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16 January 2015

Professor Lee Godden
Commissioner Native Title Inquiry
Australian Law Reform Commission
Level 40, MLC Centre,
19 Martin Place
SYDNEY NSW 2000

Dear Professor Godden

A response to ALRC Discussion Paper 82 is set out below

1. This submission is being provided by Central Desert Native Title Services Limited ("Central Desert") in response to the *"Review of the Native Title Act 1993: Discussion Paper 82"* ("Discussion Paper") published in October 2014 by the Australian Law Reform Commission ("ALRC").

Central Desert Native Title Services

2. Central Desert is the recognized Native Title Service Provider for the Central Desert Native Title Representative Body Region of Western Australia ("Central Desert region") pursuant to section 203FE of the *Native Title Act 1993* (Cth) ("NTA"). The organisation was incorporated on 16 April 2007 and commenced operations on 1 July 2007. The Central Desert region was formerly serviced by the Native Title Unit of Ngaanyatjarra Council.

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

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

    - To secure for the Indigenous Peoples of the Central Desert:

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

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

General Observations

5. The ALRC should be commended for both the production of the Discussion Paper, and the speed with which the Discussion Paper was produced.

6. It is apparent that the ALRC clearly considered all submissions put to them and have proposed reforms that are aimed at redressing a number of imbalances and injustices in the way that native title has been developed by the courts, including with respect to judicial interpretation of the NTA. The Discussion Paper also rightly highlights the failure of the indigenous land fund to deliver the intended outcomes and the absence of the promised "social justice package". Both of these latter items are often overlooked in discussions regarding native title law reform.

7. Central Desert is of the view that the Discussion Paper:

   (a) provides a solid analysis of the inconsistences in the application of the law;

   (b) illustrates that native title case law appears to have departed from the intention of the NTA (including by the importation by the Courts of additional 'tests' required to establish native title that are not found in the NTA); and

   (c) correctly emphasizes that the NTA is beneficial legislation and, in accordance with the High Court's statements on beneficial legislation, therefore should be given a "fair, large and liberal" interpretation, rather than one that is "literal or technical"; and

   (d) raises awareness of native title as a means for economic development for traditional owner groups.

8. Central Desert is pleased to provide the ALRC with the following submissions:

Chapter 2 – Framework for the review of the NTA

Q2-1 Should the proposed amendments to the NTA have prospective operation only?

Q2-2 Should the proposed amendments to section 223 of the NTA only apply to determination made after the commencement of any amendment?

9. Any responses to the above questions are predicated on:

   (a) the amendments being both beneficial to native title parties (or traditional owner groups) and of real practical value; and
   (b) the actual form of words and drafting of the relevant provisions.

10. Generally speaking, however, any amendments which may result in a more favorable native title determination, or increase the likelihood of a native title group securing a determination in their favour, should also provide native title parties with the ability to seek to have their native title determinations varied should they chose to do so.

11. It is understood that an application to vary an approved determination of native title is likely to be a costly and time intensive exercise, and, likely to be strongly resisted by respondent groups. However, in the interests of justice, the option should be made available. Consequently, Central Desert would be in favour of the ALRC exploring drafting which would have retrospective application.

Chapter 4 – Defining Native Title

Presumption of Continuity – No proposed amendment that there be a presumption of continuity of acknowledgement and observance of traditional laws and customs and connection.

12. In its response to the ALRC's Issues Paper 45, Central Desert submitted that because of its particular regional context, its claims generally did not have issues establishing continuity. It was conceded that this was a more difficult issue for areas on the edges of the desert, and for those claims in more settled and urban areas.

13. Central Desert was generally supportive of such a presumption but acknowledged that it was not without its issues. For example, introduction of a presumption did lack certainty with regards to its potential effects and consequences. The exercise of caution by the ALRC in this regard is noteworthy.

14. Central's Desert's views on the ALRC's proposed amendments to the definition of native title is discussed below.

Chapter 5 – Traditional Laws and Customs

Proposal 5-1: The definition of native title in section 223 of the NTA should be amended to make clear that traditional laws and customs may adapt, evolve or otherwise develop

15. Central Desert agrees with ALRC's statement in the Discussion Paper that section 223(1) requires an interpretation that is 'fair, large and liberal' consistent with the Preamble and Objects of the NTA.

16. Central Desert supports Proposal 5-1, which would result in the NTA explicitly acknowledging that traditional laws and customs under which native title rights and interests are possessed may adapt, evolve or otherwise develop.

17. It is agreed that Proposal 5-1 is consistent with the Court's approach that traditional laws and customs must have their origin in pre-sovereignty laws and customs but do not need to be identical to the pre-sovereignty laws and customs to be considered 'traditional'.

18. The ALRC's statement that "legislative acknowledgement in the NTA of adaption, evolution and development of laws and customs provides explicit recognition of the cultural vitality of Aboriginal and Torres Strait Islander Peoples[1]" is a clear enunciation of the appropriateness of the proposed amendment.

