



Yamatji Marlpa
ABORIGINAL CORPORATION



Australian Law Reform Commission: Review of the Future Acts Regime

July 2025

Acknowledgement of Country

*Country is our mother, our provider and keeper of our cultural belongings.
Culture and Country go together.
You can't have one without the other.*

Yamatji Marlpa Aboriginal Corporation respectfully acknowledges the Traditional Owners and custodians throughout Western Australia, and on whose Country we work.

We acknowledge and respect their deep connection to their lands and waterways.

We honour and pay respect to Elders, and to their ancestors who survived and cared for Country.

Our offices are located on Whadjuk Country, Southern Yamatji Country, Kariyarra Country, and Yawuru Country. We recognise the continuing culture, traditions, stories and living cultures on these lands and commit to building a brighter future together.

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Introduction

Yamatji Marlpa Aboriginal Corporation (**YMAC**) is an Aboriginal corporation (i.e. operating under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (**CATSI Act**)). It is appointed as the Native Title Representative Body (**NTRB**) for the Pilbara (Marlpa) and Geraldton (Yamatji – comprising Mid West, Gascoyne and Murchison) regions of Western Australia. With offices in Geraldton, Port Hedland, Broome and Perth, the total land and waters covered by YMAC's representative areas is 1,248,292 square kilometres.

NTRBs are appointed by the Federal Minister for Indigenous Australians under the *Native Title Act 1993* (Cth) (**NTA**) to perform a range of 'functions' under the NTA. Along with assisting Traditional Owners with all aspects of their native title claims, these functions extend to the post-determination space.

YMAC operates under the direction of a twelve-member First Nations Board of Directors, with a collective experience spanning the spectrum of native title, both pre- and post-determination. For over 30 years, YMAC has supported Traditional Owners across its appointed regions to achieve 40 positive native title determinations in the Federal Court. YMAC continues to assist a number of Registered Native Title Bodies Corporate (**RNTBCs**)¹ with their ongoing obligations and aspirations via service agreements. YMAC also offers support to all 35 existing RNTBCs in its representative regions through its NTRB functions, and engagement, education and advocacy activities.

YMAC's services include (but are not limited to): native title claim, compensation, and future act representation; heritage services; executive office and governance services; anthropological services; and natural resource management support. YMAC prides itself on offering tailored support to the groups it works with, recognising each has its own unique needs, aspirations and opportunities available.

YMAC has prepared this submission in relation to the questions and proposals included in the Australian Law Reform Commission (**ALRC**) [*Review of the Future Acts Regime – Discussion Paper 88*](#) dated May 2025.

Generally, we note, the current future act regime places significant burden and strain on native title parties, particularly those without substantive resourcing. This burden and strain can cause or exacerbate internal disputes and is heightened by tight timeframe pressures.

YMAC acknowledges the changes to the NTA proposed in the discussion paper are significant, and would welcome further opportunity to comment on the amendments to the NTA, and is supportive of many of the proposals.

Following YMAC's initial submissions herein, additional recommendations are also made. YMAC strongly urges the ALRC to consider these suggestions as well.

Further, YMAC strongly recommends that any proposals that are eventually adopted by the Commonwealth Government *must* be accompanied by significant resourcing for native title parties. And, if there are proposed amendments to the NTA and accompanying regulations, it is critical that all stakeholders are informed of these changes as soon as possible and given adequate time to review the amended drafting of any legislative instruments.

¹ Also referred to as Prescribed Bodies Corporate (**PBCs**) within the native title sector; with both terms used interchangeably within this submission.

YMAC submissions

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?

In response to Question 6 of the discussion paper, YMAC agrees that empowering native title parties so they have agency to develop their own future act process under a native title management plan (NTMP) is, in theory, a positive development. However, YMAC raises the following concerns.

- **Resourcing:** the resources and time required to develop these plans could be extensive. It will likely involve an assessment of the cultural values across the whole determination area and robust discussion and decision making about how various future acts should be dealt with in different areas. In YMAC's experience with projects of this kind, it will require on-Country work with Traditional Owners and the engagement of legal, anthropological and archaeological consultants. That work can be very time consuming and expensive; and it is unclear where the resources to develop these plans will come from. The monetary and time burden of these plans may strain under-resourced PBCs.
- **PBC capacity:** in order to complete the plans, PBCs may be forced to re-prioritise their already demanding schedules and divert time and attention from the PBC's own projects, capacity building or otherwise. In YMAC's region, many PBCs do not have staff or offices. Many PBC Boards (and the decision makers) are volunteers. It is an ongoing source of frustration for these PBCs that the little time they have is dominated by requirements from government which primarily benefit government or industry (as may occur if the PBC is expected to map out their Country so that the government and Industry have certainty of future acts).
- **Interim measures:** the native title parties will continue to have to deal with responding to future act requests in order to protect their procedural rights while the NTMPs are being developed (which will likely take years).
- **Content of NTMP:** the discussion paper is unclear as to what types of acts can be covered by an NTMP. Are NTMPs able to cover all future acts or will certain acts be carved out of this process? YMAC does not support some acts being carved out of the process. Guidelines on the development and content of NTMPs should be co-designed by the Commonwealth and native title parties.
- **Consequences of NTMP:** the discussion paper is unclear whether NTMPs 'cover the field' for future acts included in the NTMP. In other words, if an NTMP specifies the terms through which a future act can be granted, can a government or proponent avoid the terms of the NTMP by having the future act granted through the statutory processes?
- **Indigenous Land Use Agreement (ILUA):** it is also unclear what the role of the ILUA will be in the revised future acts regime? Will ILUAs still be required for certain acts or will the process in NTMPs allow some future acts to occur than can presently only happen through an ILUA?

Further, YMAC makes the following recommendations.

- **Funding:** the Commonwealth must make adequate funding available for native title parties to develop NTMPs, including for paid Traditional Owner consultation, travel and meeting costs, legal, anthropological research and heritage costs. It is also recommended that funding is provided for native title parties to be able to monitor

proponents' compliance with NTMPs. This recommendation is critical to the success of the NTMPs.

- Invalid future acts: it should be clearly stated that if an NTMP is in place for a class of future acts, any future act in that class will only be valid if the NTMP process is followed. The consequences of invalidity from non-compliance must also be made clear.
- Review: native title parties need the ability and funding to periodically review and amend NTMP procedures.
- No exemptions: the ability for proponents to apply for a determination that the proposed future act should be exempt from complying with a NTMP should be prohibited;
 - Otherwise, it may create a scenario similar to the current s29 NTA expedited procedure provisions (**Expedited Procedure**), where the onus is on native title parties to prove that the Expedited Procedure should not apply. After going through an onerous inquiry process, if the native title party is successful, the native title party is granted the right to negotiate. A ruling in favour of the native title party just brings the proponent to the negotiation table. It does not stop the act being done. It is a costly and resource intensive process which is not cost recoverable for the native title party. Similarly, if a NTMP determination is successful for the native title party, it may just mean the proponent must follow the NTMP process. This would be a waste of time and resources.
 - The ability to bring a determination application should be limited, and should not be able to occur as a matter of course. It should be mandated that a determination application cannot be brought unless an alternative dispute resolution procedure such as mediation is attempted first, with the proponent to cover all the native title party's costs. The onus must be on the applicant to prove the NTMP should not apply, and the applicant must cover all the native title party's costs. These measures would deter proponents from bringing a determination application without good reason and promotes compliance with the NTMP.
- Registration: the registration criteria for NTMPs should be procedural only. The National Native Title Tribunal (**NNTT**) should not be able to assess the merits of an NTMP as part of the registration process. The State and Commonwealth should not be able to comment on the merits of a proposed NTMP.

Conduct and content standards

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

In response to Question 7 of the discussion paper, YMAC strongly agrees that mandatory conduct and content standards should be applicable to negotiations. The inclusion of standards in the NTA would ensure the proponent and native title party understand what is required of them.

