8. The Nature and Content of Native Title

Contents

Summary

8.1 'Native title' and 'native title rights and interests' are defined in s 223(1) of the *Native Title Act 1993* (Cth) ('*Native Title Act*'). The content of native title rights and interests is determined in accordance with the traditional laws and customs of the native title claim group. Section 223(2) of the *Native Title Act* provides a non-exhaustive list of some native title rights and interests. Section 225 of the Act requires a determination of the nature and extent of the native title rights and interests that are recognised.

8.2 The ALRC was asked to examine whether the *Native Title Act* should be clarified to provide that native title rights and interests 'can include rights and interests of a commercial nature'. This chapter outlines the relevant provisions in the *Native Title Act* and case law to provide a context for the recommendations. Recommendation 8–1 draws on the approach to native title rights taken in *Akiba v Commonwealth*

('*Akiba HCA*').[1] It recommends that s 223(2) of the *Native Title Act* be amended to confirm that native title rights and interests may comprise a broadly-framed right that may be exercised for any purpose, including commercial or non-commercial purposes where the evidence supports such a finding.[2] The Act should further provide a non-exhaustive list of kinds of native title rights and interests, including trading rights and interests.[3] The ALRC recommends that the terms 'commercial purposes' and 'trading' should not be defined in the Act.[4]

8.3 The potential for cultural knowledge to be considered as a native title right and interest is discussed, and further examination of the issue is recommended.

Terms of Reference

8.4 The ALRC was directed, under the Terms of Reference, to inquire into and report on Commonwealth native title laws and legal frameworks in relation to 'connection requirements relating to the recognition and scope of native title rights and interests, including … whether there should be … clarification that "native title rights and interests" can include rights and interests of a commercial nature'.

8.5 The Terms of Reference identify a range of factors for the ALRC to consider as context for its examination of 'what, if any, changes could be made to improve the operation of Commonwealth native title laws and legal frameworks'. These factors include the capacity of native title to support indigenous economic development and to generate sustainable long-term benefits for Indigenous Australians, as well as delays to the resolution of claims caused by litigation. The recommendations in this chapter balance these considerations against the need for certainty for other interests in the native title system, and the need to encourage claims resolution.

8.6 The ALRC was asked to consider the Preamble and objects of the *Native Title Act* in making any recommendations.[5] The guiding principles for this Inquiry comprise:

- acknowledging the importance of the recognition of native title;
- acknowledging all interests in the native title system;
- encouraging the timely and just resolution of native title determinations;
- adopting reforms which are consistent with Australia's international obligations; and
- promoting the sustainable, long-term social, economic and cultural development for Aboriginal and Torres Strait Islander peoples.

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1 *Akiba v Commonwealth* (2013) 250 CLR 209.
2 Rec 8–1, see recommended text for s 223(2)(a).
3 Rec 8–1, see recommended text for s 223(2)(b).
4 Rec 8–2.
5 See Ch 1.

The recognition of native title rights and interests of a commercial nature

8.7 The ALRC received a range of submissions that addressed the general question identified in the Terms of Reference as to whether there should be 'clarification that "native title rights and interests" can include rights and interests of a commercial nature' in the *Native Title Act*. The Terms of Reference were given to the ALRC before significant High Court judgments that dealt with relevant issues were handed down. The submissions therefore needed to be framed against the decision in *Akiba HCA*.[6]

8.8 Some stakeholders noted the need for the *Native Title Act* to give substance to the recognition of native title rights and interests. The National Native Title Council ('NNTC') submitted that:

> Whilst the Preamble to the Act states that the legislation is a pathway to the 'full recognition and status' of Indigenous people, this has not been borne out with regard to Indigenous economic aspirations. The proposal would go some way to fulfilling such aspirations, squarely embedding commercial rights and interests within Australia's native title regime.[7]

8.9 Other stakeholders saw native title rights and interests of a commercial nature as assisting native title holders to develop economic opportunities. Central Desert Native Title Services ('CDNTS') submitted that:

> Recognition that there were commercial activities and trade within and amongst Aboriginal groups and outsiders will provide native title groups with expanded opportunities for economic development and partnerships with existing businesses and industry.[8]

8.10 There was general acknowledgment that following *Akiba HCA* native title can comprise rights and interests of a commercial nature.

8.11 The Government of Western Australia indicated that '*Akiba* demonstrates that such [commercial] rights are capable of recognition where the evidence supports a determination of commercial rights'. It cautioned against any clarification that went further than the law in *Akiba HCA*.[9]

8.12 The Queensland Government also noted:

> Given the current rate of resolution of native title claims and the associated outcomes being presently achieved, there is little basis for significant amendments to the NTA on those issues... The Federal Court has confirmed that native title rights may comprise commercial rights..[10]

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6 The Terms of Reference were issued on 3 August 2013, four days before the High Court of Australia handed down its judgments in *Akiba v Commonwealth* (2013) 250 CLR 209.

7 National Native Title Council, *Submission 57*.

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

9 Western Australian Government, *Submission 43*.

10 Queensland Government, *Submission 28*.

8.13 The Minerals Council of Australia ('MCA') supported 'the recognition of commercial rights where they can be established under existing law', but considered statutory clarification as unnecessary.[11]

Relevant provisions in the *Native Title Act*

8.14 The *Native Title Act* contains a number of provisions relevant to the nature and content of native title rights and interests in an application for a determination of native title.[12] These general provisions for recognising native title are the ones which also determine whether native title includes commercial native title rights and interests. An overview of the statutory provisions and relevant case law therefore is provided before discussing Recommendation 8–1, which references that law.

8.15 In commencing an application for a determination of native title, the applicant must file an affidavit which includes 'a description of the native title rights and interests claimed in relation to particular land or waters (including any activities in exercise of those rights and interests)'.[13] A broad description of the rights and interests is generally sufficient.[14]

8.16 Section 223 is the key provision. Section 223(1)—which is discussed in Chapter 4—defines 'native title' and 'native title rights and interests'. Section 223(1) provides that

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

8.17 Section 223(1) is the substantive provision, with s 223(2) providing a non-exhaustive list of native title rights and interests:

> Without limiting subsection (1), ***rights and interests*** in that subsection includes hunting, gathering, or fishing, rights and interests.

8.18 Section 223(2) was enacted to provide 'an example of the type of rights and interests that might comprise native title'.[15] Accordingly, native title rights and

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11 Minerals Council of Australia, *Submission 65*.
12 Note that other provisions not discussed will be relevant.
13 *Native Title Act 1993* (Cth) s 62(2)(d). See also Ibid s 62(2)(e), (f).
14 *Strickland v Native Title Registrar* (1999) 168 ALR 242, [60].
15 Explanatory Memorandum, Native Title Bill 1993 (Cth), Part B, 77 (s 223 was originally numbered s 208 in the Bill).

interests may include, but are not limited to, fishing, hunting or gathering rights and interests.

8.19 Section 225 defines a 'determination of native title' and relevantly requires the listing of the nature and extent of the native title rights and interests found to exist in relation to the determination area.[16]

8.20 As well as the substantive provisions for establishing native title, s 211 operates so that certain activities by native title holders—that would otherwise be contrary to a law of the Commonwealth, state or territory—are not prohibited or restricted.

The nature and content of native title rights and interests

8.21 Whether native title includes rights and interests of a commercial nature—including rights to trade and to take resources for commercial purposes—raises central questions about the scope of native title rights and interests. This question goes to both the legal nature of native title rights and interests and the content of native title rights and interests.

8.22 The 'nature' of native title refers to the *legal* nature of the rights and interests.[17] 'The ambit of the native title right is a finding of law'.[18] However, in terms of the 'content' of native title, as noted by Hayne, Kiefel and Bell JJ in *Akiba HCA*:

> Paragraphs (a) and (b) of s 223(1) [of the *Native Title Act*] indicate that it is from the traditional laws and customs that native title rights and interests derive, not the common law.[19]

Accordingly, the content of the native title rights and interests is 'founded upon' the traditional laws and customs of Aboriginal and Torres Strait Islander peoples.[20] This is ascertained by reference to the evidence brought in each claim.

Legal 'nature' of native title rights and interests

8.23 There have been changes in how native title has been understood since the introduction of the *Native Title Act*. In *Mabo v Queensland [No 2]* ('*Mabo [No 2]*'), Brennan J referred to an earlier common law case which had described native title as,

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16 *Native Title Act 1993* (Cth) s 225(b).

17 *Western Australia v Brown* (2014) 306 ALR 168, [34]; *Akiba v Commonwealth* (2013) 250 CLR 209, [61] (Hayne, Kiefel and Bell JJ) citing *Western Australia v Ward* (2002) 213 CLR 1, [468] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

18 *Yanner v Eaton* (1999) 201 CLR 351, [109] (Gummow J).

19 *Akiba v Commonwealth* (2013) 250 CLR 209, [55] citing *Western Australia v Ward* (2002) 213 CLR 1, [20] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

20 *Congoo on behalf of the Bar-Barrum People No 4 v Queensland* (2014) 218 FCR 358, [35] (North and Jagot JJ). 'Native title has its origin in the traditional laws acknowledged and the customs observed by the indigenous people who possess the native title': *Fejo v Northern Territory* (1998) 195 CLR 96, [46] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) citing *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 58 (Brennan J).

'burdening or qualifying' the radical title of the Crown. The radical title of the Crown was held to be qualified by a right of beneficial user.[21]

8.24 The formal order made by the High Court in *Mabo [No 2]* was to declare 'that the Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the [lands of the Murray Islands]', although subject to inconsistent grants of interests and extinguishment by legislative power of the Queensland Government, subject to Commonwealth laws.[22]

8.25 The *Native Title Act* was subsequently enacted. A series of native title cases in 2002 reviewed the position in *Mabo [No 2]*.[23] In *Western Australia v Ward* ('*Ward HCA*'),[24] the High Court strongly emphasised the Act as the 'starting point'.[25] The majority of the Court in *Ward HCA* gave emphasis to ideas of co-existence of native title with other rights and interests. In effect, the majority adopted reasoning that pointed to native title being understood more typically as a bundle of rights, rather than a title to land (beneficial user).

8.26 Thus the *Native Title Act* emerged as the central mechanism for recognition of Aboriginal and Torres Strait Islander peoples' rights and interests in land and waters.[26] Ultimately though, it is the 'rights *only* [that] are recognised'—not the surrounding complex of law, custom and normative society.[27] Disentangling the rights from the surrounding laws and society requires a 'process of translation entail[ing] a complex fracturing of the traditional laws and customs'.[28] While the rights only are recognised,[29] proof of native title requires a more elaborate investigation into laws and customs as reinforced in *Members of the Yorta Yorta Community v Victoria* ('*Yorta Yorta*').[30]

8.27 Courts have indicated that native title is not to be understood in terms equivalent to common law property interests, but they often still tend to draw on these concepts,[31]

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21 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 50 (Brennan J); *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 403 (Viscount Haldane).

22 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 76.

23 Ulla Secher, *Aboriginal Customary Law: A Source of Common Law Title to Land* (Hart Publishing, 2014) 136.

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

25 'Yet again it must be emphasised that it is to the terms of the NTA that primary regard must be had, and not the decisions in *Mabo [No 2]* or *Wik*. The only present relevance of those decisions is for whatever light they cast on the NTA': Ibid [25] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

26 'Native title is recognised, and protected, in accordance with this Act': *Native Title Act 1993* (Cth) s 10.

27 Melissa Perry, 'Characterising Native Title Rights: A Desert Rose by Any Other Name...' (Paper Presented at AIATSIS National Native Title Conference 2014, Coffs Harbour, 4 June 2014) 2.

28 Ibid; *Western Australia v Ward* (2002) 213 CLR 1, [14] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

29 See Ch 2.

30 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422. See Ch 4.

31 'Because native title has its origin in traditional laws and customs, and is neither an institution of the common law nor a form of common law tenure, it is necessary to curb the tendency (perhaps inevitable and natural) to conduct an inquiry about the existence of native title rights and interests in the language of the common law property lawyer': *Commonwealth v Yarmirr* (2001) 208 CLR 1, [11] (Gleeson CJ, Gaudron, Gummow and Hayne JJ). This temptation is not always avoided; see Patricia Lane, 'Native Title—The End of Property As We Know It?' (2000) 8 *Australian Property Law Journal* 1.

using language like 'bundle of rights'. By contrast, the former Aboriginal and Torres Strait Islander Social Justice Commissioner, Professor Mick Dodson, stated:

> The recognition of native title at common law, and for the purposes of the NTA, must be on terms that are consistent with those laws and customs. … This means that the content of native title must be determined in accordance with our meanings of land ownership.[32]

8.28 Regard to the culturally distinct, or sui generis, nature of native title is compelling at one level as giving effect to Aboriginal and Torres Strait Islander peoples' distinctive laws and customs. Commentators suggest, however, that this characterisation of native title rights and interest may make native title a more 'vulnerable right'.[33]

8.29 Dr Sue Jackson and Professor Poh-Ling Tan submitted that '[j]urisprudence in other common law countries provides a wider spectrum of potential legal understanding of the nature of such rights', than has been the case in Australia.[34]

A 'bundle of rights'

8.30 The prevailing view of the nature and content of native title is hybrid, drawing on traditional laws and customs for content, but also at times idiosyncratically adopting common law terms to describe the nature or character of the rights. In *Ward HCA*, the High Court indicated the 'bundle of rights' metaphor for native title was useful for two reasons.[35] The Court explained:

> It draws attention first to the fact that there may be more than one right or interest and secondly to the fact that there may be several *kinds* of rights and interests in relation to land that exist under traditional law and custom.[36]

8.31 The High Court also considered in what circumstances native title might involve a right of exclusive possession or use of land and waters. The Court noted that:

> A determination of native title must comply with the requirements of s 225. In particular, it must state the *nature* and *extent* of the native title rights and interests in relation to the determination area …
>
> It is necessary to recognise that the holder of a right, as against the whole world, to possession of land, may control access to it by others and, in general, decide how the land will be used. But without a right of possession of that kind, it may greatly be doubted that there is any right to control access to land or make binding decisions about the use to which it is put. To use those expressions in such a case is apt to mislead. Rather, as the form of the Ward claimants' statement of alleged rights might suggest, it will be preferable to express the rights by reference to the activities that may be conducted, as of right, on or in relation to the land or waters.[37]

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32 Law Council of Australia, *Submission 35*, quoting Mick Dodson.
33 Maureen Tehan, 'A Hope Disillusioned, an Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the Native Title Act' (2003) 27 *Melbourne University Law Review* 523, 563.
34 S Jackson and PL Tan, *Submission 44*.
35 *Western Australia v Ward* (2002) 213 CLR 1, [76]. (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
36 Ibid [95].
37 Ibid [51]–[52].

