Review of the Future Acts Regime

Submission to the Australian Law Reform Commission in response to Discussion Paper 88

24 July 2025

The Central Land Council (**CLC**) represents Aboriginal people in Central Australia and supports them to manage their land, make the most of the opportunities it offers and promote their rights. The CLC is a corporate Commonwealth entity established by the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (**Land Rights Act**) and is a Native Title Representative Body (**NTRB**) under the *Native Title Act 1993* (Cth) (**Native Title Act**). The CLC is responsible for an area of almost 777, 000 square kilometres.

Since its establishment at a meeting of Central Australian Aboriginal communities in 1975, and through its elected representative Council of 90 Aboriginal community delegates, the CLC has represented the aspirations and interests of approximately 17,500 traditional Aboriginal landowners and other Aboriginal people resident in its region, on a wide range of land-based and socio-political issues.

In March 2025 the CLC made a submission in response to Issues Paper 50 issued by the Australian Law Reform Commission (**ALRC**) regarding its Review of the Future Acts Regime. That submission identified the issues CLC considered most important in reforming the future acts regime under the Native Title Act. The CLC stands by that submission and provides the following more specific responses to the questions and proposals identified in the ALRC's Discussion Paper 88 regarding its Review of the Future Acts Regime.

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Section 1: Native Title Management Plans

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?

1. CLC considers that native title management plans (***NTMPs***) could provide a valuable option for some groups of common law holders.

2. Provided that they remain a voluntary process, CLC has no fundamental objection to that option being made available. However, we have concerns about some aspects of the proposal. It is likely to make the system more complex (contrary to the ALRC's goal of simplification), but it does have the advantage of Prescribed Bodies Corporate (***PBCs***) being able to provide advance notice in broad terms of the concerns and aspirations of common law holders; and to provide for processes that best fit the nature and volume of future acts in a given area.

3. Some significant details about the operation of the NTMP proposal are unclear; most importantly, the registration criteria, and the consequences of a PBC withholding consent.

4. **Registration criteria.** In relation to the registration criteria:

    a. There should be a requirement for the informed consent of the common law holders to be renewed on a 5 yearly basis. That could occur through a reauthorisation requirement. An NTMP could potentially significantly reduce the rights of common law holders vis a vis the management of a PBC, and it is important that there are appropriate protections in place.

    b. The proposed criterion that the NTMP be "*consistent with, and faithful to, the objectives of the future acts regime and the Native Title Act*" is too nebulous and would provide too much discretion to the assessing body. The parameters should be much clearer so that PBCs can have some certainty that if they invest the significant resources required to make an NTMP, it will be registered.

5. **Withholding consent.** In relation to a PBC withholding consent, the proposed model appears to offer more than it delivers. A NTMP which provides, for example, that consent is not and will not be given to any mining in a particular area, would have the effect that a mining proponent could short-cut the right to negotiate process, with its requirements for notification, negotiation in good faith and minimum timeframes, and instead proceed directly to a future act determination application (***FADA***) without engaging with a PBC at all.

6. While CLC supports the reversal of the persuasive onus in relation to NTMPs,[1] excluding the right to negotiate protections (limited as they are) risks producing unintended consequences.

7. Instead, NTMPs should allow for:

   a. the withholding of consent to future acts (with no recourse to a FADA) if they affect sites or areas of significance to the common law holders; and

   b. the guaranteed application of the right to negotiate in relation to future acts which are of particular concern to the common law holders.

8. The rights in [7] should apply to more than just sites of particular significance. They should be able to encompass, for example, environmental and cultural refugia in otherwise disturbed areas and other places that are important to common law holders for other cogent reasons. Common law holders may wish to protect the last bush tomato patch, a prolific hunting ground, or ceremony patch through their NTMP.

9. If this suggestion is taken up, registration of an NTMP could be dependent on whether consent provisions are confined to the relevant sites / areas (for example, via a generic limitation in the NTMP), and whether the National Native Title Tribunal (***NNTT***) considers that there is a cogent reason for any stated concerns of the common law holders.

10. **Differing views on future acts**. The value of NTMP could be reduced if the common law holders and government party take differing views on whether certain grants constitute future acts. For example, in the CLC's region, the impact of groundwater extraction and pastoral land clearing for horticulture are of significant concern to common law holders. It is likely that common law holders would seek to protect areas with important groundwater dependent ecosystems with the strongest protections possible under a NTMP. However currently the Northern Territory does not treat groundwater extraction licences, pastoral land clearing applications or non-pastoral use permits as future acts. It is likely that any NTMP and government policy would come into conflict about such matters, with a high potential for litigation.

