Australian Government
Australian Law Reform Commission

Review of the Native Title Act 1993

ISSUES PAPER

You are invited to provide a submission or comment on this Issues Paper

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The Australian Law Reform Commission (ALRC) was established on 1 January 1975 by the *Law Reform Commission Act 1973* (Cth) and reconstituted by the *Australian Law Reform Commission Act 1996* (Cth).

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Making a submission

Any public contribution to an inquiry is called a submission. The Australian Law Reform Commission seeks submissions from a broad cross-section of the community, as well as from those with a special interest in a particular inquiry.

The closing date for submissions to this Issues Paper is 14 May 2014.

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The ALRC strongly encourages online submissions directly through the ALRC website where an online submission form will allow you to respond to individual questions: http://www.alrc.gov.au/publications/native-title-ip-45. Once you have logged into the site, you will be able to save your work, edit your responses, and leave and re-enter the site as many times as you need to before lodging your final submission. You may respond to as many or as few questions as you wish. There is space at the end of the form for any additional comments.

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Alternatively, pre-prepared submissions may be mailed, faxed or emailed, to:

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Please send any pre-prepared submissions in Word or RTF format.

Open inquiry policy

As submissions provide important evidence to each inquiry, it is common for the ALRC to draw upon the contents of submissions and quote from them or refer to them in publications. There is no specified format for submissions, although the questions provided in this document are intended to provide guidance for respondents.

Generally, submissions will be published on the ALRC website, unless marked confidential. Confidential submissions may still be the subject of a Freedom of Information request. In the absence of a clear indication that a submission is intended to be confidential, the ALRC will treat the submission as public. The ALRC does not publish anonymous submissions.

The ALRC may redact certain information from submissions in order to protect the privacy of submitters or others mentioned in submissions. This may include withholding the name of the submitter. Publication or redaction of information in submissions is at the discretion of the ALRC.

See the ALRC policy on submissions and inquiry material for more information www.alrc.gov.au/about/policies.

Contents

Terms of Reference **3**

Questions **5**

Issues Paper **11**

The Inquiry 12
Defining the scope of the Inquiry 15
Connection and recognition concepts in native title law 23
Presumption of continuity 29
The meaning of 'traditional' 38
Native title and rights and interests of a commercial nature 43
Physical occupation, continued or recent use 49
'Substantial interruption' 54
Other changes? 62
Authorisation 62
Joinder 72

Terms of Reference

REVIEW OF THE NATIVE TITLE ACT 1993

I, Mark Dreyfus QC MP, Attorney-General of Australia, having regard to:

- the 20 years of operation of the *Native Title Act 1993* (the Act)
- the importance of the recognition and protection of native title to Indigenous Australians and the broader Australian community
- the importance of certainty as to the relationship between native title and other interests in land and waters
- Australia's statement of support for the United Nations Declaration on the Rights of Indigenous Peoples
- the need to ensure that the native title system delivers practical, timely and flexible outcomes for all parties, including through faster, better claims resolution
- significant and ongoing stakeholder concern about barriers to the recognition of native title
- delays to the resolution of claims caused by litigation, and
- the capacity of native title to support Indigenous economic development and generate sustainable long-term benefits for Indigenous Australians.

I REFER to the Australian Law Reform Commission for inquiry and report, pursuant to subsection 20(1) of the *Australian Law Reform Commission Act 1996*, Commonwealth native title laws and legal frameworks in relation to two specific areas, as follows:

- connection requirements relating to the recognition and scope of native title rights and interests, including but not limited to whether there should be:
    - a presumption of continuity of acknowledgement and observance of traditional laws and customs and connection
    - clarification of the meaning of ‘traditional’ to allow for the evolution and adaptation of culture and recognition of 'native title rights and interests'
    - clarification that ‘native title rights and interests’ can include rights and interests of a commercial nature
    - confirmation that ‘connection with the land and waters’ does not require physical occupation or continued or recent use, and

- empowerment of courts to disregard substantial interruption or change in continuity of acknowledgement and observance of traditional laws and customs where it is in the interests ofjustice to do so.

- any barriers imposed by the Act's authorisation and joinder provisions to claimants', potential claimants' and respondents' access to justice.

In relation to these areas and in light of the Preamble and Objects of the Act, I request that the Commission consider what, if any, changes could be made to improve the operation of Commonwealth native title laws and legal frameworks.

Scope of reference

In performing its functions in relation to this reference, the Commission should consider:

(a) the Act and any other relevant legislation, including how laws and legal frameworks operate in practice

(b) any relevant case law

(c) relevant reports, reviews and inquiries regarding the native title system and the practical implementation of recommendations and findings, including the Taxation of Native Title and Traditional Owner Benefits and Governance Working Group, the Review of Native Title Organisations and the Productivity Commission inquiry into non-financial barriers to mineral and energy resource exploration

(d) the interests of key stakeholders, and

(e) any other relevant matter concerning the operation of the native title system.

Consultation

In undertaking this reference, the Commission should identify and consult with key stakeholders, including:

(a) relevant Commonwealth, State, Territory and local governments, departments and agencies

(b) the Federal Court of Australia and the National Native Title Tribunal

(c) Indigenous groups, Native Title Representative Bodies and Native Title Service Providers, and Prescribed Bodies Corporate

(d) industry, including the agriculture, pastoral, fisheries, and minerals and energy resources industries, and

(e) any other relevant groups or individuals.

Timeframe for reporting

The Commission is to report by March 2015.

Dated 3 August 2013

Mark Dreyfus QC MP

Attorney-General

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?

Issues Paper

Contents

The Inquiry 12
- Review of the *Native Title Act* 12
- Getting involved in the law reform process 14

Defining the scope of the Inquiry 15
- Key concepts 15
- Reform in the native title system 16
- Guiding principles 17
- Trends in the native title system 21
- Learning from other jurisdictions and approaches 23

Connection and recognition concepts in native title law 23
- The definition of native title in the *Native Title Act* 24
- Scope of native title rights and interests 27
- Examining connection requirements for native title 28

Presumption of continuity 29
- Proof in native title 30
- Options for reform: a presumption of continuity? 31
- The presumption and overlapping claims 37

The meaning of 'traditional' 38
- The use of 'traditional' in s 223 38
- Definition of the meaning of traditional? 42

Native title and rights and interests of a commercial nature 43
- Nature and content of native title rights and interests 44
- Evolution and adaptation of native title rights and interests 47
- Defining 'commercial' native title rights and interests 48

Physical occupation, continued or recent use 49
- Establishing connection 50
- Physical occupation, continued or recent use, and connection 51
- Physical occupation and the identification of native title rights and interests 52
- Other references to physical occupation or use 53

'Substantial interruption' 54
- Establishing law and custom that is 'substantially uninterrupted' 54
- Overview of the case law 55
- Options for reform 61

Other changes? 62

Authorisation 62
- What is authorisation? 63
- The process of authorisation 64
- Problems arising after authorisation 67
- Other issues 70

Joinder 72
Applications to join as a party under s 84(5) 74
The exercise of the discretion 77
Respondent interests and representation 78

The Inquiry

Review of the *Native Title Act*

1. The *Native Title Act 1993* (Cth) represented an important step in building the relationship between Aboriginal and Torres Strait Islander people and other Australians. The legislation reflected the landmark High Court decision of *Mabo v Queensland [No 2]*.[1] *Mabo [No 2]* first recognised native title in Australia.[2] For Aboriginal and Torres Strait Islander people, the recognition of native title has immense significance as acknowledging their first occupation of Australian land and waters; and it brings the potential of tangible benefits.

2. Since the introduction of the Act over twenty years ago, native title determinations and agreement-making have become in many contexts, 'a way of doing business'.[3] In other areas, native title remains a more contested right. A native title determination affects many people.[4] Continuing to develop the relationship between Aboriginal and Torres Strait Islander people and the Australian community, and 'advancing the process of reconciliation among all Australians'[5] that began with the *Native Title Act* in 1993 remains a significant legal and policy challenge.

3. Native title is the recognition by the Australian legal system of the relationships that Aboriginal and Torres Strait Islander people have with 'country'.[6] Accordingly, 'native title has its origins in the traditional laws acknowledged and the customs observed by the Indigenous peoples who possess the native title'.[7] Native title is defined in the *Native Title Act*, however, the nature and content of native title rights and interests are ascertained by reference to Aboriginal and Torres Strait Islander laws

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

2 Justice Robert French and Patricia Lane, 'The Common Law of Native Title in Australia' (2002) 2 *Oxford University Commonwealth Law Journal* 15.

3 Minerals Council of Australia, Submission to the Australian Attorney-General's Department, Review of the *Native Title Act 1993*—Draft Terms of Reference, 2013; Association of Mining and Exploration Companies Inc, Submission to the Australian Attorney-General's Department, Review of the *Native Title Act 1993*—Draft Terms of Reference, 2013; Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2012' (Australian Human Rights Commission, 2012).

4 Crown Solicitor's Office, South Australian Attorney-General's Department, Submission to the Australian Attorney-General's Department, *Review of the Native Title Act 1993—Draft Terms of Reference*, 2013.

5 *Native Title Act 1993* (Cth) preamble.

6 Various terms are used, for example see, 'lands, territories and resources', Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2012' (Australian Human Rights Commission, 2012) 18.

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

and customs.[8] Native title therefore sits at the intersection of two legal systems.[9] To establish that they have native title, Aboriginal and Torres Strait Islander people must prove that they have maintained, through traditional law and custom, a continuous connection with the land and waters of the areas being claimed since before European settlement and the introduction of the common law.[10]

4. While recognition of native title has brought opportunities for Aboriginal and Torres Strait Islander people, 'connection requirements' have been regarded as unduly limiting.[11] The need to demonstrate a normative society, observing traditional laws and customs continuously since before European settlement, in order to provide proof of connection to land and waters is seen as particularly onerous. It is often more difficult to establish 'connection' in situations where there has been extensive dispossession or displacement of Aboriginal and Torres Strait Islander people.

5. Concerns have also been raised about the complexity, length and difficulty of native title proceedings for all parties involved. These problems include authorisation processes for determining who may bring a native title claim and joinder provisions as to which parties may contest a determination of native title. Debates have emerged about the nature of native title rights and interests, and the extent to which native title can provide economic and social development for Aboriginal and Torres Strait Islander people.[12] These debates raise questions about the nature of the outcomes achieved by native title law—questions pertinent to this Inquiry.

6. On 3 August 2013, the then Attorney-General of Australia, the Hon Mark Dreyfus QC MP, requested that the Australian Law Reform Commission (ALRC) conduct an Inquiry into, and report on, the Commonwealth native title laws and legal frameworks in relation to two specific areas:

> Connection requirements relating to the recognition and scope of native title rights and interests, including, but not limited to whether there should be:
>
> - a presumption of continuity of acknowledgment and observance of traditional laws and customs and connection;
> - clarification of the meaning of 'traditional' to allow for the evolution and adaptation of culture and recognition of 'native title rights and interests';
> - clarification that 'native title rights and interests' can include rights and interests of a commercial nature;

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8 *Native Title Act 1993* (Cth) s 223(1)(c); *Fejo v Northern Territory* (1998) 195 CLR 96; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [49].

9 *Yanner v Eaton* (1999) 201 CLR 351, [46]; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [38].

10 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

11 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Social Justice and Native Title Report' (Australian Human Rights Commission, 2013) 77.

12 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Promoting Economic and Social Development through Native Title' (Issues Paper 28, Native Title Research Unit, AIATSIS, 2004).

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

Any barriers imposed by the Act's authorisation and joinder provisions to claimants', potential claimants' and respondents' access to justice.

7. In relation to the two areas identified for review, and in light of the Preamble and Objects of the Act, the Commission is to consider what, if any, changes could be made to improve the operation of Commonwealth native title laws and legal frameworks. [13]

Getting involved in the law reform process

8. The ALRC is engaging in widespread community, government and industry consultation throughout the Inquiry. This Issues Paper is the first consultation document. It is intended to encourage informed community participation. The ALRC invites individuals and organisations to make submissions in response to specific questions, or to any of the background material and analysis provided. **The closing date for submissions is 14 May 2014.**

9. There is no specified format for submissions. Submissions may be made in writing, by email or using the ALRC's online submission form. Submissions made using the online submission form are preferred.

10. Generally, submissions will be published on the ALRC website, unless marked confidential. Confidential submissions may still be the subject of a request for access under the *Freedom of Information Act 1982* (Cth). In the absence of a clear indication that a submission is intended to be confidential, the ALRC will treat the submission as public. The ALRC does not publish anonymous submissions.

11. The submissions and further consultation rounds will inform the next stage of the Inquiry process—the publication of a Discussion Paper in September 2014. The ALRC will call for submissions on the proposals in the Discussion Paper before finalising its recommendations in a Final Report in March 2015.

12. Further information about the consultation and submission process is available on the ALRC website. This information includes how the ALRC uses submissions in its research and policy development. You can subscribe to an e-newsletter for the Inquiry on the website.

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13 *Terms of Reference* <www.alrc.gov.au>.

Defining the scope of the Inquiry

Key concepts

13. The Terms of Reference contain a number of technical terms. This section briefly describes what these terms mean.

Connection requirements for the recognition and scope of native title: Connection requirements relate to what must be established in law for native title to be recognised and in order to determine the scope—nature and content—of native title rights and interests. The requirements are principally found in the definition of native title in s 223 of the *Native Title Act* and in the interpretation of native title in case law.

Native title determination: A determination of native title by a court under the *Native Title Act* formally recognises native title rights and interests, and the nature and content of those rights and interests.

Authorisation: Authorisation refers to the process under the *Native Title Act* that establishes which persons in a native title claim group have the authority to bring an application for a determination of native title. Those persons are the 'applicant' and can make decisions about the claim.

Joinder: Joinder refers to the legal process by which the Federal Court allows new parties to join (to be involved in) legal action in respect of a native title determination.

Native title law and legal frameworks: Native title law refers to the *Native Title Act* as well as case law interpretation of the Act. The *Native Title Act* is the 'starting point' for the recognition of native title rights and interests in Australia.[14] The legislation is a complex and detailed statute that is underpinned by a multi-faceted institutional and decision-making structure. However this Inquiry focuses only on those sections of the Act that are directly related to connection requirements, authorisation and joinder. Legal frameworks, in this context, are taken to include: the practices of parties to native title determinations, such as the preparation of connection reports, together with policy and administrative guidelines integral to the operation of the *Native Title Act* in respect of connection requirements, authorisation and joinder.

The *Native Title Act* intersects with other Commonwealth, state and territory legislation,[15] including resource and land management laws. The Terms of Reference ask the ALRC to consider other legislation, case law and other relevant matters, concerning the operation of the native title system.

Options for reform: In relation to connection requirements for the recognition and scope of native title and native title rights and interests, the ALRC is directed to consider five specific 'options for reform', but is not limited to consideration of these measures.

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14 The Act is held to be the starting point rather than the common law: *Native Title Act 1993* (Cth) s 10; *Commonwealth v Yarmirr* (2001) 208 CLR 1, [15].

15 An example is the *Federal Court of Australia Act 1976* (Cth).

Reform in the native title system

14. The *Native Title Act* is invested with many aspirations for the future of Australia's Indigenous peoples. It has brought opportunities and challenges for the wider Australian society. The law surrounding connection requirements for the recognition and scope of native title raises fundamental questions about the nature of native title as it is currently conceived within the Australian legal system. The provisions relating to authorisation and joinder, while more procedural in character, also impinge on important questions around access to justice and the identification of interests that may be affected by native title.

15. Given that the Act has been in operation for 20 years it is clear that 'native title is not going away'.[16] To sustain and build relationships around native title within the Australian community will require an approach to law reform that can balance the many interests involved to ensure the native title system achieves a range of objectives. There are diverse views about native title law. The Aboriginal and Torres Strait Islander Commissioner's 2013 report suggests that there has been a failure of the native title system to meet expectations—'the promise of the *Mabo* decision and the *Native Title Act* as drafted in 1993 has not been fully realised'.[17] Other stakeholders stress the need for certainty in the native title process.[18] Native title claims occur in a highly-contested environment with significant political, economic and social ramifications. It is unsurprising then that there are calls for reform to native title law.

16. In addition to these factors, native title law is complex. This legal complexity works with the need for detailed factual evidence relating to connection and authorisation having to be brought by claimants. Compiling such evidence typically will require significant resources and the extensive use of experts, such as anthropologists. Preparing or responding to connection reports, for example, is a time-intensive process.[19] Similarly, authorisation or joinder of parties may involve many procedures for compliance. Taken together, these factors represent a significant challenge for any potential law reform, especially given increasing attention to the need to resolve many longstanding native title claims.

17. Native title and reform have been inextricably linked.[20] There have been several reviews of the *Native Title Act*,[21] with a series of amendments to the Act over

16 See Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Social Justice and Native Title Report' (Australian Human Rights Commission, 2013) 103.

17 Ibid, 76.

18 See, eg, Association of Mining and Exploration Companies Inc, Submission to the Australian Attorney-General's Department, Review of the *Native Title Act 1993*—Draft Terms of Reference, 2013.

19 Graeme Neate, 'Resolving Native Title Issues: Travelling on Train Tracks or Roaming the Range?' (Paper Presented at Native Title and Cultural Heritage Conference, Brisbane, 26 October 2009) 11.

20 The Hon Justice John Gilmour, 'Native Title: Reform and Why?' (Speech Delivered at LegalWise Seminar on 'Native Title', Perth, 3 June 2011).

21 See eg, Graeme Hiley and Ken Levy, 'Native Title Claims Resolution Review' (Report, Attorney-General's Department, 31 March 2006).

time.[22] To date, however, there has not been a recent, substantial review of connection requirements for the recognition and scope of native title, or authorisation and joinder.

18. Amendments have been made in regard to authorisation and joinder matters since the inception of the *Native Title Act*. These amendments have sought to reconcile the interests of justice for parties with the need for facilitating effective resolution of claims.

19. There has been a series of proposed amendments to the *Native Title Act*, in respect of the connection requirements for the recognition and scope of native title rights and interests. In 2011, the Native Title Amendment (Reform) Bill was introduced into the Federal Senate. The 2011 Bill was revised following an Inquiry by the Senate Standing Committee on Legal and Constitutional Affairs, and reintroduced as the Native Title Amendment (Reform) Bill (No 1) 2012. This Bill lapsed. At the time of writing, the Native Title Amendment (Reform) Bill 2014 (Cth) was before Parliament, and its content is substantially the same as that of the lapsed 2012 Bill.

Other inquiries and reviews

20. This Inquiry occurs in the context of several reviews into the native title system. The ALRC is to have regard to the recommendations of the

- Taxation of Native Title and Traditional Owner Benefits and Governance Working Group;
- Review of Native Title Organisations; and
- Productivity Commission Inquiry into non-financial barriers to mineral and energy resource exploration.

21. The Inquiry will gain valuable insights from these contemporary reports. The Inquiry will contribute to building the longer-term governance and operation of the native title system.

Guiding principles

22. The ALRC has developed draft principles to inform its Inquiry. These will help to evaluate what, if any, changes could be made to improve the operation of Commonwealth native title law and legal frameworks. First, the Guiding Principles refer to the existing Preamble and Objects of the *Native Title Act*. These reflect principles adopted at the time the legislation was introduced. Other identified principles capture important policy, human rights and legal developments over the course of the 20 year operation of the *Native Title Act*.

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22 For an overview of amendments to the *Native Title Act 1993* (Cth), see Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Social Justice and Native Title Report' (Australian Human Rights Commission, 2013) 78.

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?

