7. Proof and Evidence

Contents

Summary

7.1 The Terms of Reference for this Inquiry require the ALRC to consider whether there should be a 'presumption of continuity of acknowledgment and observance of traditional laws and customs and connection'. The ALRC considers that it is not necessary to introduce such a presumption in light of other recommended reforms. It considers that issues concerning proof of native title should be addressed by amendments to the definition of native title in s 223 of the *Native Title Act 1993* (Cth) ('*Native Title Act*'). These recommended amendments are detailed in Chapter 5. However, the ALRC does recommend that there be guidance in the *Native Title Act* regarding when inferences may be drawn in the proof of native title rights and interests.

Proof of native title

7.2 The *Native Title Act* is designed to encourage parties to take responsibility for resolving native title claims without the need for litigation.[1] The Preamble indicates the legislative preference for resolving native title claims by negotiation.[2] Nonetheless, native title claims are commenced and conducted as legal proceedings in the Federal Court of Australia—they are proceedings under the *Native Title Act*.[3]

7.3 In those proceedings, claimants bear the persuasive burden[4] of proving all of the elements necessary to establish the existence of native title as defined in s 223.[5] As

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1 *Lovett on behalf of the Gunditjmara People v Victoria* [2007] FCA 474 (30 March 2007) [36].

2 *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595, [18] (Brennan CJ, Dawson, Gaudron, Toohey and Gummow JJ).

3 *Native Title Act 1993* (Cth) ss 13(1), 61(1).

4 In a legal proceeding, a party may bear a 'burden' or 'onus' of proof of different kinds. A 'legal' or 'persuasive' burden of proof is 'the obligation of a party to meet the requirement of a rule of law that a fact in issue be proved (or disproved)': J D Heydon, LexisNexis, *Cross on Evidence*, Vol 1 (at Service

detailed in Chapter 4, native title claimants are required to show that, as a matter of fact, they possess communal, group or individual rights and interests in relation to land or waters under traditional laws acknowledged and customs observed by them, and that, by those laws and customs, they have a connection with the land or waters claimed.[6] Additionally, the native title rights and interests must be able to be recognised by the common law.[7] Whether they can be recognised is a question of law.

7.4 Aboriginal and Torres Strait Islander peoples may also claim compensation for the extinguishment of native title.[8] Doing so requires proving that native title was in existence before being extinguished.[9]

7.5 Native title must be proved in accordance with the rules of evidence, except to the extent otherwise ordered by the Court.[10] The standard of proof required is the civil standard—the balance of probabilities.[11]

7.6 Native title matters may be resolved by consent between parties—in fact, this is the most common means by which a native title determination has been reached.[12] If an agreement between parties to a determination is reached, the Federal Court may, if satisfied that an order consistent with the terms of the agreement would be within the power of the Court[13] and it appears to the Court to be appropriate,[14] make a native title determination order over the whole or part of a determination area without a court hearing.

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164) [7010]. An evidential burden of proof is 'the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue': [7015].

5 *Western Australia v Ward* (2000) 99 FCR 316, [114]–[117] (Beaumont and von Doussa JJ); *Daniel v Western Australia* [2003] FCA 666 (3 July 2003) [146]; *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* (2007) 238 ALR 1, [339]. In a non-claimant application, the party making the application seeks a determination that no native title exists in a particular area. In such an application, the legal burden of establishing that no native title exists lies on the non-claimant applicant: *Worimi Local Aboriginal Land Council v Minister for Lands (NSW) (No 2)* [2008] FCA 1929 (18 December 2008) [49]. A non-claimant applicant may alternatively assert that no native title rights exists in the relevant land because any such rights and interests have been extinguished: *Gandangara Local Aboriginal Land Council v A-G (NSW)* [2013] FCA 646 (3 July 2013).

6 *Native Title Act 1993* (Cth) s 223(1)(a)–(b).

7 Ibid s 223(1)(c).

8 Ibid ss 50(2), 61(1).

9 See, eg, *Jango v Northern Territory* (2006) 152 FCR 150. Not all extinguishing acts can be compensated under the *Native Title Act*. Compensation is dealt with in *Native Title Act 1993* (Cth) pt 2 div 5.

10 *Native Title Act 1993* (Cth) s 82. The *Evidence Act 1995* (Cth) recognises the unique circumstances involved in providing evidence of Aboriginal and Torres Strait Islander laws and customs, and provides exceptions to the hearsay and opinion rules in relation to evidence of the existence or non-existence or the content of such laws and customs: *Evidence Act 1995* (Cth) ss 72, 78A. These exceptions were included in the *Evidence Act* in 2008, implementing recommendations from the joint ALRC, NSWLRC and VLRC Inquiry into Uniform Evidence Law: *Evidence Amendment Act 2008* (Cth); Australian Law Reform Commission; New South Wales Law Reform Commission; Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC Report No 102 (2006) Recs 19–1, 19–2.

11 *Milirrpum v Nabalco* [1972] ALR 65, 119–20; *Mason v Tritton* (1993) 70 A Crim R 28, 42; *Evidence Act 1995* (Cth) s 140.

