12. Promoting Claims Resolution

Contents

Summary 357
Efficient resolution of native title claims 358
The commencement of the amendments 359
The role of the Crown in native title proceedings 361
    Consent determinations and connection assessment 362
    Timing of tenure analysis and connection assessment 364
    Best practice principles 367
Expert evidence 369
    Availability of experts 371
    Expert evidence and legal requirements 371
    Conflicting expert evidence 373
Handling connection materials 375
Promoting effective representation 376
Native title application inquiries 379
    Requirement for an applicant to agree to an inquiry 381
    Evidence gathering powers of the Tribunal 383

Summary

12.1 This chapter considers aspects of the processes involved in the resolution of native title claims, whether this resolution is achieved through litigated proceedings or, as is increasingly the case, through consent determinations. The aspects considered include:

- the role of the Crown in native title applications, and particularly in consent determinations;
- the use of expert evidence in native title proceedings;
- handling information generated as connection evidence;
- specialist training schemes; and
- the native title application inquiry process.

12.2 This chapter includes a recommendation that options for voluntary specialist training for native title practitioners be explored. The ALRC makes two recommendations regarding the native title application inquiry process, intended to facilitate the use of the native title application inquiry process where the Court considers it appropriate. The ALRC also recommends that amendments made to s 223

of the *Native Title Act* should only apply to determinations made after the date of commencement of any amendment.

Efficient resolution of native title claims

12.3 The time and costs needed to resolve native title claims have been noted by commentators including Vance Hughston SC:

> The major problem with the system for resolving native title claims is not hard to identify. It is the significant time and resources needed to resolve those native title claims which are opposed by government and other respondents. The problem is compounded by the limited physical capacity of most representative bodies, the scarcity of financial resources and the small number of experienced lawyers and anthropologists who are available to work on native title claims.[1]

12.4 The ALRC has also received submissions noting the time and costs in native title claims proceedings. In some cases, the factors leading to increased times and costs may be unavoidable. For example, the preparation of anthropological research will, by necessity, take a significant amount of time. Reducing the time taken to reach a determination does not, in itself, guarantee that justice is being achieved in the native title system. As noted by AIATSIS,

> the timely resolution of matters is an important principle underpinning reform. However … that the 'integrity' of the native title system lies in ensuring that measures to improve the timeliness of matters will at least do no harm and that considerations of efficiency should focus first on 'just' and then on 'timely'. [2]

12.5 In other cases, there may be mechanisms available to manage inefficiencies and ensure that a just outcome is achieved. For example, where conflicting expert evidence is adduced, the Federal Court may make directions for an expert conference to more efficiently identify the areas of disagreement between the parties.

12.6 In many cases, the necessary powers and policies are already in place. For example, there has been significant progress towards resolving native title claims through consent determinations. The Queensland Government noted that

> as at 1 May 2014, 100 determinations of native title have been achieved in Queensland. 90 determinations recorded the existence of native title and, of these, 87 determinations were made by consent.[3]

12.7 Intensive case management also appears to have assisted in the resolution of native title claims. The Federal Court of Australia referred to the establishment, in 2010, of a priority list of claims, which

> has had a significant effect on the rate of resolution of matters with the number of consent determinations jumping from 12 and 10 in 2009 and 2010 respectively to 35 in 2011.[4]

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1 Vance Hughston, 'A Practitioner's Perspective of Native Title' (2009) 93 *Australian Law Reform Commission Reform Journal* 28, 28.

2 AIATSIS, *Submission 70*.

3 Queensland Government, *Submission 28*.

4 Federal Court of Australia, *Submission 40*.

12.8 Given this, the ALRC considers it unnecessary to introduce legislative reforms to improve the claims resolution process. This chapter discusses various mechanisms that are in place in order to highlight emerging best practice.

The commencement of the amendments

Recommendation 12–1 The amendments recommended to s 223 of the *Native Title Act 1993* (Cth) (Recommendations 5–1 to 5–5, and 8–1) should only apply to determinations made after the date of commencement of any amendment.

Recommendation 12–2 The amendments recommended regarding authorisation (Recommendations 10–1 to 10–9) and joinder (Recommendations 11–1 to 11–6) should only apply to matters that come before the Court after the date of commencement of any amendment.

12.9 The usual way for amended legislation to operate is prospectively, that is, it affects matters that come before the court after the date of the amendment. Legislation with prospective operation is consistent with the rule of law, which requires laws to be known and certain at the time of the act affected by the law. Accordingly, the ALRC recommends that the amendments recommended in this Report should only apply to determinations made after the date of commencement of any amendment. The *Native Title Amendment Act 1998*, which included amendments to s 223[5] and s 225,[6] applied to all determinations made after the commencement of the amendment.[7]

12.10 Some stakeholders called for the *Native Title Act* to provide that existing determinations are amended with automatic effect, so that those who have already had a determination of native title could benefit from the proposed reforms with regard to the nature and content of native title rights.[8] While not necessarily retrospective (as it would operate from the date of the amendment), this approach would unsettle many determinations that were made by consent and were a result of negotiations and compromise between the parties.

12.11 There is provision in the Act for revisiting determinations in certain circumstances. Applications may be made under s 13 to revoke or vary an approved determination. Such applications may only be made by the registered native title body corporate, the Commonwealth Minister, the state or territory minister, or the Native Title Registrar.[9] From a claimant perspective, this means that an application to revoke or vary could not be made where there was a determination that native title does not

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5 *Native Title Amendment Act 1998* (Cth) sch 1, item 42.

6 Ibid sch 2 item 80.

7 Ibid sch 5 pt 5 item 24. The transitional provisions only refer specifically to the amendments to s 225. In the absence of any specification, the amendments to s 223 can be assumed to operate upon commencement.

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

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

exist, as in this case there would be no registered native title body corporate.[10] Also, applications may only be made on the grounds that

- events have taken place since the determination was made that caused the determination no longer to be correct; or
- the interests of justice require the variation or revocation of the determination.[11]

12.12 Some stakeholders suggested that, as the *Native Title Act* is beneficial legislation, the proposed reforms should apply to determinations made as a result of an application under s 13 for a variation of a determination.[12] Stakeholders who supported the reopening of past determinations referred to the fundamental requirement of justice[13] and the importance of equity between groups whose claims have been determined and groups whose claims are yet to be determined.[14] Some acknowledged the potential expense and inconvenience that reopening determinations could cause, but indicated that such inconvenience could be dealt with by carefully specifying the circumstances in which determinations could be reopened.[15]

12.13 Other stakeholders indicated that reopening determined claims would be divisive,[16] disruptive,[17] would 'divert resources away from the resolution of outstanding claims and undo years of work'[18] and would result in uncertainty.[19]

12.14 The *Native Title Act* only allows a determination to be varied on the limited grounds outlined above. There has been no judicial determination as to whether statutory amendments to the *Native Title Act* invoke either of these grounds.

12.15 Section 13 does not provide for the variation of a determination by consent. Since the *Native Title Act* is intended to facilitate conciliation and negotiation,[20] it may be useful for s 13 to provide that the consent of the parties is grounds for a variation of a determination.[21]

10 *Levinge on behalf of the Gold Coast Native Title Group v State of Queensland* [2013] FCA 634 (3 June 2013) [43].
11 *Native Title Act 1993* (Cth) s 13(5).
12 National Native Title Council, *Submission 57*; Queensland South Native Title Services, *Submission 55*; Central Desert Native Title Service, *Submission 48*.
13 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*; North Queensland Land Council, *Submission 42*.
14 A Frith and M Tehan, *Submission 52*; Native Title Services Victoria, *Submission 45*.
15 Queensland South Native Title Services, *Submission 55*.
16 Yamatji Marlpa Aboriginal Corporation, *Submission 62*.
17 Association of Mining and Exploration Companies, *Submission 54*.
18 Minerals Council of Australia, *Submission 65*.
19 National Farmers' Federation, *Submission 62*; The Chamber of Minerals and Energy of Western Australia, *Submission 49*.
20 *Native Title Act 1993* (Cth) Preamble.
21 Law Council of Australia, *Submission 64*.