Conduct standards: the standards must focus on the process of agreement making to ensure that native title parties enter into all agreements with their free, prior and informed consent (**FPIC**).

FPIC refers to the rights of Indigenous persons to provide consent on a free and informed basis, prior to any developments on their Country. The principles of FPIC are enshrined in

various articles of the United Nations Declaration on the Rights of Indigenous People (UNDRIP). Australia is a signatory to the UNDRIP and the principles of FPIC are expected to be followed in Australia.

Expert Mechanism Advice No.2, 2011 on the UNDRIP defines FPIC as follows:

- 'Free' implies no coercion, intimidation, or manipulation;
- 'Prior' implies that consent is obtained in advance of the activity associated with the decision being made, and includes the time necessary to allow Indigenous peoples to undertake their own decision-making process;
- 'Informed' implies that Indigenous peoples have been provided all information relating to the activity and that the information is objective, accurate and presented in a manner and form understandable to Indigenous peoples; and
- 'Consent' implies that Indigenous peoples have agreed to the activity that is the subject of the relevant decision, which may also be subject to conditions.

The Juukan Gorge inquiry considered the principles of FPIC in detail. Paragraph 7.52 of the subsequent report, *A Way Forward: Final Report into the destruction of Indigenous heritage sites at Juukan Gorge*, states:

"To address FPIC, the following must be observed:

- a. the timing and method of consent timeframes and sign-offs must be culturally appropriate and reflect decision-making processes that abide by the traditional law and custom of an affected Aboriginal and Torres Strait Islander group*
- b. ongoing consent issues – how to communicate and seek consent over the life of a project*
- c. remediation processes*
- d. processes for dealing with new information – if an agreement is already in place between a proponent and Traditional Owners and new information is unearthed, a clear process should be in place. Any new information about the significance of sites, or any associated knowledge that has potential to change Traditional Owners' consent, should be disclosed, and the consent decision should be able to be revoked or altered."*

In the aftermath of Juukan Gorge it is the responsibility of governments to lead the "way forward" and enshrine the principle of FPIC in legislation.

In addition to the infusion of FPIC, YMAC submits, at a minimum, the following standards should be included:

- a proponent must be required to provide reasonable funds for the costs of meetings (including travel and attendance time of the Traditional Owners), legal, economic and financial assistance;
- a requirement for a proponent to make reasonable and substantive offers;
- a proponent is required to provide full information about a proposed project (e.g. land valuations, scale of the project, project information, environmental information and project timelines);

- the right of the native title party to appoint its own independent expert advisors, funded by the proponent, such as legal, anthropological, environmental, social surrounds, engineering and economic to ensure that the project information is accurate and balanced, and conveyed in a way that is culturally appropriate and accessible;
- sufficient timing must be allowed for negotiations. This time must allow for discussions not just about funding but of the substantive terms of the agreement. The timing of the negotiations must allow for cultural obligations such as lore time and sorry business that may cause delay;
- clear and binding communication protocols must be established between the parties to ensure that a proponent is not 'by-passing' the native title party in negotiations (i.e. seeking consent from individual traditional owners rather than the PBCs or registered applicants) that would undermine FPIC; and
- the negotiations must be free from coercion, intimidation, pressure or manipulation.

Good faith: NTA requires parties who are engaged in 'right to negotiate' negotiations to negotiate in 'good faith'. This requirement is imperfect as:

- the meaning of "good faith" is not clearly defined;
- the parties are not required to have engaged in substantive negotiations;
- native title parties may not be adequately resourced to participate in the negotiations;
- if it is alleged that a party did not negotiate in good faith, generally the burden is on the native title party to prove the other party did not negotiate in good faith; and
- in some cases, if a native title party does not want a particular project to proceed, they are still required to negotiate in good faith about the project.

YMAC submits the 'good faith' requirement should be strengthened. We note with support Schedule 2 of the *Native Title Amendment Bill 2012*², which proposed the changes to the 'right to negotiate' process in the NTA, including:

- a definition of "good faith negotiation requirements", adapted from the *Fair Work Act 2009* (Cth), and a requirement that the parties comply with the definition;
- a requirement that the negotiations include consideration of the effect of the doing of the act on the native title rights and interests.
- reversal of the onus of proof on good faith, so that the proponent or the government party must demonstrate they have indeed negotiated in good faith.

It is in the interest of proponents, government parties and native title parties for the NTA to set out clear processes to foster positive negotiations. Noting the findings of the Juukan Gorge inquiry, it is timely the proposed amendments are adopted into the NTA.

In addition to these changes, the NTA should be amended to ensure native title parties are adequately resourced to participate in negotiations. We acknowledge this issue is dealt with in more detail in Proposal 17, and refer to our comments on this proposal, below.

Content standards: YMAC is supportive of the inclusion of content standards, in particular the proposed content standards listed in the discussion paper (pp. 17-18). However, the mandatory content standards must not be so rigid that they restrict native title parties from making their own commercial decisions. For example, the condition that 'particular matters

² *Native Title Amendment Bill 2012* (Cth). We also note YMAC's submission to the Senate Standing Committees on Legal and Constitutional Affairs on this Bill dated 31 January 2013.

are dealt with in the head agreement' and not ancillary agreement may restrict native title parties who wish to keep their commercial dealings private.

YMAC strongly agrees with the statement made in the discussion paper (p.18) that "content standards are limited to essentially protective mechanisms for the benefit of native title parties".

Expanding standard instructions for agreements

Proposal 1: The *Native Title Act 1993* (Cth) and *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) should be amended to allow for the expanded use of standing instructions given by common law holders to Prescribed Bodies Corporate for certain purposes.

In response to Proposal 1 of the discussion paper, YMAC is broadly supportive of the proposal to expand the use of standing instructions from common law holders³ to PBCs. This change would allow PBCs greater flexibility, particularly in managing exploration and prospecting tenements, even those matters subject to the right to negotiate process.

YMAC acknowledges that any amendment to the NTA and the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) (**Regulations**) must carefully balance the need for streamlined PBC operations against the essential requirement to protect common law holders' rights. The challenge lies in reducing the 'excessive red tape' that burdens PBCs—especially those with limited resources, without compromising the authority and comfort of common law holders.

YMAC highlights the following ambiguities in the current regulatory framework that require clarification:

- defining "Native Title Decisions": there is ongoing uncertainty about what constitutes a 'native title decision' under the Regulations, which complicates PBC compliance and decision-making; and
- inconsistency of standing instructions: it is unclear whether common law holders can issue standing instructions that go beyond what is covered by the definition of 'standing instructions decision' in the Regulations. For example, if, following informed consultation, the common law holders consent to a PBC entering into a mining agreement (not an ILUA) that includes an obligation for the PBC to execute a s31(1)(b) agreement for future mining tenements in the determination area, is this legally valid?

Clarifying these ambiguities is crucial to providing legal certainty and ensuring that expanded standing instructions genuinely serve the interests of native title holders and PBCs.

³ Note, the terms "common law holders" and "native title holders" are used interchangeably in the sector and throughout this submission.

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?

In response to Question 8 of the discussion paper, YMAC submits that the NTA should clarify that clauses in common law agreements that place obligations on PBCs contrary to their obligations under the NTA or Regulations are void.

Some common law agreements include clauses that require PBCs to do things that are contrary to their obligations under the Regulations. For example, a heritage agreement for a tenement presently in the Expedited Procedure may include the requirement that the PBC execute a s31(1)(b) agreement under the NTA, if required. If the tenement is removed from the Expedited Procedure, the PBC would be required under the heritage agreement to execute a s31(1)(b) agreement. However, the Regulations prohibit PBCs from entering s31(1)(b) agreements without first consulting with, and obtaining the consent of, common law holders. A PBC who has entered into such an agreement is put in an untenable position. It must either breach the agreement, breach their obligations under the Regulations, or self-fund a potentially expensive consultation process with their common law holders.

