ALRC Review of the Future Acts Regime

Submission on Issues Paper

Central Land Council

The Central Land Council (CLC) represents Aboriginal people in Central Australia and supports them to manage their land, make the most of the opportunities it offers and promote their rights. The CLC is a statutory corporation established by the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (**Land Rights Act**) and is a native title representative body under the *Native Title Act 1993* (Cth) (**Native Title Act**). The CLC is responsible for an area of almost 777, 000 square kilometres.

Since its establishment at a meeting of Central Australian Aboriginal communities in 1975, and through its elected representative Council of 90 Aboriginal community delegates, the CLC has represented the aspirations and interests of approximately 17,500 traditional Aboriginal landowners and other Aboriginal people resident in its region, on a wide range of land-based and socio-political issues.

The CLC makes this submission in response to Issues Paper 50 issued by the Australian Law Reform Commission, regarding the ALRC's Review of the Future Acts Regime.

Question 1 **What are the most important issues to consider for reform in the future acts regime? If you have had negative experiences, we would like to hear about them and what did not work well.**

Question 2 **Are there any important issues with how the future acts regime currently operates that we have not identified in the Issues Paper?**

The most important issues to consider in reforming the future acts regime are:

a) The future acts regime must reflect international principles of human rights including the right to Free, Prior and Informed Consent (FPIC) contained in the United Nations Declaration on the Rights of Indigenous People (UNDRIP).

b) There must be consequences for failing to comply with the requirements of the Native Title Act.

c) The procedural rights allowed in the current future acts regime are not commensurate to the impact that those acts have on native title holders' country and their rights and interests.

d) The negotiating power between proponents and native title holders must be balanced.

1. The future acts regime must reflect international principles of human rights including the right to FPIC in UNDRIP.

FPIC is a crucial principle that must be embedded into the future acts regime.

To enshrine this principle into the Native Title Act, native title holders must have the right to:

a) Give or withhold consent to any project that may affect them

b) Withdraw consent at any stage if significant new information emerges or changes to the project are proposed, and

c) Negotiate conditions under which the project will be designed, implemented, monitored and evaluated.

The Native Title Act allows most future acts to be done without needing native title holders' consent.

One of the more substantive rights, the right to negotiate, does not adhere to the principle of FPIC. If parties do not reach an agreement within 6 months, any party may apply to the National Native Title Tribunal (**NNTT**) for a future act determination.[1] To date, the NNTT has determined in almost all arbitral determinations that a future act can be done without native title holders' consent. The risk of a NNTT making such a determination puts undue pressure on native title holders to consider and consent to a project even when the project, or the terms of an agreement are unreasonable in their eyes.

Further, it needs to be squarely acknowledged that many of the provisions of the future acts regime operate on a racially discriminatory basis. As has been identified by the High Court: "It is because native title characteristically is held by members of a particular race that interference with the enjoyment of native title is capable of amounting to discrimination on the basis of race, colour, or national or ethnic origin."[2] The equivalence between native title and freehold title is recognised in Subdivision M of the future acts provisions. However, due to the operation of the provisions,[3] earlier Subdivisions operate as explicit exceptions to the non-discriminatory approach embodied by Subdivision M. Particularly, Subdivisions G to L are racially discriminatory. Each of them permit things which would not be permissible if native title holders held the equivalent non-Indigenous title. They largely afford only tokenistic rights to native title holders. They have no place in modern Australian legislation.

[1] Native Title Act ss 35(1) and 38(1).
[2] *Western Australia v Ward* (2002) 213 CLR 1 at [117], and see the further discussion at [118]-[121].
[3] Particularly Native Title Act s 24AB.

2. There are few, if any, legal consequences for failing to comply with the procedural requirements of the Native Title Act.

There are few, if any, consequences for failing to comply with the procedural requirements (such as failing to give notice and an opportunity to comment). Failing to comply with such procedural requirements *does not* affect the validity of those acts.

CLC considers that the heading, "*Future acts must be done validly"* (in page 9 of the Issues Paper) is not technically correct in law or practice. There is no clear remedy for future acts not done validly as recognised in paragraph 44 of the Issues Paper.

An example of this issue in the Northern Territory is the systematic refusal of the Territory Government to treat the grant of a water licence as a future act. Native title holders have no practical recourse against this policy decision, other than a future compensation claim.

