Commonwealth Native Title Connection Policy Research Project

Final report

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Contents

Executive summary 5
Terms of reference 5
Methodology 5
Recommendations 6
Introduction 14
Developing the Commonwealth's policy on connection 14
Clarifying and refining the terms of reference 15
The approach to the inquiry 16
Project design 17
Methodology 18
Structure of the research report 19
1. Commonwealth roles, responsibilities, interests and policy priorities 21
1.1 Indigenous policy 21
1.2 Responsibility for the native title system 27
1.3 Roles or interests potentially affected by native title determination 34
2. Legal environment 38
2.1 The substantive law from litigation 38
2.2 Legal principles governing the making of consent determinations 41
2.3 Protecting the litigation position of the Commonwealth? 48
2.4 Model litigant obligations and ss 37M/37N *Federal Court of Australia Act 1976* 49
3. General principles for Commonwealth conduct as a respondent party 51
3.1 Flexible, non-legalistic approach 51
3.2 Close integration of policy considerations into negotiations 55
3.3 Consistency and predictability in Commonwealth approach 57
3.4 Proportionality and interest-based negotiation 60
3.5 Early identification and coordination of interests and risks 62
3.6 Leadership 66
3.7 Commonwealth joinder as a respondent party 67
4. Models for satisfying Commonwealth respondent as to connection 69
4.1 Current state/territory assessment practices 70
4.2 Model I: Direct reliance on the state or territory's assessment 74
4.3 Model II: Commonwealth waits for state/territory's assessment and decides on the basis of state/territory's summary of content and process 78
4.4 Model IIA: Commonwealth relies on summary of assessment process but not content 83

4.5 Model IIB: Commonwealth is provided with state or territory expert assessor's advice 84

4.6 Model IIC: NTRB provides summary or material where state or territory does not 86

4.7 Model III: Commonwealth negotiates general agreed assessment framework with state or territory 89

4.8 Model IV: Early, active Commonwealth participation, including pre-report meetings 91

4.9 Model V: Commonwealth assesses independently 95

4.10 Model VI: Expert independent of any party conducts assessment and/or research 97

4.11 Commonwealth conduct as a primary respondent 98

4.12 Recommendations from Chapter 4 99

5. System-wide issues informing Commonwealth policy 101

5.1 Consistency within and between states and territories 102

5.2 State and territory connection assessment requirements 104

5.3 Approaches of judges 108

5.4 Connection and ILUAs 109

6. Promoting Commonwealth policy priorities, improving the native title system 111

6.1 Providing national leadership on matters of connection 111

6.2 Commonwealth publication of model guidelines 113

6.3 National principles for the assessment of connection 115

6.4 Case-specific intervention 118

6.5 Funding-related recommendations 123

6.6 Legislative amendment to support more flexible assessment of connection 128

7. Conclusion 130

7.1 Policy objectives, responsibilities, and legal constraints 130

7.2 Commonwealth conduct as a respondent party 131

7.3 Commonwealth as primary respondent 132

7.4 Commonwealth connection requirements? 133

7.5 Commonwealth's broader role in the system 135

7.6 Commonwealth joinder as a respondent party 136

7.7 Next steps 137

Appendices 139

Appendix 1 — Legal analysis of the case law on connection 140

Appendix 2 – Extracts from the Federal Court Act 1975 (Cth) 141

Appendix 3 — Terms of reference 143

Appendix 4 — List of participants 146

Executive summary

In 2011, the Commonwealth Attorney-General's Department commissioned researchers from the Australian Institute of Aboriginal and Torres Strait Islanders Studies (AIATSIS) to conduct research and analysis and make recommendations to inform the development of a Commonwealth policy on the assessment of native title 'connection' in consent determinations. This report presents the findings of the review. 'Connection' in this context means the factual basis for native title as defined in the *Native Title Act 1993* (Cth). In essence, assessing 'connection' means being satisfied that the native title claimants do in fact hold rights and interests under their traditional laws and customs so that those rights can be legally recognised without the need for contested litigation. Since the Draft Report was completed in 2012 there has been a change of government, in September 2013. Responsibility for the native title system remains with the Attorney-General, while responsibility for native title organisations has been centrally located with Indigenous programs in the Department of the Prime Minister and Cabinet. This report does not include an up-to-date review of emerging policy positions of the current government.

Terms of reference

The terms of reference required the review team to:

- research the current state of law, policy, stakeholder attitudes and policy direction about the 'connection' test when entering into native title consent determinations and best practice emerging from alternative settlement processes
- provide advice, options and recommendations on minimum connection requirements the Commonwealth should use when entering into consent determinations, to inform a consistent Commonwealth policy position on connection.

It became clear during the course of the research that the term 'minimum connection requirements' is not an unproblematic concept. There was not a shared understanding of the term minimum requirements, nor did this term capture the range of possible policy options available to the Commonwealth when approaching connection issues in relation to consent determinations. The analysis would therefore risk excluding important and relevant matters if it limited itself to the narrow task of determining a set of Commonwealth connection guidelines or if it assumed that the Commonwealth would necessarily have a substantive role in the assessment of connection. Accordingly, the terms of reference were interpreted broadly enough to place the question of 'minimum Commonwealth connection requirements' in an appropriate context in order to provide advice that would allow the Commonwealth to develop a coherent policy on engaging with connection issues in the context of consent determinations.

Methodology

A coherent Commonwealth policy on connection cannot be limited to the narrow protection of the Commonwealth's land interests and compensation liability, because the Commonwealth has a range of other roles, responsibilities, interests and policy objectives. It is not just another native title respondent party. Accordingly, this report asks two preliminary contextual questions:

- What practices and policies in relation to connection should the Commonwealth adopt in its own participation in claims as a respondent party?
- How might the Commonwealth's broader role in the native title system influence the form and content of a Commonwealth policy on connection?

From this context, a more specific schema was adopted for research and consultation:

1. The full range of relevant Commonwealth roles, responsibilities, interests and policy priorities were identified. This was a necessary first step in developing a Commonwealth policy on connection, by identifying what it is that the Commonwealth is seeking to achieve.
2. The legal environment that informs and governs the Commonwealth's pursuance of its roles, responsibilities, interests and policy priorities was outlined. This step was necessary in order to ascertain the legal bounds within which the Commonwealth's connection policy must operate.
3. A number of general principles that, in light of the authors' research, should inform any Commonwealth policy on connection were identified. These principles related to the benefits and risks associated with different potential approaches by the Commonwealth to its role as respondent in native title claims.
4. A range of models for satisfying the Commonwealth as to connection in particular claims were then outlined. Comparative analysis was made of their respective advantages and disadvantages, but final recommendations were reserved so that broader, system-wide issues could be considered first.
5. A number of broader systemic issues that had been raised during the research were outlined and analysed. These were issues which did not relate directly to the Commonwealth's conduct as a respondent party but which a Commonwealth policy on connection would necessarily have to consider.
6. In light of those broader systemic issues, various options for Commonwealth responses to those issues were considered, insofar as they relate to the Commonwealth's role in connection issues.
7. Finally, the analysis brought together those broader systemic responses with the models for the Commonwealth's conduct as a respondent party that had been identified earlier and distilled a series of final recommendations for the Commonwealth's connection policy.

Recommendations

The recommendations, set out below, are informed by detailed desktop research and thorough consultations (including interviews, written surveys and a call for submissions) with state and territory governments, Commonwealth departments and agencies, Native Title Representative Bodies and Service Providers, barristers, consultant anthropologists and peak bodies for third party respondents.

The recommendations cover:

- general principles for the Commonwealth's involvement in native title consent determinations

- specific models for satisfying the Commonwealth as to connection in particular cases
- broader aspects of a Commonwealth connection policy aimed at promoting Commonwealth policy priorities and improving the native title system.

Framework for implementing recommendations

1. The Commonwealth should develop, publish and implement a written policy setting out:
    a. the Commonwealth's roles, responsibilities and policy priorities (as discussed in Chapter 1)
    b. the processes it will follow in order to protect or promote those priorities (set out in Sections 7.1–7.6).

   Such a policy document should be specific enough to give parties a useful indication of what to expect from Commonwealth engagement but broad enough to allow for constructive flexibility in individual cases.
2. For each state and territory, the Commonwealth should seek to negotiate an agreed connection assessment framework setting out the parties' objectives, needs and expectations in relation to the assessment of connection in claims to which the Commonwealth is a party and the practical processes for meeting these.
3. A national principles document should be developed in a collaborative process conducted through the Joint Working Group on Indigenous Land Settlements (JWILS), addressing issues of best-practice in connection assessment and building on those matters identified in Section 6.2.
4. The Commonwealth should provide leadership to promote the implementation of those principles, including in general policy work and in particular claims, and should consider supporting parties in the pursuit of those principles through funding and legislative measures.
5. Commonwealth connection guidelines, setting out substantive 'minimum connection requirements', are not an appropriate or effective way to promote the Commonwealth's interests and policy priorities in consent determinations.

General principles for Commonwealth conduct as a respondent party

Flexible, non-legalistic approach

1. A Commonwealth policy on connection should prioritise taking full advantage of the flexibility in the law in relation to the substantive requirements of s 223 and in relation to making of consent determinations.
2. In relation to the Commonwealth's various policy priorities, responsibilities and interests, a Commonwealth connection policy should specify the following:
    a. The Attorney-General's role as First Law Officer does not require the Commonwealth to take on an 'oversight' role in the assessment of connection for particular consent determinations to ensure that sufficient rigour is being exercised. In any case, such a role would logically be applicable to all consent determinations, not just those to which the Commonwealth happens to be a party by reason of its land interests.

   b. 'Right people for country' issues are important to the Commonwealth's policy priorities, whereas other technical aspects of the 'connection' inquiry, such as continuity of acknowledgment and observance, are of more limited policy relevance.
   c. The Commonwealth's land interests will often be accommodated within determinations, with the result that connection issues have no direct bearing on the Commonwealth's interests.
   d. The prospect of compensation liability may lead the Commonwealth to take an interest in the sufficiency of connection material, but this consideration will not apply to every case to which the Commonwealth is party.
   e. Claims beyond the high water mark warrant scrutiny because they may restrict public use and access, but this need not necessarily require the Commonwealth's involvement in assessing connection (particularly in areas within three nautical miles of the baseline).
   f. Connection issues are not directly relevant to the need to ensure that determinations do not breach Australia's international legal obligations.

3. In relation to the Commonwealth's legal responsibilities regarding connection evidence, a Commonwealth connection policy should note the following:
   a. The substantive law on connection issues provides ample support for flexibility in respect of evidentiary requirements.
   b. There is no legal impropriety in a respondent (particularly a secondary respondent) agreeing to a consent determination on a lesser evidentiary basis than would be required at trial. The fundamental question is whether a determination is 'appropriate' in all the circumstances. A prima facie, credible or arguable case is all that is required, and it is the state or territory that generally bears the task of making that assessment.
   c. Because of the way s 87 has been interpreted and applied, consent determinations are highly unlikely to have precedential effect in respect of connection issues.
   d. Establishing the factual basis for native title, whether at trial or in negotiations, inevitably requires inferences to be made. In the context of consent determinations (in which parties are already operating outside the formal judicial context in which the legal elements of native title must be proved to the civil standard of proof) the question of whether a government respondent should make a particular inference is not a technical matter governed by law but rather a matter of weighing the policy objectives, risks and available information.
4. Where a point of law is unsettled (for example, because an appeal is pending or because the parties have different legal interpretations), Commonwealth negotiators should consider the option of inserting a mechanism into the draft determination to account for the present uncertainty about the law.

Close integration of policy considerations into negotiations

5. A Commonwealth policy on connection should be based on the aim of coordinating the full range of Commonwealth objectives, interests and responsibilities.

6. A Commonwealth policy on connection should emphasise the importance of close coordination and frequent communication between Commonwealth policy officers and legal representatives to ensure that the primary focus of the Commonwealth's conduct in claims is the achievement of Commonwealth policy aims rather than legal issues per se.
7. Commonwealth legal representatives should not be left to assume that the Commonwealth's sole or even primary interest in native title matters is to test the legal and factual basis for each claim. They should instead be given specific instructions about the full range of Commonwealth priorities and responsibilities that are applicable to a given case. To the extent that these priorities may be in tension, policy officers should give instructions on how the competing objectives should be balanced.
8. The Commonwealth's policy on connection would appropriately specify that legal representatives who attend negotiations should be given specific instructions as to not only the legal outcome desired by the client but also the relationship outcomes (see 'ambassador' role in Chapter 1). The manner in which negotiations towards consent determinations are conducted can have a positive or negative effect on other stakeholders' perceptions of, and relationships with, the Commonwealth.

Consistency and predictability in Commonwealth approach

9. To promote transparency, predictability and consistency, the Commonwealth should publish a written policy that sets out general Commonwealth policy priorities and the processes it will follow in order to protect or promote those priorities.
10. Such a policy document should be specific enough to give parties a useful indication of what to expect from Commonwealth engagement but broad enough to allow for constructive flexibility in individual cases.
11. In individual cases, open and frank communication with state and territory parties and applicants should cover the nature of specific Commonwealth interests raised and the processes by which the Commonwealth intends to address its concerns. Any concerns relating to the law or the conduct of the claim ought to be raised as early as possible.
12. In cases where the Commonwealth seeks more detailed information about connection in response to a particular query or concern, articulating the relevant concern and how it relates to the Commonwealth's specific interests would assist other parties to provide the relevant information and target their assistance.
13. In cases where the Commonwealth seeks further material without having any particular issue or query, it would be appropriate to give a clear articulation of why the material is required, what use it will put it to, and how and by whom it will be examined.
14. In a case where the process of satisfying the Commonwealth as to connection may cause delays, such delays will not cause as much frustration for other parties, and therefore not as much negative feedback to the Commonwealth, if there is a clear understanding of why the delay is happening and why it is justified and necessary.

Proportionality and interest-based negotiation

15. The nature and degree of the Commonwealth's involvement in claims, including its concern with connection issues, should be proportional to the extent of its interests in the outcome. Proportionality means:

    a. for offshore places, being primarily interested in those aspects of the material that connect the laws and customs of the claim group to the specific geographical area that is subject to Commonwealth responsibility, rather than taking an equally strong interest in all aspects of the case for connection

    b. for internationally protected areas, limiting Commonwealth involvement to the nature of the rights and interests, the potential for extinguishment, and opportunities for constructive coexistence and land management, rather than taking any particular interest in the question of connection

    c. for land interests, calibrating the Commonwealth response to match both the land interest's significance to the Commonwealth and the extent to which the land interest is likely to be affected

    d. for the interest in managing potential compensation liability, making a careful assessment of the likelihood of liability and the likely quantum.

Early identification and coordination of interests and risks

16. The Commonwealth should take steps at the beginning of the claims process to identify as precisely as possible the full range of interests that may be brought to bear on its involvement in the claim. Internal consultations with Commonwealth agencies should cover policy objectives as well as land issues.

17. Frequent and close ongoing communication should be maintained between legal representatives and those Commonwealth agencies whose land or policy interests are potentially affected by particular claims.

18. Prior to important negotiation meetings, arrangements should be made to empower Commonwealth legal representatives to give relevant undertakings or commitments.

19. Standing instructions may be an appropriate way of ensuring that the Commonwealth does not lose the opportunity to join relevant claims pending the precise identification of Commonwealth interests. Once the Commonwealth has become party to a claim, however, its specific interests should be assessed as soon as possible. This should include assessing the degree to which such interests may be potentially affected by native title.

20. The costs of obtaining firm information on tenure and potential compensation liability early in the claim process should be weighed against the overall cost of the Commonwealth's involvement in a claim. There is a risk that the overall cost may not ultimately be justified by the extent of the interests once they are identified. That risk should be assessed in each case. The overall costs may include costs borne by other parties.

Leadership

21. A Commonwealth connection policy should emphasise the importance of leading by example, with particular attention to the effect that the Commonwealth's negotiation position and style may have on the dynamic of the negotiations.

Commonwealth joinder as a respondent party

22. A Commonwealth connection policy should provide that the Commonwealth consider joining native title claims as a respondent where:
    a. land used and/or owned by the Commonwealth is within the claim area
    b. there is a potential compensation issue
    c. the claim area includes offshore areas beyond three nautical miles from the baseline
    d. the recognition of native title may negatively affect Australia's ability to comply with its international obligations.
23. The policy should provide that the following will not ordinarily constitute sufficient reasons to join a claim:
    a. the mere fact that the claim extends beyond the high water mark
    b. the bare possibility that the Commonwealth may wish to express a position on a legal issue.

Models for satisfying Commonwealth respondent as to connection

1. The Commonwealth's 'respondent role' in relation to connection should be founded on an agreed connection assessment framework for each state and territory. Such frameworks should be negotiated at the policy level, with the intention that the Commonwealth will be able in most cases to rely on the state or territory's assessment of connection without the need to scrutinise the factual material in each case. This collaborative process will involve communicating Commonwealth concerns and priorities with respect to connection so that its interests and responsibilities with respect to land, compensation and offshore areas can be met by state and territory assessment processes.
2. In appropriate cases of special importance, the Commonwealth should participate actively and early in claims. This should include:
    a. attendance at pre-research meetings with the state or territory and the NTRB
    b. participation in on-country and oral evidence sessions
    c. generally maintaining a degree of familiarity and comfort with the process and content of connection assessment
    d. where appropriate, seeking a summary of the assessment process followed in the particular case in order to confirm that the previously negotiated concerns have been addressed, or seeking access to an extract of the state or territory's expert assessment (subject to some important qualifications and controls).

3. The following models are generally not advisable for satisfying the Commonwealth about connection:

   a. Merely relying on state or territory assessment without any attempt to understand the assessment process or have input into it

   b. Waiting until the state or territory indicates that it has accepted connection and then deciding whether or not to enter into the consent determination on the basis of a position paper issued by the state or territory

   c. Commonwealth assessment of connection based on primary connection materials or on a summary of material provided by applicants

   d. Using an independent expert engaged by the principal parties (including the Commonwealth) to assess and/or research connection.

Promoting Commonwealth policy priorities, improving the native title system

1. The Commonwealth should take a significant role in leading actors in the system towards greater flexibility with respect to connection in consent determinations. That role will require sensitivity to state and territory concerns and leadership by example where the Commonwealth is a respondent party. In addition to its conduct as a respondent party, leadership in this context could include the public promotion of the benefits of flexible, non-technical approaches to connection (such as were made by the former Attorney-General, the Hon. Robert McClelland) and private encouragement to this effect in discussions with parties, both in general and in relation to specific claims.

2. The Commonwealth should not publish model connection assessment guidelines.

3. The Commonwealth should produce, in collaboration with state and territory governments, NTRBs and representatives of third party respondents, a 'principles document' to inform national practice in the assessment of connection for connection determinations. Such a document should set out:

   a. a legal framework highlighting all available opportunities for flexibility

   b. approaches to matters of evidence that are consistent with the policy objectives of native title

   c. a focus on identifying the 'right people for country'

   d. good-practice procedures to assist more streamlined and productive assessment processes.

4. There is some limited scope for well-targeted Commonwealth intervention in individual cases in order to promote quicker, more flexible outcomes, most appropriately where the Commonwealth is already a party to the claim and is requested to intervene.

5. Under exceptional circumstances (if the Commonwealth were a party and came to suspect that a state or territory respondent was withholding the recognition of connection for improper reasons, and if the Commonwealth considered that an independent assessment of connection would help rather than hinder settlement in the particular matter) the assessment of connection by the Commonwealth might assist to break deadlocked negotiations, but otherwise it would not be an advisable option.

6. Where called upon, the Commonwealth should engage in discussions with parties about the law, assisting parties in identifying the opportunities in the case law for flexibility. This role, however, should not extend to the quasi-authoritative determination of disputes about the law.
7. Greater contribution by the Commonwealth to native title settlement packages can be achieved without necessarily increasing the number of claims to which the Commonwealth is a party or the intensity of involvement in connection.
8. Any future review of funding for the native title system should have regard to measures that would increase the capacity of NTRBs to resolve connection through research, mediation or litigation.
9. A whole-of-government approach is required to support Indigenous dispute resolution programs, both within NTRBs and through independent dispute resolution services.
10. The Commonwealth Government should consider amendments to the Native Title Act that take into account the barriers the current legislation poses to the achievement of the policy priorities outlined in Chapter 1.
    a. Amendments could usefully confirm that consent determinations made pursuant to s. 87 require a lower standard of evidence than do litigated determinations.
    b. Amendments could also address some of the aspects of the law around s 223 of the Native Title Act that continue to cause problems, such as the proof of continuity back to sovereignty or the significance of physical occupancy to s 223(1)(b).

Introduction

Assessing the underlying factual basis for native title claims has become a fundamental step in the process of resolving claims. While in the past this task has often fallen to the courts, the current preference among Australian governments is to negotiate settlements without the need for litigation, through consent determinations. In negotiations for consent determinations the task of establishing the factual case for native title is described colloquially as establishing the claimants' 'connection' to the land and waters claimed. Reaching agreement on connection is arguably the most confusing and time-consuming part of the process and the cause of significant delay in resolving many outstanding claims. The courts have not provided consistent guidance on an approach to determining connection. State and territory governments currently determine the connection evidence requirements that must be satisfied before they will agree to a consent determination. Each state and territory has its own policies and guidelines in making these decisions, giving rise to inconsistencies in approaches. The Commonwealth is party to many native title claims, but in almost all cases the primary respondent is the relevant state or territory. While the Commonwealth has generally relied on the relevant state's or territory's assessment of connection, there remains a perception that the Commonwealth has no clear policy on its participation in connection matters.

Developing the Commonwealth's policy on connection

The only previous sector-wide discussion to consider connection practice and policy issues took place in 2007. This culminated in the 'Getting Outcomes Sooner' workshop, which was co-sponsored by the National Native Title Tribunal (NNTT) and AIATSIS.[1] That workshop, however, focused almost exclusively on the approaches of state and territory governments. It is now timely to consider Commonwealth practice in relation to the proof of native title connection and to establish and promote a clear Commonwealth policy position on the assessment of connection and the Commonwealth's roles and responsibilities. This should bring greater transparency to the Commonwealth's processes and reduce uncertainty about the nature of its involvement.

In May 2011 the Native Title Unit of the Attorney-General's Department (AGD) entered into a contract with AIATSIS to research the current status of law, policy, stakeholder attitudes and policy direction concerning their roles, responsibilities and requirements in relation to assessing native title connection when entering into native title consent determinations and best practice emerging from alternative settlement processes. AIATSIS is required, as a result of this research, to provide options and recommendations to AGD in a final report (see Appendix 3 for the Terms of Reference). The purpose of the project, as set out in the Terms of Reference distributed to stakeholders, is:

> …to develop minimum Commonwealth connection requirements for use by the Commonwealth when entering into consent determinations, to inform a consistent Commonwealth policy position on native title connection.

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[1] R Farrell, J Catlin & T Bauman, *Getting outcomes sooner: report on a native title connection workshop, Barossa Valley, 2007*, Australian Aboriginal and Torres Strait Islander Studies and the National Native Title Tribunal, Canberra, 2007, <http://aiatsis.gov.au/publications/products/getting-outcomes-sooner-report-native-title-connection-workshop>.

Clarifying and refining the terms of reference

While the Terms of Reference refer to the development of 'minimum Commonwealth connection requirements', from the outset two threshold issues were identified that made it necessary to give a broad interpretation to the Terms of Reference:

1. the meaning of 'minimum connection requirements'
2. whether the most appropriate model for a Commonwealth connection policy should involve a set of substantive Commonwealth connection requirements.

The term '**minimum connection requirements**' is not a simple or unproblematic concept. Some interviewees used 'minimum requirements' to mean a set of criteria that would mark the lower limit of evidence on which a government could recognise native title in a consent determination but would not necessarily oblige the government to consent to a determination. On this view, applicants could not expect to proceed to a determination on the basis of anything less than 'minimum requirements' but could not insist on a consent determination merely by meeting those requirements.

By contrast, other interviewees saw 'minimum requirements' as meaning a standard that, if met, should entitle applicants to the recognition of native title. Such requirements would set a ceiling on what government respondents could reasonably demand. Many interviewees who took this view considered that there should be 'flexibility downwards' in the sense that, while government respondents ought not require more than is set out in guidelines, it may be appropriate in some cases for governments to settle claims on the basis of less material. Others did not consider this to be appropriate, seeing connection as an objective question of fact; a matter of the recognition of rights that should not depend on other parties' interests in the outcome.

Even more significant than this divergence in people's understandings of the term 'minimum connection requirements' was the range of views about whether the Commonwealth *should* produce its own set of substantive '**guidelines**' containing minimum connection requirements. Many interviewees considered that Commonwealth guidelines would be undesirable; for example, because they might be overly prescriptive, create an additional layer of complexity, be ineffective or fail to account for important contextual differences across the country. Some interviewees considered that the most useful thing would be a written Commonwealth '**policy document**' setting out the interests and roles that drive Commonwealth participation in claims and the processes that the Commonwealth would follow in negotiations. A policy document would, on this view, specify how the Commonwealth's decision to enter consent determinations would relate to the question of connection but would not necessarily go into the substantive detail of 'minimum requirements'. Other interviewees thought that a '**principles document**', developed collaboratively by the Commonwealth and other stakeholders, could usefully stipulate the principles that should govern the assessment of connection in *all* jurisdictions, not just the Commonwealth, without getting into the detail suggested by 'guidelines'. In a sense, such a principles document might be seen as 'guidelines for developing guidelines'. A principles document would be an additional element to a broader Commonwealth policy on connection.

As was the case at the 2007 workshop, there was concern across the sector that the Commonwealth might be attempting through this project to impose a set of national standards on state and territory governments or to disrupt existing state and territory processes which have been developed now over a considerable period. Alternatively, there were suggestions from some stakeholders that they would welcome Commonwealth intervention in state and territory connection negotiations that had stalled or were taking too long. In other words, there was considerable

variation in views across the sector, often reflecting the level of satisfaction or otherwise with current practices.

The approach to the inquiry

In light of the threshold issues just mentioned, the analysis would risk pre-empting important debates if it limited itself to the narrow task of determining a set of Commonwealth connection guidelines or assumed that the Commonwealth would have a substantive role in the assessment of connection. Accordingly, the research team designed the consultation questions to place the question of 'minimum Commonwealth connection requirements' in an appropriate context in order to provide advice that would allow the Commonwealth to develop a coherent policy on engaging with connection issues in the context of consent determinations.

The complexity of the interactions between the Commonwealth's various roles made it appropriate to distinguish conceptually between the Commonwealth's role as a respondent party to individual native title claims and its other institutional roles. The development of a coherent Commonwealth policy would necessarily cover both of these categories. Accordingly, it was necessary to ask two preliminary contextual questions:

1. What practices and policies in relation to connection should the Commonwealth adopt in its own participation in claims as a respondent party (Chapters 3 and 4)?
2. How might the Commonwealth's broader role in the native title system influence the form and content of a Commonwealth policy on connection (Chapters 5 and 6)?

From this context, a more specific schema was adopted for research and consultation:

1. The full range of relevant Commonwealth roles, responsibilities, interests and policy priorities were identified. This was a necessary first step in developing a Commonwealth policy on connection, by identifying what it is that the Commonwealth is seeking to achieve.
2. The legal environment that informs and governs the Commonwealth's pursuance of its roles, responsibilities, interests and policy priorities was outlined. This step was necessary in order to ascertain the legal bounds within which the Commonwealth's connection policy must operate.
3. A number of general principles that, in light of the authors' research, should inform any Commonwealth policy on connection were identified. These principles related to the benefits and risks associated with different potential approaches by the Commonwealth to its role as respondent in native title claims.
4. A range of models for satisfying the Commonwealth as to connection in particular claims were then outlined. Comparative analysis was made of their respective advantages and disadvantages, but final recommendations were reserved so that broader, system-wide issues could be considered first.
5. A number of broader systemic issues that had been raised during the research were outlined and analysed. These were issues which did not relate directly to the Commonwealth's conduct as a respondent party but which a Commonwealth policy on connection would necessarily have to consider.
6. In light of those broader systemic issues, various options for Commonwealth responses to those issues were considered, insofar as they relate to the Commonwealth's role in connection issues.
7. Finally, the analysis brought together those broader systemic responses with the models for the Commonwealth's conduct as a respondent party that had been identified earlier and distilled a series of final recommendations for the Commonwealth's connection policy.

Project design

The initial discussions for this project began between staff of the Native Title Unit of AGD and the Native Title Research Unit (NTRU) at AIATSIS in 2010. These discussions arose out of AGD's concerns that greater clarity was required around Commonwealth roles, expectations, policy and practice in relation to the Commonwealth's participation in consent determinations, in particular when and how it participates in processes of establishing 'connection'. Other background factors included mixed messages from stakeholders around what level and type of Commonwealth involvement in claims were appropriate, and some complications arising in the interaction between Commonwealth and state or territory processes. The project was then designed by AIATSIS in collaboration with the Native Title Unit within the Social Inclusion Division of AGD.

The primary stakeholders for the project were identified as the state and territory governments, other Commonwealth native title agencies, the Native Title Representative Bodies and Service Providers (together referred to as NTRBs) and the native title claimants who are represented by NTRBs.[2] These primary stakeholder groups (other than native title claimants, whose interests were taken to be represented by NTRBs) were consulted prior to the commencement of the project in June 2011 through key stakeholder meetings. These included the Joint Working Group on Indigenous Land Settlements (JWILS), made up of state government native title officers; the NTRB Chief Executive Officers workshop; and the Native Title Coordination Committee, made up of Commonwealth native title agencies. At the NTRB Chief Executive Officers workshop it was agreed that a five-person advisory committee for the project would be formed.

Feedback from these consultations demonstrated a range of perspectives, which were taken into account in the project design. These included the misgivings of some state and territory governments about the purpose of the project and the risk of it disrupting existing state and territory processes. NTRBs proposed that the scope of the project should be broad enough to consider the connection requirements of the states and territories, and that the project should address the Commonwealth's role, if any, in managing third party respondents through the connection assessment process. These perspectives were taken into account in the project design.

A draft project rationale, terms of reference and critical questions were then agreed by the project team and AGD and circulated to the key stakeholder representatives for comment and suggested changes. The terms of reference for the project were settled in May 2011.

Ethical clearance for the project was obtained from the AIATSIS Research Ethics Committee in June 2011. The committee reviewed the research methods and techniques, the interview consent form, and approaches to confidentiality and intellectual property. The project design and methodology were also overseen by the Native Title Research Advisory Committee.

In accordance with the terms of the contract between AIATSIS and AGD, periodic progress reports were made during the research process, and the draft final report was given to AGD for comment before being finalised.

Privacy and intellectual property

In accordance with the ethical protocols for this project, interviewees have not been individually identified in this report unless they wished to be. Interviews were not electronically recorded and

[2] The project did not include consultations with representatives of governments or applicants in Tasmania or the Australian Capital Territory because of the currently low level of native title activity in those jurisdictions.

notes made by the interviewers will be destroyed following the completion of the project. Copyright in the content of any interviews remains with the interviewee.

Intellectual property in this report lies with AGD. However, AIATSIS asserts the independence of this research and its findings. The views expressed in this report are those of the authors and are not necessarily those of AIATSIS or AGD. Under the research contract, AGD may publish this report. If it chooses not to do so, AIATSIS may, subject to the terms of the contract, publish the results of the research.

Methodology

The project employed a mixed methods approach. The methods included:

- desktop study and case analysis
- survey and interviews
- written submissions
- data analysis
- final report and recommendations.

Desktop study and case analysis

Initial desktop research to enable the scoping of issues and provide background for the consultations informed the development of stakeholder survey questions. It included consideration of issues that arose through the 2007 workshop 'Getting Outcomes Sooner', which was co-sponsored by AIATSIS and the National Native Title Tribunal, and issues arising out of key legislation, case law, government policy documents and secondary published material.

A more detailed analysis of the substantive case law around connection and the evidentiary requirements for consent determinations was also conducted. The case law analysis can be found at Appendix 1.

Survey and interviews

The AIATSIS project team conducted face-to-face and telephone interviews and surveys with primary stakeholders between July and September 2011. These consultations sought stakeholder views on current and future Commonwealth policy on connection when entering into consent determinations. Face-to-face or telephone interviews were also held with secondary stakeholders, including barristers, consultant anthropologists and peak third party respondent representatives.

Prior to each interview, interviewees were provided with the terms of reference for the project, the survey questions and the interview consent form in which they indicated their preferences as to confidentiality and the attribution of their views. Interviews were semi-structured with reference to the survey questions but with a view to constructing a conversation around the questions to facilitate discussion.

A list of those individuals and organisations interviewed can be found in Appendix 4.

Written submissions

An invitation to make written submissions was published on the AIATSIS website. Four submissions were received (see Appendix 4 for a list of those who provided written submissions).

Submissions have been made available on the AIATSIS NTRU website (http://www.aiatsis.gov.au/ntru/commonwealth.html) unless respondents specifically requested that they be kept confidential.[3]

Analysis of material

Once all interviews were completed, stakeholder views were collated, organised into respective issues and analysed. This analysis was combined with further desktop research, including research into the substantive case law around connection and the evidentiary requirements for consent determinations. Recommendations were developed from that combined analysis.

The volume and diversity of the interview material meant that the most appropriate structure for the analysis was to intersperse this data throughout rather than set out an exposition of the data separately from the analysis. That approach was also made necessary by the need to maintain the confidentiality of interview material.

While attempts have been made to indicate the frequency and strength of various stakeholder views, there are only limited references to 'majority' views or any precise quantification. This is because of the small sample size of interviewees and the likelihood of numerical biases (for example, a greater number of NTRBs in some jurisdictions than others).

Final report and recommendations

The draft final report, including recommendations for future policy directions, was given to AGD.

Dissemination of findings

The final report was placed on the AGD and AIATSIS websites.

Structure of the research report

The report sets out the outcomes of the AIATSIS research and consultations. It analyses issues and competing viewpoints, and presents options and recommendations for future Commonwealth policy directions. The structure of the report is as follows:

- **Chapter 1** discusses the range of Commonwealth roles, responsibilities, interests and policy priorities that may be promoted through, or affected by, Commonwealth involvement in native title consent determinations. These roles range from overarching system oversight through to the Commonwealth's role as a land interest holder.
- **Chapter 2** outlines the legal environment in which the Commonwealth's policy on connection in consent determinations must operate.
- **Chapter 3** sets out some of the issues and concerns that interviewees raised about the Commonwealth's conduct as a party to consent determinations in general. It then makes recommendations as to how some of these might be addressed in future Commonwealth policy and practice. Not all of the issues discussed in this chapter relate directly to the assessment of connection but they do provide a general framework within which a policy on connection should be located.

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[3] Note that as at 11 September 2015 these submissions are no longer available online because of website changes.

- **Chapter 4** deals more specifically with the manner in which the Commonwealth should gain an appropriate degree of satisfaction around the issue of connection in negotiated claims to which it is a party. The key question is how the Commonwealth's protection of its interests as a party, and its execution of its other responsibilities in claims, may be harmonised with its broader policy objectives. To this end, six models are explored, ranging from a complete reliance on state or territory assessments of connection to an entirely separate assessment of connection by the Commonwealth. Final recommendations on these models are left until **Chapter 7** to ensure coordination with other policy considerations. **Chapter 4** also deals the Commonwealth's conduct as primary respondent.
- **Chapter 5** gathers together a range of other concerns relating to the native title system as a whole that were raised by interviewees in the course of consultations. They are included in this report because they have a bearing on the issue of connection and potentially raise a role for the Commonwealth to play in that regard. In light of the 'system oversight' role discussed in **Chapter 1**, a Commonwealth policy with respect to connection might necessarily have to deal with issues of practice at the state and territory level, or at least take those issues into account.
- **Chapter 6** explores some options for Commonwealth policy and practice that may assist to address some of the issues identified in **Chapter 5**.
- **Chapter 7** brings together the different strands of the previous analysis and synthesises the final recommendations.

1. Commonwealth roles, responsibilities, interests and policy priorities

It is necessary to identify the different 'hats' that are worn by the Commonwealth in its engagement with the native title system in order to set the groundwork for a policy position on connection that adequately and effectively reflects and promotes the full spectrum of Commonwealth objectives. It is noted that the improvement of whole-of-government cooperation on significant legal issues is a core part of the Attorney-General's role as First Law Officer, a role in which the Attorney is assisted by AGD.[4]

The Commonwealth holds a range of roles, responsibilities, interests and policy priorities that may be promoted through, or affected by, connection issues in native title consent determinations. The most significant of those are:

1.1. the Commonwealth's Indigenous policy objectives

1.2. roles and objectives arising out of the Commonwealth's responsibility for the native title system as a whole

1.3. specific interests and responsibilities of the Commonwealth that may be affected by particular native title consent determinations.

1.1 Indigenous policy

The Commonwealth has a formal policy role in relation to Aboriginal and Torres Strait Islander peoples. This role was confirmed in the 1967 constitutional referendum.[5] The previous Commonwealth Government's 'Indigenous policy' objectives and commitments may be summarised as follows:

- closing the gap on Indigenous disadvantage
- Indigenous economic development
- justice and the recognition and protection of rights
- recognition, respect and relationships
- 'right people for country' — governance, conflict and simple fairness
- coordination of government service delivery to Indigenous communities.

Since the change of government in 2013 there has been a shift in policy in Indigenous affairs, although many of the principles underpinning these policy objectives are consistent. These policy objectives and commitments are outlined below. Together, they tend to favour an approach to native title claims that emphasises efficiency, flexibility, more and better outcomes for the 'right people for country' and close attention to relationships between government and Indigenous peoples — that is, the objectives and commitments that made up the Commonwealth's Indigenous policy suggest an approach to litigation and negotiations in which the Commonwealth would not

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[4] See Attorney-General's Department (AGD), *Attorney-General's Department Annual Report 2009–10*, AGD, 2010, p.10, <http://www.ag.gov.au/Publications/AnnualReports/Annualreport200910/Pages/default.aspx>. Note that clarity of roles and coordination between them was emphasised in NTSCorp's written submission to this research project.

[5] Section 51(xxvi) of the Commonwealth Constitution was amended by the *Constitution Alteration (Aboriginals) 1967* legislation to extend the so-called 'race power' so that it no longer excluded 'the aboriginal race in any State'. This amounted to a direct grant of legislative power in respect of Australia's Indigenous peoples.

actively seek out arguments that could be used to challenge a finding that native title exists, but rather actively encourage the recognition of native title and the resolution of outstanding claims.

1.1.1 Closing the gap on Indigenous disadvantage

The previous Commonwealth Government's approach to Indigenous policy existed within the 'Closing the Gap' framework, which sets six targets to reduce the disparities in health and socio-economic indicators between Indigenous and non-Indigenous Australians. Agreed at the 2008 meeting of the Council of Australian Governments (COAG), those targets are to:

- close the gap in life expectancy within a generation
- halve the gap in mortality rates for Indigenous children under five within a decade
- ensure all Indigenous four-years-olds in remote communities have access to early childhood education within five years
- halve the gap in reading, writing and numeracy achievements for Indigenous children within a decade
- halve the gap for Indigenous students in year 12 attainment or equivalent attainment rates by 2020
- halve the gap in employment outcomes between Indigenous and non-Indigenous Australians within a decade.[6]

To support this work, COAG also agreed to seven strategic platforms, or 'building blocks', as a means of meeting these targets:

- early childhood
- schooling
- health
- economic participation
- healthy homes
- safe communities
- governance and leadership.

These targets and building blocks informed the policies of all Commonwealth departments and agencies and were of particular relevance to the former Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA), the former Department of Education, Employment and Workplace Relations (DEEWR), and AGD.

The key Commonwealth policy documents dealing with the Closing the Gap targets summarise the commitment as the following:

> The Australian Government is committed to working in partnership with Indigenous Australians, with state and territory governments, with business, community organisations and all Australians so that Indigenous Australians have access to opportunities that allow for self-respect,

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[6] Council of Australian Governments (COAG), 'COAG Meeting, 2 October 2008', webpage, <http://www.coag.gov.au/node/290>.

> independence and better living standards — an education, a job, and a decent home — while still retaining a strong cultural identity and sense of community.[7]

Within this broad policy framework, the following specific elements had a direct bearing on the Commonwealth's approach to native title.

1.1.2 Indigenous economic development

Economic development in Aboriginal and Torres Strait Islander communities was a central component of the previous Commonwealth Government's Indigenous policy. The *Indigenous Economic Development Strategy 2011–2018* listed five key priorities:

- strengthening foundations to create an environment that supports economic development
- education
- skills development and jobs
- supporting business development and entrepreneurship
- helping people achieve financial security and independence.

As part of the priority of financial security and independence, the strategy set an objective of supporting Indigenous Australians to get the most out of their assets. This includes the provision of support for effective native title settlements. To this end, the Commonwealth aimed to:

> [c]ontinue to work with the Federal Court, state and territory governments, and other respondent parties, the National Native Title Tribunal and Native Title Representative Bodies to help resolve outstanding native title claims in a more flexible and timely manner.[8]

Further, the strategy recognised the range of benefits for economic development that native title can bring: title to land, payments, training and employment, and business, cultural heritage and conservation opportunities.[9] Indeed, the then Minister for Families, Housing, Community Services and Indigenous Affairs, in a speech to the 2010 National Native Title Conference, spoke of the need to maximise 'the potential of native title as a platform for long-term Indigenous economic development'.[10]

In 2009 the previous Attorney-General, the Hon. Robert McClelland, announced the provision of over $50m in additional funding over four years 'to support the native title system so that it can help close the gap between Indigenous and non-Indigenous Australians'.[11] In particular, this funding was focused on:

- Improving the efficiency of the native title system, especially by focusing on 'achieving resolution through agreement-making rather than costly and protracted litigation'

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[7] Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA), *Closing the gap on Indigenous disadvantage: the challenge for Australia,* FaHCSIA, February 2009, p. 4, <http://bit.ly/1e7s67C>.
[8] Department of Families, Housing, Community Services and Indigenous Affairs, *Indigenous Economic Development Strategy 2011–2018,* FaHCSIA, p. 64, <http://apo.org.au/node/27022> .
[9] ibid., p. 17.
[10] The Hon. Jenny Macklin MP, 'Harnessing opportunities for future generations of Indigenous Australians', speech presented at the National Native Title Conference convened by the Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 3 June 2010, <http://www.formerministers.dss.gov.au/jenny-macklin/speech/page/3/>.
[11] Minister for Families, Housing, Community Services and Indigenous Affairs, the Hon Jenny Macklin MP and former Attorney-General, the Hon. Robert McClelland MP, *Additional $50 million for native title system*, media release, 12 May 2009, <http://www.ag.gov.au/Publications/Budgets/Budget2009-10/Pages/Additional50millionforNativeTitleSystem.aspx>.

