ATTORNEY GENERAL; MINISTER FOR COMMERCE

Our Ref: 44-14179

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

Dear Ms Wynn

WESTERN AUSTRALIAN GOVERNMENT SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION'S NATIVE TITLE INQUIRY

Please find attached the Western Australian Government's submission in relation to the Australian Law Reform Commission's (ALRC) Inquiry into the *Native Title Act 1993* (Cth) (NTA). Specifically, this submission is made in response to the ALRC's Discussion Paper, released in October 2014.

The submission shows why the Discussion Paper's proposals and overall approach are seriously flawed. The Discussion Paper fails to demonstrate that its proposals are solidly based upon evidence and relevant case law which prove that the current provisions are unworkable or ambiguous.

The proposals contained in the Discussion Paper will have a significant impact on both the architecture and interpretation of the NTA. Any major changes to the fundamental laws of native title will increase uncertainty and complexity for stakeholders and lead to a new wave of litigation, delay and expense as parties seek to understand the new law.

Recognition of native title alone does not guarantee that practical, social or economic opportunities will follow. While Western Australia supports amendments that deliver such opportunities, it does not support re-engineering native title legislation to provide access to those presently unable to demonstrate native title. Such efforts will not only fail to achieve this principle, they risk undoing the considerable outcomes already achieved by the native title system to date.

The impact of the NTA, including native title claims, determinations, future acts, and compensation liabilities is greater in Western Australia than any other jurisdiction in Australia. Any changes to the NTA, particularly in relation to connection requirements, should not create manifest uncertainty or increase litigation as newly introduced, unprecedented, legal standards are tested in the courts and new definitions and elements of law are clarified.

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Western Australia's consistent record of recognising native title by consent contradicts the premise underlying the Discussion Paper that the current NTA provisions do not deliver efficient, effective or just outcomes for Indigenous Australians. It is also an unfounded premise that existing connection requirements lead to adverse consequences (e.g. creating legal uncertainty, introducing further delays, making the system less efficient or less flexible) and so need to be amended.

As I have indicated by my comments above, the Western Australian Government is seriously concerned about the ramifications of the Discussion Paper's proposals and has prepared a submission that demonstrates why this is so. I provide the attached submission for your due consideration.

Yours sincerely

Hon. Michael Mischin MLC
ATTORNEY GENERAL; MINISTER FOR COMMERCE

16 DEC 2014

The Western Australian Government's Submission

to the

Australian Law Reform Commission's

Native Title Inquiry

December 2014

REVIEW OF THE *NATIVE TITLE ACT 1993* – DISCUSSION PAPER
STATE OF WESTERN AUSTRALIA'S SUBMISSION

1. INTRODUCTION

1.1 Background

(a) The Western Australian Government is pleased to make a submission in relation to the Australian Law Reform Commission's (**ALRC**) Inquiry into the *Native Title Act 1993* (Cth) (**NTA**), as referred to the ALRC by the then Attorney-General of Australia, the Hon Mark Dreyfus QC MP, on 3 August 2013 (**Inquiry**).

(b) The Western Australian Government previously made a submission to the ALRC in respect of the ALRC's Issues Paper 45 in relation to this Inquiry (**see attached**). The present submission is in respect of the ALRC's Discussion Paper 82.

(c) In this Submission, we principally address the proposals contained in chapters 5, 7 and 8 of the Discussion Paper which deal, broadly, with the NTA's requirements for proof of native title ("connection" requirements) and with native title rights of a commercial nature. We generally rely upon and refer to our earlier submission.

1.2 Summary of Western Australian Government's position

(a) The Western Australian Government's view is that the Discussion Paper's proposals and overall approach are seriously flawed. Not only is it likely that the steady progress of native title determinations will be disrupted if the ALRC's proposals were to be adopted, the Discussion Paper contains little reference to evidence or relevant case law demonstrating the need for the changes. That is, while its proposals are premised on the native title system being broken, the ALRC has failed to demonstrate why this is so.

(b) The proposals contained in the Discussion Paper will have a significant impact on both the architecture and interpretation of the NTA. In the Western Australian Government's view, any major changes to the fundamental laws of native title will increase uncertainty and complexity for stakeholders and lead to a new wave of litigation, delay and expense as parties seek to understand the new law.

(c) One of the guiding principles for reform that the ALRC has developed is to support sustainable futures. According to the ALRC, '*reform should promote sustainable, long-term social, economic and cultural development for Aboriginal and Torres Strait Islander peoples*'. However, as previously submitted by the Western Australian Government, recognition of native title alone does not guarantee that practical, social or economic opportunities will follow. While Western Australia supports amendments that deliver such opportunities, it does not support re-engineering native title legislation to provide access to those presently unable to demonstrate native title. Such

efforts will not only fail to achieve this principle, they risk undoing the considerable outcomes already achieved by the native title system to date.

(d) The impact of the NTA, including native title claims, determinations, future acts, and compensation liabilities is greater in Western Australia than any other jurisdiction in Australia. The Western Australian Government therefore stresses that any changes to the NTA, particularly in relation to connection requirements, not create manifest uncertainty or increase litigation as newly introduced, unprecedented legal standards are tested in the courts and new definitions and elements of law are clarified.

(e) Western Australia's consistent record of recognising native title by consent contradicts the premise underlying the Discussion Paper that the current NTA provisions do not deliver efficient, effective or just outcomes for Indigenous Australians. It is also an unfounded premise that existing connection requirements lead to adverse consequences (e.g. creating legal uncertainty, introducing further delays, making the system less efficient or less flexible) and so need to be amended. These views are explained further below.

2. DETAILED RESPONSE TO DISCUSSION PAPER

2.1 "Connection" requirements under the NTA – chapters 5 and 7

(a) Chapters 5 and 7 of the Discussion Paper set out a number of proposals for amendments to s 223 of the NTA, which defines native title and is accordingly fundamental to the negotiation and litigation processes comprising the native title system in Western Australia. In the Western Australian Government's view, the proposed changes to s 223 under both chapter 5 and chapter 7 constitute significant changes to the present legal principles in relation to native title and potentially alter the nature of native title as posited in *Mabo No. 2* and as presently understood by all participants in the system.

(b) The Western Australian Government is opposed to these changes for the following reasons.

(c) First, the Discussion Paper does not demonstrate a need for any of the proposed substantive changes to the connection requirements – there are references to "technicality and complexity" and native title being "excessively vulnerable", but there is no suggestion such factors have proved a significant barrier to the recognition of native title, or, any barrier at all.

