

NT Government Submission – Discussion Paper: Review of the Future Acts Regime of the Native Title Act 1993 (Cth) (2025)

Document title	NT Government Submission – Discussion Paper: Review of the Future Acts Regime of the Native Title Act 1993 (Cth) (2025)
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Acronyms	Full form
ALRA	<i>Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)</i>
ALRC	Australian Law Reform Commission
ILUA	Indigenous Land Use Agreement
NTMP	Native Title Management Plan
NTRB	Native Title Representative Bodies
NNTT	National Native Title Tribunal
NTA	<i>Native Title Act 1993 (Cth)</i>
PBC	Prescribed Bodies Corporate

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Introduction

The NT Government welcomes the opportunity to make a submission in response to the Australian Law Reform Commission's (ALRC) Discussion Paper: Review of the Future Acts Regime of the *Native Title Act 1993 (Cth)* (NTA).

NT Government Position

The NT Government supports measures to improve the simplification, efficiency and effectiveness of the future acts regime of the NTA. Streamlining, simplifying and improving processes would assist all parties to the native title system.

However, there needs to be adequate resourcing and funding for stakeholders including native title parties and state/territory governments is a key factor for improving the future acts regime.

There are significant human and financial resources challenges due to the extensive work involved in navigating native title processes. There are shortages of suitably qualified people across all aspects of the native title sector.

Some proposals of the ALRC could have positive impacts, such as better resourcing of Prescribed Bodies Corporate (PBCs) and expanding the use of standing instructions.

A number of the ALRC's proposals have raised concerns about potentially worse outcomes for participants in the future acts regime, or at least it is unclear what the outcome will be until more detail is available on how some proposed high level reforms would work in practice.

In particular, the NT Government opposes Native Title Management Plans (NTMP) and an Impact-Based Model unless there are further details and analysis of the two proposals.

If an Impact-Based Model were to be considered, there would need to be exceptions to ensure that public infrastructure and low impact acts are not subject to increased regulatory burden.

It is critical that any proposed reforms strike a balance between the rights of native title holders, the public interest, and other key stakeholders, especially concerning the development and maintenance of essential infrastructure.

Key issues: Questions 6-28 and Proposals 1-18

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?

There are existing mechanisms under the NTA which provide pathways for native title holders to negotiate alternative procedures for how future acts can be validated which replace the future acts regime under the NTA.

Alternative Procedures ILUAs

One example is an alternative procedure agreement Indigenous Land Use Agreement (ILUA) between native title holders and the relevant government for an area, which may set out the manner of exercise of native title rights and interests and an agreed procedure for future acts done by the government in the agreement area (in addition to other matters). Alternative procedure ILUAs can be made where there is no determination for the area.

PBCs may also negotiate with the government in relation to any of those matters in an ILUA. This may address an agreed alternative procedure for future acts and may provide for the extinguishment of native title rights and interests.

However, as far as the NT Government is aware, no alternative procedure ILUAs have been registered in Australia - so it is unclear that an additional mechanism under the NTA would be of further utility.

Consideration should be given to increasing the use of existing mechanisms such as alternative procedure ILUAs.

Concerns

However, the following matters raise concerns for the NT Government:

- The ability to declare no-go zones in a NTMP area.
- NTMPs could impose an additional layer of complexity to an already complex area of law and introduce the potential for a patch work of different requirements across the country which may represent an increase in compliance costs and a decrease in certainty.
- The NT Government (and other legal interest-holders in land and waters) should be consulted and consider whether to approve a “plan”. This would ensure that the plan would not go beyond the determined rights or have unintended consequences.
- It is unclear as to whether the NTMPs could also trump procedures set out in the NTA regarding low impact acts.
- That a PBC might unilaterally set out processes, procedures and other rules regarding low impact future acts is opposed.

Cultural Mapping

Native title holders should be encouraged to identify areas of economic potential in their traditional lands and invite industry participation in development.

