National Native Title Tribunal

Native Title Amendment (Reform) Bill 2011

Submission to the Senate Legal and Constitutional Affairs Committee

National Native Title Tribunal, 29 July 2011

Facilitating timely and effective outcomes.

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Introduction

1. The National Native Title Tribunal (the Tribunal) welcomes the opportunity provided by the Senate Legal and Constitutional Affairs Committee to make submissions in relation to the *Native Title Amendment (Reform) Bill 2011* (the Bill).

2. The Tribunal supports changes to the native title system that will provide greater opportunities for timely and effective outcomes under the *Native Title Act 1993* (Cwlth) (NTA). The Tribunal notes that in the Second Reading Speech, Senator Siewert stated:

> In this first Bill we have sought to address some of the 'low-hanging fruit' of native title reform - by targeting some of the areas of native title law where relatively simple amendments have been identified that could have far-reaching implications for addressing some of the current barriers to effective native title outcomes... .[1]

3. The Tribunal considers that the Bill raises important questions about the way in which the NTA, if amended as proposed, would be applied and about the impact of the proposed amendments upon established native title case law.

4. The Tribunal submits that some of the proposed amendments would have a substantial impact on both the architecture and the interpretation of the NTA, in particular:
   - the addition of a new object, i.e. that the provisions of the NTA are to be interpreted and applied consistently with the United Nations Declaration on the Rights of Indigenous People (UNDRIP) (Item 1 of the Bill)
   - the introduction of a presumption of continuity of connection (Item 12), and
   - the proposed amendments to the meaning of 'traditional' under the NTA (Items 13 and 14).

5. Accordingly, the Tribunal considers that, at least in the short to medium term, those proposed amendments would be likely to give rise to further uncertainty, delay and expense in respect of both the resolution of native title claims and future act matters. The Tribunal acknowledges, however, that any such delay and expense might be considered necessary if the result is a significantly improved native title system.

6. In the passage quoted above at [2], Senator Siewert indicated this is the 'first' Bill. This submission is prepared without the benefit of knowing what other amendments might be proposed.

7. In that regard, the Tribunal also notes that the Australian Government has consulted extensively in respect of its discussion paper 'Leading practice agreements: maximising outcomes from native title benefits' and the 'Proposed amendments to the Native Title Act 1993 relating to national parks etc', as well as the consultation paper

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[1] Commonwealth, *Parliamentary Debates*, Senate, 21 March 2011, 1298 (Rachael Siewert).

'Native Title, Indigenous Economic Development and Tax', and has not announced whether any other amendments to the NTA are intended.

8. The comments contained in this submission focus on technical and practical matters. In making these submissions, the Tribunal has considered the provisions of the Bill, the Explanatory Memorandum and the Second Reading Speech in the context of the established case law and the Tribunal's experience of the operation of the native title system.

Summary of the Bill

9. In summary, the Bill proposes the following amendments to the NTA:
   - insert an additional object that refers to, and incorporates for certain purposes, the UNDRIP
   - apply a presumption as to proof of specified factual matters in relation to native title claimant applications
   - state that laws acknowledged and customs observed are 'traditional' for the purposes of s. 223(1) 'if they remain identifiable through time'
   - state that native title rights and interests of a commercial nature fall within s. 223(1)
   - enable any extinguishment of native title rights and interests in relation to any area to be disregarded by agreement between the claimants and the relevant government
   - require the effectiveness of heritage protection laws to be examined in future act proceedings before the 'arbitral body' (usually the Tribunal)
   - apply the non-extinguishment principle to all compulsory acquisitions of native title rights and interests
   - apply the right to negotiate to inter-tidal and offshore areas
   - create 'stronger incentives for beneficial future act agreements' and 'strike a better balance' in good faith negotiations by:
     - inserting criteria for determining whether negotiations in good faith have occurred
     - reversing the onus, i.e. person asserting they have negotiated in good faith has the onus of proving it, and
   - allow an arbitral body to impose a profit sharing/royalty condition to the doing of a future act that attracts the right to negotiate.[2]

[2] See the Bill and accompanying Explanatory Memorandum.

Item 1: Implement the UNDRIP

10. The Bill, if passed, would insert an additional object (s. 3A) that would refer to the UNDRIP and require that governments take 'all necessary steps to implement' a number of the principles set out in the UNDRIP: see proposed s. 3A(1). It would also state that:
    - Parliament intends the NTA to be *interpreted and applied in a manner that is consistent with* the UNDRIP (proposed s. 3A(2), emphasis added), and
    - the UNDRIP principles 'must, *in every relevant case*, be applied by each person exercising a power or performing a function under this Act' (proposed s. 3A(3), emphasis added). This would include future act determinations, and decisions in relation to the registration of indigenous land use agreement (ILUA) and claimant applications.

11. In recent years, the Tribunal has been asked to take the UNDRIP (along with other international instruments) into account when making some right to negotiate determinations. The Tribunal decided those international instruments could not be used as an aid to interpreting the relevant provisions of the NTA because there was not the ambiguity in those provisions to allow the Tribunal to have reference to those international instruments. That decision was upheld on appeal to the Federal Court.[3] An appeal against the judgment has been heard by a Full Federal Court and the decision is reserved.

Practical implications

12. The Tribunal considers that the introduction of proposed s. 3A, either alone or when read with proposed ss. 61AA and 61AB, and the proposed amendments to s. 223, might raise a question as to whether there has been a fundamental shift in the legislative policy underpinning the NTA. Accordingly, and for the reasons set out below, appropriate consequential amendments and transitional provisions would seem to be necessary.

13. The Tribunal also considers that the introduction of proposed s. 3A is likely to lead to litigation to determine its effect on the resolution of claims to hold native title, future act determinations and registration decisions by the Native Title Registrar (the Registrar) in relation to both claimant applications and ILUAs. Therefore, additional legislative guidance as to how the principles and the provisions of the UNDRIP are to be 'applied' pursuant to proposed 3A in various contexts by various decision makers would assist in interpreting its intended effect.

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[3] See *Western Desert Lands Aboriginal Corporation v Western Australia* (2009) 232 FLR 169; [2009] NNTTA 49. Member O'Dea; *FMG Pilbara Pty Ltd/Cheedy/Western Australia* [2009] NNTTA 91, Member O'Dea; *Cheedy v Western Australia* [2010] FCA 690, McKerracher J.

14. Further, the Tribunal submits that the introduction of proposed s. 3A might lead to contentions that certain parts of the NTA have no legal effect or, at least, are significantly limited in operation, given that proposed s. 3A(2) provides that all provisions of the NTA 'are to be interpreted and applied in a manner that is consistent with' the UNDRIP. For example, what would be the implications of Article 32(2) of the UNDRIP[4] on future act proceedings before the Tribunal? Further, to what extent (if at all) might the effect of that Article be qualified by Articles 27[5] and 46(2)[6] of the UNDRIP?

15. Similar issues arise in relation to proposed s. 3A(3). It provides that the principles of proposed s. 3A(1) 'must, *in every relevant case*,[7] be applied by each person exercising a power or performing a function under' the NTA (emphasis added). This would include the Tribunal's role in relation to future act proceedings and the Registrar's role in relation to registration testing claimant applications and applications for registration of an ILUA, assuming these are 'relevant' cases.

16. Proposed s. 3A(1) states that 'governments' are to take 'all necessary steps to implement' the following principles set out in the UNDRIP:
    - the rights of all peoples including Indigenous peoples to self-determination;
    - full and direct consultation and participation of the Indigenous peoples concerned
    - free, prior and informed consent of Indigenous peoples in matters affecting them
    - the right of Indigenous peoples to their traditional lands, territories and natural resources
    - demonstrated respect for Indigenous cultural practices, traditions, laws and institutions
    - reparation for injury to or loss of Indigenous interests
    - non-discrimination against the interests of Indigenous peoples.

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4 'States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories or other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.'

5 'States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.'

6 'In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.'