11. **Fees.** It would be of assistance if NTMPs could prescribe fees for categories of future act applications, as well as compensation payments.[2] PBC would also need to be resourced to develop NTMPs. The obvious source of external funding is a proponent wishing to undertake activities on it. However relying on that alone risks NTMPs being focused on specific project types rather than being of broadest application.

[1] Discussion Paper 88 (***DP***), [60].
[2] DP [61].

12. **Cultural heritage laws**. We support NTMPs being able to amount to compliance with State/Territory cultural heritage laws.

Section 2: Promoting fair and equitable agreements

Conduct and content standards

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. Legislated **conduct standards** are only of utility if they rise above the current state of the common law. Nothing is gained by legislating some or all of the *Nyamal* indicia.

14. The ALRC should be cognisant of the risk that entrenching a conduct standard will make it the prevalent standard, not the minimum one. This also applies to content standards.

15. **Real minimum conduct standards**. There should therefore be real minimum standards for both process and substance of negotiation, such as:

    a. Proponents funding negotiations adequately. Between most proponents, government and PBCs there is an imbalance of resources. For common law holders to give informed consent, that imbalance needs to be addressed to allow them to obtain the advice that they consider is important. It is appropriate that cost is borne by the proponent, who not only presses for the act to be done, but seeks to benefit from it.

    b. Where PBCs or claimants are represented, no contact with common law holders is in the absence of their representatives. Grantee and government parties should be prohibited from directly contacting native title holders, unless the native title holders as a group first give their consent. Direct contact with native title holders is not consistent with the communal nature of native title, or with the representative structures (PBCs and Applicants) established by the Native Title Act. Allowing direct contact can create enormous conflict within groups, to the benefit of those proponents who choose to act unscrupulously and pursue 'divide and conquer' tactics.

    c. Early and ongoing provision of important and relevant information by proponents and governments. This is needed to address the power imbalance in negotiations between parties. It should be recognised that the common law holders themselves can determine what information they deem relevant to them in the negotiation. It will not necessarily be information which a proponent or government considers important or relevant. All projects evolve throughout their early stages, so disclosure needs to be a continuing obligation. However native title holders should not be required to disclose cultural information.

d. Making reasonable substantive offers and counter-offers. After more than 30 years of the operation of the Native Title Act, there is substantial information available to enable the NNTT, which is supposed to operate as a specialist tribunal, to assess what a reasonable offer is. Negotiation parties should be required to make reasonable offers as part of their obligation to negotiate in good faith.

e. Meaningfully discussing all issues identified for negotiation by the parties before applying for a FADA. There is currently no threshold at all for the stage of negotiations, provided the 6 month time limit has elapsed. [3]

16. **Government parties.** The obligation to negotiate in good faith should continue to apply to government parties. In our experience governments usually only need to participate in negotiations in the later stages. When they do, it is often not as constructive a contribution as it could be. This often derives from an unwillingness to treat each matter on its merits, in favour of a rigid 'one size fits all' approach.

17. **Onus of proof**. We support the reversal of the onus of proof for good faith.

18. **Registration implications.** While we support conduct standards applying to Indigenous Land Use Agreements (**ILUAs**), this would require a registration criteria to be added relating to good faith. To avoid onerous obligations, the Registrar should be required to assume that this good faith criterion is met unless a party or objector alleges otherwise.

19. **Content standards** should not be overly prescriptive. CLC supports some of the matters raised by the ALRC, but **not**:[4]

    a. Prohibiting parties from agreeing on the purpose for which particular payments will be expended (although we do support a prohibition on restrictions on how payments will be administered and managed).

    b. Requirements that certain matters be in head agreements or ancillary agreements.

    c. Guarantees of minimum procedural rights, if that would interfere with agreements that provide project-level consents.

    d. Requirements about dispute resolution clauses.

    e. A right for common law holders to access agreements – in many circumstances this would make confidentiality clauses (which are in the common law holders' interests) impossible to

[3] That is, overturn *FMG Pilbara Pty Ltd v Cox* (2009) 175 FCR 141, which held that the requirement to negotiate in good faith can be satisfied after the 6 months deadline expires, no matter the stage of negotiations.
[4] DP [86].