(d) We note that the Aboriginal and Torres Strait Islander Social Justice Commissioner's *Social Justice and Native Title Report 2014* states as follows based on information provided by the Federal Court of Australia (page 77, omitting footnotes):

> *The Federal Court has identified the following trends in native title in the last five years:*
>
> - *A decline in the number of new applications filed each financial year from a peak of 322 in 1995-96 to 40 new claims in 2013-14.*

- *A significant reduction in the median time for resolution of applications determined in 2013-14 compared to previous years, from an average of 12 years and 11 months in June 2013 to an average of two years and six months as at 30 June 2014.*

- *A marked increase in the number of applications resolved by consent from 2010-11 onwards, from nine in 2008-09, to 10 in 2010-11, 28 in 2012-13 and 60 consent determinations in 2013-14.*

- *A decrease in the number of claims in mediation and an increase in the number of claims in active case management. Of the 416 claimant applications active as at 30 June 2011, 189 were referred to mediation and 177 were in case management before the Court. Of the 325 claimant applications active as at 30 June 2014, 28 were referred to mediation and 214 claims are in active case management before the Court.*

(e) In its first submission the Western Australian Government referred to the trend in Western Australia towards resolution of native title claims by consent. Other State Governments have made similar submissions, but it does not appear that the ALRC has given significant weight to these submissions.

(f) The assertion that proposed reforms may be "consistent with the beneficial purpose" of the NTA[1] is insufficient reason to make substantial changes to the existing law. Substantial changes which will have the effect of upsetting the existing law in a significant way must be justified by reference to compelling evidence drawn from practical case examples, but the ALRC has not referred to such evidence. As explained below, there is high risk in proceeding in the manner proposed by the ALRC without careful consideration of the practical implications of the various proposals.

(g) Second, the proposed changes will shift the current emphasis from establishing rights and interests possessed by Indigenous societies at sovereignty to rights and interests asserted by contemporary Indigenous groupings. The proposals under both chapter 5 and chapter 7 would have this effect if adopted. For example:

(1) Proposal 5-2 contemplates recognition of rights and interests which have been transmitted between groups. Such rights and interests are, by definition, not rights and interests which existed at sovereignty because at sovereignty the relevant rights were held by a different group under different laws and customs.

(2) Proposal 5-3 contemplates that rights and interests may be recognised notwithstanding that the Indigenous group in question has not

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[1] Discussion Paper, [2.65][5.2].

continuously acknowledged and observed laws and customs sustaining relevant rights since sovereignty. This necessarily implies that any such rights now recognised would be new and different rights from those which originally existed (at sovereignty) on the assumption that the original rights are no longer possessed by the group pursuant to the laws and customs which existed at sovereignty.

(3) Proposal 5-4 contemplates omission of a requirement for a traditional society. Absence of a traditional society implies that non-traditional groupings of Aboriginal people may assert rights (see scenarios below). This also implies that the laws and customs relied upon to sustain rights and interests need not be those which existed at sovereignty, but, rather, only be those of the contemporary group.

(4) Proposal 7-1 (omission of the word "traditional" from s 223(1)) explicitly contemplates rights and interests which did not exist at sovereignty.

(5) Proposal 7-2 contemplates that Indigenous groups need only have a "relationship" with country pursuant to (non-traditional) laws and customs. This necessarily makes native title available to a multitude of contemporary groupings in respect of a given area.

(h) The legal and practical implications of these proposals, if adopted, are profound:

(i) There is little doubt that rights which did not exist at sovereignty will now be capable of recognition. There will therefore be a greater burden on the Crown's radical title than existed at sovereignty. As explained by the High Court in *Yorta Yorta* such a proposition is inconsistent with the nature and effect of the Crown's acquisition of sovereignty.

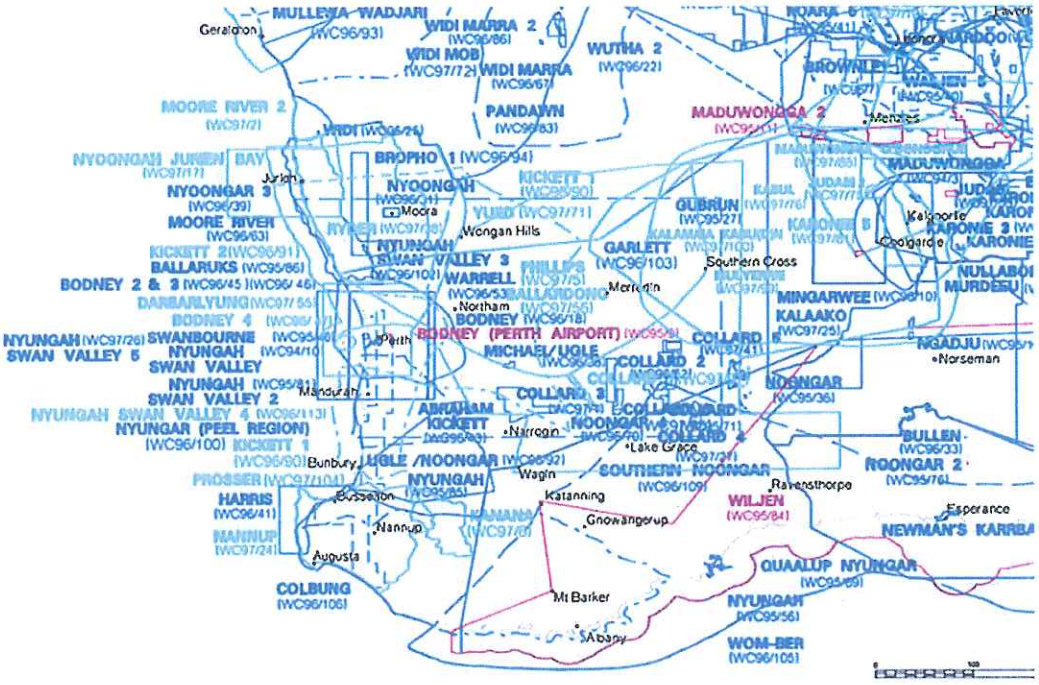
(j) The legal basis for establishing native title rights and interests posited by the High Court in *Mabo No. 2* will be fundamentally altered. As explained by Justice Brennan at page 58, '*[n]ative title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.*' It is a fundamental principle of *Mabo No 2* that native title rights and interests survived sovereignty and are now capable of recognition because they have been sustained by the acknowledgement and observance of traditional laws and customs. Any omission of requirements for acknowledgement and observance of traditional laws and customs as a prerequisite for proving and having recognised native title rights and interests necessarily means that the nature of native title as previously understood has been altered.

(k) Native title rights and interests will no longer be claimable only by those groups which traditionally held rights in respect of an area at sovereignty pursuant to their laws and customs acknowledged and observed at sovereignty. Post-sovereignty, contemporary groupings of Indigenous people will be able to assert rights on the basis of laws and customs which did not necessarily exist in

respect of an area at the time of sovereignty, or, existed in a substantially different form at sovereignty. It can therefore be expected that the number of claim overlaps and intra-Indigenous disputes will increase, perhaps significantly. As the Western Australian Government submitted previously, claim overlaps are a principal reason for delays in the resolution of claims currently.

(l) Relatedly, the proposals will have an impact upon the application of the registration test. Under s 62(2)(e) of the NTA as it presently stands, claimant applications must contain a general description of the facts supporting a claim, including that there are traditional laws and customs that give rise to the claimed native title. Further, under s 190B(6) the Native Title Registrar must consider whether, *prima facie*, at least some of the native title rights and interests claimed in the application can be established. If the word "traditional" was removed from s 223(l)(a) it follows that that this *prima facie* test for the observance of traditional laws and customs would become redundant. There would therefore be little to stand in the way of many overlapping claims being filed and registered over an area.

