

## 3. Context for Reform

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### Summary

3.1 This chapter outlines the context for the ALRC's recommendations for reform. It identifies some features of the native title system that have been particularly significant in the development of those recommendations. It also identifies some factors outside the native title system that influence the way the system works.

3.2 First, it outlines the claims process, and describes the outcomes of that process thus far. There have been 308 native title determinations, including 248 determinations that native title exists in at least part of the determination area. Of the 60 determinations that native title does not exist, 46 were by consent or unopposed. Only

14 followed litigation. State and territory outcomes vary, partly as a result of pre-existing land rights regimes, and the different impacts of colonisation and dispossession.

3.3 The native title system is still evolving, and in particular, the roles of the National Native Title Tribunal and the Federal Court under the *Native Title Act 1993* (Cth) (*'Native Title Act'*) have changed since 1994. The prevalence of consent determinations and the increasing number of determinations since 2011 is a positive trend, but is not sufficient evidence to conclude that the connection requirements of the *Native Title Act* provide for the appropriate recognition and protection of native title.

3.4 Delay and the cost of native title proceedings continue to be of significant concern for stakeholders. The reasons identified for delay include capacity constraints within representative bodies, the collection, assessment and hearing of evidence in relation to connection, overlapping claims, the limited availability of appropriately qualified experts, tenure analysis (in order to identify areas of extinguishment) and the exercise of the right to negotiate. Importantly, just outcomes take time to achieve and time must be allowed to develop sustainable and effective outcomes.

3.5 Finally, native title is not the only path to land justice. The role of the Land Account and the Indigenous Land Corporation, social justice responses and alternative settlements are considered in this chapter. Commonwealth–state financial arrangements may also have an impact.

## Claims process

3.6 The Terms of Reference for this Inquiry direct the ALRC to inquire into 'connection requirements', authorisation and joinder—areas principally related to the claims process. The claims process under the *Native Title Act* has some unique features that distinguish it from other litigation. This section of the Report presents a short overview of the claims process.

3.7 As discussed in Chapter 2, a determination of native title is a product of the interaction between the Australian legal system and traditional law and custom; it is that system's way of recognising and protecting the immensely older relationship of Aboriginal and Torres Strait Islander peoples to this country.<sup>1</sup>

3.8 This process is initiated when a native title claim group makes an application to the Federal Court for a determination of native title (a claim) under the *Native Title Act*.<sup>2</sup> There are three types of application for a determination of native title which can be made under the Act: claimant, non-claimant and a revised native title determination application.<sup>3</sup>

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1 See further Ch 2.

2 *Native Title Act 1993* (Cth) ss 13(1); 61(1).

3 *Ibid* ss 61(1); 253. A revised native title determination application enables parties to apply for revision or revocation of an approved native title determination on certain grounds: *Ibid* s 13(5).

3.9 The *Native Title Act* prescribes the form and content of an application; for example, a claimant application must be accompanied by an affidavit sworn by the person or persons authorised by the native title claim group to make the application (the ‘applicant’).<sup>4</sup> The details required in the affidavit are directly aimed at addressing the elements of native title set out in s 223(1) of the Act.

3.10 Once the application has been filed with the Court, a dual process commences, involving the Court on one hand and the National Native Title Tribunal (NNTT) on the other. A copy of the claim is given to the NNTT by the Court,<sup>5</sup> and the NNTT notifies the public and specified persons of the claim.<sup>6</sup> The Registrar of the NNTT applies the registration test—a consideration of whether a claim meets certain merit and procedural conditions.<sup>7</sup> If these conditions are met, the claim must be registered.<sup>8</sup> When a claimant application passes the registration test, the applicant acquires various procedural rights as a ‘registered native title claimant’.<sup>9</sup>

3.11 Generally, the applicant and the relevant state or territory Minister will be parties to the proceedings.<sup>10</sup> Other persons who have interests in the land or waters claimed may also become parties to the proceedings.<sup>11</sup> Joinder of parties is discussed in Chapter 11. It is common for there to be a large number of parties.

3.12 Usually, the Court will then refer the application to mediation between the parties.<sup>12</sup> The purpose of mediation is to assist 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.<sup>13</sup>

3.13 The ultimate outcome, if the application is pursued, is a determination of native title. A determination that native title exists must identify the persons holding the native title rights, the nature and extent of the native title rights, the nature and extent of any other interests in the area, the relationship between the native title rights and the other interests, and whether the native title rights include the right to exclude others.<sup>14</sup>

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4 *Native Title Act 1993* (Cth) ss 61(2)–(5), 62. See Ch 10 for further consideration of authorisation.

5 *Ibid* s 63.

6 *Ibid* s 66.

7 *Ibid* ss 190A–190C.

8 *Ibid* s 190A(6).

9 *Ibid* s 253; pt 2 div 3.

10 *Ibid* s 84. The state or territory Minister will be a party unless notice is given that the Minister does not want to be a party: *Ibid* s 84(4).

11 *Native Title Act 1993* (Cth) ss 84(3), (5). See Ch 11 for more detail about parties to native title proceedings.

12 *Ibid* s 86B. However, the Court must order that there be no mediation if it considers that it would be unnecessary; 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).

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

14 *Ibid* s 225.

3.14 The Court may make a native title determination where the application is unopposed;<sup>15</sup> where the parties have reached agreement (a ‘consent determination’);<sup>16</sup> or as a result of a contested hearing.

## Outcomes to date

3.15 The *Native Title Act* has been in force since 1 January 1994. On 1 April 2015 there had been 308 native title determinations. Of these, 234 were by consent, 38 were litigated, and 36 were unopposed.<sup>17</sup> There have been 100 determinations that native title exists in the entire determination area, 147 determinations that native title exists in part of the determination area, and 60 determinations that native title does not exist in the determination area.<sup>18</sup> The 60 determinations that native title does not exist include 36 unopposed determinations. There have been only 15 determinations that native title does not exist made in response to a claimant application.

3.16 Map 1, Native Title in Australia, and Table 1 show the area of Australia subject to determinations of native title and registered claims for native title on 30 June 2014.<sup>19</sup> Professor Jon Altman reports that a further 13% of Australia is land granted under land rights legislation—see Map 2, Land Rights and Native Title in Australia, and Table 2.<sup>20</sup>

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15 Ibid s 86G.

16 Ibid ss 87, 87A.

17 National Native Title Tribunal, *National Native Title Register*. All of the unopposed determinations were non-claimant applications, and most of them were made by Aboriginal land councils in NSW where a finding of no native title is necessary for an Aboriginal land council to sell land: *Aboriginal Land Rights Act 1983* (NSW) s 42.

18 National Native Title Tribunal, *National Native Title Register*.

19 Data is as at December 2014, provided by the National Native Title Tribunal and used with permission.

20 Map 2 prepared by Jon Altman and Francis Markham: J Altman, *Submission 27*. Data in Table 2: Jon C Altman and Francis Markham, ‘Burgeoning Indigenous Land Ownership: Diverse Values and Strategic Potentialities’ in Sean Brennan et al (eds), *Native Title from Mabo to Akiba: a Vehicle for Change and Empowerment?* (Federation Press, forthcoming).

Map 1: Native Title in Australia, December 2014

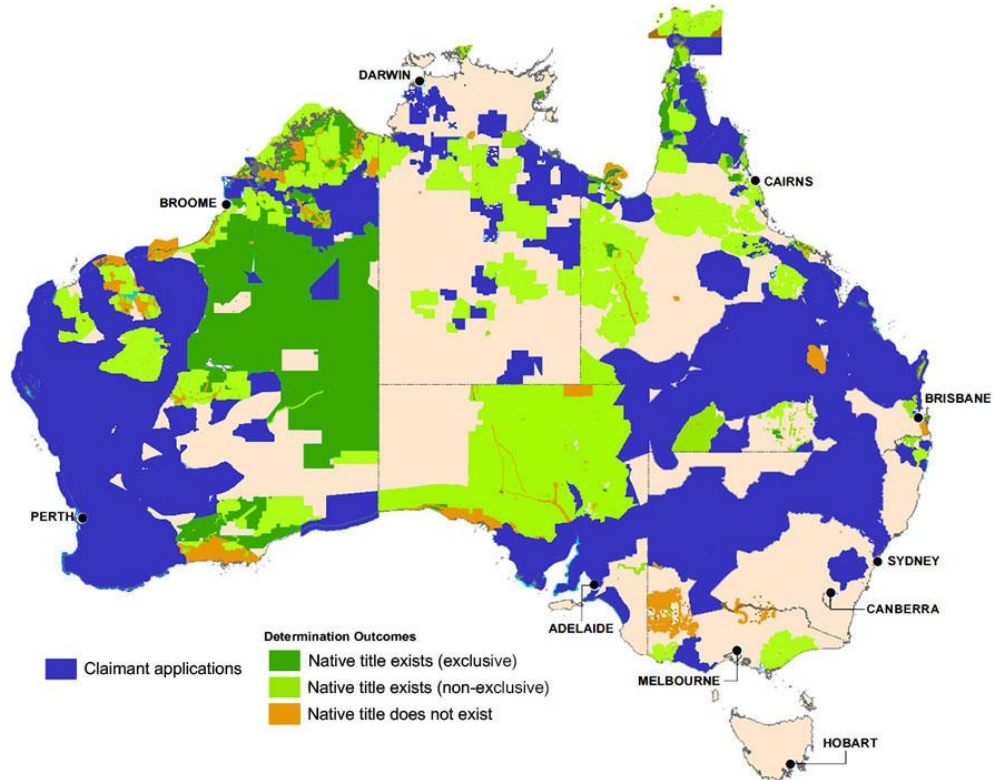
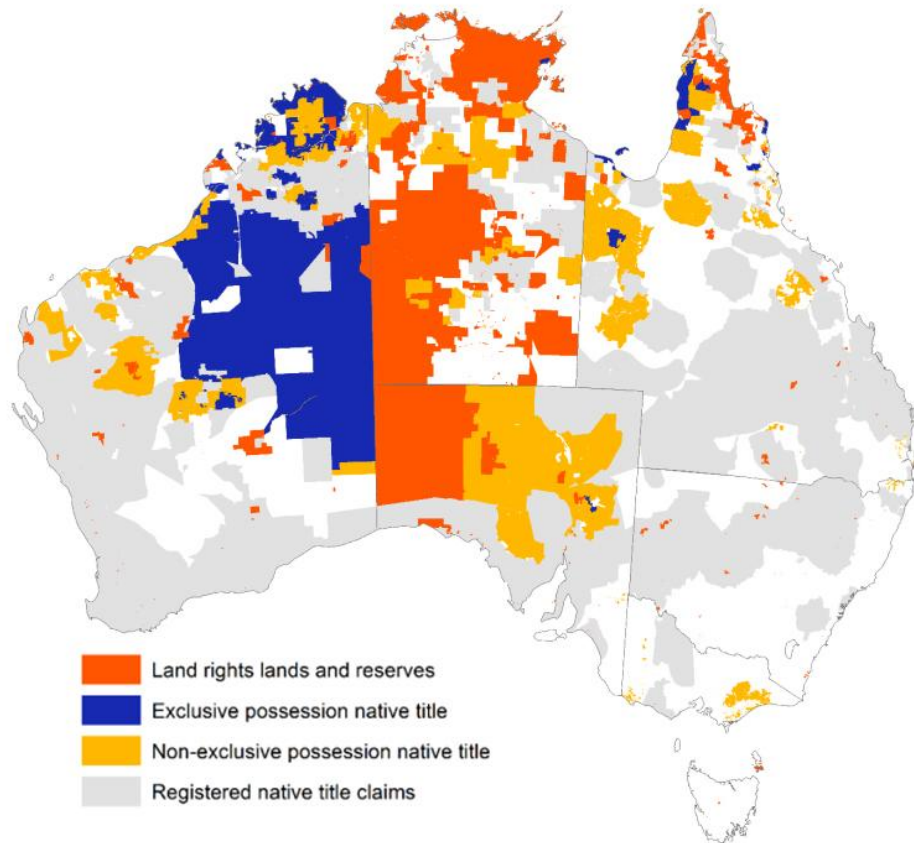