The role of the Crown in native title proceedings

12.16 Crown parties—states, territories and the Commonwealth—have specific roles in native title proceedings. States and territories are typically the first respondents to a native title determination application.[22] This reflects the fact that native title is primarily a matter to be determined between native title applicants and the Crown.[23] The Commonwealth may also be a party to proceedings.[24]

12.17 The Commonwealth has an additional role in overseeing the operation of the native title system. The Commonwealth Attorney-General may intervene in proceedings as of right under s 84A of the *Native Title Act 1993* (Cth) (*Native Title Act*). For example, the Attorney-General intervened in *Risk v Northern Territory* in order to 'submit that the course set in Full Court native title appeals determined since *Yorta Yorta* … had departed from what had been laid down in *Yorta Yorta*'.[25]

12.18 Crown parties are subject to model litigant requirements.[26] States, territories and the Commonwealth have published model litigant guidelines that set out how these parties will conduct themselves in proceedings, including in native title proceedings. The South Australian model litigant guidelines, for example, state that the model litigant requirement obliges the State to 'act with complete propriety, fairly and in accordance with the highest professional standards'.[27] The *Legal Services Direction 2005* (Cth) sets out various elements of the model litigant requirement for the Commonwealth:

> The obligation to act as a model litigant requires that the Commonwealth and its agencies act honestly and fairly in handling claims and litigation brought by or against the Commonwealth or an agency by:
>
> (a) dealing with claims promptly and not causing unnecessary delay in the handling of claims and litigation
>
> (b) paying legitimate claims without litigation, including making partial settlements of claims or interim payments, where it is clear that liability is at least as much as the amount to be paid
>
> (c) acting consistently in the handling of claims and litigation
>
> (d) endeavouring to avoid, prevent and limit the scope of legal proceedings wherever possible, including by giving consideration in all cases to alternative dispute resolution before initiating legal proceedings and by participating in alternative dispute resolution processes where appropriate

22 *Native Title Act 1993* (Cth) s 84(4).
23 See Ch 11.
24 See, eg, *Commonwealth v Yarmirr* (2001) 208 CLR 1.
25 *Risk v Northern Territory* (2007) 240 ALR 75, [5].
26 See, for example, *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333, 342. See generally Gabrielle Appleby, 'The Government as Litigant' 37 *UNSW Law Journal* 94.
27 South Australian Crown Solicitor's Office, *Legal Bulletin No 2: The Duties of the Crown as Model Litigant*, 10 June 2011, 2.

(e) where it is not possible to avoid litigation, keeping the costs of litigation to a minimum, including by:

(i) not requiring the other party to prove a matter which the Commonwealth or the agency knows to be true, and

(ii) not contesting liability if the Commonwealth or the agency knows that the dispute is really about quantum

(f) not taking advantage of a claimant who lacks the resources to litigate a legitimate claim

(g) not relying on technical defences unless the Commonwealth's or the agency's interests would be prejudiced by the failure to comply with a particular requirement

(h) not undertaking and pursuing appeals unless the Commonwealth or the agency believes that it has reasonable prospects for success or the appeal is otherwise justified in the public interest, and

(i) apologising where the Commonwealth or the agency is aware that it or its lawyers have acted wrongfully or improperly.[28]

12.19 Similar requirements exist in state and territory model litigant policies.

12.20 Once a native title application has been made and the parties ascertained, the Federal Court refers the parties to mediation.[29] Mediation assists the parties to reach agreement on matters including whether native title exists in the area claimed, who holds the native title, and the nature and extent of the native title rights and interests and of any other interests in the area.[30] Where mediation results in an agreement between the parties, the Court may make a determination consistent with, or giving effect to, the terms of that agreement (a 'consent determination') under ss 87 or 87A of the *Native Title Act*. The Court's power to direct parties to mediation and to make consent determinations reflects the importance of negotiation in the native title system.[31]

Consent determinations and connection assessment

12.21 Consistent with the role of the Crown as first respondent in native title determination proceedings, a preliminary step is for the relevant state or territory to assess an applicant's connection evidence to determine whether the state or territory will enter into negotiations. In practice, other respondents will typically rely on the assessment of the relevant state or territory.[32] State and territory governments assess connection evidence in the light of each government's consent determination policies, which must in turn reflect native title law as stated.

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28 *Legal Services Directions 2005* (Cth) app B para 2.

29 *Native Title Act 1993* (Cth) s 86B. However, the Court must order that there be no mediation if it considers that it would be unnecessary; that there is no likelihood that the parties will reach agreement; or the applicant has not provided sufficient detail about certain matters: Ibid s 86B(3).

30 *Native Title Act 1993* (Cth) s 86A.

31 Ibid Preamble.

32 See, eg, *Watson v Western Australia (No 3)* [2014] FCA 127 (24 February 2014).

12.22 Before making a consent determination under ss 87 or 87A, the Court must be satisfied that it is 'appropriate to do so'.[33] This does not require the Court to make its own assessment of the merits of the native title application[34]—the Court 'is not required to examine whether the agreement is grounded on a factual basis which would satisfy the Court at a hearing of the application'.[35] Rather,

> the primary consideration of the Court is to determine whether there is an agreement and whether it was freely entered into on an informed basis.[36]

12.23 The Court does not 'exercise any paternalistic role as to the merits or demerits of the proposed settlement',[37] and does not enter into consideration of the fairness of settlement terms, provided the parties involved have legal representation.

12.24 In considering whether the parties to proceedings have independent and competent legal representation, the Court may consider

> the extent to which the State is a party, on the basis that the State, or at least a Minister of the State, appears in the capacity of *parens patriae* to look after the interests of the community generally. The mere fact that the State was a party may not be sufficient. The Court may need to be satisfied that the State has in fact taken a real interest in the proceeding in the interests of the community generally. That may involve the Court being satisfied that the State has given appropriate consideration to the evidence that has been adduced, or intended to be adduced, in order to reach the compromise that is proposed. The Court, in my view, needs to be satisfied at least that the State, through competent legal representation, is satisfied as to the cogency of the evidence upon which the applicants rely.[38]

12.25 State and territory respondents may indicate to claimants their expectations regarding connection reports and negotiation, such as: the information they require about the claim; the standard of evidence they seek; and the elements upon which they would be willing to make inferences. However, in *Lovett on behalf of the Gunditjmara People v Victoria (No 5)*, North J stated that:

> something significantly less than the material necessary to justify a judicial determination is sufficient to satisfy a State party of a credible basis for an application.[39]

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33 *Native Title Act 1993* (Cth) ss 87(1A), 87A(4)(b), 87A(5)(b).

34 On s 87, see *Owens on behalf of the Tagalaka People v Queensland* [2012] FCA 1396 (10 December 2012) [15]; *Cox on behalf of the Yungngora People v Western Australia* [2007] FCA 588 (27 April 2007) [3]. On s 87A, see *Goonack v Western Australia* [2011] FCA 516 (23 May 2011) [25]; *May v Western Australia* [2012] FCA 1333 (27 November 2012) 13.

35 *Lovett on behalf of the Gunditjmara People v Victoria* [2007] FCA 474 (30 March 2007) [37]; *Owens on behalf of the Tagalaka People v Queensland* [2012] FCA 1396 (10 December 2012) [14].

36 *Lovett on behalf of the Gunditjmara People v Victoria* [2007] FCA 474 (30 March 2007) [37]; *Owens on behalf of the Tagalaka People v Queensland* [2012] FCA 1396 (10 December 2012) [14].

37 *Clarrie Smith v Western Australia* [2000] FCA 1249 (29 August 2000) [26].

38 *Munn for and on behalf of the Gunggari People v Queensland* (2001) 115 FCR 109, [29]; *Watson v Western Australia (No 3)* [2014] FCA 127 (24 February 2014) [6].

39 *Lovett on behalf of the Gunditjmara People v State of Victoria (No 5)* [2011] FCA 932 (27 July 2011) [13].

