The Northern Territory Government's Submission to the Australian Law Reform Commission's Issues Paper 45 "Review of the *Native Title Act 1993*"

May 2014

The Northern Territory welcomes the opportunity to make a submission in relation to the Australian Law Reform Commission's (ALRC) Inquiry in to the *Native Title Act 1993 (Cth)* (NTA) announced by the former Attorney-General for the Commonwealth the Hon Mark Dreyfus QC MP on 3 August 2013.

This submission is made on behalf of the Northern Territory Government to the ALRC's Review of the *Native Title Act 1993 Issues Paper* published by the ALRC in March 2014.

Responsibility for Native Title in the Northern Territory

The Attorney-General for the Northern Territory and Minister for Justice, the Hon John Elferink, is the Minister responsible for native title under the NTA.

In 2012, the Northern Territory Government established the Native Title and Aboriginal Land Working Group to:

- provide Government with strategic advice on Aboriginal land and native title matters (including strategic policy);
- provide instructions to the Solicitor for the Northern Territory for the progress of Aboriginal land and native title matters;
- ensure there is whole-of-government collaboration in relation to Aboriginal land and native title matters;
- determine priority for dealing with native title and Aboriginal land matters; and
- determine desired outcomes and whether policy exists to support the desired outcomes or whether policy needs to be developed.

The Native Title and Aboriginal Land Working Group's membership is comprised of the Chief Executives or senior officers from Government agencies including the Department of Lands, Planning and the Environment, the Department of Regional Development and Indigenous Advancement, the Department of Land Resource Management, the Department of Treasury and Finance, the Aboriginal Areas Protection Authority and the Department of the Attorney-General and Justice (the latter's role being primarily to clarify legal issues as they arise). The Native Title and Aboriginal Land Working Group is chaired by the Chief Executive of the Department of Lands, Planning and the Environment. The Group reports to, and seeks instructions from, the Attorney-General.

The Solicitor for the Northern Territory, (SFNT), Department of the Attorney-General and Justice provides the Northern Territory Government with whole-of-government legal services. The Aboriginal Land Division of the SFNT provides specialist legal services to the Northern Territory Government on Native Title and Aboriginal land and related matters. It provides advice, legal representation and assistance on issues concerning, or claims under, the NTA and the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)*. It also deals with land use agreements on both Aboriginal Land and in relation to native title, and general land tenure issues. The Division retains a core group of experienced solicitors to provide in-house legal advice and representation on whole of Government strategic or sensitive issues involving native title or Aboriginal Land matters. The Northern Territory does not employ anthropologists or historians as part of its administration of the NTA.

The Terms of Reference for the ALRC Inquiry relate to two specific areas:

- Connection requirements relating to the recognition and scope of native title rights and interests, including but not limited to whether there should be:
    - a presumption of continuity of acknowledgement and observance of traditional laws and customs and connection;
    - clarification of the meaning of "traditional" to allow for the evolution and adaptation of culture and recognition of "native title rights and interests;"
    - clarification that "native title rights and interests" can include rights and interests of a commercial nature;
    - confirmation that "connection with the land and waters" does not require physical occupation or continued recent empowerment use; and
    - empowerment of courts 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.
- Any barriers imposed by the Act's authorisation and joinder provisions to claimants', potential claimants' and respondents' access to justice.

In relation to these areas, the ALRC was requested to consider what, if any, changes could be made to improve the operation of Commonwealth native title laws and legal frameworks.

Overview of Northern Territory Government Submission

This submission responds to the issues most relevant to the Northern Territory Government's experience in the resolution of claims in the Northern Territory.

The Northern Territory supports initiatives that may enhance the operation of the NTA and, in particular, efficient and effective claim resolution. On the basis of the Northern Territory's experience with the NTA, the Northern Territory submits that legislative amendment to the NTA is not required to give effect to the tenor of the reform agenda proposed by the ALRC. In the Northern Territory context, many of the proposed reforms have been achieved through principles of negotiation agreed between the Territory, the native title party through the representative bodies, and stakeholders.

Snapshot of Native Title in the Northern Territory

Approximately 47 percent of land in the Northern Territory and approximately 85 percent of its coastline is land granted as Aboriginal communal freehold pursuant to the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)* (ALRA). Approximately 45 percent of land in the Northern Territory is pastoral lease land and a further five percent of land in the Territory comprises other areas subject to the NTA.

The Northern Territory submits that since the High Court's judgment in *Mabo No. 2* there is a substantial body of jurisprudence and continuing developments in native title law that have operated to aid consistency across jurisdictions with respect to the matters the subject of the ALRC's Inquiry.

The Northern Territory has played an instrumental role in the development of native title law following the High Court's decision in *Mabo No. 2* including *Fejo v Northern*

Territory[1], *Yarmirr v Northern Territory (Croker Island Sea Claim)*[2], *Hayes v Northern Territory (Alice Springs)*[3], *Wandarang, Alawa, Marra & Ngalakan Peoples v Northern Territory (St Vidgeon's Roper River)*[4], *Ward on behalf of the Miriuwung and Gajerrong Peoples v Western Australia*[5], *Hayes v Northern Territory*[6], *Griffiths v Northern Territory*[7], *Northern Territory v Alyawarr, Kaytetye, Wurumungu, Wakaya Native Title Claim Group*[8], *Risk v Northern Territory (Darwin Part A)*[9], *and King v Northern Territory ((Newcastle Waters)*[10].

Having litigated a number of test cases to clarify the operation of various provisions of the NTA, in more recent times, the Northern Territory's approach to the resolution of native title claims is, in general terms, a twofold approach focusing on the large number of pastoral estate claims and claims affecting remote and regional town areas. It has been the position of successive Northern Territory Governments to seek to achieve a negotiated resolution of native tittle claims. There have been no substantive litigated claims in the Northern Territory since 2007.[11]

The Northern Territory has the largest number of claims, followed by Western Australia and Queensland. It is anticipated that the number of claimant applications filed in the Northern Territory will rise in the coming years as new claims are made over pastoral lease areas in the Central Land Council region of the Northern Territory and new whole-of-pastoral-lease claims are filed over existing "pastoral polygon" claims in the Northern Land Council region.[12] The predicted extent of native title in the Northern Territory is shown at the table at Attachment "B." Accordingly, the impact of the NTA in the Northern Territory is substantial. The resolution of claims in turn creates a compensation liability on the Crown. It is expected that in the post-determination environment of the coming years, native title holders will increasingly seek compensation for the extinguishment or impairment of their native title rights and interests. One such claim is proceeding in the Northern Territory in relation to the Town of Timber Creek[13].

There are approximately 71 native title determinations recognising the existence of native title in the Northern Territory to date. Of these, 61 relate to pastoral land, 9 relate to land within a town and 1 to an area of land and offshore waters on the Arnhem Land coast (Croker Island). 60 of the 61 pastoral estate determinations

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[1] [1998] HCA 58
[2] [1998] FCA 1185
[3] [2000] FCA 671
[4] [2004] FCAFC 187
[5] [1998] FCA 1478
[6] [2000] FCA 671
[7] [2007] FCAFC 178
[8] [2005] FCAFC 135
[9] [2006] FCA 404
[10] [2007] FCA 1498
[11] *Griffiths v Northern Territory* [2007] FCAFC 178 and *King v Northern Territory* [2007] FCA 1498 (discussed below in this submission) were both determined in that year.
[12] The "pastoral polygon" claims are claims made in response to a section 29 NTA notice. The claims follow the boundaries of the proposed/granted mining tenure. These claims, which make up the bulk of claims filed in the Northern Land Council region, will never proceed to determination; that is, they are either discontinued or amended to the extent a new "whole of pastoral lease" claim overlaps with the underlying polygon and is the subject of a consent determination.
[13] *Griffiths v Northern Territory* (NTD18/2011)

were achieved by consent. 7 of the 9 town determinations were by consent. Consent determinations of native title affecting the pastoral estate are generally consistent in the Northern Land Council and Central Land Council region. The determinations of native title reached to date in the Northern Territory is shown in the table at Attachment "A" "Current Extent of Native Title." It is anticipated a further 18 consent determinations of pastoral estate claims will be achieved by the end of 2014/early 2015. Against this background, the Northern Territory submits that the existing provisions of the NTA provide a sound basis to deliver efficient and effective outcomes for all stakeholders.

The majority of claims filed in the Northern Territory relate to claims made over the pastoral estate in the Northern region of the Territory. As such, the Northern Territory (and the Court's) focus is on resolution of these claims. These claims have been identified by the Court (with the support of the parties) as the claims most suited to resolution by way of consent determination. The Northern Land Council is the representative body for claims in this region. The second focus of the Northern Territory's efforts in resolving claims relates to claims affecting regional and remote town areas. Currently, claims affecting the towns of Borroloola and Katherine in the northern region of the Northern Territory are subject to programming orders of the Federal Court. The Northern Territory Government's policy position in resolving town claims includes both a consent determination of native title and the negotiation of an ILUA which will release land for development and economic opportunity.

