

10. Authorisation

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Summary

10.1 An application for a native title determination, or for compensation for extinguishment or impairment of native title, can only be lodged by an applicant—that is, a person or group of people who have been authorised by the group to make the application. The authorisation provisions of the *Native Title Act 1993* (Cth) (*‘Native Title Act’*) are intended to ensure that the application is made with the consent of the claim group. The group is also given the power to remove and replace an applicant, thus contributing to the ongoing legitimacy of the applicant.

10.2 Groups do not generally invest full decision-making authority in the applicant, but expect the applicant to bring important decisions back to the group and to follow

the directions of the group. Some groups establish separate decision-making bodies, such as steering committees or working groups. The recommendations in this chapter are intended to support claim groups as they develop their own governance structures, work within the requirements of Australian law and negotiate with third parties.

10.3 The ALRC recommends that groups should be able to use a traditional decision-making process or a decision-making process agreed to and adopted by the group, to authorise an applicant. The Government should consider amending other provisions of the *Native Title Act* regarding decision-making, consistent with this recommendation.

10.4 Many groups include in their authorisation of an applicant specific directions or constraints on the applicant's authority. The legal status of these directions is not clear. The *Native Title Act* should be amended to clarify that the claim group may define the scope of the authority of the applicant.

10.5 Currently, claim groups may authorise an applicant to act by majority, but where the terms of the authorisation are silent, an applicant must act jointly. The ALRC recommends that this default position should be reversed to provide that, where the terms of the authorisation are silent, the applicant may act by majority. This recommendation is intended to address the situation where the group has directed the applicant to take some action, but only some members of the applicant are willing to act on the direction.

10.6 It is unclear whether an applicant remains authorised to act if a member of the applicant dies or is unable to act. The *Native Title Act* should provide that the remaining members of the applicant may continue to act without reauthorisation, unless the terms of the authorisation provide otherwise, and may apply to the Federal Court for an order that the remaining members constitute the applicant.

10.7 Sometimes an applicant includes a member of each family group, and the authorisation provides for the replacement of a member who is unable to act, with a specified person from the same family. The *Native Title Act* should provide that, in such circumstances, the applicant may apply to the Federal Court for an order that the member be replaced by the specified person, without requiring reauthorisation.

10.8 Finally, the *Native Title Act*, and some state and territory legislation, creates opportunities for the applicant to receive funds that are intended for the native title group. The *Native Title Act* should be amended to provide that a member of the applicant must not obtain an advantage or benefit at the expense of the common law holders.

What is authorisation?

10.9 An application for a determination of native title can only be made by an applicant who has been authorised by all the people who hold the native title claimed.¹

1 *Native Title Act 1993 (Cth)* s 61.

10.10 An applicant for compensation must also be authorised. The *Native Title Act* provides for applications for compensation for the extinguishment or impairment of native title arising from validation of certain past, intermediate or future acts.² To make an application for compensation, a person or group of people must be authorised by all the people who claim to be entitled to the compensation. The person or group of people is ‘the applicant’, and the people who claim to be entitled to the compensation are ‘the compensation claim group’. This chapter refers to both native title claims and compensation claims, unless otherwise indicated.

10.11 The *Native Title Act* does not require all members of a claim group to participate in the authorisation of the applicant. It is sufficient if all members have been given an opportunity to participate.³ The Federal Court has provided guidance as to the correct procedure for giving notice of and conducting an authorisation meeting.⁴

10.12 A claim cannot be registered unless the Registrar is satisfied that the applicant is authorised to make the application, or that the representative body has certified that the applicant is authorised.⁵

Access to justice

10.13 The Terms of Reference ask the ALRC to consider whether any barriers are imposed by the *Native Title Act*’s authorisation provisions to claimants’, potential claimants’ and respondents’ access to justice. Access to justice includes access to courts and lawyers, but also information and support to identify, prevent and resolve disputes.⁶ It can encompass both procedural rights and access to the resources necessary to participate fully in the legal system. It may also include the removal of structural inequalities within the justice system and the provision of informal justice and alternative dispute resolution options.⁷

10.14 The Inquiry has not identified widespread concern about barriers to justice imposed by the authorisation provisions, but has identified areas where amendment of the provisions may reduce disputes, confirm the ultimate authority of the claim group and reduce the cost of a native title application.

The purpose of the authorisation provisions

10.15 The authorisation provisions were introduced into the *Native Title Act* in 1998.⁸ Before this, any member of a claim group could apply for a determination of native title. This resulted in large numbers of conflicting and overlapping claims. The purpose

2 Ibid pt 2 div 5.

3 *Lawson on behalf of the ‘Pooncarie’ Barkandji (Paakantyi) People v Minister for Land and Water Conservation (NSW)* [2002] FCAFC 1517 (9 December 2002) [25].

4 *Ward v Northern Territory* [2002] FCA 171 (8 February 2002); *Weribone on behalf of the Mandandanji People v Queensland* [2013] FCA 255 (25 March 2013).

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

6 Attorney-General’s Department, ‘A Strategic Framework for Access to Justice in the Federal Civil Justice System’ (2009) 3; Productivity Commission, *Access to Justice Arrangements* (2014) 77–78.

7 Attorney-General’s Department, above n 6, 3.

8 *Native Title Amendment Act 1998* (Cth).

of the authorisation provisions is to ensure that those who bring applications for determinations have the authority of the group to do so.⁹ French J described authorisation as

a matter of considerable importance and fundamental to the legitimacy of native title determination applications. The authorisation requirement acknowledges the communal character of traditional law and custom which grounds native title.¹⁰

10.16 The National Native Title Council said the authorisation process is ‘fundamentally important to the integrity of the native title claims process’ as it ensures that claims are lodged with the consent of the traditional owners.¹¹ Similarly, Mansfield J noted that ‘proper authorisation is fundamental to the legitimacy of native title applications’.¹² The existence of a mechanism to remove the applicant if it exceeds its authority contributes to the ongoing legitimacy of the applicant, as the applicant is ‘subject to the ongoing scrutiny of the members of the claim group in respect of the manner of the exercise of that authority’.¹³

10.17 Section 62A sets out the power of applicants, and is discussed further below. The Explanatory Memorandum to the Bill that inserted s 62A indicated that the section ‘ensures that all those who deal with the applicant in relation to matters arising under the NTA can be assured that the applicant is authorised to do so’.¹⁴

10.18 However, in explaining the purpose of s 62A, the courts have focused not on the benefits to third parties, but on the desirability of avoiding overlapping claims. French J made this point in 2002:

It is of central importance to the conduct of native title determination applications and the exercise of the rights that flow from their registration, that those who purport to bring such applications and to exercise such rights on behalf of a group of asserted native title holders have the authority of that group to do so. Prior to the 1998 amendments there was no requirement under the *Native Title Act* that an applicant have such authority. The absence of that requirement led, in some cases, to conflicting and overlapping claims all carrying with them the statutory right to negotiate in respect of the grant of mineral tenements and the compulsory acquisition by Commonwealth or State Governments of native title rights and interests. Although many aspects of the 1998 amendments were the subject of controversy in the public and parliamentary debates that preceded their enactment, the need for communal authorisation of claims was largely a matter of common ground.¹⁵

10.19 This passage has been cited at least 17 times in judgments of the Federal Court. Overlapping claims, while still an issue, have significantly reduced since the 1998

9 Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) [25.16]; *Daniel v Western Australia* [2002] FCA 1147 (13 September 2002) [11].

10 *Strickland v Native Title Registrar* (1999) 168 ALR 242, [57].

11 National Native Title Council, *Submission 16*.

12 *Hazlebane v Northern Territory* [2008] FCA 291 (2008) [13].

13 *Dingaak Tribe v Queensland* [2003] FCA 999 (17 September 2003) [6].

14 Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) [25.41].

15 *Daniel v Western Australia* [2002] FCA 1147 (13 September 2002) [11].

amendments¹⁶ that introduced both the authorisation provisions and the registration test.

10.20 After the 1998 amendments, there was some initial uncertainty about what the Act required with regard to holding an effective authorisation meeting. However there is now a settled body of law in this respect,¹⁷ and the authorisation requirements are well understood and widely supported by stakeholders. There continues to be challenges to the actions of applicants, and applications for the replacement of applicants. These do not necessarily indicate flaws in the legal framework. Native title claim groups must make a range of important decisions about matters including the correct composition of the group, the boundaries of the area claimed, and the nature and scope of the rights and interests claimed. They may also have to deal with proponents who wish to obtain agreement to future acts—acts that affect (and may extinguish) native title. These decisions can be difficult and contested and it would be unrealistic not to expect conflict within and between groups. Challenges to the authorisation of an applicant may be a symptom of such conflict. Another symptom might be an application by a member of the group for joinder as a respondent.

