First Nations
HERITAGE PROTECTION
ALLIANCE

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

Via email: nativetitle@alrc.gov.au

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First Nations Heritage Protection Alliance
Submission to the Australian Law Reform Commission
Review of the Future Act Regime – Issues Paper

1 Introduction

The First Nations Heritage Protection Alliance (**Alliance**) is a coalition of member organisations representing First Nations Peoples from across Australia - including major Native Title, Land Rights, Traditional Owner, and Aboriginal and Torres Strait Islander Community Controlled Organisations (**ACCO**).

The Alliance was formed at an historic meeting held on the 17th of June 2020, following the shocking destruction of the sacred 46,000-year-old Juukan Gorge Caves in the Pilbara, Western Australia. At this meeting, Aboriginal and Torres Strait Islander leaders from across the nation – representing Aboriginal Land Councils (**ALC**), Native Title Representative Bodies (**NTRB**) and Service Providers (**NTSP**) and ACCOs – expressed their outrage at the destruction and vowed to pursue national reforms to prevent this from ever happening again. A mandate was created to strengthen and modernise Cultural Heritage laws and to create industry reforms that ensure Indigenous Cultural Heritage is valued and protected for the future.

Following this meeting, the Alliance entered into a formal Partnership Agreement with the Commonwealth Minister for the Environment. The Agreement required the Alliance to consult Traditional Owners, State and Territory Governments, Industry and other stakeholders and develop proposals for the reform of the Commonwealth Aboriginal and Torres Strait Islander cultural heritage legislation. The Alliance and the Commonwealth have continued this work with secretariat support provided by the National Native Title Council (**NNTC**). Many Alliance members are also members of the NNTC.

The Alliance and the Commonwealth are currently finalising the development of a package of comprehensive reforms to the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (**ATSIHPA**) and associated legislation. It is expected these reforms will be brought forward later this year.

Legislation around the protection and management of Traditional Owners' cultural heritage (like ATSIHPA) is most commonly engaged in the context of land development proposals. Where these proposals are located on lands on which native title is or may be recognised under the *Native Title Act 1993* (Cth) (**NTA**), they will also constitute an NTA future act. For this reason, the Alliance members see the proposals developed as part of the current Review of the Future Act Regime (**FAR**) as vital to the overall framework for the management and protection of Traditional Owners' cultural heritage in this country.

The NTA Future Act was first put in place in 1993 with significant amendments introduced following the *Native Title Amendment Act 1998* (Cth). The articulation of international law, with respect to the rights of Indigenous Peoples, has developed significantly in the over thirty years since the regime was commenced. Foremost amongst the development of this articulation is the adoption of the United Nations *Declaration of the Rights of Indigenous Peoples* (**UNDRIP**)[1] by the United Nations (**UN**) General Assembly in 2007.

The central tenet of this submission is that the FAR should be amended to bring it into accord with the relevant provisions under UNDRIP. As stated in *Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia*:[2]

> *As a foundational principle, Australia's Indigenous Peoples are entitled to expect that Indigenous Cultural Heritage legislation will uphold the international legal norms contained in the UNDRIP.*

The Alliance is aware that the NNTC will also be making a submission to the current review. To the knowledge of the Alliance that submission will have a particular focus (with regard to the considerations at this stage of the review) on the necessity to increase financial support to the various Traditional Owner native title organisations. The Alliance supports and adopts the NNTC submission in regard these matters. Given the content of the NNTC submission, this Alliance submission will focus on:

- the broad acceptance of the application of the relevant provisions of UNDRIP;
- the content of the relevant provisions of UNDRIP; and,
- the incorporation of a human rights-based framework into the FAR.

The paper will conclude by recommending that this 'human rights-based framework' be a central feature of the forthcoming Review Discussion Paper.

[1] *United Nations Declaration of the Rights on Indigenous Peoples* GA/res/61/295 Ann. 1 (Sept 13, 2007).
[2] Heritage Chairs of Australia and New Zealand, *Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia,* (Government Policy Document, 2020) (*Dhawura Ngilan),* 24.

