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29 July 2025

Australian Law Reform Commission
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***By email***: nativetitle@alrc.gov.au

Dear Australian Law Reform Commission

**REVIEW OF THE FUTURE ACTS REGIME: DISCUSSION PAPER**

Please find ***enclosed*** the First Nations Bailai, Gurang, Gooreng Gooreng, Taribelang Bunda People Aboriginal Corporation RNTBC (**BGGGTB PBC**).

We welcome the opportunity to respond to the Australian Law Reform Commission (**ALRC**) Discussion Paper and its review of the future acts regime of the *Native Title Act 1993* (Cth).

We also thank the ALRC for the comprehensive review provided in its Issues Paper and summary of the difficulties and discrimination native title holders face when engaging with the future acts regime and the Native Title Act, and regret that we were unable to prepare a response to the Issues Paper.

The BGGGTB PBC has managed the Native Title rights and interests for the common law holders on trust since the consent determination was made in the Federal Court of Australia in November 2017.

We draw on our experience engaging with the future acts regime to inform this submission and our support for urgent reform to the future acts regime.

Thank you for accepting our late submission.

Yours sincerely

[redacted]

Matthew Cooke
Group Chief Executive Officer

# Review of the Future Acts Regime Discussion Paper

## First Nations Bailai, Gurang, Gooreng Gooreng, Taribelang Bunda People Corporate Group

28 July 2025

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## *Background*

1. The First Nations Bailai, Gurang, Gooreng Gooreng Taribelang Bunda People Aboriginal Corporation RNTBC (**BGGGTB PBC**), holds and manages the Native Title rights and interests on trust for four Traditional Owner Nations (**TO Nations**), the Bailai, Gurang, Gooreng Gooreng and Taribelang Bunda People (**BGGGTB People**), pursuant to the consent determination made in the Federal Court of Australia in November 2017.

2. We are, and always have been, four independent TO Nations and our approach to governance is based on this principle, and the importance of ensuring that each of those TO Nations is given a measure of practical self-determination.

3. The First Nations Bailai, Gurang, Gooreng Gooreng, Taribelang Bunda People Development Corporation Ltd. (**DevCo**) is responsible for giving effect to the strategic objectives and shared vision for the governance of the BGGGTB People.

4. The BGGGTB Group is the vehicle for the BGGGTB People to assert our human rights as Indigenous People to:

   (a) enjoy, maintain, control, protect, develop and advance our cultural identity and heritage, including our traditional knowledge, distinctive spiritual practices, observances, beliefs and teachings;

   (b) enjoy, maintain, control, protect, develop and advance use our language, including traditional cultural expressions;

   (c) enjoy, maintain, control, protect and develop our kinship ties including the recognition of our apical ancestors and their descendants;

   (d) maintain and strengthen our distinctive spiritual, material and economic relationship with our traditional lands, territories, waters and other resources with which we have a connection under our traditions and customs;

   (e) conserve and protect the environment and productive capacity of our traditional lands, territories, waters and other resources; and

   (f) benefit from the use of our lands, territories, waters, knowledge and other resources by others with or without our consent.

## *Terminology*

5. This submission uses the terms:

   (a) **'native title party'** and **'native title holders'** consistently with those defined at paragraph [41] of the Australian Law Reform Commission (**ALRC**) Issues Paper (2024) (**Issues Paper**),

   (b) However, when referring to cultural heritage matters, we use the term **Traditional Owners**, as the custodians of the cultural knowledge.

   (c) **'proponent'** to refer to a person or organisation who intends to pursue a future act as defined in the Native Title Act, or who holds the relevant licence or approval to pursue

a future act such as a mining company grantee party, a tourism operator, utility, government department or other government entity.

## *Introduction*

6. BGGGTB acknowledges the comprehensive review of the issues identified in the ALRC Issues Paper 50 (2024) (**Issues Paper**) and regrets that we were unable to lodge a submission when responses were sought. Having considered the Issues Paper we confirm our agreement with the Key Issues identified, and the impossible and inequitable future acts regime that we are required to navigate as native title holders, under the *Native Title Act 1993* (Cth) (**Native Title Act**).
7. For this reason, we strongly support the need for reform to the Native Title Act and the future acts regime in particular.

8. We also acknowledge the submissions on the Issues Paper submitted by the Kimberley Land Council (**KLC Submission 26**) and the Australian Human Rights Commission (**AHRC Submission 48**) and provide strong support for their comments in relation to future acts regime being discriminatory, re-traumatising and not-fit for purpose,[1] and that any amendments should reinstate a commitment to the intent of the Native Title Act and prioritise consistency with the *Racial Discrimination Act 1975* (Cth) (**RD Act**) and Australia's international obligations under the United Nations Conventions on the Elimination of All Forms of Racial Discrimination (**UNCERD**), and the Declaration on the Rights of Indigenous Peoples (**UNDRIP**).[2]

9. Consistency with the RD Act and our international obligations must be applied across the broader legislative framework that native title holders are expected to function within, and comprehensively reviewed together to ensure consistency and compliance. The *Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)* (**CATSI Act**) for example, maintains its status as a special measure under section 8 of the RDA, despite containing numerous provisions that are unnecessarily onerous, time consuming and costly for native title parties than the equivalent provisions of the *Corporations Act 2001* (Cth). Unfortunately, the 2017 Review of the CATSI Act was not conducted to ensure consistency with the RD Act, contrary to the decision of the Full Court of the Federal Court,[3] and failed to assess individual provisions of the CATSI Act and their discriminatory and onerous impact on native title holders. Any amendments to the CATSI Act to give effect to reforms of the Native Title Act will need to be considered against the special measures test.[4]