- using the native title system to remove 'barriers to investment and infrastructure on Indigenous land, and [provide] the basis for economic and commercial opportunities'
- improving the capacity of NTRBs to represent native title claimants and holders, and to negotiate agreements which ensure sustainable long term economic and social benefits for Indigenous Australians
- improving the capacity of NTRBs to meet the needs of native title claimant groups and improve the rate of resolution of claims.

Over $4m of that funding was allocated to improving the resolution of claims by working with state and territory governments to develop new approaches to the settlement of claims through negotiated agreements. The aim of this measure was 'to ensure that the native title system supports a more flexible, less legalistic approach', in recognition that '[f]aster resolution of native title claims will provide certainty to all stakeholders and will help create sustainable, long-term outcomes for Indigenous Australians'.[12]

This has strong implications for Commonwealth conduct in native title claims and for Commonwealth engagement with other actors in the system: the recognition of native title, through quick and efficient processes, constitutes a key part of the Commonwealth's broader policy for Indigenous economic development. Negotiated determinations of native title are therefore an outcome to be encouraged wherever possible.

1.1.3 Justice and the recognition and protection of rights

The native title system is not solely about the instrumental, practical benefits that it may bring. In addition to these, the concepts of justice, equality and the enjoyment of legal rights play a central role in the origins and ongoing application of the *Native Title Act 1993* (Cth) (the Act). The preamble to the Act states the legislative intent as including:

> …to rectify the consequences of past injustices…for securing the adequate advancement and protection of Aboriginal peoples and Torres Strait Islanders…[and] 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 preamble has continued to inform the interpretation of the Act by courts.[13]

The idea of native title as an imperative of justice is connected to the broader Closing the Gap framework. As then Prime Minister Kevin Rudd stated in the foreword to the Commonwealth policy document *Closing the gap on Indigenous disadvantage*, 'Closing the Gap is fundamentally important to building a fairer Australia.'[14]

The implication for Commonwealth policy and practice in native title is that one of the objectives and priorities of Commonwealth engagement in native title claims, as well as of Commonwealth activity in the system as a whole, is to promote the righting of past wrongs with respect to the dispossession of Aboriginal and Torres Strait Islander peoples.

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[12] ibid.
[13] Eg, *Sampi v Western Australia* [2005] FCA 777.
[14] FaHCSIA, above n. 6, p. 1.

1.1.4 Recognition, respect and relationships

Economic development and a commitment to justice do not exhaustively describe Commonwealth Indigenous policy objectives. Building and maintaining positive relationships between government and Aboriginal and Torres Strait Islander peoples is an additional and central element. As is made clear in *Closing the gap on Indigenous disadvantage*:

> Fundamental to the Government's strategy is a new partnership with Indigenous Australians, based on mutual respect, mutual resolve and mutual responsibility. This partnership must be respectful and collaborative, and involve open communication with Indigenous Australians.[15]

'Relationships' and 'respect' are core elements of the Reconciliation Action Plans of Commonwealth departments, including the former FaHCSIA,[16] AGD[17] and the Department of the Prime Minister and Cabinet.[18] The concept of 'recognition', which is a key outcome of native title determinations, also informs a range of Commonwealth initiatives, including the proposal to amend the Commonwealth Constitution to recognise the special status of Aboriginal and Torres Strait Islander peoples within the Australian political, social and cultural landscape.[19]

Again, the focus on recognition, respect and relationships is not divorced from the Closing the Gap framework. It is recognised that, in addition to the intrinsic importance of recognition, it has instrumental value in its bearing on issues of individual and community self-esteem, which have concrete impacts on other important outcomes.[20]

Recognition and respect therefore are, firstly, a central *part of* Commonwealth policy and, secondly, *necessary for* the achievement of other aspects of Commonwealth policy. These policy priorities have two important implications for Commonwealth conduct in native title claims:

- **Recognition outcome**: One of the main outcomes of native title consent determinations is an active and willing recognition by state, territory and/or Commonwealth governments of the distinct legal status, and ancient and continuing vitality, of Australia's first peoples. This recognition is an intrinsic benefit which plays an indispensable part in broader Commonwealth policy. This means that consent determinations should be encouraged wherever possible.
- **Ambassador role**: During the conduct of negotiation or litigation, the Commonwealth has a strong interest in ensuring that the face it presents to native title claimants and to Aboriginal and Torres Strait Islander communities in general is consistent with its policy objectives. This would imply a need for respectful, collaborative and openly communicative relationships between legal representatives of the Commonwealth and those representing claimants.

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[15] FaHCSIA, above, n. 6, p. 5.

[16] Department of Families, Housing, Community Services and Indigenous Affairs, *FaHCSIA's Reconciliation Action Plan July 2009 to July 2011,* FaHCSIA, last modified 9 July 2009, <http://www.dss.gov.au/about-fahcsia/publications-articles/corporate-publications/fahcsias-reconciliation-action-plan>.

[17] Attorney-General's Department (AGD), *Attorney-General's Department Reconciliation Action Plan 2010–2012*, AGD, 2010, <http://www.ag.gov.au/About/Pages/WorkplaceDiversity.aspx>.

[18] Department of the Prime Minister and Cabinet (PM&C), *Department of the Prime Minister and Cabinet Reconciliation Action Plan—2011 to 2013: committed to closing the gap,* PM&C, 2011.

[19] Department of Families, Housing, Community Services and Indigenous Affairs, 'Recognition & Respect', <http://webarchive.nla.gov.au/gov/20140802064704/http://www.dss.gov.au/our-responsibilities/indigenous-australians/programs-services/recognition-respect>.

[20] See, eg, *A national conversation about Aboriginal and Torres Strait Islander Constitutional Recognition*, Discussion Paper, May 2011, p. 7, <http://bit.ly/1LRXO3Q>.

1.1.5 'Right people for country' — governance, conflict and simple fairness

An important part of Commonwealth business in Indigenous affairs relates to the governance of Indigenous corporations. A concern with corporate governance is reflected in the *Indigenous economic development strategy 2011–2018*,[21] and the activities of the Office of the Registrar of Indigenous Corporations reflect a strong interest in the smooth internal workings of Indigenous corporations.[22]

It is increasingly evident that a key element to the success of Registered Native Title Bodies Corporate (RNTBCs) in this respect is a clear foundation in the initial determination of native title around group membership, decision-making processes and, above all, the identification of the 'right people for country'. These considerations are also crucial for successful interface between RNTBCs and government at the local, state/territory and Commonwealth levels. They are also highly relevant to the resolution of neighbouring native title claims, in respect of boundaries and overlapping claims. Insufficient attention to these issues can have implications for the efficiency or even possibility of resolving those claims.

'Right people for country' issues also have the capacity to cause or exacerbate conflict within and between Aboriginal or Torres Strait Islander communities. Such conflict can have a range of negative flow-on effects, including social rupture or even violence. Native title agreements made in the midst of such conflict may be unsustainable or impossible to implement. Ensuring that native title determinations are made only in respect of the people who have rights and interests under traditional law and custom is an important part of minimising the number of conflicts generated by the claims process.

Finally, the issues of justice mentioned above (1.1.3) apply equally between Aboriginal and Torres Strait Islander groups. It is a matter of simple fairness to ensure that the benefits of having native title recognised flow to the relevant traditional owners and not to others.

These three considerations mean that there is a strong Commonwealth interest not only in the quick and efficient recognition of native title, but also in the recognition of the correct claim group and in taking care not to increase the likelihood of intra-Indigenous conflict in the future.

1.1.6 Coordination of government service delivery

To the extent that better coordination of Commonwealth service delivery can be achieved through native title settlements, this constitutes an additional factor in Commonwealth policy that suggests an approach to native title that favours the speedy negotiation of consent determinations. In addition, the need for better coordination between agencies at the Commonwealth level and between state or territory governments and the Commonwealth is at the heart of the Council of Australian Governments (COAG) intergovernmental agreement and national partnership framework.[23] The National Native Title Coordination Committee and the Joint Working Group on Indigenous Land Settlements (JWILS) also support a more coordinated approach to native title.

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[21] Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA), *Indigenous Economic Development Strategy 2011–2018*, p. 31, <http://apo.org.au/node/27022>.

[22] See, eg, *Dunghutti Elders Council (Aboriginal Corporation) RNTBC v Registrar of Aboriginal and Torres Strait Islander Corporations (No. 3)* [2011] FCA 1019 and related litigation.

[23] See <http://www.coag.gov.au/>.

1.2 Responsibility for the native title system

The Commonwealth is commonly understood as having a special responsibility for the native title system as a whole. That understanding is informed by a number of factors:

- The Native Title Act is Commonwealth legislation, and the Commonwealth Attorney-General in particular is seen as having a role in respect of its implementation.
- The claims process is overseen by the Federal Court and the National Native Title Tribunal, whose capacity to handle their respective caseloads is relevant to questions of Commonwealth resourcing.
- Other key actors in the system, most significantly the NTRBs and to a lesser extent the third party respondents, receive Commonwealth funding.

Almost all interviewees consulted in the research noted that the Commonwealth has unique roles in designing and funding the system in which the other actors operate. These systemic roles, however, were often seen by interviewees as separate from the Commonwealth's role as a party. There was a clear differentiation between the Commonwealth's 'architect' role in the native title system as a whole and its 'agent' role in particular claims. (Indeed, many interviewees indicated a preference for Commonwealth participation in specific claims to be limited to the protection of its narrow interests as a landholder. This view will be explored further in Chapters 5 and 6.)

The following four sections outline some different aspects to the Commonwealth's systemic role and include a discussion of how those aspects might be reflected in a Commonwealth policy on connection:

- Commonwealth policy of flexibility, non-technicality
- protecting the integrity of the legislation
- national consistency
- leading parties towards settlement.

1.2.1 Commonwealth policy of flexibility, non-technicality

Consistent with the policy priorities identified at the beginning of Chapter 1, former Attorney-General the Hon. Robert McClelland articulated a policy favouring the efficient resolution of native title claims by fostering broad, creative and flexible attitudes towards negotiations and avoiding unduly narrow and legalistic approaches.[24] This involves, in accordance with the original aims of the Act, an emphasis on resolving claims by agreement rather than litigation, with a focus on interest-based negotiations rather than technical legal arguments about the existence of native title.

That policy position is informed not only by the recognition of the importance of native title to the broad COAG policy framework but also by the need to manage and optimise the degree of Commonwealth expenditure in the operation of the system as a whole, including considerations around the workload and capacity of the courts, the tribunal and NTRBs.[25] AGD has been working with the Federal Court and other parties to find ways of reducing delays and promoting efficient resolution of claims. Particular mention should be made of the *Guidelines for best practice flexible*

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[24] See, eg, former Attorney-General the Hon. Robert McClelland MP, speech presented at the Negotiating Native Title Forum, Brisbane, 29 February 2008, [9]–[10], <http://pandora.nla.gov.au/pan/21248/20111214-1249/www.attorneygeneral.gov.au/Speeches/Pages/ArchivedSpeeches20072008.html>, and references collected above, n. 2.

[25] ibid.

and sustainable agreement making, drafted by JWILS and endorsed at the 2009 Native Title Ministers' Meeting.[26] Through those guidelines and the processes that surrounded their drafting and adoption, the Commonwealth has taken on a leadership role, within a framework of cooperative federalism,[27] aimed at fostering more, better and quicker native title outcomes. The guidelines are designed:

> …to provide practical guidance for government parties on the behaviours, attitudes and practices that can achieve flexible, broad and efficient resolutions of native title.[28]

It should be noted that the guidelines highlight the benefits of the efficient and effective resolution of native title claims in terms of not only recognition, justice and Indigenous economic development but also the benefit to the broader community in certainty of land tenure.[29]

The Commonwealth's policy of flexibility and efficiency will have implications for its policy on connection in a number of ways. It will have a direct bearing on the circumstances in which it is appropriate for the Commonwealth, in addition to the relevant state or territory, to investigate the question of connection. It will affect the question of how the Commonwealth should go about satisfying itself on the connection issue in those circumstances where this is appropriate. And it will inform the consideration of how the Commonwealth might take a broader leadership role in respect of negotiations between other parties.

1.2.2 Protecting the integrity of the legislation

The Attorney-General is the First Law Officer of the Commonwealth, supported in that role by AGD. Many interviewees took the view that this role included a function of protecting the integrity of Commonwealth legislation, although there was some variation in people's understandings of what such protection might entail, particularly in the context of native title consent determinations. In general, the authors have assumed this to mean that the Commonwealth has an interest in how provisions of the legislation are interpreted and applied.

Native title consent determinations possess two attributes that are in tension with each other in respect of their implications for the role of First Law Officer. On the one hand, as will be discussed in Chapter 3, consent determinations reflect the agreement of the parties (usually at a minimum the applicants and the relevant state or territory) rather than involving a detailed forensic assessment of evidence by the court. Parties are not expected to adduce evidence to a trial standard, and (subject to what is said below in Chapter 3) determinations are of minimal precedential effect. These considerations tend to support a more 'hands-off' role for the Commonwealth. By contrast, consent determinations are orders in rem, meaning that they are binding as against the whole world rather than merely as between the parties to the proceedings. This consideration may support a greater degree of Commonwealth oversight on the grounds that interest-based negotiations between parties may not adequately protect all of the public policy interests that are intended to be captured by the proper operation of the Act. This tension is explored in greater depth in the next three subsections.

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[26] Attorney-General's Department, Joint Working Group on Indigenous Land Settlements, *Guidelines for best practice flexible and sustainable agreement making*, AGD, August 2009, <http://aiatsis.gov.au/publications/products/guidelines-best-practice-flexible-and-sustainable-agreement-making>.
[27] Former Attorney-General, above, n. 23.
[28] Guidelines, above, n. 25, p. 4.
[29] ibid. See also Minerals Council of Australia submission.

What is the role of the states and territories in relation to the integrity of the legislation?

An assessment of the nature of the Commonwealth's role in relation to the integrity of the Native Title Act necessarily depends on an understanding of the roles of the other key governmental actors, the states and territories.

Under s 84 of the Act, states and territories are automatically parties to native title applications within their jurisdictional limits, unless they opt out within the prescribed time limit.[30] The way that native title was conceptualised in *Mabo*[31] and subsequently, in each respective jurisdiction the Crown in right of the state or territory holds the radical title or underlying dominion against which native title is asserted. For this reason the states and territories are treated as the primary respondents for all cases other than those, such as sea country claims,[32] in which the area subject of the claim is solely or primarily Commonwealth territory. Where claims are negotiated towards consent determination, the states and territories act in practice as contradictors on the factual issue of connection. (For a discussion of claims over the seas, see Section 1.3.3).

Generally, in negotiating consent determinations the states and territories adopt a broad public function of representing the interests of the general community in consent determinations. Possible exceptions to this are Queensland and Western Australia. In the view of some non-government interviewees, Queensland distances itself from this broad public role and instead sees itself in the more narrow role of simply looking after the interests of the state *per se*; in Western Australia, recent changes in state practice may indicate that it has moved away from the broad community-representative function, although non-government interviewees saw the state as still representing community interests. Certainly the courts have either assumed or positively stipulated that states and territories, including Queensland and Western Australia, properly have a role in reflecting broad community interests when negotiating towards a consent determination.[33]

In addition to their role in protecting the public interest (noting, of course, that the public includes Aboriginal and Torres Strait Islander people), states and territories themselves have institutional interests in ensuring that the case for native title is sound. These include potential compensation liability and the revenues that may otherwise accrue to the state from the alienation of Crown land.

Together, these factors indicate that, as a matter of principle and a matter of fact, the states and territories are the primary actors testing the factual case for native title. A detailed description of current state and territory policies and practices appears below at Section 3.1.

What is the role of the court in respect of the integrity of the legislation?

The Federal Court has two functions that may be relevant to the nature of the Commonwealth's role in the 'integrity of the legislation':

- First, the court has the role of ensuring that the processes leading up to the making of the consent determination and the content of the determination itself (including the description of rights and interests) are in accordance with the law. It is both a part of the general judicial

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[30] Strictly, it is the state or territory ministers who are parties under s 84(4) of the Native Title Act.

[31] *Mabo v Queensland (No 2)* [1992] HCA 23.

[32] See, eg, *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v State of Queensland (No 2)* [2010] FCA 643.

[33] *Wilson v Northern Territory of Australia* [2009] FCA 800 at [17]; *Ampetyane v Northern Territory of Australia* [2009] FCA 834 at [19]; *Hayes on behalf of the Thalanyji People v State of Western Australia* [2008] FCA 1487 at [23]; *Wik and Wik Way Native Title Claim Group v State of Queensland* [2009] FCA 789; *Munn v Queensland* ('*Munn*')[2001] FCA 1229 at [29]; *Mullett on behalf of the Gunai/Kurnai People v State of Victoria* [2010] FCA 1144 at [20]; *Hayes on behalf of the Thalanyji People v State of Western Australia* [2008] FCA 1487 at [23].

function of the court and a part of the court's specific function under s 87(1)(c) of the Act to be satisfied that an order in terms of the proposed determination would be 'within the power of the Court'.

- Second, the court has a function of ensuring that the making of the proposed determination would be 'appropriate' within the meaning of s 87(1A), which involves some degree of investigation into the quality of the state or territory's assessment of the factual case for connection.

The question of how closely courts will look into the state or territory's assessment of connection is dealt with in greater detail below in Section 2.2. At this stage, the following two points can be made:

- The greater extent to which the court will 'look behind' the agreement of the parties, the more support there is for the argument that there is a substantive legal requirement that the evidence for connection must meet a certain minimum standard. At the same time, however, the closer that the court is checking the state or territory's process, the less need there is for the Commonwealth to do so.
- The more that the s 87 'appropriateness' enquiry is seen as a hands-off affair in which the parties are taken to have protected their own interests, the more one might argue that the Commonwealth's First Law Officer role requires it to ensure that the making of the consent determination would not be contrary to the Act. This argument, however, has two weaknesses. Firstly, judicial reluctance to 'look behind' the agreement of the parties is often expressed in terms of recognising the state or territory's role as the contradictor on the question of connection, not in terms of reliance on the Commonwealth exercising any degree of oversight in respect of the states or territories or assessing connection independently. Secondly, to the extent that courts consider it appropriate to make orders for a consent determination without even a detailed investigation into the state or territory process of assessing connection, this suggests that courts do not consider that it would be legally improper to recognise native title in the absence of connection evidence to any particular standard.

These two points tend to support a conclusion that, at least from the court's perspective, the task of ensuring that there is a sound case for native title in particular claims rests either with the states and territories[34] or with the court itself.

What is the Commonwealth's role in protecting the integrity of the legislation?

During the consultations for this project, interviewees were invited to express their views on how the First Law Officer role might operate in the context of native title consent determinations.

Some interviewees considered that the Commonwealth has an interest in ensuring that the Act is interpreted and applied consistently with the parliamentary intention, an interest which could see the Commonwealth joining claims as a party or intervener in order to make submissions as to the proper interpretation of the Act. Generally, these people did not consider that this role would extend to the question of whether the available evidence in any particular case was sufficient to establish the existence of native title.

Others expressed the view that, in ensuring the proper functioning of the Act, the First Law Officer function may require the Commonwealth to bring to the court's attention instances in which, for example, a party was not negotiating in good faith.

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[34] Other than those cases in which the determination area is solely or primarily over Commonwealth land or waters.

Still others — from state or territory governments and NTRBs alike — considered that the Commonwealth First Law Officer role is almost never relevant to the question of connection in native title consent determinations.

Of those people interviewed from state and territory governments, NTRBs, the Federal Court and the National Native Title Tribunal, and from among barristers and anthropologists, no interviewee expressed the view that the First Law Officer role extends to ensuring that state and territories are not agreeing to consent determinations without sufficient factual basis.

Representatives of third party respondent viewpoints were invited to express an opinion, in writing or in person, as to whether they considered the Commonwealth as having an oversight role in respect of states and territories' assessment of connection. Unfortunately, AIATSIS received only a small number of responses. One industry peak body expressed strong support for its state's current role in assessing connection. Another third party respondent representative said that the Commonwealth did not have any oversight role in relation to the state's assessment of connection, and that the currently low level of Commonwealth involvement in connection was appropriate. In its written submission, the Minerals Council of Australia stated:

> Whilst it is acknowledged that the state Government role is making the assessments and the decisions, MCA believes the Commonwealth Government should…Monitor the performance of state Governments against minimum standards and undertake reviews where complaints regarding process of decision making (as opposed to the decision) have been initiated. It is imperative that any policy direction is consistent with the law in terms of assessment.

It should be noted that if the Commonwealth's responsibility for the native title system required it to ensure that consent determinations are not made without a proper factual basis such a responsibility would logically require the Commonwealth to oversee the assessment of connection in ***every*** case, or for it to join a representative sample of claims for the purpose of overseeing assessment. To perform this oversight role only in those cases where the Commonwealth happened to be a party by reason of its more immediate interests (as set out in Section 1.3.3) would be entirely arbitrary.

Bringing together all of the arguments and positions outlined above, there is no clear consensus around what a First Law Officer role may mean in respect of the issue of connection in native title consent determinations. The respective roles of the states or territories and the courts, together with the discussion below at Section 2.2 about what precisely the law requires for consent determinations, tend to suggest that the Commonwealth should have only a very minimal concern with issues of connection as part of its responsibility for the integrity of the Act. There are other interests and responsibilities, considered below at Sections 1.3.1–1.3.4, that may in some circumstances support closer attention by the Commonwealth on issues of connection, but these are independent of the First Law Officer role described above.

1.2.3 National consistency

The proposition that the Commonwealth's responsibility for the native title system entails a responsibility to ensure national consistency in the application of the Act generated a wide range of responses from interviewees, who were divided over whether the Commonwealth should treat the achievement of national consistency as a high policy priority. Among the respondents:

- some saw national consistency as a good thing in itself

- others considered that consistency was desirable in the sense that they disapproved of particular practices in some jurisdictions and considered that those practices should be changed in favour of approaches in other jurisdictions
- still others considered that consistency was undesirable if it meant being forced away from what they thought were sound local practices — a view common both to those who considered that state and territory autonomy should be protected from centralising control and those who valued the flexible processes that had been negotiated in their jurisdictions and wanted to avoid a move towards something more rigid.

It was apparent from these responses that many people's views about the benefits of consistency were informed largely by their appraisal of current practices in their own jurisdiction. Many agreed that their views on consistency might well be different if they were working in a different jurisdiction.

Many expressed the view that, even if consistency were desirable, it would be impossible for the Commonwealth to achieve consistency in respect of consent determinations. Consent determinations are highly dependent on how individual states and territories weigh up the benefits and costs of recognising native title in particular cases, and also on regional differences in the evidence available and the histories of dispossession. Consistency as a concern was also raised in the context of cross-border claims, though it was recognised by interviewees that differences in state or territory legislation and policy might justify different results across neighbouring jurisdictions.

In the context of judicial management of native title processes, Louise Anderson stated in 2001, 'National consistency, whilst desirable, ought not to be at the cost of flexibility.'[35] The same may well be said in the context of connection. If there is compliance with the legal requirements for consent determinations in each case, and if parties are satisfied with the outcome, it may be that the promotion of national consistency for its own sake should not occupy a high place on the Commonwealth's list of priorities.

To summarise, to the extent that there is a systemic need for national consistency, there would properly be a role for the Commonwealth in promoting consistency, although this need not take the form of a centralised prescriptive approach to connection. There may, however, be virtues in a national system that is flexible enough to allow a certain degree of variation in state and territory practice. The somewhat different question of how differences between jurisdictions may impact on the consistency of the Commonwealth's own conduct as a respondent party is considered below at Section 3.3.

More specific concerns about inconsistencies both within and between jurisdictions are discussed in Section 4.7.

1.2.4 Leading parties towards settlement

A large number of interviewees described the Commonwealth as properly having a role as a leader of native title outcomes, encouraging parties towards resolution. Some interviewees expressed the view that the Commonwealth's leadership role could take an active form in particular claims, including:

- active facilitation of outcomes

[35] Louise Anderson, National Native Title Coordinator, Federal Court of Australia, *Managing native title in the Federal Court*, speech at 'Negotiating Country', National Native Title Tribunal Forum, Brisbane, 3 August 2001, <http://www.nntt.gov.au/News-and-Publications/Pages/Forms-and-Publications.aspx>.

- applying pressure or acting as a moderator when relationships between parties were no longer constructive
- contributing to settlements to assist parties come to agreement and to improve the overall outcomes
- clarifying questions of law that are contested between the parties.

Others considered that a general systemic role was appropriate but that this should not extend to Commonwealth involvement in specific cases (beyond those cases in which the Commonwealth was a party because of its other interests).

A more comprehensive discussion of this role appears in Chapter 6. At this point it is sufficient to note the following three points:

- It was common ground among interviewees that the Commonwealth, in its conduct as a respondent party, should lead by example (if not in other ways) by embracing and implementing the policy articulated by the former Attorney-General as described above.
- Most interviewees considered that a general leadership role, outside of particular cases, was appropriate and desirable, although there were concerns that the autonomy and experience of states and territories should be respected and that local priorities and particularities should not be overridden by too strong an emphasis on national consistency.
- In respect of active Commonwealth leadership in bringing parties to resolution in particular claims, there was a wide range of viewpoints and no clear consensus.

Intra-indigenous disputes

Almost all interviewees considered that the Commonwealth does not have a role in mediating intra-indigenous disputes directly, although many considered that Commonwealth support for this function in NTRBs or other dispute-resolution programs is essential. That issue is discussed further in Section 6.5.

Role with respect to third party respondents

One issue that arose during the course of this research was whether the Commonwealth has a role in native title negotiations to provide security to third party respondent interests in the connection process with a view to facilitating their consent to a determination.

Only a few interviewees considered that third party respondents actively look to the Commonwealth (where it is a party) in deciding whether or not to sign up to a consent determination. Rather, most interviewees considered that third party respondents largely rely on the state or territory's assessment of connection or, to the extent that they do not, prefer to make their own enquiries about connection. It was, however, generally recognised by interviewees that any Commonwealth reluctance to agree on connection may *discourage* third party respondents from consenting to a determination, and, conversely, that Commonwealth support for a settlement can help to build momentum towards an agreement among all parties.

Most interviewees did not see the Commonwealth as having a role in 'managing' the third party respondents in the sense of exercising a liaison, coordination or leadership role.[36] This was mostly

[36] The submission of the NSW Crown Solicitor's Office stated: 'Other than by constructive engagement on a case by case basis, it is difficult to see a significant and structured role for the Commonwealth in its capacity as a respondent party in helping to resolve disputes and in engaging with non-government respondents', and later, 'it is difficult to see a role for

seen as the job of the states or territories in light of their closer relationships and familiarity with the local concerns of third party respondents — or perhaps of the tribunal or court, in light of their specialised roles as mediators and managers of the progress of claims. In Queensland and Western Australia some interviewees described their governments as playing a lesser role in this regard than in other jurisdictions.

The influence of Commonwealth policy on third parties through its policies for their funding was raised by a number of interviewees. Most of these were supportive of the Commonwealth's practice, through its Financial Assistance Section, of not providing funding for third party respondents to challenge connection issues. On 1 November 2013 the Attorney-General announced that the government would reinstate third party respondent funding effective from 1 January 2014.[37]

1.3 Roles or interests potentially affected by native title determination

The previous sections of Chapter 1 set out the Commonwealth Indigenous policy objectives that may have a bearing on a Commonwealth connection policy, and also aspects of the Commonwealth's role as the entity responsible for the native title system as a whole. The following four sections set out particular interests or responsibilities of the Commonwealth that may be affected by the recognition of native title, and so, may lead the Commonwealth to join as a respondent party and perhaps also to take an interest in the issue of connection.

1.3.1 Use of land by Commonwealth departments and agencies

The most obvious Commonwealth interest that may be affected by the recognition of native title is the interest of the Commonwealth as a landholder and land user. The public functions that are served by the Commonwealth's use of land, and the public financial investment in its landholdings, give it a clear policy reason to join as a party.

The Commonwealth, however, can protect its land interest in ways other than active involvement in claims. Where the Commonwealth has a clear land tenure interest in a claim area, which may wholly or partially extinguish native title, such an interest can be accommodated by amendment to the claim and/or the wording of the draft determination. Where the Commonwealth's tenure is less certain, the Commonwealth may need to obtain a firmer tenure through legislation or a grant from the relevant state or territory — with possible implications for compensation. (The question of compensation in respect of extinguishment is discussed below at Section 1.3.2.). In addition, in all cases it is open to the Commonwealth to enter into an ILUA to govern the interaction between the Commonwealth's property rights and native title rights and interests.

Nevertheless, many if not most interviewees recognised the appropriateness of the Commonwealth seeking some degree of assurance on the question of connection where it has significant land interests. This is reinforced by the Commonwealth's *Legal Services Directions 2005*, which require Commonwealth agencies to act in the Commonwealth's financial interest by 'fully defending claims against it where a defence is properly available, subject to the desirability of settling claims wherever possible and appropriate' (see below, Section 2.4). Many interviewees considered that the *degree* of interest in connection the Commonwealth should properly take should be proportional

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the Commonwealth in managing or engaging with non-government respondents, other than in its present funding capacity, that is not or could not be played by the NNTT or a mediator.'

[37] See Senator the Hon. George Brandis, *Native title respondent funding*, media release, <http://www.attorneygeneral.gov.au/Mediareleases/Pages/2013/Fourth%20quarter/1November2013-Nativetitlerespondentfunding.aspx>.

both to the significance of the relevant Commonwealth interest and the extent to which it is likely to be affected. This is discussed in further detail below at Section 3.7.

It should be noted that the interests of Commonwealth land-holding agencies are not limited to the mere accommodation of their land tenure interests. Their status as land users also gives them an interest in the efficient resolution of outstanding native title claims over their land, and the building and maintenance of relationships with co-users of land and neighbours.

1.3.2 Compensation

In cases where the Commonwealth has a potential liability to pay compensation for acts affecting native title in a given area, it will have an interest in being satisfied that there is a sufficient factual basis for any native title determination over that area.

As previously noted, the *Legal Services Directions 2005* require agencies to 'defend fully and firmly claims brought against the Commonwealth'.[38] The principle of rigorous defence is balanced by the desirability of settling claims and an obligation not to oppose a claim that is known to be true simply in order to avoid liability.

Importantly, the Commonwealth's interest in managing its potential compensation liability will not arise in every case. Commonwealth liability will depend on the existence of an invalid act attributable to the Commonwealth that affects native title. Invalidity is most likely to arise out of the interaction between native title and the *Racial Discrimination Act* 1975 (Cth) or potentially from the operation of s 51(xxxi) of the Commonwealth Constitution (which may itself vary according to whether the act occurred before or after the *Racial Discrimination Act 1975* came into operation).[39] An assessment of extinguishment and invalidity is required in each case before the extent of this interest of the Commonwealth's can be ascertained.

The separate question of whether the Commonwealth should contribute to state compensation liability is discussed at Section 7.2.

1.3.3 Constitutional responsibility for waters beyond state and territory jurisdiction

The Commonwealth has tended to join as respondent to native title claims on the basis of the claim area extending beyond the low water mark, and also in some cases where the claim area includes the intertidal zone. One of the concerns of Commonwealth officers in these cases has been to ensure that the formulation of the rights and interests in any consent determination is consistent with the Commonwealth's understanding of the law and with its international obligations (which is explored below in Section 1.3.4.). Commonwealth involvement has not been limited, however, to the form of the draft determination. In consent determinations, the Commonwealth has also tended to require some degree of satisfaction as to connection.

It may be argued that, since a determination of native title will have the effect of limiting the freedom of people other than the native title holders to do as they please (subject to laws of general application), there is an obligation on the Commonwealth to ensure that this limitation on public liberties within its jurisdictional area is not without justification. For example, where the interests of

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[38] Para 4.3, Sched.

[39] Sections 17, 18, 22D, 22E, Division 3, 226–233 *Native Title Act* 1993. See S Glacken, 'Native title as compensable property', paper presented at the 2011 Native Title Conference, Brisbane, 2011, online at <http://aiatsis.gov.au/publications/presentations/native-title-compensable-property>.

recreational or commercial fishers or divers in Commonwealth waters would be affected by a determination, the Commonwealth should be satisfied that there is a sound case for native title.

Importantly, however, it is not clear that the Commonwealth has (sole) responsibility for sea claims, particularly in respect of areas closer than three nautical miles from the baseline (usually the low water mark). In strict constitutional terms, the jurisdictional limits of the states and the Northern Territory extend only to the low water mark.[40] This position, though, was altered by an agreement between the Commonwealth, states and Northern Territory that was implemented through legislation passed by the respective parliaments.[41] In general terms, the result is that the states and the Northern Territory are granted jurisdiction and title over waters (including seabed and airspace) out to three nautical miles from the baseline as if these areas were within the state or territory's jurisdictional limits. This grant is subject to a number of complex divisions of responsibility for particular subject matters.

All of the state and territory interviewees stated that, in conducting litigation or negotiations with respect to native title claims, they treat their jurisdictional limits as including the intertidal zone and extending out to three nautical miles from the baseline (usually the low water mark). This was seen as a direct consequence of the intergovernmental settlement mentioned above. Further, most indicated that in practice they also assess connection beyond three nautical miles where the claim area extends that far.

It does not necessarily follow, therefore, that the Commonwealth must or should act as a contradictor on the factual issue of connection to sea country. There would be a clear duplication of effort in any case where the Commonwealth assessed connection in the intertidal zone and out to three nautical miles. Further, in respect of sea claims beyond the three nautical mile limit, the responsibility for assessing connection could, with sufficient safeguards and assurances, be in effect delegated to the relevant state or territory. The bulk of connection assessment at present relates to the definition of the claim group, establishing the relevant laws and customs and continuity of acknowledgment and observance. The further step of establishing connection to individual parts of the claim area is but one of a number of factual enquiries. It is arguable that where the groundwork of the case for connection has been assessed by the state or territory the Commonwealth's additional responsibility may be limited to this further step.

States and territories consulted indicated that they would not have a problem, in principle, with an arrangement whereby they would assess the case for connection to the entire claim area rather than only those areas that are strictly within their jurisdictional limits. State and territory interviewees indicated that there would be efficiency advantages in such an approach.

In summary, the Commonwealth does not have an automatic interest in, or responsibility for, the assessment of connection for all claims that extend beyond the high water mark. States and territories currently assume that responsibility out to three nautical miles and could potentially extend this to the full extent of claim areas.

1.3.4 International obligations

Another potential source of Commonwealth responsibility in respect of native title determinations is the possibility that a determination may impact on Australia's obligations under international law.

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[40] *New South Wales v The Commonwealth (Seas and Submerged Lands Act Case)* (1975) 135 CLR 337.
[41] M White, 'Australia's Offshore Legal Jurisdiction: Part 1 — History & Development', *Australian and New Zealand Maritime Law Journal*, vol. 25, 2011.

This consideration may arise, for example, in respect of a determination's impact on the right of free passage within Australian waters or on the Commonwealth's ability to fulfil its obligations with respect to internationally protected sites such as Ramsar wetlands.

If an aspect of a proposed determination may cause Australia to be in breach of its international obligations then this will provide a reason for the Commonwealth to join as a party and seek for that aspect to be changed, either through negotiation or litigation.

That consideration, however, is not necessarily affected by the issue of connection. If a proposed determination would cause Australia to breach its international obligations, it would be the case regardless of whether the claimants could establish connection to any particular standard. In such circumstances, the Commonwealth may be interested in the question of recognition under s 223(1)(c) of the Native Title Act, as occurred in *Yarmirr* — raising the question of whether the common law of Australia *can* recognise native title in these circumstances.[42] Alternatively, the Commonwealth may be concerned with questions of extinguishment: are the relevant native title rights and interests claimed extinguished or regulated by any Australian law?

By contrast, if the Commonwealth were considering recognising native title rights *despite* the fact that such recognition might be problematic in light of Australia's international obligations then there would be a good reason for wanting to be sure that the claim had a strong legal basis. On the assumption that a determination in those circumstances could have a negative impact on Australia's international relations, such as through diplomatic or financial sanctions, it would be necessary for the Commonwealth to weigh up the relative cases for agreeing to a determination versus avoiding the sanctions. That might well involve a closer examination of the connection material.

Where a native title claim covers areas which may be subject to international obligations, but where the rights and interests claimed would not raise any issue with respect to those international obligations, the issue of connection would not be relevant.

It should be noted also that Australia has endorsed international instruments, and is subject to international legal obligations, that weigh in favour of recognising native title rather than militating against it.[43]

[42] *Yarmirr v Northern Territory* [2001] HCA 56.
[43] Eg, the Declaration on the Rights of Indigenous Peoples, for which Australia announced its support in 2009.

2. Legal environment

This chapter outlines the legal environment in which the Commonwealth's policy on connection in consent determinations must operate. What are the legal constraints on what the Commonwealth *may* do, and what are the imperatives dictating what it *must* do? Four main areas are covered:

2.1 The substantive law on connection as set out in s 223 of the Native Title Act and the case law which interprets it (noting that this establishes the litigation standard for connection).

2.2 The legal principles governing the making of consent determinations, including an exploration of the relationship between the requirements for litigated determinations and the requirements for consent determinations.

2.3 The legal implications of the Commonwealth's entry into consent determinations for future litigation or negotiations.

2.4 The Commonwealth's general obligations in respect of its conduct of litigation and negotiations.

2.1 The substantive law from litigation

As indicated above at Section 1.2.2, the Commonwealth may be concerned not to consent to a determination without regard to the legal requirements of the Act, particularly in light of the *in rem* nature of native title consent determinations.

Given that this consideration may limit the flexibility with which the Commonwealth can go about achieving its other policy priorities, it is appropriate to have close regard to the case law in order to identify any binding or authoritative interpretations of the law that provide opportunities for flexible, non-technical, non-legalistic, non-adversarial approaches.

An analysis of the legal elements of native title is set out in Appendix 1. Some key points abstracted from that analysis are set out below.

- **Authority**

  While *Yorta Yorta*[44] is the most recent High Court decision dealing with native title connection issues, the law on connection is constituted by the full body of High Court, Federal Court and Full Federal Court judgments. There have been very few applications for special leave to appeal to the High Court on connection issues, and none have been granted.[45] This weakens any argument that the current body of Federal Court case law is inconsistent with High Court authority.

  To the extent that there are inconsistencies between the approaches taken in different Federal Court judgments, the Commonwealth may take comfort, where it follows the more flexible approaches, in the fact that it does so with sound judicial support.

- **Law and custom**

[44] *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58.

[45] The only post–*Yorta Yorta* special leave applications the author could identify as relating to 'connection' issues are: *Quall v Northern Territory of Australia & Ors* [2008] HCATrans 127; *Risk & Ors v Northern Territory of Australia & Ors* [2007] HCATrans 472; and *Fuller & Anor v De Rose & Ors* [2006] HCATrans 49. Special leave to appeal was refused in all three.

Native title consists of rights and interests held under law and custom acknowledged and observed by the claimants; acknowledgment and observance is determined by reference to the group as a whole, and so there is no requirement that all group members have the same degree of involvement in law and custom. Failure by some group members to discharge their responsibilities under law and custom does not mean a total failure of observance and acknowledgment and will not automatically result in the loss of rights and interests (unless such an outcome is dictated by law and custom).

- **Traditional**

  Laws and customs must be 'traditional' in the sense that they constitute a normative system that bears a relationship of continuity to the normative system under which rights and interests were held at the assertion of sovereignty. The content of the laws and customs does not need to be identical to those that existed at sovereignty. Alterations, developments and even 'significant adaptations' to the pre-colonial laws and customs will not deprive contemporary laws and customs of their 'traditional' status, so long as the changed or adapted laws and customs continue to sustain the same rights and interests that existed at sovereignty. Even changes to the rules by which rights and interests are distributed within a society may not be fatal to a claim. The cases suggest that the true touchstone regarding change in law and custom in this respect is whether or not the change would create a greater burden on the Crown's radical title.

  The interpretation of the word 'traditional' in *Yorta Yorta* requires that acknowledgment and observance have been substantially uninterrupted since the Crown's assertion of sovereignty. Courts have been prepared to find that even quite significant disruptions to Aboriginal peoples' physical presence on country and ability to perform ceremony, for example, have not amounted to substantial interruptions such that the present-day laws and customs are no longer 'traditional'.[46]

  The law makes significant allowance for the difficulties involved in marshalling proof that laws and customs have been observed and acknowledged for over two centuries. In the absence of evidence to the contrary, inferences about the longevity of laws and customs may be made on the basis of living witnesses' testimony, and would be particularly appropriate in the context of consent determinations.

- **Society**

  The issue of 'society', introduced by the joint judgment in *Yorta Yorta*, may be relevant to s 223 issues in one of two ways:

  - The society, under whose laws and customs the rights and interests were held at sovereignty, is found to have 'ceased to exist' at some point. The legal result is that any laws and customs subsequently acknowledged and observed will no longer be 'traditional'. This may be called the 'continuity issue' or '*Yorta Yorta* issue'.

