FNLRS
FIRST NATIONS
LEGAL & RESEARCH
SERVICES

FNLRS Responses to ALRC Future Acts Regime Review Issues Paper

1 First Nations Legal and Research Services

1.1 Introduction

First Nations Legal and Research Services (**FNLRS**) is the native title service provider performing the functions of a native title representative body (**NTRB**) established by the *Native Title Act 1993* (Cth) (**NTA**) to work with First Peoples to pursue land justice outcomes in Victoria. We are an Aboriginal controlled organisation, with a team of lawyers, researchers and community liaison staff that assist Victorian First Nations in their native title and formal recognition journeys.

FNLRS welcomes the opportunity to make submissions in response to the Australian Law Reform Commission (**Commission**) Issues Paper concerning the review of the NTA future acts regime (**Review**). In any inquiry into native title processes and rights we recognise that First Peoples' voices must be front and centre. Our submissions are therefore not representative of First Peoples' voices but are offered for context and background in our capacity as practitioners in the field.

The future acts regime is complex and interacts with various cultural heritage, environment and planning laws in multiple jurisdictions. We are conscious that a future acts regime needs to work harmoniously across jurisdictions to efficiently deliver transparency, clarity, fairness, and efficacy so that developments can be considered in a responsible manner respecting various rights holders.

The Review is an important opportunity to highlight the concerns expressed by many registered native title bodies corporate (**RNTBCs**) regarding the burden of administrative processes and the need for increased levels of resourcing and support to ensure fair negotiation and collaboration between native title holders and proponents.

FNLRS believes that a fairer future acts regime for developments impacting native title rights and interests will lead to greater involvement of RNTBCs in project development and in turn lead to benefits to the broader community and regional economic development. Further, it is anticipated that greater involvement of RNTBCs in major projects will result in improvements in health, housing and wellbeing, with corresponding savings in government spending.

Our submissions are limited to the questions posed in the Issues Paper. We have had limited opportunities to canvas these questions widely with our clients and stakeholders. Accordingly, our responses are largely limited to our experiences and knowledge. We expect to conduct greater stakeholder engagement, research and make more detailed submissions following the Commission's release of the Review Discussion Paper.

2 Assessment of Native Title Act Against UNDRIP Norms

2.1 Key Articles Relating to Land Justice Articulated in UNDRIP

FNLRS' view is that the United Nations Declaration on the Rights of Indigenous People (**UNDRIP**) is an appropriate benchmark for review of the native title future act regime. While UNDRIP is not itself a binding instrument it is agreed between signatories to be an articulation of existing international law as it relates to indigenous peoples. The principles set out in the declaration are agreed to constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world

(see Article 43). It is as an articulation of both international legal norms and minimum standards that it is a useful reference point against which to measure the Australian native title future acts regime.

UNDRIP is meant to be read and understood as a coherent and integral whole. Rights under UNDRIP are indivisible, interdependent and interrelated. Many of the articles are relevant to the native title future acts regime, for example: Articles 1 (the right to enjoy human rights), 2 (the right to be free from discrimination), 3 (the right of self-determination), 4 (the right of self-governance), 5 (the right to maintain distinct institutions and participate in affairs of the State), 8(b) (the right to redress for dispossession of traditional land), 10 (the right not to be forcibly removed from traditional land), 11 (the right to practice cultural traditions), 18 (the right to participate in decision-making in matters affecting rights), 19 (the right to free, prior and informed consent in relation to legislative measures affecting traditional rights), 25 (the right to maintain spiritual connection to traditional lands), 26 (rights to traditional lands), 27 (the right to fair adjudication of rights relating to lands), 28 (the right to redress for loss, use or damage to traditional lands), 29 (the right to conservation and protection of the environment of traditional lands), 30 (rights in relation to military use of traditional lands), 31 (rights to control cultural heritage), 32 (rights in relation to development of traditional lands, including rights of redress and the right of free, prior and informed consent), and 39 (the right to access financial and technical assistance).

Where their human rights are not observed, indigenous people have a right articulated in UNDRIP to an effective remedy. This is expressed as a right to access to and prompt decisions through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such decision is to be made with due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights (Article 40).