The powers and duties of the applicant

‘Matters ... in relation to the application’

10.21 Section 62A of the *Native Title Act* provides that the applicant ‘may deal with all matters arising under this Act in relation to the application’.¹⁸ The phrase ‘matters arising under the Act’ should not be read narrowly,¹⁹ and includes filing the application, applying for leave to amend the application,²⁰ filing a notice of change of solicitors,²¹ and applying for leave to discontinue the claim.²² Native title claims are representative actions, and therefore require leave of the court to discontinue.²³

10.22 While the applicant, and only the applicant, may apply for leave to amend or discontinue the claim, the court has an unfettered discretion to grant or refuse leave.²⁴

10.23 There has been a trend towards greater scrutiny of the claim group’s involvement in native title claims. This can be seen in statutory amendments requiring first, in 1998, that the applicant be authorised by the claim group, and second, in 2007, that the applicant must swear an affidavit setting out details of the process of

16 Western Australian Government, *Submission 43*.

17 See, eg, *Weribone on behalf of the Mandandanji People v Queensland* [2013] FCA 255 (25 March 2013).

18 *Native Title Act 1993* (Cth) s 62A.

19 *Close on behalf of the Githabul People #2 v Queensland* [2010] FCA [32].

20 *Anderson v Western Australia* [2003] FCA 1423 (2003) [48].

21 *Anderson on behalf of the Wulli Wulli People v Queensland* (2011) 197 FCR 404, [49]; *Ankamuthi People v Queensland* [2002] FCA 897 (2002) [7]–[8].

22 *Levinge on behalf of the Gold Coast Native Title Group v Queensland* [2012] FCA 1321 (23 November 2012) [39]–[42].

23 *Federal Court Rules 2011* (Cth) O 22 r 2; *Close on behalf of the Githabul People #2 v Queensland* [2010] FCA [2].

24 *Tucker v Western Australia* [2014] FCA 23 (2014); *Levinge on behalf of the Gold Coast Native Title Group v Queensland* [2013] FCA 634 (3 June 2013).

authorisation.²⁵ In the courts, early judgments simply asserted that s 62A gave the applicant power to deal with all matters arising under the Act in relation to the application.²⁶ In later cases the court is more likely to indicate that, in exercising its discretion, the court will take into account whether the applicant has consulted with the claim group, and the views of the claim group.²⁷

10.24 While the law does not require the applicant to obtain the consent of the claim group for all dealings in relation to the application, Adjunct Associate Professor John Southalan commented:

it would be a brave/myopic lawyer who seeks to enact outcomes of significance for the broader group (eg, commence/settle/amend a native title claim) without assurance that the broader group understand, had the opportunity to deliberate, and have specifically agreed to that outcome.²⁸

Indigenous Land Use Agreements

10.25 The Note to *Native Title Act* s 62A indicates that this section ‘deals only with claimant applications and compensation applications’, and that provisions dealing with Indigenous Land Use Agreements (ILUAs) are elsewhere. The applicant is a party to an area ILUA²⁹ but these agreements cannot be registered, and are therefore not binding, unless they have been authorised by the entire claim group.³⁰ While it is standard practice for an ILUA to be signed by all members of the applicant, the Federal Court has indicated that the signatures of the members of the applicant are not required.³¹

Future act agreements

10.26 Section 62A makes no reference to future act agreements made pursuant to the *Native Title Act* pt 2 div 3 (sometimes called s 31 agreements or right to negotiate agreements). While it is untested, it is not likely that s 62A is the source of the applicant’s authority to enter future act agreements, as future act agreements are not clearly ‘matters arising under this act in relation to the application’. The Act provides that the applicant is a negotiation party and must negotiate with a view to reaching agreement to the doing of the act that affects native title.³² If the negotiating parties reach an agreement, it has the effect of a contract, and is binding on any other person included in the native title claim group.³³

25 John Southalan, ‘Authorisation of Native Title Claims: Problems with a “Claim Group Representative Body”’ (2010) 29 *Australian Resources and Energy Law Journal* 49, 55.

26 *Grant v Minister for Land & Water Conservation for New South Wales* [2003] FCA 621 (2003); *Drury v Western Australia* [2000] FCA 132 (2000).

27 *Tucker v Western Australia* [2014] FCA 23 (2014) [14]; *Levinge on behalf of the Gold Coast Native Title Group v Queensland* [2012] FCA 1321 (23 November 2012); *Close on behalf of the Githabul People #2 v Queensland* [2010] FCA [18]–[20].

28 Southalan, above n 25, 59.

29 *Native Title Act 1993* (Cth) ss 24CD, 253.

30 *Ibid* s 24CG(3)(b).

31 *QGC Pty Ltd v Bygrave (No 2)* [2010] FCA 1019 (17 September 2010) [103].

32 *Native Title Act 1993* (Cth) ss 30, 30A, 31(1)(b).

33 *Ibid* s 41.

10.27 The *Native Title Act* does not contain any explicit requirement for the approval of the claim group. However the practice of the National Native Title Tribunal (NNTT) suggests that some level of claim group consent is required.

10.28 Currently, if all of the members of the applicant do not sign a future act agreement, whether because of remoteness, incapacity, dispute or other reason, an application may be made to the NNTT for a consent determination. When the NNTT considers whether consent to a future act has been properly given by the native title party (the applicant, s 30(1)), the NNTT takes into account ‘whether the agreement has been endorsed by the wider claim group, or is of a type to which the claim group has previously consented’.³⁴ The NNTT has also indicated that the consent should be given in accordance with the decision-making procedures of the group:

the Tribunal will be prepared to act on the consent given by the native title party collectively unless there is some credible suggestion that this is not appropriate. Lawyers acting for the native title party should normally be in a position to advise the Tribunal that the consent has properly been given, based on the established decision making processes of the native title claim group. The fact that a representative Aboriginal and Torres Strait Islander body is involved in assisting the native title party (s 202 NTA) would add weight to a decision that a consent determination is appropriate ...

The Tribunal can see no impediment to proceeding to make a consent determination where the consent is given by the native title party collectively in accordance with its agreed procedures (including traditional law and custom).³⁵ (emphasis in original)

10.29 One representative body advised the ALRC:

it is generally the case that the applicant, and its individual members, understand the limits of their authority, even if it is not explicitly and formally set out, for example, major future act agreements are not likely to be entered into without express claim group consent or the consent of the relevant common law holders in accordance with traditional law and custom.³⁶

10.30 One stakeholder favoured an amendment to allow third parties to make assumptions about the authority of the applicant, such as the indoor management rule, consistent with the assumptions that can be made about the authority of directors under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth).³⁷ However, the applicant’s role is not the same as that of company directors. This approach would not allow claim groups to retain decision-making power within the group or to place that power in a committee or working group, rather than the applicant.

10.31 Another approach would be to amend the Act to require the approval of the claim group for all future act agreements, which would be consistent with the post-determination requirement for claim group approval of native title decisions in the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) reg 8(1)(b). This

³⁴ *Foster v Copper Strike* (2006) 200 FLR 182, [33].

³⁵ *Monkey Mia Dolphin Resort Pty Ltd v Western Australia* (2001) 164 FLR 361, [19]. See also *Simpson on behalf of Wajarri Yamatji/Western Australia/Skytone Pty Ltd* [2009] NNTTA 113.

³⁶ Central Desert Native Title Service, *Submission 48*.

³⁷ Association of Mining and Exploration Companies, *Submission 54*.

Inquiry's Terms of Reference, which require a focus on authorisation of the applicant, would not encompass such a recommendation. A statutory requirement for claim group approval might more closely approximate the guarantee of free, prior and informed consent required by the UN *Declaration on the Rights of Indigenous People*.³⁸ On the other hand, such a requirement might be inconvenient for some groups, particularly those whose membership is geographically scattered and who frequently make future act agreements, and for the parties who deal with them.

10.32 The ALRC has not consulted on such an approach and makes no comment on its advisability.

10.33 A number of stakeholders have pointed to the importance of allowing claim groups and their legal representatives the flexibility to tailor arrangements to the specific circumstances of the group.³⁹ Similarly, Professor Marcia Langton stated 'a "one size fits all" approach is ... not tenable for negotiation and agreement-making in Australia'.⁴⁰ The ALRC therefore recommends that the claim group should be able to make their own arrangements, either to authorise the applicant to agree to future acts without further approval, with conditions, or to withhold this authority—see Recommendation 10–4 below.

10.34 Regardless of the terms of the authorisation, it is likely that the applicant has fiduciary obligations to the native title group (the duties of the applicant are discussed further below).

Agreements under other statutes

10.35 Other statutes relating to mining and heritage create a role for the applicant (usually described as the 'registered native title claimant').⁴¹ These do not usually require the applicant to have the specific authority of the claim group. Again, in performing these functions, the applicant is likely to have fiduciary obligations.

Can the applicant appoint an agent?

10.36 The Association of Mining and Exploration Companies asked this Inquiry to consider whether an applicant can authorise an agent to act on its behalf, and what powers can be delegated to the agent.⁴²

38 *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).

39 Law Society of Western Australia, *Submission 41*; Kimberley Land Council, *Submission 30*; Cape York Land Council, *Submission 7*.

40 Marcia Langton, 'From Conflict to Cooperation: Transformations and Challenges in the Engagement between the Australian Minerals Industry and Australian Indigenous Peoples' (Public Policy Analysis 7, Minerals Council of Australia, February 2015) 43.

41 *Aboriginal Cultural Heritage Act 2003* (Qld) ss 34, 35; *Aboriginal Heritage Act 2006* (Vic) s 6; *Mineral Resources Act 1989* (Qld) s 10A; *Pastoral Land Act 1992* (NT) s 72C; *Petroleum (Onshore) Act 1991* (NSW) s 69A. *Native Title Act 1993* (Cth) s 253 provides that 'registered native title claimant' means 'a person or persons whose name or names appear in an entry on the Register of Native Title Claims as the applicant'.

