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The Executive Director
Australian Law Reform Commission
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BY Email: nativetitle@alrc.gov.au

RE: **Issues Paper 45 – Australian Law Reform Commission's Review of the Native Title Act 1993 – March 2014**

Thank you for the opportunity to respond to the Issues Paper.

Cape York Land Council (CYLC) is the Representative Body for Cape York pursuant to the *Native Title Act 1993* (Cth) (NTA).

We respond as follows:-

**DEFINING THE SCOPE OF THE INQUIRY**

**Question 1.** The Preamble and Objects of the *Native Title Act 1993* (Cth) provide guidance for the Inquiry. The ALRC has identified five other guiding principles to inform this review of native title law.

(a) Will these guiding principles best inform the review process?

**CYLC**: Yes.

(b) Are there any other principles that should be included?

**CYLC**: None identified at this time.

**Question 2.** The ALRC is interested in understanding trends in the native title system. What are the general changes and trends affecting native title over the last five years?

(a) How are they relevant to connection requirements for the recognition and scope of native title rights and interests?

**CYLC**: It is our experience that native title claims are not necessarily taking a longer time to resolve than in the past. However:-

- Claims which have progressed to consent determination in Cape York to date have generally been those which were lodged with a view to obtaining a quicker and easier path to determination. For example, early claims in Cape York were generally lodged on a parcel basis, with lot on plan descriptions and following current tenure boundaries, rather than on a whole of country or regional basis. This simplified tenure investigations, often avoided having to identify boundaries with neighbouring native title groups and limited the number of respondent parties likely to be involved. The claims often relied on the application of the 47 provisions of the NTA to obtain exclusive rights, which in turn simplified negotiations with the State and other parties about the form of the rights;
- Existing claims for various reasons tend to be more complex than those which have proceeded to determination, both in relation to connection requirements and other issues;
- The Federal Court's intensive case management of native title claims in Queensland appears to be having a generally beneficial effect, with the time taken to complete steps and processes generally being less than in the past;
- With greater familiarity with native title processes in Indigenous communities and the lodgement of more complex claims, there has been a rise in Indigenous disputes within the formal claim system in Cape York. This is partly due to claims being lodged or progressed over areas which are not solely or clearly within the traditional country of one group, but also possibly because individuals or families who are disenchanted with native title or have other issues or concerns appear more likely to use the native title process to seek to advance their (often individual, rather than group) interests;
- All of these things can have an effect on claim progress, and it seems likely that claims will continue to take a considerable time to resolve unless there are changes made to connection requirements.

We also note that:-

- There is a trend for an increasing level of rights being created through the operation of state legislation such as land transfers under the *Aboriginal Land Act 1991* (Qld) (ALA). The ALA has been amended to allow for RNTBCs to be appointed as trustees for transfer of ALA land. There is potential for DOGITS and other land (such as pastoral leases) in Cape York to be the subject of transfers (usually under the ALA), and thus the potential for RNTBCs to be appointed as trustees for DOGIT land, with substantial land holding responsibilities that are more usually the function of local governments. However, there has been no provision made for ongoing support by the State Government to support the increasing legal and governance requirements. Although not strictly speaking native title related, CYLC is often the first point of call for requests for assistance from bodies which do not have the capacity or resources to adequately discharge their functions. This creates additional demand and pressure on CYLC's delivery of services and management of expectations. It may also impact on the ability of RNTBCs to meet their post-determination responsibilities;
- As more claims are settled and more consent determinations come into effect, issues are likely to shift from pursuing claims to exercising the substantial rights

that flow from determinations and registered agreements. It appears that the scope of the ALRC review is very claims orientated, and we suggest that potential future trends (such as a greater focus on compensation claims and sea claims) should also be considered.

(b) How are they relevant to the authorisation and joinder provisions of the *Native Title Act*?

**CYLC**: Overlapping claims and Indigenous disputes (which can of course occur without there being an overlapping claim) can affect connection requirements, authorisation and joinder procedures. CYLC has expended considerable time, resources and funding in recent years attempting to mediate disputes between and within groups, so that claims can progress. While these efforts have largely been successful, with overlaps withdrawn, claim groups amended and agreements between disputing parties negotiated, there have been significant delays in obtaining consent determinations for some claims, and this has a roll-on effect, on the basis that CYLC's funding and resources are finite and their use to resolve disputes for one area limits CYLC's ability to progress other claims and areas.

