

SUBMISSION

Review of the Futures Acts Regime: Discussion Paper (2025)

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for the Australian Law Reform Commission

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INTRODUCTION

Isaac Regional Council (IRC) welcomes the opportunity to provide a submission to the Australian Law Reform Commission's (ALRC) Review of the Future Acts Regime: Discussion Paper (2025). IRC is committed to playing a respectful and constructive role in the native title system. As a respondent party to claims, IRC has consented to the making of all positive determinations so far made within its LGA. Council is eager to continue its ongoing constructive engagement with First Nations communities and its advocacy for a more balanced, transparent and inclusive framework.

PART 1 – BACKGROUND

- 1.1 Isaac Regional Council ("IRC") administers a local government area ("LGA") in Central Queensland covering some 58,708sq km. It has roles and responsibilities under the *Local Government Act 1993* (Qld) and other legislation and under its own local laws and land use planning scheme.
- 1.2 As with many of Queensland's regional and remote local governments, IRC is substantially affected by native title in two broad ways. First, in responding to native title claims; it particularly seeks to ensure the recognition of its many existing interests where positive native title determinations are made. Second, in ensuring its many activities which may affect native title – so-called future acts – are undertaken validly under the *Native title Act 1993* (Cth) ("NTA").
- 1.3 Perhaps more than any other level of government, and most other land use proponents, a large proportion of local government responsibilities and activities relate to land use and land management. This renders the native title system highly relevant – particularly for regional and remote local governments where there is only limited historical extinguishment within an LGA.
- 1.4 Annexure 1 contains an overview of the native title landscape as it relates to IRC's LGA. A substantial proportion of the total LGA falls within the external boundaries of current native title claims and positive native title determinations.
- 1.5 IRC is committed to playing a respectful and constructive role in the native title system. As a respondent party to claims, IRC has consented to the making of all positive determinations so far made within its LGA. In relation to future acts, IRC has dedicated substantial resources to its assessment and compliance responsibilities under the current future act regime. This includes development of its own native title operating system involving in-house compliance systems and regular reference to the Queensland Government's *Native Title Work Procedures* ("NTWP").
- 1.6 In conjunction with its responsibilities under the native title system, IRC has wide-ranging public interest functions involving many aspects of public service provision across multiple townships, rural communities, resource industries and agricultural industries. This includes the construction, operation and maintenance of roads, bridges, airstrips, the full range of water and sewage infrastructure, some public housing, recreation facilities, flood and fire management and weed and pest control. These activities flow through to associated land uses such as the extraction of quarry materials for public infrastructure construction and maintenance.

- 1.7 Local government also have primary responsibility for land use regulation through their land use planning schemes and local laws.
- 1.8 Local governments in Queensland also undertake extensive activities as land holders. This includes them acting as the State's trustee for substantial areas of reserve land where they have powers and responsibilities for land management and control involving a wide range of public purposes. Most activities undertaken by IRC on its reserves, which include the grant of trustee leases and permits to third parties, involve future act compliance.
- 1.9 For some of its responsibilities, local governments rely on land dealings (grants of land tenures including ordinary freehold) and permits, approvals and authorities from other levels of government – particularly the Queensland Government. Although the government party undertaking such future acts has the direct responsibility for ensuring future act validity, a now general practice by the Queensland Government is for it to condition grants so as to require the grantee to address future act compliance. This can include meeting all of the associated compensation, PBC fee for service and other future act process costs.
- 1.10 All of the local government functions, responsibilities and activities outlined above can have future act compliance implications. As native title claims are steadily determined, prescribed body corporates ("PBCs"), perform increasing roles in the operation of the future act regime. Their costs in doing so can be recovered as a statutory fee for service (Section 60AB NTA). In earlier years, the Commonwealth Attorney-General's Native Title Assistance Scheme (Section 213A NTA), allowed some financial assistance to local governments; particularly in native title agreement-making. However, a steady tightening of restrictions on that funding has left local governments to directly cover almost all costs under the native title system themselves. The increasing local government cost burden has to be passed on through higher local government rates, charges, fees or cost transfers to the users to local government public services.
- 1.11 In Queensland, separate laws apply to the protection of Aboriginal cultural heritage. The *Aboriginal Cultural Heritage Act 2003* (Qld) imposes a statutory cultural heritage duty of care on proponents of activities which could harm Aboriginal cultural heritage. This typically includes ground disturbing activities, such as the construction of the full range of local government public infrastructure. Although there is some limited cross-over between the native title and cultural heritage laws (particularly as to the identity of the Aboriginal party with whom compliance measures must be undertaken), statutory requirements generally diverge to such extent that there is a duplication of compliance assessments, measures and costs.
- 1.12 Having regard to this background, the following overarching submissions apply in conjunction with IRC's more specific comments in Part 2 and Part 3 of this submission:
- a) **One size does not fit all** – For most proponents, future act compliance may be a one-off proposition – involving a particular project, a single or a small number of land dealings or future acts limited in area, type and scope. Local governments are affected in a different way. Local government future acts are large in number, diverse in character, may cover large areas, involve multiple native title parties, often involve third parties (grantors and grantees of interests in land and third-party contractors) and are subject to tight time and budget constraints. Almost all

