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FNLRS Response to ALRC Discussion Paper for Native Title Act Future Acts Regime Review

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1 Introduction

First Nations Legal and Research Services (**FNLRS**) is the native title service provider performing the functions of a native title representative body (**NTRB**) established by the *Native Title Act 1993* (Cth) (**NTA**) to work with First Peoples to pursue land justice outcomes in Victoria. We are an Aboriginal controlled organisation, with a team of lawyers, researchers and community liaison staff that assist Victorian First Nations in their native title and formal recognition journeys.

FNLRS welcomes the opportunity to make submissions in response to the Australian Law Reform Commission (**Commission**) Discussion Paper as part of its review of native title processes and rights (**Review**). We recognise that First Peoples' voices must be front and centre. Our submissions are therefore not representative of First Peoples' voices but are offered for context and background in our capacity as practitioners in the field.

This document is supplementary to, and to be read with, our original submission entitled *FNLRS Responses to ALRC Future Acts Regime Review Issues Paper*.

2 Responses to Discussion Paper Proposals and Questions: Major Reforms

2.1 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?

2.1.1 Development of NTMPs by PBCs

FNLRS supports amendments to the NTA to enable Prescribed Bodies Corporate (PBCs) to develop Native Title Management Plans (NTMPs) in areas where there has been a positive determination of native title.

FNLRS sees multiple potential benefits for native title holders in using NTMPs to create tailored future act regimes. As outlined in the Discussion Paper, these benefits are likely to include the following benefits:

- prescribe potentially more robust or streamlined processes for certain future acts than the processes set out in the NTA, to better reflect how native title holders wish to care for Country;
- promote early engagement between proponents and native title holders; and
- signal where there are development opportunities on Country that native title holders are open to pursing with industry and government.

In addition to outlining the processes of the future act regime for that area, NTMPs are likely to deliver other benefits including:

- reducing "red tape" for proponents;
- reducing negotiation, transaction and administrative costs for PBCs;
- introducing proponents to native title holders' engagement and negotiation protocols;
- facilitating cross-cultural training;

- introducing proponents to native title holders' aspirations for greater collaboration in certain industries;
- highlighting opportunities for economic development and investment; and
- better alignment with principles of self-determination, international norms as articulated in UNDRIP and the objects of the NTA, thereby derisking long-term projects that might otherwise be inconsistent with those principles, norms and objects.

We see a risk that NTMPs could create additional complexity in an already complex system. However, in the context of the other proposed reforms to simplify the negotiation process and in light of the potential efficiencies, and the greater flexibility that may be realised by the introduction of NTMPs, we support their introduction.

We anticipate that the creation of NTMPs will involve a PBC mapping the NTMP area and identifying areas where bespoke future act processes could be established for specific development categories, for example areas where activities are authorized only with project-specific consent; or sensitive areas might be reserved for conservation purposes, renewable projects and; further areas could be identified where certain public works could be fast-tracked.

There are potential systemic efficiencies in the adoption of NTMPs. There is an opportunity for NTMPs to reduce transactional costs where NTMPs could establish low impact 'green areas' and set out pre-approved conditions for certain future acts. For example, in areas approved for exploration licence applications, the NTMPs could outline a high level of standardisation covering the expected conditions, the fees for exploration and provide a standardised agreement form. For higher impact activities there would obviously need to be greater consultation and negotiation of conditions as occurs under the current future act regime.

2.1.2 Mandatory application of registered NTMPs

We believe it should be open to a PBC to determine whether it chooses to apply for a NTMP over its Country. However, once a NTMP is registered, then the NTMP needs to be followed for future act validity.

As noted in the Mabo Centre and the National Native Title Council submission to this Review[1] (NNTC Submission), where an NTMP is in place, having its application as "optional" would undermine the proposed process. If a PBC spent the time and resources to develop and successfully register a NTMP, it would render that process redundant if a proponent could elect to adopt the regular procedures under the Act.

2.1.3 Registration of NTMPs

Consistent with the principles of fairness and good planning, FNLRS agrees that there should be a right to challenge the registration of NTMPs by another party, most likely a state (or territory) government with the likely grounds of objection being that the proposed NTMP was inconsistent with the land management aspirations of the state (or territory).

The incorporation of a process for objection to an NTMP registration will require the establishment of criteria by which such objections would be assessed, and an authority to decide objection applications. We submit the determination of an objection to registration would best be performed by the NNTT.

