

Queensland Government Response to the Australian Discussion Paper Review of the Future Acts Regime

The Queensland government welcomes the opportunity to provide input into the Australian Law Reform Commission's (ALRC) Review of the future act regime under the *Native Title Act 1993* (Cth) (NTA). The future acts regime is a key component in managing native title responsibilities when progressing the many land and resource dealings the Queensland Government undertakes daily.

Reviewing the future acts regime is timely. The future acts regime has not had significant amendments since the Commonwealth Government amendments in 1998 following the High Court's Wik decision. Reforms to the future acts regime should be guided by promoting sound decision making that considers the whole community whilst promoting First Nations determined native title rights and interests, supported by best practice standards.

Whilst parts of the future act regime work well, other parts should be improved, particularly in a post-determination environment and working towards Closing the Gap outcomes. As an extensive user of the future act regime, the Queensland Government believes that the challenges posed by the current system are increasingly evident.

All parties can benefit from a future acts regime which seeks to strengthen relationships by recognising the significance of native title rights and interests, whilst providing practical ways to progress land and resource dealings, such as critical government infrastructure, housing and quarrying activities.

Queensland supports in principle several of the proposals in the Discussion Paper. The proposals seek to allow a more flexible procedure for a future act to occur which considers the impact of the act on native title rights and interests and for native title parties to have a greater say as part of those procedures. For example, the proposed impact-based model has the ability to simply allow a valid future act. This is discussed further below in this submission.

There is significant work needed however, to further develop these proposals and to understand the implications (including time, resources and costs) for all parties participating in this sector (particularly in relation to some of the key Queensland issues noted below). Funding is a key consideration in the adopting and developing of these proposals by the Commonwealth Government. As native title is Commonwealth legislation, and Queensland will not accept any shifting of costs under any implemented reform.

Further calibration is required to create a more balanced approach to ensure critical government and community infrastructure is not significantly delayed, while still respecting and protecting native title rights and interests. Success depends upon several factors which need to be carefully considered in the final design (if recommended). Some of these issues have been outlined in our responses below, building upon the issues raised in response to the earlier Issues Paper.

Key Queensland issues in the context of the future act regime

Quarrying to support building and maintaining critical government infrastructure

Native title requirements for the maintaining of access to quarry materials in Queensland is a significant issue, particularly for local governments who need to maintain long term access for regional and remote road networks. Local governments in regional areas can be vast in size, with a greater use of gravel roads and may need to travel a long distance to access materials where not able to be accessed close to the relevant road.

The current legislative requirement for a sales permit to be issued to access quarry materials is currently restricting the Queensland Government in addressing these future act issues and, must negotiate registered ILUAs to ensure long term access to quarry materials. This is particularly problematic where the quarry resource might be located, for example, on a pastoral lease. Local government authorities can be constrained by time and access issues, that prevent a registered ILUA being achieved, when accessing the quarry material to undertake disaster repairs or urgent maintenance on public roads.

Under the current regime, section 24GE of the NTA notionally provides a way forward on non-exclusive pastoral holdings subject to notification and opportunity to comment. However, in practice the State's use of this provision is significantly limited as, for example, gravel pits are deemed to go beyond the 'natural surface of the land' are considered mining under the NTA (excluded under s24GE).

It is noted that the proposed impact-based model provides one way forward for the grant of a sales permit (irrespective of whether it is considered mining) to get access to quarry materials without the requirement of an ILUA in all cases, which is an issue currently being experienced in Queensland. As a result the impact-based model could provide improved efficiency and security for critical public purpose material extractions. However, most sales permits for quarrying (even for a gravel pit) would appear to fall within the 'high impact' category, requiring the right to negotiate process under the proposed reforms due to the activity and its high impact potential on the native title rights and the land. If a native title management plan (NTMP) applied, it would need to appropriately deal with maintaining access to quarry materials, underlining the importance for the proposed plans to be negotiated and agreed with the state, as well as a separate category for a more streamlined procedure for gravel pits under the impact-based model.

If the existing future act regime were to be retained, the inclusion of 'natural surface' in the 'mine' definition in the NTA should be reconsidered or the definition amended, as it effectively means that most quarrying activities on the land are considered mining, even though the quarrying activity does not involve extracting, producing or refining minerals (section 253(d)) or processing by non-mechanical means (section 253(e)). There is a need to clarify the scope of section 24KA to support essential government infrastructure, to make it clear that it extends to those acts that are integral to the creation and maintenance of facilities for services to the public. For example, a road, and the grant of an authority to get gravel necessary for that road.

Public housing and critical government infrastructure in Aboriginal and Torres Strait Islander communities

Section 24JAA of the NTA currently provides a valid pathway for public housing and certain government infrastructure to proceed in Aboriginal and Torres Strait Islander communities, as well as related infrastructure of staff housing, section 24KA facilities and sewerage treatment plants. This provision, however, will sunset in 2030.

The impact-based model will enable these works and other critical infrastructure not currently covered by section 24JAA to proceed, such as stand-alone power systems (SAPs) to provide electricity. However, as with quarrying, most of these works are likely to fall under the high impact category and require a right to negotiate process. Whilst this process has set timeframes, it may have the effect that funding opportunities are missed due to strict funding allocation timeframes. This again underlines the need for critical government infrastructure (including those under section 24JAA and section 24KA (whether or not in Aboriginal or Torres Strait Islander communities) to be treated separately to reflect that these types of facilities are for the benefit of the community/public with a more streamlined statutory procedure. It is noted that Question 15 raises whether certain works should be excluded from the impact-based model.

If the existing future act regime was retained, section 24JAA has a legitimate place and should be retained and improved to deliver projects that benefit and support social and health outcomes within remote Indigenous communities, in the absence of a registered ILUA. The sunset provision should be removed.

Expedited procedure

The expedited procedure, where there is no objection, provides a valid pathway forward for exploration. The Discussion Paper asks whether the expedited procedure should be repealed, with exploration then coming under the impact-based model requiring consultation (very low-level activities) or full right to negotiate process, an ILUA or the NTMP.

The Queensland government does not support repealing the expedited procedure. Instead, there is value in retaining and reforming the process to reflect clear guidance to provide a uniformed approach as to when it applies.

Simplifying Indigenous Land Use Agreement processes

ILUAs can be used pre- and post-determination of native title. While ILUAs are voluntary agreements that can encompass numerous negotiated outcomes (individually or collectively per agreement) and build relationships, they can also be time consuming, expensive and resource intensive processes to undertake.

The Discussion Paper considers a number of ways to improve agreement-making for all parties, for example the expansion of standing instructions via the Native Title (Prescribed Bodies Corporate) Regulations 1999 to reduce the need for costly and time-consuming authorisation processes for certain agreements. The Queensland government welcomes mechanisms that would simplify agreement-making, but further detail is required to support the proposals considered in the Discussion Paper (our responses to the proposals and questions are set out below).

