5. Traditional Laws and Customs

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Summary

5.1 To establish that they hold native title rights and interests, native title claimants must satisfy the definition of native title in s 223(1) of the *Native Title Act 1993* (Cth). Section 223(1)(a) requires that the claimed rights and interests are possessed under the traditional laws acknowledged and traditional customs observed by the relevant Aboriginal peoples or Torres Strait Islanders. This chapter outlines how this requirement has been interpreted, focusing on the approach taken to the meaning of acknowledgment and observance of traditional laws and customs.

5.2 The ALRC makes proposals for reform of this aspect of the definition. It 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.

5.3 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 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.

5.4 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.

5.5 These proposals address the technicality and complexity of establishing the existence of native title rights and interests. In many respects, they endorse the movement in case law and in negotiations towards flexibility in the evidentiary requirements to establish native title.

Approach to statutory construction of s 223

5.6 Ordinary principles of statutory interpretation dictate the consideration of the purpose of the legislation.[1] The language of the Preamble and Objects of the *Native Title Act*—referring to, among other things, an intention to rectify the consequences of past injustices and that the law be a special measure for the advancement of Aboriginal and Torres Strait Islander peoples—suggests that its purpose is beneficial.[2]

5.7 As noted in Chapter 2, where legislation is identified as being beneficial and remedial, 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'.[3]

5.8 International law principles are also relevant to the approach taken to construing the *Native Title Act*. The High Court has accepted that 'a statute is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law'.[4] Rights to equality and non-discrimination are central principles in human rights law, enunciated in a number of treaties to which Australia is a party.[5]

5.9 Other principles of statutory interpretation are arguably relevant to the construction of the definition of native title rights and interests. For example, AIATSIS pointed to common law principles for interpreting legislation 'root[ed] in the common

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1 *Acts Interpretation Act 1901* (Cth) s 15AA. In 2014, the High Court commented that this provision reflected a 'general systemic principle [of statutory construction]': *Thiess v Collector of Customs* (2014) 306 ALR 594, [23].

2 Sean Brennan, 'Statutory Interpretation and Indigenous Property Rights' (2010) 21 *Public Law Review* 239, 252. In *Alyawarr*, the Full Court of the Federal Court described the Preamble as the Act's 'moral foundation': *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [63]. See also Justice Robert French, 'Lifting the Burden of Native Title—Some Modest Proposals for Improvement' (Speech Delivered at the Federal Court Native Title User Group, Adelaide, 9 July 2008) [7]. A number of submissions also referred to the beneficial purpose of the *Native Title Act*: see, eg, Queensland Government Department of Natural Resources and Mines, *Submission 28*; Central Desert Native Title Services, *Submission 26*; Native Title Services Victoria, *Submission 18*; North Queensland Land Council, *Submission 17*; Law Society of Western Australia, *Submission 9*.

3 *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].

4 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J).

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

law protection of the rights of citizens against arbitrary exercises of power by the state, especially in relation to property'.[6]

5.10 As noted in Chapter 4, native title rights and interests can be determined not to exist when either:

- they cannot be established as a matter of fact, because claimants cannot establish that they possess rights and interests under traditional laws and customs; and a connection, by those laws and customs, with the land or waters claimed;[7] or
- they cannot be established as a matter of law, because the rights and interests are not recognised by the common law of Australia, as they are inconsistent with them.[8]

5.11 One of the guiding principles for this Inquiry is that reform should recognise the importance of recognition of native title to Aboriginal and Torres Strait Islander peoples and the Australian community.[9] It is consistent with this principle, and the Preamble and Objects of the Act, to approach the task of recognition of native title rights and interests in a way that does not render them excessively vulnerable to a finding of factual loss. Accordingly, the proposals in this chapter are intended to promote an interpretation of the definition of native title consistent with the purpose of the *Native Title Act*.

5.12 However, the ALRC recognises that not all Aboriginal or Torres Strait Islander peoples will be able to establish that they hold native title under the *Native Title Act*. The Preamble to the *Native Title Act* acknowledges that 'many Aboriginal peoples or Torres Strait Islanders, because they have been dispossessed of their traditional lands, will be unable to assert native title rights and interests'.[10]

Section 223(1)(a)

5.13 Section 223(1)(a) of the *Native Title Act* requires that native title rights and interests are rights and interests possessed under the traditional laws acknowledged and traditional customs observed by the relevant Aboriginal peoples Torres Strait Islanders. As explained in Chapter 4, the High Court in *Members of the Yorta Yorta Aboriginal Community v Victoria* ('*Yorta Yorta*') has stated that the laws and customs that can be properly described as 'traditional' are those that find their origin in the laws and customs acknowledged and observed at sovereignty.[11]

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6 AIATSIS, *Submission 36*. See generally Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35 *Melbourne University Law Review* 449.

7 *Native Title Act 1993* (Cth) s 223(1)(a), (b).

8 Ibid s 223(1)(c).

9 Guiding Principle 1: see Ch 1.

10 A number of submissions to this Inquiry highlighted this aspect of the Preamble: see, eg, Queensland Government Department of Natural Resources and Mines, *Submission 28*; Western Australian Government, *Submission 20*; National Farmers' Federation, *Submission 14*. See Ch 3 for further discussion.

11 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [46] (Gleeson CJ, Gummow and Hayne JJ).

5.14 As a result, the meaning of 'traditional' has been interpreted as having a number of aspects:

- the means of transmission of a law or custom: a 'traditional' law or custom is one which has been passed from generation to generation of a society;[12]
- the age of the laws and customs: the origins of the content of the law or custom concerned are to be found in the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown;[13]
- continuity: the 'normative system'—that is, the traditional laws and customs—under which rights and interests are possessed must have had a continuous existence and vitality since sovereignty.[14]

Accommodation of change to laws and customs

Proposal 5–1 The definition of native title in s 223 of the *Native Title Act* should be amended to make clear that traditional laws and customs may adapt, evolve or otherwise develop.

