11. Parties and Joinder

Contents

Summary

11.1 Section 84 of the *Native Title Act 1993* (Cth) ('*Native Title Act*') sets out the party and joinder provisions. These provisions specify who is a party to native title proceedings, who may join native title proceedings, in what circumstances they may join, and when they may be dismissed.

11.2 The Terms of Reference for the Inquiry ask the ALRC to consider any barriers to access to justice for claimants, potential claimants and respondents, imposed by the party and joinder provisions of the *Native Title Act*. In this chapter, the ALRC makes recommendations designed to facilitate access to justice for these groups and to ensure that those persons with an interest affected by a native title determination are adequately represented in native title proceedings. The ALRC notes that the need for access to justice for respondents must be balanced by the need for equity for the native title applicant, and the need for the efficient administration of justice in native title claims.

11.3 In this chapter, the ALRC makes recommendations regarding the party and joinder provisions of s 84 of the *Native Title Act*. These include recommendations to allow respondent parties to elect to limit their involvement in proceedings to representing their own interests, to provide Aboriginal Land Councils in NSW with notice of native title proceedings, to clarify the law regarding joinder of claimants and potential claimants, and to clarify the law regarding dismissal of parties. The ALRC also recommends that the *Federal Court Act 1976* be amended to allow appeals from joinder and dismissal decisions in native title proceedings, and that the Australian Government develop principles governing the circumstances in which the Commonwealth will become a party to, or intervene in, native title proceedings.

Overview of the party and joinder provisions

11.4 A determination of native title rights and interests by the Federal Court takes effect *in rem*.[1] This term means that the determination of native title rights and interests is enforceable against 'the whole world'. A determination therefore results in legal finality.[2] Participation as a respondent in native title proceedings is a means by which a person may represent their interest in a claim area before a determination is reached.

11.5 Section 84 describes who is or may become a party to native title proceedings under the *Native Title Act*, and how parties may withdraw or be dismissed from proceedings. The provisions apply in relation to native title determination applications (including non-claimant applications), revised native title determination applications and compensation applications.[3] The term 'joinder' is often used in relation to native title procedure to describe both the s 84(3) method of becoming a party and s 84(5) applications to the Court to be joined as a party. Discussions about joinder under s 84(5), whether judicial or otherwise, may consider other subsections of s 84.[4]

11.6 Parties to a native title proceeding include the applicant[5] and the relevant state or territory minister.[6] Various third party respondents may also become parties to proceedings under s 84(3) by notifying the Federal Court within a specified time that they wish to participate, or under s 84(5) by applying to be joined to proceedings.[7] Broadly speaking, s 84(3) identifies that certain types of interests will be affected by a native title determination, and provides a mechanism for a person with such interests to become party to proceedings upon compliance with notification procedures. The joinder of a party under s 84(5), however, is subject to the discretion of the Court. These provisions are discussed in detail below.

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1 *Western Australia v Ward* (2000) 99 FCR 316, [190] (Beaumont & von Doussa JJ); *Wik v The State of Queensland* (1994) 49 FCR 1; *Dale v State of Western Australia* [2011] FCAFC 46 (31 March 2011) [92].

2 Subject to possible variation or revocation of a determination: *Native Title Act 1993* (Cth) s 13.

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

4 See for example, *Butterworth v Queensland* (2010) 184 FCR 297.

5 *Native Title Act 1993* (Cth) s 84(2).

6 Ibid s 84(4).

7 See, eg, *Butterworth on behalf of the Wiri Core Country Claim v Queensland* [2010] FCA 325 (26 March 2010).

11.7 Section 225 of the Act provides that a determination must address the interests of third parties, including a determination of:

> (c) the nature and extent of any other interests in relation to the determination area; and
>
> (d) the relationship between the rights and interests in paragraphs (b) [ie the native title rights and interests] and (c) (taking into account the effect of this Act).

11.8 Party status in native title proceedings brings with it the right to participate in negotiations that may lead to a consent determination under either s 87 or s 87A of the Act. Under s 87, a consent determination requires the agreement of all parties to proceedings. As a result of this, 'a person who is a party can veto [a consent determination] and … can continue to do so at every stage so that only a judicial determination can resolve the claim'.[8] Section 87A provides for a consent determination over part of the claim area. This type of consent determination does not require the agreement of all parties, but only the agreement of certain defined parties.[9] If a person has an interest sufficient to become a party under s 84(3), that person's agreement will typically be required for a consent determination under s 87A. However, a consent determination may be possible under s 87A without the agreement of persons who join under s 84(5).[10]

11.9 The party and joinder provisions may need to accommodate Aboriginal and Torres Strait Islander respondents, for example, where there are overlapping claim groups or disaffected members of the claim group. For these respondents, access to justice may involve considerations distinct from, and potentially in conflict with, the considerations of equity for the primary claim group as represented by the applicant.

11.10 The importance of respondent interests being adequately represented in native title proceedings must be balanced against the impact that a large number of respondents may have on the resolution of native title proceedings, and in turn on the members of the claim group. These burdens may be administrative—as the number of parties increases, so too, does the number of persons who must, for example, be served with documents. The interests of claim groups must also be considered, given the context of the beneficial purposes of the *Native Title Act*.

11.11 Section 37M of the *Federal Court of Australia Act 1976* (Cth), which describes the over-arching purpose of civil practice and procedure provisions as the just resolution of disputes according to law 'as quickly, inexpensively and efficiently as possible', may also have decisive weight in a particular joinder case.[11]

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8 *Byron Environment Centre Inc v Arakwal People* (1997) 78 FCR 1, 5 (Black CJ).

9 *Native Title Act 1993* (Cth) s 87A(1)(c).

10 *Kokatha Uwankara (Part A) Native Title Claim v South Australia* [2013] FCA 856 (30 August 2013) [23]. The Court has held that, where a consent determination may be made under either s 87 or s 87A, it is preferable that it be made under s 87A: *Goonack v Western Australia* [2011] FCA 516 (23 May 2011) [21].

11 *Dodd on behalf of the Gudjala People Core Country Claim No 1 v Queensland (No 2)* [2013] FCA 1167 (9 August 2013) [37]–[40].

Participation by notification under s 84(3)

11.12 Most persons, other than the applicant and the Crown (ie, the relevant state, territory or Commonwealth government), become parties to native title proceedings under s 84(3). Section 84(3) provides that certain persons are a party to native title proceedings if that person notifies the Federal Court in writing to that effect within the prescribed time period. These persons include:

- persons who must be notified of a claim by the Registrar under s 66(3)(a)(i)–(vi), such as registered native title claimants, native title bodies corporate, persons with a registered proprietary interest, the Commonwealth Minister, and local government bodies—s 84(3)(a)(i);
- persons who claim to hold native title in relation to land or waters in the area covered by the application—s 84(3)(a)(ii); and
- persons whose interests in relation to land or waters may be affected by a determination in the proceedings—s 84(3)(a)(iii).

11.13 For the purposes of s 84(3)(a)(iii), the phrase 'interests in relation to land or waters' is to be read in conjunction with the s 253 definition of 'interests, in relation to land or waters'.[12] That definition provides:

> ***interest***, in relation to land or waters, means:
>
> (a) a legal or equitable estate or interest in the land or waters; or
>
> (b) any other right (including a right under an option and a right of redemption), charge, power or privilege over, or in connection with:
>
> (i) the land or waters; or
>
> (ii) an estate or interest in the land or waters; or
>
> (c) a restriction on the use of the land or waters, whether or not annexed to other land or waters.

11.14 Proceedings cannot substantively commence until the notification process has concluded and the parties are known.

11.15 Section 84(3) expresses a legislative assumption that the interests of the specified classes of parties will be affected by a determination of native title. The provisions are relatively wide in terms of the nature of an interest affected.

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12 *Kokatha Uwankara (Part A) Native Title Claim v South Australia* [2013] FCA 856 (30 August 2013) [23]. The phrase 'interest in relation to land and waters' was introduced by the *Native Title Amendment Act 2007* (Cth).

11.16 A consent determination under s 87A requires the agreement of specified categories of persons. These categories include many of the categories of person who may become a party under s 84(3).[13] A consent determination under s 87A will therefore require the agreement of most persons who are able to become a party to proceedings under s 84(3).

Joinder of parties under s 84(5)

11.17 If a person does not become a party to proceedings under s 84(3),[14] the person may apply to be joined to proceedings under s 84(5).[15] Section 84(5) provides that the Federal Court may

> at any time join any person as a party to the proceedings, if the Court is satisfied that the person's interests may be affected by a determination in the proceedings and it is in the interests of justice to do so.[16]

11.18 If the threshold questions—whether there is an interest and whether that interest may be affected by a determination—have been resolved in favour of the party making the application, the Court then considers whether it should exercise its discretion to join the person as a party.[17] Legal action may be well advanced when a person seeks to become a party under s 84(5) ('late joinder').

11.19 In exercising its discretion to join a person as a party to proceedings under s 84(5), the Court must first be satisfied that the person's interests may be affected by a determination. Case law suggests that an 'interest', for the purposes of s 84(5), is not limited to a legal or equitable interest, and that it may include some commercial, recreational or other interests.

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13 Section 87A does not require the agreement of a registered native title body corporate in relation to the claim area, or of a person who holds a proprietary interest in relation to the claim area that is registered in public register of interests in relation to land or waters. However, persons in either of these categories are able to become parties under ss 84(3)(a)(i), 66(3)(a)(ii) and 66(3)(a)(iv), respectively. The categories of person whose agreement is required for a s 87A consent determination include: (i) the applicant; (ii) each registered native title claimant in relation to any part of the determination area who is a party to the proceeding at the time the agreement is made; (iv) each representative Aboriginal/Torres Strait Islander body for any part of the determination area who is a party to the proceeding at the time the agreement is made; (v) each person who holds an interest in relation to land or waters in any part of the determination area at the time the agreement is made, and who is a party to the proceeding at the time the agreement is made; (vi) each person who claims to hold native title in relation to land or waters in the determination area and who is a party to the proceeding at the time the agreement is made; (vii) the Commonwealth Minister, if the Commonwealth Minister is a party to the proceeding at the time the agreement is made or has intervened in the proceeding at any time before the agreement is made; (viii) if any part of the determination area is within the jurisdictional limits of a State or Territory, the State or Territory Minister for the State or Territory if the State or Territory Minister is a party to the proceeding at the time the agreement is made; (ix) any local government body for any part of the determination area who is a party to the proceeding at the time the agreement is made: *Native Title Act 1993* (Cth) s 87A(1)(c).

14 This may be because the person does not fall within the categories in s 84(3)(a), or because the person does not notify the Court within the relevant time period.

15 *Kokatha Uwankara (Part A) Native Title Claim v South Australia* [2013] FCA 856 (30 August 2013) [24].

16 *Native Title Act 1993* (Cth) s 84(5).

17 *Far West Coast Native Title Claim v South Australia (No 5)* [2013] FCA 717 (30 July 2013) [26]; *Barunga v Western Australia (No 2)* [2011] FCA 755 (25 May 2011) [162]–[168]; *Jacob v State of Western Australia* [2014] FCA 1106 (14 October 2014) [4].

