1. Introduction

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Review of the *Native Title Act 1993* (Cth)

Connection to Country: Overview

1.1 This Report marks the first major review of the law governing 'connection' in native title claims since the introduction of the *Native Title Act 1993* (Cth) ('*Native Title Act*'). In tandem it examines authorisation of persons bringing claims and joinder of parties to a native title claim. The recognition of native title in *Mabo v Queensland [No 2]* ('*Mabo [No 2]*'),[1] and the introduction of the *Native Title Act*, marked a significant shift in Australia's relationship with Aboriginal and Torres Strait Islander peoples. It is important that the claims process for determining native title effectively recognises and protects native title rights and interests, while balancing the wide range of other interests that are affected by a native title determination.

1.2 On 3 August 2013, the then Attorney-General of Australia, the Hon Mark Dreyfus QC MP, requested that the Australian Law Reform Commission (ALRC) conduct an Inquiry into, and report on Commonwealth native title laws and legal frameworks in the following areas:

- connection requirements relating to the recognition and scope of native title rights and interests; and
- any barriers imposed by the Act's authorisation and joinder provisions to claimants', potential claimants' and respondents' access to justice.

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

1.3 'Connection' generally refers to the relationship that Aboriginal peoples and Torres Strait Islanders have with their traditional lands and waters. Reform to the law governing connection requirements under the *Native Title Act* poses significant challenges. The definition of native title in the *Native Title Act* draws on *Mabo [No 2]*, but the requirements to prove native title under s 223 of the Act have been reinterpreted over time. Parties, subsequently, have ordered their practices, including negotiation of consent determinations on this basis—'in the shadow of the law'.

1.4 For Aboriginal and Torres Strait Islander peoples, the recognition of native title has immense significance as acknowledging their first occupation of Australian land and waters, and it brings the potential for tangible benefits. The recognition and protection of native title is a central object of the *Native Title Act*—and the Preamble identifies the beneficial purposes of the Act. Reforms of connection requirements, authorisation and joinder are important to ensure that native title law and legal frameworks achieve efficiencies but remain consistent with such beneficial purposes.

1.5 The law for determining native title is complex. The *Native Title Act* requires that Aboriginal peoples and Torres Strait Islanders must prove they have maintained a connection since before European settlement. Difficulties in the proof of native title stem from two sources. First are the inherent problems of establishing rights and interests that area possessed under traditional laws and customs with origins from the pre-sovereign period.

1.6 Second, these difficulties are increased by the amplification of requirements for proving native title, such as the need for a 'normative society'.[2] The ALRC considers that an approach to the law defining native title that more fully acknowledges that traditional laws and customs may adapt, evolve and develop, while still retaining the core elements of native title 'connection', is in keeping with the beneficial objectives of the legislation. While it remains important for claims to assess whether Aboriginal peoples and Torres Strait Islanders have substantially maintained their connection to land and waters, the requirements for proof should be more flexible, and facilitate an efficient and equitable claims resolution system.

1.7 While it is important that native title claims are rigorously tested, the extensive requirements may result in an involved claims process for determinations. Such considerations, however, must be balanced by the acknowledgment that it is necessary to invest sufficient time and resources to secure enduring outcomes for all parties.

1.8 The claims process also must accommodate the wide range of interests in the Australian community 'affected' by a native title determination. Effective and fair provisions governing parties and joinder of parties to native title proceedings play an important function in this regard.

1.9 It is important that the 'right people for country' are identified in the claims process and that the Aboriginal and Torres Strait Islander peoples bringing the native title claim (the 'applicant') are duly authorised by the claim group. The authorisation

2 Law Council of Australia, *Submission 35*.

process is costly. The role of the applicant can generate conflict, but it can also be the basis for building governance and capacity within the native title group. Reforms are needed to ensure the authorisation process is robust, transparent and able to reduce potential conflict.

1.10 Consideration should also be given to considering the impacts of reform upon the native title system as a whole, especially as native title operates across many sectors in Australian society. Certainty is an important consideration for third parties who may deal with native title claimants.

1.11 In this context, the ALRC, in formulating its recommendations, has had regard to the development of the law, procedure and practice over the 20 years since the Act was introduced, as well as the significant policy and economic arena in which native title is implemented.

1.12 Native title has the capacity to contribute to the improvement of the economic circumstances of Aboriginal and Torres Strait Islander peoples. If native title is to provide an effective platform for future development, then a prerequisite is ensuring an equitable process within the law governing connection requirements.

1.13 The Inquiry has also looked to the future and how native title law might develop over the next 20 years and beyond. In 2007 the *United Nations Declaration on the Rights of Indigenous Peoples* provided international standards upon which to base a 'constructive partnership' between nations and their Indigenous peoples to employ best practice principles in a range of legal and policy areas.

The law reform brief

The scope of the Inquiry

1.14 The ALRC examined four areas of the *Native Title Act.* Broadly, these areas included: the legal requirements for recognising native title rights and interests; the nature and content (scope) of native title rights and interests; the Act's provisions for authorisation of an applicant; and the Act's provisions governing when persons become parties to an application for a determination of native title. The ALRC also considered ancillary aspects of these areas, such as expert evidence and connection reports.

Connection requirements

1.15 Connection requirements relate to how native title is established and proved under the *Native Title Act*. 'Connection' is not specifically defined in the legislation but the term appears in s 223(1)(b) of the Act.[3] More generally, it refers to s 223 which defines native title and to s 255 which sets out what is required for a determination of native title. Section 61 governs the originating process for an application for a determination of native title. Connection requirements relate to both the factual matters relevant to Aboriginal peoples' and Torres Strait Islanders' laws and customs, as well

3 *Native Title Act 1993* (Cth) s 223(1)(b).

as the legal rules that govern how native title is proved. This legal architecture owes much to *Mabo [No 2]*.[4]

1.16 Aboriginal peoples or Torres Strait Islanders may bring an application for a determination of native title rights and interests (a claim) under the *Native Title Act*. Section 223 of the Act defines native title:

> (1) The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
>
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
>
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
>
> (c) the rights and interests are recognised by the common law of Australia.

