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Australian Law Reform Commission - Review of the Future Acts Regime Discussion Paper

NSW Minerals Council Submission – July 2025

The NSW Minerals Council (**NSWMC**) provides the following submission on the Review of the Future Acts Regime Discussion Paper (**Discussion Paper**).

NSWMC is the peak body representing the State's \$40 billion mining industry, with around 80 member companies, including most coal and metals mining operations in NSW, as well as a range of explorers.

With a number of mine sites and exploration licence areas located within or close proximity to determined Native Title (**NT**) areas or areas subject to NT claim processes under the *Native Title Act 1993* (**NTA**), the NSW mining industry is keen to ensure there is an efficient and certain NT framework in place to: build enduring partnerships with First national peoples; deliver an efficient and timely NT framework that gives certainty to all stakeholders, and supports the ongoing economic contribution of the mining sector to the Australian, state, First Nations and local economies.

Comments on the Discussion Paper

The Discussion Paper proposes a range of measures, some of which if implemented could potentially improve the existing NT future acts regime. Initiatives such as expanded standing instructions and short form agreements for exploration activities, conduct standards for negotiations, content standards for agreements, increased development of guidelines to support negotiation processes, timeliness and improved certainty, increased dispute resolution options, increased baseline funding and capacity building for Native Title Parties (**NTP**), as well as attempting to achieve critical NT decisions earlier in the process are supported in principle.

However there are a number of proposals introducing new and untested processes into the future acts regime. These include Native Title Management Plans (**NTMPs**) (Question 6), reformed right to negotiate processes (Proposal 6), repealing the expedited procedure processes (Proposal 9), installing an impact based model (Question 14), repealing existing exclusions (Question 15) amongst others.

At this stage the proposed new processes are largely conceptual and would require significant additional information to better understand the full impact of the changes, how they would work in practice when applied in each State and Territory, and further detailed analysis and consultation to understand if there are any unintended consequences.

Overarching comments are provided below, with more detailed responses to the relevant proposals and questions included in the Discussion Paper provided in the table below.

Improve the existing framework - avoid wholesale change

NSWMC agrees improvements could be made to existing processes within the existing NT future acts regime to make it more certain, equitable and timely for all stakeholders.

However, the complete repeal of existing and well understood NTA future act processes and replacement with new and untested processes is considered unwarranted. Many of the stated outcomes could be achieved through updates and improvements to the existing NT frameworks or processes.

There are a number of incremental changes proposed that could offer a significant improvement without the difficulties and uncertainty offered by a complete revision of the future act regime. Given the current future act system has remained largely unchanged or improved since 1998 – wholesale removal of the existing regime and replacement with an untested alternative regime is likely to create considerable uncertainty, disruption and potential unintended consequences.

It's considered that the interests of all stakeholders would be better served by implementing the incremental changes or reforms to the current future act regime. These incremental changes incorporating the positive initiatives identified in the Discussion Paper could offer significant short term improvements without the added time, difficulties and uncertainty offered by a complete revision of the future act procedures.

Further consultation and testing of reforms

Appreciating the conceptual nature of the proposals at this stage, before these proposals are recommended to the Government there should be further information made available around how the new proposals will work in practice, and how stakeholders concerns have been considered. It's also recommended that any new processes be subject to further consultation with impacted stakeholders, development of case studies and trials before they are recommended to be embedded into the NTA and before existing established processes are removed.

Any new regulatory requirements should not increase red tape or duplicate existing requirements. It is imperative that any reforms recommended to the Government: give detailed consideration around how it would work with existing regulatory frameworks at both the state and Commonwealth levels; and include recommendations that further consultation and engagement with all impacted stakeholders be undertaken before any reforms are implemented.

Transitioning new arrangements

Any proposed reform recommendations must ensure it is made explicit that existing agreements are protected and upheld, and that the integrity or legal standing of existing agreements are not undermined.

It is important that the reforms also be prospective in nature and preserve the status quo for existing rights and interests such as exploration licences and mining leases.

Transition and grandfathering arrangements should also be considered which account for agreement making and negotiation processes which are currently being undertaken to avoid further unnecessary delays or disruption to agreement making.

