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From

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To

Australian Law Reform
Commission

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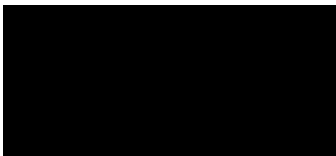
Dear Commission

We welcome the opportunity to provide submissions in response to the Australian Law Reform Commission's *Review of the Future Acts Regime: Discussion Paper (2025)* (**Discussion Paper**).

Our submissions are contained in **Attachment A** to this letter.

Given the nature of our experience with the Future Acts Regime and the *Native Title Act 1993* (Cth) (**NT Act**), our submissions focus primarily on matters of process and procedure in response to the questions and proposals contained in the Discussion Paper. We have, by and large, elected not to comment on matters of policy.

Yours faithfully



Michael Winram
Partner



Attachment A – Submissions in response to Discussion Paper

Questions and proposals	Response	Comments, concerns and suggested changes
Native Title Management Plans (NTMP)		
Question 6 [p 9 of Discussion Paper] Should the <i>Native Title Act 1993</i> (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?	In principle, yes.	Standards and guidelines for content of the NTMP (at [55] – [63] of the Discussion Paper) will need to be carefully considered and drafted with as much detail and specificity as reasonably practical. It should also allow for flexibility where the Prescribed Bodies Corporate (PBC) functions have been delegated pursuant to the relevant PBC Rule Book. To enable an effective NTMP, there should be clear expectation that proponents seeking an NTMP should fund the reasonable costs (including legal costs) of the PBC or its delegate to negotiate and enter into a NTMP. If the NTMP is to be an alternative to an ILUA, noting costs for authorisation of an ILUA can be high, an alternative process for PBCs (or their delegates) to gain native title holders authorisation to enter into a NTMP should be considered. The considerations in the following section ('Promoting fair and equitable agreements') must apply to NTMPs as well as ILUAs including, critically, the content standards (at [85] – [89] of the Discussion Paper). NNTT resourcing may need to increase to prevent a backlog of agreed, but unregistered NTMPs. We suggest clarifying how an ILUA interacts with an NTMP to the extent of any inconsistency. We also suggest clarifying what impact, if any, an agreed but unregistered NTMP has.
Promoting fair and equitable agreements		
Question 7 [p 15 of Discussion Paper]	In principle, yes.	Conduct standards will need to be sufficiently detailed so that they are meaningful, but not so restrictive that negotiations become



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Questions and proposals	Response	Comments, concerns and suggested changes
Should the <i>Native Title Act 1993</i> (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?		unduly formal, thereby restricting a party's opportunities to engage in the process. The standards at [86] of the Discussion Paper are appropriate in scope. We agree with the comment at [89] that a conservative approach to the scope of standards will lower the risk that the standards result in a 'race to the bottom'. Additionally, good faith provisions will need to be carefully drafted so that they are informative and objective. We suggest confirming what consequences, if any, arise from a party's breach of the conduct standards, good faith provisions or information-sharing responsibilities. Conduct standards should also deal with coercive behaviour and where parties refuse to acknowledge the right people for country, for example where a proponent refuses to acknowledge the validity of a registered claim group where the claim has met the registration test. Provisions requiring proponents to provide funding for participation will need to be sufficiently detailed. A balance will need to be struck so that native title parties are encouraged to participate but proponents are not unfairly put out of pocket. We suggest consideration be given to the question of how funding provisions should be prepared, e.g. fixed or formula amounts (see our response to Question 24). It may be useful to use current conduct standards used in other industries for other legislation, such as employment law.
Proposal 1 [p 18 of Discussion Paper] The <i>Native Title Act 1993</i> (Cth) and <i>Native Title (Prescribed Bodies Corporate) Regulations 1999</i> (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.	In principle, yes.	'Lower impact future acts' will need to be described in enough detail so that they are clear and certain. Further, there will need to be clear guidelines for PBCs in relation to how standing instructions are given as well as consequences for PBCs that act where no appropriately authorised standing instructions have been given.
Question 8 [p 19 of Discussion Paper] Should the <i>Native Title Act 1993</i> (Cth) expressly regulate ancillary agreements and other common law contracts as part of agreement-making frameworks under the future acts regime?	In principle, no.	The parties should not be restricted from reaching a private agreement as this infringes on the native title party's rights to self-determination and decision making. However, this does not preclude the development of guidelines to ensure that Native Title Parties and Proponents comply with their obligations under the law, as well as protect parties from power imbalances that may result in unfair contracts.