10. Our response to the Discussion Paper is primarily directed to areas within our experience including, and of greatest concern including Cultural Heritage Surveys as the foundation for promoting self-determination and giving effect to the intent of the Native Title Act and our

[1] KLC Submission 26 para [13] - [18].
[2] AHRC Submission 48 pp 5-7.
[3] *Vanstone v Clark [2005] FCAFC 189* at 208
[4] Submission to the Senate Inquiry regarding amendment of the *Corporations (Aboriginal and Torres Strait Islander) Act* - Phase 2 Consultation, on behalf of the First Nations Bailai, Gurang, Gooreng Gooreng, Taribelang Bunda People (October 2020).

international obligations, ‘Native Title Management Plans’ (**NTMPs**), the impact-based model of future act categorisation and introduction of negotiation standards.

11. We extend our general support and agreement with the remainder of the questions and proposals identified in the Discussion Paper not specifically referred to in this submission, and again thank the ALRC for their meaningful and comprehensive proposals.

## *An ideal Future Acts Regime: Cultural Heritage Surveys*

12. The future act regime as it currently applies, contradicts the intent of the Native Title act, places Australia in breach of its international obligations under UNCERD and UNDRIP and frustrates native title holder rights to self-determination and capacity to protect Country and culture.

13. After going through the demands of the native title claim process to achieve a determination of their native title rights and interests, native title holders now have to contend with yet another process that again requires them to identify and explain the particular cultural significance of heritage. Without always having access to the information, surveys and evidence that was collected to support their determination, native title holders must now conduct heritage surveys over their Country with proponents present and proponents responsible for funding the surveys, thus forcing them to give away or disclose culturally sensitive knowledge to the proponents.

14. To engage in a future act without impacting culturally significant objects or areas is impossible without appropriately targeted cultural heritage surveys over the area proposed for the activity.

15. It also needs to be acknowledged that the outcome of cultural heritage surveys is not a 'set and forget' process. The cultural heritage management plan (or native title management plan) created following a survey, will depend on the nature of the cultural heritage sites or objects identified, and may involve mitigation, monitoring during proponent activities on site, cultural site management, further research cultural education or connection to Country activities.

16. We refer to the terminology insert below to explain and define the types of experts required for a cultural heritage survey and the most common types of cultural heritage surveys, referred to in this submission. We note that this is not a comprehensive list of surveys but a summary of the main types. We also note that while the purpose may be the same, names of the survey type may differ between States as they reflect the relevant cultural heritage legislation that they are designed to facilitate compliance with.

**Terminology and Definitions**

**Archaeology** the study of past human cultures through the examination of material remains, like artifacts and structures

**Archaeological Survey a** large-scale examination and systematic process of searching for, identifying, and recording archaeological sites and artifacts within a designated land area to identify and document any archaeological resources present, such as historic structures, prehistoric artifacts, or buried features.

**Environmental Assessment** documents the botanical, zoological, hydrological and geological features of an area, identifies any particular values or features of significance (depending on relevant legislative definitions) in a subject area.

**Ethnography (Anthropology)** is the study and systematic recording of human cultures, *also*: a descriptive work produced from such research[5] which can be a discrete study or gathered to inform archaeological surveys.

**Ethnographic (or Anthropological) Survey** is a systematic process of searching for, identifying, and recording archaeological sites and artifacts within a specific area involving on-site fieldwork and characterised by extended discussions with a diversity of people. Combines observation with interviews to understand what people do, to understand a person or community, without assumptions.[6] The quality of the observations is dependent on the experience of the expert.[7]

**Site Assessment (Also Project or Work Area Clearance) Survey** involves collaboration between native title holders and proponents to modify work programs if necessary, ensuring the avoidance of cultural sites. Cultural information is typically recorded to a Site Avoidance level.

This allows proponents to identify the location of culturally significant areas. The proponent engages the experts, provides the brief for the experts to respond to in their report and covers the cost of the survey. Experts have various types of qualifications but usually for cultural heritage work, at least one person with archaeological survey qualifications is required. Cultural knowledge holders and native title holder representatives are always present. Proponent representatives are also present during these assessments.

**Site Avoidance Survey** is conducted where tangible and intangible heritage has been located, the location and extent of a site and a description will be recorded to enable the proponent to avoid the location and protect any Aboriginal heritage identified. This will also include an initial consultation with the Traditional Owners to discuss management and recommendations for the site.[8]

**Site Identification Survey** involves ethnographic site recording which necessitates meaningful engagement with Aboriginal communities, encompassing their stories and values associated with the site and landscape. Such sites may hold profound significance for spiritual, social, aesthetic, or historical reasons, as outlined in the Burra Charter of 1992. A vital component of Site Identification recording is the assessment of a site's importance and significance, which can be guided by other frameworks like the Australia ICOMOS Burra Charter (1992), the Practice Note on Indigenous Cultural Heritage Management (2013), and the 2001 Australia ICOMOS Statement on Indigenous Cultural Heritage[9]

17. The native title claim process also often encouraged different groups with overlapping connection to an area to join together as a single native title party to achieve a single determination. Our PBC represents four Traditional Owner groups. The same cultural knowledge is therefore not held by all common law holders to the single determination area. This means that all Traditional Owners are not always aware of all of the objects, sites and areas of particular significance on each other's Country. Without comprehensive cultural surveys, this information is not always known or available to the Board of Directors of a PBC representing the different Traditional Owners groups when making decisions about suitable future act proposals and negotiating with proponents.