12.26 Several stakeholders expressed concerns about current consent determination policies and approaches to negotiation. Queensland South Native Title Services (QSNTS) identified a lack of transparency as a concern:

> The State's assessment of the test requirements is not a transparent process with an option of being contested, for example, their standard for what is an acceptable or requisite level of acknowledgement of traditional laws and observance of traditional customs has never been clearly articulated … in the absence of clarity and the possibility of failing to reach agreement on the issues, matters will have to resort to formal litigation.[40]

12.27 Third party respondents may also benefit from a transparent approach to negotiation, particularly where they wish to assess whether or not they should proceed to a consent determination. The Association of Minerals and Energy Companies (AMEC) noted:

> AMEC members, who may find themselves as respondents to native title proceedings, would benefit from greater transparency on the basis on which the primary respondent (the relevant State or Territory Government) accepts connection or refuses to accept.
>
> Clarity on the lead respondent's position and the basis for that position, particularly early in a claim process, would assist third party respondents to more effectively and efficiently participate in claim proceedings.
>
> AMEC members have expressed a need to access connection reports in order to better understand the actual history and customs of the claimant group and their veracity. At significant cost some AMEC members have had to commission their own connection reports to satisfy themselves with the authenticity of claim groups, and individuals within the claim group. This transparency issue should be addressed.[41]

12.28 More generally, concerns have been raised that the 'current method of assessing connection has simply relocated an adversarial evidentiary process from the Federal Court to State and Territory Governments'.[42] Justice Barker, writing extra-curially, has commented that there is a danger that assessment of connection by state and territory respondents can 'tend to become ritualistic, formulaic, cumbersome and bureaucratic'.[43]

Timing of tenure analysis and connection assessment

12.29 As part of native title proceedings, state and territory respondent parties will analyse the tenure in the areas under claim, for the purpose of identifying areas where native title has been extinguished. Although some stakeholders suggested that tenure

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

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

42 Rita Farrell, John Catlin and Toni Bauman, 'Getting Outcomes Sooner: Report on a Native Title Connection Workshop' (National Native Title Tribunal and AIATSIS, 2007) 8. For an alternative perspective, see Stephen Wright, 'The Legal Framework for Connection Reports' (Paper Presented at National Native Title Conference, Coffs Harbour, 1–3 June 2005).

43 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) [17].

analyses should be prepared earlier in proceedings, the ALRC has concluded that statutory reform in not necessary.

12.30 Commentators and stakeholders have noted that the production of tenure analyses is often a source of delay in native title proceedings. Justice Barker commented:

> It would be extremely useful to the early resolution of all claims if, contrary to the practice currently adopted whereby tenure analysis is usually conducted after connection issues are resolved, States and Territories were to undertake a tenure analysis as soon as possible after a claim has been lodged, if not beforehand. Once a tenure analysis has been made and settled by the parties, realistic assessments can be made on all sides about the extent to which native title is contestable. This would serve to inform the direction of negotiations over a claim made or likely to be made. …
>
> This is a conversation that needs to be had, because the approach to tenure analysis usually taken under current approaches consumes an inordinate amount of time and money, comes late in the process and has the real potential to delay the resolution of native title claims or limit the options for their resolution. If, without compromising the outcomes of tenure analysis, a current tenure analysis different from that ordinarily made were capable of serving the purposes of all parties under the NTA, and could be completed more easily, cheaply and quickly, then why would it not be considered? That is the question.[44]

12.31 Stakeholders also expressed concerns about the time taken for the production of tenure analyses. Yamatji Marlpa submitted that Western Australia's

> approach to tenure analysis—deferring it until after connection material has been reviewed in order to form a view about progressing to the next stage of potential consent determination negotiations—has the effect of causing unreasonable delays.[45]

12.32 Similarly, the Law Society of Western Australia submitted that:

> the State's unwillingness to undertake a tenure analysis until it has reviewed connection material and determined that it is willing to proceed to a consent determination unreasonably delays consideration of tenure issues. The open and early dissemination of information by the State would promote the early resolution of claims and a consideration by native title parties of the impact of extinguishment issues on their claims and negotiation position. It would be within the scope of the court's jurisdiction to make programming orders to this effect.[46]

12.33 The impact of tenure analysis timing on respondents was noted by the Minerals Council of Australia (MCA):

> The MCA agrees that the lack of concurrence in the sequence between the bringing of evidence to establish connection and tenure searches conducted by governments is a key constraint in the native title system. In particular, this was experienced in the *Ngadju* case in Western Australia where leases were granted but then found to be

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44 Ibid [13]–[14]. See also Justice Michael Barker, 'Alternative Pathways to Outcomes in Native Title Anthropology' (Paper Presented at Centre for Native Title Anthropology/Native Title Services Victoria, Australian National University, 12 February 2015).

45 Yamatji Marlpa Aboriginal Corporation, *Submission 62*.

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

> invalid as the State was unable to demonstrate the existence of historical grants for the lease areas.
>
> Presently, there is no common set of programming orders for a native title claim. This results in all claims evolving differently, and we welcome the proposal for reform. Changes must deliver a commonality of approach (including predictability and systemisation) to the process. At this same time, tenure information must also be comprehensively and accurately provided.[47]

12.34 However, there are several arguments against the introduction of a general requirement for tenure analyses to be prepared concurrently with connection reports.

12.35 First, the Federal Court's existing powers with regard to case management and expert evidence provide a means to manage the sequence of connection reports and tenure analyses. Moreover, the Court's discretion may be exercised on a case-by-case basis, allowing for the specific circumstances in each case. Several stakeholders submitted that the sequence of bringing connection evidence and tenure analyses should be determined using the Court's existing powers, with sequences determined on a case-by-case basis.[48] The Federal Court of Australia noted that it has

> in various matters made orders timetabling the provision of connection material and the outcome of the analysis of that material. The imposition of a Court ordered timetable aims to ensure that the connection process occurs in a timely manner and allows the parties to allocate resources accordingly.[49]

12.36 Secondly, reforms designed to accelerate the production of tenure analysis material may have deleterious consequences if they result in insufficiently considered tenure analyses. NTSCORP made this point, noting:

> There can be significant delay in the preparation of tenure material. Following its production, the consideration of this material by parties is laborious, but it is essential that such analysis is undertaken properly as the rights and interests afforded to native title claimants are largely dictated through this process.[50]

12.37 This argument reflects the observation, made several times throughout this Inquiry, that the speed with which outcomes are achieved is not the only factor to be considered.

12.38 Thirdly, several state governments advised the ALRC that the preparation of a tenure analysis is both expensive and time consuming.[51] The Department of Justice, Victoria submitted that the 'complexity of historical land dealings has given rise to high transaction costs for the required tenure analysis'.[52] The Western Australian Government submitted that 'tenure and extinguishment considerations … are currently

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47 Minerals Council of Australia, *Submission 65*; referring to *Graham on behalf of the Ngadju People v Western Australia* [2014] FCA 1247 (21 November 2014).

48 NTSCORP, *Submission 67*; National Native Title Council, *Submission 57*; A Frith and M Tehan, *Submission 52*.

49 Federal Court of Australia, *Submission 40*.

50 NTSCORP, *Submission 67*.

51 South Australian Government, *Submission 34*; Western Australian Government, *Submission 20*; Department of Justice, Victoria, *Submission 15*.

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

a significant source of delay'.[53] The timing of a tenure analysis will also depend on the consent determination policy of Crown respondents. The South Australian Government submitted that, under its policy,

> the tenure analysis is undertaken at the same time as the expert anthropological material is being prepared. … As such, in South Australia there is concurrence unless the balance between the perceived weakness of the connection of the group concerned suggests that expensive analysis of tenure should await confirmation that the group actually holds native title.[54]

12.39 It emerged from consultations that tenure analyses are often delayed until there is greater certainty about the lands and waters being claimed. By delaying tenure analysis until a connection report has been prepared, state and territory respondents may avoid the unnecessary costs of preparing a tenure analysis for lands over which connection cannot be established. However, early tenure analysis may assist applicants in avoiding the unnecessary costs of preparing connection evidence for an area where native title has been extinguished.[55]

12.40 Overall, the ALRC considers that it is unnecessary to introduce statutory reforms requiring the earlier production of tenure analyses and assessment of connection. As a matter of best practice, however, it may be appropriate for state and territory governments to seek to prepare tenure analyses earlier, where possible.