implement. However, we do support a duty for PBCs to keep common law holders informed about the terms and implementation of agreements, and to be transparent about finances related to agreements. For example, CLC's usual practice is to assist income-receiving PBCs to hold regular meetings with directors and common law holders to explain and make decisions about the "money story": that is, the source of the income, decision-making processes in relation to the income, and where it will be allocated following said decisions. CLC also encourages all such PBCs to include in their rulebooks a requirement that common law holders play a significant role in decision-making meetings in relation to income.

f. Assignment/succession clauses – the potential circumstances are too varied and complex for a statutory standard to be workable. Assignment/succession of agreements would be better dealt with by a statutory mechanism rather than a required content standard (see Question 9 below).

20. The content standards not supported are ones where parties can agree legitimate and useful terms, and imposing constraints would make it more difficult for mutually workable agreements to be negotiated.

21. **Registration/FOI implications.** If agreements are required to be provided to the Registrar for registration purposes, they should be protected from freedom of information legislation.

Expanding standing instructions for agreements

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.

22. The CLC makes no comment on this proposal as few, if any, PBCs in the CLC's region have sufficient volume of future acts or governance issues to warrant expanded use of standing instructions.

Common law agreements

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?

23. **Key advantages**. Ancillary agreements are a very important element of the practical commercial negotiations involved in many future acts. Any reforms to address the use of ancillary agreements should not undermine the key advantages of those agreements, including:

a. they can be between limited parties and address issues only of concern to those parties; and

b. they are confidential as between those parties.

24. To the extent the ALRC has concerns about transparency within PBCs about ancillary agreements, it is not a significant issue in the CLC region and should be dealt with in the context of PBC governance reforms.

Access and assignment

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.

25. CLC supports Proposal 2a.

26. In relation to Proposal 2b, our view is that the Registrar's obligation to provide registered agreements should only be triggered on receiving a request from the PBC. This would avoid unnecessary administrative burdens on both PBCs and the Registrar.

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?

27. **Succession**. CLC is generally supportive of PBCs having the ability to instigate succession into agreements. However, there are likely to be many subtleties to agreements nationwide which could produce unintended consequences.

28. For example, ILUAs made pre-claim might have the NTRB as the sole Indigenous party. Under such an ILUA there might be rights accrued to the NTRB which are appropriate to transfer to the PBC, and others which are not – for example, obligations to organise a heritage survey if the PBC does not have capacity to do so; or obligations to carry out certification of the ILUA authorisation which the PBC does not have the power to do. There would need to be capacity for the PBC to nominate or negotiate which particular rights and obligations it would be succeeding to, or the agreement could become unworkable.

29. **Consent determinations.** CLC does not support requiring that agreements be dealt with at the time of a consent determination. This would complicate and delay consent determinations, which already involve a large burden of procedural requirements.

Registration and oversight

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.

30. **Interest expiry.** CLC's view is that proposal 3a is hugely problematic. Many obligations in ILUAs can outlive the relevant property interest – for example, mining rehabilitation obligations, or tapering compensation payments after the end of a project.
31. **Agreement expiry, termination etc.** Our view is that proposals 3b and c are reasonable, but procedural fairness should be provided to the parties before any deregistration occurs. We note that all of the risk of deregistration falls on the common law native title holders, who will be potentially unable to enforce agreements while the future acts will remain validated.
32. CLC sees a broader issue here whereby ILUA de-registration does not have any real consequences. For example, de-registration does not appear to affect the validity of activities done pursuant to the future act that was originally validated by the ILUA registration, but which occur after de-registration.[5] De-registration offers little more than symbolic recourse, and as such the PBC and common law native title holders have effectively zero bargaining power following the expiry or termination of the ILUA.
33. In circumstances where an ILUA has expired or been terminated but activities stemming from the future act remain valid, there is no incentive for the other parties to enter into negotiations for a new ILUA. This could be remedied by minor amendments to ss 24EB(2A) and 44H providing that a future act and associated activities are only valid for the period in which the agreement is registered.
34. Assuming the above issue is remedied, there should also be a straightforward mechanism for de-registration where:

[5] Due to the combined effect of ss 24EB(2A) and 44H.

a) Parties register an ILUA which provides for the doing of acts subject to conditions;[6] and

b) Those conditions are not met.

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.

35. CLC does not support this proposal. Periodic audits should be a matter for the discretion of the Registrar, and for many agreements it will be an unwelcome administrative burden.