5.15 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.

5.16 As a number of submissions to this Inquiry have noted,[15] the current interpretation of the requirement that rights and interests are possessed under traditional laws and customs already allows for some change in those laws and customs. Contemporary laws and customs do not have to be identical to those at sovereignty to be considered traditional. Instead, to be designated traditional, contemporary laws and customs need only have their 'origins' in pre-sovereign laws and customs.[16]

5.17 The High Court in *Yorta Yorta* explicitly deals with the question of evolution and adaptation. There, Gleeson CJ, Gummow and Hayne JJ stated that some change to, or adaptation of, traditional laws and customs will not necessarily be fatal to a native title claim.[17] There is no bright line test that can be offered to judge the significance, in

12 Ibid [46].
13 Ibid.
14 Ibid [47]. See also Melissa Perry and Stephen Lloyd, *Australian Native Title Law* (Lawbook Co, 2003) 22–23.
15 Law Council of Australia, *Submission 35*; South Australian Government, *Submission 34*; Northern Territory Government, *Submission 31*; Kimberley Land Council, *Submission 30*; Queensland South Native Title Services, *Submission 24*; Law Society of Western Australia, *Submission 9*; Cape York Land Council, *Submission 7*.
16 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [46].
17 Ibid [83].

a particular case, of change and adaptation to law and custom.[18] The key question remains 'whether the law and custom can still be seen to be traditional law and traditional custom'.[19]

5.18 Gaudron and Kirby JJ in *Yorta Yorta* also considered that laws and customs may adapt and still be considered traditional:

> What is necessary for laws and customs to be identified as traditional is that they should have their origins in the past and, to the extent that they differ from past practices, the differences should constitute adaptations, alterations, modifications or extensions made in accordance with the shared values or the customs and practices of the people who acknowledge and observe those laws and customs.[20]

5.19 A number of submissions to this Inquiry argued that the existing approach to the meaning of 'traditional' sufficiently allows for evolution and adaptation of laws and customs.[21] For example, the South Australian Government submitted that the 'evolution of traditional law and custom tends to be accepted in most circumstances but the evolved laws must be in some way referable to those in existence at sovereignty'.[22]

5.20 In a number of determinations of native title, the Federal Court has recognised adapted laws and customs as retaining a 'traditional' character. For example, in *Neowarra v Western Australia*, Sundberg J found that the claimants' laws and customs were traditional notwithstanding that they were 'modified and to some extent diluted by the changed circumstances of the older applicants and their forebears'.[23] Other examples of adapted laws and customs have included changes to:

- descent rules: from patrilineal to cognatic;[24] or a shift over time involving an increase in reliance on matrilineal descent;[25]
- laws allowing images relating to country to be painted on canvas rather than on country, and the sale of these artworks;[26]
- the location of initiation rituals,[27] or a cessation of initiation ceremonies on the claimed area;[28]

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18 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [83].
19 Ibid.
20 Ibid [114].
21 South Australian Government, *Submission 34*; Northern Territory Government, *Submission 31*; Queensland Government Department of Natural Resources and Mines, *Submission 28*; Western Australian Government, *Submission 20*.
22 South Australian Government, *Submission 34*.
23 *Neowarra v Western Australia* [2003] FCA 1402 (8 December 2003) [346].
24 *Griffiths v Northern Territory* (2006) 165 FCR 300, [501]; *Western Australia v Sebastian* (2008) 173 FCR 1, [121]–[122]; *Banjima People v Western Australia (No 2)* (2013) 305 ALR 1, [507].
25 *Bodney v Bennell* (2008) 167 FCR 84, [116].
26 *Neowarra v Western Australia* [2003] FCA 1402 (8 December 2003) [140]–[141].
27 *Dempsey on behalf of the Bularnu, Waluwarra and Wangkayujuru People v Queensland (No 2)* [2014] FCA 528 (23 May 2014) [693]–[694].
28 *Graham on behalf of the Ngadju People v Western Australia* [2012] FCA 1455 (21 December 2012) [146].

- social organisation associated with particular parts of the claimed area—with a number of smaller groups 'coalescing' into larger groupings.[29]

5.21 However, while it is clear that some accommodation of change to laws and customs has been held to be possible, the ALRC considers that the definition of native title in the *Native Title Act* should explicitly acknowledge that traditional laws and customs may adapt, evolve or otherwise develop.

5.22 Such legislative acknowledgment of change is arguably in keeping with the approach envisaged upon first recognition of native title in *Mabo v Queensland [No 2]* ('*Mabo [No 2]*'). That native title rights will continue notwithstanding cultural change was repeatedly adverted to by the High Court in *Mabo [No 2]*. For example, Brennan J noted that, 'of course in time the laws and customs of any people will change and the rights and interests of the members of the people among themselves will change too'.[30] Deane and Gaudron JJ stated that traditional laws and customs are not

> frozen as at the moment of establishment of a Colony. Provided any changes do not diminish or extinguish the relationship between a particular tribe or other group and particular land, subsequent developments or variations do not extinguish the title in relation to that land.[31]

5.23 Toohey J was also of the view that 'an indigenous society cannot … surrender its rights by modifying its way of life'.[32]

5.24 As Kirby J noted in *Commonwealth v Yarmirr*, an adherence to the principle of non-discrimination

> must include a recognition that the culture and laws of indigenous peoples adapt to modern ways of life and evolve in the manner that the cultures and laws of all societies do. They do this lest, by being frozen and completely unchangeable, they are rendered irrelevant and consequently atrophy and disappear.[33]

5.25 As the National Congress of Australia's First Peoples noted,[34] the *United Nations Declaration on the Rights of Indigenous Peoples* also recognises the right of Indigenous peoples to 'practise and revitalize their cultural traditions and customs'.

