NEW SOUTH WALES
BAR ASSOCIATION

Our ref: DIV25/510

24 July 2025

The Hon. Justice Mordy Bromberg
President

Mr Tony McAvoy SC
Commissioner

Australian Law Reform Commission
By email: nativetitle@alrc.gov.au

Dear Justice Bromberg and Mr McAvoy,

Review of the Future Acts Regime – Discussion Paper

1. The NSW Bar **Association** thanks the Australian Law Reform Commission (**ALRC**) for the opportunity to make a submission in response to the **Discussion Paper** for the Review of the future acts regime.

2. The Association supports systemic changes to the future acts regime under the *Native Title Act 1993* (Cth) (***NTA***). The Association supports a future acts regime that provides sufficient safeguards for the protection of native title that are on par with the protection of other forms of property in Australia. The Association supports a regime which is fair and equitable toward native title parties, and which gives native title parties the right to withhold consent to future acts that occur on their country. Nothing less than this would be consistent with the *UN Declaration on the Rights of Indigenous Peoples*,[1] which provides:

> *Article 32*
>
> *1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.*
> *2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.*
> *3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.*

[1] *UN Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007). See also Articles 25, 26, 27, 28.

3. The Association recognises the need to promote efficacy, equality and fairness between native title holders and other parties involved in future acts negotiations or processes, and supports the proposals put forward in the discussion paper to the extent that they achieve this aim.

4. The submission does not seek to address each of the proposals or questions posed by the Discussion Paper. Rather, it responds to key proposals and questions on which the Association is in a position to comment. In summary, the Association makes the following submissions:

    a. In response to Question 6, the Association supports the development of Native Title Management Plans to provide for alternative procedures for the validation of future acts.
    b. In response to Question 7, the Association supports the introduction of mandatory conduct standards applicable to negotiations under Part 2, Division 3, Subdivision P of the *NTA* in order to support the rights of native title parties and provide greater clarity to the parties.
    c. The Association supports Proposal 1 that the *NTA* and the Native Title (Prescribed Bodies Corporate) Regulations 1999 be amended to allow common law native title holders to provide standing instructions to a prescribed body corporate (**PBC**) granting consent to the doing of particular classes of future acts (subject to the inclusion of safeguards to ensure that native title holders have given their free, prior and informed consent to each future act).
    d. The Association supports granting PBCs access to all registered agreements involving the PBC's determination area by way of right under the *NTA* (Proposal 2). The Association also supports the amendments to the *NTA* contemplated by Proposals 3 and 4, which would make it easier for terminated or expired Indigenous Land Use Agreements (**ILUAs**) to be removed from the Register of ILUAs, and require the Registrar to periodically audit the Register of ILUAs respectively.
    e. The Association supports Proposal 5, being the inclusion in the *NTA* of a provision that allows for parties to an existing agreement to, by consent, seek a binding determination from the National Native Title Tribunal (**NNTT**) in relation to disputes arising under the agreement. In relation to Question 11, the Association supports the introduction of a provision that would allow parties to seek determinations akin to an arbitral award through the NNTT, but submits that this provision should not override agreed-upon dispute resolution processes that are fit for purpose.
    f. In response to Question 14, in principle, the Association supports the repeal of Part 2, Division 3, Subdivisions G to N, of the *NTA* and the introduction of an impact-based assessment consisting of two categories, by which native title holders would either be entitled to a right to consultation or to a right to negotiate. In response to Question 17, the Association agrees that legislative acts should be subject to a different procedure than the impact-based assessment process, and notes that this will likely require native title holders be involved in the legislative process.
    g. The Association supports Proposal 6 to amend the right to negotiate process, generally in the form proposed on page 40 of the Discussion Paper. However, we suggest that timeframe for native title parties to indicate their objection to a future act be extended beyond six months.
    h. The Association supports Proposal 7 that the *NTA* be amended to empower the NNTT to determine issues referred to it by agreement of the negotiation parties.

i. In response to Question 18, the Association supports an amendment to the existing criteria under section 39 of the *NTA* to guide the NNTT when determining whether a future act can be done where the native title party objects. These amendments should aim to provide greater clarity as to how these criteria should be weighted and should require greater weight to be afforded to the views of the native title holders.
j. The Association supports Proposal 8 that section 38(2) of the *NTA* be repealed or amended in order to provide for a wider range of arbitration outcomes (including royalty-type payments).
k. In response to Question 19, the Association submits that consideration should be given to amending section 39 of the *NTA* to specify that a determination that a future act may proceed without conditions may only be made where the Tribunal is satisfied that the imposition of any condition on the act would result in significant harm to the economic or public interest in the doing of the act, and that this harm would outweigh the greater enjoyment by the native title parties of their rights as a result of the condition.
l. The Association supports Proposal 9 that section 32 of the *NTA* should be repealed and the expedited procedure abolished.
m. The Association supports Proposal 10 that the *NTA* be amended to explicitly provide that a government party or future act proponent must comply with procedural requirements for a future act to be valid.
n. The Association supports Proposal 11, by which all future acts notices would be lodged with the NNTT, and by which the NNTT would be empowered to maintain a public register of notices containing specified information about each notified future act.
o. The Association supports Proposal 14 by which the *NTA* would be amended to provide for the establishment of a perpetual capital fund overseen by the Australian Future Fund Board of Guardians for the purposes of providing financial support to PBCs.
p. The Association supports Proposal 15, by which Native Title Representative Bodies and Native Title Service Providers would be permitted to use a portion of the funding dispersed by the National Indigenous Australians Agency to support PBCs in responding to future acts notices and participating in future act processes.
q. The Association endorses Proposal 16 that the Australian Government should adequately fund the NNTT to fulfil its functions, and to provide greater facilitation and mediation support to users of the native title system.