1.17 In regard to connection, the ALRC was asked to consider the following four options for reform:

- a presumption of continuity of acknowledgment and observance of traditional laws and customs and connection;
- clarification of the meaning of 'traditional' to allow for the evolution and adaptation of culture and recognition of 'native title rights and interests';
- confirmation that 'connection with the land and waters' does not require physical occupation or continued or recent use; and
- empowerment of courts to disregard substantial interruption or change in continuity of acknowledgment and observance of traditional laws and customs where it is in the interests of justice to do so.

Nature and content of native title

1.18 The nature and content (scope) of native title rights and interests is determined by reference to the factual circumstances of each native title claim.[5] The court in making a determination of native title must set out

> (a) who the persons, or each group of persons, holding the common or group rights comprising the native title are; and
>
> (b) the nature and extent of the native title rights and interests in relation to the determination area; and
>
> (c) the nature and extent of any other interests in relation to the determination area; and
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> (d) the relationship between the rights and interests in paragraphs (b) and (c) (taking into account the effect of this Act).[6]

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4 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.
5 *Native Title Act 1993* (Cth) ss 223(2), 225.

1.19 The ALRC was asked to consider the scope of native title rights and interests, and it considered this question generally, as well as specifically, in relation to examining whether there should be clarification that 'native title rights and interests' can include rights and interests of a commercial nature.

1.20 The Terms of Reference indicated that the ALRC could also consider any other improvements to the law and legal frameworks for connection requirements.

Authorisation

1.21 In the native title claim process, it is necessary to identify which Aboriginal peoples or Torres Strait Islanders are the native title claimants, and the claimants must validly authorise persons in the group (the 'applicant') to bring an application for a determination (claim). Authorisation forms an initial step in bringing an application for a determination (claim) under the *Native Title Act*. The Act establishes a process for authorisation in s 251B. The applicant can deal with matters arising in relation to the claim.[7] In a successful claim, the court determines who holds native title.[8] The ALRC was asked to consider any potential barriers to access to justice.

1.22 There is an important meeting point between the law concerning 'connection and recognition of native title' and questions of claim group membership.

> It is a matter of simple justice that native title determinations should be made only in favour of the traditional owners of each area of land … Just as importantly, the ongoing demands of governance and decision-making in relation to native title lands require a clear and shared understanding of how different groups and subgroups fit together. These two considerations highlight the paramount importance of identifying the 'right people for country'.[9]

Parties and joinder

1.23 Native title intersects with many other interests in the Australian community. The *Native Title Act* contains provisions that set out the persons and organisations that are parties to a native title claim. The applicant is always a party. Relevant state and territory governments and, at times, the Commonwealth government, are respondents to a native title claim. Other persons holding interests in the claim area, such as a mining lease, may also be a party.

1.24 Most persons become parties at the initial notification stage of a claim. Other persons whose interests are affected by a native title determination may seek to become a party after this stage. Aboriginal peoples or Torres Strait Islanders, as well as other persons affected by a native title determination, may seek joinder. Joinder raises issues about potential barriers to access to justice, and the good ordering and productive relationships between all participants—Indigenous and non-Indigenous—within the native title system.[10]

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6 Ibid s 225.
7 Ibid s 62(1)(iv).
8 Ibid s 225.
9 Nick Duff, 'What's Needed to Prove Native Title? Finding Flexibility Within the Law on Connection' (Research Discussion Paper 35, AIATSIS, June 2014) 17.
10 Association of Mining and Exploration Companies, *Submission 19*.

1.25 The ALRC was asked to consider any barriers to access to justice imposed by the Act's joinder provisions for claimants, potential claimants and respondents.

Claims resolution and legal frameworks

1.26 The *Native Title Act* is a detailed statute that is underpinned by a multifaceted institutional and decision-making structure. The Federal Court and National Native Title Tribunal play an important role. Legal frameworks include the practices of parties to native title determinations, such as the preparation of connection reports, together with policy and administrative guidelines integral to the operation of the *Native Title Act* in respect of connection requirements, authorisation and joinder. Many institutions and professionals, such as anthropologists and historians, will be involved at various stages of a native title claim.

1.27 The *Native Title Act* intersects with other Commonwealth, state and territory legislation,[11] including resource and land management laws. The Terms of Reference ask the ALRC to consider other legislation, case law and other relevant matters, concerning the operation of the native title system.

Other reviews

1.28 There have been many reviews, consultations and proposed amendments to the *Native Title Act.*[12] The outcomes have been a modest series of largely technical and procedural amendments to the Act, since 1997.[13] Since 2011 a number of amendments to the *Native Title Act* have been proposed. In 2011, the Native Title Amendment (Reform) Bill was introduced into the Federal Senate. The 2011 Bill was revised following an Inquiry by the Senate Standing Committee on Legal and Constitutional Affairs, and reintroduced as the Native Title Amendment (Reform) Bill (No 1) 2012. This Bill lapsed. At the time of writing, the Native Title Amendment (Reform) Bill 2014 (Cth) was before the Senate of the Federal Parliament. The content of this Bill is substantially the same as that of the lapsed 2012 Bill.

Why reform is needed

1.29 The *Native Title Act* is invested with many aspirations for the future of Australia's Indigenous peoples. It has brought opportunities and challenges for the wider Australian society. The law regarding the recognition and scope of native title raises fundamental questions about the nature of native title within the Australian legal system. Authorisation procedures are of concern to claim group members and for third parties. The party and joinder provisions reflect a critical point in the interaction between Aboriginal people and Torres Strait Islanders, the courts and third parties in the native title claims process.

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11 See, eg, *Federal Court of Australia Act 1976* (Cth).

12 Nick Duff, 'Reforming the Native Title Act: Baby Steps or Dancing the Running Man?' (2013) 17 *Australian Indigenous Law Reporter* 56, 56.

13 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Social Justice and Native Title Report' (Australian Human Rights Commission, 2013) 78; Duff, above n 12, 58–61.

