Hon Rachel Nolan MP
Member for Ipswich

Queensland Government

Minister for Finance, Natural Resources and The Arts

Ref CTS 12531/11

25 AUG 2011

Senator Patricia Crossin
Chair
The Senate Standing Committee on Legal and Constitutional Affairs
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Senator Trish

I refer to your letter to the Honourable Anna Bligh MP, Premier of Queensland inviting submissions to the Senate Inquiry into the *Native Title Amendment (Reform) Bill 2011*.

As the Minister responsible for native title in Queensland, I make this submission on behalf of the Queensland Government because of the Bill's potential impact on two important things. Those things are:

- the State's current credible record on native title consent determinations; and
- those persons and entities whose actions and activities are subject to the Commonwealth *Native Title Act 1993*.

In regard to native title consent determinations, Queensland has a successful record of operating under the Native Title Act with more than 50 Federal Court determinations recognising native title by agreement. There were four consent determination of native title settled in the 2010/2011 financial year and up to another ten are anticipated this financial year. The native title outcome recently achieved by agreement between the State of Queensland and the Quandamooka people on North Stradbroke Island demonstrates a maturity and flexibility in the application and interpretation of the Native Title Act in its current state. This more flexible approach has been encouraged by State and Territory governments, the Federal government, and by the Federal Court. While there are a number of aspects of the Native Title Act that the State would enjoy seeing clarified, there is a risk of more legalistic approaches being taken to amendments which apparently alter the legal relationships (as opposed to those which clarify).

Queensland also has a strong record in regard to affording procedural rights for future acts. The State has published detailed native title work procedures - see <http://www.derm.qld.gov.au/nativetitle/policy/procedures_toc.html> and, at time of writing, Queensland has 52%, or 269, of the 512 registered Indigenous Land Use Agreements in Australia. Again, even though difficult at times the State policy of affording procedural rights and pursuing agreement based solutions to native title issues has been effective. Additionally there are a huge number of mining related agreements achieved under the Native Title Act in its current state without the need for the native title party to 'prove' their native title.

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For reasons outlined in the attached table, the drafting of the proposed amendments may not fully take account the sometimes complicated interrelationships within the structure of the Native Title Act and for that reason may not achieve their apparent objective.
Part One of the attached submission table outlines in more detail the issues identified with the specific initiatives in the Bill by item.

Part Two of the submission table outlines a series of issues which could form the basis of future parliamentary amendments to the Native Title Act. These are more in the nature of practical issues where the suggested amendment seeks to address uncertainty and inefficiency in the current operation and application of the Native Title Act.

If any further information is required, please do not hesitate to contact Mr Travis Dawson, Acting Principal Advisor in my office on telephone 3224 5304.

Yours sincerely

RACHEL NOLAN

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Native Title Amendment (Reform) Bill 2011

Submission on behalf of the State of Queensland to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry

Part 1 - Native Title Amendment (Reform) Bill 2011		
Summary	**Proposed amendment to NTA** (amendments marked in italics)	**Issues**
	ITEM 1	
The inclusion of new section 3A into the *Native Title Act 1993* (NTA) that the government in Australia take all necessary steps to implement seven principles set out in the United Nations Declaration of the Rights of Indigenous People (the Declaration) and in particular that the NTA be interpreted and applied in a manner that is consistent with The Declaration.	***3A United Nations Declaration on the Rights of Indigenous Peoples*** *(1) It is an additional object of this Act that governments in Australia take all necessary steps to implement the following principles set out in the United Nations Declaration on the Rights of Indigenous Peoples:* *(a) the rights of all peoples including Indigenous peoples to self-determination;* *(b) full and direct consultation and participation of the Indigenous peoples concerned;* *(c) free, prior and informed consent of Indigenous peoples in matters affecting them;* *(d) the right of Indigenous peoples to their traditional lands, territories and natural resources;* *(e) demonstrated respect for Indigenous cultural practices, traditions, laws and institutions;* *(f) reparation for injury to or loss of Indigenous interests;* *(g) non-discrimination against the interests of Indigenous peoples.*	• The Declaration is not incorporated into Australian domestic law[1]. Currently there is a push to do so[2]. The inclusion of the proposed amendment in the NTA does not achieve this. The proper way is by the enactment of specific legislation to that effect[3]. • The principles set out in s (1) do not include all articles of the Declaration. Confusion arises as s (2) provides that the provisions of the NTA are to be applied in a manner consistent with the Declaration. This would include articles not captured by the principles set out in s (1). • In addition, s (3) provides that the principles set out in s (1) are to be applied by persons exercising power or performing a function under the NTA without further reference to s (2). If it is intended that only those principles which are set out in s (1) are to apply rather than all articles of the Declaration then references to the Declaration in s (2) must be amended for consistency. The heading of the proposed section 3A may also need to be amended in that regard.