(m) By way of illustration of the potential impact on the claims landscape we refer to the maps below which show the native title claims currently over the south-west of Western Australia, and those which existed in 1997 prior to the introduction of the registration test in 1998.



(n) The Discussion Paper offers no viable means of resolving these issues. For Courts to be able to resolve factual contests between competing groups and identify the "right people for country" there must be clear legal principles – non-statutory "guidelines"[2] are not an adequate substitute. Nor is recourse to anthropology, for in any given situation there may be multiple groups with a "legitimate" claim, depending on the legal principles to be followed (see scenarios below).

(o) The proposals will create a lacuna in relevant legal principles. By stipulating what "traditional" does <u>not</u> mean or include in the chapter 5 proposals, considerable doubt is left as to the meaning of the term. It is for this reason that the chapter 5 and 7 proposals are substantially the same in substance.

(p) It is also likely that groups which have already achieved determinations of native title will seek to vary their determinations to avail themselves of the amended law and the potentially superior native title rights available. Addressing a multitude of variation applications will necessarily divert resources away from the resolution of outstanding claims and undo many years of work. The alternative – making the legislation prospective only – will arguably create an inequity between current and future determined rights holders.

(q) For all these reasons the proposals will cause significant uncertainty and delay in the resolution of native title claims. It is very likely that the current progress

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[2] Discussion Paper, [7.27].

in resolution of claims by consent will be interrupted as respondent parties seek to understand the new requirements.

(r) Without considering the practical implications of its proposed reforms the ALRC is not in a position to say whether its proposals will "promote timely and practical outcomes for parties to a native title determination through effective claims resolution."[3] It is the Western Australian Government's view that the ALRC's chapter 5 and 7 proposals will not achieve this principle, and, indeed, will have the opposite effect.

(s) The legal and practical difficulties with the chapter 5 and 7 proposals are illustrated by the following scenarios based on the experience of the Western Australian Government:

Scenario 1

(t) A group of Indigenous people migrated to an area belonging to a different language group in 1910. In 1910 the resident language group (which held rights and interests in respect of the relevant area at sovereignty) accommodated the migrant group pursuant to traditional laws and customs.

(u) The descendants of the migrant group now acknowledge and observe their laws and customs in the relevant area. So does the original group which occupied the area at sovereignty.

(v) Under the proposals, which group now holds native title in the area?

Scenario 2

(w) At sovereignty, an Indigenous society occupied a particular area and acknowledged and observed its traditional laws and customs in respect of that area.

(x) In the twentieth century due to various historical factors the original society split into multiple groups which migrated to different areas. The laws and customs of each of those groups changed over time such that each group now has different laws and customs.

(y) Each group now brings a claim of native title over the area occupied by the original society. Under the proposals which group, if any, holds native title rights and interests over the relevant area and on what basis?

Scenario 3

(z) At sovereignty, an Indigenous society occupied a particular area and acknowledged and observed its traditional laws and customs in respect of that area.

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[3] Principle 3 of the Inquiry.

(aa) In the twentieth century that society became mixed with the members of another society, and that "mixed" society now occupies a relevant area. That "mixed" society brings a claim for native title over the area, as do sub-groups deriving from each of the original two societies.

(bb) Under the proposals which of the groups, if any, hold native title over the relevant area?

(cc) In this context we also note question 7-3 which asks whether the reasons for displacement of Aboriginal or Torres Strait Islanders should be considered in assessing connection for the purposes of s 223(1)(b) of the NTA. This question is premised on the assumption that a group of Indigenous persons may be able to establish that they hold native title rights and interests in the absence of any "connection" to an area pursuant to traditional law and customs. In the Western Australian Government's view that premise is flawed because it calls into question the basis on which the "rights" are held in the first place. If made into a proposal this approach would also give rise to complex questions of historical fact because the reasons for an Indigenous group's displacement from and lack of connection to an area may be multi-faceted – a mixture of the negative forces imposed by European settlement and the voluntary choices made by members of the group to migrate from their traditional country. At present this is not a significant issue in the resolution of native title claims but it will become a significant issue if framed in the way suggested in the Discussion Paper.

2.2 Chapter 8 – Native title rights and interests of a commercial nature (Proposals 8-1 and 8-2)

(a) The proposal for reform in relation to commercial rights (Proposal 8-1) is flawed because it proceeds on a number of false premises.

(b) First, *Akiba* is not authority for the broad proposition that native title rights comprise rights in relation to any purpose. Rather, it was concerned only with the nature and scope of the native title right to take and use resources (in that case, marine resources). In *Akiba*, Justice Finn concluded on the evidence that, as a matter of traditional law and custom, rights to use the resources of the claim area extended to commercial exploitation, and that the evidence supported the determination of a right "to take for any purpose". The evidence in that case revealed a long history of commercial exploitation of marine resources as a matter of traditional law and custom, including the sale of fish for money. Evidence of that type has not been found to exist elsewhere.

(c) Second, it is wrong to say that "the High Court held in *Akiba* that native title rights and interests could comprise a 'right to access resources and to take for any purpose resources' in the native title claim area." The determination made in that form by the primary judge was not the subject of the appeal to the High Court. The case concerned only extinguishment issues.

(d) Third, and related to the second, the law in relation to commercial rights is not settled. *Akiba*, *Willis* and *BP (Deceased)* are first instance decisions. For *Willis* and *BP (Deceased)*, the appeal periods have not yet run. No superior court has yet considered the correctness of a determination of a right "to take

for any purpose" and, in particular, the nature and extent of evidence required to support such a determination. Important aspects of the law which require clarification include (a) whether evidence of activities undertaken pursuant to traditional laws and customs is required to establish the right and (b) the relevance of adaptation and change to the recognition of rights of a commercial nature. Before *Akiba*, the weight of case law was against the recognition of rights of a commercial nature.

(e) Fourth, the native title right to take for any purpose as found is *Akiba* should not be conflated with a native title "right to trade". Both require separate consideration. The Western Australian Government is not aware of any instance where the Court has made a determination of a native title right to trade where a right claimed in that form has been put in issue.

(f) Ultimately, the State's position remains that there is no need to amend the NTA to include express reference to commercial rights. *Akiba* demonstrates that such rights are capable of recognition where the evidence supports a determination of commercial rights.

(g) To expand the scope of recognition by legislative amendment also raises the possibility that any such amendment will result in an acquisition of the State's property otherwise than on just terms. That is, at sovereignty, the State's radical title was not burdened by native title rights "in relation to any purpose" which would involve commercial rights. It is only by allowable change and adaptation that such rights are now capable of recognition (where made out on the evidence). The proposed amendment would expand the scope of that recognition to native title rights generally and thereby increase the burden on the State's radical title. There is also the prospect that the State's property would then be available for commercial exploitation where no such right existed previously.