5. These positions are discussed further below.

Question 6 – Native Title Management Plans

6. Question 6 asks whether prescribed bodies corporate (**PBCs**) should be enabled to develop Native Title Management Plans (**NTMPs**) that, subject to a registration process, could provide for alternative procedures for the validation of future act in a PBC's area.

7. The Association supports the introduction of NTMPs. The introduction of NTMPs would allow native title holders, through their PBCs, greater control over the processes that proponents and governments must follow before carrying out future acts on native title land. The Association acknowledges that the

current processes for creating alternative pathways – either by an Indigenous Land Use Agreement (**ILUA**) or by state and territory legislation – can be cumbersome and time-consuming.

8. The Association agrees that the development of NTMPs by native title holders may help to support native title groups to lead or co-lead development. The Association submits that the criteria for registration of NTMPs must allow for the development of NTMPs that provide greater protection of native title, and must allow native title holders the ability to withhold their consent to the doing of certain acts if particular requirements are not met, especially if the future act is proposed to be done in an area of particular significance.

Question 7 – Negotiation conduct standards

9. In response to Question 7, the Association supports the introduction of mandatory conduct standards applicable to negotiations under Part 2, Division 3, Subdivision P of the *NTA* in order to support the rights of native title parties and provide greater clarity to the parties.

10. In 2011, legislative reforms sought to address concerns particularly in light of the full Federal Court's decision in *FMG Pilbara Pty Ltd v Cox.*[2] The intended reforms were directed at rectifying the uncertainty and the alleged weakness of the negotiation requirements under section 31(1)(b) of the *NTA*, regarding the duty of the parties to negotiate in good faith. Problems with the operation of the duty were said to include that the duty:[3]
    a. did not require negotiations to reach any stage beyond anything embryonic;
    b. did not prescribe the manner and content of negotiations;
    c. did not require substantive negotiations about the doing of future acts;
    d. was tied to a nebulous good faith duty;
    e. was unlikely to be breached unless conduct was 'extreme';[4] and
    f. was unduly focused on a party's state of mind rather than objective criteria (such as in the *Fair Work Act 2009* (Cth), s228, which arguably provided stronger protection for weaker negotiation parties) and did little to assist with promoting agreement-making, protecting native title or maximising sustainable agreements.

11. Certain key statistics considered at the time, included:[5]
    a. There had only been three breaches of the duty to negotiate in good faith found by the NNTT which were sustained: ***Western Australia/Johnson Taylor on behalf of the Njamal people/Garry Ernest Mullan*** [1996] NNTTA 34; *Western Australia v Dimer* [2000] NNTTA 290 ('*Dimer*'); and *Cosmos/Alexander/Western Australia/Mineralogy Pty Ltd* [2009] NNTTA 35 ('*Cosmos*'). A further breach finding was overturned: *Cox v FMG* [2008] NNTTA 90.
    b. The NNTT had only prevented future acts going ahead on *3 occasions*: *WDLAC (Jamukurnu–Yapalikunu)/Western Australia/Holocene Pty Ltd* [2009] NNTTA 49; *Seven Star Investments Group Pty Ltd and Western Australia and Wilma Freddie and Others on behalf of Wiluna* [2011]

[2] [2009] FCAFC 49.
[3] See 2011 Submission of Adam Butt to Hon Robert McClelland as then solicitor at Chalk & Fitzgerald.
[4] See also Burnside, S (2009) "Negotiation in good faith under the Native Title Act: a critical analysis" *Land, Rights, Laws: Issues of Native Title* 4(3) p11.
[5] See 2011 Submission of Adam Butt to Hon Robert McClelland as then solicitor at Chalk & Fitzgerald.

NNTTA 53; *Weld Range Metals Limited and Western Australia and Ike Simpson and Others on behalf of Wajarri Yamatji [2011] NNTTA 172* [2011] NNTTA 172.

12. The three breach cases (*Njamal*, *Dimer* and *Cosmos*) involved instances where the grantee parties did not negotiate at all or had not committed to the process. These were obvious, 'extreme' breaches, which – as the only examples of breach in the jurisprudence – reflected that the duty did not, in substance, require much beyond parties' commercial self-interest.[6] The case law reflected that the standard of positive conduct expected – such as making reasonable proposals – was extremely low,[7] such that only extreme conduct would violate the duty.