[1] See Senate Legal and Constitutional Affairs Legislation Committee, *Wild Rivers (Environmental Management) Bill 2011,* May 2011, p 10 and 11, http://www.aph.gov.au/Senate/committee/legcon_ctte/wild_rivers_2011/report/report.pdf accessed 12 July 2011

[2] For example, the *2010 Social Justice Report* makes the case for full implementation of the United Nations Declaration on the Rights of Indigenous Peoples.

[3] See for instance the *Racial Discrimination Act 1975* (Cth)

	(2) The provisions of this Act are to be interpreted and applied in a manner that is consistent with the Declaration. *(3) The principles in subsection (1) must, in every relevant case, be applied by each person exercising a power or performing a function under this Act.*	• In regard to proposed s (3) there is no guidance as to what a "relevant case" is where the principles set out in subsection (1) must be applied. • Issues also arise in regard to the practical consequences of giving effect to the principles set out in s 3A(1). For instance, the requirement in s (1)(b) for full and direct consultation or s (1)(c) for free prior and informed consent conflict with the NTA future act provisions where the procedural rights to be afforded to the native title party are something less[4]. The proposed amendment offers no assistance as to how this obvious conflict is resolved with any certainty.
	ITEM 2	
Amendment to current section 24MB(1)(c) of the NTA (which sets out how, as part of the freehold test for grants of tenures, there must be heritage protection legislation in place) to provide that the cultural heritage laws of the Commonwealth, the State or the Territory provide for the underlining <u>effective protection or preservation</u> of the area or site that may be of particular significance to the	**24MB Non-legislative acts** *Freehold test* (1) This Subdivision applies to a future act if: (a) it is an act other than the making, amendment or repeal of legislation; and (b) either: (i) the act could be done in relation to the land concerned if the native title holders concerned instead held ordinary title to it; or (ii) the act could be done in relation to the waters concerned if the native title holders concerned held ordinary title to the land adjoining, or surrounding, the waters; and ~~(c) a law of the Commonwealth, a State or a Territory makes provision in relation to the preservation or protection of~~	• Courts and decision makers will have to consider the "effectiveness" of the heritage laws in considering whether the elements of s 24MB are met. There is no guidance in the proposed amendments about the meaning of "effective" and by what criteria it should be judged. • Accordingly the amendment provides a platform for litigation challenging the validity of future acts passing the freehold test on the basis of the "effectiveness" of heritage legislation. • The proposed amendment creates discrepancies within the NTA as the proposed amendment wording is not applied to other provisions in the NTA, see for example ss 24JAA(1)(e), 24KA(1)(d), 24MC(2)(d) and 43A(7).