36. Our view is that if the parties to a registered ILUA are experiencing implementation issues, then the parties can take their own steps to address them.

Amending agreements

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?

37. The ALRC appears to have misunderstood our submission at p 10 of our response to the Issues Paper. We are not saying that it should be sufficient for parties to agree to amendments – there should also be re-authorisation and re-registration of any changes to agreements (except perhaps enumerated non-substantive changes – and we have no suggestions to add beyond those in s 24ED(c)-(e)).

38. Our point is that s 24ED(2) currently requires the existing agreement to be de-registered (presumably by agreement under s 199C(1)(c)(ii)) and then the amended agreement to be the subject of a fresh application for registration. There should be a simple and direct process for the registration of an amended agreement, to replace the existing registration.

Implementing and enforcing agreements

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.

[6] See s 24BB(a).

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?

39. CLC supports Proposal 5 to enable this as a voluntary mechanism, but not Question 11, which restricts parties' ability to negotiate appropriate dispute resolution clauses (see response to content standards above).

40. We also support the Federal Court being given jurisdiction exclusive of all other judicial bodies (except the HCA) in relation to disputes about future act agreements. The Federal Court is the most appropriate tribunal given its subject-matter expertise.

Agreement transparency

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?

41. CLC does not support a register being established. It would be misleading unless it was a complete register, and for the reasons identified in the Discussion Paper,[7] it would not be appropriate to undermine parties' ability to keep terms confidential.

42. CLC also does not support resources being diverted from the area of critical need – PBC support – to fund a register of this kind. In that light, this kind of reform should not be a priority.

Pre-determination agreements

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?

43. CLC's experience is that this is not a common issue in our region, and therefore we do not express a view.

[7] DP [135].

Section 3: Reshaping the statutory procedures

Impact-based model

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?

44. As set out in CLC's response to the Issues Paper, a future acts regime which truly reflects international principles of human rights would provide for consent as the standard for all future acts.

45. However, the CLC recognises the impact-based model in the Discussion Paper as an improvement on the status quo. The CLC generally supports this proposal; however there is a **critical issue** with this proposal which must be addressed. If that issue is not addressed it would undermine the heart of the limited human rights protections contained in the future acts provisions.

46. **Critical issue – freehold test.** That issue is protection for native title holders against acts which could not be done to a holder of ordinary title. The current mechanism for this protection is the application of the freehold test in Subdivision M. If that test is not passed, Subdivision O applies to onshore future acts, making the act invalid to the extent it affects native title.

47. The freehold test is a critical protection – noting that the Native Title Act displaces the operation of the *Racial Discrimination Act* 1975 (Cth) (**RDA***)* in relation to future acts. It is the only thing which prevents:

    a. Legislation extinguishing native title entirely – of the ilk made by the State of Queensland and struck down in *Mabo (No 1)*.

    b. The grant of freehold or leasehold titles (including pastoral leases) over areas of Crown land.

    c. The transformation of existing tenures to exclusive possession tenures.

48. In each of these situations native title holders and native title rights would be the only interests affected by Government action. Such actions are inherently racially discriminatory. An iteration of the Native Title Act which allowed such actions to occur could not be said to be just, or to be consistent with the aspirations of its Preamble.

49. Under an impact-based model, the Native Title Act should prescribe that acts not passing the freehold test may not be done other than by an ILUA or pursuant to an NTMP. Governments would retain the capacity to carry out a non-discriminatory compulsory acquisition if the circumstances justified doing so.

50. **Project-based impacts.** CLC considers that consideration of project-based impacts is essential. An example which particularly illustrates this issue is petroleum production. Petroleum production licensing is usually distinct from petroleum exploration. In many cases, all of the substantial physical impacts of conventional petroleum production occur during the exploration phase. However it would be perverse if an impact-based system were to deny a right to negotiate in relation to petroleum production.

51. To address this issue, project-based notification should be used but the system should also allow flexibility – parties should be permitted to agree that certain acts within a project can be agreed at different stages of the project. For example, parties might choose to negotiate a conjunctive agreement (addressing exploration and production) before exploration commences in an area. Or they might enter into an exploration agreement only and agree to defer a further agreement until any production permits are applied for. Agreements would be required to specify precisely which acts or categories or acts are consented to.

52. **Contextual assessment of impact.** Assessment should also be contextual, and take into account the cumulative impacts of past and current activities.