We concur with the Discussion Paper's suggestion that the criteria for registration will need to include the following:

[1] National Native Title Council and Mabo Centre, Submission to the Australian Law Reform Commission Review of the Future Act Regime – Discussion Paper, 10 July 2025 p10.

- an examination of whether an NTMP is consistent with, and faithful to, the objectives of the future acts regime and the *NTA* as a whole;
- matters that must or must not be dealt with by an NTMP;
- limitations on how some types of future acts can be dealt with by an NTMP; and
- ensuring an NTMP is sufficiently clear and comprehensible.

We believe there needs to be further consideration of the criteria for the registration of NTMPs.

2.1.4 Enforcement of NTMPs

In order for NTMPs to provide an effective future act regime, we submit that there must be enforceability for non-compliance of procedural rights. We refer to our below submissions regarding suggested NTA future act regime compliance measures. We support the NNTC Submission's position that the most effective and cost-effective mechanisms for enforcement will be against a proponent's title or interest (forfeiture) to expeditiously compel compliance by proponents within the terms of an NTMP[2].

2.1.5 Resourcing the Development of NTMPs

We support the NNTC Submission regarding the resourcing of PBCs in the development of NTMPs[3]. FNLRS is conscious of the under-resourcing of PBCs to conduct their current responsibilities. We submit that should a NTMP scheme be introduced, significant resources will need to be provided to PBCs to consult and develop NTMPs. While we anticipate there will be significant work in assisting PBCs to establish bespoke NTMPs, as discussed above, this approach may lead to significant long-term efficiencies which may reduce future transaction costs to proponents.

We **recommend** a well-resourced pilot project be established involving a selection of PBCs with the readiness and a self-identified desire to create NTMPs. An adequately funded pilot project could provide sector-wide benefits by providing examples of well-designed NTMPs to which other PBCs could look in the development of their own NTMPs.

Further, we **recommend** that additional technical expertise will be needed for PBCs to develop NTMPs. We acknowledge that there is currently a shortage of experienced, competent, trustworthy personnel across a range of disciplines required to develop a NTMP. PBCs could be given access to panels of 'accredited' practitioners of various disciplines; and/or a centralised, specialist service be established to both provide professional services and for the service to create a repository of resources to share learnings and expertise within the PBC sector. Alternatively, NTSPs could be funded to deliver these services to PBCs.

In terms of funding the creation of NTMPs, we are conscious that proponents are unlikely to be willing to bear the historical costs of the development of a NTMP. Accordingly, we submit that the State is best placed to fund this work. Further, we think a well-resourced pilot project will most efficiently create a best practice model, resources and templates that can be adapted elsewhere.

2.1.6 Harnessing and Promoting Cultural Authority

We anticipate that NTMPs may provide an important tool for native title holders to harness and promote cultural authority. It is anticipated that the development and use of NTMPs will involve early engagement with community leaders and enable proactive, community-led decision making about land use, heritage protection, and development priorities. We anticipate that PBCs will view NTMPs as an opportunity to embed cultural governance at the centre of the future act regime to ensure that

[2] Opcit at. p.8.

[3] Opcit at p.8.

native title holders have a say in how their Country is managed. This could be a welcome improvement to the future act regime for native title holders who often report feeling marginalised and traumatised by the current regime.

2.1.7 Amendment and Revision of NTMPs

We **recommend** that there be mandatory reviews of NTMPs on a medium to long-term basis. We suggest that a 15-20 year period for mandatory reviews would be adequate. Given the potential costs and time to conduct a NTMP review, we recommend that there should be the capacity for PBCs to apply for an expedited review where a PBC is of the view that there are no changed circumstances to warrant this.

We also **recommend** that PBCs be able to apply to amend NTMPs at any time.

2.2 Reformed Negotiation 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).
c. The requirement to negotiate would be suspended if the native title party objects to the doing of the future act.
d. 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).
e. 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.
f. 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.

g. 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.
h. 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).
i. 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.

FNLRS supports the implementation of the Reformed Negotiation Process outlined above.

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?

