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Native Title Representative Body Aboriginal Corporation

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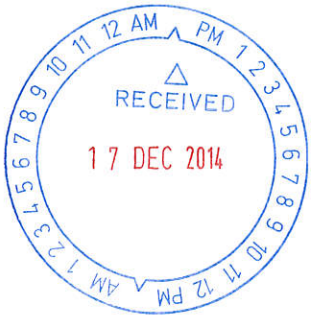

16 December 2014

The Executive Director
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001
Email: nativetitle@alrc.gov.au

Dear Executive Director

RE: REVIEW OF THE NATIVE TITLE ACT 1993 - DISCUSSION PAPER 82 - OCTOBER 2014 ("DP82")

Thank you for providing the North Queensland Land Council ("NQLC") with the opportunity to respond to the matters raised in DP82, referred to above.

The NQLC is the Native Title Representative Body Aboriginal Corporation set up pursuant to the *Native Title Act 1993 (Cth)* ("NTA") for a large representative area in North Queensland, and formerly provided detailed submissions in response to Issues Paper 45.

Representatives of NQLC met with representatives of the Australian Law Reform Commission ("ALRC") on 6 November 2014 in Cairns. NQLC's response to DP82 will largely endorse what was communicated on that day to the ALRC's representatives.

Proposals and questions contained in DP82

DP82	NQLC response
Proposal not to proceed with presumption of continuity and to proceed to reform substantive law instead.	NQLC advised at the meeting with the ALRC representatives on 6 November 2014 that it considers there needs to be a non - rebuttable presumption of continuity to effect meaningful cost or time savings on the requirement to demonstrate connection.
2. Framework for review of the NTA	
Question 2–1 Should the proposed amendments to the NTA have prospective operation only?	NQLC supports retrospective operation of the amendments, which if enacted may involve using s13 (4) of the NTA to vary a determination for any of the grounds set out in s13 (5) of the NTA.
Question 2–2 Should the proposed amendments to s 223 of the NTA only apply	NQLC supports retrospective operation of the proposed amendments to s223 of the

to determinations made after the date of commencement of any amendment?	NTA but realises that this may require using s13 of the NTA to vary determinations, as appropriate, and that may create significant work-loads for representative bodies, other interest holders and Courts.
5. Traditional Laws and Customs	
Proposal 5–1 The definition of native title in s 223 of the NTA should be amended to make clear that traditional laws and customs may adapt, evolve orotherwise develop.	NQLC supports this proposal.
Proposal 5–2 The definition of native title in s 223 of the NTA should be amended to make clear that rights and interests may be possessed under traditional laws and customs where they have been transmitted between groups in accordance with traditional laws and customs.	NQLC supports this proposal.
Proposal 5–3 The definition of native title in s 223 of the NTA should be amended to make clear that it is not necessary to establish that (a) acknowledgment and observance of laws and customs has continued substantially uninterrupted since sovereignty; and (b) laws and customs have been acknowledged and observed by each generation since sovereignty.	NQLC supports this proposal.
Proposal 5–4 The definition of native title in s 223 of the NTA should be amended to make clear that it is not necessary to establish that a society united in and by its acknowledgment and observance of traditional laws and customs has continued in existence since prior to the assertion of sovereignty.	NQLC supports this proposal.
6. Physical Occupation	
Proposal 6–1 Section 62(1) (c) of the NTA should be amended to remove references to "traditional physical connection".	NQLC supports this proposal.
Proposal 6–2 Section 190B (7) of the NTA should be amended to remove the requirement that the Registrar of the NNTT must be satisfied that at least one member of the native title claim group has or previously had a traditional physical connection with any part of the land or waters, or would have had such a connection if not for things done by the Crown, a statutory authority of the Crown, or any holder of a lease.	NQLC supports this proposal.

