To: Australian Law Reform Commission

Re: ALRC consultation on Future Acts regime

21 February 2025

Introduction

AMEC appreciates the opportunity to provide feedback to the Australian Law Reform Commission (ALRC) regarding the Review into the Future Acts Regime. The Future Acts regime underscores and defines how land users engage with Native Title in a respectful manner when accessing a granted lease by a State Government.

This submission is provided to identify concerns with the current Future Acts process in the *Native Title Act 1993* and is anticipated to be one of several submission from AMEC during this process.

AMEC appreciates that the ALRC met with AMEC members to discuss issues and hear feedback directly. This submission is structured to reflect the subjects covered in that conversation, as well as directly then answers the questions specifically identified in the Discussion Paper.

About AMEC

The Association of Mining and Exploration Companies (AMEC) is a national industry association representing over 600 member companies across Australia. Our members are mineral explorers, emerging miners, producers, and a wide range of businesses working in and for the industry. Collectively, AMEC's member companies account for over $100 billion of the mineral exploration and mining sector's capital value.

Mineral exploration and mining make a critical contribution to Australia's economy, directly employing over 274,000 people. In 2022-23 Industry generated a record high $466 billion in resources exports, invested $4.27 billion (CY2023) in exploration expenditure to discover the mines of the future, and collectively paid over $63 billion in royalties and taxes.

AMEC has a long-standing objective for increased clarity, certainty, efficiency and effectiveness of native title and cultural heritage processes to:

- ensure fair, equitable and quality negotiated outcomes and benefits for Aboriginal people, governments, and industry;
- reduce delays and costs for all stakeholders;
- provide increased trust, integrity and confidence in decision making; and ensure compliance.

These objectives are intended to enhance, and not diminish native title or cultural heritage values.

Our commentary in this submission, and all previous submissions to the ALRC, in no ways seeks to diminish respect for indigenous cultural heritage, or Native Title, because places which are sacred, ritual, or ceremonial sites of importance to Aboriginal people should be valued and acts or processes that irreversibly damage or destroy these sites are to be avoided or resolved to the satisfaction of relevant parties.

Consultation

General remarks

The ALRC Review of the Future Act Regime is being undertaken as the Commonwealth Government also delivers policies, legislative frameworks and funding grants schemes intent on responsibly incentivising and accelerating the development of renewables, hydrogen and critical minerals production. Streamlining, cutting red tape and speeding the development of these projects is the key focus of these Government policies, seeking to unlock the social and community benefits economic development bring. Nationally, most of these projects will occur on land under Native Title.

This Review addresses one of the key issues for the economic future of Australia, how the speed and cost of land access is managed and balanced with the rights of Native Title holders.

Currently the majority of activities that occur in regional Australia are mineral exploration, mining, pastoral and (increasingly) renewable energy generation. The Review does not directly affect the operation of the service sector, banking, finance, retail sector or the farming sector – as they primarily occur on private freehold land where Native Title rights have been extinguished.

While securing land access in a timely and commercially affordable manner is crucial for successful mineral exploration, Industry acknowledges it must be done in a manner that ensures the relationships with Native Title holders are both realistic and undamaged.

The Issues paper reflects this, mining and mineral exploration are the main private industry engagement with Native Title due to the volume of activity.

There has been substantial feedback regarding the framing of this Issues Paper, which could be taken to imply a “David versus Goliath” relationship: a tiny Prescribed Body Corporate tackling a mining behemoth. This is inaccurate and mischaracterises the realities of the mining and mineral exploration sector. While there are some globally large companies, the vast majority of companies in the mining and metals space are mineral exploration companies. These companies are a handful of people who are keen to engage with Traditional Owners and PBC in a light touch, but respectful manner.

Geographical dispersal of Native Title is unacknowledged

Industry feedback has also suggested that the Issue Paper downplays the reality of the geographical dispersal of Native Title. Over 85% of Australian determined Native Title is in WA. There is a view in a large portion of Industry that the Future Act review is, in many respects, a review of the Western Australian government’s treatment of the expedited procedure. As at 1 November 2024, 70% of

Western Australia's land mass is exclusive or non-exclusive Native Title. While Queensland has more Prescribed Bodies Corporate, a higher percentage of Western Australia is subject to Native Title.

