6. Connection with the Land or Waters

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Summary

6.1 This chapter complements Chapters 5 and 7 as part of the set of chapters concerned with 'connection requirements for the recognition of native title rights and interests'. This chapter concentrates on how connection to land and waters is proved. Section 223(1)(b) states that 'the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters'.

6.2 The chapter starts with an overview of the various meanings of 'connection' in native title law as relevant to examining connection requirements generally,[1] and the two specific options for reform that are the focus of this chapter. These two options for reform are whether there should be:

- confirmation that 'connection with the land and waters' does not require physical occupation or continued or recent use; and
- empowerment of courts to disregard substantial interruption or change in continuity of acknowledgement and observance of traditional laws and customs where it is in the interests of justice to do so.[2]

6.3 With respect to the first option for reform, the ALRC considers that the law is already clear in not requiring evidence of physical occupation or recent and continued use in order to establish connection in s 223(1)(b). The ALRC makes no recommendation to confirm this in the *Native Title Act 1993* (Cth) ('*Native Title Act*'). However, two provisions of the *Native Title Act*—dealing with the claimant application and the registration test—refer to 'traditional physical connection' with land and waters and these appear to be causing confusion about the substantive law regarding connection. The ALRC recommends the repeal of these provisions.

6.4 The next section of the chapter considers the feasibility of reframing the definition of connection in s 223(1) of the *Native Title Act*. The ALRC gauged support for a redefinition of connection that gave priority to the present connection 'as a relationship with country'—although retaining origins of the laws and customs in the pre-sovereign period. The ALRC stresses the importance of giving primacy to Indigenous peoples' own expressions of connection in line with best practice international standards.[3] However, no recommendation is made to amend s 223(1)(b).

6.5 The chapter then considers two areas of law relevant to the second option for reform. First, there is discussion of whether revitalisation of traditional law and custom should be a permissible factor for establishing connection in s 223(1)(b). The ALRC considers that Recommendation 5–1, to the effect that traditional laws and customs may adapt, evolve and develop, provides an effective measure.[4] Statutory amendment around revitalisation is not warranted.

6.6 Second, the ALRC examines 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'. The ALRC, after careful consideration of the complex matters involved in this option for reform, has concluded that direct legislative amendment of the definition in s 223 is a more targeted means of law reform; with the expected net effect of

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1 An overview of the law on connection is contained in Ch 4. This chapter includes a more in-depth analysis of that law, as well as discussion of relevant legal frameworks, eg evidence gathered in connection reports.

2 See the Terms of Reference.

3 *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.

4 See Rec 5–1, discussed in Ch 5.

Recommendations 5–1 to 5–5 better addressing the concerns that gave rise to the suggested option for reform.[5] The ALRC considers that no specific statutory reform is required to empower courts to disregard substantial interruption or change in continuity.

Connection

What is connection?

6.7 *Mabo v Queensland [No 2]* (‘*Mabo [No 2]*’) held that native title is ‘ascertained according to the laws and customs of the indigenous people who, by those laws and customs, have a connexion with the land’.[6] This proposition finds statutory reflection in s 223(1)(b) of the *Native Title Act*—‘the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters’.

6.8 The North Queensland Land Council (‘NQLC’) submitted that:

> Aboriginal and Torres Strait Islander people understand connection to be gained through affiliation with ancestors dating back to a time before sovereignty but this is not necessarily the totality of how connection is viewed because connection is also a social experience and involves interaction with a living group of people associated with a particular area who, in the native title context, identify as native title holders for that area. The possession and speaking of language unique to the group of people, a personal totem linked to a story place, the presence of Elders who are respected decision makers may also constitute elements of connection for Aboriginal and Torres Strait Islander people.[7]

6.9 The term ‘connection’ operates at several formal and informal levels in the claims process for a determination of native title.[8] Connection is often used in a generic way to refer to whether native title has been proved and established.[9] Consultations revealed wide diversity in references made to connection, and in its meaning among stakeholders within the native title system—particularly in relation to consent determinations. NQLC emphasised the diversity of what connection means between claim groups, stating that ‘subtle differences of understandings are very difficult, if not impossible, to capture in a s 223 legal definition’.[10] The Kimberley Land Council emphasised the conflict inherent in understanding native title in terms of common law understandings of interests in land.[11] The eminent anthropologist WEH Stanner wrote:

> No English words are good enough to give a sense of the links between an Aboriginal group and its homeland … A different tradition leaves us tongueless and earless towards this other world of meaning and significance.[12]

5 See Rec 5–1 to 5–5, discussed in Ch 5.
6 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 70 (Brennan J).
7 North Queensland Land Council, *Submission 17*.
8 See Ch 3 for an overview of the claims process.
9 See, eg, use in Terms of Reference.
10 North Queensland Land Council, *Submission 17*.
11 Kimberley Land Council, *Submission 30*.
12 A Frith and M Tehan, *Submission 12* quoting WEH Stanner.

6.10 Courts have articulated several approaches to the factual ascertainment of ‘connection with the land or waters’, although guided by specific legal tests as detailed in Chapter 4. In consent determinations, where parties agree on the facts supporting connection, some ambiguity exists about what the factual inquiry entails and how much evidence of connection is necessary.[13] Some governments provide connection guidelines. Nonetheless, the ambiguity presents significant practical difficulties for claimants in bringing evidence in support of the claim.[14] Considerable investment of time and resources is also required in assessing evidence of connection.

6.11 The Federal Court in *Neowarra v Western Australia* (‘*Neowarra*’), in reference to the factual circumstances in *Western Australia v Ward*,[15] noted that ‘little is required to constitute a continuing connection’.[16] However, the variable meaning of connection has contributed to expanding the scope of the connection inquiry,[17] the range of matters that might be considered, and influenced the extent or ‘standard’ of evidence considered necessary.[18] This ambiguity is compounded when connection must be established over the extended length of time that is a requirement of the native title recognition model.[19] The practical result is the potential for a broad-ranging connection inquiry.[20]

6.12 In the determination of facts, courts at first instance have dealt with the concept of connection in a variety of ways.[21] In *Neowarra*, the Court set out two sets of factors relevant to establishing connection: first, matters pertaining to land and waters referable to law and custom, such as the languages of the area; and, secondly, factual inquiries about links to specific places in the claim area.[22] The first group referenced matters such as clan estates (areas of land) and the languages of the area—‘language countries, not merely languages spoken by people who live on the country’.[23] The second group comprised factual matters that demonstrate the maintenance of a physical, spiritual, economic or cultural link to land and water claimed, such as traditional ceremonies in particular places and ritual knowledge being passed on within the group. *Neowarra* demonstrates the wide variety of factors that may be relevant to establishing connection to the land or waters by laws and customs.

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13 See Ch 4.

14 See Ch 7.

15 *Western Australia v Ward* (2002) 213 CLR 1.

16 *Neowarra v Western Australia* [2003] FCA 1402 (8 December 2003) [350].

17 Nick Duff, ‘What’s Needed to Prove Native Title? Finding Flexibility Within the Law on Connection’ (Research Discussion Paper 35, AIATSIS, June 2014) 50.

18 For a discussion of the approach to evidence to be adopted in consent determinations see, eg, Justice John Mansfield, *Re-Thinking the Procedural Framework* (Speech Delivered to the Native Title User Group, Adelaide, 9 July 2008).

19 See Ch 2.

20 Some submissions noted that other factors, such as overlapping claims and mining tenure research contribute to lengthy timeframes and high costs. See Northern Territory Government, *Submission 71*; Western Australian Government, *Submission 43*.

21 Duff, above n 17, 50.

22 *Neowarra v Western Australia* [2003] FCA 1402 (8 December 2003) [352]–[353].

23 Ibid [352].

6.13 The High Court in *Ward* emphasised that connection pertains to the land and waters claimed and that native title rights and interests therefore must 'relate to land and waters'.[24] In acknowledging the significance of connection to land and waters, it is important that the common law understanding of rights and interests in land and waters should not unduly narrow the perspective upon 'connection' for Aboriginal and Torres Strait Islander peoples.

6.14 Notwithstanding that some boundaries are set by the reference to land and waters, precisely which elements of Aboriginal and Torres Strait Islander peoples' law and custom will give effect to connection in any claim is relatively open.[25] This reflects the need for native title to be determined in accordance with the unique factual circumstances for each claim. At another level, it renders the proof of connection potentially unbounded.

Alternative proof of connection

6.15 These difficulties are compounded by the adoption of a 'laws and customs' model for proof of native title which places so much emphasis on the continuity aspect in establishing connection.[26] In *Mabo [No 2]*, several bases for proving connection with land and waters were canvassed. Justices Deane, Gaudron and Toohey discussed a possessory title drawing on Canadian jurisprudence.[27] A title founded on possession or occupation places less emphasis on the legal inquiry into the traditional laws and customs of Indigenous peoples. The Northern Territory land rights claim process is another potential model of proof that might have been adopted.[28]

6.16 Case law interpreting the *Native Title Act* has not examined alternative bases for structuring evidence to establish native title, although Ch 9 canvasses models from comparative jurisdictions. Some submissions noted advantages in possessory or occupation models.[29] Scholarship has identified other potential models, for example, common law Aboriginal title to land.[30] These models are untested under the *Native Title Act*. Accordingly, the ALRC makes no recommendation in relation to the viability of alternative models for proving connection.

Judicial interpretation of s 223(1)(b)

6.17 Section 223(1)(b) has been held to require that claimants demonstrate that they have a connection, by their traditional laws and customs, with the land or waters claimed. That is, the phrase 'by those laws and customs' in s 223(1)(b) is taken to refer

24 *Western Australia v Ward* (2002) 213 CLR 1, [61]. See further Ch 8.

25 Sean Brennan, 'Statutory Interpretation and Indigenous Property Rights' (2010) 21 *Public Law Review* 239, 259.

26 See Ch 2.

27 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 83–89.

28 Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [663].

29 See, eg, AIATSIS, *Submission 36* for a discussion of the Canadian approach.

30 Kent McNeil, 'The Onus of Proof of Aboriginal Title' (1999) 37 *Osgoode Hall Law Journal* 775.

to the traditional laws and customs referred to in s 223(1)(a).[31] Satisfaction of s 223(1)(b), like s 223(1)(a), is a question of fact.[32]

6.18 Thus, ss 223(1)(a) and (b) are interrelated, although two separate legal thresholds must be established. The High Court in *Ward* stated that a separate inquiry from that required by s 223(1)(a) is demanded by s 223(1)(b).[33] This is so even though the inquiry may depend on the same evidence as is used to establish s 223(1)(a).[34]

6.19 In construing the provision, the courts have strongly aligned connection with continuity of acknowledgment of laws and observance of custom. The Full Federal Court in *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (‘*Alyawarr*’) held connection to be

> descriptive of the relationship to the land and waters which is, in effect, declared or asserted by the acknowledgment of laws and observance of customs which concern the land and waters in various ways. To observe laws and acknowledge customs which tell the stories of the land and define the rules for its protection and use in ways spiritual and material is to keep the relevant connection to the land.[35]

6.20 The Full Federal Court has similarly observed that, because connection must be ‘by’ traditional laws and customs, connection involves an element of continuity, deriving from ‘the necessary character of the relevant laws and customs as “traditional”’.[36]

6.21 Further, the Full Federal Court in *Bodney v Bennell* set out the relationship between s 223(1)(a) and s 223(1)(b) as

> 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.[37]

6.22 At other points, the concept of ‘recognition’ of native title has been associated with ‘connection’.[38] The High Court in *Ward* noted:

> An important aspect of the socially constituted fact of native title rights and interests that is recognised by the common law is the spiritual, cultural and social connection with the land.[39]

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31 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [46], [86]; *Western Australia v Ward* (2002) 213 CLR 1, [18]; *Bodney v Bennell* (2008) 167 FCR 84, [165].

