Department of
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GOVERNMENT OF
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WA Government Submission to the Australian Law Reform Commission Review of the Future Acts Regime

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Contents

Introduction

The Western Australian (WA) Government welcomes the opportunity to provide a submission in response to the Australian Law Reform Commission (ALRC) Review of the Future Act Regime established under the *Native Title Act 1993* (Cth) (NTA). This submission addresses key issues and areas of concern from a WA perspective, some of which are referenced in the *Issues Paper* and the *Discussion Paper* published by the ALRC in November 2024 and May 2025 respectively.

The first three sections of this document address a range of technical and administrative challenges that are of priority importance for WA, whilst also responding to broader issues likely to be experienced across jurisdictions. These issues are grouped under the following topics:

- Native Title Sector Capability
- Agreement-Making
- Complexity and Workability of the Future Acts Regime

The balance of the submission provides a WA Government position on the reforms set out in the *Discussion Paper*, followed by a series of 'Proposals' and 'Questions' the WA Government says should be considered as alternative reforms (if the proposed reforms outlined in the *Discussion Paper* do not proceed).

The submission considers the WA Government's overlapping responsibilities in relation to the Future Acts Regime. The WA Government acts variously as:

- A proponent and/or negotiation party that both undertakes and facilitates future acts such as the grant of land tenure under State land administration and resources legislation;
- A regulator that oversees the complex intersections between the NTA and State legislation to ensure compliance with future act processes and procedural requirements;
- A State Government representing and balancing the (sometimes competing) interests of the broader Western Australian community, including the Aboriginal community, industry, and other stakeholders.

This multifaceted role requires the WA Government to navigate legal obligations, promote development, regulate land use, and respect the rights of native title holders through transparent and inclusive governance. The views expressed in this submission are informed by, and speak to, these various roles. They reflect the WA Government's commitment to ensuring that the Future Acts Regime operates in a way that is legally robust, procedurally fair, and responsive to the diverse interests and responsibilities it is required to balance.

This submission has been developed through consultation with the ALRC and in close consultation with WA Government agencies that administer land use regimes and native title policy settings and engage with native title holders and other participants in the native title system.

WA Context

The majority of determined native title is located within WA. As of 15 October 2024, there were 3.5 million square kilometres of determined native title. WA represents 1.9 million square kilometres or 53 percent of that total area, with more than half being exclusive possession native title, the highest form of recognition under the NTA.

By comparison, the State of Victoria only has 16,335 square kilometres of land subject to native title and New South Wales has even less at 10,022 square kilometres. Queensland, the jurisdiction with the second largest area of native title at 682,189 square kilometres comes to only 19 percent of the national area.

As a consequence, the amount of activity on land subject to native title in WA dwarfs activity in other jurisdictions. For this reason, comparing processes in WA to those of other States and territories runs the risk of assuming those processes would function well in the WA context.

WA is in the latter stages of a transition to a post-determination landscape:

- There are currently 87 Prescribed Bodies Corporate (PBCs) in WA covering around 77 percent of WA's landmass. This increases to approximately 87 percent when including the six South West Native Title Settlement Regional Corporations and the Yamatji Southern Regional Corporation;
- A number of registered claimant applications remain unresolved, which once resolved, may bring the number of PBCs in WA to over 100;
- WA has over one million square kilometres of determined, exclusive Native Title rights and interests, representing 92 percent of the national total;
- Of the existing 81 PBCs in WA:
    - Approximately 60 percent are in the Pilbara and Kimberley regions;
    - Almost half are classified as 'small' by the Office of the Registrar of Indigenous Corporations;
    - Approximately 60 percent have a reported annual income of $1 million or less; and
    - Approximately 50 percent have no paid employees.

The WA Government acknowledges the significant impact of the Future Acts Regime in the broader context of the NTA and the complex responsibilities it places on native title holders (and claimants), proponents, and other stakeholders. The renewed focus on the Future Act Regime presents an opportunity for the Commonwealth Government to address long-standing and emerging issues related to, or triggered by, the NTA.

Executive Summary

1. **Native Title Sector Capability**: WA's native title landscape is vast and complex, with over 87 PBCs managing rights across 77% of the State. Many PBCs face significant capability and resourcing challenges, including limited funding, a predominately volunteer workforce, and high consultation demands. These constraints undermine the effectiveness of the Future Acts Regime and must be addressed through structural reforms and increased Commonwealth investment.

2. **Agreement-Making Challenges**: The current agreement-making environment is marked by procedural uncertainty, inconsistent practices, resourcing constraints, and limited access to precedents. These factors hinder fair negotiations and delay project delivery. The WA Government supports agreement-making as the preferred approach but calls for clearer guidance, streamlined processes, and equitable funding arrangements to support meaningful engagement.

3. **Complexity and Workability**: The intersection of the NTA with WA's legislative frameworks creates a fragmented and burdensome regulatory environment. Compliance requires coordination across multiple agencies and legislative instruments, often resulting in delays and legal uncertainty. The WA Government highlights the need for reforms that simplify processes without compromising native title rights.

4. **Position on Proposed Reforms:** The WA Government supports reforms that enhance transparency, efficiency, and procedural clarity, including:

    - Expanded use of standing instructions
    - Improved access to agreements
    - Centralised registers and data systems
    - Strengthened PBC support and funding

    However, it strongly opposes reforms that:

    - Introduce an impact-based model for future acts
    - Extend the scope and duration of the Right to Negotiate
    - Repeal the Expedited Procedure
    - Establish Native Title Management Plans as an alternative procedure

    These proposals are legally uncertain, administratively burdensome, and incompatible with WA's regulatory environment.

5. **Alternative Reform Proposals**: The WA Government proposes practical alternative reforms to improve the Future Acts Regime, including:

    - Enhanced structural, governance and funding support for PBCs
    - Alternative reforms to the Right to Negotiate and the Expedited Procedure
    - Amendments to clarify treatment of low-impact acts and mining renewals
    - The introduction of electronic notifications and standardised notice formats
    - Establishment of an independent body to provide advice on compensation
    - Clear guidelines and oversight for cost recovery mechanisms

6. **Interaction with Aboriginal Cultural Heritage Legislation**: The submission emphasises the need for better integration between the NTA and cultural heritage frameworks to reduce duplication, improve coordination, and ensure respectful engagement with Traditional Owners, noting the different scope of the *Aboriginal Heritage Act 1972* (WA) and the role of other Aboriginal people who are not native title holders in the management of Aboriginal cultural heritage.

1.0 Native Title Sector Capability

The capability and resourcing of the Native Title sector as a whole is critical to the operation of the Future Acts Regime in WA. Capability and resourcing gaps exist across the system, which hinder the current operation of the Future Acts Regime. If left unaddressed, these gaps will undermine any attempt at reform.

The ALRC's *Issues Paper* and *Discussion Paper* highlight the significant challenges faced by PBCs in meeting their obligations under the NTA, the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) (PBC Regulations) and the Future Acts Regime. These challenges are driven by insufficient investment in foundational governance and support for their ongoing operations; complex statutory obligations and regulatory burdens; and onerous consultation demands. The following is an overview of these challenges:

- A unique corporate, organisational and regulatory context – This includes:
    - Meeting perpetual and permanent obligations to manage land and fulfil cultural obligations, driven by complex cultural, social and environmental factors that are unique to each native title holding group;
    - Maintaining sustainable capability and organisational memory with a workforce that (in up to half of WA PBCs) is exclusively composed of volunteer directors who must balance legal obligations, community expectations, cultural protocols and their own livelihoods; and
    - A lack of clear guidance on the core statutory functions of PBCs (noting the comments of Barker J in *Stevens v Wintawari Guruma Aboriginal Corporation RNTBC* [2016] FCA 149 at [59]).
- High demand – The extent of Native Title recognition and the volume of land activity throughout WA contributes to a high volume of future acts generally, but particularly concentrated on certain regions (e.g. the Pilbara and the Goldfields).
- Inadequate baseline funding – Basic Support Funding provided by the National Indigenous Australians Agency does not adequately cover the basic costs of operating a PBC, let alone the base operational costs associated with responding to future acts.
- An operational funding gap – Baseline funding is intended to be supplemented by cost recovery mechanisms (including under section 60AB of the NTA). However, a reliance on a cost recovery model has created an operational funding gap that has driven inefficiencies, created perverse incentives, and inhibited development.
- Knowledge gaps – There are significant gaps in basic operational knowledge of the Native Title system that exist across PBCs, industry and government. Despite the Native Title sector in WA attracting a range of consultancy and advisory firms with legal, anthropological, economic and social policy experience, there remains a shortage of expertise across the board to support both native title holders and other parties under the Future Acts Regime.

- Sector conduct issues – While many of these firms provide a positive contribution to the Native Title sector, the lack of consistent professional or industry standards creates confusion and contributes to ongoing challenges for PBCs. This, combined with the lack of dedicated training and support for PBCs and other participants in the sector, creates the conditions for exploitative practices and inefficiencies.
- Economic diversification and new industries – Proponents from new and emerging industries (including their internal and external advisors) have often very limited knowledge of Native Title, let alone the Future Acts Regime. There are different profiles of resource intensiveness, capability and ultimately profitability that attach to different industry sectors (for example tourism vs. extractive mining). There are also different attributes of proposed projects (and components of projects) which may have different impacts on country, risk profiles, business models and future act implications (for example a power transmission line vs. a power generation facility). Much of this is unknown during the preliminary stages of new types of projects.

2.0 Agreement-Making in Western Australia

The sectoral challenges outlined above are compounded by a lack of transparency, consistency, precedent, and guidance that presents an inconsistent but often poor background environment for agreement-making. The following are the key contributors to this dynamic:

- Native title rights and interests are *sui generis* – Determining fair and reasonable compensation for impacts on these rights and interests attributable to future acts is challenging due to the limited jurisprudence and lack of established precedents, which leave parties without clear guidance or benchmarks. The valuation process is further complicated by the need to account for both economic loss and cultural or spiritual impacts, which are inherently difficult to quantify and can be managed or mitigated through the agreement-making process. This, combined with procedural uncertainty and inconsistent negotiation practices, contributes to a lack of clarity and fairness in compensation outcomes.
- Limited access for PBCs and other parties to precedent agreements – Without access to past agreements or relevant jurisprudence, parties face significant barriers to determining reasonable terms or minimum standards that enable negotiations to take place on an equal footing, restricting the capacity for free, prior and informed consent.
- Inconsistent approaches and outcomes across different regions, industries, and proponents – The absence of standardised processes and guidance leads to variability in negotiation practices, agreement terms, and compensation levels, creating uncertainty for all parties and undermining confidence in the Future Acts Regime.
- Uneven dynamics between PBCs and proponents – Disparities in access to resources, information expertise, and institutional support creates imbalances between negotiating parties, exacerbated by the under-resourcing of PBCs and

expectation gaps created between proponents across higher and lower-capital sectors.