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[5] https://www.merriam-webster.com/dictionary/ethnography
[6] Ethnographic research Sage Research https://www.vic.gov.au/ethnographic-research
[7] Ethnographic research Sage Research https://www.vic.gov.au/ethnographic-research
[8] Joshua Davis, Trace Enterprises (2024) https://www.traceenterprises.com/the-latest-news/understanding-the-types-of-surveys-and-assessments-in-aboriginal-cultural-heritage
[9] Joshua Davis, Trace Enterprises (2024) https://www.traceenterprises.com/the-latest-news/understanding-the-types-of-surveys-and-assessments-in-aboriginal-cultural-heritage

18. It is therefore fundamentally important to conduct cultural heritage surveys to confirm the presence of objects sites or areas of cultural significance before a future act can progress. It also means that where sites or areas of significance are identified, a further survey is required to obtain the detailed information about a site that will inform an assessment of the impact a future act is likely to have, before it can progress.

19. Any decision for a proposal in an area not covered by a cultural heritage (or native title) management plan needs to be surveyed to Site Assessment level as an interim measure, to confirm the presence of tangible or intangible heritage across the proposed development footprint, and understand that the footprint may be broader than anticipated by a proponent because of direct and indirect connections to other objects, places or features that are situated outside of the defined activity area such as a scar tree to a waterway, a knapping site to a quarry or songlines.

20. Should any cultural heritage be identified, and the proponent seeks to proceed with proposal, a more detailed site avoidance or site identification survey then needs to be completed by the Traditional Owners, before the impacts of the proposal on cultural heritage can be properly established.

21. Unfortunately, this entire system of cultural heritage recording and mapping by survey, is primarily:

    (a) conducted in an ad hoc manner in response to future act proposals lodged in a determination area,

    (b) conducted by non-indigenous services who are retained, led by and funded by proponents,

    (c) costly, and requires a level of qualification that many Traditional Owners do not have or cannot obtain;

    (d) conducted with Traditional Owner present but not always coordinated to ensure the appropriate Traditional Owners are present, that they have adequate training are comfortable to speak frankly or provided protection of their intellectual property

    (e) with proponents attending and being present when important cultural knowledge is discussed,

    (f) with proponents retaining a share in the intellectual property by receiving a copy of the final report, or making the report public.

22. Many large corporations have their own cultural heritage team of ‘experts’ to conduct cultural heritage surveys and prepare reports, with native title holders present. Thus taking the organisation and responsibility for collection and recording of our own cultural heritage away from Traditional Owners and preventing surveys from being conducted in a way that the Traditional Owners determine appropriate, at the time that is appropriate to go to each particular site, with the appropriate people to ensure that the complexities of the site, area or object can be properly understood and recorded.

23. While there has been some attempt to address this problem and give the native title holders a greater role in the cultural heritage surveys, the process is still led and controlled by the proponent, involves 'co-development' of cultural heritage management plans and results in a significant body of cultural knowledge and often the intellectual property, being acquired by proponents.[10]

24. A genuine commitment to self-determination and protection of cultural heritage would have provided the necessary funding and support to allow Traditional Owners to develop and establish our own businesses conducting the survey work required to negotiate future act proposals more promptly, to hold the information necessary to prepare our own management plans and to retain the detailed cultural knowledge without sharing the intellectual property.

25. To properly address the discriminatory application of the future acts regime necessitates:

    a. Creating a respectful and adequately resourced system that acknowledges the importance of cultural heritage surveys as providing the necessary information for the parties to negotiate fairly,

    b. Addressing the causes of the power imbalance that limits our ability to negotiate more effectively and equitably, and

    c. Most importantly, allows us to control the recording, mapping and collection of cultural heritage and what knowledge can be released to proponents for the purposes of preparing management plans and negotiating the approval of future acts on our Country.

### *How this would be achieved*

26. Recording and mapping of cultural heritage: An ideal future acts regime would provide adequate funding and resources to allow native title holders the option to conduct their own coordinated reclamation of cultural heritage by recording and mapping the determination areas through cultural heritage surveys. Funding of these surveys could be charged in the form of an advance, and reimbursed through a scaled cost on agreement in relation to future acts proposals, that can be returned to any fund that covers the costs of the surveys.

27. Recording to inform management plans: The inseparability of Cultural and Environmental Values is not adequately addressed in the current system. The recording of bio-cultural knowledge will broaden the species and ecosystems information that informs Matters of National or State Significance in EIS surveys and reporting. If done right, this would be another component of Future Act based approvals work that could include native title holders or Aboriginal Party representation.

[10] From Rio Tinto's website, media release *A Change in Approach* dated 19 February 2023, and referring to changes made since Rio Tino's decision to destroy Juukan Gorge, the site quotes Rio Tinto 'Traditional Owner Engagement Lead' as saying "The difference with this process is that Yinhawangka people led the itinerary when we were out on Country on these field trips, the Yinhawangka people led Rio Tinto people around and showed us what was important https://www.riotinto.com/en/news/stories/a-change-in-approach accessed 22 July 2025.