2 Broad acceptance of the application of the relevant provisions of UNDRIP

It is broadly recognised that UNDRIP does not impose new international legal obligations on states. Rather, it restates existing international legal obligations reframes then in the specific context of Indigenous Peoples.[3] Since its adoption in 2007, the status of UNDRIP as applicable international law has been broadly accepted. The examples of this acceptance are too numerous to comprehensively list but include examples at an international level, national level, industry level and a corporate level.

To specifically identify some of these, that list would legitimately start at an international level with:

- the *UN Guiding Principles on Business and Human Rights*; [4]
- the *Guidelines for Multinational Enterprises*; [5]
- the International Finance Corporation's *Performance Standards on Environmental and Social Sustainability*; [6] and,
- the *Equator Principles 4*.[7]

The list of examples continues with:

- the UN Food and Agriculture Organisation's *Free Prior and Informed Consent – Manual for Project Practitioners*;[8]
- the UN Global Compact's *Business Reference Guide to implementing the United Nations Declaration on the Rights of Indigenous Peoples*; [9] and,
- the UN (Department of Economic and Social Affairs) *Resource Kit on Indigenous Peoples Issues*.[10]

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[3] S James Anaya, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, UN Doc A/HRC/9/9 (11 August 2008) 24 [86].

[4] United Nations Human Rights Committee (2011*). UN Guiding Principles on Business and Human Rights - Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie*, HRC, UNGOAR, 17th Sess, UN Doc A/HRC/17/31, 2011.

[5] Organisation for Economic Cooperation and Development (2011). *OECD Guidelines for Multinational Enterprises*, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264115415-en

[6] International Finance Corporation (2012) *Performance Standards on Environmental and Social Sustainability,* Washington, DC**,** International Finance Corporation. *https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/publications/publications_handbook_pps*

[7] Equator Principles Association, (2020). *Equator Principles (EP4)*, https://equator-principles.com/resources/

[8] United Nations Food and Agriculture Organisation (2016)., *Free Prior and Informed Consent An Indigenous Peoples' Right and Good Practice for Local Communities – Manual for Project Practitioners,* UNFAO, 2016, www.fao.org/indigenous-peoples/our-pillars/fpic/en/

[9] United Nations Global Compact on Business and Human Rights Network (2013). *Business Reference Guide to implementing the United Nations Declaration on the Rights of Indigenous Peoples*, 2013, https://unglobalcompact.org/library/541

[10] United Nations, Department of Economic and Social Affairs (2008). *Resource Kit on Indigenous Peoples Issues*, United Nations, New York. https://desapublications.un.org/publications/resource-kit-indigenous-peoplesissues

In the instance, of the application of UNDRIP by the resources industry, one could look to the Organisation for Economic Cooperation and Development (**OECD**) *Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector,*[11] and the International Council on Mining and Metals (**ICMM**) *Position Statement on Indigenous Peoples and Mining*[12] .

At a national level also, there are legislative and policy examples.

In Canada there is:

- the *Implementing the United Nations Declaration on the Rights of Indigenous Peoples Act 2021* (Canada);
- the *Declaration on the Rights of Indigenous Peoples Act* (British Columbia); and,
- policy examples such as the *Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canadian Extractive Sector Abroad.*[13]

Finland, Norway (*Finnmark Act* of 2005) and the Philippines (*Indigenous Peoples Rights Act* of 1987) provide further national examples of the application of UNDRIP

There are many others national level examples. As the Commonwealth Parliament's Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs (**JSC**) noted:

> … a number of countries have implemented UNDRIP into law, while others are developing non-legislative ways forward, such as amendments to constitutions, policy-based approaches, and enhancing existing systems of recognising Indigenous rights. The Democratic Republic of the Congo (2006), Ecuador (2008), Kenya (2010), Mexico (2011 and 2016), Morocco (2011), Sweden (2011), Costa Rica (2014), El Salvador (2014), Nicaragua (2014) and Chile (2016) have amended their constitutions to advance Indigenous peoples' rights in-line with UNDRIP[14]

Even at a corporate level there are examples, such as the Rio Tinto publication - *Why Agreements Matter.*[15]

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[11] Organisation for Economic Cooperation and Development (2017). *Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector*, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264252462-en

[12] International Council on Mining and Metals (2024). *Position Statement on Indigenous Peoples and Mining,*

[13] Global Affairs Canada (2014). *Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canadian Extractive Sector Abroad* (Ottawa: Global Affairs Canada, 2014) https://www.canada.ca/en/news/archive/2014/11/canada-renewed-csr-strategy-doing-business-canadian-way-strategy-advance-csr-canada-extractive-sector-abroad.html

[14] Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Inquiry into the application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia* (Commonwealth Parliamentary Committee Report, 2023), 47, [3.3].

