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21 February 2025

Australian Law Reform Commission
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Dear Australian Law Reform Commission

**Review of the Future Acts Regime – Submission from MPS Law**

***Background***

1. MPS Law thanks the Australian Law Reform Commission (**ALRC**) for the opportunity to provide a submission in relation to the ALRC's review of the future acts regime in the *Native Title Act 1993* (Cth) (**NTA**) and its 'Issues Paper'.[1]

2. MPS Law is a boutique, for-purpose law firm, specialising in native title, commercial law, dispute resolution and pro bono services. MPS Law has extensive experience acting for native title claimants, RNTBCs, and proponents navigating the future acts regime and negotiating and implementing future act agreements. MPS Law practitioners also draw on experience from previous roles in private practice, government, and native title representative body / service providers (**NTRB/SPs**).

3. Although MPS Law is based in Adelaide, our firm operates nationally. Our team has experience in future act matters across Australia, particularly in South Australia, New South Wales, Queensland, Western Australia and the Northern Territory.

4. MPS Law considers that the Issues Paper has comprehensively canvassed many of the key issues arising from the current future acts regime.

5. This submission seeks (and is accordingly structured) to:

    a. briefly make some high-level observations about the future acts regime and the Issues Paper;

    b. address what we consider to be some of the most important issues facing the future acts regime (Questions 1-2); and

    c. provide suggestions for reform and improvements to the future acts regime to address these issues (Questions 4 and 5).

6. In focusing on certain 'key issues' our submission is not intended to undermine the importance of other issues canvassed by the Issues Paper. The submission simply

[1] Australian Law Reform Commission, Review of the Future Acts Regime: Issues Paper (2024) (**Issues Paper**).

focusses on certain key issues that we consider ourselves well placed to comment on based on our firm's experience.

7. Our firm's experience is that of predominantly representing native title parties, although that is not always the case. Indeed, our team members also have considerable experience representing proponents and government parties. Regardless, our role is limited to that of advisors. The views of native title parties should be held as paramount throughout the review. While advisors and proponents may come and go, it is the native title parties and their connections to land and waters that will endure beyond the life of any future act.

## A. *Observations*

8. MPS Law supports reform of the future acts regime.

9. As identified in the Issues Paper and Terms of Reference, it is essential that any reform of the future acts regime is firmly grounded in the principles set out in the United Nations *Declaration on the Rights of Indigenous Peoples* (**UNDRIP**), and in particular the rights of Aboriginal and Torres Strait Island Peoples to:

    a. self-determination;[2]

    b. participation in decision-making in matters which affect their rights;[3]

    c. be consulted with, and for States to ensure their free, prior and informed consent (**FPIC**) be provided, before anything occurs that affects them;[4] and

    d. have rights and interests in the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired recognised and protected.[5]

10. As also identified in the Issues Paper, it is essential for the review to have careful regard to the findings and recommendations made in or arising out of the Joint Standing Committee's Report on the destruction of sacred sites at Juukan Gorge.[6]

## B. *Key issues: Questions 1-2*

Resourcing

11. MPS Law agrees with the Issue Paper's observation that under-resourcing is negatively affecting parties' ability to participate in the future acts regime, particularly affecting native title and smaller proponent parties.[7]

12. Native title parties need to be sufficiently resourced to meaningfully participate in the future acts regime. This includes resources for managing and reviewing future act notices, negotiating with project proponents and overseeing and implementing agreement outcomes. Compliance with the future acts regime will often require a native title party to convene and conduct meetings of the native title holders/claimants, develop and maintain accounts and information management systems, in addition to

[2] UNDRIP, Article 3.

[3] UNDRIP, Article 18.

[4] UNDRIP, Article 19.

[5] UNDRIP, Article 26.

[6] Joint Standing Committee on Northern Australia, Parliament of Australia, *A Way Forward: Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge* (2021).

[7] Issues Paper, [78].

abiding by any consultation and decision-making processes enshrined in a group's traditional laws and customs or otherwise adopted by the native title holders/claimants.