Questions and proposals	Response	Comments, concerns and suggested changes
Proposal 2 [p 20 of Discussion Paper] The <i>Native Title Act 1993</i> (Cth) should be amended to provide that: - 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 - 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.	We support the proposal so long as it is implemented with the auditing requirement under Proposal 4.	Detail is needed regarding the mechanism by which all relevant agreements are comprehensively identified. Further there will need to be consideration of what occurs in relation to PBCs that represent a number of different groups under one rule book, as this may inadvertently allow people access to agreements that do not relate to their traditional lands, for example the four Land groups under the Wajarri Yamaji Aboriginal Corporation. Proposal 4, if implemented, would go some way to addressing this concern. We suggest clarifying who is responsible for identifying and providing all registered agreements (we assume the NNTT Registrar).
Question 9 [p 22 of Discussion Paper] Should the <i>Native Title Act 1993</i> (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?	In principle, yes.	We support the amendment and the three bullet points set out under [108]. The statutory succession/assignment process under the NT Act would need to be sufficiently detailed. We suggest clarifying what happens when an agreement is negotiated with parties who are ultimately determined not to be native title holders (e.g. if the agreement is not renegotiated within a certain period, will it lapse or expire as in South Australia?)
Proposal 3 [p 23 of Discussion Paper] Section 199C of the <i>Native Title Act 1993</i> (Cth) should be amended to provide that, unless an Indigenous Land Use Agreement specifies otherwise, the agreement should be removed from the Register of Indigenous Land Use Agreements when: - the relevant interest in property has expired or been surrendered; - the agreement has expired or been terminated; or - the agreement otherwise comes to an end.	We do not support the proposal.	There is utility in retaining former ILUAs on the register so long as the relevant entry specifies whether the ILUA or property interest has expired, been surrendered, been terminated or otherwise come to an end, and the dates on which these events took place. We suggest increasing the functionality of the Register rather than removing old entries, such as having a register for expired, surrendered or terminated ILUAs as well as a register for old s 31 Deeds, similar to the historical layer in NNTT Vision.
Proposal 4 [p 24 of Discussion Paper] The <i>Native Title Act 1993</i> (Cth) should be amended to require the Native Title Registrar to periodically audit the Register of Indigenous Land Use Agreements and remove agreements that have expired from the Register.	We support the periodic auditing of the register. See our response to Proposal 2. We do not support removal of expired agreements. See our response to Proposal 3.	Nil.
Question 10 [p 24 of Discussion Paper]	In principle, yes.	We support the amendment options set out in the bullet points under [123]. The categories of amendments permissible without re-registration may need to be narrow in scope so that the Registrar can confirm they are minor.