[15] Everingham, J., Kemp, D., Ali, S., Cornish, G., Brereton, D., Parmenter, J., Langton, M., Harvey, B.(2016). *Why Agreements Matter*. Rio Tinto. https://www.csrm.uq.edu.au/publications/why-agreements-matter

Within Australia there are also examples of human rights legislation that give effect to rights recognised in UNDRIP.[16] While the Commonwealth has not at this stage given specific domestic legal effect to the comprehensive rights contained in UNDRIP, the Government does acknowledge its obligation to respect the international instruments it has accepted. The Commonwealth (attorney General's Department) stated before the JSC:

> Australia is not legally bound by UNDRIP. According to the Attorney-General's Department, 'as a matter of policy, though, Australia supports the Declaration and shares the declaration's underlying commitment to delivering real and lasting improvements for First Nations people[s] and their communities'.[17]

In the Commonwealth Governments *Response to the Juukan Gorge desecration Parliamentary Inquiry*, the Government also stated:

> The Australian Government recognises that First Nations peoples have long been calling for urgent cultural heritage reforms, which is why we are committed to working in full and genuine partnership with First Nations peoples to reform cultural heritage protections through a standalone piece of cultural heritage legislation.
>
> The Australian Government will do this within the framework of the United Nations Declaration on the Rights of Indigenous Peoples, particularly the principle of self-determination…[18]

Given this broad acceptance of the contemporary application of the rights of Indigenous Peoples, as contained within UNDRIP, it is clearly essential that any review of the FAR would ensure that these processes are now in accordance with international expectations.

The following section of this submission summaries the provisions of UNDRIP relevant to the FAR and, in particular, matters relevant to cultural heritage.

[16] *Charter of Human Rights and Responsibilities Act 2006* (Vic) and *Human Rights Act 2019* (Qld).
[17] Ibid, 23 [2.2].
[18] Australian Government, *Australian Government's Response to the Joint Standing Committee on Northern Australia's: "A Way Forward: Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge"* hereinafter "Juukan Final Report)"*; and "Never Again: Inquiry into the Destruction of 46,000-Year-Old Caves at the Juukan Gorge in the Pilbara Region of Western Australia",* (2022) 5.

3 The content of the relevant provisions of UNDRIP

UNDRIP Articles 11, 12, 13, 14, 15, 18, 19, 25, 26, 27, 28, 31, and 32 are relevant provisions for the operation of the FAR and which may, therefore, impact on a general right to enjoy cultural heritage which is the particular focus of the Alliance.

Article 11 deals with 'the right to practise and revitalize their cultural traditions and custom'.

Article 12 with 'the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains'.

Article 13 with 'the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures…'

Article 14 with 'have the right to establish and control their educational systems and institutions'.

Article 15 with 'the right to the dignity and diversity of their cultures, traditions, histories and aspirations.'

Article 18 sets out provisions relating to Indigenous decision-making structures. These structures become central to the ability of an Indigenous people to be able to assert the collective rights which are a feature of many of the unique rights of Indigenous Peoples. The Representative Institution is also central to domestic legislative e structures regarding ICH to which enable effect to be given to rights with respect to ICH. For these reasons the terms of Article 18 are worthy of reproduction in full:

> Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19 provides that states shall obtain Indigenous Peoples Free, Prior and Informed Consent through the representative institutions before: 'adopting and implementing legislative or administrative measures that may affect them'.

Article 25 with 'the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas.'

In UNDRIP the issue of natural resources is dealt with extensively in Articles 26-28.