FNLRS holds concerns over the existing NTA s 39 criteria for arbitral determinations. Our view is that the current application of the test disadvantages native title holders opposing future acts. As noted in the NNTC Submission, only 3 of 156 cases considered by the NNTT under the s 39 test have found that the future act must not be done. Further, 90 of the determinations found that the future act may be done without any specified conditions.[4]

Under the proposed Reformed Negotiation Procedure, the NNTT would determine the preliminary question of "whether the act could proceed". FNLRS is supportive of the NNTC's position[5] that the primary test be whether native title holders had "*unreasonably withheld consent*" to progressing the proposal.

This would place the evidential onus on the grantee and state parties to demonstrate why native title holder objections to the project should be overridden. In turn, this approach would give greater effect to the concept of "consent" within FPIC than if the evidential onus was on the native title holders to demonstrate why the project should not proceed.

FNLRS concurs with the NNTC Submission's concerns that current future act determinations assume (explicitly or implicitly) that there is a public interest in granting the licence (or other relevant interest) and it is inferred that there is an economic benefit to the state - even when there is no direct evidence given in support of this.

We believe there needs to be further consideration of the arbitral criteria for the doing of a future act under the Reformed Negotiation Process.

[4] Statistics sourced at Native Title Tribunal, Search Future Act Applications and Determinations. [Accessed 7/7/2025]

[5] Opcit 1 at p10..

In the event that the Reformed Negotiation Process is not introduced, FNLRS **recommends** the ALRC review the s 39 arbitral criteria to ensure fairer outcomes for native title holders. One possibility is to amend the s39 test to be whether native title holders had "*unreasonably withheld consent*" to progressing the proposal accompanied by consideration similar to the s39 test to inform that test. Further, FNLRS **recommends** that cultural heritage protection considerations be more strongly incorporated in the criteria to harmonises cultural heritage and native title laws.

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?

We are not in a position to provide a comprehensive response to this question. We believe there needs to be further consideration of the criteria to guide the NNTT when determining the conditions for the doing of a future act.

Irrespective of whether the Reformed Negotiation Process is introduced, we **recommend** that NTA s 38 be amended to allow the NNTT to attach conditions for payments, on a reasonable basis, with reference to royalties, profits and turnover from projects. See below response to Proposal 8.

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

Irrespective of the introduction of the proposed Reformed Negotiation Process, FNLRS supports the repeal of the expedited procedure under s 32 of the NTA.

The proposed NTMP framework would be a fairer, less administratively burdensome, less costly and more efficient mechanism for progressing future acts, than is the current expedited procedure framework.

2.3 Impact Model for Classification

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?

FNLRS supports the proposed Reformed Statutory Procedures and the Impact Model for Classification. We see great value in the simplification of the categorisation of future acts under the NTA. We believe that the proposed impact assessment method for categorisation of future acts will deliver a more just regime. Further, we anticipate the this will provide greater clarity and ease of navigation for parties which in turn may lead to greater compliance and greater efficiencies.

FNLRS supports the notion that the future act framework be recast so that there is better alignment between the strength of procedural rights afforded to a native title party in relation to a future act and the extent of impact of that act on native title rights and interest. It is a failure of the current system that some of the future acts that have the most devastating impact on native title holders attract little in the way of procedural rights.

FNLRS' view is that multiple future acts relating to a common project can be dealt with under the existing framework through negotiation of an ILUA or a bilateral project agreement. In many instances the notification of multiple future acts relating to a common project in in one notice would result in significant diminishment in the rights of native title holders. While there can be unfairness in piecemeal notification (analogous to the unfairness of piecemeal planning processes as identified by the High Court decision in *Pioneer Concrete (Qld) Pty Ltd v Brisbane City Council* (1980) 145 CLR 485 at 504 per Stephen J.), such unfairness might be better dealt with in the context of consideration of whether parties have negotiated in good faith rather than by conflation of multiple notifications.

One proposal to improve consistency and transparency of classification is for the publication (by the NNTT) of guidelines for the appropriate classification of future acts as "low impact" (and therefore not "high impact")[6]. FNLRS supports this proposal.

FNLRS agrees that the impact assessments process will require a mechanism to consider objections to classifications to ensure fairness. This is a further additional function which could be conducted by the NNTT. This is preferable to the limited and costly alternative action of judicial review under administrative law to challenge classifications.

We share the NNTC's concern that the impact assessment model may have resource implications for NTRBs/PBCs which will have to consider and respond to greater numbers of notifications under this model. FNLRS' view is that mechanisms that allow NTRBs/PBCs to recover costs from proponents and grantee parties will ultimately drive system-wide efficiency.

