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

February 2015

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

This submission is made on behalf of the Northern Territory Government to the ALRC's second consultation document in its Review of the Native Title Act 1993 and to the specific proposals put forward in the ALRC's Discussion Paper published in October 2014.

The submission addresses the ALRC proposals with respect to section 223 of the Native Title Act 1993 (NTA) and set out at Chapters 5, 7 and 8, and the proposals contained in Chapter 10 of the Discussion Paper regarding the authorisation provisions of the NTA.

The Northern Territory Government's previous submission to the ALRC's Issues Paper in relation to its Review of the *Native Title Act 1993* is attached as "Attachment A." The Northern Territory Government relies on and refers to its earlier submission.

Overview of ALRC Reform Proposals[1]

In addition to the Preamble and Objects of the NTA, the ALRC's *Review of the Native Title Act 1993* developed five guiding principles for reform:

- acknowledging the importance of the recognition of native title
- acknowledging interests in the native title system
- encouraging timely and just resolution of determinations
- consistency with International law; and
- supporting sustainable futures.[2]

The Discussion Paper provides that the ALRC's proposals *"retain the basis of native title law adopted in the Native Title Act from Mabo v Queensland (No 2)."* The paper then provides that attention, however, is directed to clarifying and refining what is described in the Discussion Paper as *"the highly complex law around connection requirements centred on section 223 of the Act to ensure that claim resolution is not impeded."*[3] The Discussion Paper notes that the reform proposals take into account the development of native title law since the enactment of the NTA and the degree of legal certainty achieved as a result of major litigation. The Paper also notes the Northern Territory's previous submission that some caution to reform of the NTA is advised in terms of potential disruption to the stability of the native title system. In that context, the Discussion Paper provides that the ALRC does not propose that there should be comprehensive redefinition of native title under the NTA as this may exacerbate the uncertainties experienced by all participants in the native title system. Rather, the rationale for reform, it is put, is intended to *"refocus on the core elements of native title law to facilitate an effective determination process."*[4]

Chapter 4 of the Discussion Paper sets out the legal requirements to establish native title rights and interests. It outlines the definition of native title in section 223 of the NTA, judicial statements on its interpretation and proof of native title.

---

[1] Discussion Paper pp42-44
[2] Discussion Paper, pp21-30.
[3] Para [2.9]
[4] Para [2.20]

Chapter 5 considers the definition of native title in section 223 of the NTA, focusing on the judicial approach taken to the meaning of acknowledgment and observance of traditional laws and customs. The ALRC makes proposals for reform of this aspect of the definition. The ALRC proposes that there be explicit acknowledgment in the NTA that traditional laws and customs under which native title rights and interests are possessed may adapt, evolve or otherwise develop. It also proposes that the definition of native title in section 223 of the NTA clarify that rights and interests may be possessed under traditional laws and customs where they have been transmitted between groups in accordance with traditional laws and customs. Additionally, the ALRC makes proposals addressing the degree of continuity of acknowledgment and observance of traditional laws and customs that is required to establish native title.

Chapter 6 considers whether there should be confirmation that 'connection with the land or waters' in section 223(1)(b) of the NTA does not require physical occupation or continued or recent use. The ALRC has concluded that amendments to the NTA on this issue are not necessary.

Proposals in Chapter 7 are alternative proposals to those put forward in Chapter 5 regarding changes to the definition in section 223(1) of the NTA. The changes relate to the terms 'traditional' and 'connection'.

Chapter 8 considers whether there should be clarification that native title rights and interests can include rights and interests of a commercial nature. The ALRC also seeks views on whether the indicative listing in the proposed amendments to section 223 should include the protection or exercise of cultural knowledge.

Chapter 9 considers various procedural aspects of the native title process, including: evidence in native title proceedings and consent determinations, the development of policies relating to the involvement of the Commonwealth in consent determinations, the development of principles guiding assessment of connection reports and the potential for a training and accreditation scheme for native title practitioners.

Chapter 10 considers whether any barriers to access to justice are imposed by the authorisation provisions in the NTA for claimants, potential claimants and respondents. The ALRC proposes changes to the authorisation provisions of the NTA to allow a claim group to choose its decision-making process, clarify that the claim group can define the scope of the authority of the applicant; simplify the procedure where a member of the applicant is unable or unwilling to act; and clarify that the applicant may act by majority unless the terms of the authorisation provide otherwise. Finally, this chapter considers how the identification of claim group members, and disputes about claim group composition, affect access to justice for claimants, potential claimants and respondents.

Chapter 11 considers the party and joinder provisions in section 84 of the NTA. These provisions specify who is a party to native title proceedings, who may join native title proceedings, in what circumstances they may join, and when they may be dismissed. In this chapter, the ALRC asks several questions and proposes several reforms designed to reduce burdens that may limit access to justice, while also ensuring that a wide range of interests are adequately represented in native title proceedings. The ALRC also makes proposals about allowing appeals from joinder

and dismissal decisions, and about the Commonwealth's participation in proceedings.

Overview of Northern Territory Government Submission

The ALRC proposes several amendments to section 223 of the NTA including amendments to the key concepts of "native title" and "native title rights and interests" set out in the section.

Specifically, the ALRC proposes that the term "traditional" in section 223 of the NTA be deleted and the requirement that native title holders have a "connection" with land or waters be amended. These proposals are set out at Chapters 5, 7 and 8 of the Discussion Paper and are reproduced in this submission at "Attachments B, C and D. The proposals contained at Chapter 10 of the Discussion Paper include proposals to amend the authorisation provisions of the NTA as defined at section 251B in the context of applications to replace the named applicant in a proceeding pursuant to section 66B of the NTA.

The ALRC's reform proposals with respect to section 223 of the NTA are premised on the following assertions:[5]

(a) the interpretation of section 223 of the NTA has become "difficult an pluralistic;"
(b) the wording in section 223 of the NTA contains straightforward core elements regarding the concept of native title, yet the courts have progressively articulated an expanded set of requirements for determining native title beyond the core elements;
(c) concepts introduced into the framework of the NTA have produced extensive requirements for factual proof of native title under the NTA. For example, "continuity" now effectively functions as an integrated but additional "connection requirement."

The reform proposals put forward in the ALRC Discussion Paper proceed on a number of premises, including, principally, that *"the interpretation of section 223 of the NTA has become 'difficult and pluralistic' as the court have grappled with the difficulties of reconciling the Aboriginal and Torres Strait Islander laws and customs with the Australian legal system – as the necessary task for determining native title."*[6]

As previously submitted, there is, since the enactment of the NTA, a substantial body of law which informs and gives meaning to section 223 of the NTA to the effect that the legal principles enunciated in the major judicial considerations of section 223 have served to better clarify for all participants in the native title system what the expressions "native title" and "native title rights and interests" mean in the context of the resolution of claims. To that extent, the Northern Territory submits that existing connection requirements have not led to legal uncertainty or delays in the resolution of claims.

The Northern Territory Government submits that the proposals relating to section 223 of the NTA, if adopted, will have a significant impact on native title law as it is presently understood and interpreted and on the processes adopted by the Northern

[5] Discussion Paper pp37-38
[6] Discussion Paper paragraph [2.41]. The footnote reference here is to *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, however it is not apparent that the statement may be attributed to the High Court in this case.

Territory Government to expedite the resolution of claims. While there is some scope for improvement in the native title system, the Northern Territory Government is concerned that the proposals contained in the Discussion Paper, if adopted, will unsettle and complicate the Northern Territory's current approach to resolving native title claims.

The Discussion Paper provides that the proposals around changes to the definition of "connection" are designed to *"expedite the claims process by a refocus on core elements of the definition of native title in the framing and assessment of connection."* However, as previously submitted, the requirement for native title claimants to evidence that their native title rights and interests are possessed under traditional laws acknowledged and customs observed and that those laws and customs have continued "substantially uninterrupted" has been uncontroversial in the Northern Territory. The Northern Territory Government has a strong record in achieving consent determinations of native title. We also note that these statistics are generally representative of the experience in other States and Territories.

