# 3. Context for Reform Proposals

## Contents



## Summary


3.1 This chapter sets out the context for this Inquiry and for the proposals for reform made in this Discussion Paper.


3.2 The *Native Title Act* commenced on 1 January 1994. After a slow beginning, native title determinations are now being made at a steady pace with between 35 and 45 determinations made each year from 2011 until 2013.[1] As at 30 September 2014

1 Federal Court of Australia, *Submission 40*.

there have been 301 native title determinations made, and 242 of these have determined that native title exists in at least part of the determination area. More than two-thirds of determinations were by consent.[2] Native title rights are held over approximately 18% of Australia.

3.3 Despite the increased rate of determinations, concerns remain about the time and the cost of proceedings. This chapter reports on the views of participants and finds that there are multiple reasons for the drawn-out processes. Factors contributing to delay include the limited resources of representative bodies, the burden of collecting and assessing connection material and undertaking tenure analysis, the availability of experts and the difficulty of resolving overlapping claims.

3.4 The introduction of intensive case management of native title matters appears to have contributed to the increased rate of determinations. However the ALRC has not been able to determine whether this rate can be sustained; more complex matters may be in the pipeline. Just outcomes may take time to achieve, and it is important that priority be given to recognising and protecting native title, rather than to timeliness.

3.5 Finally, this chapter notes that the recognition of native title was not intended to be the sole answer to the question of Indigenous land justice. Land purchase, alternative settlement and social justice measures are also important policy tools.

## Progress to date

3.6 The *Native Title Act* has been in force for 21 years. During that time there have been 301 native title determinations. Of these, 229 were by consent, 36 were litigated, and 36 were unopposed.[3] There have been 96 determinations that native title exists in the entire determination area, 146 determinations that native title exists in part of the determination area, and 59 determinations that native title does not exist in the determination area.[4] The 59 determinations of no native title include the 43 unopposed (non-claimant) determinations. There have been only 13 determinations of no native title made in response to a claimant application.

3.7 The following map and Table 1 show the area of Australia subject to determinations of native title and registered claims for native title. Professor Jon Altman reports that a further 13% of Australia is land claimed under land rights legislation.[5]

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2 National Native Title Tribunal, *National Native Title Register* <www.nntt.gov.au>.

3 National Native Title Tribunal, *Statistics* <http://www.nntt.gov.au/Pages/Statistics.aspx>. All of the unopposed determinations were non-claimant applications, and most of them were made by Aboriginal land councils in NSW where a finding of no native title is necessary for an Aboriginal land council to sell land: *Aboriginal Land Rights Act 1983* (NSW) s 42.

4 National Native Title Tribunal, *Statistics*, above n 3.

5 J Altman, *Submission 27*.

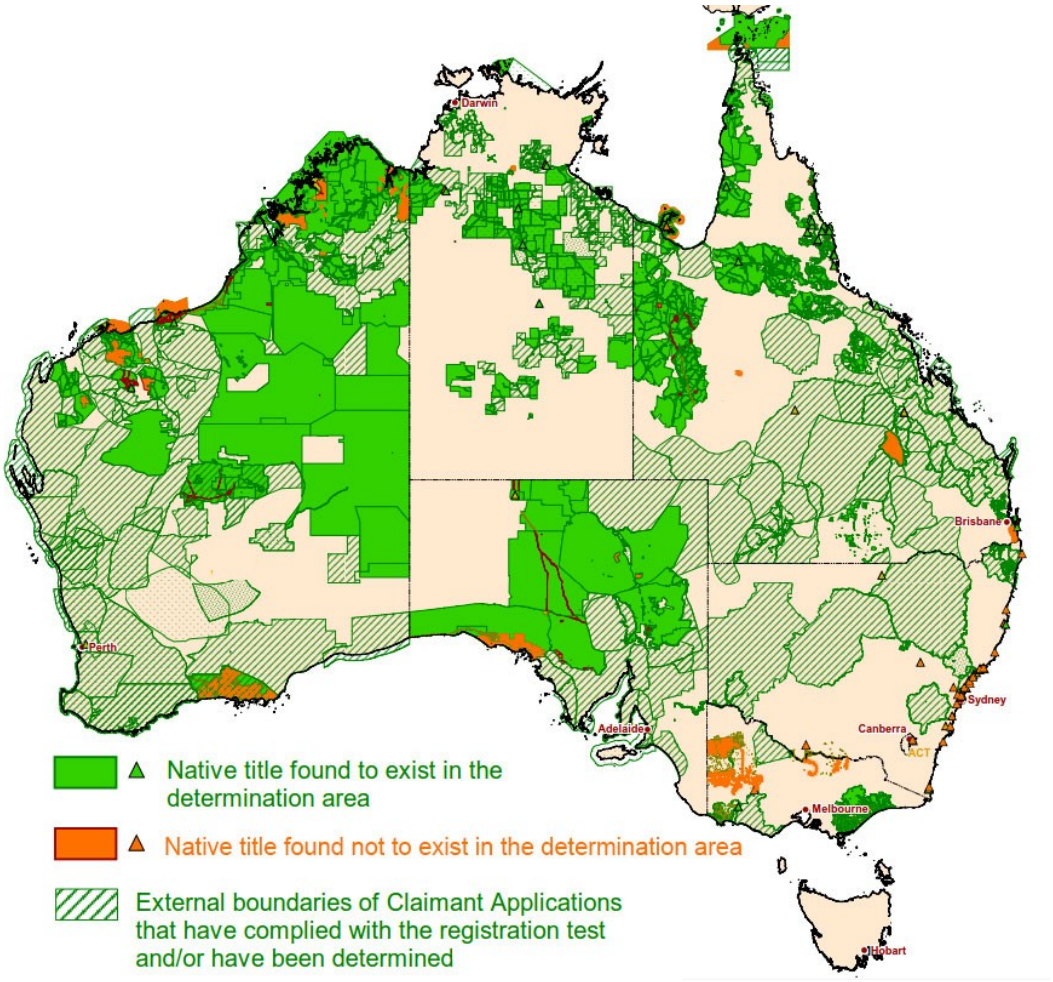


**Table 1.**

| Jurisdiction | Determinations | | Area subject to a registered claim | |
|---|---|---|---|---|
| | Native title found to exist | Native title found not to exist | Land | Sea |
| **ACT** | - | - | - | - |
| **Cth** | 20,407.8 | 14,300.1 | - | 67,466.16 |
| **NSW** | 1,790.2 | 868.8 | 373,121.82 | 494.84 |
| **NT** | 183,150.9 | 964.1 | 205,924.32 | 3,145.18 |
| **QLD** | 317,568.3 | 11,893.2 | 815,152.11 | 35,670.79 |
| **SA** | 390,076.9 | 13,626.7 | 280,031.20 | 13,609.38 |
| **Tas** | - | - | - | - |
| **Vic** | 15,164.7 | 11,023.9 | 24,271.28 | 27.25 |
| **WA** | 1,018,595.6 | 55,409.6 | 1,098,637.50 | 40,454.27 |
| **TOTAL** | 1,946,754.3 | 108, 086.4 | 2,797,138.22 | 160,867.87 |

Map and data in Table 1 provided by the National Native Title Tribunal and used with permission.

3.8 Only 46 determinations occurred during the first 11 years of the Act's operation, and 12 of those were non-claimant applications.[6] As the graph and Table 2 below indicate, from 2004 the number of determinations per year moved from single digits to double digits, and from 2011 the number rose significantly again.