7 This, in itself, raises a question of interpretation, i.e. what is a 'relevant' case?

17. It appears arguable that the application of the UNDRIP principles listed in [16] above would render the provisions of the NTA relating to the expedited procedure[8] nugatory. It may also precipitate a challenge to the practice of state and territory governments including a statement of expedition in a notice issued under s. 29 in relation to an exploration or prospecting tenement as a matter of course. Other parts of the NTA might also be able to be challenged on similar grounds.

18. If the intended effect of the proposed amendments is to render (for example) the expedited procedure provisions nugatory, the Tribunal considers that it would be better to amend the relevant substantive provisions to provide so explicitly. If that is not the intention, some guidance as to how proposed s. 3A(1) is to be 'applied' would be useful.

19. Further, based on its experience, the Tribunal considers that even if consequential amendments are made, the insertion of proposed s. 3A would result in challenges to the application of the current case law in relation to the expedited procedure, negotiation in good faith and the criteria for making a future act determination by the Tribunal. If that occurs, there could be substantial delays while those matters were resolved. This may require significant investment of resources from parties, the Tribunal and the Federal Court (and, ultimately, the Commonwealth, which funds most of the participants and institutions). The same could be said for the impact of passing the Bill in its current form on the application of the NTA provisions dealing with the registration of claimant applications (the registration test, discussed below) and (to a lesser extent) the registration of ILUAs.

20. As to the resolution of claimant applications, the Tribunal considers that the impact of proposed s. 3A (along with other of the proposed provisions) on the interpretation of s. 223, particularly when combined with the changes proposed to s. 223 (which defines the terms 'native title' and 'native title rights and interests') is also likely to require judicial consideration.

21. The Tribunal notes that considerable time might elapse between the identification of an issue about the meaning of a statutory provision and its authoritative interpretation. (For example, the meaning of s. 223 was decided by the High Court[9] on 12 December 2002 in the Yorta Yorta case, some seven and half years after the claim had been referred to the Federal Court.) There are likely to be differing views about the precise meaning and operation of the proposed amendments, giving rise to the need for judicial determination, perhaps at the highest level.

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8 *Native Title Act 1993* ss. 32, 237.

9 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; (2002) 194 ALR 538; [2002] HCA 58.

22. Moreover, legislative changes of such a substantial nature might foster a more adversarial approach to native title matters than that which currently exists. Unless managed carefully, this may damage some important stakeholder relationships.[10]

23. In her Second Reading Speech, Senator Siewert identified 'a need for the Parliament and the nation to have a debate about the meaning and implementation of these rights' and referred specifically to issues "in relation to ... interpreting the meaning of 'free prior and informed consent' and what in practice 'consent' means when applied to native title decisions".[11]

24. His Honour Chief Justice French wrote recently that: 'The scope of Art 5 [of the UNDRIP] and its implications for the relationship of the domestic laws ... and the customary laws of our indigenous peoples will no doubt have to be worked out over time'.[12]

25. In short, the Tribunal submits that the impact of the articles of the UNDRIP (for which Australia has indicated its support, but which it has not ratified) and the complex and interlocking provisions of the NTA should be considered closely before amendments such as those proposed in the Bill are made. The Tribunal notes that substantive changes to the NTA in the past have resulted in delays (sometimes significant) and the incurring of considerable expense in resolving claims and future act matters.

Other options

26. The Tribunal considers that, if the intended effect of proposed s. 3A, among other things, is to reduce or negate the effect of some of the 1998 and 2010 amendments to the NTA (e.g. procedural rights in relation to certain classes of future acts) then that outcome might be better achieved by amending the relevant substantive provisions of the NTA.

27. In that regard, the Tribunal notes the following comments made by Wilcox, French and Weinberg JJ:

> The preamble declares the moral foundation upon which the NT Act rests. It makes explicit the legislative intention to recognise, support and protect native title. That moral foundation and that intention stand despite the inclusion in the NT Act of *substantive provisions*, which are *adverse to native title rights and interests* and provide for their extinguishment, permanent and

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10 See the discussion of current context later in this submission.

11 Commonwealth, *Parliamentary Debates*, Senate, 21 March 2011, 1300 (Rachael Siewert).

12 R French, 'Home grown laws in a global neighbourhood: Australia, the United States and the rest' (2011) 85(3) Australian Law Journal 147 at 156.

temporary, for the validation of past acts and for the authorisation of future acts affecting native title.[13] (emphasis added)

Item 12: Presumptions relating to applications and continuing connection

28. The current proposal is to include the following new provisions:

61AA Presumptions relating to applications

(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.

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.

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13 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442; (2005) 220 ALR 431; [2005] FCAFC 1 at [63].

(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.

29. Proposed ss. 61AA and 61AB are considered below in the light of:
- the current context in which claimant applications are considered, and
- the likely impact of proposed ss. 61AA and 61AB on the disposition of claimant applications.

Current context

30. The Tribunal notes that the circumstances in which native title applications are resolved today are significantly different from those that existed in the years prior to the High Court decisions in *Ward* and *Yorta Yorta* when key aspects of the law were unclear. This lack of clarity was thought to make parties reluctant to settle claims and also led to some long and expensive trials and appeals.

31. However, it is notable that since the NTA commenced, there have been only 16 cases[14] involving a full trial of all of elements of s. 223(1), with 10 appeals to the Full Federal Court from those judgments and the grant of special leave to bring three further appeals to the High Court.[15]

32. While some of those matters were lengthy and expensive, they are not the norm. In any case, test case litigation of this kind was almost inevitable given the fact that native title was a new concept in Australian law.

33. Since those major test cases were determined, if there is resort to a hearing, it is usually for limited purposes such as to resolve a single issue that is preventing agreement (e.g.

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[14] Three of which involved intra-indigenous disputes about the nature of the native title held or overlapping contested claimant applications, namely the Miriuwung Gajerrong claim, the Ngarluma and Yinjibarndi claim and the Yawuru claim.

[15] Those noted in footnote 17 above, along with the Yorta Yorta claim, the Wanjina Winguur Willingun claim, the Alyawarr , Kaytetye, Warumungu, Wakay Peoples'claim, the Lardil, Kaiadilt, Yangkaal and Gangalidda Peoples' claim, the Wandarang, Alawa, Marra and Ngalakan Peoples' claim, the Ngalakan People's claim, the Bardi and Jawi Peoples' claim, the De Rose claim, the claim by Myra Hayes Ampetyane and others, the Croker Island claim by Mary Yarmirr and others, the claim to Timber Creek on behalf of the Ngaliwurru and Nungali Peoples, and the Torres Strait Regional Sea Claim.

the effect of a particular grant on native title rights and interests).[16] For example, following limited litigation to clarify the legal effect of a non-exclusive pastoral lease on native title rights and interests in *King v Northern Territory*, 13 consent determinations recognising the existence of native title have been made, with more expected in the future. Litigation has also been used to separate questions of 'connection' from issues relating to extinguishment.[17] There have also been two trials recently in relation to contested overlap areas, one in the Northern Territory and one in Western Australia.[18]

34. It now appears that litigation of claims on a scale seen in the early days of the NTA is unlikely. There are many reasons for this including:
    - the law on which native title rights and interests will (or will not) be recognised is much clearer in light of the decisions mentioned above, particularly the High Court's judgments in 2001 (*Commonwealth v Yarmirr*[19]) and 2002 (*Western Australia v Ward*[20] and *Members of the Yorta Yorta Aboriginal Community v Victoria*[21] (*Yorta Yorta*))
    - judges of the Federal Court have been willing to infer continuity back to the assertion of British sovereignty[22]
    - there is a widespread acceptance that parties should attempt to resolve native title claim issues by negotiated agreement rather than litigated determination and, as a consequence, from the financial year following *Yorta Yorta* (i.e. 2003-2004) to 28 July 2011, 86 (or 88%) of the determinations recognising that native title exists have been made with the consent of the parties
    - many of the determinations that native title exists are accompanied by (and in some cases are contingent on) ILUAs
    - some claims could soon be finalised by way of a suite of agreements that do not (or need not) involve a determination of native title, and which deal with a range of related issues (e.g. protection of cultural heritage), and[23]

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16 See *King v Northern Territory* [2007] FCA 1498 (pastoral leases), *Brown v Western Australia (No 3)* [2010] FCA 859 (mining leases), *James v Western Australia* (2010) 184 FCR 582; (2010) 269 ALR 323; [2010] FCAFC 77 (mining leases).

