



Law Council
OF AUSTRALIA

Office of the President

24 July 2025

The Hon Justice Mordecai Bromberg
President
Australian Law Reform Commission
PO Box 209
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By email: nativetitle@alrc.gov.au

Dear Justice Bromberg

Review of the Future Acts Regime: Discussion Paper

The Law Council of Australia is grateful for the opportunity to make a submission in response to the Discussion Paper released by the Australian Law Reform Commission as part of the Review of the Future Acts Regime.

I am pleased to enclose our submission.

I acknowledge that the Law Council's submission has been provided after the original closing date. Thank you for the Commission's patience, and for granting the Law Council an extension.

The submission is informed by contributions for this submission from the Queensland Law Society, the Law Society of New South Wales, the Victorian Bar, and expert advisers on the Law Council's informal Working Group.

If you would like to discuss the submission further, please contact Alan Freckelton, Senior Policy Lawyer, on [REDACTED] in the first instance.

Yours sincerely

[REDACTED]
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President

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Review of the Future Acts Regime: Discussion Paper

Australian Law Reform Commission

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About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its Constituent Bodies on federal, national, and international issues; promotes and defends the rule of law; and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts, and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 107,000 Australian lawyers.

The Law Council is governed by a Board of 23 Directors: one from each of the Constituent Bodies, and six elected Executive members. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

The members of the Law Council Executive for 2025 are:

- Ms Juliana Warner, President
- Ms Tania Wolff, President-elect
- Ms Elizabeth Shearer, Treasurer
- Mr Lachlan Molesworth, Executive Member
- Mr Justin Stewart-Rattray, Executive Member
- Mr Ante Golem, Executive Member

The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.au.

Acknowledgements

The Law Council of Australia thanks the Law Society of New South Wales (**NSW**), the Queensland Law Society, the Victorian Bar, and expert advisers on the Law Council's informal Working Group for their contributions to the preparation of this submission.

Introduction

1. The Law Council of Australia is pleased to make this submission in response to the Discussion Paper released by the Australian Law Reform Commission (**ALRC**) in May 2025 as part of the *Review of the Future Acts Regime (Review)*.
2. The Discussion Paper poses 23 questions and lists 18 proposals concerning reform to the Future Acts regime. The Law Council understands that feedback on the Discussion Paper will inform the ALRC's Final Report for the Review.
3. This submission will address each of the questions and proposals in the Discussion Paper.
4. The Law Council welcomes many of the ALRC's proposals which would, in our view, enhance consultation and negotiation processes for First Nations people with Government and private parties within the Future Acts regime. The Law Council also acknowledges that the ALRC has addressed various elements of our earlier submission on the Issues Paper dated 16 April 2025.¹ This includes issues concerning consultation and negotiation processes, resourcing, compensation, the complexity of the existing regime, and its relationship to other regimes, including state and territory laws and cultural heritage laws.
5. The Law Council again emphasises that the Review presents an opportunity to better align the *Native Title Act 1993 (Cth) (NTA)* with international law, and especially with the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**).² In our view, UNDRIP's principles—in particular, the principles of free, prior and informed consent (**FPIC**) and effective participation—must be implemented within the NTA, with specific application to the Future Acts regime.

Comments on Specific Questions and Proposals

Questions

Question 6

Should the Native Title Act 1993 (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?

6. The Law Council would support this amendment. Native Title Management Plans (**NTMPs**) have the potential to afford Native Title holders greater self-determination in relation to how Future Acts can take place on their land, and to empower Prescribed Bodies Corporate (**PBCs**) to have more control over how they protect and manage their country and cultural heritage.
7. The Discussion Paper proposes that NTMPs would be made by a PBC for its determination area subject to the consent of the common law holders.³ This condition is essential to avoid issues that can arise where PBC membership does

¹ Law Council of Australia, *Review of the Future Acts Regime: Issues Paper*, April 2025, <<https://www.alrc.gov.au/wp-content/uploads/2025/04/47.-Law-Council-of-Australia.pdf>>.

² *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007).

³ Australian Law Reform Commission, *Review of the Future Acts Regime (Discussion Paper No 88, May 2025)* [49] <<https://www.alrc.gov.au/publication/review-of-the-future-acts-regime-discussion-paper-2025>>.

not reflect the common law holders for the determination area. This consent is already protected by Regulation 8 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) but should be expressly included in the NTMP legislative framework.

8. In preparing NTMPs, PBCs will need to be cognisant that, in relation to most Future Acts, it will be a government party that has to authorise the act, and so the act will, in any event, need to be lawful under general law.
9. To be effective, a proponent would need to have certainty that an act done under an NTMP is valid. One option to provide more certainty could be through a certificate of validity issued by the relevant PBC, potentially in a prescribed form and registered with the National Native Title Tribunal (**NNTT**), as identified at paragraph 53 of the Discussion Paper.
10. As proposed in the Discussion Paper,⁴ NTMPs could be used for any class of Future Acts, including large projects. It will be important that the NTMP does not afford a lower level of procedural rights than equivalent statutory procedures in the Future Acts regime. In this respect, the scope of NTMPs needs to be carefully considered, including whether there are some classes of Future Act which cannot be approved under an NTMP. At the very least, the approval processes under an NTMP should be commensurate with the Future Acts contemplated by it, and there should be a requirement to ensure that PBCs have access to legal advice and representation before an NTMP is approved.
11. At paragraph 61, the Discussion Paper suggests that NTMPs could address how compensation pursuant to that NTMP may be dealt with. The Law Council supports this approach to encourage and facilitate the negotiation of agreements including provision of monetary benefits (such as compensation), provided that those provisions are properly authorised by the common law holders. However, the appropriateness of such provisions may depend on the nature of the activity approved. While it may be useful in facilitating compensation for small scale Future Acts, it may be problematic in relation to larger activities.
12. Finally, it will be critical to ensure that NTMPs reduce administrative burdens for all parties, and that PBCs receive appropriate funding, resourcing and training to support their preparation of NTMPs and ensure that intended outcomes are achieved.

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?

13. The Law Council would support this amendment. These standards are particularly important given that the majority of Future Act determinations by the NNTT have been in favour of the government or grantee party.⁵

⁴ Ibid, [49] – [50].

⁵ As at March 2025, there were only three out of 156 Future Act determinations by the NNTT which found that the future act must not be done, representing less than 2% of determinations.
<<https://www.nntt.gov.au/searchRegApps/FutureActs/Pages/default.aspx>>.

