THE FUTURE ACT REGIME IN AUSTRALIAN NATIVE TITLE: DATA ANALYSIS, TRENDS, AND INSIGHTS

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Within the native title system, development actions are considered through the 'future act' regime. Future acts are those which affect native title and occur after the enactment of the Native Title Act 1993 (Cth). The purpose of this paper is to look at the future act regime using quantitative data to expose key trends and to suggest avenues for reform that benefit all parties. This data on future acts can simultaneously inform policymakers contemplating reforms and proponents seeking to develop more meaningful partnerships with Indigenous peoples. The Native Title Act 1993 (Cth) makes clear that for future acts to be done validly, that prescribed processes set out in the legislation need to be followed. This paper addresses the three methods of validly addressing future acts. These three methods are known as: i) expedited procedures – which cover low impact actions; ii) arbitration determinations – where agreement between parties has failed to occur; and iii) agreement-making – covering Indigenous land use agreements, section 31 agreements, and their ancillary agreements.

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I INTRODUCTION

Within the Australian native title system, developments actions fall under the future acts regime. The purpose of this paper is to look at the future act regime using quantitative data to expose key issues and challenges necessary to reach a balanced and efficient native title future acts system. These issues take on added significance within the context of the global transformations that are underway to reduce greenhouse gas emissions and to reach set targets for net-zero emissions. Given Australia's economic reliance on an emissions intensive export industry the need for a just transition is critical to remaining competitive in the future world economy. It is well established that a fundamental prerequisite of this transition is access to large areas of land and waters – areas primarily subject to native title.[1]

In Australia, there was no legal recognition of the rights of Aboriginal and Torres Strait Islander peoples over their traditional lands until almost 200 years after Europeans arrived. The passage of the first lands rights legislation, the *Aboriginal Land Rights (Northern Territory) Act* would change this in 1976. More than 15 years later, the Australian High Court recognized the first nationwide form of Indigenous land rights, 'native title', through the *Mabo* decision in 1992. The *Mabo* case overturned the doctrine of *terra nullius* and resolved that native title rights could survive where Indigenous people maintain a continuous connection with their lands and waters.

In response to the *Mabo* decision, the Australian Government enacted federal legislation known as the *Native Title Act 1993* (NTA). "Native title consists of the rights of Indigenous people to their traditional lands and waters recognised at common law and under the Native Title Act 1993 (Cth)".[2] Thirty years on from the introduction of the NTA and, determined native title rights and interests have exceeded 3.4 million square kilometres of the nation and continue to grow. This massive area, which would rank 7th against the geography of the world's nations, comprises rights in both land (96.7%) and waters (3.3%). The extent of the land coverage alone is more than 43% of Australia's land mass.

In looking to a regime that supports the co-existence of native title rights with those of other property rights holders, the NTA sets out a system for '*future acts'*. Future acts are those which affect native title and occur after the enactment of the legislation (from 1994 onwards). Under the law, an act is taken to affect native title "if it extinguishes the native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise."[3] The NTA makes clear that for future acts to be done validly, that prescribed processes set out in the legislation need to be followed. In 2022, the native title future act regime resulted in 3316 future act notices, 1507 objections to notices, 78 future act agreements, 37 Indigenous land use agreements and 12 arbitration requests. All these future act-based developments require engagement among multiple parties to achieve optimal outcomes for all. In this paper three methods of validly addressing future acts are discussed at length. These three methods are known as: i) expedited procedures; ii) arbitration determinations; and iii) agreement-making – covering both Indigenous land use agreements and section 31 agreements.

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[1] The definition of 'native title' used in this paper is the same as in the NTA, meaning the communal, group or individual rights and interests in relation to land or waters, where: i) The rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed; and ii) By those laws and customs, there is a connection with the lands or waters; and iii) That the rights and interests are recognised by the common law of Australia. *Native Title Act 1993* (Cth) s 223(1).

[2] Richard Bartlett, 'Native Title in Australia' (LexisNexis Butterworths, 4th ed, 2020) 3.

[3] *Native Title Act 1993* (Cth) s 227.

Existing literature on the native title system has tended to focus either on the process of conferral of native title rights or the lacking support to native title corporations themselves. The purpose of the paper is to look at the future act regime using quantitative data to expose key trends and to suggest avenues for reform that benefit all parties. Quantitative data on future acts simultaneously informs policymakers contemplating reforms and proponents seeking to develop more meaningful partnerships with Indigenous peoples.

A Key Findings

1. The rate of objections to future acts under the expedited procedures continues to grow each year. In 2021 and 2022, the objection rate was 64%. Given that the expedited procedures pathway comprises over 80% of all future act notices, this signals a growing delay period for these acts and represents incongruent understandings of impact between native title parties and state governments.

2. Future act arbitration decisions tend to privilege resource developers over native title parties with just three out of 515 formal tribunal decisions resulting in a determination that the act must not be done. Further, across the past five years a breakdown of decisions demonstrates that two-thirds of decisions imposed no conditions on the act and one-third resulted in imposed conditions.

3. Section 31 agreements negotiated since 2021 show that the median time from notice to registration is 23 months and that 79% of all section 31 agreements were accompanied by a written ancillary agreement.

4. Whilst the extractives industry dominates the literature due to its high risk and high profits nature, the top three subject matter areas for Indigenous Land Use Agreements were 'pastoral', 'access', and 'government'. Combined, extractive industry agreements comprise around 18% of all ILUAs.

B Data and methods

The maintenance of registers on native title claims, determinations and future acts in Australia is the responsibility of the National Native Title Tribunal (NNTT). The NNTT is a federal government statutory authority established by the *Native Title Act 1993*. In general terms, the NNTT has functions relating to native title applications, inquiries, and determinations. In fulfilling its functions, the NNTT maintains registers of the applications and determinations that occur under the NTA and publishes this data on its website.[4] All data used in this paper is publicly available and downloaded from the NNTT.[5] Specific datasets used include future acts notices, objections, section 31 agreements, ILUAs, and future act determination applications. Methods used in the research include a comparative and basic

[4] The data presented in this working paper has been downloaded from the NNTT data downloads website. This includes the utilisation of several different datasets including: the Schedule of Native Title Determination Applications dataset; the Register of Native Title Claims dataset; the Native Title Determinations dataset; the Indigenous Land Use Agreements dataset; the Native Title Determinations Outcomes dataset; the Future Act Notices dataset; the Future Act Objections dataset; the Future Act Determination Applications dataset; the RNTBC dataset; and the Records of Section 31 Agreements dataset. These datasets are openly available and have been analysed by the author using ArcGIS Pro software.

[5] National Native Title Tribunal, '*Data downloads*' (Web Page, 6 August 2023), . http://www.nntt.gov.au/assistance/Geospatial/Pages/DataDownload.aspx

statistical analysis of the dataset using software including ArcGIS Pro, RStudio and Microsoft Excel.

