



Northern Territory

Treaty Commission

Treaty Discussion Paper

Executive Summary

June 30 2020

Acknowledgement of Country

The office of the NT Treaty Commission is located on the traditional lands of the Larrakia Nation.

We pay our respects to the Larrakia elders past and present and all the Larrakia people and to all Aboriginal First Nations peoples of the Northern Territory.

BACKGROUND

The treaty development process initiated by the Barunga Agreement 2018 rests on the Northern Territory Government's express acceptance of three foundational propositions for the treaty consultation process:

- That Aboriginal people, First Nations, were the prior owners and occupiers of the land, seas and waters that are now called the Northern Territory of Australia;
- The First Nations of the Northern Territory were self-governing in accordance with their traditional laws and custom; and
- First Nations peoples of the Northern Territory never ceded sovereignty of their land, seas and waters.

This is a great starting point for treaty discussions because these things are already agreed.

Also critical is the Northern Territory Government's agreement in the Barunga Agreement that *"there has been deep injustice done to the Aboriginal people of the Northern Territory, including violent dispossession, the repression of their languages and cultures, and the forcible removal of children from their families, which have left a legacy of trauma, and loss that needs to be addressed and healed"*.

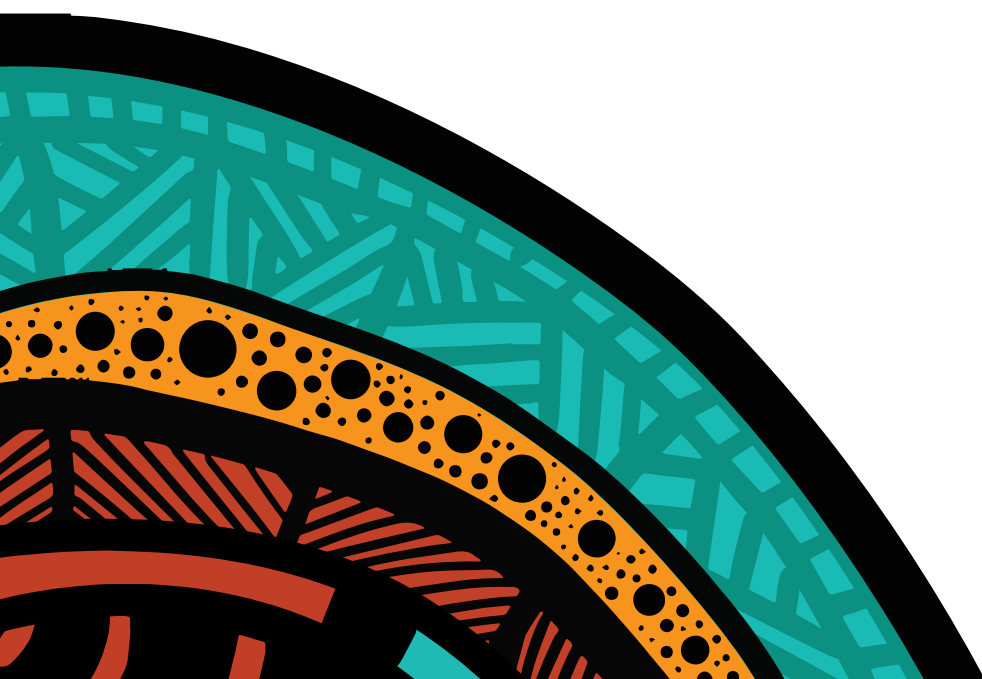
The Barunga Agreement is very clear that: *The key objective of any treaty in the Northern Territory must be to achieve real change and substantive, long term, benefits for Aboriginal people.*

This Discussion Paper provides detailed information, and throws out questions for consultation:

- Why is a Treaty needed in the Northern Territory?
- What minimum standards should be required?
- What should the scope and content of treaty/treaties be?
- What is the legal context for treaties in the NT?
- What is national and international best practice?

The Discussion Paper also proposes options for a treaty making framework and negotiation model in the NT to be discussed during consultations.

The full Discussion Paper can be downloaded from our website www.treatynt.com.au



TREATIES

The use of the word Treaty in this Discussion Paper also includes the plural “Treaties”.