7. The Transmission of Aboriginal and Torres Strait Islander Culture	
Proposal 7–1 The definition of native title in s 223(1) (a) of the NTA should be amended to remove the word 'traditional'. The proposed re-wording, removing traditional, would provide that: The expression ***native title*** or ***native title rights and interests*** means thecommunal, group or individual rights and interests of Aboriginal peoples orTorres Strait Islanders in relation to land or waters, where: (a) the rights and interests are possessed under the laws acknowledged, andthe customs observed, by the Aboriginal peoples or Torres Strait Islanders; and (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and (c) the rights and interests are recognised by the common law of Australia.	NQLC would not object to the removal of the work "traditional". The Federal Court has spent a considerable amount of time looking at the meaning of the word "traditional". The approach has not always been consistent between single Judges and this hasn't been helpful. In spite of significant Court deliberation the meaning of "traditional" is still not clear.
Question 7.1 Should a definition related to native title claim group identification and composition be included in the NTA.	If the word "traditional" was removed threshold guidelines for identification of the right people for country may be appropriate to be developed, such as has occurred in Victoria, but these need not necessarily be included in the NTA.
Proposal 7–2 The definition of native title in s 223 of the NTA should be further amended to provide that: The expression ***native title*** or ***native title rights and interests*** means thecommunal, group or individual rights and interests of Aboriginal peoples orTorres Strait Islanders in relation to land or waters, where: (a) the rights and interests are possessed under the laws acknowledged, and the customs observed, by the Aboriginal peoples or Torres Strait Islanders; and (b) the Aboriginal peoples or Torres Strait Islanders, by those laws andcustoms, have a relationship with country that is expressed by their present connection with the land or waters; and (c) the rights and interests are recognised by the common law of Australia.	In the event the word "traditional" isn't retained in s223 of the NTA the Courts may not accept that the common law recognises rights and interests that have been relearned by the claim group. It would not be helpful to open up this issue to potentially years of Court interpretation. It may be better to expressly provide in the NTA that relearned rights and interests are able to be recognised by the common law.
Question 7–2 Should the NTA be amended to provide that revitalisation of law and custom may be considered in establishing whether 'Aboriginal peoples and Torres Strait Islanders, by those laws and customs,	NQLC supports amendment to provide for revitalisation of laws and custom.

have a connection withland and waters' under s 223(1)(b) of the NTA?	
Question 7–3 Should the reasons for any displacement of Aboriginal peoples orTorres Strait Islanders be considered in the assessment of whether 'Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters' under s 223(1) (b) of the NTA?	NQLC agrees that displacement should be able to be considered in the assessment of connection with land or waters.
Question 7–4 If the reasons for any displacement of Aboriginal peoples or Torres Strait Islanders are to be considered in the assessment of whether 'Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters' under s 223(1) (b), what should be their relevance to a decision as to whether such connection has been maintained?	NQLC considers that groups in its representative body area are able to establish connection requirements, not withstanding historical displacement. However, NQLC would support historical reasons being able to be taken into account and a high degree of relevance being accorded to historical reasons in relation to assessment of whether connection has been maintained provided the historical reasons are not permitted to be used adversely to native title claimants. NQLC would not support a list of historical events that are able to be taken into account being included in the NTA because the list would not be able to be exhaustive and this could invoke significant Court deliberation as to whether a particular historical event not on the list can be taken into account. This may operate to prolong resolution time.
Question 7–5 Should the NTA be amended to include a statement in the following terms: Unless it would not be in the interests of justice to do so, in determining whether Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters under s 223(1)(b): (a) regard may be given to any reasons related to European settlement that preceded any displacement of Aboriginal peoples or Torres Strait Islanders from the traditional land or waters of those people; and (b) undue weight should not be given to historical circumstances adverse to those Aboriginal peoples or Torres Strait Islanders.	See above and note that NQLC considers that historical reasons for displacement should not be permitted to be used adversely to native title claimants.
8. The Nature and Content of Native Title	
Proposal 8–1 Section 223(2) of the NTA should be repealed and substituted with a	NQLC supports this proposal.