The future acts regime falls short of the bar articulated in UNDRIP in many ways. For instance, the future acts regime does not provide native title holders or claimants with a right of free, prior and informed consent in relation to any act, and is thereby inconsistent with Articles 19 and 32, among others. Categorisation of future acts does not always take into account the impact of the proposed act, so that high-impact acts often attract insignificant procedural rights. For example, taking water from an aquifer for a mine may have a devastating impact on sites of high cultural and environmental significance, over a broad area of Country, but may only attract minimal procedural rights (being rights to be notified and to comment under NTA s24HA, and a minimal right, or no right, to be compensated under NTA Part 2, Division 5). The lack of consistent proportionality between the effect of a future act on native title holders and the procedural rights and/or compensation rights afforded to them, is inconsistent with UNDRIP principles such as those set out in Article 32.

Further, in many instances native title holders have no practical redress nor access to any effective remedy where a government agency ignores or misapplies the future acts regime, contrary to the requirements of Article 40. Moreover, where native title holders are in dispute with State governments or others in relation to future act matters, they often have little or no recourse to dispute resolution procedures, aside from prohibitively expensive and lengthy court proceedings.

FNLRS **recommends** that the Commission undertakes a careful analysis of how the future act regime measures against the principles of international law articulated in UNDRIP.

3 Benefits of First Peoples' Agreement-Making

3.1 First Peoples' Agreement-Making as a Driver of Innovation and Regional Economic Development

There are a number of ways in which First Peoples' agreement-making can be a driver of economic growth. For instance, in the international context, First Peoples are seen to have an increasingly

important role in development of trade and commerce. For instance, First Peoples are seen as key contributors to and constituents of the United Nations 2030 Agenda for Sustainable Development[1]. Facilitation of First Peoples' involvement in international trade is encouraged through mechanisms such as the Indigenous Peoples Economic and Trade Cooperation Arrangement.[2]

In Australia, businesses recognise that engagement with UNDRIP and First Peoples is increasingly relevant and important to their work.[3] Peak industry bodies such as the National Farmer's Federation point to the significant opportunities that can be gained from greater investment in First Peoples' involvement in regional industries.[4] They see First Peoples' agribusiness, further participation of First Peoples in the agricultural sector and integration of *Caring for Country* practices with agricultural projects as important drivers of change that will help Australia to achieve its national target of agricultural farm gate output exceeding $100 billion by 2030.[5]

The views of peak bodies such as the National Farmer's Federation are borne out by what is happening on the ground in Victoria. The rapid expansion of the Dja Dja Wurrung Clans Aboriginal Corporation (**DJAARA**)[6] is an example of how a Victorian Traditional Owner community can be a driver of innovation and regional development. In March 2013, DJAARA signed a Recognition and Settlement Agreement (**RSA**) with the State under the *Traditional Owner Settlement Act 2010* (Vic) (**Settlement Act**). Seed funding provided under its RSA, along with funds from agreement-making under the Land Use Activity Agreement (**LUAA**) with the State has led to significant economic developments through:

- expansion of its core services;
- local job creation and economic activity generated through its enterprise arm Djandak (delivering Natural Resource Management, Cultural Services and Landscaping);[7] and
- the recent launch of its new yabby farm enterprise, DJAKITJ.[8]

Since 2013 DJAARA and Djandak have grown to collectively employ over 260 people. With bold and innovative initiatives, such as DJAKITJ and its Galk-galk Dhelkunya Forest Gardening Strategy 2022-2034,[9] it is set to continue its rapid expansion.

The future act regime is often characterised as a fetter on development and economic growth.[10] However, our experience as native title practitioners is that meaningful engagement with native title holders by future act proponents often adds significant value to proposed projects, such as by providing an impetus to look at their project in new and innovative ways, by de-risking and future-proofing their projects, and by opening new investment and market opportunities. Recognising that

[1] United Nations, *Transforming Our World: 2023 Agenda for Sustainable Development* (Website) <sustainabledevelopment.un.org/content/documents/21252030 Agenda for Sustainable Development web.pdf?ref=truth11.com>.

[2] *Indigenous Peoples Economic and Trade Cooperation Arrangement* (Website) <https://www.niaa.gov.au/indigenous-affairs/indigenous-peoples-economic-and-trade-cooperation-arrangement-ipetca>.

[3] Global Compact Network Australia, KPMG, UTS (2020) *The Australian Business Guide to Implementing the UN Declaration on the Rights of Indigenous Peoples:* (Website) <https://unglobalcompact.org.au/wp-content/uploads/2020/11/Australian-Business-Guide-to-Implementing-the-UN-Declaration-on-the-Rights-of-Indigenous-People_FINAL-2.0.pdf>.

