RESPONSES AND COMMENT ON THE DISCUSSION PAPER REVIEW OF THE FUTURE ACTS REGIME May 2025

Forward

This submission in made by Indigenous On Country Services. We are an Indigenous organisation that provides services to PBCs, including an assessment of mining and exploration activities to identify unpaid entitlements and provide strategic advice on how to recover them. Our aim is to assist PBCs to build capacity and implement effective processes to create a sustainable income stream.

The authors of this submission have extensive experienced in native title, PBC management, administering mining tenements and native title agreements.

Comments provided are based largely on PBCs that are resourced with mining tenements and the issues that PBCs (with capacity and those that are also under resourced) are currently experiencing under the expedited procedure and with s.31 agreements. We have made general comments about problems with the current system including the Expedited procedure where issues that have been problematic for PBCs should be examined and analysed prior to any new system being developed.

Initial Comments on Agreement making, the proposed removal of the expedited procedure

The observation that under-resourcing is impacting parties' ability to participate in the future acts regime, particularly for native title parties, is significant. This needs to be considered when creating any new system to validate future acts, especially those related to mining and exploration. Any reforms should include clear guidance for PBCs to support effective administration and positive outcomes.

The proposed reforms aim to address some of the existing imbalances with the validation of future acts by establishing a more comprehensive system of engagement and approval by native title holders, including expanding the range of future acts that trigger the right to negotiate (RtN). The outlined reforms are likely to increase the number of exploration permits that trigger the RtN based on an impacts model and removal of the expedited procedure. The proposed process may require more resources and may not be appropriate for all PBCs.

Standardised Agreement Proposal

There may be circumstances where a standard agreement between parties is appropriate for when a PBC is unable to engage in the right to negotiate process.

Submissions have highlighted issues such as under-resourcing of PBCs and a shortage of specialised staff, as well as instances where some PBCs prefer to maintain autonomy and develop internal capacity rather than seek assistance from NTRBs.

A system may be needed for contemporary PBCs that are not currently able to interact on equal terms with miners, explorers, and developers. A standard base agreement for exploration and small-scale mining could be developed, provided it meets minimum requirements regarding administration payments, compensation, and cultural heritage protection. Standard agreements could reduce administrative demands on PBCs and facilitate certain activities without delays associated with the right to negotiate.

For example, this approach could be considered in situations including:

1. The PBC does not have the capacity to participate in negotiations
2. The proposed activity involves land already subject to significant disturbance
3. No recognised cultural heritage sites are present in the relevant area.

These standard agreements would become effective once agreed upon by the PBC or, alternatively, if there is no response from the PBC within a specified timeframe.

Suggested contents of Standard Agreements

We would recommend that any payments under these agreements would have to proceed without the active participation of the PBC (cf. NTPCs). This framework would enable PBCs to receive the benefits of mining agreements without undertaking specified administrative actions, such as responding to notifications and invoicing. This would provide an income stream for PBCs to allow them to build capacity until they are able to fully engage with the more resource intensive RtN process.

Many PBCs in Queensland have not fully engaged with native title processes and have lost significant funds in mining agreement payments over the last two decades because of the onerous provisions in the NTPCs. Mining and exploration is a mechanism to provide funds to PBCs and it is a strong indictment on the current system that many PBCs in resource rich areas have not been able to capitalise on monies available under native title processes while mining and exploration have continued unmonitored on their traditional country.

This should be addressed to prevent the new system from repeating this outcome we have outlined below some of the problems we have faced in the last 15 years of managing a PBC.

Challenges Relating to the Native Title Protection Conditions in Queensland - An Analysis of Systemic Issues and Reform Options

Overview of NTPCs Compliance Issues

The State of Queensland's processes for addressing non-compliance with Native Title Protection Conditions (NTPCs) are characterised as slow and ineffective. The NTPCs, attached as conditions to exploration permits, are intended to ensure that Explorers fulfil their obligations to the Native Title Parties including prompt payment and adherence to prescribed protocols regarding land disturbance. However, there is a notable gap between the content of these conditions and their practical enforcement.

Discretionary Compliance and Enforcement Gaps

While the NTPCs provide that complaints from a PBC may trigger compliance action by the Department, these actions are discretionary rather than mandatory. Even in cases of major disturbance to land—amounting to a clear breach of grant conditions—the Minister's response may range from imposing a penalty, amending conditions, imposing new conditions, or cancelling the resource authority. Notably, there is no clear mechanism addressing the non-payment of fees, nor is there an automatic sanction for such breaches. There is no penalty for late payment of fees and even after the lengthy enforcement process the explorer will pay the same amount that was owing prior to compliance commencement. This Departmental discretion in compliance action raises questions about fairness and effectiveness, particularly when repeated or serious breaches occur without consequence.

Lack of Timely Enforcement

The NTPCs stipulate that payment must be made within ten business days of invoicing (clause 8.3/8.4). Despite this clear timeframe, enforcement by the State is often delayed for months or even years. Frequently, during this protracted period, the relevant tenement may expire or be relinquished by the Explorer, rendering the NTPCs unenforceable and leaving unpaid invoices outstanding.

Privity of Contract and Recovery Limitations

Once a tenement expires or is relinquished, privity of contract prevents PBCs from recovering unpaid amounts, even when all NTPC requirements have been met by the PBC and invoices have been repeatedly issued. This legal barrier, combined with the slow pace of departmental enforcement, leaves PBCs without recourse for recovery.

