of the definition in s 223.[3] The *Native Title Act* and associated case law require an involved process for identifying and assessing the evidence for proving native title. An approach to refocus on the core elements in defining native title and connection may be beneficial.

1.8 While it is important that claims are rigorously tested, these requirements can result in long time frames for determinations. Such considerations, however, must be balanced by the acknowledgment that it is necessary to invest sufficient time and resources in the claims process to secure enduring outcomes for all parties.

---

1 *Fejo v Northern Territory* (1998) 195 CLR 96.

2 *Native Title Act 1993* (Cth) s 225.

3 For example, '[T]he reference to rights or interests in land or waters being possessed under traditional laws acknowledged and traditional customs observed by the peoples concerned, requires that the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty': *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [47]. The law is covered in detail in Ch 4.

1.9 Therefore, reforms are needed to 'connection requirements' to simultaneously reduce complexity, while ensuring that the claims process facilitates long-term sustainable outcomes for Aboriginal and Torres Strait Islander peoples. The claims process also must accommodate the range of interests in the Australian community.

1.10 It is important that the 'right people for country' are identified in the claims process and that persons bringing the native title claim (the applicant) are duly authorised by the claim group. Reforms are needed to ensure the authorisation process within a claim group is robust and to reduce potential conflict. Further, there must be effective opportunities for Aboriginal and Torres Strait Islander peoples to test the transparency of the authorisation process—if necessary, in the court system.

1.11 Reforms must consider the impacts upon all participants in the native title system, 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.

1.12 In this context, the ALRC has had regard to the complexity of law, procedure and practice; but also the highly significant policy and economic arena in which native title is implemented.

1.13 The ALRC was asked to consider what, if any, changes could be made to improve the operation of Commonwealth native title laws and legal frameworks.[4] The challenge is to consider change in the native title system that advances the recognition and protection of native title in accordance with the *Native Title Act*,[5] while ensuring that reforms support a robust and productive relationship between all participants.

Consultations and submissions

1.14 The Discussion Paper commences the second stage in the consultation processes in this Inquiry. The first stage included the release of the Issues Paper, *Review of the Native Title Act 1993* (IP 45), generating 40 public submissions.[6] The ALRC Inquiry team has undertaken more than 100 consultations around Australia gathering information and views on the *Native Title Act*. Both the Issues Paper and this Discussion Paper may be downloaded free of charge from the ALRC website. In releasing this Discussion Paper, the ALRC again calls for submissions to build on the evidence base so far established and to inform the final stage of the Inquiry leading to the Final Report, which is to be provided to the Attorney-General by the end of March 2015.

1.15 With the release of this Discussion Paper, the ALRC invites individuals and organisations to make submissions in response to the specific proposals and questions, or to background material and analysis.

---

4 The Terms of Reference are set out in full on the ALRC website: <www.alrc.gov.au>.

5 *Native Title Act 1993* (Cth) s 10.

6 Public submissions are available on the ALRC website: <www.alrc.gov.au>.

The scope of Inquiry

1.17 The Terms of Reference direct the ALRC to inquire into, and report on, Commonwealth native title laws and legal frameworks in the following areas:

- connection requirements for recognition and scope of native title;
- nature and content of native title;
- authorisation; and
- joinder.

Connection requirements for recognition and scope of native title

1.18 Connection requirements relate to how native title is established and proven under the *Native Title Act*. 'Connection' is not specifically defined in the legislation, but the term appears in s 223(1)(b) of the *Native Title Act*.[7] As a term of more general usage, it refers to the provisions in s 223 defining native title and associated sections, such as the originating process for the application for a determination of native title, not only s 223(1)(b).

1.19 In regard to connection, the ALRC was asked to consider the following five 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';
- 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 acknowledgment and observance of traditional laws and customs where it is in the interests of justice to do so.

1.20 The Inquiry may consider any other improvements to the law and legal frameworks for connection requirements.

1.21 Connection requirements consider both the factual matters relevant to Aboriginal and Torres Strait Islander peoples' laws and customs, as well as the legal rules that govern how native title is proven. This legal architecture owes much to *Mabo v Queensland [No 2]* (*'Mabo [No 2]'*).[8]

---

7 *Native Title Act 1993* (Cth) s 223 (1)(b).
8 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

1.22 The statutory provisions dealing with connection requirements for native title rights and interests form one section of the *Native Title Act.* The Inquiry, under its Terms of Reference, is to focus on these areas of law. The ALRC acknowledges the extent to which the native title claims process necessarily interacts with other sections of the Act, and the many other components in the native title system.[9]

1.23 Recognition encompasses the acknowledgment of the historical occupancy of Aboriginal and Torres Strait Islander peoples in Australia and it animates the relevant legal rules in that

> 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'.[10]

Nature and content of native title

1.24 The nature and content (scope) of native title rights and interests is determined by reference to the factual circumstances of each claim.[11] Section 223(2) of the *Native Title Act* relevantly provides '[w]ithout limiting subsection (1), rights and interests in that subsection includes hunting, gathering, or fishing, rights and interests'. The court, in making a determination of native title under s 225 of the Act, must set out

> (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).

Authorisation

1.25 Authorisation forms an initial step in bringing an application for a determination (claim) of native title under s 61 of the *Native Title Act*. Under s 251B of the Act there is a process that establishes which persons from a claim group have the authority to bring the claim. Those persons are the 'applicant' and can deal with matters arising in relation to the claim.[12]

1.26 The ALRC is to consider any potential barriers to access to justice imposed by the authorisation procedures in the *Native Title Act.*

---

9 Association of Mining and Exploration Companies, *Submission 19*.
10 *Sampi v Western Australia* [2005] FCA 777 (10 June 2005) [948].
11 *Native Title Act 1993* (Cth) ss 223(2), 225.
12 Ibid s 62(1)(iv).

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

> 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'.[13]

Joinder

1.28 The applicant is always a party to a claim, as well as the respective governments involved. There may be many other parties too. Most persons become parties at the initial notification stage. Other persons may seek to become a party after this stage. Aboriginal peoples or Torres Strait Islanders as well as non-Indigenous Australians can 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 system.[14]

The Preamble and objects of the *Native Title Act*

1.29 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*.

The Preamble

1.30 The Preamble to the *Native Title Act* affirmed that '[t]he people whose descendants are now known as Aboriginal peoples and Torres Strait Islanders were the inhabitants of Australia before European settlement'.[15]

1.31 The Preamble lists relevant matters for the Parliament of Australia in enacting the law—it is the 'moral foundation' for the Act.[16] The matters include: the uncompensated and involuntary dispossession of Aboriginal peoples and Torres Strait Islanders; their comprehensive social disadvantage in Australian society; and the 1967 amendment to the Constitution.[17]

1.32 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.[18]

---

13 Nick Duff, 'What's Needed to Prove Native Title? Finding Flexibility Within the Law on Connection' (Research Discussion Paper 35, AIATSIS, June 2014) 17.
14 Association of Mining and Exploration Companies, *Submission 19*.
15 *Native Title Act 1993* (Cth) Preamble.
16 *Sampi v Western Australia* [2005] FCA 777 (10 June 2005) [942].
17 *Native Title Act 1993* (Cth) Preamble. See also *Sampi v Western Australia* [2005] FCA 777 (10 June 2005) [939].
18 *Native Title Act 1993* (Cth) Preamble.

1.33 The Preamble references international law 'by recognising international standards for the protection of universal human rights and fundamental freedoms'.[19]

1.34 The Act was identified as an opportunity 'to do justice to the Mabo decision in protecting native title and to ensure workable, certain, land management'.[20] The Preamble notes that the 'broader Australian community requires certainty and the enforceability of acts potentially made invalid because of the existence of native title'.[21]

1.35 The *Native Title Act* was to be a special law:[22]

> The Parliament of Australia intends that the following law will 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.[23]

1.36 The Act and claims process were part of a proposed broader package, as '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'.[24] A Special Fund for land acquisitions has been implemented.[25] The proposed social justice package has not eventuated.

1.37 Central Desert Native Title services submitted that the guiding principles should be seen as consistent with 'the characterisation of the NTA as beneficial legislation'.[26]

The objects of the Act

1.38 The objects in s 3 of the *Native Title Act* align with the Preamble. They are

(a) to provide for the recognition and protection of native title; and

(b) to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings; and

(c) to establish a mechanism for determining claims to native title; and

(d) to provide for, or permit, the validation of past acts, and intermediate period acts, invalidated because of the existence of native title.

---

19 Ibid.

20 Commonwealth, *Parliamentary Debates*, House of Representatives, 16 November 1993, 2878 (Paul Keating).

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

22 *Western Australia v Commonwealth* (1995) 183 CLR 373, 462. Sean Brennan notes the complex interaction between statutory presumptions and interpretive principles when construing the *Native Title Act*: Sean Brennan, 'Statutory Interpretation and Indigenous Property Rights' (2010) 21 *Public Law Review* 239, 252.

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

24 Ibid.

25 The National Farmers Federation submitted that examination of the feasibility of greater reliance on the land fund should precede reform of the legislation. National Farmers' Federation, *Submission 14*.

26 Central Desert Native Title Services, *Submission 26*.

1.39 The introduction of the *Native Title Act* was promoted as a 'practical building block of change' and 'the basis of a new relationship between indigenous and non-Aboriginal Australians'.[27] The legislation was 'enacted against the fabric of the common law and in response to the recognition of native title in *Mabo [No 2]*'.[28] Later cases have adopted differing positions on the extent of common law influence.[29]

1.40 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.[30] 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.[31] 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.[32]

1.41 The *Native Title Act* is a valid exercise of the Commonwealth's legislative power pursuant to s 51(xxvi) of the *Constitution*.[33] As valid Commonwealth legislation, pursuant to s 109 of the *Constitution*, it is binding upon the states and territories.[34]

1.42 There is no similar statutory scheme for determining Indigenous peoples' claims of the extent of the *Native Title Act* in comparable jurisdictions.[35] In New Zealand, the Waitangi Tribunal has a compensation and settlement function predicated upon the *Treaty of Waitangi*.[36] In Canada, the courts have continued to play the major role in developing the common law of aboriginal rights and aboriginal title—albeit against the back drop of significant treaty and constitutional protections for First Nations peoples.[37]

1.43 The objects reflect practical mechanisms to facilitate co-existence but reinforce the fundamental schema of native title imported from *Mabo [No 2]*.[38] The interplay

---

27 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, 539 citing 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, 5.

28 Melissa Perry and Stephen Lloyd, *Australian Native Title Law* (Lawbook Co, 2003) 3.

29 Ibid.

30 Richard H Bartlett, *Native Title in Australia* (Butterworths, 2nd ed, 2004) 88.

31 *Walker v State of South Australia (No 2)* [2013] FCA 700 (19 July 2013) [29].

32 See, eg, Lisa Strelein, *Dialogue About Land Justice: Papers from the National Native Title Conference* (Aboriginal Studies Press, 2010).

33 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).

34 *Western Australia v Commonwealth* (1995) 183 CLR 373, [79].

35 Bartlett, above n 30, 39.

36 Giselle Byrnes and David Ritter, 'Antipodean Settler Societies and Their Complexities: The Waitangi Process in New Zealand and Native Title and the Stolen Generations in Australia' (2008) 46 *Commonwealth & Comparative Politics* 54.

37 V Marshall, *Submission 11*.

38 Hal Wootten, 'Mabo at Twenty: A Personal Retrospect' in Toni Bauman and Glick Lydia (eds), *The Limits of Change: Mabo and Native Title 20 Years On* (AIATSIS, 2012) 431, 441.

between recognition, extinguishment and protection of native title rights and interests are central to understanding the functional structures within the Act.[39] The Act ensures that 'constitutional and legislative protections afforded to other property holders are enjoyed by Aboriginal and Torres Strait Islander peoples. This includes the requirement that compensation be paid on just terms'.[40]

Guiding principles

1.44 In addition to guidance from the Preamble and objects of the *Native Title Act*, the ALRC developed five guiding principles for reform. The ALRC invited comment on these principles in the Issues Paper.

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

Reform should acknowledge the importance of the recognition and protection of native title for Aboriginal and Torres Strait Islander peoples and the Australian community.

1.45 The principle that reform to the *Native Title Act* should adhere to the importance of the recognition and protection of native title received support in many submissions.[41]

1.46 In a legal sense, recognition may be thought of as

> [l]ying 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.[42]

1.47 The importance of a determination of native title is captured in that

> [r]ecognition 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'.[43]

---

39 *Western Australia v Commonwealth* (1995) 183 CLR 373, [76]–[78].

40 AIATSIS, *Submission 36*.

41 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.

42 *Sampi v Western Australia* [2005] FCA 777 (10 June 2005) [948].

43 South Australian Government, *Submission 34*.

1.48 The Australian Human Rights Commission highlighted the ongoing importance of the recognition and protection of native title 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'. This has resulted in a native title system that has created some opportunities for Aboriginal and Torres Strait Islander communities, but which remains slow and cumbersome in the delivery of outcomes.[44]

1.49 Some commentators argued that 'recognition' is no longer a barrier to achieving outcomes under the Act.[45] 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"'. [46] In respect of any proposed reforms, their submission 'cautions against amending the core provisions of the NTA that concern the recognition of native title without probative and objective evidence to this effect'.[47]

1.50 Just Us Lawyers stressed the need to return a balance to the Act. [48]

Principle 2: Acknowledging interests in the native title system

Reform should acknowledge the range of interests in achieving native title determinations that support relationships between stakeholders.

1.51 It is inherent to the nature of native title rights and interests in land and waters that a claim will interact with many other interests.[49] Section 225 of the *Native Title Act* sets out, with respect to a determination, the relationship between native title and other interests in a claim area. The precise interaction will depend upon the law and custom of the relevant claimant group, and the specific interests held by others in the area concerned.[50]

1.52 Section 253 of the *Native Title Act* defines an interest in land and waters.[51] The guiding principles extend that meaning to encompass consideration of a wider range of interests including those of 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. A determination of native title takes effect as a judgment *in rem*—a legal right that is enforceable against third parties over time.[52]

---

44 Australian Human Rights Commission, *Submission 1*.
45 South Australian Government, *Submission 34*.
46 Chamber of Minerals and Energy of Western Australia, *Submission 21*.
47 Ibid.
48 Just Us Lawyers, *Submission 2*.
49 An act in relation to native title is defined in *Native Title Act 1993* (Cth) s 226.
50 Chief Justice Robert French, 'Native Title—A Constitutional Shift?' (Speech Delivered at the JD Lecture Series, The University of Melbourne, 24 March 2009).
51 The operation of this section is examined in detail in Ch 11.
52 *Western Australia v Fazeldean on behalf of the Thalanyji People (No 2)* [2013] FCAFC 58 (6 June 2013); Perry and Lloyd, above n 28, 108; *Munn for and on behalf of the Gunggari People v Queensland* (2001) 115 FCR 109.

1.53 The many interests involved in any native title determination can also include overlapping claims or disputed claims by Aboriginal or Torres Strait Islander peoples. Particular issues in terms of 'access to justice' arise for native title claimants and potential claimants.[53]

1.54 'Co-existence' captures the idea that there are complex inter-relationships between native title holders and the wider community.[54] Agreement-making has built relationships between all stakeholders in the native title system.[55]

1.55 Nonetheless, the Western Australian Government submission called for an additional principle for 'ensuring consistency and compatibility with the development of Australia's unique political and legal history, including its history of European settlement.[56]

1.56 Relevant industry groups acknowledged the importance of fostering relationships.

> Members of the MCA recognise that industry's engagement with Indigenous peoples needs to be founded in mutual respect and in the recognition of Indigenous Australian's rights in law, interests and special connections to land and waters. This point is made even more acute by the fact that more than 60 per cent of minerals operations in Australia have neighbouring Indigenous communities.[57]

1.57 It would be unrealistic to expect that all conflict has been resolved since the *Native Title Act* was enacted, particularly given the strong divisions when the legislation was introduced.[58] Further, the objectives of stakeholders within the native title system are not necessarily congruent.

1.58 The need for the *Native Title Act* to achieve certainty is emphasised by some stakeholders.[59] The Chamber of Minerals and Energy of Western Australian suggested adoption of guiding principles which seek to ensure that the native title system maintains integrity, efficiency, timeliness, and certainty.[60] In this light, the Minerals Council of Australia 'supports the guiding principles but suggests that providing 'transparency and certainty' for all stakeholders should be added to Principle 2.[61] Ed Wensing noted that certainty as a goal needs to be balanced against other outcomes to be achieved under the Act.[62]

---

53 See Ch 10 and Ch 11.

54 Aden Ridgeway, 'Addressing the Economic Exclusion of Indigenous Australians through Native Title' (2005) 2.

55 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*.

56 Western Australian Government, *Submission 20*.

57 Minerals Council of Australia, *Submission 8*.

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

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

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

61 Minerals Council of Australia, *Submission 8*.

62 E Wensing, *Submission 13*.

1.59 As the Association of Mineral Exploration Companies stated,

> [t]he 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.[63]

1.60 The ALRC notes that acknowledging all interests within the native title system will require balance and proportionate responses.

1.61 Commentators from a range of perspectives urged a move toward a settlement framework, rather than the current claims process under the *Native Title Act*.[64]

1.62 The *Native Title Act* is to give precedence to conciliation and negotiation of native title determinations where possible.[65] Chapter 3 outlines the shifts in practice toward achieving consent determinations,[66] and a growing emphasis upon settlements.[67]

1.63 A lack of certainty on legal points may inhibit effective negotiation and conciliation. As the South Australian Government explained:

> As the law on the recognition of native title became clearer, the State Government and other parties could more confidently proceed with negotiations to resolve claims by consent … While there is no doubt scope for improvement in the native title system, South Australia is concerned that significant changes to native title law will actually slow down and complicate the State's current program for resolving native title claims. [68]

Principle 3: Encouraging timely and just resolution of determinations

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

1.64 There was general support for this principle. However, AIATSIS qualified its support by indicating that timeliness in itself should not be the primary concern, arguing for a

> principled approach to reform that encourages savings in time and resources; though not at the cost of achieving just recognition of the rights of Aboriginal and Torres Strait Islander peoples. The paramount 'integrity' of the system in this context lies in ensuring that measures to improve the timeliness of matters will at least do no harm.

---

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

64 See, eg, National Native Title Council, *Submission 16*; 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.

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

66 Northern Territory Government, *Submission 31*; Queensland Government Department of Natural Resources and Mines, *Submission 28*; Western Australian Government, *Submission 20*.

67 For a recent example, see Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Bill 2014 (WA) tabled as a draft bill in WA Parliament in February 2014.

68 South Australian Government, *Submission 34*.

> An appropriate policy rationale applies considerations of efficiency, only in the context of a focus first on 'just' and then on 'timely'.[69]

1.65 A need for balance was stressed. AIATSIS further submitted that

> [p]romoting the timely and effective resolution of native title matters is an appropriate concern for any actor in the system. While avoidable delay can be a denial of justice, a lapse of time may be necessary for the just and efficient resolution of a matter. This is particularly the case in native title matters, which are unique in the Federal Courts' jurisdiction, as they are lodged well before the parties are prepared for litigation.[70]

1.66 The North Queensland Land Council directed attention to securing the integrity of the claims process and its role in building capacity for all parties to successfully engage.[71] Adherence to international best practice built on human rights standards for negotiation and consultation was identified as another important factor.[72]

1.67 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.[73] Costs for the parties involved and, more generally, within the native title system, can escalate if there are long time frames. 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'.[74]

1.68 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.[75] 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.[76]

Principle 4: Consistency with international law

Reform should reflect Australia's international obligations in respect of Aboriginal and Torres Strait Islander peoples, and have regard to the United Nations Declaration on the Rights of Indigenous Peoples.

---

69 AIATSIS, *Submission 36*.
70 Ibid.
71 North Queensland Land Council, *Submission 17*.
72 S Bielefeld, *Submission 6*.
73 '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*.
74 Federal Court of Australia, 'Annual Report 2011–2012' 13.
75 Valerie Cooms, *Governance, Community Control and Native Title* (Paper presented at the AIATSIS Native Title Conference, Coffs Harbour, 1–3 June 2005).
76 Australian Human Rights Commission, *Submission 1*.

1.69 Australia has international obligations in respect of Aboriginal and Torres Strait Islander peoples under a range of binding international law instruments. *The United Nations Declaration on the Rights of Indigenous Peoples*[77] ('UNDRIP' or 'the Declaration') also reflects human rights standards that are relevant to the *Native Title Act*.[78] The Terms of Reference direct the ALRC Inquiry to Australia's statement of support for the Declaration.[79]

1.70 The Minerals Council of Australia, while agreeing 'it is important to have regard to international law', noted also 'it needs to be applied as ratified within the Australian context where the Crown has sovereign rights over minerals and with regard to the overall context and objects of the instruments in question, not just provisions read in isolation'.[80]

1.71 The National Congress of Australia's First Peoples supported the view that ALRC proposals 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.[81]

1.72 The *Native Title Act* was enacted in light of developments in international law.[82] The *Convention on the Elimination of all Forms of Racial Discrimination*, to which Australia is a party, was of particular relevance.[83] Under article 1(4) of the Convention an allowance is made for 'special measures'.[84]

1.73 Australia signed the *International Covenant of Economic, Social and Cultural Rights* (ICESCR) on 18 December 1972 and ratified the Convention on 10 December 1975, with no reservations. The UN ICESCR Committee noted the high cost,

---

77 *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).

78 Australian Human Rights Commission, *Submission 1*.

79 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).

80 Minerals Council of Australia, *Submission 8*.

81 National Congress of Australia's First Peoples, *Submission 32*; see also National Native Title Council, *Submission 16*.

82 See, eg, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 2, 26; *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) arts 1, 2, 5. See also Australian Human Rights Commission, *Rights to Equality and Non-discrimination* <www.humanrights.gov.au/rights-equality-and-non-discrimination>.

83 Bartlett, above n 30, 15.

84 Art 14 relevantly states 'taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or 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'. Section 8 of the *Racial Discrimination Act* 1975 (Cth) reflects this Article of the Convention.

complexity and strict rules for native title claims, and the inadequate protection of Indigenous cultural and intellectual property and language, in accordance with art 15.[85]

1.74 Since the enactment of the *Native Title Act*, specific human rights frameworks for Indigenous peoples have emerged internationally. UNDRIP is the most significant. In 2009 Australia issued a statement of support for the Declaration.[86] The Declaration has provisions relating to the recognition and protection of Indigenous peoples' lands and waters.[87]

1.75 Professor Megan Davis suggests that

> [t]he Declaration represents an important framework from which the Australian state can re-engage Indigenous communities in relation to native title on the basis of internationally recognised and accepted standards pertaining to the rights of Indigenous peoples to land and the recognition of their culture.[88]

1.76 The Declaration is a resolution of the General Assembly giving Indigenous Peoples 'an evidentiary and persuasive role in stimulating the development of jurisprudence on the rights of indigenous people'.[89] As the National Congress submission states, in regard to the *Native Title Act*,

> Congress draws distinction between the requirements of the Act, which merely extend to clarifying where land ownership of our Peoples might have survived the imposition of British and Australian law over our territories, combined with the additional requirement to provide evidence of continued customary practices; in contrast to the human rights standard, requiring independent and balanced adjudication of the rights of the Aboriginal and Torres Strait Islander Peoples.[90]

1.77 Article 38 of the Declaration provides that:

> States, in consultation and cooperation with Indigenous Peoples, shall take appropriate measures, including legislative measures, to achieve the ends of the Declaration.

1.78 Within Australia, the Aboriginal and Torres Strait Islander Social Justice Commissioner has advocated a 'principled approach' to implementing the Declaration.[91] The Australian Human Rights Commission stated:

> The Declaration is a remedial instrument, designed to rectify a history of failings when it comes to protecting Indigenous peoples' human rights. The Declaration

---

85 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]–[33].

86 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).

87 Arts 25–28. See S Bielefeld, *Submission 6*.

88 Megan Davis, 'Adding a New Dimension: Native Title and the UN Declaration on the Rights of Indigenous Peoples' [2008] *Australian Law Reform Commission Reform Journal* 17, 17 as quoted in S Bielefeld, *Submission 6*.

89 NSW Young Lawyers Human Rights Committee, *Submission 29*.

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

91 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Social Justice and Native Title Report' (Australian Human Rights Commission, 2013) 93.

> contains the 'minimum standards for the survival, dignity and well-being of the indigenous peoples of the world'. It elaborates the rights already set out in existing human rights instruments, including the treaties to which Australia is a party.[92]

1.79 Free, prior and informed consent (FPIC) is a principle that has gained increasing acceptance as an international best practice standard to govern dealings between indigenous peoples and third parties.[93] More informal concepts such as a 'social licence to operate' have gained increasing acceptance in industry and the community.

1.80 These standards have important practical ramifications:

> [s]uccess 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. Sure you may have some challenges through the process, but they are never insurmountable and if you treat people with respect—that includes affording people the right to their free, prior and informed consent—and listen to what they are saying, you will get things done.[94]

Principle 5: Supporting sustainable futures

Reform should promote sustainable, long-term social, economic and cultural development for Aboriginal and Torres Strait Islander peoples.

1.81 Many submissions supported this principle, but also raised some caveats about the capacity of the *Native Title Act* to deliver effective social, economic and cultural development.[95] 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.[96]

1.82 The NSW Young Lawyers Human Rights Committee endorsed the view of the UN Human Rights Committee to the effect

> that culture manifests itself in a variety of forms, including livelihood activities including fishing or hunting, in addition to the right to live on reserves protected by law. The right of indigenous peoples to participate in resource development on their traditional land has also been recognised by international law.[97]

---

92 Australian Human Rights Commission, *Submission 1*.
93 S Bielefeld, *Submission 6*.
94 Brian Wyatt, *National Planning Congress*, (Speech Delivered to the Planning Institute Australia, Canberra, 25 March 2013) as quoted in E Wensing, *Submission 13*.
95 AIATSIS, *Submission 36*; North Queensland Land Council, *Submission 17*.
96 AIATSIS, *Submission 36*.
97 NSW Young Lawyers Human Rights Committee, *Submission 29*.

1.83 The Preamble to the *Native Title Act* draws a link between Indigenous disadvantage and the dispossession of Aboriginal and Torres Strait Islander peoples. Since that time, many Commonwealth and state policies have been developed to redress Aboriginal and Torres Strait Islander disadvantage. For example, on 1 July 2014, the Australian Government's Indigenous Advancement Strategy commenced.[98]

1.84 Several submissions noted that few policies effectively link socio-economic opportunities for Aboriginal and Torres Strait Islander peoples with native title outcomes.[99]

1.85 The importance of simultaneously developing sustainable native title outcomes and policies designed to enhance Aboriginal and Torres Strait Islander peoples' economic opportunities was highlighted by Professor Jon Altman. He questioned, 'how can socioeconomic gaps be closed without economic development where people live?'[100]

1.86 Other submissions emphasised that '[r]ecognition 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'.[101]

1.87 Several submissions identified wide variation in native title outcomes.[102] The Kimberley Land Council noted that the *Native Title Act*

> provides the best opportunity for economic, social and cultural development to those Aboriginal and Torres Strait Islander people who are least impacted by colonisation … It is important to recognise that the NTA is not a panacea for all of the wrongs of dispossession and colonisation, but is one important device in addressing these wrongs. [103]

1.88 Other submissions identified the need for a longer term perspective. Frith and Tehan contended that

> more attention should be paid, in terms of sustainable futures, to achieving mechanisms by which native title groups can sustainably and effectively manage their determined native title rights and interests to achieve their long term land justice aspirations. Ultimately, a native title determination is not the only or even the main outcome of the native title process in the NTA.[104]

---

98 The objective of the Strategy is to improve the lives of Indigenous Australians. Its focus includes 'getting Indigenous Australians into work, fostering Indigenous business and ensuring Indigenous people receive economic and social benefits from the effective management of their land and native title rights': Department of the Prime Minister and Cabinet, *Indigenous Affairs—Indigenous Advancement Strategy* <www.dpmc.gov.au/indigenous_affairs/ias/index.cfm>.

99 See, eg, AIATSIS, *Submission 36*; Kimberley Land Council, *Submission 30*.

100 Jon C Altman, 'Reforming the Native Title Act' (Topical Issue 10, Centre for Aboriginal Economic Policy Research ANU, 2011) 4.

101 Northern Territory Government, *Submission 31*.

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

103 Kimberley Land Council, *Submission 30*.

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

1.89 There are expectations that native title can achieve effective economic outcomes for Aboriginal and Torres Strait Islander peoples in coming years.[105] The identification of native title with sustainable future outcomes also suggests that critical components, such as the underpinning rights and governance structures, will be important for long-term social, economic and cultural development for Aboriginal and Torres Strait Islander peoples.

1.90 A robust framework for reviewing the *Native Title A*ct based on the principles identified in this chapter is important in that regard.

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

2. Framework for Review of the *Native Title Act*

Contents

Framework for the proposals

2.1 This chapter outlines the approach adopted for the ALRC proposals in light of the Guiding Principles identified in Chapter 1 and by reference to the Preamble and Objects of the *Native Title Act 1993* (Cth). The analysis deals primarily with proposals related to 'connection requirements', and secondly with issues in relation to authorisation and joinder.

2.2 The ALRC Inquiry, in formulating its proposals, has adopted the benchmark of 'the recognition and protection' of native title rights and interests.[1] This platform can provide an effective basis for native title to support 'Indigenous economic development and generate sustainable long-term benefits for Indigenous Australians.[2]

2.3 However, notwithstanding the growing number of native title determinations across Australia, and the achievement of benefits for Aboriginal and Torres Strait Islander peoples, the law relating to connection requirements remains complex and variable in its outcomes. There is a need to reduce complexity and to focus on the core elements for proving native title. Timely—but just—resolution of claims is also an important objective.

2.4 The ALRC was asked to examine potential improvements to the operation of the native title system—requiring analysis of the effectiveness of proposals against the systemic operation of native title laws and the many interests and areas affected.

---

1 *Native Title Act 1993* (Cth) s 3(a).
2 *Terms of Reference* <www.alrc.gov.au>.

2.5 The statutory provisions relating to authorisation of an applicant, for example, have significant human and resource impacts. Joinder matters impinge on important questions around access to justice for all parties in the system.

2.6 The improved operation of native title law and legal frameworks therefore has many potential benefits for participants in the claims process and for the Australian community.

Rationale for reform

2.7 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.[3]

2.8 This Inquiry seeks to balance requirements for certainty and orderly interaction in the native title system, with the principles of fairness and equality that are stated in the Act. Australia has obligations under international instruments that help shape its relationship with Aboriginal people and Torres Strait Islanders.

2.9 The ALRC's proposals retain the basis of native title law adopted in the *Native Title Act* from *Mabo v Queensland [No 2]*[4] (*Mabo [No 2]*). The Law Society of Western Australia submitted that the legislation as originally enacted was intended to reflect beneficial purposes consistent with the decision in *Mabo [No 2]*.[5]

2.10 Attention, however, 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.

2.11 In addition, the Inquiry seeks to streamline aspects of the authorisation process, while adopting decision-making processes appropriate to Aboriginal and Torres Strait Islander communities—in line with facilitating access to the claims process. Access to justice considerations, balanced by the need for system integrity and efficiency, inform the suggested reforms to joinder provisions.

2.12 These areas are important in governing the interactions between Aboriginal and Torres Strait Islander peoples, as well as between claimants and other parties in the native title claims process. The laws have significant ramifications for the effective operation of institutions within the native title system, such as courts, the National Native Title Tribunal, Native Title Representative Bodies and service providers.

The question of change?

2.13 The Australian legal system is characterised by change to ensure its continued relevance and coherence, through statutory reform and common law evolution. In examining improvements to native title law and legal frameworks, the ALRC, has

---

3 *Sampi v Western Australia* [2005] FCA 777 (10 June 2005) [938].
4 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.
5 Law Society of Western Australia, *Submission 9*.

necessarily, included an analysis of the interaction between the *Native Title Act* and case law.

2.14 The proposals 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.[6] 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. Some submissions have stressed the importance of stability.[7]

2.15 Nonetheless, there have been calls for reform of the *Native Title Act*, over time; including to the law governing the claims mechanism.[8] Dr Paul Burke noted:

> there is a tendency in legal circles towards acceptance of the law as it is. The promise of bodies like the Australian Law Reform Commission is to step outside the usual orientation towards acceptance, at least within the terms of the enquiry.[9]

2.16 However, some caution was advised in terms of potential disruption in some submissions.[10] Others pointed to the achievements of the last two decades and noted that the native title claims process has accelerated and consent determinations are moving forward in many areas.[11]

2.17 Other submissions advocated an incremental model of change within the *Native Title Act*.[12] In addition, recent years have seen systemic changes to the claims process designed to deliver 'practical, timely and flexible outcomes.'[13]

2.18 Several ALRC proposals are oriented to the practical operation of the claims process in relation to authorisation and joinder procedures, although some issues generating conflict in the native title sphere are not easily resolved through the legal process.

---

6 See for example, *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] HCA 8 (12 March 2014); *Akiba v Commonwealth* (2013) 250 CLR 209.

7 National Farmers' Federation, *Submission 14*; Pastoralists and Graziers Association, *Submission 3*.

8 See for example, Justice A M North and Tim Goodwin, *Disconnection–The Gap between Law and Justice in Native Title: A Proposal for Reform* (Paper Delivered at the 10th Annual Native Title Conference, Melbourne, 4 June 2009).

9 P Burke, *Submission 33*.

10 Northern Territory Government, *Submission 31*; Association of Mining and Exploration Companies, *Submission 19*.

11 A more complete analysis of those outcomes is contained in Ch 3.

12 Western Australian Government, *Submission 20*.

13 *Terms of Reference*, above n 2.

2.19 In turn, there were calls for a more fundamental revision of the *Native Title Act*, arguing 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.[14]

2.20 The ALRC does not propose that there should be comprehensive redefinition of native title under the Act as this may exacerbate the uncertainties experienced by all participants in the native title system. Nor does the ALRC suggest removal of the current claims-based process for native title determinations. 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. The elements in the definition of native title come from *Mabo [No 2]*.[15]

Australia's legal history

2.21 In *Mabo [No 2]*, the High Court explored the legal relationship between Australia's Indigenous peoples and the incoming settlers. One of the central questions was to consider whether, upon assertion of British sovereignty over Australia, the Crown's title was 'burdened' by pre-existing rights.

2.22 The Court declared that the pre-existing rights of Australia's Indigenous peoples survived the acquisition of sovereignty.[16] The majority decision was summarised as recognising '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'.[17]

2.23 *Mabo [No 2]* 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 law. On the other hand, the demands of justice prevented a simple confirmation of the extinguishment of all Indigenous rights to land.[18]

2.24 As the Western Australian Government submitted

> 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.[19]

---

14 P Burke, *Submission 33*.
15 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 2.
16 Ibid 116.
17 Ibid 15.
18 Ibid 68–69, 63–71, 112–113; 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].
19 Western Australian Government, *Submission 20*.

2.25 The overarching political relationship between the Australian nation and Aboriginal and Torres Strait Islander peoples that has evolved since *Mabo [No 2]* and its future development are beyond the scope of this Inquiry. However, the ALRC notes the *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth).[20] Native title can contribute to a platform for strengthening the place of Aboriginal peoples and Torres Strait Islanders within Australian society—including by supporting economic development in a culturally relevant manner, in line with the principles adopted for this Inquiry.

The basis of native title law

2.26 The source for native title in *Mabo [No 2]* was the recognition by the common law of the pre-existing rights and interests of Aboriginal and Torres Strait Islander peoples.[21] 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.[22]

2.27 This form of judicial 'recognition' is part of a long standing tradition in the common law system where courts give legal effect to 'rights'.[23] The common law, derived from Britain, constituted the law 'received' in Australia at settlement.[24] Common law courts have long asserted their power to protect people's rights.[25]

2.28 'Recognition' also has a more specific genesis. It refers to the historical body of law that governed the British acquisition of colonies, and which included the doctrine of recognition, and the associated doctrine of continuity.[26]

2.29 In the current Australian context, the concept of recognition links the common law and statute via the concepts of 'recognition and protection' for native title, expressed in the Objects of the *Native Title Act*.[27]

---

20 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. See John Anderson, Tanya Hosch and Richard Eccles, 'Final Report of the Aboriginal and Torres Strait Islander Act of Recognition Review Panel' (September 2014). The Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples is receiving submissions on steps to progress towards a successful referendum on Indigenous Constitutional Recognition by 30 October 2014. Co-chairs Patrick Dodson and Mark Leibler of the Expert Panel on Constitutional Recognition of Indigenous Australians completed their report, 'Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel' (Commonwealth of Australia, January 2012).

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

22 P Burke, *Submission 33*.

23 AIATSIS, *Submission 36*.

24 *Wik Peoples v Queensland* (1996) 187 CLR 1, 182 (Gummow J); Reilly, above n 18, [67].

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

26 Ibid.

27 Commonwealth, *Parliamentary Debates*, Senate, 16 December 1993, 5097 (Christopher Evans).

2.30 Both courts and the legislature are part of the law-making system. Courts interpret and apply statutes and develop the body of case law rules and principles, subject to a concept of parliamentary sovereignty. This has proven central to the understanding of native title as it has developed in the law around the *Native Title Act*.[28]

The *Native Title Act*

2.31 *Mabo [No 2]* provided the source for the legal definition in s 223 of the *Native Title Act*.[29] The wording there reflects the findings 'that proof of native title requires proof that there is identifiable group, traditional connection with the land and the group's laws and customs, and the maintenance of connection'.[30] The High Court, in *Ward*, acknowledged the link, stating that 'pars (a) and (b) of s 223(1) plainly are based on what was said by Brennan J in *Mabo [No 2]*'.[31]

2.32 Secondly, *Mabo [No 2]* drew upon long-established common law principles arising from the British colonial experience and the jurisprudence from comparable countries, such as Canada.[32] The majority in the High Court, in *Mabo [No 2]*, was guided by international law and human rights principles.[33] Submissions emphasised that *Mabo [No 2]* has been accepted as a principled platform for dealing with historical injustice.[34] AIATSIS noted that the case has provided a model for the courts in several countries.[35]

2.33 When the Act was being drafted, the assumption was that the law concerning connection requirements would develop in line with the initial common law.[36] Once the *Native Title Act* was in place, some argued that the High Court gave 'the concept of "recognition" a narrower scope than … Parliament intended'.[37] According to another view, this process unnecessarily reduced the influence of the body of common law principles.[38]

2.34 In *Ward*, however, the Court stated: '[b]ecause what is claimed in the present matters are claims made under the *Native Title Act*, for rights defined in the *Native Title Act*, it is that statute which governs'.[39] In *Yorta Yorta*, the majority of the High

---

28 Michael Hudson McHugh, 'The Law-Making Function of the Judicial Process–Part II' (1998) 62 *Australian Law Journal* 116, 124.

29 '[T]he antecedent rights and interests in land possessed by the indigenous inhabitants of the territory survived the change in sovereignty. Those antecedent rights and interests thus constitute a burden on the radical title of the Crown': *Mabo v Queensland [No 2]* (1992) 175 CLR 1, [62].

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

31 *Western Australia v Ward* (2002) 213 CLR 1, [16]. Although, later found to be unconstitutional, s 12 of the *Native Title Act* provided that 'the common law of Australia in respect of native title has … the force of a law of the Commonwealth'.

32 AIATSIS, *Submission 36*.

33 Ibid.

34 V Marshall, *Submission 11*; S Bielefeld, *Submission 6*.

35 AIATSIS, *Submission 36*.

36 *Western Australia v Commonwealth* (1995) 183 CLR 373.

37 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [134] (McHugh J).

38 Justice Robert French, 'A Moment of Change—Personal Reflections on the National Native Title Tribunal 1994–98' (2003) 27 *Melbourne University Law Review* 488, 521.

39 *Western Australia v Ward* (2002) 213 CLR 1, [468].