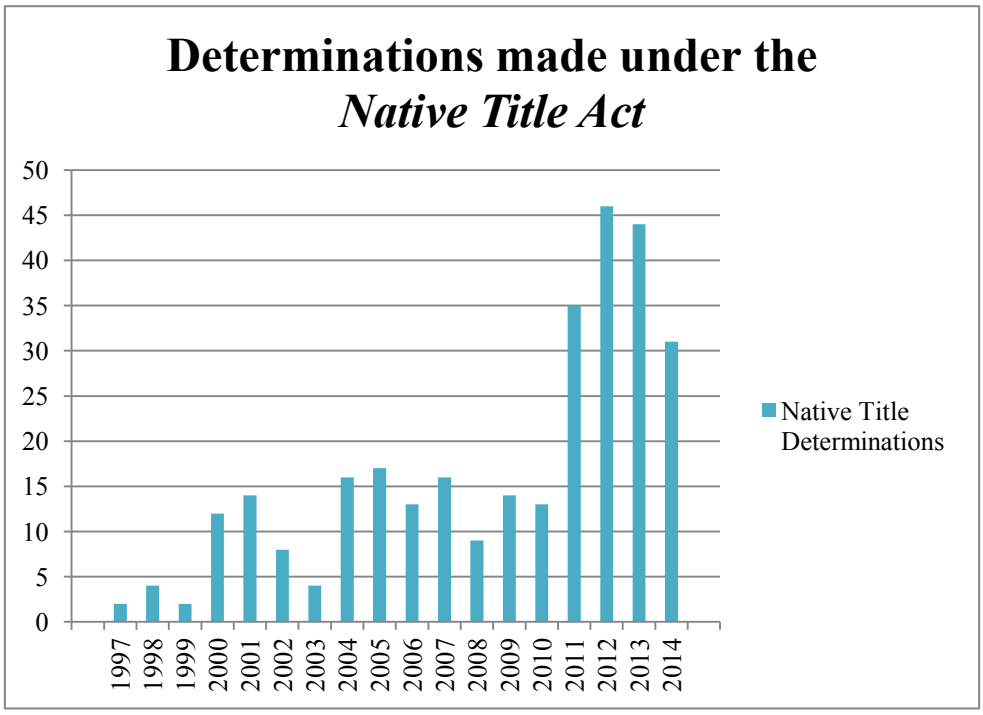


**Table 2**

| Year | Native Title Determinations | Year | Native Title Determinations |
|---|---|---|---|
| 1997 | 2 | 2006 | 13 |
| 1998 | 4 | 2007 | 16 |
| 1999 | 2 | 2008 | 9 |
| 2000 | 12 | 2009 | 14 |
| 2001 | 14 | 2010 | 13 |
| 2002 | 8 | 2011 | 35 |
| 2003 | 4 | 2012 | 46 |
| 2004 | 16 | 2013 | 44 |
| 2005 | 17 | 2014 | 31* |

6 National Native Title Tribunal, *National Native Title Register*, above n 2.

3.9 There are currently 419 native title applications lodged with the Federal Court: 396 claimant applications, 18 non-claimant applications and five compensation applications. There are 285 registered applications. It is expected that many compensation applications will be filed in the future.[7]

3.10 The native title process in each state and territory is affected by the history of the jurisdiction's land rights arrangements. The next section of this chapter briefly outlines the way each jurisdiction has dealt with the question of Aboriginal and Torres Strait Islander rights to land.

## New South Wales

3.11 Under the *Aboriginal Land Rights Act 1983* (NSW) (ALRA), vacant Crown land can be claimed by land councils on behalf of Aboriginal people. The ALRA also established the Statutory Investment Fund. For 15 years, from 1984 until 1998, an amount equivalent to 7.5% of NSW Land Tax (on non-residential land) was paid to NSW Aboriginal Land Council as compensation for land lost by the Aboriginal people of NSW. This fund is used for both administration and land purchase, and the Aboriginal Land Council and the land council network has been self supporting since 1998.[8]

3.12 If a land council wishes to sell land, it must get a determination under the *Native Title Act* that there is no native title in the land.[9] There have been 39 non-claimant determinations that native title does not exist in NSW, and only five positive determinations, including the first determination of native title under the *Native Title Act*, *Buck v New South Wales (Dunghutti People)*.[10] There are 21 registered claims.[11]

## Queensland

3.13 Under the *Aboriginal Land Act 1991* (Qld) and the *Torres Strait Islander Land Act 1991* (Qld), land that had been reserved for Aboriginal people could be transferred to Aboriginal people as trustees to hold the land for the benefit of Aboriginal and Torres Strait Islander people. The Acts also made provision for claims to be heard by a Land Tribunal which could make recommendations to the Minister. According to the Queensland Government, 4.5 million hectares of land has been transferred under these Acts.[12]

3.14 The Queensland Government considers that 'native title is arguably at its most complex in Queensland', because of the history of removals of traditional owners from their lands and the decentralised nature of development in that state.[13]

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7 AIATSIS, *Submission 36*; Northern Territory Government, *Submission 31*.
8 NSW Aboriginal Land Council, *Our Organisation* <http://www.alc.org.au>.
9 *Aboriginal Land Rights Act 1983* (NSW) s 42.
10 National Native Title Tribunal, *National Native Title Register*, above n 2.
11 Ibid.
12 Department of Natural Resources and Mines, *Land Transfers* <http://www.dnrm.qld.gov.au/land/indigenous-land/land-transfers>.
13 Queensland Government Department of Natural Resources and Mines, *Submission 28*.

3.15 Despite this complexity, there have been more than 100 successful determinations of native title in Queensland. There are a further 66 registered applications, with further applications under preparation.[14]

## South Australia

3.16 In 1966, South Australia was the first state to transfer control of land reserved for Aboriginal people to a body controlled by Aboriginal people: the Aboriginal Lands Trust.[15] Land rights were also acknowledged in the *Pitjantjatjara Land Rights Act 1981* (SA) and the *Maralinga Tjarutja Land Rights Act 1984* (SA).

3.17 There have only been two contested native title hearings in South Australia, and since 2004 the state has had a policy of 'resolving claims by consent wherever possible'.[16] There have been 20 consent determinations that native title exists and there are a further 16 registered claims.[17]

3.18 As in most jurisdictions, overlapping claims have been a significant issue in South Australia. In around 2005 'a combined effort by South Australian Native Title Services and the National Native Title Tribunal managed to resolve almost all overlaps that then existed between claims, meaning attention could be focussed on settlements'.[18] However, in recent years there have been more overlapping claims and more intra-Indigenous disputes.[19]

## Tasmania

3.19 The *Aboriginal Lands Act 1995* (Tas) did not establish a claims process, but vested 12 areas, listed in the schedule, in the Aboriginal Land Council of Tasmania to be held on trust for the benefit of Aboriginal people.

3.20 There have been no determinations of native title in Tasmania and there are no registered claims.[20]

## Victoria

3.21 There was no claims procedure for land rights in Victoria before the *Native Title Act*, but land was transferred on an ad hoc basis under six separate Acts.[21] The *Traditional Owner Settlement Act 2010* (Vic) (TOSA) provides for 'a recognition and settlement agreement between the State and a traditional owner group entity for an area of public land'.[22] TOSA is discussed further below.

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14 See, eg, Cape York Land Council, *Submission 7*.
15 Thomson Reuters, *The Laws of Australia*, (at 15 June 1997) 1. Aborigines and Torres Strait Islanders '1.3 Land Law' [1.3.359]; *Aboriginal Lands Trust Act 1966* (SA).
16 South Australian Government, *Submission 34*.
17 National Native Title Tribunal, *National Native Title Register*, above n 2.
18 South Australian Government, *Submission 34*.
19 Ibid.
20 National Native Title Tribunal, *National Native Title Register*, above n 2.
21 Thomson Reuters, *The Laws of Australia*, (at 1 April 1997) 1. Aborigines and Torres Strait Islanders '1.3 Land Law' [1.3.412].
22 Explanatory Memorandum, Traditional Owner Settlement Bill 2010 (Vic).