11.20 The types of interest necessary to be joined to proceedings were considered in *Byron Environment Centre Inc v Arakwal People* ('*Byron*').[18] In that case, the Full Court held that a Deputy President of the National Native Title Tribunal had erred in refusing the Byron Environment Centre party status because it could not demonstrate that it fell within the definition of 'interests in relation to land or waters' in s 253. Unlike s 84(3)(a)(iii), s 84(5) is not limited to interests in relation to land and waters as defined in s 253.[19]

11.21 The interests allowing joinder under s 84(5) may include a 'special, well-established non-proprietary connection with land or waters', but must not be 'indirect, remote or lacking substance'.[20] The interests must be 'capable of clear definition and … be affected in a demonstrable way by a determination in relation to the application'.[21] The interests 'should be greater than that of a member of the general public',[22] although there

> is no reason why persons who have had and continue to have regular and lawful use or enjoyment of areas of land or waters covered by a claim under the Act should not be afforded the opportunity of being heard as a party before losing their 'right' or having it otherwise affected by a native title determination.[23]

11.22 An interest in using the claim area for bushwalking, hunting or camping, for example, would not appear to be sufficient for joinder under s 84(5),[24] but ongoing use over many years may be, particularly where the native title claim is for exclusive possession.[25] A sufficient interest may arise where the person applying for joinder has a number of well advanced applications for mining licences,[26] although a single application for a licence may be insufficient.[27] The way in which a person's interest may be affected is also a relevant consideration.[28] In *Byron*, Black CJ considered that

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18 *Byron Environment Centre Inc v Arakwal People* (1997) 78 FCR 1. *Byron* concerned the *Native Title Act* prior to amendment by the *Native Title Amendment Act 1998* (Cth). In the earlier version of the Act, the joinder provision (then s 84(2)) read: 'A person may seek leave of the Federal Court to be joined as a party to proceedings if the person's interests are affected by the matter or may be affected by a determination in the proceedings'. However, *Byron* has been followed in subsequent cases concerning s 84(5): *Woodridge v Minister for Land and Water Conservation* (2001) 108 FCR 527; *Harrington-Smith on behalf of the Wongatha People v Western Australia* [2002] FCA 184 (11 February 2002).

19 *Byron Environment Centre Inc v Arakwal People* (1997) 78 FCR 1, 6 (Black CJ).

20 Ibid 6.

21 Ibid 7. The principles described in *Byron* continue to be applied: see, eg, *Cheinmora v Western Australia* [2013] FCA 727 (25 July 2013); *Kokatha Uwankara (Part A) Native Title Claim v South Australia* [2013] FCA 856 (30 August 2013).

22 *Byron Environment Centre Inc v Arakwal People* (1997) 78 FCR 1, 6 (Black CJ).

23 Ibid 41 (Merkel J).

24 *Atkinson on behalf of the Gunai/Kurnai People v Victoria (No 3)* [2010] FCA 906 (16 August 2010); *Atkinson on behalf of the Gunai/Kurnai People v Victoria (No 4)* [2010] FCA 907 (16 August 2010). Note that, in both cases, the application for joinder was dismissed due to the non-appearance of the joinder applicant.

25 See, eg, *Combined Mandingalbay Yidinji-Gunggandji Claim v Queensland* [2002] FCA 730 (14 June 2002).

26 *Walker on behalf of the Ngalia Kutjungkatja People v Western Australia* [2002] FCA 869 (10 July 2002).

27 *Yorta Yorta Aboriginal Community v Victoria* (Unreported, Federal Court of Australia, Olney J, 7 June 1996).

28 *Akiba on behalf of the Torres Strait Regional Seas Claim People v Queensland (No 1)* [2006] FCA 1102 (18 August 2006) [32].

the interests of a corporation might be affected if its activities might be 'curtailed or otherwise significantly affected by the determination'.[29] In the same case, Merkel J considered that a determination of exclusive native title might affect regular and lawful use and enjoyment of land, but also that those rights are subject to statute, and drew attention to the need to show 'how they may be actually affected by the determination'.[30]

11.23 Where a person seeking to be joined under s 84(5) has an interest that may be affected merely because the person has a public right of access over, or use of, an area covered by the application, s 84(5A) provides a discretionary power for the Federal Court to limit the number of parties with the same interest.[31] The Court may 'make appropriate orders to ensure that the person's interests are properly represented in the proceedings',[32] but 'need not allow more than one such person to become a party to the proceedings in relation to each area covered by such a public right of access or use'.[33]

11.24 Given the range of interests that may be sufficient for joinder under s 84(5) but which are not strictly 'interests in relation to land or waters', a consent determination under s 87A may not require the agreement of all persons who join under s 84(5).

Dismissal of parties under ss 84(8) and 84(9)

11.25 Section 84(8) allows the Federal Court to dismiss a party. Under s 84(9), the Court is to consider dismissing a party if that party's interests in the claim area arise merely because of a public right of access and if the person's interests are adequately represented by another party, or if the person never had (or no longer has) an interest that may be affected by a determination in the proceedings. A party (other than the applicant) may also withdraw from proceedings by giving written notice before the first hearing,[34] or at any time with the leave of the Court.[35]

11.26 The power to dismiss a party has been used, for example, to remove a party from proceedings who refused a consent determination, apparently without basis.[36]

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29 *Byron Environment Centre Inc v Arakwal People* (1997) 78 FCR 1, 10 (Black CJ).

30 Ibid 42 (Merkel J).

31 An alternative reading of s 84(5A) is that it provides an additional basis for joinder, rather than merely providing a power for the Court to limit joinder of multiple parties with the same interest arising from a public right of access over, or use of, the claim area under s 84(5): *Mamu People v State of Queensland* [2006] FCA 1563 (29 August 2006) [10] (Dowsett J); *Chapman v Minister for Land and Water Conservation for New South Wales* [2000] FCA 1114 (28 July 2000).

32 *Native Title Act 1993* (Cth) s 84(5A)(c). See also *Combined Mandingalbay Yidinji-Gunggandji Claim v Queensland* [2002] FCA 730 (14 June 2002).

33 *Native Title Act 1993* (Cth) s 84(5A)(d).

34 Ibid s 6.

35 Ibid s 7.

36 *Watson on behalf of the Nyikina Mangala People v Western Australia (No 5)* [2014] FCA 650 (20 May 2014).

The need for reform

Balancing considerations in the party and joinder process

11.27 The party and joinder provisions in the *Native Title Act* raise a number of issues around the balance of interests in the native title system which may affect how readily a native title determination is reached, as well as whether the proceedings are protracted and involve administrative burdens for all parties,[37] and the institutions administering the native title claims process (the National Native Title Tribunal and the Federal Court).

11.28 As 'a useful tool of legal analysis', native title is regarded as a burden on the radical title of the Crown.[38] In accordance with this position, the parties to a native title proceeding include the applicant and the relevant state, territory or Commonwealth government. The *Native Title Act*, as noted, provides other persons and organisations in addition to the Crown with an opportunity to be become a party through the notification process and also allows for applications for subsequent joinder of parties.[39]

11.29 As a practical matter of access to justice, therefore, third party respondents whose interests may be affected by a native title determination are provided with an opportunity to be involved in the proceedings.[40] The ALRC notes that this has the practical effect that there can potentially be a large number of parties. Once a person becomes a party, that person will be required to participate in proceedings, often at some time and cost, and in most circumstances, that person's consent is necessary for a consent determination.

11.30 Different considerations apply to claimants and potential claimants as respondent parties. There may be a mix of reasons for claimants or potential claimants to seek to join native title proceedings. The existence of overlapping claims or disaffection within claim groups may precipitate applications for joinder. Other Aboriginal and Torres Strait Islander peoples may seek to assert their own claims to land and waters, and see the courts as the appropriate avenue, notwithstanding that no determination can eventuate through participation as a respondent.

11.31 Given the diversity of interests in any native title claim, the ALRC considers that in most instances active case management by the Federal Court will be the most appropriate way to balance the considerations arising in applications for joinder.

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37 Merkel J in *Byron* noted that '[i]t takes little imagination to conceive of the variety of ideological or conscientious interests or groups that may be genuinely and deeply committed to supporting or opposing native title claims in particular areas of Australia. To afford such interests or groups the standing of a party under the Act is a recipe for promoting, rather than resolving, differences': *Byron Environment Centre Inc v Arakwal People* (1997) 78 FCR 1, 45. *Byron* was decided before the introduction of s 84(5A) into the Act, and the operation of this provision may go some way to addressing the concern expressed by Merkel J.

38 *Commonwealth v Yarmirr* (2001) 208 CLR 1, [49].

39 See Ch 2 for a brief discussion of the history of the *Native Title Act*.

40 See Ch 1, Guiding Principle 2. In law, a legal person can include a corporation and other entities having legal personality.

11.32 The ALRC has not made recommendations about respondent funding, but notes that respondent funding for some parties, especially groups not able to avail themselves of representation by major industry organisations, will be an important means of enabling participation. On principles of equity, consideration might be given to whether potential claimants, unable to avail themselves of funding through other sources, might access such funding in appropriate circumstances. Consideration around the provision of funding in all circumstances should support the conciliation and mediation focus in native title claims resolution, and the beneficial purposes of the *Native Title Act*.[41]

11.33 It is also important, however, to balance access to justice considerations with the need for proceedings not to be unduly long or complicated, so that justice can be efficiently administered.[42] Large numbers of respondent parties have the potential to adversely affect the interests of claim groups. AIATSIS expressed a concern that:

> Resource intensive challenges to native title claims are at times avoided only by the applicant agreeing to enter an arrangement with the respondent, whereby many of the rights that could be gained from a determination are abrogated. This can occur even when the State has agreed connection and the parties are negotiating terms for a consent determination.[43]

11.34 Other stakeholders suggested that the party and joinder provisions in s 84 were operating adequately, and that reform of these provisions was unnecessary. The South Australian Government, for example, considered

> the current powers of the Federal Court to be adequate whereby the interests of justice can be taken into account. The jurisprudence that has developed in this area over the last ten years should not be undermined by making changes to the underlying provisions.[44]

11.35 Although consultations indicated that the party and joinder provisions generally appear to be operating satisfactorily, several issues of concern were identified in the Inquiry. Stakeholders expressed concerns, such as:

- the potential for increased costs and delays arising from participation of non-Crown respondents;[45]
- the impact on parties when a new party is joined late in proceedings;[46]

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41 *Native Title Act 1993* (Cth) Preamble.
42 See Ch 1, Guiding Principle 3.
43 AIATSIS, *Submission 36*.
44 South Australian Government, *Submission 34*. See also Law Council of Australia, *Submission 35*; Northern Territory Government, *Submission 31*; Goldfields Land and Sea Council, *Submission 22*; Western Australian Government, *Submission 20*.
45 Kimberley Land Council, *Submission 30*.
46 See, eg, Central Desert Native Title Services, *Submission 26*; North Queensland Land Council, *Submission 17*; A Frith and M Tehan, *Submission 12*.