The ALRC consultation is occurring while the Western Australian State Government contests the 8 March State Election. The caretaker conventions may make it difficult for the Government to provide fulsome feedback, and we ask that a separate conversation occurs directly given that the absolute majority of Future Acts appear to occur in WA.

Issues

AMEC appreciates that the Australian Law Reform Commission met with AMEC members to discuss issues and hear feedback. The following issues were discussed:

Prescribed Bodies Corporate Capacity

The construction of the Prescribed Body Corporate in the Native Title Act means that they hold a monopoly over access. A proponent has no other party to negotiate with regarding land access. The capacity and willingness of that group determines the speed and cost of land access.

Industry feedback was uniform: Prescribed Bodies Corporate lack capacity, with few exceptions. Those groups that have the most capacity is located in the most geologically prospective and developed areas. The inverse is unfortunately also true.

However, there was considerable frustration that the Commonwealth Government insufficiently funds the Prescribed Bodies Corporate (PBC). With the view of Industry that the Commonwealth Government has never funded the PBCs enough for the task ascribed to them under the Act. This has flow on consequences for the management of cultural heritage.

As the PBCs face complex governance tasks and rising requests for land use, particularly with the Government incentivised rapid increase in renewable energy and transmission infrastructure, the strain on PBCs appears to be increasing.

The lack of Commonwealth Government funding has led to a reliance of PBCs on the commercialisation of heritage surveys as a revenue stream. In Western Australia (in particular) it is extremely difficult to navigate the process without reaching an ancillary agreement. Without being willing to negotiate a further, and usually confidential, agreement a company is forced to either take the contest path or suffer an effective veto through delays.

It is not an unreasonable contention that the lack of funding is leading to an effective veto. If a company holds out to not agree to an ancillary agreement seeking only grant, and it is not exclusive Native Title, all they can really do without increasing risk of Heritage Act can do is non-disturbing activities. This is commercially unrealistic, as the Government has passed on the rights of access to ground to the under resourced Prescribed Bodies Corporate.

The Office of the Registrar of Aboriginal and Torres Strait Islander Corporations is appointed by the Minister for Indigenous Australians to oversees the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (CATSI Act). It has powers akin to the Australian Securities and Investments

Commission (ASIC). ORIC needs to be adequately resourced and staffed, with the intent to ensure that high standards of governance, fiduciary duty and ethics are maintained in the Prescribed Bodies Corporate.

Independent Person

In 1998 amendments to the Native Title Act introduced a distinct procedure for infrastructure supporting mining, namely miscellaneous licences and general-purpose leases. Tenement applicants must consult with affected Native Title parties if objections are raised within two months of notification, to minimize the Act's impact on their rights and interests.

These consultation rights are less onerous than the negotiation process. If objections persist, an identified Independent person, will determine the matter.

In theory this process is simple. However, in practice, the Independent Person process is flawed and needs to be reworked. The timeframes for the passage of matters through the Independent person process are unclear, and the feedback from Industry has been consistent that it could be faster.

Expedited procedure

How the expedited procedure is implemented differs in each jurisdiction in Australia. There has been debated within Industry as to whether the expedited procedure, is in fact “expedited”. However, it is seen as the fastest route to access currently available. There are two needed areas of reform: the Regional Standard Heritage Agreements; and the timeliness of handling objections.

In Western Australia, Regional Standard Heritage Agreements (RSHA) in their current form are essentially redundant. Unfortunately, they are no longer being used and their exchange at the beginning of the process is little more than a formality. They badly need to be rewritten to meet modern expectations of both industry and indigenous counterparties. Equally, they would need to be recognised as a standard and supported by indigenous groups, and in some way enforceable, or they will simply be disregarded, as quickly happened to the RSHA.

A necessary reform that will improve the entire system is whether the system can deal with objections on an expedited basis. Statistically the Western Australian process receives the most objections. This is both a factor of being the largest jurisdiction with Native Title, and that Western Australian PBCs set instructions to object to every single application. It has been noted by many in industry that the objections to the Native Title expedited procedure is not a good measure of performance. Most objections fall away before being tested and are used as tool to create delay. Valid objections should (and must) be allowed to stand, however the use of objections as a vexatious tool and a point of leverage is frustrating.

Right to Negotiate

Nationally, the overwhelming Industry feedback was to note that the process of Right to Negotiate is challenging, but amendments to the process would have to be carefully considered, and widely consulted.