Resourcing, costs and implementation

The NSW mining industry incurs substantial costs as part of its engagement in NT processes. The resources sector acknowledges that reasonable costs and fees should be borne by industry as part of that engagement and that these should directly relate to the interests, benefits and impacts being evaluated as part of the NT processes.

There is currently little transparency or standardisation on how fees should be determined. The absence of guidance or determined fee structures in relation to costs associated with NT processes, has resulted in evolving and often disparate expectations between parties, and excessive costs. This is further exacerbated by the lengthy, legalistic and administratively complex NTA framework.

The proposal to clarify and strengthen costs recovery so NT parties may more effectively engage with the future acts regime is supported in principle, subject to specific guidance or rules being established to introduce reasonable limits on the extent of all costs associated with NT processes, and which are linked to the type of activity being undertaken.

Consideration should also include the capacity for stakeholders to pay fees. For example exploration activities are typically undertaken by mid-tier and junior-tier explorers who operate with constrained budgets and limited revenue streams. Unbridled costs associated with NTA processes can be prohibitive. Similarly, fee structures for negotiations with mining operations should also be subject to clear transparent guidance and reasonable limits.

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Native Title Management Plans		
Question 6	Should the <i>Native Title Act 1993</i> (Cth) be amended to enable Prescribed Bodies Corporate 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?	NTMPs are proposed to provide a tailored approach where individual PBCs can prescribe processes, promote early engagement and identify development opportunities or restrict areas for development. Whilst appreciating the conceptual nature of the proposal, there are a number of issues including: ● The NTMPs appear to act as quasi land use plans which could be used to prohibit certain types of development without any ability to test or explore opportunities through a holistic environmental assessment process that typically occurs at State government level and takes into consideration all relevant environmental, social and economic considerations. ● Questions around how NTMPs are developed and implemented including consultation and engagement with all levels of government and key stakeholders, processes to manage/determine the reasonableness of proposed outcomes and processes contained in the plans; ● How NTMPs work with State and Commonwealth environment and heritage protection frameworks, as well as other relevant legislative frameworks; ● Potentially sterilising State resources by providing a right of veto over certain areas; ● Lack of information around rights of review/appeal for impacted stakeholders before the plans are made and/or when decisions are made under the plans; and ● The role of government in the approval of the NTMPs. These issues should be addressed and NTMPs tested before they are included as a recommendation to the government. This testing process should include direct consultation with impacted stakeholders. The NTA presently provides for alternative future act regimes for RNTBC through the rigour of the ILUA process. It is currently open for native title parties to enter an ILUA with the State that provides for an alternative future act regime. There are examples of this on both a large and small scale. The benefit of the use of ILUA

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		process is that the system is known, transparent and rigorous and necessarily includes the relevant State as the counter party. The ILUA process and the involvement of the State also ensures that any alternative procedure is consistent with the NTA and the State's relevant enabling legislation. If a management plan approach is to be recommended by the ALRC, it should be an amendment to or work within the framework of the ILUA process.
	Promoting fair and equitable agreements	
Question 7	Should the Native Title Act 1993 (Cth) be amended to provide for mandatory conduct standards applicable to negotiations and content standards for agreements, and if so, what should those standards be?	The introduction of mandatory conduct standards and content requirements for agreements that facilitate effective and streamlined negotiations is supported in principle. Any such standards should be subject to further consultation prior to implementation. In particular, this should extend to prescribing who is to meet the costs of the process as well as the amounts payable. This would include a link between the type of future act and the amount of costs payable. The amendments could also include a timely and cost-effective dispute process. This is particularly important for exploration activities where costs may prove to be prohibitive for exploration projects to proceed.
Proposal 1	The <i>Native Title Act 1993 (Cth)</i> and <i>Native Title (Prescribed Bodies Corporate) Regulations 1999 (Cth)</i> should be amended to allow for the expanded use of standing instructions given by common law holders to Prescribed Bodies Corporate for certain purposes.	The expanded use of standing instructions could be beneficial in effectively balancing the interests of all parties involved by reducing costs and process timeframes and improving efficiency. Any such reforms should include appropriate governance and procedural arrangements, including certainty around the recording and validity of standing instructions. The position may be further improved through the expanded use of standing instructions with registered native title claimants, in addition to registered native title body corporates.