The Aboriginal and Torres Strait Islander Social Justice Commissioner's Annual *Social Justice and Native Title Report 2014* noted the following:

"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."*[7]

Similarly, the Federal Court of Australia's Annual Report 2013-2014 makes the following observations:

"Significant Issus and Developments – Native Title Consent Determinations

The design of this annual report is intended to acknowledge, in a graphic way, the continuing acceleration of native title consent determinations during the reporting year. The Court commenced the acceleration of consent determinations following the creation of the priority list of claims in 2010. The rate of acceleration was further increased and has been sustained since the transfer of responsibility for mediation from the National Native Title Tribunal (NNTT) to the Court in 2012. In the years preceding the transfer of responsibility the average number of annual consent

[7] Australian Human Rights Commission, *Social Justice and Native Title Report 2014* at 63.

determinations was nine. Since taking on the responsibility, the Court has achieved an average annual consent determination of forty-three. During the reporting year sixty consent determinations were reached and it is expected that seventy-nine additional consent determinations will be made in the next two years."[8]

The ALRC's proposals, if adopted, will mark a fundamental shift in the operation and interpretation of the NTA. Whilst the ALRC acknowledges that not all Aboriginal or Torres Strait Islander peoples will be able to establish that they hold native title rights and interests under the NTA,[9] the Northern Territory is concerned at proposals that are likely to enable a much wider class of Aboriginal persons who, under the NTA, cannot properly establish native title rights and interests, to do so in the future. Under the proposals, native title rights and interests will no longer be claimable only by those groups which traditionally held rights and interests in respect of a claim area pursuant to their laws and customs acknowledged and observed at sovereignty. Rather, contemporary groupings of indigenous people will be able to assert rights on the basis of laws and customs which did not (necessarily) exist at sovereignty or, alternatively, existed in a substantially different form at sovereignty.

If the proposals are adopted, it is most likely that there will be a significant increase in the number of claims being made under the NTA, in particular, overlapping claims which are likely to give rise to intra-indigenous disputes as to who are the right people for country. This will inevitably lead to uncertainty and delays to the resolution of claims for stakeholders in the native title system. Further, there is the likelihood that many new cases would be litigated to test new definitions of key concepts such as "native title" and "native title holders" and the possibility that claimants who have been previously unsuccessful in seeking a determination recognising native title rights and interests may seek to re-agitate their claims.

The Northern Territory submits that the Discussion Paper (reflecting the results of nationwide submissions made to the Issues Paper) does not demonstrate that there is a need for the amendments proposed. As noted above, since the enactment of the NTA, anthropological evidence and Court determinations have worked to inform and give meaning to the definition of native title in section 223. Paragraph 5.26 of the Discussion Paper states that "a number of stakeholders were critical of the present interpretation of the meaning of 'traditional' laws and customs, or supported better recognition of evolution and adaptation to laws and customs." For example, reference is made to the Goldfields Land and Sea Council (GLSC) submission which argued that focusing on tradition has the propensity "to ingrain and incentivise a cultural conservatism in Indigenous communities, effectively discouraging (even punishing) processes of cultural change and renewal that might otherwise occur."' Further, the Discussion Paper notes several submissions noted the difficulties that the requirements of section 223 impose.[10] However, as previously submitted, the evolution of traditional laws and customs has not, in the Northern Territory's experience, presented as a difficulty associated with the current claim process and there appears insufficient evidence in the Discussion Paper to indicate that the requirements of section 223 have proved a barrier to claimants seeking a determination of their native title rights and interests.

---

[8] Federal Court of Australia Annual Report 2013-2014 at 12.

[9] Discussion Paper paragraph [5.12]

[10] Footnote 51 at page 39 of the Discussion Paper refers submissions made by the Kimberley Land Council, Queensland Native Title Services and the Cape York Land Council.

It is submitted that if the proposed amendments are adopted, they will have the effect of fundamentally shifting the legal basis for the recognition of native title as presently understood. For example, proposal 5.3 recommends that native title rights and interests may be recognised notwithstanding that the claimant group has not continuously acknowledged and observed laws and customs which have their origin in the traditional laws acknowledged and customs observed at sovereignty. Similarly, proposal 5.4 recommends that the NTA should be amended "to make clear that it is not necessary to establish that acknowledgement and observance of laws and customs has continued substantially uninterrupted since sovereignty and laws and customs have been acknowledged by each generation since sovereignty." This proposal implies that the traditional laws acknowledged and customs observed which have their origin in those laws and customs observed and acknowledge at sovereignty are no longer possessed by the native title claimant group. If that is so, the proposal has the practical effect that a native title claimant group does not need to demonstrate a continuous acknowledgement of the traditional laws and customs from which their native title rights and interests derive.

The proposal that native title claimants do not need to evidence that their rights and interests have their origin in a traditional society is likely to result in many new claims being made by persons who are "recent immigrants" to country; that is, persons who are not native title holders and who assert rights on the basis of, amongst other things, historical association. Claims of this nature have, in the Northern Territory's experience, led to an increase in overlapping (unregistered) claims and intra-indigenous disputes. In the Northern Territory context, claims of this nature have been made and struck out by the Federal Court.[11]

Similarly, at Question 7.3, the ALRC asks for views on whether the reasons for any displacement of Aboriginal peoples or Torres Strait Islanders should be considered in the assessment of whether "Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters under section 223(1)(b) of the NTA." The Northern Territory submits that this question gives rise to a lengthy assessment of questions of historical fact particular to each claim as to why a claimant group may not be able to demonstrate a continuous connection to the claim area.[12]

Where the traditional laws and customs of a native title claimant group support a right to maintain and protect places of significance in land and waters those rights are capable of recognition, but not otherwise. To that extent, the Northern Territory does not support the proposed amendments to section 223 to include the protection or exercise of cultural knowledge.

The Northern Territory is concerned that the ALRC's reform proposals to the authorisation processes under the NTA, coupled with the substantive proposals to section 223 of the NTA, will further weaken the basis upon which native title claims may be made.

---

[11] Refer *Hazelbane v Northern Territory of Australia* [2008] FCA 291 and *Hazelbane v Northern Territory of Australia* [2014] FCA 886. These judgments relate to competing, unregistered claims made by members of the Finniss River Brinkin Group, a subset of a potentially broader group of persons, to the Town of Batchelor south of Darwin. Similar claims have been made by members of the Finniss River Brinkin Group to adjacent areas of land and waters in the Northern Territory. At the time of making this submission, the Northern Territory had sought interlocutory orders to dismiss these proceedings. That application will be heard in March 2015.

[12] See discussion below regarding Risk v Northern Territory of Australia [2006] FCA 404

Chapters 5 and 7 – Traditional Laws and Customs and the Transmission of Aboriginal and Torres Strait Islander Culture

The High Court has repeatedly said that it is necessary to begin consideration of a claim for a determination of native title by an examination and consideration of the provisions of the NTA.[13] Native title, therefore, is what is defined and described in section 223(1) of the NTA. Nonetheless, in order to properly construe the NTA and the definition of native title in section 223(1), it is necessary to place the NTA into the context of what is now known about the recognition and protection of native title rights and interests in Australia:

(a) on the acquisition of sovereignty by the Crown in 1825, certain rights and interests held by indigenous people under their traditional laws and customs were recognised by and became enforceable under the common law;[14]

(b) in the years that followed, from 1825 until the commencement of *Racial Discrimination Act* 1975 (Cth), native title rights and interests were vulnerable to extinguishment or partial extinguishment by a wide range of legislative and executive acts;[15]

(c) the coming into force in 1975 of the *Racial Discrimination Act,* at least to some extent, provided then-existing native title rights and interests with a measure of protection from extinguishment by both legislative and executive acts;[16]

(d) on 1 January 1994, the NTA commenced. It contained four main objects.[17] First, it provided for the recognition and protection of the body of native title rights and interests that was still in existence on the date of commencement.[18] Secondly, it validated (or permitted the States and Territories to validate) past legislative and executive acts which were invalid by reason of the existence of native title.[19] This validation involved, or potentially involved, the extinguishment (or partial extinguishment) of native title that was in existence on 1 January 1994.[20] Thirdly, it made provision for when acts would be permitted to affect (including extinguish) native title in the future.[21] Fourthly, it established a mechanism for determining claims, both to native title and to compensation for extinguishment or impairment of native title permitted or effected by the NTA;[22]

(e) in *WA v Commonwealth*, six Justices of the High Court held that the common law concept of native title is incorporated into the definition of "native title" and

---

[13] Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 77 ALJR 356 ("Yorta Yorta") at 364 [32]; Commonwealth v Yarmirr (2001) 208 CLR 1 ("Commonwealth v Yarmirr") at 35 [7]; Western Australia v Ward (2002) 76 ALJR 1098 ("Ward") at 1108 [16] .