*Resourcing by proponents has its limitations*

13. As has been identified in the Issues Paper,[8] it is common practice for project proponents to contribute funding towards the native title party's participation in negotiations for a future act. Our experience however is that funding will vary substantially depending on the size and resources of the proponent party. This will often influence the support a native title party receives to meaningfully engage in negotiations, such as the amount of expert advice available and the amount of time provided to discuss, deliberate and consult with native title holders/claimants on the nature and impacts of a proposed future act.

14. Moreover, we often observe that a significant amount of unfunded time and resources are invested in negotiating funding arrangements before negotiations for the actual future act substantively commence. This includes work to establish, and obtain proponent understanding and agreement to, third-party funding arrangements, as well as work to manage and agree on expectations in relation to the amount, cost and timing of work. This issue is particularly challenging when negotiating with smaller proponents, who may take cost-reducing measures such as engaging in future act negotiations without legal representation.

15. There is also risk, despite these arrangements, that proponents ultimately refuse to meet costs for completed work, sometimes triggering debt-recovery proceedings.

16. We also observe in these funding arrangements that the imperatives for both a cost- and time-effective resolution of future act matters will often be at odds. It is common practice for native title parties to adopt measures to meet their compliance requirements in a way that manages costs, such as by convening meetings of native title holders/claimants for multiple purposes. Such tactics can impact the negotiation timeline, where the native title party awaits an economically convenient opportunity to progress native title holder/claimant consultation and consent. Such impacts may meet resistance from proponent parties facing industry pressures to arrive at an outcome earlier.

17. Resourcing will often be limited to the negotiations themselves, as opposed to the oversight and implementation of any negotiated outcome. While the parties may, as part of the negotiations, agree to ongoing funding for the native title party to implement an agreement,[9] our experience is that this funding will often only be sufficient to support the native title party's bare compliance with the agreement, and will not enable the native title party to fully realise the opportunities negotiated as part of an agreement, such as opportunities associated with heritage and environmental protection and economic, business and employment development. Moreover, project proponents will often consider funding of this kind an element of a negotiated financial benefits package. The resourcing will consequently comprise amounts that could have otherwise been applied to provide benefits to the native title party as an agreement outcome.

*The need for resources is increasing*

18. Our experience is that the demands placed on Prescribed Bodies Corporate (**PBCs**) and native title applicants to satisfy its obligations to native title holders and claimants have expanded over time. This includes an increased level of transparency and accountability expected by native title holders/claimants and by legislative

[8] Issues Paper, [81]

[9] This is often referred to as an 'administration payment'.

amendments.[10] These demands are further compounded by native title groups' need to discharge these obligations in a way that adheres to and upholds traditional laws and custom. While the demands (and their associated cost and workload) on native title parties in their carriage of future act matters increase, the avenues for resourcing for native title applicants and PBCs remain largely unchanged.

19. As noted in the Issues Paper,[11] government funding is available to PBCs through the National Indigenous Australian Agency's (**NIAA**) basic support funding program, which is provided indirectly to PBCs via their NTRB/SP.[12] Our experience accords with the reports described in the Issues Paper that this funding is not sufficient to meet basic needs. This particular funding is also not available to native title claim groups who may face a high volume of future act activity.

20. The NIAA reports that, on average, $50,000 to $80,000 per PBC is provided in basic support funding.[13] By contrast, in 2016 the Centre for Aboriginal Economic Policy Research ANUY College of Arts & Social Sciences calculated that the indicative annual cost for a PBC to meet its core functions is $621,075.[14] This latter figure accords with our experience with PBCs, and can be even higher depending the PBC's size, remoteness and complexity of governance arrangements.

21. Further, requiring this funding to be administered by the NTRB/SPs places additional administrative pressures on both NTRB/SPs and PBCs, can lead to strains on the NTRB/SP and PBC's relationship, and can create perceptions that PBCs are not capable of administering this funding in accordance with the grant requirements.

22. The Issues Paper notes the option for PBCs to recover costs by charging fees, such as pursuant to s 60AB of the NTA.[15] We note that this does not assist native title claim groups.

23. Our experience is that the limited, short-term and non-guaranteed resourcing available to native title groups results in reactive engagement by groups in the future act regime. Better and more structural funding will assist native title groups to engage with the future acts regime in a way that not only meets their mandatory compliance functions, but that is also fit for purpose and gives practical effect to native title holder/claimants' interests, expectations and strategic aspirations.

