This submission is provided by the Central Desert Native Title Services **(Central Desert)** in response to the *"Review of the Native Title Act 1993: Issues Paper 45"* published in March 2014 by the Australian Law Reform Commission **(ALRC)**.

1. About Central Desert

1.1 Central Desert is the recognised native title service provider for the Central Desert native title representative body region of Western Australia **(Central Desert region)** under section 203FE of the *Native Title Act 1993* (Cth) **(NTA)**. Central Desert was incorporated on 16 April 2007 and commenced operations on 1 July 2007. The Central Desert region was formerly serviced by the native title unit of Ngaanyatjarra Council.

1.2 The Central Desert region is vast, covering 830,935 square kilometres of regional and remote Western Australia. This region is nearly one third of Western Australia.

1.3 Central Desert's vision is that the *"Indigenous Peoples of the Central Desert use their traditional lands to achieve their social, cultural and economic aspirations"*. To achieve that vision, Central Desert's mission is:

To secure for the Indigenous Peoples of the Central Desert:

- *The highest level of native title rights and interests; or*
- *Alternative forms of title to land in those areas where native title cannot be recognised or where such titles are in the social, economic and cultural interests;*
- *Protection of cultural heritage; and*
- *Best practice agreements, which advance their social, economic and cultural interests; and*

To build for the Indigenous Peoples of the Central Desert, native title/land title holding entities that are sustainable, effective and culturally appropriate and that empower them to use their traditional lands to achieve their social, cultural and economic aspirations.

2. The Scope of the Inquiry

2.1 Central Desert is supportive of the scope of the Inquiry and the Guiding Principles that underpin the Inquiry. However, Central Desert is of the view that the characterisation of the NTA as "beneficial legislation" should be the core principle on which any inquiry into the operation of the NTA is conducted. It is acknowledged that the Guiding Principles could be seen to 'drop out of' the characterisation of the NTA as beneficial legislation.

2.2 Of the Guiding Principles set out in the Issues Paper, close attention should be paid to Principle 3, not just in the reform of the legislation, but in the investigative phase reform process itself. While it is common knowledge that the resolution of native title claims takes an inordinate amount of time, thus negatively impacting on native title claim groups, attention should also be paid to the amount of time spent undertaking inquiries on legislative reform.

2.3 As the Issues Paper correctly identifies, there have been a number of reviews into the native title system, as well as a number of proposed amendments (and associated consultation processes) to the NTA. Participation by native title parties in multiple and sometimes overlapping reviews or consultations is time consuming and costly and often without any positive outcome. It creates a feeling of cynicism and pessimism within the native title sphere and a reluctance to participate in 'another review'.

2.4 The views expressed in these submissions are those based on Central Desert's experience and particular regional context. It is accepted and understood that regional variations may produce different opinions and approaches on the matters the subject of the Inquiry. Central Desert has approached the Inquiry from its own unique regional context and bearing in mind that the NTA is beneficial legislation.

3. Trends in the Native Title System

3.1 The movement of native title claim mediation from the National Native Title Tribunal **(NNTT)** to case management in the Federal Court has impacted on the progress of native title claims.

3.2 Historically, native title claims would spend years in NNTT mediation with little or no substantive progress as non-native title interests occupied a great deal of time in the mediation process. Since the transfer of mediation to the Federal Court, the timelines, at least in the West Australian context, have become tighter and more regimented.

3.3 The Federal Court has been firm in imposing strict timeframes, and is increasingly moving native title determination applications into case management and programming matters for trial. Although a litigated outcome is a costly and stressful exercise for native title parties, it nonetheless has meant that native title claims are no longer stuck in a circle of never-ending negotiations with respondent parties. In Western Australia, it has often been the case that negotiations and mediations have slowed to almost a grinding halt as pastoralists attempt to have matters that may not necessarily be within the scope of section 86A of the NTA dealt with in the mediation. Programming matters for trial has also meant that the State of Western Australia, who are the primary respondent to native title claims,

has been required to become more articulate in its opposition to native title claims and more pro-active in progressing claims such as with the early provision of tenure information.

3.4 In Central Desert's experience, the State of Western Australia consistently maintains a position that the Applicant has not made out its case, without being particular about why, or producing evidence to support their assertion. Central Desert notes with interest the recent decision in *Graham on behalf of the Ngadju People v State of Western Australia*[1] **(Ngadju)** where Marshall ACJ reiterated the responsibility of the State to act as a model litigant.