Table 1

Jurisdiction	Area subject to a determination (sq km)			Land subject to an application	
	Native title exists, exclusive	Native title exists, non-exclusive	Native title does not exist	Area (sq km) subject to application	Percent of jurisdiction land area
ACT	-	-	-	-	-
Cth	0.1	20 794.7	14 300.1	-	-
NSW	0.1	1 794.3	868.7	373 113	46.6
NT	1 040.3	200 674.5	964.7	201 520	15.0
Qld	34 715.8	342 024.0	12 090.1	718,542	41.5
SA	5 901.3	467 728.5	20915.6	189 155	19.2
Tas	-	-	-	-	-
Vic		15 164.7	11 023.9	24 269	10.7
WA	800 402.5	320 832.9	55 410.2	1 084 815	42.9
<b>Total</b>				2 591 414	33.7

**Map 2: Land Rights and Native Title, June 2013****Table 2**

Tenure	Area (1000 sq km)	% of Australian landmass
Land rights or Aboriginal reserve	969	12.6
Exclusive possession native title	752	9.8
Non-exclusive possession native title	825	10.7
Registered claims (excluding claims over land rights lands or Aboriginal reserves)	3014	39.2

### Applications, past and present

3.17 There have been 2114 native title applications made between 1 January 1994 and 1 April 2015. More than half of those (1155) were dismissed, discontinued or struck out.<sup>21</sup>

3.18 On 1 April 2015, there were 398 native title applications lodged with the Federal Court: 374 claimant applications, 19 non-claimant applications and five compensation applications. There are 273 registered applications. It is expected that many compensation applications will be filed in the future.<sup>22</sup>

### Land rights and native title in the states and territories

3.19 Although the *Native Title Act* is Commonwealth legislation that operates across all state and territory jurisdictions, the way in which the native title process operates in each state and territory is affected by the history of the jurisdiction's land rights arrangements. In some jurisdictions, titles to extensive areas of traditional lands were granted before the *Native Title Act* commenced. This section briefly outlines the way each jurisdiction has dealt with the question of Aboriginal and Torres Strait Islander peoples' rights to land.

#### New South Wales

3.20 Under the *Aboriginal Land Rights Act 1983* (NSW) (ALRA), certain Crown land can be claimed by Aboriginal Land Councils (ALCs) on behalf of Aboriginal people. The ALRA also established the Statutory Investment Fund. For 15 years, from 1984 until 1998, an amount equivalent to 7.5% of NSW Land Tax (on non-residential land) was paid to the NSW Aboriginal Land Council as compensation for land lost by the Aboriginal people of NSW. This fund is used for both administration and land purchase, and the NSW Aboriginal Land Council and the land council network has been self supporting since 1998.<sup>23</sup>

3.21 If an ALC wishes to sell land, it must get a determination under the *Native Title Act* that native title does not exist in the area.<sup>24</sup> There have been 43 non-claimant determinations that native title does not exist in NSW, most brought by ALCs, and 36 of which were unopposed.<sup>25</sup> Because most of the state is subject to extinguishing tenures,<sup>26</sup> there are not extensive areas where native title might be recognised. There have been five positive determinations, including the first determination of native title under the *Native Title Act*, *Buck v New South Wales (Dunghutti People)*.<sup>27</sup> There are 21 registered claims.<sup>28</sup>

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21 National Native Title Tribunal, *Register of Native Title Claims*.

22 AIATSIS, *Submission 36*; Northern Territory Government, *Submission 31*.

23 NSW Aboriginal Land Council, *Our Organisation* <<http://www.alc.org.au>>.

24 *Aboriginal Land Rights Act 1983* (NSW) s 42.

25 National Native Title Tribunal, *National Native Title Register*.

26 *Wilson v Anderson* (2002) 213 CLR 401.

27 National Native Title Tribunal, *National Native Title Register*.

28 National Native Title Tribunal, *Register of Native Title Claims*.

## Queensland

3.22 Under the *Aboriginal Land Act 1991* (Qld) and the *Torres Strait Islander Land Act 1991* (Qld), land that has been reserved for Aboriginal people could be transferred to Aboriginal people as trustees to hold the land for the benefit of Aboriginal and Torres Strait Islander people. The Acts also made provision for claims over specified areas of land to be heard by a Land Tribunal which could make recommendations to the Minister. According to the Queensland Government, 4.5 million hectares of land have been transferred under these Acts.<sup>29</sup>

3.23 The Queensland Government considers that ‘native title is arguably at its most complex in Queensland’, because of the history of removals of traditional owners from their lands and the decentralised nature of development in that state.<sup>30</sup>

3.24 Despite this complexity, there have been more than 100 determinations that native title exists in Queensland, including 97 by consent.<sup>31</sup> On 1 April 2015, there were a further 63 registered applications, with further applications under preparation.<sup>32</sup>

## South Australia

3.25 In 1966, South Australia was the first state to transfer control of land reserved for Aboriginal people to a body controlled by Aboriginal people: the Aboriginal Lands Trust.<sup>33</sup> Land rights were also acknowledged in the *Pitjantjatjara Land Rights Act 1981* (SA) and the *Maralinga Tjarutja Land Rights Act 1984* (SA).

3.26 There have only been two contested native title hearings in South Australia, and since 2004, the State has had a policy of ‘resolving claims by consent wherever possible’.<sup>34</sup> There have been 22 consent determinations that native title exists and on 1 April 2015 there were a further 15 registered claims.<sup>35</sup>

3.27 As in most jurisdictions, overlapping claims have been a significant issue in South Australia. In around 2005 ‘a combined effort by South Australian Native Title Services and the National Native Title Tribunal managed to resolve almost all overlaps that then existed between claims, meaning attention could be focussed on settlements’.<sup>36</sup> However, in recent years there have been more overlapping claims and more intra-Indigenous disputes.<sup>37</sup>

29 Department of Natural Resources and Mines, *Land Transfers* <<http://www.dnrm.qld.gov.au/land/indigenous-land/land-transfers>>.

30 Queensland Government, *Submission 28*.

31 The only common law determination of native title occurred in Queensland: *Mabo [No 2]*. All other determinations have been made under the *Native Title Act*.

32 See, eg, Cape York Land Council, *Submission 7*.

33 Thomson Reuters, *The Laws of Australia*, (at 15 June 1997) 1. Aborigines and Torres Strait Islanders ‘1.3 Land Law’ [1.3.359]; *Aboriginal Lands Trust Act 1966* (SA).

34 South Australian Government, *Submission 34*.

35 National Native Title Tribunal, *Register of Native Title Claims*.

36 South Australian Government, *Submission 34*.

37 *Ibid*.



## Tasmania

3.28 The *Aboriginal Lands Act 1995* (Tas) did not establish a claims process, but vested 12 areas, listed in the schedule, in the Aboriginal Land Council of Tasmania to be held on trust for the benefit of Aboriginal people.

3.29 There have been no determinations of native title in Tasmania and at 1 April 2015 there were no registered claims.<sup>38</sup>

## Victoria

3.30 There was no claims procedure for land rights in Victoria before the *Native Title Act*, but land was transferred on an ad hoc basis under six separate Acts.<sup>39</sup> The *Traditional Owner Settlement Act 2010* (Vic) (TOSA) provided for ‘a recognition and settlement agreement between the State and a traditional owner group entity for an area of public land’.<sup>40</sup> TOSA is discussed further below.

3.31 The Victorian Department of Justice reported that ‘the claimable Crown land estate comprises roughly one third of the State’s land area’, and ‘native title has been settled over approximately 40% of that area, by way of a positive or negative native title determination and/or a *Traditional Owner Settlement Act* settlement’.<sup>41</sup> There have been four determinations that native title exists in Victoria, and three that it does not exist.<sup>42</sup> At 1 April 2015 there were two registered claims in Victoria.<sup>43</sup>

## Western Australia

3.32 The *Aborigines Act 1889* (WA) empowered the Governor to reserve Crown lands for Aboriginal people. By 1947, 15 million hectares had been set aside.<sup>44</sup> The Aboriginal Lands Trust now holds 27 million hectares of reserved land, but title remains in the Crown. It is intended that ‘the control and management or ownership of all the land held by the Trust will be handed back to Aboriginal people’.<sup>45</sup> There was no provision for land claims in Western Australia before the *Native Title Act*.