Access and assignment

Proposal 2: The *Native Title Act 1993* (Cth) should be amended to provide that:
a. the Prescribed Body Corporate for a determined area has an automatic right to access all registered agreements involving any part of the relevant determination area; and
b. when a native title claim is determined, the Native Title Registrar is required to identify registered agreements involving any part of the relevant determination area and provide copies to the Prescribed Body Corporate.

In response to Proposal 2 of the discussion paper, YMAC notes that many agreements relating to future acts are not registered, and so the PBC will not have access to all ancillary agreements (which often include the payment provisions).

YMAC also notes that the NNTT appears to register agreements made under s31(1)(b) of the NTA to the entirety of the area of the relevant s29 notice. Where a s29 notice covers multiple claims/determinations, each s31(1)(b) agreement appears to be registered to the entire area.

PBCs should only have access to registered agreements signed by applicants or PBCs for the area they are responsible for.

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?

Further, in response to Question 9 of the discussion paper, YMAC supports this amendment and believes there should be an automatic assignment of agreements made by registered claimants to the PBC where they were registered claimants for the claim group that was

determined, formalising the general finding in *CITIC Pacific Mining Management Pty Ltd v Yaburara & Coastal Mardudhunera Aboriginal Corporation* [2020] WASC 332 at [54]. However, agreements should not be assigned to a PBC if made by a group that is not the same as the determined native title holders. Such agreements should not be cancelled or removed by the Registrar but should remain as a common law agreement. Sometimes, a withdrawal of claim depends on an agreement remaining for a sub-group. See the discussion on this point in response to Question 13 below.

Registration and oversight

Proposal 3: Section 199C of the *Native Title Act 1993* (Cth) should be amended to provide that, unless an Indigenous Land Use Agreement specifies otherwise, the agreement should be removed from the Register of Indigenous Land Use Agreements when:

- a. the relevant interest in property has expired or been surrendered;
- b. the agreement has expired or been terminated; or
- c. the agreement otherwise comes to an end.

In response to Proposal 3 of the discussion paper, YMAC submits that it seems reasonable to expand s199C of the NTA to incorporate removal from the Register once the relevant interest in property has expired or been surrendered provided that all environmental rehabilitation obligations, and any other obligations owed by the proponent to the native title party, have been complied with.

In relation to the other circumstances identified in Proposal 3, these allow greater flexibility to the Registrar where there is no party to advise the Registrar that the agreement has expired or all parties are not in existence to advise the Registrar that the agreement is terminated. Again, this proposed change seems sensible provided the Registrar is assured that the agreement has expired / terminated. This could be complicated where it is difficult to ascertain whether an agreement has been assigned.

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.

In response to Proposal 4, YMAC is unclear of the extent to which this is an existing problem. It may be appropriate for a party to request that an agreement be removed where the other parties no longer exist (e.g. a company party has been deregistered and not assigned the agreement).

In addition, consideration could be given to a notification process where, if the NNTT considers that one or more parties to the agreement no longer exists it can notify the remaining parties (and the NTRB) that it intends to remove the agreement. If a party objects then the agreement would not be removed and the notification process should not occur again for at least five (5) years. Alternatively, if there are no objections, the agreement could be removed from the Register of Indigenous Land Use Agreements.

Amending agreements

Question 10: Should the *Native Title Act 1993* (Cth) be amended to allow parties to agreements to negotiate specified amendments without needing to undergo the registration process again, and if so, what types of amendments should be permissible?

In response to Question 10 of the discussion paper, YMAC agrees flexibility should be allowed if the agreement is with a PBC, and there are limitations as to what amendments are permissible. YMAC submits that substantive changes still must be reverted to the common law holders.

Implementing and enforcing agreements

Proposal 5: The *Native Title Act 1993* (Cth) should be amended to provide that the parties to an existing agreement may, by consent, seek a binding determination from the National Native Title Tribunal in relation to disputes arising under the agreement.

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?

In response to Proposal 5 of the discussion paper, YMAC supports an option arising under an existing agreement. This should be in addition to other existing options for dispute resolution.

Further, in response to Question 11 of the discussion paper, YMAC does not support a mandatory requirement that parties to new agreements must utilise the NNTT's dispute resolution services. While the NNTT may offer a useful option for resolving disputes, it should remain one of several available mechanisms, rather than being imposed as the exclusive pathway.

In practice, many agreements currently nominate the Resolution Institute as the dispute resolution body. While the NNTT could serve as an alternative to this, it is unclear whether mediation conducted by the NNTT would result in materially different outcomes. Parties should retain the flexibility to choose the dispute resolution process that best suits the nature of the dispute and the context of the agreement.

It is also unclear whether the NNTT would have the power to award costs, particularly in cases where one party has acted unreasonably. This is a significant consideration, as cost implications can influence the fairness and deterrent effect of dispute resolution processes. Without such powers, the NNTT may not be equipped to handle certain disputes effectively.

YMAC supports an amendment to the NTA to confirm that contractual disputes related to native title agreements can be heard by the Federal Court. This would provide clarity and reinforce the legitimacy of native title agreements as enforceable contracts. However, we do not support exclusive jurisdiction being granted to the Federal Court. Some disputes, particularly minor or procedural ones, may be more cost-effectively resolved through other forums, including state courts or alternative dispute resolution mechanisms.

Agreement transparency

Question 12: Should some terms of native title agreements be published on a publicly accessible opt-in register, with the option to redact and de-identify certain details?

In response to Question 12 of the discussion paper, YMAC considers a publicly available register could be used only if it is 'opt-in' and gives native title parties the option to opt-out at a later date, including having their data removed from the public register.

It is unclear what information is proposed to be redacted and who makes that decision. Native title parties may not entirely agree with which information is redacted or left whole. YMAC has some concerns that it may result in native title parties experiencing adverse pressure amongst other native title groups or industry to align with other agreements in surrounding areas which are not suited to that group's needs and connections to Country. For example, we question whether negotiated outcomes that are commercial in nature such as compensation or community benefits clauses could be unfairly used or used for disclosure purposes in other actions.

There also seems to be a contradiction between de-identifying the details of an agreement and providing a meaningful benchmark to compare with other negotiated agreements. As each agreement involves complex and site-identifying information, any redaction means agreements may not be easily generalised or compared. To provide a meaningful benchmark, parties would want to know the year the agreement was signed, the scale of the project, the kind of project, and the region of the country. If details of this type are required in order for comparison, we consider that it may reveal the precise agreement or at least the parties and Country involved. Another contradiction is that for common law holders to be able to review the register to see what agreements have been entered into on their behalf would presumably only be possible if agreements are not redacted.

There must also be adequate ongoing funding for native title parties participating in an opt-in register to undertake and/or review redaction of agreements.

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?

In response to Question 13 of the discussion paper, YMAC submits that there should not be any changes to affect pre-determination agreements, even if those agreements are made with people who were not the ultimate native title holders. The people who entered into pre-determination agreements were likely to have been registered claimants and are entitled to the benefits of registration.

This does not impact adversely on the rights of the ultimate native title holders to obtain its own compensation for any acts later. If the wrong group receives some compensation, this is no different to the correct group than if there was no agreement at all. For example, if ultimate native title holders did not have a registered claim at the relevant time, the

proponent would still have their tenure granted without agreeing or paying anything at the time to those ultimate native title holders.

There have been many occasions where overlapping claim groups or sub-groups have agreed to reduce or withdraw their native title claims or agreed to have those claims combined or replaced by new claims on the express basis that the prior groups could retain the benefits of agreements that they have already made. These changes to configuration of claims and groups would often not have occurred by agreement if not for ability of those groups to retain the benefits of their agreements made to that date. Legislating changes to those agreements would be likely to have the effect of hindering inter-Indigenous agreements and causing more litigation and delay.

