7. The Transmission of Aboriginal and Torres Strait Islander Culture

Contents

Summary

7.1 This chapter completes the sections of the Discussion Paper that are concerned with the definition of native title in s 223(1) of the *Native Title Act*. The chapter is in two parts. The first considers a partial redefinition of s 223(1). The second part considers the framing of 'connection'. In that context, it examines whether revitalisation of Aboriginal and Torres Strait Islander laws and customs is to be distinguished from revival of native title. The second part also considers whether facts relating to European settlement may be considered when determining if Aboriginal peoples and Torres Strait Islanders have a connection with the land and waters claimed.

7.2 The proposals outlined in Chapter 5 suggest amendment of s 223(1) of the *Native Title Act* by clarifying statements directed to the interpretation of terms that exist in the statutory definition.[1] Those proposals retain the existing text of s 223.

7.3 Proposals in this chapter offer an alternative approach by suggesting changes to the text of the definition in s 223(1).[2] The changes relate to the terms 'traditional' and 'connection'. These terms are found in the text of s 223 but each has been the source of

1 See Proposals in Ch 5.
2 See Proposals 7–1 and 7–2.

much confusion.[3] Each has attracted elaborate jurisprudence in an attempt to comprehensively determine its meaning. The relevant law is outlined in Chapters 4, 5 and 6. These proposed amendments are consistent with defining native title rights and interests in a manner that gives effect to the recognition and protection of native title.

7.4 In the first part of this chapter, the ALRC invites comment about the utility of providing greater legal formality to native title claim group identification and composition prior to the final determination of native title.

7.5 In the second part of this chapter, the ALRC seeks views on whether the law relating to connection should include revitalisation of the relationship with country. The ALRC also asks whether, in determining connection, there should be regard to the reasons for any displacement of Aboriginal peoples and Torres Strait Islanders and, if so, their relevance. The ALRC seeks views on one possible model for reform that would permit the influence of European settlement to be considered.

Removing 'traditional'

Proposal 7–1 The definition of native title in s 223(1)(a) of the *Native Title Act* should be amended to remove the word 'traditional'.

The proposed re-wording, removing traditional, would provide that:

> The expression ***native title*** or ***native title rights and interests*** means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
>
> (a) the rights and interests are possessed under the laws acknowledged, and the customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
>
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
>
> (c) the rights and interests are recognised by the common law of Australia.

7.6 In the Issues Paper the ALRC asked whether there should be a definition of traditional or traditional laws and customs in s 223 of the *Native Title Act*, and if so, what this definition should contain.[4] Chapter 5 proposes that the Act clarify that traditional laws and customs may adapt, evolve or otherwise develop.[5] Many submissions attested to the difficulties of interpretation of the term.

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3 See, eg, Lisa Strelein, 'From Mabo to Yorta Yorta: Native Title Law in Australia' (2005) 19 *Washington University Journal of Law and Policy* 225.

4 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Issues Paper No 45 (2013) Q 11.

5 Proposal 5–1.

7.7 The ALRC proposes that the term 'traditional' be removed from the text of s 223(1)(a). The term has been assigned multiple functions in the jurisprudence. It is a characterisation of Aboriginal and Torres Strait Islander law and custom, but also the means to locate law, custom and connection in a pre-sovereignty timeframe. In Chapter 5, the proposal regarding 'traditional' centres on how traditional law and custom, and native title rights and interests in land and waters, can evolve and adapt over time.[6] 'Traditional' also plays a role in the identification of the 'right people for country'.

7.8 Proposal 7–1 removes the word 'traditional' from s 223 of the *Native Title Act*. First, deletion of the term is suggested in view of the complexity of its interpretation in case law. Secondly, the term is often associated with rigid concepts, such as rights 'frozen in time'.[7] Thirdly, the term 'traditional' may not reflect contemporary views of Aboriginal and Torres Strait Islander law and custom.[8] Finally, the proposal has regard to Australia's statement of support for the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).[9]

7.9 If the term is removed, it could be replaced by a phrase that locates the origins of law and custom in the period prior to the assertion of sovereignty.[10] The amended definition focuses on current law and custom in line with the present tense of the wording in s 223(1)(a), while operating in conjunction with an amended definition of connection in s 223(1)(b).

7.10 The term 'traditional' is not simply a description of law and custom. Case law establishes several requirements emanating from s 223(1)(a). Evidence must establish the existence of the claim group's laws and customs which have normative content.[11] Typically, some evidence is required of the detail of law and custom to identify the 'nature and content' of native title,[12] and for proving connection with land and waters.[13]

7.11 In addition to proving that the claimants currently acknowledge law and observe custom, those laws and customs must be 'traditional'.[14] 'Traditional' has been a general basis for legal recognition of Aboriginal and Torres Strait Islander peoples.[15]

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6 See discussion in Chapters 4 and 5.

7 National Native Title Council, *Submission 16*.

8 'A definition of traditional that does not acknowledge the natural evolution of culture and change under British and Australian governments, is discriminatory to Aboriginal and Torres Strait Islanders Peoples as it persecutes our Peoples for matters outside of our control.' National Congress of Australia's First Peoples, *Submission 32*.

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

10 The suggested phrase is 'in the period prior to the assertion of sovereignty'.

11 *Gumana v Northern Territory* (2005) 141 FCR 457, [147].

12 Ibid.

13 Ibid [148].

14 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [43]–[45]. See the more complete discussion in Chapters 4 and 5.

15 Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (1986).

7.12 The movement to integrate aspects of Aboriginal and Torres Strait Islander law and custom within the Australian legal system has been a gradual process. The ALRC Report, *Recognition of Customary Law*, was an important milestone in this regard.[16] Writing in 1986, the ALRC noted:

> the fact remains that the recognition of Aboriginal customary laws by the general law has continued to be erratic, uncoordinated and incomplete.[17]

7.13 The ALRC concluded that 'the arguments in favour of recognition establish a case for the appropriate recognition of Aboriginal customary laws by the general legal system'.[18] The ALRC, however, 'treated the question of customary rights to land as outside the scope of its inquiry'.[19] Since then native title has been recognised, and the concept finds expression in the *Native Title Act*.

7.14 The concept of 'traditional' marks the threshold of entitlement with respect to native title, as the Full Federal Court in *Bodney v Bennell* stated:

> If this were not the case, a great many Aboriginal societies would be entitled to claim native title rights even though their current laws and customs are in no meaningful way traditional.[20]

7.15 Currently, therefore, the process of recognition of native title is strongly aligned to the requirement that the laws and customs be 'traditional'.[21] Chapter 5 indicates that, in *Yorta Yorta*, 'traditional' has been held to comprise three components:

> Means of transmission: the laws and customs are passed from generation to generation, usually by word of mouth and common practice.
>
> History: the origins are to be found in the normative rules of the societies that existed before the Crown's assertion of sovereignty; and
>
> Continuity: i.e. a normative system that has had a continuous existence and vitality since sovereignty.[22]

7.16 The alignment of traditional with a particular means of transmission of laws and customs, on an intergenerational basis, has ramifications for proof of native title.[23] It has particular relevance for evidence in relation to the adaptation, revitalisation and potential loss or abandonment of law and custom.[24] The law relating to adaptation and continuity are addressed in Chapter 5.