Best practice principles

12.41 In the Discussion Paper, the ALRC asked whether the Australian Government should develop its own consent determination policy setting out the Commonwealth's responsibilities and interests in relation to consent determinations.[56] The ALRC also asked whether the Australian Government should develop national best practice principles to guide the assessment of connection in respect of consent determinations. The development of such policies, it was suggested, would allow the Commonwealth to clarify its own position, and may provide a leadership role with respect to the development of best practice principles. It may also assist in addressing some of the variations between the consent determination policies of the states and territories. These variations were noted by the North Queensland Land Council:

> [S]ome States and Territories have not published connection guidelines and the observation is made that it may be difficult to determine the exact requirements of their connection policy. Some States do not require connection reports as such. There is no requirement in the [Act] to develop connection guidelines.[57]

12.42 There have been previous documents setting out principles to guide states and territories in native title negotiations. The *Guidelines for Best Practice*, developed by the Joint Working Group on Indigenous Land Settlements for Flexible and Sustainable

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53 Western Australian Government, *Submission 20*.
54 South Australian Government, *Submission 68*.
55 Yamatji Marlpa Aboriginal Corporation, *Submission 62*.
56 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014) Question 9–4.
57 North Queensland Land Council, *Submission 17*.

Agreement Making,[58] set out principles designed to provide practical guidance for government parties to achieve 'flexible, broad and efficient resolutions of native title', particularly with respect to broader land settlements.[59] These guidelines emphasise early negotiation, cultural awareness and sensitivity and adherence to model litigant principles.[60]

12.43 Several stakeholders supported the development of a Commonwealth consent determination policy or national best practice principles,[61] although Central Desert Native Title Services questioned whether a Commonwealth policy or principles would 'have any real and substantive impact on the resolution of native title claims'.[62] The South Australian Government was opposed to the development of national best practice principles, submitting:

> The states and territories all have best practice principles in the assessment of connection that reflect the requirements of each State or Territory jurisdiction and that are consistent with the requirements of the NTA.[63]

12.44 Overall, it was not clear that there were problems with consent determination policies that could reasonably be addressed by Commonwealth policies. Stakeholders' experiences with consent determinations appeared to vary between jurisdictions. For example, while several stakeholders submitted that there were significant delays in consent determinations in Western Australia,[64] South Australian Native Title Services stated that they had 'established positive relationships with successive State Governments and other respondent parties to resolve native title through negotiation and consent'.[65]

12.45 The context of consent determinations also varies between states and territories. Victoria has adopted an approach based on agreement and consent through legislation.[66] In the Northern Territory, a range of processes have been introduced since 2007 to increase the efficiency of claims resolution over pastoral estates, including:

- not disputing the existence of native title holding group at sovereignty (subject to extinguishment);
- progressing claims in 'group clusters' based on geographical and anthropological commonalities;

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58 Joint Working Group on Indigenous Land Settlements, *Guidelines for Best Practice: Flexible and Sustainable Agreement Making*, August 2009.

59 Ibid 4.

60 Ibid 12.

61 AIATSIS, *Submission 70*; 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*; Native Title Services Victoria, *Submission 45*; Law Society of Western Australia, *Submission 41*.

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

63 South Australian Government, *Submission 68*.

64 Yamatji Marlpa Aboriginal Corporation, *Submission 62*; Central Desert Native Title Service, *Submission 48*; Law Society of Western Australia, *Submission 41*.

65 South Australian Native Title Services, *Submission 10*.

66 *Traditional Owner Settlement Act 2010* (Vic).

- negotiating consent determinations of native title on pastoral leases based on a short-form or truncated supporting anthropological connection report;
- agreeing on templates for ‘statement of agreed facts’ and ‘joint submissions’ in support of all pastoral estate consent determinations;
- relying on a generic list of public works existing on pastoral lease areas; and
- streamlining Governmental approval processes of consent determinations of all pastoral estate claims.[67]

12.46 Given the varied experiences and contexts between the states and territories, the ALRC considers that it would be impractical to develop best practice principles that could be applied across all jurisdictions.

Expert evidence

12.47 In a native title proceeding, claimants must provide evidence to establish the elements of native title—ie that they possess communal, group or individual rights and interests in relation to land or waters under traditional laws acknowledged and customs observed by them, and that, by those laws and customs they have a connection with the land or waters claimed.[68] Compiling such evidence typically will require significant resources and the extensive use of experts. Typically, this will be a time-intensive process.[69]

12.48 The establishment of native title under s 223 draws on a wide range of expert evidence:

> The historical reality of an indigenous society in occupation of land at the time of colonisation is the starting point for present day claims for recognition of native title rights and interests. The determination of its composition, the rules by which that composition is defined, the content of its traditional laws and customs in relation to rights and interest in land and waters, the continuity and existence of that society and those laws and customs since colonisation, are all matters which can be the subject of evidence in native title proceedings. Such evidence can be given, most importantly, by members of the society themselves and also by historians, archaeologists, linguists and anthropologists.[70]

12.49 Relevant experts may include, for example, historians, archaeologists, botanists, palaeontologists, cartographers, ethnomusicologists, and anthropologists. The importance of such expert evidence to claimants was noted by AIATSIS:

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67 Northern Territory Government, *Submission 31*.

68 *Western Australia v Ward* (2000) 99 FCR 316, [114]–[117] (Beaumont and von Doussa JJ); *Daniel v Western Australia* [2003] FCA 666 (3 July 2003) [146]; *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* (2007) 238 ALR 1, [339].

69 Graeme Neate, ‘Resolving Native Title Issues: Travelling on Train Tracks or Roaming the Range?’ (Paper Presented at Native Title and Cultural Heritage Conference, Brisbane, 26 October 2009) 11.

70 *Sampi v Western Australia* [2005] FCA 777 (10 June 2005) [951].

> Anthropological evidence is often critical to native title claimants. It forms the basis for proving 'the content of pre-sovereignty laws and customs and the continuous acknowledgement and observance of those laws'.[71]

12.50 This expert evidence also has significant value to the Court.[72] Vance Hughston SC and Tina Jowett have observed that expert evidence is of particular importance where the collective memory of a claim group does not extend prior to the assertion of sovereignty:

> the expert evidence of anthropologists will most frequently be relied upon to overcome the inherent forensic difficulties in proving the content of pre-sovereignty laws and customs and the continuous acknowledgment and observance of those laws and customs down to the present day.[73]

12.51 However, Hughston and Jowett identified several concerns with the use of expert evidence:

- concerns have at times been expressed that expert evidence may be partisan or biased, possibly because experts are briefed by only one party and may have a long-standing association with a particular claim group;[74]
- there have been instances of experts giving expert opinion evidence about matters extending beyond their professional expertise;[75]
- expert evidence and anthropological reports may be highly technical and difficult to understand;
- significant time may be required to take each expert through their evidence, particularly in an adversarial setting; and
- the adversarial context may not provide the best way for an expert to assist the court, nor for the court to properly assess experts' competing opinions.[76]

12.52 Many of these concerns were echoed by stakeholders. Issues regarding expert evidence emerging through the ALRC's consultations and in submissions included:

- the limited availability of experts;
- the possible disconnect between anthropological evidence and the legal tests necessary to establish native title; and
- the potential for delays in proceedings resulting from conflicting expert evidence.

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71 AIATSIS, *Submission 70*.

72 *Willis on behalf of the Pilki People v Western Australia* [2014] FCA 714 (4 July 2014) [116] (North J).

73 Vance Hughston and Tina Jowett, 'In the Native Title "Hot Tub": Expert Conferences and Concurrent Expert Evidence in Native Title' (2014) 6 *Land, Rights, Laws: Issues of Native Title* 1.

74 Hughston and Jowett refer to *Jango v Northern Territory* (2006) 152 FCR 150, [315]–[338].

75 Hughston and Jowett refer to *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 7)* (2003) 130 FCR 424, [41]; *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* (2007) 238 ALR 1, [459]–[468].