3.5 The parties, in particular, the State as a model litigant, should attempt to resolve that matter as quickly as possible in the interests of a speedy resolution of the matter leading to a final determination without undue delay[2].

3.6 Although there are some positives to matters being programmed for trial, the cost and administrative burden on native title parties and their representatives remains a large concern. This is particularly so in light of the Federal Government's *"Indigenous Advancement Strategy"* which was accompanied by approximately $500million of funding cuts.

4. Connection and recognition concepts in native title law

Presumption of Continuity

4.1 The native title claims assisted by Central Desert are located in the central and western desert region of Western Australia and because of this particular regional context, these native title claims do not on the whole have issues with establishing continuity of connection.

4.2 Native title claim groups in the Central Desert region have had relatively little post-sovereignty disruption compared to other regions. As a result, little documentary evidence exists about these groups and evidence regarding a group's occupation, use and enjoyment of an area, and the traditional law basis, is taken from current senior claimants who have living memories of their grandparents and great grandparents. The State of Western Australia has generally accepted continuity of connection in the western desert. Central Desert's experience in this regard is that there effectively exists an unstated 'presumption of continuity' for native title claims in the region.

4.3 A formal 'presumption of continuity' would be of greatest benefit to Central Desert's clients for areas on the edges of the desert. It would also obviously

[1] [2014] FCA 516.
[2] *Ibid* at paragraph 120.

benefit native title claimants whose claims encompass regional centres, where there has been greater post sovereignty impact. A 'presumption of continuity' would be beneficial where there are gaps in the documentary evidence but where reasonable evidence of contemporary connection could be extrapolated to continuity of connection since sovereignty, for example where connection of grandparents and great grandparents to a particular area are within claimants living memories.

4.4 For Central Desert, the question in the first instance is whether a native title claim group is a society, or more specifically, a 'Western Desert' society. Any 'presumption of continuity' will still require the proper identification of the group, or society, who claim connection to, and rights and interests in, a particular area of land and waters, and on whose behalf a native title determination application is made.

4.5 Central Desert supports the introduction of a rebuttable 'presumption of continuity'. Such a presumption has a role in both consent determinations and contested matters. As the process currently stands, native title parties have the burden of providing the relevant information and Central Desert prepares all information to a standard that could be used in litigation. The State however provides little in the way of evidence to support its position and does not provide tenure information at the start of a native title claim mediation, which effectively means that native title parties are preparing a case over areas in which native title may clearly have been extinguished. A presumption of continuity means that the State would have to actively rebut the presumption, including by way of early provision of tenure information.

4.6 Central Desert's notes the *Ngadju* decision in which the State was subjected to a very strict evidentiary burden in relation to a number of "special leases" which they claimed extinguished native title. Marshall ACJ was not inclined to find that native title was extinguished over areas subject to special leases where the documentation was incomplete, or, insufficient, and refused to accept the States submissions that it was a matter of "administrative oversight" and the Court should apply a "presumption of regularity".

4.7 The Issues Paper identifies some potential effects of a presumption of continuity, including the possibility that overlapping claims may be able to take the benefit of such a presumption. Although Central Desert does not represent any claims that overlap each other, Central Desert is of the view that overlapping claims should be able to take the benefit of a presumption of continuity. Where the *prima facie* evidence demonstrates that the relevant area is an area where there are shared native title rights and interests, then the presumption is able to benefit both parties. Where there is a dispute between different native title groups over an area, the relevant Government party will no doubt exercise its right to rebut the presumption and where there is no agreement between the native title claimants, the

matter will be resolved in the usual course of action, that is by the courts in a litigated outcome.

The Meaning of Traditional and "substantial interruption"

4.8 The concept of "traditional" and "traditional law and customs" is not problematic in the central and western desert region and what constitutes "traditional" is well understood. However, Central Desert acknowledges that outside of the desert regions and particularly in metropolitan areas, the concepts of "traditional" and "traditional law and customs" as currently defined by case law, creates significant hurdles for particular native title claim groups to prove native title.

4.9 Central Desert considers that there must be recognition that laws and customs will adapt and evolve over time, and, that the level of adaptation allowed by a groups traditional law and custom may differ amongst groups. Central Desert is therefore of the view that there is danger associated with prescribing what is "traditional" and that any codified prescription of "traditional" may have unintended consequences, which may not be clear at a drafting stage.

