



Submission to the Australian Law Reform Commission's Review of the Future Acts Regime

By the Legal Branch of the Northern Land Council

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1 INTRODUCTION

1. The legal branch of the Northern Land Council (**NLC**) welcomes the opportunity to provide submissions on the review of the future acts regime by the Australian Law Reform Commission (**ALRC**).
2. The NLC was established in 1973. Following the enactment of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (**Land Rights Act**), the NLC became an independent statutory authority responsible for assisting Aboriginal people in the northern region of the Northern Territory (**NT**) to acquire and manage their traditional lands and seas. The NLC is also a representative Aboriginal and Torres Strait Islander body (**RATSIB**) under the *Native Title Act 1993* (Cth) (**NTA**) assisting 18 native title claims and a service provider to the Top End (Default PBC/CLA) Aboriginal Corporation RNTBC, which is the Prescribed Body Corporate (**PBC**) for 85 native title determinations across the northern half of the NT.
3. These submissions are primarily drawn from the perspectives of lawyers of the NLC who have acted within the future acts regime, offering insights based on experience with the technical frameworks of the future acts regime and how such frameworks translate in practice. Owing to considerable capacity constraints, which have been acknowledged in the Australian Law Reform Commission (**ALRC**), *Review of the Future Acts Regime: Discussion Paper* (2025) (**Discussion Paper**), the NLC has unfortunately been unable to directly collect the views of native title holders for this submission, nor have we been able to prepare fulsome responses to all of the proposals and questions. We have not sought to make submissions on new approaches that would replace the fundamental elements of the existing future acts regime under the NTA, but have engaged with the proposals as they have been put. We encourage the ALRC to continue to actively engage with PBCs and native title representative bodies (**NTRB**) as it progresses towards proposed legislative reforms.
4. It is prudent at the outset to note the purpose, objectives and principles of the NTA, given this forms the basis of the review, and will be formative in shaping reform to the future acts regime.¹ As noted in the preamble of the NTA:

"It is particularly important to ensure that native title holders are now able to enjoy fully their rights and interests. Their rights and interests under the common law of Australia need to be significantly supplemented. In future, acts that affect native title should only be able to be validly done if, typically, they can also be done to freehold land and if, whenever appropriate, every reasonable effort has been made to secure the agreement of the native title holders through a special right to negotiate. It is also important that the broader Australian community be provided with certainty that such acts may be validly done."

5. To achieve the objects of the NTA as set out in section 3 of the Act, particularly s 3(a) and s 3(b), it is important that this review process facilitates recognition and protection of native title in a meaningful way, and sets standards for future dealings affecting native title that are conducive to safeguarding Aboriginal and Torres Strait Islander peoples' rights and interests.
6. The future acts framework has the potential to play a critical role in achieving aspirations of Aboriginal and Torres Strait Islander peoples across northern Australia to utilise hard-won land tenure systems like native title not merely as a legal recognition of rights, but as a foundation to secure real and lasting outcomes on their

¹ As noted in the **Discussion Paper**, [37].

terms. However, such potential can only be realised if the framework is firmly rooted in the right to self-determination, a right that has long been recognised both domestically and internationally to be the primary driver of improved outcomes for First Nations peoples.

7. The NLC has had the benefit of reviewing other NTRB submissions on the ALRC's **Issues Paper** and the message across the sector,² which the NLC strongly agrees with, is that the future acts regime must reflect a rights-based approach rooted in best practice standards consistent international principles of human rights. This includes the right to Free, Prior and Informed Consent (**FPIC**) contained in the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**).
8. The following submissions are guided by the understanding that genuine self-determination and FPIC can only be realised where legal and policy frameworks promote long-term active partnerships with native title holders rather than facilitating short-term transactional engagements that treat native title holders as reactive stakeholders.
9. Any future acts framework that does not embed the right to self-determination and FPIC at its core will continue to risk replicating historical structural inequities and will continue to fail to achieve the transformative change that is long overdue.

2 NATIVE TITLE MANAGEMENT PLANS ('NTMP')

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?

Answer: The NLC considers that there are benefits in NTMPs as they have the potential to provide native title holders with greater agency by facilitating proactive management of future acts on country. The NLC is not opposed to the introduction of NTMPs provided they are voluntary. However, the challenges of resourcing strategic planning of this scale cannot be understated and as such appropriate resourcing of appropriately experienced professionals and adequate funding must be provided to PBCs. Any NTMP regime must prioritise native title holders' voices in line with the NTA's intended purpose to protect native title and set appropriate standards for future acts. The NLC is concerned that registration of NTMPs, objections to the application of NTMPs and enforcement of NTMPs could erode this focus if not carefully drafted.