Principle 1: Acknowledging the importance of the recognition of native title

Reform should acknowledge the importance of the recognition and protection of native title for Aboriginal and Torres Strait Islander people and the Australian community.

23. The recognition and protection of native title is integral to the rights of Australia's Aboriginal and Torres Strait Islander people. The Preamble to the *Native Title Act* captured the importance of the initial acknowledgment of the recognition of native title by the Commonwealth Parliament:

> The people of Australia intend:
>
> (a) to rectify the consequences of past injustices by the special measures contained in this Act ... for securing the adequate advancement and protection of Aboriginal peoples and Torres Strait Islanders; and
>
> (b) to ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire.

The main objects of the *Native Title Act* include:

- to provide for the recognition and protection of native title; and
- to establish a mechanism for determining claims to native title.[23]

Principle 2: Acknowledging interests in the native title system

Reform should acknowledge the range of interests in achieving native title determinations that support relationships between stakeholders.

24. The commencement of the *Native Title Act* in 1994 caused concern for many stakeholders. Over time, there have been significant shifts in the practices surrounding the Act. Among the most important has been the trend toward achieving consent determinations rather than litigated outcomes,[24] and the emphasis given to

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23 *Native Title Act 1993* (Cth) s 3(a),(c).

24 Data from National Native Title Tribunal as at 24 February 2014 shows that the total number of decisions about determinations of native title made by a court or other recognised body stands at 270, of which 203 were consent determinations, 28 were litigated determinations, and 36 were unopposed determinations. Other types of determinations make up the remainder.

agreements.[25] The *Native Title Act* is to give precedence to conciliation and negotiation of native title determinations where possible.[26]

25. Indigenous organisations, such as Native Title Representative Bodies and Native Title Service Providers, together with the Commonwealth government and state and territory governments, play an important role in facilitating determinations of native title and agreement-making. These entities, together with key stakeholders in industry and the broader Australian community, have an interest in sustaining an effective native title system that can support ongoing relationships.

Principle 3: Encouraging timely and just resolution of native title determinations

Reform should promote timely and practical outcomes for parties to a native title determination through effective claims resolution, while seeking to ensure the integrity of the process.

26. Many stakeholders have commented on the excessive length of time taken to achieve native title determinations. It is of concern for many Indigenous communities that their elders are dying before seeing the resolution of native title claims. Other stakeholders point to continuing uncertainty in relation to their rights and interests in land and waters posed by lengthy resolution of native title determinations.[27] The unique challenges that native title pose include:

- lengthy hearings in some matters once they get to trial, which require extensive evidence and submission;
- the large number of parties involved in a single matter;
- the range and amount of evidence required to establish connection, authorisation, and extinguishment;
- the management and evidencing of Indigenous decision-making processes; and
- the resolution of intra-Indigenous disputes and overlapping claims.[28]

27. Related to the amount of time taken to reach a resolution are factors such as costs for the parties involved, and more generally, within the native title system. The Federal Court has instituted practice initiatives designed to 'ensure where possible that resolution of native title cases is achieved more easily and delivered in a more timely, effective and efficient way'.[29] While time itself should not be the sole standard against

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25 For a recent example, see Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Bill 2014 (WA).

26 *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595, [18]; *Native Title Act 1993* (Cth) Preamble.

27 See eg, The Chamber of Minerals and Energy of Western Australia, Submission to the Australian Attorney-General's Department, *Review of the Native Title Act 1993—Draft Terms of Reference*, 2013.

28 Angus Frith and Ally Float, 'The 2007 Amendments to the *Native Title Act 1993* (Cth): Technical Amendments or Disturbing the Balance of Rights?' (Native Title Research Monograph 3, AIATSIS, November 2008).

29 Federal Court of Australia, 'Annual Report 2011–2012' (2012).

which native title outcomes are evaluated, consideration of principles which promote the integrity of processes but which also address the excessive length of native title resolutions are pertinent to the Inquiry.

Principle 4: Consistency with international law

Reform should reflect Australia's international obligations in respect of Aboriginal and Torres Strait Islander people, and have regard to the United Nations Declaration on the Rights of Indigenous Peoples.

28. The *Native Title Act* was enacted against the backdrop of significant developments in international law.[30] The *Convention on the Elimination of all Forms of Racial Discrimination,* to which Australia is a party, was of particular relevance to the development of native title law.[31] The *Native Title Act* was informed by international standards for the protection of universal human rights.

29. Since the *Native Title Act* came into effect, there have been further changes in international law. In 2009 Australia issued a statement of support for the *United Nations Declaration on the Rights of Indigenous Peoples* (the 'Declaration').[32] Article 38 of the Declaration provides that:

> States, in consultation and cooperation with Indigenous Peoples, shall take appropriate measures, including legislative measures, to achieve the ends of the Declaration.

30. The Aboriginal and Torres Strait Islander Social Justice Commissioner has suggested a 'principled approach' that involves identifying key principles in the Declaration, and then agreeing on ways in which the principles can give practical guidance on the operation of articles under the Declaration.[33]

31. In undertaking the Inquiry, the ALRC must aim to ensure its recommendations are, as far as practicable, consistent with Australia's international obligations in respect of Aboriginal and Torres Strait Islander people.[34] More generally, the ALRC Inquiry will consider how international law may inform the two areas of the Inquiry.

Principle 5: Supporting sustainable futures

Reform should promote sustainable, long-term social, economic and cultural development for Aboriginal and Torres Strait Islander people.

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30 Justice Robert French and Patricia Lane, 'The Common Law of Native Title in Australia' (2002) 2 *Oxford University Commonwealth Law Journal* 15; *Convention on the Elimination of All Forms of Racial Discrimination*, Opened for Signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969); *International Labor Organisation Convention Concerning Indigenous and Tribunal Peoples in Independent Countries (No. 169)*, (entered into force 5 September 1991).

31 Richard H Bartlett, *Native Title in Australia* (Butterworths, 2nd ed, 2004), 15.

32 The Hon Jenny Macklin, MP, 'Statement on the United Nations Declaration on the Rights of Indigenous Peoples' (Speech Delivered at Parliament House, Canberra, 3 April 2009).

33 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Social Justice and Native Title Report' (Australian Human Rights Commission, 2013) 93.

34 *Australian Law Reform Commission Act 1996* (Cth) s 24(1)(b).

32. The Preamble to the *Native Title Act* draws a link between Indigenous disadvantage and the dispossession of Aboriginal and Torres Strait Islander people. Since the introduction of the Act, there have been many policies developed and strategies adopted to address Aboriginal and Torres Strait Islander disadvantage. The Terms of Reference identify as an important consideration, 'the capacity of native title to support Indigenous economic development and generate sustainable long-term benefits for Indigenous Australians'. The ALRC, in undertaking the review of the *Native Title Act*, is cognisant of the extent to which reform should engage with broader questions about how native title may support longer-term development.

Trends in the native title system

33. The Inquiry is directed to consider what, if any, changes could be made to improve the operation of Commonwealth native title laws and legal frameworks. To provide a platform for evaluation, it is important for the ALRC to gather as much information as possible. This will assist the ALRC to better understand from a range of perspectives, what is working well and what difficulties there are around connection requirements, authorisation, and joinder in the native title system. Some indicative examples are listed below.

- Is there evidence that native title claims are taking a longer time to resolve than in the past? If so, what factors are relevant to such delays?
- What evidence is there, if any, that overlapping claims and disputes affect connection requirements, authorisation and joinder procedures?
- Do financial and capacity constraints continue to pose a barrier for claimants, potential claimants, and respondents in relation to native title determinations?
- Is there sufficient expertise available to undertake the necessary reports and other procedures in relation to connection requirements?
- What institutional and administrative constraints exist for claimants, potential claimants or respondents?

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*?

34. The *Native Title Act* is Commonwealth legislation that operates across all state and territory jurisdictions.[35] However the extent to which native title is recognised, and the scope of native title rights and interests recognised, vary considerably across Australia.[36]

35. Historical factors relating to the timing of British sovereignty and the dispossession or displacement of Aboriginal and Torres Strait Islander people are relevant to that variation.[37] In turn, different patterns of settlement may influence the extent to which evidence in respect of 'connection' and group membership (relevant to authorisation and joinder) may be available in any particular part of Australia. Anthropological material and historical records also may vary in availability across the country. Therefore, in some locations, the requirements for connection in s 223 of the *Native Title Act* or compliance with authorisation procedures may be more readily met than in other parts of Australia.[38]

36. The following question asks to what extent different geographical, historical and cultural circumstances affect the *Native Title Act*, and in particular, the two reference areas. The question seeks to understand whether the native title system operates uniformly and equitably across Australia.

37. The different patterns related to dispossession and displacement also may have a bearing on the potential for overlapping claims and disputes, which in turn may affect procedures for establishing a native title applicant. These factors are significant in terms of the viability of authorisation procedures, and the potential for joinder applications in respect of native title determinations.

38. Certain practices have developed to support the operation of the *Native Title Act*; often with jurisdictional particularity. Connection reports, for example, are not mandated under the Act. Nonetheless, these procedures have a significant function in relation to determinations of native title. How important is a nationally consistent approach? Alternatively, is there sufficient scope to give effect to local circumstances in the operation of the native title system?

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?

35 *Western Australia v Commonwealth* (1995) 183 CLR 373.

36 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Social Justice and Native Title Report' (Australian Human Rights Commission, 2013) 81.

37 See for example the discussion of the settlement of the 'waste lands' of Queensland in *Wik v Queensland* (1996) 187 CLR 1, 169.

38 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Social Justice and Native Title Report' (Australian Human Rights Commission, 2013).

Learning from other jurisdictions and approaches

39. The High Court in *Mabo [No 2]* drew on extensive jurisprudence from common law countries.[39] This jurisprudence addressed the fundamental question of how the common law was to be reconciled with the existing laws and customs of the Indigenous inhabitants that reflected their relationship with land and waters. Native title law also draws on international law.

40. Many comparative jurisdictions have a longer history of legal developments in the field than Australia. Given that longer experience, and a common progression of the law, it is appropriate that the Inquiry examines approaches in other jurisdictions—principally common law countries.[40]

41. Similarly, within Australia, the *Native Title Act* came into operation in many states, and in the Northern Territory, that already had existing land rights legislation or associated regimes, such as the protection of cultural heritage. The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), for example, was an important point of reference for the *Native Title Act*. Different models for resolving the issues raised by the Terms of Reference have been adopted within Australia. A diversity of approaches now exist within Australia relating to connection requirements (claim processes), authorisation (group membership and authority), and joinder of parties.

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

42. The phrase 'connection requirements for the recognition and scope of native title rights and interests', is a construct of many elements of native title law that are interwoven. Integral to native title is the concept of recognition of Aboriginal and Torres Strait Islander laws and customs by which means connection to land and waters is established. Connection requirements for the recognition and scope of native title in this sense comprise a shorthand reference to a complex of statutory provisions in the *Native Title Act* (principally s 223 and s 225); and associated case law, policy and practices, such as connection reports. This section explains the concepts of

39 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

40 For an example of comparative scholarship, see Kent McNeil and University of Saskatchewan Native Law Centre, *Emerging Justice?: Essays on Indigenous Rights in Canada and Australia* (Native Law Centre, 2001).

'recognition' and the 'scope' of native title, and introduces the definition of native title as set out in s 223 of the *Native Title Act*.

The definition of native title in the *Native Title Act*

43. Section 223 of the *Native Title Act* defines the native title rights and interests that are the subject of a determination of native title under s 225 of the Act. In s 223(1), the term '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.

44. Section 223 has been the subject of extensive judicial interpretation. As interpreted by the Court, native title claimants must address a number of requirements to satisfy s 223. Justice Mansfield of the Federal Court has summarised these in the following way:

> A threshold requirement is that the evidence shows that there is a recognisable group or society that presently recognises and observes traditional laws and customs in the Determination area. In defining that group or society, the following must also be addressed:
>
> (1) that they are a society united in and by their acknowledgement and observance of a body of accepted laws and customs;
>
> (2) that the present day body of accepted laws and customs of the society is in essence the same body of laws and customs acknowledged and observed by the ancestors or members of the society adapted to modern circumstances; and
>
> (3) that the acknowledgement and observance of those laws and customs has continued substantially uninterrupted by each generation since sovereignty, and that the society has continued to exist throughout that period as a body united in and by its acknowledgment and observance of those laws and customs.
>
> The claimants must show that they still possess rights and interests under the traditional laws acknowledged and the traditional customs observed by them, and that those laws and customs give them a connection to the land.[41]

41 *Lander v South Australia* [2012] FCA 427 (1 May 2012), [32]–[34]. See also *King on behalf of Eringa Native Title Claim Group v South Australia* (2011) 285 ALR 454 [32]–[33]; *Dodd v South Australia* [2012] FCA 519 (22 May 2012) [23]–[25]; *Bandjalang People No 1 and No 2 v A-G (NSW)* [2013] FCA 1278 (2 December 2013), [20].

Recognition of native title

45. While s 223 sets out the manner in which native title rights and interests claimed can be established:

> It is a necessary condition of their inclusion in a determination that the rights and interests are recognised by the common law of Australia. That condition flows from s223(1)(c). 'Recognise' in this context means that the common law 'will, by the ordinary processes of law and equity give remedies in support of the relevant rights and interests to those that hold them'.[42]

In *Mabo [No 2]* the High Court held that when the British Crown asserted sovereignty over Australia it acquired a radical title.[43] Acquisition of the radical title was held to be consistent with the recognition of native title in that native title 'burdened' the radical title of the Crown. However, while native title was held to burden the radical title of the Crown, native title rights and interests do not have their source in the common law. As the High Court stated in *Fejo v Northern Territory*:

> Native title is neither an institution of the common law nor a form of common law tenure but it is recognised by the common law.[44]

46. While native title does not derive from the common law, it coexists with the common law and statute that determines how other peoples' interests are granted and governed within the Australian legal system. The High Court in *Commonwealth v Yarmirr* stated:

> The concept of radical title provides an explanation in legal theory of how the two concepts of sovereignty over land and existing native title rights and interests *co-exist*.[45]

47. The idea of two systems has significance for determining continuity of native title from the pre-sovereign period time. Continuity in acknowledgment and observance of the laws and customs of an Indigenous society since pre-sovereignty is 'essential', because it is the normative quality of those rules which the common law has subsequently recognised as effecting a burden on the Crown at the time of sovereignty.[46] Accordingly, the normative system—from which the traditional laws and customs stem—must be that of the particular society that was to be found pre-sovereignty, not that of some other, different, society.[47]

48. In this manner, native title is the product of an intersection of two systems of law.[48] As the High Court in *Members of the Yorta Yorta Aboriginal Community v Victoria* (*'Yorta Yorta'*) stated, recognition

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42 *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth* (2013) 300 ALR 1, [9].
43 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, [50].
44 *Fejo v Northern Territory* (1998) 195 CLR 96, [46].
45 *Commonwealth v Yarmirr* (2001) 208 CLR 1, [48].
46 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [88].
47 Ibid [89]. See section below, 'The meaning of "traditional"'.
48 Ibid [37]–[38] (Gleeson CJ, Gummow and Hayne JJ).

> is a requirement that emphasises the fact that there is an intersection between legal systems and that the intersection occurred at the time of sovereignty. The native title rights and interests which are the subject of this Act are those which existed at sovereignty, survived that fundamental change in regime, and now, by resort to the processes of the new legal order, can be enforced and protected. It is those rights and interests which are 'recognised' in the common law.[49]

49. The relationship that Aboriginal and Torres Strait Islander people have with land and waters through their laws and customs, however, still remains even without recognition by the Australian legal system. As French CJ and Crennan J stated in *Leo Akiba on behalf of the Torres Strait Regional Sea Claim Group* (*Akiba)*:

> Extinguishment is the obverse of recognition. It does not mean that native title rights and interests are extinguished for the purposes of the traditional laws acknowledged and customs observed by the native title holders. By way of example apposite to this case, the plurality pointed out in *Yanner v Eaton* that to tell a group of Aboriginal people that they may not hunt or fish without a permit:
>
> "does not sever their connection with the land concerned and does not deny the continued exercise of the rights and interests that Aboriginal law and custom recognises them as possessing."[50]

50. French CJ, writing extra-curially, described recognition as a form of 'mapping' of Aboriginal and Torres Strait Islander people's relationship to land and waters onto the common law:

> Consistently with the notion of 'mapping' traditional relationships to land onto the common law universe, recognition may be seen as a present declaration of a mapping that, from the point of view of today's common law, came into existence at the time of annexation ... The identification of indigenous groups today, the rules by which they are defined, the content of their traditions and customs and their relationship to the land and waters which comprise their 'country' may be described and interpreted by evidence in court proceedings given by the members of such groups, anthropologists and other experts. The things of which they speak constitute the subjects of the common law of native title. The common law establishes the judge-made rules for determining whether native title rights and interests exist. These are the rules of recognition.[51]

51. A native title determination can occur either as a result of litigation involving a contested hearing or it can be made by consent of the parties involved.[52] The *Native Title Act* sets out the ways in which native title intersects with many other interests in Australian society. The native title held, 'by particular Indigenous people will depend

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49 Ibid [77] (Gleeson CJ, Gummow and Hayne JJ). Section 223(1)(c) may also require 'refusal of recognition to rights or interests which, in some way, are antithetical to fundamental tenets of the common law': Ibid.

50 *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth* (2013) 300 ALR 1, [10].

51 Justice Robert French and Patricia Lane, 'The Common Law of Native Title in Australia' (2002) 2 *Oxford University Commonwealth Law Journal* 15, 26–27.

52 See *Native Title Act 1993* (Cth) pt 4.

on both their traditional laws and customs and what interests are held by others in the area concerned'.[53]

52. In general terms, connection requirements relating to the recognition and scope of native title rights and interests, working in conjunction with authorisation and joinder provisions, raise issues involving:

- What is necessary, as a matter of law and fact, to establish a native title claim?
- What is the scope (nature and content) of the native title rights and interests that are determined?
- Who may bring a claim (application for determination of native title)?
- Who may contest an application for a determination of native title?

53. The requirement that the laws and customs acknowledged and observed by Aboriginal and Torres Strait Islander people claiming native title can be described as 'traditional laws and customs' is discussed further under options for reform in the section relating to the meaning of 'traditional'. The requirement for continuity of acknowledgment and observance of traditional laws and customs is the focus of discussion around options for reform in relation to 'substantial interruption'.

Scope of native title rights and interests

54. The scope of native title is often referred to as the nature and content of native title. As native title rights and interests have their source in Aboriginal or Torres Strait Islander laws and customs, the specific native title rights and interests asserted will be grounded in fact and vary between claims. Identifying the traditional laws and customs of the claimant group is significant not only to determine the rights and interests concerned, but thereby to establish connection to land and waters under s 223(1)(b).

55. The scope of native title and native title rights and interests is determined on the basis of the factual material that provides evidence of traditional laws and customs. What is required to demonstrate, under s 223(1)(b), that Aboriginal or Torres Strait Islander people, by their traditional laws and customs, have a connection with the land or waters is discussed further when considering options for reform related to 'physical occupation and continued or recent use'. Native title is a 'unique' interest.[54]

56. Not all rights arising under Aboriginal and Torres Strait Islander people's traditional laws and customs are recognised by the Australian legal system. Rights and interests arising under traditional laws and customs cannot be recognised if they 'fracture a skeletal principle' of the law, or if they are held to be inconsistent with

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53 Chief Justice Robert French, 'Native Title—A Constitutional Shift?' (Speech Delivered at the JD Lecture Series, The University of Melbourne, 24 March 2009).