Processes Adopted by the Northern Territory to Streamline Resolution of Pastoral Estate Claims/Evidentiary Requirements of the Northern Territory

King v Northern Territory [2007] FCA 1498
In June 2007 His Honour Justice Moore delivered reasons for judgment in the above proceedings. Notwithstanding this claim was litigated, the orders made by the Court were made by consent. Those orders recognised non-exclusive native title rights and interests over pastoral leases within the Newcastle Waters area of the Northern Territory.[14] The proceedings concerned six native title claims (or parts thereof) over the whole of Newcastle Waters Station, nearly the whole of Murranji Station, stock routes within the external boundaries of the Stations, the proclaimed Town of Newcastle Waters, a garbage reserve within the external boundaries of Newcastle Waters stations and a commonage reserve adjacent to the Town of Newcastle Waters. The claimant group comprised 15 estate groups (or clans). None of the respondent parties took any issue with the composition of the claimant group.

The central issue in the proceedings was the nature and scope of native title rights and interests in land covered by subsisting and operating pastoral leases. In mediation, prior to the hearing, these proceedings were identified as a test case with the potential to establish a model of determination of native title rights and interests over pastoral lease land.

Generally speaking, the decision of His Honour Justice Moore, led to a determination of native title which was acceptable to the Northern Territory and which provided a

[14] The determination also recognised exclusive native title rights and interests in areas where section 47B of the NTA applied.

practical, workable resolution of co-existing native title rights and interests and pastoral lease rights. It was accepted by the representative body for claimants in the Northern region of the Northern Territory, the Northern Land Council, as a "template" or at least a starting point for the negotiated resolution of other native title claims over pastoral lease land.

Following the determination in the *Newcastle Waters matters*, at the Court callover of native title claims in January 2008, the Court indicated its desire to see all pastoral claims in the Northern region of the Northern Territory resolved more expeditiously on the basis of Justice Moore's determination. The Federal Court requested the Northern Territory to inform the Court whether, with respect to claims affecting pastoral leases in the Northern Territory, there was any particular feature of those claims which gives rise to a dispute as to:

(a) the existence of a native title group at settlement;
(b) whether the present native title claim group has continued to practice traditional laws and customs to the present time; and
(c) if not (that, is if there is no "special defence"), whether "Newcastle Waters type" native title rights and interests should not be recognised in a consent determination.

Subsequently, the Federal Court requested the Northern Territory respond to these identified issues in the context of claims affecting Towns in the Northern region of the Northern Territory.

With respect to the questions posited by the Federal Court and on the basis of expert anthropological advice obtained by the Northern Territory, the Northern Territory determined its position as follows:

- it is not possible for an anthropologist to refer either to the historical or ethnographic record to comment upon the continuity/discontinuity of traditional law and custom because the native title applications are "pro forma" documents which do not identify (except in a couple) the "tribal" identity or language group affiliations of the applicant group;
- if *Yorta Yorta* requires, for the recognition of native title, that an applicant group is a society which is united by its acknowledgement and observance of law and custom, which society has continued substantially uninterrupted since sovereignty, then determining the tribal identity/identities of claimants and/or their linguistic affiliations is a first step towards identifying which society is relevant to each claim;
- the applications appear to put forward claimant groups based upon a Western Desert model (that is, multiple pathways of connection to land), which is inappropriate outside of the Western Desert (which these claims are) and is not what the vast body of anthropological writing regards as was found at sovereignty;
- if the applications were amended to put forward claimants based upon a tribe/society model identified as a "proximate estate groups model" (as per *Alyawarr* (Murchison/Davenport) and *Newcastle Waters*), it would be possible to make the assessment of continuity having regard to anthropological writing – that is, by comparing like with like;

- such a comparison would still require identification of estate areas, genealogies, locations of sites, maps of travelling Dreamings and relevant previous claims;
- reference to claim materials and reports under the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)* will not provide assistance in assessment of the applications because:
    - claim books do not stray from the area under claim to become generally informative;
    - they do not show the extent of "tribal" territories; or
    - they do not yield general ethnographies of groups.
- *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)* materials can, however, indicate which anthropological model has been relied on under those claims.

On this basis, the Northern Territory subsequently informed the Court that:

1. there is no particular feature of any of the pastoral estate applications which gives rise to a dispute as to the existence of a native title claim group at settlement;
2. there is a particular feature of all of them which makes it impossible to ascertain whether the claim group is a group which has continued to practice their traditional laws and customs since settlement; and
3. subject to extinguishment by tenure or public works, there is no particular matter which gives rise to a dispute as to whether Newcastle Waters type native title rights should not be recognised.

Further, the Northern Territory informed the Court that, notwithstanding its position with respect to the second point, this feature is not a matter which rendered these applications unsuitable to proceed to a consent determination.

By October 2008, the Court had convened a case management conference, chaired by Their Honours Justice Mansfield and Reeves to identify the next steps toward streamlining the pastoral estate claims. The case management conference was attended by solicitors for the claimants, the Northern Territory and pastoralists, the head of the Northern Land Council's anthropological team and anthropologists employed/engaged by the Northern Land Council, and the Northern Territory's consultant anthropologist. Principally, there were three outcomes of the case management conference:

1. that the large number of pastoral estate claims in the Northern region would be grouped in to "group clusters" of 10 or so claims based on their geographic and anthropological commonalities;
2. the large number of existing pastoral estate "polygon claims" would be discontinued to allow for new whole-of pastoral lease claims to be determined; and
3. that the Northern Territory would develop its Minimum Connection Material Requirements for supporting connection reports for pastoral estate claims identified as suitable for resolution by way of consent determination.

By May 2009, the parties agreed the Northern Territory's Minimum Connection Material Requirements. A copy of those requirements is attached at Attachment C. As a general statement, approximately all of the pastoral matters determined in 2011 and 2012 on the "Current Extent of Native Title" table at Attachment A were determined in accordance with the Minimum Connection Material Requirements.

Further streamlining of the Northern Territory's requirement for connection evidence occurred in November 2010. Prior to this time, the Federal Court and the legal representatives for the Northern Territory, the Northern and Central Land Councils and for the major pastoral interests engaged co-operatively in endeavouring to find a way of resolving the pastoral estate claims without having to provide the similar evidence and use the same criteria that might be used if the matters were litigated. Three areas of concern in terms of evidence identified to determine or agree the continuing existence or otherwise of native title were:

(a) The provision of anthropological evidence going to proof of native title;
(b) The provision of evidence relating to public works; and
(c) The provision of evidence relating to pastoral improvements.

It had been agreed that the collection of this evidence is enormously resource intensive and had the potential to consume the scarce resources of all parties. The Northern Territory Government obtained approval for new parameters for the negotiated settlement of native title claims over pastoral lease land. Those new parameters included the following:

Anthropological Evidence
The Northern Territory accepting provision of an abbreviated anthropological report identifying:

- The relevant claim group and apical ancestors;
- A statement of the native title rights and interests sought, which would be consistent with the rights and interests held to exist in *King v Northern Territory of Australia* (2007) 162 FCR 89;
- A list of the primary estate groups including representative biographical material relating to a senior member of each group;
- A list of the secondary estate groups to the extent that they can be identified, or if they cannot be identified then a statement to the effect of "other neighbouring groups in accordance with traditional laws and customs"; and
- A map indicating known sites and/or dreaming tracks.

The report, provided by an anthropologist who provides their expert opinion (which includes a declaration pursuant to the *Federal Court Practice Note regarding Expert Witnesses* as to the completeness of enquiries she or he has made), contains the necessary information concerning:

- Who holds the native title rights and interests claimed;
- That the rights and interests are possessed under the traditional laws acknowledged, and traditional customs observed, by the native title holders;

- That the acknowledgement and observance has continued substantially uninterrupted since sovereignty by the native title holders and their ancestors; and
- That the native title holders, by those laws and customs, have a connection with the land and waters the subject of the particular pastoral lease.

Evidence relating to public works and certain land types
The work required to closely identify all public works was enormous. For example, accurately locating and defining the operating area of every single Government constructed bore within a pastoral lease and proving its construction by Government is a huge task and the resources required were disproportionate to the outcome. Accordingly, the Northern Territory applied a generic approach determining extinguishment of native title to areas the subject of an identified range of commonly occurring Government constructed infrastructure and a standard approach recognising non-exclusive native title rights in areas covered by stock routes and stock reserves.

Pastoral Improvements[15]
The Northern Territory also adopted a standard approach determining extinguishment of native title to areas the subject of pastoral improvements consistent with the determination of the Court in *King v Northern Territory of Australia* (2007) 162 FCR 89.

It was anticipated that the adoption of a pragmatic and cooperative approach would result in the speedier resolution of the outstanding pastoral claims. That has been the case. As a general statement, approximately all of the pastoral matters determined in 2013 and 2014 on the "Current Extent of Native Title" table at Attachment A were determined in accordance with the "short form" approach. In our view, the legal tests for connection have not presented a significant barrier to the recognition of native title, As noted above, the majority of claims in the Northern Territory are resolved by consent, not litigation. On this basis our view is that any proposal to amend the connection requirements of the NTA is likely to lead to delays and, probably, litigation.