Financial and capacity constraints definitely pose a barrier for native title outcomes – CYLC does not believe that there has been any significant change in the last 5 years in relation to these issues:-

- Priorities have to be carefully set and maintained to enable limited funding and resources to achieve outcomes. Other groups have to wait until existing claims are settled, for their areas to be progressed;
- CYLC's communication with and ability to engage with its clients is less than ideal, with a lot of time and effort spent negotiating with the State and other parties before a "deal" can be put to the group for consideration. There is often insufficient time or funding available for native title groups to properly consider information provided before they are required to provide instructions to CYLC, and to authorise determinations and related agreements. There are often difficulties in meeting with and obtaining instructions from groups whose membership may run into the thousands, and whose members may be geographically widespread;
- CYLC does not believe that there are similar constraints for respondents to claims, who are generally individuals or groups with individual representation. Although funding for respondent parties has been more limited in recent times, CYLC believes that the issues surrounding respondent's interests are generally now well settled and there often is no need for those parties to either join as parties or to remain as parties, once their interests have been resolved;
- There continue to be difficulties in engaging experts with sufficient expertise to undertake the necessary reports and other procedures in relation to connection requirements. The work required to commence a claim, to provide evidence in relation to connection requirements and to assist with other issues that may arise in the lead-up to a determination can be substantial. There are significant areas of Cape York which have still not been claimed, because it has not been possible to progress connection work for all areas at the same time. CYLC now has a regional approach to research in train, which will hopefully see the remaining areas of Cape York claimed within the next 2 to 3 years. The experts engaged by Cape York generally now have a better understanding of current connection requirements than may have been the case in the past (particularly as the goal posts have kept changing), but issues such as boundaries between groups and the relationship with existing or previous claims must still be resolved before claims can be lodged or finalised. Further work is then required throughout the life of the claim, which is likely to mean that there will continue to be pressures in terms of being able to engage experts for the next few years.

**Question 3.** What variations are there in the operation of the *Native Title Act* across Australia? What are the consequences for connection requirements, authorisation, and joinder?

**CYLC**: It is submitted that:-

- For Cape York generally there is strong evidence available in respect of connection and group membership, with the State Government having been willing in mediation of native title claims to draw inferences about connection from the date of "effective" sovereignty to the period when written records are available. However, locating and collating that evidence into a suitable form for provision to the State (and to meet its requirements under Queensland's connection guidelines) and sometimes to other parties for the purposes of mediation of native title claims continues to be a significant impost on available funding and resources, including the availability of experts. There can also be a significant burden on members of the claim group, whose input into the process has sometimes been required on multiple occasions as legislation changes and jurisprudence develops;
- CYLC is confident that most Cape York claim groups are able to meet current connection and authorisation requirements, but the time and expense required to do so means that the claim process continues to be lengthy and that means that other groups have to wait for long periods for their areas to be progressed;
- CYLC is also aware that other groups across Australia may not have the same ability to meet those requirements, and the general understanding is that native title outcomes may not be achieved for many other groups across Australia. This is not in our view an equitable situation, when the original intention of the Native Title Act to otherwise compensate those groups has not been met;
- Dispossession and displacement of Indigenous people from Cape York since sovereignty has certainly increased the potential for overlapping claims and disputes. Some individuals or families have claimed membership of groups where they are not automatically accepted as members and where their ability to establish their membership may be limited by a lack of available evidence. There may also be difficulties in delineating boundaries between groups, which can lead to disputes, overlapping claims and Indigenous people joining as Respondent Parties to claims. With time, resources and expert advice, it has generally been possible to resolve these matters but again that delays other matters being progressed;
- It would be difficult to develop a nationally consistent approach to satisfying connection requirements due to the geographical, historical and cultural differences between groups across Australia. However, it is submitted that a significant improvement would be achieved if a rebuttable presumption of continuity was introduced – see further below.

**Question 4.** The ALRC is interested in learning from comparative jurisdictions.

(a) What models from other countries in relation to connection requirements, authorisation and joinder may be relevant to the Inquiry?

(b) Within Australia, what law and practice from Australian states and territories in relation to connection requirements, authorisation, and joinder, may be relevant to the Inquiry?

**CYLC**: CYLC does not have adequate time or resources to contribute to the consideration of these questions.

**CONNECTION AND RECOGNITION CONCEPTS IN NATIVE TITLE LAW**

**Question 5.** Does s 223 of the *Native Title Act* adequately reflect how Aboriginal and Torres Strait Islander people understand 'connection' to land and waters? If not, how is it deficient?