13. It is apparent that the process of NNTT arbitration has overwhelmingly resulted in outcomes favourable to grantee parties – only 3 out of 515 arbitration outcomes from 1994 to 2023 resulted in a determination that the future act must not be done, with the most recent occurring in 2011.[8] In the same period, only 27% of determinations included conditions on the future act, leaving nearly three quarters of all future acts allowed without any conditions.[9]

14. It has been observed that lopsided arbitration outcomes serve as an incentive for grantee parties to 'wait out' the minimum negotiation period, knowing that they would most likely be able to obtain a favourable outcome in arbitration.[10] This concern was picked up in 2018 by the Australian Institute of Aboriginal and Torres Strait Islander Studies (**AIATSIS**), when it suggested that the agreement-making process is characterised by a fundamental inequality of bargaining position 'due to [there being a] right to negotiate, but without a right to say no'.[11] AIATSIS suggested that grantee parties are overwhelmingly successful in arbitration because 'more often than not, the native title party is not able to demonstrate the sufficient evidentiary requirement to meet the objection requirements'.[12] While some First Nations groups made submissions in relation to the *Native Title Legislation Amendment Act 2021* calling for an extension of the minimum negotiation period to make it more difficult for grantee parties to "wait out" negotiations, this effort was ultimately unsuccessful.[13] The Association notes, however, that not all grantee parties are unwilling to properly engage with native title parties. The median time from future acts notice to arbitration application over the past five years is 733 days, as opposed to the six-month minimum prescribed by the legislation, suggesting that many grantee parties are participating in negotiations in good faith before resorting to the NNTT.[14]

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[6] See e.g. *Minister for Lands, Western Australia/Strickland/Champion/Dimer* [1997] NNTTA 31, 16; *Njamal* at 222. *Brownley v Western Australia* [1999] FCA 1139 [21]-[22].

[7] See e.g. *Western Australia/Cyril Gordon & Others on behalf of the Kariyarra People/Pilbara Livestock Depot* [2010] NNTTA 55 ('*Cyril Gordon*').

[8] Michael Lucas, 'The Future Act Regime in Australian Native Title: Data Analysis, Trends, and Insights' (2024) 51(2) *University of Western Australia Law Review* 249, 254 ('Lucas'). The three cases more fully cited are *Holocene*; *Wiluna; Wajarri Yamatji*.

[9] Ibid 260.

[10] Ciaran O'Faircheallaigh, 'Native Title and Mining Negotiations: A Seat at the Table, but No Guarantee of Success' (2007) 26(6) *Indigenous Law Bulletin* 18, 18.

[11] AIATSIS, Submission to Attorney-General's Department, *Reforms to the* NTA 1993 *(Cth) Options Paper* (28 February 2018) 13.

[12] Ibid 14.

[13] Michael O'Donnell and Mia Stone, 'Takeaways from the *Native Title Legislation Amendment Act 2021* (Cth)' [2021] (1) *Native Title Newsletter* 5, 6 ('O'Donnell and Stone').

[14] Lucas (n 8), 262.

15. Within the past decade, the NNTT has been more willing to make a finding that there has been a breach of good faith. From 1994 to 2025, there were 21 findings (from 73 decisions) that there had been a failure to negotiate in good faith,[15] eighteen of which have been made since 2013.[16] Some recent examples of such findings are as follows:
    a. In certain cases, the NNTT has found a breach notwithstanding higher levels of participation and commitment. This reflects the application of stronger objective criteria (akin to the *Fair Work Act*). For example, in the *Muccan Minerals* cases,[17] the duty was found to have been breached where the grantee party was found to have acted unreasonably by providing limited financial assistance, ignoring interests, and failing to provide useful information.[18]
    b. In *Michael Dowse Collins,*[19] adopting an intractable position regarding cultural heritage and a windfall/production-based payment, unsatisfactory changes in position and providing inconsistent information was found to breach the duty to negotiate in good faith.[20]
    c. In *Little*,[21] the grantee party applied for a prospecting licence in the Weld Range. Mediation efforts collapsed due to the grantee party (a Wajarri Yamatji man himself) refusing to allow the registered native title claimant to conduct a heritage survey, believing the native title party was usurping his rights.[22] The grantee party made minimal effort to progress negotiations and failed to offer any reasonable proposal for a heritage agreement or management, breaching his duty.[23]
    d. In *De Roma*,[24] the NNTT determined that the intractable conduct of the authorised representative of the grantee party breached the duty. The representative failed to grasp that the native title party had exclusive possession over the land, refused to agree on trivial matters, and refused to negotiate a cultural heritage survey. The representative also refused to provide financial support to the native title party upon notice of their resourcing issues, which, while not required under the *NTA*, was deemed relevant given the overall negotiation approach. The grantee party had a 'fixed and intractable negotiation position' which breached the duty.[25]
    e. In *Mobile Concreting Solutions*,[26] the government's application to grant a mining lease to the grantee party was dismissed due to the grantee party's failure to negotiate in good faith. The grantee party refused to address any of the native title party's concerns around preserving

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[15] NNTT, *Search Future Act Applications and Determinations* (9 July 2025) https://www.nntt.gov.au/searchRegApps/FutureActs/Pages/default.aspx

[16] Ibid.

[17] *Muccan Minerals Pty Ltd and Another v Taylor and Others on behalf of Njamal* [2014] NNTTA 74; *Muccan Minerals Pty Ltd and Another v Taylor and Others on behalf of Njamal* [2016] NNTTA 28.

[18] *Muccan Minerals Pty Ltd and Another v Taylor and Others on behalf of Njamal* [2014] NNTTA 74, [98]; *Muccan Minerals Pty Ltd and Another v Taylor and Others on behalf of Njamal* [2016] NNTTA 28, [106]–[111].

[19] *Michael Dowse Collins and Another v Nguddaboolgan Native Title Aboriginal Corporation RNTBC* [2015] NNTTA 13.

[20] Ibid [97].

