KIMBERLEY LAND COUNCIL

21 February 2025

Australian Law Reform Commission
nativetitle@alrc.gov.au

Dear Commissioners,

Review of the Future Acts Regime: Issues Paper

The Kimberley Land Council **(KLC)** welcomes the opportunity to provide a submission to the Australian Law Reform Commission in response its *Review of the Future Acts Regime: Issues Paper*.

The KLC is an Aboriginal organisation established in 1978 for the purpose of working for and with Kimberley Traditional Owners to get back Country, care for Country and get control of the future. As the native title representative body for the Kimberley, the KLC has achieved native title determinations across 97 per cent of the region. There are currently 31 prescribed bodies corporate in the Kimberley holding and managing native title rights and interests.

The KLC makes the following submission on the basis of its experience and observations as the native title representative body for the Kimberley over more than three decades. Our submission expands on many of the issues the Commission has identified in the issues paper, providing further detail and practical examples of challenges experienced by native title holders and the KLC with respect to the future acts regime.

A review of the future acts regime is long overdue, and the KLC hopes that the Commission's work in this space will lead to greater equity and clarity in the regime. In particular, incorporating the principle of free-prior and informed consent is fundamental to ensuring the regime supports native title holders to fully enjoy their rights and interests.

The KLC appreciates your consideration of this submission and looks forward to reading and responding to the Commission's discussion paper later this year.

Yours sincerely,

[redacted]

Tyronne Garstone
Chief Executive Officer

[redacted]

11 Gregory Street / PO Box 2145
Broome WA 6725

(08) 9194 0100
reception.bme@klc.org.au

ICN 21

www.klc.org.au

KIMBERLEY LAND COUNCIL

SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION

Review of the Future Acts Regime: Issues Paper

Contents

Introduction

1. The Kimberley Land Council (**KLC**) is an Aboriginal organisation established in 1978 for the purpose of working for and with Kimberley Traditional Owners to get back Country, care for Country and get control of the future. As the native title representative body (**NTRB**) for the region since 1999, the KLC has achieved native title determinations across 97 per cent of the Kimberley.

2. The KLC provides legal support and representation to native title parties in the Kimberley in relation to future acts as part of its functions under the *Native Title Act 1993* (Cth) (**NTA**). There are currently 31 registered native title bodies corporate (**PBCs**) and seven registered native title claimants in the Kimberley with future act rights under the NTA. The KLC also, as an Aboriginal member-based community organisation, has a mandate and responsibility to advocate for the rights of Kimberley Aboriginal people in relation to their land, waters, and cultural heritage.

3. The KLC welcomes the opportunity to provide this submission to the Australian Law Reform Commission (**ALRC**) in response to the Review of the Future Acts Regime: Issues Paper (**Issues Paper**). The ALRC's comprehensive review of the NTA's future acts regime provides a critical opportunity to craft solutions to address the shortcomings of the regime, which currently contribute to inequity and inefficiencies within the native title system.

4. This submission first sets out principles for an ideal future acts regime, before addressing the most important issues with the current regime and its operation, providing case studies and specific examples of KLC's experiences, in response to the Issues Paper. The submission proposes some limited considerations for reform, noting that the KLC intends to submit a further submission to address reform options in detail in reply to the forthcoming discussion paper.

5. The KLC has previously made submissions to federal parliamentary inquiries regarding issues with the future acts regime and related matters, including:

    a. Submission to the Senate Legal and Constitutional Affairs Committee inquiry into the Native Title Legislation Amendment Bill 2019 (**Senate Submission**);[1]

    b. Submission to the Joint Standing Committee on Northern Australia inquiry into the destruction of 46,000-year-old caves at the Juukan Gorge in the Pilbara region of Western Australia (**Juukan Gorge Submission**);[2]

    c. Submission to the 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 (**UNDRIP Submission**);[3] and

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[1] Kimberley Land Council, Submission No 16 to Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Inquiry into the Native Title Legislation Amendment Bill 2019* (29 November 2019) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/NativeTitle/Submissions>.

[2] Kimberley Land Council, Submission No 101 to Joint Standing Committee on Northern Australia, Parliament of Australia, *Inquiry into the Destruction of 46,000 Year Old Caves at the Juukan Gorge in the Pilbara Region of Western Australia* (14 August 2020) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Northern_Australia_46P/CavesatJuukanGorge/Submissions>.

[3] Kimberley Land Council, Submission No 22 to Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs,

d. Submission to the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs inquiry into economic self-determination and opportunities for First Nations Australians (**Economic Self-Determination Submission**).[4]

6. **Terminology:** The submission uses the term "**proponent**" to refer to the person or organisation who has applied for or holds the relevant interest the subject of the future act, such as a mining company, a tourism operator, a telecommunications provider, the State, and so on. The terms "**native title party**" and "**native title holders**" are as defined in the Issues Paper.

Parliament of Australia, *Inquiry into the application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia* (24 October 2022) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Aboriginal_and_Torres_Strait_Islander_Affairs/UNDRIP/Submissions>.

[4] Kimberley Land Council, Submission No 83 to the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Inquiry into economic self-determination and opportunities for First Nations Australians* (24 June 2024) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Aboriginal_and_Torres_Strait_Islander_Affairs/Economicself-determinati/Submissions>.

An ideal future acts regime

7. The United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**) and the principle of free, prior and informed consent (**FPIC**) must be enshrined into the future acts regime.[5] Anything less than FPIC will fail to meet the goals of the NTA to rectify the consequences of past injustices by securing the advancement and protection of Indigenous Australians, and to ensure the full recognition and protection of their rights and interests.

8. UNDRIP acknowledges that the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights affirm the fundamental importance of the right to self-determination of all peoples (Indigenous and non-Indigenous alike) and makes clear that Indigenous peoples have the same rights to the full enjoyment of their rights and freedoms under international human rights law as all other peoples. In advocating for the principles enshrined in UNDRIP to be reflected in the domestic legislation, the KLC is doing no more, and no less, than pleading that the laws that apply to Indigenous Australians should be fair and equitable in the outcomes they seek to achieve.

9. UNDRIP requires FPIC to be realised in a number of circumstances, including prior to the approval of any project affecting Indigenous peoples' lands or territories and other resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resources. Under UNDRIP and the right of all peoples to self-determination, Indigenous Australians have the right to determine and implement strategies for the development of their own resources and lands, and activities done by governments or lawfully by third parties should be done with the FPIC of Traditional Owners.

10. The principle of FPIC in practice means:

    a. negotiations and agreements with Traditional Owners must be *free* from coercion, intimidation, manipulation and undue influence;

    b. Traditional Owners must be consulted and have time to give consideration *prior* to any acts and activities on their Country going ahead;

    c. all Traditional Owners need to be well *informed* about activities on their Country, particularly about mining and other large projects; and

    d. Traditional Owners have the opportunity to give or withhold *consent*.

11. A precondition for meeting the principle of FPIC is the provision of adequate financial and other support to PBCs and to native title representative bodies and service provides (**NTRB/SPs**). Native title holders must be well resourced if the decisions they make are to be free from coercion and properly informed. The power imbalance between native title parties on the one hand, and governments and proponents on the other, can only be redressed with sufficient resourcing and the development of institutional

[5] This is consistent with Recommendation 4 of the *A Way Forward* report: see Joint Standing Committee on Northern Australia, Parliament of Australia, *A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge* (Report, October 2021) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Northern_Australia_46P/CavesatJuukanGorge/Report>.

capacity.

12. In addition to enshrining the principle of FPIC, an ideal future acts regime will:

    a. provide substantive and procedural rights to native title parties for the protection of native title on par with non-native title interests;

    b. be workable, as simple as possible, and aligned with other legislation including state heritage and mining laws, and related Commonwealth heritage, nature repair, carbon and environmental laws;

    c. provide certainty to native title parties, proponents and government parties;

    d. provide clear and immediate consequences for non-compliance by government parties and proponents;

    e. provide accessible and timely remedies to native title holders for non-compliance;

    f. ensure compensation is easily accessible to native title parties and remove technical and procedural barriers to accessing compensation; and

    g. enable native title parties to pursue economic development opportunities on their native title determined land, including carbon projects and nature repair activities.

The current future acts regime does not achieve its goals

The regime is discriminatory

13. In stark contrast to the ideal, the current future acts regime discriminates against Indigenous Australians and puts Australia in breach of its international human rights obligations.[6] Its design prioritises non-Indigenous interests and creates structural barriers to the enforcement and exercise of native title rights and interests. It is difficult to understand and overly complex, and has produced much uncertainty in its application, while requiring little accountability of governments and proponents. Numerous aspects of the future acts regime demonstrate this, including: native title parties' lack of veto over those future acts provided for in Part 2, Division 3 of the NTA[7] which wholly extinguish or suppress native title rights; the lack of enforceability and weakness of procedural rights; the limitations on the right to negotiate and the problems with the expedited procedure; and the low bar on what constitutes the 'good faith' requirements for third parties in negotiations. In these ways, the regime does not meet its stated goals to enable native title holders to fully enjoy their native title rights and interests and to secure the advancement and protection of Indigenous Australians.[8]

The regime is re-traumatising

14. Engaging with the future acts regime can often be re-traumatising and harmful for Traditional Owners. Native title holders who have gone through the claims process and been required to provide evidence of connection – a process which itself can compound the effects of intergenerational trauma experienced from structural racism and colonisation – find themselves often having to defend and explain, over and over again, their native title rights and interests in the future acts process. In this way, they face the realisation that their hard-won native title can mean very little against non-native title interests and can be bypassed and ignored by governments and proponents through mechanisms such as weak procedural rights, the expedited procedure, and the grossly unbalanced outcomes experienced by native title parties in future act determinations.

15. The comments of Jagot J in *Widjabul Wia-bal v Attorney General of New South Wales* [2022] FCA 1187 at [72] encapsulate the repeated traumatisation and exhaustion that occurs from many Indigenous Australians' ongoing engagement with the native title claims process:

> [The] dispossession of Aboriginal peoples and Torres Strait Islanders from their land, the failure of our country to reach a lasting and equitable agreement with Aboriginal peoples and Torres Strait Islanders concerning the use of their lands, and the disadvantage of Aboriginal peoples and Torres Strait Islanders, involves ongoing trauma to both individuals and communities. The effects of these unrectified past injustices are exposed and exacerbated in some native title

[6] See the Committee on the Elimination of Racial Discrimination, *Decision 2(54) on Australia*, 18 March 1999, UN Doc CERD/C/54/Misc.40/Rev.2 at [6]-[11]; Committee on the Elimination of Racial Discrimination, *Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia*, 19 April 2000, UN Doc CERD/C/304/Add.101 at [8]-[9]; Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, 28 July 2000, CCPR/CO/69/AUS at [10]. See further: Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights and Equal Opportunity Commission, *Native Title Report 2000* at pp 149-164, 165.

[7] There is a narrow category of future acts which, if not otherwise provided for under the NTA, are invalid unless done by agreement under an Indigenous land use agreement: see s24OA of the NTA.

[8] NTA, preamble.

> matters. They manifest in circumstances such as the present case. In areas of Australia where Aboriginal people suffered the greatest dislocation, **the very process the NTA requires of proving who you are, who you are descended from, where your country is, the continuity of the traditional laws and customs of your people, translating your rights and responsibilities under those traditional laws and customs of your people into categories the common law of Australia will recognise, and negotiating with multiple others the recognition of those rights and interests which your people have held for millennia, can be exhausting, debilitating and re-traumatising**. It can exacerbate the splintering effects of the dispossession of people. It can re-open old wounds. It can generate and reinforce community dysfunction. These are unintended consequences. They do not always arise. The process under the NTA can be empowering and, to some extent, can ameliorate and lighten the burden of the past. But **the process can also magnify the harm done by the very past injustices the NTA seeks to redress**. When we see this evidence of community and individual pain, this anguish, this grief, particularly when manifested as community discord, we should know and understand that we are seeing the effects of the past in the present. We should acknowledge this pain and the sources from which it springs.
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> (Emphasis added).

16. In the KLC's experience, Justice Jagot's comments reflect many native title holders' experiences of the future acts regime, examples of which are included in this submission.

The regime is not fit for purpose

17. The future acts regime is no longer fit for purpose in terms of the types of future acts it regulates, the manner in which it regulates, and the assumptions it makes about the impact of those types of acts on native title holders. The future acts regime is structured so that procedural rights of native holders are determined by reference to land uses familiar to government and industry in the 1990s. This is a structural flaw, as it cannot adequately account for new industries and land uses which affect native title rights and interests in significantly different ways to activities such as mining, public works, and pastoralism. It is also built on an erroneous assumption that the level of impact from a future act on native title holders can be determined by reference to factors such as the extent of ground disturbance from the act.

