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By Email: nativetitle@alrc.gov.au

Australian Law Reform Commission
Justice Mordecai Bromberg, President
PO Box 209
Flinders Lane
Victoria

Dear Justice Bromberg and members of the Commission

**SUPPLEMENTAL SUBMISSIONS OF THE NTCA ON THE NATIVE TITLE ACT -
REVIEW OF FUTURE ACT REGIME - DISCUSSION PAPER**

1. We act for the Northern Territory Cattlemen's Association (**NTCA**) and file these supplemental submissions on their behalf. These submissions address one specific issue, the effect of potential reforms to the future act regime – in particular, those involving land clearing on a pastoral lease – on *Wik Peoples v Queensland (Wik)*.¹ The ALRC Discussion Paper context for these comments is Question 14 and Appendix A Example 7.
2. Clearing of native vegetation is not necessarily a 'by right' activity on pastoral leaseholds in the Northern Territory. It often requires a Land Clearing Permit (**LCP**) issued in accordance with the *Pastoral Land Act 1992* (NT) (**Pastoral Land Act**). Changing the future act regime such that the grant of an LCP is a future act to which the right to negotiate attaches, while not entirely overturning Wik, nullifies the decision with respect to land clearing for pastoral purposes. This will create significant confusion for the over 100 consent determinations covering pastoral properties in the Northern Territory, as well as over a dozen additional native title claim applications currently pending before the Federal Court in the Northern Territory Registry.
3. The relevant holding of Wik is that pastoral leaseholds do not extinguish non-exclusive native title rights and interests, and if there is any inconsistency between pastoral rights and interests and native title rights and interests the pastoral rights and interests will prevail over, but not extinguish, native title rights and interests. This holding manifests itself in native title consent determinations in the Northern Territory in what is colloquially referred to as the "inconsistency" clause.² In *Mumu v Northern Territory (Karinga Lakes)*,³ for example, the clause provides:

In relation to NT Portions 326, 3350 and 3351, the other rights and interests referred to in paragraph 8 and the doing of an activity in giving effect to them or of an activity required or permitted by them, prevail over but do not extinguish the native title rights and interests referred to

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¹ *Wik Peoples v Queensland* (1996) 187 CLR 1; [1996] HCA 40.

² It is also reflected in section 44H of the *Native Title Act 1993* (**NTA**).

³ *Mumu v Northern Territory* [2023] FCA 288, Determination at [9].

in paragraph 5 and the existence and exercise of the native title rights and interests do not prevent the carrying on of any such activity.

4. Paragraph 8 of the Karinga Lakes Determination includes the "rights and interests" of the three affected pastoral leaseholders under their respective pastoral leases.
5. Pastoral interest is not defined in consent determinations. "Pastoral purposes", however, is defined in the Pastoral Land Act:⁴

pastoral purposes means the pasturing of stock for sustainable commercial use of the land on which they are pastured or agricultural or other non-dominant uses essential to, carried out in conjunction with, or inseparable from, the pastoral enterprise, including the production of agricultural products for use in stock feeding and pastoral based tourist activities such as farm holidays, but does not include a use which, under section 91, is declared by the Board not to be a use for pastoral purposes.

6. Improving pasture is "in conjunction" with the pastoral enterprise. Growing fodder for livestock is also "in conjunction" with the pastoral enterprise. Both fall within the definition of pastoral purposes as "production of agricultural products for use in stock feeding" so long as the growing of fodder remains a non-dominant use.⁵ Land clearing is essential to advance those activities and also falls within the pastoral purpose.
7. Land clearing of native vegetation on pastoral properties, however, is not a 'by right' activity. An LCP is required under Part 7A of the Pastoral Land Act. While guidelines issued by the Pastoral Land Board provide exceptions for certain land clearing activities that are part of regular day-to-day station operations, those exceptions do not extend to land clearing for improving pasture or growing fodder.⁶ Land clearing for these activities, even though they fall within the definition of pastoral purpose, require an LCP.
8. Introducing the right to negotiate into this regime effectively overturns Wik with respect to that particular pastoral interest, land clearance for pasture improvement and the growing of fodder for grazing and supplementary feeding of livestock.
9. We understand there may be a belief that the reforms would not overturn Wik, in full or in part, because there are no changes contemplated to NTA section 44H. This fails, however, to account for the fact that permits or licences may be necessary to conduct some pastoral activities under a pastoral lease.
10. In order to invoke section 44H, the grant of an LCP must be valid.⁷ If the right to negotiate attaches to the grant of an LCP, the LCP is not valid as against native title – and section 44H does not apply – until the right has been exercised and a conclusion has been reached, either by agreement or by decision of the National Native Title Tribunal.
11. The ramifications of what effectively is a partial overturning of Wik are significant. It creates confusion with regard to the inconsistency clause that has been a feature of native title

⁴ Pastoral Land Act s 3.

⁵ Guidance provided by the Northern Territory Department of Agriculture and Fisheries (DAF) provides that a non-dominant use would not include use of one or more that (1) would occupy more than 50% of the leased land; or (2) require or consume more of the pastoral lessee's efforts, resources (e.g. staff, buildings and infrastructure/improvements, equipment) or costs than the core pastoral enterprise of pasturing stock; or (3) would generate from the pastoral lessee more receipts or income than the core pastoral enterprise of pasturing stock. DAF (January 2025), *Pastoral purposes guide - Development and use of pastoral leasehold land under the Pastoral Land Act 1992*.

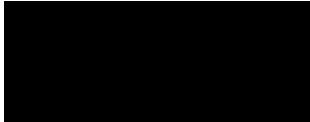
⁶ Northern Territory Government, *Gazette*, No S11, 31 March 2022.

⁷ NTA s 44H(a).

determinations over pastoral leaseholds in the Northern Territory since Wik. The determinations provide that pastoral interests prevail over, but do not extinguish, native title rights and interests. The reform would provide otherwise. Some pastoral interests will prevail. Others will not.

12. Thank you for your consideration of these submissions.

Yours faithfully
WARD KELLER



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