2.3 Chapters 10 and 11 – authorisation and joinder

(a) The Western Australian Government considers that it is not able to comprehensively address the proposals with respect to authorisation in light of the significant proposed changes to the connection requirements. These changes if adopted will have a bearing upon authorisation and the bringing of claimant applications generally as discussed above. Western Australia would not support any amendments that increase the complexity, cost or uncertainty of the authorisation process.

(b) The Western Australian Government has similar concerns about the proposals for joinder. Issues surrounding joinder will be significantly complicated if the proposals with respect to connection are adopted. In particular, there is likely to be a greater intensity of joinder applications by Indigenous parties, as well as overlapping applications as discussed above. While the State is seldom actively involved in joinder applications we are concerned about increases in delay and complexity of proceedings if these proposals are implemented. It is unclear to us how these proposals will facilitate will "promote timely and practical outcomes for parties to a native title determination through effective claims resolution."

ATTACHMENT

The Western Australian Government's Submission

to the

Australian Law Reform Commission's

Native Title Inquiry

May 2014

REVIEW OF THE *NATIVE TITLE ACT 1993* – ISSUES PAPER

STATE OF WESTERN AUSTRALIA'S SUBMISSION

1. INTRODUCTION

1.1. Background

(a) The State of Western Australia (**State**) is pleased to make a submission in relation to the Australian Law Reform Commission's (**ALRC**) Inquiry into the *Native Title Act 1993* (Cth) (**NTA**), as referred to the ALRC by the then Attorney-General of Australia, the Hon Mark Dreyfus QC MP, on 3 August 2013 (**Inquiry**).

(b) Specifically, this submission is made in response to the *Review of the Native Title Act 1993 Issues Paper*, released by the ALRC in March 2014 (**Issues Paper**). The Issues Paper invites public submissions by 14 May 2014.

(c) This submission first sets out a summary of the State's general position in relation to the Inquiry, having reference to the Issues Paper, and then sets out the State's detailed response to the particular issues raised in the Issues Paper.

1.2. Summary of State's position

(a) The Western Australian Government considers that a review of the NTA has merit. However, it notes that the scope of the Inquiry's Terms of Reference is predisposed to a substantive revision of the NTA's connection requirements and, potentially, amendments to the authorisation and joinder provisions.

(b) Western Australia's consistent record of recognising native title by consent (see Appendix 1) contradicts the premise informing the Terms of Reference and Issues Paper that the current NTA provisions do not deliver efficient, effective or just outcomes for Indigenous Australians. It is also an incorrect premise that existing connection requirements lead to adverse consequences (for example, creating legal uncertainty, introducing further delays, making the system less efficient or less flexible) and therefore require amendment. These views will be further explored below.

(c) The Western Australian Government strongly supports technical amendments to the NTA and associated administrative functions that:

(1) make the native title system more equitable and streamlined for all parties;

(2) provide increased certainty to the relationship between native title and other interests in lands and waters; and

(3) deliver strategic and long-term benefits to Indigenous Australians.

(d) The impact of the NTA, including native title claims, determinations, future acts, and compensation liabilities is greater in Western Australia than any other jurisdiction in Australia (see Appendix 2). Western Australia therefore prefers that any changes to the NTA, particularly in relation to connection requirements, do not create manifest uncertainty or increase litigation as newly introduced,

unprecedented, legal standards are tested in the courts and new definitions and elements of law are clarified.

(e) Any proposal to remove, or fundamentally alter, the requirement to demonstrate adherence to a continuing normative system based on pre-settlement laws and customs ignores a central tenet of the *Mabo No. 2* decision. The process of identifying the right people for country will inevitably become more complex and fraught with contention for both Aboriginal and non-Aboriginal interests if new bases for asserting rights in country are arbitrarily inserted into the NTA. Existing jurisprudence and case law developed since 1992 (e.g. *Mabo*, *Yorta Yorta*, *Wik*) will cease to have currency or direct relevance. There will no longer be clear, objective and tested bases for ascertaining group membership and asserting connection to country.

(f) In relation to the requirement for the Inquiry to address the '*capacity of native title to support Indigenous economic development and generate sustainable long-term benefits for Indigenous Australians*', the Western Australian Government notes that the recognition of native title alone does not guarantee that practical, social or economic opportunities will follow. Multi-tiered support is critical to create sustainable Prescribed Bodies Corporate (**PBCs**) that can proactively leverage long-term benefits derived from effective integration into their respective local and regional economy. The Western Australian Government considers that good governance and well understood or soundly based, transparent, decision-making processes are essential to that end.

(g) To introduce a '*presumption of continuity of acknowledgment and observance of traditional laws and customs and connection*' will not, of itself, alter the fact that in most instances a native title determination does not necessarily provide an automatic platform for social and economic advancement for native title holders.

(h) The Terms of Reference require the ALRC to have regard to the Preamble and the Objects of the NTA in considering the above issues. The central theme of the Inquiry appears to be timely access to justice. Significantly the Preamble recognises that:

> *...many Aboriginal peoples and Torres Strait Islanders, because they have been dispossessed of their traditional lands, will be unable to assert native title rights and interests and that a special fund needs to be established to assist them to acquire land.*

(i) The Western Australian Government observes that this fundamental aspect of the Preamble, despite its focus on justice for all Indigenous Australians and not just those able to prove native title, has not been addressed in the Issues Paper. The Western Australian Government recommends that the ALRC not overlook this important aspect of the NTA. Rather than viewing the NTA as the single panacea to solve all challenges faced by Indigenous Australia, effort must be focussed on developing other practical and effective mechanisms, as originally envisioned in the Preamble, to ensure that just non-native title outcomes are also in place. A significant example of an alternative approach to resolving native title claims in Western Australia is the proposed South West Settlement – see Appendix 3.

(j) In the State's view, any attempt to address social justice and economic development for Indigenous Australians by re-engineering the basic premises of native title is misguided and overlooks the context in which the NTA was enacted.

(k) Below, the questions are considered in the order in which they are discussed in the Issues Paper.

2. DETAILED RESPONSE TO ISSUES PAPER

2.1. Scope of Inquiry

(a) Questions 1-4 of the Issues Paper relate to the scope of the Inquiry.

(b) In relation to Question 1, the State notes that the present concepts of native title derive from *Mabo No. 2*, and, in turn, from Australia's unique political and legal history, including its history of European settlement. Any proposed changes to the native title system, especially any changes to s 223(1) of the NTA, must take into account these historical foundations of native title. Radical changes to the system not properly grounded in Australia's unique history are likely to result in uncertainty and instability in the system. Accordingly, the State suggests the inclusion of an additional principle to those listed in the Issues Paper, namely, *'ensuring consistency and compatibility with the development of Australia's unique political and legal history, including its history of European settlement.*'

(c) As stated above, the State considers that the ALRC should take into account the paragraph of the Preamble to the NTA which states that '*many Aboriginal peoples and Torres Strait Islanders, because they have been dispossessed of their traditional lands, will be unable to assert native title rights and interests and that a special fund needs to be established to assist them to acquire land.*' The NTA was never intended to provide a comprehensive solution to all the socio-economic issues facing Indigenous Australians, and should not now be amended in pursuit of that goal. Such amendments are unlikely to achieve this goal, but carry the risk of creating greater uncertainty and a fresh wave of litigation, as discussed further below.