18. As such, the procedural and substantive rights afforded to native title parties under the future acts regime are inadequate in respect of the particular industries and land uses dealt with in Part 2 Division 3 of the NTA, and not appropriate for contemporary and developing industries, such as renewable energy projects. Renewable energy projects differ significantly in some respects from pastoralism, public works, and traditional resource extraction projects. Points of difference include:

    a. the speed of Australia's renewable energy transition in the context of the biggest and fastest global economic transformation since the industrial revolution;

    b. the massive scale of renewable energy infrastructure required on Indigenous land for Australia to meet its legislated net zero targets; and

    c. the lifecycle of a renewable energy project spanning multiple generations given the potential permanent nature of such projects.

Resourcing and capacity as barriers to meaningful participation

Inadequate funding of native title parties

19. The under-resourcing of native title parties, in particular PBCs, is a fundamental issue that undermines the ability of native title holders to engage in the future acts regime on an equitable basis and to build organisational and economic capacity. Chronic underfunding of PBCs and NTRBs/SPs has been a permanent feature of the native title system for the past 30 years, and will continue to be an obstacle to achieving the objectives of the NTA as a whole, including in relation to future acts.

20. The NTA requires PBCs to be established to hold or manage the native title rights and interests on trust or as agent for the native title holders. Native title holders are required to act through the PBC as a matter of law, and PBCs have broad responsibilities and functions in relation to future acts.[9] Despite this, no funding is provided for PBCs to participate in the future acts process, other than PBC Basic Support funding, or that part of the native title grant that the NTRB/SPs can prioritise to future acts in the exercise of its prioritisation responsibilities. This funding is subject to the uncertainties in the budget cycle and changes in departmental funding from year to year.

21. Many Kimberley PBCs only receive PBC Basic Support funding through the National Indigenous Australians Agency (**NIAA**). This funding is limited to assisting PBCs to meet their basic administrative and compliance requirements under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (**CATSI Act**) and averages at around $70,000 per PBC per year. In the KLC's experience, this funding in most cases goes entirely towards the cost of holding the required minimum number of directors' meetings and an Annual General Meeting for the PBC each year. PBCs are not allowed to use their Basic Support funding for economic development or employing staff.

22. NIAA also offers PBC Capacity Building grant funding to assist PBCs to "grow organisational capacity and generate economic benefits from their land".[10] While the KLC supports capacity-building funding for PBCs, the reality is that there is a gap between the level of support available through Basic Support Funding and the level of capacity that a PBC needs to be able to apply for, manage and administer a PBC Capacity Building grant. The KLC is also not currently adequately resourced to provide this service to PBCs through PBC Basic Support Funding or the native title grant, given the obligations on NTRB/SPs to prioritise allocation of funding. As a result, to the KLC's knowledge, most Kimberley PBCs have not accessed NIAA's PBC Capacity Building funding.

23. As a result of the inadequate funding of PBCs, many PBCs in the Kimberley have no staff and no office or office equipment. These PBCs are heavily dependent on the administrative support of the KLC as the NTRB and on volunteerism of directors, cultural advisors, and other key members of the native title holding group. The KLC often serves as a postal and business address for these PBCs, manages their corporate governance compliance requirements as agent, and organises their meetings. The KLC supplements the PBC Basic Support funding, not charging PBCs for the full extent of the support it

[9] See, eg, regs 6, 7, 8 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) (**PBC Regulations**); definition of native title party in s29 of the NTA; provisions for the notification and comments of PBCs in ss24GB, 24GD, 24GE, 24HA, 24ID, 24JB.

[10] NIAA, *Capacity Building for Native Title Corporations* (Web Page) <https://www.niaa.gov.au/our-work/environment-and-land/capacity-building-native-title-corporations>.

provides to them on basic compliance.

24. Directors of PBCs are often not paid for their time in attending PBC meetings and attending to future acts, and many have other commitments outside of their role as a director, including work and caregiving responsibilities. For PBCs with no staff, dealing with future acts and engaging with native title holders falls entirely on to the (often unpaid) directors – a situation that is unsustainable, inefficient, and unfair.

25. The chronic underfunding of PBCs and increased burden of responsibilities and expectations on PBCs have been highlighted by Indigenous stakeholders and parliamentary committees through numerous previous inquiries and government consultation processes, and was the subject of a specific recommendation of the Joint Standing Committee on Northern Australia in its *A Way Forward* report.[11] Most recently, in 2022 the Joint Standing Committee on Northern Australia in its *The Engagement of Traditional Owners in the Economic Development of Northern Australia* report commented:

> With representative bodies operating in a 'post-determination' environment, the burden of responsibilities and expectations on Aboriginal and Torres Strait Islander organisations are very high. As well as discharging statutory responsibilities, organisations must resolve tenure issues, manage decision-making processes, consultations with communities and traditional owners, and agreements with development proponents, while also promoting or directly undertaking economic enterprises.
>
> ...
>
> The Committee considers that the financial and institutional strengthening support provided by governments to Aboriginal and Torres Strait Islanders bodies at all levels is insufficient. This especially applies to PBCs and NTRB/SPs, many of which struggle to fulfil their functions with minimal or no income. The financial needs of representative bodies were not properly anticipated at the time of inception and the issue has been neglected by successive Commonwealth and state/territory governments since then.[12]

26. PBCs have permanent structural roles under the NTA and legal system and carry an increasing burden of expectations and responsibilities, and will continue to do so long into the future. PBCs must be provided with ongoing, secure core funding and support that is free from uncertainties in changes in government policy and budget cycles. The support should be tailored to the needs of PBCs, which may include support and training for agreement-making, legislation, governance, economic development, and financial and business management.

Meeting costs and time pressure

27. Meetings in the Kimberley tend to be significantly more expensive than in other less remote locations because of logistics, travel requirements, limitations on telecommunications infrastructure and capacity,

[11] Recommendation 7 of the Joint Standing Committee on Northern Australia, Parliament of Australia, *A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge* (Report, October 2021) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Northern_Australia_46P/CavesatJuukanGorge/Report>.

[12] Joint Standing Committee on Northern Australia, Parliament of Australia, *The engagement of traditional owners in the economic development of northern Australia* (Report, January 2022), 40.

and the increased cost of products and services. Native title holding groups can also be very large – some in the Kimberley are made up of over 800 people – living in various locations across Australia, with busy lives and varying levels of understanding of the NTA and Australian legal system, and with other day-to-day commitments.

28. The high cost of meetings in remote regions such as in the Kimberley and the time required in organising and attending them limits the ability of native title parties to meaningfully engage on future acts. Legal representatives will often have limited time and opportunity to obtain instructions from native title parties on future acts due to the limited amount of time for meetings, and competing time pressures on directors and PBCs. It also hinders the ability of PBCs to effectively consult with and obtain the consent of native title holders in regards to future acts – that is, to spend the time for them to understand the proposed future act and its potential impact, the future act rights that the native title holders have, and to decide how to respond.

29. Future acts can take up a significant amount of time and resources for PBCs, often at the expense of other business such as projects aimed at exercising and enjoying hard-won native title rights and interests, such as helping native title holders access their Country, and projects aimed at building capacity and economic development. PBC directors have expressed frustration to the KLC about having to spend a majority of their limited time in meetings on responding to and dealing with future acts, a majority of which relate to third-parties seeking an interest on native title land in order to obtain a commercial benefit for themselves (e.g. mining companies, pastoralists, tourism operators).

Reduced capacity to engage on future acts

30. The lack of resourcing of native title parties is not just about a lack of time and money – there is also a lack of resources to native title parties in terms of understanding of the future acts regime, and access to legal advice and representation, and other expert advice, needed to be able to make properly informed decisions about future acts. This affects the quality of agreement-making – see further below at [54]-[84].

31. Where a native title party is unable to engage with the future acts process due to a lack of resources and capacity, the act and associated activities will, in the vast majority of cases,[13] take place on their land regardless of their views or capacity to put these views forward to proponents and governments.

32. In some cases, the native title party does not receive or respond to the notice of the government's intention to do the future act. In the KLC's experience, it is common for PBCs to either not receive, receive too late, or not have the capacity to respond within a statutory timeframe to a future act notice, due to a lack of resources and capacity. For PBCs located in remote or regional places, postal services are less reliable than in larger towns and cities, and PBCs have reported not receiving future act notices in the post at all. The KLC's Legal Secretary is often a recommended contact person for PBCs for this reason.

33. If the native title party misses a statutory deadline for responding to a future act notice, many categories of future acts can validly be done without further consideration of native title, with potentially devastating consequences to native title holders. This is in stark contrast to the lack of consequences

[13] There is a narrow category of future acts which, if not otherwise provided for under the NTA, are invalid unless done by agreement under an indigenous land use agreement: see s24OA of the NTA.

where the government fails to properly notify the native title party or afford the native title party its procedural rights for certain categories of future acts under the NTA.[14]

Case study – A section 29 notice missed

The State of Western Australia issued a section 29 notice to a Kimberley PBC with the expedited procedure statement as per s29(7) of the NTA, indicating its intention to grant an exploration licence over native title lands. The native title holders hold exclusive possession native title rights over the area of the proposed licence, which also overlapped an Aboriginal Lands Trust Reserve and an Indigenous Protected Area where Indigenous rangers conducted activities to protect and care for the land. Most significantly, the area of the proposed licence and surrounds is an area of great cultural significance and sensitivity to the native title holders, with sites connected to ancient Dreaming stories and others that are remembered and mourned as sites of historical colonial violence against the ancestors of native title holders.

Unfortunately, the relevant PBC missed the deadline to object to the expedited procedure due to limited resources and staff turnover. Between the time the notice was issued and the objection due date, the positions of CEO and Contact Person of the PBC were vacant, and the PBC struggled to find suitable personnel to fulfil this role.

As a result of missing the deadline, the tenement can be validly granted under the NTA: ss28(1)(c), 32(2). This has caused enormous stress to the native title holders, who have raised serious concerns as to the potential impacts of exploration in this area.

Limited resourcing of NTRB/SPs

34. NTRB/SPs such as the KLC are also constrained by resourcing and capacity issues that limit what support they can provide to native title parties on future acts. Further, the need to prioritise the allocation of resources to future acts in order to protect native title rights and interests from harm and interference means NTRB/SPs are often required to de-prioritise funding and resources from other, more proactive measures to enhance the enjoyment of or access to native title rights.

35. In relation to future acts specifically, the KLC expends considerable resources in dealing with and providing legal advice and representation to native title parties. The KLC resources this work primarily through its native title grant funding in line with its prioritisation responsibilities. However, this amount is inadequate to fully support native title parties to deal with all future acts, and a large portion of the funding that is allocated to responding to future acts goes to dealing with the expedited procedure (see further below at [96]-[120]) and the heavy administrative burden on native title parties of dealing with and responding to notices, as described above. There is little, if any, resources available to assist native title parties with substantive negotiations and agreement-making – see further below at [54]-[84].

36. As stated earlier, more than half of Kimberley PBCs are currently unstaffed and receive only PBC Basic Support funding, and need additional dedicated support to deal with future acts and basic compliance, and to build their capacity over time. As the NTRB for the region, the KLC is best placed to provide this

[14] Future acts covered by subdivisions F-N of Part 2, Div 3 of the NTA will not be rendered invalid by any non-compliance with their procedural requirements: see *BHP Billiton Nickel West Pty Ltd v KN (Deceased) (Tijwarl and Tijwarl #2)* (2018) FCR 521.

transitional support and should be resourced appropriately to do so.

Section 60AB of the NTA

37. Section 60AB of the NTA provides that PBCs may charge a person (other than a native title holder) for the costs incurred by the PBC in performing certain functions associated with a future act agreement under s31(1)(b) of the NTA, alternative state or territory provisions, an ILUA, or the limited category of future acts provided for in the regulations. However, s60AB does not apply to costs incurred in dealing with future act determination applications and the expedited procedure inquires.[15] The costs of these activities can be significant – see further below at [30115]-[118].

38. Further, this right to charge fees for costs incurred is not linked to any obligation on the proponent or the government party to pay or a consequence for the future act processes (such as suspension or freezing of time frames) of a failure to pay. While the NTA provides for PBCs to operate on a cost-recovery basis, the practical reality is that where a proponent or government party does not pay there is no recourse for the PBC.[16]

39. Further difficulties presented by a cost-recovery model include that it does not allow for long-term planning and organisational sustainability. The notion that PBCs can operate solely or primarily on a cost-recovery basis ignores the difficulties presented by such a reactive and uncertain model, including that it makes it difficult to plan, resource and maintain organisational stability, further constraining PBCs.

