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SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION REVIEW OF THE FUTURE ACTS REGIME – DISCUSSION PAPER RESPONSE

Executive Summary

This submission draws upon comprehensive empirical research analysing over 110,000 future act notices and detailed examination of over 200 PBCs across Australia. The research provides unique quantitative evidence of systemic dysfunction, particularly in expedited procedures where objection rates have risen to 60% (2021-2023) from a historical average of 40%.

The submission responds to the Australian Law Reform Commission's Discussion Paper on the Review of the Future Acts Regime, drawing upon comprehensive empirical research analysing native title corporations and future acts data across Australia. This submission largely supports the ALRC's proposed reforms while aiming to provide evidence-based recommendations to address key flaws in the future acts regime's operation.

While I remain supportive of most proposals in the discussion paper which seek to address the power imbalances and lack of fairness within the existing system, the discussion paper (like the issues paper before it) still lacks an emphasis on the inconsistent ways that future acts are assessed between different states/territories. I suggest that the ALRC ensures that any proposed reforms ensure that the impact of a future act on native title rights and interests is assessed in a manner that is consistent regardless of the government of the day.

Question 6 – Native title management plans

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?

The proposal to enable PBCs to develop Native Title Management Plans represents a valuable opportunity to address systemic deficiencies in the current regime. It would be expected that an effective management plan would establish clear protocols for different categories of development activity, streamline consultation processes, and provide certainty for both native title holders and proponents.

Research evidence suggests that successful native title corporations benefit from proactive, strategic approaches to land management rather than reactive responses to individual future act notifications. Research examining 242 PBC constitutions reveals that corporations with tailored governance structures demonstrate stronger institutional governance and better

cultural alignment.[1] This finding directly supports NTMPs, as they would enable PBCs to establish management frameworks reflecting their specific cultural protocols and decision-making processes. A key measure of the success of these plans is whether PBCs retain freedom and flexibility in terms of the contents and the approach to managing future acts. In other words, the framework for NTMPs should accommodate the diversity across native title groups while maintaining key procedural protections, ensuring both flexibility and consistency with the Native Title Act's objectives.

Question 7 – Mandatory agreement standards

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

Mandatory conduct and content standards for native title agreements can improve negotiation outcomes without over-regulating current processes. My opinion is that appropriate standards should balance fairness and flexibility for both parties. I would suggest a starting point for the standards as those outlined in the Njamal Indicia and those proposed in the 2012 Native Title Amendment (Reform) Bill, which provide proven frameworks for ensuring genuine engagement while maintaining flexibility for different circumstances.

These standards would establish baseline expectations for good faith negotiations, information sharing, and procedural fairness that benefit all parties. The approach should focus on outcomes rather than prescriptive processes, enabling innovation while ensuring minimum standards are maintained across all jurisdictions.

Proposal 1 – Standing instructions

The Native Title Act 1993 (Cth) and Native Title (Prescribed Bodies Corporate) Regulations 1999 (Cth) should be amended to allow for the expanded use of standing instructions given by common law holders to Prescribed Bodies Corporate for certain purposes.

Yes, the legislation should be expanded to allow for the greater use of standing instructions by PBCs. The importance of this practical reform could reduce administrative burdens and improve efficiency in routine matters. This proposal builds on existing practices that have proven effective in reducing duplication and allowing for the improved allocation of scarce resources within the native title system.

However, one caveat is that the implementation must include robust safeguards to prevent misuse by under-resourced staff (such as those in NTRBs/NTSPs) who could use standing instructions to circumvent necessary consultation with native title holders. One suggestion to address this is to place a maximum effective duration of four years for standing instructions which could help ensure regular reviews and renewals of delegated authorities, balancing administrative efficiency with ongoing accountability.

[1] Lucas, Michael. 2024. "Governing the Gap: Data-Driven Insights for Reforming Native Title Corporations and Indigenous Development," Doctoral Thesis, University of Arizona, December. Accessed: https://www.proquest.com/docview/3146709452

Proposal 2 – Access to existing agreements

The Native Title Act 1993 (Cth) should be amended to provide that: a. the Prescribed Body Corporate for a determined area has an automatic right to access all registered agreements involving any part of the relevant determination area; and b. when a native title claim is determined, the Native Title Registrar is required to identify registered agreements involving any part of the relevant determination area and provide copies to the Prescribed Body Corporate.

In my experience this issue occurs regularly where some PBCs do not possess copies of their ILUAs and often request them from either their NTRB/NTSP, the proponent, or the NNTT. This proposal is a common sense and simple solution to a matter that can support agreement continuity and PBC operational effectiveness.