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29 *Banjima People v Western Australia (No 2)* (2013) 305 ALR 1, [400], [695]–[696]. See also *AB (deceased) (on behalf of the Ngarla People) v Western Australia (No 4)* [2012] FCA 1268 (21 November 2012) [784]–[785]. In *Bodney v Bennell*, the Full Court found that the significant change from pre-settlement land-holding systems—from a system of 'home areas' and 'runs', to an identification with larger areas known as 'boodjas', pointed against continuity with pre-sovereignty laws and customs, but did not make any conclusions on this issue: *Bodney v Bennell* (2008) 167 FCR 84, [79]–[83]. The Full Court noted that the primary judge did not make any finding as to whether this change was a 'permissible adaptation' of pre-sovereignty land holding systems: Ibid [83]. However, it did not suggest that this finding was not open to the primary judge.

30 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 61.

31 Ibid 110.

32 Ibid 192. Toohey J makes this statement in the context of his position that traditional rights exist 'so long as occupation by a traditional society is established now and at the time of annexation': 192.

33 *Commonwealth v Yarmirr* (2001) 208 CLR 1, [295].

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

This includes the 'right to maintain, protect and develop the past, present and future manifestations of their cultures'.[35]

5.26 A number of stakeholders were critical of the present interpretation of the meaning of 'traditional' laws and customs, or supported better recognition of evolution and adaptation to laws and customs.[36] For example, Goldfields Land and Sea Council (GLSC) argued that focusing on tradition has the propensity 'to ingrain and incentivise a cultural conservatism in Indigenous communities, effectively discouraging (even punishing) processes of cultural change and renewal that might otherwise occur'.[37]

5.27 Queensland South Native Title Services (QSNTS) identified the tradition requirement as one of the 'inherent deficiencies' with the definition of native title, pointing to the limitations and injustice in

> the notion that upon settlement, all that the introduced law could and can ever recognise was a master copy of an indigenous legal system that existed at that point, from which successive generations of Aboriginal peoples across time have to be imprinted against.[38]

5.28 Other stakeholders noted the injustice of requiring Aboriginal people to establish the existence of a system of traditional laws and customs 'when former generations of European settlement have contrived to repress those laws and customs'.[39]

5.29 Legislative acknowledgment in the *Native Title Act* of adaptation, evolution and development of laws and customs provides explicit recognition of the cultural vitality of Aboriginal and Torres Strait Islander peoples.

5.30 An approach that explicitly acknowledges that laws and customs under which native title rights and interests are possessed can evolve, adapt and change is also in keeping with the aim of facilitating Aboriginal and Torres Strait Islander peoples' ability to utilise their native title rights to promote future development.[40] As Mr Angus Frith and Associate Professor Maureen Tehan noted, there is merit in promoting an approach to native title that allows native title holders to 'achieve their economic, social and cultural aspirations'.[41]

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35 *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st Sess, 107th Plen Mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) art 11.

36 See, eg, National Congress of Australia's First Peoples, *Submission 32*; NSW Young Lawyers Human Rights Committee, *Submission 29*; Queensland South Native Title Services, *Submission 24*; Goldfields Land and Sea Council, *Submission 22*; North Queensland Land Council, *Submission 17*; National Native Title Council, *Submission 16*; A Frith and M Tehan, *Submission 12*; Cape York Land Council, *Submission 7*; Just Us Lawyers, *Submission 2*; Australian Human Rights Commission, *Submission 1*. See also Native Title Amendment (Reform) Bill 2014 cl 18, and the submissions to the Senate Committee on Legal and Constitutional Affairs, Parliament of Australia Inquiry into Native Title Amendment (Reform) Bill 2011: Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Native Title Amendment (Reform) Bill 2011* (2011).

37 Goldfields Land and Sea Council, *Submission 22*.

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

39 North Queensland Land Council, *Submission 17*. See also Goldfields Land and Sea Council, *Submission 22*.

40 This accords with Guiding Principle 5: Supporting sustainable futures. See Ch 1.

41 A Frith and M Tehan, *Submission 12*. See also National Native Title Council, *Submission 16*.

5.31 The High Court in *Ward* has suggested that native title determinations have an indefinite character, reflecting

> the requirement for the continuing acknowledgment and observance of traditional laws and customs and continuing connection with land implicit in the definition of 'native title' in s 223(1) of the NTA.[42]

Explicit recognition that traditional laws and customs may evolve, adapt or develop is also appropriate to ensure that further adaptation or evolution of traditional laws and customs following a determination does not provide grounds for variation or revocation of a determination of native title.[43]

How much change?

5.32 The proposed amendment largely confirms and clarifies the current approach taken by courts to determining whether laws and customs are traditional. However, the ALRC acknowledges that 'difficult questions of fact and degree' will continue to arise in determining whether contemporary laws and customs can be characterised as having their origins prior to the assertion of sovereignty.[44] These are essentially matters of evidence—and inference.