[14] Mabo v Queensland (No. 2) (1992) 175 CLR 1 ("Mabo (No. 2)").

[15] Mabo (No. 2); Wik Peoples v Queensland (1996) 187 CLR 1 ("Wik"); Western Australia v Commonwealth (1994-1995) 183 CLR 373 ("WA v Commonwealth"); Ward.

[16] Mabo (No. 2); WA v Commonwealth; Ward.

[17] Section 3.

[18] Sections 10, 11, 223(1).

[19] Part 2, Division 2.

[20] Section 15.

[21] Part 2, Division 3.

[22] Parts 3 and 4.

of "native title rights and interests" in s. 223(1).[23] The same six Justices held that an act that was wholly valid when it was done and which was effective then to extinguish native title is unaffected by the NTA.[24] In *Fejo v Northern Territory*,[25] all seven Justices of the High Court held that an historic (1882) grant of freehold extinguished native title and that this situation was unaffected by the land later reacquiring its status as Crown land;

(f) the NTA does not seek to create some new species of right or interest in relation to land or waters which it then calls "native title"; rather, the NTA has as one of its main objects[26] "to provide for the recognition and protection of" those rights and interests relating to land, and rooted in traditional law and custom which the High Court decided in *Mabo (No. 2)* had survived the Crown's acquisition of sovereignty and radical title in Australia;[27]

(g) the NTA, as originally enacted, did not deal with the extinguishment of native title rights and interests that had already been extinguished when it came into force. The preamble reveals a legislative understanding that native title would have been extinguished by grants of freehold and leasehold estates, but there was no provision of a general nature effecting that result or confirming it.[28] Section 47 is premised upon Parliament's understanding of the extent of extinguishment under the common law and is directed, in substance, to reversing the extinguishing effects of certain kinds of acts in limited circumstances.

In *Fejo*,[29] six members of the High Court in a joint judgment described native title in the following terms:

> *"Native title has its origin in the traditional laws acknowledged and the customs observed by the indigenous people who possess native title.*[30] *Native title is neither an institution of the common law nor a form of common law tenure but it is recognised by the common law.*[31] *There is therefore an intersection of traditional laws and customs with the common law. The underlying existence of the traditional laws and customs is a necessary pre-requisite for native title but their existence is not a sufficient basis for recognising native title."*

In the joint judgment of Gleeson CJ, Gummow and Hayne JJ in *Yorta Yorta*,[32] their Honours quote the first three sentences of the above extract from *Fejo* and add emphasis to the sentence dealing with the intersection of traditional laws and customs with the common law. Their Honours state that an application for determination of native title requires the location of that intersection and requires that it be located by reference to the NTA. In particular, it must be located by reference to the definition of native title in section 223(1).

---

[23] At 452 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.
[24] At 454.
[25] (1998) 195 CLR 96 ("*Fejo*").
[26] Section 3(a).
[27] *Yorta Yorta* at 372 [75], [76] per Gleeson CJ, Gummow and Hayne JJ and at 394 [180] per Callinan J.
[28] Part 2, Division 2B of the NTA, which was inserted into the NTA by the *Native Title Amendment Act* 1998 (Cth), now "confirms" the past extinguishment of native title by certain "valid" or "validated" acts.
[29] At 128 [46].
[30] Mabo v Queensland [No 2] at 58 per Brennan J.
[31] *Mabo [No 2]* at 59-61 per Brennan J.
[32] At 364 [31].

In *Ward*, four Justices of the High Court, in a joint judgment, said that it is now well recognised that the connection which Aboriginal peoples have with their "country" is essentially spiritual.[33] Their Honours quoted the following passage from the judgment of Blackburn J in *Milirrpum v Nabalco Pty Ltd*:[34]

> *"The fundamental truth about the Aboriginals' relationship to the land is that whatever else it is, it is a religious relationship... There is an unquestioned scheme of things in which the spirit ancestors, the people of the clan, particular land and everything that exists on and in it, are organic parts of one indissoluble whole."*[35]

The majority judgment in *Ward* recognises the difficulty of expressing a relationship between a community or group of Aboriginal people and the land in terms of rights and interests, whilst at the same time noting that this is what is required by the NTA. That is, the spiritual or religious must be translated into the legal.[36] This requires the fragmentation of an integrated view of the ordering of affairs into rights and interests which are required to be considered apart from the duties and obligations which go with them.[37]

The statutory text of the definition of native title in s. 223(1) of the NTA reads as follows:

> "223 Native Title
>
> *Common law rights and interests*
>
> (1) 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 water, where:
>
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal people or Torres Strait Islanders; and
>
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
>
> (c) the rights and interests are recognised by the common law of Australia."

In *Ward*[38] and in *Yorta Yorta*,[39] the High Court has made the same basal points about the definition of "native title" and of "native title rights and interests" in section 223. Firstly, the rights and interests may be communal, group or individual rights and interests. Secondly, they must be rights and interests "in relation to" land or waters. Thirdly, the rights and interests must have three characteristics:

(a) firstly, they are rights and interests which are possessed under the traditional laws acknowledged and the traditional customs observed by the peoples concerned;

---

[33] At 1108 [14] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
[34] Ibid.
[35] (1971) 17 FLR 141 at 167.
[36] *Ward* at 1108 [14].
[37] Ibid.
[38] At 1109 [17].
[39] At 364 [33]-[35].

(b) secondly, the rights and interests must have the characteristic that, by the traditional laws acknowledged and the traditional customs observed by the relevant peoples, those peoples have "a connection with" the land or waters; and

(c) the rights and interests must be "recognised" by the common law of Australia.

In considering a claim for a determination of native title, all elements of the definition in section 223(1) must be given effect.[40]

The question in a given case whether section 223(1)(a) is satisfied presents a question of fact. It requires not only the identification of the laws and customs said to be traditional laws and customs but, no less importantly, the identification of the rights and interests in relation to land or waters which are possessed under those laws and customs. This is a separate inquiry to that required by section 223(1)(b), although both may very well depend upon the same evidence.[41]

Paragraphs (a) and (b) of section 223(1) indicate that native title rights and interests derive from traditional laws and customs and not from the common law. The role of the common law in the statutory definition is that stated in paragraph (c) of section 223(1); that is, the rights and interests must be capable of being "recognised by the common law".[42]

In the majority judgment in *Ward*,[43] it is noted that the case law does not purport to provide a comprehensive understanding of what is involved in the notion of "recognition" by the common law in section 223(1)(c). Their Honours identify[44] a number of instances where there may be laws and customs which meet the criteria in paragraphs (a) and (b) of section 223(1), but where the rights and interests possessed under those laws and customs will not be recognised by the common law and thus will not satisfy paragraph (c) of section 223(1).