1.30 The Act has been in operation for 20 years. Since the introduction of the Act native title determinations and agreement-making have become, in many contexts, 'a way of doing business'.[14] To sustain and build relationships around native title within the Australian community requires an approach to law reform that can balance the many interests involved. As Justice Barker noted, there is a need for

> constructive change to a system that is often characterised by formulaic approaches to dispute resolution, slowness and expense in arriving at outcomes; outcomes which sometimes are considered of limited or no utility by some indigenous groups and frustrate other parties.[15]

1.31 There are diverse views about native title law. Mick Gooda, the Aboriginal and Torres Strait Islander Social Justice Commissioner, has said:

> The process of recognising native title itself has also been frustrating from the start for Aboriginal and Torres Strait Islander peoples. While on the one hand, it brings hope and expectation of the return of country, on the other hand it can also be a process fraught with difficulties that opens up tensions and wounds around connections to country, family histories and community relationships. These instances of 'lateral violence' fragment our communities as we navigate the native title system and sadly diminish the unique opportunity native title can and should deliver to overcome disadvantage.[16]

1.32 Other stakeholders stressed the need for certainty in the native title process while noting the importance of engaging with Aboriginal and Torres Strait Islander peoples. The Minerals Council of Australia, for example, stressed that the minerals industry

> is committed to working with Indigenous communities within a framework of mutual benefit, which respects Indigenous rights and interests. It supports reforms that are consistent with these principles and which promote certainty and timely, equitable and efficient outcomes.[17]

1.33 The growing number of native title determinations across Australia is a positive trend.[18] The law relating to connection requirements, however, remains complex to navigate for all parties and variable in its outcomes across Australia.[19]

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14 Minerals Council of Australia, Submission to the Australian Attorney-General's Department, Review of the *Native Title Act 1993*—Draft Terms of Reference, 2013; Association of Mining and Exploration Companies Inc, Submission to the Australian Attorney-General's Department, Review of the *Native Title Act 1993*—Draft Terms of Reference, 2013; Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2012' (Australian Human Rights Commission, 2012).

15 Justice Barker, *Alternative Pathways to Outcomes in Native Title Anthropology* (12 February 2015) 1 <http://www.fedcourt.gov.au/publications/judges-speeches/justice-barker/barker-j-20150219>.

16 As quoted in Law Society of Western Australia, *Submission 9*.

17 Minerals Council of Australia, *Submission 8*.

18 See Queensland Government, *Submission 28*; Western Australian Government, *Submission 20*; South Australian Government, *Submission 34*. Note also that Victoria has developed the *Traditional Owner Settlement Act 2010*.

19 Law Council of Australia, *Submission 35*.

1.34 The native title system is highly resource intensive.[20] Costs are borne by a range of governments, public institutions, industry, and private persons—and most acutely by Aboriginal and Torres Strait Islander peoples—for example, in the need for detailed evidence relating to connection to be brought by claimants.[21]

1.35 Major constraints in the processes for proving native title increase transaction costs for all in the system, reduce the basis for 'full' recognition of rights and confine the scope for native title rights and interests to serve as a platform for the future development for Aboriginal and Torres Strait Islander peoples.[22]

1.36 The ALRC considers that native title claims should not be unnecessarily prolonged. Long time frames have repercussions for the viability of current and future native title communities, and in terms of commercial certainty.[23] Costs for the parties involved and, more generally, within the native title system can escalate. The Federal Court has instituted practice initiatives designed to 'ensure where possible that resolution of native title cases is achieved more easily and delivered in a more timely, effective and efficient way'.[24] Consultations and submissions revealed that the tighter timetable for claims resolution while beneficial in many respects may, at times, place pressure on parties in a time and resource intensive process.[25]

1.37 Similarly, there is a need to reduce complexity and to facilitate focus on the core elements for proving native title. The Law Council of Australia submitted that

> statutory interpretation of s 223(1) of the *Native Title Act* 1993 (Cth) should accord more closely with Aboriginal and Torres Strait Islander peoples' understanding of 'tradition'.[26]

1.38 The reasons for the complexity and problems of proof in native title are examined in detail in the individual chapters assessing the options for reform identified under the Terms of Reference.

1.39 One of the difficult and compelling problems for this Inquiry into connection requirements is how to address the position of those persons who may 'fall outside' the native title system. During the Inquiry these issues surfaced at points around the issues of overlapping native title claims and the processes for determining claim group composition. A related dilemma is captured by the Law Council of Australia:

> It is recognised that in many parts of Australia, native title has been extinguished, with little chance of being revived, due to the passage of time and dispossession of those who held a connection with their ancestral lands. It is a bitter irony for those

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

21 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.

22 AIATSIS pointed to the need for a mediated understanding of efficiency that allows access to resources and capacity building: AIATSIS, *Submission 36*.

23 'Principle 3 should also include the aim of providing certainty for future land use in the areas of determined native title': South Australian Government, *Submission 34*.

24 Federal Court of Australia, 'Annual Report 2011–2012' 13.

25 North Queensland Land Council, *Submission 17*.

26 Law Council of Australia, *Submission 35*.

> groups that the heavy impact of European colonisation, particularly in the south-eastern and eastern parts of Australia, has left many of them without any claim to native title. This injustice was recognised at the time the Act was drafted and implemented, and was to be addressed through the creation of a statutory compensation fund, along with other measures.[27]

1.40 The ALRC notes that the initial fund for land purchases for Aboriginal and Torres Strait Islander peoples is an important measure to support land equity. However, as Just Us Lawyers submitted, 'the failure by successive Federal Governments to deliver Paul Keating's "Social Justice Package" has meant that the void created by the inability of the NTA to deliver benefits to certain people has never been filled'.[28] Commentators suggest that this fact has placed considerable strain on the native title claims process.[29]

1.41 The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), in its submission to the Inquiry, noted:

> Broader issues of intergenerational land justice exist outside the current native title framework and AIATSIS seeks to promote recommendations from this Review that lead to a redesigned legislative scheme, expanded to accommodate and ameliorate some of the existing situations of injustice.[30]

1.42 Queensland South Native Title Services (QSNTS) advocated that native title should operate in conjunction with

> an alternative settlements system to build on [native title] recognition status to achieve some real, tangible outcomes in tandem with the native title claims process—outcomes that are of value to and empowering for the traditional owners and, reciprocally, that can provide certainty to and a positive legacy for negotiating governments.[31]

1.43 The ALRC sees merit in considering a wider range of legislative and policy options for addressing opportunities to promote the culturally appropriate social and economic development for Australia's Aboriginal and Torres Strait Islander peoples. The Inquiry, however, is centrally concerned with the *Native Title Act* under its Terms of Reference. Moreover, it is imperative that attention is focused on ensuring that the existing system is efficient, fair and equitable and that reforms are directed to that end.

The question of change

1.44 The ALRC was asked to examine improvements to the practical operation of the native title system—requiring analysis of the effectiveness of proposals in terms of the systemic operation of native title laws and the many interests and areas affected.