8.32 Since that time, native title determinations may include exclusive use and possession, where the court has been satisfied that rights of control of access are found under the relevant traditional laws and customs. More typically, determinations have involved lists of activities which native title holders are able to undertake on the land and waters claimed. The distinction turns on whether the evidence supports exclusive use and enjoyment under laws and customs, and whether there has been extinguishment of the right to control access.[38]

8.33 The identification of the character of the rights and interests in *Ward HCA* was held to be necessary to determine whether native title rights and interests had been extinguished.[39] Native title may be extinguished by the legislative or executive acts of governments.[40] Extinguishment is outside the Terms of Reference for this Inquiry, but whether a native title right is extinguished or merely regulated is relevant to the scope—or character—of native title.[41] The test for extinguishment is if the legislative or executive acts are inconsistent with the claimed native title rights and interests.[42] In *Western Australia v Brown* (‘*Brown*’) the High Court confirmed that ‘inconsistency is that state of affairs where the existence of one right necessarily implies the non-existence of the other’.[43]

8.34 In *Akiba HCA*, the High Court held that a native title right should not be ‘severed or cut down’ into incidents.[44] In the past, the High Court had held that native title may be partially extinguished.[45]

8.35 Commentators suggest that partial extinguishment, together with the shift from a clear and plain intention to an ‘inconsistency test’ for extinguishment, has led to an ‘over-particularisation’[46] of the rights and interests that make up native title, and to ‘definitional over-specificity’.[47] Commentators contend that the ‘bundle of rights’ approach has encouraged the understanding of native title rights and interests as disaggregated.[48]

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38 *Sampi on behalf of the Bardi and Jawi People v Western Australia* (2010) 266 ALR 537, [147]–[153].

39 *Western Australia v Ward* (2002) 213 CLR 1, [94], [468].

40 Ibid [26] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

41 See, eg, *Akiba v Commonwealth* (2013) 250 CLR 209.

42 *Western Australia v Ward* (2002) 213 CLR 1, [26], [78] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Western Australia v Brown* (2014) 306 ALR 168, [33]; *Akiba v Commonwealth* (2013) 250 CLR 209, [31]–[35] (French CJ and Crennan J); [52], [62] (Hayne, Kiefel and Bell JJ). See also *Native Title Act 1993* (Cth) pt 2 div 2B; s 237A.

43 *Western Australia v Brown* (2014) 306 ALR 168, [38].

44 *Akiba v Commonwealth* (2013) 250 CLR 209, [26].

45 *Western Australia v Ward* (2002) 213 CLR 1, [468].

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

47 Paul Finn, ‘*Mabo* into the Future: Native Title Jurisprudence’ (2012) 8 *Indigenous Law Bulletin* 5, 8 (‘the fragmentation of native title rights and interests … results, in my view, in the overdefinition, and subdivision of, individual rights and interests and in the dilution of a proprietary conception of native title’); Simon Young, *Trouble with Tradition: Native Title and Cultural Change* (Federation Press, 2008) 297, 361–2.

48 For discussion see Katy Barnett, ‘Western Australia v Ward: One Step Forwards and Two Steps Back: Native Title and the Bundle of Rights Analysis’ [2000] *Melbourne University Law Review* 462.

8.36 Some stakeholders suggest a 'bundle of rights' is inapplicable:

> The bundle of rights concept of property derives from mainstream Anglo-American legal philosophy and one may well question what place it has in native title, particularly because native title is viewed by Aboriginal and Torres Strait Islander people as being holistic in nature.[49]

8.37 The combined effect has meant that native title is often associated with subsistence-style 'uses', incidents or activities rather than broader rights.[50] However, in *Akiba HCA*, French CJ and Crennan J held that:

> A broadly defined native title right such as the right 'to take for any purpose resources in the native title areas' may be exercised for commercial or non-commercial purposes. The purposes may be well defined or diffuse. One use may advance more than one purpose. But none of those propositions requires a sectioning of the native title right into lesser rights or 'incidents' defined by the various purposes for which it might be exercised. The lesser rights would be as numerous as the purposes that could be imagined. A native title right or interest defines a relationship between the native title holders and the land or waters to which the right or interest relates.[51]

8.38 The 'important jurisprudential move toward a more holistic concept of native title' by the High Court was noted in submissions.[52]

The content of native title rights and interests

8.39 Traditional laws and customs of the claim group provide the content of native title.[53] As these laws and customs are heterogeneous, the content of native title is variable.[54] The identification of native title rights and interests is a question of fact,[55] dependent on the evidence in each claim.

8.40 The importance of evidence was apparent in the Federal Court decision in *Akiba v Queensland (No 3)* ('*Akiba FCA*') where the native title right found was 'to take for any purpose resources in the native title areas'. There was a 'long and well chronicled history'[56] that 'marine products were historically, and are today, taken for the purpose of exchange and sale'.[57] The trial judge, Finn J, commented that 'the evidence

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49 North Queensland Land Council, *Submission 17*.

50 French CJ and Crennan J noted 'that proposition [ie a broadly framed right] does not exclude the possibility that a native title right or interest arising under a particular set of traditional laws and customs might be defined by reference to its exercise for a limited purpose': *Akiba v Commonwealth* (2013) 250 CLR 209, [21].

51 Ibid.

52 See, eg, AIATSIS, *Submission 70*.

53 See, eg, *Yanner v Eaton* (1999) 201 CLR 351, [72] (Gummow J); *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 58 (Brennan J).

54 *Yanner v Eaton* (1999) 201 CLR 351, [72] (Gummow J).

55 'The … incidents of native title must be ascertained as a matter of fact by reference to those laws and customs': *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 58 (Brennan J).

56 *Akiba v Queensland (No 2)* (2010) 204 FCR 1, [526].

57 Ibid [527]. For discussion, see Lauren Butterly, 'Before the High Court: Clear Choices in Murky Waters: *Leo Akiba on Behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia*' (2013) 35 *Sydney Law Review* 237; and Lauren Butterly, 'Changing Tack: Akiba and the Way Forward for Indigenous Governance of Sea Country' <http://search.informit.com.au/documentSummary; dn=234915685257993;res=IELIND>.

establishes beyond question that the Islanders sold marine resources for money … The Islanders were, and are, trading fish'.[58] The South Australian Government observed that 'there was significant and compelling evidence in that claim of extensive trade and bartering of marine resources'.[59] In other instances the evidence may lead to a different finding. With respect to *Akiba FCA*, the Western Australian Government submitted that 'evidence of that type has not been found to exist elsewhere'.[60]

8.41 In *Banjima People v Western Australia (No 2)* ('*Banjima*'), the trial judge, Barker J, distinguished the evidence before him from that in *Akiba FCA*:

> The situation is not akin to the circumstances in which the claimants in *Akiba (No 3)* were found traditionally to take whatever resources they found at sea and were apt to trade and use it however they could.[61]

8.42 Rather, the Federal Court in *Banjima* found that particular resources were taken for particular uses, with limited evidence of trade in resources.[62] The claimed right 'to manufacture and trade the resources of the land and waters' was not found on the evidence.[63] Similarly, the Northern Territory Government referred to the Federal Court's decision in *Yarmirr v Northern Territory*,[64] where Olney J had concluded that '[t]he evidence does not support the claim that the applicants enjoy a native title right or interest to trade in the resources of the claimed area'.[65]

8.43 The case law at times has conflated a native title right with the evidence of its exercise. As explained in *Yorta Yorta*, by Gleeson CJ, Gummow and Hayne JJ, the 'exercise of native title rights or interests may constitute powerful evidence of both the existence of those rights and their content'.[66] However, they observed that the relevant statutory inquiry is 'directed to possession of the rights or interests, not their exercise'.[67]

8.44 Gaudron and Kirby JJ, who were in the minority in *Yorta Yorta*, expressed the view that 'it is not necessary, pursuant to s 223(1)(a), to establish that those rights and interests have been continuously availed of in relation to land, or even, that they are presently availed of'.[68]

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58 *Akiba v Queensland (No 2)* (2010) 204 FCR 1, [528].
59 South Australian Government, *Submission 68*. See also Northern Territory Government, *Submission 31*: the determination of the right 'was made on the basis of a factual foundation; that is that the traditional laws acknowledged and customs observed by the native title holders evidenced the existence of the right'.
60 Western Australian Government, *Submission 43*.
61 *Banjima People v Western Australia (No 2)* (2013) 305 ALR 1, [783].
62 Ibid [783]–[784].
63 Ibid [788], [799], [802].
64 Northern Territory Government, *Submission 31*.
65 *Yarmirr v Northern Territory [No 2]* (1998) 82 FCR 533, 588.
66 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [84].
67 Ibid.
68 Ibid [103].

8.45 The Federal Court, in the Pilki People's and the Birriliburu People's native title claims, remarked that:

> In many cases, proof of activities undertaken pursuant to laws or customs will assist in proving the existence of the right. But evidence of the activity is not necessary. Thus, if the applicants had not shown that they traditionally accessed and took resources for commercial purposes, they could still show that they had the right to do so if there were traditional laws or customs which gave them such a right. In the same way, the holders of freehold do not need to show that they have leased out their properties to prove that they have the right to do so.[69]

The specification of the right

8.46 Native title rights may be specified across a broad spectrum.[70] Perry J, writing extra-curially, stressed that how a native title right is expressed 'can matter greatly'.[71] Claimants' legal representatives specify the rights claimed on the basis of claimant and expert evidence in an application for a determination of native title.[72] Some submissions suggested that claimants routinely seek to frame rights broadly.[73] The South Australian Government submitted that:

> While many groups currently accept a fairly standard description of their native title rights and interests and the courts are tending towards a more generalised formulation, there are a number that exhibit a novel approach contrary to established jurisprudence.[74]

8.47 In *Akiba FCA*, the relevant native title right claimed was 'a right to access and take marine resources as such—a right not circumscribed by the use to be made of the resource taken'.[75] The High Court found that this right was limited in that it was non-exclusive,[76] and in that it did not exist in respect of minerals and petroleum resources.[77]

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69 *Willis on behalf of the Pilki People v Western Australia* [2014] FCA 714 (4 July 2014) [118]; *BP (Deceased) on behalf of the Birriliburu People v Western Australia* [2014] FCA 715 (4 July 2014) [89]. At the time of writing an appeal by the State of Western Australia in respect of the Pilki People's claim was about to be heard by the Full Federal Court (May 2015). The Western Australian Government submitted that '[i]mportant aspects of the law which require clarification include (a) whether evidence of activities undertaken pursuant to traditional laws and customs is required to establish the right and (b) the relevance of adaptation and change to the recognition of rights of a commercial nature': Western Australian Government, *Submission 43*.

70 See, eg, J Altman, *Submission 27*. He submitted that 'rights and interests in native title determinations can vary considerably, not just between determinations of exclusive or non-exclusive possession, but also within each category and between States and Territories … such an approach makes for a high degree of variability and potential inequity'.

71 Melissa Perry, 'Characterising Native Title Rights: A Desert Rose by Any Other Name...' (Paper Presented at AIATSIS National Native Title Conference 2014, Coffs Harbour, 4 June 2014).

72 Commentators suggest that claiming a broader right rather than highly specific native title rights better reflects 'the relationship of people to country under their laws and customs'. Michael Meegan and Robert Blowes, 'Pleadings, Limited Trials and Extinguishment Principles' (Paper Presented at AIATSIS National Native Title Conference 2014, Coffs Harbour, 4 June 2014) 13.

73 Central Desert Native Title Services, *Submission 26*; Queensland South Native Title Services, *Submission 24*.

74 South Australian Government, *Submission 34*.

75 *Akiba v Queensland (No 2)* (2010) 204 FCR 1, [847]. Note that other rights were claimed in *Akiba FCA* as well: Ibid [512]. Not all were established.

76 *Akiba v Commonwealth* (2013) 250 CLR 209, [1].

77 *Akiba v Queensland (No 2)* (2010) 204 FCR 1, [847].

Native title rights to petroleum and minerals are general exclusions from consent determinations. The native title right set out in the order of the determination was 'the right to access resources and take for any purpose resources' in the determined areas.[78]

8.48 A native title right, 'to take for any purpose resources' of the claim area, was found on the evidence in the later cases of *Willis on behalf of the Pilki People v Western Australia* and *BP (Deceased) on behalf of the Birriliburu People v Western Australia*. Both concerned claims over land.[79]

Clarifying the scope of native title rights and interests

Recommendation 8–1 Without limiting s 223(1) of the *Native Title Act 1993* (Cth), this recommendation is intended to give effect to the principle of a broadly defined native title right as recognised in *Akiba v Commonwealth* (2013) 250 CLR 209 and *Western Australia v Brown* (2014) 306 ALR 168; to reflect that a native title right can be exercised for any purpose (including commercial purposes); and to provide a non-exhaustive list of native title rights and interests.

Section 223(2) of the *Native Title Act 1993* (Cth) should be repealed and substituted with a subsection that provides:

> Without limiting subsection (1), native title rights and interests in that subsection:
>
> (a) may comprise a right that may be exercised for any purpose, including commercial or non-commercial purposes; and
>
> (b) may include, but are not limited to, hunting, gathering, fishing, and trading rights and interests.

8.49 Recommendation 8–1 addresses the Terms of Reference which ask whether there should be 'clarification that "native title rights and interests" can include rights and interests of a commercial nature'. The ALRC recommends repeal of the current s 223(2) of the *Native Title Act* and adoption of a new subsection, without limiting the operation of s 223(1) and s 211 of the *Native Title Act*.