  - Some or all of the land claimed to be possessed under the traditional law and custom of one society is found to have been held at sovereignty under the laws and customs of a different society. This may have the effect that the rights and interests with respect to that land will

[46] Eg, *De Rose v State of South Australia (No 2)* [2005] FCAFC 110.

not be held under 'traditional' law and custom.[47] This may be called the 'geographical extent issue' or 'Bardi Jawi issue'.

There is no independent legal requirement, whether as a substantive part of the law on s 223 or as a procedural aspect of s 225, that the claimants' 'society' be identified at all, let alone with any particular degree of precision or consistency. 'Society' is a subordinate issue, solely directed to answering the main question of whether the relevant laws and customs are 'traditional' in the requisite sense; it is not an independent element of proof in itself. Importantly, it is not necessary for the native title holding group to be coterminous with the relevant society.

Neither *Yorta Yorta* nor subsequent cases hold that native title cannot be recognised unless a single, clearly bounded society is identified. The anthropological realities are often more complex. Depending on the context, a given set of facts will be capable of sustaining a number of different but equally valid answers to the legal question of society. So long as the laws and customs which give rise to the rights and interests are 'traditional' in the requisite sense, there is no further need to inquire into the question of 'society'. Courts have not found it necessary to devote much time to the society question in cases where it has not been put into issue.

Further, there is no legal or logical requirement that the definition of 'society' be consistent as between neighbouring claims. Although a neat tessellating map of societies would be convenient from an administrative point of view, the courts have been quite prepared to accept a society cast at one level for one claim and a society cast at a more or less abstracted level for a different claim. It is a question of fact in each application, and neither courts nor parties are bound by previous findings as to society in the determination of new applications.

This means that, so long as a respondent party does not have any specific concerns about the 'continuity/*Yorta Yorta* issue' or the 'geographical extent/Bardi Jawi issue', there is no additional reason to insist on a detailed description of the applicable society.

- **Connection**

  Despite considerable variation and uncertainty around the meaning and purpose of s 223(1)(b), there is a considerable body of case law dealing with the question of whether claimants 'have a connection' with the claim area 'by [their traditional] laws and customs'. The cases establish that this inquiry is a subtle and multifaceted one, grounded in an examination of the content of the laws and customs and how they interact with the facts on the ground. 'Connection' will often be established by the same facts that go to establish the other elements, and usually not difficult to establish if the other elements are made out.

  Connection does not require physical presence, and nor will an absence of 'spiritual' attachment be fatal to this element. In general, the courts have been resistant to interpreting s 223(1)(b) as requiring a fine-grained approach to connection in terms of either connection to particular geographical places or connection possessed by particular people. Courts have frequently observed that it is unnecessary to determine connection estate by estate and that an assessment in respect of the claim group as a whole is sufficient (this may depend on whether native title is found to be held communally).

[47] This is subject to the possibility of inter-societal transmission of law and custom, a question which has not been decided in the case law to date.

It was noted in *Bodney*[48] that connection may have to be assessed in respect of particular areas if put into issue by a party, but, where not put into issue, a more general approach to the evidence is appropriate.

- **Evidence and inferences**

  In terms of the minimum legal requirements for a consent determination, it is worth noting that the Act does not state that a determination of native title may not be made unless the matters in s 223(1) are proved to the civil standard or indeed to any evidentiary standard in particular. Rather, the court may make a determination under s 87, and s 223(1) defines the proper subject of that determination. It is open for parties to make inferences, and what will constitute an adequate basis for such inferences will depend on the circumstances. The court's duty with respect to the evidentiary basis for consent determinations is dealt with below.

  In short, there is no legally-defined minimum standard of evidence for entry into consent determinations. Parties are entitled and expected to make inferences, in the absence of evidence to the contrary, in relation to the facts establishing the elements of s 223. The quantity and type of material that a party requires is a matter of policy rather than law. It is a matter of weighing up the interests, risks and available evidence and making a judgment.

2.2 Legal principles governing the making of consent determinations

Consent determinations are made under ss 87 and 87A of the Native Title Act (the discussion here will focus on s 87, since the provisions are similar). Section 87 provides that a court may make a determination of native title (among other orders) if:

1. three months have elapsed since the notification date of the application
2. the parties have reached agreement on the terms of the proposed determination
3. the agreed terms are written down, signed by the parties and filed in court
4. the court is satisfied that an order in those terms would be within its power
5. it appears to the court to be appropriate to do so.[49]

Looking at the fourth condition, there are a range of issues that may affect the court's power to make a consent determination. The Native Title Act specifies some of these: all of the matters listed in s 225 must be addressed in the determination,[50] there must not be any existing determination in the claim area[51] or any overlapping claim,[52] and the rights and interests set out in the proposed determination must be 'in relation to land or waters'.[53] Another matter to be considered is whether the rights and interests can be recognised by the common law of Australia, as required by s 223(1)(c).[54] In deciding whether a determination would be within the court's power, courts have

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[48] *Bodney v Bennell* [2008] FCAFC 63 at [179].
[49] Sections 87(1) and (1A).
[50] Section 94A.
[51] Sections 13(1)(a), 68.
[52] Section 67(1).
[53] Section 223. See RS French (2009) 'Native Title: A Constitutional Shift?", JD Lecture Series, 24 March 2009, University of Melbourne Law School.
[54] See, eg, *Kearns on behalf of the Gunggari People #2 v State of Queensland* [2012] FCA 651; *Kngwarrey on behalf of the members of the Irrkwal, Irrmarn, Ntewerrek, Aharreng, Arrty/Amatyerr and Areyn Landholding Groups v Northern Territory of Australia* [2011] FCA 428.

not generally found it necessary to look to the factual basis for the matters listed in s 225 — it is a formal rather than substantive requirement.[55]

In relation to the fifth condition, there are two distinct questions: what does the court need to be satisfied of in order for it to conclude that a determination is 'appropriate'; and how far must the government respondent (usually the state or territory) go in satisfying itself that there is a proper basis for a determination? The short answer to both these questions is: the law does not require courts to conduct a mini trial as to the merits of the applicants' case for native title; nor are government respondents expected to conduct their own trial by proxy. The government respondents, rather than the court, are entrusted with assessing the substantive adequacy of the claimants' case, and the law does not require them to assess the evidence with the same rigour a court would. These two questions are explained in more detail under the next two headings.

2.2.1 When is a consent determination 'appropriate'?

Courts have taken a range of different approaches to the question of when it is 'appropriate' to make a consent determination. As French CJ has remarked, 'appropriate' is 'an evaluative term and so has a somewhat elastic application'.[56] The diversity and detail of this range of opinion is the subject of a separate publication,[57] but for the purposes of this paper it is useful to make a few short points.

The court has a wide discretion to make consent determinations. This power must be exercised 'judicially', meaning not arbitrarily or capriciously, and in accordance with the subject matter, scope and purpose of the legislation.[58] A primary and overarching purpose of the Native Title Act is to facilitate the resolution of native title claims by agreement rather than litigation.[59] Across the board, then, judges recognise that it will be appropriate to make a consent determination without a full hearing and assessment of the evidence.[60] By the same token, however, judges acknowledge that the making of a native title determination is a serious matter that will bind not only the immediate parties but also the world at large.[61] This means that courts must not simply apply a 'rubber stamp'

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[55] Reeves, J (2009) 'Consent determinations under the Native Title Act 1993 (Cth)', Presentation to the Law Society Northern Territory, Wednesday 18 February 2009. Cf eg *Rex on behalf of the Akwerlpe-Waake, Iliyarne, Lyentyawel Ileparranem and Arrawatyen People v Northern Territory of Australia* [2010] FCA 911.

[56] French, RS (2009) 'Native title - A constitutional shift?', JD Lecture Series, University of Melbourne Law School, 24 March 2009.

[57] Duff, N 2014, *What's needed to prove native title? Finding flexibility within the law on connection*, AIATSIS Research Discussion Papers, no. 35, June, AIATSIS Research Publications, Canberra.

[58] *Smith v Western Australia* (2000) 104 FCR 49 at [22]; *Munn for and on behalf of the Gunggari People v State of Queensland* [2001] FCA 1229 at [28]. These cases have been cited by dozens of subsequent consent determination judgments.

[59] See, eg, *Clarrie Smith v State of Western Australia [2000] FCA 1249* at [22]-[24]; *Ward v State of Western Australia* [2006] FCA 1848 at [8]; *Hunter & Ors v State of Western Australia* [2012] FCA 690; *Hoolihan on behalf of the Gugu Badhun People #2 v State of Queensland* [2012] FCA 800; *Archer on behalf the Djungan People #1 v State of Queensland* [2012] FCA 801 at [3]; *Trevor Close on behalf of the Githabul People v Minister for Lands* [2007] FCA 1847 at [6]; *Payi Payi on behalf of the Ngururrpa People v the State of Western Australia* [2007] FCA 2113 at [6].

[60] See, eg, *Munn (for and on behalf of the Gunggari People) v State of Queensland* (2001) 115 FCR 109 at [30]; *Billy Patch and Others on behalf of the Birriliburu People v State of Western Australia* [2008] FCA 944 at [13]; *Wik and Wik Way Native Title Claim Group v State of Queensland* [2009] FCA 789 at [16]; *Kuuku Ya'u People v State of Queensland* [2009] FCA 679 at [12].

[61] *Erica Deeral (On behalf of herself & the Gamaay Peoples) & Ors v Gordon Charlie & Ors* [1997] FCA 1408; *Clarrie Smith v State of Western Australia* [2000] FCA 1249 at [26]; *Cox on behalf of the Yungngora People v State of Western Australia* [2007] FCA 588; *Wik and Wik Way Native Title Claim Group v State of Queensland* [2009] FCA 789 at [15]; *Rex on behalf of the Akwerlpe-Waake, Iliyarne, Lyentyawel Ileparranem and Arrawatyen People v Northern Territory of Australia* [2010] FCA 911; *Lennon on behalf of the Antakirinja Matu-Yankunytjatjara Native Title Claim Group v The State of South Australia* [2011] FCA 474 at [4]; *Prior on behalf of the Juru (Cape Upstart) People v State of Queensland (No 2)* [2011] FCA 819; *King on behalf of the Eringa Native Title Claim Group v State of South Australia* [2011] FCA 1386.

to the parties' agreement; rather, the court should be satisfied that there is some basis for the exercise of their jurisdiction and that the proposed determination is 'rooted in reality'.[62]

Within these bounds, judges differ in how they approach the task of deciding whether a consent determination is appropriate. Three distinct approaches are outlined below.

Firstly, the clear mainstream of cases consider that the existence and quality of the agreement between the parties is the focus of the enquiry. As North J said in *Nangkiriny*:[63]

> I rely primarily on the fact that the parties have freely agreed to the terms of the orders. The fact that there is evidence before the Court which justifies the order confirms the view that the agreement freely made is appropriate.

The most frequently cited statement of the law on 'appropriateness' is the following passage from Emmett J's judgment in *Munn*:[64]

> …the Court must have regard to the question of whether or not the parties to the proceeding, namely, those who are likely to be affected by an order, have had independent and competent legal representation. That concern would include a consideration of the extent to which the State is a party, on the basis that the State, or at least a Minister of the State, appears in the capacity of *parens patriae* to look after the interests of the community generally. The mere fact that the State was a party may not be sufficient. The Court may need to be satisfied that the State has in fact taken a real interest in the proceeding in the interests of the community generally. That may involve the Court being satisfied that the State has given appropriate consideration to the evidence that has been adduced, or intended to be adduced, in order to reach the compromise that is proposed. The Court, in my view, needs to be satisfied at least that the State, through competent legal representation, is satisfied as to the cogency of the evidence upon which the applicants rely.
>
> However, that is not to say that the Court would itself want to predict the State's assessment of that evidence or to make findings in relation to those matters. On the other hand, in an appropriate case, the Court may well ask to be shown the evidence upon which the parties have based their decision to reach a compromise. Either way, I would not contemplate that, where the Court is being asked to make an order under s 87, any findings would be made on those matters. The Court would look at the evidence only for the purpose of satisfying itself that those parties who have agreed to compromise the matter, particularly the State on behalf of the community generally, are acting in good faith and rationally.

This passage, and the cases which have applied it, makes clear that courts should be deeply interested in the process by which the parties reached their agreement, in particular the process by which the government respondent came to regard the claimants' case as strong enough. Reeves J said in *Nelson*[65] that:

> …the central issue in an application for a consent determination under s 87 is whether there exists a free and informed agreement between the parties. In this respect, the process followed by the State party respondent, particularly how it goes about assessing the underlying evidence

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[62] French, RS (2009) 'Native title — a constitutional shift?', JD Lecture Series, University of Melbourne Law School, 24 March 2009. See also *Clarrie Smith v Western Australia* [2000] FCA 1249 at [26]; *Cox on behalf of the Yungngora People v State of Western Australia* [2007] FCA 588 at [3]; *Prior on behalf of the Juru (Cape Upstart) People v State of Queensland (No 2)* [2011] FCA 819 at [19].

[63] *Nangkiriny v Western Australia* [2004] FCA 1156 at [15] — cited in some 30 subsequent consent determination judgments.

[64] *Munn for and on behalf of the Gunggari People v State of Queensland* [2001] FCA 1229 at [29]-[30] — cited in about 40 consent determination judgments.

[65] *Nelson v Northern Territory of Australia* (2010) 190 FCR 344 at [14].

> as to the existence of native title, is critical. Other critical factors, all directed to the processes that lead to the agreement and what was agreed, that have been previously identified by the Court include: whether the parties have independent and competent legal representation …; whether the terms of the proposed order are unambiguous and clear…; and whether the agreement has been preceded by a mediation process… [*references omitted*].

In pursuance of this approach there have been cases in which judges make virtually *no* reference to the evidence or facts of the substantive native title claim and instead limit their inquiry to procedural matters relating to the agreement.[66] More commonly, though, judges will refer to the facts and evidence in support of their conclusions about the propriety of the agreement, or else as a way of 'telling the story' of the determination.[67]

A second category of cases treats 'appropriateness' as a matter of *both* the circumstances of the agreement *and* an independent (albeit cursory) assessment of the evidence. This might be thought of as a 'hybrid' approach. While the 'mainstream' approach outlined above focuses on the agreement but may consider the evidence to determine whether the parties are acting rationally and in good faith, the second approach is concerned primarily with the factual basis for the claim but also considers the agreement as a factor weighing heavily in favour of a determination.[68] In most 'hybrid' cases the relationship between the evidence, the agreement and the appropriateness of the determination is not explicitly stated, but it is apparent from context that the court considers that a sound agreement and an independent factual basis are both necessary conditions for a determination. In the Nookanbah determination, for example, French J said:[69]

> I have had the opportunity of examining the proposed orders, and subject to some minor variations, which have been made, I am satisfied that they are in accordance with the law. I have also had the opportunity of considering a comprehensive expert report by two experienced consultant anthropologists, Mr Michael Gallagher and Dr Kingsley Palmer. The conclusions reached in their report indicate that the applicants would satisfy the criteria for a determination of native title in the terms which they seek.
>
> …Having regard to the agreement of the parties, the form of the order proposed and the supporting material in the report prepared by the anthropologists, I regard it as appropriate that I should make the orders and the determination which are proposed.

The cases in this 'hybrid' category constitute a significant proportion of the overall number of consent determinations historically, but the approach is becoming less common as the 'mainstream' approach outlined above is increasingly adopted.

Finally, there are the cases that do not explicitly consider the process of agreement-making to be relevant to the appropriateness enquiry, other than to signal that the court is justified in applying a

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[66] Eg, *Trevor Close on behalf of the Githabul People v Minister for Lands* [2007] FCA 1847 per Branson J; *Wilson v Northern Territory of Australia* [2009] FCA 800 per Reeves J; *Barunga v State of Western Australia* [2011] FCA 518 per Gilmour J; *Hunter v State of Western Australia* [2012] FCA 690 per North J; *Albert v Northern Territory of Australia* [2012] FCA 673 per Lander J; *Roberts on behalf of the Najig and the Guyanggan Nganawirdbird Groups v Northern Territory of Australia* (No 3) [2012] FCA 255 per Finn J.

[67] Eg *Lovett on behalf of The Gunditjmara People v State of Victoria* [2007] FCA 474; *Hayes on behalf of the Thalanyji People v State of Western Australia* [2008] FCA 1487.

[68] Eg *Kaurareg People v State of Queensland* [2001] FCA 657 per Drummond J; *Ngalpil v Western Australia* [2001] FCA 1140 per Carr J; *James on behalf of the Martu People v Western Australia* [2002] FCA 1208 per French J; *Stanley Mervyn, Adrian Young, and Livingston West and Ors, on behalf of the Peoples of the Ngaanyatjarra Lands v Western Australia and Ors* [2005] FCA 831 per Black CJ; *Patta Warumungu People v Northern Territory of Australia* [2007] FCA 1386 Mansfield J; *Adnyamathanha No 1 Native Title Claim Group v The State of South Australia (No 2)* [2009] FCA 359 per Mansfield J; *Prior on behalf of the Juru (Cape Upstart) People v State of Queensland (No 2)* [2011] FCA 819 per Rares J.

[69] *Cox on behalf of the Yungngora People v State of Western Australia* [2007] FCA 588 at [4], [12].

lower than normal standard to its assessment of the evidence. This might be considered the 'hands-on' approach, as the court sees itself as having the central role in assessing the evidence to determine the appropriateness of the determination, as opposed to relying primarily on the fact of agreement as supporting the determination. Often the judge's conclusions about appropriateness are expressed exclusively in terms of the adequacy of the evidentiary material and make no reference to the agreement (other than in invoking the power under s 87 in the first place).[70] The 'hands-on' approach is the one that was generally adopted in the earliest consent determinations, and has continued to be associated with Queensland judges.[71]

Across all three approaches — mainstream, hybrid and hands-on — in the vast majority of cases courts will be provided with a range of material covering both the government respondent's processes of assessing connection evidence *and* the substance of the claim. It is relatively rare for judges to have *no* exposure to the substance of a claim by the time a consent determination is sought, given the range of court processes that are likely to take place during the life of a native title claim, such as the taking of preservation evidence, the filing of affidavits, witness statements and agreed statements of facts. Even where they do not consider it strictly necessary, judges will often refer to the material they have been given, in acknowledgment of the work that has gone into producing the research, out of respect for the culture and history of the claimant group, and sometimes simply to reinforce the factual basis for the claim.[72]

2.2.2 'Standard of evidence' for consent determinations

Having established what role the court and government respondents are expected to play in confirming the factual basis for a consent determination, the next question is: to what evidentiary standard must that factual basis be established?

In the cases applying s 87, it is evident that the degree to which the state or territory is expected to have tested the evidence falls significantly short of what would be required of a court at trial. The court does not require the state or territory to show that the claimants have proved the elements in s 223 to the standard of proof applicable to civil litigation.[73] The government respondent's role in consent determinations does not involve an outsourcing of the judicial fact-finding function, but rather a distinctly lower threshold of evidence. A majority joint judgment of the High Court observed that:

> If it be practicable to resolve an application for determination of native title by negotiation and agreement rather than by the judicial determination of complex issues, the court and the likely parties to the litigation are saved a great deal of time and resources. Perhaps more importantly, if the persons interested in the determination of those issues negotiate and reach an agreement,

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[70] Eg *Timothy James Malachi on behalf of the Strathgordon Mob v State of Queensland* [2007] FCA 1084 per Greenwood J.

[71] Eg *Western Yalanji or "Sunset" peoples v Alan & Karen Pedersen & Ors* [1998] FCA 1269 per Drummond J; *Masig People v Queensland* [2000] FCA 1067 per Drummond J; *Congoo v Queensland* [2001] FCA 868 per Hely J; *David on behalf of the Iama People and Tudulaig v Queensland* [2004] FCA 1576 per Cooper J; *Djabugay People v Queensland* [2004] FCA 1652 per Spender J; *Mundraby v Queensland* [2006] FCA 436.

[72] Eg *Kngwarrey on behalf of the members of the Irrkwal, Irrmarn, Ntewerrek, Aharreng, Arrty/Amatyerr and Areyn Landholding Groups v Northern Territory of Australia* [2011] FCA 428 per Reeves J; *King on behalf of the Eringa Native Title Claim Group and the Eringa No 2 Native Title Claim Group v State of South Australia* [2011] FCA 1387 per Keane CJ; *Kearns on behalf of the Gunggari People #2 v State of Queensland* [2012] FCA 651 per Reeves J; *Archer on behalf of the Djungan People 1 v State of Queensland* [2012] FCA 801 per Logan J

[73] The civil standard of proof, in this context, means that on all of the admissible evidence taken together it is more likely than not that the facts that the applicant relies on to make their case are true. This is also called the 'balance of probabilities'.

> they are enabled thereby to establish an amicable relationship between neighbouring occupiers.[74]

It is implicit in the first sentence that the legislation allows for parties to negotiate resolutions to complex issues of law and fact without determining them precisely as a court would.

In the Gunditjmara consent determination judgment, North J found that it was appropriate for the state to have assessed the applicant's material at the level of a 'reasonably arguable case'.[75] His Honour said that the court's power to 'approve agreements' under s 87 was given in order to avoid lengthy hearings before the court, and that the Act does not intend to replace a court hearing with 'a trial, in effect, conducted by state parties'.[76] This means 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] Further, in the Thalanyji consent determination North J observed that if a state party were to make excessive demands for information it would be acting in a manner inconsistent with the concept of agreement making provided by the Native Title Act.[78] His Honour said:[79]

> The way in which native title jurisprudence has developed provides a significant contextual factor which should influence a State respondent in specifying the extent to which applications should be investigated where orders under s 87 are to be sought. In broad terms the learning relating to extinguishment has shown that successful applications will not interfere significantly with the rights and interests of respondent parties. To the extent that native title rights and interests are inconsistent with the rights of respondents, those latter rights will prevail: *Western Australia v Ward* (2002) 213 CLR 1; [2002] HCA 28.
>
> This circumstance moderates the degree of verification required by a State respondent acting in the interests of citizens on questions such as the constitution of the relevant society at settlement, and the requirements of continuity in the acknowledgment of traditional laws and the observation of traditional customs. It is necessary to emphasise that, in the context of s 87, State respondents are not required, in effect, to conduct a trial of the application in order to satisfy the Court that it is appropriate to make the orders sought. Section 87 is designed to avoid that necessity and all the disadvantages which are involved in the conduct of litigation.

Other judges have endorsed this approach. Reeves J has articulated the relevant standard to which the government respondent ought to be satisfied as that of a 'credible' or 'arguable' basis.[80] Emmet J, Barker J and Gilmour J have on different occasions stated that the government respondent must simply be 'satisfied as to the cogency of the evidence on which the applicants rely'.[81] Other cases put the matter more broadly still, requiring only that the state or territory be

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[74] *North Ganalanja Aboriginal Corporation v Queensland* [1996] HCA 2 at [26] per Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ.
[75] *Lovett on behalf of the Gunditjmara People v State of Victoria (No 5)* [2011] FCA 932 at [26].
[76] *Lovett on behalf of the Gunditjmara People v State of Victoria (No 5)* [2011] FCA 932 at [38]. See also *Kuuku Ya'u People v State of Queensland* [2009] FCA 679 at [12] per Greenwood J.
[77] *Ibid.*
[78] *Hayes on behalf of the Thalanyji People v State of Western Australia* [2008] FCA 1487 at [30]. See also *Hunter v State of Western Australia* [2009] FCA 654 at [17]-[26].
[79] *Ibid* at [23]-[24].
[80] *Kngwarrey on behalf of the members of the Irrkwal, Irrmarn, Ntewerrek, Aharreng, Arrty/Amatyerr and Areyn Landholding Groups v Northern Territory of Australia* [2011] FCA 428 at [15]; *Nelson v Northern Territory of Australia* [2010] FCA 1343 at [12]-[15]; *Ampetyane v Northern Territory of Australia* [2009] FCA 834 at [19].
[81] *Munn v Queensland* [2001] FCA 1229 per Emmett J at [29]; *Thudgari People v State of Western Australia* [2009] FCA 1334 at [25] per Barker J; *Goonack v State of Western Australia* [2011] FCA 516 per Gilmour J at [26]; *Barunga v State of Western Australia* [2011] FCA 518 per Gilmour J at [25].

satisfied that there is a 'proper basis'[82] for the determination or that the determination is 'justified in all the circumstances'.[83]

It should be stated that the large number of consent determinations do not contain any explicit statement of what is expected of states and territories in assessing connection material. But the only judgments that do contain such a statement are in concurrence with the principles outlined above. Further, as indicated earlier there are some judges who do not consider that the basis for the government respondent's agreement (as opposed to the underlying evidence of native title itself) is particularly relevant, and so it is unsurprising that these judges do not specify the degree to which governments are expected to assess the evidence. Even in those cases, however, it is clear that the judges are not themselves testing the evidence so much as surveying it to ensure that there is some factual basis to support the determination. Even for these more 'hands on' judges, the fact that the parties have agreed on the determination reduces the extent to which the court is required to scrutinise the material — a prima facie case[84] is generally held to be sufficient.[85]

To summarise, consent determinations do not require any particular 'standard of proof' and certainly do not require government respondents to be satisfied on the balance of probabilities.[86] Indeed, it would be misleading to use the term 'standard of proof' to describe the degree to which governments are expected to assess the evidence, because it would suggest that they are required to take on a quasi-judicial role. The only relevant legal requirement is that the determination be 'appropriate' in all the circumstances. In the unique context of the Native Title Act, this merely requires that there be an arguable or credible basis for the existence of native title. This means that there is no legal impropriety in a government respondent agreeing to a consent determination where the evidence is significantly less complete than it would be at a trial. Indeed, some judges have suggested that it would be improper for a state or territory to impose such a high standard on applicants.

2.2.3 Implications for Commonwealth policy

The prevailing view in the case law, across all of the approaches outlined above, is that the states and territories have a central role in examining the material supporting consent determinations, although some judges regard the court as bearing the ultimate responsibility for ensuring the factual probity of the claim. Just as clearly, government respondents are not required to test claims to the same extent as a court would in contested litigation, and there are strong indications that setting the evidentiary bar too high would be improper in terms of the additional time and costs incurred, and in light of the imperative to resolve native title claims by agreement. State and territory respondents may consider it important to protect their interests (and the public interest) by carefully considering the merits of claims, but the courts have made it clear that government respondents should not adopt the position of refusing to agree to a consent determination until they are convinced that the

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[82] *Hunter & Ors v State of Western Australia* [2012] FCA 690 at [28] per North J.

[83] Eg *Simon v Northern Territory of Australia* [2011] FCA 575; *Roberts on behalf of the Najig and the Guyanggan Nganawirdbird Groups v Northern Territory of Australia* [2012] FCA 223; *Albert v Northern Territory of Australia* [2012] FCA 673; *Hoolihan on behalf of the Gugu Badhun People #2 v State of Queensland* [2012] FCA 800 ; *Archer on behalf the Djungan People #1 v State of Queensland* [2012] FCA 801.

[84] A case that is supported 'on the face of it' – assuming that the supporting material is true and accurate, without necessarily testing it against potentially contradictory assertions, does the applicant's case appear to be sufficiently supported at first blush?

[85] eg *Wik and Wik Way Native Title Claim Group v State of Queensland* [2009] FCA 789 at [16]-[17]; *Kowanyama People v State of Queensland* [2009] FCA 1192 at [24]; *Kuuku Ya'u People v State of Queensland* [2009] FCA 679 at [12]. See also *Delaney on behalf of the Quandamooka People v State of Queensland* [2011] FCA 741; *Wonga on behalf of the Wanyurr Majay People v State of Queensland* [2011] FCA 1055.

[86] Again, meaning that the facts relied on by the claimants are more likely to be true than to be false.

claimants would succeed at trial. Certainly, there is no legal impropriety in agreeing to a consent determination where the evidence is less complete than would be required for a trial.

The majority of judges treat the states or territories as the contradictor on the question of connection (in its broad meaning) and would not expect the Commonwealth to have embarked on an independent or parallel process of assessing connection before agreeing to a consent determination.

This would suggest that the Commonwealth would not be expected in consent determinations to make thorough investigations into connection in performance of its roles of protecting the integrity of the Act or ensuring that any consent determination it enters into is consistent with the law.

In terms of the Commonwealth's protection of its interests, it means that the Commonwealth should not necessarily rely on the court to assess connection in determining a consent determination. The majority of judges would consider that it is for the states and territories, not for the court, to be satisfied as to the adequacy the factual and legal basis underpinning a proposed determination.

2.3 Protecting the litigation position of the Commonwealth?

One possible area of concern for the Commonwealth is whether its entry into a consent determination may have implications for its later litigation position. This raises the question of what precedential or issue estoppel effects a consent determination may have.[87]

This concern was raised by non-government respondents in *Munn for and on behalf of the Gunggari People v State of Queensland,*[88] where Emmett J said:

> The concern is that any findings that the Court may make, either explicitly or implicitly, in the course of making a consent determination will make it difficult for different findings and conclusions to be sought in other cases where the evidence might otherwise be thought to be the same, notwithstanding that there could be no issue estoppel if there is a fresh proceeding to deal with the Part B land.[89]

His Honour went on to explain that the court's role under s 87 is to determine whether a determination would be appropriate based on findings about the process and circumstances of the parties' agreement. Evidence about the substantive merits of the matter might be considered for the limited purpose of assessing whether the parties are 'acting in good faith and rationally', but the court's role is not to make findings of fact about the merits of the case based on that substantive connection evidence.[90]

So not only would issue estoppel not be strictly raised in any case, but also there would be no relevant findings on which estoppel would operate.[91] In light of the principles outlined above governing the application of s 87, the findings on which the court's orders are based would properly include matters such as the fact that the parties were legally represented and that their consent

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[87] 'Issue estoppel' is a rule that prevents a party from disputing particular facts in legal proceedings, if the same facts had already been found by a Court in previous proceedings..

[88] [2001] FCA 1229.

[89] [2001] FCA 1229 at [24].

[90] [2001] FCA 1229 at [30].

[91] The question of issue estoppel was also considered without final decision in *Akiba*, where Finn J likewise suggested that since the Court in a consent determination is not required to make findings on the matters implicit or presupposed by the orders made, parties ought not be precluded from contesting those implicit matters in later proceedings: *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v State of Queensland (No 2)* [2010] FCA 643 at [153]. Cf *Quall v Northern Territory of Australia* [2009] FCAFC 157.

was free and informed; and the process the state or territory had gone through to assess the material. Such findings are of minimal precedential effect.

There may be some question as to whether the *content* of the determination could have some precedential effect, such as establishing that a particular form of right or interest were legally acceptable or that native title could be recognised beyond a certain distance offshore. But in terms of whether a particular set of facts is capable of supporting the elements of s 223, it is unlikely that a consent determination would have any binding effect on future proceedings. It would be legally open for a party to accept a legal proposition in negotiations towards a consent determination, and then to take a different position in later proceedings.

In saying this, it is recognised that the Commonwealth has an obligation under its model litigant obligation to act consistently in the handling of claims and litigation, as explained below in Section 2.4. This may lead the Commonwealth to exercise a degree of caution in entering consent determinations, in order to avoid agreeing to a proposition in one case that may cause problems in a later case. Having said that, there is an argument that in some cases the balance of the Commonwealth's various policy priorities may in fact favour *withdrawing* as a party rather than withholding consent out of concern for consistency. For example, if the Commonwealth had a quite minor land interest at stake but strong reasons for a consent determination to go ahead, and the Commonwealth's position on a particular point of law would pose problems for its entry into the consent determination, the balance of the Commonwealth's policy priorities might favour withdrawing from the matter. In this way, the Commonwealth's legal position would be preserved and the outcome which serves its other policy priorities would be achieved.

2.4 Model litigant obligations and ss 37M/37N *Federal Court of Australia Act 1976*

The Commonwealth is bound by two sets of rules governing its conduct of litigation and negotiations: the *Legal Services Directions 2005*, including the model litigant obligations, and ss 37M and 37N of the *Federal Court of Australia Act 1976* (Federal Court Act).

The *Legal Services Directions 2005* require claims to be conducted in accordance with legal principle and practice, including the example already discussed that requires agencies to act 'in the Commonwealth's financial interest to defend fully and firmly claims brought against the Commonwealth where a defence is properly available, subject to the desirability of settling claims wherever possible and appropriate'.[92] The directions also require entry into litigation to be preceded by legal advice indicating that there are reasonable grounds for starting proceedings.

Relevantly, the model litigant obligation requires (cl 2):

(a) dealing with claims promptly and not causing unnecessary delay in the handling of claims and litigation

(aa) making an early assessment of:

(i) the Commonwealth's prospects of success in legal proceedings that may be brought against the Commonwealth; and

(ii) the Commonwealth's potential liability in claims against the Commonwealth

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[92] Para 4.3, Sched.

(b) paying legitimate claims without litigation, including making partial settlements of claims or interim payments, where it is clear that liability is at least as much as the amount to be paid

(c) acting consistently in the handling of claims and litigation

(d) endeavouring to avoid, prevent and limit the scope of legal proceedings wherever possible, including by giving consideration in all cases to alternative dispute resolution before initiating legal proceedings and by participating in alternative dispute resolution processes where appropriate

(e) where it is not possible to avoid litigation, keeping the costs of litigation to a minimum, including by:

(i) not requiring the other party to prove a matter which the Commonwealth or the agency knows to be true

(ii) not contesting liability if the Commonwealth or the agency knows that the dispute is really about quantum

(iii) monitoring the progress of the litigation and using methods that it considers appropriate to resolve the litigation, including settlement offers, payments into court or alternative dispute resolution, and

(iv) ensuring that arrangements are made so that a person participating in any settlement negotiations on behalf of the Commonwealth or an agency can enter into a settlement of the claim or legal proceedings in the course of the negotiations

(f) not taking advantage of a claimant who lacks the resources to litigate a legitimate claim

(g) not relying on technical defences unless the Commonwealth's or the agency's interests would be prejudiced by the failure to comply with a particular requirement

(h) not undertaking and pursuing appeals unless the Commonwealth or the agency believes that it has reasonable prospects for success or the appeal is otherwise justified in the public interest

(i) apologising where the Commonwealth or the agency is aware that it or its lawyers have acted wrongfully or improperly.

Section 37M of the Federal Court Act sets out the 'overarching purpose' of the Federal Court's civil practice and procedure provisions, and s 37N requires litigants and their legal representatives to act consistently with the overarching purpose. The full text of these sections is set out in Appendix 2 to this report. Section 37M emphasises the importance of resolving disputes justly, quickly, inexpensively and efficiently. This is clearly relevant to the manner in which the Commonwealth engages with the question of connection in consent determinations. As part of this, the section requires proportionality between the costs incurred and the importance and complexity of the matter at hand.

3. General principles for Commonwealth conduct as a respondent party

The previous two chapters of this report have respectively outlined the range of roles, responsibilities, interests and policy priorities that must be accommodated in any Commonwealth connection policy, and the various legal frameworks that may inform or constrain the manner in which the Commonwealth goes about pursuing such roles, responsibilities, interests and policy priorities. Chapter 3 outlines a number of general principles that are intended to inform a Commonwealth connection policy. These principles relate to the Commonwealth's role as a respondent party to consent determinations and are relevant to the issue of connection because they have a bearing on the timing, logistics, relationship dynamics and general workability of the Commonwealth connection models proposed in Chapter 4.

The approach for Chapter 3 is to set out some of the interviewees' views about the Commonwealth's current and/or ideal conduct as a party to consent determinations and then to distil from these (and other analysis) some guiding principles of general application. It should be noted that, by reporting the views of interviewees, the authors should not be taken necessarily to endorse those views — ascertaining the accuracy of particular observations is beyond the scope of the research project.

The recommendations made below are intended to describe ideal practice and do not necessarily imply a judgment that the Commonwealth does not already promote these practices. To the extent that interviewees have expressed concerns that are already addressed in Commonwealth policy, this may highlight a need for the Commonwealth to communicate its current position more clearly to all stakeholders, or to ensure that its policies are implemented consistently in all claims.

It should be noted that some interviewees did not express any significant concerns on the issues discussed and were largely content with the status quo. These tended to be interviewees at NTRBs representing claimants with strong evidentiary claims, or parties whose contact with the Commonwealth has been minimal.

The themes discussed in Chapter 3 are:

3.1 flexible, non-legalistic approach

3.2 close integration of policy considerations into negotiations

3.3 consistency and predictability in Commonwealth approaches

3.4 proportionality and interest-based negotiation

3.5 early identification and coordination of interests and risks

3.6 leadership

3.7 Commonwealth joinder as a respondent party.

3.1 Flexible, non-legalistic approach

As mentioned previously, the former Commonwealth government had a stated policy of avoiding unduly technical and legalistic approaches to native title. This policy position has the capacity to promote many of the priorities and interests identified in Chapter 1 of this report. It follows that, to

the greatest extent possible within the legal constraints identified in Chapter 2 and the competing responsibilities identified in Chapter 1 (Sections 1.1.5, 1.2.2, 1.2.3 and 1.3), a Commonwealth policy on connection should be founded on the principle of flexibility and the avoidance of legalism or technicality.

To summarise some of the most relevant conclusions from Chapters 1 and 2:

- The Attorney-General's role as First Law Officer does not require the Commonwealth to take on an 'oversight' role in the assessment of connection for particular consent determinations to ensure that sufficient rigour is being exercised. In any case, such a role would logically be applicable to all consent determinations, not just those to which the Commonwealth happens to a party by reason of its land interests.
- 'Right people for country' issues are important to the Commonwealth's policy priorities, whereas other technical aspects of the 'connection' inquiry, such as continuity of acknowledgment and observance, are of more limited policy relevance.
- The Commonwealth's land interests will often be accommodated within determinations, with the result that connection issues have no direct bearing on the Commonwealth's interests.
- The prospect of compensation liability may lead the Commonwealth to take an interest in the sufficiency of connection material, but this consideration will not apply to every case to which the Commonwealth is party.
- Claims beyond the high water mark warrant scrutiny because they may restrict public use and access, but this need not necessarily require the Commonwealth's involvement in assessing connection (particularly in areas within three nautical miles of the baseline).
- Connection issues are not directly relevant to the need to ensure that determinations do not breach Australia's international legal obligations.
- The substantive law on connection issues provides ample support for flexibility in respect of evidentiary requirements.
- There is no legal impropriety in a respondent (particularly a secondary respondent) agreeing to a consent determination on a lesser evidentiary basis than would be required at trial. The fundamental question is whether a determination is 'appropriate' in all the circumstances. A prima facie or credible or arguable case is all that is required — and it is the state or territory that generally bears the task of making that assessment.
- Because of the way s 87 has been interpreted and applied, consent determinations are highly unlikely to have precedential effect in respect of connection issues.
- Establishing the factual basis for native title, whether at trial or in negotiations, inevitably requires inferences to be made. In the context of consent determinations (in which parties are already operating outside the formal judicial context in which the legal elements of native title must be proved to the civil standard of proof) the question of whether a government respondent should make a particular inference is not a technical matter governed by law but rather a matter of weighing the policy objectives, risks and available information.

In light of these conclusions, there is a wide scope for Commonwealth flexibility in relation to connection issues.

During consultations, interviewees were asked about their views on flexibility versus legalistic approaches in relation to Commonwealth policy and practice. Stakeholder perceptions in this

regard are relevant to the development of a Commonwealth policy because (as mentioned in Chapter 1, especially Sections 1.1.4 and 1.2.4) perceptions of the Commonwealth constitute important policy elements in their own right. The Commonwealth's ability to maintain positive relationships with Indigenous peoples, and to provide leadership within the native title system generally, depends on how it is perceived by stakeholders. In particular, any perceived disjuncture between policy and practice in consent determinations may foster cynicism about the Commonwealth in other areas, regardless of whether such perceptions are accurate.

Across all the interviewees, the prevailing opinion was that the Commonwealth's conduct as a respondent party is cast primarily in terms of protecting the legal position of the Commonwealth and ensuring that determinations accord with the Commonwealth's understanding of the law. A majority of interviewees indicated that they perceived the Commonwealth as having a legally focused and technical approach to negotiations.[93] A number of interviewees expressed a preference for greater flexibility in the approach of the Commonwealth in relation to the law of connection and its application in consent determinations. Others considered that it was appropriate for the Commonwealth approach to be driven by legal considerations and emphasised the Commonwealth's duty to consider legal issues carefully. Commonwealth interviewees expressed the view that the Commonwealth will put submissions to the court on matters that are fundamental to the correct interpretation of the Native Title Act and said that this position is consistent with the Commonwealth's responsibility for the administration of the Act and the Attorney-General's role as First Law Officer.

Interviewees impressions about the Commonwealth's approach to connection appear to be influenced by a range of factors beyond the strict question of connection, including:

- the cumulative effects of previous governments' approaches to native title, some of which may no longer be relevant
- the Commonwealth's approach in litigation as opposed to consent determination negotiations
- the Commonwealth's past stances on legal issues other than connection, such as procedural issues[94] or the legal availability of particular rights and interests.

3.1.1 Recommendations

1. Any Commonwealth policy on connection should prioritise taking full advantage of the flexibility in the law in relation to the substantive requirements of s 223 and in relation to the making of consent determinations.
2. In relation to the Commonwealth's various policy priorities, responsibilities and interests, a Commonwealth connection policy should specify that:
    a) the Attorney-General's role as First Law Officer does not require the Commonwealth to take on an 'oversight' role in the assessment of connection for particular consent determinations to ensure that sufficient rigour is being exercised. In any case, such a

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[93] In addition to the views expressed in interviews, one of the written submissions made a similar point. NTSCorp, in its written submission, said that it considers that the Commonwealth approaches its current role in native title proceedings 'in a narrow and legalistic manner'. The submission contrasted this with the Commonwealth's stated policy of flexibility.

