1. Introduction

Contents

Review of the *Native Title Act*

What is this Inquiry about?

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

1.2 Aboriginal peoples or Torres Strait Islanders may bring an application for a determination of native title rights and interests (a claim) under the *Native Title Act*. Section 223 of the Act defines native title:

> (1) The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
>
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and

(c) the rights and interests are recognised by the common law of Australia.

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

1.4 In the native title claim process, it is necessary to identify which Aboriginal peoples or Torres Strait Islanders are the native title claimants, and the claimants must validly authorise persons in the group to bring a claim. In a successful claim, the court determines who holds native title.[2]

1.5 Native title intersects with many other interests in the Australian community. The *Native Title Act* contains provisions that set out the persons and organisations that are parties to a native title claim. Relevant state and territory governments and, at times, the Commonwealth government, are respondents to a native title claim. Other persons holding interests in the claim area, such as a mining lease, may also be a party. The Act has provisions setting requirements for persons seeking to join a native title claim.

Why is reform needed?

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

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

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

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

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

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

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

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

1.11 Reforms must consider the impacts upon all participants in the native title system, as native title operates across many sectors in Australian society. Certainty is an important consideration for third parties who may deal with native title claimants.

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

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

Consultations and submissions

1.14 The Discussion Paper commences the second stage in the consultation processes in this Inquiry. The first stage included the release of the Issues Paper, *Review of the Native Title Act 1993* (IP 45), generating 40 public submissions.[6] The ALRC Inquiry team has undertaken more than 100 consultations around Australia gathering information and views on the *Native Title Act*. Both the Issues Paper and this Discussion Paper may be downloaded free of charge from the ALRC website. Hard copies may be obtained on request by contacting the ALRC on (02) 8238 6333.

1.15 In releasing this Discussion Paper, the ALRC again calls for submissions to build on the evidence base so far established and to inform the final stage of the Inquiry leading to the Final Report, which is to be provided to the Attorney-General by the end of March 2015.

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

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4 The Terms of Reference are set out in full on the ALRC website: <www.alrc.gov.au>.
5 *Native Title Act 1993* (Cth) s 10.
6 Public submissions are available on the ALRC website: <www.alrc.gov.au>.

The scope of Inquiry

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

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

Connection requirements for recognition and scope of native title

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

1.19 In regard to connection, the ALRC was asked to consider the following five options for reform:

- a presumption of continuity of acknowledgment and observance of traditional laws and customs and connection;
- clarification of the meaning of 'traditional' to allow for the evolution and adaptation of culture and recognition of 'native title rights and interests';
- clarification that 'native title rights and interests' can include rights and interests of a commercial nature;
- confirmation that 'connection with the land and waters' does not require physical occupation or continued or recent use; and
- empowerment of courts to disregard substantial interruption or change in continuity of acknowledgment and observance of traditional laws and customs where it is in the interests of justice to do so.

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

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

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

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

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

> the metaphorical result of applying rules whereby rights and interests are defined at common law as having vested, at the time of annexation, in the members of an Aboriginal society by reason of its traditional laws and customs and the way in which they define its relationship to land and waters. It is not a 'mere' metaphor. Its choice reflects a desire to give effect legally to the human reality involved in the ordinary meaning of 'recognition'.[10]

Nature and content of native title

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

> (b) the nature and extent of the native title rights and interests in relation to the determination area; and
>
> (c) the nature and extent of any other interests in relation to the determination area; and
>
> (d) the relationship between the rights and interests in paragraphs (b) and (c) (taking into account the effect of this Act).

Authorisation

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

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

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

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

> It is a matter of simple justice that native title determinations should be made only in favour of the traditional owners of each area of land … Just as importantly, the ongoing demands of governance and decision-making in relation to native title lands require a clear and shared understanding of how different groups and subgroups fit together. These two considerations highlight the paramount importance of identifying the 'right people for country'.[13]

Joinder

1.28 The applicant is always a party to a claim, as well as the respective governments involved. There may be many other parties too. Most persons become parties at the initial notification stage. Other persons may seek to become a party after this stage. Aboriginal peoples or Torres Strait Islanders as well as non-Indigenous Australians can seek joinder. Joinder raises issues about potential barriers to access to justice, and the good ordering and productive relationships between all participants—Indigenous and non-Indigenous—within the native system.[14]

The Preamble and objects of the *Native Title Act*

1.29 In examining what, if any, changes could be made to Commonwealth native title laws and legal frameworks, the Terms of Reference direct the ALRC to be guided by the Preamble and objects of the *Native Title Act*.

The Preamble

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

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

1.32 The Preamble captures the Commonwealth Parliament's intention to

> ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire.[18]

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

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

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

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

> The Parliament of Australia intends that the following law will take effect according to its terms and be a special law for the descendants of the original inhabitants of Australia … for securing the adequate advancement and protection of Aboriginal peoples and Torres Strait Islanders.[23]

1.36 The Act and claims process were part of a proposed broader package, as 'many Aboriginal peoples and Torres Strait Islanders, because they have been dispossessed of their traditional lands, will be unable to assert native title rights and interests'.[24] A Special Fund for land acquisitions has been implemented.[25] The proposed social justice package has not eventuated.