**CYLC**:

- At paragraph 54 of the Issues Paper, it is stated that "As native title rights and interests have their source in Aboriginal or Torres Strait Islander laws and customs, the specific native title rights and interests asserted will be grounded in fact and vary between claims" and that "Identifying the traditional laws and customs of the claimant group is significant not only to determine the rights and interests concerned, but thereby to establish connection to land and waters under s 223(1)(b)". However, it is now reasonably clear that the native title rights and interests which the State of Queensland is prepared to recognise are essentially the same for groups throughout Queensland. There are some exceptions, such as the right to live which was recognised as a native title right for the Kowanyama People in a determination in December 2012, but has not yet been recognised for any other groups in Queensland in a non-exclusive determination. For exclusive rights and for other non-exclusive rights, determinations have generally adopted similar wording throughout the State, with some minor variation of wording which we submit is unlikely to have much practical difference. CYLC submits that consideration should be given to a standard set of rights for Queensland determinations, with claim groups only required to produce evidence of specific rights if they assert the existence of other rights;
- CYLC submits that native title holders and claimants continue to be confused about the inability of native title to reflect their understanding of their society, law and custom. Section 223, and its judicial interpretation, raises concerns that the native title system is set up to fail, particularly the requirement for continuity (of the relevant society, observance of law and custom and content of law and custom). While CYLC is confident that native title claim groups in Cape York will continue to meet these requirements, it is extremely difficult and often distressing for Cape York Traditional Owners to participate in a process which in practical terms requires them to effectively deny the devastating effects of their dispossession and displacement;
- The legal position in terms of exercise of native title rights and interests, and the relationship with other rights and interests, remains complex. Without a corresponding tenure in place, such as ALA land, native title determinations often provide little practical benefit for groups, other than some level of recognition. Members of groups are often confused about exactly what aspects of their traditional law and custom can be exercised under native title. These problems are exacerbated by the failure of successive governments to properly resource RNTBCs. This has meant that many groups are limited to activities associated with meeting reporting and administrative requirements, and have no funding or resources to enable them to pursue their own aspirations. Recognition of native title, on its own, even where the rights are exclusive, is unlikely to provide economic opportunities;
- S 223 does not cover cultural property rights (in a Western sense, intellectual property rights). Native title holders are unable to protect those rights through the native title system.

**PRESUMPTION OF CONTINUITY**

**Question 6.** Should a rebuttable 'presumption of continuity' be introduced into the *Native Title Act*? If so, how should it be formulated:

What, if any, basic fact or facts should be proved before the presumption will operate?
What should be the presumed fact or facts?
How could the presumption be rebutted?

**CYLC**: Yes:-

- CYLC has made numerous submissions over the years that the native title system is unfairly biased against the native title parties, who bear the significant onus of proving that native title exists. The Native Title Act is said to be designed to encourage parties to resolve claims without litigation. However, it is our experience that the system has often been manipulated by other parties in circumstances where those parties have no cost risks for behaving unreasonably or other factors that would ordinarily influence parties to litigation to behave in a reasonable manner. Other parties are able to sit back and wait, contributing little or nothing in the way of money, time or effort, and making demands in exchange for providing consent to a native title determination. The involvement of the Federal Court in case management of claims in Queensland and the changes in funding for respondent parties in recent years has improved this situation to some extent. However, there remain parties to native title claims in Cape York whose rights will clearly be protected in a consent determination, but who nevertheless remain as parties and slow the process;
- Changing the process by introducing a rebuttable presumption of continuity would potentially significantly reduce the time, money and resources required to pursue native title outcomes, and would place the parties on a more even footing in negotiations;
- CYLC submits that the proposal by French J would significantly improve the process. However, we further submit that consideration should be given to a presumption that an agreed set of native title rights and interests are possessed by native title holders in Queensland, if the claim group is able to establish the laws and customs acknowledged and observed by the group. Native title holders would be able to adduce evidence if they wished to vary those rights.

**Question 7.** If a presumption of continuity were introduced, what, if any, effect would there be on the practices of parties to native title proceedings? The ALRC is interested in examples of anticipated changes to the approach of parties to both contested and consent determinations.