(d) In terms of trends in the native title system (Question 2), the State considers that courts have been increasingly willing to recognise native title notwithstanding the ostensibly onerous requirements of the *Yorta Yorta* test. The State considers that this fact is a compelling rejoinder to many of the criticisms levelled at the *Yorta Yorta* test, and which appear to underpin many of the questions and options for reform in the Issues Paper.[1]

(e) There has also been a continuing trend in Western Australia towards determinations by consent rather than litigation. So far during the 2013-14 financial year there have been 5 consent determinations and 1 litigated determination in Western Australia, resolving 8 claimant applications (see Appendix 1). The State is involved in many more non-litigious than litigious proceedings – currently there are 40 claims in Western Australia in active Federal Court case management or mediation. Subject to tenure analysis, respondent party agreement and settlement of final terms of draft determinations, the State expects 11 consent determinations resolving a further 18 claimant applications in 2014-15.

(f) In terms of variations in the operation of the NTA across Australia (Question 3), Western Australia is particularly active in the native title sphere, having a total of

[1] See further discussion below at 2.2(d).

100 outstanding claims at the present time. Determined claims in Western Australia represent 19.9% of the total determined area in Australia (see Appendix 2). Accordingly, as stated above, the impact of the NTA, including native title claims, determinations, future acts, and compensation liabilities is greater in Western Australia than any other jurisdiction in Australia. The State is concerned to see that any changes to the native title system, especially to the connection requirements, do not increase the burden to the State and cause any additional barriers or delays to the just resolution of native title claims. The State considers that any major changes to the connection requirements should be supported by clear and unequivocal justification.[2]

(g) In relation to comparative jurisdictions (Question 4), the view of the State is that the ALRC should take note of the considerable body of jurisprudence which has developed in Australia following *Mabo No. 2*, and the associated progress in resolving claims. These developments demonstrate that the existing system is delivering suitable outcomes for all parties. There is a degree of stability in, and acceptance of, the existing system across a broad range of stakeholders. Accordingly, the State considers that any attempt to adopt elements of foreign systems – which are necessarily sourced in different historical and legal circumstances – is likely to have a destabilising effect that may lead to a new wave of litigation.

(h) The State also notes that despite Canada having arguably lower thresholds for the proof and recognition of Aboriginal title and rights (as native title is known in that country), there has yet to be a single judicial determination of native title in that country. It is also the case that the Supreme Court of Canada and Canadian scholars have long proposed negotiation of comprehensive agreements, rather than litigation, as the ideal means for reconciling the divergent interests of Aboriginal peoples, the Crown and society at large.[3]

(i) In terms of states' practice which may be relevant to the Inquiry (Question 4), the State draws the ALRC's attention to Western Australia's practice of resolving native title claims by consent. The Land, Approvals and Native Title Unit of the Department of the Premier and Cabinet maintains and periodically updates guideline documents and associated materials to assist native title claim groups in progressing their claims in a non-litigious context.[4]

2.2. Connection requirements

(a) Questions 5-22 inclusive of the Issues Paper deal with '*connection requirements relating to the recognition of acknowledgement and observance of traditional laws and customs and connection*' (**connection requirements**). Connection requirements are one of two specific areas the subject of the Inquiry's Terms of

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[2] Further discussion below, particularly at 2.2(b)-(h).

[3] See e.g. Lisa Dufraimont, "Continuity and Modification of Aboriginal Rights in the Nisga'a Treaty" (2002) 25 UBC L Rev 455;, Thomas Isaac, "The Courts, Government, and Public Policy: The Significance of *R. v. Marshall*" (2000) 63 Sask. L. Rev. 701 [Isaac, "Courts, Government and Public Policy].

[4] The latest version of this document is the *Guidelines for the Provision of Connection Material* dated February 2012, available at <http://www.dpc.wa.gov.au/lantu/MediaPublications/Documents/Guidelines-for-the-provision-of-connection-material-Feb-2012-FINAL.pdf>.

Reference.[5] Connection requirements are also the subject of 5 specific '*options for reform*' (each with its own set of questions):

(1) '*a presumption of continuity of acknowledgment and observance of traditional laws and customs and connection*' (Questions 6-9);

(2) '*clarification of the meaning of 'traditional' to allow for the evolution and adaptation of culture and recognition of 'native title rights and interests*' (Questions 10-11);

(3) '*clarification that 'native title rights and interests' can include rights and interests of a commercial nature*' (Questions 12-15);

(4) '*confirmation that 'connection with the land and waters' does not require physical occupation or continued or recent use*' (Questions 16-17); and

(5) '*empowerment of courts to disregard substantial interruption or change in continuity of acknowledgment and observance of traditional laws and customs where it is in the interests of justice to do so*' (Questions 18-21)

(b) As a global response to Questions 5-22 and the options for reform, it appears to the State that the underlying premise of this part of the Inquiry is that the current legal tests for the proof and recognition of native title are unduly onerous and time-consuming for native title claimants, and serve as a barrier to the prompt, just and full recognition of native title.

(c) The State's fundamental position is that this premise is false. In the State's experience, connection requirements are not a significant contributor to delays in the resolution of native title claims. Instead, issues of overlapping claims and land and mining tenure information research are significant contributors to delay. Land and mining tenure research is vital to identify "other interests" in determination areas as required by s 225(c) of the NTA (including those held by third party respondents – see below), as well as to determine the impact of extinguishment upon the nature and extent of native title rights and interests which can be recognised (s 225(b) of the NTA). Delays may also be caused by claims for novel or unusual rights that are unsubstantiated, and by a range of administrative matters not related to connection requirements.

(d) Courts have interpreted the *Yorta Yorta* requirements broadly and generously. In the State's experience, the *Yorta Yorta* requirements have seldom posed a significant barrier to the recognition of native title in a litigated context. In practice, the "bar" is now low for the recognition of native title. In particular, the requirements for continuity of acknowledgement and observance of laws and customs, and the proscription of "substantial interruption" to laws and customs have seldom posed significant barriers to the recognition of native title (see below for further discussion).

(e) In Western Australia, most native title claims are resolved by consent, not litigation (see Appendix 1). The State government has made significant progress in resolving claims in Western Australia notwithstanding the connection requirements. Accordingly it is unlikely, in the State's view that substantial changes to the connection requirements will lead to faster resolution of claims. To the contrary, for the reasons discussed below, the State considers that

[5] Issues Paper, Terms of Reference.

substantial changes to the connection requirements are likely to lead to further delays and litigation, and could potentially undermine the native title system as presently understood.

(f) The State does not consider that s 223 of the NTA is deficient (Question 5). Significant native title outcomes have been achieved in Western Australia against the backdrop of the current definition.