[21] *Terrence Harold Little and Another v Wajarri Yamaji Aboriginal Corporation RNTBC and Another* [2023] NNTTA 26.

[22] Ibid [29]–[30].

[23] Ibid [57]–[60].

[24] *Kevin Alfred De Roma v Western Yalanji Aboriginal Corporation RNTBC and Another* [2022] NNTTA 40 ('*De Roma*').

[25] Ibid [142].

[26] *Mobile Concreting Solutions Pty Ltd & Another v Wintawari Guruma Aboriginal Corporation RNTBC* [2022] NNTTA 56 ('*Mobile Concreting Solutions*').

cultural materials on the land and mitigating dust emissions. The NNTT held that the grantee party failed to meaningfully engage with the native title party's concerns and 'did not reflect a subjective honesty of intention' and an 'objective standard' of reasonableness in the circumstances.[27]

f. In *Marine Produce Australia*,[28] the State party (WA) was found to have failed to negotiate in good faith. Negotiations between the grantee and native title parties were underway to conclude an ILUA at the time the State issued the future acts notice. The State took very little part in negotiations between the other parties after issuing the notice despite this act engaging their duty. The NNTT found that, as the State had effectively ignored its duties to facilitate negotiation around the proposed future act in favour of leaving the other parties to attempt to agree to an ILUA, it had breached its duty to negotiate in good faith.[29]

16. The NNTT's evolving approach to good faith determinations is further illustrated by a comparison between *De Roma,* decided in 2022, and *Cyril Gordon*,[30] a 2010 case in which the duty was held to be satisfied.
    a. In *Cyril Gordon*, the grantee party's offer to conduct a heritage survey, donate $500 to an unaffiliated local women's centre, and potentially employ the Kariyarra people on the grantee's stock holding yards was deemed sufficient to satisfy the duty.[31] The member said 'there is no obligation on the Tribunal to decide whether the offers made by a grantee party are unreasonable'[32] – the fact that there were 'some negotiations … with a view to obtaining the native title party's agreement' was sufficient.[33]
    b. By contrast, in *De Roma* the fact there were 'some negotiations' was not sufficient. The NNTT labelled the grantee party's negotiating position 'fixed and intransigent',[34] finding 'this approach is not that which a reasonable person seeking to reach agreement would take'.[35] This was despite the fact that the grantee party's (meagre) offer in *De Roma* was arguably more generous than that in *Cyril Gordon*.[36]

17. Notwithstanding these developments, recently, in *Gomeroi People v Santos NSW Pty Ltd ('Gomeroi People')*[37], the Federal Court clarified that the duty to negotiate in good faith does not go as far as to impose an objective standard of reasonableness on offers by grantee parties.[38] Rather, an assessment of reasonableness is focused on a party's conduct in the course of negotiations and whether, objectively, they are negotiating with an intention to reach agreement.

18. In order to promote certainty, fairness and enhanced agreement-making, the Association supports articulating the criteria as to what negotiating in good faith means in section 31(1) of the *NTA*. As a

[27] Ibid [107].
[28] *Marine Produce Australia Limited and Another v Mayala People* [2018] NNTTA 28.
[29] Ibid [207]–[217].
[30] *Cyril Gordon* (n 7); *De Roma* (n 24).
[31] *Cyril Gordon* (n 7) [29].
[32] Ibid [25].
[33] Ibid [29].
[34] *De Roma* (n 24) [142].
[35] Ibid [166].
[36] Ibid [104]–[105].
[37] [2024] FCAFC 26.
[38] Ibid [405]-[406].

starting point, it would be appropriate to consider implementing the criteria included in previous reform bills referred to at [82] of the Discussion Paper.[39] We suggest that codifying such good faith criteria would promote agreement-making by setting a clear standard of conduct to support a culture of collaboration and respect between parties and by maintaining focus on parties' legitimate interests (as opposed to adversarial bargaining). Additionally, a conduct guidance document could be developed to elaborate on the content of the duty to further assist parties and set appropriate expectations and standards. The Njamal indicia may serve as a guide for the content of the document. Such guidance could illustrate examples of real and hypothetical conduct alongside explanations as to why these are required. If legislative reform is not pursued, guidelines could be introduced independently as a secondary, alternative option.

19. The Association also supports the introduction of other mandatory conduct standards in the *NTA* (or as a secondary option, in prescribed regulations), including those outlined at [79] in the Discussion Paper, being:

    a. a requirement that proponents contribute to funding a native title party's participation in negotiations;
    b. a requirement that government parties and proponents make available certain information at the outset of agreement negotiations and that parties be subject to an ongoing obligation to disclose important and relevant information concerning the future act; and
    c. clarification of the roles of each other parties to an agreement negotiation, including the relevant government party.

20. The Association further submits that in the context of a future act determination application, the onus to prove that there has been a breach of the duty to negotiate in good faith should be reversed, such that a party must positively establish that it has discharged the duty.[40]

Proposal 1 – Expanding standing instructions for agreements

21. The Association supports Proposal 1 and the creation of processes by which common law native title holders can provide standing instructions to a PBC granting consent to the doing of particular classes of future acts. This proposal would enable PBCs to enter into agreements without needing to seek the consent of the native title holders for each individual future act proposed. However, the Association submits that the process would need to incorporate sufficient safeguards to ensure that native title holders have given their free, prior and informed consent to each future act. If a future act for which standing instructions have been given is likely to have a greater impact compared with 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 before the native title holders for authorisation.