14. The conduct and content standards should be guided by the rights and interests of First Nations people and the environmental, social and economic aspirations of the parties to negotiations. FPIC must be protected, and equal power and access to legal advice for all participants is crucial.
15. The Law Council acknowledges the challenges of setting conduct and content standards, noting this depends on the subject matter and circumstances of each case. However, we provide the following observations to support their development.
16. In respect of mandatory conduct standards:
 - (a) The standards should draw from existing guidelines for engaging with Indigenous peoples, as published by the Australian Human Rights Commission,⁶ and the United Nations Permanent Forum on Indigenous Issues.⁷
 - (b) The standards should include requirements to negotiate in good faith (see below).
 - (c) The standards should require that parties are free from coercion.⁸
 - (d) The standards should require that proponents contribute to funding a Native Title party's participation in negotiations.⁹ Section 60AB of the NTA enables PBCs to have their reasonable legal costs paid for by a proponent, but only where the parties ultimately enter into an agreement. As a result, under the current regime, PBCs have no right to recover costs for a negotiation that breaks down, creating a risk that PBCs may feel pressured to finalise an agreement where they otherwise may not, to avoid losing the benefit of section 60AB and being required to pay their own costs. Further, registered Native Title claimants have no right to recover their legal costs when negotiating with a proponent that is seeking an agreement. To address this, PBCs and pre-determination native title groups should be entitled to recover reasonable legal and other costs, including where negotiations break down, provided they have engaged in negotiations in good faith. If there are disputes on the question of reasonableness or good faith, the NNTT should be empowered to resolve them (in similar circumstances to those envisaged in Proposal 5).
 - (e) The standards should require that government parties and proponents make available certain information at the outset of negotiations,¹⁰ and include an ongoing obligation to disclose important and relevant information concerning the Future Act.¹¹

⁶ Aboriginal and Torres Strait Islander Social Justice Commissioner, 2009 Native Title Report (Australian Human Rights Commission, 2009), Appendix 3,

<https://humanrights.gov.au/sites/default/files/content/social_justice/nt_report/ntreport09/ntr_nx3.pdf>

⁷ United Nations Workshop – 2005 International Conference on Engaging Communities, Guidelines for Engagement with Indigenous Peoples, 15 August 2005.

<https://humanrights.gov.au/sites/default/files/content/social_justice/conferece/engaging_communities/sjr-unws-bw.pdf>

⁸ Australian Law Reform Commission, Review of the Future Acts Regime (Discussion Paper No 88, May 2025) [79] dot point 1. <<https://www.alrc.gov.au/publication/review-of-the-future-acts-regime-discission-paper-2025>>

⁹ Ibid at dot point 2.

¹⁰ Ibid at dot point 3.

¹¹ Ibid.

- (f) The standards should clarify the roles of each of the parties to an agreement negotiation, including the relevant government party.¹²

17. In respect of a requirement to negotiate in good faith:

- (a) The definition of 'good faith' should be an inclusive provision, allowing for culturally appropriate procedures and consideration of the subject matter and circumstances of a given case, with the objective of reaching an agreement.
- (b) The definition of good faith should include reference to the 'Njamal indicia' (as discussed in *Western Australia v Taylor*¹³) in relation to what 'bad faith' constitutes.
- (c) There should be a prohibition on 'stonewalling' by the proponent.
- (d) The conduct standards should ensure that Native Title groups have independent legal advice.

18. In respect of mandatory content standards:

- (a) The standards should prohibit clauses that would be regarded as inappropriate on public policy grounds.
- (b) The standards should prohibit or restrict terms that limit how compensation or other payments are expended, administered, or managed by Native Title parties.
- (c) The standards should include sunset dates for particular clauses such as non-disparagement clauses.
- (d) The standards should include application of the non-extinguishment principle, as far as practicable.
- (e) The standards should include a requirement that particular matters be dealt with in the 'head agreement' and not in ancillary agreements.
- (f) The standards should guarantee minimum rights for Native Title parties with respect to Future Acts, such that agreements should not be able to provide for a lower standard of procedural rights than what is provided for in the NTA.
- (g) The standards should address dispute resolution mechanisms (see also the Law Council's response to Question 11 below).
- (h) The standards should include a right for common law holders to access agreements.
- (i) The standards should include a periodic review mechanism which provides a process for review of some or all of the agreement terms.

19. The Law Council notes and accepts the ALRC's response to the concerns raised in our submission to the Issues Paper, at paragraphs 88 and 89 of the Discussion Paper.

¹² Ibid at dot point 4.

¹³ (1996) 134 FLR 211.

Question 8

Should the Native Title Act 1993 (Cth) expressly regulate ancillary agreements and other common law contracts as part of agreement-making frameworks under the Future Acts regime?

20. Ancillary agreements could be regulated as part of the agreement-making frameworks under the Future Acts regime, to provide statutory protection to compensation afforded. However, it is preferable that ancillary agreements and other common law contracts remain private between the parties.
21. The proliferation of ancillary agreements noted in the Discussion Paper is not necessarily counter to the objects of self-determination. On the contrary, ancillary agreements can be seen as a response to the limitations of point-in-time legislative responses and can have other benefits as noted at paragraph 97 of the Discussion Paper. As such, there are some risks to expressly regulating ancillary agreements. Principally, regulation may curtail the capacity of common law contracts to meet the unique circumstances arising between, for example, applicants and respondents. This is especially so in Native Title contexts, where issues and conflicts arise across traditional and cultural planes, as well as economic planes. Common law contracts can also generate creative solutions acceptable to each contracting party to regulate specific issues between them.
22. In respect of the issues raised at paragraph 100 of the Discussion Paper, one approach may be to identify more clearly in the NTA the priority and status of agreements that do not conform with NTA requirements, so that potential parties to common law contracts are clear, prior to their entry, about the risks of entering such agreements in relation to the NTA. In particular, a common law agreement between Native Title holders and a proponent in relation to a Future Act does not meet the requirements of the NTA unless it is in fact an Indigenous Land Use Agreement (**ILUA**) entered into as part of a section 31 agreement or an ancillary agreement to a section 31 agreement.

Question 9

Should the Native Title Act 1993 (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?

23. The Law Council provides the following views of its constituent bodies on this question for the ALRC's consideration. Those views should be attributed to each body, rather than to the Law Council.

Victorian Bar

24. The Victorian Bar would support this amendment, but cautions against a mechanism that goes beyond bare assignment, so as not to prejudice agreements reached between Native Title applicants (who subsequently succeed in obtaining a determination) and other First Nations peoples who are not the applicant (for example, First Nations respondents) who may enter into such agreements as a mechanism to resolve disputes between the applicant and a respondent. For example, the second and third options at paragraph 108 of the Discussion Paper would be problematic if the PBC could both have the agreement assigned to them, and then, by relying on any new assignment regime in the NTA, also renegotiate the terms of that agreement and/or have the agreement removed from the register. This

may be contrary to the terms of that agreement, noting that the agreement itself may have been essential to the resolution of issues in dispute between the applicant and First Nations respondents, contributing (for example) to a consent determination.