II EXPEDITED PROCEDURES – LOW IMPACT ACTIONS

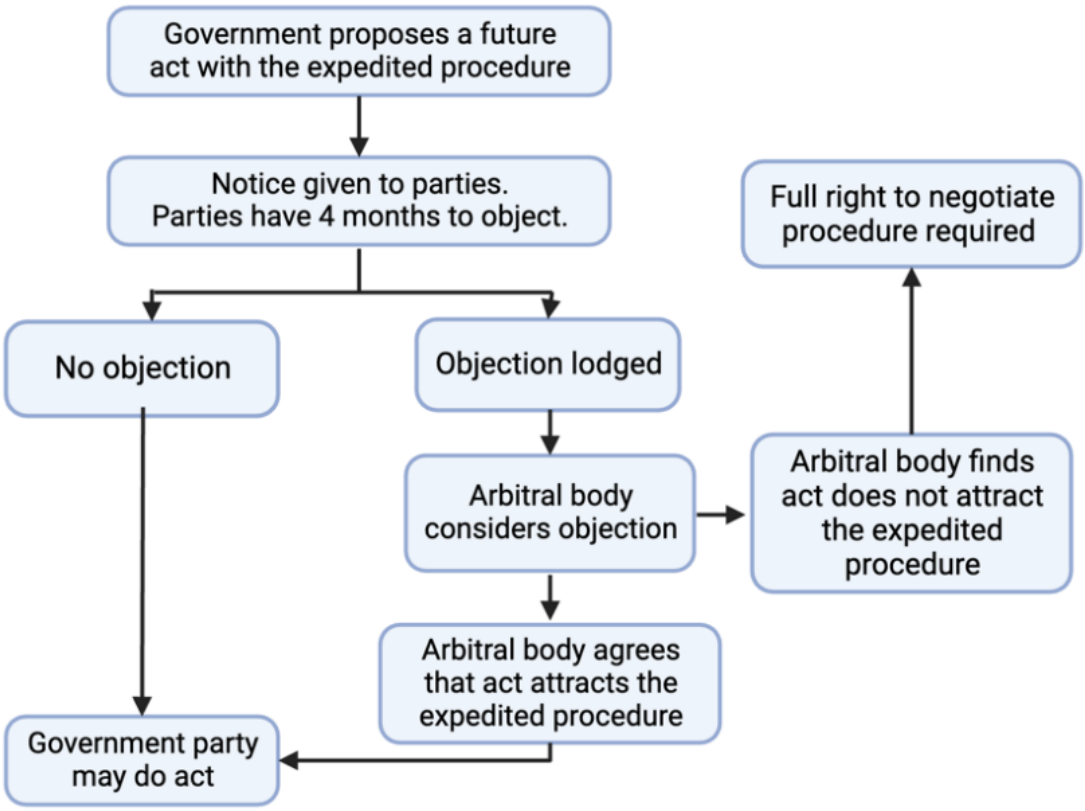
A Background

The expedited procedure is the most used future act process in the NTA and is a key exception from the right to negotiate procedure that governs section 31 agreements. Designed to empower state governments to rapidly approve perceived low impact development under the NTA, expedited procedure notices make up over 80% of all future act notices. However, given they represent more than 80% of all future act notices, they naturally have a critical role for native title parties in assessing development and impacts to their lands, communities, and rights. Until recently, some state governments applied a 'blanket approach' by assessing all exploration activity as low impact (discussed in further detail later in the paper). The process for expedited procedures is outlined in Figure 1 below.[6] Under the expedited procedure, a future act may be done if the native title parties do not lodge an objection within four months.[7] If an objection is lodged, the relevant arbitral body must determine whether the act attracts the expedited process. A future act attracts the expedited procedure under three conditions:[8]

a) The act is not likely to interfere directly with the carrying on of community or social activities of native title holders in relation to the lands or waters concerned; and
b) The act is not likely to interfere with areas or sites of particular significance, in accordance with their traditions, to person who are the holders of native title in the area; and
c) The act is not likely to involve major disturbance to any land or waters concerned or create rights whose exercise is likely to involve major disturbance to any land or waters concerned.

[6] Explanatory Memorandum, *Native Title Bill 1993* (Cth) 7.
[7] *Native Title Act 1993* (Cth) s 32(3).
[8] *Native Title Act 1993* (Cth) s. 237.

Figure 1: Expedited Procedure Flow Chart



B Existing systems

Given they comprise over 80% of all future acts, understanding the existing expedited procedures system can greatly support all parties to which they apply. The continued growth of the native title system suggests that the number of future acts will increase. As the decision to apply the expedited procedure hinges upon state and territory governments, it is critical to understand their internal processes. As the two largest sources of all expedited procedures, Western Australia (88%) and Queensland (7%) are an apt reference point.

1.1 Western Australia

The high proportion of expedited procedures in the State of Western Australia is largely due to its application of the "blanket approach". The blanket approach was particularly problematic as it assessed *all* exploration activity as low impact and made no effort to differentiate work programs, methods of exploration, environmental damage, and native title party perspectives on impact. In June 2022, the Western Australian Government transitioned away from its applications of the blanket approach for decisions that attract expedited procedures.[9] The new Western Australian system has two primary facets: 1) encouraging early engagement and agreement-making between parties; and 2) developing a risk assessment 'heat map' system based on previous NNTT objection determinations where the expedited

[9] State of Western Australia, 'Expedited Procedures Reforms' (Web Page) https://www.dmp.wa.gov.au/Minerals/Expedited-Procedure-Reforms-30446.aspx

procedures do not apply. An identified weakness of the former facet is that it merely places an 'expectation' on proponents to engage with native title parties, not a 'requirement'. The second facet applies common sense to not apply the expedited procedures where impact has been substantiated previously by the tribunal. While it is still too early to assess the longer-term impacts of this new system, early data suggests that the reform has lowered numbers of expedited procedures and objections, but not the overall objection rate. Given that Western Australia is the source of 88% of expedited procedures, it will be interesting to monitor shifts in these figures that reflect the increase in the state's baseline requirements.

1.2 Queensland

In contrast, the Queensland system aims to address the growing objection rate by recommending a set of minimum standards ('native title protection conditions').[10] Under this system, native title parties agree not to lodge objections if the proponent signs on in advance to the minimum protection conditions. The minimum protection conditions set up a system which enable, upon request, consultation, or a field inspection by traditional owners. Commonly, following the initial engagement between a proponent and native title party a written agreement is negotiated which supersedes and improves upon the minimum set of conditions. This may suggest that the existing minimum protection conditions are inadequate and that parties could benefit from the state making them more robust. Such robustness may help to reduce the number of objections – a rate that continues to grow. Given that the most common outcome of these objections is an agreement between the parties, it would seem in the interests of government and proponents to start all initial engagements with agreements as the end goal. Not only does this save time and resources, but it also leads to improved relationships and benefits for all parties.

C Current data on objections and delays

In 2022, there were 2,598 expedited procedure notices lodged, which averages to more than 7 each day. Since 1994, NNTT records show that native title parties have lodged 35,825 objections to the expedited procedure.[11] Across all records this represents an objection lodged for approximately 2 in every 5 expedited procedure notices. However, more recent data shows that current objection rates are much higher than this. Across 2021 and 2022, the objection rate was 64%. This recent data suggests that these perceived low impact actions by government and proponents are viewed very differently by the native title parties whom they effect. In practice, objection applications primarily arise in the context of mineral exploration - specifically, for the grant of proposed exploration tenements. The growth in objection rate flags potential issues in terms of the absence of native title corporation consent and appropriate assessment of development impacts upon native title.

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[10] State of Queensland, 'Native Title Protection Conditions' (Web Page, 25 July 2022) https://www.business.qld.gov.au/industries/mining-energy-water/resources/minerals-coal/authorities-permits/applying/native-title/expedited/conditions

[11] The timeline for the native title party to lodge an objection is within four months of the notification date. The objection period is reduced to 3 months if it was certified by representative Aboriginal/Torres Strait Islander bodies for the area: *Native Title Act 1993* (Cth) s 24CH(2)(d)(i); Data correct as of 6th November 2023.

Table 1: Key statistics on objections and expedited procedures within the future acts system

Characteristic	Total records	2021 and 2022 records
Future Act notices	110,742	7,100
Expedited procedures notices	90,012 (81%)	5,647 (80%)
Total objections	35,825	3,598
Objection rate (%)[12]	40%	64%
Days to objection (median)[13]	107 days	50 days
Days from notification to finalisation with objection (median)[14]	250 days	201 days

Source: Author's calculations using NNTT open data from November 2023.

