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The Hon Senator Trish Crossin
Chair
Senate Standing Committee on Legal and Constitutional Affairs
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By email to legcon.sen@aph.gov.au

Dear Senator

I refer to your letter dated 20 May 2011 inviting a submission from the Northern Territory to the Senate Inquiry into the Native Title Amendment (Reform) Bill 2011. Thank you for accepting the Northern Territory Government's late submission.

The Northern Territory Government is supportive of efforts to enhance the effectiveness of the native title system for Aboriginal and Torres Strait Islander peoples, as for other parties.

The Northern Territory Government has sought to address procedural barriers claimants face through a co-operative approach to native title. An example of this is the recent 'new approach' to provision of anthropological material and public works extinguishment agreed between the Northern Territory and the Northern Land Council, allowing faster and less resource-intensive resolution of native title claims affecting over 100 pastoral leases in the Northern Territory.

At a recent handing down of Consent Determinations for 12 native title claims in the Auvergne and Montejinni group clusters over pastoral leases, His Honour, Justice Mansfield AM of the Federal Court, expressed satisfaction about the Northern Territory Government being "so supportive in facilitating and adopting a means by which it can proceed now to a speedy recognition of native title claims" and declared that the "new approach will see cases such as these being resolved much more quickly than they have in the past".

The Northern Territory is not alone in finding alternative mechanisms to resolve its native title backlog, and it has been working hard together with the States and the Commonwealth - and all other stakeholders - to overcome the challenges frustrating native title resolution.

Different native title policy and legislative backdrops in each Australian jurisdiction will determine how effective provisions in the Bill might be for that State or Territory if passed into law. We look forward to the Committee's report and an opportunity to comment on further developments in this area.

Yours sincerely

PAUL HENDERSON

01 NOV 2011

**NORTHERN TERRITORY COMMENTS ON PROVISIONS TO
AMEND THE NATIVE TITLE ACT CONTAINED IN THE
NATIVE TITLE AMENDMENT (REFORM) BILL 2011**

Item 1 – implementing the UN Declaration on the Rights of Indigenous Peoples

Comment: this provision is unlikely to have any real effect in relation to outcomes, and could impose further burden on decision-making processes.

Item 2 – strengthening heritage protection

Comment: this provision should not affect the Northern Territory because the *Northern Territory Aboriginal Sacred Sites Act* is already in place and most effective. However, the amendment may lead to delay by increased litigation challenging the concept of “effectiveness”.

Item 3 – applying the non-extinguishment principle to compulsory acquisition

Comment: does not provide any real benefit for native title holders, and may decrease the value of freehold where there is underlying native title.

Item 4 – a right to negotiate over offshore acts

Comment: this proposed measure will increase the cost of offshore exploration. The current position is based on the principle that no one has a right to negotiate offshore.

Item 5-9 – strengthening the requirement to negotiate in good faith

Comment: these measures would make it virtually impossible for a proponent to get to arbitration, thus increasing the cost of settlement.

Item 10 – referencing profits and royalties in arbitration

Comment: this measure removes any incentive to reach a timely negotiated outcome. (There is current incentive for native title parties to reach agreement prior to arbitration - knowing that profit sharing conditions may not be determined afterwards.)

Item 11 – disregarding extinguishment where applicant and government agree

Comment: There can be value to this measure in the context of a negotiated settlement, and it allows for a consistent approach in dealing with tenure.

Item 12 – reversing the burden of proof

Comment: this measure will have little practical effect in the Northern Territory. In reality it is happening now in any event.

Item 13 – definition of ‘traditional’

Comment: this is a significant departure from the common law definition of ‘traditional’ (currently interpreted by the courts as ‘only if it remains largely unchanged’) - and amounts to a vesting of Commonwealth statutory title to Northern Territory Crown lands in native title claimants not otherwise entitled.

Item 14 – commercial native title rights and interests

Comment: the matter of whether native title rights and interests are commercial in any situation is a question for determination by the Courts: there is no current provision preventing commercial rights and interests – just no evidence proven to support it.