3.22 The Victorian Department of Justice reports that 'the claimable Crown land estate comprises roughly one third of the State's land area', and 'native title has been settled over approximately 40% of that area, by way of a positive or negative native title determination and/or a Traditional Owner Settlement Act settlement'.[23] There have been four determinations that native title exists in Victoria, and three that it does not exist. There are currently only two registered claims in Victoria.[24]

## Western Australia

3.23 The *Aborigines Act 1889* (WA) empowered the Governor to reserve Crown lands for Aboriginal people. By 1947, 15 million hectares had been set aside.[25] The Aboriginal Lands Trust now holds 27 million hectares of reserved land, but title remains in the Crown. It is intended that 'the control and management or ownership of all the land held by the Trust will be handed back to Aboriginal people'.[26] There was no provision for land claims in Western Australia before the *Native Title Act*.

3.24 The Western Australian Government reports that 'the impact of the *Native Title Act*, including native title claims, determinations, future acts, and compensation liabilities is greater in Western Australia than any other jurisdiction in Australia'.[27] There have been 45 determinations that native title exists in at least part of the determination area, including 35 consent determinations.[28] There is a continuing trend towards determinations by consent, with five consent determinations and one litigated determination so far in 2013–14. The Government expects a further 11 consent determinations in 2014–15. It has made a final offer in an effort to settle six claims in the south west of the state, via the Noongar Native Title Settlement.[29]

3.25 There are 81 registered claims in Western Australia,[30] and research is currently being undertaken with the purpose of lodging native title claims in the future.[31]

## Australian Capital Territory

3.26 The *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) vested land in the Jervis Bay area in the Wreck Bay Aboriginal Community Council.

3.27 There have been no determinations of native title in the Australian Capital Territory, and there are no registered claims.[32]

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23 Department of Justice, Victoria, *Submission 15*.
24 National Native Title Tribunal, *National Native Title Register*, above n 2.
25 Thomson Reuters, *The Laws of Australia*, (at 1 September 1997) 1 Aborigines and Torres Strait Islanders, '1.3 Land Law' [1.3.310] 2014.
26 Department of Aboriginal Affairs, WA, *What Land Does the Aboriginal Lands Trust (ALT) Hold for Aboriginal People ?* (19 September 2014) <http://www.daa.wa.gov.au>.
27 Western Australian Government, *Submission 20*.
28 National Native Title Tribunal, *National Native Title Register*, above n 2.
29 Western Australian Government, *Submission 20*.
30 National Native Title Tribunal, *National Native Title Register*, above n 2.
31 See, eg, Central Desert Native Title Services, *Claims—Unclaimed Areas* <http://www.centraldesert.org.au>.
32 National Native Title Tribunal, *National Native Title Register*, above n 2.

### Northern Territory

3.28 Approximately 47% of land in the Northern Territory is Aboriginal freehold under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). Pastoral leases cover 45% of the Territory, and a further five percent of the Territory is also available for claim under the Native Title Act.[33]

3.29 There have been 242 determinations of native title in the Northern Territory, and there are a further 100 registered claims.[34]

3.30 The Northern Territory Government has indicated that, 'having litigated a number of test cases to clarify the operation of various provisions of the *Native Title Act*', it now seeks to achieve negotiated resolutions of native title claims.[35] The Territory has set out *Minimum Connection Material Requirements for Consent Determinations* which streamline the resolution of claims.

## Time frames and cost

### Concerns about timeliness

3.31 Concerns about cost and timeliness have been prominent in discussion of the *Native Title Act*. In 2012, Brian Wyatt, CEO of the National Native Title Council, said that 'we are tired and weary of our old people dying before decisions are made on the native title'.[36] Also in 2012, John Catlin, Executive Director, Native Title Unit, West Australian Department of Premier and Cabinet, noted that 'the failure of the Act to deliver timely and effective outcomes is undeniable'.[37]

3.32 Despite the increase in the rate of determinations made by the Federal Court since 2011, stakeholders continue to report that they consider the native title system to be too slow and expensive.[38]

3.33 Traditional Owner, Gumbaynggirr man and Garby Elder, Anthony Clarence Perkins, commented after the determination over his land at Red Rock Beach:

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33 Northern Territory Government, *Submission 31*.

34 National Native Title Tribunal, *National Native Title Register*, above n 2.

35 Northern Territory Government, *Submission 31*.

36 Sally Sara, *Indigenous Leaders Want Faster Native Title Process* (6 June 2012) PM with Mark Colvin <http://www.abc.net.au/pm>.

37 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. See also Graeme Neate in the same collection: 'Concern has been expressed by claimants, judges, political leaders and others about the time it takes to resolve native title applications and the implications of the delay for claim groups' (at 218).

38 NSW Young Lawyers, *Submission 58*; Queensland Government Department of Natural Resources and Mines, *Submission 28*; Central Desert Native Title Services, *Submission 26*; Association of Mining and Exploration Companies, *Submission 19*; National Farmers' Federation, *Submission 14*; Minerals Council of Australia, *Submission 8*; Telstra, *Submission 4*.

> I never thought it would have an ending, I'll be honest. It's been going a long while. To me we may say it's taking too long to be awarded native title to our property or country or whatever areas. But again we've got to look at the fact that there's a lot to be done in the process. We've been sort of disconnected for lots of years, and we've got to pull all the information back before we can go forward, and that sometimes frustrates a lot of people. But to us it's a step in the right direction.[39]

3.34 The time frame in this case attracted judicial criticism. Jagot J was scathing about the 17 years that it took to reach a consent determination in this matter:

> the enormous resources and extraordinary length of time involved in this process could have been avoided, in large part, by the bringing to bear at an earlier time of a focus on the outcomes sought to be achieved and the application of common sense, practicality, proportionality, and flexible, constructive and creative thinking …
>
> Native title claims, in common with most litigation but perhaps also particularly given their character, run the risk of the consuming of resources and time well beyond what is reasonable … Recognition of this fact, and of the need for the kind of focus and approach which I have described, is essential to guard against the repetition of examples such as the present case, spanning not years but decades …[40]

3.35 These very long time frames are not confined to NSW. In September 2014, the Kokatha claim in South Australia was finalised, by consent, after an 18-year proceeding.[41]

3.36 Stakeholders representing the minerals sector also emphasised the importance of timely and expeditious resolution of native title claims, and certainty for the wider community.[42]

## Timeliness and just outcomes

3.37 As noted in Chapter 1, just outcomes may take time to achieve. The Australian Institute of Aboriginal and Torres Strait Islander Studies has cautioned against an excessive focus on timeliness, suggesting that 'sustainable and effective outcomes' may require time to develop,[43] and that 'the integrity of the process requires justice to be prioritised ahead of timeliness'.[44] Concerns were raised in 2008 by the then Social Justice Commissioner, Dr Tom Calma, regarding the priority given to efficiency, rather than the recognition and protection of native title.[45] Again in 2012, the Social Justice Commissioner, Mick Gooda, commented on a 'silent disregard for the fundamental inequalities in the native title system in favour of more efficient outcomes in the rush to finalise settlement of native title'.[46]

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39 Anthony 'Tony' Perkins, 'TO Comment' (2014) *Native Title Newsletter*.
40 *Phyball on behalf of the Gumbaynggirr People v A-G (NSW)* [2014] FCA 851 (15 August 2014) [8]–[9].
41 Helen Davison, 'Indigenous Title Claim Settlement "One of the Most Complex" in SA History' *The Guardian*, 2 September 2014 <http://www.theguardian.com>.
42 Chamber of Minerals and Energy of Western Australia, *Submission 21*; Association of Mining and Exploration Companies, *Submission 19*.
43 A Frith and M Tehan, *Submission 12*.
44 AIATSIS, *Submission 36*.
45 'Native Title Report 2007' (Australian Human Rights Commission, 2008) 23.
46 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2012' (Australian Human Rights Commission, 2012) 56.