**CYLC**: CYLC submits that a presumption of continuity would reduce the cost and resources involved in preparing connection reports and in progressing to consent determinations:-

- Generally, the requirement to establish that the claim group are the right people for the claim area is only a small part of the current connection work required, and retaining that requirement would still result in a significant reduction in overall time and expense;
- We agree with the NNTC that it is more appropriate for respondent parties (in practice, the State) to identify any “gaps” in the requirements to establish native title, with the Queensland Government already holding significant material concerning Cape York. Our experience has been that the State analyses the connection material provided on behalf of claim groups, identifies “gaps” or issues on the basis of the material it already has, and then requires the claimants to undertake further work to produce evidence to respond to those queries or to fill in the gaps. It would be a better use of resources to focus on areas of interest from the outset, rather than spending significant time and resources producing a full set of evidence in circumstances where there is no concern. We don’t believe that it would create a situation where State and Territory governments would place renewed emphasis on identifying flaws in connection

evidence, as suggested by the Western Australian Government, as it is our experience that governments focus on that aspect anyway;

- We also agree with the NNTC that the Queensland Government might be more inclined to negotiate and settle more quickly;
- We don't believe that there would be any significant effect in relation to other parties, who generally in Cape York take a back seat anyway in relation to connection. It is usually the case that other respondent parties do not require connection material to be provided. Those that do require it do not appear to have the necessary expertise to properly analyse it or raise concerns about it. We submit that consideration should be given to providing for connection to be a question for the State alone;
- The tenure of the land claimed can be relevant – there are examples of Traditional Owners being prevented from accessing pastoral land by the leaseholders, with the State and others then arguing that although non-exclusive native title rights and interests survived the grant of the lease, the inability of the native title claimants to access the land for periods of time has resulted in a loss of connection. For other tenures, the mere declaration of the interest can be sufficient to extinguish native title, despite the fact that the land was never taken up for the purpose intended. Consideration should be given to ways in which continuity can be presumed in these circumstances.

**Question 8.** What, if any, procedure should there be for dealing with the operation of a presumption of continuity where there are overlapping native title claims?

> **CYLC**: If French J's proposal was adopted, native title claim groups would still be required to prove basic facts (ie that rights and interests are held under laws acknowledged and customs observed by the group, that members of the group reasonably believe those laws and customs to be traditional, that they have a connection with the land and waters, and that they reasonably believe that persons from whom one of more was descended acknowledged and observed those laws and customs at sovereignty). In our view, that would require overlapping groups to establish that they are "the right people" for the claim area. CYLC suggests that it is unlikely that both overlapping groups will be able to establish those requirements. If one group is able to do so, then it seems reasonable for that group to benefit from the presumption of continuity.

**Question 9.** Are there circumstances where a presumption of continuity should not operate? If so, what are they?

> **CYLC**: CYLC has not identified any circumstances where a presumption of continuity should not operate, unless perhaps in the unlikely event that overlapping groups are each able to establish the basic facts referred to above.

**THE MEANING OF 'TRADITIONAL'**

**Question 10.** What, if any, problems are associated with the need to establish that native title rights and interests are possessed under the traditional laws acknowledged and traditional customs observed by the relevant Aboriginal or Torres Strait Islander people? For example, what problems are associated with:
(a) the need to demonstrate the existence of a normative society 'united in and by its acknowledgment and observance' of traditional laws and customs?
(b) the extent to which evolution and adaptation of traditional laws and customs can occur?
How could these problems be addressed?

**CYLC**: We submit that most, if not all, Cape York groups are or will be able to establish the existence of "traditional" laws and customs and associated native title rights and interests. However:-