3.33 The Western Australian Government reports that ‘the impact of the *Native Title Act*, including native title claims, determinations, future acts, and compensation liabilities is greater in Western Australia than any other jurisdiction in Australia’.<sup>46</sup> There have been 45 determinations that native title exists in at least part of the determination area, including 34 consent determinations.<sup>47</sup> The Western Australian

38 National Native Title Tribunal, *Register of Native Title Claims*.

39 Thomson Reuters, *The Laws of Australia*, (at 1 April 1997) 1. Aborigines and Torres Strait Islanders ‘1.3 Land Law’ [1.3.412].

40 Explanatory Memorandum, Traditional Owner Settlement Bill 2010 (Vic).

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

42 National Native Title Tribunal, *National Native Title Register*.

43 Ibid.

44 Thomson Reuters, *The Laws of Australia*, (at 1 September 1997) 1 Aborigines and Torres Strait Islanders, ‘1.3 Land Law’ [1.3.310] 2014.

45 Department of Aboriginal Affairs, WA, *What Land Does the Aboriginal Lands Trust (ALT) Hold for Aboriginal People ?* (19 September 2014) <<http://www.daa.wa.gov.au>>.

46 Western Australian Government, *Submission 20*.

47 National Native Title Tribunal, *National Native Title Register*.

Government has recently concluded a settlement with the Noongar people that will result in the withdrawal of six native title claims.<sup>48</sup>

3.34 At 1 April 2015, there were 77 registered claims in Western Australia<sup>49</sup> and research is currently being undertaken with the purpose of lodging native title claims in the future.<sup>50</sup>

### Australian Capital Territory

3.35 The *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) vested land in the Jervis Bay area in the Wreck Bay Aboriginal Community Council.

3.36 There have been six native title claims made in the Australian Capital Territory, but no determinations, and at 1 April 2015 there were no registered claims.<sup>51</sup>

3.37 In 2001, the ACT Government and the Ngunnawal People entered into a joint management agreement regarding Namadgi National Park, known as the *Agreement Between the Australian Capital Territory and ACT Native Title Claim Groups*.<sup>52</sup>

### Northern Territory

3.38 Approximately 47% of land in the Northern Territory is Aboriginal freehold under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). Pastoral leases cover 45% of the Territory, and a further five percent of the Territory is also available for claim under the *Native Title Act*.<sup>53</sup>

3.39 There have been 75 determinations of native title in the Northern Territory, 66 by consent, and at 1 April 2015 there were 97 registered claims.<sup>54</sup>

3.40 The Northern Territory Government has indicated that, 'having litigated a number of test cases to clarify the operation of various provisions of the *Native Title Act*', it now seeks to achieve negotiated resolutions of native title claims.<sup>55</sup> The Territory has set out *Minimum Connection Material Requirements for Consent Determinations* which streamline the resolution of claims.

## An evolving system of dispute resolution

3.41 The approach to native title determinations has changed several times since the system was established in 1994. Initially, applications were to be filed in the NNTT and determinations of the NNTT were to be given effect as if they were orders of the Federal Court. Such a scheme was held to be unconstitutional<sup>56</sup> and from 1998

48 Discussed further below.

49 National Native Title Tribunal, *National Native Title Register*.

50 See, eg, Central Desert Native Title Services, *Claims—Unclaimed Areas* <<http://www.centraldesert.org.au>>.

51 National Native Title Tribunal, *Register of Native Title Claims*.

52 AIATSIS, *ACT Native Title Information Handbook*, 2014.

53 Northern Territory Government, *Submission 31*.

54 National Native Title Tribunal, *Register of Native Title Claims*.

55 Northern Territory Government, *Submission 31*.

56 *Brandy v Human Rights & Equal Opportunity Commission* (1995) 183 CLR 245.

applications have been filed in the Federal Court. However, the Court would refer each application to the NNTT for mediation.<sup>57</sup> From 2007, the NNTT had sole responsibility for mediation, but in 2012, the mediation function was transferred from the NNTT to the Federal Court.<sup>58</sup>

3.42 The Court has shifted away from the referral of entire matters to mediation, and prefers ‘intensive case management to identify the issues in dispute ... and ... referral of particular issues to mediation’.<sup>59</sup> The Court suggests that this approach has contributed to the increased number of determinations in 2012 and 2013.<sup>60</sup>

3.43 In July 2010, the Court established a priority list for case management. Case management is intended to identify the issues in dispute and to assist the parties to reach agreement on those matters, which may include the identity of the persons who hold the rights claimed, the nature and extent of the rights, and most importantly for this Inquiry, whether the requirements of 223 of the *Native Title Act* (known as ‘connection requirements’) have been established.

3.44 A range of strategies has been used to assist the parties to reach agreement, including:

- case management conferences where experts identify the issues likely to be contentious prior to beginning fieldwork;
- orders timetabling the provision of connection material and the respondent’s analysis of that connection material;
- conferences of experts in the absence of lawyers, supervised by a registrar, aimed at narrowing connection issues;
- court-appointed experts, particularly where there is a dispute between Indigenous people;
- mediation on country, where state experts can question claimants; and
- early evidence hearings.<sup>61</sup>

3.45 These initiatives have been generally well received. The Cape York Land Council, for example, said the initiatives have increased the rate of determinations and are generally beneficial.<sup>62</sup>

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57 Graeme Neate, “‘It’s the Constitution, It’s Mabo, It’s Justice, It’s Law, It’s the Vibe’”: Reflections on Developments in Native Title since *Mabo v Queensland [No 2]*” in Toni Bauman and Lydia Glick (eds), *The Limits of Change: Mabo and Native Title 20 Years On* (AIATSIS, 2012) 188, 196.

58 Federal Court of Australia, *Submission 40*.

59 *Ibid.*

60 *Ibid.*

61 *Ibid.*

62 Cape York Land Council, *Submission 7*.

3.46 Central Desert Native Title Services commented that ‘native title claims are no longer stuck in a circle of never-ending negotiations with respondent parties’, and that:

Programming matters for trial has also meant that the State of Western Australia, who are the primary respondent to native title claims, has been required to become more articulate in its opposition to native title claims and more pro-active in progressing claims such as with the early provision of tenure information.<sup>63</sup>

3.47 Similarly, the Queensland Government reported that:

Case management by the Federal Court provides a more disciplined framework within which the parties to claims are required to be more accountable for the prosecution of matters ... [and] has ensured that all aspects of claims are dealt with in a professional and timely manner.<sup>64</sup>

3.48 On the other hand, the North Queensland Land Council said:

It would be desirable for the Court to recognise that its compressed time frames work against some native title groups particularly where the groups have been fractured and widely separated by removal policies as is the case in Queensland.<sup>65</sup>

3.49 Prior to the introduction of intensive case management for native title matters, the Social Justice Commissioner raised concerns that the pressure of court deadlines can distract the parties from negotiating broader agreements and divert resources away from negotiations. The Commissioner suggested that there should be an option for parties to obtain a long-term adjournment of a matter if both parties consent.<sup>66</sup>

3.50 Only 46 determinations occurred during the first 11 years of the *Native Title Act*, and 12 of those were non-claimant applications.<sup>67</sup>

3.51 A series of test cases occurred between 1996 and 2002,<sup>68</sup> and there were significant amendments to the *Native Title Act* in 1998.<sup>69</sup> As the graph and Table 2 below indicate, from 2004 the number of determinations per year moved from single digits to double digits, and from 2011 the number rose significantly again.

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

64 Queensland Government, *Submission 28*.

65 North Queensland Land Council, *Submission 17*.

66 Aboriginal and Torres Strait Islander Social Justice Commissioner, ‘Native Title Report 2008’ 44.

67 National Native Title Tribunal, *National Native Title Register*.

68 *Wik Peoples v Queensland* (1996) 187 CLR 1; *Yanner v Eaton* (1999) 201 CLR 351; *Commonwealth v Yarmirr* (2001) 208 CLR 1; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; *Western Australia v Ward* (2002) 213 CLR 1; *Wilson v Anderson* (2002) 213 CLR 401.

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

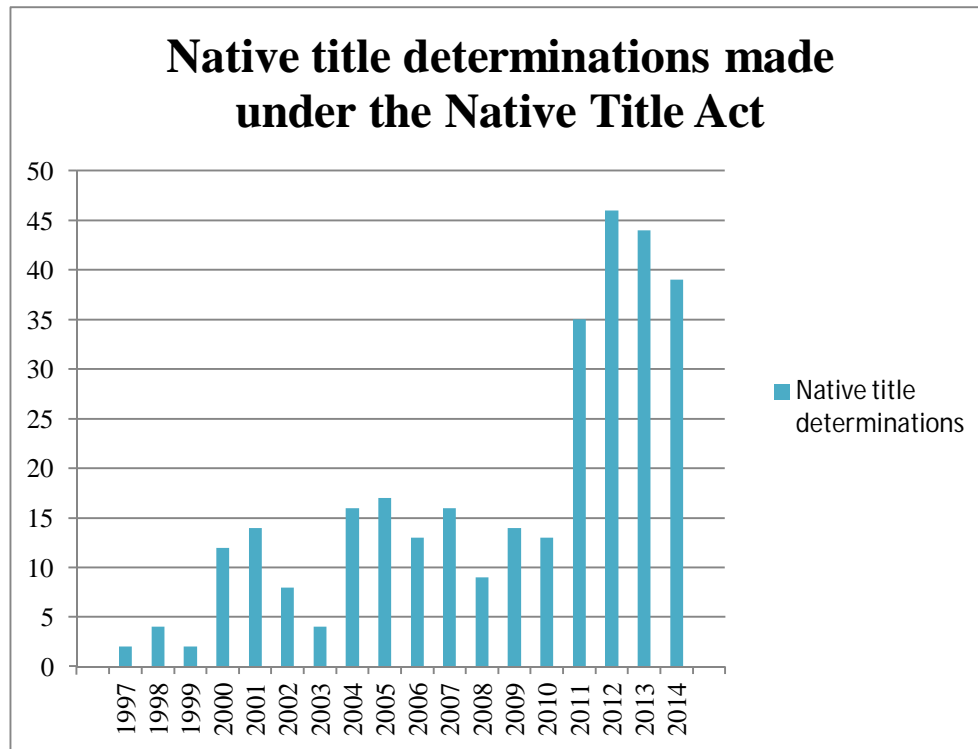


Table 3

Year	Native title determinations	Year	Native title determinations
1997	2	2006	13
1998	4	2007	16
1999	2	2008	9
2000	12	2009	14
2001	14	2010	13
2002	8	2011	35
2003	4	2012	46
2004	16	2013	44
2005	17	2014	39

3.52 The National Native Title Tribunal reported that, between 1 January 1994 and 31 December 2011, the average time taken to reach a consent determination was six years and three months. The average time for a determination after litigation was seven years. These figures do not take into account the common occurrence of claims being

withdrawn, consolidated and relodged.<sup>70</sup> In its 2013–14 Annual Report, the Federal Court reported that:

The number of native title matters over eighteen months old decreased by twenty per cent from 368 in 2013 to 291 at 30 June 2014. The number of native title matters over two years old decreased from 320 at 30 June 2013 to 257 at 30 June 2014, a clear indication that the innovative case management strategies being employed in this area are working.<sup>71</sup>

## The prevalence of consent determinations

3.53 The increasing numbers of consent determinations since 2011 is a positive trend. However the ALRC does not consider this trend, and the small number of ‘no native title’ determinations, to be sufficient evidence to conclude that the connection requirements of the *Native Title Act* provide for the appropriate recognition and protection of native title.