12 See Ch 3 for an overview of the disposition of claims by consent or contested hearing.

13 *Native Title Act 1993* (Cth) ss 87(1)(c), 87A(4)(a).

14 Ibid ss 87(1A), (2), 87A(4)(b), (5)(b).

Problems of proof

7.7 As discussed in Chapter 2, the basis on which native title was recognised by the Australian legal system brings with it difficulties of proof. Native title involves the recognition that Aboriginal and Torres Strait Islander peoples had rights and interests in land and waters, possessed under Aboriginal and Torres Strait Islander laws and customs, which pre-existed and survived annexation. The time elapsed between the assertion of sovereignty,[15] and the Australian legal system's recognition, in 1992, of the existence of native title means that evidencing the survival of those rights over approximately 200 years presents significant challenges.[16] Sackville J in *Jango v Northern Territory* provides a useful summation of some of these challenges:

> Claimants in native title litigation suffer from the disadvantage that, in the absence of a written tradition, there are no indigenous documentary records that enable the Court to ascertain the laws and customs followed by Aboriginal people at sovereignty. While Aboriginal witnesses may be able to recount the content of laws and customs acknowledged and observed in the past, the collective memory of living people will not extend back for 170 or 180 years.[17]

7.8 The Court has also recognised that what written records do exist may have limitations. As Lindgren J noted,

> early records made by European amateur and professional ethnographers are limited by the ethnocentric views of the writers and by the limits on their understanding of the language and culture of those about whom they wrote.[18]

7.9 In addition, the recognition of native title involves an 'intersection of traditional laws and customs with the common law'.[19] There can be difficulties of translation between these two systems of law. Christos Mantziaris and Dr David Martin have noted:

> It may be difficult or impossible to render comprehensible to a person located in a non-indigenous system of meaning (system A), the meaning of relations defined in the terms and concepts of the system of traditional law and custom (system B). A practical setting for this problem is where a judge is asked to determine the content of native title rights and interests.[20]

7.10 These challenges have been compounded by the approach to construing the statutory requirements for establishing native title. A number of submissions to this Inquiry emphasised the complexity of these requirements. For example, Queensland

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15 The date of sovereignty varies in different parts of Australia: see further Richard H Bartlett, *Native Title in Australia* (LexisNexis Butterworths, 3rd ed, 2015) 216–217.

16 See generally, Anthony Connolly, 'Conceiving of Tradition: Dynamics of Judicial Interpretation and Explanation in Native Title Law' in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (Federation Press, 2005) 118, 134–35.

17 *Jango v Northern Territory* (2006) 152 FCR 150, [462].

18 *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* (2007) 238 ALR 1, [441]. See also *Daniel v Western Australia* [2003] FCA 666 (3 July 2003) [149]; *Risk v Northern Territory* [2006] FCA 404 (29 August 2006) [135].

19 *Fejo v Northern Territory* (1998) 195 CLR 96, [46].

20 Christos Mantziaris and David Martin, *Native Title Corporations: A Legal and Anthropological Analysis* (Federation Press, 2000) 31.

South Native Title Services (QSNTS) argued that s 223 is 'unnecessarily complicated, fragmented and inconsistently interpreted and applied in practice'.[21] Goldfields Land and Sea Council (GLSC) commented upon the 'unnecessary technicality and legalism in native title'.[22]

7.11 However, other stakeholders said that the current legal test for the proof of native title was not unduly onerous and time-consuming.[23] For example, the Western Australian Government submitted that:

> Courts have interpreted the *Yorta Yorta* requirements broadly and generously. In the State's experience, the *Yorta Yorta* requirements have seldom posed a significant barrier to the recognition of native title in a litigated context. In practice, the 'bar' is now low for the recognition of native title.[24]

7.12 Discharging the burden of proving that native title exists is a significant undertaking. In *Yorta Yorta*, the High Court acknowledged that 'difficult problems of proof' face native title claimants when seeking to establish native title rights and interests—particularly in demonstrating the content of traditional laws and customs as required by s 223(1)(a).[25] However, it also noted that 'the difficulty of the forensic task does not alter the requirements of the statutory provision'.[26]

7.13 Native title claimants will rely on a range of sources of evidence to establish native title rights and interests, including, most importantly, evidence from Aboriginal or Torres Strait Islander witnesses.[27] Expert evidence is also routinely adduced, primarily from anthropologists, but also from other experts including linguists and archaeologists.[28] Expert evidence is considered in more detail in Chapter 12.

7.14 The evidence required to establish native title has attracted criticism, as well as calls for reform to ease the burden on claimants. In 2005, the United Nations Committee on the Elimination of Racial Discrimination stated that it was

> concerned about information according to which proof of continuous observance and acknowledgement of the laws and customs of Indigenous peoples since the British acquisition of sovereignty over Australia is required to establish elements in the statutory definition of native title under the *Native Title Act*.… It recommends that the

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21 Queensland South Native Title Services, *Submission 24*. The Law Council of Australia expressly agreed with QSNTS's position: Law Council of Australia, *Submission 35*.

22 Goldfields Land and Sea Council, *Submission 22*. See also AIATSIS, *Submission 36*; National Congress of Australia's First Peoples, *Submission 32*.