The WA Government supports agreement-making as the preferred approach to resolving all native title matters, including those arising under the Future Acts Regime. This commitment aligns with the principles of the WA Government's *Aboriginal Empowerment Strategy 2021–2029* and *Closing the Gap Jurisdictional Implementation Plan*. Though the WA Government recognises the importance of agreement-making to a fair and equitable Future Acts Regime, the open-ended nature of Indigenous Land Use Agreement (ILUA) processes in particular can frustrate the overall intent of the NTA and sits uneasily alongside other validation provisions. Proponents (including State and Territory Governments) are therefore drawn between an open-ended and uncertain process with limited statutory or judicial guidance and a closed system that offers limited procedural rights to native title holders and ongoing uncertainty as to compensation liabilities (including when and how those liabilities will be realised).

The uncertain environment in which future act agreement-making currently takes place is one of the main drivers of the significant costs incurred by native title parties, government and proponents in engaging with the Future Acts Regime, and a key reason for the capacity constraints within the sector.

With this in mind, the WA Government has identified three practical issues that should be addressed as part of improving the Future Acts Regime:

1. The WA Government utilises funding agreements (and in some cases grant agreements) as the primary vehicle to support native title party participation in agreement-making. These agreements often also serve as a de facto negotiation protocol. Settling these agreements often becomes a negotiation in itself, which is resource and cost intensive for both parties. Guidance on reasonable processes and costs that also accounts for customary obligations and traditional decision-making protocols would reduce uncertainty and the resource burden of negotiating funding agreements.
2. Related to the above point, the capability gaps of PBCs (and to a lesser extent, Native Title Representative Bodies and Service Providers – NTRBs/SPs) outlined above often result in PBCs seeking to pass on significant operational costs to proponents through funding agreements and negotiation protocols. This can delay substantive negotiations and create significant barriers for proponents, particularly for lower scale and/or capital proponents and in new and emerging industries.
3. The lack of consistent guidance on the costs of supporting native title party participation in negotiations and a predominately 'user pays' engagement model places proponents in competition with one another in terms of access to PBCs. This places certain industries (in particular, lower scale and/or capital industries) at a disadvantage, given they lack a financial 'buffer' to deal with higher levels of uncertainty. This is likely to inhibit the growth and development potential of these sectors in WA. Similarly, competition for access to PBCs can constrain the capacity of proponents (including the WA Government) to pursue agreement-making approaches for essential public works and infrastructure.

The lack of baseline funding and reliance on cost recovery models means that proponents often find themselves subsidising the operational costs of PBCs, rather

than meeting the costs of the service being provided. Whilst the WA Government recognises that section 60AB of the NTA establishes a 'user pays' model, the administrative burden and additional costs of negotiating and managing individual funding agreements is substantial for both parties. Reliance on cost recovery mechanisms to support the day-to-day operations of a PBC creates its own set of inefficiencies and ultimately increases the administrative burden on PBCs and other participants in the system, especially considering the uneven distribution of future acts across a particular jurisdiction.

Greater certainty and consistency in key aspects of the agreement-making process, such as timelines, documentation requirements, and dispute resolution mechanisms, would work to benefit both native title holders and proponents. The WA Government acknowledges and provides commentary on the proposed reforms identified in the *Discussion Paper* in later sections of this paper, but suggests that these reforms do not sufficiently address the lack of process certainty.

Uncertainty around compensation and commercial benefits in future act negotiations also presents a significant challenge for the WA Government across its roles in the native title system. The absence of jurisprudence and clear guidance on what constitutes fair and reasonable compensation complicates negotiations, particularly where governments are simultaneously responsible for initiating future acts, regulating land and resource use, and representing the broader public interest. These overlapping roles create tension between legal obligations, policy objectives, and stakeholder expectations. The current provisions of the Future Acts Regime offer limited support in navigating these complexities, impairing the parties' ability to negotiate confidently, delaying project delivery, and undermining trust with Traditional Owners and other stakeholders.

In the absence of jurisprudence, a clear and consistent framework for determining compensation and commercial benefits for future acts (or native title compensation generally) would improve certainty, fairness, and transparency in the native title system. A framework that has the effect of establishing an objective concept of value would help all parties engage in negotiations with a shared understanding of what constitutes fair and reasonable compensation. It is equally important to ensure that this does not inadvertently create a de facto floor or ceiling. However, a well-designed framework could balance clarity with adaptability, supporting equitable outcomes without constraining genuine negotiation.

3.0 Complexity and Workability of the Future Acts Regime

Over 90 percent of WA is Crown Land, much of which is subject to Native Title rights and interests. The interaction between the NTA and State legislation in WA creates a highly complex and fragmented regulatory environment.

Achieving full compliance with the Future Acts Regime, requires a never-ending process of interpretation and alignment of procedural requirements across multiple interrelated legislative frameworks, administered by approximately 20 different WA Government agencies, Statutory Authorities and Government Trading Enterprises.

This highly complex operating environment places a substantial burden on the WA Government, industry proponents, and PBCs alike. This is exacerbated in circumstances where reforms to State legislation can be characterised as legislative

future acts, even where there is no clear relationship to a physical impact on native title rights and interests (notwithstanding that there may be a spiritual and/or cultural impact unknown to the WA Government). This situation, which is a function of the intersect between the NTA and State legislation, makes it difficult for the WA Government to innovatively adapt and/or modernise State laws. The WA Government must engage with this complexity while ensuring that native title rights and interests are respected (including entitlements to compensation), regulatory obligations are met, and economic development (and diversification) is not unduly hindered.

These challenges impact the efficient functioning of the Future Acts Regime and the WA Government's role as a statutory regulator (across approvals for land, mining, water and environment), with multiple layers of approval and consultation involving native title parties. Specific examples include:

Land Administration Act 1997 (LAA)

- Crown Land Access: Access to Crown land in WA is regulated via the LAA, triggering procedural requirements under the Future Acts Regime (either via section 24LA or more substantive procedures, including ILUAs). The requirement to obtain tenure before undertaking feasibility work means that proponents often cannot clearly articulate project benefits until that work is complete, yet are required to engage in substantive negotiations upfront, leading to misaligned expectations and compromising free, prior and informed consent.
- Granting land tenure for third parties: The WA Government faces a complex challenge under the NTA when issuing land tenure that constitutes a future act, as it bears default liability for ensuring compliance with native title procedures, even when the future act benefits a third party. This places an administrative and compliance burden on the WA Government, requiring its active involvement in notification, negotiation, and agreement-making processes to avoid invalid tenure and potential compensation claims. A key example is where, to mitigate residual liability, the State must insert itself into ILUA negotiations, to ensure that third-party beneficiaries do not expose the WA Government to legal or financial risk.
- Compulsory acquisition: The WA Government regards compulsory acquisition of native title rights and interests as a last resort, pursued only when all reasonable negotiation avenues have been exhausted and the future act is deemed essential for the broader public benefit (with reference to relevant statutory requirements). Where native title is affected and is for the benefit of a third party, such acquisitions trigger the Right to Negotiate (RTN) under the NTA, requiring strict procedural compliance and good faith engagement with native title parties. The inflexible and highly prescriptive legal framework surrounding compulsory acquisition acts as both a safeguard for native title rights and a disincentive for the State to pursue this pathway routinely, given the complexity, risk of compensation liability, and the need to uphold community expectations and legal integrity.

Mining Act 1978

- Procedural certainty and validity issues: Cases such as *Forrest & Forrest v Wilson* (2017) 262 CLR 510 highlight the risk of native title invalidity arising

through State regulatory processes, with changes to State legislation unlikely to create sufficient certainty and/or avoid legal challenges without complementary federal legislation.

- Pass through provisions: Section 125A of the *Mining Act 1978* (WA) is and has been the subject of legal challenges, and the ability for the WA Government to 'pass through' a future act compensation liability has not been the subject of judicial consideration.

Rights in Water and Irrigation Act 1914 (RIWI Act)

- Relationship to other approvals: Water licences in WA are granted in the context of other approvals related to land use, development and tenure. The practical operation of the Future Acts Regime creates ambiguity in terms of procedural requirements and in some cases procedural validity in the context of the high number of water licences (over 12,000) held across WA.
- PBC capability: PBCs may not have the specialist capacity to assess water impacts under the same methodologies as the WA Government, limiting opportunities for meaningful engagement.
- Unclear Status of Instruments: There is ambiguity around whether non-statutory Water Management Plans and proclamation processes constitute or directly engage procedural requirements under the Future Acts Regime.

4.0 WA Government Position on Proposed Reforms

The WA Government considers that broader reforms, particular to the resourcing of the native title system, are needed to ensure the Future Acts Regime operates fairly, transparently and effectively. In particular, the WA Government strongly supports the forms of PBC resourcing outlined in the *Discussion Paper* and suggests that any reform of the NTA should be accompanied by a substantial increase in Commonwealth funding to PBCs.

The WA Government supports reforms that improve agreement-making, access to information, and procedural clarity, but opposes reforms that will introduce significant administrative burdens, delay State approval processes, or create uncertainty for the WA Government and its stakeholders. Any reforms to the Future Acts Regime must be carefully balanced against the operational realities of administering State legislation to achieve full compliance with the Future Acts Regime, in a jurisdiction with extensive Crown land and a complex post-determination landscape such as WA.

Irrespective of the particular reform proposals recommended by the ALRC or taken forward by the Commonwealth Government, the WA Government stresses the need, highlighted by the issues identified in this submission, for the implementation of any reforms to consider:

- A significant lead-in time and transitional arrangements to minimise disruption and avoid stakeholders losing confidence in existing or new processes;
- A significant uplift to training and capability to ensure a seamless transition between the existing and reformed processes; and

- A considerable investment by the Commonwealth Government in PBCs as part of any implementation pathway that permanently uplifts their baseline capability to adequately reflect their existing and any new, potentially enhanced role in a reformed Future Acts Regime.

The WA Government is committed to constructive engagement with the reform process and must be a part of the implementation pathway for any reforms recommended by the ALRC or proposed to be taken forward by the Commonwealth Government, to ensure a detailed assessment of their legal, financial, and operational implications in WA.

The WA Government's position in relation to each individual Question and Proposal from the *Discussion Paper* is included as **Appendix 1** to this submission.

4.1 Supported Reforms

The WA Government supports those reforms identified in the *Discussion Paper* that aim to improve the transparency, efficiency, and workability of the native title system (in particular, those that could be implemented to improve the operation of the Future Acts Regime in WA, with minimal disruption). These include the following Proposals and Questions:

Proposal 1 – Expanded Use of Standing Instructions

If implemented, this proposal has the potential to streamline agreement-making by reducing repeated authorisation processes, improving efficiency for low-impact future acts. It also addresses process inefficiencies and costs associated with PBC-led future act proposals.

Care must be taken to ensure standing instructions are legally robust and clearly scoped, to avoid misuse or duplication of authorisation processes. A monitoring mechanism should be considered to track implementation across PBCs and agreement types.

Proposal 2 – PBC Access to Agreements

If implemented, this proposal has the potential to enhance transparency and empower PBCs by backing up and supporting their corporate memory and record-keeping.

A key consideration for this proposal should be implementing clear protocols for timely and secure transfer of agreements; clarifying responsibilities for data management; and ensuring the systems maintained by the National Native Title Tribunal (NNTT) are compatible and equipped to manage access.

