Review of the Future Acts Regime

Submission in Response to Discussion Paper 88

Introduction

I have represented pastoral respondents to native title claims in Queensland since 1998.

In that time I have participated in 60 consent determinations over pastoral land in Queensland. I have negotiated over 240 registered ILUAs. I have also had carriage of eight non-claimant applications that have led to negative determinations including the leading authority of *Mace v State of Queensland*.

My engagement with the future act regime under the NTA on behalf of pastoral lessees has been limited to negotiations concerning upgrade of pastoral tenure – either upgrade from permit/licence (non-extinguishing tenure) to term lease (non-extinguishing tenure) or upgrade from term lease (non-extinguishing tenure) to freehold (extinguishing tenure). Those negotiations have resulted in only three (3) surrender ILUAs allowing conversion to freehold.

Most pastoral lessees who have approached me about engaging in ILUA negotiations about tenure upgrade involving non-extinguishing tenure have been deterred from proceeding further on account of the anticipated legal and administrative costs of the proposed native title party to participate in negotiations. The anticipated costs exceed the perceived commercial benefit of the proposed future act when it is an upgrade from a one form of non-extinguishing tenure to another form of non-extinguishing tenure.

It is accepted that conversion to an extinguishing tenure is in a different category.

As someone who routinely acts for pastoral lessees the key concern about the proposed amendments in the paper is the increased requirement to engage with native title holders about acts that are currently classified as permissible under the NTA. The engagement costs will be borne entirely by the pastoral lessee.

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?

The limitations set out in paragraph [62] of the Paper are a major concern.

The concept of management plans requires much more detail. The proposal that management plans can displace the statutory regime is not supported.

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?

No.

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.

This is something that could have merit.

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?

Ancillary agreements are not commonly used in the pastoral industry. Their use has been restricted to the handful of negotiated agreements about surrender of native title.

The native title party and the proponent have used the ancillary agreement to keep confidential from the State Government the consideration provided for the surrender. The consent for the surrender is recorded in the ILUA to which the State Government is a party.

If such agreements are to be regulated, confidentiality must be protected.

One key advantage of the ancillary agreement is that it is easier to amend if it is not subject to registration requirements that apply to an ILUA.

Proposal 2 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.**

This is supported as I have personal experience of having to provide PBCs with ILUAs negotiated pre-determination.

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 and which do not contain an express clause relating to succession and assignment?

Yes.

A sizable proportion of the pastoral ILUAs I have negotiated have contemplated assignment to the PBC post determination.

Proposal 3 Section 199C of the Native Title Act 1993 (Cth) should be amended to provide that, unless an Indigenous Land Use Agreement specifies otherwise, the agreement should be removed from the Register of Indigenous Land Use Agreements when:

a. **the relevant interest in property has expired or been surrendered;**
b. **the agreement has expired or been terminated; or**
c. **the agreement otherwise comes to an end.**

No objection.

Proposal 4 The Native Title Act 1993 (Cth) should be amended to require the Native Title Registrar to periodically audit the Register of Indigenous Land Use Agreements and remove agreements that have expired from the Register.

No objection.

Question 10 Should the Native Title Act 1993 (Cth) be amended to allow parties to agreements to negotiate specified amendments without needing to undergo the registration process again, and if so, what types of amendments should be permissible?

No comment as it is not an issue that has arisen in regard to the existing pastoral ILUAs.

Proposal 5 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.

No objection.

Question 11 Should the Native Title Act 1993 (Cth) be amended to provide that new agreements must contain a dispute resolution clause by which the parties agree to utilise the National Native Title Tribunal's dispute resolution services, including mediation and binding arbitration, in relation to disputes arising under the agreement?

The Pastoral ILUAs negotiated in Queensland as part of the native title claim resolution negotiations all contain a dispute resolution clause. That clause does not mandate use of the NNTT for mediation.

It is not stated why the NNTT needs to be the exclusive provider of dispute resolution services.

What is the capacity of the NNTT to be the exclusive dispute resolution service for native title disputes? Will excessive demand lead to the NNTT charging for its services?

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?

No objection.

The overwhelming majority of pastoral ILUAs in Queensland deal with access and use by native title holders – not future acts. The ILUAs were negotiated as part of the native title claim resolution process and were based on a template developed in conjunction with the State and two of the Representative Bodies.

