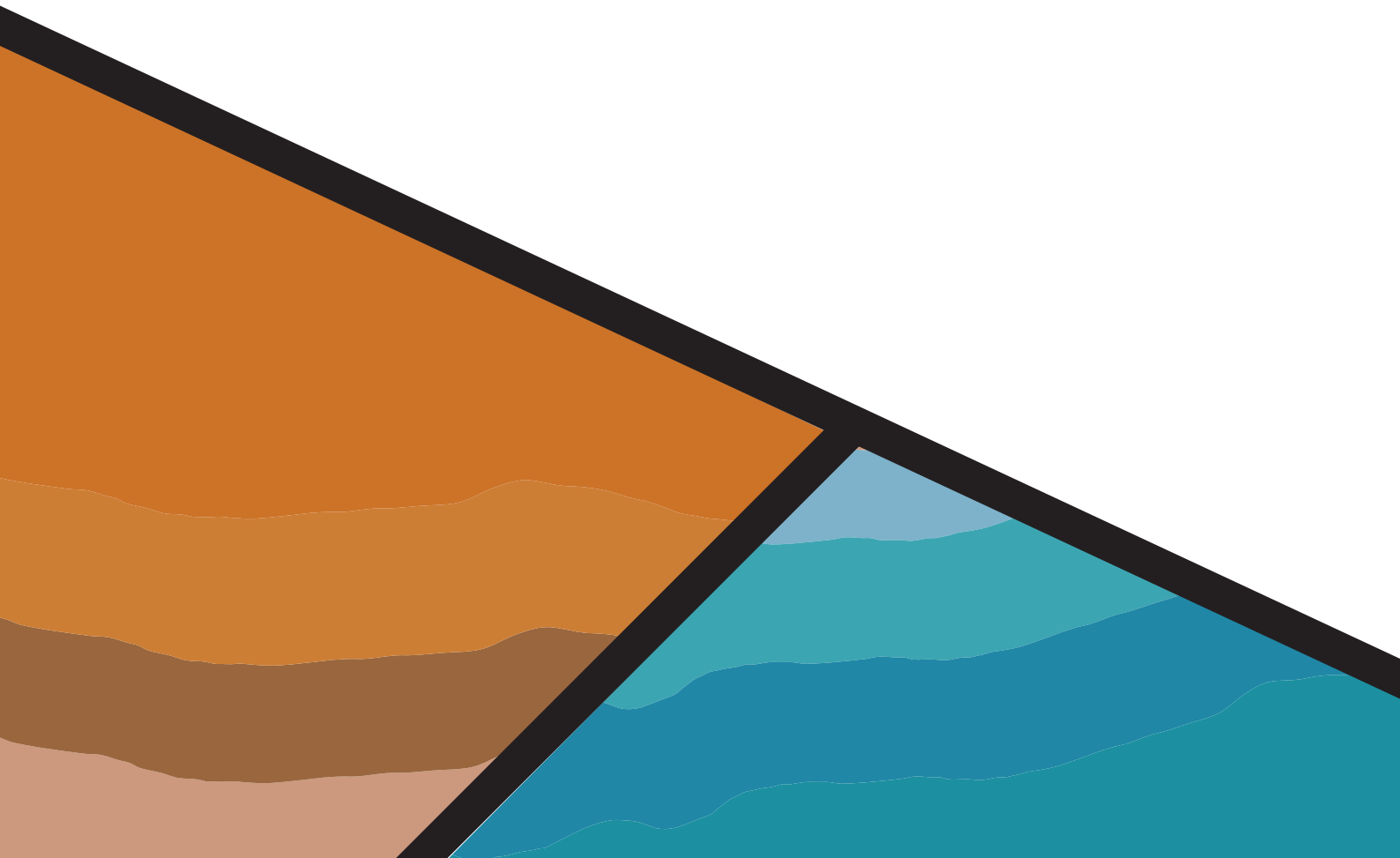
Australian Government
Australian Law Reform Commission

ISSUES PAPER

REVIEW OF THE FUTURE ACTS REGIME

Issues Paper 50

November 2024



We acknowledge the Traditional Custodians of Country throughout Australia and their continuing connection to land, waters, skies, and community. We pay our respects to their Elders past and present, and to their community leaders, and extend that respect to all Aboriginal and Torres Strait Islander peoples.

We also acknowledge the distinct cultural identity of Aboriginal and Torres Strait Islander peoples. In this paper, we use the terms 'Aboriginal and Torres Strait Islander peoples' and 'First Nations people' synonymously. The term 'Indigenous' is used in reference to original source materials, such as the United Nations *Declaration on the Rights of Indigenous Peoples*. All terms are used with the utmost respect.

This Issues Paper reflects the law as at 18 November 2024.

The Australian Law Reform Commission ('ALRC') was established on 1 January 1975 and operates in accordance with the *Australian Law Reform Commission Act 1996* (Cth).

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ISBN: 978-1-7637876-0-5

Citation: Australian Law Reform Commission, Review of the Future Acts Regime: Issues Paper (2024)

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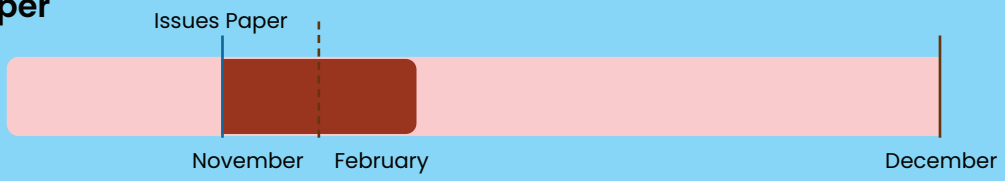
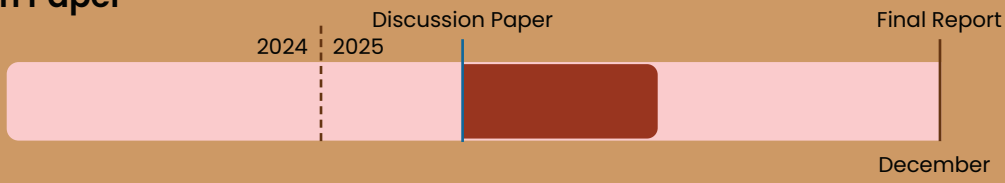
Issues Paper



You can send your submission to us between November 2024 and 21 February 2025

Discussion Paper



You can send your submission to us when we publish our Discussion Paper

Your submission might be

- a written document
- an audio recording
- an artwork

Get in touch and share your views

You can share your views with us at any time during the Inquiry

You might like to

- email us
- send us a letter
- give us a call

Introduction

1. Aboriginal and Torres Strait Islander peoples hold special relationships and connections to Country that have continued for many tens, and perhaps hundreds, of thousands of years. The preamble to the *Native Title Act 1993* (Cth) ('*NTA*') acknowledges that since European settlement of Australia, Aboriginal and Torres Strait Islander peoples have been progressively dispossessed of their lands. The preamble also notes that the *NTA* is intended to provide a means of rectifying past injustices and ensuring that Aboriginal and Torres Strait Islander peoples 'receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire'.[1]

2. The *NTA* provides for legal recognition of the rights and interests that Aboriginal and Torres Strait Islander peoples hold in their traditional lands and waters. We have been asked to review one part of the *NTA* known as the future acts regime. The future acts regime provides the legal framework for doing future acts. In summary, 'future acts' are acts which occur after the *NTA* commenced in 1993 that affect native title rights and interests.[2] Broadly speaking, only a state, territory, or the Commonwealth government can do an 'act' that can lawfully affect native title rights and interests.[3] Some examples of future acts are discussed further below.[4]

3. This Issues Paper aims to explain the future acts regime at a high level and introduce our Inquiry. It starts a conversation by asking you to let us know your thoughts about the Inquiry. You can do this by making a submission or in another way that works for you.

4. Your input is very important and we are committed to listening. At this stage of the Inquiry, we are especially interested in hearing about what you see as problematic in the current future acts regime and your ideas for improvements.

This Issues Paper has three parts:

		Here you will find …
1	**What we have been asked to do**	Information about how we plan to approach this Inquiry
2	**Native title and the future acts regime**	A brief explanation of key legal concepts, including native title and the future acts regime
3	**What we have heard and found so far**	A summary of the key issues that people have raised with us, and some questions you might like to respond to in a submission

1 *Native Title Act 1993* (Cth) preamble.
2 Ibid ss 227, 233. Note that ss 232A–D of the *NTA*, inserted by the *Native Title Amendment Act 1998* (Cth), provide that acts occurring after the commencement of the *NTA* but prior to the end of 23 December 1996 are defined as 'intermediate period acts' and affect native title as set out there.
3 Section 226 of the *NTA* provides for a range of 'acts' that may affect native title, including 'the creation, variation, extension, renewal or extinguishment of any legal or equitable right, whether under legislation, a contract, a trust or otherwise' and 'an act having any effect at common law or in equity'. Section 227 defines when an act 'affects' native title.
4 See [37] below.

Making a submission

5. We welcome submissions from anyone who is interested in the Inquiry. This Issues Paper sets out **five** questions that you may wish to answer. We are asking these questions to help us identify the issues that we should examine and to help us develop ideas for reform. You do not need to answer all of them.

Questions 1 and 2 ask what you see as the **important issues** for us to consider and whether there are any issues that we have not yet identified.

Question 3 asks if there are any aspects of the future acts regime you think **work well**.

Question 4 asks for your **ideas** about how to reform the future acts regime.

Question 5 asks what an **ideal future acts** regime would look like.

6. You can structure your submission in any way that works for you. You can also make a submission without answering specific questions. For example, you may wish to tell us about your experiences of the future acts regime, or to comment on parts of our Terms of Reference, which are discussed further below.[5]

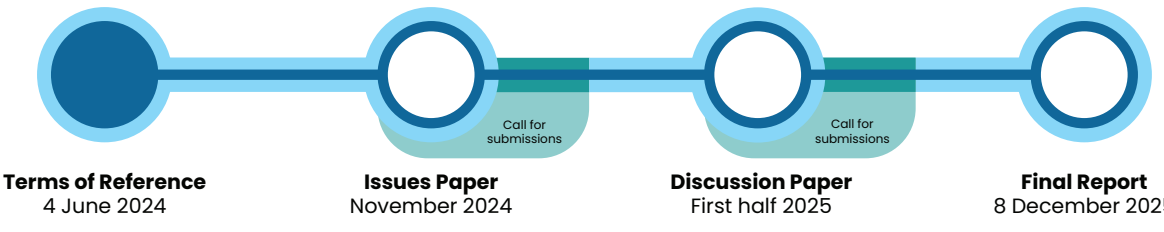
7. The best way to make a written submission is by uploading it through the ALRC website or by email to nativetitle@alrc.gov.au. You can also write or draw your ideas, or send us an audio or video recording if this is easier. Please contact us about how best to do this.

8. We will accept submissions until **21 February 2025**. We will publish submissions on our website, unless you ask for your submission to be confidential.[6]

We know that making a submission can be time-consuming and sometimes difficult. We also know that people have competing demands on their time and resources, including from the future acts regime itself.

We are asking for submissions now to help us identify the issues we should address when we develop our ideas for reform. **If you cannot make a submission now, there will be another opportunity to make a submission when we publish our Discussion Paper.** The Discussion Paper will contain ideas for reform and ask for feedback on those ideas.

You are welcome to make a submission in response to one or both of our papers, however you think best.