Commonwealth funding for underfunded proponents and government entities who are unable to participate in the proposed reformed regime

Queensland notes that resourcing for all participants in the reformed future act regime, as proposed by the ALRC, has been identified as an issue for further consideration. This issue has been further intensified following the Commonwealth's ending of the Native Title Respondents Scheme.

Consideration needs to be given to providing certain classes of proponents and government authorities with access to Commonwealth funding so that they can participate and validly address future acts. Individuals, groups, private sector or government entities, and statutory bodies might be required to actively participate in the relevant processes without adequate resources.

Resourcing for native title processes is a significant issue for local government authorities with limited means, not for profit organisations, community bodies, and/or incorporated bodies or trusts. Comprehensively addressing resourcing will support balance in the native title sector so that fair funding can be provided for all participants in the future act process.

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?

Response

Not supported in its current form.

The Queensland Government supports the provision of alternative procedures for how future acts can validly occur in the relevant determined areas, and where those procedures recognise the need for the State to act appropriately and do not restrict, for example, critical public infrastructure (housing) or time sensitive activities (disaster recovery measures).

There is some merit in the concept of native title management plans (NTMPs) as they could provide guidance for the socio-cultural, environmental and economic aspirations of First Nations peoples. A registered management plan that specifies the types of activities that could occur and the location, supported by costs, payments, and protocols for agreement-making, would assist all parties, including at an early planning stage.

The proposal only requires the state to be notified of the intention to make a NTMP and, once lodged with the NNTT for registration, an ability for the state to make representations to the NNTT as to whether registration criteria have been met. As a further safeguard, it is also proposed in the Discussion Paper that where a native title party effectively withholds consent, a proponent or government may seek determination from the NNTT as to whether the future act can be done. These measures are not sufficient.

An NTMP could set out the future act processes that apply, where the native title parties may wish to withhold their consent and minimum or specified payments (or their calculation). As such, the Queensland government is strongly of the view that an NTMP should be negotiated, or otherwise approved, between the native title group and other stakeholders, including the state, for it to be effective in managing native title for all parties. There is significant detail that needs to be developed, particularly around implementation of NTMPs, before support can be provided by the Queensland government. In particular, the implications for proponents, existing interest holders (such as pastoral lessees) or government parties that represent other interests needs to be fully articulated.

The Queensland government would not support NTMPs where they restrict critical public infrastructure, such as roads, housing or time sensitive activities including disaster recovery. NTMPs must not place unnecessary restrictions or burdens on local governments. For example, a potential delay in the issuing of a sales permit to allow local councils from extracting state-owned quarry materials such as gravel materials, particularly following emergencies such as flooding events where roads are needed to be repaired quickly. The non-renewal, or delay in approvals, of these permits results in cost increases for councils, road user safety issues and delays in undertaking essential road maintenance works (including DTMR and the Queensland Reconstruction Authority (QRA) administered works) and has been a major concern for councils.

As noted in the Discussion Paper [paragraph 62] resourcing would also be critical to the introduction of NTMPs, particularly funding support for them to be reviewed, updated and re-registered so parties can have surety. Where NTMPs include sensitive cultural sites and potential exclusion zones, specialist advice may be required to record, map and determine the significance of cultural heritage sites. These recordings will need to be undertaken by experienced professionals, particularly if their significance is contested.

NTMPs present a practical way forward to progress low impact land and resource dealings post-determination, over costly and time-consuming ILUAs (e.g., assessing quarry pits and apiary sites). They could also be an effective way to address agreements for environmental outcomes, and emerging technologies and schemes, such as carbon credit units, stand-alone power systems (SAPS) operated by an electricity distributor, or visitor infrastructure on national parks.

NTMPs would acknowledge the diversity of Aboriginal and Torres Strait Islander people's culture, aspirations, engagement and decision-making protocols and law. However, consideration needs to be given to the difficulty of parties assessing proposed future acts where they span multiple registered NTMP, ILUAs or other agreements, particularly where there is overlap in subject matter or geography. For example, permits for fisheries research for the monitoring of fish species, hardwood timber harvesting, or the grant of an exploration permit, can occur across multiple native title areas or throughout the entirety of the state. This could result in a requirement for multiple future act processes for the one future act increasing administrative burdens and costs. NTMPs would also need a degree of consistency so that content can be understood and be sufficiently clear on their relationship with existing ILUAs and agreements to minimise legal interpretations.

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?

Response

Not supported.

Queensland does not support prescribing conduct standards in legislation but believes that codified good faith principles/standards would achieve the same outcomes. Otherwise, legal principles and existing case law can address any poor conduct that cannot be addressed through codified good faith.

However, Queensland supports the provision of guidance material that underpins fair and equitable agreement making, but this guidance should retain flexibility for differing circumstances and contexts which is better achieved through voluntary rather than mandatory means.

An alternative approach would be to codify "good faith". The Queensland government believes that establishing a code for good faith would provide better guidance across the native title sector and achieve better conduct standards without the need to prescribe that conduct. Existing case law and legal principles could otherwise address any issues arising from poor conduct during negotiations, which would be supported by codified good faith.

Any standards that are considered should not be prescribed by legislation, alternatively, industry/sector best practice models, codes of conduct or guidance material should be examined. They could also be adopted by RNTBC's and native title groups through the proposed NTMP model. This would guide the native title party's expectations for how negotiations should be conducted and/or agreement content should be drafted.

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.

Response

Supported.

Native title groups should have the autonomy to manage decision making processes in ways that align with their culture. It is not for the state to make those decisions or influence an expanded use of standing instructions. Standing instructions, however, should not be used to prevent PBCs from engaging in lawful future act processes.

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?

Response

Not supported.

Ancillary agreements are often commercial and confidential in nature, and, not specifically a native title agreement (relevant native title consents and impacts are defined in the head agreement such as a Section 31 Deed or an ILUA). Accordingly, confidential or commercially sensitive information in ancillary agreements should be excluded from being publicly available.

Any matter dealing with native title validity and consent should meet the relevant requirements under the NTA. Where it is a 'head agreement', one of the requirements should be that where compensation is dealt with in the ancillary agreement, that is made clear in the head agreement.

Ancillary agreements are often used together with native title agreements and will usually contain the commercial terms agreed between the parties. Accordingly, confidential or commercially sensitive information in such agreements should be excluded from being publicly available. Giving the NTA a wider reach could reduce the confidentiality and autonomy of these agreements, as well as providing additional processes for other types of ancillary agreements which may be required under state legislation or may simply be service level agreements.