[4] KPMG and National Famers' Federation Report (May 2023) *Realising the opportunity: Enhancing and strengthening Indigenous engagement as part of the growth of Australian agriculture*, (Website) <https://nff.org.au/wp-content/uploads/2023/05/NFF-Realising-the-Opportunity-Final-Report_25.5.2023.pdf>.

[5] Ibid at 6.

[6] (Website) <https://djadjawurrung.com.au/>.

[7] (Website) <https://djandak.com.au/>.

[8] (Website) <https://djadjawurrung.com.au/djaara-launches-new-enterprise-djakitj/>.

[9] (Website) <https://djadjawurrung.com.au/wp-content/uploads/2023/04/Forest-Gardening.pdf>.

[10] Eg <https://stockhead.com.au/resources/miners-alarm-at-native-title-rule/>

the future act regime is a potential driver of growth, rather than just a hurdle to be overcome, is an important consideration in analysis of potential reforms to the regime.

FNLRS **recommends** that the Commission examines ways in which reform of the future act regime can drive economic growth in Australia.

3.2 Commercial Motivations for First Peoples' Agreement-Making

International energy and resource companies are increasingly placing a greater emphasis on sustainable and effective agreement-making with First Peoples.[11]

The commercial motivations for greater First Peoples' agreement-making include the following:

- legislative and policy requirements from governments;
- reputational issues for companies;
- business cases identifying risks involved in disputes and conflict, need for certainty and security of access to resources;
- international human rights instruments:
    - International treaties and conventions since the 1980s have given greater recognition and emphasis to the rights of First Peoples' groups;
- international agency policies:
    - Peak agencies such as the International Council on Mining and Metals (**ICMM**) have developed policy frameworks and guides to good practice in dealing with First Peoples groups; and
- international financial institutions:
    - Financial institutions such as the International Finance Corporation (**IFC**), the World Bank and European Bank for Reconstruction and Development (**EBRD**) have developed policies and standards that they expect borrowers, which may include resource companies, to comply with[12].

3.3 Agreement-Making as a Mechanism for De-risking Major Projects and Investments

First Peoples' agreement-making is an important mechanism for de-risking and future-proofing major projects and investments that might otherwise be delayed or obstructed as a result of a lack of proper engagement with Traditional Owners. International agreements and organisations increasingly recognise that proper engagement with First Peoples is an important element of doing business in any part of the world.

For example, the International Forest Stewardship Council (**FSC**) recognises that forest managers should recognise and respect the legal and customary rights of First Peoples to own, use and manage their lands, territories, and resources, and should uphold the rights, customs and culture of Indigenous Peoples as defined in UNDRIP, including upholding the principle of free, prior and informed consent.[13] This is reflected in the FSC National Forest Stewardship Standard of Australia FSC-STD-AUS-01-2018 EN.[14]

Similarly, international mining bodies recognise the importance of proper engagement with First Peoples, and the commercial risks involved in not doing so. For example, this is reflected in the

[11] *Agreement-Making with Indigenous Groups, Oil and Gas Developments* Australia Centre for Social Responsibility in Mining (website) <https://www.csrm.uq.edu.au/media/docs/248/agreement_making_indigenous_groups.pdf>

[12] Ibid.

[13] FSC *Principles and Criteria for Forest Stewardship* (FSC-STD-01-001 V5-3 EN) (Website) <https://open.fsc.org/handle/resource/392>

[14] *FSC Forest Stewardship Standard of Australia Forest Stewardship Standards* (Website) <https://connect.fsc.org/document-center/documents/fa9c929d-6d44-4142-abd1-b9e3c106066b>

International Council on Mining and Metals' Position Statement on Indigenous Peoples (2013)[15] and its Human Rights Due Diligence Guidance.[16]

FNLRS **recommends** that the Commission consider how a rigorous future acts regime serves to mitigate risk involved in major projects in Australia, such as major mining projects, through appropriate engagement and consultation.

3.4 First People's Involvement in Projects Promotes Innovation

First Peoples bring unique knowledge, skills and perspectives to project development. When project proponents engage meaningfully with First Peoples it can change the way they look at their own project, and the engagement can itself be a driver of innovation.

For example, the involvement of First Peoples in energy projects has often driven innovation in project design. One leading example is the East Kimberley Clean Energy Project which involves the development of a large-scale renewable hydrogen and ammonia production facility in East Kimberley, Western Australia[17]. Another example of recent innovation is the Pilbara Solar pilot project, Junja Solar Farm, a joint venture between Yamatji Marlpa Aboriginal Corporation and Pilbara Solar,[18] which is now shovel ready.