Law Society of NSW

25. The Law Society of NSW's view is that any assignment of an agreement should be carried out only with the PBC's consent. Allowing an agreement in relation to a Future Act to be renegotiated or removed from the Register where parties were determined not to be the Native Title holders is likely to create considerable uncertainty. If a determined Native Title group or PBC is the successor or assignee to an agreement, then it would most likely be able to renegotiate terms if the proponent is open to this.

Queensland Law Society

26. The Queensland Law Society's Energy and Resources Committee would support this amendment, on the basis that such an amendment could ensure the efficacy of agreements irrespective of a determination. However, the Queensland Law Society's First Nations Legal Policy Committee does not support this amendment, and considers that, if there is a positive Native Title determination, all agreements should be assigned to the PBC.

Question 10

Should the Native Title Act 1993 (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?

27. The Law Council would support this amendment. There is a need for greater flexibility to amend agreements once registered, noting that the ILUA process is resource intensive for Native Title holders. Allowing lower risk or less sensitive amendments to be approved as proposed by the ALRC is sensible for this reason.
28. The assessment of what amendments are 'lower risk' or 'less sensitive' should be determined by Native Title holders and not proponents. Allowing amendments with more substantive changes to be approved where the Native Title holders give their consent may be appropriate, without the need to go through the registration process. However, there may be changes of such a sensitive or important nature that the NNTT Registrar's oversight through the registration process should be maintained.
29. Consideration should also be given to whether the legislation should specify processes or procedures that parties must follow prior to approving amendments. If so, such processes and procedures should be aimed at, amongst other things, safeguarding FPIC. Relatedly, the Law Council would support the option at paragraph 123 of the Discussion Paper for PBCs to hold standing instructions from common law holders to agree on particular categories of amendments with counterparties, noting that careful consideration will need to be given to the process to authorise those instructions.

Question 11

Should the Native Title Act 1993 (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?

30. The Law Council would support this amendment, provided it is not the only option open to parties. That is, the mechanism for dispute resolution should not be confined to the exclusive dispute resolution services of the NNTT and should be streamlined as much as practicable to ensure timely resolution and reduced costs. Parties should also be able to tailor dispute resolution mechanisms to reflect their specific circumstances. For these reasons, the Law Council recommends that, in addition to this option, parties have the right to choose alternative dispute resolution and/or mediation.

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?

31. The Law Council's position is that First Nations people must be able to choose what personal, communal and cultural information remains private. The 'opt in' aspect of this proposal, together with the ability to redact and de-identify details, would support parties to decide the level of confidentiality that applies to the agreement.

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?

32. The Law Council does not support reforms in respect of agreements entered into before a Native Title determination is made.
33. The ability to negotiate and receive payments when Native Title has not been determined may not benefit the wider group of claimants. Cultural heritage management and payment for this has caused disputes between those controlling such work and others. This is also complicated by the length of time between the establishment of a Native Title claim group and the handing down of the consent determination.
34. In respect of the reforms identified at paragraph 140 of the Discussion Paper, the Law Council queries the benefits of holding the monies attached, in a trust or the like, until Native Title is determined. This would disincentivise agreements for pre-determination parties, particularly for groups that are under-resourced and require access to finances, noting that the ultimate Native Title group would have the power to terminate the agreement under section 199C of the NTA.

Question 14

Should Part 2 Division 3 Subdivisions G–N of the Native Title Act 1993 (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:

- 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?*
35. The Law Council would support an impact-based model. However, we make the following observations with respect to its implementation.
36. The impact-based model draws attention to how the grant of interests in relation to a Future Act are framed and may encourage engagement with affected Native Title groups at the outset to ensure their agreement regarding the grant of the interest.
37. However, there are likely to be challenges in its implementation. For example:
- (a) In relation to the characterisation of a Future Act, parties to an agreement under an impact-based model will need to be clear about what they intend to occur under that agreement. Consideration must be given to how variations in a project will be treated.
 - (b) It is also unclear whether the mischaracterisation of a Future Act would lead to invalidity. If this were the case, it may create substantial uncertainty for proponents. Allowing an act to be valid subject to any challenge, in the NNTT, to the characterisation of the Future Act (as contemplated by Question 14 at paragraph (e)) may be one way to strike a balance in this regard. Consideration will need to be given to whether any such determination by the NNTT would be taken to be an exercise of judicial power. It does not, on its face, appear to be different from a determination of the NNTT as an arbitral body in any right-to-negotiate procedure.
38. In addition, under the proposed model, the party proposing to do the Future Act (which, as the Discussion Paper notes at paragraph 151, is usually the government party) will be able to decide the impact of the Future Act—and, therefore, the level of procedural rights between Category A (leading to consultation) compared to Category B (leading to a more substantive right to negotiate)—without consulting the Native Title holders. This risks creating a power imbalance between the (usually) government and Native Title parties and may result in further uncertainty and disputes within the Future Acts regime. To address this, as identified above, there should be a process that enables a Native Title party to challenge the categorisation decision, including full rights of review without privative clauses.

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 Native Title Act 1993 (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 Native Title Act 1993 (Cth); and*
 - d. *Future Acts proposed to be done by, or for, Native Title holders in their determination area?*
39. In respect of question 15(a), for the reasons set out in the Discussion Paper at paragraph 168, the current processes prescribed for public infrastructure are problematic. Given their impacts on Native Title parties, the Law Council considers public works should not be excluded from any impact-based scheme. However, certain public works may be capable of being specified as falling within Category A or Category B in regulations (for example). Further, in the event that public works fall into Category B, the ALRC may wish to consider how the right to negotiate can be formalised in legislation to ensure that FPIC is required before such work can proceed.
40. In respect of question 15(b), for the reasons set out in the Discussion Paper at paragraph 170, the Law Council considers that all Future Acts involving the compulsory acquisition of Native Title rights and interests should be captured by Category B, triggering the right to negotiate. The right to negotiate should invariably apply whenever there is a compulsory acquisition for public purposes, or for the benefit of third parties in circumstances where section 24MD(6B) of the NTA applies.
41. In respect of question 15(c), an orderly phase out as proposed by the Discussion Paper at paragraph 171 would be preferable. This may, in the case of a pre-December 1996 mining lease up for renewal, reasonably exclude the proposed right to object that is referred to in Proposal 6(b). However, to avoid unfairness, including any failure to take into account the now recognised Native Title rights and interests, the right to negotiate should apply in those circumstances, including an obligation to negotiate in good faith. If no agreement is successfully negotiated and entered into, the NNTT should determine what constitutes ‘fair conditions’. The same should apply in the case of renewals where there was an agreement negotiated in respect of that mining lease pre-determination, or a determination at any time by the NNTT. In the case of a post-determination right-to-negotiate agreement, the right could be limited to one of reviewing the terms of that agreement in good faith, subject to the equivalent of Proposal 5. This could also be imposed in relation to conjunctive agreements or determinations, where section 26D(2) of the NTA would otherwise apply to the mining lease renewal.
42. In respect of question 15(d), for the reasons at paragraph 172 of the Discussion Paper, the Law Council considers there is merit to this option. There should be safeguards to protect against exploitation by third parties to ensure the PBC or Native Title holder is genuinely the proponent of the Future Act. This could include review rights by third parties to the NNTT, and a penalty regime if third parties have engaged in exploitative acts.

