8. The Nature and Content of Native Title

Contents

Summary

8.1 The Terms of Reference direct the ALRC to inquire into whether there should be 'clarification that "native title rights and interests" can include rights and interests of a commercial nature'. The suggested reform option has particular relevance for issues related to determining the scope (nature and content) of native title.[1]

8.2 Native title or native title rights and interests are defined in s 223(1) of the *Native Title Act 1993* (Cth). Section 223(2) provides a non-exhaustive listing of representative native title rights and interests. It does not refer to rights of a commercial nature. Recent case law has held that native title comprises a 'right for any purpose'.[2]

8.3 This chapter is in three parts. First, it considers the nature and content of native title rights and interests and whether statutory clarification of the commercial nature of native title is appropriate. Secondly, it considers whether there is a need to adopt a definition of commercial native title rights and interests. Finally, the chapter considers what other native title rights and interests fall within the scope of s 223(1).

1 See Terms of Reference.
2 *Akiba v Commonwealth* (2013) 250 CLR 209.

Overview of the proposals and questions

8.4 The ALRC proposes that the definition in s 223 reflect the law in *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth* ('*Akiba*'),[3] that native title is a 'right for any purpose'.

8.5 The proposal is that s 223(2) of the *Native Title Act* should be repealed and substituted with a provision that provides 'without limiting subsection (1) but to avoid doubt, native title rights and interests in s 223(1) comprise rights in relation to any purpose and may include, but are not limited to, hunting, gathering, fishing, commercial activities and trade'.

8.6 The inclusion of the terms 'commercial activities' and 'trade' in s 223(2) is indicative and not intended to limit the operation of s 223(1). The precise native title rights and interests determined in each claim will turn on the particular factual circumstances and the evidence brought by the claimants.

8.7 The ALRC is not proposing that the terms 'commercial activities' and 'trade' be defined in the Act. This is to allow flexibility—in acknowledgment that '[n]ative title has its origins in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory'.[4]

8.8 The ALRC seeks views on whether the exercise of cultural knowledge should be included in s 223(2) and the utility of a specific s 223(2)(b) to that effect. The ALRC also invites comment on other activities that should be included in the proposed indicative listing in the revised s 223(2)(b).

Relevant provisions in the *Native Title Act*

8.9 Within the *Native Title Act* there are a number of provisions relevant to the nature and content of native title rights and interests in an application for a determination of native title.[5]

8.10 Under s 62(2) a claimant application must be accompanied by an affidavit sworn by the applicant. It must include, inter alia:

- 'a description of the native title rights and interests claimed in relation to particular land or waters (including any activities in exercise of those rights and interests)',[6] and
- 'a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist'.[7]

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3 Ibid.
4 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 58 (Brennan J).
5 Note that other provisions not discussed will be relevant.
6 *Native Title Act 1993* (Cth) s 62(2)(d).
7 Ibid s 62(2)(e).

8.11 Section 223 is the key provision. Section 223(1)—which is discussed in Chapter 4—defines 'native title' and 'native title rights and interests'. Importantly, native title is variable:

> Native title is not treated by the common law as a unitary concept. The heterogeneous laws and customs of Australia's indigenous peoples, the Aboriginals and Torres Strait Islanders, provide its content. It is the relationship between a community of indigenous people and the land, defined by reference to that community's traditional laws and customs, which is the bridgehead to the common law.[8]

8.12 Section 223(1) is the substantive provision, with s 223(2), providing a non-exhaustive list of native title rights and interests. Section 223(2) currently states that,

> Without limiting subsection (1), ***rights and interests*** in that subsection includes hunting, gathering, or fishing, rights and interests.

8.13 Section 223(2) was enacted to provide 'an example of the type of rights and interests that might comprise native title'.[9] Melissa Perry and Stephen Lloyd suggest:

> As a result of the express recognition of such rights in s 223(2), it is not open to contend that native title rights and interests cannot comprise fishing, hunting or gathering rights and interests.[10]

8.14 On this view, s 223(2) confirms that the specified purposes *are* native title rights and interests.

8.15 Section 225 defines a 'determination of native title' and requires the listing of the native title rights and interests found to exist. Relevantly, s 225(b) provides:

> A ***determination of native title*** is a determination whether or not native title exists in relation to a particular area (the ***determination area***) of land and waters and, if it does exist, a determination of:
>
> …
>
> (b) the nature and extent of the native title rights and interests in relation to the determination area.

8.16 As well as the substantive provisions for establishing native title, s 211 of the Act provides a 'savings provision' giving limited protection of native title rights to hunt, gather, fish and engage in cultural or spiritual activities.[11] The 'protection' is in respect of licensing and similar government regulation, not in terms of the grant of third party interests or development activities.[12] Section 211(2) provides:

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8 *Yanner v Eaton* (1999) 201 CLR 351, [72] (Gummow J).

9 Explanatory Memorandum, Native Title Bill 1993 (Cth), Part B, 77 (s 223 was originally numbered s 208 in the Bill).

10 Melissa Perry and Stephen Lloyd, *Australian Native Title Law* (Lawbook Co, 2003) 768.

11 Section 211(3) defines 'class of activity'—with hunting, fishing and gathering referred to as separate classes of activity, rather than as rights and interests. The other class of activity that is specified is 'a cultural or spiritual activity'. There is also provision for any other kind of activity to be prescribed for the purpose of the sub-section.

12 Richard H Bartlett, *Native Title in Australia* (Butterworths, 2nd ed, 2004) 659.

> the law does not prohibit or restrict the native title holders[13] from carrying on the class of activity, or from gaining access to the land or waters for the purpose of carrying on the class of activity, where they do so:
>
> (a) for the purpose of satisfying their personal, domestic or non-commercial communal needs; and
>
> (b) in exercise or enjoyment of their native title rights and interests.[14]

8.17 Section 211(1) sets out the conditions necessary to activate s 211(2).[15]

8.18 In effect, s 211 has provided a defence to prosecution for charges involving:

- the 'taking' of juvenile estuarine crocodiles—by way of hunting with a traditional form of harpoon—for food, where it was a traditional custom of the relevant native title holders to hunt such crocodiles for food;[16] and
- possessing a quantity of undersized abalone, where the abalone were taken in accordance with the traditional laws and customs of the relevant native title holders.[17]

Commercial native title?

8.19 The inquiry as to whether native title includes rights and interests of a commercial nature, including rights to trade, raises central issues about the scope of native title and 'the capacity of native title to support Indigenous economic development and generate sustainable long-term benefits for Indigenous Australians'.[18]

8.20 For Indigenous communities, there are expectations that native title can provide the platform for redressing disadvantage and a more secure economic future for native title holders. Principle 5 identifies that reform should promote sustainable long-term social, economic and cultural development for Aboriginal people and Torres Strait Islanders.

8.21 These considerations form the context for the following discussion of the law in relation to the nature and content (scope) of native title rights and interests. There are three main points. First, there are questions about the 'nature' and 'content' of native title rights and interests. Secondly, with respect to the 'nature' of native title, case law has affirmed that a distinction should be made between the native title right and its exercise. Thirdly, questions are raised about the extent to which the exercise of a right (with its origins in the pre-sovereignty period) can develop—for example, by reference to adaptations such as modern technologies.

