5. Traditional Laws and Customs

Contents

Summary

5.1 To establish that they hold native title rights and interests, for the purposes of a determination of native title under the *Native Title Act* (Cth) ('*Native Title Act*'), native title claimants must satisfy the definition of native title in s 223(1) of the *Native Title Act*. Section 223(1)(a) requires that the claimed rights and interests 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.

5.2 The ALRC makes recommendations for reform of this aspect of the definition. First, the ALRC recommends that there be explicit acknowledgment in the *Native Title Act* that traditional laws and customs under which native title rights and interests are possessed may adapt, evolve or otherwise develop.

5.3 Second, the ALRC recommends that the definition be amended to clarify that it is not necessary to establish either that:

- the acknowledgment of traditional laws and the observance of traditional customs have continued substantially uninterrupted since sovereignty; or

- traditional laws and customs have been acknowledged and observed by each generation since sovereignty.

5.4 Third, the ALRC recommends that the definition of native title be amended to clarify that it is not necessary to establish that a society united in and by its acknowledgment and observance of traditional laws and customs has continued in existence since prior to the assertion of sovereignty.

5.5 Finally, the ALRC recommends that the definition of native title clarifies that rights and interests may be possessed by a native title claim group where they have been transmitted or transferred between groups, or otherwise acquired in accordance with traditional laws and customs.

5.6 These recommendations address the technicality and complexity of establishing the existence of native title rights and interests. In many respects, the recommendations endorse the movement in case law and in negotiations towards flexibility in the evidentiary requirements to establish native title.[1] However, they keep in place the doctrinal foundation for native title. That is, they preserve the position that native title rights and interests are those possessed under laws and customs that have their origins in laws and customs acknowledged and observed at sovereignty. As such, they are consistent with the ALRC's guiding principles for reform: acknowledging the importance of the recognition of native title rights and interests; achieving greater efficiency in the claims process; and providing a sound platform for use of native title rights and interests into the future.[2]

Approach to statutory construction of s 223

5.7 One of the guiding principles for this Inquiry is that reform should recognise the importance of recognition of native title to Aboriginal and Torres Strait Islander peoples and the Australian community.[3] Additionally, ordinary principles of statutory interpretation dictate the consideration of the purpose of the legislation.[4] The language of the Preamble and objects of the *Native Title Act*—referring to, among other things, an intention to rectify the consequences of past injustices and that the law be a special measure for the advancement of Aboriginal and Torres Strait Islander peoples—suggests that its purpose is beneficial.[5]

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1 Such flexibility is evident in *Croft on behalf of the Barngarla Native Title Claim Group v South Australia* [2015] FCA 9 (22 January 2015).

2 See Ch 1.

3 Guiding Principle 1: see Ch 1.

4 *Acts Interpretation Act 1901* (Cth) s 15AA. In 2014, the High Court commented that this provision reflected a 'general systemic principle [of statutory construction]': *Thiess v Collector of Customs* (2014) 306 ALR 594, [23].

5 In *Alyawarr*, the Full Court of the Federal Court described the Preamble as the Act's 'moral foundation': *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [63]. See also Justice Robert French, 'Lifting the Burden of Native Title—Some Modest Proposals for Improvement' (Speech Delivered at the Federal Court Native Title User Group, Adelaide, 9 July 2008) [7]. A number of submissions also referred to the beneficial purpose of the *Native Title Act*: see, eg, Queensland Government, *Submission 28*; Central Desert Native Title Services, *Submission 26*; Native Title Services Victoria, *Submission 18*; North Queensland Land Council, *Submission 17*; Law

5.8 Where legislation is identified as being beneficial and remedial, the High Court has stated that it should be given a 'fair, large and liberal' interpretation, rather than one which is 'literal or technical'.[6]

5.9 As noted in Chapter 4, native title rights and interests cannot be recognised when either:

- they cannot be established as a matter of fact, because claimants cannot establish that they possess rights and interests under traditional laws and customs; and a connection, by those laws and customs, with the land or waters claimed;[7] or
- they cannot be established as a matter of law, because the rights and interests are not recognised by the common law of Australia, as they are inconsistent with them.[8]

5.10 This chapter considers the requirements for establishing native title as a matter of fact. It makes recommendations intended to promote an interpretation of the definition of native title consistent with the beneficial purpose of the *Native Title Act*. An approach that promotes a 'fair, large and liberal' interpretation of the definition of native title, rather than a 'literal or technical' one, also accords with the ALRC's guiding principles for reform—promoting efficiency in the native title system.[9] Reducing technicality in interpretation of the definition will produce a concomitant reduction in the resources and time involved in bringing evidence to establish the existence of native title.

5.11 Some submissions to this Inquiry argued that the reforms recommended in this chapter[10] would increase uncertainty in native title law, and promote overlapping claims.[11] However, if recommendations in this chapter are adopted, claimants will still need to demonstrate that they are the 'right people for country'.[12] Native title claimants will still be required to establish that they possess rights and interests under laws and customs presently acknowledged and observed by them. Further, those present-day laws and customs must have their origins in laws and customs acknowledged and observed at sovereignty. The ALRC acknowledges that not all Aboriginal and Torres

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Society of Western Australia, *Submission 9*. For further discussion of the Act's status as beneficial, see Sean Brennan, 'Statutory Interpretation and Indigenous Property Rights' (2010) 21 *Public Law Review* 239, 252.

6 *IW v City of Perth* (1997) 191 CLR 1, 12 (Brennan CJ, McHugh J); 39 (Gummow J). See also *AB v Western Australia* (2011) 244 CLR 390, [24] (French CJ, Gummow, Hayne, Kiefel and Bell JJ).

7 *Native Title Act 1993* (Cth) s 223(1)(a), (b).

8 Ibid s 223(1)(c). For further discussion of the concept of 'recognition', see Ch 2.

9 Guiding Principle 3: see Ch 1.

10 These reforms were proposed in substantially the same form in: Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014) Proposals 5–1 to 5–4.

11 Northern Territory Government, *Submission 71*; Minerals Council of Australia, *Submission 65*; National Farmers' Federation, *Submission 56*; Association of Mining and Exploration Companies, *Submission 54*; The Chamber of Minerals and Energy of Western Australia, *Submission 49*; Western Australian Government, *Submission 43*.

12 Victoria Department of Premier and Cabinet, *Right People for Country Project* <www.dpc.vic.gov.au>.

Strait Islander peoples will be able to establish that they hold native title under the *Native Title Act*.[13]

5.12 There are existing mechanisms to screen claims that have an insufficient factual basis,[14] and to limit overlapping claims.[15] The ALRC considers that the modest changes recommended in this chapter, coupled with these mechanisms, will not result in a proliferation of claims.

Section 223(1)(a)

5.13 Section 223(1)(a) of the *Native Title Act* provides that native title rights and interests are rights and interests possessed under the traditional laws acknowledged and traditional customs observed by the relevant Aboriginal peoples or Torres Strait Islanders. In *Members of the Yorta Yorta Aboriginal Community v Victoria* (*'Yorta Yorta'*), the High Court stated that the laws and customs that can properly be described as 'traditional' are those that find their origin in the laws and customs acknowledged and observed at sovereignty.[16]

5.14 As a result, the term 'traditional' in s 223(1)(a) was held to involve a number of aspects:[17]

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13 The Preamble to the *Native Title Act* acknowledges that 'many Aboriginal peoples or Torres Strait Islanders, because they have been dispossessed of their traditional lands, will be unable to assert native title rights and interests'. A number of submissions to this Inquiry highlighted this aspect of the Preamble: see, eg, Queensland Government, *Submission 28*; Western Australian Government, *Submission 20*; National Farmers' Federation, *Submission 14*. See also Ch 3.

14 A native title claim is subjected to a 'registration test': a consideration, by the Registrar of the National Native Title Tribunal, of whether a claim meets certain merits and procedural conditions: *Native Title Act 1993* (Cth) ss 190A–190C. Among the merits conditions that must be satisfied are that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion, and that there is a prima facie case for establishing at least some of the native title rights and interests claimed: ss190B(5)–(6). The Court may dismiss a claim that has not been accepted for registration, when satisfied of certain matters, including that avenues for review of the decision have been exhausted, and that the application has not been amended and is not likely to be amended in a way that would lead to a different outcome once considered by the Registrar: ss 190F(5), (6). Strictly, the registration test is not a screening mechanism for access to the Federal Court—it is the Court's power under s 190F(6) which provides this screening mechanism. However, 'satisfaction of the registration test has ramifications for whether an application should be allowed to *remain* on the Court's list': *Christine George on behalf of the Gurambilbarra People v Queensland* [2008] FCA 1518 (10 October 2008) [50]. See also *Little on behalf of the Djaku:nde People v Queensland* [2015] FCA 287 (31 March 2015) [43].

15 For a native title claim to be registered, the Registrar must be satisfied that no member of the claim group has also been part of a previous application over part of the same claim area unless that entry onto the register of the previous application has now been removed: *Native Title Act 1993* (Cth) s 190C(3). Native Title Representative Bodies (NTRBs) must make all reasonable efforts to minimise the number of claims covering land or waters within its area: ss 203BC(3)(b); 203BE(3)(a)–(b). An NTRB also has dispute resolution functions, including to assist in promoting agreement among native title holders in its area about the making of native title applications: s 203BF(1)(a). If two or more proceedings before the Federal Court relate to native title claims that cover the same area, the Federal Court must make such order as it considers appropriate to ensure that, to the extent that the applications cover the same area, they are dealt with in the same proceeding: s 67(1).

16 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [46] (Gleeson CJ, Gummow and Hayne JJ).

17 Ch 2 discusses approaches to the term 'traditional' prior to the High Court's decision in *Yorta Yorta*.

- the means of transmission of a law or custom: a 'traditional' law or custom is one which has been passed from generation to generation of a society;[18]
- the age of the laws and customs: the origins of the content of the law or custom concerned are to be found in the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown;[19]
- continuity: the 'normative system'—that is, the traditional laws and customs—under which rights and interests are possessed must have had a continuous existence and vitality since sovereignty.[20]

5.15 The interpretation of 'traditional' has been criticised as productive of restrictive and technical approaches to establishing native title rights and interests. This chapter details some of these criticisms, and makes a number of recommendations to address them.

Accommodation of change to laws and customs

Recommendation 5–1 The definition of native title in s 223 of the *Native Title Act 1993* (Cth) should be amended to provide that traditional laws and customs may adapt, evolve or otherwise develop.

5.16 The ALRC recommends that there be explicit acknowledgment in the *Native Title Act* that traditional laws and customs may adapt, evolve or otherwise develop.[21]

5.17 Legislative acknowledgment in the *Native Title Act* of adaptation, evolution and development of laws and customs provides explicit recognition of the cultural vitality of Aboriginal and Torres Strait Islander peoples.

5.18 Such legislative acknowledgment of change is arguably in keeping with the approach envisaged upon first recognition of native title in *Mabo v Queensland [No 2]* (*'Mabo [No 2]'*). That native title rights will continue notwithstanding cultural change was repeatedly adverted to by the High Court in *Mabo [No 2]*. For example, Brennan J noted that 'of course in time the laws and customs of any people will change and the rights and interests of the members of the people among themselves will change too'.[22] Deane and Gaudron JJ stated that traditional laws and customs are not

> frozen as at the moment of establishment of a Colony. Provided any changes do not diminish or extinguish the relationship between a particular tribe or other group and

18 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [46] Gleeson CJ, Gummow and Hayne JJ).
19 Ibid [46] (Gleeson CJ, Gummow and Hayne JJ).
20 Ibid [47] (Gleeson CJ, Gummow and Hayne JJ). See also Melissa Perry and Stephen Lloyd, *Australian Native Title Law* (Lawbook Co, 2003) 22–23.
21 This chapter focuses on evolution, adaptation and development of *traditional laws and customs*. The question of evolution of the manner of exercise of a native title right is considered further in Ch 8.
22 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 61.

> particular land, subsequent developments or variations do not extinguish the title in relation to that land.[23]

5.19 Toohey J was also of the view that 'an indigenous society cannot … surrender its rights by modifying its way of life'.[24]

5.20 It is also consistent with a non-discriminatory approach to Aboriginal and Torres Strait Islander peoples' rights and interests in land and waters. As Kirby J noted in *Commonwealth v Yarmirr*, an adherence to the principle of non-discrimination

> must include a recognition that the culture and laws of indigenous peoples adapt to modern ways of life and evolve in the manner that the cultures and laws of all societies do. They do this lest, by being frozen and completely unchangeable, they are rendered irrelevant and consequently atrophy and disappear.[25]

5.21 Further, the *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP') recognises the right of Indigenous peoples to 'practise and revitalize their cultural traditions and customs'. This includes the 'right to maintain, protect and develop the past, present and future manifestations of their cultures'.[26]

5.22 An approach that explicitly acknowledges that laws and customs can evolve, adapt and change also facilitates Aboriginal and Torres Strait Islander peoples' ability to utilise their native title rights to promote future development.[27] As Dr Angus Frith and Associate Professor Maureen Tehan submitted, there is merit in promoting an approach to native title that allows native title holders to 'achieve their economic, social and cultural aspirations'.[28]

5.23 This recommendation will also promote clarity in native title legislation, particularly in assisting those affected by the legislation to understand how the law applies to them.[29]

Criticisms of tradition

5.24 A number of stakeholders supported amending the *Native Title Act* to provide that traditional laws and customs may adapt, evolve or otherwise develop.[30] Many of

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23 Ibid 110.

