

# Proposals and Questions

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\* *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.