If a purpose of the plans is to share information upfront with a proponent via a cultural mapping process for a large-scale project, then this is supported in principle if it does not add an extra regulatory burden for the proponent and increase their operational and investment costs.

If management plans are to be introduced, there will need to be sufficient federal funding available to create, register and refresh them, noting that they will need to be a live and evolving document.

They should be limited to prescribed content, be easily read and interpreted, and be consistent with the NTA as a whole.

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?

There is now significant and substantial jurisprudence regarding the requirement to act in good faith in the “right to negotiate” under the current NTA, and more generally in how other parts of the right to negotiate are to operate. It is not clear that codifying those requirements in the NTA would improve procedures and outcomes. There is a risk that introducing additional legislative complexity may:

- increase engagement costs for all parties in an area where transaction costs are already very high
- require new case law development to create certainty

Irrespective of the proposed reforms to the NTA, the NT Government would support a whole-of-system approach that ensures greater guidance is provided to proponents, governments, native title holders and representative bodies to promote knowledge, understanding and capacity to encourage best practice engagement with native title holders.

PBCs should be empowered to participate on an equal footing in negotiations. Resources should be made available to strengthen PBC governance and increase their capacity (including ensuring appropriate remuneration is available to negotiation parties). This would ensure that PBCs are able to fully participate in negotiations and facilitate more cost-effective, efficient and timely agreement-making.

If standards are to be introduced, they might include provisions relating to timeliness and consistency in the negotiation process to ensure that all parties progress with negotiations in a timely manner. Dispute resolution processes and defined roles and responsibilities may also be helpful.

However, again it is noted that the native title system is not adequately funded or resourced, and to implement new standards without injecting more money into the system would be problematic.

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.

This proposal is supported.

This is particularly important for smaller projects, which often compete with larger projects for priority, resources and attention.

It would be appropriate to provide a mechanism for native title holders to give PBCs standing instructions to deal with smaller projects that (for example) fall under the relevant threshold of acceptable impact for future acts (as determined by the native title holders) to facilitate cost and time efficient agreement making in relation to those acts.

Proper consultation, consent and review processes would need to be in place to ensure the standing instructions are dependable, reliable and up to date.

The scope of PBC standing instructions (including any applicable limitations or conditions) should be notified to proponents and governments.

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?

It is not clear that legislative reform to impose additional requirements for ancillary agreement-making would deliver better outcomes for native title holders and other participants. Parties to ancillary agreements should have the freedom to contract independently and not be bound by the NTA.

The NT Government would support a whole-of-system approach that ensures greater guidance is provided to proponents, governments, native title holders and representative bodies to promote knowledge, understanding and capacity to encourage best practice engagement with native title holders, especially in agreement making.

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.

Agreed in principle that PBCs should have the right to obtain information relevant to their members' native title rights and interests and that pre-determination agreements should be automatically assigned to the PBC post-determination.

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?

See above comments. It is important that succession and assignment is clear and certain for the benefit of all parties.

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.

Supported, subject to the views of the parties to the ILUA being sought and taken into account prior to removal.

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.

Conditional support.

Historical ILUAs available on the Tribunal's register are a good resource into the kinds of ILUAs that native title parties, government and/or proponents have successfully negotiated.

Removing obsolete ILUAs may prevent administrative confusion and avoid delays in tenure assessment processes, but the consequences of removing the information from being publicly available, and the views of the parties to the ILUA proposed to be removed, should be considered.

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?

Generally, native title holders and their representatives should have the flexibility to tailor contractual arrangements to the parties' circumstances.

Minor amendments to ILUAs may already be made in a limited number of circumstances (e.g. to change contact details and amend area descriptions [provided the agreement does not cover a greater area of land]).

Additional flexibility may be useful given that projects often need minor technical amendments as systems are built and the project develops – a simplified amendment pathway will reduce unnecessary procedural burden where minor substantive native title impacts arise.

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.

Supported in principle.

Parties to an ILUA should be empowered to agree the appropriate forum for dispute resolution, and that could include the option to seek a binding determination by the NNTT.

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?