A key finding across all recorded data is that the median time from notification to objection by native title parties was 107 days (3.5 months), with a large proportion submitting objections in the final days of the objection period (4 months). Notably, when limited to records in 2021 and 2022, the number of days to objection halved to 50 days. Objections to date in 2023 mirror this trend with a median of 48 days in the first ten months of the year. This could signal that as native title parties build capacity in assessing future acts, they are becoming more efficient in dealing with objections.

When measured from notification to finalisation, the duration of a low impact expedited procedure is approximately 7 months. By comparison, data on section 31 agreements (presented later in this paper) shows a median time from notification to finalisation of 23 months.[15] This gap in time to finalisation between a low impact act (via expedited procedure) and high impact future act (via s.31 agreement) can be construed in a few ways. For example, many native title parties and large proponents would consider it a minimal difference, especially given the potential for enhanced outcomes in community engagement for future relationships. Conversely, some proponents and state governments could see it as an extensive delay. Based on these figures, the evidence supports calls for legislative reform to the NTA and procedural reform to various state government applications of the expedited procedures process. Such reform could reduce the number of objections and enhance the relationships and outcomes from these acts by reconsidering the interpretation of 'impact'.

The delay period between these key decision points is significant because of the subsequent outcomes shown in Table 2 (below).[16] The outcomes data indicates that proponents and government often waste time by going through the expedited procedure as objections often send them back to square one - the agreement making process. It demonstrates that there is a clear benefit for a state government or proponent to develop a relationship with the native title party as the likelihood of going back to negotiate an agreement

[12] Calculated by the total objections divided by the total expedited procedures notices.
[13] Values calculated using the median of all objections that are consolidated by tribunal IDs rather than by Future Act notice. This has the effect of consolidating groups of notices by decision. This avoids having the duration of proposals with multiple future acts that attract multiple objections skew the data. For all records (n=30,708) and for 2021 and 2022 records (n=3,593).
[14] For all records (n=31,008) and for 2021 and 2022 records (n=3,451).
[15] Calculation based on all section 31 agreements published by the NNTT at 6 November 2023 (n=194).
[16] There are 14 different outcome categories listed by the NNTT. These simplified figures use the practical result of the objection to show a more concise summary. There are numerous complex factors that can result from an objection.

is the most prevalent outcome. The reality of this is that state governments waste many months trying to squeeze their proposed future act notice through an expedited system which leads to delays and avoids communication.

Table 2: Simplified objections data

Outcome type[17]	**Total records**	**2021 and 2022 records**
Objection withdrawn as an agreement was made	14,953 (42.6%)	1,406 (46.2%)
Expedited procedure applies[18]	13,939 (39.8%)	987 (32.4%)
Expedited procedure does not apply[19]	6,174 (17.6%)	649 (21.3%)

Source: Author's calculations using NNTT open data from November 2023.

Given the growth in objection rates, and that the burden of proof is on native title parties, considerable resource limitations arise. As a result, reforms to the objections system could significantly reduce the costs facing Prescribed Bodies Corporate (PBCs), Native Title Representative Bodies (NTRBs), and Native Title Service Providers (NTSPs). This in turn would allow native title parties to invest greater amounts in their strategic priorities.

D Addressing the challenges in the expedited procedures system

Given they comprise over 80% of all future acts, addressing the key challenges of the expedited procedures system can greatly support the native title parties to which they apply. The continued growth of the native title system suggests that the number of future acts will increase. An obvious starting point is to close the expedited procedure avenue for future act notices that are consistently perceived to cause impacts to native title parties. The discussion below outlines current avenues to addressing these challenges with suggested focus areas for reform.

1.1 Reforming the fees systems for objection applications

A noteworthy aspect of expedited procedure objection applications is the substantial fee for application ($1002 per objection). Given the growing rate of objections and that they already numbers in the thousands, the potential annual impact of application fees on PBCs, NTRBs and NTSPs is already in the millions of dollars. Given the severely underfunded nature of the native title sector and the existing demand on resources to meet compliance obligations, it seems counterproductive that such a fee persists. The NNTT has raised

[17] Data is based off the 35,066 objections that were finalised as at 6 November 2023.
[18] This outcome type includes the combination of the following outcome categories listed by the NNTT. Application not accepted; Application withdrawn; Objection dismissed; Objection – expedited procedure applies; Objection not accepted; Objection withdrawn; Objection withdrawn – no agreement; Objection withdrawn – external factors; Objection withdrawn prior to acceptance.
[19] This outcome type includes the combination of the following outcome categories listed by the NNTT. Objection – expedited procedures does not apply; Future act dismissed; Tenement withdrawn; Expedited procedure statement withdrawn; Future act notice withdrawn.

concerns about this system, asserting that the fee payment creates inequities in the participation of PBCs in the expedited procedures process.[20] Despite the Tribunal voicing these concerns, the fees and their application are set forth under the *Native Title (Tribunal) Regulations 1993* and can only be reformed by the Australian Parliament. Discussions of potential reform by the federal government are ongoing with possible solutions including the removal of fees, expanding the grounds for fee refund (currently reserved for favourable determinations), and a concept to extend fee waivers to PBCs and claimants unsupported by a NTRB.[21]

III ARBITRATION APPLICATIONS – HIGH IMPACT ACTIONS

A Background

A second mode for approving future acts is through a future act determination application (FADA) - an application made to the NNTT by a negotiation party for an arbitrated determination. By far the least favoured route for addressing future acts, a FADA can only be made if at least six months have passed since the notification date, and if no agreement has been made by the parties, having negotiated in good faith.[22] As a result of the disproportionate burden on time, resources, reputation, and stakeholder relationships, determined arbitrations make up less than 1% of all notified cases of future acts. As set out in the *Native Title Act*, the arbitral body must make one of the three following determinations:[23]

a) A determination that the act must not be done;
b) A determination that the act may be done;
c) A determination that the act may be done subject to conditions to be complied with by any of the parties.

In making its determination the tribunal must consider set criteria under the NTA, which include the effects on native title holders, the effects on the government, and the public interest.[24] Another key element of the arbitration scheme which differentiates it from key agreement-making paths is the 'no royalty' provision. An arbitrated decision of the tribunal cannot include provisions or conditions for profit-sharing, compensation or royalties.[25] The result of this system is that it can unfairly validate future acts and simultaneously take compensation off the negotiation table.