5 See [11]–[13] below.

6 We will not publish submissions that breach applicable laws, promote a product or a service, contain offensive language, may be defamatory, express sentiments that are likely to offend or vilify sections of the community, or that do not substantively comment on issues relevant to the Inquiry. More information is available on the ALRC website: Australian Law Reform Commission, 'Submissions and Inquiry Material' <www.alrc.gov.au/about/policies/submissions-and-inquiry-material/>.

How we will handle First Nations people's information and data

9. We recognise that First Nations people have a right to have a say about how government collects, stores, and manages their information and data. However, laws about how government and agencies like the ALRC must handle information often mean that First Nations people cannot exercise full control over how their information is managed or shared. Wherever possible, we will seek to communicate clearly about what we will do with the information we collect and seek consent for future uses of that information.

10. If you wish to share confidential or sensitive information with us, please tell us that you want it to be treated as confidential. Further information about how we handle information is available on our website.[7]

What we have been asked to do

11. The Terms of Reference describe what we have been asked to do. In summary, the Australian Government has asked us to review the future acts regime in the *NTA* and develop recommendations for how it can be improved. The Terms of Reference ask us to consider a list of specific things. These include options for reform to:

- rectify any inefficacy, inequality, or unfairness in how the regime currently works, as well as ways to make it work more efficiently;
- support native title holders so they can effectively engage with the future acts regime, as well as supporting fair negotiation and collaboration between native title holders and proponents; and
- strengthen data collection and data transparency to support the operation of the future acts regime into the future.

12. The Terms of Reference ask us to consider the rights and obligations recognised in the international instruments to which Australia is a party or which it has pledged to support, including the United Nations *Declaration on the Rights of Indigenous Peoples* ('UNDRIP'). We will examine whether the future acts regime adequately reflects internationally recognised principles of human rights, including the right to free, prior, and informed consent ('FPIC') and the right to self-determination.

13. We have been asked to consult with key users of the native title system, including native title holders, proponents, government departments and agencies, and non-government stakeholders. We aim to engage with affected communities, particularly native title holders and First Nations groups in ways that:

- are culturally safe and appropriate, and consistent with UNDRIP; and
- minimise consultation fatigue as far as practicable.

14. Our Inquiry is the first comprehensive review of the future acts regime since it was created. It comes after the Joint Standing Committee on Northern Australia's inquiry and report, which examined the destruction of two 46,000 year old rock shelters in Juukan Gorge and recommended that the future acts regime be reviewed.[8]

7 Australian Law Reform Commission, 'Submissions and Inquiry Material' <www.alrc.gov.au/about/policies/submissions-and-inquiry-material/>.

8 Joint Standing Committee on Northern Australia, Parliament of Australia, *A Way Forward: Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge* (2021).

Native title and the future acts regime

15. This part introduces two important concepts: native title and the future acts regime. These are both large and complex areas of law, so this part only discusses them briefly and in overview. Footnotes help to explain some of the legal terminology used in this part. This part also briefly explains some of the other laws that interact with the future acts regime.

What is native title?

16. Native title was first recognised in Australia by the High Court of Australia in 1992 in *Mabo (No 2)*.[9] The case was the result of decade-long legal proceedings in which the Meriam People sought legal recognition of rights over their traditional Country, Mer (Murray) Island in the Torres Strait. In its landmark decision, the High Court found that Australian law recognised the Meriam People's rights and interests in their Country that came from their traditional laws.

17. Following *Mabo (No 2)*, the Commonwealth Parliament passed the *NTA*. The *NTA* establishes a legal framework for the recognition and protection of native title in Australia.[10]

18. Native title is difficult to define using common law legal concepts.[11] This is because it is not a common law interest, but rather an interest *recognised* by the common law.[12] Through native title, the common law recognises the rights and interests that form part of the traditional laws acknowledged, and customs observed, by First Nations people. Native title is not '"won" or "given"', but it is 'the legal recognition of rights that have existed for thousands of years'.[13] Put differently, native title 'is not granted; nor is it a right that has been created by the legislatures, it is about recognising rights that "have always been there"'.[14]

19. When courts and tribunals decide matters about native title, they use the definition of 'native title' found in the *NTA*.[15] Section 223(1) of the *NTA* defines 'native title' (or 'native title rights and interests') as having three parts.[16] First, native title rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the group of First Nations people who claim native title. Secondly, by those traditional laws and customs, the group of people claiming native title have a connection with the land or waters in the claim area. Thirdly, the common law must recognise the rights and interests. The third requirement 'emphasises the fact that there is an intersection between legal systems and that the intersection occurred at the time of [European settlement]'.[17] This makes native title unique: it exists at the intersection of common law and First Nations law. **Figure 1** below illustrates the intersection of these two legal systems.

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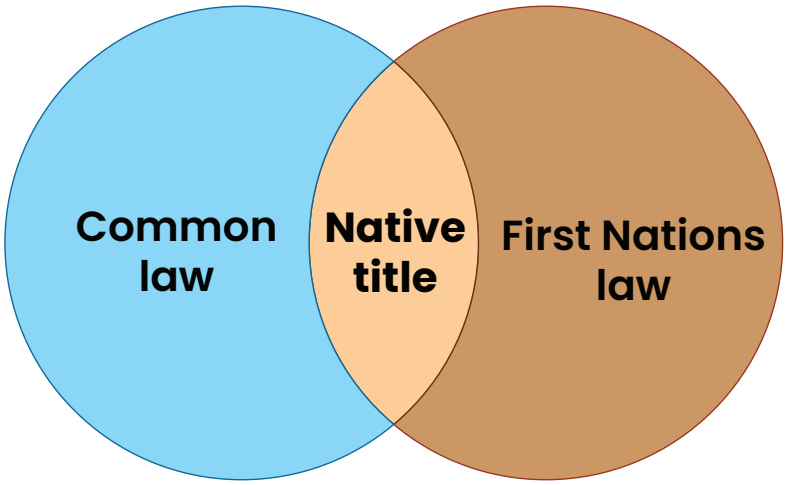
9 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.
10 *Native Title Act 1993* (Cth) s 3(a).
11 See Noel Pearson, 'The Concept of Native Title at Common Law' (1997) 5 *Australian Humanities Review* <https://australianhumanitiesreview.org/1997/03/01/the-concept-of-native-title-at-common-law/>.
12 The **common law** refers to a body of court decisions developed over time and means that legal disputes decided in Australia must consider earlier decisions.
13 Queensland Government, 'What Is Native Title?' <www.qld.gov.au/firstnations/environment-land-use-native-title/connecting-with-country/native-title>.
14 Norman Laing, 'Distinguishing Native Title and Land Rights: Not an Easy Path to Rights or Recognition' [2007] (8) *The Journal of Indigenous Policy* 50, 54.
15 *Commonwealth v Yarmirr* (2001) 208 CLR 1 [7].
16 The first two parts of the definition are based on the judgment of Brennan J in *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 57: 'The term "native title" conveniently describes the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants'.
17 See *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 [77].

Figure 1 Native title at the intersection of legal systems



20. The content of native title rights and interests is determined according to traditional laws and customs. This means that the content of native title for a particular group of First Nations people requires a factual inquiry into the traditional laws and customs acknowledged and observed by that group over their Country. The factual inquiry about traditional laws and customs is at the heart of the native title claims process, which is briefly discussed further below.[18]

21. Some examples of native title rights and interests include rights to:

- protect places and areas of importance on native title land and waters;[19]
- hunt, fish, or gather;[20]
- take resources, which may include taking for commercial purposes;[21]
- access areas to perform ceremonies;[22]
- camp;[23] and
- possess, occupy, use, and enjoy an area to the exclusion of all others (commonly referred to as 'exclusive possession' or 'exclusive native title').[24]

22. It is generally accepted that there are no native title rights and interests in minerals, gas, or petroleum.[25]

23. Native title rights and interests may be extinguished by a lawful grant of rights that shows a 'clear and plain intention'[26] to extinguish native title or by the construction of public works in certain circumstances.[27] The High Court has held that a clear and plain intention to extinguish native title is demonstrated by the objective inconsistency between the rights granted to a third party and

18 See [27]–[31] below.
19 See, eg, *Austin on behalf of Eastern Maar People v Victoria* [2023] FCA 237; *Daniel v Western Australia* [2003] FCA 666.
20 *Native Title Act 1993* (Cth) s 223(2).
21 See, eg, *Akiba v Commonwealth* (2013) 250 CLR 209.
22 See, eg, *Yindjibarndi Aboriginal Corporation RNTBC v Western Australia* [2020] FCA 1416.
23 See, eg, *Austin on behalf of Eastern Maar People v Victoria* [2023] FCA 237; *Daniel v Western Australia* [2003] FCA 666.
24 See, eg, *Warrie (on behalf of the Yindjibarndi People) v Western Australia (No 2)* (2017) 366 ALR 467; *Fortescue Metals Group v Warrie* (2019) 273 FCR 350; *Anderson v Western Australia* [2000] FCA 1717; *James on behalf of the Martu People v Western Australia* [2002] FCA 1208.
25 See Richard Bartlett, *Native Title in Australia* (LexisNexis, 5th ed, 2023) 831–2; *Western Australia v Ward* (2002) 213 CLR 1 [376]–[385].
26 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 64. But see discussion in Bartlett (n 25) 375–95.
27 See, eg, *Native Title Act 1993* (Cth) ss 24JA, 24JB.

native title rights and interests.[28] Extinguishment means that native title rights and interests no longer exist in a particular parcel or parcels of land. Once a native title right is extinguished, it cannot be revived (except in the limited circumstances covered by ss 47–47C of the *NTA*).[29]

24. Extinguishing native title means that Australian law no longer *recognises* those rights and interests. Extinguishment does not break the spiritual connection to Country but it may mean First Nations people are unable to exercise many aspects of their pre-existing connection to Country.[30] Native title rights and interests have been found by the High Court to be a 'bundle of rights',[31] and each right in the 'bundle' may be extinguished separately.[32]

25. Granting freehold title over land is an example of an act that wholly extinguishes native title because it grants the freehold title holder exclusive rights to possess the land.[33] By contrast, some acts will not extinguish, or wholly extinguish, native title because they can coexist with native title. A non-exclusive pastoral lease is an example of an interest in land that can coexist with non-exclusive native title.[34]

26. Extinguishment of native title is different from a finding that there is no native title. Native title can exist in a broad claim area, but be extinguished in particular parcels within that area.[35] However, if a claim does not meet the requirements of the *NTA* to demonstrate that native title exists in an area, then native title does not exist in the area.

The native title claims process

27. The process for claiming native title has some unique features that distinguish it from other court processes. This section gives a brief overview.

28. The claims process begins when a group of First Nations people apply to the Federal Court for a native title determination over a specified claim area (known as a claimant application). A claimant application must contain certain information set out in the *NTA*.[36] A copy of the application is given to the National Native Title Tribunal ('NNTT') to consider whether the claim meets certain conditions, known as the 'registration test'.[37] If the application passes this test, then the applicants become 'registered native title claimants' and acquire rights under the future acts regime.[38] This, however, does not mean that the native title rights and interests claimed have been formally recognised.

29. The claims process can take several years. It will usually require claimants to collect and present evidence about traditional laws and customs. It may also involve mediation or negotiation between the registered native title claimants and other parties. The other parties will generally include the relevant state or territory minister and other people who claim interests in the relevant land or waters.