[4] See for instance ss 24HA, 24IB, 24JA, 24KA, 24LA, and 24MD

Indigenous people.	~~areas, or sites, that may be:~~ ~~(i) in the area to which the act relates; and~~ ~~(ii) of particular significance to Aboriginal peoples or Torres Strait Islanders in accordance with their traditions.~~ *(c) a law of the Commonwealth, a State or a Territory:* *(i) applies to the area to which the act relates; and* *(ii) provides **effective** protection or preservation of areas, or sites, that may be of particular significance to Aboriginal peoples or Torres Strait Islanders in accordance with their traditions.*	
ITEM 3		
Amendment to section 24MB(2)(c) so that the non-extinguishment principle applies to the acquisition of native title.	**24MD Treatment of acts that pass the freehold test** … *Extinguishment of native title by compulsory acquisition* (2) If: (a) the act is the compulsory acquisition of the whole or part of any native title rights and interests under a law of the Commonwealth, a State or a Territory that permits both: (i) the compulsory acquisition by the Commonwealth, the State or the Territory of native title rights and interests; and (ii) the compulsory acquisition by the Commonwealth, the State or the Territory of non-native title rights and interests in relation to land or waters; and (b) the whole, or the equivalent part, of all non-native title	• Currently the acquisition of native title under s 24MD extinguishes native title at the time of acquisition. • Prior to the 1998 NTA amendments native title did not extinguish on the acquisition of the native title rights and interests but rather when the act which gave effect to the purpose of the acquisition was done. The effect of the proposed amendment is to revert to the pre-1998 position (see repealed s 23(3)). • This allows revocation of compulsory acquisition of native title prior to doing the act which gives effect to the purpose of the acquisition[5]. • However, it may be problematic where there is no act giving effect to the purpose of the acquisition. See for example s 125 of the *State Development and Public*

[5] See s 17 of the *Acquisition of Land Act* which provides for the revocation of compulsory acquisition in certain circumstance.

	rights and interests, in relation to the land or waters to which the native title rights and interests that are compulsorily acquired relate, is also acquired (whether compulsorily or by surrender, cancellation or resumption or otherwise) in connection with the compulsory acquisition of the native title rights and interests; and (ba) the practices and procedures adopted in acquiring the native title rights and interests are not such as to cause the native title holders any greater disadvantage than is caused to the holders of non-native title rights and interests when their rights and interests are acquired; then: ~~(c) the compulsory acquisition extinguishes the whole or the part of the native title rights and interests; and~~ *(bb) the non-extinguishment principle applies to the acquisition; and* *(c) nothing in this Act prevents any act that is done in giving effect to the purpose of the acquisition from extinguishing the native title rights and interests; and* (d) if compensation on just terms is provided under a law of the Commonwealth, a State or a Territory to the native title holders for the compulsory acquisition, and they request that the whole or part of any such compensation should be in a form other than money, the person providing the compensation must: (i) consider the request; and (ii) negotiate in good faith in relation to the request; and (e) if compensation on just terms is not provided under a law of the Commonwealth, a State or Territory to the native title holders for the compulsory acquisition, they are entitled to	*works Organisation Act* where land vests in fee simple upon resumption[6]. • It is not clear on the drafting of ss 2(bb) and (c) that an act which gives effect to the purpose of the acquisition would extinguish native title. • This has the potential to create confusion with freehold title potentially being subject to the non-extinguishment principle. Whilst a legal option, it effectively creates a practical "deception" on the native title with the suppression of native title continuing forever in contrast to the situation of a lease with its reversion expectant. • No equivalent amendment to Item 3 (to apply the non-extinguishment principle) is proposed for a compulsory acquisition of native title under section 24NA. Accordingly, offshore acquisitions would extinguish whereas onshore acquisitions would not. The need for this additional inconsistency is not explained in the Bill.

[6] In those circumstances there is no second act giving effect to the 'purpose' of the acquisition.

