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Australian Law Reform Commission
PO Box 209
Flinders Lane
MELBOURNE VIC 8009

By email: nativetitle@alrc.gov.au

Dear Sir/Madam,

**SUBMISSION RE AUSTRALIAN LAW REFORM COMMISSION REVIEW OF THE FUTURE ACTS
REGIME**

We act for a number of registered native title body corporates (**RNTRNTBCs**) and native title claimants across Western Australia and also NSW. Our clients include:

1. Wilinggin Aboriginal Corporation/Wanjina-Wunggurr (Native Title) Aboriginal Corporation RNTBC
2. Karajarri Traditional Lands Association (Aboriginal Corporation) RNTBC
3. Mayala Inninalang Aboriginal Corporation RNTBC
4. Nyamal Aboriginal Corporation RNTBC
5. Robe River Kuruma Aboriginal Corporation RTNBC
6. Buurabalanyji Thalanyji Aboriginal Corporation RNTBC
7. Jidi Jidi Aboriginal Corporation RNTBC
8. Marlinyu Ghoorlie Native Title Claimants/Marlinyu Ghoorlie Aboriginal Corporation
9. Esperance Tjaltjraak Native Title Aboriginal Corporation
10. Warrabinga Wiradjuri Native Title Claimants.

As the principal lawyer and managing director of Houston Legal, I have worked in native title for almost 20 years and have acted almost exclusively for native title parties with my initial experience being with the Kimberley Land Council, KRED/Arma Legal and Nyamba Buru Yawuru Limited and then as an independent lawyer acting for RNTBCs and native title claimants for the previous 9 years of my career.

Our lawyers have also worked for Native Title Representative Bodies (NTRBs) in the Kimberley and Pilbara/Yamatji regions and with a number of other native title parties and RNTBCs across Western Australia.

We have sought to address the Australian Law Reform Commission's Review through responding to the questions and proposals posited throughout the discussion paper.

We have also made some general comments at the end of this letter.

1. 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?

We understand that Native Title Management Plans (NTMPs) are being proposed as an alternative mechanism for RNTBCs to design tailored future act processes which would be available for proponents seeking to undertake activities in their determination area. This could be a useful strategic planning tool for RNTBCs and with an appropriate level of funding to support the process it would allow for a proactive, strategic approach to agreement making rather than the current reactive, responsive approach that is very much driven by proponent development demands and short commercial timeframes.

We note that currently much of the agreement making that takes place in native title occurs outside of the statutory processes set out in the *Native Title Act 1993* (Cth) (NTA) and occurs on a voluntary basis and addresses the full spectrum of issues which need to be addressed by a project proponent including native title consents, cultural heritage approvals, environmental approvals and community engagement. The formalisation of the use of NTMPs as a planning tool would support current voluntary agreement making processes which are generally flexible and adopt a holistic approach to development. They could also enable engagement to occur at a relationship level and provide a better mechanism for equitable partnerships rather than the traditional model of an individual projects based passive payment for consent and participation/non-objection to approvals.

A major benefit of NTMPs would be to allow RNTBCs to proactively plan how to manage areas which weren't subject to future act notices or under immediate development pressure. This would then allow an RNTBC to adopt a more holistic, balanced approach to managing native title and provide the space to plan how best to leverage their native title to achieve economic, social, cultural and environmental outcomes consistent with the expectations of an RNTBC's membership. This would provide an informed starting point for engagement between proponents and RNTBCs about development and future acts on native title land.

I note that the current regime of ILUAs could be used in a similar way without too much need for legislative reform. The key issue to be addressed which currently prevents this is funding and for the proposal around NTMPs to be implemented (either under a new regime in the NTA or through the existing ILUA regime), RNTBCs would need access to significant levels of funding and capacity support to enable this front-end land mapping and development planning to be undertaken.

There will also likely be questions around consent for a project and often whether an RNTBC and native title holders are prepared to consent to a project with a large impact on country will relate to the compensation that can be negotiated. It is difficult to determine what the likely quantum of compensation might without a proponent undertaking detailed feasibility studies and developing economic models around a given project. It may therefore be difficult to pre-bake development consents into NTMPs and it may be necessary for secondary negotiations and native title approvals processes to occur in addition to the NTMP.

