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16 May 2014

The Executive Director
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001

By email: nativetitle@alrc.gov.au

Dear Sir

Re: Submission on Issues Paper 45 - Inquiry into native title

In response to the Issues Paper published as a result of the Australian Law Reform Commission's ("ALRC") Inquiry into native title, the following submission is made on behalf of the North Queensland Land Council Native Title Representative Body Aboriginal Corporation ("NQLC").

As way of background, the NQLC is the Native Title Representative Body for the Cairns area in North Queensland and has had the conduct of a significant number of native title determinations made by consent since the enactment of the *Native Title Act 1993 (Cth)*("NTA"). The NQLC employs experts including native title lawyers and anthropologists and is a repository of considerable information relating to Aboriginal people, including native title holders, in North Queensland.

Representatives from the ALRC visited Cairns and consulted with the NQLC before the Issues Paper was published and that consultation is valued as is the chance to respond to the findings of the ALRC Inquiry into native title.

As requested, comments on the questions posed in the Issues Paper are provided hereunder.

Question 1 is concerned with the matters that have provided guidance for the ALRC Inquiry which includes the Preamble and Objects of the NTA and 5 guiding principles. The NQLC agrees that these are important elements to have informed the Inquiry but, in addition, the Inquiry should have informed itself by speaking to a very wide group of interest holders including as many traditional owners and native title holders throughout Australia as

possible. The NQLC is not certain if consultation of this type occurred but for the ALRC to be fully informed this is considered necessary.

Question 2 advises that the ALRC is interested in understanding trends in the native title system and asks what are the general changes and trends affecting native title over the last five years and how are they relevant to recognition and scope of native title and to authorisation and joinder provisions in the NTA?

One of the trends that is relevant over the past 5 years is the Federal Court's streamlining processes to bring about resolution of native title applications far more quickly than has been the case in the former 15 years. This has meant that the applications have to be fully researched before being lodged in the Federal Court and that representative bodies have needed to be very focussed in setting their priorities for research and allocation of appropriate funding to progress the claims in the timeframes set by the Federal Court. The States need to establish a highly cooperative approach with the representative bodies as it is very clear that the Federal Court will not now tolerate claims taking 10-15 years to resolve as has been the case with many claims lodged soon after the commencement of the NTA. Some of the Elders regrettably have not survived to see their determination of native title made by the Federal Court because of the extended length of time it has taken to achieve resolution in the native title process.

The Court's tightening up the timeframes is particularly significant in future act matters where it may not be possible to protect native title and to secure the right to negotiate when a future act mining notice is received affecting an unclaimed area because anthropological evidence may not then be available. The requirements of the NTA are that a claim would have to be lodged within three months of the notification date and registered by one month after that.

What was previously a very hard to achieve situation has, by virtue of the higher standards imposed by the courts become an impossible task.

The idea that within three months a claim could be researched, hold an authorisation meeting, lodge a claim and then one month later pass the registration test is fanciful in the extreme.

Additionally, the Federal Court is treating native title applications in the same way as other Federal court cases which doesn't take into account the beneficial objects of the NTA or the customary concerns of the native title holders. It would be desirable for the court to recognise that its compressed time frames work against some native title groups particularly where the groups have been fractured and widely separated by removal policies as is the case in Queensland.

There is also an increasing trend over the past 5 years for certifications of either claims or ILUA's to be challenged.

The NQLC considers that the NTA should be amended to remove the right to challenge certifications on the basis that there is little point in having a certification function if it can

be challenged. It is relevant that the certification function isn't the end of the native title process simply a step in the process.

Another trend noted in the federal process is that persons who don't possess an interest or possess an unlawful interest are being permitted to join as respondent parties. This should not occur as the determinations cannot reflect interests that either don't exist or are unlawful.

Unfortunately the case law has developed to give a very wide interpretation to interest so that persons asserting public access rights or having no proprietary or equitable rights are admitted as parties.

There is a fundamental illogicality in the notion that a person's interest may be affected by a determination of native title. In many recent determinations in the NQLC area the court is at pains to say they are not granting something to the native title holders but merely recognising what exists and has always existed.

If native title has always existed how does a determination affect an interest? It cannot – to the extent that an interest is affected it has from the very inception of that interest been affected by the native title which has always been there and which in fact pre-dates the creation of any other interest.

Ultimately under the European system all rights in land (other than native title) come from some form of grant, licence, permission given by the Crown.

Most determinations now recite that the native title is subject to the rights of the holders of (and there follows a list which will include for example pastoral leases under the *Land Act*, licences under the *Mining Act* etc). Included in the list will be those entities that have rights arising under statute i.e. Telstra.