provision that provides: Without limiting subsection (1) but to avoid doubt, ***native title rights and interests*** in that subsection: (a) comprise rights in relation to any purpose; and (b) may include, but are not limited to, hunting, gathering, fishing, commercial activities and trade.	
Proposal 8–2 The terms 'commercial activities' and 'trade' should not be defined in the NTA.	NQLC supports this proposal and considers there is more flexibility if these terms are not defined.
Question 8–1 Should the indicative listing in the revised s 223(2) (b), as set out inProposal 8–1, include the protection or exercise of cultural knowledge?	NQLC supports that the indicative listing as raised in Proposal 8.1 should include the protection and exercise of cultural knowledge.
Question 8–2 Should the indicative listing in the revised s 223(2) (b), as set out in Proposal 8–1, include anything else?	Protection of secular, cosmological and religious knowledge should also be included in the indicative listing in the revised s223 (2) (b) as set out in proposal 8-1.
9. Promoting Claims Resolution	
Question 9–1 Are current procedures for ascertaining expert evidence in native title proceedings and for connection reports, appropriate and effective? If not, what improvements might be suggested?	NQLC submits that current procedures are onerous and expensive in most circumstances. NQLC would support a simplified set of requirements to establish connection. NQLC is not entirely convinced that the proposed amendments will be effective to bring about a simplified approach. A non-rebuttable presumption of continuity, as suggested by NQLC, would assure a simplified approach.
Question 9–2 What procedures, if any, are required to deal appropriately with the archival material being generated through the native title connection process?	NQLC encourages further consideration of this issue, and while an archival database is supported it should not be publicly accessible because the material is sensitive, gender specific at times and personal.
Question 9–3 What processes, if any, should be introduced to encourage concurrence in the sequence between the bringing of evidence to establish connection and tenure searches conducted by governments?	NQLC submits that tenure material should be supplied by the State to NQLC very early if possible and before connection material is supplied. The approach of the Queensland State government to minimise historical tenure searches should have assisted in reducing timeframes. Unfortunately, timeframes have not been reduced due other Qld State policy changes.
Question 9–4 Should the Australian Government develop a connection policy setting out the Commonwealth's responsibilities and interests in relation to consent determinations?	NQLC is unaware if the Commonwealth has developed a written connection policy. No doubt it has a policy but if it isn't written it doesn't assist native title claimants to be able to ascertain what the

	Commonwealth requires for a consent determination.
Question 9–5 Should the Australian Government, in consultation with state and territory governments and Aboriginal and Torres Strait Islander representative bodies, develop nationally-consistent, best practice principles to guide the assessment of connection in respect of consent determinations?	NQLC does not support this idea. The Commonwealth isn't involved in every application for a determination of native title in Australia. The States and Territories have their own approaches which are influenced by State and Territory legislation and policy. This idea may potentially add to the complexity of the native title process rather than reduce its complexity.
Question 9–6 Should a system for the training and certification of legal professionals who act in native title matters be developed, in consultation with relevant organisations such as the Law Council of Australia and Aboriginal and Torres StraitIslander representative bodies?	NQLC generally supports the development of a system for the training and certification of legal professionals who act in native title matters, provided new funding was made available and was not drawn from existing native title funding. NQLC does not consider this would necessarily add to the ability to recruit or retain experienced native title legal professionals in representative bodies.
Question 9–7 Would increased use of native title application inquiries be beneficial and appropriate?	The option should be available but NQLC would not necessarily take advantage of the option and request such an inquiry.
Question 9–8 Section 138B(2)(b) of the NTA requires that the applicant in relation to any application that is affected by a proposed native title application inquiry must agree to participate in the inquiry. Should the requirement for the applicant to agree to participate be removed?	If this question means that the applicant is compelled to attend when it doesn't agree to an inquiry, the NQLC completely opposes that idea.
Question 9–9 In a native title application inquiry, should the National NativeTitle Tribunal have the power to summon a person to appear before it?	See above. The NNTT should not be able to summons persons to appear before it.
Question 9–10 Should potential claimants, who are not parties to proceedings, be able to request the Court to direct the National Native Title Tribunal to hold a native title application inquiry? If so, how could this occur?	Such a proposal has the potential to increase costs and timeframes, and create increased workload for NTRBs. NQLC does not agree with the idea put forward in question 9-10.
Question 9–11 What other reforms, if any, would lead to increased use of the native title application inquiry process?	NQLC does not support reforms leading to the increased use of the inquiry function.
10. Authorisation	
Proposal 10–1 Section 251B of the NTA should be amended to allow the claim group, when authorising an application, to use a decision-making process agreed on and adopted by the group.	NQLC supports that there should be a choice in relation to the decision making process.