Legislating retrospective changes to agreements made causes uncertainty for everyone. There are dangers that this may in some circumstances have effect as a disincentive to proponents to agree to native title determinations if this would impact on rights obtained under the earlier agreements.

It may also be difficult in some situations to work out if the prior agreement was in fact with the wrong people. What would be the situation if some of the members of the group that made the prior agreement are members of the correct group?

Proponents who reach agreement with the wrong group would have made their own risk assessments at the time and would get the benefit of having their tenure consented to, long before the ultimate native title determination.

Impact-based model

Question 14: Should Part 2 Division 3 Subdivisions G–N of the *Native Title Act 1993* (Cth) be repealed and replaced with a revised system for identifying the rights and obligations of all parties in relation to all future acts, which:

- a. categorises future acts according to the impact of a future act on native title rights and interests;
- b. applies to all renewals, extensions, re-grants, and the re-making of future acts;
- c. requires that multiple future acts relating to a common project be notified as a single project;
- d. provides that the categorisation determines the rights that must be afforded to native title parties and the obligations of government parties or proponents that must be discharged for the future act to be done validly; and
- e. provides an accessible avenue for native title parties to challenge the categorisation of a future act, and for such challenge to be determined by the National Native Title Tribunal?

In response to Question 14 of the discussion paper, YMAC submits the following.

Categorisation of acts: While YMAC generally agrees with an impact-based model – provided that model includes the impact on broader environmental and First Nations cultural heritage values – a fundamental concern YMAC has with the proposal, is that it is unclear how government will be able to successfully determine the ‘impact’ of an act. For example, in Western Australia, a non-ground disturbing act, in an area not registered as a site under the *Aboriginal Heritage Act 1972* (WA) may appear to have a ‘low impact’. However, the location

of the act may mean that any act is extremely impactful to the native title parties. Something that may be 'low impact' in one place, would be considered high impact in another.

YMAC acknowledges there may be guidelines produced by State and Federal governments as to how to categorise 'impact'. However, the same issue as outlined above arises. The only party who knows the impact is the native title party.

The definition of impact must be broad and consistent with native title parties' understanding of 'impact' so that it includes their broader environmental and cultural heritage values. The definition must not prescribe particular acts that are considered 'low impact' because they are not ground disturbing as that does not take into account the spiritual aspect of Aboriginal culture.

YMAC reiterates that there can be significant impacts to non-exclusive native title, even if the act appears to be low impact. For example, the taking of water from a river may impact the ability of native title holders to fish and hunt. Alternatively, clearing a small area may scare animals away therefore limiting bush tucker.

Further, as ALRC may be aware, State governments often rely on a site registration system to determine whether an area of Country is culturally significant. This system is not adequate for the following reasons:

- it does not capture the nuances of cultural heritage;
- the boundaries are often outdated and incorrect; and
- many groups do not feel comfortable to have their secret and sacred sites registered and exposed to the public. Therefore, the list is incomplete.

It is highly likely that these systems will be relied on by government to determine impact, which again puts excessive onus on the native title party to establish that sites not registered are significant.

Assessing impact: YMAC has reviewed the proposed factors that may be considered to determine whether a future act attracts the right to negotiate, as outlined in the discussion paper (p.30), and submits there must be a baseline condition that for any future act to be categorised as a Category A future act it must not:

- disturb any sites; or
- substantially affect the exercise of native title rights and interests.⁴

If a future act cannot satisfy the above Conditions then it must be a Category B act.

In YMAC's experience, the only way to know with certainty that the Conditions have been satisfied is after a heritage survey. YMAC submits that for a future act to be classified as a Category A act it must first be subject to a heritage agreement with the PBC which may require heritage surveys and can prohibit activities in exclusion zones (i.e. areas of high cultural sensitivity) identified by the PBC.

YMAC is concerned that under the proposed impact-based approach, the governments will take a similar approach as they have for the Expedited Procedure. This would mean that all future acts are 'Category A acts' unless the native title party objects and establishes

⁴ Together, the **Conditions**.

otherwise. This would put an unreasonable onus on the native title parties and is not consistent with the intention of these proposed amendments. YMAC submits the default must be that an act is a Category B act, unless the state government can prove that a future act is a Category A act. This could be proved by the parties demonstrating to the state government that they already have an existing heritage agreement that is being complied with.

Further, the potential lifespan of an act, not just the term, needs to be considered. For example, if an act is only granted a three-year term, but there is the potential for ongoing renewals for up to 50 years, then it is no longer a low impact act.

Notification of a whole 'Project': YMAC is unclear how this proposal will practically operate. In YMAC's experience it is common for projects to evolve over time and need rolling future act approvals. For example, if not all future acts are notified together, do previous notifications become void? It is important in fulfilling the principles of FPIC that the native title party understands what they are consenting to, and the consequences of that consent (for example, if the native title party is consenting to a whole project – what does that mean for additional future acts that form part of the project?).

Current exclusions and potential exclusions in a reformed future acts regime

Question 15: If an impact-based model contemplated by Question 14 were implemented, should there be exclusions from that model to provide tailored provisions and specific procedural requirements in relation to:

- a. infrastructure and facilities for the public (such as those presently specified in s24KA(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 ss26A–26D of the *Native Title Act 1993* (Cth); and
- d. future acts proposed to be done by, or for, native title holders in their determination area?

In response to Question 15 of the discussion paper, YMAC submits that the acts outlined in Question 15(a) are likely to be high impact and should be treated as such.

Compulsory acquisition of native title is also high impact and should only proceed with the FPIC of the native title party. In any event, at a minimum, the right to negotiate should apply before any act can extinguish native title.

YMAC has limited experience with exclusions under ss26A-26D of the NTA. It supports the removal of these exclusions.

YMAC disagrees that future acts by native title holders should automatically be low impact. If they are high impact, then it may be that the PBC can reach relatively quick agreement with them.

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?

Further, in response to Question 16 of the discussion paper, YMAC supports amending the NTA to account for the impacts that future acts have on native title rights and interests in areas outside the footprint of the future act. YMAC suggests amending the NTA to clarify that an act may affect native title beyond its immediate footprint.

For example, waterways are of high importance to native title holders throughout the Pilbara and Yamatji regions – they are intrinsically woven into spiritual beliefs, creation stories and cultural practices. They are fundamental for sustenance and traditional law, and essential for connection of Traditional Owners to ancestral lands and identity. Waterways can, and often do, flow through several native title determinations. The extraction of water in one native title determination area, may impact the waterflow through Country of other native title parties. The native title parties who hold the procedural right to comment under the NTA currently, are therefore not the only native title parties whose rights and interests would be affected by extraction of water under a water licence.

The true extent of the effect of an act may not always be evident. YMAC proposes that assessments of which native title may be affected by an act be expansive, and all native title parties be notified. In addition, all future act notices should be publicly available for a reasonable period, and there should be a mechanism for a PBC or registered native title claimant to seek to become a native title party for a future act outside their determination or claim area. The NTA should also be amended to clarify that native title holders are entitled to compensation in relation to all compensable acts that affect their native title, regardless of if the immediate footprint of the act is outside their native title area.

YMAC proposes a similar process to that which the National Offshore Petroleum Safety and Environmental Management Authority (**NOPSEMA**) requires for offshore projects. Its process involves consultation requirements for preparing environmental plans to ensure those affected by the plan (in particular, native title parties) are given reasonable opportunity to provide details on how the plan would affect social, economic and cultural features of the environment. Comments are required to be considered by proponents for the creation of the environment plan and the area covered is expansive. A similar method could be applied for inland waterways that may be affected by mining licences or water extraction in a number of adjacent native title determinations.

Legislative dealings and planning activities

Question 17: Should the *Native Title Act 1993* (Cth) be amended to:

- 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
- clarify that planning activities conducted under legislation (such as those related to water management) can constitute future acts?

