

SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION

Review of the Future Acts Regime: Discussion Paper

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Introduction

1. The Kimberley Land Council (**KLC**) is an Aboriginal organisation established in 1978 for the purpose of working for and with Kimberley Traditional Owners to get back Country, care for Country and get control of the future. As the native title representative body (**NTRB**) for the region since 1999, the KLC has achieved native title determinations across 97 per cent of the Kimberley.
2. The KLC provides legal support and representation to native title parties in the Kimberley in relation to future acts as part of its functions under the *Native Title Act 1993* (Cth) (**NTA**). There are currently 32 registered native title bodies corporate (**PBCs**) and five registered native title claimants in the Kimberley. The KLC also, as an Aboriginal member-based community organisation, has a mandate and responsibility to advocate for the rights of Kimberley Aboriginal people in relation to their land, waters and cultural heritage.
3. The KLC welcomes the opportunity to provide this submission to the Australian Law Reform Commission (**ALRC**) in response to the *Review of the Future Acts Regime: Discussion Paper May 2025* (**Discussion Paper**). The submission is supplementary to KLC's comprehensive submission on the *ALRC's Review of the Future Act Regime: Issues Paper* (**KLC Issues Paper Submission**).
4. The submission considers the proposals and questions in the Discussion Paper and provides additional submissions on the NNTT's performance of its future act functions and on carbon, nature repair and biodiversity projects. The submission provides feedback centered on the experiences and priorities of Kimberley native title holders and the KLC as NTRB for the Kimberley. The KLC supports the majority of the ALRC's proposals. Where the KLC does not support a proposal, the KLC has provided an explanation for its position. Several of the ALRC's proposed reform components will require further development with stakeholders within the sector.
5. The importance of increased and sustained resourcing of PBCs and NTRBs and native title service providers (together, **NTRB/SPs**) to support effective reform of the future acts regime cannot be overstated. PBCs are an essential component of the future acts regime (and broader native title system), and yet, to date, they have not been supported up to properly perform their native title functions at the most basic level, let alone prosper. As highlighted in the KLC Issues Paper Submission, current PBC funding arrangements are severely inadequate – more than half of Kimberley PBCs are currently unstaffed and receive only PBC basic support funding, which is sufficient only to meet basis compliance under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (**CATSI Act**). Alongside significantly increased funding for PBCs, increased resourcing for NTRB/SPs is essential to support PBC capacity-building. Many Kimberley PBCs still need dedicated support to build their capacity over time. As the NTRB for the region, the KLC is best placed to provide this transitional support and should be resourced appropriately to do so.
6. The KLC wishes to highlight this context at the outset of the submission, as an overhaul of PBC and NTRB/SP resourcing is a fundamental enabler of effective reform of the future acts regime. The submission reiterates the importance of improved resourcing in relation to several of the proposals and questions raised in the Discussion Paper.



ALRC proposals

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.

7. The KLC supports this proposal. The permitted use of standing instructions should be extended to Indigenous Land Use Agreements (ILUAs) and section 31 agreements.
8. The alternative consultation process provided for in regulation 8A of the Native Title (Prescribed Bodies Corporate) Regulations 1999 (Cth) (**PBC Regulations**) should also be extended to all native title decisions and to the consent requirement in regulation 8(1).¹ PBCs require clarity and certainty as to the form and process for satisfactory consultation and consent of the native title holders, and allowing native title holders to set out a consultation process in the PBC's constitution will help provide this. It would also provide greater transparency for members and native title holders on the consultation process and increase the accountability of PBC decision-makers, and it may reduce internal disputes and provide efficiencies in the long term. Further, native title holders should be able to set out consultation processes for all native title decisions that align with cultural protocols, including any traditional decision-making processes, that reflect the intramural distribution of rights within the broader native title holding group.
9. PBCs require additional support and resources to consult with and obtain the consent of the native title holders in order to set up standing instructions and alternative consultation procedures in their constitutions (also referred to as Rule Books in this submission). This will produce efficiencies in the long term; however, significant investment is required to set up these processes. PBCs need resource support, such as access to qualified personnel to facilitate meetings and develop these instructions and procedures, as well as funding to conduct multiple meetings with the native title holders.
10. There should also be amendments to provide that the government party or the proponent for the relevant future act must cover the costs of the PBC consulting with and obtaining the consent of the common law holders, where the PBC is required to do so in order to agree to that future act being done. This is an important step and can be a very time- and resource-intensive process for PBCs, particularly where there is large body of native title holders who live in multiple locations. The future act is done for the benefit of the relevant proponent and/or government party as against the property rights of the native title party; however, in the KLC's experience, government parties and proponents are often unwilling to cover these costs either partly or in full.

¹ There is some uncertainty as to whether reg 8(4) allows the native title holders to agree and adopt a decision-making process that delegates certain categories of decisions, including high level decisions, to a smaller body of decision-makers. On its face it appears to, however this is potentially in tension with reg 8(8) and reg 8A, which are constrained to low level decisions, such that a court may conclude that reg 8(4) is similarly constrained.



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.

11. The KLC supports this proposal.

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.

12. ILUAs may contain clauses that survive the termination of the agreement, and it may also be helpful for parties to refer back to old agreements for various reasons. As such, the KLC suggests that ILUAs that have come to an end remain on the Register, but that these ILUAs are identified on the Register separately to ILUAs that remain on foot.

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

13. The KLC supports this proposal; however, rather than being removed, such agreements should be identified on the Register as expired, for the reasons identified in the above paragraph.

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.

14. The KLC supports this proposal, as the National Native Title Tribunal (NNTT) provides a cost-efficient and accessible forum for disputes as compared with other available forums. However, the KLC considers there is a strong and urgent need for a review of the NNTT's practices and performance of its future act functions to ensure the NNTT is making determinations in a fair and just manner, and in accordance with its merits decision-making obligations – see further [112]-[120] below.



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:
 - a. 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;
 - b. at the parties' joint request, proceed to determine the conditions (if any) that should attach to the doing of the future act; or
 - c. 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.
15. The KLC supports the mandatory requirement for the provision of certain information about the future act. This information should include:



- a. the nature, duration, scope, timing and objective of any proposed project or activity;
 - b. the locality of areas that are likely to be affected and suitable maps, which may include appropriate scale topographic maps, and/or aerial/satellite images, showing with reasonable accuracy where relevant areas;
 - c. the techniques, infrastructure and major items of equipment to be used for any project or activity;
 - d. details about the proponent and the personnel (including staff, consultants, partners) likely to be involved in the project or activity on the ground;
 - e. an assessment of the likely economic, social, cultural and environmental impacts of the project or activity, including the likely impacts on native title rights and interests, and the provision of any reports or information about these impacts held or commissioned by the proponent or government party;
 - f. any water, timber, vegetation, soil (including ochre) or other natural resources proposed to be obtained from the area;
 - g. the estimated costs and projected profits of the project or activity; and
 - h. any other relevant information in relation to the project or activity.
16. There should be an ongoing requirement on the government party and the proponent to provide any additional information or information relating to a change in the project or activity throughout the negotiation process. This could be incorporated into the mandatory conduct standards (see Question 7 below) or as a separate requirement as part of Proposal 6(a).
17. The KLC supports the inclusion of the native title party's right to object to the doing of the future act (at Proposal 6(b)). However, the **native title party must have the right to object for the entirety of the negotiation period**, until either an agreement is reached as to the doing of the act, or until the NNTT determines the conditions (if any) that attach to the doing of the act following the 18-month negotiation period. There are several compelling reasons for this:
- a. First, the current right to negotiate scheme's ineffectiveness stems largely from unequal bargaining positions of the parties. Research consistently shows that balanced negotiating power leads to more durable and mutually beneficial agreements. When native title parties can object throughout the negotiation period, it mirrors the proponent's ongoing right to seek a determination, creating genuine parity in the process. Under the ALRC's proposal, native title parties lose their primary leverage mechanism after six months, while proponents and Government parties retain the right to seek a determination that the act be done with or without conditions, and without or without the native title party's consent – but with no option for the NNTT to conclude that the act not be done.² This severely undercuts the bargaining power of the native title party after the six-month period.
 - b. Second, in the KLC's experience, a native title party's concerns and objections to an act can often

² The KLC understands that under Proposal 6, the right to object in (b) is the only point at which the native title party is able to object to the doing of the act, as after this point they would no longer have the option to seek a determination through the NNTT that the act not be done.



be addressed through project modifications and heritage and native title protections agreed by the proponent. A six-month objection window is not enough time for the parties to negotiate these matters to address the native title party's concerns and will likely lead to objections being lodged prematurely to preserve the native title party's position, even when they might otherwise be open to negotiation. An extended timeframe will reduce the likelihood of defensive objections and allow an extended period of meaningful engagement between the parties to build relationships and negotiate terms that work for all parties.

- c. Third, six months is not enough time for the native title party to consider and receive information about the act and will likely lead to more objections as a result. The native title party's decision on whether to object will depend on several factors that may require advice from senior Traditional Owners and cultural advisors and other experts such as environmental consultants. Further, projects such as mining and public works are dynamic, and significant details often emerge beyond six months from notification as projects develop. It is unrealistic to expect that native title parties will be in a position to make a properly informed decision about whether or not to object after 6 months, particularly if not all project information is available, and the native title party has not had the benefit of independent advice on whatever project information is available. Allowing time for the native title party to properly consider these factors and a fully developed project before objecting will likely lead to less objections being lodged by native title parties.
 - d. Finally, an extended objection period will improve systemic efficiencies and long-term gains. The current model will encourage early objections. Extended timeframes encourage collaborative rather than adversarial and defensive approaches to negotiations, and joint referrals to the NNTT for specific issues in dispute in negotiations can resolve genuine impasses (as per Proposal 7). All parties will benefit from reduced legal costs, fewer post-approval disputes, reduced administrative burdens, and stronger relationships. The NNTT gains efficiency through fewer but better-informed objections.
18. **Future act determinations by the NNTT, with or without conditions, should be a last resort.** Comprehensive agreements will produce better outcomes than imposed conditions. The NNTT has historically displayed an unwillingness to impose substantive conditions in future act determinations that have not already been agreed by the negotiation parties, to the detriment of the native title party.³
19. **There should be additional pre-conditions that must be met before the proponent or government party is able to apply for a future act determination that the act be done.** The 18-month negotiation period is a welcome extension of the current six-month minimum timeframe; however, there should also be requirements that, prior to a determination application, negotiations are substantially advanced in their content and the proponent and the government party have positively satisfied the mandatory conduct standards, including the duty to negotiate in good faith (see further the KLC's response to Question 7).
20. **The burden must be on the party seeking that the future act be done** where the native title party objects, given that all future acts, by definition, impact native title rights and interests. As to the test or criteria for determining whether a future act can or cannot be done, see the KLC's response to Question

³ See further T Corbett & C O'Faircheallaigh, 'Unmasking the Politics of Native Title: The National Native Title Tribunal's Application of the NTA's Arbitration Provisions' (2006) 33 UWAL Rev 153 at 162-166.