[94] Eg, a number of interviewees referred to the Commonwealth having taken an active role in relation to the interpretation of s 66B *Native Title Act* 1993, arguing that fresh authorisation meetings are required whenever a constituent member of the applicant dies or is otherwise unwilling or unable to continue acting as applicant. The authors note the Commonwealth's view that such involvement in s 66B is justified by the fundamental need to ensure that applicants are properly representative of claim groups, particularly where there may be contentious factional divisions within groups.

role would logically be applicable to all consent determinations, not just those to which the Commonwealth happens to be a party by reason of its land interests.

b) 'Right people for country' issues are important to the Commonwealth's policy priorities, whereas other technical aspects of the 'connection' inquiry, such as continuity of acknowledgment and observance, are of more limited policy relevance.

c) The Commonwealth's land interests will often be accommodated within determinations, with the result that connection issues have no direct bearing on the Commonwealth's interests.

d) The prospect of compensation liability may lead the Commonwealth to take an interest in the sufficiency of connection material, but this consideration will not apply to every case to which the Commonwealth is party.

e) Claims beyond the high water mark warrant scrutiny because they may restrict public use and access, but this need not necessarily require the Commonwealth's involvement in assessing connection (particularly in areas within three nautical miles of the baseline).

f) Connection issues are not directly relevant to the need to ensure that determinations do not breach Australia's international legal obligations.

3. In relation to the Commonwealth's legal responsibilities regarding connection evidence, a Commonwealth connection policy should note that:

   a) The substantive law on connection issues provides ample support for flexibility in respect of evidentiary requirements.

   b) There is no legal impropriety in a respondent (particularly a secondary respondent) agreeing to a consent determination on a lesser evidentiary basis than would be required at trial. The fundamental question is whether a determination is 'appropriate' in all the circumstances. A prima facie or credible or arguable case is all that is required — and it is the state or territory that generally bears the task of making that assessment.

   c) Because of the way s 87 has been interpreted and applied, consent determinations are highly unlikely to have precedential effect in respect of connection issues.

   d) Establishing the factual basis for native title, whether at trial or in negotiations, inevitably requires inferences to be made. In the context of consent determinations (in which parties are already operating outside the formal judicial context in which the legal elements of native title must be proved to the civil standard of proof) the question of whether a government respondent should make a particular inference is not a technical matter governed by law but rather a matter of weighing the policy objectives, risks and available information.

4. Where a point of law is unsettled (for example, because an appeal is pending or because the parties have different legal interpretations), Commonwealth negotiators should consider the option of inserting a mechanism into the draft determination to account for the present uncertainty about the law.[95]

[95] This approach has been endorsed and commended by courts in a number of consent determination judgments: *Ngalpil v Western Australia* [2001] FCA 1140; *Munn for and on behalf of the Gunggari People v State of Queensland* [2001] FCA 1229 at [33]; *Yankunytjatjara/Antakirinja Native Title Claim Group v The State of South Australia* [2006] FCA 1142 at [23].

3.2 Close integration of policy considerations into negotiations

For the Commonwealth's connection policy to give full effect to a flexible and non-legalistic approach, it is necessary for the Commonwealth's conduct in consent determination negotiations to be closely informed by the full range of policy considerations identified in Chapter 1. The aim should be to ensure that the Commonwealth's attention to legal issues does not adversely affect its ultimate policy objectives. Achieving this requires the instructions to Commonwealth legal representatives to articulate explicitly what the client wants to achieve, not only in terms of legal propriety but also in terms of the policy benefits of efficient and flexible approaches to the recognition of native title and the importance of maintaining positive relationships with other stakeholders.

In terms of stakeholder perceptions, a large number of interviewees said that they had in the past perceived a degree of 'distance' between the formulation of Commonwealth policy on one hand and the negotiation of native title claims on the other:

- Some attributed this perceived distance to the institutional effects of managing Commonwealth action through the legally focused 'filter' of AGD and the Australian Government Solicitor (AGS). While recognising the appropriateness of having legal representation, these interviewees emphasised the importance of ensuring that policy drives the legal process rather than vice versa.
- Others stressed the importance of close and effective communication between Commonwealth policy staff and those who attend negotiations, including the provision of detailed instructions about what the client's policy objective is or how flexible the legal representatives are authorised to be.
- Similarly, some interviewees in state/territory departments and NTRBs expressed a desire for closer and more sustained relationships with Commonwealth policy officers.
- Still others emphasised the importance of Commonwealth officers gaining an understanding what native title and procedural norms mean to claimants.

Many interviewees had positive perceptions of their dealings with Commonwealth officers.

Commonwealth interviewees considered that Commonwealth legal representatives are given clear and considered instructions in all matters, and suggested that some of the stakeholders' concerns may be attributable to a lack of familiarity with Commonwealth processes.

3.2.1 Importance of relationships

Stakeholder perceptions about how well the Commonwealth's policy objectives are integrated into its native title negotiations are relevant in three ways:

- **System leader role**: The credibility and authority of the Commonwealth in bringing parties towards settlements could be diminished to the extent that it is seen as operating from a distant remove without a close understanding or relationship with the people and issues at hand.
- **'Ambassador' role**: A perception that the Commonwealth's involvement in negotiations is an impediment to settlement rather than a positive force could damage the objective of building positive relationships with Aboriginal and Torres Strait Islander peoples. The respect shown in sitting down and doing deals, in acknowledging claimants, is important.

- **Role regarding connection**: Fostering close relationships between Commonwealth representatives and other stakeholders is important for the Commonwealth to achieve its needs and fulfil its responsibilities with respect to connection. To the extent that the Commonwealth may need to make its own inquiries in respect of connection, this would both be easier and cause less anxiety among other parties if there were stronger and more sustained relationships in place. Further, closer relationships would give the Commonwealth greater familiarity and comfort with the processes by which connection material is prepared on behalf of claimants and assessed on behalf of states and territories. This may give the Commonwealth greater confidence when entering into consent determinations.

Some interviewees said they had experienced situations in which successive meetings about a claim had been attended by a series of different Commonwealth representatives. These interviewees were concerned that this represented a lost opportunity for Commonwealth officers to build up long-term familiarity with particular claims and to foster ongoing relationships with other parties. Historical issues can affect the dynamics of negotiation and perceptions of the parties, and negotiations may be more difficult if negotiating representatives are not aware of such issues. There was a view among some interviewees that efforts to build the experience and capacity of Commonwealth officers might be wasted when the individual officers move on. Others considered that the investment was still worthwhile but that efforts should be made to ensure that the same officers worked on a single claim for longer. Still others questioned whether building the capacity and experience of Commonwealth officers was desirable, suggesting that this may lead to an increase in situations in which the Commonwealth played a stronger role than those interviewees would advocate.

3.2.2 Separate legal representation?

A number of interviewees suggested that there may be a need for the protection of Commonwealth legal interests to be handled by legal representatives whose instructors are separated from those charged with the system oversight role.[96] This was a response to the impression that the tensions between the different Commonwealth objectives were sufficient to amount to a conflict of interest, warranting a ‘Chinese wall’ approach within the Commonwealth.

There is a strong counter argument to this suggestion. It is apparent in many of the comments made during consultations that there is already a perceived degree of disconnect between the Commonwealth-as-party and the Commonwealth-as-policymaker. Such a disconnect, if it were present, would imply a need not for further separation but rather for more integration of the Commonwealth policy aims into its behaviour as a party. The authors consider that prioritising the harmonisation and coordination of policy objectives in the conduct of claims is preferable to any formal separation of the different roles of the Commonwealth (other than the existing separations for funding claimants, NTRBs and third party respondents).

3.2.3 Recommendations

1. A Commonwealth policy on connection should be based on the aim of coordinating the full range of Commonwealth objectives, interests and responsibilities.
2. A Commonwealth policy on connection should emphasise the importance of close coordination and frequent communication between Commonwealth policy officers and legal

[96] In addition to this view being expressed by interviewees, NTSCorp also made this suggestion in its written submission.

representatives, to ensure that the primary focus of the Commonwealth's conduct in claims is the achievement of Commonwealth policy aims, rather than legal issues per se.

3. Commonwealth legal representatives should not be left to assume that the Commonwealth's sole, or even primary, interest in native title matters is to test the legal and factual basis for each claim but should instead be given specific instructions about the full range of Commonwealth priorities and responsibilities that are applicable to a given case. To the extent that these priorities may be in tension, policy officers should give instructions on how the competing objectives should be balanced.
4. The Commonwealth's policy on connection would appropriately specify that legal representatives who attend negotiations should be given specific instructions not only as to the legal outcome desired by the client, but also the relationship outcomes (see 'ambassador role' in Chapter 1). The manner in which negotiations toward consent determinations are conducted can have a positive or negative effect on other stakeholders' perceptions of, and relationships with, the Commonwealth.

3.3 Consistency and predictability in Commonwealth approach

The development of a formal, publicly available Commonwealth policy on connection would bring valuable benefits in terms of the consistency and predictability of Commonwealth conduct in claims.

3.3.1 Consistency

While interviewees at Commonwealth departments tended to emphasise the importance of internal consistency in the Commonwealth's conduct, non-Commonwealth interviewees were not particularly concerned about whether the Commonwealth was consistent in its approach *across jurisdictions*. It was not a strong or frequent complaint among interviewees that the Commonwealth had behaved in one way in one jurisdiction and another way in a different jurisdiction. Indeed, many said that they recognised that in practice a jurisdiction-by-jurisdiction approach to Commonwealth practice would be unavoidable in light of the different approaches of the different states and territories.

Some interviewees considered that any pressure on the Commonwealth to maintain a consistent line on particular issues, or a consistent approach to the assessment of connection, may undesirably prevent the Commonwealth from acting as flexibly in negotiations as it might otherwise. Across all of the interviewees, the dominant view was that consistency of Commonwealth approach is desirable, but not at the cost of flexibility.

There was greater concern around the consistency of Commonwealth practice from case to case *within the same jurisdiction*. In the absence of a published policy, the perception has developed among many interviewees that Commonwealth involvement in consent determinations can be inconsistent over time and can vary according to which individuals are involved (including AGS officers, counsel or consultant anthropologists).[97] AGS indicated that it has introduced a coordination role for its native title practice to ameliorate some of these differences. In addition, from a Commonwealth point of view, the degree to which Commonwealth officers have considered it necessary to ask for further information or to query particular issues has depended on the nature and quantity of the material they are given by states and territories. This is not always apparent to

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[97] In addition to those views expressed in various interviews, the Goldfields Land and Sea Council, in its written submission, stated 'The GLSC does not understand the Commonwealth to have any policy in relation to connection. The Commonwealth's approach to connection in relation to GLSC represented claims has been varied and ad hoc, appearing to coincide with changes in government and changes in personnel engaged in mediation.'

outsiders, who can only perceive in particular cases that things are taking more or less time than previously.

3.3.2 Predictability

Most non-Commonwealth interviewees, and particularly those representing applicants, were uncertain about Commonwealth practices and policy on connection. This view was partly attributed to:

- the perceived inconsistencies identified above
- general unfamiliarity and lack of contact with the Commonwealth
- a perceived need for better communication with the Commonwealth.

In some claims, applicants and their representatives have been unaware that the Commonwealth has raised issues in respect of connection material at all, because the Commonwealth's queries have been directed to the state or territory and not communicated to applicants' representatives.

It was a recurring theme in consultations that parties want more clarity, transparency and predictability around Commonwealth practices and involvement. This was expressed in terms of both a need for a written policy and a need for open lines of communication in individual cases. A number of interviewees expressed uncertainty about what processes the Commonwealth employs to assess connection material or to satisfy itself on the basis of connection summaries. They did not know whether qualified anthropologists were involved or what particular issues were of concern to the Commonwealth.

Interviewees expressed a desire to know which of the Commonwealth's policy or land interests were informing negotiating positions at specific junctures in the process. There was a general sense among interviewees that it was not always clear why the Commonwealth was taking a particular approach or why a particular legal or factual point was being treated by the Commonwealth as significant.

Some interviewees said that they were sometimes unsure whether a Commonwealth legal representative is acting on specific instructions informed by Commonwealth policy, or instead exercising a more independent role based on standing instructions and the lawyer's own understanding of what is important about the case.

Commonwealth interviewees said that all Commonwealth legal representatives are given detailed and specific instructions for each individual case. The existence of such divergent views may suggest that there is scope for better communication between the Commonwealth and other stakeholders about the Commonwealth's processes and objectives.

3.3.3 Openness, active communication

There was an overwhelming emphasis among most interviewees on the importance of the Commonwealth actively and openly communicating its interests, concerns, intentions, and processes. In short, other parties need to know what to expect.

Once the Commonwealth has identified which of its interests are affected in a particular case, the clear articulation of these interests to the other parties is necessary for effective negotiations to proceed smoothly. If there are (non-connection related) legal issues such as the framing of

particular claimed rights and interests or other terms of the proposed determination, these can be aired and discussed before the state or territory has accepted connection.

Where Commonwealth positions or approaches are influenced by land interests, potential compensation liability, the need for consistency, or offshore responsibilities, this should be made explicit. Communicating the nature of the relevant interest can build trust, allow other parties to plan more effectively to accommodate Commonwealth needs, and allow for more effective negotiation. When speaking to other parties about Commonwealth interests, it may be more constructive for the Commonwealth to specify precisely what aspect of the operation of the Act is at issue, rather than pointing in general to the Commonwealth's interest in the broader operation of the Act.

Interviewees frequently indicated a desire for a more informal approach from Commonwealth officers, favouring face-to-face and telephone communication over formal written correspondence. A perceived Commonwealth preference for written communication over oral communication was highlighted as a potential impediment to effective engagement and relationship building. While Commonwealth interviewees emphasised their obligation to keep accurate and detailed records, other interviewees indicated that it may be possible to meet this obligation by making records of oral communications.

It is apparent that people do not tend to differentiate their impressions of the Commonwealth according to changes in personnel or government, nor according to litigation or negotiation contexts. This means that, before engaging in claims work, Commonwealth officers who may not have a longstanding involvement in the native title area should be made aware of the history of Commonwealth involvement in claims (including during previous governments) and some of the residual perceptions about the Commonwealth that may exist among stakeholders. It also implies that the Commonwealth's conduct during litigation should be calibrated to take such lasting impressions into account.

3.3.4 Recommendations

1. To promote transparency, predictability and consistency, the Commonwealth should publish a written policy setting out general Commonwealth policy priorities and the processes it will follow in order to protect or promote those priorities.
2. Such a policy document should be specific enough to give parties a useful indication of what to expect from Commonwealth engagement, but be broad enough to allow for constructive flexibility in individual cases.
3. In individual cases, open and frank communication with state and territory parties and applicants should cover the nature of specific Commonwealth interests raised and the processes by which Commonwealth intends to address its concerns. Any concerns relating to the law or the conduct of the claim ought to be raised as early as possible.
4. In cases where the Commonwealth seeks more detailed information about connection in response to a particular query or concern, articulating the relevant concern and how it relates to the Commonwealth's specific interests would assist other parties to provide the relevant information and target their assistance.
5. In cases where the Commonwealth seeks further material without having any particular issue or query, it would be appropriate to give a clear articulation of why the material is required, what use it will put it to, and how and by whom it will be examined.
6. In a case where the process of satisfying the Commonwealth as to connection may cause delays, such delays will not cause as much frustration for other parties, and therefore not as

much negative feedback to the Commonwealth, if there is a clear understanding of why the delay is happening and why it is justified and necessary.

3.4 Proportionality and interest-based negotiation

A key consideration for a Commonwealth connection policy is whether the nature of the Commonwealth's involvement in claims should be constant, or should vary according to the nature of the Commonwealth's interests. The following discussion canvasses the competing arguments on that question, and concludes that it is appropriate for the Commonwealth's engagement in claims to be tailored to the nature of the Commonwealth interests at stake and the degree to which such interests are likely to be affected by a determination.

Roughly half of interviewees expressed the view that Commonwealth involvement as a party should be proportional to its interests — that is, they thought that it would be inappropriate for the Commonwealth to take a strong role in negotiations, and particularly in connection issues, if its interest in the outcome is minor (examples included claims where the Commonwealth interest is limited to weather stations and lighthouses).[98] This view was based partly on what interviewees saw as an added workload arising from Commonwealth involvement or the need to satisfy more technical requirements on connection, and partly on a concern that public funds would be spent unnecessarily. The Commonwealth's practice of withdrawing as a party from some claims on the assurance that extinguishment is acknowledged was commended by those interviewees who were aware of it.

The proportionality stance was not only negative: many interviewees expressly recognised that, as a party with land interests or potential compensation liability, the Commonwealth would understandably and properly have an interest in seeking some assurance on connection before agreeing to a consent determination. This did not, though, amount to a recommendation that the Commonwealth should take on an equivalent function to the states or territories with respect to connection.

The Goldfields Land and Sea Council stated in its written submission that involvement should be proportional not only to the extent of the Commonwealth interest but also the degree to which it is likely to be affected by a determination. The logic of this submission is that even where an area of land within a claim area has significant monetary value or policy importance for the Commonwealth, the Commonwealth's direct interest in the outcome of the determination may be negligible if that value or importance would not be materially affected by the making of a determination.

It was not always clear in interviews whether the concerns expressed about proportionality were in every case motivated by previous experiences, or whether they also included a forward-looking suggestion for future policy. Certainly in some cases interviewees gave examples of what they considered to be disproportionate Commonwealth involvement (not necessarily limited to connection issues) in light of relatively minor interests. In others, the concern around proportionality was cast in conditional or future tenses.

The following considerations support the concept of proportionality:

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[98] That view was also expressed in one of the written submissions. Goldfields Land and Sea Council, in its written submission, advocated such a proportional approach and suggested that it should be seen as part of the Commonwealth's role as a 'model litigant'.

- The Commonwealth would be able to achieve maximum efficiency in its expenditure on legal services by concentrating involvement on those claims at which the greatest Commonwealth interests were at stake.
- Other parties would only be required to devote greater time and resources to addressing Commonwealth concerns in those cases where the Commonwealth interest was more significant.
- Many stakeholders expect a proportional Commonwealth involvement.
- Proportionality is more consistent with an interest-based approach to negotiations.

Against proportionality are the following points:

- Some may interpret the Commonwealth obligation to act consistently to require the same degree of involvement or the same evidentiary threshold in every case to which the Commonwealth is a party.
- There are those who consider that the role of assessing connection lies exclusively with the states and territories, such that the Commonwealth should rely in every case on the state or territory's assessment of connection, regardless of the Commonwealth interest.
- Some interviewees took the view that the issue of connection is an objective matter of fact, and should not be influenced by other matters. Accordingly, they would regard as illegitimate a policy that made it more difficult to obtain recognition of native title based on the degree of other parties' interest in the outcome.
- There is a degree of difficulty and expense in identifying precise interests and risks sufficiently early to achieve proportionality.
- There is a degree of cost and effort in tailoring approaches on a case by case basis rather than relying on standing instructions or general policies.
- Those interviewees who expressed a desire for a strong Commonwealth leadership role (see below Section 3.6) generally considered that this leadership role should not depend on the extent of other Commonwealth interests. They thought that the Commonwealth should promote flexible negotiations and more and better outcomes wherever it can, regardless of the extent of other Commonwealth interests.

The case against proportionality of Commonwealth engagement according to its interests can be met to some degree as follows:

- The obligation of consistency, properly construed, requires like cases to be treated alike. If the Commonwealth can make a case for why a variegated approach is appropriate, and articulate this to stakeholders, concerns over consistency may be diminished — that is, if the Commonwealth can explain why a particular case is different from previous cases, what may have otherwise appeared as inconsistency on the part of the Commonwealth can instead be seen as the consistent application of principles across differing circumstances.
- The proposition relating to Commonwealth reliance on state and territory connection assessment processes may amount to no more than the proposition that even the Commonwealth's most significant interests will be adequately protected by state and territory processes for assessing connection. This proposition is addressed in more detail below in Chapter 4, but does not necessarily affect the discussion of proportional participation more generally.

- The concerns about the objectivity of the assessment process may be founded in a rights-based, rather than interest-based, approach to native title. The two are not necessarily contradictory but may be in tension in particular cases. In respect of the state and territory assessment processes, this tension is brought to the foreground, as discussed below at Section 5.4. **In respect of the Commonwealth's involvement in connection, however, these concerns may simply require that the overall process of connection assessment is not made more difficult for applicants in cases of high Commonwealth interest.** It does not mean, for example, that it would be improper for the Commonwealth to seek more information about the state or territory process in those cases where it has a greater interest.
- The difficulty and expense of precisely identifying interests early in the process will have to be weighed up against the difficulty and expense of alternative approaches. There is at least a strong case that a proportional approach will allow a more efficient use of resources in achieving Commonwealth objectives.

In light of the foregoing discussion, the authors consider that there is a good case for tailoring the degree of Commonwealth engagement in claims, including the degree to which the Commonwealth is concerned with issues of connection, to the nature of the Commonwealth interests at stake and the degree to which they are likely to be affected.

3.4.1 Recommendations

7. The nature and degree Commonwealth's involvement in claims, including its concern with connection issues, should be proportional to the extent of its interests in the outcome. Proportionality means:

   a) for offshore places, being primarily interested in those aspects of the material that connect the laws and customs of the claim group to the specific geographical area that is subject to Commonwealth responsibility, rather than taking an equally strong interest in all aspects of the case for connection;

   b) for internationally protected areas, limiting Commonwealth involvement to the nature of the rights and interests, the potential for extinguishment, and opportunities for constructive coexistence and land management, rather than taking any particular interest in the question of connection;

   c) for land interests, calibrating the Commonwealth response to match **both** the land interest's significance to the Commonwealth, **and** the extent to which the land interest is likely to be affected;

   d) for the interest in managing potential compensation liability, making a careful assessment of the likelihood of liability and the likely quantum.

3.5 Early identification and coordination of interests and risks

It is implicit in the previous recommendations in Chapter 3, and particularly in Section 3.4, that the Commonwealth's involvement in native title claims will necessarily involve the balancing of various Commonwealth roles, interests, priorities and responsibilities. This means that a Commonwealth connection policy should encourage the clear identification of the precise matrix of Commonwealth interests and responsibilities in each particular claim, and an assessment of the degree to which they may be affected or promoted by a consent determination.

The sooner that the Commonwealth interests are identified, the sooner the Commonwealth's legal representatives can begin to negotiate for those interests to be accommodated in a draft determination. Interests can be discussed in the hypothetical, so these substantive negotiations do not need to wait until the assessment of connection is complete.[99] To the extent that expenses are incurred anyway in sending Commonwealth representatives to mediations, the extra expense required to prepare Commonwealth representatives for substantive negotiations may be a relatively good investment.

The early identification of interests is emphasised in the JWILS *Guidelines for best practice flexible and sustainable agreement making*.[100] However, a significant proportion of interviewees considered that Commonwealth representatives attending negotiations do not always seem to be in a position to articulate the precise nature of the Commonwealth's interest in the particular case.[101] Such interviewees did not know whether this perception was because the interests were not clearly defined, or because the representatives were not at liberty to discuss them in detail. Regardless, interviewees considered that the clear articulation of Commonwealth interests in any given negotiation was important for effective negotiation and for the avoidance of an over-commitment of Commonwealth resources to claims that did not warrant them.[102]

Standing instructions may be an appropriate way of ensuring that the Commonwealth does not lose the opportunity to join relevant claims pending the precise identification of Commonwealth interests. Once the Commonwealth has become party to a claim, however, its specific interests should be assessed as soon as possible. This should include assessing the degree to which such interests may be potentially affected by native title.

3.5.1 Tenure interest

Identifying the land interests of the Commonwealth early in the process should be a priority, in order to target strategically those cases that warrant a greater degree of Commonwealth involvement.

Tenure searches can be expensive, imperfect, and dependent on state or territory records. It is also noted that Commonwealth practice is to conduct initial tenure searches and initial internal consultations to determine potential interests of Commonwealth agencies. Arguably, though, the kinds of interests that would be missed by these initial processes (because, for example, records are imperfect or things can be missed) are unlikely to be at the more significant end of the spectrum. It would seem probable that large or valuable parcels of land, or land important to national interests such as defence, would be readily identifiable.

Further, the costs incurred in a thorough and early assessment of interests must be assessed in comparison with the costs incurred in an unnecessarily high degree of involvement in connection. That is, while it may be expensive to conduct more thorough initial searches, this expense must be compared to the full cost of Commonwealth involvement in negotiations. In some cases efficiency may favour the earlier outlay of costs.

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[99] This point was emphasised in the written submission of NTSCorp.

[100] *Guidelines*, clauses 26, 40.

[101] In addition, the written submission of Goldfields Land and Sea Council stated that in one case within its area 'the Commonwealth took more than 12 months to conduct such a search'.

[102] This concern was expressed in the written submission of Goldfields Land and Sea Council, which went on to say that the Commonwealth should withdraw from claims where it does not have a legal interest or where its legal interests are likely to be affected only in a very limited way by any prospective determination.

It was also suggested by some interviewees that the more significant land interests would have greater potential for extinguishment, and should therefore present a *lesser* concern, not a greater one (depending on the timing of extinguishment). Nevertheless, it is noted that not all Commonwealth land-use is based on clear tenure.

One interviewee suggested that the contents of the Commonwealth's Form 5 (Notice of intention to become a party to an application) could be updated as the Commonwealth interests become clearer.

3.5.2 Compensation risk

To the extent that concerns about compensation liability contribute to the degree of interest the Commonwealth will take in the issue of connection:

- the magnitude and likelihood of liability should be assessed in every case in order to strategically prioritise involvement
- there is an interest in communicating to other parties any Commonwealth concerns over compensation so that Commonwealth behaviour which may not otherwise be explicable can be more readily understood by others.

Making an early assessment of potential liability is a part of cl 2(aa)(ii) of the model litigant obligations (set out above at Section 2.4). It also assists in effective and efficient interest-based negotiation. The timing and other circumstances of the potentially compensable act, and the size and other aspects of the relevant area, must be considered in order to assess both the likelihood that the Commonwealth may be liable for compensation, and the likely quantum of that liability. Predictive assessments of quantum will be difficult, however, as there have been no cases decided on that issue and therefore no guiding precedents.

It is noted that exhaustively assessing the extinguishing effect of Commonwealth interests on native title can be difficult before the state or territory provides tenure material. Nevertheless, there may be situations in which the information available would allow the Commonwealth to confidently identify its compensation potential liability.

Commonwealth-employed interviewees stated that there is no legal relationship between the Commonwealth and the states or territories that would require the Commonwealth to contribute to state or territory liabilities for compensation. Nevertheless, it is possible that Commonwealth may decide to assist states and territories with compensation liabilities, consistently with the objective of fostering 'broader land settlements'.[103] To the extent that this would influence the degree of Commonwealth interest in the assessment of connection, it may be noted that the cases to which the Commonwealth is a party because of tenure or maritime interests are not necessarily the same cases that would generate the most significant compensation liabilities on the part of the states and territories. There may, therefore, be more strategic ways to manage the risk of future Commonwealth contributions than through its engagement as a party.

Maritime and internationally protected areas

As mentioned in Sections 1.3.3 and 3.3, the mere fact that a claim extends beyond the high water mark does not necessarily mean that the Commonwealth has a responsibility for or interest in testing the claimants' case for connection. States and territories treat areas within three nautical

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[103] See JWILS *Guidelines*.

miles of the baseline as being fully within their jurisdiction, and assess connection accordingly. Further, whether or not a determination is likely to impact on Australia's international obligations will depend on the content of the determination rather than on the details of the connection material. Accordingly, while a maritime or other international component to a claim may lead the Commonwealth to join a claim, identifying the precise issues at stake may lead the Commonwealth to limit its involvement to ensuring that its concerns are met in the drafting of the determination.

Coordination of Commonwealth interests

It was noted above that AGS conducts initial consultations with other Commonwealth agencies in order to identify potential Commonwealth interests in particular claims. In light of the broad range of policy imperatives and responsibilities outlined above in Chapter 1, it would be appropriate for such consultations to include inquiries as to policy interests as well as land interests.[104] There may be a range of departments or agencies, ranging from service delivery to environmental management, whose objectives will be relevant to the conduct of Commonwealth claims. A whole-of-government approach to claims would involve an explicit and ongoing process of identifying, mapping and balancing the various Commonwealth priorities in each claim, prioritising and coordinating them, in close collaboration between AGS, AGD policy officers and the affected agencies.[105]

A recurring frustration reported by non-Commonwealth interviewees was that the processes involved in Commonwealth negotiators getting instructions had the potential to delay negotiations and to inhibit active interest-based negotiations. A number of interviewees said they had perceived Commonwealth legal representatives as being reluctant to make binding decisions and undertakings during negotiations. Commonwealth interviewees recognised that the need for ministerial approval for major decisions could sometimes cause delays, but considered that this was an unavoidable aspect of decision-making within government.

Recognising the constraints involved in formulating positions within government, Clause 2(e)(iv) of the model litigant obligations requires that 'arrangements [be] made so that a person participating in any settlement negotiations on behalf of the Commonwealth or an agency can enter into a settlement of the claim or legal proceedings in the course of the negotiations'. This suggests a need for close consultation with affected agencies early in the claim process, rather than leaving the process of obtaining specific instructions until later.

One option that was raised by interviewees was the possibility that AGD policy officers or representatives of other relevant Commonwealth agencies could attend negotiations in person. The authors recognise that the affected Commonwealth agencies may be quite disparate and may lack the necessary negotiating capacity and background in native title. These constitute reasons against the direct participation of agencies in negotiations, or at least reasons for the primary representative role to be taken by AGD and AGS. It is further recognised that consistency and policy coherence may favour the current 'funnel' structure, whereby AGD and AGS conduct all negotiations on behalf of the Commonwealth. Nevertheless, where there is an agency with a strong interest in resolving a

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[104] See also the NTSCorp written submission: 'It is our view that the Commonwealth's 'interest' in proceedings might legitimately extend beyond this to include promoting Indigenous social, economic and land justice and to achieving the aims of the NTA as set out in the preamble to the act.'

[105] NTSCorp, in its written submission to this research project, said 'the Commonwealth is variously represented by the Attorney-General and associated government department, the minister and associated department responsible for the interest in land and/or waters affected by the claim, and the Australian Government Solicitor ("AGS") as the lawyer representing the Commonwealth. Often the role of each of the three Commonwealth agencies and the relationship between them is less than clear in the course of proceedings and mediation. As First Law Officer, the Attorney-General might reasonably be expected to approach native title proceedings from a whole of government perspective.'

claim, and a policy framework that favours more, better and quicker outcomes, greater agency involvement would seem to be a positive development.

3.5.3 Recommendations

1. The Commonwealth should take steps at the beginning of the claims process to identify as precisely as possible the full range of interests that may be brought to bear on the Commonwealth's involvement in the claim. Internal consultations with Commonwealth agencies should cover policy objectives as well as land issues.
2. Frequent and close ongoing communication should be maintained between legal representatives and those Commonwealth agencies whose land or policy interests are potentially affected by particular claims.
3. Prior to important negotiation meetings, arrangements should be made to empower Commonwealth legal representatives to give relevant undertakings or commitments.
4. Standing instructions may be an appropriate way of ensuring that the Commonwealth does not lose the opportunity to join relevant claims pending the precise identification of Commonwealth interests. Once the Commonwealth has become party to a claim, however, its specific interests should be assessed as soon as possible. This should include assessing the degree to which such interests may be potentially affected by native title.
5. The costs of obtaining firm information on tenure and potential compensation liability early in the claim process should be weighed against the overall cost of the Commonwealth's involvement in a claim. There is a risk that the overall cost may not ultimately be justified by the extent of the interests, once they are identified. That risk should be assessed in each case. The overall costs may include costs borne by other parties.

3.6 Leadership

Calibrating the degree of Commonwealth involvement in connection issues may require a consideration of the kind of 'leadership' role the Commonwealth might be expected to exercise in its capacity as a respondent party.

Many interviewees mentioned a desire to see the Commonwealth take a more active leadership role, rather than a passive observer role, in its participation in claims work, with a view to bringing other parties towards creative and flexible agreements.[106] This view was not limited to those interviewees representing applicants.

The desire for greater Commonwealth leadership in negotiations was not universal, and other interviewees considered that a low-profile Commonwealth role would be more appropriate. A number of interviewees were of the opinion that the tribunal and courts may be better placed than the Commonwealth to bring parties towards settlement, and that a clear delineation of functions was desirable. Another factor supporting a more 'hands-off' leadership role was a concern expressed by some interviewees about whether this role was within the skill-set of the AGS officers who attend negotiations, as opposed to Commonwealth policy officers. The issue of leadership in negotiations will be considered further below in Chapter 6.

[106] NTSCorp and Goldfields Land and Sea Council expressed such a desire in their respective written submissions, although Goldfields Land and Sea Council considered that such a leadership role should be limited to cases in which the Commonwealth has assessed that the capacity for the prospective determination to affect its interests is great enough to warrant continued Commonwealth participation in the proceedings.

Distinct from whether the Commonwealth ought to actively work to bring the other parties to a settlement, is the concept of leading by example. Interviewees considered that the approach taken by the Commonwealth in negotiations, whether in the direction of flexibility or inflexibility, can affect the prospects of all parties reaching agreement. Creative, flexible and proactive behaviours can encourage the same in others; conversely, the Commonwealth could, if it took an adversarial, legalistic, positional approach, risk leading parties *away* from flexibility. Where non-government respondents are resistant to recognising native title in a particular case, the perception that the Commonwealth is second-guessing the state or territory's assessment of connection may reduce the extent to which respondents are willing to rely on the state or territory. This could make agreement-making more difficult. Further, flexible interest-based negotiations require a degree of trust in the room, and an understanding that everyone is on board. The mere perception that there is a legalistic player at the table can change the dynamics of the negotiation, causing everyone to put their guards up more than they otherwise would or to use the perception of a more legalistic player as a shield or screen to justify a stricter position.

3.6.1 Recommendation

1. A Commonwealth connection policy should emphasise the importance of leading by example, with particular attention to the effect that the Commonwealth's negotiation position and style may have on the dynamic of the negotiations.

3.7 Commonwealth joinder as a respondent party

Drawing together some elements of the discussion above, it is possible to make some observations and recommendations about the circumstances in which the Commonwealth might decide to join native title applications as a respondent party. This would form a part of the framework for a Commonwealth connection policy.

While many respondents expressed the view that the Commonwealth should not join as a party unless its significant property interests are engaged, the authors recognise that there is a broader range of interests that may be brought to bear on this decision. The Commonwealth has a clear reason to join claims whenever:

- land used and/or owned by the Commonwealth is within the claim area
- there is a potential compensation issue
- the claim area includes offshore areas beyond three-nautical miles from the baseline
- the recognition of native title may negatively affect Australia's ability to comply with its international obligations.

As discussed, the interests and responsibilities raised in these circumstances will not always warrant the same degree of Commonwealth involvement and in some cases will not require much or any Commonwealth interest in the issue of connection.

In light of the above discussion on proportionality the authors do not consider that there is a strong reason for the Commonwealth to join proceedings as a party solely in order to take a position on a legal question that may arise:

- Where a claim to which the Commonwealth is not a party raises novel legal questions, the Commonwealth has the power under s 84A Native Title Act to intervene and make submissions. If there are grounds for the Commonwealth to make submissions on interlocutory issues (for example, the proper legal process for authorising applicants), on the

content of a consent determination, or on legal points raised in contested litigation, its involvement should not be contingent on the accidental fact of it having joined by reason of its land tenure interests. It plainly would not be efficient for the Commonwealth to join every single native title proceeding to preserve its ability to make submissions on legal points.

- Where a claim, to which the Commonwealth is not a party, proceeds to consent determination, the Commonwealth need not be concerned about the precedential effect of any legal issues raised about connection (see above Section 2.3). For legal questions around recognition of particular rights and interests under s 223(1)(c), this is a matter on which submissions could be made as an intervener once draft orders were settled. These latter legal questions would appear from the Form 1 (the original court document by which the application is made) and any subsequent amendments to the Form 1.

Further, in light of the potential for additional cost and complexity in negotiations, as well as the efficiency of Commonwealth expenditure, it would be appropriate for the Commonwealth to withdraw as a party whenever it can be assured that its land and compensation interests are adequately protected, or that its international obligations will not be engaged, in the terms of the determination. Commonwealth interviewees indicated that this is the normal practice for consent determinations, and that opportunities are constantly being sought to implement it.

The further question of whether the Commonwealth should join as a party in pursuance of its role in leading more and better outcomes and more flexible processes will be left for a fuller discussion of these issues in Chapters 5 and 6.

3.7.1 Recommendation

1. A Commonwealth connection policy should provide that the Commonwealth should consider joining native title claims as a respondent where:
    a) land used and/or owned by the Commonwealth is within the claim area
    b) there is a potential compensation issue
    c) the claim area includes offshore areas beyond three-nautical miles from the baseline
    d) the recognition of native title may negatively affect Australia's ability to comply with its international obligations.
2. The policy should provide that the following will not ordinarily constitute sufficient reasons to join a claim:
    a) the mere fact that the claim extends beyond the high water mark
    b) the bare possibility that the Commonwealth may wish to express a position on a legal issue.

4. Models for satisfying Commonwealth respondent as to connection

The principles identified in the previous chapter apply generally to the Commonwealth's conduct as a respondent party in native title claims.

Chapter 4 deals more specifically with the question of the degree of satisfaction that the Commonwealth should appropriately require with respect to connection, before entering into a consent determination. The key question is how the Commonwealth's protection of its interests as a party, and its execution of its other responsibilities with respect to offshore and internationally protected areas, can be conducted so as to cause minimum disruption to its other policy objectives.

This chapter begins by describing current state and territory assessment practices, and then assesses and compares six possible models (with variants) for how the Commonwealth might approach the question of connection in matters to which it is a party. These models are not all necessarily mutually exclusive, but nevertheless are considered separately:

- **Model I**: Once the state or territory agrees on the issue of connection, the Commonwealth adopts this judgment without further investigation.
- **Model II**: The Commonwealth waits until the state or territory has assessed connection and agreed, and then itself agrees provided that it is satisfied on the basis of:
    - a summary, provided by the state, of the material and/or a summary of the process
    - (**Model IIA**) a summary, provided by the state, of the process only
    - (**Model IIB**) a copy of the state's expert assessor's advice
    - (**Model IIC**) full material, or a summary, provided by the applicant.
- **Model III**: Commonwealth relies on the judgment of the state or territory, but within an agreed framework where the Commonwealth can ensure its concerns are addressed as part of the assessment process.
- **Model IV**: In significant interest cases, the Commonwealth takes an early and active role including:
    - participation in the pre-report meeting between state and applicants to ensure that the researcher's terms of reference will cover the Commonwealth's concerns
    - participation in early evidence et cetera, and staying across the matter so there is no 'catch-up' period.
- **Model V:** Commonwealth conducts its own assessment of connection.
- **Model VI:** Independent expert conducts assessment and/or research on behalf of all parties.

Considerations for the Commonwealth's conduct of matters as primary respondent will also be discussed.

Some initial conclusions will be made with respect to each of the models at the end of each section. Final recommendations are left until Chapter 8 to ensure coordination with other important policy considerations.

4.1 Current state/territory assessment practices

In order to determine the most appropriate model for Commonwealth approaches to connection assessment, it is first necessary to map out the practice environment with which such a Commonwealth policy will interact. To this end, the following section sketches the processes employed by state and territory governments to assess connection.[107] The descriptions of state and territory practice represent the authors' understanding based on consultations – they do not necessarily represent official state or territory policy.

4.1.1 Victoria

The Victorian Government has developed a legislative regime for alternative settlements under the *Traditional Owner Settlement Act 2010* (Vic). At the time of interviews in early 2012, the state was seeking alternative settlements under this statutory scheme in five out of the ten native title applications then on foot. At that time there were no assessments of connection taking place in Victoria for the purposes of native title determinations.[108] Nevertheless it is possible to outline some aspects of state practice with respect to consent determinations.

Victoria has connection guidelines drafted in 2001, based on the requirements of s 223 as interpreted in the case law. The guidelines set out the kind of evidence that may be relevant for consent determinations and ILUAs, and state the principle that the rights that the state will recognise will be commensurate to the standard of the evidence available. It appears from the consultations that these guidelines are not actively referred to in practice, though they still inform the general tenor of the process.

Typically, anthropological and other material is prepared by the NTRB, and provided to the state under strict confidentiality conditions. A register is kept to record the people who are authorised to access the material. Early evidence hearings are sometimes held, usually on the court's initiative rather than the state's. Connection material is assessed internally by the state, and by an external consultant anthropologist, and lastly by legal counsel briefed externally. Queries, concerns and requests for additional information are transmitted back to the NTRB. An iterative process follows, whereby applicants submit information and the state responds with outstanding queries. In one claim, dozens of bundles of documents were submitted to the state in this manner. Conferences of experts may be held, and are considered by the state to be highly beneficial for identifying and progressing outstanding connection issues. The state's objective in assessing connection is to determine whether there is a reasonably arguable case for native title on the available material.

Once the key issues of connection, claim group, claim area, and types of rights are settled between the state and NTRB, the state prepares a position paper to share with the non-state respondents. Position papers describe both the process and content of assessment.

The state's assessment of connection proceeds on the understanding that the state stands in a position of responsibility towards the interests of third parties and the general public, rather than having a responsibility merely to promote its own interests. It therefore ensures that its assessment processes are sufficiently thorough that it can publicly defend its decision to agree that connection is established. State interviewees in Victoria expressed the view that connection issues are more

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[107] Practices for Tasmania and the Australian Capital Territory were not included, as Tasmania and the ACT were not included in face-to-face consultation because they have no active claims; neither government has a published connection policy and neither provided a written submission.
[108] See also National Native Title Tribunal, 'Victorian framework promises faster, better native title outcomes', media release, 04 June 2009.

complex and variable than can be captured in a single continuum of lesser versus greater stringency. Accordingly, any suggestion that the assessment of connection in Victoria is somehow 'less stringent' than other jurisdictions would be misplaced.