Question 16

Should the Native Title Act 1993 (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?

43. The Law Council would support this amendment, provided that there is clarification about how it would be administered in practice.
44. The Law Council agrees with concerns set out in the Discussion Paper at paragraph 185 that section 24HA of the NTA does not adequately reflect the importance of water to the exercise of Native Title rights and interests, particularly the excessive extraction of water resources. The area of land discussed in *Mpwerempwer Aboriginal Corporation RNTBC v Minister for Territory Families and Urban Housing as delegate of the Minister for the Environment and Anor* [2025] NTCA 6 demonstrates that Future Acts that involve water usage can have impacts that go beyond the immediate footprint of the Future Act. Sacred sites are often co-located with water sites, and do not correlate with the immediate footprint of the Future Act. The amendment should account for this.
45. Although Native Title can only be claimed for parts of country where it can be proven in a court of law that Native Title exists, there are other parts of surrounding country where traditional law and custom exist, or which have cultural significance to the Native Title group, which should also be taken into account. Further, the exercise and enjoyment of Native Title rights and interests in the location for the proposed Future Act may be affected by the cultural significance of a site outside its immediate footprint where Native Title does not exist or is within an area below the high-water mark. The latter situation is currently covered by subsection 26(3), and on this matter, please refer to our response to Question 28.
46. The Law Society of NSW queries whether there has been any clear judicial opinion as to the area to which a Future Act relates, noting that section 227 of the NTA does not on its terms limit the Future Act to the footprint of any tenement.
47. At paragraph 189, the Discussion Paper notes that an impact-based approach would be capable of recognising situations where a Future Act will impact Native Title in areas outside, but in the vicinity, of the location of a Future Act. The ALRC may also wish to consider whether the impact-based model could accommodate the cumulative effects of multiple extraction permits on a river system that are not necessarily issued concurrently and not necessarily in a small geographic area.
48. With regards to compensation, the Law Society of NSW's view is that situations contemplated by Question 16 are already compensable under the current scheme and any amendment should expressly be drafted in a clarifying or confirmatory way to avoid any inference that Native Title holders are not already entitled to compensation for 'off-tenure' impacts.

Question 17

Should the Native Title Act 1993 (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?*
49. The Law Council would support these amendments, where specific provisions with respect to legislative Future Acts may be necessary, and to clarify the nature of planning activities conducted under legislation under the NTA.

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?

50. The Law Council provides the following views of its constituent bodies on this question for the ALRC's consideration. Those views should be attributed to each body, rather than to the Law Council. The Law Council notes that the Victorian Bar's views are consistent with the principle of FPIC and with recognising the authority of PBCs, as promoted in Recommendation 4 of the Joint Standing Committee on Northern Australia's 'A Way Forward' report following its inquiry into the destruction of cultural heritage at Juukan Gorge.¹⁴

Queensland Law Society

51. The Queensland Law Society supports the existing test in section 39 of the NTA. The test to be applied by the NNTT in deciding whether a Future Act may be done necessarily requires consideration of, and a balancing of, all relevant (and often competing) interests. The existing test further requires the NNTT to consider the impact of the Future Act on a range of Native Title interests, the wishes of the Native Title holders, the economic or other significance of the act to the country or State, the public interest and any other factor the NNTT considers relevant. The test does not require the NNTT to give any of these matters more weight than any other and gives the NNTT the necessary flexibility to decide a matter based on the specific circumstances and merits of the case. The Queensland Law Society considers this to be appropriate and not unusual where decisions of this nature and complexity need to be made.

Victorian Bar

52. The Victorian Bar supports each option identified in the Discussion Paper being included in tandem, noting the inherent difficulties with each approach (as also identified in the Discussion Paper).

¹⁴ Joint Standing Committee on Northern Australia, *A Way Forward: Final Report Into the Destruction of Indigenous Heritage Sites at Juukan Gorge*, October 2021.
<https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024757/toc_pdf/AWayForward.pdf;fileType=application%2Fpdf>

53. The Victorian Bar supports the test of reasonableness being a subjective one that is assessed from the position of the Native Title party concerned, noting however the great diversity that exists amongst Native Title parties. The Victorian Bar further supports a moratorium on Future Acts that would present a real risk of substantial and irreparable harm. Section 39 of the NTA could be amended to incorporate these two options, and a weighting system with the primary consideration being the protection of culturally sensitive sites.
54. The Victorian Bar notes the difficulty that arises in placing the onus on Native Title parties to establish cultural sensitivity or site sensitivity and supports a presumption that, if a certain kind of activity (such as mining) is to occur in the geographic location of a site, it will impact that site. The onus of overturning this presumption would be on the proponent. The Victorian Bar also supports the 5-year moratorium (akin to that in the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)) on a Future Act that has been determined cannot be done to save resources of PBCs.

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?

55. Consistent with its response to Question 18, the Law Council provides the following views of its constituent bodies that should respectively be attributed to each body rather than to the Law Council.

Queensland Law Society

56. The Queensland Law Society considers that the criteria under section 39 of the NTA should also be applied in deciding whether the approval of the Future Act is subject to conditions and what those conditions are. To promote efficiency, finality and certainty, the decisions on approval and conditions (if any) that attach to the Future Act should be made at the same time.

Victorian Bar

57. The Victorian Bar supports using the same criteria in determining whether the Future Act can be undertaken, as referred in its response to Question 18.

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 Native Title Act 1993 (Cth)?

58. The Law Council would support the removal of States and Territories' ability to enact alternative schemes. The Law Council's response to the Issues Paper noted concerns raised by the Law Society of South Australia regarding aspects of the alternative right-to-negotiate regime operating in South Australia, by way of example. Given the limited use of the 'alternate procedures' provisions, their removal would reduce the overall complexity of the legislation and promote consistent approaches across Australia. Appropriate transitional arrangements would be necessary for Future Acts that have relied upon alternate procedures for approval.