19. Proposal 5-1 also provides comfort to native title holders that adaption, evolution or development of laws and customs does not necessarily put their native title determinations at risk.

20. Of course, it should be noted that the extent to which any adapted, evolved or developed law and custom is deemed to have its origins in pre sovereignty laws and customs is a question to be determined on the evidence.

21. In principle, Proposal 5-1 is supported by Central Desert.

Proposal 5-2: The definition of native title in section 223 of the NTA should be amended to make clear that rights and interests may be possessed under traditional law and custom where they have been transmitted between groups in accordance with traditional law and customs.

22. ALRC is seeking an amendment to the NTA to clarify that native title rights and interests may be succeeded to by sub-groups within a native title claim group, as well as by a different group or society than that which possessed the rights and interests at sovereignty, where the rights and interests have been transmitted in accordance with traditional laws and customs.

23. Current case law is not clear on the question of transmission between different groups and societies and, as such, it is important that the matter is addressed and clarified.

24. Succession between groups in accordance with traditional law and custom is not uncommon, particularly where groups have significantly reduced in number or ceased to exist, often due to the impact of non-Aboriginal settlement activity. As such, proposal 5-2 is a sensible clarification of the law regarding a legitimate practice and is supported by Central Desert.

Proposal 5-3: The definition of native title in section 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.***

[1] Page 101 of the Discussion Paper

25. Central Desert agrees with the ALRC's assessment that the requirement that traditional law and custom remain "substantially uninterrupted... by each generation" makes native title "excessively vulnerable" to adverse findings, and is not consistent with the beneficial purposes of the Act[2].

26. It is without a doubt that the 'generation requirement' is unduly harsh and unjust. It is interesting to note that submissions made by various Governments were generally opposed to any amendments regarding continuity, and, believed that "substantially uninterrupted" provided enough flexibility. Additionally, government submissions claimed that they were usually willing to infer continuity. While the latter is generally Central Desert's experience, it is arguably the result of the particular factual situation of native title claims in our region, and may not be a universal experience throughout Western Australia.

27. It is worthwhile noting that although some Governments may take a practical approach with regards to continuity, the actions of government can vary significantly depending on both the particular government, and, the people within it. Consequently, the extent to which "substantially interrupted" provides sufficient flexibility in favour of native title groups depends significantly upon the government assessing the merits of the claim. Additional clarity within the NTA may reduce the extent to which this variation occurs.

28. Additionally, as correctly noted in the Discussion Paper, apparent gaps in continuity could well result from a lack of available evidence regarding continuity rather than non-observance of traditional laws and customs. As such, Central Desert supports an amendment such as Proposal 5-3 to ensure consistency regarding how continuity is approached, bearing in mind the beneficial nature of the NTA.

Proposal 5-4: The definition of native title in section 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 acknowledgement and observance of traditional laws and customs has continued in existence since prior to the assertion of sovereignty.

29. Central Desert supports the concept contained within Proposal 5-4. A great deal of time and resources are spent obtaining evidence to establish "societies" when what is, in fact, required under the NTA is the identification of a group who holds rights and interests in relation to land accordance with law and custom.

30. Based on section 223 and the definition of a native title claim group in the NTA, the focus should be on both the content of law and custom as they relate to rights and interests in land and their observance by a group. Essentially, there needs to be a demonstration of 'right people for right country' without necessarily having to provide comprehensive evidence of the intricacies of the particular social system.

Chapter 6 – Physical Occupation

[2] Page 106 of the Discussion Paper

31. As set out in Chapter 6 of the Discussion Paper, the NTA and the case law have made it clear that connection of a native title claim group does not need to be physical. Physical presence provides evidence of connection, but it is not essential to prove native title.

32. ALRC's proposal that no amendment is required in relation to section 223(1)(b) is sensible. However, it should be noted that despite what case law has said regarding connection, in practice most respondent parties want evidence of some form of physical use or occupation.

Proposal 6-1: Section 62(1)(c) of the NTA should be amended to remove references to 'traditional physical connection'.

33. ALRC is proposing that section 62(1)(c) be amended to promote consistency with judicial interpretation of section 223(1)(b).

34. Central Desert supports this proposition. Additionally, there is an argument for removing the whole of section 62(1)(c). As demonstration of physical connection is not required to prove native title, providing information about being prevented from gaining access to an area is redundant. Even if section 62(1)(c)(ii) served some particular purpose (which is unclear), what the native title claim group appears to be asked to evidence may contribute to, or prompt, an argument by respondent parties as to an interruption to connection. Consequently, section 62(1)(c) appears, to Central Desert, to be both redundant and potentially damaging.

Proposal 6-2: Section 190B(7) of the NTA should be amended to remove the requirement that the Registrar 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.

35. The "traditional physical connection" requirement found in section 190B(7) is not consistent with section 223 and the interpretation of that section by the courts.