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[10] An example of the latter includes amendments introduced in February 2021 to the NTA, *Corporation (Aboriginal and Torres Strait Islander) Act 2006* (Cth) and *Native Title (Prescribed Bodies Corporate) Regulations 1999* which require PBCs, amongst other things, to provide for detailed dispute resolution pathways for dealing with disputes between PBCs and persons who claim to be common law holders in relation to the PBC's exercise of its native title functions. This includes the exercise of the PBC's functions in relation to the future acts regime. While a PBC's accountability to its common law holders is an important element to the functioning of the native title system, requirements of this kind increase the likelihood of PBCs diverting limited resources into dispute resolution procedures.

[11] Issues Paper, [79].

[12] Funding is also available through the NIAA's PBC Capacity Building Program, however this program Is for short-term funding applications, focused on specific activities as opposed to ongoing development and capacity needs to fulfill a PBC's obligations.

[13] These figures were collected from the NIAA website: https://www.niaa.gov.au/our-work/environment-and-land/capacity-building-native-title-corporations#:~:text=PBC%20Basic%20Support%20Funding,basic%20administration%20and%20compliance%20activities, accessed on 16 February 2025.

[14] Woods K et al, 'Toward a Perpetual Funding Model for Native Title Prescribed Bodies Corporate', p 16.

[15] Issues Paper, [79].

*Expertise and information resources*

24. As identified in the Issues Paper,[16] resourcing also includes access to expertise and information.

25. Commercial, legal, environmental and anthropological expertise is required to make informed decisions in relation to future acts, as well as facilitation and mediation expertise to consult and engage with native title holders or claimants to ascertain, protect and promote their interests. Ready access to such expertise becomes increasingly important where information about agreements (and in turn agreement benchmarks) is often confidential.

26. There is often a very limited pool of suitably qualified and experienced experts and practitioners who can provide support of this nature. The limited availability of appropriate experts and practitioners is further complicated by the time restraints commonly faced by proponent parties due to industry requirements and by native title parties due to the future act regime itself.[17]

27. We make the general observation that, while some native title parties may support confidentiality, confidentiality in future act agreements is often a requirement imposed by proponent parties. The lack of readily-available information on the contents of future act agreements makes transparent and accurate benchmarking of agreements a challenge.

Limitations on the right to negotiate

*No veto rights*

28. As identified in the Issues Paper, apart from future acts which may require an Indigenous Land Use Agreement (**ILUA**) for validation (provided there is no possibility of the State compulsorily acquiring the relevant land), there is no right of 'veto' in the NTA.[18]

29. Rather, the proposed granting of exploration and mining interests are subject to the 'right to negotiate' (**RTN**) process under Subdivision P of the NTA and do not require an ILUA to be negotiated. In our experience, and as detailed further below, the RTN process appears to be inconsistent with FPIC principles and does not appear to afford native title parties a level of right that is commensurate with the seriousness and scale of the future act. This is particularly the case for future acts concerning the proposed granting of a mining interest.

*The negotiation period is too short*

30. In our experience, the minimum six-month period for RTN negotiations does not provide an adequate negotiation period for parties to negotiate a complex agreement such as a mining agreement, or even an exploration agreement in some circumstances, particularly noting that the native title party will often:

    a. be managing significant competing priorities, such as progressing its native title claim or managing RNTBC operations with limited resources;

    b. prefer face to face meetings on country in often remote locations, in order to facilitate informed participation in the process;

[16] Issues Paper, [79].

[17] See below our discussion of the legislatively imposed timeframes for 'right to negotiate' negotiations.

[18] Issues Paper, [43], [46]-[48], [104].

c. require time to understand the details of a complex extraction project, consult with the broader community and provide instructions;

d. often require advice about environmental impacts;

e. require time to seek advice on financial aspects of the project, including royalty calculations and complex mineral extraction figures; and

f. face costly and time-consuming agreement authorisation processes.

*NNTT determinations weigh in favour of proponents*

31. Further, the RTN process does not appear to be consistent with principles of FPIC when the threat of a future act determination application (**FADA**) being made to the National Native Title Tribunal (**NNTT**) looms over the native title party.