- the need for clarity and certainty around the party provisions;[47] and
- the desirability of mechanisms allowing parties to limit their involvement.[48]

11.36 The Federal Court has noted:

> the claims notification and joinder provisions of the Act in their application to both indigenous and non-indigenous prospective parties have the capacity to significantly delay the progress of claims and impose substantial administrative burdens on the Court, National Native Title Tribunal and the parties. For example, while the provisions relating to the joinder outside of the notification period were amended in 2007 to require not only that the applicant for joinder have an interest that may be affected by a determination but also that it be in the interests of justice that they be joined, no similar interests of justice requirement exists in relation to joinder during the notification period. This has frequently meant that parties whose interests the jurisprudence tells us are protected and who have no desire or capacity to participate in the resolution of the claim must be joined. Often these parties are dismissed when a claim approaches resolution without ever having actively participated despite Court orders that they do so. Delay and administrative burden are inevitable with seemingly little, if any, overall benefit.[49]

11.37 Legislative reform may not be the most appropriate way to address all stakeholder concerns, particularly, given the Court's existing powers for managing the participation of parties, joinder and dismissal of parties.

11.38 More generally, recommendations should balance the importance of representation of interests for respondents, claimants and potential claimants in native title proceedings,[50] with timely but just outcomes for claimants.[51]

The Crown as primary respondent

11.39 Where native title is determined to exist, it is held to be a burden on the radical title of the Crown—that power allows the Crown to deal with land and water and to grant interests to third parties. Where native title is found to exist in offshore areas, it is non-exclusive, and must be consistent with Commonwealth sovereignty over those waters and Australia's international obligations.[52] States, territories and the Commonwealth as the holders of the powers and obligations to deal with land, waters and offshore areas, are therefore the 'primary' respondents in native title determination proceedings.

11.40 Section 84(4), which provides that the relevant state or territory minister is automatically a party to proceedings unless the minister opts out by notice, reflects this

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

48 Telstra, *Submission 53*; Chamber of Minerals and Energy of Western Australia, *Submission 21*; Telstra, *Submission 4*.

49 Federal Court of Australia, Submission to the Australian Attorney-General's Department, Review of the *Native Title Act 1993*—Draft Terms of Reference, 2013.

50 Guiding Principle 2.

51 Guiding Principle 3.

52 *Commonwealth v Yarmirr* (2001) 208 CLR 1; *Akiba v Commonwealth* (2013) 250 CLR 209, [34] (French CJ and Crennan J).

central role. The Commonwealth may become a party to proceedings if the minister gives notice under s 84(3)[53] and may otherwise join proceedings under s 84(5). The Commonwealth may also intervene in proceedings under s 84A.

11.41 In fulfilling its role as a primary respondent, the Crown is not held to be subject to a qualification of its powers, beyond those of a procedural character required for the proper conduct of proceedings. In other jurisdictions, such as Canada and New Zealand, there are doctrines or treaty obligations that mediate the role of the Crown in its relationship to indigenous claimants. Chapter 9 sets out relevant principles, such as 'Honour of the Crown'.

11.42 On one view, Crown parties should represent all interests that are ultimately derived from a Crown grant for the purposes of ss 225(c) and (d).[54] Persons holding these rights and interests—which may include, for example, holders of certain classes of pastoral leases, holders of mining tenements, and holders of licenses permitting the use of an area such as a national park for recreational or commercial purposes—should generally not be involved in proceedings, on the basis that the Crown, as grantor, may not derogate from the rights granted and thus has a duty to identify and confirm the interests it has created. NTSCORP set out this argument:

> Only the [Crown] has the power to effect changes to land tenure. … NTSCORP submits that any interest in land granted to a member of the public is created by legislative instrument or by a contractual arrangement. The interest thereby created extinguishes native title to the extent contained within that instrument/document, nothing more, nothing less. The interests thus created are picked up during the tenure analysis process and those interests are noted in the determination. To this extent we argue that any person with an interest in land cannot under the operation of the NTA be affected in any way by the determination of native title. If that party does consider their/its interests may be affected then they are at liberty to raise their concerns with the State who are able to ensure those interests are accommodated in any determination.[55]

11.43 A number of stakeholders took this view. Kimberley Land Council submitted that the 'appropriate parties to address connection are Crown parties', since 'recognition of connection is a recognition of an imposition on sovereignty'.[56] Angus Frith and Associate Professor Maureen Tehan argued that

> the only parties that should be involved in native title litigation are the applicant, together with any other native title party, and the Crown. All other respondents take their rights and interests from [the] Crown, which, in the native title context, has a duty to protect them.

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53 The Commonwealth Minister must be notified of a native title application by the Native Title Registrar, and may therefore become a party by notification under s 84(3): *Native Title Act 1993* (Cth) s 66(3)(a)(iv).

54 Queensland South Native Title Services, *Submission 55*; Native Title Services Victoria, *Submission 45*; North Queensland Land Council, *Submission 42*; Kimberley Land Council, *Submission 30*; A Frith and M Tehan, *Submission 12*.

55 NTSCORP, *Submission 67*.

56 Kimberley Land Council, *Submission 30*.

> The respondents themselves are not likely to be able to add very much to the litigation apart from the manner in which they exercise those rights and interests. The Crown is quite capable of asserting and describing the rights and interests it has granted.[57]

11.44 Queensland South Native Title Services (QSNTS) similarly submitted:

> From a principled perspective, native title is fundamentally the resolution of rights and interests relating to three legal systems—Indigenous (including overlapping interests), State/Territories and the Commonwealth. As such, the mandatory parties should be confined to those three categories of parties.[58]

11.45 Other stakeholders, however, expressed concerns about limiting participation to applicants and Crown parties.[59] The Western Australian Government noted:

> The State is not always in a position to identify all interests held by all third parties … The State's tenure records and retrieval systems are extensive and thorough but not perfect. Much historical land tenure information was created at a time before the existence of native title was contemplated. Third parties sometimes hold interests which are not apparent in the State's records for a variety of reasons.[60]

11.46 Concerns were expressed about procedural fairness and the Crown's capacity or suitability for representing commercial, recreational and other interests in relation to the determination area. Ergon Energy, for example, submitted that there may be 'a potential conflict between the State and Ergon Energy's interests particularly where Ergon Energy holds or seeks an interest in State land',[61] and that 'an expectation that the State will represent Ergon Energy's interests in native title proceedings is unrealistic given the capacity of the State and the potential for conflict of interests to arise'.[62]

11.47 The views expressed by stakeholders reflect the different ways in which the representation of 'interests' is understood to be at issue in native title determination proceedings. On the one hand, the Crown (subject to the concerns of the Western Australian Government, set out above) is in a position to represent the interests of third parties that are ultimately derived from the Crown. On the other hand, at a practical level the Crown may not be in a position to know the operational, commercial, or recreational factors that third parties see as part of a broader designation of interests, especially where information about the determination is not readily available from the Crown. These practical factors may generate concerns about a native title determination and may impede negotiations.[63]

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

58 Queensland South Native Title Services, *Submission 55*.

59 The Pastoralists and Graziers Association stated that it was opposed to any reforms which '(i) restrict the joinder of parties to an application for determination from all people with an interest to only the Applicants and State, and/or (ii) limits the involvement of respondents in the proceedings. Pastoral lessees are the most affected by native title determinations and have a legal right to be informed about claims, and to have their positions heard in the Federal Court': Pastoralists and Graziers Association, *Submission 3*.

60 Western Australian Government, *Submission 20*.

61 Ergon Energy Corporation, *Submission 5*.

62 Ibid.

63 Pastoralists and Graziers Association, *Submission 3*.

11.48 The ALRC considers that, as a matter of principle, native title proceedings should ultimately be a matter between the applicant for a determination of native title and relevant Crown parties. However, the *Native Title Act* currently allows for designated persons whose interests are affected by a determination to become parties.[64]

11.49 Under its Terms of Reference, the ALRC was asked to examine access to justice for designated classes of persons rather than broader reforms to the party and joinder provisions of the Act as a whole. The ALRC therefore makes no recommendations about whether wider reforms are required. The ALRC supports further examination of these issues and notes that managing the current broader participation of parties is generally best handled by robust case management.

Effective representation of interests affected

11.50 Native title proceedings differ from many other types of legal proceedings in that very large numbers of parties can be involved and affected by the outcome of the proceedings.

11.51 A native title determination is 'conclusive evidence for the future of the existence or non-existence of the native title … claimed, not only as between the parties to the proceedings under the *Native Title Act* but as against the entire world'.[65] Native title proceedings therefore bring before the Court

> all parties who hold or wish to assert a claim or interest in respect of the defined area of land [in order to] bring about a decision which finally determines the existence and nature of native title rights in the determination area, and which also identifies other rights and interests held by others in respect of that area. As the determination is to be declaratory of the rights and interests of all parties holding rights or interests in the area, the determination operates as a judgment *in rem* binding the whole world.[66]

11.52 Access to justice is a principle which requires that a person is given a full opportunity to represent their interests before the court. The Full Court of the Federal Court noted in *Gamogab v Akiba* that it 'is fundamental that an order which directly affects a third person's rights or liabilities should not be made unless the person is joined as a party'.[67] A number of stakeholders also noted the importance of a person being able to participate in proceedings that may affect their rights or interests. For example, the Association of Mining and Exploration Companies (AMEC) submitted that

> it is in the interests of justice if all parties with interests in a claim area are given the opportunity to participate in the resolution of the claim. This is because the Court is

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64 Merkel J in *Byron* noted however that '[i]t takes little imagination to conceive of the variety of ideological or conscientious interests or groups that may be genuinely and deeply committed to supporting or opposing native title claims in particular areas of Australia. To afford such interests or groups the standing of a party under the Act is a recipe for promoting, rather than resolving, differences': *Byron Environment Centre Inc v Arakwal People* (1997) 78 FCR 1, 45. *Byron* was decided before the introduction of s 84(5A) into the Act, and the operation of this provision may go some way to addressing the concern expressed by Merkel J.

65 *Wik v The State of Queensland* (1994) 49 FCR 1, 3.

66 *Western Australia v Ward* (2000) 99 FCR 316, [190].

67 *Gamogab v Akiba* (2007) 159 FCR 578, [60].

> being asked to make a finding in relation to the nature and extent of third party interests in a claim area, which necessarily includes their validity.[68]

11.53 The Chamber of Minerals and Energy of Western Australia (CME) submitted, as an example of these impacts and consequences, that the validity of mining interests may be challenged through the native title determination process.[69]

11.54 Wide community involvement in native title proceedings may also contribute to general community support and acceptance of the native title process.[70] This is particularly important given the concerns that have been held by various parts of the community about the native title system.[71] AIATSIS made the related observation that many persons may seek joinder in order to have access to information about the progress of the proceedings:

> Many parties to native title matters … are involved in native title processes in order to keep appraised of the progress of individual matters. There is potential for focussing on stronger information-sharing with [such parties] that provides opportunity for their engagement with any particular native title matter, while reducing the burden of [their] involvement in legal processes for native title recognition.[72]

11.55 The ALRC considers that it is important that parties with rights or interests that may be affected by a determination are given the opportunity to participate in native title determination proceedings. It does not follow, however, that any 'right' that intersects with native title should be sufficient to ground a person's participation in proceedings. The Court's existing discretion under s 84(5) is appropriate for balancing these considerations.