Court held that the 'common law of Australia cannot be understood as a form of drafting by incorporation'.[40]

2.35 In 2013, the High Court noted the contribution of the common law to recognition of native title:

> It is a necessary condition of their inclusion in a determination that the rights and interests are recognised by the common law of Australia. That condition flows from s 223(1)(c). 'Recognise' in this context means that 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'.[41]

2.36 Given the foundation of the *Native Title Act* in both statute and the common law, it is appropriate for the ALRC to consider both areas. Common law and statute have had an intertwined role in defining and interpreting native title.[42] In particular, the proposed reforms seek to refocus on 'core elements' in the definition of native title.

Construction of s 223

2.37 In its Preamble, the *Native Title Act* stated: 'The Parliament of Australia intends that the following law will take effect according to its terms and be a special law for the descendants of the original inhabitants of Australia'.[43] The Terms of Reference expressly direct the ALRC to the Preamble and Objects of the Act when considering what, if any, changes could be made to improve the operation of Commonwealth native title law and legal frameworks.

2.38 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'.[44]

2.39 In view of these approaches to interpreting the Act, this section briefly summarises the approach to reforms to the definition of native title. The intention is to reduce the complexity and remain consistent with a 'fair, large and liberal' interpretation of the *Native Title Act*. A detailed overview of the law relevant to s 223 of the Act appears in Chapters 4–8.

2.40 It is accepted though that there is a complex approach to the interpretation of statutory definitions:

> 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.[45]

---

40 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [76].
41 *Akiba v Commonwealth* (2013) 250 CLR 209, [9].
42 A Frith and M Tehan, *Submission 12*.
43 *Native Title Act 1993* (Cth) Preamble.
44 *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].
45 Francis Bennion, 'The Global Method: Statutory Interpretation in the Common Law World' (2000) 82 *Commonwealth Legal Education Association Newsletter* 30, 33.

2.41 Interpretation of s 223 of the *Native Title Act* has become 'difficult and pluralistic' as the courts have grappled with the difficulties of reconciling the Aboriginal and Torres Strait Islander laws and customs with the Australian legal system—as the necessary task for determining native title.[46]

2.42 Yet the actual wording in s 223 of the *Native Title Act* contains relatively straightforward concepts—rights and interests in land and waters which are possessed under laws and customs; acknowledgment of those laws and observance of customs since the 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 core elements have remained constant.[47]

2.43 The Act is the starting point for determining native title rights and interests.[48]

New requirements for s 223

2.44 Over time, however, the courts have progressively articulated an expanded set of requirements for determining native title beyond the 'core elements' actually contained in the statutory definition of native title.[49] Although sourced in *Mabo [No 2]*, this framework has reoriented or expanded the meaning of certain terms in the actual wording, such as 'traditional'. In turn, other concepts, such as 'normative society', have been implied into the definition. These additional requirements are now held to be integral to the s 223 definition of native title, although not found in the text of the statute.

2.45 The expanded exposition of 'connection requirements' to prove native title culminated in the formulation adopted by the High Court in *Yorta Yorta*.[50] This 'test' for determining native title was affirmed in later case law and has become central to framing the evidence that is brought to prove native title (see Chapters 4–7).

2.46 Concepts introduced into the framework of the *Native Title Act* have produced extensive requirements for factual proof of native title under the Act. For example, 'continuity' now effectively functions as an integrated, but yet an additional 'connection requirement' (see Chapter 5).

---

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

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

48 As affirmed by the High Court in: *Western Australia v Ward* (2002) 213 CLR 1; *Commonwealth v Yarmirr* (2001) 208 CLR 1; *Wilson v Anderson* (2002) 213 CLR 401. 'However, as indicated, the immediately relevant elements in the definition in s 223(1) of "native title" and "native title rights and interests" have remained constant': *Western Australia v Ward* (2002) 213 CLR 1, [17].

49 French J, 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).

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

2.47 Several submissions noted the difficulties for all parties that these additional requirements have imposed.[51] By contrast, other submissions suggested that connection requirements no longer constituted a significant difficulty for claim resolution.[52]

Summary of approach to connection requirements

2.48 The ALRC proposes several amendments to s 223 of the *Native Title Act* by means of clarifying statements to focus construction on the core elements in the text of the section to ameliorate the effect of 'additional' requirements.

2.49 The proposals give renewed attention to the actual wording of s 223(1) of the *Native Title Act.* In line, with accepted principles for statutory construction governing Commonwealth legislation, the statements support an interpretation of s 223, 'that would best achieve the Act's purpose'.[53]

2.50 Proposals 5–1 to 5–4 suggest amendment of s 223 of the *Native Title Act* through clarifying statements directed to the interpretation of terms that exist in the statutory definition.

2.51 Proposals 7–1 and 7–2 provide an alternative by proposing that the text of the definition itself be altered. 'Traditional' and 'connection' are to be found in the text of s 223.[54] The ALRC proposes that the term 'traditional' be deleted from the text of s 223. The ALRC also proposes amendments to the term 'connection' in s 223(1)(b).

2.52 Proposals 8–1 and 8–2 reflect the current law with respect to 'commercial native title rights and interests'.

2.53 The proposals 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*;
- 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 by emphasising the present day connection of Aboriginal and Torres Strait Islander peoples with land and waters, while recognising the origins in the period before the assertion of sovereignty;
- expedite the claims process by a refocus on core elements of the definition of native title in the framing and assessment of connection;

---

51 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*.

52 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*.

53 *Acts Interpretation Act 1901* (Cth) s 15AA.

54 See Ch 7.

- provide statutory reflection of the law on the scope of native title rights and interests;
- 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; and
- review the anomalous position of Australian native title jurisprudence in terms of the evolution of international law and comparative law.

The link between connection and the claim group

2.54 The legal framework for the establishment of native title rights and interests is focused on 'connection requirements'. In the Act, there is a nexus between the particular Aboriginal peoples or Torres Strait Islanders bringing the claim and the rights and interests claimed. The native title claimants must be indicated at the registration of the claim.[55] The case law on native title, while acknowledging the communal nature of native title has directed less attention to group composition unless the matter is put to issue through overlapping or disputed claims and claims boundaries.[56] In those instances, claim group membership and composition and the interrelation with connection assume much significance.[57]

2.55 The absence of substantive provisions in the *Native Title Act* to define the claimant group, avoids prescriptive processes of claim group composition and membership, in order to allow as much autonomy as possible for Aboriginal peoples and Torres Strait Islanders.[58]

2.56 However, the pressures introduced by the native title claims process can lead to conflicts within communities that surface at points in the Act such as the authorisation and joinder provisions. Difficulties inherent to determining claim group composition have implications for third parties, governments, courts, native title organisations and many other organisations. These issues are dealt with in more detail in the proposals around authorisation and joinder; and in the general proposals promoting effective and sustainable claims resolution.

The limitations of native title

2.57 The Terms of Reference ask the ALRC to consider improvements in the existing native title system under the *Native Title Act*. Accordingly, the Review is not proposing the substitution of the native title claims process with a settlement framework model. The ALRC notes, however, that many claims are now resolved by consent determination (see Chapter 3). Settlement frameworks potentially offer advantages over the current native title system, although the outcomes that can be achieved will

---

55 The Social Justice Commissioner notes that 'in the shadow of dispossession, the current arrangements including agreeing on the membership of the claim group; deciding on who will be the applicant; and determining the boundaries of the claim area can contribute to lateral violence within Aboriginal and Torres Strait Islander communities'. Australian Human Rights Commission, *Submission 1*.

56 *Wyman on behalf of the Bidjara People v State of Queensland (No 4)* [2014] FCA 93 (21 February 2014).

57 *Banjima People v Western Australia (No 2)* (2013) 305 ALR 1.

58 AIATSIS, *Submission 36*.

clearly depend upon a range of circumstances. Nonetheless, there is strong merit in investigating whether elements of settlement frameworks may address the acknowledged limitations in the native title system. Such settlement frameworks might operate either in conjunction with the *Native Title Ac*t or in substitution.

2.58 The Preamble to the *Native Title Act* identifies that several related initiatives to be adopted in conjunction with the Act.

> [T]he form of the NTA as agreed in 1993 was only part of a broader settlement, which also included the Indigenous land fund and the social justice package. The Indigenous land fund was implemented as the Indigenous Land Corporation, but the social justice package was never given effect. Accordingly, the other elements of the settlement, including the recognition of native title rights and interests, have acquired more significance for Aboriginal and Torres Strait Islander peoples than might be obvious from the terms of the NTA. [59]

2.59 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'.[60]

Settlement frameworks

2.60 Several submissions endorsed consideration of settlement frameworks.[61] The National Native Title Council submitted

> the Council has been consistently advocating for the agreement of and implementation of a Broader Land Settlement framework, where native title is a means to an end, not an end in itself—that is native title should be a tool along with other legislative and administrative tools that assist with recognising Indigenous peoples and redressing Indigenous disadvantage.
>
> For some time a Comprehensive Land Claims Settlement policy and legislative package has been needed in Australia. In terms of the ALRC's current reference this would allow Indigenous peoples ... to bypass complex legal proposals to address the inadequacies of the common law and native title jurisprudence to date and address the real issues from an Indigenous perspective. That is having traditional rights to country recognised, agreeing to a fair compensation package whilst being able to facilitate equitable outcomes in the modern economy.[62]

2.61 Several state-based frameworks have emerged:

> These settlements occur largely under the framework of the NTA and therefore have the same issues in relation to connection and authorisation.[63]

---

59 A Frith and M Tehan, *Submission 12*; See also, National Farmers' Federation, *Submission 14*.
60 Just Us Lawyers, *Submission 2*.
61 'So whilst a consent determination or a Court victory might provide formal recognition–for most it provides little else': Queensland South Native Title Services, *Submission 24*.
62 National Native Title Council, *Submission 16*.
63 AIATSIS, *Submission 36*.

2.62 Other models 'opt out' of the *Native Title Act* system.[64] For example, the focus of the *Traditional Owner Settlement Act 2010* (Vic) is on identifying the 'right people for country' rather than a laborious connection requirement.[65] The adoption of agreement-based models may contribute to achieving long-term sustainable outcomes as identified by Guiding Principle 5.

2.63 However, the negotiation of broader settlement frameworks has its own difficulties. Accordingly, it may promote certainty to consider retaining the existing native title framework under the Act but to implement changes within that model.

Overview of proposals

2.64 Chapter 4 sets out the legal requirements to establish native title rights and interests. It outlines the definition of native title in s 223 of the *Native Title Act* and sets out major judicial statements on its interpretation. The chapter then discusses problems in relation to proof of native title and considers whether a presumption of continuity should be introduced. The ALRC does not propose that there be a presumption of continuity, as it considers that it is not necessary to introduce such a presumption in light of other proposed reforms to the definition of native title in the *Native Title Act*.

2.65 Chapter 5 considers the definition of native title in s 223 of the *Native Title Act* more detail, focusing on the approach taken to the meaning of acknowledgment and observance of traditional laws and customs. The ALRC makes proposals for reform of this aspect of the definition. The Inquiry considers that an interpretation of this provision consistent with the beneficial purpose of the *Native Title Act*, and in accordance with the Preamble and Objects of the Act, entails an approach that is 'fair, large and liberal'. As a consequence, the ALRC considers that s 223(1) should not be construed in a way that renders native title rights and interests excessively fragile, or vulnerable, to a finding that there has been loss of their factual foundation.

2.66 In Chapter 5, the ALRC proposes 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. It also proposes that the definition of native title in s 223 of the Act clarify that rights and interests may be possessed under traditional laws and customs where they have been transmitted between groups in accordance with traditional laws and customs. Additionally, the ALRC makes proposals addressing the degree of continuity of acknowledgment and observance of traditional laws and customs that is required to establish native title.

2.67 Chapter 6 considers whether there should be confirmation that 'connection with the land or waters' in s 223(1)(b) of the *Native Title Act* does not require physical occupation or continued or recent use. The ALRC has concluded that amendment of the *Native Title Act* on this issue is not necessary, as there is no lack of clarity in the Act or in the courts' interpretation of the Act. The *Native Title Act* contains two references to 'physical connection', in sections of the Act concerning affidavits in

64 A Frith and M Tehan, *Submission 12*.
65 Ibid.

support of an application, and the registration of claims. The ALRC proposes that these references should be removed, to promote consistency with the courts' interpretation of s 223(1)(b).

2.68 Chapter 7 completes the chapters of the Discussion Paper that are concerned with the definition of native title in s 223(1) of the *Native Title Act*. The proposals outlined in Chapter 5 suggest amendment of the definition of native title in s 223 of the *Native Title Act* by clarifying statements directed to the interpretation of terms that exist in the statutory definition. Those proposals retain the existing text of s 223.

2.69 Proposals in Chapter 7 offer an alternative approach by proposing changes to the text of the definition in s 223(1) of the Act. The changes relate to the terms 'traditional' and 'connection'. These terms are found in the text of s 223 but each has been the source of much complexity. These two amendments are in accordance with the Guiding Principles for the Inquiry.

2.70 Chapter 7 asks a number of questions. The ALRC invites comment about the utility of providing greater legal formality to native title claim group identification and composition prior to the final determination of native title. It seeks views on whether the law relating to connection should include revitalisation of the relationship with country. The ALRC also asks whether, in determining connection, there should be regard to the reasons for any displacement of Aboriginal peoples and Torres Strait Islanders and, if so, how the relevance of those reasons is to be taken into account. The ALRC seeks views on one possible model for reform that would permit the influence of European settlement to be considered.

2.71 Chapter 8 considers whether there should be clarification that native title rights and interests can include rights and interests of a commercial nature. The chapter is in three parts. First, it considers the nature and content of native title rights and interests and whether statutory clarification of the commercial nature of native title is appropriate. Secondly, it considers whether there is a need to adopt a definition of commercial native title rights and interests. Finally, the chapter considers what other native title rights and interests fall within the scope of s 223(1).

2.72 The ALRC proposes that the definition in s 223 reflect the law in *Akiba v Commonwealth*,[66] that native title is a 'right for any purpose'. The ALRC does not propose that the terms 'commercial activities' and 'trade' be defined in the Act. The ALRC also seeks views on whether the exercise of cultural knowledge should be included in the list of native title rights and interests in s 223(2).

2.73 Chapter 9 considers various procedural aspects of the native title process, including: evidence in native title proceedings and consent determinations; the development of policies relating to the involvement of the Commonwealth in consent determinations; the development of principles guiding assessment of connection reports; and the potential for a training and accreditation scheme for native title

66 *Akiba v Commonwealth* (2013) 250 CLR 209.

practitioners. Several questions are also asked about possible reforms of the native title application inquiry process.

2.74 Chapter 10 considers whether any barriers to access to justice are imposed by the authorisation provisions in the *Native Title Act* for claimants, potential claimants and respondents. In this chapter, the ALRC proposes changes to the authorisation provisions of the *Native Title Act* to: allow a claim group to choose its decision-making process; clarify that the claim group can define the scope of the authority of the applicant; simplify the procedure where a member of the applicant is unable or unwilling to act; and clarify that the applicant may act by majority unless the terms of the authorisation provide otherwise.

2.75 These proposals are intended to confirm the ultimate authority of the claim group, and may support efforts to ensure that native title benefits are held for the benefit of the claim group. Chapter 10 also reports on other efforts that are being made to assist claim groups in managing benefits. Finally, this chapter considers how the identification of claim group members, and disputes about claim group composition, affect access to justice for claimants, potential claimants and respondents.

2.76 Chapter 11 considers the party and joinder provisions in 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. In this chapter, the ALRC asks several questions and proposes several reforms designed to reduce burdens that may limit access to justice, while also ensuring that a wide range of interests are adequately represented in native title proceedings. The ALRC also makes proposals about allowing appeals from joinder and dismissal decisions, and about the Commonwealth's participation in proceedings.

Transitional arrangements

2.77 It is important to consider how the reforms proposed above may take effect, and to recognise the need for transitional arrangements. The ALRC will direct further consideration to the areas of transitional arrangements and the commencement of any recommended reforms in its Final Report.

2.78 Under the *Native Title Act*, a determination of native title may be varied or revoked on the ground that 'events have taken place since the determination was made that have caused the determination no longer to be correct' or 'that the interests of justice require'.[67] The ALRC invites comment on these matters.

2.79 In respect of the commencement of reforms, the ALRC notes that there is a common law presumption that legislation does not have a retrospective operation.[68] This presumption informs past practice. The *Native Title Amendment Act 1998*, which included amendments to s 223[69] and s 225,[70] applied to all determinations made after

67 *Native Title Act 1993* (Cth) s 13(5).
68 Thomson Reuters, *The Laws of Australia*, (at 15 April 2013) 25 Interpretation and Use of Legal Sources, '25.1 Statutory Interpretation' [25.1.2230].
69 *Native Title Amendment Act 1998* (Cth) sch 1, item 42.
70 Ibid sch 2 item 80.

the commencement of the amendment.[71] The changes came into operation after evidence had been completed in the trial of *Yorta Yorta*, and were applied by the trial judge in making that determination.[72]

2.80 At this point, the ALRC invites comments about the commencement of any proposed reforms to the claims process; including to the authorisation and joinder provisions. The Inquiry notes some concerns raised by stakeholders. Two submissions from representatives of the mining industry were concerned that there would be changes to the *Native Title Act* with retrospective operation or changes that would unsettle existing agreements.[73]

Question 2–1 Should the proposed amendments to the *Native Title Act* have prospective operation only?

2.81 It is anticipated, that if enacted, any reforms to s 223 of the *Native Title Act* should only apply to determinations made after the commencement of the amendments. Again, this expectation would be in accordance with past practice.

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

2.82 The ALRC invites comment on these two questions and related matters.

---

71 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.

72 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [9].

73 Chamber of Minerals and Energy of Western Australia, *Submission 21*; Minerals Council of Australia, *Submission 8*.

3. Context for Reform Proposals

Contents

Summary

3.1 This chapter sets out the context for this Inquiry and for the proposals for reform made in this Discussion Paper.

3.2 The *Native Title Act* commenced on 1 January 1994. After a slow beginning, native title determinations are now being made at a steady pace with between 35 and 45 determinations made each year from 2011 until 2013.[1] As at 30 September 2014

1 Federal Court of Australia, *Submission 40*.

there have been 301 native title determinations made, and 242 of these have determined that native title exists in at least part of the determination area. More than two-thirds of determinations were by consent.[2] Native title rights are held over approximately 18% of Australia.

3.3 Despite the increased rate of determinations, concerns remain about the time and the cost of proceedings. This chapter reports on the views of participants and finds that there are multiple reasons for the drawn-out processes. Factors contributing to delay include the limited resources of representative bodies, the burden of collecting and assessing connection material and undertaking tenure analysis, the availability of experts and the difficulty of resolving overlapping claims.

3.4 The introduction of intensive case management of native title matters appears to have contributed to the increased rate of determinations. However the ALRC has not been able to determine whether this rate can be sustained; more complex matters may be in the pipeline. Just outcomes may take time to achieve, and it is important that priority be given to recognising and protecting native title, rather than to timeliness.

3.5 Finally, this chapter notes that the recognition of native title was not intended to be the sole answer to the question of Indigenous land justice. Land purchase, alternative settlement and social justice measures are also important policy tools.

Progress to date

3.6 The *Native Title Act* has been in force for 21 years. During that time there have been 301 native title determinations. Of these, 229 were by consent, 36 were litigated, and 36 were unopposed.[3] There have been 96 determinations that native title exists in the entire determination area, 146 determinations that native title exists in part of the determination area, and 59 determinations that native title does not exist in the determination area.[4] The 59 determinations of no native title include the 43 unopposed (non-claimant) determinations. There have been only 13 determinations of no native title made in response to a claimant application.

3.7 The following map and Table 1 show the area of Australia subject to determinations of native title and registered claims for native title. Professor Jon Altman reports that a further 13% of Australia is land claimed under land rights legislation.[5]

---

2 National Native Title Tribunal, *National Native Title Register* <www.nntt.gov.au>.

3 National Native Title Tribunal, *Statistics* <http://www.nntt.gov.au/Pages/Statistics.aspx>. 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.

4 National Native Title Tribunal, *Statistics*, above n 3.

5 J Altman, *Submission 27*.

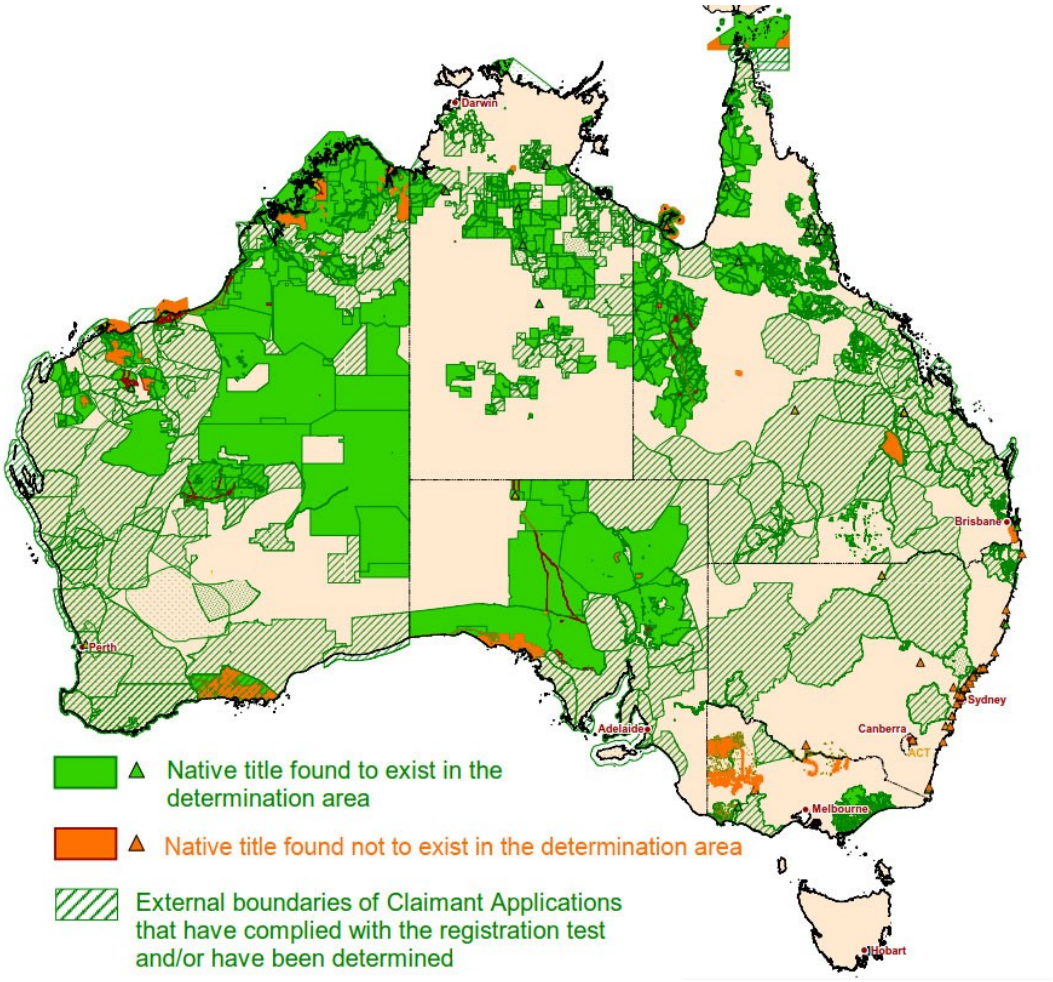

Table 1.

Jurisdiction	Determinations		Area subject to a registered claim	
	Native title found to exist	Native title found not to exist	Land	Sea
ACT	-	-	-	-
Cth	20,407.8	14,300.1	-	67,466.16
NSW	1,790.2	868.8	373,121.82	494.84
NT	183,150.9	964.1	205,924.32	3,145.18
QLD	317,568.3	11,893.2	815,152.11	35,670.79
SA	390,076.9	13,626.7	280,031.20	13,609.38
Tas	-	-	-	-
Vic	15,164.7	11,023.9	24,271.28	27.25
WA	1,018,595.6	55,409.6	1,098,637.50	40,454.27
TOTAL	1,946,754.3	108, 086.4	2,797,138.22	160,867.87

Map and data in Table 1 provided by the National Native Title Tribunal and used with permission.

3.8 Only 46 determinations occurred during the first 11 years of the Act's operation, and 12 of those were non-claimant applications.[6] 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.

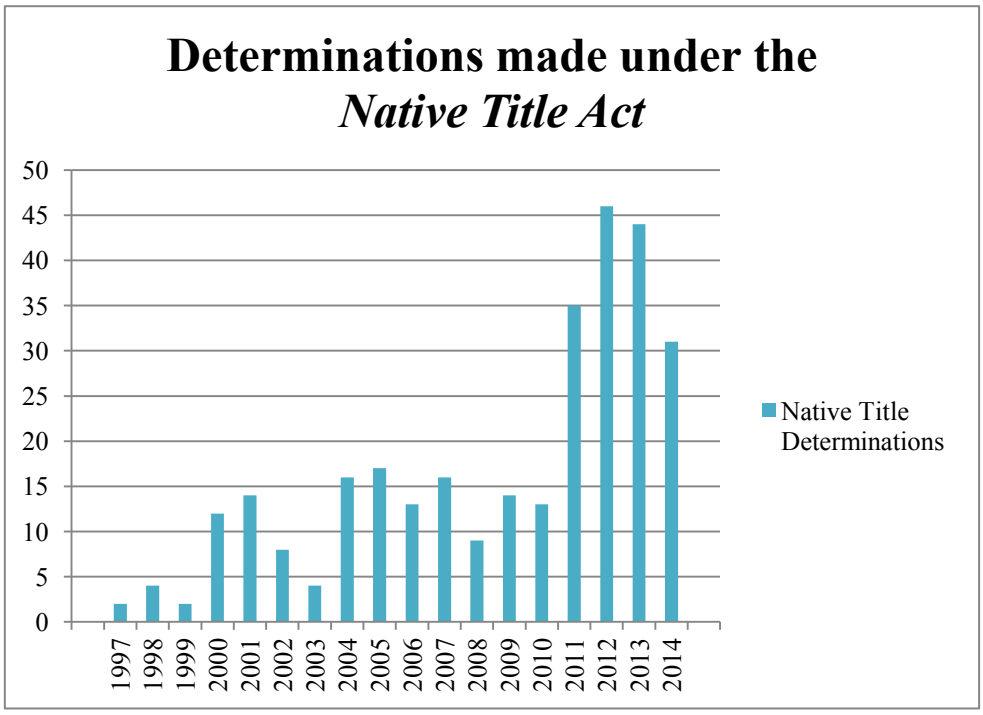

Table 2

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	31*

6 National Native Title Tribunal, *National Native Title Register*, above n 2.

3.9 There are currently 419 native title applications lodged with the Federal Court: 396 claimant applications, 18 non-claimant applications and five compensation applications. There are 285 registered applications. It is expected that many compensation applications will be filed in the future.[7]

3.10 The native title process in each state and territory is affected by the history of the jurisdiction's land rights arrangements. The next section of this chapter briefly outlines the way each jurisdiction has dealt with the question of Aboriginal and Torres Strait Islander rights to land.

New South Wales

3.11 Under the *Aboriginal Land Rights Act 1983* (NSW) (ALRA), vacant Crown land can be claimed by land councils 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 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 Aboriginal Land Council and the land council network has been self supporting since 1998.[8]

3.12 If a land council wishes to sell land, it must get a determination under the *Native Title Act* that there is no native title in the land.[9] There have been 39 non-claimant determinations that native title does not exist in NSW, and only five positive determinations, including the first determination of native title under the *Native Title Act*, *Buck v New South Wales (Dunghutti People)*.[10] There are 21 registered claims.[11]

Queensland

3.13 Under the *Aboriginal Land Act 1991* (Qld) and the *Torres Strait Islander Land Act 1991* (Qld), land that had 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 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 has been transferred under these Acts.[12]

3.14 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.[13]

---

7 AIATSIS, *Submission 36*; Northern Territory Government, *Submission 31*.
8 NSW Aboriginal Land Council, *Our Organisation* <http://www.alc.org.au>.
9 *Aboriginal Land Rights Act 1983* (NSW) s 42.
10 National Native Title Tribunal, *National Native Title Register*, above n 2.
11 Ibid.
12 Department of Natural Resources and Mines, *Land Transfers* <http://www.dnrm.qld.gov.au/land/indigenous-land/land-transfers>.
13 Queensland Government Department of Natural Resources and Mines, *Submission 28*.

3.15 Despite this complexity, there have been more than 100 successful determinations of native title in Queensland. There are a further 66 registered applications, with further applications under preparation.[14]

South Australia

3.16 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.[15] Land rights were also acknowledged in the *Pitjantjatjara Land Rights Act 1981* (SA) and the *Maralinga Tjarutja Land Rights Act 1984* (SA).

3.17 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'.[16] There have been 20 consent determinations that native title exists and there are a further 16 registered claims.[17]

3.18 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'.[18] However, in recent years there have been more overlapping claims and more intra-Indigenous disputes.[19]

Tasmania

3.19 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.

3.20 There have been no determinations of native title in Tasmania and there are no registered claims.[20]

Victoria

3.21 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.[21] The *Traditional Owner Settlement Act 2010* (Vic) (TOSA) provides for 'a recognition and settlement agreement between the State and a traditional owner group entity for an area of public land'.[22] TOSA is discussed further below.

---

14 See, eg, Cape York Land Council, *Submission 7*.
15 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).
16 South Australian Government, *Submission 34*.
17 National Native Title Tribunal, *National Native Title Register*, above n 2.
18 South Australian Government, *Submission 34*.
19 Ibid.
20 National Native Title Tribunal, *National Native Title Register*, above n 2.
21 Thomson Reuters, *The Laws of Australia*, (at 1 April 1997) 1. Aborigines and Torres Strait Islanders '1.3 Land Law' [1.3.412].
22 Explanatory Memorandum, Traditional Owner Settlement Bill 2010 (Vic).

3.22 The Victorian Department of Justice reports 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'.[23] There have been four determinations that native title exists in Victoria, and three that it does not exist. There are currently only two registered claims in Victoria.[24]

Western Australia

3.23 The *Aborigines Act 1889* (WA) empowered the Governor to reserve Crown lands for Aboriginal people. By 1947, 15 million hectares had been set aside.[25] 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'.[26] There was no provision for land claims in Western Australia before the *Native Title Act*.

3.24 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'.[27] There have been 45 determinations that native title exists in at least part of the determination area, including 35 consent determinations.[28] There is a continuing trend towards determinations by consent, with five consent determinations and one litigated determination so far in 2013–14. The Government expects a further 11 consent determinations in 2014–15. It has made a final offer in an effort to settle six claims in the south west of the state, via the Noongar Native Title Settlement.[29]

3.25 There are 81 registered claims in Western Australia,[30] and research is currently being undertaken with the purpose of lodging native title claims in the future.[31]

Australian Capital Territory

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

3.27 There have been no determinations of native title in the Australian Capital Territory, and there are no registered claims.[32]

---

23 Department of Justice, Victoria, *Submission 15*.
24 National Native Title Tribunal, *National Native Title Register*, above n 2.
25 Thomson Reuters, *The Laws of Australia*, (at 1 September 1997) 1 Aborigines and Torres Strait Islanders, '1.3 Land Law' [1.3.310] 2014.
26 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>.
27 Western Australian Government, *Submission 20*.
28 National Native Title Tribunal, *National Native Title Register*, above n 2.
29 Western Australian Government, *Submission 20*.
30 National Native Title Tribunal, *National Native Title Register*, above n 2.
31 See, eg, Central Desert Native Title Services, *Claims—Unclaimed Areas* <http://www.centraldesert.org.au>.
32 National Native Title Tribunal, *National Native Title Register*, above n 2.

Northern Territory

3.28 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.[33]

3.29 There have been 242 determinations of native title in the Northern Territory, and there are a further 100 registered claims.[34]

3.30 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.[35] The Territory has set out *Minimum Connection Material Requirements for Consent Determinations* which streamline the resolution of claims.

Time frames and cost

Concerns about timeliness

3.31 Concerns about cost and timeliness have been prominent in discussion of the *Native Title Act*. 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'.[36] 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'.[37]

3.32 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.[38]

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

---

33 Northern Territory Government, *Submission 31*.

34 National Native Title Tribunal, *National Native Title Register*, above n 2.

35 Northern Territory Government, *Submission 31*.

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

37 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).

38 NSW Young Lawyers, *Submission 58*; Queensland Government Department of Natural Resources and Mines, *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*.

> 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.[39]

3.34 The time frame in this case attracted judicial criticism. Jagot J was scathing about the 17 years that it took to reach a consent determination in this matter:

> the enormous resources and extraordinary length of time involved in this process could have been avoided, in large part, by the bringing to bear at an earlier time of a focus on the outcomes sought to be achieved and the application of common sense, practicality, proportionality, and flexible, constructive and creative thinking …
>
> Native title claims, in common with most litigation but perhaps also particularly given their character, run the risk of the consuming of resources and time well beyond what is reasonable … Recognition of this fact, and of the need for the kind of focus and approach which I have described, is essential to guard against the repetition of examples such as the present case, spanning not years but decades …[40]

3.35 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.[41]

3.36 Stakeholders representing the minerals sector also emphasised the importance of timely and expeditious resolution of native title claims, and certainty for the wider community.[42]

Timeliness and just outcomes

3.37 As noted in Chapter 1, just outcomes may take time to achieve. The Australian Institute of Aboriginal and Torres Strait Islander Studies has cautioned against an excessive focus on timeliness, suggesting that 'sustainable and effective outcomes' may require time to develop,[43] and that 'the integrity of the process requires justice to be prioritised ahead of timeliness'.[44] 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.[45] 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'.[46]

---

39 Anthony 'Tony' Perkins, 'TO Comment' (2014) *Native Title Newsletter*.
40 *Phyball on behalf of the Gumbaynggirr People v A-G (NSW)* [2014] FCA 851 (15 August 2014) [8]–[9].
41 Helen Davison, 'Indigenous Title Claim Settlement "One of the Most Complex" in SA History' *The Guardian*, 2 September 2014 <http://www.theguardian.com>.
42 Chamber of Minerals and Energy of Western Australia, *Submission 21*; Association of Mining and Exploration Companies, *Submission 19*.
43 A Frith and M Tehan, *Submission 12*.
44 AIATSIS, *Submission 36*.
45 'Native Title Report 2007' (Australian Human Rights Commission, 2008) 23.
46 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2012' (Australian Human Rights Commission, 2012) 56.

3.38 Graeme Neate, former National Native Title Tribunal President, notes 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'.[47]

3.39 The ALRC has adopted as a guiding principle that any proposed reforms should encourage timely and just resolution of native title applications.[48] 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.[49]

Length of proceedings

3.40 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. However, these figures do not take into account the common occurrence of claims being withdrawn, consolidated and relodged.[50]

Reasons for lengthy processes

3.41 The ALRC has considered whether the requirements of *Native Title Act* s 223 (and associated case law) 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',[51] 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.[52]

3.42 The ALRC 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.[53] While the length of proceedings can be accurately identified, the 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.[54] The ALRC has also relied on this approach. It is acknowledged that

---

47 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 Glick Lydia (eds), *The Limits of Change: Mabo and Native Title 20 Years On* (AIATSIS, 2012) 188, 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.

48 See Ch 1.

49 See Ch 1.

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

51 Western Australian Government, *Submission 20*.

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

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

54 See, eg, Public Accounts Committee, NSW Parliament, 'Report, Inquiry into Court Waiting Times' (133, June 2002) ch 5.

there are limitations to this approach, particularly in light of the duty of confidentiality that legal representatives have to their clients.

3.43 Importantly, as the Federal Court submitted, the causes of delay have changed over time.[55] In the first 10 years of the Act, there were only 45 determinations of native title. There was uncertainty about the requirements of the Act, and a number of test cases occurred 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'.[56]

3.44 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. There have been 268 determinations in the second 10 years of the Act. There is now significantly more certainty around many aspects of the law,[57] and significantly more of the participants in the system have highly developed skills and expertise—although shortages remain in some areas.[58] The following matters (in no particular order) have been identified by stakeholders as present-day factors contributing to the length of proceedings.

Capacity constraints in representative bodies

3.45 Stakeholders indicated that the limited resources of representative bodies is a cause of delays.[59] Cape York Land Council said that 'financial and capacity constraints definitely pose a barrier for native title outcomes', causing delay and inadequate engagement with clients.[60] The Law Society of Western Australia reported that a contributing factor to the long-running case of *Banjima People v Western Australia (No 2)*[61] was the limited capacity of the representative body, and the claim was only able to be resolved when the claim group paid for private legal representation from the proceeds of agreements with iron ore companies.[62]

Establishing native title

3.46 Many stakeholders indicated that the collection, assessment and hearing of evidence in relation to connection is an important reason for the significant length and

---

55 Federal Court of Australia, *Submission 40*.
56 South Australian Government, *Submission 34*.
57 Ibid.
58 Justice John Mansfield, *Re-Thinking the Procedural Framework* (Speech Delivered to the Native Title User Group, Adelaide, 9 July 2008).
59 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.
60 Cape York Land Council, *Submission 7*.
61 *Banjima People v Western Australia (No 2)* (2013) 305 ALR 1.
62 Law Society of Western Australia, *Submission 9*.

cost of proceedings.[63] The Northern Territory Government reported that 'it had been agreed that the collection of this evidence is enormously resource intensive and has the potential to consume the scarce resources of all parties'.[64] Justice Barker has also noted that hearings in relation to connection take 'enormous' time and costs are high.[65]

3.47 The Attorney General of Western Australia, the Hon Michael Mischin indicated in 2013 that 'there could be a hiatus in consent determinations if the rate of research is not increased and connection deadlines adhered to',[66] which suggests that the preparation of connection reports may be a bottleneck in the process in that state. The Queensland Government said that until at least 2008, connection reports did not address the issues the state considered relevant, causing delay. The Government noted, however, that after it clarified the principles it relied on in assessing connection reports, the quality of reports improved and the rate of resolution of claims increased.[67]

3.48 Queensland South Native Title Services (QSNTS) reported that delays are being caused by the state's recent (August 2013) policy shift on connection requirements, requiring lot by lot evidence of connection.[68] Cape York Land Council said that, while there is strong evidence regarding connection in Cape York, locating and collating that evidence in a way that meets the state's connection guidelines is a 'significant impost'.[69]

The availability of experts

3.49 Several stakeholders indicated that the limited availability of appropriately qualified expert anthropologists contributed to the length and cost of proceedings.[70] Anthropologists collect and collate evidence of connection, assist in the preparation of connection reports, and provide expert evidence in hearings. The Federal Court described the scarcity of experts as 'a constant factor in the causes of delay'.[71]

Tenure analysis

3.50 As part of native title proceedings, state respondent parties will analyse the tenure in the areas under claim, for the purpose of identifying areas where native title

---

63 See Ch 4 for a detailed discussion of what is required to establish native title rights and interests.

64 Northern Territory Government, *Submission 31*.

65 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) 2013 7.

66 Michael Mischin, 'Improving the Native Title System' (paper Presented at National Native Title Conference, Perth, 14 June 2013) 7.

67 Queensland Government Department of Natural Resources and Mines, *Submission 28*.

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

69 Jon C Altman, 'Wild Rivers and Informed Consent in Cape York' (CAEPR Topical Issue No. 02/2010, Centre for Aboriginal Economic Policy Research ANU, 2010).

70 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) 2013; Law Society of Western Australia, *Submission 9*; 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 59, 35.