32. Native title parties and proponents are well aware that FADA determinations overwhelmingly find in favour of the future act being done. As at the date of this submission, there are only three determinations in which the NNTT has determined that a future act 'must *not* be done'.[19] There have been 93 determinations that a future act 'may be done' and 60 determinations that a future act 'may be done subject to conditions'.[20]

33. Our experience is that the threat of a FADA being made to the NNTT after six months of negotiations, and the likely reality of the outcome of the FADA, places native title parties in a weak negotiation position and places immense pressure on native title holders to agree to terms that may not align with their values or cultural obligations, or to accept negotiation positions that are inconsistent with best practice or market standards.

34. The above circumstances are further compounded by the 'good faith' negotiation standards not requiring grantee parties to make objectively reasonable offers,[21] and the fact that the NNTT cannot order that compensation be paid including by any royalty or profit-sharing arrangements.[22]

*FADA litigation is costly*

35. FADA litigation can also be costly, and resource and time-consuming. It is not uncommon for witnesses to be called (including expert witnesses), counsel to be engaged and for an in-person hearing to take place over several days. Such resourcing is prohibitive and simply not available to many native title groups.

*Good faith negotiation standards pose an unnecessary burden on native title parties*

36. Where a FADA is made, a native title party may argue that the NNTT should dismiss the application on the grounds that the grantee or government party has failed to

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[19] Those determinations are: *Weld Range Metals Limited/Western Australia/Ike Simpson and Others on behalf of Wajarri Yamatji,* [2011] NNTTA 172; *Seven Star Investments Group Pty Ltd/Western Australia/Wilma Freddie and Others on behalf of Wiluna*, [2011] NNTTA 53; and *Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu)/Western Australia/Holocene Pty Ltd,* [2009] NNTTA 49.

[20] These figures were generated using the NNTT's online register of Future Act Applications and Determinations, accessed via https://www.nntt.gov.au/searchRegApps/FutureActs/Pages/default.aspx. There have been further determinations relating to good faith and other matters which are not picked up in the above figures.

[21] See for instance, *Gomeroi People v Santos NSW Pty Ltd and Santos NSW (Narrabri Gas) Pty Ltd* [2024] FCAFC 26 at [405]-[407] (O'Bryan J).

[22] NTA, s 38(2).

negotiate in good faith.[23] The evidential burden will be on the native title party to establish a failure to negotiate in good faith.[24]

37. The standards for 'good faith' negotiations have not been defined by the NTA. Instead, case law to date has often defined good faith in relation to its negative (i.e. conduct amounting to 'bad faith'), such as:[25]

    a. failing to provide information in a timely manner;

    b. adopting a rigid non-negotiable position;

    c. failing to make counter-proposals; and

    d. shifting positions as agreement appears in reach.

38. Framing good faith standards in the negative sets a higher threshold for establishing a failure to negotiate in good faith. Native title parties will often have to establish actions demonstrating an active or intentional failure to negotiate in good faith. This standard provides scope for grantee parties to comply with the standards at a procedural level, while never engaging with native title parties in a substantive or meaningful way.

39. While the reputational, time and cost risks associated with pursuing a FADA may encourage proponent parties to genuinely seek a negotiated outcome, this is not always the case. There remains the risk that the standards as currently set out (and the corresponding evidential burden) can be taken advantage of by actors who were never interested in meaningfully engaging with the native title party in the first place.

40. We often observe native title clients interpreting good faith negotiation standards as compelling them to arrive at a point of consent, as opposed to upholding standards by which government and proponent parties meaningfully engage with the native title party's interests and expectations, and accommodate those interests and expectations in the planning for a future act.

41. For instance, the standards do not accommodate a situation where there may be no common ground, such as where consenting to a future act may cause unacceptable levels of heritage or environmental harm, or where consent may otherwise not be reconcilable with native title holders' responsibility under traditional law and custom. The good faith requirement to not adopt a rigid non-negotiable position may unduly pressure native title holders/claimants to accept acts which under traditional law and custom are not acceptable.