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Question 8	Should the <i>Native Title Act 1993</i> (Cth) expressly regulate ancillary agreements and other common law contracts as part of agreement-making frameworks under the future acts regime?	Amendments to the NTA that could clarify the ability of native title groups to enter common law contracts is supported in principle. This could also include prescribing the status of common law contracts as native title claims are amended, withdrawn and determined. Consideration would need to be given to the content of ancillary agreements that may extend beyond NT issues and how they would be lawfully regulated under the NTA legislative framework.
Proposal 2	The <i>Native Title Act 1993</i> (Cth) should be amended to provide that: (a) the Prescribed Body Corporate for a determined area has an automatic right to access all registered agreements involving any part of the relevant determination area; and (b) When a native title claim is determined, the Native Title Registrar is required to identify registered agreements involving any part of the relevant determination area and provide copies to the Prescribed Body Corporate.	The proposal is supported on the basis that it improves certainty on the status of agreements at the point at which a native title claim is determined. The implementation of such a measure should include appropriate safeguards around disclosure of commercially sensitive information or other matters not necessarily related directly to NT issues.
Question 9	Should the <i>Native Title Act 1993</i> (Cth) 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?	The automatic statutory assignment of native title agreements from the registered native title claimants to the RNTBC on determination of native title and the automatic assignment between RNTBCs when they are changed is generally supported. Such an approach will ensure that native title agreements remain with a single identifiable authorised and regulated representative.
Proposal 3	Section 199C of the <i>Native Title Act 1993</i> (Cth) should be amended to provide that, unless an Indigenous Land Use	Any measures that reduce administrative burden and facilitate easier navigation of relevant documents is supported in principle.

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	Agreement specifies otherwise, the agreement should be removed from the Register of Indigenous Land Use Agreements when: (a) the relevant interest in property has expired or been surrendered; (b) the agreement has expired or been terminated; or (c) the agreement otherwise comes to an end.	
Proposal 4	The <i>Native Title Act 1993</i> (Cth) should be amended to require the Native Title Registrar to periodically audit the Register of Indigenous Land Use Agreements and remove agreements that have expired from the Register.	
Question 10	Should the <i>Native Title Act 1993</i> (Cth) 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?	Any amendment that improves flexibility and reduces administrative requirements is supported in principle. However there needs to be appropriate safeguards around the types of amendments that may be permissible, and under what circumstances parties can request renegotiation of specified amendments to an existing agreement. Specified amendments could include matters such as timeframe extensions, minor variations to processes and other administrative updates. Amendments that alter the fundamental nature of the agreement, particularly those relating to native title outcomes, compensation, or consent to future acts, should require full registration to maintain legal integrity and transparency.
Proposal 5	The <i>Native Title Act 1993</i> (Cth) should be amended to provide that the parties to an existing agreement may, by consent, seek a binding determination from the National Native Title Tribunal in relation to disputes arising under the agreement.	Any measures that make it more cost effective and efficient for resolving disputes are supported in principle. Any such mechanism would need to complement traditional alternative dispute resolution mechanisms under native title agreements. Potentially the NNTT could offer an expert determination process or support function. This would assist in distinguishing the NNTT approach from a traditional specialist Tribunal.

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		It's noted many disputes are purely contractual, and not necessarily 'native title' disputes in nature, and as such may be conducive to decisions being resolved by a regular court in some circumstances.
Question 11	Should the <i>Native Title Act 1993</i> (Cth) be amended to provide that new agreements must contain a dispute resolution clause by which the parties agree to utilise the National Native Title Tribunal's dispute resolution services, including mediation and binding arbitration, in relation to disputes arising under the agreement?	Whilst greater involvement by the NNTT in dispute resolution may be beneficial in some circumstances, it should not necessarily be mandated or the NNTT given exclusive jurisdiction over native title agreement disputes. Native title agreements, particularly agreements in the mining industry cover a broad range of subject matters and values. Parties to native title agreements are often best served by having flexibility in relation to dispute resolution. Additional resourcing and dispute resolution options from the NNTT would be supported as it would assist in ensuring that disputes could be promptly and efficiently resolved in the appropriate forum.
Question 12	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?	A general register of native title agreements that was publicly available is supported in principle It's agreed that the general register would need to give parties to agreements flexibility in relation to the supply of information, maintain confidentiality where appropriate, as well as the ability for entries to be amended and removed.
Question 13	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?	The automatic statutory assignment of native title agreements from the registered native title claimants to the RNTBC on determination of native title and the automatic assignment between RNTBCs when they are changed is supported in principle. Such an approach could ensure that native title agreements remain with a single identifiable, authorised and regulated representative.
	Reshaping the statutory procedures	
Question 14	Should Part 2 Division 3 Subdivisions G–N of the <i>Native Title Act 1993</i> (Cth) be repealed and replaced with a revised system for identifying the rights and obligations of all parties in relation to all future acts, which:	NSWMC acknowledges the complexity of the current future act system but cautions against wholesale reform without substantial further consultation. The proposed reforms would require detailed testing to ensure they are practical, implementable, and do not undermine certainty and investment confidence. Should reforms be