It is expected that there will be growing opportunities for First People's involvement in future energy projects as part of the transition to renewable energy.[19]

FNLRS **recommends** that the Commission consider how the future acts regime can be a driver of innovation.

3.5 Attracting Ethical Investment Through First People's Agreement-Making

There are increasing commercial incentives for First People's agreement-making in both international and federal funding projects. For example, in Australia, the Capacity Investment Scheme tender criteria include a weighting for First Peoples involvement and benefit sharing[20].

At a global level, Ethical, Social and Governance (**ESG**) agreement making is of growing influence in the finance of major projects. The Australia Centre for Social Responsibility in Mining's report *Agreement-Making with Indigenous Groups, Oil and Gas Developments,* identified that there are many practical advantages to ESG agreement making. These agreements "allowed them to gain their social licence to operate, to build trust and a good relationship with communities, to remain competitive in the mining industry, to take advantage of an increasingly more capable and educated population, to speed up regulatory approval, and to maintain a good reputation in the eyes of the public and the communities".[21]

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[15] International Council on Mining and Metals, *Indigenous Peoples and Mining* (Position Statement, May 2013) (Website) <http://www.icmm.com/en-gb/about-us/member-requirements/position-statements/indigenous-peoples#1>

[16] International Council on Mining and Metals, *ICMM Human Rights Due Diligence* (Guidance, May 2023) (Website) <guidance_human-rights-due-diligence.pdf (icmm.com)>

[17] <https://arena.gov.au/projects/east-kimberley-clean-energy-project/>

[18] https://www.ymac.org.au/about-us/pilbara-solar/

[19] https://www.abc.net.au/news/2024-09-23/nari-nari-tribal-council-wilan-wind-farm-agreement/104364388

[20] https://www.dcceew.gov.au/energy/renewable/capacity-investment-scheme

[21] *Agreement-Making with Indigenous Groups, Oil and Gas Developments* Australia Centre for Social Responsibility in Mining (website) <https://www.csrm.uq.edu.au/media/docs/248/agreement_making_indigenous_groups.pdf>.

Meaningful engagement and cooperation with First Peoples can open the door to sources of finance (such as from impact investors or ethically guided superannuation funds) that might not otherwise be available to project proponents.

FNLRS **recommends** that a rigorous future acts regime provides opportunities that can assist with attracting new sources of capital and investment to the Australian economy.

3.6 Improvements in Social Determinants and Savings in Government Spending

FNLRS believes that a fairer future acts regime will lead to greater involvement of First Peoples in project development and in turn lead to the building of intergenerational wealth, knowledge and involvement of First Peoples from developments on their traditional lands.

Further, we anticipate that increased involvement of First Peoples in agreement-making and greater self-determination will lead to multiple long term benefits including improvements in key areas including employment, education, health, housing and wellbeing with corresponding savings in government spending.

We encourage the government to undertake modelling to examine the direct and indirect economic benefits of not only better supporting First Peoples in agreement making but also providing seed funding to better negotiate with proponents. The Victorian economic development packages under the Settlement Act are a good example of how support for First Nations can lead to both regional economic development and the creation of jobs and economic independence for First Nations which have flow on benefits to social determinants of wellbeing and consequential budgetary savings.

FNLRS **recommends** that the Commission consider how a sophisticated future acts regime can empower First Nations, with corresponding savings in government spending.

4 Priority Issues for the Commission to Consider in the Review

4.1 Absence of Procedural Rights for Certain Acts

Meaningful engagement with First Peoples requires acknowledgment and recognition of their priorities and concerns. The current future acts regime can lack insight to those priorities and concerns. For example, the strength of procedural rights associated with particular future acts does not always correlate with and is not always proportionate to the impacts that those acts may have on native title rights and interests. For instance, the allocation or extraction of water from groundwater, aquifers, and rivers can have significant adverse impact on native title rights as well as other social, cultural and environmental impacts, yet native title holders are afforded limited procedural rights in relation to those acts.

One way of addressing this divergence between the effect of future acts and the procedural rights that attach to them would be to expand the range of future acts that attract the right to negotiate, such as relation to:

- sea country (offshore places);
- land that is being compulsorily acquired by a government; and
- future acts related to water in onshore places (such as groundwater, rivers, and lakes).

FNLRS **suggests** the Review include a broad examination of the future acts hierarchy and accompanying procedural rights, and of how to better align procedural rights with First Peoples' priorities and concerns.