8.50 Section 223(1) is the substantive provision which defines native title and the manner in which native title rights and interests are recognised. The ALRC has retained the original intent of s 223(2) as not limiting the operation of s 223(1).[80] The ALRC considers that native title rights and interests will continue to be recognised pursuant to the substantive provision, and in conjunction with s 225 of the *Native Title Act*. The intention is that s 223(2) continues its clarifying or illustrative function.

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78 *Akiba v Commonwealth* (2013) 250 CLR 209, [1].

79 *Willis on behalf of the Pilki People v Western Australia* [2014] FCA 714 (4 July 2014) [121]; *BP (Deceased) on behalf of the Birriliburu People v Western Australia* [2014] FCA 715 (4 July 2014) [97]. At the time of writing this report, both cases were on appeal.

80 Explanatory Memorandum, Native Title Bill 1993 (Cth), Part B, 77.

8.51 The ALRC considers that s 223(2) should be updated to accord with key principles from the case law. Accordingly, the recommendation draws upon the principles from *Akiba HCA*, in which the High Court sets out general propositions about the nature and content of native title rights and interests of wider application, although it examines a specific native title right.

8.52 The recommended s 223(2)(a) adopts language that reflects the concept of a widely-framed right that may be exercised for any purpose (commercial and non-commercial), while allowing for future application of the principles to specific claims, and for determinations to turn on the evidence adduced.

8.53 The recommended s 223(2)(b) is to continue to provide an indicative, non-exhaustive listing of native title rights and interests but also to clarify that native title rights and interests are not confined to the usufructuary rights currently listed in s 223(2). The list includes a native title right to trade in order to clarify the law on this point.

Commercial native title rights

8.54 There was a spectrum of views expressed as to whether clarification of the statute was necessary following the decision in *Akiba HCA* and the subsequent decision of the High Court in *Brown*.[81] A range of stakeholders supported the position that native title rights and interests can be exercised for commercial benefit.[82] Some stakeholders stated that the current s 223 is 'out of step with jurisprudence concerning the nature and articulation of native title rights'.[83] Further, some noted that such a clarification would align with the the *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP').[84]

8.55 Other stakeholders viewed amendment to the *Native Title Act* as unnecessary,[85] as the case law provides sufficient guidance,[86] and they considered that recognition of commercial rights will depend on the evidence.[87] Some considered that development of

81 *Western Australia v Brown* (2014) 306 ALR 168.

82 AIATSIS, *Submission 70*; National Congress of Australia's First Peoples, *Submission 69*; NTSCORP, *Submission 67*; Indigenous Land Corporation, *Submission 66*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; National Native Title Council, *Submission 57*; Queensland South Native Title Services, *Submission 55*; Native Title Services Victoria, *Submission 45*; Native Title Services Victoria, *Submission 18*.

83 AIATSIS, *Submission 70*.

84 *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). See, eg, National Congress of Australia's First Peoples, *Submission 69*; J Altman, *Submission 27*.

85 South Australian Government, *Submission 68*; National Farmers' Federation, *Submission 56*; The Chamber of Minerals and Energy of Western Australia, *Submission 49*; Chamber of Minerals and Energy of Western Australia, *Submission 21*; Law Society of Western Australia, *Submission 9*.

86 National Farmers' Federation, *Submission 56*; National Farmers' Federation, *Submission 14*; Law Society of Western Australia, *Submission 9*.

87 Northern Territory Government, *Submission 71*; South Australian Government, *Submission 68*; National Farmers' Federation, *Submission 56*; Northern Territory Government, *Submission 31*; Western Australian Fishing Industry Council, *Submission 23*; Chamber of Minerals and Energy of Western Australia, *Submission 21*.

the case law was preferable.[88] Stakeholders suggested the ALRC should 'not unduly limit the interpretation of those rights by future courts'.[89] The Western Australian Government contended that 'the law in relation to commercial rights is not settled'.[90]

8.56 The Chamber of Minerals and Energy of Western Australia ('CME') and the MCA submitted that the impacts of any change must be clearly understood and quantified.[91] Some stakeholders indicated that statutory clarification may itself cause uncertainty and ambiguity requiring further interpretation by the courts,[92] and that amending the Act, 'could lead to further litigation and testing in court. This will negatively impact upon the expediency of claim determinations and create uncertainty within the system'.[93] CME noted:

> The current legislative framework and case law recognises native title rights and interests of a commercial nature can exist, depending on the facts and circumstances of each case. There is a significant risk any amendment may introduce uncertainty into the NTA, and result in unintended consequences.[94]

8.57 The National Farmers' Federation ('NFF') expressed the view that 'the premise of the ALRC's argument for statutory confirmation is the unwillingness of state respondents to consistently accept that native title can include rights and interests of a commercial nature'.[95] The ALRC acknowledges that a state has a 'legitimate interest' in testing claimant applications and the relevant evidence brought to prove native title, including by litigation. The recommended amendment does not preclude evaluation of the evidence for commercial native title rights on a case by case basis.

8.58 In the ALRC's view, however, clarifying the law as recommended should encourage the timely and just resolution of determinations.[96] Some submissions indicated that this may be an expected outcome from reforming the law.[97] A number of stakeholders expressed their support for ensuring more timely resolution through statutory clarification.[98]

> Although there is case law to suggest that the purpose for which a holder of a right may have for exercising that right is not an incident of the right, the practical reality is

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88 See, eg, The Chamber of Minerals and Energy of Western Australia, *Submission 49*; Chamber of Minerals and Energy of Western Australia, *Submission 21*.

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

90 Western Australian Government, *Submission 43*.

91 Chamber of Minerals and Energy of Western Australia, *Submission 21*; Minerals Council of Australia, *Submission 8*.

92 Minerals Council of Australia, *Submission 65*; Association of Mining and Exploration Companies, *Submission 54*; Chamber of Minerals and Energy of Western Australia, *Submission 21*; Association of Mining and Exploration Companies, *Submission 19*.

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

94 Ibid.

95 National Farmers' Federation, *Submission 56*.

96 Guiding Principle 3.

97 See, eg, NTSCORP, *Submission 67*; Indigenous Land Corporation, *Submission 66*.

98 Yamatji Marlpa Aboriginal Corporation, *Submission 62*; Central Desert Native Title Services, *Submission 26*; A Frith and M Tehan, *Submission 12*; Cape York Land Council, *Submission 7*.

> that without clarification, it is likely that the State will continue to require non-commercial qualifications on non-exclusive native title rights and interests.[99]

8.59 The ALRC considers that the reform should assist in reducing any uncertainties about the current state of the law and thereby ensure that all parties negotiate and proceed on a clear understanding of the law. Recommendation 8–1 seeks to assist certainty in the law—particularly in relation to connection reports and consent determinations.[100]

A 'broadly defined' native title right: refining the principles

8.60 The High Court's reasons for decision in *Akiba HCA* explain the distinction between concepts such as a right, the exercise of a right for any purpose, and an incident and an activity. Since *Akiba HCA*, the law is clear that native title rights and interests may be broadly defined. They define 'a relationship between native title holders and the land or waters to which the right or interest relates'.[101]

8.61 In *Akiba FCA*, the primary judge made a determination of native title that included 'the right to access resources and to take for any purpose resources in the native title areas'.[102] No issue was taken on appeal as to the characterisation of the right in broad terms.[103] The specific question on appeal to the High Court concerned extinguishment.

8.62 The primary judge had accepted that 'an activity carried on in exercising a native title right might be treated as a distinct "incident" of the right for extinguishment purposes when the activity had a discrete and understood purpose'.[104] The Full Federal Court in *Commonwealth v Akiba*[105] also referred to 'the orthodox approach to the issue of extinguishment whereby one looks to see whether the activity which constitutes the relevant incident of native title is consistent with competent legislation relating to that activity'.[106]

8.63 All justices in the High Court agreed that the right to take resources for any purpose was the relevant right in order to determine extinguishment in that case.[107] The right was described as 'broadly defined'.[108] French CJ and Crennan J said that such a right may be exercised 'for commercial or non-commercial purposes', but the 'sectioning of the native title right into lesser rights or "incidents"' was unnecessary.[109] They distinguished between a right and its exercise for a particular purpose,[110] and

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99 Cape York Land Council, *Submission 7*.
100 Dr Paul Burke noted that connection reports and consent determinations operate in the 'shadowlands' of the formal case law: P Burke, *Submission 33*.
101 *Akiba v Commonwealth* (2013) 250 CLR 209, [21] (French CJ and Crennan J).
102 Ibid [1].
103 Ibid [11].
104 *Akiba v Queensland (No 2)* (2010) 204 FCR 1, [847].
105 *Commonwealth v Akiba* (2012) 204 FCR 260.
106 Ibid [63].
107 *Akiba v Commonwealth* (2013) 250 CLR 209, [39], [60].
108 Ibid [21].
109 Ibid.
110 Ibid [21], [23], [25]–[28].

indicated that only the former is relevant for the purpose of extinguishment. This approach is consistent with the statutory non-extinguishment principle, where a restriction on the exercise of a native title right does not affect the existence of the right.[111]

8.64 Similarly, Hayne, Kiefel and Bell JJ said that:

> The relevant native title right that was found to exist was a right to access and to take resources from the identified waters for any purpose. It was wrong to single out taking those resources for sale or trade as an 'incident' of the right that had been identified. The purpose which the holder of that right may have had for exercising the right on a particular occasion was not an incident of the right; it was simply a circumstance attending its exercise.[112]

8.65 French CJ and Crennan J stated that it is possible that a native title right could be limited by purpose if it was so limited by the traditional laws and customs that give rise to the right.[113]

8.66 In light of this jurisprudence, several models could be adopted to clarify that native title rights and interests may include rights and interests of a commercial nature—consistent with the retention of native title doctrine. The ALRC proposed one model in the Discussion Paper, outlining a new s 223(2) of the *Native Title Act* to provide that native title rights and interests 'comprise rights in relation to any purpose'.[114]

8.67 There was some support for the suggested wording,[115] but some significant queries were raised.[116] The ALRC, after further consultation and in light of extensive submissions, adopted the current Recommendation 8–1 to better meet the reform objectives outlined in Chapter 1.

8.68 Some stakeholders raised whether revision to s 223(2) should be qualified to make clear that native title rights and interests are rights and interests 'in relation to land or waters'.[117] The ALRC notes the position taken by the majority of the Full Federal Court in *Western Australia v Ward* ('*Ward FFC*') and affirmed in the High Court, to the effect that native title rights and interests must be in relation to land and waters.[118] The ALRC considers therefore that re-stating this qualification 'in relation to

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111 Ibid [26].
112 Ibid [66].
113 Ibid [21].
114 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014) Prop 8–1.
115 NTSCORP, *Submission 67*; Law Council of Australia, *Submission 64*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; National Native Title Council, *Submission 57*; Queensland South Native Title Services, *Submission 55*; A Frith and M Tehan, *Submission 52*; Central Desert Native Title Service, *Submission 48*; Native Title Services Victoria, *Submission 45*; S Jackson and PL Tan, *Submission 44*; North Queensland Land Council, *Submission 42*.
116 For example, the MCA stated, 'commercial activities are not a "right" as deemed under the proposed amendments': Minerals Council of Australia, *Submission 65*.
117 See, eg, Northern Territory Government, *Submission 71*; Queensland South Native Title Services, *Submission 55*.
118 *Western Australia v Ward* (2000) 99 FCR 316.

land and waters' is unnecessary, as the recommended textual changes to s 223(2) specify that subsection (2) is not to be interpreted as limiting the operation of s 223(1).

Evidence

8.69 The ALRC acknowledges that the evidential basis for establishing the content of native title rights and interests is crucial. The Northern Territory Government emphasised that 'whether native title rights and interests are determined to include commercial rights is a matter for the Court to determine on the evidence of each case'.[119]

8.70 The statement in the recommended s 223(2) will allow flexible application to factual circumstances. The specific native title right determined at first instance in *Akiba FCA*—the right to access resources and to take for any purposes resources in the determination areas—was fact specific. The ALRC's recommendation builds on *Akiba HCA* but is designed to allow for various factual bases across Australia, as the *Native Title Act* is a statute of general application.

8.71 Determinations will still turn on findings based on the evidence adduced. Stakeholders acknowledged this requirement.[120] The recommendation will retain emphasis on the content of the right being derived from Aboriginal peoples' and Torres Strait Islanders' traditional laws and customs.

8.72 CDNTS noted:

> Whether such an amendment makes any real impact in practice is another matter, as it is still up to the native title claim group to assert the particular right and provide evidence as to its existence under traditional law and custom.[121]

8.73 The ALRC notes that the need to establish evidence of the exercise of the right under laws and customs should not require an approach where recognition of native title rights requires the native title claimant to prove in excessive detail, the exercise of the rights.

8.74 The value of statutory clarification was highlighted by the Cape York Land Council ('CYLC'):

> There is evidence that groups across Cape York were involved in trade and barter at the time of sovereignty, but because of the development of case law and Queensland native title determination precedents limiting the exercise of rights to non-commercial uses, that evidence has not been routinely prepared and commercial rights have not been routinely pursued.[122]

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119 Northern Territory Government, *Submission 71*.

120 See, eg, South Australian Government, *Submission 68*; Central Desert Native Title Service, *Submission 48*; Western Australian Government, *Submission 20*; National Native Title Council, *Submission 16*. Central Desert Native Title Service, *Submission 48*.

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

122 Cape York Land Council, *Submission 7*. See also Cape York Land Council, Submission No 5 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, July 2011 ('In our experience, there is ample evidence to support the existence of trade and other commercial rights as part of the traditional laws and customs of Cape York groups').

8.75 On balance, the ALRC considers that statutory clarification is warranted, as the exposition of the law is still evolving—with relatively few Federal Court first instance decisions on point,[123] in addition to the High Court jurisprudence.