One instance is where the relevant laws and customs may clash with the general objective of the common law of the preservation and protection of society as a whole. A second is that recognition may cease where, as a matter of law, native title rights have been extinguished even though, but for that legal conclusion, on the facts, native title would still subsist. A third instance which their Honours raise involves the statement in *Mabo (No. 2)*[45] that native title "may be protected by such legal or equitable remedies as are appropriate to the particular rights and interests established by the evidence". Their Honours say that this statement is yet to be developed by decisions indicating what is involved in the notion of "appropriate" remedies.

In *Ward*,[46] the majority judgment makes the point that account may be taken of what was decided and what was said in *Mabo (No. 2)* when considering the meaning and effect of the NTA and that this is especially so when it is recognised that paragraphs (a) and (b) of section 223(1) are plainly based on what was said by Brennan J in *Mabo (No. 2)* at 70. It is submitted that it is equally clear that paragraph (c) of

---

[40] *Yorta Yorta* at 364 [33] per Gleeson CJ, Gummow and Hayne JJ.
[41] *Ward* at 1109 [18] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
[42] *Ward* at 1109 [20] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
[43] At 1109 [20].
[44] At [21].
[45] At 61 per Brennan J.
[46] At 1108 [16].

section 223(1) is also plainly based on what was said by Brennan J in *Mabo (No. 2)* at 59-61.[47]

In *Wik*, Brennan CJ explained what he had meant in *Mabo (No. 2)* by the expression "recognised by the common law". His Honour states in *Wik*[48] that although native title rights and interests are ascertained by reference to traditional laws and customs, they are enforceable as common law rights and that is what is meant when it is said that native title is "recognised" by the common law. In *Commonwealth v Yarmirr*,[49] Gleeson CJ, Gaudron, Gummow and Hayne JJ expressed this same view when they said that the common law will "recognise" native title rights and interests in the sense that it will, by the ordinary process of law and equity, give remedies in support of the relevant rights or interests to those who hold them.

It is submitted that, before the common law will recognise a right or interest in land possessed under traditional laws and customs, that right or interest must be capable of being described with sufficient precision to be enforced by the Courts. In *Mabo (No. 2)*,[50] Brennan J made the point that the contemporary rights and interests of the Meriam people there considered "are capable of being established with sufficient precision to attract declaratory or other relief".[51] In *Yorta Yorta*,[52] Callinan J addressed this particular requirement of the common law as follows:

> *"For rights and interests to be recognised by the common law they must be reasonably precise. In this context common law includes equity and contemplates the availability of all possible remedies in both branches of the law. Orders of courts, whether made in equity or in common law, to be enforceable, need to be framed with clarity. Parties placed under curial obligations to do, or abstain from doing, acts need to know with certainty what their obligations are. Declarations require similar certainty."*

And again:[53]

> *"The rights and interest must be definable with sufficient certainty to enable them to be enforced by the common law."*

The members of the High Court in *Yorta Yorta* delivered four separate judgments. Gleeson CJ, Gummow and Hayne JJ delivered a joint judgment dismissing the appeal ("the joint judgment"). In a short separate judgment, McHugh J appeared to adopt at least some of the reasoning of the joint judgment and also dismissed the appeal. Callinan J also dismissed the appeal and his reasons, in some respects, went further than those of the joint judgment in rejecting the arguments of the appellants.

Gaudron and Kirby JJ (in dissent) would have allowed the appeal, although they were in agreement with the approach taken in the joint judgment in relation to some questions of construction of s. 223. In the result, the joint judgment can be regarded

---

[47] This is the citation for the proposition that native title is "recognised" by the common law in the majority judgment in *Fejo* at 129 [46], fn 159.
[48] At 84.
[49] At 49 [42].
[50] At 62.
[51] See too the dictum of Lord Wilberforce in *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 at 1247-1248 quoted by Mason J in *R v Toothey; Ex Parte Menling Station Pty Ltd* (1984-85) 158 CLR 327 at 342.
[52] At 393 [176].
[53] At 395 [186].

as the leading judgment, supported in all material respects by at least either or both of McHugh and Callinan JJ.

It is the understanding that the common law's recognition of native title results from the intersection of two legal systems at the time of sovereignty as stated in *Fejo*,[54] which infuses and informs the explanation in the joint judgment in *Yorta Yorta* of the proper construction to be given to the definition of "native title" and of "native title rights and interests" in section 223.[55]

In the joint judgment,[56] *Mabo (No. 2)* is cited as providing an explanation of the consequences of sovereignty upon existing indigenous rights and interests in land. Those existing rights and interests which owed their origin to a normative system other than the legal system of the new sovereign power survived the Crown's acquisition of sovereignty. They survived because the laws and customs of the indigenous peoples constituted bodies of normative rules which could give rise to, and had in fact given rise to, rights and interests in relation to land or waters.[57] The reference therefore in section 223(1)(a) and (b) to "traditional laws acknowledged, and the traditional customs observed" is in fact a reference to a body of norms, or a normative system, that existed before sovereignty.[58]

The joint judgement adds a further important dimension to the understanding of what is involved in the notion of recognition by the common law in section 223(1)(c). The common law will only recognise those native title rights and interests which existed *at sovereignty*:[59]

> *"First, the requirement for recognition by the common law may require refusal of recognition to rights or interests which, in some way, are antithetical to fundamental tenets of the common law.[60] No such case was said to arise in this matter and it may be put aside. Secondly, however, recognition by the common law is a requirement that emphasises the fact that there is an intersection between legal systems and that the intersection occurred at the time of sovereignty. The native title rights and interests which are the subject of the Act are those which existed at sovereignty, survived that fundamental change in legal regime, and now, by resort to the processes of the new legal order, can be enforced and protected. It is those rights and interests which are 'recognised' in the common law."*

Although those rights and interests survived the change in sovereignty, if new rights or interests were to arise, those new rights and interests "must find their roots in the legal order of the new sovereign power".[61] Because the definition in section 223(1) refers to traditional laws acknowledged "and" (as opposed to "or") traditional customs observed, there is no need to distinguish between what is a matter of traditional law and what is a matter of traditional custom, but, there must be a system of rules having a normative content:

---

[54] At 128 [46].
[55] See, for example, at 364 [13], 365 [38], [39], 372 [77].
[56] At 365 [37].
[57] At 365 [40].
[58] At 365 [38]-[39].
[59] At 372 [77].
[60] Citing *Ward* at 1109 [20]-[21].
[61] At 368 [55] in the joint judgment.

"Nonetheless, because the subject of consideration is rights or interests, the rules which together constitute the traditional laws acknowledged and traditional customs observed, and under which the rights or interests are said to be possessed, must be rules having normative content. Without that quality, there may be observable patterns of behaviour but not rights or interests in relation to land or waters."[62]

The consequences of sovereignty for the pre-sovereignty normative system is explained in the joint judgment in the following terms:[63]

"It is important to recognise that the rights and interests concerned originate in a normative system, and to recognise some consequences that follow from the Crown's assertion of sovereignty. Upon the Crown acquiring sovereignty, the normative or law-making system which then existed could not thereafter validly create new rights, duties or interests. Rights or interests in land created after sovereignty and which owed their origin and continued existence only to a normative system other than that of the new sovereign power, would not and will not be given effect by the legal order of the new sovereign.

That is not to deny that the new legal order recognised then existing rights and interests in land. Nor is it to deny the efficacy of rules of transmission of rights and interests under traditional laws and traditional customs which existed at sovereignty, where those native title rights continued to be recognised by the legal order of the new sovereign. The rights and interests in land which the new sovereign order recognised included the rules of traditional law and custom which dealt with the transmission of those interests. Nor is it to say that account could never be taken of any alteration to, or development of, that traditional law and custom that occurred after sovereignty. Account may have to be taken of developments at least of a kind contemplated by that traditional law and custom. But what the assertion of sovereignty by the British Crown necessarily entailed was that there could thereafter be no parallel law-making system in the territory over which it asserted sovereignty. To hold otherwise would be to deny the acquisition of sovereignty and as has been pointed out earlier, that is not permissible. Because there could be no parallel law-making system after the assertion of sovereignty it also follows that the only rights or interests in relation to land or waters, originating otherwise than in the new sovereign order, which will be recognised after the assertion of that new sovereignty are those that find their origin in pre-sovereignty law and custom."