30. If a claim is not withdrawn or dismissed, the outcome of the claims process is a native title determination made by the Federal Court. A determination that native title exists, sometimes called a 'positive determination', must specify certain details about the persons holding native title, the

28 *Western Australia v Ward* (2002) 213 CLR 1 [78].
29 *Western Australia v Brown* (2014) 253 CLR 507 [39]; *Fejo v Northern Territory* (1998) 195 CLR 96 [56]–[58].
30 See, eg, Pearson (n 11).
31 *Western Australia v Ward* (2002) 213 CLR 1 [76].
32 *Akiba v Commonwealth* (2013) 250 CLR 209 [59].
33 **Freehold title**, sometimes called an 'estate in fee simple', is the strongest form of property rights in land in the common law system. In broad terms, freehold title means a person owns and controls the land indefinitely.
34 See *Wik Peoples v Queensland* (1996) 187 CLR 1.
35 This may be because tenure that is inconsistent with native title, such as freehold title, has been granted over some parcels of land, but not the entirety of the area.
36 See *Native Title Act 1993* (Cth) ss 61, 62.
37 Ibid ss 190A–190C.
38 See [42]–[68] below.

native title rights and interests themselves, and other interests in the area.[39] The determination will usually name a Prescribed Body Corporate ('PBC') which will hold the native title rights and interests in trust or as agent for the group of people included in the determination (referred to as the 'common law holders' in the *NTA*).[40] A determination that native title does not exist, where the requirements of the *NTA* are not met, is commonly known as a 'negative determination'.

31. It is also possible for people other than native title parties to make a 'non-claimant application' seeking a negative determination over an area of land or waters. This may be done for several reasons, including to offer certainty for land use of an area.

What is the future acts regime?

32. The future acts regime is contained in Part 2 Division 3 of the *NTA*. The regime in its current form was introduced by the *Native Title Amendment Act 1998* (Cth) ('*NT Amendment Act*'). The *NT Amendment Act* was the legislative response to the High Court decision in *Wik Peoples v Queensland*, which concerned the native title implications of pastoral leases.[41] The *NT Amendment Act* implemented the policies underpinning what was known as the 'Ten Point Plan'.[42] The future acts regime has remained largely in this form since 1998.

33. In broad terms, the future acts regime aims to promote equality before the law by providing substantive and procedural rights for the protection of native title, similar to the substantive and procedural rights that apply to property interests generally.[43] The stated policy intent underpinning the *NT Amendment Act* in 1998 was to reform the future acts regime for greater workability and certainty.[44] According to one commentator, however, changes made by the *NT Amendment Act* 'fell short of providing equality before the law' and 'attributed an inferior tenor and nature to native title' compared to other rights over land.[45] Any inequality that may exist is permitted through the suspension of the *Racial Discrimination Act 1975* (Cth) ('*RDA*').[46]

Where does the future acts regime apply?

34. The future acts regime applies to land or waters where native title may exist or has been determined to exist. This means that the future acts regime will apply:

- where native title *may exist* because, in the relevant area, native title has not been extinguished or a negative determination has not been made;
- where a claim for native title has been lodged over an area; and
- to areas subject to a determination that native title exists.

35. The future acts regime does not apply to 'Aboriginal/Torres Strait Islander land or waters' as defined in the *NTA*, which includes land granted under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and other similar land rights regimes.[47]

39 *Native Title Act 1993* (Cth) s 225. Positive determinations may be made by the Court following a contested application hearing or by consent between the parties.
40 See ibid s 56(2).
41 *Wik Peoples v Queensland* (1996) 187 CLR 1.
42 Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) 17–20.
43 See, eg, Bartlett (n 25) 561–3.
44 Commonwealth, *Parliamentary Debates*, House of Representatives, 6 December 1997, 12337 (John Howard).
45 Bartlett (n 25) 562–3.
46 *Native Title Act 1993* (Cth) s 7.
47 Ibid ss 233(3), 253 (definition of 'Aboriginal/Torres Strait Islander land or waters').

What are future acts?

36. In broad terms, future acts are acts that deal with land or waters in a way that impacts native title rights and interests.

37. Future acts are done by government. This is because they usually involve a government:

- giving someone (other than government) permission to do something;
- creating an interest in land or waters;
- doing something itself on land or waters; or
- passing certain legislation.

Examples of future acts

Some examples of future acts include:

- granting a mining tenement,[48] such as a prospecting licence, exploration licence, or mining lease;
- granting an irrigation licence;
- granting a fishing licence or making a fisheries management plan;
- issuing a permit for operating a tourist boat in a marine park;
- building facilities for public services, such as a road, powerlines, or mobile phone transmission tower; and
- compulsory acquisition.[49]

38. In more technical terms, future acts are proposed grants of non-native title rights or interests (such as a permit or licence), dedication of land or waters for a particular use (such as building a road or creating a national park), or the making of laws that affect native title. An act 'affects' native title if it:

- extinguishes native title; or
- is wholly or partly inconsistent with the continued existence, enjoyment, or exercise of native title rights and interests.[50]

39. A 'future act' does *not* refer to a 'prospective' act (something to be done in the future) at a particular point in time.[51] Rather, a future act refers to an act other than the passing of a law (such as granting a permit) *after* 1 January 1994, or an act that is the passing of a law after 1 July 1993. If an act is not a 'future act', the future acts regime does not apply.

48 A **tenement** is a right over a particular parcel of land granted by a government that permits particular activities. A tenement is generally granted by a government under particular legislation.

49 The Commonwealth, state, and territory governments have compulsory acquisition powers which may be used to acquire and extinguish native title rights and interests. These powers have, for example, been used on various occasions in New South Wales for road construction purposes: see, eg, *Bandjalang Aboriginal Corporation Prescribed Body Corporate RNTBC on behalf of the Bandjalang People v Transport for NSW* [2020] NSWLEC 1008.

50 *Native Title Act 1993* (Cth) s 227.

51 *Lardil Peoples v Queensland* (2001) 108 FCR 453 [89].

Future acts must be done validly

40. The future acts regime provides the legal mechanisms for validly doing future acts.[52] Future acts can be done validly under a registered Indigenous Land Use Agreement ('ILUA') or under another provision of the future acts regime. These provisions are commonly identified by the subdivision of Part 2 Division 3 of the *NTA* in which they appear. **Table 1** below gives an overview of these provisions.

Table 1 Overview of future acts provisions

Relevant Subdivision (*NTA* Part 2 Division 3)	**Future acts covered**
Subdivisions B, C, and D	Acts agreed to under an ILUA
Subdivision F	Acts where there is an absence of native title in the area
Subdivision G	Acts which involve: • Primary production activities on non-exclusive agricultural or pastoral leases • Primary production activities on non-exclusive agricultural leases (where the activity predates the *NTA*) • Off-farm activities directly connected to primary production activities
Subdivision HA	Acts relating to the management of water and airspace, including both: • Legislative acts of regulation of water and airspace • Acts involving leases, licences and permits relating to aquatic or airspace management
Subdivision I	Renewals and extensions of both: • Pre-*NTA* acts • Lease, licence, permit or authorities
Subdivision JA	Acts relating to public housing in Aboriginal and Torres Strait Islander communities
Subdivision J	Acts involving reservations and leases of land or waters for a particular purpose
Subdivision K	Acts involving construction, operation, use, maintenance or repair of facilities for services to the public
Subdivision L	'Low impact' acts (can be only be used pre-native title determination)
Subdivision M	Acts that pass the freehold test[53]
Subdivision N	Acts affecting offshore places
Subdivision P	Acts subject to the right to negotiate

52 Under the *NTA*, 'valid' is defined to include meaning 'having full force and effect': *Native Title Act 1993* (Cth) s 253 (definition of 'valid').

53 The **freehold test** is a hypothetical test that aims to treat native title rights and interests the same as freehold interests in certain cases. The test asks: could the proposed act be done over the area if the native title holders had a freehold interest in that area? If yes, then the act passes the freehold test. See also [52]–[53] below.

41. Any future act can be done validly under a registered ILUA. Where a future act is not done under an ILUA, it may be able to be done validly under another subdivision of the future acts regime. If a future act does not fall within one of the subdivisions, the only option for the act to be done validly is an ILUA.

A note on terminology

In this paper, we use the term **native title party** to refer to any group of First Nations people who hold native title or *may* hold native title.[54] We do this because under the future acts regime, First Nations people who have obtained a positive native title determination, who have applied for a native title determination, or who hold connections to Country over which native title has not yet been determined, can all make native title agreements with proponents.

We use the term **native title holders** to refer to registered native title claimants, PBCs, and common law holders.[55] We do this because most procedural rights under the future acts regime are conferred on these groups. Native title holders are a subset of the broader term 'native title parties'. In practice, if a positive native title determination has been made then the relevant PBC will exercise rights and perform functions under the future acts regime on behalf of the common law holders.

These terms have slightly different definitions in the *NTA*.

42. Some subdivisions specify procedural rights or substantive rights, depending on the nature of the future act and the subdivision that applies. Procedural rights typically provide for native title holders to be notified and to comment about a proposed future act. Substantive rights include rights to:

- negotiate an agreement (for example, with a mining company for the grant of some mining tenements);
- seek a determination from the NNTT about whether a future act may be done or not (this right is also available to proponents);[56] and
- compensation for the impact that a future act has on native title rights and interests.

43. The future acts regime does not generally give native title parties a right of veto. However, an effective right of veto may arise in cases where an ILUA is the only means of complying with the future acts regime and the relevant government will not exercise compulsory acquisition powers. This is because ILUAs are entirely voluntary.[57]

44. If a future act is not done validly, it does not mean the act is unlawful. However, a failure to do a future act validly may entitle native title holders to take certain actions. These actions may include seeking an injunction or damages for trespass, though there is only limited case law on this point.

54 This term is also used by the *NTA*, sometimes with a specific definition: see, eg *Native Title Act 1993* (Cth) ss 29, 30.

55 This usage differs from how the term is defined by s 224 of the *NTA*.

56 The NNTT is an independent body established under the *NTA*. It performs a variety of functions, including as the arbitral body for future acts. See further *Native Title Act 1993* (Cth) pt 6.

57 For example, in Queensland a registered ILUA is currently required for tenure for an electricity generation facility on native title land. This is because Queensland government policy specifically excludes generation facilities from the application of s 24KA of the *NTA*: see Department of Resources, Queensland Government, Queensland Government Native Title Work Procedures: Module K: Facilities for Services to the Public (Native Title Work Procedures, 2022) 1. See also Lily O'Neill et al, 'Renewable Energy Development on the Indigenous Estate: Free, Prior and Informed Consent and Best Practice in Agreement-Making in Australia' (2021) 81 *Energy Research and Social Science* 1, 4.

45. All future act provisions (other than s 24NA of the *NTA*) apply to acts done in an onshore place. Section 24NA of the *NTA* applies only to offshore places.[58] In general terms, onshore places are land or waters above (that is, on the landward side of) the low water mark, and offshore places are land or waters below (that is, on the seaward side of) the low water mark.[59] Some future act provisions do not specify if they apply to onshore places or offshore places, meaning they are not limited to one or the other and so apply to both (for example, Subdivision I, which relates to certain renewals and extensions).

ILUAs

46. An ILUA is a voluntary agreement between native title parties and other people or bodies (for example, private companies or governments) about the use and management of land and waters. Once an ILUA is registered on the Register of Indigenous Land Use Agreements, the ILUA binds all native title parties for the area covered by the ILUA.[60] In practice, an ILUA will usually be entered into by the representatives of a group claiming native title (such as the registered native claimant) or, if a determination has been made that native title exists, the PBC that holds or manages native title rights and interests on behalf of the common law holders.

