Our Ref: DK: 17044

24 July 2025

Australian Law Reform Commission
PO Box 209
Flinders Lane
Victoria 8009

By Email: nativetitle@alrc.gov.au

Dear Colleagues

ALRC – Review of Future Acts Regime – Submission on Discussion Paper

1. We refer to the May 2025 Australian Law Reform Commission's Discussion Paper 88 into its Review of the Future Acts Regime (**Discussion Paper**).

2. P&E Law is a Queensland based law firm and one of the leading native title law firms acting for traditional owners in Australia. Our solicitors have decades of combined experience working with Aboriginal and Torres Strait Islander clients. A significant proportion of our work comprises representing Indigenous clients in future act negotiations.

3. Time and capacity constraints prevent us from responding to all of the questions and proposals raised in the ALRC's Discussion Paper, but we are grateful for the extension of time provided to us to make these submissions.

4. We have limited our responses to:

   a. General comments;

   b. Questions 6 – 7, 9 – 10, 13 – 16, 22

   c. Proposals 1 – 2, 6 – 7, 10 – 11, 14, 17

5. Where possible, we have grouped together our comments to each of the above under relevant headings.

General comments

6. We commend the ALRC on its considered suggestions for reform of the future acts regime. The Discussion Paper details a breadth of views about the future acts regime but seems to universally suggest that governments, proponents and native title holders all recognise the need for reform. We support that view.

7. In our view the future acts regime is no longer fit for purpose. The native title jurisdiction is not the same as it was when the *Native Title Act 1993* (**NTA**) was introduced, nor when it was amended in 1998. Those governments and proponents who understand the value of working collaboratively with native title parties to develop projects do not fear the NTA or the future acts regime. Some are even willing to negotiate voluntary agreements to strengthen their environmental, social and governance (**ESG**) credentials. Provided legislative reforms will strengthen certainty rather than undermine it, such reforms as those suggested in the Discussion Paper should also not be feared.

Sufficient resourcing of native title parties is key (Proposals 14, 17)

8. We have chosen to start by discussing the final proposals in the above list, because they relate to adequate resourcing of Registered Native Title Bodies Corporate (**RNTBCs**) which, in our view, is key to so many of the other suggested reforms.

9. We are supportive of any initiatives that increase and support the sustainability of funding for RTNBCs. We are agnostic about whether that should be by way of a "future fund" as suggested at Proposal 14 but agree that it seems likely the most appropriate approach. If this is to be the approach, we would support the comments made in the Joint Standing Committee on Northern Australia's *A Way Forward* Report[1] that such funding may, and in our view should, come from industries that most significantly benefit from work undertaken by RNTBCs.

10. We are also supportive of the suggestions in Proposal 17. Often future act negotiations will occur with a registered native title claimant before a determination is made. There are sometimes significant power imbalances in those circumstances when, for example, multinational mining companies or renewable energy developers are negotiating with members of an applicant group. We would support any initiatives that increase the ability of native title claimants to recover costs and increase their capacity. Provided the minimum scale of costs proposed at Proposal 17(b) are reasonable and are based on views of both proponents and native title parties, this would be a good starting point. If paired with the suggested prohibition on proponents imposing caps below that scale, this reform would go some way to rebalancing the power imbalance experienced by registered native title claimants in future act negotiations.

11. Nonetheless, we continue to maintain that the approach taken in s 91 of the *Mineral and Energy (Common Provisions) Act 2014* (Qld), or similar provisions, should be considered in the reforms. This allows affected landowners in negotiations for mining, petroleum and other resource developments to recover from the proponent "necessarily and reasonably incurred negotiation and preparation costs in entering or seeking to enter into [an agreement]". These are defined to include costs of various professional consultants that may be required in negotiations including legal, valuation and accounting costs, not just legal costs. If Proposal 17 is implemented, it should be recognised that in many negotiations, native title parties may require professional advice from more than just legal advisers.