Article 26 provides:

> 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27 provides for a requirement to establish a process to 'adjudicate the rights of indigenous peoples pertaining to their lands territories and resources'. Such a process is expressed to require the involvement of Indigenous peoples and the recognition of indigenous law and land tenure systems in the process of adjudication.

Article 28 establishes a requirement for redress for land, territories and resources previously taken without indigenous peoples free, prior and informed consent.

Article 31 with 'the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures…

Article 32 deals with the management of lands and natural resources:

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. 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 and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact. (*Emphasis added*).

Notably Article 32.2 utilises the two terms "free prior and informed consent" (**FPIC**) and "representative institution" Also, notably Article 32.2 applies to "any project affecting [Indigenous] lands" not solely mineral development projects. This makes this provision of particular relevance to the FAR.

Article 46.2 deals with human rights:

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. (*Emphasis added*).

Without the need to undertake a comprehensive mapping exercise, it is clear that most of the current provisions of the FAR do not align with the expectations under UNDRIP. At its most straightforward, this is because:

- most future acts processes do not satisfy the FPIC requirements of Article 32.2; and,
- the associated NTA future act compensation provisions fail to satisfy the "redress" requirements of Article 32.3.

However, at least on their face, there are some FAR structures that do align. The Indigenous Land Use Agreement (**ILUA**) processes provide one example of that.

The following section of the submission explores how the internationally recognised human rights, articulated in UNDRIP and set out above in Article 46.2, can be incorporated into the FAR.

4 Incorporation of a human rights-based framework into the FAR

Incorporation of a human rights-based approach into the FAR is feasible within the current overall structure of the NTA. To do so however would of course require amendment to many of the existing processes.

In large part these necessary amendments are based on incorporation of the FPIC Principle. Accordingly, some preliminary matters regarding FPIC should be noted as a prelude to examination of specific aspects of the FAR.

4.1 Elaboration of a human rights-based approach in the context of the NTA

4.1.1 Elements of FPIC

The FPIC principle is explained in general terms in the following text developed by the UN Permanent Forum on Indigenous Issues and contained in the 2005 *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples*.[19]

- ***Free*** should imply no coercion, intimidation or manipulation.
- ***Prior*** should imply that consent has been sought sufficiently in advance of any authorization or commencement of activities and that respect is shown for time requirements of indigenous consultation/consensus processes.

[19] Extract from: United Nations Permanent Forum on Indigenous Issues, *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples* (New York, 17–19 January 2005), UN Doc E/C.19/2005/3 (2005), [46]. At https://undocs.org/E/C.19/2005/3 .

- ***Informed*** should imply that information is provided that covers (at least) the following aspects:
    - the nature, size, pace, reversibility and scope of any proposed project or activity;
    - the reason(s) for or purpose(s) of the project and / or activity;
    - the duration of the above;
    - the locality of areas that will be affected;
    - a preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks and fair and equitable benefit-sharing in a context that respects the precautionary principle;
    - personnel likely to be involved in the execution of the proposed project (including indigenous peoples, private sector staff, research institutions, government employees and others); and
    - procedures that the project may entail.
- ***Consent*** Consultation and participation are crucial components of a consent process. Consultation should be undertaken in good faith. The parties should establish a dialogue allowing them to find appropriate solutions in an atmosphere of mutual respect in good faith, and full and equitable participation.

  Consultation requires time and an effective system for communicating among interest-holders. Indigenous peoples should be able to participate through their own freely chosen representatives and customary or other institutions.

  The inclusion of a gender perspective and the participation of indigenous women are essential, as well as participation of children and youth, as appropriate. This process may include the option of withholding consent.

  Consent to any agreement should be interpreted as indigenous peoples have reasonably understood it.