47. Future acts done in accordance with a registered ILUA will be valid if the ILUA is registered at the time the future act is done, and future acts done invalidly can be retrospectively validated under an ILUA.[61] ILUAs can include any matters concerning native title.[62] Common conditions include:

- consents to non-extinguishing future acts proposed to be done or that have previously been done;
- payment of financial compensation to, and conferral of other benefits on, native title parties (such as employment and business opportunities); and
- grants of extinguishing and non-extinguishing tenure over land, including freehold title and leasehold title.[63]

48. Where a native title party consents to a future act under an ILUA, the native title party is only entitled to the compensation provided for in the ILUA for that future act.[64] This means that a native title party cannot later make another claim or claim a different amount of compensation for the act, except in limited circumstances. ILUAs sometimes function as a key component for expansive native title settlement agreements between government and First Nations people.[65]

Procedural rights

49. Where a future act is not covered by an ILUA, some of subdivisions F–N in Part 2 Division 3 of the *NTA* give native title holders procedural rights. The *NTA* defines 'procedural right' as 'a right to be notified of the act', 'a right to object to the act', or 'any other right that is available as part of the procedures that are to be followed when it is proposed to do the act'.[66] If a future act would fall within more than one subdivision, the subdivision earlier (or higher) in the alphabetical

58 *Native Title Act 1993* (Cth) s 24NA.
59 *New South Wales v Commonwealth* (1975) 135 CLR 337; *Native Title Act 1993* (Cth) ss 6, 253 (definitions of 'offshore place' and 'onshore place').
60 *Native Title Act 1993* (Cth) s 24EA.
61 Ibid s 24EBA. However, the relevant state or territory must be a party to the ILUA.
62 Ibid ss 24BB, 24CB, 24DB.
63 Bartlett (n 25) 733.
64 *Native Title Act 1993* (Cth) ss 24EB(4)–(6), 24EBA(5).
65 For example, ILUAs are a key component of settlement packages under the *Traditional Owner Settlement Act 2010* (Vic). Additionally, the recent settlement agreement between the government and Noongar people in Western Australia comprises six ILUAs for the original six specific claim areas: see South West Aboriginal Land and Sea Council, 'Settlement Agreement' <www.noongar.org.au/about-settlement-agreement>.
66 *Native Title Act 1993* (Cth) s 253 (definition of 'procedural right').

order will apply.[67] Earlier subdivisions generally give procedural rights of notice and opportunity to comment,[68] while some future acts do not give rise to any procedural rights.[69]

50. If there is a registered claim for native title over an area where a future act is proposed, the procedural rights will be conferred on the registered native title claimants for the area. Where a positive determination has been made, the rights will be conferred on the relevant PBC for the area.

51. At a high level, procedural rights are granted under the categories outlined in **Table 2** below.

Table 2 Procedural rights under the future acts regime

Procedural rights	Types of future acts and relevant section of the *NTA*
Right to notice	This procedural right applies to all future acts under relevant subdivisions *except for*: • acts over land subject to s 24FA protection (future acts where procedures indicate absence of native title); • certain primary production activity under s 24GC (activities on non-exclusive agricultural or pastoral leases granted on or before 23 December 1996); and • low impact future acts under s 24LA (applies to future acts completed prior to the determination of native title over an area).
Opportunity to comment	• Primary production on agricultural and pastoral leases (s 24GB) • Off-farm activities directly connected to primary production (s 24GD) • Third party rights on non-exclusive agricultural and pastoral leases (s 24GE) • Management of water and airspace (s 24HA) • Some renewals and extensions of leases and licences (ss 24IB, 24IC, and 24ID) • Public housing (s 24JAA) • Some acts related to reservations and leases — where the act relates to the construction or establishment of public works or the creation of a management plan for a national, state, or territory park (ss 24JA and 24JB)
Right to be consulted	• Some renewals and extensions of leases and licences — non-exclusive pastoral or agricultural leases where the term of the renewal is longer than the term of the original lease (ss 24IC and 24ID) • Public housing (s 24JAA) • Certain acts that pass the freehold test that are not subject to the right to negotiate (s 24MD(6B))

67 Ibid s 24AB.
68 Bartlett (n 25) 567.
69 See, eg, *Native Title Act 1993* (Cth) s 24LA.

Procedural rights	Types of future acts and relevant section of the *NTA*
Right to object	• Some renewals and extensions of leases and licences — non-exclusive pastoral or agricultural leases where the term of the renewal is longer than the term of the original lease (ss 24MB(6B), 24IC, and 24ID) • Acts that pass the freehold test that are not subject to the right to negotiate (s 24MD)
Rights of ordinary title holder (or other corresponding rights or interests)	• Facilities for services to the public (s 24KA) • Acts that pass the freehold test that are not subject to the right to negotiate (s 24MD) • Acts affecting offshore places (s 24NA)

Substantive rights

The right to negotiate

52. The right to negotiate applies to certain future acts that pass the 'freehold test'.[70] The freehold test

> reflects the notion that, for the purposes of providing equality before the law, future acts should only be valid over native title lands or waters if they could also be done over 'ordinary title', and subject to similar conditions and procedural requirements.[71]

53. In practice, these acts are usually the grant of mining tenements and petroleum titles (and renewals of these grants). Where the right to negotiate applies, the NNTT's role as an 'arbitral body' under the *NTA* is enlivened. This means that the NNTT can hear applications for future act determinations and undertake what is known as an 'inquiry'.[72]

54. Where a future act triggers the right to negotiate, the relevant state or territory government must inform the public and any PBC or registered native title claimant of a proposed grant.[73] States and territories do this using what is referred to as a 'section 29 notice'. Unless the expedited procedure applies, the negotiation parties must negotiate in good faith with a view to reaching agreement to the doing of the act.[74] Future acts will be done validly under the right to negotiate process if the parties enter an agreement under s 31 of the *NTA*. This is commonly known as a 'section 31 agreement'. Parties can also request that the NNTT help them mediate negotiations for an agreement during the negotiation period.[75]

55. If the negotiation parties do not reach an agreement within six months of the notification day in a notice, any party may apply to the NNTT for a future act determination.[76] Once an application is made, the NNTT is obliged to take all reasonable steps to make a determination as soon as practicable.[77] During the 2023–24 financial year, the NNTT received eight applications for future act determinations.[78]

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70 Ibid pt 2 div 3 subdivs M, P.
71 Bartlett (n 25) 600–1.
72 *Native Title Act 1993* (Cth) s 139.
73 Notice is also given to the proponent, to the NNTT, and to any representative Aboriginal or Torres Strait Islander body where there is no PBC for the whole of the area: ibid s 29.
74 Ibid s 31(1)(b). The expedited procedure is discussed further below: see [59]–[65].
75 Ibid s 31(3).
76 Ibid ss 35(1), 38(1).
77 Ibid s 36(1). The NNTT cannot make a determination if the parties otherwise reach agreement: ibid s 37.
78 This was a reduction from 26 applications in the 2022–23 financial year: see Federal Court of Australia, *Annual Report 2023–24* (2024) 106; Federal Court of Australia, *Annual Report 2022–23* (2023) 77.

56. A native title holder may argue that the NNTT should dismiss an application for a future act determination because another party has not negotiated in good faith. If the NNTT determines that a party has not negotiated in good faith then the NNTT has no power to make a determination.[79]

57. Where the good faith requirement is met, the NNTT has the power to decide that the future act may be done (with or without conditions) or that it may not be done.[80] The NNTT has wide discretion as to the nature of any conditions as long as they are connected to 'the matters relevant to the inquiry'.[81] However, the *NTA* prohibits the NNTT from imposing a condition for payments worked out by reference to the amount of profits, any income derived, or things produced by a proponent.[82] These matters may nonetheless be agreed between the parties in the course of negotiations.[83]

58. The NNTT must consider the criteria set out in s 39 of the *NTA* when making a determination.[84] These include consideration of the act's impact on native title holders' rights and interests, and the act's potential benefit to the economy or public interest.[85] The NNTT has only made three determinations that a future act may not be done since the commencement of the *NTA* in 1994.[86] A decision by the NNTT that a future act cannot be done may be overruled by the Commonwealth Minister, though we are not aware of the Minister ever exercising this power.[87]

The expedited procedure

59. The expedited procedure is intended to provide a 'fast-tracked' process for the grant of certain kinds of mining tenements.[88] The expedited procedure is typically applied to the grant of exploration and prospecting licences.

60. When giving a section 29 notice, the government party may include a statement that it considers the expedited procedure applies to the proposed future act. If the native title holder does not object to the application of the expedited procedure, the government party may grant the tenement without taking any further steps in respect of native title.[89]

61. A native title holder may object to the application of the expedited procedure within four months of the notification day in the notice.[90] When determining an objection to the expedited procedure, the NNTT can decide that the expedited procedure applies or does not apply to the future act.[91] If the NNTT decides that the expedited procedure does not apply, the right to negotiate process must be followed.

79 *Native Title Act 1993* (Cth) 36(2); *Walley v Western Australia* (1996) 67 FCR 366.
80 *Native Title Act 1993* (Cth) s 38(1).
81 Bartlett (n 25) 664–5, citing *Downes v Gomeroi People* [2022] NNTTA 26 [268].
82 *Native Title Act 1993* (Cth) s 38(2).
83 Ibid s 33(1).
84 Ibid s 39.
85 Ibid.
86 These three determinations related to a total of six future acts.
87 *Native Title Act 1993* (Cth) s 42(2); Bartlett (n 25) 669.
88 Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) 190; Bartlett (n 25) 670–1.
89 *Native Title Act 1993* (Cth) s 32(2).
90 Ibid s 32(3).
91 Ibid s 32(4), (5).

62. When deciding an objection to the expedited procedure, the NNTT must consider whether the act is not likely to:

- 'interfere directly with the carrying on of the community or social activities' of the native title holders in relation to the land or waters concerned;[92]
- 'interfere with areas or sites of particular significance, in accordance with their traditions,' to the native title holders in relation to the land or water concerned;[93] or
- 'involve major disturbance … or create rights whose exercise is likely to involve major disturbance to any land or waters concerned'.[94]

63. Future acts notified under the expedited procedure have made up the majority of acts notified under s 29 of the *NTA* in recent years:

- 2,097 out of a total 2,465 (85%) in 2022–23; and
- 2,188 out of a total 2,468 (89%) in 2023–24.[95]

64. As outlined in **Table 3** below, the majority of objections to the application of the expedited procedure lodged with the NNTT in recent years related to future acts in Western Australia.