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13 'Native title holder' is defined in *Native Title Act 1993* (Cth) s 224.

14 A note to the provision states 'Note: In carrying on the class of activity, or gaining access, the native title holders are subject to laws of general application'.

15 The second-listed condition—s 211(1)(b)—provides that 'a law of the Commonwealth, a State or a Territory prohibits or restricts a person from carrying on the class of activity other than in accordance with a licence, permit or other instrument granted or issued to them under the law'.

16 *Yanner v Eaton* (1999) 201 CLR 351.

17 *Karpany v Dietman* (2013) 88 ALJR 90.

18 *Terms of Reference*, above n 1.

The nature and content of native title rights and interests

8.22 The 'nature' of native title refers to the 'legal nature' of the rights and interests.[19] As '[n]ative title has its origin in the traditional laws acknowledged and the customs observed by the indigenous people who possess the native title',[20] the rights and interests are 'founded upon'[21] the traditional laws and customs of the relevant Indigenous communities.

8.23 The High Court has explained that '[t]he ambit of the native title right is a finding of law'.[22] The High Court has emphasised that '[t]he identification of the relevant rights is an objective inquiry'.[23] Thus identification of the native title rights and interests is a question of fact and the 'content' of the rights and interests will depend on the evidence in each case.[24]

8.24 Two examples illustrate this point. In *Akiba* there was a 'long and well chronicled history' that '[t]he Islanders were, and are, trading fish'—that is, that 'marine products were historically, and are today, taken for the purpose of exchange and sale'.[25] In *Banjima People v Western Australia (No 2)*, the trial judge distinguished the evidence before him from that in *Akiba*:

> The situation is not akin to the circumstances in which the claimants in *Akiba (No 3)* were found traditionally to take whatever resources they found at sea and were apt to trade and use it however they could.[26]

8.25 Rather, the Federal Court found that particular resources were taken for particular uses, with limited evidence of trade in resources.[27]

The nature of native title

8.26 Courts indicate that native title is not equivalent to common law property interests.[28] In 2014, the High Court cautioned against confining the understanding of

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19 *Western Australia v Brown* [2014] HCA 8 (12 March 2014) [34]; *Akiba v Commonwealth* (2013) 250 CLR 209, [61] (Hayne, Kiefel and Bell JJ) citing *Western Australia v Ward* (2002) 213 CLR 1, [468] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

20 *Fejo v Northern Territory* (1998) 195 CLR 96, [46] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ citing *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 58 (Brennan J)).

21 *Congoo on behalf of the Bar-Barrum People No 4 v Queensland* (2014) 218 FCR 358, [35] (North and Jagot JJ).

22 *Yanner v Eaton* (1999) 201 CLR 351, [109] (Gummow J).

23 *Western Australia v Brown* [2014] HCA 8 (12 March 2014) [34].

24 'The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs': *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 58 (Brennan J).

25 *Akiba v Queensland (No 3)* (2010) 204 FCR 1, [527].

26 *Banjima People v Western Australia (No 2)* [2013] FCA 868 (28 August 2013) [783].

27 Ibid [783]–[784].

28 'Because native title has its origin in traditional laws and customs, and is neither an institution of the common law nor a form of common law tenure, it is necessary to curb the tendency (perhaps inevitable and natural) to conduct an inquiry about the existence of native title rights and interests in the language of the common law property lawyer': *Commonwealth v Yarmirr* (2001) 208 CLR 1, [11] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

rights and interests 'to the common lawyer's one-dimensional view of property as control over access'.[29]

8.27 In *Western Australia v Ward* ('*Ward*'), the majority of the High Court considered native title as a 'bundle of rights',[30] finding the metaphor to be 'useful' for two reasons. They explained:

> It draws attention first to the fact that there may be more than one right or interest and secondly to the fact that there may be several *kinds* of rights and interests in relation to land that exist under traditional law and custom.[31]

8.28 The majority expressed the view that identification of the rights and interests is necessary in order to determine extinguishment.[32] While the issue of extinguishment is outside the Terms of Reference for this Inquiry, whether a native title right is extinguished or merely regulated is relevant to the scope—or content—of native title.[33]

8.29 Some stakeholders are critical of the 'bundle of rights' doctrine:

> The bundle of rights concept of property derives in mainstream Anglo-American legal philosophy and one may well question what place it has in native title, particularly because native title is viewed by Aboriginal and Torres Strait Islander people as being holistic in nature.[34]

8.30 Some commentators regard such an approach to native title as one of 'definitional over-specificity'.[35] Sean Brennan has argued that the High Court's prioritisation of fact-specific laws and customs has negated a more holistic conception of native title.[36]

8.31 Some submissions reflected on how conceiving of the 'nature' of native title as a bundle of rights could influence the 'content' and exercise of native title. For the former Aboriginal and Torres Strait Islander Social Justice Commissioner, conceiving of the nature of native title as a bundle of rights inhibits economic development.[37] North Queensland Land Council submitted that the bundle of rights doctrine 'should not be permitted to exclude the inclusion of commercial native title rights and interests in the NTA'.[38]

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29 *Western Australia v Brown* [2014] HCA 8 (12 March 2014) [36], citing *Western Australia v Ward* (2002) 213 CLR 1, [95].
30 Ibid [76] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
31 Ibid [95].
32 Ibid [94], [468].
33 See, eg, *Akiba v Commonwealth* (2013) 250 CLR 209.
34 See, eg, North Queensland Land Council, *Submission 17*.
35 Paul Finn, '*Mabo* into the Future: Native Title Jurisprudence' (2012) 8 *Indigenous Law Bulletin* 5, 8 ('the fragmentation of native title rights and interests … results, in my view, in the overdefinition, and subdivision of, individual rights and interests and in the dilution of a proprietary conception of native title'); Simon Young, *Trouble with Tradition: Native Title and Cultural Change* (Federation Press, 2008) 297, 361–2.
36 Sean Brennan, 'Statutory Interpretation and Indigenous Property Rights' (2010) 21 *Public Law Review* 239, 259.
37 Australian Human Rights Commission, *Submission 1*.
38 North Queensland Land Council, *Submission 17*.