24 Ibid 192. Toohey J makes this statement in the context of his position that traditional rights exist 'so long as occupation by a traditional society is established now and at the time of annexation': 192.

25 *Commonwealth v Yarmirr* (2001) 208 CLR 1, [295].

26 *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st Sess, 107th Plen Mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) art 11. The National Congress of Austrlaia's First Peoples drew attention to this aspect of UNDRIP in its submission: National Congress of Australia's First Peoples, *Submission 32*.

27 This accords with Guiding Principle 5: Supporting sustainable futures. See Ch 1.

28 A Frith and M Tehan, *Submission 12*. See also National Native Title Council, *Submission 16*.

29 Australian Government Office of Parliamentary Counsel, *Causes of Complex Legislation and Strategies to Address These* <www.opc.gov.au/clearer/docs/ClearerLaws_Causes.PDF>.

30 AIATSIS, *Submission 70*; National Congress of Australia's First Peoples, *Submission 69*; NTSCORP, *Submission 67*; Indigenous Land Corporation, *Submission 66*; Law Council of Australia, *Submission 64*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; D Wy Kanak, *Submission 61*; National Native Title Council, *Submission 57*; Queensland South Native Title Services, *Submission 55*; A Frith and M Tehan, *Submission 52*; Central Desert Native Title Service, *Submission 48*; Native Title Services Victoria, *Submission 45*; S Jackson and PL Tan, *Submission 44*; North Queensland Land Council, *Submission 42*.

these stakeholders were critical of the present interpretation of the meaning of 'traditional' laws and customs, or supported better recognition of evolution and adaptation to laws and customs.[31]

5.25 For example, Goldfields Land and Sea Council ('GLSC') argued that focusing on tradition can 'ingrain and incentivise a cultural conservatism in Indigenous communities, effectively discouraging (even punishing) processes of cultural change and renewal that might otherwise occur'.[32] Professor Simon Young has argued that this is

> inconsistent with the continuing … external pressure on Indigenous communities to adapt and participate. Contemporary communities face irresistible western influence and an increasingly urgent need to engage in the politics, law and economy of the non-Indigenous society. Yet they are met in the courts with detailed, doctrinally authorised and inevitable stylised preconceptions and a rule that calls on them to demonstrate, within that frame of reference, their cultural stagnancy.[33]

5.26 Other stakeholders noted the injustice of requiring Aboriginal people to establish the existence of a system of traditional laws and customs 'when former generations of European settlement have contrived to repress those laws and customs'.[34] Professor Francesca Merlan has identified this as a 'basically anachronistic' demand:

> After all these decades of non-recognition and, indeed, state attempts to erase Indigenous relations to land, one might ask: why should recognition depend on the capacity for land courts and tribunals, and Indigenous and other participants, to produce collectively what is essentially an 'as if ' story: we (in a position to decide these things) accord you (Indigenous people) recognition to the extent you can show you are traditional in your relations to land?[35]

5.27 AIATSIS argued that tradition is a limiting concept:

> The long-held dominant view in anthropology is that societies and cultures are not and never have been static, but that they are developing in a continual process of change and transformation. Over the last few decades, much anthropological research concerning Aboriginal and Torres Strait Islander culture has focused on the process of

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31 See, eg, National Congress of Australia's First Peoples, *Submission 32*; NSW Young Lawyers Human Rights Committee, *Submission 29*; Queensland South Native Title Services, *Submission 24*; Goldfields Land and Sea Council, *Submission 22*; North Queensland Land Council, *Submission 17*; National Native Title Council, *Submission 16*; A Frith and M Tehan, *Submission 12*; Cape York Land Council, *Submission 7*; Just Us Lawyers, *Submission 2*; Australian Human Rights Commission, *Submission 1*. See also Native Title Amendment (Reform) Bill 2014 cl 18, and the submissions to the Senate Committee on Legal and Constitutional Affairs, Parliament of Australia Inquiry into Native Title Amendment (Reform) Bill 2011: Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Native Title Amendment (Reform) Bill 2011* (2011). Tradition has also been the focus of academic commentary critical of its centrality in native title law. See, eg, Simon Young, *Trouble with Tradition: Native Title and Cultural Change* (Federation Press, 2008); Kent McNeil, 'Judicial Treatment of Indigenous Land Rights in the Common Law World' (CLPE Research Paper 24, 2008) 27–28; Francesca Merlan, 'Beyond Tradition' (2006) 7 *The Asia Pacific Journal of Anthropology* 85. See also the position in other jurisdictions, discussed further in Ch 9.

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

33 Young, above n 31, 364.

34 North Queensland Land Council, *Submission 17*. See also Goldfields Land and Sea Council, *Submission 22*.

35 Merlan, above n 31, 86.

> cultural change and 'creative adaptation to change consistent with the continuity of aspects of traditional beliefs and practices'. Laws and customs do not exist in a static past and to impose that deprives Aboriginal and Torres Strait Islander people of the right to interpret and re-interpret the meaning and content of their evolving laws and customs in line with changing conditions and environments.[36]

5.28 In the Discussion Paper, the ALRC proposed, as an alternative to clarifying that traditional laws and customs may adapt, evolve or otherwise develop, that the term 'traditional' be removed from the definition of native title.[37] After consideration, the ALRC has not proceeded with this approach.

5.29 The proposal did not receive widespread support, even from those critical of aspects of the tradition requirement.[38] For example, Queensland South Native Title Services ('QSNTS') identified the tradition requirement as one of the 'inherent deficiencies' with the definition of native title. It pointed to limitations and injustice in

> the notion that upon settlement, all that the introduced law could and can ever recognise was a master copy of an indigenous legal system that existed at that point, from which successive generations of Aboriginal peoples across time have to be imprinted against.[39]

5.30 Nonetheless, QSNTS advocated that the word 'traditional' be retained, with 'some statutory clarification around its meaning'.[40]

5.31 Generally, other submissions in favour of reform also preferred an amendment clarifying that traditional laws and customs may change over time to removing the term

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36 AIATSIS, *Submission 36*.

37 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014) Proposal 7–1. The ALRC also sought comment on two associated matters. The first was whether another term should be substituted for traditional in the definition of native title, to ensure that the *Native Title Act* recognised only those rights and interests that have their origins in pre-sovereign laws and customs: [7.29]–[7.31]. The second matter on which feedback was invited was whether a definition related to claim group composition should be included in the *Native Title Act:* Question 7–1. The majority of submissions did not support such a definition: South Australian Government, *Submission 68*; NTSCORP, *Submission 67*; Minerals Council of Australia, *Submission 65*; Law Council of Australia, *Submission 64*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; National Native Title Council, *Submission 57*; A Frith and M Tehan, *Submission 52*; Central Desert Native Title Service, *Submission 48*; Western Australian Government, *Submission 43*. Most preferred that claim group composition be defined through a group's own laws and customs: see, eg, NTSCORP, *Submission 67*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; A Frith and M Tehan, *Submission 52*.

38 AIATSIS supported this proposal: AIATSIS, *Submission 70*. The Indigenous Land Corporation offered provisional support for the removal of 'traditional': Indigenous Land Corporation, *Submission 66*. The North Queensland Land Council stated that it would not object to its removal: North Queensland Land Council, *Submission 42*. The following submissions did not support the proposal: Northern Territory Government, *Submission 71*; South Australian Government, *Submission 68*; NTSCORP, *Submission 67*; Minerals Council of Australia, *Submission 65*; Law Council of Australia, *Submission 64*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; National Native Title Council, *Submission 57*; National Farmers' Federation, *Submission 56*; Queensland South Native Title Services, *Submission 55*; Association of Mining and Exploration Companies, *Submission 54*; Central Desert Native Title Service, *Submission 48*; Native Title Services Victoria, *Submission 45*; Western Australian Government, *Submission 43*.

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

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

'traditional' from the definition of native title.[41] Native Title Services Victoria ('NTSV') submitted that 'it is not the word "traditional" but its interpretation that is at issue'.[42]

5.32 Concern to ensure that the *Native Title Act* recognises only the rights and interests of peoples with a relationship to country that has endured since sovereignty was shared by Aboriginal and respondent interests who made submissions to the Inquiry.[43] The Western Australian Government argued that removal of the word traditional 'explicitly contemplates rights and interests which did not exist at sovereignty'.[44] Native Title Representative Bodies and Native Title Service Providers were similarly concerned that if 'traditional' were removed, the *Native Title Act* could recognise those with more recent connections to country as native title holders. Yamatji Marlpa Aboriginal Corporation suggested that the 'danger of removing the word "traditional" … is that it may suggest that native title claims could be supported by mere "historical" (namely, post-settlement) connection and/or newly invented laws and customs'.[45]

5.33 This would bring with it the potential for intra-Indigenous conflict. For example, Central Desert Native Title Services ('CDNTS') suggested:

> removal of the requirement for laws and customs to be 'traditional' could also lead to an increase in intra-indigenous disputes over country including disputes relating to historical versus traditional connection. This would particularly be the case where people of long historical occupation held different laws and customs to those observed by those people with a traditional connection to the area concerned.[46]

5.34 QSNTS argued:

> re-defining the parameters around this element might give 'historical people' (people not traditionally associated or affiliated with the area) a 'leg up' to gain native title or a boon to those who would not have otherwise been traditionally entitled to the land. It is submitted that this is cause for the creation of conflicts within claim groups and/or lateral violence.[47]

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41 NTSCORP, *Submission 67*; Law Council of Australia, *Submission 64*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; National Native Title Council, *Submission 57*; Queensland South Native Title Services, *Submission 55*; A Frith and M Tehan, *Submission 52*; Law Society of Western Australia, *Submission 41*.

42 Native Title Services Victoria, *Submission 45*. See also Yamatji Marlpa Aboriginal Corporation, *Submission 62*.

43 See, eg, South Australian Government, *Submission 68*; NTSCORP, *Submission 67*; Minerals Council of Australia, *Submission 65*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; National Farmers' Federation, *Submission 56*; Queensland South Native Title Services, *Submission 55*; Central Desert Native Title Service, *Submission 48*.

44 Western Australian Government, *Submission 43*. See also South Australian Government, *Submission 68*; Minerals Council of Australia, *Submission 65*; Law Council of Australia, *Submission 64*; National Farmers' Federation, *Submission 62*.

45 Yamatji Marlpa Aboriginal Corporation, *Submission 62*.

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

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

5.35 NTSV argued that 'the term "traditional" is one of importance to Aboriginal people, denoting their unique relationship with particular land and waters through the concept of traditional ownership'.[48] The National Native Title Council ('NNTC') submitted that 'traditional' functions in native title to recognise a 'longstanding relationship with land and waters that is more significant than other more recent connections with country'.[49]

How much change?

5.36 The current interpretation of the requirement that native title rights and interests are possessed under traditional laws and customs allows for some change in those laws and customs.[50] To be designated traditional, the content of contemporary laws and customs need only have their 'origins' in pre-sovereign laws and customs.[51] This means that contemporary laws and customs may not be identical to those at sovereignty. They may still be considered traditional so long as the origin, or source, of their content, can be found in laws and customs acknowledged and observed before the assertion of sovereignty.