Recurring Non-Compliance and Lack of Sanction

Explorers who fail to comply with NTPCs are often able to obtain further permits without sanction. There is a pattern of repeat offenders facing little consequence, despite clear

evidence of prior instances of non-notification of ground-breaking activities, unreported drilling, non-payment of fees, and other actions performed in breach of the NTPCs.

Resource Imbalance and Inequity

Even well-resourced PBCs struggle to navigate the compliance process. The challenges are significantly greater for under-resourced PBCs, who may lack the capacity to send timely invoices, monitor compliance or pursue complaints with the Department.

Conclusion on NTPCs

This systemic inequity enables some Explorers to exploit dysfunction or resource scarcity within PBCs, undermining the intent of the expedited procedure and leading to unfair outcomes. These issues must be addressed for any proposed agreement making under the Native Title Act

Responses to Reform Questions

Native Title Management Plans (NTMPs)

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?

This option may be appropriate for well-resourced PBCs, particularly those that have already conducted comprehensive cultural mapping. Many PBCs, however, have not completed detailed cultural mapping and often rely on mining and development funding to access their land for the purposes of reviewing and monitoring cultural heritage protection.

For NTMPs to be effective and advantageous for PBCs or native title holders, it is essential that a regulatory framework or assessment mechanism exists to monitor non-compliance with NTMPs, and this should be available at no cost to PBCs. The current proposal states that Government Party agreement would not be required for NTMPs; however, there is insufficient detail regarding how any non-compliance by mining and exploration companies would be addressed in the absence of government involvement. Referral to the National Native Title Tribunal (NNTT) is suggested as a possibility, though it is unclear whether the NNTT possesses the jurisdiction to sanction mining tenements holders.

The issues paper also refers to the issuance of certificates of compliance, yet this would increase administrative burdens on PBCs. As outlined above in comments regarding NTPCs, the most frequent breach encountered is the non-payment of funds owed to the

PBC. Typically, proponents do not dispute these obligations but simply fail to pay, citing reasons such as lack of funds or cash flow problems. This situation is exacerbated when explorers or miners perceive that there are no consequences for delayed or withheld payments. There must be an effective mechanism to address such instances of non-compliance.

The proposal includes that*: In circumstances where a future act process set out in NTMP enables the native title party to effectively withhold consent for a particular future act, and the native title party does withhold consent, the NTA may provide an avenue for proponents or government parties to apply to the NNTT for a determination that the future act can be done.*[1]

There seems to be no equivalent process available to the native title holders. For example, if a proponent proposes a venture that was outside of the consideration of the native title holders when they entered into the NTMP (such as a very large scale mine of development that is going to impact on a wider area) will an avenue be available for the Native Title Holders to apply to the NNTT for a determination that the proposal is outside the parameters of the NTMP and requires a separate agreement/ILUA?

Sacred sites should ALWAYS be protected not just under an NTMP. Protecting heritage sites should not be optional and should be fully enforced in all circumstances.

Conduct and Content Standards

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

Yes, definitely standard content would ease some of the administrative burden for PBCs.

Expanding standing instructions for agreements

Proposal 1

The *Native Title Act 1993* (Cth) and *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.

[1] [59] page 12 Australian Law Reform Commission (ALRC), *Review of the Future Acts Regime: Discussion Paper 88* (May 2025).

This approach could speed up agreements processes, there are concerns that it could become a shortcut for agreements and ILUAs that may not serve the best interests of native title holders. The risk is particularly acute given the underfunding of most PBCs. An objection process might be considered as a risk management tool, allowing native title holders to contest certain agreements before registration. Potentially something like a committee of native title holders could be formed with fair representation of the wider group.

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?

All ancillary agreements should be registered and accessible to the PBC. It has been our experience that PBCs cannot locate old ancillary agreements (many have been made prior to the PBCs existence). The PBC may know an agreement exists, but are unable to enforce payments, and tenement holders are not required to provide copies detailing any conditions or amounts owing. This situation does not align with the NTA's objectives.
This would also increase transparency and accountability, the confidentiality terms in ancillary agreements are not usually to the benefit of the native title holders. Our view is that it would be preferable if there were no ancillary agreements and they are included in the s31 agreement.

Access and assignment

Proposal 2

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

Strongly agreed, it is often the case that s.31 agreements and ancillary agreements are unable to be located and parties are unaware of their existence.

There are also frequent cases where a mining lease is transferred and the new holder claims ignorance of a s.31 agreement with native title holders, then refuses to accept liability. Due diligence aims to guarantee payments by the new holder, in reality, miners and often withhold payment and as noted above enforcement mechanisms are limited.

Question 9 Should *the Native Title Act 1993* (Cth) be amended to provide a mechanism for the assignment of agreements entered into before a positive native title determination is made which do not contain an express clause relating to succession and assignment.

Yes, this would assist the PBCs to raise revenue.

Implementing and enforcing agreements

Question 11 Should *The Native Title Act 1993* (Cth) should be amended to provide that the parties to an existing agreement may, by consent, seek a binding determination from the National Native Title Tribunal in relation to disputes arising under the agreement.

Yes, this would be valuable in those situations where the Proponent refuses to pay any obligations of the previous holder of the agreement after transfer. The PBCs having access to a less costly mechanism to review and adjudicate on disputes would all PBCs some power in addressing failure on the part of miner/developer to meet conditions of the agreement.

Question 19 What criteria should guide the National Native Title Tribunal when determining the conditions (if any) that attach to the doing of a future act?

Expedited Procedure

Proposal 9 is that section 32 of the *Native Title Act 1993* (Cth) should be repealed and replaced with another mechanism.

There is support for this however it is imperative that the problems that are encountered by PBCs with the NTPCs are not replicated.

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