Regulation of ancillary agreements could be helpful for all parties in future, given that arrangements under some agreements may be long-term. Having more of the details of all relevant agreements connected to the head native title agreement, where that information is not confidential, would support better oversight of the agreement landscape.

It is suggested that like section 31 Agreement Records maintained by the NNTT, where a head native title agreement is registered/recorded, it must include whether there is another written agreement in connection with it, to ensure visibility and the 'totality' of the agreement. Members of the registered native title body corporate (RNTBC) should be able to access all ancillary agreements associated with the head native title agreement to ensure transparency. This could be done, for example, under the *Native Title (Prescribed Body Corporate) Regulations 1999*. There are risks also with the broader access to confidential information; a breach by a common law holder or an RNTBC should be enforceable and have remedies available. The RNTBC will require a process to manage this access to address these issues.

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.

Response

Supported.

Queensland supports Proposal 2 to the extent that it intends to provide copies only of the registered agreements without creating expectations that legal obligations in those agreements can be amended or changed.

For transparency, this should include agreements that have expired before a determination has been made. This is particularly important where agreements contain provisions in relation to compensation, to alleviate the risk of being compensated twice.

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?

Response

Supported in principle.

The Queensland government recognises the importance of who holds determined native title rights and interests however, changing a registered agreement by assigning rights as a result of a determination must consider the rights and legal obligations of all parties to that agreement, including their ability to agree or not to the proposal to assign.

It is suggested that post-determination, a PBC may request the assignment of an agreement pursuant to a process that allows for natural justice. A person whose interests may be adversely affected, must be given adequate notice of the proposed assignment and be provided with a reasonable opportunity to present their case if they wish. It should also be noted that PBCs should not be bound by an agreement made with different parties, and that the option for an assignment should remain with them.

In that regard, consideration could be given to:

- The Registrar notifying existing parties to an agreement of the determination and the intention to assign the interest in the agreement to the PBC. The parties would have an opportunity to make submissions on why the agreement should not be assigned. This could occur once the PBC has been nominated.
- The need for common law holders to ratify/authorise the assignment of the agreement.
- The Registrar considering and resolving objections.
- Timeframe post-determination for the agreement to be assigned. Twelve to eighteen months could be appropriate, acknowledging the workload of new PBCs are already significant.
- Confirming that the agreement being assigned is valid and enforceable pending assignment.

In some circumstances, assignment may not be appropriate. For example, it may significantly impact on the joint management of national parks such as Cape York Peninsula Aboriginal land (CYPAL). Many CYPAL national parks were negotiated prior to a positive determination of native title. First Nations landholding entities are often not PBCs and may not wish to assign rights and responsibilities to PBCs.

Any amendments should also make provision for where an agreement covers areas of land that include multiple distinct determined native title parties.

If the Federal Court is required to make a declaration regarding which agreements are to remain on the register and which are to be removed (or archived), for certainty it would be better to make this at the point of determination. Unless funding and resourcing is expanded post-determination, leaving a matter like this until post-determination potentially means native title parties may not have the capacity or support to appropriately address the matter.

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.

Response

Not supported in its current form.

Instead of 'removal', a status of "inactive / archived" should be utilised so the ILUA details can still be accessed.

The Queensland government does not support the proposal in its current form. Instead of 'removal', a status of "inactive / archived" should be utilised so the ILUA details can still be accessed. For example, if it is needed to establish at a later date that a future act was covered by the now inactive agreement, the agreement would remain valid.

A process would need to be developed in relation to (a) to advise the NNTT. There may also be value in notifying the parties to the ILUA that the status of the ILUA has changed or is to change. Upon the status change, this should then constitute a separate mapping layer / register to current ILUAs.

Proposal 4

The Native Title Act 1993 (Cth) should be amended to require the Native Title Registrar to periodically audit the Register of Indigenous Land Use Agreements and remove agreements that have expired from the Register.

Response

Not supported in its current form.

The Queensland government does not support the proposal in its current form. Audit requirements as outlined should be part of general administrative practices. To further assist with this outcome, an amendment to s199C(1)(c) could be made to include deactivating an ILUA upon expiration where the ILUA has an expiry date. This expiry date should specifically have an end date field in the Register information, meaning this process could be automated.

Question 10

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

Response

Supported in principle.

The Queensland government notes the analysis provided by paragraphs [120 – 123] of the Discussion Paper. The degree to which any proposed amendments expand the concept of permissible amendments, and what is currently considered by section 24ED, should be carefully considered. Amendments need to avoid any risk that adversely affect the authorised native title consent in the ILUA and, consequently, the contractual obligations of other ILUA parties.

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.

Response

Supported.

Where an agreement does not have a dispute resolution process, the parties should be able to agree to resolve the dispute through the NNTT.

Question 11

Should the Native Title Act 1993 (Cth) be amended to provide that new agreements must contain a dispute resolution clause by which the parties agree to utilise the National Native Title Tribunal's dispute resolution services, including mediation and binding arbitration, in relation to disputes arising under the agreement?

Response

Supported in principle.

All agreements should include a dispute resolution clause to clearly outline the process for resolving conflicts. As the Discussion Paper notes, parties should always be permitted to agree that disputes be decided by an independent person or body or the Federal Court.

There is benefit in providing a mandatory alternative dispute resolution (ADR) framework, with the qualification that the statutory avenue is available where the parties do not identify an alternative approach in the agreement. This approach would create a safety net and choice for the parties to rely on the statutory provisions or negotiate an alternative. The ADR framework appropriately would sit with the NNTT, or elsewhere by agreement.

Question 12

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

Response

Supported.

The proposal supports transparency where ILUA parties agree to have agreements registered openly. The Queensland government agrees that this should not be imposed. If the parties decide to keep their agreement confidential then the current framework for ILUA publication and register extracts should also be retained. If agreements are registered and made publicly available, it would be appropriate to redact parts of the agreement that are specific to the parties.

A register, as proposed, may be useful if publicly available information included details of future act agreements where alternative processes are agreed (including within ancillary agreements if that is agreed). It could become a useful point of truth and should remove concerns around what information can be shared with third parties and improve transparency.

Question 13

What reforms, if any, should be made in respect of agreements entered into before a native title determination is made, in recognition of the possibility that the ultimately determined native title holders may be different to the native title parties to a pre-determination agreement?

Response

Supported in principle.

As per Question 9, reforms relating to pre-determination agreements should be considered carefully. All area ILUAs should include provisions detailing the actions to be taken following a determination. Any reform needs to balance the entitlement of the native title parties, whether they are the ILUA party or the PBC, and the security of legal commitments being made by the non-native title party.

Additionally, any reform for this issue also needs to consider processes whereby the members of the ILUA party and the PBC agree to address issues such as:

- assignment of rights and obligations, potentially to the PBC.
- consideration of the rights of individuals who are not members of the PBC; and
- funds and benefits from the ILUAs and how they are invested, disbursed and who might access the funds for reasonable purposes.