The state employs experienced consultant anthropologists in its assessment processes, many of whom have conducted assessments in other jurisdictions. The Victorian process also gives consideration to the professional reputation of applicants' researchers. Although both the state and the NTRB aim for a truly collaborative approach to connection assessment, NTRB interviewees expressed frustration at what they said could sometimes be an 'endless iterative process'. NTRB interviewees in Victoria did not consider it easy to convince the state on the issue of connection.

4.1.2 South Australia

In South Australia connection guidelines were developed jointly between the state and the NTRB and published in 2004, setting out the elements of s 223 and what was required to meet them. Interviewees considered that current practice is not strictly tied to the specific procedures set out in the guidelines, and that there would be a benefit in updating the guidelines to reflect changes in the case law on connection.

The South Australian process demonstrates flexibility as to the form in which evidence of connection is provided to the state. State interviewees described it as a collaborative process. Internal state researchers conduct on-country investigations, and experienced consultant anthropologists are engaged to assess the written material. Written material includes reports, contemporary ethnographic data, and representative genealogies. The material is then assessed by the Solicitor-General personally or by independent counsel. After this there is an iterative process of questions to the NTRB, requests for further information, and follow-ups. 'Hot tub' conferences of experts are common.

There is a greater focus in South Australia on contemporary ethnographic material and evidence about acknowledgment and observance over the last 60–70 years, than on historical material dealing generation-by-generation back to sovereignty. This was expressed to be a function of the history of colonisation in the state, such that inferences about continuity back to sovereignty are more readily open than in other jurisdictions. Oral evidence from claimants is treated as one of the most valuable forms of evidence. Consistent with the court's statements, the state is explicit in its view that a lower threshold of evidence is required for consent determinations than would be required for litigation.

Once the assessment process is complete and the state is satisfied on the question of connection, the state provides a position paper to other respondent parties detailing the process and content of the assessment process.

4.1.3 New South Wales

The New South Wales Government has not published formal guidelines on connection, although it has on occasion directed the NTRB to the Queensland guidelines for guidance. The state assesses connection by reference to the elements of s 223 as interpreted by the case law including *Yorta Yorta*, and requires 'credible evidence' that these elements are made out.

In terms of the material the state considers, this is not strictly limited to material that would be admissible in court proceedings, and includes on-country evidence and video material. Apart from that, the bulk of material consists of affidavits, genealogies (with certificates of births deaths and

marriages), site maps, anthropological and historical reports (covering the whole of the claim area and all of the apical ancestors). Material is sought from neighbouring groups to confirm the boundaries of the claim area. The process for gathering material for assessment by the state was described as iterative, practical and pragmatic. In one case, the state briefed experienced independent counsel to provide legal advice and to assist with on-country evidence gathering tribunal mediations, allowing members of the claim group to fill in what the state or counsel considered to be gaps in the case.

The state has been prepared to provide other parties with position papers explaining their decision to accept connection, and even on one occasion to provide extracts of their internal advice to the Commonwealth.

4.1.4 Northern Territory

Guidelines were developed between the Northern Territory, the NTRBs and the Northern Territory Cattlemen's Association in 2009, with input from the Commonwealth, setting out the legal criteria and the material that would be required to enter into a consent determination. Under the 2009 process, applicants would submit anthropological reports, dreaming maps, site maps, full genealogies and other material. The Northern Territory Government scrutinises the material, including through the engagement of outside anthropological experts, and makes requests for further information. The applicants respond, and there are further iterations of this process until the Territory is satisfied. The practice has not been to produce formal position papers for other respondents, particularly in light of the constructive relationship and frequent communication that has developed between the government and the main non-government respondents (in particular the pastoralists).

A number of factors unique to the Northern Territory have led government and NTRBs to develop more streamlined processes, and these processes now tend to differ according to the type of land the claim concerns; for example, pastoral leases, coastal and offshore, and town areas. These factors include the long history of statutory land rights in the Territory, the quality and quantity of existing anthropological research, cultural characteristics of Northern Territory claimants groups, and aspects of the history of colonisation in the Territory. In respect of pastoral leases, the time and resources expended in collecting and assessing large quantities of connection material were considered to be out of proportion to the nature and extent of the rights that would ultimately be recognised. Accordingly, a short-form process has been developed in consultation with NTRBs and third party respondents, with the Commonwealth expressing initial support for it.

Under this process, an expert anthropologist prepares a report identifying the relevant claim group and apical ancestors; the native title rights and interests sought; the primary estate groups including representative biographical material relating to a senior member of each group; the secondary estate groups; neighbouring groups; maps of sites and dreaming tracks. The anthropologist provides a declaration consistent with the Federal Court Practice Note regarding Expert Witnesses as to the completeness of enquiries made, and states their opinion as to whether the applicants satisfy each of the legal elements in s 223. Where the material submitted raises any issues about connection, the Territory has these issues considered by a consultant anthropologist, and then determines whether the issues would affect the legal basis for a determination.

Significantly, the NTRBs indicated that the amount and rigour of the research that goes into the short form reports is still as high as previously. The main difference is that the Territory does not need to see the entirety of the material; the brevity of the report belies the depth of research that has gone into it. This approach has considerable efficiencies in terms of the presentation of

research — the production of the large reports for assessment by the Territory, and updating to account for iterative changes.

The Territory is currently considering how to develop more streamlined processes for claims beyond the pastoral estate.

4.1.5 Queensland

Queensland has connection guidelines published in 2003, although the details of what is required to satisfy the state are generally worked out on a case-by-case basis between the state and the NTRB both before and after the production of the connection report.

Typically, an anthropologist engaged by the applicants will prepare a connection report which is then submitted to the state for assessment. The state has anthropologists and historians to assess the material internally, and a great deal of archival material is retrieved, against which the report is checked. The state has recently extended this archival support to NTRBs on request. The state does substantial work prior to receiving the report to identify possible interruptions to connection. Once the report is received and assessed, state and NTRB meetings are held to discuss what further material may be required to satisfy the state. Supplementary research reports are often required.

The factual bases for consent determinations are subject to a high degree of scrutiny in Queensland. Although examples were given of where less stringent requirements were applied in the interests of reaching agreement, in general, the state assesses the material thoroughly against the legal requirements as set out in *Yorta Yorta* (and subsequent case law). The courts in Queensland have been encouraging the state to work actively with applicants to deal with connection issues in a timelier manner. At the same time, some judges in Queensland tend, in their application of s 87, to require detailed material relating to the substance of connection. At a number of NTRBs, connection material is consciously prepared to a trial standard.

4.1.6 Western Australia

AIATSIS was not able to consult directly with the Western Australian Government about its assessment processes, but gained an understanding from interviews with NTRBs and others.

Western Australia published connection guidelines in 2004 and a companion document in 2006. These documents set out what was required to establish a proper evidentiary basis for the state to conclude that a claim satisfies s 223. NTRB interviewees were uncertain of the current status of these guidelines in state policy and practice, but considered that they still inform the general process of assessment.

Typically, applicants submit a connection report bringing together anthropological, genealogical, historical and other material addressing the legal criteria. The state assesses this material both internally and with external consultant anthropologists. Additional means of putting material before the state, such as on-country trips and video recordings, have been useful for all parties where employed. Often the state will require further evidence to establish the claims made, including documentation, certificates and affidavits. Interviewees at a number of NTRBs described themselves as preparing their evidence to a trial standard.

Up until the last year or so, the state would provide the applicants with an indication that it had accepted the applicants' case on connection, and then prepare a position paper for the other respondent parties. Recently the practice of releasing position papers has ceased, and NTRBs also

report that in most cases the state no longer gives them a clear statement about whether it has accepted connection or not. Current state practice appears to be to communicate to applicants that the state does not require any further information on connection, but not to state explicitly that the state is satisfied or that it firmly considers the case for connection to be insufficient. This practice was briefly considered by Barker J in 2011, and while his Honour expressed some concern about it, he did not come to a final view about it.[109]

4.1.7 Conclusion

In summary, a number of connection guidelines published by state and territory governments have now become dated and practice has continued to develop. Most but not all state and territory government provide positions papers to third party respondents. All state and territory governments interviewed considered that they vigorously interrogate the factual basis for the claims according to the legal standard required for entering into a consent determination. Interviewees across the board rejected any suggestion that their respective states or territories might not be sufficiently thorough in their assessment of connection. State and territory interviewees explicitly rejected any suggestion that they were 'letting native title claims through' without adequate assessment. Indeed the contrary position was put by many non-government interviewees who see state and territory processes as overly cautious. And state and territory interviewees consistently emphasised the importance of conducting a thorough assessment of claimants' cases – particularly in respect of 'right people for country' issues. The transparency of the state or territory standards and processes for assessment of connection has a direct impact on the policy approach of the Commonwealth. It is against this backdrop, then, that the following models for Commonwealth participation in connection are presented for consideration.

4.2 Model I: Direct reliance on the state or territory's assessment

Model I consists of the Commonwealth accepting connection whenever the state or territory does. No further investigation into connection would be conducted.[110] When the draft order for a determination is made available to the Commonwealth, any concerns about the terms of the determination that have not been addressed in previous negotiations may be raised at that point.

4.2.1 Advantages of Model I

- This model would reinforce the position of the states and territories as the contradictor on the factual question of connection, as described above in Section 1.8.[111]

- It would be consistent with the AGD Financial Assistance Section's general position on funding third party respondents, namely that it is unnecessary for non-state/territory respondents to assess connection, and so it is an inefficient duplication of resources to provide funding to third party respondents to challenge connection issues.

- By relying on the state or territory's assessment of connection, and not making additional enquiries sufficient to gain a degree of independent satisfaction, the Commonwealth would

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[109] *Maudie Downton v State of Western Australia (Puutu Kuntik Kurrama Pinikura #1)*, Transcript of Proceedings (Federal Court of Australia, Barker J, 12 August 2011).
[110] This model received support in the written submissions of NTSCorp and Goldfields Land and Sea Council.
[111] This consideration was mentioned in the written submission of the Goldfields Land and Sea Council.

save resources, in terms of both the AGD's own expenditure and also the costs that may be incurred by NTRBs, the court and the tribunal.[112]

- State resources required to satisfy Commonwealth requests for information would be saved.
- The Commonwealth's relationships with stakeholders may be improved, by avoiding the impression that the Commonwealth constitutes an additional, technical hurdle on the way to a consent determination. The scope would be widened for the Commonwealth to concentrate on pursuing its other policy objectives in native title and Indigenous affairs.
- This model would accord with previously stated aims of achieving more and better native title outcomes by allowing quicker resolution of claims.
- The Commonwealth's interests would be well protected. As indicated in the previous section, the states' processes are thorough and their standards are aligned with a generally risk averse interpretation of the law. States have access to the services of experienced experts, and a clear interest in a rigorous assessment.
- In the absence of specific concerns that states and territories are not taking their responsibilities seriously, the Commonwealth's responsibility for the native title system does not require it to oversee the assessment of connection to ensure that standards are 'high enough'. As discussed above at Section 2.8, the legal propriety of consent determinations is a matter for which the courts are responsible. If the Commonwealth had any concerns about the degree of supervision exercised by the courts, these could be addressed through legislative amendment rather than by the Commonwealth using its role as a party to step in and perform the function itself.
- None of the representatives of third party respondent interests who participated in the project expressed concerns about particular states or territories not being sufficiently rigorous in their assessment of connection, other than where subsequent intra-indigenous disputes raised the question of whether sufficient work had been put into identifying the right people for country. The Minerals Council of Australia, in its written submission, made general recommendations for the Commonwealth to help ensure that 'the level of scrutiny [applied by states in connection assessment] is reasonable without being excessive', and to monitor the performance of state governments against minimum standards. The submission did not indicate any specific concerns with current practice in any jurisdiction.

4.2.2 Disadvantages or risks of Model I

- There is a risk that a state or territory may not have Commonwealth issues in mind when assessing connection, if the Commonwealth has not communicated its particular interests, responsibilities and priorities to the state or territory beforehand. An example of this would be where a claim extends beyond three nautical miles from the baseline but the state or territory only assesses connection within the three nautical mile limit. (This risk would be ameliorated by combining Model I with Models III and/or IV, discussed below.)
- The Commonwealth's interests and responsibilities as set out in Sections 1.3.3 to 1.3.4 above may require the Commonwealth to take active steps to ensure that these are being

[112] The written submission of the Goldfields Land and Sea Council drew attention to this consideration.

addressed appropriately. (Such active steps are set out in Models II, III and/or IV, discussed below).

- The Commonwealth model litigant obligation includes a duty to act consistently, which on one view may require some consistency in the standards it applies to connection. If state and territory connection processes differ, this may be considered to amount to inconsistency on the Commonwealth's part.

    - Arguably, though, the duty to act consistently would not be an issue here. The duty requires the Commonwealth to treat like cases alike. It could not be complained that the Commonwealth had accepted connection in one case but rejected it in a similar case elsewhere, since the Commonwealth would never be in the position of *rejecting* connection. The only relevant Commonwealth act in each case is to enter a consent determination once the state or territory has agreed. At no point would it be in the position of *holding up* a determination. A complaint about Commonwealth consistency on this model would be predicated on the assumption that the Commonwealth ought to assess connection independently of the state or territory, *before* the completion of the state or territory's own process. That proposition is discussed below at Section 6.4.

- The Commonwealth may need to consider how agreeing to a given consent determination may affect the positions it can take in future proceedings, and this may imply a degree of familiarity with the detail of the claim.

    - As mentioned above at Section 2.3, the fact-specific nature of claims gives them a quite low precedential effect, and further the nature of the legal question in a s 87 consent determination is such that the legal position of the Commonwealth is unlikely to be constrained by agreeing to a determination.

    - Of greater concern is the Commonwealth's duty to act consistently and how this may be affected by the Commonwealth's agreement to a particular consent determination. To engage this concern, a claim would have to clearly raise a legal issue rather than a question about the adequacy of the evidentiary material. For example, if the material clearly established that there had been migration or transmission between two unequivocally distinct societies, this may raise a legal question of interest to the Commonwealth (but also, presumably, the state or territory); if the relevant question was whether there were in fact two societies, this would not raise a distinct legal issue of the kind that would be of concern to the Commonwealth, but rather one of factual characterisation.

    - The question would remain as to how the Commonwealth would be able to ascertain whether a particular case raised a legal question of concern to it. That question may be answered by Models II, III and/or IV.

- The Commonwealth may have some material before it, for example evidence previously received while the matter was on track for litigation. The Commonwealth may be required to consider whether agreeing would be appropriate in light of that material.

    - Unless the material already received by the Commonwealth revealed a clear problem that was fatal to the applicants' case, the mere fact that it was incomplete would not give the Commonwealth cause to believe that a consent determination

would be inappropriate. Connection material, as many interviewees stressed, stands as a whole; and having regard to only a part of it will never be sufficient to establish a sound case.

- A complete delegation of the assessment task to the states and territories may result in the Commonwealth being unable to maintain corporate knowledge and a strong internal capacity to deal with claims work. It may also limit the Commonwealth's ability to maintain relationships, experience and credibility for the purpose of providing leadership in the native title system.
    - This is a significant concern, but it is not limited to Model I alone. Model II, described below, is also affected by this problem, and so adopting Model I in preference to Model II would not necessarily make the problem worse.
- Some states reject the proposition that they have a systemic responsibility to assess connection on behalf of all other parties. This is partly a matter of resources, and partly a concern about the added pressure from the courts, the parties and the public, that accompanies the idea that the state is the only party that needs to be convinced, and therefore the only party holding things up. If the Commonwealth were seen as sharing responsibility for assessing connection, this may ease some of that pressure.
- Adopting this model may generate concern among some stakeholders about the appropriateness of leaving states and territories as the sole gatekeepers on the question of connection. Such concerns were evident in comments by a small number of interviewees about the idea that states and territories may be the parties with the greatest material interests to protect in native title claims, and may have in the past been the agents of the very cultural disruptions which are later cited as proof of discontinuity in traditional society. This question is discussed further in Chapters 5 and 6.
- This model could be problematic in Western Australia, where the state does not currently give an indication of when it is satisfied of connection before embarking on the negotiations around other issues relating to the determination.
    - The problem is not fatal to the Model's application in Western Australia, since on this Model there is no need for the Commonwealth to consider its entry into the consent determination until it is clear that the determination is likely to go ahead. Once the state's approval to the final deal is given, that approval can be communicated to the Commonwealth and the Commonwealth may agree to the determination.

4.2.3 Assessment of Model I

Model I has some distinct advantages, and it generated widespread, though not universal, support among interviewees. The most significant disadvantages for this model centre on the lack of Commonwealth knowledge of, and input into, the process by which connection is assessed. These problems tend to recommend Models II, III or IV. The concerns about the states and territories being positioned as the sole assessors of connection merit attention, but may be ameliorated by some of the recommendations discussed below in Chapters 5 and 6.

4.3 Model II: Commonwealth waits for state/territory's assessment and decides on the basis of state/territory's summary of content and process

Model II consists of the Commonwealth taking a relatively minor role in the detail of connection issues, waiting until the state or territory indicates that it has accepted connection, and then deciding whether or not to enter into the consent determination on the basis of a position paper issued by the state or territory.[113] Such a position paper would describe the process of assessment and also the substantive content of the case for connection. This model may involve an iterative process of asking the state or territory for clarifications, explanations or more detail. Model II is the closest approximation to current Commonwealth practice.

4.3.1 Comparison of Model II to Model I

The primary advantages of Model II compared to Model I are those relating to greater Commonwealth knowledge about the assessment process and about the content of what the Commonwealth is agreeing to:

- The Commonwealth can be more certain that its interests are being protected and that its responsibilities are being performed.
- The Commonwealth can more closely monitor whether any legal issues are raised in respect of connection.
- Where the Commonwealth has already received some material, it can see how that material fits with the final result.

Model II also deals to some extent with issues about the states and territories being the sole assessors of native title, by providing for some Commonwealth involvement. Importantly, however, this only addresses the concerns of some states and territories about being too exposed to pressure or criticism about its conduct of assessment processes; it does not address the concerns about the states and territories having great and unsupervised power over the process.

One of the main problems with Model II is that it relies on the quality of the state or territory assessment process and, at the same time, appears to doubt that quality — that is, by looking behind the state or territory's judgment to some degree, the Commonwealth would be implying that it cannot be entirely confident in the processes. But, by the same token, unless a full independent Commonwealth assessment were conducted, the Commonwealth would be necessarily relying on the quality of the state or territory's process in any event. Due to the fact-heavy nature of connection, and the fact that the material must be considered in its entirety, an interrogation of the *summary* of the state or territory's assessment is only likely to reveal problems that are obvious and serious.[114]

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[113] The NSW Crown Solicitor's office, in its written submission, said that 'The State of New South Wales hopes and in most cases expects that the Commonwealth and other respondent parties will be satisfied that the State's assessment process is suitably rigorous, and not seek to make their own assessment of connection materials. However, this is a matter for those parties to consider in the light of the extent of their interests in the claim area and the degree to which these would be impacted upon.' The submission went on to note that a general summary of the State's assessment process can be useful for other parties, though a case-specific summary of the State's assessment would require the consent of the applicants.

[114] On this issue, one interviewee made the following comment: 'If the Commonwealth doesn't have a problem with the process, don't start querying random parts of the connection issues'.

In light of the description of state and territory assessment practices above, such obvious and serious problems are unlikely. For queries of a subtler, deeper or more detailed nature, a far greater immersion by the Commonwealth in the material, with a much greater degree of specialist expertise, would be required than is implied in Model II. As previously argued, however, this higher degree of scrutiny is unnecessary in light of the thoroughness of state and territory processes.

If the Commonwealth's concerns were related to how much it knows about the state or territory's assessment process, rather than the quality of the assessment per se, then too great a focus by the Commonwealth on the content of connection rather than the process of assessment would result in unnecessary duplication of effort.

In any case, Model II would have a number of clear disadvantages compared to Model I:

- By raising queries and concerns after the state or territory has accepted connection, when the parties are making their way towards a consent determination, could lead to significant delays in the consent determination process.
- In addition to the inefficiencies and cost such delays, they may also harm the Commonwealth's objective of building positive relationships with Aboriginal and Torres Strait Islander peoples, and building goodwill in the native title system as a whole. By appearing to delay a determination when the other key stakeholders already agree, the Commonwealth may be perceived as an opponent of native title rather than a leader.
- Querying the state or territory's assessment would appear to be inconsistent with the logic of the Commonwealth's funding policy for third party respondents, namely that the states and territories are entrusted with the assessment of connection.
- Compared to Model I, a greater Commonwealth involvement in connection would test the capacity of the Commonwealth and increase costs for the Commonwealth, the states and potentially for the NTRBs, courts and tribunal.
- Model II would pose problems for the ideal of consistency in Commonwealth practice, and in particular the *perceptions* of consistency. For example, if the Commonwealth raises issues in one case but not in another similar case, non-Commonwealth stakeholders may perceive this as a form of inconsistency, even if from the Commonwealth's perspective there are relevant differences in the nature of the material received.

4.3.2 Comparison of Model II to an earlier and more active involvement

The practice whereby states and territories provide position papers to other respondents to indicate the reasons for accepting connection has some distinct advantages over a process in which all parties sought to satisfy themselves of connection independently.

- The process is more streamlined, and scarce specialists are not duplicating each other's efforts on the same claim.
- The states and territories' central role in looking after the interests of other respondents is reinforced (although, as mentioned above, this is not seen as a positive thing by everyone).
- The public distribution of position papers can contribute to transparency and public confidence in the process. Further, it builds a community of practice across different regions and jurisdictions.
- Land-users, and especially mining companies, who wish to make agreements with native title groups have an interest in understanding the internal structure of those groups and the

decision-making processes they use. Ambiguity in this area can be risky and potentially costly, so position papers have a function in alerting outside parties to these issues.

- The Commonwealth saves on expenditure — on its own behalf, through its third party respondent funding, and through its funding of NTRBs and the courts — to the extent that it and other respondents can rely in the most part on the state or territory's summary of assessment. [115]

In respect of the Commonwealth's approach to the position-paper model, however, interviewees raised some significant concerns.

One of the main disadvantages of Model II is the use of time and resources to 'catch up' the Commonwealth officers about issues that have already been discussed and understood by the state or territory and the NTRB over a considerable period of time. This can cause delays that are inefficient, cause considerable frustration for other parties and stakeholders (including the courts), and contrary to cl 2(a) of the model litigant obligations.

- Where the Commonwealth 'comes in cold' to connection issues in a particular case, without a detailed understanding of the process that has occurred previously between the state or territory and the applicants, it will not always be obvious to the Commonwealth officer where or why particular concessions or inferences were made, or how a particular issue has been resolved.
- This is particularly the case where the state or territory has employed streamlined and flexible processes to assess connection. For example, where state or territory representatives have conducted on-country investigations or oral investigations, the impact of this evidence will not be as apparent to someone reading a transcript or a description. Or, where the strength of the factual case and the extent of existing anthropological research makes a detailed connection report unnecessary, a short-form summary may not convey the full picture to an outsider. So, by relying on summaries, the Commonwealth may either be left with an incomplete picture, or else its efforts to gain a complete picture will negate the benefits and efficiencies gained through streamlined and flexible processes.
- The often unexpected nature of Commonwealth queries about connection, made after the release of the position paper, poses problems for applicants, NTRBs, state and territory governments and the courts in terms of forward planning and expectation management. At times the timeline for consent determinations have been interrupted without prior indication that problems might arise. That is an unavoidable result of this model. The raising of unexpected and previously unmentioned concerns can throw long-term planning out, can cause frustration and friction for NTRBs, and bring disappointment for claimant groups.

An additional disadvantage of Model II, compared to an earlier and more active involvement, is the 'distance' that it introduces between the Commonwealth and the process:

- The more 'hands off' approach implied by Model II may deprive the Commonwealth and its representatives of the opportunity to develop familiar, respectful relationships with applicants, NTRBs, and state and territory officers.
- This may make it more difficult for the Commonwealth to exercise some of its leadership roles. Some NTRB interviewees suggested, for example, that by coming in at the end of the assessment process the Commonwealth does not have the opportunity to ensure that negotiations are proceeding in accordance with the former Attorney-General's stated policy

[115] See NSW Crown Solicitor's Office's written submission to this research project.

of flexibility in agreement-making. That issue is discussed further in Chapters 5 and 6 below.

4.3.3 Discussion of Model II

Ultimately, a preference for Model II over Model I would have to be based in one or more of the three concerns that:

- the state or territory process was insufficiently thorough
- the Commonwealth does not know enough about the state or territory process to be confident in it
- the state or territory process may not have taken Commonwealth concerns into account.

As argued above, the first concern is highly unlikely to be borne out in reality, and in any event if it were justified in a particular case, it would require a more in-depth inquiry by experienced experts than is suggested by Model II. As for the other two concerns, in light of Model II's disadvantages it is worth considering whether there may be better ways of addressing these concerns:

- The second concern suggests a need for greater information about the research and assessment process rather than the content of the connection material (see below, Model IIA).
- The third concern suggests a need to work with the states and territories, and also NTRBs, to ensure that Commonwealth concerns are addressed in the NTRB's production of connection materials and the state or territory's assessment of them (see Models III and IV below). For example, to the extent that the Commonwealth would prefer Model II over Model I out of concerns about its responsibilities for offshore areas, the interrogation of the state or territory's summary document after the research and assessment process has finished may be less effective in fulfilling that responsibility than an earlier and more strategic involvement in the research and assessment process.

Compared to an earlier and more active engagement, Model II presents some considerable drawbacks. That being said, not all interviewees considered that earlier and deeper Commonwealth involvement in connection would be desirable in all cases. As discussed below (Model III), interviewees expressed concerns about the costs associated with such an approach.

Crucially, this model depends on the state or territory's willingness to provide material of sufficient detail, and with a sufficient warranty, to satisfy the Commonwealth. The positions of the respective states and territories in this regard, as the authors understand them, are as follows:

- **Victoria**: The state prepares and distributes position papers for all third party respondents, covering both process and content.
- **South Australia**: Position papers are generally available, and on one occasion the state has showed the Commonwealth the Solicitor-General's advice with the permission and caveats of the applicants.
- **New South Wales**: The state has been willing to give the Commonwealth extracts of their counsel's legal assessment, and other material, subject to authorisation by the applicants. The state has to date been willing to assist negotiations with other respondents by providing a general outline of its assessment process. A more detailed summary of the state's assessment could only be provided with the approval of the applicant. The state may assist

in the preparation of a statement of agreed facts and/or a focussed synopsis of the key matters (such as may also be supplied to the court for consideration in some matters).

- **Northern Territory**: The Territory would consider any Commonwealth request for access to materials on a case by case basis having regard to the apparent position of the Commonwealth in that matter and the interests of the Territory.
- **Queensland**: The state has not in the past made position papers available, though it has been willing to provide oral briefings to the Commonwealth explaining the reasons for its assessment.
- **Western Australia**: The state previously released position papers but has ceased this practice with no indication that it will resume in the near future. The state's more recent practice is not to reveal whether, when or why it is satisfied as to connection until it is in a position to agree to a consent determination.

There are a number of possible reasons for states or territories to be reluctant to produce position papers:

- They may be reluctant to put a position in writing, not wanting to get bogged down in the language and wording of a written statement.
- There may be a degree of risk around external scrutiny, perhaps a risk of being thought to have been insufficiently rigorous. This may undermine a state's position politically and may undermine its position as leader of the third party respondents.
- There may be a reluctance to put the entire case up for scrutiny, instead of responding to particular issues.
- A different concern is that agreeing publicly to connection, before the details of the settlement are finalised, may affect the litigation position of the state or territory, and may be used by the courts to push the matter forward to resolution.
- Some may simply regard the production of a position paper as an unnecessary investment of resources. There may also be a slight perception of unfairness: on this view, if the Commonwealth considers assessment to be the state or territory's task, then it should accept the state or territory's judgment; or if the Commonwealth considers that the state or territory is doing the work of assessment on behalf of the Commonwealth and other respondents, then some contribution to resources would be appropriate.

Some of these concerns may be ameliorated through the use of confidentiality and without-prejudice conditions on disclosure, or the making of directions by the tribunal under s 94L of the Act. Further, oral briefings rather than formal written statements may be sufficient for Commonwealth officers to gain an adequate understanding of the content and process of assessment. In Western Australia there may be some scope for Commonwealth officers to speak to state officers on a confidential, informal and without-prejudice basis in order in to gain an understanding of the issues in cases in which the Commonwealth is a party. The authors did not have the opportunity to discuss this proposal with the Western Australian Government.

In Queensland, one judge has trialled a process of compulsory disclosure, which may assist the operation of Model II. After the state had announced that it was satisfied as to connection in the Quandamooka claim, Dowsett J ordered the state to put out a notice of the relevant admissions it

was willing to make.[116] The other parties were ordered to give an indication of which admissions they disputed, and the Commonwealth ultimately accepted all of them. This approach may not work as well in Western Australia, since the state currently appears (from interviewees' descriptions) reluctant to give any indication to the court that it has accepted connection, and therefore may treat all issues as still in dispute.

4.3.4 Assessment of Model II

Model II, as it is currently implemented, has clear disadvantages. It is particularly problematic in Western Australia due to the current apparent reluctance of the state to provide other parties with an indication of its position on connection. Some of the disadvantages may be ameliorated by varying the model as indicated below (Model IIA, IIB and IIC) and supplementing the variation with Models III or IV.

4.4 Model IIA: Commonwealth relies on summary of assessment process but not content

Model IIA is a variant of Model II that would involve the Commonwealth waiting until the state or territory has announced its position on connection, and then using a summary of the state or territory's assessment process to satisfy itself of the rigour of that process, as opposed to using the summary to assess the content of the case for connection.

4.4.1 Advantages of Model IIA

- As discussed above, some of the main disadvantages of Model II stem from the prospect of the Commonwealth actively interrogating the state or territory's summary material to satisfy itself as to the content of the connection question. Model IIA would ameliorate these disadvantages by specifying that a position paper's primary function in the Commonwealth's policy is to demonstrate the rigour of the *process* rather than the specific detail of the *content*.

- Model IIA would still allow the Commonwealth to satisfy itself that its land and compensation interests were being looked after, and to check whether its responsibilities with respect to offshore areas were being fulfilled. What would be avoided by adopting Model IIA over Model II would be the added expense, time and trouble of gaining an understanding of the factual detail; an understanding that may necessarily be quite superficial when compared to the depth of analysis of the material as a whole, and that may not in any case demonstrate the kinds of flaws that ought properly to concern the Commonwealth.

4.4.2 Disadvantages or risks of Model IIA

- A summary of process may not disclose those situations in which the facts throw up a novel, or contentious, proposition of law. As was argued above, the Commonwealth need not be directly concerned with whether a consent determination reflects precisely the same understanding of the law as the Commonwealth would argue at trial – it was the former Attorney-General, the Hon. Robert McClelland's position that outcomes need not be 'legally perfect', and that valid disagreements about the law can exist without derailing the

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[116] *Ian Delaney on behalf of the Quandamooka People #2 v State of Queensland & Ors* (unreported, Federal Court of Australia, Dowsett J, 2 March 2010).

agreement.[117] Nevertheless, it is recognised that the Commonwealth may at the very least have an interest in being *aware* of legal issues thrown up by a consent determination, in order to fulfil its duty to act consistently. By itself, a bare summary of process may not achieve this.

- It may be difficult for the Commonwealth to be satisfied as to the quality of the process of state or territory assessment based on a procedural description alone, without any closer involvement. Where on-country and oral evidence forms a strong part of the material, or where the amount of material required has been reduced because of a trusting relationship between the parties and a strong factual context, a mere description of process may not be convincing if the Commonwealth has not been party to these activities and discussions.

- If the Commonwealth has issues or queries that are not satisfied by the state or territory's description of process, it may find itself in a similar position as that described above in Model II: needing to make extra inquiries and reassurances about process and content at a time where the research and assessment processes are complete and the matter is progressing towards consent determination. So Model IIA carries the risk of the same problems as were raised in Model II, and such problems could be similarly avoided by doing some previous groundwork with the state or territory and NTRB such as that described in Models III and IV.

4.4.3 Assessment of Model IIA

Model IIA would address some of the internal contradictions of Model II, and would be more streamlined, but would not alert the Commonwealth to potential legal issues in connection, and nor would it give the Commonwealth opportunity to address potential concerns it might have about the state or territory process before that process had finished. Combined with Models III and/or IV, this Model would constitute a sound balance between competing priorities.

4.5 Model IIB: Commonwealth is provided with state or territory expert assessor's advice

Modell IIB would apply in those states or territories where an expert assessor is engaged to advise the government on connection, and would involve the state or territory providing the Commonwealth with a copy or extracts of this advice in lieu of a position paper.

4.5.1 Advantages of Model IIB

- This is a practice that has been trialled in a number of states, and was successful in those cases in the sense that after reading the advice the Commonwealth was comfortable in agreeing with the state's position. There are obvious potential efficiencies in this model, and at least one additional state has indicated that, in principle, it would be willing to consider it.

- Unlike Model IIA, this model would alert the Commonwealth to any significant legal issues raised on the connection issue. It may also be a useful next step in cases where (following from Model IIA) the Commonwealth considered a description of the state or territory's

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[117] Attorney General, the Hon. Robert McClelland MP, speech presented at the Negotiating Native Title Forum, Brisbane, 29 February 2008, online at <http://pandora.nla.gov.au/pan/21248/20111214-1249/www.attorneygeneral.gov.au/Speeches/Pages/ArchivedSpeeches20072008.html>.

process and had concerns about it. In that way it could act as a form of confirmation of state process in unusual cases.

4.5.2 Disadvantages or risks of Model IIB

- One problem with Model IIB is the issue of confidentiality. The advice may refer to material and information that was only made available to the state or territory on strict access conditions. To ameliorate this problem, the advice could be redacted or condensed, could be provided to the applicants for them to make comments or disclaimer, and could be provided to the Commonwealth on a confidential and without-prejudice basis.

- Similarly, some care needs to be taken in employing this model if the state or territory counsel's advice involves queries and requests for further information which are subsequently satisfied, but are not included in the body of the advice. Where a reading of the advice might suggest matters are still outstanding, it would simply be a matter of ensuring that all relevant correspondence and supplementary information is included with the advice.

- Even with these protections there may still be sensitivities, both among applicants and within the state or territory, around providing the advice to the Commonwealth. Western Australian practice, for example, may imply that the state would be unwilling to give the Commonwealth access to even a condensed version of its advice (assuming that the state engages counsel to give it advice on connection – the authors were not able to confirm this). In other cases, applicants may be wary of extending authorisation to include the Commonwealth out of concerns that a higher, less-flexible threshold would be applied. These sensitivities would have to be negotiated on a case by case basis, for example the Commonwealth may seek to reassure parties in a particular case about why it wishes to see the advice and what it will be looking for. Ultimately, however, these sensitivities mean that this model may not work in every case.

- One of the sensitivities, which may be fairly straightforward to accommodate, would be the issue of resourcing. States may take the view that, if they have expended resources on good quality legal advice, and that advice is to be used for the benefit of the Commonwealth, then the Commonwealth should share the cost. It may be useful to explore options for co-funding of advice between Commonwealth and state or territory, to reflect that the expert is assisting both governments to perform their functions. The Commonwealth could also contribute to the terms of reference.

- The issue of consistency should be given some consideration in this model. Given that the model is unlikely to be workable in every case and in every jurisdiction, the question arises whether the Commonwealth would be acting inconsistently if it employed this model in some cases but not others. Certainly, the views expressed in consultations indicate that there would be problems in the Commonwealth deciding its practices in a completely ad hoc and unpredictable way. If, however, this model was given a definite place as a contingency measure within a relatively firm policy, the fact that it was not used in every case would not necessarily amount to inconsistency. For example, a policy may stipulate that the Commonwealth would rely on Model IIA in the first instance, but if there were any serious issues, the Commonwealth may request to see the state's advice in order to confirm the assessment.

4.5.3 Assessment of Model IIB

A close involvement in the detailed content of connection is not a necessary part of the Commonwealth's broad native title responsibilities. Nevertheless, in exceptional cases where the Commonwealth's interests are particularly valuable or vulnerable, and where the Commonwealth is unwilling to proceed on the basis of less detailed information, Model IIB may act as a valuable supplement to other models. Model IIB would not work in every state and territory, but could be useful in some situations. If co-funding were a high priority of the state or territory, then resourcing issues may require the Commonwealth to prioritise this model for the cases of the highest importance. Again, a strategic and collaborative planning approach as in Models III or IV would improve this option.

4.6 Model IIC: NTRB provides summary or material where state or territory does not

Model IIC would involve the Commonwealth seeking some sort of reassurance on connection issues directly from the applicants' representatives in cases where the state or territory is unwilling for whatever reason to release sufficient information to satisfy the Commonwealth.

In cases where the Commonwealth would ordinarily rely on receiving some sort of information about the connection assessment process from the state or territory, but where that information is not forthcoming, the Commonwealth could approach the relevant NTRB for either a summary of the case for connection, or for copies of the connection material.

Particularly around issues of 'right people for country', NTRBs are the initial and substantive investigators and assessors of connection; the states and territories' role is to confirm the quality of that assessment. NTRB researchers perform a great deal of desktop and field work research in order to test the relative strength of connection claims by different groupings of claimants, to determine the level at which the claim group and society should be cast; to determine membership of the group and the laws and customs that may sustain native title; and to locate the most appropriate boundaries for different claims. All of this happens before the states or territories are given access to the material. In this sense, NTRBs are not simple advocates – so much is confirmed by the NTRB functions under s 203B of the Act. This means that NTRBs are in a good position to be able to demonstrate that they have done a thorough job in their approach to group composition, negotiating claim boundaries with neighbours, and the like.

4.6.1 Provision of summary

A number of interviewees mentioned the option of the NTRB providing to the Commonwealth a summary of the material it had given to the state, and a summary of the processes they have gone through, as well as any aspects of the state or territory's assessment process of which they were aware and were at liberty to disclose.

Some NTRBs engage outside peer reviewers or expert counsel to assess their connection reports before they submit them to the state or territory. These reviewers could provide the Commonwealth with some indication of whether they considered the connection report to be of good quality and to establish the requirements of s 223.

The NTRB-supplied-summary option would bring many of the same advantages and disadvantages as the state-supplied-summary model.

Advantages of providing summary

- An additional advantage is that this process would not need to wait until the state or territory had given an indication that it had accepted connection. The Commonwealth could be considering the NTRB's summary at the same time as the state or territory was considering the primary connection material. Against this advantage is the proposition that the Commonwealth would not wish to incur the expense of having one of its officers consider the NTRB's summary until it was confident that the matter would come to a consent determination.

Disadvantages or risks of providing summary

- A disadvantage of this option is that it would constitute an additional burden on the workload of the NTRBs, both in producing the summary in the first place, and in dealing with any follow-ups and queries that the Commonwealth may have. There is a risk that the Commonwealth may be less willing to accept statements of fact on face value from a party with an interest in those statements being accepted.
    - On the other hand, it could be a good investment by the NTRB in situations where the state or territory was not encouraging third party respondents to agree by providing them with summaries. Once a summary had been prepared for the Commonwealth it could be released to the third party respondents to reassure them about the factual basis for the determination.
- In order to constitute a positive contribution to the Commonwealth's practice, this option would need to be adopted with a clear understanding on both sides about what the Commonwealth was looking for. It would not be an appropriate model to give detailed evidentiary information sufficient for the Commonwealth to form an independent view of the strength of the claim, but would be appropriate as a form of reassurance that thorough research had been done and that there was a factual basis for the claim.
- Finally, it must be noted that this option is dependent on the willingness and ability of the NTRB to generate a summary. There are a range of reasons why the NTRB may be unwilling or unable, including resourcing and the time required, and for some a degree of scepticism about the flexibility of the approach the Commonwealth may take.

4.6.2 Provision of primary material

If a mere summary would not satisfy the Commonwealth, or if the NTRB was unable or unwilling to spend the time summarising the material, then another option would be for the applicants simply to provide the primary material to the Commonwealth.

Advantages of providing primary material

- Assuming that no connection summary from the NTRB or the state or territory was available, there may be very few options for providing third party respondents with information about the factual case for connection. If the Commonwealth has been provided with applicants' material and is satisfied on that basis, the Commonwealth could potentially provide a position paper to this effect.

Disadvantages or risks of providing primary material

- The principal problem with this option would be the lack of internal capacity, expertise and resources within the Commonwealth to interpret the connection material. NTRBs would be seeking some reassurance about the use to which the material would be put and the identity and qualifications of the people who would be assessing it. To the extent that the Commonwealth was engaging in a more thorough assessment of the material, this option would shade into a full independent Commonwealth assessment process, with all of the problems described at Model V below. To the extent that the Commonwealth was engaging in a more superficial examination of the material, there are questions around just how valuable an exercise that would be. That is particularly so if it would involve Commonwealth officers approaching NTRB representatives for clarifications and requests for further information (thus duplicating the workload of NTRBs in responding to such requests from two levels of government).

- NTRBs may lack the authority to release the information to the Commonwealth. The material:
    - may have been authorised only for disclosure to the state (on stringent conditions of access), and so a great deal more work may be required in re-authorisation before it can be shown to the Commonwealth
    - may be redacted to remove sensitive information, although this again would require the investment of time and resources.

- NTRBs may be unwilling to grant the Commonwealth access, even if they have legal authority.
    - The proportionality issue as described above will arise in some cases — NTRBs may consider that the Commonwealth's interest in the outcome is insufficient to warrant its access to the material.
    - Alternatively, the NTRB may be concerned that the Commonwealth would be applying an unpredictable or overly technical standard of assessment, and thus providing it with the material would open the applicants' case up to unwelcome attack. That concern could be addressed to some extent by a condition of without-prejudice, but not entirely – the prospect of the Commonwealth raising substantive concerns and requiring further information in a manner similar to the state or territory would be a serious disincentive.

