

Submission

To:	Australian Law Reform Commission
From:	Parallax Legal Pty Ltd
RE:	Future Act Regime Review – Discussion Paper
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1. Abbreviations

For brevity, abbreviations which are frequently used in this submission are:

Short-form term	Long-form term
Cultural Heritage Acts	The <i>Aboriginal Cultural Heritage Act 2003</i> (Qld) and the <i>Torres Strait Islander Cultural Heritage Act 2003</i> (Qld)
FPIC	Free, prior and informed consent
ICIP	Indigenous Cultural and Intellectual Property
ILUA	Indigenous Land Use Agreement
NNTT	National Native Title Tribunal
NTA	<i>Native Title Act 1993</i> (Cth)
NTPs	Native Title Parties

Short-form term	Long-form term
NTRB	Native Title Representative Body
NTSP	Native Title Service Provider
PBC	Prescribed Body Corporate
RDA	<i>Racial Discrimination Act 1975</i> (Cth)
RNTBC	Registered native title body corporate
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

2. About Us

Parallax Legal is a small Queensland based law firm, co-founded in early 2022 by Cassie Lang, a Bundjalung woman, and Stephanie Parkin, a Quandamooka woman. Our primary focus is working with Aboriginal and Torres Strait Islander people, communities, and those wishing to do business with such communities.

Parallax Legal provides both legal and consultancy services. Our areas of expertise include Indigenous Cultural and Intellectual Property, intellectual property, Aboriginal and Torres Strait Islander cultural heritage, native title and other Indigenous land titles, Indigenous corporations, and engagement with First Nations communities.

The views and perspectives provided by us in this submission are based on 17 years of direct experience working in the native title and cultural heritage space, representing and engaging with NTPS, PBCs, government parties and proponents.

3. Contextual observations

The following matters have informed our approach to this review and our submissions.

Relevant standards: the *Racial Discrimination Act 1975* (Cth) and the United Nations Declaration on the Rights of Indigenous People

We are pleased to note that the Guiding Principles under the Discussion Paper acknowledge the normative importance of upholding fundamental human rights principles under Australian and international law.¹ For the participation of Aboriginal Peoples and Torres Strait Islander Peoples, communities and nations in the NTA future acts regime, we consider Article 32(2) of the UNDRIP to be instructive:

*States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their **free and informed consent prior** to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.*

¹ Australian Law Reform Commission, *Review of the Future Acts Regime*, Discussion Paper No 88 (May 2025) 9 [43]–[45].

This requirement of obtaining FPIC supplements the provision in Article 18 of UNDRIP that 'Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures'.²

The Discussion Paper also notes that, domestically, the RDA broadly establishes the unlawfulness of racial discrimination and rights to equality before the law.³ Again as noted in the Discussion Paper, the High Court has stressed the primacy of equality before the law as the 'motivating rationale' behind the recognition of native title in *Mabo (No 2)*.⁴

This includes the non-consensual management of property (see below at paragraphs 3.7 – 3.9) regarding the proprietary nature of native title) owned by Aboriginal persons or Torres Strait Islander persons, where the law would otherwise operate differently for non-Indigenous persons.⁵

The NTA is 'intended to be read and construed subject to the provisions of the RDA'.⁶ But this is limited greatly to 'only' applying to provisions regarding 'the performance of functions and the exercise of powers conferred by or authorised by this Act' and questions of construction where ambiguity arises.⁷

The Discussion Paper notes that the future acts regime 'should also reflect, and give effect to, other fundamental principles of human rights and, as far as practicable, be consistent with Australia's obligations with international law'.⁸ In our view, the limiting of RDA protection is not consistent with Australia's international obligations, and more can, of course, be practically done to uphold these standards by removing the overarching limitations on the application of the RDA under the NTA.

Substance and procedure

A further theme underpinning our response is our view that substantive rights should be conferred and acknowledged where relevant in addition to procedural rights. This is front of mind when considering any amendments to decision-making under the future acts regime. It is important to consider regarding the benefits (monetary or otherwise) that are otherwise not guaranteed by procedural protections alone.

The current future acts regime only grants, at its highest, a right to negotiate. The inclusion and expansion of greater substantive rights and guarantees is the only way to ensure that native title rights and interests will not be unnecessarily impaired.

² Ibid art 18.

³ *Racial Discrimination Act 1975* (Cth) ss 9 and 10.

⁴ *Commonwealth v Yunupingu on behalf of the Gumatj Clan or Estate Group* [2025] HCA 6 [80]; ALRC, *Review of the Future Acts Regime* (n 1) 9 [44].

⁵ Ibid pt 2 s 8(1), s 10.

⁶ *Native Title Act 1993* (Cth) s 7(1).

⁷ Ibid s 7(2)(a) and (b).

⁸ ALRC, *Review of the Future Acts Regime* (n 1) 9; *Australian Law Reform Commission Act 1996* (Cth) s 24(1)(b).

The proprietary nature of native title rights and interests

We agree with the Guiding Principle set out in the Discussion Paper, citing High Court judgments, that native title is ‘legally recognised and protected as a distinctive form of “property”’.⁹ In our view, it is uncontroversial that native title rights and interests are proprietary in nature. Determinations of native title operate *in rem*, as distinct from *in personam* – they recognise pre-existing rights and interests in land and waters, as held by Aboriginal persons and Torres Strait Islander persons, communities and nations. Notably, it was the view of the Full Court of the Federal Court of Australia in *Yunupingu on behalf of the Gumatj Clan or Estate Group v Commonwealth of Australia* that ‘native title rights and interests are proprietary and concern land and waters’.¹⁰

The issue of whether native title should be considered equivalent to a freehold estate was among those considered in *Griffiths v Northern Territory of Australia (No 3)*, in which Justice Mansfield held that ‘it would be erroneous to treat the nature of [Aboriginal peoples’] interests in land as other than the equivalent of freehold’.¹¹ In appeal proceedings, the High Court held that ‘the objective economic value of exclusive native title rights to and interests in land, in general, equates to the objective economic value of an unencumbered freehold estate in that land’.¹²

In practice, the land tenure types upon which native title (whether exclusive or non-exclusive) can be recognised by Australian law are generally limited to ‘Crown’ tenures, such as unallocated state land and reserves. Under the NTA, native title holders do not have a right of veto over proposed activities on their lands or waters. The Crown exclusively holds decision-making rights that are denied to native title holders and claimants. This is inconsistent with both the RDA and rights contained in UNDRIP.

4. Consultation proposals and questions

The balance of our submission responds either in full, or in part, to questions and proposals in parts 5-9 of the *Discussion Paper: Review of the Future Acts Regime*.¹³

⁹ ALRC, *Review of the Future Acts Regime* (n 1) 8.