1.1 The legal duty to negotiate in good faith

During debates around the structure and nature of native title legislation in 1993, Indigenous representatives were unable to get buy-in from government around the inclusion

[20] Australian Government, 'Review of Sunsetting Instruments undeer the Native Title Act 1993 (Cth) – Reform Options' (Consultation Paper, February 2023) 17 https://consultations.ag.gov.au/legal-system/review-native-title-act/user_uploads/native-title-consultation-paper-1.pdf
[21] Ibid 17-18.
[22] *Native Title Act 1993* (Cth) s 35.
[23] Native Title Act 1993 (Cth) s 38(1).
[24] Native Title Act 1993 (Cth) s 39.
[25] *Native Title Act 1993* (Cth) s 38(2).

of consent requirements. As a less favourable alternative, these representatives put forward the idea of a duty to negotiate in good faith – a system popularized in US industrial relations jurisprudence.[26] The Act incorporated this duty requiring that:

> The negotiation parties must negotiate in good faith with a view to obtaining the agreement of each of the native title parties to: (i) the doing of the act; or (ii) the doing of the act subject to conditions to be complied with by any of the parties.[27]

Despite this legislation, the hope of Indigenous representatives that the 'good faith' requirement might be a 'second best' way of dealing with the absence of consent were dashed, because the requirements for good faith have been interpreted in a narrow way. As the NTA does not define good faith, the courts have adopted the common meaning and developed their own jurisprudence. A little over one-quarter (19 of the 70) of good faith decisions have found against the grantee party which is usually a small mining company or the state government.[28] In practice, the courts have adopted an understanding of good faith as "acting honestly, without ulterior motive or purpose, with an open mind, willingness to listen, willingness to compromise, an active and open participation of the other parties, and the making of every reasonable effort to reach an agreement".[29] Courts have also clarified that a party negotiating in good faith is not limited to the making of a reasonable offer.[30] While not statutory considerations, the NNTT has often used a set of 18 indicators of good faith, known as the 'Njamal Indicia' as a tool and aid.[31]

B Past analysis of future act arbitrations

A detailed review of the NNTT's application of the NTA arbitration provisions was previously conducted on arbitrations between 1994 and 2006. This review is a critical benchmark which found that of the 17 arbitration decisions made by the NNTT, all cases resulted in the future act being permitted.[32] In 2006, they found that the NNTT "applied the arbitration provisions of the NTA in a manner that renders them largely innocuous from the perspective of grantees."[33] Further, that the NNTT's application of arbitration provisions resulted in one-sided outcomes against native title parties.

Corbett and O'Faircheallaigh posited two key factors to explain the Tribunal's conduct. First, that the process does not reflect traditional arbitration in which the parties willingly agree in advance to arbitration, and to an equitable set of rules. Second, that the NNTT is set up as a part of the executive and not as an independent judicial body. As a result, it tends to be responsive to government priorities, which tend to privilege resource developers over native title parties.[34]

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[26] Bartlett (n 2) 604.
[27] Native Title Act 1993 (Cth) s 31(1)(b).
[28] Data based on the NNTT arbitration decisions as of 20 November 2023.
[29] Charles, on behalf of Mount Jowlaenga Polygon #2 v Sheffield Resources Limited [2017] FCAFC 218; 257 FCR 29 at 94.
[30] *Walley v Western Australia* [1996] FCA 409; 67 FCR 366 at 15.
[31] *Western Australia v Taylor* [1996] 134 FLR 211 at 224.
[32] Tony Corbett and Ciaran O'Faircheallaigh, 'Unmasking the Politics of Native Title: The National Native Title Tribunal's Application of the NTA's Arbitration Provisions' (2006) 33 University of Western Australia Law Review 162.
[33] Ibid 153.
[34] Ibid 155.

This review determined that the policy implications of such a system include highly favourable conditions for mineral developers that are unlikely to be sustainable in the long-term due to the absence of equitable and positive relationships with native title parties. It concluded that "given the scale of investment involved in modern mining projects and their demonstrated vulnerability to disruption by hostile local populations, this prospect should be of serious concern to shareholders of the companies concerned.[35]

In response to the Corbett and O'Faircheallaigh article and its acceptance by many others in the sector, NNTT staff published an article with their counter-arguments.[36] In this article Sumner and Wright argue that the "flawed" claims of Corbett and O'Faircheallaigh are more appropriately characterized as criticisms of the Australian Parliament's legislation and policy decisions.[37] More specifically, they explain that often the reason for an arbitration determination that an act may be done "with or without conditions being attached is the absence of any adequate material from the native title party addressing the criteria the Tribunal must take into account."[38]

C Current data on arbitrations – outcomes and time to decision

1.1 Types of outcomes

Data on future act determination applications show that since 1994, 5,554 arbitration applications have been finalised by the Tribunal, with just 932 (16.8%) of those reaching decision.[39] In terms of interpreting the data accurately it is important to note that whilst there is one arbitration application per future act, the NNTT generally makes determinations on a project basis (which can include multiple separate tenements, applications or future acts). As a result, the total number of 5,554 applications is represented by 3,111 tribunal identification records. Less than one-fifth (17%) of all these records ended in a formal decision of the tribunal. Withdrawals prior to decision represent 79% of applications. The breakdown of the decisions is outlined in Table 3 below.

Table 3: Arbitration outcomes of the NNTT future act arbitration process as of 6th November 2023

Arbitration outcome	**1994 to 2023**	**Past five years**[40]
Future act can proceed without conditions	375 (73%)	35 (67%)
Future act can proceed with conditions	137 (27%)	17 (33%)
Future act cannot proceed	3 (<1%)	0 (0%)
Total	515	52

Source: Author's calculations using NNTT open data from November 2023.

[35] Ibid 176.

[36] Christopher Sumner and Lisa Wright, 'The National Native Title Tribunal's Application of the Native Title Act in Future Act Inquiries' (2009) 34(2) *University of Western Australia Law Review* 191.

[37] Ibid.

[38] Ibid.

[39] This figure is based on data extracted as of 6 November 2023 from the NNTT data download portal.

[40] This is five whole years backwards from the time of the data extraction. This represents arbitration decisions between 6th November 2018 and 6th November 2023.

The data in Table 3 (above) indicate that the grantee party has little to fear from the arbitration process in terms of having their tenement withdrawn or future act refused. In interpreting these outcomes, it is important to consider what type of conditions were imposed. Examples of conditions imposed in the past five years include: imposition of a cultural heritage survey[41]; copies of environmental protection and mineral resource activity notices provided to the state[42]; conditions equal to those proposed by the proponent[43]; completion of supplementary cultural heritage work prior to commencement of Stage 2 of the project[44]; and establishment of a liaison committee for communications.[45]

These conditions indicate a minimalist approach, consistent with findings by Corbett and O'Faircheallaigh in 2006. This is because they are often reiterating existing legal requirements which (1) they have to anyway; and (2) as we know, offers little protection. As a result, the data on imposed conditions in Table 3 should not be taken to signal a positive impression about the outcomes of arbitration.

For arbitrations, it is reasonable to assume that the aim of proponents is to have a future act proceed, and the aim of each native title party is to have a future act not proceed or to have more stringent conditions imposed. Given these assumptions, and the above-mentioned minimalist conditions, the results of native title arbitration appear strongly weighed against native title parties.

1.2 Days to application and decision

Often seen as the last resort to determining future acts, the timelines between key decision milestones are of key relevance. The data below in Table 4 shows that the median time from initial notice to arbitration application is two years. This duration is important for two reasons. First, it provides a benchmark upon which we can assess the effectiveness of the statutory six-month negotiation period prior to lodging an arbitration application. Second, it allows us to compare this duration against the median duration required to reach agreement under the right to negotiate scheme (discussed later in this paper).

Criticism has been levelled by native title holders, practitioners and academics about the six month timeline required prior to determination applications.[46] Key reasons for this include the ability of parties to 'wait out' the period given its short duration, the inability of parties to conclude a negotiation in such a period, and the ability to operate in faux good faith.[47] The two-year median negotiation time prior to lodging arbitration applications demonstrates that in general, most proponents are not exploiting the arbitration process and are using reasonable efforts to reach agreement. However, the data also shows those who are likely to be exploiting or at least misusing the system. The worst of these are the proponents who apply for

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[41] *Eureka Petroleum Pty Ltd and Bularnu Waluwarra Wangkayujuru Aboriginal Corporation RNTBC and Another* [2022] NNTTA 3 (20 January 2022), Annexure A; *Atlas Iron Pty Ltd and Another v Nyamal Aboriginal Corporation RNTBC* [2021] NNTTA 7 (18 February 2021), Annexure D and E.