- We acknowledge that that may not be the case across Australia and for areas where traditionality cannot be established, alternative provisions should be available;
- Interpretation of the extent to which evolution and adaptation can occur can cause difficulties and delay in resolution of claims. For example:-
    - The issue of identification of the relevant "society" has caused considerable delays in some Cape York claims, although recent case law appears to have improved the situation somewhat. Anthropological evidence obtained for Cape York indicates that there may be a number of different "societies" for a particular group of native title claimants, within which the group "acknowledges the same body of laws and customs relating to rights and interests in land and waters". A number of early Cape York determinations were based on societies at the language-named group level. However, it is arguable that those groups may also be part of broader "regional" groupings which still meet native title requirements. Later claims and determinations have been hampered by the State's desire for consistency across Cape York. As Finn J pointed out in the Akiba case, " … answers to the question of native title rights and interests – which is, after all, the concern of the NT Act – would in all probability be the same whether my conclusion had been one, or four, or thirteen societies." We suggest that consideration be given to a provision which allows evidence of the existence of more than one native title society, with the potential for acknowledgement within a determination that the claim group may be members of more than one native title society. The focus should be on establishing the "right" people as native title holders for the claim area;
    - The issue of "succession" to an area where a group in existence at sovereignty no longer exists can be problematic. A recent example involved two neighboring groups which succeeded to country of an extinct group. Notwithstanding the existence of evidence of exclusive native title rights held by each group, including the right to exclude others, the State queried whether two groups could succeed to the country of another group;
    - While the High Court has acknowledged that some change to or adaptation of traditional laws and customs will not necessarily be fatal to a native title claim, in practice, we have found that practical issues arise. For example, native title groups assert the right to hunt using modern weapons, and the right to take and use resources not available at the time of sovereignty. Respondent parties including the State have resisted these assertions;
    - We discuss further below issues associated with native title rights of a commercial nature, but suggest that evidence of trade and barter under a group's traditional laws and customs should be able to translate in the present day to a right to conduct activities with a commercial nature;
- If it is accepted that traditional laws can evolve and adapt, then determinations of native title may themselves be problematic – they potentially prevent future evolution and adaptation of traditional law and custom, by restricting native title rights and interests to those in existence at the time the determination is made. Consideration should be given to provisions which ensure that native title can continue to evolve into the future;
- Further, although not directly associated with the native title claim and determination process, the need to establish that native title rights and interests are possessed under the traditional laws acknowledged and traditional customs observed creates particular difficulties with regard to the way in which certain rights and interests are exercised and how they are regulated. For example, the right to hunt is generally recognised as part of non-exclusive native title rights and interests. However, there is no authoritative

mechanism for native title parties to regulate the way in which such rights are exercised amongst native title holders. Traditional authority has been removed in many cases so that native title parties have no legal mechanism for enforcing their 'traditional laws acknowledged and traditional customs'. A mechanism should be developed to reinstate traditional authority and to integrate the exercise of traditional authority into existing legal frameworks and regulatory and enforcement regimes. This can be done through means such as designing regulatory frameworks that integrate into existing legislative frameworks and through the targeted use of ILUAs.

**Question 11.** Should there be a definition of traditional or traditional laws and customs in s 223 of the *Native Title Act*? If so, what should this definition contain?

**CYLC**: We submit that clarification that laws and customs can change over time would be useful, although we do not support the inclusion of a definition of traditional or traditional laws and customs in s 223 of the Native Title Act;

**NATIVE TITLE AND RIGHTS AND INTERESTS OF A COMMERCIAL NATURE**

**Question 12.** Should the *Native Title Act* be amended to state that native title rights and interests can include rights and interests of a commercial nature?

**CYLC**: Yes:-

- It would appear logical that if native title rights and interests were traditionally exercised in a manner which involved trade or barter, then rights and interests of a commercial nature should be afforded to native title claimants. Regulatory regimes would still address matters such as sustainability, safety and protection of the environment;
- The State in Queensland has required non-commercial qualifiers in consent determinations of native title, particularly in relation to native title rights to water. There is evidence that groups across Cape York were involved in trade and barter at the time of sovereignty, but because of the development of case law and Queensland native title determination precedents limiting the exercise of rights to non-commercial uses, that evidence has not been routinely prepared and commercial rights have not been routinely pursued;
- Although there is case law to suggest that the purpose for which a holder of a right may have for exercising that right is not an incident of the right, the practical reality is that without clarification, it is likely that the State will continue to require non-commercial qualifications on non-exclusive native title rights and interests;
- While the Native Title Act is not concerned with addressing the future viability of PBCs or other vehicles set up to manage native title rights and interests, rights of a commercial nature are potentially one of the mechanisms that could be employed to advance the future economic development of these organisations.

**Question 13.** What, if any, difficulties in establishing native title rights and interests of a commercial nature are raised by the requirement that native title rights and interests are sourced in traditional law and custom?

**CYLC**: As noted above, there is evidence of trade and barter across Cape York at the time of sovereignty. However, it may be difficult for individual groups to establish the continuing exercise of rights of a commercial nature in areas where people were removed from their traditional country, and where that country was used for other purposes, such as pastoral and mining activities. The continued practice of activities of a commercial nature in the

Torres Strait (such as fishing) may not have occurred in many areas of Cape York. While rights and interests of a commercial nature would be subject to numerous legislative and licensing regimes, we submit that recognition of rights of a commercial nature should still be recognised where such rights were traditionally held, even if the ability to exercise such rights has been limited since the late 1880s or early 1900s.