Proposal 3 and 4 – Automatic Removal of Expired ILUAs and Periodic Audit of ILUAs

If implemented, this will improve the accuracy of the Register, as well as improving transparency and clarity in relation to future act consents.

A key consideration for this proposal should be providing sufficient time and support for the NNTT to assess the administrative burden and practical implementation process (including back capture) as well as providing adequate resources for ongoing compliance. A minor consideration is the extent to which this will require detailed input from the WA Government, in which case sufficient time and support should be

extended to relevant WA Government agencies in providing information to assist implementation.

Proposal 11 – Central Register of Future Act Notices

The WA Government notes that this proposal is aligned with work it is currently undertaking to develop contemporary, whole of government policy settings for future acts. This approach includes centralised reporting and data management for future acts undertaken by the WA Government. Consideration should be given to ensuring that any centralised register is required to capture information spatially, even if this is not the primary mechanism for recording data.

Proposal 15 – NTRB/SP Support for PBCs

This reform, if correctly targeted and implemented, will strengthen PBC capacity to respond to future act notices, facilitating a more effective operation of the Future Acts Regime.

A key consideration for implementing this proposal should be clarifying the funding scope (with particular reference to the statutory functions of PBCs) and any required reporting and/or auditing which could impact the operational funding gaps outlined in the preliminary parts of this submission. Coordination with WA Government support programs for PBCs should also be a strong consideration to avoid duplication and/or missed opportunities.

Proposal 16 – Fund the National Native Title Tribunal

This reform, if implemented comprehensively, will enhance the NNTT's ability to manage their existing responsibilities. However, the WA Government expresses concern that the other proposals advanced and reforms explored in the *Discussion Paper* will require a substantial uplift in, and considerable expansion of, the NNTT's resourcing and capability to avoid uncertainty and delay.

Workload implications must be considered in detail and sufficient investment in resourcing made, monitored and adjusted as needed should any of the proposals in the *Discussion Paper* be implemented.

Question 12 – Public Register of Agreements

This reform, if implemented, will improve transparency and consistency, as well as potentially creating de facto guidance for agreements.

The WA Government suggests mandatory publication of agreements is considered, with redaction options for sensitive content agreed by the parties to the agreement (ie. an opt out rather than opt in approach with respect to published content).

Question 20 – Retention of Alternative Procedures

Retaining sections 43 and 43A of the NTA preserves flexibility for States and Territories to legislate tailored future act procedures, maintains jurisdictional autonomy and allows for processes that meet the needs of individual PBCs.

A streamlined process to obtain the approval of the Commonwealth Minister should be considered to ensure barriers to the use of these provisions are minimised. Commonwealth consideration should be limited to ensuring that alternative procedures are legally robust and do not conflict with federal legislation.

Question 23 – Content of Future Act Notices

This reform could improve the quality of information provided to PBCs, aiding informed decision-making without imposing excessive burdens.

Care should be taken in defining any minimum content standards and the impact on existing State legislation and processes. Confidentiality and the disclosure of third-party information should be part of these considerations.

Question 25 – Interaction of Future Act Payments and Compensation

The WA Government supports this reform only if payments are clearly offset against compensation entitlements to avoid duplication, do not result in an overpayment of compensation and have a clear intersection with the operation of existing provisions of the NTA, such as sections 24EBA(4) and 49.

Question 27 – Costs Awards for Future Act Matters

This reform, if implemented, promotes fairness by recommending that each party bear its own costs in Federal Court proceedings.

The *Discussion Paper* notes jurisprudence from WA that raises the prospect of amending section 85 of the NTA to specifically apply to future act proceedings. There is an expectation from many that section 85A applies to any proceeding arising under the NTA, so the WA Government supports that being clarified via amendment.

4.2 Reshaping the Statutory Procedures

The *Discussion Paper* outlines a suite of reforms aimed at modernising and streamlining statutory procedures under the NTA (Proposals 6 – 10; Questions 14 – 22 and 24). The WA Government acknowledges the intent to improve procedural efficiency, enhance fairness in agreement-making, and support the effective participation of native title parties. However, this is outweighed by two overarching and interrelated concerns.

Firstly, the WA Government's firm view is that the proposed reforms cannot be implemented in a way that maintains confidence in the integrity of the Future Acts Regime. The proposed reforms are not only inherently uncertain but also represent a fundamental departure from the principles that underpin the existing regime, which will create additional legal, administrative, and commercial uncertainty.

Secondly, the reforms would require wholesale amendments to WA legislation, including to address the pass-through of compensation liability, which is an unacceptable burden to place on the WA Government and risks contributing further to uncertainty and issues with process integrity.

The WA Government's position on individual Proposals and Questions is as follows:

Proposal 6 – Right to Negotiate

The WA Government does not support extending the negotiation period to 18 months or the proposed moratorium, and expresses concern about the broader reform proposal.

In the context of the existing RTN, there is no demonstrated need to extend the minimum period for negotiations. Over the past 10 years, the average time between

notification and the lodgment of a Future Act Determination Application is approximately three years and six months, with a median of two and a half years. By requiring a longer minimum negotiation period, the proposal risks significant delays for the mining and exploration sector, particularly in circumstances where the inability to reach agreement is unconnected to the impact of the future act on native title rights and interests, or where a determination is required because parties have been unable to meet the formal requirements of a section 31 agreement.

The proposal to expand the scope of the RTN, either through the impact-based future act provisions or the Native Title Management Plan (NTMP) concept, would also create a substantial impact on other tenure grants, including for critical infrastructure and regional service delivery in WA, including essential services to remote Aboriginal communities. The reform could also deter investment in projects of national and State significance that, if negotiated successfully, could provide substantial benefits to native title holders.

Alongside the extended negotiation period, the proposed moratorium would in practice create an effective veto, and is likely to be in conflict with WA legislation (e.g. *Mining Act* priority rights) and may lead to legal challenges from proponents who had a legitimate expectation that their applications would proceed, for example, in the event of forfeiture.

Proposal 7 – Referral of Isolated Issues to National Native Title Tribunal

This proposal requires further investigation and extensive consultation with the WA Government. This should include assessing how binding determinations during negotiations could affect the operation of State legislation and processes, as well as workload impacts for key WA Government agencies.

Proposal 8 – Removing the Ban on Royalty-Based Conditions

The WA Government does not support this proposal as it will likely lead to overcompensation, require complex valuation and commercial expertise that does not currently reside within the NNTT, create commercial uncertainty and expose the State to significant financial risk, especially when combined with the impact-based future act provisions and the NTMP proposal. It would also leave open the possibility that commercially unviable conditions could be imposed on future acts that are inherently unprofitable, including public infrastructure.

Proposal 9 – Repeal the Expedited Procedure

The repeal of the Expedited Procedure is strongly opposed by the WA Government. Doing so would have a significant impact on the mining and exploration sector, creating significant uncertainty, delay and additional costs that will likely hinder new and ongoing investment in exploration and restrict the pipeline of new mining projects.

The proposal would also create significant administrative and resource burdens for PBCs, considering the volume of exploration applications granted annually in WA. While the *Discussion Paper* also proposes reforms to PBC resourcing, this would likely overwhelm PBCs at their current capacity levels and would require substantial additional resourcing and time to 'scale up.'

By way of illustration – in the last five years, 9,774 tenements were notified with an Expedited Procedure statement, in response to which 5,661 objections were lodged

with the NNTT, with 4,693 tenements progressing to grant without objection. If the Expedited Procedure were repealed, applicants would be required to enter into an RTN process with one or more PBCs for each of those tenements, which would compound existing capacity issues within the PBC sector.

The WA Government is concerned that the existing RTN is an overly cumbersome process for what are, in most cases, low impact and ephemeral land uses, especially when considering the volume of exploration titles granted in the WA context. Repealing the Expedited Procedure would place unworkable administrative burdens on all parties and introduce significant delays and costs that would make a substantial number of exploration projects unviable and overwhelm the capacity of PBCs and other native title parties.

In this regard, there are currently 137 applications for exploration and prospecting licences under the *Mining Act* in the RTN that have been in the process for an average of three years and nine months, while 20 exploration and access authorities under the *Petroleum and Geothermal Energy Resources Act 2006* have been in the RTN for an average of six years and 10 months. The oldest unresolved exploration licence application in the RTN was first notified in February 2014, more than 11 years ago.

Proposal 10 – Procedural Compliance as a Condition of Validity

The WA Government notes this reform, combined with the proposal to introduce statutory remedies for invalid acts, would require significant resourcing to ensure high levels of technical compliance. Other suggested reforms, including an 'impact-based' assessment of future acts, have the potential to create additional ambiguity and uncertainty, increasing risk of non-compliance and associated administrative costs.

Making procedural compliance a condition of validity increases risk of invalidity due to minor errors. It would require high levels of technical compliance and, if the proposal is to invalidate tenure for all purposes (as opposed to invalidity insofar as the future act affects native title), would conflict with WA tenure and registration systems (including the Torrens system of land registration) and may have broad-reaching constitutional implications. This would be a disproportionate response to what might be the result of human error.

There is also a risk that third parties (ie non-native title parties) could challenge the validity of future acts on procedural grounds to gain a commercial advantage, leading to further litigation and resourcing burdens across the sector.

Question 14 and 15 – Replacing Subdivisions G-N with an Impact-Based Model (Including Exclusions)

This proposed reform is strongly opposed by the WA Government as the 'impact-based' model is legally uncertain, administratively complex, and fundamentally inconsistent with State legislation, policy and/or processes. In the absence of an objective means of identifying impact, the categorisation of future acts is likely to be subject to legal challenge, including potentially under the *Administration Decisions (Judicial Review) Act 1977* (Cth). Transitional provisions would also be required to cater for a new set of acts, which will further complicate the system rather than simplifying it.

Further work would be needed to define what a statutory right to be consulted would involve, which may itself lead to further litigation.[1] Moreover, a binary approach to the impact of future acts on native title rights and interests is difficult to reconcile with the intricacies of WA's regulatory environment and will increase litigation, delay, and cost, as well as undermining the principle of equality by creating greater rights for native title holders than exist for freeholders under State laws.

There is also a risk that, combined with the proposal for the NNTT to hear and determine challenges to how a future act is categorised, the proposed reform will have the effect of replicating some of the practical difficulties associated with the Expedited Procedure. As this would apply to a broader range of acts which a State or Territory Government seeks to notify as a 'Category A' act, there is a risk that such notices will be regularly challenged as a means of accessing a more robust set of procedural rights, which will fall to the NNTT to determine (meaning its workload, and that of PBCs and other parties, will shift from Expedited Procedure objections to 'low impact procedure' inquiries, but not diminish overall).

The exclusions outlined in Question 15 are supported to the extent that Question 14 is progressed despite opposition from the WA Government. These exclusions are essential to facilitate future acts relating to State activities related to infrastructure, lease renewals, and emergency services. A comprehensive review of State legislation would be needed to identify further necessary exclusions, but is not possible within the timeframe for submissions.