Representative organisations

11.56 Representative organisations—recreational groups, industry representative bodies, or sporting bodies, for example—may represent the commercial, recreational or other interests of their members, and the interests of these members may be affected by a native title determination. However, the representative organisation itself will generally not be able to become a party to proceedings unless, separately from its members, it has an interest sufficient to become a party under ss 84(3) or 84(5).[73]

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68 Association of Mining and Exploration Companies, *Submission 54*. See also Western Australian Government, *Submission 20*; Association of Mining and Exploration Companies, *Submission 19*; Ergon Energy Corporation, *Submission 5*.

69 The Chamber of Minerals and Energy of Western Australia, *Submission 49*. The Chamber of Minerals and Energy referred, as an example, to *Graham on behalf of the Ngadju People v Western Australia* [2014] FCA 1247 (21 November 2014).

70 Justice John Dowsett, 'Beyond Mabo: Understanding Native Title Litigation through the Decisions of the Federal Court' (2009) 10 *Federal Judicial Scholarship*.

71 See, for example, Justice Robert French, 'A Moment of Change—Personal Reflections on the National Native Title Tribunal 1994–98' (2003) 27 *Melbourne University Law Review* 488.

72 AIATSIS, *Submission 36*.

73 See, for example, *Harrington-Smith on behalf of the Wongatha People v Western Australia* [2002] FCA 184 (11 February 2002); *Dann on behalf of the Amangu People v Western Australia* [2006] FCA 1249 (18 September 2006).

11.57 The 2006 *Native Title Claims Resolution Review* included a recommendation regarding allowing industry bodies to intervene in proceedings:

> That consideration be given to amending the 'party' provisions of the NTA (section 84) to allow an industry body to intervene in a representative capacity if one or more of its members is or was otherwise entitled to be a party and wishes the industry body to represent him, her or them. This should be subject to the Court's discretion to refuse permission to intervene as appropriate, to allow intervention on terms, and to later remove the industry body if relevant circumstances change.[74]

11.58 In the Discussion Paper, the ALRC proposed a similar reform to the *Native Title Act* to allow a representative organisation to become a party to proceedings if it represented a person with an interest that may be affected by a determination.[75] The proposal would have allowed an organisation—such as a recreational group, sporting body, or industry body—to become party to proceedings, despite the organisation itself not having an interest in the claim area. The proposed reform may have relieved persons who are represented by an organisation from the need to actively participate in proceedings that may be unfamiliar and complex, as well as reducing the numbers of parties, delays and expenses in native title proceedings.

11.59 A number of stakeholders expressed support or conditional support for the proposal. The primary reason expressed for this support was that the reform would result in a reduction in party numbers,[76] particularly if a representative organisation were a party instead of, rather than in addition to, its members.[77] The Minerals Council of Australia (MCA) suggested that the participation of a representative body would be 'particularly beneficial where there is no current application for title or current holding for tenure',[78] while the National Farmers' Federation suggested the participation of a representative body 'would support transition in circumstances such as when pastoral land is transferred land'.[79] Other stakeholders were opposed to the reform, expressing concerns about the introduction of organisations which may represent broader interests than those that would be directly affected by a native title determination in the proceedings.[80]

11.60 The ALRC considers that it would be problematic to restrict the participation of a person on the grounds that the person's representative organisation was party to proceedings. A member may disagree with the position taken by the representative body, and different members may have different or conflicting interests that cannot be adequately represented by a single representative body.

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74 Graeme Hiley and Ken Levy, 'Native Title Claims Resolution Review' (Report, Attorney-General's Department, 31 March 2006) rec 19.

75 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014) Proposal 11–3.

76 See, for example, National Native Title Council, *Submission 57*; A Frith and M Tehan, *Submission 52*; Native Title Services Victoria, *Submission 45*.

77 See, for example, South Australian Government, *Submission 68*.

78 Minerals Council of Australia, *Submission 65*.

79 National Farmers' Federation, *Submission 56*.

80 AIATSIS, *Submission 70*; Queensland South Native Title Services, *Submission 55*; Central Desert Native Title Service, *Submission 48*.

11.61 The proposal must also be considered against the existing s 84B of the *Native Title Act*, which allows a party to appoint 'a society, organisation, association or other body to act as agent on behalf of the party in relation to the proceeding'.[81] That organisation may act for more than one party in the proceeding.[82] The Law Council of Australia noted the relevance of this section of the Act, and submitted that the appointment of an agent under s 84B 'ensures that those whose interests are at stake are properly identified and engaged in the Court process and specifically answerable for their position, in the same way all other parties are'.[83]

11.62 The ALRC agrees that the appointment of an agent, particularly where that agent is representing multiple parties, is preferable to the participation of a representative body as a party in its own right. The possible use of s 84B to appoint a representative body was noted in the Explanatory Memorandum to the Native Title Amendment Bill 1997 (Cth):

> A party may appoint a society, organisation, association or other body as that party's agent in the proceeding [section 84B]. That agent may act for more than one party in the proceeding. For example, a number of pastoralists who are parties to a proceeding and have similar interests could appoint a peak body to act as their agent in the proceeding. The body might also arrange, for example, for a number of parties to be represented by one legal practitioner. The common law rules of agency will apply where an agent acts on behalf of a party to the proceeding.[84]

11.63 Where a representative organisation wishes to raise issues in proceedings but does not have sufficient interest to become a party to proceedings, it may nevertheless seek the Court's leave to appear as amicus curiae or to intervene under r 9.12 of the *Federal Court Rules 2011* (Cth). In either of these roles, a representative body is able to bring matters to the Court's attention without being a party to proceedings.

Increasing efficiency for parties and the Court

11.64 Some native title proceedings involve very large numbers of respondents. In the 2013–2014 reporting year alone, the Federal Court dealt with 781 party applications under s 84(3), and in the 2012–13 reporting year there were 982 party applications under s 84(3).[85] Over the five year period 2009–2013, 220 applications for joinder were made to the Court under s 84(5) after the relevant notification period.[86] As at 31 May 2013, the average number of respondents in Western Australian native title cases was 21.[87] Claims made over geographically large areas, particularly if those areas are relatively closely settled, are likely to have many respondents.

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81 *Native Title Act 1993* (Cth) s 84B(1).
82 Ibid s 84B(2).
83 Law Council of Australia, *Submission 64*.
84 Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) [26.14].
85 Federal Court of Australia, 'Annual Report 2013–2014' 141.
86 Figures provided by the Federal Court of Australia, December 2013.
87 Justice Michael Barker, 'Innovation and Management of Native Title Claims: What Have the Last 20 Years Taught Us?' (Paper Presented at National Native Title Conference, Alice Springs, 3–5 June 2013) 11.

11.65 Large party numbers can complicate proceedings, slow outcomes and place an administrative burden on courts and on other parties. Cape York Land Council noted its experience of

> significant delays and expense incurred because of the behaviour of parties to native title claims, often in circumstances where it is clear that the party's interests will not be negatively affected by a determination because their interests are protected at law.[88]

11.66 Large party numbers may also make it more difficult for parties to reach an agreement in order for the Court to make a consent determination. As noted earlier, a consent determination under s 87 of the Act requires the agreement of all parties to proceedings. As the number of parties increases, it may become more difficult for all parties to reach an agreement. This problem may be mitigated, to some extent, by the possibility of a consent determination under s 87A, which does not require the consent of all parties. A consent determination under s 87A may be made over a part of the claim area, which may allow parties to reach agreement on particular parts of the claim area even if disagreement remains about other parts.[89]

11.67 As noted above, a native title determination may affect the interests of a large number of persons, and it is important that persons who may be affected are given sufficient opportunities to represent their interests in proceedings. This point was made by the Law Council:

> If a party with a substantive interest in relation to that land stands to have that interest adversely affected, then they should be entitled as a matter of procedural fairness to be heard in relation to it.[90]

11.68 Reforms that reduce the number of parties may be undesirable if they result in a person not having a real opportunity to participate in proceedings. The ALRC considers reform is desirable if it leads to increased efficiencies for parties or the Court without restricting access to justice.

11.69 The existing powers of the Federal Court allow the Court to reduce many of the negative impacts that may result from large party numbers. *Watson v Western Australia (No 3)* ('*Watson (No 3)*') provides an example of the way in which orders may be moulded to ensure that a person seeking joinder has an adequate opportunity to participate.[91] Gilmour J directed that a respondent's 'participation in the proceeding be limited to leading evidence and making submissions in respect of the matters listed in ss 225(c) and (d) of the NTA'.[92]

11.70 In *Akiba on behalf of the Torres Strait Regional Seas Claim People v Queensland (No 1)* the Court refused an application for joinder by a local council under s 84(5), taking into account four factors, including the 'very significant and largely

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88 Cape York Land Council, *Submission 7*.

89 If a consent determination is made under s 87A, the application will be taken to have been amended to reduce the area of land or waters covered in the application: *Native Title Act 1993* (Cth) s 64(1B).

90 Law Council of Australia, *Submission 64*.

91 *Watson v Western Australia (No 3)* [2014] FCA 127 (24 February 2014).

92 Ibid [110].

unexplained delay in bringing the motion for joinder'.[93] Other relevant factors included: the 'theoretical and abstract and limited character of the interests relied upon'; that the state respondent could 'be expected adequately to represent the kinds of interests which have been identified and relied upon in this case'; and that the joinder applicant's interests were otherwise sufficiently protected, since any 'native title determination will inevitably be expressed as subject to the valid laws and delegated laws' of the state respondent.[94]

11.71 Such examples suggest that the Court's existing discretion to manage the participation and joinder of parties are sufficient to avoid undue burdens on other parties while ensuring access to justice. The ALRC therefore considers that it is unnecessary to introduce legislative reforms.

Parties to proceedings under s 84(3)

11.72 In order to become a party to proceedings under s 84(3)(a)(iii), a person must have an interest in relation to land or waters, as defined by s 253. This 'very wide'[95] definition includes interests which, at common law, would not be 'interests in relation to land or waters', such as licences or permits.[96] The definition extends to a public right to fish,[97] and to a 'privilege' such as the right of a member of the public to cross a recreational reserve managed by a public charitable trust.[98] Due to the breadth of this definition, the range of persons who may become parties to proceedings under s 84(3)(a)(iii) is, arguably, very wide in terms of identifying persons with appropriate interests that may be affected by native title proceedings.

11.73 In the Discussion Paper, the ALRC asked whether s 84(3)(a)(iii) should be amended to allow only persons with a legal or equitable estate or interest in the land or waters—that is, the first limb of the s 253 definition of 'interest, in relation to land or waters'—to become parties under s 84(3)(a)(iii).[99] Such an amendment would not affect a person's ability to become a party under s 84(a)(i)–(ii), nor the person's ability to make an application for joinder under s 84(5).