5.33 Establishing that laws and customs have their origins in laws and customs acknowledged and observed prior to sovereignty will, in most cases, rely on the court (or a respondent in a consent determination) being willing to draw inferences from other evidence. As discussed in Chapter 4, in *Gumana v Northern Territory*, Selway J usefully identifies the evidence that may found such an inference, akin to the proof of custom at common law. Selway J considered that, where there is:

- a clear claim of the continuous existence of a custom or tradition that has existed at least since settlement;
- supported by credible evidence from persons who have observed that custom or tradition; and
- evidence of a general reputation that the custom or tradition had 'always' been observed;

then, in the absence of evidence to the contrary, there is an inference that the tradition or custom has existed at least since the date of settlement.[45]

5.34 In a consent determination in favour of the Dieri people, Mansfield J remarked:

> The Determination can be made without the necessity of strict proof and direct evidence of each issue as long as inferences can legitimately be made. In consent determination negotiations, it is the State's policy to focus on contemporary expressions of traditional laws and customs and pay less regard to laws and customs

42 *Western Australia v Ward* (2002) 213 CLR 1, [32].
43 *Native Title Act 1993* (Cth) s 13(5).
44 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [88].
45 *Gumana v Northern Territory* (2005) 141 FCR 457, [201].

> that may have ceased. The State can reasonably infer that such contemporary expressions are sourced in the earlier laws and customs. So can the Court.[46]

5.35 The ALRC considers that, when assessing whether or not laws and customs are 'traditional', adaptation, evolution and development of laws and customs should be treated as the norm rather than the exception. In this regard, the ALRC notes QSNTS's submission that, implicit in 'the recognition established at the time of acquisition of sovereignty is an acceptance that the indigenous normative system of law was and is inherently capable of dynamism'.[47] As AIATSIS argued, Aboriginal and Torres Strait Islander people should not be deprived of 'the right to interpret and re-interpret the meaning and content of their evolving laws and customs in line with changing conditions and environments'.[48] Moreover, as the Law Society of Western Australia noted in its submission, 'the requirement for adaptation from an original source does not require that adaptation to have occurred without the outside influence of European interaction'.[49]

5.36 The ALRC also considers that recognition that traditional laws and customs may adapt, evolve or develop should not be limited by any requirement that such changes be of a kind contemplated by the laws and customs.[50]

5.37 The ALRC further considers that significant weight should be accorded to claimants' perspectives as to the traditional character of their contemporary laws and customs. For example, the NSW Young Lawyers Human Rights Committee argued that, in assessing whether laws and customs are traditional, 'the degree to which the claim group genuinely acknowledges and observes the laws and customs as a reflection of their traditions and customs' should be taken into account.[51] Such an approach would be in keeping with according the 'highest importance' to the testimony of Aboriginal and Torres Strait Islander witnesses.[52]

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46 *Lander v South Australia* [2012] FCA 427 (1 May 2012) [42]. See also Bennett J's acceptance of the submission that 'the Court is entitled to draw inferences about the content of the traditional laws and customs at sovereignty from contemporary evidence and that if the evidence establishes a contemporary normative rule': *AB (deceased) (on behalf of the Ngarla People) v Western Australia (No 4)* [2012] FCA 1268 (21 November 2012) [724].

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

48 AIATSIS, *Submission 36*.

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

50 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [44]. See also *Rubibi Community v Western Australia (No 5)* [2005] FCA 1025 (29 July 2005) [266].

51 NSW Young Lawyers Human Rights Committee, *Submission 29*. See also S Bielefeld, *Submission 6*; Jason Behrendt, 'Changes to Native Title Law Since Mabo' (2007) 6 *Indigenous Law Bulletin* 13.

52 *Sampi v Western Australia* [2005] FCA 777 (10 June 2005) [48]; *Sampi on behalf of the Bardi and Jawi People v Western Australia* (2010) 266 ALR 537, [57].

Recognition of succession

Proposal 5–2 The definition of native title in s 223 of the *Native Title Act* should be amended to make clear 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.

5.38 The ALRC proposes that the definition of native title be amended to make clear that native title rights and interests may be succeeded to by sub-groups within a native title claim group, as well as by a different group or society than that which possessed these rights and interests at sovereignty, where these rights and interests have been transmitted in accordance with traditional laws and customs.

5.39 The ALRC views this proposal as consistent with treating native title rights and interests as durable, rather than excessively fragile, rights. Moreover, recognition of succession does not, in the ALRC's view, disturb the basis of recognition of native title—that is, it does not involve a greater burden on the radical title of the Crown than existed at sovereignty.[53]

5.40 Succession to native title rights and interests, where they have been transmitted in accordance with traditional laws and customs, was arguably envisaged in *Mabo [No 2]*.[54] There, discussing alienability of native title, Brennan J stated that

> a right or interest possessed as a native title cannot be acquired from an indigenous people by one who, not being a member of the indigenous people, does not acknowledge their laws and observe their customs; nor can such a right or interest be acquired by a clan, group or member of the indigenous people unless the acquisition is consistent with the laws and customs of that people.[55]

5.41 Deane and Gaudron JJ stated that

> The enjoyment of the rights can be varied and dealt with under the traditional law or custom. The rights are not, however, assignable outside the overall native system.[56]

5.42 There is a lack of clarity in the case law as to the possibility of succession to native title rights and interests under the *Native Title Act*. The judgment of Gleeson CJ, Gummow and Hayne JJ in *Yorta Yorta* may be considered to provide some support for the efficacy of transmission of native title rights and interests from one group to another. They state:

> The rights and interests in land which the new sovereign order recognised included the rules of traditional law and custom which dealt with the transmission of those interests.[57]

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53 *Bodney v Bennell* (2008) 167 FCR 84, [121].
54 Justice Robert French, 'Mabo—Native Title in Australia' (2004) 23 *Federal Judicial Scholarship* [27].
55 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 60.
56 Ibid 110.
57 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [44].