Proposals 2, 3 and 4 – Access by PBCs to all registered agreements

22. The Association supports Proposal 2, being to grant PBCs access to all registered agreements involving the PBC's determination area by way of right under the *NTA*. The Association considers it sensible and

[39] Native Title Amendment (Reform) Bill 2011 (Cth) cl 6; Native Title Amendment (Reform) Bill (No 1) 2012 (Cth) cl 4; Native Title Amendment (Reform) Bill 2014 (Cth) cl 4.
[40] As discussed in the Discussion Paper at [84].

necessary for PBCs to have access to agreements within their remit to ensure they understand how their native title rights and interests have been affected by past agreements and what the PBC's and the native title holders' rights, obligations and duties are under those agreements.

23. The Association supports an amendment to the *NTA* which would require the Native Title Registrar to identify registered agreements involving any part of the determined area, and to provide copies of the same to the PBC following a determination of native title. In the rare instance that an agreement contains material that is confidential, or for some other reason is required to be withheld from a PBC, parties to the agreements should either have noted such things in the agreement or to the Registrar during the registration process. Parties should be provided with the opportunity to make submissions to the Registrar at the time the Registrar proposes to provide the agreements to the PBC.

24. The Association also supports the amendments to the *NTA* contemplated by Proposals 3 and 4, which would make it easier for terminated or expired ILUAs to be removed from the Register of ILUAs, and require the Registrar to periodically audit the Register of ILUAs respectively. In relation to agreements around which there may be some controversy as to whether they are in fact terminated or have expired, provision could be made in the *NTA* for the Registrar to approach the PBC or parties to the agreements to seek submissions before their removal from the Register.

Proposal 5 and Question 11 – Implementing and enforcing agreements

25. The Association supports Proposal 5, being the inclusion in the *NTA* of a provision that allows for parties to an existing agreement to, by consent, seek a binding determination from the NNTT in relation to disputes rising under the agreement.

26. The Association acknowledges that there is a need for a more efficient mechanism for the resolution of disputes arising between parties to an existing agreement. In the post-determination context, since the passage of the *Native Title Legislation Amendment Act 2021* (Cth), the NNTT has had the ability to assist in promoting agreements about native title matters between PBCs and common law holders.[41] However, the NNTT has not yet been afforded the necessary resources to carry out this assistance function properly.[42] The function was set up with a 'skeleton staff' and 'limited remit to undertake assistance on country or face-to-face with participants'.[43] Of the 68 requests for assistance received by the NNTT in 2023-24, the NNTT provided preliminary conferencing in only 20 matters, with further information support or mediation only occurring in four matters.[44] The fact that the NNTT provided assistance in less than a third of the matters referred to it suggests that the assistance function is still a long way from real effectiveness.

[41] *NTA*, s 60AAA, as inserted by *Native Title Legislation Amendment Act 2021* (Cth) sch 7 s 1.
[42] Federal Court of Australia, *Federal Court of Australia Annual Report 2023-2024* (Report, 2024) 104; see chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/file:///C:/Users/adame/Downloads/Part5.pdf
[43] Ibid.
[44] Ibid 105.

27. The Association considers that the NNTT would be well placed to arbitrate matters arising in this context, but submits that the NNTT must be adequately funded to carry out its statutory functions with appropriate promptness.[45]

28. Relatedly, Question 11 in the Discussion Paper asks whether the *NTA* should be amended to provide that new agreements must contain a dispute resolution clause by which parties agree to utilise the NNTT's dispute resolution services, including mediation and binding arbitration. While it is appropriate for parties to agreements that do not make adequate provision for alternative dispute resolution (**ADR**) processes to have access to the NNTT's services under a statutorily prescribed process, the Association is aware of many agreements in which ADR processes are adequately provided for, which do not necessarily utilise the NNTT. The Association supports the introduction of a provision that would allow parties to seek determinations akin to an arbitral award through the NNTT, but submits that this provision should not override agreed-upon dispute resolution processes that are fit for purpose.

29. The Association considers that such a provision should not disentitle a party from seeking relief in court, whether urgently or otherwise.

Questions 14 and 17 – Impact-based model and applicability of impact-based assessments for legislative acts

30. In relation to Question 14, the Discussion Paper asks for feedback on a new system of categorising future acts according to the impact of the act on native title rights and interests.

31. In principle, the Association supports the introduction of a revised system in place of the current Subdivisions G to N, Division 3 in Part 2 of the *NTA*. The Association agrees that the current system is difficult to understand and groups future acts that have a wide range of impacts on native title – from the very low to significant – within the same subdivision. Validating future acts that have a significant impact on native title under provisions that sometimes only afford native title holders the opportunity to comment is not fair or equitable, and does not provide native title holders with an appropriate level of control over access by proponents or government to their country.

32. On this basis, the Association supports an impact-based assessment consisting of two categories, by which native title holders would either be entitled to a right to consultation or to a right to negotiate.

33. The Association also supports the guiding factors for the purposes of categorisation referred to at [155] of the Discussion Paper – particularly the long-term effects of a future act, and the question of whether the future act forms part of a larger project.