- The following gives a sketch of how NTRB interviewees responded to the suggestion of providing material to the Commonwealth, though in most cases they stressed that it would be a case-by-case matter:
    - In South Australia there are strong controls over authorisation, and in most cases the researcher would have to go back out and have the material reauthorised for the Commonwealth.
    - In Queensland there is already some support among NTRBs for the option of providing material to the Commonwealth.
    - In the Northern Territory material is often authorised for distribution to all parties, subject to controls.

- There was some support for the idea in New South Wales and Victoria.
- In Western Australia NTRB interviewees expressed concerns about the sensitivity of personal information (including in genealogies) and the provision of information to third party respondents. These concerns perhaps would be somewhat addressed by explaining why the Commonwealth's role is different (for example, fulfilling the state's role with respect to offshore areas, if that is the position the Commonwealth is taking).

4.6.3 Assessment of Model IIC

Model IIC, involving a summary of the applicant's case provided by the NTRB, would be subject to most of the disadvantages of Model II, with the further disadvantages of potentially increasing the burden on NTRBs and potentially providing less reassurance to the Commonwealth. Nevertheless, it would be an option for those jurisdictions where the state government is unwilling to provide any kind of summary and the Commonwealth was unwilling to adopt Model I.

Model IIC, involving the NTRB providing the full connection material to the Commonwealth, would be more problematic still. A lack of clarity around the nature of the test to which the material would be put, a lack of capacity to assess the material and potential problems around access all pose serious problems for this option. Again, it would only be recommended if none of the other options were available.

4.7 Model III: Commonwealth negotiates general agreed assessment framework with state or territory

Model III consists of the Commonwealth working at the policy level with each state and territory to communicate its concerns and priorities with respect to connection, and seeking to negotiate an agreed connection assessment framework for each jurisdiction. The objective would be for the Commonwealth to be satisfied that the state or territory process meets its needs in terms of protecting Commonwealth land and compensation interests and offshore responsibilities. The Commonwealth would be in a position to concur with the acceptance of connection provided it can be sure that the agreed issues are addressed and that the process meets the agreed standards. Model III can work in conjunction with other models.

4.7.1 Advantages of Model III

- Model III would address some of the main problems in Model I. As described above, in Model I the Commonwealth may be unaware of how the states or territories assess connection, or may lack confidence that the state or territory process is conducted with Commonwealth interests and responsibilities in mind.
- Model III addresses the problems in Model II that arise from the Commonwealth 'coming in late'. It was noted earlier that by the time the Commonwealth comes to considering its position on connection under Model II, the research and assessment procedures are already complete. Summaries will have already been produced that may not satisfy the Commonwealth's needs, and if the Commonwealth is not confident that its interests and responsibilities were incorporated into these processes, it may be too late to go back. Certainly, not without a great deal of further time and expense. By contrast, Model III offers the opportunity for the Commonwealth to be confident that the assessment processes in the

states and territories are such that the Commonwealth will be able to rely largely on their respective judgments.

- The general framework agreed could include some propositions about the law, as taken from s 223 and the case law, and where there were differences around interpretation as between the Commonwealth, state or territory and NTRB, the Commonwealth could request to be notified where those issues were raised on the facts.

- The process of agreeing a process could draw in other third party respondents to ensure that the assessment process serves their concerns too. This was the case in the Northern Territory, where the pastoralists sought for the Territory's assessment process to include the production of representative biographies for senior claimants, in order to address their procedural priority in knowing who they would be dealing with in the future.

- Subject to what is said below (under the heading 'Disadvantages and risks), this model received in-principle support from interviewees in Northern Territory, Queensland, Victoria, New South Wales and South Australia. It was supported by NTRBs in Western Australia, although the authors were unable to gauge whether the Western Australian Government would support it. The in-principle support just mentioned was expressed by relevant interviewees to depend on the content of what the Commonwealth would be seeking in its agreed framework, the Commonwealth's expectations as to settlement outcomes, and the Commonwealth's willingness to contribute to settlement outcomes.

4.7.2 Disadvantages or risks of Model III

- In implementing Model III, the Commonwealth would have to be sensitive to possible concerns on the part of states and territories not to be subjected to centralised dictation. It would be important to ensure that the process of developing agreed assessment procedures and priorities was a collaborative one, designed to meet everyone's needs.

- As mentioned above, some states do not fully endorse the idea of the state being the only entity responsible for assessing connection. This concern may be met to some extent by emphasising the range of policy priorities that the Commonwealth is required to promote and the reasons (as outlined in this report) why it is more efficient to conduct just one process of connection assessment for all parties.

- Possibly of greater concern to states and territories would be the issue of resourcing, both in relation to the assessment process and in relation to contributions to settlements. To the extent that the Commonwealth is relying on the state or territory to perform this vital function in the native title system, and in particular where it is to perform that function in respect of offshore areas or land in which the Commonwealth has strong interest, there may be some expectation of a contribution to the costs of that process.

- There is a risk, in adopting Model III, that if the Commonwealth is still minded to come back to the state or territory with queries and requests for further information, state or territory officers may feel as though they have gone to all this trouble for nothing. This means that the Commonwealth will need to be clear, when it is negotiating processes with the states and territories, about precisely what it expects and in what circumstances it may require additional reassurance. Ideally, the collaborative process envisaged by Model III will render unnecessary the degree of detailed involvement in connection issues that has sometimes

been the case under Model II. In most cases, Model III combined with Model II or IIA should constitute a sufficient basis for the Commonwealth to proceed with a consent determination.

- One potential drawback to Model III is that it may imply the creation of a somewhat rigid process for the states and territories to follow. As is discussed below at Sections 5.6 and 6.2, interviewees differed considerably in their views about the value of fixed, written connection assessment guidelines at the state or territory level. The main drawback identified by opponents of guidelines is that they may constrain the flexibility with which the state or territory can approach the task of assessment. Supporters of guidelines, and in particular those in Western Australia, pointed to their advantage in setting an objective marker as to what was required in order to establish connection to the satisfaction of the state. So the benefits and risks of guidelines in general will also inform the consideration of the merits of Model III.
- The Commonwealth may consider that a one-off arrangement with the state or territory about the procedures to be followed will be insufficient assurance in particular cases. To counter this concern, Model III could be combined with brief summaries of content or process in particular cases, or a formal certification by the state or territory that the agreed process had been followed. There may even be scope for a regular reporting process, though this would of course need to be negotiated with the states and territories. Additionally, Model IV may be employed in cases of particular importance to provide an additional degree of comfort.

4.7.3 Assessment of Model III

Model III has strong advantages as a part of future Commonwealth practice. In implementing it, the Commonwealth should avoid the impression that it is dictating process from the centre, but rather foster a collaborative effort with its state and territory counterparts.

4.8 Model IV: Early, active Commonwealth participation, including pre-report meetings

Model IV would involve the Commonwealth actively familiarising itself with the content and process of connection assessment in the particular case to avoid the need for an extra ‘catch-up’ stage at the end. This model would be one way of approaching claims of greater-than-normal significance to Commonwealth interests and responsibilities, where the Commonwealth may be less comfortable relying on the state or territory’s assessment even with Model III in place.

The potentially most useful form of this model involves the Commonwealth participating in pre-report scoping and planning discussions between state or territory, NTRB and consultant anthropologist in order to ensure that the anthropologist’s Terms of Reference will address the Commonwealth’s priorities in that case. This early involvement may extend to the Commonwealth being involved in the state or territory’s ‘call-back’ meetings, at which queries arising from the report are put to the NTRB and further information requested.

An additional aspect of this model would see the Commonwealth attending oral and on-country evidence sessions.

Roughly corresponding to the divide between those interviewees who favoured a more minimalist role for the Commonwealth in consent determinations and those who envisaged a stronger involvement (discussed above at Sections 1.10, 3.8) there was a divide over whether the

Commonwealth should be actively involved at the early stages of a mediated claim, such as early on-country evidence. Those who considered that the Commonwealth should in general simply accept connection when the state or territory does, considered that Commonwealth involvement earlier in the process would result in unnecessary expenditure, possibly complicate matters, and may encourage greater Commonwealth involvement in the question of connection. Those who raised concerns about the Commonwealth 'coming in late', or considered that it should exercise a greater leadership role, thought that earlier and more active Commonwealth involvement may assist.[118]

There was a more solid consensus among interviewees around the conditional proposition that *if* the Commonwealth is to take a stronger interest in connection in some cases, then it would in most cases be useful for them to take active part in discussions and early-evidence from an early stage. Some expressed it as a problem of hindsight — in those cases where it transpired that the Commonwealth had issues with the applicant's case for connection, other parties wished that the Commonwealth had been involved earlier. But in those cases where Commonwealth involvement was minimal overall, parties who regarded Commonwealth involvement as unnecessary and potentially troublesome would not have welcomed a greater involvement earlier on.

It follows from the principles outlined in Chapter 3 that the Commonwealth should be able to identify in advance those cases in which more significant interests, risks or responsibilities are at stake. If Model IV is prioritised for these cases, the tension just identified should be largely addressed.

4.8.1 Advantages of Model IV

- If Commonwealth officers know the general background of a matter, and have sufficient familiarity with the general state of the factual basis for connection, then acceptance of connection by the state or territory will not be an unheralded event that needs to be investigated and justified, but rather merely the next step in an already familiar process.

- Where streamlined or truncated processes are employed, it would assist the Commonwealth to understand the reasons for choosing those processes, and to be comfortable with their appropriateness. This can be achieved if Commonwealth officers are present at the meeting where the relevant process was negotiated.

- This model would assist in the achievement of the recommendations made above at Section 3.3 about open and active communication. At early meetings with other parties the Commonwealth is able to communicate its objectives and to develop collaborative means of meeting those objectives. Reservations, concerns and expectations on the part of other parties can be aired and addressed also.

- The idea of greater Commonwealth involvement on a selective basis, in order to avoid the need for a later 'catch-up' process, was supported by a wide range of interviewees from NTRBs, states and territories, and other bodies.

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[118] NTSCorp expressed in its written submission a slightly different position from this. NTSCorp's position was that the Commonwealth should accept connection in every case where the state has done so, and should only be involved in connection issues as a means of prompting a stalled process of state connection assessment. In relation to early Commonwealth involvement, NTSCorp said: 'If the Commonwealth were seeking to take a beneficial view of the legal requirements to proceed to consent determination and to consider their role in proceedings as representing broader interests than those held in land and waters, involvement in mediating connection with the State, at an earlier stage might assist in progressing matters in a more expeditious fashion.'

- Model IV can help to avoid the inefficiencies, delays, costs, and other difficulties associated with the Commonwealth attempting to resolve its concerns about connection at the end of the process.
- Involvement in the early planning stages, and ongoing involvement, can ameliorate the expectation management and strategic planning issues that may come from unanticipated Commonwealth issues arising late in the process. The aim with Model IV would be for all parties to know what to expect.
- Approaching connection solely on the papers, without a background and without having been present when oral or on-country evidence is given, may not give an accurate impression of the strength of the case. Speaking to applicant witnesses can assist Commonwealth officers to gain a better understanding of the applicants' perspectives and how those perspectives may reinforce the case for connection.
- If the Commonwealth is negotiating in its capacity as a landholder, then it may be valuable for relevant Commonwealth representatives to come on country and develop an understanding of how the land is to be used, managed, and shared.
- This model would also enable the Commonwealth to play a greater leadership role in particular cases as discussed above at Section 3.8. The manner in which that may work is considered below at Sections 6.3-6.5.
- As with Model III, Model IV would give the Commonwealth an opportunity to discuss its understanding of the case law with the state or territory ahead of the assessment process, and to request to be notified if any particular legal issues were raised by the material.

4.8.2 Disadvantages or risks of Model IV

- It follows from what has been written above that a close Commonwealth involvement in the detailed content of connection is not necessary in light of the processes followed by states and territories and NTRBs. This applies more so where the Commonwealth has negotiated general positions on assessment procedures with each jurisdiction in accordance with Model III. This is a factor that tends against the adoption of an extensive form of Model IV.
  - Still, if the Commonwealth in a particular case is likely to require a greater degree of reassurance in a particular case, this would be an appropriate way of delivering it, particularly in comparison to the current implementation of Model II.
- One of the most immediate hurdles in implementing Model IV is for the Commonwealth gaining access to the confidential meetings and correspondence that may form the bulk of the assessment process. Notwithstanding the comments above about the benefits that may flow from attendance and participation in on-country and oral evidence, these may form only a small part of the assessment process. This means that where the Commonwealth anticipates a case in which it will take a stronger interest in connection, it will need to negotiate with the state or territory and the NTRB over the degree of access that will be appropriate and necessary for the fulfilment of the relevant Commonwealth objectives. There was some concern among NTRBs about the early release of any evidence to the Commonwealth – they would seek legal advice and protections before proceeding. This means that building trust about the Commonwealth's intentions and its internal processes would be essential. Access protocols and the like would be required in this regard, as would

a clear articulation of the why the Commonwealth is unable to rely on the state or territory's assessment in a particular case.

- An additional difficulty in this model is the resources required. A greater degree of participation will take more time and money on the part of the Commonwealth. Some interviewees regarded the early and active involvement of Commonwealth officers as a waste of resources because it would duplicate state or territory efforts. That objection, however, is subject to what is said about the potential inefficiencies of Model II. Early active involvement in high interest cases may be more cost effective, taking into account the entire expenditure across the system, than other methods. The resources issue, however, requires careful consideration and decisions about greater involvement will have to be made strategically.
    - A related risk is that Commonwealth officers will devote resources developing familiarity with a claim that subsequently stalls in negotiations or proceeds to litigation. The expenditure would then seem to be wasted. Or, the relevant Commonwealth officer may move to a different employment position, taking the experiential benefits of early engagement with them. These risks would have to be assessed and addressed on a case by case basis, but would not necessarily constitute a reason to reject the model outright.
    - The resourcing concerns would not constitute a reason for rejecting the option of Commonwealth participation in pre-research meetings with the state or territory and the NTRB. The comparison between cost and benefits would be favourable in almost every case.
- One risk of this model is that, notwithstanding having attended pre-report meetings and on-country evidence, Commonwealth officers may still consider that they require more detail in the form of a summary or position paper, and may have additional queries or requests for information. This may considerably reduce support for the model among states and territories, on the basis that the proposal of involving the Commonwealth earlier would be intended to reassure the Commonwealth about the state or territory's assessment process, and subsequent inquiries may make this effort seem wasted.
- Some interviewees mentioned a particular risk to be managed in oral or on-country hearings, namely that a large number of government participants may be intimidating to witnesses. This concern means that Commonwealth representatives would need to be sensitive to the needs of witnesses to avoid overwhelming or aggressive participation.
- As mentioned earlier, states and territories and NTRBs may consider it appropriate for the Commonwealth to contribute to the cost of research and assessment, if it is to have input into the terms of reference and perhaps access to some of the outcomes.
- The fact that this model would be most appropriately employed on an occasional, rather than regular, basis may have implications for the consistency of Commonwealth practice, since other stakeholders would observe varying degrees of Commonwealth engagement in different cases.
    - This would not necessarily constitute a serious problem, however, since the obligation to act consistently amounts to an obligation to treat like cases alike. From the Commonwealth perspective, the cases of high interest that might warrant this

model would possess certain common features, and provided these features were applied as criteria across all claims, this would amount to the consistent application of a conditional rule.

4.8.3 Assessment of Model IV

In appropriate cases of high importance to the Commonwealth, Model IV may assist to streamline the Commonwealth's participation in consent determinations through:

- Attendance at pre-research meetings with the state or territory and the NTRB;
- Participation in on-country and oral evidence sessions; and
- Generally maintaining a degree of familiarity and comfort with the process and content of connection assessment.

Adoption of this model is subject to the significant risks and should not be adopted without qualification; however, it could be strategically employed in high interest cases.

4.9 Model V: Commonwealth assesses independently

Model V describes a situation in which a state or territory is the primary respondent, but the Commonwealth nevertheless conducts its own independent assessment of connection.

4.9.1 Advantages of Model V

- Model V would allow the Commonwealth to gain a high degree of confidence in agreeing to consent determinations, in respect of protecting its land interests and potential compensation liabilities, or discharging its responsibilities with respect to offshore areas.
- It would also give the Commonwealth a stronger voice in negotiations, which could be used to lead parties to more flexible outcomes.
- It may be a way of dealing with the reluctance of some states to disclose the basis of their assessment of connection.

4.9.2 Disadvantages or risks of Model V

- This model generated strong concerns almost universally among interviewees, subject to what is said below in Section 6.4 about a possible procedure to help bring parties out of deadlock.
- The expense involved in this model would be considerable, and in almost all cases out of proportion to the benefits.
- As argued above, this would constitute an unnecessary duplication of the state or territory's process.
- The issue of duplication was of great concern to interviewees representing applicants, with the risk of having to produce two sets of materials to satisfy two different sets of criteria at the state/territory and Commonwealth levels. That duplication would extend to the iterative process that generally follows the submission of a connection report. Different personnel at the Commonwealth and state or territory levels may have different queries or concerns. This was identified by all parties as overwhelmingly the worst possible outcome of this project.

- The resources required from the NTRBs because of this duplication were of great concern to interviewees.
- This model would cause delays in one of two ways:
  - If the Commonwealth waited until the state or territory's process was completed before embarking on its own, this would radically increase the time taken to reach a consent determination.
  - If the Commonwealth conducted its assessment at the same time as the state or territory, it would add to the burden of the NTRB's capacity to deal with the iterative process of call-backs and requests for information. A limited capacity in NTRBs would result in a much longer process.
- Because of a lack of internal capacity and expertise, the assessment would be conducted by external anthropologists and counsel. This would increase stress on the already limited number of experts in the system, worsening the bottleneck that is currently affecting the resolution of claims.
- Many interviewees considered that the Commonwealth does not have the close relationships or local familiarity with applicants, NTRBs and third party respondents that the states and territories can bring to assessment.
- The harm done by Model II to the Commonwealth's image and relationships would be greatly increased by adopting Model V.
- Even more than Model II, this model undercuts the idea of the states and territories as the primary contradictors on the factual question of connection, and may undercut the faith of the third party respondents in the state or territory's assessment. It may also reduce the states and territories' willingness to lead the third party respondents and to consider wider community interests in their assessment.
- Many interviewees considered that there was a risk of Commonwealth approach to assessment being more technical, legalistic and inflexible than the approach of their state or territory. This would raise questions about how this model would fit with the former Commonwealth Government's stated objective of flexibility.
- A great many interviewees considered that guidelines for Commonwealth assessment would be required if this model were adopted. As indicated below at Sections 4.11 and 6.2, this would not be an ideal outcome.

4.9.3 Assessment of Model V

Subject to what is said in Section 6.4, Model V is an unsatisfactory basis for the Commonwealth's involvement in connection issues.

In light of the clear disadvantages, the only situation in which this model would be at all feasible is where the Commonwealth had no other way of satisfying itself as to connection. As indicated above (Section 4.3), the only case where this might currently arise is in Western Australia, where present state practice appears to be not to disclose any information about its position on connection, even to other parties on a confidential without-prejudice basis.

Nevertheless, it is probably premature to consider this model in the Western Australian case. As mentioned in Section 4.1, there has been some judicial consideration of current state practice and there is the potential that state practice may change in the future. Further, it has yet to be seen whether the state would consider giving the Commonwealth a summary of material *after* all

negotiations are completed and the state is ready to move towards a consent determination. Once an agreement has been concluded between the state and applicants in any case, other respondents would need to be informed, and the Commonwealth could seek information about connection at that point, either from the state or the NTRB.

4.10 Model VI: Expert independent of any party conducts assessment and/or research

Model VI would use an independent expert engaged by the principal parties (including the Commonwealth) to assess and/or research connection. The parties could agree to abide by the decision of the expert within certain boundary conditions.

This model was raised a number of times by interviewees. Independent assessors have been used in recent court-mandated processes, where the negotiation process has broken down. In these cases, the court has appointed an expert, whose costs are to be borne by the state and applicants equally. Those processes are ongoing, and so it may be too early to judge their success.

4.10.1 Advantages of Model VI

- Co-funding of assessors allows for an equal degree of control or confidence on all sides. Further, agreeing on an expert allows parties to be confident in the quality or impartiality of the assessment.
- Some states supported this model on the grounds that they could avoid criticism from the public, the courts and applicants about being 'too easy' or 'too hard' on connection. It was considered that connection is an objective question of fact, which the state could not be held accountable for if people were unhappy with the state's judgment.
- There are certain efficiencies to be gained from this model: to the extent that the a single assessor (or team) is responsible for reaching a conclusion on the connection question, fewer experts would be used on a single claim and other experts in the system are thus freed up to work on other claims.
- If the model extended to the initial research for a claim, it would help to ease the resource burden on NTRBs and their funders.
- The model would also assist with some of the concerns about current state and territory practice identified in Chapter 5 below.

4.10.2 Disadvantages or risks of Model VI

- States and territories may resist the reduction in their control over their assessment process.
- Similarly, if the model were to extend to include all parties, applicants may be reluctant to give up the security of having an expert working to ensure the best case for them is put forward.
- If an expert applied a high threshold of evidence or particular interpretations of the law, it would be difficult for the state or territory, or the Commonwealth, to find room for flexibility.
- There may be substantial disagreements between the parties as to what interpretation of the law, and what standard of evidence, should be applied by the assessor.
- The process may begin to look more and more like litigation, depriving it of the kinds of advantages that a negotiated settlement is intended to achieve. Parties may raise concerns

about the quality of the assessor's work, or the processes, or even the impartiality of the assessor.

- The pool of experts who would be agreeable to all parties is relatively small.
- If this model is only brought in at the end of a stalled process then the efficiencies may be illusory, since the cost and time for independent assessment would come in addition to the cost and time for the previous processes. If, on the other hand, parties might agree to independent assessment at the beginning of the claim process, then time and resources might be saved.

4.10.3 Assessment of Model VI

If parties can agree at the beginning of the claims process to abide by the findings of an independent assessor, Model VI could provide some efficiencies, but it would risk losing these if disagreements arose at a later stage.

If parties are deadlocked, then Model VI might be considered as a way out, though it would impose additional cost burdens and may not guarantee a resolution.

Model VI may not be viable for Commonwealth policy in the near future, though could conceivably be appropriate in some limited cases.

4.11 Commonwealth conduct as a primary respondent

The above exploration of options for Commonwealth engagement in connection issues assumed that the primary respondent in a given claim would be a state or territory. While this will be the case in the overwhelming proportion of claims, it is possible that claims will arise where the Commonwealth is the primary respondent, such as where the claim is limited to sea country within the Commonwealth's area of responsibility.

It is therefore necessary to determine whether or how a Commonwealth connection policy should be designed to deal with that remote possibility. Specifically, the question arises as to whether the Commonwealth should publish its own set of 'connection guidelines' to govern situations in which it is the primary respondent.

4.11.1 Advantages of developing Commonwealth guidelines

- Interviewees across the board considered that if the Commonwealth were to be involved in any substantive assessment of connection, other parties would benefit from knowing its understanding of the legal elements, its expectations as to how those elements may be established and the kinds of material necessary, and what processes of assessment it would employ.
- The predictability and objectivity that published guidelines may afford could be seen as an advantage for applicants and the Commonwealth alike.

4.11.2 Disadvantages or risks of developing Commonwealth guidelines

- The number of situations in which the Commonwealth would be required to act as primary respondent is extremely small.
- There is a risk that Commonwealth guidelines would be out-dated or unhelpfully restrictive by the time they came to be used.

- The production of Commonwealth guidelines may raise issues of consistency between those guidelines and Commonwealth practice where it is a secondary respondent.
- Given the value in the Commonwealth meeting with the NTRB ahead of time in order to plan the assessment process, negotiate details, and explain particular concerns, the existence of a written document may not add a great deal to that process.

There may be additional reasons in favour of producing Commonwealth guidelines, other than their application where the Commonwealth is primary respondent. These are discussed below at Section 5.4 and 6.2, and decided finally at Section 7.1. For present purposes, it is sufficient to say that the case in favour of producing guidelines for use when the Commonwealth is primary respondent is very weak.

4.11.3 Conclusion

In those rare cases where the Commonwealth is primary respondent, the most appropriate approach would be to consult and negotiate on a case by case with NTRBs around the material and processes that would be appropriate to meet Commonwealth needs. Those discussions should be informed by the principles identified below in Section 6.2. The rare prospect of acting as primary respondent is not a sufficient reason for the Commonwealth to publish connection guidelines (though there may be other reasons for producing such guidelines — these are discussed at 6.2 and 7.1)

4.12 Recommendations from Chapter 4

The analysis in Chapter 4 gives rise to the following interim recommendations, with the *proviso* that they may be more or less significant in light of the conclusions reached in Chapters 5 and 6:

1. The Commonwealth's 'respondent role' in relation to connection should be founded on an agreed connection assessment framework for each state and territory. Such frameworks should be negotiated at the policy level, with the intention that the Commonwealth will be able in most cases to rely on the state or territory's assessment of connection without the need to scrutinise the factual material in each case. This collaborative process will involve communicating Commonwealth concerns and priorities with respect to connection, so that its interests and responsibilities with respect to land, compensation and offshore areas can be met by state and territory assessment processes.
2. In appropriate cases of special importance, the Commonwealth should participate actively and early participation in claims, including:
    a) attendance at pre-research meetings with the state or territory and the NTRB
    b) participation in on-country and oral evidence sessions
    c) generally maintaining a degree of familiarity and comfort with the process and content of connection assessment
    d) where appropriate, seeking a summary of the assessment process followed in the particular case in order to confirm that the previously negotiated concerns have been addressed or seeking access to an extract of the state or territory's expert assessment (subject to some important qualifications and controls).
3. The following models are generally not advisable for satisfying the Commonwealth about connection:
    a) merely relying on state or territory assessment without any attempt to understand the assessment process or have input into it

b) waiting until the state or territory indicates that it has accepted connection, and then deciding whether or not to enter into the consent determination on the basis of a position paper issued by the state or territory

c) Commonwealth assessment of connection based on primary connection materials, or based on a summary of material provided by applicants

d) using an independent expert engaged by the principal parties (including the Commonwealth) to assess and/or research connection.

5. System-wide issues informing Commonwealth policy

Whereas Chapter 3 dealt with general aspects of the Commonwealth's conduct as a party in consent determinations and Chapter 4 discussed how the Commonwealth can approach the question of connection in the context of its role as a respondent party, Chapter 5 identifies some other system-wide concerns that may have a bearing on the ultimate form of a Commonwealth policy on connection. These are then developed into recommendations in Chapter 6.

The question for Chapters 5 and 6 is: 'How can the Commonwealth maximise the achievement of the full range of its policy objectives in the native title system, in relation to the issue of connection?' The main reason for asking this question is that many interviewees did not consider that the full scope of their concerns with respect to connection were captured by the relatively narrow question considered in Chapter 4, namely how the Commonwealth should deal with connection issues in pursuit of its interests and responsibilities relating to landholdings, compensation liability or offshore areas. A Commonwealth policy cast in those narrower terms alone, therefore, may not deliver the best possible outcomes.

If an aim of this research project is to identify how the Commonwealth's conduct in individual claims can be designed to achieve positive outcomes in the wider native title system, it is equally relevant to ask what the Commonwealth might do *beyond* its conduct of individual claims to achieve those same outcomes. In light of the 'system oversight' role discussed in Chapter 1, a Commonwealth policy with respect to connection might necessarily be directed to issues of state and territory practice, or NTRB capacity, or the broader legislative environment for native title.

Further, stakeholders' general perceptions of the Commonwealth may have a direct impact on its options for gaining satisfaction about connection in particular claims. The models recommended in Chapter 4 require a degree of trust, confidence, communication and general good relations with other actors in the system. Successful engagement on connection depends not just on the conduct of Commonwealth's representatives in particular cases, but also on how the Commonwealth performs its broader system-leader role — and, just as importantly, on the *perceptions* of how it performs that role.

It is important to note that the concerns discussed in Chapter 5 are not raised for the purpose of criticising particular states or territories or other parties, and that by voicing interviewees' concerns the authors should not be taken to be expressing a concluded judgment about those concerns. Also, it should be recognised that not all interviewees expressed these concerns, and further that there were other concerns that interviewees raised which are not included here because the scope of the paper is limited to issues of connection and the Commonwealth's role with respect to it.

Key concerns raised by interviewees related to:

5.1 consistency of approach within and between states and territories

5.2 the connection assessment requirements set by states and territories

5.3 the differing approaches of judges

5.4 the relationship between connection assessment and the negotiation of ILUAs

5.5 model litigant standards in state and territory practice.

5.1 Consistency within and between states and territories

Many interviewees raised the issue of consistency both between and within jurisdictions in the assessment of connection material by the state or territory. This issue is distinct from the issue of how the Commonwealth should achieve consistency in its own practice as a respondent party (above, Section 3.3), and relates instead to divergences in state or territory practice, but it may be relevant to a Commonwealth connection policy insofar as the Commonwealth takes a 'system oversight' role in relation to nation-wide consistency. Interviewees expressed a variety of views on the issue and on how a Commonwealth policy might affect it.

5.1.1 Differences between jurisdictions

A number of interviewees expressed concerns about what they saw as inconsistencies between the processes and standards applied by different states and territories. For interviewees representing applicants, complaints about inconsistency were largely about the practices of particular states and territories, rather than about the need for system-wide consistency for its own sake. Others (researchers and barristers working across different jurisdictions, the Minerals Council of Australia, interviewees at Commonwealth departments) did express some desire for more consistency per se across jurisdictions, although this was generally recognised to be an ideal that would be difficult to achieve in practice. Inconsistency between jurisdictions in processes and standards was seen as a frustration for many lawyers at NTRBs and governments, because the drawing of analogies or comparisons to consent determinations in other parts of the country is made more difficult.

Jurisdictional differences in connection assessment practices were seen as particularly problematic in cross-border claims. In cases where connection is accepted on one side of a state or territory boundary but not on the other, perceptions of unfairness or arbitrariness are likely. At the same time, it was generally recognised that differences in statutory and policy histories across jurisdictions could differentially impact the nature of the connection evidence that claimants might present.

Some interviewees cited the differing approaches of judges between jurisdictions as a factor reinforcing the states' or territories' different legal interpretations or evidentiary processes. Judges often work primarily in one jurisdiction, and so their individual approaches can come to shape the way that connection is assessed in their jurisdiction.

A minority of interviewees rejected the proposition that there should be more consistency, and most interviewees did not consider that consistency should be achieved by increased Commonwealth influence on the states and territories. Many were sceptical about the Commonwealth's ability to harmonise practice among the states and territories, whether through policy work or through participation in claims. Others considered that such influence would not be helpful for the conduct of flexible negotiations grounded in unique relationships and circumstances. One interviewee suggested that intergovernmental cooperation was the only appropriate way for greater harmonisation.

5.1.2 Differences within jurisdictions

Some non-government interviewees were also concerned about variations within the same jurisdiction, raising the following three issues:

- the perception that states and territories apply different standards to assessing connection depending on the political and economic interests engaged

- the perception that individuals within assessment processes (legal officers, in-house anthropologists, consultant anthropologists, barristers) have different priorities, preconceptions, attitudes, or interpretations of the law, resulting in different approaches within the same jurisdiction
- the need for flexibility in assessment processes to deal with regional variations in patterns of disruption, urbanisation, dispossession and cultural differences.

The primary factor that was said to vary between cases was the amount of evidence required to prove the relevant facts for each legal element of native title. It was not so much a matter of different legal interpretations as a question of 'how much is enough'. That said, there were anecdotes about changes over time as to the legal issues that were emphasised in assessment — the 'society' issue being one such issue.

Interviewees cited a number of different reasons for criticising perceived intra-jurisdictional variations in connection assessment:

- For predictability and planning, there should be a clear understanding of what is required to establish connection. NTRB interviewees expressed frustration at the guesswork and uncertainty involved when the goalposts may be shifting — the lack of a transparent objective standard made their jobs more difficult.
- Issues of fairness. Where different claims are assessed to different thresholds, this can generate real grievances, and problems may arise between claimant groups as a result.
- In light of the importance of a thorough assessment of the 'right people for country', as indicated above (Section 1.5), some interviewees were concerned that if standards were relaxed too far in politically 'easy' cases, there could be problems for future governance of registered native title bodies corporate.
- The perception of inconsistency was also said to undermine the idea that connection assessment is an objective legal and factual enquiry. Interviewees expressing this view considered that the recognition of applicants' legal rights through a determination should not depend on accidents of fate. In this vein, some state and territory interviewees specifically rejected the notion that they would require a greater weight of evidence for more 'significant' claims.

The following quote, from an NTRB interviewee, sums up many of these concerns:

> The lesser the [State] interest, the lower the bar. That's not really appropriate – I'm happy [a particular claim] got through, but what are they going to say to the other neighbouring claims? It makes it so difficult from a research perspective because you don't know what you're meant to do. It's like a game in the dark. We are trying to strategise, plan, based on differential state interest and approaches depending on state interest.

On the other hand, some interviewees did not consider consistency to be an especially important issue:

- Some said too much emphasis on consistency would hamper the ability to relax the evidentiary burden in cases where connection was clearly established.
- Others expressed the view that the point of a non-litigated process is to avoid the need to pursue a strictly objective legal-factual enquiry, and engage instead in interest-based negotiations. On this view, politically motivated variations in the degree to which the state or territory would test the case for connection are inevitable and not inappropriate.

- Some state and territory interviewees accepted that, as a matter of practical reality, it was inevitable that the degree to which they were willing to make inferences or need to test the veracity or accuracy of factual claims, would depend in part on the interests at stake.
- Many interviewees recognised that a degree of variation in the way the legal tests were applied to the evidence would be appropriate in light of the different contexts in different parts of the same jurisdiction. Relevant differences would include regional differences in historic colonial and state policy, inconsistent record-keeping across time and in different regions, greater historical anthropological interest in some areas, regional differences in important cultural characteristics.

5.2 State and territory connection assessment requirements

In each of the jurisdictions there were NTRBs, and barristers and anthropologists working for applicants, who expressed frustration with what they perceived as overly high thresholds of evidence for consent determinations. This was particularly the case in Western Australia and Queensland, though not limited to those states.

Often, this frustration was expressed on behalf of applicants who were confident that they would ultimately be able to gain recognition of native title, but who felt that the state or territory's requests for information and evidence were unnecessarily onerous.

The following are some particular manifestations of this perceived overly-high standard, as described by interviewees:

- applying a litigation standard to the assessment of material for consent determinations[119]
- refusal to make inferences that are available on the established facts
- raising issues that are unnecessary or irrelevant, or are unrealistic in light of the scarcity or poor quality of available evidence
- requiring documentation and affidavits to prove facts whose veracity is not necessarily in question
- requiring full genealogies with birth, marriage and death certificates, in cases where these are unnecessary to establish the claim, or where law and custom does not require descent for group membership
- failing to adequately articulate whether the state or territory's problem is:
    - that the facts asserted by claimants do not, in the assessor's view, establish the legal elements of native title
    - that the evidence provided is not considered sufficient to prove the facts claimed. For example, where a genealogy is considered to be insufficient unless accompanied by certificates of birth, death and marriage, this is a matter of the veracity of the relationships asserted. It is not a question of whether those relationships, if accepted as true, establish the claimant group's claim to native title.
- requiring applicants to provide connection evidence and identify particular people for specific sub-areas within the claim area

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[119] NTSCorp, in its written submission, said 'the level of evidence required by the State to satisfy their credible evidence process often reflects the litigation standard of proof required in native title proceeding.'

- setting high bars as to what constitutes 'substantially uninterrupted', or 'adaptation' versus innovation, in relation to continuity and change in traditional law and custom
- requiring, contrary to the case law, that applicants establish 'physical connection' to claim areas
- requiring more detail about the relevant 'society' than legally necessary, disputing the applicants' formulation of the relevant society, or unrealistically insisting on consistency about society across different claims
- reasoning from the existence of conflict within a claim group that the society or claim group is defined incorrectly, rather than accepting conflict as a normal phenomenon within a single normative system

In Queensland interviewees described a practice of testing the evidence around significant removal events or other events likely to have disrupted physical connection to land. This practice is focused on archival government documents and other historical records that indicate invasive colonial or State policies, which may therefore have caused dislocation in native title. NTRB interviewees described this as creating effectively a presumption against native title, which had to be rebutted in fine detail, including by identifying where particular individuals were living during particular years. By contrast government interviewees saw this as usefully refining the matters for which they required extensive proof of continuity of connection.

Any judgment about the veracity of these complaints or their impact is outside the scope of this project. However, they are considered here as perceptions about the effectiveness of the system of connection assessment as a whole and may inform the role Commonwealth might play in that system.

5.2.1 Is there a 'stringency problem'?

Complaints about a high evidentiary bar were often cast in terms of the time and resources devoted to meeting state or territory requirements, rather than the standard being too high for the claimants to be able to meet.

- The iterative process of providing additional information, answering queries and submitting supplementary reports, as well as the research for the initial connection report, constitute significant burdens on the NTRBs and the system as a whole.
- NTRB funds spent on research and legal services have tended to be higher in Queensland and Western Australia, in part because of the higher evidentiary standard applied in those jurisdictions.
- As one NTRB interviewee noted, to the extent that a state or territory's position on connection may push a claim toward trial, or require interlocutory manoeuvring, the NTRB will be forced to spend more of the Commonwealth's money. A number of NTRBs are now preparing all of their connection material for consent determinations to a litigation standard, largely in order to avoid the need for call-backs and supplementary reports, and partly to improve their negotiating position by making litigation a more realistic option. Some have said that the money and time spent on the less comprehensive reports, plus the call-backs and supplementary reports, may in some cases be greater than would be required to prepare for litigation. This development may have the effect of reducing the savings and gains to be made from the non-litigation route.

Most non-government interviewees who spoke to this issue considered that *if* the Commonwealth is able to do something about it, then it should.

State and territory government interviewees, as well as some barristers and a small number of anthropologists, disagreed with the proposition that state and territory assessment processes were overly stringent. They cited a range of reasons for preferring a rigorous process of assessment:

- State and territory responsibilities to the general community, in terms of the potential for compensation liability, the potential effects of native title on the economic development of the state or territory, and the possible impacts on the rights and interests of the public.
- The fact that the courts have interpreted s 87 *Native Title Act* as placing the states and territories in a central position with respect to the assessment of connection, and that states and territories are required satisfy the courts of the rigour of their assessment process.
- The need for governments to be able to point to native title determinations as representing hard-won legal rights beyond the government's control, as opposed to merely discretionary hand-outs. This reduces any political pressures on governments not to recognise native title, because recognition is framed as an objective, legislatively mandated outcome rather than the government's own policy choice. Further, it was suggested that in a resource-competitive environment, it is easier for governments to justify the dedication of significant funds towards settlement packages if they are seen as a legal obligation to traditional owners rather than a discretionary matter.

Even among those interviewees who did consider that some states and territories set the bar on connection too high, most agreed that there should be a thorough assessment of connection as part of the native title process. Many interviewees who were critical of state or territory assessment thresholds were careful to emphasise the need for a rigorous process at some level, whether it occurs mainly at the NTRBs, or at the state or territory level, or some combination. Some of the main reasons cited in favour of this proposition were that:

- It is essential to identify the right people for country. This is necessary as a matter of rights and justice, and to minimise the potential for intra-Indigenous conflict, and also to ensure that the governance of the future registered native title body corporate is built on sound foundations. This factor was also cited by state, territory, Commonwealth and third party respondent interviewees as a key issue.[120]
- The potential for overlapping claims or challenges to claims means that a strong research foundation is required. The identification of connection to country under traditional law and custom, and the accurate representation of estate groups and wider societies, is a crucial dispute management resource.
- As one NTRB interviewee said, 'This is forever; we need to get it right.'
- There is a benefit in collecting and recording the history of a people and important aspects of their culture. Connection material can become a focal point for community self-identification.
- The fact that governments will take aspects of history and culture seriously, and devote resources to learning about them, serves an important function. There is a pride and a sense of respect that may be diminished without an adequate treatment of connection material. Further, the process encourages the dissemination of knowledge about Indigenous cultures among a broader audience than might otherwise be the case.

[120] See Minerals Council of Australia's written submission.

- From a practical point of view, a reasonably thorough investigation of connection by the state or territory is necessary to ensure that other respondents will agree to a consent determination, and to convince a court to make an order under s 87.

In light of all of these reasons, there is plainly a strong case for the states and territories to continue to make substantive assessments of connection. That conclusion does not mean, however, that all aspects of a 'high bar' approach to connection are equally useful or legitimate. A critical examination of the kinds of information and evidence that states and territories might request from applicants would help determine whether current assessment processes could be improved. Such a critical examination, however, is beyond the scope of this report.

5.2.2 Case law in state and territory assessment processes

The role played by case law in the assessment of connection was a matter raised by a number of interviewees. There was a wide variety of perceptions about the extent to which assessment processes reflect current case law, and this variety is evidence that disagreements about the law (and not just the facts) can be an impediment to the successful resolution of claims. Negotiating in an ambiguous and contested legal environment can be frustrating for parties and hold up progress.

Some state and territory interviewees said that they explicitly seek comfort in the flexibility of the case law in making choices about what is required for connection. They said they can see the policy imperatives that favour recognition, and use the opportunities in the case law that support more flexible approaches, including the manner of receiving evidence, the weight of evidence required, and the interpretation of the legal elements (see above, Section 2.1).

Even within those jurisdictions where interviewees described their approach to the case law in this way, there was some evidence of internal disagreements over what constitutes the 'correct' law, with some legal officers taking the view that some Federal Court and Full Federal Court judgments are inconsistent with *Yorta Yorta* and therefore 'bad law'. Interviewees outside government speculated whether such disagreements may explain variations in connection assessments within the same jurisdiction (See below, Section 5.7).

There are other jurisdictions where NTRBs expressed frustration with what they saw as a selective approach to case law by the government, in which the narrower, higher-threshold cases were emphasised and the more flexible cases disregarded or rejected as unorthodox or inconsistent with *Yorta Yorta*.