	compensation for the acquisition in accordance with Division 5	
	ITEM 4	
Repeals subsection 26(3) such that the right to negotiate provisions will apply to offshore areas.	**26 When Subdivision applies** … ~~*Sea and intertidal zone excluded*~~ ~~(3) This Subdivision only applies to the act to the extent that the act relates to a place that is on the landward side of the mean high water mark of the sea. A reference to an act to which this Subdivision applies is to be read as referring to the act to that extent only.~~	• The proposed amendment purports to extend the right to negotiate to offshore. It fails to achieve this. Relevantly s26 is only operative if s24IC or Subdivision M of the NTA applies to the future act which is a "right to mine". Section 26 otherwise has no application to future acts to which Subdivision N (acts affecting offshore places) applies. The proposed amendment has failed to appreciate this structural issue.
	ITEM 5-9	
Expand on the current requirements in the NTA for parties to negotiate in good faith. Substitutes a new section 31(1)(b) and inserts new subsection 31(1A) requiring parties to negotiate in good faith and including explicit criteria as to what is required. New section 31(2) inserted to shift the burden of proof to the party who asserts that the negotiations were in good faith and new subparagraph 35(1A)	**31 Normal negotiation procedure** (1) Unless the notice includes a statement that the Government party considers the act attracts the expedited procedure: (a) the Government party must give all native title parties an opportunity to make submissions to it, in writing or orally, regarding the act; and ~~(b) the negotiation parties must negotiate in good faith with a view to obtaining the agreement of each of the native title parties to:~~ ~~(i) the doing of the act; or~~ ~~(ii) the doing of the act subject to conditions to be complied with by any of the parties.~~ *(b) the negotiation parties must, for a period of at least 6 months, negotiate in good faith using all reasonable efforts to come to an agreement about:*	• The proposed amendments are a response to the decision of the Full Federal Court in *FMG Pilbara Pty Ltd v Cox* (2009) 175 FCR 141 which is perceived as watering down the requirements of "good faith"[7]. • There is a lack of clarity in the wording in proposed s (1)(b) in regard to what happens if an agreement is reached before the expiration of the 6 month mandatory negotiation period.

[7] See paragraph 12 of the *Native Title Amendment (Reform) Bill 2011* Explanatory Memorandum.

inserted to provide that an application cannot be made to the arbitral body unless sections 31(1) and 31(2A) have been complied with.	*(i) the doing of the act; or* *(ii) the conditions under which each of the native title parties might agree to the doing of the act.* *(1A) For the purposes of paragraph (1)(b),* negotiate in good faith using all reasonable efforts *includes but is not limited to:* *(a) attending, and actively participating in, meetings at reasonable times including, where reasonably practicable, at a location where most of the members of the native title parties reside, if so requested by them;* *(b) disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;* *(c) making reasonable offers and counter-offers;* *(d) demonstrably giving genuine consideration to proposals made by other negotiation parties;* *(e) responding to proposals made by other negotiation parties in a timely and detailed manner, including providing reasons for the relevant response;* *(f) refraining from capricious or unfair conduct that undermines the beneficial nature of the right to negotiate.* *Negotiation in good faith* (2) If any of the negotiation parties refuses or fails to negotiate as mentioned in paragraph (1)(b) about matters unrelated to the effect of the act on the registered native title rights and interests of the native title parties, this does not mean that the negotiation party has not negotiated in good faith for the purposes of that paragraph. *(2A) In any proceeding in which the application of paragraph (1)(b) is raised, the party asserting good faith has the onus of proving that it negotiated in good faith.* ...	

	35 Application for arbitral body determination (1) *Subject to subsection (1A)*, any negotiation party may apply to the arbitral body for a determination under section 38 in relation to the act if: (a) at least 6 months have passed since the notification day (see subsection 29(4)); and (b) no agreement of the kind mentioned in paragraph 31(1)(b) has been made in relation to the act. *(1A) A negotiation party may not apply to the arbitral body under subsection (1) unless the negotiation party has complied with subsections 31(1), (1A) and (2A).*	
	ITEM 10	
Amendment to section 38(2) repealing and substituting the section which will provide that profit sharing conditions including the payment of royalties can be determined by the arbitral body in relation to future acts	**38 Kinds of arbitral body determinations** … *Matters to be determined by arbitration* (1B) If: (a) the manner specified is arbitration (other than by the arbitral body); and (b) the negotiation parties do not agree about the manner in which the arbitration is to take place; the arbitral body must determine the matter at an appropriate time. ~~*Profit-sharing conditions not to be determined*~~ ~~(2) The arbitral body must not determine a condition under paragraph (1)(c) that has the effect that native title parties are to~~	• This amendment gives power to the NNTT to make conditions regarding profit sharing arrangements when making a s 38 determination. The mischief this proposed amendment seeks to address is a view that native title party is currently placed at an unfair disadvantage during good faith negotiations because if the native title party cannot reach agreement regarding profit sharing during the negotiations, they will not receive any such payments if the matter goes to the NNTT for arbitration[8]. • Note that such payments are not 'compensation' under the NTA as the NNTT does not have the power to make determinations in regard to compensation[9]. • Because the compensation principles of the NTA do not apply, what then are the relevant criteria that the negotiation parties should expect the NNTT to apply?