Questions and proposals	Response	Comments, concerns and suggested changes
Should the <i>Native Title Act 1993</i> (Cth) be amended to allow parties to agreements to negotiate specified amendments without needing to undergo the registration process again, and if so, what types of amendments should be permissible?		
Proposal 5 [p 25 of Discussion Paper] The <i>Native Title Act 1993</i> (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.	We support the proposal.	Currently there is no mechanism, aside from under contract law, for parties to resolve disputes for breaches of agreements. Having a mechanism to deal with disputes will enable parties to be held accountable from breaches. The NNTT's resources may need to be scaled-up to facilitate timely dispute resolution.
Question 11 [p 25 of Discussion Paper] Should the <i>Native Title Act 1993</i> (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?	We support the proposal.	As stated above a mechanism to hold parties accountable for breaches would be welcomed. However, the NNTT will need to ensure there is monetary support for Native Title Parties that may not have the resources to participate in the dispute resolution process.
Question 12 [p 26 of Discussion Paper] 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?	No.	This does not provide agreement transparency. Instead, potential risks of this approach include: a. consolidating power amongst the proponents, as the negotiations may become a matter of all proponents against all native title parties; b. restricting the terms parties may wish to negotiate as they are not within the publicly available agreements; and c. limiting the terms proposed and agreed by the parties, because certain terms may only be agreeable if they are kept private (e.g. for public relations reasons).
Reshaping the statutory procedures		
Question 14 [p30 of Discussion Paper] Should Part 2 Division 3 Subdivisions G–N of the <i>Native Title Act 1993</i> (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;	Regarding paragraphs a, d and e, in principle yes. We choose not to respond to paragraphs b and c of this question.	The guidelines relevant to the categorisation of future acts under the impact-based model (at [154] of the Discussion Paper) would need to be comprehensive and detailed. The factors identified at [155] of the Discussion Paper are appropriate but should be expanded. Dispute mechanisms (i.e. paragraph e of the question) are critical. As noted at [161], these amendments should focus on timely dispute resolution that is cost-effective for native title parties. As noted at [162], it may be appropriate to formalise a process by which the parties negotiate the disputed categorisation before bringing the dispute before the NNTT.



Questions and proposals	Response	Comments, concerns and suggested changes
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?		
Question 15 [p 34 of Discussion Paper] 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 <i>Native Title Act 1993</i> (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 <i>Native Title Act 1993</i> (Cth); and d. future acts proposed to be done by, or for, native title holders in their determination area?	In principal, yes for those acts covered by a, b and d.	The impact model is suitable for activities where disturbance is being undertaken, but how can this be quantified in relation to compulsory acquisition? Therefore, this should remain as a separate future act process with its own procedural rights and process as it effectively is a right in rem. In relation to exclusion for ‘acts’ pursuant to ss 26A–26D, these should not be afforded an exclusion as they do have impacts on native title rights and interests, and are not for the public’s benefit as it is usually by private proponents who make profits. Therefore an impact model is best placed to deal with these ‘acts’. In relation to exclusion for ‘acts’ pursuant to ss 24K, as these ‘acts’ are usually for the benefit of the public, the greater public good should afford these ‘acts’ an easier pathway as they benefit all citizens including the native title party. If the purpose of native title is to afford some type or redress and recognition, then ‘acts’, done by, or for, native title holders in their determination area should be exempt. However, there should be a requirement that these ‘acts’ are only undertaken with consent of all of the common law native title holders to ensure there is no misuse of the provision.
Question 16 [p 37 of Discussion Paper] Should the <i>Native Title Act 1993</i> (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?	Yes.	As noted at [189] of the Discussion Paper, an impact-based model may be appropriate for impacts on native title rights and interests outside the location of the future act. We agree.
Question 17 [p 38 of Discussion Paper] Should the <i>Native Title Act 1993</i> (Cth) be amended to: a. exclude legislative acts that are future acts from an impact-based model as contemplated by Question 14, and apply tailored provisions and specific procedural requirements instead; and b. clarify that planning activities conducted under legislation (such as those related to water management) can constitute future acts?	In principal, yes for acts that benefit the public.	‘Acts’ that are for the benefit of the public, should be afforded an easier pathway to validation as they benefit all citizens including the native title party.



Questions and proposals	Response	Comments, concerns and suggested changes
Proposal 6 [p 40 of Discussion Paper] a. 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: b. 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. c. Native title parties would be entitled to withhold their consent to the future act and communicate their objection to the doing of the future act to the government party and proponent within six months of being notified. From the time of notification, the parties must negotiate in accordance with negotiation conduct standards (see Question 7). The requirement to negotiate would be suspended if the native title party objects to the doing of the future act. d. 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). e. 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. f. 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. g. 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. h. If the parties reach agreement, the agreement would be formalised in the same manner as agreements presently made under s 31 of the Native Title Act 1993 (Cth).	We support the proposal with one minor concern.	Native Title Parties usually do not have the appropriate resources to adequately participate in disputes that are referred to the NNTT for determination. Therefore, unless there is some provision of assistance for Native Title Parties to participate, this may end up with unjust outcomes.



