11. Joinder

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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]

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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

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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]

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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

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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

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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:

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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]

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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

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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.

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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).