The content of native title rights and interests

8.32 A broader specification of native title rights is evident in *Akiba*. The High Court held in *Akiba* that native title rights and interests could comprise a 'right to access resources and to take for any purpose resources' in the native title claim area.[39] The right could be exercised for commercial or non-commercial purposes.[40]

8.33 In the High Court, French CJ and Crennan J held that the native title right should be conceived as a widely-framed right.[41] They observed that '[t]he native title right so framed could be exercised in a variety of ways, including by taking fish for commercial or trading purposes'.[42] The 'sectioning of the native title right into lesser rights or "incidents" defined by the various purposes which it might be exercised' was unnecessary as '[t]he lesser rights would be as numerous as the purposes that could be imagined'.[43]

8.34 Similarly, Hayne, Kiefel and Bell JJ observed that

> The relevant native title right that was found to exist was a right to access and to take resources from the identified waters for *any* purpose. It was wrong to single out taking those resources for sale or trade as an 'incident' of the right that had been identified. The purpose which the holder of that right may have had for exercising the right on a particular occasion was not an incident of the right; it was simply a circumstance attending its exercise.[44]

8.35 Their Honours continued:

> Focusing upon the *activity* described as 'taking fish and other aquatic life for sale or trade', rather than focusing upon the relevant native title *right*, was apt to, and in this case did, lead to error.[45]

8.36 In *Western Australia v Brown* the High Court stated that '[t]he nature and content of a right is not ascertained by reference to the way it has been, or will be, exercised'.[46]

8.37 In the reasons for judgment in respect of the Pilki People's and the Birriliburu People's native title claims, the Federal Court remarked that

> it is not necessary as a matter of logic to prove that activity in conformity with traditional laws and customs has taken place in order to establish that a right exists. In many cases, proof of activities undertaken pursuant to laws or customs will assist in proving the existence of the right. But evidence of the activity is not necessary. Thus, if the applicants had not shown that they traditionally accessed and took resources for commercial purposes, they could still show that they had the right to do so if there were traditional laws or customs which gave them such a right. In the same way, the

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39 *Akiba v Commonwealth* (2013) 250 CLR 209.
40 Ibid, [21] (French CJ and Crennan J); [67] (Hayne, Kiefel and Bell JJ) ('the relevant native title right that was found in this case was a right to take resources for *any* purpose').
41 Ibid [21].
42 Ibid [1].
43 Ibid [21].
44 Ibid [66].
45 Ibid [67].
46 *Western Australia v Brown* [2014] HCA 8 (12 March 2014) [33].

> holders of freehold do not need to show that they have leased out their properties to prove that they have the right to do so. If there is evidence of witnesses accepted by the Court that there are traditional laws and customs which give a right to access and take for any purpose the resources of the country, then the right is established even if there is no evidence of trading activity.[47]

8.38 The determination that was made in *Akiba* specified the non-existence of native title rights and interests in minerals and petroleum resources.[48] The High Court in *Ward* held that native title rights and interests do not include rights to statutory minerals and petroleum.[49] The Minerals Council of Australia submitted that

> minerals ownership (and ownership of some other natural resources including some water rights) is vested in the Crown in Australia imposing limits on the extent to which commercial rights and interests are able to be recognised.[50]

Confirming the nature and content of native title rights and interests

Proposal 8–1 Section 223(2) of the *Native Title Act* should be repealed and substituted with a provision that provides:

> Without limiting subsection (1) but to avoid doubt, ***native title rights and interests*** in that subsection:
>
> (a) comprise rights in relation to any purpose; and
>
> (b) may include, but are not limited to, hunting, gathering, fishing, commercial activities and trade.

8.39 Given the importance of the evidential basis in establishing the content of native title rights and interests, the ALRC proposes that the express inclusion of a right for any purpose in s 223(2) will allow sufficient flexibility to cover a variety of factual circumstances and will retain emphasis on the content being derived from Aboriginal people and Torres Strait Islander law and custom.

8.40 Since *Akiba* it is clear that a native title determination may include a 'right to access resources and to take for any purposes resources in the native title areas',[51] if the evidence supports it, and that the 'right so framed could be exercised in a variety of

47 *Willis on behalf of the Pilki People v Western Australia* [2014] FCA 714 (4 July 2014) [118]; *BP (Deceased) on behalf of the Birriliburu People v Western Australia* [2014] FCA 715 (4 July 2014) [89].

48 *Akiba v Commonwealth* (2013) 250 CLR 209, [14].

49 *Western Australia v Ward* (2002) 213 CLR 1, [22] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

50 Minerals Council of Australia, *Submission 8*. Some submissions called for the position to be reviewed. See, eg, J Altman, *Submission 27*; V Marshall, *Submission 11*. Another called for the statute to be amended to include 'a commercial right to take and use minerals wholly owned by the Crown': North Queensland Land Council, *Submission 17*.

51 Note that the right was non-exclusive and that minerals and petroleum resources were excluded from the scope.

ways, including by taking fish for commercial or trading purposes'.[52] In *Akiba*, '[n]o distinct or separate native title right to take fish for sale or trade was found'.[53]

8.41 The key question for this Inquiry is whether there should be statutory 'clarification'[54] of that case law. The ALRC proposes a statutory confirmation of the current statement of the law[55] in *Akiba* as a platform for the courts to assess the evidence in each instance to determine the content of the native title rights and interests. The proposed reform of s 223(2) reflects the current case law.

Is statutory confirmation necessary?

Reasons for confirmation

8.42 The ALRC considers that statutory confirmation of the case law in *Akiba* is warranted because it:

- would accord with the Preamble and Objects of the *Native Title Act*;
- may assist in unlocking the economic potential of native title; and
- may assist in ensuring that the practice of all parties is in accordance with the stated case law and in accordance with the Preamble of the Act.

8.43 First, the ALRC considers that statutory confirmation would accord with the principles of statutory construction outlined in Chapter 5 in respect of s 223.[56] Such a statutory confirmation accords with Principle 1—acknowledging the importance of the recognition of native title[57]—and with Principle 4—consistency with international law.[58]

8.44 Secondly, the ALRC considers that statutory confirmation that native title is a right for any purpose and that such rights may include commercial activities, may assist in unlocking the economic potential of native title. This reason accords with

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52 *Akiba v Commonwealth* (2013) 250 CLR 209, [1] (French CJ and Crennan J).

53 Ibid [67] (Hayne, Kiefel and Bell JJ). Rather, the purpose, which the holder of the claimed right may have had for exercising the right on a particular occasion, 'was simply a circumstance attending its exercise': Ibid [66].

54 The ALRC considers that it is more appropriate to speak of 'confirmation' rather than 'clarification' of the law, which is the word used in the Terms of Reference for this Inquiry. This is because the Terms of Reference were issued on 3 August 2013—four days before the High Court of Australia handed down its judgments in *Akiba v Commonwealth* (2013) 250 CLR 209. While it might have been said, on 3 August 2013, that the law needed 'clarification', the High Court has 'clarified' the law so it is apt to speak of whether statutory 'confirmation' of that case law is required.

55 The ALRC is mindful of the High Court's decision that s 12 of the *Native Title Act* as enacted was invalid: *Western Australia v Commonwealth* (1995) 183 CLR 373. Section 12 had stated 'Subject to this Act the common law of Australia in respect of native title has, after 30 June 1993, the force of a law of the Commonwealth'. It is not intended that a revised s 223(2) would seek to operate in the way that s 12 sought to operate—that is, by making the common law immune from a valid State law.

56 See Ch 1 and 'Approach to statutory construction of s 223' in Ch 5.

57 Principle 1 provides 'Reform should acknowledge the importance of the recognition and protection of native title for Aboriginal and Torres Strait Islander people and the Australian community'.

58 Principle 4 provides 'Reform should reflect Australia's international obligations in respect of Aboriginal and Torres Strait Islander people, and have regard to the *United Nations Declaration on the Rights of Indigenous Peoples*'.