2. Promoting fair and equitable agreements

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?

We understand that it is proposed that there should be some sort of codification and mandating of the conduct of parties in native title negotiations and also in terms of what should be included in a final agreement.

This may be useful for parties to a negotiation although it may be difficult to do this within the legislation itself and it may be more appropriate to adopt codes of conduct or best practice guidelines in regulations or policy documentation, which the government is prepared to enforce in some capacity.

The institution of such standard would be relevant if parties were not able to reach agreement and could be drawn upon in Future Act Determination Application (**FADA**) Arbitration process and other dispute resolution processes, particularly in relation to decisions relating to whether there have been good faith negotiations.

In that regard, the NTA should be amended to require proponents to contribute to funding the native title party's participation in negotiations, give native title parties often have no other income sources to fund their engagement and representation in future act negotiations. Unless an appropriate method for determining funding is otherwise provided for in the legislation, s 31(2) of the NTA should also be amended to make clear that proponents must negotiate in good faith about the funding of the native title party's participation in negotiations.

I note that it may be difficult to prescribe content standards for agreements given the large differences between jurisdiction and industry sectors but there could certainly be some better established benchmarks for native title compensation and guidelines established around what constitutes good faith negotiation.

We note that there is a risk that by attempting to formalise and codify standards and to make processes and standards more certain, there is a general weakening of existing standards which may then lead to poorer outcomes in the future in geographic areas and industry areas where RNTBCs and native title groups have been able to achieved good outcomes (although might improve outcomes for RNTBCs and native title groups outside those areas such as in NSW and Queensland). There could also be a possible devaluation of

the cultural and political strength of certain native title groups to dictate and determine what development occurs on country and how that development occurs with averaged out agreement outcomes instead applied as a default if agreement cannot be reached.

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.

It is proposed that RNTBCs be provided with more flexibility to utilise standing instructions to comply with consultation and consent requirements around native title decisions that impact on native title.

We agree that these provisions should be made as flexible as possible to promote autonomy, flexibility and self-determination in the management of native title by RNTBCs.

Expanding the range of future acts to which standing instructions decisions could apply, particularly mining exploration, could allow RNTBCs to use standing instructions decisions before NTMPs are developed.

There should be an acceptance by Government as part of their consideration of reform that by imposing very strict consultation and consent requirements on RNTBCs on top of the other factors such as lack of funding for RNTBC, weak and significantly time constrained procedural rights and the cultural and logistical complexity around collective decision making are factored in, they are putting a substantial and often unreasonable burden on native title parties and placing them in a close to impossible position to comply. This needs to be recognised and addressed as one of major barriers inhibiting the application of the future act provisions for native title parties and proponents.

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?

Because of the complexity, compliance burden and unfairness of the future acts system, there are many voluntary agreements entered into outside of the agreement making frameworks in the future acts regime. These operate in a similar way to settlement agreements which parties to disputes enter into to avoid litigation. It is important that such agreements are recognised and the NTA should reference these as options to manage native title and clarify the validity and effect of such agreements. I would generally advocate against such regulation being prescriptive and narrowing flexibility, noting that ILUA processes are currently available to parties who require absolute certainty (which will be balanced against the complexity of having ILUAs authorised and registered).

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.

Yes the NTA should be amended to provide for this.

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 the NTA should be amended to provide for this.

Often assigning an agreement that has been entered into prior to a determination by the applicant for the native title claim means that the RNTBC has to provide a deed of assignment executed by the individual members of the applicant, who may be living in remote areas, or who may have passed away by the time the agreement is proposed to be assigned.

Given the apparent intention in the NTA that the RNTBC is to be the successor of the applicant for the purpose of managing the native title rights and interests after a determination, it is appropriate that the NTA include a process for the assignment of agreements entered by the applicant to be assigned to the RNTBC with the RNTBC's consent.

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.**

Yes the NTA should be amended to provide for this.

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.