42 Association of Mining and Exploration Companies, *Submission 54*.

10.37 The *Native Title Act* specifies that the applicant is to exercise the powers created by ss 29-31, and makes no reference to the possibility of those powers being delegated to another. If, as Reeves J has suggested, the applicant is an agent for the claim group,⁴³ then the applicant must act personally and not delegate its authority without the express or implied authority of the claim group.⁴⁴

Authorisation, the applicant and governance

10.38 While some native title claim groups have a long history of interaction with government agencies and third parties, and have developed sophisticated structures to manage these interactions, others have had few opportunities to make decisions about matters that affect them, particularly regarding land. For the second group, the authorisation of an applicant is not merely a statutory requirement for a valid application, but is an opportunity for a group to formalise its procedures and develop its governance structures and skills.

10.39 Claim groups do not generally invest full decision-making authority in the applicant, but expect the applicant to bring important decisions back to the group and to follow the directions of the group. A variety of decision-making structures have been adopted.

10.40 Some claim groups establish a decision-making body and require the applicant to carry out the decisions made by that authority. The Social Justice Commissioner described an effective and culturally appropriate decision-making structure adopted by the Quandamooka people:

This group of twelve family representatives advised the single named applicant during the native title negotiations. Decisions by the applicant required the mandate of the family representatives, who agreed on issues by consensus. Any issues that were disputed and could not be resolved by the group of family representatives were taken to the Council of Elders. The Council of Elders comprises twelve female Elders and twelve male Elders who represent each of the family groups and apical ancestors. Elders must be acknowledged as such by their peers before they are accepted on to the Council of Elders.⁴⁵

10.41 The Githabul people also authorised one applicant and established a steering committee whose role was to ‘direct and assist the applicant in the matters relating to the native title proceedings’.⁴⁶ The applicant was held to have the authority of the group to discontinue, based on a resolution of the steering committee rather than the entire group.⁴⁷

10.42 In Cape York, a claim known as Cape York United Number 1 Claim, has been made on behalf of nine groups of traditional owners. The applicant was authorised on the basis that the people who make up the applicant do not make decisions with regard

43 *QGC Pty Ltd v Bygrave (No 2)* [2010] FCA 1019 (17 September 2010) [98].

44 Westlaw, *The Laws of Australia*, Vol 8 (at 1 April 2014) 8. Contracts: Specific, ‘8.1 Agency’ [8.1.770].

45 Aboriginal and Torres Strait Islander Social Justice Commissioner, ‘Native Title Report 2011’ (Australian Human Rights Commission, 2011) 110.

46 *Close on behalf of the Githabul People #2 v Queensland* [2010] FCA [11].

47 *Ibid* [18].

to land or waters. Such decisions are to be made by the traditional owners for the particular area according to law and custom.⁴⁸

10.43 Other groups retain decision-making power for the whole group. A member of the applicant for the Ngarluma and Yindjibarndi People described the relationship between the group to the court this way:

He said there is always discussion and consultation between members of the claim group both before and during the meeting. He said it is always a group decision. Young people help the old people by explaining ‘white fella’ laws to them. This, he said, is the way of making decisions under their traditional laws and customs. It is not just up to individual applicants to go their own way and make a separate decision. They must do what the group decides. Community meetings, he said, are accepted by the Ngarluma and Yindjibarndi People as the proper way to make decisions.⁴⁹

10.44 Similarly, in *KK v Western Australia*, the Nyul Nyul claim groups passed resolutions instructing the applicant to discontinue their claims, although the applicant is not obliged to seek the authority of the claim group to do so.⁵⁰

10.45 Also in Western Australia, the Yaburara and Mardudhunera peoples established a corporation to facilitate negotiations with industry. They told the Court that the entire group discusses proposals and informs the corporation’s committee of their decision. The committee tells the applicant what to do.⁵¹

10.46 Queensland South Native Title Services reported that decisions to compromise a claim or endorse a consent determination are dealt with at a claim group meeting, not by the applicant:

Claim group meetings are, for traditional owners, an important feature of participatory decision-making through the principle of free, prior and informed consent, and inherently linked to the fundamental right of self determination.⁵²

10.47 As the National Native Title Council noted:

A native title application in relation to the recognition of native title includes the pleading of the name and nature of the group, its rules of membership, the rights and interests claimed and the traditional boundaries of the society or group concerned. This assists in the process of self-determination and facilitates a lessening of internal dissension and disputes with neighbouring groups if properly done.⁵³

10.48 The recommendations in this chapter are intended to support claim groups as they develop their own governance structures, work within the requirements of Australian law and negotiate with third parties. Establishing structures and skills during the pre-determination stage should leave groups better placed to manage their rights and interests in the post-determination stage.

48 Personal communication, Adam McLean, Principal Legal Officer, Cape York Land Council Aboriginal Corporation, 31 March 2015.

49 *Daniel v Western Australia* [2002] FCA 1147 (13 September 2002) [27].

50 *KK (deceased) v Western Australia* [2013] FCA 1234 (13 November 2013) [19], [33].

51 *Daniel v Western Australia* [2002] FCA 1147 (13 September 2002) [63].

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

53 National Native Title Council, *Submission 16*.

Decision-making process

Recommendation 10–1 Section 251B of the *Native Title Act 1993* (Cth) requires a claim group to use a traditional decision-making process for authorising an applicant, if it has such a process. If it does not have such a process, it must use a decision-making process agreed to and adopted by the group.

Section 251B of the *Native Title Act 1993* (Cth) should be amended to provide that a claim group may authorise an applicant *either* by a traditional decision-making process *or* a process agreed to and adopted by the group.

10.49 The process for authorising an applicant is set out in s 251B. If the claim group has a traditional decision-making process that must be complied with in relation to authorising ‘things of that kind’, the group must use that process to authorise an applicant. It may not choose to use a different process.

10.50 If a group does not have a traditional decision-making process for ‘authorising things of that kind’, it must use a process of decision making that has been agreed to and adopted by the group.⁵⁴

10.51 The requirement to use a traditional decision-making process, where it exists, can create problems when it is unclear if such a process exists, and what it is.⁵⁵ The lack of clarity is sometimes a result of the community having been denied the opportunity to make decisions about their land for many generations.⁵⁶

10.52 Where the group has a traditional decision-making process, it may not be one that is suited to making decisions in the native title context. Adapting the process for use in native title procedures can be complex and time consuming.⁵⁷ The group may wish to change the decision-making process to be more inclusive.⁵⁸

10.53 Where the group does not have a traditional decision-making process, it may be reluctant to declare that fact, when seeking recognition of rights and interests ‘possessed under traditional laws and customs’.⁵⁹

10.54 The ALRC recommends that the group should be able to choose its own decision-making process, without having to declare whether or not it has a traditional decision-making process for things of that kind. Section 251B should simply provide

54 *Native Title Act 1993* (Cth) s 251B.

55 See, eg, *Butchulla People v Queensland* (2006) 154 FCR 233; *Holborow v Western Australia* 2002 FCA 1428. See also National Native Title Council, *Submission 16*; Cape York Land Council, *Submission 7*; Just Us Lawyers, *Submission 2*.

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

57 *Ibid*.

58 *Butchulla People v Queensland* (2006) 154 FCR 233, 30. In *Butchulla*, the group changed their decision-making process so that elders no longer had the final say. See also National Native Title Council, *Submission 16*.

59 Susan Phillips, ‘The Authorisation Trail’ (2000) 4 *Indigenous Law Bulletin* 13.

that a claim group may use a traditional decision-making process or a process of decision making agreed to and adopted by the group. The claim group would still be able to use its traditional decision-making process if it wished. If it did not have such a process, or preferred another process, it could use the other process.

10.55 Allowing the group to choose its own decision-making process promotes the autonomy of the group. It ‘maintains the ultimate authority of the claim group or native title holders’.⁶⁰

10.56 For some groups, the process of choosing a decision-making process will always be a difficult one.⁶¹ For example, the choice between one vote per family group (which can disempower members of large families) or one vote per adult (which can disempower members of small families), can be fraught.⁶² As AIATSIS noted, there is logical circularity in employing a decision-making process to choose a decision-making process.⁶³ The ALRC considers that the proposed amendment will remove some, but not all, of the difficulties of choosing a decision-making process. An alternative approach might be to prescribe a decision-making process in the statute. This might remove difficulties for some groups but could create other problems—for example, in some groups, a decision reached by a majority vote rather than by a traditional decision-making process would not be regarded as legitimate, and could fuel disputes. Further, statutory prescription would not promote the autonomy of claim groups.

10.57 Stakeholders, including governments and representative bodies, agreed that claim groups should be able to choose their own decision-making process, including a traditional process.⁶⁴

Recommendation 10–2 Section 251A of the *Native Title Act 1993 (Cth)* requires persons holding native title to use a traditional decision-making process for authorising an indigenous land use agreement (ILUA), if they have one. If they do not have one, they may use a decision-making process agreed to and adopted by the persons.