5.37 In *Yorta Yorta*, the High Court addressed the question of evolution and adaptation of laws and customs. Gleeson CJ, Gummow and Hayne JJ stated that some change to, or adaptation of, traditional laws and customs was not necessarily fatal to a native title claim.[52] They stated that there was no 'bright line' test that could be offered to judge the significance, in a particular case, of change and adaptation to law and custom.[53] The key question remained 'whether the law and custom can still be seen to be traditional law and traditional custom'.[54]

5.38 Gaudron and Kirby JJ also considered that laws and customs may adapt and still be considered traditional:

> What is necessary for laws and customs to be identified as traditional is that they should have their origins in the past and, to the extent that they differ from past practices, the differences should constitute adaptations, alterations, modifications or extensions made in accordance with the shared values or the customs and practices of the people who acknowledge and observe those laws and customs.[55]

5.39 A number of submissions to this Inquiry argued that the existing approach to the meaning of 'traditional' sufficiently allows for evolution and adaptation of laws and

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48 Native Title Services Victoria, *Submission 45*.
49 National Native Title Council, *Submission 57*.
50 A number of submissions to this Inquiry noted this: Law Society of Western Australia, *Submission 41*; Law Council of Australia, *Submission 35*; South Australian Government, *Submission 34*; Northern Territory Government, *Submission 31*; Kimberley Land Council, *Submission 30*; Queensland South Native Title Services, *Submission 24*; Law Society of Western Australia, *Submission 9*; Cape York Land Council, *Submission 7*.
51 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [46] (Gleeson CJ, Gummow and Hayne JJ).
52 Ibid [83].
53 Ibid [82]–[83].
54 Ibid [83].
55 Ibid [114].

customs.[56] For example, the South Australian Government submitted that the 'the term "traditional" is one of broad interpretation and has been found to permit a substantial element of adaptation'.[57]

5.40 In a number of determinations of native title, the Federal Court has recognised adapted laws and customs as retaining a traditional character. For example, in *Neowarra v Western Australia*, Sundberg J found that the claimants' laws and customs were traditional notwithstanding that they were 'modified and to some extent diluted by the changed circumstances of the older applicants and their forebears'.[58] Other examples of adapted laws and customs have included changes to:

- descent rules: from patrilineal to cognatic;[59] or a shift over time involving an increase in reliance on matrilineal descent;[60]
- laws allowing images relating to country to be painted on canvas rather than on country, and the sale of these artworks;[61]
- the location of initiation rituals,[62] or a cessation of initiation ceremonies on the claimed area;[63] and
- social organisation associated with particular parts of the claimed area—with a number of smaller groups 'coalescing' into larger groupings.[64]

5.41 Notwithstanding that some scope exists to accommodate evolution and adaptation of traditional laws and customs within the interpretation of s 223, the ALRC

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56 South Australian Government, *Submission 34*; Northern Territory Government, *Submission 31*; Queensland Government, *Submission 28*; Western Australian Government, *Submission 20*.

57 South Australian Government, *Submission 68*.

58 *Neowarra v Western Australia* [2003] FCA 1402 (8 December 2003) [346].

59 *Griffiths v Northern Territory* (2006) 165 FCR 300, [501]; *Western Australia v Sebastian* (2008) 173 FCR 1, [121]–[122]; *Banjima People v Western Australia (No 2)* (2013) 305 ALR 1, [507].

60 *Bodney v Bennell* (2008) 167 FCR 84, [116].

61 *Neowarra v Western Australia* [2003] FCA 1402 (8 December 2003) [140]–[141].

62 *Dempsey on behalf of the Bularnu, Waluwarra and Wangkayujuru People v Queensland (No 2)* [2014] FCA 528 (23 May 2014) [693]–[694].

63 *Graham on behalf of the Ngadju People v Western Australia* [2012] FCA 1455 (21 December 2012) [146]. See also *Croft on behalf of the Barngarla Native Title Claim Group v South Australia* [2015] FCA 9 (22 January 2015) [644]–[645].

64 *Banjima People v Western Australia (No 2)* (2013) 305 ALR 1, [400], [695]–[696]. See also *AB (deceased) (on behalf of the Ngarla People) v Western Australia (No 4)* [2012] FCA 1268 (21 November 2012) [784]–[785]. However, in *CG (Deceased) on behalf of the Badimia People v Western Australia* [2015] FCA 204, Barker J inferred that at sovereignty, it is probable that some form of local group organisation operated that gave rise to a primary native title right to speak for parts of Badimia country: [422]. He inferred that the estate or local group organisation likely to have existed at sovereignty collapsed, but was not prepared to infer that the contemporary rule that all Badimia people have rights to speak for country was an evolution of the sovereignty rule: [430], [425]. In *Bodney v Bennell*, the Full Court stated that the significant change from pre-settlement land-holding systems—from a system of 'home areas' and 'runs', to an identification with larger areas known as 'boodjas'—pointed against continuity with pre-sovereignty laws and customs, but did not make any conclusions on this issue: *Bodney v Bennell* (2008) 167 FCR 84, [79]–[83]. The Full Court noted that the primary judge did not make any finding as to whether this change was a 'permissible adaptation' of pre-sovereignty land holding systems: Ibid [83]. However, it did not suggest that this finding was not open to the primary judge.

considers that the *Native Title Act* should explicitly provide for this. The ALRC agrees with those submissions that argue for keeping the word 'traditional' but providing guidance as to how it ought to be interpreted, in a manner beneficial to Aboriginal and Torres Strait Islander peoples.

5.42 The ALRC acknowledges that, if Recommendation 5–1 is adopted, 'difficult questions of fact and degree' will continue to arise in determining whether the content of contemporary laws and customs can be characterised as having their origins in pre-sovereign laws and customs.[65] These are essentially matters of evidence and the inferences to be drawn from the evidence.

5.43 Establishing that the content of contemporary laws and customs have their origins in laws and customs acknowledged and observed prior to sovereignty will, in most cases, rely on the Court (or a respondent in a consent determination) being willing to draw inferences from other evidence. As discussed in Chapter 7, in *Gumana v Northern Territory*, Selway J usefully identifies the evidence that may found such an inference, akin to the proof of custom at common law. Selway J considered that, where there is:

- a clear claim of the continuous existence of a custom or tradition that has existed at least since settlement;
- supported by credible evidence from persons who have observed that custom or tradition; and
- evidence of a general reputation that the custom or tradition had 'always' been observed;

then, in the absence of evidence to the contrary, there is an inference that the tradition or custom has existed at least since the date of settlement.[66]

5.44 In a consent determination in favour of the Dieri people, Mansfield J remarked:

> The Determination can be made without the necessity of strict proof and direct evidence of each issue as long as inferences can legitimately be made. In consent determination negotiations, it is the State's policy to focus on contemporary expressions of traditional laws and customs and pay less regard to laws and customs that may have ceased. The State can reasonably infer that such contemporary expressions are sourced in the earlier laws and customs. So can the Court.[67]

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65 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [82] (Gleeson CJ, Gummow and Hayne JJ). The South Australian Government emphasised that determining where 'evolution has gone so far as to represent a break with the traditional laws and customs in place at Sovereignty … can only be answered on the basis of each unique set of facts attaching to each claim': South Australian Government, *Submission 68*.

66 *Gumana v Northern Territory* (2005) 141 FCR 457, [201].

67 *Lander v South Australia* [2012] FCA 427 (1 May 2012) [42]. See also Bennett J's acceptance of the submission that 'the Court is entitled to draw inferences about the content of the traditional laws and customs at sovereignty from contemporary evidence and that if the evidence establishes a contemporary normative rule': *AB (deceased) (on behalf of the Ngarla People) v Western Australia (No 4)* [2012] FCA 1268 (21 November 2012) [724].

5.45 The ALRC considers that, when assessing whether or not laws and customs are 'traditional', adaptation, evolution and development of laws and customs should be treated as the norm rather than the exception. In this regard, the ALRC notes QSNTS's submission that, implicit in 'the recognition established at the time of acquisition of sovereignty is an acceptance that the indigenous normative system of law was and is inherently capable of dynamism'.[68] As AIATSIS argued, Aboriginal and Torres Strait Islander peoples should not be deprived of 'the right to interpret and re-interpret the meaning and content of their evolving laws and customs in line with changing conditions and environments'.[69] Moreover, as the Law Society of Western Australia noted in its submission, 'the requirement for adaptation from an original source does not require that adaptation to have occurred without the outside influence of European interaction'.[70]

5.46 The ALRC also considers that recognition that traditional laws and customs may adapt, evolve or develop should not be limited by any requirement that such changes be of a kind contemplated by the laws and customs.[71]

5.47 The ALRC further considers that significant weight should be accorded to claimants' perspectives as to the traditional character of their contemporary laws and customs. As French J stated in *Sampi v Western Australia*, claimants' 'testimony about their traditional laws and customs and their rights and responsibilities with respect to land and waters, deriving from them, is of the highest importance. All else is second order evidence'.[72] The NSW Young Lawyers Human Rights Committee argued that, in assessing whether laws and customs are traditional, 'the degree to which the claim group genuinely acknowledges and observes the laws and customs as a reflection of their traditions and customs' should be taken into account.[73] Such an approach would be in keeping with according the 'highest importance' to the testimony of Aboriginal and Torres Strait Islander witnesses.[74]

5.48 The High Court in *Western Australia v Ward* suggested that native title determinations have an indefinite character, reflecting

> the requirement for the continuing acknowledgment and observance of traditional laws and customs and continuing connection with land implicit in the definition of 'native title' in s 223(1) of the NTA.[75]

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68 Queensland South Native Title Services, *Submission 24*.
69 AIATSIS, *Submission 36*.
70 Law Society of Western Australia, *Submission 9*.
71 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [44] (Gleeson CJ, Gummow and Hayne JJ). See also *Rubibi Community v Western Australia (No 5)* [2005] FCA 1025 (29 July 2005) [266].
72 *Sampi v Western Australia* [2005] FCA 777 (10 June 2005) [48]. The Full Federal Court agreed with this view: *Sampi on behalf of the Bardi and Jawi People v Western Australia* (2010) 266 ALR 537, [57].
73 NSW Young Lawyers Human Rights Committee, *Submission 29*. See also S Bielefeld, *Submission 6*; Jason Behrendt, 'Changes to Native Title Law Since Mabo' (2007) 6 *Indigenous Law Bulletin* 13.
74 *Sampi v Western Australia* [2005] FCA 777 (10 June 2005) [48]; *Sampi on behalf of the Bardi and Jawi People v Western Australia* (2010) 266 ALR 537, [57].
75 *Western Australia v Ward* (2002) 213 CLR 1, [32] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

5.49 Explicit recognition that traditional laws and customs may evolve, adapt or develop is also appropriate to ensure that adaptation or evolution of laws and customs following a determination does not provide grounds for arguments to be raised for variation or revocation of a determination of native title.[76]

5.50 Recognition that traditional laws and customs may adapt, evolve or otherwise develop is also relevant to consideration of whether there has been continuity of acknowledgment and observance of traditional laws and customs. If there is recognition that a law or custom adapts, evolves or otherwise develops, there should be similar recognition that the manner in which the law is acknowledged and the custom is observed may also adapt, evolve or otherwise develop.

Continuity of acknowledgment of traditional laws and customs

Recommendation 5–2 The definition of native title in s 223 of the *Native Title Act 1993* (Cth) should be amended to clarify that it is not necessary to establish that the acknowledgment of traditional laws and the observance of traditional customs have continued substantially uninterrupted since sovereignty.

Recommendation 5–3 The definition of native title in s 223 of the *Native Title Act 1993* (Cth) should be amended to clarify that it is not necessary to establish that traditional laws and customs have been acknowledged and observed by each generation since sovereignty.

5.51 The ALRC recommends that there be explicit acknowledgment in the *Native Title Act* that there is no independent legal requirement to establish that the acknowledgment of traditional laws and observance of traditional customs has continued substantially uninterrupted since sovereignty. Further, there should be no additional refinement of that requirement so that traditional laws and customs must have been acknowledged and observed by each generation since sovereignty. A number of stakeholders supported the ALRC's approach to reform in this regard.[77]

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76 *Native Title Act 1993* (Cth) s 13(5). A number of submissions drew particular attention to the importance of the recommendation in this regard: Yamatji Marlpa Aboriginal Corporation, *Submission 62*; National Native Title Council, *Submission 57*; Central Desert Native Title Service, *Submission 48*.

77 Rec 5–2 and Rec 5–3 are substantially the same as was proposed in the Discussion Paper: Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014) Proposal 5–3. Proposal 5–3 in the Discussion Paper was supported by AIATSIS, *Submission 70*; National Congress of Australia's First Peoples, *Submission 69*; NTSCORP, *Submission 67*; Indigenous Land Corporation, *Submission 66*; Law Council of Australia, *Submission 64*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; National Native Title Council, *Submission 57*; Queensland South Native Title Services, *Submission 55*; A Frith and M Tehan, *Submission 52*; Central Desert Native Title Service, *Submission 48*; Native Title Services Victoria, *Submission 45*; North Queensland Land Council, *Submission 42*. While Yamati Marlpa gave in principle support, it preferred different wording, see: Yamatji Marlpa Aboriginal Corporation, *Submission 62*. NSW Young Lawyers Human Rights Committee also suggested a different way of amending the Act so as to limit the requirement: NSW Young Lawyers Human Rights Committee, *Submission 29*.

5.52 The ALRC recommends the removal of this legal requirement.[78] The requirement stems from the courts employing what may be considered an overly technical approach to the statutory construction of s 223(1). Interpretation of the word 'traditional', in the context of s 223(1)(a), has relevantly been held to require that the acknowledgment and observance of those laws and customs has continued substantially uninterrupted by each generation since sovereignty.