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

The objects of the Act

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

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

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

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

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

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19 Ibid.

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

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

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

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

24 Ibid.

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

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

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

1.40 The *Native Title Act* operates within Australia's federal system of government with divided, but at times overlapping, spheres of legislative powers and executive responsibilities between the Commonwealth and state and territory governments.[30] The powers to grant interests of land in the tenure-based system of land law rest with state governments, as the inheritors of the colonial land law structures.[31] In conjunction, state and territory governments have extensive land management, environmental protection, infrastructure provision, land use planning and other responsibilities that interface with native title rights and interests.[32]

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

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

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

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27 Maureen Tehan, 'A Hope Disillusioned, an Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the Native Title Act' (2003) 27 *Melbourne University Law Review* 523, 539 citing The Hon Paul Keating, 'Speech by the Honourable Prime Minister, PJ Keating MP, Australian Launch of the International Year of the World's Indigenous Peoples, Redfern, 10 December 1992' (1993) 3 *Aboriginal Law Bulletin* 4, 5.

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

29 Ibid.

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

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

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

33 The relevant power operates in respect of 'the people of any race for whom it is deemed necessary to make special laws' *Commonwealth of Australia Constitution Act* (Cth) s 51 (xxvi).

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

35 Bartlett, above n 30, 39.

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

37 V Marshall, *Submission 11*.

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

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

Guiding principles

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

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

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

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

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

> [l]ying at the heart of the common law of native title and the Act … It is embedded in a matrix of rules defining the circumstances in which recognition will be accorded to native title rights and interests and those in which it will be withheld or withdrawn. The idea of recognition operates in a realm of legal discourse. It may be seen as a kind of translation of aspects of an indigenous society's relationship to land and waters into a set of rights and interests which exist under non-indigenous laws.[42]

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

> [r]ecognition of native title is significant for the individual native title holders, the native title holding body and the broader Australian community. It will usually also give rise to an entitlement to compensation for some past extinguishment, to exclusive rights in some areas, and to statutory procedural rights, including the 'right to negotiate'.[43]

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

40 AIATSIS, *Submission 36*.

41 Law Council of Australia, *Submission 35*; National Congress of Australia's First Peoples, *Submission 32*; North Queensland Land Council, *Submission 17*; Minerals Council of Australia, *Submission 8*; Association of Mining and Exploration Companies Inc, Submission to the Australian Attorney-General's Department, Review of the *Native Title Act 1993*—Draft Terms of Reference, 2013.

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

43 South Australian Government, *Submission 34*.

1.48 The Australian Human Rights Commission highlighted the ongoing importance of the recognition and protection of native title as

> reforms to both the *Native Title Act* and the native title system more generally have been ad hoc and only 'tinkered around the edges'. This has resulted in a native title system that has created some opportunities for Aboriginal and Torres Strait Islander communities, but which remains slow and cumbersome in the delivery of outcomes.[44]

1.49 Some commentators argued that 'recognition' is no longer a barrier to achieving outcomes under the Act.[45] The Chamber of Minerals and Energy of Western Australian questioned the assumption that 'the system established under the NTA for the recognition of native title has somehow failed or is "unduly limiting"'. [46] In respect of any proposed reforms, their submission 'cautions against amending the core provisions of the NTA that concern the recognition of native title without probative and objective evidence to this effect'.[47]

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

Principle 2: Acknowledging interests in the native title system

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

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

1.52 Section 253 of the *Native Title Act* defines an interest in land and waters.[51] The guiding principles extend that meaning to encompass consideration of a wider range of interests including those of Aboriginal and Torres Strait Islander communities, governments at all levels, the courts, industry and commerce, and community organisations that may be involved in the native title system. A determination of native title takes effect as a judgment *in rem*—a legal right that is enforceable against third parties over time.[52]

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

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

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

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

1.56 Relevant industry groups acknowledged the importance of fostering relationships.

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

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

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

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53 See Ch 10 and Ch 11.

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

55 See, eg, the views expressed by pastoralists, 'that more than any other respondents in the Federal Court, they have to live the longest with outcomes of native title determinations': Pastoralists and Graziers Association, *Submission 3*.

56 Western Australian Government, *Submission 20*.

57 Minerals Council of Australia, *Submission 8*.

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

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

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

61 Minerals Council of Australia, *Submission 8*.

62 E Wensing, *Submission 13*.

1.59 As the Association of Mineral Exploration Companies stated,

> [t]he NTA is of course concerned with more than simply the recognition and protection of native title. It is in effect a compromise between the recognition and protection of native title rights and interests and the provision of certainty to the wider community, which holds or may seek to acquire or exercise non-native title rights.[63]

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

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

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

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

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

Principle 3: Encouraging timely and just resolution of determinations

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

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

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

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

64 See, eg, National Native Title Council, *Submission 16*; John Catlin, 'Recognition Is Easy' in Toni Bauman and Lydia Glick (eds), *The Limits of Change: Mabo and Native Title 20 Years On* (AIATSIS, 2012) 426.