¹⁰ *Yunupingu on behalf of the Gumatj Clan or Estate Group v Commonwealth of Australia* [2023] FCAFC 75 at [411] (CJ Mortimer, Moshinsky and Banks-Smith JJ) <<https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/full/2023/2023fcafc0075>>; see also *Commonwealth v Yunupingu on behalf of the Gumatj Clan or Estate Group* [2025] HCA 6 [143] .

¹¹ *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900 at [214] <<https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2016/2016fca0900>>.

¹² *Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurr and Nungali Peoples, Commonwealth of Australia v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurr and Nungali Peoples, Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurr and Nungali Peoples v Northern Territory* [2019] HCA 7 at [3(1)] <<https://resources.hcourt.gov.au/showCase/2019/HCA/7>>.

¹³ Australian Law Reform Commission, *Discussion Paper: Review of the Future Acts Regime*, Discussion Paper No. 88 (May 2024) <<https://www.alrc.gov.au/wp-content/uploads/2025/05/NTFA-Discussion-Paper-2025.pdf>> (**Discussion Paper**).

4.1. Native Title Management Plans (Part 5 of Discussion Paper)

Question 6 Should the *NTA 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?

Our perspective:

We agree in principle to the introduction of Native Title Management Plans (**NTMPs**). We note there will be significant practical barriers to be addressed. These include:

- (a) resourcing RNTBCs to plan, design and implement NTMPs; and
- (b) appropriate cultural competency requirements are in place to address language barriers.

From experience we know that RNTBCs are not sufficiently resourced to undertake negotiations and consultations without costs (including legal fees) being covered by government parties or proponents. If NTMPs are introduced there needs to be sufficient resources allocated to RNTBCs to plan, design and implement NTMPs.

Additionally, the resourcing of NTMPs must enable RNTBCs to design their own NTMPs in accordance with the principle of self-determination and without external influence. Any resourcing would need to include:

- (a) costs for directors to travel and attend several meetings;
- (b) costs of legal advice from experienced native title lawyers;
- (c) costs for consultation with elders and other native title holders about the design and process to be included in the NTMP; and
- (d) costs for a meeting of native title holders to endorse any NTMP.

Our experience is that proponents, regardless of size, consistently encounter challenges related to the costs associated with engaging NTPs during negotiation meetings and the extended timeframes often required to obtain responses or reach agreement. These concerns can lead to hesitancy and frustration, complicating the negotiation process for all parties involved.

A key benefit of implementing NTMPs is the establishment of a clear framework that could assist proponents by making the process, expected timeframes, and associated costs transparent and predictable. Having these elements outlined upfront as part of proponents' budget and project planning would not only help them manage their own resources and expectations, but also foster a more informed, efficient, and respectful engagement with NTPs. This would also assist proponents and government parties to understand the 'why' – why certain processes need to be considered and implemented when engaging with RNTBCs.

Where NTMPs have been developed, proponents should not be able to benefit from the process in the NTMP without:

- (a) an upfront payment; and
- (b) an agreement to undertake cultural awareness and capability training.

This will benefit the incoming proponent by:

- (a) giving them an introduction the culturally appropriate ways of doing business with that community;
- (b) gaining an understanding of the history of the community;
- (c) introducing them to the priorities that the RNTBC have identified;
- (d) teaching them what types of behaviour and language is offensive in the negotiations; and
- (e) helping them understand and identify any unconscious bias they are carrying into the negotiations.

This is all especially important where language barriers exist, as many directors of RNTBCs speak multiple languages. Lawyers are supposedly taught in law school the importance of communicating in plain English; in our experience, lawyers often overcomplicate drafting. This is unnecessary and does not empower clients to determine how they want their own agreements to sound and work.

We support our clients in developing their own template agreements. We workshop with them the processes of how they want things to work, and we will then draft the agreement, going through each clause with them. Our clients tell us what words to use, which helps them better understand what they need to do at each step.

Some proponent lawyers will mark-up changes to a draft document and send it back. Many times, there is no consideration or appreciation to the amount of consideration and effort that a RNTBC has put into the drafting of their standard agreements. Marking up an agreement without first seeking to understand why particular words were used or why a process has been proposed in a particular way is demonstration of a powerplay. When this happens, our clients see this as a sign of disrespect. A more considered and different approach needs to be taken by proponents and government parties when seeking to engage with RNTBCs.

Our example: Torres Strait Regional ILUA

A practical example of how we have developed a similar concept to a NTMP is the development and rollout of the Regional Infrastructure and Housing ILUA ("**Regional ILUA**") across each inhabited island in the Torres Strait. This initiative originated from the collective vision of all the RNTBCs in the region, who sought to place Traditional Owners at the centre of decision-making for infrastructure and housing matters. RNTBCs in the region were being blamed for the holding up of delivery of essential community infrastructure because the native title negotiations and consent process was taking too long.

The Regional ILUA took five years of negotiations between a negotiation committee of RNTBCs in the Region, the Torres Strait Regional Island Council, the Torres Strait Regional Authority and the Queensland Government. These groups all then became parties to the Regional ILUA.

The Regional ILUA was designed with several guiding principles:

- Ensuring that the process for obtaining consent from Traditional Owners is the first step in any project, putting their authority front and centre from the outset.
- Guaranteeing that the ultimate approval or refusal for any project rests with the Traditional Owner, thereby safeguarding their decision-making power.
- Preventing timeframes from being misused as leverage or threats by establishing clear protocols. An example is where Government departments suggest funding for essential community infrastructure will be reallocated to another community if agreement isn't reached promptly.
- Requiring that compensation to Traditional Owners is paid upfront, prior to any works occurring on their land.
- Protecting culturally significant sites and items as a fundamental condition of project approval.
- Ensuring that Traditional Owners and community members are compensated for their time and contributions in the process.
- Providing consistency in how projects are handled across each island, reducing confusion and ensuring fairness.
- Limiting opportunities for government entities or proponents to circumvent the requirement for Traditional Owner consent or the payment of compensation.
- Establishing a baseline for agreements, compensation, and processes that cannot be undermined or reduced by state or federal parties.
- Maintaining flexibility so that Traditional Owners can choose, on a project-by-project basis, whether to use the Regional ILUA or negotiate a separate ILUA tailored to specific needs.
- Promoting greater transparency and accountability to Traditional Owners through clearly articulated processes and standards.
- Creating uniformity in project treatment and agreement terms across all determination areas, ensuring equal treatment for all communities.
- Eliminating the need to negotiate a new ILUA for every proposed project, thus streamlining approval processes and reducing negotiation fatigue.
- Upholding the autonomy of each RNTBC and their Traditional Owners to decide whether to adopt the Regional ILUA, thereby respecting community-specific preferences.
- Providing a framework for other parties to request to Opt-in to the Regional ILUA.