54 Melissa Perry and Stephen Lloyd, *Australian Native Title Law* (Lawbook Co, 2003) 13.

established 'public rights'.[55] The primary category of native title rights and interests found to be 'inconsistent' are those characterised as 'exclusive' in nature'.[56]

57. A determination of native title sets out the specific native title rights and interests that are recognised in a particular area that is claimed. An order for a determination of native title must cover a set of designated elements under s 225 of the *Native Title Act*. If native title is established, there is a determination of

(a) who the persons, or each group of persons, holding the common or group rights comprising the native title are; and

(b) the nature and extent of the native title rights and interests in relation to the determination area; and

(c) the nature and extent of any other interests in relation to the determination area; and

(d) the relationship between the rights and interests in paragraphs (b) and (c); and

(e) whether the native title rights and interests confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others.

Examining connection requirements for native title

58. Many concerns have been raised about how the law around connection requirements for the recognition and scope of native title is formulated and how it has evolved. Some commentators raise specific concerns about the highly technical character of the requirements necessary for the establishment of native title.[57] The test for establishing native title may be considered too difficult to meet, and the nature and content of the native title rights and interests recognised too limited:

> Changes in the law (statutory and jurisprudential) have made it both more difficult for claimants to meet the requirements for proof of native title and limited the nature of the rights and interests that can be recognised. Consequently, there is an increasing disjunct between the contemporary worldviews and aspirations of Aboriginal people and the legal construction of native title.[58]

59. It has been pointed out that 'native title' as a legal construct may not accord with Aboriginal and Torres Strait Islander people's understandings of society, law and custom. Justice Jagot in *Wyman on behalf of the Bidjara People v Queensland (No 2)* noted:

> It should be apparent that the provisions of the NTA involve a construct. That is, the provisions impose a set of requirements which bear no necessary relationship to contemporary Aboriginal Australia or, for that matter, what might ordinarily be considered to be a society and its continuance. Whether native title rights and interests

55 *Commonwealth v Yarmirr* (2001) 208 CLR 1, [97]–[101].

56 Samantha Hepburn, 'Native Title Rights in the Territorial Sea and Beyond : Exclusivity and Commerce in the Akiba Decision' (2011) 34 *University of New South Wales Law Journal* 159.

57 The Hon Robert McClelland, 'Opening Address' (Speech Delivered at the Negotiating Native Title Forum, Brisbane, 29 February 2008).

58 David Martin, Toni Bauman and Jodi Neale, 'Challenges for Australian Native Title Anthropology: Practice Beyond the Proof of Connection' (Research Discussion Paper 29, AIATSIS, May 2011).

> can be established does not necessarily say anything about the existence of any contemporary Aboriginal society (in the sense of a body of persons united in and by its acknowledgment and observance of a body of laws and customs), the content or strength of any norms and values of that society, or the merits or otherwise of those norms and values.[59]

60. The ALRC invites comment on the adequacy of s 223 as a test for establishing the existence of Aboriginal and Torres Strait Islander people's rights and interests in relation to land and waters.

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?

Options for reform

61. Connection requirements for the recognition and scope of native title rights and interests raise a number of interwoven challenges. The Terms of Reference direct the ALRC to consider five specific options for reform that have been identified, but the Inquiry can be more wide-ranging in its examination of suggested measures. The following sections consider the nature of the challenges posed by native title law and legal frameworks, and the suggested options for reform in detail.

Presumption of continuity

62. The process for determining whether native title exists in any particular case has often proved to be lengthy and costly.[60] The substantive law requires native title claimants to prove continuity in the acknowledgment and observance of traditional laws and customs and the continued existence of the rights and interests which derived from those laws and customs from sovereignty through until the present day. This imposes a significant forensic burden on native title claimants.

63. The Terms of Reference direct the ALRC to consider whether there should be a presumption of continuity of acknowledgment and observance of traditional laws and customs and connection. This section sets out background to understanding how a presumption of continuity may affect the process for establishing native title. It outlines the process of proof in native title matters. It then explains the function of presumptions in legal proceedings, and asks questions about how a presumption of continuity might operate in native title matters.

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59 *Wyman on behalf of the Bidjara People v Queensland (No 2)* [2013] FCA 1229 (6 December 2013) [472].

60 For example, it took 17 years to reach a determination of the native title held by the Bandjalang people: *Bandjalang People No 1 and No 2 v Attorney General of New South Wales* [2013] FCA 1278 (2 December 2013) [1].

Proof in native title

64. In a legal proceeding, a party may bear a 'burden' or 'onus' of proof of different kinds. A 'legal' or 'persuasive' burden of proof is 'the obligation of a party to meet the requirement of a rule of law that a fact in issue be proved (or disproved)'.[61] An evidential burden of proof is 'the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue'.[62]

Proof in native title determination applications

65. The *Native Title Act* is designed to encourage parties to take responsibility for resolving native title claims without the need for litigation.[63] The preamble indicates the legislative preference for resolving native title claims by negotiation.[64] Nonetheless, native claims must still be commenced and conducted as legal proceedings in the Federal Court.[65] In those proceedings, the Federal Court must apply the substantive law under which claimants must prove all of the elements necessary to establish the existence of native title as defined in s 223.[66] The standard of proof required is the civil standard—the balance of probabilities.[67]

66. In a non-claimant application, the party making the application seeks a determination that no native title exists in a particular area.[68] In such an application, the legal burden of establishing that no native title exists lies on the non-claimant applicant.[69]

Proof in consent determinations

67. Native title matters may be resolved by consent between parties. If an agreement between parties to a determination is reached, the Federal Court may, if it is satisfied that an order consistent with the terms of the agreement would be within the power of the Court[70] and it appears to the Court to be appropriate,[71] make a native title determination order over the whole or part of a determination area without a hearing.

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61 J D Heydon, LexisNexis, *Cross on Evidence*, Vol 1 (at Service 164) [7010].
62 Ibid [7015].
63 *Lovett on behalf of the Gunditjmara People v Victoria* [2007] FCA 474 (30 March 2007) [36].
64 *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595, [18] (Brennan CJ, Dawson, Gaudron, Toohey and Gummow JJ).
65 *Native Title Act 1993* (Cth) ss 13(1), 61(1).
66 *Western Australia v Ward* (2000) 99 FCR 316, [114] (Beaumont and von Doussa JJ); *Daniel v Western Australia* [2003] FCA 666 (3 July 2003) [146]; *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* (2007) 238 ALR 1, [339].
67 *Milirrpum v Nabalco* [1972] ALR 65, 119–20; *Mason v Tritton* (1993) 70 A Crim R 28, 42; *Evidence Act 1995* (Cth) s 140.
68 *Native Title Act 1993* (Cth) ss 13, 61(2).
69 *Worimi Local Aboriginal Land Council v Minister for Lands (NSW) (No 2)* [2008] FCA 1929 (18 December 2008) [49]. A non-claimant applicant may alternatively assert that no native title rights exists in the relevant land because any such rights and interests have been extinguished: *Gandangara Local Aboriginal Land Council v A-G (NSW)* [2013] FCA 646 (3 July 2013).
70 *Native Title Act 1993* (Cth) ss 87(1)(c), 87A(4)(a).
71 Ibid ss 87(1A),(2), 87A(4)(b),(5)(b).

68. In determining whether the order is appropriate, the Federal Court has stated that it is not required to embark on its own inquiry into the merits of the claim.[72] Instead, its focus is on whether there is an agreement between parties that was 'freely entered into on an informed basis'.[73] In relation to State parties, this will involve the Court being satisfied that the State has taken steps to satisfy itself that there is a credible basis for an application for determination of native title.[74]

69. In negotiating consent determinations, State parties have developed a practice of requiring evidence about claimants' connection to an area to be provided to them in the form of a 'connection report'.[75] Formal guidelines regarding the level of evidence required have been issued by a number of state governments.[76]

70. The Federal Court has considered the appropriate extent of the investigation required by a State party to satisfy itself that there is a credible basis for an application for determination of native title. In *Lovett on behalf of the Gunditjmara People v Victoria*, for example, North J commented that 'something significantly less than the material necessary to justify a judicial determination is sufficient to satisfy a State party of a credible basis for an application'.[77]

Options for reform: a presumption of continuity?

71. In *Yorta Yorta*, the High Court acknowledged that 'difficult problems of proof' face native title claimants when seeking to establish the existence of native title rights and interests—particularly in demonstrating the content of traditional laws and customs as required by s 223(1)(a).[78] However, it also noted that 'the difficulty of the forensic task does not alter the requirements of the statutory provision'.[79]

72. Associate Professor Sean Brennan has summarised the effect of the judicial interpretation of what is needed to prove the existence of native title. Brennan suggests that to satisfy s 223 requires establishing 'continuity' in a number of senses:

- continuity of a society from sovereignty to the present;
- continuity in the observance of law and custom; and
- continuity in the content of that law and custom.[80]

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72 See, eg, *Lander v South Australia* [2012] FCA 427 (1 May 2012) [12].
73 *Lovett on behalf of the Gunditjmara People v Victoria* [2007] FCA 474 (30 March 2007) [37].
74 *Munn for and on behalf of the Gunggari People v Queensland* (2001) 115 FCR 109, [29]–[30].
75 LexisNexis, *Native Title Service* (at Service 91) [1804].
76 See, eg, Department of Natural Resources and Mines, *Guide to Compiling a Connection Report for Native Title Claims in Queensland* (2013); Government of South Australia Crown Solicitor's Office, *Consent Determinations in South Australia: A Guide to Preparing Native Title Reports* (2004); Government of Western Australia Department of the Premier and Cabinet, *Guidelines for the Provision of Connection Material* (2012).
77 *Lovett on behalf of the Gunditjmara People v Victoria* [2007] FCA 474 (30 March 2007) [38].
78 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [80] (Gleeson CJ, Gummow and Hayne JJ).
79 Ibid.
80 Sean Brennan, 'Statutory Interpretation and Indigenous Property Rights' (2010) 21 *Public Law Review* 239, 255.

73. The difficulty of proving the existence of native title has attracted comment. For example, the concluding observations of the United Nations Committee on the Elimination of Racial Discrimination in 2005 stated:

> The Committee is concerned about information according to which proof of continuous observance and acknowledgement of the laws and customs of Indigenous peoples since the British acquisition of sovereignty over Australia is required to establish elements in the statutory definition of native title under the *Native Title Act*. … It recommends that the State Party review the requirement of such a high standard of proof, bearing in mind the nature of the relationship of Indigenous peoples to their land.[81]

74. It has been suggested that one way to 'ease the burden' of establishing native title is to introduce certain rebuttable presumptions of law in relation to proof.[82] In particular, it has been argued that there should be a rebuttable 'presumption of continuity' or a 'presumption of continuous connection' for native title.[83]

75. Proponents of a legal presumption of continuity have argued that there are principled bases for its introduction. For example, it has been argued that it is 'fundamentally discriminatory' to require that Indigenous people who were dispossessed of land bear the burden of proof of connection to land and waters.[84] The Law Council of Australia has argued that a presumption of continuity is consistent with the beneficial purpose of the *Native Title Act*.[85]

What is a presumption?

76. Presumptions of law are rules of evidence that affect how a fact in issue is proved. Presumptions of fact, on the other hand, are not true presumptions at all, rather they are nothing more than inferences drawn from established facts.[86]

77. How presumptions operate can be confusing. Former Justice of the High Court, the Hon John Dyson Heydon AC QC, describes them as causing 'extraordinary perplexity'.[87] Despite this, they are a convenient method of proving otherwise elusive facts.[88] This section sets out some of the technical operation of presumptions generally, to provide a basis for considering how a presumption might work in native title matters.

78. A presumption of law operates so that when a fact—the 'basic fact'—is proved, it must, in the absence of further evidence, lead to a conclusion that another fact—the

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

82 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Social Justice and Native Title Report' (Australian Human Rights Commission, 2013) 104.

83 See, eg, Ibid.

84 Les Malezer, 'Mabo Lecture' (Speech Delivered at the Native Title Conference, Melbourne, 5 June 2009) 4; Commonwealth, *Parliamentary Debates*, Senate, 21 March 2011, 1303 (Rachel Siewert).

85 Law Council of Australia, Submission No 21 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, August 2011.

86 J D Heydon, LexisNexis, *Cross on Evidence*, Vol 1 (at Service 164) [7255].

87 Ibid [7235].

88 Ibid [7260].

'presumed fact'—exists.[89] In other words, a presumption that a fact exists will arise on proof of a basic fact. The presumption will then operate unless rebutted by evidence to the contrary.[90]

79. Once other evidence is called, however, the presumption has no inherent superadded weight.[91] Judicial statements concerning the amount of rebutting evidence required vary from presumption to presumption and they sometimes differ with regard to the same presumption.[92] In some cases, it is said that the presumption stands until 'some' evidence to the contrary is given. In other cases, it is said that the rebutting evidence must be 'clear', 'strong' or even 'conclusive'.[93]

80. As noted above, a presumption of law is distinct from an inference (sometimes called a presumption of fact). While presumptions have a formal role in the proof of a particular fact,

> An inference is a tentative or final assent to the existence of a fact which the drawer of the inference bases on the existence of some other fact or facts. The drawing of an inference is an exercise of the ordinary powers of human reason in the light of human experience; it is not affected directly by any rule of law.[94]

81. When an inference is drawn, it may satisfy a burden of proof, but the 'trier of fact decides whether to draw an inference and what weight to give to it'.[95] In *Yorta Yorta*, it was observed that, in many, perhaps most, native title cases, claimants will invite the Court to draw inferences about the content of traditional laws and customs at times earlier than those described in the claimants' evidence.[96] It is not possible, however, to offer any 'single bright line test' for deciding what inferences may be drawn or when they may be drawn.[97]

How could a presumption of continuity be formulated?

82. Any presumption introduced into the *Native Title Act* would involve a change in the way in which proof currently operates in native title matters. However, the legal test for establishing native title would not be affected. If a presumption were

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89 Ibid [7240], [7260].

90 Some presumptions of law are irrebuttable. However, the focus in this section is on rebuttable presumptions. See generally Ibid [7265].

91 Ibid [7280].

92 Ibid [7290].

93 Ibid.

94 Thomson Reuters, *The Laws of Australia* (at 1 September 2011) 16 Evidence, '16.2 Proof in Civil Cases' [16.2.270].

95 Ibid.

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

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

introduced, the persuasive onus of proof of certain basic facts would lie on native title claimants. Once these basic facts have been proved, the presumed fact would be found to exist unless rebutted. In other words, respondents in native title matters would be required to adduce evidence to rebut the existence of the presumed fact.

83. The way in which a presumption would operate in native title matters will vary significantly depending on how it is formulated. Such a presumption could be formulated in a number of different ways by varying:

- the basic facts required to be established;
- the facts that are presumed upon proof of the basic facts; or
- the way in which a presumption could be rebutted.

84. One model for a presumption in native title matters was offered as a basis for discussion by French J (as he then was) in 2008:

> (1) This section applies to an application for a native title determination brought under section 61 of the Act where the following circumstances exist:
>
> (a) the native title claim group defined in the application applies for a determination of native title rights and interests where the rights and interests are found to be possessed under laws acknowledged and customs observed by the native title claim group;
>
> (b) members of the native title claim group reasonably believe the laws and customs so acknowledged to be traditional;
>
> (c) the members of the native title claim group, by their laws and customs have a connection with the land or waters the subject of the application;
>
> (d) the members of the native title claim group reasonably believe that persons from whom one or more of them was descended, acknowledged and observed traditional laws and customs at sovereignty by which those persons had a connection with the land or waters the subject of the application.
>
> (2) Where this section applies to an application it shall be presumed in the absence of proof to the contrary:
>
> (a) that the laws acknowledged and customs observed by the native title claim group are traditional laws and customs acknowledged and observed at sovereignty;
>
> (b) that the native title claim group has a connection with the land or waters by those traditional laws and customs;
>
> (c) if the native title rights and interests asserted are capable of recognition by the common law then the facts necessary for the recognition of those rights and interests by the common law are established.[98]

98 Justice Robert French, 'Lifting the Burden of Native Title—Some Modest Proposals for Improvement' (Speech Delivered at the Federal Court Native Title User Group, Adelaide, 9 July 2008) 11–12. This model is largely adopted by a series of Native Title Amendment (Reform) Bills: Native Title Amendment (Reform) Bill 2011; Native Title Amendment (Reform) Bill (No 1) 2012; Native Title Amendment

85. In French J's model, the basic facts to be proved are those contained in cls (1)(a)–(d). The onus would remain on the claimants to make these out. The presumed facts are those contained in cls 2(a)–(c). When the basic facts are made out, the presumed facts will also be found to exist, unless rebutted by proof to the contrary: that is, French J's model is a persuasive, rather than an evidentiary presumption.[99]

86. It appears that the intent of such a provision would be to provide that, when the basic facts are made out, the facts required to satisfy ss 223(1)(a)–(c) will be presumed to exist. If this were the case, the presumption could be rebutted by evidence that goes to disprove the existence of any of these elements. To recall Associate Professor Brennan's formulation, this could involve adducing evidence that establishes, on the balance of probabilities, that there has not been:

- continuity of a society from sovereignty to the present; or
- continuity in the observance of law and custom; or
- continuity in the content of that law and custom.[100]

87. The ALRC is interested in comment on whether a presumption of continuity should be introduced into the *Native Title Act*. It also invites submissions addressing how a presumption could be framed. While stakeholders are welcome to comment on French J's draft presumption, the ALRC is particularly interested in discussion of a range of ways in which a presumption of continuity could be formulated.

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?

(Reform) Bill 2014. See also Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Native Title Amendment (Reform) Bill 2011* (2011).

99 Justice Robert French, 'Lifting the Burden of Native Title—Some Modest Proposals for Improvement' (Speech Delivered at the Federal Court Native Title User Group, Adelaide, 9 July 2008) 11. An evidential presumption may be rebutted by the introduction of evidence to the contrary, while a persuasive presumption can be rebutted by proof to the contrary: J D Heydon, LexisNexis, *Cross on Evidence*, Vol 1 (at Service 164) [7295], [7300].

100 Sean Brennan, 'Statutory Interpretation and Indigenous Property Rights' (2010) 21 *Public Law Review* 239, 255. For further discussion of the 'society' requirement, see the section, 'The meaning of "traditional"'. For discussion of the requirement for continuity in the observance of law and custom, and the effect of interruption of continuity, see the section, 'Substantial interruption'. For discussion of the requirement for continuity of content of traditional law and custom, and the effect of evolution and adaptation, see the section, 'The meaning of "traditional"'.

Possible effects of a presumption of continuity

88. The introduction of a presumption of continuity may have a number of possible effects on native title proceedings. Some stakeholders have suggested, for example, that the cost and resources involved in the preparation of connection reports on behalf of claimants would be reduced.[101] However, others have noted that claimants will still be required to establish that the claim group are the right people for the claim area. Resources and research will still be needed to investigate these issues.[102]

89. If a presumption were introduced, it may be anticipated that respondent parties would undertake research into claimants' connection to a claim area to decide whether to challenge a presumption, and to gather evidence for rebuttal. The National Native Title Council (NNTC) has argued this is an appropriate allocation of resources, because state respondent parties are in a better position to provide evidence about 'how it colonized or asserted its sovereignty over a claim area'.[103]

90. The Centre for Native Title Anthropology has expressed concern about the prospect of respondent parties becoming 'commissioners of native title research'.[104] It warned that this may result in Aboriginal and Torres Strait Islander people involved in native title claims losing the capacity to 'control the circumstances in which research about their history and culture occurs … and how it is managed in the future'.[105]

91. Different views have been expressed about the possible effect of a presumption of continuity on the settlement of claims by consent. For example, it has been suggested that a presumption may prompt respondents to be 'more inclined to settle claims with a strong prospect of success'.[106] The NNTC has contended that, with a presumption, state governments might be 'more inclined to negotiate earlier and more openly with the aim of spending less on the process and more on possible opportunities for Traditional Owners'.[107]

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101 See, eg, National Native Title Council, Submission No 14 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, 2011; 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.

