



Australian
Human Rights
Commission

Submission to Discussion Paper: Review of the Future Acts Regime

Australian Human Rights Commission

Submission to the Australian Law Reform Commission

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1 Introduction

The Australian Human Rights Commission ('the Commission')¹ welcomes the opportunity to provide a submission in response to the Australian Law Reform Commission's (ALRC) Discussion Paper: Review of the Future Acts Regime² ('the Discussion Paper').

This submission is made by the Aboriginal and Torres Strait Islander Social Justice Commissioner (Social Justice Commissioner), who has statutory responsibilities under the *Australian Human Rights Commission Act 1986* (Cth)³ (AHRC Act) to examine the enjoyment and exercise of human rights by Aboriginal and Torres Strait Islander peoples; as well as responsibility under section 209 of *Native Title Act 1993* (Cth)⁴ ('the Act') to report on the effect of the Act on the exercise and enjoyment of human rights of Aboriginal Peoples and Torres Strait Islander Peoples.

The Discussion Paper presents a comprehensive, thoughtful and innovative approach to reform of the native title system. The Commission is broadly supportive of the proposals the ALRC has put forward.

As stated in our submission to the Issues Paper,⁵ the Review provides an important opportunity to consolidate and assess information on how the Act is functioning in practice, and to map out a reform pathway which honours the original stated intent of the Act – that is to:

- 'rectify the consequences of past injustices by the special measures'... 'for securing the adequate advancement and protection of Aboriginal and Torres Strait Islander Peoples'; and
- 'to ensure that Aboriginal and Torres Strait Islander Peoples receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire'.⁶

We agree with the ALRC's assessment that the current Future Acts Regime does not further the intention of the Act in these respects and we hope that the opportunity the Review affords to address this misalignment will be taken up by the Australian Government at the conclusion of the Review process.

Likewise, we agree with the ALRC that 'the future acts regime should uphold fundamental principles of human rights'¹⁷. The functioning of the reformed Future Acts Regime should be consistent with the commitments Australia has voluntarily committed to under international law.

2 A human rights-based approach

2.1 Addressing discriminatory provisions in the Act

The ALRC emphasises that the rights to equality before the law and freedom from racial discrimination are important guiding principles in the context of the Review.

The establishment of the Native Title Act provided a process by which the common law rights of First Nations communities would be considered and respected rather than defining or limiting those rights.

The 1998 amendments to the Act—often referred to as the '10 Point Plan'⁸—were inconsistent with both the Racial Discrimination Act (RDA) and the Convention on the Elimination of All Forms of Racial Discrimination (CERD)⁹. Their effect has severely diminished the intent of the Act, and the full recognition and delivery of the rights and interests intended.

Amending the Future Acts Regime, and the Act more broadly, to ensure consistency with international human rights law and the RDA would support the intent of the Act to achieve equality before the law and non-discrimination. We agree with the ALRC that upholding these rights will require that:

native title rights and interests, as a distinctive form of property, are protected from incursion or impairment and their importance is respected like any other form of property.¹⁰

2.2 Leveraging the human rights framework

We note the ALRC's broader attention to human rights. For example:

- the references made within the context of agreement-making to the standards of 'free, prior and informed consent' and 'good faith'¹¹ which are

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set out in the United Nations Declaration on the Rights of Indigenous Peoples ('the Declaration'); and

- the rationale the ALRC has provided for Proposal 18 in the context of shared decision-making which is presented as follows:

International human rights obligations require that the process of making laws, and not just their substance, should give effect to the right to self-determination and principles of free, prior, and informed consent.¹²

Drawing upon international human rights law in this way helps to raise awareness of, and respect for, these rights and reinforces governments' accountability to their international obligations.

With this in mind, the reforms proposed in the Discussion Paper would be strengthened through broader application of a human rights-based approach which articulates Australia's human rights obligations as they pertain to each proposal and considers how these obligations could be realised and reinforced through domestic laws and procedures.

Adopted by the United Nations General Assembly on 2007, and with Australia confirming its support in 2009, the Declaration stands as the most comprehensive international instrument on the rights of Indigenous peoples. It provides a lens through which to apply existing legal obligations sourced in international human rights treaties which Australia has ratified¹³ to the lives and circumstances of Indigenous people and their communities.