18 below.

21. In addition to these reforms, the NTA should be amended to incorporate the following elements in the right to negotiate process:
- a. The native title party should be able to withdraw consent at any stage, including after the grant of the future act, if significant new information emerges or significant changes to the project are proposed.
 - b. There should be statutory consequences if the proponent fails to comply with conditions that attach to the doing of the future act imposed by the NNTT or fails to comply with key terms in any agreement reached with the native title party, that being the basis of the native title party's consent to the future act. Currently, conditions apply as if they were terms of a contract among negotiation parties,⁴ however native title parties face significant barriers in monitoring compliance and taking legal action for breach. Statutory consequences may include the revocation of the proponent's interest, the future act being rendered invalid, civil or criminal penalties, legal mechanisms such as injunctions to prevent further work being undertaken by the proponent until non-compliance is rectified, a requirement that the proponent engage with the native title party to rectify non-compliance, and compensation to the native title party for any impacts on native title rights and interests as a result of non-compliance.
 - c. Governments should be equipped to monitor and enforce compliance with conditions imposed by the NNTT and there should be an independent body to hear and determine issues of non-compliance and impose consequences.
22. As with all aspects of the future acts regime, the native title party must be adequately resourced and supported throughout these processes. This will require the native title party having access to expertise required to understand the project or activity and the impacts of the future act on its native title and cultural heritage, in order to determine whether the terms and conditions of any proposed agreement are fair and reasonable.

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.

23. The KLC supports this proposal, but notes that disputes over certain issues, such as royalty payments, will require specialist decision-makers with expertise in this area, or independent expert advice to inform the decision-maker.

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.

24. The KLC supports this proposal, but is concerned with the risk that the payment conditions imposed by the NNTT may set a low threshold for payments, such that proponents will be incentivised to apply for a future act determination application rather than agree to a higher payment standard.

⁴ NTA s 41(1).



25. As with the above proposal, the NNTT would require specialist expertise or access to independent expert advice in order to determine the quantum of the payments, informed by expert commercial advice regarding the value of the project. It will likely be too resource intensive for the PBC to engage and present expert commercial advice in a NNTT hearing, particularly for small scale future acts or where the proponent has not agreed to cover the costs of the PBC to obtain this advice. There could be a mechanism for the NNTT to refer the question of royalty payments to an independent specialist, or a requirement for the NNTT to consider modelling on fair royalty and profit-sharing payment conditions.

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

26. The KLC strongly supports this proposal to remove the expedited procedure. The expedited procedure has long been a key concern of the KLC, and along with many other organisations, the KLC has been advocating against the expedited procedure since its inception. The expedited procedure causes harm to native title holders, undermines the objects of the NTA, and creates a significant burden on native title parties and NTRB/SPs.⁵
27. The KLC has also proposed some reforms of the current expedited procedure in the next paragraph below. These should only be considered if complete removal proves impossible. These reforms are not intended as an alternative to removal, nor do they represent an acceptable compromise. They are contingency measures that would marginally improve an inherently flawed system.
28. If the expedited procedure cannot be removed entirely, the NTA should be amended in the following way:
- a. The government party must be required to actively consider and come to a reasonable view about whether the expedited procedure applies, prior to including a statement to that effect in any s 29 notice.
 - b. The NNTT should not be able to dismiss objections under s 148(b) on the basis that the native title party has not led evidence as to the matters in s 237, as the native title party does not bear a burden of proof (see further [113]-[114] below regarding the NNTT's problematic exercise of this power).
 - c. Where the native title party objects, the proponent and the Government party bear the burden of establishing that the act is an act that attracts the expedited procedure.
 - d. The requirement in s 237(b) that a site be of "particular" significance should be removed so as to include all sites of significance.
 - e. The expedited procedure should be prevented from applying to ground-disturbing activities.
 - f. Section 60AB should be amended to enable PBCs to charge for the costs of participating in any objection process.

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.

29. The KLC strongly supports this proposal. This is a key concern of the KLC, as it renders many future act procedural rights weak and meaningless in practice. There must also be amendments to incorporate and clarify consequences for invalidity, which is discussed further below in relation to Proposal 13 and

⁵ See further the KLC Issues Paper Submission at pp 25-31, and the case studies at pp 11, 14.



Question 22.

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.

30. The KLC strongly supports this proposal. There is a need for greater transparency in this area. Currently, the KLC manually collates some data in relation to future act notices; however, this is ad hoc and burdensome. It is also important to move away from reliance solely on paper notices, which, if missed, result in the native title party missing out on its procedural rights and a future act being done. See, for example, the case study at page 12 of the KLC Issues Paper Submission.

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.

31. The KLC strongly supports this proposal, for reasons described in the Discussion Paper at [286]-[288]. The KLC further notes that it is often not possible to calculate the full compensation payable at the time of making the agreement or upon the grant of a future act, as the full impact of the act on native title rights and interests is not known until the activities undertaken pursuant to it are completed. This proposal will allow agreements to defer the settlement of full and final compensation until such impacts are known.
32. Provision should also be made to allow native title parties to access additional compensation to that provided under existing agreements currently subject to the restrictions in ss 24EB and 24EBA, where the amount provided does not adequately compensate the native title party for the full impacts of the act on native title rights and interests.

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

33. The KLC strongly supports this proposal, for the reasons described in the Discussion Paper at [293]-[295]. It also supports the inclusion of additional heads of damages for compensation payable for invalid future acts to encourage compliance with the scheme, as noted at [295] of the Discussion Paper.

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.

34. The KLC strongly supports this proposal, and agrees with the observations of the ALRC at [301] of the Discussion Paper. The funding available must be sufficient for PBCs to operate effectively. To the extent possible, application, administration and reporting burdens for the funding should be reduced or removed. The funding should be available to every PBC as a matter of course, and support should also be provided to PBCs to apply for and administer grant funding.
35. The Indigenous Land and Sea Corporation (ILSC) is not the appropriate body to administer the fund contemplated in this proposal. Under the NTA, the ILSC is the default agent PBC for native title holders in the event that a PBC is not nominated by the native title holders, as is the case currently in relation the



Birriman-gan native title holders in the Kimberley.⁶ There may be a conflict of interest, or the perception of a conflict of interest, in the ILSC receiving and administering funds to PBCs as contemplated in this proposal.

36. The KLC supports the development and appointment of a new body to administer the capital fund. The First Nations advisory group contemplated in Proposal 18 may be appropriate to advise on the creation of this new body.

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

37. The KLC agrees that funding for NTRBs/SPs should be provided for this purpose, but it should be additional to the existing National Indigenous Australians Agency (NIAA) funding. The issue is not that NTRB/SPs are limited in providing future acts support to PBCs by the terms of the NIAA funding, but rather by the amount of grant funding.
38. In practice, the KLC already uses the funding it receives from NIAA to assist PBCs in responding to future act notices and participating in future acts processes. KLC directs a significant portion of the NIAA native title grant towards negotiating agreements with proponents on behalf of native title parties, assisting with expedited procedure inquiries, and advising PBCs about other future act notices and facilitating their engagement with the regime. In doing so, the KLC sacrifices the resources it can allocate to its other statutory functions, such as dispute resolution and assisting with the recognition of native title rights and interests.

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.

39. The KLC supports this proposal, but notes that this should not take away from other funding for the operation of the native title system, particularly funding to NTRB/SPs and to native title parties. Funding should be separated from native title grant funding in all government administrative processes so as to not conflate them.
40. Additionally, the NNTT should be adequately resourced with specialised staff with training in region-specific issues, with strong cultural awareness and with expertise (or access to experts), needed for the resolution of certain disputes, such as that suggested above in relation to Proposals 7 and 8.
41. Regarding facilitation or mediation of disputes within native title parties, such as between native title holders and PBCs, the NNTT may have a role to play in providing facilitators or mediators to assist. However, this does not and cannot replace the statutory function of NTRB/SPs to assist in the resolution of these disputes. NTRB/SPs are generally best placed to understand and mediate the issues on the ground, given our placement in the region, our understanding of any history of the claim and the claim or native title holding group, and our connections and relationships with people in the region. NTRB/SPs require separate and additional funding to perform this function, as current resourcing and capacity issues

⁶ Birriman-gan native title determination WCD2019/017, as determined in Federal Court proceeding WAD541/2018.



limit our ability to carry out this function.⁷

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).

- 42. The KLC strongly supports these proposed amendments to s 60AB of the NTA. Certain costs should be payable upfront in accordance with the minimum scale of costs, such as the processing of future act notices or negotiating section 31 agreements, so that native title parties are able to use these funds to carry out the relevant process. The native title party should then be able to charge additional fees for any shortfall of actual costs incurred. There may be an exception to the requirement to pay these costs, at the discretion of the native title party, where the proponent is a native title holder or the PBC itself.
- 43. The express obligation on a party liable to pay costs to a native title party under s 60AB should include the imposition of interest on outstanding payments.
- 44. Where costs are not paid, the native title party should not be penalised for being unable to carry out the related functions within prescribed timeframes, such as responding to future act notices, engaging in consultations with the proponent, or conducting negotiations. In these circumstances, the timeframes could be automatically extended or the proponent could be prevented from making a future act determination application.
- 45. There should also be a mechanism for NTRB/SPs to charge fees incurred for these same processes directly to the government party or the proponent, where the NTRB/SP carries out these processes on behalf of or as legal representative of the PBC. Such a mechanism would also considerably reduce the administrative burden by avoiding the need for the NTRB/SP to first charge the PBC, and then the PBC to charge the proponent, particularly where PBCs do not have any staff to arrange this.