Principle 5—supporting sustainable futures. There was stakeholder support for this rationale.[59] Many stakeholders submitted that there was a need for native title to afford Aboriginal and Torres Strait Islander peoples—and Prescribed Bodies Corporate[60]—economic development opportunities.[61] AIATSIS submitted that including economic rights 'will help unlock some of the potential for native title holders to freely pursue the aspirations they hold for their traditional lands and waters'.[62] Similarly, others submitted that statutory confirmation 'would help native title groups that have achieved native title determinations become more future-focused'.[63]

8.45 Thirdly, the ALRC considers that statutory confirmation may assist in ensuring that the practice of all parties is in accordance with the stated case law and in accordance with the Preamble. Again, this reason reflects Principle 1.[64]

8.46 The view that statutory confirmation may assist in ensuring that the practice of all parties is in accordance with the stated case law was supported by a number of stakeholders.[65] Angus Frith and Maureen Tehan submitted:

> While the recent decisions in *Akiba* and *Brown* do support arguments that native title rights and interests should be sufficiently broadly conceived to encompass rights to use land and waters subject to native title for commercial purposes, they may not suffice to ensure that native title rights and interests recognised in the future do enable commercial activities.
>
> The High Court has stated that if rights exist they can be exercised in the manner that the native title group wants to exercise them subject to regulation or extinguishment. However, there is no necessary implication that native title rights and interests can be exercised in a commercial manner. This should be made explicit in the *NTA*.[66]

8.47 Some native title representative bodies submitted that the state governments, with whom they had been negotiating, had been unwilling to accept that native title

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59 AIATSIS, *Submission 36*; Kimberley Land Council, *Submission 30*; J Altman, *Submission 27*; Native Title Services Victoria, *Submission 18*; Cape York Land Council, *Submission 7*; Australian Human Rights Commission, *Submission 1*; National Native Title Council, Submission No 14 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, 2011.

60 Cape York Land Council, *Submission 7* ('rights of a commercial nature are potentially one of the mechanisms that could be employed to advance the future economic development of these organisations').

61 AIATSIS, *Submission 36*; J Altman, *Submission 27*; Native Title Services Victoria, *Submission 18*; Just Us Lawyers, *Submission 2*; Australian Human Rights Commission, *Submission 1*; Yamatji Marlpa Aboriginal Corporation, Submission No 8 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, July 2011; Australians for Native Title and Reconciliation, Submission No 6 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, June 2011.

62 AIATSIS, *Submission 36*. See also National Native Title Council, Submission No 14 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, 2011.

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

64 See Ch 1.

65 Central Desert Native Title Services, *Submission 26*; A Frith and M Tehan, *Submission 12*; Cape York Land Council, *Submission 7*.

66 A Frith and M Tehan, *Submission 12* (footnotes omitted).

included rights and interests of a commercial nature.[67] Cape York Land Council expressed the view that '[t]here is evidence that groups across Cape York were involved in trade and barter at the time of sovereignty'.[68] However, because of the State of Queensland's view of the native title jurisprudence, prior to the High Court's decision in *Akiba*, commercial rights were unable to be recognised.[69] It submitted:

> Although there is case law to suggest that the purpose for which a holder of a right may have for exercising that right is not an incident of the right, the practical reality is that without clarification, it is likely that the State will continue to require non-commercial qualifications on non-exclusive native title rights and interests.[70]

8.48 Central Desert Native Title Services submitted that a number of native title claims in which it had been involved had asserted native title rights to take and use resources.[71] However, the State of Western Australia has 'not been prepared to agree to such a right', and 'attempted to limit the right to take resources for "non-commercial" or "domestic purposes only"'. It referred to the native title claims of the Pilki People and the Birriliburu People. The Federal Court subsequently found that the determinations in these claims should include a 'native title right to access and take for any purpose the resources of the determination area'.[72]

8.49 Governments submitted that their practice in respect of resolving native title claims was commendable.[73] The Western Australian Government submitted that its 'consistent record' of recognising native title by consent contradicts the premise that the Act's provisions do not deliver just outcomes for Indigenous Australians.[74] The South Australian Government submitted that six of the claims that had been resolved by consent determination in that jurisdiction 'involved comprehensive settlement agreements that address broader issues including compensation, sustainability of the Prescribed Body Corporate, and future act issues'.[75]

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67 Central Desert Native Title Services, *Submission 26*; Cape York Land Council, *Submission 7*.

68 Cape York Land Council, *Submission 7*. See also Cape York Land Council, Submission No 5 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, July 2011 ('In our experience, there is ample evidence to support the existence of trade and other commercial rights as part of the traditional laws and customs of Cape York groups').

69 Cape York Land Council, Submission No 5 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, July 2011. See also Cape York Land Council, *Submission 7*.

70 Cape York Land Council, *Submission 7*.

71 Central Desert Native Title Services, *Submission 26*. This may have been an uncommon practice amongst native title representative bodies. See Cape York Land Council, *Submission 7* ('because of the development of case law and Queensland native title determination precedents limiting the exercise of rights to non-commercial uses, that evidence has not been routinely prepared and commercial rights have not been routinely pursued').

72 *Willis on behalf of the Pilki People v Western Australia* [2014] FCA 714 (4 July 2014) [135]; *BP (Deceased) on behalf of the Birriliburu People v Western Australia* [2014] FCA 715 (4 July 2014) [104].

73 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*.

74 Western Australian Government, *Submission 20*.

75 South Australian Government, *Submission 34*.

Reasons against confirmation

8.50 Some stakeholders were opposed to a statutory confirmation, considering that it:

- is unnecessary;
- will cause uncertainty;[76] and
- will open the floodgates.

8.51 Some stakeholders opposed amendment of the *Native Title Act*, considering such statutory confirmation to be unnecessary given that case law, namely *Akiba*, already so provides.[77] The Law Society of Western Australia was of the view that the decision in *Akiba* 'provides a sufficient statement of the law to deal with the issue of the possibility of native title rights comprising commercial interests'.[78] The Chamber of Minerals and Energy of Western Australia (CME) made a similar point, stating '[i]n light of this, it is unclear why amendments to the [Act] to expressly recognise commercial native title rights and interests are required'.[79] Statutory confirmation was seen as unnecessary given that the recognition of commercial rights will depend on the evidence.[80]

8.52 A few stakeholders, notably those with minerals and energy resource interests, were opposed to amendment of the statute because they considered that such an amendment would introduce uncertainty.[81] The Association of Mining and Exploration Companies (AMEC) expressed concern that uncertainties could outweigh any benefits of the proposal.[82] The CME expressed concern about unintended consequences.[83] Both the CME and the Minerals Council of Australia submitted that there was a need for the impacts of any change to be clearly understood and quantified.[84]

8.53 Some state governments raised a 'floodgates' argument—that is, a fear that groups may seek to re-open existing determinations.[85] The South Australian Government submitted that,

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76 By contrast, the Cape York Land Council, which was in favour of statutory confirmation of the law stated in *Akiba*, was of the view that '[r]egulatory regimes would still address matters such as sustainability, safety and protection of the environment': Cape York Land Council, *Submission 7*.