2.4 **Right to Negotiate and (high) Impact Assessment**

FNLRS supports the proposed Reformed Negotiation Process and the proposed impact assessments process.

Time Frames

FNLRS acknowledges the need for timeframes that balance the need to promote efficiency of project approvals with adequate time for native title holders' consideration of proposals and subsequent negotiations. We concur with the NNTC Submission that the current timeframes under the NTA are inadequate[7] and we support the timeframes proposed in the Reformed Negotiation Process contained in the Discussion Paper.

[6] Ibid at p10.

[7] Ibid at p11.

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 (ie 26A Approved exploration etc. acts 26B Approved gold or tin mining acts 26C Excluded opal or gem mining 26D Excluded mining acts: earlier valid acts ; and
d. future acts proposed to be done by, or for, native title holders in their determination area?

We are not in a position to provide a comprehensive response to this question. We believe there needs to be further consideration of the impact-based model to account for the issues outlined in Question 15.

We submit that any accommodation of exclusions should leave native title holders in no worse a position than under the current NTA future act regime.

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?

FNLRS supports the NTA being amended to account for the impacts that future acts may have on native title rights and interests in areas outside the immediate footprint of the future act. Sometimes the impact of a future act outside that immediate footprint is far greater than the impact within the it. For example, this is often the case for acts that involve the taking of water from an aquifer, where the notified act relates to the drilling and instillation of the bore, whereas the impact of the act is felt over the much larger aquifer drawdown area, or 'cone of depression' [8].

With limited native title rights to protect their water-related sites native title holders will often look to other processes, such as those under water, environmental, mining or judicial review laws. This can lead to a proliferation of parallel contested processes, that are inefficient, costly and potentially distressing for all parties. It would be more efficient to bring the 'real issues in dispute' within the remit of native title law, so that they can be dealt with under the one statutory regime and one jurisdiction.

[8]One of the mechanisms for measuring this impact include ecohydrological conceptual models which can be used to map the impact pathway diagrams that outline how resource development's extraction of water can affect the ecological, cultural and economic values supported by ecosystems: see Luk Peeters, Marko Draganic, Huade Guan, Kate Holland, Angela London, Amir Jazayeri, Carmel Pollino, Margaret Shanafield, Cristina SolórzanoRivas, Haylee Thomas, Adrian Werner, Goyder Institute for Water Research Technical Report Series No. 2024/04, *Ecohydrological Conceptual Models and Impact Pathway Diagrams for the Braemar, Stuart Shelf and Northern Eyre* (2024) at 1.

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?

Legislative acts require special scrutiny so that they are not able to be used as a way of circumventing the *Racial Discrimination Act* 1975 and/or otherwise applicable native tile future act procedures.

This principle lies at the heart of native jurisprudence, being the basis for the first Mabo High Court decision: see *Mabo v Queensland* (1988) 166 CLR 186 per Brennan, Toohey and Guadron JJ at [21]. Also see *Western Australia v Commonwealth* [1995] HCA 47.

A reformed native title future act framework should not inadvertently create a pathway for legislative circumvention of the future act regime. On this basis FNLRS supports tailored provisions for legislative future acts.

FNLRS also supports the principle that planning consents, and amendments to planning schemes, be considered as future acts, where they affect native title. Planning consents are often sought at the early stage of project design at a time when engagement with traditional owners is likely to be most effective and productive. Such early engagement should be encouraged.

2.5 Dispute Resolution and Enforcement

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?

FNLRS supports the NTA being amended to provide that new agreements must contain a dispute resolution clause by which parties agree to use the NNTT's dispute resolution services. This amendment will promote more cost-efficient and timely dispute resolution. Further, this avoids the current issue of parties having to pursue litigation to resolve matters.

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.

FNLRS supports Proposal 5.

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.

FNLRS supports Proposal 7.

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.

FNLRS supports Proposal 8. See above discussion in response to Question 19.

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.

FNLRS supports Proposal 10.

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.

FNLRS supports Proposal 12.

3 Additional Questions and Proposals

3.1 Mandatory Conduct and Content Standards for Negotiations and Agreements

Question 7
Should the *Native Title Act 1993* (Cth) be amended to provide for mandatory conduct standards applicable to negotiations and content standards for agreements, and if so, what should those standards be?

