

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

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### Framework for the proposals

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

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

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

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

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1 *Native Title Act 1993* (Cth) s 3(a).

2 *Terms of Reference* <[www.alrc.gov.au](http://www.alrc.gov.au)>.

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

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

### **Rationale for reform**

2.7 The *Native Title Act* is sketched upon a large ethical canvas, but also serves

the pragmatic requirements of an orderly interaction between the recognition of native title and the myriad laws and interests that have settled upon the land and waters of Australia since their progressive annexation by the British Crown.<sup>3</sup>

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

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

2.10 Attention, however, is directed to clarifying and refining the highly complex law around connection requirements centred on s 223 of the Act to ensure that claim resolution is not impeded.

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

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

### ***The question of change?***

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

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3 *Sampi v Western Australia* [2005] FCA 777 (10 June 2005) [938].

4 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

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

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

2.14 The proposals take into account the development of native title law since the enactment of the *Native Title Act* and the degree of legal certainty achieved as a result of major native title litigation.<sup>6</sup> Parties in the native title system have ordered their practices and interactions with other parties and with native title institutions and organisations on this basis. Some submissions have stressed the importance of stability.<sup>7</sup>

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

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

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

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

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

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6 See for example, *Western Australia v Ward* (2002) 213 CLR 1; *Commonwealth v Yarmirr* (2001) 208 CLR 1; *Wilson v Anderson* (2002) 213 CLR 401; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; *Western Australia v Brown* [2014] HCA 8 (12 March 2014); *Akiba v Commonwealth* (2013) 250 CLR 209.

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

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

9 P Burke, *Submission 33*.

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

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

12 Western Australian Government, *Submission 20*.

13 *Terms of Reference*, above n 2.

2.19 In turn, there were calls for a more fundamental revision of the *Native Title Act*, arguing that

some of the problems underlying the specific questions of the inquiry stem back to fundamental choices in the judicial formulation of the legal doctrine of native title.<sup>14</sup>

2.20 The ALRC does not propose that there should be comprehensive redefinition of native title under the Act as this may exacerbate the uncertainties experienced by all participants in the native title system. Nor does the ALRC suggest removal of the current claims-based process for native title determinations. Instead, the underpinning model of native title and the claims process is retained, while seeking to refocus on the core elements of native title law to facilitate an effective determination process. The elements in the definition of native title come from *Mabo [No 2]*.<sup>15</sup>

### Australia's legal history

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

2.22 The Court declared that the pre-existing rights of Australia's Indigenous peoples survived the acquisition of sovereignty.<sup>16</sup> The majority decision was summarised as recognising 'a form of native title which, in cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their law and customs to their traditional lands'.<sup>17</sup>

2.23 *Mabo [No 2]* navigated a path between extremes:

On the one hand, the implications of sovereignty and the demand for a coherent skeleton of principle in the law prevented a wholesale reappraisal of Australian land law. On the other hand, the demands of justice prevented a simple confirmation of the extinguishment of all Indigenous rights to land.<sup>18</sup>

2.24 As the Western Australian Government submitted

the present concepts of native title derive from *Mabo No 2*, and, in turn, from Australia's unique political and legal history, including its history of European settlement. Any proposed changes to the native title system, especially any changes to s 223(1) of the NTA, must take into account these historical foundations of native title.<sup>19</sup>

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14 P Burke, *Submission 33*.

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

16 *Ibid* 116.

17 *Ibid* 15.

18 *Ibid* 68–69, 63–71, 112–113; Alex Reilly, 'From a Jurisprudence of Regret to a Regrettable Jurisprudence: Shaping Native Title from *Mabo* to *Ward*' (2002) 9 *E Law Journal: Murdoch University* [21].