Native Title Management Plans (Question 6)

12. We are generally supportive of the concept of native title management plans (**NTMPs**) and believe native title parties would welcome the ability to set clear guidelines and processes for future acts on their country. However, we agree with the comments at [62] of the Discussion

[1] Discussion Paper fn 251.

Paper that appropriately resourcing such a process will be critical. If that is to come from the future fund under Proposal 14, the application for funding costs of developing an NTMP should be streamlined and granted "as of right" to an RNTBC if they are within a reasonable limit set by the regulations. Otherwise, the funding application itself will create an additional burden on RNTBCs that are already poorly resourced.

13. Additionally, for those RNTBCs that do not benefit from large resource reserves in their determination areas that can be used to build financial resources and capacity, the development of NTMPs will likely be a daunting, expensive and time-consuming task after the many years it will likely have taken to fight for their native title determinations. The transition from claimant group to native title holding group, and the capacity building and development work often needed to support RNTBCs post-determination, may mean developing an NTMP is low on the priority list if its development has not been considered throughout the claim process (such as during a consent determination negotiation with the government party). The opportunity to develop an NTMP may therefore only be taken up by those RNTBCs already blessed with rich resource developments and financial capacity.

14. Despite these reservations, we believe the introduction of NTMPs would create another positive avenue for native title parties to take greater control over how future acts are done on their traditional countries and will create certainty for industry, government and community members.

Conduct and content standards (Question 7)

15. We support minimum conduct and content standards for negotiations of agreements under the NTA. We echo the sentiments of many other submitters[2] that reaching agreement about properly resourcing the negotiation costs of the native title parties can be time-consuming and sometimes lead to disputation before the negotiations proper have begun. We suggest that a statutory entitlement to recover reasonable and necessarily incurred costs of the negotiations, as discussed at [11], would go some way to address this issue. As a minimum conduct standard, the appropriate resourcing of the native title parties' costs of the negotiations should be an indicator of "good faith". That is not to say that native title parties can unreasonably charge proponents costs that are not incurred, or incur costs that are not "reasonable or necessary" for the negotiations, but any disputation about these questions could be within the remit of the National Native Title Tribunal (**NNTT**) to resolve.

16. Similarly, proponent parties should be required to provide any information requested by the native title party to properly inform themselves of the project and its impacts, subject to necessary confidentiality undertakings. This is consistent with the concept of Free, Prior and Informed Consent.

17. We also support the idea of reversing the onus of proof to place the burden on a proponent party to prove it negotiated in "good faith".

18. In terms of content standards, we support the proposals in the Discussion Paper and agree with the comments at [89] that content standards be limited to those protective measures for the benefit of the native title party, as the party most likely to have an imbalanced bargaining position.

[2] Discussion Paper at [79] and the footnotes therein.

Impact based model (Questions 14 – 16, Proposals 6 – 7)

19. We strongly support the idea of the impact-based model for categorising future acts and believe Part 2, Division 3, Sub-divisions G-N of the NTA should be replaced with a model as suggested in the Discussion Paper. We believe the statutory procedures for Category A and Category B future acts are fair. However, certain terms in Category A such as "small-scale", "temporary or short duration" and "do not substantially impact native title" will all need to be clearly defined to provide parties with clarity and certainty.

20. We do not think there should be exclusions for certain acts from the impact-based model. For example, those future acts which currently benefit from a s 24KA exclusion under the NTA (infrastructure and facilities for the public) very often still need consultation and negotiation with native title parties to meet State-based cultural heritage protection obligations which themselves can take significant time. Rather than an exclusion, there may be merit in a third category in the impact-based model for those things listed in Question 15, which still require negotiation but have a more streamlined process (such as a 12-month timeframe rather than an 18-month timeframe under Proposal 6, and minimum standards discussed in Question 7).

21. We support the proposals for reform of the right to negotiate under Proposal 6 for Category B future acts. We also support, and believe it to be critical, that the NNTT be empowered to resolve "separate issues" as part of those negotiations, as proposed in Proposal 7, without a full determination of whether a future act can be done. This will assist the parties to progress negotiations without getting "stuck" on a single issue.

