Queensland Government

Hon Andrew Cripps MP
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Professor Rosalind Croucher
President
Australian Law Reform Commission
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Dear Professor Croucher

Thank you for your letter of 16 April 2014 to the Director-General, Department of Natural Resources and Mines about the Australian Law Reform Commission's Inquiry into certain aspects of the *Native Title Act 1993* (Cth).

The Queensland Government is pleased to make the enclosed submission in response to the Review of the Native Title Act 1993 Issues Paper 45 released in March 2014.

If you have any questions about the Submission, Ms Judith Jensen, Executive Director, Aboriginal and Torres Strait Islander Land Services, Department of Natural Resources and Mines will be pleased to assist you and can be contacted on telephone (07) 3330 6230.

Yours sincerely

Andrew Cripps MP
Minister for Natural Resources and Mines

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Queensland Government Submission

Australian Law Reform Commission Issues Paper 45
Review of Native Title Act 1993
May 2014

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Introduction

The Queensland Government welcomes the opportunity to make a submission in relation to the Australian Law Reform Commission's (ALRC) Inquiry into the *Native Title Act 1993* (Cth) (NTA) . The submission is made in response to the *Review of the Native Title Act 1993 Issues Paper 45* (Issues Paper). The submission has been compiled by the Department of Natural Resources and Mines on behalf of the Queensland Government. The Department of Natural Resources and Mines is responsible for the State's native title policy and legislation and also for the resolution of native title claims lodged in the Federal Court of Australia in Queensland.

The Queensland Government is committed to growing a four pillar economy focusing on the pillars of agriculture, resources, tourism and construction. Addressing native title is one of the ways to secure the security and certainty of rights and interests granted for land and other natural resources which is essential to underpin a strong economy.

The Queensland Government strongly believes there are opportunities to engage with the Australian Government on reforms to the native title processes under the NTA. This is with the aim to streamline processes to deliver significantly reduced transaction costs, provide for more timely decisions and to remove uncertainty for the benefit of all parties involved in the native title processes.

Whilst the resolution of native title claims is a very resource intensive process incurring considerable costs over years, it delivers significant benefits for Indigenous Queenslanders as well as for the wider community by providing certainty of traditional connections and rights and certainty for future development respectively.

It is acknowledged that the ALRC's terms of reference are limited to a more narrow review of the NTA regarding the aspects of connection, authorisation and joinder. In particular, the specific questions which are the most relevant to the State of Queensland are those relating to possible changes to connection requirements relating to the recognition and scope of native title rights and interests. The submission therefore focuses on responding to the relevant questions about connection requirements under the NTA. In that regard, the general position of Queensland is that the focus of the Inquiry is tending to lead to a substantive revision of the connection requirements under the NTA that is neither necessary nor supported given the high rate of resolution of native title claims in Queensland over the last five years notwithstanding the existing connection requirements.

Native title environment in Queensland

From a national perspective, native title is arguably at its most complex in Queensland. This is due to the Aboriginal and Torres Strait Islander histories and cultures, together with the favourable topographies and climates supporting such communities, intersecting with the history and development of Australia's most decentralised State.

Queensland sees its position sitting between the States with relatively small populations and large areas of undeveloped land (Western Australia, South Australia and the Northern Territory) and the more populated and earlier developed States where native title has mostly been completely extinguished by industrial and agricultural development (New South Wales, Victoria and Tasmania).

The history of the settlement and development of the State of Queensland has meant that establishing the existence of native title and identifying extinguishment of native title can both be matters of considerable complexity. In the case of establishing connection, the historical removals of traditional owners from their lands is a significant complicating factor. In the matter of extinguishment of native title by tenure, Queensland's decentralised population and development has led to a situation where extinguishing and non-extinguishing tenures are interspersed to a large degree and which cover a multi-tiered history of tenures. Nevertheless, the State of Queensland's response to native title claims made under the NTA has been to seek outcomes by consent wherever possible. The result has been that, as at 1 May 2014, 100 determinations of native title have been achieved in Queensland. 90 determinations recorded the existence of native title and, of these, 87 determinations were made by consent.

In a national context, this means that Queensland has accounted for:

- 34% of all determinations in Australia;
- 40% of all determinations where native title has been recognised; and
- 39% of all consent determinations in Australia.