The joint judgment states that the construction of the definition of native title must take account of these considerations.[64] That being the case, whilst a "traditional" law or custom is one which has been passed from generation to generation of a society, usually by word of mouth and common practice, in the context of the NTA, the word "traditional" in paragraphs (a) and (b) of the definition of native title in section 223(1) carries with it two other elements in its meaning. First, it conveys an understanding of the age of the traditions. It is only the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown that are "traditional" laws and customs.[65] Secondly, and it is said, no less importantly, the reference to rights or interest in lands or waters being "possessed" under traditional laws acknowledged and traditional customs observed by the

---

[62] *Yorta Yorta* at 366 [42].
[63] At 366 [43].
[64] At 366 [45].
[65] At 366 [46], 372 [79] and 374 [86].

peoples concerned, requires that the normative system under which the rights and interests are possessed (ie, the "traditional laws and customs") is a system that has had "a continuous existence and vitality since sovereignty."[66] If that normative system has not existed throughout that period, the rights and interests which owe their existence to that system will have ceased to exist.[67]

In *Yorta Yorta,* the joint judgment makes the further point that laws and customs and the society or group who acknowledge and observe those laws and customs, are interrelated.[68] In this context, "society" is to be understood as a body of persons united in and by its acknowledgement and observance of a body of law and custom.[69] The word "society" is used in the joint judgment, rather than "community", to emphasise this close relationship between the identification of the group and the identification of the laws and customs of the group.[70]

Where the society whose laws and customs existed at sovereignty ceases to exist as a group which acknowledges and observes those pre-sovereignty laws and customs, the rights and interests in land to which those laws and customs give rise cease to exist.[71] The position is not altered even if, as was said to be the case in *Yorta Yorta*, the content of those laws and customs is passed on from individual to individual, despite the dispersal of the society which once acknowledged and observed them, and the descendants of those who used to acknowledge and observe the laws and customs take them up again.[72]

Substantial Interruption

The joint judgment recognises that the fact that there has been some change to, or adaptation of, traditional law or custom, or some interruption of enjoyment or exercise of, native title rights or interests in the period between the Crown asserting sovereignty and the present, will not necessarily be fatal to a native title claim.[73] Nonetheless, both change, and interruption in exercise, may, in a particular case, take on considerable significance in deciding the issues presented by an application for determination of native title.[74]

In that same paragraph of the joint judgment ([83]), their Honours state that the relevant criterion to be applied in deciding the significance of change to, or adaptation of, traditional law or custom is readily stated, though its application to particular facts may well be difficult. Their Honours state that the key question is whether the law and custom can still be seen to be "traditional" law and "traditional" custom in the sense earlier identified in the judgment.

Their Honours then go on to state[75] that interruption of use or enjoyment of native title rights or interests presents more difficult questions. The relevant statutory questions are directed to the present possession of the rights or interests, not their exercise yet, nonetheless, the rights and interests must be possessed under

---

[66] At 367 [47].
[67] At 367 [47].
[68] At 367 [49].
[69] Ibid.
[70] Fn 31 at 367.
[71] At 367 [50].
[72] At 367-368 [51]-[53].
[73] At 373 [83].
[74] Ibid.
[75] At 373 [84].

"traditional" laws and customs in the sense earlier described in the joint judgment. Accordingly, proof of the possession of native title rights and interests must necessarily require proof that the acknowledgement and observance of the society's pre-sovereignty laws and customs have continued substantially uninterrupted since sovereignty:[76]

> *"Yet again, however, it is important to bear steadily in mind that the rights and interests which are said now to be possessed must nonetheless be rights and interests possessed under the traditional laws acknowledged and the traditional customs observed by the peoples in question. Further, the connection which the peoples concerned have with the land or waters must be shown to be a connection by their traditional laws and customs. For the reasons given earlier, "traditional" in this context must be understood to refer to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty.*
>
> *For exactly these same reasons, acknowledgement and observance of those laws and customs must have continued substantially uninterrupted since sovereignty. Were that not so, the laws and customs acknowledged and observed now could not properly be described as the traditional laws and customs of the peoples concerned. That would be so because they would not have been transmitted from generation to generation of the society for which they constituted a normative system giving rise to rights and interests in land as the body of laws and customs which, for each of those generations of that society, was the body of laws and customs which in fact regulated and defined the rights and interests which those people had and could exercise in relation to the land or waters concerned. They would be a body of laws and customs originating in the common acceptance by or agreement of a new society of indigenous peoples to acknowledge and observe laws and customs of content similar to, perhaps even identical with, those of an earlier and different society.*
>
> *To return to a jurisprudential analysis, continuity in acknowledgement and observance of the normative rules in which the claimed rights and interests are said to find their foundations before sovereignty is essential because it is the normative quality of those rules which rendered the Crown's radical title acquired at sovereignty subject to the rights and interests then existing and which now are identified as native title."*

The qualification "substantially" in the proposition that the acknowledgement and observance of traditional laws and customs must have continued uninterrupted is not unimportant.[77] Nonetheless, it must be shown that the society, under whose laws and customs the native title rights and interests are said to be possessed, has continued to exist throughout the period from sovereignty as a body united by its acknowledgement and observance of those laws and customs.[78]

The practical consequences of the requirements of continuity in the acknowledgement and observance of pre-sovereignty rules and in the existence of

---

[76] At [86]-[88].
[77] At 374 [89].
[78] Ibid.

the "society" or people united in and by their acknowledgement and observance of those traditional laws and customs is explained in the joint judgment as follows:[79]

> *"The critical question is whether the errors of law which were made at trial bore, in any relevant way, upon the primary judge's critical findings of fact that the evidence did not demonstrate that the claimants and their ancestors had continued to acknowledge and observe, throughout the period from the assertion of sovereignty in 1788 to the date of their claim, the traditional laws and customs in relation to land of their forebears, and that "before the end of the nineteenth century, the ancestors through whom the claimants claim title had ceased to occupy their traditional lands in accordance with their traditional laws and customs". If those findings of fact stand unaffected of error of law, the claimants' claim to native title fails and their appeal should be dismissed.*
>
> *These findings were findings about interruption in observance of traditional law and custom not about the content of or changes in that law or custom. They were findings rejecting one of the key elements of the case which the claimants sought to make at trial, namely, that they continued to observe laws and customs which they, and their ancestors, had continuously observed since sovereignty. More fundamentally than that, they were findings that the society which had once observed traditional laws and customs had ceased to do so and, by ceasing to do so, no longer constituted the society out of which the traditional laws and customs sprang."*

The legal principles regarding proof of native title should be apparent from the foregoing discussion of the High Court's decision in *Yorta Yorta*. So too should be the difficulty of proving the existence of native title:[80]

> *"It may be accepted that demonstrating the content of that [pre-sovereignty] traditional law and custom may very well present difficult problems of proof. But the difficulty of the forensic task which may confront claimants does not alter the requirements of the statutory provision."*

That task may prove to be even more difficult in circumstances where the laws and customs now said to be acknowledged and observed, are also said to have been adapted or changed in response to European settlement:[81]

> *"It is, however, important to notice that demonstrating the content of pre-sovereignty traditional laws and customs may be especially difficult in cases, like this, where it is recognised that the laws or customs now said to be acknowledged and observed are laws and customs that have been adapted in response to the impact of European settlement. In such cases, difficult questions of fact and degree may emerge, not only in assessing what, if any, significance should be attached to the fact of change or adaptation but also in deciding what it was that was changed or adapted. It is not possible to offer any single bright line test for deciding what inferences may be drawn or when they may be drawn, any more than it is possible to offer such a test for deciding what changes or adaptations are significant. Indeed, so far as the second of those issues is concerned, it would be wrong to attempt to reformulate the statutory language when it is the words of the definition to which effect must be given."*

---

[79] At 375 [94]-[95].
[80] *Yorta Yorta*, joint judgment at 372 [80].
[81] *Yorta Yorta*, joint judgment at 373 [82].

