CONNECTION TO COUNTRY:
REVIEW OF THE *NATIVE TITLE ACT* 1993 (CTH)

LEE GODDEN, Australian Law Reform Commission

ALRC Inquiry and Report

On 3 August 2013, the Australian Law Reform Commission (ALRC) was asked to inquire into the *Native Title Act* 1993 (Cth) and to report on:

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

The ALRC conducted a comprehensive examination of native title laws, assisted by over 160 consultations and 72 submissions. The Report was tabled in Federal Parliament in Reconciliation Week, on 4 June 2015. The Inquiry is the first major review of 'connection' in native title claims.

Connection requirements

The ALRC examined the central legal tests for 'connection' found in the *Native Title Act*; how the courts have interpreted these requirements; as well as how evidence of connection is gathered—e.g. in connection reports. The requirements for Aboriginal and Torres Strait Islander peoples to establish native title are complex and technical. This is due partly to the length of time in which claimants must demonstrate that they have continued to acknowledge and observe traditional laws and customs—often a particular injustice in light of the dislocation of people from their lands and bans on the exercise of cultural practices.

Amending the definition of native title

The ALRC recommends that the definition of native title should be clarified to refocus upon the core elements in the statutory definition of native title that reflect *Mabo [No 2]*, by amending section 223 of the *Native Title Act* to provide that:

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

The proposed amendments aim to streamline proof requirements, while providing flexibility of interpretation around 'adaptation', 'society' and 'substantially uninterrupted acknowledgment of laws and customs'. Statutory amendment accords with a 'fair, large and liberal' interpretation—appropriate to beneficial legislation. The recommendations accept the need for a link between the laws and customs that existed in the period prior to sovereignty and their modern counterpart, but acknowledge that, in practice, Aboriginal and Torres Strait Islander peoples and their relationships with land and waters can and do adapt to changing circumstances—the influence of European settlement makes it inevitable.

A presumption of continuity

Rather than recommending that there should be a presumption of continuity in relation to the proof of connection to establish native title, the ALRC concluded a more effective approach is to amend the definition, to provide that—the Court may draw inferences from contemporary evidence that the claimed rights and interests are possessed under traditional laws and customs.

Disregarding substantial interruption and evidence of physical occupation

Similarly, the ALRC preferred direct amendment of s 223 of the *Native Title Act*, rather than recommending that the courts should be empowered to disregard 'substantial interruption' to 'connection'. It was unclear what may be involved in any such 'empowerment'.

In examining whether evidence of physical occupation or continued or recent use is required to prove connection, the ALRC considers that the law is already clear—that neither is necessary. Two provisions of the *Native Title Act*—dealing with the claimant application and the registration test—refer to 'traditional physical connection' with land and waters. The ALRC recommends repeal of these provisions.

Native title rights and interests for commercial purposes?

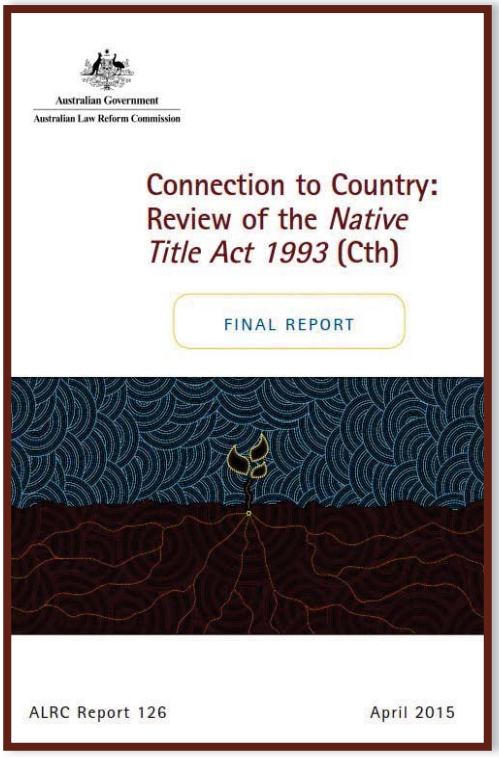
The ALRC also examined whether the *Native Title Act* should provide that native title, 'can include rights and interests of a commercial nature'. With the case law evolving, the ALRC recommends that s 223 (2) of the *Native Title Act* be amended to confirm that a broadly framed native title right may be exercised for commercial purposes, where it is found on the facts.

Secondly, the ALRC recommends the inclusion of a right to trade in a representative list of native title rights and interests in s 223 (2) (b) of the *Native Title Act* to expressly indicate that native title rights may include the right to trade. The ALRC did not recommend statutory definition of commercial purposes.

The ALRC recognises the important role that native title rights and interests 'exercised for a commercial purpose' may play in securing economic and cultural sustainability for Aboriginal and Torres Strait Islander peoples.

Authorisation

The authorisation provisions of the *Native Title Act* are working reasonably well, but proposed amendments include: the choice of a decision-making process; limits on the scope of the authority of the applicant; and the applicant's capacity to act by majority. Recommendations also address where a member of the applicant dies or is unable to act. An important recommendation is for the Act to provide that the applicant must not obtain a benefit at the expense of the group. Such recommendations are intended to support claim groups as they develop their own governance structures, work within the requirements of Australian law and negotiate with third parties.



Parties and joinder

The party and joinder provisions in the *Native Title Act* raise issues around the balance of interests in the native title system, influencing how readily a native title determination is reached and whether the proceedings are lengthy. The ALRC considers that in most instances, the Federal Court's existing discretion, in combination with robust case management, will be the most appropriate way to balance the considerations involved.

The ALRC does however recommend amendment of the Act:

- to allow respondent parties to elect to limit their involvement in proceedings to 'representing their own interests'
- to provide Aboriginal Land Councils in NSW with notice of native title proceedings
- to clarify the law regarding joinder of claimants and potential claimants; and dismissal of parties.

The ALRC recommends that the *Federal Court Act* 1976 (Cth) be amended to allow appeals from joinder and dismissal decisions in native title proceedings.

Other pathways

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