11.74 Many stakeholders expressed support for a reduction in the range of s 84(3)(a)(iii).[100] However, others argued that the suggested amendment would result in too great a restriction on the persons who may become parties under s 84(3). The MCA, for example, stated that:

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93 *Akiba on behalf of the Torres Strait Regional Seas Claim People v Queensland (No 1)* [2006] FCA 1102 (18 August 2006) [29].

94 Ibid.

95 *Western Australia v Ward* (2002) 213 CLR 1, [387].

96 Explanatory Memorandum, Native Title Bill 1993 (Cth), Part B 102–103.

97 *Western Australia v Ward* (2002) 213 CLR 1, [387].

98 *Kanak v Minister for Land and Water Conservation* (2000) 106 FCR 31, [28].

99 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014) Q 11–1.

100 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*; Native Title Services Victoria, *Submission 45*; Law Society of Western Australia, *Submission 41*.

> Ambiguity exists under relevant statues and case law which suggest that mining tenements may not be a legal or equitable interest in land in all cases … As a result, [the suggested amendment] may diminish existing rights.[101]

11.75 The MCA observed that s 10 of the *Minerals Resources Act 1989* (Qld) provides that the grant of a mining tenement granted under that Act does not create an estate or interest in land. The MCA also noted the decision of the High Court in *TEC Desert v Commissioner of State Revenue (WA)* ('*TEC Desert*').[102] This case suggests that mining tenements may not be regarded as legal or equitable estates or interests in land.[103] Such examples suggest that a mining company with an interest in a claim area arising from a mining tenement would not be able to become a party under s 84(3)(a)(iii) if that section were limited to persons with a legal or equitable estate or interest in the claim area. Given the importance of persons whose interests may be affected by a determination being able to represent their interests, the ALRC considers that such a restriction would be overly burdensome.

11.76 Telstra noted that it is granted certain access rights under the *Telecommunications Act 1997* (Cth). Schedule 3 of that Act authorises a telecommunication carrier to enter land for the purposes of inspecting the land,[104] installing facilities[105] or maintaining facilities.[106] Similar access rights were granted under the predecessor legislation to the *Telecommunications Act 1997*.[107] Moreover, Telstra's Universal Service Obligation (USO) has, since 1975, required Telstra 'to ensure that standard telephone services are reasonably accessible to all people in Australia … wherever they reside or carry on business'.[108] As a result of these access rights and the USO, there was 'an unprecedented expansion of Telstra's infrastructure throughout urban and regional Australia … installed on land … without the need to obtain formal land tenure'.[109] It would therefore appear that Telstra may not hold 'a legal or equitable estate or interest in the land or waters claimed' if the common law position on 'legal or equitable estate or interest' is accepted for the purposes of s 84(3)(a)(iii).

11.77 Other telecommunication carriers are granted the same access rights under the *Telecommunications Act 1997*, and similar rights of access are granted to utility providers under, for example, the *Electricity Supply Act 1995* (NSW),[110] the *Gas*

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101 Minerals Council of Australia, *Submission 65*.
102 *TEC Desert v Commissioner of State Revenue (WA)* (2010) 241 CLR 576.
103 Ibid [27], [36]. Although this case is primarily concerned with the status of fixtures affixed to land that is the subject of a mining tenement, it raises the possibility that a mining tenement would not be considered a legal or equitable estate or interest in land for the purposes of the *Native Title Act*.
104 *Telecommunications Act 1997* (Cth) sch 3, cl 5.
105 Ibid sch 3, cl 6.
106 Ibid sch 3, cl 7.
107 *Telecommunications Act 1975* (Cth) ss 16–20; *Post and Telegraph Act 1901* (Cth) ss 84–90.
108 *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth) s 9(1)(a). The predecessor to Telstra, the Australian Telecommunications Commission (trading as Telecom), had a similar obligation under *Telecommunications Act 1975* (Cth) s 6.
109 Telstra, *Submission 53*.
110 *Electricity Supply Act 1995* (NSW) ss 54–63A.

Supply Act 2003 (Qld),[111] and the *Water Act* (NT).[112] While the geographical range of Telstra's infrastructure may be particularly broad due to the USO, many carriers or utility providers with a right of access under statute may own infrastructure installed on land covered by a native title claim without holding 'a legal or equitable estate or interest in the land or waters claimed'. The ALRC considers that such persons and organisations should have an opportunity to participate in proceedings, notwithstanding that the interest may not amount to a legal or equitable estate or interest in the land.

11.78 The ALRC considers that holders of mining tenements, telecommunications carriers, utility providers, and similar third party respondents should not be required to apply for joinder under s 84(5). This would accord with the efficient administration of justice.[113]

11.79 The ALRC remains concerned, however, that s 84(3)(a)(iii) may be too wide and uncertain in application, particularly as claims are made in closely settled areas where respondent party numbers may increase. For example, the terms 'power', 'privilege', and 'restriction',[114] have a potentially broad and uncertain interpretation. It may be appropriate to amend s 84(3)(a)(iii) to apply to a more specific and clearly-defined category of persons. For example, rather than applying to persons with a power, privilege or restriction in relation to the land or waters in the claim area, s 84(3)(a)(iii) could be amended to include those persons with a statutory right in relation to the land or waters in the claim area. This would make clear that interests such as those held by holders of mining tenements or telecommunications providers were sufficient to participate under s 84(3)(a)(iii), and would also extend to other persons with a statutory right, such as persons who hold a licence or permit for commercial fishing.[115]

11.80 An amendment to s 84(3)(a)(iii) would require further consideration that is outside the scope of this Inquiry. Relevant state and territory legislation granting rights or interests in the claim area would need to be assessed to ensure that appropriate persons would be captured. Further consideration would also be required as to whether such an amendment should be made to s 84(3)(a)(iii) directly, or to the underlying definition of 'interest, in relation to lands or waters' in s 253. The s 253 definition is referred to in other provisions of the *Native Title Act*, and amendment of the definition in s 253 may indirectly alter the interpretation and effect of these other provisions. For example, a consent determination under s 87A requires the agreement of, among others, 'each person who holds an interest in relation to land or waters in any part of the determination area at the time the agreement is made, and who is a party to the proceeding at the time the agreement is made'.[116] An amendment of the s 253

111 *Gas Supply Act 2003* (Qld) ss 138–145.
112 *Water Act* (NT) s 20.
113 In particular, when a third party respondent is joining only for the purposes of representing its own interests in the claim area, rather than to challenge a claim: see, eg, Telstra, *Submission 45*.
114 *Native Title Act 1993* (Cth) s 253.
115 One example of such a license can be found in the *Fisheries Management Act 2007* (SA). However, permits and licences for a wide range of activities exist under various state and territory laws.
116 *Native Title Act 1993* (Cth) s 87A(1)(c)(v).

definition of 'interest, in relation to land or waters' would therefore affect the operation of s 87A. However, it may be appropriate to amend s 253 if it were considered that the categories of person whose agreement would be required for a consent determination under s 87A should be varied.

Notification of Aboriginal Land Councils

Recommendation 11–1 Section 66(3)(a) of the *Native Title Act 1993* (Cth) should be amended to provide that the Registrar must notify the NSW Aboriginal Land Council and Local Aboriginal Land Councils, established under the *Aboriginal Land Rights Act 1983* (NSW), of a native title application.

11.81 The ALRC recommends that the *Native Title Act* be amended to explicitly include the NSW Aboriginal Land Council and Local Aboriginal Land Councils (ALCs) among the categories of persons whom the Registrar must notify of a native title application under s 66(3)(a). A further amendment to s 84(3)(a)(i) reflecting the inclusion of ALCs in s 66(3)(a) would ensure that ALCs were able to join native title determination proceedings under s 84(3)(a)(i).

11.82 The *Aboriginal Land Rights Act 1983* (NSW) provides a process for an ALC to make a claim to land independently of the claims process of the *Native Title Act*. Although the two claim processes are distinct, they may interact. An ALC cannot claim land under the *Aboriginal Land Rights Act* that is subject to a native title determination or a registered claim.[117] Where a native title claim is made after a claim under the *Aboriginal Land Rights Act*, the *Aboriginal Land Rights Act* transfer is made subject to any native title rights and interests that exist immediately before the transfer.[118] An ALC may not deal with land that is vested in it subject to native title rights and interests unless the land is the subject of an approved determination of native title.[119] Additionally, extinguishment of native title due to the grant of land to an ALC may be disregarded.[120]

11.83 It will often be appropriate for an ALC to be a respondent party to native title determination proceedings, because title to land may be affected by native title rights and interests in significant and complex ways.[121] Where an ALC holds a fee simple over land it will be able to become a party to proceedings under s 84(3)(a)(iv) of the *Native Title Act*. However, where an ALC has made a claim under the *Aboriginal Land Rights Act* that has not been determined, it has only a statutory, inchoate interest in the

117 *Aboriginal Land Rights Act 1983* (NSW) s 36(1)(d), (e).
118 Ibid s 36(9), (9A). This is subject to the claim under the *Aboriginal Land Rights Act* being made after 28 November 1994: *Native Title Act 1993* (Cth) s 22J(b).
119 *Aboriginal Land Rights Act 1983* (NSW) s 42.
120 *Native Title Act 1993* (Cth) s 47A.
121 The complex interaction of these two systems was also raised by the NSW Aboriginal Land Council: NSW Aboriginal Land Council, *Submission 51*.

land claimed.[122] Such an interest may not amount to a legal or equitable estate or interest in the land.

11.84 Several stakeholders supported the recommended reform.[123] NTSCORP noted that such amendments

> would assist in ensuring that relevant parties are joined to the proceedings earlier on in the process and may assist in a more efficient native title process. Late joinder of respondent parties, particularly Local Aboriginal Land Councils, has caused significant problems at the eleventh hour of several claim resolution process in NSW.[124]

11.85 However, the National Native Title Tribunal submitted that ALCs are already notified of relevant native title proceedings.[125] The Law Council similarly submitted that, in practice, ALCs are able to join native title proceedings 'by virtue of their interest in undetermined claims'.[126]

11.86 If all relevant ALCs are notified of native title claims affecting their claim area under the *Aboriginal Land Rights Act*—including those ALCs with an inchoate interest in the claim area—then amendment of s 66(3)(a) of the *Native Title Act* may be unnecessary. However, given the complex interactions of the *Aboriginal Land Rights Act* and the *Native Title Act*, and the importance of affected parties having the opportunity to participate in native title determination proceedings, the ALRC considers that it is still desirable to ensure that ALCs with an inchoate interest are able to participate in proceedings without being required to apply for joinder under s 84(5).

11.87 Recommendation 11–1 achieves this result—ALCs with interests arising under the *Aboriginal Land Rights Act* would be able to become parties to native title determination proceedings under s 84(3). This would apply once a claim has been determined under the *Aboriginal Land Rights Act*, and the ALRC considers that it should also apply to the inchoate interest arising under the *Aboriginal Land Rights Act* when an ALC has made a claim but that claim has not yet been determined.

