

Questions

Defining the scope of the Inquiry

Question 1. The Preamble and Objects of the *Native Title Act 1993* (Cth) provide guidance for the Inquiry. The ALRC has identified five other guiding principles to inform this review of native title law.

- (a) Will these guiding principles best inform the review process?
- (b) Are there any other principles that should be included?

Question 2. The ALRC is interested in understanding trends in the native title system. What are the general changes and trends affecting native title over the last five years?

- (a) How are they relevant to connection requirements for the recognition and scope of native title rights and interests?
- (b) How are they relevant to the authorisation and joinder provisions of the *Native Title Act*?

Question 3. What variations are there in the operation of the *Native Title Act* across Australia? What are the consequences for connection requirements, authorisation, and joinder?

Question 4. The ALRC is interested in learning from comparative jurisdictions.

- (a) What models from other countries in relation to connection requirements, authorisation and joinder may be relevant to the Inquiry?
- (b) Within Australia, what law and practice from Australian states and territories in relation to connection requirements, authorisation, and joinder, may be relevant to the Inquiry?

Connection and recognition concepts in native title law

Question 5. Does s 223 of the *Native Title Act* adequately reflect how Aboriginal and Torres Strait Islander people understand ‘connection’ to land and waters? If not, how is it deficient?

Presumption of continuity

Question 6. Should a rebuttable ‘presumption of continuity’ be introduced into the *Native Title Act*? If so, how should it be formulated:

- (a) What, if any, basic fact or facts should be proved before the presumption will operate?

- (b) What should be the presumed fact or facts?
- (c) How could the presumption be rebutted?

Question 7. If a presumption of continuity were introduced, what, if any, effect would there be on the practices of parties to native title proceedings? The ALRC is interested in examples of anticipated changes to the approach of parties to both contested and consent determinations.

Question 8. What, if any, procedure should there be for dealing with the operation of a presumption of continuity where there are overlapping native title claims?

Question 9. Are there circumstances where a presumption of continuity should not operate? If so, what are they?

The meaning of ‘traditional’

Question 10. What, if any, problems are associated with the need to establish that native title rights and interests are possessed under the traditional laws acknowledged and traditional customs observed by the relevant Aboriginal or Torres Strait Islander people? For example, what problems are associated with:

- (a) the need to demonstrate the existence of a normative society ‘united in and by its acknowledgment and observance’ of traditional laws and customs?
- (b) the extent to which evolution and adaptation of traditional laws and customs can occur?

How could these problems be addressed?

Question 11. Should there be a definition of traditional or traditional laws and customs in s 223 of the *Native Title Act*? If so, what should this definition contain?

Native title and rights and interests of a commercial nature

Question 12. Should the *Native Title Act* be amended to state that native title rights and interests can include rights and interests of a commercial nature?

Question 13. What, if any, difficulties in establishing native title rights and interests of a commercial nature are raised by the requirement that native title rights and interests are sourced in traditional law and custom?

Question 14. If the *Native Title Act* were to define ‘native title rights and interests of a commercial nature’, what should the definition contain?

Question 15. What models or other approaches from comparative jurisdictions or international law may be useful in clarifying whether native title rights and interests can include rights and interests of a commercial nature?

Physical occupation, continued or recent use

Question 16. What issues, if any, arise concerning physical occupation, or continued or recent use, in native title law and practice? What changes, if any, should be made to native title laws and legal frameworks to address these issues?

Question 17. Should the *Native Title Act* include confirmation that connection with land and waters does not require physical occupation or continued or recent use? If so, how should it be framed? If not, for what reasons?

‘Substantial interruption’

Question 18. What, if any, problems are associated with the need for native title claimants to establish continuity of acknowledgment and observance of traditional laws and customs that has been ‘substantially uninterrupted’ since sovereignty?

Question 19. Should there be definition of ‘substantial interruption’ in the *Native Title Act*? If so, what should this definition contain? Should any such definition be exhaustive?

Question 20. Should the *Native Title Act* be amended to address difficulties in establishing the recognition of native title rights and interests where there has been a ‘substantial interruption’ to, or change in continuity of acknowledgment and observance of traditional laws and customs? If so, how?

Question 21. Should courts be empowered to disregard ‘substantial interruption’ or change in continuity of acknowledgment and observance of traditional laws and customs where it is in the interests of justice to do so?

If so, should:

- (a) any such power be limited to certain circumstances; and
- (b) the term ‘in the interests of justice’ be defined? If so, how?

Other changes?

Question 22. What, if any, other changes to the law and legal frameworks relating to connection requirements for the recognition and scope of native title should be made?

Authorisation

Question 23. What, if any, problems are there with the authorisation provisions for making applications under the *Native Title Act*?

In particular, in what ways do these problems amount to barriers to access to justice for:

- (a) claimants;
- (b) potential claimants; and
- (c) respondents?

Question 24. Should the *Native Title Act* be amended to allow the claim group, when authorising an application, to adopt a decision-making process of its choice?

Question 25. What, if any, changes could be made to assist Aboriginal and Torres Strait Islander groups as they identify their claim group membership and the boundaries of the land claimed?

Question 26. What, if any, changes could be made to assist claim groups as they resolve disputes regarding claim group membership and the boundaries of the land claimed?

Question 27. Section 66B of the *Native Title Act* provides that a person who is an applicant can be replaced on the grounds that:

- (a) the person consents to his or her replacement or removal;
- (b) the person has died or become incapacitated;
- (c) the person is no longer authorised by the claim group to make the application; or
- (d) the person has exceeded the authority given to him or her by the claim group.

What, if any, changes are needed to this provision?

Question 28. Section 84D of the *Native Title Act* provides that the Federal Court may hear and determine an application, even where it has not been properly authorised.

Has this process provided an effective means of dealing with defects in authorisation? In practice, what, if any, problems remain?

Question 29. Compliance with the authorisation provisions of the *Native Title Act* requires considerable resources to be invested in claim group meetings. Are these costs proportionate to the aim of ensuring the effective participation of native title claimants in the decisions that affect them?

Question 30. Should the *Native Title Act* be amended to clarify whether:

- (a) the claim group can define the scope of the authority of the applicant?
- (b) the applicant can act by majority?

Joinder

Question 31. Do the party provisions of the *Native Title Act*—in particular the joinder provision s 84(5) and the dismissal provisions s 84(8) and (9)—impose barriers in relation to access to justice?

Who is affected and in what ways?

Question 32. How might late joinder of parties constitute a barrier to access to justice?

Who is affected, and in what ways?

Question 33. What principles should guide whether a person may be joined as a party when proceedings are well advanced?

Question 34. In what circumstances should any party other than the applicant for a determination of native title and the Crown:

- (a) be involved in proceedings?
- (b) play a limited role in proceedings?

Question 35. What, if any, other changes to the party provisions of the *Native Title Act* should be made?