40. The provisions are therefore uncertain and largely ineffective in easing the significant burden on native title parties of responding to third party activities on native title lands.

41. It is unacceptable for native title parties to continue to bear the risk of not being able to participate in the future act processes due to lack of resources, particularly where a native title party's participation is driven by the commercial interests of a third party. The native title party's costs of performing those functions should in all cases be covered by the government party or internalised to the commercial party as part of the cost of doing business.

Pressure from proponents

42. Proponents often put pressure on native title parties and individual native title holders and PBC directors to progress and provide support for the proponent's project, and many proponents have a poor understanding of the proper process to follow for engaging with native title parties and the limited resources of these parties.

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[15] See s60AB(5) of the NTA and an opinion of the Registrar of Aboriginal and Torres Strait Island Corporations published by ORIC on 6 January 2023 which states that "*an RNTBC cannot rely on section 60AB to charge fees for activities it undertakes in response to receiving a section 29 notice in circumstances where that notice states that the act it relates to attracts the expedited procedure*".

[16] Note s60AC of the NTA makes provision for a person or organisation that has been charged a fee by a PBC to seek an opinion from the Registrar of Indigenous Corporations as to whether the fee is one that the PBC may charge. The person seeking the opinion from the Registrar is not required to pay the PBC's fee while the review is being undertaken: reg 26 of the PBC Regulations. If the Registrar is ultimately of the opinion that the fee is not one that the PBC may charge, the PBC is required to withdraw the fee: s60AC(3), NTA.

43. A lot of time is spent by PBCs and the KLC in attempting to explain and engage proponents (including governments) on the process. These attempts are often met with the expectation that PBCs can and should deal with the project or request quickly, and proponents can get frustrated with native title holders when their timelines are not met. The KLC and native title holders are often held responsible by proponents for delays caused by under-resourcing, the inefficiencies of the future acts regime, and regulatory requirements on PBCs, such as the requirement for PBCs to consult with and obtain the consent of affected native title holders before agreeing to acts that affect native title.[17]

44. In some cases, proponents approach individual PBC directors or native title holders to talk about or progress their project approvals, before they have had the opportunity to be briefed or receive legal advice on a proposal. This can lead to stress and misunderstandings in communities about what is happening on their Country and what, if anything, they can do to protect Country. Individual native title holders can also be pressured by proponents to sign approval documentation, without fully knowing what they are signing.

45. Further, the flexibility proponents have in the tenement application process under the *Mining Act 1978* (WA) in Western Australia can waste native title party resources and unnecessarily exacerbate and increase the trauma to native title holders cause by the future act process. Often proponents will apply for a tenement which will proceed through the various government approvals and be notified under the NTA. The native title party will spend its own resources on considering and responding to the notice, negotiating with the proponent, and objecting in the NNTT. Then, the proponent, with no notice, will withdraw the tenement application. Where this happens in large numbers, it can be very distressing, timewasting, and an enormous waste of public money (noting that government parties, native title parties, and the NNTT are all publicly funded).

[17] PBC Regulations, reg 8.

Case study – a heavy burden on native title parties

FMG applied for approximately 110 exploration licences in the Kimberley area between August 2021 and January 2022, as part of a broader strategy that marked out large swathes of land in WA covering an area larger than Tasmania.[18] In the same time period, the State of Western Australia notified 92 of these tenements with the expedited procedure statement. The KLC on behalf of the seven Kimberley native title parties notified lodged objections to all 92 expedited procedure statements.

For the last 3 years, the KLC and native title parties have expended considerable resources in negotiating with FMG and in pursuing the objections to the expedited procedure statement in the NNTT. FMG has slowly been withdrawing its applications over this time period, and as of mid-February 2025, it had withdrawn approximately 90 of the 110 original applications.

Given the very large area covered by the 110 tenement applications, and the progressive withdrawal of the applications over the past 12 months, a reasonable conclusion to draw from this is that FMG was 'land banking' the areas covered by the applications.[19] While this may be permissible under processes established by the *Mining Act 1978* (WA), the significant impact on native title holders, PBCs, NTRB/SPs, and the workload of the NNTT is unacceptable and mechanisms should be introduced to the future acts process to reduce the harm suffered by native title holders and wastage of public resources caused by these practices.

Regulatory burden

46. The ability of PBCs to engage meaningfully on future acts is further impeded by the heavy regulatory burden on PBCs and sweep of statutory requirements that PBCs are required to meet with their limited resources. In addition to extensive obligations under the Native Title Act, PBCs must comply with other statutory obligations, including under the CATSI Act, the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) (**PBC Regulations**), and the *Native Title (Indigenous Land Use Agreements) Regulations 1999* (Cth).

47. The PBC Regulations require that PBCs consult with and obtain the consent of the native title holders before making a "native title decision", a term which is defined very broadly to include "to do, or to agree to, any act that would otherwise affect the native title rights or interests" of the native title holders.[20] This requirement is inflexible, and compliance with it can be expensive, time consuming, impractical, and uncommercial if the decision does not relate to an economically significant proposal. More flexible and practical options for making native title decisions (or, at least, low level decisions) should be investigated. In addition, all ILUAs are captured by the definition of high-level decision. Given the breadth in the scope of subject matter which ILUAs can address, consideration should be given to whether the definition of 'native title decision' should focus on the subject matter of the decision rather than the form in which it is enshrined.

[18] See Peter de Kruijff, 'Andrew Forrest marks land mass the size of Portugal in Western Australia for 'exploration'', *Sydney Morning Herald* (online, 16 September 2021) <https://www.smh.com.au/business/companies/andrew-forrest-marks-land-mass-the-size-of-portugal-in-western-australia-for-exploration-20210818-p58jms.html>.
[19] Ibid. As Mr Peter de Kruijff explains, by submitting exploration applications, FMG effectively locks out other proponents from pursuing mining tenements over the same areas.
[20] PBC Regulations, reg 3.

48. The lack of appropriate resourcing for PBCs to meet basic compliance requirements under the CATSI Act and PBC Regulations also raises questions in general about the appropriateness of the imposition of corporate governance principles and potential civil and criminal liabilities on corporations which exist, in many cases, only because the NTA requires it in order for a determination recognising native title to take effect.

The rise of unethical and/or inexperienced service providers

49. In circumstances where the NTRB cannot assist or where PBCs do not wish to engage the NTRB, PBCs may be left without legal representation or have to seek and engage private law firms. In general, there is a limited pool of private law firms that specialise in native title, and access to these specialists is even more difficult in remote areas.

50. The KLC has seen the rise in the Kimberley of persons seeking to fill this gap who are inexperienced in native title law and practice. The KLC is also aware of costs arrangements with private law firms and, in the case of prospective compensation claims, litigation funders, which have the potential to create a debt the PBCs can never hope to repay except by compromising on settlement agreement terms.

51. In some cases, these resourcing and capacity issues are driving native title parties to enter unsatisfactory arrangements with service providers. For example, the KLC is aware of one example of an arrangement between a Kimberley PBC and a law firm which provides for 60 per cent of all income received by the PBC (including from future act agreements which the law firm is engaged to negotiate) to be paid directly to the law firm.

52. This situation is problematic for a number of reasons, but most pertinently it demonstrates how under-resourced PBCs can be forced to divert a significant portion of the economic benefits that they are able to negotiate to third party service providers to be able to engage in the system, or even compromise on outcomes under agreements in order to secure payments to defray an existing debt. Of course, this deprives the PBC and the native title holders of those benefits, which are instead received by non-Aboriginal commercial enterprises.

53. Another issue that KLC has observed is a lack of effective regulation of these service providers, who access and expend public money through PBCs. In one case, a company with the name “Legal” in its title purported to act for a native title group and conducted themselves in a way that the KLC considered breached standards of ethical legal practice and professional conduct. The Western Australian Legal Practice Board declined to take any action on the matter because the company was not a law firm and its staff were not lawyers.

Agreement-making

54. The KLC broadly supports the principle of agreement-making between native title holders and third parties accessing native title lands. Agreement-making has the potential to embody FPIC and deliver substantial economic development opportunities to native title holders. However, for this potential to be realised, it is imperative that current issues with the agreement-making processes under the NTA be rectified.

55. This is particularly important in the context of the transition to a 'net zero' economy, which "will be among the largest and fastest economic transformations in history".[21] Emerging industries such as carbon, biodiversity and nature repair activities, and renewable energy projects offer significant opportunities for native title holders for more sustainable land management, climate change mitigation, economic development, and self-determination. However, without proper consultation and appropriate checks and balances that ensure the principles of FPIC, there is a risk of these projects contributing to the disempowerment of Aboriginal people.

56. The increase in critical minerals exploration also creates significant opportunities for Kimberley native title holders in the race to 'net zero'. Australia has some of the world's largest reserves of critical minerals.[22] The Australian Government has included critical minerals as a key area for investment through its $22.7 billion Future Made in Australia plan[23] and has developed the Critical Minerals Strategy 2023-2030 which aims to grow the sector.[24] The Northern Australia Infrastructure Facility (**NAIF**) Investment Mandate now includes realizing the Critical Minerals Strategy 2023-2030 as one of five priorities with which NAIF-supported projects must align, indicating that critical minerals projects are going to feature strongly across northern Australia in the future.[25]

57. For the Kimberley, this context provides even further urgency to the need to strengthen agreement-making procedures under the NTA. The KLC is concerned that unless reforms to the future acts regime strengthen the bargaining position of native title parties, Kimberley native title parties will be locked out of having a say in the extraction of these minerals from their traditional lands as part of the push towards net zero and, consequently, from participating in decisions about how those activities will impact their rights, Country, and cultural heritage, and from sharing in the wealth that may flow from their land.

Pressure to agree to projects – a lack of true FPIC

58. Current agreement-making processes under the NTA do not meet the best-practice requirements of FPIC under UNDRIP, and rely too heavily on the goodwill of the proponent and the government party. While some proponents do attempt to engage meaningfully with native title parties, the KLC has observed many other proponents who have made public statements endorsing and committing to FPIC,

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[21] Net Zero Australia, *Mobilisation report: How to make net zero happen* (Report, 12 July 2023) at page 12, available at <https://www.netzeroaustralia.net.au/mobilisation-report/>.
[22] Commonwealth of Australia, *Critical Minerals Strategy 2023-2030* (Report, June 2023) at page 6, available at <https://www.industry.gov.au/sites/default/files/2023-06/critical-minerals-strategy-2023-2030.pdf> (***Critical Minerals Strategy***).
[23] Commonwealth of Australia, 'Future Made in Australia' (Web Page) <https://futuremadeinaustralia.gov.au/#plan>.
[24] *Critical Minerals Strategy* at page 4.
[25] *Northern Australia Infrastructure Facility Investment Mandate Direction 2023* (Cth), Schedule 2.

but whose conduct in negotiations with native title parties falls far short of this standard. Strong legislative protections and enforcement of FPIC are therefore required.

59. Native title parties face various pressures to agree to projects. For future acts subject to the right to negotiate, including those involving a right to mine, native title parties do not have a right to veto – a right to ultimately say 'no' to projects and activities occurring on their traditional lands and waters. Native title parties know that if they do not reach agreement with a proponent and a matter goes to the NNTT for determination, precedent overwhelmingly indicates that the NNTT will find in favour of the proponent, and the native title party will be left with no agreement, no benefits, and no protections for their native title rights and cultural heritage.

60. As the KLC noted in its UNDRIP Submission, this imposes structural coercion on native title parties to reach agreement with proponents. This legislative arrangement and administrative outcome is significantly below the FPIC standards set by the UNDRIP, specifically Articles 11, 12, 31 and 32. As the KLC concluded in its Juukan Gorge Submission:

> The KLC submits that the operation of the right to negotiate provisions effects a form of legislative force or coercion on native title parties when they negotiate agreements about activities which will impact their cultural heritage. While consent may appear to be given, it should not be assumed that it is freely given. For this reason, any inquiry into the adequacy of heritage protection laws should take into account the interaction between these laws and the NTA, in particular the future act provisions.[26]

61. See further below the discussion in relation to the limitations of the right to negotiate at [85]-[94], and future act determinations at [121]-[125].

Native title as an after-thought

62. For proponents (including government proponents), the future acts process under the NTA is usually the final step in an often-lengthy process to undertake a large commercial project or other undertaking.