However, it is my view that the automatic right to access agreements should extend beyond determination to ensure ongoing operational effectiveness. At determination, PBCs often face multiple competing priorities and may lack the immediate capacity or resources to review all relevant agreements. The right should therefore be ongoing and extend to current PBC directors and CEOs (where they exist), to ensure continuity in institutional knowledge and agreement governance.

Question 12 – Opt-in register for agreement information

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?

The proposal for an opt-in public register of agreement terms is a critically essential and incremental step towards enhanced transparency and outcomes in the native title sector. The aim is to enhance transparency and outcomes while respecting commercial confidentiality through an optional approach to information sharing within native title agreements.

The opt-in process benefits both native title parties and proponents in two forms. First, by respecting their choices in confidentiality and transparency, and second, by providing them with access to information to support agreement benchmarking exercises and the establishment of best practice standards. Access to this information has the ability to enable small steps forward in agreement contents and standards.

Question 14 – An impact-based model

Should Part 2 Division 3 Subdivisions G–N of the Native Title Act 1993 (Cth) be repealed and replaced with a revised system for identifying the rights and obligations of all parties in relation to all future acts, which: a. categorises future acts according to the impact of a future act on native title rights and interests; b. applies to all renewals, extensions, re-grants, and the re-making of future acts; c. requires that multiple future acts relating to a common project be notified as a single project; d. provides that the categorisation determines the rights that must be afforded to native title parties and the obligations of government parties or proponents that must be discharged for the future act to be done validly; and e. provides an accessible avenue for native title parties to challenge the categorisation of a future act, and for such challenge to be determined by the National Native Title Tribunal?

The proposal to replace existing categories with an impact-based model represents a logical advancement but requires important qualifications to ensure it does not repeat the problems of the existing future acts system. The primary requirement is sufficient impact categorisation guidelines and examples to ensure consistent categorisation of future acts across different states and territories.

For an impact-based model to succeed, it must include objective criteria for determining "low impact" activities, consider cumulative impacts, and establish presumptions against using lower impact categorisations when in doubt. The model must also address the resource imbalance and system issues that prevent meaningful participation by native title parties. Empirical analysis of NNTT data demonstrates the scale of this dysfunction: Western Australia's dominance of expedited procedures (88% of all EPs) while maintaining proportionally fewer negotiated agreements indicates systematic jurisdictional inconsistencies that undermine the Act's objectives.[2]

I am generally supportive of the model proposed in the ALRC discussion paper but wish to raise two specific suggestions.

First, I agree with the challenge noted at section 160 of the discussion paper, which highlights the variability of native title rights and interests across groups. The ALRC correctly identifies that this creates tension between creating a practical system and accurately assessing the impact of activities on specific native title rights. To address this challenge, any impact-based model should utilise the fewest possible impact categories. This approach minimises the risk that differences in native title rights and interests across groups will produce inconsistent outcomes for similar activities. Despite this inherent limitation in any standardised system, the proposed impact-based model represents a net improvement on the existing system.

Second, regarding the future acts raised in Question 15 (those typically for public purposes, compulsory acquisition, etc), I agree that these processes should be treated differently (as they currently are) to other future acts. In the absence of a bespoke process for these types of future acts, I suggest they should fit into the impact-based model as a third category: future acts attracting a right to notification. This would recognise their distinct public purpose character while ensuring appropriate procedural protections.

Question 15 – Processes for future acts performed in the public interest

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

The future acts referred to in categories (a) through (d) should either have their own tailored procedures or be embedded as a separate category within the impact-based model with a right to notification. For categories (a) and (c), in the absence of a bespoke system, these should

[2] Lucas Michael. 2024. "The Future Act Regime in Australian Native Title: Data Analysis, Trends, and Insights", University of Western Australia Law Review, 51(2), p. 252.

fall under a proposed third 'right to notification' category with tailored notification procedures that recognise their unique purpose.

For category (d), future acts by or for native title holders should be subject to streamlined procedures (such as a right to notification category) within the impact-based model, but only where they are undertaken by the PBC itself or a subsidiary/related body of the PBC, and where they are not acting on behalf of an external proponent.

Question 16 – Reforming future act categories in the absence of an impact-based model

Should the Native Title Act 1993 (Cth) be amended to account for the impacts that future acts may have on native title rights and interests in areas outside of the immediate footprint of the future act?

Absolutely, if a future act can be 'reasonably expected' to have an impact on native title rights and interests, then those impacts should be considered and addressed through the future acts regime, regardless of whether they occur within the immediate footprint of the future act or beyond it.