Yes the NTA should be amended to provide for this.

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?

Yes the NTA should be amended to provide for such amendments where those amendments in and of themselves are not substantive or directly related to the native title decision which is the subject of the ILUA. We understand that generally this would permit amendments as

long as they did not expand the scope of consents provided in registered agreements or weaken or diminish the compensation that is provided as consideration for consent.

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.

Yes the NTA should be amended to provide for this. Currently native title parties and RNTBCs often face a significant resource disadvantage which can make enforcing rights under an agreement through the court process difficult. This resource imbalance is often compounded where the primary revenue of native title party emanates from the agreement in relation to which the dispute relates. Having access to a low-cost, accessible dispute resolution/arbitration process would greatly enhance dispute resolution and the workability of agreements for all parties.

There would still need to be options to appeal through court processes but perhaps there could be a provision which meant that any judicial appeal process instituted by a proponent or non-native title party would require the native title party's costs to be resourced to participate in this appeal process.

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?

Potentially, although there would need to be certainty in relation to the capacity of the NNTT to mediate and hear such disputes both from a resourcing point of view and also the capability and expertise of members and NNTT staff. Generally any measures to support fair and cost efficient dispute resolution processes should be encouraged.

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?

Yes we agree that this should occur.

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?

Normally, in pre-determination agreements, there will be drafting which provides for scenarios where a different group of native title holders is determined to hold native title. Such drafting can be complicated and difficult to administer, particularly where there may be areas where native title does not exist but would otherwise have been determined to exist if native title hadn't been otherwise extinguished.

There could potentially be scope to reform the NTA such that any native title agreements which predated determination are automatically assigned to a RNTBC. It would be

presumed that this would be the case in any event so we would expect such a reform to clarify the situation to be fairly uncontroversial.

3. Reshaping the statutory procedures

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?**

We understand the proposal is to significantly simplify the future acts regime with a view to making the system fairer and having the procedural right more consistent with the native title impact of the proposed future act.

Our view is that this would be a worthwhile reform and other than dealing with the legacy issue around the treatment of future acts under the current regime, would be reasonably well supported by native title parties and proponents.

The examples used in the discussion paper for the impact-based model suggest that impact on native title will be greater where the future act impact on or take place near a culturally significant site. This perhaps overly conflates native title rights with cultural heritage. Would the impact on native title of a future act be greatest where the act takes place on area of exclusive possession native title, whether it was in the vicinity of a cultural site or not?

The treatment of infrastructure related to mining as part of the mining project as whole, and the treatment of acts under s 24GB as based on the impact of the land clearing those acts would permit are sensible reforms that would better align native title parties' procedural rights with the high impact of those kinds of acts.

We support the proposal as described in the Discussion Paper and suggest that this would simplify and demystify the future acts regime (which may not necessarily be in my interest as a native title/future acts lawyer!). We note that the procedural right often only becomes important where parties are unable to reach agreement and that often have a future act right granted without an agreement in place is not the preferred option for a proponent because of uncertainty and potential compensation exposure.

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?**

Our view is that generally there shouldn't be concessions or exclusion on public interest grounds or other political reasons such as those cited above. An act will have the same impact on native title whether it is done for a public or a private purpose. I note that whatever the future act procedures adopted, it is likely that the preferred avenue for undertaking a future act is by agreement. Where there is mutual benefit or reasons for why an agreement should be reached for less consideration, then this will automatically be factored into negotiations by both parties which may be reflected in the level of compensation payable under the agreement. The weaker procedural rights will only really apply if parties are unable to reach agreement and therefore I don't see that there is any reason to discount impact to allow for a non-negotiated outcome. I presume that whatever the justification for a more streamlined non-negotiated outcome approach, the compensation for impact would be the same in any event.

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?

Yes. This could be captured through the previous reforms which would recharacterise future acts on the basis of impact with corresponding procedural rights. This would also be relevant in looking at compensation which I note potentially does include broader impacts through the non-economic loss concept articulated in *Timber Creek*.