In South Australia the Part 9B process has drawn multiple years of feedback from Industry is a consistent call for South Australia to abandon their unique process and align nationally.

South Australia's need to move Right to Negotiate

Relationships with Traditional Owners and Native Title Mining Agreements (NTMA) are an important, fundamental part of agreement making and land access in South Australia. Much of the land where mineral exploration and mining occurs in South Australia is subject to Native Title. Exploration and mining companies are required to undertake consultation and to have NTMAs in place with First Nations groups to undertake mineral exploration and mining activities.

The requirement to comply with the provisions of Part 9B before starting any operations on Native Title land, finds companies held up in negotiations or attempted agreement processes. In many areas of South Australia, proponents of mineral exploration and mining projects are currently experiencing a long wait to engage, consult and make agreements with Aboriginal groups. Wait times are expected to significantly increase as the number of mining, renewable energy and other projects grow to support national and global decarbonisation goals.

Timeframes and costs to obtain the necessary NTMA agreements for mineral exploration are escalating in South Australia and proving difficult to obtain in some cases. In some instances, companies have waited several years to negotiate agreements while the clock continues to count down on time-limited mineral exploration licences.

The 'low-level activity' permitted under 9B, is no longer viewed as acceptable, and may threaten relationships with Traditional Owners, so it is not adopted by Industry as it was once was. Furthermore, Part 9B is not required under the new South Australian Hydrogen and Renewable Energy Act or the Petroleum and Geothermal Act, as companies operating under these Acts use the Right to Negotiate. Native Title land access requirements should be the same for mineral exploration and mining as these industries.

Right to Negotiate provides up-front certainty for explorers and miners. With an NTMA in place before a tenement is granted, companies will be able to move more quickly and achieve more on-ground exploration activities during tenure. Administration will also reduce for DEM who are having to provide expenditure compliance provisions to explorers unable to get the required access under Part 9B.

AMEC and industry are asking for amendments to the *Mining Act 1971* to move from Part 9B to the Right to Negotiate system to ensure that timeframes are supported by effective resourcing and certainty, whilst supporting the ongoing relationship building between stakeholders.

While the required amendments may be some time away, industry needs greater support from Government now, to ensure that NTMA's under the existing system can be obtained in a more efficient manner.

Duty to Act in Good Faith

Industry feedback regarding the 'Duty to Act in Good faith" have suggested that changing any aspect of this will alter 30 years of hard-won certainty and practice.

Powers of the National Native Title Tribunals (NNTT) role to award compensation

The question was raised during the conversation with Industry, and the feedback was largely consistent - the NNTT role is quite clear. The Federal Court is much more qualified. The Tribunals powers under the RTN were limited to imposing securities pending resolution of claims.

Aboriginal Heritage surveys

Aboriginal heritage surveys are an important, fundamental part of agreement making and land access. Engagement and progress toward industry activity, including surveys, start from the earliest stages of mineral exploration, to establish long-lasting relationships with traditional owners and Aboriginal peoples.

The costs of heritage surveys continue to escalate along with long periods of waiting for requested surveys to occur, which can be years, even for low impact exploration. The pool of people able to provide heritage clearances and monitoring services is already stretched and with the additional demands of renewable energy projects, the Government should find ways to support Aboriginal groups to build capacity to adequately provide these services that are required under legislation.

Obtaining the required Aboriginal heritage clearances is becoming a significant barrier to access land for mineral exploration and other industry activities and causing major delays to projects. There are no policy mechanisms to contain the growth in these costs or timelines to achieve heritage surveys.

Policy solutions can support a better way forward for Aboriginal heritage surveys. This can help reduce the uncertainty around land access so that companies can proceed with committed on-ground mineral exploration work programs on time-limited exploration licences.

In certain parts of Australia, the cost of accessing land through the Native Title and Heritage survey processes have exponentially risen for Industry in the last three years. AMEC has members who report survey costs increasing from $20,000 to $200,000 in that time period. However, in areas that do not witness much mineral exploration or mining activity the cost of surveys and land access have not correspondingly increased.

These fees and charges are driven by the archaeologist and anthropologist costs, and a range of professionals that have inserted themselves in the negotiation and agreement making process, primarily lawyers and consultants representing the PBCs.

An intense irony, that the ALRC is silent upon, is that for most mining and mineral exploration activities the company funds the legal representation of the Prescribed Body Corporate. Due to the scale of significance of the agreements, a company will pay to ensure that they are prepared in an expedient manner.