In the circumstances considered by this proposal the allocation or holding of funds received from pre-determination ILUAs in a trust could be beneficial in the long term for the broader native title group, if the issues raised in this response can be appropriately addressed.

Reshaping the statutory procedures

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; Response Supported in principle.
b) applies to all renewals, extensions, re-grants, and the re-making of future acts; Response Not supported in its current form.
c) requires that multiple future acts relating to a common project be notified as a single project; Response Supported in principle.
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 Response Supported in principle.
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? Response Supported in principle.

The Queensland government acknowledges that the current future act regime requires improvement, as demonstrated in our response to the Issues Paper. The current activities-based model is complex and can create inconsistent processes for activities with a similar impact on the land or culture. A more nuanced approach is needed with additional impact categories and associated procedural rights.

Should Part 2 Division 3 Subdivisions G–N be retained, it is recommended that the matters raised in the response to the Issues Paper should inform any recommendations for improvement to those provisions, particularly to support critical government infrastructure, housing and quarrying.

If the ALRC recommends that Part 2 Division 3 Subdivisions G–N not be retained and be replaced by a different system, Queensland government support would be dependent upon how the new system appropriately balances all interests.

a) categorises future acts according to the impact of a future act on native title rights and interests

This is supported in principle. The impact-based model in its current form is not supported. However, an impact based model as a concept is supported in principle as it aligns with the extent of an act's impact on native title. An impact-based model would provide valid pathways for all future acts that may otherwise currently require an ILUA (apart from where surrender was required under an ILUA).

However, the proposed model does not appropriately balance all interests, and a more nuanced approach is needed with additional impact categories and associated procedural rights. An expanded list of impact categories is required, for example:

- emergency works.
- notification and comment process for low-level impacts such as research permits on a national park or fisheries resources; and
- activities where a streamlined procedural process would be appropriate such as for critical government infrastructure and gravel pits for roads.

The Queensland government needs to ensure that government infrastructure can be built for the benefit of the public (such as those under s24KA), and social housing and other infrastructure can be built on Indigenous land (s24JAA) – see question 15(a) below.

This expanded category list should also recognise dealings that would currently fall under current section 24JA. Where there are existing pre-Wik interests, these should be able to continue to be used and managed for their purpose, e.g., a Land Act reserve, protected area, state forest, etc., and future acts on these lands should be dealt with in a separate category.

Within an expanded impact-based model, consideration could also be given to retaining the freehold test for certain 'lower level' impact future acts, which would still provide reasonable protection in relation to native title and is a test currently understood by the sector. In relation to procedural rights, for lower level' type future acts, it may be appropriate (at least in certain instances) that procedural rights are not applicable and a regular bulk update (e.g., monthly) provided to advise the native title party of such future acts undertaken.

Cost, timeframes and resourcing

Queensland is strongly opposed to any proposal that would significantly increase the costs, administrative burden and timeframes for all parties under the proposed model with every future act requiring a native title process - every permit, every water allocation, every trustee lease, etc., accompanied by either consultation or a right to negotiate. The future act system will break under the weight and volume this would create and will create significant delays in decision-making. Queensland would need to increase its resources to handle the level of consultation and negotiation required, as would PBCs, many who do not have sufficient capacity or resources to handle their current obligations.

The Discussion Paper notes that consultation also includes engagement between the parties to minimise the impact of the future act on native title rights and interests to the extent reasonably practicable. Whilst that may be considered best practice in one sense of the term, it is not reasonably practicable to undertake engagement on every type of future act the State undertakes. The consultation process does not suggest a timeframe, other than the right to negotiate process could extend to 18 months.

There is also a need to consider the inter-relationship with other legislative timeframes, for example, a requirement under legislation to consider a permit application be made within 40 business days.

Further guidance/clarity needed

Clear guidance is required to correctly categorise a future act as 'low impact' or 'high impact', or as suggested above, an expanded range of impact categories. The guidance in the paper does not give sufficient clarity as to how it would apply to the state's land and resource dealings. For example, categorisation was unclear or not considered appropriate for a 30-year trustee lease for a local soccer club to construct a club house on a pre-Wik reserve; the dedication and construction of an area as road; a gravel permit for the purpose of maintaining roads; a development approval to permit a large development but where the main authority is a different future act.

The categorisation also identifies whether the right to negotiate process applies which is proposed to have a broader context and as such the proponent could include members of the public. Additionally, the effect on native title needs to be considered where the non-extinguishment principle may not be appropriate (such as the grant of freehold).

It is also unclear what happens where an area has previously been assessed as high impact and is now being considered for a low impact activity. Further, the procedural rights that would apply

where an existing impact is similar / same to a proposed future act. For example, see response to renewals, extensions etc., below.

Difficulty may also arise in assessing the impact on native title for certain dealings, in the absence of a determination or registered native title claim.

Lack of clarity creates a subjective environment, and thus more open to challenge by native title parties and non-native title parties.

b) *applies to all renewals, extensions, re-grants, and the re-making of future acts*

This is not supported in its current form. Renewals, regrants and extensions and re-makings should be included in the impact-based model but not in the model's current form. There should be a separate category for renewals etc with appropriate procedural rights. If a lease has already undergone the statutory right to negotiate process for its initial grant under a reformed future acts regime, it should not be required to repeat this process for every renewal or re-grant within a short timeframe, and no additional impact on the land is identified.

Criteria like section 26D of the NTA could be developed to support those renewals of mining/non-mining interests originally subject to the reformed right to negotiate procedures. For example, deeming those types of renewals as being in the low impact future act category and therefore subject to consultation. The right to negotiate could also deal with future renewals, where appropriate.

However, this should exclude where there is an existing interest that meets the following requirements:

- current section 24IC of the NTA. Queensland's non-exclusive pastoral leases are generally rolling term leases, which originate pre-Wik and rely upon section 24IC to extend the term of those leases to provide security of tenure for the lessee; and
- current section 26D of the NTA for an existing right to mine which has no increase in area, term or new rights created.

This exclusion would allow those existing interests to be renewed without a further native title process, as per the current process.

c) *requires that multiple future acts relating to a common project be notified as a single project*

This is supported in principle. The overall impact of the project must be considered, and it may not be suitable for all projects, especially those occurring in different stages and timeframes. As such, this reform should be optional and not be mandated. There are advantages for the native title party in receiving one notification and being able to consider all future acts for the project. For the Queensland government, it would require a high level of coordination between the relevant departments and agencies. It would need to be made clear whether the 'project act' was considered the 'future act', as this would have relevance to compensation. Clarity would be useful as there is usually the main future act, with a number of regulatory type approvals that support it.