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16 Ibid.
17 Ibid 54.
18 Ibid 116.
19 Ibid 132.
20 *Bodney v Bennell* (2008) 167 FCR 84, [97].
21 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [87].
22 Nick Duff, 'What's Needed to Prove Native Title? Finding Flexibility Within the Law on Connection' (Research Discussion Paper 35, AIATSIS, June 2014) 24–5.
23 David Trigger, 'Anthropology and the Resolution of Native Title Claims: Presentation to the Federal Court Judicial Education Forum, Sydney 2011' in Toni Bauman and Gaynor Macdonald (eds), *Unsettling Anthropology: The Demands of Native Title on Worn Concepts and Changing Lives* (AIATSIS, 2011) 142.
24 Adaptation and revitalisation are considered in Ch 5.

Removal of traditional?

7.17 The Law Council of Western Australia cautioned against statutory amendment of this kind:

> The Society is of the view that it would not assist the process of developing the meanings of 'traditional' and 'society', for the legislature to attempt to intervene and add words to the NTA, which in turn would need to be interpreted by the courts in future cases.[25]

7.18 However, difficulties occur at a practical level as the 'traditional' character of law and custom must be ascertained afresh with each claim.[26] Just Us Lawyers noted problems in complying with 'traditional':

> Given that Indigenous Australians were not credited with even possessing laws or systems of land tenure giving rise to ownership for most, if not all, of the 19th century, it is often very difficult to find a useful account of their laws and customs from the pre-sovereignty era. This is coupled with the impossibility of obtaining direct (ie. affidavit evidence) about observance by the relevant pre-sovereignty society of such laws and customs.[27]

7.19 Such practical difficulties may contribute to lengthy time frames for resolution of claims and consequent resource, capacity and financial burdens on claimants and on parties with responsibilities for assessing connection.

7.20 Further, concerns were raised that adherence to 'traditional' in s 223 does not reflect the reality of the distribution of Aboriginal peoples and Torres Strait Islanders that has resulted from European settlement.[28] Underpinning definitions of native title may be skewed toward remote Indigenous communities.[29] As Toni Bauman and Gaynor Macdonald stated:

> Native title jurisprudence has been slow in reflecting the complexities of Aboriginal lives in both settled and remote areas and anthropologists working across Australia are faced with the difficult task of explaining how cultural change is commensurate with continuing tradition. Although other important post-*Yorta Yorta* decisions have applied, clarified and refined the High Court's reasoning in *Yorta Yorta* in both the Federal Court and the full court of the Federal Court on appeal, the High Court decision continues to provide the definitive benchmark for many of those involved in preparing and assessing the connection of claimants.[30]

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25 Law Society of Western Australia, *Submission 9*.
26 Duff, above n 22.
27 Just Us Lawyers, *Submission 2*.
28 '[L]egal doctrine envisages a grand continent –wide rationalisation of those who have maintained traditional connection and those who have not (and those in between who might be able to negotiate a non native title outcome.': P Burke, *Submission 33*.
29 Ibid; Central Desert Native Title Services, *Submission 26*.
30 Toni Bauman and Gaynor Macdonald (eds), *Unsettling Anthropology: The Demands of Native Title on Worn Concepts and Changing Lives* (AIATSIS, 2011) 2.

7.21 Other commentators raised concerns about the removal of traditional from s 223 of the *Native Title Act.* As David Martin noted, 'it is tradition which grounds and legitimates claims to country from the perspective of Indigenous people, not mere connection'.[31]

> [R]emoving the concept of 'tradition'/'traditional' from s 223, while well intentioned, would actually cause more conflict and confusion within claimant groups. [To do so] ignores the deep significance accorded to traditional connections within Indigenous societies'. The legal construction of tradition is, in my view, a translation (if in rather impoverished form) of a set of deeply embedded and highly significant values within much of Indigenous Australia. To remove the requirement for laws and customs to be traditional denies this important value.[32]

7.22 Similarly, some submissions indicated that deletion of 'traditional' from s 223 would remove an extremely important differentiator between different kinds of assertions of Indigenous rights—for example, those based on historical occupation in contrast to native title.[33] Some submissions raised the possibility that any amendment to 'traditional' could increase conflicts within Indigenous communities, with consequent ramifications for community cohesion and for third parties who must deal with native title claimants.[34]

7.23 The ALRC notes that matters of identifying native title group membership and composition must be informed by culturally sensitive ways of group identification. The availability of other models for identifying the 'right people for country' in non-native title frameworks suggests that alternative approaches may be beneficial. Better resourcing of the existing processes for identifying the claim group also may contribute to the robustness of both the 'right people for country' and connection processes.

7.24 The ALRC invites comment about the utility of providing greater legal formality to the group structure prior to the final determination of native title.

7.25 Section 224 of the Act defines a native title holder to mean:

> (a) if a prescribed body corporate is registered on the National Native Title Register as holding the native title rights and interests on trust—the prescribed body corporate; or
>
> (b) in any other case—the person or persons who hold the native title.

Question 7–1 Should a definition related to native title claim group identification and composition be included in the *Native Title Act*?

31 David Martin, *Correspondence*, 15 August 2014.
32 Ibid.
33 South Australian Government, *Submission 34*; Northern Territory Government, *Submission 31*.
34 Western Australian Government, *Submission 20*; Minerals Council of Australia, *Submission 8*.

7.26 The ALRC also asks whether it would be appropriate to develop a set of guidelines for identifying the right people for country for inclusion within the *Native Title Act*.

7.27 If 'traditional' were removed from s 223 of the *Native Title Act*, then the section might operate in conjunction with 'threshold guidelines' similar to the *Traditional Owner Settlement Act 2010* (Vic) (TOSA). The Victorian Department of Justice has developed 'Threshold Guidelines' for traditional owner groups seeking a settlement under the TOSA. These Guidelines set out the process for assessing threshold requirements, which includes lodgement by the claim group of a two-part threshold statement, evaluation by the Victorian Government Native Title Unit and thereafter notifying the broader traditional owner community and seeking feedback on its adequacy.[35]

7.28 The ALRC seeks comment on the feasibility of this approach.

Substitution of another term for traditional?

7.29 Of the three components of 'traditional' in *Yorta Yorta*, the requirements related to the age of law and custom have particular significance for the native title rights and interests that can be recognised. As the court stated in *Yorta Yorta*:

> it also follows that the only rights or interests in relation to land or waters, originating otherwise than in the new sovereign order, which will be recognised after the assertion of that new sovereignty are those that find their origin in pre-sovereignty law and custom.[36]

7.30 In light of the requirement that the native title rights and interests claimed cannot constitute a greater burden on the Crown title than at the assertion of sovereignty,[37] the ALRC asks, if traditional is removed from s 223, whether it is appropriate to substitute a term that fulfils the 'history' function that has been attributed to 'traditional'.