3.38 Graeme Neate, former National Native Title Tribunal President, notes that 'broader settlements'—settlements that include grants of land, joint management arrangements, or employment and economic opportunities—take longer to negotiate than a 'bare determination', but 'might be much more satisfactory for all the parties'.[47]

3.39 The ALRC has adopted as a guiding principle that any proposed reforms should encourage timely and just resolution of native title applications.[48] The potential for changes to the *Native Title Act* to delay the resolution of native title claims has been taken seriously. However the value of timeliness must not be placed ahead of the fundamental requirement of justice.[49]

## Length of proceedings

3.40 The National Native Title Tribunal reported that, between 1 January 1994 and 31 December 2011, the average time taken to reach a consent determination was six years and three months. The average time for a determination after litigation was seven years. However, these figures do not take into account the common occurrence of claims being withdrawn, consolidated and relodged.[50]

## Reasons for lengthy processes

3.41 The ALRC has considered whether the requirements of *Native Title Act* s 223 (and associated case law) unnecessarily prolong proceedings. The Western Australian Government has suggested that connection requirements 'are not a significant contributor to delays in the resolution of native title claims',[51] and the Chamber of Minerals and Energy of Western Australia has recommended that the ALRC should only make proposals for reform that are based on quantitative, clear and objective evidence.[52]

3.42 The ALRC has identified multiple reasons for the slow pace of resolution of claims. It is well recognised that data on reasons for delay in court proceedings is difficult to obtain.[53] While the length of proceedings can be accurately identified, the reasons for the time taken will not usually be evident from court files. Research on this topic is largely based on qualitative techniques, particularly interviews with participants.[54] The ALRC has also relied on this approach. It is acknowledged that

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47 Graeme Neate, '"It's the Constitution, It's Mabo, It's Justice, It's Law, It's the Vibe": Reflections on Developments in Native Title since *Mabo v Queensland [No 2]*' in Toni Bauman and Glick Lydia (eds), *The Limits of Change: Mabo and Native Title 20 Years On* (AIATSIS, 2012) 188, 205; see also Justice Michael Barker, 'Innovation and Management of Native Title Claims: What Have the Last 20 Years Taught Us?' (Paper Presented at National Native Title Conference, Alice Springs, 3–5 June 2013) 6 on the importance of determinations with non-native title outcomes.

48 See Ch 1.

49 See Ch 1.

50 National Native Title Tribunal, 'National Report: Native Title' (February 2012).

51 Western Australian Government, *Submission 20*.

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

53 CH van Rhee (ed), *The Law's Delay: Essays on Undue Delay in Civil Litigation* (2004) 4.

54 See, eg, Public Accounts Committee, NSW Parliament, 'Report, Inquiry into Court Waiting Times' (133, June 2002) ch 5.

there are limitations to this approach, particularly in light of the duty of confidentiality that legal representatives have to their clients.

3.43 Importantly, as the Federal Court submitted, the causes of delay have changed over time.[55] In the first 10 years of the Act, there were only 45 determinations of native title. There was uncertainty about the requirements of the Act, and a number of test cases occurred before parties could confidently negotiate consent agreements. The South Australian Government suggested that delays were 'in large part reflective of the comparative newness of native title within the Australian legal system at the time the claims were lodged, the developing jurisprudence in this area, and the size and complexity of many of the claims'.[56]

3.44 It was also necessary for representative bodies, claim groups, expert witnesses, government parties and third party respondents to acquire skills and expertise in the area. There have been 268 determinations in the second 10 years of the Act. There is now significantly more certainty around many aspects of the law,[57] and significantly more of the participants in the system have highly developed skills and expertise—although shortages remain in some areas.[58] The following matters (in no particular order) have been identified by stakeholders as present-day factors contributing to the length of proceedings.

### *Capacity constraints in representative bodies*

3.45 Stakeholders indicated that the limited resources of representative bodies is a cause of delays.[59] Cape York Land Council said that 'financial and capacity constraints definitely pose a barrier for native title outcomes', causing delay and inadequate engagement with clients.[60] The Law Society of Western Australia reported that a contributing factor to the long-running case of *Banjima People v Western Australia (No 2)*[61] was the limited capacity of the representative body, and the claim was only able to be resolved when the claim group paid for private legal representation from the proceeds of agreements with iron ore companies.[62]

### *Establishing native title*

3.46 Many stakeholders indicated that the collection, assessment and hearing of evidence in relation to connection is an important reason for the significant length and

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55 Federal Court of Australia, *Submission 40*.
56 South Australian Government, *Submission 34*.
57 Ibid.
58 Justice John Mansfield, *Re-Thinking the Procedural Framework* (Speech Delivered to the Native Title User Group, Adelaide, 9 July 2008).
59 Federal Court of Australia, *Submission 40*; NSW Young Lawyers Human Rights Committee, *Submission 29*; Law Society of Western Australia, *Submission 9*; Minerals Council of Australia, *Submission 8*; Cape York Land Council, *Submission 7*. See also Deloitte Access Economics, 'Review of the Roles and Functions of Native Title Organisations' (Australian Government, March 2014) 21; Graeme Hiley and Ken Levy, 'Native Title Claims Resolution Review' (Report, Attorney-General's Department, 31 March 2006) 35.
60 Cape York Land Council, *Submission 7*.
61 *Banjima People v Western Australia (No 2)* (2013) 305 ALR 1.
62 Law Society of Western Australia, *Submission 9*.

cost of proceedings.[63] The Northern Territory Government reported that 'it had been agreed that the collection of this evidence is enormously resource intensive and has the potential to consume the scarce resources of all parties'.[64] Justice Barker has also noted that hearings in relation to connection take 'enormous' time and costs are high.[65]

3.47 The Attorney General of Western Australia, the Hon Michael Mischin indicated in 2013 that 'there could be a hiatus in consent determinations if the rate of research is not increased and connection deadlines adhered to',[66] which suggests that the preparation of connection reports may be a bottleneck in the process in that state. The Queensland Government said that until at least 2008, connection reports did not address the issues the state considered relevant, causing delay. The Government noted, however, that after it clarified the principles it relied on in assessing connection reports, the quality of reports improved and the rate of resolution of claims increased.[67]

3.48 Queensland South Native Title Services (QSNTS) reported that delays are being caused by the state's recent (August 2013) policy shift on connection requirements, requiring lot by lot evidence of connection.[68] Cape York Land Council said that, while there is strong evidence regarding connection in Cape York, locating and collating that evidence in a way that meets the state's connection guidelines is a 'significant impost'.[69]

### *The availability of experts*

3.49 Several stakeholders indicated that the limited availability of appropriately qualified expert anthropologists contributed to the length and cost of proceedings.[70] Anthropologists collect and collate evidence of connection, assist in the preparation of connection reports, and provide expert evidence in hearings. The Federal Court described the scarcity of experts as 'a constant factor in the causes of delay'.[71]

### *Tenure analysis*

3.50 As part of native title proceedings, state respondent parties will analyse the tenure in the areas under claim, for the purpose of identifying areas where native title

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63 See Ch 4 for a detailed discussion of what is required to establish native title rights and interests.

64 Northern Territory Government, *Submission 31*.

65 Justice Michael Barker, 'Innovation and Management of Native Title Claims: What Have the Last 20 Years Taught Us?' (Paper Presented at National Native Title Conference, Alice Springs, 3–5 June 2013) 2013 7.

66 Michael Mischin, 'Improving the Native Title System' (paper Presented at National Native Title Conference, Perth, 14 June 2013) 7.

67 Queensland Government Department of Natural Resources and Mines, *Submission 28*.

68 Queensland South Native Title Services, *Submission 24*.

69 Jon C Altman, 'Wild Rivers and Informed Consent in Cape York' (CAEPR Topical Issue No. 02/2010, Centre for Aboriginal Economic Policy Research ANU, 2010).

70 Justice Michael Barker, 'Innovation and Management of Native Title Claims: What Have the Last 20 Years Taught Us?' (Paper Presented at National Native Title Conference, Alice Springs, 3–5 June 2013) 2013; Law Society of Western Australia, *Submission 9*; Cape York Land Council, *Submission 7*; Rita Farrell, John Catlin and Toni Bauman, 'Getting Outcomes Sooner: Report on a Native Title Connection Workshop' (National Native Title Tribunal and AIATSIS, 2007) 9; Graeme Hiley and Ken Levy, above n 59, 35.