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	(a) categorises future acts according to the impact of a future act on native title rights and interests; (b) applies to all renewals, extensions, re-grants, and the re-making of future acts; (c) requires that multiple future acts relating to a common project be notified as a single project; (d) 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 (e) provides an accessible avenue for native title parties to challenge the categorisation of a future act, and for such challenge to be determined by the National Native Title Tribunal?	further considered, they should be developed through extensive consultation over reasonable timeframes. The complete repeal of the future act system (primarily contained in Subdivision G-N) and replacement with a new “impact based” mode is not considered to be warranted. The current system is already partly impact based as it distinguishes between classes of future acts based on their purpose and rights. For example, it distinguishes between facilities for services to the public and private mining interests. It is considered the interests of all stakeholders would be better served by incremental changes or reforms to the current future act system. This is because the current future act system has remained largely unchanged or improved since 1998 – wholesale removal of the existing regime and replacement with an untested alternative regime is likely to create considerable uncertainty and disruption. Incremental changes could offer a significant improvement without the difficulties and uncertainty offered by a complete revision of the future act procedures. There are a number of incremental changes that could offer a significant improvement without the difficulties and uncertainty offered by a complete revision of the future act regime. Reforms could include: • increased transparency and certainty as to which future act subdivision is being applied by the relevant person doing the future act. Any provisions accommodating a review of that decision would need to be timely and proportionate to the nature of the future act. • where there is more than one future act that may apply to the undertaking of a project, there could be a mechanism for the ‘downstream’ future acts to be included with the primary future act. For example, the undertaking of a single ‘right to negotiate’ for all future acts. Such an approach would also be consistent with the approval of State Significant Development in NSW;

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		• conduct standards and agreement requirements. This could include standard agreements; • the ability to have disputes resolved in a timely manner through the NNTT.
Question 15 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: (a) infrastructure and facilities for the public (such as those presently specified in s 24KA(2) of the <i>Native Title Act 1993</i> (Cth)); (b) future acts involving the compulsory acquisition of all or part of any native title rights and interests; (c) exclusions that may currently be permitted under ss 26A–26D of the <i>Native Title Act 1993</i> (Cth); and (d) future acts proposed to be done by, or for, native title holders in their determination area?		The exclusion of certain renewals from sub-division P under the provisions of the NTA, including section 26A - 26D should continue. If an impact based model is recommended to the government, it should include tailored exemptions or exclusions consistent with the existing exclusions. For example the exclusions could be expanded to cover NSW Assessment Leases, which are the only form of prospecting tenure under the NSW Mining Act 1992 not currently excluded. As noted there are a range of incremental changes that could offer a significant improvement to the future act regime without the difficulties and uncertainty offered by a complete revision of the future act regime. With respect to the exclusions in section 26A, it is considered each State and Territory needs the ability to put in place alternative regimes that are tailored to each State and Territory to address jurisdictional differences. In NSW there are a number of Determinations by the Commonwealth Minister in force under section 26A and its predecessor provisions. These Determinations are bespoke to NSW and have worked successfully for many years and form the core of how compliance with the NTA is achieved in NSW for the grant of exploration tenure. NSWMC is opposed to reforms that would have the effect of revoking the existing Determinations. Two of the primary Determinations / Approvals in NSW are the Native Title (Right to Negotiate (Exclusion) – NSW Land) Determination No.1 of 1996 and Native Title (Right to Negotiate (Inclusion) – NSW Land) Approval No.1 of 1996. It is important to note that these Determinations are not absolute exclusions from the right to negotiate. In practical terms they permit exploration tenure to be granted over native title land. However, the holder of the exploration tenure is conditioned to