22. We agree that the future acts regime should be amended to account for impacts on native title rights and interests in areas outside of the immediate vicinity of the future act, such as in the case of water extraction. We support and echo the sentiments of the Kimberley Land Council expressed at [188] of the Discussion Paper. Water is both culturally significant and interconnected for many groups and the consequences of damming water courses or highly intensive mining that requires extensive water extraction or redirection of rivers can impact the cultural and traditional responsibilities of native title holders well beyond the immediate vicinity of the particular future act.

Other questions and proposals

23. We support Proposal 1 to allow RNTBCs to receive standing instructions on a greater number of matters, including some things that are currently defined as "high level native title decisions" under the *Native Title (Prescribed Body Corporate) Regulations 1999*, such as small-scale mining activities and exploration future acts, without the need for the full consultation and consent requirements currently required for these types of activities.

24. We support Proposal 2 to give RNTBCs an automatic right to access any registered agreements in any part of their determination area.

25. In relation to Question 9, we support the idea of an amendment to provide a mechanism for automatic assignment of agreements entered into before a positive native title determination to the RNTBC, even where the agreements do not contain an express provision for succession or assignment. Relatedly, in relation to Question 13, we also suggest that any agreements reached with a registered native title claimant that was from an earlier claim group and not the one ultimately determined to be native title holders, should be automatically terminated, regardless

of whether there is an express provision in the agreement.[3] There are sound reasons for reforms to be made about how benefits under pre-determination agreements should be managed, as suggested at Question 13. However, these may be appropriate in some instances but not others, such as where an area is disputed by more than one native title group versus a claim that is absent any Indigenous respondents. In the latter instance, this may lead to unjust outcomes, where elders who have fought hard for a determination do not see any benefits along the way.

26. We support the ideas for reform at Question 10 and the options suggested at [123] of the Discussion Paper. This would be supported by an ability for RNTBCs to take greater standing instructions from native title holders about things such as how amendments to existing agreements can be made.

27. In relation to Proposal 10 and Question 22, we agree that the NTA should be amended to expressly provide that a government party or proponent's compliance with procedural requirements will be necessary for a future act to be valid. Where such requirements are not met the party should be required to negotiate an ILUA seeking retrospective validation and include compensation for the impermissible impacts on native title from the invalid future act. The NNTT should be given decision making powers where a native title party claims non-compliance.

28. We support Proposal 11 and the introduction of a publicly available register of future act notices to be kept by the NNTT. Such a mechanism would allow native title holders to identify future acts that are being notified instead of them just going to an RNTBC, which may not have the time, capacity or knowledge to manage responses to them. We know of one instance in particular where a future act notice was given to an RNTBC for a mineral exploration permit with a statement by the government party that the act attracted the expedited procedure under s 32 of the NTA. Objections were not lodged by the RNTBC, even though the permit was over highly significant cultural and environmental areas for the native title holders. Those native title holders were not informed about the grant until the mining company notified the community of an information session about its development plans. Such an outcome may have been avoided if a future act notice register maintained by the NNTT was available to the public.

Closing comments

29. We once again commend the ALRC for its work on the proposals for reform of the future acts regime under the NTA. We appreciate the commitment and dedication of its staff and the commissioner and deputy commissioners and thank them for taking the time to consider our submissions.

30. Should you have any questions about these submissions, please do not hesitate to contact us.

[3] Some areas of Queensland had very large areas under claim in the late 1990s and early 2000s which were subsequently dismissed or the group was found to not have a continuity of connection, but over which there were native title agreements reached for things like mining tenements before those outcomes. Some of those areas have subsequently been positively determined in favour of other native title groups. These earlier agreements should be automatically terminated and removed from the register maintained by the NNTT.

Yours faithfully

David Knobel BA BSc LLB (Hons)
Director - Maroochydore Office
e david@paelaw.com