State of Queensland submission to the Issues Paper for the Review of the Future Acts Regime published by the Australian Law Reform Commission

As a major land and resource holder, the future acts regime is a key component for the Queensland Government in managing its native title responsibilities when progressing land and resource dealings. Whilst some parts of the future acts regime work well, other parts do not, particularly in a post-determination environment and working towards Closing the Gap outcomes.

As at February 2025, there have been 198 positive native title determinations in Queensland covering 39.7 percent of the state (including 4.5 percent of the state comprising exclusive determinations). Currently, 7.6 percent of the state is subject to 44 native title claims.

The Queensland Government has extensive experience in applying the future acts regime in its land and resource dealings since the future acts regime has commenced. It has seen the benefits and challenges of the current system in relation to native title and non-native title stakeholders, including the state. Over that time the understanding of native title has also matured, as has relationships with Aboriginal and Torres Strait Islander Queenslanders.

All parties can benefit from a future acts regime which seeks to strengthen relationships by recognising the significance of native title rights and interests whilst providing practical ways forward to progress land and resource dealings (such as dealings relating to mining, land, public infrastructure and conservation). As such, the issues identified below highlight improvements for reform, working towards an ideal future acts regime, which seeks to take into account all stakeholder interests.

The following discussion engages with and adds to the main topics raised in the Issues Paper. Where headings are copied from the Issues Paper, this is signified by single inverted commas around the headings.

'Resourcing and capacity are significant barriers to meaningful participation'

Resourcing and capacity constraints are significant barriers to meaningful participation in the future acts regime as identified in the Issues Paper at [78]. This can be true for both native title parties and non-native title parties.

Transaction costs of agreement-making

Resourcing constraints are particularly apparent in terms of the significant costs involved in negotiating Indigenous land use agreements (ILUAs), which can be prohibitive for both native title parties and non-native title parties (including government bodies). Limited financial resources within native title parties means that smaller projects can be given lower priority, with the State competing with better-resourced commercial proponents for time and attention. This makes it challenging to secure the availability of native title parties for some ILUA negotiations, leading to lengthy delays and uncertainty

for stakeholders. This is especially evident for low impact agreements post-determination.

It is difficult for either party to justify taking on cost burdens of agreement-making to validate acts that have a limited effect on native title rights and interests and/or where the transaction costs can outweigh the value or benefits of the dealing (noting, however, sometimes this is the only way forward).

Improving meaningful engagement

The costs associated with negotiating ILUAs, and other consultations, impose significant pressure to finalise all details accurately in a single instance. This often precludes the opportunity to revise and adapt the agreement as circumstances and relationships evolve over time.

Further, a proponent's inability to fund right to negotiate (RTN) meetings can lead to perceptions of not negotiating in good faith, can delay the agreement-making process and lead to a future act determination application (FADA) being lodged.

As noted in the Issues Paper at [78], under-resourced parties are unable to engage meaningfully with the future acts regime. One part of a whole-of-system approach (noted at [86] of the Issues Paper), to support the capacity of Registered Native Title Bodies Corporate (RTNBCs) to engage with the future acts regime, could be applying a provision similar to section 203FE of the NTA for initial setup and operational costs of Prescribed Bodies Corporate.

Cost recovery

There is a lack of clarity on cost recovery provisions for responding to future act notifications and for agreement-making. State departments have noted greatly differing amounts invoiced by RNTBCs.

Since 2017, some Queensland government agencies have been using an annually adjusted guideline fee to pay RNTBCs for responding to future act notifications (FANs). The guideline fee sets the minimum payment for responding to a FAN. If an invoice exceeds this guideline fee, the RNTBC is required to itemise.

Some RNTBCs consider that the guideline fee is not reasonable. Likewise, there are times when fees sought to be recovered are considered unreasonable.

Providing additional national guidance on what types of activities, and costs, are appropriate to recover would assist all parties. It is considered that the provision in section 60AB(3) of the NTA that fees imposed must not be such as to amount to taxation, is unclear. In that regard, consideration could be given to including the concept of reasonableness into sections 60AB and 60AC of the NTA. Additionally, perhaps the issue could be clarified in regulations under section 60AC(5)(d).