17 See *Bennell v Western Australia* [2006] FCA 1243 and *Bodney v Bennell* (2008) 167 FCR 84; (2008) 249 ALR 300; [2008] FCAFC 63 ('connection' in relation to the Single Noongar claim, in particular over the Perth metropolitan area).

18 Brunette Downs and Rockhampton - Brunette Downs (NT), with judgment due on 5 August 2011; Warrarn and Ngarla, which has been heard and judgment reserved.

19 (2001) 208 CLR 1; (2001) 184 ALR 113, [2001] HCA 56.

20 (2002) 213 CLR 1; (2002) 191 ALR 1; [2002] HCA 28.

21 (2002) 214 CLR 422; (2002) 194 ALR 538; [2002] HCA 58.

22 For example, *Neowarra v Western Australia* [2003] FCA 1402 at [336]; *The Alyawarr , Kaytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory* [2004] FCA 472 at [74].

23 See, e.g. the Wulgurukaba claim to Magnetic Island, which was recently settled using ILUAs rather than determinations over the entire area, with native title (if any) being surrendered, and also the Victorian Native Title Settlement Framework.

- successive meetings of Australian, state and territory ministers responsible for native title have supported the use of the native title scheme for broader settlements of practical issues (i.e. beyond the technicalities of determinations of native title) to provide long term economic, social and other benefits to native title holders.[24]

35. The practical approach to agreement-making (both in terms of determinations of native title and broader or alternative settlements) was developed within the current legal framework and not without considerable effort on the part of all major participants in the system. It is not possible to predict with any certainty what impact the introduction of proposed ss. 61AA and 61AB (along with proposed s. 3A and the changes to s. 223 discussed below) might have on the approach of one or more government parties, in particular whether such changes would result in more, or more timely, consent determinations recognising the existence of native title. The Tribunal considers that, at the very least, each state and territory government might review its native title policy in the light of the amendments, with a consequent delay in having any new policy endorsed by Cabinet. Moreover, well resourced non-government respondents might attempt to have the presumption set aside in relation to particular applications.

36. The Tribunal notes that a majority of current claims have been in the system for some years.[25] Further, new claims are lodged each year (60 in 2010-11). However, it appears that many of the most 'straightforward' claims have been resolved by consent determinations (or are set to be resolved in the near future). Those that remain include claims that (absent the applications of the proposed presumption) might raise complex issues in relation to continuity of connection. The Tribunal submits that, in those cases, respondent parties might be more inclined to attempt to challenge the presumptions set out in proposed 61AA(2).

Practical issues

37. Before amendments to the effect of those in proposed ss. 61AA and 61AB are enacted, consideration should be given to the following issues (among others) and how they might be addressed:
    - the drafting of proposed ss. 61AA and 61AB
    - the implications of the presumptions for:

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[24] See e.g. the communiqué issued by Commonwealth, State/Territory Native Title Ministers on 28/08/2009 attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2009_ThirdQuarter_28August2009-Communique-NativeTitleMinistersMeeting and the *Guidelines for Best Practice in Flexible and Sustainable Agreement Making* endorsed by the Ministers.

[25] According to the Tribunal's databases, of the 440 claimant applications current at 30 June 2011, 112 (or 25 per cent) were less than five years old, 121 (or 28 per cent) were 5-10 years old and 207 (or 47 per cent) were more than 10 years old.

- intra-Indigenous issues, including overlapping claims, disputes as to claim group membership and disputes as to the 'level' at which native title is held
- the Federal Court's power to make determinations of native title by consent of the parties
- the registration test
- native title claims based on succession
- earlier decisions dismissed on the basis of abuse of process or lack of evidence
- mediation
- native title inquiries and reviews

- when a party would need to elect to challenge the presumption of connection
- the circumstances when the presumption should not apply, if any
- transitional provisions
- compensation, and
- potential responses of stakeholders.

Some general comments on drafting of proposed s. 61AA

38. The Tribunal submits that a number of issues arise in relation to the drafting of this proposed provision including:
    - How is it to be shown that 'members of the claim group reasonably believe' the things referred to in ss. 61AA(1)(b) and (d)? Would it be sufficient that the applicant depose to this? If so, an amendment is required to s. 62(1)(a).
    - Would the reasonableness of that belief be open to question and, if so, at what point?
    - How is it to be established that the claim group has the connection referred to in s. 61AA(1)(c) i.e. via an assertion (as in paragraph (a)) or via a 'reasonable belief' (as in paragraphs (b) and (d))?
    - As currently drafted, s. 61AA(1)(c) implies that current 'connection' must be proven to exist as a matter of fact before reliance can be placed on the presumption found in s. 61AB. This is because it is one of the 'circumstances' that must 'exist', i.e. the members of the native title claim group, 'by the laws acknowledged and the customs observed', must 'have a connection' with the claim area as a matter of fact, rather than via a presumption or a reasonable belief. If that is what is intended, then the benefit of the presumption may be reduced.
    - Is proposed s. 61AA(2)(c) intended to mean 'absent any extinguishing act' for the purposes of s. 223(1)(c)? It seems so but it would be helpful if that was expressly stated.
    - It is assumed in s. 61AA(1)(d) that the native title holding group is, in all cases, descent based, which might not always be the case.[26]

[26] For example, in *Harrington-Smith v Western Australia (No 9)* [2007] FCA 31 at [291], Lindgren J found on the evidence that the pre-sovereignty (i.e. traditional in the NTA sense) Western Desert Cultural Bloc laws and customs were such that that descent from an ancestor was not a basis of a landholding unit.

Effect of potential ambiguity in s. 61AB(1)

39. Proposed s. 61AA(2) provides that if s. 61AA(1) applies, then 'it must be presumed, *in the absence of proof to the contrary*' (emphasis added) that:

- the laws acknowledged and customs observed by the native title claim group are traditional laws acknowledged and traditional customs observed at sovereignty
- the native title claim group has a connection with the land or waters by those traditional laws and traditional customs,
- the facts necessary for the recognition of those rights and interests by the common law are established if the native title rights and interests asserted are capable of such recognition.

40. Initially, this would appear to allow for a challenge to all three aspects of the presumption via 'proof to the contrary'. However, s. 61AB provides that:

> 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.[27] (emphasis added)

41. The Tribunal submits that, on one reading, proposed s. 61AB(1) limits the scope of any challenge to the application of the presumptions in s. 61AA to proof of a substantial interruption. If it is what is intended, then it will have a significant impact. Therefore, it is submitted that it is important to make clear the intent behind this provision.

Effect of 'relevant' in proposed s. 61AB(2)

42. This proposed provision stated that: 'In any proceeding relating to the application of ... [s. 61AB](1), the court must treat as relevant' certain matters. However, it is not clear what should follow from that. For example, could the court take account of them but still decide there has been a substantial interruption as referred to in s. 61AB(1)?

43. The Tribunal submits that , if the legislative intent is to reverse the effect of *Yorta Yorta* at [90] and *Bodney v Bennell*[28] at [96] to [97] in relation to the matters covered by ss. 61AB(2)(a) and (b), then the amendment may not be drafted clearly enough to achieve that aim.

44. The Tribunal submits that, in considering the potential effect of the proposed amendment to insert s. 61AB, note should be taken of the statement of Justices Finn, Sundberg and Mansfield in *Bodney v Bennell* that:

> European settlement is what justifies the expression "substantially uninterrupted" rather than "uninterrupted". It explains why it is that the common law will recognise traditional laws and customs that are not exactly the same as they were at settlement. But

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27 It would be more consistent with s. 223(1) to use 'and' rather than 'or' in this provision.

28 (2008) 167 FCR 84; (2008) 249 ALR 300; [2008] FCAFC 63.

> if ... there has been a substantial interruption, it is not to be mitigated by reference to white settlement. The continuity enquiry does not involve consideration of why acknowledgment and observance stopped. If this were not the case, *a great many Aboriginal societies would be entitled to claim native title rights even though their current laws and customs are in no meaningful way traditional*. *Yorta Yorta* HC *would have been decided differently*, since the primary judge in that case found that it was European settlement that had caused the forebears of the claimants to leave their traditional lands and cease acknowledgement and observance of their traditional laws and customs.[29] (emphasis added)

Interaction with amendments to s. 223

45. The proposal is to insert the following into the current s. 223, the definition of 'native title' and 'native title rights and interests'.