Question 16 – 'Beyond Act' Impacts

This proposed reform is strongly opposed by the WA Government as it cuts across existing State and Commonwealth legislation relating to Aboriginal cultural heritage and environmental regulation (including in relation to 'social surrounds'). Defining and assessing impacts beyond the immediate disturbance, footprint or boundary of future acts, in most cases, would require extensive investigation, which would themselves be future acts. This difficulty is compounded by taking into account cultural impacts. The reform introduces unacceptable uncertainty, creates litigation risk in respect of the WA Government's regulatory role, and would be fundamentally unworkable.

Question 17 – Legislative Acts and Planning Activities

The WA Government does not support applying the impact-based model to legislative acts, which have broad application and differential effects. The application of procedural rights under the NTA would be practically unworkable and is highly likely to fetter unconstitutionally the WA Parliament's legislative powers.

Question 17 also identifies planning activities under State legislation such as water management as possible future acts that should attract procedural rights. This is strongly opposed as it lacks an understanding of WA's regulatory environment (noting in particular, that water allocation plans under the *Rights in Water and Irrigation Act 1914* do not grant or directly permit water licences). At worst, the reform is fundamentally inconsistent with consultation principles under land use planning legislation.

[1] Cf *Cooper v National Offshore Petroleum Safety and Environmental Management Authority* [2023] FCA 1112.

Questions 18 and 19 – Test for National Native Title Tribunal Determinations and Criteria for Conditions

The WA Government expresses cautious support for these reforms, with the following qualifications. Firstly, on Question 18, the WA Government's support for the reform is conditional on the introduction of a multi-factorial test that includes consideration of existing statutory criteria (including the economic significance of the act and public interest in the doing of the act), whether the native title party's consent was unreasonably withheld, and whether the future act would present a real risk of substantial and irreparable harm.

In relation to Question 19, conditions placed on the doing of future acts must be consistent with State legislation, policy and practice. Conditions should also be practical, culturally appropriate, and not impact the viability of projects to which the future acts relate. Restrictions on trade or investment (e.g. domestic-only sales) should be avoided, if not expressly prohibited.

Question 21 – Non Claimant Applications

The WA Government does not express a view on this proposed reform as it does not utilise non-claimant applications (which are not generally used in WA).

Question 22 – Consequences of Invalidity

The WA Government agrees that consequences for non-compliance with the procedural obligations of the NTA should be clarified. This will provide greater certainty to government, industry and PBCs on the implications of invalid acts.

This proposed reform must be carefully considered and calibrated to reflect the complex intersections with State legislation outlined throughout this submission. In particular, any reform must avoid a disproportionate response to invalidity that may ultimately be the result of human error. The constitutional impacts of this proposal must also be considered (ie. confirming that the Commonwealth has the power to invalidate acts for all purposes), as well as other commercial and litigation risks it may precipitate.

Questions 24 and 25 – Future Act Payments

The WA Government strongly opposes these proposed reforms. It sees no principled basis for a Future Act Payment unless it is directly referable (and set off from) compensation for the impact of the future act on native title rights and interests. Even if these conditions were satisfied, the proposed reform is apt to create confusion given the varied role the WA Government plays in the Future Acts Regime – for example, would the WA Government be responsible for making or overseeing a Future Act Payment associated with granting land tenure to a third-party proponent?

The WA Government observes that calculating a Future Act Payment on the basis of the bifurcated approach set out in the *Timber Creek* decision[2] prior to the act being done (and cultural loss having been suffered) will be challenging, if not impossible. Careful consideration will need to be given to the basis on which a Future Act Payment is calculated, to avoid exceeding the entitlement to compensation.

[2] *Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples* [2019] HCA 7

4.3 Reforms to Compensation and Payments

The *Discussion Paper* outlines a suite of reforms aimed at ensuring native title parties receive commensurate and timely compensation for effects on native title rights and interests caused by future acts (Proposals 12 and 13; Question 26 – noting commentary above in relation to Questions 24 and 25). The WA Government acknowledges the importance of ensuring that native title holders are fairly compensated for the impact of future acts on their native title rights and interests. However, the legal, financial, and administrative implications of the ALRC's proposed reforms cause serious concern:

Proposal 12 – Clarifying Compensation in ILUAs

This proposal requires further investigation. The proposed amendment to make compensation "full and final" only where explicitly stated and paid in full could create residual liabilities for the State, particularly where third-party proponents are involved and the State is not a party to the ILUA. This would undermine the certainty that ILUAs are intended to provide and may necessitate broader amendments to the compensation framework under the NTA, given that compensation for future acts is currently predicated on the compensation entitlement arising from the Subdivision that validates the particular future act, when typically no other Subdivision would apply to give rise to a compensation entitlement.

Proposal 13 – Statutory Compensation for Invalid Future Acts

This proposal requires further, careful investigation, as it is likely to have a significant impact in WA (including for the WA Government), notwithstanding that the number of invalid future acts in the State is currently unknown (and would require significant investigation to determine). Further work is needed to determine how a statutory right to compensation would interact with existing remedies under the general law.

While the WA Government acknowledges that a clear statutory basis for compensation for invalid future acts could be useful, it is generally understood that compensation for interference with native title arising from invalid acts currently exists outside the NTA. Any reform must be carefully considered to avoid unintended legal and financial consequences.

Question 26 – Short Form Agreements

The WA Government supports further investigation of this proposed reform, conditional upon the form of agreement and class of acts being clear and subject to standing instructions. The reform may not be viable or worthwhile progressing if the circumstances covered by Short Form Agreements are too narrow.

The WA Government does not agree (as set out in the *Discussion Paper*) that the only method of agreeing compensation is via an ILUA. Ancillary agreements pursuant to section 31 of the NTA regularly provide for compensation and compensation can be agreed by way of a Deed.

4.4 Native Title Management Plans

The WA Government strongly opposes the reform proposal outlined in Question 6 of the *Discussion Paper* to amend the NTA to enable PBCs to develop and register NTMPs as an alternative statutory procedure for validating future acts.

The WA Government acknowledges the intent behind the reform proposal in empowering native title holders to signal the interests, proposals, opinions and wishes of Traditional Owners in relation to land management. However, the NTMP proposal presents significant legal, administrative, and strategic challenges that would undermine the integrity of the existing agreement-making system, the State's land use management frameworks, and create substantial uncertainty for government, industry, and native title parties alike.

The WA Government considers the NTMP proposal to be legally and practically unworkable and recommends that reform efforts focus on strengthening existing mechanisms (such as ILUAs) that support negotiated, transparent, and coordinated outcomes. The WA Government's strong opposition is based on the following:

- Fragmentation and Complexity for Proponents: NTMPs would create a patchwork of procedural requirements across the State, increasing complexity and compliance burdens for proponents, especially those undertaking cross-regional or large-scale projects that cover multiple determination areas (and therefore may be subject to more than one NTMP);
- Barriers to Strategic Development and Investment: The lack of a consistent framework would deter investment and hinder the delivery of major infrastructure projects, including those critical to Australia's energy transition and decarbonisation goals;
- Lack of State Involvement: NTMPs would be developed without formal State involvement, raising risks of legal and administrative conflict with State legislation and processes. The WA Government notes the heavy reliance in the *Discussion Paper* on the Tjiwarl Palyakuwa ILUA, but stresses that it is not an appropriate analogy for the NTMP concept, as it was the outcome of an agreement between the relevant PBC and the WA Government;
- Undermining of Strategic Land Use Planning: NTMPs could include exclusion zones that effectively prohibit development, conflicting with the State's role in land use planning and constraining public infrastructure and housing delivery, including in remote Aboriginal communities whose populations can often be a blend of native title holders and other Aboriginal residents;
- Departure from Agreement-Making Principles: The NTMP model bypasses collaborative negotiation and agreement-making, undermining the principles of mutual consent and shared decision-making central to the native title system. The WA Government notes that the ILUA provisions already allow for agreement to be reached about the doing, or the doing subject to conditions, of particular future acts or classes of future acts;
- Capacity and Resourcing Limitations: The proposal assumes a level of capability within PBCs that does not currently exist. Without significant investment, NTMPs would exacerbate existing challenges and increase the risk of procedural invalidity.

4.5 Reforms to Resourcing and Costs

The *Discussion Paper* outlines several reforms to support the capacity and capability of PBCs (Proposals 14, 15 and 17). While some of these proposals (such as operational funding for PBCs and enhanced support from NTRBs/SPs) may offer benefits and warrant cautious support, others raise significant concerns for the WA Government. In particular, the proposed cost recovery mechanisms risk imposing unsustainable financial and administrative burdens on the State and industry, and may encourage transactional rather than collaborative approaches to agreement-making. Overall, the WA Government considers that these reforms require further investigation to ensure they are workable, equitable, and aligned with broader policy objectives.

Proposal 14 – Perpetual Capital Fund for PBCs

The WA Government expresses cautious support for this proposal, recognising the importance of addressing the operational funding gap for PBCs. This support is contingent on greater clarity around the proposed administrative arrangements and governance of the fund.

Proposal 15 – NTRB/SP Support for PBCs

The WA Government supports this proposal, as it has the potential to improve the responsiveness and capacity of PBCs in future act negotiations and streamline administrative processes, but notes this will require commensurate funding for NTRBs/SPs to be practically effective.

Proposal 17 – Strengthen Cost Recovery

The WA Government does not support this proposal in its current form. In particular, it is concerned about the sustainability of the proposed cost recovery model, the risk of transactional approaches to future act administration, and the potential financial burden on government and industry. The proposal is not responsive to sector specific challenges (e.g. low capital industries) and would likely require the WA Government to consider mechanisms to pass on costs in full to third party proponents.

5.0 Proposed Alternative Reforms

The WA Government suggests the following alternative reforms are considered in the event that the reforms set out in the *Discussion Paper* are not progressed. This section is set out in the same format as the *Discussion Paper*, with alternative reforms posed as Proposals and Questions.

5.1 Proposal – Increased support for PBCs

The WA Government supports a comprehensive reform agenda that empowers PBCs to fulfil their statutory responsibilities under the NTA, while enabling them to pursue broader community, cultural, and economic aspirations. Central to this is the need for structural and governance reforms that make it easier for PBCs to establish and operate subsidiary or separate corporate vehicles. These vehicles would allow PBCs to compartmentalise their statutory functions, commercial enterprises, and service delivery roles. This will improve governance and the management of organisational risks by ensuring that PBCs' core statutory responsibilities in responding to future act matters are not diluted by competing demands.

The WA Government also recommends clearer guidance on the statutory functions of PBCs and targeted investment in training and education for directors, staff, and advisors. These supports would help build enduring organisational capability and address intergenerational knowledge gaps, particularly in relation to future act matters. By strengthening internal capacity and reducing reliance on external consultants, PBCs would be better positioned to engage confidently in agreement-making, manage complex negotiations, and uphold the rights and interests of native title holders.

In this context, several reform proposals in the *Discussion Paper* (particularly those relating to centralised information on future acts) could serve as important enablers for a new stream of 'activity-based' operational funding. This funding stream, administered directly to PBCs by the Commonwealth Government, could be tailored to the volume and complexity of future act matters managed by each PBC and 'ringfenced' from other funding supporting broader PBC functions.