[8] See the Second Reading Speech of the Senate dated 21 March 2011 at page 1302.
[9] *Western Desert Lands Aboriginal Corporation (Jamukurnu - Yapalikunu)/Western Australia/Holocene Pty Ltd*[2009] NNTTA 49 at [196] per Sumner DP.

	~~be entitled to payments worked out by reference to:~~ ~~(a) the amount of profits made; or~~ ~~(b) any income derived; or~~ ~~(c) any things produced;~~ ~~by any grantee party as a result of doing anything in relation to the land or waters concerned after the act is done.~~ *Profit-sharing conditions may be determined* *(2) Without limiting the nature of conditions that may be imposed under paragraph (1)(c), they may, if relevant, include a condition that has the effect that native title parties are to be entitled to payments worked out by reference to:* *(a) the amount of profits made; or* *(b) any income derived; or* *(c) any things produced;* *by any grantee party as a result of doing anything in relation to the land or waters concerned after the act is done.*	The proposed amendment provides no guidance and itself may become the source of litigation to determine its scope and application.
	ITEM 11	
Inserts a new section 47C providing that the parties to a claim can agree that the historical extinguishment of native title and interests can be disregarded.	***47C Agreements to disregard prior extinguishment*** *When section applies* *(1) This section applies if:* *(a) an application under section 61 is made in relation to an area; and* *(b) any time prior to a determination, there is an agreement between the applicant and the Government party that the extinguishment of native title rights or interests by a prior act affecting native title in relation to the area, or any part of the area, covered by the application be disregarded.*	• This is a different proposal to that s 47C put forward by the Commonwealth on 14 January 2010, when the Attorney-General released draft legislation detailing a proposed amendment to the *Native Title Act 1993*. This proposed reform allowed parties to agree to disregard the historical extinguishment of native title in areas of land set aside for the purpose of preserving the natural environment, in certain circumstances. • It is unlikely to open the gates for s 13(5) variation of a determination as this proposed s 47C can only apply prior to a determination not an 'approved determination'.

	Prior extinguishment to be disregarded *(2) For all purposes under this Act in relation to the application, any extinguishment of the native title rights and interests by any of the following acts must be disregarded:* *(a) the prior act itself;* *(b) the creation of any other interest in relation to the area as a result of the prior act;* *(c) the doing of any act by virtue of the holding of the interest.* *Effect of determination* *(3) If the determination on the application is that the native title claim group holds the native title rights and interests claimed:* *(a) the determination does not affect:* *(i) the validity of the creation of any prior interest in relation to the area; or* *(ii) any interest of the Crown in any capacity, or of any statutory authority, in any public works on the land or waters concerned; and* *(b) the non-extinguishment principle applies to the creation of any prior interest in relation to the area.*	• It is also likely to reduce the amount of compensation payable as the non-extinguishment principle would apply. • Whilst the wording of the proposed s 47C is broadly consistent with ss 47A and 47B, however: – In s (1)(b) the agreement is between the Applicant and the Government Party[10]. This could be interpreted as meaning all Government parties rather than just the 'relevant' Government party. – Unlike ss 47A(1)(c) and 47B(1)(c) there is no requirement for members of the claim group to occupy the area[11]. – Subsections (2)(a) and (b) refer to a 'prior act' rather than a 'prior interest' as is used in ss 47A and 47B[12]. – In s (3) the validity of any 'prior interest' is confirmed but not any 'prior act'. – In regard to the reference to a 'prior interest' in s (3) it is not clear if it relates to an interest existing prior to the application or prior to the determination[13].
	ITEM 12	
Insert new section 61AA and 61AB providing for a	***61AA Presumptions relating to applications***	• This amendment is based on that suggested by Chief