3. The procedural rights in the future acts regime are not commensurate to the impact that those acts have on native title holders' country and their rights and interests.

Procedural rights for certain future acts do not reflect their impact on the exercise of native title rights and interests. Examples include:

a) Agricultural projects (primary production on pastoral leases, section 24GB)

b) Water licences (section 24HA)

c) Mining infrastructure (section 24MD(6B))

d) Exploration licences (see discussion below regarding the expedited procedure).

Agricultural projects and water licences

Primary production activities on pastoral leases are predominantly intensive land uses that preclude the practical carrying out of native title rights and interests. An intensive horticultural project, involving substantial land clearing, major earthworks, bores and using high tech machinery, will substantially impact native title holders' rights and interests.

Additionally, the environmental landscape has changed significantly since the last major changes to the future acts regime in 1998. Water has always been a scarce and sacred resource to Aboriginal people in central Australia, but climate change has significantly intensified the competing pressures on water resources and environmental stresses on rangelands. Many sacred sites in the CLC's region are dependent on groundwater for their cultural values. Large-scale water extraction has enormous potential to impact on native title rights and sacred sites, in an area much larger than the physical footprint of a water-using development. To illustrate this point, **Annexure A** to this submission is a publically-released Aboriginal Cultural Values Assessment which relates to a horticultural development in central Australia.

Currently future acts of these categories acts give native title holders only an opportunity to comment. However, there is no requirement for the Government and proponents to even consider, let alone implement the comments.

The weakness of these rights is highlighted by the fact that the general public in the Northern Territory is given the same rights:

a) The Water Controller is required to publish a notice in a newspaper about intention to grant water extraction licence.[4] The notice must include an invitation to make written comments about the application.[5]

b) The Pastoral Land Board (**Pastoral Board**) must give the public notice of the application for a non-pastoral use permit,[6] a permit which allows primary production activities and the notice must invite any person who is interested in doing so to make written submissions to the Pastoral Board about the application.

Mining infrastructure

Mining infrastructure, such as haul roads, jetty or an airport, significantly impact native title rights and interests. These areas are, in practice, reserved exclusively for the use of the miner. The impacts of mining infrastructure on native title rights are not meaningfully less than those of mining itself.

The rights provided under s 24MD(6A) and (6B) of the Native Title Act create a significant increase in complexity with no real gain for miners or native title holders. It is inefficient to duplicate the NNTT's role by involving State/Territory tribunals in decision-making on these issues, and in practice in the Northern Territory, the full objection process is rarely used.

It is also inappropriate that the Ministerial override of a decision under s 24MD(6B) can be exercised by the relevant State or Territory Minister, who is necessarily conflicted in balancing the interests of native title holders and the State/Territory. Instead, the reservation of that function (if retained at all) to the Commonwealth Minister is preferable, as currently applies with decisions of the NNTT. This provides some distance in considering where the public interest lies. To be clear, the CLC's view is that the override should be removed entirely, however, as it is inconsistent with FPIC.

4. The expedited procedure is problematic

The expedited procedure was introduced to fast track mining tenements deemed as only having a minimal impact, mainly exploration licences. However, as traditional owners can attest, the grant of an exploration licence is the first step in the pathway to a mining project which will have a significant impact on their native title rights and interests.

All future act applications for exploration licences in the NT are placed in the expedited procedure process. The Northern Territory Government is unwilling to make case by case assessments of whether the expedited procedure should be applied. The legal validity of this approach is currently under challenge in Western Australia; but whatever the legal position is, as a matter of policy this places all of the onus on native title holders to protect against the impacts of exploration.

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[4] *Water Act 1992* (NT) (**Water Act**) s 71B(2).
[5] Water Act s 71B(4).
[6] *Pastoral Land Act 1992* (**Pastoral Land Act**) s 87A(1).

The large volume of applications on remote land and limited funding make it impossible for the CLC and PBCs to consult on all applications within the brief objection time frame. The CLC prioritises consultations based on known Aboriginal values of an area, informal contacts with native title holders and consideration of relevant NNTT jurisprudence. The combined effect of the NT Government's blanket expedited procedure policy and the provisions of the Native Title Act is that the government grants most exploration licences without any engagement with native title holders or claimants.