Enacted 16 years' prior to the adoption of the Declaration by Australia, key elements within the Act—including but not limited to the Future Acts Regime—are not currently compliant with Australia's obligation to uphold the Declaration, and, as the Mabo Centre and National Native Title Council's (NNTC) joint submission suggests, the Review provides an important opportunity to 'ensure that these processes are now explicitly in accordance with international human-rights-based expectations'¹⁴.

A principled approach to applying the Declaration would provide a mechanism by which to ensure that the proposals in the ALRC's final report are crafted in a way that, if implemented, would give the rights contained in the Declaration full effect.

The Declaration is underpinned by four foundational principles:

- Self-determination

- Participation in decision-making, underpinned by free, prior and informed consent and good faith
- Respect for and protection of culture
- Equality and non-discrimination.

These four principles can guide how proposals are designed and executed, provide criteria against which existing or proposed laws are audited or assessed for consistency with the Declaration, and be utilised as overarching benchmarks to assess the effectiveness of the actions taken at a later date i.e. to determine the measurable ways self-determination, participation, respect for culture and equality have been enhanced (or not) by the reforms.

These principles could also be incorporated directly into conduct and content standards relating to negotiations and agreements, and into National Native Title Tribunal (NNTT) assessment criteria across a wide array of its existing and potential future functions.

2.3 Ratification of ILO 169

We note that the Review also provides an opportunity for the ALRC to recommend that the Australian Government extend its international commitments. Also known as the Indigenous and Tribal Peoples Convention 1989, ILO 169 focuses on the importance of respecting the cultures and ways of life of indigenous peoples and ensures their participation in decisions that affect them. Australia is yet to sign and ratify ILO 169, and doing so would set clear and binding standards applicable across the native title system.

3 Consideration of the Discussion Paper's questions and proposals

3.1 New tools and supports for Prescribed Bodies Corporate

(a) Access and assignment to Agreements

The Commission is in favour of the amendments to the Act outlined in **Proposals 2a and 2b** which would provide Prescribed Bodies Corporate (PBCs) with an automatic right to access all registered agreements involving any part of their determination area and compel the Native Title Registrar (the Registrar) to facilitate this.

Many agreements—such as Indigenous Land Use Agreements (ILUAs) or section 31 agreements—are made before native title is formally determined, often with applicants or other entities. Without access to all relevant agreements, PBCs may be disadvantaged by lack of information pertaining to obligations or benefits that affect their area, undermining their right to free, prior and informed consent (FPIC), and their ability to effectively monitor compliance, enforce terms, and conduct negotiations.

The Commission also supports amendments to the Act 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.

Without a statutory mechanism for the assignment of agreements, there is a risk that agreements lacking provisions for succession and assignment may become unenforceable or ambiguous and that native title holders may lose access to benefits or protections negotiated on their behalf.

In the interests of improving the accuracy of information, reducing administrative burdens, and supporting better governance of native title agreements, the Commission also supports the proposed amendments contemplated in **Proposals 3 and 4** to provide that: unless an Indigenous Land Use Agreement specifies otherwise, the agreement should be removed from the Register of ILUAs when the relevant interest in property has expired or been surrendered, the agreement has expired or been terminated, or the agreement otherwise comes to an end; and the Registrar periodically audit the Register of ILUAs and remove agreements that have expired from the Register.

Consideration should also be given to maintaining records of agreements which have been removed from the Register in the National Archive to support future truth-telling initiatives and access to a history of engagement on country for future generations of First Peoples.

It is critical that common law holders are able to access information on the existence and content of agreements entered into on their behalf by PBCs. The Commission sees benefit in publishing native title agreements publicly on an accessible opt-in register but note that great care will need to be taken with redaction to protect culturally sensitive information from being made public. Appropriate processes should be in place and be adequately resourced to ensure this is executed without error.

In addition to a publicly accessible register, as we noted in our submission to the Issues Paper, it may also be beneficial for native title holders and parties to

agreements to have access to a confidential data management system that facilitates accountability as well as Indigenous data sovereignty. In addition to agreements, this could also apply to native title determinations, clearly outlining the rights and interests recognised, how they are to be accessed, and the extent to which they are exercised.

(b) Expanded standing instructions

The Commission acknowledges that the measure contemplated in **Proposal 1**—to expand the use of standing instructions given by common law holders to PBCs—may well serve to reduce costs and save time. If it were to go ahead, there should be a consideration of what safeguards might be required to ensure decisions are not made to the exclusion of common law holders’ consent. These might include the agreement amongst all native title parties to clear and fairly negotiated rules (i.e. compliant with FPIC) regarding the issue, review, and revocation of standing instructions, sound record-keeping, training and compliance support, and sufficient funding to ensure PBCs are well-positioned to put these in place.