32 *Gumana v Northern Territory* (2005) 141 FCR 457, [146]–[147].

33 *Western Australia v Ward* (2002) 213 CLR 1, [43].

34 Ibid [18].

35 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [88].

36 Ibid [87]–[88]. The Federal Court has suggested that Brennan J’s use of the term connection in *Mabo [No 2]* was intended to encompass an element of continuity of connection: *Sampi v Western Australia* [2005] FCA 777 (10 June 2005) [1079]; *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [92].

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

38 *Yanner v Eaton* (1999) 201 CLR 351, [37] (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

39 *Western Australia v Ward* (2002) 213 CLR 1, [41].

6.23 The strong identification of connection in s 223(1)(b) with the continued acknowledgment of traditional law and observance of custom is apparent in these statements. As detailed in Chapter 5, the ALRC recommends that the Act clarify that it is not necessary to establish that acknowledgment and observance of traditional laws and customs has continued substantially uninterrupted by each generation since sovereignty.[40] In relation to s 223(1)(b), the 'substantially maintained' threshold would be retained. Accordingly, as there is a strong interrelationship between the elements of s 223(1), a substantially maintained threshold could potentially apply to both ss 223(1)(a) and (1)(b).

6.24 The high threshold for continued acknowledgement of law and observance of custom to establish connection in current jurisprudence might be contrasted with Brennan J in *Mabo [No 2]*:

> 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.[41]

Physical occupation

Evidence of physical occupation, continued or recent use

6.25 The ALRC was asked to consider whether there should be confirmation that 'connection with the land and waters' does not require physical occupation or continued or recent use of the land and waters claimed.[42]

6.26 In *Western Australia v Ward* the Full Federal Court considered whether connection with land and waters could be maintained in the absence of physical presence.[43] The Court concluded that, while actual physical presence provides evidence of connection, it is not essential for establishing native title under s 223(1) of the *Native Title Act*. For example, it was argued by the State respondent that the inundation of parts of the claim area by Lakes Kununurra and Argyle meant that connection had not continued. The Court observed:

> The inundation of the areas by water makes it impracticable to enjoy native title rights and interests insofar as they involve activities ordinarily carried out by physical presence on the land. However, by continuing to acknowledge and observe traditional laws and customs involving ritual knowledge, ceremony and customary practices, the spiritual relationship with the land can be maintained.[44]

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40 Rec 5–2 and Rec 5–3.
41 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 59–60.
42 See Terms of Reference.
43 *Western Australia v Ward* (2000) 99 FCR 316.
44 Ibid [252].

6.27 On appeal, the High Court noted that s 223 'is not directed to how Aboriginal peoples use or occupy land or waters', although the way in which land and waters are used may be evidence of the kind of connection that exists.[45] The Court confirmed that the absence of evidence of recent use, occupation or physical presence does not necessarily mean that there is no connection with the land or waters.[46]

6.28 In *De Rose v South Australia (No 2)* ('*De Rose (No 2)*'), the Full Federal Court held:

> It is possible for Aboriginal peoples to acknowledge and observe traditional laws and customs throughout periods during which, for one reason or another, they have not maintained a physical connection with the claim area. Of course, the length of time during which the Aboriginal peoples have not used or occupied the land may have an important bearing on whether traditional laws and customs have been acknowledged and observed. Everything will depend on the circumstances.[47]

6.29 There have been occasional attempts to characterise connection as either physical or spiritual,[48] or as 'essentially spiritual'.[49] This may have been influenced by the Court's experience with cases under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), which requires claimants to establish 'common spiritual affiliations' to land.[50] However, given that connection for the purpose of the *Native Title Act* can be maintained by the acknowledgment of laws and observance of customs,[51] this distinction between physical and spiritual may be unhelpful.[52] It may also be inconsistent with the relationship of Aboriginal and Torres Strait Islander peoples with land, which was described by Blackburn J in *Milirrpum v Nabalco Pty Ltd*:

> The physical and spiritual universes are not felt as distinct. There is an unquestioned scheme of things in which the spirit ancestors, the people of the clan, particular land and everything that exists on and in it, are organic parts of one indissoluble whole.[53]

Physical occupation and the identification of native title rights and interests

6.30 A determination of native title must include a determination of the nature and extent of the native title rights and interests in the area.[54] Physical occupation and continued or recent use may be relevant to proving the particular rights and interests possessed under traditional laws and customs. The content of native title is a question

45 *Western Australia v Ward* (2002) 213 CLR 1, 86.

46 Ibid.

47 *De Rose v South Australia (No 2)* (2005) 145 FCR 290, 306; see also *Dale v Moses* [2007] FCAFC 82 (7 June 2007) [306]; *Moses v Western Australia* (2007) 160 FCR 148, 222.

48 See, eg, *De Rose v South Australia* [2002] FCA 1342 (1 November 2002) [911].

49 *Western Australia v Ward* (2002) 213 CLR 1, [14].

50 Richard H Bartlett, *Native Title in Australia* (LexisNexis Butterworths, 3rd ed, 2015) 173–176.

51 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 456; *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, 469.

52 Duff, above n 17, 49.

53 *Milirrpum v Nabalco* (1971) 17 FLR 141, 167.

54 *Native Title Act 1993* (Cth) s 225.

of fact, to be determined on a case by case basis.[55] Evidence of physical possession, occupation and use could be relevant to the question of whether the rights and interests include a right to exclude others,[56] or other rights. For example, in *Banjima People v Western Australia (No 2)*, Barker J said:

> There is ample evidence to show that hunting and the taking of fauna in customary ways continues today. Similarly, the customary practice of gathering and taking flora is well established historically and presently. The right to take fish is the subject of less contemporary evidence, but the right to take fish in the claim area is still exercised and clearly established as a right possessed by the claimants both historically and presently. It is not a right or activity that the evidence suggests has been abandoned. Similarly the right to take stones, timber, ochre and water is another right possessed by the claimants even though the evidence of current exercise of those rights is relatively limited.[57]

6.31 The courts have emphasised that, while the exercise of native title rights and interests is 'powerful evidence' of the existence of those rights, the ultimate question concerns possession of rights, not their exercise.[58]

6.32 In *Akiba v Queensland (No 3)*, the claimant failed to establish connection at the extremities of the claim because there was 'no evidence of use of, or connection to, those areas'.[59] The claim over extremities did not fail because there was no evidence of use of the areas, but because there was no evidence at all regarding *connection* to those areas.[60] The Court did not require evidence of use, but it did require evidence of connection.

6.33 The Court confirmed that:

> Islander knowledge of areas when coupled with the deep and transmitted sea knowledge that many of them possess, is itself a potent indicator of connection, and continuing connection at that, to their marine estates—the more so because under their laws and customs they have, and do exercise, traditional rights to use and forage there …[61]

Clarification of s 223?

6.34 The ALRC considers that it is not necessary to clarify *Native Title Act* s 223 with regard to physical occupation, continued or recent use, as it is a matter of settled law. When codifying, confirming or clarifying an area of settled law, there is a risk of disturbing the settled law, causing uncertainty and unnecessary litigation.

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55 *Commonwealth v Yarmirr* (2001) 208 CLR 1, 39; *Western Australia v Ward* (2000) 99 FCR 316, 338; *Wik Peoples v Queensland* (1996) 187 CLR 1, 169; *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 58, 61.

56 *Banjima People v Western Australia (No 2)* (2013) 305 ALR 1, [686], [693].

57 Ibid [775].

58 Ibid [386]; *Rubibi Community v Western Australia (No 5)* [2005] FCA 1025 (29 July 2005) [21]; *Neowarra v Western Australia* [2003] FCA 1402 (8 December 2003) [40]; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [84] (Gleeson CJ, Gummow and Hayne JJ).

59 *Akiba v Queensland (No 2)* (2010) 204 FCR 1, 168, 172.

60 Ibid 168, 173.

61 Ibid 164.

6.35 Several stakeholders suggested that the *Native Title Act* should be amended for consistency with *De Rose (No 2)*.[62] However, no lack of consistency with *De Rose (No 2)* has been identified, and the ALRC has not been directed to any areas of doubt or uncertainty in the construction of s 223 on this issue. Section 223 does not contain any reference to physical occupation or continued and recent use. The courts have been clear that, while such evidence is relevant, it is not necessary. A number of stakeholders agreed that clarification is not necessary.[63] For example, Goldfields Land and Sea Council said 'the case law clearly and consistently holds that these matters are not necessary elements of proof for establishing native title'.[64]

6.36 One representative body indicated that claim groups 'have experienced difficulties satisfying the State about continuing connection in circumstances where there is no recent evidence of physical presence on particular parts of a claim area'.[65] Just Us Lawyers also reported that 'State governments generally expect physical occupation and ongoing use of at least parts of the claim area to be demonstrated for the purposes of a consent determination'.[66] Because courts have confirmed that such evidence is 'powerful', respondents will continue to seek such evidence, and place weight on it, when it is available. However, to treat such evidence as a necessary element for a consent determination would be to impose a standard higher than that set by Parliament and the courts for a contested determination.

6.37 Even without a requirement to demonstrate physical occupation, or continued or recent use, the requirement to demonstrate connection to land or waters is still a substantial one. Connection must be demonstrated to have been maintained under traditional laws and customs that have been observed, substantially uninterrupted, since pre-sovereignty times.[67] Further discussion of these requirements and the ALRC's recommendations in this regard, are in Chapters 4 and 5.

The affidavit supporting a claimant application

Recommendation 6–1 Section 62(1)(c) of the *Native Title Act 1993* (Cth) provides that a claimant application may contain details of any 'traditional physical connection' that a member of the native title claim group has, or had, with the land or waters claimed. This subsection should be repealed.

62 Just Us Lawyers, *Submission 2*; Australian Human Rights Commission, *Submission 1*.

63 South Australian Government, *Submission 68*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; South Australian Government, *Submission 34*; Northern Territory Government, *Submission 31*; Queensland Government, *Submission 28*; Goldfields Land and Sea Council, *Submission 22*; Western Australian Government, *Submission 20*; National Farmers' Federation, *Submission 14*; Law Society of Western Australia, *Submission 9*.

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

65 Cape York Land Council, *Submission 7*.

66 Just Us Lawyers, *Submission 2*.

67 *Bodney v Bennell* (2008) 167 FCR 84, [168]; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [86]–[89].

6.38 The *Native Title Act* includes two references to physical connection that the ALRC considers may be inconsistent with the courts' interpretation of s 223 concerning connection. The ALRC recommends that these references should be removed.