42. We similarly observe native title clients fearing the consequences of being seen as having failed themselves to negotiate in good faith. For instance, clients may express concern about how engaging in civil tactics to oppose activities that do not enjoy community support (such as civil action to obstruct mining activity, public protest or media campaigns) may impact an argument opposing a FADA should that course of action be required. The native title party may feel precluded from participating in civil action due to the responsibilities imposed on them in this way by the future act regime.

*The RTN process is contrary to FPIC principles*

43. The RTN process often places native title holders/claimants in the unenviable position of having to decide whether to accept an agreement that is inconsistent with best

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[23] See NTA, s 36(2).

[24] See Strategic Minerals Corporation NL/ Allan Kyuna and Ors on behalf of the Woolgar Group/ Queensland [2003] NNTTA 83 at [7].

[25] See e.g. the indicia laid out in *Western Australia v Taylor* (1996) 134 FLR 211.

practice and that does not uphold their cultural obligations or aspirations, or to otherwise pursue costly litigation in the NNTT which has extremely low prospects of success. Native title holders may accept an agreement because there is no viable alternative strategy to mitigate the potential impacts of a future act.

44. Such circumstances are clearly contrary to FPIC principles and can cause feelings of duress, coercion, and trauma amongst native title holders.

45. MPS Law has observed many native title holders navigating the RTN process, where those native title holders fought for significant periods of time to achieve native title recognition, to express feelings of disempowerment and disillusionment with the future act and native title system because of the above issues.

The expedited procedure process

46. MPS Law agrees with the characterisation of the expedited procedure process as 'problematic'.[26] MPS Law concurs with the issues canvassed in the Issues Paper on this topic, particularly in respect of the immense administrative and resource burden that is placed on native title groups in managing the expedited procedure processes.

47. In our experience, many native title parties struggle to keep up with the volume of work required by filing and maintaining an objection and are left unaware and uninformed about exploration activities occurring on country. We further note that no fee for service can be charged under s 60AB NTA for the work of responding to expedited procedure notifications.

48. Further, the fact that parties can then engage in lengthy and costly litigation in the NNTT about whether or not the expedited procedure applies to a future act is in our view highly undesirable and not an appropriate use of scant resourcing. Such resourcing would be far better directed at agreement making and benefits to native title holders.

49. We would also add to the issues set out in the Issues Paper that use of the expedited procedure is inconsistent with the UNDRIP principles, and that it actively prevents native title holders from being informed about activities happening on their country. This in turn impacts their ability to seek just terms compensation. From our experience, it also does not promote positive relationships between grantee and native title parties.

50. We also observe use of the expedited procedure by government parties without particular regard to the specific future act and the impact it will have on native title. For example, the State of Queensland seems to assert that its 'Native Title Protection Conditions' (**NTPCs**) provides a blanket cover allowing it to grant exploration interests indiscriminately under the expedited procedure.

51. In Queensland, the NTPCs place the onus on the explorer to notify the native title party and organise surveys before it undertakes certain types of exploration activities (with other activities not attracting notification requirements). Whether there is any regulation of compliance with the NTPCs is unknown.

52. Further, our experience in Queensland is that many proponents are unwilling to agree to agreement terms beyond the NTPCs. This further drains resources of native title parties in navigating rigid and positional negotiations and can contribute to a deterioration in relationships between parties.

53. We also observe that it is common in Queensland for exploration 'side agreements' to be negotiated in response to the expedited procedure. These are often agreements

[26] Issues Paper, p 23.

between the grantee party and the native title party but not an agreement that is for the purpose of s 31 of the NTA and not an ancillary agreement to a s 31 agreement. The objection is then withdrawn, or consent given to the act being done. We consider this practice to be undesirable and not the intended consequence of Subdivision P. We also consider this practice raises complexities in the PBC context in relation to whether a native title decision has been made for the purpose of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (**PBC Regulations**).

Procedural rights

*Strength of procedural rights*

54. MPS Law agrees with the Issues Paper's observation that the strength of procedural rights afforded to a native title party does not always align with the potential impact that some categories may have on native title rights and interests.[27] We believe this particularly applies to acts the subject of Subdivisions G-K of Division 3 of the NTA (as well as Subdivision P, as outlined above).