10. The NLC supports further consultation about this proposal and acknowledges the potential benefits of NTMP outlined in [50] of the Discussion Paper. The NLC is supportive of any proposal that increases native title holders' self-determination, facilitates proactive management of future acts on country, and provides flexible

² Kimberley Land Council, Submission to the ALRC Review of the Future Acts Regime: Issues Paper, 21 February 2025; Central Land Council, Submission to the ALRC Review of the Future Acts Regime: Issues Paper, 21 February 2025.

processes to align with the wishes of unique native title holding groups. The NLC has observed that better outcomes for native title holders in respect of future acts are realised through early engagement from proponents to ensure placement of projects is appropriate. The NTMP proposal has the potential to facilitate this early engagement and to empower native title holders to direct what can occur and where, on their country. In developing the details of the proposal, native title holders' self-determination must be the guiding objective.

11. The difficulties in implementing a proposal of this kind must also be acknowledged. The Discussion Paper addresses some of these concerns at [62]. This proposal is essentially strategic planning. To implement meaningful NTMPs across the NLC region would be an incredibly resource intensive undertaking. Funding and resource support must be made available to facilitate appropriate consultation with native title holders and engagement of discipline experts over a multi-year process. It also requires active engagement by government and government agencies, including the provision of relevant information held by governments and government agencies to ensure informed and meaningful NTMPs can be prepared.
12. We are concerned that the registration process and ability for proponents to object to withholding consent for a project that is consistent with the NTMP³ moves away from what is intended by NTMPs – that being promoting proactive and self-determined management of future acts on country. If native title holders have gone to the immense effort of preparing a NTMP which includes identifying a 'no go' area, and this was subsequently bypassed by proponents through an objection avenue, it would be incredibly frustrating to native title holders and undermines the regime. If NTMPs are not binding, the NLC considers that there is little incentive or utility in native title holders opting into the regime.
13. We also highlight the following from CLC's submission on the Issues Paper:

The Land Rights Act gives traditional owners the ability to withhold consent to exploration on the land.⁴ Where consent is withheld, resource companies must wait 5 years before making another application to explore the land. Once consent is given for exploration, traditional owners are unable to withhold consent for mining.⁵ This system has not inhibited the development of mineral projects in the Northern Territory. Generally, traditional owners are not opposed to economic development on their country. However, those developments must be conducted properly, taking into consideration the rights and interests of traditional owners, and avoiding impact on sacred sites.

14. The NLC agrees with CLC's observations that Traditional Owners are generally not opposed to economic development on their country when the developments are appropriately located and fair compensation and other benefits are shared with Traditional Owners. The operation and effectiveness of the Land Rights Act highlights the importance of agency for Traditional Owners and how this supports economic development. The NTMP regime should look closely at the veto rights of Traditional Owners under the Land Rights Act and seek to mirror them.
15. In respect of registration of NTMPs, it is our view that:

³ Discussion Paper, [59].

⁴ Land Rights Act, s 42.

⁵ Land Rights Act, s 46.

- There should be **limited substantive criteria** for the registration of NTMPs and NTMPs should be **automatically registered** where formal requirements are met.
 - **Objections to registration** of NTMPs should only be available to government parties and government parties must bear the burden of establishing the grounds for their objection. The objection process should allow PBCs an opportunity to respond and correct any issues, and if corrected, the government party may withdraw its objection.
 - To ensure continued FPIC of NTMPs and in recognition of changing industries in regions, NTMPs must include **review** functions. Funding must be allocated for reviews of NTMPs.
16. Once registration of a NTMP has occurred, adherence to NTMPs by government parties and proponents should be mandatory. There should also be enforcement mechanisms such as revocation of tenure and monetary penalties for non-compliance with NTMPs.
17. NLC had the benefit of reviewing CLC's submission on the Discussion Paper, and echo its views at [7] that NTMPs should allow for:
- a. the withholding of consent to future acts (with no recourse to a FADA) if they affect sites or areas of significance to the common law holders; and
 - b. the guaranteed application of the right to negotiate in relation to future acts which are of particular concern to the common law holders, and as such any avenue of objection should be limited to non-compliance with NTMP.
18. There should not be an avenue of objection that can override a 'withholding of consent' decision in accordance with a registered NTMP. To allow for such an avenue undermines the NTMP regime and the NLC anticipates that it would be incredibly frustrating to native title holders who would have expended extensive time and resources to register an NTMP.
19. If this suggestion is not adopted, we strongly support the reversal of the burden of establishing that the future act should occur in the absence of native title holders' agreement.