Again, the authors are not in a position to judge the accuracy of interviewees' views in this matter, not having had the benefit of being present at the negotiations where these issues would become apparent.

One legal issue in particular emerged as a recurring concern for interviewees: how to define the relevant 'society' for a claim and what was required to establish the society described by the claimants.

NTRB interviewees and anthropologists in a number of jurisdictions were critical of what they saw as an overemphasis by states and territories on consistency in the descriptions of society across different claims. There was a desire among NTRB interviewees to see assessment processes move beyond this focus on society, such that government respondents could accept differences in the definition of society between different claims, and accept that older reports or studies might describe society differently without undermining the basis for the claim.

A number of government interviewees indicated that their concern with ascertaining the relevant society was founded in considerations around conflict prevention and the governance of registered native title bodies corporate. They said that if there were internal argument or uncertainty about whether there were one or multiple societies, then this could create serious problems in the future. They saw this as a strong reason to require a high degree of certainty and clarity around the society question.

In response to this 'governance argument' in favour of a close attention to 'society', NTRB interviewees said that the legal concept of 'society' is not necessarily related to the decision-making processes or constituencies that will be involved in registered native title bodies corporate. They said that the correct definition of the claim group, the criteria for membership, and the internal distribution of rights and interests are all vital matters for research and decision (although not necessarily matters that need to be mediated by government). By contrast, any requirement in the Native Title Act for the applicants to identify 'a society' in order to establish that their laws and customs are 'traditional' does not necessarily have any relevance for the post-determination governance of native title.

The contrasting views on the society issue demonstrate that consent determination negotiations would be improved by bringing parties' understandings of the law closer together. How the Commonwealth may assist in this is addressed in the next chapter.

5.3 Approaches of judges

There were two aspects of the judicial involvement in connection issues for consent determinations that raised concerns for some interviewees: the application of s 87, and case management.

5.3.1 Application of s 87

Some interviewees in Queensland and New South Wales expressed uncertainty about what courts will require in order to be satisfied that a consent determination would be 'appropriate' within the meaning of s 87. They spoke a wide range of approaches by judges, with some judges requiring far higher degree of evidentiary detail than others.

Planning can be difficult for parties in light of this uncertainty: for example, a judge might indicate close to the proposed determination date that further material will be required before a determination can be made. This may require the production of documents and genealogies at short notice, which can put a strain on resources. The problem in such cases would not be the judge's approach per se, but rather the fact that parties are unable to anticipate what that approach will be.

That said, some interviewees did express concerns about judicial approaches that put less emphasis on the making of inferences and greater emphasis on evidentiary detail such as genealogies, proof of descent from apical ancestors, or geographic specificity of connection evidence. The fact that some judges may adopt such approaches may encourage a greater degree of technicality in assessment processes by states and territories, contrary to the previous Commonwealth's stated policy objective of flexibility and non-technicality.

Usually in litigation, inconsistencies between judges are resolved through the appeals process. In the case of connection in native title consent determinations, this does not happen, since the judge's ruling about the adequacy of the material rarely amounts to a final decision that a consent determination should not be made, but is rather an interim step on the way to a positive outcome

that none of the parties are likely to appeal. Further, even if there were an appeal from a judge's decision not to grant a consent determination, the question of law would concern the judge's exercise of a discretionary power in a highly fact-specific context. This would make a court of appeal unlikely to substitute its own judgment, even if it disagreed with the decision at first instance.

Accordingly, some interviewees considered that there was a legitimate role for the Commonwealth to be involved in engaging with judges in relation to native title matters. Recent examples of judicial education programs around anthropological issues were cited by a number of interviewees as positive examples of this. Other interviewees considered that there may also be scope for leadership and discussion on these matters *within* the court. A final suggestion was that the legislation could be amended to give a clearer indication of what matters a court should, may or must have regard to in deciding whether or not to make an order under s 87.

5.3.2 Case management

The second aspect of judicial approaches that generated discussion during consultations was the manner in which courts conduct active case management. A number of interviewees from state or territory governments, legal representatives, and also some NTRBs, said that the pressure from the courts to settle matters could make things more difficult.

- For some, courts' attempts to push things forward and, for example, to lock parties into positions around connection, could in fact make negotiations more difficult, and may force states or territories into putting the entire question of connection into issue.
- For others, the court's pressure towards a settlement was seen to come at the expense of a proper application of the law.
- For NTRBs, concerns around case management were primarily related to the internal capacity to meet deadlines, or about the capacity for pressure on the states or territories that disrupt sensitive negotiation positions.
- An additional concern from NRTBs, governments and others was that excessive pressure to settle within a constrained timeframe was in tension with the need to ensure that determinations are made in favour of the 'right people for country'.

Contrary to these criticisms, a great many other interviewees were supportive of the courts' approach and considered that judicial pressure towards settlements was a necessary and appropriate part of fulfilling the then Commonwealth native title policy objectives and broader priorities.

5.4 Connection and ILUAs

In more than one jurisdiction, some NTRBs and other interviewees felt that the assessment of connection was being linked in some way to ILUA negotiations. Such interviewees were concerned that the degree of time and difficulty involved in establishing connection to the state or territory's satisfaction may be partly dependent on the applicants' willingness to sign ILUAs with the state or territory to limit the potential impact of recognising native title.

Of those who identified this issue as a concern, a majority expressed a desire for the Commonwealth to use its influence to ensure that states and territories were negotiating about recognition of native title in accordance with the proper principles. There was general appreciation that Commonwealth officers had previously made public statements about the need to focus on recognition of rights and not to link connection assessment to ILUAs. Nevertheless, stronger and

perhaps more case-specific action was being sought by interviewees at some NTRBs. Some indicated that stronger participation in regional directions hearings rather than case-by-case would be preferable.

The general view from state and territory interviewees on this issue was that greater Commonwealth intervention would not be appropriate.

5.4.1 Model litigant standards in state practice

Some interviewees representing applicants expressed a desire for greater emphasis on model litigant standards in their jurisdictions' connection assessment processes, and considered that a Commonwealth connection policy might somehow be able to encourage such emphasis.

Some of the specific aspirations expressed by these interviewees included:

- open communication from state or territory representatives about their intentions and views in relation to connection
- in some jurisdictions, willingness by state or territory representatives to engage in informal discussions; in others jurisdictions, willingness on the state or territory's part to participate in open mediations (in order for the mediators to be able to play a stronger role)
- full disclosure of potentially negative information held in government archives and research, without the need for formal discovery
- willingness to consider the existence of native title closer to metropolitan areas.

It is not necessary to express a view about whether any states and territories are currently lacking in any of these respects. It suffices to say that model litigant standards should form a common minimum threshold for the conduct of native title matters and if the Commonwealth were to perceive that such standards were not being fully observed in a given case, it might appropriately express its view or even to take action to encourage compliance with those standards. The relevance of this observation to a Commonwealth connection policy is addressed in Chapter 6.

6. Promoting Commonwealth policy priorities, improving the native title system

As mentioned in Chapter 5, the Commonwealth's role in relation to the native title system as a whole may require its policy on connection to go further than what is required to promote its narrow 'respondent' interests in particular cases.

This chapter draws together issues and concerns raised in Chapter 5 and examines possible strategies that may assist the Commonwealth to improve the operation of the native title system as a whole, in relation to issues of connection. This discussion is a necessary last step before an overall policy on connection can be formulated.

- In relation to the broad Commonwealth policy objective of promoting native title outcomes, **Section 6.1** discusses the general role of the Commonwealth in providing national leadership on matters of connection.
- **Section 6.2** addresses the specific suggestion of Commonwealth-published model guidelines for assessing connection or nationally consistent principles for assessing connection.
- **Sections 6.3** and **6.4** analyse whether the Commonwealth could assist in achieving outcomes in particular claims, including by assessing connection independently of states or territories in order to progress deadlocked negotiations.
- **Section 6.4** discusses a possible role for the Commonwealth in providing guidance on legal interpretation to parties.
- Issues of Commonwealth funding for the native title system are discussed in **Sections 6.4.1–6.4.2**.
- Suggestions for reform of the Native Title Act to facilitate more flexible outcomes are discussed in **Section 6.5.3.**

6.1 Providing national leadership on matters of connection

6.1.1 Leadership — general

There were three main strands of opinion among interviewees around the question of the Commonwealth's role in providing leadership to parties across the native title system:

- those who considered that the Commonwealth should lead parties towards positive negotiated outcomes, both in cases where it is a respondent party itself, and also through other avenues outside specific claims
- those who considered that the Commonwealth's conduct as a party should be limited to protecting its immediate interests, although it may legitimately pursue wider policy priorities through its more general influence on the system
- those who did not express any concerns about the current system and did not see the need for any change to the status quo.

There was no clear majority view among these opinions, though a majority of interviewees shared the view that the Commonwealth can at least partly fulfil its leadership role by:

- ensuring that the Commonwealth's own behaviour as a party reflects its policy objectives

- utilising avenues beyond its role as a party in specific claims to promote its policy objectives.

During consultations a number of avenues were identified for the Commonwealth to exert influence through general leadership of the native title system, including:

- publishing Commonwealth policy documents
- reiterating, where the opportunity arises, the objectives and imperatives of the Act as beneficial legislation aimed at recognising rights and righting wrongs and not a technical compliance exercise
- discussions with stakeholders through various fora to identify concerns and barriers to recognition of native title and developing strategies to overcome them[121]
- one-on-one discussions between Commonwealth and state and territory officers about their approaches to connection, their interpretations of the law and anthropology generally
- regular contact with senior management at NTRBs
- opening a discussion within the sector about the benefits of streamlined and truncated processes
- public discussion at the political level about the most appropriate way negotiations and assessment of connection to be conducted
- minister-to-minister talks
- amending the legislation to clarify and/or improve flexibility.

It must be recognised that states and territories do not generally accept that they are in need of external guidance from the Commonwealth in the conduct of claims. As the primary respondent in the vast majority of cases, states and territories have acquired substantial expertise, established stakeholder relationships and have made their own assessment as to what is appropriate in dealing with connection in the context of their own political and resource environment. Often, governments consider that their flexibility in negotiations is constrained by that environment rather than by any lack of good will on their part. As such, they would not welcome what they may regard as Commonwealth interference. Any greater Commonwealth activity in this regard, therefore, will have to be sensitive to these views.

One important observation that emerged from the consultations is that a perceived need for changes at the state or territory level does not necessarily imply a need for greater Commonwealth oversight or intervention. In particular, the Commonwealth may not have appropriate or effective levers to promote state- or territory-specific reform. In addition, there is a risk in seeking lasting *structural* changes to issues that are the result of *current* government policy.

Having regard to the range of Commonwealth policy priorities outlined above in Chapter 1, and some of the challenges identified by parties in Chapter 5, it would be appropriate for the Commonwealth to continue and extend its activities in leading parties towards quicker, better and more flexible processes for recognising native title, while having due regard to the concerns and constraints on state and territory governments. To the extent that the Commonwealth seeks to encourage greater flexibility in its general policy work, it is important that it also lead by example

[121] Fora include: User Group Forums, JWILS meetings, Standing Committee of Attorneys-General meetings, Native Title Consultative Forum meetings, meetings with NTRB Chief Executive Officers and Senior Professional Officers.

when it is a respondent party. Its ability to provide general leadership would be hampered to the extent that it was seen as not implementing its own advice.

6.1.2 Recommendation

The Commonwealth should take a significant role in leading actors in the system towards greater flexibility with respect to connection in consent determinations. That role will require sensitivity to state and territory concerns, and leadership by example where the Commonwealth is a respondent party. In addition to its conduct as a respondent party, leadership in this context could include the public promotion of the benefits of flexible non-technical approaches to connection (such as have been made by the former Attorney-General), and private encouragement to this effect in discussions with parties, both in general and in relation to specific claims.

6.2 Commonwealth publication of model guidelines

There was a significant divide in opinion between those interviewees who considered that the Commonwealth could positively influence the system by publishing a best-practice set of connection guidelines to be used as a model by states and territories, and those who considered that this would be unhelpful or too risky. The latter view was expressed more often, and more forcefully, than the former.

The term ‘model guidelines’ here refers to a document, similar in form to those used in some jurisdictions,[122] that would address matters such as:

- the legal elements and sub-elements that need to be met
- the factual circumstances the assessor would take to meet those elements and sub-elements
- the forms of evidence and material that would be considered necessary to establish those facts, such as contemporary ethnographies, genealogies (full or representative, with or without certificates), anthropological and historical reports, et cetera
- the form in which material is to be presented, including the structure of the connection report
- the processes by which assessment is to take place.

Model guidelines would be intended to have the function of demonstrating what states and territories *ought* to require, and ought to be satisfied with.

Those interviewees who supported Commonwealth-published model guidelines for assessing connection made the assumptions that the guidelines:

- would reflect and give effect to the then Commonwealth’s policy pronouncements of flexibility and non-technicality

[122] Connection guidelines have been published in Western Australia, Queensland and South Australia: Office of Native Title Government of Western Australia, *Guidelines for the Provision of Information in Support of Applications for a Determination of Native Title,* Government of Western Australia, 2004; Government of Western Australia, *Preparing Connection Material: A Practical Guide*, Government of Western Australia, April 2006; Department of Natural Resources and Mines, Queensland Government, *Guide to Compiling a Connection Report for Native Title Claims in Queensland,* Queensland Government, October 2003; Crown Solicitor’s Office, Native Title Section, Government of South Australia, *Consent determinations in South Australia: A guide to preparing native title reports ,* Government of South Australia 2004, online at <https://www.lga.sa.gov.au/webdata/resources/files/Consent_Determinations_in_SA___A_Guide_to_Preparing_Native_Title_Reports.pdf>.

- could stand as a benchmark or yardstick for applicants and respondents, as a measure of what was legitimate and reasonable for states and territories to ask for and what constituted excessive demands
- would have some influence on parties.

6.2.1 Benefits

- Commonwealth-published model guidelines could provide an 'objective' standard that parties can point to — applicants and respondents alike. Respondents can refer to guidelines to meet applicant complaints that the standards being applied are unreasonable, and applicants can refer to them where they consider that the information they have provided should be sufficient.[123]
- All parties could refer to the guidelines to build confidence about the process among outside stakeholders.
- Guidelines could be used to specify ways in which connection assessment for consent determinations can usefully differ from the litigation standard.
- Model guidelines could be used to promote consistency and predictability in assessment within and across jurisdictions.
- Model guidelines could help to foster a national 'community of practice', establishing norms of good assessment processes.

6.2.2 Risks and impediments

- Published guidelines could limit the flexibility of Commonwealth, state, and territory parties. Many interviewees representing applicants recognised the double-edged nature of guidelines: specific guidelines purporting to set an 'objective' benchmark may be beneficial to applicants where the evidence is strong and plentiful, but may be disadvantageous where native title is more difficult to establish.
- There may be inherent problems in codifying connection assessment in categorical terms when it is, on one view, a question of judgment informed by context and the give-and-take of negotiations. It has been suggested that many state or territory guidelines have fallen in to disuse for this reason.[124]
- Connection guidelines have been criticised as a bureaucratic 'box ticking' exercise that detracts from the sense of active and constructive negotiation between parties.
- There may still be subjective arguments when applying guidelines about 'how much is enough'.
- The differences between different geographic and historical contexts would make it difficult to develop a single set of guidelines appropriate to all claims. Relevant differences include variations in historic colonial and state/territory policy, inconsistent record-keeping across

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[123] The Minerals Council of Australia, in its written submission recommended that the Commonwealth should promote national consistency 'by ensuring the level of scrutiny is reasonable without being excessive.' The MCA recommended that the Commonwealth produce 'minimum standards in this regard' and 'monitor the performance of state governments against minimum standards'. NTSCorp's written submission noted that the absence of connection guidelines at the State level can result in the application of 'inconsistent evidentiary standards'.

[124] The written submission of the NSW Crown Solicitor's Office noted that 'the publication of detailed connection guidelines might unintentionally conflict with the stated goals of encouraging flexible negotiations and avoiding unduly narrow and legalistic approaches.'.

time and in different places, uneven anthropological interest in different areas, and regional differences in important cultural characteristics.

- Commonwealth-published guidelines may be ineffective in 'anchoring' a benchmark if state and territory governments do not adhere to the Commonwealth's standard.
- An overwhelming concern among interviewees was the risk of creating two separate processes and standards for applicants to meet if Commonwealth guidelines existed side-by-side with substantially different state or territory guidelines. This would be particularly problematic where the Commonwealth was a party to proceedings.

6.2.3 Discussion

Detailed guidelines on requirements for connection at the national level would risk being too prescriptive to deal with the wide range of contexts in which decisions about connection need to be made. The type and amount of evidence appropriate to establish connection may depend on cultural, legislative and historical differences between jurisdictions, intrajurisdictional differences of geography and history, and the procedural history of particular claims. Further, complex matters of judgment will remain to be determined at a jurisdictional level or on a case by case basis, such as what constitutes a 'substantial interruption' to acknowledgment and observance, or whether an aspect of law and custom is sufficiently 'traditional', or whether particular historical inferences are open. In light of these considerations and the other drawbacks highlighted above, guidelines that purported to set out a detailed evidentiary threshold for consent determinations would not be certain to contribute positively to the native title system and may in fact create additional problems.

6.2.4 Recommendation

The Commonwealth should not publish model connection assessment guidelines.

6.3 National principles for the assessment of connection

An alternative to model guidelines is a document setting out broad principles that should inform the assessment of connection. Rather than set out the specifics of what material applicants are required to provide, a principles document could act as a guide for all parties around how connection assessment can engage with the policy aims of native title.

A principles document would provide some aspects of an 'objective standard', but without limiting flexibility. It could foster a degree of consistency across jurisdictions, but without descending to the level of detail that would make it inapplicable across the diverse range of contexts around the country. It would not purport to answer the question of 'how much is enough', but would contain some guidance as to how that question should be approached.

The idea of a principles document was endorsed by most interviewees, and was expressly suggested in the New South Wales Government's written submission. New South Wales proposed a document, formulated in consultation with the states, that would be complementary to the JWILS *Guidelines for Best Practice in Flexible and Sustainable Agreement Making*, with a more specific focus on consent determinations.[125]

The ideal way to proceed would be to develop a final principles document in consultation with governments (through JWILS) and applicant representatives, based on the findings of this report.

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[125] New South Wales Government written submission, p. 2.

Once a principles document was produced, it would be appropriate for the Commonwealth to implement the principles in its own practice (to the extent that they would be applicable, in light of the models discussed above in Chapter 5), and for Commonwealth officers to refer to the principles in the performance of their functions.

The following would be useful elements to include in a principles document, though the list is of course not exhaustive:

- a commitment to the importance of recognising native title in terms of realising the rights of Indigenous peoples, righting the wrongs of the past, building a foundation for positive and respectful relationships in the future, and native title's potential contributions to the economic development of Aboriginal and Torres Strait Islander communities
- an explicit recognition that the legal framework of native title includes Federal Court jurisprudence as well as High Court cases
- an outline of the legal elements required to establish native title, with a clear indication of what is *and what is not* required (see Section 2.1 and Appendix 1).
- a commitment to using the flexibility provided by the law to take a beneficial view of the evidence
- a statement of the appropriate relationship between the way in which connection is treated in litigation and the way it should be treated in consent determinations.
    - A different and more appropriate standard applicable to consent determinations, such as 'credible evidentiary basis', 'reasonably arguable case', 'taking the evidence at its highest', should be endorsed in the document.
- highlighting the need in assessment to distinguish clearly between the concepts of legal elements, facts, and evidence
- recognition that the absence of historical documents does not necessarily imply the absence of connection
- setting out appropriate presumptions to guide decision makers in a beneficial approach to their task, such as a presumption:
    - that a society of Aboriginal people was in occupation at the time of sovereignty, such that the relevant task is to confirm or clarify the relationship between that society and the claim group[126]
    - of the continuity of acknowledgment and observance of traditional laws and customs from sovereignty, rather than presuming that continuity has been broken unless proved otherwise.
- specific recognition that the content of laws and customs acknowledged and observed by the claimant group is likely to have been modified since sovereignty, without necessarily impacting on native title

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[126] The Mabo judgment simply says that: 'We need…sufficient connection by way of actual, or implied, genealogical links to show that the community in occupation of the land at sovereignty was the predecessor of a community that now claims native title…' Mabo v Queensland (No 2 (1992) 175 CLR 1 at 70 per Brennan J. This is far more in tune with the kinds of Australian Aboriginal classificatory kinship relationships with which anthropologists are familiar. There have been numerous instances where people have succeeded to country on this basis.

- focusing the inquiry on the touchstone question, as indicated in Section 2.1, namely whether the changes in traditional law would have the effect of increasing the burden on the Crown's radical title
- recognition that the emphasis in assessing connection should be the identification of the 'right people for country' — that is, focusing on whether the claim group matches the claim area in a way that takes into account the claims of neighbouring groups, and will allow the effective governance of native title after the determination. Of less importance from a policy perspective are questions about historical continuity or fine-grained connection evidence to particular areas within a claim area.

There are a number of procedural principles, or aspects of best practice, that could be usefully included: [127]

- Connection assessment processes should be non-adversarial and observe the principles of good faith, cooperation and goodwill.
- The importance of close communication between lawyers and researchers both within NTRBs and within governments should be recognised, as should the multidisciplinary nature of the question of connection.
- Close, collaborative and ongoing communication between government and NTRBs is important.
- There are benefits from early scoping of connection requirements, including:
    - identifying the needs and expectations of all parties, including non-government respondents
    - assisting the parties to narrow the research brief by identifying specific issues that need to be addressed and eliminate issues that are not contentious
    - establishing appropriate methods for incorporating direct evidence from Indigenous witnesses and the preferred formats for presenting research
    - investigating the possibility of conducting negotiations parallel with assessment of connection
    - establishing frameworks for communication, including scheduled meetings.
- The early sharing of tenure information can be a valuable way of narrowing the areas over which connection research should concentrate.
- Collaboration and cooperation involves the sharing of information, resources and support during the production and assessment of research to produce reports in a timely manner. This may include governments granting access to relevant archival information before the commencement of applicant research.
- All parties should be encouraged to be mindful of resource limitations and plan together to ensure practical outcomes and realistic timeframes for preparing research and assessing connection.
- It should be recognised that an emphasis on written reports can minimise opportunities for claimants to state their case directly to governments and other respondents. At the same time, there is potential for miscommunication and misinterpretation of claimant responses, so context and appropriate management are crucial.

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[127] These suggestions draw on the *Getting Outcomes Sooner* report, above n.1, as well as the consultations.

- Assessment processes should be open to a range of ways of presenting information, including DVDs of witnesses' evidence, and direct on-country evidence. Assessors should be aware, though, that too great an emphasis on this form of evidence can raise the risk of relying on unexamined ideas about what 'real' native title holders look and act like.
- The early ethnographies should be critically evaluated according to the context in which they were recorded and the expertise of the ethnographer.
- The issuing of position papers or summaries can greatly assist non–state or territory respondents to confidently enter consent determinations, and are useful for outside parties who may wish to negotiate with claimants or native-title holders.

This list of principles is by no means exhaustive or conclusive but may form the basis for stakeholders to discuss and build from, in order to generate a document that best captures the principles they would wish to govern the process of assessing connection for consent determinations.

6.3.1 Recommendation

The Commonwealth should produce, in collaboration with state and territory governments, NTRBs, and representatives of third party respondents, a principles document to inform national practice in the assessment of connection for connection determinations. Such a document should set out:

- a legal framework highlighting all available opportunities for flexibility
- approaches to matters of evidence that are consistent with the policy objectives of native title
- a focus on identifying the 'right people for country'
- good practice procedures to assist more streamlined and productive assessment processes.

6.4 Case-specific intervention

6.4.1 Generally

In light of the concerns raised in Chapter 5, the consultations considered whether there was a valid Commonwealth role in stepping in on particular claims to encourage parties towards a positive outcome.[128] There was some support for this idea; for example, one interviewee said:

> Ultimately, this is designed to be beneficial legislation. There are compelling arguments for the Commonwealth to keep a watching brief to ensure that good faith and due process criteria are being met by the states, to ensure that they are not using legal or policy impediments to hold things up. Not to say they should be arguing for lower thresholds, but where these impediments are being thrown up, the Commonwealth does have a policy role to play.

This role was described in various terms by interviewees: a 'wise grandfather', an 'honest broker', an 'umpire', a 'moderator', the 'good cop', someone to act as a third party to 'streamline and focus the relationship'.

Proponents of this role considered that the Commonwealth could, in individual cases:

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[128] See Goldfields Land and Sea Council written submission, p.3.

- make formal or informal communications at the bureaucratic or ministerial level where negotiations did not appear to be promoting the then Commonwealth's stated objective of flexible negotiations
- make representations to the court in matters to which the Commonwealth is a party or intervener, perhaps moving for procedural orders to progress matters (such as the filing of evidence, or bringing the matter to trial, or splitting claim areas)
- assist with resourcing issues where appropriate, such as funding NTRBs to take a legal issue to trial
- form its own view on connection, as discussed in Section 6.4.2 below.

Where negotiations had broken down, or the Commonwealth was otherwise requested to intervene, Commonwealth officers could seek to identify the issues holding the parties back from settlement, and consider how these might be addressed.

Where the Commonwealth is not already a party, some interviewees considered that it had option of using its power to enter proceedings as an intervener under s 84A of the *Native Title Act* 1993. This would then raise the question of how the Commonwealth is to know which cases to intervene in, and at what point in time. One option would be to consider intervention when one of the parties requests it.

A number of these issues are drawn together in the following quote from one interviewee:

> If connection was assessed 3-4 years ago and got the tick and the claim is still not resolved, that's where the Commonwealth with its first law officer and model litigant hat on could play a constructive role. But it's hard to build a structure around that, it's more an issue of case by case influence, confidence, authority plus maybe a bit of money.

Risks and impediments

There are a number of reasons why this sort of case-by-case intervention may be problematic:

- The tribunal and courts already have the function of acting as intermediary between parties. To the extent that these institutions lack the powers required to (a) know when there is a problem; or (b) take adequate action to remedy it; then the answer may be to bolster their powers.
- A number of interviewees described the prospect of the Commonwealth taking on an arbitrator or mediator role as the 'least useful' possible outcome of this policy review. These interviewees were primarily concerned about the greater degree of complexity and perhaps cost that may result from the presence of another active party at the negotiating table whose objectives were not simply limited to the protection of their interests.
- Confidentiality is a significant barrier to Commonwealth involvement in cases that it has not previously been active in. Where the Commonwealth is not a party it will not have access to mediation meetings. Even where the Commonwealth is a party, substantial work on connection may take place between the state or territory and the applicants outside of formal mediation and on a confidential basis.
- There was some concern that the Commonwealth may not be perceived as sufficiently neutral if it were already a party to the relevant claim; though this concern was not shared by all interviewees.

- Commonwealth intervention in particular cases may have little effect on negotiations. Indeed in some cases, it may be more politically difficult for a state or territory to take a given course of action if it appears that such a course is being imposed by the Commonwealth.
- Many state and territory interviewees and others considered that a more interventionist Commonwealth role was not desirable, since it may have the capacity to disrupt systems that were working well.
- There were also concerns stemming from the impression that the Commonwealth has not in the past promoted, through its own conduct in negotiations or litigation, a flexible and non-technical approach to connection.

Discussion

The risks and challenges to a Commonwealth role in case-specific intervention are considerable. These would require any Commonwealth activity in this area to be strategically planned and sensitively implemented. Nevertheless, in the right circumstances, a well-targeted Commonwealth involvement in negotiations may make a positive contribution in the direction of greater flexibility, and more constructive negotiations. Even where the Commonwealth is not privy to the exact nature of a deadlocked claim, an NTRB could for example indicate that no activity on connection had taken place for a given number of months, and the Commonwealth could speak to the relevant state or territory with a view to identifying any problems hindering agreement.

Interviewees who are involved in conducting mediations indicated that they would strongly discourage a non-party from becoming involved in negotiations, largely because of the complex and unpredictable effect it may have on the dynamics of negotiations.

Recommendation

There is some limited scope for well-targeted Commonwealth intervention in individual cases in order to promote quicker, more flexible outcomes, most appropriately where the Commonwealth is already a party to the claim and is requested to intervene.

6.4.2 Commonwealth forms own view on connection in particular cases

As an extension of Commonwealth intervention discussed in the previous section, many interviewees (not limited to those representing applicant interests) considered that there may be a role for the Commonwealth to contribute to breaking deadlocks on connection by making (on request) an independent assessment of connection.[129]

As described by interviewees, this type of intervention would proceed as follows:

- Applicants and the state or territory would have been negotiating for some time, and connection material would have been submitted to the state or territory for assessment.
- Some trigger point would occur, perhaps a request from the applicants, or a request together with the expiry of a given period of time since the last substantive communication from the state or territory about connection.
- The Commonwealth would then engage an expert assessor to review the material supplied by applicants.

[129] This was advocated in the NTSCorp written submission.

- If satisfied that connection material is sufficient for consent determination, the Commonwealth would express this to parties and also to the court. A position paper could be prepared for other respondents, indicating the basis for the Commonwealth's assessment.

Underpinning this suggestion are the following assumptions:

- State or territory governments may, in particular cases, be applying a threshold of connection assessment that is higher than is appropriate for consent determinations.
- The Commonwealth, through forming its own view on connection, could bring moral or political pressure to bear on the state or territory to encourage it to settle. Alternatively some form of procedural pressure could result if the court were informed of the Commonwealth's view.
- This pressure would positively influence the outcome.

Risks and impediments

- From the perspective of some states and territories, this type of intervention would be seen as unwelcome, unwarranted or unnecessary interference.
- From the point of view of applicants, there was a perceived risk that the Commonwealth assessment will have no effect on the negotiations towards consent determination. The state or territory may simply maintain that its expertise and experience, together with its consideration of community interests, render its judgment appropriate in all the circumstances, regardless of the view taken by the Commonwealth.
- There is a risk that, in political terms, Commonwealth involvement may make it paradoxically *more difficult* for the state or territory to come to a settlement. The perception of undue Commonwealth pressure may lead to the entrenchment of the state or territory's position.
- There is a related risk of damaging the relationship between the Commonwealth and the state or territory, arising from a perception of an adversarial or confrontational Commonwealth approach. This may hamper wider Commonwealth efforts to foster positive native title outcomes in the system. (On the other hand, some representatives of applicant interests said that they currently see the Commonwealth as being aligned against applicants, partly by reason of its reluctance to intervene on their behalves).
- It may be difficult for courts to use a Commonwealth assessment to bring the state or territory towards agreement – the state or territory may still maintain that all questions are in issue, and that it does not accept the Commonwealth's view. A Commonwealth assessment, however, may be used to support a process of structured admissions such as that described above at Section 4.3.
- The Commonwealth lacks the experience and capacity to undertake assessment in-house, particularly if only in isolated matters. Accordingly Commonwealth assessment would have to be done by expert consultants, which would be costly and would take experts out of the national pool available for native title work.
- The potential need for the Commonwealth assessor to follow up on issues and request further information would add to the burden on applicants.
- Applicants may be reluctant to give Commonwealth access to their material where there is a risk that the Commonwealth would apply an overly technical legal standard, or impose a

high evidentiary threshold. Further, the material may not have been authorised for disclosure to the Commonwealth.

Discussion

In light of the conditions necessary for this type of intervention to achieve its objective, and in light of the risks and difficulties identified, there may be only rare cases in which it has a beneficial and useful effect in resolving the connection issue. Such an intervention would be best suited to those cases in which the Commonwealth is already a party, and thus has in the eyes of other parties (and the court or tribunal) a legitimate and immediate interest in the speedy resolution of the claim. The Commonwealth would have to be reasonably certain that the state or territory had improper political reasons for not agreeing on connection, rather than substantive factual concerns, and that these matters could not be better managed at a political level.

Embracing this type of intervention may also be somewhat premature, as the options open to the court in the face of stalled negotiations have not yet been fully explored. During a directions hearing in 2011 there was some discussion of whether the court has the power to compel a government respondent to state its position on connection (whether privately to the applicants or alternatively on the public record).[130] That question has not yet been resolved, and so it is too early to say whether the Commonwealth's intervention is the only available means of breaking 'connection deadlocks' such as those described. A court-ordered process whereby the state would be required to specify the admissions it is willing to make (described above at Section 4.3) may have some role to play also.

Recommendation

Under exceptional circumstances (if the Commonwealth were a party and came to suspect that a state or territory respondent was withholding the recognition of connection for improper reasons, and if the Commonwealth considered that an independent assessment of connection would help rather than hinder settlement in the particular matter) the assessment of connection by the Commonwealth may assist to break deadlocked negotiations, but otherwise it would not be an advisable option.

6.4.3 Commonwealth provides authoritative interpretations of the law

Some interviewees, particularly in NTRBs, considered that there could be a useful role in the Commonwealth providing assistance with disagreements about the content of native title law. The comment was made that, since the *Native Title Act 1993* is Commonwealth legislation, the Commonwealth might legitimately and usefully step in to give a view when parties disagree.

The assumption underlying these suggestions was that the Commonwealth's view of the law, while not binding, would be given weight by all parties. Commonwealth legal interpretations could be provided in case-specific interventions, particularly where the Commonwealth was a party and called upon by the other parties, or the court or tribunal, to express a view.

More broadly, if it appeared that a party was arguing for a view of the law that the Commonwealth considered to be inconsistent with the cases or the Act, the Commonwealth could consult on a more general basis with that party around the source of the disagreement. Or, more broadly still, the Commonwealth could publish a periodically updated report on the state of the law.

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[130] *Maudie Dowton v State of Western Australia (Puutu Kuntik Kurrama Pinikura #1),* Transcript of Proceedings (Federal Court of Australia, Barker J, 12 August 2011).

There are four main risks with this suggestion:

- The central role of the courts in articulating the law may be undermined by the perception that the Commonwealth has an authoritative interpretive role. That risk would be highly problematic in cases where the Commonwealth itself is a party.
- The Commonwealth's interpretations may be unavoidably influenced by its status as a respondent party to many native title applications. There is a risk, or at least a perception of a risk, that the Commonwealth may prefer its own interpretation to that of the courts.
- Parties may still reject the interpretation provided by the Commonwealth, meaning that the legal disagreement continues.
- The cost of briefing counsel for this task would take resources away from elsewhere in the system.

Recommendation

Where called upon, the Commonwealth should engage in discussions with parties about the law, assisting parties in identifying the opportunities in the case law for flexibility. This role, however, should not extend to the quasi-authoritative determination of disputes about the law.

6.5 Funding-related recommendations

The premise of this chapter is that, in light of the policy objectives and system-oversight responsibilities identified in Chapter 1, the Commonwealth's involvement in connection issues may necessarily extend beyond the narrow question of when to agree to consent determinations. The issues outlined in Chapter 5, for instance, are partly dependent on the resourcing environment of the native title system; and various Commonwealth departments and agencies have direct and indirect influences on that resourcing environment. The purpose of the following three sections is to demonstrate how a whole-of-government approach to connection assessment in the native title system could employ these funding-based influences to improve outcomes and achieve the Commonwealth's previously stated policy of promoting more flexible negotiated resolutions of native title claims.

Given that a whole-of-government approach is envisaged, the funding-related recommendations will not all necessarily be within the direct control or responsibility of AGD. Nevertheless, the task of developing a Commonwealth policy on connection need not (and indeed should not) be limited to the activities of a single department or agency.

6.5.1 Commonwealth contributions to native title settlements

Impact of settlement resources on connection assessment

A significant number of state, territory, NTRB and other interviewees considered that greater availability of funds and resources for native title settlements would assist states and territories to implement a more flexible approach to connection, and the faster resolution of claims. For example, the Western Australian Government has indicated in budget estimates hearings that:

> …the significant roadblock to progressing the south west claim is getting some kind of indication on a case-by-case basis—if that is the new policy—that the Commonwealth Government is going to contribute some percentage of the reasonable cost of extinguishment. I would like to have the Commonwealth involved in the process of negotiations, so that it is satisfied that the cost of extinguishment is reasonable. …that is not, in my view, a cost that Western Australia,

> which will be dealing with these claims for many years to come — particularly with the south west, which is going to be a very large one — can afford to bear alone. It will be significant.[131]

It should be noted that this reference is to a claim on an alternative settlement track rather than a simple consent determination situation. Nevertheless, the view was expressed in other jurisdictions that the potential cost to the states and territories arising from the recognition of native title (in terms of compensation, lost opportunities for revenue and demands for negotiation of broader land settlements) was a factor that may cause states and territories to require a higher degree of satisfaction on connection than they would otherwise. That is, the states and territories were constrained by their resource environments from fully implementing the then Commonwealth's stated policy objectives as outlined above at 1.7.

Contrary to this view was an opinion expressed on a number of occasions, that connection is a factual question whose assessment by states and territories should not be influenced by other factors. Interviewees expressing this view considered that it would be illegitimate for a state or territory to refuse to accept connection on the basis of concerns about compensation or lost revenue opportunities. A problem with this view, however, is that the consent determination process already assumes that states and territories will accept connection based on less evidence than would be required at trial. On that assumption, the question of *how much less* than the litigation standard is sufficient, from the state or territory's point of view, will depend on the risks and costs associated with entering a consent determination. States and territories may consider that their decision not to put applicants to proof in litigation makes it appropriate to engage in interest-based negotiations, which suggests a degree of negotiability around the standard of evidence required to satisfy the state or territory. The degree of confidence with which inferences can be made, for example, may depend to some extent on the consequences of making the inferences.

Commonwealth role in contributing to settlements

Interviewees across the board, in state and territory governments, NTRBs, and other organisations, considered that negotiations towards native title settlements, of which connection issues form a part, would be assisted by a greater Commonwealth contribution towards settlement packages.[132]

In 2008, state, territory and Commonwealth ministers agreed to negotiate in good faith in respect of a Native Title National Partnership Agreement, providing for Commonwealth financial assistance to facilitate the settlement of native title claims.[133] From consultations and other research, it would appear that the global financial crisis and other intervening factors have meant that the expected contributions from the Commonwealth to broader land settlements have not eventuated.

Broader land settlements have previously been at the centre of Commonwealth policy, although they remain somewhat ill defined.[134] The term 'broader land settlements' is used here to refer to consent determinations that are supported by other agreements that seek to meet the outstanding claims and future aspirations of native title groups. Broader land settlements may include upfront or periodic payments for past extinguishment or to support the ongoing administration and

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[131] Western Australia, Parliamentary Debates, Legislative Assembly, 1 June 2011, p.327.

[132] This was an explicit recommendation of the NTSCorp written submission.

[133] Australian Government, Attorney-General's Department (AGD), 'Funding of the native title system', online at <http://webarchive.nla.gov.au/gov/20110604013535/http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Nativetitle_Financialassistancetothestatesandterritoriesfornativetitlecosts>.

[134] Australian Government, Attorney-General's Department, Joint Working Group on Indigenous Land Settlements, *Guidelines for best practice flexible and sustainable agreement making*, AGD, August 2009, online at, < http://www.aiatsis.gov.au/ntru/docs/researchthemes/agreement/agreements/GuidelinesForBestPractice.pdf >.

governance of the native title organisation, transfers of land otherwise subject to extinguishment, among myriad other things.[135]

Some other areas for potential Commonwealth contributions raised by interviewees included:[136]

- Indigenous Land Corporation property purchases and disbursements
- Indigenous Protected Area Agreements and funding
- access to Commonwealth land management programs such as Caring for Country
- addressing service delivery issues such as aged care and health
- arrangements for access by traditional owners to Commonwealth-owned or -managed lands.

Risks or impediments

- Some NTRB interviewees were concerned that settlements with Commonwealth service delivery as bargaining chips would be inappropriate, because those services should be available as of right.
- Interviewees in various governments raised the risk that settlements may simply involve the repackaging of existing 'Indigenous dollars' in the budget. This means that Commonwealth contributions, if they are to have optimal effect, should be additional to current expenditure.
- There is a risk that a greater Commonwealth investment in settlements may give greater flexibility to the states and territories in coming to do deals with applicants, but at the cost of making the Commonwealth *more* concerned about the factual basis for native title. There would have to be clear policies around the purpose of this Commonwealth expenditure and how it should relate to Commonwealth interest in the question of connection.
- The prospect that the Commonwealth may take a stronger interest in connection matters for claims to which it is contributing settlement resources raises the question of whether this would increase the number of claims to which the Commonwealth would be a party. It would also raise the question of how the Commonwealth might decide, during the period specified in s 66 Native Title Act, whether or not to join a particular claim.

Discussion

There may be ways for the Commonwealth to gain a sufficient awareness about, and input into, broader land settlement negotiations *without* becoming party to the underlying native title application. Parties can agree for certain information to be made available to the Commonwealth on a confidential and without-prejudice basis, both about the content of the determination and about the relevant aspects of connection. From this information, the Commonwealth can be a party to any supporting ILUA, where necessary, without needing to be a party to the related consent determination.

Resourcing for contribution to settlements could be sourced from a number of different Commonwealth departments and agencies.

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[135] Attorney-General's Department (AGD), Native Title Ministers' Meeting, Communiqué, 28 August 2009 online at <http://www.aph.gov.au/Parliamentary_Business/Senate_Estimates/legconctte/estimates/sup0910/ag/index> . Examples include the Gunditjmara settlement in Victoria and the Eastern Kuku Yalanji settlement in Queensland.
[136] See also NTSCorp's written submission.

Recommendation

Greater contribution by the Commonwealth to native title settlement packages could be achieved without necessarily increasing the number of claims to which the Commonwealth is a party or the intensity of involvement in connection.

6.5.2 Funding for NTRBs

During consultations, two distinct pathways were identified by which greater funding for NTRBs could potentially improve connection assessment process nationwide:

- increasing the capacity for NTRBs to produce the connection material required by states and territories, to a standard and in a form that assists the states and territories to assess it, and in a reasonable time
- improving NTRB access to litigation funding in order to make the prospect of litigation more realistic.