77 Queensland Government Department of Natural Resources and Mines, *Submission 28*; Chamber of Minerals and Energy of Western Australia, *Submission 21*; Western Australian Government, *Submission 20*; Law Society of Western Australia, *Submission 9*.

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

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

80 Northern Territory Government, *Submission 31*; Western Australian Fishing Industry Council, *Submission 23*; Chamber of Minerals and Energy of Western Australia, *Submission 21*; Western Australian Government, *Submission 20*.

81 Chamber of Minerals and Energy of Western Australia, *Submission 21*; Association of Mining and Exploration Companies, *Submission 19*.

82 Association of Mining and Exploration Companies, *Submission 19*.

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

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

85 South Australian Government, *Submission 34*. See also 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. Note that neither submission used the term 'floodgates'. Section 13(4) of the *Native Title Act* currently provides for the variation or revocation of a

> Were the NTA to be amended to make commercial rights easier to establish, this would change the basis on which native title has been approached for 20 years and would most probably result in a number of groups seeking to re-open existing determinations.[86]

Supporting sustainable futures

8.54 Some stakeholders submitted that more than statutory confirmation is needed to deliver real economic returns to Aboriginal and Torres Strait Islander peoples.[87] Some stakeholders outlined other things which they considered could be done to create real economic benefit, such as: amending all existing native title determinations 'to specify that the recognised native title rights and interests can be exercised in a commercial manner';[88] amending the future act regime;[89] and enacting a comprehensive broader land settlement framework.[90] Both the future act regime and the possibility of the enactment of a land settlement framework are outside the scope of this Inquiry.[91]

8.55 Further, a number of submissions advocated consistency with,[92] or drew upon key rights[93] which are provided in the *United Nations Declaration on the Rights of Indigenous Peoples*.[94]

ALRC conclusion

8.56 The ALRC proposes that there be a statutory confirmation of the wording in the case law.[95] The ALRC considers that a statutory confirmation would provide overarching principles for the determination of native title. Further, amending the provision to reflect current case law accords with the original purpose of the provision in that the statute will continue to provide examples of the type of rights and interests

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determination and s 13(5) outlines the two grounds. These are: '(a) that events have taken place since the determination was made that have caused the determination no longer to be correct; or (b) that the interests of justice require the variation or revocation of the determination'.

86 South Australian Government, *Submission 34*.

87 The National Farmers' Federation opposed a statutory confirmation. National Farmers' Federation, *Submission 14* ('Indigenous people require a proprietary interest in land to derive a real economic benefit. Native title does not and cannot deliver that outcome'). See also Northern Territory Government, *Submission 31*; Western Australian Government, *Submission 20*. By contrast, others expressed the view that while a statutory confirmation may be of some use, outcomes would still be constrained: Central Desert Native Title Services, *Submission 26*; National Native Title Council, *Submission 16*.

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

89 Native Title Services Victoria, *Submission 18*; National Native Title Council, *Submission 16*.

90 National Native Title Council, *Submission 16*. See Ch 3.

91 See Ch 1 and Ch 2.

92 National Congress of Australia's First Peoples, *Submission 32*; J Altman, *Submission 27*; V Marshall, *Submission 11*; Australian Human Rights Commission, *Submission 1*. For example, the Australian Human Rights Commission referred to the relevant provision in UNDRIP that provides that 'Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions': *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st Sess, 107th Plen Mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) art 31. The issue of the protection or exercise of cultural knowledge is addressed later in this chapter.

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

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

95 *Western Australia v Brown* [2014] HCA 8 (12 March 2014); *Akiba v Commonwealth* (2013) 250 CLR 209.

that might comprise native title. The ALRC is mindful that the content of the native title rights and interests would still need to be established on the facts in each case. Respondents may still challenge whether the evidence substantiates that the claimed native title right and interest can include a right to take resources for any purpose, such as for commercial activities.

8.57 The ALRC's approach in proposing statutory confirmation is in contrast to the ALRC's approach to the consideration of 'whether there should be … confirmation that "connection with the land and waters" does not require physical occupation or continued or recent use'.[96] The ALRC considers that statutory confirmation of the case law in *Akiba* is warranted as this case law is evolving—with only a couple of Federal Court decisions in this regard[97]—compared with the case law pertaining to physical occupation.[98]

Rights in relation to any purpose

8.58 Paragraph (a) of the ALRC's proposal provides statutory confirmation of the case law statement that native title rights and interests may comprise rights in relation to any purpose. This reflects the High Court's stated view of the nature of the right.

8.59 A number of stakeholders supported the broadly defined, purpose-based native title right—namely the right to take resources.[99] Central Desert Native Title Services submitted that the *Native Title Act*

> must be taken to recognise the existence of broadly stated rights which may be exercised in particular ways or for particular purposes without listing every way in which, or every activity by which, a right may be exercised, for example, the right to take and use resources without specifying how that right is to be, or may be, exercised.[100]

8.60 AMEC contrasted the characterisation of rights in relation to purpose, submitting:

> rights and interests 'of a commercial nature' defines a category of native title rights by reference to their purpose. This contrasts to the accepted conceptualisation of native title as a 'bundle of rights' which are primarily defined by their content rather than their purpose.[101]

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96 See Ch 6.

97 See, eg, *Willis on behalf of the Pilki People v Western Australia* [2014] FCA 714 (4 July 2014); *BP (Deceased) on behalf of the Birriliburu People v Western Australia* [2014] FCA 715 (4 July 2014).

98 See Ch 6.

99 See, eg, AIATSIS, *Submission 36*; J Altman, *Submission 27*; Central Desert Native Title Services, *Submission 26*; Native Title Services Victoria, *Submission 18*. See also Lisa Strelein, 'The Right to Resources and the Right to Trade—Native Title: A Vehicle for Change and Empowerment?' (Paper Presented at UNSW Symposium, 5–6 April 2013) 13 ('it could be that the appropriate approach, building on the formulation of right by Finn J in *Akiba*, is to clarify that the enjoyment of native title rights are not limited by purpose').

100 Central Desert Native Title Services, *Submission 26*.

101 Association of Mining and Exploration Companies, *Submission 19*.

8.61 The question of how Aboriginal rights should be designated has arisen for decision in jurisdictions such as Canada.[102]

8.62 The ALRC considers that the *Native Title Act* should be amended to make clear that rights and interests comprise rights in relation to any purpose to avoid the potential confusion over the characterisation of native title rights.

Indicative activities for which a right might be exercised

8.63 Paragraph (b) of the ALRC's proposal provides that native title rights and interests may include, but are not limited to, hunting, gathering, fishing, commercial activities and trade. That is, this aspect of the proposal provides an indicative listing of examples or types of native title rights and interests.

8.64 Section 223(2) of the *Native Title Act* provides that native title rights and interests can include hunting, gathering, or fishing, rights and interests. The ALRC's proposal would continue to provide expressly that native title may encompass such rights and interests.