4.10 Central Desert also reiterates its earlier point that the NTA is beneficial legislation. It is ironic that those groups who experience "substantial interruption" to their traditional law and custom and connection to country, are the most disadvantaged by the NTA and native title case law. Groups who have experienced "substantial interruption" are generally also the most socially, economically and culturally disadvantaged. The fact that they are unable to obtain recognition or derive benefits from the NTA goes against the Act being beneficial. The "special fund", i.e. the Indigenous Land Corporation, established to assist those who have been dispossessed of their traditional lands to acquire land has arguably failed in its mission to connect people with their traditional lands and address the many issues faced by dispossessed peoples.

4.11 The idea that "native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived"[3] fails to acknowledge the history of dispossession and that such "abandonment" was not a choice. It also fails to acknowledge that even "revived" language, culture and custom must, by its nature, be based on tradition and traditional law and custom i.e. a revived culture is not one that is simply invented, its roots are still traditional. To this end, Central Desert in principle supports the recognition of native title for groups who have experienced substantial interruption, but who have nonetheless revived their acknowledgment and observance of traditional customs.

[3] *Mabo v Queensland [No. 2] 1992 175 CLR 1* per Brennan J at 60.

Native Title Rights and Interests of a Commercial Nature

4.12 Central Desert notes the decision of the *High Court in Akiba v Commonwealth* [2013] HCA 33, and supports the position that native title rights and interests to use land and waters includes rights to take and use the resources of the land and waters for purposes which may be commercial in nature.

4.13 An amendment to the NTA to state that native title rights and interests can include rights and interests of commercial nature may be of some utility, but practically it is not likely to be of any real benefit or assistance to native title parties. As identified in the issues paper, inserting references to "commercial nature" begs questions as to what is the definition of commercial nature or commercial native title rights and interests.

4.14 Central Desert's opinion is that the NTA must be taken to recognise the existence of broadly stated rights which may be exercised in particular ways or for particular purposes without listing every way in which, or every activity by which, a right may be exercised, for example, the right to take and use resources without specifying how that right is to be, or may be, exercised.

4.15 A number of native title claims assisted by Central Desert have asserted native title rights to take and use resources. The State of Western Australia have not been prepared to agree to such a right and have attempted to limit the right to take resources for 'non-commercial' or 'domestic purposes only'. As such, this particular limited issue has been the subject of one hearing to date where it remained the only outstanding matter of disagreement between the parties. Central Desert is currently awaiting the outcomes of the hearing. Central Desert notes that it has provided the ALRC with a copy of its closing submissions in this matter.

Physical occupation, continued or recent use

4.16 Central Desert supports amendments to the NTA that confirm that connection with land and waters does not require physical occupation or recent use, noting however what denotes "recent" may be the subject of some debate and will require careful consideration when drafting such a clause.

Authorisation

4.17 Central Desert supports the strong authorisation process set out in the NTA and concurs with Justice French's (as he then was) observation that

authorisation is "fundamental to the legitimacy of native title determination applications"[4].

4.18 Claims in the Central Desert region use decision-making processes based on traditional law and culture to authorise native title applications.

4.19 It is Central Desert's view that the introduction of section 84D(4) of the NTA can provide beneficial outcomes by providing the Federal Court with the ability to determine a native title determination application even where there is a defect in authorisation. This ensures that there is no repeat of the situation in *Wongatha*[5], where despite a lengthy and costly trial, the native title claim was dismissed for failing to strictly comply with the requirements of section 61 of the NTA, which meant that the Federal Court had no jurisdiction to hear the matter.

Section 66B

4.20 Central Desert supports any amendments to the NTA which would allow a native title party to notify the court that a member of the Applicant has passed away but which do not require the native title party to reauthorise the Applicant. Specifically, provisions should be considered which makes it clear that an Applicant can continue to act in the event of the death of a member of the Applicant, until the native title claim group has the opportunity to reauthorise the Applicant.

4.21 Re-authorisation of the Applicant in the event of a member's death can be a difficult exercise and places a significant administrative and financial burden on a native title claim group and its representatives, particularly as more often than not, the Applicant is comprised of senior members of the group. Where such a provision becomes uncertain is when the member of the Applicant is so numerically low compared to the original number of members, that there are genuine concerns about whether that single person is authorised as the Applicant.