19 Western Australian Government, *Submission 20*.

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

### The basis of native title law

2.26 The source for native title in *Mabo [No 2]* was the recognition by the common law of the pre-existing rights and interests of Aboriginal and Torres Strait Islander peoples.<sup>21</sup> As Dr Paul Burke comments

the most fundamental choice was to adopt a ‘laws and customs’ approach in which ideas of ‘laws and customs’ become universal, cross-cultural means of recognition.<sup>22</sup>

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

2.28 ‘Recognition’ also has a more specific genesis. It refers to the historical body of law that governed the British acquisition of colonies, and which included the doctrine of recognition, and the associated doctrine of continuity.<sup>26</sup>

2.29 In the current Australian context, the concept of recognition links the common law and statute via the concepts of ‘recognition and protection’ for native title, expressed in the Objects of the *Native Title Act*.<sup>27</sup>

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20 On 27 March 2014, the Minister for Indigenous Affairs appointed a Review Panel under the *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth) to assess Australia’s readiness to support a referendum to recognise Indigenous Australians in the Australian Constitution. See John Anderson, Tanya Hosch and Richard Eccles, ‘Final Report of the Aboriginal and Torres Strait Islander Act of Recognition Review Panel’ (September 2014). The Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples is receiving submissions on steps to progress towards a successful referendum on Indigenous Constitutional Recognition by 30 October 2014. Co-chairs Patrick Dodson and Mark Leibler of the Expert Panel on Constitutional Recognition of Indigenous Australians completed their report, ‘Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel’ (Commonwealth of Australia, January 2012).

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

22 P Burke, *Submission 33*.

23 AIATSIS, *Submission 36*.

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

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

26 *Ibid.*

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

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

### **The Native Title Act**

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

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

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

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

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

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

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

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

32 AIATSIS, *Submission 36*.

33 *Ibid.*

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

35 AIATSIS, *Submission 36*.

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

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

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

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

Court held that the ‘common law of Australia cannot be understood as a form of drafting by incorporation’.<sup>40</sup>

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

It is a necessary condition of their inclusion in a determination that the rights and interests are recognised by the common law of Australia. That condition flows from s 223(1)(c). ‘Recognise’ in this context means that the common law ‘will, by the ordinary processes of law and equity, give remedies in support of the relevant rights and interests to those who hold them’.<sup>41</sup>

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

## Construction of s 223

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

2.38 Further, where legislation is identified as being beneficial, the High Court has stated that such legislation should be given a ‘fair, large and liberal’ interpretation, rather than one which is ‘literal or technical’.<sup>44</sup>

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

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

The common law system of statutory interpretation is not just going by the words alone (literal interpretation) or applying rules of thumb ... but something much more difficult and pluralistic.<sup>45</sup>

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40 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [76].

41 *Akiba v Commonwealth* (2013) 250 CLR 209, [9].

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

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

44 *IW v City of Perth* (1997) 191 CLR 1, 12 (Brennan CJ, McHugh J); 39 (Gummow J). See also *AB v Western Australia* (2011) 244 CLR 390, [24].

45 Francis Bennion, ‘The Global Method: Statutory Interpretation in the Common Law World’ (2000) 82 *Commonwealth Legal Education Association Newsletter* 30, 33.

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

2.42 Yet the actual wording in s 223 of the *Native Title Act* contains relatively straightforward concepts—rights and interests in land and waters which are possessed under laws and customs; acknowledgment of those laws and observance of customs since the assertion of sovereignty, giving rise to the connection that Aboriginal peoples and Torres Strait Islanders have with land and waters. The rights and interests are recognised by the common law. The High Court in *Ward*, noted that these core elements have remained constant.<sup>47</sup>

2.43 The Act is the starting point for determining native title rights and interests.<sup>48</sup>

### ***New requirements for s 223***

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

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

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

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

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

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

49 French J, in an extra-curial comment, noted that the turn to the statute also involved extensive re-interpretation of the terms within s 223. Justice Robert French, ‘Western Australia v Ward: Devils and Angels in the Detail’ (Paper presented at the Native Title Conference 2002, Geraldton).