71 Federal Court of Australia, *Submission 40*.

has been extinguished. State governments have advised the ALRC that this analysis is expensive and time consuming and a significant contributor to the length of proceedings.[72]

3.51 There is some debate as to whether an analysis of current tenure is sufficient for the purpose of a determination of native title[73] or whether historical tenure analysis is necessary.[74] There is also debate as to the timing of tenure analysis.[75] Justice Barker has called for respondents to conduct this analysis soon after the lodgement of a claim.[76]

### *Difficulties in negotiations*

3.52 Two representative bodies were concerned about delays caused by the state indicating that its connection requirements have not been met, but not specifying what aspects of a connection report are unsatisfactory.[77]

3.53 One representative body submitted that delays are being caused by the state 'using the carrot of its consent as leverage to secure agreement on other matters'.[78] It reported that the state insisted on an Indigenous land use agreement (ILUA) restricting the rights of the claimants, without offering anything of value in return, as a condition of consenting to a determination.[79]

3.54 A similar concern was raised by the Yamatji Marlpa Aboriginal Corporation in its submission to the Deloitte *Review of Native Title Organisations*.[80] This submission reported that the state was seeking to negotiate a 'complex, whole-of government State ILUA' at a late stage of the claim process, with 'little incentive for groups to enter into the agreement.[81]

### *Overlapping claims and disputes*

3.55 Stakeholders from both claimant and respondent perspectives reported that overlapping claims and intra-Indigenous disputes are significant contributors to the

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72 South Australian Government, *Submission 34*; Western Australian Government, *Submission 20*; Department of Justice, Victoria, *Submission 15*.

73 Justice John Mansfield, *Re-Thinking the Procedural Framework* (Speech Delivered to the Native Title User Group, Adelaide, 9 July 2008).

74 Michael Mischin, 'Improving the Native Title System' (paper Presented at National Native Title Conference, Perth, 14 June 2013).

75 See further Ch 1.

76 Justice Michael Barker, 'Innovation and Management of Native Title Claims: What Have the Last 20 Years Taught Us?' (Paper Presented at National Native Title Conference, Alice Springs, 3–5 June 2013) 2013.

77 Central Desert Native Title Services, *Submission 26*; Queensland South Native Title Services, *Submission 24*.

78 Queensland South Native Title Services, *Submission 24*.

79 Ibid.

80 This Review is discussed further in Ch 10.

81 Yamatji Marlpa, Submission to Deloitte Access Economics, *Review of the Roles and Functions of Native Title Organisations* 2014.

time taken to resolve claims.[82] Disputes between Aboriginal people sometimes result in a late application for joinder.[83] These applications can disrupt the progress of a claim towards a consent determination, causing upset, delay and considerable expense for all parties.[84]

3.56 Some of the reasons for disputes and overlaps are discussed in Chapter 8. Toni Bauman has reported that there is an 'urgent and unmet demand for skilled and experienced native title ADR [alternative dispute resolution] practitioners, including Indigenous practitioners'.[85]

3.57 In some jurisdictions, the state respondent will not negotiate towards a consent determination over land subject to an overlapping claim.[86] Cape York Land Council 'has expended considerable time, resources and funding in recent years attempting to mediate disputes'. Even where this mediation is successful, delay is inevitable, as is the diversion of resources towards the dispute and away from other claims.[87]

### *Capacity constraints in government bodies*

3.58 Some non-government stakeholders indicated that state government resources are stretched by its obligations to conduct settlement negotiations,[88] assess connection[89] and undertake tenure analysis.[90]

### *Novel claims*

3.59 One stakeholder noted that delays may be caused by 'claims for novel or unusual rights that are unsubstantiated'.[91]

### *The right to negotiate*

3.60 Two stakeholders noted that because the *Native Title Act* gives significant procedural rights to groups with a registered claim, there may be a reduced incentive to speedily progress the claim,[92] particularly if there is a risk the claim will fail.

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82 Chamber of Minerals and Energy of Western Australia, *Submission 21*; National Farmers' Federation, *Submission 14*; Law Society of Western Australia, *Submission 9*; Minerals Council of Australia, *Submission 8*; Cape York Land Council, *Submission 7*.

83 See, eg, *Davis-Hurst on behalf of the Traditional Owners of Saltwater v Minister for Land and Water Conservation (NSW)* [2003] FCA 541 (4 June 2003); *Isaacs on behalf of the Turrbal People v Queensland* [2011] FCA 828 (25 July 2011); *Far West Coast Native Title Claim v South Australia (No 5)* [2013] FCA 717 (30 July 2013). See further Ch 11.

84 Federal Court of Australia, *Submission 40*.

85 'Bauman, T (Ed), 'Dilemmas in Applied Native Title Anthropology in Australia' 136.

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

87 Cape York Land Council, *Submission 7*.

88 Native Title Services Victoria, *Submission 18*.

89 Queensland South Native Title Services, *Submission 24*; Ergon Energy Corporation, *Submission 5*; Just Us Lawyers, *Submission 2*.

90 Ergon Energy Corporation, *Submission 5*.

91 Western Australian Government, *Submission 20*.

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

3.61 Negotiating with proponents can absorb a great deal of the claim group's time, energy and resources. A group and their representative body may not be able to simultaneously undertake the work involved with a claim, resulting in delay.

# Changing court practices

## Mediation and intensive court management

3.62 The original *Native Title Act* provided that applications were to be filed in the National Native Title Tribunal (the Tribunal) and determinations of the Tribunal were to be given effect as if they were orders of the Federal Court. Such a scheme was held to be unconstitutional[93] and from 1998 applications were filed in the Federal Court. However the Court would refer each application to the Tribunal for mediation.[94] From 2007 the Tribunal had sole responsibility for mediation, but in 2012, the mediation function was transferred from the Tribunal to the Federal Court.[95]

3.63 The Federal Court has shifted away from the referral of entire matters to mediation, and prefers 'intensive case management to identify the issues in dispute … and … referral of particular issues to mediation'.[96] The Court suggests that this approach has contributed to the increased number of determinations in 2012 and 2013.[97]

3.64 In July 2010, the Federal Court established a priority list for case management. A range of strategies have been used to assist the parties to reach agreement on connection issues, including:

- case management conferences where experts identify the issues likely to be contentious, prior to beginning fieldwork;
- orders timetabling the provision of connection material and the respondent's analysis of that connection material;
- conferences of experts in the absence of lawyers, supervised by a registrar, aimed at narrowing connection issues;
- court-appointed experts, frequently where there is a dispute between Indigenous people;
- mediation on country, where state experts can question claimants; and
- early evidence hearings.[98]

3.65 These initiatives have been generally well received. The Cape York Land Council said the initiatives have increased the rate of determinations and are generally

93 *Brandy v Human Rights & Equal Opportunity Commission* (1995) 183 CLR 245.
94 Neate, above n 47, 196.
95 Federal Court of Australia, *Submission 40*.
96 Ibid.
97 Ibid.
98 Ibid.

beneficial.[99] Central Desert Native Title Services commented that 'native title claims are no longer stuck in a circle of never-ending negotiations with respondent parties', and that

> Programming matters for trial has also meant that the State of Western Australia, who are the primary respondent to native title claims, has been required to become more articulate in its opposition to native title claims and more pro-active in progressing claims such as with the early provision of tenure information.[100]

3.66 Similarly, the Queensland Government reported that

> Case management by the Federal Court provides a more disciplined framework within which the parties to claims are required to be more accountable for the prosecution of matters … [and] has ensured that all aspects of claims are dealt with in a professional and timely manner.