7.31 The ALRC asks stakeholders to consider whether the phrase, 'since prior to the assertion of sovereignty', should be inserted in s 223(1)(a) to indicate that the rights and interests have origins in the pre-sovereignty period. If adopted, any such phrase would be regarded as consistent with proposals in Chapter 5 to allow for law and custom to adapt, evolve and develop.

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35 Victorian Department of Justice, *Threshold Guidelines for Victorian Traditional Owner Groups Seeking a Settlement Under the Traditional Owner Settlement Act 2010* (2013) 11–12.

36 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [44].

37 *Commonwealth v Yarmirr* (2001) 208 CLR 1, [223].

Redefining 'connection'

Proposal 7–2 The definition of native title in s 223 of the *Native Title Act* should be further amended to provide that:

> The expression ***native title*** or ***native title rights and interests*** means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
>
> (a) the rights and interests are possessed under the laws acknowledged, and the customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
>
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a relationship with country that is expressed by their present connection with the land or waters; and
>
> (c) the rights and interests are recognised by the common law of Australia.

7.32 In addition to removal of 'traditional' in s 223(1)(a), the ALRC proposes amendment to the term 'connection' in s 223(1)(b). The meaning of this term has become opaque[38] and its meaning open to various interpretations.[39] Accordingly, it presents significant practical difficulties for parties in bringing evidence in support of the claim, and in ascertaining proof of connection.

7.33 Section 223(1)(b) of the *Native Title Act* states 'the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters'. The case law on connection is covered in Chapter 6. That chapter considered 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 ALRC has concluded that amendment of the 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.

7.34 The proposal here examines a broader question about the meaning of connection in s 223(1)(b) of the *Native Title Act* and its interpretation. The ALRC suggests that the definition of 'connection' in s 223(1)(b) of the *Native Title Act* should be amended to state that connection is the relationship with land and waters claimed. That relationship is expressed in the present form of acknowledgment of laws and observance of customs.

7.35 The proposal could be read against further possible amending statements that, 'connection with land and waters means the holistic relationship that Aboriginal people and Torres Strait Islanders have with land and waters claimed' and 'the relationship

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38 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [87].

39 *Sampi v Western Australia* [2005] FCA 777 (10 June 2005) [1077] (French J).

may be expressed in various ways including but not limited to physical presence on the land'.[40]

7.36 The proposal could operate in conjunction with either an amended definition of traditional, or with the removal of traditional from s 223 of the *Native Title Act* and its substitution.

What is connection?

7.37 'Connection' reflects the view that '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'.[41]

7.38 In *Members of the Yorta Yorta Community v Victoria*, the High Court noted:

> [I]t would be wrong to confine the inquiry for connection between claimants and the land or waters concerned to an inquiry about the connection said to be demonstrated by the laws and customs which are shown now to be acknowledged and observed by the peoples concerned. Rather, it will be necessary to inquire about the relationship between the laws and customs now acknowledged and observed, and those that were acknowledged and observed before sovereignty. [42]

7.39 The focus for the amended definition would be to emphasise that the starting point in determining connection is the 'present relationship with country' that the claimant group has with the relevant land and waters.

7.40 Secondly, the amended definition is intended to give 'connection' some meaningful content in the definition of native title. In *De Rose v South Australia (No 1)*, the Full Federal Court stated

> At first glance, it may not be evident what par (b) of s 223(1) adds to par (a). If Aboriginal people possess rights and interests in relation to land under the traditional laws acknowledged and the traditional customs observed by them, it would seem to be a small step to conclude that the people, by those laws and customs, have a connection with the land.[43]

7.41 The courts typically have aligned connection with continuity of acknowledgment of law and observance of law and custom.[44] Alternatively, the independence of s 223(1)(a) and 223(1)(b) has been emphasised.[45] At other points, the concept of 'recognition' under s 223(1)(c) has been aligned with 'connection'.[46]

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40 See *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [111].
41 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 70.
42 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [56].
43 *De Rose v South Australia (No 1)* (2003) 133 FCR 325, [305].
44 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [92].
45 *Western Australia v Ward* (2002) 213 CLR 1, [18]–[19].
46 *Yanner v Eaton* (1999) 201 CLR 351, [37].

7.42 Courts have dealt with the concept of connection in a variety of ways; reflecting some uncertainty in its interpretation.[47] In *Neowarra v Western Australia*, the court considered matters pertaining to land and waters referable to law and custom, as well as factual inquires about links to specific places in the claim area.[48]

7.43 Therefore, precisely which elements of Aboriginal peoples and Torres Strait Islanders' law and custom can give effect to 'connection' can be relatively indeterminate.[49] At one level, this reflects the need for native title to be determined in accordance with the unique factual circumstances for each claim. At another level, it renders the test for connection 'unbounded', thereby generating difficulties for what is to be deemed as 'sufficient' factual evidence of law and custom constituting connection.

7.44 The proposed amendment seeks to re-emphasise the relationship to land and waters as the primary focus when connection is interpreted—reflecting the actual text of s 223(1)(b).

7.45 The reference to a 'holistic relationship' in regard to connection (expressed in *Ward* as an integrated view of the ordering of affairs),[50] is intended to overcome uncertainties in the interpretation of the Act. There have been uncertainties over whether the relationship comprises 'physical', 'spiritual', 'economic' and 'cultural' elements in favour of a more broadly-conceived concept. In this sense, the interpretation of connection might align to the view in *Bodney v Bennell* that claimants must assert 'the reality of their connection' to their land and waters.[51]

7.46 It is likely that no statutory construction can entirely reflect Aboriginal and Torres Strait Islander understanding of connection:

> No English words are good enough to give a sense of the links between an Aboriginal group and its homeland ... A different tradition leaves us tongueless and earless towards this other world of meaning and significance.[52]

7.47 By contrast, general legal scholarship has been used to provide insights into how Aboriginal and Torres Strait Islander law and custom constitutes a normative society.[53]

7.48 The Law Council of Australia explained the inadequacy of the current legal model in terms of capturing Indigenous relationships with country.[54]

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47 Duff, above n 22, 50.
48 *Neowarra v Western Australia* [2003] FCA 1402 (8 December 2003) [352]–[353].
49 Sean Brennan, 'Statutory Interpretation and Indigenous Property Rights' (2010) 21 *Public Law Review* 239.
50 *Western Australia v Ward* (2002) 213 CLR 1, [14].
51 *Bodney v Bennell* (2008) 167 FCR 84, [171].
52 WEH Stanner quoted in A Frith and M Tehan, *Submission 12*.
53 For example, the Court drew on US Constitutional law theory propounded by HLA Hart as to why people acknowledge law: *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [41].
54 Law Council of Australia, *Submission 35*.

7.49 At one level, it may be appropriate to provide a broad frame for connection requirements. At another, the task may be unrealistic, compressing a richly-textured world into legal forms.