102 See, eg, Centre for Native Title Anthropology, ANU, Submission No 20 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, August 2011; 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; 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.

103 National Native Title Council, Submission No 14 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, 2011.

104 Centre for Native Title Anthropology, ANU, Submission No 20 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, August 2011.

105 Ibid.

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

107 National Native Title Council, Submission No 6 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment Bill 2009*, 2009.

92. However, the National Native Title Tribunal has warned that it is not possible to predict the impact that a presumption may have on the approach of respondent government parties and, in particular, whether there would be 'more, or more timely, consent determinations recognising the existence of native title'.[108]

93. The Western Australian Government has suggested that a presumption of continuity would 'disrupt radically the existing processes for resolving claims'.[109] It has stated that a presumption would have a 'counter-productive' effect, by requiring 'State and Territory Governments to place renewed emphasis on identifying the flaws in connection evidence'.[110]

94. The ALRC seeks comment about the effects that a presumption of continuity might have on practices in native title proceedings.

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.

The presumption and overlapping claims

95. It is possible for more than one application for determination of native title to be registered over the same area of land or waters. In such cases, depending on how a presumption of continuity is formulated, it may be possible for more than one native title claim group to take the benefit of a presumption of continuity. The ALRC seeks comment about what procedure should deal with the operation of a presumption of continuity where there are overlapping native title claims.

96. The ALRC also seeks stakeholder views about whether a presumption of continuity should not be available in certain circumstances.

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?

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108 National Native Title Tribunal, Submission No 15 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, August 2011.

109 Western Australian Government, Submission No 18 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, August 2011.

110 Ibid.

The meaning of 'traditional'

97. The Terms of Reference ask the ALRC to consider clarification of the meaning of 'traditional' to allow for the evolution and adaptation of culture and recognition of 'native title rights and interests'.

98. Tradition plays a central role in the definition of native title in s 223 of the *Native Title Act*. Case law has provided guidance on its meaning in that section.[111] This part of the Issues Paper sets out the interpretation of the meaning of traditional and traditional laws and traditional customs, including the extent to which evolution and adaptation is possible. It also considers criticism of the requirements associated with proof of traditional laws and customs, and asks for submissions on options for reform.

The use of 'traditional' in s 223

99. Native title is defined in s 223 of the *Native Title Act*. Section 223(1)(a) states that native title rights and interests are possessed under the traditional laws acknowledged, and traditional customs observed, by the relevant Aboriginal peoples or Torres Strait Islanders.

100. The High Court in *Yorta Yorta* embarked on a detailed analysis of s 223(1), including what is meant by the term 'traditional' in s 223(1)(a). The interpretation of 'traditional' is central to *Yorta Yorta*.

101. In a joint judgment, Gleeson CJ, Gummow and Hayne JJ stated that 'traditional' in the context of its use in relation to laws and customs carries a number of elements. The first is the means of transmission of laws and customs. 'Traditional' laws and customs are those which have been 'passed from generation to generation of a society, usually by word of mouth and common practice'.[112]

102. The second relates to the age of the laws and customs. Traditional laws and customs 'must be understood to refer to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty'.[113]

103. The third element relates to the requirement that rights and interests be 'possessed' under traditional laws and customs. Gleeson CJ, Gummow and Hayne JJ held that this means that the

> normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty.[114]

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111 Elsewhere in the *Native Title Act*, the term 'traditional activity' is defined in the context of providing for rights of access to non-exclusive agricultural or pastoral leases for certain native title claimants: *Native Title Act 1993* (Cth) ss 44A, 44B.

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

113 Ibid [86] (Gleeson CJ, Gummow and Hayne JJ). The High Court's approach to the age of 'traditional' laws and customs is informed by its assessment of the nature of recognition of native title by the common law—that is, recognition involves an 'intersection' of two normative systems at the point of assertion of sovereignty by the Crown: Ibid [37]–[38] (Gleeson CJ, Gummow and Hayne JJ). See further the section 'The concept of connection in native title law'.

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

104. Gleeson CJ, Gummow and Hayne JJ also found that there was an 'inextricable' link between a society and its laws and customs. Society, in this context, was to be understood as 'a body of persons united in and by its acknowledgment and observance of a body of laws and customs'.[115] Therefore, related to the requirement that traditional laws and customs must have had a continuous existence and vitality since sovereignty is a requirement that the society continues to exist as a group which acknowledges and observes traditional laws and customs. If the society ceases to exist, 'those laws and customs cease to have continued existence and vitality'.[116]

105. The following sections will consider a number of concepts associated with the notion of traditional in s 223(1), including the concept of 'society', and the extent to which traditional laws and customs can evolve and adapt. Some criticisms of the approach taken to the interpretation of traditional are also considered. The requirements of generational transmission of laws and customs and continuity of acknowledgment and observance of traditional laws and customs are detailed in the section, 'Substantial interruption'.

'Society'

106. The existence of a society is a discrete element to be established in native title claims.[117] It has been described as 'a fundamental threshold question for native title claimants'.[118]

107. The relevant society for native title purposes has been the subject of significant consideration by the Federal Court. The Full Federal Court in *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* ('*Alyawarr*') has stated that the term 'society' does not require 'arcane construction':

> It is not a word which appears in the NT Act. It is a conceptual tool for use in its application. It does not introduce, into the judgments required by the NT Act, technical, jurisprudential or social scientific criteria for the classification of groups or aggregations of people as 'societies'.[119]

108. The Full Federal Court in *Sampi on behalf of the Bardi and Jawi People v Western Australia* ('*Sampi*') provided further guidance on the meaning of 'society'. It noted that the central consideration for whether a group constitutes a society is 'whether the group acknowledge the same body of laws and customs relating to rights and interests in land and waters'.[120] This could be so 'notwithstanding that the group

115 Ibid [49].
116 Ibid [50].
117 See, eg, the formulation of the requirements of s 223 in *Lander v South Australia* [2012] FCA 427 (1 May 2012) [33].
118 Lisa Strelein, 'From Mabo to Yorta Yorta: Native Title Law in Australia' (2005) 19 *Washington University Journal of Law and Policy* 225, 259–260.
119 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [78].
120 *Sampi on behalf of the Bardi and Jawi People v Western Australia* (2010) 266 ALR 537, [51].

was composed of people from different language groups or groups linked to specific areas within the larger territory which was the subject of the application'.[121]

109. A native title claim group may also assert that it holds individual or group rights under the traditional laws and customs of a larger society or community of which they are a part.[122]

110. There may be some difficulties with the requirement that a native title claim group must identify its membership of a society united in and by their acknowledgment and observance of a body of accepted laws and customs. For example, difficulties with the society requirement may also arise where there has been succession to land by one group of Aboriginal or Torres Islander peoples from another group.[123]

111. The need to establish the existence of a society to satisfy s 223 of the Act has has been said to have created an 'enormous grey area in the requirement of proof'.[124] The Hon Justice Paul Finn, writing extra-curially, commented that the society requirement has created a 'problematic and quite time consuming distraction' in native title litigation.[125] He refers to his own judgment in a claim over the Torres Strait, *Akiba v Queensland (No 3)* to illustrate this difficulty, noting that

> The Islanders' primary case was that they were one society; the Commonwealth's, that they were four societies, these representing the four island groups involved in the hearing; and the State of Queensland alleged there were thirteen societies, each being one of the thirteen inhabited islands.[126]

112. Finn J found that the applicant had established its case that it comprised one society. However, he noted that:

> There is an irony in this… answers to the question of native title rights and interests—which is, after all, the concern of the NT Act—would in all probability be the same whether my conclusion had been one, or four, or thirteen societies.[127]

113. The need to identify membership of a society will also be important to the composition of the native title claim group. This is discussed further in the section, 'Authorisation'.

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121 Ibid [71]. See, eg, *Neowarra v Western Australia* [2003] FCA 1402 (8 December 2003); *Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory* (2004) 207 ALR 539; *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442; *Akiba v Queensland (No 3)* (2010) 204 FCR 1.

122 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [80]; *Bodney v Bennell* (2008) 167 FCR 84, [145]–[146]. This was the case in *De Rose*, in which the claim group did not assert that they constituted a discrete society or community. Instead, they asserted that they held rights and interests under the traditional laws and customs that they shared with a wider society of Aboriginal people of the Western Desert Bloc: *De Rose v South Australia (No 1)* (2003) 133 FCR 325, [275].

123 See *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [44]; *Dale v Moses* [2007] FCAFC 82 (7 June 2007) [120]; *Western Australia v Sebastian* (2008) 173 FCR 1, [94]–[104].

124 Lisa Strelein, 'From Mabo to Yorta Yorta: Native Title Law in Australia' (2005) 19 *Washington University Journal of Law and Policy* 225, 259.

125 Paul Finn, '*Mabo* into the Future: Native Title Jurisprudence' (2012) 8 *Indigenous Law Bulletin* 5, 6.

126 Ibid.

127 Ibid 7, quoting *Akiba v Queensland (No 3)* (2010) 204 FCR 1.

Evolution and adaptation of law and custom

114. As explained above, native title rights and interests must find their origin in the laws and customs acknowledged and observed at sovereignty—it is these laws and customs that are 'traditional'.[128]

115. However, the High Court has acknowledged that some evolution and adaptation of law and custom may occur. In *Yorta Yorta*, Gleeson CJ, Gummow and Hayne JJ stated that some change to, or adaptation of, traditional laws and customs will not necessarily be fatal to a native title claim.[129]

116. The judgment of Gaudron and Kirby JJ also considered that adaptation to law and custom may occur and still be considered traditional:

> What is necessary for laws and customs to be identified as traditional is that they should have their origins in the past and, to the extent that they differ from past practices, the differences should constitute adaptations, alterations, modifications or extensions made in accordance with the shared values or the customs and practices of the people who acknowledge and observe those laws and customs.[130]

117. Different views have been expressed about the extent to which the current approach to traditional laws and customs allows for evolution and adaptation. The Western Australian Government has argued that change or adaptation to laws and customs may occur under the current understanding of traditional.[131] Notwithstanding such views, the Jumbunna Indigenous House of Learning Research Unit suggests that 'judicial interpretations of "traditional" laws and customs have created an edifice around continuity, which has imposed a frozen rights approach or a museum mentality'.[132]

Commentary on emphasis on tradition

118. The approach to tradition taken in *Yorta Yorta* has received some criticism. Professor Simon Young has argued that the emphasis on the maintenance of pre-sovereign law and custom is inconsistent with Australian legal and social history:

> Traditional Aboriginal Law and custom has been actively and effectively repressed and discouraged for much of Australia's European history … Moreover, the history of dispossession demonstrates that the very laws and customs most focused upon by the native title doctrine, namely the detail and incidents of the Aboriginal relationship with land and waters, have been the most interfered with, ignored and constrained.[133]

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

129 Ibid [83].

130 Ibid [114].

131 Western Australian Government, Submission No 18 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, August 2011.

132 Jumbunna Indigenous House of Learning Research Unit, UTS, Submission No 17 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, July 2011.

133 Simon Young, *Trouble with Tradition: Native Title and Cultural Change* (Federation Press, 2008) 361–362.

119. The result, for Young, is that the native title claims of those Indigenous peoples most severely affected by non-Indigenous settlement are unlikely to be recognised.[134]

120. Dr David Martin considers that the requirement to demonstrate traditionality is at odds with Indigenous peoples' contemporary lives:

> Regardless of the fact that in various ways, and to varying degrees, the contemporary lives of native title claimants involve multiple forms of engagement with the wider society … their identities as Indigenous people—as well as those of their groups—must be constructed for the purposes of claiming native title in a singular and traditionalist modality.[135]

121. The ALRC invites comment on any difficulties associated with the need to establish that native title rights and interests are possessed under traditional laws and customs.

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?

Definition of the meaning of traditional?

122. Any definition of the term 'traditional' may have a significant impact on the interpretation of s 223 in the *Native Title Act*. It may also affect the operation of other parts of the Act.[136] This part of the Issues Paper notes some previous suggestions that have been made to clarify the meaning of traditional in the Act—in particular, to clarify that laws and customs may change over time. It also considers some uses of the concept of traditional in other legislation, and invites comment as to whether there should be definition of 'traditional' in s 223 of the *Native Title Act*.

123. The Native Title Amendment (Reform) Bill 2014 has proposed amendments to s 223 relating to the meaning of traditional law and custom. These involve amendments to insert the following:

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134 Ibid 363.

135 David Martin, 'Alternative Constructions of Indigenous Identities in Australia's *Native Title Act*' in Toni Bauman and Lydia Glick (eds), *The Limits of Change: Mabo and Native Title 20 Years On* (AIATSIS, 2012) 356.

136 For example, it may affect the interpretation of s 211 of the Act.

> (1A) Without limiting subsection (1), ***traditional laws acknowledged*** in that subsection includes such laws as remain identifiable through time, regardless of whether there is a change in those laws or in the manner in which they are acknowledged.
>
> (1B) Without limiting subsection (1), ***traditional customs observed*** in that subsection includes such customs as remain identifiable through time, regardless of whether there is a change in those customs or in the manner in which they are observed.[137]

124. Other legislation in Australia has taken a variety of approaches to the question of tradition in relation to Aboriginal and Torres Strait Islander people. For example, 'Aboriginal tradition' is defined in the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).[138]

125. 'Traditional owner group' is defined in the *Traditional Owner Settlement Act 2010* (Vic) to include those people recognised by the Attorney-General as traditional owners, based on their traditional and cultural associations with the land.[139] Victoria has published threshold guidelines detailing what the state views as amounting to traditional and cultural association. These guidelines state that 'traditional':

> Denotes linkages with the past that are actively kept alive by the traditional owner group members. It is not restricted to features or activities understood to be fully continuous with, and identical to, such activities or features in pre-contact Aboriginal society.[140]

126. The ALRC invites comment on whether there should be a definition of the term traditional, or traditional laws and customs in the *Native Title Act*.

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

127. The ALRC has been directed to inquire into whether there should be clarification that 'native title rights and interests' can include rights and interests of a commercial nature. The High Court held in *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth* ('*Akiba*') that native title rights and interests could comprise a right to access resources and take for any purpose resources

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137 Native Title Amendment (Reform) Bill 2014 cl 18.

138 The definition is: 'the body of traditions, observances, customs and beliefs of Aboriginals or of a community or group of Aboriginals, and includes those traditions, observances, customs and beliefs as applied in relation to particular persons, sites, areas of land, things or relationships': *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 3. See also *Aboriginal Land Act 1991* (Qld) s 7.

139 *Traditional Owner Settlement Act 2010* (Vic) s 3. A traditional owner group is also defined in that section to mean a group of Aboriginal persons who authorise certain Indigenous Land Use Agreements under the *Native Title Act*, or native title holders.

140 Department of Justice, *Threshold Guidelines for Victorian Traditional Owner Groups Seeking a Settlement Under the Traditional Owner Settlement Act 2010* (2013) 32.

in the native title claim area.[141] The right could be exercised for commercial or non-commercial purposes.

128. This section briefly outlines the law relating to the nature and content of native title rights and interests and how these relate to s 223 of the *Native Title Act* and 'connection requirements'. It discusses the concepts inherent to defining the scope of native title as they may be relevant to a commercial element of native title rights and interests. It then considers how adaptation of traditional law and custom has a bearing on commercial native title rights and interests. The section explores the meaning of 'commercial', with a brief overview of options for reform—including amendment of s 223 of the *Native Title Act*. The section concludes with approaches in comparative jurisdictions.

Nature and content of native title rights and interests

129. The definition of native title in s 223 of the *Native Title Act* does not contain reference to commercial rights and interests. How the law conceives of native title rights and interests influences their nature and content, and therefore, is significant when considering the possibility of native title rights and interests of a commercial character. The nature of native title often has been characterised as comprising 'incidents':

> Each collective right, power or other interest is an 'incident' of that Indigenous community's native title.[142]

130. More recently, the High Court emphasised that '[t]he identification of the relevant rights is an objective inquiry. This means that the legal nature and content of the rights must be ascertained'.[143]

A right to take resources for any purpose

131. The question of the nature and content of native title as comprising 'separate' incidents was directly raised in *Akiba.* At first instance, the Federal Court made a determination of, 'a right to take resources for trading or commercial purposes—whether exclusive or non-exclusive.[144] In the High Court, French CJ and Crennan J held that the native title right should be conceived as a widely-framed right. They observed that '[t]he native title right so framed could be exercised in a variety of ways, including by taking fish for commercial or trading purposes'.[145] Similarly, Hayne, Kiefel and Bell JJ observed 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

141 *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth* (2013) 300 ALR 1.
142 *Yanner v Eaton* (1999) 201 CLR 351, [73].
143 *Western Australia v Brown* [2014] HCA 8 (12 March 2014) [34].
144 *Akiba v Queensland (No 3)* (2010) 204 FCR 1, [847].
145 *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth* (2013) 300 ALR 1, [1].

> particular occasion was not an incident of the right; it was simply a circumstance attending its exercise.[146]

132. In *Western Australia v Brown* the High Court stated that '[t]he nature and content of a right is not ascertained by reference to the way it has been, or will be, exercised'.[147] The distinction between a right and its exercise may cut across typical classifications that separate commercial or non-commercial uses and activities.

133. Native title is not equivalent to common law property constructs. Nonetheless, some commentators have suggested that property constructs are an important backdrop to formulating models for native title rights and interests that allow for severability and fragmentation.[148] The High Court has cautioned against confining 'the understanding of rights and interests which have their origin in traditional laws and customs "to the common lawyer's one-dimensional view of property as control over access"'.[149] Other commentators see the problem with the scope of native title rights and interests as stemming from the failure to give effect to native title as a 'title'—that is, as conferring powers akin to exclusive possession.[150] Some regard the approach to native title as one of 'definitional over-specificity'.[151] Native title has been characterised as involving 'the over-definition, and subdivision of, individual rights and interests and … the dilution of a proprietary conception of native title'.[152] Debates as to whether native title has a proprietary character also are relevant to examining the question of the potential scope of commercial native title rights and interests.

Non-exclusive native title rights and inconsistency

134. In clarifying whether native title rights and interests can include rights and interests of a commercial character, the exclusive or non-exclusive character of the native title rights claimed may be of significance. Only non-exclusive native title rights and interests have been recognised in the offshore.[153] Native title cannot be recognised where there is inconsistency between the native title rights claimed and certain common law or statutory rights.[154] However, the High Court in *Akiba* found no inconsistency between the non-exclusive native title right to take resources for any purpose, and the relevant Commonwealth and Queensland statutes.[155]

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146 *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth* (2013) 300 ALR 1.
147 *Western Australia v Brown* [2014] HCA 8 (12 March 2014) [33].
148 Katy Barnett, '*Western Australia v Ward*: One Step Forwards and Two Steps Back: Native Title and the Bundle of Rights Analysis' [2000] *Melbourne Univeristy Law Review* 462.
149 *Western Australia v Brown* [2014] HCA 8 (12 March 2014) [36].
150 Lisa Strelein, *Compromised Jurisprudence: Native Title Cases since Mabo* (Aboriginal Studies Press, 2nd ed, 2009) 68.
151 Simon Young, *Trouble with Tradition: Native Title and Cultural Change* (Federation Press, 2008) 361–362, 297.
152 Paul Finn, '*Mabo* into the Future: Native Title Jurisprudence' (2012) 8 *Indigenous Law Bulletin* 5, 8.
153 *Commonwealth v Yarmirr* (2001) 208 CLR 1.
154 Ibid [98] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
155 *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth* (2013) 300 ALR 1, [49] (Hayne, Kiefel and Bell JJ).