In relation to the first pathway, a number of interviewees in state and territory governments, NTRBs and other organisations expressed the view that the resolution of claims was being held up by a lack of capacity within NTRBs to conduct the necessary research and to present it in a useful and timely way. Achievement of more and sooner native title outcomes was therefore regarded as dependent on an increase in NTRBs capacity to produce this connection material (particularly given the importance of not sacrificing the quality of research).

The second pathway is relevant to those cases where NTRBs consider that the state or territory's approach to the case law or to the degree of evidence required is stringent beyond the requirements of the law, or those cases in which negotiations have simply become deadlocked. In those cases it would appear that litigation or at least the realistic prospect of it is a necessary ingredient to moving claims along. At present, many NTRBs are refraining from resorting to litigation because of a lack of capacity and resources. Improving NTRB access to litigation funding may streamline the consent determination process in some cases by providing a credible threat to governments that withhold consent on connection or apply a high or litigation benchmark for connection in consent determinations.

It is likely, therefore, that the rate of resolved native title claims would increase in accordance with the Commonwealth's policy objectives if funding for both research and litigation at NTRBs were increased.

While questions of resourcing of NTRBs may fall outside the scope of this review they do impact on recommendations in relation to the role if any in circumstances where negotiations are deadlocked. The authors acknowledge that the responsibility for funding NTRBS is the responsibility of PM& C (formerly responsibility of FaHCSIA), nevertheless, should be regarded as part of a whole-of-government effort towards achieving the Commonwealth's goals in respect of native title connection assessment.

Recommendation

Any future review of funding for the native title system should have regard to measures that would increase the capacity of NTRBs to resolve connection through research, mediation or litigation.

6.5.3 Supporting intra-Indigenous conflict resolution

There was consensus that the Commonwealth does not currently, and generally should not, have a direct role in resolving disputes between or among indigenous groups.[137] In general, dispute resolution and assistance is seen as the statutory role of NTRBs, although some NTRB interviewees indicated that their funding conditions did not allow them to prioritise that function.[138] However, it was suggested on a number of occasions that the Commonwealth could assist the resolution of claims by funding programs for intra-Indigenous dispute resolution.[139]

The process of establishing the connection of a particular group to a particular area of land and water necessarily involves engaging with questions of group structure and membership, territorial boundaries, and the authority to speak for country. Disagreements can arise in that context, making the assessment of connection difficult or even impossible.

Concerns were raised about the current capacity for NTRBs to manage all of the cases of intra-Indigenous conflict that may arise, and in particular where an NTRB may not be regarded by all participants to a conflict as entirely neutral. Accordingly, there is scope both for better resourcing of NTRBs for conflict resolution, and the support of other providers of dispute resolution services and programs or training that increase access to effective Indigenous dispute resolution.[140]

The Minerals Council of Australia suggested that research could be conducted to assist state governments in the development of a connection standard that minimised potential for intra-Indigenous disputes, for example, requiring clarity around membership and rules associated with a group. The authors recognise that negotiations between resource companies and Indigenous peoples can be difficult where there are disputes around group membership and connection. However, it is unlikely that any general standard could be developed that could assist with particular cases of dispute. The rules and dynamics of group membership are unique to each case, and NTRBs' research into connection for particular claims is already focused on this issue.

Recommendation

A whole-of-government approach is required to support Indigenous dispute-resolution programs, both within NTRBs and through independent dispute resolution services.

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[137] Reasons against direct Commonwealth involvement in managing intra-Indigenous disputes included issues of capacity, expertise, turnover, distance, and (where the Commonwealth is also a party) potential conflict of interest.

[138] See s 203B *Native Title Act* 1993.

[139] The NSW Crown Solicitor's Office stated in its written submission that: 'It is … difficult to see a role for the Commonwealth in any other capacity in helping to resolve disputes between the State and claimants, or between claimants and indigenous respondents, that could not be played by the National Native Title Tribunal, either under their current or an amended operating framework, or by a mediator appointed under s 868(1). That said, further efforts could certainly be made in building the capacity of Native Title Representative Bodies and perhaps relevant regional indigenous organisations to enhance or take on dispute resolution functions with respect to overlaps and indigenous respondents.'

[140] See, eg, Federal Court of Australia's Indigenous Dispute Resolution & Conflict Management Case Study Project, *Solid Work You Mob Are Doing: Case Studies in Indigenous Dispute Resolution & Conflict Management in Australia*, report to the National Alternative Dispute Resolution Advisory Council, online at <http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/solid-work-you-mob-are-doing.pdf>. Also T Bauman, *Final Report of the Indigenous Facilitation and Mediation Project July2003-June2006: research finding, recommendations and implementation*, Report No.6, Australian Institute of Aboriginal and Torres Strait Islander Studies.

6.6 Legislative amendment to support more flexible assessment of connection

This report has discussed issues arising from the Commonwealth's involvement as a party to native title claims, and issues arising from its position of leadership within the native title system. That discussion has, up until now, assumed that the current state of the law will continue unchanged. Yet given the Commonwealth's legislative role in the native title system, it is relevant to ask how legislative change might assist the Commonwealth to achieve its objectives in respect of connection assessment.

Interviewees representing both governments and applicants raised the issue of legislative amendment as an important factor in implementing the objective of getting more, better, quicker outcomes. As indicated in the case law review in Appendix 1, there are ambiguities and conceptual problems in the requirements of s 223 of the *Native Title Act 1993*, as interpreted *Yorta Yorta* and subsequent cases, around what is required to establish each of the elements, around the issue of society, and around the issues of change and continuity.

Some states and territories expressed being constrained, in how flexible they could be, by the requirements of the Act. This presumably applies equally to the Commonwealth. They indicated that amendments to s 223 would assist them in the implementation of the then Commonwealth's stated policy objectives. For example, a provision clarifying the meaning of s 223(1)(b), or removing it entirely, would be useful in light of the comments made in the cases about its apparent lack of clear purpose and the confusion over its provenance (see Appendix 1). There is an apparent reluctance on the part of some government respondents to move beyond a focus on evidence of physical occupation or visitation as part of the enquiry into connection, in spite of case law confirming that 'physical connection' is unnecessary.

Legislating a more appropriate way of dealing with the proof of the continuity of traditions back to sovereignty, such as that outlined in *Gumana*,[141] would be another positive contribution towards the achievement of quicker, better native title outcomes.

Another useful amendment would be the insertion of provisions giving additional guidance around:

- the standard which would be legally required for a consent determination as opposed to a litigated determination
- what matters judges may or must have regard to in their application of s 87 of the Native Title Act.

The former provision would operate to reassure government officers that they would be committing no legal impropriety in consenting to a determination on the basis of a relaxed standard of evidence, for example by specifying that there need only be an 'arguable' or 'prima facie' case. As demonstrated above in Section 2.2, the case law already reflects this relaxed standard, but a legislative amendment could usually confirm that aspect of the law. The latter provision would ensure that judges were not constrained from giving effect to parties' agreement on that more flexible evidentiary basis.

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[141] *Gumana v Northern Territory of Australia* [2005] FCA 50 at [198]-[201].

6.6.1 Best practice from alternative settlement processes

It was part of the terms of reference for this project to include in the final report an analysis of best practice in connection assessment from alternative settlement processes. After completing the research, however, it became apparent that best practice from alternative settlements cannot be adequately translated to mainstream native title, given the current legal constraints applicable to the latter. Work in Victoria on the Right People for Country Project and the *Traditional Owner Settlement Act 2010* (Vic), and comments made during the interviews, establish that the best practice in alternative settlements is precisely to move away from the concept of 'connection' set out in s 223 and the post-*Yorta Yorta* case law. The present legal requirements for native title are grounded in a concept of 'tradition' that can at times equate to an unreasonable emphasis on cultural stasis and essentialism, and that is highly vulnerable to the consequences of disruption, dispossession and removal by state authorities and others.[142] In short, the present legal framework for native title represents the very thing to which alternative settlements are intended to be *alternative*. Accordingly, the paradigm shift in alternative settlements towards identifying the right people for country without the need to prove details about the continuity of cultural practice over more than a century means that there is little that can be directly taken and applied back to the mainstream native title process.

These conclusions about 'best practice from alternative settlement processes' reinforce the relevance of legislative change to a coherent Commonwealth policy on connection.

6.6.2 Recommendations

The Commonwealth Government should consider amendments to the Native Title Act that take into account the barriers posed by the current legislation to the achievement of the policy priorities outlined in Chapter 1.

- Amendments could usefully confirm that consent determinations made pursuant to s 87 require a lower standard of evidence than for litigated determinations.
- Amendments could also address some of the aspects of the law around s 223 Native Title Act 1993 which continue to cause problems, such as the proof of continuity back to sovereignty, or the significance of physical occupancy to s 223(1)(b).

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[142] See generally, Toni Bauman (ed.), *Dilemmas in applied native title anthropology in Australia*, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2010; Toni Bauman and Gaynor Macdonald (eds), *Unsettling anthropology: the demands of native title on worn concepts and changing lives*, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2011.

7. Conclusion

This final chapter gathers together the conclusions that have been made throughout the report, in order to give a concise summary of the reasons for the report's ultimate recommendations. The bare recommendations can be found at the front of the report, after the Executive Summary.

7.1 Policy objectives, responsibilities, and legal constraints

The Commonwealth has a broad range of policy objectives and responsibilities that are engaged by the native title claims process and to which a policy on connection must be responsive:

- Indigenous policy objectives
- roles emerging from the Commonwealth's responsibility for the native title system as a whole
- specific Commonwealth interests and responsibilities that may be affected by particular native title consent determinations.

While the fulfilment of these objectives and responsibilities must occur within a legal framework (defined largely by the Native Title Act), it has been Commonwealth policy to promote the efficient resolution of native title claims by fostering broad, creative and flexible attitudes towards negotiations and avoiding unduly narrow and legalistic approaches. The authors' assessment of the substantive and procedural case law applicable to connection in consent determinations reveals that such a flexible negotiated approach is not only permissible, it is actively encouraged by the legal framework.

A close analysis of various Commonwealth Government's policy priorities, responsibilities and interests reveals the following:

- The Attorney-General's role as First Law Officer does not require the Commonwealth to take on an 'oversight' role in the assessment of connection for particular consent determinations to ensure that sufficient rigour is being exercised. In any case, such a role would logically be applicable to all consent determinations, not just those to which the Commonwealth happens to a party by reason of its land interests.
- 'Right people for country' issues are important to the Commonwealth's policy priorities, whereas other technical aspects of the 'connection' inquiry — such as continuity of acknowledgment and observance — are of more limited policy relevance.
- The Commonwealth's land interests will often be accommodated within determinations, with the result that connection issues have no direct bearing on the Commonwealth's interests.
- The prospect of compensation liability may lead the Commonwealth to take an interest in the sufficiency of connection material, but this consideration will not apply to every case to which the Commonwealth is party.
- Claims beyond the high water mark warrant scrutiny because they may restrict public use and access, but this need not necessarily require the Commonwealth's involvement in assessing connection (particularly in areas within three nautical miles of the baseline).
- Connection issues are not directly relevant to the need to ensure that determinations do not breach Australia's international legal obligations.

The Commonwealth's legal responsibilities regarding connection evidence are subject to the following propositions:

- The substantive law on connection issues provides ample support for flexibility in respect of evidentiary requirements.
- There is no legal impropriety in a respondent (particularly a secondary respondent) agreeing to a consent determination on a lesser evidentiary basis than would be required at trial. The fundamental question is whether a determination is 'appropriate' in all the circumstances. A prima facie or credible or arguable case is all that is required — and it is the state or territory that generally bears the task of making that assessment.
- Because of the way s 87 has been interpreted and applied, consent determinations are highly unlikely to have precedential effect in respect of connection issues.
- Establishing the factual basis for native title, whether at trial or in negotiations, inevitably requires inferences to be made. In the context of consent determinations (in which parties are already operating outside the formal judicial context in which the legal elements of native title must be proved to the civil standard of proof) the question of whether a government respondent should make a particular inference is not a technical matter governed by law, but rather a matter of weighing the policy objectives, risks and available information.

7.2 Commonwealth conduct as a respondent party

Analysing the range of policy objectives and responsibilities identified, together with views gathered during consultations, a number of principles are proposed as a general guide for Commonwealth conduct as a respondent party to native title matters. These provide the framework in which the more specific recommendations on connection issues are intended to sit. Broadly, the principles fall within under the following headings:

- close integration of policy considerations into negotiations
- consistency and predictability in Commonwealth approach
- proportionality and interest-based negotiation
- early identification and coordination of interests and risks
- leadership
- Commonwealth joinder as a respondent party.

These principles should inform the Commonwealth's determination of (a) which cases warrant its joinder and involvement in connection issues; and (b) the manner in which that involvement in connection issues should be conducted.

Having assessed the various options in Chapter 4, the ideal manner in which the Commonwealth should engage with the question of connection as a respondent party would be:

- working at the policy level with each state and territory to communicate Commonwealth concerns and priorities with respect to connection, to ensure that its interests and responsibilities with respect to land, compensation and offshore areas are met, and to seek to negotiate an agreed assessment framework for each jurisdiction
- in appropriate cases of special importance, participating actively and early participation in claims, including:
    - attendance at pre-research meetings with the state or territory and the NTRB
    - participation in on-country and oral evidence sessions

- generally maintaining a degree of familiarity and comfort with the process and content of connection assessment
- where appropriate, seeking a summary of the assessment process in order to confirm that the previously negotiated concerns have been addressed.

A model whereby the Commonwealth simply accepts connection whenever the state does would have some distinct advantages, and generated widespread though not universal support among interviewees. Most of the disadvantages of this model would be ameliorated by closer Commonwealth involvement in the development of state or territory connection assessment processes or in the scoping of research in particular cases. Still, it is possible that Commonwealth officers will not always consider that such a model is sufficient for them to adequately perform their roles and responsibilities.

There are clear disadvantages to the current practice whereby the Commonwealth waits until the state or territory has assessed connection and attempts to satisfy itself on the basis of a summary provided by the state or territory. It is particularly problematic in Western Australia due to the reluctance of the state to provide an indication of its position on connection.

- The current practice could be supplemented by the provision by states or territories of the advice from their expert assessors. This would not be appropriate in all jurisdictions, and would be unnecessary in most situations. If employed, it would require a strategic and collaborative planning approach, and possibly co-funding from the Commonwealth.

Only in very rare cases would it be desirable for the Commonwealth to attempt to satisfy itself on the basis of material or a summary provided by the applicants. Ideally the Commonwealth would work collaboratively with states and territories to ensure that its concerns are addressed in the state or territory's assessment processes and that it is able to access sufficient information to confirm this. Where that is not possible, however, material or preferably a summary provided by applicants could be a workable option of last resort.

- Independent Commonwealth assessment of connection would not be appropriate or necessary even where a state or territory government appears unwilling to give the Commonwealth an indication about its conclusions on connection. State practice in Western Australia may be in a state of development, and it has yet to be seen whether the state would consider giving the Commonwealth a summary of material *after* all negotiations are completed and the state is ready to move towards a consent determination.
- As a means of breaking a deadlock and bringing parties towards settlement, Commonwealth assessment of connection is subject to considerable risks, costs and uncertainties, and even though it may be an option in rare circumstances, it would not be advisable to build a structure around it.

The engagement of an assessor and/or researcher who is independent of all parties would not be recommended as part of Commonwealth policy in the near future, although there may be a case for it where other models are inappropriate or have stalled.

7.3 Commonwealth as primary respondent

In the rare cases where the Commonwealth is the primary respondent, and therefore primary contradictor on the question of connection, the authors would recommend that the Commonwealth work collaboratively with other parties to identify the kinds of information, material and processes that would be appropriate in that case. It would be appropriate to engage experienced consultant

anthropologists and counsel at this early stage, and also to seek input from the state or territory government most closely associated with the claim area. The process should be informed by the principles set out in the principles document discussed above in Section 6.2.

7.4 Commonwealth connection requirements?

As indicated in the Introduction, the terms of reference for this project indicated that its purpose was:

> to develop minimum Commonwealth connection requirements for use by the Commonwealth when entering into consent determinations, to inform a consistent Commonwealth policy position on native title connection.

Having considered the full range of Commonwealth interests, roles and responsibilities in Chapter 1, the legal environment in Chapter 2, matters particular to Commonwealth conduct as a respondent party in Chapters 3 and 4, and wider systemic issues in Chapters 5 and 6, the authors **do not consider that the development of 'minimum Commonwealth connection requirements' should form part of a Commonwealth policy on native title connection.**

- Commonwealth guidelines in support of Commonwealth conduct as a *primary* respondent would be unnecessary in light of the rarity of such situations, and would risk being out-dated or unhelpfully restrictive by the time they came to be used.
- In respect of the Commonwealth's conduct as a *secondary* respondent (accounting for virtually all cases) the discussion of the various models in Chapter 4 demonstrates that it is unnecessary for the Commonwealth to develop its own set of substantive connection requirements:
    - Considered together, the conclusions made in Chapter 4 mean that the Commonwealth's respondent party role does not require it to make its own substantive assessment of connection. In light of the primary role of the states and territories in assessing connection, the principal concern of the Commonwealth should be to satisfy itself of the quality and integrity of state and territory processes, with the option of a greater involvement in the content of assessment in cases of higher significance.
    - The problem posed by the apparent reluctance of some states to give an indication of their conclusions on connection, is not such as to require the Commonwealth to embark on its own process of assessment:
        - Firstly, states or territories that do not publicly issue position papers may nevertheless be willing to give Commonwealth officers detailed information about the content and process of connection assessment. Close collaboration as suggested in Models III and IV may assist this communication further.
        - Secondly, it may be premature for the Commonwealth to develop new structures to accommodate Western Australia's apparent practice of not indicating its position on connection. That practice may in the future be the subject of judicial consideration.
        - Thirdly, the Commonwealth need not deal with the question of connection until the state or territory has indicated that it is willing to proceed to a consent determination. Once negotiations are completed between applicants and the state/territory, other respondents must be informed, and at this point

the Commonwealth can seek any additional information about the connection assessment process that it requires.

- Finally, the only other reason the Commonwealth might consider assessing connection in claims *prior* to the state or territory completing negotiations, is to seek to move negotiations forward by demonstrating Commonwealth acceptance of the applicants' case. As indicated in Section 6.5, the situations in which this approach would be effective and in which the benefits outweighed the risks and costs, would be rare. The rarity of such situations, balanced against the other problems associated with the idea of Commonwealth connection requirements, means that the case in favour of producing a set of Commonwealth requirements is extremely weak.

- Models III and IV involve the Commonwealth working collaboratively with states and territories, and potentially NTRBs. Going into these talks with a pre-written set of substantive guidelines may be less constructive than identifying the underlying issues that the Commonwealth would regard as significant, and working out how those issues might be addressed within the individual state or territory's assessment process. The virtue of Model III is that a mutually satisfactory process may be developed in each jurisdiction *without* imposing a single national standard that may be inappropriate to local conditions.
- The production of Commonwealth connection requirements would raise serious issues of consistency with existing state and territory practices. State and territory assessment processes and requirements are likely to continue to differ considerably among themselves. A universal national set of requirements would fail to account for important differences in the histories and legislation of different jurisdictions, and important regional differences in terms of culture and patterns of displacement.
- Consistency of Commonwealth conduct across different jurisdictions was not of great concern to other stakeholders, and other issues — primarily flexibility and efficiency — were seen to be important enough to excuse some variation in Commonwealth conduct.
- To the extent that the Commonwealth as a respondent party would require its own set of requirements to be met before entering into a consent determination, any differences between these and the state or territory's requirements would impose a serious double-burden on applicants.
- As an aid to those applicants who consider that their respective state or territory governments impose inappropriate or overly stringent requirements, Commonwealth guidelines would not be likely to have much significant effect. This is particularly so to the extent that they might be seen by states and territories as a form of centralised dictation.
- The idea of 'minimum' requirements is problematic: to some it indicates baseline requirements from which a state or territory could require flexibility 'upwards'; to others it indicates a standard that, if met, should entitle applicants to a determination.

In light of these conclusions, the authors do not consider that a Commonwealth policy on connection in consent determinations should contain a set of substantive connection requirements that would need to be established before the Commonwealth could enter a consent determination.

7.5 Commonwealth's broader role in the system

The Commonwealth's broader role in the native title system was considered separately for the purpose of identifying considerations that might affect the other recommendations. In particular, the general recommendations for Commonwealth conduct as a party may have potentially required adjustment to account for the prospect of a greater Commonwealth leadership role (a) generally, (b) in specific claims, and (c) by assessing connection to break deadlocks.

The conclusions reached in Chapters 5 and 6, however, mean that no significant adjustment to those proposed principles is necessary.

- After considering interviewees' views and the surrounding issues, the authors recommended a greater Commonwealth role in leading actors in the system generally towards greater flexibility with respect to connection in consent determinations. That role will require sensitivity to state and territory concerns, and leadership by example where the Commonwealth is a respondent party.
    - Close Commonwealth communication with all stakeholders, and familiarity with both NTRB research processes and state/territory assessment processes, is essential to the performance of this leadership role. That does not of itself, however, imply a need for the Commonwealth to become more involved in the assessment process in particular claims. The degree of familiarity generated through Model III and IV, together with other contact at the policy level, should be sufficient to equip the Commonwealth to exercise this role.
- In individual cases where negotiations appear to be in difficulty, there is some limited scope for careful, well-targeted Commonwealth intervention, most appropriately where the Commonwealth is a party to the claim. Such interventions could consist of:
    - formal or informal communications at the bureaucratic or ministerial level
    - making representations to the court, perhaps moving for procedural orders to progress the matter and generate momentum (such as the filing of evidence, or bringing the matter to trial, or splitting claim areas)
    - assisting with resourcing issues where appropriate.

  These types of interventions will require sensitivity to state and territory concerns, and leadership by example where the Commonwealth is a respondent party.
- In respect of the possibility that a Commonwealth assessment of connection may help to break deadlocked negotiations, the authors would recommend this only with significant reservations and in a small number of cases, and would recommend close consultation with the parties and mediators prior to considering this type of intervention.
    - Because this would only be a measure of last resort, it would not require any change to the manner in which the Commonwealth would approach claims at the beginning of the process. It would be appropriate for the Commonwealth to adopt the procedural models recommended above in the first instance and to consider this more serious type of intervention only if other options had broken down.

The analysis in Chapter 6 did, however, produce a number of recommendations in addition to those proposed earlier in the paper. These recommendations focus on the Commonwealth's central role in the native title system, and are formulated from a whole-of-government perspective such that they do not necessarily fall within the purview of any single Commonwealth department or agency. The recommendations relate to:

- leading the native title system generally towards flexible, non-legalistic approaches, including the collaborative development of national principles for assessing connection
- ways in which the Commonwealth can usefully play a role in specific cases where progress towards a constructive and flexible settlement has stalled, which in the overwhelming majority of cases should **not** involve the Commonwealth independently assessing connection in order to drive negotiations forward
- ways in which Commonwealth funding for the native title system can affect the degree to which connection assessment processes meet the Commonwealth's policy objectives
- the likely benefits to be gained from amending the Native Title Act to support Commonwealth policy goals about connection.

7.6 Commonwealth joinder as a respondent party

Having considered the full range of Commonwealth roles, and the manner in which they might be appropriately and effectively performed, it is possible to return to the overall question of the circumstances in which the Commonwealth ought to join as a respondent party to claims.

The Commonwealth has a clear reason to join claims whenever:

- land used and/or owned by the Commonwealth is within the claim area
- there is a potential compensation issue
- the claim area includes offshore areas beyond three nautical miles from the baseline
- the claim may affect Australia's international obligations.

As discussed, the interests and responsibilities raised in these circumstances will not always warrant the same degree of Commonwealth involvement, and in some cases will not require much or any Commonwealth interest in the issue of connection.

In light of the conclusions made about proportionality, the authors do not consider that there is a strong reason for the Commonwealth to join proceedings as a party solely in order to take a position on a legal question that may arise.

- Where a claim, to which the Commonwealth is not a party, comes to litigation and novel legal questions are raised, the Commonwealth has the power under s 84A Native Title Act to intervene and make submissions. If there are grounds for the Commonwealth to make submissions on interlocutory issues (for example, the proper legal process for authorising applicants), on the content of a consent determination, or on legal points raised in contested litigation, its involvement should not be contingent on the accidental fact of it having joined by reason of its land tenure interests. It plainly would not be efficient for the Commonwealth to join every single native title proceeding to preserve its ability to make submissions on legal points.
- Where a claim to which the Commonwealth is not a party proceeds to consent determination, the Commonwealth need not be concerned about the precedential effect of any legal issues raised about connection (see above Section 2.3). For legal questions around the recognition of particular rights and interests under s 223(1)(c), this is a matter on which submissions could be made as an intervener once draft orders were settled. These latter legal questions would appear from the Form 1 (the original court document by which the application is made) and any subsequent amendments to the Form 1.

On the further question of whether the Commonwealth should join as a party in pursuance of its role in leading more and better outcomes and more flexible processes, it follows from the discussion in Chapter 6 that:

- While Commonwealth contribution to settlement packages is highly desirable, there are problems with the idea of the Commonwealth joining claims as a respondent party solely for this purpose. Joinder may be unnecessary, since parties can agree for certain information to be made available to the Commonwealth on a confidential and without-prejudice basis, both about the content of the determination and about the relevant aspects of connection. Further, the Commonwealth can be a party to any supporting ILUA, where necessary.
- Provision by the Commonwealth of leadership in individual claims, encouraging greater flexibility in negotiations, is valuable and is most appropriate when the Commonwealth is a party.
    - However, joining as a respondent solely on this basis would be likely to raise concerns in many parties around the issue of proportionality — they may see the Commonwealth as interfering where its interests are not properly engaged. That perception may make it difficult for the Commonwealth's leadership to be effective.
    - Further, joining as a party as opposed to an intervener requires the Commonwealth to identify the relevant interests at the early stages of the proceedings. It will often be too late to join by the time problems requiring Commonwealth leadership appear. The only alternative is to join as a party to a great number of claims on the chance that Commonwealth leadership may be useful later. This would raise serious issues about efficient use of resources, as well as concerns around proportional involvement.

Accordingly, the four key interests identified above (land, compensation, offshore areas and internationally protected areas) remain the only reasons, save in exceptional circumstances, that would warrant Commonwealth joinder as a respondent party.

In line with previous recommendations, where the Commonwealth identifies the relevant interest or responsibility, it should develop for each claim a clear case around why participation is necessary to protect the interest of perform the responsibility, and a strategy outlining what type and degree of involvement is necessary. This should be communicated openly to the other parties.

Finally, in light of the potential for additional cost and complexity in negotiations, as well as the efficiency of Commonwealth expenditure, it would be appropriate for the Commonwealth to withdraw as a party whenever it can be assured that its land and compensation interests are adequately protected, or that its international obligations will not be engaged, in the terms of the determination.

7.7 Next steps

Bringing all of the analyses and recommendations together, the authors conclude that:

1. The Commonwealth should develop, publish and implement a written policy setting out:
    a) the Commonwealth's roles, responsibilities and policy priorities (as discussed in Chapter 1)
    b) the processes it will follow in order to protect or promote those priorities (set out in Sections 7.1–7.6).

Such a policy document would be specific enough to give parties a useful indication of what to expect from Commonwealth engagement, but be broad enough to allow for constructive flexibility in individual cases.

2. For each state and territory, the Commonwealth should seek to negotiate an agreed connection assessment framework setting out the parties' objectives, needs and expectations in relation to the assessment of connection in claims to which the Commonwealth is a party, and the practical processes for meeting these.
3. A national principles document should be developed in a collaborative process conducted through JWILS, addressing issues of best-practice in connection assessment and building on those matters identified in Section 6.2.
4. The Commonwealth should provide leadership to promote the implementation of those principles, including both general policy work and in particular claims, and should consider supporting parties in the pursuit of those principles through funding and legislative measures.
5. Commonwealth connection guidelines, setting out substantive 'minimum connection requirements', would not be the most appropriate or effective way to promote the Commonwealth's interests and policy priorities in consent determinations.

Appendices

Appendix 1 — Legal analysis of the case law on connection

[The text from this appendix has now been published as: Duff N 2014, *What's needed to prove native title? Finding flexibility within the law on connection*, AIATSIS Research Discussion Papers, no. 35, AIATSIS, Canberra.]

Appendix 2 – Extracts from the Federal Court Act 1975 *(Cth)*

Section 37M

(1) The overarching purpose of the civil practice and procedure provisions is to facilitate the just resolution of disputes:

(a) according to law; and

(b) as quickly, inexpensively and efficiently as possible.

(2) Without limiting the generality of subsection (1), the overarching purpose includes the following objectives:

(a) the just determination of all proceedings before the Court;

(b) the efficient use of the judicial and administrative resources available for the purposes of the Court;

(c) the efficient disposal of the Court's overall caseload;

(d) the disposal of all proceedings in a timely manner;

(e) the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.

(3) The civil practice and procedure provisions must be interpreted and applied, and any power conferred or duty imposed by them (including the power to make Rules of Court) must be exercised or carried out, in the way that best promotes the overarching purpose.

(4) The civil practice and procedure provisions are the following, so far as they apply in relation to civil proceedings:

(a) the Rules of Court made under this Act;

(b) any other provision made by or under this Act or any other Act with respect to the practice and procedure of the Court.

Section 37N

(1) The parties to a civil proceeding before the Court must conduct the proceeding (including negotiations for settlement of the dispute to which the proceeding relates) in a way that is consistent with the overarching purpose.

(2) A party's lawyer must, in the conduct of a civil proceeding before the Court (including negotiations for settlement) on the party's behalf:

(a) take account of the duty imposed on the party by subsection (1); and

(b) assist the party to comply with the duty.

(3) The Court or a Judge may, for the purpose of enabling a party to comply with the duty imposed by subsection (1), require the party's lawyer to give the party an estimate of:

(a) the likely duration of the proceeding or part of the proceeding; and

(b) the likely amount of costs that the party will have to pay in connection with the proceeding or part of the proceeding, including:

(i) the costs that the lawyer will charge to the party; and

(ii) any other costs that the party will have to pay in the event that the party is unsuccessful in the proceeding or part of the proceeding.

(4) In exercising the discretion to award costs in a civil proceeding, the Court or a Judge must take account of any failure to comply with the duty imposed by subsection (1) or (2).

(5) If the Court or a Judge orders a lawyer to bear costs personally because of a failure to comply with the duty imposed by subsection (2), the lawyer must not recover the costs from his or her client.

Appendix 3 — Terms of reference

FEDERAL MINIMUM CONNECTION THRESHOLD IN NATIVE TITLE CONSENT DETERMINATIONS

RESEARCH PROJECT

Terms of Reference

Research partners and funding

The Native Title Unit within the Social Inclusion Division of the Attorney-General's Department (AGD) has entered into a contract with the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) to research the current status of law, policy, stakeholder attitudes and policy direction about the 'connection' test when entering into native title consent determinations and best practice emerging from alternative settlement processes.

Purpose

The purpose of this Project is to develop minimum Commonwealth connection requirements for use by the Commonwealth when entering into consent determinations, to inform a consistent Commonwealth policy position on native title connection. As a result of this research, AIATSIS will provide options and recommendations to AGD in a Final Report.

Background

Determining connection under s 223(1)(b) of the *Native Title Act 1993* is a fundamental step in resolving native title claims. Reaching agreement on connection is arguably the most confusing and time consuming part of the process and the cause of significant delay in resolving many outstanding claims. The courts have not provided consistent guidance on an approach to determining connection.

State and territory governments currently determine the connection evidence requirements that must be satisfied before negotiations between the claimant and the state can begin. Each jurisdiction has its own policies and guidelines in making these decisions, giving rise to inconsistencies in approaches.

While the Commonwealth has generally relied on the assessment of connection of the relevant state or territory (as primary respondent) there remains a perception that the Commonwealth may have a higher threshold for proof of connection and may oppose states' and territories' acceptance of 'connection' because of this higher threshold. The establishment and promotion of a clear Commonwealth policy position would address this.

Project scope

To undertake this project, AIATSIS will:

a) Consult with stakeholders, including the Native Title Representative Bodies (NTRBs) / Native Title Service Providers (NTSPs) advisory group and state and territory members of the Joint Working Group on Indigenous Land Settlements (JWILS), about these Terms of Reference.

b) Conduct desktop research, including a literature review and analysis of current case law and government policy documents.

c) Seek written submissions and gather qualitative data from workshops and meetings with relevant stakeholders, including members of JWILS, NTRB/NTSPs CEO and Senior Professional Officers (SPOs) fora, the Native Title Consultative Forum (NTCF), the Federal Native Title Coordination Committee (NTCC), bilateral meetings with state and territory governments and staff of NTRBs involved in the processing of connection, consultant native title anthropologists, Judges, lawyers/barristers and other stakeholders.

d) Examine and analyse best practice in connection standards for alternative settlement processes.

e) Prepare, finalise and present to AGD, a draft Final Report, providing guidance on the varying standards applied to date and options and recommendations for future policy direction. Circulate the draft Final Report agreed between AIATSIS and AGD to interviewees and relevant representative groups who indicate they wish to comment on the draft.

f) Revise draft based on comments received and present Final Report to AGD.

g) Joint AIATSIS-AGD presentation of research findings to relevant stakeholders (potentially through presentations to JWILS, NTRB CEOs and/or SPOs fora and the NTCF).

Project timeline

The project will be conducted over a six month period, with the Final Report to be presented to AGD by end October 2011. Timelines and tasks are dependent on the level of work required and the availability of stakeholders for consultation. Estimated key milestones include:

Output/Actions	**Timing**
Consultation with key stakeholders on the Terms of Reference and critical questions	16 May – 24 June 2011
Desktop research and preliminary literature review	30 May – 24 June 2011
Announcement/promotion of the Project to relevant stakeholders and release of request for written submissions from stakeholders on the Terms of Reference and critical questions	18 July 2011
Consultations with relevant stakeholders (via phone and in person)	July – September 2011
Circulation of AIATSIS-AGD agreed draft report to participants for comment	18 October 2011
Submission and presentation of Final Report to AGD	31 October 2011
Joint AGD-AIATSIS presentation of research findings to relevant stakeholders (potentially through NTCF, JWILS and NTRB/NTSP CEOs / SPOs fora)	November – December 2011

Privacy protections

Written submissions will be published on the project website, unless respondents specifically request that their response be kept confidential. All respondents to the call for submissions will be informed of this.

Interviews will not address personal or private information. Any personal contact details or other information not relevant to the submission will be removed. Interviews will not be held with individual claimants or groups of claimants.

Appendix 4 — List of participants

Interviews — in person and by telephone and email

Date	Organisation/Person	Comments
19/7/11	Commonwealth Attorney-General's Department, Financial Assistance Section	Terina Koch
19/7/11	Commonwealth Attorney-General's Department, Native Title Unit	Leith Watson, Ryan Perry, Kathleen Denley, Leanne Schrader
20/7/11	Queensland South Native Title Services	Christie Groves, Di O'Rourke, Mike Thompson, Jacqui Hilton, Katherine Eames, Shaz Rind, Vivian Dixit, Tim Madigan, Kay Whyte, Alex Crowe, Diana Romano
21/7/11	Queensland Department of Environment and Resource Management	Colin Sheehan, Kathy Franklind, Kathy Seton, Jacqui Michael, Andrew Luttrell, Beverley, Kevin Murphy
21/7/11	Registrars of Federal Court of Australia (Brisbane Registry)	Louise Anderson, Ian Irving, Christine Fewings
21/7/11	Cape York Land Council	Marita Stinton
21/7/11	National Native Title Tribunal (Queensland Registry)	John Sosso, Graeme Neate, Therese Ford, Amy Barrett
22/7/11	Australian Government Solicitor	Gordon Kennedy
22/7/11	New South Wales Department of Lands; Department of Premier and Cabinet	John Gibbons, Jennifer Jude, Janet Moss, Michael Flynn, Tim Dauth
22/7/11	Windeyer Chambers, Sydney	Vance Hughston, John Waters, Tina Jowett
1/8/11	Department of Prime Minister and Cabinet	Joy Savage, Bob Eckhardt, Dot Wright, Kate Wheldrake
5/8/11	Department of Families, Housing, Community Services and Indigenous Affairs	Libby Bunyan and John Eldridge
8/8/11	National Native Title Council	Brian Wyatt
8/8/11	Victoria Department of Justice	Mary Scalzo, Dean Cowie, Anoushka Lenffer, Ian Parry
9/8/11	Federal Court of Australia (Melbourne Registry)	Judges, Registrars

9/8/11	Native Title Services Victoria	Tatiana Romanovsky, Kim Pilbrow, Jill Webb, Austin Sweeney
16/8/11	South Australian Native Title Services	Andrew Beckworth
16/8/11	South Australia Crown Solicitor's Office	Jenny Hart, Simon McCaul, Peter Tonkin, Stephan Kent
17/8/11,	Susan Phillips	(by phone from Adelaide)
17/8/11	Tony McAvoy	(by phone from Adelaide)
17/8/11	Raelene Webb QC	We met with Raelene in Adelaide, but she had just been taken quite severely ill and had to excuse herself. We arranged to follow up by telephone.
18/8/11	Central Land Council	Pat D'Aranjo, James Nugent, Craig Elliot (by phone)
19/8/11,	Northern Land Council	Ben Gotch, Tamara Cole, Sid Stirling, Ron Levy
19/8/11	Northern Territory Department of Justice	Anita Kneebone, Matthew Storey, Jennifer Laurence, Poppi Gatis
23/8/11	NTSCorp	Ken Lum, Jemima McCaughan, Michael Bennett, Mishka Holt
23/8/11	Dr Gaynor McDonald, University of Sydney	
25/8/11	South West Aboriginal Land and Sea Council	Bill Lawrie, Stuart Bradfield, Glenn Kelly, Maryse Aranda
25/8/11	Goldfields Land and Sea Council	Sophie Kilpatrick, Craig Muller
25/8/11	Western Australia Department of Premier and Cabinet	We had left time in the schedule of meetings to meet with the Western Australian Government, but in an email dated 8 August 2011, John Catlin indicated that the Western Australian Government would not be participating in the research project. The email cited concerns about "a fundamental lack of clarity about the rationale for the research and the intent of the Commonwealth Government". In subsequent correspondence, attempts were made to address these concerns. On 25 August 2011 Lisa Strelein spoke to Mr Catlin by phone, who confirmed that the Western Australia Government would not be participating.
26/8/11	Central Desert Native Title Services	Malcolm O'Dell, Tessa Hermann, Gemma Wheeler-Carver
26/8/11	National Native Title Tribunal	June Eaton, Daniel O'Dea

	(Principal Registry)	
29/8/11	Kimberley Land Council	Erika Blades, Jacki Cole, Laurelea Robb
31/8/11	Yamatji Marlpa Aboriginal Corporation	Michael Meegan, John Southalan, Carolyn Tan, Louahna Lloyd, Melissa Moore
9/9/11	Cape York Land Council	Matthew Moharich, Charles Wilde
9/9/11	North Queensland Land Council	David Saylor, Nick Roberts, Gemma Sanford, Martin Dore, Louise Allwood Helen Tait from Carpentaria Land Council was confirmed to attend this meeting but was at the last minute unable to attend. She has advised that we should contact Marnie Parkinson, of Slater and Gordon in Perth, who does the legal work for Carpentaria. We will follow this up by telephone.
19/9/11	Dr David Martin, Anthropos Consulting	
19/9/11	Sonia Brownhill, William Forster Chambers	
19/9/11	Kim McCaul, Anthropos Consulting	
21/9/11	Prof David Trigger, University of Queensland	
21/9/11	Dr James Weiner, Australian National University	
21/9/11	Raelene Webb QC, Magayamirr Chambers	
22/9/11	Greg McIntyre SC, John Toohey Chambers	
22/9/11	Dr Lee Sackett, University of Queensland	
23/9/11	Attorney-General's Department	Ryan Perry, Leith Watson, Kathleen Denley
23/9/11	Marnie Parkinson, Slater and Gordon	Works for Carpentaria Land Council

Written Submissions Received

6/9/11	Goldfields Land and Sea Council	

8/9/11	Crown Solicitor, New South Wales	
16/9/11	Minerals Council of Australia	
5/10/11	NTS Corp	

Third Party Respondent Representatives

15/11/11	AgForce Queensland	Phone interview - John Stewart. No written submission.
16/9/11	Minerals Council of Australia	Written submission received.
24/10/11	Local Government Association, Queensland	Invited to participate in consultations, response received.
24/10/11	Pastoralists and Graziers Association of Western Australia	Invited to participate in consultations, response received.
18/8/11	NQ Mining	Invited to make written submission, none received.
18/8/11	Queensland Boulder Opal Gemtrends	Invited to make written submission, none received.
18/8/11	Australian Petroleum Production and Exploration Association	Invited to make written submission, none received. Invited to participate in consultations, no response.
18/8/11	Western Australian Fishing Industry Council Inc	Invited to make written submission, none received. Invited to participate in consultations, no response.
18/8/11	Australian Local Government Association	Invited to make written submission, none received.
18/8/11	Blake Dawson Waldron	Invited to make written submission, none received. Invitation to participate in consultations declined.
24/10/11	Northern Territory Cattlemen's Association	Invited to participate in consultations, no response.
24/10/11	South Australian Chamber of Mines and Energy	Invited to participate in consultations, no response.
24/10/11	South Australian Farmers Federation	Invited to participate in consultations, no response.
24/10/11	Local Government Association of South Australia	Invited to participate in consultations, no response.
24/10/11	Victorian Farmers Federation	Invited to participate in consultations, no response.
24/10/11	Queensland Seafood Industry Association	Invited to participate in consultations, no response.

24/10/11	Seafood Industry Victoria	Invited to participate in consultations, no response.
24/10/11	Northern Territory Seafood Council	Invited to participate in consultations, no response.