Questions and proposals	Response	Comments, concerns and suggested changes
i. 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.		
Proposal 7 [p 42 of Discussion Paper] The <i>Native Title Act 1993</i> (Cth) should be amended to empower the National Native Title Tribunal to determine issues referred to it by agreement of the negotiation parties.	We agree with this proposal.	We agree with this proposal however we note the issue of resourcing for Native Title Parties that will need to be addressed if this amendment is made.
Proposal 8 [p 46 of Discussion Paper] Section 38(2) of the <i>Native Title Act 1993</i> (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.	We support the proposal in principle.	We echo the concerns at [234] of the Discussion Paper that there may be difficulty ensuring the NNTT receives sufficient information to determine royalty-based payments or profit-sharing conditions. In addition, this requirement may place considerable administrative burden on the proponent to show, to the NNTT's satisfaction, the accuracy of their declared profits.
Proposal 9 [p 49 of Discussion Paper] Section 32 of the <i>Native Title Act 1993</i> (Cth) should be repealed.	We support the proposal.	Nil.
Question 20 [p 49 of Discussion Paper] 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 <i>Native Title Act 1993</i> (Cth)?	In principal, no.	Having a set regime for all of the Commonwealth provides certainty. Allowing differences between States and Territories diminishes this certainty.
Question 21 [p 51 of Discussion Paper] Should Part 2 Division 3 Subdivision F of the <i>Native Title Act 1993</i> (Cth) be amended: - to provide that non-claimant applications can only be made where they are made by, or for the benefit of, Aboriginal or Torres Strait Islander peoples; - for non-claimant applications made by a government party or proponent, to extend to 12 months the timeframe in which a native title claimant application can be lodged in response; - for non-claimant applications in which the future act proposed to be done would extinguish native title, to require the government party or proponent to establish that, on the balance of probabilities, there are no native title holders; or - in some other way?	We choose not to respond to paragraph a of this question. Regarding paragraphs b and c of this question, we say yes.	Regarding paragraph b, we agree that the current 3-month timeframe is unnecessarily onerous and agree that a 12-month timeframe is appropriate. Regarding paragraph c, we agree that the onus should fall on the government party or proponent to establish, on the balance of probabilities, that there are no identifiable native title holders. We choose not to respond to the suggestions under [255] of the Discussion Paper except for the fifth bullet point. We do not support outright repeal of non-claimant applications. We consider them to be an important mechanism when dealing with land with no identifiable native title holders.



Questions and proposals	Response	Comments, concerns and suggested changes
Proposal 10 [p 52 of Discussion Paper] The <i>Native Title Act 1993</i> (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.	We support the proposal.	Nil.
Question 22 [p 52 of Discussion Paper] If the <i>Native Title Act 1993</i> (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?	Yes.	Articulating consequences for breaches of procedural requirements provides certainty for all parties.
Question 23 [p 53 of Discussion Paper] Should the <i>Native Title Act 1993</i> (Cth), or the <i>Native Title (Notices) Determination 2024</i> (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?	Yes.	We support either option raised in [266] of the Discussion Paper – either more detailed template notice should be prescribed under the NT Act or relevant Determination. The latter may be a more efficient option as determinations can be updated and amended more easily.
Proposal 11 [p 54 of Discussion Paper] All future act notices should be required to be lodged with the National Native Title Tribunal. The Tribunal should be empowered to maintain a public register of notices containing specified information about each notified future act.	We support the proposal in principal.	The NNTT's resources may need to be scaled-up to facilitate timely handling of future act notices and register maintenance.
Compensation and other payments		
Question 24 [p 55 of Discussion Paper] Should the <i>Native Title Act 1993</i> (Cth) be amended to provide that for specified future acts, an amount which may be known as a 'future act payment' is payable to the relevant native title party prior to or contemporaneously with the doing of a future act: - as agreed between the native title party and relevant government party or proponent; - in accordance with a determination of the National Native Title Tribunal where a matter is before the Tribunal; - in accordance with an amount or formula prescribed by regulations made under the <i>Native Title Act 1993</i> (Cth); or - in accordance with an alternative method?	In principle, yes.	We support future act payments that are calculated or quantified by agreement between the parties (paragraph a of this question) or by NNTT determination (paragraph b of this question). Although we do not object to the use of a fixed or formula amount in principle as noted as paragraph c of this question, we think these options would need to be thoughtfully implemented. It is not clear to us what the fixed amount would be based on. It is also unclear what the formula amount would be based on or how it would be calculated in such a manner that is fair to each party. Each amount should be indexed to CPI.
Proposal 12 [p 57 of Discussion Paper]	Yes.	This provides certainty to all parties.