Enormous amounts of money (public purse money) could be saved if the right to become a respondent on the basis of having a right that may be affected by a determination was done away with and replaced by a process whereby persons could file a form with the court showing their proprietary interest in order that the type of legislation under which the right was granted is set out so that it is not omitted from the list

Recently, although there has been a cooperative relationship between the State of Queensland and NQLC, it has been noted that the State appears to have changed some of its processes to require connection to be proven lot by lot in relation to town lots. In addition, the State of Queensland has taken a different position to that of some other States and the Commonwealth in relation to the affect on native title of particular historical tenures, which it is entitled to do, but which may indicate a shift in attitude and the operation of a less cooperative relationship. It also appears there may have been a shift in policy as to the level of connection that is required for a consent determination with significant anthropology and affidavits having been required to be obtained to satisfy the State's requirements very close to the determination date in some instances. If there is indeed a shift in attitude or

deterioration in the cooperative relationship of the past it may signify that there will be a level of resistance to any attempt to modify connection requirements in the NTA.

Other trends and changes over the past five years have been brought about by decisions in Federal Court cases involving joinder applications[1] concerning the level of evidence required and the affect of delay in seeking joinder to native title applications. These have had, and will continue to have, significant relevance for authorisation and the importance of a thorough authorisation process and for Indigenous persons wishing to join applications and representative bodies and service providers who may be asked for legal assistance in that regard. Where Indigenous persons do not take swift action to join applications as respondent parties, as appropriate, their reasonable prospects of success may be low and that may impact on the level of support that can be provided.

Question 3 seeks to know what variations there are in the operation of the NTA across Australia and what the consequences are for connection requirements, authorisation, and joinder.

It is clear that the NTA is applied differently across Australia. For example, it has been observed to date that some States and Territories have chosen to run test cases, some have entered into State wide Indigenous Land Use Agreements ("ILUA"), another has entered into a claim wide agreement to settle all native title claims in the State. Another State has sought full extinguishment pursuant to settlements involving compensation while another employs a policy of dealing with all compensation issues by ILUA as a prerequisite to a consent determination. Queensland has not settled compensation issues when consent determinations have been made and the bringing of compensation applications may be the direction the native title process takes in Queensland in the future.

The approach to the extinguishing effect of Military Orders has also differed. The issue of whether the Orders made under the *National Security Act* allowing the military to take over and use land during the war years differs widely. In NSW the government agreed such orders did not create extinguishment whereas the Queensland government pushed the issue to a hearing and when they lost, sought leave to appeal.[2]

There is a National Native Title Council ("NNTC") which is nationwide and is a body comprised of 11 NTRBs/Service Providers. The NQLC is a member and through this body has developed an awareness of different policies/strategies that operate between the States and Territories. NQLC is aware that the NNTC has made submission in response to the Issues Paper and those submissions are fully supported.

There is also currently a national representative bodies' CEO forum which deals with issues at the CEO level which are of concern to representative bodies. Differences between the attitudes of States and Territories and differences in the approach of State and Territory legislation relating to, mining, cultural heritage and Aboriginal land claims that impact on native title are often items for discussion and a more consistent approach to the application

[1] *Brooks on behalf of the Mamu People v State of Queensland (No 2) [2013] FCA 557*

[2] Congoo on behalf of the Bar Barrum People #4 v Qld 2014 FCAFC 9 21 February 2014 (special leave application pending before the High Court]

of the NTA and between State and Territory legislation using the best models drawn from the appropriate jurisdictions and applying them nationally would be desirable, if not readily achievable .

As well, a representative body alliance in Queensland exists but it is not nationwide. This means that it is somewhat difficult to know how other representative bodies and service providers in different States and Territories conduct business at the operational level in respect of implementing the provisions of the NTA. There are likely to be differences relating to certification, representation, general and specific policy and levels of Commonwealth funding.

Question 4 provides that the ALRC is interested in learning from comparative jurisdictions and requests information on models from other jurisdictions that may be relevant and from Australian law and policy relating to connection, authorisation and joinder.

The NQLC considers it is appropriate for the ALRC to inform itself about comparative jurisdictions but as the law has developed differently in Australia to that of other jurisdictions which have entered into treaties or treated native title as a usufruct, sui generis or as a customary right there may be limited guidance to be gained.

As far as authorisation and joinder requirements within Australia are concerned, it is doubtful that there would be significant variation between Australian States and Territories because the Federal Court and the High Court have established the legal principles that apply. In litigated native title cases there also would be little variation in relation to connection but there may be some differences between States and Territories in relation to their connection requirements for consent determinations and the ALRC is directed to the connection guidelines or the credible evidence policies of the States and Territories where they are published.

It is noted that some States and Territories have not published connection guidelines and the observation is made that it may be difficult to determine the exact requirements of their connection policy. Some States do not require connection reports as such. There is no requirement in the NTA to develop connection guidelines and NQLC supports the position that the onus of proof be reversed.

Question 5 invites comment on "whether s223 of the NTA adequately reflects how Aboriginal and Torres Strait Islander people understand connection to land and waters. If not, how is it inadequate? ".

In response, the difficulty with the s223 definition in the NTA is that it is a legal definition and it is doubtful that any Aboriginal or Torres Strait Islander person would consider or think of connection within legal confines. The s223 definition refers to "land or waters" and the NTA treats these areas of "country" separately. This separation doesn't occur in relation to the way in which connection to country is viewed or understood by Aboriginal or Torres Strait Islander people. Country is holistic and county extends as far as the stories attached to country apply.

