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Submissions to ALRC on the Reforms to the Future Act Regime

Introduction

1. Kyburra Munda Yalga Aboriginal Corporation RNTBC (ICN 7581) (**KMY**) are pleased to put forward the following submissions to the ALRC.
2. The Juru People were determined to be the native title holders of land and waters pursuant to approved determinations of native title made by the Federal Court on 26 July 2011, 11 July 2014 and 22 June 2015.[1] On those same dates, the Federal Court made orders that Kyburra Munda Yalga Aboriginal Corporation RNTBC (ICN 7581) (**KMY**) be the Registered Native Title Body Corporate for the native title determinations.
3. KMY performs functions pursuant to subsection 57(1) of the *Native Title Act 1993 (Cth)* (**NTA**). KMY is also the Aboriginal Party within the meaning of Sections 34 and 35 of the *Aboriginal Cultural Heritage Act 2003 (Qld)* (**ACHA**).
4. KMY notes that the Review of the Future Acts Regime Issues Paper has been informed by consultations with various stakeholders such as native title holders, representative bodies, legal practitioners, government and industry bodies, and other stakeholders.
5. KMY supports the ALRC review of the future act regime and consultation and engagement on with various stakeholders however, we emphasise that it is important to ensure that ongoing consultation, engagement and any ALRC report and

[1] *Prior on behalf of the Juru (Cape Upstart) People v State of Queensland (No 2) [2011] FCA 819, Lampton on behalf of the Juru People v State of Queensland [2014] FCA 736 and Lampton on behalf of the Juru People v State of Queensland [2015] FCA 609*

recommendations accurately reflects the interests of native title holders and Prescribed Bodies Corporate (**PBCs**) who are determined to, among other things, hold, manage and protect native title on behalf of the native title holders. The concerns and the voice of the native title holders and PBCs is paramount during the Review and implementation process as it is the native title holders that will be most impacted by any changes to the future act regime.

6. KMY performs its statutory and rule book functions which is, among other things, protecting and managing country. KMY strongly recommends that the future acts regime be reformed based on native title holders traditional ownership of and physical and spiritual connection to country and reform of the regime should not be misguided by discriminatory assumptions about the Juru peoples culture, laws and customs.

7. Noting the above comments, KMY makes the following submissions.

Questions 1 and 2 – What are the Important Issues

Inadequate regime

1. KMY submissions will focus on the expedited procedure process which we say, at the outset, is an inadequate and unfair process which does not operate for the benefit of native title holders and PBCs.
2. A study by Michael Lucas has found that National Native Title Tribunal (**NNTT**) as the arbitrator of future act determination decisions:

> "… tend to privilege resource developers over native title parties with just three out of 515 formal tribunal decisions resulting in a determination that the act must not be done. Further, across the past five years a breakdown of decisions demonstrates that two-thirds of decisions imposed no conditions on the act and one-third resulted in imposed conditions".[2]

3. KMY submits that determined native title rights and interests are not simply the right to exercise and enjoy traditional rights and interests on country. Juru peoples native title rights are proprietary[3] in nature and operates *in rem*, in that native title rights and interests are enforceable against the whole world.[4]

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[2] Lucas, M (2024), The Future Act Regime in Australian Native Title: Data Analysis, Trends and Insights, *University of Western Australia Law Review, Vol.51 (2) 1*.

[3] *Yunupingu on behalf of the Gumatj Clan or Estate Group v Commonwealth of Australia* [2023] FCAFC 75 at [411] (CJ Mortimer, Moshinsky and Banks-Smith JJ). This decision is currently on appeal to the High Court of Australia and at the time of preparing these submissions the Court's decision was reserved. See also *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900 at [214].

[4] *Western Australia v Ward* (2000) 99 FCR 316 at [190].

4. The NTA expedited procedure process is inadequate because it does not consider the *in rem* recognition of native title rights and interests.
5. KMY strongly recommends that the future act regime be reformed based on native title holders traditional ownership of and physical and spiritual connection to country.

Expedited Procedure - Unfair Process and Power Imbalance

6. In Queensland, an Exploration Permit for Minerals or Coal (**EPs**) attracts the expedited procedure based on three criteria:
    a. The act is not likely to interfere directly with the carrying on of community or social activities of native title holders in relation to the lands or waters concerned; and
    b. The act is not likely to interfere with areas or sites of particular significance, in accordance with their traditions, to person who are the holders of native title in the area; and
    c. The act is not likely to involve major disturbance to any land or waters concerned or create rights whose exercise is likely to involve major disturbance to any land or waters concerned.[5]
7. The current expedited procedure is a convenient 'shortcut' process used by the State for the granting EPs. A State government agency, without any engagement with KMY or the Juru people, make decisions that EPs will have minimal impact on our determined native title. If the State takes the view that the expedited procedure applies, it is stated in a public notice and, unless a registered claimant or prescribed body corporate objects, the right to negotiate process will not apply.
8. The Queensland process to address objections to the grant proceeding through the expedited procedure is to recommend minimum standards through the Native Title Protection Conditions (**NTPCs**). [6] The process includes that a native title party will not lodge an objection if the proponent agrees that the NTPCs are a condition of the EP. The NTPCs operates to, among other things, issue notices to KMY to undertake consultation and for cultural heritage surveys to be done by Traditional Owners.