To date, this approach has seen widespread adoption, with 11 Torres Strait PBCs—representing Saibai, Boigu, Dauan, Mabuiag, Moa, Badu, Warraber, Iama, Masig, Ugar, and Erub—having already signed on, and Poruma about to formalise their participation. The

Regional ILUA has proven its ability to foster consistency, respect, and efficiency, while protecting the rights and interests of Traditional Owners.

Learnings from the Regional ILUA

The Regional ILUA on most of the islands has been operating for about five years. One key reflection upon its implementation has been that the constant change of directors at RNTBCs means corporate knowledge is lost about how the agreement works. Working with Crown Law and Gur a Baradharaw Kod—the peak body for Torres Strait PBCs—we are looking at developing tools and templates that provide a visual and video guides to help new directors and staff understand the role of the RNTBC at each stage.

The Regional ILUA includes a review clause. The first review is five years after the registration of the ILUA and then as requested by the any of the Parties. The difficulty is that the other parties have not allocated in their budgets funding to participate in a review process of the Regional ILUA.

While the Regional ILUA was designed to improve the expediency of the native title consent process, without the adequate capacity and human resources within individual RNTBCs, it has in some communities made the process longer.

Our example: whole of country cultural heritage management agreements

We are also working with some clients on the mainland in Queensland who regularly receive requests from infrastructure departments to participate in cultural heritage management. In response, we have begun negotiating what our clients call “whole of country agreements” with these departments. Essentially, these agreements establish a framework that scales participation by the NTP in line with the level of impact and disturbance, enabling various regional offices within the department to apply a consistent and transparent approach across the NTP area.

Importantly, while this process requires an upfront investment of resources and support from the department, it streamlines future operations by removing the need to negotiate a new agreement for every individual project or activity. Over time, this approach results in significant efficiency gains and reduced operational costs for all parties involved.

4.2. Promoting fair and equitable agreements (Part 6 of Discussion Paper)

Our perspective

Beyond resourcing constraints, NTPs continue to face systemic challenges in negotiating equitable agreements. These include proponents’ limited cultural awareness and a lack of understanding of native title processes. Engagement often falls short of the standards set by the UNDRIP, particularly the principle of FPIC. Proponents are frequently unprepared for the time and cost involved, leading to frustration and an undermining of constructive negotiations and long-term relationships.

In our experience, engagement issues include proponents:

- (a) being reluctant to furnish NTPs with relevant information to ensure decision making is informed;

- (b) seeking to apply a 'one-size-fits-all' approach to negotiations and agreements;
- (c) being reluctant to meet face-to-face with the NTPs, particularly if more than one meeting is required;
- (d) not understanding the process for confirming instructions, for example, that NTPs typically require a meeting with their lawyer to discuss legal advice and confirm instructions before proposed amendments can be approved; and
- (e) being reluctant to pay a given NTP's costs, sitting fees or costs of required experts.

Any re-designed models for the participation of NTPs in the future act regime should be developed following relevant provisions of the UNDRIP as an international instrument that reflects the 'minimum standards for the survival, dignity and well-being of the indigenous peoples of the world'.¹⁴ The proposed reforms must ensure standards of FPIC and self-determination are respected, and ensure fairness in the bargaining positions of parties in future act negotiations.

While we support the development of a 'gold standard' engagement protocol, it must be sufficiently flexible to accommodate the cultural diversity of native title groups.

Our experience: Negotiation Protocol

To overcome some of the challenges with engagement several of our clients have developed a Negotiation Protocol (**Protocol**). This document is provided to a proponent when they first make contact. This document sets out the ground rules and framework for conducting negotiations between the parties. Its primary objectives are to:

- (a) establish a structured process for good faith negotiations;
- (b) define a tentative timeline for meetings and milestones; and
- (c) provide documented evidence of negotiations for use with government agencies and funders.

The Protocol covers the following:

Content Heading	Description
<i>Negotiation Framework</i>	- Based on the "Njamal indicia" from <i>Western Australia v Taylor</i>, ensuring cultural, environmental, and native title protections. - Meetings are to be held in person where possible, with pre-meeting legal consultations for the NTPs.
<i>Representation and Authority</i>	Confirms that the NTPs are authorised under the relevant legislation to negotiate on behalf of their communities.

Content Heading	Description
	Similarly, the Proponent confirms its representatives have authority to negotiate and make decisions.
<i>Communication and Confidentiality</i>	Clarifies all communications are confidential unless legally required or culturally appropriate to share.
<i>Guiding Principles</i>	Aligns with the UNDRIP, affirming rights to land, culture, and self-determination.
<i>Benefit Sharing</i>	Commits to negotiating a separate Benefit Sharing Agreement to ensure fair compensation and support for NTPs.
<i>Access to Advisors and Information</i>	Proponent agrees to provide relevant project information and fund expert advice, subject to confidentiality and commercial sensitivity.
<i>Conduct and Administration</i>	- Emphasises respectful, professional behaviour and meaningful engagement during negotiations. - Details cost responsibilities, including remuneration rates and invoicing procedures.
<i>Dispute Resolution</i>	Provides a process for resolving disputes, including mediation and recourse to an independent body.
<i>Term and Termination</i>	The Protocol remains in effect until a CHMP or other agreement is executed, with provisions for termination under specific conditions.

We believe that having this type of agreement upfront provides certainty and benefits both parties in the negotiations as set out below:

NTP Benefits	Proponent Benefits
Recognition and authority to negotiate on behalf of their communities	Clear negotiation framework, reducing risk and delays
Structured process to ensure cultural protocols and decision-making are respected	Demonstrates commitment to best practice in Indigenous engagement
Access to expert advice and funding to support informed participation	Supports social licence to operate, enhancing reputation and stakeholder trust
Commitment to benefit sharing, ensuring long-term support and compensation	Facilitates compliance with legal obligations under the relevant legislation
Protection of rights and cultural heritage that align with international standards	

Question 7 Should the *NTA 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?

Our perspective

Mandatory conduct standards should be provided under the NTA, and these standards should apply to negotiations and content standards for agreements. These standards should align fully with the principle of FPIC and respect self-determination, in accordance with international legal standards. The substance of these standards should be clearly articulated under any amendments.

Regarding conduct, at a minimum, these standards should include:

- (a) a mandatory requirement that proponents have at least one face-to-face meeting with the NTP;
- (b) a requirement for the proponent to cover the costs of relevant experts reasonably required by the NTP, including legal representation;
- (c) a requirement for the proponent to cover the costs of any meetings or steps that are mandatory for the NTP to obtain consent from the broader native title group;¹⁵
- (d) a requirement for proponents to provide relevant project information, including, but not limited to, the proponent's expected profit, timeframes, activities and footprint of the project; and
- (e) reasonable timeframes for negotiation of the agreement, allowing up to 12-18 months.

