Submission to the Review of the Future Acts Regime

Discussion Paper

Introduction

The Local Government Association of the Northern Territory (LGANT) welcomes the opportunity to provide a submission to the Australian Law Reform Commission as part of the review of the Future Acts Regime in the *Native Title Act 1993* (Cth).

LGANT is the voice of local government, representing 17 of the 18 councils across the NT. This membership consists of four municipal, three shire and ten regional councils, and one associate member. LGANT provides leadership, support, representation, and advocacy on behalf of our member councils for the benefit of their communities.

Local government councils are the sphere of government closest to the community, and they know their community's priorities. Councils are responsible for local roads, street signage, stormwater drainage, lighting, footpaths, parking, cycle ways, parks and playgrounds, sporting fields and courts, swimming pools, public toilets, animal management, land and coast care programs, libraries, waste management, cemeteries, and community events and programs such as youth support, sport, and child and aged care – and in some places, deliver Centrelink and Australia Post services.

The local government sector in the NT collectively employs around 3,000 people and is often the largest employer of Aboriginal people in remote and regional areas. Councils also manage and control assets and infrastructure valued at $2.57 billion, are responsible for over 13,000 kilometres of roads, and receive and expend over $505 million in the NT annually.

The local government sector in the NT is a significant stakeholder given:

- ten of the 18 local government councils have majority Indigenous elected members;
- four of these local government councils are entirely Indigenous elected members;
- nearly 60% of all local government elected members are Indigenous;
- around 89% of the ten regional council elected members are Indigenous;
- 92 of the 154 elected members are Indigenous;

Also, approximately 50% of the NT's landmass is Aboriginal land under the *Aboriginal Land Rights Act (Northern Territory) 1976,* 80% of NT's coastline is Aboriginal land and approximately 48% of the remaining NT landmass is, or is likely to be, subject to native title.

Conduct and content standards

LGANT is a signatory to Closing the Gap and is committed to delivering the key targets as one of the public sector representatives in the NT.

It is fundamental to achieving progress on the key targets of Closing the Gap that the views of Aboriginal and Torres Strait Islander people are central to decision-making. In line with the United Nations Declaration on the Rights of Indigenous Peoples, negotiations should be guided by the principles of Free, Prior and Informed Consent (FPIC). FPIC is a valuable and necessary tool that

should be implemented throughout the decision-making process, so that parties to the proceedings are fully informed, with the most up-to-date information.

The principle of FPIC must be embedded as part of the conduct and content standards (**Question 7**) as a mechanism to ensure that negotiations are carried out in good faith, and that proponents have process certainty. The standards should include:

- a requirement that negotiations are free from coercion.
- ensuring appropriate resourcing for negotiations and consultations (i.e. allocation of resources for the time required, personnel, meetings, travel).
- a mechanism for determining the likely costs involved from the outset.
- statutory timeframes that are consistent with an impact-based model.
- 'discovery' requirement so that all parties have all relevant information going into negotiations, and as negotiations progress.
    - This discovery step should include consideration of the cumulative impacts of future acts, i.e. potential flow-on effects of a future act that are known from the outset or can be reasonably predicted.

Consultation requirements

Clear consultation requirements should sit as part of a system that identifies the rights and obligations of all parties (**Question 14**), and those requirements should be scalable as part of an impact-based model. An impact-based model should include varying degrees of consultation dependent on the impact and circumstances of a future act, with the impact and subsequent process to be agreed to by native title parties. These steps and statutory timeframes being known from the outset enables process certainty and helps local government councils, for example, to plan around the agreed process and ensure minimal disruption to service delivery/inform contingency planning. Consequences for any unreasonable delays to this process by any party should be clearly outlined and apply equally.

The consultation requirements should include an obligation on proponents to consider the comments received and demonstrate how comments have been/will be incorporated. This would contribute to process certainty and avoid delays and the impost of further costs otherwise unaccounted for.

Consultation requirements must also be cognisant of factors presented by the environment (i.e. NT wet season presenting access issues for parties in remote areas) and cultural considerations (i.e. Sorry Business/ceremony). Where requirements are too rigid, and one-size-fits-all, a consultation process runs the risk of becoming adversarial in nature.

The expansion of standing instructions (**Proposal 1**) may, to some extent, address geographical constraints (because travel to remote areas is deemed too expensive). However, the location of native title parties must not preclude them from being appropriately consulted, especially in situations where the subject and circumstances require a certain level of consultation.

Proponents must factor in access and cultural consideration contingencies into their planning and resourcing from the outset.

Assuming that there is a requirement to attend to consultations that are scaled based on the impact of the activity, and that this may be subject to a determination, standing instructions may be applied.

Standing instructions are supported in the context where it is known that certain future acts in specific areas, with known impact, can expedite processes and avoid consultation fatigue.

Compensation

The NTA should expressly outline the consequences of non-compliance with procedural obligations where a future act is determined to be invalid (**Proposals 10, 13** & **Question 22**). This contributes to process certainty. All parties should be furnished with the necessary information to carry out their responsibilities and obligations, including the potential outcomes if they do not adhere to those.

Further, considering the existing framework for compensation under the NTA, whereby compensation is only payable once, for acts that are essentially the same, the relevant provisions must be amended to be, at the very least, in line with the rights of landowners under other legislation (**Question 25**).

Considering the findings in *Griffiths v Northern Territory of Australia (No. 3) [2016] FCA 900,* the "Timber Creek Case" and subsequent appeal to the High Court (*Northern Territory Australia v Griffiths & Ors [2019] HCA 7*), likely compensation liabilities and parameters for determining compensation must be clear in the future acts regime so that proponents can be aware of the financial implications of future acts.

LGANT appreciates the opportunity to contribute to the review of the future acts regime. The NT voice is key to shaping the future acts regime, considering the Territory context, the legislative framework and interplay of Aboriginal land rights, and the native title recognition in place in the NT. LGANT welcomes the opportunity to further discuss our viewpoints as the future acts regime takes shape.