5.53 In making these recommendations, the ALRC is responding to the Terms of Reference which asked the ALRC to inquire into, and report on, connection requirements relating to the recognition and scope of native title rights and interests. Specifically, the ALRC was directed to consider whether there should be 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. In Chapter 6, the ALRC discusses various models for accommodating change in, and interruptions to, continuity of acknowledgment and observance of laws and customs, including allowing judicial discretion to disregard substantial interruption. Having considered the issues and reform options, the ALRC has concluded that Recommendations 5–2 and 5–3 are the best way to approach the problems caused by the legal requirement. The ALRC considers that, because the requirement arises from the statutory construction that has been given to s 223(1), the most effective way to address problems stemming from the requirement is to clarify that it is not necessary to establish it. That is, to remove the requirement for the continuity of the acknowledgment of traditional laws and observance of traditional customs to be at the high 'substantially uninterrupted' and 'by each generation since sovereignty' thresholds.

5.54 The ALRC considers that the reforms outlined in this chapter should be implemented as a package. However, in the event that only part of the reform is implemented, the ALRC makes two separate recommendations with respect to continuity of acknowledgment and observance of traditional laws and customs. The ALRC considers that the need for traditional laws and customs to have been acknowledged and observed by 'by each generation since sovereignty' is a particularly high threshold.

The idea of 'continuity'

5.55 The word 'continuity' does not appear in the definition of native title in the *Native Title Act*. However, in *Yorta Yorta*, Gleeson CJ, Gummow and Hayne JJ stated that 'continuity of acknowledgment and observance is a condition for establishing native title'.[79] They derived a requirement for continuity of the acknowledgment of traditional laws and observance of traditional customs (together, 'the normative

78 The 'generation by generation' requirement in Rec 5–3 may be conceived as a further refinement of the broader continuity requirement referred to in Rec 5–2.

79 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [90].

rules')[80] from their interpretation of the qualifier 'traditional', in respect of laws and customs, in s 223(1)(a).[81] They stated that

> acknowledgment and observance of those laws and customs must have continued substantially uninterrupted since sovereignty. Were that not so, the laws and customs acknowledged and observed *now* could not properly be described as the *traditional* laws and customs of the peoples concerned. That would be so because they would not have been transmitted from generation to generation of the society for which they constituted a normative system giving rise to rights and interests in land …[82]

5.56 Later, they stated that

> continuity in acknowledgment and observance of the normative rules in which the claimed rights and interests are said to find their foundations before sovereignty is essential because it is the normative quality of those rules which rendered the Crown's radical title acquired at sovereignty subject to the rights and interests then existing and which now are identified as native title.[83]

5.57 That is, these members of the High Court insisted on 'continuity' so as 'to ensure that the court does not recognise any parallel lawmaking entity subsequent to the Crown's initial assertion of sovereignty'.[84] In consequence, where there is no continuity of acknowledgment of laws and observance of customs, the laws and customs cannot be revived for the purposes of establishing native title. Revival is discussed in Chapter 6.

5.58 The need for traditional laws and customs to have been acknowledged and observed continuously from sovereignty to the present imposes a considerable burden of proof on native title claimants. It has also been criticised for not according with 'universal principles as to the respect due [to] existing rights of a society'.[85]

The requirement for the acknowledgment and observance of traditional laws and customs to have continued 'substantially uninterrupted' since sovereignty

5.59 The High Court has acknowledged that continuity in acknowledgment and observance of laws and customs from sovereignty to the present need not be absolute. To that end, the qualification 'substantially' is important in 'substantially uninterrupted'.[86] Two reasons were given for this in *Yorta Yorta*. First, the qualification was said to recognise the great difficulty of proving continuous acknowledgment and

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80 Ibid [88].
81 Ibid [87].
82 Ibid.
83 Ibid [88]. In *Commonwealth v Yarmirr* (2001) 208 CLR 1, the majority of the High Court described the concept of radical title as a legal tool of analysis, explaining that 'when the Crown acquired sovereignty over land it did not acquire beneficial ownership of that land … What the Crown acquired was a "radical title" to land': Ibid [47] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
84 Nick Duff, 'What's Needed to Prove Native Title? Finding Flexibility Within the Law on Connection' (Research Discussion Paper 35, AIATSIS, June 2014) 27.
85 Richard H Bartlett, *Native Title in Australia* (LexisNexis Butterworths, 3rd ed, 2015) 100. Earlier Bartlett had referred to 'the principles of recognition of existing rights at common law or international law': Ibid 97.
86 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [89] (Gleeson CJ, Gummow and Hayne JJ).

observance of oral traditions over the many years since sovereignty. Second, it recognises the 'most profound effects' of European settlement on Aboriginal societies. This means that it is 'inevitable that the structures and practices of those societies, and their members, will have undergone great changes'.[87] While there is stated acknowledgment that the European settlement of Australia brought about great changes to Aboriginal and Torres Strait Islander societies, it is arguable that insisting that the acknowledgment and observance of law and custom must have continued substantially uninterrupted by each generation since sovereignty effectively counters any real acknowledgment of the ensuing, and in many cases insurmountable, difficulties.

5.60 In *Yorta Yorta*, Gleeson CJ, Gummow and Hayne JJ stated that 'the inquiry about continuity of acknowledgment and observance does not require consideration of why, if acknowledgment and observance stopped, that happened'.[88] If the requirement is not met, then 'examining why that is so is important *only* to the extent that the presence or absence of reasons might influence the fact-finder's decision about whether there was such an interruption'.[89] Consideration of the reasons for interruption is discussed in Chapter 6.

Further refinement of the requirement: that, since sovereignty, each generation must have acknowledged and observed the traditional laws and customs

5.61 In *Yorta Yorta*, Gleeson CJ, Gummow and Hayne JJ stated that a 'traditional law or custom is one which has been passed from generation to generation of a society, usually by word of mouth and common practice'.[90] In *Risk v Northern Territory*, Mansfield J summarised the *Yorta Yorta* continuity requirement as the requirement to establish that 'acknowledgment and observance of the laws and customs has continued substantially uninterrupted *by each generation* since sovereignty'.[91] Such a requirement has significant implications in terms of the evidence to be produced by claimants.

5.62 The 'generation by generation' test was also discussed in *Bodney v Bennell*. The Full Federal Court stated that the correct question was 'whether the laws and customs

87 Ibid.

88 Ibid [90].

89 Ibid. See also *Bodney v Bennell* (2008) 167 FCR 84, [97].

90 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [46]. The 'generation by generation' requirement appears to stem from dictionary definitions of 'traditional' and 'tradition'. See *Risk v Northern Territory* (2007) 240 ALR 75, [124], [127] (Branson and Katz JJ).

91 *Risk v Northern Territory* [2006] FCA 404 (29 August 2006) [97], emphasis added. On appeal the Full Court considered Mansfield J's statement of the law to be accurate: *Risk v Northern Territory* (2007) 240 ALR 75, [78]–[98]. Justice Mansfield has ameliorated somewhat the stringency of this requirement in *Croft on behalf of the Barngarla Native Title Claim Group v South Australia* [2015] FCA 9 (22 January 2015). His Honour stated, 'it is clear that s 223(1)(a) will be fulfilled only where there is proof that a society acknowledges and observes rules under which rights and interests in land are possessed that have normative content and that find their real origins in the same pre-sovereignty society. The acknowledgment and observance of those normative rules must have continued substantially uninterrupted from the time of sovereignty. However, the qualification indicated by the use of the adverb "substantially" recognises both the difficulty of proving continuous acknowledgment and observance of oral traditions and the inevitability of change to the structures and practices of Aboriginal societies in the light of European settlement': Ibid [69].

have continued to be acknowledged and observed substantially uninterrupted by each generation since sovereignty'.[92]

Regional variation

5.63 The requirement for native title claimants to establish that the acknowledgment of their traditional laws and the observance of their traditional customs have continued substantially uninterrupted by each generation since sovereignty has caused particular difficulty for claimants in some parts of Australia.[93] For example, in *CG (Deceased) on behalf of the Badimia People v Western Australia*, the Federal Court concluded that 'the claimants have not proved that the Badimia people, since sovereignty, and in each generation, have continued to acknowledge traditional laws and observe traditional customs to the present day in respect of the claim area'.[94]

5.64 In a number of instances where claimants have not been able to establish this requirement, the claims are in closer proximity to areas of concentrated settlement.[95] Professor Richard Bartlett has expressed the view that the decision in *Bodney v Bennell* 'affirmed the nigh impossibility of proving native title in urban areas irrespective of consideration of extinguishment'.[96]

5.65 By contrast, there are other cases where the traditional laws and customs observed by the claimants were found to have continued substantially uninterrupted since sovereignty because the 'evidence to that effect was strong'.[97] This was the situation in *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group*, which was a claim for land and waters south-east of Tennant Creek in the Northern Territory. Also, in *Banjima People v Western Australia (No 2)*, which concerned a claim over land and waters in the east Pilbara region of Western Australia, the Federal Court found that there had been continuity of the acknowledgment and observance of the traditional laws and customs.[98]

The rationale for reform

5.66 The ALRC heard divergent views about whether reform of the requirement was needed. A number of stakeholders considered the requirement for the acknowledgment and observance of traditional laws and customs to have continued substantially

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92 *Bodney v Bennell* (2008) 167 FCR 84, [73].

93 See, eg, *CG (Deceased) on behalf of the Badimia People v Western Australia* [2015] FCA 204 (12 March 2015); *Sandy on behalf of the Yugara People v State of Queensland (No 2)* [2015] FCA 15 (27 January 2015); *Wyman on behalf of the Bidjara People v Queensland (No 2)* [2013] FCA 1229 (6 December 2013); *Bodney v Bennell* (2008) 167 FCR 84; *Risk v Northern Territory* (2007) 240 ALR 75; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

94 *CG (Deceased) on behalf of the Badimia People v Western Australia* [2015] FCA 204 (12 March 2015) [495].

95 See, eg, *Sandy on behalf of the Yugara People v State of Queensland (No 2)* [2015] FCA 15 (27 January 2015); *Bodney v Bennell* (2008) 167 FCR 84; *Risk v Northern Territory* (2007) 240 ALR 75.

96 Bartlett, above n 85, 106.

97 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [25].

98 *Banjima People v Western Australia (No 2)* (2013) 305 ALR 1, [399].

uninterrupted by each generation since sovereignty to be problematic.[99] Some stakeholders called for the 'substantially uninterrupted' threshold to be removed,[100] or its application otherwise limited.[101] However, a number of state and territory governments submitted that they considered that discharging the onus in respect of the requirement for substantially uninterrupted continuity of acknowledgment and observance of traditional laws and customs is not unduly problematic for native title claimants, or for the resolution of claims.[102] Governments and other stakeholders representing respondent interests, such as industry groups in the minerals sector, opposed the reform as proposed in the Discussion Paper.[103]

5.67 Some governments expressed the view that the requirement for continuity of acknowledgment and observance of traditional laws and customs already incorporates appropriate flexibility,[104] noting that the qualification 'substantially' essentially 'makes allowances for the impacts of European settlement upon Aboriginal societies'.[105] To this end, the Western Australian Government submitted:

> It is … the State's experience from a broad range of consensual and contested matters that Aboriginal groups may compellingly and successfully establish that they hold native title rights and interests notwithstanding profound social and demographic changes since European settlement.[106]

5.68 However, there are examples in Western Australia where this has not been the case.[107]

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99 See, eg, Yamatji Marlpa Aboriginal Corporation, *Submission 62*; AIATSIS, *Submission 36*; Goldfields Land and Sea Council, *Submission 22*; North Queensland Land Council, *Submission 17*; S Bielefeld, *Submission 6*; Just Us Lawyers, *Submission 2*.

100 See, eg, Native Title Services Victoria, *Submission 45*; Queensland South Native Title Services, *Submission 24*; A Frith and M Tehan, *Submission 12*. Some stakeholders did not specify removal of the requirement but it seems clear that this was their intent, or not something they opposed: Goldfields Land and Sea Council, *Submission 22*.

101 See, eg, NSW Young Lawyers Human Rights Committee, *Submission 29*; North Queensland Land Council, *Submission 17*; Cape York Land Council, *Submission 7*.

102 Northern Territory Government, *Submission 71*; South Australian Government, *Submission 34*; Northern Territory Government, *Submission 31*; Western Australian Government, *Submission 20*.

103 South Australian Government, *Submission 68*; Minerals Council of Australia, *Submission 65*; National Farmers' Federation, *Submission 56*; Association of Mining and Exploration Companies, *Submission 54*; The Chamber of Minerals and Energy of Western Australia, *Submission 49*; Western Australian Government, *Submission 43*; Queensland Government, *Submission 28*.

104 South Australian Government, *Submission 34*; Queensland Government, *Submission 28*; Western Australian Government, *Submission 20*. The South Australian Government submitted that it was a 'flexible doctrine that in recent years has generally been interpreted by the Courts (and in the State's consent determination process) in favour of claimant groups'. See also Minerals Council of Australia, *Submission 65*.

105 Western Australian Government, *Submission 20*. See also South Australian Government, *Submission 68*: 'The courts readily acknowledge the impact of British settlement on Australia's Indigenous cultures'. However, Frith and Tehan argued that the exception for 'substantially uninterrupted' acknowledgment and observance of laws and customs 'does not go far enough': A Frith and M Tehan, *Submission 12*.