Regarding content standards for agreements, it is important to not make these standards too restrictive, but should include (at a minimum):

- (a) some kind of benefit (whether it is monetary or non-monetary) for NTPs. Where a benefit is (for example) an employment or training target, these must be quantifiable and must include implementation provisions or plans, along with clauses that specify the consequences for not meeting these targets;
- (b) cultural heritage management provisions, where this is compatible with relevant applicable state or territory legislation;
- (c) Indigenous Cultural and Intellectual Property (ICIP) clauses confirming the NTP is the owner of any ICIP created or communicated in relation to the project. These clauses should require the proponent to use ICIP in accordance with an agreed scope of use and provide for payment of a fee each time the proponent

¹⁵ For example, under the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) or otherwise in accordance with traditional laws and customs.

- uses the ICIP (or other relevant payment structure);
- (d) allowance for the NTP to assign an agreement – for example, to a new native title party, such as a PBC, where a determination is achieved; and
 - (e) review clauses for larger agreements, such as ILUAs, that allow amendments to be made where clauses are not functioning appropriately or have unintended consequences without necessarily requiring reauthorisation.

We also agree with the following content standards proposed in the Discussion Paper:¹⁶

- (a) prohibiting certain clauses, specifically:
 - ‘gag clauses’;
 - clauses that limit NTPs from accessing protections or remedies under cultural heritage or other laws; and
 - clauses that restrict seeking injunctive relief;
- (b) prohibiting or restricting terms that limit how compensation or other payments are to be expended, administered, or managed by NTPs;
- (c) sunset dates for particular clauses — for example, non-disparagement clauses;
- (d) application of the non-extinguishment principle, as far as is practicable;
- (e) a guarantee of minimum rights afforded to NTPs with respect to future acts, such that agreements cannot provide for a lower standard of procedural rights than what is provided for in the NTA;
- (f) a dispute mechanism clause (noting we do not support mandatory involvement of the NNTT); and
- (g) assignment, novation or succession clauses that allow the NTP to assign or novate the agreement if they are no longer the relevant NTP.

Proposal 1 The *NTA 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.

Our perspective

We agree with this proposal. Standing instructions should be allowed on agreements made under section 31 NTA.

¹⁶ Discussion Paper, above n 13, pp 17-18.

Question 8 Should the *NTA 1993* (Cth) expressly regulate ancillary agreements and other common law contracts as part of agreement-making frameworks under the future acts regime?

Our perspective

Ancillary agreements and other common law contracts should be regulated under the NTA as part of agreement-making frameworks under the future acts regime, to an extent. There needs to be enough flexibility to allow NTPs to negotiate agreements that suit their circumstances and aspirations. However, we consider legislating the following requirements would be appropriate:

- (a) engagement standards, beyond the requirement to ‘negotiate in good faith’ and reflective of FPIC standards (see above at paragraphs 4.2.7);
- (b) some standard agreement content (see above at paragraphs 4.2.8 – 4.2.9);
- (c) provisions on costs that ensure NTPs ability to engage is not prohibited by cost, for example, placing the burden of payments onto the proponent or ensuring appropriate funding is available to NTPs;
- (d) provisions around implementation of agreements and failure to implement, under which there are penalties or other consequences for proponents which could include the withdrawal of the NTPs consent and the requirement to negotiate a solution;
- (e) provisions around the definitions of native title groups and/or applicants (see below, in our response to Question 13).

Proposal 2 The *NTA 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.

Our perspective

We support the proposed reforms but recommend they be expanded to protect the interests of all native title claim groups. This includes ensuring agreements are accessible to ‘former’ applicants following a negative determination, and requiring disclosure of all agreements negotiated on behalf of a claim group—not just those formally registered.

Difficulty accessing agreements

In our experience, legal representatives often refuse or cause significant delays in providing agreements to former clients or their new representatives for varying reasons. Agreements may have been negotiated by a previous Applicant and not formally assigned,

leading to the assertion that the current Applicant or PBC is not a party. Alternatively, some argue the claim group is the true client, and without instructions from the entire group, disclosure is not permitted. This is impractical. Small law firms and former Applicants rarely have the resources to convene a claim group meeting to obtain such instructions.

Regardless of the legal merit of these arguments, the result only benefits proponents and former legal representatives. Proponents gain consent without offering consideration or benefits, enhancing their social licence while NTPs receive nothing. Legal professionals avoid accusations of breaching confidentiality, but native title groups are left without protection or the benefits they worked hard to secure.

Legislative requirements to disclose these agreements would resolve this. They would protect legal professionals, ensure agreements are honoured, and allow benefits to flow to NTPs.

Provision of agreements to 'former applicants' upon negative determinations

Following a negative determination, legislative changes should require the Native Title Registrar or former legal representatives to provide relevant agreements to the former applicant, ensuring NTPs can access agreements made on their behalf.

Access to native title agreements is essential, particularly where they contain cultural heritage obligations appropriately implemented by the Aboriginal Party. In Queensland, following a negative determination, the individuals named as the applicant become the Aboriginal Party for cultural heritage purposes under the interaction of the NTA and relevant state legislation. This designation is ongoing and carries responsibilities directly linked to the terms of cultural heritage management contained in native title agreements. Without access, the Aboriginal Party cannot fulfil their responsibilities or realise their cultural and legal rights.

The preamble of the NTA¹⁷ and the terms of many agreements support their continuation despite a negative determination. If termination was intended, parties would include a clause to that effect. While some proponents argue frustration, NTPs should still be entitled to review the agreement and seek legal advice. To do so, they must have access, yet this is often withheld.

Provision of non-registered agreements

¹⁷ See the *Native Title Act 1993* (Cth) Preamble, which reads relevantly as follows:

"The people of Australia intend:

(a) to **rectify the consequences of past injustices** by the special measures contained in this Act, announced at the time of introduction of this Act into the Parliament, or agreed on by the Parliament from time to time, for securing the adequate advancement and protection of Aboriginal peoples and Torres Strait Islanders; and
(b) to ensure that Aboriginal peoples and Torres Strait Islanders receive the **full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them** to aspire.

....

It is also important to **recognise** that many Aboriginal peoples and Torres Strait Islanders, **because they have been dispossessed of their traditional lands, will be unable to assert native title** rights and interests and that a special fund needs to be established to assist them to acquire land." (emphasis added).

Provisions should also require that former legal representatives, agents, or other relevant parties holding agreements—such as ancillary agreements to s 31 NTA agreements or carbon farming agreements—must provide copies to appropriate representatives. This includes PBCs where native title exists, or former applicants or nominated entities where it does not.