Aboriginal and Torres Strait Islander people understand connection to be gained through affiliation with ancestors dating back to a time before sovereignty but this is not necessarily the totality of how connection is viewed because connection is also a social experience and involves interaction with a living group of people associated with a particular area who, in the native title context, identify as native title holders for that area. The possession and speaking of language unique to the group of people, a personal totem linked to a story place, the presence of Elders who are respected decision makers may also constitute elements of connection for Aboriginal and Torres Strait Islander people.

In addition, it must be remembered that there is large diversity in Aboriginal society even within North Queensland and the understanding between groups of what is meant by connection may not be identical. Subtle differences of understanding are very difficult, if not impossible, to capture in a s223 legal definition.

The s223 definition could be improved if it was more consistent with the way in which Aboriginal and Torres Strait Islander people view connection and if it was less restrictive. In addition where s223 (1) of the NTA provides that "the rights and interests are possessed under the traditional laws acknowledged, **and** the traditional customs observed" the highlighted word "and" should be changed to "or".

Question 6 seeks comment on whether there should be a rebuttable presumption of continuity introduced into the NTA and if so how it should be formulated and what, if any, should be the basic fact or facts proven before the presumption will operate? In addition, it is also asked what the presumed fact or facts should be and how the presumption could be rebutted.

The NQLC's preferred position is that there should be a presumption of continuity which is not rebuttable. In the event that the NTA is amended to include a rebuttable presumption of continuity, the NQLC would support it as being a situation that is preferable to the current situation but one that still has the potential to delay the native title process and that would need to be addressed in the NTA. The basic facts that would need to be proven before the presumption of continuity could operate, would be identification of the claim group and the claim area. If the State was to show, through anthropological research, either of these facts as presented to be incorrect, and it is in this area that there is potential for delay, the presumption of continuity would not be invoked. Once the claim group and the claim area is accepted as being correct the presumption should be that native title exists and has been continuously maintained from before European settlement.

The Issues Paper poses **Question 7** as "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".

If a presumption of continuity was introduced which would reverse the onus of proof this would mean that the States and Territories would have to commission detailed anthropological reports in both contested and consent determinations if they sought to rebut the presumption. Perhaps detailed external legal advice would also be required by the

States and Territories. This would be a significant change to existing State and Territory processes for resolving native title but may constitute a change for the better and speed up the native title process if, in a significant number of cases, the States and Territories did not seek to rebut the presumption.

If the States or Territories were to take the approach of seeking to rebut the presumption in every application, strict timelines would need to be placed on the rebuttal process in the NTA as, if not, this may serve to lengthen the native title process rather than shorten it.

If the onus of proof is reversed, the representative bodies would not be completely relieved from seeking anthropological and genealogical reports because these would still be required to ensure the correctness of the claim group, the claim area and that there is prima facie evidence sufficient to satisfy the registration test. It is likely, however, that reports commissioned by the representative bodies would not be required to be as detailed and this would shorten the research time and lower the expense for the applicant.

The appropriate balance of proof for rebuttal of the presumption would also need to be considered. The civil law "balance of probabilities" may be satisfactory.

Question 8 asks what, if any, procedure should there be for dealing with the operation of a presumption of continuity where there are overlapping native title claims and
Question 9 enquires whether there are circumstances where a presumption of continuity should not operate and if so, what those circumstances are.

Contrary to what the Issues Paper says, the NQLC does not agree that more than one claim over the same area could gain the benefit of the presumption of continuity unless the claims become combined. The Registrar of the National Native Title Tribunal ("NNTT") adds to the complexity in this area by sometimes registering two claims over the same area and it is noted that claims over the same area are never lodged by NQLC but arise as a result of private solicitors taking that approach.

Where there are competing claims, the balance of probabilities test could be applied and, if on anthropological evidence or by agreement, one claim is shown or agreed to be slightly better than the other, the claim that is slightly better would be the recipient of the presumption of continuity. As the States and Territories may possibly be adverse to the interests of both claims they should not be responsible for weighing up the merits of each competing claim and an independent decision maker would be required.

In cases where anthropologists cannot determine which claim is slightly better, the two groups would need to meet in an attempt to resolve the issue of which group is able to avail itself of the presumption of continuity. Independent mediation may be required and could be made compulsory under the NTA. If that issue can't be resolved then both matters would need to be set down for hearing. It is in those circumstances that the presumption of continuity should not be permitted to operate.

Question 10 asks about problems associated with the need to establish that native title rights and interests are possessed under traditional laws acknowledged and traditional

customs observed by the relevant Aboriginal and Torres Strait Islander people. For example, it is raised as to whether there are problems associated with the need to demonstrate the existence of a normative society and the extent to which evolution and adaption of traditional laws and customs can occur.