> The difficulty of expressing a relationship between a community or group of Aboriginal people and the land in terms of rights and interests is evident. Yet that is required by the NTA. The spiritual or religious is translated into the legal. This requires the fragmentation of an integrated view of the ordering of affairs into rights and interests, which are considered apart from the duties and obligations which go with them.[55]

7.50 The view that the 'translation' of Aboriginal and Torres Strait Islander peoples' connection necessarily requires fragmentation has been questioned:

> Is there really, in the words of s 223, the compulsion apparently felt by the plurality [in *Ward*] to further fragment what is holistic by translating it into Western legal terms in a diffuse rather than organically cohesive way... It is suggested that the disaggregating impact of the words in the statute at s 223 has been overstated and the task of translation, difficult though it is, could be approached in a less atomising way.[56]

Proof of connection

7.51 The complexity involved in bringing evidence to establish 'connection' derives in part from the particular model for proof adopted under the *Native Title Act*. In *Mabo [No 2]*, several bases for proving Indigenous peoples' connection with land and waters were canvassed. Deane and Gaudron JJ, and Toohey J discussed a possessory title drawing on Canadian jurisprudence.[57] A title founded on the basis of possession or occupation places less emphasis on the legal inquiry into the traditional laws and customs of Indigenous peoples. Deane and Gaudron JJ in *Mabo [No 2]* accepted that occupation of land and waters may constitute adequate evidence of the continued maintenance of traditional law and custom.[58]

7.52 The Northern Territory land rights claims process is another potential model.[59] Case law interpreting the *Native Title Act* has not examined alternative bases for structuring evidence to establish native title. Some submissions noted that there may be advantages in considering possessory or occupation models.[60] Scholarship has identified other potential models, for example, common law Aboriginal title to land.[61]

7.53 The ALRC Inquiry under its Terms of Reference is to focus on the current *Native Title Act* and therefore makes no proposal in relation to alternative models.[62]

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55 *Western Australia v Ward* (2002) 213 CLR 1, [14] (Gleeson CJ, Gaudron, Gummon and Hayne JJ) quoted in National Native Title Council, *Submission 16*.

56 Brennan, above n 49, 259.

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

58 Ibid 110.

59 Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [663].

60 See AIATSIS, *Submission 36* for a discussion of the Canadian approach.

61 Kent McNeil, 'The Onus of Proof of Aboriginal Title' (1999) 37 *Osgoode Hall Law Journal* 775.

62 See Ch 3.

7.54 Further the difficulties of translating Aboriginal and Torres Strait Islander peoples' connection into Australian law find resonance in the past. In *Banjima People v Western Australia (No 2)* ('*Banjima*') the Federal Court noted the incommensurability of two different cultures:

> It may readily be inferred from the evidence in this proceeding that upon their arrival in the Swan River Colony the agents of the British Sovereign and the first British settlers had no detailed knowledge of the circumstances and social organisation, laws and customs of the indigenous people. It may also be inferred from that same evidence that the indigenous people were oblivious to the social organisation, laws and customs of the new settlers when they first encountered them.[63]

7.55 This underscores the difficulties of accurately 'reaching back' to establish past 'connection':

> At most, a right in the past might be juxtaposed against current rights in order to better understand how they came to be shaped and asserted in the present. But to interpose rights from the past into the present and expect their nature and extent to be unchanged requires a similitude between conditions in the past and the present that gives a false notion of history.[64]

7.56 Other submissions noted that the historical record is often incomplete or ad hoc in terms of the evidence of connection or genealogy that has survived.[65] In *Banjima*, the court noted that

> The evidence of early seafarers, explorers, pastoralists, ethnographers and anthropologists, which falls into an historical category, may also be relevant in any proceeding and have evidentiary value in relation to matters in issue, although depending on the circumstances and context in which it was gathered, and by whom it was gathered, it may need to be treated with care.[66]

7.57 Given the practical difficulties in bringing evidence, the vagaries of the historical record and constraints in relation to expert evidence, the ALRC seeks stakeholder comment on the proposed amendments to the existing requirements for establishing connection.

Revitalisation of connection?

Question 7–2 Should the *Native Title Act* be amended to provide that revitalisation of law and custom may be considered in establishing whether 'Aboriginal peoples and Torres Strait Islanders, by those laws and customs, have a connection with land and waters' under s 223(1)(b)?

7.58 This section of the chapter considers whether the law relating to connection to land and waters could include revitalisation of the relationship with country. The case

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63 *Banjima People v Western Australia (No 2)* (2013) 305 ALR 1, [23].

64 Alex Reilly and Ann Genovese, 'Claiming the Past: Historical Understanding in Australian Native Title Jurisprudence' (2004) 3 *Indigenous Law Journal* 19, 38. See Ch 5.

65 AIATSIS, *Submission 36*; A Frith and M Tehan, *Submission 12*.

66 *Banjima People v Western Australia (No 2)* (2013) 305 ALR 1, [26]–[29].

law is clear that *revival* of native title is not possible.[67] However, the ALRC asks whether it is appropriate to distinguish between *revival* and *revitalisation* (meaning renewed vigour as opposed to reinvention) of Aboriginal and Torres Strait Islanders peoples' connection, based upon acknowledging the various forms in which transmission of culture can take place.[68]

7.59 The ALRC is interested in views on whether the *Native Title Act* should be amended to provide that *revitalisation* of law and custom may be a factor that may be considered in establishing the requirement in s 223(1)(b) that 'Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with land or waters'.

7.60 In *Mabo [No 2]*, Brennan J stated:

> when the tide of history has washed away any real acknowledgment of traditional law and real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition.[69]

7.61 By contrast, Deane and Gaudron JJ felt it unnecessary to decide whether native title rights 'will be lost by the abandonment of traditional customs and ways'.[70]

7.62 The majority of the High Court in *Fejo v Northern Territory* noted, in the context of explaining the effects of extinguishment, that '[t]he argument that native title may revive fails because the rights are extinguished by the grant of freehold title; they are not merely suspended'.[71] The *Native Title Act* now allows for suspension of native title in respect of certain future acts.[72]

7.63 As discussed in Chapters 4 and 5, native title applicants must demonstrate that, since the assertion of sovereignty, acknowledgment of their traditional laws and observance of their traditional customs have continued 'substantially uninterrupted'.[73] For example, in *Risk v Northern Territory*, concerning the Larrakia[74] people's claim, the court at first instance found that

> A combination of circumstances has, in various ways, interrupted or disturbed the presence of the Larrakia people in the Darwin area during several decades of the 20th Century in a way that has affected their continued observance of, and enjoyment of, the traditional laws and customs of the Larrakia people that existed at sovereignty.[75]

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67 *Fejo v Northern Territory* (1998) 195 CLR 96, [56]–[58] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).
68 See, eg, AIATSIS, *Submission 36*.
69 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 60.
70 Ibid 110.
71 *Fejo v Northern Territory* (1998) 195 CLR 96, [57].
72 See, eg, *Native Title Act 1993* (Cth) s 24AA(6).
73 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.
74 Both the judgments at trial and on appeal referred to 'Larrakia' as encompassing all the relevant applicants.
75 *Risk v Northern Territory* [2006] FCA 404 (29 August 2006) [812]. See Ch 5.