34. The Association notes, however, that several of the criteria proposed are, to some extent, subjective and it is not clear how these would be construed in practice. Native title parties might have a different view as to the nature, the intensity, or the long-term effects of future acts, as compared to, say, the proponent of a project. While the Association supports guidelines to promote clarity and consistency, the guidelines must ensure that native title holders can properly protect their rights and interests and the

[45] Please refer to paragraph [64] which expresses the Association's support of Proposal 16, which relates to increased funding for the NNTT.

cultural significance of their land. The Association supports the suggestion at paragraph [e] of Question 14 that a native title party should have an accessible avenue to challenge an impact-based categorisation, and for such challenge to be determined by the NNTT. Consideration should be given to allowing native title holders a prescribed period following notification of an impact-based future act, by which to assess the categorisation against the information provided, and if it so decides, challenge that categorisation with the relevant body, proponent or government. If the parties cannot resolve the categorisation issue between themselves, the parties should then have a prescribed time within which they can approach the NNTT. The NNTT should also then have a prescribed time within which it must decide as to the correct categorisation of the future act.

35. In principle, the Association acknowledges there would be benefits to the approach described at [165] of the Discussion Paper, by which project acts would attract a single procedural obligation in the same manner as individual future acts. However, the Association is concerned that native title holders may be entitled to greater rights of consultation and negotiation where future acts are notified individually, rather than where those future acts are notified together as a project, with native title holders required to engage with them on a project basis. Therefore, it is essential that any reform of this nature must ensure that native title parties are not deprived of future act entitlements that would otherwise have accrued to them had project future acts been notified one at a time. Further, for very large projects, future acts notices are sometimes issued years apart depending on the development of the project and the needs of the proponent. In large projects of this kind, it may not be practicable for future acts to be notified in a single project notification.

36. The Association supports the replacement of a right to comment with right to consultation (noting that this already exists in some provisions of the regime), and agrees with the observation at [175] of the Discussion Paper that a right to comment encourages relatively limited engagement through correspondence alone, whereas a focus on consultation may provide a better opportunity for parties to develop constructive working relationships.

37. In relation to Question 17(a), as to whether legislative acts should be excluded from the impact-based assessment process, the Association acknowledges that it is likely to be difficult to incorporate legislative acts into such an assessment process. This is because the overall impacts of a legislative change may not be known at the time of the commencement of the legislation and may change or increase over time. For this reason, it makes sense to create a different procedure for the involvement of native title holders in relation to the doing of legislative future acts. The Association considers that this is likely to require, at the least, that native title holders be involved in the legislative process, prior to the commencement of the legislation and during or prior to the adoption of the legislation by the relevant State, Territory or Commonwealth legislature.

Proposal 6 – Reforming the right to negotiate

38. The Association supports reform to the right to negotiate to enable native title holders to withhold their consent to future acts, generally in the form contemplated by Proposal 6 of the Discussion Paper.

39. However, the Association suggests that the six-month timeframe for native title parties to indicate their objection to a future act be extended. The Association is of the view that a six-month timeframe would not be sufficient for the following reasons:

a. an insufficient timeframe may limit native title parties' ability to engage fully in the negotiation process. It is possible for native title parties' position to change during negotiations. A party may initially object, but after successful negotiations, may withdraw any objection, or alternatively, a party may initially consent, but due to failed negotiations, may subsequently object. Requiring native title parties to provide an indication of their objection within six months may create pressure to arrive at a decision before the negotiation process has run its course.
b. Imposing pressure on native title parties to withhold their consent before the natural conclusion of the negotiation process may result in unnecessary applications by proponents or government parties to the NNTT for a determination as to whether or not the act can be done. Although a native title party may wish to withhold their consent six months into negotiations, many native title parties are nevertheless willing to engage with a proponent or government party in relation to the doing of the future act in anticipation of agreement being reached.
c. A six-month period may not allow sufficient time to review and form an opinion on voluminous materials in relation to large projects (which is often provided in piecemeal fashion).

40. For the above reasons, the Association considers that imposing a six-month deadline may have unintended consequences and, in fact, inhibit native title holders from engaging in the agreement-making process. The Association suggests that the deadline should be reasonably increased.

41. The Association does, however, support the proposal to require a proponent of a future act to provide native title holders with sufficient information regarding the future act within two months of notification. It is observed that future act negotiations often occur in an information-deficient landscape, where proponents are seeking consent to a future act without a full understanding or access to sufficient information, with the consequence that native title holders cannot develop an informed position.

Proposal 7 – Empowering the NNTT to determine issues referred to it by agreement of the negotiation parties

42. The Association supports Proposal 7 that the *NTA* be amended to empower the NNTT to determine issues referred to it by agreement of the negotiation parties. The Association agrees with the observations at [205] of the Discussion Paper that such a measure would promote agreement-making by providing an avenue to resolve discrete issues which might otherwise stymie the progress of the negotiation process.

Question 18 – determining the test for the NNTT to apply in determining whether a future act can be done

43. The Association supports a model that allows native title parties the ability to object or withhold consent to future acts and that applies a test in which the protection of native title rights is given sufficiently significant weight.

44. The first option put forward at [212] of the Discussion Paper is that the test as to whether a future act can be done might ask whether the native title party's consent was unreasonably withheld. It is difficult to envisage what this test may entail in practice. For example, some native title parties may object to

mining on their country for a variety of reasons, including on the basis that they object to the industry itself. It is not clear whether the withholding of consent for these reasons would be considered unreasonable under the test. It is also unclear what criteria would the NNTT consider in determining the reasonableness of a native title parties' objection to a future act. The Association is of the view that native title parties should have the ability to object to development on their country for the same reasons any ordinary land holder might object to development on their land in Australia, including for political or other reasons. Setting a test by which a native title party is required to prove that they have not unreasonably withheld their consent could introduce a measure of subjectivity which may inappropriately restrict native title holders' rights over their land.