Commercial and non-commercial purposes

8.76 In *Akiba HCA* and in *Brown*,[124] the High Court distinguished between a right and its exercise—albeit in the context of discussing extinguishment of native title. In *Akiba HCA*, the High Court stated that the 'right so framed could be exercised in a variety of ways, including by taking fish for commercial or trading purposes'.[125] In *Brown*, the High Court stated:

> The nature and content of a right is not ascertained by reference to the way it has been, or will be, exercised. That is why the plurality in *Ward* said that consideration of the way in which a right has been exercised is relevant only in so far as it assists the correct identification of the nature and content of the right.[126]

8.77 Recommendation 8–1 states that a right may comprise a right that may be exercised for any purpose—including commercial and non-commercial purposes. The intention is to incorporate the principles from *Akiba HCA* and *Brown*, which confirm that it is not necessary to provide evidence of the numerous ways in which a right might be exercised in order to confirm the existence of the right.

8.78 On this point, AIATSIS submitted that:

> By this construct, reclaiming or reinvigorating an aspect of traditional law and custom does not mean it previously ceased to be available as a right. The inquiry should be about the existence of the right, not the existence of the modes of its exercise.[127]

8.79 A number of stakeholders supported an explicit amendment that would ensure that native title rights could be exercised for commercial purposes.[128]

> The NTA must be taken to recognise the existence of broadly stated rights which may be exercised in particular ways or for particular purposes without listing every way in which, or every activity by which, a right may be exercised, for example, the right to take and use resources without specifying how that right is to be, or may be, exercised.[129]

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123 See, eg, *Willis on behalf of the Pilki People v Western Australia* [2014] FCA 714 (4 July 2014); *BP (Deceased) on behalf of the Birriliburu People v Western Australia* [2014] FCA 715 (4 July 2014).

124 The relevant statement that '[t]he nature and content of a right is not ascertained by reference to the way it has been, or will be, exercised' is made in respect of the inconsistency between native title rights and interests and other interest in the claimed area: *Western Australia v Brown* (2014) 306 ALR 168, [34].

125 *Akiba v Commonwealth* (2013) 250 CLR 209, [1] (French CJ and Crennan J).

126 *Western Australia v Brown* (2014) 306 ALR 168, [34].

127 AIATSIS, *Submission 70*.

128 See, eg, AIATSIS, *Submission 36*; J Altman, *Submission 27*; Central Desert Native Title Services, *Submission 26*; Native Title Services Victoria, *Submission 18*; A Frith and M Tehan, *Submission 12*; Cape York Land Council, *Submission 7*; Just Us Lawyers, *Submission 2*; Australian Human Rights Commission, *Submission 1*.

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

8.80 Just Us Lawyers said, 'if native title is to contribute to the improving of Indigenous peoples' lives, it is vital that they be entitled to derive a commercial benefit from the exercise of such rights'.[130]

8.81 The South Australian Government noted that 'the current s 223(2) is explicitly unbounded'.[131] The Northern Territory Government said that, where rights are non-exclusive, 'it will be preferable to express the rights and interests by reference to the activities that may be conducted, as of right, on or in relation to, the relevant land or waters'.[132]

8.82 Stakeholders noted a risk of conflating native title rights with uses.[133] The ALRC has sought to avoid the nomenclature of 'uses' but instead has adopted 'purpose'. In turn, the Association of Mining and Exploration Companies ('AMEC') pointed to a possible confusion over right and purpose. It submitted that,

> rights and interests 'of a commercial nature' defines a category of native title rights by reference to their purpose. This contrasts to the accepted conceptualisation of native title as a 'bundle of rights' which are primarily defined by their content rather than their purpose.[134]

8.83 To avoid such confusion, the ALRC considers that any new s 223(2) should specifically provide that native title rights and interests may comprise a right that may be exercised for any purpose—including commercial or non-commercial purposes.

8.84 AIATSIS supported reform but pressed for a slightly different s 223(2) from that which the ALRC had proposed in the Discussion Paper. The model proposed by AIATSIS was in the following form:

> Without limiting subsection (1) but to avoid doubt, native title rights and interests in that subsection comprise rights that may be exercised for any purpose including, but not limited to, personal, communal and economic purposes.[135]

8.85 The National Congress of Australia's First Peoples considered excluding commercial native title rights would be 'inconsistent' with UNDRIP.[136] Several stakeholders saw native title rights exercised for commercial purposes as an important 'mechanism' to secure future economic development.[137] Professor Jon Altman noted that allowing commercial exploitation of resources based on rights exercised under traditional laws and customs is particularly important for developing a 'hybrid economy' in remote parts of Australia.[138]

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130 Just Us Lawyers, *Submission 2*.
131 South Australian Government, *Submission 68*.
132 Northern Territory Government, *Submission 71*.
133 Minerals Council of Australia, *Submission 65*; Association of Mining and Exploration Companies, *Submission 54*.
134 Association of Mining and Exploration Companies, *Submission 19*.
135 AIATSIS, *Submission 70*.
136 National Congress of Australia's First Peoples, *Submission 32*. Professor Jon Altman saw it as 'quite appropriate for the *Native Title Act* to be updated to comply as closely as possible with key "property and procedural rights" principles in UNDRIP': J Altman, *Submission 27*.
137 National Native Title Council, *Submission 57*; North Queensland Land Council, *Submission 42*.
138 J Altman, *Submission 27*.

8.86 Over the course of the Inquiry, the ALRC heard concerns of a general nature about clarifying the Act with respect to 'commercial native title rights and interests'. Concerns about the impact on certain resources industries were raised.[139] The South Australian Government submitted that '[s]ome respondent interest holders are particularly concerned at the prospect of there being commercial native title rights over their area of interest'.[140] AMEC, for example, stated that it does not support the recognition of commercial rights in the definition of native title.[141]

8.87 The ALRC notes that any native title rights exercised for commercial purposes would remain subject to general law requirements for permits and licences and subject to relevant regulation.

8.88 The Western Australian Fishing Industry Council noted the need for careful consideration of natural resource management principles when any commercial native title rights and interest are considered. The Council submitted that

> poorly defined 'indigenous' commercial fishing rights are discriminatory against indigenous participants, a dead end for development and corrosive of good resource management outcomes.[142]

8.89 Other stakeholders submitted that more than statutory reform is needed to deliver 'real economic returns' to Aboriginal and Torres Strait Islander peoples.[143] The Western Australian Government stated:

> Recognition of native title alone does not guarantee that practical, social or economic opportunities will follow. While Western Australia supports amendments that deliver such opportunities, it does not support re-engineering native title legislation to provide access to those presently unable to demonstrate native title.[144]

8.90 Other stakeholders pointed to positive changes that also would be needed, including amending the future act regime in the *Native Title Act*;[145] and enacting a comprehensive broader land settlement framework.[146] Both the future act regime and the possibility of the enactment of a land settlement framework are outside the scope of this Inquiry.[147]

Indicative list of native title rights and interests

8.91 Recommendation 8–1 provides that a new s 223(2)(b) should be enacted to clarify that native title rights and interests may include, but are not limited to, hunting,

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139 See, eg, Cement Concrete and Aggregates Australia, *Submission 47*; Western Australian Fishing Industry Council, *Submission 23*.

140 South Australian Government, *Submission 34*.

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

142 Western Australian Fishing Industry Council, *Submission 23*.

143 See, eg, National Farmers' Federation, *Submission 56*; Western Australian Government, *Submission 43*; Northern Territory Government, *Submission 31*; Kimberley Land Council, *Submission 30*; Central Desert Native Title Services, *Submission 26*; Western Australian Government, *Submission 20*; National Native Title Council, *Submission 16*; National Farmers' Federation, *Submission 14*.

144 Western Australian Government, *Submission 43*.

145 Native Title Services Victoria, *Submission 18*; National Native Title Council, *Submission 16*.

146 National Native Title Council, *Submission 16*. See Ch 9.

147 See Ch 1 and Ch 2.

gathering, fishing and trading rights and interests. Currently, s 223(2) states rights and interests includes hunting, gathering, or fishing, rights and interests. The ALRC recommends express inclusion of a right to trade in the list. A right to trade has been recognised in principle.[148]

8.92 Section 223(2) as enacted was intended to provide examples of native title rights and interests.[149] Recommendation 8–1 does not disturb that illustrative function. The inclusion of trading rights in this list indicates that native title rights and interests are not limited to the usufructuary rights that were initially identified in s 223(2).[150] The ALRC considers that the examples listed currently in s 223(2) may unnecessarily confine the scope of native title rights and interests that are recognised.

8.93 CDNTS contended that statutory confirmation of the law in *Akiba HCA* 'may assist in shifting the perception of native title rights in the broader community from being primordial hunter-gatherer rights to being rights and interests that are to be taken seriously'.[151] Native Title Services Victoria ('NTSV') submitted that it 'it would be beneficial to native title holders if the Act were capable of recognising the complex reality of [the] economy, placing a value on resources, trading in the access or use of the right itself'.[152] The ALRC heard concerns, however, particular to certain industries.[153]

Minerals

8.94 Some stakeholders pointed to potential exclusions to the types of native title rights and interests. AMEC submitted that the ALRC's proposed amendment to s 223(2) would not affect mineral ownership rights.[154] The MCA stated that

> minerals ownership (and ownership of some other natural resources including some water rights) is vested in the Crown in Australia imposing limits on the extent to which commercial rights and interests are able to be recognised.[155]

148 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [153], [155].

149 Explanatory Memorandum, Native Title Bill 1993 (Cth), Part B, 77.

150 On occasion, the examples listed in s 223(2) have been described as 'usufructuary rights': *Akiba v Commonwealth* (2013) 250 CLR 209, [9] (French CJ and Crennan J). By contrast, s 211 defines hunting, fishing, and gathering, for the purpose of that section, as separate classes of activity: *Native Title Act 1993* (Cth) s 211(3)(a)–(c).

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

152 Native Title Services Victoria, *Submission 18*.

153 See, eg, Cement Concrete and Aggregates Australia, *Submission 47*, which submitted that it was 'concerned that the broadening of rights associated with native title to include commercial activities and trade will effectively result in significantly higher costs of products to government and the community and will reduce the incentives required to invest in new quarry projects'.

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

155 Minerals Council of Australia, *Submission 8*. Some submissions called for the position to be reviewed: see, eg, J Altman, *Submission 27*; V Marshall, *Submission 11*. Another called for the statute to be amended to include 'a commercial right to take and use minerals wholly owned by the Crown': North Queensland Land Council, *Submission 17*.

8.95 In *Ward HCA*, in relation to the question of a native title right to minerals, and in contrast to the position in *Yanner v Eaton*, the High Court stated:

> the vesting of property in minerals was no mere fiction expressing the importance of the power to preserve and exploit these resources. Vesting of property and minerals was the conversion of the radical title to land which was taken at sovereignty to full dominion over the substances in question.[156]

8.96 The recommendations for reform in this chapter do not seek to disturb the finding on extinguishment in *Ward HCA*. The Terms of Reference for this Inquiry precluded a wider investigation of the operation of the *Native Title Act* with respect to statutory minerals. For example, the Terms of Reference do not extend to consideration of extinguishment, the right to negotiate or the future act provisions necessary to a more comprehensive examination of the issues raised by the MCA.

Water

8.97 While AMEC acknowledged that the ALRC's proposed amendment to s 223(2) would not affect mineral ownership rights,[157] both it and the MCA expressed concern about surface resource rights, specifically water rights.[158]

8.98 The position with respect to the statutory vesting of water under state and territory laws is less settled than for minerals, and it turns on the particular terms under which the vesting is effected. In *Ward FFC* and *Ward HCA* the statutory vesting of water was considered in respect of the *Rights in Water and Irrigation Act 1914* (WA). In *Ward FFC*, Beaumont and von Doussa JJ found that the relevant provision

> is a clear example of a statutory provision where all that is vested in the Crown is only such powers of control and management as are necessary to enable the Crown to discharge the powers and functions arising under the Act. We do not consider that the mere vesting effected under s 4(1) evidenced an intention to extinguish native title rights.[159]

8.99 However, their Honours found the legislation placed restrictions on the diversion and use of water. These restrictions necessarily removed the exclusivity of the native title right to control the use and enjoyment of the water.[160] The High Court in *Ward HCA* affirmed this analysis.[161]

8.100 The Terms of Reference do not extend to comprehensive examination of the *Native Title Act* provisions governing extinguishment. Accordingly, the ALRC makes no recommendations in respect of the extinguishment of native title rights to water, but notes the capacity for non-exclusive native title rights to water to be determined.

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156 *Western Australia v Ward* (2002) 213 CLR 1, [384] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

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

158 Minerals Council of Australia, *Submission 65*; Association of Mining and Exploration Companies, *Submission 54*. The MCA observed that many companies are dependent on water rights for their operations.

159 *Western Australia v Ward* (2000) 99 FCR 316, [400].

160 Ibid [405] (Beaumont and von Doussa JJ).

161 The vesting of waters in the Crown was inconsistent with any native title right to possession of those waters to the exclusion of all others: *Western Australia v Ward* (2002) 213 CLR 1, [263] (Gleeson CJ, Gaudron, Gummow and Hayne JJ). See also [820] (Callinan J).

8.101 Following *Akiba HCA*, a native title right to access and take resources that may be exercised for any purpose, may include water where established on the evidence. In *Akiba FCA*, the right found at first instance was to 'access resources and to take for any purpose resources in those areas'.[162] Resources were held to include water.[163] Water use could also be considered as a necessary ancillary to the exercise of usufructuary rights—again where established on the evidence.

8.102 Dr Sue Jackson and Professor Poh-Ling Tan submitted:

> With respect to water, where the necessary connection and other requirements for native title are currently satisfied, the content of rights to water within a native title claim are generally regarded by the courts as usufructuary in character, and a number of native title determinations have recognized limited, non-exclusive and non-commercial rights to use water without the need for a licence. In a similar vein to the comments above, this narrow definition is having the effect of excluding Indigenous people from valuable markets and is counter to national Indigenous policy. Definitions and interpretations of native title that preclude commercial use will perpetuate and entrench Indigenous disadvantage and marginalization, thus we support the proposal that the definition in s 223 reflect the law in *Akiba v Commonwealth*.[164]

8.103 In *Daniel v Western Australia* a right to take water for drinking and domestic purposes was found as 'it is a necessary incident to life in the exercise of other rights', such as camping.[165] In consent determinations, native title rights and interests to take surface and subterranean water are typically confined to 'personal, domestic and communal purposes'.[166]

8.104 The ALRC notes that if sustainable and culturally appropriate economic development is to occur in many regional and remote indigenous communities, water will be a critical component to that development. Professor Jon Altman contended that 'in the interest of the efficient allocation of resources it would make sense to allocate a customary and tradeable commercial right in fresh water to native title groups'.[167] Jackson and Tan submitted that there is 'a real risk that those indigenous groups whose rights are yet to be recognised through a determination may be locked out of a market approaching full allocation'.[168]

8.105 In light of the many considerations around native title rights and interests in water, the ALRC makes no specific recommendation. Recommendation 8–1 is not intended to limit the evolution of the law on a case by case basis, and as supported by requisite evidence. The ALRC sees merit in a broader review of native title rights in relation to water, in conjunction with state and territory governments and relevant Aboriginal and Torres Strait Islander organisations.