The pastoral ILUAs are expressed not to be confidential, so the lack of detail on the Register concerning those agreements is unfortunate.

I have a concern about revisiting those ILUAs to obtain consent to publication.

Question 13 What reforms, if any, should be made in respect of agreements entered into before a native title determination is made, in recognition of the possibility that the ultimately determined native title holders may be different to the native title parties to a pre-determination agreement?

I have no firm view on this as it has only arisen once in relation to an ILUA I am aware of and in that matter the group of native title holders expanded post determination so re-authorisation was not an issue.

Question 14 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?**

No.

This is a rejection of the concept of permissible future acts on which many pastoral respondents who have consented to native title determinations have relied.

Pastoral ILUAs negotiated as part of the native title claim resolution process do not deal with any future acts. It was understood there was no need to deal with any of the acts caught by the Division as the Division gave the pastoral respondents the certainty they required about the future implications of a consent determination. It was recognised that major future acts like tenure upgrades needed to be subject to a separate process.

Replacement of this Division will require pastoral lessees to engage in an expensive legal and administrative exercise with the expectation that they bear the entire cost. The costs will be magnified where pastoral leases are covered by multiple determinations or overlapping claims. The NTA registration test provisions do not prevent the lodgement of overlapping claims.

There are also leases in Queensland covered by determinations due to technical issues associated with mapping. These areas can be less than 1% of the lease area, yet a right to negotiate about the renewal/extension of the lease is proposed.

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?**

The impact-based model is opposed.

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?

No.

Question 17 Should the Native Title Act 1993 (Cth) be amended to:

a. **exclude legislative acts that are future acts from an impact-based model as contemplated by Question 14, and apply tailored provisions and specific procedural requirements instead; and**
b. **clarify that planning activities conducted under legislation (such as those related to water management) can constitute future acts?**

No.

Proposal 6 The provisions of Part 2 Division 3 Subdivision P of the Native Title Act 1993 (Cth) that comprise the right to negotiate should be amended to create a process which operates as follows:

a. **As soon as practicable, and no later than two months after a future act attracting the right to negotiate is notified to a native title party, a proponent must provide the native title party with certain information about the proposed future act.**
b. **Native title parties would be entitled to withhold their consent to the future act and communicate their objection to the doing of the future act to the government party and proponent within six months of being notified. From the time of notification, the parties must negotiate in accordance with negotiation conduct standards (see Question 7). The requirement to negotiate would be suspended if the native title party objects to the doing of the future act.**
c. **If the native title party objects to the doing of the future act, the government party or proponent may apply to the National Native Title Tribunal for a determination as to whether the future act can be done (see Question 18).**
d. **If the National Native Title Tribunal determines that the future act cannot be done, the native title party would not be obliged to negotiate in response to any notice of the same or a substantially similar future act in the same location until five years after the Tribunal's determination.**
e. **If the National Native Title Tribunal determines that the future act can be done, the Tribunal may:**
    - **require the parties to continue negotiating in accordance with the negotiation conduct standards to seek agreement about conditions that should attach to the doing of the future act;**
    - **at the parties' joint request, proceed to determine the conditions (if any) that should attach to the doing of the future act; or**
    - **if the Tribunal is of the opinion that it would be inappropriate or futile for the parties to continue negotiating, after taking into account the parties' views, proceed to determine the conditions (if any) that should attach to the doing of the future act.**
f. **At any stage, the parties may jointly seek a binding determination from the National Native Title Tribunal on issues referred to the Tribunal during negotiations (see Proposal 7). The parties may also access National Native Title Tribunal facilitation services throughout agreement negotiations.**
g. **If the parties reach agreement, the agreement would be formalised in the same manner as agreements presently made under s 31 of the Native Title Act 1993 (Cth).**

h. **If the parties do not reach agreement within 18 months of the future act being notified, or within nine months of the National Native Title Tribunal determining that a future act can be done following an objection, any party may apply to the National Native Title Tribunal for a determination of the conditions that should apply to the doing of the future act (see Question 19). The parties may make a joint application to the Tribunal for a determination of conditions at any time.**

Not supported as the proposed expanded right to negotiate is not supported.