63. Engagement with native title holders is often an afterthought, and proponents in ILUA and s31 negotiations frequently come to the table with a fully developed project plan, a tight time period for approval, and predetermined amount of compensation that they have budgeted for. Some PBCs refer to this as 'rubber stamping' as they feel that they have limited leverage or room to negotiate. This is particularly evident where the project is a public work or is seen to be of benefit to the broader community.

64. Proponents are often unaware of the steps that need to happen 'behind the scenes' in a PBC, including the statutory requirements for consultation and consent. For example, some proponents have not been aware that there is a distinction between the common law holders of native title and the membership of a PBC, or between a members' meeting and a common law holders' meeting, or that decisions classified as "native title decisions" must be made in compliance with the requirements of the PBC Regulations. As a result, reaching an agreement with proponents to fund the requirements for consultation and consent can be challenging, and often consumes significant resources of NTRB/SPs.

[26] Juukan Gorge Submission at [18].

65. Further, proponents often have commercial deadlines for obtaining the interest (such as a mining lease) for reasons such as raising capital or reporting back to investors or shareholders, that are unrealistic in light of the time required to properly negotiate and reach agreement with native title parties, and are set without taking these steps into account. The KLC has witnessed proponents putting significant pressure on individual native title holders and PBCs to agree to the grant of the interest as a result. Native title holders far too often provide convenient scapegoats for proponents to blame when their projects do not go to plan.

Lack of funding for negotiations, including for independent expert advice, consultation and consent

66. A native title party cannot reasonably engage in negotiations for agreement-making until it is properly resourced to make itself sufficiently informed to make a decision, including through independent legal representation, expert advice, and culturally appropriate engagement with native title holders.

67. For this reason, when supporting a native title party in negotiations, the KLC often seeks to first negotiate an agreement for the proponent to cover the native title party's costs in participating in the agreement-making process. There is often substantial push-back from proponents in relation to this, and this step can take up significant time and resources that are usually not recovered from the proponent, and are therefore met from the native title grant.

68. The KLC's recent experience in agreement-making in relation to mining projects is that considerable resources and expertise is required for native title parties to come to an informed position as to the social, environmental and heritage risks of, as well as the economic opportunities provided by, such projects (including what would constitute a fair monetary benefit for native title holders). This might include, for example, technical expert advice on assessing the value of the project or its impacts on the environment, or expert advice and support to set up a trust for the native title holders' benefits under the agreement.

69. The KLC does not have the necessary expertise in-house to provide such advice and is not appropriately funded in that regard. It is also expertise that the KLC increasingly competes with the private sector to obtain, with many experts being conflicted or priced out.

70. Further, the Issues Paper notes that some native title parties encounter difficulties in decision-making in relation to agreements, which can create uncertainty for proponents and governments and increase the risk of the proponent seeking an arbitrated outcome and the native title party missing out on benefits. The KLC's view is that these difficulties are often a result of native title parties not having the resources to be able to properly consult and engage with native title holders about the agreement, and not having sufficient time to do so due to statutory deadlines and time pressures from proponents and governments. Native title parties cannot properly consult with native title holders without adequate upfront funding for this purpose, which native title parties currently lack. As noted above at [21], many Kimberley PBCs receive only PBC Basic Support funding, which barely covers their basic governance requirements.

71. Without adequate resourcing and expert advice, native title holders in the Kimberley – and indeed across Australia – are unlikely to be in a position to make fully informed decisions in relation to proposed projects and the effect of those projects on their native title rights.

72. The future acts regime is silent as to this resourcing imbalance.

73. Some proponents, particularly those that are large companies, may decide to resource native title holders to engage necessary specialist advice, and there have been several examples of this occurring in the Kimberley. However, such payments as part of negotiations are *ex gratia*. Nothing in the future acts regime compels project proponents to ensure that native title holders are appropriately resourced so there is an 'equality of arms' in agreement-making processes.

74. Any reforms to the future acts regime must adequately address this resourcing imbalance by ensuring sufficient funding required for native title holders to engage in agreement-making processes is available, and proponents are required to fully internalise the costs of their projects.

Best-practice agreement-making

A clear and unequivocal requirement for free, prior and informed consent

75. The incorporation of FPIC is critical to a best-practice agreement-making regime. To reflect the FPIC standard set in UNDRIP, the future acts regime must be reformed to include a requirement that future acts cannot be done without the informed consent of the native title party. The need for such a requirement has been stated repeatedly by stakeholders and parliamentary committees, including by the Joint Standing Committee on Northern Australia in its final report resulting from the inquiry into the destruction of 46,000-year-old caves at Juukan Gorge.[27]

76. The KLC is of the strong view that absent the implementation of FPIC in full as part of urgently needed reforms to the future acts regime, any reforms will only 'tinker around the edges' and do little to ensure native title parties are on equal footing with governments and proponents when responding to future acts and making agreements.

77. The KLC supports the industry standards regarding FPIC that have been set out in the Dhawura Ngilan Business and Investor Guides published by the First Nations Heritage Protection Alliance, which have been supported by the Minerals Council of Australia in its embracement of both 'relationships *and regulation*' in heritage protection.[28] As stated in the Guide:

> By embedding a hard requirement for the organisation to obtain the FPIC of relevant First Nations stakeholders, companies can demonstrate respect for First Nations rights, set a strong foundation for meaningful and mutually beneficial partnerships, and avoid risks associated with financing, operations, social licence, and reputation.[29]

78. Whilst the Dhawura Ngilan Business and Investor Guides focus on the related issue of heritage protection rather than native title, the KLC considers the Guides as examples of FPIC in practice which

[27] Joint Standing Committee on Northern Australia, Parliament of Australia, *A Way Forward: final report into the destruction of Indigenous heritage sites at Juukan Gorge* (Report, October 2021) at p 201.
[28] Media Release of Tania Constable, the CEO of the Minerals Council of Australia, dated 19 March 2024, 'MCA Welcomes the Launch of Dhawura Ngilan Business and Investor Guides', available at: <https://minerals.org.au/resources/mca-welcomes-the-launch-of-dhawura-ngilan-business-and-investor-guides/>.
[29] Dhawura Ngilan Business and Investor Initiative, *A Guide for Businesses and Investors, Dhawura Ngilan (Remembering Country): A Vision for Aboriginal and Torres Strait Islander Heritage prepared by Terri Janke and Company Pty Ltd* (Report, 2024), available at <https://culturalheritage.org.au/wp-content/uploads/2024/03/DNBII_BusinessesInvestorsGuide.pdf>.

could be adopted and adapted in reforms to the future acts regime.

Kimberley precedents and critical terms

79. Notwithstanding the imbalance in the NTA and in resourcing that generally exists in favour of proponents and governments, Kimberley Aboriginal people have developed strong regional standards for agreement-making over many years in the context of extractive and other developments in the region. These standards are underpinned by principles that are consistent with international frameworks and create a sophisticated and nuanced interface between traditional decision-making about Country and dominant regulatory and commercial drivers for economic development. Kimberley Aboriginal people have successfully used these principles to guide developments that impact their Country.

80. A ready example of this is the KLC Heritage Protection Agreement (**HPA**), which puts Traditional Owners in control of decisions about activities on their Country, without undermining or preventing third-party activities on country. The HPA, for example, includes a clause that the proponent will not apply for a section 18 approval under the *Aboriginal Heritage Act 1972* (WA) without the consent of the relevant PBC or native title claim group.[30] Over 300 companies with mineral exploration tenements in the Kimberly have signed up to the KLC HPA.

81. Best-practice agreement-making requires the parties to go beyond minimum legislative standards and ensure agreement-making encompasses appropriate resources, timeframes, negotiation processes and the inclusion of critical terms in all agreements (including triggers for the agreements to be reviewed over the life of the projects).

82. Critical terms include the application of the non-extinguishment principle, mechanisms to address co-existing rights to ensure native title rights can continue to be enjoyed to the fullest extent possible, robust environmental and cultural heritage protection and management provisions, appropriate benefits (whether monetary, non-monetary or both), and properly resourced monitoring and implementation processes, including review mechanisms (i.e. provision for periodic reviews and avenues to vary the agreement as needed over time).

Strong, better resourced regional organisations

83. Professor Ciaran O'Faircheallaigh has extensively researched agreement-making in the native title context. In his analysis of outcomes from negotiated agreements in Australia and Canada,[31] Professor O'Faircheallaigh finds a high degree of variability in negotiated outcomes even within the same legal regime. He concludes that the "most convincing explanation for variable outcomes from negotiations relates to Indigenous political organisation at both local and regional levels, as indicated by the fact that positive negotiated outcomes are consistently associated with strong political organisations and poor outcomes with its absence".[32] He explains:

[30] See *Aboriginal Heritage Act 1972* (WA) s18. Section 18 allows proponents to seek consent from the Minister to undertake activities that would likely destroy or damage an Aboriginal site and therefore otherwise be an offence under section 17 of that Act.
[31] Ciaran O'Faircheallaigh, 'Explaining outcomes from negotiated agreements in Australia and Canada' (2021) 70 *Resources Policy* 101922.
[32] Ibid at [28].

> Where Indigenous landowner groups are linked to strong regional political organisations they are able to gain access to financial and technical resources to support negotiations, including negotiating with developers and the State; they can make credible threats of direct political action where company or state negotiators prove recalcitrant; and can develop a strategic approach to using environmental impact legislation, administrative law, and mining law. They can also develop regional strategies to build positive precedents from one agreement to another.[33]

84. The take-away from Professor O'Faircheallaigh's research is that strong regional and representative organisations create better outcomes for native title parties, and in the long run more certainty for industry. In line with these findings, best-practice agreement-making under the NTA should ensure NTRB/SPs have dedicated resourcing to support native title parties in negotiations. This is in addition to resourcing for native title parties themselves for agreement-making. Guaranteed, ongoing resourcing for this purpose would allow native title parties to participate in negotiations on an equal footing with proponents and enable NTRB/SPs such as the KLC to consistently support native title parties in agreement-making, whether through direct negotiation support, access to precedents and expert advice, or regional advocacy.

Case study – ILUAs establishing Kimberley Marine Parks

A positive example of agreement-making is the successful negotiation of ILUAs establishing the Bardi Jawi Garra, Mayala and Maiyalam Marine Parks, which cover more than 600,000 hectares of the Buccaneer Archipelago in the Kimberley.

The thorough and well-resourced negotiation process provided for flexibility and sufficient timeframes for consultations with native title holders, and for the genuine engagement of the native title holders in the co-design of the Marine Parks. The KLC was heavily involved throughout the negotiation and co-design process, and in supporting the development and uptake of healthy country plans into the process and the mapping of cultural zones and environmental and cultural values. Throughout the co-design process there were genuine partnerships and respect between native title holders and representatives from the State, with native title holders listened to and their feedback taken on-board.

The result of this process was the successful authorisation of ILUAs with strong terms and the establishment of Marine Parks that protect cultural heritage and marine life, while enabling recreational and commercial use of the areas in a sustainable way.

See further: Kimberley Land Council, 'KLC Celebrates the First Indigenous-led Design of State Marine Parks', <https://www.klc.org.au/klc-celebrates-the-first-indigenousled-design-of-state-marine-parks>.

[33] Ibid at p 5 (pdf).

The right to negotiate

85. The limitations on the right to negotiate identified in the Issues Paper and discussed elsewhere in this submission include:

    a. the lack of a right to veto;

    b. the threat of a future act determination that the act may be done, which wedges native title parties to accept unsatisfactory terms in agreements (as it is often better to have a poor agreement than no agreement at all);

    c. the limited six-month window, a time limit which is insufficient for native title parties and proponents to meaningfully negotiate, particularly in remote areas;

    d. the lack of adequate funding and resourcing for native title parties and the resulting power imbalance between native title parties, proponents and governments; and

    e. the ease with which the right to negotiate can be stripped away through the application of the expedited procedure.

86. These issues require examination and resolution, as the potential of the 'right to negotiate' as a meaningful right for native title parties is significantly undermined by these limitations. As noted above at [59]-[60], the consent of the native title party cannot be assumed to be freely given even where there are agreements in place, as native title parties are often wedged into making agreements under the threat of the act being done without any agreement at all.

87. Two further issues are discussed in this section – the role of the government party in s31 negotiations, and the limitations in the NTA on the ability of the NNTT to resolve specific issues in dispute.

The role of the government party in s31 negotiations

88. In Western Australia the State requires that the agreement of the native title party to the doing of the act for the purposes of s31 take the form of a pro forma deed between the State, proponent and native title party, known as a State Deed.[34] In the usual course of things, the proponent and the native title party will negotiate an ancillary agreement which will typically detail heritage protection protocols and monetary benefits (if any).