As indicated above, the Northern Territory has worked co-operatively with representative bodies and stakeholders to identify ways in which native title claims could be resolved more efficiently and effectively. Notwithstanding the connection requirements of section 223 of the NTA, the Northern Territory has made significant progress in resolving claims. As noted above, since 2007, the Northern Territory has engaged with representative bodies and stakeholders to implement steps to further streamline processes to resolve pastoral estate claims including:

- not disputing the existence of native title holding group at sovereignty (subject to extinguishment);

[15] The HCA decision in *Western Australia v Brown* [2014] HCA 8 has overturned *De Rose (No.2)* regarding the extinguishing effect of pastoral leases on native title rights and interests. Both the Central and Northern Land Councils have indicated that consent determinations made by the Court prior to the decision in Brown will be the subject of an application to amend.

- progressing claims in "group clusters" based on geographical and anthropological commonalities;
- negotiating consent determinations of native title on pastoral leases based on a short-form or truncated supporting anthropological connection report;
- agreeing a template "statement of agreed facts" and "joint submissions" in support of all pastoral estate consent determinations;
- relying on a generic list of public works existing on pastoral lease areas;
- streamlining Governmental approval processes of consent determinations of all pastoral estate claims.

Other measures, including relying on current tenure only for determining extinguishment of native title on pastoral leases, have been put forward by the Northern Territory and are under consideration by stakeholders. The issue of the level of extraction of tenure data needs to be considered in a context where:

(a) the Northern Territory has not disputed the existence of traditional Aboriginal societies at sovereignty;
(b) in most cases Aboriginal communities in the Northern Territory have maintained a level of traditional activity;
(c) in most cases the rights to be recognised are non-exclusive and subject to the rights held under a pastoral lease;
(d) Northern Territory pastoral leases are subject, among other things, to a reservation in favour of the "Aboriginal inhabitants of the Northern Territory" which permits Aborigines who ordinarily reside on the land to enter and be on the land, to take and use waters, to take or kill wild animals for food or for ceremonial purposes; and
(e) having regard to the history of land development in the Northern Territory, it is unlikely that pastoral land will have previously been subject to historical tenure which extinguished all native title rights and interests.

The Northern Territory also submits that its negotiating principles for resolving claims affecting pastoral leases has led to expediting resolution of the pastoral estate claims. Whilst the group clustering of native title pastoral estate claims has presented difficulties for the Northern Land Council (for example, the resources required to progress 10 or more claims at the one time) and some issues for the Northern Territory government's administration of land in the Northern Territory (for example, the amendment of underlying polygon claims only to the extent the claim area falls outside the whole-of-pastoral lease claim to be determined)[16], in the main, the approach has, to date, worked to expedite the resolution of pastoral estate claims. For example, with respect to 16 new whole-of-pastoral lease claims in the "Group 8" group cluster, these claims were filed between September and October 2011 and were determined in October 2013.

As a final remark, on 31 May 2011 the Federal Court made consent orders on country at Keep River National Park with respect to a number of pastoral lease claims collectively known as the "Group 4 Auvergne matters." In giving reasons for judgment, His Honour Justice John Mansfield made the following remarks:

[16] As can be seen from Attachment B "Northern Territory Predicted Extent of Native Title as at May 2014" approximately 70 of the 122 current NTDAs are identified as "pastoral polygon claims to be discontinued or amended."

The Northern Territory Government, as I am sure the Northern Land Council representatives will agree, has at all times been cooperative with and receptive to the idea of the recognition by Australian law of native title within the Northern Territory. In the last few years, after exploring with the Court a number of ways in which that recognition could be achieved in a more timely manner, the Northern Territory Government has taken a step which no other government has yet taken within Australia yet. In conjunction with the Northern Land Council, the Northern Territory has come to an agreement about what evidence is required to establish that the people in whose favour the native title is to be recognised are the right people for that Country. The approach agreed by the Government and the Land Council pays due respect to anthropological evidence as well as the evidence of the Indigenous people, and to the regard of all to see the just resolution of these claims as quickly, inexpensively and efficiently as possible. All governments around Australia have taken the view that, because of the significance of the recognition that Indigenous rights and interests have existed since time immemorial, it is important to make sure that those interests did exist and do exist and that the right people for the country are being recognised. That is a heavy responsibility. Governments around Australia have taken different views as to how they should fulfil that responsibility. The Northern Territory Government has in recent times, and after the experience of considering a number of claims, taken a view which we are all confident will bring about a much more prompt recognition of native title throughout the northern part of the Northern Territory under the responsibility of the Northern Land Council. It is to be commended for its wisdom and foresight, and for its flexibility. It has been ably advised by the legal team to which I have referred. It is very satisfying to be able to say that the Northern Territory Government has been so supportive in facilitating and adopting a means by which it, on behalf of the whole of the Territory community, can proceed now to a speedy recognition of native title claims.

Northern Territory Response to Issues Paper

Questions 1 to 4 of the Issues Paper relate to defining the scope of the Inquiry. In relation to Question 1, the draft Principles developed by the ALRC to inform its Inquiry are provided at pages 18-21 of the Issues Paper. The Northern Territory considers the Preamble and Objects of the NTA are sufficient with respect to the recognition and protection of native title rights and interests. Further, the text of the Preamble and Objects of the NTA operate as an important historical record to the common law (*Mabo No. 2*) which preceded enactment of the NTA.

The recognition and protection of native title rights and interest under the NTA does not, and cannot, guarantee social and economic development for native title holders. Multiple factors affect whether native title holders can benefit from the recognition of their rights and interests in land and waters. Recognition and protection of native title under the NTA is a starting point but not a complete answer to the social and economic issues which may face native title holders.

Section 223 of the NTA

The Northern Territory submits that the law in relation to connection evidence is largely settled and, at a practical level, does not present an impediment to the resolution of claims. Any proposal to depart from the approach to connection evidence requirements practised in the Northern Territory (and supported to date by

the Federal Court) would, in our view, lead to potential uncertainty and a reduction in the speedy resolution of claims. We are also concerned that if the tests for connection are substantially amended, this will lead to uncertainties that will only be resolved by litigation.

Section 223(1) of the NTA requires that in order to gain recognition and protection of native title rights and interests through a determination of native title, claimants must show that they have maintained a "connection" to the land or waters over which those native title rights and interests are claimed. It also requires that the rights and interests claimed are recognised by the common law of Australia. The Northern Territory submits that the decisions of the High Court in *Yorta Yorta*[17] and *Ward (HC)*[18] and the Full Federal Court in *Ward*[19] and *De Rose*[20], provide guidance as to what is required in order to show the necessary connection and that connection has been maintained. The Federal Court must be satisfied that :

1. There is a recognisable society that presently recognises and observes traditional laws and customs with respect to the claim area;
2. The group or society has continued to exist as a group acknowledging and observing those laws and customs since sovereignty;
3. The observance of those traditional laws and customs by that group or society has continued substantially uninterrupted since sovereignty;
4. By those laws and customs, the claimants have a connection in relation to the claim area; and
5. The native title rights and interests claimed are possessed under those traditional laws and customs.

The Northern Territory submits that these legal tests for the proof and recognition of native title are not unduly onerous on native title claimants and nor do the requirements create a barrier for native title claimants to have their rights recognised. In relation to Question 5 of the Issues Paper, the Northern Territory submits that section 223 of the NTA adequately reflects how Aboriginal and Torres Strait Islander people understand connection to land and waters (noting however that that understanding is in the context of the operational requirements of the NTA and that the question is really a matter for representative bodies to answer).

Presumption of Continuity

Questions 6 to 9 of the Issues Paper consider whether a rebuttable "presumption of continuity" should be introduced into the NTA and, if so, how it should be formulated. The concept of a presumption was first raised by His Honour Justice French in His Honour's speech to the Federal Court's Native Title User Group in Adelaide in July 2008 entitled "Lifting the Burden of Native title – Some Modest Proposals for Improvement."[21]

His Honour suggested that:

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[17] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 77 ALJR 356
[18] *Western Australia v Ward* (2002) 76 ALJR 1098
[19] *Western Australia v Ward* (2000) 99 FCR 316
[20] *De Rose v South Australia* [2003] FCAFC 286
[21] Later published in [2008] FedJSchol 18

"It may be possible to lighten some of the burden of making a case for a determination, whether in litigation or mediation, by a change to the law so that some elements of the burden of proof are lifted from applicants. A presumption may be applied in a variety of ways in favour of native title applicants. It could be applied to presume continuity of the relevant society and the acknowledgement of its traditional laws and observance of its customs from sovereignty to the present time. A fact sufficient to engage such a presumption might be that the native title claim group acknowledges laws and observes customs which members of the group reasonably believe to be, or to have been, traditional laws and customs acknowledged and observed by their ancestors. And if by those laws and customs the people have a connection with the land or waters today, in the sense explained earlier, then a continuity of that connection, since sovereignty, might also be presumed."