[42] *Stephen Christopher Purse v Guwa-Koa Aboriginal Corporation RNTBC and Another* [2022] NNTTA 7 (4 February 2022), Annexure C; *FMG Pilbara Pty Ltd v Yindjibarndi Ngurra Aboriginal Corporation RNTBC and Another* [2020] NNTTA 8 (5 February 2020) at 99.

[43] *Stephen Christopher Purse* (n 42) Annexure B and C.

[44] S*antos NSW Pty Ltd and Another v Gomeroi People and Another [2022]* NNTTA 74 (19 December 2022) at 1041.

[45] *India Bore Diamond Holdings Pty Ltd and Another v Bununa Dawangarri Aboriginal Corporation RNTBC* [2021] NNTTA 5 (12 February 2021), Annexure B.

[46] *Native Title Act 1993* (Cth) s 35(1)(a).

[47] Sarah Burnside, 'Negotiation in Good Faith under the Native Title Act: A Critical Analysis' (2009) 4(3) *Land, Rights, Laws: Issues of Native Title* 1, 5-7.

arbitration in the first week after the six-month required negotiation period has passed. These applications comprise 5% (4 out of 81) of arbitrations determined in the last five years and clearly undermine agreement-making and the underlying intent of the right to negotiate. This number triples to 15% when considering those who have applied within ten months of notification - that is four months after the six-month right to negotiate. To provide a contrast point, data presented later in this paper will outline that the median time to reach a section 31 agreement is 23 months. Importantly, genuine failure of efforts to reach agreement are not a metric that should be measured solely in time. After all, sometimes it is just not possible to find common ground. I would propose that given the above evidence that at least 5% are abusing the system, there is a need to consider amendments to prevent system misuse and abuse. Such amendments will be considered in the conclusion of this paper.

Table 4: Data on the time to application and to decision for future act arbitrations

Characteristic	**Total records**	**Past five years**
Tribunal arbitration records[48]	3,111	81
Days from notice to arbitration application (median)[49]	715	733
Days from arbitration application to formal decision (median)[50]	56	167

Source: Author's calculations using NNTT open data from November 2023.

1.3 Applicant types

In terms of applicant type, unsurprisingly, proponents dominate contemporary use of the arbitrations process. In the past five years, just one of the 81 arbitration applications came from the native title party. Notably, the proportion of applications by Indigenous parties has declined over time relative to use by proponents. There are several reasons for this. Firstly, that native title parties are aware that if they choose to into arbitration the rates of a ruling that a future act 'must not be done' are virtually zero. Secondly, that choosing to do so results in foregoing any royalty-type payments[51]. Further, that in cases where conditions are imposed, that these conditions are minimalist and largely reflect a requirement to comply with the law.

1.4 Key factors leading to a determination that a future act – 'must not be done'

The last arbitration determination that an act 'must not be done' occurred in 2011. Given this rare result has occurred in only 3 of the 515 arbitrated decisions, it is worthwhile to consider what circumstances led to these decisions. In two of these cases, the primary basis for not doing the future act was a sacred site of particular significance to the native title party. In addition, both cases had a secondary exacerbating circumstance. In one case, the native title party held exclusive native title over the lands.[52] In the second case, there was a decision

[48] Total tribunal arbitration records are a consolidation of the total applications (5,554) as the tribunal groups future acts of the same project together.
[49] Authors calculations across all tribunal IDs with listed notice date and arbitration application date (n=3,111).
[50] Author's calculations across all applications which ended in a formal decision by the NNTT (n=515).
[51] *Native Title Act 1993* (Cth) s 38(2).
[52] *Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu)/Western Australia/Holocene Pty Ltd,* [2009] NNTTA 49 (27 May 2009).

of the proponent not to fund the costs of the native title party to engage in a meeting, which created delays.[53]

In the third case, the basis for decision was not related to a site of particular significance. In this case, the tribunal found that the act was not in the public interest based on two key findings. First, that the exploration plan had no methodological or scientific basis. Secondly, given the animosity held by the proponent towards the representative body, that the future act going ahead would likely lead to serious further disputes.[54]

On review of the three decisions discussed above, two key commonalities arose. First, that there needs to be more than one substantial basis against the act being done. Secondly, that all three decisions occurred between 2009 and 2011 and were made by the same tribunal member, who retired in 2012. This may suggest that these decisions were the outlier of one specific tribunal member, or that others remain reluctant to go against the agenda of the government they are employed by.

1.5 Arbitrations for development other than resource extraction

Discussions of future acts and their arbitration are dominated by mining, gas, and petroleum development. This is unsurprising given the potential of these developments to cause significant impacts to the lands, waters, and communities of native title parties. In addition, they present high risk and high reward investments for the resource companies seeking to develop. In at least 10 of the 515 arbitration decisions the development was not for purposes of resource extraction. In all cases the future act being arbitrated was a compulsory acquisition of native title rights and interests by the State of Western Australia. In general, the intended beneficiary of these compulsory acquisitions were pastoralists, with a few minor cases for recreational areas (golf courses and parklands) and infrastructure (gravel pits). The below excerpt from one of these decisions demonstrates the definitive nature in which native title party interests are placed behind nation and state interests.

> There is no doubt the proposed acquisitions will have some effect on native title and the natural environment. However, this is far outweighed by the public interest in the proposed development and the potential economic benefits that will accrue to the nation, the State, the region, and local Aboriginal people. In light of these matters, I have concluded that the proposed acquisitions may be done without conditions.[55]

IV AGREEMENT-MAKING

A Background

The prevalence of Indigenous agreement-making was initially driven by judicial and legislative recognition of Indigenous land rights in the late 1970s. The more recent this growth in agreement-making has, in part, been a product of the pressure on companies to demonstrate

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[53] *Weld Range Metals Limited/Western Australia/Ike Simpson and Others on behalf of Wajarri Yamatji,* [2011] NNTTA 172 (21 September 2011).
[54] *Seven Star Investments Group Pty Ltd/Western Australia/Wilma Freddie and Others on behalf of Wiluna*, [2011] NNTTA 53 (24 March 2011).
[55] *Minister for Lands, State of Western Australia and Another v Buurabalayji Thalanyji Aboriginal Corporation RNTBC* [2014] NNTTA 85 (18 August 2014) at [306].

'social licence to operate' in affected communities.[56] These negotiated agreements are subject to diverse conflicting perspectives within communities, the media, and literature. One prevalent perspective tends to emphasise the ability of agreements to share in the project benefits, whilst simultaneous mitigating the impacts. While a competing perspective asserts that these agreements are a means for continued exploitation of Indigenous lands and the marginalisation of their communities.[57]

Thirty years on from the enactment of the Native Title Act 1993, and almost all discussion of agreements has centred on mineral development, despite their heterogeneous nature. This section describes and explores the public data held by the National Native Title Tribunal on two types of agreements - Indigenous Land Use Agreements and section 31 agreements. This quantitative description is intended to demonstrate the diversity, size, and nature of native title agreement-making present in Australia.