In spite of "traditional laws and customs"[3] and "normative society"[4] having received significant judicial interpretation the views of Professor Simon Young[5] and Dr David Martin[6] are very persuasive. Professor Young argues that traditional Aboriginal law and custom has been repressed and discouraged for much of Australia's European history which has meant the native title groups most affected by non Indigenous settlement are unlikely to be able to prove their native title. This being the case, it appears to the NQLC that an unjust and onerous burden has been placed on Aboriginal people who are being required by Australian law to prove something that British and Australian policies and laws have contributed towards making a very difficult task. In Queensland these removal processes were particularly pernicious and children were taken from their parents, placed into dormitories and not allowed contact with family members or to speak language. This means that children who were prevented from knowing their families are now, as adults, being required by the native title process to prove the identity of their families.

Dr Martin considers that the requirement to prove traditionality is at odds with the contemporary lives of Aboriginal people [7] which the NQLC considers a valid comment.

Obviously, there have been significant problems encountered by NQLC clients whose ancestors were subjected to massacres and removal policies, in proving the existence of a normative system and the possession of traditional laws and customs which have changed over time, when former generations of European settlement have contrived to repress those laws and customs. For the reasons outlined by Professor Young and Dr Martin, the native title process would be improved if the need to prove these concepts was disposed of entirely.

Question 11 seeks views on whether there should be a definition of 'traditional' or 'traditional laws and customs' in s223 of the NTA and if so what should the definition should contain.

NQLC does not support the inclusion of a definition of 'traditional' and 'traditional laws and customs' in the NTA. These concepts have received significant judicial interpretation[8] over many years and if a statutory definition was included in the NTA several more years of

[3] *Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422 [46]*
[4] *Ibid [47] and [86]*
[5] Simon Young, *Trouble with tradition; Native Title and Cultural Change,* Federation Press, 2008 361-362; Issues Paper p 41
[6] David Martin, "Alternative Constructions of Indigenous identities in Australia's Native Title Act" in Toni Bauman and Lydia Glick (eds), *The Limits of Change; Mabo and Native Title 20 years On* (AIATSIS 2012) 356; Issues Paper p 42
[7] Ibid, 356; Issues Paper 42
[8] *Western Australia v Ward 92000) 99 FCR 316, Mabo v Queensland (No 2) (1992) 175 CLR 1; Commonwealth v Yamirr (1999) 168 ALR 426*

judicial interpretation may take place. This would not be constructive and would have the potential to delay the resolution of native title applications.

Question 12 invites comment as to "whether the (NTA) should be amended to state that native title rights and interests can include rights and interests of a commercial nature". Our position is yes. However we would go further and say that to avoid arguments the NTA should also provide that the right to trade in resources taken from the land or the waters should be included.

The NQLC would be in favour of an amendment of this nature and makes the observation that there is often early anthropological and historical evidence of the exchange of sea and land based natural resources or products made from natural resources between native title groups. For example, in respect of land based natural resources, a native title group may have had an abundance of natural resources at one time of year which was traded or exchanged between an adjoining group and in return the adjoining group shared its natural resources where an abundance occurred at a different time of year. Travelling over considerable distances to obtain the particular natural resource was often involved. This activity aligns to general commercial mindset dating back to ancient times where if one didn't have a product at hand, couldn't secure it nearby or in some cases herd it in more plentiful times and maintain the herd for leaner times, one was prepared to travel great distances over established trade routes to obtain that product.

Some Aboriginal groups are noted to have had significant walking tracks over which they travelled great distances. By following a bush calendar they knew the time of year when such resources were available in adjoining country and when to make travel. This exchange of natural resources between adjoining Aboriginal groups should, arguably, be viewed as commercial native title activity in spite of *Akiba*[9] holding that such rights and interests are not related to land or waters and, by logical extension, these can't be native title rights and interests because it has been held that a native title right and interest must relate to land or waters[10].

There is well established evidence of ochre being traded from South Australia to other localities and in Western Australia ochre was traded up and down the west coast. In addition, there were well established international trade routes between the Yolngu people and the Macassar people of Indonesia particularly in respect of beche de mer (sea cucumber) that have existed for many generations.[11]

Before settlement, commercial native title activity was conducted in a moneyless society, and over time the activity has acceptably changed and modified to include sea and land based native title resources and products produced from natural resources being taken in a different manner and being sold for money. Such changes over time should not affect the continuation of the commercial native title rights and interests that existed at sovereignty.[12] If the changes continue to sustain the same native title rights and interests that existed at

[9] *Akiba on behalf of the Torres Strait Regional Seas Clan Group v Commonwealth (2013) 300 ALR 1, [6]*
[10] *Lardil Peoples v Queesnland [2004] FCA 298, [173]*
[11] *Yamirr v NT [2001] HCA Trans 17*
[12] *Yorta Yorta v State of Victoria (2002) 214 CLR 422, [83]*

sovereignty that should be sufficient to demonstrate the adaption or modification is acceptable.

Comment is invited in relation to **Question 13** which asks "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".