FNLRS supports the amendment of the NTA to provide for mandatory conduct standards to negotiations and content standards for agreements.

We support the NNTC's Submission recommending the incorporation of the *Njamal indicia*[9] into the requirements of "good faith negotiations", under s 31(2)[10] noting the *Njamal indicia* could be strengthened by a clear obligation to seriously "negotiate" – to put offers on the table and respond to alternative proposals. We also note that the provision of project information and provision of resources to native title parties to support the negotiation process is part of ensuring fairness in negotiations.

FNLRS supports NNTC's proposal for the following mandatory inclusions in native title agreements:

- a prohibition on gag clauses or provisions seeking to limit access to cultural heritage legislation or civil remedies;
- requirement for dispute resolution clauses;
- requirement for the provision of reasonable negotiation costs by the proponent; and
- a review and amendment mechanism.

We do not support the imposition of "minimum rates" in agreements that would be enforceable at the stage of registration. We are of the view that negotiations should be on a 'commercial terms' basis.

We **recommend** that checking and enforcement of any requirements be conducted as part of a registration process for native title agreements. Further, government funding programs could require valid agreement making to reinforce the above requirements.

3.2 NTA to regulate 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?

FNLRS supports the NTA expressly regulating ancillary agreements and other common law contracts as part of an agreement-making framework under the future act regime. This is a necessary step to restore equity in the native title regime as it would make agreement making more enforceable for parties with limited resources to enforce contracts in civil proceedings.

3.3 Assignment of Pre-Determination Agreements

> 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?

FNLRS supports the NTA being 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. We suggest this should be subject to a process under which parties are able to object on a reasonable basis.

[9] *Western Australia v Taylor* [1996] NNTTA 34.

[10] Opcit at p13.

3.4 Negotiation of ILUA amendment without Registration Process

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?

FNLRS supports the NTA being amended to allow parties to agreements to negotiate specified agreements without needing to undergo the registration process again for particular agreement variations. This would overcome the need for additional authorisation meetings for minor amendments.

3.5 Publication, access and registration of agreements by NNTT

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?

FNLRS supports native title agreements being published on a publicly accessible opt-in register with the option to redact and de-identify certain details.

PBC Access to agreements and registration by NNTT

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.

FNLRS supports Proposal 2.

Removal of ILUAs from register when expired

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.

FNLRS supports Proposal 3.

Native Title Registrar auditing ILUAs

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.

FNLRS supports Proposal 4 and views the audit of a Register of ILUAs as a useful function to enhance scrutiny and enforcement of agreements.

3.6 Treatment of 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?

FNLRS supports reforms in respect of agreements struck before native title determinations to facilitate the assignment of rights where the ultimately determined native title holders may be different to the native title parties to a pre-determination agreement.

There may be some value in providing a process to object where there are particular rights subject to the assignment, such as rights that are personal in nature, that are not dependent on the parties' status as native title holders.

3.7 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?

FNLRS supports the 3 amendments proposed in question 21 relating to reform of non-claimant applications. We submit that these amendments are consistent with NTA s 3 objectives and the NTA preamble.

3.8 Consequences of non-compliance with procedural obligations

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?

FNLRS believes that the ambiguity in the NTA regarding the consequences of non-compliance with procedural obligations needs to be addressed. We are concerned that the current ambiguity and the lack of consequences has led to semi-regular non-compliance by notification and negotiation parties.

FNLRS supports the amendment of the NTA to provide that non-compliance with procedural obligations would result in the future act being invalid. A substantive consequence for non-compliance would compel proponents to either comply with the Act or alternately negotiate an ILUA consenting to any outstanding non-compliance issues.

If there are concerns about the delays that invalidity may cause, there could be a process for validating the agreement which would involve further agreement making. Alternatively, a process for assessing and awarding pecuniary sanctions or compensation could be established.

3.9 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?

FNLRS supports the amendment of the NTA and or the Native Title (Notices) Determination 2024 (Cth) to prescribe in more detail what should be included in a future act notice.

If the above Reformed Statutory Procedures and the Impact Model for Classification is to be adopted, then information and reasons used to determine the classification should be provided. We recommend that further work me conducted on this point.