28. Approved experts would be engaged and retained by the native title holders to assist in surveys to identify, record and map areas of significance. Reports could be comprehensive and include ethnographic and environmental values reporting, held by the native title holders, which will be essential to the creation of effective Native Title Management Plans, and Environmental Management Plans across the determination area setting out suitable areas for future acts, the type of future acts and areas where future acts are not permitted, and evidence to support a veto to particular future acts where necessary.

29. Cultural knowledge retained by native title holders: All records, reports and management plans would be held by the native title holders, with non-confidential information released under licence to proponents to inform cultural heritage reports and the environmental impact assessments needed by proponents to obtain legislative approvals for any future act proposal. This would address the historical reluctance native title holders have had with the collection and recording of traditional information as historically, they have been required to disclose it to the public by way of government departments (where cultural heritage registers have been required) or disclosed to proponents (to negotiate the approval of future acts in their determination area). Cultural heritage surveys conducted in this manner would give traditional owners control over their own cultural knowledge, and the intellectual property in that knowledge and result in more accurate and informed Cultural Heritage Management Plans.

30. Ongoing recording, management and monitoring: Native title holders can develop the programs and workforce necessary to conduct the survey work, monitoring and management of important cultural sites. Environmental monitoring and data gathering can provide important baseline data for Environmental Impact Assessments, which as the body of data increases, will increase assessment and approval process time and give proponents greater certainty.

31. Return of information: Expediting the return of information, data, archaeological and ethnographic survey reports collected during the native title claim process, so that it can be made available to the native title holders to inform management plans, and protect culturally sensitive areas from inappropriately located future acts. Some native title parties are unable to access the detailed cultural knowledge already provided during the Native Title Claim process to defend an objection to a future act. Many PBCs with limited funding do not have the resources to fund a cultural heritage report with sufficient detail to support their objection to a future act, and cannot access the detailed information provided about the same location during the native title claim process.

32. The Aboriginal Heritage Program in WA is an attempt to address some of the difficulties associated with the lack of information regarding location and significance of cultural heritage, the ad hoc mapping and surveying which occurs in the current ‘proponent led’ system of heritage surveys, and the lack of standards and consistency that can occur when proponents are responsible for retaining and conducting heritage surveys. Unfortunately, the Program remains fundamentally problematic as moves the control of traditional cultural knowledge from the proponents to a government entity and makes the cultural knowledge of the Traditional Owners a public commodity. The Program states that it “aims to Survey areas to record Aboriginal heritage for inclusion on the Aboriginal Cultural Heritage Inquiry System (ACHIS) and the Register of Places and Objects… Surveys will be conducted by

qualified heritage professionals in consultation with the native title holders and participation of Aboriginal people and will result in an Aboriginal heritage survey report, that will then be **made publicly available by the Department in accordance with Department Policy**."[11]

33. Our submission is that a primary tenant of any future acts regime approach that is consistent with international obligations and a commitment to the protection of first nations cultural heritage must be underpinned by the principle that cultural knowledge belongs to the Traditional Owners and that it is therefore the Traditional Owners who should retain the cultural knowledge acquired through cultural heritage surveys that can only be released with permission under licence. Cultural Heritage Management Plans (or Native Title Management Plans) would be the method of disclosing sufficient information to facilitate the future acts regime, without expecting Traditional Owners to make their cultural knowledge a public commodity.

## *Native Title Management Plans*

**Question 6:** Should the *Native Title Act* 1993 (Cth) be amended to enable Prescribed Bodies Corporate to develop management plans (subject to a registration process) that provide alternative procedures for how future acts can be validated in the relevant determined area?

34. One of the primary reason for delays in agreement making and protracted negotiations between native title holders and proponents regarding future acts is the presence of culturally significant sites in the activity area. The inability to reach agreement on how to modify a proposal to adequately avoid or protect culturally significant areas and commercially beneficial terms are also significant causes for delay.

35. The full benefits of a Native Title Management Plan (**NTMP**) could only be effectively realised where the area included in the NTMP has been mapped with a cultural heritage survey, at least to a cultural site assessment level, with all information and detail held by the relevant native title holders. Therefore, provided that the PBCs are assisted to map the cultural heritage in their determination area, they will be in a position to control the release of information related to it. This information can be released where needed, to create the procedure for the validation of future acts in a determination area governed by a NTMP. If introduced in this manner, with the NTMP being the only cultural heritage information made public, they would be a positive inclusion to the Native Title Act.

36. Whilst the detail of the site and the cultural significance may need to remain confidential, records of the location would be needed to prepare a meaningful NTMP. A NTMP created based on cultural heritage surveys conducted by the native title holders who retain the details of the cultural heritage survey and the survey report, is imperative. The NTMP then need only include the information needed to create a process for approval of future acts in the area covered by the NTMP. This would be a positive change to the future acts regime and create greater certainty and clarity for all parties.