71 Federal Court of Australia, *Submission 40*.

has been extinguished. State governments have advised the ALRC that this analysis is expensive and time consuming and a significant contributor to the length of proceedings.[72]

3.51 There is some debate as to whether an analysis of current tenure is sufficient for the purpose of a determination of native title[73] or whether historical tenure analysis is necessary.[74] There is also debate as to the timing of tenure analysis.[75] Justice Barker has called for respondents to conduct this analysis soon after the lodgement of a claim.[76]

Difficulties in negotiations

3.52 Two 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.[77]

3.53 One representative body submitted that delays are being caused by the state 'using the carrot of its consent as leverage to secure agreement on other matters'.[78] It reported that the state insisted on an Indigenous land use agreement (ILUA) restricting the rights of the claimants, without offering anything of value in return, as a condition of consenting to a determination.[79]

3.54 A similar concern was raised by the Yamatji Marlpa Aboriginal Corporation in its submission to the Deloitte *Review of Native Title Organisations*.[80] This submission reported that the state was seeking to negotiate a 'complex, whole-of government State ILUA' at a late stage of the claim process, with 'little incentive for groups to enter into the agreement.[81]

Overlapping claims and disputes

3.55 Stakeholders from both claimant and respondent perspectives reported that overlapping claims and intra-Indigenous disputes are significant contributors to the

---

72 South Australian Government, *Submission 34*; Western Australian Government, *Submission 20*; Department of Justice, Victoria, *Submission 15*.

73 Justice John Mansfield, *Re-Thinking the Procedural Framework* (Speech Delivered to the Native Title User Group, Adelaide, 9 July 2008).

74 Michael Mischin, 'Improving the Native Title System' (paper Presented at National Native Title Conference, Perth, 14 June 2013).

75 See further Ch 1.

76 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) 2013.

77 Central Desert Native Title Services, *Submission 26*; Queensland South Native Title Services, *Submission 24*.

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

79 Ibid.

80 This Review is discussed further in Ch 10.

81 Yamatji Marlpa, Submission to Deloitte Access Economics, *Review of the Roles and Functions of Native Title Organisations* 2014.

time taken to resolve claims.[82] Disputes between Aboriginal people sometimes result in a late application for joinder.[83] These applications can disrupt the progress of a claim towards a consent determination, causing upset, delay and considerable expense for all parties.[84]

3.56 Some of the reasons for disputes and overlaps are discussed in Chapter 8. Toni Bauman has reported that there is an 'urgent and unmet demand for skilled and experienced native title ADR [alternative dispute resolution] practitioners, including Indigenous practitioners'.[85]

3.57 In some jurisdictions, the state respondent will not negotiate towards a consent determination over land subject to an overlapping claim.[86] Cape York Land Council 'has expended considerable time, resources and funding in recent years attempting to mediate disputes'. Even where this mediation is successful, delay is inevitable, as is the diversion of resources towards the dispute and away from other claims.[87]

Capacity constraints in government bodies

3.58 Some non-government stakeholders indicated that state government resources are stretched by its obligations to conduct settlement negotiations,[88] assess connection[89] and undertake tenure analysis.[90]

Novel claims

3.59 One stakeholder noted that delays may be caused by 'claims for novel or unusual rights that are unsubstantiated'.[91]

The right to negotiate

3.60 Two stakeholders noted that 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,[92] particularly if there is a risk the claim will fail.

---

82 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*.

83 See, eg, *Davis-Hurst on behalf of the Traditional Owners of Saltwater v Minister for Land and Water Conservation (NSW)* [2003] FCA 541 (4 June 2003); *Isaacs on behalf of the Turrbal People v Queensland* [2011] FCA 828 (25 July 2011); *Far West Coast Native Title Claim v South Australia (No 5)* [2013] FCA 717 (30 July 2013). See further Ch 11.

84 Federal Court of Australia, *Submission 40*.

85 'Bauman, T (Ed), 'Dilemmas in Applied Native Title Anthropology in Australia' 136.

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

87 Cape York Land Council, *Submission 7*.

88 Native Title Services Victoria, *Submission 18*.

89 Queensland South Native Title Services, *Submission 24*; Ergon Energy Corporation, *Submission 5*; Just Us Lawyers, *Submission 2*.

90 Ergon Energy Corporation, *Submission 5*.

91 Western Australian Government, *Submission 20*.

92 Chamber of Minerals and Energy of Western Australia, *Submission 21*; Minerals Council of Australia, *Submission 8*.

3.61 Negotiating with proponents can absorb a great deal of the claim group's time, energy and resources. A group and their representative body may not be able to simultaneously undertake the work involved with a claim, resulting in delay.

Changing court practices

Mediation and intensive court management

3.62 The original *Native Title Act* provided that applications were to be filed in the National Native Title Tribunal (the Tribunal) and determinations of the Tribunal were to be given effect as if they were orders of the Federal Court. Such a scheme was held to be unconstitutional[93] and from 1998 applications were filed in the Federal Court. However the Court would refer each application to the Tribunal for mediation.[94] From 2007 the Tribunal had sole responsibility for mediation, but in 2012, the mediation function was transferred from the Tribunal to the Federal Court.[95]

3.63 The Federal 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'.[96] The Court suggests that this approach has contributed to the increased number of determinations in 2012 and 2013.[97]

3.64 In July 2010, the Federal Court established a priority list for case management. A range of strategies have been used to assist the parties to reach agreement on connection issues, 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, frequently where there is a dispute between Indigenous people;
- mediation on country, where state experts can question claimants; and
- early evidence hearings.[98]

3.65 These initiatives have been generally well received. The Cape York Land Council said the initiatives have increased the rate of determinations and are generally

93 *Brandy v Human Rights & Equal Opportunity Commission* (1995) 183 CLR 245.
94 Neate, above n 47, 196.
95 Federal Court of Australia, *Submission 40*.
96 Ibid.
97 Ibid.
98 Ibid.

beneficial.[99] 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.[100]

3.66 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.

3.67 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.[101]

3.68 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.[102]

Right to negotiate

3.69 Case management of native title claims must be seen in the context of the right to negotiate, which contributes to two unusual features of this type of litigation. First, claims are frequently made not at a time of the claimant's choosing, but in response to a future act notice.[103] If the group does not already have a determination, the right to negotiate is only available to a person who, four months after the notification day, is a registered native title claimant.[104] An Aboriginal or Torres Strait Islander group must lodge a claim in order to 'speak for country' and seek protection of their rights and interests. At this time, the group may not have confirmed its membership, the boundaries of the lands and waters held under Aboriginal or Torres Strait Islander law, or the scope of the rights and interests held. The North Queensland Land Council said 'the idea that within three months a claim could be researched, hold an authorisation meeting, lodge a claim and then one month later pass the registration test is fanciful in the extreme'.[105] It takes several years and significant resources for an expert to prepare a report on these matters, and the group may not have access to the resources or the

---

99 Cape York Land Council, *Submission 7*.
100 Central Desert Native Title Services, *Submission 26*.
101 North Queensland Land Council, *Submission 17*.
102 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2008' 44.
103 *Native Title Act 1993* (Cth) s 29.
104 Ibid s 30(1)(a).
105 North Queensland Land Council, *Submission 17*; See also AIATSIS, *Submission 36*.

expert at the time of the claim. Susan Phillips has suggested that courts need to show patience in these circumstances, where native title applicants can be 'properly understood as respondents to the proceedings of others'.[106]

3.70 Secondly, as noted above, the right to negotiate can affect a claim group's incentive to speedily progress the claim.[107]

Can the increased rate of determinations be sustained?

3.71 It is not clear that the faster rate of determinations can be sustained. Cape York Land Council pointed out that existing claims are more complex than past ones and there are more disputes.[108] Others have agreed that current claims are more difficult than past claims[109] and the National Farmers' Federation noted that many unresolved claims involve disputes about the composition of the claim group and overlap with other claims.[110]

3.72 Justice Barker has suggested that

> the overall success of this next phase is highly dependent upon a tripartite endeavour involving the Federal Court, claims groups and their representatives, and respondent parties, especially governments, and their representatives.[111]

3.73 He calls on the parties to:

- show flexibility, for example regarding non-native title outcomes;
- undertake tenure analysis soon after the lodgement of a claim;
- avoid full-blown hearings on connection by 'better disclosure and exchange of information in the pre-hearing stage'; and
- avoid formulaic requirements for proof of connection.[112]

3.74 He also notes the importance of adequate resourcing.[113]

The Land Fund and social justice package

3.75 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

---

106 Susan Phillips, '"Like Something out of Kafka": The Relationship Between the Roles of the National Native Title Tribunal and the Federal Court in the Development of Native Title Practice' (2002) 2 *Land, Rights, Laws: Issues of Native Title*.

107 Chamber of Minerals and Energy of Western Australia, *Submission 21*; Minerals Council of Australia, *Submission 8*.

108 Cape York Land Council, *Submission 7*.

109 Law Society of Western Australia, *Submission 9*; See also Michael Mischin, 'Improving the Native Title System' (paper Presented at National Native Title Conference, Perth, 14 June 2013) 8; Neate, above n 47, 218.

110 National Farmers' Federation, *Submission 14*.

111 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) 2013 9.

112 Ibid 4–8.

113 Ibid 8.

justice, or to the economic and social disadvantage that is a consequence of dispossession.[114] It was to be accompanied by a land fund and social justice package, thus providing a comprehensive response.[115]

3.76 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'.[116]

3.77 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.[117]

The Land Fund

3.78 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 Fund, administered by the Indigenous Land Corporation (ILC). The purpose of the ILC is 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.[118]

3.79 The Land Fund received appropriations from consolidated revenue for the first 10 years of its operation, and at the end of 2004, the value of the fund was $1.42 billion.[119] The ILC has acquired 5.86 million hectares of land since establishment.[120]

3.80 There are some concerns as to whether the ILC has fulfilled its purpose.[121] Dr Calma said in 2008 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

---

114 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*.

115 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Social Justice and Native Title Report 2013' (Australian Human Rights Commission) 82–3.

116 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2008', above n 102, 46.

117 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.

118 *Aboriginal and Torres Strait Islander Act 2005* (Cth) s 191B.

119 Patrick Sullivan, 'Policy Change and the Indigenous Land Corporation' (Research Discussion Paper 25, AIATSIS) 19.

120 Indigenous Land Corporation, 'Annual Report 2012–13' (2013) 3.

121 Sullivan, above n 119; Catlin, above n 37, 428; 'Native Title Report 2007', above n 45, 47–49.

noted that Indigenous people are concerned about the ILC's focus on economic gain rather than reparation for dispossession.[122]

3.81 Similarly, in 2009, Patrick Sullivan reported that, while the Prime Minister's second reading speech indicated that the purpose of establishing the ILC was 'building and sustaining an adequate stock of land in the hands of indigenous owners currently dispossessed', the Annual Reports of the ILC indicate a focus on 'running its own commercial activities and emphasising employment and training'.[123]

3.82 In 2014, Ernst & Young inquired into 'the effectiveness of Indigenous Business Australia and the ILC … in driving economic development'.[124] The report noted that the purpose of the ILC was compensatory, rather than to pursue commercial activity, and that some of its activities indicated 'a lack of clarity around purpose' that should be addressed.[125] It also noted that 'there is no interest on the part of the Government to change the purpose of the Land Account or the ILC's functions towards commercial activity'.[126]

3.83 In June 2013, the ILC adopted a policy setting out its commitment to 'contribute to the constructive and flexible settlement of native title claims'.[127] 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.[128]

3.84 The policy also indicates that the ILC will

> give preference to working with those States or Territories and NTRBs that have an effective, fair and realistic State or Territory or regional wide framework in place for the settlement of native title claims.[129]

3.85 The ILC reported a number of native title-related activities in 2012–13, although only one of them involved acquiring and divesting property.[130]

The social justice package

3.86 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

122 'Native Title Report 2007', above n 45, 47.
123 Sullivan, above n 119.
124 Ernst & Young, 'Review of the Indigenous Land Corporation and Indigenous Business Australia' (2014) 24.
125 Ibid 11.
126 Ibid 20.
127 Indigenous Land Corporation, above n 120, 27.
128 Indigenous Land Corporation, 'Indigenous Land Corporation Board Endorsed Policy on Support for the Resolution of Native Title Claims'.
129 Ibid.
130 Indigenous Land Corporation, above n 120, 24.

native title'.[131] 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.[132] It suggested that the need for compensation and restitution goes beyond the scope of the National Land Fund, and such compensation should include 'access to revenue derived from the use of land by non indigenous Australians'.[133]

3.87 Without a social justice response, great pressure is placed on the native title system.[134] There have been continuing calls for a social justice package to complement the native title system[135] and to compensate traditional owners whose native title rights have been found to have been extinguished.[136]

3.88 The ALRC's proposals for reforms 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. A fourth element is alternative settlements (discussed below).

Alternative settlement

3.89 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'.[137] The National Native Title Council has also endorsed such an approach.[138]

3.90 In jurisdictions outside Australia, 'settlement' implies not only the resolution of native title claims, but the resolution of broader issues.[139] Professor Mick Dodson has noted that property rights alone will not 'allow Indigenous peoples to determine our economic and social development' and suggested that Indigenous people should be involved in all decision-making forums which impact on the region. On this view, regional settlements 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,

131 Native Title Social Justice Advisory Committee, 'Rights Reform and Recognition' (Aboriginal and Torres Strait Islander Commission, 1995) 1.
132 Ibid 4.32.
133 Ibid 4.36, 4.40.
134 A Frith and M Tehan, *Submission 12*.
135 Australian Human Rights Commission, *Submission 1*.
136 Law Council of Australia, *Submission 35*; National Congress of Australia's First Peoples, *Submission 32*; Law Society of Western Australia, *Submission 9*.
137 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.
138 National Native Title Council, *Submission 16*.
139 Bradfield, above n 137, 2–3.

joint management agreements, service delivery arrangements and measures to strengthen Aboriginal local government.[140]

3.91 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'.[141]

3.92 The Joint Working Group produced *Guidelines for Best Practice, Flexible and Sustainable Agreement Making*. The Guidelines do not define what the scope of a 'broader land settlement' might be, except to note that they can include both native title and non-native title outcomes.[142]

3.93 The *Traditional Owner Settlement Act 2010* (Vic) (TOSA) provides for 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.[143] The Social Justice Commissioner described this agreement as setting 'the benchmark for other states to meet when resolving native title claims'.[144]

3.94 The first settlement under the TOSA was with the Gunaikurnai people, in 2010.[145] 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.[146]

3.95 The Western Australian Government and the South West Aboriginal Land and Sea Council, representing six native title groups—Yued, Gnaala Karla Boodja, South West Boojarah, Wagyl Kaip, Ballardong, and Whadjuk—have, since 2009, been negotiating a settlement in the South West of Western Australia. The matters under negotiation include recognition of the Noongar people as traditional owners, the

---

140 Mick Dodson, 'Indigenous Social Justice Strategies and Recommendations' (Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, 1995).

141 *Native Title Ministers Meeting Communique* 2009.

142 Joint Working Group on Indigenous Land Settlements, *Guidelines for Best Practice: Flexible and Sustainable Agreement Making*, August 2009 5.

143 Department of Justice Justice, *Traditional Owner Settlement Act* <http://www.justice.vic.gov.au/home/your+rights/native+title/traditional+owner+settlement+act>.

144 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2011' (Australian Human Rights Commission, 2011) 4.

145 Department of Justice, Victoria, *Submission 15*.

146 Dja Dja Wurrung Clans Aboriginal Corporation, *Settlement of the Dja Dja Wurrung Native Title Applications under The* Traditional Owner Settlement Act 2010.

transfer of land, funding, joint management of the conservation estate and processes for the protection of heritage.[147]

3.96 The South Australian Government reports that it has had a policy of resolving claims by consent since 2004:

> Eleven claims have been resolved by consent determinations … and, of these, six have involved comprehensive settlement agreements that address broader issues including compensation, sustainability of the Prescribed Body Corporate, and future act issues.[148]

3.97 Some efforts have been made to achieve regional agreements in Queensland, but they do not appear to have been successful.[149] QSNTS has suggested that an alternative settlement framework, similar to the Victorian TOSA, should be discussed.[150]

Compensation for extinguishment

3.98 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.

3.99 First, two state governments raised concerns that changes to the *Native Title Act* could increase the liability of state and territory governments for compensation.[151] The South Australian Government reported that 'virtually all determinations of native title are followed by negotiations or claims for significant compensation for historical extinguishment'.[152]

3.100 The *Native Title Act* provides that where an act extinguishing native title is attributable to the Commonwealth, compensation is payable by the Commonwealth,[153] while the states and territories are liable for compensation when their acts extinguish native title.[154] 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'.[155] The Commonwealth has entered into discussion with the states and territories regarding a Commonwealth contribution to state and territory compensation liabilities, but no final agreement has been reached.[156]

---

147 Western Australian Government, *The South West Native Title Settlement* Land, Approvals and Native Title Unit <http://www.dpc.wa.gov.au>.
148 South Australian Government, *Submission 34*.
149 Graeme Neate 'Negotiating Comprehensive Settlements of Native Title Claims' (Paper Presented at LexisNexis Native Title Law Summit, 2009) 26.
150 Queensland South Native Title Services, *Submission 24*.
151 South Australian Government, *Submission 34*; Western Australian Government, *Submission 20*.
152 South Australian Government, *Submission 34*.
153 *Native Title Act 1993* (Cth) ss 17, 22A.
154 Ibid ss 20, 22G.
155 South Australian Government, *Submission 34*.
156 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.

3.101 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'. [157]

3.102 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'.[158] The ALRC is not aware that such an agreement has been finalised. However in 2010, the Commonwealth entered into a written agreement with Victoria under *Native Title Act* s 200 for the provision of financial assistance to that state 'to enable benefits to be provided to native title claim groups under settlement agreements'.[159] The Commonwealth's financial contribution will not exceed the state's financial contribution.[160] 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'.[161]

3.103 The Western Australian Government has sought a Commonwealth contribution to the proposed settlement with the Noongar community.[162]

3.104 Alternative settlements, and the respective contributions of governments to their funding, are policy matters and the ALRC will not make recommendations in this regard. However it is important to note that both Indigenous leaders and government Ministers have indicated that alternative settlements are preferable to a continued reliance on litigation.[163] 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.

Consistency with other policy settings

3.105 The National Indigenous Reform Agreement (Closing the Gap) is an agreement between the Commonwealth of Australia and all states and territories. It commits 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'.[164]

---

157 Michael Mischin, 'Improving the Native Title System' (paper Presented at National Native Title Conference, Perth, 14 June 2013) 12.

158 Joint Working Group on Indigenous Land Settlements, 'Report to the Native Title Ministers' Meeting 2008-09'.

159 COAG, *National Partnership Agreement on Native Title* cl 27 <www.federalfinancialrelations.gov.au>.

160 Ibid cl 31.

161 Ibid cl 4.

162 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>.

163 *Native Title Ministers Meeting Communique* 2009; National Native Title Council, *Submission 16*.

164 COAG, 'National Indigenous Reform Agreement' 7.

3.106 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.[165]

3.107 On the other hand, obtaining a determination of native title does not guarantee economic opportunity.[166] Much depends on whether the area is rich in minerals,[167] whether the group has an effective body corporate and good governance,[168] and the content of the rights themselves.[169]

3.108 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'.[170] Similarly, Wayne Bergman, CEO of Kred Enterprises, said:

> 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.[171]

3.109 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'.[172]

A holistic approach to reform

3.110 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.

3.111 Nick Duff has identified 11 native title law reform activities since 2007.[173] This places a significant burden on stakeholders, particularly native title representative bodies and service providers. Central Desert Native Title Services said

---

165 AIATSIS, Submission to the Review of Native Title Organisations, 2013.

166 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.

167 Graeme Neate, 'Using Native Title to Increase Indigenous Economic Opportunities' (paper Presented at 5th Indigenous Recruitment and Training Summit, Brisbane, 6 December 2010).

168 Western Australian Government, *Submission 20*.

169 J Altman, *Submission 27*.

170 Warren Mundine, 'Australia Day Address' (2014).

171 Dan Harrison, 'Call to Link Native Title to Aboriginal Economy' *The Sydney Morning Herald*, 28 June 2012.

172 See Ch 1.

173 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.

> 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'. [174]

3.112 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'.[175]

3.113 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 Attorney-General's Department, designed to achieve implementation of the rights set out in the UN Declaration of the Rights of Indigenous People'.[176]

3.114 The Social Justice Commissioner has 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, in 2010 and 2011.[177]

3.115 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'.[178]

3.116 There are also significant post-determination challenges to be addressed, including the effectiveness and funding of prescribed body corporates (PBCs). The Deloitte *Review of Native Title Organisations*[179] and the *Taxation Working Group*[180] addressed some of these issues, but again it is not clear that these activities formed part of a coherent long-term plan for reform.

---

174 Central Desert Native Title Services, *Submission 26*.
175 Association of Mining and Exploration Companies, *Submission 19*.
176 National Congress of Australia's First Peoples, *Submission 32*.
177 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2011', above n 144, 19–20; Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2010' (2010).
178 Goldfields Land and Sea Council, *Submission 22*.
179 Deloitte Access Economics, above n 59.
180 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. It outlines the definition of native title in s 223 of the *Native Title Act* and sets out major judicial statements on its interpretation. The chapter then discusses problems in relation to proof of native title and considers whether a presumption of continuity should be introduced. The ALRC does not propose that there be a presumption of continuity. Instead, it proposes a number of amendments to the definition of native title to address the technicality and complexity of establishing native title rights and interests. These proposals are made in later chapters of this paper.

Establishing native title rights and interests

Recognition of native title in *Mabo [No 2]*

4.2 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.[1]

4.3 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

1 *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 more detail in Ch 2.

traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory'.[2]

4.4 Brennan J set out the conditions for the survival 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;[3] and
- it has not been extinguished by the valid exercise of sovereign power.[4]

4.5 However, where 'any real acknowledgment of traditional law and any real observance of traditional customs' has ceased, 'the foundation of native title has disappeared'.[5]

Defining native title in the *Native Title Act*: s 223(1)

4.6 Following *Mabo [No 2]*, the *Native Title Act* was enacted to provide, among other things, a mechanism for determining native title.[6]

4.7 To establish that they hold native title rights and interests, claimants must be able to satisfy the definition of native title in s 223(1), which is based on Brennan J's judgment in *Mabo [No 2]*.[7] 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.

4.8 Briefly, the definition requires that the native title claimants show, as a matter of fact, 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

---

2 Ibid 58.
3 Ibid 59.
4 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.
5 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 60. See also Perry and Lloyd, above n 4, 22–23.
6 *Native Title Act 1993* (Cth) s 3(c).
7 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 70.

claimed.[8] Additionally, the native title rights and interests must be able to be recognised by the common law.[9] Whether they can be recognised is a question of law.

4.9 This means that native title rights and interests can be determined not to exist because:

- there is no factual foundation for them; or
- they cannot be recognised as a matter of law.

4.10 A determination of native title 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.

4.11 The High Court has emphasised repeatedly that the *Native Title Act* provides the starting point for considering a determination of native title.[10] However, the interpretation of the Act has been guided by the basis upon which native title was first recognised in *Mabo [No 2]*.

4.12 In *Members of the Yorta Yorta Aboriginal Community v Victoria* ('*Yorta Yorta*'), Gleeson CJ, Gummow and Hayne JJ began their discussion of s 223 by emphasising this. They noted that, upon the 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.[11] 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

8 *Native Title Act 1993* (Cth) s 223(1)(a), (b).
9 Ibid s 223(1)(c).
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].

> 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.[12]

4.13 This basis for the recognition of native title has consequences for the construction of the definition of native title in the *Native Title Act*.[13] 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

4.14 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.[14] *Yorta Yorta* provides the High Court's fullest elaboration of how s 223(1)(a) should be construed.[15]

'Traditional' laws and customs

4.15 In *Yorta Yorta*, Gleeson CJ, Gummow and Hayne JJ found that the reference to 'traditional' law and custom in the definition of native title must be understood in light of the proposition that

> 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.[16]

4.16 As a result, the meaning of 'traditional' has been held 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;[17]
- 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;[18]
- 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.[19]

---

12 Ibid [77]. See also *Akiba v Commonwealth* (2013) 250 CLR 209, [9].
13 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [45].
14 *Western Australia v Ward* (2002) 213 CLR 1, [18]; *De Rose v South Australia (No 1)* (2003) 133 FCR 325, [161].
15 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.
16 Ibid [45] (Gleeson CJ, Gummow and Hayne JJ).
17 Ibid [46].
18 Ibid.
19 Ibid [47]. See also Perry and Lloyd, above n 4, 22–23.

4.17 Section 223(1)(a) is in the present tense, directing attention to the present possession of rights and interests.[20] However, Gleeson CJ, Gummow and Hayne JJ in *Yorta Yorta* stated that, nonetheless, the

- rights and interests presently possessed must be possessed under traditional laws and customs—that is, 'the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty';[21]
- 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'.[22]

Laws and customs

4.18 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'.[23]

Society

4.19 In *Yorta Yorta*, Gleeson CJ, Gummow and Hayne JJ interpreted the requirement that rights and interests are possessed under law and custom in the light of their assertion 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.[24]

4.20 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, and may be utilised as a 'conceptual tool' to illuminate the central question of acknowledgment and observance of traditional laws and customs.[25] The

---

20 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [85].
21 Ibid [86].
22 Ibid [87].
23 Ibid [42]. See also *Akiba v Queensland (No 3)* (2010) 204 FCR 1, [171]–[174].
24 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [51]–[53].
25 *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].

following propositions can be identified in relation to the concept of society for native title purposes:

- A society can be seen as the 'repository' of traditional laws and customs in existence since sovereignty.[26] It functions to provide a link between pre-sovereign and contemporary laws and customs.[27]
- Proof of the continuity of a society is insufficient to establish that there has been continuity of a normative system of traditional laws and customs.[28]
- 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"'.[29]
- In determining whether a group of people constitute a society, the central consideration is whether the group acknowledge the same body of laws and customs relating to rights and interests in land and waters.[30] 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'.[31]
- 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.[32]
- 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.[33]

---

26 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [78].

27 Nick Duff, 'What's Needed to Prove Native Title? Finding Flexibility Within the Law on Connection' (Research Discussion Paper 35, AIATSIS, June 2014) 34.

28 *Bodney v Bennell* (2008) 167 FCR 84, [74], [123].

29 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [78].

30 *Sampi on behalf of the Bardi and Jawi People v Western Australia* (2010) 266 ALR 537, [51].

31 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.

32 *Akiba v Queensland (No 3)* (2010) 204 FCR 1, [169].

33 *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].

Relationship between traditional laws and customs and rights and interests

4.21 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.[34]

4.22 There is a relationship between rights and interests and traditional laws and customs. Native title rights and interests are those that find their origin in traditional (pre-sovereign) law and custom.[35] This is because:

> What survived [after 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 to the traditional laws acknowledged and the traditional customs observed by the indigenous peoples concerned.[36]

4.23 Gleeson CJ, Gummow and Hayne JJ also pointed out that the relevant 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.[37]

4.24 The nature and content of native title rights and interests is considered further in Chapter 8.

Section 223(1)(b): Connection with land or waters

4.25 Section 223(1)(b) requires that the claimants, by 'those laws and customs'—that is, the traditional laws and customs referred to in s 223(1)(a)[38]—have a connection with the land or waters. Satisfaction of s 223(1)(b), like s 223(1)(a), is a question of fact.[39]

4.26 The drafting of s 223(1)(b) has been described as 'opaque'.[40] Its origins 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'.[41]

---

34 *Western Australia v Ward* (2002) 213 CLR 1, [18].
35 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [44].
36 Ibid [37].
37 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [84].
38 *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].
39 *Gumana v Northern Territory* (2005) 141 FCR 457, [146]–[147].
40 *Bodney v Bennell* (2008) 167 FCR 84, [163]; *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [87].
41 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [87].

4.27 The High Court in *Ward* stated that a separate inquiry to that required by s 223(1)(a) is demanded by s 223(1)(b).[42] This is so even though the inquiry may depend on the same evidence as is used to establish s 223(1)(a).[43]

4.28 The connection inquiry under s 223(1)(b) requires, 'first an identification of the content of traditional laws and customs and, secondly, the characterisation of the effect of those laws and customs as constituting a "connection" of the peoples with the land or waters in question'.[44] The concept of connection is 'multifaceted, with differing aspects of it being emphasised in differing factual contexts'.[45]

4.29 The laws and customs connecting claimants to land or waters need not exclusively be the laws and customs giving them rights and interests in the land or waters.[46]

Connection and continuity

4.30 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.[47] The Full Court of the Federal Court has observed that this means that connection involves an element of continuity, deriving from 'the necessary character of the relevant laws and customs as "traditional"'.[48]

4.31 Continuity of acknowledgment and observance of laws and customs can manifest connection—that is, connection can be maintained by continued acknowledgment and observance of traditional laws and customs.[49]

4.32 *Bodney v Bennell* 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.[50] In *Sampi v Western Australia*, French J expressed the continuity aspect to the connection inquiry as involving the 'the continuing internal and

---

42 *Western Australia v Ward* (2002) 213 CLR 1, [43].
43 Ibid [18].
44 Ibid [64]; *Bodney v Bennell* (2008) 167 FCR 84, [169].
45 *Bodney v Bennell* (2008) 167 FCR 84, [164].
46 Ibid [169].
47 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [86].
48 *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].
49 *Bodney v Bennell* (2008) 167 FCR 84, [48]; *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [92].
50 *Bodney v Bennell* (2008) 167 FCR 84, [168].

external assertion by [a claimant community] of its traditional relationship to the country defined by its laws and customs'.[51]

4.33 To establish connection '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'.[52] Lack of physical presence does not necessarily mean a loss of connection.[53]

Connection to particular areas within a claim

4.34 The connection inquiry can have a particular topographic focus within the claim area, but connection to an area may be inferred from activities in the surrounding areas.[54] 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.[55]

Section 223(1)(c): Recognised by the common law

4.35 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.[56]

4.36 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.[57]

4.37 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'.[58] If there is no inconsistency, the common law will 'recognise' the rights and interests by giving remedies in support of

---

51 *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].
52 *Bodney v Bennell* (2008) 167 FCR 84, [171].
53 Ibid [172].
54 Ibid [175].
55 Ibid [179].
56 *Western Australia v Ward* (2002) 213 CLR 1, [20].
57 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [77].
58 *Commonwealth v Yarmirr* (2001) 208 CLR 1, [76].

the relevant rights and interests to those who hold them.[59] If there is inconsistency, recognition by the common law will be 'withdrawn'.[60]

4.38 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',[61] or 'clash with the general objective of the common law of the preservation and protection of society as a whole'.[62]

4.39 Recognition may also cease because native title rights and interests have been 'extinguished'.[63] 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.[64]

4.40 Extinguishment is, in this sense, the 'obverse' of recognition.[65] 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'.[66] 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.[67]

4.41 Questions of continuity of acknowledgment and observance of traditional laws and customs,[68] or of a traditional community,[69] pertain to s 223(1)(a), and not s 223(1)(c).[70]

Problems of proof

4.42 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 proposed reforms. It considers that issues with proof of native title should be addressed by amendments to

---

59 Ibid [42]; *Akiba v Commonwealth* (2013) 250 CLR 209, [9].
60 *Western Australia v Ward* (2002) 213 CLR 1, [82].
61 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [77].
62 *Western Australia v Ward* (2002) 213 CLR 1, [21].
63 Ibid. 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].
64 *Western Australia v Ward* (2002) 213 CLR 1, [26], [78]; *Western Australia v Brown* [2014] HCA 8 (12 March 2014) [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.
65 *Akiba v Commonwealth* (2013) 250 CLR 209, [10].
66 Ibid. See also *Western Australia v Ward* (2002) 213 CLR 1, [21].
67 *Congoo on behalf of the Bar-Barrum People No 4 v Queensland* (2014) 218 FCR 358, [35] (North and Jagot JJ).
68 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [92] (Gleeson CJ, Gummow, Hayne JJ).
69 Ibid [111] (Gaudron and Kirby JJ).
70 Ibid [92] (Gleeson CJ, Gummow and Hayne JJ).

the definition of native title in s 223 of the *Native Title Act*. These proposed amendments are detailed in subsequent chapters.[71]

Proof in native title

4.43 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)'.[72] 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'.[73]

Proof in native title determination applications

4.44 Native claims are commenced and conducted as legal proceedings in the Federal Court—they are proceedings under the *Native Title Act*.[74] In those proceedings, claimants bear the persuasive burden of proving all of the elements necessary to establish the existence of native title as defined in s 223.[75] The standard of proof required is the civil standard—the balance of probabilities.[76]

4.45 Native title matters may also be resolved by consent. 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[77] and it appears to the Court to be appropriate,[78] make a native title determination order over the whole or part of a determination area without a hearing.

4.46 In *Yorta Yorta*, the High Court acknowledged that 'difficult problems of proof' face native title claimants when seeking to establish the existence of native title rights and interests—particularly in demonstrating the content of traditional laws and customs as required by s 223(1)(a).[79] However, it also noted that 'the difficulty of the forensic task does not alter the requirements of the statutory provision'.[80]

---

71 See Chs 5 and 7.

72 J D Heydon, LexisNexis, *Cross on Evidence*, Vol 1 (at Service 164) [7010].

73 Ibid [7015].

74 *Native Title Act 1993* (Cth) ss 13(1), 61(1).

75 *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).

76 *Milirrpum v Nabalco* [1972] ALR 65, 119–20; *Mason v Tritton* (1993) 70 A Crim R 28, 42; *Evidence Act 1995* (Cth) s 140.

77 *Native Title Act 1993* (Cth) ss 87(1)(c), 87A(4)(a).

78 Ibid ss 87(1A), (2), 87A(4)(b), (5)(b).

79 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [80] (Gleeson CJ, Gummow and Hayne JJ).

80 Ibid.

4.47 A number of the submissions to this Inquiry emphasised the complexity of establishing that native title exists. For example, Queensland South Native Title Services (QSNTS) argued that s 223 is 'unnecessarily complicated, fragmented and inconsistently interpreted and applied in practice'.[81] Goldfields Land and Sea Council commented upon the 'unnecessary technicality and legalism in native title'.[82]

4.48 However, other stakeholders said that the current legal test for the proof and recognition of native title was not unduly onerous and time-consuming.[83]

A presumption in relation to proof?

4.49 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.[84] Justice French considered 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.[85]

4.50 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.[86]

4.51 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.[87] 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.[88] The amount of evidence required in rebuttal differs between presumptions.[89] Some may require 'some' evidence to be adduced. Others may be rebutted only by adducing evidence 'sufficiently cogent to persuade the tribunal of fact of the non-existence of the presumed fact'.[90]

---

81 Queensland South Native Title Services, *Submission 24*. The Law Council of Australia expressly agreed with QSNTS's position: Law Council of Australia, *Submission 35*.

82 Goldfields Land and Sea Council, *Submission 22*. See also AIATSIS, *Submission 36*; National Congress of Australia's First Peoples, *Submission 32*.

83 Northern Territory Government, *Submission 31*; Western Australian Government, *Submission 20*.

84 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 French J is 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).

85 Ibid.

86 Macquarie Dictionary (Macquarie Library, Revised 3rd Ed, 2001).

87 J D Heydon, LexisNexis, *Cross on Evidence*, Vol 1 (at Service 164) [7240], [7260].

88 Some presumptions of law are irrebuttable. However, the focus here is on rebuttable presumptions. See generally Ibid [7265].

89 Ibid [7290].

90 Ibid [7300].

4.52 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;
- 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.[91]

4.53 Justice French considered that the presumption should operate subject to proof to the contrary.[92]

4.54 Many stakeholders supported the introduction of a presumption,[93] and many of these supported the model proposed by Justice French, in whole or in part.[94]

4.55 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,[95] and would place some of that burden more appropriately on state and territory respondent parties.[96] Related to this, a number of submissions argued that a presumption would reduce delay and speed resolution of claims.[97] Other submissions argued that a presumption would be appropriate on the basis that it is unjust or

---

91 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).

92 Ibid [30].

93 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*.

94 See, eg, NSW Young Lawyers Human Rights Committee, *Submission 29*; Queensland South Native Title Services, *Submission 24*; Native Title Services Victoria, *Submission 18*; Law Society of Western Australia, *Submission 9*; Cape York Land Council, *Submission 7*.

95 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*.

96 National Congress of Australia's First Peoples, *Submission 32*; National Native Title Council, *Submission 16*.

97 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*.

discriminatory to require native title claimants to prove their customary connection to their territories.[98]

4.56 However, the ALRC considers that, rather than proposing a presumption—a reform affecting how facts in issue in native title matters are proved—it is preferable to propose amendments to the definition of native title itself. These are detailed in Chapters 5 and 7. The ALRC agrees with the observation of Mr Angus Frith and Associate Professor Maureen Tehan that the benefits of introducing a presumption must substantially outweigh potential disadvantages.[99] The ALRC considers that such a substantial benefit has not been demonstrated, for a number of reasons. 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. These matters are considered in more detail below.

Effect on resolution of claims by consent

4.57 Introduction of a presumption may affect parties' practices in ways that are detrimental to claim resolution, particularly in relation to resolution of claims by consent.

4.58 Most claims are now resolved by consent.[100] For example, the South Australian Government's submission noted that it has 'only contested one native title matter since the resolution of *De Rose*, and that was set down for trial without going through its [consent determination] process. All other determinations have been by consent'.[101] Similarly, the Northern Territory Government submitted that there had been no substantive litigated claims in the Northern Territory since 2007.[102]

4.59 Some submissions suggested that a presumption would strengthen the position of claimants in negotiations to resolve native title determination applications.[103] However, resolution of claims by consent currently occurs in the context of a state or territory respondent party being in a position to be satisfied of the existence of native title rights and interests on the basis of claimants' provision of 'connection material'—factual material capable of demonstrating the existence of the claimed native title rights and interests.

---

98 National Congress of Australia's First Peoples, *Submission 32*; Native Title Services Victoria, *Submission 18*.

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

100 See Ch 3.

101 South Australian Government, *Submission 34*.

102 Northern Territory Government, *Submission 31*.

103 See, eg, NSW Young Lawyers Human Rights Committee, *Submission 29*; National Native Title Council, *Submission 16*.

4.60 If more limited material sufficient to establish the basic facts of a presumption were to be provided by claimants, the willingness of state and territory respondents to agree to a determination is not clear.[104] In this, the ALRC agrees with the observation of the National Native Title Tribunal that it is not possible to predict whether introducing a presumption would result in 'more, or more timely, consent determinations recognising the existence of native title'.[105]

Will a presumption 'reduce the burden' on claimants?

4.61 It is also unclear that the introduction of a presumption will have the effect of reducing the evidentiary burden on claimants. Even some advocates of a presumption conceded that the projected savings of time and resources rely on respondent parties electing not to rebut it.[106] AIATSIS, for example, cautions that

> There is a risk that little will be gained by a presumption that States actively seek to rebut, by adducing evidence that supports an argument of discontinuity and to which claimants would then be forced to mount proof of continuity in any event.[107]

4.62 The Northern Territory Government submitted that a presumption 'would not obviate the Northern Territory's requirement to assess evidence of connection'.[108] Similarly, the Western Australian Government submitted that it

> would still be obliged to undertake a due diligence process in respect of claims if a presumption of continuity was introduced … It is unlikely the State would compromise due diligence by streamlining its connection assessment process, so in a consent determination context it is unlikely that there would be significant time savings … In a contested context, it is likely that the State or other parties (including competing Indigenous parties) would seek to test the various elements comprising the presumption.[109]

4.63 Stakeholders who supported the presumption noted that claimants would still need to undertake research in the preparation of a claim, including research to establish that the claim group are the right people for the claim area.[110] Time and resources will be needed to investigate these issues. Some stakeholders considered that this would

---

104 In particular, states and territories are likely to consider the compensation implications of a native title determination. The South Australian Government noted that 'virtually all determinations of native title are followed by negotiations or claims for significant compensation for historical extinguishment': South Australian Government, *Submission 34*.

105 National Native Title Tribunal, Submission No 15 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, August 2011. See also Queensland South Native Title Services, *Submission 24*.

106 For example, NQLC state that the presumption may constitute a change for the better and speed up the native title process if, in a significant number of cases, the States and Territories did not seek to rebut the presumption: North Queensland Land Council, *Submission 17*.