23 Northern Territory Government, *Submission 31*; Western Australian Government, *Submission 20*.

24 Western Australian Government, *Submission 20*.

25 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [80] (Gleeson CJ, Gummow and Hayne JJ).

26 Ibid.

27 Such evidence has been described as having the 'highest importance': *Sampi v Western Australia* [2005] FCA 777 (10 June 2005) [48]; *Sampi on behalf of the Bardi and Jawi People v Western Australia* (2010) 266 ALR 537, [57].

28 LexisNexis, *Native Title Service* (at Service 100) [1845].

> State Party review the requirement of such a high standard of proof, bearing in mind the nature of the relationship of Indigenous peoples to their land.[29]

7.15 Submissions from Native Title Representative Bodies and Native Title Service Providers also drew attention to the heavy burden that lies on the claimants in native title proceedings. For example, Native Title Services Victoria submitted that the current burden of proof in the Act is a significant evidentiary barrier faced by all native title claimants'.[30] The Law Council of Australia noted the 'considerable' onus on claimants.[31] The Northern Territory Government submitted that the provision of anthropological evidence was 'enormously resource intensive'.[32]

Evidence in consent determinations

7.16 When a native title claim is resolved by consent, native title claimants do not have to prove their case in a court hearing, although the Court is still involved in making a formal determination of native title. As noted above, if an agreement between parties to a determination is reached, the Federal Court may, if satisfied that an order consistent with the terms of the agreement would be within the power of the Court[33] and it appears to the Court to be appropriate,[34] make a native title determination order over the whole or part of a determination area without a hearing.

7.17 In determining whether such an order is appropriate, the Court has stated that it is not required to embark on its own inquiry into the merits of the claim.[35] Instead, its focus is on whether there is an agreement between parties that was 'freely entered into on an informed basis'.[36] In relation to a state or territory respondent party, this will involve the Court being assured that such a party has 'taken steps to satisfy itself that there is a credible basis for an application',[37] or is 'satisfied as to the cogency of the evidence upon which applicants rely'.[38]

7.18 The Court has considered the appropriate extent of the investigation required by a state or territory respondent party to satisfy itself that there is a credible basis for an application for determination of native title. In *Lovett on behalf of the Gunditjmara People v Victoria*, for example, North J commented that 'something significantly less

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29 Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, 66th Sess, UN Doc CERD/C/AUS/CO/14 (14 April 2005) [17].

30 Native Title Services Victoria, *Submission 18*. See also Goldfields Land and Sea Council, *Submission 22*.

31 Law Council of Australia, *Submission 35*.

32 Northern Territory Government, *Submission 31*. The Northern Territory Government noted that evidence relating to public works and pastoral improvements was similarly resource intensive.

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

34 Ibid ss 87(1A), (2), 87A(4)(b), (5)(b).

35 See, eg, *Lander v South Australia* [2012] FCA 427 (1 May 2012) [12]. In respect of s 87A, see, eg, *Brown (on behalf of the Ngarla People) v Western Australia* [2007] FCA 1025 (30 May 2007) [22]; *Goonack v Western Australia* [2011] FCA 516 (23 May 2011) [24]–[26].

36 *Lovett on behalf of the Gunditjmara People v Victoria* [2007] FCA 474 (30 March 2007) [37].

37 Ibid.

38 *Munn for and on behalf of the Gunggari People v Queensland* (2001) 115 FCR 109, [29]–[30]. Mansfield J considered that similar principles applied in the resolution of compensation claims by consent: *De Rose v South Australia* [2013] FCA 988, [24]–[26].

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

7.19 In negotiating consent determinations, state and territory respondent parties have developed a practice of requiring evidence about claimants' connection to an area to be provided to them in the form of a 'connection report'.[40] Formal guidelines regarding the kind of evidence required have been issued by a number of state governments.[41]

7.20 These guidelines largely reflect the governments' understandings of the kind of evidence required to satisfy s 223 of the *Native Title Act*. For example, the Queensland Department of Natural Resources and Mines indicated that its requirements for the content of a connection report draw upon 'the NTA and current Australian native title case law', in setting out 'the broader principles that should be addressed in a connection report to demonstrate the claim group's native title'.[42] The Western Australian Department of Premier and Cabinet states that 'the connection material provided in support of a native title claim must satisfy the requirements of ss 223 and 225 of the NTA and developing case law'.[43]

7.21 The Court has stressed that 'The Act does not intend to substitute a trial, in effect, conducted by State parties for a trial before the Court'.[44] However, as the connection guidelines published by state governments indicate, such assessments are guided by understandings of the requirements of the substantive law in respect of native title. The assessment of connection evidence in consent determinations is considered further in Chapter 12.

A presumption in relation to proof?

7.22 A presumption in relation to proof of native title is perceived as one response to the difficulty of establishing the existence of native title rights and interests. It was first proposed by Justice French (as he then was) in 2008.[45] Justice French suggested that a presumption may 'lighten some of the burden of making a case for a determination' by lifting some elements of the burden of proof from native title claimants.[46]

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39 *Lovett on behalf of the Gunditjmara People v Victoria* [2007] FCA 474 (30 March 2007) [38].