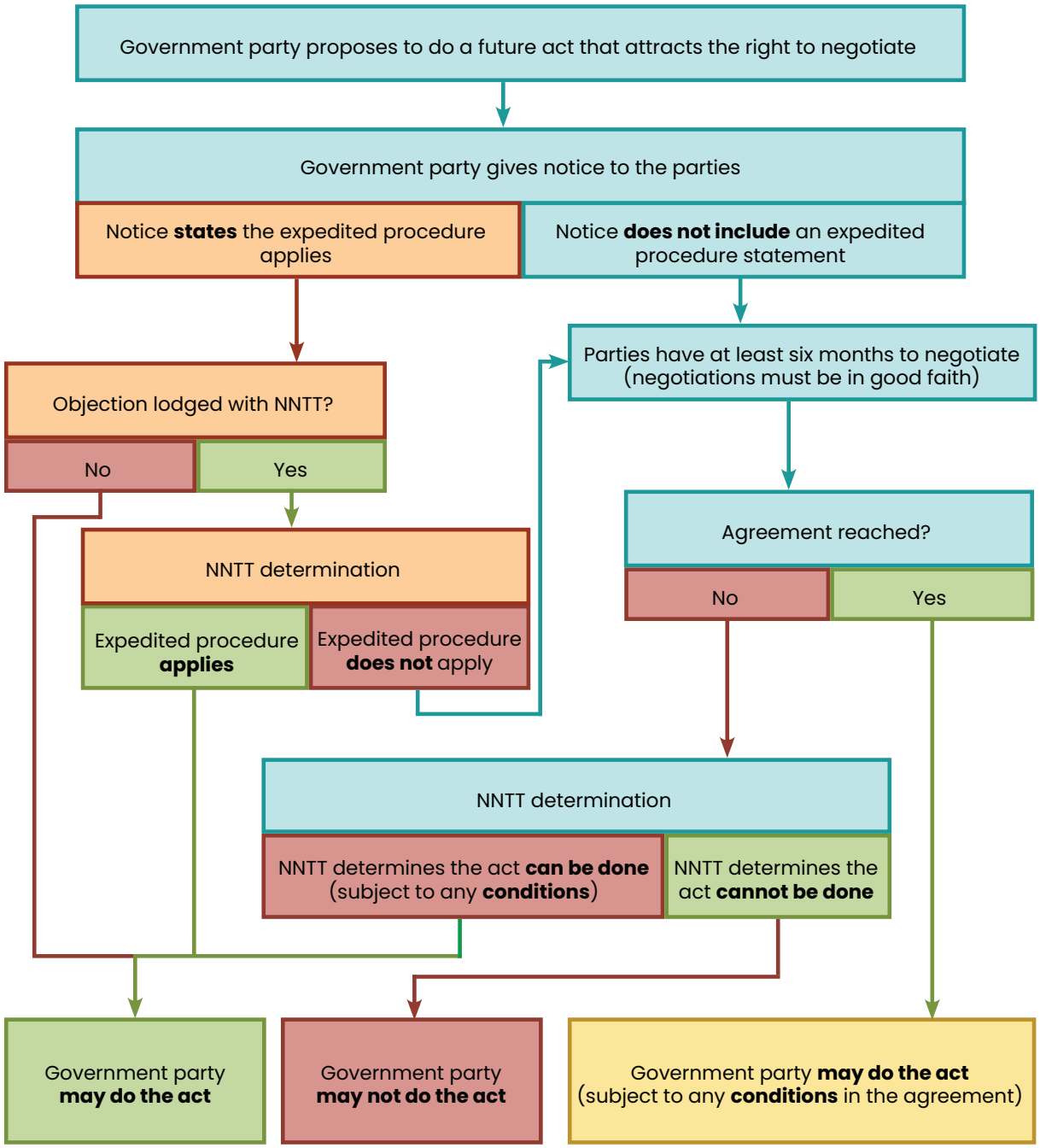
Table 3 Number of objections to the expedited procedure

Year	Northern Territory	Queensland	Western Australia	Total
2021–22[96]	27 (2%)	74 (4%)	1,669 (94%)	1,770
2022–23[97]	39 (3%)	58 (5%)	1,193 (92%)	1,290
2023–24[98]	34 (3%)	46 (4%)	1,017 (93%)	1,097

65. **Figure 2** below illustrates how the expedited procedure and right to negotiate processes interact.

92 Ibid s 237(a).
93 Ibid s 237(b).
94 Ibid s 237(c).
95 Data supplied by the NNTT. Data here refers to the number of future acts notified under s 29 of the *NTA*, and not the number of section 29 notices. Individual section 29 notices may sometimes relate to multiple future acts.
96 Federal Court of Australia, *Annual Report* 2021–22 (2022) 84.
97 Federal Court of Australia, *Annual Report* 2022–23 (n 78) 77.
98 Federal Court of Australia, *Annual Report* 2023–24 (n 78) 106.

Figure 2 The expedited procedure and right to negotiate



Compensation for interference with or extinguishment of native title

66. Native title holders under a positive determination are entitled to compensation for valid future acts.[99] This recognises the fact that future acts interfere with, or in some cases extinguish, native title rights and interests. Compensation may be monetary or non-monetary.[100]

99 *Native Title Act 1993* (Cth) ss 51, 53.
100 Ibid ss 51(5), (6).

67. Compensation is payable by the relevant state, territory, or Commonwealth government to whom a future act is 'attributable'.[101] Compensation is not automatically paid or payable upon the doing of a future act. Rather, native title holders must:

- agree compensation as part of future act negotiations; or
- apply to the Federal Court under Part 2 Division 5 of the *NTA* to obtain an award of compensation, which will determine the party liable to pay the compensation and the amount of the compensation payable.[102]

68. In practice, compensation applications have been rare and accessing compensation can be difficult.[103]

Other relevant laws and frameworks

69. Other legislation impacts how the future acts regime works in practice. This is because future acts under the *NTA* usually involve the grant of rights, permits, or approvals under other legislation, or otherwise are generally subject to other legislative frameworks that regulate how acts can be done. These include:

- legislation setting out approval processes and requirements, such as mining and Crown lands legislation;[104]
- state and territory Aboriginal and Torres Strait Islander cultural heritage legislation;[105] and
- Commonwealth Aboriginal and Torres Strait Islander cultural heritage legislation and environmental legislation.[106]

70. Legislation aimed at protecting Aboriginal and Torres Strait Islander cultural heritage varies substantially between each state and territory, and as between the states and territories and the Commonwealth. The Australian Government is currently working with the First Nations Heritage Protection Alliance 'to develop advice on reforms to strengthen First Nations cultural heritage protections'.[107]

71. Some states and territories have land rights or settlement regimes that are separate or alternatives to native title. These include the *Aboriginal Land Rights (Northern Territory) Act 1975* (Cth), the *Aboriginal Land Rights Act 1983* (NSW), and the *Traditional Owner Settlement Act 2010* (Vic) ('*Victorian Settlement Act*').

101 Ibid s 239.
102 Ibid ss 50(2), 61.
103 See [119]–[122] below.
104 For example, the *Mineral Resources Act 1989* (Qld); *Mineral Titles Act 2010* (NT); *Mining Act 1978* (WA). The Queensland Law Reform Commission is currently reviewing the processes used to decide contested applications for mining leases in Queensland under the *Mineral Resources Act 1989* (Qld) and associated environmental authorities under the *Environmental Protection Act 1994* (Qld). The QLRC's final report is due on 30 June 2025. See Queensland Law Reform Commission, 'Mining Lease Objections Review' <www.qlrc.qld.gov.au/reviews/mining-lease-objections-processes-review>.
105 *Heritage Act 2004* (ACT); *National Parks and Wildlife Act 1974* (NSW); *Northern Territory Aboriginal Sacred Sites Act 1989* (NT); *Aboriginal Cultural Heritage Act 2003* (Qld); *Torres Strait Islander Cultural Heritage Act 2003* (Qld); *Aboriginal Heritage Act 1972* (WA); *Aboriginal Heritage Act 1975* (Tas); *Aboriginal Heritage Act 1988* (SA); *Aboriginal Heritage Act 2006* (Vic).
106 *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth); *Environment Protection and Biodiversity Conservation Act 1999* (Cth).
107 See Partnership Agreement, *Agreement between the First Nations Heritage Protection Alliance and the Commonwealth of Australia to Establish a Co-Design Partnership on Cultural Heritage Reform* (June 2024).

What we have heard and found so far

72. This part summarises what we have heard so far through early consultations and found through research about the future acts regime. It is not comprehensive, but focused on the issues that have been most prominent in our consultations and research so far. We seek your feedback to help us complete the picture and identify what is most important to you.

73. This part also discusses some of the preliminary reform options that we have identified through our research. Although at this stage of the Inquiry we are focused on identifying issues, we invite you to share any ideas that you may have for reforming the future acts regime.

74. So far, we have consulted with a number of native title holders, representative bodies, legal practitioners, government and industry bodies, and other stakeholders. We are very grateful to them for sharing their experiences with us, and although this summary does not reflect the full extent of information shared with us, we will take it into account as we develop proposals for reform. We will continue to consult broadly throughout the Inquiry.

75. We know that a lot has already been said about native title and the future acts regime. To help identify key issues and to reduce the need for stakeholders to repeat themselves, we have reviewed recommendations made in several recent reports and ideas contained in submissions that relate to the future acts regime. We have also reviewed some of the reports and submissions relating to Bills introduced to Parliament that would have amended the *NTA*, but which were not passed. **Appendix A** to this Issues Paper contains a list of the reports, other papers, and Bills that we have reviewed.

Key issues: Questions 1–3

Question 1 What are the most important issues to consider for reform in the future acts regime? If you have had negative experiences, we would like to hear about them and what did not work well.

Question 2 Are there any important issues with how the future acts regime currently operates that we have not identified in this Issues Paper?

Question 3 Are there any aspects of the future acts regime that work well? If you have had positive experiences, we would like to hear about them and why they were positive.

When responding to **Questions 1–3**, you may wish to consider the issues summarised here and discussed in further detail below:

a. **Resourcing and capacity** constraints are significant barriers to meaningful participation. This can be true for both native title parties and proponents.

b. While **agreement-making** can have important benefits, its success in reaching an equitable outcome can depend on the parties involved and resources available to them. Bargaining power is often uneven and weighted in favour of proponents.

c. The strength of **procedural rights** does not always align with the potential impact that some categories of future acts may have on native title rights and interests. Additionally, there are few, if any, legal consequences for non-compliance with the requirements of the future acts regime.

d. The **right to negotiate** applies to only limited future acts and the six-month negotiation window may limit its effectiveness. It can be difficult to satisfy the onus of proof that a party has not negotiated in **good faith**.

e. The **expedited procedure** is problematic, particularly in how it intersects with state and territory Aboriginal and Torres Strait Islander cultural heritage laws.

f. **Future act determinations** have predominately been in favour of the future act being done.

g. It is difficult for native title holders to obtain **timely and accessible compensation**.

h. **Alternative regimes** offer a point of comparison to the future acts regime, but experiences are mixed.

i. The interaction between the future acts regime and **other legislative regimes** is confusing.

j. The future acts regime does not appear to achieve its **goals** as stated in the preamble to the *Native Title Act 1993* (Cth).

k. **Disapplying the *Racial Discrimination Act 1975* (Cth)** may not be needed or appropriate for a fair and balanced future acts regime.

l. The future acts regime is **complex**.

m. A lack of **data** and its centralised collection makes it difficult to assess how the future acts regime is operating.

n. The current categories of future acts may not be fit for purpose for **new and emerging industries**.

76. This section outlines some of the key issues identified through our consultations and research so far.

77. We know that experiences can vary greatly between, and within, different states and territories. When responding to our questions, we welcome your feedback on whether your experiences reflect the broad issues discussed here, or issues that may be unique to your region.

Resourcing and capacity are significant barriers to meaningful participation

78. There are significant disparities in resources available to parties engaging in the future acts regime. Here, resources and capacity refer to more than financial resources: they also include access to legal advice, familiarity with the regime, and understanding of the regime. Insufficient resources and capacity can affect native title parties as well as smaller or non-commercial proponents. Under-resourced parties are unable to engage meaningfully with the future acts regime.