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

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

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

68 South Australian Government, *Submission 34*.

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

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

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

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

1.67 Claims should not be unnecessarily prolonged. Long time frames have repercussions for the viability of current and future native title communities, and in terms of commercial certainty.[73] Costs for the parties involved and, more generally, within the native title system, can escalate if there are long time frames. The Federal Court has instituted practice initiatives designed to 'ensure where possible that resolution of native title cases is achieved more easily and delivered in a more timely, effective and efficient way'.[74]

1.68 The balance between timely and practical outcomes, and procedural and substantive integrity, assumes particular significance as native title moves into the 'next phase'. Attention is shifting to governance of native title.[75] The Australian Human Rights Commission explained:

> The Commission also considers it appropriate that any suggested amendments that relate to benefits obtained from either determinations of native title or Indigenous Land Use Agreements (ILUAs), also take into consideration the need to build good governance capacity within the native title system. This is particularly important to enable PBCs to manage native title benefits into the future.[76]

Principle 4: Consistency with international law

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

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69 AIATSIS, *Submission 36*.
70 Ibid.
71 North Queensland Land Council, *Submission 17*.
72 S Bielefeld, *Submission 6*.
73 'Principle 3 should also include the aim of providing certainty for future land use in the areas of determined native title': South Australian Government, *Submission 34*.
74 Federal Court of Australia, 'Annual Report 2011–2012' 13.
75 Valerie Cooms, *Governance, Community Control and Native Title* (Paper presented at the AIATSIS Native Title Conference, Coffs Harbour, 1–3 June 2005).
76 Australian Human Rights Commission, *Submission 1*.

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

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

1.71 The National Congress of Australia's First Peoples supported the view that ALRC proposals should be consistent with Australia's international obligations while stating:

> we are cognisant that despite repeated calls from UN treaty bodies for the Act to be amended to reduce the high evidentiary requirements that prevent many Aboriginal and Torres Strait Islander Peoples from regaining control of their traditional lands, successive Australian governments have failed to move beyond piecemeal amendments.[81]

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

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

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77 *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st Sess, 107th Plen Mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007).

78 Australian Human Rights Commission, *Submission 1*.

79 The Hon Jenny Macklin, MP, 'Statement on the United Nations Declaration on the Rights of Indigenous Peoples' (Speech Delivered at Parliament House, Canberra, 3 April 2009).

80 Minerals Council of Australia, *Submission 8*.

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

82 See, eg, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 2, 26; *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) arts 1, 2, 5. See also Australian Human Rights Commission, *Rights to Equality and Non-discrimination* <www.humanrights.gov.au/rights-equality-and-non-discrimination>.

83 Bartlett, above n 30, 15.

84 Art 14 relevantly states 'taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms'. Section 8 of the *Racial Discrimination Act* 1975 (Cth) reflects this Article of the Convention.

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

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

1.75 Professor Megan Davis suggests that

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

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

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

1.77 Article 38 of the Declaration provides that:

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

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

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

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85 UN Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, 42nd Sess, UN Doc E/C.12/AUS/CO/4 (12 June 2009) [32]–[33].

86 The Hon Jenny Macklin, MP, 'Statement on the United Nations Declaration on the Rights of Indigenous Peoples' (Speech Delivered at Parliament House, Canberra, 3 April 2009).

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

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

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

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

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

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

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

1.80 These standards have important practical ramifications:

> [s]uccess on projects, or at least a smooth process from inception to conclusion, depends for a large part on how you build relationships with people along the way. It is critical that you engage Aboriginal people early in the piece. People are keen to be involved—they are very determined to protect their country and sacred sites, but they do not want to stifle development. People want to participate—it's as simple as that. Sure you may have some challenges through the process, but they are never insurmountable and if you treat people with respect—that includes affording people the right to their free, prior and informed consent—and listen to what they are saying, you will get things done.[94]

Principle 5: Supporting sustainable futures

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

1.81 Many submissions supported this principle, but also raised some caveats about the capacity of the *Native Title Act* to deliver effective social, economic and cultural development.[95] Other submissions emphasised the need for economic development to occur in a culturally appropriate way:

> The Aboriginal and Torres Strait Islander Social Justice Commissioner encourages that outcomes sought be measurable, highlighting the critical importance of economic development occurring in a way that supports and respects Aboriginal and Torres Strait Islander peoples' culture and identity.[96]

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

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

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

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

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

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

1.86 Other submissions emphasised that '[r]ecognition and protection of native title under the NTA is a starting point but not a complete answer to the social and economic issues which may face native title holders'.[101]

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

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

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

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

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

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

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

101 Northern Territory Government, *Submission 31*.

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

103 Kimberley Land Council, *Submission 30*.

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

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

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

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