By contrast, the regime under Part IV of the Land Rights Act recognises the significance of exploration as the gateway to mining. Notably, under the Land Rights Act, traditional Aboriginal owners have a veto in relation to exploration, but not in relation to subsequent mining if they have allowed exploration to occur. This strikes a balance by enabling traditional Aboriginal owners to enforce a veto in areas where mining would never be contemplated by them, and allowing a reasonable bargaining process in other areas. In the CLC's experience, areas subject to veto are generally confined and linked to the presence of highly significant sacred sites. This regime, while not fully respecting the Aboriginal peoples' rights of FPIC, is far preferable to the future acts regime.

5. Bargaining power is uneven and too skewed towards the proponents.

A period of 6 months is too short and unrealistic to negotiate an agreement for a complex project and obtain the requisite authorisation from native title holders. For complex projects, native title holders will need to obtain independent advice on a number of matters including financial terms and environmental matters. Equally, it is very often the case that complex projects go through multiple iterations of development by proponents. Progress on project development is often put on hold, for example while a proponent conducts a review of the design of a mine and processing infrastructure; while a proponent pursues other higher priorities; or when proponents are waiting on work from consultants (such as having their lawyers review or prepare draft agreements). This means that negotiations are usually characterised by periods of intensive activity, or limited progress. Calculating a timeframe by reference purely to the initial date of a notice is not fit for purpose.

After negotiating the terms of an agreement, the registered native title body corporate or CLC (as the representative body, in areas where there is no native title claim) needs to identify the native title holders affected by that project and seek their consent (normally through an authorisation meeting).

In Central Australia, with weather conditions and ceremony obligations, meetings generally cannot be held between November and March. With the remoteness of certain locations, proponents often do not appreciate the logistical efforts involved in organising an authorisation meeting and often request that meetings be held in too short a timeframe.

Proponents have previously used the threat of seeking a determination at the NNTT to rush the negotiation process and force native title holders to consider and accept terms that they feel are unreasonable. This is an ever-present reality of negotiations under the right to negotiate. Native title holders are placed in an invidious position where they may prefer not to consent to a project but knowing that failure to consent will likely not prevent a project from proceeding with no benefits given to native title holders.

6. Lack of financial resourcing can hinder meaningful participation.

Obtaining expert advice and holding a meeting (especially a large authorisation meeting) can cost tens of thousands of dollars.

Section 60AB(1) of the Native Title Act allows a registered native title body corporate to charge a fee for costs incurred by the registered native title body corporate. The provisions supporting this power should be strengthened.

However, the Act is silent on registered native title claimants, which has been interpreted as meaning that a proponent's obligations of good faith do not extend to resourcing negotiations.

The effect is that the Native Title Act affords a higher quality of negotiation to native title holders compared to registered native title claimants. There is no good reason to discriminate between these two groups, who are otherwise treated identically by the future acts regime.

7. It can be difficult to satisfy the onus of proof that a party has not negotiated in good faith.

The threshold of what constitutes "good faith negotiations" is too low.

After more than 30 years of the operation of the Native Title Act, there is substantial information available to enable the NNTT, which is supposed to operate as a specialist tribunal, to assess what a reasonable offer is. Negotiation parties should be required to make reasonable offers as part of their obligation to negotiate in good faith.

Parties should also be required to have engaged in negotiations of substance before applying for a future act determination application (FADA). There is currently no threshold at all for the progress of negotiations, provided the 6 month time limit has elapsed. Instead, parties should be required to meaningfully discuss all issues identified for negotiation by the parties.

Grantee and government parties should be prohibited from directly contacting native title holders, unless the native title holders as a group first give their consent. Direct contact with native title holders is not consistent with the communal nature of native title, or with the representative structures (PBCs and Applicants) established by the Native Title Act. Allowing direct contact can create enormous conflict within groups, to the benefit of those proponents who choose to act unscrupulously and pursue 'divide and conquer' tactics.

The difficulty of satisfying the practical onus of proof in relation to good faith is exacerbated by the NNTT's practice of requiring evidence and submissions on good faith and the substantive future act determination applications *at the same time*. This imposes a huge resource burden on native title holders and wastes the time of all parties if the NNTT concludes a party has not negotiated in good faith.