53. CLC supports the ability for a native title party to challenge an impact-based categorisation in the NNTT.

Some further comments on this proposal:

54. **Reasons.** Governments should be required to give reasons for their impact assessments, on request from a native title party.

55. **Temporal limits on obtaining right to negotiate.** The period for filing and registering a claim to obtain rights under the right to negotiate should be increased, to encourage the lodging of properly researched claims. While this is becoming an increasingly infrequent event due to the high coverage of determinations and registered claims, four months has always been too short a

time period to properly research and authorise a claim. It should be more in the order of twelve months (a change which would create no additional delay for proponents if the 18 month timeframe in the proposed RTN reform is adopted). Proper research means an opportunity to avoid the kinds of disputes which have been caused by polygon claims in the past.

56. **Transitional provisions.** The transitional provisions for this system should provide that the new system applies to all acts not yet done. A clean changeover is required to avoid the enormous complexity of 'grandfathering' some future acts for potentially decades to come.

Current exclusions and potential exclusions in a reformed future acts regime

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?

57. Regarding the ALRC's contemplated exclusions from the impact-based model:
    a. **Public works.** Public works are usually high-budget Government processes which should not be exempt from native title requirements. Government should be leading the way in carrying out appropriate consultations. Public works also involve a high risk of damage or destruction of sacred sites. The CLC has repeatedly experienced issues with public works, particularly road works, destroying sacred sites. For example, a sacred tree associated with a recorded sacred site was destroyed during road works in a remote community. Territory laws and Government processes have not been effective to prevent this damage, and a reformed Native Title Act would provide very important additional protections.
    b. **Compulsory acquisitions.** In the experience of the CLC, it is exceptionally rare for a compulsory acquisition of native title rights and interests to occur in areas where any non-native title interests also exist. They primarily occur in areas of Crown land. While a compulsory acquisition of "all" interests in such an area is formally non-discriminatory, in practice, native title holders are much more likely to experience compulsory acquisition than any other

landowner. Their interests in land have a unique spiritual dimension, and they should be entitled to the protections of the right to negotiate. CLC supports the right to negotiate applying to all compulsory acquisitions; or alternatively, the impact of activities intended to be enabled by the compulsory acquisition should be taken into account under the project-based impact assessment approach.

c. **Sections 26A and 26B** would be expected to be dealt with as low impact acts on the proposed impact assessment model. Consultation is appropriate, and not unduly onerous.

d. **Section 26C.** CLC does not support the exclusion of s 26C acts from the proposed impact assessment model.

e. **Section 26D** applies to renewals of certain mining leases. If parties have already entered into agreements which give consent to renewals, then removing this provision has no adverse impact. If parties have not, then a renewal is a Government decision with a very substantial impact on native title rights. It is appropriate that the right to negotiate apply, particularly as native title rights and interests pre-date all mining in Australia. We note, however, that it might be safely assumed that only in very exceptional circumstances would the NNTT refuse a FADA in relation to an existing mine.

f. **PBC acts.** Acts done for, or by, a PBC, are better dealt with via NTMPs.

The significance of water

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?

58. **Footprint.** It may not be as clear-cut as is suggested by the Discussion Paper that impacts outside the immediate footprint cannot be taken into account. The definition in s 227 Native Title Act is not confined by reference to the 'footprint' of an act, and the Tribunal has long taken into account the possibility of impacts outside the area of an exploration or prospecting tenement (see, eg, *Silver v Northern Territory* [2002] NNTTA 18; 169 FLR 1 at [89]).
59. However, the CLC agrees that an impact-based model should include a definition of the 'area' of a future act as including all areas where physical impacts will occur (including, for example, the drawdown of water, or dust and pollution emissions). The Government should be required to determine the affected area, after making reasonable enquiries, and indicate that area on the future act notice.

Legislative dealings and planning activities

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?

60. **RDA.** In relation to legislative dealings, the situation is complex. Currently, the Native Title Act displaces the RDA. It may be worth exploring whether the RDA could be applied to legislative future acts, rather than having a more bespoke model. The CLC suggests this only tentatively, due to the complexities involved.

61. **Minimum standards.** There are minimum standards which must be preserved by any changes:

    a. State and Territory legislatures should not be able to extinguish native title rights and interests wholesale, or to grant interests over Crown land, without native title holder consent. That is currently the state of the Native Title Act and it must not be undermined.

    b. State and Territory legislatures sometimes grant bespoke tenures directly through legislation (for example, as part of State agreements for major projects). Such grants should not be excluded from the impact-based assessment.