(g) It should also be noted that the definition of native title in s 223 comes from Brennan J's judgment in *Mabo No. 2* and its current interpretation comes primarily from *Yorta Yorta*. Any alteration of the definition of native title will likely cause a substantial shift in native title jurisprudence and result in a fresh wave of litigation as parties seek to understand the meaning of the new definition. In any event, the idea that native title rights and interests are '*the rights and interests possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders*' is fundamental and, seemingly, uncontroversial. However, Aboriginal groups are best placed to answer this question.

(h) The State submits the following in relation to each of the specific options for reform and related questions.

Presumption of continuity (Questions 6-9)

(i) The State's view is that a rebuttable "presumption of continuity" should not be introduced into the NTA for the following reasons.

(j) First, it does not appear to the State that continuity has been a major issue in many native title cases, or, at least, it has not been a major obstacle to the attainment of native title. Accordingly, there appears to be little basis for an assumption that the introduction of a "presumption of continuity" will lead to better native title outcomes.

(k) Second, reduced or simplified requirements for establishing connection as per, for example, Justice French's (as he was then known) suggestion, would very likely increase the incidence of overlapping claims. Since overlaps are currently a significant source of delay in the resolution of claims, this eventuality will negate the intended benefits of this proposal. It is unclear how the State or the Court would resolve overlaps given a presumption of continuity. It is unlikely the State would have any or sufficient information or resources at its disposals to resolve overlaps.

(l) Third, despite the prevalence of overlaps, the existing connection requirements (which include the requirement for a traditional "society") perform the useful function of ensuring that native title claims are brought on behalf of the correct people for country. The introduction of a rebuttable "presumption of continuity" as per French J's model would remove the requirement for a traditional society, and so would increase the risk that claims are not brought on behalf of the correct people. Apart from increasing the likelihood of overlaps (see above), this carries the risk that native title determinations will not have the normative force and widespread acceptance that they enjoy currently.

(m) Fourth, the State would still be obliged to undertake a due diligence process in respect of claims if a presumption of continuity was introduced (Question 7). The connection issues would be the same, but the onus would be solely on the State to

address the relevant issues. It is unlikely the State would compromise due diligence by streamlining its connection assessment process, so in a consent determination context it is unlikely that there would be significant time savings. The State would also still have to deal with tenure and extinguishment considerations which are currently a significant source of delay. In a contested context, it is likely that the State or other parties (including competing Indigenous parties) would seek to test the various elements comprising the presumption. This could lead to a new wave of litigation that might take several years given the likely inapplicability of existing jurisprudence to the new legal questions.

The meaning of 'traditional' (Questions 10-11)

(n) From the State's perspective there are no significant problems associated with the need to establish that native title rights and interests are possessed under the traditional laws acknowledged and traditional customs observed by the relevant Aboriginal or Torres Strait Islander people (Question 10). In particular, the Courts have taken a broad and flexible approach to the issue of change and adaptation of rights, so there is little substance, in the State's view, to an alleged prevalence of a "frozen rights" approach.[6] For example, the Full Federal Court has on three occasions (in *Griffiths v Northern Territory*,[7] *Western Australia v Sebastian*,[8] and *Bodney v Bennell*[9]) accepted as "traditional" a change from an estate-based, patrilineal landholding system at sovereignty to a cognatic/ambilineal descent-based system in modern times.

(o) Further, as discussed above, the requirement for a traditional society provides a degree of rigour to the native title process, and reduces the risk of claims and determinations being made in respect of the wrong people for country. This in turn gives greater normative force to determinations and fosters their widespread acceptance.

(p) In relation to the question of whether there should be a definition of traditional or traditional laws and customs in s 223 of the *Native Title Act* (Question 11), the State considers that a definition is unnecessary, primarily because these terms are already interpreted flexibly by the Courts. New definitions are therefore unlikely to lead to time savings or greater recognition of native title. However, any new definitions are likely to be tested in the Courts, so their introduction may well lead to delays in the resolution of claims which might not otherwise have occurred.

(q) Any new definitions of "traditional" would also be likely to open up more claims to native title based on contemporary (non-traditional) interests in land (such as where there has been contemporary migration by Aboriginal people to country traditionally occupied by another group). It is precisely these kinds of divergent interests which have led to overlapping claims and intra-Indigenous disputes.

(r) In most parts of Western Australia, "traditional" (as currently defined in s 223 of the NTA) interests coexist with the interests of other Aboriginal people who have migrated into the relevant area. The archetypal example would be where the members of several different groups are co-resident at an Aboriginal community on Crown reserve land. Any expansion of the definition of "native title" to

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[6] See Issues Paper, [117].
[7] (2007) 243 ALR 72.
[8] (2008) 173 FCR 1.
[9] (2008) 167 FCR 84.

include those non-traditional interests would simply increase the risk of intra-Indigenous disputes (and litigation).

Native title rights and interests of a commercial nature (Questions 12-15)

(s) The State does not consider that the NTA should be amended to state that native title rights and interests can include rights and interests of a commercial nature (Question 12). This is because, as recognised in the Issues Paper, the *Akiba* decision already confirms that native title rights may comprise commercial rights. The existence or otherwise of commercial rights always turns on the evidence provided.

(t) Moreover, there is no need to amend the requirements in respect of adaptation and change because it is clear that the Courts take a broad and flexible approach to these issues (see above). There is, as yet, little indication from the Courts that the definition of native title or the connection requirements pose a significant barrier to the recognition of commercial rights.

(u) As discussed above, care must be taken in applying approaches from other jurisdictions in this context (Question 15). Each country's jurisprudence is based on a unique set of historical factors which might not be replicated in other countries. Hence, the importation of foreign concepts without sufficient consideration would in all likelihood lead to unexpected consequences.

Physical occupation, continued or recent use (Questions 16-17)

(v) The State considers that the Issues Paper accurately sets out the broad issues in relation to physical occupation, or continued or recent use (Question 16). In short, it appears that "connection" for the purposes of s 223(1)(b) does not require physical occupation, but that physical occupation or continued or recent use may be relevant but not determinative in the context of determining rights under s 223(1)(a). The State does not consider that any changes should be made to native title laws and legal frameworks to address these issues.

(w) Nor does the State consider that the NTA should include confirmation that connection with land and waters does not require physical occupation or continued or recent use (Question 17).

'Substantial interruption' (Questions 18-21)

(x) In the State's view, there are no significant problems associated with the need for native title claimants to establish continuity of acknowledgment and observance of traditional laws and customs that has been 'substantially uninterrupted' since sovereignty (Question 18). As acknowledged in the Issues Paper, the qualification that acknowledgment and observance of traditional laws and customs must only be "substantially" uninterrupted makes allowances for the impacts of European settlement upon Aboriginal societies. Moreover, in the State's experience this requirement has seldom proven a barrier to the recognition of native title. Courts have tended to interpret this requirement flexibly.