We note that the process of giving effect to agreements reached by a RNTBC should be made as simple and streamlined as possible to incentivise this pathway. I don't think incentivising a pathway that doesn't involve parties reaching agreement serves any purpose or will support enhanced, interest-based agreement making under the NTA.

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?**

This is complex and will likely require separate consideration and tailored processes given the potentially broadscale application of such future acts. I would agree that these types of future acts could potentially be exempt from the proposed, new simplified impact-based future act procedures described elsewhere in the paper although there may still be discrete impacts on particular RNTBCs and native title parties where legislative acts or regulations are

relied upon to undertake activities. This could potentially be the trigger for the impact future act processes to apply (ie in the case of a water catchment plan, the award of a licence or water allocation pursuant to that catchment plan). Perhaps a broad right of consultation could be applied as a default which would cover all future acts other than higher impact future acts and which would include legislative/regulatory future acts.

In general any reform that provides native title parties and RNTBCs with the ability to be consulted about management frameworks in any legislation that provides for the doing of future acts under those frameworks is a positive step, and would ultimately mean that future acts done under those frameworks would have a lesser impact on native title and cultural heritage because those impacts have been considered in the design phase of the future act.

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.

This process appears fairer and more workable than the current right to negotiate process. We would support the two-stage arbitration process and also the more flexible role that the NNTT could take on to assist with the resolution of any issues that prevent a negotiated outcome.

The more nuanced arbitration options would also appear to allow a fairer and more agreement-focused approach to resolving issues through the right to negotiate process. Our view is that having the two different levels through which arbitration can be utilised also strikes a more appropriate and fair balance between the need for security of tenure and development certainty for States and proponents and the rights of native title holders to oppose development but also to seek appropriate compensation and conditions managing the impacts of development should it be determined that it is in the public interest for a project to proceed.

Noting our earlier comment that the participation of native title parties in negotiation should be appropriately funded by proponents, we would reiterate that resourcing issue here and suggest the RTN provisions specifically include reference to this.

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?

We suggest that this test should have a high bar to ensure there is not political and community opposition to the reform process and that the existing criteria in Section 39 of the NTA could form the starting point for a determination (which would effectively mean no change to the existing FADA process in applying the proposed first stage of arbitration).

It is also worth noting that in the event the NNTT decides that an act can be done, there is an opportunity for the native title party to either negotiate or have arbitrated the conditions on which the act can be done and also the compensation to be paid. Ultimately the complexity and time of these processes as the Best Alternative to a Negotiated Agreement should incentivise agreement making and whilst there is not an absolute right of Free Prior and Informed Consent (which is unlikely to ever be politically supported), the ability of a native title party to reach agreement using the principles of FPIC appear to be well supported through this proposed reform.

The weighting of the s 39 criteria as suggested at [218] of the discussion paper could assist to address the glaring statistical imbalance in the NNTT's decisions whether a future act can be done.

There will obviously be political implications around the settings applied to BATNA processes to be administered by the NNTT and we assume that there will need to be consideration of

these political implications if any proposed reforms are to be capable of being adopted into legislation.

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?

We see the settings applied here as vital for the efficient and fair operation of the right to negotiate process and ensuring both parties to a negotiation are able to engage in good faith and on a equal footing.

Our view is that the NNTT in these circumstances should essentially impose an agreement between the parties which is fair and reasonable given the particular circumstances around the negotiations. This would require that NNTT members who are adjudicating and arbitrating to have sufficient experience and knowledge in native title negotiations to be able to objectively impose such arrangements so that the appropriate balance between the interests of each party is struck. It is important that such agreements have geographic and industry context, that they are commercially justifiable given the economics and nature of the project to which they apply and that they are able to be implemented in a workable and commercial manner between the parties.

We also submit that through the design of this process there needs to continue to be an incentivisation for parties to reach agreement rather than resort to dispute resolution and arbitration and that the availability of a non-negotiated outcome should be a last resort.

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.

We agree with this proposed reform. The current inability for the NNTT to do this puts the native title party at a significant disadvantage in negotiations and incentivises the proponent to refer matters to arbitration given they are not exposed to an award of compensation or project royalties/benefits. Our comments in response to Question 19 also apply to this proposal.