[5] *Native Title Act 1993* (Cth) s. 237.
[6] See Business Government website for more information on the NTPCs: https://www.business.qld.gov.au/industries/mining-energy-water/resources/minerals-coal/authorities-permits/applying/native-title/expedited/conditions.

9. KMY has had varied experiences when engaging with miners, and other proponents including government parties. Our starting point and preferred position is to negotiate our preferred cultural heritage template agreements which are different to the NTPCs in a number of respects. For example, we have developed our agreements to capture Juru standards of managing and protecting country.

10. We have had an experience where an objection was lodged and a miner would not engage with KMY to negotiate an agreement because they firmly believed that the NTPCs cover the management and protection of cultural heritage and native title rights and interests.

11. While we understand that there is a legal obligation on the proponent to negotiate in good faith, the NTPCs in that case was relied on by the miner as a means of negotiating in good faith. The miner's position was that they met their legal obligations if the NTPCs were a condition of the grant of the EP.

12. When an agreement cannot be reached with the miner, the NNTT usually conducts an Inquiry on whether or not an EP is an act attracting the expedited procedure. A NNTT Inquiry takes into account the following factors:

    a. the requirement to construe the NTA in a beneficial manner to the native title parties;[7] and

    b. the overriding imperative of the NTA and the bodies established under it to recognise and protect native title.[8]

13. Like the NTA generally, the expedited procedure process, should be beneficially construed having regard to the overall objects and purposes of the NTA.[9]

14. The NNTT Inquiry to be made is whether, on its face, the future act falls within the provisions of 237(a), (b) or (c) of the NTA and to determine if the future act is not an act attracting the expedited procedure.

15. The legal principles regarding the approach to s 237 are summarised in *Yindjibarndi v FMG*.[10] That is, the NNTT is required to undertake a predictive assessment by considering what is likely to occur (in the sense of a real, not remote, chance) as a result of the grant of the permit. The miner's intentions may be relevant to that assessment.

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[7] *Kanak v National Native Title Tribunal* (1995) 61FCR 103 at 124 ("*Kanak*").
[8] Section 3(a) and (b) of the NTA.
[9] *Western Australia v Thomas* (1996) 133 FLR 124 at 149; *Smith v State of Western Australia* [2001] FCA 19, per French J at para [23].
[10] [2014] NNTTA 8 at [15].

16. KMY submits that the expedited procedure process, the NNTT's Inquiry process and standard directions made into relation to an Inquiry and the legal principles that have been developed, creates a power imbalance and is extremely unfair to the native title parties.

17. One example of this unfairness is when KMY instructed our Solicitor to object to an EP which was located in a sensitive cultural area in the Burdekin. The EP notice said in simple terms that the grant of the EP authorises the proponent to explore for all minerals other than coal for a term not exceeding five years with the possibility of renewal for a term not exceeding five years. The State's position was that the granting of the EP can be expedited and was subject to the NTPCs.

18. KMY offered on several occasions to meet with the proponent to discuss and negotiate our preferred agreement however, the proponent through its agent refused to do so and insisted that the NTPCs were appropriate.

19. The KMY preferred agreements operates to ensure that cultural awareness and cultural inductions are done before any activity is done in the EP area.

20. Further, our agreements include a committee that is made up of Juru Traditional Owners and the proponent. The purpose of the committee process is to, among other things, review any works notices and to agree where possible about:

    a. the location of where works will be done on the EP area;

    b. The scope and scale of the activity in the EP area;

    c. How the activity will be done ie will machinery such as bulldozers or graders be used to clear vegetation;

    d. Who will do and when will cultural heritage surveys commence.

21. The committee process is a way of minimising risk of damaging or destroying any Juru sites and special places and is an excellent means of ensuring that the parties work together and develop an ongoing relationship.

22. Because the proponent refused to engage with KMY, the NNTT set our objection down for an Inquiry and made standard directions requiring KMY, the State and the proponent to respectively prepare and lodge evidence. The directions placed on KMY were unfair, unreasonable and put heavy burden on KMY because we have limited funds and do not have the same resources as the proponent or the State.