Question 9 Should the *NTA 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?

Our perspective

We agree with this suggested amendment but note it should be further expanded to apply to negative determinations. See our comments above regarding agreement access following negative determinations.

Proposal 5 The *NTA 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.

Our perspective

We do not support this amendment to the NTA. Such a clause may be included in an agreement where the parties consider it appropriate. However, given the National Native Title Tribunal's (NNTT) tendency to arrive at outcomes that favour proponents, we would be reluctant to make this mandatory.

Question 11 Should the *NTA 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?

Our perspective

We do not support this proposal. As stated above, amending the NTA in this way would likely, in practical terms, largely favour proponents, given the proportion of decisions of the NNTT that fall in a proponent's favour.

It should be up to parties to an agreement, as to whether they want to engage the NNTT's dispute resolution services.

Our experience

We have been working with several of our clients who wish to develop a more culturally appropriate dispute resolution process for their agreements. This often involves identifying relevant experts including knowledge holders who can assist the parties in

finding a mutually beneficial outcome. The parties can ensure the mediators or facilitators can communicate in the preferred languages of both parties. It should not be assumed that mediation or dispute resolution must be done in English. There needs to be flexibility that allows the NTP or the Proponent to communicate in the language that they are most comfortable using.

In our experience, where the NNTT has been engaged and the communication has been in a language other than English, NNTT representatives often misunderstood what was being said. This did not assist in reaching a resolution and instead, at times, added further confusion. If these amendments were to be considered, there would need to be a mandatory number of First Nations Members or a panel of mediators that the NNTT could engage to assist their Members.

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?

Our perspective

We would not support this approach. The presence of such a register, while perhaps appealing in abstract terms, would likely have the consequence of encouraging proponents to argue for a 'cookie cutter' or 'one size fits all' approach, along the lines that a particular practice, provision or approach is an 'industry standard'.

This would be injurious to effective negotiations, causing delays and inconsistent expectations. Terms of agreements will vary based on relevant factors including but not limited to the:

- nature, type, size, location, and industry of each project;
- identity, structure, industry, and size of the proponent;
- relevant timeframes;
- whether the NTP has had adequate legal representation; and
- NTPs' individual goals, ambitions, values, traditions, Country, protocols, and overall ways of doing business.

There may be a further unintended consequence of encouraging NTPs and/or proponents to negotiate and settle agreements without legal representation, relying on published agreements that may not be fit-for-purpose in their circumstances. This would be risky for all parties concerns and risk non-compliance with relevant law.

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 NTPs to a pre-determination agreement?

Our perspective

The NTA should include provisions requiring that older agreements be read as though they refer to the native title group as described in a determination, or immediately prior to a determination, if it is a negative determination and does not include a full claim group description.

For the reasons set out above there should be similar clauses for negative determinations to clarify the identity of the 'Applicant' as the relevant NTP responsible for implementation of agreements.

Given the ongoing obligations of former applicants to implement agreements (unless an assignment clause applies) there should be a process for registering 'nominated entities' with the National Native Title Tribunal. These entities, whether individuals or corporations, would be authorised to manage and implement agreements on behalf of the claim group following a negative determination.

This would allow former applicants to assign agreements to new family members or purpose-built entities when they are unable or unwilling to continue in that role, ensuring continuity and proper implementation of agreement obligations where appropriate.

4.3. Reshaping the statutory procedures (Part 6 of Discussion Paper)

Our perspective:

In our experience, a common challenge in negotiations is the classification by a proponent or the government classification of certain acts as 'low impact', in contrast with the NTP's assessment. Even where there is minimal physical disturbance, the presence of personnel or machinery in an area can disrupt ecosystems, interfere with hunting or food-gathering, and prevent the exercise of cultural rights. Further, the extent of the disturbance will vary depending on the characteristics and significance of the location.

The impact of a future act on native title depends not only on the legal rights affected but also on the cultural significance of the area and the specific connections individual native title holders or families have to it. For example, if a proposed activity affects known koala habitat and the koala is a totem for a particular family, this may significantly interfere with their rights to teach, protect, or access places of cultural importance.

Further, proponents in Queensland regularly assume that if no sites are recorded on the cultural heritage register, the area holds no significance. This is a flawed assumption. Many groups choose not to register cultural heritage sites to protect their locations and avoid

harm. This is often due to concerns that proponents, whether acting out of prejudice or convenience may destroy sites rather than engage with cultural heritage obligations.

In other cases, native title may be recognised over areas from which Traditional Owners have long been excluded, preventing them from identifying and recording cultural heritage sites, even if they are aware of their existence within the vicinity. Therefore, public sources cannot be relied on to determine whether an act is likely to impact cultural heritage or significant sites. This assessment must be undertaken by the NTP.

To respect the diversity of native title groups, their cultural protocols, cultural heritage and the principles of UNDRIP and self-determination, NTPs must be involved in assessing the impact of proposed acts. The process must also be flexible enough to accommodate regional and cultural differences.

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

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

Our perspective

We support this proposal in principle but reiterate that native title holders should be involved in the assessment of the level of impact a future act will have on native title. This may vary based on factors known only to the native title holders.

A preferred process to the government or proponent assessing the impact prior to issuing the notice would be that the notice is issued (with sufficient detail) to the NTP, inviting them to elect the category of impact and provide reasons for their decision.

If the proposed process in question 14 is implemented, it is imperative that the avenue for NTPs to challenge the categorisation be accessible for NTPs. This includes by:

- not requiring them to pay a fee;
- the development of evidentiary guidelines as to what evidence the NNTT requires to be satisfied of the objection; and

- inclusion in those guidelines details of the forms in which the NNTT will accept evidence.

Further, a different approach should be taken to acts done in any areas where exclusive native title is recognised. Jurisprudence suggests that freehold is the best analogy for exclusive native title.¹⁸ To abide by s 9(1) of the RDA, rights analogous to those of a holder of freehold title should apply (e.g. right to negotiate) where exclusive native title is recognised. Renewable energy projects, such as solar and wind farms should automatically trigger the right to negotiate.

These projects often result in long-term exclusion from Country and permanent changes to the landscape, which can prevent native title holders from hunting, teaching, protecting significant places, or maintaining connection to the area. These projects often change the landscape of the NTP country and ultimately impacting the stories connected to that area. Therefore, despite what might be considered ‘minor’ impact on the land and waters, the impact on native title rights can be high.

Question 16 Should the *NTA 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?

Our perspective

We agree that the NTA should be amended to account for the impacts that future acts have on native title rights and interests outside of the immediate footprint. The interconnectedness of Country, through songlines, watersheds and ecosystems means that some sites and associated native title rights may be affected by activities that occur elsewhere. To properly protect native title rights, it is important that this be recognised.