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122 *Narromine Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (1993) 79 LGERA 430, 433–434 (Stein J); *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands (Consolidation) Act and the Western Lands Act* (1988) 14 NSWLR 685, 696. See also Jason Behrendt, 'Some Emerging Issues in Relation to Claims to Land under the Aboriginal Land Rights Act 1983 (NSW)' (2011) 34 *University of New South Wales Law Journal* 811.

123 NTSCORP, *Submission 67*; Minerals Council of Australia, *Submission 65*; NSW Aboriginal Land Council, *Submission 51*.

124 NTSCORP, *Submission 67*.

125 National Native Title Council, *Submission 57*.

126 Law Council of Australia, *Submission 64*.

An option for respondents to limit their participation

Recommendation 11–2 Federal Court of Australia practice notes (or similar mechanisms) should provide for a person who becomes a party to proceedings under s 84(3) or s 84(5) of the *Native Title Act 1993* (Cth) to elect to participate only in respect of the matters listed in s 225(c) and s 225(d) of the Act.

11.88 The ALRC recommends that provision be made for parties wishing to formally limit their participation in proceedings to matters relating to ss 225(c) and (d)—that is, the nature and extent of their interests in relation to the determination area and the relationship between those interests and native title rights and interests.

11.89 A person who becomes a party to native title proceedings will be a party to the *entire* proceedings. However, a number of stakeholders argued that it may be of benefit for persons to participate only as far as is needed to represent their interests—namely, in relation to the matters raised in ss 225(c) and (d).[127] A person who elected to participate in this way would be able to represent their interests to the Court and to stay informed about the proceedings, without a need to actively participate in all aspects of the proceedings. The results of respondents electing to target their participation in this way are likely to include reduced costs for the respondents, as well as increased certainty for applicants while retaining access to justice.

11.90 In the Discussion Paper, the ALRC proposed amending the *Native Title Act* to allow a person who becomes a party to native title proceedings to elect to join proceedings only when the proceedings concern matters affecting the party's interests under ss 225(c) and (d). The proposal drew on Telstra's submission that

> legislative reform that permits respondent parties to formally limit their involvement in native title claims while questions of connection are being resolved would be a positive outcome.[128]

11.91 Telstra proposed a 'secondary joinder portal', allowing a person to give notice of an intention to join proceedings once the Federal Court has considered and made a determination on connection. This would have two main benefits:

- a person would have the option of minimising time and resources spent on matters not directly affecting their interests; and
- if there was no determination of connection, or if the claim was withdrawn or dismissed, the person would not have joined proceedings unnecessarily, minimising the costs for all parties.

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127 Section 225(c) refers to 'the nature and extent of any other interests in relation to the determination area'. Section 225(d) refers to the relationship between the rights and interests in s 225(c) and native title rights and interests in relation to the determination area.

128 Telstra, *Submission 4*.

11.92 The proposal was widely supported by stakeholders,[129] with several noting the potential cost and efficiency benefits of allowing parties to formally limit their participation. Under this proposal, the option to participate only in certain aspects of proceedings would remain with the party. It would not prevent a party that wished to participate in the entirety of proceedings from doing so.

11.93 Some stakeholders suggested that further reforms were warranted. The Yamatji Marlpa Aboriginal Corporation, for example, submitted that they

> would prefer … that those who fit within section 84(3)(a)(iii) should only automatically become parties under section 225(c) or (d) … but that leave should be required in relation to section 225(a) or (b).[130]

11.94 This suggestion reflects a recommendation of the 2006 *Native Title Claims Resolution Review* that

> consideration be given to limiting the right of participation of a third party (that is, a non-government respondent party) to issues that are relevant to its interests and the way in which they may be affected by the determination sought.[131]

11.95 The National Native Title Council (NNTC) submitted that the proposal could be extended by either:

> (a) giving the Court the discretion to limit the ability of a person to elect to be party to proceedings to participating in them only in respect of s 225(c) and (d); or
>
> (b) not allowing a person to be a party to the proceedings before the Court has made decisions concerning the identity of the native title holders and connection issues.[132]

11.96 Frith and Tehan similarly submitted that the proposal

> should be extended to expressly give the Court the ability to limit a party's involvement in proceedings to participating in them only in respect of s 225(c) and (d).[133]

11.97 The ALRC notes that the Federal Court has existing powers to manage the participation of a party to proceedings, and that it may limit the participation of a party as appropriate in given circumstances. In *Watson (No 3)*, the Court made orders that a

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129 AIATSIS, *Submission 70*; Minerals Council of Australia, *Submission 65*; Law Council of Australia, *Submission 64*; National Native Title Council, *Submission 57*; Queensland South Native Title Services, *Submission 55*; Telstra, *Submission 53*; A Frith and M Tehan, *Submission 52*; The Chamber of Minerals and Energy of Western Australia, *Submission 49*; Central Desert Native Title Service, *Submission 48*; Native Title Services Victoria, *Submission 45*. The North Queensland Land Council supported the proposal 'provided the parties who have joined for a limited purpose are able to withdraw automatically once their matters of concern have been addressed': North Queensland Land Council, *Submission 42*. The South Australian Government noted that a similar practice was followed in its consent determination practice: South Australian Government, *Submission 68*.

130 Yamatji Marlpa Aboriginal Corporation, *Submission 62*. A similar suggestion was made by the Law Society of WA: Law Society of Western Australia, *Submission 41*.

131 Graeme Hiley and Ken Levy, above n 74, rec 20.

132 National Native Title Council, *Submission 57*.

133 A Frith and M Tehan, *Submission 52*.

respondent's 'participation in the proceeding be limited to leading evidence and making submissions in respect of the matters listed in ss 225(c) and (d) of the NTA'.[134]

11.98 The ALRC considers that such measures exercised by the Court in light of the circumstances in each case, is preferable to mandatory statutory provisions around the participation of parties in respect of ss 225(c) and (d). The ALRC therefore considers that direct statutory amendment governing participation of parties is not required. Recommendation 11–2 would provide a simple mechanism for respondents to elect to limit their participation if they wish to do so, which would operate alongside the Court's existing powers.

11.99 Parties' participation in native title proceedings is already being managed by the Federal Court in designating an 'active' and 'inactive' party list in some matters. Parties asserting interests based on statutory permits or joined pursuant to s 84(5) are not notified of directions hearings or required to join in consent orders while the applicants and the state or territory minister are negotiating the issues of traditional law and custom and connection. This enables the Court to focus on the key parties involved until it is clear that a determination will be sought by consent (in which case the other parties will be brought in to the negotiations concerning ss 225(c) and (d)) or will proceed to trial (and directions will be made for the participation of all parties in the hearing).

11.100 Although the *Native Title Act* could be amended to provide for parties to elect to limit their participation to matters relating to ss 225(c) and (d), in practice there are likely to be many circumstances and contingencies which cannot be adequately dealt with in legislation.[135] The ALRC considers that case management mechanisms allow greater flexibility and the capacity to respond as circumstances change.

11.101 However, as noted by QSNTS, amendment of the schedule to the *Native Title (Federal Court) Regulations 1998* (Cth) may be warranted. QSNTS suggested that the Regulations,

> be amended to provide for an election provision on the Form 5 where parties wishing to join positively indicate from the outset whether they would be involved in the whole claims process including connection assessment or only for the purposes of ss 225(c)–(d). Such details could assist in the culling of the party list by the Court in its case management of the claim once interests that ought to be in the Other Interests schedule of any determination have been identified and extinguishment issues have been resolved between the parties.[136]

11.102 The ALRC agrees that the inclusion of an election provision in Form 5 of the schedule to the Regulations would be of value. The Federal Court might also be assisted in its case management processes if a person seeking to become a party—under s 84(5)—provides a statement that sets out how that interest may be affected if a determination of native title is made.

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134 *Watson v Western Australia (No 3)* [2014] FCA 127 (24 February 2014) [110].
135 Minerals Council of Australia, *Submission 65*.
136 Queensland South Native Title Services, *Submission 55*.

Joinder of claimants and potential claimants

Recommendation 11–3 This recommendation is intended to make clear that a claimant or potential claimant may join native title proceedings as a respondent under s 84(5). However, such a person would be required to demonstrate a 'clear and legitimate objective' to be achieved by joining the proceedings.

The *Native Title Act 1993* (Cth) should be amended to clarify that, for the purposes of s 84(5):

(a) a member of a claim group or other person who claims to hold native title has an interest that may be affected by the determination in the proceedings; and

(b) when determining if it is in the interests of justice to join such a person, the Federal Court should consider whether they can demonstrate a clear and legitimate objective to be achieved by joining the proceedings.

11.103 The ALRC recommends that the *Native Title Act* be amended to clarify that a member of a claim group (claimant) or a person who claims to hold native title but who may not have made an application in respect of that claim (potential claimant) has an interest that may be affected by the determination in native title determination proceedings, and so may join proceedings under s 84(5).

11.104 The ALRC also recommends that the *Native Title Act* be amended to require that, in exercising its discretion under s 84(5), the Court should consider whether the claimant or potential claimant can demonstrate a clear and legitimate objective to be achieved by joinder to the proceedings. This requirement will not allow the joinder of persons with vague or unspecified purposes while upholding the principle of access to justice. The ALRC considers that the recommendation will promote efficient native title claims proceedings without introducing unnecessary barriers to justice.

11.105 Claimants and potential claimants have consistently presented in cases concerning s 84(5) or its antecedents.[137] In these cases, a claimant or potential claimant seeks to become a respondent party to proceedings. This typically arises in one of the following situations:

- a member (or members) of the claim group disputes matters, such as who has been authorised as the applicant, or the way in which a claim is being conducted;

137 See, for example, *Far West Coast Native Title Claim v South Australia (No 5)* [2013] FCA 717 (30 July 2013); *Isaacs on behalf of the Turrbal People v Queensland* [2011] FCA 828 (25 July 2011); *Bonner on behalf of the Jagera People #2 v Queensland* [2011] FCA 321 (6 April 2011); *Davis-Hurst on behalf of the Traditional Owners of Saltwater v Minister for Land and Water Conservation (NSW)* [2003] FCA 541 (4 June 2003).

- a person (or persons) asserts that they are a member of the claim group, but that they have been excluded from, or not included in, the claim group; or
- a person (or persons) is a member of a competing claim group or potential claim group, and is seeking to represent their claimed native title interests.

11.106 Recommendation 11–3 comprises two limbs. The first limb would make clear that a claimant or potential claimant in the claim area has an interest that may be affected by a native title determination for the purposes of s 84(5). This limb of the recommendation reflects existing case law. As stated by Mansfield J in *Far West Coast Native Title Claim v South Australia (No 5)* (*'Far West Coast (No 5)'*), it is

> clear … that native title rights and interests (and similar traditional rights-based interests) have been held in some circumstances to be interests capable of satisfying the s 84(5) criteria, and that those native title rights and interests need not have been certainly established in order to qualify under s 84(5) as a person whose interests may be affected by a determination.[138]

11.107 However, earlier cases differed on the question of whether a member of the claim group would not be able to join as a respondent.[139] Recommendation 11–3 would make clear that a member of a claim group has an interest that may be affected for the purposes of s 84(5).