In the event that the Reformed Statutory Procedures and the Impact Model for Classification is not implemented, we still recommend that the NTA be amended to prescribe the information that needs to be included in future act notices, including:

- Classification of the future act and reasons;
- Description of proposed future act;
- Description of works, including maps and projects plans;
- Description of the land or waters and other site details including:
    - Description of site(s);
    - Maps;
    - Parcel/Allotment Number; and
    - GIS reference/SPI number;

- Relevant native title holders;
- Identification of disturbance of ground or earth works and construction;
- Access requirements and likely timeframes;
- Any expected restriction of native title holders' access to any parts of the area; and
- Confirmation of procedural rights, contact details and next steps.

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.

FNLRS supports Proposal 11.

3.10 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?

FNLRS supports the amendment of the NTA to provide for 'future act payments' to the relevant native title party prior to or contemporaneously with the doing of a future act:
as agreed between the native title party and the relevant government party or proponent; or
in accordance with a determination of the NNTT where a matter is before the NNTT.

FNLRS is not supportive of future act payments being made in accordance with an amount or formular prescribed by regulations made under the NTA. We believe the negotiation and or determination of a future act payment should be made or assessed by reference to industry benchmarks and similar agreements negotiated on a 'commercial terms' basis. The use of a formula will unreasonable limit the payments made to native title holders.

3.11 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)?

FNLRS believes that future act payments should be in addition to any compensation payable under Part 2 Division 5 of the NTA, unless there was agreed set off against from any future compensation payment.

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.

FNLRS supports Proposal 12. Additionally, FNLRS view is that compensation payable under an agreement pursuant to ss24EB and 24EBA can only be full and final if it is objectively made on just terms. FNLRS' view is that this is already the case, due to the applicability of NTA s53(1), which ensures the constitutional validity of the NTA: see *Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples* [2019] HCA 7 at [49].

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

FNLRS supports Proposal 13. FNLRS supports inclusion in the NTA of a statutory framework for recovering damages for tortious interference with native title rights and interests: see *Buurabalayji Thalanyji Aboriginal Corporation v Onslow Salt Pty Ltd* (No 2) [2018] FCA 978, [7], [26]-[27] and at [88]. Codifying the way in which the general law applies to actions for compensation or damages in relation to invalid future acts will provide more certainty for all stakeholders.

3.12 Alternate Agreement recording future act payments

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?

We support the amendment of the NTA to provide for a form of agreement with is not an ILUA, capable of recording the terms of, and basis for a future act payment and compensation payment for future act. This will be necessary to enable negotiated future act payments being made.

3.13 No Costs in Federal Court Proceedings for Future Act Regime

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?

FNLRS supports the NTA being amended to address the awarding of costs in Federal Court of Australia proceedings relating to the future act regime. In particular, we recommend amendments that make this a no costs forum to enable PBCs to more readily access this forum.

3.14 Cultural Heritage Protection

> **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?

FNLRS believes that there is potential for the NTA to be amended to provide for the management of future acts on Aboriginal and Torres Strait Islander cultural heritage.

FNLRS acknowledges the work of the First Nations Heritage Protection Alliance (**Alliance**) on reforms to the existing Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) (**ATSIHPA**) and its partnership agreement around this issue with the Commonwealth Minister for Environment and Heritage.

We support the alignment of native title and cultural heritage laws as recommended by the Alliance. We await the outcome of any proposed reforms of the Alliance and defer to the Alliance for direction on this point.

3.15 Expanding Standing Instructions given by CLHs

> **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.

FNLRS supports Proposal 1. We think this will promote greater efficiency in decision making by supporting common law holders to provide standing instructions.

3.16 Funding for PBCs and NTRBs

> **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.

FNLRS supports Proposal 14. The Victorian Self-Determination Fund provides a good example of how such a fund can work in practice.

> **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.

FNLRS supports Proposal 15.

3.17 Funding for NNTT functions

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.

FNLRS supports Proposal 16.

3.18 Claimants' costs

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).

FNLRS supports Proposal 17.

3.19 First Nations Reform 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).

FNLRS supports Proposal 18.

4 Other Issues

4.1 Clean Energy Projects and Native Title Management Plans

As noted in the NNTC Submission, currently, the future act regime fails to include a clear approvals procedure for renewable energy projects. Accordingly, renewable energy agreements that deal with native title consents often take the form of an ILUA. We recommend that any reforms to the Negotiation Process consider amendments to the NTA to include renewable energy projects.