1.1 Indigenous Land Use Agreements (ILUAs)

Federal government desires to ensure the validity of future acts through mutual agreement and to provide certainty to areas with *claimants* (where native title was not yet determined) led to the 1998 native title amendments.[58] These amendments resulted in the establishment of Indigenous Land Use Agreements (ILUAs). These agreements act as the machinery that can provide legal certainty for parties doing future acts. As part of the agreement-making process with external agents, RNTBCs can negotiate social and economic benefits such as land grants, compensation, or employment programs. The ILUA model is generally the agreement-model of choice for large complex development projects, in part due to their ability to cover multiple future acts with legal certainty. As of August 2023, the NNTT register records 1,452 ILUAs over a total area of 5,611,153 square kilometres.[59]

1.2 Section 31 Agreements – Normal negotiation procedure

Section 31 of the NTA provides for the 'normal negotiation procedure', which is another form of agreement by parties seeking to validate a future act. These agreements are known as a 'section 31 agreements', 'Future Act agreements' or 'State deeds.' These agreements are unique from ILUAs primarily because the 'right to negotiate' applies. The right to negotiate intends to establish a process which encourages, without compelling, agreed settlements with a mutually acceptable result.[60] In conjunction with the s.31 agreement which validates the future act, most parties will enter into an additional written 'ancillary agreement.'[61] These ancillary agreements are intended to operate as a form of benefit sharing agreement.

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[56] Ciaran O'Faircheallaigh, *Indigenous Peoples and Mining: A Global Perspective* (Oxford University Press, 2023) 108.
[57] Ibid 107,
[58] Bartlett (n 2) 598.
[59] National Native Title Tribunal, 'Search Register of Indigenous Land Use Agreements' (Web Page, August 2023) http://www.nntt.gov.au/searchRegApps/NativeTitleRegisters/Pages/Search-Register-of-Indigenous-Land-Use-Agreements.aspx
[60] Bartlett (n 2) 596.
[61] National Native Title Tribunal, 'Search Records of Section 31 Agreements' (Web Page, November 2023) https://www.nntt.gov.au/searchRegApps/NativeTitleRegisters/Pages/Search-Register-of-s31-Agreements.aspx.

1.3 Differences between ILUAs and section 31 agreements

As the two key methods of agreement-making under the NTA, it is important to understand key differences between ILUAs and section 31 agreements. Whilst these are not exhaustive, they help paint a picture of what issues parties are contemplating when they decide between each option.

Parties to the agreement: for section 31 agreements the state or territory government is always a party to the negotiations and agreement. Whereas for ILUAs, state government involvement as a party is only compulsory when native title is being extinguished.[62] The presence of the government can have varying impacts on negotiations, but in general most parties tend to prefer negotiations without an additional party.

Binding nature of the agreement: once registered with the NNTT, ILUAs bind all successors to native title, including those not yet identified, to the terms of the agreements.[63] It is primarily this future binding effect, which differentiates ILUAs from typical contracts under the common law.[64] Conversely, section 31 agreements only bind those who are party to the agreement. For this reason, many proponents prefer ILUAs over areas where native title is yet to be determined or may have further determinations in the future.

Arbitration: unlike section 31 agreements which have an arbitration option after six-months have passed, ILUAs have no set time frames and no arbitration trigger.[65] As a result of no time limit on ILUAs, it is up to the parties to determine how long the consultations and negotiations will take.

Cost effectiveness: ILUAs can cover future activities and multiple projects in one agreement. As a result, they can be more cost effective in the long run for complex projects with multiple tenements or stages. In contrast, s.31 agreements can only cover what was in the notice but can make provision for a sequential action.[66]

Related native title determination dealings: section 31 agreements are required to be processed independently from a native title determination application. If using an ILUA, parties may decide to deal with future act matters in conjunction with their native title determination application.[67] As native title applications are often lengthy this allows proponents to be proactive in addressing native title issues at earlier stages.

Validation of invalid future acts: ILUAs can validate particular future acts that were invalidly done in the past provided that the party liable for the act is a party to the ILUA.[68] In contrast, s. 31 agreements do not have the ability to invalidate acts which were previously done invalidly. As a result of this difference, ILUAs can provide significant risk mitigation where previous invalid actions may have occurred.[69]

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[62] National Native Title Tribunal, 'ILUA or the right to negotiate process? A comparison for mineral tenement applications' (Web Page, October 2010) http://www.nntt.gov.au/Information%20Publications/ILUA%20-%20The%20Right%20to%20Negotiate.pdf

[63] Ibid 3.

[64] Deirdre Howard-Wagner and Amy Maguire, ''The Holy Grail' or 'The Good, the Bad and the Ugly'?: A Qualitative Exploration of the ILUAs Agreement-Making Process and the Relationship between ILUAs and Native Title' (2014) 18(1). *Australian Indigenous Law Review*, 74.

[65] National Native Title Tribunal (n 38).

[66] Ibid 5.

[67] Ibid 6.

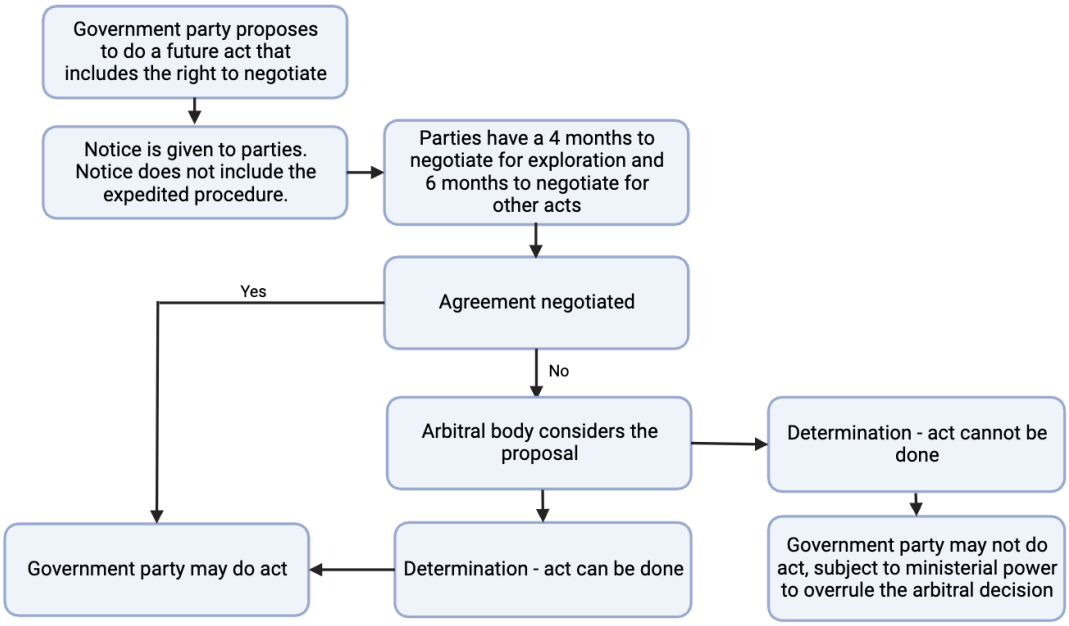
[68] Native Title Act 1993 (Cth) s 24EBA.

[69] National Native Title Tribunal (n 62) 7.

B Section 31 Agreements

There is very little analysis written on section 31 agreements in the public domain for two key reasons. Firstly, because there was no register of these agreements required under law until the 2021 amendments to the NTA. Secondly, because they are validated under state governments, there is variance among jurisdictions. The section 31 process is outlined in Figure 2 (below).[70]

Figure 2: Right to negotiate flow chart



1. Data on section 31 agreements

Since the native title act amendments came into effect on the 25th of March 2021, there have been 194 section 31 agreements registered with the NNTT.[71] On average, these s. 31 agreements cover 459 square kilometres each with approximately one agreement reached every five days. Table 5 below presents the summary data on these agreements and their timeline from notification to registration. The first key finding from this dataset is that around four-fifths of all section 31 agreements also incorporate a written ancillary agreement. This is a positive finding and reflects a clear dominance among the sector to engage meaningfully between resource companies, governments, and native title parties.

[70] Explanatory Memorandum, *Native Title Bill 1993* (Cth) 14.
[71] National Native Title Tribunal (n 61). Figures correct as of 6th November 2023.