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).

- 46. The KLC strongly supports this proposal, and agrees with the ALRC's observations at [324]-[327] of the Discussion Paper. A First Nations advisory group should not be merely a consultative body, but be a statutory body with dedicated functions and powers, that shares decision-making authority with the relevant government departments in developing reforms and legislative amendments.

⁷ See further the KLC Issues Paper Submission at [34]-[36] regarding the limited resourcing of NTRB/SPs.



47. The statutory functions and powers of a First Nations advisory group could include:
- a. Veto powers over certain policy directions and amendments, and mandatory consent requirements for key reforms.
 - b. Power to issue binding recommendations on NTA reforms, with the government required to either implement recommendations (e.g. by proposing amendments in legislation in Parliament) or provide detailed public justification for rejection.
 - c. Research, advocacy and implementation activities, supported by dedicated funding streams.
 - d. Authority to monitor implementation of reforms, collect data and feedback from stakeholders, establish working groups on specific reform areas, and investigate issues.
 - e. Power to evaluate and publicly report on government performance in implementing reforms, with protection from political interference.
 - f. A representative structure to ensure representation from different regions across Australia, with members selected through First Nations governance process rather than government appointment.

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?

48. Native Title Management Plans (**NTMPs**) have the potential to provide PBCs and native title holders with greater agency in managing their Country and determining how future acts should be dealt with in their determination areas, while also improving efficiency in the future acts regime. In addition to the potential benefits identified in the Discussion Paper at [50], NTMPs would provide an opportunity for native title holders to set out their aspirations for Country and expectations for engagement with proponents and government parties. However, their success depends heavily on the proper resourcing of PBCs to create and engage with NTMPs, the ongoing freedom of PBCs to determine the content of NTMPs without external constraints, and the enforceability of compliance by government parties and proponents with the processes in them.
49. The KLC supports NTMPs being introduced into the NTA, provided that:
- a. **PBCs are provided with adequate resourcing and information.** The development of a meaningful NTMP will require significant resourcing and work for PBCs. Funding and resource support must be made available to PBCs to properly consult with native title holders and engage necessary experts over a long-term period. Consultations should provide for culturally appropriate decision-making processes and be informed by advice from Aboriginal elders and cultural advisors, and other experts as required such as anthropologists, archaeologists, legal experts, land valuers, environmental consultants, economic development experts, community engagement facilitators, land management experts including Indigenous rangers, cultural heritage management specialists, and mapping and geographic information system specialists. Relevant information held by government agencies must also be made available to PBCs, including information about geology, hydrogeology, minerals, petroleum resources and tenure



within the PBC's determination area, existing reports or assessments of the value of land or environmental impacts within the determination area, and any proposals for future public works in the determination area.

- b. **NTMPs are automatically registered where formal requirements are met.** NTMPs should be automatically registered if they address matters within the permitted scope and meet formal requirements, which may include requirements around the clarity and detail about the alternative processes, and proof of consultation and consent of the native title holders by way of a certificate under regulation 9 of the PBC Regulations.
- c. **There are no substantive criteria for the registration of NTMPs.** The registration of NTMPs should not be based on substantive criteria such as reasonableness or the public interest, which have historically been applied to the disadvantage of native title holders and in favour of proponents, particularly the mining industry.⁸ Imposing external standards on traditional decision-making processes and cultural heritage is problematic, and these tests would defeat the purpose of enhancing the agency of PBCs and native title holders, who have already met demanding proof requirements to obtain the recognition of their native title rights and interests.⁹
- d. **There are limits on objections to the registration of NTMPs.** If an avenue to object to the registration of NTMPs is included, such objections should only be permitted by government parties, given the prospective nature of NTMPs. Objections must only be made by government parties on the grounds that the native title party has not met formal requirements. PBCs must be provided with an opportunity to respond and correct any issues with meeting these formal requirements, such that if corrected, the government party may withdraw its objection.
- e. **NTMPs may be revised or withdrawn by PBCs (subject to the consent of the common law holders).** There should be no mandatory review period, but there should be flexibility for PBCs to update and register new NTMPs or withdraw existing NTMPs and revert to the statutory process, on any grounds. PBCs may wish to update NTMPs for various reasons, including due to any lessons arising from the implementation of an existing NTMP, changes to the aspirations of native title holders for their Country, and new information. Minor amendments or revisions to NTMPs should not necessarily require the application of a new registration test, especially if this enlivens the possibility of re-litigating objections to their registration.
- f. **NTMPs apply to transfers and renewals of existing interests.** This is essential to prevent the creation of a two-tiered system where legacy interests operate under different and potentially weaker protective standards than those incorporated into NTMPs.
- g. **NTMPs complement, rather than replace, agreement-making and heritage impact assessment processes.** NTMPs may identify areas where certain activities are permitted provided the proponent agrees to a Heritage and Native Title Protection Agreement (HPA) or other agreement that provides for the regulation of activities undertaken by the proponent, including a process for managing the impacts of the act. This is important because activities undertaken by proponents

⁸ See further KLC Issues Paper Submission at [123]–[125].

⁹ See, *Widjabul Wia-bal v Attorney General of New South Wales* [2022] FCA 1187 at [72]; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [80] (Gleeson CJ, Gummow and Hayne JJ); Sean Brennan, 'Statutory Interpretation and indigenous property rights' (2010) 21 *Public Law Review* 239, 255.



on Country will have different impacts depending on the nature of those activities, the nature of the relevant cultural heritage and the extent of native title rights and interests. Without the safeguards provided by an HPA or other relevant agreement, NTMPs may operate to 'green light' development in areas and discourage early engagement and collaboration with native title holders.

- h. **NTMPs include mechanisms for the protection of cultural heritage but do not require the mapping of cultural sites or areas.** The KLC welcomes a process for PBCs to protect cultural heritage and to identify 'no-go' areas within their determination areas. However, the KLC notes that the mapping of particular cultural sites or areas (even in a general way) may be undesirable for native title holders, as such information may be culturally sensitive and only permitted to be known to select senior native title holders. Further, the mapping of sites or areas may allow for proponents to bypass engagement with the PBCs on cultural heritage issues. This has occurred in some expedited procedure objection determinations where the NNTT has determined that, since the proponent is aware of the location of these sites, the proponent is able to avoid them in the conduct of its activities.¹⁰ Further, under the *Aboriginal Heritage Act 1972 (WA) (AHA)*, once the location of such sites are known, proponents can apply for consent to harm or destroy those sites.¹¹
- i. **Any maps that accompany NTMPs should not be viewed as fixed and PBCs should be resourced to review them.** If a PBC decides to map the cultural significance of Country as part of a NTMP, any maps generated should not be treated as fixed. Changes to landscape (e.g. via mining, roads, natural disasters), animal populations (e.g. via new gun laws, cane toad movements) and access to Country (e.g. via economic factors, natural disasters, fencing) may lead to shifts in the way people interact with Country, the cultural significance of places on Country and the values associated with different parts of Country. Examples of this include the shift in location of a law camp where a mine is established in its vicinity, and a shift in the location of hunting grounds in response to changes to the habitat of native species including because of environmental damage and the influx of pests and introduced species. PBCs should be resourced to review such maps on a regular basis.
- j. **PBCs have freedom to determine the content of NTMPs,** within the scope of permitted matters under the NTA. In addition to the points above, NTMPs should be flexible enough to allow PBCs to include such content as: 'no-go' areas for all or particular types of future acts or activities; future acts requiring the proponent to enter into an HPA with the PBC; detailed heritage protection and impact assessment processes; the aspirations and development needs of the native title holders; preferred communication methods; minimum standards for consultation; costs of such consultations; minimum or specified payments to native title holders; and the other

¹⁰ *The Top End (Default PBC/CLA) Aboriginal Corporation v Baudin Resources Pty Ltd and Another* [2024] NNTTA 30 at [91]-[92]; see also, *Kallenia Mines Pty Ltd and Others v Walalakoo Aboriginal Corporation RNTBC and Another* [2016] NNTTA 50: "I see no reason to doubt the effectiveness of the Government's regulatory regime and the protections afforded under the AHA in relation to this site. Kallenia Mines will now be aware of the existence and location of this site and can take the necessary steps to avoid any damage or interference. I agree there is public interest served in preserving this site, however the evidence does not show this licence to be a significant threat"; see also *FMG Magnetite Pty Ltd/FMG North Pilbara Pty Ltd/Western Australia/Johnson Taylor and Others on behalf of Njamal* [2011] NNTTA 213.

¹¹ See sections 16 and 18 of the *Aboriginal Heritage Act 1972 (WA)*.



matters identified at [54]-[55] of the Discussion Paper.

- k. **NTMPs may include processes for dealing with future acts outside of the relevant determination area.** As recognised in the Discussion Paper, some future acts can have impacts beyond their immediate footprint. Subject to whatever reform is enacted in relation to Question 16, NTMPs should be able to include procedures in place for a PBC to be consulted in relation to future acts that fall outside the PBC's relevant determination area, but that will have impacts on its determination area.
 - l. **NTMPs work in with standing instructions by common law holders to PBCs.** This will ensure NTMPs' workability for PBCs and reduce delays and inefficiencies. For example, native title holders may provide standing instructions to their PBC by setting out a process or conditions in an NTMP that, where followed, will allow the PBC to consent to the future act without separately needing to meet the consultation and consent requirements in the PBC Regulations or the PBC's Rule Book.
 - m. **To the extent of any inconsistency, NTMPs prevail over State and Territory laws relating to cultural heritage.** This is presumed given that NTMPs are proposed to establish alternative pathways to the validity of future acts under the NTA. It should be made clear that NTMPs will also override state laws relating to cultural heritage, to the extent of any inconsistency in the processes under NTMPs.
 - n. **Adherence to NTMPs is mandatory and there are enforcement mechanisms in place.** Where they apply, the procedures in NTMPs must be mandatory for government parties and proponents to follow. If a PBC has spent the time and resources to develop and successfully register a NTMP, it would render that process redundant if a proponent could elect to adopt the regular procedures under the NTA. There may be a function for PBCs to provide positive confirmation of compliance with NTMPs prior to the doing of a future act. There must be clear enforcement mechanisms and penalties for non-compliance by government parties and proponents with the procedures set out in NTMPs.¹²
 - o. **NTRBs/SPs must be funded to support PBCs in the development and implementation of NTMPs.**
50. To ensure certainty and reduce disputes, there should be only very limited circumstances in which government parties should be able to apply to the NNTT, in the absence of the PBC's consent under an NTMP or otherwise, for a determination that a future act can be done as set out at [59] of the Discussion Paper. Proponents should have no right to much such an application.
51. To the extent an avenue is included to enable proponents to apply for a determination that a future act can be done within a NTMP area, the KLC agrees that the proponent should have the burden of establishing that the future act should occur in the absence of native title holders' agreement. The criteria for establishing this must be a high bar and only apply in exceptional circumstances, so as not to undermine the value and strength of NTMPs as alternative future act regimes. Proponents must also consult with the PBC prior to going directly to the NNTT to make such an application.