62. **Water planning.** CLC supports Question 17b, and sees force in the observations of the ALRC regarding the merits of accounting for impacts of prospective water use on native title at an earlier stage in the process.[8]

63. For the past 5 years CLC has been assisting a PBC in its region in relation to litigation regarding judicial review of a water licence, including on procedural fairness grounds. The Northern Territory failed to observe the relevant future acts provisions prior to granting the water licence. It is possible that this litigation, and the associated time and expense on the part of all parties (in this case, the PBC, common law holders, the government party and the grantee), could have been avoided if the concerns of native title holders were addressed during the water planning stage for the region, and incorporated into any water planning documents. Instead, native title holders were effectively forced to resort to resource-intensive litigation in respect of the water licence to protect their native title rights and interests.

[8] DP [194].

Reforming the right to negotiate process

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:

- 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;
- at the parties' joint request, proceed to determine the conditions (if any) that should attach to the doing of the future act; or
- if the Tribunal is of the opinion that it would be inappropriate or futile for the parties to continue negotiating, after taking into account the parties' views, proceed to determine the conditions (if any) that should attach to the doing of the future act.

f. At any stage, the parties may jointly seek a binding determination from the National Native Title Tribunal on issues referred to the Tribunal during negotiations (see Proposal 7). The parties may also access National Native Title Tribunal facilitation services throughout agreement negotiations.
g. If the parties reach agreement, the agreement would be formalised in the same manner as agreements presently made under s 31 of the 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 a determination of conditions at any time.

64. **6 month limit.** The CLC is generally supportive of this proposal; however limiting the right to object to the first 6 months of negotiations risks severely comprising native title party's ability to negotiate fair agreements. The Tribunal's decision in relation to an objection should only be a provisional one, and subject to further consideration at the final stages of the right to negotiate (**RTN)** process. A reformed RTN process needs to proceed as a package, and CLC will not support changes to the right to object a future act unless the fully reformed RTN process is implemented.

65. **Changing project proposals.** A critical issue is the risk of project proposals changing. While the provision of up-front information is important, projects often change in significant ways during the course of negotiations. For example, minerals processing may not initially be intended to occur on-site, but may become part of the proposal at a later stage. The target mineral, or the method of extraction, might also change. The process needs to accommodate such a situation so that native title holders are not deprived of an opportunity to object if developments in the project proposal become unacceptable. The appropriate solution to this issue would seem to be that the initial information provided is **binding** on the proponent, and **a material variation** to that information requires the process to be restarted. Otherwise the important right to object and to have the matter heard by the Tribunal could be entirely undermined by a change in project plans.

66. **Active negotiation**. The six month timeframe for objections should apply to periods where the proponent is **actively** negotiating. In CLC's experience it is not uncommon for it to take more than 6 months for a proponent to respond to substantive correspondence during a negotiation.

67. **Government parties.** It is not clear from the Discussion Paper whether the ALRC considers the Government party would continue to be a participant in negotiations. CLC's view is that the negotiations should continue to be formally tripartite, but flexibility in involving the Government party should be retained in any reformed system.

68. **Safeguards.** Regarding the safeguards considered by the ALRC:[9]
    a. CLC recognises the need for some degree of case management controls; however we submit that the Tribunal's current powers to make directions, and to dismiss matters for failure to comply with those directions, are sufficient. Applying a 'no reasonable prospects of success'

[9] DP [236]

test would require procedural fairness and would entail a hearing of a similar scale to the substantive matter.

b. The proposal for proponents to be able to seek a determination early, if the native title party is not negotiating, needs to be approached with caution. The ALRC is aware of the serious resourcing issues plaguing PBCs. Until PBC capacity is at a much higher level than it is currently, no response should not be mistaken for no interest, or for an unwillingness to negotiate later in the negotiation period. CLC does agree that if a native title party makes clear that it will not negotiate, then a determination should be able to be brought.

c. CLC supports serious failure to meet the negotiation conduct standards as a basis for deciding that an act must not be done. However, native title parties should also have recourse during negotiations, and proponents should be provided with a signal that their behaviour is unacceptable. To facilitate this, and to give the conduct standards greater weight, the Tribunal should have the power to 'reset the clock' on a negotiation if it determines that the proponent is failing to meet the conduct standards during the negotiation period. Such determinations would be considered on application of the native title party during a negotiation.

d. Safeguards around project changes are essential and are addressed in the first section of the CLC's response to this Proposal.