76 Hughston and Jowett, above n 73, 1–2.

Availability of experts

12.53 There was significant and widespread concern among stakeholders about the availability of experts. The Cape York Land Council said:

> There continue to be difficulties in engaging experts with sufficient expertise to undertake the necessary reports and other procedures in relation to connection requirements.[77]

12.54 The Law Society of Western Australia noted:

> the paucity of availability of Anthropological experts to assist in the preparation of claims and the presentation of the necessary ethnographic evidence to engage with the State in arriving at a consent determination or to present a case at trial. The *Wongatha* case effectively engaged all available Anthropological experts in the country. During the trial the expert for the State of Western Australia passed away and was unable to be replaced. Typically today (as has been the case since 1994), if an Anthropological expert is required, then long time periods need to be allowed to await the availability of the small number of experts who are available to perform the task.[78]

12.55 The Federal Court of Australia also noted that 'the limited number and availability of appropriately qualified expert anthropologists continues to be a significant source of delay'.[79]

12.56 The limited availability of experts cannot be addressed through legislative reform. Some stakeholders suggested that there may be a need for further programs to train and develop anthropologists and other experts with native title expertise. Such programs could be modelled on, for example, the internship program of the Aurora Project.

Expert evidence and legal requirements

12.57 Anthropology and the law are distinct, specialised fields, each with their own specific methodology and terminology. Expertise in one field cannot necessarily be translated directly into the other field. David Martin has suggested:

> Common anthropological ways of thinking and writing in materials contributed to debate within the discipline do not necessarily prove appropriate in the context of preparing 'connection reports' for native title litigation or mediation.
>
> It is crucial that anthropologists and other experts understand the role of expert witnesses as per the Federal Court's guidelines in order that their evidence is given due weight. A reading of the judgments, and practical experience, should encourage an interdisciplinary approach to these issues.[80]

12.58 Dr Paul Burke noted a related problem occurring when the law adopts technical concepts, such as 'society', from anthropology, without necessarily adopting the

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77 Cape York Land Council, *Submission 7*.

78 Law Society of Western Australia, *Submission 9*. The Law Society referred in its submission to *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* (2007) 238 ALR 1.

79 Federal Court of Australia, *Submission 40*.

80 David Martin, 'Capacity of Anthropologists in Native Title Practice. Report to the National Native Title Tribunal 2004' (Anthropos Consulting Services, Canberra, April 2004) 6.

theoretical framework surrounding those concepts. As a result, ‘once those concepts appear in legislation or judicial pronouncements the links to their original context is severed’.[81]

12.59 The different expectations of the law and anthropology also emerge with respect to the time taken and methods used for anthropologists and other experts to conduct their research. Dr Kingsley Palmer has made the observation that:

> The issue of the length of time an anthropologist needs to spend in the field and how long might be too long is a matter that has been addressed in other claims. In particular, the matter of the possible over-involvement of the anthropologist and a consequential loss of objectivity has been a matter for comment in a number of claims.[82]

12.60 However, a lengthy research period, and the formation of close relationships with claim groups, may be seen by native title experts as an essential requirement of their work. Dr Palmer has noted:

> a fundamental tenet of the anthropological method is some degree of immersion in the society being studied. This provides for an appreciation and comprehension of the nature of the social relationships and structures of the society that is unavailable to those whose experience of it is cursory and consequently superficial.[83]

12.61 During consultations, it was suggested to the ALRC that there may be benefits in further developing guidance or training for anthropologists to assist them in presenting their expert evidence in a way that may be more readily accessible for native title proceedings. The ALRC considers that the development of such guidance or training may be a useful tool for strengthening and expediting native title litigation and consent determinations. By encouraging experts to prepare their evidence in a way that more directly corresponds to the legal process, there may be a reduction in the time needed for parties and the Court to consider this evidence, and less possibility of differences between the two fields to lead to confusion or misinterpretation.

12.62 Any such guidance or training would need to ensure that the independence of experts in native title proceedings was not compromised, and would need to recognise that an expert witness’s ‘paramount duty is to the Court and not to the person retaining the expert’.[84] There may be a concern that any guidance or training would not account for variations that may exist between different anthropologists and different native title claim groups. This concern was expressed by NTSCORP:

> NTSCORP understands there are substantial delays in the connection process and trying to find agreement on connection issues with the State and other parties. However, there are different experts and several ways of presenting expert evidence

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81 P Burke, *Submission 33*. See also Paul Burke, *Law’s Anthropology: From Ethnography to Expert Testimony in Native Title* (ANU E Press, 2011) 13; Kingsley Palmer, ‘Societies, Communities and Native Title’ (2009) 4 *Land, Rights, Laws: Issues of Native Title*.

82 Kingsley Palmer, ‘Anthropology and Applications for the Recognition of Native Title’ (2007) 3 *Land, Rights, Laws: Issues of Native Title* 1, 5.

83 Kingsley Palmer, ‘Anthropologist as Expert in Native Title Cases in Australia’ (AIATSIS, 2012) 5.

84 Federal Court of Australia, *Practice Note CM 7: Expert Witnesses in Proceedings in the Federal Court of Australia*, 4 June 2013 [1.3].

> and this is often unique to each case. Prescribing the way or form this evidence should be presented would be unlikely to solve the problems of delay faced in native title claims. In NSW, much of the delay in the process is due to the State and respondent parties being unable or unwilling to specify their concerns with connection material.[85]

12.63 The ALRC suggests that further consideration might be given to the development of training programs, which might be conducted through, for example, university anthropology courses or the Australian Anthropological Society.

Conflicting expert evidence

12.64 In the course of native title proceedings, there is potential for experts to provide conflicting evidence. This may occur, for example, where an expert retained for a state or territory party prepares evidence contradicting that of the expert witness for the claim group, or where multiple groups assert native title over the same area.

12.65 The conflicting expert evidence may result in increased time and complexity. The South Australian Government submitted:

> The State does have some experience of situations where disagreement between (usually overlapping claimant) parties' experts leads to the serial exchange of reports over extended periods of time, however, the Court has attempted to mediate agreement by case management conferences or conferences of experts where that assists. It is, perhaps an imperfect system, but the State cannot see a clear means to improve matters.[86]

12.66 The Federal Court has a wide range of powers under the *Federal Court Rules 2011* (Cth), allowing the Court to make a range of directions relating to expert evidence.[87] These directions may include, for example, a direction that the experts confer,[88] or a direction that experts be cross-examined and re-examined in any particular order or sequence.[89] These powers provide a range of mechanisms for addressing the complexities that may arise when conflicting expert evidence is presented.

12.67 Expert conferences (in which experts meet to discuss and prepare a report stating their areas of agreement and disagreement) and concurrent expert evidence (in which experts present and respond to questions about their evidence together) may help avoid some of these concerns. Expert conferences and concurrent evidence may be particularly useful in cases where there is disagreement about, for example, claim group composition or the laws and customs of the group. AIATSIS noted the value of expert conferences and concurrent expert evidence:

> These procedures allow experts to come together and discuss significant issues and present agreed and disputed issues to the court. This contributes to a significant reduction in court time.[90]

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85 NTSCORP, *Submission 67*.
86 South Australian Government, *Submission 68*.
87 *Federal Court Rules 2011* (Cth) rr 5.04(3), 23.15.
88 Ibid r 23.15(a).
89 Ibid r 23.15(i).
90 AIATSIS, *Submission 70*.