4.2 Categories of Future Acts May Not be Fit for Purpose for New and Emerging Industries

FNLRS shares concerns of others in the native title sector that the future acts regime does not adequately account for new and emerging industries, for example IT data storage, green energy (including transmission, generation and storage projects), carbon farming and bio-diversity trading schemes.

Accordingly, we **encourage** the Review to explore new categories and accompanying procedural rights for renewable energy and other emerging industries in the hierarchy of future acts giving native title holders the right to negotiate for these activities.

4.3 Process for Classification of Projects in Future Acts Notifications

In our experience there is sometimes inconsistency in how future acts are classified and therefore notified by the State. It appears that future act classifications can be inconsistent and unpredictable which can lead to perverse results where, for example, similar projects on the land of adjacent groups are classified differently leading to inequitable outcomes.

Inconsistent and incorrect classification can put considerable burden on under-resourced RNTBCs which are obliged, on behalf of the native title holders they represent, to investigate and challenge the associated notification. For many categories of future acts, particularly where validity of the act is not in question, there is no effective path for RNTBCs to challenge or contest the notification, and no adverse consequence for a State if it misclassifies a future act or issues an erroneous notification.

Inconsistent and incorrect classification may be caused by lack of skill, experience and independence in the classification processes in various government departments. Our view is that some State departments conducting classifications may lack the relevant legal skills and experience in native title.

FNLRS **suggests** that one possible way of addressing this issue is for ultimate responsibility for the classification of future acts notifications to be given to the National Native Title Tribunal (**NNTT**) which has the requisite skill and experience to properly perform this function. This could be achieved by amending the NTA to provide interested parties with a right to seek review by the NNTT of future acts notifications to ensure that they are correctly classified and lawfully issued. Where the NNTT finds a future act notice to be incorrectly classified or erroneously issued it could be re-notified under the correct category of future act and with errors corrected.

Greater expertise and independence in the assessment of the future act classifications would provide higher quality notifications and an independent oversight of the classification of future acts.

While creating a new path for review might cause some delay for particular projects, our view as practitioners in the space is that overall, it would lead to a more efficient process. Notifications would be standardised, consistent, accurate and contain necessary information. Unresolved disputes about classification would not need to be revisited every time a particular State agency issues a notice but could be determined on one occasion and thereafter applied.

4.4 Resourcing of RNTBCs to Process Future Act Notifications, Conduct Consultations and Negotiations

As the Issues Paper outlined, many RNTBCs have reported that resourcing and capacity constraints negatively impact on their meaningful participation, consultations and negotiations under the future acts regime.

FNLRS **supports** better resourcing of RNTBCs to process future acts notifications, and to conduct consultations and negotiations.

4.5 **Better Resourcing of NTRBs and RNTBCs to Ensure Negotiations are Conducted in good Faith and on an Equal Footing**

Negotiation and agreement-making is a fundamental precept of the future acts regime and is designed to resolve issues regarding the validity of future acts and involve First Peoples in decision-making and benefits sharing for the impact of their native titled rights. In order for agreements to deliver equitable outcomes, it is important for parties to be well supported and for negotiations to be conducted in 'good faith'.

However, bargaining power is often uneven and weighted in favour of proponents. Better resourcing of RNTBCs would help ensure negotiations are conducted in good faith and on an even footing. Under the NTA there is no obligation on the proponent in the right to negotiate process to provide reasonable negotiation costs to native title parties to allow them to negotiate on equal footing: see *Xstrata Coal Queensland Pty Ltd & Ors/Mark Albury & Ors (Karingbal #2); Brendan Wyman & Ors (Bidjara People)/Queensland*, [2012] NNTTA 93 at [287]-[288].

FNLRS **recommends** that there be a positive obligation on grantee parties to provide reasonable negotiation costs to native title parties in the context of good faith negotiation, taking into the account the size of the grantee party's project, the ability of the grantee party to pay and the needs of the native title party. To enable proper participation in negotiations we suggest that this requirement for funding (being a requirement to provide reasonable negotiation costs taking into account the circumstances of the negotiation including the ability of the grantee party to pay and the needs of the native title party) be stipulated as a requirement for negotiation in good faith.

4.6 **Time Limits on the Right to Negotiate**

FNLRS is concerned that the timeframes on the right to negotiate can in some circumstances be too short and potentially undermine the negotiation position of native title parties and the requirement for parties to negotiate in good faith.

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.