In response to Question 17 of the discussion paper, YMAC submits that legislative acts that impact native title should be treated as all other future acts and must comply with the impacts based model. Legislative acts still impact native title rights and interests, and the

same assessment should apply as with other future acts. They should not be a separate category with a different pathway to validity.

Planning and management frameworks should also be subject to the impact based future acts model. Planning and management frameworks, particularly those relating to water have a significant impact on Country, cultural values and the ability to practice native title. Native title parties should have the right to co-design planning and management frameworks that impact native title, unless they specifically advise otherwise.

Reforming the right to negotiate

Proposal 6: The provisions of Part 2 Division 3 Subdivision P of the *Native Title Act 1993* (Cth) that comprise the right to negotiate should be amended to create a process which operates as follows:

- a. As soon as practicable, and no later than two months after a future act attracting the right to negotiate is notified to a native title party, a proponent must provide the native title party with certain information about the proposed future act.
- b. Native title parties would be entitled to withhold their consent to the future act and communicate their objection to the doing of the future act to the government party and proponent within six months of being notified. From the time of notification, the parties must negotiate in accordance with negotiation conduct standards (see Question 7). The requirement to negotiate would be suspended if the native title party objects to the doing of the future act.
- c. If the native title party objects to the doing of the future act, the government party or proponent may apply to the National Native Title Tribunal for a determination as to whether the future act can be done (see Question 18).
- d. If the National Native Title Tribunal determines that the future act cannot be done, the native title party would not be obliged to negotiate in response to any notice of the same or a substantially similar future act in the same location until five years after the Tribunal's determination.
- e. If the National Native Title Tribunal determines that the future act can be done, the Tribunal may:
 - require the parties to continue negotiating in accordance with the negotiation conduct standards to seek agreement about conditions that should attach to the doing of the future act;
 - at the parties' joint request, proceed to determine the conditions (if any) that should attach to the doing of the future act; or
 - if the Tribunal is of the opinion that it would be inappropriate or futile for the parties to continue negotiating, after taking into account the parties' views, proceed to determine the conditions (if any) that should attach to the doing of the future act.
- f. At any stage, the parties may jointly seek a binding determination from the National Native Title Tribunal on issues referred to the Tribunal during negotiations (see Proposal 7). The parties may also access National Native Title Tribunal facilitation services throughout agreement negotiations.
- g. If the parties reach agreement, the agreement would be formalised in the same manner as agreements presently made under s31 of the *Native Title Act 1993* (Cth).
- h. If the parties do not reach agreement within 18 months of the future act being notified, or within nine months of the National Native Title Tribunal determining that a future act can be done following an objection, any party may apply to the National Native Title Tribunal for a determination of the conditions that should

apply to the doing of the future act (see Question 19). The parties may make a joint application to the Tribunal for a determination of conditions at any time.

In response to Proposal 6 of the discussion paper, YMAC submits that, while the NTA's existing future act regime is imperfect, and YMAC welcomes a consideration of alternative approaches, YMAC generally has concerns with the proposed reformed right to negotiate process.

One of the strengths of the existing right to negotiate process is the focus on agreement making, and good faith negotiation between native title parties, proponents and government parties. While imperfect, YMAC has seen many native title parties and proponents develop strong collaborative relationships with proponents operating on their Country through the right to negotiate process. YMAC is concerned that several aspects of the reformed right to negotiate may have the effect of derogating or interfering with negotiation parties entering into an agreement.

In the above proposal, native title parties must object to the doing of an act within six (6) months of the act being notified. In some cases, it will be apparent to a native title party that a particular act should never be done. However, in YMAC's experience, it is rarely that simple. Challenging proposals may become palatable if the resulting agreement contains strong enough heritage and cultural protections. Alternatively, a future act may initially appear not to be problematic, but once the full effect of the project is known, or the attitude of the proponent becomes evident, native title parties form the view that they cannot agree to the act proceeding. As the right of native title parties to wholly object must be exercised within six (6) months of notification, native title parties may decide they must object to the act to avoid losing that right. There may also be a concern of the proponent stringing the native title party along until the six (6) month objection period closes.

If a native title party objects to the act, the government or proponent can, and likely will, challenge that objection. If the objection is challenged, the NNTT is required to determine if the act can or cannot be done. Question 18 below deals with what the NNTT should consider in making that determination. Each of the three options provided as part of the question place a substantial burden on the native title party. This determination process will take place before substantive negotiations can take place with the proponent. It may be that the first substantial interaction between the native title party and the proponent is in this adversarial context. If the NNTT determines that the act may be done subject to conditions, it may refer parties to negotiations or determine itself what those conditions should be.

If the NNTT so refers, or if the native title party does not object, the parties can negotiate as to what the conditions will apply to the doing of the act. However, unlike negotiations under the existing right to negotiate process, these negotiations will not have the benefit of an enforceable obligation to negotiate in good faith, and the proponent is not at risk of a determination that the act cannot proceed. The reformed right to negotiate seems to imply if a native title party commences negotiations with a proponent, they are implicitly consenting to the act being done, even if the conditions under which the act is done are yet to be determined. If an agreement is not reached, the NNTT can be asked to determine what conditions will apply to the act being done.

The current right to negotiate process centres around good faith negotiation and agreement making. A future act determination application under the current right to negotiate process cannot proceed if the NNTT finds that the government or proponent did not negotiate in good faith. However, it appears this requirement is largely absent in the reformed process. While there may be an expectation that parties negotiate in good faith, there is no provision for the NNTT to make an assessment of whether parties have negotiated in good faith, or for there to be consequences if a party does not. If negotiations are not required to be done in good faith, it is less likely that productive agreements will be reached.

YMAC considers that to be effective, the right to negotiate must encourage, not discourage negotiations and agreement making, where possible. To facilitate this, YMAC proposes that the proposed right to negotiate process be modified in the following ways:

- native title parties must be able to object to the future act at any time. If a native title party knows that they will never agree to a particular future act, they may object immediately. However, a native title party should be able to engage in negotiations about the future act without fear of losing a right to object, or being seen as implicitly consenting to the doing of the act;
- YMAC supports the requirement for the proponent to give the native title party sufficient information about the proposed future act. To encourage the proponent to be forthcoming, the information provided by the proponent at this point should be the only information about the future act from the proponent available to the NNTT, when the NNTT considers an objection or what conditions must be imposed on the doing of the act;
- the proponent must be required to pay the native title party's reasonable costs of participating in the right to negotiate process. This includes negotiation costs, and costs associated with participating in any determination process;
- in YMAC's experience, negotiations generally drag out because the proponent is unable or unwilling to genuinely and promptly engage with the native title party. The parties must be required to negotiate in good faith, to enable good negotiation outcomes and co-operation between the parties;
 - the obligation to negotiate in good faith is strengthened as described in this submission's response to Question 7; and
 - the proponent may only apply to the NNTT to determine what conditions the future act be done subject to, if it demonstrates it has negotiated in good faith with the native title party.

YMAC re-iterates for completeness, that even if the proposal or the YMAC proposed amendments are not adopted in full, the requirement of 'good faith' should still be strengthened as per YMAC's response to Question 7.

If a substantial change such as the proposal is adopted, it is critical key bodies are consulted about any proposed legislative and regulatory amendments before they are finalised to ensure there are no unintended consequences.

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.

Further, in response to Proposal 7 of the discussion paper, YMAC does not oppose this proposal; however, in our experience we see limited circumstances where both parties would agree to refer a substantive issue to arbitral proceedings.

Significant issues such as agreement terms pertaining to exclusion zones or heritage applications would require both parties to expend considerable resources preparing submissions, akin to the preparation required for a formal inquiry hearing. On the other hand, less contentious issues like survey coordination and timeframes are likely better resolved through a process of mediation between the parties as opposed to arbitration.

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?