6.39 Section 62(1)(c) provides that a claimant application may contain details of 'any traditional physical connection' with the land or waters by a member of the native title claim group, or if any member of the native title claim group has been prevented from gaining access, the circumstances in which the access was prevented.

6.40 This section does not require evidence of physical connection. It is consistent with statements of the courts that evidence of the exercise of rights can be adduced to support a claim for the existence of rights.[68] However, the ALRC is concerned that the section specifically refers to physical connection and does not refer to other ways of demonstrating connection, such as observing traditional laws and customs,[69] maintaining traditional customs and ceremonies,[70] maintaining stories and allocating responsibilities,[71] faithfully performing obligations under traditional law[72] and the continuing internal and external assertion by the group of its traditional relationship with country.[73] The inclusion of physical connection in s 62 and the omission of spiritual, social and cultural evidence of connection give an apparent priority to physical connection that does not reflect the case law or the requirements of s 223.

6.41 Stakeholders largely supported the proposed change, on the basis that s 62(1)(c) is inconsistent with the law on connection,[74] or places an overemphasis on this type of evidence.[75] Native Title Services Victoria said that s 62(1)(c) is

> inconsistent with s 223 and the jurisprudence, which does not require physical connection with the land claimed, and recognises the myriad of other ways in which Aboriginal people connect to land.[76]

6.42 The National Native Title Council (NNTC) expressed the hope that

> removing any reference to a requirement for evidence of 'traditional physical connection' may help persuade respondents that they should not treat such evidence

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68 AIATSIS, *Submission 36*.

69 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 59–60; *Western Australia v Ward* (2000) 99 FCR 316, 382.

70 *Western Australia v Ward* (2000) 99 FCR 316, 382.

71 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, 469–470.

72 *De Rose v South Australia (No 2)* (2005) 145 FCR 290, 306–307.

73 *Sampi v Western Australia* [2005] FCA 777 (10 June 2005) [1079].

74 AIATSIS, *Submission 70*; National Congress of Australia's First Peoples, *Submission 69*; 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*; Law Society of Western Australia, *Submission 41*.

75 AIATSIS, *Submission 70*.

76 Native Title Services Victoria, *Submission 45*.

> as a necessary element in their decision-making about whether to agree to a consent determination.[77]

6.43 The National Native Title Tribunal noted that such a change would not affect the Registrar's functions, as s 62(1)(c) does not make evidence of traditional physical connection a mandatory requirement.[78] The ALRC agrees that the recommended change would not alter the operation of the registration test. However, the use of the term 'traditional physical connection' in the *Native Title Act* has the potential to cause confusion. A number of stakeholders appeared to be of the understanding that the law currently requires evidence of physical connection, and that removing s 62(1)(c) would remove that requirement.[79] For example, one said that

> we are concerned that removal of the requirement to establish a traditional physical connection with the land or water may increase the number of groups wishing to participate in a native title claim.[80]

6.44 The recommended amendment would not change the substantive law on connection. However, removing references to 'physical connection' could help eliminate this confusion.

The registration test

> **Recommendation 6–2** Section 190B(7) of the *Native Title Act 1993* (Cth) provides that the Registrar must be satisfied that at least one member of the native title claim group has, or previously had, a traditional physical connection with any part of the land or waters, or would have had such a connection if not for things done by the Crown, a statutory authority of the Crown, or any holder of a lease. This subsection should be repealed.

6.45 Section 190B(7) of the registration test includes a requirement that at least one member of the claim group demonstrate a 'traditional physical connection', except in certain circumstances. The ALRC considers that the registration test should not include a requirement that is additional to what is required by s 223 and the courts' interpretation of that section, and recommends that it should be removed.

6.46 Part 7 of the *Native Title Act* establishes a Register of Native Title Claims and sets out conditions for registration. If a claim satisfies all of the conditions, it must be entered in the Register.[81] The native title claim group is then entitled to certain rights, including the right to negotiate under s 31 of the *Native Title Act*.

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77 National Native Title Council, *Submission 57*.

78 National Native Title Tribunal, *Submission 63*.

79 Minerals Council of Australia, *Submission 65*; Association of Mining and Exploration Companies, *Submission 54*; Cement Concrete and Aggregates Australia, *Submission 47*.

80 Cement Concrete and Aggregates Australia, *Submission 47*.

81 *Native Title Act 1993* (Cth) s 190A(6).

6.47 The registration test requires the Registrar to be satisfied that the factual basis exists to support the assertion that the native title claim group has an association with the area.[82] The native title claim group must show an association with the entire area claimed, but it has been held that the association can be physical or spiritual.[83]

6.48 Section 190B(7) adds a requirement that the Registrar must be satisfied that at least one member of the native title claim group has, or previously had, a traditional physical connection with any part of the land or waters, or would have had such a connection if not for things done by the Crown, a statutory authority of the Crown, or any holder of a lease.[84] 'Traditional physical connection', in this instance, means that the connection is in accordance with the laws and customs of the group.[85]

6.49 Information about a claim group member's presence on, or use of, the land or waters, is relevant to whether the factual basis exists for a claim. However, the requirement in s 190B(7) that an application include information about 'traditional physical connection' is inconsistent with the case law that has established that physical occupation or use is not required to establish connection. The requirement could result in a claim group with ample evidence of connection being denied registration and the procedural rights that are associated with registration.

6.50 If the s 190B(7) requirement is the only reason a claim is not registered, an applicant may apply to the Federal Court for an order that the claim be registered. However, Professor Richard Bartlett has noted that it would be difficult for an applicant to secure a court order in time to use the right to negotiate.[86]

6.51 When the introduction of this subsection into the *Native Title Act* was being considered, concerns were raised that it did not reflect the common law elements for a native title claim.[87]

6.52 Further, the reference in s 190(7)(b) to 'things done' by the Crown, a statutory authority of the Crown, or a leaseholder suggests that those things are relevant to the question of whether connection has been maintained. However, the courts have indicated that the reasons for an absence of connection are not relevant.[88] There are concerns that this section may elicit evidence that could be used against the claimant group.[89]

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82 Ibid s 190B(5).

83 *Martin v Native Title Registrar* [2001] FCA 16 (19 January 2001) [26]; *Corunna v Native Title Registrar* [2013] FCA 372 (24 April 2013).

84 *Native Title Act 1993* (Cth) s 190B(7).

85 *Gudjala People No 2 v Native Title Registrar* [2007] FCA 1167 (7 August 2007) [89].

86 Bartlett, above n 50, 266–267.

87 Commonwealth Government, Submission to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, *Native Title Amendment Bill 1997*.

88 *Bodney v Bennell* (2008) 167 FCR 84, 104–105; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 456–457. In *Yorta Yorta*, the High Court said that the presence or absence of reasons might be relevant to the question of whether there has been an interruption: at [90], discussed further below.

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

6.53 This element of the registration test is also inconsistent with the reality of the lives of Aboriginal and Torres Strait Islander people who have moved away from their country in order to access employment, health services and education. Queensland South Native Title Services (QSNTS) noted:

> Whilst traditional owners might be physically separated from country, they remain rooted in their identity and their convictions about their connections to their traditional estates. QSNTS's clients managed to stay connected to their traditional life and land in multiple ways. Aside from maintaining traditional practices and beliefs, there is also tourism, preservation actions, government involvement and the use of symbols which maintain strong connections.[90]

6.54 There was wide support for the proposed change regarding s 190B(7) as it would create consistency between the requirements of the registration test and the requirements of s 223 of the *Native Title Act* regarding connection.[91] The Law Society of Western Australia said 'a physical connection is not required for connection or a finding of native title. It should not be required for the registration test'.[92]

6.55 There have been no instances where a claim has been refused registration solely on the basis of s 190B(7).[93] The provision does not appear to serve any independent function, but may be contributing to confusion regarding the substantive requirements for connection. Several stakeholders opposed the repeal of s 190B(7) on the basis that it would amount to 'the removal of connection'[94] or a broadening of the definition of native title.[95]

6.56 Section 190B(7) is one of the few parts of the *Native Title Act* that acknowledges that acts of the Crown, and others, have interfered with the connection between Aboriginal and Torres Strait Islander peoples and their lands and waters. The issue of the reasons for 'substantial interruption' or displacement is discussed later in this chapter. While this acknowledgment in s 190B(7) may have some symbolic value, the ALRC considers that it is important that the registration test is consistent with s 223 and the case law regarding physical occupation and continued and recent use.

Redefining connection

6.57 In the Discussion Paper, the ALRC proposed amendment to the term 'connection' in s 223(1)(b) of the *Native Title Act*.[96] The revised definition sought to re-emphasise the relationship to the claimed land and waters as the primary focus when

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

91 AIATSIS, *Submission 70*; 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*; Native Title Services Victoria, *Submission 45*; North Queensland Land Council, *Submission 42*; Law Society of Western Australia, *Submission 41*.

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

93 National Native Title Tribunal, *Submission 63*.

94 Minerals Council of Australia, *Submission 65*.

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

96 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014) Prop 7–2.

connection is interpreted—reflecting the actual text of s 223(1)(b). In this sense, interpretation of connection may permit claimants to assert 'the reality of their connection' to traditional land and waters.[97]

6.58 The Law Council of Australia explained the inadequacy of the current legal model in terms of capturing Indigenous relationships with country,[98] especially as the meaning of the term has become opaque[99] and variable in interpretation.[100]

6.59 The ALRC's suggested redefinition was for connection to describe 'the relationship to the land and waters' claimed.[101] That relationship is expressed in the present form of the acknowledgment of laws and observance of custom, although the origins of the laws and customs must be in the period prior to the assertion of sovereignty.

6.60 It sought to capture the centrality of connection to land or waters as a form of sacred obligation to country.[102] While the expression of connection to land and waters may vary, particularly between Torres Strait Islander peoples and Aboriginal peoples of the Australian mainland, Torres Strait Islander peoples' relationship to land and waters is also interwoven with laws and customs.[103] Some stakeholders queried the phrasing of the redefinition.[104]

Connection—in the present tense

6.61 In *Members of the Yorta Yorta Community v Victoria* ('*Yorta Yorta*'), the High Court noted that:

> it would be wrong to confine the inquiry for connection between claimants and the land or waters concerned to an inquiry about the connection said to be demonstrated by the laws and customs which are shown *now* to be acknowledged and observed by the peoples concerned. Rather, it will be necessary to inquire about the relationship between the laws and customs now acknowledged and observed, and those that were acknowledged and observed before sovereignty.[105]

6.62 Yet the definition in s 223(1)(b) refers to the present tense, 'by those laws and customs, *have* a connection with land and waters'.[106] The focus for an amended

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97 *Bodney v Bennell* (2008) 167 FCR 84, [171].

98 Law Council of Australia, *Submission 35*.

99 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [87].

100 *Sampi v Western Australia* [2005] FCA 777 (10 June 2005) [1077].

101 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [88].

102 Marcia Langton, 'The Estate as Duration: "Being in Place" and Aboriginal Property Relations in Areas of Cape York Peninsula in North Australia' in Lee Godden and Maureen Tehan (eds), *Comparative Perspectives on Communal Lands and Individual Ownership: Sustainable Futures* (Routledge, 2010) 76.