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27 Ibid.
28 Just Us Lawyers, *Submission 2*.
29 Western Australian Government, *Submission 20*; Law Society of Western Australia, *Submission 9*.
30 AIATSIS, *Submission 36*.
31 Queensland South Native Title Services, *Submission 24*.

1.45 As French J noted, the *Native Title Act* is sketched upon a large ethical canvas, but also serves

> the pragmatic requirements of an orderly interaction between the recognition of native title and the myriad laws and interests that have settled upon the land and waters of Australia since their progressive annexation by the British Crown.[32]

1.46 This Inquiry sought to balance requirements for orderly interaction in the native title system, with the principles of equality and non-discrimination that are stated in the Act. Australia has obligations under international instruments that help shape its relationship with Aboriginal people and Torres Strait Islanders.[33]

1.47 In line with the Terms of Reference, attention is directed to clarifying and refining the highly complex law around connection requirements centred on s 223 of the Act to ensure that claim resolution is not impeded. In examining improvements to native title law and legal frameworks, the ALRC has, necessarily, included an analysis of the interaction between the *Native Title Act* and its judicial interpretation. The recommendations take into account the development of native title law since the enactment of the *Native Title Act* and the degree of legal certainty achieved as a result of major native title litigation.[34]

1.48 Parties in the native title system have ordered their practices and interactions with other parties and with native title institutions and organisations on this basis. Many submissions have stressed the importance of stability.[35] Some caution was advised to avoid potential disruption,[36] with some submissions advocating an incremental model of change within the *Native Title Act*.[37]

1.49 The Australian Human Rights Commission, however, highlighted the need for an effective reform process as 'reforms to both the *Native Title Act* and the native title system more generally have been ad hoc and only "tinkered around the edges"'.[38] The ALRC, in turn, has limited Terms of Reference that do not allow comprehensive review of the Act.[39]

1.50 The ALRC notes that there may be significant 'reform fatigue' in the native title sector,[40] and that piecemeal reform to date has not dealt with many of the underlying inequities in the native title system.

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32 *Sampi v Western Australia* [2005] FCA 777 (10 June 2005) [938].
33 National Congress of Australia's First Peoples, *Submission 32*.
34 See, eg, *Western Australia v Ward* (2002) 213 CLR 1; *Commonwealth v Yarmirr* (2001) 208 CLR 1; *Wilson v Anderson* (2002) 213 CLR 401; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; *Western Australia v Brown* (2014) 306 ALR 168; *Akiba v Commonwealth* (2013) 250 CLR 209.
35 National Farmers' Federation, *Submission 14*; Pastoralists and Graziers Association, *Submission 3*.
36 Northern Territory Government, *Submission 31*; Association of Mining and Exploration Companies, *Submission 19*.
37 Western Australian Government, *Submission 20*.
38 Australian Human Rights Commission, *Submission 1*.
39 *Submissions to the Draft Terms of Reference* <http://www.ag.gov.au/consultations/pages/AustralianLawReformCommissionnativetitleinquiry.aspx>.
40 Duff, above n 12.

1.51 Nonetheless, the ALRC does not propose that there should be comprehensive redefinition of native title under the Act. This may exacerbate the uncertainties experienced by all participants and prolong claims resolution. Nor does the ALRC suggest replacement of the current recognition-based process for native title determinations by a statutory land rights model. Instead, the underpinning model of native title and the claims process is retained, while seeking to refocus on the core elements of native title law to facilitate an effective determination process.[41]

1.52 The ALRC's recommendations therefore retain the basis of native title law adopted in *Mabo [No 2]* and then in the *Native Title Act*, but seek to redress some of the most egregious problems of proof. The Law Society of Western Australia submitted that the legislation as originally enacted reflected the beneficial purposes consistent with the decision in *Mabo [No 2]*.[42] In association, the ALRC seeks to secure robust and streamlined authorisation and joinder procedures.

1.53 The challenge for the ALRC was to consider reform in the native title system that advances the recognition and protection of native title in accordance with the *Native Title Act*,[43] while ensuring that reforms support a robust and productive relationship between all participants.

Law reform process

1.54 In undertaking the Inquiry, the ALRC sought evidence as to whether the current native title system is meeting its objectives, whether specified options for reform would improve the operation of the system, and whether alternative reform options should be implemented. In particular, the ALRC sought evidence as to whether the reforms recommended in this Report would: advance the recognition and protection of native title; acknowledge the range of interests in the native title system; encourage timely and just resolution of claims; be consistent with international law; and support sustainable futures.

Community consultation

1.55 Law reform recommendations must be built on an appropriate conceptual framework and a strong evidence base. The *Native Title Act* is Commonwealth legislation that operates across Australia and the ALRC undertook extensive consultation with parties involved in the native title system around the country.

1.56 Under the provisions of the *Australian Law Reform Commission Act 1996* (Cth), the ALRC 'may inform itself in any way it thinks fit' for the purposes of reviewing or considering anything that is the subject of an inquiry.[44] While the process for each law reform reference may differ according to the scope of the inquiry, the complexity of the laws under review, and the timeframe in which the inquiry must be completed, the

41 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 2.
42 Law Society of Western Australia, *Submission 9*.
43 *Native Title Act 1993* (Cth) s 10.
44 *Australian Law Reform Commission Act Cth* (1996) s 38.

ALRC usually works within an established framework, outlined in detail on the ALRC website.[45]

1.57 The Terms of Reference for this Inquiry directed the ALRC to consult with relevant stakeholders. Two consultation documents were produced to facilitate consultations and stakeholder input throughout the Inquiry. An Issues Paper was released on 20 March 2014 and a Discussion Paper on 23 October 2014. The Discussion Paper put forward 24 proposals and 24 questions to assist with the consultation process.

1.58 A major aspect of building the evidence base for law reform is consultation. Widespread community consultation is a hallmark of best practice law reform. Two national rounds of consultation meetings were conducted following the release of each of the consultation documents. This Inquiry has analysed evidence from 162 consultations, including consultations with Commonwealth, state, territory and local governments, departments and agencies; with judges and registrars from the Federal Court of Australia; with Indigenous leaders and traditional owners; with Indigenous organisations, including Native Title Representative Bodies, Native Title Service Providers, Prescribed Bodies Corporate and Land Councils; with industry including peak bodies representing the agriculture, pastoral, fisheries, and minerals and energy resources industries; with the National Native Title Tribunal; and with a number of anthropologists and academics. A full list of consultations is included at the end of the Report.

