Dr Ed Wensing (Life Fellow) FPIA FHEA

Associate and Special Adviser, SGS Economics and Planning
Research Fellow, City Futures Research Centre, UNSW
Visiting Research Fellow, Centre for Indigenous Policy Research, ANU

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Australian Law Reform Commission,
PO Box 209
Flinders Lane
Victoria 8009

Review of the Future Acts Regime: Issues Paper (2024)

Please find attached my submission to the Review of the Future Acts Regime under the *Native Title Act 1993* (Cth).

I am an experienced planner, policy analyst and academic. I have worked in government, the private sector, non-government organisations, professional associations and I have engaged in teaching and research in several universities around Australia. I have a long track record of academic publications in a wide range of fields.

For the past 30 years, I have had the privilege of working with Aboriginal and Torres Strait Islander peoples and communities across Australia on a wide range of land and water related matters. I have an extensive knowledge and understanding of the statutes relating to land administration, land use and environmental planning, Aboriginal land rights, native title rights and interests, environmental protection, natural resource management, cultural heritage protection and local government in every jurisdiction around Australia.

My current research interests are in the intercultural contact zone between Indigenous peoples' rights and interests (however defined by them) and the Crown's land administration, land use and environmental planning and management systems.

This submission is therefore based on many years of research and practice with a particular focus on the interactions between the land use planning systems around Australia and the native title system.

The primary focus of this submission is about the inclusion of statutory approvals within the scope of low impact future acts in Indigenous Land Use Agreements that are being settled at the time of consent determinations. I believe what is happening is contrary to the intention of the of the low impact future acts provisions in the *Native Title Act 1993* (Cth). The matters raised in this submission arose from my doctoral research between 2013 and 2019 as a PhD Scholar at the National Centre for Indigenous Studies at ANU.

I'd be happy to discuss these matters with the ALRC at any time.

Kind regards

Dr Ed Wensing, (Life Fellow) FPIA FHEA

The 'Statutory Approvals' clause in the definition of *low native title impact* activities in ILUAs with local government

The focus of my PhD research was on how two systems of law and custom relating to land could be accorded an equal and non-discriminatory status and in such a way that native title holders would no longer be required to agree to the surrender and permanent extinguishment of their native title rights and interests and would be able to use their ongoing native title rights and interests to engage in the economy on their terms and at their choosing.

My research led me to take a much closer look at many of the Indigenous Land Use Agreements (ILUAs) that were being struck, especially in Queensland, as part of native title consent determinations. What I discovered was that native title holders were inadvertently agreeing to planning decisions that were yet to be made that could potentially still impact, negatively, on their native title rights and interests, and also negate their entitlement to compensation for the loss, diminution, impairment or extinguishment of their native title rights and interests.

I discovered that a Schedule to several ILUAs between native title holders and local government councils[1] included a class of activities deemed by the ILUA to be of 'low native title impact', including Statutory Approvals. In the terms of the ILUAs, Statutory Approvals includes 'Anything that involves, or which permits or requires, the granting, issuing, making by or to the *Local Government* of any approval, consent or permission under any *Law*.'

Under the terms of the ILUA, *low native title impact* activities can proceed with no further conditions or requirements for the prior consent of the native title holders before proceeding with the activity.

Given my 50 years' experience as an urban and regional planner with exposure to the land use planning and local government systems in every jurisdiction around Australia, I believe there are serious questions to be asked about the veracity of whether 'any approval, consent or permission under any *Law'* by a local government anywhere around the country could really be cast as of *low native title impact*, especially approvals under State/Territory planning laws.

I examined several cases, but one stood out in particular. I am unable to disclose the locality, but the case involved the development of tourist accommodation and other facilities on a pastoral lease that was subject to a non-exclusive possession native title determination. The effect of the inclusion of statutory approval for a tourist development on a pastoral lease subject to native title, not only denied the native title holders the opportunity to be consulted about the proposed development, but also had the effect of denying them the right to compensation for the loss, diminution, impairment or extinguishment of their native title rights and interests under s.24HA of the *Native Title Act 1993* (Cth).

The Development Application (DA) went through the local government Council's planning and development assessment process without any notification or consultation with the native title holders. The development proposal included the development of tourist accommodation and a helicopter landing pad on the pastoral lease to facilitate the ease of movement of tourists to and from the property. The proposed helipad on the pastoral lease is of particular concern because the operation of a helicopter landing will have adverse impacts on the rights and interests of the native title holders. *Prima facie*, aircraft activities will impact on their right to hunt by making game scarcer in and around the heliport when noisy helicopters arrive and

[1] I can provide a list of those ILUAs in Queensland.

depart. The native title holders would also be denied access and therefore their native title rights and interests over a very large portion of their determination area for reasons of safety under aviation law.