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*

This is supported in principle. Subject to the previous feedback regarding categorisation of future acts under the proposed impact-based model (see 14(a) and 14(b)), it makes sense for the category to determine the relevant procedural rights where the impact-based model applies.

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?*

If an impact-based model were to be implemented, there would need to be a clear avenue where both native title party and the state could seek the NNTT to determine the correct category. Ideally the impact-based model should be set up to succeed, such that the categorisation of the dealing is clear and provides certainty for all parties (see 14(a) above) so there would be no need to seek such a determination.

This process would also need to have a timeframe attached, so that land and resource dealings were not unnecessarily delayed.

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)); Response Not supported in its current form.
b) future acts involving the compulsory acquisition of all or part of any native title rights and interests; Response Not supported in its current form.
c) exclusions that may currently be permitted under ss 26A–26D of the Native Title Act 1993 (Cth); and Response Supported in principle.
d) future acts proposed to be done by, or for, native title holders in their determination area? Response Supported in principle.

Further to the response in Question 14 where Queensland believes that a more nuanced approach should be created if the impact-based model is established, Queensland government support would be dependent upon how the new system appropriately balances all interests.

Clear identification of categories would be required for those acts that are delivering critical government infrastructure, or provide for leases, licences or permits that support that delivery of services to the public as an ongoing function, or in times of emergency or disaster recovery.

The Queensland government acknowledges that the current future act regime requires improvement, as demonstrated in our response to the Issues Paper. The current activities-based model is complex and can create inconsistent processes for activities with a similar impact on the land or culture.

a) infrastructure and facilities for the public (such as those presently specified in s 24KA(2) of the Native Title Act 1993 (Cth))

This is not supported in its current form. Critical government infrastructure such as that listed in section 24KA(2), as well as social housing and other government infrastructure on Indigenous land covered by section 24JAA, should not be excluded from the impact-based model but should have a separate category/s to reflect that these types of facilities are for the benefit of the community with a more streamlined statutory procedure. In some cases, such infrastructure can also be subject to funding timeframes.

There should also be a stand-alone category for emergency situations, such as immediate works that are required to keep a community safe during or immediately after a severe weather event. Emergency would need to be clearly defined. A notice advising of the works could be provided to native title parties detailing the works required to be undertaken.

b) future acts involving the compulsory acquisition of all or part of any native title rights and interests

This is not supported in its current form. The Queensland government recognises the irreversible impact the compulsory acquisition of native title rights and interests has on native title. Wherever possible, an agreement with the native title party should be pursued as a priority, with compulsory acquisition considered only as a final resort – after all other reasonable and practicable alternatives have been explored. This approach may form part of current state and territory government policy or legislative frameworks.

Compulsory acquisition should have its own category / procedure reflective of the significant nature of acquisition within the impact-based model, with one suggested element of the process to enable objections by the native title party be heard by an independent body. If so, a similar provision to section 42 of the NTA should be included to enable the relevant state Minister to overrule the determination, where in the state's interests.

c) *exclusions that may currently be permitted under ss 26A–26D of the Native Title Act 1993 (Cth)*

This is supported. As noted above, section 26D of the NTA should be retained as noted in the response to Question 14(b) above. No comments are made in relation to sections 26A to 26C.

d) *future acts proposed to be done by, or for, native title holders in their determination area?*

This is supported. There should be a recognition that where a future act is being done by, or on behalf of, a native title holder on their determined land that there is a separate process or no process. Where the native title party is the proponent or landholder, it should not be undertaking the relevant process with itself.

The definition of 'future act' in section 233 should be amended, to ensure that this scenario does not constitute a future act. This does not preclude the RNTBC being required to undertake any required consultation with its members regarding the act.

It is also noted that this issue could otherwise be dealt with by the NTMP.

Question 15(a) also notes the need for a separate process / category for social housing and government infrastructure on Indigenous freehold land.

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?

Response

Strongly opposed.

The practical implementation of this concept, particularly in relation to waters, would need significant consideration and consultation to ensure its feasibility. Without some certainty as to what this area should cover, there is potential for validity issues to arise.

Expansion outside of the immediate footprint area may also deter proponents from proceeding with proposed expansion of irrigated agricultural production - resulting in loss of potential benefit to the regional economy and jobs. This could occur where a proponent is seeking additional water supplies to expand irrigated agriculture. The requirement to account for native title rights and interests outside the immediate footprint of the future act means that all native title claims and determinations along a watercourse downstream of the proposal and any connected water bodies are in scope of the future act assessment, substantially increasing procedural timeframes and costs.

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

Response

Supported in principle.

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

Response

Strong opposed.

- 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*

This is supported in principle. The application of tailored provisions and specific procedural requirements would need a baseline test to guarantee that any new legislative acts that are future acts do not leave affected parties worse off e.g., the “not better off” test or a freehold test.

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

This is strongly opposed as this could have significant implications on the efficient delivery of statutory water planning activities. Water planning processes already include extensive engagement with First Nations people and involve a public submissions process. This process includes considering Aboriginal and Torres Strait Islander values, interests and cultural rights, as well as supporting and advancing First Nations cultural outcomes.

This proposal could protract the procedural timeframes to finalise water plans in a manner that can facilitate positive community outcomes, undermining stakeholder support for suitable water management arrangements. It can also delay improved day to day management of water aimed to deliver cultural, economic, social and environmental benefits for Queensland communities.

Furthermore, section 233, of the NTA already sets out the definition of a future act. An act, whether a planning activity or otherwise, is a future act when it meets the definition of ‘future act’ under section 233, NTA. As with any act, an assessment will need to be carried out to understand if the particular act is one that affects native title.

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.

Response

Not supported.

- 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.

Response Not supported in its current form.
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). Response Supported.
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. Response Not supported in its current form
e) If the National Native Title Tribunal determines that the future act can be done, the Tribunal may: • require the parties to continue negotiating in accordance with the negotiation conduct standards to seek agreement about conditions that should attach to the doing of the future act; • at the parties' joint request, proceed to determine the conditions (if any) that should attach to the doing of the future act; or • if the Tribunal is of the opinion that it would be inappropriate or futile for the parties to continue negotiating, after taking into account the parties' views, proceed to determine the conditions (if any) that should attach to the doing of the future act. Response Supported.
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. Response Supported.
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). Response Supported.
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. Response Supported.

The current Right to Negotiate (RTN) process is not balanced. The requirement for native title holders to negotiate in good faith, with a view of allowing a project to go ahead and that a native title consent is

assumed, removes any real influence the native title holders have over the project or their ability to negotiate a fair deal with the proponent.