40 LexisNexis, *Native Title Service* (at Service 91) [1804].

41 See, eg, Department of Natural Resources and Mines, Queensland, *Guide to Compiling a Connection Report for Native Title Claims in Queensland* (2013); Government of South Australia Crown Solicitor's Office, *Consent Determinations in South Australia: A Guide to Preparing Native Title Reports* (2004); Department of the Premier and Cabinet, Government of Western Australia, *Guidelines for the Provision of Connection Material* (2012).

42 Department of Natural Resources and Mines, Queensland, above n 41, 5.

43 Department of the Premier and Cabinet, Government of Western Australia, above n 41, 3.

44 *Lovett on behalf of the Gunditjmara People v Victoria* [2007] FCA 474 (30 March 2007) [38].

45 Justice Robert French, 'Lifting the Burden of Native Title—Some Modest Proposals for Improvement' (Speech Delivered at the Federal Court Native Title User Group, Adelaide, 9 July 2008). The model proposed by Justice French has been largely adopted by a series of Native Title Amendment (Reform) Bills: Native Title Amendment (Reform) Bill 2011; Native Title Amendment (Reform) Bill (No 1) 2012; Native Title Amendment (Reform) Bill 2014. See also Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Native Title Amendment (Reform) Bill 2011* (2011).

46 Justice Robert French, 'Lifting the Burden of Native Title—Some Modest Proposals for Improvement' (Speech Delivered at the Federal Court Native Title User Group, Adelaide, 9 July 2008).

7.23 A presumption has a specific meaning in a legal context, distinct from its ordinary meaning as an assumption of something as true, or a belief on reasonable grounds.[47]

7.24 A presumption of law is a rule of evidence that affects how a fact in issue is proved. A presumption of law operates so that when a fact—the 'basic fact'—is proved, it must, in the absence of further evidence, lead to a conclusion that another fact—the 'presumed fact'—exists.[48] In other words, a presumption that a fact exists will arise on proof of a basic fact. The presumption will operate unless rebutted by evidence to the contrary.[49] The amount of evidence required in rebuttal differs between presumptions.[50] Some may require 'some' evidence to be adduced, and 'one way of stating the effect of such presumptions is to say that they shift the evidential burden of proof'.[51] Others may be rebutted only by adducing evidence 'sufficiently cogent to persuade the tribunal of fact of the non-existence of the presumed fact'.[52] In other words, they can be seen as shifting the persuasive or legal burden of proof.[53]

7.25 An inference is distinct from a presumption of law. Presumptions have a formal role in the proof of a particular fact. By contrast,

> An inference is a tentative or final assent to the existence of a fact which the drawer of the inference bases on the existence of some other fact or facts. The drawing of an inference is an exercise of the ordinary powers of human reason in the light of human experience; it is not affected directly by any rule of law.[54]

7.26 When an inference is drawn, it may satisfy a burden of proof, but the 'trier of fact decides whether to draw an inference and what weight to give to it'.[55]

7.27 There can be some imprecision in the distinction between presumptions and inferences. Where a fact in issue may be inferred from the proof of another particular fact in a commonly recurring situation, such an inference is often referred to as a 'presumption of fact'.[56] Unlike a presumption of law, a court is not obliged to draw this inference. A presumption of fact plays no formal role in the allocation of a burden of proof. However, it can be said to cast a provisional, or tactical, burden of disproving the fact on the opponent of the issue.[57] As such, 'the party proving the basic fact is

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47 Macquarie Dictionary (Macquarie Library, Revised 3rd Ed, 2001).
48 J D Heydon, LexisNexis, *Cross on Evidence*, Vol 1 (at Service 164) [7240], [7260].
49 Some presumptions of law are irrebuttable. However, the focus here is on rebuttable presumptions. See generally Ibid [7265].
50 Ibid [7290].
51 Ibid [7295].
52 Ibid [7300].
53 Ibid.
54 Thomson Reuters, *The Laws of Australia* (at 1 September 2011) 16 Evidence, '16.2 Proof in Civil Cases' [16.2.270].
55 Ibid.
56 J D Heydon, LexisNexis, *Cross on Evidence*, Vol 1 (at Service 164) [7215]. Heydon notes that presumptions of fact are 'not true presumptions', but that 'nevertheless this misleading connotation of the term "presumption" used in connection with the ordinary processes of inferential reasoning has become so familiar that in most cases the word is hardly likely to be productive of great confusion': Ibid [7255].
57 Ibid [7300].

likely to win on the issue to which the presumed fact relates, in the absence of evidence to the contrary adduced by the other party'.[58]

7.28 In Justice French's model, the facts necessary to satisfy s 223(1) would be presumed to exist on the proof of certain basic facts, namely, that:

- the native title claim group defined in the application applies for a determination of native title rights and interests where the rights and interests are found to be possessed under laws acknowledged and customs observed by the native title claim group;
- members of the native title claim group reasonably believe the laws and customs so acknowledged to be traditional;
- the members of the native title claim group, by their laws and customs, have a connection with the land or waters the subject of the application; and
- the members of the native title claim group reasonably believe that persons from whom one or more of them was descended, acknowledged and observed traditional laws and customs at sovereignty by which those persons had a connection with the land or waters the subject of the application.[59]

7.29 Justice French considered that the presumption should operate subject to proof to the contrary.[60]

7.30 Many stakeholders supported the introduction of a presumption.[61] A number of proponents of a presumption argued that it would reduce the resource burden on claimants to establish the elements necessary to prove the existence of native title,[62] and would place some of that burden more appropriately on state and territory respondent parties.[63] Related to this, a number of submissions argued that a presumption would reduce delay and speed resolution of claims.[64] The National Native Title Council made both these points, arguing that:

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58 Ibid [7215].

