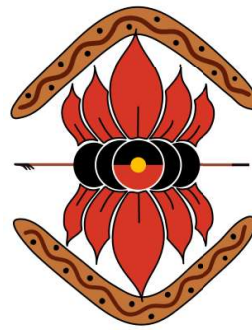


Gawler Ranges Aboriginal Corporation
ICN 7652

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**GAWLER RANGES
ABORIGINAL
CORPORATION**

11 July 2025

Ms Jane Hall
Senior Legal Officer
The Australian Law Reform Commission

By Email: [REDACTED]
Cc': Nativetitle@ALRC.gov.au

Dear Madam

ALRC Discussion Paper: Review of the Future Acts Regime

1. Gawler Ranges Aboriginal Corporation RNTBC (**GRAC**) welcomes the opportunity to make a submission to the Australian Law Reform Commission (**ALRC**) in relation to its Discussion Paper published in May 2025 and is grateful for the extension of time given for this purpose. That extension has provided the GRAC Board with time to be briefed at its meeting on 11 July, in particular, on the ALRC's Proposals and Questions set out in the Discussion Paper
2. GRAC is the agent registered native title body corporate/prescribed body corporate in respect of the native title rights and interests of the Gawler Ranges People of the north of South Australia (*McNamara on behalf of the Gawler Ranges People v State of South Australia* [2011] FCA 1471).
3. This submission primarily addresses Question 20 and paragraphs 245 to 249 in the Discussion Paper. The Question asks whether a reformed future acts regime in the *Native Title Act 1993* (**NTA**) should retain the ability for States and Territories to legislate alternative 'right to negotiate' procedures to those set out in Subdivision P in the NTA. The NTA currently allows for such alternative provisions and, as is noted in paragraph 246, only South Australia (**SA**) at present has such provisions. They are contained in Part 9B of the *Mining Act 1971* (**SA**) and apply in relation to mineral exploration and mining on native title land in SA (but not to petroleum, gas or any other resource exploration or production).
4. Recently, the SA Department for Energy and Mining (**DEM**) published a Mining Act 1971 Issues Paper. This raised a number of issues, including, in particular, the question of whether Part 9B should be repealed. GRAC made a submission to DEM by letter dated 11 June 2025 in which GRAC argued strongly in favour of the repeal of Part 9B. A copy of that submission letter is **attached**.
5. It is now confirmed that the GRAC Board fully endorses that position for the reasons set out in the letter; and it intends to promote the repeal of Part 9B and (in its place) the application in SA of Subdivision P, hopefully reformed in accordance with ALRC recommendations in line with the Proposals set out in the Discussion Paper.

6. As regards Question 20, GRAC supports the repeal of sections 43 and 43A of the NTA and the removal of the ability of SA, in particular, to retain the existing Part 9B provisions or to legislate other alternative procedures. GRAC wants the relevant legislation applying in relation to mineral exploration and mining (as well as other resource exploration and production) over native title land in SA to be national legislation which meets international standards, including by requiring governments and proponents to adhere to the principles of Free, Prior and Informed Consent as set out in the UN Convention of the Rights of Indigenous People (UNDRIP).
7. In addition to the above and to numbered paragraphs 1 to 5, 9 and 11 of its submission letter to DEM, GRAC draws attention to numbered paragraphs 6 to 8, 10, 14 and 15 of that letter. We confirm that these have been considered by the GRAC Board and the Proposals and the ideas in the ALRC Discussion Paper have its broad support, including, in particular, the proposed reforms identified in paragraphs 6 to 8.
8. Further attention is also drawn to paragraph 4.7, in light of which GRAC specifically supports an amendment to the NTA which “provide[s] that a positive determination of native title enlivens a statutory right for the relevant PBC to have a primary role in being consulted and making decision with respect to cultural heritage for the determination area”.
9. With regard to paragraph 13 of the submission letter to DEM, reference is made to section 26D(1) of the NTA. That section (generally speaking) exempts from the application of Subdivision P any renewal, re-grant or extension of the term of an earlier right to mine (e.g. under an exploration licence or mining lease), where otherwise no new rights are created in addition to those under the earlier right to mine. Mining leases in SA are usually granted for a term of 21 years (but may be granted for a longer period) and may be renewed for a further 21 years or more; and as the submission letter notes, exploration licences may be granted for up to 6 years and currently may be renewed for two further 6 year periods. The Discussion Paper notes (at paragraph 171) that the effect of section 26D(1) and other exempting provisions “prevent any consideration of the cumulative impacts of repeated mining and exploration activities in the same area”. Whilst it is accepted that, where a native title mining agreement has been freely negotiated and entered into between native title groups and proponents, the latter should have certainty for the term of the relevant mining tenement, fairness demands that there be, if not a new ‘right to negotiate’, at least consultation on the part of the State with the native title group before any renewal with a view to an assessment of the conduct of the proponent in the carrying out of exploration mining activities and in its engagement with the native title group.