55. Our experience is that s 24K can be particularly problematic. The section intends that native title holders will have the same procedural rights (if any) as would be the case for a holder of 'ordinary title'.[28] In most cases 'ordinary title' will be freehold title,[29] or will otherwise be the procedural rights enjoyed by a lessee where the affected land is covered by a non-exclusive agricultural or pastoral lease.[30]

56. In practice however, the section does not provide effective protection for native title as often the acts covered by this section cannot be done on freehold land and accordingly no corresponding procedural rights apply. The section allows in this way acts which can have significant impact on country and native title (such as the construction of roads) to be done with, at best, native title holders being provided with an opportunity to provide comment.

57. The future acts covered by s 24K predominantly relate to infrastructure being built on Crown land. Under most Crown Lands legislation there are no procedural rights attaching to such activities. This applies for instance to the construction of infrastructure such as roads and jetties. In these instances, the requirement of s 24K that the procedural rights would be the same as if the native title holders held ordinary title is meaningless, as the act could not be done on freehold land without the government acquiring it.

*No consequences for failures to comply*

58. We also agree with the Issue Paper's observation that there are few, if any, legal consequences for non-compliance with the requirements of the future act regime.[31] While a native title party may have limited recourse through natural justice,[32] a failure to comply with the future act procedural requirements will generally not affect the validity of a future act.[33]

59. The limited consequences for non-compliance makes enforcement a challenge. Our experience is that acts are not consistently notified, and when they are notified the

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[27] Issues Paper, [18].

[28] NTA s 24KA(7)(b).

[29] See definition of 'ordinary title' in NTA s 253.

[30] See definitions in NTA, ss 247B and 248B.

[31] Issues Paper, [95].

[32] A native title party may for instance seek an interim injunction.

[33] *Lardil Peoples v Queensland* (2001) 108 FCR 453, at [58] & [62]; *BHP Billiton Nickel West Pty Ltd v KN (Deceased) (TJIWARL and TJIWARL #2)* [2018] FCAFC 8.

notices will often not include necessary information to review and respond. There is no general consistency within different state governments on when and how future acts are notified.

*Compensation is difficult to recover*

60. We also agree with the Issue Paper's observation that it is difficult for native title holders to obtain timely and accessible compensation for future acts.[34]

61. Compensation is difficult to recover for those acts that attract the right to compensation. This difficulty is compounded by the fact that there is no clear record of acts which have taken place.

62. This means compensation may never be recouped for a lot of the future acts validly done under these provisions, particularly where many acts have been done without notice ever being given.

Alternative regimes

63. We note the Issue Paper's observation that experiences of alternative regimes are mixed.

64. We work with a number of native title clients in South Australia who have experience of the alternative scheme under Part 9B of the *Mining Act 1971* (SA).

65. The experience of South Australia's alternative regime varies greatly between groups. Our general observation is that where native title groups have strong and robust negotiation, consultation and heritage processes, they are better placed to leverage the streamlined process to negotiate stronger terms on access and heritage protection.

New and emerging industries

66. We do not agree with the Issue Paper's observation that the current future acts regime may not be fit for purpose for new and emerging industries.

67. Currently, the Indigenous Land Use Agreement (**ILUA**) provisions apply to these future acts. We consider this appropriate and the best avenue to support native title parties negotiating these future acts in accordance with the principles of FPIC.

## C. *Potential reform options: Questions 4 and 5*

Resourcing

68. MPS Law considers it important to increase the amount of resourcing available to native title groups to comply with their core functions and obligations, including associated with their participation in the future act regime.

69. Government funding should be available on a perpetual basis for native title groups to cover their costs in engaging in the future act regime. This funding should be available to both PBCs and native title claimants, and should critically include costs associated with engaging in the expedited procedure.

70. Basic PBC funding should be provided directly to each PBC, as opposed to indirectly via the NTRB/SPs.

[34] Issues Paper, [119]-[121].

71. Proponent parties who cannot afford to properly resource and engage in the RTN process (and engage with the native title party) should not be enabled though use of the expedited procedure to undertake exploration activities on native title land.[35]

72. The cost recovery provisions in the NTA should be strengthened to provide clear expectations on proponent parties that they are required to properly resource native title parties' participation in RTN negotiations.