103 For a discussion of Torres Strait Islander law and custom, see Nonie Sharp, *Stars of Tagai: The Torres Strait Islanders* (Aboriginal Studies Press, 1993).

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

105 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [56] (Gleeson CJ, Gummow and Hayne JJ).

106 Emphasis added. See for discussion Gaudron and Kirby JJ Ibid [104]. The plurality make similar comment at [85].

definition would not avoid the need 'to inquire about the relationship between the laws and customs now acknowledged and observed, and those that were acknowledged and observed before sovereignty'. Presumptively, it suggests that a claim group's present connection should be the 'starting point' when considering whether connection is established. That relationship necessarily informs the scope of the laws and customs together with inquiries about right people for country.

6.63 Secondly, the proposal for an amended definition was intended to give 'connection' some meaningful content. In *De Rose v South Australia (No 1)*, the Full Federal Court stated:

> At first glance, it may not be evident what par (b) of s 223(1) adds to par (a). If Aboriginal people possess rights and interests in relation to land under the traditional laws acknowledged and the traditional customs observed by them, it would seem to be a small step to conclude that the people, by those laws and customs, have a connection with the land.[107]

6.64 Some stakeholders suggested an alternative revision of s 223(1)(b). One suggested:

> 223(1)(b)—those laws and customs arise [or derive] from a relationship between the Aboriginal peoples or Torres Strait Islanders and the land or waters, which relationship presently connects them to the land or waters.[108]

6.65 In comparative jurisdictions, the equivalent test to 'connection' does not rely so heavily upon an investigation of pre-sovereign law and custom.[109] While in Canada there is a stronger foundation in occupancy to ground aboriginal title, *Tsilhqot'in Nation* confirmed that

> what is required is a culturally sensitive approach to sufficiency of occupation based on the dual perspectives of the Aboriginal group in question—its laws, practices, size, technological ability and the character of the land claimed—and the common law notion of possession as a basis for title. … [T]he perspective of the Aboriginal group [to possession] … might conceive of possession of land in a somewhat different manner than did the common law.[110]

6.66 The ALRC's intention, in proposing a revised definition of connection, was to align the definition with international standards, specifically with respect to articles 13, 25 and 26(3) of the *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP').[111]

6.67 A few submissions supported redefining s 223(1)(b) but concurrently expressed concerns about drafting[112] or preference for the reforms in Chapter 5.[113] A few

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107 *De Rose v South Australia (No 1)* (2003) 133 FCR 325, [305].

108 Mr Tony Neal QC.

109 See Ch 9.

110 *Tsilhqot'in Nation v British Columbia* 2014 SCC 44 [41].

111 *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).

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

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

submissions supported redefinition to focus on present connection.[114] However, the majority of submissions were opposed, for various reasons.[115] The Minerals Council of Australia saw the proposal as calling for 'significant' legislative change, without sufficient foundation.[116] The Law Society of Western Australia held the view that 'a fixed interpretation by the legislature would be more likely to constrain, rather than assist' in the development of relevant concepts.[117]

6.68 A number of submissions were concerned about the uncertainty likely to result from change.[118] The South Australian Government observed that 'there is a large body of jurisprudence on the current definition—any attempt to change it will merely introduce further uncertainty and promote more litigation'.[119] Others felt that 'the addition of new terms to the definition should be limited as much as possible'.[120]

6.69 The proposal to redefine connection was intended to operate in conjunction with either an amended definition of 'traditional', or removal of 'traditional' from s 223 and its substitution by the phrase, 'in the period prior to the assertion of sovereignty'. The pairing of these proposed changes, particularly the suggestion of removal of the word 'traditional', caused a number of stakeholders to raise concerns,[121] including the possibility of increased conflict. The NNTC considered these combined changes 'would undermine native title rights and interests, create confusion amongst native title groups, and completely erode any glimmers of confidence that native title holders might have in the NTA to protect their rights to country'.[122] NTSCORP Limited (NTSCORP) submitted that

> there is a need to ensure that traditional owners and their traditional connections to country are recognised by the native title process. The change to the wording might be interpreted in such a way as to create a whole new set of issues where people with more recent relationships to country make claims under the NTA.[123]

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114 National Native Title Council, *Submission 57*; Native Title Services Victoria, *Submission 45*.

115 AIATSIS, *Submission 70*; 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*; Central Desert Native Title Service, *Submission 48*; Native Title Services Victoria, *Submission 45*; Law Society of Western Australia, *Submission 41*.

116 Minerals Council of Australia, *Submission 65*.

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

118 AIATSIS, *Submission 70*; South Australian Government, *Submission 68*; Minerals Council of Australia, *Submission 65*; Central Desert Native Title Service, *Submission 48*; North Queensland Land Council, *Submission 42*; Law Society of Western Australia, *Submission 41*.

119 South Australian Government, *Submission 68*.

120 A Frith and M Tehan, *Submission 52*. Central Desert Native Title Services raised concerns about use of the word 'relationship', submitting that the word 'implies both rights and obligations; however, the ordinary meaning of the word "relationship" is "a connection or association"': Central Desert Native Title Service, *Submission 48*.

121 South Australian Government, *Submission 68*; NTSCORP, *Submission 67*; Minerals Council of Australia, *Submission 65*; Law Council of Australia, *Submission 64*; National Native Title Council, *Submission 57*; Native Title Services Victoria, *Submission 45*.

122 National Native Title Council, *Submission 57*.

123 NTSCORP, *Submission 67*.

6.70 The Minerals Council of Australia submitted that removal of traditional would cause uncertainty as to 'the identity of persons who claim to hold native title over time and confusion to the legitimacy of existing agreements'.[124]

6.71 The South Australian Government submitted that 'the removal of any requirement that the laws and customs be traditional, and a requirement only for a contemporary connection to the land or waters claimed, is to re-define native title into something completely different'.[125] Only a small number of stakeholders gave any support to the idea of removing 'traditional' from s 223(1).[126]

6.72 Given strong stakeholder comment from diverse perspectives about the uncertainty and conflict that the proposal might generate, the ALRC is not recommending statutory redefinition of connection in s 223(1)(b). The ALRC stresses that the interpretation of connection should adequately reflect Indigenous expressions of connection, in line with relevant standards in the UNDRIP.

6.73 Despite acknowledged difficulties concerning the concept of 'traditional' in native title law,[127] for many it has become integral to the recognition of native title—although the term itself does not appear in s 223(1)(b). While noting the potential for the concept of traditional to lock connection 'to an artificial concept of culture frozen in time at the moment of British sovereignty',[128] the ALRC makes no recommendation for its removal. The ALRC considers that the recommendations in Chapter 5 provide a better balance of legal reform and certainty for stakeholders in the native title system.

6.74 As David Martin noted, 'it is tradition which grounds and legitimates claims to country from the perspective of Indigenous people, not mere connection'.[129]

> [R]emoving the concept of 'tradition'/'traditional' from s 223, while well intentioned, would actually cause more conflict and confusion within claimant groups. … [To do so] ignores the deep significance accorded to traditional connections within Indigenous societies … The legal construction of tradition is, in my view, a translation (if in rather impoverished form) of a set of deeply embedded and highly significant values within much of Indigenous Australia.[130]

Revitalisation of connection?

6.75 The ALRC considered whether the Act should be amended to distinguish between *revival* and *revitalisation*.[131] The approach suggested in the Discussion Paper would allow *revitalisation* of laws and customs but not *revival* of native title. Revival

124 Minerals Council of Australia, *Submission 65*.
125 South Australian Government, *Submission 68*. See also Minerals Council of Australia, *Submission 65*; Northern Territory Government, *Submission 31*.
126 See, eg, Indigenous Land Corporation, *Submission 66*, which gave 'provisional' support to the idea.
127 See Ch 5.
128 National Congress of Australia's First Peoples, *Submission 32*.
129 David Martin, *Correspondence*, 15 August 2014.
130 Ibid.
131 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014) Q 7–2.

of native title at common law is not possible.[132] The High Court adopted a similar position on revival in construing the *Native Title Act*.[133] The ALRC is not recommending any change to the *Native Title Act* in respect of revival.

6.76 In *Mabo [No 2]*, Brennan J stated:

> When the tide of history has washed away any real acknowledgment of traditional law and real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition.[134]

6.77 In *Risk v Northern Territory*, concerning the Larrakia people's claim, the Federal Court at first instance concluded that there were 'significant' changes in the laws and customs compared to those which existed prior to the assertion of sovereignty. The Court expressed its view that '[t]hose differences and changes stem from, and are caused by, a combination of the historical events which occurred during the 20th Century'.[135] This was despite a finding that '[t]he Larrakia community of today is a vibrant, dynamic society, which embraces its history and traditions. This group of people has shown its strength as a community, able to re-animate its traditions and customs'.[136]

6.78 On appeal, the Full Federal Court remarked that:

> A claimant group that has been dispossessed of much of its traditional lands and thereby precluded from exercising many of its traditional rights will obviously have great difficulty in showing that its rights and customs are the same as those exercised at sovereignty.[137]

6.79 This passage was approved in *Sandy on behalf of the Yugara People v Queensland (No 2)* as 'directly applicable to the circumstances' in that case.[138]

Revitalisation of Aboriginal and Torres Strait Islander culture

6.80 Since early cases were litigated, there is more knowledge about how culture is transmitted in Aboriginal and Torres Strait Islander communities and how laws and customs change over time. The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) submitted:

> 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

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132 The Act now allows for suspension of native title in respect of certain future acts: *Native Title Act 1993* (Cth) s 24AA(6).

133 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [47], [53] (Gleeson CJ, Gummow and Hayne JJ). See Ch 4.

134 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 60. By contrast, Deane and Gaudron JJ felt it unnecessary to decide whether native title rights 'will be lost by the abandonment of traditional customs and ways': 110.

135 *Risk v Northern Territory* [2006] FCA 404 (29 August 2006) [835].

136 Ibid [530].

137 *Risk v Northern Territory* (2007) 240 ALR 75, [104].

138 *Sandy on behalf of the Yugara People v State of Queensland (No 2)* [2015] FCA 15 (27 January 2015) [79].

> concerning Aboriginal and Torres Strait Islander culture has focused on the process of cultural change and 'creative adaptation to change consistent with the continuity of aspects of traditional beliefs and practices'.[139]

6.81 AIATSIS has expressed concern about unduly focusing on 'the distinction between "revitalise" and "revive" may divert the relevant inquiry from the critical consideration of the existence of a right'.[140]

6.82 The Federal Court, in *Wyman on behalf of the Bidjara People v Queensland (No 2)*, outlined the opinion of two anthropologists about revitalisation:

> Professor Langton considered that Bidjara songs, dances and stories have continued since sovereignty and that any difference in practices through the generations is explicable and does not amount to a severance of continuity. She acknowledged there had been revitalisation of some traditions, but noted that this did not imply recent invention. Rather, revitalisation is a legitimate means of maintaining Bidjara culture within a contemporary setting. Professor Sutton agreed with this latter point.[141]

6.83 While the Court concluded that the Bidjara people did not meet the requirements of s 223, it stated that 'these conclusions say nothing about the value of Bidjara efforts to continue, revive and protect aspects of Bidjara culture'.[142]

6.84 The issue of whether laws and customs, and therefore connection, have been substantially maintained where there has been some revitalisation as an adaptation to changing circumstances has been addressed in Canadian and New Zealand case law.[143]

6.85 Article 11 of UNDRIP provides, in part, that 'Indigenous peoples have the right 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'. Article 13(1) provides that

> Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.[144]

6.86 At the time of writing, the interpretation of s 223 does prevent evidence of revitalisation. Some people view the current interpretation of s 223 of the Act, 'as creating 'insurmountable barriers to cultural resurgence'.[145]

> Where a group has revitalised its culture, laws and customs by actively seeking out and recovering those elements of cultural continuity driven underground by dispossession, forced relocation, or the removal of children—a comparatively

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139 AIATSIS, *Submission 36*. See also AIATSIS, *Submission 70*.