Provided the point raised above in relation to *Akiba* is addressed, the NQLC does not envisage that difficulties will necessarily be raised in its representative body area although this may not be the case in other areas of Australia and a case by case approach will no doubt apply. In the NQLC representative body area there is often sufficient evidence to show that activities of a commercial nature were taking place as part of traditional law and custom at the time of, and by implication, before settlement. The boundaries of Aboriginal tribes in mainland North Queensland adjoin with neighbouring tribal boundaries and there were often relationships through marriage and ceremony that were maintained. The transfer of the ownership of goods and products made from natural resources (e.g. bark blankets) from one to another took place in return for other goods or products which, if not for the point decided in *Akiba* as discussed above, in a general understanding of trade, exchange and commerce, should be sufficient to demonstrate that commercial native title rights and interests were being exercised.

Response is sought in **Question 14** as to "what a definition should contain if the NTA were to define native title rights and interests of a commercial nature".

NQLC is of the view that there needs to be a very broad definition of commercial rights and interests in the NTA and one that overturns *Ward* in respect of its finding that traditional knowledge isn't a right that relates to land or waters [13] and, accordingly, under logical extension, the use of traditional knowledge can't be a native title right and interest of a commercial nature. Also, the definition should overturn *Akiba* on the point referred to above that reciprocal rights relating to use and access of resources are not related to land or waters[14]. The definition in the NTA should, in addition, provide that native title commercial rights and interests can include a commercial right to take and use minerals wholly owned by the Crown.[15]

The NQLC submits that the bundle of rights doctrine which provides for fragmentation of native title which is discussed in the Issues Paper as being a possible barrier[16] should not be permitted to exclude the inclusion of commercial native title rights and interests in the NTA.

Question 15 relates to "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".

[13] *Western Australia v Ward (2002) 213 CLR 1, [22]*
[14] *Akiba on behalf of the Torres Strait Regional Seas Clan Group v Commonwealth (2013) 500 ALR 1, [6]*
[15] *Ibid [6]*
[16] Issues Paper para 135-136

The suggestion in the above paragraph relating to minerals is drawn from another jurisdiction, namely NSW. The *Aboriginal Land Rights Act 1989 (NSW)* ("ALRA") pursuant to s45 provides that mineral resources and any transfer of land to an Aboriginal Land Council under s36 of that Act includes the transfer of mineral resources contained in those lands. Under the ALRA it is not necessary to prove connection and if a presumption of the maintenance of connection is inserted into the NTA the insertion of the taking and use of mineral resources as a commercial native title right and interest would be a valuable inclusion.

There is also a model that can be drawn from Northern Territory land rights legislation which provides for an inquisitorial forum and whilst that would require wholesale re-writing of the NTA it would result in a much more equitable approach than the advisorial form currently embodied in the NTA . We urge for that approach to be considered by the ALRC.

In the Issues Paper it is expressly stated "The potential for fragmentation of native title rights and partial extinguishment may impact on the capacity for commercial uses of native title rights and interests. Questions related to whether a native title right is extinguished or merely regulated are relevant to the scope of native title and therefore to issues of the potential for commercial native title rights and interests". [17]

The reason such fragmentation occurs, directly relates to the content of native title being held to be a bundle of rights. The bundle of rights concept of property derives in mainstream Anglo-American legal philosophy[18] and one may well question what place it has in native title, particularly because native title is viewed by Aboriginal and Torres Strait Islander people as being holistic in nature.

Examples from other jurisdictions illustrate that the bundle of rights doctrine is not used and that there are many different ways of looking at the content of native title. For example, the content of native title in relation to American Indians in a very early case was found to be a usufruct[19] and in Canada it has been found to be sui generis and that the Federal government has a fiduciary duty to preserve it.[20] In *Delgamuukw v British Columbia*[21] Lamer CJ considered that native title was not a mere bundle of rights but a fundamental connection with the land upon which other rights were dependent. Other jurisdictions regard native title to be a customary right[22].

Guidance from other jurisdictions should be had if, as stated in the Issues Paper, the level of fragmentation brought about by the bundle of rights doctrine, may potentially restrict the inclusion of important commercial native title rights and interests in the NTA. The bundle of rights doctrine should be disregarded in relation to commercial rights and interests.

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[17] Ibid 135-136
[18] "The Bundle of Rights – Picture of Property" 43, UCLA L. Rev 711
[19] *Johnson v McIntosh 21 US.543,573, 1823*
[20] *R v Guerin (1984) 2 SCR 335*
[21] *[1997] 3 SCR 1010, 1080-1; 153 DLR (4th) 193, 240-1*
[22] *Te Weehi v Regional Fisheries Office (1986) 1 NZLR 682*

On the point of regulation as opposed to prohibition the High Court in *Akiba* held the relevant legislation to be regulatory rather than prohibitory which does leave some room for commercial native title rights and interests.[23] The High Court will be likely to be followed in other cases where the legislation is similar. However, as a safeguard, it could be written into the NTA that wherever possible the interpretation of statutes that may be either regulatory/prohibitory are to be construed as being regulatory.