3.54 Increasing numbers of consent determinations could indicate that in certain areas of Australia, the current connection requirements do not pose any barrier to the recognition of native title. However, those requirements might present significant evidential difficulties in other areas, perhaps areas more affected by the actions of settlers and governments.

3.55 While the *Native Title Act* operates across all states and territories, the extent to which native title is recognised, and the scope of native title rights and interests recognised, varies considerably across Australia.<sup>72</sup>

3.56 Historical factors relating to the timing of British sovereignty and the dispossession or displacement of Aboriginal and Torres Strait Islander people are relevant to that variation.<sup>73</sup> In turn, different patterns of settlement may influence the extent to which evidence of connection is available in any particular part of Australia. Anthropological material and historical records also may vary in availability across the country. Therefore, in some locations, the requirements for connection in s 223 of the *Native Title Act* may be more readily met than in other parts of Australia.<sup>74</sup> These factors have a bearing on whether consent determinations are pursued.

3.57 The prevalence of consent determinations may reflect the willingness of some state governments to enter into consent determinations in situations where claimants would not meet the stringent tests set out in *Yorta Yorta*.<sup>75</sup> However native title holders are entitled to the protection of law, rather than to depend on the good will of

70 National Native Title Tribunal, ‘National Report: Native Title’ (February 2012).

71 Federal Court of Australia, ‘Annual Report 2013–2014’ 24.

72 Aboriginal and Torres Strait Islander Social Justice Commissioner, ‘Social Justice and Native Title Report’ (Australian Human Rights Commission, 2013) 81.

73 See for example the discussion of the settlement of the ‘waste lands’ of Queensland in *Wik v Queensland* (1996) 187 CLR 1, [136]–[141].

74 Aboriginal and Torres Strait Islander Social Justice Commissioner, ‘Social Justice and Native Title Report’ (Australian Human Rights Commission, 2013).

75 The requirements for proof of native title are discussed in Chs 4 and 7.

governments. It would not be reasonable to leave the protection of native title on this basis. Central Desert Native Title Services said:

although some governments may take a practical approach with regards to continuity, the actions of government can vary significantly depending on both the particular government, and the people within it.<sup>76</sup>

3.58 Other stakeholders raised concerns about variation in state respondents' policies regarding connection requirements and settling native title claims.<sup>77</sup> Some variation is to be expected, but this variation highlights the need for negotiations to be conducted in the context of law that appropriately recognises and protects native title and sets a fair and reasonable standard of proof of native title.

3.59 Very few native title claimants have received a determination that native title does not exist. The ALRC does not consider this to be evidence that the connection requirements are aligned with the objects of the recognition and protection of native title. Presumably claim groups with claims that might not meet the statutory criteria would not go to a hearing where extensive proof is required, where they would risk having their claims dismissed and determinations made that native title does not exist. Instead, a claimant might enter into a negotiation for a consent determination with the poor bargaining position that comes from the awareness of both sides that the claimant is likely to fail at hearing. Compromises would be likely regarding such things as boundaries, the extent and nature of native title rights and interests, and compensation for extinguishment. AIATSIS reported that

resource intensive challenges to native title claims are at times avoided only by the applicant agreeing to enter an arrangement with the respondent, whereby many of the rights that could be gained from a determination are abrogated.<sup>78</sup>

3.60 Consent determinations in those circumstances may be less advantageous (from a claimant perspective) than a consent determination reached in the context of a reformed s 223 (as recommended in Chapter 5). The confidentiality associated with negotiations for consent determinations means that these propositions cannot be fully tested. But it is a normal part of negotiations that parties bargain 'in the shadow of the law'.<sup>79</sup>

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

77 Queensland South Native Title Services, *Submission 24*; North Queensland Land Council, *Submission 17*; Just Us Lawyers, *Submission 2*.

78 AIATSIS, *Submission 36*.

79 Queensland South Native Title Services, *Submission 24*; Robert N Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 *Yale Law Journal* 950. Government respondents have common law model litigant obligations and in some jurisdictions, these obligations are expressed in legislation and policy. Some concerns have been expressed about compliance with these rules and the lack of enforcement options: Productivity Commission, *Access to Justice Arrangements* (2014) 429–440.

## Cost and delay

3.61 Concerns about cost and delay have been prominent in discussion of the *Native Title Act* with the claims process identified by many commentators as a significant factor contributing to cost and delay. In 2012, Brian Wyatt, CEO of the National Native Title Council, said that ‘we are tired and weary of our old people dying before decisions are made on the native title’.<sup>80</sup> Also in 2012, John Catlin, Executive Director, Native Title Unit, West Australian Department of Premier and Cabinet, noted that ‘the failure of the Act to deliver timely and effective outcomes is undeniable’.<sup>81</sup>

3.62 The Productivity Commission recently noted concerns that the ‘negotiation process in land subject to a native title claim can be lengthy and complex and can often involve multiple parties, which in turn can lead to significant delays in gaining access to land’.<sup>82</sup>

3.63 Despite the increase in the rate of determinations made by the Federal Court since 2011, stakeholders continue to report that they consider the native title system to be too slow and expensive.<sup>83</sup>

3.64 Traditional Owner, Gumbaynggirr man and Garby Elder, Anthony Clarence Perkins, commented after the determination over his land at Red Rock Beach:

I never thought it would have an ending, I’ll be honest. It’s been going a long while. To me we may say it’s taking too long to be awarded native title to our property or country or whatever areas. But again we’ve got to look at the fact that there’s a lot to be done in the process. We’ve been sort of disconnected for lots of years, and we’ve got to pull all the information back before we can go forward, and that sometimes frustrates a lot of people. But to us it’s a step in the right direction.<sup>84</sup>

3.65 The Gumbaynggirr People’s claim took 17 years.<sup>85</sup> These very long time frames are not confined to NSW. In September 2014, the Kokatha claim in South Australia was finalised, by consent, after an 18-year proceeding.<sup>86</sup>

80 Sally Sara, *Indigenous Leaders Want Faster Native Title Process* (6 June 2012) PM with Mark Colvin <<http://www.abc.net.au/pm>>.

81 John Catlin, ‘Recognition Is Easy’ in Toni Bauman and Lydia Glick (eds), *The Limits of Change: Mabo and Native Title 20 Years On* (AIATSIS, 2012) 426. See also Graeme Neate in the same collection: ‘Concern has been expressed by claimants, judges, political leaders and others about the time it takes to resolve native title applications and the implications of the delay for claim groups’ (at 218).

82 Australia and Productivity Commission, *Mineral and Energy Resource Exploration: Productivity Commission Inquiry Report No 65* (2013) 127.

83 NSW Young Lawyers, *Submission 58*; Queensland Government, *Submission 28*; Central Desert Native Title Services, *Submission 26*; Association of Mining and Exploration Companies, *Submission 19*; National Farmers’ Federation, *Submission 14*; Minerals Council of Australia, *Submission 8*; Telstra, *Submission 4*.

84 Anthony ‘Tony’ Perkins, ‘TO Comment’ (2014) *Native Title Newsletter*.

85 *Phyball on behalf of the Gumbaynggirr People v A-G (NSW)* [2014] FCA 851 (15 August 2014).

86 Helen Davison, ‘Indigenous Title Claim Settlement “One of the Most Complex” in SA History’ *The Guardian*, 2 September 2014 <<http://www.theguardian.com>>.



3.66 Stakeholders representing the minerals sector also emphasised the importance of timely and expeditious resolution of native title claims, and certainty for the wider community.<sup>87</sup> As the Chamber of Minerals and Energy said,

of primary interest to the sector is the expeditious resolution of native title claims to deliver certainty, confirm the validity of non-native title interests, and define the native title holders.<sup>88</sup>

3.67 Some stakeholders considered that the primary goal of this Inquiry should be to address delays in determinations and suggested that more research is needed to identify the causes of ‘the native title claim backlog’.<sup>89</sup> While certainty and timeliness are two guiding principles, the recognition and protection of native title is the central object of the *Native Title Act* and of this Inquiry.<sup>90</sup> As the Minerals Council of Australia suggests, reducing time frames may well be addressed via administrative reform.<sup>91</sup> The Federal Court case management processes have clearly produced results. However, if native title is not sufficiently recognised and protected at law, the only response can be statutory change.

### **Timeliness and just outcomes**

3.68 Just, sustainable and effective outcomes may take time to achieve.<sup>92</sup> AIATSIS cautioned against an excessive focus on timeliness, suggesting that the integrity of the process requires justice to be prioritised ahead of timeliness.<sup>93</sup> Concerns were raised in 2008 by the then Social Justice Commissioner, Dr Tom Calma, regarding the priority given to efficiency, rather than the recognition and protection of native title.<sup>94</sup> Again in 2012, the Social Justice Commissioner, Mick Gooda, commented on a ‘silent disregard for the fundamental inequalities in the native title system in favour of more efficient outcomes in the rush to finalise settlement of native title’.<sup>95</sup>

3.69 Graeme Neate, former NNTT President, noted that ‘broader settlements’—settlements that include grants of land, joint management arrangements, or employment and economic opportunities—take longer to negotiate than a ‘bare determination’, but ‘might be much more satisfactory for all the parties’.<sup>96</sup>

3.70 Claimants value an efficient process, but they also need time to make decisions about their claim group composition, the appropriate boundaries of their claim, and the

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

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

89 Minerals Council of Australia, *Submission 65*.

90 Terms of Reference; *Native Title Act 1993* (Cth) s 3(a).

91 Minerals Council of Australia, *Submission 65*.

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

93 AIATSIS, *Submission 36*.

94 ‘Native Title Report 2007’ (Australian Human Rights Commission, 2008) 23.