140 AIATSIS, *Submission 70*.

141 *Wyman on behalf of the Bidjara People v Queensland (No 2)* [2013] FCA 1229 (6 December 2013) [370]. Professor Sutton's general views with respect to revitalisation are outlined later in the reasons: Ibid [622].

142 *Wyman on behalf of the Bidjara People v Queensland (No 2)* [2013] FCA 1229 (6 December 2013) [672]. The Court made a similar comment about the Karingbal people's efforts: Ibid [622].

143 See Ch 9.

144 *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).

145 Commonwealth, *Parliamentary Debates*, Senate, 21 March 2011, 1303 (Rachel Siewert).

> minimal interruption to the sharing of that culture across the claimant group should not … prevent recognition of native title.[146]

6.87 Several submissions expressly supported distinguishing between ‘revitalisation’ and ‘revival’,[147] with some suggesting the *Native Title Act* recognise a right of revitalisation.[148] QSNTS indicated that revitalisation ‘does not necessarily suggest starting from a position where there has been a clean break or abandonment’. It submitted that revitalisation ‘simply means that something which had dissipated or lessened in some degree has intensified’.[149]

6.88 Few stakeholders supported amendment of the Act to permit revitalisation of connection.[150] QSNTS and Central Desert Native Title Services Limited (CDNTS) viewed the proposal as addressing ‘continuity’,[151] but evidence was crucial:

> The difficulty of course is one of evidence. A group may very well be revitalizing law and customs but because of the particular evidence, lack of evidence, or the way it is presented, it could be deemed revival because of what appears to be a ‘substantial interruption’.[152]

6.89 Other stakeholders expressed strong concerns[153] or outright opposition.[154] The Western Australian Government’s submission, amongst others, was opposed. It argued it would make native title ‘available to a multitude of contemporary groupings in respect of a given area’.[155]

Revitalisation as adaptation

6.90 The ALRC, by reference to UNDRIP,[156] supports a distinction between revitalisation and revival (that is, abandonment) although it acknowledges the fine

146 Ibid.

147 Queensland South Native Title Services, *Submission 55*; A Frith and M Tehan, *Submission 52* (it ‘may’ be useful); Central Desert Native Title Service, *Submission 48*.

148 AIATSIS, *Submission 70*.

149 Queensland South Native Title Services, *Submission 55*. See also Central Desert Native Title Service, *Submission 48*.

150 Law Council of Australia, *Submission 64*; Queensland South Native Title Services, *Submission 55*; Central Desert Native Title Service, *Submission 48*; North Queensland Land Council, *Submission 42*.

151 As discussed in Chs 4 and 5, currently native title applicants must demonstrate that, since the assertion of sovereignty, acknowledgment of their traditional laws and observance of their traditional customs have continued ‘substantially uninterrupted’: *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422. Central Desert Native Title Services saw revitalisation as useful in addressing the ‘generation by generation’ test: Central Desert Native Title Service, *Submission 48*.

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

153 D WYkanak, *Submission 61* (asserting that sovereignty has not been ceded by Aboriginal peoples and Torres Strait Islander peoples and arguably expressing a concern about ‘historical’ people possibly undermining that claim); A Frith and M Tehan, *Submission 52* (‘it should not be central to the definition of native title in s 223’).

154 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*.

155 Western Australian Government, *Submission 43*.

156 *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) arts 11 and 13.

distinctions required in the evidence and the questions of degree that arise factually in determining these matters.

6.91 The ALRC acknowledges the importance of Indigenous peoples' right to revitalise culture, but it is not recommending direct statutory amendment to allow recognition of revitalisation of laws and customs under s 223(1). The ALRC believes that reform objectives are more effectively achieved by a recommendation that it be made clear that traditional laws and customs may adapt, evolve or otherwise develop.[157]

6.92 Revitalisation can be best accommodated *as an adaptation or evolution in the manner* in which traditional law is acknowledged and traditional customs observed. Any adaptation will be determined by reference to the factual circumstances of each claim. Working in conjunction with other recommendations in Chapter 5 (allowing for succession;[158] not necessary to establish 'substantially uninterrupted' continuity[159] by each generation since sovereignty)[160] should provide sufficient flexibility.[161]

6.93 NTSCORP felt the recommendations, 'would allow for sufficient scope to include the way laws and customs may have changed due to many varying circumstances over time including, where appropriate, the revitalisation of laws and customs'.[162] CDNTS commented:

> The central question that the ALRC appears to be grappling with is, how … one deal[s] with forced abandonment while producing a just outcome and one that does not deter people from reviving or revitalising their culture in any event? … It is arguable that if proper and respectful regard is had to historical factors which cause displacement, then accepting revitalisation of law and custom should necessarily follow.[163]

Empowerment of courts to disregard 'substantial interruption'

6.94 The ALRC, under its Terms of Reference, was directed to inquire and report on whether Commonwealth native title laws and legal frameworks should provide for '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'.[164]

6.95 Several models for disregarding or accommodating change in, or interruptions to, the continuity of acknowledgment and observance of laws and customs were

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157 See Ch 5, Rec 5–1.
158 See Ch 5, Rec 5–5.
159 See Ch 5, Rec 5–2.
160 See Ch 5, Rec 5–3.
161 Some stakeholders also considered these other suggested reforms to be more effective measures: NTSCORP, *Submission 67*; National Native Title Council, *Submission 57*; Native Title Services Victoria, *Submission 45*.
162 NTSCORP, *Submission 67*.
163 Central Desert Native Title Service, *Submission 48*.
164 Terms of Reference, above n 2.

examined. This examination included investigation of the various legal elements comprised in a model for judicial disregard of ‘substantial interruption’, as well as alternative formulations for ‘judicial disregard’ that have been proposed.[165]

6.96 Assessment of this option for reform in the Terms of Reference required consideration of many complex factors in the native title claim process, including the role of the judiciary in determining native title and how consent determinations are concluded. Chapter 2 provides context for understanding the doctrine of recognition—its strengths, but also its constraints. In relation to determinations of matters of fact, it required investigation of whether European settlement may be taken into account, and to what degree, when determining if there has been substantial interruption to, or a change in, ‘continuity’ and thereby loss of connection. The current threshold for establishing connection is that of substantial maintenance.[166]

6.97 The ALRC acknowledges that many submissions and commentators, among them prominent Indigenous leaders,[167] have stressed the importance of addressing the effects of European settlement upon Aboriginal and Torres Strait Islander peoples.[168] The ALRC considers that the solution is best found in the Recommendations 5–1 to 5–5[169] which would act in conjunction to achieve a similar legal effect to the ‘option for reform’ outlined in the Terms of Reference. Accordingly, the ALRC is not recommending that the *Native Title Act* be amended specifically to empower courts to disregard substantial interruption or change in continuity of acknowledgment and observance of traditional laws and customs.

Relevant law

6.98 The terms ‘continuity’ and ‘substantially uninterrupted’ do not appear in the text of s 223 of the Act. The requirement has arisen instead from the statutory construction of s 223(1) of the *Native Title Act.* The requirement that acknowledgment of law and observance of custom must have occurred substantially uninterrupted by each generation since sovereignty is discussed in earlier chapters.[170] Connection, as discussed, must be ‘substantially maintained’.[171]

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165 See Native Title Amendment (Reform) Bill 2014 cl 14; Native Title Amendment (Reform) Bill (No 1) 2012 cl 14; Native Title Amendment (Reform) Bill 2011 cl 12.

166 See Ch 4.

167 See, eg, Aboriginal and Torres Strait Islander Social Justice Commissioner, ‘Native Title Report 2009’ (Australian Human Rights Commission, 2009) 87; Aboriginal and Torres Strait Islander Social Justice Commissioner, ‘Native Title Report 2008’ 86–87.

168 This was first acknowledged by the ALRC in its 1986 Final Report *Recognition of Aboriginal Customary Laws*. The ALRC stated that it is against the ‘background of deprivation and dislocation that any examination of Aboriginal customary laws must take place’: Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [31].

169 A detailed examination of the effect of these recommendations is given in Ch 5.

170 See Ch 4 and Ch 5.

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

6.99 The qualification of 'substantially' reflects the impacts of European settlement, as the High Court explained in *Yorta Yorta*:

> It is a qualification that must be made to recognise that European settlement has had the most profound effects on Aboriginal societies and that it is, therefore, inevitable that the structures and practices of those societies, and their members, will have undergone great change since European settlement.[172]

6.100 Further, the High Court held that, to describe 'the consequences of interruption in acknowledgment and observance of traditional laws and customs as "abandonment" or "expiry" of native title was apt to mislead', because it involved imputing an intention to abandon law and custom on the part of Indigenous peoples.[173]

6.101 Nonetheless, the High Court emphasised:

> the inquiry about continuity of acknowledgment and observance does not require consideration of why, if acknowledgment and observance stopped, that happened. That is, continuity of acknowledgment and observance is a condition for establishing native title. If it is not demonstrated that that condition was met, 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.[174]

6.102 Accordingly, the High Court left open the permissibility of examining why acknowledgment and observance may have 'stopped' in confined circumstances.

6.103 However, subsequently, the Full Federal Court in *Bodney v Bennell*, when discussing continuity, stated:

> But if … there has been a substantial interruption, it is not to be mitigated by reference to white settlement. The continuity enquiry does not involve consideration of *why* acknowledgment and observance stopped.[175]

6.104 The law is uncertain as to whether consideration of the reasons why acknowledgment and observance may have 'stopped' is permitted at all. Further, the view has been expressed that *Bodney v Bennell* 'should be treated with caution insofar as it suggests that evidence of European influence is irrelevant to the question of *change*, as opposed to *interruption*'.[176] This caution is relevant in relation to the recommendations made in Chapter 5.

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172 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [89] (Gleeson CJ, Gummow and Hayne JJ).

173 Ibid [90]. As CDNTS put it, it is 'exceptionally rare' that Aboriginal groups 'abandon' law and custom 'willingly': Central Desert Native Title Service, *Submission 48*. AIATSIS expressed the view that transformational events, such as European settlement, and cataclysmic events, such as drought and flood, while bringing changes, do not necessarily result in the abandonment of law and custom: AIATSIS, *Submission 70*.

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

175 *Bodney v Bennell* (2008) 167 FCR 84, [97].

