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Connection to Country: Review of the *Native Title Act 1993* (Cth)

Terms of reference

On 3 August 2013, the then Attorney-General of Australia, the Hon Mark Dreyfus QC MP, referred to the Australian Law Reform Commission (ALRC), for inquiry and report, the following matters:

- connection requirements relating to the recognition and scope of native title rights and interests; and
- any barriers imposed by the Act's authorisation and joinder provisions to claimants', potential claimants' and respondents' access to justice.

Our process

The ALRC conducted a comprehensive examination of native title laws and legal frameworks with regard to connection requirements, authorisation and joinder. It was greatly assisted by 162 consultations with government agencies, judicial officers, Indigenous leaders and traditional owners, Indigenous organisations, industry representatives, and others. It was also assisted by 72 thoughtful submissions.

Connection requirements

The ALRC found that the legal requirements for Aboriginal and Torres Strait Islander peoples to establish native title are unduly onerous, complex and technical. The High Court in *Yorta Yorta* said that 'difficult problems of proof face native title claimants when seeking to establish native title rights and interests over a long period of time'. In particular, the requirements that claimants prove that their laws have been passed from generation to generation, and have been acknowledged by each generation since sovereignty, impose a considerable burden on claimants. Many stakeholders noted the injustice of these requirements, in light of the history of dislocation, forced removal of people from their lands, and prohibitions on the exercise of cultural practices.

The ALRC recommends that the definition of native title should be clarified to remove some requirements. The basis of native title, as set out in *Mabo* and reflected in *Native Title Act* s 223, should be preserved—that is, native title rights and interests are those possessed under laws and customs that have their origins in laws and customs acknowledged and observed at sovereignty. Section 223 should be amended to clarify that

- traditional laws and customs may adapt, evolve or otherwise develop;

- acknowledgment of traditional laws and customs need not have continued substantially uninterrupted since sovereignty—nor is acknowledgement required by each generation;
- it is not necessary that a society, united by acknowledgment of traditional laws and customs, has continued since sovereignty; and
- native title rights and interests may be acquired by succession.

These proposed amendments will streamline proof requirements to focus on the essential elements of native title. These recommendations reflect the approach often adopted in case law and in consent negotiations. Statutory amendments will confirm this flexible approach and ensure that the law is given a 'fair, large and liberal' interpretation, as is appropriate for beneficial legislation.

The collection and assessment of connection evidence is a significant contributor to cost and delay in the native title system, although it is not the only contributor. Reducing technicality in the definition of native title will reduce the resources and time required.

Claimants will still have to establish that they are the 'right people for country', with rights and interests possessed under laws and customs that have their origins in laws and customs acknowledged and observed at sovereignty. This remains a significant evidentiary challenge in light of the disruption caused by European settlement. The ALRC considered whether a presumption of continuity would be appropriate, but concluded that amending the definition is a better approach. The ALRC also recommends that the Act should provide that the Court may draw inferences from contemporary evidence that the claimed rights and interests are possessed under traditional laws and customs.

Native title rights and interests used for commercial purposes

During the Inquiry, the High Court held in *Akiba* that a broadly defined native title right to take resources may be exercised for commercial or non-commercial purposes. The case law in this area is evolving. Accordingly, the ALRC recommends that s 223(2) of the *Native Title Act* should be amended to confirm that a broadly framed right may be exercised for commercial purposes, where the evidence supports such a right. The ALRC also recommends the inclusion of a right to trade in the representative list of native title rights and interests in s 223. The ALRC recognises the important role that these recommendations may play in securing economic and cultural sustainability for Aboriginal and Torres Strait Islander peoples.

Authorisation and joinder

The authorisation provisions of the *Native Title Act* are largely working well. The ALRC has recommended some changes to allow native title claim groups to limit the authority of the applicant, and to provide that the applicant must not obtain a benefit at the expense of the group. These recommendations are intended to support claim groups as they develop their own governance structures, work within the requirements of Australian law and negotiate with third parties.

Similarly, the joinder provisions have not attracted significant criticism. The ALRC has recommended some changes to improve access to justice and reduce costs.

Finally, the ALRC notes that native title is not the only path to land justice and reconciliation between Aboriginal and Torres Strait Islander people and non-Indigenous Australia. Both in Australia and in comparable jurisdictions, progress is being made via non-native title settlements that encompass land, compensation for dispossession, and economic development opportunities.

The Final Report can be found at www.alrc.gov.au/publications.