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		not explore on native title land without the Minister's consent. In order to obtain the Minister's consent, the right to negotiate must first be complied with. The Determinations means that exploration tenure can be efficiently and cost effectively granted. It is only where exploration on native title land is required that the right to negotiate will be triggered. As native title land makes up a small proportion of the land covered by exploration tenure, the native title land may never be explored on. This means that the holder of the tenure does not go through the right to negotiate where exploration on native title land is not required. With respect to the operation of the exclusions in section 26D, the exclusions should remain unchanged. If reform to these provisions is being considered, the NSWMC position is that any reforms should only have future operation and should not apply to existing interests being renewed. A clarification could be made to the right to negotiate process such that it is made clear that renewals need to be expressly addressed as part of any agreement
Question 16	Should the <i>Native Title Act 1993</i> (Cth) 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?	This is not supported. What is and is not a future act must be clearly defined and referable to the relevant area covered by the future act. This is consistent with the management of the rights and interests of ordinary title holders. The proposed process would be complex, and open to subjective debate as to the extent of impacts on areas outside the project/approval footprint.
Question 17	Should the <i>Native Title Act 1993</i> (Cth) be amended to: (a) 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 (b) clarify that planning activities conducted under legislation (such as those related to water management) can constitute future acts?	No comment

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Proposal 6	The provisions of Part 2 Division 3 Subdivision P of the <i>Native Title Act 1993</i> (Cth) that comprise the right to negotiate should be amended to create a process which operates as follows: (a) As soon as practicable, and no later than two months after a future act attracting the right to negotiate is notified to a native title party, a proponent must provide the native title party with certain information about the proposed future act. (b) Native title parties would be entitled to withhold their consent to the future act and communicate their objection to the doing of the future act to the government party and proponent within six months of being notified. From the time of notification, the parties must negotiate in accordance with negotiation conduct standards (see Question 7). The requirement to negotiate would be suspended if the native title party objects to the doing of the future act. (c) If the native title party objects to the doing of the future act, the government party or proponent may apply to the National Native Title Tribunal for a determination as to whether the future act can be done (see Question 18). (d) If the National Native Title Tribunal determines that the future act cannot be done, the native title party would not be obliged to negotiate in response to any notice of the same or a substantially similar future act in the same location until five years after the Tribunal's determination. (e) If the National Native Title Tribunal determines that the future act can be done, the Tribunal may: require the parties to continue negotiating in accordance with the negotiation conduct standards to seek	Proposal 6 aims to reform the current right to negotiate and future act determination application processes to promote fair negotiation and equitable agreements while providing an efficient process for the resolutions of deadlocks and objections. Whilst it's acknowledged the current form of Subdivision P can be improved as outlined below, it is otherwise a fundamentally sound process that does not require wholesale change. As noted elsewhere, wholesale removal of the existing regime and replacement with an untested alternative is likely to create considerable uncertainty and disruption. Amendments to the right to negotiate that would bring initial certainty as to whether the native title party objects or not to the relevant future act would be a positive reform that would give certainty to stakeholders earlier in the process. Additional improvements to the right to negotiate could include: - clarity as to the payment of costs; - a pathway where the parties have reached agreement but circumstances preclude the signing of an agreement - conduct standards and agreement requirements. This could include standard agreements for exploration licences; - the ability to have disputes resolved in a timely manner through the NNTT; and - the ability to include (if desired) additional future acts to ensure a holistic approach. If a reform is proposed that adopts the use of a 5 year moratorium period, any such reform should include an exception where there is agreement of the parties or there has been a material change to the underlying circumstances. It is also important to note that in some States, such as NSW, there are successful alternative regimes that have been approved and operating for some time.