Following an introduction and Executive Summary, Section 3 of the Discussion Paper deals with the foundational issues of treaty. At its simplest, a treaty is an agreement between one or more parties. Modern treaties between First Nations and their colonisers are a particular type of treaty. The use of the word ‘treaty’ conveys the significance and distinctive standing of agreements between Indigenous peoples and the governments of States or Territories founded on the land and resources of free First Nations.

The intention of such treaties is to rectify an unjust relationship resulting from colonisation. Accordingly, Indigenous treaties typically include, but are not limited to, common key elements:

- recognition of the original status of First Nations as sovereign, self-governing, political communities;
- restoration of the First Nation right to self-determination and a meaningful degree of self-government within the State or Territory;
- restoration of traditional lands and interests in natural resources;
- material reparation for irrecoverable historical losses;
- financial and material resources to enable economic independence; and
- standing and negotiation procedures based on equality and good faith

The United Nations Declaration on the Rights of Indigenous Peoples, adopted by resolution of the General Assembly of the UN in September 2007, outlines the inherent rights of First Nations peoples

that could form part of the minimum standards for NT treaties. The Declaration covers four key rights:

- self-determination;
- participation in decision making;
- protection of culture; and
- equality and non-discrimination, including the right to be free from racial discrimination.

The UN Declaration’s “golden thread” is Indigenous peoples’ right to their free, prior and informed consent on issues affecting them.

A treaty is not about international law or formal definitions of sovereignty. It is about the human recognition of the unique status of Australia’s First Nations and the chance to define, for the first time, the terms of our relationship with the colonisers. Treaties provide an opportunity for a renewed relationship based on sound principle and practicality to correct the flaw and fill the vacuum of Australian history in the Northern Territory.

Truth telling is at the core of any treaty negotiations and is also at the heart of documenting the unfinished business. The timing for it is extremely urgent. It is of utmost importance that we must start immediately to record the stories of the hundreds of older Aboriginal First Nation Territorians’ whose memories stretch back into a previous era, before those stories are gone forever. Treaty negotiations will not begin, at best, for years. Truth telling must start well before that. Truth telling must include the Stolen Generations of the Northern Territory. This Discussion Paper strongly suggests that the negotiation process and the truth telling process should start separately.

LEGAL ISSUES

Section 4 of the Discussion Paper highlights that the best way to achieve a treaty with adequate scope and contents, and protection, is through legislation enacted by the Northern Territory Government.

There is a fundamental limitation on the scope of any treaty negotiated with the Northern Territory. It is not a State within Australia's federal system. As a Commonwealth Territory, the powers exercised by the Northern Territory Government are conferred and defined by the Commonwealth under the *Northern Territory (Self Government) Act 1978*. Northern Territory legislation giving effect to a treaty must be consistent and comply with that Act and all other Commonwealth laws in operation across the Northern Territory. Other Commonwealth law includes, for example, the *Aboriginal Land Rights Act (Northern Territory) 1976* (C'th) ('*Aboriginal Land Rights Act*') and the *Native Title Act 1993* (C'th). If the terms of a treaty exceed the powers of the Northern Territory, or are inconsistent with any element of Commonwealth legislation, they will have no legal effect.

The Commonwealth also has complete power over the governance of any Australian Territory under section 122 of the *Commonwealth of Australia Constitution Act 1900* (C'th) (the Constitution). The Commonwealth has the legislative power to void any treaty enacted by the Northern Territory and to amend the *Northern Territory (Self-Government) Act*, expressly withdrawing any power to conclude a treaty with First Nations. This fact highlights the role the Commonwealth has in ensuring that any treaty with First Nations in the Northern Territory will have meaningful and lasting legal effect.

NATIONAL AND INTERNATIONAL BEST PRACTICE

Section 5 of the Discussion Paper describes some of the national and international developments in modern treaty making.

Significant modern treaty development has occurred in British Columbia, Canada and Aotearoa

(New Zealand). The parties to modern treaties in British Columbia are three governments: the First Nations Government, the British Columbia Government and the Canadian Government and treaties are negotiated using their own "made-in-BC" process. Treaties are facilitated by the British Columbia Treaty Commission, which is an independent Commission where all five Commissioners are Indigenous Canadians.