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162 *Akiba v Queensland (No 2)* (2010) 204 FCR 1, [540].
163 Ibid [760].
164 S Jackson and PL Tan, *Submission 44*.
165 *Daniel v Western Australia* [2003] FCA 666 (3 July 2003) [490], [510].
166 Richard H Bartlett, *Native Title in Australia* (LexisNexis Butterworths, 3rd ed, 2015) 890.
167 J Altman, *Submission 27*.
168 S Jackson and PL Tan, *Submission 44*. See also National Water Commission, *Indigenous access to water resources* http://www.nwc.gov.au/nwi/position-statements/indigenous-access.

Trading rights and interests

8.106 In *Yarmirr v Northern Territory*, the Federal Court suggested that the right to trade 'was not a right or interest in relation to the waters or land'.[169] Subsequently, in *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group*, the Full Federal Court stated:

> The right to trade is a right relating to the use of the resources of the land. It defines a purpose for which those resources can be taken and applied. It is difficult to see on what basis it would not be a right in relation to the land.[170]

8.107 A number of stakeholders supported the express inclusion of 'trade' in s 223(2).[171] CYLC submitted:

> It would appear logical that if native title rights and interests were traditionally exercised in a manner which involved trade or barter, then rights and interests of a commercial nature should be afforded to native title claimants. Regulatory regimes would still address matters such as sustainability, safety and protection of the environment.[172]

8.108 The NNTC submitted that '[i]t is common to recognise non-commercial rights to share and exchange "traditional" resources'.[173] 'Commercial' has, however, been linked to rights to take resources for trade or exchange:

> Before settlement, commercial native title activity was conducted in a moneyless society, and over time the activity has acceptably changed and modified to include sea and land based native title resources and products produced from natural resources being taken in a different manner and being sold for money.[174]

8.109 Some submissions referred to anthropological and historical evidence of trade in various parts of Australia,[175] including international trade.[176]

> [Dale] Kerwin, amongst others, has detailed extensive trade, including in pituri, ochre, furs, stone, shells, songs and stories, and notes the significance of market places/trade centres as being central to large ceremonial gatherings.[177]

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169 *Yarmirr v Northern Territory [No 2]* (1998) 82 FCR 533, 587.

170 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [153].

171 National Native Title Council, *Submission 57*; A Frith and M Tehan, *Submission 52*; Native Title Services Victoria, *Submission 45*; North Queensland Land Council, *Submission 42*.

172 Cape York Land Council, *Submission 7*.

173 National Native Title Council, *Submission 16*.

174 North Queensland Land Council, *Submission 17*. See also Native Title Amendment (Reform) Bill 2014 cl 19; Native Title Amendment (Reform) Bill (No 1) 2012 cl 19. The amendment for s 223(2) proposed in these Bills would provide that native title rights and interests include 'the right to trade and other rights and interests of a commercial nature'.

175 AIATSIS, *Submission 36*; North Queensland Land Council, *Submission 17*; Cape York Land Council, *Submission 7*; Just Us Lawyers, *Submission 2*. See also Yamatji Marlpa Aboriginal Corporation, Submission No 8 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, July 2011.

176 AIATSIS, *Submission 36*; North Queensland Land Council, *Submission 17*; Just Us Lawyers, *Submission 2*. See also Kimberley Land Council, Submission No 2 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, June 2011.

177 AIATSIS, *Submission 36*.

8.110 AIATSIS noted that 'much of the discussion on commercial rights has tended to concentrate on fishing and water rights. However, this ignores the large body of research on terrestrial trade and commercial activity'. It submitted that '[t]here is, in reality, no point to be made in distinguishing between marine and terrestrial rights'.[178]

8.111 The NNTC referred to early consent determinations in the Torres Strait which included a native title right to engage in trade in the natural resources of the determination area.[179]

8.112 By contrast, the Western Australian Government expressed concern lest the right, as found in *Akiba HCA*, is 'conflated with a native title "right to trade"'. It submitted that it was 'not aware of any instance where the Court has made a determination of a native title right to trade where a right claimed in that form has been put in issue'.[180]

8.113 While acknowledging the need for evidence in each claim to determine a native title right to trade, the ALRC recommends express inclusion of the right to trade in s 223(2) to assist clarity on the point of law.

Commercial activities and economic rights and interests

8.114 In the Discussion Paper, the ALRC proposed amending s 223(2) of the *Native Title Act* to include commercial activities in the non-exhaustive list of native title rights and interests.[181] The ALRC no longer recommends the inclusion of commercial activities in the list in s 223(2).

8.115 Some stakeholders suggested any new s 223(2) should refer to 'economic rights and interests' or 'economic purposes'. The Australian Human Rights Commission supported amendments 'to clarify that native title rights and interests can include commercial or economic rights and interests', to advance the economic development of Aboriginal and Torres Strait Islander peoples and to comply with international law.[182] The UNDRIP refers to the right of Indigenous peoples to 'engage freely in all their traditional and other economic activities'.[183]

8.116 The Victorian Government noted that in the *Traditional Owner Settlement Act 2010* (Vic), the list of traditional owner rights that may be included in an agreement includes 'the maintenance of a distinctive spiritual, material and *economic* relationship with the land and the natural resources on or depending on the land'.[184] The Indigenous

178 Ibid.
179 National Native Title Council, *Submission 16*, citing *Kaurareg People v State of Queensland* [2001] FCA 657 (23 May 2001).
180 Western Australian Government, *Submission 43*.
181 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014) 156, Prop 8–1.
182 Australian Human Rights Commission, *Submission 1*.
183 *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 20.
184 Department of Justice, Victoria, *Submission 15*.

Land Corporation indicated that 'economic' represents 'a broader scope of activities enabling Indigenous economic development'.[185]

8.117 The ALRC considers that 'economic purposes' or 'economic activities' may more effectively capture the range of activities that may be encompassed by native title rights and interests. However, as the ALRC did not consult on such a proposal, it makes no specific recommendation for adoption of the term 'economic' rather than 'commercial'.

Usufructs, commercial purposes and consent determinations

8.118 Since *Commonwealth v Yarmirr* and *Ward HCA*, native title consent determinations have typically included a right to take resources, such as fishing and hunting for non-commercial purposes.[186] In *Akiba HCA*, the High Court affirmed that the designation of native title rights and interests as usufuctuary rights and interests does not necessarily preclude their exercise for commercial purposes.[187] Recommendation 8–1 confirms that position.

8.119 NTSV drew attention to the *Traditional Owner Settlement Act 2010* (Vic), which enables Traditional Owners, under a settlement, to harvest forest produce and flora for commercial purposes.[188]

The relationship between s 211 and s 223(2)

8.120 It is important to distinguish between the scope of the ALRC's recommendations for s 223(1) and s 223(2), and the operation of s 211 of the *Native Title Act*. Section 211 deals expressly with usufructuary native title rights.

8.121 Recommendation 8–1 is not intended to affect the current interaction between s 223(1) and s 211 of the *Native Title Act.* The ALRC considers that s 211 is narrowly drafted and unlikely to be affected by the recommendation.

8.122 Section 211 operates to render lawful certain activities by native title holders that would otherwise be contrary to a law of the Commonwealth, state or territory, because they were carried on without 'a licence, permit or other instrument'. It has the effect of allowing the exercise of some native title rights and interests, notwithstanding the general requirement for a licence or permit for the activity.[189]

8.123 The High Court, in *Western Australia v Commonwealth*, said:

> If the affected law be a law of the State … its operation is suspended in order to allow the enjoyment of the native title rights and interests which, by s 211, are to be enjoyed without the necessity of first obtaining 'a licence, permit or other instrument'. … [T]he effect of s 211 … [is to] exclude laws made in exercise of that power (inter alia)

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185 Indigenous Land Corporation, *Submission 66*.

186 *Commonwealth v Yarmirr* (2001) 208 CLR 1; *Western Australia v Ward* (2002) 213 CLR 1.

187 *Akiba v Commonwealth* (2013) 250 CLR 209, [21] (French CJ and Crennan J), [60] (Hayne, Kiefel and Bell JJ).

188 Native Title Services Victoria, *Submission 45*.

189 Section 211 'operates to remove prohibitions or restrictions': *Yanner v Eaton* (1999) 201 CLR 351, [122] (Gummow J).

> from affecting the freedom of native title holders to enjoy the usufructuary rights referred to in s 211.[190]

8.124 Section 211 has three elements. First, the exercise or enjoyment of native title rights and interests in doing any of the activities set out in s 211(3); second, the activities are prohibited for all unless permitted by 'a licence, permit or other instrument'; and third, the activity is both for the purpose of satisfying the 'personal, domestic or non-commercial needs' of native title holders and in the exercise or enjoyment of native title rights and interests. All elements must be satisfied for the benefit of the section to flow.

8.125 Subsection (3) sets out separate classes of activity: hunting, fishing, gathering, cultural or spiritual activity and any other prescribed purpose. In the context of s 211, these are the rights collectively described, in *Western Australia v Commonwealth* and *Yanner v Eaton*, as usufructuary rights.[191] The limitation of s 211 to these classes of activity means that not all native title rights and interests in a determination under s 225 will necessarily engage s 211. Gummow J in *Yanner v Eaton*, citing *Western Australia v Commonwealth*, referred to, '[t]he usufructuary rights comprehended by sub-s (3)'.[192]

8.126 Therefore, only the exercise of rights and interests recognised under s 223 can attract the protection of s 211.[193] These rights and interests are further limited by both s 211(2) and (3), namely they must fall into the 'class of activities' in subsection (3) and must be '(a) for the purpose of satisfying … personal, domestic or non-commercial communal needs; *and* (b) in exercise of enjoyment of … native title rights and interests'.[194]

8.127 The application of s 211 as a defence to prosecutions has come before the High Court in two cases: *Yanner v Eaton*[195] and *Karpany v Dietman.*[196] In both cases, the Court first addressed the issue of extinguishment of any native title right by the regulatory regimes in the relevant state legislation.

8.128 In *Yanner v Eaton*, the appellant was charged with the taking of juvenile crocodiles without a permit as required by s 54(1)(a) of the *Fauna Act 1974* (Qld). The appellant argued successfully before the Magistrate that s 211 applied and this finding was ultimately upheld by a majority of the High Court. As the majority said:

> Accordingly, by operation of s 211(2) of the *Native Title Act* and s 109 of the Constitution, the Fauna Act did not prohibit or restrict the appellant, as a native title

190 *Western Australia v Commonwealth* (1995) 183 CLR 373, 474.
191 Ibid [474]; *Yanner v Eaton* (1999) 201 CLR 351, [39].
192 *Yanner v Eaton* (1999) 201 CLR 351, [120] (Gummow J) citing *Western Australia v Commonwealth* (1995) 183 CLR 373, 474.
193 French CJ and Crennan J noted 'The distinction between native title rights and their exercise is made explicit in s 211 and was noted by the plurality in *Yanner v Eaton*': *Akiba v Commonwealth* (2013) 250 CLR 209, [28].
194 Ibid [27].
195 *Yanner v Eaton* (1999) 201 CLR 351.
196 *Karpany v Dietman* (2013) 88 ALJR 90.

> holder, from hunting or fishing for the crocodiles he took for the purpose of satisfying personal, domestic or non-commercial communal needs.[197]

8.129 *Karpany v Dietman* involved a prosecution of Karpany and another, both members of the Narrunga People, for taking undersized abalone contrary to s 72(2)(c) of the *Fisheries Management Act 2007* (SA). It was accepted that the appellants had taken the undersized abalone in accordance with 'traditional laws and customs of the Narrunga People',[198] that the 'relevant native title right was the right to fish which included taking undersized abalone',[199] and that it was for 'bona fide non-commercial, or communal need'.[200]

8.130 There have been a number of other cases in which s 211 has been argued as a defence to prosecutions, with varying outcomes.[201] In summary:

- ss 211 and 223 are linked in that s 211 only operates where activities are undertaken in exercise and enjoyment of 'native title rights and interests' under s 223;
- s 211 does not permit the exercise of *all* 'native title rights and interests' that might exist under s 223 in any particular case;
- the application of s 211 is further limited by the 'class of activity" in s 211(3);
- the application of s 211 is further limited by the purpose set out in s 211(2)(a)—'satisfying their personal, domestic or non-commercial needs'; and
- the range of cases that have been unsuccessful indicates the difficulties in establishing the applicability of s 211 as a defence in prosecutions.

8.131 There is a power in s 211 for further activities to be added by administrative act.[202]

8.132 Leaving aside the operation of s 211, a native title holder in exercising a native title right, including the right to hunt, fish or gather would be able to exercise that right 'for any purpose'—commercial or non-commercial—in terms of Recommendation 8–1 and where established on the evidence.

No statutory definition of terms

Recommendation 8–2 'Commercial purposes' and 'trading' should not be defined in the *Native Title Act*.

197 *Yanner v Eaton* (1999) 201 CLR 351, [40] (Gleeson CJ, Gaudron, Kirby and Hayne JJ).
198 *Karpany v Dietman* (2013) 88 ALJR 90, [1].
199 Ibid [17].
200 Ibid [46].
201 See, eg, *Lewis (Department of Primary Industries-Fisheries) v Wanganeen and Harradine* [2005] SASC 36; *Police v Graeme William Sydney Talbot* [2013] NTMC 033 (17 December 2013).
202 *Native Title Act 1993* (Cth) s 211.