89. The State takes an inflexible approach to the terms of its State Deed. Its own policy states:

> The Minister for Mines and Petroleum (or his representative) will execute the Deed only in the form as supplied to the parties by the Department of Mines, Industry Regulation and Safety (DMIRS) and after execution by all other parties to the Deed. In exceptional circumstances, if the parties need to alter the basic document, then they should discuss the desired alterations with DMIRS before altering or signing the Deed.[35]

[34] See, Government of Western Australia, Department of Energy, Mines, Industry Regulation and Safety, *Native Title Act process* (Web Page) at <https://www.dmp.wa.gov.au/Minerals/Native-Title-Act-Process-5548.aspx>.
[35] Government of Western Australia, Department of Energy, Mines, Industry Regulation and Safety, *Guidelines for Completion of State Deed (Deed for Grant of Mining Tenement)* (Publication, undated) at <https://www.dmp.wa.gov.au/Documents/Minerals/Minerals-Guidelines_State_Deed.pdf>.

90. The KLC takes issue with certain terms in the State Deed, namely:

    a. Clause 10.1 requires that all parties bear their own costs in connection with the completion of the State Deed. This is unfeasible in circumstances where PBCs are required to consult with, and obtain the consent of, the native title holders in relation to the entering into a State Deed,[36] and yet do not have the resources to do so (see further above at [20], [47]).

    b. Clause 4 requires the native title party to contract out of its statutory right to seek compensation for the effect of the act on native title, in circumstances where the native title party is unable to ascertain whether compensation has been fully dealt with in the ancillary agreement because the full effect of the act on native title is not known, and the law on compensation remains uncertain.

91. The KLC queries whether the State's inflexible approach to the terms of its State Deed is consistent with the requirements on the State to negotiate in good faith under s31, and the objectives of the NTA more broadly.

92. The State's inflexible approach to the State Deed means that where the native title party pushes back on any of its terms, no agreement can be reached for the purposes of s31(1)(b) of the NTA and that act cannot be validly done pursuant to s28(1)(f) of the NTA. This is so even where there is an ancillary agreement in place between the proponent and the native title party in relation to the proposed act.

93. A common, but inefficient, workaround that the State often proposes is for the proponent to make a future act determination application under s35 of the NTA, so that the act may validly be done pursuant to s28(1)(g). See, for example, *Elderberry Resources Pty Ltd v Wanjina-Wunggurr (Native Title) Aboriginal Corporation RNTBC and Another* [2024] NNTTA 47 (28 June 2024). This workaround creates additional administrative burdens on the proponent and the native title party, as well as on the NNTT to consider and make a determination pursuant to s38 of the NTA.

The role of the NNTT

94. In the KLC's experience, mediation before the NNTT rarely successfully resolves issues between the parties, as the NNTT does not have the power to compel or enforce the parties to participate. The NNTT's limited scope in future act determinations means that any progress made in negotiations between a proponent and native title party is lost if full agreement cannot be reached. This means that mutually agreeable terms on important items like heritage protection, information sharing, land-access protocols, employment and other economic development opportunities for native title holders may be lost if a future act determination application is made because of an absence of agreement on unrelated terms such as, for example, the profit-sharing aspect of the agreement. The NNTT does not make determinations on conditions which address all matters typically covered by an ancillary agreement which means that, once a determination is made, there is no reason for the proponent to proceed with the agreement on the matters which were resolved in principle prior to the future act determination application being made.

[36] The entering of a State Deed, being an agreement under Subdivision P of the NTA, is a "native title decision" for the purposes of the PBC Regulations: see regs 3, 8 of the PBC Regulations.

95. Consideration should be given to a referral mechanism whereby the NNTT could be asked to determine specific issues that remain in dispute between the parties. Alternatively, parties could be required to submit agreed terms as part of the future act determination application, which would form a 'benchmark' agreement to be implemented if the NNTT determines that the future act can be done subject to conditions. Consideration should also be given to the removal of the prohibition on the NNTT to impose a profit-sharing condition in future act determinations, as well as mechanisms for merits review of the NNTT's decisions.

The expedited procedure

96. The expedited procedure causes harm to native title holders. Its application takes away the native title parties' right to negotiate, and places a significant burden on to the native title parties to regain it. This burden is felt by native title parties both in terms of the resources required to review the s29 notice and to make and pursue objections in the NNTT, as well as in terms of the emotional and psychological toll of having to repeatedly give evidence to merely reinstate a procedural right to defend their native title rights and interests.

97. The expedited procedure also undermines the ability of native title parties to negotiate effectively, and overall harms the relationship between native title holders, the State and proponents. The expedited procedure assumes that there will be some future acts that pass the 'freehold test' that ordinarily attract the right to negotiate under the NTA,[37] that nevertheless have no or very little impact on native title holders and their rights and interests. This is a falsehood that the KLC and native title parties have tried time and time again to counter. In many areas of the Kimberley, the very presence of strangers on Country without the permission of the native title holders can have significant consequences under traditional laws and customs, and bypassing the native title party can result in significant cultural loss as native title holders are prevented from meeting out cultural obligations to protect Country.

The government's "entirely unfettered" discretion to apply the expedited procedure

98. The inclusion of a statement in a s29 notice that the government party "considers the act is an act attracting the expedited procedure"[38] has the effect of removing the native title party's right to negotiate in respect of the proposed act, unless the native title party positively objects and successfully proves in the NNTT that the proposed act is not an act attracting the expedited procedure.

99. The Federal Court has previously held that the government party has an "entirely unfettered" discretion to either include or not include the expedited procedure statement in a s29 notice, without requiring the government party to first turn its mind to or form an opinion about whether the proposed act attracts the expedited procedure.[39]

100. This results in the undesirable and highly unusual outcome that the government is able to affect the rights of persons (i.e. the native title party's right to negotiate) by stating, in writing, that it considers something to be the case, without actually needing to consider it. The KLC is not aware of any examples where this is permitted under other legislation.

101. Prior to June 2022, the State of Western Australia applied a "blanket approach" to the inclusion of the expedited procedure statement in all s29 notices for particular types of tenements (namely prospecting licences, exploration licences, and retention leases granted under the *Mining Act 1978* (WA)). This meant that the State included the expedited procedure statement with no regard to the particularities of the land and waters concerned, and with no regard to any information given to the State by the native

[37] See Part 2, Div 3, Subdiv P of the NTA.
[38] Subsection s29(7) of the NTA.
[39] *Holt v Manzie* (2001) FCA 627; 114 FCR 282 at [25] (Olney J); see also *Cheinmora v Striker Resources* (1996) 142 ALR 21 (Carr J).

title party about the importance or use of the area – that is, without regard to the actual indicia of an act attracting the expedited procedure under s237.

102. While the State has adopted a new policy since June 2022, it may, of course, return to this old approach at any time, unless there are reforms to the NTA. The State's policy since June 2022 is focused on a 'risk assessment' test to determine those tenements that are at a 'high risk of a determination' by the NNTT that the expedited procedure does not apply. Instead of a fair and balanced assessment of the s237 criteria, the focus on 'risk' of a negative determination by the NNTT means that the State, in considering whether to include the expedited procedure statement, assesses what the native title party may or may not be able to actually 'prove' in the NNTT – a highly adversarial approach which positions the native title party on one side, and the State and the proponent on the other side, of a contested argument about whether or not an under-resourced party forced to respond to a third party activity is likely to be able to muster its scant resources and prove the likely effects of an act on its rights and interests, in circumstances where the State has chosen not to itself turn its mind to those effects.

103. Under the State's current policy, where the State assesses that there is a high risk of a negative determination in the NNTT (meaning a determination in favour of the native title party that the act does not attract the expedited procedure), the State will contact the native title party and the proponent to ascertain whether there is an agreement between them as to the doing of the act and activities under it. The State does this via 'case management letters' issued at the same time to both parties, which state two opposing positions:

    a. the letter to the proponent says that the State has "concluded that the application is 'at risk' of a determination (Adverse Finding) that it does not attract the expedited procedure" (emphasis added), and that "the Department expects that as the [proponent] you will support the Government Party in its assertion that the expedited procedure applies";

    b. contradictory to this, the letter to the native title party says that the State considers the act "does attract the expedited procedure" (emphasis added) and advises that an officer will "contact you in due course to facilitate the timely grant of the application". Understandably, receiving such a letter can be alarming to native title parties, who understand the State to mean what they say – i.e. that the State does, in fact, consider the act attracts the expedited procedure.

104. The KLC has queried this contradiction with the State a number of times. The State's motivations appear to be aimed at providing the proponent with procedural fairness prior to notifying the future act without the expedited procedure statement. The letter to the proponent also includes materials used by the State in its assessment, such as copies of relevant NNTT determinations and any information about sites registered on the WA's Aboriginal Heritage Inquiry System. The native title party receives no such 'heads up' from the State where the State assesses a low risk of a determination by the NNTT that the expedited procedure does not apply – rather the State proceeds directly to notify the act under s29 with the expedited procedure statement, without any forewarning or prior engagement of the native title party.

105. The KLC and three Kimberley PBCs have launched a legal challenge in the Federal Court to this interpretation of s29(7) and the State of Western Australia's current policy in relation to the expedited

procedure.[40] This legal challenge has already been very costly for the KLC, as the State has sought summary dismissal and the KLC has had to cover the costs of the three PBCs, as those PBCs do not have the resources to be able to bring the challenge themselves. However, if the application is successful it is likely to significantly reduce the public cost burden of the State's current approach to the expedited procedure. The Court is currently reserved in respect of three interlocutory applications heard in May 2024, including the State's application for summary dismissal.

Burden on the native title party

106. Once notified with the expedited procedure statement, the native title party (and often the NTRB as its representative) bears the burden of assessing whether the proposed act is an act attracting the expedited procedure, and to lodge an objection with the NNTT and prove that the expedited procedure should not apply. In some cases, the native title party may not object to the expedited procedure statement on the basis that there is an agreement in place between the native title party and the proponent in relation to the act.

107. Native title parties face strict requirements and timeframes for lodging objections to the expedited procedure.[41] Non-compliant objections will be rejected by the NNTT.[42] If the native title party fails to lodge a valid objection in time, the act and the associated activities can be done without any engagement with the native title parties. This is particularly problematic in light of the inadequate resourcing of native title parties leading to notices and objection due dates being missed by the native title parties, as discussed above at [32]-[33].

108. In NNTT Inquiries into the expedited procedure, the technical legal position is that no party bears an onus of proof.[43] In practice however, the native title party bears the burden of demonstrating that the expedited procedure does not apply by leading sufficient evidence of the matters in s237 of the NTA. This plays out in the NNTT inquiries in the following way:

    a. If the native title party does not have sufficient evidence or does not lead sufficient evidence in relation to one of the s237 criteria, the NNTT will conclude that the ground is not made out, without undertaking further analysis and despite no evidence being led by the proponent.[44]

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[40] *Yanunijarra Aboriginal Corporation RNTBCS & Ors v State of Western Australia* (Federal Court of Australia, WAD3/2024, commenced 22 December 2023).
[41] See NTA ss 29(4), 32(3), 76; *Native Title (Tribunal) Regulations 1993* (Cth) reg 4(1)(a).
[42] The NNTT may dismiss a non-compliant objection under s148(a) of the NTA. See, eg, *Yanunijarra Aboriginal Corp RNTBC v State of Western Australia* (2020) 276 FCR 53; *Charles, on behalf of Mount Jowlaenga Polygon #2 v Sheffield Resources Limited* [2017] FCAFC 218 at [142].
[43] *FMG Pilbara Pty Ltd v Yindjibarndi Aboriginal Corporation RNTBC* [2014] FCA 1335 at [79] (McKerracher J); *Ward v Western Australia* (1996) 69 FCR 208 at 215-218 (Carr J).
[44] See, eg, *Wanjina-Wunggurr (Native Title) Aboriginal Corporation RNTBC v Diamond Bright Star Pty Ltd* [2019] NNTTA 16 at [3]; *Barbara Sturt & Others on behalf of Jaru v Grant Jonathan Mooney/Zlatomir Aurel Sas and Another* [2019] NNTTA 9 at [27]; *Wilma Freddie and Others on behalf of the Wiluna Native Title Claimants v Western Australia and Adelaide Prospecting Pty Ltd* [2003] NNTTA 120 at [12]-[15]; *Leonne Velickovic on behalf of the Widji People v Westex Resources Pty Ltd and Western Australia* [2004] NNTTA 13 at [16]-[21]; *Yugunga-Nya Native Title Aboriginal Corporation RNTBC v Factor Resources Pty Ltd & Another* [2024] NNTTA 71 at [24]; *Yugunga-Nya Native Title Aboriginal Corporation RNTBC v M61 Holdings Pty Ltd and Anor* [2024] NNTTA 51 at [34]-[41]; *Evelyn Gilla & Ors on behalf of the Yugunga-Nya People #2 v Jordan James Mitchell and Others* [2024] NNTTA 46 at [17].