8.65 The ALRC considers that a revised s 223(2) should include reference to both commercial activities and trade. A number of stakeholders, including a large number of native title representative bodies, supported the amendment of the *Native Title Act* so that it expressly states that native title rights and interests can include rights and interests of a commercial nature.[103] Further, a number of stakeholders supported the express inclusion of 'trade' as indicative of commercial activities under law and custom.[104]

8.66 While 'commercial' is a term that is capable of various meanings, typically it has been linked to native title rights to take resources for trade or exchange.[105] What is meant by 'trade'? Some submissions referred to anthropological and historical

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102 *Lax Kw'alaams Indian Band v Canada* [2011] 3 SCR 535.

103 See, eg, AIATSIS, *Submission 36*; Kimberley Land Council, *Submission 30*; Native Title Services Victoria, *Submission 18*; North Queensland Land Council, *Submission 17*; National Native Title Council, *Submission 16*; A Frith and M Tehan, *Submission 12*; Cape York Land Council, *Submission 7*; Australian Human Rights Commission, *Submission 1*.

104 See, eg, Native Title Services Victoria, *Submission 18*; North Queensland Land Council, *Submission 17*; National Native Title Council, *Submission 16*; A Frith and M Tehan, *Submission 12*; Cape York Land Council, *Submission 7*; National Native Title Council, Submission No 14 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, 2011; Yamatji Marlpa Aboriginal Corporation, Submission No 8 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, July 2011; 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.

105 See, eg, Native Title Amendment (Reform) Bill 2014 cl 19; Native Title Amendment (Reform) Bill (No 1) 2012 cl 19. The proposed amendment for s 223(2) would provide that native title rights and interests include 'the right to trade and other rights and interests of a commercial nature'.

evidence of trade in various parts of Australia,[106] including international trade.[107] AIATSIS submitted:

> [Dale] Kerwin, amongst others, has detailed extensive trade, including in pituri, ochre, furs, stone, shells, songs and stories, and notes the significance of market places/trade centres as being central to large ceremonial gatherings.
>
> Daryl Wesley and Mirani Lister … argue that glass beads were received from Macassan traders in exchange for fishing rights in areas off the coast of Arnhem land.[108]

8.67 For some stakeholders, such trade and exchange exhibited by Aboriginal and Torres Strait Islander peoples 'aligns to [a] general commercial mindset'.[109] In Cape York Land Council's view, it is

> logical that if native title rights and interests were traditionally exercised in a manner which involved trade or barter, then rights and interests of a commercial nature should be afforded to native title claimants.[110]

Adaptation and native title

8.68 Native title rights are understood as being possessed under laws and customs with origins in the period prior to annexation.[111] While there can be some degree of change and adaptation of the traditional *laws and customs*, there cannot be new native title *rights and interests*.[112] The Full Court of the Federal Court in *Bodney v Bennell* stated that '[s]o long as the changed or adapted laws and customs continue to sustain the same rights and interests that existed at sovereignty, they will remain traditional'.[113] In Chapter 5, the ALRC proposes that there be explicit acknowledgment in the *Native Title Act* that traditional laws and customs, under which native title rights and interests are possessed, may adapt, evolve or otherwise develop.[114]

8.69 Views vary as to what might be included in any definition of 'commercial' and what could have evolved and adapted. For the National Farmers' Federation, the commercial exploitation of activities done in accordance with traditional laws and customs, such as hunting and gathering, is 'one thing', but they see the 'expan[sion of] the range of activities to encompass broad commercial rights' as quite another, and one

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106 AIATSIS, *Submission 36*; North Queensland Land Council, *Submission 17*; Cape York Land Council, *Submission 7*; Just Us Lawyers, *Submission 2*. See also Yamatji Marlpa Aboriginal Corporation, Submission No 8 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, July 2011.

107 AIATSIS, *Submission 36*; North Queensland Land Council, *Submission 17*; Just Us Lawyers, *Submission 2*. See also 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.

108 AIATSIS, *Submission 36*.

109 North Queensland Land Council, *Submission 17* ('a general understanding of trade, exchange and commerce, should be sufficient to demonstrate that commercial native title rights and interests were being exercised').

110 Cape York Land Council, *Submission 7*.

111 Perry and Lloyd, above n 10, 13.

112 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [43] (Gleeson CJ, Gummow and Hayne JJ).

113 *Bodney v Bennell* (2008) 167 FCR 84, [74].

114 See Proposal 5–1 in Ch 5.

that they do not support.[115] By contrast, Native Title Services Victoria submitted that '[w]hen linked to an "unfrozen" definition of traditional, rights that are commercial in nature would not then imply a time-bound and stagnated view of the value of the interest'.[116] An example here is the use of Aboriginal practices of fire management in northern Australia which formed the basis for generating carbon credits for native title holders under the carbon farming legislation.[117]

8.70 In other jurisdictions there have been debates about the evolution and adaptation of indigenous rights to land and waters.[118] In New Zealand, there have been several claims to rights in waters with a commercial aspect[119] and cases seeking to establish commercial activities around a 'right to development'.[120] In 2013, the British Columbia Court of Appeal affirmed the existence of an Aboriginal commercial fishing right.[121] Major agreements[122] and settlements[123] with indigenous peoples often include a component that allows for commercial utilisation of land and waters.

8.71 Just Us Lawyers submitted:

> If it is still traditional to hunt with a rifle rather than a spear, then the same logic should apply to commercial native title rights and interests. The source of the right to trade is in the ancestral connection to the land from where the commodity is obtained.[124]

8.72 Dr Lisa Strelein has argued that the decision in *Akiba* at first instance is 'important', because

> Finn J held that once a determination had been made that law and custom supported the right to take resources, the use made of those resources was irrelevant … That is, where the laws of the society in question support a right to take for any purpose available at the time sovereignty was asserted, there is no barrier to the development of new modes of use and taking advantage of new opportunities and purposes that may arise.[125]

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115 National Farmers' Federation, *Submission 14*.

116 Native Title Services Victoria, *Submission 18*.

117 *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth). See also J Altman, *Submission 27*.

118 See, eg, *Lax Kw'alaams Indian Band v Canada* [2011] 3 SCR 535.

119 Jacinta Ruru, 'Indigenous Restitution in Settling Water Claims: The Developing Cultural and Commercial Redress Opportunities in Aotearoa, New Zealand' (2013) 22 *Pacific Rim Law & Policy Journal* 342.

120 *Ngai Tahu Maori Trust Board v Director General of Conservation* [1995] 3 NZLR 553.

121 *Ashousaht Indian Band and Nation v Canada (A-G)* [2013] BCCA 300.

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

123 One of the most well known settlements is the 'Sealords deal', where compensation under a Waitangi Tribunal settlement facilitated purchase of shares in a commercial fishery on behalf of New Zealand Maori. See, Shane Heremaia, 'Native Title to Commercial Fisheries in Aotearoa/New Zealand' (2000) 4 *Indigenous Law Bulletin* 15.

124 Just Us Lawyers, *Submission 2*. They observed that a 'reasonable' balance will need to be struck.

125 Lisa Strelein, 'The Right to Resources and the Right to Trade—Native Title: A Vehicle for Change and Empowerment?' (Paper Presented at UNSW Symposium, 5–6 April 2013) 9 (submitted as an attachment to AIATSIS, *Submission 36*).