8.133 The ALRC considers that 'commercial purposes' and 'trading' should not be defined in the *Native Title Act*. A statutory definition may be inflexible and unhelpful, given the fact-dependent nature of native title claims. It is unnecessary to define prescriptively the meaning of 'commercial purposes' and the scope of 'trading' rights. The application of terms is most appropriately left to judicial exposition as a question of fact based on the relevant law and custom in each claim.[203]

8.134 In the Discussion Paper, the ALRC proposed that the terms 'commercial activities' and 'trade' should not be defined.[204] Submissions were received on this terminology. Similar considerations apply in respect of the reworded s 223(2) in Recommendation 8–1.

8.135 Several stakeholders agreed that the terms 'commercial activities' and 'trade' should not be defined in the *Native Title Act*.[205] Some stakeholders agreed that definitions would limit flexibility,[206] and 'the type of commercial activities or trade being recognised'.[207] Others preferred the interpretation to be 'driven' by the Act's Preamble and objects.[208]

8.136 CDNTS submitted that 'the content of commercial activities and trade are going to be dependent on the particular group and the relevant law and custom'.[209] This position was echoed in many submissions.[210] Dr Angus Frith and Associate Professor Maureen Tehan submitted that to define the terms would 'inappropriately reduce the significance of the laws and customs'.[211]

8.137 For some stakeholders, trade and exchange 'aligns to [a] general commercial mindset'.[212] The Kimberley Land Council ('KLC') submitted that:

> The understanding of commercial activity should also not be unduly limited by its current operation or understanding in modern secular societies. Traditional Indigenous communities were/are not necessarily 'secular', and as such spiritual or religious obligations could infiltrate almost all undertakings, including transactions, transfers, exchanges and activities undertaken for value or benefit. The fact that an activity may

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203 Melissa Perry and Stephen Lloyd, *Australian Native Title Law* (Lawbook Co, 2003) 3; *Western Australia v Ward* (2002) 213 CLR 1, [20] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

204 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014) Prop 8–2.

205 AIATSIS, *Submission 70*; South Australian Government, *Submission 68*; NTSCORP, *Submission 67*; Law Council of Australia, *Submission 64*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; National Native Title Council, *Submission 57*; Queensland South Native Title Services, *Submission 55*; A Frith and M Tehan, *Submission 52*; Native Title Services Victoria, *Submission 45*; S Jackson and PL Tan, *Submission 44*; North Queensland Land Council, *Submission 42*; Law Society of Western Australia, *Submission 41*.

206 Yamatji Marlpa Aboriginal Corporation, *Submission 62*; National Native Title Council, *Submission 57*; A Frith and M Tehan, *Submission 52*; North Queensland Land Council, *Submission 42*.

207 NTSCORP, *Submission 67*.

208 AIATSIS, *Submission 70*.

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

210 National Native Title Council, *Submission 57*; A Frith and M Tehan, *Submission 52*; Native Title Services Victoria, *Submission 45*.

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

212 North Queensland Land Council, *Submission 17*. See also A Frith and M Tehan, *Submission 52*.

> have a spiritual or religious component or derivation should not exclude it from being recognised as a 'commercial' activity, right or interest.[213]

8.138 Most stakeholders who opposed reforms to include commercial native title rights and interests in the *Native Title Act* did not address the issue of statutory definitions of the terms. The South Australian Government stated that native title rights and interests of a commercial nature 'cannot be comprehensively codified, as each example of any ongoing traditional commerce will turn on its own facts'.[214]

Adaptation and commercial native title rights and interests

8.139 Native title rights and interests are possessed under laws and customs with origins in the period prior to annexation. 'It is those rights and interests which are "recognised" in the common law.'[215] There can be some degree of change and adaptation of the traditional *laws and customs*, but there cannot be new native title *rights and interests*.[216] In *Mabo [No 2]*, Brennan J stated:

> It is immaterial that the laws and customs have undergone some change since the Crown acquired sovereignty provided the general nature of the connection between the indigenous people and the land remains.[217]

8.140 Activities or practices that constitute the exercise of an established native title right may be exercised in modern form.[218] In *Yorta Yorta*, the majority acknowledged the changing nature of laws and customs.[219] The Law Society of Western Australia noted the greater allowance for adaptation of traditional law and custom set out in the judgment of Gaudron and Kirby JJ 'ought to be sufficient to avoid the approach of laws and customs being "frozen in time"'.[220]

8.141 The implications of an adaptation of laws and customs were elaborated by the Full Court of the Federal Court in *Bodney v Bennell*.[221]

> Proof of the continuity of a society does not necessarily establish that the rights and interests which are the product of the society's normative system are those that existed at sovereignty, because those laws and customs may change and adapt. Change and adaptation will not necessarily be fatal. So long as the changed or adapted laws and customs continue to sustain the same rights and interests that existed at sovereignty, they will remain traditional.[222]

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213 Kimberley Land Council, *Submission 30*. See also P Burke, *Submission 33*: '"Aboriginal law" typically has a unique range of reference inclusive of rituals, songs and sacred objects that have no counterpart in the modern law of the secular constitutional state'.
214 South Australian Government, *Submission 34*.
215 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [77]. See also *Akiba v Commonwealth* (2013) 250 CLR 209, [9].
216 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [43] (Gleeson CJ, Gummow and Hayne JJ).
217 See *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 70.
218 Ibid 192.
219 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [83] [114].
220 Law Society of Western Australia, *Submission 41*.
221 *Bodney v Bennell* (2008) 167 FCR 84.
222 Ibid [74].

8.142 More specifically, the Court stated the 'rights and interests, which are the product of rules and customs which adapt or develop, may themselves change without losing recognition'.[223]

8.143 Despite acknowledgment of the possibility of adaptation, there has often been limited accommodation to modern circumstances. Kirby J in *Ward HCA* stated that 'it would be a mistake to ignore the possibility of new aspects of traditional rights and interests developing as part of Aboriginal customs not envisaged, or even imagined, in the times preceding settlement'.[224]

8.144 In other jurisdictions there are questions about the evolution and adaptation of indigenous rights to land and waters.[225] Major agreements and settlements[226] with Indigenous peoples often include a component that allows for commercial utilisation of land and waters.

8.145 In Chapter 5, the ALRC recommends that the definition of native title in s 223(1) of the *Native Title Act* should be amended to make clear that traditional laws and customs, under which native title rights and interests are possessed, may adapt, evolve or otherwise develop.[227] The recommended revision to s 223(2) expressly states that it is not to 'limit' the operation of s 223(1). Recommendation 5–1 makes it clear that where laws and customs adapt, evolve or otherwise develop, the exercise of rights and interests possessed under traditional laws and customs may similarly adapt, evolve and develop.

8.146 Finn J, writing extra-curially noted,

> merely because other rights have been used in particular ways in the past, for example, for subsistence because there was no opportunity otherwise to exploit them, that should not of itself preclude newer modes of taking, ie using new technologies, or newer purposes in taking, ie for commercial purposes, because the opportunity presents itself to do so *after* sovereignty.[228]

8.147 Views vary as to what might constitute such adaptation, evolution and development of traditional laws and customs. North Queensland Land Council submitted that, '[i]f the changes continue to sustain the same native title rights and interests that existed at sovereignty that should be sufficient to demonstrate the adaption or modification is acceptable'.[229]

8.148 For the NFF, the commercial exploitation of activities done in accordance with traditional laws and customs, such as hunting and gathering, is 'one thing', but they see the 'expan[sion of] the range of activities to encompass broad commercial rights' as

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223 Ibid [120].
224 *Western Australia v Ward* (2002) 213 CLR 1, [574].
225 See, eg, *Lax Kw'alaams Indian Band v Canada* [2011] 3 SCR 535. See Ch 9.
226 A well known settlement is the 'Sealords deal', which facilitated purchase of shares in a commercial fishery on behalf of Maori. See Shane Heremaia, 'Native Title to Commercial Fisheries in Aotearoa/New Zealand' (2000) 4 *Indigenous Law Bulletin* 15.
227 See Rec 5–1 in Ch 5.
228 Finn, above n 47, 8.
229 North Queensland Land Council, *Submission 17*.

quite another, and one that they do not support.[230] In the view of the NFF, '[a]part from the commercial exploitation of traditional activities, the creation of general commercial rights would have no source in traditional law and custom'.[231]

8.149 Just Us Lawyers submitted that '[i]f it is still traditional to hunt with a rifle rather than a spear, then the same logic should apply to commercial native title rights and interests. The source of the right to trade is in the ancestral connection to the land from where the commodity is obtained'.[232]

8.150 The KLC submitted that 'native title rights and interests of a commercial nature should be broadly inclusive and accommodate … the current and future commercialisation of previously non-commercial activities such as ecosystem services, carbon farming and bio-banking'.[233]

Expansion of the burden of native title

8.151 As noted, some governments articulated concerns about the Discussion Paper proposal for clarifying whether native title might comprise commercial rights and interests.[234] The South Australian Government expressed the view that such a proposition is 'not an accurate reflection' of *Akiba HCA*. It saw the proposal as going 'beyond' a mere statutory confirmation of the decision in *Akiba HCA*.[235]

8.152 Governments and industry groups in the mining, construction and farming industries expressed concern that the proposal, as drafted, would expand the current law.[236] Some industry sectors considered that the existing case law does not currently extend to recognising commercial activities and trade.[237]

8.153 In respect of the ALRC's proposal in the Discussion Paper, the submissions from the Western Australian and South Australian governments raised the possibility that the proposal, if enacted, may constitute an acquisition of a state's property, otherwise than on just terms, contrary to s 51(xxxi) of the *Australian Constitution*:

> [A]t sovereignty, the State's radical title was not burdened by native title rights 'in relation to any purpose' which would involve commercial rights. It is only by allowable change and adaptation that such rights are now capable of recognition

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230 National Farmers' Federation, *Submission 14*. This view was reiterated in National Farmers' Federation, *Submission 56*.

231 National Farmers' Federation, *Submission 14*.

232 Just Us Lawyers, *Submission 2*. They observed that a 'reasonable' balance will need to be struck.

233 Kimberley Land Council, *Submission 30*.

234 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014) Prop 8–1.

235 South Australian Government, *Submission 68*.

236 Ibid; Minerals Council of Australia, *Submission 65*; National Farmers' Federation, *Submission 56*; Association of Mining and Exploration Companies, *Submission 54*; The Chamber of Minerals and Energy of Western Australia, *Submission 49*; Cement Concrete and Aggregates Australia, *Submission 47*; Western Australian Government, *Submission 43*. The National Native Title Tribunal also expressed the view that Proposal 8–1 would likely be an expansion of the law but it did not specify its opposition, rather noting that '[s]uch an amendment may in turn expand the rights and interests which are capable of being registered and impact on how the Registrar approaches this task at s 190B(6)': National Native Title Tribunal, *Submission 63*.

237 See, eg, Cement Concrete and Aggregates Australia, *Submission 47*.

> (where made out on the evidence). The proposed amendment would expand the scope of that recognition to native title rights generally and thereby increase the burden on the State's radical title. There is also the prospect that the State's property would then be available for commercial exploitation where no such right existed previously.[238]

8.154 The Full Federal Court in *Bodney v Bennell* suggested that rights which originate in traditional laws and customs may change and adapt in accordance with changes in traditional laws and customs, although not so as, 'to impose a greater burden on the Crown's radical title'.[239]

8.155 It is well established in *Mabo [No 2]* that the Crown's radical title is burdened by native title rights. The Crown, at the point of sovereignty, acquired a radical or ultimate title—but not a beneficial interest. Native title rights and interests, as recognised, therefore must necessarily pre-date sovereignty and thus the accrual of any beneficial interest to the Crown.[240]

8.156 If the evidence demonstrates, for example, that there were rights to trade, then this is not a new burden, but one where the rights and interests stem from the traditional laws and customs with origins in the period prior to sovereignty. Recommendation 8–1 adopts the principles from *Akiba HCA*, but still requires that any finding of a right that is exercised for a commercial purpose will be determined on the evidence of traditional laws and customs. Further, for the right to be recognised, it must be possessed under traditional laws and customs which have pre-sovereign origins.

8.157 This position is consistent with the case law that suggests adaptation of laws and customs is permissible.[241] The corollary of the position outlined by Western Australia is that there can be no adaptation to laws and customs. The ALRC confirms, in Recommendation 5–1, that traditional laws and customs may adapt, evolve and develop.

Resolution of claims

8.158 A number of governments submitted that their practice in respect of resolving native title claims was commendable.[242] The Northern Territory Government stated that it has 'a strong record in achieving consent determinations of native title'.[243] The Western Australian Government submitted that its 'consistent record' of recognising native title by consent contradicts the premise that the Act's provisions do not deliver just outcomes for Indigenous Australians.[244] The South Australian Government observed that six of the claims that had been resolved by consent determination in that jurisdiction involved 'comprehensive settlement agreements that address broader issues

238 Western Australian Government, *Submission 43*. See also South Australian Government, *Submission 68*.
239 *Bodney v Bennell* (2008) 167 FCR 84, [120]–[121].
240 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 48.
241 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [83]; *Bodney v Bennell* (2008) 167 FCR 84, [74].
242 South Australian Government, *Submission 34*; Northern Territory Government, *Submission 31*; Queensland Government, *Submission 28*; Western Australian Government, *Submission 20*.
243 Northern Territory Government, *Submission 71*.
244 Western Australian Government, *Submission 20*.

including compensation, sustainability of the Prescribed Body Corporate, and future act issues'.[245]

8.159 The Queensland Government suggested that there was little basis for amendment to the Act because of the current rate of resolution of claims and the associated outcomes being achieved. The Queensland Government pointed to its accelerating number of consent determinations in recent years. It stated that the Federal Court has taken 'a broad and flexible approach' in applying the definition of native title and has confirmed that native title rights may comprise commercial rights.[246]

8.160 In this context, a substantial number of stakeholders opposed statutory amendment on the basis that it would introduce uncertainty.[247] The potential for commercial native title rights and interests also may be a factor that affects the willingness of industry and other third party respondents to enter negotiated consent determinations and agreements.[248]

8.161 Some stakeholders suggested that some governments may start negotiations with a relatively conservative position on whether the native title claim may include rights and interests of a commercial nature.[249] The NNTC observed that 'the recognition of native title rights and interests of a commercial nature in a determination of native title continues to be generally hotly contested by all levels of government'.[250]

8.162 CDNTS noted that in claims for native title rights to take resources, Western Australia had 'attempted to limit the right to take resources for "non-commercial" or "domestic purposes only"'.[251] This precipitated the litigated native title claims of the Pilki People and the Birriliburu People.[252]

8.163 NTSCORP submitted that amending the law 'would assist in the process of resolving claims by removing the, often circular, discussion about what rights are able to be claimed and limit the issue to which rights can be established by the evidence'.[253]

8.164 The ALRC considers that statutory amendment to clarify the position is preferable to increased litigation that may introduce delay and increased costs into the native title system.