¹² See further discussion at [21(b)] regarding penalties for non-compliance.



Promoting fair and equitable agreements

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

52. The KLC is in favour of mandatory conduct and content standards being incorporated into the NTA. These standards are important in the realisation of the principle of free, prior and informed consent and will assist in addressing the uneven bargaining power between the parties.
53. The **mandatory conduct standards** should be based on the duty to negotiate in good faith with a view to reaching the free, prior and informed consent of the native title party to the doing of the act. The proponent and government party must positively satisfy the NNTT that they have met the mandatory conduct standards (including the duty to negotiate in good faith) prior to making a future act determination about whether the act should be done.
54. The standards should include requirements that:
 - a. negotiations are conducted in good faith, defined by reference to satisfaction of the mandatory conduct standards and other indicia – see [55] below;
 - b. the proponent or the government party fund a native title party's participation in negotiations, which will include paying the costs of necessary consultation and consent processes and seeking independent advice;
 - c. the proponent and the government party provide information to the native title party at the outset and throughout the negotiation process, including any new information or information relating to a change in the project or activity throughout the negotiation process. That information should include the matters defined above at paragraph [15] of this submission; and
 - d. the proponent and government party do not contact individual native title holders or claimants, except where those individuals have specifically been authorised to negotiate on behalf of the native title party.
55. The duty to negotiate in good faith should be defined in the positive to include satisfaction of the mandatory conduct standards and relevant indicia such as:
 - a. respectful and timely communication with the native title party, including following up on any lack of response;
 - b. proactive presentation of substantive proposals to advance negotiations;
 - c. creating reasonable opportunities for meaningful dialogue and engagement between the parties;
 - d. attending and participating in meetings as reasonably requested by the native title party;¹³
 - e. responding promptly to reasonable requests for relevant information;

¹³ Negotiations in the future act context are not standard business transactions and will often require face to face meetings to ensure mutual understanding and direct engagement with the native title party, not just the native title party's legal representative, in line with cultural protocols around asking Traditional Owners for permission to enter Country.



- f. sending negotiators with appropriate authority to make decisions or advance discussions;
 - g. agreeing to reasonable requests, including standard provisions;
 - h. approaching negotiations with flexibility and openness to compromise and creative solutions;
 - i. maintaining consistent negotiating positions without strategic shifts designed to undermine progress;
 - j. responding to proposals with constructive counter-proposals or alternatives;
 - k. taking actions that support collaboration and enhance the negotiating process;
 - l. willingness to formalise negotiation processes and outcomes in writing;
 - m. acting reasonably throughout the process; and
 - n. where a future act determination application is made, this is made as a last resort following all reasonable attempts to reach agreement with the native title party and negotiations are required to be substantially advanced, both in time and in their content.
56. A provision should be included in relation to the codified 'good faith' standard that meeting these indicia is not conclusive of the question of whether the proponent or the government party has negotiated in good faith, where other conduct indicates a lack of good faith or ulterior and undisclosed purpose antithetical to the making of an agreement with the native title party.
57. **Agreement content standards** should be expressed at a level of generality which encourages negotiation but allows the parties to tailor agreements to their needs. Agreements should be required to satisfy the mandatory content standards in order to be registered or as a pre-condition to the validation of future acts under the NTA through the right to negotiation.
58. Content standards should include:
- a. a prohibition on the following types of clauses:
 - i. gag clauses;
 - ii. clauses that limit native title parties from accessing protections or remedies under the NTA, cultural heritage laws and other laws;
 - iii. clauses that restrict seeking injunctive relief;
 - iv. clauses that seek to amend to override these standards, including through ancillary agreements;
 - v. clauses that limit how payments to the native title party can be expended, administered or managed by native title parties;¹⁴
 - b. comprehensive heritage protection in accordance with best practice, including provision for native title holders to veto or say no to certain activities in particular areas;

¹⁴ Native title parties are already subject to extensive obligations under the common law and the NTA and the CATSI Act and delegated legislation in how they use and manage these funds.



- c. comprehensive environmental protections, based on industry best practice;
 - d. provision for native title parties to be adequately resourced to meet their obligations under an agreement and for implementation more broadly – separate to a conduct standard which requires a native title party to be adequately resourced to negotiate and enter the agreement in the first place;
 - e. provision for information to be shared on an ongoing basis with the native title party, including notification of each intended activity or access to the area of the future act;
 - f. a right of the native title holders to access the agreement;
 - g. provision, as appropriate, for:
 - i. the sharing of profits and financial benefits, for future acts relating to for-profit activities such as mining and pastoral activities; and/or
 - ii. employment and training or other capacity-building opportunities for native title parties;
 - h. a dispute resolution mechanism, which may include access to mediation or arbitration in the NNTT;
 - i. provision for damages to be paid or other steps required to rectify a breach of agreement resulting in harm to cultural heritage or native title rights and interests;
 - j. a right for the native title party to withdraw consent to the future act in the event that there is a significant breach by the other party with the terms of the agreement, or a significant change to the proposed project or activity;
 - k. periodic review, resourced by the proponent, to provide native title parties with oversight of what benefits are available under the agreement and what have or have not been used (for example, traineeships or employment opportunities); and
 - l. assignment or succession clauses where the parties change, including where the proponent party transfer their interest to another party, or when the PBC changes or where the agreement is made pre-determination.
59. Content standards should not include minimum royalty percentages, or similar, as doing so may reduce the bargaining power of the native title party.

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?

60. The NTA should expressly regulate all agreements, including ancillary and common law contracts, that purport to confer rights or discharge obligations under the NTA. The regulation of these agreements should be limited to:
- a. the requirement that they include the mandatory content standards identified above;
 - b. mechanisms for enforcing these agreements, including monitoring compliance and resolving disputes; and
 - c. legal consequences for significant breaches of the agreement by the non-native title party,



including provision for damages payable where the breach results in harm to native title rights and interests or cultural heritage.

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?

61. The KLC supports the reforms proposed in the Discussion Paper at [108]. Safeguards are needed to ensure that PBCs are not required to take on obligations and risks under agreements that they cannot meet and/or that they are unaware of.
62. Where there is no succession or assignment clause in the agreement, the NTA should set out a process to be followed for the assignment of the agreement, with the PBC's consent. This process should include:
 - a. A step where the terms of the agreement are explained and considered by the PBC prior to assignment.
 - b. A review of the obligations on the PBC in the agreement, and an option for the PBC to renegotiate these obligations with the other party, so as to ensure that the PBC can meet its obligations under the agreement.
 - c. Resources and support to be made available to assist PBCs in situations where the assumptions made in agreements about the characteristics or area of interest of a native title party do not reflect the final determination – for example, in areas where there is more than one PBC, or multiple native title groups recognised. This is needed to enable PBCs and directors to meet their legal obligations in how they hold and manage the native title rights and interests, whether in trust or as agent of the native title holders.

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?

63. The parties should retain the option to agree to the resolution of disputes by an independent person or body of their choosing. The NNTT should be an option but not a mandatory requirement.

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?

64. The KLC agrees that agreements should be made available via an opt-in (not mandatory) register with the option to redact and de-identify details. As observed in the Discussion Paper, this will allow parties to conduct more informed negotiations and make better-informed decisions, and to allow native title holders to have knowledge of the existence and content of agreements.



Repairing the statutory procedures

Impact-based model

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

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

66. The KLC agrees that Part 2 Division 3 Subdivisions G–N of the NTA should be repealed and replaced with a revised system for identifying the rights and obligations of parties with respect to future acts. While the KLC does not consider the impact-based model presented in the Discussion Paper to be the preferred model for revising the current system, the KLC acknowledges the intent behind the impact-based model to improve on the existing regime and strengthen procedural rights for native title parties. The impact-based model goes some way to addressing the issues with the existing regime, including its complexity, the weak procedural rights afforded to native title parties, the misalignment between the future act and the impact on native title rights and interests, and lack of consequences for non-compliance with these subdivisions.¹⁵

67. However, while the impact-based model presented in the Discussion Paper represents an improvement on the current system, it raises several issues, as detailed below.

- a. The proposal for the party proposing to do the future act, usually the government party, to undertake the initial impact assessment creates an inherent conflict of interest. Our primary concern with this approach is that government parties will inappropriately classify acts as ‘low impact’, either through a lack of understanding of the impacts on native title rights and interests, or to avoid right to negotiate obligations. This concern arises from the KLC’s experience with the State of Western Australia’s application of the expedited procedure,¹⁶ and with future acts being incorrectly notified under the incorrect provisions.¹⁷
- b. Only native title holders can accurately determine the impacts of future acts on their native title rights and interests and cultural heritage as they alone know where, when and how these rights are exercised, including cultural activities and resource-taking rights such as hunting. Impact

¹⁵ See further, KLC Issues Paper Submission at [33], [126](b).

¹⁶ See KLC Issues Paper Submission at pp 26–31.

¹⁷ See KLC Issues Paper Submission at pp 40–41.



depends on specific circumstances that only the relevant native title party can assess for particular acts on particular areas of Country. The precise location, timing and nature of proposed activities are critical factors. A short-term act with minimal ground disturbance can still have high impact if it affects culturally significant sites or coincides with important ceremonies. Conversely, more extensive ground disturbance over longer periods may have less impact if it avoids areas of cultural significance and where native title rights are not as actively exercised. It should be noted that sites of significance are not all the same. They can be understood as significant for a variety of reasons and the precise significance held should be determined by the native title holders themselves.