The cost of meeting these fees is borne by the proponent, none of which ends up with the PBC or representative body, meaning that despite the exponential rise in costs the PBCs are still only really recovering their costs, while the traditional owners they represent receive nothing, unless they are directly involved in a heritage survey as a monitor.

Industry acknowledges that reasonable costs and fees should be borne by proponents. The current costs are not reasonable and are no longer manageable for small mineral exploration companies. They are being driven by consultants and third parties leveraging the monopoly available via Native Title. The ALRC must look to consult regarding sub-regulations or guidance regarding the reasonableness of cost.

Future Act issues in Western Australia

Second renewals of Western Australian mining leases

Section 78 of the Western Australian Mining Act 1978 (WA Mining Act) provides for the initial term of a mining lease to be 21 years and, on application, for further renewals of the lease to be granted. Under section 78(1)(b) of the Mining Act, the first renewal of a mining lease for a further term of 21 years is “as of right” where an application for renewal is made in the prescribed manner during the final year of the initial term of that lease.

Under section 78(2), all further renewals of a mining lease (each not to exceed 21 years) are at the Minister’s discretion. The WA State Government’s interpretation of Section 26D of Native Title is that it will apply on an alternating basis. So that following two terms (42 year) of a mining lease, the mining lease holder will have to speak with the Native Title party. Then the lease will hold for a further 42 years, before again seeking confirmation via the Right to Negotiate. This hopscotch is not the intention of the Native Title Act (or the WA Mining Act). Consideration should be given to legislate amendments to correct this unintended consequence.

Forrest & Forrest Pty Ltd v Wilson & Ors

The implications of the High Court decision of Forrest & Forrest Pty Ltd v Wilson & Ors [2017] HCA 30 for the validity of Western Australian mining tenements is that it is necessary to amend both the WA Mining Act and the Native Title Act to ensure security of mining tenure in the future.

In this case, the High Court held that a failure to strictly comply with the technical requirements regarding lodgement under the Mining Act have led to applications to be considered invalid and there was no jurisdiction to progress a mining lease application through to grant.

This has generated uncertainty about the validity of mining tenements that were processed in good faith and in accordance with the previous practices and understandings of the law at the time they

were granted. This is a complex problem and has been the subject of considerable discussion between the Western Australian and Commonwealth Governments. It remains unresolved.

In the final sitting weeks, before the prorogue of Western Australian parliament for the coming State Election, the Mining Amendment Bill 2024 was tabled. When this legislation passes it intends to cauterise the legislative problem created by the Forrest & Forrest case, drawing a line of when granted tenures will not suffer from this invalidity risk. However, the 2024 Bill is unable to validate the tenements granted in the past that have questions of invalidity. To completely resolve ramifications of the Forrest & Forrest decision through amendments to the Native Title Act done in concert with further amendments to the WA Mining Act.

Overlap between the future act's regime and other statutory regimes

The phrasing of Section 237 of the Native Title Act does not align with a single jurisdiction in Australia. This provides two alternative pathways for the ALRC, each jurisdiction can amend their legislation so that it aligns. Alternatively, the ALRC could clearly define 'sites of particular significance' as a site that is covered by the existing State legislative framework. The inclusion of "sites of particular significance" in the Native Title Act contributes to the confusion of Aboriginal Cultural Heritage with Native Title. This clarification will also sidestep the considerable conversation underway in Industry as to the adequacy of each jurisdiction's Aboriginal Heritage.

Of similar concern is the practice of the State Environmental Protection Authorities (EPAs) to attempt to regulate Aboriginal Cultural Heritage. This draws back to their definition of environment including Aboriginal Cultural Heritage in the environmental legislation. This extends in the WA EPA extending considerations into the social surroundings assessment of Part IV applications. The duplication of environmental legislation to cultural heritage legislation is an unnecessary frustration.

In the Commonwealth, the drafting of a Nature Positive standard for First Nations Engagement and Participation in Decision-making would have similarly drawn regulation of Aboriginal Cultural Heritage into the Federal environmental legislative framework. An unnecessary and confusing duplication.