5.43 The Full Federal Court has expressed views in obiter about the ability of native title rights and interests to be transmitted through succession. In *Dale v Moses*, Moore, North and Mansfield JJ considered the remarks made in *Yorta Yorta* about transmission did not encompass succession. The Full Federal Court considered that the statement in *Yorta Yorta* was

> probably directed to intergenerational transmission of rights and interests under traditional laws within the society possessing rights and interests in the land under traditional laws and customs at the time of sovereignty. The observations of the members of the High Court do not establish a principle of the type … that where the traditional laws and customs of one society provide for the transmission of rights and interests in land recognised by those laws and customs, then transmission to another society can be effected and the acquisition of the transferred rights in interest can ultimately be recognised as rights and interests of the transferee society for the purposes of the NTA.[58]

5.44 The issue of succession was also considered in *Western Australia v Sebastian*.[59] In that case, the Full Federal Court was inclined to the view that succession could occur, in factual circumstances where succession occurred as the numbers of one group had reduced and in accordance with the traditional laws and customs of the two relevant Aboriginal clans.[60]

5.45 There was some evidence from submissions that the question of succession is causing practical issues in native title. Cape York Land Council (CYLC) provided an example:

> A recent example involved two neighbouring groups which succeeded to country of an extinct group. Notwithstanding the existence of evidence of exclusive native title rights held by each group, including the right to exclude others, the State queried whether two groups could succeed to the country of another group.[61]

5.46 The ALRC considers that rights and interests that have been succeeded to in accordance with traditional laws and customs should be recognised as native title rights and interests, and that this proposal will clarify the law in this regard.

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58 *Dale v Moses* [2007] FCAFC 82 (7 June 2007) [120].

59 *Western Australia v Sebastian* (2008) 173 FCR 1.

60 Ibid [104]. See also *AB (deceased) (on behalf of the Ngarla People) v Western Australia (No 4)* [2012] FCA 1268 (21 November 2012) [577]–[579]; *Graham on behalf of the Ngadju People v Western Australia* [2012] FCA 1455 (21 December 2012) [31]–[33]; *Lardil Peoples v Queensland* [2004] FCA 298 (23 March 2004) [127]–[132].

61 Cape York Land Council, *Submission 7*. See also P Burke, *Submission 33*; Goldfields Land and Sea Council, *Submission 22*.

Continuity of acknowledgment and observance of laws and customs

Proposal 5–3 The definition of native title in s 223 of the *Native Title Act* should be amended to make clear that it is not necessary to establish that

(a) acknowledgment and observance of laws and customs has continued substantially uninterrupted since sovereignty; and

(b) laws and customs have been acknowledged and observed by each generation since sovereignty.

5.47 The ALRC considers that the requirement that acknowledgment and observance of law and custom must have continued substantially uninterrupted by each generation since sovereignty renders native title claims excessively vulnerable to a finding that the factual basis for recognising rights and interests is no longer in existence.[62] The ALRC considers that it is consistent with the promotion of the beneficial purpose of the Act to make clear that it is not necessary to establish this level of intensity of continuity of acknowledgment and observance of traditional laws and customs.[63]

The idea of continuity

5.48 Continuity does not appear in the definition of native title in the *Native Title Act*. However, in *Yorta Yorta*, Gleeson CJ, Gummow and Hayne JJ derive a requirement for continuity from its interpretation of the word 'traditional' in s 223(1)(a).[64] They state that the requirement for rights and interests to be

> *possessed* under traditional laws acknowledged and traditional customs observed by the peoples concerned, requires that the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty.[65]

5.49 If this 'normative system' of laws and customs cannot be said to have had a 'continuous existence and vitality' since sovereignty, the 'rights and interests which owe their existence to that system will have ceased to exist'.[66] Gleeson CJ, Gummow and Hayne JJ state that 'continuity in acknowledgment and observance of the normative rules in which the claimed rights and interests are said to find their foundations before sovereignty is essential'.[67] Where there is no such continuity, the laws and customs cannot be revived for the purposes of establishing native title.[68]

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62 See also Australian Human Rights Commission, *Submission 1*.
63 See also Central Desert Native Title Services, *Submission 26*; Law Society of Western Australia, *Submission 9*.
64 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [47], [87].
65 Ibid [47].
66 Ibid.
67 Ibid [88].
68 Ibid [47].

'Substantially uninterrupted' continuity

5.50 In *Yorta Yorta*, Gleeson CJ, Gummow and Hayne JJ elaborated on the degree of continuity required to establish native title, stating that acknowledgment and observance of laws and customs must have continued 'substantially uninterrupted' since sovereignty: '[w]ere that not so, the laws and customs acknowledged and observed *now* could not properly be described as the *traditional* laws and customs of the peoples concerned'.[69]

5.51 As with evolution or adaptation of laws and customs, the High Court acknowledged that continuity in acknowledgment and observance of laws and customs from sovereignty to the present need not be absolute. To that end, the qualification 'substantially' is important in 'substantially uninterrupted'.[70] The qualification was said to recognise the great difficulty of proving continuous acknowledgment and observance of oral traditions over the many years since sovereignty. It also recognises the 'most profound effects' of European settlement on Aboriginal societies. This means that it is 'inevitable that the structures and practices of those societies, and their members, will have undergone great changes'.[71]

5.52 In *Yorta Yorta*, Gleeson CJ, Gummow and Hayne JJ stated that 'the inquiry about continuity of acknowledgment and observance does not require consideration of why, if acknowledgment and observance stopped, that happened'.[72] If the requirement is not met, then 'examining why that is so is important *only* to the extent that the presence or absence of reasons might influence the fact-finder's decision about whether there was such an interruption'.[73]

Substantially uninterrupted 'generation by generation'

5.53 In *Yorta Yorta*, Gleeson CJ, Gummow and Hayne JJ stated that a 'traditional law or custom is one which has been passed from generation to generation of a society, usually by word of mouth and common practice'.[74] In *Risk v Northern Territory*, Mansfield J summarised the *Yorta Yorta* continuity requirement as the requirement to establish that 'acknowledgment and observance of the laws and customs has continued substantially uninterrupted *by each generation* since sovereignty'.[75] Such a requirement has significant implications in terms of the evidence to be produced by claimants.

