20 February 2025

Australian Law Reform Commission
Mr Tony McAvoy SC
PO Box 209
Flinders Lane
Victoria 8009

Dear Commissioner,

ALRC – Future Act Regime Review – submission on issues paper

1. We refer to the Australian Law Reform Commission's Review of the Future Acts Regime and its call for submissions.

2. P&E Law is a Queensland based law firm and one of the leading native title law firms acting for traditional owners in Australia. These submissions are thus focused on the impacts of the future act regime on our Aboriginal and Torres Strait Islander clients.

Improving power imbalances

3. Future act negotiations do not take into account the disparate negotiating positions of parties. For example, Registered Native Title Bodies Corporate (**RNTBCs**) will often be in a compromised negotiation position against well-resourced multi-national mining companies who generally have generous negotiation budgets and significant experience in negotiating agreements.

Although section 60AB of the *Native Title Act 1993* (**NTA**) entitles RNTBCs to charge reasonable fees for negotiating agreements, a statutory requirement for a proponent to pay reasonable negotiation costs in our view requires improvement. For freehold land owners in Queensland, for example, the *Mineral and Energy Resources (Common Provisions) Act 2013* (Qld) (**MERCP Act**) provides a statutory obligation for mineral explorers and coal seam gas mining proponents to pay reasonable and necessarily incurred costs for a landowner to obtain advice and assistance during negotiations. These costs are prescribed to include costs for legal, accounting (tax), valuation and agronomy costs. Importantly, the requirement to pay costs remains even if there is no agreement reached. However, the MERCP Act is deficient in that it does not clearly include the costs incurred by the landowner themselves for their time in a negotiation.

4. Similarly, legislation must acknowledge that processes for consultation and consent often require native title group decision making in person, and legislative amendments must provide native title parties with access to resources to meet and consult. The basic RNTBC support funding provided by the Commonwealth is insufficient for these processes.

Requirement for Free, Prior and Informed Consent

5. As beneficial legislation, the NTA should adopt the principles in the United Nations Declaration of the Right of Indigenous People and place a positive obligation on governments and proponents to obtain the Free, Prior and Informed Consent (**FPIC**) to projects occurring on native title lands. Negotiation in good faith is quite a different requirement and represents a much lower standard of participation by Traditional Owners.

Changes to the Right to Negotiate

6. Section 31(1)(b) of the NTA requires parties to negotiate in good faith, but good faith provisions are unilateral – that is, the native title party may be held accountable if deemed not to have negotiated in good faith, and the proponent may seek a determination by the tribunal. Conversely, if the proponent does not negotiate in good faith, the finding is that it must re-engage in good faith negotiations, at which point they may re-apply for an arbitral determination of their application under s38(1) NTA. If a proponent does not negotiate in good faith, the native title party should be granted relief including a finding that the act cannot be done.

7. Similarly, if a determination is made under section 38(1)(a) NTA that the act cannot be done, the NTA should be amended to create a presumption that a notified act 'must not be done' and create an onus on the State and / or proponent to rebut this presumption.

8. There is also no clear rationale as to why mining projects trigger the right to negotiate under Part 2 Division 3 Subdivision P of the NTA, but not all activities that also have a material impact on native title rights and interests.

9. There is also no clear rationale about the broad use of section 32 NTA and how a government party determines how an act is an act attracting the expedited procedure.[1] The use of the expedited procedure in circumstances where RNTBCs are often poorly resourced or lack professional advisers has and will continue to lead to situations where mining exploration permits will be granted over areas of cultural significance because a government has decided a class of acts (for example, grant of an mining exploration permit) will attract the expedited procedure without a proper investigation of the impacts.

Strengthening procedural rights

10. Some future acts (such as those proposed to be done under sections 24KA or 24HA of the NTA) only provide a right to native title parties to comment on the doing of the act. This is a procedural right that places no obligation on the issuing party to confirm receipt, nor consider comments or provide responses. An amendment is required to give native title parties greater influence and options for a native title party to have its views formally considered and taken into account.

11. There does not appear to be a consolidated record of future acts occurring in accordance with notice provisions under Part 2 Division 3 of the NTA. For example, a power authority issues a notice to a representative body that it intends to undertake a future act comprising the construction of powerlines under section 24KA. A native title compensation claim is brought by an RNTBC 15 years later – how does the RNTBC know to claim compensation for that earlier

[1] As defined in section 237 of the NTA.

act? We suggest there should be a central register kept by the National Native Title Tribunal (**NNTT**), required to record all future acts for which compensation can be claimed in future. Further, the notice does not necessarily mean that the act has occurred, it is merely a notice of an intention to undertake an act. The Representative Body or RNTBC and NNTT should also be notified once the act has occurred.

Yours faithfully

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