Generally, Queensland strongly opposes any right to negotiate processes that would have a significant impact on water-related activities. A right to negotiate could have significant implications on delivery of urban water supplies, including expansion of clean water supplies to towns to meet their growing needs. The relevant *Water Plan* (subordinate legislation) may establish water for this purpose and be informed by extensive stakeholder engagement, including First Nations people and public engagement with the community.

This engagement process includes native title considerations and includes notification to the PBC. The proposed right to negotiate protracts this process. If there is an RTN as proposed, where a Council cannot provide adequate access to water supplies for the community, water will need to be provided by other means, or applying prolonged water use restrictions on residents and industry, increasing costs for council and residents and limiting regional economic development.

Under Proposal 6, the right to negotiate will be extended to dealings that are considered high impact, not just for mining activities. Consideration needs to be given as to whether a 'one size fits all' approach for all dealings that would fall into 'high impact' should be subject to the right to negotiate (see comments at Questions 14 and 15).

Aboriginal and Torres Strait Islander people are not necessarily anti-mining, or against agreement-making, and in most cases are willing to make reasonable deals with proponents which are mutually beneficial. For over 50 years now, Aboriginal people have agreed to deals in the Northern Territory where they have a veto right on Aboriginal freehold land. There is little reason to believe that this would not also be the case outside of the Northern Territory. Mining is of high importance to not only the Queensland economy, but also regional communities and any process must not be an impediment to mining opportunities.

- 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.*

This is not supported. As a minimum standard, proponents should be provided the required information at the time notification is given. The native title party could be provided with a timeframe to seek clarification or additional information, but notifications should be properly made when provided. Extended timeframes for the notification period could impact on the processing of commonly agreed dealings. For example, an Allocation of Quarry Material Permit process currently occurs within a timeframe of less than 6-months.

- 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.*

This is not supported in its current form. The Queensland government supports a process of withholding consent (objection) where that objection is reasonable and justified but not as a blanket veto right. An ability to object recognises that inherent in the right to negotiate process, is good faith negotiations with a view to reaching agreement, and that a native title party may well have reasonable grounds not to agree to certain aspects of the proponent's plan, e.g., a sacred site. The objection process also has potential to create an adversarial situation or an opportunity for obstructionists to slow down the process with vexatious objections, impacting an agreement making environment.

The Queensland government suggests this proposal is modified to include the ability to object be limited under the NTA (or regulations) to a list of reasonable and justified reasons for objection. For example, where the project may have significant impact on, or access to, important cultural sites or where the proponent refuses to act in good faith in modifying their plans in response to concerns raised.

- 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).*

This is supported. If an objection process was incorporated and the native title party objects, the basis for the NNTT deciding whether an act can or cannot be done should be tied to whether the objection was reasonable and justified. The NNTT's powers should be clearly defined and appealable.

- 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.*

This is not supported in its current form. Further clarity is needed regarding the process if the NNTT determines that a future act cannot be done. Questions include: could the native title party then choose another party to negotiate a future act with; who decides if the circumstances are similar; would there be a register of areas where the decision applies so a party can ascertain if they would be lodging a notification within the 5-year time period?

The 5-year period with no requirement for the native title party to negotiate is not supported. This is essentially a right of veto and could prevent applications over that area for a 5-year period and be detrimental for example in the mining and resources sector.

- e) *If the National Native Title Tribunal determines that the future act can be done, the Tribunal may:*
- i. *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;*
 - ii. *at the parties' joint request, proceed to determine the conditions (if any) that should attach to the doing of the future act; or*
 - iii. *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.*

This is supported. The options appear to cover different scenarios to take into account whether negotiations should keep proceeding or not.

- 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.*

This is supported. There is currently no format for the parties to seek resolution of matters of non-agreement. It also should be recognised it carries the risk of parties jumping the objection process and increasing the regulatory costs of the NNTT.

- 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).*

This is supported. This is current practice and agree that this should be continued.

- 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.*

This is supported. The longer timeframe to lodge a future act determination application from the notification day is supported.

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.

Response

Supported in principle.

The proposed amendments would significantly expand the role of the NNTT. While the Discussion Paper acknowledges the need for adequate funding, it remains unclear whether the NNTT has been properly consulted on the additional responsibilities or whether it supports the scope of the proposed changes. To ensure the NNTT can carry out these new functions efficiently, it would require adequate funding in line with the increased demands.

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?

Response

See below.

Please refer to response to Proposal 6(b).

The Queensland government supports a process of withholding consent (objection) where that objection is reasonable and justified but not as a blanket veto right. This should be based on the principles of good faith negotiations and where reasonable grounds for the objection can be demonstrated.

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?

Response

See the response to Question 19 below.

The Queensland government supports consistent criteria that also take into account the submissions of the parties. Given that the right to negotiate process will apply also in a non-mining context under the proposals there will be a need to consider if the current considerations are fit for purpose. Also, consideration with the inter-relationship with the relevant state legislation under which the future act is done.

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.

Response

Supported in principle.

The Queensland government supports this proposal in principle, noting the comments raised in the Discussion Paper. It should be made clear the linkage between the native title payments and the native title compensation payable for the future act, that is these payments are compensation for the future act. See also response to Question 25.

Proposal 9

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

Response

Not supported.

It is suggested that rather than repealing the expedited procedure (s32), there is value in retaining it and reforming the process, with clear guidance being developed to provide for a uniformed approach to when the expedited procedure can be applied.

If not retained, and the impact-based model were to apply, there should be clear guidance as to when an exploration permit would be considered 'low impact' or 'high impact'.

Question 20

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

Response

No response.

Queensland offers no views on this question.

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;

Response

Not supported.

- 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;

Response

Supported in principle.

- 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

Response

Not supported in current form.

- d) in some other way?

Response

Further suggestion.

Queensland supports the review of the provisions under Part 2 Division 3 Subdivision F of the Native Title Act 1993 (Cth). However, caution should be applied to some proposals where that may "lock out" the ability of governments, proponents and non-native title parties to progress dealings where there may be no native title claims, or there has not been a sustainable claim for an extended period. Additional tests or thresholds should be established, which have been explained in the responses

below, to elicit a more thorough application and support any outcome that may permanently affect native title in the area concerned.

- a) *should Part 2 Division 3 Subdivision F of the Native Title Act 1993 (Cth) be amended: to provide that non-claimant applications can only be made where they are made by, or for the benefit of, Aboriginal or Torres Strait Islander peoples*

This is not supported. The Queensland government does not support this proposal as it would remove the potential use of a non-claimant application by a government party or a non-native title party to gain section 24FA protection for progressing future acts. In some cases, this may be the only way to progress a future act, particularly where there is no claimant and no reasonable prospects of negotiating an ILUA in an area not subject to a claim or determination. This proposal would effectively 'lock out' these activities from validly occurring across vast areas of land where no claims have been progressed for a substantial period of time.