Partly supported.

Tribunal arbitration options may offer more timely resolution of disputes that otherwise delay the delivery of public infrastructure projects.

However, parties should still have the option of applying to the courts or have alternative mediation and arbitration options to resolve disputes. That is, the matter should only be referred to the NNTT if agreed by all parties to the agreement.

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?

Supported in principle.

This would be useful, especially if an ILUA provides for:

- an agreed alternative procedure for future acts - that information should be made publicly available,
- validation of certain acts by the ILUA - that information should be publicly available, and
- a certain method for or constraint on decision making - that information should be publicly available.

This proposal should not require the sharing of any sensitive (cultural or commercial) information.

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?

As a matter of principle, reforms that enable the rightful native title holders to receive the benefits of a positive determination are supported.

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?

General comments

It is noted that the proposal is based on other “impact” based models in environmental and other protective legislation, and that the intention is to solve issues with the current categorisation of future acts which is sometimes complex and ambiguous.

The beneficial aspects of the NTA and the rights of native title holders must be balanced with the interests of other stakeholders and the broader public – particularly in relation to the facilitation of lower-impact activities and public infrastructure – and the impacts on people, businesses and industries.

It is not clear that the current high-level proposal would improve clarity for all parties, facilitate clear and time efficient pathways or foster better engagement and agreement-making.

As a matter of general principle, it makes sense that multiple future acts relating to a common project should be approached as a single project. A project approach would potentially reduce consultation and engagement fatigue. However, it is not clear that this proposal would do so.

Any impact-based model would need substantial further consideration of the categories and details. Any model should allow for certain legislative actions, public infrastructure and other low impact acts to proceed as normal without additional requirements.

Any large-scale reform of the future acts regime would, in the short term, greatly increase compliance costs as stakeholders adjust to the new regime.

Industry Impacts

The proposed model will significantly burden primary industries.

There would be new procedural steps, new abilities for native title parties to challenge classifications, more legal appeals to the NNTT delaying projects and the potential for unequal application of the procedures across jurisdictions.

The industries most affected will be mining and resources, energy and renewables, infrastructure and transport, and agriculture and water.

Retention of low impact and public infrastructure provisions

Subdivisions L (pre-determination) and subdivision K are well understood by the vast majority of native title stakeholders and are regularly used by governments and proponents and should not be repealed unless equivalent processes are kept in the NTA.

Subdivision L should be preserved and expanded so that low impact acts may be undertaken post-determination (subject to consultation and an entitlement, if appropriate, to compensation).

The scope of activities contemplated in Section K should be reviewed, modernised and broadened to capture the types of projects regularly undertaken by governments (e.g. extended to power generation sites and not just transmission, and other services or facilities for legitimate public purposes such as public recreation).

Non-extinguishment principle

Any proposal to re-organise future acts around impact on native title rights and interests would need to address the consequences of the non-extinguishment principle applying to the act.

Compensation

The NTA could be amended to more clearly define the principles which are to be applied to compensation.

Standing instructions and notifications

Where the native title holders have given their PBC standing instructions in relation to certain acts, the native title holders should be able to opt-out of notification of some of those types of acts to decrease the administrative burden of receiving many similar notices.

Renewals

There are only a small number of renewals that comprise a future act under the NTA. That class of future acts should not be expanded. For example, the renewal (or regrant) of an exploration licence or a mining lease has no greater impact on native title rights and interests than the original grant.

This proposal would certainly lead to an increase in administrative burden for governments and costs to industry.

The NT Government opposes any proposal to include renewals of mining and petroleum titles as a new class of future act.

Question 15: If an impact-based model contemplated by Question 14 were implemented, should there be exclusions from that model to provide tailored provisions and specific procedural requirements in relation to: a. infrastructure and facilities for the public (such as those presently specified in s 24KA(2) of the Native Title Act 1993 (Cth)); b. future acts involving the compulsory acquisition of all or part of any native title rights and interests; c. exclusions that may currently be permitted under ss 26A–26D of the Native Title Act 1993 (Cth); and d. future acts proposed to be done by, or for, native title holders in their determination area?