12.68 The Federal Court noted that it has, in particular claims, facilitated case management conferences

> at which the experts for the Applicant and State confer to identify the issues likely to be most contentious prior to the commencement of anthropological field work. The aim of these conferences is for the parties' experts to discuss their knowledge of the relevant anthropological literature and related or neighbouring claims so that scarce research resources may be appropriately focused on areas of particular interest to the State, minimising the need for follow up research and reports.[91]

12.69 The Federal Court also noted that it has

> made orders that the experts confer under the supervision of a Registrar of the Court to identify those matters and issues about which their opinions are in agreement and those where they differ. These conferences have usually taken place in the absence of the parties' lawyers and have been remarkably successful in narrowing connection issues, often resulting in agreement between the experts on all matters.[92]

12.70 Several stakeholders in consultation expressed support for the use of court-appointed experts. Support for court-appointed experts may reflect the perceived advantages of an increased role for inquisitorial processes in native title proceedings, where a less adversarial approach may be appropriate. The potential value of court-appointed experts was noted by the Australian Human Rights Commission:

> Significant time and expense is incurred in the collection of expert evidence. Courts are often faced with multiple and conflicting expert reports and testimony. A mechanism by which the court can deal with particular questions of fact, such as in respect of genealogy, by referring the question to one independent expert referee may therefore prove useful.[93]

12.71 The decision to use a court-appointed expert may be more appropriately made on a case-by-case basis. The use of a court-appointed expert may be problematic, for example, in cases where there is significant dispute about facts relating to connection.[94] The Federal Court has an existing power to make orders for the use of court-appointed experts under the *Federal Court Rules 2011*:

> (1) A party may apply to the Court for an order:
>
> (a) that an expert be appointed (a ***Court expert***) to inquire into and report on any question or on any facts relevant to any question arising in a proceeding …[95]

12.72 Given the Court's existing powers for managing expert evidence, the ALRC considers that legislative reform regarding expert evidence in native title proceedings is unnecessary.

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91 Federal Court of Australia, *Submission 40*.

92 Ibid.

93 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2009' (Australian Human Rights Commission, 2009) 120.

94 For some concerns about the use of Court-appointed experts, see, for example, Justice Garry Downes, 'Expert Evidence: The Value of Single or Court-Appointed Experts' (Paper Presented at the Australian Institute of Judicial Administration Expert Evidence Seminar 2005, Melbourne).

95 *Federal Court Rules 2011* (Cth) r 23.01.

Handling connection materials

12.73 The evidence used in native title proceedings provides information about the laws, customs, histories and cultures of Aboriginal and Torres Strait Islander peoples. This material is of significant value to claimants, and may be of a culturally sensitive, private or confidential nature.

12.74 In the Discussion Paper, the ALRC asked what processes, if any, were needed to handle this material in an appropriate way outside native title proceedings.[96] This material may be of value to Aboriginal and Torres Strait Islander peoples outside proceedings, and for prescribed bodies corporate (PBCs) in identifying common law holders[97] for the purposes of carrying out consultations required under the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth).[98] The information may also be valuable to society generally, contributing to a stronger understanding of Aboriginal and Torres Strait Islander peoples and their history.

12.75 This information is generally not available to persons outside proceedings. Dr Paul Burke notes that this information 'remains inaccessible … because it has been initiated within the legal context of native title and remains confidential'.[99] Just Us Lawyers noted the value of archival information, and suggested that 'archival information should be digitised, indexed and made searchable and available to claimants' legal representatives'.[100]

12.76 Many submissions acknowledged the importance of native title evidence being made available in certain circumstances, while cautioning that privacy, confidentiality and cultural sensitivities must be carefully considered.[101] AIATSIS submitted:

> The future of connection material has generated a range of activity and ongoing research by AIATSIS. The valuable information assets produced by native title research are disparately held in the institutional and personal archives of the thousands of native title claimants, anthropologists, lawyers, bureaucrats, historians and others who have been involved in preparing, writing and critiquing connection reports, affidavits, future act heritage surveys and the like. While AIATSIS welcomes this material into our collection, the [AIATSIS Native Title Research Unit] considers that the social and economic potential of these extraordinary assets will not be realised unless native title groups and their representatives are empowered to sustainably hold, manage and provide access to locally relevant information holdings.[102]

12.77 The National Archives of Australia noted that records created by Commonwealth government agencies (including the Federal Court, the National Native

96 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014) Question 9–2.

97 *Native Title Act 1993* (Cth) s 56. See also Ch 10.

98 *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) regs 8–10. See also *Gumana v Northern Territory* (2005) 141 FCR 457, [138]–[140]. The value of connection evidence to PBCs was also noted by the Yamatji Marlpa Aboriginal Corporation: Yamatji Marlpa Aboriginal Corporation, *Submission 62*.

99 P Burke, *Submission 33*.

100 Just Us Lawyers, *Submission 2*. See also AIATSIS, *Submission 36*.

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

102 AIATSIS, *Submission 70*.

Title Tribunal, several land councils and the Torres Strait Regional Authority) are Commonwealth records under the *Archives Act 1983* (Cth). Under the *Archives Act*, these records become public after the expiration of the ‘open access period’.[103]

12.78 QSNTS submitted that the appropriate archiving of connection material is

> an important issue and QSNTS acknowledges that material collected and produced through the connection process should be archived for future generational use.[104]

12.79 QSNTS submitted that ‘retention by the PBC is ideal but the capacity issues of PBCs to retain the material which requires expert handling and storage for the benefit of future generations is problematic’. AIATSIS may be a suitable organisation to store the information,[105] but would need to be appropriately resourced to carry out this additional function.

12.80 Central Desert Native Title Services submitted that whether, and how, to store connection material should be a matter for each native title group to determine, and that a group may wish to have different types of information stored in different ways or for different purposes (such as for the transmission of law and custom or for public education).[106]

12.81 Yamatji Marlpa questioned how much of the material used for establishing connection should be archived, noting that much of this material may be the property of the claim group or its individual members, and that such material should be returned to its rightful owners on the conclusion of the relevant proceedings.[107]

12.82 The ALRC considers that further consideration of this issue is warranted. However, any requirements of general application—for example, that connection reports be made publically available—would be problematic, given the privacy, confidentiality and cultural issues that may arise. The ALRC agrees that any further use or archiving of connection materials should be at the discretion of claim groups and their members.

Promoting effective representation

> **Recommendation 12–3** The Australian Government should explore options for specialist training schemes for professionals in the native title system.

12.83 In the Discussion Paper, the ALRC asked whether a scheme for the training and certification of professionals in the native title system should be developed.[108] An

103 At the time of writing, the open access period for this material is 21 years: *Archives Act 1983* (Cth) s 3(7).
104 Queensland South Native Title Services, *Submission 55*.
105 Ibid.
106 Central Desert Native Title Service, *Submission 48*.
107 Yamatji Marlpa Aboriginal Corporation, *Submission 62*.
108 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014) Question 9–6.

accreditation scheme was identified as an option by Deloitte Access Economics in its 2014 *Review of the Roles and Functions of Native Title Organisations*:

> A stronger form of regulation would be to operate a registration system for which native title practitioners require accreditation. Accreditation could be based on a simple test of competencies or qualifications in areas of law or relevant experience. Again, the registration could be voluntary, providing additional information to the market, or mandatory.[109]

12.84 Such a system was considered in this Inquiry as an option for addressing concerns raised by some stakeholders. AIATSIS, for example, expressed

> a particular concern that native title applicants may access legal representatives who carry none of the additional obligations that currently vest in officers of the NTRBs/NTSPs. These obligations exist in order to assist, consult with and have regard to the interests of RNTBCs, native title holders and persons who may hold native title and they also extend to requiring the NTRB to identify persons who may hold native title.[110]

12.85 The question drew a range of views from stakeholders. A number of submissions expressed support for a training or certification scheme.[111] The Law Society of Western Australia noted that there may be value in training schemes for non-legal practitioners in the native title system:

> Non-legal practitioners working in native title (who do not provide legal advice) are not otherwise regulated or accountable and there may be some basis for establishing a process of registering and accrediting these persons for work in this area. This would, however, require the establishment of a supervisory body funded and administered so that it was effective and any poor practices could be addressed, including through de-registration.[112]

12.86 Several stakeholders, however, expressed concern about any further regulation of legal practitioners.[113] The MCA submitted that any training and certification program should

> not be burdensome to the legal profession which is already heavily regulated. It could focus on ensuring professionals can efficiently and effectively navigate a complex system. We also note that this program should not be at the exclusion of all practitioners who are involved or specialise in native title. We recommend it be made available to practice area experts who may wish to reinforce their knowledge.[114]

12.87 The Law Council of Australia (in a submission including comments from the Law Society of NSW and the Law Institute of Victoria) opposed any further regulation of legal practitioners, noting that practitioners 'are already subject to comprehensive

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109 Deloitte Access Economics, 'Review of the Roles and Functions of Native Title Organisations' (Australian Government, March 2014) 39. The Terms of Reference for this Inquiry specifically direct the ALRC to consider this report.