It is submitted that the proposal that claimants need not prove the existence of a "society" acknowledging laws and customs prior to sovereignty, and that this may be assumed, is entirely inconsistent with the above quoted passage.[82]

Difficulties of proof cannot mandate any departure from the legal requirement that, on an application under section 13 of the NTA for a determination of native title, the applicant must establish each of the elements of the definition of native title in section 223(1). Accordingly, in any native title determination application, the applicants must establish that the persons in the native title claim group whom the named applicant represents, are members of a society, united in and by its acknowledgement and observance of a body of laws and customs which constitutes a normative system and under which they possess rights and interests in, and have a connection with, the land and waters of the claim area.[83]

The present day body of laws and customs that are acknowledged and observed by the native title claim group must be shown to be the body of laws and customs acknowledged and observed by their ancestors at the time of sovereignty.[84] It must also be shown that the acknowledgement and observance of those laws and customs has continued substantially uninterrupted by each generation since sovereignty[85] and that the society under whose laws and customs the rights and interests are said to be possessed, has continued to exist throughout that period as a body united in and by its acknowledgement and observance of those laws and customs.[86]

The rights and interests presently possessed must be shown to have existed at sovereignty. The corollary of this is that the existence of those rights and interests, their nature and their extent, will be dependent upon (proof of) the content of the pre-sovereignty laws and customs.[87]

It is useful at this point to make reference to the judgment of the Full Federal Court in *Risk v Northern Territory.*[88] The Full Federal Court affirmed the decision of the primary judge[89] in concluding that a *"combination of circumstances has, in various ways, interrupted or disturbed the presence of the Larrakia people in the Darwin area during several decades of the 20th Century in a way that has affected their continued observance of, and enjoyment of, the traditional laws and customs of the Larrakia people that existed at sovereignty".* The factual findings that led to His Honour's conclusions are set out at in detail at paragraphs [813]-[833] of the judgment.

The proceedings under appeal were a consolidation of a number of native title determination applications made on behalf of three claimant groups in relation to land and waters in and around Darwin in the Northern Territory. The primary judge dismissed the consolidated applications on the ground that the present society, comprising the Larrakia people or else the Dangalaba claim, did not now have the rights and interests possessed under the traditional laws acknowledged and the traditional customs observed by the Larrakia people at sovereignty, because their

---

[82] See paras 93-94 of the First Applicants' Submissions on Connection.
[83] *Yorta Yorta* joint judgment at [33], [34], [37]-[40], [42], [47], [49] and [87].
[84] *Yorta Yorta* joint judgment at [46], [56] and [86].
[85] *Yorta Yorta* joint judgment at [47], [87], [88], [94] and [95].
[86] *Yorta Yorta* joint judgment at [49], [50], [52], [53], [89] and [95].
[87] *Yorta Yorta* joint judgment at [43], [44], [45], [54], [55], [77] and [79].
[88] [2007] FCAFC 46
[89] [2006] FCA 404 at 812

current law and customs were not "traditional" in the sense required by section 223(1) of the NTA as explained by the High Court in Members of the *Yorta Yorta Aboriginal Community v Victoria*[90] (2002) (Yorta Yorta): *Risk v Northern Territory of Australia.* Mr Risk and others on behalf of the Larrakia applicants and Mr Quall on behalf of the Dangalaba and Kulumbiringin applicants appealed to the Full Court of the Federal Court. On 5 April 2007 the Full Court dismissed the appeals.

The Full Court made the following observations with respect to the primary judge's findings in *Risk v Northern Territory*[91], affirming His Honour's reasons for judgment at para [104]:

Read in totality, it is clear that his Honour's conclusion on interruption was not based on the dislocation of the claimants from Darwin, or their failure to continue to exercise many of their native title rights. Rather he recognised that these were both evidence and symptoms of a more fundamental discontinuity in the traditional laws acknowledged and customs observed. ... A claimant group that has been dispossessed of much of its traditional lands and thereby precluded from exercising many of its traditional rights will obviously have great difficulty in showing that its rights and customs are the same as those exercised at sovereignty. This is, in effect, what has happened to Larrakia in this case. It is not that the dispossession and failure to exercise rights has, ipso facto, caused the appellants to have lost their traditional native title, but rather that these things have led to the interruption in their possession of traditional rights and observance of traditional customs. That this was the primary judge's view is clear from the following passage, at [839]:

> *'To summarise, in my judgment, the Larrakia people were a community of Aboriginal people living in the claim area at the time of sovereignty. The settlement of Darwin from 1869, the influx of other Aboriginal groups into the claim area, the attempted assimilation of Aboriginal people into the European community and the consequences of the implementation of those attempts and other government policies (however one might judge their correctness), led to the reduction of the Larrakia population, the dispersal of Larrakia people from the claim area, and to a breakdown in Larrakia people's observance and acknowledgement of traditional laws and customs. In the 1970s the land claims drew interest to the Larrakia culture and there has since been a revival of the Larrakia community and culture. A large number of people who now identify as Larrakia only became aware of their ancestry during these land claims, and acquired much 'knowledge' at this time. The Larrakia community of 2005 is a strong, vibrant and dynamic society. However, the evidence demonstrates an interruption to the Larrakia people's connection to their country and in their acknowledgement and observance of their traditional laws and customs so that the laws and customs they now respect and practice are not 'traditional' as required by s 223(1) of the NT Act.'"*

At paragraph [54] his Honour noted that in *Yorta Yorta*, the majority stated that the rights and interests the subject of the NTA are those which derive from traditional laws and customs that formed a body of norms existing before the assertion of sovereignty.

---

[90] 214 CLR 422
[91] [2006] FCA 404

His Honour went on to consider the continuity aspect of native title, a matter of some importance in *Yorta Yorta*. He noted at [56] that if a society that had once possessed native title rights ceased to exist: *"then so too do its traditional laws and customs, from which rights and interests arise ... . Once a society has ceased to exist, it is not possible for descendants of that society to take up again the 'traditional' laws and customs as those expressions are used in the NT Act."*

His Honour then quoted further from the majority judgment in *Yorta Yorta* at [53]:

> *"When the society whose laws or customs existed at sovereignty ceases to exist, the rights and interests in land to which these laws and customs gave rise, cease to exist. If the content of the former laws and customs is later adopted by some new society, those laws and customs will then owe their new life to that other, later, society and they are the laws acknowledged by, and customs observed by, that later society, they are not laws and customs which can now properly be described as being the existing laws and customs of the earlier society. The rights and interests in land to which the re-adopted laws and customs give rise are rights and interests which are not rooted in pre-sovereignty traditional law and custom but in the laws and customs of the new society."* (High Court's emphasis).

The primary judge's conclusions on the question whether native title rights have survived are contained in the section entitled "Conclusions Regarding s 223(1) of the Native Title Act." At [803] his Honour said:

> *"I have found above that, at sovereignty, there was a society of indigenous persons who had rights and interests possessed under traditional laws and customs, and giving them a connection to the land and waters of the claim area. I have also found that that society was the same society as existed at settlement and continued to exist up to the first decade of the 20th Century, that it continued to enjoy rights and interests under the same or substantially similar traditional laws and customs as those which existed at settlement. Consequently, to that point, that society of Larrakia people were possessed of traditional laws and customs giving them the rights and interests to which I have referred."*

His Honour also concluded, at [805], that the Larrakia people of today are the same society as that which existed previously, including at settlement. He then re-iterated what was said in *Yorta Yorta* about traditional laws and customs. He contrasted two sets of circumstances, the first where *"interruption in the use or enjoyment of native title rights and interests ... may not disqualify the current generation from having those laws and practices regarded as 'traditional'"*, and the second where *"there has been an interruption in the acknowledgment and observance of laws and customs"* such that *"the laws and customs which are now acknowledged and observed will not have continued substantially uninterrupted since sovereignty"*.