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

We agree with the proposed reform. The expedited procedure is a flawed system and a fairer and more efficient system should be designed to apply to exploration. In areas of heavy exploration and large volumes of exploration licence future acts, there needs to be resources invested to assist parties manage this process in a streamlined, efficient, fair and robust manner.

We note that the application of the full right to negotiate with accompanying obligations to consult and obtain the consent of native title holders for agreements might also create significant administrative and cost burdens on parties in areas of heavy mining activity and that the effective removal of Section 32 would need to be supported by the institution of

standing arrangements which allows a streamlined and fair approach to managing exploration licence applications. This could include the availability of standing consents, processes set out in a NTMP and also streamlined and low cost dispute resolution and arbitration processes (i.e. our response to Question 19 would apply where the NNTT could effectively impose a reasonable agreement if parties were unable to reach agreement).

Question 20. Should a reformed future acts regime retain the ability for states and territories to legislate alternative procedures, subject to approval by the Commonwealth Minister, as currently permitted by ss 43 and 43A of the Native Title Act 1993 (Cth)?

We agree that this may assist with supporting flexibility but would submit that any such procedures cannot be weaker than the existing national standards in the NTA. We note that there is an option already through an ILUA for a State or Territory to agree an alternative framework for future acts with the agreement of the relevant native title party.

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

- a. to provide that 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?**

Agreed with the proposed reforms in (a) – (c) under Question 21.

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.

Agreed with the proposed reforms.

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. There should potentially be a penalty (say 100% of freehold value) which could be applied with the award of compensation. The penalty would apply unless the invalid future act was validated through agreement.

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?

Yes. Future Act notice requirements should be standardised to ensure a common approach and to ensure there are agreed, shared expectations in relation to information requirements.

As a minimum, notices should clearly set out what the grant is, the provision of the legislation it is granted under, and what rights the grant will confer on the grantee.

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.

Agreed. The Native title party should also be able to challenge the validity of a future act notice with the NNTT to determine whether it is valid.

4. Compensation and other Payments

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 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?**

Agreed with the proposed reforms. We note that our previous comments apply in that there needs to be recognition that the system operates reasonably efficiently at present in many areas on a voluntary, by-agreement basis, outside of the framework of the future regime and that this should continue to be promoted and incentivised as part of any reforms. Any reforms which make future act approvals easier and faster through non-negotiated pathways are likely to act as a disincentive to agreement making and native title parties providing free, prior and informed consent to activities on country.

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)?

Our view is that they should be a set-off against any future award of native title compensation. It may be useful to recognise that parties have the option for a future act payment to constitute full and final compensation which may promote higher and financial payments and also incentivise negotiated outcomes to provide certainty and ensure support for development.

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.

Agreed with the proposed reforms.

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?

This is very common in practice and therefore should be referenced in the NTA. I note that such agreements are voluntary, flexible and enable parties to commercially and collaboratively deal with native title and that this approach should be enabled to continue.

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

Agreed with the proposed reforms.

5. Resourcing cost

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.

Agreed with the proposal. It may be preferable to support self-determination and capacity building for RNTBCs to manage their own capital funds with an agreement that such capital funds are a one-off. This would then allow RNTBCs to make decisions to invest which may enable for increased revenue in the future. There may need to be some guardrails around how this works in practice (i.e. the investment of the capital funds could be a native title decision which requires common law holder approval).

A centralised fund would need to be accessible and avoid overly bureaucratic and time-consuming discretionary fund allocation processes for RNTBCs to obtain funding. We note that there are a number of examples of such centralised funds not delivering the expected outcomes such as the Land Fund administered by the ILSC or the large amounts of funding administered by NIAA from Canberra which are often quite disconnected from funding requirements on the ground.

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.

Agreed with the proposal, although we note that this should not detract from the funding available to Representative Bodies to fulfill their other functions such as assisting native title holders with dispute resolution or compensation claims. The funding should be made available in addition to existing funding streams.

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 with the proposal.

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).**

Agree with the proposal.

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?