His Honour further considered *that "such a presumption would enable the parties, if it were not to be challenged, to disregard a substantial interruption in continuity of acknowledgment and observance of traditional laws and customs. Were it desired, the provision could expressly authorise disregard of substantial interruptions in acknowledgment and observance of traditional law and custom unless and until proof of such interruption was established."*

His Honour then proposed the form of a provision containing a presumption along the following lines:

(1) This section applies to an application for a native title determination brought under section 61 of the Act where the following circumstances exist:

   (a) the native title claim group defined in the application applies for a determination of native title rights and interests where the rights and interests are found to be possessed under laws acknowledged and customs observed by the native title claim group;

   (b) members of the native title claim group reasonably believe the laws and customs so acknowledged to be traditional;

   (c) the members of the native title claim group, by their laws and customs have a connection with the land or waters the subject of the application;

   (d) the members of the native title claim group reasonably believe that persons from whom one or more of them was descended, acknowledged and observed traditional laws and customs at sovereignty by which those persons had a connection with the land or waters the subject of the application.

(2) Where this section applies to an application it shall be presumed in the absence of proof to the contrary:

   (a) that the laws acknowledged and customs observed by the native title claim group are traditional laws and customs acknowledged and observed at sovereignty;

(b) that the native title claim group has a connection with the land or waters by those traditional laws and customs;

(c) if the native title rights and interests asserted are capable of recognition by the common law then the facts necessary for the recognition of those rights and interests by the common law are established.

The Northern Territory submits, firstly, that the proposal for a presumption of continuity will have little practical effect in the Northern Territory. In practice, a rebuttable presumption operates in the context of resolution of pastoral estate claims. However, the Northern Territory submits that a rebuttable presumption of continuity should not be introduced into the NTA on the basis that:

- the presumption will operate where the circumstances in (1)(a) to (d) exist such that some measure, test or proof will be required to establish that the circumstances exist;
- the "reasonable belief" requirement in (1)(b) and (d) of the draft provision is not an appropriate standard of proof for the foundation of the native title rights and interests asserted;
- it is not clear that a presumption of continuity will mitigate the "burden" of bringing native title determination applications;
- a presumption in favour of the claimants is likely to lead to overlapping claims on the basis that the requirements for connection are reduced to a "reasonable belief" that the native title rights derive from traditional laws acknowledged and customs observed;
- a presumption, removing, in effect, the requirement of a traditional society would increase the likelihood of claims being made by persons who do not, traditionally, hold native title rights and interests in the claim area; and
- the presumption would not obviate the Northern Territory's requirement to assess evidence of connection (albeit on a truncated basis).

The meaning of "traditional"

An application under the NTA for a determination of native title requires factual evidence that native title exists and has existed since sovereignty. Claimants must show that the group and its predecessors had an association with the area, that there are traditional laws and customs of the claimants, and that the group has continued to hold native title in accordance with those traditional laws and customs (sections 62(1)(b)(c), (2)(e) NTA). In *Ward* the majority of the High Court stated that section 223(1)(b) requires consideration of whether, by the traditional laws acknowledged and the traditional customs observed by the peoples concerned, they have a 'connection' with the land and waters. First, this requires that the indigenous claimants identify the content of traditional laws and customs. That is, the claimants must particularise the content of the rights and interests held pursuant to those traditional laws and customs. It is clear that a connection cannot be established without demonstrating the existence of a traditional system of laws and customs.

In the Northern Territory, the requirement for native title claimants to evidence that their native title rights and interests are possessed under traditional laws acknowledged and customs observed has been uncontroversial. For example, in

Griffiths v Northern Territory[22], His Honour Justice Weinberg determined that the members of the claim group "continue to acknowledge traditional laws and to observe traditional customs in much the same way as their ancestors did over many generations and that there had not been a fundamental change in the normative system that governs right to country in the claim area, but a gradual shift from a patrilineal to a cognatic system and that this shift continues today. However, the crucial point being that rights to country in Timber Creek are and always have been based upon principles of descent. The shift to cognation is one of emphasis and degree. It is not a revolutionary change, giving rise to a new normative system."

With respect to Question 11 of the Issues Paper as to whether there should be a definition of "traditional" or "traditional laws and customs" in section 223 of the NTA, the Northern Territory considers this unnecessary. The definition of native title in section 223 of the NTA derives from Brennan J's judgment in *Mabo No. 2*. Further, if such definitions were included in section 223, there is the potential for the definitions to be tested which may lead to a wave of litigation. Section 223 of the NTA expressly recognises that native title rights and interests are possessed under traditional laws and customs and that Aboriginal and Torres Strait Islander people have a connection with land or waters by those laws and customs. We are concerned about the potential that any new definitions of "traditional" would lead to an assertion of native title being based on non-traditional or contemporary rights in land. We note here that the definition of "Aboriginal tradition" in section 3 of the ALRA is the kind of broad, snapshot-in-time definition of "tradition" which is not appropriate in the context of claims made pursuant to the NTA. There have been some cases in the Northern Territory where an indigenous individual or family group has asserted native title rights and interests in an existing claim area on the basis of an historical residency or association to the claim area. We share the views of supporting anthropological reports provided in relation to pastoral estate claims that such assertions are not based in "traditional laws and customs." Potentially, broadening the definition of "traditional" may see an increase in overlapping claims or intra-indigenous disputes.

Native title and rights and interests of a commercial nature

Whether native title rights and interests are determined to include commercial rights is a matter for the Court to determine on the evidence of each case.

The 2010 HCA determination in *Akiba*[23] of the native title right to take resources including the right to take marine resources for trading or commercial purposes was made on the basis of a factual foundation; that is that the traditional laws acknowledged and customs observed by the native title holders evidenced the existence of the right. This is to be compared with the determination in *Yarmirr v Northern Territory*[24] where the Court determined that there was no evidence that since European contact the members of the Croker Island community had engaged in trade, either by way of sale or exchange in the "sustenance or other" resources of the waters of the claimed area. The Court determined there was no evidence to suggest that trade in the resources of the claimed area formed part of the traditional

[22] [2006] FCA 903

[23] *Leo Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia* [2013] HCA 33

[24] [1998] FCA 1185

customs of the applicants' ancestors, and in any event such trade as there may have been conducted is no longer engaged in.

Accordingly, the Northern Territory does not support any proposal to amend the NTA to the effect that native title rights and interests include rights of a commercial nature.

Physical occupation, continued or recent use

The Northern Territory submits that the connection of a native title holding group to the claim area under traditional laws and customs will inevitably include physical as well as spiritual and cultural elements. Physical occupation may be severed by the impact of settlement. However, the courts have determined that this does not necessarily result in a failure to prove continuing connection. In *De Rose (No. 2)*[25] the Full Federal Court held that a continuing physical connection between the claimant community or group and the claim area is not necessary. However, the length of time during which members of the community or group have not used or occupied the land may have an important bearing on whether traditional laws and customs have been acknowledged and observed. Similarly in *Western Australia v Ward*[26], the Court determined that "actual physical presence upon the land in pursuit of traditional rights to live and forage there, and the performance of traditional ceremonies and customs, would provide clear evidence of the maintenance of the connection with the land. However, the spiritual connection, and performance of responsibility for the land can be maintained even where physical presence has ceased."

The Northern Territory submits, with respect to Question 16 of the Issues Paper, that no changes should be made to native title laws and legal frameworks to address the issue of physical occupation. Further, with respect to Question 17, on the basis of the above, the Northern Territory does not consider that the NTA should be amended to include confirmation that connection with land and waters does not require physical occupation or continued or recent use.

Substantial interruption

The Northern Territory submits that the nature and incidents of native title in a particular case are matters of fact to be ascertained by the evidence in support of the claim. The Northern Territory further submits that it is not necessary for there to be a definition of "substantial interruption" in the NTA as the concept of native title including the proof of native title has been the subject of considerable judicial consideration and clarification with the Courts acknowledging the impacts of settlement upon native title. Two early cases following *Mabo No. 2* illustrate this point.

First, as to proving native title pursuant to the NTA, in *Re Waanyi (No. 2)*[27], French J offered a number of propositions derived from Brennan J in *Mabo (No. 2)* including the following:

1. Where a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connexion with the land has been

[25] [2005] FCAFC 110
[26] (2000) 99 FCR 316
[27] (1995) 129 ALR 118

substantially maintained, the traditional community title of that claim or group can be said to remain in existence. The common law can, by reference to the traditional laws and customs of an indigenous people identify and protect the native title rights and interests to which they give rise;
2. Where there is no longer any real acknowledgement of traditional law and any real observance of traditional customs the foundation of native title has disappeared;
3. Traditional laws and customs will determine the incidents of native title;
4. The laws and customs of people may change and the rights and interests of members of the people among themselves change accordingly. But so long as an identifiable community remains, the members of which are identified by one another as members of that community living under its laws and customs, the communal native title survives to be enjoyed by the members according to the rights and interests to which they are respectively entitled under the traditionally based laws and customs as currently acknowledged and observed.

Similarly, in *Mason v Tritton*[28], Kirby P indicated a number of propositions regarding proving native title including:

1. Evidence of change in the indigenous community's traditional laws and customs is not of itself fatal to a claim for native title. Rather, the claimant will enjoy native title to the extent to which the traditional laws and customs are currently acknowledged and observed;
2. Substantial change in the traditional laws and customs of an indigenous community may result in the recognition afforded to that native title being somewhat less that the exclusive use, occupation and possession afforded to the inhabitants of the Island of Mer in the *Mabo case*."

These principles have been adopted in a number of determinations including *Risk v Northern Territory*[29] and *Griffiths v Northern Territory*[30].