95 Aboriginal and Torres Strait Islander Social Justice Commissioner, ‘Native Title Report 2012’ (Australian Human Rights Commission, 2012) 56.

96 Neate, above n 57, 205; See also 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) 6. on the importance of determinations with non-native title outcomes.

rights and interests held under traditional laws and customs.<sup>97</sup> Each group is new to the system and must learn about native title processes and how to work within those processes.

3.71 Daniel O’Dea, a former Member of the NNTT, pointed out that compromising a claim is particularly stressful for claimants, and can be ‘highly complex, emotional and confronting’:

Such decisions will often not only involve conflict or disagreement amongst the group, but require time and discussion within a group to consider the complex matters before proper decisions can be made ... these things need to be worked through internally, carefully and, consequently, slowly.<sup>98</sup>

3.72 Rushing these decisions can result in conflict emerging at a later stage of the process, in challenges to the authorisation of the applicant, late joinder of Indigenous respondents, or disputes within the prescribed body corporate.

3.73 The ALRC has adopted as a guiding principle that any proposed reforms should encourage timely and just resolution of native title applications.<sup>99</sup> The potential for changes to the *Native Title Act* to delay the resolution of native title claims has been taken seriously. However the value of timeliness must not be placed ahead of the fundamental requirement of justice.<sup>100</sup>

### **Reasons for lengthy processes**

3.74 The ALRC has considered whether the requirements of s 223 of the *Native Title Act* (and associated case law concerning connection) unnecessarily prolong proceedings. The Western Australian Government has suggested that connection requirements ‘are not a significant contributor to delays in the resolution of native title claims’,<sup>101</sup> and the Chamber of Minerals and Energy of Western Australia has recommended that the ALRC should only make proposals for reform that are based on quantitative, clear and objective evidence.<sup>102</sup> The Minerals Council of Australia suggested that it would be useful to “commission further work to identify and understand the key constraints in the system, and test whether the proposed reforms addressed the constraints”.<sup>103</sup>

3.75 This Inquiry has identified multiple reasons for the slow pace of resolution of claims. It is well recognised that data on reasons for delay in court proceedings is difficult to obtain.<sup>104</sup> While the length of proceedings can be accurately identified, the

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97 In other litigation, such decisions would be made before commencing the claim, but native title claims are often lodged in response to a notification by a government of a future act under *Native Title Act* s 29, rather than at a time of the claim group’s choosing. If traditional owners wish to speak for country, they must have a claim registered within four months: s 30.

98 Daniel O’Dea, *Negotiating Consent Determination: Co-Operative Mediation – The Thalanyji Experience* (Paper Delivered at the 3rd Annual Negotiating Native Title Forum, Melbourne, 19 February 2009).

99 See Ch 1.

100 See Ch 1.

101 Western Australian Government, *Submission 20*.

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

103 Minerals Council of Australia, *Submission 65*.

104 CH van Rhee (ed), *The Law’s Delay: Essays on Undue Delay in Civil Litigation* (2004) 4.

reasons for the time taken will not usually be evident from court files. Research on this topic is largely based on qualitative techniques, particularly interviews with participants.<sup>105</sup> The ALRC has also relied on this type of evidence. There are limitations to the information that some participants can disclose, in light of the duty of confidentiality that legal representatives have to their clients. These difficulties are not unique to native title, but are encountered in many areas of civil law where confidential settlements are a frequent outcome.<sup>106</sup>

3.76 The ALRC is satisfied that there is sufficient publicly available information upon which to base recommendations, and does not consider that the collection of further statistical or other data would be necessary or useful. The effect of law reform can never be precisely modelled, as it is not possible to hold any variables constant or to perfectly predict the responses of human actors in the system.

3.77 Importantly, as the Federal Court submitted, the causes of delay have changed over time.<sup>107</sup> In the first 10 years of the Act, there were only 45 determinations of native title.<sup>108</sup> There was uncertainty about the requirements of the Act, and a number of test cases were decided by the High Court before parties could confidently negotiate consent agreements. The South Australian Government suggested that delays were ‘in large part reflective of the comparative newness of native title within the Australian legal system at the time the claims were lodged, the developing jurisprudence in this area, and the size and complexity of many of the claims’.<sup>109</sup>

3.78 The registration test and the requirement that a claim be made by an authorised applicant were not introduced until 1998. Prior to this, many overlapping claims were lodged, some without the consent of the claim groups, and some without strong factual foundations. The existence of these claims made resolving matters by consent very difficult.

3.79 It was also necessary for representative bodies, claim groups, expert witnesses, government parties and third party respondents to acquire skills and expertise in the area.<sup>110</sup> There were 223 determinations in the second 10 years of the Act.<sup>111</sup> There is now significantly more certainty around many aspects of the law,<sup>112</sup> and significantly more of the participants in the system have highly developed skills and expertise—although shortages remain in some areas.<sup>113</sup> The following matters (in no particular

105 See, eg, Public Accounts Committee, NSW Parliament, ‘Report, Inquiry into Court Waiting Times’ (133, June 2002) ch 5.

106 EW Wright, ‘National Trends in Personal Injury Litigation: Before and After “Ipp”’ (Justice Policy Research Centre, University of Newcastle, 2006) 5.

107 Federal Court of Australia, *Submission 40*.

108 Between 1 January 1994 and 1 January 2004.

109 South Australian Government, *Submission 34*.

110 JA Dowsett, ‘Native Title Litigation—an ADR-Free Zone?’ (Paper Presented at Mediation Strategies for Native Title Stakeholders, University of Queensland Law School, 8 April 2010) 3.

111 Between 1 January 2004 and 1 January 2014.

112 South Australian Government, *Submission 34*.

113 Justice John Mansfield, *Re-Thinking the Procedural Framework* (Speech Delivered to the Native Title User Group, Adelaide, 9 July 2008).

order) have been identified by stakeholders as present-day factors contributing to the length of proceedings.

- Stakeholders from claimant, respondent and judicial perspectives indicated that capacity constraints in representative bodies were a significant source of delay.<sup>114</sup>
- The collection, assessment and hearing of evidence in relation to connection take significant time and resources.<sup>115</sup>
- There are concerns that one state government's requirement for 'specific' evidence of connection in town and urban areas before settling a claim will require significant further resources and time to satisfy.<sup>116</sup>
- Overlapping claims and intra-Indigenous disputes contribute to the time taken to resolve claims.<sup>117</sup>
- The limited availability of appropriately qualified expert anthropologists contributed to the length and cost of proceedings.<sup>118</sup>
- The analysis of tenure for the purpose of identifying areas where native title has been extinguished is expensive and time consuming.<sup>119</sup> Claimant representatives have called for earlier tenure analysis,<sup>120</sup> or a flexible approach<sup>121</sup> but report that government respondents consider it impractical to conduct tenure analysis until connection has been accepted, which adds to time frames.<sup>122</sup>

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114 Federal Court of Australia, *Submission 40*; NSW Young Lawyers Human Rights Committee, *Submission 29*; Law Society of Western Australia, *Submission 9*; Minerals Council of Australia, *Submission 8*; Cape York Land Council, *Submission 7*. See also Deloitte Access Economics, 'Review of the Roles and Functions of Native Title Organisations' (Australian Government, March 2014) 21; Graeme Hiley and Ken Levy, 'Native Title Claims Resolution Review' (Report, Attorney-General's Department, 31 March 2006) 35.

115 NSW Aboriginal Land Council, *Submission 51*; Northern Territory Government, *Submission 31*; Cape York Land Council, *Submission 7*; 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) 7. See Ch 3 for a detailed discussion of what is required to establish native title rights and interests.

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

117 Chamber of Minerals and Energy of Western Australia, *Submission 21*; National Farmers' Federation, *Submission 14*; Law Society of Western Australia, *Submission 9*; Minerals Council of Australia, *Submission 8*; Cape York Land Council, *Submission 7*.

118 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); Minerals Council of Australia, *Submission 65*; Law Society of Western Australia, *Submission 41*; Cape York Land Council, *Submission 7*; Rita Farrell, John Catlin and Toni Bauman, 'Getting Outcomes Sooner: Report on a Native Title Connection Workshop' (National Native Title Tribunal and AIATSIS, 2007) 9; Graeme Hiley and Ken Levy, above n 114, 35.

119 NTSCORP, *Submission 67*; Western Australian Government, *Submission 43*; South Australian Government, *Submission 34*; Western Australian Government, *Submission 20*; Department of Justice, Victoria, *Submission 15*.

120 Yamatji Marlpa Aboriginal Corporation, *Submission 62*; North Queensland Land Council, *Submission 42*.

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

122 North Queensland Land Council, *Submission 42*; Law Society of Western Australia, *Submission 41*.

- Three representative bodies were concerned about delays caused by the state indicating that its connection requirements have not been met, but not specifying what aspects of a connection report are unsatisfactory.<sup>123</sup> There are also concerns that the state respondent sometimes requires a litigation standard of proof to consent to a claim, where the Federal Court has said a lower standard is sufficient.<sup>124</sup>
- Two representative bodies reported that delays were caused by state governments that insisted on an Indigenous Land Use Agreement<sup>125</sup> before entering into a consent determination.<sup>126</sup>
- The right to negotiate may contribute to delay in two ways. First, because the *Native Title Act* gives significant procedural rights to groups with a registered claim, there may be a reduced incentive to speedily progress the claim,<sup>127</sup> particularly if there is a risk the claim will fail. Second, negotiating with proponents can absorb the claim group's time, energy and resources, meaning they are unable to simultaneously undertake the work involved with the claim.