1.59 The ALRC's consultation process was greatly strengthened by the willingness of Indigenous leaders, traditional owners and Indigenous organisations to offer insights into the native title claims process, informed by their experience in representing Aboriginal and Torres Strait Islander communities across Australia. The perspectives on connection to country and traditional laws and customs that they shared with the ALRC were invaluable in building a greater understanding of native title from the position of those people deeply affected by the *Native Title Act*. The consultations also were important in revealing connection as a dynamic and lived experience for Aboriginal and Torres Strait Islander peoples.

1.60 Evidence has also been obtained from 72 thoughtful submissions. These submissions are publicly available on the ALRC website. The ALRC acknowledges the considerable amount of work involved in preparing submissions which can have a significant impact on organisations with limited resources—the input of several pastoral and fishing industry groups is relevant in this regard. In addition, the ALRC notes that its Inquiry placed yet another request for information and consultation upon already overstretched claimants, native title professionals, and court and tribunal personnel.

1.61 The ALRC also appreciates the insights that were offered into the native title claims process by many current and former members of the Federal Court who generously gave of their time and expertise to the Inquiry. The ALRC acknowledges

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45 ALRC, *Law Reform Process* <http://www.alrc.gov.au/law-reform-process>.

the profound contribution made by judges of the High Court and Federal Court to the development of native title jurisprudence over the 20 years since the *Native Title Act* was enacted.

1.62 The ALRC in this manner substantiated recommendations for reform from the many observations of participants in the system—this is at the heart of this Inquiry. The ALRC is grateful for the contribution of all those who participated in consultations and provided submissions. Evidence on the workings of the native title system has also been obtained from published commentary, from previous reports, reviews and inquiries regarding the native title system.[46]

1.63 The ALRC has closely examined the *Native Title Act* itself, associated regulations, and court judgments. The National Native Title Tribunal and the Federal Court Registrar also provided useful statistical data which is discussed in Chapter 3.

1.64 The recommendations for reform made in this Report have been tested by consulting with the most senior and experienced actors within the system, and seeking their views on the likely outcomes of the proposals made. These recommendations are informed by the views of experts and stakeholders, and are based on an independent assessment of the likely outcomes of those reforms.

Appointed experts

1.65 Specific expertise is also obtained in ALRC inquiries through the establishment of Advisory Committees and the appointment by the Attorney-General of part-time Commissioners. In this Inquiry, the ALRC was able to call upon the expertise of the Hon Justice Nye Perram of the Federal Court of Australia as a part-time Commissioner.

1.66 Members of the Advisory Committee are listed at the beginning of the Report. Three meetings of the Advisory Committee were held in Sydney: on 6 February 2014, 14 August 2014 and 5 February 2015. While the ultimate responsibility in each inquiry remains with the Commissioners of the ALRC, the Advisory Committee assists in the identification of key issues, provides quality assurance in the research and consultation effort, and provides invaluable feedback during the development of reform proposals. The ALRC acknowledges the significant contribution made by the Advisory Committee in this Inquiry and expresses its gratitude to members for voluntarily providing their time and expertise.

Matters outside the Inquiry

1.67 In the course of this Inquiry, stakeholders have raised many issues broader than the Terms of Reference. Many matters concerned policy development for Aboriginal and Torres Strait Islander peoples in the fields of business development, health and welfare and social policy. The importance of simultaneously developing sustainable native title outcomes and policies designed to enhance Aboriginal and Torres Strait Islander peoples' economic opportunities has been highlighted. Stakeholders, and

46 For detail see Ch 3.

many of those consulted, called for the development of native title law to be consistent with other indigenous policy settings. Some stakeholders stressed the need for an integrated approach to reform of the *Native Title Act* and that of cognate legislation.[47]

1.68 Clearly, native title has a bearing on these matters, although many issues generating conflict in the native title sphere are not easily resolved through the legal process. The Terms of Reference, however, focus the Inquiry on the native title claims process under the Act.

1.69 This Inquiry raises matters of great significance and sensitivity for Aboriginal and Torres Strait Islander peoples. It engages questions about laws and customs and the nature of their relationship to traditional lands and waters. It canvasses matters that go to the founding of the Australian nation and the impacts of European settlement.[48] It touches upon the many interrelationships between Aboriginal and Torres Strait Islander peoples and the Australian community.

1.70 These are involved questions around which there is much law, scholarship, commentary and debate. This Inquiry proceeds against the backdrop of those challenges, but the brief in this Inquiry is guided by the Terms of Reference, as well as by the role and function of a law reform commission.

Constitutional recognition

1.71 The overarching political relationship between the Australian nation and Aboriginal and Torres Strait Islander peoples and its future development are beyond the scope of this Inquiry. Native title can contribute, however, to strengthening the place of Aboriginal and Torres Strait Islander peoples within Australian society.

1.72 An important issue is the recognition of Aboriginal and Torres Strait Islander peoples in the Commonwealth Constitution.[49] The ALRC notes the introduction of the *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth)[50] and the process of review and report on constitutional recognition that has been instigated.[51] That procedure is the proper forum in which to address broader questions of political and constitutional recognition.

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47 Jon C Altman, 'Reforming the *Native Title Act*' (Topical Issue 10, Centre for Aboriginal Economic Policy Research ANU, 2011).

48 Western Australian Government, *Submission 20*.

49 Expert Panel on Constitutional Recognition of Indigenous Australians, 'Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel' (Commonwealth of Australia, January 2012) <http://www.recognise.org.au/wp-content/uploads/shared/uploads/assets/3446_FaHCSIA_ICR_report_text_Bookmarked_PDF_12_Jan_v4.pdf>.

50 On 27 March 2014, the Minister for Indigenous Affairs appointed a Review Panel under the *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth) to assess Australia's readiness to support a referendum to recognise Indigenous Australians in the Australian Constitution.

51 As a result of this Act, the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples was established. This committee released a progress report in October 2014 and is expected to have completed its final report on or before 30 June 2015.