GRAC will be pleased to respond to queries in relation to any of the matters raised in this submission.

Yours sincerely

GAWLER RANGES ABORIGINAL CORPORATION

Zoe Saunders

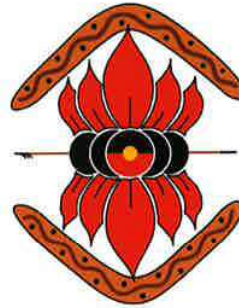
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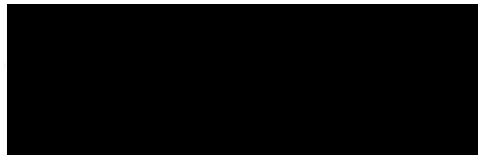


**GAWLER RANGES
ABORIGINAL
CORPORATION**

11 June 2025

Ms Jacqui Commerford
Principal Policy Officer
Mineral Resources Division
Department for Energy and Mining
GPO Box 618
ADELAIDE SA 5000

By email:



Dear Ms Commerford

Mining Act 1971: Issues Paper

1. GRAC welcomes the opportunity to make a submission to DEM regarding the *Mining Act 1971* Issues Paper, specifically in relation to Part 9B of that Act. Amongst other things, DEM in the Issues Paper raises the question of whether Part 9B should be repealed and, if so, what the associated benefits would be. DEM also asks for feedback on the operation of 'right to negotiate' (RTN) schemes used in other jurisdictions.
2. Briefly, GRAC considers that Part 9B should be repealed. It remains frozen in time, has not kept pace with changes to Subdivision P of the *Native Title Act 1993 (NTA)* since 1998, is outdated and no longer fit for purpose, and now operates unfairly for native title parties. Further, in light of Recommendation 4 of the (Federal Parliament) Joint Standing Committee on Northern Australia's report "A Way Forward"¹ (October 2021) and the likely recommendations of the Australian Law Reform Commission (ALRC) (on the assumption the Proposals set out in its Review of the Future Acts Regime: Discussion Paper (May 2025) become recommendations in its final report), there are further substantial changes to Subdivision P which may be anticipated, and which, if Part 9B remains in place, would result in significantly greater disparity between that Subdivision and Part 9B and in determined native title holders and registered native title claimants in SA in effect receiving discriminatory treatment by having lesser procedural rights than their counterparts in the other States and Territories.

¹ the (substantially) unanimous final report of a Federal Parliamentary Committee inquiring into the destruction of the Juukan caves in the Pilbara

Current disadvantages of Part 9B

3. Part 9B has been in existence now for 30 years. There was some merit in SA's alternative RTN regime back in 1995, in the early post-Mabo, post-NTA days. At that time, some Governments in Australia adopted a politically hostile approach to native title and took steps to try to eliminate it or otherwise minimise or undermine its effects. Further, there were concerns that States might interfere to dictate or limit what financial benefits for a native title party could be negotiated to be provided by the proponent. For those reason, there appeared to be some advantage in not having the State involved in giving notices or as a participant in negotiations² for Native Title Mining Agreements (**NTMA's**) between native title parties and mining companies/mineral explorers.

4. After 30 years it is apparent the disadvantages in Part 9B outweigh any advantages:

4.1 Unlike in the NTA where the relevant State (or Territory) Government is the notice giver under section 29 (and a negotiation party), it is generally the case that in SA under Part 9B native title parties such as Prescribed Bodies Corporate/Registered Native Title Bodies Corporate (**PBC's**) have not been aware that exploration authorities (e.g. exploration or prospecting licences) have been applied for or indeed granted over their native title land until receiving a section 63M notice (or a notice of entry under section 58A) from the mineral explorer proponent. Further, there is no equivalent in Part 9B to section 31(1)(a) of the NTA (which gives native title parties the opportunity to make submissions to the State before it grants a mining tenement).