176 Duff, above n 17, 29.

Consideration of the reasons for 'substantial interruption'

The case for reform

6.105 A number of stakeholders expressly supported consideration of the reasons for displacement of Aboriginal peoples or Torres Strait Islanders in construing s 223(1)(b).[177] The Law Council of Australia submitted that there should not be 'an inflexible rule against the Court having regard to the reasons for displacement' when assessing connection under s 223(1)(b).[178]

6.106 Two main reasons were given in support. First, some stakeholders submitted that, given the history of colonisation, it was inherently unjust for the reasons for displacement not to be taken into account when assessing connection.[179]

6.107 As NQLC put it, 'European settlement which occurred pursuant to British and Australian law inhibited the observance of traditional laws and customs in areas of closer settlement'.[180] Similarly, others noted that state or settler acts—such as being forced to move off country to missions or reserves—often denied groups 'the right or ability to acknowledge and observe their laws and customs'.[181] Yet, as the Aboriginal and Torres Strait Islander Social Justice Commissioner has observed, 'there is little room to raise past injustice as a counter to the loss of, or change in, the nature of acknowledgment of laws or the observance of customs'.[182]

6.108 The Australian Human Rights Commission (AHRC) submitted that 'native title claimants are effectively frustrated in satisfying the requirements of demonstrating continuous connection in circumstances where the interruption has been caused by colonisation'.[183] The National Congress of Australia's First Peoples (National Congress) submitted that the courts 'must have capacity to take into account displacement, caused by direct or indirect effects of European Settlement, when

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177 The Discussion Paper asked a number of questions in this respect: Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014) Questions 7–3 to 7–5. Submissions in support included: National Congress of Australia's First Peoples, *Submission 69*; NTSCORP, *Submission 67*; Law Council of Australia, *Submission 64*; Queensland South Native Title Services, *Submission 55*; North Queensland Land Council, *Submission 42*; Australian Human Rights Commission, *Submission 1*. Dr Angus Frith and Associate Professor Maureen Tehan submitted that '[a]t the very least, the Court should be given the discretion to consider the reasons for any such interruption in considering its relevance to its determination of whether traditional laws and customs have been acknowledged and observed': A Frith and M Tehan, *Submission 12*. However, in their later submission they expressed the view that a specific reform was unnecessary given other reforms that the ALRC had proposed: A Frith and M Tehan, *Submission 52*.

178 Law Council of Australia, *Submission 64*.

179 National Congress of Australia's First Peoples, *Submission 69*; Queensland South Native Title Services, *Submission 55*.

180 North Queensland Land Council, *Submission 17*.

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

182 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2009', above n 167, 87. See also Australian Human Rights Commission, *Submission 1*.

183 Australian Human Rights Commission, *Submission 1*. See also Central Desert Native Title Service, *Submission 48*.

assessing whether Aboriginal and/or Torres Strait Islander Peoples have a connection with land or waters'.[184]

6.109 Several submissions commented on the 'apparent unconscionability of the State or Territory effectively relying on its own actions to the detriment of native title groups' assertion of native title'.[185] Just Us Lawyers submitted that the strict application of 'substantial interruption' effectively downplays the practical impacts of colonisation and dispossession.[186]

6.110 The second, and interrelated, rationale given in support of reform was that a failure to consider the factual reasons may lead to unjust outcomes for some native title claimants.[187] NTSCORP submitted that where the reasons for interruption are not taken into account, it

> can and has had the perverse effect that Aboriginal groups who have been forced off their land by governmental or other Anglo-European intervention can be disentitled from the native title process, despite later continuing the physical aspect of their association with their Country. This is true no matter how strongly they have resisted that dislocation or maintained their non-physical connection to their Country, nor how short the duration of the dislocation.[188]

6.111 NTSCORP indicated that, '[s]uch outcomes are disproportionately likely in NSW due to the long history of repeated forced dislocation due to the government's Mission program'.[189] The South Australian Government acknowledged that 'as the State approaches resolution of native title claims in areas where European settlement has had greater impacts on the practice of Aboriginal law and custom, more difficulties will be encountered in achieving resolution by consent'.[190]

Complexities of reform that would enable consideration of reasons

6.112 A number of stakeholders, including those representing Indigenous interests and respondent interests, did not support specific reform enabling consideration of the reasons for substantial interruption or change in continuity within the native title claims process.[191]

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184 National Congress of Australia's First Peoples, *Submission 69*.
185 See, eg, Queensland South Native Title Services, *Submission 55*; Native Title Services Victoria, *Submission 18*; A Frith and M Tehan, *Submission 12*; Australian Human Rights Commission, *Submission 1*.
186 Just Us Lawyers, *Submission 2*.
187 NTSCORP, *Submission 67*.
188 Ibid.
189 Ibid.
190 South Australian Government, *Submission 68*.
191 Northern Territory Government, *Submission 71*; AIATSIS, *Submission 70*; South Australian Government, *Submission 68*; National Native Title Council, *Submission 57*; A Frith and M Tehan, *Submission 52*; Central Desert Native Title Service, *Submission 48*; Native Title Services Victoria, *Submission 45*; Western Australian Government, *Submission 43*. See also NTSCORP, *Submission 67*. As noted earlier, while NTSCORP supported reform, it listed a number of significant concerns.

6.113 Some stakeholders expressed opposition to any change to s 223, considering such reform to be unnecessary.[192] The Western Australian Government submitted that 'courts have been increasingly willing to recognise native title notwithstanding the ostensibly onerous requirements of the *Yorta Yorta* test'.[193] The South Australian Government submitted that, in practice, courts already consider the reasons for any displacement—specifically when considering the group's efforts to retain connection in situations where they have not been present on the land, and also when considering the adaptation of traditional laws and customs.[194]

> The Federal Court takes into account that extensive loss or modification of traditional law and custom was almost inevitable in the face of colonisation and has, on occasion, found in favour of groups that have long been absent from their lands or whose culturally active membership has, at various times in history, numbered very few individuals.[195]

6.114 The Law Society of Western Australia similarly submitted that there was no need for a change to the law, because 'the Courts have made it clear since the first court determination of native title under the NTA that a connection in accordance with traditional laws and customs did not need to be a physical connection or a continued or recent use'.[196]

6.115 Governments expressed concern lest reform seek to change the basis of native title law. The Western Australian Government considered the ALRC's inquiry to be premised on the 'flawed' assumption that 'a group of Indigenous persons may be able to establish that they hold native title rights and interests in the absence of any "connection" to an area pursuant to traditional law and customs'.[197] The Northern Territory Government expressed its concern at proposals which it considered would likely 'enable a much wider class of Aboriginal persons who, under the NTA, cannot properly establish native title rights and interests, to do so in the future'.[198] Amendment to the Act 'could not overcome the complete loss of a group's traditional laws and customs that related to land from which they had been historically displaced'.[199]

6.116 Some stakeholders qualified their support. The Law Council of Australia submitted that 'having regard to the reasons for displacement should not result in a group of people with no meaningful connection to land or waters being found to have native title on the basis that their displacement explains the lack of connection'.[200] Similarly, QSNTS noted the need for 'agreement on certain minimum threshold

192 South Australian Government, *Submission 68*; Minerals Council of Australia, *Submission 65*; South Australian Government, *Submission 34*; Northern Territory Government, *Submission 31*; Queensland Government, *Submission 28*; Western Australian Government, *Submission 20*.

193 Western Australian Government, *Submission 20*.

194 South Australian Government, *Submission 68*. 'For example, a group long-removed from its traditional areas may nevertheless maintain knowledge and ceremony in relation to those lost lands. In turn, the maintenance of that knowledge, albeit at a remove, maintains the group's connection with the lands'.

195 South Australian Government, *Submission 34*.

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

197 Western Australian Government, *Submission 43*.

198 Northern Territory Government, *Submission 71*.

199 South Australian Government, *Submission 68*.

200 Law Council of Australia, *Submission 64*.

requirements (eg right people, right country; and acknowledgment and observance of laws relating to land and waters)'.[201]

6.117 Conversely, other stakeholders expressed concern that presenting the reasons for displacement 'may be antithetical to obtaining a positive determination of native title',[202] as reform may impose 'unintended prejudicial impacts on groups'.[203] A number of stakeholders submitted that reform would focus on the past rather than the future;[204] and reinforce a 'frozen in time' approach to native title,[205] rather than focusing on the future aspirations of native title groups.[206]

6.118 Other submissions indicated that it may limit 'the recognition of Aboriginal or Torres Strait Islander agency in responding to the particular circumstances of colonisation that they faced'[207] and not recognise that 'it may not always be possible to prove a direct correlation between a demonstrated interruption or change and the effect of government policies and individual behaviour on the movements of individuals or families'.[208]

6.119 Some submissions expressed concern about unhelpful distinctions.[209] As Native Title Services Victoria (NTSV) put it, '[a] debate about the difference between Traditional Owners forced off country by European colonisation and Traditional Owners leaving "voluntarily" to be closer to education and services, should not be fostered'.[210]

6.120 Other concerns centred on the increased complexity and time that might be introduced into native title proceedings,[211] potentially precipitating 'another wave of judicial interpretation'.[212] The NNTC expressed concern that 'such an inquiry may end up involving an assessment of competing versions of history, which may be difficult for the Court and for claim groups'.[213] NTSCORP, who favoured reform, was

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

202 Central Desert Native Title Service, *Submission 48*. See also AIATSIS, *Submission 70*; Native Title Services Victoria, *Submission 45*.

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

204 National Native Title Council, *Submission 57*; A Frith and M Tehan, *Submission 52*. See also South Australian Government, *Submission 68*.

205 National Native Title Council, *Submission 57*. See also AIATSIS, *Submission 70*.

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

207 National Native Title Council, *Submission 57*.

208 AIATSIS, *Submission 70*.

209 National Native Title Council, *Submission 57*; Native Title Services Victoria, *Submission 45*.

210 Native Title Services Victoria, *Submission 45*. The Western Australian Government acknowledged that 'the reasons for an Indigenous group's displacement from and lack of connection to an area may be multi-faceted—a mixture of choices made by members of the group to migrate from their traditional country': Western Australian Government, *Submission 43*.

211 Northern Territory Government, *Submission 71*; National Native Title Council, *Submission 57*; A Frith and M Tehan, *Submission 52*; Native Title Services Victoria, *Submission 45*; Western Australian Government, *Submission 43*.