‘Agreement-making is important, but success depends on a number of factors’

ILUAs can be used pre- and post-determination of native title. While ILUAs are voluntary agreements that can encompass numerous negotiated outcomes (individually or collectively per agreement) and build relationships, they can also be time consuming, expensive and resource intensive processes to undertake. Several issues have been identified that if addressed could increase efficiencies and effectiveness in agreement-making.

Agreement-making post determination

The process for negotiation, authorisation and consultation of an agreement is substantially the same for both area and body corporate ILUAs. As a result, even with a body corporate agreement, there are significant time and cost implications for the ILUA proponents and parties before the RNTBC resolves to execute the agreement and submit the ILUA for registration. Consultation and authorisation, with the broader native title group or collective of family groups, of a body corporate ILUA with the determined native title holders should be simpler than what is required in a pre-determination environment.

ILUAs negotiated as part of determination

When an ILUA is negotiated and executed as part of a consent determination process, the ILUA is done as an area agreement as there is no RNTBC. The determination does not take effect until registration of the ILUA. This means that the agreement must be notified for three months, even though the native title group has been identified and will be subsequently determined by the Court. This issue will continue to delay processes as the state and territories continue to negotiate settlements in order to address their compensation liabilities. In this case, simpler registration processes, such as required for a body corporate agreement, should apply.

RNTBC as the successor in relation to pre-determination agreements

Further to the above, where an agreement was executed by the registered native title claimants pre-determination as part of the determination process, issues arise from the RNTBC not being a party to the agreement. This is similar to other agreements that were negotiated and registered before the determination on behalf of the native title group.

This may have a significant effect on the ongoing business of the native title group post-determination. For example, revenue streams, additional consents that are yet to be enacted or other consultation or advice functions.

Consideration should be given as to whether the NTA should include agreement-making succession provisions that can be beneficial in these situations. That is, where an ILUA has been made with the registered claimants of the determined native title group, the RTNBC should stand in the shoes of that group and/or be deemed to be a party. This will ensure that an agreement can operate effectively in a post-determination environment.

Registered copy of ILUA

Where the state is not a party to an ILUA, apart from considering the Register Extract available on the National Native Title Tribunal (NNTT) website, it does not know if the ILUA it is provided with is the registered agreement in order to validly progress a land or resource dealing the subject of the ILUA. Consideration should be given to ways in which the NNTT can identify to states and territories that the ILUA document itself has been registered, such as by a stamp and/or with a relevant registration number.

Alternative agreement-making post-determination

Other forms of acceptable agreements or contracts need to be considered to reduce this burden on the parties involved.

In a post-determination environment, there should be consideration of options for allowing a RNTBC to enter into an agreement such as a contract as opposed to an ILUA, about certain types of future acts whereby native title consent can still be achieved without the need for costly and time-consuming authorisation or consultation in particular circumstances. This could also build upon the recent amendments that allow native title groups to provide standing instructions decisions in accordance with provisions in the *Native Title (Prescribed Bodies Corporate) Regulations 1999*.

In addition, where time is of the essence and the only way forward is by way of an ILUA, an alternative agreement-making process or expansion of existing future act provisions is required. For example, disaster recovery following an extreme weather event.

'Some procedural rights are weak'

The future acts regime applies a variety of procedural rights from a notification and opportunity to comment to the negotiation of an ILUA. Sometimes there are no procedural rights that apply, sometimes the procedural rights afforded do not match the impact of an act, and sometimes there is an inconsistency in their application. The issue of capacity building for native title parties is also raised.

Inconsistent application

Procedural rights afforded under the future acts regime are applied inconsistently throughout, and they do not always align with the impact of proposed activities. For example, native title parties with sea country receive many notifications under section 24HA of the NTA for marine park permits. In contrast, similar activities in terrestrial protected areas often fall under section 24JA, which does not require notification for permits or authorities.

Additionally, many dealings under section 24KA lack procedural rights as the dealing could not be done on ordinary freehold land, with the procedural rights being based upon what would be provided to an ordinary freeholder or leaseholder (if on leasehold land) even though the test for section 24KA is not the freehold test. Whilst the non-extinguishment principle applies, significant infrastructure is able to proceed without

notification. This is also in contrast to section 24JA where public works are required to be notified.