Chapter 8 – The Nature and Content of Native Title

Chapter 8 considers whether there should be clarification that native title rights and interests can include rights and interests of a commercial nature. The ALRC also seeks views on whether the indicative listing in the proposed amendments to section 223 should include the protection or exercise of cultural knowledge.

Firstly, the Northern Territory has agreed consent determinations of native title over the pastoral estate recognising, as part of the suite of non-exclusive native title rights

and interests, the rights of native title holders to conduct and participate in cultural activities and practices on the land and waters subject to the determination area. The exercise of such rights include the right to privacy in the exercise and enjoyment of those activities (which does not extend to a right to control access or use of the area by others) and are subject to the rights of any person arising under the laws in force in the Northern Territory to be present on the land. Any recognition of a non-exclusive right to maintain and protect an area does not amount to an exclusive right (although there may be restrictions if the area is a registered sacred site under the *Northern Territory Sacred Sites Act*, but not as a result of the recognition of a non-exclusive native title right to protect).

Secondly, Chapter 8 of the Discussion Paper includes a proposal to repeal section 223 of the NTA and substitute it with a provision that native title rights and interests comprise "rights in relation to any purpose" and may include "commercial activities and trade." The Northern Territory has previously made submissions with respect to the recognition of native title rights of a commercial nature. In summary, that submission provided that whether native title rights and interests are determined to include rights of a commercial nature is a matter for the Court to determine on the evidence of each case; such rights are capable of recognition where the evidence supports a determination of commercial rights.

Although the Aboriginal relationship with land is essentially spiritual, the native title rights and interests recognised under the NTA are rights and interests that relate to the use of the land (and waters).[92] In particular, the High Court has said in *Ward*[93] that where the native title rights and interests that are found to exist do not amount to a right as against the whole world, to possession, occupation, use and enjoyment of land or waters, it will seldom be appropriate, or sufficient, to express the nature and the extent of the relevant native title rights and interests by using those terms. Rather, it will be preferable to express the rights and interests by reference to the activities that may be conducted, as of right, on or in relation to, the relevant land or waters.

To submit native title rights and interests comprise "rights in relation to any purpose" must be qualified to the extent that native title rights and interests are rights and interests in relation *to* land and waters. We note also that the High Court's consideration of the nature of the native title rights determined in *Akiba*[94] was concerned with the nature and scope of the native title right to take and use marine resources within the claim area; that is, the right to "take for any purpose" was in the context of the evidence in that case supporting the right to take resources for a commercial purpose. For these reasons, the Northern Territory does not support an amendment to the NTA to include express reference that native title rights and interests may include commercial rights.

Chapter 10 - Authorisation

In the Northern Territory experience, questions regarding whether persons have been properly authorised to make a native title claim, deal with all matters in relation to that claim and make an application to replace the named applicant to a native title

---

[92] *Fejo* at 126 [43] and 128 [47]; *Western Australia v Ward* (**YEAR**) 170 ALR 159 (FFC) at [104], [108] and [666] per Beaumont and von Doussa JJ.
[93] At 1119 [52].
[94] Leo Akiba on behalf of the Torres Strait Regional Seas Claim Group v. Commonwealth of Australia and Ors [2013] HCA 33

claim have arisen in the context of competing, unregistered claims to Darwin, the Town of Batchelor, pastoral lease land and land and waters south of Darwin.[95]

The Northern Territory is concerned that the ALRC's reform proposals to the authorisation processes under the NTA, coupled with the substantive proposals to section 223 of the NTA, will further weaken the basis upon which native title claims may be made.

Section 61(1) of the NTA has two principal requirements for the making of a native title determination application:

(a) There must be a "native title claim group;" and

(b) The applicant must be "authorised" by all of the persons in that group.

The obtaining of proper authorisation of a native title determination application has been described as a fundamental requirement of the NTA[96] which underpins the legitimacy of the application.[97] Prior to the 1998 amendments to the NTA, the absence of the requirement for authorisation led, in some cases, to conflicting and overlapping claims all carrying with them the statutory right to negotiate in respect of the grant of mineral tenements and the compulsory acquisition by Commonwealth or State Governments of native title rights and interests[98]. Amid the controversy in the public and parliamentary debates that proceeded the enactment of the 1998 amendments, the need for communal authorisation of claims was largely a matter of common ground.[99]

There are two processes by which native title determination applications may be authorised under section 251B of the NTA:

(a) under the process of decision-making available under the traditional laws and customs of the native title claim group; or

(b) by some other process of decision-making agreed to and adopted by the native title claim group – but only where there is no process of decision-making available under the traditional laws and customs of the group.

Paragraphs (a) and (b) are not alternatives; it is not open to choose between them. Paragraph (a) must be followed in cases where a decision-making process of the type referred to in the paragraph exists. The two permissible modes of authorisation are therefore mutually exclusive.[100] The importance of compliance with section 251B may be gauged from the fact that the NTA requires that claimant applications must be accompanied by an affidavit sworn by the applicant stating the basis on which he or she is authorised by all the persons of the native title claim group to make the application and to deal with matters arising in relation to it.

In *Quandamooka People (No 1) v State of Queensland*, Drummond J, after dismissing a notice of motion seeking the removal of a named applicant under

---

[95] See *Hazelbane v Northern Territory of Australia* [2008] FCA 291, *Hazelbane v Northern Territory of Australia* [2014] FCA 886, *Barnes v Northern Territory* [2011] FCA 879, *Quall v Risk* [2001] FCA 378

[96] *Moran v Minister for Land and Water Conservation for the State of New South Wales* [1999] FCA 1637 at [48].

[97] *Strickland v Native Title Registrar* (1999) 168 ALR 242 at 259-260.

[98] *Daniel v State of Western Australia* [2002] FCA 1147 at [11], per French J.

[99] Ibid.

[100] *Dieri People v South Australia* [2003] FCA 187, [57]; *Harrington-Smith v Western Australia (No. 9)* [2007] FCA 31, [1230].

section 66B of the NTA, noted "the importance of there being evidence identifying the nature of the decision-making processes followed by a native title claim group that result in one or more of their members being given authority to act in relation to the claim on behalf of the group."[101] This passage was cited by Mansfield J in *Risk v Northern Territory*. In dismissing section 66B motions in *Bolton v State of Western Australia*, French J stated:[102]

> *In my opinion, each of the motions for amendment under section 66B suffers from the same fatal deficiency. The evidence is insufficient to demonstrate that there has been notification to members of the native title claim group as defined or that those who attended belonged to it. A fortiori, there is no evidence that the meetings were, in any sense, fairly representative of the native title claim groups concerned. In so saying I do not wish to be taken to be critical of the SWALSC [South West Aboriginal Land and Sea Council]. It may be that there is a chronic difficulty that cannot be overcome despite its most heroic efforts because of the apathy, lack of interest or divided opinions held by members of the relevant native title claim groups. If that be so, then that may be a reason for reconsidering whether the applications should proceed at all. It is not a basis for accepting a constructed "decision-making" process which cannot be demonstrated, to reflect in any legitimate sense, the informed consent of the members of the native title claim group or persons properly representing them as a substitute for the authorisation required by the Act.*

Section 61(1) of the NTA provides that authorisation must come from all persons who hold the common or group rights and interests (that is, the native title claim group). Different views have been expressed as to the use of the word "all." O'Loughlin J in *Quall v Risk* was of the view that "all" cannot mean every person in the group for there may be members of the group who are infants or mental defectives or whose whereabouts are unknown and, as such, incapable of giving their authorisation. In De Rose v State of South Australia, O'Loughlin went further to say that the word "all" should be taken to mean "all those who are reasonably available and who are competent to express an opinion." Wilcox J in Moran v Minister for Land and Water Conservation for the State of New South Wales said that it will be enough that the applicant has been authorised to make the claim in accordance with a process of decision-making recognised under the traditional laws acknowledged and customs of the claimant group. His Honour observed that "[i]n meritorious cases, (the obtaining of proper authorisation in accordance with that process) is unlikely to be an onerous requirement. Traditional laws and customs are likely to exist in cases where the claimant group still maintains a vigorous communal life."