When combined with the structural and capability-building reforms outlined above and increased baseline funding from the Commonwealth Government, this approach would support PBCs in developing and retaining corporate knowledge and experience, particularly in relation to future acts. Collectively, these support measures could underpin a transformative change that empowers PBCs to proactively engage with the Future Acts Regime as part of broader 'Nation-building' efforts.

5.2 Proposal – Alternative Reforms to the Right to Negotiate

The WA Government acknowledges persistent challenges in the operation of the RTN provisions in WA, including inconsistent engagement between parties, ambiguity around the requirements for Negotiating in Good Faith (NIGF), limited resourcing of the NNTT, and insufficient support for PBCs. These issues collectively undermine the intent and effectiveness of the RTN framework and contribute to procedural inefficiencies and inequities in agreement-making.

The WA Government considers that extending statutory timeframes would not address these underlying issues. A significant proportion of Future Act Determination Applications lodged with the NNTT in WA are uncontested, often because parties have reached agreement but are unable to satisfy formal procedural requirements.

Instead, the WA Government proposes the following as practical reforms to the RTN:

- limitations on the number of times a future act matter can be referred back to negotiation after a successful NIGF challenge; and
- enhanced resourcing and capability of the NNTT to support timely and effective facilitation and arbitration.

Future Act Payments could also be incorporated into this reformed RTN process, provided the issues outlined above concerning their relationship to compensation are addressed.

This approach would be complemented by increased transparency in funding arrangements and targeted support for PBCs to participate meaningfully in negotiations. The WA Government considers that these reforms would improve the accessibility, fairness and efficiency of the RTN process in WA, and better reflect the realities of agreement-making in a post-determination landscape.

5.3 Proposal – Amend section 24LA (Low Impact Future Acts)

Over 90 percent of WA is Crown Land, much of which is subject to Native Title rights and interests. The WA Government regulates third-party access to this land, particularly for new industry development, under the *Mining Act 1978*, *Petroleum and Geothermal Energy Resources Act 2006*, and the *Land Administration Act 1997* (LAA).

The Future Acts Regime presents significant challenges for the management of the Crown Land estate, especially in the early stages of project development. Section 24LA of the NTA allows for low impact future acts, such as feasibility studies, aerial and geological surveys, and other scoping activities. Many of these activities are permitted via licences under section 91 of the LAA, which provides for non-exclusive land access akin to a *profit à prendre*.

The issue arises because section 24LA stipulates that such acts cannot continue after a determination of native title. Given that most of WA has either determined or pending native title claims, this limitation means that even low-impact activities must be validated through an ILUA. As a result, proponents are drawn into substantive negotiations with PBCs at a very early stage (often before the project scope or benefits can be clearly articulated) leading to delays, increased costs and misaligned expectations, frustrating efforts to secure free, prior and informed consent.

To address these challenges, it is suggested that consideration be given to amending section 24LA or introducing a new subdivision (possibly after Subdiv E) to:

- Extend the validation of low impact future acts, such as aerial and geological surveys and feasibility studies, beyond the point of native title determination.
- Clarify and codify the scope of permissible low impact activities, ensuring they remain consistent with the protection of native title rights, while enabling responsible early-stage development.
- Introduce streamlined processes and cost guidance for preliminary engagement with Traditional Owners, reducing the burden on both proponents and PBCs.
- Support a staged engagement model, allowing proponents to build relationships and negotiate ILUAs once feasibility studies have clarified the development potential and benefits for Traditional Owners.

These amendments would maintain the integrity of native title while enabling more efficient and transparent land access for early-stage development across WA.

5.4 Proposal – Amend section 26D to Permit Secondary Mining Renewals

A problematic intersection that currently exists between State legislation and the Future Acts Regime is the secondary renewals of mining leases under the *Mining Act 1978* and similar State legislation. The explanatory memoranda for the 1998 amendments, which introduced section 26D of the NTA, make clear that renewal of an earlier right to mine that is valid or which had gone through the RTN process would not have to go through that process again. As it is currently drafted, this position is potentially uncertain.

The WA Government suggests section 26D be amended to clarify the position and realign it to the original statutory intent expressed in the explanatory memoranda. This would provide greater clarity and certainty for existing mining operations.

5.5 Proposal – Alternative Reforms to the Expedited Procedure

The WA Government acknowledges concerns about the fairness and efficacy of the Expedited Procedure. While the Expedited Procedure facilitates efficient processing of low-impact tenement applications in WA, the WA Government recognises the potential impact of existing policies and practices on native title parties.

The WA Government considers its existing policy and practice in relation to the use of the expedited procedure is appropriate when considered in the context of the volume of exploratory titles granted in the State, as outlined above. Of the 5,661 objections lodged against the 9,774 tenements notified in the Expedited Procedure over the last five years, 3,547 were withdrawn, 389 dismissed and only 71 objections were upheld (meaning the NNTT determined that the Expedited Procedure did not apply to the act).

The WA Government understands the practical challenges native title holders face in responding to Expedited Procedure notices, including providing sufficient evidence to sustain an objection. It also recognises the associated difficulties with cultural restrictions on disclosing culturally sensitive information about sites and the difficulty of gathering such evidence. However, repeal of the Expedited Procedure would at best increase the compliance burden on all parties (and in particular, native title parties) and at worst create a significant bottleneck of exploration titles in WA.

Although the Expedited Procedure is an inquiry process, in practice it is utilised as a de facto RTN, facilitated by the NNTT's case management processes. The WA Government considers this to be the main driver of process costs associated with the Expedited Procedure, noting that section 60AB does not (and should not) apply to Expedited Procedure objections. In recognition of this, the WA Government recommends that the ALRC consider reforms that would:

(a) Align the Expedited Procedure with the RTN by requiring the NNTT to determine an objection within six months of the closing date for objections and report to the Commonwealth Minister if that timeframe cannot be achieved;

(b) Address funding, training and capability gaps for PBCs to decrease any perceived or actual pressure to lodge an objection due to timeframes and/or available information to assess individual applications (including what is required to demonstrate that the Expedited Procedure should not apply); and

(c) Provide greater guidance on the evidentiary standards required to disapply the criteria in s 237 of the NTA.

The WA Government introduced reforms to its application of the Expedited Procedure in 2022, which implemented a 'risk based' assessment process characterised by early intervention and negotiation mechanisms to appropriately identify higher risk areas, resulting in notifying certain matters identified directly to the RTN process. Based on this experience, the WA Government's view is that better outcomes would be achieved if native title parties were adequately supported to undertake their own risk assessment of future acts notified in the Expedited Procedure.

5.6 Proposal – Fully Electronic Notifications

The WA Government acknowledges that the complexity of the Future Acts Regime can often run counter to the NTA's core objectives (particularly the goals of fostering transparent and informed consultation with native title parties and providing certainty to land users). Determining whether an activity constitutes a future act, and under which provision it should be notified, can be administratively burdensome and legally ambiguous. This complexity can disincentivise early engagement and lead to procedural inefficiencies.

The WA Government is committed to improving consultation with Traditional Owners on matters affecting their country. However, significant resources are often expended by government agencies, proponents, and native title holders to comply with or respond to notification requirements—efforts that may not be proportionate to the actual impact of the future act on native title rights and interests.

Key challenges include:

- Determining whether an activity is a future act requiring notification, especially when part of a larger, staged project.
- Balancing early engagement with native title holders and claimants (which supports site avoidance and good practice) against formal notification requirements under the NTA.
- Navigating cost recovery provisions triggered by consultation that may involve future acts.
- Ambiguity that can lead to a strict compliance approach, discouraging early, informal consultation.

In some cases, these issues have led proponents and government agencies to delay engagement with PBCs until a formal decision to proceed is made, which is arguably consistent with the NTA but may be contrary to good practices in stakeholder engagement.

To address these challenges, the WA Government proposes the following reforms:

1. Electronic Notifications as Default

   Amend the NTA and the *Native Title (Notices) Determination 2024* to make electronic notifications the default and legally valid method for future act notices, assuming appropriate safeguards are in place to address digital access and literacy needs. This would:

   - Reduce administrative burden.
   - Improve timeliness and accessibility.
   - Strengthen compliance and transparency.

2. Standardised Notice Formats

   Introduce prescribed templates and formats for future act notices to promote clarity, consistency, and reduce the risk of legal challenge.

3. Clearer Guidance on Notification Triggers and Timing

   Develop comprehensive guidance to help stakeholders determine:

- When an activity constitutes a future act.
- The appropriate timing and method of notification.
- How to engage meaningfully with Traditional Owners without prematurely triggering cost recovery provisions.

These reforms would support more equitable and efficient engagement, and ensure that procedural requirements are proportionate to the impact on native title rights and interests.

5.7 Question – Additional Agreement-Making Vehicles

The WA Government considers that reforms can be made to the Future Acts Regime to retain the flexibility and adaptability of ILUAs, whilst achieving greater alignment with the intent of the NTA and the principle of free, prior and informed consent.[3]

One such reform is to introduce a more targeted 'right to negotiate' process into the existing validation provisions of the NTA and permitting validation by a simple contractual arrangement between the parties. This could apply to certain types of projects or activities (for example, low-impact future acts relating to preliminary land access). To the extent that validation through one of these provisions creates a compensation liability, consideration could also be given to incorporating a limited arbitration process to provide an appropriate compensation range to inform those negotiations (discussed below).

Notwithstanding the WA Government's support for ILUAs to remain as the principal tool for future act agreement-making, there is a need for additional vehicles to be considered. These vehicles should retain the general procedural guidance for ILUAs (for example sections 24B-D), but could provide additional flexibility through:

- Modified processes for certain categories of future acts (for example, facilities for services to the public and low impact activities) that are proportionate to the impact of those acts on native title rights and interests;
- Provisions that enable the WA Government to undertake future acts where the PBC is the proponent, without the need to register an ILUA (or a simplified ILUA process) to ensure the State is not responsible for a compensation liability;
- Set costs and timeframes; and
- Modified native title decision-making processes.

5.8 Question – Introducing an Independent Compensation and Arbitration Process

The WA Government supports the introduction of a mechanism for independent decision-making to guide fair and reasonable compensation outcomes in native title negotiations. This reform would allow parties (by mutual agreement or election) to refer compensation matters to an independent body or panel for non-binding guidance, helping to resolve disputes and promote equitable outcomes.

[3] Conceived as the 'right to a robust process': see Blackhawk J in *Kebaowek First Nation v Canadian Nuclear Laboratories* [2025] FC 319.

Currently, the process for determining compensation under the NTA is complex, resource-intensive, and often lacks clarity, particularly in negotiations involving non-extinguishing acts or legacy tenures. While the High Court's decision in *Timber Creek* remains the only judicial precedent on compensation valuation, it does not provide a scalable framework for the wide variety of compensation scenarios encountered in practice.