45. The second option put forward at [214] of the Discussion Paper would consider whether the doing of a future act would present a real risk of substantial and irreparable harm. The Association is concerned native title parties might encounter real difficulties in meeting this high threshold, such that their right to object would be significantly diminished.

46. The third option presented at [215] is an amendment to the existing criteria under section 39 of the *NTA*. The Association agrees with the comments at [217] of the Discussion Paper that section 39 of the *NTA* favours proponents and broader economic interests above the rights and interests of native title parties impacted by future acts. The Association would support an amendment to the criteria that provides for sufficient weight to be given to the views of native title parties in relation to the management, use, or control of their country. As noted above at [13], the scarcity of determinations by the NNTT that future acts cannot be done suggests that the discretion afforded to the NNTT as to how the criteria in s 39 are weighted, more often than not, leads to a finding that a future act can be done. The Association supports an amendment that provides greater clarity as to how these criteria should be weighted, and that requires greater weight to be afforded to the views of the native title holders.

Question 19 – Criteria to guide the NNTT in determining conditions to attach to the doing of a future act

47. As noted above (at [13]), virtually all arbitrations in the NNTT result in a determination that the future act can be done, and in nearly 75% of cases, without the imposition of any conditions. This is a concerning statistic, given that it is an objective of the *NTA* to provide for the recognition and protection of native title.[46]

48. The Association submits that consideration should be given to amending section 39 of the *NTA* to specify that a determination that a future act may proceed without conditions may only be made where the Tribunal is satisfied that the imposition of any condition on the act would result in significant harm to the economic or public interest in the doing of the act, and that this harm would outweigh the greater enjoyment by the native title parties of their rights as a result of the condition.

Proposal 8 – Conditions relating to payments

[46] *Ibid* s 3(a).

49. The Association notes that NNTT arbitration does not allow for native title parties to receive royalty-type payments, and supports Proposal 8 that section 38(2) of the *NTA* be repealed or amended in order to provide for a wider range of arbitration outcomes.[47]

Proposal 9 – Repeal of the expedited procedure

50. The Association supports Proposal 9 that section 32 of the *NTA* should be repealed.

51. The expedited procedure provides an expedited process for the grant of certain kinds of mining tenements. Under the *NTA,* a government party may submit a future acts notice with a statement that it considers that the act in question is an act attracting the expedited procedure.[48] If no native title party objects to the application of the expedited procedure within four months of being notified, then the government party may do the act.[49] If there is an objection, the NNTT will determine whether the act is one that attracts the expedited procedure.[50] If the NNTT determines that it is, the government party may do the act; if not, the normal negotiation procedure is engaged.[51]

52. The expedited procedure is, by a significant margin, the most frequently used avenue for resolving future acts issues, with 80% of future acts notices in 2021 and 2022 using this procedure,[52] 85% using it in 2022-2023, and 89% in 2023-2024.[53] This proportion of usage has remained relatively constant over time, with the total proportion of notices using the expedited procedure from 1993-2022 being 81%.[54] Western Australia (**WA**) is the source of the vast majority (about 88%) of these expedited notices, due largely to its blanket policy of assessing all exploration activity as low impact,[55] and thereby eligible for the expedited procedure.[56] However, in June 2022, WA replaced this blanket approach, with a policy that encourages early agreement-making and the use of more sophisticated risk assessment.[57] This change was partly motivated by the intention to 'identify applications for tenements that are at high risk of a determination by the [NNTT] that the expedited procedure does not apply'.[58] At present, it is too early to make a conclusive finding on how this has affected the practical enforcement of the future acts regime.[59]

53. There is a very high rate of objections to expedited procedure notices by native title groups, with objections being raised in response to 58% of notices in 2022 and 48% in 2023-2024.[60] Rates of

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[47] *NTA*, s 38(2).
[48] Ibid s 29(7).
[49] Ibid ss 32(2), (3).
[50] Ibid s 32(4).
[51] Ibid s 32(5).
[52] Lucas (n 8), 254.
[53] Australian Law Reform Commission, *Review of the Future Acts Regime* (Issues Paper 50, November 2024) ('Issues Paper'), [63].
[54] Ibid.
[55] Ibid 253.
[56] s 237.
[57] Lucas (n 8), 253.
[58] 'Expedited Procedure Reforms', *Department of Energy, Mines, Industry Regulation and Safety* (Web Page, 2022) <https://www.dmp.wa.gov.au/Minerals/Expedited-Procedure-Reforms-30446.aspx>
[59] Lucas (n 8), 253.
[60] Ibid 254; Issues Paper (n 53), 24.

objections in recent years have been particularly high, with the historical average over the period 1994-2024 being about 35%.[61] The high rate of objections may be attributable to various factors. One reason may be a gap between parties' understanding as to what acts attract the expedited procedure. Another may be ideological. For example, Kimberley Land Council objects to almost every notice it receives to 'maintain the rights of [native title parties] to negotiate'.[62] This reflects a tension between native title parties and grantee and government parties over the expedited procedure, and indicates that negotiation is the preferred route for many native title parties.

