6. Physical Occupation

Contents

Summary

6.1 Section 223(1)(b) of the *Native Title Act 1993* (Cth) requires an Aboriginal or Torres Strait Islander claim group to show that, by their traditional laws and customs, they have a connection with the land and waters claimed.

6.2 The ALRC has been directed to inquire into whether there should be confirmation that 'connection with the land or waters' in s 223(1)(b) does not require physical occupation or continued or recent use. The courts have consistently stated that connection is maintained by the continued acknowledgment of traditional laws, and by the observance of traditional customs.[1] Evidence of acknowledgment and observance may include activities on the land, but the courts have been clear that physical presence is not necessary.[2] The ALRC has concluded that amendment of the *Native Title Act* on this issue is not necessary, as there is no lack of clarity in the Act or in the courts' interpretation of the Act.

6.3 The *Native Title Act* contains two references to 'physical connection', in sections of the Act concerning affidavits in support of an application, and the registration of claims. The ALRC proposes that these references should be removed, to promote consistency with the courts' interpretation of s 223(1)(b).

Connection by laws and customs

6.4 The definition of native title in s 223 of the *Native Title Act* refers to interests in relation to land and waters possessed under traditional laws and customs where Aboriginal peoples or Torres Strait Islanders 'by those laws and customs, have a

1 *Bodney v Bennell* (2008) 167 FCR 84, 96; *De Rose v South Australia (No 2)* (2005) 145 FCR 290, 306; *Western Australia v Ward* (2000) 99 FCR 316, 382.

2 *Western Australia v Ward* (2002) 213 CLR 1, 85-86.

connection with the land or waters'. These words are taken from the judgment of Brennan J in *Mabo v Queensland [No 2]*: 'native title … [is] ascertained according to the laws and customs of the indigenous people who, by those laws and customs, have a connection with the land'.[3] In *Members of the Yorta Yorta Community v Victoria*, the High Court held that the phrase 'by those laws and customs' indicates that the 'connection' that must be shown is connection sourced in Aboriginal and Torres Strait Islander laws and customs.[4] The Full Federal Court in *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* ('*Alyawarr*') said that

> 'connection' is descriptive of the relationship to the land and waters which is, in effect, declared or asserted by the acknowledgment of laws and observance of customs which concern the land and waters in various ways. To observe laws and acknowledge customs which tell the stories of the land and define the rules for its protection and use in ways spiritual and material is to keep the relevant connection to the land.[5]

6.5 When traditional laws and customs confer rights and responsibilities in relation to land, that creates connection as required by s 223(1)(b).[6] The connection, or relationship, between people and country includes the obligation to care for country and the right to speak for country.[7]

6.6 The courts have held that s 223(1)(b) requires the claim group to establish that they have had the connection with the land or waters from the time of sovereignty.[8] This is because the connection must be by their traditional laws and customs, and traditional laws and customs are those that have their origin in pre-sovereignty law and custom.[9]

6.7 Again, in *Alyawarr,* the Full Federal Court said:

> The use of 'connection' as emphasising a requirement to show continuity of association with the land by observance and acknowledgment of traditional law and custom relating to it gives proper recognition to its origins in the *Mabo* judgment. It involves the continuing assertion by the group of its traditional relationship to the country defined by its laws and customs.[10]

6.8 A substantial interruption in the observance of laws and customs in relation to country will result in a failure to establish connection as required by s 223(1)(b).[11]

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3 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 70.
4 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 456.
5 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, 469.
6 *De Rose v South Australia (No 2)* (2005) 145 FCR 290, 323.
7 *Western Australia v Ward* (2002) 213 CLR 1, 64.
8 *Sampi v Western Australia* [2005] FCA 777 (10 June 2005) [1079]; *Neowarra v Western Australia* [2003] FCA 1402 (8 December 2003) [353]; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 447; *Western Australia v Ward* (2000) 99 FCR 316, 382.
9 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 444, 447. For a more detailed examination of what it means for a law to be 'traditional', see Ch 4.
10 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, 469–470.
11 *Bodney v Bennell* (2008) 167 FCR 84, 132.For a more detailed examination of 'substantial interruption', see Ch 5.