4.2 In SA, the State grants an exploration authority to a proponent applicant invariably prior to any initiation of the negotiating process under section 63M, without regard to when (if ever) that process will be initiated by the proponent; and it is up to the proponent to decide when to initiate the process. On the face of it, section 63F allows a proponent to delay until it supposedly considers (invariably wrongly) the exploration activities it proposes to carry out will "*affect native title*". It is not until that point that section 63F requires the existence of an NTMA or a Native Title Mining Determination (**NTMD**) for exploration operations thereafter to be able to be lawfully conducted. This is completely at odds with the NTA requirement which prevents a State from granting an exploration authority until it has issued a section 29 notice to the native title party and the negotiating procedure (or, where applicable, expedited procedure) process has been completed.

4.3 As a result of the circumstances set out in 4.2, there have at times been prospectors or other small operators who have sought to ignore their obligations under Part 9B entirely and not given notice under section 63M to initiate negotiations for a NTMA (or purportedly in reliance on the expedited procedure under section 63O), until required by DEM to have a registered NTMA (or an NTMD from the ERD Court) in order to have a PEPR approved (e.g. so that drilling may be allowed to take place).

4.4 GRAC is aware of some criticism levelled at WA (and perhaps one or more other States) in effectively avoiding compliance with their obligations to negotiate in good faith under section 31. However, that section at least gives PBC's an opportunity to have dealings with the relevant State Department prior to the grant of a mining tenement. This is substantially unavailable to them in SA under Part 9B. It is noteworthy that this is in marked contrast to the level of consultation with PBC's (including GRAC, in particular) which DEM has engaged in under the *Hydrogen and*

² GRAC understands that the Energy Division within DEM, when engaged in tripartite negotiations for native title agreements for petroleum exploration and production under Subdivision P used to constrain proponents who may otherwise have been willing to negotiate and agree to more favourable monetary benefits for native title parties than DEM was prepared to allow them to provide.

Renewable Energy Act 2023 (HRE Act) e.g. in relation to renewable energy release areas and feasibility licences.

- 4.5 There is no equivalent in Part 9B to section 36(2) of the NTA. That section applies where no NTMA has been negotiated/entered into and an application is made to the National Native Title Tribunal (**NNTT**) by the proponent (or the State) for an NTMD after at least six months have passed since the date of the section 29 notice initiating the RTN procedure. It provides a significant (albeit inadequate) safeguard by prohibiting the NNTT from making an NTMD if the native title party satisfies it that the proponent (or the State) has not negotiated in good faith with a view to an NTMA, as required by section 31. However, Part 9B does not include any such modest safeguard: there appears to be nothing stopping a proponent, despite failing to comply with its obligation to negotiate in good faith under section 63P, from applying for and successfully pursuing an NTMD from the ERD Court once six months have passed since giving a section 63M notice to the native title party purporting to initiate negotiations for an NTMA. [It is noteworthy that the ALRC in its Discussion Paper takes the view that the six month period is too short and can impede the process towards successful agreement-making; and as a result it may be expected to recommend an amendment to the NTA which provides for a significantly longer period for negotiations to have elapsed before an application may be made to the NNTT for an NTMD.]
- 4.6 The NNTT operates throughout the whole country in accordance with the NTA, but not for the purposes of Part 9B. The NNTT's focus is entirely on native title matters, and as a result it has developed (and is widely respected for) its specialist knowledge, expertise and experience in all aspects of native title, including in conducting mediations in relation to the negotiation of NTMAs and also in acting as the arbitral body under Subdivision P (even if its current NTMD options are too limited: see Proposals 6 to 9, Figure 5 and paragraphs 211 to 236 and 272 to 285 of the ALRC Discussion Paper). On the other hand, the body with equivalent responsibility under Part 9B, the ERD Court, has a significantly broader jurisdiction which is certainly not limited in its scope to native title matters. In fact, it is only rarely involved in native title matters; and by comparison with the NNTT it may fairly be said to lack knowledge, expertise and experience in relation to them. It is considered that native title parties in SA (and at times proponents too) have been disadvantaged by not being able to have access to the NNTT's expertise etc., for example in conducting mediations when they are seeking to negotiate an NTMA. With the likely expansion of the NNTT's role in that area in the future, this disadvantage may be expected to become more greatly felt (unless Part 9B is repealed).
- 4.7 Another area of problematic interaction between the future act provisions in the NTA (not just those in Subdivision P relating to the RTN procedure) and State law (including Part 9B) has been caused by the *Aboriginal Heritage Act 1988* (SA). New provisions were inserted into that Act in 2017. These had the seemingly obvious intention of giving determined native title holders greater management control of their cultural heritage by, in particular, prioritising (in section 19B(4)) the appointment of their (agent representative) PBCs as Recognised Aboriginal Representative Bodies (**RARBs**), thereby providing them with additional statutory rights in relation to negotiating heritage agreements--in line with their determined native title rights and consistently with their obligations under the NTA and Part 9B to negotiate NTMAs, including as they relate to the conduct of heritage clearance surveys to protect Aboriginal sites and other areas and objects of significance. However, it is understood that, despite many applications being made by SA PBCs (including GRAC) to be given approval (by the Aboriginal Heritage Committee) for appointment as RARBs, to date only one PBC's application (not being GRAC's) has been approved. In GRAC's view, this has resulted in the effective undermining of the rights, obligations and