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

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

### Summary of approach to connection requirements

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

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

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

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

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

2.53 The proposals around connection requirements are designed to:

- accord with the object of the recognition and protection of native title rights and interests under the *Native Title Act*;
- give greater attention to how Aboriginal people and Torres Strait Islanders frame their relationship to country;
- reduce the complexity of the law around connection requirements by emphasising the present day connection of Aboriginal and Torres Strait Islander peoples with land and waters, while recognising the origins in the period before the assertion of sovereignty;
- expedite the claims process by a refocus on core elements of the definition of native title in the framing and assessment of connection;

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51 Kimberley Land Council, *Submission 30*; Queensland South Native Title Services, *Submission 24*; A Frith and M Tehan, *Submission 12*; Cape York Land Council, *Submission 7*; Australian Human Rights Commission, *Submission 1*.

52 Northern Territory Government, *Submission 31*; Central Desert Native Title Services, *Submission 26*; Chamber of Minerals and Energy of Western Australia, *Submission 21*; Western Australian Government, *Submission 20*.

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

54 See Ch 7.

- provide statutory reflection of the law on the scope of native title rights and interests;
- give closer attention to the common law doctrines that were drawn upon in *Mabo [No 2]* to form the basis for interpretation of the text in s 223; and
- review the anomalous position of Australian native title jurisprudence in terms of the evolution of international law and comparative law.

### **The link between connection and the claim group**

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

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

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

### **The limitations of native title**

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

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

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

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

58 AIATSIS, *Submission 36*.

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

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

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

2.59 As Just Us Lawyers submitted, ‘the failure by successive Federal Governments to deliver Paul Keating’s “Social Justice Package” has meant that the void created by the inability of the NTA to deliver benefits to certain people has never been filled’.<sup>60</sup>

### **Settlement frameworks**

2.60 Several submissions endorsed consideration of settlement frameworks.<sup>61</sup> The National Native Title Council submitted

the Council has been consistently advocating for the agreement of and implementation of a Broader Land Settlement framework, where native title is a means to an end, not an end in itself—that is native title should be a tool along with other legislative and administrative tools that assist with recognising Indigenous peoples and redressing Indigenous disadvantage.

For some time a Comprehensive Land Claims Settlement policy and legislative package has been needed in Australia. In terms of the ALRC’s current reference this would allow Indigenous peoples ... to bypass complex legal proposals to address the inadequacies of the common law and native title jurisprudence to date and address the real issues from an Indigenous perspective. That is having traditional rights to country recognised, agreeing to a fair compensation package whilst being able to facilitate equitable outcomes in the modern economy.<sup>62</sup>

2.61 Several state-based frameworks have emerged:

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

59 A Frith and M Tehan, *Submission 12*; See also, National Farmers’ Federation, *Submission 14*.

60 Just Us Lawyers, *Submission 2*.

61 ‘So whilst a consent determination or a Court victory might provide formal recognition—for most it provides little else’: Queensland South Native Title Services, *Submission 24*.

62 National Native Title Council, *Submission 16*.

63 AIATSIS, *Submission 36*.

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

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

## Overview of proposals

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

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

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

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

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

65 *Ibid*.

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

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

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

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

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

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

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

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

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

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

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

2.76 Chapter 11 considers the party and joinder provisions in s 84 of the *Native Title Act*. These provisions specify who is a party to native title proceedings, who may join native title proceedings, in what circumstances they may join, and when they may be dismissed. In this chapter, the ALRC asks several questions and proposes several reforms designed to reduce burdens that may limit access to justice, while also ensuring that a wide range of interests are adequately represented in native title proceedings. The ALRC also makes proposals about allowing appeals from joinder and dismissal decisions, and about the Commonwealth's participation in proceedings.

### **Transitional arrangements**

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

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

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

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67 *Native Title Act 1993* (Cth) s 13(5).

68 Thomson Reuters, *The Laws of Australia*, (at 15 April 2013) 25 Interpretation and Use of Legal Sources, '25.1 Statutory Interpretation' [25.1.2230].

69 *Native Title Amendment Act 1998* (Cth) sch 1, item 42.

70 *Ibid* sch 2 item 80.

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

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

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

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

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

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

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71 Ibid sch 5 pt 5 item 24. The transitional provisions only refer specifically to the amendments to s 225. In the absence of any specification, the amendments to s 223 can be assumed to operate upon commencement.

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

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