(c) Native Title Management Plans

The Commission supports amendments to the Act to enable PBCs to develop native title management plans (NTMPs) that provide alternative procedures for the validation of future acts.

A key strength of NTMPs—and an important point of alignment with First Peoples’ right to development under the Declaration—is that they have the capacity to exclude or restrict unwanted activity as well as to promote development deemed desirable by native title holders.

Subject to regular review, NTMPs would provide clear, upfront expectations for governments and proponents, complement existing mechanisms like ILUAs, and serve as an equitable and transparent alternative to expedited procedures. We also note that these plans could potentially address both native title and cultural heritage legislation compliance.

We note that consideration should be given to:

- the registration requirements for NTMPs, whether this would be subject to a process of objection, and how objections would be considered, and whether this should also become a function of the NNTT; and

- the inclusion of sea country not included in determinations but, nonetheless, recognised as a PBC's (or traditional owner group's recognised or operating under alternative governance mechanisms that intersect with native title and PBCs) responsibility under other laws and regulations.

We are also concerned that the development and review of NTMPs would significantly add to the costs and workloads of PBCs which are insufficiently funded to manage their existing responsibilities and functions.

(d) Service supports, recovery of costs incurred, and award of costs

For the intent of the Act to be realised, access to justice for native title parties must be ensured. Measures to address this should recognise that the impact of resource constraints is of far greater significance and detriment to First Nations participants than to third parties, and that Indigenous participants in the native title system are not voluntarily entering this system. It has been imposed upon them.

The Commission agrees with **Proposal 15** that Native Title Representative Bodies (NTRBs) and Native Title Service Providers (NTSPs) should be permitted to use a portion of the funding disbursed by the National Indigenous Australians Agency (NIAA) to support Prescribed Bodies Corporate in responding to future act notices and participating in future acts processes. However, we note that not all PBCs work with or receive support from NTRBs and NTSPs. In the interest of equity and self-determination, consideration should also be given to the disbursement of funds directly to PBCs not utilising these services.

We are also broadly supportive of the amendments to Section 60AB of the Act which are set out in **Proposal 17** to entitle registered native title claimants to charge fees for costs incurred for any of the purposes referred to in s 60AB of the Act; although we echo the concerns expressed in the Mabo Centre and NNTC's joint submission as to whether the minimums would create 'a "safeguard" or a "bottom" to be raced to' ¹⁵

Relative lack of resources also puts native title parties at a distinct disadvantage with respect to litigation, and the Commission favours amendment to the Act to establish a modified no costs jurisdiction whereby the court would have discretion to order that successful native title parties' costs be paid by the unsuccessful counterparties.

All this said, we acknowledge that, while helpful, measures such as NTRB and NTSP support, payment of fees, and awarding of costs in litigation proceedings do not constitute an adequate nor sustainable solution to the systemic resource deficit faced by PBCs.

(e) A perpetual capital fund

Without appropriate resourcing for PBCs the many other promising reforms contained in the Discussion paper will ultimately fail to deliver the outcomes sought.

Consistent with our submission to the Issues paper¹⁶, the Commission strongly supports proposed amendments to the Act outlined in **Proposal 14** which provide for a perpetual capital fund for the purposes of providing PBCs with core operations funding.

The burden of facilitating the effective engagement of traditional owners in the native title system must lie with those responsible for administering the system (governments), and those seeking to benefit from its existence (proponents). Benefits (royalties, compensation and future act payments) received from native title determinations or agreements, should not be required to fund future engagement in the system.

PBCs have an ongoing responsibility to comply with the statutory requirements and future acts processes imposed upon them. Within this context, administrative equality warrants a perpetual fund—independent and separately administered, supplied by government and industry, free from corporate influence and the whims of political cycles, and dispersing funds directly to PBCs rather than through RNTBCs. Such a fund would also need to consider the limited governance capacity of PBCs to secure and administer funding provided.

We support the ALRC's consideration of the Indigenous Land and Sea Corporation (ILSC) as a suitable administrator of such a fund and acknowledge that the administrator would require appropriate operational funding—potentially sourced from contributions to the fund—to carry out its functions, including the publication and dissemination of process guidelines, and the timely resolution of applications and disbursement of funds.