107 AIATSIS, *Submission 36*.

108 Northern Territory Government, *Submission 31*.

109 Western Australian Government, *Submission 20*.

110 AIATSIS, *Submission 36*. 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; Kimberley Land Council, *Submission 30*.

still involve a reduction in overall time and expense spent on claim preparation.[111] However, QSNTS considered that

> no decline in the requisite work to prove native title may occur, at least in the short to medium term upon the presumption's introduction. … We suggest that it is sound legal strategy for the claim group to still nevertheless prepare its material in case it needs to evidence facts required to be shown pursuant to ss 223(1)(a)–(b) of the Act in those circumstances where the State is able to provide evidence to rebut that presumption.[112]

Effect on quality of applications

4.64 State and territory governments also expressed concern that a presumption may, variously, promote applications by those who do not hold traditional rights and interests in an area,[113] or affect the quality of the evidence establishing the group and the rights and interests held.[114] The South Australian Government submitted that, in contested matters,

> the Court would not be in receipt of anthropological and historical material explaining the basis of the rights sought and the structure of the native tile group asserting native title. Such a situation does not seem appropriate to deliver just decisions (for either the applicants or the respondents).[115]

Claimants' control of evidence of relationship to land and waters

4.65 The ALRC considers that the introduction of a presumption may have an unfavourable effect on claimants' control of the narrative of their connection to land and waters. AIATSIS raised concerns that, if state and territory respondent parties seek to rebut a presumption, 'claimants will likely be asked to respond to anthropological research by State-commissioned researchers'. They considered that this could 'undermine cohesion within Indigenous communities', and may involve an engagement with claimants, 'without responsibility or capacity to resolve disputes or to understand their location within the broader dynamics of a claimant group or its neighbours'.[116]

4.66 AIATSIS's concerns echoed those raised by the Centre for Native Title Anthropology, which has warned that Aboriginal and Torres Strait Islander people involved in native title claims may lose the 'capacity to control the circumstances in which research about their history and culture occurs … and how it is to be managed in the future'.[117] Such control may be particularly important in factual circumstances such as claims in relation to urban areas, or where there has been significant historical removal of groups from claimed areas. In such cases, it may be beneficial to claimants

---

111 North Queensland Land Council, *Submission 17*; Cape York Land Council, *Submission 7*.
112 Queensland South Native Title Services, *Submission 24*.
113 Northern Territory Government, *Submission 31*.
114 Queensland Government Department of Natural Resources and Mines, *Submission 28*.
115 South Australian Government, *Submission 34*.
116 AIATSIS, *Submission 36*.
117 Centre for Native Title Anthropology, ANU, Submission No 20 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, August 2011.

to themselves contextualise and structure the evidence of their connection to land or waters.[118]

4.67 The South Australian Government also expressed concerns about the role of a respondent party in gathering evidence to rebut a presumption, submitting that, in present negotiations to settle native title matters,

> Claimants are prepared to release their information knowing it will be handled sensitively and on the basis that it will not be disclosed further without their consent … On occasion, State representatives have gone on country with claimants and their representatives to fill gaps in the material.[119]

4.68 However, it observed that 'it is unlikely that this collaboration would be offered if it were for the State to disprove presumptions of continuity'.[120]

Federal Court case management

4.69 The Federal Court's submission detailed case management strategies that have been adopted by the Court to assist parties to reach agreement on connection issues. For example,

> - In South Australia and Queensland the Court 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. …
> - In the Northern Territory, Western Australia, South Australia, Victoria and Queensland the Court has in various matters 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.[121]

4.70 In light of this information, the ALRC considers that some of the assistance that a presumption would provide in narrowing the issues in contention in native title matters has been accomplished through other means.

Inferences in relation to proof of native title

4.71 The ALRC also notes the preparedness of the Court, where appropriate, to draw inferences as to the existence of facts satisfying s 223. Additionally, submissions to this Inquiry suggest that there is an increased preparedness on the part of state and territory respondent parties to draw inferences in the context of agreeing to consent

---

118 See generally Sally Babidge, 'The Proof of Native Title Connection in Absentia' in Toni Bauman and Gaynor MacDonald (eds), *Unsettling Anthropology: The Demands of Native Title on Worn Concepts and Changing Lives* (AIATSIS, 2011) 82; 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.

119 South Australian Government, *Submission 34*.

120 Ibid.

121 Federal Court of Australia, *Submission 40*.

determinations. The ALRC considers that this approach to proof of native title rights and interests is appropriate, and that the increased willingness to draw inferences to satisfy the burden of proof makes the case for the introduction of a formal presumption in native title matters less compelling.

4.72 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.[122]

4.73 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'.[123]

4.74 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'.[124] Unlike a presumption of law, a court is not obliged to draw this inference. However, 'the party proving the basic fact is 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'.[125]

4.75 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.[126] 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.[127]

4.76 Cases since *Yorta Yorta* have elaborated on the 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

---

122 Thomson Reuters, *The Laws of Australia* (at 1 September 2011) 16 Evidence, '16.2 Proof in Civil Cases' [16.2.270].

123 Ibid.

124 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].

125 J D Heydon, LexisNexis, *Cross on Evidence*, Vol 1 (at Service 164) [7215].

126 *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).

127 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [82] (Gleeson CJ, Gummow and Hayne JJ).

and observed. In this, guidance has been taken from the approach to proof of customary rights at English common law.[128]

4.77 To establish the existence of a custom enforceable at common law required, among other things, proof that the custom had existed since 'time immemorial'.[129] 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'.[130]

4.78 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.[131] He observed that

> 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.[132]

4.79 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.[133]

4.80 The approach to the drawing of inferences set out in *Gumana* has been approved in a number of subsequent cases.[134] For example, in *AB (deceased) (on behalf of the Ngarla People) v Western Australia (No 4)*, Bennett J accepted the claimants' submission that

---

128 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.

129 LexisNexis, *Halsbury's Laws of England*, Vol 32 (2012) Custom and Usage.

130 *Gumana v Northern Territory* (2005) 141 FCR 457, [198].

131 Ibid [197]–[202].

132 Ibid [201].

133 Ibid.

134 *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].

> 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.[135]

4.81 State and territory respondent parties, in some circumstances, are also willing to draw inferences in relation to proof of certain facts in native title matters. Indeed, Mr John Catlin has observed that 'consent determinations invariably are a product of a combination of agreed facts and beneficial inferences about the available evidence'.[136] For example, the South Australian Government submitted that it is 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;
- 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.[137]

4.82 In reasons accompanying a determination of native title by consent in *Lander v South Australia*, Mansfield J agreed with 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.[138]

4.83 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'. In this regard, CDNTS submitted, 'there effectively exists an unstated "presumption of continuity" for native title claims in the region'.[139]

---

135 *AB (deceased) (on behalf of the Ngarla People) v Western Australia (No 4)* [2012] FCA 1268 (21 November 2012) [724].

136 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).

137 South Australian Government, *Submission 34*.

138 *Lander v South Australia* [2012] FCA 427 (1 May 2012) [48].

139 Central Desert Native Title Services, *Submission 26*. 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*.

4.84 The Northern Territory Government also submitted that 'in practice, a rebuttable presumption operates in the context of resolution of pastoral estate claims'.[140] 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)'.[141]

4.85 The ALRC considers that it is appropriate for the Court and respondent parties to accept that a 'presumption of fact', or inference, arises on proof of the circumstances set out in *Gumana*. Such an approach to the drawing of inferences will increasingly be necessary if the beneficial purpose of the Act is to be sustained as the date of Crown assertion of sovereignty grows more distant.

140 Northern Territory Government, *Submission 31*.
141 Ibid.

5. Traditional Laws and Customs

Contents

Summary

5.1 To establish that they hold native title rights and interests, native title claimants must satisfy the definition of native title in s 223(1) of the *Native Title Act 1993* (Cth). 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 proposals for reform of this aspect of the definition. It considers that an interpretation of this provision consistent with the beneficial purpose of the *Native Title Act*, and in accordance with the Preamble and Objects of the Act, entails an approach that is 'fair, large and liberal'. As a consequence, the ALRC considers that s 223(1) should not be construed in a way that renders native title rights and interests excessively fragile, or vulnerable, to a finding that there has been loss of their factual foundation.

5.3 The ALRC proposes 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. It also proposes that the definition of native title clarify that rights and interests may be possessed under traditional laws and customs where they have been transmitted between groups in accordance with traditional laws and customs.

5.4 Additionally, the ALRC makes proposals addressing the degree of continuity of acknowledgment and observance of traditional laws and customs that is required to establish native title.

5.5 These proposals address the technicality and complexity of establishing the existence of native title rights and interests. In many respects, they endorse the movement in case law and in negotiations towards flexibility in the evidentiary requirements to establish native title.

Approach to statutory construction of s 223

5.6 Ordinary principles of statutory interpretation dictate the consideration of the purpose of the legislation.[1] 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.[2]

5.7 As noted in Chapter 2, where legislation is identified as being beneficial and remedial, 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'.[3]

5.8 International law principles are also relevant to the approach taken to construing the *Native Title Act*. The High Court has accepted that 'a statute is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law'.[4] Rights to equality and non-discrimination are central principles in human rights law, enunciated in a number of treaties to which Australia is a party.[5]

5.9 Other principles of statutory interpretation are arguably relevant to the construction of the definition of native title rights and interests. For example, AIATSIS pointed to common law principles for interpreting legislation 'root[ed] in the common

---

1 *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].

2 Sean Brennan, 'Statutory Interpretation and Indigenous Property Rights' (2010) 21 *Public Law Review* 239, 252. 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 Department of Natural Resources and Mines, *Submission 28*; Central Desert Native Title Services, *Submission 26*; Native Title Services Victoria, *Submission 18*; North Queensland Land Council, *Submission 17*; Law Society of Western Australia, *Submission 9*.

3 *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].

4 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J).

5 See, eg, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 2, 26; *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) arts 1, 2, 5. See also Australian Human Rights Commission, *Rights to Equality and Non-discrimination* <www.humanrights.gov.au/rights-equality-and-non-discrimination>.

law protection of the rights of citizens against arbitrary exercises of power by the state, especially in relation to property'.[6]

5.10 As noted in Chapter 4, native title rights and interests can be determined not to exist 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]

5.11 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.[9] It is consistent with this principle, and the Preamble and Objects of the Act, to approach the task of recognition of native title rights and interests in a way that does not render them excessively vulnerable to a finding of factual loss. Accordingly, the proposals in this chapter are intended to promote an interpretation of the definition of native title consistent with the purpose of the *Native Title Act*.

5.12 However, the ALRC recognises that not all Aboriginal or Torres Strait Islander peoples will be able to establish that they hold native title under the *Native Title Act*. 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'.[10]

Section 223(1)(a)

5.13 Section 223(1)(a) of the *Native Title Act* requires 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 Torres Strait Islanders. As explained in Chapter 4, the High Court in *Members of the Yorta Yorta Aboriginal Community v Victoria* ('*Yorta Yorta*') has stated that the laws and customs that can be properly described as 'traditional' are those that find their origin in the laws and customs acknowledged and observed at sovereignty.[11]

---

6 AIATSIS, *Submission 36*. See generally Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35 *Melbourne University Law Review* 449.

7 *Native Title Act 1993* (Cth) s 223(1)(a), (b).

8 Ibid s 223(1)(c).

9 Guiding Principle 1: see Ch 1.

10 A number of submissions to this Inquiry highlighted this aspect of the Preamble: see, eg, Queensland Government Department of Natural Resources and Mines, *Submission 28*; Western Australian Government, *Submission 20*; National Farmers' Federation, *Submission 14*. See Ch 3 for further discussion.

11 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [46] (Gleeson CJ, Gummow and Hayne JJ).

5.14 As a result, the meaning of 'traditional' has been interpreted as having a number of aspects:

- 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;[12]
- 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;[13]
- 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.[14]

Accommodation of change to laws and customs

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

5.15 The ALRC proposes 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.

5.16 As a number of submissions to this Inquiry have noted,[15] the current interpretation of the requirement that rights and interests are possessed under traditional laws and customs already allows for some change in those laws and customs. Contemporary laws and customs do not have to be identical to those at sovereignty to be considered traditional. Instead, to be designated traditional, contemporary laws and customs need only have their 'origins' in pre-sovereign laws and customs.[16]

5.17 The High Court in *Yorta Yorta* explicitly deals with the question of evolution and adaptation. There, Gleeson CJ, Gummow and Hayne JJ stated that some change to, or adaptation of, traditional laws and customs will not necessarily be fatal to a native title claim.[17] There is no bright line test that can be offered to judge the significance, in

12 Ibid [46].
13 Ibid.
14 Ibid [47]. See also Melissa Perry and Stephen Lloyd, *Australian Native Title Law* (Lawbook Co, 2003) 22–23.
15 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*.
16 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [46].
17 Ibid [83].

a particular case, of change and adaptation to law and custom.[18] The key question remains 'whether the law and custom can still be seen to be traditional law and traditional custom'.[19]

5.18 Gaudron and Kirby JJ in *Yorta Yorta* 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.[20]

5.19 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 customs.[21] For example, the South Australian Government submitted that the 'evolution of traditional law and custom tends to be accepted in most circumstances but the evolved laws must be in some way referable to those in existence at sovereignty'.[22]

5.20 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'.[23] Other examples of adapted laws and customs have included changes to:

- descent rules: from patrilineal to cognatic;[24] or a shift over time involving an increase in reliance on matrilineal descent;[25]
- laws allowing images relating to country to be painted on canvas rather than on country, and the sale of these artworks;[26]
- the location of initiation rituals,[27] or a cessation of initiation ceremonies on the claimed area;[28]

---

18 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [83].
19 Ibid.
20 Ibid [114].
21 South Australian Government, *Submission 34*; Northern Territory Government, *Submission 31*; Queensland Government Department of Natural Resources and Mines, *Submission 28*; Western Australian Government, *Submission 20*.
22 South Australian Government, *Submission 34*.
23 *Neowarra v Western Australia* [2003] FCA 1402 (8 December 2003) [346].
24 *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].
25 *Bodney v Bennell* (2008) 167 FCR 84, [116].
26 *Neowarra v Western Australia* [2003] FCA 1402 (8 December 2003) [140]–[141].
27 *Dempsey on behalf of the Bularnu, Waluwarra and Wangkayujuru People v Queensland (No 2)* [2014] FCA 528 (23 May 2014) [693]–[694].
28 *Graham on behalf of the Ngadju People v Western Australia* [2012] FCA 1455 (21 December 2012) [146].

- social organisation associated with particular parts of the claimed area—with a number of smaller groups 'coalescing' into larger groupings.[29]

5.21 However, while it is clear that some accommodation of change to laws and customs has been held to be possible, the ALRC considers that the definition of native title in the *Native Title Act* should explicitly acknowledge that traditional laws and customs may adapt, evolve or otherwise develop.

5.22 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'.[30] 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 particular land, subsequent developments or variations do not extinguish the title in relation to that land.[31]

5.23 Toohey J was also of the view that 'an indigenous society cannot … surrender its rights by modifying its way of life'.[32]

5.24 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.[33]

5.25 As the National Congress of Australia's First Peoples noted,[34] the *United Nations Declaration on the Rights of Indigenous Peoples* also recognises the right of Indigenous peoples to 'practise and revitalize their cultural traditions and customs'.

---

29 *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]. In *Bodney v Bennell*, the Full Court found 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.

30 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 61.

31 Ibid 110.

32 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.

33 *Commonwealth v Yarmirr* (2001) 208 CLR 1, [295].

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

This includes the 'right to maintain, protect and develop the past, present and future manifestations of their cultures'.[35]

5.26 A number of 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.[36] For example, Goldfields Land and Sea Council (GLSC) argued that focusing on tradition has the propensity 'to ingrain and incentivise a cultural conservatism in Indigenous communities, effectively discouraging (even punishing) processes of cultural change and renewal that might otherwise occur'.[37]

5.27 Queensland South Native Title Services (QSNTS) identified the tradition requirement as one of the 'inherent deficiencies' with the definition of native title, pointing to the 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.[38]

5.28 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'.[39]

5.29 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.

5.30 An approach that explicitly acknowledges that laws and customs under which native title rights and interests are possessed can evolve, adapt and change is also in keeping with the aim of facilitating Aboriginal and Torres Strait Islander peoples' ability to utilise their native title rights to promote future development.[40] As Mr Angus Frith and Associate Professor Maureen Tehan noted, there is merit in promoting an approach to native title that allows native title holders to 'achieve their economic, social and cultural aspirations'.[41]

---

35 *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.

36 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).

37 Goldfields Land and Sea Council, *Submission 22*.

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

39 North Queensland Land Council, *Submission 17*. See also Goldfields Land and Sea Council, *Submission 22*.

40 This accords with Guiding Principle 5: Supporting sustainable futures. See Ch 1.

41 A Frith and M Tehan, *Submission 12*. See also National Native Title Council, *Submission 16*.

5.31 The High Court in *Ward* has 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.[42]

Explicit recognition that traditional laws and customs may evolve, adapt or develop is also appropriate to ensure that further adaptation or evolution of traditional laws and customs following a determination does not provide grounds for variation or revocation of a determination of native title.[43]

How much change?

5.32 The proposed amendment largely confirms and clarifies the current approach taken by courts to determining whether laws and customs are traditional. However, the ALRC acknowledges that 'difficult questions of fact and degree' will continue to arise in determining whether contemporary laws and customs can be characterised as having their origins prior to the assertion of sovereignty.[44] These are essentially matters of evidence—and inference.

5.33 Establishing that 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 4, 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.[45]

5.34 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

42 *Western Australia v Ward* (2002) 213 CLR 1, [32].
43 *Native Title Act 1993* (Cth) s 13(5).
44 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [88].
45 *Gumana v Northern Territory* (2005) 141 FCR 457, [201].

> 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.[46]

5.35 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'.[47] As AIATSIS argued, Aboriginal and Torres Strait Islander people 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'.[48] 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'.[49]

5.36 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.[50]

5.37 The ALRC further considers that significant weight should be accorded to claimants' perspectives as to the traditional character of their contemporary laws and customs. For example, 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.[51] Such an approach would be in keeping with according the 'highest importance' to the testimony of Aboriginal and Torres Strait Islander witnesses.[52]

---

46 *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].

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

48 AIATSIS, *Submission 36*.

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

50 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [44]. See also *Rubibi Community v Western Australia (No 5)* [2005] FCA 1025 (29 July 2005) [266].

51 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.

52 *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].

Recognition of succession

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

5.38 The ALRC proposes that the definition of native title be amended to make clear that native title rights and interests may be succeeded to by sub-groups within a native title claim group, as well as by a different group or society than that which possessed these rights and interests at sovereignty, where these rights and interests have been transmitted in accordance with traditional laws and customs.

5.39 The ALRC views this proposal as consistent with treating native title rights and interests as durable, rather than excessively fragile, rights. Moreover, 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.[53]

5.40 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]*.[54] There, discussing alienability of native title, Brennan J stated that

> 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.[55]

5.41 Deane and Gaudron JJ stated that

> 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.[56]

5.42 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*. 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. They state:

> 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.[57]

---

53 *Bodney v Bennell* (2008) 167 FCR 84, [121].
54 Justice Robert French, 'Mabo—Native Title in Australia' (2004) 23 *Federal Judicial Scholarship* [27].
55 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 60.
56 Ibid 110.
57 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [44].

5.43 The Full Federal Court has expressed views in obiter about the ability of native title rights and interests to be transmitted through succession. 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 can ultimately be recognised as rights and interests of the transferee society for the purposes of the NTA.[58]

5.44 The issue of succession was also considered in *Western Australia v Sebastian*.[59] In that case, 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 in accordance with the traditional laws and customs of the two relevant Aboriginal clans.[60]

5.45 There was some evidence from submissions that the question of succession is causing practical issues in native title. Cape York Land Council (CYLC) provided an example:

> A recent example involved two neighbouring groups which succeeded to country of an extinct group. Notwithstanding the existence of evidence of exclusive native title rights held by each group, including the right to exclude others, the State queried whether two groups could succeed to the country of another group.[61]

5.46 The ALRC considers that rights and interests that have been succeeded to in accordance with traditional laws and customs should be recognised as native title rights and interests, and that this proposal will clarify the law in this regard.

---

58 *Dale v Moses* [2007] FCAFC 82 (7 June 2007) [120].

59 *Western Australia v Sebastian* (2008) 173 FCR 1.

60 Ibid [104]. See also *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].

61 Cape York Land Council, *Submission 7*. See also P Burke, *Submission 33*; Goldfields Land and Sea Council, *Submission 22*.

Continuity of acknowledgment and observance of laws and customs

Proposal 5–3 The definition of native title in s 223 of the *Native Title Act* should be amended to make clear that it is not necessary to establish that

(a) acknowledgment and observance of laws and customs has continued substantially uninterrupted since sovereignty; and

(b) laws and customs have been acknowledged and observed by each generation since sovereignty.

5.47 The ALRC considers that the requirement that acknowledgment and observance of law and custom must have continued substantially uninterrupted by each generation since sovereignty renders native title claims excessively vulnerable to a finding that the factual basis for recognising rights and interests is no longer in existence.[62] The ALRC considers that it is consistent with the promotion of the beneficial purpose of the Act to make clear that it is not necessary to establish this level of intensity of continuity of acknowledgment and observance of traditional laws and customs.[63]

The idea of continuity

5.48 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 derive a requirement for continuity from its interpretation of the word 'traditional' in s 223(1)(a).[64] They state that the requirement for rights and interests to be

> *possessed* under traditional laws acknowledged and traditional customs observed by the peoples concerned, requires that the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty.[65]

5.49 If this 'normative system' of laws and customs cannot be said to have had a 'continuous existence and vitality' since sovereignty, the 'rights and interests which owe their existence to that system will have ceased to exist'.[66] Gleeson CJ, Gummow and Hayne JJ state 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'.[67] Where there is no such continuity, the laws and customs cannot be revived for the purposes of establishing native title.[68]

---

62 See also Australian Human Rights Commission, *Submission 1*.
63 See also Central Desert Native Title Services, *Submission 26*; Law Society of Western Australia, *Submission 9*.
64 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [47], [87].
65 Ibid [47].
66 Ibid.
67 Ibid [88].
68 Ibid [47].

'Substantially uninterrupted' continuity

5.50 In *Yorta Yorta*, Gleeson CJ, Gummow and Hayne JJ elaborated on the degree of continuity required to establish native title, stating that acknowledgment and observance of laws and customs must have continued 'substantially uninterrupted' since sovereignty: '[w]ere 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'.[69]

5.51 As with evolution or adaptation of laws and customs, the High Court 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'.[70] The qualification was said to recognise the great difficulty of proving continuous acknowledgment and observance of oral traditions over the many years since sovereignty. It also 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'.[71]

5.52 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'.[72] 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'.[73]

Substantially uninterrupted 'generation by generation'

5.53 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'.[74] 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'.[75] Such a requirement has significant implications in terms of the evidence to be produced by claimants.

5.54 The 'generation by generation' test was also discussed in *Bodney v Bennell*. There, the Full Federal Court stated that the correct question as to continuity was

---

69 Ibid [87].
70 Ibid [89].
71 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [89].
72 Ibid [90].
73 Ibid. See also *Bodney v Bennell* (2008) 167 FCR 84, [97].
74 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [46].
75 *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].

'whether the laws and customs have continued to be acknowledged and observed substantially uninterrupted by each generation since sovereignty'.[76]

Have issues with establishing continuity been overcome in practice?

5.55 The Hon Justice Paul Finn has argued that the effect of the interpretation of s 223 in *Yorta Yorta* was to produce a 'discernible hardening of the arteries of the *Native Title Act* … the onus cast on claimants by the *Native Title Act* as so interpreted is a severe one'.[77]

5.56 Submissions by state and territory governments contended that substantially uninterrupted continuity of the acknowledgment and observance of traditional laws and customs is an important aspect of native title law.[78] The South Australian Government was of the view that '[i]t is only appropriate to recognise native title in circumstances where the rights and interests have been uninterrupted (to at least some degree) since sovereignty'. It continued: '[w]here there has been a substantial interruption of traditional law and custom, that should preclude a finding that native title exists'.[79]

5.57 The Western Australian Government submitted that

> Any 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.[80]

5.58 A number of the governments that made submissions expressed the view that the requirement already incorporates appropriate flexibility,[81] noting that the qualification 'substantially' essentially 'makes allowances for the impacts of European settlement upon Aboriginal societies'.[82]

5.59 Moreover, a number of governments submitted that discharging the onus in respect of continuity is not a problem in practice because of a willingness, by both the Court and respondent parties, to draw inferences.[83] 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

---

76 *Bodney v Bennell* (2008) 167 FCR 84, [73].

77 Paul Finn, '*Mabo* into the Future: Native Title Jurisprudence' (2012) 8 *Indigenous Law Bulletin* 5, 6.

78 South Australian Government, *Submission 34*; Northern Territory Government, *Submission 31*; Western Australian Government, *Submission 20*.

79 South Australian Government, *Submission 34*.

80 Western Australian Government, *Submission 20*.

81 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': South Australian Government, *Submission 34*. See also Western Australian Government, *Submission 20*.

82 Western Australian Government, *Submission 20*. However, Frith and Tehan argued to the contrary 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*.

83 South Australian Government, *Submission 34*; Northern Territory Government, *Submission 31*; Queensland Government Department of Natural Resources and Mines, *Submission 28*; Western Australian Government, *Submission 20*.

> without some other (usually historical) evidence suggesting that interruption may be relevant and it is then discussed with the applicant.[84]

5.60 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.[85]

5.61 CYLC submitted that the requirement itself may not pose a problem in that region as 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'. Nonetheless,

> 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.[86]

5.62 CYLC also expressed concern that groups in different parts of Queensland and Australia may not be able to satisfy the requirement.[87]

5.63 The ALRC acknowledges the practical developments that have occurred in the approach taken to evidence of continuity, particularly the use of inferential reasoning to fill gaps in continuity where appropriate. However, it is consistent with the promotion of the beneficial purpose of the Act, and a 'fair, large and liberal' approach to statutory construction, to explicitly provide that it is not necessary to establish that laws and customs have been acknowledged and observed substantially uninterrupted by each generation since sovereignty.[88]

5.64 In this, the ALRC agrees with Black CJ's view, in the Full Federal Court decision in *Yorta Yorta*, that to justify a finding that 'there is a point in time at which acknowledgment and observance has ceased to the extent that the foundation for *any* native title rights or interests has disappeared' requires consideration of a 'very substantial time frame'.[89]

5.65 The ALRC considers that the current degree of continuity of acknowledgment and observance of traditional laws requires claimants to surmount unnecessarily high evidential 'hurdles' to establish native title.[90]

---

84 South Australian Government, *Submission 34*. See also *Lander v South Australia* [2012] FCA 427 (1 May 2012) [48].

85 Western Australian Government, *Submission 20*.

86 Cape York Land Council, *Submission 7*. 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*.

87 Cape York Land Council, *Submission 7*.

88 See also Central Desert Native Title Services, *Submission 26*; Law Society of Western Australia, *Submission 9*.

89 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2001) 110 FCR [61].

90 Transcript of Proceedings, *Risk v Northern Territory* [2007] HCATrans 472 (31 August 2007) (Kirby J).

5.66 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'.[91]

5.67 Many stakeholders considered the continuity requirement to be problematic, with a number calling for the application of the continuity requirement to be limited.[92] 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'.[93] While submissions expressed various views on how limitation of the requirement should be achieved,[94] 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'.[95]

5.68 As a number of submissions pointed out, the requirement for generation by generation proof of continuity of the acknowledgment and observance of laws and customs is problematic because the evidence may be limited or have limitations.[96]

5.69 Frith and Tehan expressed the view that, in many cases, 'the gap in continuity observed by the Court is due to a lack of evidence rather than a lack of acknowledgment and observance of laws and customs.[97]

5.70 The Law Society of Western Australia similarly argued that cases where acknowledgment and observance of laws and customs was 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'.[98]

5.71 AIATSIS argued that the need to meet the requirement in such circumstances 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'.[99]

---

91 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 60.

92 NSW Young Lawyers Human Rights Committee, *Submission 29*; Goldfields Land and Sea Council, *Submission 22*; North Queensland Land Council, *Submission 17*; Cape York Land Council, *Submission 7*.

93 Goldfields Land and Sea Council, *Submission 22*.

94 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*.

95 See, eg, NSW Young Lawyers Human Rights Committee, *Submission 29*; Cape York Land Council, *Submission 7*.

96 See, eg, AIATSIS, *Submission 36*; A Frith and M Tehan, *Submission 12*; Law Society of Western Australia, *Submission 9*. Some respondent interests also acknowledged that the current requirement presents evidentiary problems. See, eg, National Farmers' Federation, *Submission 14*.

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

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

99 AIATSIS, *Submission 36*.

5.72 Other submissions argued that the requirement for substantially uninterrupted continuity of the acknowledgment of traditional laws and observance of traditional customs is inherently unconscionable or unjust given the history of colonisation.[100]

Continuity of society

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

5.73 The ALRC proposes that the definition of native title should be amended to make clear that continuity of a society is not an independent requirement to establish native title. Again, this proposal seeks to overcome an overly technical approach to statutory construction.

5.74 As outlined in Chapter 4, the High Court in *Yorta Yorta* considered there to be 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.[101]

5.75 The ALRC considers that its Proposal 5–4 is in keeping with Federal Court consideration of the relevance of society to establishing native title rights and interests. The Full Court in *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* has emphasised that the term 'society' is not found in the words of the Act, and is to be used as a conceptual tool[102] in the application of the words of the *Native Title Act.* The proposal is intended to further clarify that establishing a society is relevant only as a conceptual tool to assist in answering the central definitional question of whether there is acknowledgment and observance of traditional laws and customs under which rights and interests are possessed.

100 See, eg, North Queensland Land Council, *Submission 17*; A Frith and M Tehan, *Submission 12*. See Ch 7 for further discussion.

101 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [51]–[53].

102 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [78].

5.76 Justice Paul Finn has commented that the society requirement has created a 'problematic and quite time consuming distraction' in native title litigation.[103] He referred to his own judgment in a claim over the Torres Strait, *Akiba v Queensland (No 3)*, to illustrate this difficulty, noting that

> The Islanders' primary case was that they were one society; the Commonwealth's, that they were four societies, these representing the four island groups involved in the hearing; and the State of Queensland alleged there were thirteen societies, each being one of the thirteen inhabited islands.[104]

5.77 In *Akiba*, Finn J found that the applicant had established its case that it comprised one society. However, he noted that:

> There is an irony in this … [T]he answers to the question of native title rights and interests—which is, after all, the concern of the NT Act—would in all probability be the same whether my conclusion had been one, or four, or thirteen societies.[105]

5.78 Dr Paul Burke argued that society should not be seen as an independent element of proof for native title:

> If claimants prove that they, as a group, have been following a coherent body of traditional laws and customs relating to land that is substantially continuous with the pre-contact era, they would have, *ipso facto*, established that there had been and continues to be a relevant society out of which laws and customs arose. In other words, if the claimant group demonstrates the continuity of a body of traditional laws and customs, it will have demonstrated that it forms a 'society' or that it is part of a 'society'. On this view, '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.[106]

5.79 The South Australian Government argued that there was no need for reform in this area, noting also the development of the jurisprudence related to society:

> In practice, the apparently difficult test proposed by the High Court in *Yorta-Yorta* has not proved onerous. For example the cultural differences between native title holding groups in *Akiba* did not prevent the Court describing the group as a single normative society.[107]

5.80 However, a number of submissions to this Inquiry were critical of the use of society in native title law. Frith and Tehan submitted that decisions related to society 'have generally tended to limit the prospect that native title applicants can establish native title'.[108] GLSC submitted that the 'society issue is a prime example of the

---

103 Finn, above n 77, 6.
104 Ibid.
105 Ibid 7, quoting *Akiba v Queensland (No 3)* (2010) 204 FCR 1.
106 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*.
107 South Australian Government, *Submission 34*.
108 A Frith and M Tehan, *Submission 12*.

unfortunate development of quite unnecessary technicality and legalism in native title'.[109]

5.81 CYLC reported practical difficulties with the approach taken to society, submitting that

> The issue of identification of the relevant 'society' has caused considerable delays in some Cape York claims, although recent case law appears to have improved the situation somewhat. Anthropological evidence obtained for Cape York indicates that there may be a number of different 'societies' for a particular group of native title claimants, within which the group 'acknowledges the same body of laws and customs relating to rights and interests in land and waters'. A number of early Cape York determinations were based on societies at the language-named group level. However, it is arguable that those groups may also be part of broader 'regional' groupings which still meet native title requirements.[110]

5.82 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 practiced by a 'normative' society.[111]

5.83 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'.[112] The Young Lawyers Human Rights Committee argued that

> allowing native title to be tested on a concept of society ultimately involves superficial value judgments about Indigenous ways of life, and inappropriately measures traditional, nomadic society against the legal ideas and institutions of a 'civilised' society.[113]

Implications for s 223(1)(b)

5.84 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

---

109 Goldfields Land and Sea Council, *Submission 22*.
110 Cape York Land Council, *Submission 7*.
111 Law Council of Australia, *Submission 35*.
112 Goldfields Land and Sea Council, *Submission 22*.
113 NSW Young Lawyers Human Rights Committee, *Submission 29*.

traditional laws and customs referred to in s 223(1)(a)[114]—have a connection with the land or waters.

5.85 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 that

> 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.[115]

The ALRC considers that it follows from Proposal 5–3 that a commensurate approach should be taken to establishing connection for the purpose of satisfying s 223(1)(b).[116]

114 *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].

115 *Bodney v Bennell* (2008) 167 FCR 84, [168].

116 See Ch 7 for an alternative approach to connection in s 223(1)(b).

6. Physical Occupation

Contents

Summary

6.1 Section 223(1)(b) of the *Native Title Act 1993* (Cth) requires an Aboriginal or Torres Strait Islander claim group to show that, by their traditional laws and customs, they have a connection with the land and waters claimed.

6.2 The ALRC has been directed to inquire into whether there should be confirmation that 'connection with the land or waters' in s 223(1)(b) does not require physical occupation or continued or recent use. The courts have consistently stated that connection is maintained by the continued acknowledgment of traditional laws, and by the observance of traditional customs.[1] Evidence of acknowledgment and observance may include activities on the land, but the courts have been clear that physical presence is not necessary.[2] The ALRC has concluded that amendment of the *Native Title Act* on this issue is not necessary, as there is no lack of clarity in the Act or in the courts' interpretation of the Act.

6.3 The *Native Title Act* contains two references to 'physical connection', in sections of the Act concerning affidavits in support of an application, and the registration of claims. The ALRC proposes that these references should be removed, to promote consistency with the courts' interpretation of s 223(1)(b).

Connection by laws and customs

6.4 The definition of native title in s 223 of the *Native Title Act* refers to interests in relation to land and waters possessed under traditional laws and customs where Aboriginal peoples or Torres Strait Islanders 'by those laws and customs, have a

1 *Bodney v Bennell* (2008) 167 FCR 84, 96; *De Rose v South Australia (No 2)* (2005) 145 FCR 290, 306; *Western Australia v Ward* (2000) 99 FCR 316, 382.

2 *Western Australia v Ward* (2002) 213 CLR 1, 85-86.

connection with the land or waters'. These words are taken from the judgment of Brennan J in *Mabo v Queensland [No 2]*: 'native title … [is] ascertained according to the laws and customs of the indigenous people who, by those laws and customs, have a connection with the land'.[3] In *Members of the Yorta Yorta Community v Victoria*, the High Court held that the phrase 'by those laws and customs' indicates that the 'connection' that must be shown is connection sourced in Aboriginal and Torres Strait Islander laws and customs.[4] The Full Federal Court in *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* ('*Alyawarr*') said 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.[5]

6.5 When traditional laws and customs confer rights and responsibilities in relation to land, that creates connection as required by s 223(1)(b).[6] The connection, or relationship, between people and country includes the obligation to care for country and the right to speak for country.[7]

6.6 The courts have held that s 223(1)(b) requires the claim group to establish that they have had the connection with the land or waters from the time of sovereignty.[8] This is because the connection must be by their traditional laws and customs, and traditional laws and customs are those that have their origin in pre-sovereignty law and custom.[9]

6.7 Again, in *Alyawarr,* the Full Federal Court said:

> The use of 'connection' as emphasising a requirement to show continuity of association with the land by observance and acknowledgment of traditional law and custom relating to it gives proper recognition to its origins in the *Mabo* judgment. It involves the continuing assertion by the group of its traditional relationship to the country defined by its laws and customs.[10]

6.8 A substantial interruption in the observance of laws and customs in relation to country will result in a failure to establish connection as required by s 223(1)(b).[11]

---

3 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 70.
4 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 456.
5 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, 469.
6 *De Rose v South Australia (No 2)* (2005) 145 FCR 290, 323.
7 *Western Australia v Ward* (2002) 213 CLR 1, 64.
8 *Sampi v Western Australia* [2005] FCA 777 (10 June 2005) [1079]; *Neowarra v Western Australia* [2003] FCA 1402 (8 December 2003) [353]; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 447; *Western Australia v Ward* (2000) 99 FCR 316, 382.
9 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 444, 447. For a more detailed examination of what it means for a law to be 'traditional', see Ch 4.
10 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, 469–470.
11 *Bodney v Bennell* (2008) 167 FCR 84, 132.For a more detailed examination of 'substantial interruption', see Ch 5.

Establishing connection

6.9 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.[12]

6.10 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.[13]

6.11 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[14] and knowledge of the land and the Dreamtime beings that created the land.[15] For example, in *Western Australia v Ward* ('*Ward FFC*'), the 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.[16]

6.12 The *Federal Court Rules 2011* (Cth) make specific provision for the giving of evidence by way of singing, dancing and storytelling.[17]

6.13 Using language is a way of observing law and custom, and may connect people with country.[18] 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'.[19]

---

12 Ibid 129.
13 *Western Australia v Ward* (2000) 99 FCR 316, 382.
14 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.
15 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.
16 *Western Australia v Ward* (2000) 99 FCR 316, 382.
17 *Federal Court Rules 2011* (Cth) r 34.123.
18 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) 38; *Ward v Western Australia* (1998) 159 ALR 483.
19 *Ward v Western Australia* (1998) 159 ALR 483, 525.

6.14 It is not necessary to adduce evidence of connection to every part of the claim area. A court may draw inferences from the evidence as a whole and from evidence of connection to surrounding or neighbouring areas.[20]

Evidence of physical occupation, continued or recent use

6.15 In *Ward FFC*, the Full Federal Court considered whether connection with land and waters could be maintained in the absence of physical presence.[21] The Court concluded that, while actual physical presence provides evidence of connection, it is not essential for establishing native title under *Native Title Act* s 223(1).

6.16 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.[22] The Court confirmed that the absence of evidence of recent use, occupation or physical presence does not mean that there is no connection with the land or waters.[23]

6.17 In *De Rose v South Australia (No 2)* ('*De Rose (No 2*)'), the Full Federal Court held that

> 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.[24]

6.18 In *Moses v Western Australia*, the Full Federal Court confirmed that 'physical presence is not a necessary requirement for connection'.[25]

Physical occupation and the identification of native title rights and interests

6.19 A determination of native title must include a determination of the nature and extent of the native title rights and interests in the area.[26] 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 of fact, to be determined on a case by case basis.[27] Evidence of physical possession, occupation and use could be relevant to the question of whether the rights and interests

---

20 *Moses v Western Australia* (2007) 160 FCR 148, 224.
21 *Western Australia v Ward* (2000) 99 FCR 316.
22 *Western Australia v Ward* (2002) 213 CLR 1, 86.
23 Ibid.
24 *De Rose v South Australia (No 2)* (2005) 145 FCR 290, 306; see also *Dale v Moses* [2007] FCAFC 82 (7 June 2007) [306].
25 *Moses v Western Australia* (2007) 160 FCR 148, 222.
26 *Native Title Act 1993* (Cth) s 225.
27 *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.

include a right to exclude others,[28] or other rights. For example, in *Banjima*, the Court 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.[29]

6.20 The courts have repeatedly 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.[30]

6.21 In the Issues Paper, it was noted that 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'.[31] 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.[32] The Court did not require evidence of use, but it did require evidence of connection.