Extinguishment and regulation

135. The majority in *Ward* considered native title as a 'bundle of rights'.[156] Native title, when conceived of as a 'bundle of rights' is integrally linked to 'connection' under s 223(1)(b). Generally speaking, Aboriginal and Torres Strait Islander 'connection' with land and waters established by reference to traditional law and custom translates into particular rights and interests with regard to land and waters.[157] Some commentators suggest that such an approach to the legal construct of native title may allow for excessive fragmentation, and thereby, partial extinguishment of native title, as individual elements of the 'bundle' may be extinguished separately.[158] The potential for fragmentation of native title rights and partial extinguishment may impact the capacity for commercial uses of native title rights and interests.

136. Questions related to whether a native title right is extinguished or merely regulated are relevant to the scope of native title, and therefore to issues of the potential for commercial native title rights and interests. In *Ward*, it was stated that '[q]uestions of extinguishment first require identification of the native title rights and interests that are alleged to exist'.[159] Issues of extinguishment and regulation are not the central focus of examination in the Inquiry. However, in *Akiba* a particular issue was whether there was partial extinguishment of a native title right to take resources for any purpose, including commercial purposes. In the High Court, Hayne, Kiefel and Bell JJ, in considering the effect of the relevant statutory licensing regimes for fisheries and other marine resources, found that the determination provisions of the Act were 'directly engaged'.[160] They observed

> not only does regulation of a native title right to take resources from land or waters not sever the connection of the peoples concerned with that land or those waters, regulation of the native title right is not inconsistent with the continued existence of that right.[161]

137. The ALRC is interested in views as to whether the *Native Title Act* should make it clear that native title can include commercial native title rights and interests, particularly in light of recent case law.

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?

156 *Western Australia v Ward* (2002) 213 CLR 1, [76] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
157 *Lardil Peoples v Queensland* [2004] FCA 298 (23 March 2004) [173].
158 *Western Australia v Ward* (2002) 213 CLR 1, [76] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
159 Ibid [468].
160 *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth* (2013) 300 ALR 1, [54].
161 Ibid [64].

Evolution and adaptation of native title rights and interests

138. Native title rights and interests must be possessed under traditional law and custom that is referable to a normative society.[162] This will be established as a question of fact. In *Akiba* there was a 'long and well chronicled history' that '[t]he Islanders were, and are, trading fish'—that is, that 'marine products were historically, and are today, taken for the purpose of exchange and sale'.[163] Other claims for native title across Australia also may include a right to take resources from land and waters that relate to some aspect of trade, exchange or manufacture. In *Banjima*, the trial judge distinguished the evidence before him from that in *Akiba*:

> Unlike the position in *Akiba (No 3)*, it is not open to conclude on the evidence in this case that the claimants were entitled to take all manner of resources from the claim area. ... 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.[164]

139. Rather, the Court found that particular resources were taken for particular uses, with limited evidence of trade in resources.[165]

140. The requirement for native title rights and interests to have their origin in a pre-sovereign (traditional) normative society is relevant to whether there can be adaptation and evolution of native title rights and interests. In *Yorta Yorta* the High Court held:

> Upon the Crown acquiring sovereignty, the normative or law-making system which then existed could not thereafter validly create new rights, duties or interests. Rights or interests in land created after sovereignty and which owed their origin and continued existence only to a normative system other than that of the new sovereign power, would not and will not be given effect by the legal order of the new sovereign.[166]

141. However some degree of change and adaptation of the traditional law and custom can occur. The Full Court of the Federal Court in *Bennell* stated:

> 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.[167]

142. Some commentators have argued that the requirement that native title rights and interests must be possessed under traditional law and custom, limits the extent to which 'adaptation' can occur. In turn it may not adequately allow for 'commercial' native title rights and interests.[168]

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162 *Yorta Yorta* stated that: 'Because there could be no parallel law-making system after the assertion of sovereignty it also follows that the only rights or interests in relation to land or waters, originating otherwise than in the new sovereign order, which will be recognised after the assertion of that new sovereignty are those that find their origin in pre-sovereignty law and custom': *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [44].

163 *Akiba v Queensland (No 3)* (2010) 204 FCR 1, [527].

164 *Banjima People v Western Australia (No 2)* [2013] FCA 868 (28 August 2013) [783].

165 Ibid [783]–[784].

166 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [43] (Gleeson CJ, Gummow and Hayne JJ).

167 *Bodney v Bennell* (2008) 167 FCR 84, [74]. See also the section 'The meaning of "traditional"'.

168 Samantha Hepburn, 'Native Title Rights in the Territorial Sea and Beyond : Exclusivity and Commerce in the Akiba Decision' (2011) 34 *University of New South Wales Law Journal* 159.

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?

Defining 'commercial' native title rights and interests

143. 'Commercial' is a term that is capable of various meanings. There is some ambiguity as to what may be comprised in the phrase 'commercial native title rights and interests'. Typically, 'commercial' has been linked to native title rights to take resources for trade or exchange.

144. In addition, there are existing exclusions to defining the scope of commercial native title rights and interests. In *Ward* , for example, it was held that native title rights and interests did not include rights to statutory minerals and petroleum.[169]

145. The general requirement that native title rights and interests must have a 'connection' to land and waters may also influence the scope of any definition of commercial rights and interests. In *Ward* for example, the High Court held there was no right to protect traditional knowledge—akin to a form of intellectual property[170]—as it was held not to be a right in relation to land and waters. In *Akiba*, 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'[171] are not rights and interests in relation to land or waters within the meaning of s 223 of the *Native Title Act*.

146. Section 223(1) is interpreted in conjunction with s 223(2) of the *Native Title Act*. The latter provision is regarded as a non-exhaustive list of native title rights and interests. It states that:

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

147. Given that hunting, gathering and fishing rights and interests are already set out, should the listing of native title rights and interests in s 223(2) be amended? While each native title determination will 'turn on the facts' brought forward to establish native title, may there be value in developing an 'indicative listing' of commercial native title rights and interests? A suggested amendment to s 223(2) was drafted as:

> Without limiting subsection (1), ***rights and interests*** in that subsection includes:
>
> (a) hunting, gathering, or fishing, rights and interests; and
> (b) the right to trade and other rights and interests of a commercial nature. [172]

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169 *Western Australia v Ward* (2002) 213 CLR 1, [22] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
170 *Western Australia v Ward* (2002) 213 CLR 1.
171 *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth* (2013) 300 ALR 1, [6].
172 Native Title Amendment (Reform) Bill 2014 cl 19; Native Title Amendment (Reform) Bill (No 1) 2012 cl 19.

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

Learning from other jurisdictions

148. The question whether there is a commercial component to Indigenous people's rights to land and waters is a compelling issue in many comparative jurisdictions. It is raised also in the international sphere.[173] In New Zealand, there have been several claims to rights in waters with a commercial aspect[174] and cases seeking to establish commercial activities around a 'right to development'.[175] In Canada, there is a distinction drawn between Aboriginal rights and Aboriginal title. In 2013 the British Columbia Court of Appeal affirmed the existence of an Aboriginal commercial fishing right.[176] Major agreements and settlements with Indigenous Peoples often include a component that allows for commercial utilisation of land and waters.[177] Indigenous Australians also participate in general commercial ventures.[178] The following question seeks to draw on experience and approaches in other relevant jurisdictions.

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

149. The ALRC has been directed to inquire into whether there should be confirmation that 'connection with the land and waters' does not require physical occupation or continued or recent use. This section will consider how connection with land and waters is established, and the role of physical occupation, continued and recent use in establishing connection.

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173 For example, the Declaration provides that Indigenous peoples have the right to 'maintain and develop their political, economic and social systems or institutions ... and to freely engage in all their traditional and other economic activities': *United Nations Declaration on the Rights of Indigenous Peoples* A/RES/61/295 art 20.

174 Jacinta Ruru, 'Indigenous Restitution in Settling Water Claims: The Developing Cultural and Commercial Redress Opportunities in Aotearoa, New Zealand' (2013) 22 *Pacific Rim Law & Policy Journal* 342.

175 *Ngai Tahu Maori Trust Board v Director General of Conservation* [1995] 3 NZLR 553.

176 *Ashousaht Indian Band and Nation v Canada (A-G)* [2013] BCCA 300.

177 One of the most well known settlements is the 'Sealords deal', where compensation under a Waitangi Tribunal settlement facilitated purchase of shares in a commercial fishery on behalf of New Zealand Maori. See, Shane Heremaia, 'Native Title to Commercial Fisheries in Aotearoa/New Zealand' (2000) 4 *Indigenous Law Bulletin* 15.

178 For example, Indigenous Business Australia provides access to programs that help Indigenous Australians to take up investment opportunities and create business enterprises: Indigenous Business Australia, 'Annual Report 2012–2013'.

Establishing connection

150. The definition of native title in s 223 of the *Native Title Act* refers to interests in relation to land and waters possessed under traditional laws and customs where Aboriginal peoples or Torres Strait Islanders 'by those laws and customs, have a connection with the land or waters'. The phrase 'by those laws and customs' indicates that the 'connection' that must be shown is connection sourced in Aboriginal and Torres Strait Islander laws and customs.[179]

151. The High Court has said that 'the connection which Aboriginal peoples have with country is essentially spiritual'.[180] It includes both the obligation to care for country and the right to speak for country.[181] The connection can also be cultural or social.[182]

152. Under Aboriginal and Torres Strait Islander laws and customs, people are connected with land or waters by their knowledge of ceremony, song, dance and body painting[183] and their knowledge of the land and the Dreamtime beings that created the land.[184] Evidence of this connection may be given in native title proceedings by performing ceremonies and making inspections of significant sites.[185] Language also connects communities with land or waters.[186]

153. Many Aboriginal and Torres Strait Islander people do not currently physically occupy the land or waters that are the subject of a native title claim, and may not have continuously or recently used them. The absence from the land may be a result of the actions of colonial governments and settlers, of twentieth century government policies of forced removal and resettlement on reserves,[187] the need to make a living elsewhere, or a voluntary decision by an individual to live at a distance from the land. Of those people who do occupy or use the land, they may not necessarily occupy or regularly visit all areas of the land. In relation to waters, regular use of all areas might not be expected.

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179 See the section 'The concept of connection in native title law'.

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

181 Ibid.

182 *Yanner v Eaton* (1999) 201 CLR 351, [373].

183 Grace Koch, 'We Have the Song, So We Have the Land: Song and Ceremony as Proof of Ownership in Aboriginal and Torres Strait Islander Land Claims' (AIATSIS Research Discussion Paper 33, AIATSIS, July 2013) 8–10.

184 Graeme Neate, '"Speaking for Country" and Speaking About Country: Some Issues in the Resolution of Indigenous Land Claims in Australia' (Paper Presented at Joint Study Institute, Sydney, 21 February 2004) 65–68.

185 Ibid; Grace Koch, 'We Have the Song, So We Have the Land: Song and Ceremony as Proof of Ownership in Aboriginal and Torres Strait Islander Land Claims' (AIATSIS Research Discussion Paper 33, AIATSIS, July 2013) 23.

186 *Ward v Western Australia* (1998) 159 ALR 483; Grace Koch, 'We Have the Song, So We Have the Land: Song and Ceremony as Proof of Ownership in Aboriginal and Torres Strait Islander Land Claims' (AIATSIS Research Discussion Paper 33, AIATSIS, July 2013) 38.

187 For example, *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* (2007) 238 ALR 1, [1119]–[1123]; *Wyman on behalf of the Bidjara People v Queensland (No 2)* [2013] FCA 1229 (6 December 2013) [518]–[519].

154. For some Aboriginal peoples, particularly those who live in arid and marginal areas, periodic absence may have been a normal part of the relationship with land, and may not indicate a loss of connection.[188]

155. The next section considers how evidence regarding the occupation and use of land is relevant to the establishment of native title rights and interests.

Physical occupation, continued or recent use, and connection

156. In *Western Australia v Ward* (*'Ward FFC'*)[189] the Full Federal Court considered whether connection with land and waters could be maintained in the absence of physical presence. The Court concluded that, while actual physical presence provides evidence of connection, it is not essential. The essential feature of connection is acknowledgment and observance of traditional laws and customs. The Court stated that

> Acknowledgment and observance may be established by evidence that traditional practices and ceremonies are maintained by the community, insofar as that is possible, off the land, and that ritual knowledge including knowledge of the Dreamings which underlie the traditional laws and customs, continue to be maintained and passed down from generation to generation. Evidence of present members of the community, which demonstrates a knowledge of the boundaries to their traditional lands, in itself provides evidence of continuing connection through adherence to their traditional laws and customs.[190]

157. On appeal, the High Court noted that s 223 'is not directed to how Aboriginal peoples use or occupy land or waters', although the way in which land and waters are used may be evidence of the kind of connection that exists.[191] The Court confirmed that the absence of evidence of recent use, occupation or physical presence does not mean that there is no connection with the land or waters.[192]

158. In *De Rose v South Australia (No 2)* (*'De Rose (No 2)'*) the Full Court of the Federal Court confirmed that

> It is possible for Aboriginal peoples to acknowledge and observe traditional laws and customs throughout periods during which, for one reason or another, they have not maintained a physical connection with the claim area. Of course, the length of time during which the Aboriginal peoples have not used or occupied the land may have an important bearing on whether traditional laws and customs have been acknowledged and observed. Everything will depend on the circumstances.[193]

159. The Court in *De Rose (No 2)*, as in *Ward FFC*, indicated that the relevant question is whether the claimant group has continued to acknowledge and observe its

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188 Peter Veth, '"Abandonment" or Maintenance of Country? A Critical Examination of Mobility Patterns and Implications For Native Title' (Paper Presented at Native Title Conference, Geraldton, 2002) 4–5.
189 *Western Australia v Ward* (2000) 99 FCR 316.
190 Ibid [243].
191 *Western Australia v Ward* (2002) 213 CLR 1, 65. [65].
192 Ibid.
193 *De Rose v South Australia (No 2)* (2005) 145 FCR 290, [62].

traditional laws and customs 'on which it relies to establish possession of native title rights and interests'.[194]

160. Continued or recent use took on a particular importance in the case of *Akiba*, a claim over a large area of sea in the Torres Strait. The trial judge found that connection with waters had been established in relation to the main area of the claim, but not at the extremities of the claim, described as Areas 1, 2, 3 and 4. Regarding Areas 2, 3 and 4, Finn J said that 'there is no evidence of use of, or connection to, those areas'.[195] On appeal, the Full Federal Court also placed weight on the absence of evidence of use of these areas, and concluded that the trial judge was not in error on this point.[196]

Physical occupation and the identification of native title rights and interests

161. A determination of native title must include a determination of the nature and extent of the native title rights and interests in the area.[197] Physical occupation, and continued or recent use may be relevant to proving the particular rights and interests possessed under traditional laws and customs. The content of native title is a question of fact, to be determined on a case by case basis.[198] Evidence of physical possession, occupation and use could be relevant to the question of whether the rights and interests include a right to exclude others,[199] or other rights. For example, in *Banjima*, the Court said:

> There is ample evidence to show that hunting and the taking of fauna in customary ways continues today. Similarly, the customary practice of gathering and taking flora is well established historically and presently. The right to take fish is the subject of less contemporary evidence, but the right to take fish in the claim area is still exercised and clearly established as a right possessed by the claimants both historically and presently. It is not a right or activity that the evidence suggests has been abandoned. Similarly the right to take stones, timber, ochre and water is another right possessed by the claimants even though the evidence of current exercise of those rights is relatively limited.[200]

162. The courts have repeatedly emphasised that, while the exercise of native title rights and interests is 'powerful evidence' of the existence of those rights, the ultimate question concerns possession of rights, not their exercise.[201]

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194 Ibid [64].
195 *Akiba v Queensland (No 3)* (2010) 204 FCR 1, [664], [684].
196 *Commonwealth v Akiba* (2012) 204 FCR 260, [114].
197 *Native Title Act 1993* (Cth) s 225.
198 *Western Australia v Ward* (2000) 99 FCR 316, 58; *Yarmirr v Northern Territory* (1998) 82 FCR 533, [16]; *Wik v Queensland* (1996) 187 CLR 1, 169; *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 58, 61.
199 *Banjima People v Western Australia (No 2)* [2013] FCA 868 (28 August 2013) [686], [693].
200 Ibid [775].
201 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [84]; *Neowarra v Western Australia* [2003] FCA 1402 (8 December 2003) [40]; *Rubibi Community v Western Australia (No 5)* [2005] FCA 1025 (29 July 2005) [21]; *Banjima People v Western Australia (No 2)* [2013] FCA 868 (28 August 2013) [386].

Other references to physical occupation or use

163. The *Native Title Act* includes other provisions that raise issues of physical occupation or recent use.

164. First, s 62 sets out the requirements for a claimant application for determination of native title. In 1997, this provision was amended to provide that the application may contain details of any 'traditional physical connection with any of the land or waters covered by the application' that is held by any member of the native title claim group.[202] If any member of the native title claim group has been prevented from gaining access to land and waters, details of those circumstances may also be included in the claim.[203]

165. Secondly, since 1998,[204] the registration test[205] has required the Registrar to be satisfied that the factual basis exists to support the assertion that the native title claim group has an association with the area.[206] The native title claim group must show an association with the entire area claimed, but the association can be physical or spiritual.[207]

166. The registration test in s 190B also requires the native title claim group to show that at least one member of the native title claim group has or previously had a 'traditional physical connection' with a part of the land or waters covered by the application, or would have had such a connection if not for things done by the Crown, a statutory authority or a leaseholder.[208] 'Traditional physical connection', in this instance, means that the connection is in accordance with the laws and customs of the group.[209]

167. The Native Title Amendment (Reform) Bill 2011 proposed amendments to s 223 relating to the meaning of traditional law and custom. These involved amendments to insert the following:

> To avoid doubt, and without limiting subsection (1), it is not necessary for a connection with the land or waters referred to in paragraph (1)(c) to be a physical connection.[210]

168. The ALRC invites comment as to how issues concerning physical occupation, or continued or recent use, arise in relation to connection requirements, and whether any changes to the law are needed in this regard.

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202 *Native Title Act 1993* (Cth) s 62(1)(c)(i).
203 Ibid s 62(1)(c)(ii).
204 *Native Title Amendment Act 1998* (Cth).
205 The *Native Title Act* establishes a Register of Native Title Claims and sets out conditions for registration. If a claim satisfies all of the conditions, it must be entered in the Register. The native title claim group then is entitled to certain rights, including the right to negotiate.
206 *Native Title Act 1993* (Cth) s 190B(5).
207 *Martin v Native Title Registrar* [2001] FCA 16 (19 January 2001) [26]; *Corunna v Native Title Registrar* [2013] FCA 372 (24 April 2013).
208 *Native Title Act 1993* (Cth) s 190B(7).
209 *Gudjala People No 2 v Native Title Registrar* [2007] FCA 1167 (7 August 2007) [89].
210 Native Title Amendment (Reform) Bill 2011 cl 13.