23. The NNTT directions required KMY to lodge its evidence including preparing a statement of contentions which sets out the community activities that are likely to be interfered with directly by the grant of the EPM and the nature and location of areas or

sites of significance that are located in or close to the EPM. Furthermore, KMY had to provide evidence of the significance of the site in accordance with our customs and how the EPM is likely to interfere with the area or site.

24. After KMY provides its evidence, the proponent was required to provide evidence which was simply what the evidence it relies on and a statement of contentions on what is proposed to be done. We emphasise that the proponent was required to provide evidence of what is 'proposed to be done' whereas KMY was required to give evidence of " the nature and location of areas or sites of significance".

25. We were also advised that KMY had to prepare evidence identifying sites in the claim area and also provide evidence of how the EP will interfere with those sites. We were made aware that in order to satisfy the requirements of s 237(b) of the NTA on the question of whether sites of particular significance exist in the area, the onus is on KMY to produce some concrete evidence relating to the particular site, its location and the grounds for its particular significance.[11] This is an extremely high burden requiring KMY to prepare witness statements from Juru Elders and prepare expert reports from an anthropologist and archaeologist. KMY simply does not have the resources to retain and pay our legal advisor and experts to assist with preparing evidence to support our preparing a case. Further, there would have been stress and trauma placed on Juru Elders giving evidence. There would have also been further resources and expenses incurred by KMY to attend an on-country hearing.

26. Our Solicitor advised KMY of previous NNTT Inquiry decisions and how the Federal Court and the NNTT have made decisions about the expedited procedure process and that we also have to prove that community and social activities take place on the EP area.

27. KMY discontinued its objection to the EP which was eventually granted subject to the NTPCs and at the date of these submissions, the miner has not issued a NTPC notice advising that a cultural heritage survey is required. KMY does not know if the miner has undertaken any mining activity that may disturb or damage our special and sacred sites.

28. It did not matter that the Juru people fought hard to get our *in rem* determination and we thought our native title was protected and enforceable against the whole world. The

[11] See *Barnes v AngloGold Ashanti Australia* NNTTA 17 at [49].

expedited procedure has changed that and it is like our native title rights and interests means nothing.

29. We are aware that Native Title Representative Bodies (**NTRB**) may assist Traditional Owners with preparing an expedited procedure case[12] however, we note that NTRB funding is limited and prioritised which means they cannot assist KMY with preparing evidence in support of objections to the numerous EPs that are processed *via* the expedited procedure process.

30. It is KMY submissions that the legal principles and expedited procedure processes which are forcefully applied by the NNTT are unfair and creates a power imbalance which operates in favour of proponents.

Free, Prior and Informed Consent

31. The current expedited procedure regime is also contrary to the Juru peoples basic human right to have free, prior and informed consent (**FPIC**).

32. FPIC is a fundamental principle of the United Nations Declaration on the Rights of Indigenous People (**UNDRIP**). KMY submissions are that FPIC is a core principle that must be recognised and adhered to in any changes to the future acts regime and expedited procedure.

33. The *Final report into the destruction of Indigenous heritage sites at Juukan Gorge* (2021) describes FPIC as:

> "… a specific right that pertains to Indigenous people which allows them to give or withhold consent to any project that may affect them or their lands. Once given, consent may be withdrawn at any stage. Furthermore, the principle of FPIC allows Indigenous people the right to negotiate conditions under which the project will be designed, implemented, monitored and evaluated.[13]

34. KMY's experience is that proponents, and in particular mining proponents and various State government parties, commitments around free prior and informed consent, is in many cases lacking. Whilst some proponents and government parties do make genuine efforts to engage with KMY and the Juru people there are instances where miners take advantage of the expedited procedure process knowing that process works favourably

[12] See for example *Michael Ross & Others on behalf of the Cape York United Number 1 Claim v Gamboola Resources Pty Ltd* [2018] NNTTA 10 and *Top End (Default PBC/CLA) Aboriginal Corporation v Northern Territory of Australia* [2025] FCA 22.
[13] At p. 183.

for them. The decision about protecting Juru country is taken out of the hands of the Juru people and put into the hands of the State and the NNTT. This breaches our fundamental human right to have FPIC.

35. We also draw to the attention of the Inquiry Justice McHugh's comments in *Mirriuwung Gajerrong* about how "The deck is stacked against the native title holders whose fragile rights must give way to the superior rights of the landholders whenever the two classes of rights conflict".[14] KMY respectfully does not support those comments however, we submit that those comments are sadly to this day true and apply fittingly to the expedited procedure regime. To be frank, the expedited procedure regime and the NNTT Future Act Inquiry process removes Juru peoples FPIC.

36. Queensland has legislation designed to protect Aboriginal cultural heritage and legislation which operates to recognise Aboriginal and Torres Strait Islander human rights.