The Report goes on to suggest:

> Indigenous peoples should specify which representative institutions are entitled to express consent on behalf of the affected peoples or communities…

This description of FPIC is that most cited both in Australia and internationally.[20]

4.1.2 The role of the Representative Institution

FPIC is one of the collective rights articulated in UNDRIP. The right to manage and protect cultural heritage is also a collective right. As a collective right, the exercise of the right to FPIC (or the management of cultural heritage) can only occur through operation of the appropriate Representative Institution (*per* Article 18). Within the NTA, the Prescribed Body Corporate (**PBC**)

[20] It was included in the Australian Human Rights Commission *Social Justice Report 2010* and is frequently referred to in Australia since that time.

satisfies the definition of Representative Institution for the purposes of UINDRIP. So too do the NTRBs recognised under the NTA.

While this fact satisfies an essential component of the exercise of a right to FPIC with the FAR, it also points to the desperate need to ensure adequate resourcing of PBCs (and other Representative Institutions) to undertake these functions. Without these operational resources, any legal structural satisfaction of the requirements of FPIC is meaningless.

This matter is the key element of the NNTC submission which the Alliance endorses and adopts.

4.1.3 "Free" and the role of The National Native Title Tribunal

A number of processes within the FAR would appear to satisfy the FPIC principle. The ILUA and the s 31 agreement process are the clearest examples. This is correct up to a point. The short coming in the existing structure is that utilisation of these processes is optional for a proponent. The proponent also has the option of seeking a Future Act Determination from the National Native Title Tribunal (**NNTT**). The process by which this occurs are well known but should be stated in this particular context.

A proponent (particularly in relation to resources projects but also other significant projects) has an option of seeking negation of an ILUA or commencing a future act process under the Right to Negotiate (**RTN**) process. In the resources context, the object of the negotiations is to reach an agreement as to the granting of the relevant title.

Under the NTA,[21] negotiations at this stage can contemplate the ultimate agreement including the payment of "royalties" to the native title holding/claiming community. If an agreement is reached the title can be granted.[22] At the conclusion of the period, if no agreement is reached, the state or the putative miner can seek arbitration of the matter.[23]

The arbitration is undertaken by the NNTT. The NNTT can determine to approve, approve on conditions or not approve the proposed grant. However, the determination cannot include provisions relating to royalty payments.[24] The criteria the NNTT is required to take into account in making its decision include:

- the effect on the native title holding communities and their wishes;
- the "economic or other significance" of the grant; and,
- the "national interest".[25]

Between 2012 and 2017, the NNTT dealt with over 100 applications to arbitrate the grant of a mining title because agreement could not be reached between the parties. On only two

[21] NTA, s 33.
[22] NTA, s 31.
[23] NTA, s 35.
[24] NTA s 38(2).
[25] NTA, s 39.

occasions had there been a determination that the grant of a mining title cannot proceed.[26] While these figures are somewhat dated it is understood there has only been a marginal improvement in the statistics.

In this way, neither the s 31 agreement process nor the ILUA process can (at present) truly satisfy the "Free" requirement. Traditional Owners negotiate these "voluntary" agreements under the threat of an inevitable adverse arbitration outcome.

4.1.4 Consent and Arbitration in FPIC

The foregoing discussion of the role of the NNTT also warrants some closer analysis of the consent aspect of FPIC. Consent in FPIC is often characterised as a right to veto all developments of traditional lands.[27] However, this understanding of FPIC ignores the role of Article 46.2.

This provision does allow for the rights to FPIC regarding developments on traditional lands and management of cultural heritage to be subject *"to such limitations as are determined by law and in accordance with international human rights obligations"*.

FPIC is a human right and, as with other human rights, must at times be adjusted or limited to accommodate other human rights. This approach to FPIC has been described as the "human rights pluralist" approach.[28] Recognising this interpretation of FPIC provides a role for bodies such as the NNTT in the determination by law of necessary limitations.[29] The difficulty with the existing statutory framework (as described immediately above) is that the statutory criteria by which determinations are made favour proponents, and broader economic interests, above the human rights of Traditional Owners under UNDRIP. While this matter suggests that legislative amendment is necessary, it also suggests the existing fundamental structure of the NTA can accommodate a rights-based approach.

4.2 Specific Proposal Regarding NTA Structures

4.2.1 Use of ILUAs and Amendment to the Arbitration Processes and Criteria

The principle of FPIC must be more broadly respected within the NTA. In this context, the principle of FPIC would require that all proposals affecting Traditional Owners lands or other resources under the NTA, particularly in connection with the development, utilization or exploitation of mineral, water or other resources, would be required to proceed by way of ILUA.