3.67 On the other hand, the North Queensland Land Council said:

> It would be desirable for the court to recognise that its compressed time frames work against some native title groups particularly where the groups have been fractured and widely separated by removal policies as is the case in Queensland.[101]

3.68 Prior to the introduction of intensive case management for native title matters, the Social Justice Commissioner raised concerns that the pressure of court deadlines can distract the parties from negotiating broader agreements and divert resources away from negotiations. The Commissioner suggested that there should be an option for parties to obtain a long-term adjournment of a matter if both parties consent.[102]

## Right to negotiate

3.69 Case management of native title claims must be seen in the context of the right to negotiate, which contributes to two unusual features of this type of litigation. First, claims are frequently made not at a time of the claimant's choosing, but in response to a future act notice.[103] If the group does not already have a determination, the right to negotiate is only available to a person who, four months after the notification day, is a registered native title claimant.[104] An Aboriginal or Torres Strait Islander group must lodge a claim in order to 'speak for country' and seek protection of their rights and interests. At this time, the group may not have confirmed its membership, the boundaries of the lands and waters held under Aboriginal or Torres Strait Islander law, or the scope of the rights and interests held. The North Queensland Land Council said 'the idea that within three months a claim could be researched, hold an authorisation meeting, lodge a claim and then one month later pass the registration test is fanciful in the extreme'.[105] It takes several years and significant resources for an expert to prepare a report on these matters, and the group may not have access to the resources or the

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99 Cape York Land Council, *Submission 7*.
100 Central Desert Native Title Services, *Submission 26*.
101 North Queensland Land Council, *Submission 17*.
102 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2008' 44.
103 *Native Title Act 1993* (Cth) s 29.
104 Ibid s 30(1)(a).
105 North Queensland Land Council, *Submission 17*; See also AIATSIS, *Submission 36*.

expert at the time of the claim. Susan Phillips has suggested that courts need to show patience in these circumstances, where native title applicants can be 'properly understood as respondents to the proceedings of others'.[106]

3.70 Secondly, as noted above, the right to negotiate can affect a claim group's incentive to speedily progress the claim.[107]

### Can the increased rate of determinations be sustained?

3.71 It is not clear that the faster rate of determinations can be sustained. Cape York Land Council pointed out that existing claims are more complex than past ones and there are more disputes.[108] Others have agreed that current claims are more difficult than past claims[109] and the National Farmers' Federation noted that many unresolved claims involve disputes about the composition of the claim group and overlap with other claims.[110]

3.72 Justice Barker has suggested that

> the overall success of this next phase is highly dependent upon a tripartite endeavour involving the Federal Court, claims groups and their representatives, and respondent parties, especially governments, and their representatives.[111]

3.73 He calls on the parties to:

- show flexibility, for example regarding non-native title outcomes;
- undertake tenure analysis soon after the lodgement of a claim;
- avoid full-blown hearings on connection by 'better disclosure and exchange of information in the pre-hearing stage'; and
- avoid formulaic requirements for proof of connection.[112]

3.74 He also notes the importance of adequate resourcing.[113]

## The Land Fund and social justice package

3.75 Stakeholders have pointed out that the *Native Title Act* was never intended to be the sole response to *Mabo v Queensland [No 2]* and to Indigenous demands for land

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106 Susan Phillips, '"Like Something out of Kafka": The Relationship Between the Roles of the National Native Title Tribunal and the Federal Court in the Development of Native Title Practice' (2002) 2 *Land, Rights, Laws: Issues of Native Title*.

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

108 Cape York Land Council, *Submission 7*.

109 Law Society of Western Australia, *Submission 9*; See also Michael Mischin, 'Improving the Native Title System' (paper Presented at National Native Title Conference, Perth, 14 June 2013) 8; Neate, above n 47, 218.

110 National Farmers' Federation, *Submission 14*.

111 Justice Michael Barker, 'Innovation and Management of Native Title Claims: What Have the Last 20 Years Taught Us?' (Paper Presented at National Native Title Conference, Alice Springs, 3–5 June 2013) 2013 9.

112 Ibid 4–8.

113 Ibid 8.

justice, or to the economic and social disadvantage that is a consequence of dispossession.[114] It was to be accompanied by a land fund and social justice package, thus providing a comprehensive response.[115]

3.76 In 2008, the then Social Justice Commissioner, Dr Tom Calma, commented that 'the other two limbs did not eventuate in the form intended, and this abyss is one of the underlying reasons why the native title system is under the strain it is under today'.[116]

3.77 The Jumbunna Indigenous House of Learning submission to the Senate Committee on Law and Justice said:

> Jumbunna considers that native title should be conceived within a comprehensive land justice framework with restitution at its centre. Such a comprehensive settlement process would deal with traditional and historic land claims, reparation for dispossession, resource management, Indigenous jurisdiction over land and resources, economic development, would deal with the realities and consequences of dispossession and should promote and embody Indigenous peoples' exercise of sovereignty.[117]

## The Land Fund

3.78 The Preamble to the *Native Title Act* notes that '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 and that a special fund needs to be established to assist them to acquire land'. That special fund is the Land Fund, administered by the Indigenous Land Corporation (ILC). The purpose of the ILC is to assist Aboriginal and Torres Strait Islander people to acquire and manage land, so as to provide economic, environmental, social or cultural benefits for those people.[118]

3.79 The Land Fund received appropriations from consolidated revenue for the first 10 years of its operation, and at the end of 2004, the value of the fund was $1.42 billion.[119] The ILC has acquired 5.86 million hectares of land since establishment.[120]

3.80 There are some concerns as to whether the ILC has fulfilled its purpose.[121] Dr Calma said in 2008 that the ILC 'does not always provide an effective and accessible alternative form of land justice when native title is not available'. In particular, he

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114 See, eg, Law Council of Australia, *Submission 35*; Kimberley Land Council, *Submission 30*; Western Australian Government, *Submission 20*; National Native Title Council, *Submission 16*; Law Society of Western Australia, *Submission 9*; Just Us Lawyers, *Submission 2*.

115 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Social Justice and Native Title Report 2013' (Australian Human Rights Commission) 82–3.

116 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2008', above n 102, 46.

117 Jumbunna Indigenous House of Learning Research Unit, UTS, Submission No 17 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, July 2011 2.

118 *Aboriginal and Torres Strait Islander Act 2005* (Cth) s 191B.

119 Patrick Sullivan, 'Policy Change and the Indigenous Land Corporation' (Research Discussion Paper 25, AIATSIS) 19.

120 Indigenous Land Corporation, 'Annual Report 2012–13' (2013) 3.

121 Sullivan, above n 119; Catlin, above n 37, 428; 'Native Title Report 2007', above n 45, 47–49.

noted that Indigenous people are concerned about the ILC's focus on economic gain rather than reparation for dispossession.[122]

3.81 Similarly, in 2009, Patrick Sullivan reported that, while the Prime Minister's second reading speech indicated that the purpose of establishing the ILC was 'building and sustaining an adequate stock of land in the hands of indigenous owners currently dispossessed', the Annual Reports of the ILC indicate a focus on 'running its own commercial activities and emphasising employment and training'.[123]

3.82 In 2014, Ernst & Young inquired into 'the effectiveness of Indigenous Business Australia and the ILC … in driving economic development'.[124] The report noted that the purpose of the ILC was compensatory, rather than to pursue commercial activity, and that some of its activities indicated 'a lack of clarity around purpose' that should be addressed.[125] It also noted that 'there is no interest on the part of the Government to change the purpose of the Land Account or the ILC's functions towards commercial activity'.[126]

3.83 In June 2013, the ILC adopted a policy setting out its commitment to 'contribute to the constructive and flexible settlement of native title claims'.[127] This policy indicates that the ILC

> will consider providing assistance where a proposed native title settlement will facilitate a full and final resolution of claims and improve the quality of native title outcomes for Indigenous parties.[128]

3.84 The policy also indicates that the ILC will

> give preference to working with those States or Territories and NTRBs that have an effective, fair and realistic State or Territory or regional wide framework in place for the settlement of native title claims.[129]

3.85 The ILC reported a number of native title-related activities in 2012–13, although only one of them involved acquiring and divesting property.[130]