The need for rigour and integrity in the authorisation process has been recognised in numerous cases. In *Daniel v Western Australia*,[103] French J stated "[I]t is of central importance to the conduct of native title determination applications and the exercise of the rights that flow from their registration, that those who purport to bring such applications and to exercise such rights on behalf of a group of asserted native title holders have the authority of that group to do so." In *Strickland v Native Title*

---

[101] [2002] FCA 259, [25].
[102] [2004] FCA 760 at [46].
[103] [2002] FCA 1147, [11].

Registrar,[104] French J stated "[T]he authorisation requirement acknowledges the communal character of traditional law and custom which grounds native title. it is not a condition to be met by formulaic statements in or in support of applications."

In light of these authorities, there is some conflict between the ALRC's proposals for reform of the authorisation provisions and the requirements of section 61 of the NTA, including the proposal that an applicant may act by majority and that, in relation to applications under section 66B of the NTA, the section be amended to provide that a person may be authorised on the basis that, if that person becomes unwilling or unable to act, a designated person may take their place by filing a notice with the Court. The Northern Territory submits that the authorisation provisions of the NTA do not impose barriers to access to justice but, rather, are cornerstone provisions to the making of native title claimant applications under the NTA.

[104] (1999) 168 ALR 242, 259-60.

ATTACHMENT A

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

May 2014

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

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

Responsibility for Native Title in the Northern Territory

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

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

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

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

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

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

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

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

Overview of Northern Territory Government Submission

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

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

Snapshot of Native Title in the Northern Territory

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Northern Territory Response to Issues Paper

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

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

Section 223 of the NTA

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

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

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

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

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

Presumption of Continuity

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

His Honour suggested that:

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The meaning of "traditional"

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

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

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

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

Native title and rights and interests of a commercial nature

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

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

[22] [2006] FCA 903

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

[24] [1998] FCA 1185

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

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

Physical occupation, continued or recent use

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

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

Substantial interruption

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

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

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

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

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

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

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

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

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

---

[28] (1994) 34 NSWLR 572

[29] "Larrakia Part A" or the "Darwin and surrounds claim" [2006] FCA 404

[30] [2007] FCAFC 178

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

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

Authorisation

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

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

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

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

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

---

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

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

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

Joinder

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

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

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

ATTACHMENT A

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

CURRENT EXTENT OF NATIVE TITLE IN THE NORTHERN TERRITORY

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

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

ATTACHMENT A

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

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

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

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

ATTACHMENT A

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

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

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

ATTACHMENT A

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

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

ATTACHMENT B

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

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

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

Predicted extent of native title SFNTD14/10999

ATTACHMENT B

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

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

Predicted extent of native title SFNTD14/10999

ATTACHMENT B

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

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

ATTACHMENT B

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

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

Predicted extent of native title SFNTD14/10999

ATTACHMENT B

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

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

Predicted extent of native title SFNTD14/10999

ATTACHMENT B

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

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

Predicted extent of native title SFNTD14/10999

ATTACHMENT B

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

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

Predicted extent of native title SFNTD14/10999

ATTACHMENT B

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

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

Predicted extent of native title SFNTD14/10999

ATTACHMENT B

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

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

Notes to Table

Predicted extent of native title SFNTD14/10999

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

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

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

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

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

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

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

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

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

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

Predicted extent of native title SFNTD14/10999

ATTACHMENT C

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

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

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

Attachment B

Chapter 5 – Traditional Laws and Customs

Proposal 5–1

The definition of native title in s 223 of the Native Title Act should be amended to make clear that traditional laws and customs may adapt, evolve or otherwise develop.

Proposal 5–2

The definition of native title in s 223 of the Native Title Act should be amended to make clear that rights and interests may be possessed under traditional laws and customs where they have been transmitted between groups in accordance with traditional laws and customs.

Proposal 5–3

The definition of native title in s 223 of the Native Title Act 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.

Proposal 5–4

The definition of native title in s 223 of the Native Title Act should be amended to make clear that it is not necessary to establish that a society united in and by its acknowledgment and observance of traditional laws and customs has continued in existence since prior to the assertion of sovereignty.

Attachment C

Chapter 7 - The Transmission of Aboriginal and Torres Strait Islander Culture

Proposal 7–1

The definition of native title in s 223(1)(a) of the Native Title Act 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 recognised by the common law of Australia.

Question 7–1

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

Proposal 7–2

The definition of native title in s 223 of the Native Title Act 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 recognised by the common law of Australia.

Question 7–2

Should the Native Title Act be amended to provide that revitalisation of law and custom may be considered in establishing whether 'Aboriginal peoples and Torres Strait Islanders, by those laws and customs, have a connection with land and waters' under s 223(1)(b)?

Question 7–3

Should the reasons for any displacement of Aboriginal peoples or Torres Strait Islanders be considered in the assessment of whether 'Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters' under s 223(1)(b)?

Question 7–4

If the reasons for any displacement of Aboriginal peoples or Torres Strait Islanders are to be considered in the assessment of whether 'Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters' under s 223(1)(b), what should be their relevance to a decision as to whether such connection has been maintained?

Question 7–5

Should the Native Title Act be amended to include a statement in the following terms:

Unless it would not be in the interests of justice to do so, in determining whether 'Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters' under s 223(1)(b):

(a) regard may be given to any reasons related to European settlement that preceded any displacement of Aboriginal peoples or Torres Strait Islanders from the traditional land or waters of those people; and

(b) undue weight should not be given to historical circumstances adverse to those Aboriginal peoples or Torres Strait Islanders.

Attachment D

Chapter 8 - The Nature and Content of Native Title

Proposal 8–1

Section 223(2) of the *Native Title Act* should be repealed and substituted with a provision that provides:

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

Proposal 8–2

The terms 'commercial activities' and 'trade' should not be defined in the Native Title Act.

Question 8–1

Should the indicative listing in the revised s 223(2)(b), as set out in Proposal 8–1, include the protection or exercise of cultural knowledge?

Question 8–2

Should the indicative listing in the revised s 223(2)(b), as set out in Proposal 8–1, include anything else?

Attachment E

Chapter 10 - Authorisation

Proposal 10–1
Section 251B of the *Native Title Act* should be amended to allow the claim group, when authorising an application, to use a decision-making process agreed on and adopted by the group.

Proposal 10–2
The Australian Government should consider amending s 251A of the *Native Title Act* to similar effect.

Proposal 10–3
The *Native Title Act* should be amended to clarify that the claim group may define the scope of the authority of the applicant.

Question 10–1
Should the *Native Title Act* include a non-exhaustive list of ways in which the claim group might define the scope of the authority of the applicant? For example:

(a) requiring the applicant to seek claim group approval before doing certain acts (discontinuing a claim, changing legal representation, entering into an agreement with a third party, appointing an agent);
(b) requiring the applicant to account for all monies received and to deposit them in a specified account; and
(c) appointing an agent (other than the applicant) to negotiate agreements with third parties.

Question 10–2
What remedy, if any, should the *Native Title Act* contain, apart from replacement of the applicant, for a breach of a condition of authorisation?

Proposal 10–4
The *Native Title Act* 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.

Proposal 10–5
The *Native Title Act* should be amended to provide that the applicant may act by majority, unless the terms of the authorisation provide otherwise.

Proposal 10–6
Section 66B of the *Native Title Act* 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 reauthorisation, unless the terms of the authorisation provide otherwise. The person may be removed as a member of the applicant by filing a notice with the court.

Proposal 10–7
Section 66B of the *Native Title Act* should provide that a person may be authorised on the basis that, if that person becomes unwilling or unable to act, a designated person may take their place. The designated person may take their place by filing a notice with the court.