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

61 Just Us Lawyers, *Submission 2*.

62 Ibid.

63 AIATSIS, *Submission 36*.

64 AIATSIS, *Submission 70*; South Australian Government, *Submission 68*; NTSCORP, *Submission 67*; Minerals Council of Australia, *Submission 65*; Law Council of Australia, *Submission 64*; National Native Title Tribunal, *Submission 63*; National Native Title Council, *Submission 57*; Queensland South Native Title Services, *Submission 55*; A Frith and M Tehan, *Submission 52*; The Chamber of Minerals and Energy of Western Australia, *Submission 49*; Native Title Services Victoria, *Submission 45*; North Queensland Land Council, *Submission 42*; Kimberley Land Council, *Submission 30*; NSW Young Lawyers Human Rights Committee, *Submission 29*; Western Australian Government, *Submission 20*; North Queensland Land Council, *Submission 17*; Law Society of Western Australia, *Submission 9*; Cape York Land Council, *Submission 7*.

Section 251A of the *Native Title Act 1993* (Cth) should be amended to provide that persons holding native title may authorise an ILUA *either* by a traditional decision-making process, *or* a decision-making process agreed to and adopted by the group.

10.58 Section 251A of the *Native Title Act* regarding the authorisation of ILUAs is similar to s 251B regarding the authorisation of an applicant. Section 251A provides that if there is a traditional decision-making process that must be complied with in relation to authorising things of that kind, persons holding native title must use that process to authorise an ILUA. If no such process exists, the persons must use a process agreed to and adopted by the group. Sections 251A and 251B are interpreted in a consistent way by the courts.⁶⁵

10.59 The Terms of Reference for this Inquiry specify that the ALRC is to consider whether the *Native Title Act's* authorisation provisions impose barriers to access to justice on claimants, potential claimants or respondents. A person who authorises an ILUA is known as a party, rather than a claimant, so these Terms of Reference do not direct the ALRC to consider the authorisation of ILUAs. However the ALRC considers that it is desirable for the two authorisation provisions to remain consistent. Many stakeholders agreed.⁶⁶

Recommendation 10–3 Regulation 8 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) provides that common law holders must use a traditional decision-making process in relation to giving consent for a native title decision, if they have one. If they do not have one, they must use a decision-making process agreed to and adopted by the common law holders.

Regulation 8 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) should be amended to provide that common law holders may give consent to a native title decision using *either* a traditional decision-making process *or* a decision-making process agreed on and adopted by them.

10.60 Several stakeholders pointed out that the *Native Title (Prescribed Bodies Corporate) Regulations 1999* mirror the current approach in ss 251A and 251B by requiring common law holders to use a traditional decision-making process (if one

⁶⁵ *Fesl v Delegate of the Native Title Registrar* (2008) 173 FCR 150, [72].

⁶⁶ AIATSIS, *Submission 70*; South Australian Government, *Submission 68*; NTSCORP, *Submission 67*; Minerals Council of Australia, *Submission 65*; Law Council of Australia, *Submission 64*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; Queensland South Native Title Services, *Submission 55*; The Chamber of Minerals and Energy of Western Australia, *Submission 49*; Native Title Services Victoria, *Submission 45*; North Queensland Land Council, *Submission 42*; Law Society of Western Australia, *Submission 41*.

exists) to give consent to a native title decision.⁶⁷ These stakeholders suggested that the regulations should continue to be consistent with ss 251A and 251B. The ALRC agrees. If ss 251A and 251B are amended, the Government should consider amending the regulations also.

Recommendation 10–4 Section 203BC(2) of the *Native Title Act 1993* (Cth) provides that a native title holder or a person who may hold native title must use a traditional decision-making process to give consent to any general course of action that the representative body takes on their behalf, if they have one. If they do not have one, they must use a decision-making process agreed to and adopted by the group to which the person belongs.

Section 203BC(2) of the *Native Title Act 1993* (Cth) should provide that a native title holder or a person who may hold native title may give consent to any general course of action that the representative body takes on their behalf using *either* a traditional decision-making process *or* a decision-making process agreed to and adopted by the group to which the person belongs.

10.61 Finally, s 203BC of the *Native Title Act* has equivalent provisions for the giving of consent by a native title holder or a person who may hold native title to ‘any general course of action that the representative body takes on their behalf’. If sections 251A and 251B are amended, the Government should consider amending this provision as well.

Scope of authorisation

Recommendation 10–5 The *Native Title Act 1993* (Cth) should be amended to clarify that the claim group may define the scope of the authority of the applicant.

10.62 As noted earlier, s 62A of the *Native Title Act* provides that, once authorised, the applicant may deal with all matters arising under the Act in relation to the application.⁶⁸ Claim groups have been disinclined to hand over all decision-making responsibility to the applicant. Many include in their authorisation specific directions or constraints on the applicant’s authority. For example, in Queensland, the Wulli Wulli Native Title Group authorised the applicant on a number of conditions, including:

- that members of the applicant represent the whole group, not just their own family;

⁶⁷ National Native Title Council, *Submission 57*; A Frith and M Tehan, *Submission 52*; Law Society of Western Australia, *Submission 41*.

⁶⁸ *Native Title Act 1993* (Cth) s 62A.

- that the applicant may agree to reduce the area of the claim without further authorisation;
- that the applicant must ensure that cultural heritage work is allocated fairly; and
- that the applicant may negotiate with respect to future acts, but must consult with elders before executing any agreement.⁶⁹

10.63 The legal status of the conditions and instructions included in the authorisation given to an applicant is not clear.⁷⁰ If the applicant does not act in accordance with the instructions, the claim group may replace the applicant on the grounds that ‘the person has exceeded the authority given to him or her by the claim group to make the application’.⁷¹ The words ‘exceeded the authority’ suggest that the group may be able to define or limit the scope of the applicant’s authority. In *Daniel v Western Australia (Daniel)*, French J said:

If the original authority conferred upon an applicant for the purpose of making and dealing with matters in relation to a native title determination is subject to the continuing supervision and direction of the native title claim group, then it may be that an applicant whose authority is so limited is not authorised to act inconsistently with a resolution or direction of the claim group.⁷²

10.64 However in this case, the applicant was replaced on the basis that he was no longer authorised by the claim group,⁷³ not on the basis that he exceeded his authority, so these comments are obiter dicta. This approach has been endorsed in later judgments, but it is arguable that these comments were also obiter.⁷⁴

10.65 In *Weribone on behalf of the Mandandanji People v Queensland*, the claim group had not authorised the applicant to act by majority, and Logan J held that the applicant could not so act. He also said that:

insofar as the submission carried with it anything of the notion that the native title claim group may in some way direct how the applicant is to carry its business of dealing with ‘all matters arising under this Act in relation to the application’, I reject that submission.⁷⁵

10.66 On the other hand, in *Anderson on behalf of the Wulli Wulli People v Queensland*, Collier J said:

I do not consider that s 61(2)(c) ought be interpreted in such a way as to remove the autonomy of the native title claim group itself to place a condition on the manner in which the applicant can make effective decisions.

⁶⁹ *Anderson on behalf of the Wulli Wulli People v Queensland* (2011) 197 FCR 404, [7]; *Close on behalf of the Githabul People #2 v Queensland* [2010] FCA [32]–[33]. For another example of a conditional authorisation, see *Coyne v Western Australia* [2009] FCA 533, [7].

⁷⁰ Darryl Rangiah and Justin Carter, ‘The Role of the “Applicant” in Native Title Disputes’ (2013) 87 *Australian Law Journal* 761, 772.

⁷¹ *Native Title Act 1993* (Cth) s 66B.

⁷² *Daniel v Western Australia* [2002] FCA 1147 (13 September 2002) [16].

⁷³ *Ibid* [52].

⁷⁴ See, eg, *Far West Coast Native Title Claim v South Australia (No 5)* [2013] FCA 717 (30 July 2013) [50]; *KK (deceased) v Western Australia* [2013] FCA 1234 (13 November 2013).

⁷⁵ *Weribone on behalf of the Mandandanji People v Queensland* [2011] FCA 1169 (6 October 2011) [15].

10.67 In *Anderson*, the claim group had authorised the applicant to make decisions by majority, and the applicant was allowed to so act.⁷⁶ Similarly, in *KK (deceased) v Western Australia*, Barker J found that ‘the authority of the named applicants to act or refrain from acting in relation to the claim was subject to any direction from the claim group from time to time’.⁷⁷

10.68 There is no Full Court authority on this matter, and it is appropriate for the Act to be clarified on this issue.

10.69 As noted earlier, the purpose of the authorisation provisions is to ensure that the application is brought with the authority of the claim group, allowing the group to supervise proceedings and thus giving legitimacy to the proceedings.⁷⁸ It would further this purpose to amend the *Native Title Act* to provide that the claim group may define the scope of the authority of the applicant. Such an amendment may be as simple as inserting the words ‘subject to the terms of its authorisation’ in s 62A. This approach creates the flexibility to accommodate differences between claim groups, and ensures that the native title claim will only be dealt with in accordance with the claim group’s wishes.⁷⁹

10.70 Such an amendment would also be consistent with the general law regarding the principal and agent relationship: ‘a principal is only bound by acts of the agent which are within the agent’s authority as conferred by the principal’.⁸⁰ Reeves J has indicated that (at least when negotiating an ILUA), the applicant is ‘in much the same position as an agent concluding a contract on behalf of a principal’.⁸¹

Scope of authority and the right to negotiate

10.71 The ALRC acknowledges that Recommendation 10–5 may raise concerns for those stakeholders who sought amendments that would allow third parties to make assumptions about the authority of the applicant in the context of agreement making.⁸² These stakeholders raised concerns that permitting claim groups to define the scope of the applicant’s authority could create uncertainty.⁸³ However, as discussed earlier, it is not presently certain that the applicant has unfettered authority to enter into future act agreements without reference to the claim group. While the *Native Title Act* requires claim groups to authorise an applicant to act on their behalf in relation to both the claim and future act agreements, it does not require the claim group to delegate all decision-making powers to the applicant. In this respect, the members of the applicant have a different role from that of directors of a corporation.