Refer to response above.

If an impact-based model is adopted, then there should be exclusions or tailored provisions and specific requirements (i.e. to be consulted) in relation to future acts relating to infrastructure and projects that facilitate the doing of those acts which are undertaken in the public interest.

There should also be exclusions for future acts done by or for the benefit of native title holders in their determination area, and which reflect where native title holders have given standing instructions to their PBC to deal with certain acts.

If the proposal proceeds, an impact-based model must not prevent/interfere with grants that provide necessary infrastructure for the public.

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?

No. An expansion of consideration of the impacts that future acts may have to areas outside the project footprint would increase uncertainty.

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?

It would be helpful for the NTA to clarify the circumstances in which legislative acts may be future acts.

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

- a. As soon as practicable, and no later than two months after a future act attracting the right to negotiate is notified to a native title party, a proponent must provide the native title party with certain information about the proposed future act.
- b. Native title parties would be entitled to withhold their consent to the future act and communicate their objection to the doing of the future act to the government party and proponent within six months of being notified. From the time of notification, the parties must negotiate in accordance with negotiation conduct standards (see Question 7). The requirement to negotiate would be suspended if the native title party objects to the doing of the future act.
- c. If the native title party objects to the doing of the future act, the government party or proponent may apply to the National Native Title Tribunal for a determination as to whether the future act can be done (see Question 18).
- d. If the National Native Title Tribunal determines that the future act cannot be done, the native title party would not be obliged to negotiate in response to any notice of the same or a substantially similar future act in the same location until five years after the Tribunal's determination.
- e. If the National Native Title Tribunal determines that the future act can be done, the Tribunal may:
 - require the parties to continue negotiating in accordance with the negotiation conduct standards to seek agreement about conditions that should attach to the doing of the future act;
 - at the parties' joint request, proceed to determine the conditions (if any) that should attach to the doing of the future act; or
 - if the Tribunal is of the opinion that it would be inappropriate or futile for the parties to continue negotiating, after taking into account the parties' views, proceed to determine the conditions (if any) that should attach to the doing of the future act.
- f. At any stage, the parties may jointly seek a binding determination from the National Native Title Tribunal on issues referred to the Tribunal during negotiations (see Proposal 7). The parties may also access National Native Title Tribunal facilitation services throughout agreement negotiations.
- g. If the parties reach agreement, the agreement would be formalised in the same manner as agreements presently made under s 31 of the Native Title Act 1993 (Cth).
- h. If the parties do not reach agreement within 18 months of the future act being notified, or within nine months of the National Native Title Tribunal determining that a future act can be done following an objection, any party may apply to the National Native Title Tribunal for a determination of the conditions that should apply to the doing of the future act (see Question 19). The parties may make a joint application to the Tribunal for a determination of conditions at any time.

Not supported.

Generally, it is important that there is a mechanism for objections to be identified, heard and resolved as fairly and efficiently as possible.

Measures to increase certainty of outcome are welcome. All participants in the future act system (including the NNTT) need to be adequately resourced to effectively engage in the process.

It may be problematic to allow native title holders to withhold consent (and the decision to then be with the NNTT to make a determination). The proposal needs to set out when consent may be withheld. Consent should not be able to be withheld for *any* reason. The NTA should also state that consent cannot be withheld in relation to any act that is done in the public interest.

Any extension of the timeframe beyond 6 months may cause detriment to those non-native title parties who have sought to negotiate in good faith and who wish to avail themselves of a determination.

Proceedings before the NNTT can be adversarial and expensive, and determinations can take a long time. The NTA could be amended to give greater clarity to the matters which the NNTT must consider in making determinations.

Under this proposal, while there would be a legitimate interest in discouraging multiple or repeated future act applications, it seems that the nomination of a 5 year exclusion period is excessive and doesn't reflect that projects may re-defined or re-designed for many reasons (including stakeholder feedback) which may lead to stakeholders, including native title holders, changing their views in relation to a particular project or future act.