NNTT referral

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.

69. **Agreement.** CLC supports this proposal on the condition that referral only be by agreement of all parties to the negotiation. The criteria for resolving the issue should be the same as described in the response to Question 19 below.

70. However, CLC notes that this may be of limited utility as sometimes specific issues are interlinked with other aspects of the agreement. For example, a determination on one aspect of an agreement may 'lock in' financial costs (such as those associated with an Indigenous employment program) which a negotiation party may then seek to offset against other payments associated with an agreement.

Future Act Determination Criteria

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?

71. **Consent reasonably withheld**. CLC considers that a subjective 'consent reasonably withheld' test is appropriate to be applied in relation to objections. This is the approach most consistent with principles of free, prior and informed consent. Such a standard will require native title holders to be properly informed, to give genuine consideration to the proposal and to come to a reasonable decision on the basis of their traditions, values and wishes.

72. 'Substantial and irreparable harm' is a test which is too speculative to apply at the early stage of project approvals where most FADAs are made. It would require the NNTT to second guess, for example, what environmental conditions are likely to be imposed, before an environmental assessment has even begun.

73. **Alternative position**. If a 'consent reasonably withheld' test is not ultimately preferred by the ALRC, CLC agrees that the interests and wishes of the native title holders, and impacts on significant sites, should be the primary criteria for decision-making under s 39; and general, rather than specific, information about impacts on and wishes of native title holders should be given weight by the NNTT.

74. If an objection fails, CLC does not support a power for the NNTT to immediately determine conditions on the basis that it would be inappropriate or futile to refer the matter for further negotiation.[10] Objection applications are litigation. They are inevitably a polarising period for both parties, when positions are put in robust terms. Unless the parties immediately agree that no negotiations should occur, the negotiation period should commence so that they can re-assess their positions in light of the Tribunal's decision.

Criteria for conditions

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?

75. **Fair and reasonable.** Criteria for conditions should be the terms and conditions that are fair and reasonable and that, in the NNTT's opinion, should have been negotiated by the parties in commercial arms' length negotiations conducted in good faith (similar to s 46(11) of the Land Rights Act).

76. The protection of sites and areas of significance should be a paramount criterion. These criteria are appropriate as they make the parties' disparate positions the focus of the Tribunal's

[10] DP [222].

consideration, and casts its role as 'closing the deal' between the parties – promoting the Native Title Act's policy priority on agreements.

NNTT able to determine royalties

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.

77. CLC considers this to be an essential reform if the ALRC's proposed overhaul is to be workable.

78. To facilitate NNTT arbitration of royalties and similar payments, the NNTT's power to order the non-disclosure of evidence should be expressly expanded to include the suppression of commercially sensitive information.

Expedited procedure

Proposal 9: Section 32 of the *Native Title Act 1993* (Cth) should be repealed.

79. CLC strongly supports the repeal of section 32. The expedited procedure is not an appropriate balancing of rights and interests, and is an enormously inefficient process which creates burdens for proponents, native title holders and Government. It is not fit for purpose.

Alternative State and Territory provisions

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)?

80. CLC does not support alternative provisions to be imposed by State and Territory Governments. The native title system should be a national one. ILUAs and NTMPs are the appropriate ways to allow for flexibility.

Non-claimant applications

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?

81. CLC supports reforms to prevent abuse of the Subdivision F procedure, and notes that the 12 month timeframe for filing and registering a claim should also apply to the timeframe for obtaining the right to negotiate.

Compliance and invalidity

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.

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?

82. CLC strongly supports the proposal that compliance with future acts provisions should be a condition of validity and agrees with the ALRC's observations in that regard.[11] Under the impact-based model, requirements for compliance would be unambiguous, making compliance a very reasonable expectation.

83. Invalid acts should be invalid for all purposes. The current system of making an act invalid to the extent it effects native title but not for other purposes leaves proponents with a right which is valid at face value but in practice cannot be relied on for any commercial purpose. This creates uncertainty and is commercially inefficient.

[11] See, e.g., DP [158].

Future act notices

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?

84. We refer to our response to Question 16 above.

Register of notices

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.