54. The definition of an act attracting the expedited procedure under s 237 of the *NTA* is:
    (a) *the act is not likely to interfere directly with the carrying on of the community or social activities of the persons who are the holders (disregarding any trust created under Division 6 of Part 2) of native title in relation to the land or waters concerned; and*
    (b) *the act is not likely to interfere with areas or sites of particular significance, in accordance with their traditions, to the persons who are the holders (disregarding any trust created under Division 6 of Part 2) of the native title in relation to the land or waters concerned; and*
    (c) *the act is not likely to involve major disturbance to any land or waters concerned or create rights whose exercise is likely to involve major disturbance to any land or waters concerned.*

55. This definition involves a series of subjective and probabilistic judgements, with the result being that native title parties are likely to have starkly differing opinions on what acts should and should not attract the procedure, compared with grantee and government parties. For instance, the opinion of a native title party on whether a future act is likely to 'interfere directly with the carrying on of the community' or to 'involve major disturbance to any land or waters concerned' is likely to be different to that of grantee and government parties. An example of this occurred during the reform process that resulted in the *Native Title Legislation Amendment Act 2021* (Cth), in which First Nations groups advocated for the removal of the expedited procedure in relation to applications for diversification of activities on pastoral lease land, though this was not ultimately reflected in the legislation.[63]

56. The lack of clarity regarding the definition of an act attracting the expedited procedure results in considerable inefficiency. The result of such a high objection rate for a class of application that makes up the overwhelming majority of future acts notices is that the expedited procedure is causing many applications to take longer than they otherwise would. This is because a significant proportion of expedited applications (over 20% in 2021 and 2022)[64] do not actually proceed according to the expedited procedure.[65] When taking into account only applications that the NNTT actually determines, this percentage rises to 39.6%.[66] Such a finding requires the parties to enter negotiations, which could have occurred at the beginning if the grantee and government parties were able to ascertain whether the application would attract the expedited procedure with greater certainty. As the median time between notification of an expedited future act application and finalisation with objection was 201 days in 2021 and 2022,[67] this represents a significant waste of time and resources.

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[61] issues Paper (n 53), 24.
[62] Kimberley Land Council, *Annual Report 2022-2023* (Report, 2023) 41.
[63] O'Donnell and Stone (n 13), 6.
[64] Lucas (n 8), 256.
[65] Ibid 255.
[66] Ibid 256.
[67] Ibid 254.

57. For these reasons, the Association supports Proposal 9 that section 32 of the *NTA* should be repealed. The Association submits that the high level of distrust and animosity surrounding the expedited procedure support it being abolished.

58. As a secondary, alternative position, in the event that the expedited procedure is maintained, the Association submits that it is in the interests of NTPs, grantee and government parties and courts to have greater certainty as to when the procedure will apply. This may be achieved by requiring the NNTT to publish guidance on the subject (as contemplated in the Issues Paper).[68]

Proposal 10 – compliance with procedural requirements necessary for validity

59. The Association supports Proposal 10 that the *NTA* be amended to explicitly provide that a government party or future act proponent must comply with procedural requirements for a future act to be valid. The Association considers that this proposal promotes clarity and fairness, and provides native title parties with a minimum standard of procedural rights before an act can be considered to have been validly done.

Proposal 11 – All future acts notices to be lodged with the NNTT

60. The Association supports Proposal 11, by which all future acts notices would be lodged with the NNTT, and by which the NNTT would be empowered to maintain a public register of notices containing specified information about each notified future act. The Association considers that a register of this kind would allow native title parties to easily search for future acts notices, and agrees that this would assist native title parties, proponents, and government to assess cumulative impacts of future acts in particular areas.

Proposals 14 and 15 – Creation of a perpetual capital fund and the use of NIAA funding

61. The Association supports Proposal 14 by which the *NTA* would be amended to provide for the establishment of a perpetual capital fund overseen by the Australian Future Fund Board of Guardians for the purposes of providing financial support to PBCs. The Association agrees with the Discussion Paper at [301] that the primary benefit of this approach would be that PBC funding would continue in perpetuity and that money received by PBCs for the effect of future acts on their native title can be used solely for their community's economic development rather than the administrative costs of setting up and running the PBC itself.

62. In terms of the national body that would administer the fund, the Association submits that it would be necessary for the body to have as independent a membership as possible, so that it could be said that that decisions around the division of funding between PBCs across the country were not met with allegations of favouritism or the like.

63. The Association also supports Proposal 15, by which Native Title Representative Bodies and Native Title Service Providers would be permitted to use a portion of the funding dispersed by the National

[68] Issues Paper (n 53), p 29.

Indigenous Australians Agency to support PBCs in responding to future acts notices and participating in future act processes.

Proposal 16 – Adequate funding for the NNTT

64. The Association endorses Proposal 16 that the Australian Government should adequately fund the NNTT to fulfil its functions, and to provide greater facilitation and mediation support to users of the native title system.

Conclusion

65. Thank you for the opportunity to contribute to this review and for your consideration of our submission.

66. The Association would welcome the opportunity to discuss the issues raised in this submission. If we can be of further assistance, please contact Laura Toren, Policy Lawyer, at [redacted] at first instance.

Yours sincerely,

[redacted]

Dominic Toomey SC
President