36. As correctly noted by the ALRC, the reasons for why connection has not been maintained (for example, because of things done by the Crown) is not relevant to the question of whether connection has been maintained. Section 190B(7), perhaps somewhat mischievously, attempts to elicit evidence demonstrating the fact that connection may not have been maintained, even if the reasons are ultimately irrelevant.

37. Central Desert supports Proposal 6-2.

Chapter 7 – Transmission of Aboriginal and TSI Culture

Proposal 7-1: The definition of native title in section 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 the communal, group or individual rights and interests of Aboriginal peoples or Torres 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 and customs, have a connection with the land or waters; and
(c) the rights and interests are recognized by the common law of Australia

38. Proposal 7-1 suggests that the word 'traditional' be removed from the definition of native title in section 223(1)(a) of the NTA due to the complexity of its interpretation in case law, and, because it is often associated with rigid concepts and the notion of traditional law and culture being 'frozen in time'.

39. Central Desert agrees with ALRC's analysis that section 223(1)(a) is framed in the present tense. Ultimately however, those laws and customs, which give rise to the connection to land and the rights and interests, must have roots. Generally speaking, it is understood where those roots lie and where they, according to claimants, originate from. In this regard, Central Desert supports the statement of David Martin found at paragraph 7.21 of the Discussion Paper.

40. Central Desert submits that it is difficult to separate native title from the concept of tradition. Rather, the law needs to acknowledge that laws, customs and tradition do evolve and adapt over time, and, that an interruption in observance does not mean that the laws and customs actually cease to exist. Certainly this would not be the view of Aboriginal people.

41. Additionally as stated at paragraph 28, an interruption in observance may not be a true interruption, but rather a lack of evidence to demonstrate continuity. The concept that continuity can be broken by one generation is absurd and highly unjust. It could very well be the case that grandparents transmit knowledge to grandchildren that they look after; Central Desert's experience is that the relationship between grandparents and grandchildren, including with respect to the inter-generational transfer of law and culture, is consistently highly valued by our clients. It may be the case that a middle generation, having been subject to removal from their parents and country due to government policy and European settlement, do not observe law and custom, but their parents and their children do. Lack of observance by one generation does not break continuity nor is does it constitute a 'substantial interruption'.

42. A removal of the requirement for laws and customs to be 'traditional' could also lead to an increase in intra-indigenous disputes over country including disputes relating to historical versus traditional connection. This would particularly be the case where people of long historical occupation held different laws and customs to those observed by those people with a traditional connection to the area concerned.

43. It is Central Desert's view that the amendments in Chapter 5, coupled with the ability for law and custom to be revitalized, are preferable to Proposal 7-1.

44. Amendments, or further developments in case law, also need to address the concept enunciated in *Yorta Yorta* that 'traditional' encompasses transmission of law and culture usually by word of mouth and common practice. Groups are increasingly embracing new ways to transmit law and custom, including by using technology and social media. How law and custom is transmitted is important in demonstrating observance and acknowledgement, but it is not central to the concept of tradition. It is the act of transmission, not the method, which is significant.

Question 7-1: Should a definition related to native title claim group identification and composition be included in the Native Title Act?

45. Question 7-1 is related to the difficulties that may arise between historical and traditional connection of a claim group to an area. The removal of 'traditional' makes the identification of a claim group more difficult. It is not clear how one would frame such a definition of claim group or how a claim group is identified if you are not rooting a connection to country in something other that a historical connection, that is, a traditional connection.

46. Whether the reference is to 'traditional' or 'pre sovereignty' the effect is still the same, however a reference to laws and customs which exists prior to the assertion of sovereignty but which may evolve and adapt over time may be more palatable and seen as less "frozen".

47. In the Discussion Paper, the ALRC refers to the 'threshold guidelines" of the *Traditional Owner Settlement Act 2010* (Vic) ("TOSA") and suggests that something similar may be useful if the word 'traditional' is removed from the NTA. From Central Desert's perspective, the TOSA threshold guidelines regarding the identification and composition of a traditional owner group is not dissimilar to that of a native title claim group, and, the TOSA guidelines do require that traditional owner groups provide technical descriptions of their group. Additionally, under the TOSA guidelines traditional owner groups must be able to demonstrate that all persons who hold or may hold native title are included as any settlement agreement is registered as an ILUA. The TOSA guidelines use the terminology of 'traditional' throughout the document, albeit the description of 'traditional' is more 'lenient' than that of the Courts making decisions in relation to the NTA. Of course, the TOSA is aimed at groups who are not likely to be able to meet the high evidentiary burden of the NTA.

48. Central Desert is of the view that removal of the word 'traditional' would create additional conflict and uncertainty in the native title system. Central Desert is particularly concerned that such a change to the NTA could result in considerable litigation in an effort by various parties to gain judicial guidance with respect to the uncertainty introduced by such an amendment. Our view is that native title groups in Western Australia are currently seeking determinations in an increasingly adversarial environment. A further increase of litigation could put undue pressure on native title groups and worsen the under-resourcing of native title representative bodies who advocate on their behalf.