Consideration should also be given as to whether the fund could manage funding for purposes other than core funding for compliance with statutory requirements and future acts processes. As recommended in the Commission's Women in Native Title: Native Title Report 2024 which states:

The reform process should include recognition of the impact that the native title system has had on communities and recommend a mechanism for the Australian Government to resource and support bespoke community initiatives for healing, educating and empowering communities in the wake of native title.¹⁷

(f) Addressing the scarcity of qualified personnel

As noted in the Mabo Centre and NNTC's joint submission, there is also a 'shortage of experienced, competent, trustworthy personnel across a range of disciplines in the native title sector... [and urgent need of] the development of panels of 'accredited' practitioners'¹⁸ to assist native title holders with a range of activities, including the development of NTMPs.

3.2 Improved agreement-making

(a) Conduct standards

The Commission strongly supports amendment to the Act to provide for mandatory conduct standards applicable to negotiations and content standards for agreements. The burden of proof as to whether standards have been met should sit with the proponent, not the native title party.

These standards should align with Australia's international human rights obligations and explicitly include the Declaration's four foundational principles: self-determination; participation in decision-making, underpinned by free, prior and informed consent and good faith; respect for and protection of culture; and equality and non-discrimination.

An enforceable definition of 'good faith' should be included in the Act. This should include the provision to native title parties of funding to cover negotiation-related costs as well as timely, accessible, fulsome and unbiased information regarding the site and the proposed future act.

(b) Content standards

The Commission supports amending the Act to provide for mandatory content standards for agreements. These should comply with First Peoples' rights under the Declaration and be limited to protective provisions in aid of progressing the intent expressed in the Act's preamble.

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 Commission supports amending the Act to:

- require that all future pre-determination agreements include a clause specifying how the agreement will transfer to the determined native title holders and clear procedures for updating parties post-determination; and
- enable re-negotiation of pre-determination agreements in the event determined native title holders were not adequately represented or consulted in the making of these agreements.

The Commission also supports amendments to the Act to enable the regulation of ancillary agreements and other common law contracts. As it currently stands, ancillary agreements often contain non-disclosure clauses and gag provisions, which can reduce accountability and transparency for common law holders to know what has been negotiated either in their name or on their behalf and whether this would be allowable under the Act.

While there should be room for significant flexibility in the way ancillary agreements and other common law contracts are structured, regulation could include elements such as minimum standards and prohibition of certain provisions, oversight of agreement objectives and deliverables, and provisions to enforce accountability in the event of a breach. Actions taken by the regulator pertaining to these agreements should be transparent and demonstrate compliance with the intent and objectives of the Act.

As the Discussion Paper states, presently ILUAs are the only mechanism available for recording the terms of, and basis for, a compensation payment for future acts. Given the administrative burden and expense involved in establishing an ILUA and foreseeing the need for an accessible and less burdensome mechanism to agree to payments, the Commission is supportive of amendments to the Act to provide for an alternative form of agreement.

Lastly, while we note their very limited use to date, a reformed Future Acts Regime would ideally phase out provisions for states and territories to legislate alternative procedures. While it is important that the national system allows for internal flexibility in agreement-making, allowing some jurisdictions to create alternative procedures particular to their state or territory risks fragmentation, inconsistency, and potentially weaker protections for native title holders depending on the location of their Determination Area.

(c) Safeguards for amendments not requiring re-registration

With respect to amendments to the Act to allow the negotiation of specified amendments to agreements without needing to undergo the registration process again, we suggest that such specified amendments should include only non-substantive changes such as updates to contact details, adjustments to payment schedules and clarification on procedural steps; not substantive changes which would alter the nature of the core agreement. In the interests of good governance, transparency and accountability, it should be required under the Act that all parties must agree in writing to any such amendments, and that there be clear and well-documented processes in place regarding the execution and record-keeping of such amendments.

(d) Payment under agreements

With respect to payments made through agreements, the Commission strongly supports the amendments to the Act contemplated in **Proposal 12** 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.

3.3 An Impacts-based model

The Commission supports the repeal of Part 2 Division 3 Subdivisions G–N of the Act and its replacement 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; 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.

Subdivisions G–N deal with specific types of future acts each with different procedural requirements. This creates unnecessary complexity and inconsistent levels of protection. Currently most future acts under these subdivisions do not trigger a right to negotiate, only a right to be notified, or to consultation. This leaves native title holders with little influence over decisions impacting their Country and undermines their right to participation in decision-making, underpinned by FPIC and good faith.