[11] https://www.wa.gov.au/government/document-collections/aboriginal-heritage-survey-program

37. The current practice for future act proposals involves negotiation of cultural heritage agreements to conduct a survey to locate sites of significance in a project area. The cultural heritage surveys are then funded by proponents, who engage the relevant experts and send representatives to complete the cultural heritage survey with an agreed contingent of native title holders in attendance. A report is then prepared and each proponent retains rights to the reports and information obtained from the survey. This process disempowers traditional owners from the identification and documentation of their own cultural heritage, results in ad hoc information gathering, and gives proponents right and access to the cultural information that may not be needed or relevant to the future act proposed.

38. A resourced process that facilitates the native title holders to conduct their own cultural heritage surveys, engage their own suitably qualified experts and prepare their own cultural heritage reports that is maintained by the native title holders is more consistent with self-determination and the UNDRIP principles. Once gathered this information not only provides a record and resources for the benefit of the native title holders, but can be used to inform the preparation of NTMPs, rather than the project-by-project approach funded by proponents. Where the necessary cultural heritage assessments are conducted to inform and prepare a NTMP, amendments would need to be made to either section 60AB extending its application to allow native title holders to seek reimbursement of the costs of the surveys from any proponents engaging in future acts in the NTMP area or a Fund created to achieve the same. Any funds provided should directly to the relevant PBC to conduct the survey and engage the relevant experts.

39. This would ensure native title holders maintain control over the documentation of their own cultural heritage, would ensure native title holders retain the confidentiality and intellectual property in their own cultural heritage and limit unnecessary release of culturally sensitive information to proponents. Only the information needed to inform negotiations or procedures for the negotiation of a future act proposal need be released. Having this information available at an early stage of a proposal, before a proponent has been put to any significant expense, is likely to give the proponents greater flexibility to adapt a proposal to avoid or mitigate impacts to areas of cultural significance.

40. Whilst this will be a difficult undertaking to implement initially, there is a very consistent approach to predictive modelling for potential archaeological deposits and other cultural sites, that can be engaged to identify and prioritise the planning of the survey work. For example, protected flora map used for state biodiversity considerations in planning and development assessments already uses a predictive modelling approach and has been in place unchallenged for over a decade now.

41. PBCs, particularly those representing separate TO Nations, all hold different pieces of the cultural heritage information in a determination area. Beginning the process of keeping the detailed database of the records essential for the protection of sites and the cultural connections associated with those sites is part of the obligations of a PBC as the holders of native title rights and interests on trust for the benefit of the native title holders. NTMP can be informed from information approved for release by the native title holders and, when given the resources needed to achieve determination-wide heritage surveys, employment

opportunities will be created as native title holders take a more significant role in the cultural heritage surveys conducted in their determination area.

42. Any amendment to the Native Title Act to include NTMPs would need to allow the NTMPs to cover sections of the determination area and to be modified as assessment surveys are completed. Restrictive procedures for registration and amendments to registration will therefore undermine the benefits of this proposed change.

43. Based on our understanding of the NTMP amendment being proposed, approved qualifications of the individual experts engaged in the cultural heritage surveys and consistent survey methods would be required to support registration of a NTMP. NTMP will therefore need to set out:

    (a) How and when the native title holder should be notified of a future act;

    (b) Maps identifying the areas approved for future acts and the types of future acts that can be pursued in the approved areas; and

    (c) Standard costs for engagement and negotiation with native title holders and reimbursement scales for the costs of cultural heritage surveys.

44. Consistent with the RD Act, we do not support the publication of ancillary or other benefit sharing agreements to any greater extent than is required by Corporations under the *Corporations Act 2001* (Cth).

### *Improved agreement-making processes*

**Question 7:** Should the Native Title Act 1993 (Cth) be amended to provide for the mandatory conduct standards applicable to negotiations and content standards for agreements, and if so, what should those standards be?

45. We believe that addressing the power imbalance between the negotiating parties will make a significant improvement to the conduct of parties in the negotiations. Where native title holders have greater access to information regarding the detail and impacts of the future act proposal and accurate cultural heritage information, the parties will be better able to negotiate more effectively. However, where the introduction of conduct standards for agreements are considered, standards should be no more onerous than any standard applied to negotiations between corporations as required under the *Corporations Act 2001* (Cth), unless a genuine reason consistent with the RD Act justifies the application of a special measure.

46. Any clauses in agreements that limits native title holders' abilities to access protections or remedies under cultural heritage laws or other laws or which prohibits their legal rights to seek injunctive relief should be discouraged.

### *Negotiation Conduct Standards*

47. We support the amendments to the Native Title Act that introduce negotiation conduct standards set out in the Discussion Paper, including requirements:

    (a) To disclose relevant or reasonably requested information

    (b) For proponent funding of negotiation, and

    (c) Duty to negotiate in good faith

48. The most significant impediment to progressing positive negotiations in our experience, has been in obtaining relevant information from proponents to make the informed decisions needed to progress negotiations.[12] Incorporating a requirement to provide reasonably requested information in a timely manner is needed in the Native Title Act. This reform could be addressed by defining the failure to provide reasonable requested information in a timely manner as a breach of the good faith obligation.

49. It is also common practice for proponents to approach native title holders early in the preparation and application stage of a future act proposal, but after the Final Investment Decision (**FID**) and the financial viability and investment decision.