8. The NNTT has not exercised its power to impose meaningful conditions on the doing of such future acts.

Although the NNTT may not impose a condition for payments worked out by reference to amounts of profit, any income derived or things produced by a proponent,[7] the NNTT has the power to impose conditions on other matters when it determines that a future act may be done.[8]

However, the NNTT has failed to exercise its power in a meaningful way by imposing conditions that could require the proponent to:

a) comply with meaningful sacred site protection processes;

b) provide preferential employment and contracting opportunities to native title holders; or

c) consult meaningfully on environmental protection matters.

Instead, conditions imposed by the NNTT are largely tokenistic in nature. They are no substitute for any agreement, even one on very poor terms. The social and environmental impacts of mining are widely recognised. The NNTT should embrace its role as a specialist tribunal, draw on the widespread information and literature about these issues, seek further information from parties, and craft meaningful conditions when permitting acts such as the grant of a mineral lease.

9. Native title holders do not receive timely and accessible compensation.

To obtain compensation, native title holders need to apply to the Federal Court for a compensation determination and demonstrate cultural loss. There is no requirement for compensation to be paid before the doing of the activity relating to the future act. CLC considers that the compensation incentive is misaligned. The liability for any compensation rests with the Crown unless the relevant government has entered into an arrangement with the proponent. Because compensation is payable by the Crown, there is no incentive for a proponent to enter into negotiations with native title holders to obtain their consent.

The Crown needs to remain as a respondent of last resort in providing native title compensation. However, the Northern Territory has consistently failed to put in place appropriate structures to make proponents primarily liable for native title compensation (such as making use of existing 'pass through' provisions,[9] or making it a condition of the grant of titles that proponents indemnify the Territory in relation to any native title compensation liability).

[7] Native Title Act s 38(2).
[8] Native Title Act s 38(1).
[9] Such as Native Title Act ss 24JAA(9), 24KA(6), 24MD(4), 24NA(7).

The principle of the proponent as the primary bearer of compensation liability, with the State or Territory as a fallback, should be prescribed by the Native Title Act in relation to all future acts.

A related issue is that the demonstration of cultural loss involves a very substantial evidentiary burden. To some extent this inheres in the nature of this head of compensation as articulated by the High Court. Identifying it raises a very significant resourcing burden for native title holders. Further, in many cases it will not be possible to identify the extent of cultural loss until after a project has ceased, or has been in operation for a substantial period of time.

10. The future acts regime is complex and difficult to understand.

The futures act regime is complex and difficult to understand. The Native Title Act is not the only piece of legislation underpinning the futures act regime. Significant matters are also dealt with in the *Native Title (Indigenous Land Use Agreements) Regulations 1999* (Cth) and *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth).

The future acts regime also requires an understanding of the legislation of the relevant State and Territory.

Such complexity makes it difficult to explain to constituents where English is not their first language, and the western legal system is not their primary frame of reference when it comes to rights in relation to land. Native title holders in the CLC's region are often in disbelief when told that mining can occur on their country without their consent. In the Northern Territory, it is also particularly complex where the rights of native title holders under the Native Title Act is substantively different (and reduced) compared to their rights under the Land Rights Act.

11. The regime under the Land Rights Act is an alternative regime offering a useful point of comparison.

The Land Rights Act is a Commonwealth Act that applies in the Northern Territory.

The Land Rights Act provides Aboriginal people with a right to withhold consent to exploration on their land.[10] Where consent is withheld, resource companies must wait 5 years before making another application to explore the land. Once consent is given for exploration, traditional owners are unable to withhold consent for mining.[11]

This system has not inhibited the development of mineral projects in the Northern Territory. Generally, traditional owners are not opposed to economic development on their country. However, those developments must be conducted equitably, taking into consideration the rights and interests of traditional owners, and avoiding impact on sacred sites.

[10] See section 42 of the Land Rights Act

[11] See section 46 of the Land Rights Act.

12. **There is no obligation on a proponent to revisit the terms of an agreement and there are no consequences on the validity of a future act if a proponent fails to comply with an agreement.**

    Consent given by native title holders is "once and for all", and Indigenous Land Use Agreements (**ILUAs**) apply for the life of a project even though projects often change significantly after an agreement has been signed.