79. PBCs have reported that the PBC Basic Support funding available from the Commonwealth's National Indigenous Australians Agency, intended to assist PBCs to meet their corporate and operational obligations, is not sufficient to fund these basic needs. We have also heard that where PBCs are able to charge fees (including under s 60AB of the *NTA*) or recover expenditure for future acts work, the amounts are often insufficient to cover the full cost of the work. Some PBCs therefore have no funding or only minimal funding to support their participation in future acts processes. This, in turn, places pressure on PBC directors and other community members to use their own time and resources to make up for the shortfall.

80. Some proponents also report that their experience with the future acts regime, including the expedited procedure, is unnecessarily time-consuming, expensive, complex, and disrupts their core business.

81. It is common for native title parties to request proponents to fund meetings for negotiations, project approval, and agreement-making. Some native title parties may be unable to meaningfully engage, or may refuse to engage, in negotiations unless this request is granted. We have heard

that large, commercial proponents are more likely to have the resources to agree to requests for funding and may feel a greater obligation to do so to meet community expectations (that is, to maintain their social licence to operate). Other proponents and government parties may not have the resources to do so.

82. The future acts regime does not provide a process for resolving situations where a native title party is unable to participate meaningfully without support from government or a proponent. This limits native title parties' ability to exercise their rights and can create uncertainty for proponents and government parties about whether a future act can be done validly. This makes the regime inefficient.

83. Where native title parties cannot participate in some future acts processes, the future acts regime does not achieve its aim of ensuring that native title holders are able to enjoy fully their rights and interests.[108]

84. There are capacity and resourcing issues more broadly in the native title sector. First Nations people who participate in native title processes can experience significant fatigue. In this context, it is important to recognise the considerable processes that First Nations people must undergo to obtain a native title determination. The expectations and burden placed on a PBC, its directors, and common law holders to participate in future acts processes — after obtaining a determination — can be a significant source of additional fatigue.

85. We have also heard of the propensity for people working in the native title sector, including lawyers, to suffer burnout. This can mean a higher turnover of people working in the field and loss of expertise when it comes to dealing with the complexity of native title law (including the future acts regime). This, in turn, affects the quality of legal advice and assistance available to parties to effectively engage with future acts processes.

86. These considerations point to the importance of taking a whole-of-system approach when considering reforms to the future acts regime.

Agreement-making is important, but success depends on a number of factors

87. Agreement-making here refers to agreements negotiated under the future acts regime. This includes both ILUAs and section 31 agreements. Though ILUAs and section 31 agreements are negotiated under different provisions of the regime, many of the issues we have identified in relation to agreement-making are relevant to both kinds of agreements.

88. We have heard that there are several benefits to parties entering an agreement for future acts:

- ILUAs and section 31 agreements are the only part of the future acts regime that require consent from native title parties. In this sense, they are the only mechanisms in the future acts regime that have the potential to reflect the principles of FPIC.
- ILUAs provide a framework to build an ongoing relationship between project proponents (or government departments) and native title parties. For future acts that attract only procedural rights, negotiating an ILUA instead of using other future acts provisions can be a more constructive way to engage with native title parties.
- Once an ILUA is registered or a section 31 agreement is in place, financial and non-financial benefits can flow immediately. These are the only timely compensation opportunities provided by the future acts regime.

108 *Native Title Act 1993* (Cth) preamble.

89. However, native title parties report that bargaining power is often uneven and weighted in favour of proponents. This asymmetry is informed by several related factors, including:

- the relative resources available to each party and their ability to access information;
- the statistical likelihood that the NNTT will determine that a future act can be done if the parties cannot reach agreement;
- the potential for fallback alternatives (such as compulsory acquisition) to be used, where available, if the parties cannot reach agreement; and
- pressure to secure benefits in negotiations, such as profit-sharing conditions, because the NNTT cannot impose profit-sharing conditions in a determination.

90. There are no minimum prescribed content standards for agreements. Because agreements are generally confidential to the parties, there is no way to evaluate the terms of particular agreements and whether they meet applicable benchmarks of the time for agreements of that kind. The only means for assessing whether an agreement meets benchmarks is based on the prior experience of the native title party, their legal and other advisers (increasingly including economic advisers), and limited publicly available data.

91. The effectiveness of the working relationship between native title parties and project proponents largely depends on the policies and available resources of the proponent, including its commitment to going beyond minimum legal requirements. This means that whether an agreement is in accordance with or exceeds applicable compliance requirements may be determined by factors extraneous to the *NTA*.

92. Some stakeholders have observed that there are barriers to building the capacity of native title parties, particularly PBCs, meaning they are often required to engage a significant amount of external assistance. Where this external assistance is inadequate — for example, because an adviser has not communicated key information to the native title party, or an adviser lacks relevant expertise — it can hinder relationship building between native title parties and project proponents when negotiating agreements.

93. We have heard that some types of clauses that may be included in ILUAs are problematic. These include 'gag' clauses, confidentiality clauses, entire agreement clauses, and clauses that may prevent or inhibit native title parties from exercising their rights under other laws, such as Aboriginal and Torres Strait Islander cultural heritage laws.

94. Aside from asserting that a party has not negotiated in good faith, which only arises if the future act triggers the right to negotiate, there is no mechanism to require that negotiations be conducted in any particular manner, including in good faith or otherwise. There is also no formal mechanism under the *NTA* for monitoring the implementation of agreements. This means it is not possible to objectively assess whether the terms of an agreement are in accordance with prevailing benchmarks or to monitor whether parties are satisfying their obligations under an agreement.

95. Enforcing an agreement, or seeking a remedy for non-compliance, falls entirely on the native title party through legal action for breach of contract. A proponent's non-compliance with an agreement does not generally have any consequences for the validity or lawfulness of the future act. There is also no obligation on a proponent to revisit the terms of an agreement at any stage, including to assess whether the impacts of the future act on native title rights and interests differ from what had been anticipated at the time any compensation was negotiated.

96. Some native title parties encounter difficulties in decision-making, including reaching agreement where consensus is a part of the group's decision-making processes. This can create uncertainty for proponents and government parties. For native title parties, difficulties in reaching

agreement within the group about a particular future act may risk not concluding a beneficial agreement with a proponent and increase the risk of the proponent seeking an arbitrated outcome (and the native title party missing out on the benefits the proponent had been prepared to grant under an agreement).

97. Identifying the correct native title party to authorise and enter into an ILUA can also be problematic. If there is a determination that native title exists, the PBC for the area is the correct party. However, if there is not yet a native title determination or claim, it can be difficult to say whether the native title party entering the ILUA includes the group of people ultimately entitled to native title for that area. We have also heard about difficulties during the negotiation process where there is not yet a determination (or claim), including people being excluded from negotiations.

98. Section 199C of the *NTA* requires that an ILUA be deregistered if any of the group of people ultimately entitled to native title did not authorise entry into the ILUA. While this mitigates the risk that attach to ILUAs being made between incorrect parties, there can still be uncertainty for all parties to an ILUA about its status following a determination or if a claim is discontinued or dismissed. This includes uncertainty about management and distribution of compensation paid prior to the determination and whether a further compensation liability may arise for the future acts consented to under the ILUA after a determination is made.

Some procedural rights are weak

99. The content of procedural rights conferred on native title holders under the *NTA* depends on the provision that applies to the type of future act. The content of procedural rights is therefore not informed by, or tied to, the anticipated impact of a particular future act on the native title rights and interests in the area where the future act will be done. Put differently, the current future acts regime appears to assume that some future acts have lesser or more significant impacts than others, and that this is always the case (regardless of the particular future act, the rights involved, the scale of the project, or area).

100. There are few, if any, legal consequences for proponents and government parties if procedural rights are not afforded, or not properly afforded, to native title holders. The Full Federal Court has held that a failure to comply with the provisions that afford procedural rights to native title parties (for example, failing to give notice and an opportunity to comment) will not result in the future act being done invalidly under the *NTA*.[109] This lack of consequences, combined with the minimal rights of notice and opportunity to comment, means that native title holders may consider the *NTA* does not provide any meaningful role for them in mitigating the impacts of a future act on their native title rights and interests. Native title holders may therefore be less likely to participate in these processes, even where the proponent or government elects to comply with procedural requirements.

101. Non-compliance with the future acts regime can have important consequences for native title holders. For example, failure to give notice of a future act may deny native title holders an opportunity to ensure compliance with cultural heritage laws and maintain records for the purpose of obtaining compensation.

102. The quality of future acts notices given to native title holders can vary greatly. For example, notices may contain inadequate or imprecise descriptions of the nature of the future act and the area it may impact. Additionally, some notices may be issued for the entirety of a state or territory (or other very large area), making it difficult for native title holders to assess how their native title rights and interests may be impacted. This can mean that rights to notice and opportunity

109 *BHP Billiton Nickel West Pty Ltd v KN (Deceased) (Tjiwarl and Tjiwarl #2)* (2018) 258 FCR 521. See also *Lardil Peoples v Queensland* (2001) 108 FCR 453. Cf Richard Bartlett, 'Undermining the Objects of the Native Title Act: The Debasing of the Future Act Process by the Federal Court' (2019) 46(1) *University of Western Australia Law Review* 161.

to comment are effectively meaningless or difficult to exercise. Responding to imprecise notices can also impose a significant burden on representative bodies and PBCs, particularly those that receive a large volume of notices.

103. Where the future acts regime gives native title holders a right to comment, it does not also require comments to be taken into account by the decision-maker in considering whether to proceed to grant the future act (with or without variations or conditions to address any concerns expressed by native title holders). There is also no requirement for decision-makers to provide reasons for their decision or explain how any comments they receive from native title holders are taken into account.

Limitations on the right to negotiate

104. The future acts regime does not expressly give native title holders a right of veto over any future acts (although as discussed above, an effective right of veto may arise if an ILUA is the only means of validly doing a future act).[110] The right to negotiate, which applies to future acts such as the grant of a mining lease, therefore confers the highest level of protection over native title rights and interests. Given the potential impact of some future acts on native title rights and interests, there is a question as to whether the right to negotiate should be extended to other kinds of future acts beyond mining interests.

105. The onus of proof to establish that a party has not negotiated in good faith under the right to negotiate is on the party asserting that failure. In practice, this can place significant resourcing and costs burdens on a native title holder to identify and produce the requisite evidence.[111] A lack of resources may therefore prevent a native title holder from applying to the NNTT where another party has not negotiated in good faith.

106. When the right to negotiate applies, the *NTA* provides a six-month window in which parties must negotiate before seeking a determination by the NNTT. Some stakeholders say that this time period is too short to negotiate fair agreement terms, particularly for complex projects. It also means that proponents may wait and seek a determination of the NNTT shortly after the good faith negotiation period has expired. However, because of limits on the NNTT's powers, negotiating an agreement is the only way for certain benefits to be conferred on native title holders (for example, a profit-sharing arrangement). The timeframe therefore places pressure on native title holders to reach agreement, which can mean entering into agreements that may contain unfair terms.

107. In the course of negotiations, proponents sometimes require certain compensation structures, such as trusts, for the purpose of managing compensation under an agreement. These structures may impose overly restrictive conditions on native title holders' access to compensation, thereby limiting the group's right to self-determination.

The expedited procedure is problematic

108. The expedited procedure is intended to fast-track future acts that the *NTA* deems as having only minimal impacts on native title. It aims to reduce the burden on proponents, governments, and native title holders for this class of future act where the right to negotiate would otherwise apply. It is unclear whether, in practice, the expedited procedure achieves this objective.