59. The Law Society of NSW specifically notes a number of variations to the right to negotiate in NSW made pursuant to sections 26A and 26(3) (as enacted).¹⁵ These include the following:
- (a) *Native Title (Approved Opal or Gem Area—Lightning Ridge (Area 2) New South Wales) Determination 2000*;
 - (b) *Native Title (Approved Exploration etc. Acts—New South Wales) (Petroleum) Determination 2000*;
 - (c) *Native Title (Right to Negotiate (Inclusion)—NSW Land) Approval No. 1 1996*
 - (d) *Native Title (Right to Negotiate (Exclusion)—NSW Land) Determination No. 1 1996*; and
 - (e) *Native Title (Approved Exploration etc. Acts—New South Wales) (Mining) Determination 2000*.
60. The effect of these schemes is to pass responsibility for compliance with the NTA on to grantees without sufficient supervision by government. The Law Society of NSW suggests that the Review consider the impact of these schemes in NSW.

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?*
61. The Law Council provides the following views of its constituent bodies on this question for the ALRC's consideration. Those views should be attributed to each body, rather than to the Law Council.

Law Society of NSW

62. The Law Society of NSW notes that the Discussion Paper does not address all the circumstances where non-claimant applications arise. In many instances in NSW, non-claimant applications arise because of the requirements of section 42 of the *Aboriginal Land Rights Act 1983* (NSW) and often, but not always, in circumstances where there are clear extinguishing events. This includes applications being made over former prisons, police stations, and land which has been freehold for over 140 years. Such applications are also often made where there are no Aboriginal and Torres Strait Islander objectors to the determination, and land which the Government has continuously dealt with without regard to Native Title precisely because that land has historically been extinguished. In these circumstances, and contrary to

¹⁵ Law Council of Australia, *Review of the Future Acts Regime: Issues Paper*, April 2025, [71] and [72]. <<https://www.alrc.gov.au/wp-content/uploads/2025/04/47.-Law-Council-of-Australia.pdf>>

paragraph 253 of the Discussion Paper, the determination that Native Title does not exist is not to 'secure interests which would otherwise require negotiating or engaging with Native Title parties'.

63. Where Native Title has clearly been extinguished, it is not clear what the requirement for negotiation with third parties would be. If there are objectors to a non-claimant application, Federal Court processes allow for mediation in appropriate circumstances.
64. The Law Society further notes that paragraph 225 of the Discussion Paper does not consider that where an act proceeds pursuant to 'section 24FA protections' compensation is still payable for the act. In its view, the ability to make a non-claimant application is an appropriate mechanism for a determination of Native Title to be made and should be retained. Furthermore, where there are historically extinguishing events there is no utility in the non-extinguishment principle applying.

Queensland Law Society

65. The First Nations Legal Policy Committee of the Queensland Law Society would support this amendment.
66. The Energy and Resources Committee of the Queensland Law Society notes that Part F non-claimant applications remain relatively rare and when they are made, they are very targeted. The Part F process is not considered a problematic issue requiring any significant reform. The ability for a non-claimant application under Part F needs to be retained. There also needs to be an ability for non-Indigenous people to make such an application.
67. There are some classes, or types, of Future Act where this is the only option for the act to comply with the NTA requirements, as no other Future Act authorisation process applies. An ILUA may not be possible (including because no Native Title negotiation party can be identified, noting that such an application can only be made in the first place where there is no existing registered Native Title claim or determination).
68. Extending the timeframe to 12 months for a Native Title claim to be lodged in response is not supported by the Queensland Law Society's Energy and Resources Committee. One of the main criticisms of the NTA is its efficiency and the length of time compliance with the Act takes. The Energy and Resources Committee have noted that the Native Title claim and determination landscape in Australia is now mature, and a quadrupling of timeframes in this respect is not considered justified.
69. Many uses of Part F are only directed at achieving approval of the Future Act, rather than a determination that Native Title is extinguished. A higher benchmark for a determination that Native Title is extinguished is supported if there is a commensurate recognition that it is acceptable to use the Part F process just to achieve Future Act approval.

Victorian Bar

70. The Victorian Bar supports the extension of the timeframe to 12 months as per Question 21(b). The Bar tentatively supports the proposed amendment at Question 21(a), that non-claimant applications can only be made where they are made by, or for the benefit of, Aboriginal Torres Strait Islander Peoples. It does not support non-claimant applications that would result in extinguishment of Native Title.

Question 22

If the Native Title Act 1993 (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?

71. The Law Council would support this amendment, to provide clarity and certainty, and to avoid Future Acts proceeding without prior consultation.
72. Members of the profession have identified that non-compliance with any procedural requirements of the NTA is likely result of administrative oversight, or ambiguity in the Act, rather than deliberate avoidance. As such, the issue might be better addressed by removing the ambiguity in the legislation around procedural requirements and when they apply. Further, there can be practical difficulties with 'unwinding' a Future Act that may have been undertaken or completed before questions as to procedural compliance arise. Any consequences specified in the NTA should be non-exhaustive, to provide judicial discretion to make an order that ensures a just and fair outcome (i.e. that the Court have the discretion to order any other remedy or consequences that it considers appropriate in the circumstances subject to any necessary safeguards or restrictions).
73. The Law Council notes that Native Title holders should be entitled to compensation for the impact on Native Title caused by an invalid Future Act.

Question 23

Should the Native Title Act 1993 (Cth), or the Native Title (Notices) Determination 2024 (Cth), be amended to prescribe in more detail the information that should be included in a Future Act notice, and if so, what information or what additional information should be prescribed?

74. The Law Council would support this amendment, as it would allow Native Title holders to make informed submissions and comment on acts affecting their Native Title interests. Additional information could include the time taken for the future act and its proposed benefits. The information requirements for a notice should be simplified, manageable and necessarily succinct, to avoid risk of inadvertent technical non-compliance. A template may also assist in this regard.

Question 24

Should the Native Title Act 1993 (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 Native Title Act 1993 (Cth); or*
 - d. *in accordance with an alternative method?*
75. The Law Council provides the following views of its constituent bodies on this question for the ALRC's consideration. Those views should be attributed to each body, rather than to the Law Council.