6.22 The Court did confirm 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 …[33]

No clarification of s 223

6.23 The ALRC considers that it is not necessary to clarify *Native Title Act* s 223. When codifying, confirming or clarifying an area of settled law, there is a risk of disturbing the settled law, causing uncertainty and unnecessary litigation.

6.24 Several stakeholders suggested that the *Native Title Act* should be amended for consistency with *De Rose (No 2)*.[34] 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

---

28 *Banjima People v Western Australia (No 2)* [2013] FCA 868 (28 August 2013) [686], [693].

29 Ibid [775].

30 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 455; *Neowarra v Western Australia* [2003] FCA 1402 (8 December 2003) [40]; *Rubibi Community v Western Australia (No 5)* [2005] FCA 1025 (29 July 2005) [21]; *Banjima People v Western Australia (No 2)* [2013] FCA 868 (28 August 2013) [386].

31 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Issues Paper No 45 (2013); referring to *Akiba v Queensland (No 3)* (2010) 204 FCR 1, 168, 172.

32 *Akiba v Queensland (No 3)* (2010) 204 FCR 1, 168, 173.

33 Ibid 164.

34 Just Us Lawyers, *Submission 2*; Australian Human Rights Commission, *Submission 1*.

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.[35]

6.25 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'.[36] 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'.[37] 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.

6.26 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. Further discussion of these requirements and the ALRC's proposals in this regard, are in Chapter 4.

The affidavit supporting a claimant application

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

6.27 The *Native Title Act* includes two references to physical connection that the ALRC considers may be inconsistent with the courts' interpretation of s 223 on this issue. The ALRC proposes that these references should be removed.

6.28 Claimants are required to provide an affidavit supporting their application. This affidavit must contain

> a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist and in particular that … the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.[38]

35 South Australian Government, *Submission 34*; Northern Territory Government, *Submission 31*; Goldfields Land and Sea Council, *Submission 22*; Western Australian Government, *Submission 20*; National Farmers' Federation, *Submission 14*; Law Society of Western Australia, *Submission 9*.

36 Cape York Land Council, *Submission 7*.

37 Just Us Lawyers, *Submission 2*.

38 *Native Title Act 1993* (Cth) s 62(2)(e)(iii).

6.29 Section 62(1)(c) provides that the affidavit may contain details of 'any traditional physical connection' with the land or waters had 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.

6.30 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.[39] 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,[40] maintaining traditional customs and ceremonies,[41] maintaining stories and allocating responsibilities,[42] faithfully performing obligations under traditional law[43] and the continuing internal and external assertion by the group of its traditional relationship with country.[44] The inclusion of physical connection in s 62 and the omission of spiritual, social and cultural evidence of connection gives an apparent priority to physical connection that does not reflect the case law or the requirements of s 223.

The registration test

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

6.31 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 such a requirement is inconsistent with s 223 and the courts' interpretation of that section and proposes that it should be removed.

6.32 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.[45] The native title claim group is then entitled to certain rights, including the right to negotiate under *Native Title Act* s 31.

---

39 AIATSIS, *Submission 36*.
40 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 59–60; *Western Australia v Ward* (2000) 99 FCR 316, 382.
41 *Western Australia v Ward* (2000) 99 FCR 316, 382.
42 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, 469–470.
43 *De Rose v South Australia (No 2)* (2005) 145 FCR 290, 306–307.
44 *Sampi v Western Australia* [2005] FCA 777 (10 June 2005) [1079].
45 *Native Title Act 1993* (Cth) s 190A(6).

6.33 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.[46] 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.[47]

6.34 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.[48] 'Traditional physical connection', in this instance, means that the connection is in accordance with the laws and customs of the group.[49]

6.35 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.

6.36 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.[50]

6.37 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.

6.38 Section 190B(7) is one of the few parts of the 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. While this acknowledgment may have some 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.

---

46 *Native Title Act 1993* (Cth) s 190B(5).

47 *Martin v Native Title Registrar* [2001] FCA 16 (19 January 2001) [26]; *Corunna v Native Title Registrar* [2013] FCA 372 (24 April 2013).

48 *Native Title Act 1993* (Cth) s 190B(7).

49 *Gudjala People No 2 v Native Title Registrar* [2007] FCA 1167 (7 August 2007) [89].

50 *Bodney v Bennell* (2008) 167 FCR 84, 104–105; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 456–457.

7. The Transmission of Aboriginal and Torres Strait Islander Culture

Contents

Summary

7.1 This chapter completes the sections of the Discussion Paper that are concerned with the definition of native title in s 223(1) of the *Native Title Act*. The chapter is in two parts. The first considers a partial redefinition of s 223(1). The second part considers the framing of 'connection'. In that context, it examines whether revitalisation of Aboriginal and Torres Strait Islander laws and customs is to be distinguished from revival of native title. The second part also considers whether facts relating to European settlement may be considered when determining if Aboriginal peoples and Torres Strait Islanders have a connection with the land and waters claimed.

7.2 The proposals outlined in Chapter 5 suggest amendment of s 223(1) of the *Native Title Act* by clarifying statements directed to the interpretation of terms that exist in the statutory definition.[1] Those proposals retain the existing text of s 223.

7.3 Proposals in this chapter offer an alternative approach by suggesting changes to the text of the definition in s 223(1).[2] The changes relate to the terms 'traditional' and 'connection'. These terms are found in the text of s 223 but each has been the source of

1 See Proposals in Ch 5.
2 See Proposals 7–1 and 7–2.

much confusion.[3] Each has attracted elaborate jurisprudence in an attempt to comprehensively determine its meaning. The relevant law is outlined in Chapters 4, 5 and 6. These proposed amendments are consistent with defining native title rights and interests in a manner that gives effect to the recognition and protection of native title.

7.4 In the first part of this chapter, the ALRC invites comment about the utility of providing greater legal formality to native title claim group identification and composition prior to the final determination of native title.

7.5 In the second part of this chapter, the ALRC seeks views on whether the law relating to connection should include revitalisation of the relationship with country. The ALRC also asks whether, in determining connection, there should be regard to the reasons for any displacement of Aboriginal peoples and Torres Strait Islanders and, if so, their relevance. The ALRC seeks views on one possible model for reform that would permit the influence of European settlement to be considered.

Removing 'traditional'

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

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

> The expression ***native title*** or ***native title rights and interests*** means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
>
> (a) the rights and interests are possessed under the laws acknowledged, and the 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.

7.6 In the Issues Paper the ALRC asked whether there should be a definition of traditional or traditional laws and customs in s 223 of the *Native Title Act*, and if so, what this definition should contain.[4] Chapter 5 proposes that the Act clarify that traditional laws and customs may adapt, evolve or otherwise develop.[5] Many submissions attested to the difficulties of interpretation of the term.

---

3 See, eg, Lisa Strelein, 'From Mabo to Yorta Yorta: Native Title Law in Australia' (2005) 19 *Washington University Journal of Law and Policy* 225.

4 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Issues Paper No 45 (2013) Q 11.

5 Proposal 5–1.

7.7 The ALRC proposes that the term 'traditional' be removed from the text of s 223(1)(a). The term has been assigned multiple functions in the jurisprudence. It is a characterisation of Aboriginal and Torres Strait Islander law and custom, but also the means to locate law, custom and connection in a pre-sovereignty timeframe. In Chapter 5, the proposal regarding 'traditional' centres on how traditional law and custom, and native title rights and interests in land and waters, can evolve and adapt over time.[6] 'Traditional' also plays a role in the identification of the 'right people for country'.

7.8 Proposal 7–1 removes the word 'traditional' from s 223 of the *Native Title Act*. First, deletion of the term is suggested in view of the complexity of its interpretation in case law. Secondly, the term is often associated with rigid concepts, such as rights 'frozen in time'.[7] Thirdly, the term 'traditional' may not reflect contemporary views of Aboriginal and Torres Strait Islander law and custom.[8] Finally, the proposal has regard to Australia's statement of support for the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).[9]

7.9 If the term is removed, it could be replaced by a phrase that locates the origins of law and custom in the period prior to the assertion of sovereignty.[10] The amended definition focuses on current law and custom in line with the present tense of the wording in s 223(1)(a), while operating in conjunction with an amended definition of connection in s 223(1)(b).

7.10 The term 'traditional' is not simply a description of law and custom. Case law establishes several requirements emanating from s 223(1)(a). Evidence must establish the existence of the claim group's laws and customs which have normative content.[11] Typically, some evidence is required of the detail of law and custom to identify the 'nature and content' of native title,[12] and for proving connection with land and waters.[13]

7.11 In addition to proving that the claimants currently acknowledge law and observe custom, those laws and customs must be 'traditional'.[14] 'Traditional' has been a general basis for legal recognition of Aboriginal and Torres Strait Islander peoples.[15]

---

6 See discussion in Chapters 4 and 5.

7 National Native Title Council, *Submission 16*.

8 'A definition of traditional that does not acknowledge the natural evolution of culture and change under British and Australian governments, is discriminatory to Aboriginal and Torres Strait Islanders Peoples as it persecutes our Peoples for matters outside of our control.' National Congress of Australia's First Peoples, *Submission 32*.

9 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).

10 The suggested phrase is 'in the period prior to the assertion of sovereignty'.

11 *Gumana v Northern Territory* (2005) 141 FCR 457, [147].

12 Ibid.

13 Ibid [148].

14 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [43]–[45]. See the more complete discussion in Chapters 4 and 5.

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

7.12 The movement to integrate aspects of Aboriginal and Torres Strait Islander law and custom within the Australian legal system has been a gradual process. The ALRC Report, *Recognition of Customary Law*, was an important milestone in this regard.[16] Writing in 1986, the ALRC noted:

> the fact remains that the recognition of Aboriginal customary laws by the general law has continued to be erratic, uncoordinated and incomplete.[17]

7.13 The ALRC concluded that 'the arguments in favour of recognition establish a case for the appropriate recognition of Aboriginal customary laws by the general legal system'.[18] The ALRC, however, 'treated the question of customary rights to land as outside the scope of its inquiry'.[19] Since then native title has been recognised, and the concept finds expression in the *Native Title Act*.

7.14 The concept of 'traditional' marks the threshold of entitlement with respect to native title, as the Full Federal Court in *Bodney v Bennell* stated:

> If this were not the case, a great many Aboriginal societies would be entitled to claim native title rights even though their current laws and customs are in no meaningful way traditional.[20]

7.15 Currently, therefore, the process of recognition of native title is strongly aligned to the requirement that the laws and customs be 'traditional'.[21] Chapter 5 indicates that, in *Yorta Yorta*, 'traditional' has been held to comprise three components:

> Means of transmission: the laws and customs are passed from generation to generation, usually by word of mouth and common practice.
>
> History: the origins are to be found in the normative rules of the societies that existed before the Crown's assertion of sovereignty; and
>
> Continuity: i.e. a normative system that has had a continuous existence and vitality since sovereignty.[22]

7.16 The alignment of traditional with a particular means of transmission of laws and customs, on an intergenerational basis, has ramifications for proof of native title.[23] It has particular relevance for evidence in relation to the adaptation, revitalisation and potential loss or abandonment of law and custom.[24] The law relating to adaptation and continuity are addressed in Chapter 5.

---

16 Ibid.
17 Ibid 54.
18 Ibid 116.
19 Ibid 132.
20 *Bodney v Bennell* (2008) 167 FCR 84, [97].
21 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [87].
22 Nick Duff, 'What's Needed to Prove Native Title? Finding Flexibility Within the Law on Connection' (Research Discussion Paper 35, AIATSIS, June 2014) 24–5.
23 David Trigger, 'Anthropology and the Resolution of Native Title Claims: Presentation to the Federal Court Judicial Education Forum, Sydney 2011' in Toni Bauman and Gaynor Macdonald (eds), *Unsettling Anthropology: The Demands of Native Title on Worn Concepts and Changing Lives* (AIATSIS, 2011) 142.
24 Adaptation and revitalisation are considered in Ch 5.

Removal of traditional?

7.17 The Law Council of Western Australia cautioned against statutory amendment of this kind:

> The Society is of the view that it would not assist the process of developing the meanings of 'traditional' and 'society', for the legislature to attempt to intervene and add words to the NTA, which in turn would need to be interpreted by the courts in future cases.[25]

7.18 However, difficulties occur at a practical level as the 'traditional' character of law and custom must be ascertained afresh with each claim.[26] Just Us Lawyers noted problems in complying with 'traditional':

> Given that Indigenous Australians were not credited with even possessing laws or systems of land tenure giving rise to ownership for most, if not all, of the 19th century, it is often very difficult to find a useful account of their laws and customs from the pre-sovereignty era. This is coupled with the impossibility of obtaining direct (ie. affidavit evidence) about observance by the relevant pre-sovereignty society of such laws and customs.[27]

7.19 Such practical difficulties may contribute to lengthy time frames for resolution of claims and consequent resource, capacity and financial burdens on claimants and on parties with responsibilities for assessing connection.

7.20 Further, concerns were raised that adherence to 'traditional' in s 223 does not reflect the reality of the distribution of Aboriginal peoples and Torres Strait Islanders that has resulted from European settlement.[28] Underpinning definitions of native title may be skewed toward remote Indigenous communities.[29] As Toni Bauman and Gaynor Macdonald stated:

> Native title jurisprudence has been slow in reflecting the complexities of Aboriginal lives in both settled and remote areas and anthropologists working across Australia are faced with the difficult task of explaining how cultural change is commensurate with continuing tradition. Although other important post-*Yorta Yorta* decisions have applied, clarified and refined the High Court's reasoning in *Yorta Yorta* in both the Federal Court and the full court of the Federal Court on appeal, the High Court decision continues to provide the definitive benchmark for many of those involved in preparing and assessing the connection of claimants.[30]

---

25 Law Society of Western Australia, *Submission 9*.
26 Duff, above n 22.
27 Just Us Lawyers, *Submission 2*.
28 '[L]egal doctrine envisages a grand continent –wide rationalisation of those who have maintained traditional connection and those who have not (and those in between who might be able to negotiate a non native title outcome.': P Burke, *Submission 33*.
29 Ibid; Central Desert Native Title Services, *Submission 26*.
30 Toni Bauman and Gaynor Macdonald (eds), *Unsettling Anthropology: The Demands of Native Title on Worn Concepts and Changing Lives* (AIATSIS, 2011) 2.

7.21 Other commentators raised concerns about the removal of traditional from s 223 of the *Native Title Act.* As David Martin noted, 'it is tradition which grounds and legitimates claims to country from the perspective of Indigenous people, not mere connection'.[31]

> [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. To remove the requirement for laws and customs to be traditional denies this important value.[32]

7.22 Similarly, some submissions indicated that deletion of 'traditional' from s 223 would remove an extremely important differentiator between different kinds of assertions of Indigenous rights—for example, those based on historical occupation in contrast to native title.[33] Some submissions raised the possibility that any amendment to 'traditional' could increase conflicts within Indigenous communities, with consequent ramifications for community cohesion and for third parties who must deal with native title claimants.[34]

7.23 The ALRC notes that matters of identifying native title group membership and composition must be informed by culturally sensitive ways of group identification. The availability of other models for identifying the 'right people for country' in non-native title frameworks suggests that alternative approaches may be beneficial. Better resourcing of the existing processes for identifying the claim group also may contribute to the robustness of both the 'right people for country' and connection processes.

7.24 The ALRC invites comment about the utility of providing greater legal formality to the group structure prior to the final determination of native title.

7.25 Section 224 of the Act defines a native title holder to mean:

> (a) if a prescribed body corporate is registered on the National Native Title Register as holding the native title rights and interests on trust—the prescribed body corporate; or
>
> (b) in any other case—the person or persons who hold the native title.

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

31 David Martin, *Correspondence*, 15 August 2014.
32 Ibid.
33 South Australian Government, *Submission 34*; Northern Territory Government, *Submission 31*.
34 Western Australian Government, *Submission 20*; Minerals Council of Australia, *Submission 8*.

7.26 The ALRC also asks whether it would be appropriate to develop a set of guidelines for identifying the right people for country for inclusion within the *Native Title Act*.

7.27 If 'traditional' were removed from s 223 of the *Native Title Act*, then the section might operate in conjunction with 'threshold guidelines' similar to the *Traditional Owner Settlement Act 2010* (Vic) (TOSA). The Victorian Department of Justice has developed 'Threshold Guidelines' for traditional owner groups seeking a settlement under the TOSA. These Guidelines set out the process for assessing threshold requirements, which includes lodgement by the claim group of a two-part threshold statement, evaluation by the Victorian Government Native Title Unit and thereafter notifying the broader traditional owner community and seeking feedback on its adequacy.[35]

7.28 The ALRC seeks comment on the feasibility of this approach.

Substitution of another term for traditional?

7.29 Of the three components of 'traditional' in *Yorta Yorta*, the requirements related to the age of law and custom have particular significance for the native title rights and interests that can be recognised. As the court stated in *Yorta Yorta*:

> it also follows that the only rights or interests in relation to land or waters, originating otherwise than in the new sovereign order, which will be recognised after the assertion of that new sovereignty are those that find their origin in pre-sovereignty law and custom.[36]

7.30 In light of the requirement that the native title rights and interests claimed cannot constitute a greater burden on the Crown title than at the assertion of sovereignty,[37] the ALRC asks, if traditional is removed from s 223, whether it is appropriate to substitute a term that fulfils the 'history' function that has been attributed to 'traditional'.

7.31 The ALRC asks stakeholders to consider whether the phrase, 'since prior to the assertion of sovereignty', should be inserted in s 223(1)(a) to indicate that the rights and interests have origins in the pre-sovereignty period. If adopted, any such phrase would be regarded as consistent with proposals in Chapter 5 to allow for law and custom to adapt, evolve and develop.

---

35 Victorian Department of Justice, *Threshold Guidelines for Victorian Traditional Owner Groups Seeking a Settlement Under the Traditional Owner Settlement Act 2010* (2013) 11–12.

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

37 *Commonwealth v Yarmirr* (2001) 208 CLR 1, [223].

Redefining 'connection'

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

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

7.32 In addition to removal of 'traditional' in s 223(1)(a), the ALRC proposes amendment to the term 'connection' in s 223(1)(b). The meaning of this term has become opaque[38] and its meaning open to various interpretations.[39] Accordingly, it presents significant practical difficulties for parties in bringing evidence in support of the claim, and in ascertaining proof of connection.

7.33 Section 223(1)(b) of the *Native Title Act* states 'the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters'. The case law on connection is covered in Chapter 6. That chapter considered whether there should be confirmation that 'connection with the land or waters' in s 223(1)(b) does not require physical occupation or continued or recent use. The ALRC has concluded that amendment of the Act on this issue is not necessary, as there is no lack of clarity in the Act or in the courts' interpretation of the Act.

7.34 The proposal here examines a broader question about the meaning of connection in s 223(1)(b) of the *Native Title Act* and its interpretation. The ALRC suggests that the definition of 'connection' in s 223(1)(b) of the *Native Title Act* should be amended to state that connection is the relationship with land and waters claimed. That relationship is expressed in the present form of acknowledgment of laws and observance of customs.

7.35 The proposal could be read against further possible amending statements that, 'connection with land and waters means the holistic relationship that Aboriginal people and Torres Strait Islanders have with land and waters claimed' and 'the relationship

---

38 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [87].

39 *Sampi v Western Australia* [2005] FCA 777 (10 June 2005) [1077] (French J).

may be expressed in various ways including but not limited to physical presence on the land'.[40]

7.36 The proposal could 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.

What is connection?

7.37 'Connection' reflects the view that 'native title … [is] ascertained according to the laws and customs of the indigenous people who, by those laws and customs, have a connection with the land'.[41]

7.38 In *Members of the Yorta Yorta Community v Victoria*, the High Court noted:

> [I]t 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. [42]

7.39 The focus for the amended definition would be to emphasise that the starting point in determining connection is the 'present relationship with country' that the claimant group has with the relevant land and waters.

7.40 Secondly, the amended definition is intended to give 'connection' some meaningful content in the definition of native title. 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.[43]

7.41 The courts typically have aligned connection with continuity of acknowledgment of law and observance of law and custom.[44] Alternatively, the independence of s 223(1)(a) and 223(1)(b) has been emphasised.[45] At other points, the concept of 'recognition' under s 223(1)(c) has been aligned with 'connection'.[46]

---

40 See *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [111].
41 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 70.
42 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [56].
43 *De Rose v South Australia (No 1)* (2003) 133 FCR 325, [305].
44 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [92].
45 *Western Australia v Ward* (2002) 213 CLR 1, [18]–[19].
46 *Yanner v Eaton* (1999) 201 CLR 351, [37].

7.42 Courts have dealt with the concept of connection in a variety of ways; reflecting some uncertainty in its interpretation.[47] In *Neowarra v Western Australia*, the court considered matters pertaining to land and waters referable to law and custom, as well as factual inquires about links to specific places in the claim area.[48]

7.43 Therefore, precisely which elements of Aboriginal peoples and Torres Strait Islanders' law and custom can give effect to 'connection' can be relatively indeterminate.[49] At one level, 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 test for connection 'unbounded', thereby generating difficulties for what is to be deemed as 'sufficient' factual evidence of law and custom constituting connection.

7.44 The proposed amendment seeks to re-emphasise the relationship to land and waters as the primary focus when connection is interpreted—reflecting the actual text of s 223(1)(b).

7.45 The reference to a 'holistic relationship' in regard to connection (expressed in *Ward* as an integrated view of the ordering of affairs),[50] is intended to overcome uncertainties in the interpretation of the Act. There have been uncertainties over whether the relationship comprises 'physical', 'spiritual', 'economic' and 'cultural' elements in favour of a more broadly-conceived concept. In this sense, the interpretation of connection might align to the view in *Bodney v Bennell* that claimants must assert 'the reality of their connection' to their land and waters.[51]

7.46 It is likely that no statutory construction can entirely reflect Aboriginal and Torres Strait Islander understanding of connection:

> 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.[52]

7.47 By contrast, general legal scholarship has been used to provide insights into how Aboriginal and Torres Strait Islander law and custom constitutes a normative society.[53]

7.48 The Law Council of Australia explained the inadequacy of the current legal model in terms of capturing Indigenous relationships with country.[54]

---

47 Duff, above n 22, 50.
48 *Neowarra v Western Australia* [2003] FCA 1402 (8 December 2003) [352]–[353].
49 Sean Brennan, 'Statutory Interpretation and Indigenous Property Rights' (2010) 21 *Public Law Review* 239.
50 *Western Australia v Ward* (2002) 213 CLR 1, [14].
51 *Bodney v Bennell* (2008) 167 FCR 84, [171].
52 WEH Stanner quoted in A Frith and M Tehan, *Submission 12*.
53 For example, the Court drew on US Constitutional law theory propounded by HLA Hart as to why people acknowledge law: *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [41].
54 Law Council of Australia, *Submission 35*.

7.49 At one level, it may be appropriate to provide a broad frame for connection requirements. At another, the task may be unrealistic, compressing a richly-textured world into legal forms.

> The difficulty of expressing a relationship between a community or group of Aboriginal people and the land in terms of rights and interests is evident. Yet that is required by the NTA. The spiritual or religious is translated into the legal. This requires the fragmentation of an integrated view of the ordering of affairs into rights and interests, which are considered apart from the duties and obligations which go with them.[55]

7.50 The view that the 'translation' of Aboriginal and Torres Strait Islander peoples' connection necessarily requires fragmentation has been questioned:

> Is there really, in the words of s 223, the compulsion apparently felt by the plurality [in *Ward*] to further fragment what is holistic by translating it into Western legal terms in a diffuse rather than organically cohesive way... It is suggested that the disaggregating impact of the words in the statute at s 223 has been overstated and the task of translation, difficult though it is, could be approached in a less atomising way.[56]

Proof of connection

7.51 The complexity involved in bringing evidence to establish 'connection' derives in part from the particular model for proof adopted under the *Native Title Act*. In *Mabo [No 2]*, several bases for proving Indigenous peoples' connection with land and waters were canvassed. Deane and Gaudron JJ, and Toohey J discussed a possessory title drawing on Canadian jurisprudence.[57] A title founded on the basis of possession or occupation places less emphasis on the legal inquiry into the traditional laws and customs of Indigenous peoples. Deane and Gaudron JJ in *Mabo [No 2]* accepted that occupation of land and waters may constitute adequate evidence of the continued maintenance of traditional law and custom.[58]

7.52 The Northern Territory land rights claims process is another potential model.[59] Case law interpreting the *Native Title Act* has not examined alternative bases for structuring evidence to establish native title. Some submissions noted that there may be advantages in considering possessory or occupation models.[60] Scholarship has identified other potential models, for example, common law Aboriginal title to land.[61]

7.53 The ALRC Inquiry under its Terms of Reference is to focus on the current *Native Title Act* and therefore makes no proposal in relation to alternative models.[62]

---

55 *Western Australia v Ward* (2002) 213 CLR 1, [14] (Gleeson CJ, Gaudron, Gummon and Hayne JJ) quoted in National Native Title Council, *Submission 16*.

56 Brennan, above n 49, 259.

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

58 Ibid 110.

59 Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [663].

60 See AIATSIS, *Submission 36* for a discussion of the Canadian approach.

61 Kent McNeil, 'The Onus of Proof of Aboriginal Title' (1999) 37 *Osgoode Hall Law Journal* 775.

62 See Ch 3.

7.54 Further the difficulties of translating Aboriginal and Torres Strait Islander peoples' connection into Australian law find resonance in the past. In *Banjima People v Western Australia (No 2)* ('*Banjima*') the Federal Court noted the incommensurability of two different cultures:

> It may readily be inferred from the evidence in this proceeding that upon their arrival in the Swan River Colony the agents of the British Sovereign and the first British settlers had no detailed knowledge of the circumstances and social organisation, laws and customs of the indigenous people. It may also be inferred from that same evidence that the indigenous people were oblivious to the social organisation, laws and customs of the new settlers when they first encountered them.[63]

7.55 This underscores the difficulties of accurately 'reaching back' to establish past 'connection':

> At most, a right in the past might be juxtaposed against current rights in order to better understand how they came to be shaped and asserted in the present. But to interpose rights from the past into the present and expect their nature and extent to be unchanged requires a similitude between conditions in the past and the present that gives a false notion of history.[64]

7.56 Other submissions noted that the historical record is often incomplete or ad hoc in terms of the evidence of connection or genealogy that has survived.[65] In *Banjima*, the court noted that

> The evidence of early seafarers, explorers, pastoralists, ethnographers and anthropologists, which falls into an historical category, may also be relevant in any proceeding and have evidentiary value in relation to matters in issue, although depending on the circumstances and context in which it was gathered, and by whom it was gathered, it may need to be treated with care.[66]

7.57 Given the practical difficulties in bringing evidence, the vagaries of the historical record and constraints in relation to expert evidence, the ALRC seeks stakeholder comment on the proposed amendments to the existing requirements for establishing connection.

Revitalisation of connection?

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

7.58 This section of the chapter considers whether the law relating to connection to land and waters could include revitalisation of the relationship with country. The case

---

63 *Banjima People v Western Australia (No 2)* (2013) 305 ALR 1, [23].

64 Alex Reilly and Ann Genovese, 'Claiming the Past: Historical Understanding in Australian Native Title Jurisprudence' (2004) 3 *Indigenous Law Journal* 19, 38. See Ch 5.

65 AIATSIS, *Submission 36*; A Frith and M Tehan, *Submission 12*.

66 *Banjima People v Western Australia (No 2)* (2013) 305 ALR 1, [26]–[29].

law is clear that *revival* of native title is not possible.[67] However, the ALRC asks whether it is appropriate to distinguish between *revival* and *revitalisation* (meaning renewed vigour as opposed to reinvention) of Aboriginal and Torres Strait Islanders peoples' connection, based upon acknowledging the various forms in which transmission of culture can take place.[68]

7.59 The ALRC is interested in views on whether the *Native Title Act* should be amended to provide that *revitalisation* of law and custom may be a factor that may be considered in establishing the requirement in s 223(1)(b) that 'Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with land or waters'.

7.60 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.[69]

7.61 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'.[70]

7.62 The majority of the High Court in *Fejo v Northern Territory* noted, in the context of explaining the effects of extinguishment, that '[t]he argument that native title may revive fails because the rights are extinguished by the grant of freehold title; they are not merely suspended'.[71] The *Native Title Act* now allows for suspension of native title in respect of certain future acts.[72]

7.63 As discussed in Chapters 4 and 5, 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'.[73] For example, in *Risk v Northern Territory*, concerning the Larrakia[74] people's claim, the court at first instance found that

> A combination of circumstances has, in various ways, interrupted or disturbed the presence of the Larrakia people in the Darwin area during several decades of the 20th Century in a way that has affected their continued observance of, and enjoyment of, the traditional laws and customs of the Larrakia people that existed at sovereignty.[75]

---

67 *Fejo v Northern Territory* (1998) 195 CLR 96, [56]–[58] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).
68 See, eg, AIATSIS, *Submission 36*.
69 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 60.
70 Ibid 110.
71 *Fejo v Northern Territory* (1998) 195 CLR 96, [57].
72 See, eg, *Native Title Act 1993* (Cth) s 24AA(6).
73 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.
74 Both the judgments at trial and on appeal referred to 'Larrakia' as encompassing all the relevant applicants.
75 *Risk v Northern Territory* [2006] FCA 404 (29 August 2006) [812]. See Ch 5.

7.64 The Court specifically referred to a lack of evidence about the passing on of knowledge of the traditional laws and customs.[76] There was a finding that there had been a substantial interruption in the 'practice' of the traditional laws and customs.[77] This was despite a finding by the trial judge that

> The 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.[78]

7.65 The factual questions around revitalisation of law and custom, and thereby connection, raise matters about how the impact of European settlement on the transmission of Aboriginal and Torres Strait Islander peoples might be considered. Concerns have been raised that a comparatively short break in continuity was sufficient to find that native title did not exist.[79]

7.66 Some view the current interpretation of the definition of native title, specifically with respect to substantially uninterrupted continuity, as creating 'insurmountable barriers to cultural resurgence'.[80] A view has been expressed that 'a comparatively minimal interruption' to the sharing of culture across the claimant group should not prevent recognition of native title.[81] However, the Western Australian Fishing Industry Council submitted that '[i]t is not for the Courts to revive customs that have fallen away'.[82] Similarly, the South Australian Government submitted that '[r]ecognising revived or other rights is better left to other policy devices on a local jurisdictional basis'.[83]

7.67 Commentators have noted that the forms for transmission of culture necessarily respond to the circumstances in which Aboriginal and Torres Strait Islander peoples found themselves.[84] Further, there is growing knowledge about how culture is transmitted in Aboriginal and Torres Strait Islander societies that has emerged since early cases were litigated—driven in part by the claims process under the *Native Title Act*. Proposal 5–1, that traditional laws and customs may evolve, adapt or otherwise develop, is consistent with a view that the transmission of laws and customs may also change, and such change may be a result of making use of available technologies. Thus, revitalisation of culture, through, for example, transmission of knowledge of law

---

76 Ibid [823].
77 Ibid [835], [839].
78 Ibid [530].
79 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2009' (Australian Human Rights Commission, 2009) 86.
80 Commonwealth, *Parliamentary Debates*, Senate, 21 March 2011, 1303 (Rachel Siewert).
81 Ibid.
82 Western Australian Fishing Industry Council, *Submission 23*.
83 South Australian Government, *Submission 34*.
84 S Bielefeld, *Submission 6*; Australian Human Rights Commission, *Submission 1*; Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Social Justice and Native Title Report 2013' (Australian Human Rights Commission) 108–10.

and custom through ethnographic, anthropological and biographical texts, may be 'an unavoidable and acceptable cultural adaptation'.[85] Dr Paul Memmott has argued that

> contemporary Aboriginal cultures must be recognised as including textual and digital media, which constitute part of the process of negotiating meaning out of the current socio-economic and cultural circumstances.[86]

7.68 The Inquiry is an opportunity to consider whether there may be merit in investigating a distinction between:

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

7.69 The ALRC invites comment as to whether a distinction between *revival* and *revitalisation* may be useful in this respect.

Disregarding substantial interruption or change in continuity?

7.70 The Terms of Reference ask the ALRC to inquire into and report on connection requirements for the recognition and scope of native title rights and interests. In its Inquiry, the ALRC is directed to a number of options for reform but can examine connection more broadly. In the context of a general examination of connection requirements, this section considers whether the *Native Title Act* and legal frameworks should be amended, to allow the 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.

7.71 The requirement that acknowledgment and observance of law and custom must have occurred substantially uninterrupted by each generation since sovereignty is discussed in earlier chapters.[87] The requirement has arisen from the statutory construction of s 223(1)(a) of the *Native Title Act*. Proposal 5–3 provides that the Act should be amended to make clear that it is not necessary to establish that:

- acknowledgment and observance of law and custom has continued substantially uninterrupted since sovereignty; and
- laws and customs have been acknowledged and observed by each generation since sovereignty.

7.72 That is, Proposal 5–3 addresses the degree or frequency of *continuity* of acknowledgment and observance of traditional laws and customs that is required to

---

85 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.

86 Ibid. See, eg, the discussion of acquisition of language in *Wyman on behalf of the Bidjara People v Queensland (No 2)* [2013] FCA 1229 (6 December 2013) [663]–[665].

87 See Ch 4 and Ch 5.

meet s 223(1)(a). The terms 'continuity' and 'substantially uninterrupted' do not appear in the text of s 223 of the Act.

7.73 In this section of the chapter, the ALRC examines other questions about whether the Act should be amended in relation to 'substantial interruption or change in continuity of acknowledgment and observance of traditional laws and customs'. These questions are directed primarily, but not entirely, to the function that 'connection' performs in s 223(1)(b) of the Act.[88] That section states: 'the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters'.

7.74 The ALRC asks whether in determining connection under s 223(1)(b), there can be regard to historical factors around the displacement of Aboriginal peoples and Torres Strait Islanders that may affect the manner of the *connection* with land or waters. The ALRC considers that such an approach is consistent with the recognition and protection of native title and gives effect to the beneficial purposes of the Act.

Relevant law

7.75 The extent to which the effects of European settlement can be taken into account in determining whether s 223 is established is reflected in two areas. First, in considering the degree to which there can be change or evolution in law and custom. Secondly, it is relevant in respect of whether acknowledgment of law and custom has been interrupted or ceased.

7.76 The Full Court of the 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).

7.77 The court in that respect 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.[89]

7.78 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.[90]

---

88 Connection is discussed in Ch 6.

89 *Bodney v Bennell* (2008) 167 FCR 84, [168].

90 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [89] (Gleeson CJ, Gummow and Hayne JJ).

7.79 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.[91]

7.80 Nonetheless, the High Court emphasised that

> the inquiry about continuity of acknowledgment and observance does not require consideration of why, if acknowledgment and observance stopped, that happened ... 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.[92]

7.81 Accordingly, the High Court left open the permissibility of examining why acknowledgment and observance may have 'stopped' in confined circumstances. Subsequently, the Full Federal Court in *Bodney v Bennell*, when discussing continuity, stated:

> 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.[93]

7.82 After this Full Federal Court decision, it could be said that the law is unclear as to whether consideration of the reasons why acknowledgment and observance may have 'stopped' is permitted at all.

7.83 A further complexity is that some commentators draw a distinction between the effects of European settlement in respect of adaptation, and thereby change, in law and custom, as compared with a substantial interruption. According to this view, *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*'.[94]

Should consideration of the reasons for interruption be permissible?

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

7.84 The ALRC's Issues Paper did not ask specifically about consideration of the reasons why acknowledgment and observance may have changed or 'stopped'. Nevertheless, submissions expressed a range of views about whether factual matters relating to European settlement, such as dispossession from lands, missionary activity, removal of Indigenous peoples to reserves, should be raised.

---

91 Ibid [90].
92 Ibid.
93 *Bodney v Bennell* (2008) 167 FCR 84, [97].
94 Duff, above n 22, 29.

7.85 As the North Queensland Land Council 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'.[95] Similarly, Frith and Tehan submitted 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'.[96] In its submission to a Senate Committee Inquiry, the Kimberley Land Council said:

> The movements of Aboriginal and Torres Strait Islander persons from their traditional lands was, in many cases, either directly or indirectly forced upon them—either through government activities such as the removal of children or, as was common in the Kimberley region, the movement of traditional owners off their lands into the relative safety of the missions to escape violence perpetrated by pastoralists.[97]

7.86 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'.[98]

7.87 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'.[99] Just Us Lawyers submitted that the strict application of 'substantial interruption' effectively downplays the practical impacts of colonisation and dispossession.[100] Some submissions stated that the current position does not accord with the beneficial objects of the *Native Title Act*.[101]

7.88 A number of submissions supported reform so that courts could consider the reasons for interruptions in continuity.[102] Frith and Tehan submitted that

> 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.[103]

7.89 Governments did not directly mention this issue but rather made general submissions that the system was working well and that there was no need for significant statutory amendments, particularly given that courts interpreted the

---

95 North Queensland Land Council, *Submission 17*.
96 A Frith and M Tehan, *Submission 12*.
97 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.
98 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2009', above n 79, 87. See also Australian Human Rights Commission, *Submission 1*.
99 See, eg, Native Title Services Victoria, *Submission 18*; A Frith and M Tehan, *Submission 12*; Australian Human Rights Commission, *Submission 1*.
100 Just Us Lawyers, *Submission 2*.
101 Central Desert Native Title Services, *Submission 26*; Law Society of Western Australia, *Submission 9*: *Bodney v Bennell* 'is not consistent with the beneficial objects of the NTA, and highlights the need for the NTA to require consideration of why the interruption has occurred and the broader interests of justice in the matter'.
102 See, eg, A Frith and M Tehan, *Submission 12*; Australian Human Rights Commission, *Submission 1*.
103 A Frith and M Tehan, *Submission 12*.

requirements for connection and continuity flexibly.[104] The South Australian Government submitted:

> 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.[105]

7.90 The ALRC is interested in stakeholder views on the issue of whether the reasons for any displacement of Aboriginal peoples or Torres Strait Islanders should be considered in the assessment of whether 'the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters'.

Reform options

7.91 A number of reform proposals have been advanced as to how the influence of European settlement could be considered in the determination of native title. The Aboriginal and Torres Strait Islander Social Justice Commissioner, in *Native Title Report 2008*, argued that 'the law about continuity of traditional connection needs to be brought back into line with the overall logic of *Mabo*'.[106] The Commissioner 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.[107]

7.92 In *Native Title Report 2009*, the Commissioner suggested that,

> [s]uch an amendment could empower Courts to disregard any interruption or change in the acknowledgment and observance of traditional laws and customs where it is in the interests of justice to do so.[108]

7.93 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'.[109] The Native Title Amendment (Reform) Bill 2011 proposed amendments that were broadly consistent with these recommendations.[110]

---

104 South Australian Government, *Submission 34*; Northern Territory Government, *Submission 31*; Queensland Government Department of Natural Resources and Mines, *Submission 28*; Western Australian Government, *Submission 20*.

105 South Australian Government, *Submission 34*.

106 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2008' 82.

107 Ibid 86–7.

108 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2009', above n 79, 87.

109 Ibid.

110 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'.

7.94 The Native Title Amendment (Reform) Bill 2014 differed in some key respects to the 2011 Bill.[111] The reform proposed in the 2014 Bill is for courts to be conferred with discretion—not mandated to 'treat as relevant' particular reasons for the substantial interruption. New s 61AB, as proposed in the 2014 Bill, would provide

> 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
>
> ...
>
> 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.

How could the influence of European settlement be considered?

7.95 Two reform options were raised for consideration in the Issues Paper:

- whether courts should be empowered 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;[112] and
- whether substantial interruption should be defined in the Act.[113]

7.96 Neither of these options for reform are proposed in this Discussion Paper for the reasons set out below. Rather, the ALRC asks for views about how the influence of European settlement should be considered in the determination of native title.

The empowerment of courts

7.97 The 'empowerment' of courts indicates the statutory conferral of discretion.[114] This can be contrasted with an earlier model.[115]

7.98 A number of submissions expressed support for the empowerment of courts to disregard substantial interruption or change in continuity of acknowledgment of

---

111 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 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).