Establishing connection

6.9 Evidence that connection with land is a 'continuing reality' to the claimants must be produced to establish connection:

> the connection inquiry requires … demonstration that, by their actions and acknowledgement, the claimants have asserted the reality of the connection to their land or waters so made by their laws and customs.[12]

6.10 Evidence of presence on the land and the exercise of rights in relation to the land amounts to evidence of the maintenance of connection with land.[13]

6.11 Other ways of demonstrating observance of law and custom in relation to land and waters, and thus connection, can be found in knowledge of ceremony, song, dance and body painting[14] and knowledge of the land and the Dreamtime beings that created the land.[15] For example, in *Western Australia v Ward* ('*Ward FFC*'), the Court stated that

> Acknowledgment and observance may be established by evidence that traditional practices and ceremonies are maintained by the community, insofar as that is possible, off the land, and that ritual knowledge including knowledge of the Dreamings which underlie the traditional laws and customs, continue to be maintained and passed down from generation to generation. Evidence of present members of the community, which demonstrates knowledge of the boundaries to their traditional lands, in itself provides evidence of continuing connection through adherence to their traditional laws and customs.[16]

6.12 The *Federal Court Rules 2011* (Cth) make specific provision for the giving of evidence by way of singing, dancing and storytelling.[17]

6.13 Using language is a way of observing law and custom, and may connect people with country.[18] Language is sometimes said to have been 'deposited in the landscape by Dreamtime figures', and it becomes 'possessed by the Aboriginal people connected with the land'.[19]

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12 Ibid 129.
13 *Western Australia v Ward* (2000) 99 FCR 316, 382.
14 Grace Koch, 'We Have the Song, So We Have the Land: Song and Ceremony as Proof of Ownership in Aboriginal and Torres Strait Islander Land Claims' (AIATSIS Research Discussion Paper 33, AIATSIS, July 2013) 8–10.
15 Graeme Neate, '"Speaking for Country" and Speaking About Country: Some Issues in the Resolution of Indigenous Land Claims in Australia' (Paper presented at Joint Study Institute, Sydney, 21 February 2004) 65–68.
16 *Western Australia v Ward* (2000) 99 FCR 316, 382.
17 *Federal Court Rules 2011* (Cth) r 34.123.
18 Grace Koch, 'We Have the Song, So We Have the Land: Song and Ceremony as Proof of Ownership in Aboriginal and Torres Strait Islander Land Claims' (AIATSIS Research Discussion Paper 33, AIATSIS, July 2013) 38; *Ward v Western Australia* (1998) 159 ALR 483.
19 *Ward v Western Australia* (1998) 159 ALR 483, 525.

6.14 It is not necessary to adduce evidence of connection to every part of the claim area. A court may draw inferences from the evidence as a whole and from evidence of connection to surrounding or neighbouring areas.[20]

Evidence of physical occupation, continued or recent use

6.15 In *Ward FFC*, the Full Federal Court considered whether connection with land and waters could be maintained in the absence of physical presence.[21] The Court concluded that, while actual physical presence provides evidence of connection, it is not essential for establishing native title under *Native Title Act* s 223(1).

6.16 On appeal, the High Court noted that s 223 'is not directed to how Aboriginal peoples use or occupy land or waters', although the way in which land and waters are used may be evidence of the kind of connection that exists.[22] The Court confirmed that the absence of evidence of recent use, occupation or physical presence does not mean that there is no connection with the land or waters.[23]

6.17 In *De Rose v South Australia (No 2)* ('*De Rose (No 2*)'), the Full Federal Court held that

> It is possible for Aboriginal peoples to acknowledge and observe traditional laws and customs throughout periods during which, for one reason or another, they have not maintained a physical connection with the claim area. Of course, the length of time during which the Aboriginal peoples have not used or occupied the land may have an important bearing on whether traditional laws and customs have been acknowledged and observed. Everything will depend on the circumstances.[24]

6.18 In *Moses v Western Australia*, the Full Federal Court confirmed that 'physical presence is not a necessary requirement for connection'.[25]

Physical occupation and the identification of native title rights and interests

6.19 A determination of native title must include a determination of the nature and extent of the native title rights and interests in the area.[26] Physical occupation and continued or recent use may be relevant to proving the particular rights and interests possessed under traditional laws and customs. The content of native title is a question of fact, to be determined on a case by case basis.[27] Evidence of physical possession, occupation and use could be relevant to the question of whether the rights and interests

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20 *Moses v Western Australia* (2007) 160 FCR 148, 224.
21 *Western Australia v Ward* (2000) 99 FCR 316.
22 *Western Australia v Ward* (2002) 213 CLR 1, 86.
23 Ibid.
24 *De Rose v South Australia (No 2)* (2005) 145 FCR 290, 306; see also *Dale v Moses* [2007] FCAFC 82 (7 June 2007) [306].
25 *Moses v Western Australia* (2007) 160 FCR 148, 222.
26 *Native Title Act 1993* (Cth) s 225.
27 *Commonwealth v Yarmirr* (2001) 208 CLR 1, 39; *Western Australia v Ward* (2000) 99 FCR 316, 338; *Wik Peoples v Queensland* (1996) 187 CLR 1, 169; *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 58, 61.