Aboriginal and Torres Strait Islander laws and customs

1.73 The ALRC acknowledges that the Inquiry has examined only a narrow slice of the range of issues raised by connection to country for Aboriginal and Torres Strait Islander peoples. The Commission readily accepts that it has not dealt extensively with the content of Aboriginal and Torres Strait Islander peoples' laws and customs, as that knowledge is most appropriately given by Aboriginal and Torres Strait Islander peoples themselves. The Commission does acknowledge the deep significance that traditional laws and customs have for Aboriginal and Torres Strait Islander peoples in constituting connection to traditional land and waters. It is not the role of the ALRC, however, to expound upon that law and custom.

The contribution of other disciplines

1.74 Consultations revealed that the work of many professionals was central to the operation of the native title system and the preparation of 'connection reports'.[52] The reports play an essential role in native title determinations in providing the factual material upon which connection is based and in identifying right people for country.[53] Claimants, of course, bring their own knowledge to those questions.

1.75 The report has not canvassed in depth the contribution that other disciplines bring to connection requirements. It deals briefly with expert evidence in establishing connection requirements. The ALRC acknowledges that other disciplines bring much to the understanding of native title, but has not developed comprehensive recommendations in this field.

Other components of the native title system

1.76 The native title claims process necessarily interacts with other components of the *Native Title Act*.[54] The Report canvasses the interaction of the claims process with other areas, such as the future acts regime, as necessary to an understanding of the relevant law, but not otherwise. This may have the effect of truncating consideration of issues, but is unavoidable given the scope of the Terms of Reference.

Resourcing

1.77 The ALRC heard in consultations, and stakeholders raised in submissions, that effective resourcing for parties and institutions within the native title system is of vital importance to timely and just resolution of native title claims. The ALRC acknowledges that law reform alone cannot achieve long-term practical improvements to the native title system. The ALRC, however, does not make any specific recommendations, but acknowledges the importance to all parties and people involved in the native title system of an adequately-resourced native title claims process.

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52 Paul Burke, *Law's Anthropology: From Ethnography to Expert Testimony in Native Title* (ANU E Press, 2011).

53 AIATSIS, *Submission 36*.

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

The guiding principles for the Inquiry

1.78 In examining what, if any, changes could be made to Commonwealth native title laws and legal frameworks, the Terms of Reference direct the ALRC to be guided by the Preamble and objects of the *Native Title Act*.

Preamble and objects of the Act

1.79 The Preamble lists relevant matters for the Parliament of Australia in enacting the law—as it is the 'moral foundation' for the Act.[55] The Preamble captures the Commonwealth Parliament's intention to

> ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire.[56]

1.80 The Preamble also identifies that the intention was for the law to take effect according to its terms and be a special law for the descendants of the original inhabitants of Australia … for securing the adequate advancement and protection of Aboriginal peoples and Torres Strait Islanders.[57]

1.81 The recommendations in this Report are intended to promote an interpretation of native title consistent with the beneficial purpose of the *Native Title Act*. This entails an approach that gives the statute a 'fair, large and liberal' construction.

1.82 The objects of the *Native Title Act* include the provision of measures for the recognition and protection of native title, as well as reinforcing the fundamental schema of native title imported from *Mabo [No 2]*.[58]

1.83 The Law Council of Western Australia noted:

> The NTA as originally enacted was intended to be of a more beneficial kind consistent with the Mabo decision as the preamble suggests, rather than one which facilitates the extinguishment of those rights.[59]

1.84 The ALRC Inquiry also was informed by five guiding principles.

Principle 1: Acknowledging the importance of the recognition of native title

1.85 The principle that reform should adhere to the importance of the recognition and protection of native title received support in many submissions.[60] The practical significance of native title is captured by the South Australian Government:

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55 *Sampi v Western Australia* [2005] FCA 777 (10 June 2005) [942].

56 *Native Title Act 1993* (Cth) Preamble.

57 Ibid.

58 Hal Wootten, 'Mabo at Twenty: A Personal Retrospect' in Toni Bauman and Lydia Glick (eds), *The Limits of Change: Mabo and Native Title 20 Years On* (AIATSIS, 2012) 431, 441. The interplay between recognition, extinguishment and protection of native title rights and interests are central to understanding the functional structures within the Act.

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

60 Law Council of Australia, *Submission 35*; National Congress of Australia's First Peoples, *Submission 32*; North Queensland Land Council, *Submission 17*; Minerals Council of Australia, *Submission 8*; Association of Mining and Exploration Companies Inc, Submission to the Australian Attorney-General's Department, Review of the *Native Title Act 1993*—Draft Terms of Reference, 2013.

> Recognition of native title is significant for the individual native title holders, the native title holding body and the broader Australian community. It will usually also give rise to an entitlement to compensation for some past extinguishment, to exclusive rights in some areas, and to statutory procedural rights, including the 'right to negotiate'.[61]

1.86 Some stakeholders commented that 'recognition' is no longer a barrier to achieving outcomes under the Act.[62] The Chamber of Minerals and Energy of Western Australian questioned the assumption that 'the system established under the NTA for the recognition of native title has somehow failed or is "unduly limiting"'.[63]

1.87 By contrast, there may be very practical constraints introduced by a requirement that laws and customs constituting connection should be substantially uninterrupted. As Warren Mundine, Chair of the Prime Minister's Indigenous Advisory Council, said:

> The requirement of a continuous connection with the land can discourage Indigenous people from moving away from their traditional lands (for example to obtain work) for fear this will prejudice their native title rights.[64]

Principle 2: Acknowledging interests in the native title system

1.88 The ALRC considers that reform should acknowledge the range of interests in achieving native title determinations that support relationships between stakeholders.[65] It is inherent in the nature of native title rights and interests in land and waters that a claim will interact with many other interests.[66]

1.89 This guiding principle also allowed consideration of a wider range of groups—Aboriginal and Torres Strait Islander communities, governments at all levels, the courts, industry and commerce, and community organisations that may be involved in the native title system.

1.90 The interests involved in any native title determination can include overlapping claims or disputed claims by Aboriginal or Torres Strait Islander peoples. Particular issues of access to justice arise for native title claimants and potential claimants.