112 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Issues Paper No 45 (2013) Q 21.

113 Ibid Q 19.

114 See Native Title Amendment (Reform) Bill 2014 cl 14. See also Native Title Amendment (Reform) Bill (No 1) 2012 cl 14.

115 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.

traditional laws and observance of traditional customs, where it is in the interests of justice to do so.[116] The Law Society of Western Australia submitted that such a reform would be 'consistent with the beneficial purposes for which the NTA was enacted, particularly where the interruption is caused by circumstances outside the control or intent of the relevant members of the relevant society'.[117] Similarly, the Australian Human Rights Commission submitted that such a reform would be '[i]n furtherance of the purposes of the Act', and referred to the Preamble to the Act.[118]

7.99 However, a number of stakeholders were opposed to this reform option.[119] Even stakeholders who were critical of the current law concerning substantially uninterrupted continuity raised some concerns about this approach, preferring other options instead.[120]

7.100 Concerns that such reform:

- 'would likely place greater emphasis than there is presently on the fact and nature of any substantial interruption';[121]
- would be of uncertain effect;[122]
- may not be in claimants' interests as it may lead to increased debate about issues as well as increased costs and delay;[123] and
- is problematic because of uncertainty about the meaning of 'in the interests of justice'.[124]

7.101 Judicial discretion is, by its very nature, one to be exercised in relation to the circumstances of an individual case. Therefore, the circumstances enlivening the discretion will be variable. A general empowerment of courts may therefore be quite uncertain in its effect and operation.[125] 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*.

---

116 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*.

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

118 Australian Human Rights Commission, *Submission 1*.

119 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*.

120 NSW Young Lawyers Human Rights Committee, *Submission 29*; Just Us Lawyers, *Submission 2*.

121 Western Australian Government, *Submission 20*.

122 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: 'significant uncertainty would be generated with the introduction of the presumption and the requirements for establishing "substantial interruption"'.

123 NSW Young Lawyers Human Rights Committee, *Submission 29*; Just Us Lawyers, *Submission 2*.

124 See, eg, NSW Young Lawyers Human Rights Committee, *Submission 29*.

125 S Bielefeld, *Submission 6*. Note that this submission did not express a view on the desirability of the reform option.

7.102 Other submissions focused on 'in the interests of justice'. The term typically indicates that courts retain discretion. In a more general sense, it could be implemented in varying ways.[126] A number of concerns were expressed about defining it in the Act.[127] NSW Young Lawyers submitted that

> The phrase ['in the interests of justice'] 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'.[128]

7.103 In their view, the 'appropriate' focus for 'the interests of justice' should be the actual causes of substantial interruption.[129]

7.104 Notwithstanding the breadth of the phrase 'in the interests of justice', there was little support for a definition of it in the Act. However, some submissions expressed the view that some guidance may be useful[130] or necessary.[131] The South Australian Government submitted that the phrase

> is usually utilised to provide a court or a decision maker with a discretion to act if the particular facts of the matter justify it. It provides flexibility but is to be applied in a judicial manner. However, were it to be included in the NTA as suggested here, there would need to be clear guidance on appropriate use.[132]

7.105 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'.[133] North Queensland Land Council submitted that a statutory definition of the phrase may attract 'many years' of judicial interpretation. It was of the view that '[b]y not including a definition of this term, the courts would have a greater range for finding that it is in the interests of justice to disregard substantial interruption'.[134]

7.106 The ALRC is not proposing the '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' as identified in the Terms of Reference. This is due to the concerns expressed above. Rather, the ALRC asks a question about how the influence of European settlement should be considered in the determination of native title.[135]

---

126 Ibid.

127 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).

128 NSW Young Lawyers Human Rights Committee, *Submission 29*.

129 Ibid. See also S Bielefeld, *Submission 6*.

130 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"').

131 South Australian Government, *Submission 34*.

132 Ibid.

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

134 North Queensland Land Council, *Submission 17*.

135 See Q 7–4 below.

Statutory definition of 'substantial interruption'

7.107 While originally a statutory definition of 'substantial interruption' was conceived as linked to the empowerment of courts to disregard substantial interruption,[136] some submissions to this Inquiry conceived of a statutory definition as a separate option in itself.[137] As outlined earlier, the two issues could be conceived as different reform options for how the influence of European settlement could be considered.

7.108 A number of submissions expressed support for a statutory definition of the factual matters that could be related to 'substantial interruption'.[138]

7.109 A variety of stakeholders considered the non-exhaustive nature of the list to be important.[139] Stakeholders who supported a statutory definition of substantial interruption considered a non-exhaustive list necessary because what constitutes a substantial interruption is unsettled.[140]

7.110 However, a number of stakeholders opposed a statutory definition of 'substantial interruption'.[141] Governments were opposed,[142] viewing such a reform option as:

- unnecessary;[143]

---

136 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2009', above n 79, 87.

137 See, eg, A Frith and M Tehan, *Submission 12*.

138 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 79, 87.

139 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*. Some suggested that the list could simply comprise a list of examples to guide judicial consideration, or alternatively the list could be added to over time—either by gazette or by regulation. Just Us Lawyers emphasised that while any such definition should be non-exhaustive, it should 'be capable of objective assessment'.

140 Australian Human Rights Commission, *Submission 1*. See also North Queensland Land Council, *Submission 17* ('there could be a variety of circumstances not yet known, 20 years after the commencement of the NTA').

141 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*.

142 South Australian Government, *Submission 34*; Northern Territory Government, *Submission 31*; Western Australian Government, *Submission 20*.

143 South Australian Government, *Submission 34* ('[c]ommon law courts are regularly applying the law to the circumstances without a definition and lawyers and negotiators do so when negotiating settlements'); Northern Territory Government, *Submission 31*; see also Queensland Government Department of Natural Resources and Mines, *Submission 28* (referring broadly to Australian Law Reform Commission, *Review of the Native Title Act 1993*, Issues Paper No 45 (2013) Questions 10–22, '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').

- 'impractical', given that it is 'a question of fact and degree';[144]
- making the test for recognising native title 'unduly complicated';[145] and
- tending to 'shift the focus of native title inquiries onto historical matters, without necessarily achieving any time savings'.[146]

7.111 A statutory definition of 'substantial interruption' was also opposed by some stakeholders who were in favour of law reform.[147] AIATIS, 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.[148]

7.112 However, AIATSIS reiterated its comment to the Senate Inquiry concerning the provisions of the 2011 Bill, 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. 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).[149]

7.113 Some stakeholders favoured other reform options instead.[150]

7.114 The ALRC considers that amendment of the Act to provide a statutory definition of 'substantial interruption' has limitations due to the difficulty of defining substantial interruption in a conclusive manner. Rather, the ALRC has suggested consideration of other ways of addressing these issues. Proposal 5–3 provides that the Act be amended to make clear that it is not necessary to establish acknowledgment and observance of laws and customs has continued substantially uninterrupted since sovereignty. In the discussion below the ALRC raises the issues around acknowledgment of the influence of European settlement and suggests a potential option for reform.

---

144 South Australian Government, *Submission 34*.
145 Western Australian Government, *Submission 20*.
146 Ibid.
147 See, eg, NSW Young Lawyers Human Rights Committee, *Submission 29*; A Frith and M Tehan, *Submission 12*.
148 AIATSIS, *Submission 36*.
149 Ibid.
150 NSW Young Lawyers Human Rights Committee, *Submission 29*; A Frith and M Tehan, *Submission 12*; Cape York Land Council, *Submission 7*; Just Us Lawyers, *Submission 2*.

Other models for reform

7.115 The ALRC invites comment on what other options for reform may be appropriate. The sequence of questions below is a guide. Question 7–4 asks for possible models and Question 7–5 outlines a suggested model.

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

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

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

7.116 The ALRC noted the limitations raised in respect of the models for reform that were outlined for consideration in the Issues Paper. Therefore, the ALRC is interested in views on how else reform could be appropriately implemented. The ALRC offers one possible model for consideration, as set out above. This model draws upon drafting precedents in the *Native Title Act*. For example, the construction of the provision is similar to that outlined in s 82(2) of the Act[151] and the expression 'European settlement' reflects the language in the Preamble. The ALRC welcomes views on this model and associated issues. For example, should such a statement be a section or only a note to the Act? The ALRC also welcomes comment on other models that may be appropriate.

---

151 Section 82(2) concerns the Federal Court's way of operating and provides, '[i]n conducting its proceedings, the Court may take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders, but not so as to prejudice unduly any other party to the proceedings'. This provision replaces the provision that was originally enacted. 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].

8. The Nature and Content of Native Title

Contents

Summary

8.1 The Terms of Reference direct the ALRC to inquire into whether there should be 'clarification that "native title rights and interests" can include rights and interests of a commercial nature'. The suggested reform option has particular relevance for issues related to determining the scope (nature and content) of native title.[1]

8.2 Native title or native title rights and interests are defined in s 223(1) of the *Native Title Act 1993* (Cth). Section 223(2) provides a non-exhaustive listing of representative native title rights and interests. It does not refer to rights of a commercial nature. Recent case law has held that native title comprises a 'right for any purpose'.[2]

8.3 This chapter is in three parts. First, it considers the nature and content of native title rights and interests and whether statutory clarification of the commercial nature of native title is appropriate. Secondly, it considers whether there is a need to adopt a definition of commercial native title rights and interests. Finally, the chapter considers what other native title rights and interests fall within the scope of s 223(1).

1 See Terms of Reference.
2 *Akiba v Commonwealth* (2013) 250 CLR 209.

Overview of the proposals and questions

8.4 The ALRC proposes that the definition in s 223 reflect the law in *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth* ('*Akiba*'),[3] that native title is a 'right for any purpose'.

8.5 The proposal is that s 223(2) of the *Native Title Act* should be repealed and substituted with a provision that provides 'without limiting subsection (1) but to avoid doubt, native title rights and interests in s 223(1) comprise rights in relation to any purpose and may include, but are not limited to, hunting, gathering, fishing, commercial activities and trade'.

8.6 The inclusion of the terms 'commercial activities' and 'trade' in s 223(2) is indicative and not intended to limit the operation of s 223(1). The precise native title rights and interests determined in each claim will turn on the particular factual circumstances and the evidence brought by the claimants.

8.7 The ALRC is not proposing that the terms 'commercial activities' and 'trade' be defined in the Act. This is to allow flexibility—in acknowledgment that '[n]ative title has its origins in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory'.[4]

8.8 The ALRC seeks views on whether the exercise of cultural knowledge should be included in s 223(2) and the utility of a specific s 223(2)(b) to that effect. The ALRC also invites comment on other activities that should be included in the proposed indicative listing in the revised s 223(2)(b).

Relevant provisions in the *Native Title Act*

8.9 Within the *Native Title Act* there are 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.[5]

8.10 Under s 62(2) a claimant application must be accompanied by an affidavit sworn by the applicant. It must include, inter alia:

- '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)',[6] and
- 'a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist'.[7]

---

3 Ibid.
4 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 58 (Brennan J).
5 Note that other provisions not discussed will be relevant.
6 *Native Title Act 1993* (Cth) s 62(2)(d).
7 Ibid s 62(2)(e).

8.11 Section 223 is the key provision. Section 223(1)—which is discussed in Chapter 4—defines 'native title' and 'native title rights and interests'. Importantly, native title is variable:

> Native title is not treated by the common law as a unitary concept. The heterogeneous laws and customs of Australia's indigenous peoples, the Aboriginals and Torres Strait Islanders, provide its content. It is the relationship between a community of indigenous people and the land, defined by reference to that community's traditional laws and customs, which is the bridgehead to the common law.[8]

8.12 Section 223(1) is the substantive provision, with s 223(2), providing a non-exhaustive list of native title rights and interests. Section 223(2) currently states that,

> Without limiting subsection (1), ***rights and interests*** in that subsection includes hunting, gathering, or fishing, rights and interests.

8.13 Section 223(2) was enacted to provide 'an example of the type of rights and interests that might comprise native title'.[9] Melissa Perry and Stephen Lloyd suggest:

> As a result of the express recognition of such rights in s 223(2), it is not open to contend that native title rights and interests cannot comprise fishing, hunting or gathering rights and interests.[10]

8.14 On this view, s 223(2) confirms that the specified purposes *are* native title rights and interests.

8.15 Section 225 defines a 'determination of native title' and requires the listing of the native title rights and interests found to exist. Relevantly, s 225(b) provides:

> A ***determination of native title*** is a determination whether or not native title exists in relation to a particular area (the ***determination area***) of land and waters and, if it does exist, a determination of:
>
> …
>
> (b) the nature and extent of the native title rights and interests in relation to the determination area.

8.16 As well as the substantive provisions for establishing native title, s 211 of the Act provides a 'savings provision' giving limited protection of native title rights to hunt, gather, fish and engage in cultural or spiritual activities.[11] The 'protection' is in respect of licensing and similar government regulation, not in terms of the grant of third party interests or development activities.[12] Section 211(2) provides:

---

8 *Yanner v Eaton* (1999) 201 CLR 351, [72] (Gummow J).

9 Explanatory Memorandum, Native Title Bill 1993 (Cth), Part B, 77 (s 223 was originally numbered s 208 in the Bill).

10 Melissa Perry and Stephen Lloyd, *Australian Native Title Law* (Lawbook Co, 2003) 768.

11 Section 211(3) defines 'class of activity'—with hunting, fishing and gathering referred to as separate classes of activity, rather than as rights and interests. The other class of activity that is specified is 'a cultural or spiritual activity'. There is also provision for any other kind of activity to be prescribed for the purpose of the sub-section.

12 Richard H Bartlett, *Native Title in Australia* (Butterworths, 2nd ed, 2004) 659.

> the law does not prohibit or restrict the native title holders[13] from carrying on the class of activity, or from gaining access to the land or waters for the purpose of carrying on the class of activity, where they do so:
>
> (a) for the purpose of satisfying their personal, domestic or non-commercial communal needs; and
>
> (b) in exercise or enjoyment of their native title rights and interests.[14]

8.17 Section 211(1) sets out the conditions necessary to activate s 211(2).[15]

8.18 In effect, s 211 has provided a defence to prosecution for charges involving:

- the 'taking' of juvenile estuarine crocodiles—by way of hunting with a traditional form of harpoon—for food, where it was a traditional custom of the relevant native title holders to hunt such crocodiles for food;[16] and
- possessing a quantity of undersized abalone, where the abalone were taken in accordance with the traditional laws and customs of the relevant native title holders.[17]

Commercial native title?

8.19 The inquiry as to whether native title includes rights and interests of a commercial nature, including rights to trade, raises central issues about the scope of native title and 'the capacity of native title to support Indigenous economic development and generate sustainable long-term benefits for Indigenous Australians'.[18]

8.20 For Indigenous communities, there are expectations that native title can provide the platform for redressing disadvantage and a more secure economic future for native title holders. Principle 5 identifies that reform should promote sustainable long-term social, economic and cultural development for Aboriginal people and Torres Strait Islanders.

8.21 These considerations form the context for the following discussion of the law in relation to the nature and content (scope) of native title rights and interests. There are three main points. First, there are questions about the 'nature' and 'content' of native title rights and interests. Secondly, with respect to the 'nature' of native title, case law has affirmed that a distinction should be made between the native title right and its exercise. Thirdly, questions are raised about the extent to which the exercise of a right (with its origins in the pre-sovereignty period) can develop—for example, by reference to adaptations such as modern technologies.

---

13 'Native title holder' is defined in *Native Title Act 1993* (Cth) s 224.

14 A note to the provision states 'Note: In carrying on the class of activity, or gaining access, the native title holders are subject to laws of general application'.

15 The second-listed condition—s 211(1)(b)—provides that 'a law of the Commonwealth, a State or a Territory prohibits or restricts a person from carrying on the class of activity other than in accordance with a licence, permit or other instrument granted or issued to them under the law'.

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

17 *Karpany v Dietman* (2013) 88 ALJR 90.

18 *Terms of Reference*, above n 1.

The nature and content of native title rights and interests

8.22 The 'nature' of native title refers to the 'legal nature' of the rights and interests.[19] As '[n]ative title has its origin in the traditional laws acknowledged and the customs observed by the indigenous people who possess the native title',[20] the rights and interests are 'founded upon'[21] the traditional laws and customs of the relevant Indigenous communities.

8.23 The High Court has explained that '[t]he ambit of the native title right is a finding of law'.[22] The High Court has emphasised that '[t]he identification of the relevant rights is an objective inquiry'.[23] Thus identification of the native title rights and interests is a question of fact and the 'content' of the rights and interests will depend on the evidence in each case.[24]

8.24 Two examples illustrate this point. In *Akiba* there was a 'long and well chronicled history' that '[t]he Islanders were, and are, trading fish'—that is, that 'marine products were historically, and are today, taken for the purpose of exchange and sale'.[25] In *Banjima People v Western Australia (No 2)*, the trial judge distinguished the evidence before him from that in *Akiba*:

> 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.[26]

8.25 Rather, the Federal Court found that particular resources were taken for particular uses, with limited evidence of trade in resources.[27]

The nature of native title

8.26 Courts indicate that native title is not equivalent to common law property interests.[28] In 2014, the High Court cautioned against confining the understanding of

---

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

20 *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)).

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

22 *Yanner v Eaton* (1999) 201 CLR 351, [109] (Gummow J).

23 *Western Australia v Brown* [2014] HCA 8 (12 March 2014) [34].

24 'The nature and 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).

25 *Akiba v Queensland (No 3)* (2010) 204 FCR 1, [527].

26 *Banjima People v Western Australia (No 2)* [2013] FCA 868 (28 August 2013) [783].

27 Ibid [783]–[784].

28 '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).

rights and interests 'to the common lawyer's one-dimensional view of property as control over access'.[29]

8.27 In *Western Australia v Ward* ('*Ward*'), the majority of the High Court considered native title as a 'bundle of rights',[30] finding the metaphor to be 'useful' for two reasons. They 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.[31]

8.28 The majority expressed the view that identification of the rights and interests is necessary in order to determine extinguishment.[32] While the issue of extinguishment is outside the Terms of Reference for this Inquiry, whether a native title right is extinguished or merely regulated is relevant to the scope—or content—of native title.[33]

8.29 Some stakeholders are critical of the 'bundle of rights' doctrine:

> The bundle of rights concept of property derives in 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.[34]

8.30 Some commentators regard such an approach to native title as one of 'definitional over-specificity'.[35] Sean Brennan has argued that the High Court's prioritisation of fact-specific laws and customs has negated a more holistic conception of native title.[36]

8.31 Some submissions reflected on how conceiving of the 'nature' of native title as a bundle of rights could influence the 'content' and exercise of native title. For the former Aboriginal and Torres Strait Islander Social Justice Commissioner, conceiving of the nature of native title as a bundle of rights inhibits economic development.[37] North Queensland Land Council submitted that the bundle of rights doctrine 'should not be permitted to exclude the inclusion of commercial native title rights and interests in the NTA'.[38]

---

29 *Western Australia v Brown* [2014] HCA 8 (12 March 2014) [36], citing *Western Australia v Ward* (2002) 213 CLR 1, [95].
30 Ibid [76] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
31 Ibid [95].
32 Ibid [94], [468].
33 See, eg, *Akiba v Commonwealth* (2013) 250 CLR 209.
34 See, eg, North Queensland Land Council, *Submission 17*.
35 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.
36 Sean Brennan, 'Statutory Interpretation and Indigenous Property Rights' (2010) 21 *Public Law Review* 239, 259.
37 Australian Human Rights Commission, *Submission 1*.
38 North Queensland Land Council, *Submission 17*.

The content of native title rights and interests

8.32 A broader specification of native title rights is evident in *Akiba*. The High Court held in *Akiba* that native title rights and interests could comprise a 'right to access resources and to take for any purpose resources' in the native title claim area.[39] The right could be exercised for commercial or non-commercial purposes.[40]

8.33 In the High Court, French CJ and Crennan J held that the native title right should be conceived as a widely-framed right.[41] They observed that '[t]he native title right so framed could be exercised in a variety of ways, including by taking fish for commercial or trading purposes'.[42] The 'sectioning of the native title right into lesser rights or "incidents" defined by the various purposes which it might be exercised' was unnecessary as '[t]he lesser rights would be as numerous as the purposes that could be imagined'.[43]

8.34 Similarly, Hayne, Kiefel and Bell JJ observed 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.[44]

8.35 Their Honours continued:

> Focusing upon the *activity* described as 'taking fish and other aquatic life for sale or trade', rather than focusing upon the relevant native title *right*, was apt to, and in this case did, lead to error.[45]

8.36 In *Western Australia v Brown* the High Court stated that '[t]he nature and content of a right is not ascertained by reference to the way it has been, or will be, exercised'.[46]

8.37 In the reasons for judgment in respect of the Pilki People's and the Birriliburu People's native title claims, the Federal Court remarked that

> it is not necessary as a matter of logic to prove that activity in conformity with traditional laws and customs has taken place in order to establish that a right exists. 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

---

39 *Akiba v Commonwealth* (2013) 250 CLR 209.
40 Ibid, [21] (French CJ and Crennan J); [67] (Hayne, Kiefel and Bell JJ) ('the relevant native title right that was found in this case was a right to take resources for *any* purpose').
41 Ibid [21].
42 Ibid [1].
43 Ibid [21].
44 Ibid [66].
45 Ibid [67].
46 *Western Australia v Brown* [2014] HCA 8 (12 March 2014) [33].

> 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. If there is evidence of witnesses accepted by the Court that there are traditional laws and customs which give a right to access and take for any purpose the resources of the country, then the right is established even if there is no evidence of trading activity.[47]

8.38 The determination that was made in *Akiba* specified the non-existence of native title rights and interests in minerals and petroleum resources.[48] The High Court in *Ward* held that native title rights and interests do not include rights to statutory minerals and petroleum.[49] The Minerals Council of Australia submitted 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.[50]

Confirming the nature and content of native title rights and interests

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

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

8.39 Given the importance of the evidential basis in establishing the content of native title rights and interests, the ALRC proposes that the express inclusion of a right for any purpose in s 223(2) will allow sufficient flexibility to cover a variety of factual circumstances and will retain emphasis on the content being derived from Aboriginal people and Torres Strait Islander law and custom.

8.40 Since *Akiba* it is clear that a native title determination may include a 'right to access resources and to take for any purposes resources in the native title areas',[51] if the evidence supports it, and that the 'right so framed could be exercised in a variety of

47 *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].

48 *Akiba v Commonwealth* (2013) 250 CLR 209, [14].

49 *Western Australia v Ward* (2002) 213 CLR 1, [22] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

50 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*.

51 Note that the right was non-exclusive and that minerals and petroleum resources were excluded from the scope.

ways, including by taking fish for commercial or trading purposes'.[52] In *Akiba*, '[n]o distinct or separate native title right to take fish for sale or trade was found'.[53]

8.41 The key question for this Inquiry is whether there should be statutory 'clarification'[54] of that case law. The ALRC proposes a statutory confirmation of the current statement of the law[55] in *Akiba* as a platform for the courts to assess the evidence in each instance to determine the content of the native title rights and interests. The proposed reform of s 223(2) reflects the current case law.

Is statutory confirmation necessary?

Reasons for confirmation

8.42 The ALRC considers that statutory confirmation of the case law in *Akiba* is warranted because it:

- would accord with the Preamble and Objects of the *Native Title Act*;
- may assist in unlocking the economic potential of native title; and
- may assist in ensuring that the practice of all parties is in accordance with the stated case law and in accordance with the Preamble of the Act.

8.43 First, the ALRC considers that statutory confirmation would accord with the principles of statutory construction outlined in Chapter 5 in respect of s 223.[56] Such a statutory confirmation accords with Principle 1—acknowledging the importance of the recognition of native title[57]—and with Principle 4—consistency with international law.[58]

8.44 Secondly, the ALRC considers that statutory confirmation that native title is a right for any purpose and that such rights may include commercial activities, may assist in unlocking the economic potential of native title. This reason accords with

---

52 *Akiba v Commonwealth* (2013) 250 CLR 209, [1] (French CJ and Crennan J).

53 Ibid [67] (Hayne, Kiefel and Bell JJ). Rather, the purpose, which the holder of the claimed right may have had for exercising the right on a particular occasion, 'was simply a circumstance attending its exercise': Ibid [66].

54 The ALRC considers that it is more appropriate to speak of 'confirmation' rather than 'clarification' of the law, which is the word used in the Terms of Reference for this Inquiry. This is because 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. While it might have been said, on 3 August 2013, that the law needed 'clarification', the High Court has 'clarified' the law so it is apt to speak of whether statutory 'confirmation' of that case law is required.

55 The ALRC is mindful of the High Court's decision that s 12 of the *Native Title Act* as enacted was invalid: *Western Australia v Commonwealth* (1995) 183 CLR 373. Section 12 had stated 'Subject to this Act the common law of Australia in respect of native title has, after 30 June 1993, the force of a law of the Commonwealth'. It is not intended that a revised s 223(2) would seek to operate in the way that s 12 sought to operate—that is, by making the common law immune from a valid State law.

56 See Ch 1 and 'Approach to statutory construction of s 223' in Ch 5.

57 Principle 1 provides 'Reform should acknowledge the importance of the recognition and protection of native title for Aboriginal and Torres Strait Islander people and the Australian community'.

58 Principle 4 provides 'Reform should reflect Australia's international obligations in respect of Aboriginal and Torres Strait Islander people, and have regard to the *United Nations Declaration on the Rights of Indigenous Peoples*'.

Principle 5—supporting sustainable futures. There was stakeholder support for this rationale.[59] Many stakeholders submitted that there was a need for native title to afford Aboriginal and Torres Strait Islander peoples—and Prescribed Bodies Corporate[60]—economic development opportunities.[61] AIATSIS submitted that including economic rights 'will help unlock some of the potential for native title holders to freely pursue the aspirations they hold for their traditional lands and waters'.[62] Similarly, others submitted that statutory confirmation 'would help native title groups that have achieved native title determinations become more future-focused'.[63]

8.45 Thirdly, the ALRC considers that statutory confirmation may assist in ensuring that the practice of all parties is in accordance with the stated case law and in accordance with the Preamble. Again, this reason reflects Principle 1.[64]

8.46 The view that statutory confirmation may assist in ensuring that the practice of all parties is in accordance with the stated case law was supported by a number of stakeholders.[65] Angus Frith and Maureen Tehan submitted:

> While the recent decisions in *Akiba* and *Brown* do support arguments that native title rights and interests should be sufficiently broadly conceived to encompass rights to use land and waters subject to native title for commercial purposes, they may not suffice to ensure that native title rights and interests recognised in the future do enable commercial activities.
>
> The High Court has stated that if rights exist they can be exercised in the manner that the native title group wants to exercise them subject to regulation or extinguishment. However, there is no necessary implication that native title rights and interests can be exercised in a commercial manner. This should be made explicit in the *NTA*.[66]

8.47 Some native title representative bodies submitted that the state governments, with whom they had been negotiating, had been unwilling to accept that native title

---

59 AIATSIS, *Submission 36*; Kimberley Land Council, *Submission 30*; J Altman, *Submission 27*; Native Title Services Victoria, *Submission 18*; Cape York Land Council, *Submission 7*; Australian Human Rights Commission, *Submission 1*; National Native Title Council, Submission No 14 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, 2011.

60 Cape York Land Council, *Submission 7* ('rights of a commercial nature are potentially one of the mechanisms that could be employed to advance the future economic development of these organisations').

61 AIATSIS, *Submission 36*; J Altman, *Submission 27*; Native Title Services Victoria, *Submission 18*; Just Us Lawyers, *Submission 2*; Australian Human Rights Commission, *Submission 1*; 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; Australians for Native Title and Reconciliation, Submission No 6 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, June 2011.

62 AIATSIS, *Submission 36*. See also National Native Title Council, Submission No 14 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, 2011.

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

64 See Ch 1.

65 Central Desert Native Title Services, *Submission 26*; A Frith and M Tehan, *Submission 12*; Cape York Land Council, *Submission 7*.

66 A Frith and M Tehan, *Submission 12* (footnotes omitted).

included rights and interests of a commercial nature.[67] Cape York Land Council expressed the view that '[t]here is evidence that groups across Cape York were involved in trade and barter at the time of sovereignty'.[68] However, because of the State of Queensland's view of the native title jurisprudence, prior to the High Court's decision in *Akiba*, commercial rights were unable to be recognised.[69] It submitted:

> 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 that without clarification, it is likely that the State will continue to require non-commercial qualifications on non-exclusive native title rights and interests.[70]

8.48 Central Desert Native Title Services submitted that a number of native title claims in which it had been involved had asserted native title rights to take and use resources.[71] However, the State of Western Australia has 'not been prepared to agree to such a right', and 'attempted to limit the right to take resources for "non-commercial" or "domestic purposes only"'. It referred to the native title claims of the Pilki People and the Birriliburu People. The Federal Court subsequently found that the determinations in these claims should include a 'native title right to access and take for any purpose the resources of the determination area'.[72]

8.49 Governments submitted that their practice in respect of resolving native title claims was commendable.[73] 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.[74] The South Australian Government submitted that six of the claims that had been resolved by consent determination in that jurisdiction 'involved comprehensive settlement agreements that address broader issues including compensation, sustainability of the Prescribed Body Corporate, and future act issues'.[75]

---

67 Central Desert Native Title Services, *Submission 26*; Cape York Land Council, *Submission 7*.

68 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').

69 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. See also Cape York Land Council, *Submission 7*.

70 Cape York Land Council, *Submission 7*.

71 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').

72 *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].

73 South Australian Government, *Submission 34*; Northern Territory Government, *Submission 31*; Queensland Government Department of Natural Resources and Mines, *Submission 28*; Western Australian Government, *Submission 20*.

74 Western Australian Government, *Submission 20*.

75 South Australian Government, *Submission 34*.

Reasons against confirmation

8.50 Some stakeholders were opposed to a statutory confirmation, considering that it:

- is unnecessary;
- will cause uncertainty;[76] and
- will open the floodgates.

8.51 Some stakeholders opposed amendment of the *Native Title Act*, considering such statutory confirmation to be unnecessary given that case law, namely *Akiba*, already so provides.[77] The Law Society of Western Australia was of the view that the decision in *Akiba* 'provides a sufficient statement of the law to deal with the issue of the possibility of native title rights comprising commercial interests'.[78] The Chamber of Minerals and Energy of Western Australia (CME) made a similar point, stating '[i]n light of this, it is unclear why amendments to the [Act] to expressly recognise commercial native title rights and interests are required'.[79] Statutory confirmation was seen as unnecessary given that the recognition of commercial rights will depend on the evidence.[80]

8.52 A few stakeholders, notably those with minerals and energy resource interests, were opposed to amendment of the statute because they considered that such an amendment would introduce uncertainty.[81] The Association of Mining and Exploration Companies (AMEC) expressed concern that uncertainties could outweigh any benefits of the proposal.[82] The CME expressed concern about unintended consequences.[83] Both the CME and the Minerals Council of Australia submitted that there was a need for the impacts of any change to be clearly understood and quantified.[84]

8.53 Some state governments raised a 'floodgates' argument—that is, a fear that groups may seek to re-open existing determinations.[85] The South Australian Government submitted that,

---

76 By contrast, the Cape York Land Council, which was in favour of statutory confirmation of the law stated in *Akiba*, was of the view that '[r]egulatory regimes would still address matters such as sustainability, safety and protection of the environment': Cape York Land Council, *Submission 7*.

77 Queensland Government Department of Natural Resources and Mines, *Submission 28*; Chamber of Minerals and Energy of Western Australia, *Submission 21*; Western Australian Government, *Submission 20*; Law Society of Western Australia, *Submission 9*.

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

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

80 Northern Territory Government, *Submission 31*; Western Australian Fishing Industry Council, *Submission 23*; Chamber of Minerals and Energy of Western Australia, *Submission 21*; Western Australian Government, *Submission 20*.

81 Chamber of Minerals and Energy of Western Australia, *Submission 21*; Association of Mining and Exploration Companies, *Submission 19*.

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

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

84 Chamber of Minerals and Energy of Western Australia, *Submission 21*; Minerals Council of Australia, *Submission 8*.

85 South Australian Government, *Submission 34*. See also 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. Note that neither submission used the term 'floodgates'. Section 13(4) of the *Native Title Act* currently provides for the variation or revocation of a

> Were the NTA to be amended to make commercial rights easier to establish, this would change the basis on which native title has been approached for 20 years and would most probably result in a number of groups seeking to re-open existing determinations.[86]

Supporting sustainable futures

8.54 Some stakeholders submitted that more than statutory confirmation is needed to deliver real economic returns to Aboriginal and Torres Strait Islander peoples.[87] Some stakeholders outlined other things which they considered could be done to create real economic benefit, such as: amending all existing native title determinations 'to specify that the recognised native title rights and interests can be exercised in a commercial manner';[88] amending the future act regime;[89] and enacting a comprehensive broader land settlement framework.[90] Both the future act regime and the possibility of the enactment of a land settlement framework are outside the scope of this Inquiry.[91]

8.55 Further, a number of submissions advocated consistency with,[92] or drew upon key rights[93] which are provided in the *United Nations Declaration on the Rights of Indigenous Peoples*.[94]

ALRC conclusion

8.56 The ALRC proposes that there be a statutory confirmation of the wording in the case law.[95] The ALRC considers that a statutory confirmation would provide overarching principles for the determination of native title. Further, amending the provision to reflect current case law accords with the original purpose of the provision in that the statute will continue to provide examples of the type of rights and interests

---

determination and s 13(5) outlines the two grounds. These are: '(a) that events have taken place since the determination was made that have caused the determination no longer to be correct; or (b) that the interests of justice require the variation or revocation of the determination'.

86 South Australian Government, *Submission 34*.

87 The National Farmers' Federation opposed a statutory confirmation. National Farmers' Federation, *Submission 14* ('Indigenous people require a proprietary interest in land to derive a real economic benefit. Native title does not and cannot deliver that outcome'). See also Northern Territory Government, *Submission 31*; Western Australian Government, *Submission 20*. By contrast, others expressed the view that while a statutory confirmation may be of some use, outcomes would still be constrained: Central Desert Native Title Services, *Submission 26*; National Native Title Council, *Submission 16*.

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

89 Native Title Services Victoria, *Submission 18*; National Native Title Council, *Submission 16*.

90 National Native Title Council, *Submission 16*. See Ch 3.

91 See Ch 1 and Ch 2.

92 National Congress of Australia's First Peoples, *Submission 32*; J Altman, *Submission 27*; V Marshall, *Submission 11*; Australian Human Rights Commission, *Submission 1*. For example, the Australian Human Rights Commission referred to the relevant provision in UNDRIP that provides that 'Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions': *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 31. The issue of the protection or exercise of cultural knowledge is addressed later in this chapter.

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

94 *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).

95 *Western Australia v Brown* [2014] HCA 8 (12 March 2014); *Akiba v Commonwealth* (2013) 250 CLR 209.

that might comprise native title. The ALRC is mindful that the content of the native title rights and interests would still need to be established on the facts in each case. Respondents may still challenge whether the evidence substantiates that the claimed native title right and interest can include a right to take resources for any purpose, such as for commercial activities.

8.57 The ALRC's approach in proposing statutory confirmation is in contrast to the ALRC's approach to the consideration of 'whether there should be … confirmation that "connection with the land and waters" does not require physical occupation or continued or recent use'.[96] The ALRC considers that statutory confirmation of the case law in *Akiba* is warranted as this case law is evolving—with only a couple of Federal Court decisions in this regard[97]—compared with the case law pertaining to physical occupation.[98]

Rights in relation to any purpose

8.58 Paragraph (a) of the ALRC's proposal provides statutory confirmation of the case law statement that native title rights and interests may comprise rights in relation to any purpose. This reflects the High Court's stated view of the nature of the right.

8.59 A number of stakeholders supported the broadly defined, purpose-based native title right—namely the right to take resources.[99] Central Desert Native Title Services submitted that the *Native Title Act*

> 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.[100]

8.60 AMEC contrasted the characterisation of rights in relation to purpose, submitting:

> 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.[101]

---

96 See Ch 6.

97 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).

98 See Ch 6.

99 See, eg, AIATSIS, *Submission 36*; J Altman, *Submission 27*; Central Desert Native Title Services, *Submission 26*; Native Title Services Victoria, *Submission 18*. See also Lisa Strelein, 'The Right to Resources and the Right to Trade—Native Title: A Vehicle for Change and Empowerment?' (Paper Presented at UNSW Symposium, 5–6 April 2013) 13 ('it could be that the appropriate approach, building on the formulation of right by Finn J in *Akiba*, is to clarify that the enjoyment of native title rights are not limited by purpose').

100 Central Desert Native Title Services, *Submission 26*.

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

8.61 The question of how Aboriginal rights should be designated has arisen for decision in jurisdictions such as Canada.[102]

8.62 The ALRC considers that the *Native Title Act* should be amended to make clear that rights and interests comprise rights in relation to any purpose to avoid the potential confusion over the characterisation of native title rights.

Indicative activities for which a right might be exercised

8.63 Paragraph (b) of the ALRC's proposal provides that native title rights and interests may include, but are not limited to, hunting, gathering, fishing, commercial activities and trade. That is, this aspect of the proposal provides an indicative listing of examples or types of native title rights and interests.

8.64 Section 223(2) of the *Native Title Act* provides that native title rights and interests can include hunting, gathering, or fishing, rights and interests. The ALRC's proposal would continue to provide expressly that native title may encompass such rights and interests.

8.65 The ALRC considers that a revised s 223(2) should include reference to both commercial activities and trade. A number of stakeholders, including a large number of native title representative bodies, supported the amendment of the *Native Title Act* so that it expressly states that native title rights and interests can include rights and interests of a commercial nature.[103] Further, a number of stakeholders supported the express inclusion of 'trade' as indicative of commercial activities under law and custom.[104]

8.66 While 'commercial' is a term that is capable of various meanings, typically it has been linked to native title rights to take resources for trade or exchange.[105] What is meant by 'trade'? Some submissions referred to anthropological and historical

---

102 *Lax Kw'alaams Indian Band v Canada* [2011] 3 SCR 535.

103 See, eg, AIATSIS, *Submission 36*; Kimberley Land Council, *Submission 30*; Native Title Services Victoria, *Submission 18*; 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*; Australian Human Rights Commission, *Submission 1*.

104 See, eg, Native Title Services Victoria, *Submission 18*; 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*; National Native Title Council, Submission No 14 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, 2011; 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; 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.

105 See, eg, Native Title Amendment (Reform) Bill 2014 cl 19; Native Title Amendment (Reform) Bill (No 1) 2012 cl 19. The proposed amendment for s 223(2) would provide that native title rights and interests include 'the right to trade and other rights and interests of a commercial nature'.

evidence of trade in various parts of Australia,[106] including international trade.[107] AIATSIS submitted:

> [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.
>
> Daryl Wesley and Mirani Lister … argue that glass beads were received from Macassan traders in exchange for fishing rights in areas off the coast of Arnhem land.[108]

8.67 For some stakeholders, such trade and exchange exhibited by Aboriginal and Torres Strait Islander peoples 'aligns to [a] general commercial mindset'.[109] In Cape York Land Council's view, it is

> 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.[110]

Adaptation and native title

8.68 Native title rights are understood as being possessed under laws and customs with origins in the period prior to annexation.[111] While there can be some degree of change and adaptation of the traditional *laws and customs*, there cannot be new native title *rights and interests*.[112] The Full Court of the Federal Court in *Bodney v Bennell* stated that '[s]o 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'.[113] In Chapter 5, the ALRC proposes 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.[114]

8.69 Views vary as to what might be included in any definition of 'commercial' and what could have evolved and adapted. For the National Farmers' Federation, 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 quite another, and one

---

106 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.

107 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.

108 AIATSIS, *Submission 36*.

109 North Queensland Land Council, *Submission 17* ('a general understanding of trade, exchange and commerce, should be sufficient to demonstrate that commercial native title rights and interests were being exercised').