Economic opportunities

Procedural rights can be the precursor to economic opportunities, even from a simple notification and opportunity to comment process. For example, comments received from a native title party on a research activity on dolphins led to participation in the activity for capacity building and supporting researchers in ensuring their activities were conducted in accordance with cultural protocols and avoiding sensitive areas.

Capacity building

Some RNTBCs are better resourced and more capable of responding to notifications, resulting in inconsistent engagement. There can be a significant discrepancy in an RNTBC's understanding of their procedural rights and ability to charge fees, which can be exacerbated by insufficient funding and volunteer-based roles. Well-informed groups have stronger negotiating power. Therefore, providing more education and support to native title holders and RNTBCs is essential to ensure they understand their procedural rights and can effectively participate in the future acts regime.

A balanced approach

To address some of the issues above, consideration could be given to aligning procedural rights (including expanding where appropriate) with the potential impact of proposed activities; utilising an opt-in system to allow native title parties to choose which activities they want to be notified about; the development of national guidance materials and examples of suitable future act notices to assist compliance; and technological solutions such as funding a national, spatially-based system for issuing, responding, and recording future act notices to reduce administrative burdens and increase surety.

However, it also should be recognised that procedural rights, and any realignment of procedural rights, carries the risk of increasing administrative and financial burdens on all parties, as well as consultation fatigue. A balanced approach is required.

Bolstering requirements for reliance on section 24FA protection and making a non-claimant application

The current process leading to reliance on section 24FA protection is somewhat lacking and there is room for improvement, starting with the making of a non-claimant application. Currently, the Federal Court Form 2 does not include any specific requirement for the application to identify how the applicant will support the assertion that native title does not exist in the application area. A requirement for better foundation evidence should be required, such as including that the relevant native title representative body has been consulted.

under the current process, once the application is notified there is a very short timeframe for response by a native title group to file and register a native title claim. Consideration

should be given to the adequacy of the current timeframe, in light of consequences of reliance on section 24FA protection or a potential finding of no native title.

Where section 24FA protection is relied upon to progress a dealing clarification of the effect on native title would be of benefit because the effect of the interest is not specifically provided in the section, as is done for the other future act provisions. For consistency, one suggestion is that if the future act is the grant of freehold or other exclusive interest then extinguishment results, and for any other act the non-extinguishment principle applies (such as is provided in section 24ID(2) of the NTA).

'Limitations on the right to negotiate' and 'the expedited procedure is problematic'

The right to negotiate is considered a valuable procedural right and is a key process to validly progress the grant of mining interests in Queensland. Over the last 10 years, the State of Queensland has issued 4497 section 29 notices and an additional 2642 section 29 notices that included an expedited procedure statement. However, there are improvements that could be made to the process to address the following issues.

Insufficient time for negotiations

The six month time period to allow parties to negotiate an agreement before being able to seek a determination from the NNTT is insufficient. This time period should be extended to enable a sufficient and reasonable period for negotiations. Such a measure would assist in removing pressure on parties to reach agreement in the currently short timeframe, and time to negotiate a fair agreement. This issue is also identified in the Issues Paper at [106].

Timing of determining whether parties have negotiated in good faith

The NTA makes it clear that if the parties are found not to have negotiated in good faith, the determination cannot be made on the application. Any issue associated with good faith is a threshold issue and the NNTT should decide this first as part of the FADA process in deciding whether the act can be done. This may also save parties time in collating relevant information regarding the doing of the act, if good faith is not found.

Role of the state as a negotiating party only extends to section 31 agreements and not ancillary agreements

The state is a negotiating party as part of the RTN process. However, this is in relation to the section 31 agreement and not the ancillary agreement which is a private agreement between the grantee party and native title party. The state is increasingly being asked to be present at ancillary agreement negotiation meetings, but its attendance does not generally enable any input or assistance for the parties to reach agreement. To assist parties in understanding their roles in the RTN process, it would be helpful to clarify between those negotiating parties relevant to the section 31 process and those relevant to the ancillary agreement (other related agreement).

Guidance material to assist parties through the right to negotiate process

The NNTT has a key role in the RTN process. As such, it is well placed to provide relevant guidance material in relation to topics such as good faith, mediation and when expedited procedures apply.