## The social justice package

3.86 In 1994, the then Prime Minister, the Hon Paul Keating MP sought the views of the Aboriginal and Torres Strait Islander Commission (ATSIC) on 'further measures that the Government should consider to address the dispossession of Aboriginal and Torres Strait Islander people as part of its response to the 1992 High Court decision on

122 'Native Title Report 2007', above n 45, 47.
123 Sullivan, above n 119.
124 Ernst & Young, 'Review of the Indigenous Land Corporation and Indigenous Business Australia' (2014) 24.
125 Ibid 11.
126 Ibid 20.
127 Indigenous Land Corporation, above n 120, 27.
128 Indigenous Land Corporation, 'Indigenous Land Corporation Board Endorsed Policy on Support for the Resolution of Native Title Claims'.
129 Ibid.
130 Indigenous Land Corporation, above n 120, 24.

native title'.[131] The Native Title Social Justice Advisory Committee of ATSIC reported that a social justice package should address, among other things, compensation for dispossession of land and dispersal of the Indigenous population.[132] It suggested that the need for compensation and restitution goes beyond the scope of the National Land Fund, and such compensation should include 'access to revenue derived from the use of land by non indigenous Australians'.[133]

3.87 Without a social justice response, great pressure is placed on the native title system.[134] There have been continuing calls for a social justice package to complement the native title system[135] and to compensate traditional owners whose native title rights have been found to have been extinguished.[136]

3.88 The ALRC's proposals for reforms to the *Native Title Act* are intended to be consistent with the original understanding of its drafters—that native title could never be a sufficient response to the land justice question, and that land purchase and a social justice package are essential elements of a response. A fourth element is alternative settlements (discussed below).

## Alternative settlement

3.89 The Hon Aden Ridgeway, Gumbayyngirr man and former Senator, has called for 'a complete rethinking of the way native title issues are resolved and managed in this country. What we need is to establish comprehensive settlements'.[137] The National Native Title Council has also endorsed such an approach.[138]

3.90 In jurisdictions outside Australia, 'settlement' implies not only the resolution of native title claims, but the resolution of broader issues.[139] Professor Mick Dodson has noted that property rights alone will not 'allow Indigenous peoples to determine our economic and social development' and suggested that Indigenous people should be involved in all decision-making forums which impact on the region. On this view, regional settlements could include settlement of native title claims, provision for Aboriginal control of land use and development on land they own, resource royalties, participation in planning, development and environmental management in the area,

131 Native Title Social Justice Advisory Committee, 'Rights Reform and Recognition' (Aboriginal and Torres Strait Islander Commission, 1995) 1.
132 Ibid 4.32.
133 Ibid 4.36, 4.40.
134 A Frith and M Tehan, *Submission 12*.
135 Australian Human Rights Commission, *Submission 1*.
136 Law Council of Australia, *Submission 35*; National Congress of Australia's First Peoples, *Submission 32*; Law Society of Western Australia, *Submission 9*.
137 Aden Ridgeway, 'Where We've Come from and Where We're at with the Opportunity That Is Koiki Mabo's Legacy to Australia' (Paper Presented at Native Title Conference, Alice Springs, 3-5 June 2003), cited in Stuart Bradfield, 'Agreeing to Terms: What Is a "Comprehensive" Agreement?' (Land, Rights, Laws: Issues of Native Title 2/26, 2004) 13.
138 National Native Title Council, *Submission 16*.
139 Bradfield, above n 137, 2–3.

joint management agreements, service delivery arrangements and measures to strengthen Aboriginal local government.[140]

3.91 At the Native Title Minister's Meeting in 2008, Ministers acknowledged that the potential of the native title system had been 'constrained by technical and inflexible legal practices'. The Ministers agreed to work towards negotiated settlements and established a Joint Working Group on Indigenous Land Settlements (Joint Working Group) 'to develop innovative policy options for progressing broader and regional land settlements'.[141]

3.92 The Joint Working Group produced *Guidelines for Best Practice, Flexible and Sustainable Agreement Making*. The Guidelines do not define what the scope of a 'broader land settlement' might be, except to note that they can include both native title and non-native title outcomes.[142]

3.93 The *Traditional Owner Settlement Act 2010* (Vic) (TOSA) provides for settlements between the Victorian Government and traditional owner groups in Victoria. Settlements are to be made on the basis that traditional owners must withdraw native title claims and agree not to make a claim in the future. Settlements may include recognition of the group and certain traditional owner rights over Crown land, grants of land either as freehold title or 'Aboriginal title', funding for traditional owner corporations, and the right to comment on or consent to certain activities and provide input into the management of land and natural resources.[143] The Social Justice Commissioner described this agreement as setting 'the benchmark for other states to meet when resolving native title claims'.[144]

3.94 The first settlement under the TOSA was with the Gunaikurnai people, in 2010.[145] In 2013, a comprehensive settlement was made with the Dja Dja Wurrung, which included the transfer of two freehold properties; hunting, fishing and gathering rights; a Land Use Activity Agreement (a simplified ILUA); transfer of parks and reserves as 'Aboriginal title' and joint management of those lands.[146]

3.95 The Western Australian Government and the South West Aboriginal Land and Sea Council, representing six native title groups—Yued, Gnaala Karla Boodja, South West Boojarah, Wagyl Kaip, Ballardong, and Whadjuk—have, since 2009, been negotiating a settlement in the South West of Western Australia. The matters under negotiation include recognition of the Noongar people as traditional owners, the

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140 Mick Dodson, 'Indigenous Social Justice Strategies and Recommendations' (Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, 1995).

141 *Native Title Ministers Meeting Communique* 2009.

142 Joint Working Group on Indigenous Land Settlements, *Guidelines for Best Practice: Flexible and Sustainable Agreement Making*, August 2009 5.

143 Department of Justice Justice, *Traditional Owner Settlement Act* <http://www.justice.vic.gov.au/home/your+rights/native+title/traditional+owner+settlement+act>.

144 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2011' (Australian Human Rights Commission, 2011) 4.

145 Department of Justice, Victoria, *Submission 15*.

146 Dja Dja Wurrung Clans Aboriginal Corporation, *Settlement of the Dja Dja Wurrung Native Title Applications under The* Traditional Owner Settlement Act 2010.

transfer of land, funding, joint management of the conservation estate and processes for the protection of heritage.[147]

3.96 The South Australian Government reports that it has had a policy of resolving claims by consent since 2004:

> Eleven claims have been resolved by consent determinations … and, of these, six have involved comprehensive settlement agreements that address broader issues including compensation, sustainability of the Prescribed Body Corporate, and future act issues.[148]

3.97 Some efforts have been made to achieve regional agreements in Queensland, but they do not appear to have been successful.[149] QSNTS has suggested that an alternative settlement framework, similar to the Victorian TOSA, should be discussed.[150]

## Compensation for extinguishment

3.98 The ALRC has not been asked to inquire into compensation for the extinguishment of native title. However state governments have pointed out that compensation is relevant to the consideration of the connection requirements of the *Native Title Act*. Concerns arise on two related fronts.

3.99 First, two state governments raised concerns that changes to the *Native Title Act* could increase the liability of state and territory governments for compensation.[151] The South Australian Government reported that 'virtually all determinations of native title are followed by negotiations or claims for significant compensation for historical extinguishment'.[152]

3.100 The *Native Title Act* provides that where an act extinguishing native title is attributable to the Commonwealth, compensation is payable by the Commonwealth,[153] while the states and territories are liable for compensation when their acts extinguish native title.[154] The South Australian Government noted that 'the financial assistance package promised by the Commonwealth at the time of the *Native Title Act* and since is still yet to come to fruition, leaving the bulk of the cost of native title recognition with the states and territories'.[155] The Commonwealth has entered into discussion with the states and territories regarding a Commonwealth contribution to state and territory compensation liabilities, but no final agreement has been reached.[156]

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147 Western Australian Government, *The South West Native Title Settlement* Land, Approvals and Native Title Unit <http://www.dpc.wa.gov.au>.
148 South Australian Government, *Submission 34*.
149 Graeme Neate 'Negotiating Comprehensive Settlements of Native Title Claims' (Paper Presented at LexisNexis Native Title Law Summit, 2009) 26.
150 Queensland South Native Title Services, *Submission 24*.
151 South Australian Government, *Submission 34*; Western Australian Government, *Submission 20*.
152 South Australian Government, *Submission 34*.
153 *Native Title Act 1993* (Cth) ss 17, 22A.
154 Ibid ss 20, 22G.
155 South Australian Government, *Submission 34*.
156 Western Australian Government, Submission No 18 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, August 2011.