Proposal 7-2: The definition of native title in section 223 of the NTA should be further amended to provide that:

> ***The expression 'native title' or 'native title rights and interests' means the communal, group or individual rights and interests of Aboriginal peoples or Torres 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 and customs, have a relationship with country that is expressed by their present connection with the land or waters; and***
> ***(c) the rights and interests are recognized by the common law of Australia***

49. ALRC proposes that Proposal 7-2 would clarify that the requisite connection is the relationship with the land and waters claimed and give it some meaningful content. ALRC also suggest that further amending statements could be added to clarify that "connection with land and waters means the holistic relationship" and that "the relationship may be expressed in various ways including but not limited to physical presence on the land".

50. The amendments proposed do not seem to accord with what was outlined in Chapter 6 of the Discussion Paper, that is, that the law on nature of a group's connection (i.e. not just physical) was settled and there was no need for an amendment to clarify that connection could be spiritual.

51. The characterization of connection as a relationship with country is not problematic in that it accords with how Aboriginal people view their connection. The word 'relationship' implies both rights and obligations; however, the ordinary meaning of the word 'relationship' is "a connection or association". Further consideration needs to be given as to whether this amendment adds anything in a real or practical sense. Demonstrating a connection or relationship to country requires the production of evidence to support the type of connection a group is claiming.

52. There is a danger in introducing amendments that may be well intentioned but which do not actually add anything of real or practical value. Generally, the challenge of native title lies in both gathering relevant evidence and presenting it in a way so as to satisfy the test set out by a completely different culture and legal system.

53. The insertion of the word 'present' in section 223(b) by Proposal 7-2 is aimed at addressing difficulties in either the availability, or, presentation of evidence of connection at sovereignty and refocusing the attention to a group's current connection or relationship to land and waters. It appears that it is attempting to lessen the burden on proving continuity by referring to the law and custom providing the present connection.
54. However, it is still the case that even the present connection of a group must be rooted in laws and customs, that those laws and customs must be identifiable, and that the connection be traditional.

55. There appears to be a danger in the amendments in Proposal 7-2 creating additional uncertainty and conflict.

Question 7-2: Should the NTA be amended to provide that revitalization of law and custom may be considered in establishing whether 'Aboriginal People and Torres Strait Islanders, by those laws and customs, have a connection with land and waters under section 223(1)(b)?

56. In short, the answer to Question 7-2 is yes.

57. In the Discussion Paper, the ALRC makes a distinction between 'revival' and 'revitalization', with the later meaning 'renewed vigour as opposed to reinvention'. The law has made it clear that revival is not possible. Revival means to bring back to life; reinvention means to change so much as to appear entirely new and revitalize is to imbue with new life and vitality[3].

58. The concept of revitalization here appears to be aimed at particularly addressing the 'generation by generation' continuity test. The difficulty of course is one of evidence. A group may very well be revitalizing law and customs but because of the particular evidence, lack of evidence, or the way it is presented, it could be deemed revival because of what appears to be a "substantial interruption".

59. It's going to be exceptionally rare that Aboriginal groups abandon law and custom (or more accurately, abandon law and custom willingly), and, as noted by the ALRC, the High Court has held that use of the word 'abandonment' when describing the 'consequences of interruption in acknowledgment and observance of traditional laws and customs" is in fact misleading[4].

60. The central question that the ALRC appears to be grappling with is, how then does one deal with forced abandonment while producing a just outcome and one that does not deter people from reviving or revitalizing their culture in any event? Is the current state of the law deterring people from reviving their laws and customs because native title law does not adequately accept the historical impact and present day realities of that impact for communities in a way that is just and fair?

61. It is arguable that if proper and respectful regard is had to historical factors which cause displacement, then accepting revitalization of law and custom should necessarily follow.

Question 7-3 Should the reasons for any displacement of Aboriginal Peoples or Torres Strait Islanders be considered in the assessment of whether Aboriginal People and Torres Strait Islanders, by those laws and customs, have a connection with land and waters under section 223(1)(b)?

62. The answer to this question may lie in the facts of the particular case, the connection that is demonstrated and the native title determination being sought.

63. There is no doubt that reasons for displacement are important and that acknowledgment of the impact of displacement is key to starting to address community hurt. However, consideration needs to be given as to the amount of time or evidence devoted to this in terms of putting one's best case forward in a

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[3] *Australian Concise Oxford Dictionary, Fourth Edition*
[4] page 139 of the Discussion Paper

native title determination application. Presentation of reasons for displacement may be antithetical to obtaining a positive determination of native title.

64. It would be a regretful situation if traditional owner groups put native title determinations at risk by attempting to have past injustices, and the current impact of those injustices, acknowledged by the courts. Litigation invariably requires a party to forward their best case; that is, despite displacement, there is still law and custom and connection, even if it is not the same as it was at sovereignty.