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	agreement about conditions that should attach to the doing of the future act; • at the parties' joint request, proceed to determine the conditions (if any) that should attach to the doing of the future act; or • if the Tribunal is of the opinion that it would be inappropriate or futile for the parties to continue negotiating, after taking into account the parties' views, proceed to determine the conditions (if any) that should attach to the doing of the future act. (f) At any stage, the parties may jointly seek a binding determination from the National Native Title Tribunal on issues referred to the Tribunal during negotiations (see Proposal 7). The parties may also access National Native Title Tribunal facilitation services throughout agreement negotiations. (g) If the parties reach agreement, the agreement would be formalised in the same manner as agreements presently made under s 31 of the <i>Native Title Act 1993</i> (Cth). (h) If the parties do not reach agreement within 18 months of the future act being notified, or within nine months of the National Native Title Tribunal determining that a future act can be done following an objection, any party may apply to the National Native Title Tribunal for a determination of the conditions that should apply to the doing of the future act (see Question 19). The parties may make a joint application to the Tribunal for a determination of conditions at any time.	

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Proposal 7	The <i>Native Title Act 1993</i> (Cth) should be amended to empower the National Native Title Tribunal to determine issues referred to it by agreement of the negotiation parties.	The principle of resolving issues in a timely and efficient manner is supported in principle. However, there is concern around resourcing and timeliness, particularly if multiple 'interim' issues are referred to the NNTT during negotiations. Further there would need to be appropriate guidance and safeguards around issues that are able to be resolved, and appropriate processes and timeframes.
Question 18	What test should be applied by the National Native Title Tribunal when determining whether a future act can be done if a native title party objects to the doing of the future act?	It's considered that the current future act determination process should continue in its present form, subject to amendments to the criteria considered by the NNTT discussed below. This is because the future act determination process needs to be flexible to accommodate the differences between the States and Territories. In NSW for example, it is more often the case that the area of native title land within a mining or exploration title will be relatively limited. Where the native title land makes up a small proportion of the overall mining or exploration title it would be disproportionate to provide for a consent based process for the doing of the future act.
Question 19	What criteria should guide the National Native Title Tribunal when determining the conditions (if any) that attach to the doing of a future act?	The current regime for future act determinations should continue but could be amended to improve the efficiency of the process. The future act determination process could be amended to: • prescribe standard terms and conditions that could be applied by the NNTT to future act determinations; • expressly permit the parties to narrow the issues in dispute by formally agreeing aspects of the future act determination process such as compensation ; and • provide how the NNTT is to take into consideration approvals already granted by State and Federal Governments that apply to the doing of the relevant future act.

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Proposal 8	Section 38(2) of the <i>Native Title Act 1993</i> (Cth) should be repealed or amended to empower the National Native Title Tribunal to impose conditions on the doing of a future act which have the effect that a native title party is entitled to payments calculated by reference to the royalties, profits, or other income generated as a result of the future act.	If the NNTT will have the power to order compensation, any such order must be consistent with the existing principles in the NTA for the calculation of native title compensation. There should also be consideration around the reasonableness of nexus between a royalty or profit based payment and how it equates to a measure of compensation for a project's impacts on NT rights and interests. A royalty or profits based payment is a matter that can be voluntarily agreed by parties, but shouldn't necessarily be something that can be imposed by the NNTT.
Proposal 9	Section 32 of the <i>Native Title Act 1993</i> (Cth) should be repealed.	The repeal of the expedited procedure contained in section 32 of the <i>Native Title Act 1993</i> (Cth) is not supported. Limited reform of the expedited procedure could include: • clarity as to the payment of costs; • the expanded use of standing instructions; • a pathway where the parties have reached agreement but circumstances preclude the signing of an agreement; • conduct standards; and • increased use of template or standard agreements. Further, limited reform of the expedited procedure could be undertaken which gives the States and Territories the ability to prescribe aspects of the process such as the development of standard or template agreements that can be utilised by parties, and particularly explorers. Such an approach would enable the tailoring of the expedited procedure to each State or Territory as appropriate.
Question 20	Should a reformed future acts regime retain the ability for states and territories to legislate alternative procedures, subject to approval by the Commonwealth Minister, as currently permitted by ss 43 and 43A of the <i>Native Title Act 1993</i> (Cth)?	The States should be able to retain the ability to legislate alternative procedures, subject to the approval by the Commonwealth Minister as is presently the case. This ensures that each State or Territory has the ability to put in place an alternative regime that reflects and accommodates the particular circumstances of each State