## Native title and land justice

3.80 Stakeholders have pointed out that the *Native Title Act* was never intended to be the sole response to *Mabo v Queensland [No 2]* and to Indigenous demands for land justice, or to the economic and social disadvantage that is a consequence of dispossession.<sup>128</sup> It was to be accompanied by a land fund and social justice package, thus providing a comprehensive response.<sup>129</sup>

123 NTSCORP, *Submission 67*; Central Desert Native Title Services, *Submission 26*; Queensland South Native Title Services, *Submission 24*.

124 NTSCorp, *Submission to AIATSIS Commonwealth Native Title Connection Project 2011*.

125 An Indigenous Land Use Agreement is an agreement dealing with a future act—that is, an act that affects native title—made under *Native Title Act* pt 2 div 3.

126 Yamatji Marlpa, *Submission to Deloitte Access Economics, Review of the Roles and Functions of Native Title Organisations 2014*; Queensland South Native Title Services, *Submission 24*. The North Queensland Land Council said: 'Another tactic that is engaged in not just by the State but also other respondents is that of demanding ILUA's being agreed to as the price of consent to the determination': North Queensland Land Council, *Submission to Deloitte Access Economics, Review of the Roles and Functions of Native Title Organisations*, 2013 16. The Law Society of Western Australia argued that the 'whole of government approach' to native title has resulted in 'a substantial slowing of the progress towards arriving at consent determinations': Law Society of Western Australia, *Submission 41*.

127 Chamber of Minerals and Energy of Western Australia, *Submission 21*; Minerals Council of Australia, *Submission 8*; JA Dowsett, 'Native Title Litigation—an ADR-Free Zone?' (Paper Presented at Mediation Strategies for Native Title Stakeholders, University of Queensland Law School, 8 April 2010) 6.

128 See, eg, Law Council of Australia, *Submission 35*; Kimberley Land Council, *Submission 30*; Western Australian Government, *Submission 20*; National Native Title Council, *Submission 16*; Law Society of Western Australia, *Submission 9*; Just Us Lawyers, *Submission 2*.

129 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Social Justice and Native Title Report 2013' (Australian Human Rights Commission) 82–3.

3.81 In 2008, the then Social Justice Commissioner, Dr Tom Calma, commented that ‘the other two limbs did not eventuate in the form intended, and this abyss is one of the underlying reasons why the native title system is under the strain it is under today’.<sup>130</sup>

3.82 The Jumbunna Indigenous House of Learning submission to the Senate Committee on Law and Justice said:

Jumbunna considers that native title should be conceived within a comprehensive land justice framework with restitution at its centre. Such a comprehensive settlement process would deal with traditional and historic land claims, reparation for dispossession, resource management, Indigenous jurisdiction over land and resources, economic development, would deal with the realities and consequences of dispossession and should promote and embody Indigenous peoples’ exercise of sovereignty.<sup>131</sup>

### **The Land Account and the Indigenous Land Corporation**

3.83 The Preamble to the *Native Title Act* notes that ‘many Aboriginal peoples and Torres Strait Islanders, because they have been dispossessed of their traditional lands, will be unable to assert native title rights and interests and that a special fund needs to be established to assist them to acquire land’. That special fund is the Land Account, administered by the Department of the Prime Minister and Cabinet. The fund received appropriations from consolidated revenue for the first 10 years of its operation, and on 30 June 2014, held nearly \$2 billion.<sup>132</sup>

3.84 Since 2010, a minimum of \$45 million, indexed for inflation, must be paid to the Indigenous Land Corporation (the ILC), a corporation established to assist Aboriginal and Torres Strait Islander people to acquire and manage land, so as to provide economic, environmental, social or cultural benefits for those people.<sup>133</sup>

3.85 The ILC reported that, in its early years, it focussed on acquiring properties and divesting them to Indigenous corporations. In recent years it has committed a greater proportion of funding to land management assistance rather than land acquisition.<sup>134</sup> The ILC has acquired 5.86 million hectares of land since establishment.<sup>135</sup> It has acquired 250 properties and granted 175 of them.<sup>136</sup>

3.86 Some concerns have been expressed about the focus on land acquisition and management, rather than divestment. In 2008, Dr Calma that the ILC ‘does not always provide an effective and accessible alternative form of land justice when native title is not available’. In particular, he noted that Indigenous people are concerned about the

130 Aboriginal and Torres Strait Islander Social Justice Commissioner, ‘Native Title Report 2008’, above n 66, 46.

131 Jumbunna Indigenous House of Learning Research Unit, UTS, Submission No 17 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, July 2011, 2.

132 Aboriginal and Torres Strait Islander Land Account Financial Statement 2014 <[www.dpmpc.gov.au](http://www.dpmpc.gov.au)> accessed 17 April 2015.

133 *Aboriginal and Torres Strait Islander Act 2005* (Cth) s 191B.

134 Indigenous Land Corporation, *Submission 66*.

135 Indigenous Land Corporation, ‘Annual Report 2012–13’ (2013) 3.

136 Indigenous Land Corporation, ‘Annual Report 2013–14’ (2014) 32.

ILC's focus on economic gain rather than reparation for dispossession.<sup>137</sup> He called for 'consideration by government ... of how the ILC's functions could better complement the native title system'.<sup>138</sup>

3.87 In June 2013, the ILC adopted a policy setting out its commitment to 'contribute to the constructive and flexible settlement of native title claims'.<sup>139</sup> This policy indicates that the ILC

will consider providing assistance where a proposed native title settlement will facilitate a full and final resolution of claims and improve the quality of native title outcomes for Indigenous parties.<sup>140</sup>

3.88 The policy also indicates that the ILC will

give preference to working with those States or Territories and Native Title Representative Bodies that have an effective, fair and realistic State or Territory or regional wide framework in place for the settlement of native title claims.<sup>141</sup>

3.89 Also in 2013, the ILC made its first contribution to a native title settlement under the Native Title Policy, when it acquired a property known as Mt Barker, on behalf of the Dja Dja Wurrung Clans Aboriginal Corporation.<sup>142</sup> In 2013-14, it engaged in negotiations on the final settlement of the Single Noongar Native Title Claim, but it does not appear that these negotiations included land acquisition.<sup>143</sup>

3.90 In 2014, Ernst & Young inquired into 'the effectiveness of Indigenous Business Australia and the ILC ... in driving economic development'.<sup>144</sup> The authors of the report indicated that their recommendations respect 'the land promise', that is, that the purpose of the ILC is the compensation for the dispossession of land.<sup>145</sup> Their preferred option for reform would require the ILC to refocus its activities on its original compensatory purpose of land acquisition, land management and land divestment.

3.91 The Board is now developing a strategy for divestment of ILC business land holdings.<sup>146</sup>

3.92 Submissions to this Inquiry continued to express concern as to whether the ILC has met expectations.<sup>147</sup> This Inquiry's Terms of Reference do not encompass the Land

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137 'Native Title Report 2007', above n 94, 47.

138 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2008', above n 66, 47.

139 Indigenous Land Corporation, 'Annual Report 2012-13', above n 135, 27.

140 Indigenous Land Corporation, 'Indigenous Land Corporation Board Endorsed Policy on Support for the Resolution of Native Title Claims'.

141 *Ibid.*

142 Indigenous Land Corporation, 'Annual Report 2013-14', above n 136, 34.

143 *Ibid.*

144 Ernst & Young, 'Review of the Indigenous Land Corporation and Indigenous Business Australia' (2014) 24.

145 *Ibid.* 7.

146 Indigenous Land Corporation, *Submission 66*.

147 South Australian Government, *Submission 68*; Central Desert Native Title Service, *Submission 48*; Law Society of Western Australia, *Submission 9*; See also Patrick Sullivan, 'Policy Change and the Indigenous Land Corporation' (Research Discussion Paper 25, AIATSIS); Catlin, above n 81, 428; 'Native Title Report 2007', above n 94, 47-49.

Account or the ILC. The ALRC makes no recommendations in this regard, but notes that the native title system needs to be considered in a comprehensive fashion. As Dr Calma noted, if one element of the system is not working, there is increased pressure on other elements.

3.93 In March 2014, the Board released a draft Stronger Land Account Bill, ‘aimed at reinforcing the fiduciary principle that the Land Account is held, by the Commonwealth, for, and on behalf of, Aboriginal persons and Torres Strait Islanders’.<sup>148</sup> The Greens introduced the Aboriginal and Torres Strait Islander Amendment (A Stronger Land Account) Bill 2014 to Parliament in June 2014. This Bill includes requirements for the government to consult with Aboriginal people and Torres Strait Islanders in relation to appointments to the ILC Board; any proposed legislative change affecting the Land Account; and the investment policy of the Land Account.<sup>149</sup>

3.94 Again, this matter falls outside this Inquiry’s Terms of Reference. However, as was acknowledged in the Preamble to the *Native Title Act*, the dispossession of Aboriginal people and Torres Strait Islanders, and the inability of many of those most severely affected by a European settlement to establish native title, points to the need to maintain a robust Land Account.

### **The social justice package**

3.95 In 1994, the then Prime Minister, the Hon Paul Keating MP, sought the views of the Aboriginal and Torres Strait Islander Commission (ATSIC) on ‘further measures that the Government should consider to address the dispossession of Aboriginal and Torres Strait Islander people as part of its response to the 1992 High Court decision on native title’.<sup>150</sup> The Native Title Social Justice Advisory Committee of ATSIC reported that a social justice package should address, among other things, compensation for dispossession of land and dispersal of the Indigenous population.<sup>151</sup> It suggested that the need for compensation and restitution goes beyond the scope of the Land Account, and such compensation should include ‘access to revenue derived from the use of land by non-Indigenous Australians’.<sup>152</sup>

3.96 Most other comparable jurisdictions have a major compensation fund that addresses the effect of Indigenous dispossession and the continuing disadvantage of groups affected by colonisation.<sup>153</sup>

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148 Indigenous Land Corporation, *Submission 66*.

149 Explanatory Memorandum, Aboriginal and Torres Strait Islander Amendment (A Stronger Land Account) Bill 2014.

150 Native Title Social Justice Advisory Committee, ‘Rights Reform and Recognition’ (Aboriginal and Torres Strait Islander Commission, 1995) 1.

151 *Ibid* 4.32.

152 *Ibid* 4.36, 4.40.