Detailed response to specific questions

Question 2 - What are the general changes and trends affecting native title over the last five years?

The trend in the resolution of native title claims in Queensland over the last five years has been one of a significant increase in the number and rate of claims being resolved, whilst at the same time maintaining the high level of those claims resolved by consent.

Three factors at least have played a role in this significant turn around in the resolution rate of claims.

Firstly, in 2008, the State convened a conference with native title representative bodies (NTRBs) to address the issue of connection. The quality of connection material being provided to the State up to that time was deficient as the material was not addressing what the State considered was relevant. What had been occurring was that the compilation of connection material had been predominantly an anthropological exercise.

The message the State endeavoured to communicate was that native title was first and foremost a legal question, and that the content of connection reports needed to reflect this. At the conference, the State provided to all NTRBs the set of legal principles that the State employed in determining whether or not it would recognise native title for the purposes of a consent determination. From that time, connection reports the State receives have continued to improve with reports now generally addressing the issues of connection within the legal context.

The second factor which has caused an increase in the rate of resolution of claims are the judicial precedents relating to "connection" since the Yorta Yorta case[1]. The general trend of Federal Court decisions on connection since that time has consistently been to use the "beneficial legislation" status of the NTA to enable the Courts to draw inferences in many aspects of the evidence of connection in favour of native title applicants.

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

These precedents have resulted in the evidentiary requirements for connection being less reliant on direct evidence and more on inferential reasoning to conclude that connection has been maintained. Respondent parties, especially the State and Territory governments, involved in the settlement of native title claims by consent, have been required to apply the same approach. This has meant that the evidentiary onus on native title applicants to prove connection has decreased and consequently the rate of consent determinations of native title has risen over the last five years.

The Federal Court's case management of native title matters from 2010 has been a further factor in the increased rate of resolution of native title claims. Case management by the Federal Court provides a more disciplined framework within which the parties to claims are required to be more accountable for the prosecution of matters.

The first factor above provided for an increase in the quality of connection material provided to the State in order to settle native title claims. The second factor reduced the evidentiary onus on native title parties in respect of connection. The third factor has ensured that all aspects of claims are dealt with in a professional and timely manner.

A more recent trend in Queensland sees an increase in the number of claims covering coastal areas of Queensland. These areas are relatively densely populated and include numerous urban areas. Recognising continuing connection over urban areas remains a very real issue.

Question 3 - What variations are there in the operation of the NTA across Australia?

The Issues Paper correctly recognises that different geographical and historical factors across the States and Territories of Australia give rise to native title applicants and respondents being faced with different issues in resolving native title claims. However, it is doubtful that legislative change could successfully address this issue as it would require legislation differentiating between the States and Territories. Such legislation would render and reduce what is now one national framework for native title to where native title law may be fractured as it evolved differently in each jurisdiction over time.

Question 6 - Should a rebuttable 'presumption of continuity' be introduced into the NTA?

There appears to be little basis for, and questionable utility in, making such a significant change to the concept of native title at this juncture in the history of the NTA.

A number of points can be made:

- It is assumed that the basis for the proposed reform is the "significant and ongoing stakeholder concern about barriers to the recognition of native title". There has always been an acknowledgement that native title would contain barriers for those Indigenous Australians most dispossessed by the European colonisation of Australia. The Preamble to the NTA specifically refers to the situation that many Aboriginal peoples will be unable to assert native title due to dispossession and that a special fund needs to be established to assist those people to acquire land.

- There has been a significant increase in the rate of resolution of native title claims over the last five years in Queensland and Australia as set out in Attachment 1. The difficult problems of proof that are inherent in the concept of native title have, on the evidence of the rates of resolution of claims, been adequately addressed by the jurisprudence and the attitudes and skills of the participating parties.

- Any significant change now to the underlying law of native title will bring about another wave of litigation, slowing down the rate of claim resolution and at an increased cost for all parties.

- If a presumption of continuity was to be adopted, there is a strong likelihood that without evidence of that continuity, further difficulties will arise for the native title claimants in establishing the membership of the group and the rights and interests held by that group. In other words, it is probably not possible to remove evidence of continuing connection without affecting the quality of the evidence required to demonstrate other indicia of the existence of native title.