- c. There is difficulty assessing the impact of a future act by reference to the particular rights it creates for a proponent, rather than by reference to each activity undertaken by the proponent. For this reason, the KLC's standard HPA for exploration licences requires proponents to notify the native title party prior to undertaking each activity. The native title party may then advise the proponent about whether the activity can proceed without further consultation, or with certain conditions such as employment of native title holders as cultural monitors to monitor impacts on heritage, or a comprehensive cultural heritage survey prior to works being undertaken in order to assess the potential impacts on the specific location.
- d. The impact-based assessment is burdensome and risks re-creating the current expedited procedure process. The guiding factors set out in [155]-[157] of the Discussion Paper require diligent analysis, and will not result in an accurate assessment of the impact of the act unless the views of the native title party are given determinative weight. The proposed assessment essentially requires the assessor to conduct a desktop search to analyse how the act will impact native title rights and cultural heritage, without ever speaking to a native title holder. We would expect that many notices that are notified as 'low impact' will be challenged by the native title party, resulting in a burdensome inquiry process in the NNTT (creating a similar burden to that of the expedited procedure process). The impact-based assessment risks needlessly expending the time and resources of the government, the proponent, the native title party and the NNTT.
- e. Finally, the categorisation of a future act as 'low impact' may undermine meaningful consultations with the native title party, as it may create an expectation on the part of government parties and proponents that such impacts are so minimal that they do not need to be addressed, even if concerns are raised by the native title party during consultations.

68. For these reasons, the KLC considers that the impact-based model is not efficient or fit for purpose.

Alternative model

69. The KLC proposes the following model:

- a. The native title party should have a right to be consulted and provide consent on all future acts. All future acts should be notified to the native title party and require engagement of the native title party, with the aim of reaching consent by agreement.
- b. The native title party may elect to provide agreement to the act without a formal negotiation process and/or with agreement to certain conditions, such as notification for activities undertaken on the relevant interest area, or requirement for cultural monitors to monitor the works to protect against impacts to cultural heritage.



- c. The native title party could also respond that the act may proceed without agreement or consultation, thereby fast-tracking the act to grant. This may occur in circumstances where the act is already covered by an agreement, or where the native title party considers it to be non-intrusive and therefore may proceed (for example, repairing faulty housing, emergencies for electricity or water).
 - d. If there is no response or engagement from the native title party within a reasonable timeframe, a limited category of acts, such as acts that are directly for the benefit of, and in, the public interest, may proceed within *certain confined circumstances*. Defining these limited circumstances requires further consideration.
 - e. Applications for a determination that the act may be done is open to the parties, 18 months from the date of the notification.
70. The KLC's proposed process:
- a. recognises that native title holders hold *property* rights, and assumes that the circumstances in which third parties are entitled to obtain an interest or right in the land the subject of that property are narrow and strictly prescribed (as is the case with the owners of non-native title property);
 - b. recognises that native title parties are the only party able to assess the impact of the act on native title rights and interests;
 - c. is consistent with the preamble of the NTA and principles of FPIC;
 - d. gives native title parties autonomy to decide when consultation is appropriate;
 - e. allows for certainty;
 - f. does not require the State to expend time and resources on conducting a rigorous impact assessment;
 - g. streamlines processes for all parties; and
 - h. is not likely to place an increased administrative burden on native title parties over the longer term (when considered together with other proposed reforms, such as increased and sustained resourcing of PBCs).
71. This proposed process is simplified for all parties, including the proponent. As all kinds of acts get the same procedural rights, the proponent is not confused about whether they should be preparing to consult or negotiate, and there are no disputes arising as to impact. Further, the proponent is meaningfully engaging instead of awaiting a decision from the assessor or NNTT as to whether consultation or negotiation is required. The parties are making progress towards agreement, rather than in a deadlock awaiting a NNTT decision where the categorisation is challenged.
72. When considering the administrative burden of this proposed process on native title parties, it is worth noting that native title parties may have standing instructions about certain kinds of acts. For example, the native title party may have standing instructions that certain acts: be incorporated into an HPA; are permissible on certain parts of Country; and may proceed without negotiations or consultation. Where the act is already covered by an existing agreement with the native title party, the native title party could



simply communicate that the act may proceed pursuant to the agreement process.

73. Further to this, it is important to highlight that consultation processes are often no less onerous than negotiation processes. There is an apparent assumption in the Discussion Paper that low impact acts should attract the right to consultation, because it is less burdensome than negotiation. Consultation can require as many steps as negotiation. In fact, negotiation can be far less burdensome than consultation, particularly where PBCs have standing instructions to their legal advisors about negotiating and entering into standard HPAs for certain future acts. For example, the KLC is aware of many 'global agreements' whereby future act notices are incorporated into existing agreements, and the consultation and consent processes are then conducted through the native title party's preferred process as set out in the agreement.

Impact-based assessment proposal

74. Alternatively, if the KLC proposal at [69] above is not supported, the KLC submits the following in relation to the impact-based model:
- a. The starting point for impact assessments must be the views of the native title party.
 - b. If government is conducting the assessment, the statutory guidelines should contain a high level of detail (without being exhaustive) about what types of future acts should be categorised as 'high impact' and attract a right to negotiate. Alternatively, consideration could be given to whether an independent body, suitably qualified, should conduct the impact assessment, rather than the government, while retaining a process for the native title party to challenge the outcome.
 - c. There should be mandatory criteria for impact assessments, which include a requirement that the assessor consider the views of the native title party. This could include any views of the native title party previously provided in relation to similar acts or proactively provided as part of the impact-assessment process (e.g. the assessor could be required to provide an opportunity for the native title party to provide its views as to impact where the assessor is of the view that it is 'low impact'). The criteria or process should be developed by native title holders and other Traditional Owner stakeholder groups, and it should prioritise Traditional Owner perspectives on cultural significance, include cultural heritage assessments, and recognise intangible cultural impacts as equally significant to physical impacts.
 - d. The following future acts should be deemed 'high impact' in all circumstances (and specified as such in statutory guidelines):
 - i. Future acts proposed to be done over areas of: where exclusive possession native title is recognised, an Indigenous Protected Area, marine park, national park or National Heritage Listing.
 - ii. All mining tenements, which includes exploration, prospecting, and mining licences.
 - iii. Future acts involving any level of ground disturbance.
 - iv. Future acts proposed to be done over areas or sites of cultural significance.
 - v. Compulsory acquisitions.



- vi. Future acts that create rights for more than one generation (15+ years).
 - vii. Water licences (currently under s 24HA), noting the significance of water to Aboriginal and Torres Strait Islander people.
 - viii. Agricultural projects (i.e. primary production on pastoral leases, s 24GB).
 - ix. Future acts that are proposed to occur in or adjacent to Aboriginal communities.
- e. There should be a mechanism for a future act to be re-categorised as high impact prior to grant following the provision of new information about its impacts.
 - f. Future acts should be assessed by reference to any acts that have already been done that form part of the same project, where it is not possible to notify all related future acts forming part of the same project in a single notification. This may occur, for example, where additional mining tenements are required by a proponent as part of the development of a mining project.
 - g. The right to consultation should be strengthened, as detailed below at [75]-[77].
 - h. There should be a robust and accessible review mechanism for impact assessments, including, as proposed, an avenue for native title parties to challenge the categorisation of a future act in the NNTT, with sufficient timeframes for native title parties to do so.
 - i. There should be comprehensive training for all personnel involved in impact assessments.
 - j. Native title parties and NTRB/SPs must be adequately resourced and timeframes must be sufficient. The right to be consulted and the right to negotiate will be meaningless unless native title parties are properly resourced to engage and have sufficient time to respond and engage. It is well within the capabilities of native title parties to decide how best to allocate resources, both human and financial, so that appropriate decisions can be made in an effective manner; however, substantial funding increases and investment in PBCs is required, along with the proper funding of NTRB/SPs to coordinate and support as needed.

Right to consultation

- 75. The KLC agrees that a national framework would be useful to support the conduct of consultation processes; however, such a framework would need to acknowledge and allow room for local and/or regional approaches appropriate to the type of future act being proposed. The national framework should be drafted in consultation with NTRBs/SPs and PBCs.
- 76. Consultation should, at a minimum:
 - a. Require the provision of sufficient information to the native title party (see [15] of this submission regarding the information that should be provided).
 - b. Provide an opportunity for the native title party to express their views on the proposed future act and its impacts, with sufficient timeframes to allow native title parties to consider and consult as appropriate. PBC directors may be chosen for their skill and experience in relation to business functions but may not be culturally placed to make decisions about future acts, such that they need to refer to their family groups, Traditional Owners from the relevant parts of Country or cultural advisors to inform their decisions. This process happens between PBC meetings, creating the need



for more than one meeting per decision.¹⁸

- c. Require that the government party and the proponent consult with the native title party – including the requirement that they consider and respond to the native title party’s views, with the aim of reaching consensus.

77. While welcoming a right of consultation in place of the weaker procedural rights currently provided under the NTA, the KLC notes that many PBCs are already experiencing consultation fatigue and that practical steps need to be put in place to enable PBCs to manage increased levels of consultation. First and foremost, this requires significantly increased and ongoing resourcing of PBCs. This can enable PBCs to employ staff and build capacity, including through setting up internal processes to support consultation, such as a cultural advisory group that has standing (and remunerated) involvement in future act matters.

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?**

78. Infrastructure and facilities for the public need to be managed on a case-by-case basis. Under the KLC’s proposal above at [69], all future acts should provide native title parties with a right to consultation and consent; however, there may be limited circumstances in which some future acts, such as urgent works for the benefit of local communities, can go ahead without native title holder consent. In general, consultation and engagement with the native title party should always be a part of the process to enable these acts to be done in a way that minimises the impact on native title rights and cultural heritage and to ensure that the native title party is aware of people accessing their Country. More may be required depending on the nature of the act – for example, repairs to existing infrastructure will likely not require as much engagement with the native title party as new infrastructure.

79. Further, there is a need for governments to take better account of the needs of this population in designing and building public infrastructure and facilities. The Kimberley region is comprised of more than 160 Aboriginal communities and Aboriginal and Torres Strait Islander people make up over 40 per cent of the Kimberley population. This percentage is higher outside of the major towns of Broome and Kununurra – Aboriginal and Torres Strait Islander people comprise over 60 per cent of the population in the Derby-West Kimberley local government area and over 77.6 per cent of the Halls Creek local government area.¹⁹ New infrastructure and facilities should ideally be part of a co-design process with native title parties in the Kimberley, which may also provide employment and training opportunities in relation to the project,

¹⁸ The current timeframes provided for the right to comment are insufficient – see KLC Issues Paper Submission at [131].