This is particularly important for water-related future acts, where extraction at one location can affect water sources considerable distances away. Also, it is relevant for damages to the cultural landscape which may lie outside or adjacent to the boundaries of the determination area. The current limitation to the immediate footprint creates an arbitrary gap in protection that fails to recognise the holistic impacts of development activities.

Proposal 6 – Right to negotiate process

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

I am supportive of the proposed reformed right to negotiate process, which addresses many of the existing weaknesses in the current system. The proposal's information requirements will enable more meaningful participation by ensuring native title parties have adequate details about proposed future acts. Most importantly, the extended timeframes acknowledge that the current six-month period is insufficient for fair negotiations, particularly given the resource constraints facing most PBCs and that the median time to reach agreement is approximately two years.[3]

The five-year moratorium period for substantially similar future acts is particularly valuable and aligns with the mechanism of the Aboriginal Land Rights (Northern Territory) Act 1976, where similar protections have proven highly effective in preventing the badgering of Indigenous landholders, consultation fatigue, and also providing certainty for all parties. The NT experience demonstrates that such provisions create incentives for genuine engagement in initial negotiations while protecting native title holders from being subjected to continuous applications for substantially the same activities. This mechanism would significantly

[3] Lucas Michael. 2024. "The Future Act Regime in Australian Native Title: Data Analysis, Trends, and Insights", University of Western Australia Law Review, 51(2), p. 265.

improve the integrity of the negotiation process and reduce the administrative burden on both native title parties and the system overall.

Proposal 7 – Referring negotiation issues to the NNTT

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.

The proposal to empower the NNTT to determine issues referred by agreement of negotiation parties represents a valuable extension of existing mechanisms. This may be considered as a variation to the recent section 60AAA clause for post-determination assistance, providing flexible dispute resolution that builds on the NNTT's expertise while maintaining party autonomy over the process.

Question 18 – Evaluating objections to future acts

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?

It appears to me that there is a conflation in this section of the ALRC discussion paper regarding 'an objection to a future act' and 'an objection to a future act attracting the expedited procedure.' These are two separate matters in practice and should be separated. The former type of objection speaks to the difficulty faced by governments of implementing FPIC principles without enshrining a veto (a current challenge in the Canadian context). The latter focuses on objecting to future acts being fast-tracked as low impact 'expedited' procedures when they are not classified as such by the native title parties.

In addressing the latter issue and given the overwhelming growth in objections to the expedited procedure, reform is necessary to the existing criteria under Section 237. Potential changes may include:

- Adding a requirement that an act cannot attract the expedited procedure if an objection was previously upheld in the vicinity of the proposed future act;
- Adding a requirement that an attempt was made to consult with the native title party prior to providing a future act notice;
- Removing the word 'particular' from section 237(b), such that any interference with a site or place of significance means an act does not attract the expedited procedure;
- Removing the word 'major' from section 237(c) and replacing it with 'moderate'.

Question 19 – Arbitration criteria

Should the criteria that the National Native Title Tribunal must take into account when making future act determinations be reformed?

Fundamental reform of the criteria under section 39 of the Native Title Act is required. A review of 515 future act arbitration determinations found that just 3 out of 515 arbitrations (0.6%) had an outcome that the future act cannot be done.[4] This represents a 99.4% approval

[4] Lucas Michael. 2024. "The Future Act Regime in Australian Native Title: Data Analysis, Trends, and Insights", University of Western Australia Law Review, 51(2), pp. 256-261.

rate, indicating systematic imbalance in how competing interests are weighed. The takeaway from this review is that most arbitration decisions are based upon the criteria which relate to the public interest (s. 39(1)(e)) and economic interests of government (s. 39(1)(c)). In almost all of these cases, the public interest or economic development output of major projects was found to outweigh the native title rights and interests of the Aboriginal or Torres Strait Islander party. Re-evaluating and re-balancing these criteria is necessary to having any real impact on the outcomes of arbitration determinations. In addition, I would suggest that additional minor tweaks to the criteria could include:

- Remove the word 'particular' from section 39(1)(a)(v) to broaden consideration of significant sites;
- Add a criteria that considers whether native title parties had adequate resources and time to assess potential impacts;
- Consideration of the efforts and evidence of genuine engagement between the parties

Proposal 8 – Removing the no compensation in arbitration clause

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.