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.

Supported.

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?

See comments above regarding the need to balance the rights and interests of native title holders with the rights and interests of stakeholders and the broader public. This issue requires further detailed consideration and consultation.

The test could be similar to the criteria set out at section 39: which includes the effect of the proposed act on any native title rights and interests, the interests, proposals, opinions or wishes of the native title parties in relation to the management, use or control of the lands or waters concerned, the economic or other significance of the proposed act to Australia and to the State or Territory concerned, any public interest in the proposed act proceeding and any other matter that the arbitral body considers relevant.

The objection must be qualified and subject to a reasonableness test.

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?

See comments above.

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.

Generally, the NT Government considers that it would be preferable for guidance on the liability and calculation of quantum of compensation for impacts on native title rights and interests to be provided by the federal legislature in the NTA, rather than relying on the NNTT to determine those matters.

The provisions that provide that profit-sharing conditions are not to be determined by the NNTT should be retained. Government-led projects are typically non-commercial or public-good infrastructure. Profit-sharing conditions are rarely applicable. Industry projects and agreements often have commercial-in-confidence information restrictions.

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

Not supported. There is need for reform, but not repeal.

When introducing the Bill that became the NTA, the Prime Minister said that exploration licences were one form of tenement likely to attract the expedited procedure, and that subsequently, if a viable resource were identified, the RTN would apply to the grant of the mining lease to develop that resource.

In the Northern Territory, the expedited procedure is most often used for resources exploration titles.

Issues with section 32

The Expedited Procedure process is not working as it was intended to.

The processes can be time and resource intensive for all parties, and there can be very long periods between the closing of an inquiry and a determination by the NNTT. It also seems that the PBCs operating in the Northern Territory are not adequately funded to the intensive work. The processes are difficult for junior mineral explorers or small explorers, and it is an expensive and difficult task for native title rep bodies to receive and consider notifications, obtain instructions, prepare submissions and evidence and proceed to a determination.

As is set out elsewhere in this submission, there is a need to balance the rights of native title holders with the rights and interests of non-native title holders.

The expedited procedure reflects a balance between the public interest in the efficient development of resources and the interests of native title holders. It implements a policy that low impact future acts “can proceed through an expedited process”.

It would be wrong to construe every part of the NTA (particularly exceptions such as those relating to the expedited procedure) in an uncritically broad way, as to do so would distort this balance struck by the legislature.

Exploration activities may involve activities which have a minimal impact (or with conditions, a minimised impact) on native title rights and interests. For example, exploration activities may be localised and intermittent in nature, and not involve ground disturbance.

Protection of sites of significance in the Northern Territory and other jurisdictions

In the Northern Territory there is a robust legislative regime for the protection of sacred sites under the ALRA (and processes such as Aboriginal Area Protection Authority searches and certificates, and the ability to negotiate agreements directly with custodians). Accordingly, it is not clear that the additional layer of the NTA is required for the protection of the native title right to “protect sites of significance” at the exploration stage.

It should be noted that other jurisdictions have developed measures outside the NTA to facilitate the grant of exploration titles whilst managing impacts on native title and sacred sites and cultural heritage. Those include the regional standard heritage agreements in Western Australia and the [native title protection conditions in QLD](#).

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

Yes.

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?

(a) No. Non-claimant applications are an important right which provide certainty to non-native title parties in circumstances where native title rights and interests may not exist.

(b) Native title claimants should be adequately resourced to respond to non-claimant applications. In the alternative, consideration should be given to extending timeframes.

(c) Whilst it is appropriate for the non-claimant application to require details of the steps the applicant has taken to make inquiries regarding the existence of native title holders (including consulting the Native Title Representative Bodies (NTRB)), establishing there are no native title holders would place an impractical and costly burden on proponents or government parties to undertake their own historical and anthropological research, or engage anthropologists (in respect of which there is a nation-wide skills shortage) to undertake fieldwork to establish that there are no native title holders (even to a lower civil standard).