8.73 Chapter 5 contains further detail about the courts' approach to statutory construction of s 223. Notably where legislation is identified as being beneficial and remedial, the High Court has stated that such legislation should be given a 'fair, large and liberal' interpretation, rather than one which is 'literal or technical'.[126]

'Commercial activities' and 'trade' should not be defined in the Act

Proposal 8–2 The terms 'commercial activities' and 'trade' should not be defined in the *Native Title Act*.

8.74 The ALRC considers that the terms 'commercial activities' and 'trade' should not be defined in the *Native Title Act* as it is unnecessary to define prescriptively the scope of commercial activities and trade. Statutory definitions of 'commercial activities' and 'trade' may introduce inflexibility which may not be warranted, and may actually be unhelpful, given the fact dependent nature of native title claims.

8.75 In the Issues Paper, the ALRC asked, in the event that the *Native Title Act* defines 'native title rights and interests of a commercial nature', what the definition should contain.[127] Some stakeholders submitted that any definition should be broadly defined,[128] while others submitted that prescription of what is meant by commercial activities and trade is unnecessary,[129] impossible[130] or possibly distracting.[131] Native Title Services Victoria was of the view that prescription was unnecessary because rights that are commercial in nature 'will necessarily flow from traditional law and custom'.[132] The South Australian Government, a stakeholder that opposed statutory confirmation, also made this point. In its view, it would be futile to prescribe the rights: the definition of commercial 'cannot be comprehensively codified, as each example of any ongoing traditional commerce will turn on its own facts'.[133]

8.76 As outlined earlier, native title rights and interests 'derive from' the traditional laws and customs of the relevant Indigenous communities.[134] The nature and content of native title is a question of fact that is based on the relevant law and custom.

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

127 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Issues Paper No 45 (2013) Q 14.

128 Kimberley Land Council, *Submission 30*; North Queensland Land Council, *Submission 17*.

129 Native Title Services Victoria, *Submission 18*; V Marshall, *Submission 11*.

130 South Australian Government, *Submission 34*.

131 Western Australian Fishing Industry Council, *Submission 23* ('the real question is how rights and interests are managed not how they are defined').

132 Native Title Services Victoria, *Submission 18*.

133 South Australian Government, *Submission 34*.

134 Perry and Lloyd, above n 10, 3; *Western Australia v Ward* (2002) 213 CLR 1, [20] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

Protection or exercise of cultural knowledge?

Question 8–1 Should the indicative listing in the revised s 223(2)(b), as set out in Proposal 8–1, include the protection or exercise of cultural knowledge?

Question 8–2 Should the indicative listing in the revised s 223(2)(b), as set out in Proposal 8–1, include anything else?

8.77 The interpretation of s 223(1) has excluded the protection or exercise of cultural knowledge as a native title right and interest that can be recognised by the common law. The ALRC is interested in views on whether this exclusion is appropriate given the enhanced understanding of the links between Aboriginal and Torres Strait Islander laws and customs as expressed through cultural knowledge and connection with land and waters. Section 211 includes a savings provision for cultural or spiritual activities. Should the indicative listing in any revised s 223(2) include the protection or exercise of cultural knowledge? A reversal of the current interpretation may influence the content of commercial rights and interests.

8.78 The term 'cultural knowledge' may encompass a number of different things. In *Ward*, the majority of the High Court, in joint reasons, complained of the 'imprecision' of the term.[135] In that appeal, the submissions referred to 'such matters as the inappropriate viewing, hearing or reproduction of secret ceremonies, artworks, song cycles and sacred narratives'.[136]

8.79 A submission to this Inquiry used the term 'traditional knowledge' rather than 'cultural knowledge'.[137] The concept of 'traditional knowledge' is 'contested and there is ongoing debate about the merits of various definitions of the subject matter'.[138]

8.80 In *Ward*, the majority of the High Court held that the *Native Title Act* cannot protect 'a right to maintain, protect and prevent the misuse of cultural knowledge' if it goes beyond denial or control of access to land or waters.[139] The opening words of s 223(1) of the *Native Title Act* require native title rights and interests to be 'in relation to' land or waters.[140] Section 223(1)(b) requires the Aboriginal people or Torres Strait

135 *Western Australia v Ward* (2002) 213 CLR 1, [58] (Gleeson CJ, Gaudron, Gummow and Hayne JJ). See also Kirby J at [576] ('The right to protect cultural knowledge was not well defined in submissions before this Court'; 'I agree with the joint reasons that there is a need for a degree of specificity in determining such claims').

136 Ibid [58].

137 North Queensland Land Council, *Submission 17*.

138 Christopher Antons, *Traditional Knowledge, Traditional Cultural Expressions and Intellectual Property Law in the Asia-Pacific Region* (Kluwer, 2009) 1.

139 *Western Australia v Ward* (2002) 213 CLR 1, [468] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

140 Ibid [577] (Kirby J, viewing the key issue as pertaining to the opening words of s 223(1)); *Western Australia v Ward* (2000) 99 FCR 316, [666] (Beaumont and von Doussa JJ, using the language of 'in relation to'). North J did not specify a particular part of s 223(1) as the object of his focus.

Islanders, by their traditional laws acknowledged and their traditional customs observed, to have a 'connection with' the land or waters.[141]

8.81 The majority of the High Court, stated in a joint judgment:

> To some degree, for example respecting access to sites where artworks on rock are located, or ceremonies are performed, the traditional laws and customs which are manifested at these sites answer the requirement of connection with the land
>
> …
>
> However, it is apparent that what is asserted goes beyond that to something approaching an incorporeal right akin to a new species of intellectual property to be recognised by the common law under par (c) of s 223(1). The 'recognition' of this right would extend beyond denial or control of access to land held under native title. It would, so it appears, involve, for example, the restraint of visual or auditory reproductions of what was to be found there or took place there, or elsewhere.[142]

8.82 Native title rights and interests in respect of cultural knowledge—variously described[143]—had been claimed in some early cases. In *Bulun Bulun v R & T Textiles Pty Ltd*, von Doussa J remarked that the pleadings 'appear to assert that intellectual property rights of the kind claimed by the applicants were an incident of native title in the land',[144] 'such that they constituted some recognisable interest in the land itself'.[145] However, that was not a case for the determination of native title[146] and the claim with respect to native title was not pressed.[147]

8.83 In *Commonwealth v Yarmirr*, the majority of the High Court observed that, in the course of argument before them, there had been no discussion about what was meant by the rights and interests 'to visit and protect places within the claimed area which are of cultural or spiritual importance' that had been included in the determination 'or how effect might be given to a right of access to "protect" places or "safeguard" knowledge'. They said nothing more about the issues.[148]

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141 *Western Australia v Ward* (2002) 213 CLR 1, [19], [60] (Gleeson CJ, Gaudron, Gummow and Hayne JJ, viewing the key issue as pertaining to s 223(1)(b)).