b. Objections are regularly dismissed under s148(b) of the NTA for the native title party's non-compliance with NNTT directions to produce evidence, representing a significant majority of the objections dismissed to date. A search of the NNTT's database of future act decisions on its website shows 1,708 decisions where an objection was dismissed by the NNTT. [45] An analysis of the dismissals between 2023 and 2024 shows that 93 of the 96 NNTT decisions to dismiss objection/s were due to the native title party's failure to comply with directions.

c. The native title party is required to collect and put on evidence in respect of each act subject to the expedited procedure, and it is not usually sufficient to rely on evidence of a general nature about the area and potential interference of mineral exploration. While pre-existing evidence and other materials are used where possible, in the KLC's experience, the NNTT places much more weight on current affidavit material which comes directly from native title holders in relation to the specific act, and an objection is more likely to fail in the absence of updated and future act-specific evidence of the native title holders.[46]

109. The requirement in s237(b) that native title parties prove the existence of a site or area of particular significance is particularly problematic. Often it may be culturally inappropriate to reveal or talk about such sites or areas with persons outside the native title group such as the NNTT, and yet s237(b) requires these sites to be sufficiently located and the nature of their significance explained.[47] The threshold for what the NNTT considers of '*particular*' significance is somewhat elusive,[48] and has previously required the native title party to explain to the NNTT *why* it is significant – a requirement which has recently been found by the Federal Court to be an 'additional hurdle' erected by the NNTT with no basis in s237(b).[49]

110. Further, revealing the specific location of sites or areas can backfire on native title parties under current legislative regimes of heritage 'protection'. In WA, if a proponent knows the specific location of an Aboriginal site or area, it can apply for approval from the relevant Minister to lawfully damage or destroy that site.[50] Such regimes do not work to prevent destruction but only to regulate the manner in which it happens.

111. The process of providing evidence in support of objections in the NNTT often requires significant effort and resources from native title parties and the KLC. The very process of identifying the native title holders with authority and knowledge to provide evidence can involve a lot of time and energy for the native title party. Native title parties have also reported frustrations to the KLC about the amount of time they must spend considering the expedited procedure in s29 notices, and making and pursuing

[45] National Native Title Tribunal, *Search Future Act Applications and Determinations* (Web page, 4 February 2025) <https://www.nntt.gov.au/searchRegApps/FutureActs/Pages/default.aspx>.
[46] See, eg, *Wanjina-Wunggurr (Native Title) Aboriginal Corporation RNTBC v Kimberley Bauxite Pty Ltd & Another* [2023] NNTTA 12 at [16] and [95], where the NNTT placed less weight on an affidavit due to its age.
[47] *Yindjibarndi Aboriginal Corporation RNTBC v FMG Pilbara Pty Ltd and Another* [2014] NNTTA 8 at [120].
[48] See, eg, *Yindjibarndi Aboriginal Corporation RNTBC v FMG Pilbara Pty Ltd and Another* [2014] NNTTA 8 at [127]-[130], where the NNTT held that there were no sites or areas of particular significance, despite the native title party leading evidence, including pictures and affidavit evidence and a map, showing a multitude of important sites throughout the proposed licence area. See further *Yindjibarndi Aboriginal Corporation RNTBC v FMG Pilbara Pty Ltd and Another* [2014] NNTTA 14 and *FMG Pilbara Pty Ltd v Yindjibarndi Aboriginal Corporation RNTBC* [2014] FCA 1335.
[49] *Top End (Default PBC/CLA) Aboriginal Corporation v Northern Territory of Australia* [2025] FCA 22 at [80].
[50] *Aboriginal Heritage Act 1972* (WA), s 18.

objections in the NNTT, where the best outcome that they can hope for is to have the right to negotiate – a right which should be the starting point for future acts, and not a right that requires native title parties to continuously prove they are entitled to it. As a Kimberley PBC director said:

> As a Board, we find it frustrating that it takes up so much of our time when we would rather be focused on our other matters, like the day-to-day affairs of the organisation, building up our Ranger program, negotiating land access agreements and other kinds of arrangements with people that want to go on our Country.

112. There is also an emotional and psychological toll on those native title holders giving evidence to support objections, who sometimes are required to give the same evidence again and again over the same or similar areas. The KLC is aware of several Kimberley native title holders who have given evidence more than 15 times to support objections to the expedited procedure.

113. Native title holders have often reported feeling exhausted and distressed by the continuous process of having to provide evidence for expedited procedure objections to prove, again and again, that activities such as drilling to explore for minerals do have impacts on native title rights and interests, but nevertheless having to participate as a means to defend the right to negotiate and fulfil cultural obligations to protect Country. As one Kimberley native title holder has explained:

> Old people are getting tired of being asked about these areas. I'm getting tired of it – we already proved native title, and objecting to the expedited procedure feels like we have to prove it again every time, again and again.
>
> It makes me sad and angry to talk about it over and over. I am frustrated that we are not being understood. I'm sad and angry that old people gave stories and evidence and that we are following in their footsteps and still not being heard. … The Government give us our land through native title – and then they want to take it away in those tricky ways like the expedited procedure.
>
> It is very wrong what the Government is doing. They are not thinking about what Traditional Owners think of with our sacred beliefs and how we were brought up. I show my grandchildren these sites. The Dreaming is still there. The land and the things in it, the rocks and the springs and everything else, were left by the Creator for us. We have to protect them.

114. This burden, and the continuous feeling of not being listened to by the State, creates mistrust amongst native title groups as against the State and proponents, and dismay and disappointment at the native title system itself, as a Kimberley native title holder has articulated:

> During the native title claims process, our old people fought for years and many died waiting. Some of them are still in the process, and people pass away before native title process is finished. …
>
> I thought that when we got native title we wouldn't have to fight any more. I thought getting country back, and getting native title recognised, that would mean that we would have the country back to look after our way, and that other people coming on to country would listen to us. I just want to look after the sites that are important to [my] mob. I thought they wouldn't be able to keep ripping up country without talking to us. …

> It is frustrating to have to repeat myself – giving our story over and over to the Government, having to tell the same story again and again. Now with all these expedited procedure objections, we keep having to prove something, again and again, even though we already went through the court process and proved our native title. When are they going to listen?

Cost-shifting on to native title parties and NTRBs

115. The financial costs on native title parties, and NTRBs as their representative, in objecting to the expedited procedure can be significant. These costs are not able to be recovered by native title parties under s60AB of the NTA,[51] even where the expedited procedure is found not to apply.

116. Native title parties are not funded for expedited procedure objections. The KLC allocates a component of its native title grant funding towards the costs of responding to notices issued under the NTA in respect of future acts, and most of this goes towards making and running objections to the expedited procedure in the NNTT.

117. The KLC has made many previous submissions in various forums which highlight the significance of the burden of the expedited procedure for native title parties and NTRBs. The cost-shifting from the State to the KLC and native title parties is explained in the KLC's Senate Submission, discussing the State's blanket application of the expedited procedure between 1998 and 1 June 2022 to all exploration licence applications:

> … in Western Australia it has been the practice of the State since 1998 to apply the expedited procedure statement to all exploration licences issued in the State without undertaking the consideration required by s29(7). The KLC understands that the reason for this blanket application is that the relevant government departments lack the internal processes and resources to undertake the necessary consideration in respect of each interest granted. The consequence of this lack of consideration, beyond a potential failure to comply with s29(7), is that the costs of actually determining whether or not the expedited procedure does apply to the particular grant is shifted to native title parties, who can object to the expedited procedure applying. An objection is, ultimately, heard by the National Native Title Tribunal and ordinarily involves representation by the State, the proponent and the native title party. All parties involved in this process other than the proponent is funded out of public monies (State or Federal). A high-level estimate of the cost of this process on native title parties in the Kimberley represented by the KLC in the past 12 months is $2 million, which is approximately 23% of the total native title grant funding received by the KLC for the 2019-2020 financial year.[52]

118. The process of obtaining native title holders' evidence for Inquiries is resource and time-intensive. It will usually involve a KLC lawyer, project or field officer and/or anthropologist, travelling to meet with individual native title holders where they live. In most circumstances, it is not possible for lawyers to collect this evidence over the phone or by using video technology, due to factors including:

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[51] Opinion of the Registrar of Aboriginal and Torres Strait Island Corporations published 6 January 2023 which states that "*an RNTBC cannot rely on section 60AB to charge fees for activities it undertakes in response to receiving a section 29 notice in circumstances where that notice states that the act it relates to attracts the expedited procedure*", available at: <https://www.oric.gov.au/for-corporations/native-title-and-rntbcs/native-title-fee-opinions>.

[52] Senate Submission at [6(d)].

a. Many native title holders in the Kimberley speak Kriol or different dialects of Australian English and/or do not speak English as a first language. The scope for misunderstandings or miscommunication between the witness and the lawyer is significantly reduced when taking evidence in person.

b. Many native title holders in the Kimberley live in remote places where mobile reception is non-existent or unreliable, and many people lack easy access to phones and laptops.

c. In-person meetings are by far the most effective method of communication for the purpose of ensuring witnesses feel comfortable enough to provide evidence relevant to the criteria in s237. As mentioned previously, the process of giving this evidence is often exhausting and re-traumatising for native title holders.

Impact on negotiations and relationships

119. The expedited procedure also works to undermine the bargaining position of native title parties. Proponents will often wait to see whether the tenement can be granted through the expedited procedure rather than engage properly with the native title party, and this can undermine a good working relationship between the native title holders and the proponent. As one PBC director explained:

> [Our PBC] is already at a disadvantage in future act negotiations by not having the right to say no to any mining activity. When the expedited procedure is applied, we have even less hope of getting [an agreement] in place and forming a good relationship with proponents than we do under the right to negotiate. The expedited procedure moves too fast for a relationship to be in place.

120. Accessing Country without speaking to the native title holders breaches trust and can have serious consequences under traditional laws and customs, deeply felt and experienced by native title holders:

> When we see people out on our native title areas, exploring and digging stuff out of the ground without coming and talking to us first, we feel really disrespected. Those people don't know anything about the history or struggles or significance of that land they are digging up. They don't know that place or the protocols for it. All they have is a map and a pinpoint- that doesn't give them the right to circumvent the processes and protocols in place for that country under traditional law. There's a history in the land and with Aboriginal people which has been there a lot longer than colonisation.
>
> Exploration licences can have a big impact on country and exploration activities can cause a lot of damage to our sacred sites, because the people exploring it don't know where they can go and what causes damage. We are worried about companies coming on Country and doing something that does destroy and cause damage to that land.

Future act determinations

121. The KLC has long raised concern with the alarming disparity in outcomes in future act determinations.[53] As the ALRC Issues Paper identifies, the high proportion of determinations in favour of the act being done, or being done subject to conditions, increases pressure on native title holders to reach agreements as to the doing of the act.

122. One of the reasons for this predominance identified in the Issues Paper is that "the NNTT is bound to consider mandatory statutory criteria equally and apply strict legal tests". The KLC wishes to clarify that, while the NNTT must consider the statutory criteria in s39(1) and (2) of the NTA, the NNTT is not bound to consider those criteria equally and has discretion in the weight it gives to each criterion in a determination.[54] Further, by s39(1)(f), the NNTT can consider any matter that it considers relevant.