7.64 The Court specifically referred to a lack of evidence about the passing on of knowledge of the traditional laws and customs.[76] There was a finding that there had been a substantial interruption in the 'practice' of the traditional laws and customs.[77] This was despite a finding by the trial judge that

> The Larrakia community of today is a vibrant, dynamic society, which embraces its history and traditions. This group of people has shown its strength as a community, able to re-animate its traditions and customs.[78]

7.65 The factual questions around revitalisation of law and custom, and thereby connection, raise matters about how the impact of European settlement on the transmission of Aboriginal and Torres Strait Islander peoples might be considered. Concerns have been raised that a comparatively short break in continuity was sufficient to find that native title did not exist.[79]

7.66 Some view the current interpretation of the definition of native title, specifically with respect to substantially uninterrupted continuity, as creating 'insurmountable barriers to cultural resurgence'.[80] A view has been expressed that 'a comparatively minimal interruption' to the sharing of culture across the claimant group should not prevent recognition of native title.[81] However, the Western Australian Fishing Industry Council submitted that '[i]t is not for the Courts to revive customs that have fallen away'.[82] Similarly, the South Australian Government submitted that '[r]ecognising revived or other rights is better left to other policy devices on a local jurisdictional basis'.[83]

7.67 Commentators have noted that the forms for transmission of culture necessarily respond to the circumstances in which Aboriginal and Torres Strait Islander peoples found themselves.[84] Further, there is growing knowledge about how culture is transmitted in Aboriginal and Torres Strait Islander societies that has emerged since early cases were litigated—driven in part by the claims process under the *Native Title Act*. Proposal 5–1, that traditional laws and customs may evolve, adapt or otherwise develop, is consistent with a view that the transmission of laws and customs may also change, and such change may be a result of making use of available technologies. Thus, revitalisation of culture, through, for example, transmission of knowledge of law

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76 Ibid [823].
77 Ibid [835], [839].
78 Ibid [530].
79 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2009' (Australian Human Rights Commission, 2009) 86.
80 Commonwealth, *Parliamentary Debates*, Senate, 21 March 2011, 1303 (Rachel Siewert).
81 Ibid.
82 Western Australian Fishing Industry Council, *Submission 23*.
83 South Australian Government, *Submission 34*.
84 S Bielefeld, *Submission 6*; Australian Human Rights Commission, *Submission 1*; Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Social Justice and Native Title Report 2013' (Australian Human Rights Commission) 108–10.

and custom through ethnographic, anthropological and biographical texts, may be 'an unavoidable and acceptable cultural adaptation'.[85] Dr Paul Memmott has argued that

> contemporary Aboriginal cultures must be recognised as including textual and digital media, which constitute part of the process of negotiating meaning out of the current socio-economic and cultural circumstances.[86]

7.68 The Inquiry is an opportunity to consider whether there may be merit in investigating a distinction between:

- abandonment of law and custom and substantial interruption of connection; and
- where force of circumstances requires Aboriginal and Torres Strait Islander law and custom to adapt and take different forms over time.

7.69 The ALRC invites comment as to whether a distinction between *revival* and *revitalisation* may be useful in this respect.

Disregarding substantial interruption or change in continuity?

7.70 The Terms of Reference ask the ALRC to inquire into and report on connection requirements for the recognition and scope of native title rights and interests. In its Inquiry, the ALRC is directed to a number of options for reform but can examine connection more broadly. In the context of a general examination of connection requirements, this section considers whether the *Native Title Act* and legal frameworks should be amended, to allow the empowerment of courts to disregard substantial interruption or change in continuity of acknowledgment and observance of traditional laws and customs, where it is in the interests of justice to do so.

7.71 The requirement that acknowledgment and observance of law and custom must have occurred substantially uninterrupted by each generation since sovereignty is discussed in earlier chapters.[87] The requirement has arisen from the statutory construction of s 223(1)(a) of the *Native Title Act*. Proposal 5–3 provides that the Act should be amended to make clear that it is not necessary to establish that:

- acknowledgment and observance of law and custom has continued substantially uninterrupted since sovereignty; and
- laws and customs have been acknowledged and observed by each generation since sovereignty.

7.72 That is, Proposal 5–3 addresses the degree or frequency of *continuity* of acknowledgment and observance of traditional laws and customs that is required to

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85 Paul Memmott, 'Modelling the Continuity of Aboriginal Law in Urban Native Title Claims: A Practice Example' in Toni Bauman and Gaynor MacDonald (eds), *Unsettling Anthropology: The Demands of Native Title on Worn Concepts and Changing Lives* (AIATSIS, 2011) 122, 130.

86 Ibid. See, eg, the discussion of acquisition of language in *Wyman on behalf of the Bidjara People v Queensland (No 2)* [2013] FCA 1229 (6 December 2013) [663]–[665].

87 See Ch 4 and Ch 5.

meet s 223(1)(a). The terms 'continuity' and 'substantially uninterrupted' do not appear in the text of s 223 of the Act.

7.73 In this section of the chapter, the ALRC examines other questions about whether the Act should be amended in relation to 'substantial interruption or change in continuity of acknowledgment and observance of traditional laws and customs'. These questions are directed primarily, but not entirely, to the function that 'connection' performs in s 223(1)(b) of the Act.[88] That section states: 'the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters'.

7.74 The ALRC asks whether in determining connection under s 223(1)(b), there can be regard to historical factors around the displacement of Aboriginal peoples and Torres Strait Islanders that may affect the manner of the *connection* with land or waters. The ALRC considers that such an approach is consistent with the recognition and protection of native title and gives effect to the beneficial purposes of the Act.

Relevant law

7.75 The extent to which the effects of European settlement can be taken into account in determining whether s 223 is established is reflected in two areas. First, in considering the degree to which there can be change or evolution in law and custom. Secondly, it is relevant in respect of whether acknowledgment of law and custom has been interrupted or ceased.

7.76 The Full Court of the 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).

7.77 The court in that respect stated

> 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.[89]

7.78 The qualification of 'substantially' reflects the impacts of European settlement, as the High Court explained in *Yorta Yorta*:

> It is a qualification that must be made to recognise that European settlement has had the most profound effects on Aboriginal societies and that it is, therefore, inevitable that the structures and practices of those societies, and their members, will have undergone great change since European settlement.[90]

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88 Connection is discussed in Ch 6.

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

90 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [89] (Gleeson CJ, Gummow and Hayne JJ).

7.79 Further, the High Court held that, to describe 'the consequences of interruption in acknowledgment and observance of traditional laws and customs as "abandonment" or "expiry" of native title was apt to mislead' because it involved imputing an intention to abandon law and custom on the part of Indigenous peoples.[91]

7.80 Nonetheless, the High Court emphasised that

> the inquiry about continuity of acknowledgment and observance does not require consideration of why, if acknowledgment and observance stopped, that happened ... If it is not demonstrated that that condition was met, 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.[92]

7.81 Accordingly, the High Court left open the permissibility of examining why acknowledgment and observance may have 'stopped' in confined circumstances. Subsequently, the Full Federal Court in *Bodney v Bennell*, when discussing continuity, stated:

> if... there has been a substantial interruption, it is not to be mitigated by reference to white settlement. The continuity enquiry does not involve consideration of *why* acknowledgment and observance stopped.[93]

7.82 After this Full Federal Court decision, it could be said that the law is unclear as to whether consideration of the reasons why acknowledgment and observance may have 'stopped' is permitted at all.