37. A key aspect of the *Aboriginal Cultural Heritage Act 2003* (Qld) (**ACHA**) is for the "recognition, protection and conservation" [15] of Aboriginal cultural heritage. The ACHA defines Aboriginal cultural heritage as anything that is a significant Aboriginal area; or a significant object; or evidence, of archaeological or historical significance, of Aboriginal occupation of an area in Queensland.[16]

38. The NTPCs are developed as a means for miners to meet the ACHA *Duty of Care Guidelines*.[17] The ACHA does not contemplate the right to protect and continue to enjoy and exercise our native title rights and interests once an EP has been granted.

39. The Queensland *Human Rights Act 2019* (**HRA**) considers some rights of Indigenous peoples of Queensland. The Act states that:

> Although human rights belong to all individuals, human rights have a special importance for the Aboriginal peoples and Torres Strait Islander peoples of Queensland, as Australia's first people, with their distinctive and diverse spiritual, material and economic relationship with the lands, territories, waters, coastal seas and other resources with which they have a connection under Aboriginal tradition and Ailan Kastom.

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[14] *Western Australia v Ward* [2002] HCA 28 (8 August 2002) at [561].
[15] *Aboriginal Cultural Heritage Act 2003* (Qld) (**ACHA**) s.4.
[16] ACHA (QLD), s8.
[17] See: https://www.qld.gov.au/firstnations/environment-land-use-native-title/cultural-heritage/cultural-heritage-duty-of-care.

40. To simply classify our native title rights and interest under the ACHA is contrary to the intention of the NTA and falls outside the spirit of the HRA. Further, it is not appropriate to simply rely on an obvious argument that the NTA as federal law overrides the HRA which is State law. The hands on issues of protecting country needs to be considered as does Juru human rights need to be respected and upheld. Further, Aboriginal and Torres Strait Islander people must not be denied the right, with other members of their community, to enjoy maintain, control, protect and develop their identity and cultural heritage, including their traditional knowledge, distinctive spiritual practices, observations, beliefs and teachings. [18]

41. Despite the fact of our determined and *in rem* native title rights and interests, the expedited procedure process undermines our fundamental human right to protect the right to enforce our native title rights, cultural heritage rights and human rights.

Section 24 HA Notices

42. The Juru native title determination area extends some 10 kilometres to the seaward side of the highwater mark.

43. Every year, KMY receives several hundred section 24 HA Notices from the Great Barrier Reef Marine Park Authority (**GBRMPA**) for the granting of various permits for research and tourism. These notices allows KMY to provide nothing more than the right to comment on the particular activity and we have no right to be involved in the decision itself even though that decision may affect our native title rights and interests. The GBRMPA can consider KMY comments but is under no obligation to act to minimise any risk of harm or interference to our native title rights and interests.[19]

44. Further, KMY simply does not have the resources or capacity to respond to every single notice that is received. However, there are occasions when we have instructed our solicitor to object to some permits being granted because the activity will most likely interfere with our offshore native title rights. Our solicitor has advised that we do not have the right to object, we only have the right to comment.

45. Section 24 HA Notices received by KMY are in most if not all cases vague because:

    a. notices do not contain a clear written description of the areas proposed to be accessed and used;

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[18] Human Rights Act 2019 (Qld), ss28.

[19] See *Harris v GBRMPA (2000) 98 FCR 60* at [49] and [50].

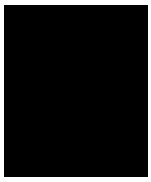
b. the information in the notice does not contain sufficient details to allow KMY to clearly relate the proposed activity to ground. Sometimes a map is attached however, KMY does not know exactly what part of Juru off shore area is being referred to except for its general location;
c. the notices do not include a detailed description of the nature and extent of the proposed activities to be undertaken in any particular geographical location and we cannot make an informed response as to what effect the proposed activities will have on our native title rights and interests;
d. explain how the person seeking the permit will meet their legal obligations under the ACHA;
e. specify the nature and scale of the proposed activity and the Juru native title holders do not know the extent to which the exercise of their native title rights and interests will be impaired.

46. Like the expedited procedure process, the section 24HA process removes our FPIC right and we cannot make an informed response.
47. KMY recommends that we have more than just the right to comment on these Notices. We recommend that our comments must be carefully considered prior to any grant and that we be resourced to be involved in the decision-making process. Further, we should have the right to appeal a decision to an arbitral body such as the Administrative Review Tribunal.

Conclusion

48. At this time, KMY explains at a high level our suggestions for reform. We note that the ALRC will also issue a Discussion Paper which will include ideas for reform and ask for feedback on those ideas. KMY will therefore consider those ideas for reform and may make a further submissions.

49. We also welcome the opportunity to meet with ALRC representatives to discuss these submissions further.



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Randal Ross
Chair
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