include a right to exclude others,[28] or other rights. For example, in *Banjima*, the Court said:

> There is ample evidence to show that hunting and the taking of fauna in customary ways continues today. Similarly, the customary practice of gathering and taking flora is well established historically and presently. The right to take fish is the subject of less contemporary evidence, but the right to take fish in the claim area is still exercised and clearly established as a right possessed by the claimants both historically and presently. It is not a right or activity that the evidence suggests has been abandoned. Similarly the right to take stones, timber, ochre and water is another right possessed by the claimants even though the evidence of current exercise of those rights is relatively limited.[29]

6.20 The courts have repeatedly emphasised that, while the exercise of native title rights and interests is 'powerful evidence' of the existence of those rights, the ultimate question concerns possession of rights, not their exercise.[30]

6.21 In the Issues Paper, it was noted that in *Akiba v Queensland (No 3)*, the claimant failed to establish connection at the extremities of the claim because there was 'no evidence of use of, or connection to, those areas'.[31] The claim over extremities did not fail because there was no evidence of use of the areas, but because there was no evidence at all regarding *connection* to those areas.[32] The Court did not require evidence of use, but it did require evidence of connection.

6.22 The Court did confirm that

> Islander knowledge of areas when coupled with the deep and transmitted sea knowledge that many of them possess, is itself a potent indicator of connection, and continuing connection at that, to their marine estates—the more so because under their laws and customs they have, and do exercise, traditional rights to use and forage there …[33]

No clarification of s 223

6.23 The ALRC considers that it is not necessary to clarify *Native Title Act* s 223. When codifying, confirming or clarifying an area of settled law, there is a risk of disturbing the settled law, causing uncertainty and unnecessary litigation.

6.24 Several stakeholders suggested that the *Native Title Act* should be amended for consistency with *De Rose (No 2)*.[34] However, no lack of consistency with *De Rose (No 2)* has been identified, and the ALRC has not been directed to any areas of doubt

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28 *Banjima People v Western Australia (No 2)* [2013] FCA 868 (28 August 2013) [686], [693].

29 Ibid [775].

30 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 455; *Neowarra v Western Australia* [2003] FCA 1402 (8 December 2003) [40]; *Rubibi Community v Western Australia (No 5)* [2005] FCA 1025 (29 July 2005) [21]; *Banjima People v Western Australia (No 2)* [2013] FCA 868 (28 August 2013) [386].

31 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Issues Paper No 45 (2013); referring to *Akiba v Queensland (No 3)* (2010) 204 FCR 1, 168, 172.

32 *Akiba v Queensland (No 3)* (2010) 204 FCR 1, 168, 173.

33 Ibid 164.

34 Just Us Lawyers, *Submission 2*; Australian Human Rights Commission, *Submission 1*.

or uncertainty in the construction of s 223 on this issue. Section 223 does not contain any reference to physical occupation or continued and recent use. The courts have been clear that, while such evidence is relevant, it is not necessary. A number of stakeholders agreed that clarification is not necessary.[35]

6.25 One representative body indicated that claim groups 'have experienced difficulties satisfying the State about continuing connection in circumstances where there is no recent evidence of physical presence on particular parts of a claim area'.[36] Just Us Lawyers also reported that 'State governments generally expect physical occupation and ongoing use of at least parts of the claim area to be demonstrated for the purposes of a consent determination'.[37] Because courts have confirmed that such evidence is 'powerful', respondents will continue to seek such evidence, and place weight on it, when it is available. However, to treat such evidence as a necessary element for a consent determination would be to impose a standard higher than that set by Parliament and the courts for a contested determination.

6.26 Even without a requirement to demonstrate physical occupation, or continued or recent use, the requirement to demonstrate connection to land or waters is still a substantial one. Connection must be demonstrated to have been maintained under traditional laws and customs that have been observed, substantially uninterrupted, since pre-sovereignty times. Further discussion of these requirements and the ALRC's proposals in this regard, are in Chapter 4.

The affidavit supporting a claimant application

Proposal 6–1 Section 62(1)(c) of the *Native Title Act* should be amended to remove references to 'traditional physical connection'.

6.27 The *Native Title Act* includes two references to physical connection that the ALRC considers may be inconsistent with the courts' interpretation of s 223 on this issue. The ALRC proposes that these references should be removed.

6.28 Claimants are required to provide an affidavit supporting their application. This affidavit must contain

> a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist and in particular that … the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.[38]

35 South Australian Government, *Submission 34*; Northern Territory Government, *Submission 31*; Goldfields Land and Sea Council, *Submission 22*; Western Australian Government, *Submission 20*; National Farmers' Federation, *Submission 14*; Law Society of Western Australia, *Submission 9*.