7.83 A further complexity is that some commentators draw a distinction between the effects of European settlement in respect of adaptation, and thereby change, in law and custom, as compared with a substantial interruption. According to this view, *Bodney v Bennell* 'should be treated with caution insofar as it suggests that evidence of European influence is irrelevant to the question of *change*, as opposed to *interruption*'.[94]

Should consideration of the reasons for interruption be permissible?

Question 7–3 Should the reasons for any displacement of Aboriginal peoples or Torres Strait Islanders be considered in the assessment of whether 'Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters' under s 223(1)(b)?

7.84 The ALRC's Issues Paper did not ask specifically about consideration of the reasons why acknowledgment and observance may have changed or 'stopped'. Nevertheless, submissions expressed a range of views about whether factual matters relating to European settlement, such as dispossession from lands, missionary activity, removal of Indigenous peoples to reserves, should be raised.

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91 Ibid [90].
92 Ibid.
93 *Bodney v Bennell* (2008) 167 FCR 84, [97].
94 Duff, above n 22, 29.

7.85 As the North Queensland Land Council put it, 'European settlement which occurred pursuant to British and Australian law inhibited the observance of traditional laws and customs in areas of closer settlement'.[95] Similarly, Frith and Tehan submitted that state or settler acts—such as being forced to move off country to missions or reserves—often denied groups 'the right or ability to acknowledge and observe their laws and customs'.[96] In its submission to a Senate Committee Inquiry, the Kimberley Land Council said:

> The movements of Aboriginal and Torres Strait Islander persons from their traditional lands was, in many cases, either directly or indirectly forced upon them—either through government activities such as the removal of children or, as was common in the Kimberley region, the movement of traditional owners off their lands into the relative safety of the missions to escape violence perpetrated by pastoralists.[97]

7.86 Yet, as the Aboriginal and Torres Strait Islander Social Justice Commissioner has observed, 'there is little room to raise past injustice as a counter to the loss of, or change in, the nature of acknowledgment of laws or the observance of customs'.[98]

7.87 Several submissions commented on the 'apparent unconscionability of the State or Territory effectively relying on its own actions to the detriment of native title groups' assertion of native title'.[99] Just Us Lawyers submitted that the strict application of 'substantial interruption' effectively downplays the practical impacts of colonisation and dispossession.[100] Some submissions stated that the current position does not accord with the beneficial objects of the *Native Title Act*.[101]

7.88 A number of submissions supported reform so that courts could consider the reasons for interruptions in continuity.[102] Frith and Tehan submitted that

> the Court should be given the discretion to consider the reasons for any such interruption in considering its relevance to its determination of whether traditional laws and customs have been acknowledged and observed.[103]

7.89 Governments did not directly mention this issue but rather made general submissions that the system was working well and that there was no need for significant statutory amendments, particularly given that courts interpreted the

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95 North Queensland Land Council, *Submission 17*.
96 A Frith and M Tehan, *Submission 12*.
97 Kimberley Land Council, Submission No 2 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, June 2011.
98 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2009', above n 79, 87. See also Australian Human Rights Commission, *Submission 1*.
99 See, eg, Native Title Services Victoria, *Submission 18*; A Frith and M Tehan, *Submission 12*; Australian Human Rights Commission, *Submission 1*.
100 Just Us Lawyers, *Submission 2*.
101 Central Desert Native Title Services, *Submission 26*; Law Society of Western Australia, *Submission 9*: *Bodney v Bennell* 'is not consistent with the beneficial objects of the NTA, and highlights the need for the NTA to require consideration of why the interruption has occurred and the broader interests of justice in the matter'.
102 See, eg, A Frith and M Tehan, *Submission 12*; Australian Human Rights Commission, *Submission 1*.
103 A Frith and M Tehan, *Submission 12*.

requirements for connection and continuity flexibly.[104] The South Australian Government submitted:

> The Federal Court takes into account that extensive loss or modification of traditional law and custom was almost inevitable in the face of colonisation and has, on occasion, found in favour of groups that have long been absent from their lands or whose culturally active membership has, at various times in history, numbered very few individuals.[105]

7.90 The ALRC is interested in stakeholder views on the issue of whether the reasons for any displacement of Aboriginal peoples or Torres Strait Islanders should be considered in the assessment of whether 'the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters'.

Reform options

7.91 A number of reform proposals have been advanced as to how the influence of European settlement could be considered in the determination of native title. The Aboriginal and Torres Strait Islander Social Justice Commissioner, in *Native Title Report 2008*, argued that 'the law about continuity of traditional connection needs to be brought back into line with the overall logic of *Mabo*'.[106] The Commissioner proposed a legislative amendment so that the courts would have capacity to take into account the reasons for interruption to the acknowledgment of the traditional laws and the observance of the traditional customs.[107]

7.92 In *Native Title Report 2009*, the Commissioner suggested that,

> [s]uch an amendment could empower Courts to disregard any interruption or change in the acknowledgment and observance of traditional laws and customs where it is in the interests of justice to do so.[108]

7.93 Further, the Commissioner suggested that 'a definition or a non-exhaustive list of historical events' could be provided in the *Native Title Act* in order 'to guide courts as to what should be disregarded'.[109] The Native Title Amendment (Reform) Bill 2011 proposed amendments that were broadly consistent with these recommendations.[110]

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104 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*.

105 South Australian Government, *Submission 34*.

106 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2008' 82.

107 Ibid 86–7.

108 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2009', above n 79, 87.

109 Ibid.

110 The Bill approached the issue of substantial interruption within a presumption of continuity—that is, by using interlinking provisions: Native Title Amendment (Reform) Bill 2011 cl 12. Proposed new s 61AA provided for presumptions and proposed new s 61AB provided for 'continuing connection'.

7.94 The Native Title Amendment (Reform) Bill 2014 differed in some key respects to the 2011 Bill.[111] The reform proposed in the 2014 Bill is for courts to be conferred with discretion—not mandated to 'treat as relevant' particular reasons for the substantial interruption. New s 61AB, as proposed in the 2014 Bill, would provide

> A court may determine that subsection 223(1) has been satisfied, despite finding that there has been:
>
> (a) a substantial interruption in the acknowledgment of traditional laws or the observance of traditional customs; or
>
> ...
>
> if the primary reason for the substantial interruption or the significant change is the action of a State or a Territory or a person or other party who is not an Aboriginal person or a Torres Strait Islander.

How could the influence of European settlement be considered?

7.95 Two reform options were raised for consideration in the Issues Paper:

- whether courts should be empowered to disregard substantial interruption or change in the continuity of acknowledgment and observance of traditional laws and customs where it is in the interests of justice to do so;[112] and
- whether substantial interruption should be defined in the Act.[113]

7.96 Neither of these options for reform are proposed in this Discussion Paper for the reasons set out below. Rather, the ALRC asks for views about how the influence of European settlement should be considered in the determination of native title.