[10] Defined in ss 26(1) and 253 as the Commonwealth, a State or a Territory.
[11] Section 47 does not require occupancy either. However, it relates to land which is already held, in some form, by the native title claimants.
[12] This may be an attempt to circumvent the decision in *Erubam Le v Qld (2003)* 134 FCR 155 at [90] where it was found that, for the purposes of s 47A(2)(b), the construction or establishment of a public work was not a prior interest.
[13] The same issues also arise in ss 47A(3)(ii) and 47B(3)(a)(ii)

presumption of continuous connection in relation to native title applications for native title determinations.	*(1) This section applies to an application for a native title determination brought under section 61 if 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 asserted to be possessed under laws acknowledged and customs observed by the native title claim group;* *(b) the members of the native title claim group reasonably believe the laws so acknowledged and the customs so observed to be traditional;* *(c) the members of the native title claim group, by the laws acknowledged and the customs observed, 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 is descended, acknowledged traditional laws and observed traditional customs at sovereignty by which those persons had a connection with the land or waters the subject of the application.* *(2) If this section applies to an application, it must 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 acknowledged and traditional customs observed at sovereignty;* *(b) that the native title claim group has a connection with the land or waters by those traditional laws and traditional customs;* *(c) if the native title rights and interests asserted are capable of recognition by the common law—that the facts necessary for the recognition of those rights and interests by the common law are established.*	Justice French of the High Court when His Honour was a Federal Court Judge. • The proposed amendment fails to take account of the current approach of the Federal Court and the significant investment by stakeholders in that process. • The proposed amendment appears to be driven by an assumption that the matters in *Yorta Yorta* are being tested at a 'trial standard' during negotiation. • Section 61AA(1) states that where certain circumstances 'exist' s 61AA will apply. Presumably, the use of the term 'exist' means that some level of proof will be required. • Section 61AA(1)(a) requires that the native title claim group 'assert' that the claim rights and interests are possessed under traditional laws and customs. Query how such an assertion by the 'claim group', as opposed to the 'applicant', is to be evidence. • Sections 61AA(1)(b) and (d) require all members of the native title claim group to 'reasonably believe' certain things. Query the nature of the evidence to establish 'reasonable belief' by <u>all</u> members of the claim group. Also query the nature of the evidence to establish that all members have a connection with the land and waters. Difficulties will arise where there are intra-Indigenous disputes within the claim group or overlapping claims. • Section 61AA(1)(c) requires that the members of the claim group have 'a connection' to the laws and customs. Because of the use of the term 'exist' in s 61AA(1), as set out above, it would still be necessary

	61AB Continuing connection *(1) A presumption under section 61AA that a native title claim group has a connection with land or waters by traditional laws and traditional customs, or a finding to that effect, may be set aside only by evidence of a substantial interruption in the acknowledgment of those traditional laws or the observation of those traditional customs.* *(2) In any proceeding relating to the application of subsection (1), the court must treat as relevant:* *(a) whether the primary reason for any demonstrated interruption in the acknowledgment of traditional laws or the observance of traditional customs is the action of a State or a Territory or a person who is not an Aboriginal person or a Torres Strait Islander; or* *(b) whether the primary reason for any demonstrated significant change to the traditional laws acknowledged or the traditional customs observed by the Aboriginal peoples or Torres Strait Islanders is the action of a State or a Territory or a person who is not an Aboriginal person or a Torres Strait Islander.*	to prove connection in order to take the benefit of the presumption. • Section 61AB provides for a rebuttal of the presumption of connection by evidence of a substantial interruption. To establish a 'substantial interruption' it would be necessary to interview native title holders. At the current time, they are represented by the Applicant which has legal representation. Therefore none of the other parties can 'access' them directly. • Also in s61AB, does the use of the words 'or a finding to that effect' mean that a finding made at trial may be set aside by evidence of a substantial interruption? • The idea of the rebuttable presumption is only logical and effective if evidence was required to establish a credible basis for the recognition of the native title rights and interests. In considering the standard of evidence required it is necessary to consider the nature of the relief sought, the special role of the State in the proceedings and the serious nature of the rights and interests claimed. Establishing a credible basis for the recognition of the rights and interests will be problematic as the substantive evidence comes from the claim group itself. At the current time, the claim group is represented by the Applicant which has legal representation. Therefore none of the other parties can 'access' them to obtain the necessary evidence. In addition that evidence is often fragmentary and the input of anthropologists and other suitably qualified experts is necessary to 'put the puzzle together'. • The proposed amendment does not create a complete rebuttable presumption. The Applicants still need to