The NTA should account for the future impacts of high-intensity activities on native title, including their contribution to climate change. Scientific methods now allow project-level emissions to be calculated, and climate change is already affecting native title rights particularly in the Torres Strait, where rising sea levels are permanently submerging land and preventing the exercise of cultural rights¹⁹ and native rights such as access, ceremony, and burial.

For large-scale projects like coal mines, the NTA should require a ‘climate change contribution’ from proponents, based on an emissions-based formula. This would reflect

¹⁸ *Yunupingu on behalf of the Gumatj Clan or Estate Group v Commonwealth of Australia* [2023] FCAFC 75 <<https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/full/2023/2023fcafc0075>>; *Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples, Commonwealth of Australia v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples, Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples v Northern Territory* [2019] HCA 7 <<https://eresources.hcourt.gov.au/showCase/2019/HCA/7>>.

¹⁹ See for example *Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796.

the long-term environmental and cultural impacts on Country and native title holders' rights and interests.

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

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

h. If the parties do not reach agreement within 18 months of the future act being notified, or within nine months of the National Native Title Tribunal determining that a future act can be done following an objection, any party may apply to the National Native Title Tribunal for a determination of the conditions that should apply to the doing of the future act (see Question 19). The parties may make a joint application to the Tribunal for a determination of conditions at any time.

Our perspective

We support Proposal 6, apart from the discretionary nature of the imposition of conditions attaching to the future act.

In our experience, the NNTT very rarely imposes conditions on the doing of a future act, when results in an unfair outcome for NTPs. Where the NNTT determines the act can be done without an agreement, they should be required to impose minimum conditions setting out:

- (a) a future act payment to the native title party as consideration for the impact on native title;
- (b) a requirement to involve the native title party in cultural heritage management, for example through the delivery of a cultural heritage induction, a cultural heritage assessment of the project area and/or consultation with the NTP in the event of a suspected cultural heritage find;
- (c) a requirement for the proponent to provide a copy of their work plan, and any amended work plans, to the NTP;
- (d) that the NTP will retain ownership of any Indigenous Cultural and Intellectual Property that is provided to the proponent in connection with the project; and
- (e) that the native title party may assign the benefits of the conditions where appropriate, for example to a new native title party, such as PBC where determination is achieved or a replacement applicant authorised under NTA.

Proposal 7 The *NTA 1993* (Cth) should be amended to empower the National Native Title Tribunal to determine issues referred to it by agreement of the negotiation parties.

Our perspective

We support Proposal 7 but suggest further clarity and resources to assist parties understand and address evidentiary requirements and considerations in such determinations. Evidentiary requirements should reflect ss 82(2) and 109(3) of the NTA, in that they should not be so onerous as proving a case in court, and should set out the standard and form of evidence the NNTT will require.

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?

Our perspective

Noting the NNTT's tendency to make decisions that favour the proponent, it is important that NTPs' perspectives are properly considered in determining whether a future act can be done, and that these perspectives are not discarded where the NNTT does not consider their evidence sufficient. This may be addressed by the creation of clear evidentiary guidelines, that require less onerous evidence than standard court proceedings.

We support consideration of the s 39 NTA factors but recommend amendments requiring the NNTT to assess the full scope of activities permitted under the relevant grant—not just those planned by the proponent at the time of application. Proponents can revise their work plans after a determination, potentially expanding the impact of the act.

Alternatively, proponents who amend their work plan post-determination should be required to provide the updated plan to the NTP. If the NTP identifies a material change, fresh negotiations should be required.

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?

Our perspective

The NNTT should be required to impose conditions on all future acts it determines. Any act that is referable to the NNTT has a significant enough impact on native title to otherwise warrant the right to negotiate under the NTA. It would be neither fair nor just to disregard that characteristic or its impact on native title rights.

We consider however that there should be some discretion as to the precise content of those conditions. In determining the content of conditions, the NNTT should have regard to:

- (a) the nature and extent of the impact on native title (determined in accordance with the native title holders' views and relevant evidence presented);
- (b) the nature and extent of native title rights impacted;
- (c) any other benefit or detriment to the native title holders;
- (d) the significance of the project area and/or connected locations to the native title holders, including by reference to any known or registered cultural heritage/sites of significance in the area;
- (e) the impact to land and waters;
- (f) profits expected to accrue to the proponent under the project;

- (g) the period of time that the act will prevent native title holders from exercising rights; and
- (h) anything else identified as relevant by the parties.

As noted above, we consider the NNTT should consider the potential impact of activities that are permissible under the relevant grant, not only the specific activities that the proponent has proposed at the time of the application.

Proposal 8 Section 38(2) of the *NTA 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.

Our perspective

We agree with this proposal but suggest the payment should also take into consideration those factors listed above. An act which has a higher impact on native title or on significant sites, ought to receive payments at a higher rate.

Proposal 9 Section 32 of the *NTA 1993* (Cth) should be repealed.

Our perspective

We agree with this proposal for the following reasons:

- (a) The expedited procedure framework falls well short of UNDRIP standards, particularly in relation to FPIC and rights to be involved in decision making regarding the use of their traditional country.²⁰ The way in which the framework is applied unfairly disempowers NTPs and limited resources mean they have limited opportunities to participate appropriately in the objection process. This is often decided against their interests anyway and offends section 9(1) of the RDA.
- (b) In relation to the application of section 237 NTA, government parties should not make the assessment of whether a future act is an act attracting the expedited procedure under section 237 of the NTA unilaterally.
- (c) Regarding objections to the expedited procedure, there is insufficient financial resources and support made available to NTPs to participate in objection processes.
- (d) Even where resources are available, however, it should be noted that low success rates at challenging the application of the expedited procedure is a deterrent. NNTT data indicates that, of future act determinations made, the

²⁰ Articles 18, 19, 26, 28, 31, 32, particularly 32(2).

expedited procedure was determined to not apply in a high majority of objection hearings matters.²¹ This data suggests that NTPs have infrequent success in pursuing the objections process.

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 *NTA 1993* (Cth)?

Our perspective

Governments should only be able to legislate alternative procedures if they can demonstrate they have consulted with all known NTPs in their jurisdiction in accordance with FPIC standards.

Alternatively, we expect the proposed 'native title management plans' would provide sufficient avenues for alternative procedures.

Proposal 10 The *NTA 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.

Our perspective

We support this proposal, but note that to be effective, there also needs to be a process for NTPs to report non-compliance and a body to investigate, determine and enforce penalties for non-compliance where there is a dispute on the subject. This could appropriately be the NNTT.

Question 22 If the *NTA 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?

Our perspective

The NTA should clearly address the consequences of invalidity. Without this, there is limited clarity, little incentive for proponents to ensure compliance, and significant barriers for NTPs seeking relief.