Question 18 What test should be applied by the National Native Title Tribunal when determining whether a future act can be done if a native title party objects to the doing of the future act?

No comment.

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?

No comment.

Proposal 8 Section 38(2) of the Native Title Act 1993 (Cth) should be repealed or amended to empower the National Native Title Tribunal to impose conditions on the doing of a future act which have the effect that a native title party is entitled to payments calculated by reference to the royalties, profits, or other income generated as a result of the future act.

Not supported.

No objection to section being amended to allow parties to consent to section 38(2) not applying to the future act under their consideration.

Proposal 9 Section 32 of the Native Title Act 1993 (Cth) should be repealed.

Not supported.

Question 21 Should Part 2 Division 3 Subdivision F of the Native Title Act 1993 (Cth) be amended:

a. **To provide non-claimant applications can only be made where they are made by, or for the benefit of, Aboriginal or Torres Strait Islander peoples;**
b. **for non-claimant applications made by a government party or proponent, to extend to 12 months the timeframe in which a native title claimant application can be lodged in response;**
c. **for non-claimant applications in which the future act proposed to be done would extinguish native title, to require the government party or proponent to**

establish that, on the balance of probabilities, there are no native title holders; or

d. in some other way?

No.

The Queensland Government does not permit section 24FA protection to apply when a lessee seeks to convert leasehold tenure to perpetual or freehold tenure. The Queensland Government requires native title to be addressed either by way of an ILUA (documenting consent to surrender of native title) or a determination that native title does not exist.

ILUAs are notoriously difficult to negotiate in the absence of a determination of native title or a registered claim.

The absence of a community or group united in observance and acknowledgement of traditional laws and customs makes an ILUA impossible and should not be a bar to converting tenure.

The majority of the non-claimant applications that have resulted in negative determinations in Queensland concern land that was previously within dismissed claims by one group. In a contested hearing the group was the subject of adverse findings of fact about its observance and acknowledgement of traditional laws and customs. It would be an abuse of process for that group to make any further claims. The group's dismissed claims covered approximately 12.5% of the area of Queensland. Lessees in that area have no alternative but to pursue a negative determination by way of a non-claimant application to secure conversion to freehold.

Allowing 12 months for a claimant application to be lodged in response to a non-claimant application is extra-ordinarily indulgent. Such a period would be grossly unfair in the respect of the area referred to in the paragraph above.

The Full Court decision in Mace has made it very clear what an applicant in a non-claimant application has to do in order to succeed.

Proposal 10 The Native Title Act 1993 (Cth) should be amended to expressly provide that a government party's or proponent's compliance with procedural requirements is necessary for a future act to be valid.

Does the use of the word "valid" in this proposal mean for all purposes?

Question 22 If the Native Title Act 1993 (Cth) is amended to expressly provide that non-compliance with procedural obligations would result in a future act being invalid, should the Act expressly address the consequences of invalidity?

Yes because of the position of third parties who have acted in reliance of the future act.

Question 23 Should the Native Title Act 1993 (Cth), or the Native Title (Notices) Determination 2024 (Cth), be amended to prescribe in more detail the information that should be included in a future act notice, and if so, what information or what additional information should be prescribed?

No comment.

Proposal 11 All future act notices should be required to be lodged with the National Native Title Tribunal. The Tribunal should be empowered to maintain a public register of notices containing specified information about each notified future act.

No objection.

Question 24 Should the Native Title Act 1993 (Cth) be amended to provide that for specified future acts, an amount which may be known as a 'future act payment' is payable to the relevant native title party prior to or contemporaneously with the doing of a future act:

a. **as agreed between the native title party and relevant government party or proponent;**
b. **in accordance with a determination of the National Native Title Tribunal where a matter is before the Tribunal;**
c. **in accordance with an amount or formula prescribed by regulations made under the Native Title Act 1993 (Cth); or**
d. **in accordance with an alternative method?**

Question 25 How should 'future act payments' interact with compensation that is payable under Part 2 Division 5 of the Native Title Act 1993 (Cth)?

It is unfortunate that this review is taking place in the absence of any guidance on what compensation under Part 2 Division 5 looks like. Therefore, it is difficult if not impossible to comment.