5.54 The 'generation by generation' test was also discussed in *Bodney v Bennell*. There, the Full Federal Court stated that the correct question as to continuity was

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69 Ibid [87].
70 Ibid [89].
71 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [89].
72 Ibid [90].
73 Ibid. See also *Bodney v Bennell* (2008) 167 FCR 84, [97].
74 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [46].
75 *Risk v Northern Territory* [2006] FCA 404 (29 August 2006) [97], emphasis added. On appeal the Full Court considered Mansfield J's statement of the law to be accurate: *Risk v Northern Territory* (2007) 240 ALR 75, [78]–[98].

'whether the laws and customs have continued to be acknowledged and observed substantially uninterrupted by each generation since sovereignty'.[76]

Have issues with establishing continuity been overcome in practice?

5.55 The Hon Justice Paul Finn has argued that the effect of the interpretation of s 223 in *Yorta Yorta* was to produce a 'discernible hardening of the arteries of the *Native Title Act* … the onus cast on claimants by the *Native Title Act* as so interpreted is a severe one'.[77]

5.56 Submissions by state and territory governments contended that substantially uninterrupted continuity of the acknowledgment and observance of traditional laws and customs is an important aspect of native title law.[78] The South Australian Government was of the view that '[i]t is only appropriate to recognise native title in circumstances where the rights and interests have been uninterrupted (to at least some degree) since sovereignty'. It continued: '[w]here there has been a substantial interruption of traditional law and custom, that should preclude a finding that native title exists'.[79]

5.57 The Western Australian Government submitted that

> Any proposal to remove, or fundamentally alter, the requirement to demonstrate adherence to a continuing normative system based on pre-settlement laws and customs ignores a central tenet of the *Mabo No 2* decision.[80]

5.58 A number of the governments that made submissions expressed the view that the requirement already incorporates appropriate flexibility,[81] noting that the qualification 'substantially' essentially 'makes allowances for the impacts of European settlement upon Aboriginal societies'.[82]

5.59 Moreover, a number of governments submitted that discharging the onus in respect of continuity is not a problem in practice because of a willingness, by both the Court and respondent parties, to draw inferences.[83] The South Australian Government submitted that, in its consent determination process,

> inferences tend to be drawn based on genealogical and anthropological information that link 'snapshots' in time periods. The question of interruption is rarely raised

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76 *Bodney v Bennell* (2008) 167 FCR 84, [73].

77 Paul Finn, '*Mabo* into the Future: Native Title Jurisprudence' (2012) 8 *Indigenous Law Bulletin* 5, 6.

78 South Australian Government, *Submission 34*; Northern Territory Government, *Submission 31*; Western Australian Government, *Submission 20*.

79 South Australian Government, *Submission 34*.

80 Western Australian Government, *Submission 20*.

81 The South Australian Government submitted that it was a 'flexible doctrine that in recent years has generally been interpreted by the Courts (and in the State's consent determination process) in favour of claimant groups': South Australian Government, *Submission 34*. See also Western Australian Government, *Submission 20*.

82 Western Australian Government, *Submission 20*. However, Frith and Tehan argued to the contrary that the exception for 'substantially uninterrupted' acknowledgment and observance of laws and customs 'does not go far enough': A Frith and M Tehan, *Submission 12*.

83 South Australian Government, *Submission 34*; Northern Territory Government, *Submission 31*; Queensland Government Department of Natural Resources and Mines, *Submission 28*; Western Australian Government, *Submission 20*.

> without some other (usually historical) evidence suggesting that interruption may be relevant and it is then discussed with the applicant.[84]

5.60 The Western Australian Government submitted:

> It is … the State's experience from a broad range of consensual and contested matters that Aboriginal groups may compellingly and successfully establish that they hold native title rights and interests notwithstanding profound social and demographic changes since European settlement.[85]

5.61 CYLC submitted that the requirement itself may not pose a problem in that region as the State in Queensland has 'generally been willing to accept continuity in circumstances where there has been some interruption for reasons beyond the group's control'. Nonetheless,

> it is extremely difficult and often distressing for Cape York Traditional Owners to participate in a process which in practical terms requires them to effectively deny the devastating effects of their dispossession and displacement.[86]

5.62 CYLC also expressed concern that groups in different parts of Queensland and Australia may not be able to satisfy the requirement.[87]

5.63 The ALRC acknowledges the practical developments that have occurred in the approach taken to evidence of continuity, particularly the use of inferential reasoning to fill gaps in continuity where appropriate. However, it is consistent with the promotion of the beneficial purpose of the Act, and a 'fair, large and liberal' approach to statutory construction, to explicitly provide that it is not necessary to establish that laws and customs have been acknowledged and observed substantially uninterrupted by each generation since sovereignty.[88]

5.64 In this, the ALRC agrees with Black CJ's view, in the Full Federal Court decision in *Yorta Yorta*, that to justify a finding that 'there is a point in time at which acknowledgment and observance has ceased to the extent that the foundation for *any* native title rights or interests has disappeared' requires consideration of a 'very substantial time frame'.[89]

5.65 The ALRC considers that the current degree of continuity of acknowledgment and observance of traditional laws requires claimants to surmount unnecessarily high evidential 'hurdles' to establish native title.[90]

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84 South Australian Government, *Submission 34*. See also *Lander v South Australia* [2012] FCA 427 (1 May 2012) [48].