Accordingly, in the Northern Territory's view, "substantial interruption" in the acknowledgement and observance of traditional laws and customs is a critical factor in the Court making a determination of native title. In the Northern Territory's experience, with the exception of the Court's determination in Larrakia Part A[31], there

[28] (1994) 34 NSWLR 572
[29] "Larrakia Part A" or the "Darwin and surrounds claim" [2006] FCA 404
[30] [2007] FCAFC 178
[31] His Honour Justice Mansfield [at 834] determined that "... the Larrakia people, that is the present society comprising the Larrakia people, do not now have rights and interests possessed under the traditional laws acknowledged, and the traditional customs observed, by the Larrakia people at sovereignty. That is because I do not find that their current laws and customs are 'traditional' in the sense explained in Yorta Yorta.." And continuing at [835] His Honour found that "there is considerable ambiguity, and some inconsistency, about the current laws and customs of the Larrakia people which I have discussed in my findings when considering the evidence. There are also in my view significant changes in those laws and customs from those which existed at sovereignty. Again, I have discussed my findings when considering the evidence. Those differences and changes stem from, and are caused by, a combination of the historical events which occurred during the 20th Century. Those events have given rise to a substantial interruption in the practice of the traditional laws and customs of the Larrakia people as they existed at sovereignty and at settlement, so that their practice and enjoyment has not continued since sovereignty. I find that the present laws and customs of the Larrakia people are not simply an

have been no significant issues with the requirement of native title claimants to establish continuity of acknowledgement and observance of traditional laws and customs that have been "substantially uninterrupted" since sovereignty. As discussed in this submission, the Northern Territory accepts there existed a native title holding group at sovereignty in the Northern Territory and does not require (in the context of consent determinations of native title on pastoral leases) historic, ethnographic or anthropological evidence of the traditional laws and customs acknowledged and observed by the native title claimants as at sovereignty. Further, the Northern Territory submits that over time Courts have interpreted this requirement beneficially.

Authorisation

The Northern Territory submits that the definition of "authorise" contained in section 251B of the NTA is a necessary safeguard in relation to claimant applications for a determination of native title rights and interests (including amendment applications), compensation applications and in relation to negotiations of an indigenous land use agreement under the NTA. Authorisation, in the case of claimant applications and compensation applications gives the applicant the power to deal with all matters arising under the NTA in relation to the application (section 62A). The authorisation provisions of the NTA give certainty that there exists a decision making process within the native title group and that there has been compliance with that process. Alternatively, the NTA provides where there is no decision making process under the traditional laws and customs of the native title group, the claim group can agree to and adopt a decision making process. Accordingly, the Northern Territory submits that the authorisation provisions in the NTA should be retained.

With respect to applications made pursuant to section 66B of the NTA (replacing the applicant), the Northern Territory has not, to our best recollection, ever objected to an application (in the Northern Land Council region, such applications are made by interlocutory application, supported by an affidavit which attests to the authorisation meeting and the decision making process and by consent order). In most cases, the application is made on the basis that one of the named claimants has passed away. To the best of our recollection, there has been only one instance where one or more members of the claim group has sought to replace an applicant on the basis of section 66B(1)((a)(iii) or (iv); namely where the person is no longer authorised by the claim group to make the application and to deal with matters arising in relation to it or where the person has exceeded the authority given to him or her by the claim group to make the application and to deal with matters arising in relation to it.[32]

With respect to Question 30 of the Issues Paper, namely:

"Should the NTA be amended to clarify whether:
(a) the claim group can define the scope of the authority of the applicant; and
(b) the applicant can act by majority"

the Northern Territory would generally support the proposal to clarify the operation of section 66B of the NTA, however the Northern Territory would not support an

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adaptation or evolution of the traditional laws and customs of the Larrakia people in response to economic, environmental and historical and other changes."

[32] See related cases *Foster v Que Noy* [2008] FCAFC 56, *Que Noy v Northern Territory* [2007] FCA 1888

amendment that was overly prescriptive, limiting or restrictive with respect to what matters have and have not been authorised. In our view, amendments in that regard have the potential to lead to disputes as to what was and was not authorised.

Joinder

Respondent parties to claimant applications in the Northern Territory are generally limited in number to pastoral respondents and Telstra. Infrequently, a competing indigenous interest may join as a respondent; however, if there are competing assertions as to the identity of the native title claimant group, these issues are resolved with/without the court's involvement prior to determination and the Northern Territory generally only appears in those proceedings as *amicus curiae*.

The Northern Territory welcomes the Commonwealth's decision to reinstate a respondent funding assistance scheme for legal representation and disbursement costs incurred in native title proceedings. Pastoral respondents are major stakeholders to claims in the Northern Territory and as discussed in this submission, have played an important part in streamlining processes to progress pastoral estate claims to resolution.

With respect to Question 31 of the Issues Paper, the Northern Territory submits that the joinder provisions contained in section 84(5), (8) and (9) of the NTA do not impose barriers in relation to access to justice. These provisions give the Court discretion to join parties whose interests may be affected by a determination of native title or discretion to remove parties on the basis of the matters set out at section 84(9) of the NTA. Generally speaking, there have been no issues of prejudice or delay with respect to the operation of the joinder provisions of the NTA.

ATTACHMENT A

Aboriginal Land Division, Solicitor for the Northern Territory
Department of Attorney-General and Justice

CURRENT EXTENT OF NATIVE TITLE IN THE NORTHERN TERRITORY

(73 determinations as at May 2014) (Consent determination except where indicated)

	Claim Name	Federal Court No. (Determined matters)	Native Title not found to exist (or extinguished)	Non-exclusive determination of native title	Exclusive native title determination	Exclusive and non-exclusive determination of native title	Comments
1.	Town of Kalkarindji	[2014] FCA 421				Exclusive and non-exclusive	
2.	Bushy Park Pastoral Lease	[2014] FCA 422		Non-exclusive			
3.	Tandyidgee Pastoral Lease	[2014] FCA 156		Non-exclusive			
4.	Rockhampton Downs	[2014] FCA 158		Non- exclusive			
5.	Alroy Downs	[2014] FCA 153		Non-exclusive			
6.	Brunette Downs Pastoral Lease	[2014] FCA 154		Non- exclusive			
7.	Eva Downs Pastoral Lease	[2014] FCA 158		Non- exclusive			
8.	Brunchilly Pastoral Lease	[2014] FCA 155		Non-exclusive			
9.	Anthony Lagoon Pastoral Lease	[2014] FCA 157		Non-exclusive			
10.	Margaret Downs Pastoral Lease	[2013] FCA 1084		Non-exclusive			
11.	Nenen Pastoral Lease	[2013] FCA 1083		Non-exclusive			

	Claim Name	Federal Court No. (Determined matters)	Native Title not found to exist (or extinguished)	Non-exclusive determination of native title	Exclusive native title determination	Exclusive and non-exclusive determination of native title	Comments
12.	Middle Creek Pastoral Lease	[2013] FCA 1086		Non-exclusive			
13.	Providence Pastoral Lease	[2013] FCA 1082		Non-exclusive			
14.	Larrizona Pastoral Lease	[2013] FCA 1076		Non-exclusive			
15.	Western Creek Pastoral Lease	[2013] FCA 1072		Non-exclusive			
16.	Gorrie Pastoral Lease	[2013] FCA 1075		Non-exclusive			
17.	Sunday Creek Pastoral Lease	[2013] FCA 1078		Non-exclusive			
18.	Dry River Pastoral Lease	[2013] FCA 1080		Non-exclusive			
19.	Birdum Creek Pastoral Lease	[2013] FCA 1081		Non-exclusive			
20.	Avago Pastoral Lease	[2013] FCA 1070		Non-exclusive			
21.	Cow Creek Pastoral Lease	[2013] FCA 1074		Non-exclusive			
22.	Tarlee Pastoral Lease	[2013] FCA 1069		Non-exclusive			
23.	Bloodwood Downs Pastoral Lease	[2013] FCA 1079		Non-exclusive			
24.	Wyworrie Pastoral Lease	[2013] FCA 1077		Non-exclusive			
25.	Lakefield Pastoral Lease	[2013] FCA 1073		Non-exclusive			

	Claim Name	Federal Court No. (Determined matters)	Native Title not found to exist (or extinguished)	Non-exclusive determination of native title	Exclusive native title determination	Exclusive and non-exclusive determination of native title	Comments
26.	Mount Doreen Pastoral Lease	[2013] FCA 637		Non-exclusive			
27.	Napperby Pastoral Lease	[2013] FCA 636		Non-exclusive			
28.	Glen Helen Pastoral Lease	[2012] FCA 1044		Non-exclusive			
29.	Newhaven Pastoral Lease	[2010] FCA 1343		Non-exclusive			
30.	Georgina Downs & Lake Nash Pastoral Leases	[2012] FCA 845		Non-exclusive			
31.	Town of Daly Waters	[2012] FCA 673		Non-exclusive			
32.	Beetaloo Pastoral Lease	[2012] FCA 683		Non-exclusive			
33.	Hayfield Pastoral Lease	[2012] FCA 672		Non-exclusive			
34.	Vermelha Pastoral Lease	[2012] FCA 671		Non-exclusive			
35.	Kalala Pastoral Lease	[2012] FCA 670		Non-exclusive			
36.	Ucharonidge Pastoral Lease	[2012] FCA 669		Non-exclusive			
37.	Shenandoah Pastoral Lease	[2012] FCA 668		Non-exclusive			
38.	Mungabroom Pastoral Lease	[2012] FCA 667		Non-exclusive			
39.	Forrest Hill Pastoral	[2012] FCA		Non-exclusive			