> (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 through time, regardless of whether there is a change in those customs or in the manner in which they are observed.

46. The Tribunal considers that it is not clear what 'through time' means in this context. For example, it could be interpreted as 'from sovereignty'. Similarly, at what point does a law or a custom change so as to be no longer 'identifiable'? If this amendment is made, it is likely to give rise to litigation to clarify its meaning, in particular if the effect of s. 61AB(1) is that the only ground for challenging the presumptions in s. 61AA is substantial interruption in the acknowledgment of traditional laws and the observance of traditional customs. If that is the effect of s. 61AB(1), then this definition will be pivotal.

47. Among other things, it is also proposed that the following provision be inserted into s. 223(1):

> (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.

48. The Tribunal considers that the effect of this provision might be problematic, particularly when considered in the light of proposed s. 61AB(1) which provides that the presumption of continuity in traditional laws and customs may only be challenged via evidence of a substantial interruption. If proposed s. 223(1D) is enacted, it is not clear what would constitute 'substantial interruption'.

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[29] Ibid at [97].

Intra-indigenous issues

49. The Tribunal submits that if s. 61AB(1) has the effect noted in [39] to [41] above, the proposed amendments might allow for (if not encourage) multiple claims over the same area by sub-groups claiming the benefit of the presumptions. Each claim group could rely on the presumption that, absent extinguishment, their claim group holds native title.

50. In other words, if there are no claimants in common, and proposed ss. 3A and 61AA to 61AB apply to ss. 190B and 190C, and the ambiguity noted in these submissions is not an ambiguity but an intended consequence, then each of those claims could be registered. Further, whether registered or not, each could obtain a determination recognising it holds native title and the court would then be required to determine a 'Prescribed Body Corporate' for each native title holding group or community.

51. As a result of much work by participants in the native title system, the number and proportion of overlapping claims have reduced in recent years. Even so, as at 30 June 2011 there were two (and in some instances three or four) overlapping claims in parts of Western Australia, South Australia, the Northern Territory and Queensland: see Attachment 1 – 'Overlap Activity Map' and Attachment 2 – 'Correlation of overlapping claimant applications 30 June 2011'. As noted earlier, there have also been two recent trials in relation to a contested overlap area. The Tribunal submits that, if one effect of the proposed amendments were to encourage more overlapping claims, the intended benefit of the amendments might be significantly eroded.

52. Therefore, two critical questions arising from the Bill as currently drafted are:
    - how would proposed ss. 61AA and 61AB operate in relation to contested overlap areas and,
    - how would those provisions operate in areas where there are internal disputes about matters such as:
        - claim group membership (i.e. who is in and who is not),[30] and
        - the operation of law and custom (e.g. is native title held at the clan estate level or on a communal level)?

53. The Tribunal submits that these matters should be resolved *from an indigenous perspective* to ensure that the right people for country are recognised as holding native title to the area concerned.

54. There are some useful examples of this in matters that went to trial. Indeed, intra-Indigenous disputes have often played a part in a matter being sent to trial. See, for example, the *Rubibi* case,[31] and the *Daniel* case.[32]

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30 This was the issue dealt with recently in *Aplin on behalf of the Waanyi Peoples v Queensland* [2010] FCA 625.

55. If the conditions of s. 61AA(1) as currently drafted are met, then it seems each claim group would benefit from the presumption that it has a connection to the area claimed via traditional laws and traditional customs. Proposed s. 61AB(1) then apparently provides that this presumption 'may be set aside *only* by evidence of a substantial interruption in the acknowledgement of those traditional laws or the observation[33] of those traditional customs'.[34] In other words, substantial interruption is (at least on one reading) the only ground for setting aside the presumption that a claim group 'has a connection with land or waters *by traditional laws and traditional customs*'.

56. As the cases show, there may be good reasons for setting aside the presumption on other grounds. However, on one reading of the current draft, it is arguable that there is no provision in proposed ss. 61AA and 61AB for a challenge to the presumption, even by another claim group that can, and wishes to, prove it holds native title to the area and that a different group does not.[35] The Tribunal submits that, if this is the case, then the Bill should be reconsidered to ensure that the 'right people for country' can be ascertained.

57. The Tribunal considers that this amendment might be problematic even if proposed s. 61AA(1)(c) does require claim group members to prove, as a matter of fact, the existence of a current connection by the current laws and customs they acknowledge and observe, including laws and customs that are not 'traditional' in the NTA (as amended by the Bill). For example, a group different from that holding native title at sovereignty after having moved into an area (by compulsion or choice) may have been observing and acknowledging its current laws and customs for some time. However, those asserting they are the descendants of the original native title holders may maintain their claim to be the 'right' native title holders. Is the intention to force them to accept that the other group also has native title to their country? Or should it be made clear that the presumptions in proposed s. 61AA(2) do not apply? Further, who should bear the factual onus of proof in such a case?

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31 See, in particular, *Rubibi Community v Western Australia (No 6)* (2006) 226 ALR 676; [2006] FCA 82, *Rubibi Community v Western Australia (No 7)* [2006] FCA 459 and *Western Australia v Sebastian* (2008) 173 FCR 1; (2008) 248 ALR 61; [2008] FCAFC 65.

32 See, in particular, *Daniel v Western Australia* [2003] FCA 666, *Moses v Western Australia* (2007) 160 FCR 148; (2007) 241 ALR 268; [2007] FCAFC 78 and *Dale v Moses* [2007] FCAFC 82.

33 *Sic,* should be 'observance'.

34 It is noted that s. 61AB was not part of the 'rough drafting ... offered as a basis for discussion of the use of presumptions in this area' by French J (as he was at the time) in the speech noted in footnote 30.

35 It is acknowledged that two or more native title claim groups may lodge native title claims over the same area of land or waters in mutual recognition of the respective traditional rights and interests of each group over that area. The NTA allows recognition of concurrent native title rights and interests and determinations have been made recognising the native title rights of more than one group to the same area See for example *James on behalf of the Martu People v Western Australia* [2002] FCA 1208.

58. The Tribunal submits that this provision might also raise issues for respondents who have not sought to have the presumption set aside while one claim is on foot but who might reconsider their position if overlapping claims are made (in relation to the later claim but also potentially the first claim).

Interaction with ss. 87 and 87A

59. No amendments are proposed to ss. 87 and 87A, which give the Federal Court power to make a determination of native title by consent of the parties, provided certain preconditions are met.

60. The Tribunal notes that a determination of native title operates *in rem*, i.e. against the whole world and not just the parties to the litigation. The fact that 'an order recognising native title is good as against all third parties, and not only the specific parties to the application' is currently 'an important factor in determining whether an order is appropriate' for the purposes of s. 87.[36]

61. Over the years, a substantive body of case law has developed around the circumstances in which it is appropriate to make a determination as sought by the parties. Justice Barker summarised the effect of that case law as follows:
    - the discretion conferred by s. 87(1) must be 'exercised judicially and within the broad boundaries ascertained by reference to the subject matter, scope and purpose' of the NTA, which include that native title 'disputes' be resolved by mediation and agreement
    - the court was not required to undertake an inquiry into the merits of the claim and provisions such as s. 87 'recognise that the court adopts a different approach' to deciding whether it was appropriate to make a determination by consent than it 'brings to the task of deciding if native title should be recognised after a contested hearing'
    - although there needs to be some 'foundation upon which' the court's jurisdiction is exercised, where the parties reach agreement on the terms of a determination, particular regard would be had to whether the agreement was 'freely entered into on an informed basis'
    - this requirement was usually met where the State or the Territory, via 'competent legal representation, is satisfied as to the cogency of the evidence upon which the applicants rely', and
    - generally, this would not involve the court 'making findings on the evidence' that the state considered, at least for the purpose of the court being satisfied the state was 'acting in good faith and rationally'.[37]

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[36] *Rex on behalf of the Akwerlpe-Waake, Iliyarne, Lyentyawel Ileparranem and Arrawatyen People v Northern Territory* [2010] FCA 911 at [56] per Collier J. See also Justice John Reeves, 'Consent Determinations under the *Native Title Act 1993* (Cth)' at [21], presentation to the Law Society Northern Territory, 18 February 2009.