		have some underlying evidence to get the benefit of the presumption. • Issues will also arise in regard to establishing 'right people for right country'. Problems will arise in situations where there are overlapping claims or competing Indigenous respondents.
	ITEM 13 - 14	
Amends section 223(1) by providing clarification of the definition of traditional to ensure that laws and customs can be considered traditional if they remain identifiable through time. Also amends section 223(2) to provide that native title rights and interests can be commercial in nature.	**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 waters, where: (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional 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. *Traditional laws and customs* *(1A) Without limiting subsection (1), traditional laws acknowledged in that subsection includes such laws as remain identifiable through time, regardless of whether there is a change in those laws or in the manner in which they are acknowledged.* *(1B) Without limiting subsection (1), traditional customs observed in that subsection includes such customs as remain identifiable*	• Section 223(1A) would allow for a domestic right to fish to become over time a commercial right to fish. • Section 223(1A) is consistent with current practice. • Section 223(1B) is consistent with current practice. • Section 223(1C) is consistent with current authorities. • Section 223(1D), query what is meant by 'acknowledged continually', 'observed continuously' and 'maintained continuously'. • Section 223(2)(b) would still require evidence of a right of that kind.

	through time, regardless of whether there is a change in those customs or in the manner in which they are observed. *Connection* *(1C) To avoid doubt, and without limiting subsection (1), it is not necessary for a connection with the land or waters referred to in paragraph (1)(c) to be a physical connection.* *(1D) Nothing in subsection (1) is to be interpreted as requiring:* *(a) in the case of traditional laws—the laws to be acknowledged continuously;* *(b) in the case of traditional customs—the customs to be observed continuously;* *(c) in the case of connection with the land or waters—the connection to be maintained continuously.* *Hunting, gathering and fishing covered* ~~(2) Without limiting subsection (1), **rights and interests** in that subsection includes hunting, gathering, or fishing, rights and interests~~ *(2) Without limiting subsection (1), rights and interests in that subsection includes:* *(a) hunting, gathering, or fishing, rights and interests; and* *(b) the right to trade and other rights and interests of a commercial nature.*	

PART 2 - OTHER ISSUES/AMENDMENTS	
Summary	**Issues /Proposed amendment to NTA**
Compensation issues	An amendment to include a provision that the consideration paid under an agreement reached under Subdivision P (the right to negotiate) is taken to be compensation for the purposes of Part 5 of the NTA. Similar to s 24EBA(1) regarding ILUAs.
Clarification in regard to s 24EB(1)(b) reference to "parties"	An amendment to clarify that a person does not have to be a party to an ILUA to take the benefit of it and confirm that the State does not have to be a party to every ILUA.
Clarification to definition of meaning of 'quarry' in s 253 (mine)	Insert a definition for "natural surface of the land" in s 253 of the NTA (mine). The lack of certainty in relation to this definition has caused some issues in assessing whether a quarrying operation is mining for the purposes of the NTA.
Amend to s 23B(3) to include vestings under Commonwealth legislation.	Include vestings done under legislation by "the Commonwealth". Section 23B(3)(a) of the NTA only includes vestings done under legislation of a State or Territory. It does not include vestings done under Commonwealth legislation. It is not clear whether it was deliberate or an accidental oversight that Commonwealth vestings are not included in this subsection. It is interesting that section 23C(1) of the NTA appears to contemplate section 23B(3) as applying to acts attributable to the Commonwealth – *If an act is a previous exclusive possession act under subsection 23B(2) (including because of subsection 23B(3)) and is attributable to the Commonwealth...*
Amend ss 62(1) and 64 to require evidence in regard to 'occupation' to be given	Amendment of section 62(1), NTA to require that evidence of 'occupation' must be included as a separate affidavit to or be included as part of the necessary affidavit material for a native title claimant application, where the native title claim relied upon sections 47A or 47B of the NTA. Also, a similar amendment to section 64 to include an affidavit about occupation when an existing claim is amended that relies upon sections 47A or 47B of the NTA. One of the requirements when considering the application of sections 47A and 47B of the NTA is that at least one member of the native title claim group must be in occupation of the area at the time the native title claim is made. In Queensland, we accept evidence of occupation through an affidavit by the native title claimants which goes to the Applicant's occupation at or around the application time.