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

**CYLC**: We agree with the inclusion in s.223(2) of a new (b), so it would read:-

Without limiting subsection(1), ***rights and interests*** in that subsection includes:

(a) Hunting, gathering or fishing, rights and interests; and

(b) The right to trade and other rights and interests of a commercial nature.

**Question 15.** What models or other approaches from comparative jurisdictions or international law may be useful in clarifying whether native title rights and interests can include rights and interests of a commercial nature?

**CYLC**: CYLC does not have adequate time or resources to respond to this question.

**PHYSICAL OCCUPATION, CONTINUED OR RECENT USE**

**Question 16.** What issues, if any, arise concerning physical occupation, or continued or recent use, in native title law and practice? What changes, if any, should be made to native title laws and legal frameworks to address these issues?

**CYLC**: Notwithstanding case law to the effect that actual physical presence is not essential, in practice, claim groups in Cape York have experienced difficulties satisfying the State about continuing connection in circumstances where there is no recent evidence of physical presence on particular parts of a claim area. This has been the case even where it is acknowledged that such area or areas are geographically remote, the group has had no practical ability to travel there, the area is only a small part of a much broader area of traditional country, or where a tenure holder has prevented or discouraged visits by Traditional Owners.

**Question 17.** Should the *Native Title Act* include confirmation that connection with land and waters does not require physical occupation or continued or recent use? If so, how should it be framed? If not, for what reasons?

**CYLC**: Yes, CYLC submits that the Native Title Act should include confirmation that connection with land and waters does not require physical occupation or continued or recent use. We support the proposal from the Native Title Amendment (Reform) Bill 2011 to include amendments to s 223 including the words "To avoid doubt, and without limiting subsection (1), it is not necessary for a connection with the land or waters referred to in paragraph (1)(c) to be a physical connection".

**'SUBSTANTIAL INTERRUPTION'**

**Question 18.** What, if any, problems are associated with the need for native title claimants to establish continuity of acknowledgment and observance of traditional laws and customs that has been 'substantially uninterrupted' since sovereignty?

**CYLC**:

- Claim groups throughout Cape York have been, and are expected to be, able to establish continuity of acknowledgement of and observance of traditional laws and customs, without substantial interruption, notwithstanding the significant dispossession and displacement of Indigenous people which occurred from the late 1800s onwards. As noted above, it is extremely difficult and often distressing for Cape York Traditional Owners to participate in a process which in practical terms requires them to effectively deny the devastating effects of their dispossession and displacement;
- The State in Queensland has generally been willing to accept continuity in circumstances where there has been some interruption for reasons beyond the group's control. However, other groups in Queensland and throughout Australia may not be able to satisfy existing requirements;
- CYLC submits that provision should be made for the Native Title Act to acknowledge and address the injustices done to Indigenous people in the past.

**Question 19.** Should there be definition of 'substantial interruption' in the *Native Title Act*? If so, what should this definition contain? Should any such definition be exhaustive?

> **CYLC**: It is difficult to suggest wording for a definition of 'substantial interruption" and we submit that inclusion of such a definition is unlikely to have any great practical effect. It seems that a focus on limiting the application of that requirement, and/or providing for it to be disregarded in certain circumstances (see below) would be better options. Any definition should not be exhaustive, but simply provide a guide for judicial consideration.

**Question 20.** Should the *Native Title Act* be amended to address difficulties in establishing the recognition of native title rights and interests where there has been a 'substantial interruption' to, or change in continuity of acknowledgment and observance of traditional laws and customs? If so, how?

> **CYLC**: Yes. CYLC suggests that consideration be given to a provision that it is sufficient if a group can establish continuity for at least some of its traditional country, and that substantial interruption in relation to some parts of that area is not fatal to the claim.

**Question 21.** Should courts be empowered to disregard 'substantial interruption' or change in continuity of acknowledgment and observance of traditional laws and customs where it is in the interests of justice to do so?
If so, should:
(a) any such power be limited to certain circumstances; and
(b) the term 'in the interests of justice' be defined? If so, how?