- 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;*

This is supported in principle. The Queensland government supports in principle a longer timeframe to enable a fairer process for a native title party to respond. Consideration will need to be given as to what would be considered 'a reasonable timeframe', based upon the effect on native title (such as 12 months for an extinguishment outcome and 3 months for a non-extinguishment outcome).

- c) *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*

This is not supported in its current form. The Queensland government supports the outcome that the non-claimant applicant should have some further responsibility, such as being required to do some due diligence before being able to make a non-claimant application. While a test is required, further consideration is needed as to what would be the most appropriate test (e.g., reasonable endeavours).

As a further observation, the Federal Court Form 2 does not include any specific requirement for the application to identify how the applicant will support the assertion that native title does not exist in the application area. A requirement for better foundation evidence should be required, such as including that the relevant native title representative body has been consulted.

A further responsibility of proponents should be that of compensation. Given that an applicant would have paid compensation through an ILUA, if that had been otherwise possible, there should be an ability under the NTA to pass the compensation liability on to the non-claimant applicant as can currently be done under subdivisions K, M and N (where a law of the state otherwise provides).

- d) *in some other way?*

Further suggestion, where section 24FA protection is relied upon to progress a dealing, clarification of the effect on native title would be of benefit, as the effect of the interest is dealt with differently to other future act provisions. For consistency, one suggestion is that if the future act is the grant of freehold or other exclusive interest, then extinguishment results, and for any other act the non-extinguishment principle applies (such as is provided in section 24ID(2) of the NTA).

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.

Response

Supported in principle.

The proposal is supported to the extent that procedural rights to be afforded to the native title parties are clear, including the area covered by a future act (see response to Question 16).

A government party or proponent should be able to demonstrate that due process has been carried out in both the decision to carry out an act as well as delivery of that act. It is important that government agencies are upholding the intent of the legislation. The proposed changes would build relationships with native title parties.

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?

Response

Supported.

The Queensland government supports codifying the rights and effects of non-compliance as this would provide greater clarity. The NTA should address expressly the consequences for invalidity.

Question 23

Should the Native Title Act 1993 (Cth), or the Native Title (Notices) Determination 2024 (Cth), be amended to prescribe in more detail the information that should be included in a future act notice, and if so, what information or what additional information should be prescribed?

Response

Supported in principle.

Currently, the sections to be completed describing what is being proposed by a future act is limited. More detail would be beneficial. Greater clarity would ensure native title parties are informed to ensure better decision-making when engaged on future act matters. A template 'form' could assist and / or minimum information standards included in the regulation.

Any additional information to ensure compliance with native title notification and to provide the same level of information on the notice regardless of jurisdiction would prove beneficial.

A resolution is needed for permits and class notifications, such as fisheries permits, which are not area specific (see also response to Question 14(a)), and therefore a clear description may not be possible and will need to depend upon the nature of the future act.

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.

Response

Not supported in current form

The Queensland government does not support the proposal in its current form. The maintenance of a public register of notices carries the risk of increased administrative and financial burdens on all parties, and this risk needs to be addressed before fully supporting this proposal. Privacy concerns of the data would also need to be considered.

It is also not clear if the proposal is suggesting that notices be lodged in 'real time' or simply as a central record of notifications provided to native title parties. Both could create a significant workload depending upon how it is implemented. For example, efficiencies could be gained if a portal-like data system replaced the current requirement for newspaper notifications and facilitated data analysis such as grouping by type of notification, proposed impact, location etc.

However, key benefits of a central record mechanism for future act notices would be improving consistency and transparency, as well as assisting in identifying compensable future acts for compensation applications.

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 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?

Response

Not supported in current form.

Queensland believes there is merit in the concept of a future act payment, but any support would be dependent on the detail in the provisions for how this model might be established and what is deemed to be a specified future act. Further consideration is required in how the payment is applied, under what circumstances and how it might be determined by an arbitral body such as the NNTT.

Particularly, where an agreement is being negotiated for the future act, then the terms of that agreement should specify what is deemed to be the future act payment.

Amendment to the NTA as proposed is not supported in its current form; further details are required as to which future act payments may fall within paragraphs (a), (b) and (c).

If a payment is made under an agreement, then it is the agreement that sets out the agreed payment terms. For payments outside of agreements, the Queensland government supports that "future act payments" are payable prior to or contemporaneously with the doing of future acts, as agreed between the native title party and relevant government party or proponent.

With regards to any relationship with the validity of the future act, the Queensland government does not consider that failure to make a native title payment should result in invalidity. There would be other processes that are available to seek enforcement of payments.

In respect of paragraph (c), for low impact future acts a statutory default would be beneficial. However, it must be indexed.

A proposed statutory default should be able to be contracted out of through a management plan or negotiated ILUA. Native title parties should always have the option to seek 'payment' in alternative forms. The framework should not be so prescriptive that it prevents these opportunities. For example, this approach may be too prescriptive in cases where native title parties are able to negotiate a better outcome, e.g., mining agreements. If an amount or formula was prescribed by regulations, it should be adjusted for indexation.

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)?

Response

See below, Question 25 is dependent upon Question 24.

Queensland believes that where the future act payment is agreed to be compensation then it should be the whole of the compensation.

Subject to the further details required in relation to the matters discussed in Question 24, a future act payment should constitute the whole compensation amount for the effect on native title by the doing of the future act under the relevant future act provision for the purposes of Part 2 Division 5, unless otherwise agreed. It should be the whole compensation amount, where it can be reasonably calculated.

The relationship of the native title payment should be very clear to ensure clarity as to whether the compensation liability has been discharged for a particular future act and there is no duplication of payment.

Proposal 12

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

Response

Supported in principle.

The fact that compensation payable under an ILUA is currently full and final, has in some cases acted as a significant barrier to reaching agreement due to concerns about lack of jurisprudence relating to calculating financial compensation for future acts.

If the parties could agree that a negotiated amount was not full and final compensation under the NTA, this may assist parties to reach agreement. It should be made explicit that when compensation is ultimately paid on a full and final basis, it must take into consideration any amounts already paid under an agreement.

Question 26

Should the Native Title Act 1993 (Cth) be amended to provide for a form of agreement, which is not an Indigenous Land Use Agreement, capable of recording the terms of, and basis for, a future act payment and compensation payment for future acts?

Response

Supported, but needs to go further.

The future acts regime also needs to allow for other types of agreement making, e.g., for certain acts of a lower impact nature, and that do not require the same time and resources to establish as an ILUA or Right to Negotiate.