In response to Question 18 of the discussion paper, YMAC supports Option 1, being an assessment of whether the native title party's consent was unreasonably withheld. The assessment should determine if the native title party acted within its authority – if a registered native title claimant, if it acted within the terms of its authorisation under s251BA of the NTA; if an RNTBC, if it made its decision in accordance with its rule book, the Regulations and the CATSI Act.

YMAC has concerns about Option 2, being an assessment of whether the doing of the act would present a real risk of substantial and irreparable harm. The NNTT has adopted a high bar in assessing whether an act is “not likely to interfere” in the context of determining if an act is an act attracting the Expedited Procedure. If an impact based assessment is implemented, it should be defined widely to include:

- the damage (physical or spiritual) to cultural heritage;
- impacts on native title rights and interests; and/or
- use of an area in a manner inconsistent with the beliefs or laws or customs of the native title parties.

YMAC does not support requiring proof that the harm be irreparable.

If Option 3 is adopted, priority should be given to the native title group's views through criteria ss39(1)(a) and 39(1)(b) of the NTA.

In all situations it should be made clear that the onus is on the State and proponent to establish why the future act should be able to be done, rather than the native title party to establish why it should not be done. The State is the party seeking to change the status quo.

YMAC supports the introduction of “safeguards” in relation to the right to negotiate process, specifically an ability for the NNTT to determine that a future act cannot be done in circumstances where:

- the proponent has failed to meet the negotiation conduct standards, including as strengthened as described in YMAC's response to Question 7 of this submission. and it would be unjust to require attempts to continue or permit the future act to proceed; and

- the conduct of a proponent has effectively prevented a native title party from making an informed decision as to whether to exercise its right to object during the objection period.

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?

Further, in response to Question 19 of the discussion paper, in YMAC's view, the criteria set out in s39(1) of the NTA would remain relevant. We note that there is already provision for the NNTT to consider "any other matter that the arbitral body considers relevant" which gives an ability to consider a broad range of matters. However, additional weight and priority should be given the criteria outlined in our answer to Question 18 above.

Consideration should also be given to imposing conditions in relation to matters which have been agreed between the parties in the negotiation process.

Conditions relating to payments

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.

In response to Proposal 8 of the discussion paper, YMAC submits that the prohibition in s38(2) of the NTA should be repealed. This would enable the NNTT to impose conditions to reflect agreements between the parties as to payments of royalties and the like. The NTA should specify that, in assessing what payments should be made, the NNTT should consider the payments in agreements reached to obtain the consent of native title parties to the doing of similar acts.

Expedited procedure

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

In response to Proposal 9 of the discussion paper, YMAC agrees with the proposed removal of the application of Expedited Procedures statements. An impact-based model is better suited to assess a proposed future act and would attract a case-by-case assessment of each proposed act. However, we consider that the party proposing to grant the future act should bear the onus of proof of any assessment. The current practice in Western Australia of the applying the Expedited Procedure to almost all mining exploration tenure places a significant burden on native title holders.

Alternative state or territory provisions

Question 20: Should a reformed future acts regime retain the ability for states and territories to legislate alternative procedures, subject to approval by the Commonwealth Minister, as currently permitted by ss43 and 43A of the *Native Title Act 1993* (Cth)?

In response to Question 20 of the discussion paper, YMAC submits that states and territories should not be permitted to legislate alternative procedures unless they provide more protection for native title parties than what is in the NTA.

Subdivision F and non-claimant applications

Question 21: Should Part 2 Division 3 Subdivision F of the *Native Title Act 1993* (Cth) be amended:

- 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;
- 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;
- 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
- in some other way?

In response to Question 21 of the discussion paper, YMAC submits that the NTA should limit the scope of non-claimant applications. YMAC otherwise has no specific comments on these questions as this section of the NTA is not used in our region.

Procedural compliance and notices

Proposal 10: The *Native Title Act 1993* (Cth) should be amended to expressly provide that a government party's or proponent's compliance with procedural requirements is necessary for a future act to be valid.

Question 22: If the *Native Title Act 1993* (Cth) is amended to expressly provide that non-compliance with procedural obligations would result in a future act being invalid, should the Act expressly address the consequences of invalidity?

In response to Proposal 10 and Question 22 of the discussion paper, YMAC supports amending the NTA, including ss24HA(3), 24KA(3), and 24LA(3), to make it explicit that compliance with procedural requirements by government parties and proponents is necessary for a future act to be valid.

This amendment is necessary to overturn the consequences of the decision in *Lardil, Kaiadilt, Yangkaal & Gangalidda Peoples v State of Queensland* [2001] FCA 414, which has allowed future acts to remain valid despite non-compliance with procedural obligations. Without such an amendment, there is no meaningful consequence for failing to follow the processes set out in the NTA, particularly where native title parties are not notified. In many cases, native title parties only become aware of a proposed act after it has already been granted, at which point their only recourse is to seek an urgent injunction — a process that is

both costly and burdensome, especially where native title has not yet been determined and must be proven.

If the NTA is amended to make procedural compliance a condition of validity, it is essential that the consequences of invalidity are clearly articulated. Under the current framework, even where a future act is found to be invalid due to non-compliance, it is only invalid to the extent that it affects native title. This can leave the future act otherwise intact, creating uncertainty and undermining the rights of native title holders.

YMAC recommends the NTA is amended to state:

- a future act is wholly invalid if procedural requirements are not met; or
- at a minimum, native title parties should be entitled to seek and obtain orders to revoke or set aside future acts that were done without complying with procedural rights that are provided by the NTA.

YMAC's proposed amendments would ensure that procedural rights are not treated as optional or symbolic, but as substantive protections that must be respected. It would also provide a clear and enforceable remedy for native title parties where those rights are breached.

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?

In response to Question 23 of the discussion paper, YMAC agrees that legislative or regulatory amendments should be made to ensure that future act notices contain sufficient information to assist native title parties in understanding the proposed future act. All future act notices sent to native title parties should include:

- a detailed description of the future act, including:
 - the details of any legislation under which the future act is proposed to be done;
 - what will be permitted by the act, if the act is done;
 - a written description of the area affected by the future act;
 - which subdivision of the NTA the future act is proposed to be done under, and the basis under which the future act falls within that subdivision;
- the existing timeline of the future act, including:
 - when the future act was applied for,
 - any legislative processes that have taken place prior to the notification (for example, if objections to the future act were made under State legislation, the details of those objections, and how and when they were resolved); and
 - when the State decided to do the future act, and how this decision was made;
- clear and detailed maps of the area of the proposed future act;

- contact details of any proponent connected to the future act; and
- a detailed description of what the proponent proposes to do if the future act is done.

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.

Further, in response to Proposal 11 of the discussion paper, YMAC agrees that all future act notices should be lodged with the NNTT, and included in a register of future act notices.

YMAC has become aware of future act notices that were not sent to the correct contact address of the relevant PBC or registered claimant. In most cases, a future act can proceed even if there is no response to a notice. Some future acts that can proceed without any response from a native title party can have significant impacts on native title, including extinguishing native title. If a PBC or registered claimant does not receive a notice for a future act, they may not become aware that a future act has been done on their Country until many years later. It may not be clear if no notice was sent, or if a notice was sent to the wrong address.

A public register of all future act notices would allow PBCs, registered claimants, and common law holders to confirm they are aware of all future act notices have been made over their Country. Requiring government bodies or other people issuing future act notices to lodge their notice with a public register will also provide a mechanism to ensure the notices are being sent to the correct address.

Compensation and other 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?

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)?

In response to Questions 24 and 25 of the discussion paper, YMAC supports the NTA being amended to provide that, for specified future acts, a 'future act payment' is payable to the relevant native title party prior to or contemporaneously with the doing of a future act. While native title parties are provided procedural rights in relation to most future acts that affect native title, it is common for many types of future acts to occur without an agreement with the native title party, including compensation payments.