There are six stages in the made-in BC negotiation process; commencing with a First Nation submitting an Intention to Negotiate and concluding with Implementation. Although each Treaty negotiation is unique, comprehensive Treaties in BC must, as a minimum, address:

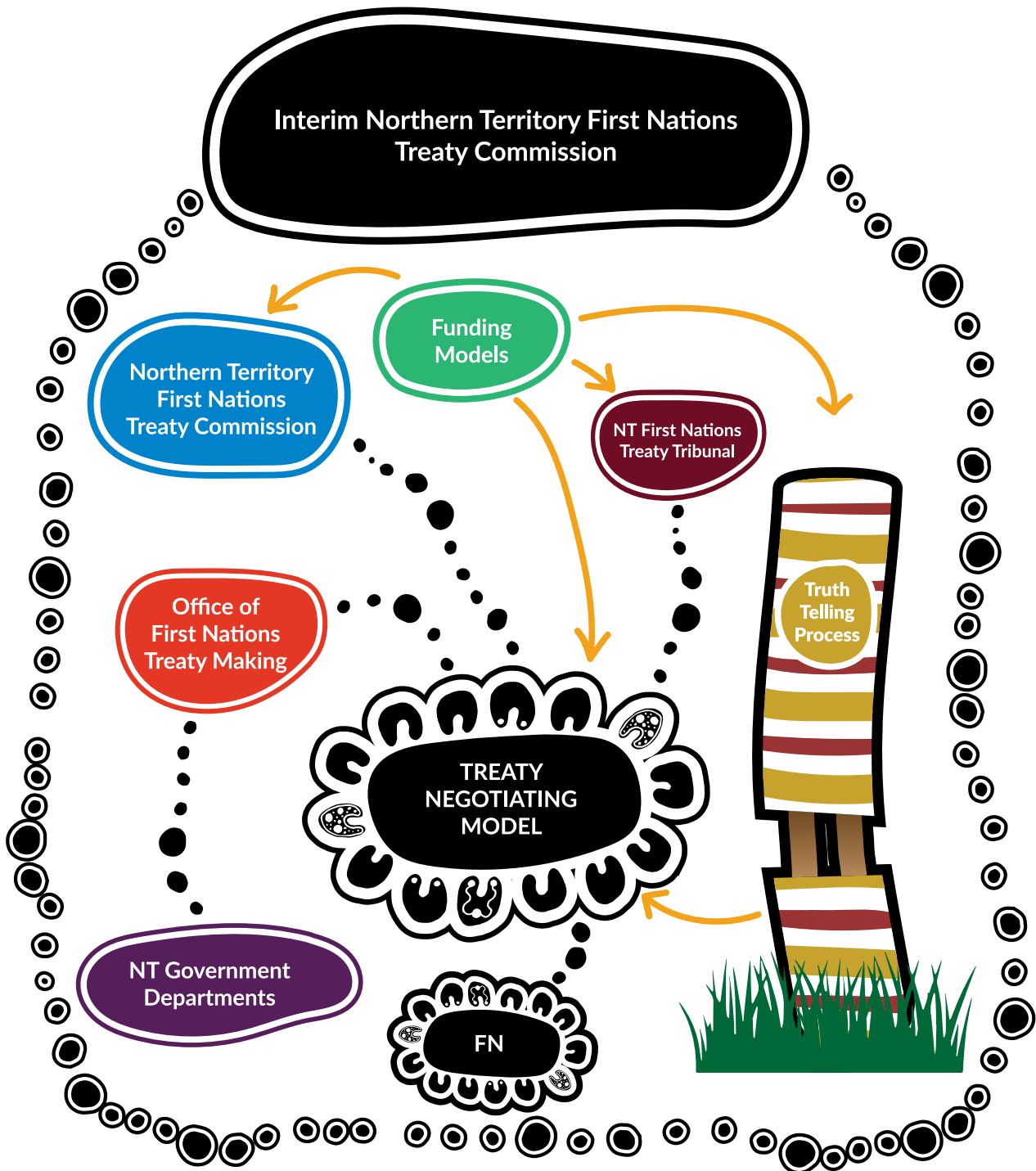
- First Nations government structures and related financial arrangements;
- Jurisdiction and ownership of lands, waters and resources;
- Cash settlements;
- Processes for amendment and resolving disputes; and now
- Implementation of the United Nations Declaration on the Rights of Indigenous Peoples.