ILUAs are expensive and time-consuming for all parties, and the transaction costs for the agreement may outweigh the benefits. As such, the future acts regime also needs to allow for other types of agreement making, e.g., for certain acts of a lower impact nature. In a post-determination environment, there should be consideration of allowing a PBC to enter into an agreement, such as a contract as opposed to an ILUA, about certain future acts (such as bee hives and gravel pits) where native title consent can be given without the need for costly and time-consuming authorisation. This could also

build upon recent amendments that allow native title groups to provide standing instruction decisions in accordance with provisions in the *Native Title (Prescribed Bodies Corporate) Regulations 1999*.

Further, where time is of the essence and the only way forward is by way of an ILUA, an alternative agreement-making process or expansion of existing future act provisions is required. An important example is disaster recovery following an extreme weather event.

Proposal 13

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

Response

Supported in principle.

The State, as the model litigant in native title matters, should be making all efforts to ensure that it does not undertake invalid future acts. Currently the future act regime does not provide strong guidance on the impacts of an invalid future act and clarity is needed.

The terms of what might trigger invalidity needs to be identified clearly. For example, to what extent does an error in a notification process trigger invalidity? Liability also needs to be clearly identified and how that liability is addressed if a third party (non-government) is involved in, or is a beneficiary of, the future act.

This issue needs to be clearly separated from the compensation of a valid future act or past and intermediate period acts under the NTA.

Resourcing, costs, and implementation

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.

Response

Supported in principle.

The Queensland government supports Commonwealth Government mechanisms fully funding PBCs to ensure they can meet their duties under the proposed reforms in the Discussion Paper. The specifics of how this funding is managed and allocated is a matter for the Commonwealth. Queensland will not accept any shifting of costs under any implemented reform.

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.

Response

Supported in principle.

Future act processes are part of the current functions of native title representative bodies / service providers. However, this funding is not sufficient and should be increased to more effectively support PBCs for all PBC functions. It is noted that the National Indigenous Australians Agency does currently provide capacity building and basic support funding.

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.

Response

Supported.

The proposed reforms would significantly expand the role of the NNTT. While the Discussion Paper acknowledges the need for adequate funding, it remains unclear whether the NNTT has been properly consulted on the additional responsibilities or whether it supports the scope of the proposed changes. Adequate funding in line with the increased demands would be critical to ensure the NNTT could carry out these new functions efficiently.

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;

Response

Supported.

- b) enable delegated legislation to prescribe a minimum scale of costs that native title parties can charge under s 60AB of the Act;

Response

Not supported.

- c) prohibit the imposition of a cap on costs below this scale;

Response

Not supported.

- 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

Response

Supported.

- 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).

Response

Not supported.

The Queensland government supports PBC's and native title claimants charging a fee where they perform any of the functions under s 60AB of the NTA. This would improve appropriate resourcing for native title parties where they carry out these responsibilities.

The fees should be established as a minimum and that it does not exceed cost recovery, aligned to a scale that is published by an established entity or organisation (e.g. NIAA or an arbitral body), and not be limited to government parties (i.e. that it should be the person, group or entity seeking the future act that also is liable for the fee).

- 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;*

This is supported. The Queensland government supports that PBCs (as well as native title claimants), can charge a fee where they perform any of the functions under s 60AB of the NTA. This would improve appropriate resourcing for native title parties where they carry out these responsibilities pre-determination, such as participating in negotiation meetings for an exploration agreement or commenting on a future act notification ,

- b) *enable delegated legislation to prescribe a minimum scale of costs that native title parties can charge under s 60AB of the Act;*

This is not supported. Rather than prescribing a minimum scale of costs, one option would be to amend clause s60AB(3)(2) of the NTA to clarify the statement that fees “must not amount to taxation”. This clause is challenging to interpret and would be better explained by stating that fees must not exceed cost recovery.

Another option could be to allow native title representative bodies/service providers to set a scale of fees for their representative areas which are approved by the National Indigenous Australians Agency that the scale is reasonable (unless otherwise agreed between the parties). These fees should be publicly advertised.

There should also be clarity that a PBC can charge fees for all other services outside of these provisions and that those fees would not be restricted by a cost recovery cap. For example, a PBC charging a fee for service for cultural heritage training.

- c) *prohibit the imposition of a cap on costs below this scale;*

This is not supported. Refer to response to Proposal 17(b) above.

- 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;*

This is supported. The Queensland government supports 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.

- 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).*

This is not supported. The Queensland government does not support specifying 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). Where appropriate, it should be able to be directed to the party seeking the future act. It is noted that the practical application of this may be difficult in some circumstances, for example, under a class notification process for fisheries permits. There are also privacy implications.

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?

Response

Supported in principle.

The Queensland government supports in principle an amendment to the NTA for the awarding of costs in future act proceedings. A ‘modified no costs’ jurisdiction for future acts proceedings in the Federal Court of Australia, such that costs of the native title party if successful are borne by the unsuccessful party, unless the proceedings were considered vexatious. This would allow successful litigants to seek costs where they have been incurred unnecessarily.

Such a power should only be discretionary to enable the Court to consider all of the circumstances of the case.

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).

Response

N/A

There are established First Nations advisory groups that provide strategic advice and support across the native title sector including the National Native Title Council, the PBC Steering Group and native title representative bodies and service providers funded by the National Indigenous Australians Agency.

It is unclear if an additional advisory group would add benefit, or if current advisory groups could be appropriately resourced to effectively advise on implementing reforms.

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?

Response

Further detail required.

Queensland currently has in place a legislative framework that manages Aboriginal and Torres Strait Islander cultural heritage through direct engagement, and where necessary agreement, with Aboriginal or Torres Strait Islander people. This framework generally aligns with the Native Title Management Plan model proposed in the Discussion Paper.

The *Aboriginal Cultural Heritage Act 2003* and the *Torres Strait Islander Cultural Heritage Act 2003* (Cultural Heritage Acts) enables proponents to collaborate with statutory Aboriginal and Torres Strait Islander parties on agreed management strategies for the protection of cultural heritage sites and areas to meet their 'cultural heritage duty of care'.

Under the Cultural Heritage Acts, the Aboriginal or Torres Strait Islander party is defined by reference to claims registered under the *Native Title Act 1993* (NTA).

For areas where there are no native title claims, persons who assert to have particular knowledge about traditions, observances, customs or beliefs associated with the area, or who have responsibility under Aboriginal tradition or island custom for some or all of the area and should be involved in the assessment and management of cultural heritage for that area. It is noted that generally, native title processes do not apply to these areas and reliance on the protection of cultural heritage rests solely on the Queensland Cultural Heritage Acts.

Consideration would need to be given as to how amendments under the NTA would inter-relate with state cultural heritage laws. If the NTA was amended to require conditions for cultural heritage protection to be met there is the risk of duplication of cultural heritage obligations under various jurisdictions.

it is noted that under native title future acts are done by the government whereas under cultural heritage laws, the cultural heritage obligations are generally the responsibility of the land user.