	Claim Name	Federal Court No. (Determined matters)	Native Title not found to exist (or extinguished)	Non-exclusive determination of native title	Exclusive native title determination	Exclusive and non-exclusive determination of native title	Comments
	Lease	666					
40.	Maryfield Pastoral Lease	[2012] FCA 665		Non- exclusive			
41.	Amungee Mungee Pastoral Lease	[2012] FCA 664		Non-exclusive			
42.	Town of Mataranka	[2012] FCA 223				Exclusive and non-exclusive	
43.	Mataranka (Cave Creek Station)	[2012] FCA 255	Native title does not exist				
44.	Kurundi Pastoral Lease	[2011] FCA 766		Non-exclusive			
45.	Neutral Junction Pastoral Lease	[2011] FCA 765				Exclusive and non-exclusive	
46.	Camfield Pastoral Lease	[2011] FCA 580		Non-exclusive			
47.	Dungowan Pastoral Lease	[2011] FCA 581		Non-exclusive			
48.	Montejinni East Pastoral Lease	[2011] FCA 582		Non-exclusive			
49.	Montejinni West Pastoral Lease	[2011] FCA 583		Non-exclusive			
50.	Birrimba Pastoral Lease	[2011] FCA 584		Non-exclusive			
51.	Killarney Pastoral Lease	[2011] FCA 585		Non-exclusive			
52.	Spirit Hills Pastoral Lease No. 2	[2011] FCA 576		Non-exclusive			
53.	Auvergne Pastoral	[2011] FCA		Non-exclusive			

	Claim Name	Federal Court No. (Determined matters)	Native Title not found to exist (or extinguished)	Non-exclusive determination of native title	Exclusive native title determination	Exclusive and non-exclusive determination of native title	Comments
	Lease	571					
54.	Rosewood Pastoral Lease	[2011] FCA 572		Non-exclusive			
55.	Newry Pastoral Lease	[2011] FCA 573		Non-exclusive			
56.	Bullo River Pastoral Lease	[2011] FCA 574		Non-exclusive			
57.	Legune Pastoral Lease	[2011] FCA 575		Non-exclusive			
58.	Ooratippra Pastoral Lease	[2011] FCA 428			Exclusive		Aboriginal owned pastoral lease
59.	Newhaven Pastoral Lease	[2010] FCA 1343		Non-exclusive			
60.	Singleton Pastoral Lease	[2010] FCA 911		Non-exclusive			
61.	Pine Hill Pastoral Lease	[2009] FCA 834		Non-exclusive			
62.	Town of Elliott	[2009] FCA 800				Exclusive and non-exclusive native title	Litigated Determination. Orders by consent.
63.	Newcastle Waters – Murranji Pastoral Leases	[2007] FCA 1498				Exclusive and non-exclusive native title	Litigated Determination. Orders by consent.
64.	Tennant Creek No2	[2007] FCA 1386		Non-exclusive native title			

	Claim Name	Federal Court No. (Determined matters)	Native Title not found to exist (or extinguished)	Non-exclusive determination of native title	Exclusive native title determination	Exclusive and non-exclusive determination of native title	Comments
65.	Town of Timber Creek	[2006] FCA 1155 [2007] FCAFC 178				Exclusive and non-exclusive Non-exclusive	Litigated Determination
66.	Larrakia (Part A - consolidated proceeding)	[2006] FCA 404	Native title does not exist				Litigated Determination
67.	Blue Mud Bay No 2	[2007] FCAFC 23				Non-exclusive native title in the intertidal zone and outer waters Exclusive native title to land and inland waters	Litigated Determination
68.	Davenport/Murchison	(2005) 145 FCR 442; (2005) 220 ALR 431; [2005] FCAFC 135				Non-exclusive native title exists on NTP 4386 and NTP 4387 Exclusive native title exists in the	Litigated Determination

	Claim Name	Federal Court No. (Determined matters)	Native Title not found to exist (or extinguished)	Non-exclusive determination of native title	Exclusive native title determination	Exclusive and non-exclusive determination of native title	Comments
						Town of Hatches Creek	
69.	Miriuwung-Gajerrong (Northern Territory)	[2003] FCAFC 283		Non-exclusive native title			Litigated Determination. Orders by Consent.
70.	Urapunga Township	[2001] FCA 654			Exclusive native title		Litigated Determination
71.	St Vidgeon's (Roper River) (St Vidgeon's Homestead Station, a gazetted stock route, the banks of the Roper River and river beds of the Roper, Towns and Limmen Bight rivers, to the extent that they are tidal).	[2004] FCAFC 187		Non-exclusive native title			Litigated Determination
72.	Alice Springs	[2000] FCA 671		Non-exclusive native title			Litigated Determination
73.	Croker Island	[1998] FCA 1185		Non-exclusive native title			Litigated Determination

ATTACHMENT B

Aboriginal Land Division
Solicitor for the Northern Territory
Department of the Attorney-General and Justice

Northern Territory Predicted Extent of Native Title as at May 2014
(Total current matters: 122)

	Claim Name	Federal Court No.	Native Title not likely to be found to exist (or likely to be extinguished)	Non-exclusive determination of native title likely	Both exclusive and non-exclusive determination of native title likely	Comments (Proposed Resolution)
1.	Borroloola Region	NTD6020/1998	Extinguished in part		Exclusive and non-exclusive	Consent determination/ILUA
2.	Borroloola/Gulf Region	NTD6021/1998	Extinguished in part		Exclusive and non-exclusive	Consent determination/ILUA
3.	Edward Pellew Seas	NTD6024/1998		Non-exclusive		Consent determination (offshore areas)
4.	West Arnhem Seas	NTD6025/1998		Non-exclusive		Consent determination (offshore areas)
5.	Jabiru Township	NTD6027/1998	Determination that no native title exists			Litigated. Awaiting Judgment.
6.	Bradshaw Station	NTD6028/1998		Non-exclusive		Consent determination
7.	Daly River	NTD6042/1998	Determination that no native title exists			Intra-indigenous claim. Court likely to dismiss.
8.	Town of Katherine	NTD6002/1999	Extinguished in part		Exclusive and non-exclusive	Consent determination/ILUA
9.	Portion 4724 Adelaide River	NTD6005/1999	Extinguished			Consent determination/ILUA (as part of Town of Adelaide River NTDAs)
10.	Middle Arm	NTD6014/1999	Determination of no native title or extinguished in part			Not known

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Department of the Attorney-General and Justice

	Claim Name	Federal Court No.	Native Title not likely to be found to exist (or likely to be extinguished)	Non-exclusive determination of native title likely	Both exclusive and non-exclusive determination of native title likely	Comments (Proposed Resolution)
11.	Pine Creek	NTD6015/1999	Extinguished in part		Exclusive and non-exclusive	Consent determination/ILUA (as part of Town of Pine Creek matters)
12.	Pine Creek No. 2	NTD6019/1999	Extinguished in part		Exclusive and non-exclusive	Consent determination/ILUA (as part of Town of Pine Creek matters)
13.	Lot 1348 Katherine	NTD6001/2000	Extinguished			Consent determination/ILUA (as part of Town of Katherine NTDAs)
14.	Lots 825 and 826 Borroloola	NTD6014/2000	Extinguished in part		Exclusive and non-exclusive	Consent determination/ILUA
15.	NTP 4410 Mary River West (Pine Creek)	NTD6015/2000	Determination of no native title			Consent determination/ILUA (as part of Town of Pine Creek matters)
16.	Lorella Downs	NTD6016/2000	No determination (refer Notes 4 & 5 to table)			Pastoral Polygon to be discontinued/amended.
17.	Spring Creek No.2	NTD6017/2000	No determination			Pastoral Polygon to be discontinued/amended.
18.	Mary River	NTD6018/2000	No determination			Pastoral Polygon to be discontinued/amended.
19.	Wollogorang	NTD6019/2000	No determination			Pastoral Polygon to be discontinued/amended.
20.	Spring Creek No 1	NTD6020/2000	No determination			Pastoral Polygon to be discontinued/amended.