The stages and the negotiating process are described in detail in section 5 of this Discussion Paper. Section 5 also describes Aotearoa (New Zealand's) settlement process in detail. Settlement Agreements in Aotearoa need to provide:

- An apology by the Crown and a historical account;
- Financial redress;
- Commercial redress; and
- Cultural redress (for example, the return of lands of special significance, arrangements to provide a role for Māori in the governance of resources and place name changes).

The central learning from overseas is that treaties are a long game and take many years to negotiate. The Tla'amin Final Agreement in British Columbia, Canada took 22 years to negotiate and finalise.

PROPOSED FRAMEWORK FOR THE NORTHERN TERRITORY



The proposed framework describes the structures, entities and the mechanisms needed to facilitate a treaty system in the NT. To get things moving, an Interim Treaty Commission headed up by Aboriginal Territorians, to aid in the development of legislation to support treaties in the NT, while at the same time do the preparatory work for the entities to be created, is proposed. The proposed Interim Treaty Commission's work will be completed once a First Nations Treaty Convention has endorsed overarching legislation and the legislation is enacted. It will then be disbanded.

The ongoing framework may include the following entities:

NT First Nations Treaty Commission (Treaty Commission)

Roles for a NT First Nations Treaty Commission may include to:

- Develop the negotiation framework in detail including all processes, systems, procedures; templates and other electronic and non-electronic resources;
- Develop and implement ongoing education and awareness programmes building on the phase 1 program delivered by the Interim Commission;
- Manage grants to First Nations, including grants to First Nations for capacity building and to "run" a treaty negotiation;
- Develop a process for treaties between First Nations and support that process;

- Develop legislation, with First Nation's representatives as significant contributors, to be enacted once treaties are signed; and
- Maintain the momentum of treaty-making and facilitate effective project management once negotiations commence.

Office of First Nations Treaty Making (Treaty Office)

Primary functions of a Treaty Office may be to:

- Lead government treaty negotiations under direction of the Minister responsible for treaty negotiations;
- Ensure the government meets its Treaty commitments in good faith and in a timely manner;
- Negotiate funding with other governments;
- Develop engagement, co-design and partnering principles that ensure Northern Territory Government agencies operate appropriately;
- Ensure public sector capability to work with First Nations in a respectful and culturally competent manner is strengthened; and
- Ensure the engagement of public sector agencies with First Nations is meaningful.