- If a rebuttable presumption of continuity was adopted, then effectively, the costs of the native title claimants in proving continuing connection (which are presently borne by the Australian Government) would be transferred to the States and Territories. It is submitted that rather than these costs being borne by the States and Territories, that the Australian Government should instead assume responsibility for assessing connection.

- By eliminating the requirement for evidence of continuity of connection, the proof of native title would, more or less, be equivalent to proving a traditional owner status. This would not necessarily result in quicker outcomes as is evidenced by the experience in the Northern Territory in respect of the Commonwealth's land rights legislation.

Questions 10 to 22 - Meaning of 'traditional'; native title rights and interests of a commercial nature; physical occupation, continued or recent use; 'substantial interruption'; other changes

Given the current rate of resolution of native title claims and the associated outcomes being presently achieved, there is little basis for significant amendments to the NTA on those issues. Instead, amendments are most likely to result in increased litigation and a consequential decrease in the rate of claim resolution. In Queensland's view, the Federal Court has to date taken a broad and flexible approach in applying the definition of native title which arguably does not support the need for amendments to the NTA. For example, the Federal Court has confirmed that native title rights may comprise commercial rights.

In the jurisdictions of Queensland, Western Australia and the Northern Territory referred to in Attachment 1, native title is being recognised at an ever increasing pace to the point that in Queensland, at least, with 100 determinations achieved and less than 80 claims extant, it is possible to contemplate resolving a backlog of existing claims in another five years.

Native title claim and determination statistics as at 1 May 2014[2]

Claims

Qld	NT	WA	SA	NSW	Tas	Vic	ACT	Total	QLD/NT /WA
78	177	104	22	34	0	2	0	417	359

Determinations

Qld	NT	WA	SA	NSW	Tas	Vict	ACT	Total	QLD/NT /WA
100	71	44	21	47	0	7	0	289	215

As at 1 May 2014, of the 417 active claims across Australia brought under the *Native Title Act 1993* (Cth), 359 or 86% of those claims were in Queensland, the Northern Territory and Western Australia.

As at 1 May 2014, the total number of native title determinations across Australia was 289.

Queensland, the Northern Territory and Western Australia accounted for 215 or 74% of those determinations.

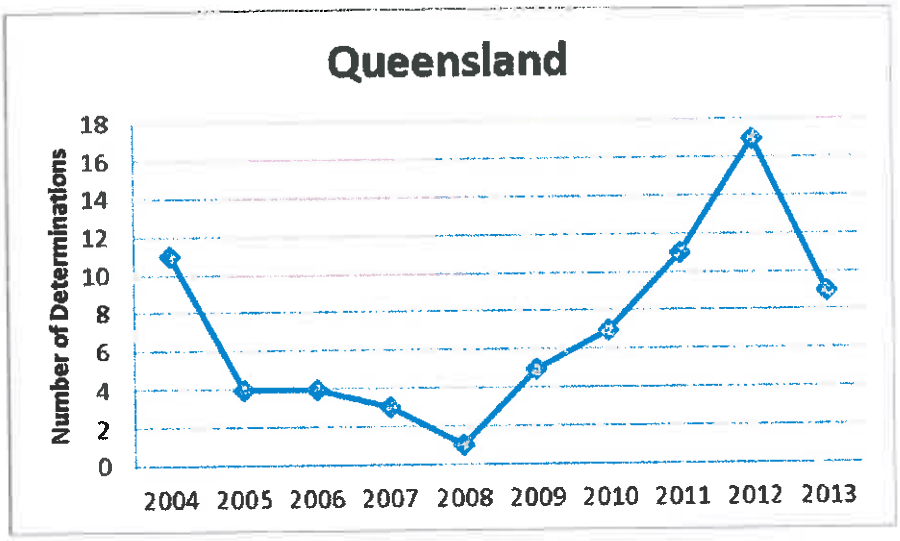
The large bulk of claims and determinations of native title are in these three jurisdictions.