The approval of helicopter landing sites away from authorised aerodromes falls with the relevant local government council in the context of their land use planning powers and not within the Civil Aviation Safety Authority (CASA). It is therefore incumbent on the local government to make its own assessment of whether the selected site by the proponent/operator satisfies the Civil Air Safety Authority's CAAP 92-2(2) guidelines in giving its land use approval, and the helicopter pilot in command of the helicopter to ensure that the site accords with the CAAP 92-2(2) guidelines.

What is concerning, is the existence of a 'Statutory Approvals' clause in the definition of *low native title impact activities* in the ILUA between native title holders and local government councils in Queensland in particular. The existence of this clause in ILUAs is that it has been used by at least one local government Council in Queensland to validate a DA in so far as it may affect the non-exclusive native title rights and interests of native title holders over a pastoral lease holding.

The reason why I am drawing this to the ALRC's attention is to ensure that the low impact future act provisions in the *Native Title Act 1993* (Cth) are properly used and not abused to deny native title holders the right to be consulted about actions may invariably impact on their native title rights and interests or to deny them their entitlement to compensate for the loss, diminution, impairment or extinguishment of their native title rights and interests..

It is arguable whether a 'statutory approval' is a *low native title impact* activity as defined or intended by s.24LA of the *Native Title Act 1993* (Cth). Under delegation from States/Territories, local governments in all jurisdictions give statutory approvals to a wide range of activities under a wide range of laws that could potentially have significant impacts on the existence, enjoyment and/or exercise of native title rights and interests. While planning approvals may not be a legislative act (i.e. the making, amendment or repeal of legislation), they are nevertheless statutory decisions that sometimes involve very significant material changes in land use that can potentially have serious adverse effects on the existence, enjoyment and/or exercise of native title rights and interests. The effects will not become evident if the native title holders are not notified and consulted prior to them being carried out. This is because only native title holders can determine how an action will impact on their native title rights and interests.

There may indeed, be a need to review many of the ILUAs that have the 'statutory approvals' clause included as a 'low native title impact activity' so as to ensure that native title holders will not be adversely affected by planning decisions that are yet to be made. Such clauses should be removed form existing ILUAs. I can see no justification for their retention. The term 'statutory approvals' term should perhaps be relocated, if necessary, within the definition of *high native title impact* activities in the ILUA where it is more likely that the parties have agreed to notification and consultation on such activities prior to them being carried out.

What is also relevant here, is whether ILUAs includes a succession clause binding a future local government council that may have changed its name, or the boundaries of the local government council may have changed due to amalgamations or boundary changes for any other reasons. Local Governments are a creature of the State/Territory, and boundary changes through amalgamations and de-amalgamations have become a regular feature of local

government reforms in every jurisdiction around Australia over the past three decades. When I first started working with local governments over 40 years ago, there were over 900 local governments in Australia. There are currently 534 local governments around Australia. The necessity for succession clauses in ILUAS to take account of changes in local government boundaries is therefore self-evident.

These issues also highlight what I have always regarded as a significant weakness in the future act regime in the *Native Title Act 1993* (Cth). Of course, an act must affect native title if it is to be a future act validated by Part 2, Division 3 of the *Native Title Act 1993* (Cth). However, the current future act regime is geared around legislative acts (i.e. the making, amendment or repeal of legislation), changes in land tenure (i.e. the issue of freehold or leasehold land titles, lease renewals or extensions) and acts that pass the freehold test (i.e. extinguishment by compulsory acquisition or voluntary surrender and opal and gem mining leases).

I believe what is missing from Part 2, Division 3 of the Act is a category dealing with significant or material changes in land use. Land use planning and development decisions will often, but not always, involve material changes in land use which can potentially have significant effects on native title rights and interests by wholly or partly affecting their existence, enjoyment or exercise. Not all land tenure changes involve material changes in land use, and many land use planning and development decisions do not always revolve around a change in land tenure. Hence, material changes in land use not involving any change in tenure on land subject to native title rights and interests are not captured by the current future acts regime in the *Native Title Act 1993* (Cth), unless they are specifically dealt with in ILUAs negotiated under Subdivisions B, C or D of Part 2, Division 3 of the *Native Title Act 1993* (Cth). I believe there is growing justification for amending the *Native Title Act 1993* (Cth) to include a new future act provision whereby land use planning and development decisions involving material changes in land use on land subject to native title rights and interests should be subject to notification of the registered native title holders/claimants and their free, prior and informed consent as per Article 19 of the United Nations *Declaration on the Rights of Indigenous Peoples*.

I am available to meet with the ALRC Native Title Future Act review team anytime to discuss these matters in more detail.