Proposal 10–2 The Australian Government should consider amending s 251A of the NTA to similar effect. [s251A relates to authorising ILUAs]	NQLC supports this proposal, and submits that the provisions for decision making for claims and ILUAs should be consistent.
Proposal 10–3 The NTA should be amended to clarify that the claim group may define the scope of the authority of the applicant.	NQLC supports this proposal.
Question 10–1 Should the NTA include a non-exhaustive list of ways inwhich the claim group might define the scope of the authority of the applicant? Forexample: (a) requiring the applicant to seek claim group approval before doing certain acts(discontinuing a claim, changing legal representation, entering into an agreement with a third party, appointing an agent); (b) requiring the applicant to account for all monies received and to deposit them in a specified account; and (c) appointing an agent (other than the applicant) to negotiate agreements with thirdparties.	NQLC considers there would be more flexibility without a non-exhaustive list being included in the NTA.
Question 10–2 What remedy, if any, should the NTA contain, apart from replacement of the applicant, for a breach of a condition of authorisation?	If this question anticipates that sanctions be included in the NTA, this would not be supported by the NQLC. It may be better to concentrate on making removal/replacement of an applicant an easier process than include other remedy provisions in the NTA.
Proposal 10–4 The NTA should provide that, if the claim group limits the authority of the applicant with regard to entering agreements with third parties, those limits must be placed on a public register.	NQLC supports this idea but is uncertain if the Register of Native Title Claims would be an appropriate register to alert third parties of the limits on the authority of the applicant. The extent of the problem may not be significant if negotiation protocols are used. Negotiation protocols should contain clauses stating the authority or limitation thereof of each party which should act as an alert. In addition, clauses are usually contained in agreements indicating the authority of each party. If the authority of an applicant has been limited by the claim group that should be shown in the appropriate clause of the agreement.
Proposal 10–5 The NTA should be amended to provide that the applicant may act by majority, unless the terms of the authorisation provide otherwise.	NQLC supports this proposal.
Proposal 10–6 Section 66B of the NTA	NQLC supports this proposal.

should provide that, where a member of the applicant is no longer willing or able to act, the remaining members of the applicant may continue to act without re-authorisation, unless the terms of the authorisation provide otherwise. The person may be removed as a member of the applicant by filing a notice with the court.	
Proposal 10–7 Section 66B of the NTA should provide that a person may be authorised on the basis that, if that person becomes unwilling or unable to act, a designated person may take their place. The designated person may take their place by filing a notice with the court.	NQLC supports this proposal.
11. Joinder	
Question 11–1 Should s 84(3)(a)(iii) of the NTA be amended to allow only those persons with a legal or equitable estate or interest in the land or waters claimed, to become parties to a proceeding under s 84(3)?	NQLC does not support any person with a legal or equitable interest that can be represented by another party, such as the State, becoming a separate party. The proposed amendment does not go sufficiently far to address the problem of too many unnecessary respondents.
Question 11–2 Should ss 66(3) and 84(3) of the NTA be amended to provide that Local Aboriginal Land Councils under the *Aboriginal Land Rights Act 1983* (NSW) must be notified by the Registrar of a native title application and may become parties to the proceedings if they satisfy the requirements of s 84(3)?	This is mainly a matter for NTSCorp and NSWALC to address. However, it is relevant that an Aboriginal Land Council with an undetermined Aboriginal Land Claim has been held to have an "inchoate right". This may be sufficient interest to be joined as a party but it may not be feasible to notify every Local Aboriginal Land Council, including those that have not had a grant of land which contains native title or have not lodged an Aboriginal land claim, if that is what is envisaged by this question.
Proposal 11–1 The NTA should be amended to allow persons who are notified under s 66(3) and who fulfil notification requirements to elect to become parties under s 84(3) in respect of s 225(c) and (d) only.	NQLC supports this proposal provided the parties who have joined for a limited purpose are able to withdraw automatically once their matters of concern have been addressed.
Proposal 11–2 Section 84(5) of the NTA should be amended to clarify that: (a) a claimant or potential claimant has an interest that may be affected by the determination in the proceedings; and (b) when determining if it is in the interests of justice to join a claimant or potential claimant, the Federal Court should consider whether they can demonstrate a	NQLC does not support the proposal to provide for a claimant who is a member of the native title claim group to be joined where the interest supporting the joinder is a native title interest. The reason for this is that all members of a claim group authorise the bringing of an application for a determination of native title and, accordingly, there should be no reason for a

