

10. Authorisation

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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 *Festl 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 Wullli Wullli 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 Wullli Wullli 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 Wullli Wullli 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 Gungandji 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 ILUA⁵⁶ 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 duties⁸⁰ 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.