59 Justice Robert French, 'Lifting the Burden of Native Title—Some Modest Proposals for Improvement' (Speech Delivered at the Federal Court Native Title User Group, Adelaide, 9 July 2008).

60 Ibid [30].

61 AIATSIS, *Submission 36*; Law Council of Australia, *Submission 35*; National Congress of Australia's First Peoples, *Submission 32*; Kimberley Land Council, *Submission 30*; NSW Young Lawyers Human Rights Committee, *Submission 29*; Central Desert Native Title Services, *Submission 26*; Queensland South Native Title Services, *Submission 24*; Goldfields Land and Sea Council, *Submission 22*; Native Title Services Victoria, *Submission 18*; North Queensland Land Council, *Submission 17*; National Native Title Council, *Submission 16*; Law Society of Western Australia, *Submission 9*; Cape York Land Council, *Submission 7*; Just Us Lawyers, *Submission 2*; Australian Human Rights Commission, *Submission 1*.

62 NSW Young Lawyers Human Rights Committee, *Submission 29*; Native Title Services Victoria, *Submission 18*; National Native Title Council, *Submission 16*; Cape York Land Council, *Submission 7*.

63 National Congress of Australia's First Peoples, *Submission 32*; National Native Title Council, *Submission 16*.

64 NSW Young Lawyers Human Rights Committee, *Submission 29*; Native Title Services Victoria, *Submission 18*; National Native Title Council, *Submission 16*; Law Society of Western Australia, *Submission 9*.

> the adoption of a rebuttable presumption would help reduce the resource burden on the system (especially where continuity is undisputed), helping facilitate the expeditious resolution of native title claims.
>
> Moreover, by reversing the onus of proof, the evidential burden is placed more appropriately on the State, which, by virtue of its 'corporate memory', is in a better position to elucidate on how it colonised or asserted its sovereignty over a claim area.[65]

7.31 Other submissions argued that a presumption would be appropriate on the basis that it was unjust or discriminatory to require native title claimants to prove their customary connection to their territories.[66] The National Congress of Australia's First Peoples argued:

> the current onus of proof mechanism is racially discriminatory as it rests on Aboriginal and Torres Strait Islander Peoples to claim and prove that we have customary connection to our territories. It also prevents Aboriginal and Torres Strait Islander Peoples from exercising and enjoying our rights and freedoms. This procedural requirement merely serves as a barrier to justice and an ongoing defensive mechanism for shielding the historical theft of lands, territories and resources.[67]

7.32 The ALRC considers that the extent of evidence required to establish native title is in tension with the *Native Title Act*'s object to recognise and protect native title.[68] However, the ALRC concludes that, rather than introducing a presumption—a reform affecting how facts in issue in native title matters are proved—it is preferable to amend the definition of native title itself.

7.33 In this regard, the ALRC makes a number of recommendations for change to the legal test for establishing native title, detailed in Chapter 5. The ALRC recommends that the *Native Title Act* make clear that:

- traditional laws and customs may adapt, evolve or otherwise develop (Recommendation 5–1);
- it is not necessary to establish continuity of acknowledgment and observance of traditional laws and customs substantially uninterrupted by each generation since sovereignty (Recommendations 5–2 and 5–3);
- establishing the existence of a society united in and by its acknowledgment and observance of traditional laws and customs is not an independent element of establishing native title (Recommendation 5–4);
- native title rights and interests may be transmitted, transferred between Aboriginal or Torres Strait Islander groups, or otherwise acquired in accordance with traditional laws and customs (Recommendation 5–5).

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65 National Native Title Council, *Submission 16*.
66 National Congress of Australia's First Peoples, *Submission 32*; Native Title Services Victoria, *Submission 18*.
67 National Congress of Australia's First Peoples, *Submission 32*.
68 *Native Title Act 1993* (Cth) s 3(a).

7.34 The ALRC considers that these changes will contribute to lessening the difficulty of the forensic task for claimants, and produce efficiency gains in the native title process, while maintaining the integrity of the doctrinal basis of native title.

7.35 While a presumption in relation to proof of native title has some merit, particularly in light of the difficulties in evidencing circumstances as they existed at sovereignty, the ALRC considers that the benefits of introducing a presumption do not substantially outweigh potential disadvantages, for a number of reasons.[69] It is not clear what effect a presumption would have on a number of aspects of native title proceedings, including the resolution of claims by consent, the resources involved in native title matters, and claimants' control of evidence. The ALRC also considers that the development of native title jurisprudence, as well as case management in native title proceedings, has rendered the case for a presumption less compelling. The ALRC canvassed these issues in detail in the Discussion Paper.[70]

7.36 However, while the ALRC has not recommended that a presumption in relation to proof of native title be introduced into the *Native Title Act*, it considers that there is utility in providing some guidance in the Act as to when inferences in relation to proof of native title may be drawn. This is detailed further below.