109. We have heard that there are issues with the quality of expedited procedure notices issued, including that they are difficult to understand and do not include sufficiently specific information about a proposed act. Expedited procedure notifications are sometimes issued over the same

110 See above [43].

111 While s 31 of the *NTA* requires all negotiation parties to negotiate in good faith, s 36(2) only applies in circumstances where a negotiation party other than a native title party does not negotiate in good faith.

areas where the NNTT has previously upheld the native title holders' objections. In these cases, native title holders have to go through the objection process afresh, including collating evidence to substantiate why the expedited procedure should not apply.

110. It is not clear whether governments have systems for tracking or understanding the cumulative impact of future acts on native title rights and interests, and for taking this into account when deciding whether the expedited procedure criteria have been met.

111. Some native title holders report being overwhelmed by the volume of expedited procedure notices they receive. Given resourcing constraints, they are unable to meaningfully consider or engage with the high volume of notices received.

112. To successfully object to the expedited procedure in practice, a native title holder must give the NNTT sufficient evidence to demonstrate that the criteria for the expedited procedure to apply have not been met. One consequence of resourcing constraints and the high volume of notifications is that, having objected, a native title holder may be unable to file evidence and submissions. The NNTT therefore routinely decides expedited procedure objections without any evidence or submissions being filed by the native title holder.

113. To uphold an objection to the expedited procedure, the NNTT requires evidence of specific sites of particular significance that fall within the area of the future act. However, it may be culturally impermissible for native title holders to disclose information regarding the cultural significance of sites, including by providing that information to proponents or filing a report with the NNTT. Such evidence may also be difficult to gather. For example, information about sacred sites may be closely held by a limited number of traditional owners and sites may be remote and difficult to reach.

114. Objections to the expedited procedure make up a large portion of the NNTT's future acts workload.[112] As outlined in **Table 4** below, the proportion of objections to the application of the expedited procedure has been higher in recent years compared to the overall proportion since the *NTA* commenced in 1994.[113]

Table 4 Objections to the expedited procedure

Period	Percentage of objections for future acts notified under s 29 of the *NTA* including an expedited procedure statement[114]
1994–2024	35%
2022–23	54%
2023–24	48%

112 For example, in 2023–24, 1,097 expedited procedure objections, eight future act determination applications, and 47 ILUAs for registration were lodged with the NNTT: Federal Court of Australia, *Annual Report 2023–24* (n 78) 106–7.

113 Cf Michael Lucas, 'The Future Act Regime in Australian Native Title: Data Analysis, Trends, and Insights' (2024) 51(2) *University of Western Australia Law Review* 249.

114 Data supplied by the NNTT. The figure for 2022–23 represents the number of objections where the four-month period for objections fell within the 2022–23 financial year. This does not mean that these future acts were notified in that year: some may have been notified in the previous financial year, but the closing date for an objection fell in the 2022–23 financial year.

Future act determinations are predominately in favour of the future act being done

115. To date, the NNTT has determined in almost all arbitral determinations that a future act can be done. This appears to be for a variety of reasons, including:

- The NNTT is bound to consider mandatory statutory criteria equally and apply strict legal tests.
- In some cases, native title holders are not sufficiently resourced to put on evidence and submissions for the NNTT to consider.

116. The statistical likelihood that the NNTT will determine that an act may be done increases pressure on native title holders to reach agreements.

117. The NNTT cannot impose profit-sharing conditions in a determination. In general, the NNTT has taken the position that it cannot determine the amount of compensation (as that is a matter for the Federal Court). This has consequences for parties in agreement-making, because the only mechanism for parties to obtain profit-sharing conditions is by reaching agreement.

118. There is no mechanism which allows merits review of a decision made by the NNTT.[115] This means that parties cannot challenge the substantive merits of decisions made by the NNTT.

Compensation

119. While the *NTA* provides for compensation for valid future acts, native title parties are required to bring a separate application for compensation in the Federal Court to confirm the entitlement (rather than compensation being assessed and payable before or upon the act being done). When making a future act determination, the NNTT will not determine the amount of compensation payable for the future act. This means compensation is not paid 'up-front'. This is typically not the case in respect of other property rights and legal frameworks (such as mining and compulsory acquisition laws), for which compensation is usually paid upon a right being impacted or taken away.

120. PBCs generally have limited capacity to bring compensation claims and representative bodies do not currently have the resources to support such claims.

121. Further, the *NTA* does not expressly provide for compensation or damages to be payable for invalid future acts.

122. Relatedly, we have heard that the operation of s 60AB of the *NTA*, which provides for a PBC to recover particular costs, requires clarification and should be extended to the expedited procedure.

Alternative regimes offer a point of comparison

123. There are alternative regimes in some parts of Australia that deal with future acts — for example, the *Victorian Settlement Act* and the Tjiwarl compensation settlement in Western Australia.[116] Where land is held as Aboriginal land granted under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), the future acts regime does not apply. South Australia also has an alternative right to negotiate regime under Part 9B of the *Mining Act 1971* (SA).[117]

115 Appeals on questions of law are permitted to the Federal Court in respect of right to negotiate applications: see *Native Title Act 1993* (Cth) s 169(1).
116 See Indigenous Land Use Agreement*, Tjiwarl Palyakuwa: Tiiwa Kuwarri Yampa Ngula* (22 May 2023).
117 See also *Opal Mining Act 1995* (SA) pt 7; *Land Acquisition Act 1969* (SA) pt 4. These have been endorsed as 'alternative state provisions' under s 43 of the *NTA*.

124. Some states and territories are at various stages of beginning a treaty negotiation process, which may also potentially result in alternative frameworks.

125. Experiences of alternative regimes are mixed. We are interested to understand what works well in these alternative regimes, and what does not.

126. For example, Land Use Activity Agreements in Victoria (which are one of the agreements included in a comprehensive settlement under the *Victorian Settlement Act*) replace the future acts regime. Compensation is negotiable prior to the doing of a 'land use activity'. This addresses one of the criticisms of the future acts regime, in which compensation is generally payable after a future act has been done and only once the native title parties have applied to the Federal Court for a compensation determination. Payment of compensation up-front requires the government to take account of this liability in the process of deciding whether to proceed with a particular act or not, rather than deferring the liability to a future time or government.

Interaction with other legislative regimes is confusing

127. The future acts regime interacts with state and territory Aboriginal and Torres Strait Islander cultural heritage legislation, as well as other Commonwealth legislation.[118] The interactions between different pieces of legislation can be confusing, create inefficiency and duplication, and produce unnecessary complexity.

128. There are significant differences in Aboriginal and Torres Strait Islander cultural heritage legislation between jurisdictions. This means that there is no national, standard approach. Rather, Commonwealth laws are generally applied only at the discretion of the Minister and in cases where there has been a perceived shortcoming under the applicable state or territory law.

The future acts regime does not appear to achieve its goals

129. There is inconsistency between the stated intent of the future acts regime and how it operates in practice.

130. The *NTA* is intended to help secure the 'adequate advancement and protection of Aboriginal peoples and Torres Strait Islander peoples'.[119] The *NTA* recognises the link between native title rights and interests and improved social, cultural, and economic outcomes for First Nations people. The *NTA*'s preamble expresses the importance of the future acts regime in ensuring that native title holders are able to fully enjoy their rights and interests and while also ensuring that the broader Australian community has certainty that particular acts can be done validly. The preamble also expresses that reasonable efforts to reach agreement with native title holders should be required through a special right to negotiate for future acts that could also be done over freehold land. We have heard that, in practice, some parts of the future acts regime limit the agency of native title holders and fail to ensure that native title holders are able to fully enjoy their rights and interests.

131. As noted above, the policy intent underpinning the *NT Amendment Act* in 1998 was to reform the future acts regime for greater workability and certainty.[120] However, we have heard from native title holders and other stakeholders that some aspects of the future acts regime are not working well. The expedited procedure provides one example.[121]

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118 See, eg, *Environment Protection and Biodiversity Conservation Act 1999* (Cth); *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth).

119 *Native Title Act 1993* (Cth) preamble.

120 Commonwealth, *Parliamentary Debates*, House of Representatives, 6 December 1997, 12337 (John Howard).

121 See [108]–[114] above.

Disapplying the Racial Discrimination Act

132. The *RDA* prohibits discrimination on the basis of 'race, colour, descent or national or ethnic origin' and implements the *International Convention on the Elimination of all Forms of Racial Discrimination* in Australian law.[122] Section 7 of the *NTA*, as amended by the *NT Amendment Act*, has the effect of disapplying legal protections contained in the *RDA*.[123] This means that, generally speaking, the future acts regime is not subject to the general standards of equality and non-discrimination contained in the *RDA*.

Other issues

133. The future acts regime, and the legislation that creates it, is complex. This can make the regime difficult to understand, particularly for people who are not lawyers. Complexity also makes it difficult for lawyers to explain the regime and advise their clients in a way that is easy to understand.

134. It is not clear whether governments keep centralised records of future acts. This means native title parties must independently track their rights (including procedural rights or rights to seek compensation) for future acts on their Country. The lack of a centralised record of future acts also presents challenges for whole of Country compensation claims.

135. Similarly, it is not clear whether state and territory government departments have central oversight mechanisms for complying with the future acts regime. This can mean native title parties have different experiences with different government departments.

136. These issues speak to a general lack of transparent data about the future acts regime. This makes it difficult to understand the full scale of future acts activity and assess how the future acts regime is operating.

137. The current categorisation of future acts may not be fit for purpose for new and emerging industries, such as critical minerals and renewable energy. It is unclear how these new industries should be incorporated into the future acts regime.

122 *Racial Discrimination Act 1975* (Cth) s 9.
123 See, eg, Bartlett (n 25) 59–60, 561–63.

Potential reform options: Questions 4 and 5

Question 4 Do you have any ideas for how to reform the future acts regime?

You may wish to consider how the future acts regime could be reformed to:

a. make it work better, more equally, and more fairly;

b. make it more efficient to reduce the time and cost of compliance for all parties;

c. reflect fundamental principles of human rights, such as equality before the law and free, prior, and informed consent;

d. support fair negotiations and encourage proponents and native title groups to work collaboratively, including options for native title groups, proponents, and governments to share in the benefits of development on native title land; and

e. strengthen data collection and appropriate data transparency.

Question 5 What would an ideal future acts regime look like?

138. We invite you to share any ideas that you have for reform of the future acts regime. As well as considering the matters outlined in **Question 4** above, you may find it helpful to look at the full Terms of Reference.

139. We would also like to hear what you think an ideal future acts regime would look like (**Question 5**). In other words, what would make the best possible future acts regime? What do you think is the best way for realising the social and economic benefits of future acts in a way that respects the rights and interests of native title holders?

140. We have reviewed numerous earlier reports and inquiries to see what has already been said about native title and the future acts regime. Through those processes, people have suggested ways to reform the future acts regime, but the suggested changes have not been implemented. We have set out below some of the suggestions for reform. Some of these suggestions have been made multiple times and by multiple people.[124] The ideas include:

- changing the way PBCs are funded and resourced to make sure they can meet their cultural, administrative, and legal obligations;[125]
- making sure native title legal services have resources and funding that are commensurate with their role and responsibilities;[126]
- extending the time period for parties to negotiate an agreement under the right to negotiate process (for example, increasing from six months to eight months);[127]

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124 We have included in the following footnotes a sample of the Bills, inquiry reports, and submissions that suggest these ideas for reform. The footnotes do not include every time the idea has been raised.