65. Now that Aboriginal people's relationship to country is widely understood and accepted, there is of course likely to be renewed vigor amongst Aboriginal people in practicing law and custom and asserting their connection. Aboriginal people should not be penalised for revitalsation of their culture in a native title context.

66. ALRC does not propose any options for reform on how the influence of European settlement should be considered. Perhaps the answer lies more in alternative settlements or regimes, and some acceptance that native title is not the answer, recognition nor means of redress that Aboriginal people have been seeking. Native title has a narrow legal meaning and applicability; the sort of justice that many Aboriginal people seek for the acts perpetrated against them should be provided, but likely lies outside of the native title system. Central Desert notes the failure of successive Commonwealth governments to deliver the "social justice package" originally promised at the time of the NTA's enactment.

67. As previously submitted, continuity of connection is not particularly an issue in Central Desert's region. Responses to this proposal are therefore best enunciated by those groups and representative bodies where this is a particular issue.

68. Additionally, there are inherent difficulties in introducing a statutory definition of 'substantially uninterrupted". Central Desert therefore submits that Proposal 5-3 is the preferred option.

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 People and Torres Strait Islanders, by those laws and customs, have a connection with land and waters under section 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;***
> ***(b) undue weight should not be given to historical circumstances adverse to Aboriginal People or Torres Strait Islanders.***

69. This question acknowledges the issue raised above, that consideration of historical circumstances around displacement may actually prejudice a group's case for a positive determination of native title, and, that groups should carefully consider the extent to which they adduce evidence of dispossession and displacement.

70. The qualification *"Unless it would not be in the interests of justice to do so"* may also give rise to questions regarding what would be considered in the 'interests of justice'?

71. Additionally, the proposal is predicated on a physical connection which is but one of the ways that people may be connected to their country. As such, it could be the case that spiritual, ceremonial and cultural connections to country were maintained despite physical displacement. If the section is intended to also cover the non-physical aspect of connection, then having courts consider cultural displacement as a result of settlement means that it is not likely that native title will be proved.

72. Difficulties may also arise with regards to the proposed insertion of "*undue weight not to be given*" to adverse historical circumstances. Essentially, the subjective discretion of the court in allocating how much weight is to be given to particular facts and evidence determines the outcome of a native title determination application.

73. The proposals above are geared towards making it easier for groups to prove native title. While there is no doubt that the current requirements for proving native title are harsh, careful consideration needs to be given to well intentioned proposals, such as the above, to ensure that they aren't attempting to right historical wrongs without understanding the real impact of such proposals or imposing unintended prejudicial impacts on groups. It needs to be borne in mind that native title involves people and for many securing a determination of native title is a painful journey which takes a huge toll on individuals, families and communities.

74. Additionally, there may need to be further consideration regarding the utility and purpose of the ILC and the 'social justice package' if it is the case that these sorts of provisions are intended to widen the net of groups achieving successful native title determinations. As correctly intimated in the Discussion Paper, the ILC and the promised 'social justice package' has not delivered what was intended, and perhaps there are more optimal ways of addressing loss of connection and the impact of such a loss, than through amendments to the NTA.

75. At the end of the day, the NTA should not be the only means by which the impact of colonization is addressed.

Chapter 8 – Nature and content of native title

Proposal 8-1: Section 223(2) of the NTA should be repealed and substituted with a provision that provides:

> ***Without limiting sub-section (1) but to avoid doubt, native title rights and interests in that sub-section:***
>
> ***(a) comprise rights in relation to any purpose; and***
> ***(b) may include, but are not limited to hunting gathering fishing, commercial activities and trade.***

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

77. An inclusion that rights may be comprised in relation to any purpose accords with this view but whether such an amendment makes any real impact in practice is another matter, as it is still up to the native title claim group to assert the particular right and provide evidence as to its existence under traditional law and custom.

78. The argument that statutory confirmation of the law as stated in *Akiba* is warranted (as it may assist in unlocking the economic potential of native title) is a good although obviously untested one. It certainly may assist in shifting the perception of native title rights in the broader community from being primordial hunter-gatherer rights to being rights and interests that are to be taken seriously. Recognition that there were commercial activities and trade within and amongst Aboriginal groups and outsiders will provide native title groups with expanded opportunities for economic development and partnerships with existing businesses and industry.

79. Groups should be able to revisit their native title determinations to take advantage of any amendments in line with Proposal 8-1 if they wish. Obviously resources and the cooperation (or not) of government and proponents will have a significant impact on the ability of a group to bring such an action, and achieve the outcomes desired.

80. Central Desert supports Proposal 8-1.

Proposal 8-2: the terms 'commercial activities' and 'trade' should not be defined in the NTA.

81. Central Desert agrees with proposal 8-2. It would not be beneficial to be prescriptive, particularly as the content of commercial activities and trade are going to be dependent on the particular group and the relevant law and custom.