We **support** the time limit being extended beyond six months in circumstances where it is reasonable to do so, such as where the future act in question relates to a large complex project, where there are multiple interrelated future acts, or where a proposed future act will have a significant impact on an area of high cultural significance. Extension could be granted to the good faith negotiation period by the NNTT on application of any party to the negotiation, where the length of the extension is decided by the NNTT on a reasonable basis taking into account the circumstances of the application and any submissions from the parties.

4.7 **Time Limits on Expedited Procedure**

FNLRS is concerned that the timeframes for the completion of negotiations for the expedited procedure are too short and likewise potentially undermine native title holders' negotiation positions and rights to negotiate in good faith.

FNLRS shares the view with many other NTRBs that the expedited procedure is problematic, particularly in how it intersects with State and Territory Aboriginal and Torres Strait Islander cultural heritage laws.

We **support** the time limit being extended, such as to four months rather than the three months that currently applies.

4.8 **Future Act Determinations: Inability of NNTT to Impose Conditions with Reference to Payments**

As noted in the Issues Paper, in disputes regarding future acts negotiations, the NNTT has the power to decide whether a future act may be done. Despite having a discretion to impose a wide variety of conditions, the NNTT is prohibited from imposing conditions for payments worked out by reference to the amount of profit, any income derived, or things produced by a proponent.

We **recommend** that in making future act determinations, the NNTT be allowed to impose conditions on a future act determination including financial terms such as requiring a proponent to provide native title holders with royalty payments or a share of the profits of a project.

FNLRS also **recommends** the publication of the financial aspect of such determinations. Where commercial-in-confidence agreements prevent such publication, confidentiality could be ensured by the provision of deidentified data cumulated as part of annual or quarterly reporting.

Providing the NNTT with binding arbitration powers on financial awards will promote greater efficiency and transparency by setting industry benchmarks on reasonable financial benefits for future act negotiations. This greater transparency will also give greater certainty to parties in the planning and negotiation of projects.

It will also mean there is less disparity and unfairness between arbitrated agreements, where the native title party gets no income or profit based payment, and negotiated agreements, where native title parties can sometimes negotiate large payments of this kind.

4.9 **Creation of an Independent Body to Assess Legality and Implementation of ILUAs**

There is a need for a body to monitor the implementation of native title agreements, including to examine whether the agreements contain unlawful clauses, to assist with periodic reviews including to assess whether the terms of historic agreements are in accordance with prevailing benchmarks, and to monitor whether parties are satisfying their obligations under existing agreement.

In the event of non-compliance with native title agreements currently the burden falls on parties to take legal action for breach of contract for non-compliance. Similarly, if agreements contain unlawful clauses the only redress currently available to parties seeking to rectify them is application to the Court. Given the power imbalance of the parties, legal action is often financially prohibitive for native title holders. Alternatively, the native title holders may tolerate unlawful terms in order to maintain a good relationship with a project proponent, in circumstances where leveraging the relationship may be their best way of protecting sites of cultural significance.

We note that the proponent's non-compliance with a native title agreement does not generally have any consequences for the ongoing validity of the proponent's tenure. This is often in distinction to other conditions that attach to the proponent's leases or licences. For example, in many jurisdictions breach of a particular condition on a mining lease can result in loss or forfeit of the lease.

There is currently no obligation on a proponent to revisit the terms of a long-standing 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.

FNLRS **recommends** that the Commission explore the creation of an independent regulatory body to review, ensure legality, and oversee implementation of native title agreements under the future acts regime. We suggest that the NNTT would be well placed to perform this function.

4.10 **Use of Non-disclosure/Confidentiality Clauses and Agreements to Enable Unlawful and Illegal Terms in ILUAs**

Future acts agreements often include non-disclosure clauses which prevent independent scrutiny and contribute to a lack of transparency across the sector (which in turn leads to wildly divergent benefits and terms in otherwise similar native title agreements).

Moreover, we are concerned that some native title agreements contain illegal clauses designed to frustrate processes under other laws, such as environmental laws or Aboriginal and Torres Strait Islander cultural heritage laws. For example, some native title agreements contain clauses that put obligations on the native title party not to report the grantee party's breaches of the law, including where those breaches constitute serious offences. Other clauses restrict the ability of the native title party to respond to requests for information by statutory bodies performing statutory functions, thereby frustrating the ability of the body to properly perform its function.

Native title parties will sometimes accept such illegal clauses, reluctantly, as they otherwise may miss out on the opportunity to secure agreement with a proponent that might include unrelated benefits such as preservation of significant cultural sites.