3 PROMOTING FAIR AND EQUITABLE AGREEMENTS

20. The proposed reforms raise important technical issues in respect of administration, enforcement and transparency regarding agreement making. We have not had the opportunity to interrogate each proposal and question to the level of detail necessary to provide a fulsome response.

CONDUCT AND CONTENT STANDARDS (QUESTION 7)

21. NLC is supportive of **conduct standards** being incorporated into the NTA. Any conduct standards should be grounded in FPIC and developed through further detailed consultation with the native title sector. There should also be recourse for native title holders in dealing with proponents and government parties who do not comply with the conduct standards.
22. NLC is not opposed to the potential introduction of **content standards** on the basis that they could ensure fairness, consistency, and accountability in native title agreements. However, this must be done carefully to

avoid over-regulation that might slow down negotiations or undermine the flexibility necessary to reach practical, mutually beneficial agreements.

23. ALRC should be mindful that enshrining conduct and content standards could unintentionally establish a standard that is seen as the norm rather than the minimum threshold. We also agree with the comments made by CLC at [15] of its submission on the Discussion Paper in respect of the real minimum standards for both process and substance of negotiation.

AMENDING AGREEMENTS (QUESTION 10)

24. NLC supports further review of the requirements applying to amendments to ILUAs to provide for flexibility for the parties to update their agreements as needed when circumstances change, while retaining the integrity of authorisation processes.

IMPLEMENTING AND ENFORCING AGREEMENTS (PROPOSAL 5, QUESTION 11)

25. NLC is supportive of Proposal 5 regarding a voluntary mechanism to allow parties to an existing agreement, to seek, by consent, a binding determination from the NNTT in relation to disputes arising under the agreement.
26. NLC is aware of instances in which a dispute resolution clause may not provide an avenue for a fair dispute resolution process, particularly where the agreement was entered into in an imbalance of bargaining power or resources, and particularly in older agreements. Therefore, the NLC is supportive of further consideration and consultation regarding a mandatory clause to provide access to dispute resolution in the NNTT.

AGREEMENT TRANSPARENCY (QUESTION 12)

27. The NLC represents a large and diverse region. It has concerns about a mandatory requirement to maintain a public register of confidential agreements. NLC would support a public register on an 'opt-in' basis, with the option to redact and de-identify certain details.

4 RESHAPING THE STATUTORY PROCEDURES

28. As set out in Section 1 of this submission, the future acts regime should reflect a rights-based approach rooted in self-determination and FPIC.

IMPACT-BASED MODEL (QUESTIONS 14 AND 15)

29. NLC considers that there are benefits to an impact-based model as described in the Discussion Paper, as this represents a likely improvement to the current regime. However, NLC's support for this model is contingent on the following key matters:
 - a. The freehold test must be retained and we refer the ALRC to CLC's submission on the Discussion Paper at [46] to [49].

- b. The impact-based categorisation tests should be drafted such that the following future acts attract the right to negotiate:
 - i. land clearing permits;
 - ii. water licences;
 - iii. permits for land uses other than those permitted in the existing tenure;
 - iv. compulsory acquisitions;
 - v. all mining tenure (including exploration licences) and associated infrastructure;
 - vi. impacts on sea country; and
 - vii. future acts proposed to be done over areas or sites of cultural significance.
 - c. The regime must include an avenue for a native title party to challenge an impact-based categorisation in the NNTT.
 - d. Transparency around impact assessment characterisation including the provision of reasons to native title parties by governments for their characterisation.
 - e. Cumulative impacts of activities including associated infrastructure and proximate (temporally and location) past and current activities must be considered in the impact assessment process.
30. Regarding the ALRC's contemplated exclusions from the impact-based model in question 15 (a) to (c), the NLC does not agree with any of the proposed works being excluded from the future acts regime. The purpose of the impact-based model is to characterise future works based on their impact, and as such, blanket exclusions are inherently inconsistent with this model.