The consequences should be:

²¹ Ibid [Search: Future act determinations; Decision/determination type: Objection - Expedited Procedure Does Not Apply] and [Search: Future act determinations; Decision/determination type: - Expedited Procedure Applies AND Objection - Expedited Procedure Does Not Apply].

- (a) A fine consisting of a 'future act payment' determined in accordance with factors identified above, plus a standardised amount as a non-compliance fee paid to the NTP; and
- (b) Suspension of the project activities until the proponent complies with the procedural obligations under the NTA.

These consequences would set a clear expectation to both the NTP and the proponent as to what the consequences are, and enable immediate redress.

Question 23 Should the *NTA 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?

Our perspective

Future act notices are often deficient of pertinent or precise information, that would otherwise assist NTPs in responding appropriately. We agree the NTA or associated regulations should be more prescriptive about what information is contained in the Future Act Notice (**FAN**), including as a minimum:

- (a) the nature, size, purpose, scope, pace, duration and reversibility of the proposed activities;
- (b) the specific areas that will be affected (such as lot on plan details, and mapping); and
- (c) a preliminary assessment of potential economic, social, cultural and environmental impacts, risks and benefits.²²

Such information should be made available both in written formats, in plain English as well as local languages (such as Yumplatok/Torres Strait Creole), and audiovisual formats.

If proponents are concerned about the sensitivity of information identified previously in our submission it could be provided directly to the NTP rather than through the FAN. While other parties may not need all details in a FAN, NTPs require this information to make informed decisions, especially regarding negotiated benefits.

4.4. Compensation and other payments (Part 7 of Discussion Paper)

Our perspective:

While we have had some success negotiating benefits or compensation for NTPs, these outcomes do not always materialise. Particularly where proponents commit to training or employment opportunities. When implementation fails, responsibility is often shifted back to the NTP, with claims that no suitable candidates were presented.

²² Food and Agriculture Organization of the United Nations (2016), *Free Prior and Informed Consent: An indigenous peoples' right and a good practice for local communities*, 15-16 <<https://www.fao.org/policy-support/tools-and-publications/resources-details/en/c/1410915/>>.

Even where there are legitimate challenges, the result is that NTPs consent to impacts on their rights without receiving the agreed benefits. In such cases, parties should be required to return to negotiations to either agree on a plan for delivering the promised benefits or to renegotiate the terms.

Our recommendation

In addition to the proposals in the Discussion Paper, the NTA should be amended to ensure NTPs receive the benefits agreed under negotiated agreements. Consent should be treated as an ongoing obligation, not a one-off formality, and linked to compliance with agreement terms. Where a proponent substantially breaches an agreement by failing to deliver agreed benefits the native title party should have the right to revoke or amend their consent.

The Act could also set clear timeframes for benefit delivery and outline consequences for non-compliance, such as suspension of the agreement and a requirement to renegotiate. These provisions could operate on an opt-in basis, which would help to establish clear legal standards and expectations around consent and benefit delivery, while still providing negotiation parties the freedom to exclude these arrangements.

Question 24 Should the *NTA 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 *NTA 1993* (Cth); or
- d. in accordance with an alternative method?

Our perspective

We support amending the NTA to require future act payments but do not support a prescribed formula. Payment amounts should be negotiated between the proponent and NTP and reflect the specific context of each act, including its impact on native title and Country, location, proximity to significant sites, and duration. Instead of a fixed calculation, the Act or regulations could list relevant considerations to provide guidance.

If a formula is adopted, it must be developed in direct consultation with NTPs, consistent with FPIC standards.

Further, future act payments should apply to all future acts, recognising that each act affects native title and connection to Country. For lower-impact acts, alternative benefits—such as data sharing—could be offered, if agreed by the native title party.

Question 25 How should ‘future act payments’ interact with compensation that is payable under Part 2 Division 5 of the *NTA 1993* (Cth)?

Our perspective

We agree that ‘compensation’ from the State and ‘consideration’ from proponents are distinct, and payments by proponents should not reduce the State’s compensation obligations for acts impacting native title.

Proposal 12 Sections 24EB and 24EBA of the *NTA 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.

Our perspective

We support this proposal, but reiterate that payments made by proponents as consideration for impacts on native title rights should not be conflated with compensation payments made by government.

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

Our perspective

We support Proposal 13, noting that acts deemed ‘invalid against native title’ under the NTA can still cause significant practical impacts; sometimes equivalent to extinguishment. For example, where a public authority constructs a road, native title holders may lose the ability to exercise native title rights such as camping, teaching, or burial on that land. Despite the act’s legal invalidity, its practical impact remains, and native title holders should be compensated accordingly.

Amendments should also introduce a reporting mechanism for proponents who proceed with future acts without issuing the required Future Act Notice.

4.5. Resourcing, costs and implementation (Part 8 of Discussion Paper)

Our perspective:

We particularly agree that a major issue in connection with the current future acts regime is the lack of resourcing for NTPs to participate effectively. This includes a lack of direct funding available to NTPs and the resultant lack of access and choice of appropriate and experienced legal representation. The lack of funding also results in a high administrative burden for NTPs, in implementing and managing agreements and meeting legislative requirements associated with decision-making and record-keeping.

NTRBs and NTSPs receive funding to assist native title applicants. However, NTPs, especially RNTBCs, lack direct funding for legal matters, limiting their ability to hire suitable legal representation to defend their rights and interests. This creates the following challenges to NTPs' competent legal representation and participation in the future acts regime:

- (a) NTPs limited to NTRB/NTSP services risk inadequate legal representation due to under-resourcing and overwork.²³ High staff turnover and burnout can lead to less experienced lawyers handling complex future acts work,²⁴ impairing the quality of legal representation and participation in the future acts regime that NTPs can achieve.
- (b) Further, there are legitimate reasons why some applicants and/or RNTBCs prefer not to use the services of the NTRB/NTSPs.²⁵ For those who are unable or unwilling to access the NTRB/NTSP services, there is little alternative given the highly specialised nature of native title and the expense of private lawyers.
- (c) Even if they can afford it, there are legitimate concerns about NTPs engaging private lawyers. Firstly, many groups may not have the resources to afford a private lawyer. Secondly, some private lawyers will take on clients without the relevant experience or expertise.²⁶ Again, this impairs the quality of legal representation and participation in the future acts regime that NTPs can achieve.

We frequently face resistance from proponents regarding paying fees for the time of NTPs and payment of legal costs. Payments to NTPs recognise the time, expertise, and cultural authority of native title holders. They also represent one of the few opportunities for economic benefit through native title. Our clients set their own fees based on experience and efficiency. Legal fee coverage is essential to uphold FPIC and ensure informed decision-making. This is especially important where NTPs engage private lawyers without government or NTRB/NTSP support.