1.91 'Co-existence' captures the idea that there are complex interrelationships between native title holders and the wider community.[67] Agreement-making has built relationships between all stakeholders in the native title system.[68] Relevant industry

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61 South Australian Government, *Submission 34*.
62 Ibid.
63 Chamber of Minerals and Energy of Western Australia, *Submission 21*.
64 Warren Mundine, 'Australia Day Address' (2014).
65 Chief Justice Robert French, 'Native Title—A Constitutional Shift?' (Speech Delivered at the JD Lecture Series, The University of Melbourne, 24 March 2009).
66 *Native Title Act 1993* (Cth) s 225.
67 Aden Ridgeway, 'Addressing the Economic Exclusion of Indigenous Australians through Native Title' (2005) 2.
68 See, eg, the views expressed by pastoralists, 'that more than any other respondents in the Federal Court, they have to live the longest with outcomes of native title determinations': Pastoralists and Graziers Association, *Submission 3*. The Western Australian government noted the need for 'ensuring consistency and compatibility with the development of Australia's unique political and legal history, including its history of European settlement.

groups acknowledged the importance of fostering relationships. Telstra noted that, at the date of its submission, it was a party to almost 200 native title claims:

> Telstra participates in a high volume of native title claim applications made under the NTA and considered by the Federal Court of Australia. Telstra's participation is as a respondent party who has rights and interests in the area of the claim that may be affected by a determination of native title. Telstra participates to protect its rights and not in opposition to or in defence of the claim.[69]

1.92 It would be unrealistic, however, to expect that all conflict has been resolved since the *Native Title Act* was enacted.[70] Further, the objectives of stakeholders within the native title system are not necessarily congruent.[71] As the Association of Mineral Exploration Companies stated:

> The NTA is of course concerned with more than simply the recognition and protection of native title. It is in effect a compromise between the recognition and protection of native title rights and interests and the provision of certainty to the wider community, which holds or may seek to acquire or exercise non-native title rights.[72]

1.93 The ALRC notes that acknowledging all interests within the native title system will require balance and proportionate responses. The *Native Title Act* is to give precedence to conciliation and negotiation of native title determinations where possible.[73] Chapter 3 outlines the growing emphasis upon consent determination and settlements.

Principle 3: Timely and just resolution

1.94 The ALRC considers that reform should promote timely and practical outcomes for parties to a native title determination through effective claims resolution. These concerns must be balanced by attention to the integrity of the processes and outcomes. There was general stakeholder support for this principle, although AIATSIS noted:

> The paramount 'integrity' of the system in this context lies in ensuring that measures to improve the timeliness of matters will at least do no harm. An appropriate policy rationale applies considerations of efficiency, only in the context of a focus first on 'just' and then on 'timely'.[74]

1.95 Promoting the timely and effective resolution of native title claims was relevant to many stakeholders in the system.[75]

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69 Telstra, *Submission 4*.

70 Tim Rowse, 'How We Got a *Native Title Act*' (1993) 65 *The Australian Quarterly* 110, 131.

71 AMEC notes that the Preamble to the *Native Title Act* recognises 'the needs of the broader Australian community require certainty': Association of Mining and Exploration Companies, *Submission 19*.

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

73 *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595, [18]; *Native Title Act 1993* (Cth) Preamble.

74 AIATSIS, *Submission 36*.

75 Telstra, *Submission 4*; Minerals Council of Australia, *Submission 8*; National Farmers' Federation, *Submission 14*; National Native Title Council, *Submission 16*.

1.96 The North Queensland Land Council directed attention to building capacity for all parties to successfully engage.[76] Adherence to international best practice built on human rights standards for negotiation and consultation was identified as another important factor.[77] The balance between timely and practical outcomes, and procedural and substantive integrity, assumes particular significance as native title moves into the 'next phase'. Attention is shifting to governance of native title.[78] The Australian Human Rights Commission explained:

> The Commission also considers it appropriate that any suggested amendments that relate to benefits obtained from either determinations of native title or Indigenous Land Use Agreements (ILUAs), also take into consideration the need to build good governance capacity within the native title system. This is particularly important to enable PBCs to manage native title benefits into the future.[79]

Principle 4: Consistency with international law

1.97 The ALRC considers reform to the *Native Title Act* should reflect Australia's international obligations in respect of Aboriginal peoples and Torres Strait Islanders and have regard to the standards in the *United Nations Declaration on the Rights of Indigenous Peoples*.

1.98 The National Congress of Australia's First Peoples supported the view that ALRC recommendations should be consistent with Australia's international obligations, while stating:

> we are cognisant that despite repeated calls from UN treaty bodies for the Act to be amended to reduce the high evidentiary requirements that prevent many Aboriginal and Torres Strait Islander Peoples from regaining control of their traditional lands, successive Australian governments have failed to move beyond piecemeal amendments.[80]

1.99 The National Congress also called for the *Native Title Act* to comply with 'the international human rights obligations of Australia, acknowledge the Declaration and insert a requirement to have regard to specific principles embodied in the Declaration into the objects of the Act'.[81]

1.100 Within Australia, the Aboriginal and Torres Strait Islander Social Justice Commissioner has advocated a 'principled approach' to implementing the Declaration.[82] Chapter 2 provides a more detailed discussion of international law relevant to native title.

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76 North Queensland Land Council, *Submission 17*.
77 S Bielefeld, *Submission 6*.
78 Valerie Cooms, *Governance, Community Control and Native Title* (Paper presented at the AIATSIS Native Title Conference, Coffs Harbour, 1–3 June 2005).
79 Australian Human Rights Commission, *Submission 1*.
80 National Congress of Australia's First Peoples, *Submission 32*; see also National Native Title Council, *Submission 16*.
81 National Congress of Australia's First Peoples, *Submission 32*.
82 Aboriginal and Torres Strait Islander Social Justice Commissioner, above n 13, 93.

1.101 Standards, such as free, prior and informed consent, have important practical ramifications for how native title will interact with the Australian community. As Bryan Wyatt notes:

> Success on projects, or at least a smooth process from inception to conclusion, depends for a large part on how you build relationships with people along the way. It is critical that you engage Aboriginal people early in the piece. People are keen to be involved—they are very determined to protect their country and sacred sites, but they do not want to stifle development. People want to participate—it's as simple as that.[83]

Principle 5: Supporting sustainable futures

1.102 The ALRC considers reform should promote sustainable, long-term social, economic and cultural development for Aboriginal and Torres Strait Islander peoples.