123. In the KLC's experience, the NNTT often exercises its discretion under s39 to give undue weight to factors in favour of the doing of the act, while diminishing the evidence of, and impact of the act on, the native title holders. In 2022, the KLC undertook a comprehensive analysis of outcomes in 137 future act determinations made between 1994 and October 2022, observations of which are set out in full at [34] to [36] of the KLC's UNDRIP Submissions. A key finding of that analysis is that the NNTT has made assumptions in future act determinations that have, over time, created the following norms and presumptions:

a. **Exploration and mining acts are of economic significance to Australia for the purposes of s39(c).** This is so even absent any evidence to support this and where the benefit was purely "speculative".[55]

> The Tribunal has consistently accepted the economic benefits arising from the grant of mining tenure in Western Australia and therefore, in the absence of any evidence to the contrary, I accept the proposed leases are likely to generate some economic benefits …[56]

The NNTT has also inferred in at least 40 determinations that the future act will provide flow on benefits to native title holders or the local community as per s39(c), despite no evidence to support that assertion being provided, and in circumstances where the native title party actively opposes the doing of the act.[57]

b. **Exploration and mining acts are in the public interest for the purposes of s39(e).** In at least 90 determinations, the NNTT was satisfied that the future act should be done because it was in the public interest to permit exploration to maintain "a viable mining industry".[58]

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[53] See, eg, Juukan Gorge Submission at [18]-[19], and UNDRIP Submission at [35].
[54] See *Cheedy on behalf of the Yindjibarndi People v State of Western Australia* [2010] FCA 690 at [20], citing *Western Australia v Thomas* [1996] NNTTA 30; 133 FLR 124 at 165-166.
[55] See, eg, *Areva Resources Australia Pty Ltd and Another v Walalakoo Aboriginal Corporation* [2014] NNTTA 70 (25 July 2014) at [155].
[56] *Bradford and Julie Young v Kariyarra and Another* [2014] NNTTA 117 (16 December 2014) at [62].
[57] See the KLC's UNDRIP Submissions at [36] for references to these 40 determinations.
[58] See the KLC's UNDRIP Submissions at [36] for references. See, eg, the following proposition often relied on in subsequent decisions of the NNTT from *Western Australia v Thomas* [1996] NNTTA 30; 133 FLR 124 (*Waljen*) at [176]: "mining in general is significant to the Australian and Western Australian economies and that the public interest is served by the maintenance of an active minerals exploration program and the continuing development of the mining industry".

c. **In the absence of sufficient evidence, the act has can be presumed to have no effect on the matters in s39(a).** Where the native title party does not lead evidence, or does not lead "sufficient" evidence, the NNTT infers that the act will not impact, or minimally impact, the native title party's rights and interests, way of life, freedom of access, or sites of particular significance.

d. **The potential impact of mining on sites of particular significance as per s39(1)(a)(v) are mitigated by the obligations on proponents under regulatory regimes such as the *Aboriginal Heritage Act 1972* (WA) or government conditions or endorsements**.[59] More recently the NNTT has accepted in expedited procedure Inquiries that the legislative scheme in Western Australia does not protect Aboriginal cultural heritage. However, in FADA determinations the presumption still remains that future acts that impact Aboriginal sites of significance are acceptable because of the mere existence of laws such as the *Aboriginal Heritage Act 1972* (WA).[60]

e. **The interest and impact on native title parties (s39(a)-(b)) should rarely, if ever, outweigh the economic significance (s39(c)) and the public interest (s39(e)) in the doing of the act.** Even in cases where the NNTT recognises that the impact of mining and exploration on native title rights and interests will be "enormous, resulting in an inability to exercise" those rights effectively in perpetuity "even when mining is finished",[61] the NNTT's reasoning was that the interests of the proponent in the grant of the mining leases outweighed the interests of native title parties.

124. Taken together, these normative presumptions explain why the NNTT overwhelmingly finds in favour of the act being done.

125. This has led to some unjust outcomes for native title holders. For example, in *Kallenia Mines Pty Ltd and Others v Walalakoo Aboriginal Corporation RNTBC and Another* [2016] NNTTA 50, the NNTT determined that the acts (the grants of five exploration licences) may be done with no conditions. The native title parties opposed to the acts being done and put on detailed and extensive affidavit and supporting documentation about the importance of the area and the anticipated negative effects of the acts on the matters in s39(1)(a). The NNTT accepted that the areas affected were of environmental and cultural significance (but not that the acts would pose a significant threat), that there was "very limited" public interest in the grant of the licences,[62] and that there were likely to be only "marginal" economic benefits.[63] Despite this, the NNTT that determined that the acts may be done.

[59] This was found to be the case in approximately 40 of the 90 contested determinations analysed by the KLC. Those determinations are set out in the KLC's UNDRIP Submissions at [36].
[60] See, eg, *FMG Magnetite Pty Ltd/FMG North Pilbara Pty Ltd/Western Australia/Johnson Taylor and Others on behalf of Njamal* [2011] NNTTA 213 (20 December 2011) at [50].
[61] *Western Australia/Leo Winston Thomas & Ors on behalf of The Waljan People; Ted Coomanoo Evans & Richard Guy Evans on behalf of the Koara People; Quinton Paul Tucker & Ors on behalf of the Ngurludharra Waljan Clan; Dimple Sullivan on behalf of the Tjinintjarra Family Group; Sadie Canning on behalf of the Thithee Birni Bunna Wiya People; Trevor Brownley & Ors on behalf of the Bibila Lungkutjarra (Waljen) People; Thomasisha Passmore on behalf of the Milangka-Purungu (Wongatha) People/Anaconda Nickel Ltd* [1999] NNTTA 99.
[62] *Kallenia Mines Pty Ltd and Others v Walalakoo Aboriginal Corporation RNTBC and Another* [2016] NNTTA 50 at [149].
[63] Ibid at [137].

Weak procedural rights

126. The Issues Paper identifies the key issues with procedural rights under the future acts regime, including:

a. the misalignment between the impact of some future acts on native title rights and interests and the corresponding procedural right (see, for example, the limited procedural rights afforded for water-related future acts, discussed below);

b. the few (if any) consequences for non-compliance by proponents or government parties with the procedural requirements, which can have significant consequences for native title parties; and

c. where there is a procedural right to comment, there is no requirement for decision-makers to take account of or have regard to those comments.

127. The KLC agrees these are important issues that require examination and makes the following additional comments.

The right to be ignored

128. While the KLC has noticed and welcomes the improvement over the past five years in the State of Western Australia's early engagement with native title holders on future acts and an increased willingness to enter into heritage protection agreements with native title parties in relation to public works, this can be dependent on the government of the day and the approaches of the relevant State agency or department. Compare this, for example, with the State of Western Australia's recent lobbying of the Federal Government to amend the NTA so that second renewals of mining leases do not trigger the right to negotiate.[64]

129. In general, the concerns and views put forward by native title parties in comments responding to future acts notices have so frequently not been acknowledged by the notifying government department that this right has colloquially become known as the "right to be ignored".

130. This is particularly problematic as many of the future acts that give rise to the right to comment can significantly impact native title and have potential to cause serious harm to cultural heritage and to the wellbeing of native title holders. See, for example, the following discussion on the significance of water to Kimberley native title holders and the limited procedural right to comment on future acts relating to the management and regulation of water under s24HA.

[64] Brad Thompson, 'WA seeks changes to Native Title Act to protect miners' *The Australian* (Sydney, 30 December 2024); Brad Thompson, 'WA turns up heat on Albanese over native title as miners fear the worst for industry future' *The Australian* (Sydney, 5 February 2025).

The undervaluing of water in the future acts regime

Water, in its many forms, is a central part of life, law and custom for Kimberley Traditional Owners. One of the region's most prominent bodies of water is the Martuwarra Fitzroy River – the longest river in the Kimberley, with a catchment of around 94,000 square kilometres. Martuwarra is highly significant to many Traditional Owner groups, both as a traditional means of sustenance and as a key tenet of their foundational beliefs and law. The outstanding importance of the Martuwarra and water sources to Traditional Owners is recognised in the West Kimberley National Heritage listing.

> The Fitzroy River and a number of its tributaries, together with their floodplains and the jila sites of Kurrpurrngu, Mangunampi, Paliyarra and Kurungal, demonstrate four distinct expressions of the Rainbow Serpent tradition associated with Indigenous interpretations of the different ways in which water flows within the catchment and are of outstanding heritage value to the nation under criterion (d) for their exceptional ability to convey the diversity of the Rainbow Serpent tradition within a single freshwater hydrological system.[65]
>
> Freshwater soaks and springs hold intense spiritual significance for desert people, and these water sources also have high biodiversity values. Each place where water can be found is individually named and known, and has many stories associated with it, although some of these stories may be secret or culturally restricted. Permanent water sources are called 'jila' and are all connected through the underlying groundwater system, which is known as kurtany, or mother.[66]

Surface and groundwater extraction from the Fitzroy River and catchment currently occurs on a relatively small scale, with concomitant cultural and social impacts that remain uncompensated (acknowledging that a compensation liability exists). Now, the WA Government is proposing to facilitate potential large-scale water extraction under a proposed Fitzroy-Derby Water Allocation Plan.

Kimberley native title holders have significant concerns about the cultural and environmental impacts of large-scale water extraction from the Fitzroy River catchment and broader allocation planning area, including impacts to native title rights and interests.

Grants of licences to take water are future acts governed by s24HA of the NTA, which provides native title parties with entitlements of compensation and a right to comment. Native title parties have no procedural rights with respect to water allocation plans, which are not considered future acts.

The KLC's position is that the procedural rights afforded for water-related future acts are far too weak and do not adequately reflect the spiritual and cultural importance of water to Aboriginal peoples in the Kimberley and across Australia. Further, the right to comment on proposed water licences is undermined by several issues identified in the Issues Paper and in this submission, including:

- decision makers are not required to consider any comments made by native title holders in response to s24HA notices;
- non-compliance of the government party with s24HA will not affect the validity of the future act; and
- the procedural right does not extend to all native title parties who may be affected by the future act.

This final point raises complex issues on which the current future acts regime is silent. Groundwater in the Kimberley is highly interconnected, and groundwater and surface waters are also connected, with groundwater feeding into springs and rivers such as the Martuwarra Fitzroy River. It is foreseeable that impacts from groundwater extraction (for example, the drying up of culturally significant soaks or springs) may occur at locations a considerable distance from the extraction location. Thus, the native title party that holds the procedural right to comment regarding the grant of a water licence may not be the only native title party whose native title rights and interests are ultimately affected by extraction under the licence. The future acts regime does not currently take account of this circumstance, with the procedural right (in this case the right to comment) only provided to the native title party for the point at which extraction occurs (e.g. location of the bore).

In the absence of any procedural rights with regard to water planning, and with very weak procedural rights with regard to water extraction, native title holders are in a challenging position of advocating to the WA Government to protect their native title rights and interests and ensure they have real influence in how water is managed.

Insufficient notice and timeframes for comment and for consultation

131. The KLC has consistently raised concerns with the State of Western Australia about the limited (short) timeframes for comment or consultation stipulated in future acts notices, the often incomplete (and at times inaccurate) nature of notification, and the incorrect identification of native title party procedural rights. This is particularly the case in relation to notifications of proposed permits and licences under Subdivision G (primary production activities) and Subdivision H (management of water and airspace) of the NTA.

132. It is extremely difficult, and for the most part unrealistic, to undertake genuine notification and consultation with affected native title holders on proposed future acts without reasonable time and notice. This is particularly problematic given that many PBCs do not have staff delegated to make decisions and therefore rely on decisions made by a board which may only meet two or three times each year. These serious constraints are in addition to remote locations, weather restrictions, traditional law time, and other matters arising that restrict PBCs from holding meetings or contacting affected native title holders. These circumstances often require PBCs to make requests for additional time to seek client views and comments, which may or may not be granted by the relevant authority.

133. These matters are well-illustrated in the following case study.

[65] Commonwealth of Australia, *Special Gazette - Inclusion of a place in the National Heritage List: The West Kimberley*, No. S132, 31 August 2021, pp 15-16.

[66] Australian Heritage Council, 'Australian Heritage Council's final assessment of national heritage values of the West Kimberley', *National Heritage Places – West Kimberley* (Final Assessment Report, 2011) at p 35, available at <https://www.dcceew.gov.au/sites/default/files/env/pages/ed0b4e39-41eb-4cee-84f6-049a932c5d46/files/ahc-final-assessment-full.pdf>.

Case study – Proposed permit under s24GB of the NTA

This case study concerned the proposed grant of a permit under s121 of the *Land Administration Act 1997 (*WA) to a pastoral lessee for the purposes of farm-based tourism activity. The notice to the native title party stated that the proposed permit would be issued under s24GB of the NTA. It is also stated (incorrectly) that no procedural rights apply to the grant,[67] but invited the native title party to submit any comments on the proposed permit or permit activities by 28 days from the date of notice.

The KLC on behalf of the native title party requested that the deadline for comment be extended by two months to allow for proper notification and consultation with the respective native title holders and obtain instructions. The relevant government department was unable to accommodate the full extension request due to a scheduled meeting of the decision-maker but granted a further four-weeks for comment.

The comments made by the KLC on behalf of the native title party pointed to the fact that the activities contemplated by the permit were plainly not farm-based tourism activities for the purposes of s24GB, particularly as they involved helicopter flights over iconic landscapes in the Kimberley, and could therefore only be validly granted in accordance with Div 3 of the NTA by entry into an ILUA with the native title party.