110 Cape York Land Council, *Submission 7*.

111 Perry and Lloyd, above n 10, 13.

112 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [43] (Gleeson CJ, Gummow and Hayne JJ).

113 *Bodney v Bennell* (2008) 167 FCR 84, [74].

114 See Proposal 5–1 in Ch 5.

that they do not support.[115] By contrast, Native Title Services Victoria submitted that '[w]hen linked to an "unfrozen" definition of traditional, rights that are commercial in nature would not then imply a time-bound and stagnated view of the value of the interest'.[116] An example here is the use of Aboriginal practices of fire management in northern Australia which formed the basis for generating carbon credits for native title holders under the carbon farming legislation.[117]

8.70 In other jurisdictions there have been debates about the evolution and adaptation of indigenous rights to land and waters.[118] In New Zealand, there have been several claims to rights in waters with a commercial aspect[119] and cases seeking to establish commercial activities around a 'right to development'.[120] In 2013, the British Columbia Court of Appeal affirmed the existence of an Aboriginal commercial fishing right.[121] Major agreements[122] and settlements[123] with indigenous peoples often include a component that allows for commercial utilisation of land and waters.

8.71 Just Us Lawyers submitted:

> If 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.[124]

8.72 Dr Lisa Strelein has argued that the decision in *Akiba* at first instance is 'important', because

> Finn J held that once a determination had been made that law and custom supported the right to take resources, the use made of those resources was irrelevant … That is, where the laws of the society in question support a right to take for any purpose available at the time sovereignty was asserted, there is no barrier to the development of new modes of use and taking advantage of new opportunities and purposes that may arise.[125]

---

115 National Farmers' Federation, *Submission 14*.

116 Native Title Services Victoria, *Submission 18*.

117 *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth). See also J Altman, *Submission 27*.

118 See, eg, *Lax Kw'alaams Indian Band v Canada* [2011] 3 SCR 535.

119 Jacinta Ruru, 'Indigenous Restitution in Settling Water Claims: The Developing Cultural and Commercial Redress Opportunities in Aotearoa, New Zealand' (2013) 22 *Pacific Rim Law & Policy Journal* 342.

120 *Ngai Tahu Maori Trust Board v Director General of Conservation* [1995] 3 NZLR 553.

121 *Ashousaht Indian Band and Nation v Canada (A-G)* [2013] BCCA 300.

122 *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).

123 One of the most well known settlements is the 'Sealords deal', where compensation under a Waitangi Tribunal settlement facilitated purchase of shares in a commercial fishery on behalf of New Zealand Maori. See, Shane Heremaia, 'Native Title to Commercial Fisheries in Aotearoa/New Zealand' (2000) 4 *Indigenous Law Bulletin* 15.

124 Just Us Lawyers, *Submission 2*. They observed that a 'reasonable' balance will need to be struck.

125 Lisa Strelein, 'The Right to Resources and the Right to Trade—Native Title: A Vehicle for Change and Empowerment?' (Paper Presented at UNSW Symposium, 5–6 April 2013) 9 (submitted as an attachment to AIATSIS, *Submission 36*).

8.73 Chapter 5 contains further detail about the courts' approach to statutory construction of s 223. Notably where legislation is identified as being beneficial and remedial, 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'.[126]

'Commercial activities' and 'trade' should not be defined in the Act

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

8.74 The ALRC considers that the terms 'commercial activities' and 'trade' should not be defined in the *Native Title Act* as it is unnecessary to define prescriptively the scope of commercial activities and trade. Statutory definitions of 'commercial activities' and 'trade' may introduce inflexibility which may not be warranted, and may actually be unhelpful, given the fact dependent nature of native title claims.

8.75 In the Issues Paper, the ALRC asked, in the event that the *Native Title Act* defines 'native title rights and interests of a commercial nature', what the definition should contain.[127] Some stakeholders submitted that any definition should be broadly defined,[128] while others submitted that prescription of what is meant by commercial activities and trade is unnecessary,[129] impossible[130] or possibly distracting.[131] Native Title Services Victoria was of the view that prescription was unnecessary because rights that are commercial in nature 'will necessarily flow from traditional law and custom'.[132] The South Australian Government, a stakeholder that opposed statutory confirmation, also made this point. In its view, it would be futile to prescribe the rights: the definition of commercial 'cannot be comprehensively codified, as each example of any ongoing traditional commerce will turn on its own facts'.[133]

8.76 As outlined earlier, native title rights and interests 'derive from' the traditional laws and customs of the relevant Indigenous communities.[134] The nature and content of native title is a question of fact that is based on the relevant law and custom.

---

126 *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].

127 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Issues Paper No 45 (2013) Q 14.

128 Kimberley Land Council, *Submission 30*; North Queensland Land Council, *Submission 17*.

129 Native Title Services Victoria, *Submission 18*; V Marshall, *Submission 11*.

130 South Australian Government, *Submission 34*.

131 Western Australian Fishing Industry Council, *Submission 23* ('the real question is how rights and interests are managed not how they are defined').

132 Native Title Services Victoria, *Submission 18*.

133 South Australian Government, *Submission 34*.

134 Perry and Lloyd, above n 10, 3; *Western Australia v Ward* (2002) 213 CLR 1, [20] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

Protection or exercise of cultural knowledge?

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

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

8.77 The interpretation of s 223(1) has excluded the protection or exercise of cultural knowledge as a native title right and interest that can be recognised by the common law. The ALRC is interested in views on whether this exclusion is appropriate given the enhanced understanding of the links between Aboriginal and Torres Strait Islander laws and customs as expressed through cultural knowledge and connection with land and waters. Section 211 includes a savings provision for cultural or spiritual activities. Should the indicative listing in any revised s 223(2) include the protection or exercise of cultural knowledge? A reversal of the current interpretation may influence the content of commercial rights and interests.

8.78 The term 'cultural knowledge' may encompass a number of different things. In *Ward*, the majority of the High Court, in joint reasons, complained of the 'imprecision' of the term.[135] 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'.[136]

8.79 A submission to this Inquiry used the term 'traditional knowledge' rather than 'cultural knowledge'.[137] The concept of 'traditional knowledge' is 'contested and there is ongoing debate about the merits of various definitions of the subject matter'.[138]

8.80 In *Ward*, the majority of the High Court held that the *Native Title Act* cannot protect 'a right to maintain, protect and prevent the misuse of cultural knowledge' if it goes beyond denial or control of access to land or waters.[139] 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.[140] Section 223(1)(b) requires the Aboriginal people or Torres Strait

135 *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').

136 Ibid [58].

137 North Queensland Land Council, *Submission 17*.

138 Christopher Antons, *Traditional Knowledge, Traditional Cultural Expressions and Intellectual Property Law in the Asia-Pacific Region* (Kluwer, 2009) 1.

139 *Western Australia v Ward* (2002) 213 CLR 1, [468] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

140 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.

Islanders, by their traditional laws acknowledged and their traditional customs observed, to have a 'connection with' the land or waters.[141]

8.81 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.[142]

8.82 Native title rights and interests in respect of cultural knowledge—variously described[143]—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',[144] 'such that they constituted some recognisable interest in the land itself'.[145] However, that was not a case for the determination of native title[146] and the claim with respect to native title was not pressed.[147]

8.83 In *Commonwealth v Yarmirr*, the majority of the High Court observed that, in the course of argument before them, there had been no discussion about what was meant by the rights and interests 'to visit and protect places within the claimed area which are of cultural or spiritual importance' that had been included in the determination 'or how effect might be given to a right of access to "protect" places or "safeguard" knowledge'. They said nothing more about the issues.[148]

---

141 *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)).

142 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 ('[T]he right and duty according to traditional law and custom to safeguard [cultural] knowledge can only be classed as a "right or interest in relation to land or waters" to the extent that the exercise of the right and duty involves the physical presence of relevant persons on or at the estate or site in question. If … the need to safeguard the cultural knowledge associated with a site in the claimed area requires, for example, a senior yuwurrumu member to visit the site with those who it is his obligation to teach the culture, then the safeguarding of the cultural knowledge could fairly be said to be a right in relation to the site, and thus in relation to land or waters').

143 For example, von Doussa J 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.

144 Ibid 254.

145 Ibid 256.

146 Ibid 255–6.

147 Ibid 256.

148 *Commonwealth v Yarmirr* (2001) 208 CLR 1, [2] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

8.84 The ALRC is aware that '[f]or Indigenous people there are unbreakable links between their knowledge systems, the land and waters, and its resources'.[149] Further, for such communities, 'spiritual or religious obligations could infiltrate almost all undertakings, including transactions, transfers, exchanges and activities undertaken for value or benefit'.[150] Frith and Tehan quoted WEH Stanner, who, in 1968, said, '[n]o English words are good enough to give a sense of the links between an Aboriginal group and its homeland'.[151]

8.85 In both the Full Court of the Federal Court and the High Court, the majority acknowledged that 'the relationship of Aboriginal people to their land has a religious or spiritual dimension'.[152] In their joint reasons, Gleeson CJ, Gaudron, Gummow and Hayne JJ remarked:

> It is a relationship which sometimes is spoken of as having to care for, and being able to 'speak for', country. 'Speaking for' country is bound up with the idea that, at least in some circumstances, others should ask for permission to enter upon country or use it or enjoy its resources … The difficulty of expressing a relationship between a community or group of Aboriginal people and the land in terms of rights and interests is evident. Yet that is required by the NTA. The spiritual or religious is translated into the legal. This requires the fragmentation of an integrated view of the ordering of affairs into rights and interests which are considered apart from the duties and obligations which go with them.[153]

8.86 Different views were expressed about the appropriate statutory construction of s 223(1) in respect of cultural knowledge in strong dissenting judgments in both the High Court[154] and in the Full Federal Court.[155] In the Full Federal Court, North J discussed an extract from the evidence—an anthropologist's report—that showed that the respective knowledge was 'intimately linked with the land',[156] and how 'the secular and spiritual aspects of the aboriginal connection with the land are twin elements of the right to the land':[157]

> 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.[158]

8.87 Kirby J, in dissent in the High Court in *Ward*, focused on the 'very broad' phrase 'in relation to' in the opening words of s 223(1).[159] He was of the view that

---

149 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.
150 Kimberley Land Council, *Submission 30*.
151 A Frith and M Tehan, *Submission 12*.
152 *Western Australia v Ward* (2000) 99 FCR 316, [666]. See also *Western Australia v Ward* (2002) 213 CLR 1, [14].
153 *Western Australia v Ward* (2002) 213 CLR 1, [14].
154 Ibid (Kirby J).
155 *Western Australia v Ward* (2000) 99 FCR 316, (North J).
156 Ibid [865].
157 Ibid [866].
158 Ibid.
159 *Western Australia v Ward* (2002) 213 CLR 1, [577]–[578].

what is required 'is a real relationship, or connection, between the interest claimed and the relevant land or waters' and 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).[160] 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.[161]

8.88 The ALRC did not expressly consult on cultural knowledge. Few submissions raised the express inclusion in the *Native Title Act* of the protection or exercise of cultural knowledge—or something like it.[162] However, the ALRC considers that it is within the scope of the ALRC's Inquiry to seek views on the express inclusion of the protection or exercise of cultural knowledge in the *Native Title Act* as part of examining the 'connection requirements relating to the recognition and scope of native title rights and interests'. Further, the issue may be relevant in conceiving of commercial activities. The Kimberley Land Council submitted that 'commercial activity should not be unduly limited by its current operation or understanding in modern secular societies' but rather should encompass 'an activity that may have a spiritual or religious component or derivation'.[163]

8.89 The ALRC invites responses as to whether the indicative listing of native title rights and interests in s 223(2) should be amended to include the protection or exercise of cultural knowledge. The ALRC is also interested in what stakeholders understand is meant by the phrase 'cultural knowledge' and on views as to whether a definition is needed and what such a definition should contain. Some submissions to this Inquiry used different descriptions.[164] With respect to Indigenous intellectual property, one stakeholder submitted to a Senate Inquiry that:

> Currently the native title system is not clear about the rights of Indigenous people to control valuable biological resources on their land and waters, rights that do exist under customary intellectual property systems (for example, the rights that people have over plants with which they have a totemic relationship).[165]

8.90 The ALRC is also aware that some stakeholders may consider that the *Native Title Act* is not the appropriate statute for recognition of Indigenous customary intellectual property norms.[166]

---

160 Ibid [577], [580].
161 Ibid [587].
162 Law Council of Australia, *Submission 35*; North Queensland Land Council, *Submission 17*.
163 Kimberley Land Council, *Submission 30*.
164 Law Council of Australia, *Submission 35* ('intellectual property rights'); North Queensland Land Council, *Submission 17* ('traditional knowledge').
165 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.
166 Ibid. However, the Law Council of Australia took the opposite view, calling for the Act to be amended in order for 'intellectual property rights' to be recognised as native title rights: Law Council of Australia, *Submission 35*.

Anything else to be included in the indicative listing?

8.91 The ALRC is aware that claims for other rights are evolving. For example, in *Akiba*, 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'[167] are not rights and interests 'in relation to' land or waters within the meaning of s 223 of the *Native Title Act*.[168] Rather, on the basis of the evidence in that case, they were correctly characterised as 'rights of a personal character dependent upon status'.[169]

8.92 The ALRC is interested in views about whether any other purposes or activities should be included in the proposed indicative listing in revised s 223(2)(b).

167 *Akiba v Commonwealth* (2013) 250 CLR 209, [6].

168 Ibid [6], [45] (French CJ and Crennan J); [47] (Hayne, Kiefel and Bell JJ).

169 Ibid [45] (French CJ and Crennan J). Some submissions called for the *Native Title Act* to be amended so that reciprocal rights may be recognised as native title rights and interests. See, eg, Law Council of Australia, *Submission 35*; North Queensland Land Council, *Submission 17*.

9. Promoting Claims Resolution

Contents

Summary

9.1 This chapter considers ways in which certain procedural aspects of the native title process might be reformed. In particular, this chapter considers:

- issues relating to the production of evidence in native title proceedings and for consent determinations;
- the development of policies relating to the involvement of the Commonwealth in consent determinations;
- the development of principles guiding assessment of connection reports;
- the potential for a training and accreditation scheme for native title practitioners; and
- the native title application inquiry process.

Evidentiary issues

9.2 In a native title proceeding, claimants must provide evidence to establish the existence of native title as defined in s 223 of the *Native Title Act*.[1] As discussed in Chapter 4, this will involve claimants bringing evidence to demonstrate 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. Chapters 5, 7 and 8 make proposals for reform of the definition of native title.

9.3 This section considers the kind of evidence that may be brought to establish the existence of native title rights and interests in litigated and consent determinations. In particular, it considers the role of expert evidence in native title proceedings.

9.4 The Federal Court assesses this evidence and makes a determination as to whether the legal requirements are satisfied or, in the case of a consent determination, makes a determination giving effect to the agreement between the parties. A determination provides the basis for recognising Aboriginal or Torres Strait Islander law, and the relationship between native title and other rights and interests, under Australian law.

Expert evidence

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

9.5 Evidence to establish native title under s 223 draws on a wide range of expert evidence, including evidence provided by historians, archaeologists, botanists, palaeontologists, cartographers, and anthropologists:

> 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.[2]

9.6 This expert evidence may have significant value to the Court.[3] Vance Hughston SC and Tina Jowett have observed that expert evidence is often of particular

---

1 *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].

2 *Sampi v Western Australia* [2005] FCA 777 (10 June 2005) [951].

3 *Willis on behalf of the Pilki People v Western Australia* [2014] FCA 714 (4 July 2014) [116] (North J).

importance where the collective memory of a claim group does not extend prior to the assertion of sovereignty. Therefore

> 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.[4]

9.7 However, Hughston and Jowett identify several concerns with the processes surrounding the use of expert evidence:

- concerns have at times been expressed that expert evidence is partisan or biased, possibly because experts are briefed by only one party and may have a long-standing association with a particular claim group;[5]
- there have been instances of experts giving evidence about matters extending beyond their professional expertise;[6]
- 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.[7]

9.8 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 be beneficial in avoiding 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.

9.9 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.[8]

---

4 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.

5 Hughston and Jowett refer to *Jango v Northern Territory* (2006) 152 FCR 150, [315]–[338].

6 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].

7 Hughston and Jowett, above n 4, 1–2.

8 Federal Court of Australia, *Submission 40*.

9.10 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.[9]

9.11 The *Federal Court Rules 2011* (Cth) provide the Federal Court with the power to make a range of directions relating to expert evidence,[10] including, for example, that the experts:

- confer, either before or after writing their expert reports;[11]
- produce to the Court a document identifying where their opinions agree or differ;[12]
- provide their evidence one after another;[13]
- be sworn at the same time and that the cross-examination and re-examination be conducted by putting to each expert in turn each question relevant to one subject or issue at a time, until the cross-examination or re-examination is completed;[14] or
- be cross-examined and re-examined in any particular manner or sequence.[15]

9.12 As noted in Chapter 3, there is a lack of experts and anthropologists with expertise in native title matters. This was also noted by several stakeholders.[16]

9.13 The ALRC seeks stakeholder views on whether the use of expert conferences and concurrent expert evidence are beneficial in native title proceedings, and, if so, whether any reforms to the law or legal frameworks are needed. The ALRC is also interested in other procedures that may lead to more effective use of expert evidence.

Archiving evidence

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

---

9 Ibid.
10 *Federal Court Rules 2011* (Cth) r 5.04(3).
11 Ibid r 23.15(a).
12 Ibid r 23.15(b).
13 Ibid r 23.15(f).
14 Ibid r 23.15(g).
15 Ibid r 23.15(i).
16 Federal Court of Australia, *Submission 40*; Law Society of Western Australia, *Submission 9*; Cape York Land Council, *Submission 7*.

9.14 The evidence used in native title proceedings provides information about the laws, customs, histories and cultures of Aboriginal and Torres Strait Islanders peoples. The evidence may therefore hold significant value to persons outside proceedings, whether for the public, as contributing to a stronger understanding of Aboriginal and Torres Strait Islanders peoples and their history.

9.15 However, this information is generally not available to persons outside proceedings. As noted by Dr Paul Burke, this information 'remains inaccessible … because it has been initiated within the legal context of native title and remains confidential'.[17] 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'.[18]

9.16 The ALRC seeks stakeholder comments on whether and, if so, how the material generated through the native title connection process should be dealt with, given that some of the information will, for example, be culturally sensitive or refer to person and family matters. For example, a publicly accessible database of key archival material may be of value, subject to appropriate consideration of cultural sensitivity and privacy.

Consent determinations

9.17 Once a native title application has been made and the parties determined, the Federal Court refers the application to mediation between the parties.[19] 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.[20]

9.18 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').[21]

9.19 The diversity of sources of evidence reveals the complexity and difficulties in proving the elements of native title. Preparation for the hearing of an application for a determination of native title requires extensive collection of factual material including affidavit evidence by native title claimants. For consent determinations, claims typically require 'connection reports' as part of developing 'agreed facts' between the parties. The amount of documentary material accompanying a claimant application varies from claim to claim. Whether the matter is ultimately resolved by a consent determination or litigation, there will typically be voluminous documentation provided to the Court and parties as the Court's management of the case proceeds.

---

17 P Burke, *Submission 33*.

18 Just Us Lawyers, *Submission 2*. See also AIATSIS, *Submission 36*.

19 *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).

20 *Native Title Act 1993* (Cth) s 86A.

21 Ibid ss 87, 87A.

9.20 For example, Cape York Land Council submitted it is

> confident that most Cape York claim groups are able to meet current connection and authorisation requirements, but the time and expense required to do so means that the claim process continues to be lengthy and that means that other groups have to wait for long periods for their areas to be progressed.[22]

Concurrence

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

9.21 Native title proceedings require the applicant to provide detailed factual evidence relating to connection and claim group membership. Compiling such evidence typically will require significant resources and the extensive use of experts, such as anthropologists. The amount of factual material required, as well as the sequence in which it is provided, may lead to inefficiencies in native title proceedings. For example, a complete connection report may be required before a state or territory respondent prepares a tenure analysis.[23] The preparation of a connection report or a tenure analysis may be a laborious, time-consuming and costly process.[24] Some costs might be reduced if, for example, a tenure analysis was made available at an early stage.[25]

Best practice principles

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

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

9.22 A clear and transparent Commonwealth policy position on its responsibilities and interests with respect to connection as a party to consent determinations may assist in the resolution of claims.

---

22 Cape York Land Council, *Submission 7*.

23 See Ch 3.

24 South Australian Government, *Submission 34*; Western Australian Government, *Submission 20*; Department of Justice, Victoria, *Submission 15*.

25 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).

9.23 Practically, such a document may guide the Commonwealth's involvement in developing the 'agreed statement of facts' for consent determinations pursuant to ss 87 and 87A of the *Native Title Act*.

9.24 A Commonwealth policy should be consistent with the object of the Act to recognise and protect native title and reflect international best practice.[26]

9.25 For a consent determination, variations exist from jurisdiction to jurisdiction in terms of what evidence the state or territory requires in order to pursue a consent determination. North Queensland Land Council noted that

> some 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.[27]

9.26 In recent years, there has been a departure from the large-scale documentation provided to support a consent determination, which typically may be similar in extent to that filed in litigation.[28] A number of submissions to the Inquiry highlighted the conciliatory nature of parties' relationships in negotiating native title matters. For example, South Australian Native Title Services stated that 'we have established positive relationships with successive State Governments and other respondent parties to resolve native title through negotiation and consent'.[29] The Northern Territory Government submission detailed the cooperative approach taken to developing processes to streamline the resolution of pastoral estate claims.[30]

9.27 However, 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'.[31] 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'.[32]

---

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). See also Principle 4: Consistency with international law in Ch 1.

27 North Queensland Land Council, *Submission 17*.

28 For example, in the Northern Territory: Northern Territory Government, *Submission 31*.

29 South Australian Native Title Services, *Submission 10*.

30 Northern Territory Government, *Submission 31*.

31 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).

32 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) 2013 [17].

9.28 Connection guidelines shape assumptions about appropriate evidence and standards. Queensland South Native Title Services highlighted the perceived problem for the applicant:

> It has to be said our clients go to considerable lengths, and a lot of resources are expended on their behalf, to prepare connection material evidencing their native title for delivery to the State … The problem as it appears to us is that a client's connection material has been prepared on the basis, amongst other things, of meeting Connection Guidelines prepared and required by the State for the purposes of reaching a negotiated agreement on native title. That in and of itself is problematic as it raises questions about the extent to which the connection material is implicitly shaped by assumptions within the Connection Guidelines about appropriate evidence and what standard of connection will be acceptable as indicative of connections between the claim group and the land.[33]

9.29 However, the Queensland Government does not support a 'substantive revision of the connection requirements' given 'the high rate of resolution of native title claims in Queensland over the last five years notwithstanding the existing connection requirements'.[34]

9.30 Queensland South Native Title Services 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.[35]

9.31 The Northern Territory Government submitted that legislative change is not necessary because significant reform has been achieved through 'principles of negotiation agreed between the Territory, the native title party through the representative bodies, and stakeholders.'[36]

9.32 Nationally consistent principles may not be appropriate given the specific state and territory interests, and the diverse nature and content of native title around Australia. However, it may be useful to develop or collate existing best practice principles which may be advanced in all jurisdictions with respect to consent determinations.

9.33 For example, the Australian Government may choose to include relevant best practice principles for native title consent determinations in the *Legal Services*

---

33 Queensland South Native Title Services, *Submission 24*.
34 Queensland Government Department of Natural Resources and Mines, *Submission 28*.
35 Queensland South Native Title Services, *Submission 24*.
36 Northern Territory Government, *Submission 31*.

Directions 2005 (Cth). Schedule 1 of the *Legal Services Directions 2005* (Cth) contains the Commonwealth's obligation to act as a model litigant.[37]

9.34 There are *Guidelines for Best Practice* which were developed by the Joint Working Group on Indigenous Land Settlements for Flexible and Sustainable Agreement Making which may serve as a platform for reform.[38] These Guidelines were 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.[39] The Guidelines emphasise early negotiation, cultural awareness and sensitivity and adherence to model litigant principles including good faith negotiations such as not relying on technical defences unless it would result in prejudice, not taking advantage of a claimant who lacks resources and demonstrating leadership to influence the behaviour of other parties.[40]

9.35 The ALRC invites comment on these questions relating to the promotion of consent determinations.

Certification and training of the legal profession

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

9.36 A training and certification scheme for practitioners working in native title may have several benefits. Deloitte Access Economics noted that accreditation was one of a number of options for improving the level of service provided:

> 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.[41]

37 *Legal Services Directions 2005* (Cth) sch 1, app B. Model Litigant Rules include (a) dealing with claims promptly and not causing unnecessary delay in the handling of claims and litigation; (aa) making an early assessment of: (i) the Commonwealth's prospects of success in legal proceedings that may be brought against the Commonwealth …; (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.

38 Joint Working Group on Indigenous Land Settlements, *Guidelines for Best Practice: Flexible and Sustainable Agreement Making*, August 2009.

39 Ibid 4.

40 Ibid 12.

41 Deloitte Access Economics, 'Review of the Roles and Functions of Native Title Organisations' (Australian Government, March 2014) 39.

9.37 Certification may help to ensure that practitioners meet certain standards or requirements. This may reduce a problem, noted by AIATSIS, of applicants accessing 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.[42]

9.38 David Ritter and Merrilee Garnett have also suggested that there are 'strong arguments for the development of an accreditation system for native title lawyers. At the very least we consider that there should be a specific code of ethics for native title lawyers'.[43]

9.39 The ALRC is seeking comments on the possible costs or benefits of a legal training and certification scheme for native title practitioners, as well as the form that such a scheme might take.

Native title application inquiries

9.40 In this section, the ALRC poses several questions regarding the power to conduct a native title application inquiry under the *Native Title Act*. Under ss 138A–138G of the *Native Title Act* the Court may direct the National Native Title Tribunal (the Tribunal) to hold an inquiry into matters or issues relevant to a determination of native title. The outcomes of the inquiry are non-binding, but may provide guidance to the parties or the Court.

9.41 The inquiry process may be beneficial in native title proceedings. However, the process appears to have been rarely used. The questions in this chapter seek stakeholder views on possible reforms to ss 138A–138G that may increase the use of inquiries.

Overview of the inquiry process

9.42 Sections 138A–138G of the *Native Title Act* make provisions for the Tribunal to conduct a native title application inquiry.[44] These sections apply where the Federal Court has referred proceedings to mediation under s 86B,[45] 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;

---

42 AIATSIS, *Submission 36*.

43 David Ritter and Merrilee Garnett, 'Building the Perfect Beast: Native Title Lawyers and the Practise of Native Title Lawyering' (1999) 1 *Land, Rights, Laws: Issues of Native Title* 8.

44 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.

45 *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.

9.43 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.[46] 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;[47] and
- the applicant agrees to participate in the inquiry.[48]

9.44 An inquiry may cover more than one proceeding[49] and more than one matter.[50] 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.[51]

9.45 Following an inquiry, the Tribunal must make a report, stating any findings of fact.[52] The Tribunal may make recommendations in the report, but these recommendations do not bind the parties.[53] 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.[54]

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

9.46 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'.[55] Inquiries could be used, for example, in disputes relating to connection, authorisation or joinder. The use of the inquiry power

46 Ibid s 138B(1).
47 Ibid s 138B(2)(a).
48 Ibid s 138B(2)(b).
49 Ibid s 138G.
50 Ibid s 140.
51 Ibid s 141(5). The state, territory and Commonwealth Ministers may elect not to participate.
52 Ibid s 163A.
53 Ibid.
54 Ibid s 86(2).
55 Chief Justice Robert French, 'Lifting the Burden of Native Title: Some Modest Proposals for Improvement' (2009) 93 *Australian Law Reform Commission Reform Journal* 10.

in appropriate circumstances is in keeping with 'the importance placed by the Act on mediation as the primary means of resolving native title applications'.[56]

9.47 Despite the potential of the inquiry process, it has, to date, been underused. The ALRC is aware of only one example of the process being used. The ALRC is therefore seeking views on whether increased use of inquiries would be beneficial, and if so, what measures may lead to increased use of the process. To this end, the ALRC asks several questions about possible reforms which may increase the use of the process.

Requirement for an applicant to agree to an inquiry

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

9.48 The Court may only direct the Tribunal to hold an inquiry if the applicant agrees to participate in the inquiry.[57] Consideration might be given to the removal of this requirement.

9.49 The requirement that the applicant agree to the inquiry reflects the intent that the inquiry process be voluntary. The Explanatory Memorandum to the Native Title Amendment Bill 2006 (Cth) noted that:

> 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.[58]

9.50 The Federal Court's power to refer proceedings to alternative dispute resolution (ADR) does not require the consent of the parties, except in the case of referrals to arbitration (which may result in a binding decision).[59] The native title mediation process itself does not require the agreement of the applicant (or any other party).[60] Given that these ADR processes are useful despite not requiring the consent of parties, the inquiry process might have value even without the agreement of the applicant.

9.51 This proposal 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

---

56 *Lovett on behalf of the Gunditjmara People v State of Victoria* [2007] FCA 474 (30 March 2007) [36].
57 *Native Title Act 1993* (Cth) s 138B(2).
58 Explanatory Memorandum, Native Title Amendment Bill 2006 (Cth) [4.278].
59 *Federal Court of Australia Act 1976* (Cth) s 53A(1A).
60 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).

to mediate, or who express a reluctance to do so, nevertheless participate in the process often leading to a successful resolution of the dispute'.[61] The same may be true of parties to the inquiry process.

Evidence gathering powers of the Tribunal

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

9.52 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) of the Act, this power does not apply in respect of a native title application inquiry.

9.53 The powers of the Tribunal could 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.

9.54 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.[62]

9.55 Empowering the Tribunal to summon a person to give evidence or produce documents would alter the voluntary nature of the inquiry process. If s 156(7) of the Act was repealed, and the Tribunal summoned a person to give evidence or produce documents, a failure of that person to attend the Tribunal or to produce the required documents would be an offence under ss 171 and 174 of the Act, respectively. However, the desirability of retaining an entirely voluntary inquiry process may need to be balanced against any benefits of strengthening the Tribunal's powers.

Application for inquiry orders by non-parties

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

9.56 A direction for an inquiry may only be made on the Court's own motion, at the request of a party, or at the request of the person conducting the mediation.[63] Other persons who are not parties to proceedings are unable to request a direction for an

61 James Spigelman, 'Mediation and the Court' (2001) 39 *Law Society of NSW Journal* 63, 65.
62 Explanatory Memorandum, Native Title Amendment Bill 2006 (Cth) 4.308.
63 *Native Title Act 1993* (Cth) s 138B(1).

inquiry. In particular, non-parties who are potential claimants are not able to request an inquiry.

9.57 However, potential claimants who are not parties to proceedings may nevertheless have significant interests in claim areas. One way for potential claimants to represent their interests in native title proceedings is through joining proceedings as a respondent.[64] However, an application for joinder by a potential claimant, and the introduction of an additional respondent in proceedings, may result in delays and increase costs for all parties.

9.58 In some cases—for example, where there is a dispute about claim group membership—it may be appropriate to allow potential claimants to seek a direction for an inquiry. This would provide potential claimants with an alternative to a formal application for joinder as a respondent in proceedings.

Other reforms of the inquiry process

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

9.59 In addition to the specific questions above, the ALRC is interested in stakeholder views on the inquiry process. In particular, the ALRC is interested in whether or not the inquiry process would be useful to parties to proceedings, and what, if any, barriers there are to the use of the inquiry process.

64 See Ch 11.

10. Authorisation

Contents

Summary

10.1 The Terms of Reference ask the ALRC to consider whether any barriers to access to justice are imposed by the *Native Title Act*'s authorisation provisions to claimants, potential claimants and respondents. The authorisation provisions of the Act require a claim group to authorise a person or persons (known as the applicant) to make an application for a native title determination. The provisions create a legal entity to perform the functions associated with the claim. They are also intended to ensure that the application is made with the approval of the claim group.

10.2 Access to justice includes access to courts and lawyers, but also information and support to identify, prevent and resolve disputes.[1] It can also encompass both procedural rights and access to the resources necessary to participate fully in the legal system.

10.3 In this chapter, the ALRC proposes some changes to the authorisation provisions of the *Native Title Act* to

- allow a claim group to choose its decision-making process;
- clarify that the claim group can define the scope of the authority of the applicant;

---

1 Attorney-General's Department, 'A Strategic Framework for Access to Justice in the Federal Civil Justice System' (2009); see also 'Access to Justice Arrangements' (Draft Report, Productivity Commission, 2014) 77–78.

- simplify the procedure where a member of the applicant is unable or unwilling to act; and
- clarify that the applicant may act by majority unless the terms of the authorisation provide otherwise.

10.4 This chapter also considers whether the authorisation provisions should be altered to ensure that native title benefits are held for the benefit of the claim group. Finally, this chapter considers how the identification of claim group members, and disputes about claim group composition, affect access to justice for claimants, potential claimants and respondents.

What is authorisation?

10.5 The authorisation provisions were introduced into the *Native Title Act* in 1998.[2] 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. Now, to make an application for a determination of native title, a person or group of people must be authorised by all the people who hold the native title claimed.[3] The person or group of people is known as 'the applicant', and the people who hold the native title are known as 'the native title claim group'.

10.6 Applicants 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.[4] 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'. The commentary in this section of the Discussion Paper refers to both native title claims and compensation claims, unless otherwise indicated.

10.7 The *Native Title Act* does not require all members of a claim group to participate in the decision-making process. It is sufficient if all members have been given an opportunity to participate.[5] The decision by the participants does not need to be unanimous.[6]

10.8 Justice French (as he then was) 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.[7]

---

2 *Native Title Amendment Act 1998* (Cth).
3 *Native Title Act 1993* (Cth) s 61.
4 Ibid pt 2 div 5.
5 *Lawson on behalf of the 'Pooncarie' Barkandji (Paakantyi) People v Minister for Land and Water Conservation (NSW)* [2002] FCAFC 1517 (9 December 2002) [25].
6 Ibid.
7 *Strickland v Native Title Registrar* (1999) 168 ALR 242, [57].

10.9 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.[8]

Decision-making process

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

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

10.10 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 similar matters, the group must use that process to authorise an applicant. It may not choose to use a different, perhaps more straightforward, process.

10.11 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.[9]

10.12 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.[10] 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.[11]

10.13 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.[12] The group may wish to change the decision-making process to be more inclusive.[13]

10.14 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'.[14]

10.15 The ALRC proposes that s 251B should simply provide that a claim group must use a process of decision-making agreed to and adopted by the group. The claim group

---

8 *Native Title Act 1993* (Cth) s 190C.

9 Ibid s 251B.

10 National Native Title Council, *Submission 16*; Cape York Land Council, *Submission 7*; Just Us Lawyers, *Submission 2*. See, eg, *Butchulla People v Queensland* (2006) 154 FCR 233; *Holborow v Western Australia* 2002 FCA 1428.

11 Department of Justice, Victoria, *Submission 15*.

12 Ibid.

13 *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*.

14 Susan Phillips, 'The Authorisation Trail' (2000) 4 *Indigenous Law Bulletin* 13.

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 do so.

10.16 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'.[15]

10.17 For some groups, the process of choosing a decision-making process will always be a difficult one.[16] 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.[17] As AIATSIS noted, there is logical circularity in employing a decision-making process to choose a decision-making process.[18] The ALRC considers that the proposed amendment will remove some, but not all, of the difficulties of choosing a decision-making process. The alternative, of statutory prescription of a decision-making process, might remove some difficulties but would not promote the autonomy of claim groups.

10.18 Stakeholders, including governments and representative bodies, supported such a change.[19]

10.19 Section 251A of the *Native Title Act* regarding the authorisation of Indigenous Land Use Agreements ('ILUAs') is similar to s 251B regarding the authorisation of an applicant. Section 251A provides that native title holders may authorise an agreement using a traditional decision-making process, or if no such process exists, using a process agreed to and adopted by the group. Sections 251A and 251B are interpreted in a consistent way by the courts.[20]

10.20 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 notes that it may be desirable for the two authorisation provisions to remain consistent.

Scope of authorisation

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

---

15 Law Society of Western Australia, *Submission 9*.
16 Just Us Lawyers, *Submission 2*.
17 Ibid.
18 AIATSIS, *Submission 36*.
19 South Australian Government, *Submission 34*; Kimberley Land Council, *Submission 30*; NSW Young Lawyers Human Rights Committee, *Submission 29*; Queensland South Native Title Services, *Submission 24*; Western Australian Government, *Submission 20*; 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*.
20 *Fesl v Delegate of the Native Title Registrar* (2008) 173 FCR 150, [72].

Question 10–1 Should the *Native Title Act* include a non-exhaustive list of ways in which the claim group might define the scope of the authority of the applicant? For example:

(a) requiring the applicant to seek claim group approval before doing certain acts (discontinuing a claim, changing legal representation, entering into an agreement with a third party, appointing an agent);

(b) requiring the applicant to account for all monies received and to deposit them in a specified account; and

(c) appointing an agent (other than the applicant) to negotiate agreements with third parties.

10.21 Section 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.[21] This provision is intended to ensure that those who deal with the applicant in relation to these matters can be assured that the applicant is authorised to do so.[22]

10.22 It is not clear whether a claim group may authorise an applicant to act subject to conditions. The reference in *Native Title Act* s 66B(1)(a)(iv) to the replacement of an applicant, on the grounds that 'the person has exceeded the authority given to him or her by the claim group to make the application', suggests 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.[23]

10.23 However in *Daniel*, the applicant was replaced on the basis that he was no longer authorised by the claim group,[24] not on the basis that he exceeded his authority, so these comments are obiter. This approach has been endorsed in later judgments, but it is arguable that these comments were also obiter.[25]

10.24 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

---

21 *Native Title Act 1993* (Cth) s 62A.
22 Explanatory Memorandum, Native Title Amendment Bill 1998 [25.41].
23 *Daniel v Western Australia* [2002] FCA 1147 (13 September 2002) [16].
24 Ibid [52].
25 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).

which the applicant can make effective decisions'. In this case, the claim group had authorised the applicant to make decisions by majority.[26]

10.25 However, in *Weribone on behalf of the Mandandanji People v Queensland*, the submission that a claim group may direct the applicant in the performance of its duties was rejected.[27] This case also concerned the question of whether an applicant can make decisions by majority.

10.26 There is no Full Court authority on this matter, and it is appropriate for the Act to be clarified on this issue. A number of stakeholders called for the Act to be clear that the claim group may define the scope of authority of the applicant,[28] or for clarity on this issue.[29] Two stakeholders cautioned that amendments should not be made that are complex or prescriptive or contribute to disputes as to what has and has not been authorised.[30]

10.27 There is a need for a legal personality to take responsibility for a native title claim. However, native title is a communal right and the ALRC considers that if the claim group wishes to retain decision-making power, or to disperse power—for example, between the claim group, the applicant, a bargaining agent, and a working group—it should be permitted to do so. For example, it was noted in *Daniels* that a claim group member and applicant 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.[31]

10.28 Some groups already use a working group, rather than the applicant, for decision-making, and require the applicant to seek claim group approval before doing certain acts. Other groups have placed conditions on an applicant's authority which require it to account for funds received on behalf of the group.

10.29 These initiatives indicate the development of governance structures that are suited to the needs of particular groups. The ALRC's proposal ensures that those practices can be formalised. Consequential amendments to s 62A may be necessary to acknowledge that, while the applicant may deal with all matters arising under the Act, it does so subject to the conditions of its authorisation.

---

26 *Anderson on behalf of the Wulli Wulli People v Queensland* (2011) 197 FCR 404, [60].
27 *Weribone on behalf of the Mandandanji People v Queensland* [2011] FCA 1169 (6 October 2011) [15].
28 See, eg, South Australian Government, *Submission 34*; Kimberley Land Council, *Submission 30*; Queensland South Native Title Services, *Submission 24*; Western Australian Government, *Submission 20*; North Queensland Land Council, *Submission 17*; Cape York Land Council, *Submission 7*.
29 Association of Mining and Exploration Companies, *Submission 19*.
30 Northern Territory Government, *Submission 31*; National Native Title Council, *Submission 16*.
31 *Daniel v Western Australia* [2002] FCA 1147 (13 September 2002) [27].