50. At an early stage where proponents have not completed all the necessary assessments (such as environmental, social, cultural assessments), proponents often seek agreement to the future act proposal from the native title holders, when, consistent with the principle of free, prior and informed consent (**FPIC**), the native title holders do not have sufficient information to determine the impacts of the proposal. It may assist proponents if minimum

[12] Refer generally to *Sunstate Sands Bundaberg Pty Ltd and Another v First Nations Bailai, Gurang, Gooreng Gooreng, Taribelang Bunda People Aboriginal Corporation RNTBC* [2021] NNTTA 44 (24 August 2021)

standards of disclosure are set out to ensure that native title holders are given all relevant information, and that any timeframes for the negotiations do not commence until this information has been provided.

51. Further friction that delays negotiation and agreement on large scale energy projects because the negotiation of benefit sharing agreements are commences after proponents FID. Where the native title holders are willing to provide consent, in our experience, proponents are unable or unwilling to negotiate competitive benefit sharing agreements because they have not factored reasonable costs for these agreements into the FID. As a result, they are unwilling or unable to negotiate meaningful benefits. Whilst addressing this problem directly may be beyond the scope of this review, and legislative amendments, the publishing of de-identified agreements (discussed below) may go some way to addressing this issue.

52. Proponent funding of negotiations Native title parties are forced to spend considerable financial resources responding to future act applications notices, negotiating agreements and responding to court proceedings when we lodge objections to a proposal. Whilst we maintain we should be given a right to veto certain applications where the impact to cultural heritage is too significant, proponents should be forced to fund the negotiation costs, expert opinion and Tribunal application costs where an agreement cannot be reached as it will serve as an incentive for the parties to reach agreement. We support the proposal to extending the application of section 60AB(1) to ensure proponent contributions to funding native title holder participation in future act negotiations, We further note that this must include funding to obtain independent expert advice to engage in the negotiations and a necessary component of free, prior and informed consent.

53. Duty to negotiation in good faith: The unwillingness of Sunstate Sands[13] to provide the relevant information, including some pre-determination agreements that we did not have access to, stemmed from the licence Sunstate Sands believed they had to refuse to disclose information under the right to negotiate process. Whilst our success at the National Native Title Tribunal (**NNTT**) may reinvigorate proponents to improve their good faith obligations in negotiations, the legal standard for good faith in negotiations established in the case law is unhelpfully low.

54. Codifying the duty to negotiate in good faith by adoption of the '*Nyamal Indicia*'[14] that identify examples of behaviour that demonstrate bad faith, will be helpful. However, section 31(2) of the Native Title Act allows the defence to allegations of a failure to act in good faith by making the decision a balance between the good and bad behaviour demonstrated by a proponent across the negotiations. Section 31(2) allows proponents to argue that while there may have been some bad faith, there had also been some good, so the behaviour on balance, satisfied the good faith obligations.

55. Given the significant power imbalance between proponents and native title holders, particularly with regards to access to information and funds, it is our submission that section 31(2) should be removed from the Native Title Act, and that any evidence of bad

[13] *Ibid*
[14] *Western Australia vs Taylor* [1996] NNTTA 34 CJ Sumner

faith, as defined, would be a breach of the section 31(1) (b) obligation to negotiate in good faith.

### *Reshaping Statutory Procedures - Impact-based model*

**Should Part 2 Division 3 Subdivisions G-N of the Native Title Act 1993 (Cth) be repealed and replaced with a revised system for identifying the rights and obligations of all parties in relation to all future acts, which:**

**(a) categorises future acts according to the impact of a future act on native title rights and interests;**

**(b) applies to all renewals, extensions, re-grants, and the re-making of future acts;**

**(c) requires that multiple future acts relating to a common project be notified as a single project;**

**(d) provides that the categorisation determines the rights that must be afforded to native title parties and the obligations of government parties or proponents that must be discharged for the future act to be done validly; and**

**(e) provides an accessible avenue for native title parties to challenge the categorisation of a future act, and for such challenge to be determined by the National Native Title Tribunal?**

56. This proposal is a positive improvement as it has broadened the types of future acts that attract the right to negotiate, and we support this proposal in principle.

57. However, this proposal is not completely supported as its practical application is of concern. It is difficult to see how an impact-based model of defining future acts can function effectively unless the area proposed is covered by a cultural heritage or native title management plan.

58. Where there is no cultural heritage management plan for the proposed area, to function effectively in practice, the impact-based model must, at the very least, require an assessment to have been conducted. The assessment to categorise the impact of a proposed future act must be at least a cultural heritage survey to a site assessment level. Whilst we would support the impact-based model if applied in this manner, and we see it as an improvement, it is difficult to see how it would be supported by proponents, particularly proponents of small-scale future acts, unless they were assisted to cover the costs of the requisite survey to properly assess the impacts of their proposal.

59. We also have some concern with some of the examples of future acts that could be included into Category A that would only attract the right to consult. The quarry permit to remove 200 tonnes of material per year for two years is a concern. This is because the right to consult in practice is rarely complied with. Where it is, there is no scope for the native title holder to respond, or negotiate a heritage agreement for a survey to determine the presence of any significant sites, and to avoid or mitigate any damage.

60. Whilst State laws would still apply, which make damage to heritage unlawful, the evidence needed to demonstrate that cultural heritage was damaged is a heritage survey, which would have to be conducted on a site once it is damaged.

61. The only activities which should attract the right to consult without a heritage survey are low impact activities that do not involve ground disturbance and low impact activities in an area approved for activities as set out in a NTMP.