Native title holders are entitled to compensation for most types of future acts, but bringing a compensation claim for a future act that occurred without an agreement including compensation payments can be time consuming and expensive. For many classes of future acts, the compensation for an individual act may be small, such that the native title holders may opt to bundle several acts into one compensation claim, further delaying the provision of compensation to native title holders. In contrast generally, if the same acts were to occur on land held in freehold, either the acts cannot proceed without compensation being agreed with the freehold landowner, or the freehold landowner would be paid compensation shortly after the act is done.

For some categories of future acts, there may be scope for fixed payments. Otherwise, there may need to be a calculation of the appropriate amounts using a prescribed formula, or determined by the NNTT. This could be based on royalty type percentages or with reference to what freehold landowners are actually be paid in similar circumstance. If native title parties are required to engage with this process, they must be funded to do so. These payments would not replace a right of compensation.

Payments provided under agreements

Proposal 12: Sections 24EB and 24EBA of the *Native Title Act 1993* (Cth) should be amended to provide that compensation payable under an agreement is full and final for future acts that are the subject of the agreement only where the agreement expressly provides as such, and where the amounts payable under the agreement are in fact paid.

In response to Proposal 12 of the discussion paper, YMAC supports this proposal. The proposal would offer significant benefits, particularly by enabling parties to finalise ILUAs on specific issues without requiring a full compensation assessment when the potential damage from a future act is unclear. This approach provides greater flexibility and efficiency in negotiations.

If parties seek a full and final settlement, they can stipulate this in the drafting. YMAC consider this also provides the native title party comfort by protecting against non-payment as compensation must actually be paid before it is considered full and final.

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?

Further, in response to Question 26 of the discussion paper, YMAC supports this amendment and welcomes the option of a new form of agreement to be available to native title parties. Commercial/common law agreements have always been an option for parties to record commercial terms. However, an agreement form that is made purely for the function of future act payments/compensation would provide consistency among native title parties and ease and safety to the process of negotiations.

Invalid future acts

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

In response to Proposal 13 of the discussion paper, YMAC supports the NTA being amended to provide a statutory entitlement to compensation for invalid future acts. It is prohibitive for native title parties to have to resort to common law remedies due to time and cost. A statutory entitlement for these acts which interfere with enjoyment of native title rights is appropriate.

Resourcing

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.

In response to Proposal 14 of the discussion paper, YMAC supports the principle of the establishment of a perpetual capital fund for providing core operations funding to PBCs. There should be further consultation about the most appropriate body to administer and disburse funding to ensure that there is input and decision-making from different regions, including the Pilbara and Yamatji regions. For PBCs to be able to carry out functions effectively, the amount of funding must be substantial. There is no point in setting up an inadequate fund.

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.

In response to Proposal 15 of the discussion paper, YMAC supports this proposal. As an NTRB, YMAC plays a key role in supporting and representing native title parties/PBCs in engaging in the future acts process. YMAC supports an increase to funding for this function to relieve the burden placed on PBCs in responding to future act notices and participating in future act processes. If this function is adequately funded then PBCs can have security knowing they will have support to participate in this process.

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.

Further, in response to Proposal 16 of the discussion paper, YMAC agrees the NNTT should have access to adequate funding.

Costs

Proposal 17: Section 60AB of the *Native Title Act 1993* (Cth) should be amended to:

- entitle registered native title claimants to charge fees for costs incurred for any of the purposes referred to in s60AB of the Act;
- enable delegated legislation to prescribe a minimum scale of costs that native title parties can charge under s60AB of the Act;
- prohibit the imposition of a cap on costs below this scale;
- impose an express obligation on a party liable to pay costs to a native title party under s60AB of the Act to pay the fees owed to the native title party; and
- specify that fees charged by a native title party under s60AB 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).

In response to Proposal 17 of the discussion paper, YMAC supports the proposed changes to improve the effectiveness of s60AB of the NTA.

In addition to the proposal, YMAC suggests the following changes in regards to s60AB of the NTA.

- The power of s60AB should be expanded to be able to recover costs associated with responding to Expedited Procedure objection matters. It is costly for PBCs and registered native title claimants to run Expedited Procedure objection applications, and it is not presently a cost that PBCs can recover under s60AB.
- Remove the prohibition under s60AB against PBCs recovering costs for future act determinations applications, and enable these costs to be recovered under s60AB. As with Expedited Procedure objections, these can be costly to PBCs and registered native title claimants, and s60AB(5) prohibits PBCs from recovering these costs.
- Remove the prohibition under s60AB against PBCs recovering costs for Federal Court proceedings, and costs associated with Federal Court appeals relating to future act matters to be recovered through s60AB.
- Change the charge opinion provider from the Office of the Registrar of Indigenous Corporations (**ORIC**) to the NNTT. The NNTT has more experience and understanding about native title future act processes, and is in a better position to understand the costs of responding to future act inquiries.
- Require that the person charged pay the fee within 14 days of the demand being made, and state that the PBCs or registered native title claimant may sue in the Federal Court or another court of competent jurisdiction for payment of costs. If payment is delayed by recourse to review of an opinion by the NNTT, then interest accrues on the fee while the opinion is provided. Under the present scheme, ORIC may take almost six (6) months to provide a final decision. The payment does not come due until 30 days after ORIC's final opinion. It is unclear if the PBC can commence an action in court if payment is not made.
- Require that 50% of fees are paid up front. Many meeting costs and other expenses that may be recovered under s60AB require up front expenses. Being able to recover these costs up front may reduce the burden on PBCs.

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?

Further, in response to Question 27 of the discussion paper, YMAC agrees with the ALRC's assessment that the lack of clarity around costs in future acts litigation has a freezing effect on native title parties bringing actions in this space. YMAC supports the NTA being amended to expressly mandate a modified no costs jurisdiction as outlined (p.64).

The Federal Court should have the power to award costs in favour of the native title party if successful. It should expressly state an adverse costs order cannot be made against a native title party unless their conduct has been unreasonable, vexatious or for an improper purpose. This amendment however will not be necessary if these costs can be claimed under an amended s60AB of the NTA.

Implementation

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).

In response to Proposal 18 of the discussion paper, YMAC agrees with this proposal.

Aboriginal and Torres Strait Islander cultural heritage

Question 28: Should the *Native Title Act 1993* (Cth) be amended to provide for requirements and processes to manage the impacts of future acts on Aboriginal and Torres Strait Islander cultural heritage, and if so, how?

In response to Question 28 of the discussion paper, YMAC recognises that reforms of the NTA are needed, these must align with ongoing negotiations for an updated *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (ATSIHPA).

YMAC understands the Commonwealth is working to ensure consistency across the Aboriginal Cultural Heritage Protection package and that the role of PBC's in managing and consulting on cultural heritage is already being addressed through the ATSIHPA updates.

YMAC supports amending the NTA to include robust requirements for managing the impacts of future acts on cultural heritage including the mandatory PBC consent for any future acts that may cause a significant impact on a culturally sensitive site and minimum mandatory conditions to manage the impact of future acts on cultural heritage.

YMAC suggests the objectives outlined in this question could be achieved by strengthening the requirements of s24MD(1)(c) of the NTA. Currently, this section requires that state or territory laws "make provisions in relation to the preservation of sites". YMAC proposes amending this to mandate that a law "will require preservation or protection" of any area or site unless the native title party expressly agrees to waive this requirement. This change would shift the emphasis from merely providing for preservation to actively requiring it, ensuring stronger protection for culturally significant areas.

Additional recommendations

In addition to the matters outlined above in response to the various questions and proposals put forward in the discussion paper, YMAC considers the following changes would also address many of the issues within the existing NTA future act structure. YMAC urges the following recommendations be adopted and included in ALRC's final report.