3.101 Secondly, one state government has expressed concerns about the absence of a commitment from the Commonwealth Government to contribute to funding for alternative settlements. In 2013, the Western Australian Attorney General said that, without such a contribution, there is 'a disincentive for the states/territories to adopt more progressive native title policies'. [157]

3.102 At the 2008 Native Title Ministers' Meeting, Ministers agreed to negotiate on 'Commonwealth financial assistance that could better facilitate state and territory settlement of native title issues'.[158] The ALRC is not aware that such an agreement has been finalised. However in 2010, the Commonwealth entered into a written agreement with Victoria under *Native Title Act* s 200 for the provision of financial assistance to that state 'to enable benefits to be provided to native title claim groups under settlement agreements'.[159] The Commonwealth's financial contribution will not exceed the state's financial contribution.[160] The agreement notes that 'the Commonwealth will determine any contribution it makes to Settlement Agreements with States and Territories on a case-by-case basis and extend this Agreement accordingly'.[161]

3.103 The Western Australian Government has sought a Commonwealth contribution to the proposed settlement with the Noongar community.[162]

3.104 Alternative settlements, and the respective contributions of governments to their funding, are policy matters and the ALRC will not make recommendations in this regard. However it is important to note that both Indigenous leaders and government Ministers have indicated that alternative settlements are preferable to a continued reliance on litigation.[163] Some progress is being made towards alternative settlements, and further progress will allow native title litigation to be just one of a range of means for achieving land justice for traditional owners and certainty for other parties.

## Consistency with other policy settings

3.105 The National Indigenous Reform Agreement (Closing the Gap) is an agreement between the Commonwealth of Australia and all states and territories. It commits those governments to effort in seven areas, one of which is economic participation. The agreement notes that 'access to land and native title assets, rights and interests can be leveraged to secure real and practical benefits for Indigenous people'.[164]

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157 Michael Mischin, 'Improving the Native Title System' (paper Presented at National Native Title Conference, Perth, 14 June 2013) 12.

158 Joint Working Group on Indigenous Land Settlements, 'Report to the Native Title Ministers' Meeting 2008-09'.

159 COAG, *National Partnership Agreement on Native Title* cl 27 <www.federalfinancialrelations.gov.au>.

160 Ibid cl 31.

161 Ibid cl 4.

162 Department of the Premier and Cabinet, Western Austrlaia, *The South West Settlement: Questions and Answers* (February 2014) Department of Premier and Cabinet <www.dpc.wa.gov.au>.

163 *Native Title Ministers Meeting Communique* 2009; National Native Title Council, *Submission 16*.

164 COAG, 'National Indigenous Reform Agreement' 7.

3.106 AIATSIS has argued that native title is significant for achieving the Closing the Gap targets:

> Establishing a regime of native title rights that are clear, strong and economically valuable can, in turn, provide a resource base for Indigenous social and economic development.[165]

3.107 On the other hand, obtaining a determination of native title does not guarantee economic opportunity.[166] Much depends on whether the area is rich in minerals,[167] whether the group has an effective body corporate and good governance,[168] and the content of the rights themselves.[169]

3.108 Aboriginal leaders have emphasised the importance of using native title for economic development. Warren Mundine, Chair of the Prime Minister's Indigenous Advisory Council, said that native title rights, as well as compensation for loss of land, 'can and should be used to generate commercial and economic development for Indigenous people through a real economy, real jobs and real for-profit businesses owned and operated by Indigenous people'.[170] Similarly, Wayne Bergman, CEO of Kred Enterprises, said:

> Aboriginal culture cannot survive without an economy to support it. And to build a viable indigenous economy, we must be allowed to control our land and sea country and to use the leverage it gives us to build an economic foundation for our future.[171]

3.109 The ALRC has adopted as a guiding principle that 'reform should promote sustainable, long-term social, economic and cultural development for Aboriginal peoples and Torres Strait Islanders'.[172]

## A holistic approach to reform

3.110 A number of stakeholders pointed out that the ALRC's Inquiry is just one of a number of inquiries into different aspects of the native title system, and suggested that this is both wearying for participants in the system, and not conducive to systematic reform.

3.111 Nick Duff has identified 11 native title law reform activities since 2007.[173] This places a significant burden on stakeholders, particularly native title representative bodies and service providers. Central Desert Native Title Services said

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165 AIATSIS, Submission to the Review of Native Title Organisations, 2013.

166 Western Australian Government, *Submission 20*; Graeme Neate, 'Using Native Title to Increase Indigenous Economic Opportunities' (paper Presented at 5th Indigenous Recruitment and Training Summit, Brisbane, 6 December 2010) 19.

167 Graeme Neate, 'Using Native Title to Increase Indigenous Economic Opportunities' (paper Presented at 5th Indigenous Recruitment and Training Summit, Brisbane, 6 December 2010).

168 Western Australian Government, *Submission 20*.

169 J Altman, *Submission 27*.

170 Warren Mundine, 'Australia Day Address' (2014).

171 Dan Harrison, 'Call to Link Native Title to Aboriginal Economy' *The Sydney Morning Herald*, 28 June 2012.

172 See Ch 1.

173 AIATSIS, *Submission 36*; See further Nick Duff, 'Reforming the Native Title Act: Baby Steps or Dancing the Running Man?' (2013) 17 *Australian Indigenous Law Reporter* 56.

> Participation by native title parties in multiple and sometimes overlapping reviews or consultations is time consuming and costly and often without any positive outcome. It creates a feeling of cynicism and pessimism within the native title sphere and a reluctance to participate in 'another review'. [174]

3.112 The Association of Mining and Exploration Companies raised a broader concern about the lack of clear strategic direction by governments, and said there is a 'need for Government to develop and articulate an overarching native title strategy including a coherent long term plan for legislative and regulatory reform in this area'.[175]

3.113 The National Congress of Australia's First Peoples noted that the ALRC Inquiry addresses 'limited issues'. It supports 'a comprehensive review of the Act by the Attorney-General's Department, designed to achieve implementation of the rights set out in the UN Declaration of the Rights of Indigenous People'.[176]

3.114 The Social Justice Commissioner has called for a comprehensive and independent review of the native title system, considering the burden of proof, extinguishment, the future act regime and other matters, in 2010 and 2011.[177]

3.115 Goldfields Land and Sea Council said that there are 'a range of issues demanding attention that have not been included in the terms of reference for the current review, including extinguishment and the right to negotiate'.[178]

3.116 There are also significant post-determination challenges to be addressed, including the effectiveness and funding of prescribed body corporates (PBCs). The Deloitte *Review of Native Title Organisations*[179] and the *Taxation Working Group*[180] addressed some of these issues, but again it is not clear that these activities formed part of a coherent long-term plan for reform.

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174 Central Desert Native Title Services, *Submission 26*.
175 Association of Mining and Exploration Companies, *Submission 19*.
176 National Congress of Australia's First Peoples, *Submission 32*.
177 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2011', above n 144, 19–20; Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2010' (2010).
178 Goldfields Land and Sea Council, *Submission 22*.
179 Deloitte Access Economics, above n 59.
180 Australian Treasury, 'Taxation of Native Title and Traditional Owner Benefits and Governance Working Group: Report to Government' (2013).