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'

169. The Terms of Reference direct the ALRC to consider options for reform of the requirement that acknowledgment of traditional laws and observance of traditional customs must have continued 'substantially uninterrupted' by each generation since sovereignty. The ALRC is specifically directed to inquire into whether there should be 'empowerment of courts to disregard substantial interruption or change in continuity of acknowledgment and observance of traditional laws and customs where it is in the interests of justice to do so'.[211]

170. This section gives an overview of the interpretation of s 223 of the *Native Title Act* and relevant case law on 'continuity' and 'substantial interruption'. For native title to be established, continuity is required in the acknowledgment of law and observance of custom.[212] This section also outlines limitations identified by some commentators, and some possible reform options.

Establishing law and custom that is 'substantially uninterrupted'

171. The Full Court of the Federal Court in *Sampi* observed that native title applications must be grounded in a particular native title claim group's history, beliefs and practices. Accordingly, '[t]he circumstances of each native title application are different'.[213] The requirement for native title claimants to establish that the acknowledgment of their traditional laws and the observance of their traditional customs has continued substantially uninterrupted by each generation since sovereignty has caused particular difficulty for claimants in some parts of Australia.[214] As European settlement occurred at different times, in different ways and with differing results across the country, a view has been raised that

> the greater the adoption of modern technology and life-styles (including education, welfare and health services) the greater the chance that a court will find that

211 The requirement in the case law uses the term 'substantially uninterrupted' whereas the Terms of Reference refer to 'substantial interruption'.

212 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

213 *Sampi on behalf of the Bardi and Jawi People v Western Australia* (2010) 266 ALR 537, [71].

214 See earlier section, 'The meaning of "traditional"'.

> traditional laws and customs have been abandoned, and that native title has been lost.[215]

172. Generally speaking, the case law tends to reflect this pattern. In many instances where claimants have not been able to establish continuity of acknowledgment of law and observance of custom due to 'substantial interruption', the claims are in closer proximity to areas of concentrated settlement. By contrast, there are other cases, such as *Alyawarr* (a claim for land and waters south-east of Tennant Creek in the Northern Territory) where the traditional laws and customs observed by the claimants were found to have continued substantially uninterrupted since sovereignty because '[t]he evidence to that effect was strong'.[216]

173. The ALRC is interested in hearing from stakeholders about whether there are any problems 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, and what are these problems.

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?

Overview of the case law

174. Neither the term 'continuity' nor 'substantial interruption' is used in s 223(1) of the *Native Title Act*. Rather, the need for native title applicants to demonstrate that, since sovereignty, acknowledgment of their traditional laws and observance of their traditional customs has continued 'substantially uninterrupted' stems from the High Court's construction of s 223(1)(a) in *Yorta Yorta*.[217] It has been argued that this approach is not radically different from that taken in *Mabo [No 2]*,[218] where Brennan J stated:

> when the tide of history has washed away any real acknowledgment of traditional law and real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition.[219]

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215 John Basten QC, 'Beyond Yorta Yorta' (2003) 2 *Land, Rights, Laws: Issues of Native Title* 6–7. Note that the author was referring to this view, not necessarily expressing an opinion on it. Other commentators have remarked that the High Court's decision in *Yorta Yorta* 'would appear to have reduced the likelihood of success of native title claims located in areas that have been most affected by colonisation': LexisNexis, *Native Title Service* (at Service 91) [1439].

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

217 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

218 John Basten QC, 'Beyond Yorta Yorta' (2003) 2 *Land, Rights, Laws: Issues of Native Title*, 4.

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

Continuity of acknowledgment and observance of traditional laws and customs required

175. In their appeal to the High Court, the native title claimants in *Yorta Yorta* contended that the primary judge and the majority of the Full Court of the Federal Court had been wrong to hold that their native title claim, over an area of land and waters in northern Victoria and southern New South Wales, had 'failed without positive proof of continuous acknowledgment and observance of the traditional laws and customs'.[220] The majority of the High Court dismissed the appeal, holding that continuity of acknowledgment and observance is a requirement for establishing native title.[221] The claim by members of the Yorta Yorta Aboriginal community failed as there was no evidence that the claimants had continued to acknowledge and observe the traditional laws and customs, that constituted them as a normative society.[222]

176. Gleeson CJ, Gummow and Hayne JJ observed that the continuity of the acknowledgment of the traditional laws and observance of the traditional customs (together, 'the normative rules')[223] is determinative:

> acknowledgment and observance of those laws and customs must have continued substantially uninterrupted since sovereignty. Were that not so, the laws and customs acknowledged and observed *now* could not properly be described as the *traditional* laws and customs of the peoples concerned. That would be so because they would not have been transmitted from generation to generation of the society for which they constituted a normative system giving rise to rights and interests in land as the body of laws and customs which, for each of those generations of that society, was the body of laws and customs which in fact regulated and defined the rights and interests which those peoples had and could exercise in relation to the land or waters concerned.[224]

177. Accordingly, if the normative society is found to no longer exist, this break in continuity means there can be no determination of native title.

Continuity—not absolute, but a high hurdle?

178. Continuity in acknowledgment and observance of the normative rules from sovereignty to the present need not be absolute in order to meet the requirement. Gleeson CJ, Gummow and Hayne JJ stated that

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220 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [74]. At trial, the native title claimants had sought to establish that '"there was a connection between the native title rights and interests which they claimed to possess with the traditions and customs of Aboriginal society *as those traditions and customs existed before European settlement*." One of the ways this connection was said to be established was by "the existence of a *continuing* system of custom and tradition."' However, between the trial and the appeal to the Full Court of the Federal Court, there was a 'marked shift' in the case which the claimants sought to make. Ibid [20], [25].

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

222 Ibid [95]–[96].

223 Ibid [88].

224 Ibid [87].

> some interruption of enjoyment or exercise of native title rights or interests in the period between the Crown asserting sovereignty and the present will not *necessarily* be fatal to a native title claim.[225]

179. *Yorta Yorta* has been described as producing 'a discernible hardening of the arteries of the *Native Title Act*'.[226] The need to establish continuity—in its different senses[227]—for a determination of native title has attracted criticism on a number of grounds.

180. The Australian Human Rights Commission suggests that '[t]he application of the tests for continuity, derived from *Yorta Yorta* ... has had a detrimental effect on native title claims'.[228]

181. The Aboriginal and Torres Strait Islander Social Justice Commissioner has remarked:

> Although referring to the text of s 223 as the basis for its decision, the majority in *Yorta Yorta* made a policy choice, although not expressly, in favour of a restricted entitlement to a determination of native title.[229]

182. The Commissioner has observed that 'there is little room to raise past injustice as a counter to the loss of, or change in, the nature of acknowledgment of laws or the observance of customs'.[230]

183. Others identify a tension in the nature of the recognition of native title. The way in which recognition is conceived as an intersection between two normative systems means that there is 'no room for a parallel system of Indigenous governance'.[231]

184. When considering whether there has been continuity of acknowledgment of traditional laws and observance of traditional customs, courts have, since *Yorta Yorta*, inquired whether that acknowledgment and observance has continued 'substantially uninterrupted'.

'Substantially uninterrupted'

185. The qualification 'substantially' is important in 'substantially uninterrupted'. In *Yorta Yorta* two reasons were given for why the qualification 'must be made'.[232] First, in order to recognise the great difficulty of proving continuous acknowledgment and observance of oral traditions over the many years since sovereignty. Secondly, to recognise the 'most profound effects' of European settlement on Aboriginal societies.

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225 Ibid [83].
226 Paul Finn, '*Mabo* into the Future: Native Title Jurisprudence' (2012) 8 *Indigenous Law Bulletin* 5, 6.
227 See earlier discussion of 'continuity' in the section 'Presumption of continuity'.
228 Australian Human Rights Commission, Submission No 24 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, August 2011.
229 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2009' (Australian Human Rights Commission, 2009) 86.
230 Ibid 87.
231 John Basten QC, 'Beyond Yorta Yorta' (2003) 2 *Land, Rights, Laws: Issues of Native Title*, 5.
232 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [89].

This means that it is 'inevitable that the structures and practices of those societies, and their members, will have undergone great changes'.[233]

186. Yet 'the inquiry about continuity of acknowledgment and observance does not require consideration of why, if acknowledgment and observance stopped, that happened'.[234] If the requirement is not met, then 'examining why that is so is important *only* to the extent that the presence or absence of reasons might influence the fact-finder's decision about whether there was such an interruption'.[235] In *Bodney v Bennell*, the Full Court of the Federal Court remarked that, '[w]e understand the last sentence of that passage to be a reference back to the expression "substantially uninterrupted"'.[236]

187. With respect to how change in acknowledgment or observance is to be dealt with, the Court in *Bodney v Bennell* stated:

> European settlement is what justifies the expression 'substantially uninterrupted' rather than 'interrupted'. It explains why it is that the common law will recognise traditional laws and customs that are not exactly the same as they were at settlement. But if ... there has been a substantial interruption, it is not to be mitigated by reference to white settlement. The continuity enquiry does not involve consideration of *why* acknowledgment and observance stopped.[237]

188. Recognising that the concept of 'traditional' is fundamental to defining the threshold of entitlement with respect to native title, the Court in *Bodney v Bennell* continued:

> If this were not the case, a great many Aboriginal societies would be entitled to claim native title rights even though their current laws and customs are in no meaningful way traditional.[238]

Define 'substantial interruption'?

189. In the 'Native Title Report 2009', the Aboriginal and Torres Strait Islander Social Justice Commissioner recommended legislative amendments to address the courts' inability to consider the reasons for interruptions in continuity that establish connection.[239] The Commissioner suggested that 'a definition or a non-exhaustive list of historical events' could be provided in the *Native Title Act* in order 'to guide courts as to what should be disregarded'. Two possible examples were given: the forced removal of children and the relocation of communities onto missions.[240] Other examples may be relevant.

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233 Ibid.
234 Ibid [90].
235 Ibid.
236 *Bodney v Bennell* (2008) 167 FCR 84, [96].
237 Ibid [97].
238 Ibid.
239 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2009' (Australian Human Rights Commission, 2009) 87.
240 Ibid.

190. The ALRC is interested in views on whether the phrase 'substantial interruption' should be defined in the *Native Title Act*.

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?

The 'generation by generation' test of native title

191. The Full Court's decision in *Risk v Northern Territory*[241] can be seen as authority for the proposition that the acknowledgment and observance of the laws and customs must have continued substantially uninterrupted by each generation since sovereignty.[242]

192. The 'generation by generation' test was also discussed in *Bodney v Bennell*, which concerned the Noongar people's claim over an area of land and waters in the south-west of Western Australia, including the area in and around Perth.

193. At first instance, the trial judge had determined—subject to matters of extinguishment—that the native title claimants held native title rights over the claim area.[243] On appeal, the Full Court overturned this finding, stating that the correct question is 'whether the laws and customs have continued to be acknowledged and observed substantially uninterrupted by each generation since sovereignty'.[244]

194. The application of the 'generation by generation' test of native title in *Bodney v Bennell* prompted calls for reform as there was a 'perception that the courts had again imposed greater strictures on the requirements of proof'.[245]

Revitalisation of laws and customs

195. *Risk v Northern Territory* concerned the Larrakia[246] people's claim over certain land and waters, including part of metropolitan Darwin and its surrounds. At first instance, the application for a determination of native title was dismissed.[247] The Court found that

> A combination of circumstances has, in various ways, interrupted or disturbed the presence of the Larrakia people in the Darwin area during several decades of the 20th Century in a way that has affected their continued observance of, and enjoyment of, the traditional laws and customs of the Larrakia people that existed at sovereignty.[248]

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241 *Risk v Northern Territory* (2007) 240 ALR 74.
242 See earlier section, 'The meaning of "traditional"' for the origins of the test in *Yorta Yorta*.
243 See *Bennell v Western Australia* (2006) 153 FCR 120.
244 *Bodney v Bennell* (2008) 167 FCR 84, [73].
245 Lisa Strelein, *Compromised Jurisprudence: Native Title Cases since Mabo* (Aboriginal Studies Press, 2nd ed, 2009) 114.
246 Both the judgments at trial and on appeal referred to 'Larrakia' as encompassing all the relevant applicants.
247 *Risk v Northern Territory* [2006] FCA 404 (29 August 2006) [840].
248 Ibid [812].

196. The Court specifically referred to a lack of evidence about the passing on of knowledge of the traditional laws and customs from generation to generation during much of the twentieth century.[249] Accordingly, the Court did not find that current laws and customs were 'traditional' in the sense required by s 223(1) of the *Native Title Act*.[250] There was a finding that there had been a substantial interruption in the 'practice' of the traditional laws and customs.[251]

197. On appeal, the Larrakia people argued that the trial judge had mis-applied *Yorta Yorta*.[252] The Full Court found it had been clear on the evidence that there had been a substantial interruption[253] and that no error had been shown.[254]

198. Concerns have been raised about the Larrakia case as '[a] break in continuity of traditional laws and customs for just a few decades was sufficient for the court to find that native title did not exist'.[255] This was despite a finding by the trial judge that

> The Larrakia community of today is a vibrant, dynamic society, which embraces its history and traditions. This group of people has shown its strength as a community, able to re-animate its traditions and customs … [256]

199. For some, revitalisation of Indigenous laws and customs is clearly outside the bounds of what can be recognised as native title.[257] However, others view the construction of native title, specifically with respect to substantial interruption, as creating 'insurmountable barriers to cultural resurgence'.[258] A view has been expressed that 'a comparatively minimal interruption' to the sharing of culture across the claimant group should not prevent recognition of native title.[259]

Decisions in other cases

200. There are other cases where the relevant State has contended that the chain of possession since sovereignty has been broken by a substantial interruption in the acknowledgment of traditional laws and the observance of traditional customs but where the relevant court has found there to be no substantial interruption.[260]

201. In *Banjima*, which concerned a claim over land and waters in the east Pilbara region of Western Australia, the Full Court of the Federal Court stated that the

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249 Ibid [823].
250 Ibid [834]. See earlier section, 'The meaning of "traditional"'.
251 Ibid [835], [839].
252 *Risk v Northern Territory* (2007) 240 ALR 74, [25]. See also [73]–[75].
253 Ibid [83].
254 Ibid [98].
255 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2009' (Australian Human Rights Commission, 2009) 86. 'His Honour found that the laws acknowledged and customs observed by Larrakia as a whole were interrupted between the war and the 1970s': *Risk v Northern Territory* (2007) 240 ALR 74, [106].
256 *Risk v Northern Territory* [2006] FCA 404 (29 August 2006) [530].
257 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 60 (Brennan J).
258 Commonwealth, *Parliamentary Debates*, Senate, 21 March 2011, 1303 (Rachel Siewert).
259 Ibid.
260 See, eg, *Banjima People v Western Australia (No 2)* [2013] FCA 868 (28 August 2013).

evidence showed that there had been no substantial interruption of the connection of the Banjima with their country, over that time, by their laws and customs:

> No doubt, as the evidence discloses, the introduction of pastoral industry in the 1880s had a real impact on the way in which the Banjima lived their lives and that they were obliged to adapt to accommodate those impacts, but that does not mean, and the evidence does not disclose, that the connection of the Banjima, by their laws and customs, with their traditional country was substantially interrupted between the 1880s and today.[261]

202. Rather, the Court found that:

> They knew who they were, they spoke their own language and they inculcated their children and grandchildren in the traditional ways of the Banjima. Practice of the ritual and ceremonial laws of the Banjima did not cease.[262]

203. The Court found that there had been continuity of the acknowledgment and observance of the traditional laws and customs.

204. The ALRC seeks comment on whether, and how, the *Native Title Act* should be amended to address substantial interruption and change in continuity of acknowledgment and observance of traditional laws and customs that establish native title.

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?

Options for reform

205. The Terms of Reference direct the ALRC to consider at least one possible reform proposal—the empowerment of courts to disregard substantial interruption or change in continuity of acknowledgment and observance of traditional laws and customs where it is in the interests of justice to do so.

206. The 'empowerment' of courts suggests the conferral of discretion;[263] however, a model previously proposed constituted more of a direction to courts.[264] 'In the interests of justice' is a broad phrase so similarly could be implemented in varying ways.

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261 Ibid [398].

262 Ibid [399].

263 See Native Title Amendment (Reform) Bill 2014 cl 14. See also Native Title Amendment (Reform) Bill (No 1) 2012 cl 14. Proposed new s 61AB relevantly provides, 'A court may determine that subsection 223(1) has been satisfied, despite finding that there has been: (a) a substantial interruption in the acknowledgment of traditional laws or the observance of traditional customs; ... if the primary reason for the substantial interruption ... is the action of a State or a Territory or a person or other party who is not an Aboriginal person or a Torres Strait Islander'.

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

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?

207. The options for reform discussed above may overlap in a range of ways. For example, a presumption of continuity could be linked to a power given to the Court to disregard substantial interruption.[265] Further, definition of the meaning of traditional laws and customs may have an impact on the nature of native title rights and interests that can be recognised.

208. The ALRC is interested in views about the possible inter-relationship between the reform options discussed above, as well as any other changes that should be made to the law and legal frameworks relating to connection requirements for the recognition and scope of native title.

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

209. The Terms of Reference ask the ALRC to consider whether any barriers are imposed by the Act's authorisation provisions to claimants', potential claimants' and respondents' access to justice. Access to justice includes access to courts and lawyers, but also information and support to prevent, identify and resolve disputes.[266] In the context of native title law and legal frameworks, the ALRC considers that access to justice encompasses both procedural rights and access to the resources necessary to participate fully in the legal system.

210. This section of the Issues Paper outlines the law and practice relating to authorisation, and asks whether changes should be made to these procedures.

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265 See, eg, Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2009' (Australian Human Rights Commission, 2009) 87; Native Title Amendment (Reform) Bill 2011 cl 12.

266 Attorney-General's Department, 'A Strategic Framework for Access to Justice in the Federal Civil Justice System' (2009).

What is authorisation?

211. The authorisation provisions were introduced into the *Native Title Act* in 1998.[267] Before this, any member of a claim group could apply for a determination of native title, which resulted in large numbers of conflicting and overlapping claims. Now, to make an application for a determination of native title, a person or group of people must be authorised by all the people who hold the native title claimed.[268] The person or group of people is known as 'the applicant', and the people who hold the native title are known as 'the native title claim group'.

212. Similarly, to make an application for compensation,[269] a person or group of people must be authorised by all the people who claim to be entitled to the compensation. The person or group of people is 'the applicant', and the people who claim to be entitled to the compensation are 'the compensation claim group'. The discussion in this section of the Issues Paper refers to both native title claims and compensation claims, unless otherwise indicated.

213. The process for authorising an application is set out in s 251B. If the claim group has a traditional decision-making process that must be complied with in relation to authorising similar matters, the group must use that process. Otherwise, the group can use a process of decision-making agreed to and adopted by the group.[270] Susan Phillips has described this scheme as 'troubling', because it requires a group, when seeking recognition of rights and interests possessed under traditional laws and customs, to admit that it does not have a traditional decision-making process for 'things of that kind'.[271]

214. The *Native Title Act* does not require all members of a claim group to participate in the decision-making process. It is sufficient if all members have been given an opportunity to participate.[272] The decision by the participants does not need to be unanimous.[273]

215. Justice French described authorisation as

> a matter of considerable importance and fundamental to the legitimacy of native title determination applications. The authorisation requirement acknowledges the communal character of traditional law and custom which grounds native title.[274]

216. A claim cannot be registered unless the Registrar is satisfied that the applicant is authorised to make the application, or that the representative body has certified that the applicant is authorised.[275]

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267 *Native Title Amendment Act 1998* (Cth).
268 *Native Title Act 1993* (Cth) s 61.
269 The *Native Title Act* provides for compensation for the extinguishment or impairment of native title arising from validation of certain past, intermediate or future acts in Pt 2 Div 5.
270 *Native Title Act* s 251B.
271 Susan Phillips, 'The Authorisation Trail' (2000) 4 *Indigenous Law Bulletin* 13.
272 *Lawson on behalf of the 'Pooncarie' Barkandji (Paakantyi) People v Minister for Land and Water Conservation (NSW)* [2002] FCAFC 1517 (9 December 2002) [25].
273 Ibid.
274 *Strickland v Native Title Registrar* (1999) 168 ALR 242, [57].
275 *Native Title Act 1993* (Cth) s 190C.