73. The ability to recover costs under s 60AB of the NTA should extend to registered native title claimants.

74. Further sources of funding should also be available to support PBCs developing particular projects to build their capability and capacity to effectively deal with their native title, such as in relation to future acts.

75. In terms of information resources, we recommend measures to publish details about agreements on the NNTT website. For instance, when registering an ILUA, parties should be given the option to opt-in to the ILUA (redacted as appropriate) being published on the website.

76. To promote transparent and accurate agreement benchmarking, there could be benefit in requiring that benefits under future act agreements are not confidential, unless requested by the native title party.

Limitations on the right to negotiate

77. MPS Law supports consideration being given to introducing a right of veto, particularly for mining interests and compulsory acquisitions. In relation to mining, this could be achieved by removing the granting of mining interests from Subdivision P, and requiring an ILUA to be negotiated in respect of a mining interest. This would mean that negotiation rights are commensurate with those of native title holders for many renewable energy projects, which often require an ILUA to be negotiated.

78. We consider this would promote more respectful and robust agreement making, support FPIC principles, and still provide a clear pathway for project consents. It may also promote engagement and reduce conflict between the negotiation parties.

79. Subject to the above, we concur that it would be appropriate to extend the minimum RTN period. Further consideration may be given as to whether there are different minimum RTN periods for different classes of Subdivision P activities (such as non-ground disturbing exploration versus drilling).

80. Where no right to veto is introduced, we recommend that limitations on the NNTT to arbitrate compensation amounts for future acts should be removed.

Good faith negotiation standards

[35] See our recommendations in relation to the expedited procedure below.

81. We suggest it may be preferable for the NTA to set out positive minimum standards of good faith negotiations.[36]

82. Moreover, the evidentiary burden should be placed on the grantee to demonstrate that they have met good faith negotiation standards when pursuing a FADA.

The expedited procedure process

83. We submit that removing the expedited procedure process from the NTA, or at the very least substantially limiting use of the expedited procedure process, will significantly improve functionality of the NTA, reduce resource strain, lead to better relationships between grantee and native title parties and promote informed participation in the native title process by native title holders.

84. We query if there may be utility in reforming the PBC Regulations to give RNTBCs and native title holders the opportunity to make a 'standing instructions' decision about entering into exploration agreements. This may facilitate faster agreement-making by RNTBCs in high activity areas with respect to exploration agreements and circumvent the utility (from the government's perspective) of an expedited procedure process altogether.

85. We further note that doing away with the expedited procedure process would still leave it open to government to negotiate an alternative procedure agreement ILUA with native title holders pursuant to s 24DB. This could see native title groups develop something akin to their own expedited procedure-style process, setting out minimum standards or conditions that they may be willing to allow exploration interests be granted under. We are aware of several examples of such agreements which have been negotiated. Of course, such agreements will need to have robust review clauses to ensure the terms agreed can be modernised and remain consistent with preferred practices and legislative amendments.

86. Alternatively, should the expedited procedure remain in the NTA, we submit that:

    a. it should not extend to ground-disturbing activities;

    b. a presumption of impact on native title should be introduced;

    c. the onus should be placed on the government or grantee party to demonstrate why there will be no impact on native title, rather than this burden falling on the objecting native title party; and

    d. s 60AB should be amended to cover costs incurred by both RNTBCs and Applicant groups in navigating the expedited procedure process.

Procedural rights

87. MPS Law recommends that non-compliance with the future act procedural requirements should invalidate the future act.

88. MPS Law considers it preferable that compensation be payable at the time a future act is done.

89. MPS Law also recommends that s 24KA should either not apply to acts that could not be done on private land in the absence of compulsory acquisition, or the NTA should

[36] As a reference, s 228 of the *Fair Work Act 2009* (Cth) expressly sets out minimum good faith bargaining requirements that an enterprise representative must meet for a proposed enterprise bargaining agreement.

expressly clarify the procedural rights that apply where there are no other procedural rights provided.

***Further information***

90. Thank you again for the opportunity to make a submission. MPS Law would be pleased to provide any further information or assistance to the ALRC, if requested.

Yours sincerely

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