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245 South Australian Government, *Submission 34*.

246 Queensland Government, *Submission 28*.

247 See, eg, Minerals Council of Australia, *Submission 65*; Association of Mining and Exploration Companies, *Submission 54*; Chamber of Minerals and Energy of Western Australia, *Submission 21*; Association of Mining and Exploration Companies, *Submission 19*.

248 Western Australian Fishing Industry Council, *Submission 23*.

249 Central Desert Native Title Services, *Submission 26*; Cape York Land Council, *Submission 7*.

250 National Native Title Council, *Submission 16*.

251 Central Desert Native Title Services, *Submission 26*. This may have been an uncommon practice amongst native title representative bodies. See Cape York Land Council, *Submission 7* ('because of the development of case law and Queensland native title determination precedents limiting the exercise of rights to non-commercial uses, that evidence has not been routinely prepared and commercial rights have not been routinely pursued').

252 *Willis on behalf of the Pilki People v Western Australia* [2014] FCA 714 (4 July 2014) [135]; *BP (Deceased) on behalf of the Birriliburu People v Western Australia* [2014] FCA 715 (4 July 2014) [104].

253 NTSCORP, *Submission 67*.

8.165 The Terms of Reference refer to 'the importance of certainty as to the relationship between native title and other interests in land and waters'. The ALRC acknowledges the importance of certainty for all stakeholders and the need to promote an efficient and effective native title system. The intention of the recommendation is to clarify the legal position—particularly in regard to the conclusion of consent determinations.

Other native title rights and interests?

8.166 The ALRC is aware, through consultations and submissions, that claims for other types of native title rights are evolving, for example in respect of reciprocal rights,[254] rights of conferral[255] and for new forms of resource utilisation, such as bio-sequestration that have origins in the traditional use of land and waters under traditional laws and customs. The ALRC has recommended statutory clarification around native title rights to be exercised for commercial or non-commercial purposes. That recommendation is intended to allow for the adoption of principles to facilitate the development of the law on a case by case basis.

8.167 The ALRC is not recommending that any other native title right or interest be expressly included in any revised s 223(2) as set out in Recommendation 8–1. This is not intended to preclude a finding on the evidence of other native title rights and interests that may be recognised in line with the adaptation of laws and customs. The ALRC stresses that the list in s 223(2)(b) is indicative—not exhaustive.

8.168 As CDNTS aptly put it, '[t]here is a danger that too indicative a list will result in native title rights and interests being unintentionally limited by virtue of the fact that an asserted right or interest is "not of the kind" found in the section'.[256] Apart from the issue of cultural knowledge, discussed below, the majority of stakeholders who addressed this issue[257] submitted that there was no need for express inclusion of anything else.[258]

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254 In *Akiba HCA*, in respect of the claim for reciprocal rights, the High Court held that, 'intramural reciprocal relationships between members of different island communities giv[ing] rise to obligations relating to access to and use of resources' are not rights and interests 'in relation to' land or waters within the meaning of s 223 of the *Native Title Act*. Rather, on the basis of the evidence in that case, they were correctly characterised as 'rights of a personal character dependent upon status'. See *Akiba v Commonwealth* (2013) 250 CLR 209, [6], [45] (French CJ and Crennan J); [47] (Hayne, Kiefel and Bell JJ).

255 Law Council of Australia, *Submission 64*.

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

257 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014) Q 8–2.

258 South Australian Government, *Submission 68*; NTSCORP, *Submission 67*; Law Council of Australia, *Submission 64*; Queensland South Native Title Services, *Submission 55*; Law Society of Western Australia, *Submission 41*. North Queensland Land Council called for 'the protection of secular, cosmological and religious knowledge' to be included expressly: North Queensland Land Council, *Submission 42*. AIATSIS submitted that any such listing as is found presently in s 223(2) should include 'the common incidents of native title, such as the right to make decisions about use of resources and the right to control access': AIATSIS, *Submission 70*. Some submissions called for the *Native Title Act* to be amended so that reciprocal rights may be recognised as native title rights and interests: Law Council of Australia, *Submission 35*; North Queensland Land Council, *Submission 17*. The Law Council of Australia

Protection or exercise of cultural knowledge

8.169 Cultural knowledge is a core aspect of the law and custom of Aboriginal and Torres Strait Islander communities. The term 'cultural knowledge' signifies an intense affiliation with land and waters, where 'places are discursively acknowledged as being essentially and primarily particular things in place, things that are resonances and signs of the ancestral past'.[259] It can encompass particular forms of expression of the knowledge of places—such as dance, art, stories and ceremonies, to knowledge of the medicinal properties of plants and genetic resources. It includes knowledge that is not to be openly-shared, but which is transmitted through particular genealogically and spatially referenced processes. Cultural heritage is a cognate term also adopted to describe this knowledge, as well as physical expressions of culture, such as paintings.

8.170 Section 223(1) of the *Native Title Act* has been construed as not extending to recognition of rights to protect cultural knowledge.[260] However, determinations of native title rights and interests under s 225 of the *Native Title Act* may, for example, comprise rights of access to sacred sites, and for groups to conduct ceremonies on traditional lands.[261]

8.171 Since the inception of the *Native Title Act*, there has been greater understanding of the links between Aboriginal and Torres Strait Islander laws and customs, as expressed through cultural knowledge, and the relationship with land and waters. The ALRC considered that it was within the scope of the Inquiry to seek views on whether rights related to the protection or exercise of cultural knowledge should be included expressly in the *Native Title Act*. The ALRC also considered the issue may be relevant to what is encompassed by 'commercial purposes'. Could cultural knowledge, for example, be considered as a native title right which could be exercised for a commercial purpose?

8.172 Specifically, the ALRC asked whether the indicative list proposed for a revised s 223(2)(b) should include the right to protect cultural knowledge.[262] The ALRC also asked what stakeholders understand by the phrase 'cultural knowledge'; whether a statutory definition is needed; and what such a definition should contain.

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submitted that the *Native Title Act* should also be amended to recognise status-based rights or permission to enter and intellectual property rights: Law Council of Australia, *Submission 35*.

259 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) 87.

260 *Western Australia v Ward* (2002) 213 CLR 1, [468].

261 See, eg, for NSW: *Phyball on behalf of the Gumbaynggirr People v A-G (NSW)* [2014] FCA 851 (15 August 2014); for Vic: *Lovett on behalf of the Gunditjmara People v State of Victoria (No 5)* [2011] FCA 932 (27 July 2011); for Qld: *Smith on behalf of the Kullilli People v State of Queensland* [2014] FCA 691 (2 July 2014); for WA: *Watson on behalf of the Nyikina Mangala People v State of Western Australia (No 6)* [2014] FCA 545 (29 May 2014); for SA: *Ah Chee v South Australia* [2014] FCA 1048 (3 October 2014); *Starkey v South Australia* [2011] FCA 456 (9 May 2011); for NT: *Apetyarr v Northern Territory of Australia* [2014] FCA 1088 (14 October 2014).

262 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014) Q 8–1.

8.173 A number of stakeholders supported the inclusion of the protection or exercise of cultural knowledge in the indicative list in a revised s 223(2)(b).[263] CDNTS submitted that 'there exists a great deal of cultural knowledge regarding the use and value of ecological and biological resources, which has the potential to provide economic benefit for groups'.[264] NTSV was supportive but considered that the issue requires further consideration.[265] Queensland South Native Title Services considered that such a reform would be 'problematic and complex', in part because of the interplay with copyright and intellectual property laws. But, in its view, it was 'potentially a huge deal for traditional owners'.[266]

8.174 Other stakeholders were opposed to the suggestion that the right to protect cultural knowledge be included in the indicative list in a revised s 223(2)(b).[267] AIATSIS expressed the view that cultural knowledge would be better dealt with outside of the scheme of the *Native Title Act*.[268]

8.175 A number of stakeholders were of the view that the term 'cultural knowledge' should not be defined in the *Native Title Act*.[269] Few stakeholders provided a definition of 'cultural knowledge'.[270]

8.176 There are complex considerations in respect of protecting cultural knowledge. While cultural knowledge is an integral aspect of the relationship to land and waters, it also has deep free-standing significance for Aboriginal peoples and Torres Strait Islanders. There has been extensive work already around cultural knowledge.[271] A complex balancing of interests is involved.

8.177 The ALRC considers that the question of how cultural knowledge may be protected and any potential rights to its exercise and economic utilisation governed by the Australian legal system would be best addressed by a separate review. An

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263 Arts Law Centre of Australia, *Submission 72*; National Congress of Australia's First Peoples, *Submission 69*; NTSCORP, *Submission 67*; Law Council of Australia, *Submission 64*; Yamatji Marlpa Aboriginal Corporation, *Submission 62*; National Native Title Council, *Submission 57*; Queensland South Native Title Services, *Submission 55*; A Frith and M Tehan, *Submission 52*; Central Desert Native Title Service, *Submission 48*; North Queensland Land Council, *Submission 42*; Law Society of Western Australia, *Submission 41*.

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

265 Native Title Services Victoria, *Submission 45*.

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

267 See, eg, Northern Territory Government, *Submission 71*; AIATSIS, *Submission 70*; South Australian Government, *Submission 68*.

268 AIATSIS, *Submission 70*. See also Chuulangun Aboriginal Corporation, Submission No 28 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, June 2011.

269 Yamatji Marlpa Aboriginal Corporation, *Submission 62*; National Native Title Council, *Submission 57*; A Frith and M Tehan, *Submission 52*.

270 See, eg, Queensland South Native Title Services, *Submission 55*: 'this knowledge includes traditional medicines, bush tucker, and aspects related to totemic or conservation responsibilities towards natural resources'.

271 See, eg, IP Australia's Indigenous Knowledge consultation: <www.ipaustralia.gov.au>; World Intellectual Property Organization's two gap analyses on the protection of Traditional Cultural Expressions and Traditional Knowledge: *The Protection of Traditional Knowledge: Draft Gap Analysis: Revision*, UN Doc WIPO/GRTKF/IC/13/5(b) Rev (11 October 2008); *The Protection of Traditional Cultural Expressions: Draft Gap Analysis*, UN Doc WIPO/GRTKF/IC/13/4(b) Rev (11 October 2008).

independent inquiry could bring to fruition the wide-ranging and valuable work that has already been undertaken but which still incompletely addresses the protection of Aboriginal and Torres Strait Islander peoples' cultural knowledge.

Definitions

8.178 In *Ward HCA*, the majority of the High Court noted the 'imprecision' of the term 'cultural knowledge'.[272] In that appeal, the submissions referred to 'such matters as the inappropriate viewing, hearing or reproduction of secret ceremonies, artworks, song cycles and sacred narratives'.[273]

8.179 The World Intellectual Property Organization (WIPO) has undertaken extensive investigation into the protection of indigenous cultural knowledge.[274] WIPO distinguishes between 'traditional knowledge' and 'traditional cultural expressions'.[275]

8.180 Traditional knowledge is conceived of broadly, as the living inter-generational body of knowledge[276] forming part of the spirit and culture of its indigenous community.[277] Traditional knowledge is important in respect of the exploitation of genetic resources;[278] and arises in a wide variety of fields including agriculture, medicine and traditional lifestyles.[279]

8.181 Traditional cultural expressions are

> any form of … expression, tangible or intangible, or a combination thereof, such as actions [such as dance …], materials [such as material expressions of art …], music

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272 *Western Australia v Ward* (2002) 213 CLR 1, [58] (Gleeson CJ, Gaudron, Gummow and Hayne JJ). See also Kirby J at [576] ('The right to protect cultural knowledge was not well defined in submissions before this Court'; 'I agree with the joint reasons that there is a need for a degree of specificity in determining such claims').

273 Ibid [58].

274 WIPO's Intergovernmental Committee has led the development of provisions for the protection of traditional knowledge since March 2004. As at the time of writing, the provisions have been the subject of three rounds of commenting processes, the last of which was between December 2009 and May 2010. The latest draft of the provisions was discussed in July 2014. See *The Protection of Traditional Knowledge: Draft Articles*, UN Doc WIPO/GRTKF/IC/28/5 (2 June 2014).

275 World Intellectual Property Organisation, *Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions: An Overview* (World Intellectual Property Organization, 2012) 8. A submission to this Inquiry used the term 'traditional knowledge' rather than 'cultural knowledge': North Queensland Land Council, *Submission 17*.

276 See *The Protection of Traditional Knowledge: Draft Articles*, UN Doc WIPO/GRTKF/IC/28/5 (2 June 2014).

277 Including the 'know-how, skills, innovations, practices, teachings and learnings' of local and Indigenous communities: Ibid Annex, 5.

278 Genetic resources refer to biological materials like plants or animals, which contain genetic information of value and which are capable of being reproduced. Genetic resources are covered by the *Convention on Biological Diversity*, opened for Signature 5 June 1992, 1760 UNTS 79 (entered into Force 29 June 1993).

279 See also *Convention for the Safeguarding of the Intangible Cultural Heritage*, Opened for Signature 17 October 2003, 2368 UNTS 3 (entered into Force 20 April 2006) art 2; *The Protection of Traditional Cultural Expressions: Draft Gap Analysis*, UN Doc WIPO/GRTKF/IC/13/4(b) Rev (11 October 2008) [4]–[5], [18].