110 AIATSIS, *Submission 36*.

111 Yamatji Marlpa Aboriginal Corporation, *Submission 62*; National Native Title Council, *Submission 57*; Queensland South Native Title Services, *Submission 55*; Native Title Services Victoria, *Submission 45*.

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

113 See, for example, Minerals Council of Australia, *Submission 65*; Law Council of Australia, *Submission 64*.

114 Minerals Council of Australia, *Submission 65*.

regulation from a range of sources, including statute, regulations, statutory rules, professional conduct rules and supervision by the court'.[115] The Law Council also noted that such a scheme may be impractical, given that:

- clearly delimiting 'native title practice' is difficult—there may be matters relating to native title that require a practitioner with, for example, commercial law expertise; and
- accreditation schemes are typically available for relatively broad practice areas (for example, criminal law) with relatively large numbers of practitioners—for a relatively specialised practice area such as native title, it may be impractical to operate such a scheme.[116]

12.88 The ALRC agrees that mandatory certification would not be advisable. A mandatory certification scheme would have a limited role in building capacity.

12.89 The ALRC considers, however, that further consideration should be given to voluntary specialist training schemes for native title professionals. Specialist training schemes for legal practitioners exist in a range of practice areas. These training schemes assist members of the public in identifying practitioners with experience and additional training in particular areas of law, such as family law or commercial litigation. Such a specialist training scheme was supported by the Law Society of Western Australia. Although opposed to regulation that would require legal practitioners to obtain certification before acting in native title matters, the Law Society was supportive of

> recognition of particular expertise in an area, and the undertaking of advanced training in the area (eg cross-cultural practice, short courses in native title law and anthropology) similar to the approach of recognising specialists in criminal law and family law.[117]

12.90 A specialist training scheme would not prevent a professional from being involved in native title matters without completing the relevant additional training, but would allow those with expertise to differentiate themselves. This may, in turn, encourage other professionals to develop their expertise.

12.91 The ALRC notes that a specialist training scheme for non-legal practitioners in the native title system may be one way to address the limited availability of anthropologists and other experts, discussed earlier in this chapter.

12.92 The ALRC accepts that there may be difficulties in implementing a specialist training scheme. For example, as noted by the Law Council of Australia, the number of professionals involved in the native title system is relatively small compared to other areas of law, and the number of professionals undertaking specialist training may therefore be relatively small. Any such scheme should take into consideration existing regulations relating to native title professionals, and should not be unduly burdensome.

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115 Law Council of Australia, *Submission 64*.
116 Ibid.
117 Law Society of Western Australia, *Submission 41*.

12.93 Consideration should be given to which bodies may be the most appropriate provider of a specialist training scheme. An organisation operating primarily in the native title system, such as the National Native Title Tribunal, may be better placed than professional bodies to operate such schemes.

Native title application inquiries

> **Recommendation 12–4** Section 138B(2)(b) of the *Native Title Act 1993* (Cth), which provides that the Federal Court may only direct that a native title application inquiry be held if the applicant agrees to participate, should be repealed.
>
> **Recommendation 12–5** Section 156(7) of the *Native Title Act 1993* (Cth), which provides that the National Native Title Tribunal's power to summon a person to appear before it or produce documents does not apply to a native title application inquiry, should be repealed.

12.94 Under ss 138A–138G of the *Native Title Act*, the Court may direct the National Native Title Tribunal (the Tribunal) to hold a native title application inquiry into matters or issues relevant to a determination of native title.[118] The outcomes of the inquiry are non-binding, but may provide guidance to the parties or the Court. The inquiry process may be beneficial in native title proceedings. However, the process appears to have been rarely used.[119]

12.95 The ALRC recommends that native title application inquiries not require the consent of the applicant, and that the National Native Title Tribunal be empowered to summon a person to appear before it in a native title application inquiry. These recommendations are intended to facilitate the use of the native title application inquiry.

12.96 The Court may direct the Tribunal to hold a native title application inquiry where proceedings have been referred to mediation under s 86B[120] and the proceedings raise a matter or an issue relevant to the determination of native title under s 225, including:

- the persons or groups of persons holding native title rights;
- the nature and extent of native title rights and interests in relation to the determination area;

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118 Native title application inquiries are distinct from other types of inquiries that may be conducted by the Tribunal, including special inquiries under s 137 of the *Native Title Act*. This chapter is concerned only with native title application inquiries.

119 Federal Court of Australia, 'Annual Report 2013–2014' 67.

120 *Native Title Act 1993* (Cth) s 138A.

- the nature and extent of any other interests in relation to the determination area; and
- the relationship between native title and other rights and interests.

12.97 A direction for an inquiry may be made on the Court's own motion, at the request of a party to the proceedings, or at the request of the person conducting the mediation.[121] The Court may only make a direction for an inquiry if:

- the Court is satisfied that resolution of the matter would be likely to lead to: an agreement on findings of facts; action that would resolve or amend the application to which the proceeding relates; or something being done in relation to the application to which the proceeding relates;[122] and
- the applicant agrees to participate in the inquiry.[123]

12.98 An inquiry may cover more than one proceeding[124] and more than one matter.[125] The parties to an inquiry include the applicant, the relevant state or territory minister, the Commonwealth Minister and, with the leave of the Tribunal, any other person who notifies the Tribunal in writing that they wish to participate.[126]

12.99 Following an inquiry, the Tribunal must make a report, stating any findings of fact.[127] The Tribunal may make recommendations in the report, but these recommendations do not bind the parties.[128] However, the Federal Court must consider whether to receive into evidence the transcript of evidence from a native title application inquiry, may draw any conclusions of fact that it thinks proper, and may adopt any recommendation, finding, decision or determination of the Tribunal in relation to the inquiry.[129]

12.100 Native title application inquiries appear to offer a number of benefits. The inquiry process 'can be harnessed to collect and assess evidence and arrive at conclusions capable of being fed into the mediation process and is also capable of being received and adopted by the Court'.[130] Inquiries could be used, for example, in disputes relating to connection, authorisation or joinder. The use of the inquiry power in appropriate circumstances is in keeping with 'the importance placed by the Act on mediation as the primary means of resolving native title applications'.[131]

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121 Ibid s 138B(1).
122 Ibid s 138B(2)(a).
123 Ibid s 138B(2)(b).
124 Ibid s 138G.
125 Ibid s 140.
126 Ibid s 141(5). The state, territory and Commonwealth Ministers may elect not to participate.
127 Ibid s 163A.
128 Ibid.
129 Ibid s 86(2).
130 Chief Justice Robert French, 'Lifting the Burden of Native Title: Some Modest Proposals for Improvement' (2009) 93 *Australian Law Reform Commission Reform Journal* 10.
131 *Lovett on behalf of the Gunditjmara People v State of Victoria* [2007] FCA 474 (30 March 2007) [36].

12.101 Several stakeholders supported an increased role for the native title application inquiry process. Yamatji Marlpa stated that ‘the increased use of inquiries would be useful in overlapping claim disputes or with disputes about claim group descriptions’.[132] The Law Society of Western Australia considered that:

> the increased use of inquiries would be useful in overlapping claim disputes or claim group description disputes. This is particularly useful where the courts have been constrained from setting matters down as preliminary issues due to parties being unwilling to agree other facts.[133]

12.102 However, support for the inquiry process was not universal. QSNTS submitted that:

> it would be counter-productive to blur the very clear demarcation that has caused stakeholder confusion in the past. With the Federal Court having greater control in this area, there is no need to have a parallel process. The preference is to keep the NNTT out of the claim process noting that the Native Title Registrar—as opposed to the Tribunal—has important administrative functions around registration testing and notification of native title determination applications that need to be retained.[134]

12.103 Recommendations 12–4 and 12–5 are intended to facilitate the use of the native title application inquiry process, in light of the support for the process from some stakeholders. The use of the inquiry process remains at the discretion of the Court, and the ALRC does not take a position on whether increased use of the process is desirable. The inquiry process will be used in circumstances in which the Court considers it appropriate.