85 Western Australian Government, *Submission 20*.

86 Cape York Land Council, *Submission 7*. The Australian Human Rights Commission argued that 'requiring "literal continuous connection" ignores 'the reality of European interference in the lives of Indigenous peoples': Australian Human Rights Commission, *Submission 1*.

87 Cape York Land Council, *Submission 7*.

88 See also Central Desert Native Title Services, *Submission 26*; Law Society of Western Australia, *Submission 9*.

89 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2001) 110 FCR [61].

90 Transcript of Proceedings, *Risk v Northern Territory* [2007] HCATrans 472 (31 August 2007) (Kirby J).

5.66 Such an intensive level of continuity of acknowledgment and observance of laws and customs was arguably not envisaged in *Mabo [No 2]*. There, Brennan J referred to a need for acknowledgment and observance of laws and customs, 'so far as it is practicable to do so'.[91]

5.67 Many stakeholders considered the continuity requirement to be problematic, with a number calling for the application of the continuity requirement to be limited.[92] GLSC submitted that it 'does not consider that "substantially uninterrupted" acknowledgment and observance of traditional law and custom should be a legal requirement for the proof of native title'.[93] While submissions expressed various views on how limitation of the requirement should be achieved,[94] a number preferred a statutory amendment to limit the application of the requirement to other possible reform options such as a statutory definition of 'substantial interruption'.[95]

5.68 As a number of submissions pointed out, the requirement for generation by generation proof of continuity of the acknowledgment and observance of laws and customs is problematic because the evidence may be limited or have limitations.[96]

5.69 Frith and Tehan expressed the view that, in many cases, 'the gap in continuity observed by the Court is due to a lack of evidence rather than a lack of acknowledgment and observance of laws and customs.[97]

5.70 The Law Society of Western Australia similarly argued that cases where acknowledgment and observance of laws and customs was not found to have continued substantially uninterrupted have reflected, 'either a disproportionate focus on some evidence over other available evidence, or a gap in the evidence of observable acknowledgment and observance of laws and customs, rather than an abandonment of that acknowledgment and observance'.[98]

5.71 AIATSIS argued that the need to meet the requirement in such circumstances constitutes 'a form of evidentiary discrimination against those groups who had little or no interaction with non-Indigenous anthropologists and scientists throughout the 19th and 20th centuries'.[99]

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91 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 60.

92 NSW Young Lawyers Human Rights Committee, *Submission 29*; Goldfields Land and Sea Council, *Submission 22*; North Queensland Land Council, *Submission 17*; Cape York Land Council, *Submission 7*.

93 Goldfields Land and Sea Council, *Submission 22*.

94 See, eg, NSW Young Lawyers Human Rights Committee, *Submission 29*; North Queensland Land Council, *Submission 17*; A Frith and M Tehan, *Submission 12*; Cape York Land Council, *Submission 7*.

95 See, eg, NSW Young Lawyers Human Rights Committee, *Submission 29*; Cape York Land Council, *Submission 7*.

96 See, eg, AIATSIS, *Submission 36*; A Frith and M Tehan, *Submission 12*; Law Society of Western Australia, *Submission 9*. Some respondent interests also acknowledged that the current requirement presents evidentiary problems. See, eg, National Farmers' Federation, *Submission 14*.

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

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

99 AIATSIS, *Submission 36*.

5.72 Other submissions argued that the requirement for substantially uninterrupted continuity of the acknowledgment of traditional laws and observance of traditional customs is inherently unconscionable or unjust given the history of colonisation.[100]

Continuity of society

Proposal 5–4 The definition of native title in s 223 of the *Native Title Act* should be amended to make clear that it is not necessary to establish that a society united in and by its acknowledgment and observance of traditional laws and customs has continued in existence since prior to the assertion of sovereignty.

5.73 The ALRC proposes that the definition of native title should be amended to make clear that continuity of a society is not an independent requirement to establish native title. Again, this proposal seeks to overcome an overly technical approach to statutory construction.

5.74 As outlined in Chapter 4, the High Court in *Yorta Yorta* considered there to be an inextricable link between a society and its laws and customs. Laws and customs cannot exist in a vacuum, so if a society—understood as a body of persons united in and by its acknowledgment of a body of laws and customs—ceases to exist, the laws and customs (and rights and interests possessed under them) also cease.[101]

5.75 The ALRC considers that its Proposal 5–4 is in keeping with Federal Court consideration of the relevance of society to establishing native title rights and interests. The Full Court in *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* has emphasised that the term 'society' is not found in the words of the Act, and is to be used as a conceptual tool[102] in the application of the words of the *Native Title Act.* The proposal is intended to further clarify that establishing a society is relevant only as a conceptual tool to assist in answering the central definitional question of whether there is acknowledgment and observance of traditional laws and customs under which rights and interests are possessed.

100 See, eg, North Queensland Land Council, *Submission 17*; A Frith and M Tehan, *Submission 12*. See Ch 7 for further discussion.

101 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [51]–[53].

102 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [78].