THE SIGNIFICANCE OF WATER (QUESTION 16 AND 17)

31. As acknowledged in the Discussion Paper at [184], water holds immense significance for native title holders. Within Indigenous cultures, water is widely regarded as a primary force of nature well beyond its physical properties and importance as a resource, and is considered a part of the process of creation. In the NLC's region, water sources are often sacred sites or parts of dreaming tracks and therefore underpin traditional Aboriginal and Torres Strait Islander people's concepts of identity and social order.
32. Despite this, water regulation is one of the most underregulated areas in terms of native title protections in the Northern Territory. This has been an issue of ongoing and significant concern for the NLC, given that water extraction can have significant impacts on Aboriginal and Torres Strait Islander people's cultural interests, including impacts to sacred sites.
33. NLC agrees that an impact-based model should include a definition of the 'area' of a future act as including all areas where physical impacts will occur (including, the drawdown of water, contamination of water or contaminated dust emissions). State and Territory governments should be required to determine the affected area, after making reasonable enquiries, and indicate that area on the future act notice.
34. NLC strongly supports the clarification proposed in Question 17 that planning activities (particularly in relation to water management) conducted under legislation constitute future acts.

REFORMING RIGHT TO NEGOTIATE (PROPOSALS 6, 7, AND 8; QUESTIONS 18, 19)

The NLC has not had the opportunity to consider and form an informed view on Proposal 6, however we note that any amendment to the right to negotiate should prioritise FPIC. We note our observations at [14] in respect of the operation and effectiveness of the Land Rights Act. A reformed right to negotiate should look closely at the veto rights of Traditional Owners under the Land Rights Act, which supports successful agreement making and balances the parties' bargaining positions such that the Traditional Owners' consent is not compromised.

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: Any referral must be by agreement to all parties in the negotiation.

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?

Answer: The Discussion Paper proposes three potential tests, citing important considerations. We note particularly the discussion at [217] of the Discussion Paper as crucial factors affecting native title holders' real ability to give or withhold consent to future acts, and on what terms.

Fundamentally, the NLC cannot support the premise that a future act could be done without native title holders' consent. The three tests proposed require decisions about country, including sacred sites and intergenerational interests and responsibilities, to be made through a non-Indigenous lens. 'Reasonableness' and 'harm' are subjective questions which should be determined by the native title holders themselves. Therefore, the NLC would be open to further considering a role for the NNTT to determine the conditions upon which a future act may be done, including compensation, only where the native title party is prepared to consent once their conditions are met.

We submit that such a rebalancing of the right to negotiate, akin to the Land Rights Act regime which provides a veto, will not prevent economic projects from proceeding, but will ensure that (a) they are developed on fair terms, and (b) that proponents and governments engage early to explore the potential for genuine consent, without being able to rely on unequal bargaining positions to ultimately proceed without consent

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?

Answer: Where a native title party is willing to consent to a future act, on certain terms:

- The NNTT should be required to determine compensation that is **fair and reasonable** and, should have been negotiated by the parties in **commercial arms' length negotiations conducted in good faith**;⁶ and
- The protection of sites or objects of cultural significance should be of paramount importance to the NNTT's determination of considerations, and protective conditions proposed by the native title party should be adopted

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: Agree.

REPEAL OF THE EXPEDITED PROCEDURE (PROPOSAL 9)

35. NLC strongly supports Proposal 9 to repeal section 32 of the NTA. The expedited procedure is an inefficient process which creates enormous burdens for proponents, native title holders and governments. As it currently stands, the expedited procedure has no place within a system that seeks to recognise and protect native title. Such a procedure not only directly erodes the core principles of native title by circumventing critical safeguards intended to protect the rights and interests of native title holders to country, but its mere existence fosters an environment where government bodies and proponents are incentivised to do so.
36. The NLC echoes the concerns raised by CLC in its submission to the Issues Paper.⁷ Specifically, in the NT, the expedited procedure initiated under s 29(7) is routinely applied to all exploration licence applications made under the *Mineral Titles Act 2010* (NT). These licences frequently serve as the initial step in long-term major resource and infrastructure developments that hold significant potential to generate substantial economic opportunities, particularly in remote communities. It is significantly prejudicial that such a critical point of reference excludes native title parties from the initial discussions and decision-making process regarding what

⁶ Similar to Land Rights Act, s 46(11).

⁷ Central Land Council, Submission to the ALRC Review of the Future Acts Regime: Issues Paper, 21 February 2025, p 4.

is happening on country, and native title parties are relegated to the status of barriers to be overcome. From the outset, proponents thus have little incentive to engage with native title holders, foregoing the opportunity for quality early engagement, relationship building and economic development, resulting in reactive, transactional, time-pressured engagements.

COMPLIANCE AND INVALIDITY (PROPOSAL 10 AND QUESTION 22)

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: NLC strongly supports this proposal.

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?