responsibilities of PBCs under the NTA and Part 9B, insofar as they bear on heritage protection. [DEM's attention is drawn in this regard to the first dot point in paragraph 333 of the ALRC Discussion Paper, where the ALRC floats the option of a possible amendment to the NTA "to provide that a positive determination of native title enlivens a statutory right for the relevant PBC to have a primary role in being consulted and making decisions with respect to cultural heritage for the determination area". Such an amendment would be in line with Recommendation 4 of the "A Way Forward" report referred to in 2 above.]

Anticipated further disadvantages in light of ALRC's likely recommendations.

5. Reference is made in 2 above to Recommendation 4 in the "A Way Forward" report of the Federal Parliamentary Committee inquiring into the destruction of the Juukan caves. That Recommendation provided for a review of the NTA which amongst other things) "should address...developing standards for the negotiation of agreements that require proponents to adhere to the principle of Free, Prior and Informed Consent as set out in the UN Convention of the Rights of Indigenous People (UNDRIP)".
6. The ALRC Discussion Paper outlines potential reforms to the NTA ("to create a future acts regime that can operate fairly and efficiently to further [its] objectives"). Relevantly, Proposal 6 (on page 40) contemplates a reformed RTN process (in Subdivision P) providing for:
 - (i) a requirement for the proponent to provide the native title party with certain information about the proposed future act (e.g. exploration or mining operations under the relevant tenement applied for);
 - (ii) negotiation conduct standards (including as to 'good faith') and possibly certain content standards too;
 - (iii) the right for native title parties to withhold consent to the proposed future act by notifying their objection to the government party and the proponent within 6 months of the section 29 notice (in which event the requirement to negotiate would be suspended);
 - (iv) the right of the government party or proponent in such circumstances to apply to the NNTT for a determination as to whether the tenement may be granted;
 - (v) if, following such application, the NNTT determines the tenement may be granted (or where there is no withholding of consent/objection as in (iii)), the obligation of the parties to continue negotiations in accordance with the negotiation conduct standards to seek agreement about conditions that should attach to the doing of the future act, with the NNTT being empowered to determine some or all of these, depending on the circumstances, e.g. at any time at the request of all parties, or (where no agreement is reached) 9 months (or earlier, where appropriate) after the NNTT has determined (following an application as in (iv)) that the tenement may be granted or otherwise 18 months after the section 29 notice.
7. There are other significant Proposals affecting Subdivision P. They include Proposals 8 (repeal of section 38(2), which prohibits the NNTT from imposing conditions for the payment of royalties, profits or other monetary benefits based on mineral production) 9 (repeal of section 32, which provides for the 'expedited procedure') 10 (amendment expressly requiring the government party and proponent's compliance with procedural requirements for a future act to be valid).
8. The Discussion Paper (in paragraph 50) also raises the prospect of the ALRC in its final report recommending amendments allowing PBCs (with the consent of the native title holders they represent) to develop Native Title Management Plans (NTMP) in respect of their determination areas (for registration by the NNTT) which "prescribe potentially more robust or

streamlined processes for certain future acts than the processes set out in the NTA, to better reflect how native title holders wish to care for Country; promote early engagement between proponents and native title holders wherever appropriate; and signal where there are development opportunities on Country that native title holders may be interested in pursuing in collaboration with industry and government." Registered NTMPs would, it seems, have the potential of providing an alternative pathway (to ILUAs and the statutory RTN procedure) for the validity of future acts such as the grant of mining tenements.