217. The ALRC seeks views on whether these provisions are effective in ensuring that claims are made by applicants who have the approval of the claim group. The ALRC is also interested in views as to whether the claim group should be able to adopt a decision-making process of its choice.

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?

The process of authorisation

Identifying the claim group

218. Before a claim can be authorised, the claim group must be identified. The native title claim group is all the persons 'who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed'.[276] In the case of a compensation claim, the claim group is 'all the persons ... who claim to be entitled to the compensation'.[277] As noted earlier, the courts have indicated that the native title claim group must be 'a recognisable group or society that presently recognises and observes traditional laws and customs'.[278] The application for a native title determination or compensation must either name the members of the claim group or 'otherwise describe the persons sufficiently clearly so that it can be ascertained whether any particular person is one of those persons'.[279]

219. In some communities, identifying the claim group is a straightforward task. In others, there are significant difficulties. One source of difficulty is the legal requirement that a claim group be a discrete entity with clear rules for membership.[280] This is not consistent with the complex nature of Aboriginal and Torres Strait Islander societies, which (like non-Indigenous societies) do not always have definite

276 Ibid s 61.
277 Ibid.
278 *Dodd v South Australia* [2012] FCA 519 (22 May 2012) [24].
279 *Native Title Act 1993* (Cth) s 61(4).
280 Ibid; *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* (2007) 238 ALR 1, [3741].

boundaries.[281] People may identify with different groups based on economic or ritual activity, kin relationship or language.[282] Kingsley Palmer has noted that 'the social units that comprise Aboriginal groups are not easily or simply identified'.[283]

220. A second source of difficulty in identifying claim groups is the impact of colonisation. Forcible exclusion from land, confinement on reserves, discouragement of language and the removal of children all had drastic effects on the social organisation of Aboriginal and Torres Strait Islander people.[284] A group may continue to observe traditional laws and customs, but also have difficulty identifying its membership because of these disruptions.

221. Before an authorisation process can occur, decisions must be made about the correct 'recognition level' for framing the group. For example, should the claim group be framed as a clan or estate group, a society or a 'cultural bloc'?[285] Usually a 'sub-group' of a larger community cannot hold native title,[286] but there are exceptions.[287] The question of whether a group comprises a society, with its own laws and customs, rather than a sub-group, is not always easily answered.[288]

222. An Aboriginal or Torres Strait Islander community may be made up of people who can trace ancestral links to country back to pre-sovereignty times. It may also include people with a historical connection to land—that is, their parents or grandparents may have moved into the area, become part of the community, and observed its laws and customs. In some communities, under traditional laws and customs, 'historical people' are native title holders and are included in the claim group.[289] In other communities, only those with ancestral connection may be included.[290] These are complex issues with considerable potential to cause disputes within groups, as well as misunderstanding within the Australian legal system.

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281 Kingsley Palmer, 'Societies, Communities and Native Title' (2009) 4 *Land, Rights, Laws: Issues of Native Title* 7; Daniel Lavery, 'The Recognition Level of the Native Title Claim Group: A Legal and Policy Perspective' (2004) 2 *Land, Rights, Laws: Issues of Native Title* 1; Toni Bauman, 'Whose Benefits? Whose Rights? Negotiating Rights and Interests Amongst Indigenous Native Title Parties' (2005) 3 *Land, Rights, Laws: Issues of Native Title* 1, 7.

282 Kingsley Palmer, 'Societies, Communities and Native Title' (2009) 4 *Land, Rights, Laws: Issues of Native Title* 7, 9.

283 Ibid.

284 For example *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* (2007) 238 ALR 1, [1119]–[1123]; *Wyman on behalf of the Bidjara People v Queensland (No 2)* [2013] FCA 1229 (6 December 2013) [518]–[519].

285 Daniel Lavery, 'The Recognition Level of the Native Title Claim Group: A Legal and Policy Perspective' (2004) 2 *Land, Rights, Laws: Issues of Native Title* 1.

286 *Risk v National Native Title Tribunal* [2000] FCA 1589 (10 November 2000); *Neowarra v Western Australia* [2003] FCA 1402 (8 December 2003) [384]–[398].

287 *Brown v South Australia* [2009] FCA 206 (12 March 2009) [19].

288 Kingsley Palmer, 'Societies, Communities and Native Title' (2009) 4 *Land, Rights, Laws: Issues of Native Title* 7, 14; Daniel Lavery, 'The Recognition Level of the Native Title Claim Group: A Legal and Policy Perspective' (2004) 2 *Land, Rights, Laws: Issues of Native Title* 1. See further section on 'The meaning of "traditional"'.

289 *Rubibi Community v Western Australia (No 7)* [2006] FCA 459 (28 April 2006).

290 Jocelyn Grace, 'Claimant Group Descriptions: Beyond the Strictures of the Registration Test' (1999) 2 *Land, Rights, Laws: Issues of Native Title* 1.

223. Finally, the identification of the members of the claim group is intrinsically linked to the identification of the boundaries of land claimed. Determining claim boundaries is complex where traditional laws and customs give rise to a 'complex regional relational and networked matrix of rights and interests'[291] which may include shared areas, or may tolerate inconsistent ownership claims.

224. Resolution of these (and other) difficult questions is necessary before the claim group can be confidently identified. The assistance of anthropologists and historians may be required, and it may take some time for their field work to be done and their reports prepared. However, claims are often lodged in response to notification of a proposed future act. People who claim to hold native title have three months from notification to file a claim, if they want to have the right to negotiate about the proposed future act.[292] In some circumstances, three months will be insufficient time for the community to resolve questions around membership of the claim group. The relevant native title representative body may not have available resources to immediately commit to the claim. A rushed process may result in disputes and litigation at later stages of the claim.

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?

Holding a meeting

225. The applicant for a claim is authorised at a meeting to which all members of the native title claim group have been invited. Notice of the meeting must be given to all members of the group, clearly indicating the nature of the business to be conducted.[293] This may be done by letter, notices in local newspapers, local radio, and television or via local Aboriginal community organisations.[294]

226. In *Ward v Northern Territory*[295] O'Loughlin J indicated that the following matters were relevant to the question of whether an application had been effectively authorised by the claim group:

> There is no information about that meeting. Who convened it and why was it convened? To whom was notice given and how was it given? What was the agenda for the meeting? Who attended the meeting? What was the authority of those who attended? Who chaired the meeting or otherwise controlled the proceedings of the meeting? By what right did that person have control of the meeting? Was there a list of attendees compiled, and if so by whom and when? Was the list verified by a second

291 Toni Bauman, 'Whose Benefits? Whose Rights? Negotiating Rights and Interests Amongst Indigenous Native Title Parties' (2005) 3 *Land, Rights, Laws: Issues of Native Title* 1, 6.
292 *Native Title Act 1993* (Cth) s 30.
293 *Weribone on behalf of the Mandandanji People v Queensland* [2013] FCA 255 (25 March 2013) [40].
294 Fred Tanner, 'Certification/Authorisation' (Paper Presented at National Native Title Tribunal Native Title Forum, Brisbane, 3 August 2001).
295 *Ward v Northern Territory* [2002] FCA 171 (8 February 2002).

> person? What resolutions were passed or decisions made? Were they unanimous, and if not, what was the voting for and against a particular resolution? Were there any apologies recorded?
>
> It may not be essential that these questions be answered on any formal basis such as in terms of the convening and conducting of a meeting in a commercial atmosphere, but the substance of those questions must be addressed.[296]

227. A notice of an authorisation meeting should give fair notice of the particular business to be considered, and should be clearly, simply and directly expressed.[297]

Problems arising after authorisation

Disputes and their resolution

228. During native title proceedings, disputes within the claim group may arise. Professor Larissa Behrendt and Dr Loretta Kelly have outlined a number of ways in which native title proceedings can trigger conflict between Indigenous people, including disagreements over the membership of the claim group, the boundaries of the claim area (which can be difficult to resolve when traditional law and custom allows for overlapping areas), and the decisions of the applicant or the representative body.[298] The essential difficulty may be the requirement to fit Indigenous relationships with land and waters into an imposed non-Indigenous framework.[299]

229. The adversarial system may cause disputes by framing claims as opposing or inconsistent when, under Aboriginal or Torres Strait Islander law and custom, the claims are related to each other and are overlapping.[300] The support of a non-Indigenous party for one side in a dispute is not always constructive.[301]

230. Disputes are characteristic of all property systems,[302] and it has been suggested that conflict 'is an indication of the continuing vigour of Aboriginal society'.[303] At the same time, disputes are causing serious harm to individuals, families and communities;[304] and being denied native title claim group membership causes great pain.[305]

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296 Ibid [24]–[25].
297 *Weribone on behalf of the Mandandanji People v Queensland* [2013] FCA 255 (25 March 2013).
298 Larissa Behrendt and Loretta Kelly, *Resolving Indigenous Disputes. Land Conflict and Beyond* (Federation Press, 2008) Ch 3.
299 Tony McAvoy and Valerie Cooms, 'Even as the Crow Flies It Is Still a Long Way: Implementation of the Queensland South Native Title Services Ltd Legal Services Strategic Plan' (Native Title Research Monograph No 2/2008, AIATSIS, June 2008) 6.
300 Mary Edmunds, 'Conflict in Native Title Claims' (1995) 1 *Land, Rights, Laws: Issues of Native Title* 6.
301 Ibid.
302 Sarah Burnside, 'Outcomes for All? Overlapping Claims and Intraindigenous Conflict Under the Native Title Act' (2012) 16 *Australian Indigenous Law Reporter* 1.
303 Mary Edmunds, 'Conflict in Native Title Claims' (1995) 1 *Land, Rights, Laws: Issues of Native Title* 6, 2.
304 Larissa Behrendt and Loretta Kelly, *Resolving Indigenous Disputes. Land Conflict and Beyond* (Federation Press, 2008), Ch 3; Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2011' (Australian Human Rights Commission, 2011) Ch 2.
305 Toni Bauman, 'Whose Benefits? Whose Rights? Negotiating Rights and Interests Amongst Indigenous Native Title Parties' (2005) 3 *Land, Rights, Laws: Issues of Native Title* 1, 7.

231. Representative bodies are responsible for promoting agreement and mediating between its constituents about the making of native title applications.[306] If these efforts are unsuccessful, one legal option is to replace the applicant as provided by s 66B. A member or members of the claim group may seek the authorisation of the claim group to apply for an order that the member or members replace the applicant, on the grounds that the applicant is no longer authorised or has exceeded its authority.

232. The ALRC is interested in views as to whether appropriate dispute resolution options are available to claim groups, and whether s 66B is working as intended.

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?

Where an applicant dies or is unable or unwilling to act

233. The s 66B procedure noted above is also available to a claim group wishing to replace an applicant on the grounds that a person who is the applicant, or is a member of the applicant, consents to his or her removal or replacement, or has died or become incapacitated.

234. In order to bring an application under s 66B, the member or members of the claim group must be authorised by the claim group to do so. Section 66B is 'directed to maintaining the ultimate authority of the native title claim group'.[307]

235. It is unclear whether an application to replace the current applicant must be made if a person who is a member of the applicant dies or is unable to act. There are decisions indicating that, in this situation, the applicant may continue to act.[308] These judgments refer to the significant expense and delay associated with further authorisation procedures.[309] For example, in one case the applicant estimated that the cost of holding a claim group meeting was $10,000–$20,000,[310] and in another case, $13,000.[311] There are other decisions indicating that if a member of the applicant dies, the applicant is no longer authorised and must return to the claim group for reauthorisation.[312] However, if the claim group originally authorised the applicant to continue, even if a member dies or is incapacitated, then no further authorisation is required.[313]

306 *Native Title Act 1993* (Cth) s 203BF.
307 *Daniel v Western Australia* [2003] FCA 666 (3 July 2003) [16].
308 *Lennon v South Australia* [2010] FCA 743 (16 July 2010) [22]; *Dodd on behalf of the Gudjala People Core Country Claim No 1 v Queensland* [2011] FCA 690 (17 June 2011) [17].
309 *Lennon v South Australia* [2010] FCA 743 (16 July 2010) [11]; *Dodd on behalf of the Gudjala People Core Country Claim No 1 v Queensland* [2011] FCA 690 (17 June 2011) [8].
310 *Sambo v Western Australia* (2008) 172 FCR 271, [6].
311 *PC on behalf of the Njamal People v Western Australia* [2007] FCA 1054 (17 August 2007) [22].
312 *Sambo v Western Australia* (2008) 172 FCR 271, [30]; *Murgha on behalf of the Combined Gunggandji Claim v Queensland* [2011] FCA 1317 (14 November 2011) [4].
313 *Coyne v Western Australia* [2009] FCA 533 (22 May 2009) [53]–[56].

236. Because a group often chooses elders to be members of the applicant, and native title claims are usually lengthy, the death of a member of the applicant is not infrequent. It has been suggested that a requirement for further authorisation places undue burden and expense on the claim group.[314] One alternative would be to allow the applicant to simply file a notice with the court indicating that a member of the applicant has died or is not longer willing to act. Another option would be to allow the claim group to appoint a corporation to represent the claim group.[315]

237. The ALRC is interested in views as to whether the *Native Title Act* should require an applicant to return to the claim group for authorisation if a member of the applicant dies or is unable or unwilling to act.

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?

Defects in authorisation

238. Until 2007, a defect in authorisation could be fatal to a claim,[316] and it was unclear whether the position could be cured by a later authorisation.[317] Section 84D of the *Native Title Act* was introduced to allow the court to hear and determine an application, even where there is a defect in authorisation.[318] The court may make an order requiring an applicant to produce evidence that it is authorised.[319] The court can make this order on its own motion, or on the application of a party or a member of a claim group.[320] If an applicant is not properly authorised, a court may, 'after balancing

314 Centre for Native Title Anthroplogy, ANU, Submission to the Australian Attorney-General's Department, *Review of the Native Title Act 1993—Draft Terms of Reference*, 2013; North Queensland Land Council, Submission to the Australian Attorney-General's Department, *Review of the Native Title Act 1993—Draft Terms of Reference*, 2013.

315 Tony McAvoy and Valerie Cooms, 'Even as the Crow Flies It Is Still a Long Way: Implementation of the Queensland South Native Title Services Ltd Legal Services Strategic Plan' (Native Title Research Monograph No 2/2008, AIATSIS, June 2008) 21.

316 *Moran v Minister for Land and Water Conservation (NSW)* [1999] FCA 1637 (25 November 1999) [47]–[48].

317 *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* (2007) 238 ALR 1, [1147].

318 Explanatory Memorandum, Native Title Amendment (Technical Amendments) Bill 2007.

319 *Native Title Act 1993* (Cth) 84D(1).

320 Ibid s 84D(2).

the need for due prosecution of the application and the interests of justice', hear and determine the application or make other orders.[321]

239. However s 84D is also used by members of claim groups to challenge the authorisation of the applicant, in the event of a dispute. Importantly, a person applying under s 84D does not need the authorisation of the claim group (unlike an application under s 66B).

240. The ALRC is interested in views as to whether s 84D is operating as intended.

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?

Other issues

Cost

241. The cost of authorisation proceedings is sometimes raised in relation to both the initial authorisation meetings and later proceedings under s 66B. Holding an authorisation meeting can be costly because claim group members may live at some distance from each other and from the land claimed. Expenses include notification and advertising, travel costs, accommodation, hiring a venue and meals. These costs are sometimes born by the representative body, sometimes by claim group members themselves, and sometimes by respondent parties.

242. John Southalan has suggested that, while authorisation proceedings can be 'time consuming, expensive and logistically challenging', they may be necessary to ensure that a determination, agreement or other settlement is understood and accepted by a community. He notes that both governments and industries have acknowledged that native title processes should make room for Indigenous community decision-making. Time and resources invested at the authorisation stage may serve to establish clear decision-making processes, develop trust between group members and avoid misunderstandings and disputes at later stages of the claim.[322]

243. The ALRC welcomes views as to whether the resourcing of authorisation processes is proportionate to the aim of ensuring that native title holders can participate in the decisions that affect them.

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321 Ibid s 84D(4).

322 John Southalan, 'Authorisation of Native Title Claims: Problems with a "Claim Group Representative Body"' (2010) 29 *Australian Resources and Energy Law Journal* 49, 57–58.

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?

Scope of authorisation

244. Section 62A of the *Native Title Act* provides that, once authorised, the applicant may deal with all matters arising under the Act in relation to the application.[323] This section is intended to ensure that those who deal with the applicant in relation to these matters can be assured that the applicant is authorised to do so.[324] The claim group may empower the applicant to deal with other matters (such as Indigenous Land Use Agreements (ILUAs)), but this power is based on the principal-agent relationship between the claim group and the applicant, and not on authorisation under the Act.[325]

245. It is not clear whether a claim group may authorise an applicant to act subject to restrictions. In one case, it was held that a claim group may authorise an applicant to act on the condition that those actions are in accordance with resolutions of the claim group.[326] In another case, the submission that a claim group may direct the applicant in the performance of its duties was rejected.[327]

246. A claim group may authorise an applicant to make decisions by majority.[328] However there is also some uncertainty as to whether an applicant may make decisions by majority when the terms of the authorisation are silent on the issue.[329]

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?

Applicants and ILUAs

247. Section 251A of the *Native Title Act* regarding the authorisation of ILUAs is similar to s 251B regarding the authorisation of an applicant. Section 251A provides that native title holders may authorise an agreement using a traditional decision-making

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323 *Native Title Act 1993* (Cth) s 62A.

324 Explanatory Memorandum, Native Title Amendment Bill 1998 25.41.

325 Tim Wishart, 'The Multifaceted Statutory Responsibilities Faced by Representative Body Lawyers and What This Could Mean For You' (Paper Presented at LexisNexis 4th Annual Native Title Summit, 2012) 15.

326 *KK (deceased) v Western Australia* [2013] FCA 1234 (13 November 2013) [87].

327 *Weribone on behalf of the Mandandanji People v Queensland* [2011] FCA 1169 (6 October 2011) [15].

328 *Anderson on behalf of the Wulli Wulli People v Queensland* (2011) 197 FCR 404, [62].

329 *Tigan v Western Australia* (2010) 188 FCR 533; Tim Wishart, 'The Multifaceted Statutory Responsibilities Faced by Representative Body Lawyers and What This Could Mean For You' (Paper Presented at LexisNexis 4th Annual Native Title Summit, 2012) 19–20.

process, or if no such process exists, using a process agreed to and adopted by the group. Sections 251A and 251B are interpreted in a consistent way by the courts.[330]

248. The Terms of Reference for this Inquiry specify that the ALRC is to consider whether the *Native Title Act*'s authorisation provisions impose barriers to access to justice on claimants, potential claimants or respondents. A person who authorises an ILUA is not necessarily a claimant or a potential claimant, so these Terms of Reference do not direct the ALRC to consider the authorisation of ILUAs. However the ALRC notes that it may be desirable for the two authorisation provisions to remain consistent.