Agree with the proposed reform as set out in the Discussion Paper having regard to the resource imbalance between proponents and native title parties. I assume the increased role of the NNTT may also allow for disputes to be settled in a more cost effective and fair manner. This proposal would also incentivise proponents to negotiate in good faith or in accordance with the conduct guidelines, where not to do so could result in costs order against a proponent in any resulting future acts litigation.

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).

Agree with the proposal. We suggest that the advisory group should also include a mix of First Nations people and also executive staff and advisors of First Nations people with experience and expertise and relevant knowledge in the area of the proposed reform (could be chosen by First Nations people who are appointed). We note also that there have been many attempts to try and reform the NTA in the past with first nations advisory groups which for various reasons have not yielded outcomes or reforms which have been pressed by traditional owners.

6. Aboriginal and Torres Strait Islander cultural heritage

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?

This is a complicated issue and will depend on the reforms being pursued in the management of cultural heritage. It is important that processes relating to the NTA and cultural heritage are aligned and complementary and there should be consideration given to whether bringing cultural heritage into the NTA assists alignment or rather complicates matters and makes reforms more politically challenging.

RNTBCs, as the representatives of common law native title holders for particular areas, are the most appropriate bodies to manage cultural heritage matters at a local level. However, any reforms to provide that RNTBCs have a primary role in making decisions about cultural heritage must consider the resources that RNTBCs need to take on that function effectively.

7. General Comments

As a general comment, we have a different, more positive experience of the implementation of the future acts regime than some of the anecdotal evidence suggests with future act matters generally being resolved by agreement with mutually beneficial and equitable outcomes being achieved. However these outcomes are often not attributable to the substance and application of the rights and processes set out in the NTA in and of themselves which generally disadvantage native title parties.

Rather it is the forum for engagement that is provided by the NTA combined with a number of extrinsic factors that sets the framework for mutually beneficial outcomes to be achieved.

These extrinsic factors include

- i) the need for investment certainty and removal of project risk through the duration of a project life-cycle;
- ii) the need for traditional owner participation in cultural heritage and environmental approvals;
- iii) the expectations of governments, banks, project finance institutions, shareholders, customers and civil society that proponents have native title or first nations consent when undertaking development that has impacts on Indigenous communities and culturally important social, cultural and heritage values;
- iv) the extent to which traditional owners have been or have perceived to have been displaced, dislocated or had their traditional connection to country disrupted by prior development; and
- v) the ability for native title parties and Indigenous communities to influence and shape political and community opinion if development occurs without FPIC.

The impact of these extrinsic factors is also highlighted by the vastly different outcomes achieved by RNTBCs and native title parties across different jurisdictions. The outcomes that are achieved are also dependent on the capacity of RNTBCs and native title claimants to understand how these extrinsic factors may supplement their procedural rights under the

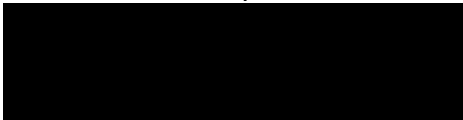
NTA and the extent to which RNTBCs and native title claimants are able to organise themselves and negotiate with clarity of purpose.

There are a number of areas where reasonable, simple reforms could make a significant difference which include:

- i) Increased funding for RNTBCs to support their basic operations, nation building aspirations and also proactive project planning;
- ii) Mechanisms to support RNTBCs to be staffed and supported by capable, honest and experienced staff and consultants in future act matters;
- iii) Making dispute resolution processes more cost effective and fairer but also ensuring that agreement making and FPIC are incentivised and supported;
- iv) Linking government approvals, grants of tenure and government funding/concessions to projects where FPIC can be demonstrated;
- v) Providing incentives for RNTBCs to engage constructively and proactively in economic development initiatives on their traditional country; and
- vi) Considering options where projects can be co-managed and co-regulated in partnership with RNTBC and native title group outside of the NTA framework.

We look forward to ALRC continuing to progress these reforms and to future engagement both in our own right and on behalf of our clients. We would be happy to facilitate engagement by ALRC with our clients if that would assist.

Yours faithfully



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