Local and international non-binding standards including: UNDRIP; International Council on Mining and Metals (ICMM) Indigenous Peoples: Position Statement; and/or International Finance Corporation (IFC) Performance Standard 7: Indigenous Peoples

Industry feedback was that the Free Prior Informed Consent (FPIC) deserves a larger and more nuisance national conversation. This is a complex topic that will have substantial ramifications for the wider community's governance over the landscape. There are limited (if any) examples of it being effectively legislated. We would consider this is a topic that is beyond the consideration of the ALRC.

Questions

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

The two most important concerns with the Future Act regime that are raised consistently are the cost to undertake the process and the lengthy timeframes.

The cost of doing the negotiations, less for expedited procedure agreements, but certainly for RTN the costs are increasingly prohibitive. The Commonwealth Government needs to consider the impact on the cost of doing business of the Native Title Act in regional Australia.

For example, nearly all agreements now include future royalties. In Australia no other post Federation agreement bestow rights to royalties for the minerals in the ground. Private freehold owners do not have rights to the minerals, they are held in the Crown.

The concerns regarding cost have increased in the last three years. Industry has reported that they have seen unilateral increases in the cost to the company, cost of meetings, daily rate, monitors and standardisation of process, costs and timeframes. It has been identified that the cost increase is not the Traditional Owners, whom hold the knowledge and understanding, but the consultants: the archaeologists, the anthropologists and the lawyers who complete the paperwork.

The unregulated cottage industry of consultants who operate at the periphery of the Prescribed Bodies Corporate are a source of significant frustration for Industry.

Question 2: Are there any important issues with how the future act regime current operates that we have not identified in the Issues Paper?

Industry identified that there should be further consideration regarding the application of the following areas of the Native Title Act:

Section 91: Now that 85% of Western Australia is determined Native Title, the only way to get a Section 91 is to have received consent. There are questions whether these granted Section 91s over determined native title are lawful instruments. So that it can be used to post determination. For example, an existing Section 91 is over a pre-disturbed area next to linear infrastructure. If a company sought to extend, they would have no ability to extend a Section 91. This could not be done in the current arrangement.

The Issues Paper is silent on settlement of Native Title, which is surprising as it does have consequences for Future Acts.

The South West settlement of Native Title in Western Australia is the “most comprehensive native title agreement negotiated in Australian history”[1]. The 200,000km^2 Settlement between the Noongar people and the WA Government will resolve all native title claims in the South-West in exchange for around $1.3 billion in land and other benefits2. This has been followed by the 48,000 km2 Yamatji Agreement and the 705 km2 Tjiwarl agreement. Each have introduced their own Future Acts processes; each have slight variations and differences. As the Government(s) around Australia move to settle Native Title, and if this trend for customised Future Acts processes continues, then the there will be in the long term a myriad of different Future Act processes.

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 are positive?

The Expedited Procedure has largely worked well historically and been successful. Recently rising costs and the technical use of objections to facilitate the passage of ancillary agreements.

Conceptually the intent of the framework is sound and efficient as it tries to balance all land uses. The legislation has been described as academic, and feedback suggests it is an academic exercise in many respects. The expectation and architecture are not actually matching the lived experience in practice.

Question 4: Do you have any ideas for how to reform the futures act regime?

There has been wide ranging discussion regarding potential improvements:

- Moving the compensation leverage points beyond mineral exploration as there is more value further down the mining development process. This would move the negotiation of costs
- Rephrase Section 237 to reduce the confusion and overlap between the Native Title Act and State definitions of Aboriginal Cultural Heritage.
- While reasonable costs and fees should be borne by industry, the current costs and fees carried by industry are not. ALRC should consider providing guidance so that small exploration companies are not priced out of engaging.

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

A timely, efficient and cost-effective process that engages a wider variety of Industry and government that satisfies both the Native Title parties and the wider community. It is unclear how to get to this piece of legislation.

[1] https://www.wa.gov.au/organisation/department-of-the-premier-and-cabinet/south-west-native-title-settlement

[2] https://www.wa.gov.au/government/media-statements/McGowan-Labor-Government/High-Court-clears-the-way-for-historic-South-West-Native-Title-Settlement-to-proceed-20201126

Concluding Remarks

AMEC appreciates the opportunity to provide feedback to the Australian Law Reform Commission (ALRC) regarding the Review into the Future Acts Regime. This Review addresses one of the key issues for the economic future of Australia, how the speed and cost of land access is managed and balanced with the rights of Native Title holders.

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