The empowerment of courts

7.97 The 'empowerment' of courts indicates the statutory conferral of discretion.[114] This can be contrasted with an earlier model.[115]

7.98 A number of submissions expressed support for the empowerment of courts to disregard substantial interruption or change in continuity of acknowledgment of

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111 For example, the provisions for presumptions and with respect to continuing connection are not linked Native Title Amendment (Reform) Bill 2014 cl 14. See also Native Title Amendment (Reform) Bill (No 1) 2012 cl 14. Note that proposed new s 61AB is in exactly the same terms in both the 2012 and 2014 Bills. The provisions in these latter Bills responded to a number of suggestions that had been made in the course of the Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the first iteration of the Bill, in particular the Law Council of Australia's submission with respect to the drafting of proposed new s 61AB: Commonwealth, *Parliamentary Debates*, Senate, 29 February 2012, 1238, 1242 (Rachel Siewert).

112 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Issues Paper No 45 (2013) Q 21.

113 Ibid Q 19.

114 See Native Title Amendment (Reform) Bill 2014 cl 14. See also Native Title Amendment (Reform) Bill (No 1) 2012 cl 14.

115 Native Title Amendment (Reform) Bill 2011 cl 12. Proposed new s 61AB(2)(a) provided that the courts 'must treat as relevant' whether the primary reason for any demonstrated interruption in the acknowledgment of traditional laws or the observance of traditional customs is the action of a State or a Territory or a person who is not an Aboriginal person or a Torres Strait Islander.

traditional laws and observance of traditional customs, where it is in the interests of justice to do so.[116] The Law Society of Western Australia submitted that such a reform would be 'consistent with the beneficial purposes for which the NTA was enacted, particularly where the interruption is caused by circumstances outside the control or intent of the relevant members of the relevant society'.[117] Similarly, the Australian Human Rights Commission submitted that such a reform would be '[i]n furtherance of the purposes of the Act', and referred to the Preamble to the Act.[118]

7.99 However, a number of stakeholders were opposed to this reform option.[119] Even stakeholders who were critical of the current law concerning substantially uninterrupted continuity raised some concerns about this approach, preferring other options instead.[120]

7.100 Concerns that such reform:

- 'would likely place greater emphasis than there is presently on the fact and nature of any substantial interruption';[121]
- would be of uncertain effect;[122]
- may not be in claimants' interests as it may lead to increased debate about issues as well as increased costs and delay;[123] and
- is problematic because of uncertainty about the meaning of 'in the interests of justice'.[124]

7.101 Judicial discretion is, by its very nature, one to be exercised in relation to the circumstances of an individual case. Therefore, the circumstances enlivening the discretion will be variable. A general empowerment of courts may therefore be quite uncertain in its effect and operation.[125] Questions may arise whether any such 'empowerment' would operate as a procedural matter or would form part of the substantive area of law interpreting s 223 of the *Native Title Act*.

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116 National Congress of Australia's First Peoples, *Submission 32*; Kimberley Land Council, *Submission 30*; NSW Young Lawyers Human Rights Committee, *Submission 29*; Goldfields Land and Sea Council, *Submission 22*; Native Title Services Victoria, *Submission 18*; North Queensland Land Council, *Submission 17*; A Frith and M Tehan, *Submission 12*; Law Society of Western Australia, *Submission 9*; Cape York Land Council, *Submission 7*; Australian Human Rights Commission, *Submission 1*.

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

118 Australian Human Rights Commission, *Submission 1*.

119 South Australian Government, *Submission 34*; Western Australian Fishing Industry Council, *Submission 23*; Western Australian Government, *Submission 20*; National Farmers' Federation, *Submission 14*; Just Us Lawyers, *Submission 2*.

120 NSW Young Lawyers Human Rights Committee, *Submission 29*; Just Us Lawyers, *Submission 2*.

121 Western Australian Government, *Submission 20*.

122 Some stakeholders also raised this concern in relation to the earlier proposal for a presumption of continuity and substantial interruption. See, eg, 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: 'significant uncertainty would be generated with the introduction of the presumption and the requirements for establishing "substantial interruption"'.

123 NSW Young Lawyers Human Rights Committee, *Submission 29*; Just Us Lawyers, *Submission 2*.

124 See, eg, NSW Young Lawyers Human Rights Committee, *Submission 29*.

125 S Bielefeld, *Submission 6*. Note that this submission did not express a view on the desirability of the reform option.

7.102 Other submissions focused on 'in the interests of justice'. The term typically indicates that courts retain discretion. In a more general sense, it could be implemented in varying ways.[126] A number of concerns were expressed about defining it in the Act.[127] NSW Young Lawyers submitted that

> The phrase ['in the interests of justice'] could import considerations of the overall circumstances of the case, including the present circumstances of the Claimants or the Respondents, or difficulties being experienced between multiple claim groups. There is a possibility that a decision may be taken to not disregard 'substantial interruption' in order to assist a poor or disadvantaged respondent due to the 'interests of justice'.[128]

7.103 In their view, the 'appropriate' focus for 'the interests of justice' should be the actual causes of substantial interruption.[129]

7.104 Notwithstanding the breadth of the phrase 'in the interests of justice', there was little support for a definition of it in the Act. However, some submissions expressed the view that some guidance may be useful[130] or necessary.[131] The South Australian Government submitted that the phrase

> is usually utilised to provide a court or a decision maker with a discretion to act if the particular facts of the matter justify it. It provides flexibility but is to be applied in a judicial manner. However, were it to be included in the NTA as suggested here, there would need to be clear guidance on appropriate use.[132]

7.105 Stakeholders who were opposed to a statutory definition of 'in the interests of justice' considered that it was 'better left to the Court in each case'.[133] North Queensland Land Council submitted that a statutory definition of the phrase may attract 'many years' of judicial interpretation. It was of the view that '[b]y not including a definition of this term, the courts would have a greater range for finding that it is in the interests of justice to disregard substantial interruption'.[134]

7.106 The ALRC is not proposing the 'empowerment of courts to disregard substantial interruption or change in continuity of acknowledgment and observance of traditional laws and customs where it is in the interests of justice to do so' as identified in the Terms of Reference. This is due to the concerns expressed above. Rather, the ALRC asks a question about how the influence of European settlement should be considered in the determination of native title.[135]

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126 Ibid.

127 The ALRC had asked a question in the Issues Paper. See Australian Law Reform Commission, *Review of the Native Title Act 1993*, Issues Paper No 45 (2013) Q 21(b).

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

129 Ibid. See also S Bielefeld, *Submission 6*.

130 NSW Young Lawyers Human Rights Committee, *Submission 29* (suggesting the option put forward by the Aboriginal and Torres Strait Islander Social Justice Commissioner, namely 'a non-exhaustive list of particular circumstances where it is "in the interests of justice" to disregard "substantial interruption"').

131 South Australian Government, *Submission 34*.

132 Ibid.

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

134 North Queensland Land Council, *Submission 17*.

135 See Q 7–4 below.

Statutory definition of 'substantial interruption'

7.107 While originally a statutory definition of 'substantial interruption' was conceived as linked to the empowerment of courts to disregard substantial interruption,[136] some submissions to this Inquiry conceived of a statutory definition as a separate option in itself.[137] As outlined earlier, the two issues could be conceived as different reform options for how the influence of European settlement could be considered.