Question 8-1: Should the indicative listing in the revised s223(2)(b), as set out in Proposal 8-1, include the protection or exercise of cultural knowledge?

82. It is arguable that intellectual property rights as a native title right are not outside the realms of being in relation to land or waters. Law, custom and knowledge is evidenced in song, art, ceremony, dance or stories. Groups should have the right to control the reproduction and use of information, knowledge and the mediums by which they are expressed, and, which is uniquely theirs under law and custom.

83. Additionally, there exists a great deal of cultural knowledge regarding the use and value of ecological and biological resources, which has the potential to provide economic benefit for groups. This knowledge should be protected as a native title right, particularly given the limitations within Australian intellectual property law with respect to recognising and protecting traditional knowledge.

Question 8-2: Should the indicative listing in the revised s223(2)(b), as set out in Proposal 8-1, include anything else?

84. There is a danger that too indicative a list will result in native title rights and interests being unintentionally limited by virtue of the fact that an asserted right or interests is 'not of the kind' found in the section.

Chapter 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 may be suggested?

85. With regards to Question 9-1, it can generally be said that in WA, the processes and procedures for ascertaining expert evidence and connection reports appear to work well. The Federal Court's experts conferences have provided valuable and useful content and outcomes and more often than not have resulted in the narrowing of issues between the parties.

Question 9-2: What procedures, if any, are required to deal appropriately with the archival material being generated through the native title connection process?

86. How material generated through the native title connection process is dealt with should be a matter for each native title group to determine. Groups may want the information used or stored in a particular way and by particular people and they should be able to provide this direction to State and Respondent parties, perhaps via the Federal Courts making orders about the information as part of, or post, a native title determination.

87. There may be different instructions on different types of information depending on the sensitivity and nature, and, it may be that there is a mass of information and evidence that a group wishes to use and make available, not only for the purposes of transmission of law and custom, but also for the purposes of educating the wider public.

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 by governments?

88. It is Central Desert's experience that the State of WA has been problematic in handing over tenure information in a timely matter, even when Court imposed timeframes exist. Tenure information should be provided at the earliest possible opportunity by the State so as to ensure that all parties understand clearly what it is they are preparing a case, and/or negotiating about. Early tenure analysis saves time and resources.

89. Central Desert's experience is that the proper conduct of native title matters can be significantly impacted, in a negative sense, by the late provision of tenure information by the State – particularly where tenure information has been supplied previously, but additional tenure information is provided at a later date.

Questions 9-4 and 9-5: Development of connection policy and best practice principles by the Commonwealth

90. Central Desert questions whether the development of a connection policy or best practice principles will have any real and substantive impact on the resolution of native title claims.

91. It also needs to be borne in mind that, as far as Question 9-5 is concerned, Native Title Representative Bodies do not have the resources to devote to consultations about best practice principles for assessment for connection reports. It would likely be a time consuming process given the different views and approaches of the various State governments to connection and consent determinations.

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 Strait Islander representative bodies?

92. Ongoing support and training of legal professionals in the native title sphere is essential. Native title practitioners are often 'jack of all trades, master of none' in that they are required to have a wide range of legal knowledge that is outside of pure native title law, particularly where there are no resources available to bring in expert advice. This is not to say that native title practitioners should become experts in other areas of law, but they should be able to access professional development opportunities which broaden their knowledge and understanding of other areas of law, so that legal issues can appropriately be identified.

93. Central Desert does not believe that certification of legal practitioners working in native title will necessarily address deficiencies in conduct or competence of native title legal practitioners. What is required, instead, is a process by which native title claim groups are provided with information and education regarding the various legal professional conduct rules and legislation, and, their ability to make complaints regarding unprofessional, unethical or illegal conduct of legal representatives.

94. Central Desert also wishes to note that there is some disconnect between native title legal practice and the legal profession conduct rules, at least in Western Australia. The professional conduct standards imposed on lawyers, by both the common law and the professional regulators have been developed in the context of more 'conventional' forms of legal practice, and do not necessarily address issues that arise in the context of native title, nor do they address the particular needs and concerns of traditional owner groups.

95. It would be worthwhile for the ALRC and the state regulators to consider engaging with Native Title Representative Bodies to discuss these issues further.

Question 9-7: Would increased use of native title application inquiries be beneficial and appropriate?

96. It is Central Desert's experience that native title application inquiries are rarely used. This may be because there does not, at least immediately, appear to be

any discernible benefit given that the outcomes are non-binding. Further, Central Desert's experience is that the current case management and mediation practices of the Federal Court appear to be producing more timely outcomes.

97. Central Desert also notes, however, that the shift from Tribunal-assisted mediation to matters being handled in the Federal Court, largely by case management, has increased the adversarial nature of native title. There may be potential benefit, therefore, in the more inquisitorial approach offered by native title application inquiries.