Inferences in relation to proof of native title

Recommendation 7–1 The *Native Title Act 1993* (Cth) should provide guidance regarding when inferences may be drawn in the proof of native title rights and interests. The Act should provide that the Court may draw inferences from contemporary evidence that the claimed rights and interests are possessed under the traditional laws acknowledged and traditional customs observed by the native title claim group.

7.37 The ALRC recommends that the *Native Title Act* provide guidance regarding when inferences may be drawn in the proof of native title. In particular, the Act should provide that the Court may infer from contemporary evidence that the claimed rights and interests are possessed under the traditional laws acknowledged and traditional customs observed by the native title claim group. Such a provision may assist in proof of native title, particularly in circumstances where there are limited historical records in relation to the claim area.

7.38 The kinds of inferences that might be drawn from contemporary evidence include, for instance, that present day laws acknowledged and customs observed by the native title claim group have adapted or evolved from those acknowledged and

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69 This point is made by A Frith and M Tehan, *Submission 12*.

70 These matters were canvassed in detail in the Discussion Paper: see Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014) [4.57]–[4.70]. Some submissions in response to the Discussion Paper reiterated their support for the introduction of a presumption: see National Congress of Australia's First Peoples, *Submission 69*; Law Council of Australia, *Submission 64*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; North Queensland Land Council, *Submission 42*.

observed at sovereignty. The ALRC recommends that the *Native Title Act* make clear that it is not necessary to establish that acknowledgment and observance of laws and customs has continued substantially uninterrupted since sovereignty: Recommendations 5–2 and 5–3. However, if these recommendations are not implemented, Recommendation 7–1 may assist in clarifying that the inference that acknowledgment and observance of laws and customs has continued substantially uninterrupted since sovereignty may also be drawn from contemporary evidence.

7.39 Legislative guidance for the drawing of inferences is consistent with the beneficial purpose of the *Native Title Act*. It is also consistent with acknowledging the importance of the recognition of native title, one of the ALRC's guiding principles for reform. It will operate to provide legislative affirmation of the practice of the Federal Court in drawing inferences in relation to proof of native title. Further, it will indicate to state and territory respondent parties that it is appropriate to draw inferences from contemporary evidence when assessing whether a credible basis exists for an application for determination of native title in negotiating determinations of native title by consent.

Why recommend guidance for inferences rather than a presumption?

7.40 As detailed above, a presumption is a rule of law that requires the trier of fact to draw a conclusion that a fact in issue exists on proof of another fact or facts. An inference, on the other hand, is a conclusion that *may* be drawn by the trier of fact on the proof of another fact or facts. Unlike a presumption, the trier of fact is not *required* to draw this conclusion.

7.41 The ALRC did not make a proposal regarding inferences in the Discussion Paper,[71] so received no submissions on this specific point. However, the Law Council of Australia explicitly submitted that guidance for the drawing of inferences should be provided in the Act.[72] Other submissions to the Issues Paper[73] provided some support for the utility of providing guidance for the drawing of inferences. As noted earlier, there may be evidential 'gaps' that exist when seeking to establish, as required by the substantive law of native title, that the laws and customs under which rights and interests are possessed have their origins in those acknowledged and observed at sovereignty. Submissions highlighted this issue. For example, GLSC drew attention to difficulties in bringing evidence to establish native title, noting that:

> In many parts of Australia there is simply a lack of sufficient ethnographic research and other documentary evidence covering the relevant historical periods. And by the time claims come to trial, key witnesses may have died or be otherwise incapable of giving evidence. This means that native title claimants are at an automatic disadvantage in meeting the legal test, for reasons entirely unconnected with the merits of their claim.[74]

71 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014).
72 Law Council of Australia, *Submission 35*.
73 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Issues Paper No 45 (2013).
74 Goldfields Land and Sea Council, *Submission 22*.

7.42 Central Desert Native Title Services, in a submission supporting the introduction of a presumption, noted that a presumption would be beneficial

> where there are gaps in the documentary evidence but where reasonable evidence of contemporary connection could be extrapolated to continuity of connection since sovereignty, for example where connection of grandparents and great grandparents to a particular area are within claimants' living memories.[75]

7.43 The ALRC considers that legislative guidance for inferences would be similarly beneficial in such instances, in providing explicit endorsement that such facts may found an inference as to the existence of facts satisfying s 223. Indeed, the ALRC considers that drawing an inference from contemporary evidence that the claimed rights and interests are possessed under the traditional laws acknowledged and traditional customs observed by the native title claim group can be seen as a 'presumption of fact'—a fact in issue that may be inferred from the proof of another particular fact in a commonly recurring situation. As such, a provisional burden will fall on respondent parties in native title matters to bring evidence to challenge the drawing of such an inference. However, the formal evidential and persuasive burden of proof remains on claimants.