Queensland Law Society

76. The Energy and Resources Committee of the Queensland Law Society does not support legislation relating to 'Future Act payments' separate to the right to compensation for impacts on Native Title.
77. For major projects, voluntary agreements are sometimes negotiated where a proponent agrees to provide payments or other benefits on a 'commercially' negotiated basis that not directly connected to (and often exceed) the impacts on Native Title or a legal measure of Native Title compensation. On some occasions agreements are negotiated with local First Nations communities to provide benefits where there is no impact on existing Native Title rights at all.
78. However, the Energy and Resources Committee notes that this should be regarded as a commercial arrangement, voluntarily negotiated by the parties. In the Committee's view, it is beyond the scope of legislation to intrude into such commercial arrangements and, as a matter of principle, not the role of government or Courts to dictate or prescribe the commercial contractual arrangements parties may negotiate. Nor is it clear how the government or Court would determine such payments if they were disconnected with compensation for impacts on rights. The NTA's focus should instead be on providing fair and appropriate compensation for the impact of Future Acts on Native Title rights. Whilst there is little caselaw on this topic at present (which may in part reflect the fact that many agreements are reached on such matters under the current legislation), that will inevitably develop over time.
79. The Committee cautiously supports the determination of Native Title compensation for registered Native Title holders at the time of certain specified Future Acts occurring, provided the process is clear and efficient, does not unduly delay Future Acts, and anybody required to make such determinations (for example, the NNTT) is appropriately resourced to make such decisions in a timely manner.

Victorian Bar

80. The Victorian Bar's view is that the amount payable should be as agreed between the Native Title party and the relevant government party. Failing this, it should be referred to the NNTT, which should have the recourse to calculate these payments in line with the approach under the *Traditional Owner Settlement Act 2010* (Vic).

Question 25

How should 'Future Act payments' interact with compensation that is payable under Part 2 Division 5 of the Native Title Act 1993 (Cth)?

81. The Law Council provides the following views of its constituent bodies on this question for the ALRC's consideration. Those views should be attributed to each body, rather than to the Law Council.

Victorian Bar

82. The Victorian Bar recognises that 'Future Act payments' are distinct from compensation payable under Part 2 Division 5 of the NTA. Native Title holders' ability to pursue 'Future Act payments' as part of their right to negotiate serves a wider purpose than the compensatory function of payments under Part 2 Division 5. Whilst the payments have some overlap, they are distinct in that one payment is

reactive to damage done to Native Title rights interests, and the other contemplates future Native Title rights and interests.

83. Accordingly, the Bar's view is that these payments should continue to operate separately, although in a negotiation for compensation, the amount of money paid in Future Act payments may be relevant.

Queensland Law Society

84. The Energy and Resources Committee of the Queensland Law Society does not support separate, legislated 'Future Act payments'. It takes the view that the function of the NTA, and role of governments and courts in implementing it, should be determining and requiring payment of compensation for impacts on Native Title rights.
85. The First Nations Legal Policy Committee of the Queensland Law Society considers 'Future Act payments' to be payments that can be discussed prior to the Future Act, with compensation payable after an act is conducted.

Question 26

Should the Native Title Act 1993 (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?

86. On available information, the Law Council would broadly support this amendment. Any alternative form of agreement may offer a less arduous path to Future Act payments and compensation for Future Acts, depending on associated enforceability measures. A 'low cost, low procedure' agreement for 'small scale' Future Acts may be a preferred alternative where ILUA or right-to-negotiate processes (including the time and cost required) are disproportionate to the actual Future Act itself, where the Future Act is small scale in nature and may have minimal impact on Native Title rights.
87. The Law Council highlights the importance of these agreements not being used to circumvent more detailed negotiations for compensation via an ILUA. The Law Council holds concerns about misuse of unequal bargaining power and that these agreements may be used by proponents with smaller PBCs to broker agreements.
88. In addition, it might be that such an agreement would only be of practical use if it was also capable of approving a Future Act, not just agreeing on compensation, as the two matters normally go hand in hand.

Question 27

Should the Native Title Act 1993 (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?

89. The Law Council provides the following views of its constituent bodies on this question for the ALRC's consideration. Those views should be attributed to each body, rather than to the Law Council.

Victorian Bar

90. The Victorian Bar supports a modified no-costs jurisdiction for Future Acts, in cases where parties would ordinarily bear their own costs. Where a Native Title party is successful, the court would have the ability to order costs against the unsuccessful party, which would improve barriers to access to justice for Native Title bodies and PBCs.

Queensland Law Society

91. The Energy and Resources Committee of the Queensland Law Society's view is that there should be no specific rules for awarding of costs in Future Act matters before the Federal Court. The usual considerations and discretions afforded to the Court in making costs orders are appropriate.

Question 28

Should the Native Title Act 1993 (Cth) 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?

92. The Law Council would broadly support amendments to this effect, in particular to reduce duplication across legislation, reduce complexity and promote consistency. However, it will be important that the amendments account for the different heritage schemes operating across states and territories.
93. Whilst there is often an overlap between Native Title holders and people who have responsibility for cultural heritage, the existing frameworks are fragmented and can result in a 'patchwork' of claims within a geographical area. Where there are determined Native Title holders or registered Native Title claimants, that party must be consulted or negotiated with in respect of Native Title and heritage. A key difficulty of existing heritage laws is that, despite best intentions, it is sometimes difficult for a proponent to identify who they must negotiate with in respect of heritage matters to meet their legal obligations. Heritage protection laws also need to address circumstances where there is no Native Title or Native Title holder. This may also present an inherent restriction on the ability of the NTA to 'cover the field' for cultural heritage.
94. As identified at paragraph 333 of the Discussion Paper, cultural heritage management could be addressed through amendment to the NTA to enable all legal obligations relating to cultural heritage for projects to be discharged by agreement (including an ILUA), where specified criteria are met. The Law Council supports the ALRC's suggestion to provide that a positive determination of native title enlivens a statutory right for the relevant PBC to have a primary role (on behalf of the determined common law holders) in being consulted and making decisions with respect to cultural heritage for the determination area. There may be other First Nations people who are not members of the determined group but have traditional interests in relation to such sites, and who should also be consulted by the PBC in accordance with traditional law and custom, supported by laws that empower (and do not undermine) the PBC's role in this respect.
95. One issue not specifically addressed in the Discussion Paper is Future Acts in relation to the intertidal zone (and, to a degree, offshore areas). The Law Council understands, for example, that in Wanjina-Wunggurr Country in the Kimberley, the intertidal zone (adjoining the mainland and surrounding islands) is of major cultural, social and economic significance. It contains some of the most complex narratives

and manifestations of the actions of Lalai (Ancestral) Beings, which inform Traditional Owners about the nature of their material and non-material world. Wanjina and their actions are manifested in many areas of the intertidal zone through rock and stone arrangements, in particular. The intertidal zone, including reefs and mangrove forests, are also important sources of bush tucker and mangrove wood for raft-making. The Law Council understands Traditional Owners are concerned about unregulated and unsupervised tourist activities in this area. Although there are many areas of sea country below low-water mark which are also of great cultural significance, subsection 26(3) of the NTA excludes the right-to-negotiate provisions in Subdivision P from applying to land or waters below high-water mark. The 'impact-based model' may go some way to address this concern. However, the ALRC may wish to consider whether subsection 26(3) should be repealed, and whether the right-to-negotiate procedure (informed by FPIC) should apply to resources exploration and production, among other Future Acts that are not low-impact.

