CONNECTION TO COUNTRY:
THE AUSTRALIAN LAW REFORM COMMISSION RECOMMENDS CHANGE TO THE NATIVE TITLE ACT

by Robyn Gilbert

In April 2015, the Australian Law Reform Commission ('ALRC') recommended changes to the *Native Title Act 1993* (Cth) ('the Act') to address issues of proof faced by Aboriginal and Torres Strait Islander peoples seeking a determination of native title. This article examines some events that led to the ALRC's inquiry, the arguments and evidence put to the inquiry, the key recommendations made and the reasons for those recommendations.

The High Court of Australia's decision in *Yorta Yorta*[1] in 2002 sparked concern about the high evidentiary barrier facing native title claimants. Under s 223 of the Act, claimants must prove that they have rights and interests possessed under the traditional laws that they acknowledge and the traditional customs they observe. They must also prove that by their traditional laws and customs, they have a connection with the land or waters and that those rights and interests are recognised by the common law of Australia.

On its face, s 223 does not impose an unreasonable burden of proof. However, in *Yorta Yorta*, the High Court defined 'traditional laws and customs' as meaning those that have been passed from generation to generation, substantially uninterrupted, and they have had a continuous existence and vitality since the British Crown asserted sovereignty.[2] The High Court acknowledged that proof of continuous acknowledgement and observance of traditions, particularly oral traditions, 'is very difficult'.[3] It was because of this difficulty that the Yorta Yorta claim failed, as did the Single Noongar claim in Western Australia[4] and the Larrakia claim in the Northern Territory.[5]

The requirement to show 'continuity of connection' has been criticised for leaving native title 'vulnerable and fragile'[6] and creating a 'Herculean' task for claimants, particularly those with a history of dispossession and the removal of children.[7] The United Nations Committee on the Elimination of Racial Discrimination also expressed concern about the requirement.[8]

In 2013, 20 years after the passing of the Act, the then Attorney-General of Australia, the Hon Mark Dreyfus QC MP, directed the ALRC to conduct an inquiry into the connection requirements of the Act. The ALRC was also directed to consider whether the Act should include reference to rights and interests of a commercial nature and whether the authorisation and joinder provisions were working effectively. This article focuses on connection requirements. It discusses commercial rights and interests, authorisation and joinder more briefly.

THE NEED FOR CHANGE

The ALRC conducted widespread consultations with stakeholders in the native title arena: native title representative bodies, state and territory governments, judicial officers, Indigenous leaders, traditional owners, representatives of the mining and fishing industries, and many others. It became clear that there was significant disagreement among stakeholders regarding a crucial issue—that is, whether the connection and continuity requirements of the Act pose a problem at all. Some stakeholders suggested that the recent increase in the number of consent determinations (more than 35 each year from 2011 until 2014) is evidence that connection requirements are not a barrier to the recognition of native title.

On the other hand, there are nearly 400 native title claims awaiting determination, some of which have been in the system for many years. It is not known how many potential claimants have been deterred by the stringency of the connection requirements. Determinations that native title exists are more likely to occur in remote areas of Australia where the impact of colonisation was later and less disruptive. In settled areas consent determinations do occur, but may reflect the willingness of state and territory government respondents to enter into consent determinations in situations where claimants would not meet the stringent tests set out in *Yorta Yorta*.

Aboriginal and Torres Strait Islander peoples who have experienced forced relocation, removal of children and prohibitions on the use of language and the practice of culture are particularly affected by the proof of continuity requirement. On the other hand, people

who did not interact with non-Indigenous anthropologists or historians for many years after the assertion of sovereignty may be unable to produce any written evidence of their continuous observance and acknowledgement of laws and customs.[9]

Section 223 'casts a long shadow over negotiations'.[10] The ALRC considers that negotiations over native title should not be dependent on the goodwill of government respondents, but should be conducted in the shadow of a fair and reasonable standard of proof. Similarly, while the Federal Court of Australia has shown a willingness to draw inferences from evidence of current laws and customs that the laws are traditional and have been observed since sovereignty,[11] the ALRC considers that this is not a sufficiently secure base upon which to rest the native title rights of Aboriginal and Torres Strait Islander peoples.

The connection requirements also contribute to excessive costs and delay in the native title system, although they are not the only contributor.[12] The ALRC was told that the cost of anthropologists' reports and legal representation is sometimes far in excess of the commercial value of the land under claim. Representatives of all parts of the native title system, including claim groups, state and territory governments, mining interests and the courts, called for a faster, less expensive process.

A PRESUMPTION OF CONTINUITY?