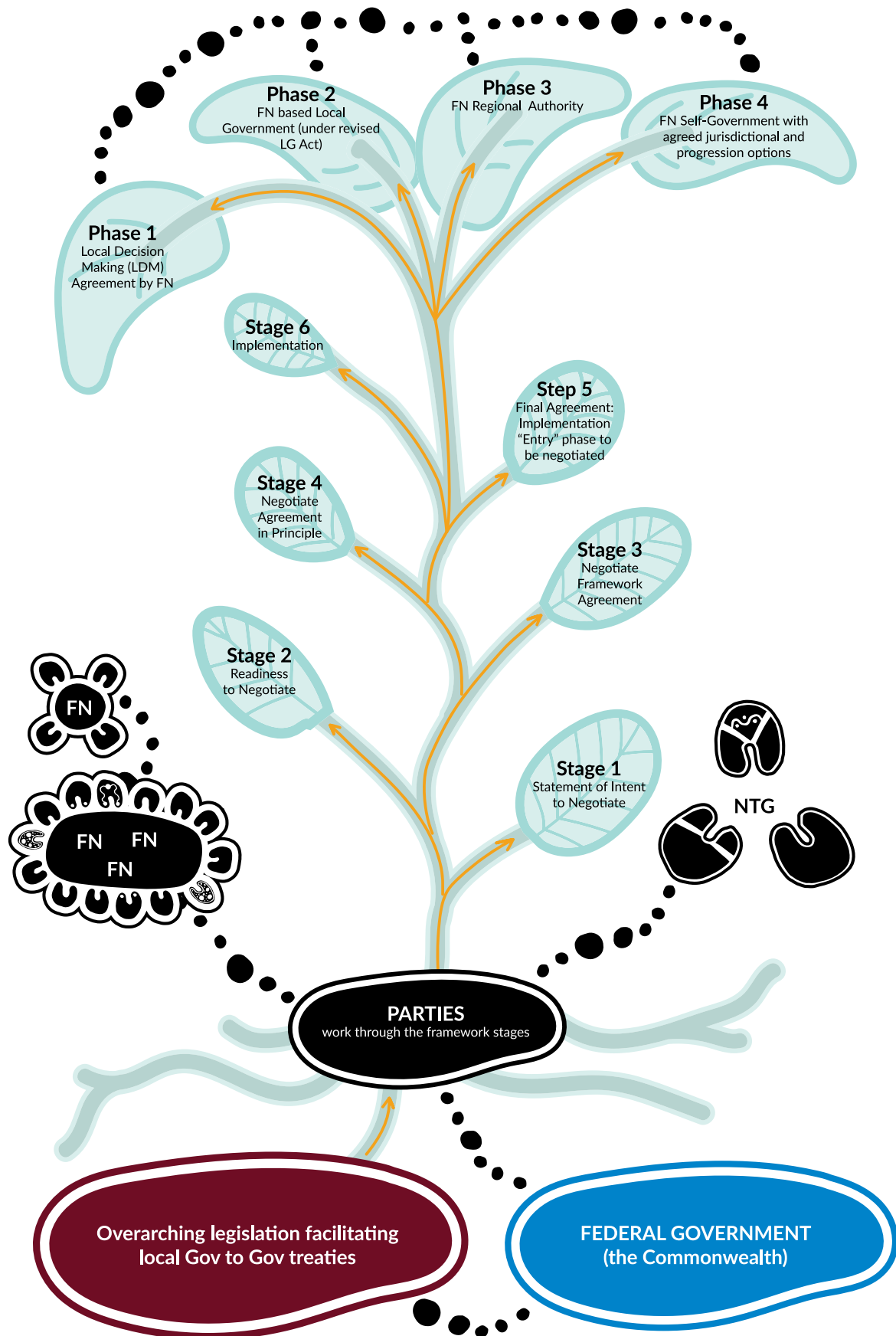
NT First Nations Treaty Tribunal (Treaty Tribunal)

All formal agreements contain dispute resolution clauses and treaties should be no different. Most issues are expected to be settled by the parties in informal talks. But if no resolution is found, the Treaty Tribunal could be an independent tribunal with powers and functions to:

- Conciliate and arbitrate disputes either during or post-implementation.
- Make findings of fact; and
- Make recommendations for dispute resolution.



PROPOSED NEGOTIATING MODEL FOR THE NORTHERN TERRITORY



The negotiating model describes the process, underpinned by NT legislation, to be overseen by the Treaty Commission and used by the parties (that is, a First Nation Government and the NT Government) to negotiate a treaty.

The suggested negotiation process aligns with the made-in-BC 6 steps process:

Stage 1: Statement of Intent to Negotiate;

Stage 2: Readiness to Negotiate;

Stage 3: Negotiation of a Framework Agreement;

Stage 4: Negotiation of an Agreement in Principle;

Stage 5: Negotiation to Finalise a Treaty; and

Stage 6: Implementation of the Treaty

Each stage is supported by detailed processes, information resources, templates and support mechanisms for the parties.

Four possible implementation points for Stage 6 are suggested:

Phase 1: Local Decision Making Agreement with the First Nation; or

Phase 2: First Nation Based Local Government; or

Phase 3: Regional Authority; or

Phase 4: Full First Nation Self Government (with agreed jurisdiction and progression options)

FEEDBACK

While the Commission will endeavour to talk to as many Aboriginal Territorians as possible over the next 18 months, we will not be able to get everywhere or talk to everyone personally. We are therefore encouraging written responses to the Discussion Paper as well as oral and audio-visual responses. We ask that all submissions be constructive and respectful. Submissions need to be provided by 30 June 2021 and can be submitted:

By Email:

to admin@treatynt.com.au or

By post to:

NT Treaty Commission
GPO Box 2096
Darwin NT 0801

The full Discussion Paper can be obtained from our web site: www.treatynt.com.au