FNLRS **suggests** some of these issues might be addressed by allowing for review of native title agreements by an independent regulatory body such as the NNTT (as discussed above).The independent body could compile data and benchmarks for best practice agreement making to inform the good faith negotiation process as well as review processes under existing agreements. Review could also be for the purpose of ensuring that agreements do not contain illegal or unconscionable terms. In cases requiring commercial-in-confidence, relevant aspects of the agreements could be restricted from publication but reviewed confidentiality by the independent body.

4.11 **Intergenerational Application of Non-disparagement Clauses**

Many native title agreements contain non-disparagement clauses (reluctantly agreed to by native title holders under the pressures of the future act framework), by which the native title holders agree not to criticise a project or a project proponent, or to object to them in any formal or informal way. We note that because native title agreements (especially ILUAs) can be binding on all native title holders these non-disparagement agreements are often intergenerationally binding.

Many First Peoples in Australia are therefore born with obligations not to criticise or disparage particular companies, or object to what they are doing on Country. In our view this kind of obligation-upon-birth is too great an intrusion into the fundamental human rights of individual native title holders, such as their right of freedom of expression set out in Article 19 of the *International Covenant on Civil and Political Rights* and would not be tolerated if they applied to other members of the Australian community.

It is the particular nature of native title agreements that allows for such infringement (for example, the lack of a requirement for privity, the statutorily imposed timeframes for negotiation and the lack of a right of veto). This means there should be a backstop to ensure that native title agreements do not infringe upon fundamental human rights of native title holders.

FNLRS **recommends** that the Commission examine how future acts agreements can infringe upon fundamental human rights of individual native title holders, and how this problem might be addressed.

4.12 **Limited Compensation for Invalid Acts**

Native title compensation is available under the NTA for acts that are validated or valid. Compensation or damages for invalid acts is available under the general law, under the jurisdiction of the Federal Court: see NTA s 50(1).

Possible causes of action for compensation for invalid acts under the general law include torts such as nuisance and trespass. However, unlike native title compensation applications under the NTA, general law actions in tort may be restricted by limitation periods. The decision of the High Court in *John Pfeiffer v Rogerson* [2000] HCA 36; 203 CLR 503 establishes that the applicable law, and therefore the relevant limitation period, in relation to commission of a tort, is to be determined by the law of the place of the tort. In Victoria, under the *Limitations of Action Act 1958* (Vic) s 5, tort claims must be brought within six years of the cause of action accruing.

If this principle applies to compensation or damages for invalid future acts then it is not fair. For example, it would not be fair for compensation to be payable under the *Land Titles Validation Act 1994* (Vic) and/or the NTA for historic valid or validated acts, but not for comparable historic invalid acts, especially where the invalidity has come about because of the unlawful action of the Commonwealth or the State.

It creates a perverse financial incentive for the Commonwealth and States to do acts invalidly.

FNLRS **recommends** that the NTA be amended to make it clear that no limitation period attaches to applications for compensation or damages under the general law for invalid future acts.

4.13 **Lack of Consequences for Non-compliance with the Future Act Regime**

With the exception of the right to negotiate, failure to comply with the future acts regime does not generally invalidate a future act: see *BHP Billiton Nickel West Pty Ltd v KN (Deceased) (Tjiwarl and Tjiwarl #2)* [2018] FCAFC 8.

If lack of compliance with the future acts regime has no impact on the validity of an act, then government parties are disincentivised to comply with the regime. Indeed, we understand anecdotally that it is commonplace for State agencies to ignore the future acts regime, or to apply or misapply it in an ad hoc way.

FNLRS **recommends** that the NTA be amended so that serious consequences attach to unlawful conduct of government parties in intentionally ignoring or misapplying procedures under the future acts regime. Intentional frustration of the future acts scheme should be made an offence, with significant financial and other penalties attaching. Validity of acts where future acts procedures have been ignored or misapplied should be reviewed.

4.14 **Compensation Regime**

Many native title holders complain that it is difficult to obtain timely and accessible compensation for future acts.

By way of comparison, we **encourage** the Commission to examine the processes of alternate compensation regimes including Victoria's Settlement Act. There are potential benefits to adopting a partially codified compensation system. In the case of the Settlement Act, compensation is available for public/crown land regardless of prior extinguishment. The compensation is governed by approved future acts which attract certain community benefits outlined in a schedule attached to the LUAA and other acts which require agreement, the equivalent of the future acts regime right of negotiation.