¹⁹ Australian Bureau of Statistics, 2021 Census Aboriginal and/or Torres Strait Islander people Quickstats, <https://www.abs.gov.au/census/find-census-data/quickstats/2021/IQS51001>



particularly in remote and regional areas where such opportunities are more limited.

80. Compulsory acquisitions should always require an ILUA and the right to negotiate, given their extinguishing effect on native title rights and interests.
81. Future acts proposed to be done by or for the benefit of the native title holders should still require the consent of the native title party, but with an option for the native title party to streamline this approval with the use of standing instructions, alternative processes, or other mechanisms.

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?

82. Yes, the KLC is of the view that the future acts regime needs to account for the impacts on native title in areas outside of the immediate footprint of a future act.
83. This question arises most particularly for issues such as fracking and water extraction – activities which, given their nature, may have impacts a considerable distance from the ground-level footprint of the future act (e.g. exploration tenement or water bore). As explained in the KLC Issues Paper Submission in the featured text following [130]:

Groundwater in the Kimberley is highly interconnected, and groundwater and surface waters are also connected, with groundwater feeding into springs and rivers such as the Martuwarra Fitzroy River. It is foreseeable that impacts from groundwater extraction (for example, the drying up of culturally significant soaks or springs) may occur at locations a considerable distance from the extraction location.

84. The KLC acknowledges, however, that this is a challenging issue to capture in legislation. Under the impact-based assessment, the impacts of acts such as the grant of a water licence on areas outside the immediate footprint of the act itself will be required. The native title party for the future act footprint area would have the right to negotiate, while neighbouring and affected native title parties would have at least the right to consultation.
85. Determining which native title parties may be affected outside of the immediate future act footprint will likely involve consideration of the cultural, environmental and social impacts of the future act and should allow for native title parties to self-nominate or NTRB/SPs to nominate on their behalf.
86. The KLC is strongly of the view that grants of water licences should attract the right to negotiate. Native title parties within the immediate licence area should have the opportunity to negotiate and enter into ILUAs with government, pastoralists or proponents, in order to advise and make decisions about how water is extracted and managed. Outside the immediate licence area, it should be up to the native title party to decide how consultation occurs.
87. The KLC notes that native title parties may also have rights, as citizens and relevant stakeholders, to be consulted about projects (which may be future acts under the NTA) through other regulatory regimes, such as environmental and planning laws and frameworks.



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?

88. The KLC supports the development of tailored provisions and specific procedural requirements for legislative acts that pass the freehold test, including because:
- a. there is a dearth of practical experience of validation of acts of this type; and
 - b. legislative acts are distinctly different from non-legislative acts, not least because they are far more likely to affect native title parties across the entire jurisdiction to which the legislation relates rather than singular native title parties.
89. The KLC is of the view that planning activities conducted under legislation, such as those related to water management, should constitute future acts.
90. Native title parties should have the opportunity to co-design water (and other land-use) planning and management frameworks that are made under legislation or that guide decision-making under legislation (for instance, in Western Australia, water allocation plans are not statutory, but do guide decision-making about water licensing and other matters under the *Rights in Water and Irrigation Act 1914*).

Future Act Determinations

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?

91. The principal consideration in the test that the NNTT should apply is the impact to the native title rights and interests of the native title party. The onus of establishing that the future act can be done should fall on the proponent. This accords with the purpose of the NTA as set out in the preamble and the objects, and would go some way to rectifying the current imbalance in NNTT determinations as described in the Discussion Paper at [217] and in the KLC Issues Paper Submission at [121]-[125].

Amendments to section 39

92. The KLC supports amendments to s 39 of the NTA, as detailed below.
- a. The burden should be on the proponent to establish that the act can be done.
 - b. The primary consideration should be the impact of the act and any proposed activities on native title (s 39(1)(a)), and the views of the native title party (s 39(1)(b)).
 - c. There should be a presumption of impact on the exercise and enjoyment of the native title holders' rights and interests.
 - d. Section 39(1)(a)(v) should be amended to remove the requirement that areas or sites be of "particular" significance to the native title party.
 - e. The conduct of the proponent or the government party in consultations or negotiations with the government party should be considered as part of the criteria.



- f. The economic or other significance of the act (s 39(1)(c)) should be removed and considered as part of a range of factors to be weighed in considering whether the doing of the act is for or against the public interest (s 39(1)(e)). Currently, economic significance is considered as part of the NNTT's consideration of both s 39(1)(c) and (e), thereby counting this twice, while the impacts on the native title party are not also considered as part of the public interest.²⁰
- g. The public interest in the doing of the act (s 39(1)(e)) should the NNTT to form its own views on where the public interest lies, rather than deferring to the government party, and expressly require consideration of both factors for and against the public interest in the doing of the act in order to assess whether there is an overall public benefit.²¹ Such factors should be identified in an inclusive list, informed by the preamble of the NTA and could include: the economic or other significance of the act (incorporating s 39(1)(c) as proposed above); the environmental impacts of the act and climate change; the impact on the community; the impact on Aboriginal cultural heritage and public interest in its protection; national and local priorities for land use and development; and broader strategic priorities for Australia and the state or territory, such as the targets and outcomes in the National Agreement on Closing the Gap.
- h. Amendments should override the norms and presumptions of the NNTT's established approach. The NNTT has made several problematic assumptions that have guided decision-making on future act determinations for decades. These include the assumption that exploration and mining acts are of economic significance (despite no evidence), that exploration is in the public interest to maintain a "viable mining industry", that the act is presumed to have no effect on the matters in s 39(a) without evidence, that the impact of mining acts on sites of particular significance are mitigated by the AHA, and that the interests of and impacts on the native title party are not to outweigh the economic significance and public interest in the doing of the act.²²

Consent unreasonably withheld

93. The KLC is cautious about this test. The deeply personal and unique connection between native title holders and Country is not always well understood by external decision-makers. Even a subjective assessment may be problematic and place a large evidentiary burden on native title parties to justify the decision. If adopted, there should be statutory provision for the withholding of consent to be deemed reasonable where:
- a. The act overlaps sites or areas of cultural significance.
 - b. The act overlaps exclusive possession native title rights and interests.
 - c. The act would prevent the exercise of non-exclusive native title rights and interests and the proponent has not provided a fair offer of compensation for this impact.
 - d. Consenting to the act is a native title decision, and the native title party has conducted a consultation process with the native title holders and the native title holders have refused consent.

²⁰ See, eg, *Rodney Wayne Bell v Watarra Aboriginal Corporation RNTBC and Another* [2025] NNTTA 19 at [50]-[51].

²¹ This is the position at law as per *Gomeroi People v Santos NSW Pty Ltd and Santos NSW (Narrabri Gas) Pty Ltd* [2024] FCAFC 26 at [221] (Mortimer CJ).

²² See KLC Issues Paper Submission at [123]-[125].

**A real risk of substantial and irreparable harm**

94. The KLC does not support this test. The bar for “substantial and irreparable” is too high and the notions of harm, such as cultural loss, are not well understood by decision-makers. It would place a large and unreasonable burden on the native title party to establish this harm.

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?

95. The NNTT should be required to determine the terms and conditions that are fair and reasonable and that, in the NNTT's opinion, should have been negotiated by the parties in commercial arm's length negotiations conducted in good faith.
96. The NNTT needs to have clear direction to impose meaningful conditions. While the NNTT currently has broad powers to impose these conditions, the conditions commonly imposed are largely tokenistic, or not imposed at all on the basis that the native title party has not provided sufficient evidence.²³
97. These conditions may include:
- a. The proponent must not conduct activities on areas or sites of cultural significance unless it has first been cleared by the native title party through a heritage survey resourced by the proponent, which includes the involvement of a suitably qualified independent heritage professional.
 - b. The payment of certain benefits, such as royalties or other profits, to the native title party.
 - c. The proponent will notify and inform the native title party about any access to the future act area.
 - d. The proponent will notify the native title party about any changes to the project (including information in advance about extending the licence or applying for productive mining).
 - e. The proponent must educate all employees and contactors using the native title party's preferred cultural awareness training service.
 - f. At the end of the term of the future act, the proponent is to rehabilitate in accordance with best practice.
 - g. A dispute resolution process and consequences for non-compliance with conditions.
 - h. There is to be no damage to any sites of significance to the native title party.
 - i. The native title party is to have full access to the land and waters subject to the licence except where there is risk to safety.
 - j. Upon assignment to a different proponent, the assignee is bound by the conditions.

²³ See, eg, *Australian Potash Limited and Another v Kalman Murphy & Ors on behalf of Waturta* [2021] NNTTA 46, in which the NNTT declined to impose any conditions on the grant of three mining leases sought by the native title party on the basis that the native title party had not provided “specific material or evidence that supports the imposition of these conditions”:



Subdivision F and non-claimant applications

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

- a. to provide that non-claimant applications can only be made where they are made by, or for the benefit of, Aboriginal or Torres Strait Islander peoples;
- b. for non-claimant applications made by a government party or proponent, to extend to 12 months the timeframe in which a native title claimant application can be lodged in response;
- c. for non-claimant applications in which the future act proposed to be done would extinguish native title, to require the government party or proponent to establish that, on the balance of probabilities, there are no native title holders; or
- d. in some other way?

- 98. Non-claimant applications are a rarity in the Kimberley, and so the KLC has limited experience on this issue. Nevertheless, the KLC supports reforms to the NTA 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. The current process is unjust and open to abuse.
- 99. The KLC agrees that the three-month timeframe in which a native title party is required to lodge a registrable native title claim in response to a non-claimant application is completely unreasonable and insufficient. A minimum of 12 months is required, as this ordinarily involves the research and consultation process to identify the common law holders, meetings for the authorisation of the claim, and legal preparation of the application. NTRBs/SPs are also limited in how quickly they can undertake this process depending on their resourcing and capacity at the relevant time.

Procedural compliance and notices

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?