The design of the impact-based model will be of critical importance, especially in its treatment of native title rights and interests. The model should assess and account for impacts in full context of First Peoples' exercise and enjoyment of human rights as per the Declaration, including their right to observe and fulfil cultural responsibilities. Likewise, in respect of scaling procedural rights according to their level of impact, the model should be designed in a manner compliant with the Declaration. This might require, for example, that all future acts involving compulsory acquisitions and extinguishments be automatically categorised as high impact, and trigger the right to negotiate.

While specific situations may warrant additional safeguards, assuming appropriate criteria are incorporated into the model and a high level of integrity and transparency are mandated for assessments conducted by adequately qualified and unconflicted personnel, all future acts could be appropriately considered under an impacts-based model without the need for exclusions.

This includes future acts proposed by native title holders. However, taking into account First Peoples' rights to self-determination and development might mean that, as part of the model's design, native title holders' proposals be automatically categorised as low-impact and, as such, exempt from some negotiation requirements, not including their obligation to consult and engage with common law holders to a standard upholding FPIC.

Future acts such as mining exploration currently proceed under the expedited procedure (which we agree should be abolished as per **Proposal 9**). The Commission is strongly opposed to any exclusion of such acts from scrutiny under an impact-assessment model. The purpose of such acts is to inform the location subsequent future acts which may result in more significant impacts.

Likewise, public works and infrastructure should not be excluded from the impacts-based model. Governments should be required to present evidence to establish that the 'public good' created by each future act outweighs the limitations they impose on native title holders' rights and interests.

The Commission also supports amendments to the Act to provide for the explicit recognition of planning activities conducted under legislation (such as those related to water management) as future acts on the basis that they are, by their nature, designed to inform subsequent future acts and should not be excluded from scrutiny simply because they are preliminary. These future acts could also be assessed under the impacts-based model.

The Commission is also in favour of amendments to the Act to account for the impacts that future acts may have on native title rights and interests in areas outside of the immediate footprint of a future act. This should include any impacts to native title rights and interests in surrounding areas outside of the Determination Area within which the future act is proposed. These wider impacts on Country can have a direct and ongoing effect on the enjoyment of native title holders' human rights. Furthermore, we consider the inclusion of impacts on waterways to be crucial, including those sections outside of the immediate footprint of a future act. Water is of very significant cultural, environmental, social and economic importance for native title holders. Impacts assessment criteria should reflect this, and consideration should be given as to whether an automatic right to negotiate should be triggered in certain circumstances.

3.4 Additional functions and resources for the National Native Title Tribunal

(a) Functions with respect to future acts

The Commission supports **Proposal 6** that provisions of Part 2 Division 3 Subdivision P of the Act that comprise the right to negotiate should be amended to establish the process as stipulated on page 40 of the Discussion Paper. As discussed further below, the criteria employed by the NNTT when facilitating this process and making determinations should be informed by, and compliant with, the Declaration.

We support amendment of the Native Title Act 1993 (Cth) or the Native Title (Notices) Determination 2024 (Cth) to prescribe minimum standards for information to be included in future act notices. This should include comprehensive details about the site and the proposed act, as well as a statement as to extent to which native title holders' social, cultural and economic rights to lands, territories and waters are likely to be impacted.

We are also supportive of the requirement outlined in **Proposal 11** for all future act notices to be lodged with the NNTT and that it should be empowered to maintain a public register of notices containing specified information about each

notified future act. This measure would increase transparency and help to bring the system into better alignment with the standard of FPIC.

The Mabo Centre and NNTC's joint submission notes that currently only 2 per cent of NNTT determinations have found that a future act may not proceed and that 90 per cent of its determinations have allowed future acts to go ahead without any special conditions.¹⁹ This suggests that the Tribunal is likely not making these decisions in accordance with the intent of the Act as stated in the preamble, nor with Australia's international human rights obligations.

The Commission is strongly of the view that, should the NNTT be given the powers to make determinations with respect to the categorisation of a future act within an impacts-assessment model and to determine whether a future act can go ahead, there will need to be significant changes made to its decision-making processes.

For example, to ensure that determinations are appropriately informed, the NNTT should be compelled to consult with native title parties as part of its process in making a determination whether a future act can be done.