Similarly there should be a statutory presumption that favours non extinguishment wherever possible.[24]

Question 16 asks "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?" **Question 17** asks whether the NTA should be amended to provide that physical connection or continued or recent use isn't required.

The NQLC supports an amendment to s223 of the NTA along the lines of that proposed in the Native *Title Amendment (Reform) Bill 2011* ("the 2011 Bill") which provided as follows:
"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".

The reason for seeking the amendment is that there appears to be confusion in regards to some of the native title case law, between the cases themselves, and also between some of the cases and what is currently provided in s62 (since 1997) and in s190B (since 1998) of the NTA. Pursuant to s62 the Form 1 may contain details of any traditional physical connection with any of the land or waters covered by the application and any details of where the traditional physical connection has been prevented. The registration test pursuant to s190B(7) of the NTA requires the Registrar to be satisfied that at least one member of the claim group currently has or previously had a traditional connection with any part of the land or waters covered by the application.

It is difficult to reconcile these provisions in the NTA with some of the findings of the Federal Court and the High Court. In *Ward (HC)* [25] which affirmed *Ward (FFC)* [26] the High Court upheld the finding in the Full Federal Court that pursuant to s223 of the NTA it was not necessary to show evidence of recent use, occupation or physical presence for there to be a connection with land or waters, however, the High Court also noted that the way in which the land or waters are used may be evidence of the kind of connection that exists.[27]

The Full Federal Court in *De Rose Hill v South Australia (No 2*) found that it was possible for native title to be proven without a physical connection but the length of time where use and

[23] Aki*ba on behalf of the Torres Strait Regional Seas Clan Group v Commonwealth (2013) 500 ALR 1*
[24] In Congoo the Federal Court decision [now subject to an application for special leave to appeal, the majority favoured non-extinguishment whilst the minority said that there was extinguishment.
[25] *Western Australia v Ward (2002) 213 CLR 1, 65 [65]*
[26] *Western Australia v Ward (2000) 99 FCR 316*
[27] *Western Australia v Ward (2002) 213 CLR 1, 65 [65]*

occupation did not occur may have a bearing on whether traditional laws and customs had been observed. [28]

Recent cases in the Federal Court seem to have added a level of uncertainty as to whether physical use or occupation is necessary to prove traditional connection because it has been held that physical rights and continued recent use may be relevant to proving particular native title rights and interests.[29] On the basis of this, the trial judge in *Akiba* [30]as affirmed by the Full Federal Court [31] was able to find that connection hadn't been proven to the waters in the extremities of the claim area because there wasn't evidence of physical use.

The clarity in this area could be greatly improved with an amendment to the NTA, as suggested above, along the lines of what was proposed in the 2011 Bill.

Question 18 requests to know the problems, if any, that are associated with the need for native title claimants to establish continuity of acknowledgement and observance of traditional laws and customs that has been "substantially uninterrupted" since sovereignty.

As mentioned in Question 10 above, European settlement which occurred pursuant to British and Australian law inhibited the observance of traditional laws and customs in areas of closer settlement. Land grants to soldiers and former convicts, *The Sale of Wastelands Act 1847*, the requirement to fence and build attaching to some Crown leases[32] and the Aboriginal mission and removal systems as well as massacres played a part in making it very difficult for traditional laws and customs to be "substantially uninterrupted" in the areas most affected by European settlement. This has been observed in Federal Court decisions[33] and it is a significant issue in North Queensland where many Aboriginal people were killed in massacres or were moved from their traditional country to Yarrabah, Palm Island, Mona Mona, Hull River, Bridgeman Reserve, Fort Cooper/Nebo and other locations. Where persons managed to return to country or were not removed it is easier to demonstrate that traditional laws and customs are "substantially uninterrupted".[34]

Whether there should be a definition in the NTA of "substantial interruption" is posed in **Question 19.**

It is noted that s223 of the NTA does not mention "substantial interruption" or "substantially uninterrupted" but native title cases have developed these concepts and, with due respect, in a most unfortunate manner because the reasons for loss of continuity are not able to be considered by the Courts[35].

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[28] *De Rose v South Australia (No 2) 92005) 145 FCR 290 [62]*

[29] *Commonwealth v Akiba (2012) 204 FCR 260 [114] and Banjima People v Western Australia (No 2) [2013] FCA 868 [386]*

[30] *Akiba v Queensland (No 3) (2010) 204 FCR 1 [664] [684*]

[31] *Commonwealth v Akiba (2012) 204 FCA 260 [114]*

[32] Butt, P *Land Law* 5th ed, 2006, Lawbook Co, Pyrmont [2301-2308]

[33] *Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422*

[34] *Northern Territory v Alyawarr, Kayteye, Warumungu, Wakaya Native Title Claim Group (2005) 145 FCR 442 [25*]

[35] *Bodney v Bennell (2008) 167 FCR 83 [96]; Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422 [89]*

If the NTA contained a non exhaustive list of matters that the Courts should disregard in determining whether native title rights and interests have continued "substantially uninterrupted" this may be an improvement. The list could include removal of whole communities on to missions and the inclusion that physical presence is not required for native title rights and interests to be "substantially uninterrupted". Clearly it would be difficult for the NTA to include an exhaustive list of historical events as there could be a variety of circumstances not yet known, 20 years after the commencement of the NTA. The list may need to be one which could be added to by providing that further historical events could be gazetted or passed by regulation. Alternatively, the list could provide that those events listed are examples but not the only matters that can be considered by the courts.