Legacy trusts established pre-determination

The Issues Paper notes at [107] that where compensation structures, such as trusts, are utilised for the purpose of managing compensation under an agreement, there may be overly restrictive conditions on the native title holders' access to compensation thereby limiting the right to self-determination. An aspect of this issue is the creation of what could be termed 'legacy trusts', where an RNTBC does not have oversight or control over trusts established resulting from a pre-determination ILUA. Often when ILUAs are executed pre-determination, little consideration is given to how the ILUA should be managed should native title be determined, including what say or control a RNTBC may have over that money and benefits. Native title groups should be given the option, following a determination, of transferring control to RNTBCs.

Where trusts remain independent, transparency should be introduced to allow native title groups to better make decisions about their own monies and benefits.

'Compensation'

There are a number of provisions in the NTA in relation to liability for the payment of compensation which require clarification. Additionally, consideration should be given to whether further guidance regarding the calculation of compensation, and perhaps some elements of quantum, should be included in the NTA or regulations.

Whether a second act is a future act where the non-extinguishment principle applies to the first act

Clarification is required as to whether an act (the second act) is a future act (which would otherwise be subject to the non-extinguishment principle) if it is done in relation to land or waters for which the exercise of native title and rights and interests is wholly suppressed under the non-extinguishment principle because of a previous future act (the first act). This directly links to whether the second act is compensable.

Invalid future acts

The legal consequences of a future act that is valid under the general law, but invalid to the extent it affects native title, are uncertain. Such acts do not attract compensation under part 2, division 5 of the NTA. The NTA does not specify what alternative remedies are available to native title holders apart from section 50 noting that native title holders would ordinarily be entitled to compensation or damages for invalid acts under the general law and that the Federal Court may be able to award such compensation or

damages in proceedings in relation to the invalidity of the act. This issue is noted at [121] of the Issues Paper.

A native title holder identified after the ILUA is authorised

Section 24EB(5)(b) of the NTA operates to limit the compensation entitlements of the native title holders who, as a group, were provided with a reasonable opportunity to participate in the process which endorsed the ILUA. Whether section 24EB(5)(b) applies to persons who become members of a native title holding group after an ILUA is authorised, for example, where an additional apical ancestor is included when a native title claim is determined, is unclear.

Effective extinguishment of a right where the non-extinguishment principle applies

The majority of future acts that are valid under part 2, division 3, subdivisions G to N of the NTA are subject to the non-extinguishment principle. There is an expectation that at some point, the future act will cease and native title holders will resume exercising their native title rights and interests. There can be occasions on which a future act can result in such profound changes to the land or waters affected by the act that the exercise of native title rights and interests is no longer practical or possible. For example, the reclamation of an area that effectively 'extinguishes' the right to fish. The NTA is silent on how the non-extinguishment principle applies in these situations and also how compensation is to be addressed.

Compensation provisions in Indigenous land use agreements

The NTA makes it clear that entitlement to compensation for the agreed acts is that which is covered by the ILUA. Where the parties agree, the ability for native title compensation to be preserved for a future compensation claim under the agreement could be clarified under the NTA. This would be beneficial in assisting certain agreement-making to reduce the immediate costs and length of time for negotiations, particularly when the current case law is limited and native title parties may be uncertain of agreeing to full and final compensation.

Third party liability and reliance on section 24FA protection

Currently, the state is liable to pay compensation in respect of non-claimant applications even where it is not the non-claimant. Given that an applicant would have paid compensation through an ILUA, if that had been otherwise possible, there should be an ability under the NTA to pass it on as can be done under subdivisions K, M and N (where a law of the state otherwise provides).

Further guidance required under the NTA

Consideration should be given to whether specifics regarding the calculation of compensation, and perhaps some elements of quantum (particularly in relation to economic loss), are included under the NTA or regulations.

Judgments on compensation, whilst they settle the specific issues being considered on the facts, do not provide sufficient guidance at this point in time for every scenario. Additionally, litigation can be lengthy and expensive. As such, further guidance regarding the calculation of compensation is required in the NTA. It would be beneficial to be able to more quickly settle compensation payments, including through formal compensation claims.