Proposals

Proposal 1

The Native Title Act 1993 (Cth) and Native Title (Prescribed Bodies Corporate) Regulations 1999 (Cth) should be amended to allow for the expanded use of standing instructions given by common law holders to Prescribed Bodies Corporate for certain purposes.

96. The Law Council supports this proposal, provided that the process incorporates sufficient safeguards to ensure Native Title holders have given FPIC to each Future Act. If a Future Act for which standing instructions have been given is likely to have a greater impact than other Future Acts within that class, or will occur over areas that are of special significance, there should be a mechanism by which the PBC is required to bring the decision back to the Native Title holders for authorisation for the specific Future Act in question.
97. The Victorian Bar further notes that if PBC membership changes, support for standing instructions may shift, resulting in further work to revisit, amend and/or withdraw the instructions. If PBC membership changes, and with it support for such instructions, the Victorian Bar notes there is a real risk for more significant or impactful decisions that the instructions may not be revisited or will be missed due to resourcing issues.

Proposal 2

The Native Title Act 1993 (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.*
98. The Law Council supports this proposal. There are clear benefits from greater transparency, and ease of access to, registered agreements by PBCs. This is especially acute when a PBC replaces a registered Native Title claimant following a successful determination (noting that, at this point, there may be many such

registered agreements that have been negotiated and registered prior to the determination). Where there are concerns regarding confidentiality of certain agreements, procedures regarding access and inspection of documents could be implemented.¹⁶

Proposal 3

Section 199C of the Native Title Act 1993 (Cth) should be amended to provide that, unless an Indigenous Land Use 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.*

99. The Law Council supports this proposal. In addition to the reasons set out in the Discussion Paper at paragraphs 114 to 117, it would be sensible for expired, surrendered, terminated and ended agreements to be removed. This could provide for a simpler and more efficient Register for the identification of relevant agreements.
100. However, the Law Council would welcome further detail of how 'relevant interest in property has expired or been surrendered' will be defined. Numerous project ILUAs do not have an expiry date, and this may have an unintended impact. Further clarity is also required in relation to how proponents will work with PBC directors and others to finalise ILUAs, and how PBCs will be funded to undertake this task.

Proposal 4

The Native Title Act 1993 (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.

101. The Law Council supports this proposal, provided that there is also a notice requirement for the Native Title Registrar to contact parties before this step, including to advise that the audit and review is taking place and provide opportunity for the parties' input.

Proposal 5

The Native Title Act 1993 (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.

102. The Law Council supports the provision of accessible, cost-effective and efficient mechanisms for resolving disputes, but would welcome greater detail about this proposal, in particular with respect to funding arrangements.
103. The Law Council notes that ILUAs can address numerous matters and processes including administrative requirements, compensation, steps to progress Future Acts, methodologies for cultural heritage management, and committee structures for agreement implementation. All of these issues could be the subject of a minor or

¹⁶ See for example *Aboriginal Land Rights Regulation 2020* (NSW) s 16, Schedule 1, Part 8.

major dispute. ILUAs also usually contain dispute resolution clauses. The NNTT is not currently sufficiently resourced to assume additional assistance functions.

104. Care also needs to be taken that the financial cost of establishing this mechanism does not outweigh the benefits—in particular, if funding were diverted away from organisations representing Native Title holders and redirected to the NNTT. As the Law Council previously identified, there is a need for significantly greater funding for Native Title holders, those seeking to assert a Native Title interest, and the organisations representing them.¹⁷

Proposal 6

The provisions of Part 2 Division 3 Subdivision P of the Native Title Act 1993 (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:*
 - i. *require the parties to continue negotiating in accordance with the negotiation conduct standards to seek agreement about conditions that should attach to the doing of the Future Act;*
 - ii. *at the parties' joint request, proceed to determine the conditions (if any) that should attach to the doing of the Future Act; or*
 - iii. *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*

¹⁷ Law Council of Australia, Review of the Future Acts Regime: Issues Paper, April 2025, [27] - [29]. <www.alrc.gov.au/wp-content/uploads/2025/04/47.-Law-Council-of-Australia.pdf>

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 Native Title Act 1993 (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 determination of conditions at any time.*
105. The Law Council supports this proposal, noting again the importance of FPIC and its incorporation into the NTA. As it requires the NNTT's more active involvement, the proposal may also need to be accompanied by more resourcing for the Tribunal.
106. The Law Council queries whether the six-month time period is adequate, considering the often-remote location of PBC members and the complexity of Future Act proposals. Subject to the views of Land Councils and PBCs, the Law Council's view is that this period should be extended.

Proposal 7

The Native Title Act 1993 (Cth) should be amended to empower the National Native Title Tribunal to determine issues referred to it by agreement of the negotiation parties.

107. The Law Council supports this proposal to the extent it would assist parties to resolve disputes and foster agreement-making. However, we again note the importance of the consent of parties being free, prior and informed, and absent any pressure from a proponent.
108. Regard would need to be had to contractual arrangements between parties (relating to existing dispute resolution clauses) and rights at common law given that ILUAs and right-to-negotiate agreements are still contracts. Further consideration is also required in relation to other agencies or entities that could be involved due to the sensitive and commercial nature of ILUAs and right-to-negotiate agreements.

Proposal 8

Section 38(2) of the Native Title Act 1993 (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.

109. The Law Council's position is that this proposal may overcome the difficulties set out in the Discussion Paper at paragraphs 231 to 234. However, appropriate safeguards may be necessary to ensure royalties, profits or other income are not too low and that the conditions are not exploitative. Common law land holders also need to be consulted where royalties, profits and other income generated from the Future Act are being determined.
110. The Law Council would welcome further details of how the NNTT would be supported to consider the conditions and economics of a project, what evidence would need to be considered, how much commercial in confidence information could

be disclosed by project proponents, and appeal rights. The Law Council would also welcome further details with respect to funding arrangements for Native Title parties before the NNTT. Increased funding for those parties will be essential to ensure more equal bargaining power, to enable consultation within their communities and to obtain professional advice and representation.

Proposal 9

Section 32 of the Native Title Act 1993 (Cth) should be repealed.

111. The Law Council supports this proposal, subject to further detail about the proposed impact-based model. The benefits of the expedited procedure are outweighed by the detrimental impacts for Native Title parties as set out in the ALRC Discussion Paper at paragraphs 237 to 244.
112. Due to challenges in governance, funding and the amount of time required to respond to notices of these types, Native Title holders are at a disadvantage as compared to the other parties involved. This is exacerbated by the fact that, before responding, Native Title holders must frequently consult with Traditional Owners to collect relevant information and to ensure the response is reflective of the communal rights and interests. Whilst each community is unique (including in respect of its decision-making processes), aspects such as consultation, application of law and lore, consideration of country and the need to contemplate impacts for future generations (not just the next generation, but, for many future generations) are processes that are typically followed prior to making a decision. Expedited processes present challenges to properly carrying out these responsibilities and can have detrimental impacts for those communities.