5.76 Justice Paul Finn has commented that the society requirement has created a 'problematic and quite time consuming distraction' in native title litigation.[103] He referred to his own judgment in a claim over the Torres Strait, *Akiba v Queensland (No 3)*, to illustrate this difficulty, noting that

> The Islanders' primary case was that they were one society; the Commonwealth's, that they were four societies, these representing the four island groups involved in the hearing; and the State of Queensland alleged there were thirteen societies, each being one of the thirteen inhabited islands.[104]

5.77 In *Akiba*, Finn J found that the applicant had established its case that it comprised one society. However, he noted that:

> There is an irony in this … [T]he answers to the question of native title rights and interests—which is, after all, the concern of the NT Act—would in all probability be the same whether my conclusion had been one, or four, or thirteen societies.[105]

5.78 Dr Paul Burke argued that society should not be seen as an independent element of proof for native title:

> If claimants prove that they, as a group, have been following a coherent body of traditional laws and customs relating to land that is substantially continuous with the pre-contact era, they would have, *ipso facto*, established that there had been and continues to be a relevant society out of which laws and customs arose. In other words, if the claimant group demonstrates the continuity of a body of traditional laws and customs, it will have demonstrated that it forms a 'society' or that it is part of a 'society'. On this view, 'society' is not conceptually distinct, but overlapping with other elements of native title legal doctrine, and there should not be a need to address it separately.[106]

5.79 The South Australian Government argued that there was no need for reform in this area, noting also the development of the jurisprudence related to society:

> In practice, the apparently difficult test proposed by the High Court in *Yorta-Yorta* has not proved onerous. For example the cultural differences between native title holding groups in *Akiba* did not prevent the Court describing the group as a single normative society.[107]

5.80 However, a number of submissions to this Inquiry were critical of the use of society in native title law. Frith and Tehan submitted that decisions related to society 'have generally tended to limit the prospect that native title applicants can establish native title'.[108] GLSC submitted that the 'society issue is a prime example of the

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103 Finn, above n 77, 6.
104 Ibid.
105 Ibid 7, quoting *Akiba v Queensland (No 3)* (2010) 204 FCR 1.
106 Paul Burke, 'Overlapping Jural Publics: A Model for Dealing with the "Society" Question in Native Title' in Toni Bauman (ed), *Dilemmas in Applied Native Title Anthropology in Australia* (AIATSIS, 2010) 55, 65–66. See also P Burke, *Submission 33*; Goldfields Land and Sea Council, *Submission 22*.
107 South Australian Government, *Submission 34*.
108 A Frith and M Tehan, *Submission 12*.

unfortunate development of quite unnecessary technicality and legalism in native title'.[109]

5.81 CYLC reported practical difficulties with the approach taken to society, submitting that

> The issue of identification of the relevant 'society' has caused considerable delays in some Cape York claims, although recent case law appears to have improved the situation somewhat. Anthropological evidence obtained for Cape York indicates that there may be a number of different 'societies' for a particular group of native title claimants, within which the group 'acknowledges the same body of laws and customs relating to rights and interests in land and waters'. A number of early Cape York determinations were based on societies at the language-named group level. However, it is arguable that those groups may also be part of broader 'regional' groupings which still meet native title requirements.[110]

5.82 Some submissions considered that the language of a society 'united in and by its acknowledgment and observance of a body of law and customs' is improperly suggestive of a need to prove the survival of an extensive social system, rather than of the relevant laws and customs relating to land and waters. The Law Council of Australia argued that reference to society

> constitutes a gloss on the statutory language of s 223(1) of the Act. Emphasis on these matters risks over-emphasising continuity of laws and customs of pre-sovereignty, such as rules about marriage, initiation and birthing practices, traditional language, which may have little relevance to whether particular customs in relation to land and waters have continued. The exercise of customary practices, such as hunting and fishing at particular times, are more relevant to establishing the existence of traditional customs than the requirement of a 'normative' system of laws and customs practiced by a 'normative' society.[111]

5.83 GLSC pointed to the 'unfairness of having to demonstrate the continuity of cultural practice and social cohesion in the face of a history of dispossession, cultural disruption, forced assimilation and geographical dispersal'.[112] The Young Lawyers Human Rights Committee argued that

> allowing native title to be tested on a concept of society ultimately involves superficial value judgments about Indigenous ways of life, and inappropriately measures traditional, nomadic society against the legal ideas and institutions of a 'civilised' society.[113]

Implications for s 223(1)(b)

5.84 Amendments affecting how s 223(1)(a) is interpreted will have a consequential effect on the construction of s 223(1)(b). Section 223(1)(b) requires that the relevant Aboriginal peoples or Torres Strait Islanders, by 'those laws and customs'—that is, the

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109 Goldfields Land and Sea Council, *Submission 22*.
110 Cape York Land Council, *Submission 7*.
111 Law Council of Australia, *Submission 35*.
112 Goldfields Land and Sea Council, *Submission 22*.
113 NSW Young Lawyers Human Rights Committee, *Submission 29*.

traditional laws and customs referred to in s 223(1)(a)[114]—have a connection with the land or waters.

5.85 The Full Federal Court in *Bodney v Bennell* set out the relationship between the level of continuity of acknowledgment and observance of traditional laws and customs required by s 223(1)(a) and the level of continuity of connection required by s 223(1)(b). It stated that

> the laws and customs which provide the required connection are 'traditional' laws and customs. For this reason, their acknowledgment and observance must have continued 'substantially uninterrupted' from the time of sovereignty; and the connection itself must have been 'substantially maintained' since that time.[115]

The ALRC considers that it follows from Proposal 5–3 that a commensurate approach should be taken to establishing connection for the purpose of satisfying s 223(1)(b).[116]

114 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [46], [86]; *Western Australia v Ward* (2002) 213 CLR 1, [18]; *Bodney v Bennell* (2008) 167 FCR 84, [165].

115 *Bodney v Bennell* (2008) 167 FCR 84, [168].

116 See Ch 7 for an alternative approach to connection in s 223(1)(b).