106 Western Australian Government, *Submission 20*. See also Queensland Government, *Submission 28*: 'The difficult problems of proof that are inherent in the concept of native title have, on the evidence of the rates of resolution of claims, been adequately addressed by the jurisprudence and the attitudes and skills of the participating parties'.

107 *CG (Deceased) on behalf of the Badimia People v Western Australia* [2015] FCA 204 (12 March 2015); *Bodney v Bennell* (2008) 167 FCR 84.

5.69 The Northern Territory Government submitted that the 'substantially uninterrupted' threshold for continuity of acknowledgment and observance of traditional laws and customs has been 'uncontroversial' in that jurisdiction.[108] Some Native Title Service Providers and Native Title Representative Bodies acknowledged that meeting the requirement may not pose a problem in their particular regions of Australia, although they expressed concern that this may not be the case elsewhere.[109] Cape York Land Council ('CYLC') submitted that the State in Queensland has 'generally been willing to accept continuity in circumstances where there has been some interruption for reasons beyond the group's control'.[110] However, it also submitted:

> it is extremely difficult and often distressing for Cape York Traditional Owners to participate in a process which in practical terms requires them to effectively deny the devastating effects of their dispossession and displacement.[111]

5.70 Further, governments referred to a willingness, by both the Court and respondent parties, to draw inferences.[112] For example, governments draw inferences in relation to reaching agreed facts for connection. The use of inferences is discussed in Chapter 7. The South Australian Government submitted that, in its consent determination process,

> inferences tend to be drawn based on genealogical and anthropological information that link 'snapshots' in time periods. The question of interruption is rarely raised without some other (usually historical) evidence suggesting that interruption may be relevant and it is then discussed with the applicant.[113]

5.71 CDNTS acknowledged its experience that the Western Australian government was usually willing to infer continuity of the acknowledgment of traditional laws and customs by the relevant claimant group since prior to first contact. However, it considered that approach to be 'arguably the result of the particular factual situation of native title claims in our region'.[114] It explained that those native title claim groups have had 'relatively little' post-sovereignty disruption.[115]

5.72 Some stakeholders expressed reservations about the extent of practical extenuation provided by the qualification 'substantially' and the use of inferences.[116] CDNTS submitted that,

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108 Northern Territory Government, *Submission 71*.
109 Central Desert Native Title Service, *Submission 48*; Cape York Land Council, *Submission 7*.
110 Cape York Land Council, *Submission 7*.
111 Ibid. The Australian Human Rights Commission argued that 'requiring "literal continuous connection" ignores 'the reality of European interference in the lives of Indigenous peoples': Australian Human Rights Commission, *Submission 1*.
112 South Australian Government, *Submission 34*; Northern Territory Government, *Submission 31*; Queensland Government, *Submission 28*; Western Australian Government, *Submission 20*.
113 South Australian Government, *Submission 34*. See also *Lander v South Australia* [2012] FCA 427 (1 May 2012) [48].
114 Central Desert Native Title Service, *Submission 48*.
115 Central Desert Native Title Services, *Submission 26*.
116 See, eg, Central Desert Native Title Service, *Submission 48*; AIATSIS, *Submission 36*.

> 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. Consequently, the extent to which 'substantially interrupted' provides sufficient flexibility in favour of native title groups depends significantly upon the government assessing the merits of the claim.[117]

5.73 With respect to the use of inferences by the courts, AIATSIS submitted that 'the extent to which an inference may be raised is amenable to judicial discretion'.[118]

5.74 In contrast to what was submitted by governments, AIATSIS submitted that the requirement for acknowledgment and observance of traditional laws and customs to have continued substantially uninterrupted by each generation since sovereignty is logically inconsistent, difficult to meet and leads to injustice.[119] Duff has argued that there are inherent difficulties of proof, including because native title claimants must prove a 'negative proposition', namely 'the absence of substantial interruption in acknowledgment and observance of law and custom'.[120] Some submissions argued that the requirement for substantially uninterrupted acknowledgment of traditional laws and observance of traditional customs is inherently unconscionable or unjust given the history of colonisation.[121]

5.75 GLSC submitted that it 'does not consider that "substantially uninterrupted" acknowledgment and observance of traditional law and custom should be a legal requirement for the proof of native title'.[122] While submissions expressed various views on how limitation of the requirement should be achieved,[123] a number preferred a statutory amendment to limit the application of the requirement to other possible reform options, such as a statutory definition of 'substantial interruption'.[124] In Chapter 6, the ALRC analyses the feasibility of providing a definition of substantial interruption and outlines the difficulties of adopting a definition that could comprehensively cover a range of circumstances given the diverse factual origins for native title.

5.76 The ALRC acknowledges the practical developments that have occurred in the approach taken to evidence and the use of inferential reasoning to fill gaps in the facts where appropriate given the absence of relevant records and claimant evidence.[125] However, notwithstanding these developments and the fact that the modifier 'substantially' provides a qualification not requiring absolute continuity, the ALRC

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117 Central Desert Native Title Service, *Submission 48*.
118 AIATSIS, *Submission 36*. AIATSIS referred to Duff, above n 84, 28–33.
119 AIATSIS, *Submission 36*.
120 Duff, above n 84, 57.
121 See, eg, Native Title Services Victoria, *Submission 45*; Kimberley Land Council, *Submission 30*; North Queensland Land Council, *Submission 17*; A Frith and M Tehan, *Submission 12*; S Bielefeld, *Submission 6*.
122 Goldfields Land and Sea Council, *Submission 22*.
123 See, eg, NSW Young Lawyers Human Rights Committee, *Submission 29*; North Queensland Land Council, *Submission 17*; A Frith and M Tehan, *Submission 12*; Cape York Land Council, *Submission 7*.
124 See, eg, NSW Young Lawyers Human Rights Committee, *Submission 29*; Cape York Land Council, *Submission 7*.
125 See Ch 7.

considers that legislative reform is needed. The ALRC considers that reform is warranted for the following reasons.

Recognising and protecting native title

5.77 First, acknowledging the importance of the recognition of native title,[126] the ALRC considers that the recommendation will facilitate the recognition and protection of native title.[127] The ALRC considers that the requirement that acknowledgment and observance of law and custom must have continued substantially uninterrupted by each generation since sovereignty is an unnecessary stricture on the recognition of native title. The requirement 'undermines' the foundation for native title rights.[128] For example, it renders native title claims excessively vulnerable to a finding that the factual basis for recognising rights and interests is no longer in existence.[129]

5.78 Demonstrating substantially uninterrupted continuity of acknowledgment and observance of laws and customs requires a high level of factual evidence. It is resource intensive to demonstrate and quite unrealistic for many native title communities affected by dislocation, removal of members and discrimination, that at times prohibited exercise of cultural practices.[130]

5.79 Recognition of native title is significant for native title holders as well as the broader Australian community.[131] However, the current degree of continuity required in the acknowledgment of traditional laws and observance of traditional customs—particularly the requirement for it to be 'generation by generation'—acts as an unnecessary barrier to the recognition of native title. The NSW Young Lawyers Human Rights Committee submitted that the requirement 'operates contrary to the aim of repairing and supporting Indigenous cultures to encourage further development'.[132] As CDNTS put it, the 'generation by generation' requirement is 'unduly harsh and unjust'.[133]

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126 Guiding Principle 1.

127 Law Council of Australia, *Submission 64*. AMEC expressed concern that the recommendation 'appear[s] to lower the threshold to prove that native title exists': Association of Mining and Exploration Companies, *Submission 54*.

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

129 Central Desert Native Title Service, *Submission 48*; Australian Human Rights Commission, *Submission 1*. Central Desert Native Title Services agreed with this statement whereas the Australian Human Rights Commission submitted that '[t]he claim of the Larrakia people illustrates the vulnerability and fragility of native title'.

130 See, eg, Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2008' 54–55: 'As it has been stated in many native title reports, providing such evidence generation by generation, while being subject to the strict rules of evidence, is a herculean task for people of an oral culture with a history of dispossession and generations of children that were removed from their parents'.

131 See Ch 1.

132 NSW Young Lawyers Human Rights Committee, *Submission 29*. Native Title Services Victoria noted that '[t]he State of Victoria declined to include continuity of connection as one of the requirements traditional owners are required to establish for a settlement under the Settlement Framework': Native Title Services Victoria, *Submission 45*.

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

5.80 A number of submissions expressed the view that the requirement serves no useful purpose.[134] The Law Society of Western Australia was of the view that 'there is no reason why a temporary failure to observe laws and customs should automatically disqualify a native title claim'.[135] GLSC went further, submitting that '[e]ither the Indigenous rights exist under Indigenous law and custom or they do not; the question of whether that law and custom has been practised continuously since colonisation is for all policy purposes irrelevant'.[136]

5.81 The ALRC considers the requirement to represent an extension of the literal wording of s 223(1) has unnecessarily narrowed the foundation of the test for proving native title. Stakeholders agreed with this approach in that:

- it requires claimants to surmount unnecessarily high evidential 'hurdles'[137] to establish native title;[138]
- it has 'a prejudicial application for those Aboriginal and Torres Strait Islander peoples who have, by choice or otherwise, adapted their cultural practices in response to the profound social and economic impacts of colonisation';[139] and
- it 'operates as a strong incentive for applicants to settle for consent determinations below their expectations lest they risk losing at trial because of "substantial interruption"'.[140]

5.82 The first point was addressed frequently in submissions. Dr Shelley Bielefeld, for example, submitted that '[t]he standard of proof is set so high that attaining a successful outcome for many Aboriginal claimants is more onerous than it should be if rectifying injustice is the aim'.[141] Some stakeholders noted that United Nations treaty bodies—such as the Committee on the Elimination of Racial Discrimination—have

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134 National Native Title Council, *Submission 57*; AIATSIS, *Submission 36*; Goldfields Land and Sea Council, *Submission 22*. Others have also criticised the requirement in this respect. 'Particularly around the issue of the continuous observance and acknowledgment of traditional custom and law … the Australian legal system imposes technical requirements that may be irrelevant to questions of intra-Indigenous justice and, arguably, questions of justice in relation to the broader Australian society too': Duff, above n 84, 17.

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

136 Goldfields Land and Sea Council, *Submission 22*. The Western Australian Fishing Industry Council was also of the view that 'the integrity of traditional law and custom' is the 'key issue'. However, it submitted that continuity is also relevant: Western Australian Fishing Industry Council, *Submission 23*.

137 Transcript of Proceedings, *Risk v Northern Territory* [2007] HCATrans 472 (31 August 2007) (Kirby J).

138 See, eg, AIATSIS, *Submission 70*; AIATSIS, *Submission 36*; Queensland South Native Title Services, *Submission 24*; Native Title Services Victoria, *Submission 18*; North Queensland Land Council, *Submission 17*; A Frith and M Tehan, *Submission 12*; S Bielefeld, *Submission 6*.

139 AIATSIS, *Submission 36*. 'The inevitable changes brought by European settlement to Aboriginal and Torres Strait Islander law and custom do not necessarily result in the abandonment of law and custom. The same could be said of other transformational events and even cataclysmic events, including drought, flood, war and the like': AIATSIS, *Submission 70*. See Ch 6.

140 Just Us Lawyers, *Submission 2*. Others have written of 'the shadow that potential litigation casts on parties' negotiations' and expressed the view that 'negotiations should not take place under the misapprehension that native title is harder to prove at trial than it really is': Duff, above n 84, 5, 57.

141 S Bielefeld, *Submission 6*.

expressed concerns about the high evidential burden on claimants to prove native title.[142]

5.83 As a number of submissions pointed out, the requirement for proof of continuity of the acknowledgment and observance of laws and customs is problematic because the evidence may be limited[143] or have limitations.[144] The Law Society of Western Australia argued that cases where acknowledgment and observance of laws and customs were not found to have continued substantially uninterrupted have reflected, 'either a disproportionate focus on some evidence over other available evidence, or a gap in the evidence of observable acknowledgment and observance of laws and customs, rather than an abandonment of that acknowledgment and observance'.[145]

5.84 A lack of evidence to meet the requirement continues to be a problem for some native title claimants.[146] In the Yugara People's claim, in respect of the need to demonstrate that acknowledgment and observance of traditional laws and customs had continued substantially uninterrupted, the Federal Court observed:

> crucially, the evidence does not cover anything more than a fraction of the period with which the court must be concerned: even to go back to the grandparents of the oldest of the Yugara applicants, there remains the better part of a century with respect to which the court does not have any relevant evidence.[147]

5.85 AIATSIS argued that the need to meet the requirement in circumstances where there is limited or no evidence constitutes 'a form of evidentiary discrimination against those groups who had little or no interaction with non-Indigenous anthropologists and scientists throughout the 19th and 20th centuries'.[148]

5.86 Some stakeholders referred to the limitations of historical records.[149] Frith and Tehan submitted that historical documents that were produced by the states and

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142 National Congress of Australia's First Peoples, *Submission 32*; Australian Human Rights Commission, *Submission 1*.