> and sound [such as songs …], verbal [such as stories …] and written … , regardless of the form in which it is embodied, expressed or illustrated …[280]

8.182 Traditional cultural expressions will often embody traditional knowledge.

8.183 In this Report, the ALRC uses 'cultural knowledge' as an umbrella term for all types of indigenous knowledge. Moreover, the concept of protection of cultural knowledge has both positive and negative aspects. 'Positive' protection can encompass giving Aboriginal and Torres Strait Islander communities control over how their cultural knowledge is used—for example, moral rights of attribution—whereas other protection may provide for compensation for misappropriation.

International instruments and models for reform

8.184 Cultural knowledge is discussed in several important international instruments to which Australia is a party. Principal among these is UNDRIP.[281] The Preamble to UNDRIP recognises that 'respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment'. Under art 31, States undertake to 'take effective measures' to recognise and protect the exercise of Indigenous peoples' right to protect their cultural heritage, traditional knowledge and traditional cultural expressions. Cultural knowledge is also protected in the context of particular fields.[282]

8.185 WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ('IGC') oversaw a major project identifying gaps in existing protections for cultural knowledge and strategies to address them.[283] The IGC's work noted that intellectual property systems provide inadequate protection for traditional knowledge. The IGC has developed draft provisions for the protection of traditional knowledge and traditional cultural expressions.[284]

Australian framework

The position under the Native Title Act

8.186 In *Ward HCA*, the majority held that the *Native Title Act* cannot protect 'a right to maintain, protect and prevent the misuse of cultural knowledge' if it goes beyond

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280 *The Protection of Traditional Cultural Expressions: Draft Articles*, UN Doc WIPO/GRTKF/IC/28/6 (2 June 2014) Annex, 5.

281 *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).

282 See, eg, *Convention on Biological Diversity*, opened for Signature 5 June 1992, 1760 UNTS 79 (entered into Force 29 June 1993) Preamble, art 8(j); *International Treaty on Plant Genetic Resources for Food and Agriculture*, Opened for Signature 4 November 2002 (entered into Force 29 June 2004) art 9.2(a); *Convention for the Safeguarding of the Intangible Cultural Heritage*, Opened for Signature 17 October 2003, 2368 UNTS 3 (entered into Force 20 April 2006) arts 13–14.

283 *The Protection of Traditional Knowledge: Draft Gap Analysis: Revision*, UN Doc WIPO/GRTKF/IC/13/5(b) Rev (11 October 2008); *The Protection of Traditional Cultural Expressions: Draft Gap Analysis*, UN Doc WIPO/GRTKF/IC/13/4(b) Rev (11 October 2008).

284 *The Protection of Traditional Knowledge: Draft Articles*, UN Doc WIPO/GRTKF/IC/28/5 (2 June 2014); *The Protection of Traditional Cultural Expressions: Draft Articles*, UN Doc WIPO/GRTKF/IC/28/6 (2 June 2014).

denial or control of access to land or waters.[285] The opening words of s 223(1) of the *Native Title Act* require native title rights and interests to be 'in relation to' land or waters.[286] Section 223(1)(b) requires the Aboriginal peoples or Torres Strait Islanders, by their traditional laws acknowledged and their traditional customs observed, to have a 'connection with' the land or waters.[287]

8.187 The majority of the High Court, stated in a joint judgment:

> To some degree, for example respecting access to sites where artworks on rock are located, or ceremonies are performed, the traditional laws and customs which are manifested at these sites answer the requirement of connection with the land …
>
> However, it is apparent that what is asserted goes beyond that to something approaching an incorporeal right akin to a new species of intellectual property to be recognised by the common law under par (c) of s 223(1). The 'recognition' of this right would extend beyond denial or control of access to land held under native title. It would, so it appears, involve, for example, the restraint of visual or auditory reproductions of what was to be found there or took place there, or elsewhere.[288]

8.188 Native title rights and interests in respect of cultural knowledge—variously described[289]—had been claimed in some early cases. In *Bulun Bulun v R & T Textiles Pty Ltd*, von Doussa J remarked that the pleadings 'appear to assert that intellectual property rights of the kind claimed by the applicants were an incident of native title in the land',[290] 'such that they constituted some recognisable interest in the land itself'.[291] That was not a case for the determination of native title[292] and the claim with respect to native title was not pressed.[293]

8.189 In *Commonwealth v Yarmirr*, the majority of the High Court observed that there was no clarity as to the meaning of the rights and interests 'to visit and protect places within the claimed area which are of cultural or spiritual importance' 'or how effect might be given to a right of access to "protect" places or "safeguard" knowledge'.[294]

8.190 The ALRC is aware that '[f]or Indigenous people there are unbreakable links between their knowledge systems, the land and waters, and its resources'.[295] Further, for such communities, 'spiritual or religious obligations could infiltrate almost all

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285 *Western Australia v Ward* (2002) 213 CLR 1, [468] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

286 Ibid [577] (Kirby J, viewing the key issue as pertaining to the opening words of s 223(1)); *Western Australia v Ward* (2000) 99 FCR 316, [666] (Beaumont and von Doussa JJ, using the language of 'in relation to'). North J did not specify a particular part of s 223(1) as the object of his focus.

287 *Western Australia v Ward* (2002) 213 CLR 1, [19], [60] (Gleeson CJ, Gaudron, Gummow and Hayne JJ, viewing the key issue as pertaining to s 223(1)(b)).

288 Ibid [59] (Gleeson CJ, Gaudron, Gummow and Hayne JJ). Olney J made a similar point in *Yarmirr v Northern Territory [No 2]* (1998) 82 FCR 533, 590.

289 Justice von Doussa used the language of 'traditional ritual knowledge' or 'ritual knowledge' rather than 'cultural knowledge' in his judgment in *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 86 FCR 244.

290 Ibid 254.

291 Ibid 256.

292 Ibid 255–6.

293 Ibid 256.

294 *Commonwealth v Yarmirr* (2001) 208 CLR 1, [2] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

295 Chuulangun Aboriginal Corporation, Submission No 28 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, June 2011.

undertakings, including transactions, transfers, exchanges and activities undertaken for value or benefit'.[296] As noted in Chapter 6, in both *Ward FFC* and *Ward HCA* the majority acknowledged that 'the relationship of Aboriginal people to their land has a religious or spiritual dimension'.[297]

8.191 Different views have been expressed about the appropriate statutory construction of s 223(1) in respect of cultural knowledge in strong dissenting judgments in the High Court[298] and in the Full Federal Court.[299] In *Ward FFC*, North J discussed an extract from the evidence—an anthropologist's report—that showed that the respective cultural knowledge was 'intimately linked with the land':[300]

> The protection of ritual knowledge is required by traditional law. Traditional law treats both elements as incidents of native title. There is no reason why the common law recognition of native title should attach to one incident and not the other. Because common law recognition is accorded to the entitlement to land as defined by traditional laws and customs the contrary conclusion should follow.[301]

8.192 Kirby J, in *Ward HCA*, focused on the 'very broad' phrase 'in relation to' in the opening words of s 223(1).[302] He saw the right to protect cultural knowledge as sufficiently connected to the area to be a right 'in relation to' the land or waters for the purpose of s 223(1).[303] Kirby J concluded:

> Recognition of the native title right to protect cultural knowledge is consistent with the aims and objectives of the NTA, reflects the beneficial construction to be utilised in relation to such legislation and is consistent with international norms declared in treaties to which Australia is a party. It recognises the inherent spirituality and land-relatedness of Aboriginal culture.[304]

8.193 The KLC submitted that the

> 'range of traditional indigenous relationships to country' are not adequately comprehended by common law native title nor, relevantly for the purposes of the Inquiry, section 223. For example, images of country and spirit beings connected to country are afforded no protection whatsoever by the NTA notwithstanding the fact that, from the perspective of the authorised custodians of those images, they are inherently connected to, and part of, country (land and waters).[305]

Intellectual property laws

8.194 Existing intellectual property laws have been successfully used to protect against some forms of misuse and misappropriation of cultural knowledge. Key forms of protection include:

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296 Kimberley Land Council, *Submission 30*.
297 *Western Australia v Ward* (2000) 99 FCR 316, [666]. See also *Western Australia v Ward* (2002) 213 CLR 1, [14].
298 *Western Australia v Ward* (2002) 213 CLR 1, (Kirby J).
299 *Western Australia v Ward* (2000) 99 FCR 316, (North J).
300 Ibid [865].
301 Ibid [866].
302 *Western Australia v Ward* (2002) 213 CLR 1, [577]–[578].
303 Ibid [577], [580].
304 Ibid [587].
305 Kimberley Land Council, *Submission 30*.

- trade marks—which appear relatively unproblematic because they can be used to protect logos and words used by indigenous communities in the course of trade and because others' marks that would be offensive may be opposed;[306]
- copyright—while it has been used to protect some cultural knowledge,[307] the requirements for expressions to be in material form, for authorship, and for originality may serve to limit legal recourse;[308] and
- patents—the scope for protection by way of patents may be relatively limited for a number of reasons.[309]

8.195 There are deep divergences between the perspectives of Indigenous peoples and conventional intellectual property systems:

> [T]he very conception of 'ownership' in the conventional IP system is incompatible with notions of responsibility and custodianship under customary laws and systems. While copyright confers exclusive, private property rights in individuals, indigenous authors are subject to dynamic complex rules, regulations and responsibilities, more akin to usage or management rights, which are communal in nature.[310]

8.196 Other laws that may provide some protection include the equitable doctrine of breach of confidence.[311]

Calls for reform

8.197 The decision in *Ward HCA*, and its approach to cultural knowledge, predates key international developments, including UNDRIP. Contemporary understanding of connection to country is being shaped by a growing body of academic and anthropological literature which is not reflected in the current state of the law. Terri Janke has pointed to a 'paradox' where cultural material is used in native title claims as evidence of continuing connection, but where cultural knowledge is not recognised as a native title right.[312]

8.198 Some stakeholders considered the protections for cultural knowledge under existing law as inadequate. The Arts Law Centre of Australia described existing

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306 Academics have highlighted the advantages of geographical indications of origin as protecting the underlying traditional knowledge: Brad Sherman and Leanne Wiseman, 'Towards an Indigenous Public Domain?' in Lucie Guibault and PB Hugenholtz (eds), *The Future of the Public Domain: Identifying the Commons in Information Law* (Kluwer Law International, 2006) 259.

307 *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 86 FCR 244.

308 See *The Protection of Traditional Cultural Expressions: Draft Gap Analysis*, UN Doc WIPO/GRTKF/IC/13/4(b) Rev (11 October 2008) [35].

309 Terri Janke, 'Our Culture: Our Future, Report on Australian Indigenous Cultural and Intellectual Property' (Australian Institute of Aboriginal and Torres Stait Islander Studies; Aboriginal and Torres Strait Islander Commission, 1998), sections 5.4 to 5.5.

310 *The Protection of Traditional Cultural Expressions: Draft Gap Analysis*, UN Doc WIPO/GRTKF/IC/13/4(b) Rev (11 October 2008) [36]. See also the work of Terri Janke, including Terri Janke, *Biodiversity, Patents and Indigenous Peoples* (26 June 2000) <http://sedosmission.org/old/eng/JankeTerry.htm>.

311 *Foster v Mountford* (1976) 14 ALR 71.

312 Terri Janke, 'Follow the Stars: Indigenous Culture, Knowledge and Intellectual Property Rights' (Speech Delivered at the Mabo Oration 2011, Brisbane, 3 July 2011) 13.

common law remedies as 'deeply complex and costly', as well as ineffective. The Centre stated that

> there are many situations where Aboriginal and Torres Strait Islander people have no effective legal remedies and therefore no absolute right to keep secret their sacred and ritual knowledge or prevent the use of their traditional knowledge and traditional cultural expressions.[313]

8.199 AIATSIS and some Native Title Representative Bodies and Service Providers echoed these sentiments, in particular, pointing to the inadequacies of current intellectual property laws.[314]

8.200 On the other hand, state governments highlighted the progress made using current frameworks.[315] Consent determinations in South Australia and the Northern Territory, for example, already include rights to conduct and participate in cultural activities and practices on their traditional lands.[316] The Northern Territory has agreed consent determinations of native title over the pastoral estate recognising, as part of the suite of non-exclusive native title rights and interests, the rights of native title holders to conduct and participate in cultural activities and practices on the land and waters subject to the determination area.[317]

8.201 Some stakeholders that supported amending the *Native Title Act* to directly cover cultural knowledge stressed the need to connect this with land or waters, as opposed to creating a new form of intellectual property.[318]

8.202 Cultural knowledge has been the subject of numerous government reviews and inquiries.[319] In 2012, IP Australia initiated an Indigenous Knowledge Consultation inviting views about how 'Indigenous Knowledge' can work with the intellectual property system.[320] Stakeholders pointed to positive steps towards protecting cultural knowledge including through voluntary protocols. Protocols cover only specific areas rather than considering the protection of cultural knowledge more generally, leading to a lack of consistency. IP Australia's stakeholders provided strong support for reform, favouring a stand-alone, sui generis framework for the protection of cultural knowledge.

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313 Arts Law Centre of Australia, *Submission 72*.

314 AIATSIS, *Submission 70*; Queensland South Native Title Services, *Submission 55*; Central Desert Native Title Service, *Submission 48*.

315 Northern Territory Government, *Submission 71*; South Australian Government, *Submission 68*; Western Australian Government, *Submission 43*.

316 See, eg, *Lennon on behalf of the Antakirinja Matu-Yankunytjatjara Native Title Claim Group v South Australia* [2011] FCA 474 (11 May 2011).

317 Northern Territory Government, *Submission 71*.

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

319 Terri Janke provided a survey of government reviews and inquiries in Australia from 1975. See Terri Janke, *New Tracks: Indigenous Knowledge and Cultural Expression and the Australian Intellectual Property System* (Terri Janke & Company, 2012) 29, Appendix A.

320 See <www.ipaustralia.gov.au>.

8.203 In summary, the ALRC has raised the potential for a native title right to protect cultural knowledge and for cultural knowledge to be considered in relation to rights to be exercised for any purpose, including commercial purposes. The ALRC does not have a concluded view on whether this would be a desirable development, but has identified the need for an in-depth inquiry that can assess the legal and policy issues.