7.44 The ALRC considers that this recommendation, in conjunction with the recommendations to amend the definition of native title, provide much of the benefit of a presumption. It also accords with developing Federal Court jurisprudence on inferences in native title, detailed further below.

Inferences in native title cases

7.45 In *Yorta Yorta* it was observed that in many—perhaps most—native title cases, claimants will invite the Court to draw inferences about the content of traditional laws and customs at times earlier than those described in the claimants' evidence.[76] It is not possible, however, to offer any 'single bright line test' for deciding what inferences may be drawn or when they may be drawn.[77]

7.46 Since *Yorta Yorta*, the Federal Court has given consideration to circumstances in which inferences may be drawn as to, for example, whether laws and customs are 'traditional', or whether such laws and customs have been continuously acknowledged and observed. In situations where the historical record is limited, or silent, in relation to a claim area, there is, as Barker J noted in *CG (Deceased) on behalf of the Badimia*

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

76 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [80] (Gleeson CJ, Gummow and Hayne JJ). The Court has been prepared, in some native title cases, to draw an inference of continuity of generational transmission of law and custom, or of the claimant group's descent from the original inhabitants of an area at sovereignty, and that the original inhabitants of an area were a society organised under traditional laws and customs: *Neowarra v Western Australia* [2003] FCA 1402 (8 December 2003) [336]; *Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory* (2004) 207 ALR 539, [103]–[110]; *Sampi on behalf of the Bardi and Jawi People v Western Australia* (2010) 266 ALR 537, [64]–[66] (North and Mansfield JJ).

77 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [82] (Gleeson CJ, Gummow and Hayne JJ).

People v Western Australia, 'a question about what reasonable inferences may be drawn by the Court in respect of key issues from the evidence led at trial'.[78]

7.47 Such difficulties of proof are not unique to native title law. Similar issues arise in proof of customary rights under English common law.[79] To establish the existence of a custom enforceable at common law required, among other things, proof that the custom had existed since 'time immemorial'.[80] The difficulty of establishing the existence of a custom from time immemorial was eased by the courts' willingness to infer from 'proof of the existence of a current custom that that custom had continued from time immemorial'.[81]

7.48 In *Gumana v Northern Territory*, Selway J noted the similarities between proof of the existence of traditional laws and customs for the purposes of establishing native title rights and interests, and proof of custom at common law.[82] He observed:

> There is no obvious reason why the same evidentiary inference is not applicable for the purpose of proving the existence of Aboriginal custom and Aboriginal tradition at the date of settlement and, indeed, the existence of rights and interests arising under that tradition or custom.[83]

7.49 Selway J considered that, where there is

- a clear claim of the continuous existence of a custom or tradition that has existed at least since settlement;
- supported by credible evidence from persons who have observed that custom or tradition; and
- evidence of a general reputation that the custom or tradition had 'always' been observed;[84]

then, in the absence of evidence to the contrary, there is an inference that the tradition or custom has existed at least since the date of settlement.[85]

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78 *CG (Deceased) on behalf of the Badimia People v Western Australia* [2015] FCA 204 (12 March 2015) [17].

79 Such customary rights may include, for instance, the use of an access path to a local church: *Brocklebank v Thompson* [1903] 2 Ch 344; or the playing of sports and other pastimes on a piece of land: *New Windsor Corporation v Mellor* [1975] Ch 380. See also LexisNexis, *Halsbury's Laws of England*, Vol 32 (2012) Custom and Usage.

80 LexisNexis, *Halsbury's Laws of England*, Vol 32 (2012) Custom and Usage. See also Ulla Secher, *Aboriginal Customary Law: A Source of Common Law Title to Land* (Hart Publishing, 2014) 305.

81 *Gumana v Northern Territory* (2005) 141 FCR 457, [198].

82 Ibid [197]–[202].

83 Ibid [201].

84 Selway J stated that 'evidence of a "custom" or tradition including evidence of what is believed about a custom or tradition … can be treated as evidence of "reputation" … Evidence can be given … of the "reputation" of the existence, nature and extent of Aboriginal custom by those subject to Aboriginal custom and by those who have studied it over a long period': Ibid [157].

85 Ibid [201].

7.50 The approach to the drawing of inferences set out in *Gumana* has been adopted in a number of subsequent cases.[86] For example, in *AB (deceased) (on behalf of the Ngarla People) v Western Australia (No 4)*, Bennett J accepted the claimants' submission that

> the Court is entitled to draw inferences about the content of the traditional laws and customs at sovereignty from contemporary evidence and that if the evidence establishes a contemporary normative rule, it may be reasonable to find that such a normative rule existed at sovereignty.[87]

7.51 A similar approach is adverted to by Sackville J in *Jango v Northern Territory*, who noted:

> If the indigenous evidence consistently favoured a particular set of laws and customs, an inference might well be available that the laws and customs described by the witnesses have remained substantially intact since sovereignty, or at least that any changes have been of a kind contemplated by pre-sovereignty norms.[88]

7.52 The ALRC considers that Recommendation 7–1, if implemented, will have a flow-on effect to the approach taken by state and territory respondent parties in assessing connection evidence. Submissions and consultations in this Inquiry have indicated that state and territory respondent parties, in some circumstances, are willing to draw inferences in relation to the existence of certain facts when assessing connection evidence provided with a view to resolving a native title determination by consent. Indeed, John Catlin observed that 'consent determinations invariably are a product of a combination of agreed facts and beneficial inferences about the available evidence'.[89] Recommendation 7–1 will operate to provide further impetus to this approach.