76 *Anderson on behalf of the Wullli Wullli People v Queensland* (2011) 197 FCR 404, [60].

77 *KK (deceased) v Western Australia* [2013] FCA 1234 (13 November 2013).

78 *Dingaali Tribe v Queensland* [2003] FCA 999 (17 September 2003) [6].

79 Law Society of Western Australia, *Submission 41*; Kimberley Land Council, *Submission 30*; Law Society of Western Australia, *Submission 9*; Cape York Land Council, *Submission 7*.

80 Westlaw, *The Laws of Australia*, Vol 8 (at 1 April 2014) 8 Contracts: Specific, ‘8.1 Agency’ [8.1.500].

81 *QGC Pty Ltd v Bygrave (No 2)* [2010] FCA 1019 (17 September 2010) [98].

82 Association of Mining and Exploration Companies, *Submission 54*; Minerals Council of Australia, *Submission 65*.

83 Minerals Council of Australia, *Submission 65*; Association of Mining and Exploration Companies, *Submission 54*.

10.72 Clarity and certainty may best be obtained by seeking the disclosure of the limits on the scope of the applicant's authority when entering into negotiations.

10.73 In the Discussion Paper, the ALRC proposed that limits on the authority of the applicant to enter into agreements with third parties should be placed on a public register.⁸⁴ There was some support for this approach,⁸⁵ on the basis that it would provide transparency for third parties.

10.74 However the ALRC has not proceeded with this proposal. A register would create costs for both government and native title claim groups.⁸⁶ Some considered the proposal paternalistic and having the potential to foster distrust.⁸⁷ There are other ways of ensuring that third parties are aware of any limits on the authority of the applicant. Third parties wishing to enter into an agreement with a group can seek a letter from the applicant's legal representative, confirming the scope of the applicant's authority, or may use negotiation protocols that outline the authority of each party.⁸⁸

Consequences for breach of authority

10.75 In the Discussion Paper, the ALRC asked if the *Native Title Act* should contain a remedy (other than the replacement of the applicant) for a breach of a condition of authorisation.⁸⁹ One stakeholder thought that disqualification from being a member of the applicant might be an appropriate remedy.⁹⁰ Stakeholders largely indicated that there should be no statutory remedy,⁹¹ on the basis that the process should not become 'more complex, adversarial, and expensive to administer'.⁹² The ALRC considers that while disqualification would sometimes be an appropriate response to a breach, creating a statutory regime would be likely to create complexity and expense. The claim group may, of course, withdraw the authorisation of the person if it wishes.

10.76 This is not to suggest that there would be no consequences for breach of a condition of authorisation. If the conditional authority given to the applicant relates to acts mediated by legal representatives or courts—for example, limits on the applicant's ability to change legal representatives or discontinue a claim—then the legal representative could decline to act, or the court could refuse to exercise its discretion if the applicant does not have the appropriate authority. As the NNTT noted, 'it is the

84 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014) Proposal 10–4.

85 South Australian Government, *Submission 68*; NTSCORP, *Submission 67*; Law Council of Australia, *Submission 64*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; Queensland South Native Title Services, *Submission 55*; Law Society of Western Australia, *Submission 41*.

86 AIATSIS, *Submission 70*; National Native Title Tribunal, *Submission 63*; A Frith and M Tehan, *Submission 52*.

87 Central Desert Native Title Service, *Submission 48*.

88 North Queensland Land Council, *Submission 42*.

89 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014) Question 10–2.

90 Minerals Council of Australia, *Submission 65*.

91 South Australian Government, *Submission 68*; NTSCORP, *Submission 67*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; Queensland South Native Title Services, *Submission 55*; North Queensland Land Council, *Submission 42*; Native Title Services Victoria, *Submission 45*; National Native Title Council, *Submission 57*; Law Society of Western Australia, *Submission 41*.

92 National Native Title Council, *Submission 57*.

duty of the solicitor on the record to ensure any instructions relating to limitations of authority are complied with'.⁹³

10.77 Statutory confirmation that the claim group may define the scope of the applicant's authority would put third parties on notice that they should seek disclosure of the scope of authority. Negotiations would then proceed on an appropriate footing.

10.78 The NNTT indicated that 'clarification of scope of the applicant's authority and any group imposed conditions would assist the Tribunal when conducting inquiries and making determinations on future act matters'.⁹⁴

10.79 The Act already permits an applicant to be replaced on the ground that it has exceeded its authority.⁹⁵ This is likely to be the appropriate response when an applicant does not enter into an agreement when directed to do so by the group.⁹⁶

10.80 Some groups have begun to place conditions on the applicant's authority with regard to the applicant's handling of funds. This is a useful way of clarifying the applicant's duties and should serve to inform both the applicant and the claim group. Should the applicant fail to account for funds received, one response would be to remove the applicant. This would not assist in the recovery of funds. Other remedies may be available in both the law of agency and equity, including account of profits and restitution.⁹⁷

Applicant can act by majority

Recommendation 10–6 The *Native Title Act 1993* (Cth) should be amended to provide that the applicant may act by majority, unless the terms of the authorisation provide otherwise.

10.81 The present state of the law is that a claim group may authorise an applicant to act by majority.⁹⁸ However, where the terms of the authorisation are silent, an applicant must act jointly.⁹⁹ The ALRC recommends that this default position should be reversed to provide that where the terms of the authorisation are silent, the applicant may act by majority.

10.82 This recommendation is intended to address the situation where the claim group (or Working Group, Steering Committee, or other delegated decision-making body)

⁹³ National Native Title Tribunal, *Submission 63*.

⁹⁴ *Ibid*.

⁹⁵ *Native Title Act 1993* (Cth) s 66B(1)(a)(iv).

⁹⁶ See, eg, *Daniel v Western Australia* [2002] FCA 1147 (13 September 2002). This problem can also be addressed by allowing the applicant to act by majority, as the cases that reach the courts tend to concern one or two members of the applicant refusing to sign an agreement.

⁹⁷ AIATSIS, *Submission 70*.

⁹⁸ *Anderson on behalf of the Wulli Wulli People v Queensland* (2011) 197 FCR 404, [62].

⁹⁹ *Tigan v Western Australia* (2010) 188 FCR 533, [18]; *Far West Coast Native Title Claim v South Australia* [2012] FCA 733 (2012); *Weribone on behalf of the Mandandanji People v Queensland* [2011] FCA 1169 (6 October 2011) [15].

has directed the applicant to take some action under the Act, but only some members of the applicant are willing to act on the direction. The ALRC considers that a minority of members of the applicant should not be able to frustrate the will of the entire claim group. Most stakeholders agreed with this approach,¹⁰⁰ although some were concerned that a majority approach could cause divisions among members of the applicant,¹⁰¹ or that majority decision-making is not consistent with s 61 of the *Native Title Act*.¹⁰²

10.83 Currently, if all of the members of the applicant do not sign a future act agreement, whether because of remoteness, incapacity or a dispute, an application must be made to the NNTT for a consent determination. The Tribunal submitted that allowing the applicant to act by majority, in the absence of specific authorisation to do so, ‘may assist with the early resolution of future act matters appearing before the tribunals for determination, simply because an individual named applicant refuses to sign an agreement, the claim group has authorised’.¹⁰³

Applicant unable or unwilling to act

Recommendation 10–7 Section 66B of the *Native Title Act 1993* (Cth) should provide that, where a member of the applicant is no longer willing or able to perform the functions of the applicant, the remaining members of the applicant may:

- (a) continue to act without reauthorisation, unless the terms of the authorisation provide otherwise; and
- (b) apply to the Federal Court for an order that the remaining members constitute the applicant.

10.84 Section 66B provides that a member or members of a claim group may seek an order that the applicant be replaced on the grounds that a person who is the applicant, or is a member of the applicant, consents to his or her removal or replacement, or has died or become incapacitated. Native title claims are usually lengthy, and a group often chooses elders to be members of the applicant. It is not infrequent for a member of the applicant to die, become incapacitated, or to be no longer willing to act.

10.85 In order to bring an application under s 66B, the member or members of the claim group must be authorised by the claim group to do so. Section 66B is ‘directed to maintaining the ultimate authority of the native title claim group’.¹⁰⁴

100 AIATSIS, *Submission 70*; National Native Title Tribunal, *Submission 63*; National Native Title Council, *Submission 57*; Queensland South Native Title Services, *Submission 55*; A Frith and M Tehan, *Submission 52*; Native Title Services Victoria, *Submission 45*; North Queensland Land Council, *Submission 42*; Central Desert Native Title Services, *Submission 26*.

101 Law Society of Western Australia, *Submission 41*.

102 Northern Territory Government, *Submission 71*.

103 National Native Title Tribunal, *Submission 63*.

104 *Daniel v Western Australia* [2003] FCA 666 (3 July 2003) [16].