Authorisation and joinder

249. This section of the Issues Paper has discussed two options for dealing with disputes regarding the authorisation of applicants—replacing the applicant under s 66B and challenging the authorisation of the applicant under s 84D. Another option for a member of a claim group who is dissatisfied with the action of an applicant or who considers that the applicant does not properly represent the claim group, is to join the proceedings as a respondent party. This option is discussed in the next section.

Joinder

250. The Terms of Reference for the Inquiry ask the ALRC to consider any barriers to access to justice for claimants, potential claimants and respondents imposed by the joinder provisions of the *Native Title Act*.

251. Native title proceedings differ from many other types of legal proceedings. Unlike, for example, a contractual dispute, where the parties bound by a court's decision are usually very limited in number, a native title determination is enforceable against the whole world.[331] Consequently, the *Native Title Act* provides mechanisms aimed at ensuring that persons who may be affected by or have a relevant interest in a determination in the proceedings, have an opportunity to be involved.

252. This section considers who can become a party, and asks whether these provisions should be reformed to remove any barriers to justice and improve the operation of native title laws and legal frameworks.

The legislation

253. Section 84 describes who is or may become a party to proceedings under the *Native Title Act*, and how parties may withdraw or be dismissed from proceedings. The provision applies in relation to native title determination applications (including non-claimant applications), revised native title determination applications and compensation applications.[332]

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330 *Fesl v Delegate of the Native Title Registrar* (2008) 173 FCR 150, [72].

331 Justice John Dowsett, 'Beyond Mabo: Understanding Native Title Litigation through the Decisions of the Federal Court' (2009) 10 *Federal Judicial Scholarship*.

332 *Native Title Act 1993* (Cth) s 61.

254. Most persons, other than the applicant and the Crown, become parties to native title proceedings by virtue of s 84(3).[333] That subsection provides that certain persons are a party if they notify the Federal Court of Australia in writing that they want to be a party.[334] They include persons:

- covered by any of subparagraphs s 66(3)(a)(i) to (vi); or
- who claims to hold native title in relation to land or waters in the area covered by the application; or
- whose interest, in relation to land and waters, may be affected by a determination in the proceedings.

255. Section 66(3)(a)(i) to (vi) refers to some of those persons and bodies, other than the applicant, whom the Registrar must notify of a claim. They are:

> (i) any registered native title claimant in relation to any of the area covered by the application; and
>
> (ii) any registered native title body corporate in relation to any of the area covered by the application; and
>
> (iii) any representative Aboriginal/Torres Strait Islander body for any of the area covered by the application; and
>
> (iv) subject to subsection (5),[335] any person who when the notice is given, holds a proprietary interest, in relation to any of the area covered by the application, that is registered in a public register of interests in relation to land or waters maintained by the Commonwealth, a State or Territory; and
>
> (v) the Commonwealth Minister; and
>
> (vi) any local government body for any of the area covered by the application.

256. Proceedings cannot substantively commence until the notification process, conducted by the National Native Title Tribunal, has concluded and the parties are known.

257. The joinder provision, s 84(5), allows the Court to join a person as a party to proceedings at any time, if the Court is satisfied that the person's interests may be affected by a determination and it is in the interests of justice to do so. Legal action may be well advanced when a person seeks to become a party under s 84(5).

258. The term 'joinder' is often used in discussions of native title procedure to describe both the s 84(3) method of becoming a party and s 84(5) applications to the

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333 The applicant and the relevant State or Territory Minister are also parties: Ibid ss 84(2),(4).

334 Notification to the Federal Court must be within the period specified in the notice given under s 66, or in the case of an amended application given under paragraph 66A(1A)(e), the period specified under that paragraph. Ibid s 84(3)(b).

335 The Registrar is not required to notify a person in accordance with s 66(3)(a)(iv) if the Registrar considers that in the circumstances it would be unreasonable to do so: Ibid s 66(5).

Court to be joined as a party. Discussions about joinder under s 84(5), whether judicial or otherwise, may consider other subsections of s 84.[336]

259. Rather than isolating issues that are only referable to s 84(5), this Issues Paper refers to some general issues to do with parties that continue to be raised in native title applications for determination and which have general relevance for joinder.

260. The original joinder provision, s 84(2), was in the following terms:

> A person may seek leave of the Federal Court to be joined as a party to proceedings if the person's interests are affected by the matter or may be affected by a determination in the proceedings.

261. The provision was amended by the *Native Title Amendment Act 1998* (Cth) and again by the *Native Title Amendment Act 2007* (Cth). The joinder provision, s 84(5), now reads:

> The Federal Court may at any time join any person as a party to proceedings, if the Court is satisfied that the person's interests may be affected by a determination in the proceedings and it is in the interests of justice to do so.

262. The 2007 amending Act also amended s 84(3)(a)(i) and (iii). A contemporaneous analysis of the effect of the changes to the party provisions concluded that 'there are likely to be fewer respondent parties in native title litigation, and that, therefore, the proceedings are more likely to be resolved by agreement and easier to manage in litigation'.[337]

Applications to join as a party under s 84(5)

263. In exercising its discretion to join a person as a party, the Court must first be satisfied that the person's interests may be affected by a determination. The meaning of the term 'interests that may be affected' was considered in the leading case *Byron Environment Centre Inc v Arakwal People*. Those interests may include a 'special, well-established non-proprietary connection with land or waters' but must be 'not indirect, remote or lacking substance'.[338] They must be 'capable of clear definition and ... be affected in a demonstrable way by a determination in relation to the application'. They do not extend to 'concerns solely of an emotional, conscientious, ideological or intellectual kind only'.[339]

264. A comparison of the position in relation to 'interests' as used in s 84(3) and s 84(5) was provided in *Kokatha Uwankara (Part A) Native Title Claim v South Australia*:

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336 See for example, *Butterworth v Queensland* (2010) 184 FCR 297.

337 Angus Frith and Ally Float, 'The 2007 Amendments to the *Native Title Act 1993* (Cth): Technical Amendments or Disturbing the Balance of Rights?' (Native Title Research Monograph 3, AIATSIS, November 2008) 76.

338 *Byron Environment Centre Inc v Arakwal People* (1997) 78 FCR 1, 6.

339 Ibid 7–8. The principles described in *Arakwal* continue to be applied: see, eg, *Cheinmora v Western Australia* [2013] FCA 727 (25 July 2013); *Kokatha Uwankara (Part A) Native Title Claim v South Australia* [2013] FCA 856 (30 August 2013).

> The 2007 amendments therefore provided for two categories of persons with 'interests' which may be affected by a determination to be able to become parties:
>
> (1) by s 84(3): those who have an interest in relation to land or waters in the claim area (as defined in s 253), and who give notice under s 84(3)(b); and
>
> (2) by s 84(5): those whose 'interests' may be affected by a determination, where the word 'interests' is not defined, but may include:
>
> (i) those who have an interest in relation to land or waters in the claim area, but did not give notice under s 84(3)(b);
>
> (ii) those who have a different (and probably lesser) interest or interests which may be affected by a determination.
>
> Those in the second category are subject to the Court's discretion as to whether they may be joined as parties.[340]

265. The 2007 amendment narrowed the meaning of 'interests' in s 84(3) to interests in land and waters. The amendment was expressly aimed at limiting party numbers.[341] It is possible that some persons who would previously have been notified and become parties under s 84(3), are now applying to be joined under s 84(5).

266. Over the five year period 2009–2013, 220 applications for joinder under s 84(5) were made to the Federal Court after the relevant notification period.[342] The great bulk of those applications—174, or approximately 80%—were made in matters concerning two jurisdictions, Queensland and Western Australia. There may be a variety of factors operating to produce this outcome, including the large number of claims made in these two jurisdictions.[343]

Aboriginal and Torres Strait Islander joinder applicants

267. Indigenous persons seeking to become respondent parties have consistently figured in cases concerning s 84(5) or its antecedents.[344] There appear to be three types of situations represented:

- a member (or members) of the claim group disputes matters, such as who has been authorised as the applicant, or the way in which a claim is being conducted;

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340 *Kokatha Uwankara (Part A) Native Title Claim v South Australia* [2013] FCA 856 (30 August 2013) [24].

341 Explanatory Memorandum, Native Title Amendment Bill 2006 (Cth) 4.123.

342 Figures provided by the Federal Court of Australia, December 2013.

343 'National Report: Native Title' (National Native Title Tribunal, February 2012); 'Claimant Applications as per the Register of Native Title Claims as at 31 December 2013' (National Native Title Tribunal, 2014) <www.nntt.gov.au>.

344 See, eg, *Davis-Hurst on behalf of the Traditional Owners of Saltwater v Minister for Land and Water Conservation (NSW)* [2003] FCA 541 (4 June 2003); *Isaacs on behalf of the Turrbal People v Queensland* [2011] FCA 828 (25 July 2011); *Far West Coast Native Title Claim v South Australia (No 5)* [2013] FCA 717 (30 July 2013).

- persons who are not members of the claim group assert rights in a personal capacity. This type of case might include persons who assert that they are members of the claim group, but that they have been excluded from, or not included in, the claim group; and
- persons who are members of a competing claim group.

268. The issue of whether, and when, a member of the claim group might properly be a respondent to an application was discussed in *Starkey v South Australia*.[345] That matter concerned whether a respondent, who was also a member of the claim group, should cease to be a party under s 84(8). The respondent party asserted, among other things, that the claim had not been duly authorised.

> There may be circumstances where a particular person wishes to be recognised as a member of a claim group, but is not included. There may be other particular circumstances where an individual's circumstances as a member of the native title claim group may need to be considered. The discretion to join such a person as a respondent party does exist, but in my view its favourable exercise to allow a member of a claim group to become a respondent party will be rare.[346]

269. Applications for joinder by Aboriginal or Torres Strait Islander people under s 84(5), or to become a respondent party during the notification period under s 84(3), may be pointers to wider problems in the native title system; for example, the authorisation provisions of the Act or the availability of effective processes for dealing with conflict within a claim group.

Other joinder applicants

270. There are various reasons why other persons or bodies may come forward seeking to be joined as parties after the notification period has ended. The asserted interests vary.

271. The National Native Title Tribunal advertises claims widely. Despite this, a person may not become aware of the existence of a native title determination application while the notification period is still running. Other fact scenarios include, for example, where land within a claim area which may be affected by a determination has been transferred to a new owner after the notification period has ended.[347]

272. Native title representative bodies have also been joined as parties outside the notification period on various occasions,[348] despite some early concerns expressed by the Court.[349]

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345 *Starkey v South Australia* [2011] FCA 456 (9 May 2011).

346 Ibid. Dismissal cases regularly canvass similar issues to those raised in s 84(5) cases.

347 *Dodd on behalf of the Gudjala People Core Country Claim No 1 v Queensland (No 2)* [2013] FCA 1167 (9 August 2013).

348 See, eg, *Bissett v Minister for Land and Water Conservation (NSW)* [2002] FCA 365 (9 April 2002); *Connelly on behalf of the Mitakoodi and Mayi People No 1 v Queensland* [2009] FCA 1181 (11 August 2009).

349 See, eg, *Munn v Queensland* [2002] FCA 78 (6 February 2002).

The exercise of the discretion

273. Joinder of a party to proceedings pursuant to s 84(5) involves the exercise of the Court's discretion. If the threshold questions of identifying whether there is an interest[350] and whether that interest may be affected by a determination, have been resolved in favour of the party making the application, the Court then considers whether it should exercise its discretion to join the person as a party.[351]

274. Most judgments available concerning joinder under s 84(5) are first instance decisions, and consideration of the particular circumstances of each case is a major part of the exercise undertaken by the presiding judge. The wide variety of fact scenarios may contribute to a reported difficulty in predicting the outcome of applications for joinder.[352]

275. Some recurring themes are identifiable. A major consideration is whether joinder of the party will cause delay, and the potential for any such delay to prejudice the other parties and the Court. The involvement of a new party, particularly when a matter is already well advanced, has potential to severely disrupt the progress, and even the resolution, of a claim.

276. In exercising its discretion to join a person as a party, the Court may consider whether the person's interest can be protected by a method other than by joining, and delay that may be caused by the application to be joined.[353] The *in rem* character of native title determinations, which bind all persons whether parties or not, is another factor, but is not decisive.[354]

277. Section 81 provides that the Federal Court has jurisdiction to hear and determine applications filed with the Court that relate to native title.[355] Section 37M of the *Federal Court of Australia Act 1976* (Cth) describes the over-arching purpose of civil practice and procedure provisions as the just resolution of disputes according to law 'as quickly, inexpensively and efficiently as possible'. It is also capable of having decisive weight in a particular joinder case.[356]

278. Since 2009, there has been no appeal from a decision of the Federal Court to join or remove, or not to join or remove, a party.[357]

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350 *Wakka Wakka People No 2 v Queensland* [2005] FCA 1578 (4 November 2005).

351 *Barunga v Western Australia (No 2)* [2011] FCA 755 (25 May 2011) [162]–[168].

352 Jennifer Jude, Martin Dore and Daniel O'Gorman SC, 'Consideration of the Nature and Extent of the Interest Required to Join or Remain Joined as a Party to Native Title Proceedings' (paper presented at National Native Title Conference Alice Springs, 3–5 June 2013).

353 See, eg, *Akiba on behalf of the Torres Strait Regional Seas Claim People v Queensland (No 1)* [2006] FCA 1102 (18 August 2006) [29].

354 *Dodd on behalf of the Gudjala People Core Country Claim No 1 v Queensland (No 2)* [2013] FCA 1167 (9 August 2013) [46].

355 *Native Title Act 1993* (Cth) s 81. Jurisdiction is exclusive of the jurisdiction of all other courts except the High Court.

356 *Dodd on behalf of the Gudjala People Core Country Claim No 1 v Queensland (No 2)* [2013] FCA 1167 (9 August 2013) [37]–[40].

357 *Federal Court of Australia Act 1976* (Cth) s 24(1AA)(b); *Singh v Super City Home Loans Pty Ltd* [2012] FCA 83 (14 February 2012) [137]–[143].

279. Section 84(8) provides that the Federal Court may at any time order that a person, other than the applicant, cease to be a party to the proceedings. In accordance with s 84(9), the Court is bound to consider dismissing a party in certain circumstances including where it is satisfied that the person no longer has interests that may be affected by a determination in the proceedings.

280. The power to dismiss parties pursuant to s 84(8) is a wide power, not confined to the circumstances described in s 84(9).[358] Some of the factors examined by the Court in relation to dismissal resemble those examined in relation to s 84(5). For example, it has been held that 'interests' for the purposes of s 84(9) and s 84(5) has the same meaning, and issues such as likely delay of the progress of a claim have been taken into account in the exercise of the Court's discretion under s 84(8).[359]

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?

Respondent interests and representation

281. There may be concerns about the number of respondent parties involved in native title determination proceedings. The bulk of respondents are not made parties by applying to join under s 84(5). Instead, many people become parties to the proceedings by notifying the Court in writing under s 84(3). In the 2012–2013 reporting year alone, for example, the Court dealt with 982 party applications under s 84(3).[360]

282. Some native title proceedings involve very large numbers of respondents. For example, there were approximately 500 named respondents in the *Yorta Yorta* case at first instance.[361] Claims made over geographically large areas, particularly if those areas are relatively closely settled, are likely to have many respondents. Large party numbers can complicate proceedings, slow outcomes and place an administrative burden on the Court.

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358 *Butterworth on behalf of the Wiri Core Country Claim v Queensland* [2010] FCA 325 (26 March 2010) [39].

359 *Cheinmora v Western Australia* [2013] FCA 727 (25 July 2013) 8.

360 Federal Court of Australia, *Annual Report 2012–2013* (2013) 143.

361 *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 (18 December 1998). See also Peter Seidel, 'Native Title: The Struggle for Justice for the Yorta Yorta Nation' (2004) 29 *Alternative Law Journal* 70.

283. There may be an historical element to party numbers in some matters. Although there has been legislative restriction over time concerning who may be a party to proceedings, transitional provisions applied in relation to both the 1998 and 2007 amendments to the s 84 party provisions.[362] Because of the length of time some cases take to be resolved, former party provisions will apply to some parties in matters currently before the Court.

284. Some commentators suggest that some persons should not be involved in proceedings on the basis that their interests could be adequately protected by the relevant state or territory government.

285. In relation to consent determinations, for example, the Court has held that the State party acts in the capacity of *parens patriae,* or 'parent of the nation', to look after the interests of the community generally.[363]

286. *Akiba* provides an example where the ability of the Crown to represent other interests was referred to among the reasons for dismissal of a joinder application, in this case, of a Shire Council. The presiding judge considered the State of Queensland, as ultimate supervisor of the Council's conduct and granter of Council's powers, could be 'expected adequately to represent the kinds of interests which have been identified'. Further, as any determination would be subject to the valid laws of Queensland, he was unable to see a basis for the Council's continued involvement.[364]

287. There may be concerns about procedural fairness and about the capacity or suitability of the Crown or some other body to represent an individual interest. It may also be argued that

> A process in which there is wider, rather than narrower, community involvement is more, rather than less, likely to attract general community support and acceptance, and to produce speedy and effective outcomes.[365]

288. Previous reviews into aspects of native title have made some suggestions about managing the involvement of non-government respondent parties in native title proceedings. In 2011, a review of the native title respondent funding scheme suggested that a distinction could be drawn between the 'conventional' parties to a native title determination application—the applicant and the relevant State—and other respondent parties. This would involve creating

> another category of those recognised as having interests affected by the proceedings [but not capable of becoming parties by their own election]. The latter might be

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362 The 2007 amendments apply in relation to a proceeding that commences on or after the commencing day (the day on which the Schedule commenced, 15 April 2007): *Native Title Amendment Act 2007* (Cth) sch 2 pt 2 item 78. For the 1998 amendments, see *Native Title Amendment Act 1998* (Cth) sch 2 pt 9 item 43. Existing parties remained parties under the amended Act. A transitional provision also covered persons for a limited period who had given notice to the Registrar after commencement of the amendments, but under the former provisions, that they wished to be a party to the application.

363 *Munn for and on behalf of the Gunggari People v Queensland* (2001) 115 FCR 109, [29].

364 *Akiba on behalf of the Torres Strait Regional Seas Claim People v Queensland (No 1)* [2006] FCA 1102 (18 August 2006) [29].

365 Justice John Dowsett, 'Beyond Mabo: Understanding Native Title Litigation through the Decisions of the Federal Court' (2009) 10 *Federal Judicial Scholarship*.

> identified on a court list and be able to seek party status if particular circumstances were shown to warrant that 'elevation' [with the onus being on them to prosecute that position]. Otherwise the State or Territory involved and perhaps the Court would have to ensure that such affected interests were properly accommodated by any proposed resolution of the matter.[366]

289. In 2006, the 'Native Title Claims Resolution Review' recommended that:

> consideration be given to limiting the right of participation of a third party (that is, a non-government respondent party) to issues that are relevant to its interests and the way in which they may be affected by the determination sought.[367]

290. It is open to a judge to join a person as a party, but to also impose conditions on the way that party may participate in proceedings.[368] This may offer a way in appropriate circumstances of reducing the impact that late joinder or large party numbers may have on proceedings.

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?

366 Anthony Neal, 'Review of the Native Title Respondent Funding Scheme' (2011) 23.

367 Graeme Hiley and Ken Levy, 'Native Title Claims Resolution Review' (Report, Attorney-General's Department, 31 March 2006).

368 *Gamogab v Akiba* (2007) 159 FCR 578, [65]–[66]. See, eg, *Watson v Western Australia (No 3)* [2014] FCA 127 (24 February 2014) [61]–[65].