153 See further Ch 9.



3.97 Without a complete response to social justice issues, great pressure is placed on the native title system.<sup>154</sup> There have been continuing calls for a social justice package to complement the native title system<sup>155</sup> and to compensate traditional owners whose native title rights have been found to have been extinguished.<sup>156</sup>

3.98 The ALRC's recommendations for reform to the *Native Title Act* are intended to be consistent with the original understanding of its drafters—that native title could never be a sufficient response to the land justice question, and that land purchase and a social justice package are essential elements of a response. Another approach is alternative settlements (discussed below).

3.99 Agreement making with Indigenous peoples has occurred over many hundreds of years in all parts of the world. Within Australia, it can operate within the native title framework or under alternative regimes. Some stakeholders expressed strong support for the adoption of settlement approaches rather than the current native title claims process which depends on judicially recognised rights and interests.<sup>157</sup>

### Alternative settlement

3.100 The Hon Aden Ridgeway, Gumbayngirr man and former Senator, has called for 'a complete rethinking of the way native title issues are resolved and managed in this country. What we need is to establish comprehensive settlements'.<sup>158</sup> The National Native Title Council has also endorsed such an approach.<sup>159</sup>

3.101 In 2006, the Land Justice Group, a group representing Victorian Traditional Owners, said

if the land grievances of Indigenous people in this State can be substantially addressed through negotiated agreements (such as Wotjobaluk and Gunditjmarra) that resolve native title whilst at the same time providing other benefits through ancillary agreements, then the need for other land justice measures may be relatively minimal.<sup>160</sup>

3.102 Professor Mick Dodson has argued that settlements, or negotiated agreements, can reduce transaction costs, improve working relationships between the state or

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

155 Minerals Council of Australia, *Submission 65*; Law Council of Australia, *Submission 64*; Central Desert Native Title Service, *Submission 48*; Australian Human Rights Commission, *Submission 1*.

156 Law Council of Australia, *Submission 35*; National Congress of Australia's First Peoples, *Submission 32*; Law Society of Western Australia, *Submission 9*.

157 See, eg, Queensland South Native Title Services, *Submission 24*; National Native Title Council, *Submission 16*; Minerals Council of Australia, *Submission 8*; Just Us Lawyers, *Submission 2*.

158 Aden Ridgeway, 'Where We've Come From and Where We're At With the Opportunity That Is Koiki Mabo's Legacy to Australia' (Paper Presented at Native Title Conference, Alice Springs, 3-5 June 2003); cited in Stuart Bradfield, 'Agreeing to Terms: What Is a "Comprehensive" Agreement?' (Land, Rights, Laws: Issues of Native Title 2/26, 2004) 13.

159 National Native Title Council, *Submission 16*.

160 Bob Nicholls, Graham Atkinson, Mark Brett, 'Native Title and Land Justice' (Paper Presented at Native Title Conference, Darwin, 26 May 2006).

territory and traditional owners, and produce better outcomes for traditional owners with regard to economic development and self-sufficiency.<sup>161</sup>

3.103 In jurisdictions outside Australia, ‘settlement’ implies not only the resolution of native title claims, but the resolution of broader issues.<sup>162</sup> Agreements could include settlement of native title claims, provision for Aboriginal control of land use and development on land they own, resource royalties, participation in planning, development and environmental management in the area, joint management agreements, service delivery arrangements and measures to strengthen Aboriginal local government.<sup>163</sup>

3.104 Agreement making has proceeded rapidly in Australia, some using the ILUA provisions of the *Native Title Act* and some under alternative legislative regimes.<sup>164</sup>

3.105 At the Native Title Minister’s Meeting in 2008, Ministers acknowledged that the potential of the native title system had been ‘constrained by technical and inflexible legal practices’. The Ministers agreed to work towards negotiated settlements and established a Joint Working Group on Indigenous Land Settlements (Joint Working Group) ‘to develop innovative policy options for progressing broader and regional land settlements’.<sup>165</sup>

3.106 The Joint Working Group produced *Guidelines for Best Practice, Flexible and Sustainable Agreement Making*. The Guidelines note that a ‘broader land settlement’ can include both native title and non-native title outcomes.<sup>166</sup>

3.107 The *Traditional Owner Settlement Act 2010* (Vic) (TOSA) provides for non-native title settlements between the Victorian Government and traditional owner groups in Victoria. Settlements are to be made on the basis that traditional owners must withdraw native title claims and agree not to make a claim in the future. Settlements may include recognition of the group and certain traditional owner rights over Crown land, grants of land either as freehold title or ‘Aboriginal title’, funding for traditional owner corporations, and the right to comment on or consent to certain activities and provide input into the management of land and natural resources.<sup>167</sup> The Social Justice Commissioner described this agreement as setting ‘the benchmark for other states to meet when resolving native title claims’.<sup>168</sup>

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161 ‘Report of the Steering Committee for the Development of a Victorian Native Title Settlement Framework’ (Department of Justice, Victoria, 2008) 1.

162 Bradfield, above n 158, 2–3. See further Ch 9.

163 Mick Dodson, ‘Indigenous Social Justice Strategies and Recommendations’ (Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, 1995); See also Neate, above n 57, 204–205.

164 Many agreements are listed on the Agreements, Treaties and Negotiated Settlements website: [atns.net.au](http://atns.net.au).

165 *Native Title Ministers Meeting Communique* 2009.

166 Joint Working Group on Indigenous Land Settlements, *Guidelines for Best Practice: Flexible and Sustainable Agreement Making*, August 2009, 5.

167 Department of Justice Justice, *Traditional Owner Settlement Act* <<http://www.justice.vic.gov.au/home/your+rights/native+title/traditional+owner+settlement+act>>.

168 Aboriginal and Torres Strait Islander Social Justice Commissioner, ‘Native Title Report 2011’ (Australian Human Rights Commission, 2011) 4; See also Law Council of Australia, *Submission 64*; AIATSIS, *Submission 36*.

3.108 The first settlement under the TOSA was with the Gunaikurnai people, in 2010.<sup>169</sup> In 2013, a comprehensive settlement was made with the Dja Dja Wurrung, which included the transfer of two freehold properties; hunting, fishing and gathering rights; a Land Use Activity Agreement (a simplified ILUA); transfer of parks and reserves as ‘Aboriginal title’ and joint management of those lands.<sup>170</sup>

3.109 In Western Australia, the Western Australian Government and the South West Aboriginal Land and Sea Council, representing six native title claim groups—Yued, Gnaala Karla Boodja, South West Boojarah, Wagyl Kaip, Ballardong, and Whadjuk—have concluded a settlement which will not include native title, but will be implemented by way of an ILUA under the *Native Title Act*. The settlement includes recognition of the Noongar people as traditional owners, the transfer of land, funding, joint management of the conservation estate and processes for the protection of heritage.<sup>171</sup> The settlement was authorised in six meetings held between 31 January 2015 and 28 March 2015.

3.110 The South Australian Government reports that six of 11 consent determinations in that State have included agreements that address ‘broader issues such as compensation, sustainability of the Prescribed Body Corporate, and future act issues’.<sup>172</sup> However it also indicated that ‘the focus on achieving non-native title land settlement outcomes has faded ... as most groups are focussed on a native title outcome’.<sup>173</sup> This Government suggested that an ‘alternative land settlement process with a guaranteed, substantial injection of funding from ILC and Indigenous Business Australia’ would be a possible way forward.

3.111 Some efforts have been made to achieve regional agreements in Queensland, but they do not appear to have been successful.<sup>174</sup> Queensland South Native Title Services has suggested that an alternative settlement framework, similar to the Victorian TOSA, should be discussed.<sup>175</sup> The return of 3.2 million hectares of land, including national park and former pastoral land, to traditional owners under the Queensland Government’s Cape York Peninsula Tenure Resolution Program is an important step. Under the Program, land owned and acquired by the State is converted to Aboriginal freehold land, while nature refuges and jointly managed national parks are created over areas with high conservation significance. The Program is intended to create economic development opportunities for Aboriginal people, provide environmental benefits, and

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

170 Dja Dja Wurrung Clans Aboriginal Corporation, *Settlement of the Dja Dja Wurrung Native Title Applications under The Traditional Owner Settlement Act 2010*.

171 Western Australian Government, *The South West Native Title Settlement Land*, Approvals and Native Title Unit <<http://www.dpc.wa.gov.au>>.

172 South Australian Government, *Submission 34*.

173 South Australian Government, *Submission 68*.

174 Graeme Neate ‘Negotiating Comprehensive Settlements of Native Title Claims’ (Paper Presented at LexisNexis Native Title Law Summit, 2009) 26.

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

contribute to the resolution of native title claims.<sup>176</sup> These transfers are in addition to the transfers made under the *Aboriginal Land Act 1991* (Qld) and the *Torres Strait Islander Land Act 1991* (Qld), discussed earlier.

3.112 The Law Council of Australia supports alternative settlements, and suggested that state and territory governments should be encouraged to establish frameworks.<sup>177</sup> However the Council considered that settlements should not be used to induce Aboriginal people and Torres Strait Islanders to accept lesser rights than they would be entitled to in a native title determination.<sup>178</sup>

### Commonwealth-state financial arrangements

3.113 The ALRC has not been asked to inquire into compensation for the extinguishment of native title. However state governments have pointed out that compensation is relevant to the consideration of the connection requirements of the *Native Title Act*. Concerns arise on two related fronts.

3.114 First, two state governments raised concerns that changes to the *Native Title Act* could increase the liability of state and territory governments for compensation.<sup>179</sup> The South Australian Government reported that ‘virtually all determinations of native title are followed by negotiations or claims for significant compensation for historical extinguishment’.<sup>180</sup> The Western Australian Government advised that ‘the impact of the *Native Title Act*, including ... compensation liabilities is greater in Western Australia than any other jurisdiction in Australia’.<sup>181</sup> The Northern Territory Government also indicated that it is expecting compensation claims in the future.<sup>182</sup>

3.115 The *Native Title Act* provides that where an act extinguishing native title is attributable to the Commonwealth, compensation is payable by the Commonwealth,<sup>183</sup> while the states and territories are liable for compensation when their acts extinguish native title.<sup>184</sup> The South Australian Government noted that ‘the financial assistance package promised by the Commonwealth at the time of the *Native Title Act* and since is still yet to come to fruition, leaving the bulk of the cost of native title recognition with the states and territories’.<sup>185</sup> The Commonwealth has entered into discussion with the

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176 Correspondence, Georgianna Fien, Department of Aboriginal and Torres Strait Islander Partnerships, 14 April 2015. See also Oliver Milman, ‘Righting a Wrong: Huge Land Handover to Traditional Cape York Owners’ *The Guardian*, 23 September 2014 <<http://www.theguardian.com>>.