10.86 It is unclear whether an applicant remains authorised to act if a member of the applicant dies or is unable to act. As Logan J has noted, ‘there is a difference of views on that subject’.¹⁰⁵

10.87 There are decisions indicating that, in this situation, the applicant may continue to act.¹⁰⁶ These judgments refer to the significant expense and delay associated with further authorisation procedures.¹⁰⁷ There are other decisions indicating that if a member of the applicant dies, the applicant is no longer authorised and must return to the claim group for reauthorisation.¹⁰⁸ The ALRC has been told that claimants generally do not take this approach, but wait for the next meeting to replace the applicant or rely on s 84D, which provides that the court may hear and determine the application, despite a defect in authorisation.

10.88 Cape York Land Council advised that ‘it is now common practice for original authorisation processes to include authorisation for the applicant to continue to act, even if one or more of the people constituting the applicant dies or is incapacitated’.¹⁰⁹ The Court has indicated that in this case, no reauthorisation is necessary.¹¹⁰ However, it is likely that there are many claims in existence where the authorisation does not include that provision. Many stakeholders called for the Act to be amended to clarify that the applicant may continue without reauthorisation.¹¹¹ The ALRC recommends that the Act should be amended in this way.

10.89 Further, where the removal of a member of the applicant is not controversial or disputed, a simple and inexpensive procedure should be available to update the Register of Native Title Claims (which includes the name and address for service of the applicant).¹¹² In the Discussion Paper, amendments were proposed to allow a member of the applicant to be removed by filing a notice with the court.¹¹³ Some stakeholders advised that such an approach may not offer sufficient procedural safeguards,¹¹⁴ and might be misused by a member wishing to remove another member with whom they

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- 105 *Weribone on behalf of the Mandandanji People v Queensland* [2011] FCA 1169 (6 October 2011) [18].
- 106 *Lennon v South Australia* [2010] FCA 743 (16 July 2010) [22]; *Dodd on behalf of the Gudjala People Core Country Claim No 1 v Queensland* [2011] FCA 690 (17 June 2011) [17].
- 107 *Lennon v South Australia* [2010] FCA 743 (16 July 2010) [11]; *Dodd on behalf of the Gudjala People Core Country Claim No 1 v Queensland* [2011] FCA 690 (17 June 2011) [8]; *Smallwood on behalf of the Juru People v Queensland* [2014] FCA 331 (3 March 2014), [46].
- 108 *Sambo v Western Australia* (2008) 172 FCR 271, [29]; *Murgha on behalf of the Combined Gungandji Claim v Queensland* [2011] FCA 1317 (14 November 2011) [4].
- 109 Cape York Land Council, *Submission 7*.
- 110 *Coyne v Western Australia* [2009] FCA 533 (22 May 2009) [53]–[56].
- 111 AIATSIS, *Submission 70 70*; South Australian Government, *Submission 68*; NTSCORP, *Submission 67*; National Native Title Tribunal, *Submission 63*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; National Native Title Council, *Submission 57*; Queensland South Native Title Services, *Submission 55*; A Frith and M Tehan, *Submission 52*; Central Desert Native Title Service, *Submission 48*; North Queensland Land Council, *Submission 42*; Law Society of Western Australia, *Submission 41*; Northern Territory Government, *Submission 31*; Western Australian Government, *Submission 20*; Association of Mining and Exploration Companies, *Submission 19*; Cape York Land Council, *Submission 7*.
- 112 *Native Title Act 1993 (Cth)* s 186(1)(d).
- 113 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014) Proposal 10–6.
- 114 Law Council of Australia, *Submission 64*.

are in dispute. Accordingly, the ALRC recommends that a member of the applicant should not be removed until the court makes an order under s 66B of the Act, based on a review of documents filed with the court, such as a certified copy of a death certificate, signed consent from the person to be removed, or evidence of incapacity.

Succession planning

Recommendation 10–8 The authorisation of an applicant sometimes provides that if a particular member of the applicant becomes unwilling or unable to act, another specified person may take their place.

Section 66B of the *Native Title Act 1993* (Cth) should provide that, in this circumstance, the applicant may apply to the Federal Court for an order that the member be replaced by the specified person, without requiring reauthorisation.

10.90 Sometimes an applicant is structured to include a member of each family group, or clan. In this situation, allowing the applicant to continue to act when one member is unable or unwilling to do so would leave a family unrepresented on the applicant.¹¹⁵ Some claim groups have provided for this eventuality by including a succession plan in the original authorisation. That is, they provide for the replacement of a member who is unable or unwilling to act with another specified person, usually from the same family.¹¹⁶

10.91 Even where family groups have nominated individual members of the applicant, the applicant must be authorised by the entire group, and the applicant must act on behalf of the entire group.¹¹⁷

10.92 The *Native Title Act* should acknowledge and encourage the use of succession planning. It maintains the authority of the group and the representativeness of the applicant, and reduces the need for expensive and unnecessary authorisations. The ALRC recommends that if a succession plan is in place, the applicant should be able to apply to the Federal Court for an order that the member who is unable or unwilling to act be replaced by the person specified in the original authorisation. The replacement should not be effective until the Court makes an order under s 66B of the Act, based on a review of documents filed with the Court, such as a certified copy of a death certificate, signed consent from the person to be removed, or evidence of incapacity.

10.93 This proposal received support,¹¹⁸ although stakeholders noted that it would be important for the terms of the authorisation to be very clear,¹¹⁹ and that the

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

116 See, eg, *Smallwood on behalf of the Juru People v Queensland* [2014] FCA 331 (3 March 2014) [11].

117 *Native Title Act 1993* (Cth) s 61; *Bidjara People (No 2) v Queensland* [2003] FCA 324 (7 April 2003) [4]; *Noble v Mundraby* [2005] FCAFC 212 (30 September 2005) [16].

118 AIATSIS, *Submission 70*; NTSCORP, *Submission 67*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; National Native Title Council, *Submission 57*; Queensland South Native Title Services, *Submission 55*; North Queensland Land Council, *Submission 42*.

119 South Australian Government, *Submission 68*.

appointment of the replacement person should not be effective until the Court has made an order under s 66B.¹²⁰

Managing and protecting benefits

10.94 The authorisation of an applicant has the predominant purpose of ensuring that a claim is made with the authority of the claim group. It also creates an entity to perform the functions and responsibilities associated with that claim under the *Native Title Act*.¹²¹ However, the Act not only gives the applicant powers to deal with the claim,¹²² but also creates opportunities for the applicant to receive funds that are intended for the native title group.¹²³ For example, the applicant must be a party to an area ILUA¹²⁴ and is a negotiation party for future acts.¹²⁵ Some state legislation also creates opportunities for an applicant to enter into an agreement on behalf of the group.¹²⁶ The Act does not regulate how funds arising from these agreements are held or disbursed. Representation in relation to future acts is sometimes provided by native title representative bodies (NTRBs) or native title service providers (NTSPs), which are not for profit and closely regulated. It may also be provided by lawyers, who are subject to professional regulation, and non-lawyers, who may be unregulated.¹²⁷

10.95 There are some concerns that funds are not always held for the benefit of the entire native title group, particularly when the applicant is represented by private agents rather than representative bodies.¹²⁸ The ALRC has not consulted on this issue and does not express a view as to whether there are widespread problems with private agents or applicants dealing inappropriately with the proceeds of future act agreements.

10.96 Two recent inquiries have considered the arrangements for managing benefits, and the ALRC was directed to consider their findings in this Inquiry.¹²⁹

Taxation Working Group

10.97 The Taxation of Native Title and Traditional Owner Benefits and Governance Working Group (the Taxation Working Group) considered ‘the adequacy of current arrangements for holding, managing and distributing (native title) benefits’ and made

120 Law Society of Western Australia, *Submission 41*.

121 Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) [25.16].

122 *Native Title Act 1993* (Cth) s 62A.

123 The term ‘native title group’ is used here because, as will be discussed below, there is some disagreement as to whether the funds are intended for the native title *claim* group or the group ultimately determined to be the native title *holding* group.

124 *Native Title Act 1993* (Cth) ss 24CD(1), 24CD(2)(a), 253.

125 *Ibid* ss 30, 30A, 253.

126 See, eg, *Aboriginal Cultural Heritage Act 2003* (Qld) ss 34, 35.

127 Australian Treasury, ‘Taxation of Native Title and Traditional Owner Benefits and Governance Working Group: Report to Government’ (2013) 17.

128 Native Title Services Victoria, Submission No 4 to Senate Standing Committee on Legal and Constitutional Affairs, *Native Title Amendment Bill 2012* (2012); Australian Treasury, above n 127, 11; Dan O’Gorman, Submission to Deloitte Access Economics, *Review of the Roles and Functions of Native Title Organisations 2014*; Yamatji Marlpa, Submission to Deloitte Access Economics, *Review of the Roles and Functions of Native Title Organisations 2014*.