	The suggestion involves requiring that evidence of occupation must be included as a separate affidavit or included as part of the necessary affidavit material for a new native title claimant application, where sections 47A or 47B were relied upon in the application. This means that the claimants are required to turn their minds to this issue at the start of the claim process. This suggestion would greatly assist in the negotiation of the claim. It would prevent unnecessary delays through going back to the claimants/NTRBs about this issue which ultimately adds another step to the negotiation process. Where there was an existing claim that relied upon section 47A or 47B of the NTA, a requirement could be included that upon amendment an affidavit regarding the occupation requirement must be included.
Section 31	Additional amendments to s 31 to reflect principles in the decision of Justice Reeves in QGC Pty Limited v Bygrave[14] so that agreements can be authorised by a majority. Further, s31 agreements do not bind all persons who hold native title, only those who are a party to the agreement[15]. Issues arise in regard to the State's exposure to compensation. Difficulties may arise in relying on such an agreement as proof compensation had already been paid[16]: (a) where the agreement does not stipulate the amount of compensation to be paid. (b) if a determination of native title is made that a group, other than that represented by the registered native title claimant who entered into the agreement, is found to hold native title in the area. This issue is addressed in an ILUA to which the State is a party by an indemnity clause in favour of the State.
Section 47B	Clarification as to what "prior interest" means. In the context of this section there will be an extinguishing event which at the time of the determination of native title is disregarded where the preconditions of the section are made out. The section outlines the relationship between the native title and any prior interest – validity and the application of the non-extinguishment principle. However the section offers no certainty as to what is the relationship between the native title that is determined and any interest that is created between the native title claim being made and the determination that native title exists. At the time these interests are created native title is extinguished and these interests are not accordingly future acts. This period – between the claim being made and

[14] [2010] FCA 1019

[15] Cf: s24EA which provides that a registered ILUA binds all persons holding native title, not just those who are signatories to the agreement.

[16] Section 49 provides that compensation can only be paid once.

	being determined - may be a number of years.
Section 190F	Amendment to allow the NNTT/Registrar to make a submission in relation to matters within the NNTT's jurisdiction relevant to making a decision about whether to dismiss the native title claim. Under section 190D of the NTA the Registrar must give the Federal Court notice of his or her decision not to accept the claim plus the reasons for the decision. This suggested amendment extends this role of the NNTT/Registrar. It is considered that an amendment to allow the NNTT/Registrar to make a submission in relation to matters within the NNTT's jurisdiction relevant to making a decision in whether to dismiss the native title claim, may be useful in such proceedings. However, as the NNTT/Registrar is not a party to the native title claimant application it would need to be also provided with notice of the proceeding.
ILUAs	An amendment which sees the Registrar of the NNTT to provide a "sealed" or stamped copy of the registered ILUA so that the State knows the version of the registered ILUA it is provided with, when the State is otherwise not a party to the ILUA, is the final and registered copy of the ILUA.
Correct address for service for registered native title body corporate	An amendment which ensures that the correct and up to date address appears on National Native Title Register. Section 253 NTA provides that the registered native title body corporate means the body corporate whose name and address are registered on the National Native Title Register. There is nothing under the NTA which ensures that the address, which the State uses to provide procedural rights to the native title party, is correct and up to date. Whilst such an obligation exists under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act), the corporation must lodge notice of a change of address of its registered office with the Registrar not later than 28 days after the date on which the change occurs, the CATSI Act does "not talk to" the NTA. This potentially puts these Acts in conflict on the issue of the address.