- 100. Yes. The consequences of invalidity as a result of non-compliance by the proponent or the government party with procedural obligations should include:
 - a. notification to the native title party about the non-compliance and any consequences;
 - b. compensation to the native title party, which includes additional heads of damage not otherwise payable for a valid future act;
 - c. an automatic injunction restraining the proponent from completing any further works pursuant to the invalid act, until the act is validated;
 - d. the automatic revocation of the future act if no third party has taken any steps to their detriment in reliance on the future act;
 - e. a process for validating the act which requires an ILUA or other agreement with the native title party to validate the act; and
 - f. invalidity in general, and not only for the purposes of the NTA. Where the proponent undertook steps to its detriment in reliance on the future act and the invalidity is caused by non-compliance



of the government party, the proponent may seek compensation or damages as against the government party.

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?

101. Yes. Future acts notices should be required to include the following information:

- a. A map or maps of the area of the proposed future act, including details of the overlap with native title rights and interests, relevant existing tenure and landmarks, showing with reasonable accuracy the relevant areas.
- b. Details about the rights proposed to be created by the doing of the future act. For example, for mining tenements granted under the *Mining Act 1978* (WA), details about what rights the proponent would have under the relevant tenement.
- c. Details about the particular native title rights and interests impacted by the future act. This can be done by reference to the exclusive or non-exclusive rights and interests recognised in the relevant area. This would encourage government parties and proponents to consider these impacts at the time of notification.
- d. All available information (excluding confidential or commercially sensitive information) about the proposed project or activity. This does not have to be onerous, but could include any relevant information from the proponent lodged with the government party as part of the application for the relevant future act, and any reports held by the government party about the economic, social, cultural and environmental impacts of the project or activity.
- e. Details about the proponent, including contact details.
- f. Information about the cultural heritage or environment of the area of the future act held by the government party.
- g. Details about the procedural or substantive rights of the native title party in response to the future act notice, such as the right to be consulted or right to negotiate, and details about how to challenge the validity of the future act notice if it is non-compliant with the NTA.



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?

102. The KLC supports the concept of a ‘future act payment’ being explicitly included in the NTA. Making the concept explicit in the NTA and providing for upfront payments would assist native title parties in negotiations. The KLC has experienced some proponents resisting the making of any type of payment in a negotiated agreement unless it is offset against the proponent’s compensation liability. Explicit provision would assist to streamline negotiations and encourage proponents to factor future act payments into their project cost modelling by normalising such payments.
103. The quantum of ongoing payments should be the subject of negotiation between the parties (or in accordance with a determination by the NNTT where relevant) to enable the flexibility to adjust them in accordance with the needs of the specific project. However, the KLC would support the inclusion of a minimum ‘upfront’ payment in the regulations payable on the doing of the future act, so long as it was clear that the ‘upfront’ payment was not intended to be exhaustive.
104. As the definition of a future act requires some effect on native title rights and interests, the KLC does not agree that future act payments should only be payable for some future acts. Of course, the quantum of the payment could differ between the different future acts depending on the effect of the act and the fee that is justified in the circumstances.

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)?

105. As set out in the Discussion Paper at [273]-[275] and [281], the proposed future act payment is different in character to compensation. It is unsatisfactory to limit the benefits available to native title parties for activities on their land to compensation for impact to native title rights and interests.

Resourcing, costs and implementation

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?

106. The KLC strongly supports amendments to the NTA in relation to costs in Federal Court proceedings relating to future acts. Of the two options for reform proposed, the KLC’s strong preference is for the ‘modified no costs’ jurisdiction, for the reasons identified in the ALRC Discussion Paper at [321].



107. Further, the ‘modified no costs’ jurisdiction should apply in the case of future act proceedings before the NNTT. Under the current regime, this should apply where the NNTT determines that the expedited procedure does not apply, that the government party or the proponent has not negotiated in good faith, or that a future act cannot be done pursuant to a future act determination application. Native title parties expend significant time and resources in pursuing objections or opposing future act determination applications, and often are unable to do so where they lack the time or resources. Native title parties are not funded for NNTT proceedings (except via the native title grant provided to NTRBs/SPs, which must be allocated to and prioritised for all NTRB/SP activities) and costs are unable to be recovered under s60AB.²⁴

Addressing skills gaps to support the sector

108. The native title sector faces a critical shortage of qualified personnel across essential disciplines including anthropology, archaeology, legal services, community engagement, facilitation and mediation, cultural heritage management, and strategic planning. This skills gap undermines the effective implementation of the NTA and threatens the quality of outcomes for all stakeholders involved in native title processes. Addressing this requires a multi-faceted approach including establishing specialised native title qualifications and training programs, creating structured career pathways with competitive remuneration, implementing knowledge transfer systems to capture expertise from retiring practitioners, and developing workforce expansion strategies such as international recruitment and shared specialist positions across organisations.
109. There is an urgent need to establish and maintain a comprehensive panel of accredited experts across these disciplines to support proper implementation of the NTA, similar to the existing Native Title Indigenous Mediator and Indigenous Facilitator list maintained by the Federal Court of Australia. Without such accreditation systems, the sector risks an influx of unethical or inexperienced service providers exploiting the expertise vacuum, potentially causing significant harm to native title processes and outcomes – see further the KLC Issues Paper Submission at [49]-[53]. This must be supported by increased government funding specifically tied to workforce development, national coordination of workforce planning, and the establishment of professional networks to facilitate knowledge sharing and maintain standards across the sector.

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?

110. In the context of Western Australia, the KLC supports reforms to the NTA to manage the impacts of future acts on cultural heritage as outlined at [333] of the Discussion Paper. The Aboriginal cultural heritage laws in Western Australia are demonstrably inadequate and do not serve to effectively protect Aboriginal cultural heritage. The position in other states and territories may be different or give rise to other complexities that should be considered with respect to this question.

²⁴ See further the KLC Issues Paper Submission at [115]-[118] regarding the cost shifting from the State to the KLC and native title parties in the expedited procedure process.



111. Any amendments to the NTA to provide for requirements and processes for managing the impacts of future acts on cultural heritage should be considered and integrated with protections and amendments to the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) to ensure consistency across both schemes and to allow for the highest level of protection to cultural heritage, in accordance with international best practice.

Review of the National Native Title Tribunal

112. The KLC considers there is a strong and urgent need for a review of the NNTT's practices and performance of its future act functions, particularly in relation to expedited procedure objection inquiries and future act determination inquiries. As raised in the KLC's Issues Paper and below, there are some problematic aspects of the NNTT's standard approach to the evidence and decision-making in these inquiries.
113. First, the NNTT regularly, as a matter of course and on its own motion, exercises its discretion under s 148(b) of the NTA to dismiss objections to the expedited procedure where the native title party fails to provide evidence and contentions in accordance with a direction of the NNTT – notwithstanding that neither the Government party nor the proponent seek a dismissal. The NNTT has dismissed objections over 1,700 times to date,²⁵ paving the way for these acts to be done by the Government party.
114. The KLC considers that this is an inappropriate exercise of the power in s 148(b) in circumstances where the NNTT's task is to conduct an 'inquiry' into whether the act is an act attracting the expedited procedure by reference to section 237 of the NTA and no party bears an evidential burden. Where an objection is lodged, the NNTT "must determine whether the act is an act attracting the expedited procedure" (s 32(4)). Evidence from the native title party will certainly be relevant to this task, however it is not a pre-condition or requirement to the performance of this task – the NNTT can, and should, consider whether s 237 is satisfied, regardless of a lack of evidence from the native title party. This is the first, and only, time in the process where a decision-maker considers and determines whether the relevant future act attracts the expedited procedure by reference to the criteria in section 237 (as the Government party is not required to consider or come to a view as to whether the expedited procedure applies when it includes the expedited procedure statement in a section 29 notice).²⁶
115. Second, the inquiries tend to operate in an adversarial manner, counter to the NNTT's administrative and inquisitorial functions. The NNTT engages in a merits decision-making process.²⁷ The NTA provides that the NNTT is not bound by the technicalities, legal forms or rules of evidence (NTA, s 109(3)), conducts 'inquiries' into future act determinations and expedited procedure objections (s 139) and may adopt and draw conclusions from any reports and findings of other persons (s 146) subject to providing the parties with an opportunity to inspect and make submissions on them (s 142). However, in the KLC's experience, the NNTT in practice limits itself to a consideration of the evidence placed before it, and rarely, if ever, makes its own inquiries beyond making the standard directions for the inquiry. This is problematic where the native title party is regularly not able to lead evidence due to limited resourcing and capacity, and there is often additional evidence held by the Government party relevant to the doing of the act. While there is no duty to inquire, the prospects of the NNTT arriving at the correct or preferable decision are

²⁵ See KLC Issues Paper Submission at p 108.

²⁶ *Yanunijarra Aboriginal Corporation RNTBC v State of Western Australia* [2025] FCA 490 at [145] (Horan J). See further the KLC Issues Paper Submission at [98]-[105].

²⁷ *Gomeri People v Santos NSW Pty Ltd and Santos NSW (Narrabri Gas) Pty Ltd (No 2)* [2024] FCAFC 49 at [13].



threatened if it does not make its own inquiries. This can lead to unjust outcomes as there is no avenue for merits review of the NNTT's determinations.