In this case, the comments of the native title party were considered and accepted by the relevant authority, and the proponent was directed to enter into ILUA negotiations with the native title party. Relevantly, as noted already, there are few, if any, legal consequences for proponents or government parties if procedural rights are not properly afforded to native title holders.

Whilst a positive outcome for the native title holders, the matter raises significant issues in regards to the potential consequences of inaccurate and imprecise notices, and the significant burden placed on representative bodies and native title parties. Concerningly, unless the comments of the native title party were made and considered, the permit would likely have been granted (albeit invalidly) and native title holders denied their procedural and substantive rights.

[67] Section 24GB(9)(d) NTA provides the right to comment.

Compensation

Structural barriers to accessing compensation

134. The significant structural barriers for native title parties in accessing compensation under the NTA were highlighted in the recent Federal Court judgment of Chief Justice Mortimer in *Karajarri Traditional Lands Association (Aboriginal Corporation) RNTBC v State of Western Australia* [2024] FCA 1114.

135. In this case, the applicant, who was represented by the KLC, did not have the requisite resources and capacity to file a compensation application under the NTA so instead sought to imminently preserve the cultural loss evidence of key witnesses, who are living with a range of debilitating health conditions, for use in a future compensation application.

136. This application was novel and highlights the procedural inequity of the NTA's compensation regime, which Chief Justice Mortimer described as heavily prescriptive, and resource and time intensive.[68] Moreover, her Honour noted:

> As I said more than once during the hearing of this application, the burdens imposed on First Nations peoples as moving parties in NTA proceedings, in terms of simply being able to commence a proceeding, are much higher under this legislative regime than in other commensurate practice areas of this Court.[69]

137. In addition to the procedural inequity of the compensation regime under the NTA, native title holders also face "large-scale litigation fatigue".[70] Native title groups litigating native title compensation claims will likely experience many of the same painful by-products of going through native title determination litigation that were observed by Justice Jagot's in *Widjabul* extracted above at [15].[71]

138. In an already under-resourced sector, the technical and procedural barriers to obtaining compensation under the NTA make it impossible for many native title parties, and there is little leverage afforded by the future acts regime to negotiate a sufficient compensation outcome.

Calculating compensation

139. As the Issues Paper notes, compensation is not paid up-front to native title holders before or upon the act being done and native title parties face the structural barriers as described above in bringing applications for compensation in the Federal Court.

140. There are, however, at least two difficulties with calculating compensation up-front. The first is that often the full impact of the relevant future act on native title is not known prior to or upon the doing of the act. For example, the grant of an exploration licence may result in significant or minimal impacts, depending on how and what the proponent does on the tenement. A proponent who seeks permission from the native title party prior to conducting activities and uses minimally invasive methods for exploration may minimally impact native title. On the other hand, a proponent who extracts additional

[68] *Karajarri Traditional Lands Association (Aboriginal Corporation) RNTBC v State of Western Australia* [2024] FCA 1114 at [44].
[69] Ibid [44].
[70] Ibid at [32].
[71] See also *Widjabul Wia-bal v Attorney General of New South Wales* [2022] FCA 1187 at [72].

tonnage,[72] damages or destroys cultural heritage over the objections of native title holders, and uses invasive mechanisms including drilling, may significantly impact native title.

141. The second difficulty with calculating compensation up-front is the lack of precedent on what constitutes a fair settlement, so that native title parties can make fully informed decisions regarding compensation.

[72] In WA, exploration licences granted under the *Mining Act 1978* (WA) have a tonnage limit of 1000 tonnes, but proponents can apply to the Minister for approval to extract additional tonnes from the licence area (which does not trigger the right to negotiate).

Complexity

142. There is much complexity and uncertainty in the future acts provisions of the NTA, and proper interpretation and understandings of these are still developing. It can be difficult to understand which particular category an act falls under, if at all, and to figure out the associated notice and procedural rights requirements. Further, the complexities of the interaction between the future acts regime under the NTA and other legislative regimes, such as the *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth), further adds to the burden on native title parties and others seeking to navigate their way through the system.

143. This complexity can and does lead to errors in the notification process by government departments, which in turn can work to deny the native title party their procedural rights. The KLC has seen future acts be improperly or inconsistently notified, including notices in which the future act cannot be identified, where the area where the act will take place is not clearly identified, or where notices incorrectly characterise the category of future act proposed.

144. The complexity of the future acts regime also increases the time native title parties have to spend considering each future act notice and the procedural rights that arise. For native title parties with a high volume of future acts, this can take up a significant amount of time and resources that they do not have.

145. The case study below in relation to native title rights in airspace provides just one example of the many complexities and potentials for misunderstanding of the future acts regime.

Access to the courts to clarify the law

146. Given the complexities and uncertainty of the future acts regime, disputes about its proper interpretation often arise between native title parties, government parties and proponents. In some circumstances, native title parties may need to access the courts to protect or enforce their future act rights and ensure their native title rights and interests are not unlawfully impacted by the grant of a future act. The ability of native title parties to do so has been an important part of clarifying and developing the law. This highlights the importance of native title parties being properly resourced to be able to access the courts where necessary.

147. Unfortunately, however, the costs of conducting litigation and accessing the courts are often prohibitive for native title parties. Further, s85A of the NTA, which provides that each party is to bear its own costs in a proceeding unless the court orders otherwise, is limited to matters arising under the exclusive jurisdiction conferred by s81 of the NTA and does not apply directly to proceedings taken by native title parties in relation to the future acts regime.[73] There is therefore an increased risk of a negative costs order for native title parties in seeking relief for infringements of their future act and native title rights and interests.

[73] *Lardil, Kaiadilt, Yangkaal and Gangalidda Peoples v State of Queensland* [2001] FCA 414; 108 FCR 453.

Case study – complexity of native title and airspace

The KLC received an email from an officer of a Commonwealth body attaching a pamphlet advising that an aerial survey will be completed over lands and waters with positive determinations of native title. The pamphlet stated that the aircraft conducting the survey will fly under the ordinary minimum height rules and tow an object behind the aircraft. The email and pamphlet do not disclose any category of future act or reference the NTA in any way.

The KLC sought clarification as to whether the email and pamphlet is being treated by the Commonwealth body as notice pursuant to s 24HA of the NTA. The officer of the Commonwealth body advised it was required to seek legal advice and then reverted with their view that the flying of an aircraft does not constitute a legislative act or the grant of a lease, licence, permit or authority under legislation that relates to the regulation or management of airspace.

The KLC advised that under Australian aviation law, for an aircraft to lawfully fly under the minimum height rules and tow an object behind it, it is likely a permit or authority will need to be obtained from the relevant authority and that such a permit or authority would relate to the management of airspace. The KLC also noted that the definition of "land" under the NTA includes "the airspace over" land and that it considers a permit or authority allowing an aircraft to fly at low levels whilst towing an object could affect native title rights and interests.

The KLC requested that the Commonwealth body seek further advice as to whether notice is required pursuant to s24HA of the NTA and refrain from conducting the survey until that further advice is obtained and communicated to KLC.

The KLC considers it is likely this issue of the extent of native title rights and interests in airspace and their interaction with western common law concepts around the limits of property rights in airspace will remain untested given the cost of bringing this issue before the Courts.

Additional issues missing from the Issues Paper

Impacts of future acts on other native title groups

148. The future acts regime affords procedural rights to native title parties with native title rights and interests in the particular area of the proposed act – for example, the proposed location of a mining tenement or water bore. However, neighbouring native title parties currently have no say under the NTA in the doing of the future act or the associated activities and the impact of that act and those activities on their native title rights.

149. For example, an agricultural project on or near a waterway may have significant impacts on the rights and interests of all native title holders with connections to the waterway, and may also cause physical impacts on neighbouring groups' country on the same waterway further upstream or downstream. Currently, the future acts regime does not account for this situation – native title parties whose determination areas do not overlap with the area of the relevant lease or licence will not be afforded procedural rights under the NTA.

150. This issue is also discussed in the breakout box above at pp 35-6 relating to the importance of water.

151. The KLC notes that while addressing this issue as part of reform to the future acts regime is likely to be complex, it nevertheless warrants consideration.

Barriers to economic development and self-determination

152. Finally, reform of the future acts regime should be considered in the context of broader barriers faced by native title holders in seeking economic development opportunities.

153. Kimberley Aboriginal people have long-held aspirations for economic development that produces intergenerational wealth and is consistent with development that sustains and conserves lands, seas and waterways for future generations. Aboriginal organisations no longer want to be mere stakeholders in projects occurring on their lands, but rather can and should be equity partners or outright owners of projects.

154. Land is a key asset for native title holders and has enormous potential to be leveraged for economic development. However, significant barriers remain, preventing the broad participation of native title holders in economic development opportunities and the creation of sustainable wealth.

155. Many of the issues discussed throughout this submission act as barriers to economic development for native title holders, including inadequate resourcing of PBCs and NTRBs/SPs, the burden placed on native title parties by the high volumes of future acts (forcing PBCs to prioritise third party activities over their own aspirations for Country), and the lack of obligation on proponents to fund native title parties' involvement in negotiations.

156. Further, there are currently no carve-outs in the regime for future acts where native title holders are the proponents, which makes it difficult for native title holders to pursue self-driven commercial opportunities on their native title land and favours economic involvement via agreements and benefit-sharing with third-party proponents. Traditional-owner-led initiatives are considered to produce better cultural and social outcomes for native title holders.

157. More broadly, it is important to note the significant limitations caused by the current legal approach to and commercial understanding of native title. Presently, native title cannot be used as collateral for finance, which significantly impedes native title holders' ability to obtain capital for projects on their Country. Further, while native title specifically recognises the unique connection of native title holders to Country, it is often not afforded the same protections or value as other interests in land or water under regulatory schemes such as those relating to renewable energy and carbon.

158. The KLC's Economic Self-Determination Submission on this topic explains the issue in further detail:

> As the KLC noted in its 2019 submission to the Joint Standing Committee on Northern Australia's inquiry into the engagement of Traditional Owners in the economic development of northern Australia:
>
> > "Due to the commercial perception of native title as being less certain or more risky than non-native title tenure, it is difficult for Traditional Owners to finance development of their assets, as land subject to native title is, currently, not readily collateralisable in traditional loan agreements."
>
> As highlighted in the *Murru waaruu (On Track) Economic Development Seminar Series: Outcomes Report*, the Native Title Act is one of only four statutory land title regimes that expressly prohibits rights and interests in land being sold, leased or mortgaged. Now that the post-determination era has largely been reached, it is more important than ever to consider how the native title regime can facilitate economic development and deliver tangible benefits for native title holders well into the future. Legislative and policy changes to enable native title holders to easily access capital for projects on native title land would be transformational in terms of opening up economic development opportunities.
>
> Reform should also be considered more broadly, beyond the Native Title Act. Current policy and statutory frameworks elevate rights and interests derived from colonisation over those derived from the traditional Aboriginal ownership of land, to the detriment of Aboriginal people. Land-use planner and academic Ed Wensing makes a compelling argument that governments need to share their power over land matters on more equal terms "by seeing the two systems of land ownership, use and tenure as having equal status, rather than as one always having to prevail over the other". If this proposition is accepted, there are a number of fundamental principles that need to be considered further, including:
>
> a. Tenure reform should provide Aboriginal people with stronger forms of land ownership.
>
> b. Tenure changes must be voluntary and only issued with the free, prior and informed consent of Aboriginal landowners.
>
> c. Tenure must be able to be used as collateral for finance for home ownership or economic development.
>
> d. Lands and property transferred to Aboriginal ownership should be remediated, made safe and transferred free from liabilities and encumbrances wherever possible.[74]

[74] Economic Self-Determination Submission at [16]-[18].

159. The full enjoyment of native title rights and interests must include the ability for native title parties to pursue economic opportunities that align with their values and priorities. Unfortunately, the native title system still falls far short in this respect, as a result of factors including the significant deficiencies in the future acts regime and the commercial perception of native title as a tenure inferior to other rights and interests in land.

Conclusion

160. The KLC's submission on the Issues Paper seeks to identify, by reference to specific examples, the very dire situation that the future acts regime places native title parties in, the gulf between the objects of the NTA and the reality of the lived experience of native title holders with the future acts regime, and some practical suggestions for how current regime could be improved to be closer to "an ideal future acts regime".

161. The KLC looks forward to the Commission's consideration of this submission and the forthcoming Discussion Paper.