To address this, the WA Government proposes that an Independent Compensation Advisory Panel is established as a statutory or administrative body empowered to provide non-binding, expert guidance on compensation, taking into account cultural, economic, and legal factors relevant to native title impacts. This should incorporate:

- A Voluntary Referral Mechanism: Parties to a negotiation (e.g. governments, proponents, and PBCs) could elect to refer compensation matters to the panel, either jointly or individually, to support informed and fair agreement-making.
- Standardised Principles and Methodologies: The panel would apply transparent and consistent principles, informed by judicial precedent and stakeholder input, to promote predictability and reduce disputes.
- Safeguards for Cultural Sensitivity and Consent: The process would respect Traditional Owner decision-making and ensure that any guidance provided does not override the need for free, prior, and informed consent.

This reform would support more efficient and equitable compensation negotiations, reduce reliance on costly litigation, and enhance confidence in the current agreement-making processes under the NTA.

5.9 Question – Recognising Pass Through Provisions

The current construction of the Future Acts Regime places the liability and responsibility for NTA compliance for a significant proportion of future acts undertaken in WA, with the WA Government by default. This includes future acts where the WA Government is undertaking the future act on behalf of a third-party proponent (for example granting land tenure under State legislation).

The WA Government has made the decision to pass on the liability for certain acts to the beneficiaries of such acts via State legislation (see for example section 125A of the *Mining Act 1978* and section 24A of the *Petroleum and Geothermal Energy Resources Act 1967*). The validity of section 125A is currently the subject of legal challenge in the Federal Court of Australia.

In other contexts where grants of interests in land are discretionary, the WA Government will seek evidence from the proponent that they have entered into an ILUA or otherwise complied with the Future Acts Regime. In some cases, the WA Government will require the proponent to confirm that they have indemnified the State against any native title liabilities associated with the future act. This process is cumbersome, complex, uncertain and not necessarily conducive to agreement making and partnerships between proponents and native title holders (and claimants).

In the interests of providing greater certainty, the WA Government suggests that the ALRC consider amendments to the NTA that confirm, codify and/or expand the ability of Commonwealth, State and Territory Governments to pass on native title liabilities for future acts to third parties, subject to the *Racial Discrimination Act 1975* (Cth). This

would encourage greater accountability for proponents to manage the impact of their projects on native title rights and interests as well as any associated liabilities.

5.10 Question – Additional Cost Recovery Guidance

The WA Government considers that the operation of section 60AB of the NTA lacks essential guardrails. There are currently no clear standards, criteria, or oversight mechanisms to guide how cost recovery should be applied by PBCs. This has led to inconsistent practices, uncertainty for proponents, and inefficiencies that undermine the sustainability of PBCs and the integrity of the Future Acts Regime.

These issues are particularly pronounced given the WA Government's dual role as a proponent responsible for meeting costs under section 60AB, and a facilitator of future acts that benefit third parties, such as issuing pastoral permits under Subdiv G. In many cases, the Government bears the financial burden for acts initiated on behalf of third-party proponents, despite not being the direct beneficiary of the activity.

To address these challenges, the WA Government proposes the following reforms:

- Introduce Guidelines for Cost Recovery: Amend the NTA to establish a regulation-making power that enables the development of clear guidelines for:
    - What types of activities justify cost recovery; and
    - How fees should be calculated to ensure they are reasonable and proportionate to the complexity, impact, and nature of the Future Act and the services provided.
- Simplify Cost Recovery Processes: Create a streamlined and transparent framework for cost recovery under section 60AB, reducing administrative burden and improving certainty for all parties.
- Independent Oversight of Fee Disputes: Transfer the function of assessing fee disputes from the Registrar of Indigenous Corporations to the NNTT, which has the expertise and authority to evaluate what fees are reasonable and proportionate in the context of future act negotiations.
- Mechanism to Transfer Cost Responsibility to Third Parties: Establish a statutory mechanism that allows governments to pass on cost recovery obligations to third-party proponents where the Future Act is initiated for their benefit. This mechanism should:
    - Be transparent and legally enforceable;
    - Include safeguards to ensure proponents are aware of and agree to the cost obligations; and
    - Be supported by administrative processes that facilitate direct payment to PBCs.
- Preserve Equity in the Expedited Procedure: The WA Government does not support extending section 60AB to the Expedited Procedure, as it would increase costs, discourage early-stage exploration, and would be inappropriate for what is essentially an arbitral process. Instead, operational funding support for PBCs should be prioritised.

These reforms would introduce much-needed guardrails, ensuring that cost recovery under section 60AB is fair, proportionate, and appropriately allocated, while supporting meaningful engagement with native title holders (and claimants) and efficient administration of the Future Acts Regime.

6.0 Interaction with Aboriginal Cultural Heritage Processes

The protection of Aboriginal cultural heritage in Australia operates through a complex framework involving both Commonwealth and State legislation, which intersects with the NTA. In WA, the *Aboriginal Heritage Act 1972* (AHA) is the primary instrument for managing Aboriginal heritage, while at the federal level, the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) provides a mechanism of last resort where State protections are inadequate.

These frameworks overlap with the Future Acts Regime, which governs activities that may affect native title rights and interests, including rights in relation to the protection of culturally significant sites. However, the lack of integration between these systems often results in procedural duplication, gaps in protection, and inconsistent engagement with Traditional Owners.

Key intersections between the NTA and the AHA include:

- Distinct but Concurrent Legal Frameworks: The NTA and the AHA operate independently, each with its own objectives and processes. While the NTA focuses on protecting native title rights in relation to land use and development, the AHA is concerned with the identification and protection of Aboriginal cultural heritage. Activities may require compliance with both regimes.
- Different Procedural Rights and Approaches: The NTA provides procedural rights such as notification, consultation, and in some cases, negotiation with native title holders. The AHA, by contrast, provides a statutory process for assessing and approving impacts on heritage sites, with advisory input from the Aboriginal Cultural Heritage Committee. The level and form of engagement with Traditional Owners may differ between the two frameworks.
- Use of Agreements: In practice, proponents often negotiate heritage agreements with PBCs as part of broader land access or ILUA processes. While these agreements can help align native title and heritage considerations, they are not formally required under the AHA.
- Role of PBCs and Individual Knowledge Holders: AHA processes are not exclusive to native title holders and has regard to other Aboriginal people who have knowledge and rights in relation to Aboriginal sites, although the role of native title parties is recognised via the right of review to the State Administrative Tribunal.
- Administrative and Resource Considerations: Navigating both systems can involve significant administrative effort for proponents, PBCs, and government agencies. The need to comply with multiple legislative requirements may contribute to complexity, particularly in high-volume sectors such as mining and infrastructure.

- Ongoing Review and Reform: The WA Government, in collaboration with the NNTT, is currently reviewing the interaction between the NTA and AHA to explore opportunities for improved coordination, efficiency, and cultural heritage outcomes.

The WA Government recognises the importance of both native title and cultural heritage frameworks in protecting the rights and interests of Aboriginal people. It acknowledges that while current legislation provides avenues for consultation and review, the lack of integration and differentiation in capacity across PBCs can lead to inconsistent outcomes. The WA Government supports reforms that improve clarity, coordination, and procedural fairness across systems, while ensuring that engagement with Traditional Owners is inclusive, culturally appropriate, and reflective of both collective and individual knowledge.

The WA Government suggests that improvements to the interface between the Future Acts Regime and legislation in relation to Aboriginal cultural heritage (as well as reforms to both State and Commonwealth legislation) is essential to achieving sustainable development and respectful heritage management.

7.0 Conclusions

The WA Government urges the ALRC and the Commonwealth Government to adopt a balanced reform approach that minimises disruption and reflects the operational realities of WA's post-determination landscape. Reforms must be supported by transitional arrangements, capacity-building investments, and implementation pathways that allow adequate consultation with States and Territories. The WA Government remains committed to constructive engagement with the reform process and ensuring that any changes to the Future Acts Regime are fair, balanced and promote agreement-making.

APPENDIX 1 – WA GOVERNMENT POSITION ON ALRC QUESTIONS AND PROPOSALS

This document sets out the WA Government's position and a brief analysis in relation to each Question and Proposal set out in the ALRC's *Issues Paper* and *Discussion Paper*.

	Question or Proposal (from Paper)	**WA Government position**	**Analysis**
Proposal 1 – Expanded Use of Standing Instructions	Amend the NTA and PBC Regulations to allow PBCs to use standing instructions from common law holders to enter into more types of agreements (e.g. for exploration or low-impact acts), reducing the need for repeated authorisation processes	Support.	If implemented, the proposal has the potential to streamline agreement-making by reducing repeated authorisation processes, improving efficiency for low-impact future acts. It addresses process inefficiencies and costs associated with PBC-led future act proposals. Care must be taken to ensure standing instructions are legally robust and clearly scoped, to avoid misuse or duplication of authorisation processes. A monitoring mechanism should be considered to track implementation across PBCs and agreement types.
Proposal 2 – PBC Access to Agreements	Ensure PBCs have automatic access to all registered agreements affecting their determination area. Upon a native title determination, the Native Title Registrar must identify and provide relevant agreements to the PBC.	Support	If implemented, the proposal has the potential to enhance transparency and empower PBCs by backing up and supporting their corporate memory and record-keeping. A key consideration for this proposal should be implementing clear protocols for timely and secure transfer of agreements; clarity in responsibilities for and data management; as well as ensuring the systems maintained by the NNTT are compatible and equipped to manage access.

Proposal 3 – Automatic Removal of Expired ILUAs	Amend the Act so that ILUAs are automatically removed from the Native Title Register when: the relevant interest has expired or been surrendered; the agreement has expired or been terminated; or the agreement otherwise ends.	Support.	If implemented, will improve the accuracy of the ILUA Register, as well as improving transparency and clarity in relation to future act consents. A key consideration for this proposal should be providing sufficient time and support for the NNTT to assess the administrative burden and practical implementation process (including back capture) as well as providing adequate resources for ongoing compliance. A minor consideration is the extent to which this will require detailed input from the WA Government, in which case sufficient time and support should be extended to relevant WA agencies in providing information to assist implementation.
Proposal 4 – Periodic Audit of ILUAs	Require the Native Title Registrar to periodically audit the ILUA Register to identify and remove expired or obsolete agreements, improving accuracy and transparency.	Support.	The WA Government supports this proposal as it has the potential to improve transparency and compliance, noting it may have an administrative impact for the WA Government if the onus is on proponent agencies to respond to the audits of the Register.
Proposal 5 – Binding Dispute Resolution by the NNTT	Allow parties to existing agreements to seek a binding determination from the NNTT to resolve disputes, offering a lower-cost alternative to litigation.	Neutral – Further investigation required.	The impact of this reform requires further investigation. It should also be noted that, taken together, the proposals advanced and reforms explored in the *Discussion Paper* would require a substantial uplift in the NNTT's resourcing and capability.