The terms of reference for the inquiry specifically asked the ALRC to consider whether there should be a 'presumption of continuity'. This approach was proposed in 2009 by Justice French (as he then was) who suggested that it would lighten the burden on native title claimants. He proposed that continuity could be presumed if members of a claim group, by their laws and customs, have a connection with land and waters and reasonably believe that their laws and customs are traditional and that their ancestors acknowledged and observed traditional laws and customs at sovereignty.[13] This proposal was adopted with some enthusiasm by a number of stakeholders, including the Australian Institute of Aboriginal and Torres Strait Islander Studies ('AIATSIS'), the Law Council of Australia, the National Congress of Australia's First Peoples, the Australian Human Rights Commission and many native title representative bodies.

After careful consideration, the ALRC concluded that a presumption would not be likely to achieve the goal of a fairer, faster and less resource-intensive resolution of native title claims. A legal presumption that a fact exists operates unless rebutted by evidence to the contrary (the amount of evidence required to rebut the presumption depends on the drafting). If a respondent produced evidence of a substantial interruption, sufficient to rebut the presumption, then the full burden of proof would once again be on the shoulders of the claimant. State and territory governments indicated to the inquiry that 'due diligence' would require them to test a claim of continuous connection.[14] If this approach is taken, a presumption is unlikely to lift the evidentiary burden on claimants, or reduce the length and expense of claims.[15]

The ALRC also heard concerns that the introduction of a presumption would mean that claimants might provide insufficient information to form the basis of a consent determination or to resolve overlapping claims.[16]

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AMENDMENT OF S 223

Section 223 of the Act is the starting point when considering native title applications. [17] For this reason, addressing the problems created by *Yorta Yorta* requires a change to s 223. However, s 223 also incorporates fundamental concepts of the common law. Caution is needed to avoid creating uncertainty, derailing negotiations towards consent determinations or unsettling the relationship between the statute and the common law. The doctrinal foundation of native title, as set out in *Mabo v Queensland (No 2)*,[18] must be preserved. Accordingly, the ALRC recommends that the existing text of s 223(1) should remain the same, but a series of clarifying statements should be added that would remove some unnecessary evidentiary hurdles. The statements would clarify that:

- traditional laws and customs may adapt, evolve or otherwise develop;
- it is not necessary to establish that acknowledgment of traditional laws and observance of traditional customs have continued substantially uninterrupted since sovereignty—nor is acknowledgement and observance required by each generation;
- it is not necessary to establish 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.[19]

These proposed amendments would streamline proof requirements and focus on the essential elements of native title. Claimants would still have to establish that they are the

'right people for country'.[20] Their rights and interests must be possessed under laws and customs that have their origins in those acknowledged at sovereignty. However, they would not have to establish that those laws and customs have been acknowledged and observed, generation by generation, substantially uninterrupted since sovereignty.

The proposed amendments are intended to confirm and entrench the trends already seen in the Federal Court towards flexibility and a less technical approach to proving connection.[21] They would bring the statute closer to the doctrine of native title set out in *Mabo v Queensland (No 2)*[22] before the 'hardening of the arteries' in *Yorta Yorta*.[23]

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COMMERCIAL RIGHTS AND INTERESTS

Native title determinations must specify the rights and interests that are included in the determination. Determinations often include the right to hunt, fish, gather, use water or take marine resources. However, almost all consent determinations include the qualification that those rights may be exercised for personal, communal, domestic or non-commercial purposes only.

The ALRC was asked to consider whether there should be clarification that native title rights and interests can include rights and interests of a commercial nature. During the inquiry, the High Court handed down its decision in *Akiba v Commonwealth*.[24] At first instance, it had been found that the claimants had a native title right 'to take for any purpose resources in the native title areas'.[25] Evidence showed that the Islanders had traded and sold fish, both historically and in the present day. The High Court confirmed that the right to take resources 'for any purpose' was the relevant right in order to consider questions of extinguishment.[26] Since *Akiba v Commonwealth*, it is generally acknowledged that native title can comprise a broad right to take resources and can include rights and interests of a commercial nature.

Currently, s 223(2) of the Act provides that native title rights and interests include 'hunting, gathering, or fishing, rights and interests'. The ALRC considers that this section should be updated to accord with key principles from the recent case law. It should be repealed and substituted with a section that refers to a right that 'may be exercised for any purpose, including commercial or non-commercial purposes' and it should also contain a non-exhaustive list of native title rights and interests that include 'hunting, gathering, fishing, and trading rights and interests'. This would clarify that native title rights and interests are not confined to the usufructuary rights currently listed in s 223(2).

Such an amendment would support the policy objective declared by the Council of Australian Governments that native title assets should be used to secure 'real and practical benefits for Indigenous people'.[27] Aboriginal leaders have also called for native title rights to be used to generate economic development, as well as to support Aboriginal culture.

AUTHORISATION

An application for a native title determination can only be lodged by a person or group of people who have been authorised by the group to make the application: an 'applicant'. The authorisation provisions of the Act are intended to ensure that the applicant acts with the consent of the claim group. The group is also given the power to remove and replace an applicant, thus contributing to the ongoing legitimacy of the applicant.