4.22 Similarly, a simple process to remove a person who no longer wishes to remain a member of the Applicant would be beneficial. Removing an applicant by consent should be distinguished from replacing that person (also by consent) as a new member of the Applicant should require authorisation by the native title claim group of that newly constituted Applicant.

[4] *Strickland vs Native Title Registrar (1999) 168 ALR 242* at 57.
[5] *Harrington – Smith on behalf of the Wongatha people v The State of Western Australia (No 9)* [2007] FCA 31.

Joinder

4.23 It is Central Desert's experience that the current joinder provisions may create barriers to justice where joinders result in significant costs and delays where parties make an application for joinder at a very late stage. In a particular instance involving a native title claim group assisted by Central Desert (Group A), a native title claim group with a recently lodged unregistered overlapping claim applied to be joined as a party (Group B) during the trail of Group A's claim, and after on country evidence had already been provided by Group A.

4.24 Group B were joined as a party to the proceedings. Pursuant to section 67(1) of the NTA, the Court ordered that their claim be dealt with in the same proceedings as Group A's claim, despite the fact that Group A's matter was significantly progressed. Group B were initially unrepresented and unfunded resulting in non-compliance with court directions. This caused significant delays and costs in the progress of Group A's trial and progress towards determination. Additionally, Group A suffered a great deal of angst as the process dragged on, and a number of senior people on their claim passed away.

4.25 This is not to say that Central Desert opposes the joinder provisions. It is in fact a necessary part of ensuring justice, however, it must be recognized that it has a real impact on native title claim groups. The question is how best to balance the interests of justice so that neither group is unduly prejudiced.

4.26 In this particular instance, the setting of springing orders to have the claim dismissed in the face of repeated non-compliance with court orders would have ensured that Group B properly participated in the court ordered mediation process and abided by court orders generally, and, that Group A's trial progressed with minimal interruption, cost and impact on the native title claim group.

5. Other comments

Section 47C

5.1 Central Desert refers to the *Native Title Amendment (Reform) Bill* 2011 introduced to Parliament by Senator Rachel Seiwart and in particular the provisions relating to the introduction of a section 47C of the NTA in which provides a mechanism by which prior extinguishment may be disregarded.

5.2 Central Desert fully supports the proposed section 47C provisions. As the situation currently stands, many native title claimants are unable to have their native title rights recognised due to the prior extinguishment of native

title rights and interests by the vesting of a state or territory national park or nature reserve. In circumstances where that extinguishment occurred before the enactment of the *Racial Discrimination Act 1975* (Cth) that extinguishment may not be compensable.

5.3 In the Central Desert region, there are approximately seven large nature reserves/national parks over which native title is purportedly extinguished because of the vesting of a national park or nature reserve. In the Martu determination[6], Justice French (as he then was) stated, referring to Karlyamili (formerly Rudall River) National Park:

> There is a limitation on the recognition which can be granted under the Native Title Act. The relationship of the people to their country in those areas is not changed by the limits that the Act or the common law place on recognition. If it is their country under their traditional law and custom it remains so under their law and custom whatever the Act or the common law say about recognition.

5.4 Central Desert requests that the ALRC take the opportunity to revisit the proposed section 47C as part of this Inquiry and makes a recommendation that section 47C be enacted as soon as possible.

Future Act Provisions – Good Faith Negotiations

5.5 In January 2013, Central Desert made submissions to the Senate Legal and Constitutional Affairs Committee and the Housing Standing Committee on Aboriginal and Torres Strait Islander Affairs regarding *the Native Title Amendment Bill 2012*, which proposed amendments to the "good faith" provisions of the NTA in response to the decision of the Full Federal Court in *FMG Pilbara Pty Ltd v Cox*[7].

5.6 Although Central Desert raised a number of issues with some of the specific amendments being proposed, Central Desert nonetheless supports amendments to the "good faith" provisions of the NTA which would require parties to actively participate in genuine good faith negotiations. Central Desert also supports the proposal that the 6 month timeframe for the conduct of 'good faith' negotiations be extended and that a party making an application for an arbitral determination be required, as part of that application, to demonstrate that they have negotiated in good faith.

5.7 Central Desert requests that the ALRC take the opportunity to revisit the proposed amendments to the 'good faith' requirements as part of this Inquiry.

[6] *James on behalf of the Martu People v State of Western Australia* [2002] FCA 1208 at paragraph 12.
[7] [2009] FCAFC 49.