62. Without an understanding of whether there are any culturally significant sites present in a development footprint the risk to cultural heritage cannot be determined. This could result in the likely impact to an area of cultural significance being incorrectly categorised as low impact and leaving the native title holders with no remedy or right to object.

63. Once surveyed however, a right to consult could be sufficient where the absence of any significant sites are confirmed in the footprint of the proposed future act. Process certainty comes from the identification of any sites or sensitive areas, not from categorising the impact without sufficient information, and risk breaching State legislation. The more area surveyed the greater the certainty when applying this model.

64. We extend our support to the additional proposals in the Discussion Paper regarding:

- reframing the procedural rights that presently refer to the rights of the holders of 'ordinary title',
- clarifying the kinds of future acts to which s 24KA applies (including scale) and what is meant by 'the general public',
- applying the non-extinguishment principle to future acts validated under Subdivision J,
- clarifying what constitutes 'low impact' future acts in s 24LA,
- as a minimum, requiring that the right to comment be accompanied by an obligation for those comments to be considered (or responded to) by the government party and provided to the proponent, and
- introducing additional categories of future acts to address new and emerging industries not contemplated when the existing future acts regime was enacted.

## *Project Acts*

65. The proposal for an amendment requiring multiple future acts relating to a common project be notified as a single project is supported. Separate notices can be confusing, time consuming and a burden on limited resources.

66. Notices of this scale should also have legislated requirements for personal service on the PBC contact person to ensure they have been notified and the notice is received, before timeframes commence.

### *Right to veto future acts*

67. Improved agreement-making processes and requiring the principles of the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**) and the principle of free, prior and informed consent (**FPIC**) to be enshrined into the Native Title Act are strongly supported. However, the creation of a veto power or defining the occasions where a veto might be possible, will go a long way to encouraging proponents to improve their commitment to negotiating in a manner more consistent with UNDRIP and the principles defining FPIC and facilitate more effective compliance with the principles.

### *The significance of water*

**Question 16:**

**Should the *Native Title Act 1993* (Cth) be amended to account for the impacts that future acts may have on native title rights and interests in areas outside of the immediate footprint of the future act?**

This amendment is supported, but clarification in terminology should be addressed. The **development area** is usually the specific area of the activity proposed and the **footprint** of the proposal includes the associated impacts that may include road and other access routes to the proposal, space for machinery or secondary materials to be stored and should include every place that the proponent intends to touch with their proposal.

68. It is our opinion that any application for a water licence (or a future act that will use or impact surface or ground water) should include an assessment of impacts to the subsurface hydrology and cultural heritage in the development footprint, before it can be approved because these licences can significantly impact on both tangible and intangible heritage. The cultural heritage survey will often a be guided by the hydrological report, but it must be understood that cultural flows for water course features, bio-culturally significant species and connectivity to areas outside of the future act activity/project area is likely.

## *Other general submissions*

### Access to qualified experts

69. Access to qualified experts with up-to-date commercial knowledge in mining, energy, renewable energy, water and other utility sectors to provide legal and economic advice to the native title holders in negotiations would address the information imbalance that creates a power imbalance in negotiations and expedite negotiations. These experts are currently difficult for native title holders to retain as they are usually engaged by proponents and unwilling to create a conflict of interest that may impact on their ability to attract corporate proponents, by assisting native title holders. Further, many native title holders cannot afford the fees of such experts. This should be a part of what a proponent is required to fund given that it is fundament to the "informed" requirement of free prior and informed consent (**FPIC**).

70. Some Native Title Representative Bodies (**NTRBs**) provide specialised services to native title holders at discounted rates which they are able to do because of government funding they receive. This can lower competition with commercial services available and limits the number of legal and other professionals entering the market to assist native title holders. This can also mean that native title holders have limited options to engage their own preferred legal or other experts.

### Specialised Legal Services

71. There is no clear funding or adequate system for funding PBCs with limited resources. PBCs will be better able to negotiate promptly and respond to proponents where they are provided assistance from specialised legal, financial, cultural heritage survey, spatial services and corporate governance support, at least equivalent to the resources available to the proponent. NTRBs currently receive insufficient government funding to assist PBCs, although they may have the appropriate specialised skills and be able to provide valuable assistance to native title parties and native title holders, but this is not done on a means tested basis. PBCs with resources to afford private services, are able monopolise the NTRB resources, because they can afford to make financial contributions for the assistance provided. NTRBs could be funded to address this inequality limiting the PBC assistance to PBCs without capacity through Legal Aid or as a Community Legal Service. Alternatively, separate Legal Services could be established to provide specialised legal, financial, cultural heritage survey, spatial services and corporate governance support.

72. For various reasons, many PBCs have fractious relationships with NTRBs and NTRBs can use their ability to provide these services as a means of manipulating or pressuring PBCs. It would be far better to provide the funding directly to the PBCs so they could choose whose services they use. This would be more consistent with the "free" part of FPIC and the principles of self-determination. The NTRB could still source discounted services by employing these experts and providing services on a cost recovery basis or through bulk procurement agreements.