129 See Terms of Reference.

recommendations to the Government on those matters in 2013.¹³⁰ Its key recommendation was for statutory support for an income tax exempt, not-for-profit entity with deductible gift recipient status, to be known as an Indigenous Community Development Corporation (ICDC). The ICDC would invest in community development and for the long-term economic development of Indigenous people.¹³¹

10.98 The Taxation Working Group also recommended that the Government:

- ‘take urgent steps to regulate private agents ... involved in negotiating native title future agreements’;
- refer the following matters for consideration by the Review of the Roles and Functions of Native Title Organisations: the establishment of a statutory trust to hold native title agreement funds; and a process for the registration of s 31 future act agreements;
- ‘take urgent steps to amend the *Native Title Act* ... to clarify that the native title holding community is the beneficial owner of funds generated by native title agreement ... and that the named applicant is in a fiduciary relationship to the native title holding group’.¹³²

10.99 The Government indicated that it supported these recommendations, and would do further work on the development of an ICDC, a register for s 31 future act agreements and amendments to the *Native Title Act* regarding a fiduciary duty.¹³³

Review of Native Title Organisations

10.100 The Review of the Roles and Functions of Native Title Organisations reported in May 2014. It was a policy review, rather than a law reform project.¹³⁴ It noted that ‘there is no comprehensive evidence base in regard to the level of any unscrupulous behaviour by private agents’.¹³⁵ However, the Review found examples of instances where the actions of private agents, engaged by applicants, did not appear to be in the best interests of the claim group.¹³⁶ The Review outlined some structural features of the native title system that create vulnerability for native title holders.¹³⁷ Five options for reform were proposed for the consideration of Government:

- a registered list of native title practitioners;
- an accreditation system encouraging native title solicitors to gain specialised accreditation;

130 Australian Treasury, above n 127, 33.

131 Ibid 5.

132 Ibid 6.

133 The Australian Treasury, *Government Response* (15 September 2014) Australian Treasury <<http://www.treasury.gov.au>>.

134 Deloitte Access Economics, ‘Review of the Roles and Functions of Native Title Organisations’ (Australian Government, March 2014) 5.

135 Ibid 17.

136 Ibid 18.

137 Ibid 118–122.

- reporting of fees paid to native title service providers over a minimum threshold amount;
- an introduction of an appeals mechanism for unethical behaviour; and
- amendment of the *Native Title Act* to clarify the fiduciary duty of the applicant.¹³⁸

The duties of the applicant

Recommendation 10–9 The *Native Title Act 1993 (Cth)* should be amended to provide that a member of the applicant must not obtain an advantage or benefit at the expense of the common law holders.

10.101 Several stakeholders considered that this Inquiry offered an opportunity to give further consideration to the duties of the applicant,¹³⁹ and suggested that the Act should be amended to impose an express fiduciary relationship on the applicant.¹⁴⁰ The ALRC supports the recommendations of the Taxation Working Group that there should be statutory clarification of the duties of the applicant, and recommends that the *Native Title Act* should provide that a member of the applicant must not obtain an advantage or benefit at the expense of the common law holders.

10.102 In consultations conducted for this Inquiry, there was widespread agreement that the applicant has fiduciary duties.¹⁴¹ The Federal Court said that ‘the authorisation of an applicant to make a native title application and to deal with matters arising in relation to it under s 251B has hallmarks of a fiduciary relationship’,¹⁴² and that ‘the native title parties entering into such arrangements ultimately do so for and on behalf of only the true owners of any native title rights and interests that exist’.¹⁴³

10.103 A fiduciary duty forbids the fiduciary from acting ‘in any other way than in the interests of the person to whom the duty to so act is owed’.¹⁴⁴ With regard to agents, the duty is said to be ‘a general obligation on agents not to profit from their position’.¹⁴⁵ That is, fiduciaries have negative, rather than positive obligations.

138 Ibid 44. The Government has not yet provided a formal response to this Report.

139 AIATSIS, *Submission 70*; Chamber of Minerals and Energy of Western Australia, *Submission 21*; Native Title Services Victoria, *Submission 18*; National Native Title Council, *Submission 16*; Minerals Council of Australia, *Submission 8*.

140 The Chamber of Minerals and Energy of Western Australia, *Submission 49*; Native Title Services Victoria, *Submission 18*; National Native Title Council, *Submission 16*.

141 See, eg, Queensland South Native Title Services, *Submission 55*.

142 *Weribone on behalf of the Mandandanji People v Queensland* [2013] FCA 255 (25 March 2013) [61]; See also *Weribone on behalf of the Mandandanji People v State of Queensland (No 2)* [2013] FCA 485 (23 May 2013) [44].

143 *Lampton on behalf of the Juru People v State of Queensland* [2014] FCA 736 (11 July 2014) [34].

144 Peter Radan and Cameron Stewart, *Principles of Australian Equity & Trusts* (2010) 181.

145 Roderick Pitt Meagher, Dyson Heydon and Mark Leeming, *Meagher, Gummow and Lehane’s Equity: Doctrines and Remedies* (LexisNexis Butterworths, 4th ed, 2002) 193.

10.104 If an applicant breaches fiduciary duties owed to the native title group, remedies such as declarations, specific performance, injunction, restitution, damages, or account of profits may be available.¹⁴⁶ There may also be liability for third parties who knowingly participate in a breach of fiduciary duty.¹⁴⁷

10.105 There are difficulties with relying on fiduciary duties to regulate the conduct of applicants. It is not completely clear whether those duties are owed to the claim group (which may change from time to time) or to the native title holders as finally determined, or both.¹⁴⁸ Actions in equity are complex and expensive, and may be beyond the resources of claim groups and NTRBs. The jurisdiction of the court hearing a native title claim to make orders regarding funds received by way of native title agreements has been challenged.¹⁴⁹ The applicant is not a legal entity that is capable of being sued.¹⁵⁰ Only individual members of the applicant can be sued.

10.106 A statutory duty on each member of the applicant to avoid obtaining a benefit at the expense of the native title holders would avoid some of these difficulties. After the registration of a claim, the applicant is known as ‘the registered native title claimant’,¹⁵¹ and it is envisaged that the statutory duty would be owed by members of the applicant when they are performing their functions as registered native title claimant.

10.107 The ALRC considers that a statutory duty, like the equitable fiduciary duty, should be framed as a negative obligation. As discussed earlier, many native title claim groups do not delegate full decision-making power to the applicant, but invest this power in a steering committee or retain this power for the entire group. A duty on the applicant to avoid obtaining an improper benefit would be consistent with these governance arrangements. However, a positive duty, for example, to act in the best interests of the claim group, would potentially conflict with these governance arrangements. It might impose decision-making responsibilities on the applicant that the group does not intend the applicant to have. The applicant might have to consider whether to act as directed by the group, or to act in the best interests of the group as the applicant perceives them.

146 Radan and Stewart, above n 144, pt VI.

147 Ibid 610–613; Meagher, Heydon and Leeming, above n 145, 202.

148 Rares J referred to obligations to ‘the actual native title claim group’ in *Weribone on behalf of the Mandandanji People v Queensland* [2013] FCA 255 (25 March 2013). However he noted that there are duties owed to the ‘true native title holders’ in *Weribone on behalf of the Mandandanji People v State of Queensland (No 2)* [2013] FCA 485 (23 May 2013) [46].

149 The orders made in *QGC Pty Ltd v Bygrave (No 2)* were resisted not only by the Mandandanji companies they were made against, but also by the State and Commonwealth. An appeal was lodged against the orders, and withdrawn when the court vacated the orders. See also Anthony Neal, ‘Fiduciary Duties of Claimants under the *Native Title Act*?’ (2013) 10 *Native Title News* 10.

150 *Butchulla People v Queensland* (2006) 154 FCR 233, [39]; *Anderson on behalf of the Wulli Wulli People v Queensland* (2011) 197 FCR 404, [54]; *Chapman on behalf of the Wakka Wakka People No 2 v Queensland* [2007] FCA 597 (2007) [9]; *Lennon v South Australia* [2010] FCA 743 (16 July 2010).

151 *Native Title Act 1993* (Cth) s 253.

10.108 Further, a duty to avoid obtaining a benefit directly addresses the specific mischief that the reform is intended to address, that is, the potential for applicants to deal inappropriately with the proceeds of future act agreements.

10.109 Other models of statutory duties include a statutory duty on each member of the applicant to act in the best interests of the native title holders. Examples of statutory duties to act in the best interests of another are common in Commonwealth laws.¹⁵² Another model is the duties of directors. Directors of corporations have a statutory duty to exercise their powers with care and diligence, to act in good faith and for a proper purpose, and to avoid using their position to gain an advantage or to cause detriment to the corporation.¹⁵³

10.110 The duty should be owed to the common law holders of the rights and interests claimed, because it is their interests that are at risk of being harmed by an applicant that acts inappropriately. Some stakeholders have indicated a preference for a statutory duty that is owed to the claim group,¹⁵⁴ either because this group is more clearly identifiable prior to a determination, or because it is the claim group that authorised the applicant. However, a person who is in the claim group, but who does not in fact hold native title rights and interests at common law, does not have any interests to be protected by a statutory duty. One advantage of the negative duty, that is, the duty to avoid obtaining a benefit, is that precisely identifying the members of the group to whom the duty is owed is of less relevance. If a positive duty to act in the best interests of the group was being imposed, it would be more important to be able to identify exactly who is in the group.