Proposal 10

The Native Title Act 1993 (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.

113. The Law Council supports this proposal. The Law Council welcomes the ALRC's consideration of the consequences of non-compliance with procedural requirements in the Future Acts regime, an issue that was identified in our response to the Issues Paper.¹⁸ Those requirements are not mere administrative steps but have behind them substantive purpose.
114. The Victorian Bar notes that planning law in Victoria provides an example where failure to follow legislative procedures can impact validity. For example, under the *Planning and Environment Act 1987* (Vic), a planning permit application must be exhibited (unless it falls within a class that is exempt from notice requirements). People so notified have the opportunity to comment on the proposal. Those who comment on the proposal are then notified of the decision and what conditions apply. They have a chance to apply to VCAT for a review of the decision (unless it falls within a class where review rights are exempt). Failure to follow the procedure can lead to an application to have the planning permit amended or cancelled (subject to meeting certain other legal tests).

¹⁸ Law Council of Australia, Review of the Future Acts Regime: Issues Paper, April 2025, [79] - [80]. <www.alrc.gov.au/wp-content/uploads/2025/04/47.-Law-Council-of-Australia.pdf>

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.

115. The Law Council supports this proposal. By increasing transparency and access to Future Act notices, this proposal would assist individuals and organisations to understand what Future Acts apply in a specific area. This will be useful not only to existing and potential rights holders, but also for government and corporations looking to invest in the area.

Proposal 12

Sections 24EB and 24EBA of the Native Title Act 1993 (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.

116. The Law Council supports this proposal. The Law Council understands these provisions have presented difficulties in circumstances when it is appropriate for the parties to defer negotiation of compensation. This would ensure that parties discuss how compensation will be addressed under an agreement and allow parties to defer compensation for loss until a later time when the impact and damage of the loss is better known.

Proposal 13

The Native Title Act 1993 (Cth) should be amended to provide a statutory entitlement to compensation for invalid Future Acts.

117. The Law Council provides the following views of its constituent bodies on this question for the ALRC's consideration. Those views should be attributed to each body, rather than to the Law Council.
118. The Victorian Bar and Law Society of NSW support this proposal. While the NTA already provides a right to compensation, this amendment would clarify the cause of action for invalid Future Acts and make such compensation more accessible. It would also overcome the issue of Native Title holders having to prove possession for common law trespass against Native Title to be entitled to compensation for Future Acts.
119. The Law Society of NSW suggests that, for certainty and consistency in process, any such amendment should apply retrospectively. This will avoid situations where compensation for some invalid Future Acts are able to be commenced in the Federal Court pursuant to a statutory right, and compensation for invalid Future Acts that occurred prior to the amendment may be sourced in common law causes of action, such as trespass, which would be commenced in a state court and subject to questions around limitation periods and discoverability.
120. The Energy and Resources Committee of the Queensland Law Society suggests that an alternative solution could be to require the validation of any invalid Future Acts (given the existing right to compensation under the NTA), which could then lead to negotiations for compensation. The First Nations Legal Policy Committee of the Queensland Law Society notes that in respect of the existing right to compensation under the NTA, there is a lack of information for PBCs, common law holders and

Native Title applicants about the High Court of Australia's decision in *Northern Territory v Griffiths (deceased) and Jones on behalf of the Ngaliwurru and Nungali Peoples* [2019] HCA 7 and what it means for them. Validating an invalid Future Act for the sake of compensation may raise broader matters for consideration besides compensation and will need to avoid increased timeframes and complexity in respect of requirements under ILUAs.

Proposal 14

The Native Title Act 1993 (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.

121. The Law Council supports this proposal. Many PBCs are not well funded to undertake their statutory roles. Better resourced PBCs can help achieve better outcomes for common law holders.

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.

122. The Law Council provides the following views of its constituent bodies on this question for the ALRC's consideration. Those views should be attributed to each body, rather than to the Law Council.

Queensland Law Society

123. The First Nations Legal Policy Committee of the Queensland Law Society does not support this proposal. Given the current and future workload of PBCs, it is important that governments efficiently and effectively support and build the capability of these bodies into the future. Currently, PBCs are not adequately funded to perform their statutory roles. To promote self-determination in Future Acts processes, one way of facilitating this is to ensure PBCs are properly resourced and capable of fulfilling their role.

Victorian Bar

124. The Victorian Bar supports this proposal. However, it wishes to emphasise the importance of cost recovery mechanisms and for parties to be free to choose their own legal advisors and engage private firms or barristers.

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.

125. The Law Council supports this proposal. The reforms in the Discussion Paper will require a significant increase in funding to deliver the necessary improvements to the current Future Acts regime. The Law Council encourages consideration of alternative ways to support participants in the Native Title system that are more closely aligned with UNDRIP, including where identified in this submission.

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).*

126. The Law Council broadly supports this proposal. Cost recovery would help improve Future Acts processes and PBCs' and common law holders' involvement in matters impacting Native Title rights and interests. We also note the significant additional expenses incurred by some Native Title holders, for example in parts of the Northern Territory, Queensland and Western Australia, because of the remoteness of their location. However, clarity would be needed on issues such as who is entitled to recover costs (whether just the PBC, or all board members, or all common law holders involved in decision making, etc).

127. The ALRC is encouraged to consider cost recovery mechanisms across other relevant legislation. This could include, for example, experiences of the Aboriginal Heritage Council and Registered Aboriginal Parties (**RAPs**) as to the success, or otherwise, of RAPs charging of fees under the *Aboriginal Heritage Act 2006* (Vic).

Proposal 18

The Australian Government should establish a specifically resourced First Nations advisory group to advise on implementing reforms to the Native Title Act 1993 (Cth).

128. The Law Council supports this proposal. Having First Nations people provide substantive input into the reforms is consistent with human rights principles, including self-determination for Indigenous peoples under the UNDRIP.

129. Input to these reforms should be facilitated in multiple ways, including direct consultation with First Nations people, First Nations people being employed as part of the teams that draft the amendments, and through an advisory group as outlined in the Discussion Paper. Careful consideration will also need to be given to how the role of a First Nations advisory group interacts with other roles and rights of Aboriginal and Torres Strait Islander people and groups. In addition, as the reforms develop, it will be important to clarify how the role of the proposed advisory group interacts with existing statutory frameworks for Native Title and cultural heritage protection laws.