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		or Territory. This reflects the differences in terms of the relevant State or Territory legislation as well as the nature and extent of the native title land within the relevant State or Territory.
Question 21	Should Part 2 Division 3 Subdivision F of the Native Title Act 1993 (Cth) be amended: (a) 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; (b) for non-claimant applications made by a government party or proponent, to extend to 12 months the timeframe in which a native title claimant application can be lodged in response; (c) for non-claimant applications in which the future act proposed to be done would extinguish native title, to require the government party or proponent to establish that, on the balance of probabilities, there are no native title holders; or (d) in some other way?	It's critical that proponents clearly understand who holds decision-making authority and under what legal basis a proponent must engage and with whom. Introducing potential ambiguity, such as by involving non-claimant parties or expanding representation beyond determined or registered entities in legal process risks increasing administrative burden, creating legal uncertainty, and potentially undermining confidence in the regulatory framework.
Proposal 10	The <i>Native Title Act 1993</i> (Cth) should be amended to expressly provide that a government party's or proponent's compliance with procedural requirements is necessary for a future act to be valid.	Introducing a fair and reasonable compliance and enforcement approach is supported in principle. However any compliance regime must take into consideration the principles of procedural fairness and proportionality.
Question 22	If the <i>Native Title Act 1993</i> (Cth) is amended to expressly provide that non-compliance with procedural obligations would result in a future act being invalid, should the Act expressly address the consequences of invalidity?	Any enforcement responses should be proportional to the type of non-compliance. For example administrative oversight or inadvertent error should not attract the same level of penalty when compared to more serious cases of wilful disregard or negligence. Invalidating future acts due to minor administrative or technical non-compliance would be unreasonable and would introduce investment uncertainty.
Question 23	Should the <i>Native Title Act 1993</i> (Cth), or the <i>Native Title (Notices) Determination 2024</i> (Cth), be amended to prescribe in	No comment.

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	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?	
Proposal 11	All future act notices should be required to be lodged with the National Native Title Tribunal. The Tribunal should be empowered to maintain a public register of notices containing specified information about each notified future act.	The proposed process would be beneficial provided it is publicly available and searchable online.
Compensation and other payments		
Question 24	Should the <i>Native Title Act 1993</i> (Cth) be amended to provide that for specified future acts, an amount which may be known as a 'future act payment' is payable to the relevant native title party prior to or contemporaneously with the doing of a future act: (a) as agreed between the native title party and relevant government party or proponent; (b) in accordance with a determination of the National Native Title Tribunal where a matter is before the Tribunal; (c) in accordance with an amount or formula prescribed by regulations made under the <i>Native Title Act 1993</i> (Cth); or (d) in accordance with an alternative method?	Who pays native title compensation, when the native title compensation is paid and the amount of native title compensation payable is dependent on the circumstances. For example, compensation may be agreed under an ILUA and paid by a proponent. Alternatively, the compensation liability may rest with the State and may not be passed on to a proponent. A further example is where the future act is done and the relevant native title party is a registered claimant but subsequently that claim is dismissed or there is a negative determination of native title. A concept therefore of a future act payment should: • be limited to areas where native title has been determined to exist only; • ensure that the calculation of compensation is consistent with the current principles in the NTA for the calculation of native title compensation. It would not be appropriate for the NTA to legislate for what would otherwise be commercial arrangements; and • ensure that there is no double up of payments. So compensation is determined once and finally for a future act and compensation paid under an ILUA or RTN agreement would count towards or offset that native title compensation.
Question 25	How should 'future act payments' interact with compensation that is payable under Part 2 Division 5 of the <i>Native Title Act 1993</i> (Cth)?	