It will also be essential that the criteria the NNTT employs in publishing guidelines and making these decisions are aligned with the Declaration and co-designed with First Nations Peoples. This will assist in recognising impact at appropriate levels, ensuring that what is considered 'reasonable' is informed by cultural values and perspectives, that extinguishment is avoided wherever possible, and that calibrating conditions placed on a determination to go ahead are maximally effective in mitigating limitations on native title holders' rights and interests.

As suggested by the ALRC, it may be that this could be achieved through amending the existing criteria in s 39 of the Act to bring native title holders' interests and values into primary consideration and clarify that general evidence as to the interests or wishes of native title parties in relation to native title rights and interests potentially affected by a future act can be considered.

The Commission strongly supports **Proposal 8** to amend of Section 38(2) of the Act to empower the NNTT to impose conditions which would entitle native title parties to payments calculated by reference to the royalties, profits, or other income generated as a result of future acts. We also support the proposed

safeguards and other measures outlined in paragraph 236 of the Discussion Paper.²⁰

We would also welcome amendments which prevents parties from filing applications for the same or similar future acts on the same site for a period of five years following a determination that a future act is denied permission to proceed.

Lastly, with respect to NTMPs, we share the concerns expressed in the Mabo Centre and NNTC's joint submission as to 'the potential for a proponent to pursue objections against the application of NTMP procedures to a particular project'²¹ and agree that 'a proponent should not be able to "jump" directly to [a determination by] the NNTT if they sought (for example) to object to the application of a "no go zone" provision of an NTMP'²².

(b) Functions with respect to agreements

Providing they also bind the NNTT to uphold the articles of the Declaration; the Commission would support the amendments to the Act outlined in **Proposal 7** to empower the NNTT to determine issues referred to it by agreement of the negotiation parties. Particularly relevant articles which should be considered in making these decisions include:

Article 46(2): In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

Article 40: Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and

legal systems of the Indigenous peoples concerned and international human rights.²³

On this basis, the Commission would also support amendments to the Act to provide that new agreements contain a mandatory dispute resolution clause by which parties agree to utilise the NNTT’s dispute resolution services. We would also be supportive of the amendments contemplated in **Proposal 5** to provide that the parties to an existing agreement may, by consent, seek a binding determination from the NNTT in relation to disputes arising under an agreement. We emphasise that such amendments should not prevent parties from appealing such determinations at the Federal Court.

(c) Resourcing of the National Native Title Tribunal

The Commission supports **Proposal 16** that the Australian Government adequately fund the NNTT to fulfil the functions contemplated by the reforms in the Discussion Paper, and to provide greater facilitation and mediation support to users of the native title system. Given the Discussion Paper’s proposals which would make utilisation of NNTT services mandatory in a great many situations, careful modelling should be undertaken to ensure that resourcing of the NNTT is sufficient to process the high volume of cases it is likely to be engaged for in a culturally competent and timely manner. Justice delayed is justice denied, and care should be taken to ensure that reliance on an underfunded NNTT does not create a barrier to parties seeking urgent relief.

3.5 Future act payments and compensation

As stated in the Mabo Centre and NNTC’s joint submission:

There is an immense logistical, legal and temporal burden in bringing a compensation application such that it would only ever be undertaken (if at all) in the context of an application for compensation for all acts affecting native title rights since 1975 (commencement of the Racial Discrimination Act 1975 (Cth) (RDA)).²⁴

The Commission agrees that the Act should 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.

We note that the Discussion Paper seeks feedback as to the mechanism(s) for future payments including how the quantum involved might be agreed. The Commission holds that whichever method(s) are selected, provisions should be put in place to protect native title parties' human rights under the Declaration, whether this be in the context of agreement-making, the design and implementation of assessment criteria by the NNTT, or in the development of prescribed amounts or formulae under the Act.

The Mabo Centre and NNTC's joint submission notes that:

One proposal that had very broad support in principle is for there to be a formula based upfront payment of compensation for future acts going forward. This payment would be offset or discounted) from any future payment of compensation following a formal s 61 compensation application.²⁵

In the interests of giving native title property rights equal standing with other property rights, consideration should be given as to how future act payments which are not compensatory but rather, as the ALRC describes, 'akin to a licence fee (in other contexts)'²⁶ or 'fee for service', might feature as a whole or part of such upfront payments, and whether these components of future payments should be excluded from calculations to offset or discount payment of compensation through s 61 applications.