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[26] Weld Range Metals Limited/Western Australia/Ike Simpson and Others on behalf of Wajarri Yamatji, [2011] NNTTA 172 (21 September 2011); and Western Desert Lands Aboriginal Corporation (Jamukurnu - Yapalikunu)/Western Australia/Holocene Pty Ltd, [2009] NNTTA 49 (27 May 2009).

[27] S James Anaya and Sergio Puig, 'Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples', (2017) 67 (4) *University of Toronto Law Journal* 435. Note that from 2008 to 2104 Anaya was appointed to the position of UN Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous peoples.

[28] Ibid.

[29] The NNTT would also have a legitimate role under Article 40 which deals with dispute resolution mechanisms.

A project should only be able to proceed in the absence of an ILUA and in circumstances where a determination has been made "*by law and in accordance with international human rights obligations*".

This requirement would necessarily mean that the Expedited Procedure would need to be abolished as it is inconsistent with international human rights obligations. This approach would **not** mean that a complete ILUA would need to be negotiated for each land use proposal. As can be seen in the processes of a Land Use Activity Agreement under the *Traditional Owner Settlement Act 2010* (Vic), an ILUA can be the foundation of a more comprehensive, equitable land management approach. The Noongar Regional Settlement is a further example of these possibilities.

At a practical level, the use of ILUAs could be further encouraged through either a policy, or legislative requirement, that projects securing Commonwealth Government funding are required to conclude an ILUA with relevant Traditional Owners.

4.2.2 Effective FAR Compensation Structures

Within a predominantly ILUA based framework, the matter of compensation for future acts could be addressed in the terms of the ILUA. This noted, it should also be recognised that the current FAR compensation provisions do not provide effective redress for projects that have proceeded without the FPIC of relevant Traditional Owners.

To the extent a project has not obtained the FPIC of relevant Traditional Owners, adequate and timely redress for the effect of projects on their traditional lands must be incorporated into any amended FAR structures.

4.2.3 Incorporating Rights to Manage and Protect Cultural Heritage

The NTA has application only to lands that have, or may be determined to be, the subject of native title rights and interests recognised by (common) law. Traditional Owner cultural heritage exists across the continent not bound by issues of tenure or "Traditional Connexion" as recognised by the common law. For this reason, the NTA in its current form can never provide a comprehensive legislative response to Traditional Owner rights to manage and protect their cultural heritage, as recognised under UNDRIP.

This broader task must be left to the legislative reform project currently being undertaken by the Alliance. However, where the NTA does operate it should also explicitly operate such that a right to manage and protect cultural heritage is an integral part of the NTA process. These rights should be explicitly incorporated into arbitration criteria for example.

Beyond this though the NTA could be amended such that a necessary consequence of any positive determination of native title rights is the enlivenment of a statutory right to manage and protect cultural heritage in accordance with the relevant provisions of UNDRIP. These rights would then be necessarily incorporated into FAR deliberations.

4.2.4 Application of the Racial Discrimination Act

One final issue needs to be specifically addressed. As noted in the Issues Paper (p 25 – [132]):

> Section 7 of the *NTA*, as amended by the *NT Amendment Act*, has the effect of disapplying legal protections contained in the *RDA*. This means that, generally speaking, the future acts regime is not subject to the general standards of equality and non-discrimination contained in the *RDA*.

It should go without saying that the explicit authorisation of racial discrimination in this provision is entirely inconsistent with a human rights-based approach. The provision must be repealed.

5 Conclusion

The Alliance appreciates that the Issues Paper is a first step in the process of Review of the FAR and looks forward to working with the Commission over the coming year to progress this task.

In the meantime, it is hoped this submission has assisted in the development of a conceptual framework by which the ongoing work of the Commission can be undertaken. If the Alliance can be of any further assistance, please do not hesitate to contact us.

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Natalie Rotumah
Co-Chair

20 February 2025

Leon Yeatman
Co-Chair

20 February 2025