## Proposal 1: Expanding standing instructions for agreements

**The *Native Title Act 1993* (Cth) and the *Native Title (Prescribed Bodies Corporate Regulations 1999* (Cth) should be amended to allow for the expanded use of standing instructions given by common law holders to Prescribed Bodies Corporate for certain purposes.**

73. This amendment is supported. The cost associated with authorisation meetings is an onerous burden on PBCs and limits their ability to communicate with common law holders effectively. Further, the time associated with organising such meetings means delays in providing consent in a timely manner to time sensitive commercial projects. Expanding the use of standing instructions will assist to address this.

74. Directors of a PBC are the authorised representatives, and have the fiduciary duties of a trustee. In all other circumstances at law the trustees are authorised to make decisions on behalf of the beneficiaries and maintain a position consistent with existing laws. It is not unreasonable for PBCs to function in the same manner, provided there were sufficient reporting requirements built in to report to the common law holders. An alternative approach may be to take an approach that required notification of the proposed consent to the common law holders and an objection mechanism requiring an authorisation process where there are objections signed by, for example, 5% of common law holders.

## Proposal 2: Access

**The *Native Title Act 1993* (Cth) should be amended to provide that:**

**(a) the Prescribed Body Corporate for a determined area has an automatic right to access all registered agreements involving any part of the relevant determination area; and**

**(b) when a native title claim is determined, the Native Title Registrar is required to identify registered agreements involving any part of the relevant determination area and provide copies to the Prescribed Body Corporate.**

75. It is often relevant to the Directors of a PBC and their duties of acting with reasonable care, skill, and diligence, and acting in good faith and for a proper purpose as well as their fiduciary duties as trustees, to have access to copies of all registered agreements involving the relevant determination area. We agree that there are occasions where the PBC may need prompt succession access to ILUAs negotiated with the native title claim group, and that the Registrar should be able to provide copies.

76. The Discussion Paper refers to the need for clarification in relation to access for common law holders to an ILUA where they are not named as a party to an ILUA[15]. The demands of the PBC Director roles are enormous. This is often with limited resources, around full-time work, or on a volunteer basis. For this reason, allowing access to agreements, by a common law holder when they are not named as a party to an ILUA, has the potential to create a significant burden on already over-stretched Directors. This would not be

[15] Paragraph 104]

supported unless it was managed by the NNTT, grounds for the request are made clear and where an application is made that satisfies the ground, the PBC is given the opportunity to respond to the application, before consent to release is granted.

## Assignment

**Question 9:**

**Should the *Native Title Act 1993* (Cth) be amended to provide for a mechanism for the assignment of agreements entered into before a positive native title determination is made and which do not contain an express clause relating to succession and assignment?**

77. This amendment is supported. Proponents have little interest in responding to requests for assignment by native title holders where it allows the native title holders to exercise rights and interests pursuant to the agreement. The amendment should:

    (a) allow for assignment and assumption where no express clause was contained in the original agreement and

    (b) require proponents to provide a copy of the deed of assignment and assumption to the native title party within fixed timeframes either following determination or a request from the native title holders, and all legal costs should be covered by the proponent.

## Proposal 11: Future Act Notices

**All future act notices should be required to be lodged with the NNTT. The Tribunal should be empowered to maintain a public register of notices containing specified information about each notified future act.**

78. This proposal is supported but needs to go further and include clarification on how service of notice must be effected, who must be served, and that proof of service provided before a notice is accepted and any associated timeframes can commence.

79. In practice, notices are not always sent to the relevant contact person of a PBC, but sent to various individuals associated with the PBC such as legal representatives who have worked with the PBC at some stage in the past or the NTRB for the area. This has meant that the Board of Directors do not always receive all future act notices, or receive them in a timely manner.

80. As a formal notice, proof of service to the relevant individual should be the legislatively accepted process for the service of a future act notice.

## Common Law Agreements

**Question 8:**

**Should the *Native Title Act 1993* (Cth) expressly regulate ancillary agreements and other common law contracts as part of agreement-making frameworks under the future acts regime?**

81. This is not supported. We would question any amendment that did not allow native title holders freedom to contract and the opportunity to negotiate confidential terms outside of the agreements. Such a proposal is also likely to be inconsistent with the RD Act and the UNDRIP and UNCERD principles. However, this would not (and should not) exempt a proponent from compliance with any appropriate content standards, such as those set out in paragraph [88] of the Discussion Paper.

## Agreement transparency

**Question 12:**

**Should some terms of native title agreements be published on a publicly accessible opt-in register, with the option to redact and de-identify certain details?**

82. If the confidentiality of the parties is assured and the decision to opt-in to the register can be made on an agreement-by-agreement basis, then this proposal is supported.

## Reshaping Statutory Procedures

**Question 15:**

**If an impact-based model contemplated by Question 14 were implemented, should there be exclusions from that model to provide tailored provisions and specific procedural requirements in relation to:**

- **(a) infrastructure and facilities for the public (such as those presently specified in s 24KA(2) of the Native Title Act 1993 (Cth));**
- **(b) future acts involving the compulsory acquisition of all or part of any native title rights and interests;**
- **(c) exclusions that may currently be permitted under ss 26A–26D of the Native Title Act 1993 (Cth); and**
- **(d) future acts proposed to be done by, or for, native title holders in their determination area?**

83. In relation to (a) – (c) above, this proposal would only be supported if the exclusions ensured the right to negotiation, and were consistent with the UNDRIP and UNCERD principles and the RD Act.

84. Future acts done by or for native title holders should be given further consideration and we make no comment on this without more detail.