116. Third, the NNTT's application of the 'common sense' approach to the evidence²⁸ requires scrutiny. A common outcome in expedited procedure determinations is where the native title party fails to lead evidence in relation to one of the matters in s 237(a)-(c), the NNTT will invariably conclude that the act is not likely to interfere with the relevant matter. While it may be accepted that matters such as the community and social activities of the native title holders or sites of particular significance are matters "peculiarly within the knowledge of" the native title party, such reasoning does not apply to major disturbance with land and waters as per s 237(c). Nevertheless, the NNTT regularly concludes that the act is not likely to cause major disturbance on the basis that the native title party did not lead evidence or argument on this matter.²⁹
117. On the other hand, in the absence of evidence from the proponent or the Government party, the NNTT applies a long-standing assumption that exploration and mining acts are of economic significance to Australia for the purpose of s 39(c) and are in the public interest for the purpose of s 39(e).³⁰ No such assumptions are made in relation to the effect of the act on the native title rights and interests of the native title party (s 39(a)(i)) in the absence of evidence from the native title party.³¹ A comprehensive review of the decision-making by the NNTT is required to ensure that the NNTT is approaching the evidence in inquiries and determination applications in a fair and just manner, and in accordance with its merits decision-making function.
118. Fourth, the NNTT has been found to have erred in inquiries so as to impose additional evidential burdens on the native title party not required by the NTA. For example, the NNTT for a long time has required the native title party to explain *why* a site is of 'particular significance' before making a finding that it meets this threshold until the Federal Court recently found this requirement has no basis in s 237(b) and is an 'additional hurdle' erected by the NNTT.³² In another recent decision, the Federal Court held that the NNTT erred by incorrectly interpreting s 39(1)(e) of the NTA – that the NNTT must consider 'any public interest in the doing of the act' – as excluding general environmental matters and requiring particular evidence of the impact on native title rights, leading it to dismiss the evidence led by the native title party regarding the impacts of the act on climate change.³³

²⁸ As per *Ward v Western Australia* [1996] FCA 1452; (1996) 69 FCR 208 at [26] (Carr J): A party "might choose not to lead any evidence on a particular issue. But that does not necessarily mean that they must fail on that issue i.e. that they have an evidential onus of proof ... However ... where facts are peculiarly within the knowledge of a party to an issue, its failure to produce evidence as to those facts may lead to an unfavourable inference being drawn when the administrative tribunal applies its common sense approach to evidence."

²⁹ The most recent example of this is *Yinggarda Aboriginal Corporation RNTBC v Vandeleur Superannuation Pty Ltd and Another* [2024] NNTTA 81, where the NNTT at [8] held that: "The Tribunal takes a commonsense approach to the evidence and, because Yinggarda does not make any arguments in relation to s 237(c), I will not further consider the likelihood of major disturbance." See further *Wanjina-Wunggurr (Native Title) Aboriginal Corporation RNTBC v Diamond Bright Star Pty Ltd* [2019] NNTTA 16 at [3]; *Barbara Sturt & Others on behalf of Jaru v Grant Jonathan Mooney & Ors* [2019] NNTTA 9 at [27]; *The Top End (Default PBC/CLA) Aboriginal Corporation v Baudin Resources Pty Ltd and Another* [2024] NNTTA 30 at [27].

³⁰ See, eg, *Areva Resources Australia Pty Ltd and Another v Walalakoo Aboriginal Corporation* [2014] NNTTA 70 at [155]; *Bradford and Julie Young v Kariyarra and Another* [2014] NNTTA 117 at [62].

³¹ See, *Gregory Mark Jensen/Scott Gorringer & Ors (Mithaka People)/Queensland*, [2011] NNTTA 41, [38].

³² *Top End (Default PBC/CLA) Aboriginal Corporation v Northern Territory of Australia* [2025] FCA 22 at [80].

³³ *Gomeri People v Santos NSW Pty Ltd and Santos NSW (Narrabri Gas) Pty Ltd* [2024] FCAFC 26



119. The KLC considers there are further examples of this occurring in determinations, and a review is required to ensure the NNTT's decision-making is not affected by similar errors, particular as the ability of native title parties to challenge NNTT determinations is severely constrained by limitations on their resources and funding.
120. Finally, the NNTT has displayed an unwillingness to impose substantive conditions in future act determinations that have not already been agreed by the negotiation parties, to the detriment of the native title party.³⁴ There is also inconsistency in the approach of the NNTT to the imposition of conditions.³⁵ A comprehensive review of the NNTT's decision-making in inquiries and determinations is required to ensure that it aligns with the objectives and the requirements of the NTA.

Carbon, nature repair and biodiversity projects

Carbon projects

121. There is need for clarity on the interaction between the future acts regime under the NTA and the *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) (**CFI Act**).
122. The CFI Act (and related instruments) is the legislative regime that enables and regulates carbon projects that generate Australian Carbon Credit Units (**ACCUs**). The Explanatory Memorandum to the CFI Act provides that “projects under the scheme are unlikely to be future acts, because projects must be based on existing rights, unless a carbon maintenance obligation (**CMO**) is applied”.³⁶ The Explanatory Memorandum proceeds to note there is a “practical and legal complexity of the interaction of the scheme with native title” and suggests amendments to the CFI Act may be considered after “consultation with a broad range of stakeholders and complete detailed legal analysis”.³⁷ These amendments have not eventuated despite 14 years of the operation of the CFI Act and a demonstrated lack of certainty in the interactions between the CFI Act and the NTA.
123. There is much uncertainty in practice and there is a risk of native title parties not being afforded future act rights due to these complexities. In practice, registration of a carbon project by the Clean Energy Regulatory (**CER**) can involve the creation of legal rights and powers over project areas where native title exists, including but not limited to the power of the CER to impose a carbon maintenance obligation (**CMO**) over sequestration offsets project areas.³⁸ According to the CER, a CMO declaration means that ‘a person must not conduct an activity that reduces or is likely to reduce carbon stores on the land below

³⁴ See further T Corbett & C O’Faircheallaigh, ‘Unmasking the Politics of Native Title: The National Native Title Tribunal’s Application of the NTA’s Arbitration Provisions’ (2006) 33 UWAL Rev 153 at 162-166.

³⁵ See, eg, *India Bore Diamond Holdings Pty Ltd and Another v Bunuba Dawangarri Aboriginal Corporation RNTBC* [2021] NNTTA 5 where the NNTT imposed conditions on the grant of a mining lease in relation to cultural heritage, cultural awareness, communications, employment, contracting and training, and access; cf with the approach of the NNTT in *Australian Potash Limited and Another v Kalman Murphy & Ors on behalf of Waturta* [2021] NNTTA 46, in which the NNTT declined to impose any conditions on the grant of three mining leases sought by the native title party on the basis that the native title party had not provided “specific material or evidence that supports the imposition of these conditions”: at [149].

³⁶ Explanatory Memorandum to the *Carbon Credits (Carbon Farming Initiative) Bill 2011*, 4.50.

³⁷ *Ibid*, 4.51.

³⁸ Sequestration projects sequester carbon in the soil, for example, the ability of right-way prescribed burning programs to encourage the growth and density of native vegetation



the level at the time the obligation was declared (benchmark sequestration level) unless it is a permitted carbon activity. This applies to *any person*, even if they weren't involved in the project.¹³⁹

124. Further, under the CFI Act, carbon projects, including sequestration offsets projects, must be registered with a 'permanence period' of 25 or 100 years with obligations to store carbon for that period. As such, in the event the permanence obligations have not been met and ACCUs not relinquished as directed by the CER, any declaration of a CMO over native title lands may have the effect of being wholly or partly inconsistent with the continued existence, enjoyment or exercise of native title rights and interests. In other words, a CMO can affect (within the meaning of s227 of the NTA) the exercise of native title rights in relation to aspects of land, including native vegetation.
125. In light of this, the registration of a sequestration offsets project, which is the statutory process that gives rise to the CER's statutory power to issue a CMO, may be a 'future act' within the meaning s233 of the NTA. The appropriate future act process to be followed for the act to be validly done will depend on the nature of the native title rights and interests in the area the subject of the registration, and the characteristics of the activities proposed to be done for the purposes of the sequestration project. In the event that none of subdivisions G-N of Part 2, Division 3 apply, and there is no consent of the native title holders through an Indigenous Land Use Agreement (ILUA), then Subdivision O of the NTA provides that the act may not be validly done.
126. The question of the interaction between the CFI Act and the NTA is particularly important given the success of (validly authorised) Indigenous-owned carbon projects in providing important economic, social and cultural benefits to Traditional Owners, including opportunities to care for Country. The KLC facilitates the registration and operation of Indigenous carbon projects on behalf of native title holders. All projects supported by the KLC are owned by native title holders (via the relevant PBC or Aboriginal corporation), and all revenue from these projects goes back to the proponents, is re-invested, and contributes directly to the regional economy, Aboriginal employment, PBC governance and capacity development, as well as ongoing and improved project operations and the co-benefits generated as a result.
127. While the CFI Act provides that native title holders hold an eligible interest in lands where native title rights and interests are recognised,⁴⁰ the CFI Act currently permits registration of carbon projects without the consent of all Eligible Interest Holders within the first reporting period.⁴¹ It is an imperative that Eligible Interest Holder consent, especially from native title holders and claimants, is provided prior to registration of the project, in accordance with FPIC,⁴² both as a matter of principle and good business practice, and to ameliorate or overcome uncertainty created by projects being done without proper consultation with and consent of native title holders.

Nature Repair Act and biodiversity projects

128. The *Nature Repair Act 2023* (Cth) (Nature Repair Act) incorporates many of the shortcomings of the CFI Act in respect of its interactions with native title. One of these shortcomings arises from the fact that the Nature Repair Act splits RNTBC consent so that it is required for:

³⁹ [Carbon maintenance obligations | Clean Energy Regulator](#)

⁴⁰ CFI Act, s 45A.

⁴¹ CFI Act, s28A (2).

⁴² See *Independent Review of Australian Carbon Credit Units* (December 2022), recommendation 11.



- (a) registration of a project (s 18A(1)(c)(iii)), and must be obtained prior to registration; and
- (b) the doing of activities for the purpose of the registered project. However, this consent can be obtained *after* the project activities are done, but must be obtained in order for a biodiversity certificate to be issued (s18A(1)(c)(iv)).

This means that the Nature Repair Act does not prohibit proponents from carrying out biodiversity project activities without the consent of the native title holders, even where such activities affect native title rights and interests.

- 129. Further, under ss18A(3) and (4) of the Nature Repair Act, RNTBC consent can be provided in a form approved by the CER, or by an ILUA. This means that the CER (purportedly) has the power to regulate the manner in which consent to acts which affect native title rights and interests may be done. It is not clear how this power interacts with the NTA or PBC Regulations, whether any inconsistency means that the Nature Repair Act provisions prevail (given it is a later act), or whether the Nature Repair Act or particular provisions of it are a legislative act that passes the freehold test.
- 130. The Nature Repair Act gives rise to similar complexities and uncertainties in the interaction with the NTA as the CFI Act, and this risk may be magnified given the broader scope activities envisioned under the Nature Repair Act to enhance or protect biodiversity that intersect with native title holders' rights and interests.
- 131. Reforms to the future acts regime must be consonant with the increasing importance of biodiversity and conservation in industry, markets and government and mandate FPIC in negotiating commercial and land-use agreements relating to biodiversity projects.