Groups do not generally invest full decision-making authority in the applicant, but expect the applicant to bring important decisions back to the group and to follow the directions of the group. Currently, the legal status of these directions is not clear. The ALRC has recommended that the Act should be amended to clarify that the claim group may define the scope of the authority of the applicant. Other amendments should be made to clarify the procedure to be followed when there is a disagreement between applicants and when a member of the applicant dies or is unable to act.

The Act and state and territory legislation create opportunities for the applicant to receive funds intended for the native title group. The ALRC recommends that the Act should be amended to provide that a member of the applicant must not obtain an advantage or benefit at the expense of the common law holders.

The recommended amendments 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.

JOINDER

The joinder provisions of the Act define who may join native title proceedings, in what circumstances they may join and when they may be dismissed. The terms of reference asked the ALRC to

consider whether these provisions pose any barriers to access to justice for claimants, potential claimants and respondents.

Because a native title determination is a judgment *in rem*—that is, it binds non-parties—it is important to allow all those with interests affected to be heard. Two main issues became evident with regard to joinder. First, the large number of respondents to many applications creates significant cost and administrative burdens, on both those who join and those interacting with the respondents. Second, claimants and potential claimants sometimes seek to join proceedings as a result of disputes within or between claim groups. This poses challenges when it is not clear whether joinder is a suitable way of resolving the dispute.

The ALRC found that the current law and procedure is generally effective in managing issues around joinder, but has made some targeted recommendations for fine-tuning the Act.

ALTERNATIVE SETTLEMENTS

Finally, the ALRC notes that native title is not the only path to land justice and reconciliation between Aboriginal and Torres Strait Islander people and non-Indigenous Australia. The inquiry heard many calls for a shift from adversarial legal processes to broader settlements that can reduce transaction costs, improve relationships between governments and traditional owners and produce better outcomes.[28] In Australia and in comparable jurisdictions, progress is being made via non-native title settlements that encompass land, compensation for dispossession and economic development opportunities.

The final report can be found at <www.alrc.gov.au/publications> as an epub or for free download.

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

2 Ibid.

3 Ibid [89].

4 *Bodney v Bennell* (2008) 167 FCR 84.

5 *Risk v Northern Territory* (2007) 240 ALR 75. Other claims that have foundered due to connection requirements include*: CG (Deceased) on behalf of the Badimia People v Western Australia* [2015] FCA 204 (12 March 2015); *Sandy on behalf of the Yugara People v Queensland (No 2)* [2015] FCA 15 (27 January 2015); and *Wyman on behalf of the Bidjara People v Queensland (No 2)* [2013] FCA 1229 (6 December 2013).

6 Australian Human Rights Commission, Submission No 1 to the Australian Law Reform Commission, *Review of the Native Title Act 1993*, (14 May 2014) 13.

7 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2008,* Report No 2, (2009) 54.

8 Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, 66th Sess, UN Doc CERD/C/AUS/CO/14 (14 April 2005) 4, [17].

9 Australian Institute of Aboriginal and Torres Strait Islander Studies, Submission to the Australian Law Reform Commission, *Review of the Native Title Act,* 14 July 2014, 34.

10 Lisa Strelein, 'Reforming the Requirements of Proof: The Australian Law Reform Commission's Native Title Inquiry' (2014) 8 *Indigenous Law Bulletin* 6, 6.

11 Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth),* Report No 126 (2015) 222–6.

12 Ibid 102–7.

13 Justice Robert French, 'Lifting the Burden of Native Title: Some Modest Proposals for Improvement' (2009) 93 *Australian Law Reform Commission Reform Journal* 10.

14 See, for example, the submissions of the Northern Territory and Western Australian Governments.

15 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014) [4.61]–[4.63]. See further Strelein, above n 10, 7.

16 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014) [4.49]–[4.64].

17 *Commonwealth v Yarmirr* (2001) 208 CLR 1, [243].

18 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

19 See further Australian Law Reform Commission, above n 11, Ch 5.

20 Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82 (2014) [5.11].

21 Australian Institute of Aboriginal and Torres Strait Islander Studies, *What's Needed to Prove Native Title? Finding Flexibility Within the Law on Connection,* Research Discussion Paper 35 (2014); Australian Law Reform Commission, above n 11, [5.6].

22 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

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

24 *Akiba v Commonwealth* (2013) 250 CLR 209.

25 Ibid [1].

26 Ibid [39], [60].

27 Council of Australian Governments, *National Indigenous Reform Agreement,* Council on Federal Financial Relations, <http://www.federalfinancialrelations.gov.au/content/npa/health_indigenous/indigenous-reform/national- agreement_sept_12.pdf>.

28 See, for example, National Native Title Council, *Submission 16*.