Proposal 6 – Reformed Right to Negotiate Process	Revise the right to negotiate process to: Require early information sharing; Allow native title parties to object within 6 months; If native title parties do not object, require a minimum period of 18 months for negotiation, before a determination can be sought from the NNTT; Empower the NNTT to determine if a future act can proceed (if a native title party objects) and under what conditions; Introduce a 5-year moratorium if the NNTT decides the act cannot be done.	Oppose.	The WA Government does not support extending the negotiation period to 18 months or the proposed moratorium, and expresses concern about the broader reform proposal. In the context of the existing RTN, there is no demonstrated need to extend the minimum period for negotiations. The proposal risks significant delays for the mining and exploration sector, particularly in circumstances where the inability to reach agreement is unconnected to the impact of the future act on native title rights and interests, or where is a determination is required because parties have been unable to meet the formal requirements of a section 31 agreement. The proposal to expand the scope of the RTN, either through the impact-based future act provisions or the NTMP concept, would also create a substantial impact on other tenure grants, including for critical infrastructure and regional service delivery in WA, including essential services to remote Aboriginal communities, and could deter investment in projects of national and State significance that, if negotiated successfully, could provide substantial benefits to native title holders.

			Alongside the extended negotiation period, the proposed moratorium would in practice create an effective veto, and is likely to be in conflict with WA legislation (e.g. Mining Act priority rights) and may lead to legal challenges from proponents who had a legitimate expectation that their applications would proceed, for example, in the event of forfeiture.
Proposal 7 – Issue Referral to the NNTT	Enable parties to jointly refer specific issues to the NNTT for binding determination during negotiations, helping resolve deadlocks and promote agreement-making.	Neutral – Further investigation required.	This proposal requires further investigation and extensive consultation with the WA Government to explore the details. This should include assessing how binding determinations during negotiations could affect the operation of State legislation and processes, as well as workload impacts for key WA Government agencies.
Proposal 8 – Remove Ban on Royalty-Based Conditions	Repeal section 38(2) of the NTA to allow the NNTT to impose conditions on future acts that include payments based on royalties, profits, or income.	Oppose.	This proposal will likely lead to overcompensation, require complex valuation and commercial expertise that does not currently reside within the NNTT, create commercial uncertainty and expose the State to significant financial risk, especially when combined with the impact-based future act provisions and the NTMP proposal. It would also leave open the possibility that commercially unviable conditions could be imposed on future acts that are inherently unprofitable, including public infrastructure.

Proposal 9 – Repeal the Expedited Procedure	Abolish the expedited procedure (section 32 NTA), replacing it with: Exploration ILUAs; Native Title Management Plans; or Impact-based statutory procedures.	Oppose.	The repeal of the Expedited Procedure is strongly opposed, as it would have a significant impact on the mining and exploration sector, creating significant uncertainty, delay and additional costs that will likely hinder new and ongoing investment in exploration and restrict the pipeline of new mining projects. The proposal would also create significant administrative and resource burdens for PBCs, considering the volume of exploration applications granted annually in WA. While the *Discussion Paper* also proposes reforms to PBC resourcing, this would likely overwhelm PBCs at their current capacity levels and would require substantial additional resourcing and time to 'scale up.' The existing RTN is an overly cumbersome process, especially when considering the volume of exploration titles granted in the WA context. Repealing the Expedited Procedure would place unworkable administrative burdens on all parties and introduce significant delays and costs that would make a significant number of exploration projects unviable and overwhelm the capacity of PBCs and other native title parties.

Proposal 10 – Procedural Compliance as a Condition of Validity	Make compliance with procedural requirements (e.g. notice, consultation) a condition for the validity of future acts, ensuring enforceability and accountability.	Oppose (pending further detail).	This proposal, combined with the proposed introduction of statutory remedies for invalid acts, would require significant resourcing to ensure high levels of technical compliance. Other suggested reforms, including an 'impact-based' assessment of future acts, have the potential create additional ambiguity and uncertainty, increasing the risk of non-compliance and associated administrative costs. Making procedural compliance a condition of validity increases risk of invalidity due to minor errors. It would require high levels of technical compliance and, if the proposal is to invalidate tenure for all purposes, would conflict with WA tenure and registration systems (including the Torrens system) and may have broad-reaching constitutional implications.
Proposal 11 – Central Register of Future Act Notices	Require all future act notices to be lodged with the NNTT, which would maintain a public register to improve transparency, data collection, and oversight.	Support.	This proposal is aligned with work it is currently undertaking to develop contemporary, whole of government policy settings for future acts. This approach includes centralised reporting and data management on future acts undertaken by the WA Government. Consideration should be given to ensuring that any centralised register is required to capture information spatially, even if this is not the primary mechanism.

Proposal 12 – Clarify Compensation in ILUAs	Amend sections 24EB and 24EBA so that compensation under an agreement is only considered full and final if: the agreement explicitly states so; and the agreed amounts are actually paid.	Neutral – Further investigation required.	This proposal requires further investigation. The proposed amendment to make compensation "full and final" only where explicitly stated and paid in full could create residual liabilities for the State, particularly where third-party proponents are involved and the State is not a party to the ILUA. This would undermine the certainty that ILUAs are intended to provide and may necessitate broader amendments to the compensation framework under the NTA.
Proposal 13 – Compensation for Invalid Future Acts	Introduce a statutory right to compensation for invalid future acts, removing the need to rely on complex and uncertain common law remedies like trespass.	Neutral – Further investigation required.	This proposal requires careful investigation, as it is likely to have a significant impact in WA. Further work is needed to determine how a statutory right to compensation would interact with existing remedies. While a clear statutory basis for compensation for invalid future acts could be useful, any reform must be carefully considered to avoid unintended legal and financial consequences.
Proposal 14 – Perpetual Capital Fund for PBCs	Establish a perpetual capital fund, overseen by the Future Fund Board, to provide core operational funding to PBCs, ensuring long-term financial sustainability.	Support (pending further detail).	The WA Government recognises the importance of addressing the operational funding gap for PBCs, however its support for this proposal is contingent on clarity around the proposed administrative arrangements and governance of the fund.

Proposal 15 – NTRB/SP Support for PBCs	Allow Native Title Representative Bodies and Service Providers to use part of their funding to support PBCs in responding to future act notices.	Support.	The WA Government supports this proposal, noting its potential to improve the responsiveness and capacity of PBCs in future act negotiations and streamline administrative processes, but notes this will require commensurate funding for NTRBs/SPs to be practically effective.
Proposal 16 – Fund the NNTT	Provide adequate funding to the NNTT to: Fulfil its expanded functions under the proposed reforms, Offer more facilitation and mediation services.	Support.	This reform, if implemented comprehensively, will enhance the NNTT's ability to manage their existing responsibilities. However, the WA Government expresses concern that the other proposals advanced and reforms explored in the *Discussion Paper* will require a substantial uplift in, and considerable expansion of, the NNTT's resourcing and capability to avoid uncertainty and delay. Workload implications must be considered in detail and sufficient investment in resourcing made, monitored and adjusted as needed should any of the proposals in the *Discussion Paper* be implemented.
Proposal 17 – Strengthen Cost Recovery	Amend section 60AB to: Allow registered claimants to charge fees, Set a minimum scale of costs, Prohibit caps below this scale, Impose a duty to pay, Clarify that government parties can pass costs to proponents.	Oppose.	The WA Government is concerned about the sustainability of the proposed cost recovery model, the risk of transactional approaches to future act administration, and the potential financial burden on government and industry.

			The proposed model is not responsive to sector specific challenges (e.g. low capital industries) and would likely require the WA Government to consider mechanisms to comprehensively pass on costs in full to third party proponents.
Proposal 18 – First Nations Advisory Group	Establish a resourced First Nations advisory group to guide the implementation of reforms, ensuring alignment with international human rights standards and Indigenous self-determination.	Neutral – Further investigation required.	This proposal requires further investigation for the WA Government to indicate a position, which may ultimately depend on matters such as the governance and membership of the group.
Issues Paper Question 1 – Important issues for reform	What are the most important issues to consider for reform in the Future Acts Regime?	Not applicable.	Important issues for reform are outlined in Section 5 of the WA Government's submission.
Issues Paper Question 2 – Important issues not identified in Issues Paper	Are there any important issues with how the Future Acts Regime currently operates that are not identified in the Issues Paper?	Not applicable.	Important issues for reform are outlined in Section 5 of the WA Government's submission.
Issues Paper Question 3 – Aspects of the Future Acts Regime that work well	Are there any aspects of the Future Acts Regime that work well?	Not applicable.	Functional areas of the regime are outlined throughout the WA Government's submission (noting the complex operating environment makes them difficult to isolate).

Issues Paper ***Question 4 – Ideas for reform***	Do you have any ideas for how to reform the Future Acts Regime?	Not applicable.	Suggested reforms are outlined in Section 5 of the WA Government's submission.
Issues Paper ***Question 5 – What would an ideal Future Acts Regime look like?***	What would an ideal Future Acts Regime look like?	Not applicable.	Legally robust, procedurally clear, and practically workable, supporting both the protection of native title rights and the efficient administration of land and resource development. It would balance all of the following principles well: 1. Empower PBCs through sustainable operational funding, clear statutory guidance, and targeted capacity-building to enable meaningful participation in agreement-making. 2. Support agreement-making as the preferred pathway, with streamlined processes, standardised documentation, and improved access to precedent agreements to promote fairness and consistency. 3. Ensure proportionality and clarity in procedural requirements, with reforms that reduce unnecessary administrative burden and align obligations with the actual impact of proposed acts. 4. Incorporate flexible and scalable mechanisms for determining compensation, including access to independent, non-binding guidance where agreed by the parties.

			5. Enable early and informed engagement through default electronic notifications, standardised notice formats, and clear guidance on when and how consultation should occur. 6. Respect jurisdictional diversity by retaining alternative procedures and recognising the unique regulatory and land tenure context of each State and Territory. 7. Promote integration with cultural heritage frameworks, ensuring that native title and heritage processes are coordinated, culturally appropriate, and not duplicative. Such a regime would balance the rights of Traditional Owners with the need for timely and transparent land access, supporting both cultural integrity and economic development.
Question 6 – Native Title Management Plans	Should the NTA be amended to enable PBCs to develop management plans (subject to a registration process) that provide alternative procedures for how future acts can be validated in the relevant determined area?	Oppose.	The WA Government strongly opposes this reform as an alternative statutory procedure for validating future acts. The NTMP proposal presents significant legal, administrative, and strategic challenges that would undermine the integrity of the existing agreement-making system and the State's land use management frameworks.

			The proposal would also create substantial uncertainty for government, industry, and native title parties alike. The WA Government considers the NTMP proposal to be legally and practically unworkable and recommends that reform efforts focus on strengthening existing mechanisms (such as ILUA) that support negotiated, transparent, and coordinated outcomes.
Question 7 – Mandatory Conduct and Content Standards	Should the NTA be amended to provide for mandatory conduct standards applicable to negotiations and content standards for agreements, and if so, what should those standards be?	Support (pending further detail).	The WA Government cautiously supports mandatory conduct standards, subject to the content of those standards. The suggested standards include required information sharing, some of which may not be available at the outset of negotiations. Clarifying the role of government in negotiations will also need careful scrutiny. While native title parties should be afforded information which allows them to make decisions about proposed acts, a balance is required to ensure that requests for information are not a cause of unnecessary or unreasonable delay. In line with this, consideration should be given to adopting a "reasonableness test" for information requests. For example, a proponent should not be required to disclose commercially sensitive information under this reform.