143 See, eg, Central Desert Native Title Service, *Submission 48*; Law Society of Western Australia, *Submission 41*; AIATSIS, *Submission 36*; Goldfields Land and Sea Council, *Submission 22*; A Frith and M Tehan, *Submission 12*.

144 See, eg, A Frith and M Tehan, *Submission 12*; Just Us Lawyers, *Submission 2*.

145 Law Society of Western Australia, *Submission 9*. The reference to the former is to the primary judge's preference, in *Yorta Yorta*, to a nineteenth century squatter's writings over the evidence of the Yorta Yorta witnesses: *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 (18 December 1998) [123]. The Society submitted that the Larrakia case is an example of the second point.

146 See Ch 7.

147 *Sandy on behalf of the Yugara People v State of Queensland (No 2)* [2015] FCA 15 (27 January 2015) [153].

148 AIATSIS, *Submission 36*. There was support for this statement from other stakeholders. See, eg, Yamatji Marlpa Aboriginal Corporation, *Submission 62*.

149 See, eg, AIATSIS, *Submission 36*; A Frith and M Tehan, *Submission 12*; Just Us Lawyers, *Submission 2*. Just Us Lawyers submitted that '[i]n many cases, we are left with inferring and extrapolating from the observations of 19th century ethnographers (of various quality), pastoralists, explorers and others whose attitudes towards Indigenous culture does little to assist claimants'.

territories may 'not record instances of the acknowledgment and observance of laws and customs because that is not what the State or Territory was interested in'.[150]

5.87 Submissions and consultations also raised specific concerns about the 'generation by generation test'. Some submissions referred to the judgments in the Larrakia people's claim.[151] There, the Federal Court specifically referred to a lack of evidence about the passing on of knowledge of the traditional laws and customs from generation to generation during much of the twentieth century.[152] Concerns have been expressed about the Larrakia case as '[a] break in continuity of traditional laws and customs for just a few decades was sufficient for the court to find that native title did not exist'.[153]

5.88 The ALRC considers that the requirement for acknowledgment and observance of traditional laws and customs by each generation since sovereignty does not accord with the prevalent view in the literature concerning the transmission of laws in Aboriginal and Torres Strait Islander communities.[154] A strict interpretation of the requirement may not recognise transmission of laws and customs from grandparent to grandchild because of the absence of the intervening generation in the process. The ALRC considers that the requirement insufficiently takes account of the impacts of European settlement. Reform would address historic injustice and facilitate the recognition of rights.

5.89 The ALRC considers that the current requirement of proof, to meet the legal test that acknowledgment and observance of law and custom must have occurred substantially uninterrupted by each generation since sovereignty, is a difficult threshold for establishing native title under the *Native Title Act*.

Encouraging timely and just resolution of determinations

5.90 The second reason the ALRC is recommending this reform accords with the objective of encouraging timely and just resolution of determinations.[155] The ALRC considers that the recommendations will assist with the efficiency of the native title system and the timely, but just, resolution of native title claims. A number of stakeholders shared this view.[156] The requirement, with its need for 'fine-grained

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150 A Frith and M Tehan, *Submission 12*. AIATSIS also mentioned the 'bias of those reporting': AIATSIS, *Submission 36*.

151 *Risk v Northern Territory* [2006] 404, 240 ALR 75. See, eg, NSW Young Lawyers Human Rights Committee, *Submission 29*; Australian Human Rights Commission, *Submission 1*.

152 *Risk v Northern Territory* [2006] FCA 404 (29 August 2006) [823].

153 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2009' (Australian Human Rights Commission, 2009) 86. The Full Court of the Federal Court observed that 'His Honour found that the laws acknowledged and customs observed by Larrakia as a whole were interrupted between the war and the 1970s': *Risk v Northern Territory* (2007) 240 ALR 75, [106].

154 See, eg, Paul Memmott, 'Modelling the Continuity of Aboriginal Law in Urban Native Title Claims: A Practice Example' in Toni Bauman and Gaynor MacDonald (eds), *Unsettling Anthropology: The Demands of Native Title on Worn Concepts and Changing Lives* (AIATSIS, 2011) 122, 130.

155 Guiding Principle 3.

156 NTSCORP, *Submission 67*; National Native Title Council, *Submission 57*; Central Desert Native Title Service, *Submission 48*.

historical enquiries',[157] burdens native title applicants and their representatives in terms of both cost and time.[158] Further, it places resource burdens on state and territory governments and also on the Australian Government, where the Commonwealth is the respondent. Governments must assess voluminous material as well as undertake tenure assessments. The ALRC heard in consultations that there were particular problems for governments in identifying experts with requisite expertise.[159] Additionally, the requirement reduces the timeliness of the overall process.[160]

5.91 NTSCORP Limited ('NTSCORP') submitted that the reform, together with other recommendations in this chapter, would assist mediation processes by reducing the number of issues and the time needed.[161] The ALRC considers that implementation of these two recommendations should reduce similarly the number of issues that might be contested in litigation—working consistently with the Federal Court's case management reforms—and consequently, the time taken in that legal process.

5.92 The ALRC considers that implementation of the recommendations will encourage just resolution of determinations in at least two ways. First, by reconceptualising the continued acknowledgment and observance of traditional laws and customs. At present, the requirement gives pre-eminence to continued acknowledgment and observance of laws and customs in a relatively decontextualised way, which ignores the past impacts of European settlement on Aboriginal and Torres Strait Islander communities. Second, by reducing the extent to which the approach taken to construction of the requirements may vary between governments throughout Australia and between consent determinations and litigated outcomes.[162]

A necessary part of native title law?

5.93 State and territory government submissions contended that substantially uninterrupted continuity of the acknowledgment and observance of traditional laws and customs is an important aspect of native title law.[163] On a practical level, the Queensland Government submitted that 'it is probably not possible to remove evidence of continuing connection without affecting the quality of the evidence required to demonstrate other indicia of the existence of native title'.[164]

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

158 National Native Title Council, *Submission 57*; AIATSIS, *Submission 36*.

159 See Ch 12.

160 National Native Title Council, *Submission 57*.

161 NTSCORP, *Submission 67*.

162 Submissions suggested that there may be regional variation and variation between outcomes that could be achieved by consent or at trial: Central Desert Native Title Service, *Submission 48*; Just Us Lawyers, *Submission 2*.

163 South Australian Government, *Submission 34*; Northern Territory Government, *Submission 31*; Western Australian Government, *Submission 20*. Accordingly, the South Australian Government could not conceive of its application causing injustice. 'It is difficult to conceive of a situation where an injustice could be wrought upon a party seeking native title where a substantial interruption had occurred, if only because it suggests that the basis for any positive native title finding does not exist': South Australian Government, *Submission 34*.

164 Queensland Government, *Submission 28*.

5.94 The Western Australian Government submitted that '[a]ny proposal to remove, or fundamentally alter, the requirement to demonstrate adherence to a continuing normative system based on pre-settlement laws and customs ignores a central tenet of the *Mabo No 2* decision'.[165]

5.95 The ALRC considers that, while the recognition of native title is anchored in traditional laws and customs at sovereignty, such an intensive level of continuity of acknowledgment and observance of laws and customs was arguably not envisaged in *Mabo [No 2]*. There, Brennan J referred to a need for acknowledgment and observance of laws and customs, 'so far as it is practicable to do so'.[166] Similarly, the Law Council of Australia submitted:

> there was no indication in *Mabo [No 2]* (the findings of which were intended to be given a statutory framework by the Act) that the recognition of continuing native title rights and interests was dependent upon the continuity of a normative system of laws and customs in a pre-sovereign normative society.[167]

5.96 As a number of stakeholders noted, the words of s 223 of the *Native Title Act* do not mention a need for 'substantially uninterrupted' continuity of the acknowledgment of traditional laws and the observance of traditional customs.[168] Rather, as has been explained above, the majority of the High Court in *Yorta Yorta* interpreted the word 'traditional', where it occurs in s 223(1)(a), in such a way that it effectively imports an independent requirement for proof of substantially uninterrupted continuity of the acknowledgment and observance of traditional laws and customs. Arguably, the Full Federal Court approved the further refinement of the requirement so that the acknowledgment and observance of the laws and customs must have continued substantially uninterrupted by each generation since sovereignty.[169] The ALRC considers that this so-called continuity requirement has been 'read into'[170] s 223(1) of the Act.

5.97 The Hon Paul Finn has argued that the effect of the interpretation of s 223 in *Yorta Yorta* produced a 'discernible hardening of the arteries of the *Native Title Act*'.[171] AIATSIS submitted that the continuity requirement stems from the 'painful' statutory interpretation of s 223. It saw that interpretation as arguably flawed because it was not based on common law traditions for interpreting legislation where the rules are 'root[ed] in the common law protection of the rights of citizens against arbitrary exercises of power by the state, especially in relation to property'.[172]

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165 Western Australian Government, *Submission 20*.
166 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 60.
167 Law Council of Australia, *Submission 35*.
168 See, eg, NTSCORP, *Submission 67*; National Native Title Council, *Submission 57*; Kimberley Land Council, *Submission 30*; Queensland South Native Title Services, *Submission 24*; North Queensland Land Council, *Submission 17*; Australian Human Rights Commission, *Submission 1*.
169 See *Bodney v Bennell* (2008) 167 FCR 84; *Risk v Northern Territory* (2007) 240 ALR 75. AIATSIS quoted Dr Lisa Strelein who has argued that it was the Full Federal Court in *Bodney v Bennell* that 'added the proviso that continuity be demonstrated "for each generation"': AIATSIS, *Submission 36*.
170 AIATSIS, *Submission 36*.
171 Paul Finn, '*Mabo* into the Future: Native Title Jurisprudence' (2012) 8 *Indigenous Law Bulletin* 5, 6.
172 AIATSIS, *Submission 36* quoting Dr Lisa Strelein.

5.98 The ALRC considers that it is consistent with the promotion of the beneficial purpose of the *Native Title Act*, and a 'fair, large and liberal' approach to statutory construction, to provide explicitly that it is not necessary to establish that acknowledgment and observance of laws and customs has continued substantially uninterrupted by each generation since sovereignty. A number of stakeholders supported this approach.[173] Such an approach accords with international law such as UNDRIP and the International Convention on the Elimination of All Forms of Racial Discrimination ('CERD').[174]

What level of continued acknowledgment and observance is required of laws and customs with origins in the pre-sovereign period?

5.99 As outlined, the ALRC considers that the requirement for 'substantially uninterrupted' acknowledgment and observance of laws and customs since sovereignty, particularly the 'generation by generation' test, is too stringent. It must be emphasised that the ALRC is not proposing change to the requirement, stemming from *Mabo [No 2]*, that the relevant laws and customs must find their origins in the pre-sovereign period.

5.100 This leaves the question of what degree of continued acknowledgment and observance of traditional laws and customs since annexation is required to meet the doctrinal tenets of *Mabo [No 2]* as adopted in the actual wording of s 223(1)(a). That is, what degree of continued acknowledgment and observance of traditional laws and customs is needed to establish that 'the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders'?

5.101 In *Mabo [No 2]*, Brennan J referred to continuity in terms of a substantial maintenance of connection:

> Where a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connexion with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence.[175]

5.102 That is, acknowledgment and observance of laws and customs from prior to the assertion of sovereignty is required to found the common law's recognition of connection, in a broad sense.[176]

5.103 In *Yorta Yorta*, Gleeson CJ, Gummow and Hayne JJ stated that it would be 'wrong' to look only at the laws and customs that are currently observed. They

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173 Indigenous Land Corporation, *Submission 66*; National Native Title Council, *Submission 57*; A Frith and M Tehan, *Submission 52*; Central Desert Native Title Service, *Submission 48*.

174 *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st Sess, 107th Plen Mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969). International law is discussed further in Ch 9.

175 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 59–60.

176 See Ch 3.

continued that it is 'necessary to inquire about the relationship between the laws and customs now acknowledged and observed, and those that were acknowledged and observed before sovereignty'.[177]

5.104 The ALRC similarly considers that there must be some link or 'relationship'[178] between pre-sovereignty origins of the law and custom and the laws and customs presently acknowledged and observed by the claimant group. However, substantially uninterrupted continuity of acknowledgment and observance of laws and customs, in the ALRC's view, puts too high an evidential burden on claimants. The terms 'substantially maintained'[179] or 'identifiable through time'[180] may be more appropriate approaches to the level of continuity required to found the existence of native title.

Continuity of society

Recommendation 5–4 The definition of native title in s 223 of the *Native Title Act 1993* (Cth) should be amended to clarify that it is not necessary to establish that a society united in and by its acknowledgment and observance of traditional laws and customs has continued in existence since prior to sovereignty.

5.105 The ALRC recommends that the definition of native title should be amended to make clear that, in the proof of native title, there is no independent requirement to establish continuity of a society united in and by its acknowledgment and observance of traditional laws and customs.