The matters of concern in **Question 20** are whether the NTA should be amended and if so, how, to address difficulties in establishing the recognition of native title rights and interests where there has been substantial interruption to, or change in continuity of, acknowledgment and observance of traditional laws and customs.

The way in which the Courts have considered that the laws and customs must have continued substantially uninterrupted generation by generation has imposed a very high level of proof on applicants.[36]

The NTA should be modified to include that some level of interruption is permissible particularly if it has occurred pursuant to the list of historical events discussed in Question 19 above. This is important because it is not certain that the approach in *Banjima*[37] will be followed by other compositions of the Federal Court. *Banjima* related to the Pilbara region where the Court found that the pastoral industry in the 1880s had impacted greatly but the *Banjima* had managed to adapt [38] and, accordingly, the traditional laws and customs continued substantially uninterrupted between the 1880s and 2013 when the case was decided by the Federal Court.

Question 21 asks whether courts should be empowered to disregard substantial interruption or change in continuity of acknowledgement and observance of traditional laws and customs where it is in the interests of justice to do so. If so, it is questioned whether such power should be limited to certain circumstances and whether the term "in the interests of justice" should be defined.

The NQLC is of the view that if a power to disregard substantial interruption was given to the Federal Court in respect of historical events as discussed in Questions 19 and 20 above, this would be an improvement.

If the term "in the interests of justice" was to be defined in the NTA this may attract many years of judicial interpretation. By not including a definition of this term, the courts would have a greater range for finding that it is in the interests of justice to disregard substantial interruption.

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[36] *Risk v Northern Territory (2007) 240 ALR 74; Bodney v Bennell (2008) 167 FCR 84 [73]*
[37] *Banjima People v Western Australia (No 2) [2013] FCA 868 [398] [399]*
[38] *Ibid [398] [399]*

With respect to **Question 22** which enquires if there are any other changes that need to be made to the law and legal frameworks relating to connection requirements for the recognition and scope of native title, it needs to be made clear, if the onus of proof is shifted because a presumption of continuity is introduced, that the anthropology required to be produced by the applicant only needs to relate to the claim group description, the claim area and sufficient prima facie evidence to satisfy the registration test.

Questions 23 and 24 relate to the authorisation process and enquire whether there are any problems and whether the NTA should be amended to allow the claim group, when authorising an application, to adopt a decision-making process of their choice.

There has been judicial determination on what is required by the authorisation process.[39] The NTA does not require that decisions are unanimous and that all members of a claim group participate in the authorisation process provided that they have been given the opportunity to do so.[40]

The case law on authorisation at this stage is reasonably clear and can be accessed by claimants, potential claimants and respondents; however, one issue does remain as to whether a native title claim group could have ever possessed a traditional process for doing such things as authorising a native title application. In traditional laws and customs, that function was not required nor was it known but if the issue is viewed in a wider sense, a process for making decisions about land and waters was no doubt possessed as part of traditional laws and customs. Representative bodies throughout Australia may have differing views on this issue and that may be reflected in the advice provided to applicants.

NQLC considers it would be appropriate for the NTA to be amended to allow a claim group, when authorising an application, to adopt the decision making process of its choice. In practice, this may occur now, but it would add clarity to all concerned if the NTA provided for this.

In **Question 25** it is asked what changes, if any, could be made to assist Aboriginal and Torres Strait Islander groups to identify their claim group membership and the boundaries of the land claimed.

The NQLC provides a high level of anthropological, genealogical and historical assistance to applicants and, as the claims will be required by the Federal Court to be resolved quickly, the research will be required to be substantially complete before the claims are lodged. Accordingly, this is not likely to be a significant issue in the claims process where an applicant isn't responding to a future act.

In the future act process, where no research may have been conducted at the time the future act is notified, this is a significant issue, particularly in relation to the claim boundary, if once the claim is lodged, anthropological research shows that the claim

[39] *Risk v Northern Territory (2006) FCA 404 [63]-[78]; Butchella People v Queensland [2006] FCA 1063*

[40] *Lawson on behalf of the 'Pooncarie' Barandji (Paakantyi) People v Minister for Land and Water Conservation (NSW) [2002] FCAFC 517 [25*]

boundary should have been larger. The claim group description is able to be amended but the claim boundary cannot be amended to include additional land and waters although it can be amended to exclude land and waters if anthropological research shows this is required.