It is crucially important that section 38(2) be repealed or amended to empower the NNTT to impose conditions enabling native title parties to receive payments calculated by reference to royalties, profits, or other income generated by future acts. The primary reason for this is that the current "no royalty" provision creates incentives for proponents to prefer arbitration over negotiation, knowing they can avoid compensation obligations.[5]

Section 38(2) should be reformed to enable fair compensation that reflects the value generated by future acts, consistent with compensation principles in other areas of law. Whether the NNTT or Federal Court is the more appropriate body for determining compensation should be assessed by legally qualified persons, but the principle of enabling appropriate compensation is fundamental to fair outcomes.

Proposal 9 – Repealing the expedited procedures

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

The proposal to repeal section 32 (and the use of expedited procedures) reflects the clear evidence that a process with an objection rate of 60% represents ineffective legislation. However, putting aside the ineffectiveness of the expedited procedures, there will always need to be a process to deal with ‘low impact’ actions. Phrased differently, if the proposed impact-based model is not implemented, there will continue to be a need for a process for low impact future acts. It is my opinion that if section 32 should only be repealed if a well thought out process for managing low-impact future acts is developed and that such a system can be consistently applied by states/territories. In the absence of repealing section 32, changes

[5] Lucas, Michael. 2024. “Governing the Gap: Data-Driven Insights for Reforming Native Title Corporations and Indigenous Development,” pp. 114 & 132. Doctoral Thesis, University of Arizona, December. Accessed: https://www.proquest.com/docview/3146709452

should be made to section 237 to modify what acts are considered to attract the expedited procedure.

Proposal 14 – Native Title Future Fund

The Native Title Act 1993 (Cth) should be amended to provide for and establish a perpetual capital fund, overseen by the Australian Future Fund Board of Guardians, for the purposes of providing core operations funding to Prescribed Bodies Corporate.

The absence of adequate funding for PBCs to meet statutory and operational obligations is one of the most significant barriers to effective participation in the future acts regime and broader development contexts. The need to provide funding support to operationalise the native title tenure system is particularly apparent when one considers the presence of funding models for other Indigenous land tenure regimes such as the Aboriginal Land Rights Act 1983 (NSW) and the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth). Further, as I previously outlined in my submission to the ALRC's future act review issues paper, there is strong quantitative evidence to support greater funding support to native title corporations. A key element of this research evidence reveals that the median PBC operates with annual income under $100,000 despite facing statutory compliance costs exceeding $600,000, creating a fundamental barrier to effective participation in future acts processes.[6]

The proposal to establish a perpetual future fund for PBC core operations funding is one potential avenue for the Australian Government to provide the necessary financial support to PBCs. The suggested creation of a native title future fund is consistent with the rationale behind the other 7 future funds Australia currently operates. The proposed native title future fund could provide the stable, ongoing funding that PBCs require to effectively discharge their statutory functions. Another expansion of the proposed future fund could be an investment from government to cover its potential liabilities arising from future native title compensation claims.

Question 28 – Relationships between future acts and cultural heritage

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?

The Native Title Act should be amended to provide streamlined processes for managing future acts impacts on Aboriginal and Torres Strait Islander cultural heritage. Given the overlaps of the two legislative processes, there should be a way to streamline costs and processes where it is beneficial to all parties.

It is not uncommon for ancillary agreements to section 31 agreements and for ILUAs to include the project cultural heritage management plans in an approach to address both native title future act matters and cultural heritage obligations in one agreement. Any new process which attempts to streamline the two processes should consider cultural heritage which lies

[6] Lucas, Michael. 2024. "Governing the Gap: Data-Driven Insights for Reforming Native Title Corporations and Indigenous Development," p. 88. Doctoral Thesis, University of Arizona, December. Accessed: https://www.proquest.com/docview/3146709452

outside the determination area but may have connections to the native title group, or where heritage in one determination belongs to another group.

Conclusion

The evidence presented demonstrates that the current future acts regime is fundamentally imbalanced, with expedited procedures attracting 60% objection rates, arbitration processes delivering 99.4% approval rates for proponents, and PBCs operating with median annual income under $100,000 while facing compliance costs exceeding $600,000. The ALRC's proposed reforms, particularly the impact-based model and the Native Title Future Fund represent a comprehensive opportunity for reform and offer genuine pathways to rebalance a system that currently fails both native title holders and legitimate development interests. When implemented with consistent national application and adequate resourcing, these reforms could transform the future acts regime from a weak and unfair system into one that genuinely achieves the Native Title Act's objectives of recognising and protecting native title while providing development certainty. Finally, I would like to thank ALRC staff for their diligence and work on this inquiry.

Yours sincerely,

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