Table 5: Key data on section 31 agreements

Characteristic	Number of agreements	Median months to reach agreement from notification[72]
Total section 31 agreements	194	23 months
Agreements with a written ancillary agreement	154 (79%)	25 months
Agreements without a written ancillary agreement	40 (21%)	18 months

Source: Author's calculations using NNTT data on section 31 agreements (2021-2023)

The second finding is that the median time to reach agreement for section 31 agreements is a little under two years. Within this data, the middle 50% of cases showed a range in time to reach agreement between 1 year and 3.33 years. Unsurprisingly, the data shows that the time from notification to registration of a section 31 agreement is longer for cases where a written ancillary agreement is also reached. Additionally, the data generates further insights when broken down at the state and territory level (see Table 6 below).

Table 6: State and territory breakdowns of s. 31 agreements

State or territory	Total agreements	With ancillary agreement	Without ancillary agreement
Queensland	108 (55.7%)	104	4
Western Australia	69 (35.6%)	42	27
Victoria	9 (4.6%)	2	7
New South Wales	7 (3.6%)	6	1
Northern Territory	1 (0.5%)	0	1

Source: Author's calculations using NNTT data on s.31 agreements (2021-2023)

A first observation from the state breakdown is that more than three-quarters of Victoria's section 31 agreements have no ancillary or written agreement. Whilst all the Victorian applications were for exploration activity, this does not explain the absence of ancillary agreements..

Another emerging theme from the state-by-state breakdown is the dominance of Queensland over Western Australia both in total agreements and in proportion of agreements with ancillary arrangements. This is noteworthy because Western Australia undoubtedly has the highest amount of mining and exploration activity among the Australian states. One potential factor in this is that the State of Western Australia favours the use of the expedited procedures for exploration tenements. It is recommended that future research investigates why Western Australia has a far higher proportion of expedited procedures than Queensland, but a much lower proportion of section 31 agreements and ILUAs.

[72] Figures have been rounded to the nearest month for simplicity. Exact median values calculated are: 697.5 days for all agreements; 538 days for agreements with no ancillary agreement; and 750 days for agreements with an ancillary agreement.

C Indigenous Land Use Agreements

Indigenous agreement-making in Australia has exploded since the enactment of the *Native Title Act 1993*, spurred on by its 1998 amendments to incorporate Indigenous Land Use Agreements (ILUAs). Designed "to facilitate the negotiation of voluntary but binding agreements as an alternative to more formal native title machinery" the agreement method has become the preferred tool for large and complex projects on native title land.[73] In the literature to date, almost all focus on ILUAs has been on those with high financial value – that is mining ILUAs and to a much smaller extent settlement ILUAs. Given this narrow focus, the overwhelming scale of ILUAs and their importance in governing the use of Indigenous and Australian lands, there is a need to broaden discussions of Indigenous agreements. Further, these discussions need to correct the common mischaracterisation that assumes that the interests of agreement proponents and indigenous peoples are entirely or always at odds with each other.[74]

1.1 Types of Indigenous Land Use Agreements

Two of the types of ILUAs under the NTA are '*body corporate agreements'* and '*area agreements*'.[75] Body corporate agreements make up around one-third of all ILUAs and are agreements which are located 100% within a fully determined native title area, and therefore the relevant RNTBC is known. In these cases, all known RNTBCs within the area must be a party to the agreement. The resulting procedural requirements for registration are simple. The second type, area agreements, are for areas where determinations have not been made over the entire area. As a result, it cannot be an area agreement if it is fully within determined native title. Area agreements are with a native title group that consists of all RNTBCs and registered claimants, if none, the non-registered claimants or the NTRB/NTSP must be parties. The ILUA registration procedure is known to be complicated where there is no determined native title.

1.2 Data on Indigenous Land Use Agreements

To generate insights on Indigenous Land Use Agreements, the author has reviewed both agreement extracts and conducted spatial analysis of the NNTT register of ILUAs.[76] This data is based on the 1,452 ILUAs registered as of 9 August 2023. The summary data outlines that the median ILUA is 10 years old and has an area of 239 square kilometres. In addition, it shows that median time from lodgement to registration across the past five years is four months. This suggests a reasonable turn-around period for ILUA registration by the NNTT as three of those months are required for the objection period, leaving just one month for compliance assessment and registration. Perhaps more insightful is the data on ILUAs when broken down by state and territory (see Table 7 below).

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[73] Office of the Prime Minister (Cth), 'Wik: The 10 Point Plan Explained' (1997) 9.

[74] James Anaya, Report of the Special Rapporteur on the rights of indigenous peoples: extractive industries and indigenous peoples, UN Doc A/HRC/24/41 (1 July 2013).

[75] A third type of ILUA, '*alternative procedure agreements*' also exists under the NTA but is not covered in this paper as it has never been used. See section 24DE of the *Native Title Act 1993* for further details.

[76] National Native Title Tribunal (n 59).

Table 7: ILUA data by state and territory

State or Territory	Number of ILUAs	Percentage of total national ILUAs	Total summation of agreement areas	Areas of the state	ILUA area as a percentage of state area
WA	219	15.1%	1,824,633	2,527,013	72.2%
QLD	897	61.8%	2,257,713	1,729,742	130.5%
NSW	29	2.0%	28,007	801,150	3.5%
VIC	61	4.2%	173,684	227,444	76.4%
SA	116	8.0%	1,145,194	984,321	116.3%
NT	130	8.9%	181,923	1,337,791	13.6%
Total	1,452	100%	5,611,153	-	-

There are several key themes emerging from the state and territory breakdowns. First, is that over 60% of all ILUAs are in Queensland. In fact, the State Government of Queensland is the most prolific applicant across all registered ILUAs, comprising 26% of the State's ILUAs and 16% of the nation's. As Queensland represents 41% of all PBCs in Australia, this finding is not completely surprising.[77] Secondly, is that the sheer number of ILUAs outweighs the total number of PBCs at more than five-to-one. This suggests that most PBCs have likely negotiated multiple ILUAs and have some level of existing experience in terms of their negotiation and application.

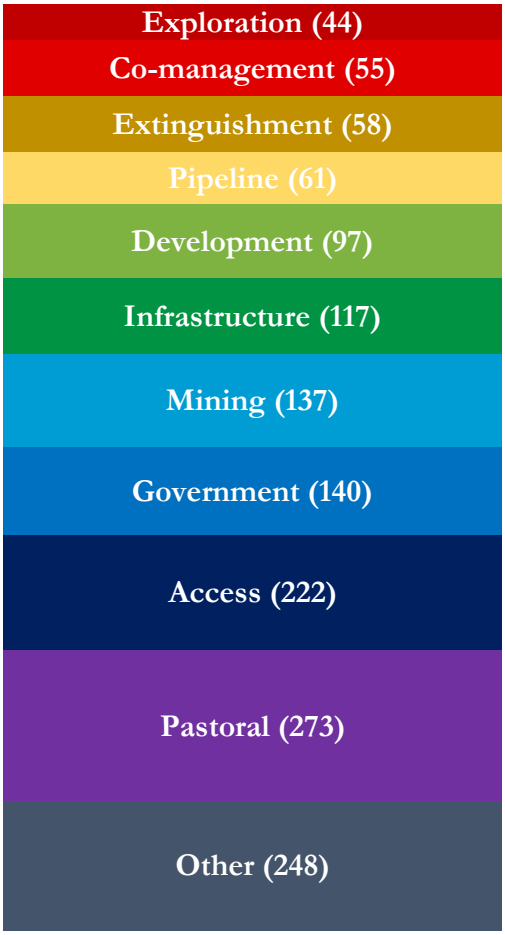
1.3 The diversity of agreements outside of the extractive resources sector

While statutory agreement-making models are commonly discussed in the context of mining and resource extraction, the fact is that the three most frequent subject matter areas for ILUAs are 'pastoral', 'access' and 'government', with mining in fourth. Figure 3 below shows the breakdown of ILUAs based on primary subject matter. Critically, this data shows that there is a significant diversity of agreements outside of the extractive resources sector. In fact, these extractive resource ILUAs only represent ~18% of all cases.[78] Considering there is limited literature provided on the three most common subject matter types I provide a summary of each and their purpose.