(a) Invalidity of future acts and consequences

The Commission is concerned at the lack of consequences for non-compliance with statutory processes and the current process assuming future act validity regardless of non-compliance. We agree with **Proposal 10** that the Act 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, as well as with the amendment to the Act stipulated in **Proposal 13** to provide a statutory entitlement to compensation for invalid future acts.

3.6 Cultural heritage

The Commission supports amendment to the Act to provide for requirements and processes to manage the impacts of future acts on Aboriginal and Torres Strait Islander cultural heritage.

The current situation is confusing and often inequitable and there would be significant benefit in harmonising these legislative regimes.

We note that there is work currently being undertaken at the federal level with respect to reforming the cultural heritage system and it will be important that the Australian Government takes the opportunity to align this with native title, environmental protection and biodiversity conservation regimes, and that these set the standards by which States and Territory legislation is established or reformed. Harmonisation would also contribute to Closing the Gap Priority Reform Three which commits to transforming government to better meet the needs of First Peoples.

We note that cultural heritage legislation at all levels will also need to consider the cultural heritage created by those with historical interests whose families and communities were forcibly removed and relocated to others lands and territories under the Protection Acts.

It is noted that with the cultural heritage legislative framework nationally (and in many jurisdictions) in a state of reform, that this is resolved as a priority to ensure that the rights and interests of Aboriginal and Torres Strait Islander peoples to their cultural heritage is maintained and protected in accordance with the international standards. Further delays in this regard, continue to expose the cultural heritage of Aboriginal and Torres Strait Islander peoples to avoidable risk.

3.7 First Peoples' participation in the reform process

The Commission would like to once again express appreciation for the work of the ALRC in respect of the Review.

In concluding our submission, we emphasise that First Peoples' participation in shaping reforms which will impact their lives is essential to the efficacy of those reforms. Australia has an international human rights obligation to support participation, and to do so to the standards it agreed to observe when making those commitments.

The Commission strongly supports **Proposal 18**: that the Australian Government establish a specifically resourced First Nations advisory group to advise on implementing reforms to the Act and suggest that consideration also be given to a broadened scope to allow this body to inform amendments to other intersecting legislation and regulation to promote alignment and mitigate inconsistency.

This aligns with the Commission's *Women in Native Title: Native Title Report 2024* which recommended that:

The Australian Government establish and resource a First Nations Native Title Reform Council to drive a comprehensive reform process in relation to the Native Title Act 1993 (Cth) and all related legislation and policy, from a person-centred, human rights perspective, with a view to creating a system for land justice that is coherent, consistent, just, sustainable and gender-responsive.²⁷

It is critical that the conclusion of the Review is followed by a prompt and considered response by the Australian Government and commencement of work to implement a reform process for which written commitment is provided to proceed in partnership with First Peoples, in accordance with the Act's intent as stated in its preamble, and in compliance with the Declaration.