Without such support, NTPs may be forced to self-fund legal representation for statutory processes that are imposed upon them and ultimately for the benefit of the proponent—an unfair and often unfeasible burden.

Alternatively, firms must act pro bono, which may be viable for large firms but places undue strain on smaller, independent practices and negatively impacts competition in the sector.

In addition to concerns regarding legal representation and negotiation costs, administrative burdens can include:

²³ See e.g. Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account, *Report on the operation of Native Title Representative Bodies*, (March 2006) at 3.70-3.73.

²⁴ *Ibid* at 3.82.

²⁵ *For example, high staff turnover can lead to inexperienced and culturally insensitive lawyers, preventing clients from building trust with a single lawyer due to frequent replacements. In our experience, NTRBs/NTSPs may also decline services to native title parties when relationships have deteriorated.*

²⁶ As is apparent from cases such as *Saunders on behalf of the Bigambul People v State of Queensland (No 2)* [2021] FCA 190 and *Wharton on behalf of the Kooma People v State of Queensland (No 2)* [2021] FCA 191.

- (a) the cost and time of undertaking required consultations or decision-making processes;²⁷
- (b) maintaining records to monitor and ensure implementation of agreements or conditions otherwise imposed on future act proponents;
- (c) invoicing and calculation of relevant amounts in accordance with often complex and confusing financial formulas;
- (d) auditing agreements or future act notices to check for compliance;
- (e) sharing information – as appropriate – with common law holders; and
- (f) resolving disputes among common law holders (including among applicants and PBC directors themselves) that arise through, or are triggered by, future acts and the NTPs management or involvement (or lack thereof) of the future acts.

Where native title groups are provided with little to no resources or support to respond to and implement processes associated with future acts, the regime amounts to a compliance burden more than an opportunity for economic advancement. In this regard it is noted that only RNTBCs have a right to cost-recover in certain circumstances,²⁸ not Applicants.

Our recommendations

In addition to the below, we recommend reforms to provide for specialist accreditation for appropriately qualified lawyers that could address some of the shortcomings identified above regarding insufficient resources and access to appropriate expertise:

- (a) A regime could be established under the NTA to provide specialist accreditation for private lawyers offering NTPs legal representation in future acts matters. Such accreditation would enable NTPs and overworked NTRBs/NTSPs to source appropriately qualified legal assistance within private practice;
- (b) A process could also be established so that funding is able to be paid directly from the National Indigenous Australians Agencies to accredited specialists engaged by NTPs, to cover the legal fees;
- (c) Under this regime, people who work in government advisory roles relating to native title would also need to become accredited to some degree, to ensure that valuable resources are not wasted by private or NRTB/NTSP lawyers on trying to educate government representatives about requirements under the NTA.

Proposal 14 The *NTA 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.

²⁷ Such as those required by the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth), *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth); *Native Title Act 1993* (Cth) (including applicant's conditions of appointment) or otherwise expected under traditional laws and customs.

²⁸ See NTA, s 60AB and *Native Title (Prescribed Bodies Corporate) Regulations 1999*, s 4.

Our perspective

We support this proposal, on the proviso that the operation of the fund and the categories of core operations are developed in consultation with PBCs and native title claim groups.

The fund should also be able to be accessed by relevant entities (e.g. 'former applicants' or nominated bodies) that implement agreements on behalf of a former claim group, after a negative determination has been made.

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.

Our perspective

We support this proposal, but consider such funding should also be available to NTPs who are not represented by NTRBs/NTSPs and their chosen legal representatives.

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.

Our perspective

We support this proposal.

Proposal 17 Section 60AB of the *NTA 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 NTPs 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).

Our perspective

We support this proposal, but suggest further amendments to require the payment of NTPs legal fees where they have otherwise been unable to access funding for this purpose.

Proposal 18 The Australian Government should establish a specifically resourced First Nations advisory group to advise on implementing reforms to the *NTA 1993* (Cth).

Our perspective

We support this proposal and suggest that the First Nations advisory group should include at least one representative from each PBC and current native title claim across Australia. In our experience, NTPs themselves are often excluded from participating in reforms. Instead, consultation is often limited to NTRBs/NTSPs, land councils, NNTT and the National Native Title Council. There needs to be mandatory representation from the PBCs in the Torres Strait from people who live in the region.

4.6. Aboriginal and Torres Strait Islander cultural heritage (Part 9 of Discussion Paper)

Our perspective:

Under Queensland's Cultural Heritage Acts, NTPs are recognised as the Aboriginal Party for cultural heritage purposes.²⁹ This recognition commonly facilitates the inclusion of cultural heritage management provisions within native title agreements.

However, the legislative framework only mandates formal cultural heritage management agreements for large-scale, high-impact projects that require an Environmental Impact Statement.³⁰ For smaller-scale activities, proponents are merely required to comply with the Cultural Heritage Duty of Care Guidelines,³¹ which allow them to take measures to avoid harm to cultural heritage without engaging with the relevant Aboriginal Party.

As a result, a significant number of future acts, despite their potential to adversely affect cultural heritage may proceed without meaningful consultation or agreement with the NTP. This gap in legislative protection risks undermining the integrity of cultural heritage management in Queensland.

Question 28 Should the *NTA 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?

Our perspective

We agree the NTA should be amended to provide requirements to address the impacts of future acts on cultural heritage, in such a way that respects FPIC and the significance of cultural heritage to NTPs. This could be done by requiring agreements (where there is a right to negotiate) to include clauses facilitating the NTPs involvement through:

- (a) the delivery of a cultural heritage awareness induction / presentation;
- (b) a cultural heritage assessment of the project area, prior to activities commencing;

²⁹ See *Aboriginal Cultural Heritage Act 2003* (Qld) (**ACHA**) and *Torres Strait Islander Cultural Heritage Act 2003* (Qld) (**TSICHA**), ss 34-35.

³⁰ ACHA and TSICHA, s 87.

³¹ ACHA and TSICHA, s 28.

- (c) negotiation of management measures for any identified cultural heritage;
- (d) consultation with the NTP in the event of a suspected cultural heritage find;
- (e) appropriate payment of NTP and representatives for their cultural heritage services under the agreement; and
- (f) suspension of the agreement and the need to negotiate a settlement and agreed management measures, where cultural heritage provisions are breached.

In our experience, these are standard clauses in any cultural heritage management agreement. Such provisions could be opted out, if both the NTP and proponent agrees.

For future acts which only involve a right to be consulted, the NTA could include the requirement for a cultural heritage management agreement including the above topics to be negotiated, where the future act is identified by NTPs as likely to impact known cultural heritage sites. This could be initiated by the NTP responding to the relevant future act notice and advising of the known cultural heritage within the project area.