85. CLC supports this proposal. CLC's experience is that the Northern Territory does not comply with the requirements of the regime in relation to future acts that may significantly affect native title: see above at [10]. A public register would allow PBCs and native title holders to be aware of such non-compliance much earlier in the piece than at present, and therefore be better placed to consider appropriate steps to protect their native title rights and interests.

Section 4: Compensation and other payments

Future act payments

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?

86. It is appropriate that the Native Title Act distinguish future act payments (ie, payment for 'services' being the giving of consent and other consideration under agreement) and compensation (ie, loss and damage) in the manner proposed by the ALRC, and that they be negotiated or determined by the NNTT in the absence of agreement.

87. However, it would be highly problematic to specify the amounts of those payments by regulation. Future act payments are negotiated in a commercial context which is not amenable to national price-setting regulations. Those regulations would inevitably quickly become the only going rate.

Payments provided under agreements

Interaction with compensation

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)?

88. It is appropriate that future act payments be off-set against any compensation liability related to the future act.

89. However, CLC's view is that Government must remain as the 'back stop' in case of an impecunious proponent.

Payments provided under agreements

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.

90. CLC strongly supports this proposal. The current provisions provide an unhelpful limitation on the flexibility of what can be agreed in an ILUA, particularly where the compensation-related impacts of a project are not well understood at the time of an ILUA negotiation.

Simple compensation agreements

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?

91. This proposal does not have any obvious utility for the CLC region and as such we do not express a view.

Compensation for invalid acts

Proposal 13: The *Native Title Act 1993* (Cth) should be amended to provide a statutory entitlement to compensation for invalid future acts.

92. CLC supports this proposal, which addresses a gap in the current statutory compensation regime under the Native Title Act. As compensation is otherwise governed by the Native Title Act, it is appropriate that it be explicitly included rather than left to the development of the common law.

Section 5: Resourcing, costs, and implementation

Perpetual capital fund for PBC core operations

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.

93. CLC supports the proposed fund, but only if will provide a meaningful level of funding to address the parlous current resourcing of the PBC sector.

94. **Efficiency.** As well as providing more resources, options for efficiency should be considered. In the Northern Territory, many PBCs have no operational function at all due to low volumes of future acts, and are not considered by common law holders as a meaningful way to express their traditional governance practices. Many common law holders would prefer to be spared the compliance burdens of PBC directorship and membership, if there was an alternative such as nominating the native title representative body to function as their PBC. Such a system would be strictly opt-in only (and revocable), and all consultation and consent obligations would apply. CLC has well-established processes for consultation and consent, due to parallel obligations under the Land Rights Act.

NTRBs should be allowed to use funding to support PBCs with future acts

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.

95. CLC supports this proposal. Many of the PBCs in the CLC region would have no capacity to address future acts without the support of the CLC.

NNTT funding

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.

96. CLC agrees that the NNTT should be adequately resourced, but considers that PBC support funding is a greater priority.

PBC power to charge

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).

97. CLC supports this proposal. It sensibly addresses obvious deficiencies in the power to charge as currently provided for in s 60AB.

Modified no costs jurisdiction

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?

98. CLC supports the modified no costs proposal for the reasons described by the ALRC.

Implementation: First Nations advisory group

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).

99. CLC supports this proposal and suggests that its membership should be primarily drawn from the NTRB/service provider and PBC sectors.

Section 6: Aboriginal and Torres Strait Islander cultural heritage

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?

100. **Heritage laws**. CLC is a member of the First Nations Heritage Protection Alliance and has been closely involved in discussion of proposed reforms. Speaking generally, CLC considers that the interaction between native title and heritage protection is best dealt with by any amended heritage laws, rather than through changes to the future acts system. This is because concepts and coverage of heritage laws and native title do not correlate, and vary between jurisdictions. It is also difficult for the ALRC to consider what proposals relating to the Native Title Act would be appropriate when it is not yet known what heritage reforms will be.

101. Issues which arise with the proposals at [333] of the Discussion Paper in the Northern Territory setting include:

a. Sacred site protection is focused on consultation with custodians of sacred sites. This is a culturally appropriate concept for the Northern Territory setting, and it would not assist to add the PBC as an intermediary body.

b. Under Northern Territory law, custodians have an absolute right to withhold consent to any impacts to sacred sites. The ALRC's proposal would water down that right.

c. Similarly, custodians already have the ability to address cultural heritage protection under Northern Territory law, as a component of a native title agreement.