[37] *Thudgari People v Western Australia* [2009] FCA 1334 at [22] to [25], citing *Eringa, Eringa No 2, Wangkangurru/Yarluyandi and Irrwanyere Mt Dare Native Title Claim Groups v South Australia* [2008]

62. As Justice Reeves has noted extra-curially: 'Not surprisingly, this focus on negotiation and agreement also underpins the power conferred on the Federal Court by s 87'.[38]

63. Reeves J also said that:

> Most notably, the central role that mediation and negotiation has under the Native Title Act and the fact that an agreement between the parties is the central focus of the exercise of the power under s 87. As well, I think it is significant that the processes set out in the Native Title Act, including: the provision of public notices of native title determination applications; the opportunity for any person with an interest to apply to be joined as a party in native title proceedings; and the fact that in most, if not all, cases the state or territory government is the main respondent to the proceedings and takes an active role in representing the interests of the broader community, address the concerns about the effect the consent determinations may have on the general public.[39]

64. Under the current NTA, the State or Territory has been in a position to be satisfied of the cogency of the evidence because there is an onus on the applicant to establish the factual basis for a determination recognising the existence of native title. That would no longer be the case if the presumption in s. 61AA applied and if s. 61AB(1) is as narrow as it might appear to be.

65. In any case, does the State or Territory have to decide to challenge the presumption in order to be in a position to request 'connection' materials, as it does presently? On one reading, that may be the outcome of the introduction of ss. 61AA and 61AB.

66. In this context, it is of particular note that Reeves J concluded his speech by saying that:

> [R]eturning to the connection between appropriateness [of making a consent determination under ss. 87 or 87A], facts and evidence, ... the central issue in an application for a consent determination ... is whether there exists a free and informed agreement between the parties. Since that is the central issue, it is axiomatic that any evidence that is called on such an application must be directed to, and relevant to, that issue. As I have just demonstrated, the process followed by the state respondent party,

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FCA 1370 at [33] per Lander J, *Nangkiriny v Western Australia* (2002) 117 FCR 6; [2002] FCA 660; *Ward v Western Australia* [2006] FCA 1848 per North J at [8]; *Lovett on behalf of the Gundtjmara People v Victoria* [2007] FCA 474 per North J at [37], *James v Western Australia* [2002] FCA 1208, *Hughes v Western Australia* [2007] FCA 365 per Bennett J at [9], *Munn v Queensland* (2001) 115 FCR 109; [2001] FCA 1229 per Emmett J at [29]-[30], *Smith v Western Australia* (2000) 104 FCR 494; [2000] FCA 1249 per Madgwick J at [38]. The same principles apply to s. 87A: see *Brown v Western Australia* [2007] FCA 1025 and *Gangalidda and Garawa People v Queensland* [2010] FCA 646.

38 Justice John Reeves, 'Consent Determinations under the *Native Title Act 1993* (Cth)' at [11], presentation to the Law Society Northern Territory, 18 February 2009.

39 Ibid at [22], footnotes omitted.

> particularly how it goes about assessing the underlying evidence as to the existence of native title, is critical.[40] ...
> Furthermore, I consider the approach I have outlined and, indeed, the flexible approach adopted by the Court in general to s 87, addresses all of the concerns that underpin the traditional approach of the courts in relation to consent declarations. The public interest will be protected by the active involvement of the state respondent party in the proceedings. As well, as I indicated earlier, the scheme of the Act ensures that the public is notified of all native title applications and any persons with a particular interest in an application are entitled to apply to become a party to the proceedings. By these measures, the concerns about the "in rem" effect of such orders on the community at large will be ameliorated, if not removed. I also consider the authority of the Court is preserved by this approach. This is so because the public will know that the Court has made the consent determination under s 87 based on the fact that the parties have entered into a free and informed agreement, in which the interests of the community have been properly considered by the state respondent party. Finally, the concern that the Court will become a "rubber stamp" for the parties is met by the fact that the Court must still be satisfied that the parties have entered into an agreement on a free and informed basis, with the emphasis on "informed".[41]

67. This was recently reinforced by Justice Rares who noted in considering the court's jurisdiction in relation to consent determinations of native title that:

> A determination of native title affects the status of the land and waters to which it relates because it creates rights and interests in them that, subject to the Act and the terms of the determination itself, the holders can exercise forever after against any other person, including the Commonwealth and the State ... . Because a consent determination, just as a determination after a fully contested hearing, creates this status, the Court must be careful to ensure that the State, as representative of the community generally, has itself played an active role in carefully evaluating the material and evidence on which its consent is based.[42]

68. Therefore, the Tribunal submits that some consideration should be given to whether the Bill as currently drafted covers the issues noted by Rares J that lead to it being 'appropriate' (for the purposes of s. 87 or s. 87A) for the court to make a native title determination by consent.

Interaction with the registration test

69. Since the NTA was amended in 1998, claimant applications are assessed against statutory conditions about the merits of the claim[43] and procedural and other matters,[44] a process that is often referred to as the 'registration test'. If the claim made in an application satisfies all of those conditions, information about it is entered on the Register of Native Title Claims (the Register). For as long as the details of the claim are

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40 Ibid at [37], emphasis added, footnotes omitted.

41 Ibid at [41], footnotes omitted.

42 *Prior on behalf of the Juru (Cape Upstart) People v Queensland (No 2)* [2011] FCA 819 at [19].

43 *Native Title Act 1993* s. 190B.

44 *Native Title Act 1993* s. 190C.

on the Register, the NTA confers on the registered native title claimant certain procedural rights, such as the right to negotiate in relation to specified types of future acts.

70. If proposed ss. 61AA and 61AB are enacted, the question arises as to what would be the impact of the presumption of continuity on the conditions of the registration test and, in particular, the 'merit conditions' found in s. 190B.

71. For example, if the amendments are made as currently drafted and proposed new claims are lodged on behalf of sub-groups that attract the presumption in proposed s. 61AA, does that provision (read with ss. 3A(2) and (3)) mean that no inquiry is required under s. 190B(5), which deals with whether there is a factual basis to support assertions similar to those subject to the presumption. In other words, would the Registrar be required to presume the factual basis is sufficient for the purposes of s. 190B(5)?

72. Further, if there were no claimants in common between overlapping applications to which the presumption applied, multiple claims brought by sub-groups could be registered over the same area.

73. Other examples could be provided. Those given above illustrate why, in the Tribunal's submission, it would be helpful to clarify how the presumption would interact with the registration test, in particular ss. 190B(5) and 190B(6), which deals with whether the rights claimed can, prima facie, be established.

Succession

74. Some native title claim groups claim areas of land or waters previously the traditional country of another group on the basis that it has succeeded to that area in accordance with traditional laws and customs. This issue has been raised in some cases.[45] However, the law is not settled as to all of the circumstances in which succession may be recognised. If the Bill is passed as currently drafted, could the presumption in proposed s. 61AB operate if the basis of a group's native title claim is (or the historical record shows) that their ancestors succeeded to the area concerned at some time after sovereignty?

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[45] *Mabo v Queensland (No 2)* (1992) 175 CLR at 60-61 per Brennan J and at 110 per Deane and Gaudron JJ, *Yorta Yorta* at [44], [83] per Gleeson CJ, Gummow and Hayne JJ, *Daniel v Western Australia* [2003] FCA 666 at [374], [382]-[383], [504] per Nicholson J, *Neowarra v Western Australia* [2003] FCA 1402 at 150], [313], [323], [343], [346], [387], *The Lardil Peoples v Queensland* [2004] FCA 298 at [131]-[132] per Cooper J, *Rubibi v Western Australia No (6)* [2006] FCA 82 at [86] to [94], *Gumana v Northern Territory* (2005) 141 FCR 457; [2005] FCA 50 at [217] to [219], *Sampi v Western Australia* [2005] FCA 777 at [1046], [1060], *Dale v Moses* [2007] FCAFC 82 at [120]-[121].