clear and legitimate objective to be achieved by joinder to the proceedings.	member of the claim group to join as a respondent party in relation to a native title interest. Persons within a claim group have access to justice through the Applicant and are not being denied access to justice by not permitting joinder as a respondent party in relation to a native title interest. However, if a claimant has a non-native title interest that would be affected by the determination then they should be permitted to join if that interest cannot be represented by another party (such as the State in relation to a pastoral lease interest).
Proposal 11–3 The NTA should be amended to allow organisations that represent persons, whose 'interest may be affected by the determination' in relation to land or waters in the claim area, to become parties under s 84(3) or to be joined under s 84(5) or (5A).	It is desirable to have fewer respondent parties and that persons who could be represented by another party not be permitted to join. It may have been preferable from the commencement of the NTA to have had the peak bodies able to join to represent their constituents and not their constituents able to join individually and to have funded the peak bodies to undertake their representative role.
Proposal 11–4 The NTA should be amended to clarify that the Federal Court's power to dismiss a party (other than the applicant) under s 84(8) is not limited to the circumstances contained in s 84(9).	NQLC supports this proposal.
Proposal 11–5 Section 24(1AA) of the *Federal Court of Australia Act 1976* (Cth) should be amended to allow an appeal, with the leave of the Court, from a decision of the Federal Court to join, or not to join, a party under s 84(5) or (5A) of the NTA.	NQLC does not support this proposal. A decision of the Court to join or not join a party is an interlocutory decision. There should be no appeal from an interlocutory decision because such an appeal right, if provided, has the potential to cause delay and add to the costs of proceedings.
Proposal 11–6 Section 24(1AA) of the *Federal Court of Australia Act 1976* (Cth) should be amended to allow an appeal, with the leave of the Court, from a decision of the Federal Court to dismiss, or not to dismiss, a party under s 84(8) of the NTA.	The same response as to Proposal 11.5 above is applicable.
Proposal 11–7 The Australian Government should consider developing principles governing the circumstances in which the Commonwealth should either: (a) become a party to a native title proceeding under s 84; or (b) seek intervener status under s 84A.	NQLC supports this proposal.

A matter that was not raised in DP82 is an amendment that the NQLC considers is required to the Native Title (Prescribed Bodies Corporate) Regulations 1999. The NTA and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* ("CATSI Act") should be consistent in relation to the membership of a Registered Native Title Prescribed Body Corporate ("RNTBC"). The membership composition included in the rulebook of the RNTBC after determination of native title by the Federal Court mirrors the claim group description in the determination judgment. However, there have been attempts in North Queensland by RNTBCs to subsequently alter their rulebooks to effect changes in the membership composition of their RNTBC to exclude a named apical ancestor with the intention that descendents of that apical ancestor are excluded from membership of the RNTBC.

The Registrar of the Office of Indigenous Corporations has to date not approved such rulebook changes because, fortunately, he has been alerted to the situation but there is no provision in the NTA or in the CATSI Act to prevent this practice. Legally, it could be prevented from occurring if express prohibition of this practice was provided in the Native Title (Prescribed Bodies Corporate) Regulations 1999.

If there are any issues arising from this correspondence please do not hesitate to contact my staff member, Ms Jennifer Jude, Senior Legal Officer, North Queensland Land Council on Ph 07 4042 7023.

Yours faithfully

Martin Dore
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North Queensland Land Council Native Title Representative Body Aboriginal Corporation

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