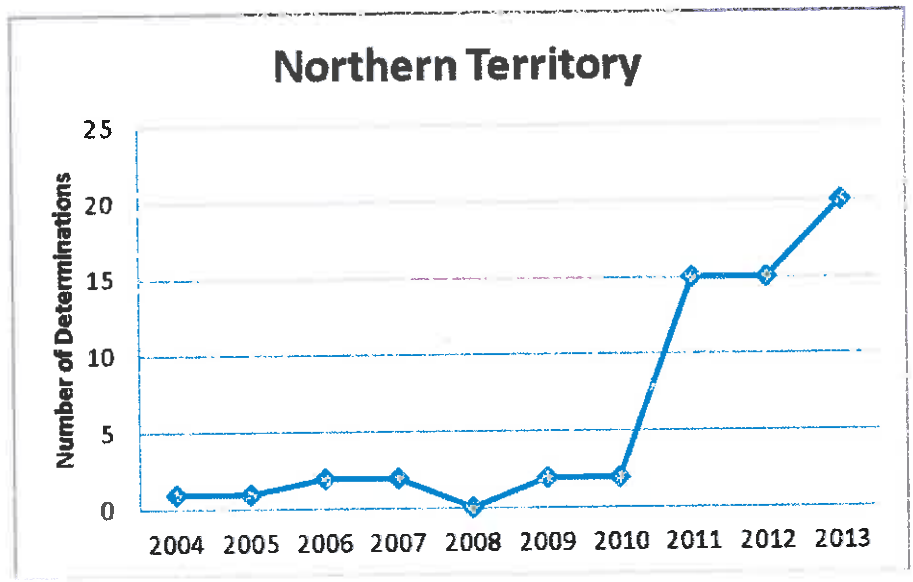
The rates of resolution of claims (by determination) within those jurisdictions between 2004 and 2013 are shown in the table and graphs below.

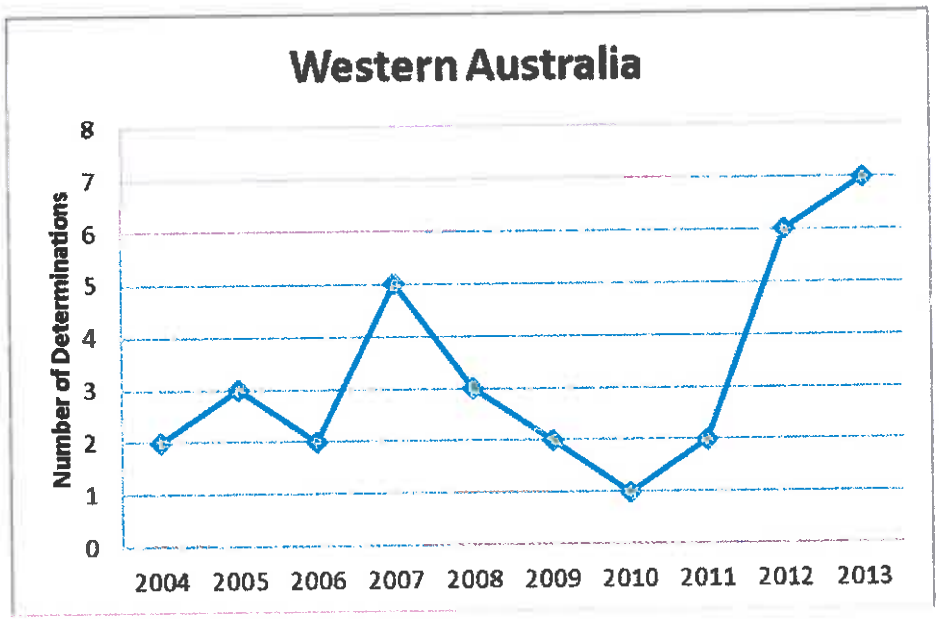
Number of Determinations by State (Qld, NT & WA) from 2004 to 2013[3]

	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	Total
Qld	11	4	4	3	1	5	7	11	17	9	**72**
NT	1	1	2	2	0	2	2	15	15	20	**60**
WA	2	3	2	5	3	2	1	2	6	7	**33**

[2] Collated from information sourced from http://www.nntt.gov.au/Pages/default.aspx
[3] Collated from information sourced from http://www.nntt.gov.au/Pages/default.aspx


Queensland
Number of Determinations
18
16
14
12
10
8
6
4
2
0
2004 2005 2006 2007 2008 2009 2010 2011 2012 2013


Northern Territory
Number of Determinations
25
20
15
10
5
0
2004 2005 2006 2007 2008 2009 2010 2011 2012 2013


Western Australia
Number of Determinations
8
7
6
5
4
3
2
1
0
2004 2005 2006 2007 2008 2009 2010 2011 2012 2013