Question 8 – Extension of Regulation to Ancillary Agreements	Should the NTA expressly regulate ancillary agreements and other common law contracts as part of agreement-making frameworks under the Future Acts Regime?	Neutral – Further investigation required.	This question requires further investigation to understand its impact in WA.
Question 9 – Assignment of Agreements	Should the NTA be amended to provide a mechanism for the assignment of agreements entered into before a positive native title determination is made and which do not contain an express clause relating to succession and assignment?	Neutral – Further investigation required.	This question requires further investigation but is unlikely to have a substantial impact in WA, noting the extent of native title recognition. Noting the obiter comments of Justice Mortimer in Tommy on behalf of the *Yinhawangka Gobawarrah People v State of Western Australia* [2023] FCA 857 have largely been accepted and acted upon, it would make sense to codify this.
Question 10 – Variations to Registered ILUAs	Should the NTA be amended to allow parties to agreements to negotiate specified amendments without needing to undergo the registration process again, and if so, what types of amendments should be permissible?	Support.	This proposed reform has the potential to streamline the current authorisation and registration processes where amendments to an ILUA are required.
Question 11 – Dispute Resolution via the NNTT	Should the NTA be amended to provide that new agreements must contain a dispute resolution clause by which the parties agree to utilise the NNTT's dispute resolution services, including mediation and binding arbitration, in relation to disputes arising under the agreement?	Support.	The WA Government expresses cautious support for this proposed reform, noting however that, taken together, the proposals advanced and reforms explored in the *Discussion Paper* would require a substantial uplift in the NNTT's resourcing and capability.

Question 12 – Public Register of Agreements and Redacting of Agreements	Should some terms of native title agreements be published on a publicly accessible opt-in register, with the option to redact and de-identify certain details?	Support.	This reform, if implemented, will improve transparency and consistency, as well as potentially creating de facto guidance for agreements. The WA Government suggests mandatory publication of agreements is considered, with redaction options for sensitive content agreed by the parties to the agreement (ie. an opt out rather than opt in approach with respect to published content).
Question 13 – Agreement with Native Title Claimants	What reforms, if any, should be made in respect of agreements entered into before a native title determination is made, in recognition of the possibility that the ultimately determined native title holders may be different to the native title parties to a pre-determination agreement?	Neutral – Further investigation required.	The WA Government cannot offer a position on this reform without understanding how it is proposed to be implemented Most agreements will have provisions dealing with this issue, whereas legislative amendments may have unintended consequences.
Question 14 – Reforms to Statutory Processes	Should Part 2 Division 3 Subdivisions G–N of the NTA be repealed and replaced with a revised system for identifying the rights and obligations of all parties in relation to all future acts, which: categorises future acts according to the impact of a future act on native title rights and interests; applies to all renewals, extensions, re-grants, and the re-making of future acts;	Oppose.	This proposed reform is strongly opposed as the 'impact-based' model is legally uncertain, administratively complex, and fundamentally inconsistent with State legislation, policy and/or processes. In the absence of an objective means of identifying impact, the categorisation of future acts is likely to be subject to legal challenge. Transitional provisions would also be required to cater for a new set of acts, which will further complicate the system rather than simplifying it.

	requires that multiple future acts relating to a common project be notified as a single project; provides that the categorisation determines the rights that must be afforded to native title parties and the obligations of government parties or proponents that must be discharged for the future act to be done validly; and provides an accessible avenue for native title parties to challenge the categorisation of a future act, to be determined by the NNTT?		Further work would be needed to define what a statutory right to be consulted would involve, which may itself lead to further litigation. Moreover, a binary approach to the impact of future acts on native title rights and interests is difficult to reconcile with the intricacies of WA's regulatory environment and will increase litigation, delay, and cost, as well as undermining the principle of equality by creating greater rights for native title holders than exist for freeholders under State laws.
Question 15 – Potential Exclusions to Impact-Based Assessment	If an impact-based model contemplated by Question 14 were implemented, should there be exclusions from that model to provide tailored provisions and specific procedural requirements in relation to specific matters?	Support (oppose Impact-based model).	The exclusions are supported to the extent that reforms to the statutory processes are progressed despite opposition from the WA Government. These exclusions are essential to a range of State activities related to infrastructure, lease renewals, and emergency services. A comprehensive review of State legislation is needed to identify other necessary exclusions, but is not possible in the timeframe.
Question 16 – 'Beyond Act' Impacts	Should the NTA be amended to account for the impacts that future acts may have on native title rights and interests in areas outside of the immediate footprint of the future act?	Oppose.	This proposed reform is strongly opposed by the WA Government as it cuts across various existing State and Federal legislation relating to Aboriginal cultural heritage and environmental regulation (including in relation to 'social surrounds').

			Further, defining and assessing impacts beyond the immediate disturbance, footprint or boundary of future acts, in most cases, would require extensive investigation, which investigations would themselves be future acts. This difficulty is compounded by taking into account cultural impacts. The reform introduces unacceptable uncertainty, create litigation risk for the WA Government in respect of its regulatory role, and would be fundamentally unworkable.
Question 17 – Legislative Acts	Should the NTA be amended to: exclude legislative acts that are future acts from an impact-based model as contemplated by Question 14, and apply tailored provisions and specific procedural requirements instead; and clarify that planning activities conducted under legislation (such as those related to water management) can constitute future acts?	Oppose.	The WA Government does not support applying the 'impact-based model' to legislative acts, which have broad application and differential effects. The application of procedural rights under the NTA would be practically unworkable and is highly likely to fetter unconstitutionally the WA Parliament's legislative powers. Question 17 also identifies planning activities under State legislation such as water management as possible future acts that should attract procedural rights. This is strongly opposed as it lacks an understanding of WA's regulatory environment. At worst, the reform is fundamentally inconsistent with consultation principles under land use planning legislation.

Question 18 – Test to be Applied where NTP Objects to Future Act	What test should be applied by the NNTT when determining whether a future act can be done if a native title party objects to the doing of the future act?	Support (conditional).	The WA Government supports this reform with the following condition: 1. A multi-factorial test must be applied that includes consideration of existing statutory criteria (including the economic significance of the act and the public interest in the doing of the act), whether the native title party's consent was unreasonably withheld, and whether the future act would present a real risk of substantial and irreparable harm.
Question 19 – Criteria to Inform	What criteria should guide the NNTT when determining the conditions (if any) that attach to the doing of a future act.	Support (conditional).	The WA Government supports this reform with the following conditions: 1. Conditions placed on the doing of future acts must be consistent with State legislation, policy and practice; 2. Conditions placing restrictions on trade and investment (e.g. domestic-only sales) should be avoided, if not expressly prohibited.
Question 20 – Alternative Procedures	Should a reformed Future Acts Regime retain the ability for States and Territories to legislate alternative procedures for future acts?	Neutral.	Retaining the alternative procedure provisions preserves flexibility for States to legislate tailored future act procedures, maintaining jurisdictional autonomy and allowing for processes that meet the needs of individual PBCs. A streamlined process to obtain the approval of the Commonwealth Minister should be considered to ensure barriers are minimised.

			Commonwealth consideration should be limited to ensuring alternative procedures are legally robust and do not conflict with federal legislation.
Question 21 – Non-claimant applications	Should Pt 2 Div 3 Subdiv F of NTA be amended: to provide that non-claimant applications can only be made where they are made by, or for the benefit of, Aboriginal or Torres Strait Islander peoples; [or]… in some other way?	Neutral.	The WA Government does not express a view on this proposed reform as non-claimant applications are not utilised by the WA Government (and not generally utilised in WA).
Question 22 – Consequences of Invalidity	If the NTA is amended to expressly provide that non-compliance with procedural obligations would result in a future act being invalid, should the NTA expressly address the consequences of invalidity?	Support.	The WA Government agrees that consequences for non-compliance with the procedural obligations of the NTA should be clarified. This will provide greater certainty to government, industry and PBCs on the implications of invalid acts. This proposed reform must be carefully considered and calibrated to reflect the complex intersections with State legislation outlined throughout this submission. In particular, any reform must avoid a disproportionate response to invalidity that may ultimately be the result of human error. The constitutional impacts of this proposal must also be considered (ie. confirming that the Commonwealth has the power to invalidate acts for all purposes), as well as other commercial and litigation risks it may precipitate.

Question 23 – Content of Future Act Notices	Should the NTA or the *Native Title (Notices) Determination* be amended to prescribe in more detail the information that should be included in a future act notice and if so, what information or what additional information should be prescribed?	Support.	This reform could improve the quality of information provided to PBCs, aiding informed decision-making without imposing excessive burdens. Care should be taken in defining any minimum content standards and the impact on existing State legislation and processes. Confidentiality and the disclosure of third-party information should be part of these considerations.
Question 24 – Future Act Payments	Should the NTA be amended to provide that for specified future acts, an amount which may be known as 'future act payment' is payable to the relevant native title party prior to or contemporaneously with the doing of the future act?	Oppose.	The WA Government strongly opposes these proposed reforms. It sees no principled basis for a Future Act Payment unless it is directly referable (and set off from) compensation for impact on native title rights and interests. Even if these conditions were satisfied, the proposed reform is apt to create confusion in the context of the varied role the WA Government has in the Future Acts Regime. Calculating a Future Act Payment on the basis of the bifurcated approach set out in the *Timber Creek* decision prior to the act being done (and cultural loss having been suffered) will be challenging, if not impossible. Careful consideration will need to be given to the basis on which a Future Act Payment is calculated, to avoid exceeding the entitlement to compensation.

Question 25 – Future Act Payments and Compensation	How should 'future act payments' interact with compensation that is payable under Part 2 Division 5 of the NTA?	Oppose.	See above.
Question 26 – Short Form Agreements	Should the NTA be amended to provide for a form of agreement, which is not an Indigenous Land Use Agreement, capable of recording the terms of, and basis of, a future act payment and compensation payment for future acts?	Support (pending further details).	The WA Government supports further investigation of this reform, conditional upon the form of agreement and class of acts being clear and subject to standing instructions. The reform may not be viable or worthwhile progressing if the circumstances covered by Short Form Agreements are too narrow. The WA Government does not agree that the only method of agreeing compensation is via an ILUA. Ancillary agreements pursuant to section 31 of the NTA regularly provide for compensation and compensation can be agreed by way of a Deed.
Question 27 – Costs Awards for Future Act Matters	Should the NTA be amended to expressly address the awarding of costs in Federal Court proceedings relating to Future Acts Regime and, if so, how?	Support.	The WA Government supports the position that each party to a proceeding relating to a future act matter should bear its own costs.
Question 28 – Native Title and Aboriginal Cultural Heritage	Should the NTA be amended to provide for requirements and processes to manage the impacts of future acts on Aboriginal and Torres Strait Islander cultural heritage, and if so how?	Neutral – Further investigation required.	The Aboriginal cultural heritage laws overlap with the Future Acts Regime, the lack of integration between these systems often results in procedural duplication, gaps in protection, and inconsistent engagement with Traditional Owners.