212 AIATSIS, *Submission 70*.

213 National Native Title Council, *Submission 57*.

concerned about the likelihood of increased litigation leading to further delay in the resolution of claims.[214]

Suggested model

6.121 The ALRC suggested an amendment to the *Native Title Act* to explore how a measure to take into account the reasons—that is the impact of European settlement—might be formulated.[215] This model drew upon drafting precedents in the *Native Title Act*.[216] Few stakeholders supported this model for reform.[217] NTSCORP submitted that

> it strikes a good balance between directing the Court to a consideration of the reasons for dislocation in reaching decisions on the existence of native title, but allowing the Court discretion to develop principles for how this consideration would be undertaken in practice. It would also give a similar indication to the State governments in the claims mediation process.[218]

6.122 However, a number of submissions expressed concerns and possible improvements.[219] While the ALRC's intention was to preserve judicial discretion, several stakeholders urged deletion of the words 'unless it would not be in the interests of justice to do so'.[220] Some raised concerns about an overemphasis on physical connection implicit in the wording of the suggested text, preferring that a wider range of 'reasons' be considered.[221] Some stakeholders objected to the expression 'undue weight'.[222]

No statutory clarification regarding reasons for 'substantial interruption'

6.123 The ALRC sees merit in the fact-finder having regard to reasons for the displacement of Aboriginal and Torres Strait Islander peoples and some change in the continuity of the acknowledgment and observance of traditional laws and customs in certain circumstances. The ALRC notes the High Court's observation in *Yorta Yorta* that examining 'the presence or absence of reasons might influence the fact-finder's decision about whether there was such an interruption'. The ALRC seeks to mediate the view expressed in *Bodney v Bennell* that it is irrelevant to ask why the

214 NTSCORP, *Submission 67*. 'It is likely changes of this kind would create just as many questions as answers'.

215 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014) Question 7–5.

216 The provision is similar to s 82(2) of the Act. When considering the current wording, Sackville J remarked, 'that provision permits, but does not oblige, the Court to take account of the cultural and customary concerns of Aboriginal peoples': *Jango v Northern Territory* [2003] FCA 1230 (31 October 2003) [49].

217 NTSCORP, *Submission 67*; D WYkanak, *Submission 61*; Queensland South Native Title Services, *Submission 55*.

218 NTSCORP, *Submission 67*.

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

220 Yamatji Marlpa Aboriginal Corporation, *Submission 62*. See also Law Society of Western Australia, *Submission 41*.

221 Central Desert Native Title Service, *Submission 48*; Law Society of Western Australia, *Submission 41*.

222 Central Desert Native Title Service, *Submission 48*; Law Society of Western Australia, *Submission 41*.

acknowledgment of traditional laws and the observance of traditional customs may have 'changed'. The fact-finder should be able to have regard to the reasons for any change in continuity of the acknowledgment and observance of traditional laws and customs when assessing whether traditional laws and customs have adapted, evolved or developed.

6.124 The ALRC considers that this approach, together with the likely net effect of recommendations made in Chapter 5, should allow greater scope to consider factors relevant to whether there was change in the continuity of acknowledgment and observance of traditional laws and customs. In particular, Recommendations 5–2 and 5–3, which remove the 'substantially uninterrupted' and the 'generation by generation' thresholds, will mean that there may be greater opportunity for the fact-finder to have regard to the reasons in deciding the effect of the interruption or change in continuity of acknowledgment of law and observance of custom. The ALRC considers that this is the best way to enable consideration of the reasons for interruption or change in continuity of acknowledgment of law and observance of custom rather than recommending specific change to the *Native Title Act*.

6.125 This approach also reflects the weight of stakeholder submissions and consultations which were opposed to specific reform to enable consideration of the reasons for any displacement. A number of stakeholders consider specific reform to be unnecessary given the ALRC's preferred approach outlined in Recommendations 5–1 to 5–5.[223] In respect of Recommendation 5–1, NTSV submitted that

> with a suitably flexible and equitable interpretation of the term 'traditional', an inquiry into the extent and effect of historical displacement of Aboriginal people need not be pursued. A definition of 'traditional' should allow for change and adaptation, including whether such changes are made in response to the forces of colonisation or by choice.[224]

6.126 Recommendations 5–2 and 5–3, in addressing the substantive legal test defining native title, provide a more direct way of accommodating the effects of European settlement. The ALRC considers that if a beneficial approach is taken to the construction of s 223, and that the requirement for continuity of the acknowledgment and observance of traditional laws and customs is no longer set at the high 'substantially uninterrupted' and 'by each generation since sovereignty' thresholds, then there will be greater scope, on a case by case basis, for consideration of the circumstances in which connection has, or has not, been substantially maintained.

6.127 By contrast, National Congress was 'adamant' that the ALRC's preferred approach, now reflected in Recommendations 5–1, 5–2 and 5–3, had 'not gone far enough' to address s 223(1)(b) and the effects European settlement may have had in impairing Aboriginal and Torres Strait Islander peoples' ability to continue their

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223 National Native Title Council, *Submission 57*; A Frith and M Tehan, *Submission 52*; Central Desert Native Title Service, *Submission 48*; Native Title Services Victoria, *Submission 45*. The National Native Title Council envisaged that the term 'traditional' would be interpreted in such a way that 'any displacement of Aboriginal peoples or Torres Strait Islanders, whatever its cause, does not give rise to any loss of the relevant connection'.

224 Native Title Services Victoria, *Submission 45*.

connection to land and waters by those laws and customs. It submitted that Proposal 5–3, now Recommendations 5–2 and 5–3, 'only addresses the level or frequency of continuity of acknowledgment and observance of traditional laws and customs under s 223(1)(a)'.[225]

6.128 Recommendations 5–2 and 5–3 are not aimed simply at the frequency of continuity; although this is typically understood to be their main effect. The ALRC's view of the law is that consideration of why acknowledgment and observance may have 'changed' is permissible in certain circumstances, specifically where it 'might influence the fact-finder's decision about whether there was such an interruption'.[226] The ALRC considers that, if the effect of Recommendations 5–2 and 5–3 is to remove the 'substantially uninterrupted' and the 'generation by generation' thresholds, then it allows scope to consider factors that have impaired the ability of Aboriginal and Torres Strait Islander peoples to continue their connection.

The empowerment of courts

6.129 The option for reform for consideration under the Terms of Reference also required examination of the 'empowerment' of courts. The ALRC understood the term 'empowerment' to indicate the statutory conferral of discretion.[227] Judicial discretion is, by its very nature, one to be exercised in relation to the circumstances of an individual case and by construction of the relevant law.[228] Therefore, the circumstances enlivening the discretion will be variable. A general empowerment of courts may therefore be quite uncertain in its effect and operation.[229] Questions may arise whether any such 'empowerment' would operate as a procedural matter or would form part of the substantive area of law interpreting s 223 of the *Native Title Act*.

6.130 A number of submissions expressed support for the empowerment of courts to disregard substantial interruption or change in continuity of acknowledgment of traditional laws and observance of traditional customs, where it is in the interests of justice to do so.[230] National Congress submitted that, '[w]here the effects of colonisation have caused a substantial interruption to connection that our Peoples have with their lands and waters, the Court must have the discretion to disregard such interruptions'.[231] Such a reform would be 'consistent with the beneficial purposes for which the NTA was enacted, particularly where the interruption is caused by

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225 National Congress of Australia's First Peoples, *Submission 69*.

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

227 See, eg, Native Title Amendment (Reform) Bill 2014 cl 14; Native Title Amendment (Reform) Bill (No 1) 2012 cl 14.

228 See the discussion on construing s 223 in totality of context in Ch 2.

229 S Bielefeld, *Submission 6*. Note that this submission did not express a view on the desirability of the reform option.

230 National Congress of Australia's First Peoples, *Submission 69*; National Congress of Australia's First Peoples, *Submission 32*; Kimberley Land Council, *Submission 30*; NSW Young Lawyers Human Rights Committee, *Submission 29*; Goldfields Land and Sea Council, *Submission 22*; Native Title Services Victoria, *Submission 18*; North Queensland Land Council, *Submission 17*; A Frith and M Tehan, *Submission 12*; Law Society of Western Australia, *Submission 9*; Cape York Land Council, *Submission 7*; Australian Human Rights Commission, *Submission 1*.

231 National Congress of Australia's First Peoples, *Submission 69*.

circumstances outside the control or intent of the relevant members of the relevant society'.[232] Similarly, AHRC submitted that such a reform would be '[i]n furtherance of the purposes of the Act', and referred to the Preamble to the Act.[233]

6.131 However, a number of stakeholders were opposed to this reform option,[234] with some preferring other options.[235] Concerns were raised that such a model for reform:

- 'would likely place greater emphasis than there is presently on the fact and nature of any substantial interruption';[236]
- would be of uncertain effect;[237]
- may not be in claimants' interests as it may lead to increased debate about issues as well as increased costs and delay;[238] and
- is problematic because of uncertainty about the meaning of 'in the interests of justice'.[239]

6.132 These concerns are largely the same as those expressed in some submissions about considering European settlement and any potential reasons for displacement, substantial interruption and change in continuity in general.

6.133 During consultations, stakeholders raised concerns that any proposed amendment of this nature may be unconstitutional because 'empowering' courts to disregard substantial interruption may amount to the legislature directing the courts as to the exercise of their jurisdiction. That is, usurpation by the legislature of the judicial power of Chapter III courts. However, having investigated the issues, the ALRC considers that this is unlikely to be a problem. Presumably the purpose of such a provision is to empower courts with a discretion as to what they may take into account—rather than a direction as to how they are to exercise that discretion.[240]

6.134 Other submissions queried the phrase 'in the interests of justice' which typically indicates that courts retain discretion.[241] Concerns were expressed about defining it in the Act:[242]

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

233 Australian Human Rights Commission, *Submission 1*.

234 South Australian Government, *Submission 34*; Western Australian Fishing Industry Council, *Submission 23*; Western Australian Government, *Submission 20*; National Farmers' Federation, *Submission 14*; Just Us Lawyers, *Submission 2*.

235 NSW Young Lawyers Human Rights Committee, *Submission 29*; Just Us Lawyers, *Submission 2*.

236 Western Australian Government, *Submission 20*.

237 Some stakeholders also raised this concern in relation to the earlier proposal for a presumption of continuity and substantial interruption. See, eg, Western Australian Government, Submission No 18 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, August 2011.

238 NSW Young Lawyers Human Rights Committee, *Submission 29*; Just Us Lawyers, *Submission 2*.

239 See, eg, NSW Young Lawyers Human Rights Committee, *Submission 29*.

240 See *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1.

241 See, eg, South Australian Government, *Submission 34*.

242 The ALRC had asked a question in the Issues Paper. See Australian Law Reform Commission, *Review of the Native Title Act 1993*, Issues Paper No 45 (2013) Q 21(b).

> The phrase could import considerations of the overall circumstances of the case, including the present circumstances of the Claimants or the Respondents, or difficulties being experienced between multiple claim groups. There is a possibility that a decision may be taken to not disregard ‘substantial interruption’ in order to assist a poor or disadvantaged respondent due to the ‘interests of justice’.[243]

6.135 Some submissions felt some guidance may be useful,[244] or necessary.[245]

6.136 Stakeholders who were opposed to a statutory definition of ‘in the interests of justice’ considered that it was ‘better left to the Court in each case’,[246] as this would provide courts with greater flexibility to disregard substantial interruption.[247]

Other models for considering the impact of European settlement

6.137 While stakeholders have certain expectations about what may be achieved by the native title system, dispossession is not necessarily capable of being redressed by a determination of native title.[248]

6.138 Although the ALRC has identified Recommendations 5–1 to 5–5 as its preferred approach, the ALRC sees value in outlining the other models or options for reform that have been offered as they have been the subject of proposed legislative amendment over a number of years and have garnered significant stakeholder support, including in submissions to this Inquiry. The following section sets out responses to these other models for considering the impact of European settlement.