'The future acts regime does not appear to achieve its goals'

The Issues Paper notes at [131] that the policy intent underpinning the amendments to the NTA in 1998 was to reform the future acts regime for greater workability and certainty, and that some aspects of the future acts regime are not working well. The following identifies some issues and examples of where the future act regime could be improved for greater workability and certainty in relation to:

- Aboriginal and Torres Strait Islander communities
- critical government infrastructure
- environmental outcomes and emerging technologies.

Future acts in Aboriginal and Torres Strait Islander communities

Simplifying processes when an RNTBC is also the landholder

Future acts done on Queensland's Aboriginal and Torres Strait Islander freehold lands are not excluded from the future act definition in section 233 of the NTA, because they are not defined as 'Aboriginal and Torres Strait Islander land' under section 253 as they are for certain other jurisdictions.

In Queensland, an RNTBC can also be the grantee of Aboriginal and Torres Strait Islander freehold land. This means they wear two hats in effect; one as the native title holder and the other as the landholder. Subject to the views of RNTBCs, consideration should be given to amending section 233(3) of the NTA to provide that future acts done by an RNTBC landholder of Aboriginal and Torres Strait Islander freehold land are excluded from being future acts. It is important to note that the state is not suggesting excluding the future act regime from these lands, but only to the extent the act is being done by the RNTBC landholder.

Timely support of essential infrastructure in communities

Section 24JAA of the NTA provides an alternate avenue for critical public housing and certain government infrastructure to proceed in Aboriginal and Torres Strait Islander communities, as well as related infrastructure of staff housing, section 24KA facilities and sewerage treatment plants.

Whilst an ILUA is always an option, and several communities have whole-of-government agreements for community development and economic opportunities, such agreements are complex and can take several years to finalise. Further, particular timeframes may prevent this avenue. For example, communities have missed out on funding opportunities where an agreement could not be negotiated within the strict funding allocation timeframes and/or due to internal native title disputes.

Section 24JAA is also limited to particular facilities, which does not take into account the other essential local government infrastructure or other infrastructure needed in communities. For example, stand-alone power systems (SAPS) to provide electricity.

A current issue is the rebuilding of council infrastructure and public housing damaged or destroyed by Cyclone Jasper in a far north Queensland Aboriginal community. The majority of these works would require an ILUA and the Council has received cyclone recovery funding which comes with a limited timeframe. As native title consent under an agreement is not a guaranteed outcome, a risk is therefore posed in the delivery of the emergency repair works and reconstruction.

This provision will sunset in 2030. Section 24JAA has a legitimate place in the future act regime and should be retained and improved to deliver projects beneficial to support social and health outcomes within remote Indigenous communities, in the absence of a registered ILUA.

Supporting critical government infrastructure

The following issues focus on supporting critical government infrastructure, which is also noted above in the comments regarding section 24JAA of the NTA.

Getting of quarry materials on pastoral leases and the definition of 'mine'

Queensland has many lands that are pastoral holdings, and there are many gravel pits located on pastoral holdings, which provide quarry materials to local governments for the purpose of maintaining regional and remote road networks.

Section 24GE of the NTA provides a valid pathway for the conferral of a right to extract, obtain or remove sand, gravel, rocks, soil or other resources (except where doing so constitutes mining, as defined under section 253 of the NTA). However, such gravel pits would go beyond the 'natural surface of the land' and thereby be considered mining under the NTA, creating a significant limitation on the ability of the state to utilise this future act section.

As such, the section does not effectively deliver upon the intent included in the Explanatory Memorandum to the Native Title Amendment Bill 1997 (Cth) which includes the following section 24GE example: *a government grant to a contractor building a road of an authority to take gravel from land covered by a nonexclusive pastoral lease where the gravel is to be used in construction of the road* (page 109, paragraph 9.36; see also page 10, table 9.2). If section 24GE could be relied on for this purpose, it would provide a way forward to support reliable and long-term access to gravel for maintaining

Queensland's extensive remote road network while preserving native title holders' rights to compensation and deliver upon the section's original intent.

Alternatively, the inclusion of 'natural surface' in the 'mine' definition should be reconsidered as it effectively means that most quarrying activities on the land are considered mining in Queensland even though the quarrying activity does not involve extracting, producing or refining minerals (section 253(d)) or processing by non-mechanical means (section 253(e)).