11.108 The Court has previously joined potential claimants to proceedings under s 84(5). In *Bonner on behalf of the Jagera People #2 v Queensland* (*'Jagera #2'*), for example, several persons were joined on the basis that they 'claimed to have native title rights and interests in various parts of the land or waters covered by the Jagera #2 claim that may be affected by a determination of that claim, sufficient to allow them to be joined as respondents to the Jagera #2 proceedings under s 84(5) of the Act'.[140] Whether the evidence for a potential claim is sufficient to permit joinder as a potential claimant will depend on the circumstances, but a prima facie case is necessary and sufficient.[141]

11.109 The second limb of Recommendation 11–3 would require that the Federal Court consider whether a claimant or potential claimant has a clear and legitimate objective in joining when determining whether or not it is in the interests of justice to join that claimant or potential claimant. The joinder of a claimant or potential claimant who does not have a clear and legitimate objective—for example, where the person sought joinder to disrupt an application or in the mistaken belief that joining as a respondent provided an avenue for having a native title claim heard—would be likely to add time and cost burdens to other parties.

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138 *Far West Coast Native Title Claim v South Australia (No 5)* [2013] FCA 717 (30 July 2013) [33].

139 See, eg, *Kulkalgal People v Queensland* [2003] FCA 163 (28 February 2003); *Combined Dulabed & Malanbarra/Yidinji Peoples v Queensland* [2004] FCA 1097 (25 August 2004).

140 *Bonner on behalf of the Jagera People #2 v Queensland* [2011] FCA 321 (6 April 2011) [13].

141 *Jacob v State of Western Australia* [2014] FCA 1106 (14 October 2014); *Pegler on behalf of the Widi People of the Nebo Estate #1 v Queensland* [2014] FCA 932 (28 August 2014); *Wakka Wakka People # 2 v Queensland* [2005] FCA 1578 (4 November 2005).

11.110 The second limb of Recommendation 11–3 reflects the statement of Mansfield J in *Far West Coast (No 5)* that if a joinder applicant 'can point to a clear and legitimate objective that he or she hopes to achieve by being joined, then it will generally be appropriate to exercise the Court's discretion in favour of the application'.[142]

11.111 The Federal Court in *Barunga v Western Australia (No 2)* noted a number of factors relevant to the exercise of its discretion to allow several members of a competing claim group to join proceedings:

> (a) Proceedings for a determination of native title are proceedings *in rem*: they bind non-parties. It is also fundamental that an order which directly affects a third person's rights or liabilities should not be made unless the person is joined as a party …
>
> (b) Consideration of the rights and interests of the party joined would lead to a more accurate definition of the native title rights and interests claimed, including by limiting the scope of the rights and interests of an applicant …
>
> (c) A party joined would also be able to protect the native title rights and interests they claim to hold from erosion, dilution, or discount by the process of the Court determining the claims of an applicant …
>
> (d) Whether the interest asserted can be protected by some other mechanism …
>
> (e) Whether the applicant for the determination would be prejudiced if the party applicant is joined …
>
> (f) The history of the proceedings.[143]

11.112 An applicant for joinder who demonstrated a clear and legitimate objective might nevertheless be denied joinder due to other considerations—for example, where the interests of the applicant for joinder could be protected through other mechanisms. The ALRC considers that whether the person seeking joinder can demonstrate a clear and legitimate objective should be given significant weight, and notes the view of Mansfield J in *Starkey v South Australia* that the

> discretion to join [a member of the claim group] as a respondent party does exist, but in my view its favourable exercise to allow a member of a claim group to become a respondent party will be rare.[144]

142 *Far West Coast Native Title Claim v South Australia (No 5)* [2013] FCA 717 (30 July 2013) [37].
143 *Barunga v Western Australia (No 2)* [2011] FCA 755 (25 May 2011) [201] (citations omitted).
144 *Starkey v South Australia* [2011] FCA 456 (9 May 2011) [68].

11.113 Many stakeholders supported this approach.[145] Frith and Tehan said:

> Requiring the Federal Court to consider whether the claimant or potential claimant has a clear and legitimate objective in joining is likely to reduce the number of parties involved in, and the cost and time of, native title proceedings.[146]

11.114 The recommended reform was opposed by North Queensland Land Council (NQLC) and QSNTS. NQLC submitted that, since the claim group authorises its applicant, 'there should be no reason for a member of the claim group to join as a respondent party in relation to a native title interest'.[147] However, given the problems that may sometimes arise in the authorisation process,[148] the ALRC considers that there may be circumstances in which it is in the interests of access to justice to allow a claimant to join as a respondent.

11.115 QSNTS expressed concerns about the inclusion of potential claimants, suggesting instead that the *Native Title Act* should be amended to provide that only persons who have filed 'a properly authorised native title claim in the Federal Court (which overlaps the application) have sufficient standing to become parties'.[149] QSNTS noted the successful joinder application in *Jagera #2*,[150] and submitted that 'joining a party who merely asserts an interest does little to create an avenue for any real resolution of the party's claims'. Further, the 'likely prejudice to the Applicant in a proceeding where a "potential claimant" is given standing (and the ability to stymie a consent determination) greatly outweighs any prejudice to the rights of a potential claimant'.[151]

11.116 The ALRC acknowledges that joinder of applicants and potential applicants may introduce difficulties into proceedings. Greater numbers of parties in proceedings may increase times and costs for all parties, and once a claimant or potential claimant is joined they may be in a position to prevent an agreement being reached for a consent determination. Nevertheless, the ALRC considers that it will, in some circumstances, be in the interests of justice for claimants and potential claimants with clear and legitimate objectives to be able to participate in proceedings.

11.117 The second limb of Recommendation 11–3 reduces the possibility of a claimant or potential claimant joining proceedings to disrupt or prevent a determination of native title. While the Court may currently join a claimant or potential claimant, the second limb of Recommendation 11–3 introduces an additional requirement for a claimant or potential claimant seeking joinder: an applicant for joinder who does not

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145 AIATSIS, *Submission 70*; NTSCORP, *Submission 67*; Minerals Council of Australia, *Submission 65*; Law Council of Australia, *Submission 64*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; National Native Title Council, *Submission 57*; A Frith and M Tehan, *Submission 52*; The Chamber of Minerals and Energy of Western Australia, *Submission 49*; Central Desert Native Title Service, *Submission 48*; Native Title Services Victoria, *Submission 45*; Law Society of Western Australia, *Submission 41*.

146 A Frith and M Tehan, *Submission 52*.

147 North Queensland Land Council, *Submission 42*.

148 See Ch 10.

149 Queensland South Native Title Services, *Submission 55*.

150 *Bonner on behalf of the Jagera People #2 v Queensland* [2011] FCA 321 (6 April 2011).

151 Queensland South Native Title Services, *Submission 55*.

show a clear and legitimate purpose in joining may have their application dismissed. This requirement is not intended to apply to other parties seeking joinder under s 84(5)—a recreational society need not show that it has a clear and legitimate objective to be achieved by joining proceedings. However, the ALRC considers that this additional requirement is appropriate. Members of a claim group who seek to join as respondents are, by definition, already involved in proceedings, and so their joinder as respondents must be well justified—particularly given concerns such as those expressed by NQLC and QSNTS. Potential claimants who seek to join as respondents have an alternative avenue for representing their interests—they may bring a native title claim—and so their joinder as respondents must be particularly well justified; especially if it is an application for late joinder.

Late joinder

11.118 Several stakeholders noted the particular impact that may be caused by late joinder. For example, Frith and Tehan submitted that late joinder may present a barrier to justice where

> the joinder confounds the legitimate expectations of the other parties involved in the proceedings that the matter will go to trial or be subject to a consent determination on a particular date, where they have worked to achieve that end over a long time.[152]

11.119 In certain cases, however, an application for late joinder may be justified or unavoidable. The NSW Aboriginal Land Council, for example, noted a number of reasons why it may be difficult or impossible for parties to join until later in proceedings. These reasons include, for example, limited resources, remoteness, and the possible lack of awareness of native title proceedings and their potential impact on interests held (or claimed) under the *Land Rights Act 1983* (NSW), until the proceedings are well advanced.[153]

11.120 Several stakeholders noted that it may be difficult for a third party to determine in advance whether that person's interests will be affected by a particular native title determination, and that a third party's interests in the claim area may change over the course of proceedings.[154] AMEC noted that a person's interests may change when the person acquires, transfers, or surrenders an interest, or when an interest expires.[155]

11.121 The ALRC considers that the existing powers of the Court are sufficient to limit the negative impact that late joinder may have on other parties in proceedings,

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152 A Frith and M Tehan, *Submission 12*. See also South Australian Government, *Submission 34*; NSW Aboriginal Land Council, *Submission 25*; Western Australian Government, *Submission 20*; North Queensland Land Council, *Submission 17*; Cape York Land Council, *Submission 7*.

153 NSW Aboriginal Land Council, *Submission 25*.

154 See, eg, NSW Aboriginal Land Council, *Submission 25*; Western Australian Fishing Industry Council, *Submission 23*; Association of Mining and Exploration Companies, *Submission 19*; National Farmers' Federation, *Submission 14*; Telstra, *Submission 4*.

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

while recognising that late joinder may in some cases be in the interests of justice.[156] Examples of the Court exercising its existing powers to limit the negative impact of late joinder can be found in *Watson (No 3)* and *Watson v Western Australia (No 5)* ('*Watson (No 5)*').[157] In *Watson (No 3)*, discussed above, a party was joined late in proceedings, but its participation was limited to matters arising under ss 225(c) and (d). That party was later dismissed in *Watson (No 5)* after it subsequently indicated it would, apparently without basis, refuse its consent to a consent determination. In reaching the decision to dismiss this party, Gilmour J had regard to a range of matters, such as:

- the purpose behind the *Native Title Act*, being to encourage the resolution of native title claims through conciliation and negotiation;
- the time, money, and other resources which had been invested in the application and which would be required if the consent determination were delayed;
- the inconvenience, anxiety and stress on members of the claim group if the consent determination were not to proceed; and
- the proximity of the remaining parties to reaching settlement.[158]

11.122 The ALRC notes that the test recommended in Recommendation 11–3 for claimants or potential claimants seeking joinder—whether the person seeking late joinder can demonstrate a 'clear and legitimate objective' to be achieved by joinder—may also be a useful test where any person seeks late joinder.

Dismissal of parties under s 84(8)

Recommendation 11–4 The *Native Title Act 1993* (Cth) should be amended to clarify that the Federal Court's power to dismiss a party (other than the applicant) under s 84(8) is not limited to the circumstances contained in s 84(9).

11.123 Recommendation 11–4 makes clear that the Court, when considering whether to dismiss a party under s 84(8), may consider a wider range of circumstances than those set out in s 84(9). Section 84(8) of the Act provides that the Federal Court may at any time order a person, other than the applicant, to cease to be a party to the proceedings. Section 84(9) provides:

> The Federal Court is to consider making an order under subsection (8) in respect of a person who is a party to the proceedings if the Court is satisfied that:
>
> (a) the following apply:

156 In this respect, the ALRC agrees with the submission from the National Farmers' Federation: National Farmers' Federation, *Submission 14*.