[77] Figures correct as of November 2023.

[78] Extractive resource ILUAs include agreements with a primary subject matter listed as mining, exploration, pipelines, gas or petroleum.

Figure 3: Primary subject matter of Indigenous Land Use Agreements as of August 2023



ILUAs classified as 'pastoral' have many similarities with those classified as 'access'. In both cases, the primary intent is to setup a process and set of rules upon which native title parties and landholders can manage their co-existing property rights. For example, the rights to access, hunt and camp on traditional country are commonplace native title rights across Australia. These agreements help set agreed terms for things like notice requirements for entry, use of firearms, presence of pets/animals, and the nature of temporary or permanent structures. In practice, the negotiation of pastoral and access agreements are unlike resource agreements as the proponent lacks the funding to participate in an extensive compensation arrangement, if any. In general, the pastoral parties to these agreements are seeking legal certainty over issues of workplace health and safety, public liability insurance, biosecurity, fire/burning practices, and the presence of any weapons. As the state with the largest area of pastoral leasehold land, it is not surprising that Queensland has the highest amount of pastoral ILUAs (187 out of 273).[79]

Access agreements have many similarities to pastoral agreements but may be applied to a broader range of proponents, landholders, and circumstances such as local governments, utility providers, or even pastoral holders. Notably, 'access' is by far the most common secondary subject matter listed for ILUAs applying to over 30% of all ILUAs. When

[79] Productivity Commission. 'Pastoral Leases and Non-Pastoral Land Use' (Research Paper, 2002) 3 https://www.pc.gov.au/research/completed/pastoral-leases/pastoralleases.pdf

combined with its categorization as a primary subject matter, access is listed as a subject category in over 45% of all ILUAs.

The third most common agreement category, 'government' is particularly common between local governments and native title parties. While governments are permitted under the NTA to do future acts necessary to carry out their functions, these expedited procedures often do not achieve the benefits of long-term partnerships. Most often, these local governments engage native title parties in a 'whole-of-council' agreement that encompasses the entire area within which the local government operates. In this way, ILUAs set up a head agreement between native title parties and local governments which set the terms for how they will work together. Other common usages of 'government' ILUAs are for tenure resolution, defence facilities, or social housing construction. For example, tenure resolution is needed in situations where the local government needs to expand housing areas or give more certainty of underlying title to residents. In such circumstances, the native title party may engage in a land swap with the local council.

In summary, whilst extractive resource agreements and native title settlements dominate discussions of ILUAs due to their high impact and high profit potential, they are not the most common uses of the instrument. The diverse purposes for which ILUAs are employed by governments, proponents and native title parties alike is a baseline understanding for any discussion of Indigenous agreement-making in Australia.

V CONCLUSION – REBALANCING THE FUTURE ACTS SYSTEM

Considering the trajectory of global economic growth and the 100+ currently registered native title claims, there is a strong likelihood of increased development proposals within native title lands and waters. Accepting this reality, also requires acceptance that there will always be potential benefits and impacts from development on Indigenous lands. However, the optimisation of benefits and mitigation of impacts are contingent upon the extent to which the future acts system can be rebalanced.

A Adoption of FPIC

In attempting to rebalance the future acts system, the adoption of the principle of free, prior, and informed consent (FPIC) stands out as a leading avenue for reform. Formalised in the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*, FPIC is aligned with original requests for consent-based legislation made by Indigenous representatives during the formulation of the *Native Title Act* in 1993. Canada, a nation with similar challenges involving extractive resources and First Nations peoples, recognised the importance of FPIC and took the step of enacting its own legislation in 2021 – the *United Nations Declaration on the Rights of Indigenous Peoples Act*.

If Australia implemented FPIC or another type of consent-based model, the primary pathway to validating future acts would be through agreement-making. Given that 79% of arbitration applications are withdrawn and most of those withdrawals end in agreement, it is evident that even current disputes tend to result in agreements. Application of FPIC would essentially involve eliminating the arbitration system for validating future acts. In short, if there is no agreement, the project or action does not proceed.

B Amending the arbitration clauses of the Native Title Act

Other less radical approaches to rebalancing the system could involve extending the right to negotiate timeframe under s. 35(1) of the *NTA*. As previously outlined, there is evidence of at least 5% of proponents abusing the existing system by applying for arbitration within one week of the right to negotiate six-month period lapsing. It would seem appropriate to extend the six-month period closer to a value of 23 months - the existing median time to reach a s. 31 agreement. Further, given that the median time from arbitration lodgement date to arbitration decision is nearly 6 months, an increase in the right to negotiate timeframe would reduce the demand and backlog of arbitration requests that consume Commonwealth resources.

Additionally, this change would need to be supported with the removal of the 'no royalty' provision in s. 38(2) of the *NTA*. If the Australian Government would propose to keep an arbitration system that has been demonstrated to be one-sided, it would seem appropriate to at least remove limitations on the Tribunal that allow it to compensate such impacts. The valuing of such compensation is hardly a new concept in arbitration, nor to the legal system.

C Expediting procedures based on a fairer interpretation of 'low impact'

The continual growth of the objection rate among native title parties to the application of the expedited procedures is the direct result of state governments and native title parties having incongruent assessments of impact. At a physical level, this may involve redefining low impact acts as relating to 'reconnaissance exploration'[80] and not 'drilling exploration'[81]. At a heritage level, this may require a compulsory site clearance for all works. As the burden of proof is on the native title party, it could require a preliminary environmental assessment by the company to outline what the proposed environmental impacts are to lands and waters.

Another preferred avenue to the criteria for arbitral determinations set out in s. 39(1) of the *NTA*. Specifically, to remove the word 'particular' in s. 39(1)(a)(v), which currently only allows consideration of Indigenous sites of 'particular' significance. This amendment would require the arbitral body to consider *any* site which has significance in accordance with the native title party's traditions.

D Transparency of agreements

This paper demonstrated that the diversity of Indigenous agreements is far broader than is generally conceived. In enhancing understandings of agreements, there is a need to overcome concerns around their confidentiality. One proposed means of achieving this would be to allow for a system in which the NNTT adds a copy of the agreement to its public register if the parties mutually consent to its publication. This could be as simple as agreement

[80] Examples of reconnaissance exploration may include: geochemical sampling, geological mapping (rock chipping), geophysical surveying (airborne or ground), firebreaks, and temporary fly-camp setups.
[81] Examples of drilling exploration may include: clearing land for drilling sumps/pads (ground disturbance), drilling holes (DD/AC/RC), semi-permanent camps, and newly created tracks.

registration processes including an option of publishing, redacting, or remaining confidential. Whilst there are needs for the confidentiality over certain types of information, there are also many cases where transparency would enhance outcomes.

In summary, public policy discussions of the native title system have tended to focus either on the process of conferral of native title rights, the extent of these rights, or the lacking support to native title corporations themselves. This paper has intended to redirect these discussions by assessing the existing future acts regime and using quantitative data to expose key trends and avenues for reform. These trends have been highlighted to increase development efficiencies and provide for a more balanced future act regime.