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Department of the Attorney-General and Justice

	Claim Name	Federal Court No.	Native Title not likely to be found to exist (or likely to be extinguished)	Non-exclusive determination of native title likely	Both exclusive and non-exclusive determination of native title likely	Comments (Proposed Resolution)
21.	Kiana No. 1	NTD6023/2000	No determination			Pastoral Polygon to be discontinued/amended.
22.	Town of Weddell	NTD6025/2000	Determination of no native title or extinguished in part			Not known
23.	Roper Valley	NTD6026/2000	No determination			Pastoral Polygon to be discontinued/amended.
24.	Lot 176(A) Adelaide River	NTD6027/2000			Exclusive and non-exclusive	Consent determination/ILUA (as part of Town of Adelaide River NTDAs
25.	Mt Ringwood	NTD6029/2000	No determination			Pastoral Polygon to be discontinued/amended.
26.	Billengarrah	NTD6030/2000	No determination			Pastoral Polygon to be discontinued/amended.
27.	McArthur River	NTD6031/2000	No determination			Pastoral Polygon to be discontinued/amended.
28.	Mount Keppler	NTD6032/2000	No determination			Pastoral Polygon to be discontinued/amended.
29.	Old Mount Bundey	NTD6033/2000	No determination			Pastoral Polygon to be discontinued/amended.
30.	Mallapunyah North	NTD6003/2001	No determination			Pastoral Polygon to be discontinued/amended.
31.	Calvert Hills	NTD6004/2001	No determination			Pastoral Polygon to be discontinued/amended.
32.	Banka Banka	NTD6005/2001	No determination			Pastoral Polygon to be discontinued/amended.
33.	Mary River West	NTD6006/2001	No determination			Pastoral Polygon to be discontinued/amended.

ATTACHMENT B

Aboriginal Land Division
Solicitor for the Northern Territory
Department of the Attorney-General and Justice

	Claim Name	Federal Court No.	Native Title not likely to be found to exist (or likely to be extinguished)	Non-exclusive determination of native title likely	Both exclusive and non-exclusive determination of native title likely	Comments (Proposed Resolution)
34.	Tipperary North	NTD6007/2001	No determination			Pastoral Polygon to be discontinued/amended.
35.	Bonaparte Gulf	NTD6009/2001	No determination			Pastoral Polygon to be discontinued/amended.
36.	Mountain Valley	NTD6011/2001	No determination			Pastoral Polygon to be discontinued/amended.
37.	Mt Drummond	NTD6012/2001	No determination			Pastoral Polygon to be discontinued/amended.
38.	Urapunga #2	NTD6013/2001	No determination			Pastoral Polygon to be discontinued/amended.
39.	Goondooloo - Moroak	NTD6014/2001	No determination			Pastoral Polygon to be discontinued/amended.
40.	Town of Larrimah	NTD6016/2001	Extinguished in part		Exclusive and non-exclusive	Consent determination/ILUA
41.	Bonrook	NTD6018/2001	No determination			Pastoral Polygon to be discontinued/amended.
42.	Chatterhoochee	NTD6019/2001	No determination			Pastoral Polygon to be discontinued/amended.
43.	Calvert Hills No.2	NTD6020/2001	No determination			Pastoral Polygon to be discontinued/amended.
44.	Ban Ban Springs	NTD6021/2001	No determination			Pastoral Polygon to be discontinued/amended.
45.	Douglas North	NTD6023/2001	No determination			Pastoral Polygon to be discontinued/amended.
46.	Kiana Calvert	NTD6024/2001	No determination			Pastoral Polygon to be discontinued/amended.
47.	Fish River	NTD6028/2001	No determination			Pastoral Polygon to be discontinued/amended.
48.	Humbert-VRD	NTD6029/2001	No determination			Pastoral Polygon to be discontinued/amended.

ATTACHMENT B

Aboriginal Land Division
Solicitor for the Northern Territory
Department of the Attorney-General and Justice

	Claim Name	Federal Court No.	Native Title not likely to be found to exist (or likely to be extinguished)	Non-exclusive determination of native title likely	Both exclusive and non-exclusive determination of native title likely	Comments (Proposed Resolution)
49.	Dalmore Downs	NTD6030/2001	No determination			Pastoral Polygon to be discontinued/amended.
50.	Brunchilly	NTD6031/2001	No determination			Pastoral Polygon to be discontinued/amended.
51.	North Calvert Hills	NTD6032/2001	No determination			Pastoral Polygon to be discontinued/amended.
52.	Tandyidgee/Powell/Helen Springs	NTD6036/2001	No determination			Pastoral Polygon to be discontinued/amended.
53.	Powell Creek	NTD6038/2001	No determination			Pastoral Polygon to be discontinued/amended.
54.	Cresswell/Benmara	NTD6039/2001	No determination			Pastoral Polygon to be discontinued/amended.
55.	Helen Springs	NTD6040/2001	No determination			Pastoral Polygon to be discontinued/amended.
56.	Adelaide River, Lot 160	NTD6045/2001			Exclusive and non-exclusive	Consent determination/ILUA
57.	West Mathison	NTD6049/2001	No determination			Pastoral Polygon to be discontinued/amended.
58.	Spring Creek No. 4	NTD6051/2001	No determination			Pastoral Polygon to be discontinued/amended.
59.	Spring Creek No. 3	NTD6052/2001	No determination			Pastoral Polygon to be discontinued/amended.
60.	Town of Batchelor	NTD6057/2001	Negotiated outcome. No determination of native title.			ILUA
61.	Pungalina	NTD6058/2001	No determination			Pastoral Polygon to be discontinued/amended.
62.	Lower Reynolds Channel Point	NTD6060/2001	No determination			Pastoral Polygon to be discontinued/amended.

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	Claim Name	Federal Court No.	Native Title not likely to be found to exist (or likely to be extinguished)	Non-exclusive determination of native title likely	Both exclusive and non-exclusive determination of native title likely	Comments (Proposed Resolution)
63.	Roper Valley North	NTD6062/2001	No determination			Pastoral Polygon to be discontinued/amended.
64.	Mountain Valley-Mainoru	NTD6063/2001	No determination			Pastoral Polygon to be discontinued/amended.
65.	Chatterhoochee-Mt McMinn	NTD6064/2001	No determination			Pastoral Polygon to be discontinued/amended.
66.	Big River Urapunga	NTD6065/2001	No determination			Pastoral Polygon to be discontinued/amended.
67.	Goondooloo Moroak 2	NTD6066/2001	No determination			Pastoral Polygon to be discontinued/amended.
68.	Wongalara	NTD6067/2001	No determination			Pastoral Polygon to be discontinued/amended.
69.	Kiana West	NTD6068/2001	No determination			Pastoral Polygon to be discontinued/amended.
70.	Sandover River	NTD6069/2001			Exclusive and non-exclusive	Consent determination/ILUA
71.	Mallapunyah/Cresswell	NTD6001/2002	No determination			Pastoral Polygon to be discontinued/amended.
72.	Dalmore Downs South	NTD6003/2002	No determination			Pastoral Polygon to be discontinued/amended.
73.	Welltree	NTD6004/2002	No determination			Pastoral polygon to be discontinued/amended
74.	Town of Adelaide River	NTD6005/2002	Extinguished in part		Exclusive and non-exclusive	Consent determination/ILUA
75.	Dry River	NTD6009/2002	No determination			Pastoral Polygon to be discontinued/amended.
76.	Willeroo Delamere	NTD6011/2002	No determination			Pastoral Polygon to be discontinued/amended.
77.	Wollogorang South	NTD6012/2002	No determination			Pastoral Polygon to be discontinued/amended.

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	Claim Name	Federal Court No.	Native Title not likely to be found to exist (or likely to be extinguished)	Non-exclusive determination of native title likely	Both exclusive and non-exclusive determination of native title likely	Comments (Proposed Resolution)
78.	McArthur River No.2	NTD6015/2002	No determination			Pastoral Polygon to be discontinued/amended.
79.	Burramurra	NTD6016/2002	No determination			Pastoral Polygon to be discontinued/amended.
80.	Pine Creek #3 (Town of Pine Creek)	NTD6020/2002	Extinguished in part		Non-exclusive and exclusive	Consent determination/ILUA
81.	Labelle Downs	NTD6029/2002	No determination			Pastoral Polygon to be discontinued/amended.
82.	Lorella-Nathan River	NTD6031/2002	No determination			Pastoral Polygon to be discontinued/amended.
83.	Town of Borroloola	NTD6003/2003	Extinguished in part		Exclusive and non-exclusive	Consent determination/ILUA
84.	Deepwater	NTD6006/2003	No determination			Pastoral Polygon to be discontinued/amended.
85.	Jindare	NTD9/2004	No determination			Pastoral Polygon to be discontinued/amended.
86.	McKinlay River	NTD21/2004	No determination			Pastoral Polygon to be discontinued/amended.
87.	Edith River	NTD20/2004	No determination			Pastoral Polygon to be discontinued/amended.
88.	West Ban Ban #2	NTD24/2004	No determination			Pastoral Polygon to be discontinued/amended.
89.	Town of Batchelor No.2	NTD21/2005	Negotiated outcome. No determination of native title.			ILUA
90.	Labelle Downs / Lower Reynolds-Channel Point No.2	NTD22/2005	No determination			Pastoral Polygon to be discontinued/amended.