- Section 24IB(1)(b) of the NTA should be removed so that only pre-existing rights-based acts that are legally enforceable rights that can be done, not future acts based on other vague commitments or undertakings.
- Sections 24IC(2)-(4) of the NTA (i.e. permissible lease renewals) should be restricted to situations where the new authority is no larger, longer or contains any more rights than the authority it replaces. In other words, if a ten (10) year lease and a five (5) year lease are combined, the new replacement lease should not be able to be for more than five (5) years.
- Section 24JAA of the NTA (which allows acts in relation to public housing) should be removed. ILUAs can still apply but YMAC would be open to the ability to "fast-track" an ILUA process, for this act only, if agreed with a PBC.
- NTA should be amended so that future acts cannot extinguish native title except by agreement, or through a full right to negotiate process. The non-extinguishment principle should apply to ss24ID(1)(b), 24JB(2), and 24NA(3) of the NTA. The exceptions to the right to negotiate set out in ss26(1)(c)(iii)(A), 26(1)(c)(iii)(B), 26(2)(f) and 26(3) of the NTA should be removed.
- The non-extinguishment principle should apply to all public works (or future public works). When a public work is no longer required, there is no reason why extinguishment of native title is required, particularly as in many cases, the area of the former public work cannot even be identified.
- Section 24MD(6A) of the NTA provides native title holders the same procedural rights as freehold land owners in relation to acts that pass the freehold test. Procedural rights are defined as those rights that arise before an act is done. In many cases, freehold land owners are provided few or no rights before an interest is granted, but substantive rights while the interest coexists with the freehold. For example, in Western Australia, geothermal titles can be granted over freehold land without any notice to the freehold land owner. However, a person with a geothermal title may not conduct any activity on freehold land without first reaching an agreement with the freehold land owner, or the compensation otherwise being determined and paid. In some cases no activities can be done at all without the freehold land owners consent. Under s24MD(6A) of the NTA, native title holders are not required to be notified of the grant of a geothermal title, as it is not required for freehold land owners, but the holder of the geothermal title is not required to engage with native title holders about impact on Country and compensation after the title is granted as that is not a "procedural right". Section 24MD(6A) of the NTA should be amended to ensure that, in relation to future acts done through the freehold test, native title holders are provided all the rights afforded to the freehold land owners in relation to the act and any resulting interest, including those rights in relation to the resulting interest that arise after the act is done.
- Section 24MD(6B)(f)(ii) of the NTA should be amended so the State must not refer applications notified by way of a future act notice in accordance with s24MD of the NTA (e.g. miscellaneous licences) to the independent person after 8 months where there has

been no consultation by the proponent. Section 24MD(6B)(e)(ii) of the NTA requires the proponent to consult with the objector native title party about ways of minimising the act's impact on native title rights and interests. The native title party's rights will be compromised if the application is referred to the independent person prior to that consultation occurring. Further, preparing for a hearing before the independent person will be resource intensive for the native title party. YMAC suggests this section of the NTA be amended so that adequate consultation is a precondition to referral to the independent person.

- The right to negotiate should be extended to inter-tidal zones and offshore determined areas (s26(3) of the NTA). These areas are just as significant to native title holders as onshore areas.
- The inclusion of an expedited procedure statement under s29(7) of the NTA causes an act in the right to negotiate to be put in Expedited Procedure unless the native title party successfully objects, at considerable burden to the native title party. In *Yanunijarra Aboriginal Corporation RNTBC v State of Western Australia* [2025] FCA 490 Horan J found that whether a government party includes an expedited procedure statement is not a decision that is subject to judicial review. Following *Yanunijarra* a government party may attach the expedited procedure statement to any right to negotiate notice. Grants of mining leases, and some compulsory acquisitions are notified through the right to negotiate. Section 29(7) of the NTA should be amended such that the government party may only include an expedited procedure statement if they have assessed the act, and decided it is an act attracting the expedited procedure. This decision must be subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), or otherwise.
- Section 31(1)(a) of the NTA should be removed. It creates an additional workload and has no substantive function.
- As set out in the above response to Question 7, the right to negotiate process should be strengthened consistent with what was proposed in Schedule 2 of the *Native Title Amendment Bill 2012* (Cth). In particular, to:
 - legislate the meaning of “good faith negotiation requirements”, adapted from the *Fair Work Act 2009* (Cth);
 - require that the negotiations must include consideration of the effect of the doing of the act on the native title rights and interests; and
 - reverse the onus of proof on good faith, so that the grantee party, or the government party must demonstrate they have indeed negotiated in good faith.
- Under s36(2) of the NTA, when hearing a future act determination application, if the NNTT finds a negotiation party (other than a native title party) did not negotiate in good faith, the NNTT must not make a determination, but a further application may be made. This allows proponents and government parties to make repeated future act determination applications without having negotiated in good faith, and without fear of significant consequence if a finding is made against them. Section 36(2) of the NTA should be amended to empower the NNTT make a determination that an act must not be done if it finds that the proponent or government party did not negotiate in good faith.
- The ministerial override power in s42 of the NTA should be removed.

- The NTA should clarify that a proposed act only becomes a future act once the State's legislative processes have determined an act should be done. The State must not be able to notify future acts prematurely;
- Timeframes should be able to be shortened if all parties agree. For example, if an Expedited Procedure matter is entirely within a determination area, the native title party should be able to consent to the tenement being granted before the four (4) month notification period ends (if agreement is reached between the parties).
- Section 60AB of the NTA should be expanded to:
 - enable registered native title claimants (in addition to PBCs) to also recover costs;
 - enable PBCs to charge for complying with native title decision making processes associated with future acts; and
 - enable registered native title claimants and PBCs to charge for costs incurred in responding to acts in the expedited procedure.
- The NTA should be amended to empower PBCs to grant leases to any person for any purpose over exclusive native title land that is not covered by freehold, a lease, or a reservation. The granting of such a lease would be a high level native title decision under the Regulations. Before the PBCs could grant the lease, it would first need to consult with, and obtain the consent of, the common law holders. Empowering a PBCs to grant a lease over exclusive native would allow native title holding groups to better manage internal allocations of rights, and also enable native title holding groups to proactively develop economic opportunities on their Country.

Definitions and acronyms

ATSIHPA	<i>Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)</i>
ALRC	Australian Law Reform Commission
CATSI Act	<i>Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)</i>
Cth	Commonwealth
Expedited Procedure	the current s29 NTA expedited procedure provisions
FPIC	free, prior and informed consent
ILUA	Indigenous Land Use Agreement
NNTT	National Native Title Tribunal
NOPSEMA	National Offshore Petroleum Safety and Environmental Management Authority
NTA	<i>Native Title Act 1993 (Cth)</i>
NTMP	native title management plan
NTRB	Native Title Representative Body
ORIC	Office of the Registrar of Indigenous Corporations
PBCs	Prescribed Bodies Corporate
Regulations	<i>Native Title (Prescribed Bodies Corporate) Regulations 1999 (Cth)</i>
RNTBCs	Registered Native Title Bodies Corporate
UNDRIP	United Nations Declaration on the Rights of Indigenous People
WA	Western Australia
YMAC	Yamatji Marlpa Aboriginal Corporation

YMAC contacts

Simon Hawkins – Chief Executive Officer

Phone: (08) 9268 7000

Email: [REDACTED]

Jane Mitchell – Communications Manager

Phone: (08) 9268 7000 or [REDACTED]

Email: [REDACTED]

General YMAC contact information

Please find the contact information for YMAC's offices below.

Perth

Level 8,
12 The Esplanade
Perth WA 6000
PO Box 3072
249 Hay Street
East Perth WA 6892
T 08 9268 7000

Geraldton

144 Flores Road
Webborton WA 6530
PO Box 2119
Geraldton WA 6531
T 08 9965 6222

Hedland

8 Manganese Street
Wedgefield WA 6721
PO Box 2252
South Hedland WA 6722
T 08 9160 3800

Broome

Shop 2/24
Clementson St
Broome WA 6725
PO Box 2059
Broome WA 6725

ICN 2001