36 Cape York Land Council, *Submission 7*.

37 Just Us Lawyers, *Submission 2*.

38 *Native Title Act 1993* (Cth) s 62(2)(e)(iii).

6.29 Section 62(1)(c) provides that the affidavit may contain details of 'any traditional physical connection' with the land or waters had by a member of the native title claim group, or if any member of the native title claim group has been prevented from gaining access, the circumstances in which the access was prevented.

6.30 This section does not require evidence of physical connection. It is consistent with statements of the courts that evidence of the exercise of rights can be adduced to support a claim for the existence of rights.[39] However, the ALRC is concerned that the section specifically refers to physical connection and does not refer to other ways of demonstrating connection, such as observing traditional laws and customs,[40] maintaining traditional customs and ceremonies,[41] maintaining stories and allocating responsibilities,[42] faithfully performing obligations under traditional law[43] and the continuing internal and external assertion by the group of its traditional relationship with country.[44] The inclusion of physical connection in s 62 and the omission of spiritual, social and cultural evidence of connection gives an apparent priority to physical connection that does not reflect the case law or the requirements of s 223.

The registration test

Proposal 6–2 Section 190B(7) of the *Native Title Act* should be amended to remove the requirement that the Registrar must be satisfied that at least one member of the native title claim group has or previously had a traditional physical connection with any part of the land or waters, or would have had such a connection if not for things done by the Crown, a statutory authority of the Crown, or any holder of a lease.

6.31 Section 190B(7) of the registration test includes a requirement that at least one member of the claim group demonstrate a 'traditional physical connection', except in certain circumstances. The ALRC considers that such a requirement is inconsistent with s 223 and the courts' interpretation of that section and proposes that it should be removed.

6.32 Part 7 of the *Native Title Act* establishes a Register of Native Title Claims and sets out conditions for registration. If a claim satisfies all of the conditions, it must be entered in the Register.[45] The native title claim group is then entitled to certain rights, including the right to negotiate under *Native Title Act* s 31.

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39 AIATSIS, *Submission 36*.
40 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 59–60; *Western Australia v Ward* (2000) 99 FCR 316, 382.
41 *Western Australia v Ward* (2000) 99 FCR 316, 382.
42 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, 469–470.
43 *De Rose v South Australia (No 2)* (2005) 145 FCR 290, 306–307.
44 *Sampi v Western Australia* [2005] FCA 777 (10 June 2005) [1079].
45 *Native Title Act 1993* (Cth) s 190A(6).

6.33 The registration test requires the Registrar to be satisfied that the factual basis exists to support the assertion that the native title claim group has an association with the area.[46] The native title claim group must show an association with the entire area claimed, but it has been held that the association can be physical or spiritual.[47]

6.34 Section 190B(7) adds a requirement that the Registrar must be satisfied that at least one member of the native title claim group has, or previously had, a traditional physical connection with any part of the land or waters, or would have had such a connection if not for things done by the Crown, a statutory authority of the Crown, or any holder of a lease.[48] 'Traditional physical connection', in this instance, means that the connection is in accordance with the laws and customs of the group.[49]

6.35 Information about a claim group member's presence on, or use of, the land or waters, is relevant to whether the factual basis exists for a claim. However, the requirement in s 190B(7) that an application include information about 'traditional physical connection' is inconsistent with the case law that has established that physical occupation or use is not required to establish connection. The requirement could result in a claim group with ample evidence of connection being denied registration and the procedural rights that are associated with registration.

6.36 Further, the reference in s 190(7)(b) to 'things done' by the Crown, a statutory authority of the Crown, or a leaseholder suggests that those things are relevant to the question of whether connection has been maintained. However, the courts have indicated that the reasons for an absence of connection are not relevant.[50]

6.37 This element of the registration test is also inconsistent with the reality of the lives of Aboriginal and Torres Strait Islander people who have moved away from their country in order to access employment, health services and education.

6.38 Section 190B(7) is one of the few parts of the Act that acknowledges that acts of the Crown, and others, have interfered with the connection between Aboriginal and Torres Strait Islander peoples and their lands and waters. While this acknowledgment may have some value, the ALRC considers that it is important that the registration test is consistent with s 223 and the case law regarding physical occupation and continued and recent use.

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46 *Native Title Act 1993* (Cth) s 190B(5).

47 *Martin v Native Title Registrar* [2001] FCA 16 (19 January 2001) [26]; *Corunna v Native Title Registrar* [2013] FCA 372 (24 April 2013).

48 *Native Title Act 1993* (Cth) s 190B(7).

49 *Gudjala People No 2 v Native Title Registrar* [2007] FCA 1167 (7 August 2007) [89].

50 *Bodney v Bennell* (2008) 167 FCR 84, 104–105; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 456–457.