177 Law Council of Australia, *Submission 64*. The Minerals Council of Australia also suggested it would be appropriate to explore state based regimes: *Submission 65*.

178 *Ibid.*

179 South Australian Government, *Submission 34*; Western Australian Government, *Submission 20*.

180 South Australian Government, *Submission 68*; South Australian Government, *Submission 34*.

181 Western Australian Government, *Submission 20*.

182 Northern Territory Government, *Submission 31*.

183 *Native Title Act 1993* (Cth) ss 17, 22A.

184 *Ibid* ss 20, 22G.

185 South Australian Government, *Submission 34*.

states and territories regarding a Commonwealth contribution to state and territory compensation liabilities, but no final agreement has been reached.<sup>186</sup>

3.116 Secondly, one state government has expressed concerns about the absence of a commitment from the Commonwealth Government to contribute to funding for alternative settlements. In 2013, the Western Australian Attorney General said that, without such a contribution, there is ‘a disincentive for the states/territories to adopt more progressive native title policies’.<sup>187</sup>

3.117 At the 2008 Native Title Ministers’ Meeting, Ministers agreed to negotiate on ‘Commonwealth financial assistance that could better facilitate state and territory settlement of native title issues’.<sup>188</sup> In 2010, the Commonwealth entered into a written agreement with Victoria under s 200 of the *Native Title Act* for the provision of financial assistance to that State ‘to enable benefits to be provided to native title claim groups under settlement agreements’.<sup>189</sup> The Commonwealth’s financial contribution will not exceed the state’s financial contribution.<sup>190</sup> The agreement notes that ‘the Commonwealth will determine any contribution it makes to Settlement Agreements with States and Territories on a case-by-case basis and extend this Agreement accordingly’.<sup>191</sup>

3.118 The Commonwealth Government also made a substantial contribution to the acquisition of three pastoral properties purchased and transferred to the Olkola people under the Cape York Peninsula Tenure Resolution Program discussed above.<sup>192</sup>

3.119 The Western Australian Government has sought a Commonwealth contribution to the proposed settlement with the Noongar community.<sup>193</sup>

3.120 Alternative settlements, and the respective contributions of governments to their funding, are policy matters and the ALRC does not make recommendations in this regard. However, it is important to note that both Indigenous leaders and the government Ministers have indicated that alternative settlements are preferable to a continued reliance on litigation.<sup>194</sup> Some progress is being made towards alternative settlements, and further progress will allow native title litigation to be just one of a range of means for achieving land justice for traditional owners and certainty for other parties.

186 Western Australian Government, Submission No 18 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, August 2011.

187 Michael Mischin, ‘Improving the Native Title System’ (paper Presented at National Native Title Conference, Perth, 14 June 2013) 12.

188 Joint Working Group on Indigenous Land Settlements, ‘Report to the Native Title Ministers’ Meeting 2008-09’. The ALRC is not aware that such an agreement has been finalised.

189 COAG, *National Partnership Agreement on Native Title* cl 27 <[www.federalfinancialrelations.gov.au](http://www.federalfinancialrelations.gov.au)>.

190 *Ibid* cl 31.

191 *Ibid* cl 4.

192 Correspondence, Georgianna Fien, Department of Aboriginal and Torres Strait Islander Partnerships, 14 April 2015.

193 Department of the Premier and Cabinet, Western Australia, *The South West Settlement: Questions and Answers* (February 2014) Department of Premier and Cabinet <[www.dpc.wa.gov.au](http://www.dpc.wa.gov.au)>.

194 *Native Title Ministers Meeting Communique* 2009; National Native Title Council, *Submission 16*.

## Policy development

3.121 In the course of this Inquiry, stakeholders have raised issues that are broader than the Terms of Reference and concern policy development more generally. They have called for the development of native title law to be consistent with other policy settings, and for a systematic approach to law reform.

### Consistency with other policy settings

3.122 The National Indigenous Reform Agreement (Closing the Gap) was made in 2008 between the Commonwealth of Australia and all states and territories, and has bipartisan support. It committed those governments to effort in seven areas, one of which is economic participation. The Agreement notes that ‘access to land and native title assets, rights and interests can be leveraged to secure real and practical benefits for Indigenous people’.<sup>195</sup>

3.123 AIATSIS has argued that native title is significant for achieving the Closing the Gap targets:

Establishing a regime of native title rights that are clear, strong and economically valuable can, in turn, provide a resource base for Indigenous social and economic development.<sup>196</sup>

3.124 On the other hand, obtaining a determination of native title does not guarantee economic opportunity.<sup>197</sup> Much depends on whether the area is rich in minerals,<sup>198</sup> whether the group has an effective body corporate and good governance,<sup>199</sup> and the content of the rights themselves.<sup>200</sup>

3.125 Aboriginal leaders have emphasised the importance of using native title for economic development. Warren Mundine, Chair of the Prime Minister’s Indigenous Advisory Council, said that native title rights, as well as compensation for loss of land, ‘can and should be used to generate commercial and economic development for Indigenous people through a real economy, real jobs and real for-profit businesses owned and operated by Indigenous people’.<sup>201</sup> Similarly, Wayne Bergman, CEO of Kred Enterprises, said:

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195 COAG, ‘National Indigenous Reform Agreement’ 7.

196 AIATSIS, Submission to the Review of Native Title Organisations, 2013. See also AIATSIS, *Submission 36*; J Altman, *Submission 27*; Native Title Services Victoria, *Submission 18*.

197 Western Australian Government, *Submission 20*; Graeme Neate, ‘Using Native Title to Increase Indigenous Economic Opportunities’ (paper Presented at 5th Indigenous Recruitment and Training Summit, Brisbane, 6 December 2010) 19.

198 Graeme Neate, ‘Using Native Title to Increase Indigenous Economic Opportunities’ (paper Presented at 5th Indigenous Recruitment and Training Summit, Brisbane, 6 December 2010).

199 Western Australian Government, *Submission 20*.

200 J Altman, *Submission 27*.

201 Warren Mundine, ‘Australia Day Address’ (2014).

Aboriginal culture cannot survive without an economy to support it. And to build a viable indigenous economy, we must be allowed to control our land and sea country and to use the leverage it gives us to build an economic foundation for our future.<sup>202</sup>

3.126 The ALRC has adopted as a guiding principle that ‘reform should promote sustainable, long-term social, economic and cultural development for Aboriginal peoples and Torres Strait Islanders’.<sup>203</sup>

### **A systematic approach to reform**

3.127 A number of stakeholders pointed out that the ALRC’s Inquiry is just one of a number of inquiries into different aspects of the native title system, and suggested that this is both wearying for participants in the system, and not conducive to systematic reform.

3.128 The ALRC has had regard to previous reports, reviews and inquiries, particularly the reports by the *Taxation of Native Title and Traditional Owner Benefits and Governance Working Group* and the *Review of Native Title Organisations*, which are discussed in Chapter 10, and the Productivity Commission’s *Mineral and Energy Resource Exploration* report, mentioned earlier.

3.129 Nick Duff identified 11 native title law reform activities since 2007.<sup>204</sup> This places a significant burden on stakeholders, particularly native title representative bodies and service providers. Central Desert Native Title Services said:

Participation by native title parties in multiple and sometimes overlapping reviews or consultations is time consuming and costly and often without any positive outcome. It creates a feeling of cynicism and pessimism within the native title sphere and a reluctance to participate in ‘another review’.<sup>205</sup>

3.130 Professor Richard Bartlett has suggested that amendments to the Act have been largely directed to ‘efficiency, efficacy, timeliness, streamlining, and improving the operation of the native title system’, rather than to addressing inequality.<sup>206</sup>

3.131 The Association of Mining and Exploration Companies raised a broader concern about the lack of clear strategic direction by governments, and said there is a ‘need for Government to develop and articulate an overarching native title strategy including a coherent long term plan for legislative and regulatory reform in this area’.<sup>207</sup>

3.132 The National Congress of Australia’s First Peoples noted that the ALRC Inquiry addresses ‘limited issues’. It supports ‘a comprehensive review of the Act by the

202 Dan Harrison, ‘Call to Link Native Title to Aboriginal Economy’ *The Sydney Morning Herald*, 28 June 2012.

203 See Ch 1.

204 AIATSIS, *Submission 36*; See further Nick Duff, ‘Reforming the Native Title Act: Baby Steps or Dancing the Running Man?’ (2013) 17 *Australian Indigenous Law Reporter* 56.

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

206 Richard H Bartlett, *Native Title in Australia* (LexisNexis Butterworths, 3rd ed, 2015) 126.

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

Attorney-General's Department, designed to achieve implementation of the rights set out in the UN Declaration of the Rights of Indigenous People'.<sup>208</sup>

3.133 In 2010 and 2011 the Aboriginal and Torres Strait Social Justice Commissioner called for a comprehensive and independent review of the native title system, considering the burden of proof, extinguishment, the future act regime and other matters.<sup>209</sup>

3.134 Goldfields Land and Sea Council said that there are 'a range of issues demanding attention that have not been included in the terms of reference for the current review, including extinguishment and the right to negotiate'.<sup>210</sup>

3.135 There are also significant post-determination challenges to be addressed, including the effectiveness and funding of prescribed bodies corporate (PBCs). The *Deloitte Review of Native Title Organisations*<sup>211</sup> and the *Taxation Working Group*<sup>212</sup> were significant in raising these issues and indicating some ways forward.

3.136 The ALRC appreciates and acknowledges the calls for a systematic approach to reform, but is bound by the Terms of Reference for this Inquiry, the scope of which is outlined in Chapter 1.

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208 National Congress of Australia's First Peoples, *Submission 32*.

209 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2011', above n 168, 19–20; Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2010' (2010).

210 Goldfields Land and Sea Council, *Submission 22*.

211 Deloitte Access Economics, above n 114.

212 Australian Treasury, 'Taxation of Native Title and Traditional Owner Benefits and Governance Working Group: Report to Government' (2013).