157 *Watson on behalf of the Nyikina Mangala People v Western Australia (No 5)* [2014] FCA 650 (20 May 2014).

158 Ibid [10].

(i) the person's interests may be affected by a determination in the proceedings merely because the person has a public right of access over, or use of, any of the area covered by the application; and

(ii) the person's interests are properly represented in the proceedings by another party; or

(b) the person never had, or no longer has, interests that may be affected by a determination in the proceedings.

11.124 AIATSIS suggested that there may be uncertainty as to whether the Court must take the matters listed in s 84(9) into consideration when making a decision to dismiss a party, or whether those matters were merely possible considerations for the Court. Recommendation 11–4 would make clear that s 84(9) simply provides one set of circumstances in which the Court is to consider making an order under s 84(8).[159] On the other hand, some stakeholders submitted that it was sufficiently clear that the Court's power under s 84(8) is not limited to the circumstances contained in s 84(9), and there are decisions indicating that the Court may take other factors into account.[160] However, these stakeholders did not oppose clarifying the matter in the Act.[161] Stakeholders who commented on this proposal generally supported it.[162]

Appeals from joinder and dismissal decisions

Recommendation 11–5 Section 24(1AA) of the *Federal Court of Australia Act 1976* (Cth) should be amended to allow an appeal, with the leave of the Court, from a decision of the Federal Court:

(a) to join or not to join a party under s 84(5) of the *Native Title Act 1993* (Cth); or

(b) to dismiss or not to dismiss a party under s 84(8) of the *Native Title Act 1993* (Cth).

159 CME also noted that problems associated with large numbers of respondents: 'could be addressed at least in part by amendments to make it easier for respondents to withdraw from claims. Presently, if a claim has been heard or part-heard, a respondent can only withdraw by making a formal application, which can involve significant time and resources. Allowing respondents to withdraw from a claim through a more informal process would reduce costs and help address the problem of having large numbers of respondents to claims': Chamber of Minerals and Energy of Western Australia, *Submission 21*.

160 *Cheinmora v Western Australia* [2013] FCA 727 (25 July 2013); *Butterworth on behalf of the Wiri Core Country Claim v Queensland* [2010] FCA 325 (26 March 2010).

161 Yamatji Marlpa Aboriginal Corporation, *Submission 62*; Law Society of Western Australia, *Submission 41*.

162 AIATSIS, *Submission 70*; South Australian Government, *Submission 68*; NTSCORP, *Submission 67*; Minerals Council of Australia, *Submission 65*; YamatjiMarlpa Aboriginal Corporation, *Submission 62*; National Native Title Council, *Submission 57*; A Frith and M Tehan, *Submission 52*; The Chamber of Minerals and Energy of Western Australia, *Submission 49*; Central Desert Native Title Service, *Submission 48*; Native Title Services Victoria, *Submission 45*; North Queensland Land Council, *Submission 42*.

11.125 The ALRC recommends that appeals be allowed, with the leave of the Court, from a decision of the Federal Court to join, not join, dismiss, or not dismiss a party to native title proceedings. This reform should be implemented by amending s 24(1AA) of the *Federal Court of Australia Act 1976* (Cth).

11.126 Section 24(1AA) of the *Federal Court of Australia Act* provides that an appeal must not be brought from a judgment of the Federal Court if the judgment is

> (b) a decision to do, or not to do, any of the following:
>
> (i) join or remove a party …[163]

11.127 As a result, an appeal cannot be made from a decision to join, or not to join, a person as a party to native title proceedings under s 84(5). Similarly, an appeal cannot be made from a decision to dismiss, or not to dismiss, a party from native title proceedings under s 84(8).

11.128 Section 24(1AA) creates a barrier to justice for participants in the native title system. Due to the operation of s 24(1AA), a person who is not joined to, or is dismissed from, proceedings may have no further opportunity to represent their interests to the Court. Section 24(1AA) similarly imposes barriers to justice for other parties, who have no avenue of appeal if another person is joined or is not dismissed. The limitations imposed by s 24(1AA) are particularly significant given the *in rem* nature of native title proceedings.

11.129 The requirement that an appeal from such decisions be subject to the leave of the Court would be an important way to ensure that the appeals process is expeditious and does not place undue burdens on the applicant or other parties. In the absence of a leave requirement, an appeal on a joinder or dismissal decision could be made that was substantially without merit, simply to delay proceedings.[164]

11.130 Section 24(1AA) was introduced in order to 'ensure the efficient administration of justice by reducing delays caused by appeals from these decisions'[165] by removing the right of appeal for certain 'minor procedural decisions'.[166] The

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163 This section was amended in 2015 by the *Federal Courts Legislation Amendment Act 2015* (Cth). Prior to the amendment, the section provided that an appeal must not be brought against 'a decision to join or remove a party, or not to join or remove a party'.

164 It has been stated, with respect to exercises of judicial discretion relating to practice and procedure—such as the joinder of parties—that 'if a tight rein were not kept upon interference with the orders of Judges of first instance, the result would be disastrous to the proper administration of justice. The disposal of cases could be delayed interminably, and costs heaped up indefinitely, if a litigant with a long purse or a litigious disposition could, at will, in effect transfer all exercises of discretion in interlocutory applications from a Judge in Chambers to a Court of Appeal': *Re Will of F B Gilbert (deceased)* 46 SR(NSW) 318, 323. See generally Bernard Cairns, *Australian Civil Procedure* (Thomson Reuters (Professional) Australia, 8th ed, 2009) [18.400].

165 Explanatory Memorandum, Access to Justice (Civil Litigation Reforms) Amendment Bill 2009 (Cth) 18, 81. See also *Cement Australia Pty Ltd v Australian Competition and Consumer Commission* (2010) 187 FCR 261, [17]–[18].

166 Explanatory Memorandum, Access to Justice (Civil Litigation Reforms) Amendment Bill 2009 (Cth) 18, [81].

Explanatory Memorandum states that the types of decisions referred to in s 24(1AA) are

> minor procedural decisions [that] are interlocutory in nature, from which there should be no avenue of appeal. Clarifying that there is no right to appeal for these types of matters will ensure the efficient administration of justice by reducing delays caused by dealing with vexatious appeals from these decisions.[167]

11.131 The ALRC considers that a decision to join, not join, dismiss, or not dismiss a party in the context of native title determination proceedings should not be considered a 'minor procedural decision', given the nature of native title proceedings. The recommended reform would not affect other areas of law where a decision to join, not join, dismiss, or not dismiss a party might be considered a 'minor procedural decision'—for example, no appeal would be available from a decision to join or remove a party in proceedings under consumer law.

11.132 While allowing appeals from joinder or dismissal decisions in the native title context is consistent with the beneficial purposes of *Native Title Act*, the requirement for seeking leave to appeal ensures the efficient administration of justice. A leave requirement is a matter for serious consideration by courts, and appeals are not granted as a matter of course.[168] However, where there are suitable grounds for an appeal, the ALRC considers that it would be in the interests of justice to allow that appeal.

11.133 This approach was supported by a number of stakeholders.[169] NQLC, however, did not support it, expressing a concern that an appeal right from an interlocutory decision, such as a joinder or dismissal decision, 'has the potential to cause delay and add to the costs of proceedings'.[170] The ALRC considers that the leave requirement will effectively preclude excessive delay in proceedings.

11.134 QSNTS did not support the proposal, noting that it would create a distinction between native title proceedings and other proceedings in the Federal Court. However, the ALRC considers that the nature of native title proceedings justifies a departure from other Federal Court proceedings on this point. Unlike many other types of proceedings in the Federal Court, native title proceedings typically involve large numbers of parties and a final determination of interests.

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167 Explanatory Memorandum, Federal Courts Legislation Amendment Bill 2014 (Cth).

168 Cairns, above n 164, [18.400].

169 AIATSIS, *Submission 70*; NTSCORP, *Submission 67*; Minerals Council of Australia, *Submission 65*; Law Council of Australia, *Submission 64*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; National Native Title Council, *Submission 57*; A Frith and M Tehan, *Submission 52*; The Chamber of Minerals and Energy of Western Australia, *Submission 49*; Native Title Services Victoria, *Submission 45*; Law Society of Western Australia, *Submission 41*.

170 North Queensland Land Council, *Submission 42*. A similar concern—that introducing an avenue for appeal 'may increase the volume of resources directed towards what are, in one sense, administrative matters, rather than towards the securing of a determination'—was raised by Central Desert Native Title Services. However, Central Desert also noted that they did not 'outright oppose' the introduction of an avenue of appeal: Central Desert Native Title Service, *Submission 48*. See also South Australian Government, *Submission 68*.

Participation of the Commonwealth

Recommendation 11–6 The Australian Government should consider developing principles governing the circumstances in which the Commonwealth should either:

(a) become a party to a native title proceeding under s 84 of the *Native Title Act 1993* (Cth); or

(b) seek intervener status under s 84A of the *Native Title Act 1993* (Cth).

11.135 The ALRC recommends that consideration be given to the development of principles setting out the circumstances in which the Commonwealth will either become a party to, or seek intervener status in, native title proceedings.

11.136 The Commonwealth may become a party to proceedings or join proceedings under the party provisions of s 84. The Commonwealth may also seek intervener status in proceedings under s 84A. The role of an intervener is generally to represent the intervener's own legal interests in proceedings that may affect those interests, without being a party to proceedings.[171] In native title proceedings, the Commonwealth may intervene where consideration is given to the construction and interpretation of the *Native Title Act*.[172] The Commonwealth, as a party or an intervener, may also be able to take a role in ensuring that negotiations are carried out in a manner consistent with the policy goals underlying the *Native Title Act*.

11.137 The development of principles setting out the circumstances in which the Commonwealth would seek to participate or intervene in native title proceedings may provide greater certainty for all parties about the likelihood of Commonwealth involvement in native title proceedings.

11.138 Stakeholders who commented on this proposal were supportive.[173] The NNTC noted that an 'indication from the Commonwealth when it would seek to participate or intervene in native title proceedings would provide greater certainty to other parties'.[174] QSNTS submitted that the 'Commonwealth [Attorney-General] is the custodian of the NTA and should be actively involved'.[175]

11.139 Consideration might also be given as to whether the Commonwealth might elect to be involved only in parts of native title proceedings that deal with specific aspects of s 225 of the *Native Title Act*.

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171 *Levy v Victoria* (1997) 189 CLR 579, 601–602 (Brennan CJ).

172 *Western Australia v Strickland* [2000] FCA 652 (18 May 2000).

173 Minerals Council of Australia, *Submission 65*; Law Council of Australia, *Submission 64*; YamatjiMarlpa Aboriginal Corporation, *Submission 62*; 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*; Central Desert Native Title Service, *Submission 48*; Native Title Services Victoria, *Submission 45*; Law Society of Western Australia, *Submission 41*.

174 National Native Title Council, *Submission 57*.

175 Queensland South Native Title Services, *Submission 55*.