Consequences for acting outside authority

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

10.30 One representative body suggested that amendments to the Act should not only permit the group to define the scope of the applicant's authority, but should 'identify the consequence of breach of limits or conditions on authority'.[32] The ALRC is exploring options in this regard, but, as the National Native Title Council (NNTC) cautioned, it is important to ensure that the process does not become more 'complex, adversarial and... expensive to administer'.[33]

10.31 It may be that different consequences should follow, depending on the type of condition breached. Where 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 or court can decline to act if the applicant does not have the appropriate authority. In these cases no other remedy would be necessary.

10.32 The Act already permits an applicant to be replaced on the ground that it has exceeded its authority.[34] 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.[35]

10.33 As noted earlier, 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 educate both the applicant and the broader community. Should the applicant fail to account for funds received, one response would be to remove the applicant. This would not, of course, assist in the recovery of funds. This issue is discussed further below.

10.34 The ALRC is interested in views as to whether the *Native Title Act* should include a remedy, beyond replacement of the applicant, for a breach of a condition of authorisation.

---

32 Kimberley Land Council, *Submission 30*.

33 National Native Title Council, *Submission 16*.

34 *Native Title Act 1993* (Cth) s 66B(1)(a)(iv).

35 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. It is common practice for the applicant to sign an agreement on behalf of the group, although in *QGC Pty Ltd v Bygrave (No 2)* [2010] FCA 1019, Reeves J indicated that no signature is necessary: [103].

Limits on the authority to enter into agreements

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

10.35 Some groups may wish to limit the applicant's authority to enter into an agreement with third parties. For example, in *Roe v Western Australia,* the group passed a resolution that the applicant must not enter into 'any agreement that affects the land and waters covered by the GJJ claim unless authorised to do so by the GJJ claim group'.[36] This poses difficult questions. First, it is not clear what the utility of such a limitation would be. An ILUA cannot be registered without the authorisation of the claim group,[37] so the claim group already has the final say on these agreements. Such a limitation might prevent the entry into a s 31 agreement regarding a future act,[38] but would not necessarily prevent the future act, as the proponent may apply to the Tribunal for a determination if no agreement is made.[39]

10.36 Second, such a limitation could create uncertainty for third parties as to the authority of the applicant to enter an agreement.[40] This could be dealt with by requiring an applicant to disclose any limits to its authority to enter agreements with third parties, for example, by placing them on a register. The Register of Native Title Claims, which includes the name and address of the applicant, may be an appropriate place.

10.37 Third, if an applicant entered into an agreement, when not authorised to do so, a question might arise as to whether the agreement is enforceable. Whether the third party had notice of the applicant's limited authority would be relevant.

Applicant can act by majority

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

---

36 See, eg, *Roe v Western Australia (No 2)* [2011] FCA 102 (15 February 2011) [141].
37 *Native Title Act 1993* (Cth) s 24CG.
38 The *Native Title Act* gives native title parties the right to negotiate over certain acts that affect native title, including the grant of exploration or mining tenements: Ibid ss 25–44.
39 Ibid s 35.
40 Association of Mining and Exploration Companies, *Submission 19*.

10.38 The question of whether an applicant can act by majority is closely related to the question of whether a claim group can define the scope of the applicant's authority. As noted above, the Federal Court has held that a claim group may authorise an applicant to make decisions by majority.[41] However where the terms of the authorisation are silent, an applicant must act jointly.[42]

10.39 There are some difficulties with the default position requiring a joint, or unanimous, decision. It gives a minority of the members of the applicant a veto power. If a disagreement cannot be resolved, the only recourse is to replace the applicant, which is expensive and time consuming, and does not necessarily resolve the disagreement. The default position in other areas of decision-making is usually a simple majority.[43] The ALRC considers that Aboriginal and Torres Strait Islander applicants should not be required to use arguably more burdensome unanimous decision-making. As Muirhead J said

> I cannot accept the argument that... Parliament intended, as it were, to add a rider to the effect 'there can be no consensus of Aboriginals without unanimity'. This would be contrary to the Aboriginal decision making processes as I understand them and would deny the wishes of the majority. It would mean that one dissident, one objector—however reasonable or unreasonable his dissent and whatever its motive—could frustrate the Land Council's role in assisting the Aboriginals to make decisions concerning the use or non-use of their land.[44]

10.40 It is proposed that, if the authorisation is silent on the matter, the applicant should be able to act by majority. As Collier J noted,

> the purpose of ss 61(1), 62(2)(c) and 251B is to seek a workable and efficient method of prosecuting claims for native title determination, one which limits the potential for dispute which might stifle the progress of claims... An interpretation of 'the applicant' within the meaning of ss 61(1), 62(2)(c) and 251B, which gives effect to decisions of the majority of those persons comprising the applicant, is consistent with the purpose of achieving a workable and efficient method of prosecuting claims for native title determinations.[45]

10.41 Should a claim group wish its applicant to act only after a unanimous decision, or after a decision made by more than 50 per cent plus one members, it may impose such a condition on its authorisation.

---

41 *Anderson on behalf of the Wulli Wulli People v Queensland* (2011) 197 FCR 404, [62].

42 *Tigan v Western Australia* (2010) 188 FCR 533, [18]; *Far West Coast Native Title Claim v South Australia (No 5)* [2013] FCA 717 (30 July 2013) [54]; *Weribone on behalf of the Mandandanji People v Queensland* [2011] FCA 1169 (6 October 2011) [15].

43 See, eg, *Aboriginal Land Rights Act 1983* (NSW) s 77; *Australian Law Reform Commission Act 1996* (Cth) s 36; *Corporations Act 2001* (Cth) s 248G.

44 *Alderson v Northern Land Council* (1983) 67 FLR 353, 360.

45 *Anderson on behalf of the Wulli Wulli People v Queensland* (2011) 197 FCR 404.

If a member of the applicant is unable or unwilling to act

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

10.42 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.

10.43 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'.[46]

10.44 It is unclear whether an application to replace the current applicant must be made if a person who is a member of the applicant dies or is unable to act. There are decisions indicating that, in this situation, the applicant may continue to act.[47] These judgments refer to the significant expense and delay associated with further authorisation procedures.[48] 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.[49] 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.

10.45 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'.[50] The Court has indicated that in this case, no reauthorisation is necessary.[51] However, it is likely that there are many claims in existence where the authorisation does not

46 *Daniel v Western Australia* [2003] FCA 666 (3 July 2003) [16].
47 *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].
48 *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].
49 *Sambo v Western Australia* (2008) 172 FCR 271, [30]; *Murgha on behalf of the Combined Gunggandji Claim v Queensland* [2011] FCA 1317 (14 November 2011) [4].
50 Cape York Land Council, *Submission 7*.
51 *Coyne v Western Australia* [2009] FCA 533 (22 May 2009) [53]–[56].

include that provision. Stakeholders have called for the Act to be amended to clarify that reauthorisation is not necessary.[52]

10.46 The ALRC considers that where the removal of a member of the applicant is not controversial or disputed, a simple and inexpensive procedure should be available. The group should be able to file a notice with the court indicating that a member of the applicant has died or is no longer willing or able to act.

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

10.47 Some applicants are structured to represent family groups, and the terms of the authorisation include a succession plan—they provide for the replacement of a member of the applicant with another person in that member's family. In these situations, simply removing a member would leave a family unrepresented on the applicant. [53] The *Native Title Act* should acknowledge and encourage the use of succession planning.

10.48 There may be concerns that allowing a member of the applicant to be removed without the supervision of the court at the time of the replacement would leave room for dishonest dealings. It is the duty of the solicitor on the record to take steps to ensure that the court is not misled.[54]

Managing and protecting benefits

10.49 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 Act.[55] However it also creates opportunities for the applicant to receive funds that are intended for the native title group. For example, the applicant must be a party to an area ILUA[56] and is a negotiation party for future acts.[57] Some state legislation also creates opportunities for an applicant to enter into an agreement on behalf of the group.[58] The Act does not regulate how funds arising from these agreements are held or disbursed.

10.50 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

---

52 AIATSIS, *Submission 36*; South Australian Government, *Submission 34*; Northern Territory Government, *Submission 31*; Central Desert Native Title Services, *Submission 26*; Western Australian Government, *Submission 20*; Association of Mining and Exploration Companies, *Submission 19*; North Queensland Land Council, *Submission 17*; Cape York Land Council, *Submission 7*.

53 NSW Young Lawyers Human Rights Committee, *Submission 29*.

54 *QGC Pty Ltd v Bygrave (No 2)* [2010] FCA 1019 (17 September 2010).

55 Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) [25.16].

56 *Native Title Act 1993* (Cth) ss 24CD(1), 24CD(2)(a), 253.

57 Ibid ss 30, 30A, 253.

58 See, eg, *Aboriginal Cultural Heritage Act 2003* (Qld) ss 34, 35.

agents rather than representative bodies.[59] 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.

10.51 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, the ALRC has not investigated this area in depth. However, two recent inquiries have looked at these issues.

10.52 The Taxation of Native Title and Traditional Owner Benefits and Governance Working Group ('the Working Group') considered 'the adequacy of current arrangements for holding, managing and distributing (native title) benefits'. In 2013, the Working Group made recommendations to the Australian Government regarding the regulation of private agents, the establishment of a statutory trust, and amendments to the *Native Title Act* to clarify the ownership of benefits and the fiduciary duty of the applicant.[60]

10.53 In 2014, the Review of the Roles and Functions of Native Title Organisations considered the role of private agents in the native title systems, and proposed a number of options for reform, including amendment of the *Native Title Act* to clarify the fiduciary duty of the applicant.[61]

10.54 The ALRC has been directed to consider the Act's authorisation provisions. Proposals have been made for changes to the authorisation provisions that are intended to support native title claim groups as they manage and protect benefits. However, the ALRC has not been directed to consider the important question of the protection of benefits more broadly. Further development of the options for reform outlined above (including statutory trusts, fiduciary duties, and the regulation of private agents) is not within the ALRC's Terms of Reference.

Claim group membership

10.55 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'.[62] In the case of a compensation claim, the claim group is 'all the persons... who claim to be entitled to the compensation'.[63] The application for a native title determination or compensation must either name the members of the claim group

59 Native Title Services Victoria, Submission No 4 to Senate Standing Committee on Legal and Constitutional Affairs, *Native Title Amendment Bill 2012* (2012); Australian Treasury, 'Taxation of Native Title and Traditional Owner Benefits and Governance Working Group: Report to Government' (3 August 2013) 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.

60 Australian Treasury, above n 59, 33.

61 Deloitte Access Economics, 'Review of the Roles and Functions of Native Title Organisations' (Australian Government, March 2014) 39–40.

62 *Native Title Act 1993* (Cth) s 61(1).

63 Ibid.

or 'otherwise describe the persons sufficiently clearly so that it can be ascertained whether any particular person is one of those persons'.[64] 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.[65]

10.56 In the Issues Paper, the ALRC canvassed some of the reasons a claim group may have difficulty determining its membership. These included:

- 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.[66]

10.57 Submissions agreed that the matters listed above contributed to difficulties identifying the claim group, and to subsequent disputes.[67] Those disputes often result in litigation, and in particular, challenges to the authorisation of an applicant.[68] Disputes, while inevitable in human interactions,[69] can cause great pain within communities.[70] Delays caused by these disputes create a barrier to access to justice.[71] Uncertainty around claim group composition also creates difficulties for third parties who are proposing future acts.

10.58 The ALRC's preliminary view is that these difficulties do not indicate a problem with the law or legal frameworks, but are a symptom 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.[72]

---

64 *Native Title Act 1993* (Cth) s 61(4).

65 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.

66 ALRC, 'Issues Paper' 64–66.

67 AIATSIS, *Submission 36*; Law Society of Western Australia, *Submission 9*; See, eg, Cape York Land Council, *Submission 7*.

68 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).

69 Kimberley Land Council, *Submission 30*.

70 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.

71 Department of Justice, Victoria, *Submission 15*.

72 On the difficulties of translation, see Ch 1.

10.59 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.[73] The ALRC has not proceeded to make this proposal, 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*.

Current options for dispute resolution

10.60 Representative bodies have statutory responsibility for dispute resolution, including assisting in promoting agreement between its constituents about native title matters.[74] In performing these functions, the representative body may seek the assistance of the National Native Title Tribunal.[75] 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.[76]

10.61 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.[77]

Options for reform

10.62 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.[78] It might be more effective for the representative body to fund independent mediation, or independent legal representation for the dissatisfied party.[79] Representative bodies are not sufficiently funded to fulfil all of their statutory duties[80] and additional funding for the purpose of engaging mediators or legal representation might assist.[81]

10.63 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.[82]

---

73 Cape York Land Council, *Submission 7*.
74 *Native Title Act 1993* (Cth) s 203BF.
75 Ibid s 203BK.
76 North Queensland Land Council, *Submission 17*.
77 A Frith and M Tehan, *Submission 12*.
78 Department of Justice, Victoria, *Submission 15*; Law Society of Western Australia, *Submission 9*; Cape York Land Council, *Submission 7*; Just Us Lawyers, *Submission 2*.
79 Just Us Lawyers, *Submission 2*.
80 Deloitte Access Economics, above n 61.
81 Cape York Land Council, *Submission 7*.
82 Law Society of Western Australia, *Submission 9*.

10.64 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.[83]

10.65 Culturally appropriate dispute resolution services may not be currently available. The AIATSIS Indigenous Facilitation and Mediation Project identified a need for a 'national fully supported and accredited network of Indigenous facilitators, mediators, and negotiators' in 2006.[84] The Federal Court of Australia's Indigenous Dispute Resolution & 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.[85] Such a service could not only address native title disputes but other family, neighbourhood or community disputes. Some disputes in the native title arena are in fact a continuation of conflict that began elsewhere, and so resolution of non-native title conflict could contribute to improved native title processes.[86]

10.66 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.[87] An Indigenous dispute resolution process might offer a forum for exploring these issues.[88]

10.67 A proposal for the establishment and funding of a national Indigenous dispute management service would be outside the Inquiry's Terms of Reference, which require a focus on the authorisation provisions of the *Native Title Act*. Instead, the ALRC suggests that the government consider establishing such a service.

---

83 Just Us Lawyers, *Submission 2*.

84 Toni Bauman, 'Final Report of the Indigenous Facilitation and Mediation Project July 2003–June 2006: Research Findings, Recommendations and Implementation' (AIATSIS, 2006) v.

85 Federal Court of Australia, Indigenous, Dispute Resolution and Conflict Management. Case Study Project, 'Solid Work You Mob Are Doing' (2009) xv–xvi.

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

87 J Hill, *Submission 37*.

88 See also Ch 9, regarding the use of mediation and inquiries into matters including the composition of the claim group.

11. Joinder

Contents

Summary

11.1 Section 84 of the *Native Title Act* sets out 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 A determination of native title rights and interests by the Federal Court takes effect *in rem*. This means that the Court's determination of native title rights and interests is enforceable not only against the parties to the application for a determination, but against all persons holding interests in the claim area and their successors in title. Given the legal finality of a determination, it is important that all persons who may be affected by, or have a relevant interest in, a determination in the proceedings have an opportunity to be involved. At the same time, it is important that proceedings are not unduly long, complicated or burdensome on the Court and on other parties.

11.3 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 joinder provisions of the *Native Title Act*. In this chapter, the ALRC asks several questions and proposes several reforms designed to reduce burdens that may limit access to justice, while also ensuring that a wide range of interests are adequately

represented in native title proceedings. The ALRC also makes two proposals about allowing appeals from joinder and dismissal decisions, and two proposals regarding the Commonwealth's participation in proceedings.

Overview of the party and joinder provisions

11.4 Section 84 of the *Native Title Act* includes provisions under which a person may become a party to native title proceedings.

11.5 Most persons, other than the applicant and the Crown, become parties to native title proceedings by virtue of s 84(3). Section 84(3)(a) provides that persons falling within certain categories can become a party to native title proceedings by notifying the Federal Court that they wish to do so within a specified time period. These categories include, for example, registered native title claimants, native title bodies corporate, persons with a registered proprietary interest, the Commonwealth Minister, local government bodies, and any other persons who claim native title in relation to land or waters in the claim area.

11.6 The joinder provision, s 84(5), allows the Federal Court to

> 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.[1]

11.7 If the threshold questions of identifying whether there is an interest[2] 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.[3] This discretionary power allows the Court to join as a party to proceedings a person who has not, or could not, become a party to proceedings under s 84(3).[4] Legal action may be well advanced when a person seeks to become a party under s 84(5) ('late joinder').

11.8 In exercising its discretion to join a person as a party to proceedings, the Court must first be satisfied that the person's interests may be affected by a determination. The meaning of the term 'interests that may be affected' was considered in *Byron Environment Centre Inc v Arakwal People*.[5] Those interests may include a 'special, well-established non-proprietary connection with land or waters', but must not be 'indirect, remote or lacking substance'.[6] They must be 'capable of clear definition and … be affected in a demonstrable way by a determination in relation to the

1 *Native Title Act 1993* (Cth) s 84(5).
2 *Wakka Wakka People No 2 v Queensland* [2005] FCA 1578 (4 November 2005).
3 *Barunga v Western Australia (No 2)* [2011] FCA 755 (25 May 2011) [162]–[168].
4 *Kokatha Uwankara (Part A) Native Title Claim v South Australia* [2013] FCA 856 (30 August 2013) [24].
5 *Byron Environment Centre Inc v Arakwal People* (1997) 78 FCR 1.
6 Ibid 6.

application'.[7] 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).[8]

11.9 Section 84(5A) provides an additional discretionary power for the Federal Court to join a person whose interests may be affected by a determination because the person has a public right of access over, or use of, an area of land covered by the application. This section allows the joinder of many persons who would not be able to become parties to proceedings under s 84(3) and who would not be held to have a sufficient interest in the claim area following *Byron*.

11.10 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.

11.11 Some 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.[9]

11.12 Other stakeholders expressed concerns about various aspects of the party provisions, such as:

- the potential for costs and delays arising from participation of non-Crown respondents;[10]
- the possible impact on parties when a new party is joined late in proceedings;[11]
- the need for clarity and certainty around the party provisions;[12]

---

7 Ibid 7. The principles described in *Arakwal* 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).

8 *Atkinson on behalf of the Gunai/Kurnai People v State of Victoria (No 3)* [2010] FCA 906 (16 August 2010); *Atkinson on behalf of the Gunai/Kurnai People v State of Victoria (No 4)* [2010] FCA 907 (16 August 2010).

9 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*.

10 Kimberley Land Council, *Submission 30*.

11 See, eg, Central Desert Native Title Services, *Submission 26*; North Queensland Land Council, *Submission 17*; A Frith and M Tehan, *Submission 12*. The National Farmers' Federation, on the other hand, suggested that the Court's discretion when considering applications for joinder later in proceedings was a sufficient mechanism for avoiding the problems of late joinder: National Farmers' Federation, *Submission 14*.

12 Chamber of Minerals and Energy of Western Australia, *Submission 21*; Association of Mining and Exploration Companies, *Submission 19*.

- the impact of parties participating in aspects of proceedings not affecting their interests;[13] and
- the desirability of mechanisms allowing parties to limit their involvement.[14]

11.13 This chapter considers possible reforms to the party and joinder provisions that may address such concerns. In making these proposals, however, the ALRC recognises that the party and joinder provisions overall appear to be operating satisfactorily in many respects. The discussion in this chapter reflects Guiding Principle 2—that any reforms should continue to allow a wide range of interests to be represented in native title proceedings—and Guiding Principle 3—that any reforms should promote timely and practical outcomes for parties to a native title determination through effective claims resolution, while seeking to ensure the integrity of the process.

The importance of representing a wide range of interests

11.14 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. Native title proceedings 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.[15]

11.15 Stakeholders and commentators have noted the importance of the *Native Title Act* continuing to provide for a wide range of persons with interests in a claim area to participate in native title proceedings. Perhaps the most important reason is that the *in rem* nature of a native title determination means a determination will affect the interests of a large number of persons. It is important that these persons are provided with an opportunity to represent their interests.[16] Wide community involvement in native title proceedings may also contribute to general community support and acceptance of the native title process.[17]

The effect of large numbers of parties

11.16 Some native title proceedings involve very large numbers of respondents. In the 2012–2013 reporting year alone, the Federal Court dealt with 982 party applications under s 84(3),[18] while over the five year period 2009–2013, 220 applications for

---

13 See, eg, Cape York Land Council, *Submission 7*.
14 Chamber of Minerals and Energy of Western Australia, *Submission 21*; Telstra, *Submission 4*.
15 *Western Australia v Ward* (2000) 99 FCR 316, [190].
16 See, eg, Western Australian Government, *Submission 20*; Association of Mining and Exploration Companies, *Submission 19*; Ergon Energy Corporation, *Submission 5*.
17 Justice John Dowsett, 'Beyond Mabo: Understanding Native Title Litigation through the Decisions of the Federal Court' (2009) 10 *Federal Judicial Scholarship*.
18 Federal Court of Australia, 'Annual Report 2012–2013' 143.

joinder were made to the Court under s 84(5) after the relevant notification period.[19] As at 31 May 2013, the average number of respondents in Western Australian native title cases was 21.[20] Claims made over geographically large areas, particularly if those areas are relatively closely settled, are likely to have many respondents.

11.17 Large party numbers can complicate proceedings, slow outcomes and place an administrative burden on courts and on other parties. This is a particular concern where increased costs and delays are caused by the participation of parties whose interests are unlikely to be affected by the native title determination,[21] or the participation of parties in aspects of the proceedings which do not bear on their interests.

11.18 However, the ALRC considers that large party numbers need not, in and of themselves, present a problem, provided that the involvement of large numbers of parties in proceedings does not result in undue burdens on parties or the Court. Reforms should not seek to reduce party numbers if this has the result of unduly limiting the ability of persons to represent their interests in proceedings.

Late joinder

11.19 Several stakeholders noted the particular impact that may be caused by the joinder of a party to proceedings that are well advanced. For example, Angus Frith and Associate Professor Maureen 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.[22]

11.20 In many cases, however, an application for late joinder may well be justified. The NSW Aboriginal Land Council (NSWALC), 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 resourcing, remoteness, and the possible lack of awareness of native title proceedings and their potential impact on interests held (or potentially to be held) under the *Land Rights Act 1983* (NSW), until the proceedings are well advanced.[23] Several stakeholders noted that it may be difficult for a third party to determine in advance whether their 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.[24]

---

19 Figures provided by the Federal Court of Australia, December 2013.

20 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) 2013 11.

21 Cape York Land Council, *Submission 7*.

22 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*.

23 NSW Aboriginal Land Council, *Submission 25*.

24 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*.

11.21 It should also be noted that the Federal Court has an existing power to limit the participation of a party joined under s 84(5) to matters relevant to the party's interests as set out in s 225(c) and (d).[25] These matters include:

- the nature and extent of interests (other than native title rights and interests) in relation to the determination area; and
- the relationship between native title and non-native title rights and interests in relation to the determination area.

11.22 This discretion appears to have been effectively exercised to reduce the impact of late joinder on other parties in proceedings, taking account of considerations such as whether the interests of the person applying for joinder late in proceedings can be protected in other ways,[26] or any delay in making the joinder application.[27]

State and territory parties

11.23 Section 84(4) provides that the relevant State or Territory Minister is automatically a party to proceedings, unless the Minister otherwise notifies the Federal Court.

11.24 The Federal Court has held that the State party acts in the capacity of *parens patriae,* or 'parent of the nation', to look after the interests of the community generally.[28] It could be suggested that third party respondents, whose interests in the claim area derive from a Crown grant, should not be involved in proceedings on the basis that their interests could be adequately represented by the relevant state or territory government. There was some stakeholder support for this position:

> It is strongly arguable 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.
>
> 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.[29]

11.25 However, other stakeholders expressed concerns about procedural fairness and about the capacity or suitability of the Crown or some other body to represent an individual interest. 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'[30] and that 'an expectation that the State

---

25 *Gamogab v Akiba* (2007) 159 FCR 578, [65]–[66]; *Watson v Western Australia (No 3)* [2014] FCA 127 (24 February 2014) [61]–[65].

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

27 Ibid.

28 *Munn for and on behalf of the Gunggari People v Queensland* (2001) 115 FCR 109, [29].

29 A Frith and M Tehan, *Submission 12*. Similarly, 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': Kimberley Land Council, *Submission 30*.

30 Ergon Energy Corporation, *Submission 5*.

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'.[31]

Parties to proceedings under s 84(3)

Only legal or equitable estates or interests in land or waters

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

11.26 Section 84(3) provides that certain persons are a party to native title proceedings if they notify the Federal Court in writing to that effect. These persons include:

- under ss 84(3)(a)(i) and 66(3)(a)(i)–(vi), various categories of defined persons with an interest in the area covered by the application, such as registered native title bodies corporate, any person with a proprietary interest registered in a public register of interests, and local councils;
- under s 84(3)(a)(ii), persons who claim to hold native title in relation to land or waters in the area covered by the application; and
- under s 84(3)(a)(iii), persons whose interests in relation to land or waters may be affected by a determination in the proceedings.

11.27 Question 11–1 is specifically concerned with s 84(3)(a)(iii), and not the participation of persons under s 84(3)(a)(i) and (3)(a)(ii). 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:

> ***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.

11.28 This 'very wide'[32] definition explicitly includes interests which, at common law, would not be interests in relation to land or waters, including licences or permits, as well as restrictive covenants.[33] The definition extends to a public right to fish,[34] and to

---

31 Ibid. See also Western Australian Government, *Submission 20*.
32 *Western Australia v Ward* (2002) 213 CLR 1, [387].
33 Explanatory Memorandum, Native Title Bill 1993 (Cth), Part B 102–103.
34 *Western Australia v Ward* (2002) 213 CLR 1, [387].

a 'privilege' such as the right of a member of the public to cross a recreational reserve managed by a public charitable trust.[35] 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, wider than necessary.

11.29 The ALRC is seeking stakeholder views on a restriction of the right to participate in proceedings under s 84(3)(a)(iii) to those persons with a legal or equitable estate or interest in the land or waters—that is, persons with an interest satisfying paragraph (a) of the definition of 'interest' in s 253. Persons whose interests were not legal or equitable estates or interests would not be able to become parties under s 84(3). However, such persons would still be able to join under s 84(5) and (5A), subject to the Federal Court making appropriate orders. This would ensure—consistent with Guiding Principle 2—that their interests were represented in proceedings.

11.30 A possible consequence of restricting s 84(3)(a)(iii) is that some persons who would previously have become parties automatically under s 84(3)(a)(iii) would instead seek to join by applications under s 84(5) and (5A). These applications would require consideration by the Court, and the costs and time involved making such applications may offset any other reductions in costs and time due to smaller party numbers. The ALRC is interested in stakeholder views as to whether this is likely to be a problem in practice.

Notification of Aboriginal Land Councils

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

11.31 As noted in Chapters 1 and 3, there are often complex interactions between the *Native Title Act* and the land rights legislation of states and territories. In NSW, for example, the *Aboriginal Land Rights Act 1983* (NSW) provides for Local Aboriginal Land Councils (LALCs) to make land claims resulting in freehold title over claim areas. The NSWALC noted that freehold title under the *Aboriginal Land Rights Act* may be affected by a native title claim.[36]

11.32 Once a claim has been determined under the *Aboriginal Land Rights Act*, a LALC has freehold title over the land, and would be able to become a party to native title proceedings under s 84(3) or to join proceedings under s 84(5). However, where a

35 *Kanak v Minister for Land and Water Conservation* (2000) 106 FCR 31, [28].
36 *Native Title Act 1993* (Cth) s 47A.

LALC has lodged a land claim but where the claim has not yet been determined, the claimant may hold an inchoate interest.[37]

11.33 The NSWALC submitted that it unclear whether a LALC would receive notification of a native title claim under s 66(3) if the LALC's interests were in land under a land rights claim, as opposed to land already owned, and that it may be appropriate to notify LALCs of a native title claim where their area overlaps with a native title claim.[38]

11.34 The importance of the holder of an inchoate interest having an opportunity to represent their interests in native title proceedings is illustrated by s 36(1d) of the *Aboriginal Land Rights Act*, which provides that land which is the subject of a registered native title determination application cannot be claimed under the *Aboriginal Land Rights Act*.

An option for respondents to limit their participation

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

11.35 A person who becomes a party to proceedings under s 84(3) will be a party to the entire proceedings. However, some persons may wish to participate only as far as is needed to represent their interests—namely, in relation to the matters raised in s 225(c) and (d).[39]

11.36 Proposal 11–1 would allow a person who becomes a party to native title proceedings under s 84(3) to elect to join proceedings only when the proceedings concern matters affecting the party's interests under s 225(c) and (d). Telstra noted the desirability of such a provision:

> 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.[40]

11.37 In its submission, 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:

---

37 *Narromine Local Aboriginal Land Council v The Minister* (1993) 79 LGERA 430, 433–434 (Stein J); see also *New South Wales Aboriginal Land Council v The Minister* (1988) 14 NSWLR 685, 696.

38 NSW Aboriginal Land Council, *Submission 25*.

39 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.

40 Telstra, *Submission 4*.

- 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.

11.38 Proposal 11–1 would allow a person to avail themselves of the right to become a party to proceedings under s 84(3), while making it possible for that person to elect to limit their involvement to matters concerning their own interests. A person who participated in this way would be able to represent their interests to the Court and to stay informed about the proceedings, without a need to be actively involved in all aspects of the proceedings. 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.

Joinder of parties under s 84(5) and (5A)

Joinder of claimants and potential claimants

Proposal 11–2 Section 84(5) of the *Native Title Act* should be amended to clarify that:

(a) a claimant or potential claimant has an interest that may be affected by the determination in the proceedings; and

(b) when determining if it is in the interests of justice to join a claimant or potential claimant, the Federal Court should consider whether they can demonstrate a clear and legitimate objective to be achieved by joinder to the proceedings.

11.39 Indigenous persons seeking to become respondent parties have consistently presented in cases concerning s 84(5) or its antecedents.[41] As noted in the Issues Paper, there appear to be three types of situations represented:

- 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;
- a person (or persons) asserts that they are members of the claim group, but that they have been excluded from, or not included in, the claim group; and
- a person (or persons) is a member of a competing claim group.

41 See, eg, *Davis-Hurst on behalf of the Traditional Owners of Saltwater v Minister for Land and Water Conservation (NSW)* [2003] FCA 541 (4 June 2003); *Isaacs on behalf of the Turrbal People v Queensland* [2011] FCA 828 (25 July 2011); *Far West Coast Native Title Claim v South Australia (No 5)* [2013] FCA 717 (30 July 2013).

11.40 Allowing claimants or potential claimants to join proceedings, in appropriate circumstances, is an important part of ensuring access to justice. In *Bidjara People (No 2) v Queensland*, Ryan J noted that, where members of a claim group were not satisfied with the authorisation of the applicant, 'it would also lead to injustice if the dissentient members were thereafter denied a voice in the determination of the claim'.[42] Stakeholders also noted the importance of claimants and potential claimants being able to join proceedings, in appropriate circumstances, under s 84(5). The Department of Justice, Victoria submitted that

> joinder as a party to a native title proceeding by persons with a native title interest remains one of a fairly limited number of avenues for disaffected or competing claimants or native title parties to seek to have their interests taken into account.[43]

11.41 Proposal 11–2 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. This would, in turn, clarify that a claimant or potential claimant with such an interest could be joined under s 84(5). Proposal 11–2 would codify a test, applied in *Barunga v Western Australia* and in *Far West Coast Native Title Claim v South Australia (No 5)*, to determine whether a member of the claim group could be joined as a respondent. This test comprises three elements:

(a) whether the person has an interest;

(b) whether the interest may be affected by a determination in the proceedings; and

(c) whether, in any event, in the exercise of its discretion the Court should join the person as a party.44

11.42 In *Far West Coast [No 5]*, Mansfield J stated that 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.[45]

11.43 However, as noted by Mansfield J in *Starkey v South Australia*, 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'.[46]

---

42 *Bidjara People (No 2) v Queensland* [2003] FCA 324 (7 April 2003) [7].

43 Department of Justice, Victoria, *Submission 15*. The value of late joinder under s 84(5) to disaffected claimants was also noted by, for example, AIATSIS, *Submission 36*; Just Us Lawyers, *Submission 2*. The needs of disaffected claim group members to participate in proceedings may also be met, to some extent, by reforms to the authorisation provisions of the NTA, as proposed in Ch 10.

44 *Barunga v Western Australia (No 2)* [2011] FCA 755 (25 May 2011) [164]; *Far West Coast Native Title Claim v South Australia (No 5)* [2013] FCA 717 (30 July 2013) [26].

45 *Far West Coast Native Title Claim v South Australia (No 5)* [2013] FCA 717 (30 July 2013) [33].

46 *Starkey v South Australia* [2011] FCA 456 (9 May 2011) [68].

11.44 Proposal 11–2 would also require that the Federal Court consider whether the claimant or potential claimant has a clear and legitimate objective in joining.[47] This requirement would limit joinder of claimants or potential claimants who join for uncertain, frivolous or vexatious reasons. The joinder of a claimant or potential claimant who does not have a clear and legitimate objective would be likely to add time and cost burdens to other parties, with little benefit to the joined party.

11.45 It is possible that this proposal would result in an increase in intra-indigenous disputes in native title proceedings.[48] However, existing case management powers of the Court (including, for example, the dismissal power under s 84(8)) may alleviate any difficulties in this regard.[49]

Representative organisations

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

11.46 Proposal 11–3 addresses the problem of large numbers of respondent parties in native title proceedings by allowing representative organisations to become parties or be joined. These organisations may themselves have no interest, proprietary or otherwise, in the claim area, and therefore may be unable to join under s 84(3), (5) or (5A). However, the members they represent may have interests that would be affected by the outcome of the proceedings. Allowing the representative organisations to participate would provide a means for these interests to be represented in proceedings, without the need for each member to participate. This would ensure that the interests of a wide range of persons were represented in proceedings—in accordance with Guiding Principle 2—while also helping to reduce party numbers—in accordance with Guiding Principle 3.

11.47 This proposal is not limited to native title representative bodies (NTRBs). Organisations representing other persons or groups—such as recreational users of the

---

47 This element of Proposal 11–2 reflects that statement of Mansfield J 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': *Far West Coast Native Title Claim v South Australia (No 5)* [2013] FCA 717 (30 July 2013) [37].

48 See, eg, 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 Glick Lydia (eds), *The Limits of Change: Mabo and Native Title 20 Years On* (AIATSIS, 2012) 188, 205–206. Also see Ch 10.

49 Cape York Land Council submitted that wider use of the dismissal power may be useful in this respect: 'Indigenous parties seem to be increasing in number in Cape York matters. It may be difficult for NTRBs to seek to remove Indigenous parties, particularly as there may be a perceived conflict, and it is usually a last resort. CYLC suggests that the Court could be more proactive in that regard': Cape York Land Council, *Submission 7*.

claim area or industry—would also be able to become parties under s 84(3), (5) or (5A).

11.48 As well as reducing the numbers of parties—and hence delays and expenses—in native title proceedings, Proposal 11–3 would relieve persons who are represented by an organisation from the need to actively participate in proceedings, which may be unfamiliar and complex. The represented persons would instead be able to rely on the organisation to represent their interests.

11.49 Queensland South Native Title Services suggested that representative bodies should have automatic party status, as state and territory governments currently have under s 84(4).[50] Proposal 11–3 would not provide such an automatic right. However, if a representative body could demonstrate an appropriate interest it would, under Proposal 11–3, be able to participate under either s 84(3), (5) or (5A).

11.50 Proposal 11–3 may have the secondary effect that a person whose interests are likely to be represented by a representative organisation—whether or not that person is a member of the organisation—would not be allowed to join proceedings. This would, of course, depend on the specific circumstances.

11.51 The ALRC is also seeking comment on whether it would be appropriate for the *Native Title Act* to provide that an Aboriginal Land Council with an inchoate interest in land within the claim area should be allowed to join proceedings. Such an inchoate interest may arise where a claim is made, but not yet determined, under the *Aboriginal Land Rights Act 1983* (NSW). Such a provision may address the need, noted by the NSWALC, for Aboriginal Land Councils to join late in proceedings in order to represent their interests.[51]

Dismissal of parties under s 84(8)

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

11.52 Proposal 11–4 would clarify 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:

50 Queensland South Native Title Services, *Submission 24*.
51 NSW Aboriginal Land Council, *Submission 25*.

(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.

11.53 In *Watson v Western Australia (No 5)*, Gilmour J dismissed a party that indicated it would, apparently without basis, refuse its consent to a consent determination. In reaching the decision to dismiss that 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 on the claimant group if the consent determination were not to proceed; and
- the proximity of the remaining parties to reaching settlement.

11.54 AIATSIS suggested that, in light of *Watson v Western Australia (No 5)*, there may be uncertainty as to whether the Court must take the matters of s 84(9) into consideration when making a decision to dismiss a party, or whether those matters were merely possible considerations for the Court. Proposal 11–4 would remove this uncertainty.[52]

Appeals from joinder and dismissal decisions

Proposal 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 to join, or not to join, a party under s 84(5) or (5A) of the *Native Title Act*.

52 The Chamber of Minerals and Energy of Western Australia (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*.

Proposal 11–6 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 to dismiss, or not to dismiss, a party under s 84(8) of the *Native Title Act*.

11.55 Section 24(1AA) of the *Federal Court of Australia Act 1976* (Cth) prohibits appeals from certain judgments of the Court, including 'a decision to join or remove a party, or not to join or remove a party'. 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) or (5A). 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).

11.56 Section 24(1AA) may create 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) may similarly impose a limit on access 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. Since native title proceedings result in determinations of the rights and interests of all persons in respect of the claim area, it is important to ensure that all persons are given an adequate opportunity to represent their interests.

11.57 Excluding native title proceedings from the scope of s 24(1AA) would set native title proceedings apart from other proceedings in the Federal Court. Section 24(1AA) would continue to apply in other areas of law. For example, no appeal would be available from a decision to join or remove a party in proceedings under consumer law. However, given the interests involved in native title proceedings, the ALRC considers that providing an avenue of appeal in the specific context of native title proceedings is warranted.

11.58 A requirement that an appeal from such decisions be subject to the leave of the Court would be an important way ensure that the appeals process was not misused. In the absence of a leave requirement, a party or other person could, for example, appeal a joinder or dismissal decision without merit, simply to delay proceedings.[53] Section 24(1AA) was specifically introduced in order to remove the right of appeal for 'minor

53 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].

procedural decisions for which there should be no avenue of appeal',[54] in order to 'ensure the efficient administration of justice by reducing delays caused by appeals from these decisions'.[55] While it may be desirable to allow appeals from joinder or dismissal decisions in the native title context, it is also desirable to continue to ensure the efficient administration of justice.

Participation and joinder of the Commonwealth

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

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

(b) seek intervener status under s 84A.

11.59 The Commonwealth may become a party to proceedings or join proceedings under the party provisions of s 84, particularly when the Commonwealth has interests within the claim area and when the claim area includes an offshore component.[56] The Commonwealth may also seek intervener status in proceedings under s 84A of the *Native Title Act*. 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.[57] In native title proceedings, 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*.

11.60 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.

11.61 Consideration might be given 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*. The Commonwealth could elect, for example, to limit its participation to representing the Commonwealth's interests in a claim area.

---

54 Explanatory Memorandum, Access to Justice (Civil Litigation Reforms) Amendment Bill 2009 (Cth) 18, [81].

55 Ibid 18, 81. See also *Cement Australia Pty Ltd v Australian Competition and Consumer Commission* (2010) 187 FCR 261, [17]–[18].

56 See, eg, *Commonwealth v Yarmirr* (2001) 208 CLR 1.

57 *Levy v Victoria* (1997) 189 CLR 579, 601–602 (Brennan CJ).