5.106 The High Court in *Yorta Yorta* noted that laws and customs 'do not exist in a vacuum'.[181] Therefore, there is an inextricable link between a society and its laws and customs. If a society—understood as a body of persons united in and by its acknowledgment of a body of laws and customs—ceases to exist, the laws and customs (and rights and interests possessed under them) also cease.[182] Following *Yorta Yorta*, subsequent native title determinations have involved detailed consideration of the native title claim group's membership of a society united in and by its acknowledgment

177 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [56].
178 Ibid [56] (Gleeson CJ, Gummow and Hayne JJ).
179 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 59 (Brennan J). Note that the phrase is used with respect to connection.
180 Native Title Amendment (Reform) Bill 2014 cl 18. The Bill relevantly proposes a new s 223(1A) which would state, 'Without limiting subsection (1), traditional laws acknowledged in that subsection includes such laws as remain identifiable through time, regardless of whether there is a change in those laws or in the manner in which they are acknowledged'. Proposed new s 223(1B) concerns 'traditional customs observed' and is expressed in similar terms.
181 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [49] (Gleeson CJ, Gummow and Hayne JJ).
182 Ibid [51]–[53] (Gleeson CJ, Gummow and Hayne JJ).

and observance of traditional laws and customs, as well as the continuity of that society.[183]

5.107 Recommendation 5–4 makes clear that establishing a society is relevant only as a 'conceptual tool' to assist in answering the central definitional question of whether rights and interests are possessed under traditional laws acknowledged, and traditional customs observed, by the native title claim group.[184] It is intended to promote an interpretation of the definition of native title consistent with the Preamble and objects of the *Native Title Act*. In doing so, the recommendation will further the objective of appropriate recognition of Aboriginal and Torres Strait Islander rights and interests. In overcoming an overly technical approach to statutory construction, it will also reduce complexity and promote efficiency in native title claims resolution.

5.108 The ALRC considers that the focus of the factual inquiry in native title claims should be on the integrity of the laws and customs that found native title rights and interests, and not on finding extensive continuity between a society as it existed at sovereignty and the present day. In this respect, the ALRC agrees with Dr Paul Burke's contention that '"society" is not conceptually distinct, but overlapping with other elements of native title legal doctrine, and there should not be a need to address it separately'.[185]

5.109 A number of submissions supported a recommendation making clear that establishing the existence of a society is not an independent element of establishing native title.[186] Some expressly agreed with the ALRC's analysis that the 'society' requirement has 'imposed an overly technical approach to statutory construction and proof on native title applicants'.[187]

5.110 A number of submissions to this Inquiry were critical of the use of the concept of 'society' in native title law.[188] Frith and Tehan submitted that decisions related to society 'have generally tended to limit the prospect that native title applicants can

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183 See, eg, the discussion of society in *AB (deceased) (on behalf of the Ngarla People) v Western Australia (No 4)* [2012] FCA 1268 (21 November 2012) [159]–[179]. See also the summary of the matters to be addressed to satisfy s 223(1) in *Lander v South Australia* [2012] FCA 427 (1 May 2012) [32]–[34].

184 In *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* the Full Federal Court emphasised that the term 'society' is not found in the words of the Act, and is to be used as a conceptual tool in the application of the words of the *Native Title Act*: *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [78].

185 Paul Burke, 'Overlapping Jural Publics: A Model for Dealing with the "Society" Question in Native Title' in Toni Bauman (ed), *Dilemmas in Applied Native Title Anthropology in Australia* (AIATSIS, 2010) 55, 65–66. See also P Burke, *Submission 33*; Goldfields Land and Sea Council, *Submission 22*.

186 AIATSIS, *Submission 70*; National Congress of Australia's First Peoples, *Submission 69*; NTSCORP, *Submission 67*; Indigenous Land Corporation, *Submission 66*; Law Council of Australia, *Submission 64*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; National Native Title Council, *Submission 57*; Queensland South Native Title Services, *Submission 55*; A Frith and M Tehan, *Submission 52*; Central Desert Native Title Service, *Submission 48*; Native Title Services Victoria, *Submission 45*.

187 A Frith and M Tehan, *Submission 52*. See also National Native Title Council, *Submission 57*.

188 National Native Title Council, *Submission 57*; A Frith and M Tehan, *Submission 52*; Central Desert Native Title Service, *Submission 48*; Law Council of Australia, *Submission 35*; P Burke, *Submission 33*; NSW Young Lawyers Human Rights Committee, *Submission 29*; Goldfields Land and Sea Council, *Submission 22*; Cape York Land Council, *Submission 7*.

establish native title'.[189] GLSC submitted that the 'society issue is a prime example of the unfortunate development of quite unnecessary technicality and legalism in native title'.[190]

5.111 The ALRC considers that limiting such technicality may assist in lessening the time and reducing the resources involved in native title claims. CDNTS supported such a recommendation. It noted:

> a great deal of time and resources are spent obtaining evidence to establish 'societies' when what is, in fact, required under the NTA is the identification of a group who holds rights and interests in relation to land in accordance with law and custom.[191]

5.112 NTSCORP considered that such a recommendation, along with others made in this chapter,

> would alleviate some of the time taken discussing these issues during the mediation processes … in the prosecution of native title claims. These changes would also assist in narrowing the substantive issues for mediation.[192]

5.113 The NNTC argued that the society concept adds considerable delay to the process of establishing native title.[193]

5.114 Some submissions considered that the language of a society 'united in and by its acknowledgment and observance of a body of law and customs' is improperly suggestive of a need to prove the survival of an extensive social system, rather than of the relevant laws and customs relating to land and waters. The Law Council of Australia argued that reference to society

> constitutes a gloss on the statutory language of s 223(1) of the Act. Emphasis on these matters risks over-emphasising continuity of laws and customs of pre-sovereignty, such as rules about marriage, initiation and birthing practices, traditional language, which may have little relevance to whether particular customs in relation to land and waters have continued. The exercise of customary practices, such as hunting and fishing at particular times, are more relevant to establishing the existence of traditional customs than the requirement of a 'normative' system of laws and customs practised by a 'normative' society.[194]

5.115 GLSC pointed to the 'unfairness of having to demonstrate the continuity of cultural practice and social cohesion in the face of a history of dispossession, cultural disruption, forced assimilation and geographical dispersal'.[195] The Young Lawyers Human Rights Committee argued:

> allowing native title to be tested on a concept of society ultimately involves superficial value judgments about Indigenous ways of life, and inappropriately

189 A Frith and M Tehan, *Submission 12*.
190 Goldfields Land and Sea Council, *Submission 22*.
191 Central Desert Native Title Service, *Submission 48*.
192 NTSCORP, *Submission 67*.
193 National Native Title Council, *Submission 57*.
194 Law Council of Australia, *Submission 35*.
195 Goldfields Land and Sea Council, *Submission 22*.

> measures traditional, nomadic society against the legal ideas and institutions of a 'civilised' society.[196]

5.116 It does not follow from Recommendation 5–4 that it will be open to 'non-traditional' contemporary groups to claim native title. The Western Australian Government argued that:

> Absence of a traditional society implies that non-traditional groupings of Aboriginal people may assert rights … This also implies that the laws and customs relied upon to sustain rights and interests need not be those which existed at sovereignty, but, rather, only be those of the contemporary group.[197]

5.117 However, native title claimants will continue to be required to establish that they hold rights and interests under traditional laws and customs acknowledged and observed by them. The recommendations in this chapter do not disturb the meaning of traditional laws and customs as those laws and customs that have their origins in those acknowledged and observed at sovereignty. This will continue to be the case, notwithstanding the explicit provision that such laws and customs may evolve, adapt and otherwise change, as recommended in Recommendation 5–1.

5.118 The South Australian Government correctly pointed out that establishing the identity of native title holders is a critical part of the native title determination process, and requires evidence as to the nature of the contemporary group.[198] It raised concern that Recommendation 5–4 would affect this requirement.

5.119 The ALRC considers that nothing in this recommendation dispenses with the need to identify whether the claim group hold native title rights and interests under presently acknowledged traditional laws and presently observed traditional customs, where traditional laws and customs are understood as laws and customs that have their origins in those acknowledged and observed at sovereignty. The relevant laws and customs are those which found the claimed rights and interests. Beyond this, proof of the survival of a more extensive society should not be relevant to establishing native title.

Recognition of succession

Recommendation 5–5 The definition of native title in s 223 of the *Native Title Act 1993* (Cth) should be amended to provide that rights and interests may be possessed by a native title claim group where they have been:

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

197 Western Australian Government, *Submission 43*. The Chamber of Minerals and Energy of Western Australia raised similar concerns: The Chamber of Minerals and Energy of Western Australia, *Submission 49*. The South Australian Government also pointed out that there are 'often numerous contemporary socio-political Aboriginal groups that seek to have influence over the same area': South Australian Government, *Submission 68*.

198 South Australian Government, *Submission 68*.

(a) transmitted or transferred between Aboriginal or Torres Strait Islander groups in accordance with the traditional laws and customs of those groups; or

(b) otherwise acquired in accordance with traditional laws and customs.

5.120 There is some uncertainty as to whether a native title claim group can establish that it holds native title rights and interests where those rights and interests were held by a different group at sovereignty. This process is often referred to, in the native title context, as 'succession'.

5.121 The ALRC recommends that the definition of native title be amended to make clear that native title rights and interests may be succeeded to by another Aboriginal or Torres Strait Islander group, where these rights and interests have been transmitted, transferred or otherwise acquired in accordance with traditional laws and customs.

5.122 This recommendation addresses an area of uncertainty in native title law. The ALRC views this recommendation as consistent with the beneficial purpose of the *Native Title Act*. Recognition of succession does not, in the ALRC's view, disturb the basis of recognition of native title—that is, it does not involve a greater burden on the radical title of the Crown than existed at sovereignty.[199] It is also arguably consistent with Aboriginal understandings of the range of ways in which rights and interests in land and waters may be acquired.[200]

Is succession possible under the *Native Title Act*?

5.123 There is a lack of clarity in the case law as to the possibility of succession to native title rights and interests under the *Native Title Act*.[201] Mansfield J, in *Croft on behalf of the Barngarla Native Title Claim Group v South Australia*, stated that

> the question of whether it is permissible for a native title claim group to claim land that was not land to which their apical ancestors possessed any rights and interests to under their laws and customs is a question that has arisen in past cases but has not been authoritatively resolved.[202]

5.124 The judgment of Gleeson CJ, Gummow and Hayne JJ in *Yorta Yorta* may be considered to provide some support for the efficacy of transmission of native title rights and interests from one group to another:

199 *Bodney v Bennell* (2008) 167 FCR 84, [121].

200 See, eg, Peter Sutton, 'Kinds of Rights in Country: Recognising Customary Rights as Incidents of Native Title' (Occasional Papers 2, National Native Title Tribunal, 2001) 6–11; Peter Sutton, *Native Title in Australia: An Ethnographic Perspective* (Cambridge University Press, 2003) 116–118.

201 For an anthropological discussion of the process of succession, see: Sutton, 'Kinds of Rights in Country: Recognising Customary Rights as Incidents of Native Title', above n 200, 6–11.

202 *Croft on behalf of the Barngarla Native Title Claim Group v South Australia* [2015] FCA 9 (22 January 2015) [711].

> The rights and interests in land which the new sovereign order recognised included the rules of traditional law and custom which dealt with the transmission of those interests.[203]

5.125 It appears that succession to native title rights and interests is likely to be accepted as legitimate where both the transferring and transferee groups are considered to be part of the same 'society' for native title purposes—that is, where both groups can be considered to be part of a society 'united in and by its acknowledgment and observance of a body of laws and customs'.[204]

5.126 In *Western Australia v Sebastian*, the Full Federal Court was inclined to the view that succession could occur, in factual circumstances where succession occurred as the numbers of one group had reduced and it was in accordance with the 'common traditional laws and customs' of the two relevant Aboriginal clans.[205]

5.127 However, the Full Federal Court has expressed doubt about the ability to transmit native title rights and interests between different native title 'societies'. In *Dale v Moses*, Moore, North and Mansfield JJ considered the remarks made in *Yorta Yorta* about transmission did not encompass succession. The Full Federal Court considered that the statement in *Yorta Yorta* was

> probably directed to intergenerational transmission of rights and interests under traditional laws within the society possessing rights and interests in the land under traditional laws and customs at the time of sovereignty. The observations of the members of the High Court do not establish a principle of the type … that where the traditional laws and customs of one society provide for the transmission of rights and interests in land recognised by those laws and customs, then transmission to another society can be effected and the acquisition of the transferred rights in interest [sic] can ultimately be recognised as rights and interests of the transferee society for the purposes of the NTA.[206]

5.128 A number of submissions supported a recommendation to explicitly recognise succession to native title rights and interests.[207] CDNTS regarded this as 'a sensible

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203 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [44].