    It is up to native title holders to monitor compliance with a native title agreement and evaluate the operation of that agreement even when there has never been adequate funding support to undertake such work.

    Failure to comply with the terms of a native title agreement does not result in the invalidation of any granted tenements.

Question 3 **Are there any aspects of the future acts regime that work well? If you have had positive experiences, we would like to hear about them and why they were positive**.

There are no aspects of the future acts regime that work notably well for native title holders. The future acts regime has failed to achieve its objective set out in the Preamble of the Act.

What works is when a proponent chooses to constructively and openly engage with native title holders. This is currently a rarity and something that depends entirely on the goodwill of the proponent. The future acts regime needs to be reformed so that this becomes the standard required of all proponents.

Question 4 **Do you have any ideas for how to reform the future acts regime?**

In addition to the reforms discussed in response to specific issues above, CLC proposes that the following reforms be made to the future acts regime:

1. Thoroughly overhaul the regime to make FPIC the central principle of its operation. This reform is the CLC's preferred pathway compared to the more specific proposals discussed below.
2. Give native title holders the right to veto all future acts attracting the right to negotiate, particularly where sacred sites would be affected.
3. Expand the range of future acts that attract the right to negotiate to include:
    a) Non-pastoral use permits (under the Pastoral Land Act) for primary production activities
    b) Water licences
    c) All compulsory acquisitions and mining infrastructure
    d) Exploration licences (and remove the expedited procedure entirely)

4. Strengthen the right to negotiate process significantly by:

    a) Clearly defining, and strengthening, what it means to negotiate in "good faith" including:

        - Proponents being required to fund the costs of native title parties in negotiating agreements
        - Proponents being required to make reasonable offers and counter-offers
        - Negotiations required to be substantively advanced, both in time and in their content, before good faith can be satisfied

    b) Reforming the criteria for a FADA so that the NNTT is required to determine the terms and conditions that are fair and reasonable and that, in the NNTT's opinion, should have been negotiated by the parties in commercial arms' length negotiations conducted in good faith.[12] This will require the removal of the prohibition on the Tribunal deciding on royalty payments or a share of the profits of a project.

5. Changing section 60AB to allow registered native title claimants (or their representative body) to charge a fee for costs incurred and including a provision to allow the costs to be recovered as a debt.

6. Change the compensation regime by placing primary liability for compensation on the grantee and not the Crown.

7. Provide sufficient funding for native title parties for all aspects of decision making: obtaining independent advice during negotiations, holding an authorisation meeting, monitoring implementation of an agreement and evaluating the agreement.

8. Adding flexibility to ILUAs:

    a) Inserting a mechanism for allowing flexibility in amending an ILUA. Section 24ED is too restrictive. Substantive variations to an ILUA should be permitted, subject to appropriate re-authorisation/common law holder consent provisions.

    b) Making it optional that the compensation payable under an ILUA is full and final. This should only be the case if the parties include a statement to that effect. This would allow parties to defer, for example, compensation for cultural loss until its quantum is better known.

9. Amending Subdivision M so that a discriminatory compulsory acquisition falls outside the operation of section 24MB.[13]

10. Clarify section 24LA so that it's clear that it only applies if the act is predetermined to cease after determination.

11. Remove the requirement for the native title party to make submissions at the commencement of the right to negotiate – in practice this is not a useful or meaningful way to initiate discussion.

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[12] Similar to Land Rights Act s 46(11).

[13] See, eg, *CG (Deceased) on behalf of the Badimia People v State of Western Australia* [2015] FCA 204 [919]-[930].

Question 5 What would an ideal future acts regime look like?

One that respects native title holders' ownership of country and rights under UNDRIP. It should provide for genuine FPIC.

It should be responsive to resource limitations where they exist for native title holders and should operate to create genuine and sustained engagement from proponents.

Too many proponents see native title holders as a regulatory hurdle to clear. By contrast, the cultural precepts of central Australian Aboriginal people mean that they seek respectful, long-term, person-to-person relationships with visitors to their country.

Native title holders want to establish and invest in relationships with proponents that produce ongoing mutual benefit. Proponents need to be incentivised to seek the same from native title holders.

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