The NQLC does not see a workable solution to this problem because making an exception for applications lodged in response to future acts by providing that the claim area could be amended to include additional land and waters would trigger additional notification by the Registrar of the National Native Title Tribunal, additional expense in having to notify twice and it may cause delay to the application and possibly to the progression of the future act.

Question 26 requests suggested changes that could be made to assist claim groups as they resolve disputes regarding claim group membership and the boundaries of the land claimed.

As representative bodies have at their disposal s203BK of the NTA whereby they can seek assistance from the National Native Title Tribunal in performing their dispute resolution functions, there appears a sufficient number of options provided already. To date, options that are available have been under utilised. The NQLC is the first to utilise s203BK of the NTA using it on two occasions to date and has found it to be very useful

Question 27 concerns s66B of the NTA and asks whether it should be changed. NQLC is of the view that an amendment is required to make it clear that further authorisation is not required when a member of the applicant has died and is not proposed to be replaced. In this case a notice could be filed with the court.

As to the appointment of a corporation to avoid the need for authorisation when a member of the applicant has died, some groups may have established a corporation well before a native title application is made while others have not and even if a corporation is established it may not contain full claim group membership. For these reasons, the requirement for a corporation to be able to act as applicant is not supported.

Question 28 enquires about s84D of the NTA and whether it is operating as intended. S84D of the NTA was enacted so that the Courts may continue to hear applications where there are defects in authorisation. Section 84D is also being used by members of claim groups to challenge the authorisation of the applicant.

This may not have been the intention of the section but there may be limited situations whereby the claim groups need to challenge the authorisation of the applicant such as where the applicant acts outside of the scope of resolutions made by the claim group. [41] If the drafting of s84D of the NTA is open to the interpretation of a wider use than intended, and it fills a gap that was lacking, it should not be amended to restrict the wider use.

Question 29 raises the expense of compliance with the authorisation process and enquires whether the costs are proportionate to the aim of ensuring the effective participation of native title claimants in the decisions that affect them.

[41] *KK (deceased) v Western Australia (2013) FCA 1234*

NQLC agrees that authorisation meetings are very expensive but as native title determinations are made in rem and authorisation is extremely important and involves Indigenous community decision making which can be detailed and complex, the costs of the authorisation process are justified.

There have been conflicting decisions as to whether the claim group can define the scope of the authority of the applicant[42] and whether the applicant can act by majority.[43]
Question 30 asks whether the NTA should be amended to clarify these issues.

As the law isn't clear in this area an amendment in the NTA is warranted to clarify that the claim group can define the scope of the authority of the applicant and that the applicant may make decisions by majority when the terms of the authorisation are silent on the issue.

Questions 31, 32 and 33 are concerned with joinder. In particular, one area is of concern which is the issue of late joinder.

The prejudice to the parties, the reasons for the delay, the significance and strength of the evidence of the interest held, the fact that the determinations are in rem are factors of importance. The NQLC is of the view that only in exceptional circumstances should late joinder be permitted because over the years taken by the native title process there would have been public notifications and sufficient opportunities for joinder at the appropriate time.

We also refer to our earlier point that there is in reality no need for some parties to be joined at all. It has also been our experience that some use joinder abusively not to protect an existing position but by way of none too subtle blackmail – refusing to agree to settle a claim until the native title parties agree to an up-grade in the form of tenure they hold.

Questions 34 and 35 deal with the circumstances when, a party other than the applicant and the Crown should be involved in the proceedings or should only be permitted to play a limited role in the proceedings.

NQLC is of the view that if a person's interests are not affected they should not be permitted to join as a respondent party to an application. In addition, where the interests of the party are able to be represented by the Crown only the Crown should be permitted to join. In spite of the finding in *Akiba*,[44] local councils which in some (but not all) of their capacities represent the Crown may be an exception to this because their interests may be slightly, or in some cases substantially, different to those of the Crown. Different Ministers of the Crown should not be permitted to join as parties as the Crown is indivisible.

[42] *Ibid; Weribone on behalf of the Mandandandanji People v Queensland (2011) FCA 1169 [15]*
[43] *Anderson on behalf of the Wulli Wulli People v Queensland (2011) 197 FCR 404 [62]; Tigan v Western Australia (2010) 188 FCR 533*
[44] *Akiba on behalf of the Torres Strait Regional Seas Claim people v Queensland (No 1) (2006) FCA 1102 [29]*

It is highly desirable that the number of respondent parties be reduced because a large number of respondent parties have the potential to delay the resolution of applications although this is not universally an agreed point.[45]

The NQLC thanks the ALRC for the opportunity to make this submission on the Issues Paper and if further information is required please contact my staff member Ms Jennifer Jude, Senior Legal Officer on 07 4042 7023.

Yours faithfully

Ian Kuch
Chief Executive Officer
North Queensland Land Council

[45] Justice John Dowsett. 'Beyond Mabo: Understanding Native Title Litigation through the decisions of the Federal Court' (2009) 10 *Federal Judicial Scholarship* as cited in Issues Paper 79