Background

6.139 The Aboriginal and Torres Strait Islander Social Justice Commissioner, in *Native Title Report 2008*, proposed a legislative amendment so that the courts would have capacity to take into account the reasons for interruption to the acknowledgment of the traditional laws and the observance of the traditional customs.[249] In the *Native Title Report 2009*, the Commissioner suggested a proposal in similar terms to the option for reform in the Terms of Reference.[250] Further, the Commissioner suggested that ‘a definition or a non-exhaustive list of historical events’ could be provided in the *Native Title Act* in order ‘to guide courts as to what should be disregarded’.[251] The

243 NSW Young Lawyers Human Rights Committee, *Submission 29*.
244 NSW Young Lawyers Human Rights Committee, *Submission 29* (suggesting the option put forward by the Aboriginal and Torres Strait Islander Social Justice Commissioner, namely ‘a non-exhaustive list of particular circumstances where it is “in the interests of justice” to disregard “substantial interruption”’).
245 South Australian Government, *Submission 34*.
246 A Frith and M Tehan, *Submission 12*.
247 North Queensland Land Council, *Submission 17*.
248 See Ch 1 and Ch 3.
249 Aboriginal and Torres Strait Islander Social Justice Commissioner, ‘Native Title Report 2008’, above n 167, 86–7.
250 Aboriginal and Torres Strait Islander Social Justice Commissioner, ‘Native Title Report 2009’, above n 167, 87.
251 Ibid.

Native Title Amendment (Reform) Bill 2011 proposed amendments broadly consistent with these recommendations.[252]

Native Title Amendment (Reform) Bill 2014

6.140 The Native Title Amendment (Reform) Bill 2014 differed in some key respects from the 2011 Bill,[253] providing for a discretion be conferred on the courts rather than mandating them to 'treat as relevant' particular reasons for the substantial interruption.[254] The 2014 Bill would have inserted a new s 61AB, providing that:

> A court may determine that subsection 223(1) has been satisfied, despite finding that there has been:
>
> (a) a substantial interruption in the acknowledgment of traditional laws or the observance of traditional customs; or
>
> (b) a significant change to traditional laws acknowledged or traditional customs observed;
>
> if the primary reason for the substantial interruption or the significant change is the action of a State or a Territory or a person or other party who is not an Aboriginal person or a Torres Strait Islander.

6.141 The ALRC, after careful assessment of various models and combinations, suggests that allowing courts to disregard substantial interruption or change in continuity of acknowledgment and observance of traditional laws and customs under the Native Title Amendment (Reform) Bill 2014 is the best of the alternative models. In the ALRC's view, it is better than the model suggested in the Discussion Paper or a statutory definition of 'substantial interruption'. It received the most support from stakeholders who favoured other reform options.

Statutory definition of 'substantial interruption'

6.142 While the Aboriginal and Torres Strait Islander Social Justice Commissioner had suggested that a statutory definition of 'substantial interruption' be linked to the

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252 The Bill approached the issue of substantial interruption within a presumption of continuity—that is, by using interlinking provisions: Native Title Amendment (Reform) Bill 2011 cl 12. Proposed new s 61AA provided for presumptions and proposed new s 61AB provided for 'continuing connection'.

253 For example, the provisions for presumptions and with respect to continuing connection are not linked: Native Title Amendment (Reform) Bill 2014 cl 14. See also Native Title Amendment (Reform) Bill (No 1) 2012 cl 14. Note that proposed new s 61AB is in exactly the same terms in both the 2012 and 2014 Bills. The provisions in these latter Bills responded to a number of suggestions that had been made in the course of the Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the Native Title Amendment (Reform) Bill 2011 (the first iteration of the Bill), in particular the Law Council of Australia's submission with respect to the drafting of proposed new s 61AB: Commonwealth, *Parliamentary Debates*, Senate, 29 February 2012, 1238, 1242 (Rachel Siewert).

254 Native Title Amendment (Reform) Bill 2011 cl 12. Proposed new s 61AB(2)(a) provided that the courts 'must treat as relevant' whether the primary reason for any demonstrated interruption in the acknowledgment of traditional laws or the observance of traditional customs is the action of a State or a Territory or a person who is not an Aboriginal person or a Torres Strait Islander.

empowerment of courts to disregard substantial interruption,[255] some submissions conceived of a definition as a separate reform option.[256]

6.143 Several submissions supported a statutory definition of the factual matters related to 'substantial interruption',[257] with a non-exhaustive list held to be important.[258] Supporters of a statutory definition considered a non-exhaustive list necessary as what constitutes a 'substantial interruption' is unsettled.[259]

6.144 Other stakeholders opposed a statutory definition.[260] Governments were opposed,[261] viewing such a reform option as:

- unnecessary;[262]
- 'impractical', given that it is 'a question of fact and degree';[263]
- making the test for recognising native title 'unduly complicated';[264] and
- tending to 'shift the focus of native title inquiries onto historical matters, without necessarily achieving any time savings'.[265]

6.145 A statutory definition of 'substantial interruption' was also opposed by stakeholders who otherwise favoured law reform.[266] AIATSIS, for example, acknowledged that:

> A strong argument exists for including a non-exhaustive list of historical events upon which the courts could be guided with respect to disregarding the requirement for continuing connection without substantial interruption.[267]

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255 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2009', above n 167, 87.

256 See, eg, A Frith and M Tehan, *Submission 12*.

257 National Congress of Australia's First Peoples, *Submission 32*; Native Title Services Victoria, *Submission 18*; North Queensland Land Council, *Submission 17*; Australian Human Rights Commission, *Submission 1*. Some of these stakeholders supported express inclusion of the forced removal of children and the relocation of communities onto missions, which were examples that the Aboriginal and Torres Strait Islander Social Justice Commissioner had suggested previously: Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2009', above n 167, 87.

258 South Australian Government, *Submission 34* (who was opposed to such a definition because '[s]uch concepts are ill suited to exhaustive definition'); National Congress of Australia's First Peoples, *Submission 32*; North Queensland Land Council, *Submission 17*; Cape York Land Council, *Submission 7*; Just Us Lawyers, *Submission 2*.

259 Australian Human Rights Commission, *Submission 1*. See also North Queensland Land Council, *Submission 17*.

260 South Australian Government, *Submission 34*; NSW Young Lawyers Human Rights Committee, *Submission 29*; Western Australian Government, *Submission 20*; National Farmers' Federation, *Submission 14*; A Frith and M Tehan, *Submission 12*; Cape York Land Council, *Submission 7*.

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

262 South Australian Government, *Submission 34*; Northern Territory Government, *Submission 31*; Queensland Government, *Submission 28*.

263 South Australian Government, *Submission 34*.

264 Western Australian Government, *Submission 20*.

265 Ibid.

266 See, eg, NSW Young Lawyers Human Rights Committee, *Submission 29*; A Frith and M Tehan, *Submission 12*.

267 AIATSIS, *Submission 36*.

6.146 However, AIATSIS reiterated its comment to the Senate Inquiry concerning the provisions of the 2011 Bill, that,

> Indigenous agency in responding to such forces is not always easily articulated and reasons for certain actions may form part of the implicit rather than explicit knowledge of claimants. In these circumstances, respondent rebuttal might argue that a particular move was voluntary as the subtleties and long terms effects of policies remain invisible. There are also many other factors, such as cataclysmic events, drought, flood, war and the like, which could, prima facie, indicate a substantial period of dislocation, but which might fall outside the protection of s 61AB(2).[268]

Other models for reform

6.147 In the Discussion Paper, the ALRC invited comment on other reform options that may be appropriate. Some stakeholders preferred other reforms to those identified by the ALRC.[269] The Law Society of Western Australia and Yamatji Marlpa Aboriginal Corporation ('YMAC') favoured text advanced by the Law Council of Australia in response to Native Title Amendment (Reform) Bill 2011, with a few minor additions.[270] Essentially, this model is similar to new s 61AB(2) as proposed in the Native Title Amendment (Reform) Bill 2014.

6.148 AIATSIS favoured a 'presumption of transformation' to be expressly stated in the *Native Title Act*, together with 'an obligation on the State to abstain from adducing any evidence about interruption of connection where the action of the State caused the interruption'. Such an approach would impose 'an equitable obligation on the State to act in the best interest of the applicant'.[271]

6.149 Others saw the native title system as an inappropriate vehicle for an inquiry into the impacts of European Settlement, highlighting the fact that Australia does not have a forum dedicated to reconciliation and compensation.[272] CDNTS stated that, while

> acknowledgment of the impact of displacement is key to starting to address community hurt[,] … native title is not the answer, recognition nor means of redress that Aboriginal people have been seeking. … [T]he NTA should not be the only means by which the impact of colonisation is addressed.[273]

6.150 Similarly, the Law Council of Australia submitted that the *Native Title Act* 'is not, of itself, sufficient to address the injustices caused by the dispossession of Aboriginal peoples and Torres Strait Islanders'.[274] Both stakeholders noted the failure

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268 Ibid.

269 AIATSIS, *Submission 70*; Minerals Council of Australia, *Submission 65*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; Law Society of Western Australia, *Submission 41*. For example, the Minerals Council of Australia called for reform of administrative processes so as to improve the claims process.

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

271 AIATSIS, *Submission 70*. See Ch 7 for a discussion of presumptions more generally.

272 Several other former Commonwealth colonies have instituted 'Reconciliation Tribunals', eg New Zealand's Waitangi Tribunal, the Truth and Reconciliation Commission of Canada, and the South African Truth and Reconciliation Commission.

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

274 Law Council of Australia, *Submission 64*.

to implement the social justice package which had originally been proposed to compensate Aboriginal peoples and Torres Strait Islanders who had been dispossessed of their land through colonisation.[275] CDNTS also submitted that the Indigenous Land Corporation had 'not delivered what was intended'. It speculated that '[p]erhaps the answer lies more in alternative settlements or regimes'.[276]

Overview of key points

6.151 The ALRC considers that together Recommendations 5–1, 5–2 and 5–3 will allow courts the discretion to take into account more readily the impacts of European settlement on Aboriginal and Torres Strait Islander claimants on a factual basis when determining connection under s 223(1)(b).

6.152 The ALRC considers that the change to be effected by Recommendation 5–1 would necessarily also apply to s 223(1)(b), given the repetition of the phrase 'by those laws and customs' in that provision. Accordingly, changes to traditional laws and customs due to displacement of groups could be accommodated; particularly as the existing law clearly does not require physical presence or continued or recent use to establish connection.

6.153 In Chapter 5, the ALRC raises the possibility that there could be a positive test for the required continuity of the acknowledgment and observance of traditional laws and customs. The terms 'substantially maintained' or 'identifiable through time' were suggested.[277] This suggestion was in response to the removal of the high thresholds of 'substantially uninterrupted' and 'by each generation since sovereignty' in respect of the required continuity of the acknowledgment and observance of traditional laws and customs.[278]

6.154 In addition, the ALRC considers that the recommendation for 'society' to be treated as a conceptual tool, rather than a strict requirement,[279] will ameliorate situations where groups have been dispersed under settlement impacts.

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275 Ibid; Central Desert Native Title Service, *Submission 48*.

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

277 See Ch 5.

278 See Rec 5–2 and 5–3.

279 See Rec 5–4.