Requirement for an applicant to agree to an inquiry

12.104 Section 138B(2)(b) of the *Native Title Act* provides that the Court may only direct the Tribunal to hold an inquiry if the applicant agrees to participate in the inquiry. This requirement reflects the intent that the inquiry process be voluntary. The Explanatory Memorandum to the Native Title Amendment Bill 2006 (Cth) noted:

> The native title application inquiry process is entirely voluntary. However, the applicant or applicants in an affected application are required … to be a party to the inquiry. Therefore, it is important that the applicants’ consent be obtained prior to conducting an inquiry. Furthermore, it is unlikely a native title application inquiry would have an effective outcome if the applicant does not participate in the inquiry process.[135]

12.105 The ALRC recommends that s 138B(2)(b) be repealed. This would not affect s 141(5) of the Act, which provides that the applicant is a party to an inquiry. An applicant may find benefit in the inquiry despite initial reluctance. It has been noted of mediation that ‘some persons who do not agree to mediate, or who express a reluctance

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132 Yamatji Marlpa Aboriginal Corporation, *Submission 62*.
133 Law Society of Western Australia, *Submission 41*.
134 Queensland South Native Title Services, *Submission 55*.
135 Explanatory Memorandum, Native Title Amendment Bill 2006 (Cth) [4.278].

to do so, nevertheless participate in the process often leading to a successful resolution of the dispute'.[136] The same may be true of parties to the inquiry process.

12.106 Support among stakeholders for the removal of the requirement for the applicant's agreement to the process was mixed. Several stakeholders were opposed to the removal.[137] The Law Society of Western Australia argued that '[n]o effective consequence could be achieved by making the process non-consensual, because … any decision arrived at by the process of inquiry could not bind the parties, so there is no point in compelling them to participate'.[138] QSNTS argued:

> A successful inquiry process can only occur where parties are invested in the process and outcome. Given the conciliation objects of the NTA and the importance of consensual decision-making in the workspace, no party should be compelled to participate if they do not wish to.[139]

12.107 Other stakeholders supported the removal of the requirement.[140] The National Native Title Tribunal submitted that:

> the complexities of many remaining native title determination applications not only mean such applications would potentially benefit from a native title application inquiry but that there may be reluctance on the part of some applicants to agree to participate in an inquiry. The current requirement that the applicant agrees to participate, limits the circumstances in which the Federal Court could direct the Tribunal to undertake an inquiry and removes a potential mechanism to assist in the resolution of an application through mediation, although, it is noted that an inquiry may be limited if unsupported by the applicant.
>
> If amendments were to be made to the Act whereby the Federal Court did not require the agreement of the applicant to direct the Tribunal to conduct an inquiry, the Tribunal would require the appropriate powers to direct parties to attend hearings, and produce documents etc.[141]

12.108 Given that the Court retains the discretion to make a direction that a native title application inquiry be held, the ALRC considers that concerns about an inquiry taking place without the consent of all parties may be overstated. In the event that an applicant does not wish to take part in an inquiry, the Court may decide not to direct the inquiry to be held.

12.109 The ALRC also notes that the Federal Court's power to refer proceedings to alternative dispute resolution does not require the consent of the parties, except in the case of referrals to arbitration, which may result in a binding decision.[142] The native title mediation process itself does not require the agreement of the applicant (or any

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136 James Spigelman, 'Mediation and the Court' (2001) 39 *Law Society of NSW Journal* 63, 65.

137 AIATSIS, *Submission 70*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; Queensland South Native Title Services, *Submission 55*; North Queensland Land Council, *Submission 42*; Law Society of Western Australia, *Submission 41*.

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

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

140 South Australian Government, *Submission 68*; National Native Title Tribunal, *Submission 63*; Native Title Services Victoria, *Submission 45*.

141 National Native Title Tribunal, *Submission 63*.

142 *Federal Court of Australia Act 1976* (Cth) s 53A(1A).

other party).[143] Given that these alternative dispute resolution processes are useful despite not requiring the consent of parties, the inquiry process might have value even without the agreement of the applicant.

Evidence gathering powers of the Tribunal

12.110 Under s 156(2) of the Act, the Tribunal has the power to summon a person to give evidence or produce documents. However, under s 156(7), this power does not apply in respect of a native title application inquiry. The ALRC recommends that s 156(7) be repealed.

12.111 The powers of the Tribunal would be strengthened by repealing s 156(7), so that the Tribunal would be empowered to summon a person to give evidence or produce documents in a native title application inquiry, as it is in other types of inquiries.

12.112 The reason for the introduction of s 156(7) into the Act is given in the Explanatory Memorandum to the Native Title Amendment Bill 2006 (Cth):

> Native title application inquiries are intended to be an entirely voluntary process which parties to proceedings may avail themselves of in order to facilitate resolution of the claim. Persons who agree to voluntarily participate may not be compelled to give evidence.[144]

12.113 Empowering the Tribunal to summon a person to give evidence or produce documents would alter the voluntary nature of the native title application inquiry process. If s 156(7) of the Act were repealed, and the Tribunal summoned a person to give evidence or produce documents, a failure of that person to do so would be an offence under ss 171 and 174 of the Act, respectively, unless the person had a ‘reasonable excuse’.[145] However, the desirability of retaining an entirely voluntary inquiry process must be balanced against the potential benefits of strengthening the Tribunal’s powers.

12.114 Stakeholders who commented on this proposal were generally supportive.[146] AIATSIS, for example, submitted:

> Inquisitorial tribunals with the power to summon persons arguably operate more effectively because the fact finding mission is not dependent on the willingness of parties to engage. Although parties rarely wish to be seen as uncooperative with or obstructive to the arbitral tribunal and usually will wish to comply when they reasonably can, the capacity to compel attendance arguably sets the tribunal apart from dispute resolution activities, such as mediation.

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143 The Court is required to refer an application to mediation unless the Court considers that mediation is unnecessary, that there is no likelihood of the mediation being successful, or that the applicant has provided insufficient information in their application: *Native Title Act 1993* (Cth) s 86B(3).

144 Explanatory Memorandum, Native Title Amendment Bill 2006 (Cth) [4.308].

145 *Native Title Act 1993* (Cth) ss 171(2), 174(2).

146 AIATSIS, *Submission 70*; National Native Title Tribunal, *Submission 63*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; Native Title Services Victoria, *Submission 45*; Law Society of Western Australia, *Submission 41*.

> Without the power to compel attendance by persons identified by the tribunal as important to its fact-finding mission, the effectiveness of the tribunal can be subverted. However, it is also arguable that compelling attendance may promote a disingenuous engagement by parties that also subverts the effectiveness of its processes.[147]

12.115 The Law Society of Western Australia supported the Tribunal having the power to summon persons for a native title application inquiry, as well as 'the power to draw inferences against any party who does not participate'.[148] The Law Society also suggested, however, that some persons may face 'resourcing issues and the NNTT should be able to take these into account together with any other reasonable excuse (eg cultural obligations)'.[149] Although the ALRC considers that a power to draw inferences against a party who does not participate is unnecessary, the ALRC agrees that the Tribunal should take factors, such as resource constraints or cultural obligations, into account when summoning a person, unless the person has a 'reasonable excuse',[150] and factors such as resource constraints or cultural obligations may provide a 'reasonable excuse' for these purposes. The ALRC also notes that factors such as resource constraints or cultural obligations may provide a 'reasonable excuse' such that the offences for a person's failure to attend the Tribunal or provide required documents under ss 171 and 174 do not apply.

147 AIATSIS, *Submission 70*.
148 Law Society of Western Australia, *Submission 41*.
149 Ibid. See also Yamatji Marlpa Aboriginal Corporation, *Submission 62*.
150 *Native Title Act 1993* (Cth) ss 171(2), 174(2).