End notes

- ¹ The Commission is established by the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
- ² Australian Law Reform Commission, Discussion Paper, Review of the Future Acts Regime, (Webpage accessed 26 June 2025 <https://www.alrc.gov.au/news/review-of-the-future-acts-regime-discussion-paper-released/>)
- ³ *Australian Human Rights Commission Act 1986*, (Cth), (Web page accessed 29 March 2025), <https://www.legislation.gov.au/C2004A03366/2018-12-20/text>
- ⁴ Native Title Act 1993 (Cth), (Web page accessed 28 March 2025), <https://www.legislation.gov.au/C2004A04665/latest/text>
- ⁵ Australian Human Rights Commission, Submission to the ALRC Review of the Future Acts Regime (Issues Paper), 17 April 2025, Submission #48, <https://www.alrc.gov.au/wp-content/uploads/2025/04/48.-Australian-Human-Rights-Commission.pdf>
- ⁶ *Native Title Act 1993* (Cth), preamble, at: https://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/nta1993147/preamble.html (accessed 31 March 2025).
- ⁷ Australian Law Reform Commission, Discussion Paper, Review of the Future Acts Regime, p.9 (Webpage accessed 26 June 2025 <https://www.alrc.gov.au/news/review-of-the-future-acts-regime-discussion-paper-released/>)
- ⁸ Federal Government of Australia --- "The Federal Government's 10 point Response to Wik" [1997] IndigLawB 46; (1997) 4(2) Indigenous Law Bulletin 12, (Webpage accessed 9 April 2025) <https://www.austlii.edu.au/cgi-bin/viewdoc/au/journals/ILB/1997/46.html>
- ⁹ Aboriginal and Torres Strait Islander Social Justice Commissioner – Fifth Report 1997, Report to the Federal Attorney-General as per section 46C.(1) of the Human Rights and Equal Opportunity Commission Act 1986, p.11, (Webpage accessed April 9 2025), https://humanrights.gov.au/sites/default/files/content/pdf/social_justice/sj_report97.pdf
- ¹⁰ Australian Law Reform Commission, Discussion Paper, Review of the Future Acts Regime, p.9 (Webpage accessed 26 June 2025 <https://www.alrc.gov.au/news/review-of-the-future-acts-regime-discussion-paper-released/>)
- ¹¹ Australian Law Reform Commission, Discussion Paper, Review of the Future Acts Regime, p.14 (Webpage accessed 26 June 2025 <https://www.alrc.gov.au/news/review-of-the-future-acts-regime-discussion-paper-released/>)
- ¹² Australian Law Reform Commission, Discussion Paper, Review of the Future Acts Regime, p.65 (Webpage accessed 26 June 2025 <https://www.alrc.gov.au/news/review-of-the-future-acts-regime-discussion-paper-released/>)
- ¹³ Including International Covenant on Civil and Political Rights (ICCPR) 16 December 1966; International Covenant on Social, Economic and Cultural Rights (ICESCR), 16 December 1966; International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 21 December 1965; Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 18 December 1979; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984; Convention on the Rights of the Child (CRC), 20 November 1989; United Nations Convention on the Rights of Persons with Disabilities (CRPD), 13 December 2006.
- ¹⁴ The Mabo Centre & The National Native Title Council, Submission to the Australian Law Reform Commission Review of the Future Act Regime (Discussion Paper), p.18
- ¹⁵ The Mabo Centre & The National Native Title Council, Submission to the Australian Law Reform Commission Review of the Future Act Regime (Discussion Paper), p.14

- ¹⁶ Australian Human Rights Commission, Submission to the ALRC Review of the Future Acts Regime (Issues Paper) , 17 April 2025, Submission #48, p.14 <<https://www.alrc.gov.au/wp-content/uploads/2025/04/48.-Australian-Human-Rights-Commission.pdf>>
- ¹⁷ Australian Human Rights Commission, Women in Native Title, Native Title Report 2024, p.333, https://humanrights.gov.au/sites/default/files/2024-08/2403_Native%20Title%20Report%202024_final_optimised_0.pdf
- ¹⁸ The Mabo Centre & The National Native Title Council, Submission to the Australian Law Reform Commission Review of the Future Act Regime (Discussion Paper), p.9
- ¹⁹ The Mabo Centre & The National Native Title Council, Submission to the Australian Law Reform Commission Review of the Future Act Regime (Discussion Paper), p.7
- ²⁰ Australian Law Reform Commission, Discussion Paper, Review of the Future Acts Regime, p.47 (Webpage accessed 26 June 2025 <https://www.alrc.gov.au/news/review-of-the-future-acts-regime-discussion-paper-released/>)
- ²¹ The Mabo Centre & The National Native Title Council, Submission to the Australian Law Reform Commission Review of the Future Act Regime (Discussion Paper), p.7
- ²² The Mabo Centre & The National Native Title Council, Submission to the Australian Law Reform Commission Review of the Future Act Regime (Discussion Paper), p.7
- ²³ United Nations Declaration on the Rights of Indigenous Peoples: resolution/adopted by the General Assembly, 2 October 2007, UN Doc A/RES/61/295, articles 40, 46 (2), https://www.ohchr.org/sites/default/files/Documents/Publications/Declaration_indigenous_en.pdf
- ²⁴ The Mabo Centre & The National Native Title Council, Submission to the Australian Law Reform Commission Review of the Future Act Regime (Discussion Paper), p.15
- ²⁵ The Mabo Centre & The National Native Title Council, Submission to the Australian Law Reform Commission Review of the Future Act Regime (Discussion Paper), p.15
- ²⁶ Australian Law Reform Commission, Discussion Paper, Review of the Future Acts Regime, p.57 (Webpage accessed 26 June 2025 <https://www.alrc.gov.au/news/review-of-the-future-acts-regime-discussion-paper-released/>)
- ²⁷ Australian Human Rights Commission, Women in Native Title, Native Title Report 2024, p.332, https://humanrights.gov.au/sites/default/files/2024-08/2403_Native%20Title%20Report%202024_final_optimised_0.pdf