The benefits of the Settlement Act model are that it provides greater certainty for parties, greater efficiency, and depending on the classification of compensable acts arguably provides greater fairness including compensation for more future acts.

Further, as is the case with the Settlement Act, certain activities are still subject to agreement/veto required under the relevant LUAA, which includes mining agreements and sale of land as is governed by the Settlement Act.

5 Ideal Future Act Regime: Redesign of the System

We have not exhaustively considered the options for fresh approaches and redesign of the native title future acts regime. However, the following themes and ideas emerged from the above discussion on improvements to the NTA. We encourage the Commission to explore reforms which address these below issues.

5.1 Review of the Future Acts Regime Hierarchy

We **encourage** the Commission to conduct a broader examination of the future act regime hierarchy and accompanying procedural rights. In particular, we encourage the Commission to explore the expansion of the range of future acts that attract the right to negotiate to include acts impacting water rights and interest and emerging industries.

We **request** the Commission to consider a future act regime that more clearly incorporates international law principles such as Free, Prior and Informed Consent.

In considering the future acts regime reforms, the Commission should consider how to better achieve the purposes of the NTA which are broader than providing an avenue to validate future acts.

5.2 Harmonising Roles and Functions of Future Act Regime with Cultural Heritage Laws

FNLRS **requests** the exploration of reforms to the NTA to create a legislative regime that harmonises the future acts regime with cultural heritage laws.

In Victoria, NTA exploration agreements and ILUAs/LUAAs operate successfully alongside Cultural Heritage Management Plans under the *Aboriginal Heritage Act 2006* (Vic) and promote early collaboration between proponents and Traditional Owner Corporations. We **suggest** the examination of reforms to the NTA which could incorporate elements of the Victorian cultural heritage management processes.

Under a combined future acts and cultural heritage regime, it would be possible to create a process in the regime for limited action zones for highly significant sensitive areas. This could be accompanied by a process for nominating and assessing applications for protection.

As part of this process, FNLRS **recommends** the creation of a new category of procedural rights for areas of high cultural significance providing a veto right on certain development. There may be long term efficiency gains for future infrastructure planning if there is a clear and transparent process for protecting areas/zones of high cultural significance rather than relying on *ad hoc* and reactive applications of local cultural heritage laws.

FNLRS **encourages** the Commission to examine the First Nations Heritage Protection Alliance reform proposals for guidance and consider whether these could be incorporated into reforms of the NTA.[22]

[22] https://culturalheritage.org.au/reform/

5.3 Creation of an Independent Future Act Agreements Monitor and Arbitrator

As outlined above, one proposal to improve the future acts regime would be the creation of a Future Acts Agreements Monitor and Arbitrator to perform the following functions:

- resolve disputes regarding future act classifications;
- arbitrate future acts disputes including having the power to require proponents to pay financial benefits that are reasonable;
- publication of best practice financial terms and conditions;
- regulate agreement implementation including:
    - role in assessing pre-existing agreements on application from a native title party to avoid going to court;
    - strike out of illegal terms;
    - regulate implementation of agreements for non-compliance/invalidity.
        - power to award compensation for unfair or conscionable from a fund;
        - administer the fund; and
        - make declarative action around implementation of agreements giving transparency so people know who is responsible for non-compliance.

Accordingly, we **request** that the Commission explore the benefits, viability, functions, structure and key processes of an independent Future Acts Agreement Monitor and Arbitrator.

5.4 Analysis of Alternative Compensation Schemes

As outlined above, FNLRS **encourages** the exploration of alternative compensation schemes more akin to the Settlement Act where crown land is extinguishment-blind and a schedule of compensation/community benefits for lower-level future acts is offered as is done under the Settlement Act LUAAs. However, we stress the need for the procedural right to negotiate be maintained in any new regime as occurs in the Settlement Act.

As part of any analysis of other alternative compensation schemes, we welcome examination of other regimes and a detailed comparison of rights under the NTA with those schemes including Victoria's Settlement Act.

6 Concluding Observations

As outlined above, FNLRS is concerned that a future acts regime needs to work harmoniously across jurisdictions to efficiently deliver transparency, clarity, fairness, and efficacy so that developments can be considered in a responsible manner respecting various rights holders.

It is expected that a fairer future acts regime for developments impacting native title rights and interests will lead to greater involvement of RNTBCs in project development and in turn lead to benefits to the broader community and regional economic development. Further, it is anticipated that greater involvement of RNTBCs in major projects will result in improvements in health, housing and wellbeing, with corresponding savings in government spending.