Questions and proposals	Response	Comments, concerns and suggested changes
Sections 24EB and 24EBA of the <i>Native Title Act 1993</i> (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.		
Question 26 [p 58 of Discussion Paper] Should the <i>Native Title Act 1993</i> (Cth) be amended to provide for a form of agreement, which is not an Indigenous Land Use Agreement, capable of recording the terms of, and basis for, a future act payment and compensation payment for future acts?	Yes.	This can be useful validation tool for those 'acts' which do not fall neatly within any of the future act Subdivision. However, we think this option would need to be thoughtfully implemented and be accompanied by detailed guidelines.
Proposal 13 [p 59 of Discussion Paper] The <i>Native Title Act 1993</i> (Cth) should be amended to provide a statutory entitlement to compensation for invalid future acts.	Yes.	This provides certainty to all parties. It may be that there is an inclusion of a schedule of payments indexed to CPI to provide certainty and transparency to all parties. These amounts will need to be carefully thought out, noting if the amounts are too small, it may mean proponents decide to breach and make the payment rather than comply.
Resourcing, costs and implementation		
Proposal 14 [p 60 of Discussion Paper] The <i>Native Title Act 1993</i> (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.	In principal, yes.	In principal this proposal is a way to ensure that PBCs are appropriately funded. However, this is an issue that should be considered and addressed by PBCs.
Proposal 15 [p 61 of Discussion Paper] 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.	In principal, yes.	In principal this proposal is a way to ensure that PBCs are appropriately funded. However, this is an issue that should be considered and addressed by PBCs.
Proposal 16 [p 62 of Discussion Paper] 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.	We support the proposal.	We have made this comment in response to relevant questions and proposals above.
Proposal 17 [p 62 of Discussion Paper] Section 60AB of the <i>Native Title Act 1993</i> (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;	Yes.	This section should also include payment of legal and expert costs to ensure that no Native Title Parties are out of pocket or disadvantaged. However, there must also be a mechanism to ensure the costs claimed are reasonable, such as a guideline or suggested schedule of costs.



Questions and proposals	Response	Comments, concerns and suggested changes
b. enable delegated legislation to prescribe a minimum scale of costs that native title parties can charge under s 60AB of the Act; c. prohibit the imposition of a cap on costs below this scale; d. impose an express obligation on a party liable to pay costs to a native title party under s 60AB of the Act to pay the fees owed to the native title party; and e. specify that fees charged by a native title party under s 60AB can be charged to the government party doing the future act, subject to the government party being able to pass through the liability to a proponent (if any).		
Aboriginal and Torres Strait Islander cultural heritage		
Question 28 [p 66 of Discussion Paper] Should the <i>Native Title Act 1993</i> (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?	Yes.	There should be a mechanism to ensure that cultural heritage surveys are undertaken prior to any future act request so that all parties can properly assess the impacts to heritage by a proposed 'act', providing certainty and transparency. There should be scaled or tiered approach to surveys dependant on the impact of the 'act' and whether recent previous surveys have been undertaken. This can also be a mechanism for parties to build relationships prior to negotiating agreements, which may facilitate more effective and efficient negotiations, and thus reduce delays in reaching agreements.