> **CYLC**: Yes, consideration should be given to a provision empowering courts to disregard substantial interruption or change in continuity in some circumstances, such as forced removal of children and relocation of people to missions, if there is evidence that notwithstanding that interruption or change, the group continues to acknowledge and observe traditional laws and customs. We do not have a view on the proposal for a definition of the term "in the interests of justice".

**OTHER CHANGES?**

**Question 22.** What, if any, other changes to the law and legal frameworks relating to connection requirements for the recognition and scope of native title should be made?

**CYLC**:CYLC does not have the time or resources available to contribute to this question.

**AUTHORISATION**

**Question 23.** What, if any, problems are there with the authorisation provisions for making applications under the *Native Title Act*?
In particular, in what ways do these problems amount to barriers to access to justice for:
(a) claimants;
(b) potential claimants; and
(c) respondents?

**CYLC**: CYLC has experienced a range of practical problems in assisting native title claim groups through authorisation processes, both for the making of and finalisation of native title claims and for ILUAs:-

- There has been considerable complexity associated with the role and responsibilities of the Applicant nominated at the time a claim is authorised. Some amendments have been made over the years, however we submit that further improvements can be achieved. For example, removal of deceased Applicants should not trigger the registration test; consideration should be given to provision for a majority of Applicants to take steps on behalf of the group; clarification is needed to ensure that Applicants can only take steps in accordance with the instructions of or directions from the group;
- The requirement to use a traditional decision-making process, if one exists, can create problems because it is often unclear if there is a specific traditional process for decisions of the relevant kind. Cape York native title groups all have traditional decision-making processes. However, it seems unlikely that a native title claim or ILUA authorisation would be the kind of decision for which such a process must be used. Issues have arisen where groups have used a traditional process to decide to make a claim, but then agree and adopt a different process for subsequent steps such as authorisation of an ILUA. CYLC has often recommended to native title groups that they could agree and adopt a process which is based on and includes elements of the traditional process.
- We are not aware of any problems associated with respondents in relation to authorisation provisions.

**Question 24.** Should the *Native Title Act* be amended to allow the claim group, when authorising an application, to adopt a decision-making process of its choice?

**CYLC:** Yes.

**Question 25.** What, if any, changes could be made to assist Aboriginal and Torres Strait Islander groups as they identify their claim group membership and the boundaries of the land claimed?

**CYLC**: We have made numerous submissions over the years identifying problems arising from identification of claim group members:-

- Not all members of a group (or asserted members) will have the same level of knowledge or other evidence about their entitlement to be included. Tensions between “traditional” and “historical” people can create conflict within groups and communities. We suggest that where core members of a group are able to establish the technical legal requirements for a native title determination, that should suffice;
- It is usually impossible to provide an exhaustive list of members of a group, as despite best efforts, individuals or families or clans might not be aware of or might choose not

to participate in a native title claim process. A native title determination should make it clear that the description of the native title group is comprehensive but not necessarily exhaustive. It should be possible for a RNTBC to consider and approve the inclusion of additional members of the group;

- Claims lodged in response to proposed future acts are often lodged in haste to meet tight time limits, and it may not be possible to properly identify all those who have native title interests in an area. This can lead to disputes and delays at later stages. There should be provision for a group description for a claim that was lodged within a very short timeframe to be amended in certain respects without requiring re-authorisation and registration;
- Boundaries between groups are notoriously difficult to map, but this may be necessary in order to settle on boundaries for a claim or claims. Again, there should be provision for a claim area to be amended without requiring re-authorisation or re-registration in certain circumstances.

**Question 26.** What, if any, changes could be made to assist claim groups as they resolve disputes regarding claim group membership and the boundaries of the land claimed?

> **CYLC**: The time and expense for NTRBs in assisting groups to resolve disputes can be significant. CYLC submits that processes for amendment of claims following dispute resolution should be simplified. NTRBs are often placed in positions of perceived conflict, so that funding must be allocated to engaging independent legal representation for one or more groups. Additional funding for the purpose of engaging such representation, and where necessary, experienced mediators, would assist.

**Question 27.** Section 66B of the *Native Title Act* provides that a person who is an applicant can be replaced on the grounds that:
(a) the person consents to his or her replacement or removal;
(b) the person has died or become incapacitated;
(c) the person is no longer authorised by the claim group to make the application; or
(d) the person has exceeded the authority given to him or her by the claim group.
What, if any, changes are needed to this provision?