Chapter 10 – Authorisation

98. Central Desert supports the strong authorisation processes set out in the NTA and concurs with Justice French's observation that authorisation is "fundamental to the legitimacy of native title determination applications."[5]

99. Claims assisted by Central Desert use decision-making processes based on traditional law and culture to authorize native title applications. Having the ability to chose the decision-making process for authorisation (traditional or agreed and adopted) rather then the current position is unlikely to impact the way that Central Desert claims operate. However, how a group makes decisions is really a matter for the group. It should be borne in mind that decision-making processes can provide evidence of observance of law and custom.

Proposal 10-3 The NTA should be amended to clarify that the claim group may define the scope of the authority of the Applicant.

100. Central Desert does not have any particular objections to the NTA stating that the scope of the authority of the applicant can be defined. It is generally the case that the Applicant, and its individual members, understand the limits of their authority, even if it is not explicitly and formally set out, for example major future act agreements are not likely to be entered into without express claim group consent or the consent of the relevant common law holders in accordance with traditional law and custom.

Question 10 -1: Should the NTA include a non-exhaustive list of ways in which the claim group might define the scope of the authority of the Applicant?

101. It is important that any defined scope is not so narrow as to make the concept of an Applicant unworkable and inefficient. Central Desert does not believe it is necessary or desirable to include a non-exhaustive list of the things that might define the authority of an Applicant.

Question 10-2: What remedy, if any, should the NTA contain, apart from replacement of the Applicant, for a breach of condition of authorisation?

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[5] *Strickland vs Native Title Registrar (1999) 168 ALR 242* at 57

102. It is difficult to articulate alternative and appropriate remedies for a breach of a condition apart from removal as an Applicant. Remedies would have to relate the damage or harm caused by breaching a condition of authorisation and it is difficult to see the utility in trying to prescribe what potential harm and damage deserves what remedy or punishment.

103. Central Desert believes that the section 66B provisions relating to removal or replacement of an Applicant are sufficient to deal with any issues relating to Applicants acting outside of their authority.

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.

104. Central Desert does not support this proposal and submits that it is somewhat paternalistic and fosters distrust between native title parties and non-native title parties. For the most part, Applicants do the right thing and abide by the limitations of authority placed upon them. In Central Desert's experience it is rare for Applicants to exceed their authority.

105. Additionally, many future act agreements are in effect commercial negotiations. In no other commercial context would there be public registers of authorities. Applicants need to be trusted to do the job they are appointed to do, with the consequences of removal as the Applicant if they are not acting as authorized.

Proposal 10-5: The NTA should be amended to provide that the Applicant may act by majority, unless the terms of the authorization provide otherwise.

106. Central Desert supports Proposal 10-5 in principle. It would address situations where a recalcitrant member of an Applicant is vetoing matters that the majority of the Applicant and the claim group wish to progress. Acting by majority would be akin to how resolutions are made by a Board of Director of a company. However, it should be clear that such an amendment would not override traditional law and custom where the native title group in question uses a traditional decision-making process and the extent of the Applicant's authority is circumscribed by traditional law and custom.

Proposal 10-6: Section 66B of the NTA 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 reauthorization unless the terms of the authorization provide otherwise. The person may be removed as a member of the Applicant by filing a notice with the Court.

107. Proposal 10-6 is supported by Central Desert.

Proposal 10-7: Section 66B of the NTA should provide that a person may be authorized on the basis that, if the person becoming 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.

108. Central Desert does not support Proposal 10-7. There may be issues relating to the length of time between the approval of a 'designated' person by the native tile claim group and a position as a member of the Applicant becoming available. During this intervening period, factors may have come into play which would cause the community to no longer wish that the individual be a member of the applicant. A provision such as Proposal 10-7 may result in increased intra-indigenous disputes and litigated outcomes as between members of the claim group.

Chapter 11 – Joinder

Question 11-1: Should s84(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 s84(3)?

109. Central Desert supports an amendment to section 84(3)(a)(iii) in the terms outlined in Question 11-1.

110. Narrowing the breadth of potential respondent parties can only be beneficial from a cost and efficiency perspective. The availability of joinder pursuant to s84(5) and (5A) to parties whose interests were not legal or equitable ensures that there is no barrier to justice for those with a legitimate 'other' interest.

Question 11-2: Should ss66(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 proceeding if they satisfy the requirements of s 84(3)?

111. This question is not relevant to Central Desert and the region within which it operates. As such, Central Desert has no comment to make in response to the question.

Proposal 11-1: The NTA should be amended to allow person show are notified under s 66(3) and who fulfill notification requirements to elect to become parties under s 84(3) in respect of s 225(c) and (d) only.

112 Central Desert is not opposed to Proposal 11-1. On the face of it, Proposal 11-1 is a sensible approach, which would minimize time and resources of all parties involved (albeit to varying degrees).

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 clear and legitimate objective to be achieved by joinder to the proceedings.***

113 Central Desert agrees with the ALRC's statement at paragraph 11.40 that "Allowing claimants or potential claimants to join proceedings, in appropriate circumstances, is an important part of ensuring access to justice".