We support the NNTC's position that the following principles be prioritised in any reforms of the future act regime: :

- *Renewable energy projects should only ever proceed with the consent of affected native title holders – as such an ILUA or NTMP are the only appropriate future act process for these projects;*
- *Consideration must also be made to the full footprint of transmission projects, including impacts on road widening, intangible cultural heritage (**ICH**) impacts and primary sites. This extended footprint may be beyond the scope of any single NTMP or ILUA. Consideration need be given for ensuring appropriate management of projects of this nature; and*
- *Legislative requirements aside, Australian Government policy should demand that proponent funding for renewable energy projects should be dependent upon the existence of a concluded agreement with relevant Traditional Owners.*

4.2 Creation of an Independent Body to Assess Legality and Implementation of ILUAs

There is a need for a body to monitor the implementation of native title agreements, including to examine whether the agreements contain unlawful clauses, to assist with periodic reviews including to assess whether the terms of historic agreements are in accordance with prevailing benchmarks, and to monitor whether parties are satisfying their obligations under existing agreement.

In the event of non-compliance with native title agreements currently the burden falls on parties to take legal action for breach of contract for non-compliance. Similarly, if agreements contain unlawful clauses the only redress currently available to parties seeking to rectify them is application to the Court. Given the power imbalance of the parties, legal action is often financially prohibitive for native title holders. Alternatively, the native title holders may tolerate unlawful terms in order to maintain a good relationship with a project proponent, in circumstances where leveraging the relationship may be their best way of protecting sites of cultural significance.

We note that the proponent's non-compliance with a native title agreement does not generally have any consequences for the ongoing validity of the proponent's tenure. This is often in distinction to other conditions that attach to the proponent's leases or licences. For example, in many jurisdictions breach of a particular condition on a mining lease can result in loss or forfeit of the lease.

There is currently no obligation on a proponent to revisit the terms of a long-standing agreement at any stage, including to assess whether the impacts of the future act on native title rights and interests differ from what had been anticipated at the time any compensation was negotiated.

FNLRS **recommends** that the Commission explore the creation of an independent regulatory body to review, ensure legality, and oversee implementation of native title agreements under the future acts regime.

4.3 Analysis of Alternative Compensation Schemes

Many native title holders complain that it is difficult to obtain timely and accessible compensation for future acts.

By way of comparison, we encourage the Commission to examine the processes of alternate compensation regimes including Victoria's Settlement Act. There are potential benefits to adopting a partially codified compensation system. In the case of the Settlement Act, compensation is available for public/crown land regardless of prior extinguishment. The compensation is governed by approved future acts which attract certain community benefits outlined in a schedule attached to the LUAA and other acts which require agreement, the equivalent of the future acts regime right of negotiation.

The benefits of the Settlement Act model are that it provides greater certainty for parties, greater efficiency, and depending on the classification of compensable acts arguably provides greater fairness including compensation for more future acts.

Further, as is the case with the Settlement Act, certain activities are still subject to agreement/veto required under the relevant LUAA, which includes mining agreements and sale of land as is governed by the Settlement Act.

We recommend that any alternate compensation scheme provide for periodic reviews of compensation formulas and provide for retrospective variation of payments with updated compensation calculations to take into account developments in jurisprudence around compensation.

4.4 Alternative Future Act Provision for High Cultural Significance Locations

FNLRS recommends that the Commission explore the amendment of the NTA to add a new provision applying to future acts where activities are to occur on locations with high cultural significance. For future acts captured by this provision, consent would be required from PBCs. This will give sacred sites the procedural rights that afford proper FPIC protections.

4.5 Creation of Indigenous Infrastructure Fund and Indigenous Growth Fund

FNLRS encourages the Commission to explore the creation of an Indigenous Infrastructure Fund to support infrastructure projects which would be conditional on projects engaging in indigenous agreement making and significant benefit sharing. The Government could determine to which category of projects these could be deployed.

A second opportunity is to establish a fund similar to Canada's Indigenous Growth Fund which provides access to capital for Indigenous business to invest in infrastructure projects. The combination of both funds would go a long way to acceleration many onshore and offshore renewable energy projects. Further, providing funds to many cash poor PBCs could lead to TO-led projects or the purchase of equity shares in many nation-building infrastructure projects that could deliver intergenerational wealth.

FNLRS also supports NNTC's Sea Country Alliance proposal for the development of a PBC Regional Future Fund to support Traditional Owner communities within offshore environments impacted by the Offshore developments.