Aboriginal people may be very concerned with a proponent or government collecting their information, including sensitive cultural information, for this purpose.

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

Not supported.

Procedural rights are important, but minor non-compliance must also be balanced with the need for certainty in the future act process.

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?

If those changes are made, yes – the NTA should expressly address the consequences of invalidity.

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?

Conditionally supported, depending on the detail of the final proposal.

Clear rules around what information must be included in a future act notice would improve consistency and understanding across jurisdictions.

Prescribed content requirements would help ensure notices are meaningful and provide sufficient detail for native title parties to make informed responses.

There should also be clarity around when the information is to be provided to ensure it aligns with key decision points in the assessment or approval process.

Future act notices should be standardised and there should be clear guidelines regarding their content. This includes maps and sufficient detail for the native title parties to clearly identify the proposed act and the power being relied upon. This could reduce confusion caused by incomplete or premature notices and promote more constructive engagement.

There should be further consideration on whether those requirements should be set in the NTA or elsewhere. It would be preferable to retain some flexibility given the changing pace of technology and communications.

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.

Yes.

A central register could assist program planning, monitoring cumulative impacts and ensuring cross-agency coordination.

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?

It is acknowledged that the timing of payments contemporaneously to when the act is done would have administrative benefits. However, payments may be deferred for a variety of reasons. For instance, a proponent may seek to enter into future act agreements with one or more native title claimant parties in the context of a contested claim area negotiation. A term of the agreement may be that payments would be deferred pending the outcome of a determination.

The timing of payments should generally remain a matter of negotiation for the proponent and native title party.

The law relating to compensation is unsettled. It is not clear that the NTA should prescribe additional commercial payments where it may be more appropriately dealt with in a negotiation between the parties. As set out above, it is not clear that the NNTT is the appropriate body to determine commercial payments to native title holders.

The NNTT has noted on numerous occasions the lack of clarity and guidance regarding the award of money that may be made by the NNTT in the context of future acts.

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)?

Considerations should be given to set appropriate guidance on total compensation for native title rights and interests (refer section 51A of the NTA).

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.

No comment.

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?

Consideration should be given to permitting PBCs to enter into non-ILUA contracts for consent to, validation of, and payment of compensation in relation to, future acts. This is particularly the case where the native title holders have provided the PBC standing instructions which address those future acts.

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

The law surrounding payment of compensation around invalid acts is uncertain. In the Timber Creek Full Court decision, the Court found they could not properly consider the compensation claim for the invalid acts on the basis that the claim “lacked a clearly articulated basis” (see Griffiths (2016) 337 ALR 362 at [446] and [448]).

While the Commonwealth Government could legislate to confirm compensation or damages for invalid future acts, the uncertainty of native title compensation remains and will only improve over time as the jurisprudence evolves.

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.

Agree that the Commonwealth should adequately fund PBCs to carry out their responsibilities.

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.

Agree that the National Indigenous Australians Agency should ensure that NTRBs and Native Title Service Providers are adequately funded to support PBCs to carry out their responsibilities.

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.

Support the NNTT being properly funded to provide facilitation and mediation support to users of the native title system.

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).

Not supported. The better course is for the Commonwealth to ensure that PBCs and NTRBs are adequately funded to carry out all their responsibilities under the NTA.

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?

Not supported.

Matters arising under the NTA should remain a no-costs jurisdiction. The provisions at section 85A should be retained.

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).

Not opposed, although it should be noted that several Indigenous advisory groups have been established in the past with respect to proposed amendments to the NTA with mixed success.

If this proposal proceeds, there must be a clear mandate that the First Nations advisory group participates solely in an advisory capacity and considers feedback from all affected stakeholders.

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?

Cultural heritage is currently managed under state-based legislation.

Any amendments to the NTA to address cultural heritage should not create a duplication of regulation.

However, amendments may be appropriate to ensure that low impact future acts and expedited procedure acts may proceed with appropriate protections that reduce the need for native title parties to object.