> **CYLC**: It is now common practice for original authorisation processes to include authorisation for the applicant to continue to act, even if one or more of the people constituting the applicant dies or is incapacitated. However, in the past that was not always the case and there are potentially still claims in existence where issues in relation to authorisation of the applicant may arise. CYLC submits that where an applicant has died or is no longer willing to act, it should be sufficient to file a notice with the Court to that effect. If an entity has been established to represent the native title claim group (and to become the RNTBC upon the making of a determination), CYLC submits that provision should be made for that entity to be able to apply to the Court for approval to act as or in place of the applicant.

**Question 28.** Section 84D of the *Native Title Act* provides that the Federal Court may hear and determine an application, even where it has not been properly authorised.
Has this process provided an effective means of dealing with defects in authorisation? In practice, what, if any, problems remain?

> **CYLC**: Although CYLC has not to date been involved in a s84D process, CYLC is concerned about the prospect of the provisions being used by disgruntled members of a claim group to challenge authorisation. In the event of disputes arising, individuals can often seek to disrupt proceedings using any avenues available. This of course has the potential to delay

and complicate resolution of claims. However, CYLC supports the proposition that the court should, in the interests of justice, be able to hear and determine an application despite possible defects in original authorisation.

**Question 29.** Compliance with the authorisation provisions of the *Native Title Act* requires considerable resources to be invested in claim group meetings. Are these costs proportionate to the aim of ensuring the effective participation of native title claimants in the decisions that affect them?

**CYLC**: Although it is difficult to suggest practical alternative for authorisation processes, the cost and resources associated with authorisation and claim group meetings in Cape York can be substantial. For many groups with members who are widespread throughout the Cape and who also have members living outside the Cape, a claim group meeting is likely to cost at least $30,000. Authorisation meetings can cost considerably more than that. The resources required to organise and run meetings can prevent other matters being progressed. CYLC submits that the costs are NOT proportionate to the aim of ensuring the effective participation of members of groups in the decisions that affect them. This concern continues beyond determinations of native title, and remains a significant burden for RNTBCs.

**Question 30.** Should the *Native Title Act* be amended to clarify whether:
(a) the claim group can define the scope of the authority of the applicant?
(b) the applicant can act by majority?

**CYLC**: We submit that the applicant should be able to act by majority, and that the claim group should be able to define the scope of the authority of the applicant.

**JOINDER**

**Question 31.** Do the party provisions of the *Native Title Act*—in particular the joinder provision s 84(5) and the dismissal provisions s 84(8) and (9)—impose barriers in relation to access to justice? Who is affected and in what ways?

**CYLC**: CYLC has had experience of significant delays and expense incurred because of the behaviour of parties to native title claims, often in circumstances where it is clear that the party's interests will not be negatively affected by a determination because their interests are protected at law. The involvement of the Federal Court in management of claims in recent times has significantly improved timeframes for responses by non-Indigenous parties, with the Court assisting to address concerns identified by those parties, but potential problems remain. Indigenous parties seem to be increasing in number in Cape York matters. It may be difficult for NTRBs to seek to remove Indigenous parties, particularly as there may be a perceived conflict, and it is usually a last resort. CYLC suggests that the Court could be more proactive in that regard.

**Question 32.** How might late joinder of parties constitute a barrier to access to justice?
Who is affected, and in what ways?

**CYLC**: Late joinder of parties can delay the finalisation of claims.

**Question 33.** What principles should guide whether a person may be joined as a party when proceedings are well advanced?

**CYLC**: CYLC submits that joinder should only be allowed in exceptional circumstances when proceedings are well advanced.

**Question 34.** In what circumstances should any party other than the applicant for a determination of native title and the Crown:
(a) be involved in proceedings?
(b) play a limited role in proceedings?

**CYLC**:CYLC submits that in most instances, the Crown should be the sole party to an application for determination of native title. Determinations are subject to the valid laws of Queensland, and the State ensures that determinations record other interests in existence. It is usual for determinations to provide that those other interests prevail over the native title rights and interests. In the past, some respondent parties, including local councils, have used the requirement for their consent to a determination of native title to insist on agreements or provisions that arguably reduce the ability of the native title holders to exercise their native title rights and interests.

**Question 35.** What, if any, other changes to the party provisions of the *Native Title Act* should be made?

**CYLC**: CYLC does not have any other suggestions at this time.

Yours faithfully,
**Cape York Land Council**

Peter Callaghan
Chief Executive Officer