114 Central Desert supports Proposal 11-2 although queries the statement that it would limit joinder of claimants or potential claimants who join for uncertain, frivolous or vexatious reasons. Central Desert is of the view that the Court would not be granting leave to join if it was apparent to the Court that the reasons for joinder were uncertain, frivolous or vexatious reasons. Certainly, Proposal 11-2 would require that potential joinder parties to properly articulate their 'clear and legitimate objective" in joining and that this requirement will assist the Courts in their determination regarding joinder, and perhaps may result in less parties being joined.

115 In Central Desert's experience, the common law with respect to the interpretation of section 84(5) – and the exercise of the Court's discretion to join parties more generally – is relatively clear and settled. Consequently, while Central Desert supports the amendments contained in Proposal 11-2, it does not consider that they are especially vital.

Proposal 11-3: The NTA should be amended to allow organizations that represent persons, whose 'interest may be affected by the determination' in relation to land and waters in the claim area, to become parties under s 84(3) or to be joined under s 84(5) or (5A).

116 In principle, Central Desert supports Proposal 11-3 as a means by which to reduce the number of respondent parties to a native title determination application. If a person's interest are represented by an organization, then that person should likely be prevented from joining as a party in their own right.

117 However, it should be noted that such a proposal should also be approached with an element of caution. It may be the case that representative organisations may advocate general positions, and may not be acting, or be required to act, on the instructions of a particular person whose interests are affected. In this instance, negotiations for a consent determination may be well progressed and may be derailed by a joinder application from individual who feels the particular organization is not properly representing their particular interests.

118 Issues may also arise where the consent of a particular person to a consent determination has been obtained, however the representative organization refuses to consent for policy or other reasons. This would not be acceptable, given that the representative organization does not, themselves, have a legal or equitable interest affected by a determination.

119 On balance, Proposal 11-3 seems like a sensible amendment, however it may not be without its difficulties and consideration may need to be had as to the nature of the participation by representative organisations.

Proposal 11-4: The NTA should be amended to clarify that the Federal Court's per to dismiss a party (other than the Applicant) under s 84(8) is not limited to the circumstances contained in s 84(9).

120 Central Desert supports Proposal 11-4.

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.

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.

121 Central Desert has relatively limited experience with respect to joinder applications, particularly with respect to joinder applications which may be characterized as vexatious or having been brought for an improper purpose. Consequently, other native title representative bodies or native title service providers may be better placed to respond to these proposals.

122 However, Central Desert does note that, in its experience, judicial discretion in relation to joinders is exercised with due consideration and caution. Further, providing an avenue for appeal in relation to joinders may increase the volume of resources directed towards what are, in one sense, administrative matters, rather than towards the securing of a determination. This would particularly be the case where applications were brought for vexatious or improper purposes.

123 On that basis, Central Desert is not supportive of the amendments suggested in Proposals 11-5 and 11-6 (however, neither do we outright oppose them).

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 proceedings under section 84; or
b. seek intervener status under section 84A.

124 While this may be helpful in anticipating whether the Commonwealth may become a party to a native title determination application, the actual decision about joinder is one for the Commonwealth and will turn on the facts of a particular case (and in particular the tenure at issue) and particular government policy at the time.

Other matters for ALRC's consideration

In its submissions in response to the ALRC's Issues Paper 45, Central Desert drew the ALRC's attention to a number of other outstanding reform matters which have been the subject of relatively recent consultations by the Commonwealth Attorney General's Department. Central Desert wishes to again draw the ALRC's attention to these matters.

Section 47C

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

Central Desert fully supports the Greens proposed section 47C provisions. As the situation currently stands, many native title claimants are unable to have their native title rights recognised due to the prior extinguishment of native title rights and interests by the vesting of a state or territory national park or nature reserve. In circumstances where that extinguishment occurred before the enactment of the *Racial Discrimination Act 1975* (Cth) that extinguishment may not be compensable.

In the Central Desert region, there are approximately 7 large nature reserves/national parks over which native title is purportedly extinguished because of the vesting of a national park or nature reserve. In the *Martu* determination[6], Justice French stated, referring to Karlyamili (formerly Rudall River) National Park

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

Central Desert requests that the ALRC take the opportunity to revisit the proposed section 47C as part of its deliberations on proposed reform and makes a recommendation that section 47C be enacted as soon as possible.

Future Act Provisions – Good Faith Negotiations

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

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

Central Desert requests that the ALRC take the opportunity to revisit the proposed amendments to the 'good faith' requirements as part of part of its deliberations on proposed reforms to the NTA.

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

[6] [2009] FCAFC 49

Should you have any queries regarding these submissions, or wish to discuss any of the matter raised herein further, please do not hesitate to contact me on (08) 9425 2000 or via email ianrawlings@centraldesert.org.au.

Yours sincerely

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