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	Claim Name	Federal Court No.	Native Title not likely to be found to exist (or likely to be extinguished)	Non-exclusive determination of native title likely	Both exclusive and non-exclusive determination of native title likely	Comments (Proposed Resolution)
91.	Bynoe No.2	NTD23/2005	Determination that no native title exists.	Non-exclusive		Intra-indigenous dispute. Court likely to dismiss.
92.	Litchfield National Park	NTD24/2005	No determination			Pastoral Polygon to be discontinued/amended.
93.	Welltree No.2	NTD25/2005	No determination			Pastoral Polygon to be discontinued/amended.
94.	Wagait #1	NTD30/2005	No determination			Pastoral Polygon to be discontinued/amended.
95.	Wagait #2	NTD31/2005	No determination			Pastoral Polygon to be discontinued/amended.
96.	Tipperary (KAMU)	NTD8/2007	No determination			Pastoral Polygon to be discontinued/amended.
97.	Aileron	NTD20/2007		Non-exclusive		Consent determination with NTD8/2014 .
98.	Borroloola Region #2 (Coastal)	NTD5/2009	No determination			Pastoral Polygon to be discontinued/amended.
99.	Stirling / Neutral Junction	NTD17/2011			Exclusive and non-exclusive	Consent determination/ILUA
100.	Timber Creek Township (Compensation application)	NTD18/2011	Extinguished in part		Exclusive and non-exclusive areas recognised in 2007 determination	Litigated determination. Compensation application current proceedings
101.	Gilnockie Pastoral Lease	NTD21/2011		Non-exclusive (refer note 5 to table for items 101 to 104, 107, 111 to 121)		Consent determination
102.	Helen Springs Pastoral Lease	NTD32/2011		Non-exclusive		Consent determination.

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	Claim Name	Federal Court No.	Native Title not likely to be found to exist (or likely to be extinguished)	Non-exclusive determination of native title likely	Both exclusive and non-exclusive determination of native title likely	Comments (Proposed Resolution)
103.	Banjo Pastoral Lease	NTD45/2011		Non-exclusive		Consent determination.
104.	Banka Banka Pastoral Lease	NTD48/2011		Non-exclusive		Consent determination
105.	Town of Larrimah	NTD49/2011	Extinguished in part		Exclusive and non-exclusive	Consent determination/ILUA
106.	Howard Springs Forestry Reserve (Non-claimant application)	NTD50/2011	Determination that no native title exists			Non-claimant application
107.	Powell Creek Pastoral Lease	NTD52/2011		Non-exclusive		Consent determination.
108.	Section 2934 Hundred of Strangways (Non-claimant application)	NTD28/2012	Determination that no native title exists			Non-claimant application
109.	Bushy Park	NTD38/2012		Non-exclusive		
110.	Narweitooma Pastoral Lease	NTD6/2013			Exclusive and non-exclusive	Consent determination
111.	Nutwood Downs Pastoral Lease	NTD20/2013		Non-exclusive		Consent determination
112.	Hodgson River Pastoral Lease	NTD21/2013		Non-exclusive		Consent determination
113.	Pungalinga Pastoral Lease	NTD23/2013		Non-exclusive		Consent determination
114.	Lorella Pastoral Lease	NTD24/2013		Non-exclusive		Consent determination
115.	Wollogorang Pastoral Lease	NTD25/2013		Non-exclusive		Consent determination
116.	Mt Denison Pastoral Lease	NTD27/2013		Non-exclusive		Consent determination
117.	Manangoora Pastoral Lease	NTD30/2013		Non-exclusive		Consent determination
118.	Greenbank Pastoral Lease	NTD31/2013		Non-exclusive		Consent determination
119.	Seven Emu Pastoral Lease	NTD32/2013		Non-exclusive		Consent determination
120.	Spring Creek Pastoral Lease	NTD33/2013		Non-exclusive		Consent determination
121.	Kiana Pastoral Lease	NTD3/2014		Non-exclusive		Consent determination
122.	Aileron PPL	NTD8/2014		Non-exclusive		Consent determination

Notes to Table

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1. The majority of NTDAs filed in the Northern Territory are over pastoral lease areas in the Northern region of the Northern Territory and are anticipated to be resolved by consent.

2. There are 223 pastoral leases in the Northern Territory: 135.5 pastoral leases are in the Northern Land Council (NLC) region and 87.5 pastoral leases are within the Central Land Council (CLC) region. Victoria River Downs pastoral lease traverses both the NLC and CLC regions.

3. In the majority of cases, determinations of NTDAs over the pastoral estate recognise non-exclusive native title rights and interests (subject to areas where native title has been wholly extinguished by historic grants of tenure and by public works).

4. A feature of the large number of existing NTDAs filed in the NLC region are claims filed in response to a section 29 NTA notice, collectively identified as "polygon claims." These claims comprise the majority of NTDAs in the above table. These NTDAs mirror the boundaries of the proposed mining tenure. This is to be differentiated from claims filed in the CLC region which, generally, claim the whole of one pastoral lease.

5. The polygon claims do not ever proceed to determination; rather, since approximately 2010 the NLC has filed new whole-of-pastoral-lease claims that overlap, to some extent (or in whole) with the underlying polygon claims. The whole-of-pastoral-lease NTDAs are the claims that proceed to determination. The underlying polygon claims are either discontinued or amended to the extent of the overlap immediately prior to the Applicant filing a minute of proposed order for the determination of native title over the relevant whole pastoral lease area. Currently, as can be seen from the table, a number of new whole-of-pastoral-lease NTDAs were filed in late 2013/early 2014. These claims necessitate the amendment or discontinuance of, approximately, five underlying polygon clams listed in the table. The total number of NTDAs in the Northern Territory table must be understood in this context; that is, over time, with the amendment/discontinuance of underlying polygons and the filing of new whole-of-pastoral lease claims, the total number of NTDAs in the Northern Territory will either remain steady, decrease or increase.

6. In the CLC region there are extensive pastoral lease areas that are not subject to a claim and have not been the subject of a determination. It is anticipated that new NTDAs will be lodged in the coming years, thus adding to the total number of NTDAs filed in the Northern Territory. As stated above, with few exceptions, determinations of these claims will recognise non-exclusive native title rights and interests.

7. In relation to NTDAs affecting remote towns in the Northern Territory, it is anticipated that these claims will also be resolved by consent with/without a contemporaneously negotiated ILUA, as the circumstances require. The Territory is currently considering its policy position with respect to the resolution of town claims. As a general proposition, determinations in remote town areas may recognise areas where exclusive native title exists.

8. With respect to NTDAs to offshore areas, the Northern Territory has indicated support for the recognition of non-exclusive native title rights and interests.

9. While not represented in the Table, there are a number of determined pastoral estate claims that the FCA lists for mention in the regular callover of Northern region matters and which relate to non-compliance by the native title holders to establish a prescribed body

corporate. Approximately 20 Prescribed Bodies Corporate have been established following pastoral estate determinations. Whereas the practice in the CLC region has been to establish PBCs as at the date of determination, this has not been the practice in the NLC region where limited development occurs on pastoral land in the Territory save for mining or petroleum activity. However, in response to increasing pressure from the Federal Court, in early 2013 the NLC established the Top End (Default PBC/CLA) Aboriginal Corporation. The Directors of the Top End Default PBC are members of the executive of the NLC. The Top End Default PBC has been nominated as the PBC for approximately 8 pastoral lease determinations in the Victoria River region of the Territory and negotiations for consent for nomination are ongoing.

ATTACHMENT C

The Northern Territory's Minimum Connection Material Requirements for Consent Determinations 6 May 2009

Failure to meet all of these requirements in a particular case will not preclude the Territory's agreement to a consent determination of native title where it can be shown to the Territory's satisfaction that a particular requirement is not, because of some special feature described in the connection report, applicable or appropriate to that particular case.

A	**Map** showing: • Claim area • Pastoral lease / town boundaries • To the extent that they are relevant, actual, indicative or approximate boundaries of applicant estate groups within (whether in part or in whole) the claim area, • To the extent that they are relevant, actual, indicative or approximate boundaries of neighbouring non-applicant estate groups outside the claim area • Location of relevant dreaming tracks which pass through country, including the claim area • Any handover points along the relevant dreaming tracks • Location of relevant sacred sites within the claim area
B	**Tribal and/or linguistic affiliations** of the applicant group[s], ie the normative society to which the applicant group[s] belong (where not otherwise identified in the native title determination application)
C	**Genealogies** (updated where necessary) for the core set of applicants in every estate group (patrifiliates and matrifiliates who still retain rights and interests in the patri-clan estate)
D	**Names and/or criteria of membership/identification of native title holders** (the holders of rights, including trustees for any estates where succession arises)
E	**Connection Report** to address the following matters: 1. Near neighbour recognition of Applicant groups' estate boundaries 2. Issues of succession or near succession (by reference to the relevant genealogies) 3. Any instances of removals from country (i.e. breaks in association with country) 4. Previous claims (whether ALRA or native title) to land in the vicinity of the Claim Area (including any relevant evidence and/or findings from those cases) 5. Representative biographies (including where possible date of birth, date of death and place of current residence) of leading Applicants providing evidence of knowledge of country, accounts of continuity of connection to country and attesting to the nature of traditions acknowledged and customs observed by Applicant group 6. Law of inheritance and ownership of land 7. History of first contact 8. Historical ethnography (as available) 9. History of continuous association with country under claim 10. Continuity of observance of laws and customs 11. In the Group 4 Pastoral Estate Matters, where relevant, a history of Aboriginal employment and residence on the station established on each pastoral lease 12. The native title rights and interests claimed and their relationship to traditional laws and customs.
F	**Witness Statements** (if required) of a representative core set of applicants providing evidence of contemporary exercise of claim native title rights and interests
G	**Signature of Anthropologist/s and Date**