9. DEM's attention is also drawn to paragraphs 245 to 249 (including Question 20) which raise the question of whether a reformed future acts regime (in the NTA) should maintain in it the right of States and Territories to legislate for alternative RTN procedures or, in the case of SA, retain the effective operation of its existing legislation (i.e. Part 9B).
10. Whilst the GRAC Board has not had an opportunity to consider the ALRC Discussion Paper since it was released in late May, it may be expected to be broadly supportive of the above Proposals and other ideas, as the Board's approach may be said to be substantially consistent with them.
11. More particularly, the Discussion Paper foreshadows some potentially radical changes to Subdivision P, if enacted in legislation following the ALRC's final report in relation to the future acts regime (expected by the end of the year). These may include the effective cessation of Part 9B's operation as the RTN procedure in relation to mining and mineral exploration in SA and its substitution by Subdivision P but otherwise will result in such major additional disparities between the State and the Commonwealth's RTN procedures as to render Part 9B grossly unfair, discriminatory and unviable for the future, at least in the absence of matching amendments to fully update it to the standards of Subdivision P. In GRAC's view, it would be better for native title parties, the State and prospective proponents for Part 9B to be repealed and allow Subdivision P to operate in future as the RTN procedure for mining and mineral exploration in SA (in addition to its operation in relation to petroleum etc. exploration and production).

Additional issues

12. GRAC wishes to take advantage of this opportunity to also make some comments:
 - regarding possible changes to the Mining Act to allow for extensions beyond the 18 year maximum exploration licence period (as outlined in the Issues Paper);
 - to emphasise GRAC's concerns regarding water.
13. Following amendments to section 30A of the Mining Act in 2021, the initial term of an exploration licence is up to 6 years, but in the event of applications to renew the EL may currently be renewed for two further (up to) 6 year periods at the discretion of the Minister on the same or varied conditions (with, in the case of a renewal from the 12th anniversary of the original grant date, a 50% reduction in the EL area). The proposal now is that there be a new amendment allowing for further extensions beyond the 18 year maximum (possibly subject to certain eligibility criteria and limited to two year terms). GRAC has concerns about the current section, and this proposal would make these all the greater and is not supported. Whether section 26D(1) of the NTA (which excludes renewals from the operation of the RTN procedure in Subdivision P) is repealed or modified in light of changes recommended by the ALRC, GRAC urges the inclusion of amendments to the Mining Act requiring consultation by DEM (and by proponent applicants) with PBCs prior to any grant or renewal of an EL, including in relation to conditions to be attached, where relevant.
14. Turning finally to GRAC's concerns about water, DEM's attention is drawn to paragraphs 184 to 186 of the ALRC Discussion Paper, which emphasise the significance of water to native title holders and other Aboriginal people, e.g.: "Not only do many groups consider water

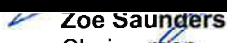
sources and flows to have sacred spiritual value with connection to creation stories and song lines, but the enjoyment of many other native title rights and interests can also be dependent on the presence of, or adequate access to, water in the natural environment.” That quite accurately summarises the relationship of Gawler Ranges native title holders to water on Country. GRAC representatives have expressed their concerns regarding water issues at length with DEM both directly and through Indigenous Energy Australia (IEA) in the course of discussions in relation to renewable energy release areas and licences under the HRE Act. Given the volume of groundwater extracted in connection with mining, these concerns are especially relevant in that context, and GRAC will wish to engage further with DEM—and with the Department of Environment and Water (DEW)—as well as with proponents in relation to them, as a core consideration.

15. It is noted that the procedural rights of native title holders (under section 24HA of the NTA) in relation to future acts comprising the grant of water licences are substantially inadequate: they simply give native title holders “the opportunity to comment”, and that does not mean necessarily they will be heard or their comments taken account of. GRAC's most recent experience with such a section 24HA notice from DEW was in respect of an application for 15 water licences. The notice failed to disclose that the application was being made on behalf of a mineral explorer (let alone naming that explorer), merely identifying the name of an individual (who, it transpired, was applying on a particular explorer's behalf); and then DEW, despite informing GRAC with the notice that it had 2 months within which to provide any comments, proceeded to grant the water licences before the end of that period, on the alleged assumption that no such comments would be forthcoming (in spite of their having been foreshadowed). Partly with that experience in mind, GRAC urges DEM to include conditions on ELs requiring a licensee to consult the relevant PBC for the EL area prior to applying to DEW for a water licence in accordance with the Landscape South Australia Act 2019.

GRAC will be pleased to respond to any queries in relation to any of the matters raised in this submission.

Yours sincerely

GAWLER RANGES ABORIGINAL CORPORATION



Zoe Saunders

Chairperson

Email: GRACcontact@gmail.com