(y) A difficulty with defining "substantial interruption" as proposed by the Aboriginal and Torres Strait islander Social Justice Commissioner[10] is that it would make the

[10] Issues Paper, [189].

test for recognising native title unduly complicated (Question 19). Such an approach would also tend to shift the focus of native title inquiries onto historical matters, without necessarily achieving any time savings. It is also the State's experience from a broad range of consensual and contested matters that Aboriginal groups may compellingly and successfully establish that they hold native title rights and interests notwithstanding profound social and demographic changes since European settlement. Proposed changes such as these may therefore not give due recognition to the capacity of Aboriginal societies to withstand change.

(z) For the same reasons the State does not consider that the Courts should be empowered to disregard 'substantial interruption' or change in continuity of acknowledgement and observance of traditional laws and customs where it is in the interests of justice to do so (Question 21). Courts already have the capacity to interpret these requirements flexibly so as to meet the interests of justice. A formal change of this nature would likely place greater emphasis than there is presently on the fact and nature of any substantial interruption, and on the term '*in the interests of justice*'.

(aa) In relation to Question 22, the State does not consider that there should be any other changes to the law or legal frameworks relating to connection requirements for the recognition and scope of native title.

2.3. Authorisation and Joinder

(a) Authorisation is the subject of Questions 23-30 inclusive, and Joinder is the subject of Questions 31-35. The specific subject of the Inquiry is '*any barriers imposed by the Act's authorisation and joinder provisions to claimants', potential claimants' and respondents' access to justice.*'

Authorisation

(b) The State considers that authorisation requirements for the bringing of native title and compensation claims are a vital component of the native title system that serve a necessary democratic function for native title claimants, and provide certainty for other parties. Accordingly, the State considers that these requirements should be retained. While there may sometimes be defects in, or challenges to, authorisation, the State considers that the relevant provisions of the NTA are generally effective in ensuring that claims are made by applicants who have the approval of the claim group (Question 23).

(c) The State would generally be supportive of amendments which streamline or simplify authorisation requirements, including confirmation that claimants may adopt a decision-making process of their choice even in circumstances where there is a traditional decision-making process (Questions 24 and 25). However, any changes to the authorisation requirements should be consistent with, and not undermine, the fundamental connection requirements in s 223(1) of the NTA.

(d) As the State seldom takes an active role in s 66B applications, it does not have a strong view on amendment proposals in relation to those applications (Question 27). However, the State would be supportive of amendments to streamline requirements and ensure effective functioning of claims where a member, or all the members of the Applicant, dies. The death of Applicants is also relevant to the signing of State Deeds in the context of s 31(1)(b) of the NTA

where each member of the Applicant must ordinarily sign. The State would similarly support amendments to streamline requirements where a member of the Applicant is incapacitated and unable to act. However, this situation is distinguishable from that where a member of the Applicant is able, but unwilling to act.[11] In the State's view that situation would properly require re-authorisation, unless majority decision-making is possible (see below).

(e) The State makes no particular submissions in relation to s 84D of the NTA (Question 28).

(f) As the State is not privy to the resourcing of authorisation meetings, it is not in a position to comment on whether resourcing is proportionate to the aim of ensuring that native title holders can participate in the decisions that affect them (Question 29). However, the State agrees with the comments cited in the Issues Paper at [242] to the effect that authorisation processes are a vital part of the native title system that perform many important functions.

(g) The State supports claim groups being able to define the scope of authority of the Applicant, or Applicants being able to make decisions on a majority rather than unanimous basis (Question 30). Majority decision-making, if permissible, may obviate the need for some s 66B applications or consent determinations in the context of future acts.

Joinder

(h) In relation to joinder, the State does not consider that the party provisions of the NTA (particularly ss 84(5), (8) and (9)) impose barriers in relation to access to justice (Question 31). The State considers that these provisions appropriately provide the Court with discretion to join parties whose interests might be affected by a native title determination, and also to remove parties in appropriate circumstances.

(i) The State acknowledges that late joinder of parties has the potential to cause prejudice to the other parties to the proceedings, especially the Applicant (Question 32). Prejudice may arise, for example, if hearings are delayed because parties join and seek to take an active role late in proceedings. However, the State considers that existing statutory provisions are sufficiently flexible to allow the Court to avoid prejudice which might arise from late joinder of parties.

(j) The principles which should guide whether a person may be joined as a party when proceedings are well advanced should include: whether the party's alleged interest is sufficiently portentous; whether the evidence supporting the alleged interest is sufficiently cogent and compelling; whether the party's reason for applying late is compelling; and whether the prejudice to existing parties of joining the new party outweighs the prejudice of non-joinder (Question 33).

(k) In relation to respondent interests and representation (Questions 34 and 35), the State supports the principle that parties should be able to protect their interests by joining claims. The State considers that third parties (non-State and non-Applicant parties) should always be able to be involved in native title proceedings, provided they have a legitimate interest which might be affected by a determination, and provided their involvement will not cause undue prejudice to

[11] Issues Paper, [237].

any party. As stated above, the State considers that existing statutory provisions are sufficiently broad and flexible to allow third parties to be involved in native title proceedings without causing undue prejudice. The Federal Court has significant experience in managing litigation under existing principles of discretion and the overall interests of justice.

(l) There are several reasons why the involvement of third parties in native title proceedings is legitimate and appropriate. For examples:

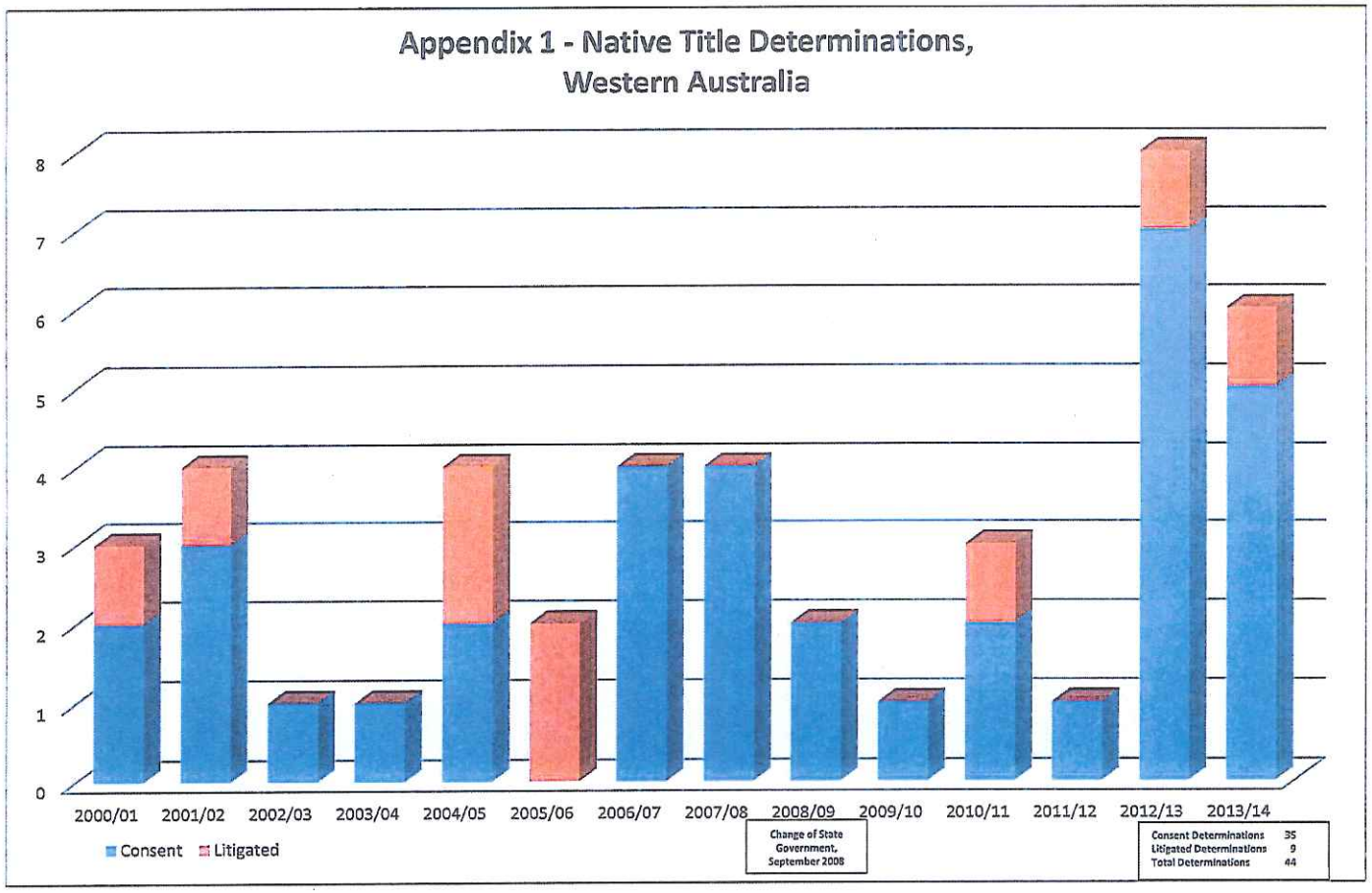
(1) As referenced in the Issues Paper at [287], the *in rem* nature of native title determinations means that it is counter-productive to exclude persons with legitimate interests. The exclusion of persons with legitimate interests would likely undermine the authority and general acceptance of native title determinations and increase the likelihood of those determinations being challenged.

(2) The State is not always in a position to identify all interests held by all third parties despite its role as *parens patriae*. The State's tenure records and retrieval systems are extensive and thorough but not perfect. Much historical land tenure information was created at a time before the existence of native title was contemplated. Third parties sometimes hold interests which are not apparent in the State's records for a variety of reasons.

(3) Third parties may have important connection-related information at their disposal which is relevant to the claim and yet not available to the State. The inclusion of such information in claim proceedings allows all relevant connection-related issues to be fully addressed.

(4) Further to (3) and (4), third parties may have particular concerns or queries in relation to their identified interests in native title proceedings that are beyond the scope of the State's duties or role as *parens patriae*. For example, a third party respondent might be particularly concerned about which members of the native title claim group are connected to an area surrounding their tenure for the purposes of s 223(1)(b), which may be relevant to future dealings affecting that tenure, but which may not be of great concern to the State.

(m) The State does not consider that any other changes to the party provisions of the NTA should be made (Question 35).


Appendix 1 - Native Title Determinations, Western Australia
8
7
6
5
4
3
2
1
0
2000/01
2001/02
2002/03
2003/04
2004/05
2005/06
2006/07
2007/08
2008/09
2009/10
2010/11
2011/12
2012/13
2013/14
Consent
Litigated
Change of State Government, September 2008
Consent Determinations 35
Litigated Determinations 9
Total Determinations 44

Appendix 2 – Incidence of native title by jurisdiction as at 31 December 2013

Category/Jurisdiction	WA	QLD	NT	SA	NSW	VIC	National Total
1. Area affected by native title (km) (% of national total)	1,740,729 km (43.6%)	1,072,306 km (26.9%)	388,336 km (9.7%)	379,422 km (9.5%)	378,807 km (9.5%)	30,741 km (0.8%)	3,990,343 km (100%)
2.Applications for native title (% of national total)	100 (24.5%)	86 (21.0%)	173 (42.3%)	22 (5.4%)	25 (6.1%)	3 (0.7%)	409 (100%)
3. Determinations of native title (% of national total)	43 (19.9%)	86 (39.8%)	62 (28.7%)	17 (7.8%)	4 (1.9%)	4 (1.9%)	216 (100%)
4.Area of jurisdiction subjected to a native title determination	39.89%	15.54%	10.72%	39.99%	0.33%	11.52%	23.99%
5. Number of Registered Native Title Body Corporates (PBC's) (% of national total)	28 (23.5%)	56 (47.1%)	16 (13.4%)	12 (10.1%)	3 (2.5%)	4 (3.4%)	119 (100%)
6. Active Future Act matters (% of national total)	722 (90.9%)	71 (9.0%)	0 (0%)	0 (0%)	1 (0.1%)	0 (0%)	794 (100%)

Appendix 3 - The South-West Settlement

The Settlement will achieve the full and final resolution of six native title claims in the South West through the surrender of all native title rights and interests by the Noongar community in exchange for a negotiated package of benefits from the State.

The final offer

The State's final offer, which will deliver enduring economic, cultural and social benefits for both the State and the Noongar community, includes:

- an Act of Parliament recognising the Noongar people as the traditional owners of the South West;
- a State contribution of $600 million ($50 million indexed per annum for 12 years) paid into a Noongar Boodja Trust 'Future Fund' to establish a perpetual fund for Noongar social, cultural and economic development;
- a State contribution of $120 million ($10 million indexed per annum for 12 years) paid into the Noongar Boodja Trust 'Operations Fund' for the establishment and operation of a Noongar governance structure;
- the creation of a Government-administered Land Partnership Fund to facilitate several initiatives including the creation of a Noongar Land Estate sourced from Crown land of up to 320,000 hectares, a joint conservation management partnership, a uniform Aboriginal cultural heritage regime, Noongar training and skills development, the management of priority properties and Aboriginal access to identified areas of the Crown estate for customary purposes;
- strengthened partnerships between government and the Noongar Corporations to improve service delivery to the Noongar community and to promote Noongar economic participation and development; and
- a capital works program that includes accommodation for the six Noongar Regional Corporations and the Central Services Corporation, the provision of Crown land and funding for the design and part of the establishment of a Noongar Cultural Centre under specified conditions, and the refurbishment and transfer of approximately 120 of the Government's housing stock into the Noongar Boodja Trust and other initiatives to improve Noongar home ownership.

Benefits to the State

The main benefits to the State from the Settlement are:

- the surrender of all native title rights and interests in the South-West;
- the removal of all future act compliance obligations under the *Native Title Act 1993* to the benefit of public and private land development;
- the cessation of costly native title claim litigation; and
- the avoidance of any future native title compensation claims.