7.53 For example, the South Australian Government submitted that it was willing, where appropriate, to draw inferences relating to information that is:

- genealogical—many asserted relationships are accepted by the State without detailed analysis;
- historical—the State often relies on historical assertions made by applicants where there is no other evidence;

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86 *Sampi on behalf of the Bardi and Jawi People v Western Australia* (2010) 266 ALR 537, [63]–[65]; *Griffiths v Northern Territory* (2006) 165 FCR 300, [580]; *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* (2007) 238 ALR 1, [341]; *Wyman on behalf of the Bidjara People v Queensland (No 2)* [2013] FCA 1229 (6 December 2013) [479]; *Dempsey on behalf of the Bularnu, Waluwarra and Wangkayujuru People v Queensland (No 2)* [2014] FCA 528 (23 May 2014) [132]–[134]; *AB (deceased) (on behalf of the Ngarla People) v Western Australia (No 4)* [2012] FCA 1268 (21 November 2012) [724].

87 *AB (deceased) (on behalf of the Ngarla People) v Western Australia (No 4)* [2012] FCA 1268 (21 November 2012) [724].

88 *Jango v Northern Territory* (2006) 152 FCR 150, [504]. In that case, Sackville J found that this evidence was not consistent: [504].

89 John Catlin, 'Recognition Is Easy' in Toni Bauman and Lydia Glick (eds), *The Limits of Change: Mabo and Native Title 20 Years On* (AIATSIS, 2012).

- anthropological—the State often accepts that contemporary differences from the historical description of a group's traditional law and custom at sovereignty reflect an adaptation rather than a break in those traditions.[90]

7.54 In reasons accompanying a determination of native title by consent in *Lander v South Australia*, Mansfield J agreed with the State of South Australia's assessment that the evidence supported

> the inference that the pre-sovereignty normative society has continued to exist throughout the period since sovereignty, and whilst there has been inevitable adaptation and evolution of the laws and customs of that society, there is nothing apparent in the Evidence to suggest the inference should not be made that the society today (as descendents of those placed in the area in the earliest records) acknowledges and observes a body of laws and customs which is substantially the same normative system as that which existed at sovereignty.[91]

7.55 In relation to the western desert region of Western Australia, Central Desert Native Title Services (CDNTS) noted that Western Australia had generally accepted continuity of connection on the basis of evidence from 'current senior claimants who have living memories of their grandparents and great grandparents'.[92] In this regard, CDNTS submitted, 'there effectively exists an unstated "presumption of continuity" for native title claims in the region'.[93]

7.56 The Northern Territory Government also submitted that 'in practice, a rebuttable presumption operates in the context of resolution of pastoral estate claims'.[94] Additionally, the Northern Territory Government detailed the development of its streamlined process to resolve pastoral estate claims, which includes 'not disputing the existence of native title holding group at sovereignty (subject to extinguishment)'.[95]

7.57 The ALRC considers that an inference from contemporary evidence that the claimed rights and interests are possessed under the traditional laws acknowledged and traditional customs observed by the native title claim group is not prevented from being drawn when there exists any conflicting or equivocal historical evidence.[96] While weight should be attached to such evidence, the ALRC considers that the correct approach is that contended for by the claimants in *CG (Deceased) on behalf of the Badimia People v Western Australia*:

> where the ethnographic record is capable of more than one interpretation and on one interpretation it is consistent with other evidence in the proceeding (here the Aboriginal evidence) but on the other interpretation it is not, then the interpretation which is consistent with the other evidence should be preferred.[97]

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90 South Australian Government, *Submission 34*.
91 *Lander v South Australia* [2012] FCA 427 (1 May 2012) [48].
92 Central Desert Native Title Services, *Submission 26*.
93 Ibid. However, there was also some criticism that state respondent parties were not readily drawing inferences as to continuity of connection: see Queensland South Native Title Services, *Submission 24*.
94 Northern Territory Government, *Submission 31*.
95 Ibid.
96 As contended by the State of Western Australia in *CG (Deceased) on behalf of the Badimia People v Western Australia* [2015] FCA 204 (12 March 2015) [384].
97 Ibid [451].

7.58 The ALRC considers that, similarly to proof of custom at common law, it is appropriate to make clear in the *Native Title Act* that the inference that the claimed rights and interests are possessed under traditional laws and customs is available from contemporary evidence. Such an approach is consistent with the ALRC's guiding principles for reform in this Inquiry, allowing for due recognition of the rights of Aboriginal and Torres Strait Islander peoples, as well as assisting in the resolution of native title claims. Moreover, this approach to the drawing of inferences is increasingly necessary if the beneficial purpose of the Act is to be sustained as the date of Crown assertion of sovereignty grows more distant.