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Question / Proposal	Detail	NSWMC Comment
Proposal 12	Sections 24EB and 24EBA of the <i>Native Title Act 1993</i> (Cth) should be amended to provide that compensation payable under an agreement is full and final for future acts that are the subject of the agreement only where the agreement expressly provides as such, and where the amounts payable under the agreement are in fact paid.	Any recommendation supporting this approach should ensure: - any amendment does not have retrospective effect. That is, it does not retrospectively alter the position under current agreements; and - there are guidelines or clear statutory tests; and - there is clarity as to how to treat staged compensation payments, such as annual payments or production type payments.
Question 26	Should the <i>Native Title Act 1993</i> (Cth) 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 for, a future act payment and compensation payment for future acts?	Changes to the NTA that support agreement making are supported in principle. This can include compensation as well as the standardisation of contractual provisions that improve engagement and efficiency.
Proposal 13	The <i>Native Title Act 1993</i> (Cth) should be amended to provide a statutory entitlement to compensation for invalid future acts.	Clarifying the consequences of the operation of section 24OA of the NTA are supported in principle. However any compliance regime must take into consideration the principles of procedural fairness and proportionality.
Resourcing, costs and implementation		
Proposal 14	The <i>Native Title Act 1993</i> (Cth) should be amended to provide for and establish a perpetual capital fund, overseen by the Australian Future Fund Board of Guardians, for the purposes of providing core operations funding to Prescribed Bodies Corporate.	NSWMC is supportive of RNTBCs being appropriately resourced to discharge their statutory responsibilities.
Proposal 15	Native Title Representative Bodies and Native Title Service Providers should be permitted to use a portion of the funding disbursed by the National Indigenous Australians Agency to support Prescribed Bodies Corporate in responding to future act notices and participating in future acts processes.	

ATTACHMENT - NSWMC Comments

Question / Proposal	Detail	NSWMC Comment
Proposal 16	The Australian Government should adequately fund the National Native Title Tribunal to fulfil the functions contemplated by the reforms in this Discussion Paper, and to provide greater facilitation and mediation support to users of the native title system.	
Proposal 17	Section 60AB of the Native Title Act 1993 (Cth) should be amended to: (a) entitle registered native title claimants to charge fees for costs incurred for any of the purposes referred to in s 60AB of the Act; (b) enable delegated legislation to prescribe a minimum scale of costs that native title parties can charge under s 60AB of the Act; (c) prohibit the imposition of a cap on costs below this scale; (d) impose an express obligation on a party liable to pay costs to a native title party under s 60AB of the Act to pay the fees owed to the native title party; and (e) specify that fees charged by a native title party under s 60AB can be charged to the government party doing the future act, subject to the government party being able to pass through the liability to a proponent (if any).	Proposal 17 seeks to clarify and strengthen costs recovery so NT parties may more effectively engage with the future acts regime. The Discussion Paper notes the introduction of negotiation of conduct standards (Question 7) could include requiring proponents to contribute to reasonable negotiation costs, and this issue would need to be resolved if both reforms were implemented. It's acknowledged that reasonable costs and fees should be borne by industry and that these should directly relate to the interests, benefits and impacts being evaluated as part of the native title processes. However, there must be specific guidance or rules established to introduce reasonable limits on the extent of all costs associated with NT processes which are linked to the type of activity being undertaken. Consideration should also include the capacity for stakeholders to pay fees. For example exploration activities are typically undertaken by mid-tier and junior-tier explorers who operate with constrained budgets and limited revenue streams. Unbridled costs associated with NTA processes can be prohibitive. Similarly, fee structures for negotiations with mining operations should also be subject to clear transparent guidance and reasonable limits.
Question 27	Should the <i>Native Title Act 1993</i> (Cth) be amended to expressly address the awarding of costs in Federal Court of Australia proceedings relating to the future acts regime, and if so, how?	No comment.
Proposal 18	The Australian Government should establish a specifically resourced First Nations advisory group to advise on implementing reforms to the <i>Native Title Act 1993</i> (Cth).	No comment.

ATTACHMENT - NSWMC Comments

Question / Proposal	Detail	NSWMC Comment
	Aboriginal and Torres Strait Islander cultural heritage	
Question 28	Should the <i>Native Title Act 1993 (Cth)</i> 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?	The holistic management of native title and cultural heritage is supported in principle provided there is no duplication with existing Commonwealth and State cultural heritage protection laws or cutting across integrated and holistic environmental assessment processes. Question 28 and the options put forward for consideration raise concerns about potential duplication of other state and Commonwealth ACH regulatory frameworks and adding additional regulatory burden, as well as potentially overriding state based integrated development assessment and decision making frameworks. This could potentially result in a right of veto based on a single issue without affording any ability to test or balance out other competing interests as part of a holistic assessment and determination process. Given the potential interaction with other state and Commonwealth legislation it would be more practical to deal with this matter through future reviews of relevant legislation such as the Aboriginal Torres Strait Island Heritage Protection Act.