Transitional provisions and retrospectivity

75. The Tribunal notes that there are no transitional provisions in the Bill. Therefore, for example, it is not clear whether the amendments would apply prospectively and, if so, in relation to which categories of native title claim, e.g. new claimant applications only, or claims that have not reached a prescribed stage in the process at the date of commencement, or all current claims irrespective of their status from the date of commencement.

76. Further, is it intended that:
    - the amendment made by proposed s. 61AA will operate retrospectively in relation to claims dismissed as an abuse of the court's process (or subject to an issue estoppel), i.e. would those decisions be able to be challenged?[46]
    - claims dismissed for lack of proof, such as in *Harrington-Smith v Western Australia (No 9)* [2007] FCA 31 (colloquially referred to as the Wongatha case) could also be revived post-amendment?

When to challenge the presumption

77. The Tribunal submits that it (and any other mediator) would be assisted if the legislation were to identify whether (and, if so, at what point) a respondent party would need to elect to challenge the presumption of continuity. For example, might this arise at the stage at which a new or amended claim is being assessed for registration?

78. The Tribunal submits that, without such guidance, a native title claim group (as well as other parties and the mediator) might proceed on the basis that the presumption applies, only to find that it is challenged at a relatively late stage in the proceeding. The consequences of that would include the need for unscheduled research and other preparation on behalf of the claimants (which, in light of budgetary allocations and the limited availability of experts, could delay matters for substantial periods) and revision of case management and mediation programs in relation to claim. In these circumstances, some parties may seek orders from the court.

Implications for mediation

79. The NTA proceeds on the basis that:
    - most s. 61(1) applications will be referred to mediation
    - mediation will be for 'the ascertaining of agreed facts'[47]
    - the purpose of mediation is to assist parties to reach agreement on some or all of specified matters, including whether native title exists and, if it exists, who holds native title and the nature of native title rights and interests,[48] and

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46 See *Dale v Western Australia* (2011) 191 FCR 521; (2011) 276 ALR 292; [2011] FCAFC 46 and *Quall v Northern Territory* (2009) 180 FCR 5; [2009] FCAFC 157.

47 *Native Title Act 1993* s. 86B(1).

48 *Native Title Act 1993* s. 86A(1).

- agreement will be reached in relation to proposed orders (e.g. a determination of native title and/or orders in relation to matters other than native title[49]).

80. As noted above, in recent years most determinations of native title were made by consent of the parties following mediation.

81. The presumption contained in proposed s. 61AA would apply to applications referred to mediation. If a party sought to have the presumption set aside, presumably that could not occur in the context of mediation. The proposed s. 61AB states that a presumption 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. It appears, therefore, that there would have to be a ruling by the court whenever a party seeks to have the presumption set aside.

82. Given that a party (or parties) could seek to have the presumption set aside, the Tribunal submits that it would assist the parties (and the mediator) if there was statutory guidance as to any implications for the requirement to act in good faith in relation to the conduct of mediation[50] arising from:
    - any apparent delay by a party in making an election to challenge the presumption (noting the practical implications of this for parties – including resourcing[51]), or
    - a party or parties seeking to change their position late in the proceedings.[52]

Implications for native title inquiries and reviews

83. The Tribunal submits that there would be questions about the implications of proposed ss. 61AA and 61AB for the conduct of reviews on whether there are native title rights and interests[53] and native title application inquiries.[54] Consideration might be given to making consequential amendments in relation to those processes.

Circumstances when the presumption should not apply

84. A question also arises as to whether there might be circumstances in which the presumption should *not* apply, e.g. where there is more than one group claiming to hold native title or there are internal issues about claim group composition or the level at which native title is held (e.g. clan estate v communal).

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49 *Native Title Act 1993* ss. 87, 87A; see also ss. 94A, 225.

50 *Native Title Act 1993* s. 94E(5).

51 For example, will the Commonwealth Attorney-General fund respondents to conduct or commission research to satisfy themselves that they should not attempt to challenge the presumption?

52 See the Commonwealth Attorney-General's *Mediation Guidelines: Guidelines for the behaviour of parties and their representatives in mediation in the National Native Title Tribunal* at paragraphs 4.9 and 4.2; but 1.1-1.5, 2.1-2.4, 3.1-3.3 might also be relevant.

53 *Native Title Act 1993* ss. 136GC-136GE.

54 *Native Title Act 1993* ss. 138A-138G.

Compensation

85. Another aspect that has not been canvassed is the effect (if any) of the proposed presumption in relation to compensation applications. For example, might there be more successful compensation claims under the amended NTA than is likely under the current law? If that is the case, then the compensation liability for the extinguishment of native title is likely to increase.

Potential responses of stakeholders

86. As noted elsewhere in this submission, the Tribunal considers that the practical effect of proposed ss. 61AA and 61AB on the rate and cost of disposition of native title applications might by influenced by the approach taken by respondent parties.

Items 5-9: Strengthening good faith negotiations

87. According to the Bill's Explanatory Memorandum:

> Items 5 to 9 expand on the current requirements in the Act for parties to negotiate in good faith in relation to future acts. ... . The amendments in items 5 to 9 are concerned with improving fairness in the right to negotiate processes and are intended to encourage better agreement-making.

88. Item 5 would substitute a new s. 31(1)(b) which would state that the negotiation parties:

> [M]ust, for a period of at least 6 months, negotiate in good faith using all reasonable efforts to come to an agreement about ... the doing of the act or ... the conditions under which each of the native title parties might agree to the doing of the act.

Practical implications

89. Item 6 would insert a new s. 31(1A) new s. 31(2A) shifting the onus of proving negotiations have been conducted in good faith to the party asserting good faith. Item 7 would insert a new s. 31(2A) shifting the onus of proving negotiations have been conducted in good faith to the party asserting good faith. Item 9 would insert a new s. 35(1A) which requires a person applying to the arbitral body under s. 35(1) to comply first with these provisions.

90. The Tribunal submits that this requirement that a party to comply with these provisions before making a s. 35 application is problematic. Who is to judge whether or not there has been compliance?

91. Most of the criteria proposed in the Bill are similar to those developed many years ago, and regularly applied, by the Tribunal in 'good faith' inquiries.[55] In the Tribunal's

[55] See *Western Australia v Taylor* (1996) 134 FLR 211; [1996] NNTTA 34 (sometimes referred to as *Njamal*), Hon CJ Sumner; *Western Australia v Dimer* (2000) 163 FLR 426; [2000] NNTTA 290, PM Lane; *Placer (Granny Smith) Pty Ltd v Western Australia* (1999) 163 FLR 87; [1999] NNTTA 361, Hon CJ Sumner at [30].

submission, codifying the indicia going to show good faith may serve little purpose. As Member O'Dea noted in *FMG Pilbara/Cheedy/Western Australia*,[56] determining whether or not parties have negotiated in good faith during the prescribed six-month period 'is not a formulaic exercise'. In any particular case, the arbitral body must assess 'whether the parties have behaved reasonably and fairly to put their mind to reach an accord over the doing of the act'. Further, the indicia applied by the Tribunal are not closed. They may be developed in an appropriate case. However, if it is decided to codify the indicia, then it is submitted that a provision similar to s. 39(1)(f) of the NTA should be included to ensure that the arbitral body has a discretion to take into account any other matter it considers relevant.

92. As to using 'all reasonable efforts to come to an agreement', in 1997 the Tribunal found that every reasonable effort must be made to negotiate and reach agreement with the native title party, including making reasonable substantive offers. However, the Federal Court rejected this, saying it added a 'further and unnecessary level of complexity' to the interpretation of s. 31(1)(b).[57] The proposed amendment to s. 31(1)(b) would seem to accord with the Tribunal's initial view. However, the Tribunal submits that this amendment, if made, might lead to further litigation as to what amounts to 'all reasonable efforts'.