10.111 While the draft Terms of Reference for this Inquiry included a reference to ‘access to and protection of native title rights and benefits’, the final Terms of Reference did not. Accordingly, this Inquiry has only considered the protection of benefits insofar as this issue intersects with the authorisation of the applicant. The introduction of a statutory duty is only one way to protect benefits, and should not be seen as resolving the issue. Other methods, including the regulation of private agents, the introduction of an ICDC, the registration of future act agreements and statutory trusts, may well be necessary to complement the statutory duty.¹⁵⁵

Claim group membership

10.112 Before a claim can be authorised, the claim group must be identified. The native title claim group is all the persons ‘who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed’.¹⁵⁶ In the case of a compensation claim, the claim group is ‘all the

152 *Life Insurance Act 1995* (Cth) s 48; *National Disability Insurance Scheme Act 2013* (Cth) s 76; *Paid Parental Leave Act 2010* (Cth) s 292; *Social Security (Administration) Act 1999* (Cth) s 1230.

153 *Corporations Act 2001* (Cth) ss 180–182.

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

155 See further Langton, above n 40; Australian Treasury, above n 127; Deloitte Access Economics, above n 134.

156 *Native Title Act 1993* (Cth) s 61(1).

persons ... who claim to be entitled to the compensation'.¹⁵⁷ The application for a native title determination or compensation must either name the members of the claim group or 'otherwise describe the persons sufficiently clearly so that it can be ascertained whether any particular person is one of those persons'.¹⁵⁸ The same specificity is not required for a determination, which may name the group that holds the native title rights and interests, and leave the identification of individual members of the group to be determined by the registered native title body corporate.¹⁵⁹

10.113 Reasons a claim group may have difficulty determining its membership include:

- the registration test requirement for a specific claim group description is not consistent with the complex nature of Aboriginal and Torres Strait Islander societies;
- the impact of colonisation has disrupted the social organisation of Aboriginal and Torres Strait Islander groups;
- in some areas there is uncertainty as to the status of people with a historical connection to land; and
- the time pressure imposed by the hasty lodgement of claims in response to a future act notification.¹⁶⁰

10.114 Stakeholders agreed that these matters contribute to difficulties identifying the claim group—and to subsequent disputes.¹⁶¹ Those disputes often result in litigation, and in particular, challenges to the authorisation of an applicant.¹⁶² Disputes, while inevitable in human interactions,¹⁶³ can cause great pain within communities.¹⁶⁴ Delays caused by these disputes create a barrier to access to justice.¹⁶⁵ Uncertainty around claim group composition also creates difficulties for third parties who are proposing future acts.

157 Ibid.

158 *Native Title Act 1993* (Cth) s 61(4).

159 Christos Mantziaris and David Martin, *Native Title Corporations: A Legal and Anthropological Analysis* (Federation Press, 2000) 70; *Western Australia v Ward* (2000) 99 FCR 316, [280]; *Dale v Moses* [2007] FCAFC 82 (7 June 2007) [370]. Where there is a dispute as to claim group membership, the Court will ordinarily deal with the question: *Banjima v Western Australia (No 2)* [2013] FCA 868.

160 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Issues Paper No 45 (2013) 64–66.

161 AIATSIS, *Submission 36*; Law Society of Western Australia, *Submission 9*; Cape York Land Council, *Submission 7*.

162 See, eg, *Davidson v Fesl* [2005] FCAFC 183 (2005); *Weribone on behalf of the Mandandanji People v Queensland* [2013] FCA 255 (25 March 2013); *Carr on behalf of the Wellington Valley Wiradjuri People v New South Wales* [2013] FCA 200 (11 March 2013).

163 Kimberley Land Council, *Submission 30*.

164 Toni Bauman, 'Whose Benefits? Whose Rights? Negotiating Rights and Interests Amongst Indigenous Native Title Parties' (2005) 3 *Land, Rights, Laws: Issues of Native Title* 1, 7.

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

10.115 These difficulties do not necessarily indicate a problem with the law or legal frameworks, but may be symptoms of the very difficult factual and philosophical problems associated with translating Indigenous people's relationships with each other and with land into the western legal system.¹⁶⁶ As Tony McAvoy and Valerie Cooms observed, the *Native Title Act*

continues to force Indigenous people to fit their own concepts of land tenure into an imposed non-Indigenous conceptualisation of what their societies and traditional laws and customs should be.¹⁶⁷

10.116 One submission suggested that a group who has lodged a claim in haste in response to a proposed future act should be able to amend the claim without requiring re-authorisation and registration.¹⁶⁸ The ALRC has not proceeded to make such a recommendation, because the authorisation and registration processes (including the notification provisions) serve important functions in the native title system, even where they cause expense and delay. Accordingly, the following discussion focuses on options for improved dispute resolution rather than on amendments to the *Native Title Act*. These are intended to advance the timely and just resolution of claims, as indicated by the guiding principles for this Inquiry.

Current options for dispute resolution

10.117 Representative bodies have statutory responsibility for dispute resolution, including assisting in promoting agreement between its constituents about native title matters.¹⁶⁹ In performing these functions, the representative body may seek the assistance of the NNTT.¹⁷⁰ The North Queensland Land Council reported that it has used this provision of the *Native Title Act* on two occasions and has found it to be very useful.¹⁷¹

10.118 In some cases, allowing time in the court processes for research to be completed and for the group to consider the results of the research may prevent disputes from occurring.¹⁷²

Options for reform

10.119 Where the representative body has made a decision that is not in the interests of some native title claimants or potential claimants, it is placed in a position of perceived conflict.¹⁷³ One suggestion is for the representative body to fund independent

166 On the difficulties of translation, see Ch 1.

167 Tony McAvoy and Valerie Cooms, 'Even as the Crow Flies It Is Still a Long Way: Implementation of the Queensland South Native Title Services Ltd Legal Services Strategic Plan' (Native Title Research Monograph No 2/2008, AIATSIS, June 2008) 6.

168 Cape York Land Council, *Submission 7*.

169 *Native Title Act 1993 (Cth)* s 203BF.

170 *Ibid* s 203BK.

171 North Queensland Land Council, *Submission 17*.

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

173 Department of Justice, Victoria, *Submission 15*; Law Society of Western Australia, *Submission 9*; Cape York Land Council, *Submission 7*; Just Us Lawyers, *Submission 2*.

mediation, or independent legal representation, for the dissatisfied party.¹⁷⁴ Cape York Land Council suggested that additional funding to representative bodies for the purpose of engaging mediators or legal representation might assist.¹⁷⁵

10.120 Alternatively, the Law Society of Western Australia said it would be preferable

for dispute resolution processes to be adopted which are independent of NTRBs entirely (for example, a referral to an independent, accredited mediator), and which are the subject of independent government funding, rather than compelling individual ‘constituents’ to pursue costly and difficult relief in the courts if the NTRB process is unsatisfactory or not considered sufficiently independent.¹⁷⁶

10.121 Just Us Lawyers made a similar suggestion, calling for a ‘panel of ex-Federal Court judges, assisted by qualified Indigenous mediators’ to be resourced by representative bodies. They suggested that the outcome of mediations should be confirmed by court orders to ensure that outcomes are enforceable.¹⁷⁷

10.122 Culturally appropriate dispute resolution services may not be currently available. In 2006, the AIATSIS Indigenous Facilitation and Mediation Project identified a need for a ‘national fully supported and accredited network of Indigenous facilitators, mediators, and negotiators’.¹⁷⁸ The Federal Court of Australia’s Indigenous Dispute Resolution and Conflict Management Case Study Project also noted that, in many areas, timely, responsive and effective dispute management services are not available and that there is a need for a national Indigenous dispute management service.¹⁷⁹ Such a service could not only address native title disputes but other family, neighbourhood or community disputes. Some disputes in the native title arena appear to be a continuation of conflict that began elsewhere,¹⁸⁰ and so resolution of non-native title conflict could contribute to improved native title processes.

10.123 Concerns have been raised that, in some proceedings, the anthropologist has ‘the last word’ in defining the claim group, and there is no avenue for a potential claimant to refute the conclusions of an anthropologist’s report, beyond joinder as a respondent.¹⁸¹ Joinder as a respondent with the aim of addressing disputes about claim group composition is often not an effective measure and may introduce cost and delay

174 Just Us Lawyers, *Submission 2*.

175 Cape York Land Council, *Submission 7*.

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

177 Just Us Lawyers, *Submission 2*.

178 Toni Bauman, ‘Final Report of the Indigenous Facilitation and Mediation Project July 2003–June 2006: Research Findings, Recommendations and Implementation’ (AIATSIS, 2006) v.

179 Federal Court of Australia, Indigenous, Dispute Resolution and Conflict Management. Case Study Project, ‘Solid Work You Mob Are Doing’ (2009) xv–xvi.

180 Law Society of Western Australia, *Submission 9*; Graeme Neate, “‘It’s the Constitution, It’s Mabo, It’s Justice, It’s Law, It’s the Vibe’”: Reflections on Developments in Native Title since *Mabo v Queensland [No 2]*’ in Toni Bauman and Lydia Glick (eds), *The Limits of Change: Mabo and Native Title 20 Years On* (AIATSIS, 2012) 188, 206.

181 J Hill, *Submission 37*.

into native title proceedings. An Indigenous dispute resolution process might offer a forum for exploring these issues.¹⁸²

10.124 The ALRC suggests that the Australian Government consider establishing a national Indigenous dispute management service.

182 See also Ch 12, regarding the use of mediation and inquiries into matters including the composition of the claim group.