1.103 Many submissions supported this principle.[84] Some caveats were raised about the capacity of the *Native Title Act*, in itself, to deliver effective social, economic and cultural development.[85] Other submissions emphasised the need for economic development to occur in a culturally appropriate way:

> The Aboriginal and Torres Strait Islander Social Justice Commissioner encourages that outcomes sought be measurable, highlighting the critical importance of economic development occurring in a way that supports and respects Aboriginal and Torres Strait Islander peoples' culture and identity.[86]

1.104 Submissions emphasised that 'recognition and protection of native title under the NTA is a starting point but not a complete answer to the social and economic issues which may face native title holders'.[87]

1.105 Several submissions identified wide variation in native title outcomes.[88] The Kimberley Land Council noted that the *Native Title Act* 'is not a panacea for all of the wrongs of dispossession and colonisation, but is one important device in addressing these wrongs'.[89]

1.106 The need for a longer-term perspective was stressed with calls for more attention to be paid to mechanisms by which native title groups can sustainably and effectively manage their determined native title rights and interests.[90]

1.107 There are expectations that native title can achieve effective economic and cultural outcomes for Aboriginal and Torres Strait Islander peoples in coming years.[91] The identification of native title with sustainable future outcomes suggests that critical

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83 Brian Wyatt, *National Planning Congress*, (Speech Delivered to the Planning Institute Australia, Canberra, 25 March 2013) as quoted in E Wensing, *Submission 13*.

84 See, eg, AIATSIS, *Submission 36*; J Altman, *Submission 27*; Native Title Services Victoria, *Submission 18*.

85 AIATSIS, *Submission 36*; North Queensland Land Council, *Submission 17*.

86 AIATSIS, *Submission 36*.

87 Northern Territory Government, *Submission 31*.

88 Ibid; Western Australian Government, *Submission 20*; North Queensland Land Council, *Submission 17*.

89 Kimberley Land Council, *Submission 30*.

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

91 Deloitte Access Economics, 'Review of the Roles and Functions of Native Title Organisations' (Australian Government, March 2014) 3.

components, such as the underpinning rights and governance structures, will be important for long-term development for Aboriginal and Torres Strait Islander peoples.[92]

Structure of the Report

Framework for Review: Historical and International Perspectives

1.108 Chapter 2 places the development of native title law in an historical context to provide an understanding of how difficulties with proof of native title evolved. It discusses recognition of native title in *Mabo [No 2]* and the *Native Title Act*, before considering how international law is relevant to native title.

Context for Reform

1.109 The operation of the native title system is affected by pre-existing land rights regimes and the differential impacts of colonisation and dispossession. Native title is not the only path to land justice, and Chapter 3 considers the role of the Land Account and the Indigenous Land Corporation, social justice responses and alternative settlements. The prevalence of consent determinations, and the increasing number of determinations since 2011 are positive trends, but concerns about cost and delay persist. Efficiency is important but just and sustainable outcomes may take time to achieve.

Defining Native Title

1.110 Chapter 4 sets out the legal requirements to establish native title rights and interests commonly referred to as 'connection requirements'. It outlines the definition of native title in s 223 of the *Native Title Act*, sets out major judicial statements on its interpretation, and provides an overview of the ALRC's recommendations for reform of connection requirements.

Traditional Laws and Customs

1.111 Chapter 5 discusses the requirements of s 223 of the *Native Title Act* in more detail, focusing on the requirement to establish that native title rights are possessed under the 'traditional laws acknowledged and traditional customs observed' by the relevant Aboriginal peoples or Torres Strait Islanders. This chapter outlines how this requirement has been interpreted, focusing on the approach taken to the meaning of acknowledgment and observance of traditional laws and customs. The ALRC makes five key recommendations for reform of this aspect of the definition.

Connection with the Land or Waters

1.112 Chapter 6 discusses how connection to land and waters is proved and whether physical occupation or continued and recent use is required as part of that proof. The ALRC makes two recommendations in this area. The chapter examines the feasibility of reframing connection to better accord with Indigenous peoples' views. The chapter

92 Valerie Cooms, *Governance, Community Control and Native Title* (Paper Presented at the AIATSIS Native Title Conference, Coffs Harbour, 1–3 June 2005).

discusses whether there should be 'empowerment of courts to disregard substantial interruption or change in continuity of acknowledgment of traditional laws and customs'. This is assessed with questions regarding the revitalisation of traditional law and custom. The ALRC examines whether the reasons for displacement of Aboriginal or Torres Strait Islander peoples should be considered. The ALRC concludes that direct legislative amendment of the definition in s 223 better addresses this issue.

Proof and Evidence

1.113 Chapter 7 considers matters relating to the proof and evidence for native title. Central to this examination is whether there should be a presumption of continuity of acknowledgment and observance of traditional laws and customs and connection. The ALRC considers that it is not necessary to introduce such a presumption in light of its recommendations to amend the definition of native title in s 223 of the *Native Title Act*. However, the ALRC does recommend that there be guidance in the Act regarding when inferences may be drawn in the proof of native title rights and interests.

The Nature and Content of Native Title

1.114 Chapter 8 discusses whether the *Native Title Act* should be clarified to provide that native title rights and interests 'can include rights and interests of a commercial nature'. It sets out the nature and content of native title rights and interests before discussing the recommendations about 'commercial native title'. Other sections examine whether 'commercial purposes' and 'trading' should be defined and if other types of interests, such as cultural knowledge, may constitute a native title right or interest.

Native Title: Comparisons with Common Law Jurisdictions

1.115 Sound law reform is enhanced by a consideration of comparable law as it operates in other common law countries. Chapter 9 provides an overview of legal frameworks and jurisprudence in Canada and New Zealand in relation to Indigenous peoples' rights to land and waters.

Authorisation

1.116 Chapter 10 concerns the authorisation process within the native title system. The *Native Title Act* requires a group making an application for a native title determination, or for compensation for extinguishment or impairment of native title, to authorise an applicant. The authorisation provisions of the *Native Title Act* are intended to ensure that the application is made with the consent of the claim group. The recommendations in this chapter are intended to support claim groups as they develop their own governance structures, work within the requirements of Australian law and negotiate with third parties.

Parties and Joinder

1.117 Chapter 11 discusses party and joinder provisions under s 84 of the *Native Title Act*. 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. The party and joinder provisions ensure that persons with interests affected by a native title determination are adequately represented in native title proceedings.

Promoting Claims Resolution

1.118 Chapter 12 considers the processes involved in native title claims resolution. It looks at the role of the Crown in native title applications; 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.