125 Joint Standing Committee on Northern Australia, Parliament of Australia (n 8) rec 7; Joint Standing Committee on Northern Australia, Parliament of Australia, *The Engagement of Traditional Owners in the Economic Development of Northern Australia* (2022) recs 1 and 2. See also Australian Human Rights Commission, *Discussion Paper: Leading Practice Agreements: Maximising Outcomes from Native Title Benefits* (2010) rec 2. The Australian Human Rights Commission has raised this issue in their Annual Native Title Reports in 2005, 2008, 2012, 2016, and 2024. Some people have pointed out that the native title and cultural heritage systems usually require First Nations people and communities to do a lot of unpaid labour to fulfil their responsibilities to Country and culture: see, eg, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Women in Native Title: Native Title Report 2024* (2024) rec 13.

126 The Australian Human Rights Commission raised this in their Annual Native Title Reports in 2001, 2009, 2010, and 2016. Some people have recommended reviewing whether PBCs, native title representative bodies, and native title service providers are able to fulfil their legal and cultural responsibilities and functions: Aboriginal and Torres Strait Islander Social Justice Commissioner (n 125) rec 11.

127 Native Title Amendment Bill 2012 (Cth) sch 2 cl 7. Several submissions to the Parliamentary Committees that considered this Bill supported the suggestion.

- more clearly defining what it means to 'negotiate in good faith' by amending the *NTA*;[128]
- requiring parties to show that they have negotiated in good faith before they can ask the NNTT to make a future act determination;[129]
- allowing the NNTT to decide whether to impose conditions on a future act determination requiring a proponent to provide native title holders with royalty payments or a share of the profits of a project;[130]
- giving native title holders a right to veto certain future acts;[131]
- creating an independent body to review ILUAs and other agreements in the future acts regime;[132]
- preventing parties from including certain clauses in ILUAs and other agreements in the future acts regime (for example, 'gag clauses' and clauses that prevent First Nations people from accessing protections under Aboriginal and Torres Strait Islander cultural heritage legislation);[133]
- requiring the NNTT to publish guidance about when the expedited procedure will apply;[134]
- expanding the range of future acts that attract the right to negotiate to include:
    - sea country (offshore places);[135]
    - land that is being compulsorily acquired by a government;[136] and
    - future acts related to water in onshore places (such as groundwater, rivers, and lakes);[137]

128 Ibid sch 2, cl 6; Native Title Amendment (Reform) Bill (No 1) 2012 (Cth) sch 1 cl 4; Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Native Title Amendment Bill 2012 [Provisions]* (2013); Aboriginal and Torres Strait Islander Social Justice Commissioner (n 125) rec 24; Australian Human Rights Commission (n 125) rec 5.

129 Native Title Amendment (Reform) Bill (No 1) 2012 (Cth) sch 1 cl 10. A subsequent amendment Bill proposed a slightly altered onus. In that Bill, if one party said that the other party had not negotiated in good faith, it would be up to that other party to show the Tribunal that they did negotiate in good faith: Native Title Amendment Bill 2012 (Cth) sch 2, cl 8. Parliament did not pass either Bill. See also Australian Human Rights Commission (n 125) rec 6.

130 See, eg, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Native Title Report 2009* (Report No 2/2010, 2010) rec 3.15; National Native Title Council, Submission No 4 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Native Title Legislation Amendment Bill 2019 [Provisions]* (2019); Goldfields Land and Sea Council, Submission No 10 to House Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Native Title Amendment Bill 2012* (January 2013).

131 See, eg, Samantha Hepburn, Submission No 54 to Joint Standing Committee on Northern Australia, Parliament of Australia, *Inquiry into the Destruction of 46,000 Year Old Caves at the Juukan Gorge in the Pilbara Region of Western Australia* (2020); National Native Title Council, Submission No DR70 to the Productivity Commission, Australian Government, *Resources Sector Regulation Study* (12 August 2020). Some people have also suggested that the right to veto should be given to both native title holders and First Nations people with interests in heritage but who do not hold native title: see Kate Galloway, Submission No 27 to Joint Standing Committee on Northern Australia, Parliament of Australia, *Inquiry into the Destruction of 46,000 Year Old Caves at the Juukan Gorge in the Pilbara Region of Western Australia* (2020).

132 See, eg, Wintawari Guruma Aboriginal Corporation, Submission No 50 to Joint Standing Committee on Northern Australia, Parliament of Australia, *Inquiry into the Destruction of 46,000 Year Old Caves at the Juukan Gorge in the Pilbara Region of Western Australia*; Marcia Langton, Submission No 103.1 to Joint Standing Committee on Northern Australia, Parliament of Australia, *Inquiry into the Destruction of 46,000 Year Old Caves at the Juukan Gorge in the Pilbara Region of Western Australia* (2020). The Australian Human Rights Commission has previously recommended that the Australian Government work with native title parties to create criteria to evaluate and monitor these types of agreements: Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Native Title Report 2009* (n 130) rec 3.22.

133 Joint Standing Committee on Northern Australia, Parliament of Australia (n 8) recs 1, 4. See also Joint Standing Committee on Northern Australia, Parliament of Australia (n 125) rec 9.

134 Productivity Commission, *Resources Sector Regulation: Productivity Study Report* (2020) rec 5.1.

135 Native Title Amendment (Reform) Bill (No 1) 2012 (Cth) sch 1 cl 2; Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Native Title Report 2009* (n 130) rec 3.15. As an alternative, some people have suggested that there should be procedural rights for future acts in offshore areas: see Aboriginal and Torres Strait Islander Social Justice Commissioner (n 125) rec 25.

136 Aboriginal and Torres Strait Islander Social Justice Commissioner (n 125) rec 23.

137 Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Native Title Report 2008* (Report No 2/2009, 2009) rec 6.3.

- making future acts that do not comply with the applicable procedural requirements invalid;[138]
- making the *NTA* less complex;[139] and
- more clearly incorporating international law principles such as FPIC in the future acts regime.[140]

138 See, eg, Bartlett (n 109).

139 See, eg, Puutu Kunti Kurrama and Pinikura people, Submission No 129 to Joint Standing Committee on Northern Australia, Parliament of Australia, *Inquiry into the Destruction of 46,000 Year Old Caves at the Juukan Gorge in the Pilbara Region of Western Australia* (2020).

140 Native Title Amendment (Reform) Bill 2011 (Cth) sch 1 cl 1. The Australian Human Rights Commission made this suggestion in their Annual Native Title Reports in 2008, 2010, 2011, 2012, and 2024. See also Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Inquiry into the Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia* (2023) rec 1; Joint Standing Committee on Northern Australia, Parliament of Australia (n 125) rec 9; Joint Standing Committee on Northern Australia, Parliament of Australia (n 8) rec 4.

Appendix A List of earlier reports and papers

141. In preparing this Issues Paper, we have reviewed a number of reports and papers. These include:

- the Australian Human Rights Commission ('AHRC') Aboriginal and Torres Strait Islander Social Justice Commissioner's *Women in Native Title: Native Title Report 2024*;[141]
- the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs' 2023 report *Inquiry into the application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia*;[142]
- the former Joint Standing Committee on Northern Australia's 2022 Report *Opportunities and Challenges of the Engagement of Traditional Owners in the Economic Development of Northern Australia*;[143]
- the former Joint Standing Committee on Northern Australia's 2021 *A Way Forward: Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge*, and submissions to that inquiry;[144]
- the Productivity Commission's 2020 Resource Sector Regulation Study, and some submissions to the Commission;[145]
- the ALRC's 2015 *Connection to Country: Review of the Native Title Act 1993 (Cth)* Report;[146]
- the AHRC's 2010 Discussion Paper *Leading Practice Agreements: Maximising Outcomes from Native Title Benefits*;[147]
- reports by Parliamentary Committees relating to draft legislation, some of which did not become law, and some submissions to those Committees;[148]

141 Aboriginal and Torres Strait Islander Social Justice Commissioner (n 125).
142 Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia (n 140).
143 Joint Standing Committee on Northern Australia, Parliament of Australia (n 125).
144 Joint Standing Committee on Northern Australia, Parliament of Australia (n 8).
145 Productivity Commission (n 134).
146 Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)* (2015).
147 Australian Human Rights Commission (n 125).
148 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Native Title Legislation Amendment Bill 2019 [Provisions]* (2020); Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 [Provisions]* (2017); Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Native Title Amendment Bill 2012 [Provisions]* (n 128); Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Native Title Amendment (Reform) Bill 2011* (2011); House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Advisory Report: Native Title Amendment Bill 2012* (2013); Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Native Title Amendment Bill (No. 2) 2009 [Provisions]* (2010); Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Native Title Amendment Bill 2009 [Provisions]* (2009); Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Native Title Amendment (Technical Amendments) Bill 2007 [Provisions]* (2007); Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Native Title Amendment Bill 2006 [Provisions]* (2007); Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Parliament of Australia, *Effectiveness of the National Native Title Tribunal* (2003); Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Parliament of Australia, *Consistency of the Native Title Amendment Act 1998 with Australia's International Obligations under the Convention on the Elimination of All Forms of Racial Discrimination* (2000).

- the AHRC's annual native title reports;[149]
- reports by Australian Government departments about the native title system;[150]
- reports commissioned by the Australian Government about native title organisations.[151]

142. We have also reviewed some Bills that have been introduced to Parliament but were not passed. These include:

- Native Title Legislation Amendment Bill 2019 (Cth);
- Native Title Amendment Bill 2012 (Cth);
- Native Title Amendment (Reform) Bill (No 1) 2012 (Cth);[152] and
- Native Title Amendment (Reform) Bill 2011 (Cth).

143. We will continue to review these and other relevant reports during the Inquiry. We would welcome feedback on whether there are any other reports that we should also consider.

149 Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Social Justice and Native Title Report 2016* (2016); Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Social Justice and Native Title Report 2015* (2015); Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Social Justice and Native Title Report 2014* (2014); Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Social Justice and Native Title Report 2013* (2013); Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Native Title Report 2012* (2012); Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Native Title Report 2011* (2011); Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Native Title Report 2010* (Report No 2/2011, 2011); Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Native Title Report 2009* (n 130); Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Native Title Report 2008* (n 137); Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Native Title Report 2007* (Report No 2/2008, 2008); Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Native Title Report 2006* (Report No 2/2007, 2007); Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Native Title Report 2005* (Report No 4/2005, 2005); Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Native Title Report 2004* (2005); Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Native Title Report 2003* (2004); Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Native Title Report 2002* (2003); Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Native Title Report 2001* (2002); Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Native Title Report 2000* (2001); Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Native Title Report 1999* (Report No 1/2000, 2000); Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Native Title Report 1998* (1998); Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Native Title Report July 1996 – June 1997* (1997).

150 Attorney-General's Department (Cth), *Exposure Draft of Native Title Legislation Amendment Bill 2018: Public Consultation Paper* (2018); Attorney-General's Department (Cth), *Options Paper: Reforms to the Native Title Act 1993 (Cth)* (2017); Department of the Treasury (Cth), *Taxation of Native Title and Traditional Owner Benefits and Governance Working Group: Report to Government* (2013).

151 Nous Group, *Performance Reviews of Native Title Representative Bodies and Services Providers* (2021); Deloitte Access Economics, *Review of the Roles and Functions of Native Title Organisations* (March 2014).

152 Later reintroduced as the Native Title Amendment (Reform) Bill 2014 (Cth).