7.108 A number of submissions expressed support for a statutory definition of the factual matters that could be related to 'substantial interruption'.[138]

7.109 A variety of stakeholders considered the non-exhaustive nature of the list to be important.[139] Stakeholders who supported a statutory definition of substantial interruption considered a non-exhaustive list necessary because what constitutes a substantial interruption is unsettled.[140]

7.110 However, a number of stakeholders opposed a statutory definition of 'substantial interruption'.[141] Governments were opposed,[142] viewing such a reform option as:

- unnecessary;[143]

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136 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2009', above n 79, 87.

137 See, eg, A Frith and M Tehan, *Submission 12*.

138 National Congress of Australia's First Peoples, *Submission 32*; Native Title Services Victoria, *Submission 18*; North Queensland Land Council, *Submission 17*; Australian Human Rights Commission, *Submission 1*. Some of these stakeholders supported express inclusion of the forced removal of children and the relocation of communities onto missions, which were examples that the Aboriginal and Torres Strait Islander Social Justice Commissioner had suggested previously: Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2009', above n 79, 87.

139 South Australian Government, *Submission 34* (who was opposed to such a definition because '[s]uch concepts are ill suited to exhaustive definition'); National Congress of Australia's First Peoples, *Submission 32*; North Queensland Land Council, *Submission 17*; Cape York Land Council, *Submission 7*; Just Us Lawyers, *Submission 2*. Some suggested that the list could simply comprise a list of examples to guide judicial consideration, or alternatively the list could be added to over time—either by gazette or by regulation. Just Us Lawyers emphasised that while any such definition should be non-exhaustive, it should 'be capable of objective assessment'.

140 Australian Human Rights Commission, *Submission 1*. See also North Queensland Land Council, *Submission 17* ('there could be a variety of circumstances not yet known, 20 years after the commencement of the NTA').

141 South Australian Government, *Submission 34*; NSW Young Lawyers Human Rights Committee, *Submission 29*; Western Australian Government, *Submission 20*; National Farmers' Federation, *Submission 14*; A Frith and M Tehan, *Submission 12*; Cape York Land Council, *Submission 7*.

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

143 South Australian Government, *Submission 34* ('[c]ommon law courts are regularly applying the law to the circumstances without a definition and lawyers and negotiators do so when negotiating settlements'); Northern Territory Government, *Submission 31*; see also Queensland Government Department of Natural Resources and Mines, *Submission 28* (referring broadly to Australian Law Reform Commission, *Review of the Native Title Act 1993*, Issues Paper No 45 (2013) Questions 10–22, 'Given the current rate of resolution of native title claims and the associated outcomes being presently achieved, there is little basis for significant amendments to the NTA').

- 'impractical', given that it is 'a question of fact and degree';[144]
- making the test for recognising native title 'unduly complicated';[145] and
- tending to 'shift the focus of native title inquiries onto historical matters, without necessarily achieving any time savings'.[146]

7.111 A statutory definition of 'substantial interruption' was also opposed by some stakeholders who were in favour of law reform.[147] AIATIS, for example, acknowledged that

> A strong argument exists for including a non-exhaustive list of historical events upon which the courts could be guided with respect to disregarding the requirement for continuing connection without substantial interruption.[148]

7.112 However, AIATSIS reiterated its comment to the Senate Inquiry concerning the provisions of the 2011 Bill, that

> It may not always be possible to prove a direct correlation between a demonstrated interruption or change and the effect of government policies and individual behaviour on the movements of individuals or families. Indigenous agency in responding to such forces is not always easily articulated and reasons for certain actions may form part of the implicit rather than explicit knowledge of claimants. In these circumstances, respondent rebuttal might argue that a particular move was voluntary as the subtleties and long terms effects of policies remain invisible. There are also many other factors, such as cataclysmic events, drought, flood, war and the like, which could, prima facie, indicate a substantial period of dislocation, but which might fall outside the protection of s 61AB(2).[149]

7.113 Some stakeholders favoured other reform options instead.[150]

7.114 The ALRC considers that amendment of the Act to provide a statutory definition of 'substantial interruption' has limitations due to the difficulty of defining substantial interruption in a conclusive manner. Rather, the ALRC has suggested consideration of other ways of addressing these issues. Proposal 5–3 provides that the Act be amended to make clear that it is not necessary to establish acknowledgment and observance of laws and customs has continued substantially uninterrupted since sovereignty. In the discussion below the ALRC raises the issues around acknowledgment of the influence of European settlement and suggests a potential option for reform.

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144 South Australian Government, *Submission 34*.
145 Western Australian Government, *Submission 20*.
146 Ibid.
147 See, eg, NSW Young Lawyers Human Rights Committee, *Submission 29*; A Frith and M Tehan, *Submission 12*.
148 AIATSIS, *Submission 36*.
149 Ibid.
150 NSW Young Lawyers Human Rights Committee, *Submission 29*; A Frith and M Tehan, *Submission 12*; Cape York Land Council, *Submission 7*; Just Us Lawyers, *Submission 2*.

Other models for reform

7.115 The ALRC invites comment on what other options for reform may be appropriate. The sequence of questions below is a guide. Question 7–4 asks for possible models and Question 7–5 outlines a suggested model.

Question 7–4 If the reasons for any displacement of Aboriginal peoples or Torres Strait Islanders are to be considered in the assessment of whether 'Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters' under s 223(1)(b), what should be their relevance to a decision as to whether such connection has been maintained?

Question 7–5 Should the *Native Title Act* be amended to include a statement in the following terms:

> Unless it would not be in the interests of justice to do so, in determining whether 'Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters' under s 223(1)(b):
>
> (a) regard may be given to any reasons related to European settlement that preceded any displacement of Aboriginal peoples or Torres Strait Islanders from the traditional land or waters of those people; and
>
> (b) undue weight should not be given to historical circumstances adverse to those Aboriginal peoples or Torres Strait Islanders.

7.116 The ALRC noted the limitations raised in respect of the models for reform that were outlined for consideration in the Issues Paper. Therefore, the ALRC is interested in views on how else reform could be appropriately implemented. The ALRC offers one possible model for consideration, as set out above. This model draws upon drafting precedents in the *Native Title Act*. For example, the construction of the provision is similar to that outlined in s 82(2) of the Act[151] and the expression 'European settlement' reflects the language in the Preamble. The ALRC welcomes views on this model and associated issues. For example, should such a statement be a section or only a note to the Act? The ALRC also welcomes comment on other models that may be appropriate.

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151 Section 82(2) concerns the Federal Court's way of operating and provides, '[i]n conducting its proceedings, the Court may take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders, but not so as to prejudice unduly any other party to the proceedings'. This provision replaces the provision that was originally enacted. When considering the current wording, Sackville J remarked, 'that provision permits, but does not oblige, the Court to take account of the cultural and customary concerns of Aboriginal peoples': *Jango v Northern Territory* [2003] FCA 1230 (31 October 2003) [49].