204 Ibid [49] (Gleeson CJ, Gummow and Hayne JJ). See the discussion accompanying Rec 5–4 for a more detailed exposition of the meaning of society in native title.

205 *Western Australia v Sebastian* (2008) 173 FCR 1, [104]. See also *Croft on behalf of the Barngarla Native Title Claim Group v South Australia* [2015] FCA 9 (22 January 2015) [710]–[719]; *AB (deceased) (on behalf of the Ngarla People) v Western Australia (No 4)* [2012] FCA 1268 (21 November 2012) [577]–[579]; *Graham on behalf of the Ngadju People v Western Australia* [2012] FCA 1455 (21 December 2012) [31]–[33]; *Lardil Peoples v Queensland* [2004] FCA 298 (23 March 2004) [127]–[132].

206 *Dale v Moses* [2007] FCAFC 82 (7 June 2007) [120]. Mansfield J has stated that 'in my opinion, there is no inconsistency between the views expressed in *Dale v Moses* and *Western Australia v Sebastian*': *Croft on behalf of the Barngarla Native Title Claim Group v South Australia* [2015] FCA 9 (22 January 2015) [717].

207 AIATSIS, *Submission 70*; National Congress of Australia's First Peoples, *Submission 69*; NTSCORP, *Submission 67*; Indigenous Land Corporation, *Submission 66*; Law Council of Australia, *Submission 64*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; D Wy Kanak, *Submission 61*; National Native Title Council, *Submission 57*; Queensland South Native Title Services, *Submission 55*; A Frith and M Tehan, *Submission 52*; Central Desert Native Title Service, *Submission 48*; Native Title Services Victoria, *Submission 45*; S Jackson and PL Tan, *Submission 44*; North Queensland Land Council, *Submission 42*.

clarification of the law regarding a legitimate practice'.[208] It noted that 'succession between groups in accordance with traditional law and custom is not uncommon, particularly where groups have significantly reduced in number or ceased to exist, often due to the impact of non-Aboriginal settlement activity'.[209] Similarly, NTSV argued that 'the transfer of rights and interests between sub-sets of a society or between different groups is an accepted practice with a traditional basis within Victoria'.[210]

5.129 The ALRC considers that succession, where in accordance with traditional laws and customs, should be recognised by the *Native Title Act* regardless of whether the transferring and transferee groups are considered to be part of one society for native title purposes. This is in keeping with a fair, large and liberal approach to the interpretation of the *Native Title Act*.

5.130 Recommendation 5–5 follows from 5–4, which recommends that it be made clear in the *Native Title Act* that it is not necessary to establish that a society united in and by its acknowledgment and observance of traditional laws and customs has continued in existence since sovereignty. Both recommendations suggest that, instead of focusing on notions of 'society', attention should appropriately be directed to whether rights and interests in land and waters are possessed in accordance with traditional laws and customs.

5.131 Succession to native title rights and interests, where they have been transmitted in accordance with traditional laws and customs, was arguably envisaged in *Mabo [No 2]*.[211] In that case, discussing alienability of native title, Brennan J stated:

> a right or interest possessed as a native title cannot be acquired from an indigenous people by one who, not being a member of the indigenous people, does not acknowledge their laws and observe their customs; nor can such a right or interest be acquired by a clan, group or member of the indigenous people unless the acquisition is consistent with the laws and customs of that people.[212]

5.132 Deane and Gaudron JJ stated:

> The enjoyment of the rights can be varied and dealt with under the traditional law or custom. The rights are not, however, assignable outside the overall native system.[213]

5.133 The ALRC notes the objections made to a recommendation of this kind by state governments, as well as from industry stakeholders.[214] The South Australian Government submitted that transmission of rights in land between groups after sovereignty should not be permissible:

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208 Central Desert Native Title Service, *Submission 48*.
209 Ibid.
210 Native Title Services Victoria, *Submission 45*.
211 Justice Robert French, 'Mabo—Native Title in Australia' (2004) 23 *Federal Judicial Scholarship* [27].
212 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 60.
213 Ibid 110.
214 South Australian Government, *Submission 68*; Minerals Council of Australia, *Submission 65*; Association of Mining and Exploration Companies, *Submission 54*; The Chamber of Minerals and Energy of Western Australia, *Submission 49*; Western Australian Government, *Submission 43*.

> Such transmission could lead to the creation of new native title rights, not only after the assertion of British sovereignty but potentially into the present day and future. Such a process would require the acceptance that native title is a parallel legal system that continues to evolve alongside the common law and this would contravene the ideal, first elucidated in *Mabo* and emphasised in *Ward* and *Yorta Yorta*, that native title should not fracture the skeleton of the Australian legal system.[215]

5.134 The Western Australian Government argued that rights and interests that have been succeeded to are,

> by definition, not rights and interests which existed at sovereignty because at sovereignty the relevant rights were held by a different group under different laws and customs.[216]

5.135 The ALRC does not consider such transfer to involve the creation of new rights. Instead, it views this is an example of a change in the distribution of rights, and not a creation of rights. As such it does not 'impose a greater burden on the Crown's radical title' than existed at sovereignty.[217]

5.136 There are precedents for the recognition of the transfer of rights between Indigenous peoples in other jurisdictions. In New Zealand, the *Marine and Coastal Area (Takutai Moana) Act 2011* provides for customary transfer of land.[218] Section 58(3) of that Act provides that

> (a) a transfer is a customary transfer if a customary interest in a specified area of the common marine and coastal area was transferred—
> (i) between or among members of the applicant group; or
> (ii) to the applicant group or some of its members from a group or some members of a group who were not part of the applicant group; and
> (b) the transfer was in accordance with tikanga; and
> (c) the group or members of the group making the transfer—
> (i) held the specified area in accordance with tikanga; and
> (ii) had exclusively used and occupied the specified area from 1840 to the time of the transfer without substantial interruption; and
> (d) the group or some members of the group to whom the transfer was made have—
> (i) held the specified area in accordance with tikanga; and
> (ii) exclusively used and occupied the specified area from the time of the transfer to the present day without substantial interruption.[219]

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215 South Australian Government, *Submission 68*.

216 Western Australian Government, *Submission 43*.

217 *Bodney v Bennell* (2008) 167 FCR 84, [120]. The Full Court suggested that the proposition that there cannot be changes in the distribution of rights after sovereignty paid 'insufficient attention' to what was said in *Yorta Yorta*: [119].

218 *Marine and Coastal Area (Takutai Moana) Act 2011* (NZ) s 58(1).

219 Ibid s 58(3). 'Tikanga' is defined in the Act as 'Māori customary values and practices': s 9.

Factual complexity

5.137 Succession to land or waters often involves complex factual scenarios, as a number of submissions noted.[220] QSNTS submitted:

> succession occurs over a long period and it is never really complete (it is only ever complete in circumstances where the group has completely died out). In most cases, there is an overlap between different interests over the same area. No doubt the issue is very complex.[221]

5.138 Such factually complex scenarios at present are to be resolved under current native title law. The ALRC's recommendation will remove a barrier to recognition of native title rights and interests where succession has occurred in accordance with traditional laws and customs. However, factual complexity, which may be attended by intra-Indigenous conflict, will remain. Cultural sensitivity is needed in approaching questions of succession. As QSNTS argued, these issues require 'a thorough appreciation of the anthropological and genealogical evidence and, culturally appropriate, sensitive management'.[222] QSNTS further advocated that 'culturally tailored alternative dispute resolution processes would need to be built around the negotiation and resolution of these matters'.[223]

5.139 The Law Society of Western Australia submitted:

> Room needs to be left for the analysis of normative systems referable to an existence which preceded colonisation which is fully comprehensive of the reality of how Aboriginal and Torres Strait Islander peoples' normative systems have evolved. It is by no means clear that the courts or the expert witnesses who have informed them in matters of ethnography have developed an entirely satisfactory set of models with which to analyse the range of normative systems which may exist in Australia.[224]

5.140 On a practical level, the question of whether succession to native title rights and interests is by a different 'society', rather than between groups within a single society, may be avoided by framing a claim at the level of a region, or cultural bloc.[225] In such cases, the question of succession to areas of land or waters will largely arise as an issue of succession *within* a society. QSNTS supported this approach, submitting:

> the phenomenon [of succession] might be better explored and explained from a broader or regional perspective where commonalities between cultural blocs particularly if such societies are governed by common nor mative systems can be identified.[226]

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220 See, eg, Minerals Council of Australia, *Submission 65*; Queensland South Native Title Services, *Submission 55*; The Chamber of Minerals and Energy of Western Australia, *Submission 49*; Western Australian Government, *Submission 43*.

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

222 Ibid.

223 Ibid.

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

225 For example, in February 2015, an application for determination of native title covering the Cape York region of Queensland was registered by the National Native Title Tribunal: *Cape York United Number 1 Claim v State of Queensland (Cape York United Number 1 Claim) Federal Court no QUD673/2014; NNTT no QC2014/008*.

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

5.141 Contrary to concerns raised by some submissions,[227] the ALRC does not consider that Recommendation 5–4 will allow groups who have moved into an area since sovereignty (sometimes referred to as 'historical' people) to establish that they hold native title rights and interests.[228]

5.142 Dr David Martin explains that the terms 'traditional' and 'historical' people are used by some Aboriginal people to differentiate between types of associations to country. Traditional refers to:

> Those who are recognised as members of the 'tribal' groups whose lands lie within the region … They are the ones who can legitimately 'talk for country' and thus should be consulted about its use. The 'historical' people include those who are living in a particular area now, but who are from elsewhere in this region, and those who have moved here from outside the region entirely.[229]

5.143 'Historical' groups would not be able to show that they have succeeded to rights and interests in accordance with *traditional* laws and customs. For example, groups who have been granted only a revocable permission or a licence to use an area by native title holders would not be able to establish that they have native title rights and interests in an area.[230]

5.144 The ALRC notes the views of some anthropologists that the native title process crystallises distinctions between 'traditional' and 'historical' people, resulting in 'increased levels of conflict and stress' in Indigenous settlements.[231] However, the *Native Title Act*, premised on the recognition of the pre-existing rights of Aboriginal and Torres Strait Islander peoples, is not able to act as the vehicle for recognising 'historical' associations to land and waters. Other mechanisms for land settlements with Aboriginal and Torres Strait Islander peoples may more appropriately recognise the spectrum of associations to land that may exist in an area.[232]

Implications for s 223(1)(b)

5.145 Amendments affecting how s 223(1)(a) is interpreted will have a consequential effect on the construction of s 223(1)(b). Section 223(1)(b) requires that the relevant Aboriginal peoples or Torres Strait Islanders, by 'those laws and customs'—that is, the

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227 Northern Territory Government, *Submission 71*; South Australian Government, *Submission 68*; Minerals Council of Australia, *Submission 65*; The Chamber of Minerals and Energy of Western Australia, *Submission 49*; Western Australian Government, *Submission 43*.

228 See generally David Edelman, 'Broader Native Title Settlements and the Meaning of the Term "Traditional Owners"' (Paper Presented at AIATSIS Native Title Conference, 4 June 2009); David Martin, 'The Incorporation of "Traditional" and "Historical" Interests in Native Title Representative Bodies' in DE Smith and J Finalyson (eds), *Fighting Over Country: Anthropological Perspectives* (CAEPR Research Monograph No 12, 1997) 153.

229 Martin, above n 205, 157.

230 See *AB (deceased) (on behalf of the Ngarla People) v Western Australia (No 4)* [2012] FCA 1268 (21 November 2012) [521].

231 Benjamin R Smith and Frances Morphy, 'The Social Effects of Native Title: Recognition, Translation, Coexistence' in Benjamin R Smith and Frances Morphy (eds), *The Social Effects of Native Title: Recognition, Translation, Coexistence* (ANU E Press, 2007) 1, 12.

232 See, eg, *Aboriginal Land Rights Act 1983* (NSW); *Traditional Owner Settlement Act 2010* (Vic).

traditional laws and customs referred to in s 223(1)(a)[233]—have a connection with the land or waters.[234]

5.146 The Full Federal Court in *Bodney v Bennell* set out the relationship between the level of continuity of acknowledgment and observance of traditional laws and customs required by s 223(1)(a) and the level of continuity of connection required by s 223(1)(b). It stated:

> the laws and customs which provide the required connection are 'traditional' laws and customs. For this reason, their acknowledgment and observance must have continued 'substantially uninterrupted' from the time of sovereignty; and the connection itself must have been 'substantially maintained' since that time.[235]

5.147 The ALRC considers that it follows from Recommendations 5–2 and 5–3 that a commensurate approach should be taken to establishing connection for the purpose of satisfying s 223(1)(b).

233 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [46], [86] (Gleeson CJ, Gummow and Hayne JJ); *Western Australia v Ward* (2002) 213 CLR 1, [18] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Bodney v Bennell* (2008) 167 FCR 84, [165].

234 See Ch 6 for further discussion of connection.

235 *Bodney v Bennell* (2008) 167 FCR 84, [168].