Answer: Yes.

37. The NLC strongly supports an amendment that mandates compliance with procedural requirements for a future act to be valid and expressly addresses the consequences of invalidity. We also submit that invalid acts should be invalid for all purposes.
38. In the NTA's current form, the procedural entitlements afforded do not operate as substantive rights that guarantee protection or influence outcomes for native title holders. The lack of consequences for failing to comply with procedural obligations thus offer little in the way of empowerment for native title holders.
39. To safeguard against uncertainty for all parties involved, and to ensure consequences are enforced, the NTA should expressly address the consequences of invalidity. NLC supports the proposals at [262] and [263] of the Discussion Paper in respect of amending the NTA to include:
 - a. an express entitlement for compensation or damages for invalid future acts, so that native title holders have a clear statutory remedy for invalid acts that violate their rights;
 - b. an injunction avenue to stop works pursuant to the invalid future act or removal of the future act interest pending compliance with the NTA;
 - c. an avenue to revoke the invalid future act interest if no third party has taken any steps to their detriment in reliance on the future act; and
 - d. a process to cure invalidity through an ILUA with the native title party to validate the act.

FUTURE ACT NOTICES (QUESTION 12, PROPOSAL 11)

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?

Answer: Yes, detailed information should be provided, particularly when it is likely that such information is already available to the proponent.

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.

Answer: NLC supports this proposal. This is important for transparency and ensuring compliance with NTA at the earliest possible stage to ensure appropriate and meaningful steps can be taken to protect native title rights and interests.

5 COMPENSATION AND OTHER PAYMENTS

PAYMENTS PROVIDED UNDER AGREEMENTS (PROPOSAL 12)

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: NLC supports this proposal. Further, even where compensation under an agreement is expressed to be full and final, it should be open to a native title party to claim compensation for impacts under the extension or expansion of developments beyond the scope of impacts that were contemplated in future act negotiations.

COMPENSATION FOR INVALID ACTS (PROPOSAL 13)

Proposal 13

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

Response: The NLC strongly supports this proposal, for the reasons described in [38] and the Discussion Paper at [293]-[295]. NLC also supports the inclusion of additional heads of damages for compensation payable for invalid future acts to encourage compliance with the scheme, as noted at [295] of the Discussion Paper.

6 RESOURCING, COSTS, AND IMPLEMENTATION

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:

NLC supports adequate funding of NNTT, however this should not take away from funding to NTRB and PBCs. Equally as important as funding is ensuring the NNTT is resourced with specialised staff trained in region-specific issues, possessing strong cultural awareness and access to subject-matter experts for resolving disputes. This level of expertise becomes crucial should the NNTT's proposed expanded role be adopted, as outlined in the Discussion Paper.

PROPOSAL 17

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

- a. entitle registered native title claimants to charge fees for costs incurred for any of the purposes referred to in s 60AB of the Act;
- b. enable delegated legislation to prescribe a minimum scale of costs that native title parties can charge under s 60AB of the Act;
- c. prohibit the imposition of a cap on costs below this scale;
- d. impose an express obligation on a party liable to pay costs to a native title party under s 60AB of the Act to pay the fees owed to the native title party; and
- e. specify that fees charged by a native title party under s 60AB can be charged to the government party doing the future act, subject to the government party being able to pass through the liability to a proponent (if any).

Response: NLC supports this proposal to address the deficiencies in s 60AB as described in the Discussion Paper at [313].

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: NLC supports the modified no costs proposal for the reasons identified in the ALRC Discussion Paper at [321].

7 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?

40. It is NLC's view that heritage protection under the NTA is best dealt with through a robust future acts regime that places self-determination and FPIC at its core.
41. We are not, in principle, opposed to further cultural heritage protections in the NTA, however, any protections must be in addition to current State and Territory legislation. This is critical in the Northern Territory where the current regime provides that custodians have an absolute right to withhold consent to any impacts to sacred sites. The NLC would be strongly opposed to any amendments that would reduce these rights.
42. If any proposal as contemplated in [333] of the Discussion Paper were to be recommended by ALRC, further consultation on how these processes could be implemented is required, including consideration of what would be captured under "Aboriginal and Torres Strait Islander Cultural Heritage". The views of native title holders need to be taken into account and any amendments should align with:
 - a. the principles of FPIC;
 - b. national and international best practice guiding documents for heritage management and conservation; and
 - c. various soft law instruments including the Burra Charter, Burra Charter Practice Notes, Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia and the findings of the Juukan Gorge Inquiry.