142 Ibid [59] (Gleeson CJ, Gaudron, Gummow and Hayne JJ). Olney J made a similar point in *Yarmirr v Northern Territory [No 2]* (1998) 82 FCR 533, 590 ('[T]he right and duty according to traditional law and custom to safeguard [cultural] knowledge can only be classed as a "right or interest in relation to land or waters" to the extent that the exercise of the right and duty involves the physical presence of relevant persons on or at the estate or site in question. If … the need to safeguard the cultural knowledge associated with a site in the claimed area requires, for example, a senior yuwurrumu member to visit the site with those who it is his obligation to teach the culture, then the safeguarding of the cultural knowledge could fairly be said to be a right in relation to the site, and thus in relation to land or waters').

143 For example, von Doussa J used the language of 'traditional ritual knowledge' or 'ritual knowledge' rather than 'cultural knowledge' in his judgment in *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 86 FCR 244.

144 Ibid 254.

145 Ibid 256.

146 Ibid 255–6.

147 Ibid 256.

148 *Commonwealth v Yarmirr* (2001) 208 CLR 1, [2] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

8.84 The ALRC is aware that '[f]or Indigenous people there are unbreakable links between their knowledge systems, the land and waters, and its resources'.[149] Further, for such communities, 'spiritual or religious obligations could infiltrate almost all undertakings, including transactions, transfers, exchanges and activities undertaken for value or benefit'.[150] Frith and Tehan quoted WEH Stanner, who, in 1968, said, '[n]o English words are good enough to give a sense of the links between an Aboriginal group and its homeland'.[151]

8.85 In both the Full Court of the Federal Court and the High Court, the majority acknowledged that 'the relationship of Aboriginal people to their land has a religious or spiritual dimension'.[152] In their joint reasons, Gleeson CJ, Gaudron, Gummow and Hayne JJ remarked:

> It is a relationship which sometimes is spoken of as having to care for, and being able to 'speak for', country. 'Speaking for' country is bound up with the idea that, at least in some circumstances, others should ask for permission to enter upon country or use it or enjoy its resources … 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.[153]

8.86 Different views were expressed about the appropriate statutory construction of s 223(1) in respect of cultural knowledge in strong dissenting judgments in both the High Court[154] and in the Full Federal Court.[155] In the Full Federal Court, North J discussed an extract from the evidence—an anthropologist's report—that showed that the respective knowledge was 'intimately linked with the land',[156] and how 'the secular and spiritual aspects of the aboriginal connection with the land are twin elements of the right to the land':[157]

> The protection of ritual knowledge is required by traditional law. Traditional law treats both elements as incidents of native title. There is no reason why the common law recognition of native title should attach to one incident and not the other. Because common law recognition is accorded to the entitlement to land as defined by traditional laws and customs the contrary conclusion should follow.[158]

8.87 Kirby J, in dissent in the High Court in *Ward*, focused on the 'very broad' phrase 'in relation to' in the opening words of s 223(1).[159] He was of the view that

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149 Chuulangun Aboriginal Corporation, Submission No 28 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, June 2011.
150 Kimberley Land Council, *Submission 30*.
151 A Frith and M Tehan, *Submission 12*.
152 *Western Australia v Ward* (2000) 99 FCR 316, [666]. See also *Western Australia v Ward* (2002) 213 CLR 1, [14].
153 *Western Australia v Ward* (2002) 213 CLR 1, [14].
154 Ibid (Kirby J).
155 *Western Australia v Ward* (2000) 99 FCR 316, (North J).
156 Ibid [865].
157 Ibid [866].
158 Ibid.
159 *Western Australia v Ward* (2002) 213 CLR 1, [577]–[578].

what is required 'is a real relationship, or connection, between the interest claimed and the relevant land or waters' and he saw the right to protect cultural knowledge as sufficiently connected to the area to be a right 'in relation to' the land or waters for the purpose of s 223(1).[160] Kirby J concluded:

> Recognition of the native title right to protect cultural knowledge is consistent with the aims and objectives of the NTA, reflects the beneficial construction to be utilised in relation to such legislation and is consistent with international norms declared in treaties to which Australia is a party. It recognises the inherent spirituality and land-relatedness of Aboriginal culture.[161]

8.88 The ALRC did not expressly consult on cultural knowledge. Few submissions raised the express inclusion in the *Native Title Act* of the protection or exercise of cultural knowledge—or something like it.[162] However, the ALRC considers that it is within the scope of the ALRC's Inquiry to seek views on the express inclusion of the protection or exercise of cultural knowledge in the *Native Title Act* as part of examining the 'connection requirements relating to the recognition and scope of native title rights and interests'. Further, the issue may be relevant in conceiving of commercial activities. The Kimberley Land Council submitted that 'commercial activity should not be unduly limited by its current operation or understanding in modern secular societies' but rather should encompass 'an activity that may have a spiritual or religious component or derivation'.[163]

8.89 The ALRC invites responses as to whether the indicative listing of native title rights and interests in s 223(2) should be amended to include the protection or exercise of cultural knowledge. The ALRC is also interested in what stakeholders understand is meant by the phrase 'cultural knowledge' and on views as to whether a definition is needed and what such a definition should contain. Some submissions to this Inquiry used different descriptions.[164] With respect to Indigenous intellectual property, one stakeholder submitted to a Senate Inquiry that:

> Currently the native title system is not clear about the rights of Indigenous people to control valuable biological resources on their land and waters, rights that do exist under customary intellectual property systems (for example, the rights that people have over plants with which they have a totemic relationship).[165]

8.90 The ALRC is also aware that some stakeholders may consider that the *Native Title Act* is not the appropriate statute for recognition of Indigenous customary intellectual property norms.[166]

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160 Ibid [577], [580].
161 Ibid [587].
162 Law Council of Australia, *Submission 35*; North Queensland Land Council, *Submission 17*.
163 Kimberley Land Council, *Submission 30*.
164 Law Council of Australia, *Submission 35* ('intellectual property rights'); North Queensland Land Council, *Submission 17* ('traditional knowledge').
165 Chuulangun Aboriginal Corporation, Submission No 28 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, June 2011.
166 Ibid. However, the Law Council of Australia took the opposite view, calling for the Act to be amended in order for 'intellectual property rights' to be recognised as native title rights: Law Council of Australia, *Submission 35*.

Anything else to be included in the indicative listing?

8.91 The ALRC is aware that claims for other rights are evolving. For example, in *Akiba*, in respect of the claim for reciprocal rights, the High Court held that, 'intramural reciprocal relationships between members of different island communities giv[ing] rise to obligations relating to access to and use of resources'[167] are not rights and interests 'in relation to' land or waters within the meaning of s 223 of the *Native Title Act*.[168] Rather, on the basis of the evidence in that case, they were correctly characterised as 'rights of a personal character dependent upon status'.[169]

8.92 The ALRC is interested in views about whether any other purposes or activities should be included in the proposed indicative listing in revised s 223(2)(b).

167 *Akiba v Commonwealth* (2013) 250 CLR 209, [6].

168 Ibid [6], [45] (French CJ and Crennan J); [47] (Hayne, Kiefel and Bell JJ).

169 Ibid [45] (French CJ and Crennan J). Some submissions called for the *Native Title Act* to be amended so that reciprocal rights may be recognised as native title rights and interests. See, eg, Law Council of Australia, *Submission 35*; North Queensland Land Council, *Submission 17*.