One has to query why both 'future act payments' and compensation should be payable for the same act. At present most 'future act payments' are confidential, so it is difficult to see how they could be offset against compnesation.

Proposal 12 Sections 24EB and 24EBA of the Native Title Act 1993 (Cth) should be amended to provide that compensation payable under an agreement is full and final for future acts that are the subject of the agreement only where the agreement expressly provides as such, and where the amounts payable under the agreement are in fact paid.

No objection.

Question 26 Should the Native Title Act 1993 (Cth) be amended to provide for a form of agreement, which is not an Indigenous Land Use Agreement, capable of recording

the terms of, and basis for, a future act payment and compensation payment for future acts?

No comment.

Proposal 13 The Native Title Act 1993 (Cth) should be amended to provide a statutory entitlement to compensation for invalid future acts.

No comment.

Proposal 14 The Native Title Act 1993 (Cth) should be amended to provide for and establish a perpetual capital fund, overseen by the Australian Future Fund Board of Guardians, for the purposes of providing core operations funding to Prescribed Bodies Corporate.

It is accepted that PBCs need to be adequately funded. How that is achieved is a matter for the Government.

Proposal 15 Native Title Representative Bodies and Native Title Service Providers should be permitted to use a portion of the funding disbursed by the National Indigenous Australians Agency to support Prescribed Bodies Corporate in responding to future act notices and participating in future acts processes.

No comment.

Proposal 16 The Australian Government should adequately fund the National Native Title Tribunal to fulfil the functions contemplated by the reforms in this Discussion Paper, and to provide greater facilitation and mediation support to users of the native title system.

Agreed.

Proposal 17 Section 60AB of the Native Title Act 1993 (Cth) should be amended to:

a. **entitle registered native title claimants to charge fees for costs incurred for any of the purposes referred to in s 60AB of the Act;**
b. **enable delegated legislation to prescribe a minimum scale of costs that native title parties can charge under s 60AB of the Act;**
c. **prohibit the imposition of a cap on costs below this scale;**
d. **impose an express obligation on a party liable to pay costs to a native title party under s 60AB of the Act to pay the fees owed to the native title party; and**
e. **specify that fees charged by a native title party under s 60AB can be charged to the government party doing the future act, subject to the government party being able to pass through the liability to a proponent (if any).**

No.

Question 27 Should the Native Title Act 1993 (Cth) be amended to expressly address the awarding of costs in Federal Court of Australia proceedings relating to the future acts regime, and if so, how?

No comment.

Proposal 18 The Australian Government should establish a specifically resourced First Nations advisory group to advise on implementing reforms to the Native Title Act 1993 (Cth).

Other proposed reforms call for more funding of PBCs and the NNTT.

The concern is that funding an additional body will lessen the funds available to the PBCs and the NNTT.

Question 28 Should the Native Title Act 1993 (Cth) be amended to provide for requirements and processes to manage the impacts of future acts on Aboriginal and Torres Strait Islander cultural heritage, and if so, how?

No, because:

- There is existing State legislation that covers Aboriginal and Torres Strait Islander cultural heritage; and
- Aboriginal and Torres Strait Islander cultural heritage also applies to land not subject to native title.

Appendix A

Impact-based model examples

Example 7: Grant of a permit for land clearing on a pastoral lease

The permit would grant rights enabling the holder to clear 400 hectares of native vegetation located on a non-exclusive pastoral lease for purposes associated with agricultural activities.

Current procedural requirement - Right to notice and opportunity to comment pursuant to s 24GB of the NTA.

Impact-based assessment - The future act would include rights enabling a high impact land-use activity over a large geographical area. The impact of these rights is likely to be long-term or permanent. The grant would substantially impact native title rights and interests.

Impact-based procedural requirement - Category B: Right to Negotiate

This example is flawed in respect of Queensland.

Lease land the subject of a term lease for pastoral purposes may be used only for—

(i) agricultural purposes; or
(ii) grazing purposes; or
(iii) agricultural and grazing purposes.[1]

Therefore, it is not the land clearing permit that allows agricultural purposes but the original lease confers a right on the lessee to use the land for activities associated with that purpose.

If the vegetation is regrowth, how would the clearing impact native title?

Dated: 10 July 2025

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[1] Land Act 1994 (Qld) Section 199A(2)(a)