Item 10: Profit sharing and royalty conditions

93. Item 10 would substitute a new s. 38(2) to allow the arbitral body to impose 'profit sharing conditions', including the payment of royalties from mining, as conditions on the doing of the future act 'if relevant'. In her Second Reading Speech, Senator Siewert said this would be an incentive for proponents to reach an agreement in good faith and ensure native title parties 'are not disadvantaged'.[58]

94. The Tribunal submits that such an amendment would make a significant change to the current policy prohibiting an arbitral body (such as the Tribunal) from determining conditions that have the effect that native title parties are to be entitled to payments worked out by reference to the amount of profits made, or any income derived, or any things produced, by a grantee party (e.g. a miner) as a result of doing anything in relation to the land or waters concerned (s. 38(2)). As noted in then Prime Minister Keating's second reading speech on the Native Title Bill 1993, compensation for the impairment of native title, 'for instance for surface disturbance caused by mining, will be on the basis of existing State and Territory regimes'.[59] Those regimes do not afford land owners with a right to payments of the types in proposed s. 38(2).

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56 [2009] NNTTA 38 at [71].

57 *Strickland v Western Australia* (1998) 85 FCR 303; [1998] 868 FCA.

58 Commonwealth, Parliamentary Debates, Senate, 21 March 2011, 1302 (Rachael Siewert).

59 Commonwealth, Parliamentary Debates, House of Representatives, 16 November 1993, 2882 (Paul Keating, Prime Minister).

95. The Tribunal understands that the policy underpinning the current provision is the freehold equivalence test, i.e. what can be done on freehold land can be done on native title land. Compensation is to be awarded accordingly. The proposed amendment would not only change a current provision of the NTA, but would appear to be contrary to that policy.

Practical implications

96. The Tribunal submits that empowering an arbitral body to determine conditions that have the effect of entitling a native title party to payments worked out by reference to profits made, or income derived, or things produced by, the grantee party as a result of anything done in relation to the lands and waters concerned could be problematic and could affect the behaviour of some parties in relation to the operation of Subdivision P of the NTA (the 'right to negotiate' provisions).

97. Some of the potential problems identified by the Tribunal for arbitral bodies can be stated briefly. If the amendment is to be made as drafted, it is likely to create an additional source of contention between native title, grantee and government parties in s. 35 arbitrations. There is likely to be uncertainty as to the extent of the powers and the width of discretion of the arbitral body (usually the Tribunal) under proposed s. 38(2) until such time as it is clarified by the appellant courts.

98. If such an amendment is to be made, the Tribunal submits that consideration be given to setting out the factors that an arbitral body should take into account when considering whether to make such an order, i.e. to clarify when imposing such a condition might be 'relevant'. Because there are no native title rights or interests currently recognised in minerals or petroleum, it may prove difficult to determine the 'relevant' factors to be taken into account in deciding whether to impose such a condition, and how those factors can be translated into a method of calculating the content of such a condition.

99. Further, because the Tribunal is an administrative decision-making body, it does not have the power to award compensation for the loss or impairment of native title rights and interests which may occur as a result of the action. Consequently, the Tribunal submits that consideration be given to inserting in the NTA provisions to explain the relationship between any such condition imposed by virtue of a s. 38(2) determination with any prospective compensation award made by the Federal Court pursuant to Division 5 of the NTA.

100. In short, the issue is whether any royalty type payments would be made on a basis that they comprise (in whole or in part) compensation to the native title party. If such payments are in the nature of compensation:
    - would the condition be satisfied once the total amount of compensation is paid?

- where native parties are registered claimants (rather than native title holders) would an arbitral body be required to direct that payments be made into trust pending the resolution of the claim?

101. An arbitral body might be reluctant to determine such conditions, other than by consent of the parties unless the NTA:
    - identified the circumstances in which an arbitral body could impose such a condition, and
    - described the relationship between any royalty type condition and compensation that the native title party is entitled to.

102. If such problems were overcome and an arbitral body imposed conditions along the lines permitted by the proposed s. 38(2), the Tribunal submits that the amendment might have two effects.
    - It might be less likely that parties (primarily native title parties) would mount objections to an application for a future act determination (s. 35 application) based on an alleged failure of another party to negotiate in good faith. That is because one clear disadvantage to a native title party from a s. 35 application under the current NTA is that the arbitral body is prohibited from determining a condition of a royalty type payment, which was permitted at the negotiation stage (s. 33(1)).
    - There might be less motivation for a grantee party to make a s. 35 application when or soon after it is entitled to do so, rather than persist with negotiation. One perceived advantage to a grantee party of moving to a s 35 application is that a condition involving a royalty type payment is currently proscribed by the NTA.

Item 2: Strengthening heritage protection

103. The proposal is to amend s. 24MB to require that the relevant state, territory or Commonwealth cultural heritage law must provide *effective* protection or preservation of areas or sites that may be of particular significance to Aboriginal peoples or Torres Strait Islanders.

104. The perceived mischief in the current provisions is that 'the mere existence of applicable state heritage legislation would satisfy these criteria and permit the future act – irrespective of whether the application of those state heritage laws will actually provide effective protection of those sites of cultural significance'. The 'inadequacy' of the Western Australian *Aboriginal Heritage Act 1972* (AHA) is of particular concern to Senator Siewert, who referred to its past failure to protect 'sites of great cultural and historical significance (such as protecting the world's oldest petroglyphs on the Burrup Peninsula from industrial development)'.[60]

105. The Tribunal already examines the *effectiveness* of legislation such as the AHA on a case by case basis, e.g. the AHA is usually found to provide inadequate protection in

[60] Commonwealth, *Parliamentary Debates*, 21 March 2011, 1301 (Rachael Siewert).

'site rich' areas, even where the grantee party is cooperative in relation to heritage protection.[61] The Federal Court has repeatedly endorsed this approach.[62] Therefore, the amendment as proposed may not be necessary or may not (as currently drafted) achieve its apparent purpose.

106. Further, the Tribunal submits that any changes to the NTA should have regard to the operation of, and any proposed changes to, the *Aboriginal Torres Strait Island Heritage Protection Act 1984* (Cwlth).

Item 4: The right to negotiate to apply offshore

107. This amendment would repeal s. 26(3) which states that the right to negotiate provisions only apply landward of the mean high water mark. According to the Explanatory Memorandum to the Bill at [9], it is intended to allow for the extension of right to negotiate provisions into the inter-tidal zone and beyond, into the sea.

Practical implications

108. If this amendment is to be made, the Tribunal submits that there may need to be consequential amendments. For example, s. 24MC would need to be modified because the right to negotiation is a subset of acts passing the 'freehold test', which only applies to a future act to the extent that it relates to an 'onshore place'. Further, to remove any doubt, it may be helpful to amend the hierarchy set out in ss. 24AA and 24AB in relation to the order of the application of the future act provisions.

Item 11: Disregarding extinguishment by agreement

109. Item 11 would insert a new s. 47C to provide that, at any time prior to a determination recognising native title, the applicant and a government party could agree that extinguishment of native title rights and interests over any area is to be disregarded.

Practical implications

110. The Tribunal submits that consideration might need to be given to consequential amendments, such as providing procedural fairness to those who may have interests that would be affected by the proposed agreement. An example of such drafting can be found in the 2010 proposal of the Australian Government to allow for agreements to be made to disregard extinguishment over national parks and nature reserves. However, there were a number of issues that arose with the drafting of those provisions which are set out in the Tribunal's submission to the Attorney-General's Department on that proposal. Those submissions are available at:

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61 See *George/Western Australia/Magnetic Resources NL* [2011] NNTTA 59 at [46] per Member Shurven. See also *Murray/Western Australia/Money* [2011] NNTTA 91, Hon CJ Sumner.

62 *Parker v Western Australia* (2008) 167 FCR 340 at [38]-[39]; *Parker v Western Australia* [2007] FCA 1027 at [18]; *Little v Western Australia* [2001] FCA 1706 at [70], [77], [88].

http://ag.gov.au/www/agd/agd.nsf/Page/RWP73DB7F92B8E8CE99CA25723A00803C08#possible.pdf.

Conclusion

111. The purpose of this submission is not to express views about the merits of the policy contained in the Bill but to identify some of the anticipated implications if the amendments are enacted as presently drafted. Accordingly, this submission has focussed on technical and practical matters.