Clarifying the scope of section 24KA to support essential government infrastructure

Section 24KA provides a valid pathway for Government to undertake future acts that are classed as 'facilities for services to the public', such as roads. This enables the valid construction and ongoing management of critical public infrastructure through an efficient and relatively low-cost process while preserving native title holders' compensation entitlements.

It is currently not clear whether the scope of section 24KA extends to those acts that are integral to the creation and maintenance of facilities for services to the public. For example a road, and the grant of an authority to get gravel necessary for that road. Historically, the state often relied upon section 24KA to authorise local government to extract gravel (quarry material) for the purpose of constructing and maintaining roads. This has recently stopped due to the uncertainty over whether section 24KA applies. In contrast, a public work under the NTA includes that adjacent area necessary or incidental to the operation or construction of the work (section 251D).

Supporting environmental outcomes and emerging technologies

Expanding the list of section 24KA facilities to incorporate emerging technologies and support environmental outcomes

As noted above, section 24KA provides a valid pathway for essential government infrastructure operated for the general public. However, the list is limited and does not cover certain necessary public infrastructure and also does not take into account advancements in technology since it was first created.

As such, consideration should be given to expand section 24KA. Examples include:

- certain renewable energy facilities, such as stand-alone power systems (SAPS) operated by an electricity distributor. A SAPS replaces a single wire electricity line and uses solar energy, with battery storage and back up diesel generation, although part of the electricity distribution network.
- visitor infrastructure on national parks, such as toilet blocks, in order to protect the environment as these areas are set aside for both the protection of the natural environment, but also for public use and enjoyment of these natural areas where section 24JA does not apply.

Infrastructure in protected areas

Section 24JA of the NTA allows state agencies to effectively develop pre-Wik reserves according to their gazetted purposes, meeting operational needs. However, the extinguishing effect of public works in state protected areas can be problematic, leading to fragmented rights and complex land management issues known as the "Swiss cheese effect". While section 47C offers a remedy to disregard this extinguishment where it has occurred, an alternate way forward for future public works is to exclude park facilities, such as shelter sheds, barbecues, toilets, and campsites, from the definition of public works, especially those that support the exercise of native title rights. These works would then be treated similarly to the creation of management plans on national parks, with the non-extinguishment principle applying.

Dealing with low impact acts post-determination

Limited options to progress low impact dealings post-determination

Section 24LA of the NTA allows 'low impact future acts' where they are done before an approved determination and cease to have effect on the making of the determination. As such, following a native title determination there are a range of low impact dealings for which an ILUA is the only valid way to appropriately address native title rights and interests.

As noted earlier in this submission, negotiating an ILUA can impose significant burdens on the resources of both the state and RNTBCs for an act that has a limited effect on native title. Even if native title holders are supportive of the activities, the cost and time to negotiate an ILUA far outweighs the scale and value of the dealings and there is a risk that they do not ultimately proceed. One instance of such dealings is apiary permits.

Expansion of section 24LA to include application post-determination

Consideration should be given for the inclusion of a corresponding provision for post-determination low impact future acts. Any new provision of this kind would need to include appropriate safeguards and, unlike the existing section 24LA, would need to provide for native title holders to be compensated. Safeguards could include a revised list of low impact future acts, a notification requirement, and/or a mechanism by which government parties or third parties can discharge their compensation obligation at the time the act is done (perhaps through a prescribed set fee).

Other clarification sought

Clarity required for referral of objections under section 24MD(6B)

The NTA does not state a specific timeframe for referral of an objection made under section 24MD(6B). Whilst the state must ensure that the objection is heard by an independent person or body (in Queensland, the Land Court) where 8 months have passed, it is unclear whether the state is permitted to refer the objection to the independent person or body prior to the end of the eight month period (for example, if a native title party was happy for the objection to be referred prior) and whether the native

title party may directly lodge their objection with the Land Court prior to the end of eight months.

Clarity is also required concerning whether the eight-month timeframe has to run before the dealing may proceed if the objection was resolved.

Confirming contact details for registered native title bodies corporate

The National Native Title Register is the point of truth for a native title determination. It is suggested that the address for service held by the Office of the Registrar of Indigenous Corporations for the RNTBC is shared with the Native Title Registrar when it is updated. This will ensure future act notices are sent to the correct point of contact.

Thank you again for the opportunity to provide input into the Australian Law Reform Commission's review on the future acts regime.