112. In summary, the Tribunal submits that the effect of many of the proposed changes could be like dropping stones into a pond. One could be sure there would be ripples, but could not predict with certainty how big they would be or precisely how far they would go.

113. If the Committee has questions about the points made in this submission, or wishes to discuss any of those matters in more detail, please contact Lisa Wright at or on (or .

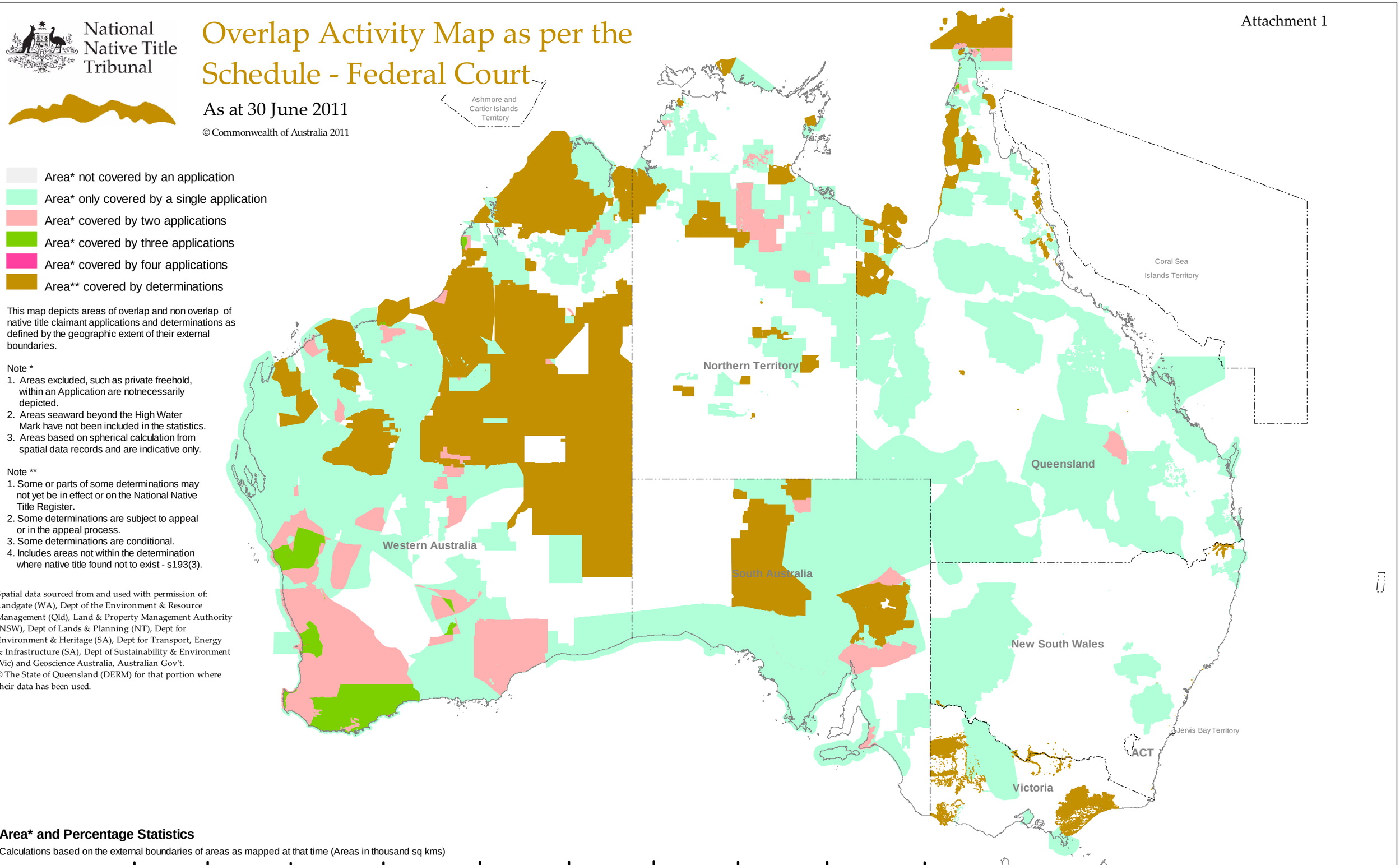
29 July 2011

National Native Title Tribunal

Overlap Activity Map as per the Schedule - Federal Court

Attachment 1

As at 30 June 2011



This map depicts areas of overlap and non overlap of native title claimant applications and determinations as defined by the geographic extent of their external boundaries.

Note *
1. Areas excluded, such as private freehold, within an Application are notnecessarily depicted.
2. Areas seaward beyond the High Water Mark have not been included in the statistics.
3. Areas based on spherical calculation from spatial data records and are indicative only.

Note **
1. Some or parts of some determinations may not yet be in effect or on the National Native Title Register.
2. Some determinations are subject to appeal or in the appeal process.
3. Some determinations are conditional.
4. Includes areas not within the determination where native title found not to exist - s193(3).

Spatial data sourced from and used with permission of: Landgate (WA), Dept of the Environment & Resource Management (Qld), Land & Property Management Authority (NSW), Dept of Lands & Planning (NT), Dept for Environment & Heritage (SA), Dept for Transport, Energy & Infrastructure (SA), Dept of Sustainability & Environment (Vic) and Geoscience Australia, Australian Gov't.
© The State of Queensland (DERM) for that portion where their data has been used.

Area* and Percentage Statistics

Calculations based on the external boundaries of areas as mapped at that time (Areas in thousand sq kms)

Area* of Land Covered	ACT		NSW		NT		QLD		SA		TAS		VIC		WA		Total	
by determination	0.0	0%	2.0	0.2%	64.8	4.8%	75.4	4.4%	145.1	14.8%	0.0	0%	26.1	11.5%	904.7	35.8%	1,218.2	15.8%
by a single application	0.0	0%	174.1	21.7%	277.5	20.6%	887.1	51.3%	492.4	50.1%	0.0	0%	41.8	18.4%	826.6	32.7%	2,699.5	35.1%
by more than 1 application	0.0	0%	0.0	0.0%	36.8	2.7%	9.0	0.5%	33.1	3.4%	0.0	0%	0.0	0%	373.5	14.8%	452.5	5.9%
not covered	2.4	100.0%	624.5	78.0%	970.1	71.9%	759.1	43.9%	312.9	31.8%	68.4	100.0%	159.4	70.1%	425.0	16.8%	3321.8	43.2%

Produced by Geospatial Services, NNTT, 25 July 2011. File path: P:\GEO_INFO\Products\National\National Overlap Activity and Analysis\20110630\Overlap_Activity.WOR

National Native Title Tribunal

Overlapping Claimant Applications
30 June 2011

Overview of overlapping claimant applications at 30 June 2011

	ACT	NSW	NT	QLD	SA	TAS	VIC	WA	Total	Total (%)
Claims with no overlaps	-	37	94	87	10	-	12	35	**275**	56.4%
Claims with 1 overlap	-	6	35	19	8	-	-	30	**98**	20.1%
Claims with 2 overlaps	-	3	23	5	6	-	-	16	**53**	10.9%
Claims with 3 overlaps	-	2	14	5	1	-	-	15	**37**	7.6%
Claims with 4 overlaps	-	-	5	-	-	-	-	5	**10**	2.0%
Claims with 5 or more overlaps	-	-	8	-	-	-	-	7	**15**	3.1%
Total	**0**	**48**	**179**	**116**	**25**	**0**	**12**	**108**	**488**	
Total (%)	0.0%	9.8%	36.7%	23.8%	5.1%	0.0%	2.5%	22.1%		100%

The figures above identify the number of claimant applications that have no overlaps and those that overlap with one or more other claimant applications. The number of different areas of overlap between applications is not counted. Overlaps less than 0.001 sq km or 1000 sq m have not been included in these calculations. Split application in Queensland has been counted as if combined.

All calculations are based on spatial analysis of the external boundaries of applications as mapped at that time of analysis.

Acknowledgement: Spatial data has been sourced from Landgate (WA), DERM (Qld), DPI (NT), DOL (NSW), DSE (Vic), DEH (SA), Geoscience Australia and NNTT.