involve the provision of public services to which vital public interests apply. Reforms which would have the effect of funnelling all such future acts through an even smaller range of compliance options, each with their own process complexities, timeframes and costs, is simply not practicable.

Submission 1

If the native title impact-based model involving Category A (“right to consultation”) and Category B (“right to negotiate”) processes were to proceed, there must be an additional compliance alternative specifically geared to public service future acts. That compliance option must be less onerous than Category A or Category B in respect of process complexity, timeframes and cost. All mechanisms for addressing future act compliance should be coordinated, wherever possible, with means for addressing Aboriginal cultural heritage compliance. This especially applies where public service-related activities are involved.

- b) **Cost assessment and recovery** – The costs of future act compliance are not limited to direct financial costs. Direct costs are already considerable where the more complex compliance measures (Indigenous land use agreements (“ILUA”), right to negotiate (“RTN”) and native title compulsory acquisition), are involved. Opportunity cost is also a factor. Where a future act regime does not enable practicable native title compliance (i.e. by reference to complexity, time and cost), a future act may simply not go ahead at all. Productivity costs can also be substantial; especially where the proposed future act is essential and a “whatever it takes” dedication of local government time and resources is needed for an outcome. An example involves how native title is addressed under the current future act regime for the grant and renewal of Sales Permits to Queensland local governments essential to the operation of public services. Annexure 2 contains a Case Study.

Submission 2

Ultimately, the full costs of compliance must fall somewhere. In the case of local government provision of public services, the cost should be carried by the Australian Government. It creates the future act laws on behalf of the broader Australian community. The cost should not be borne by local communities through rates, charges and fees or reductions in local public services.

- Amend Section 213A NTA to include specific provisions which require the grant of assistance to local government bodies in relation to all of future acts related compliance costs they incur when performing functions involving public services. This includes the costs local governments incur for native title party fees for service.
- Amend Section 213A NTA to create a statutory entitlement to assistance for local government bodies, not simply an entitlement to make an assistance application.
- Amend Section 213A(5) so that Attorney-General guidelines cannot have the effect of denying or limiting assistance for a local government body where it is entitled or which have the effect of reducing the quantum of assistance below the costs actually incurred.

- c) **Clarifying what affects native title** – The purpose of a future acts regime is the protection of native title. This is achieved by regulating “acts affecting native title” – i.e. future acts. Section 227 NTA says that “an act **affects** native title if it extinguishes the native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise.” Some acts are covered by provisions in native title determinations which describe the nature and extent of local government (non-native title) interests in a determination area (Section 225 (c) NTA). Other provisions typically provide, for purposes of Section 225 (d) NTA, that where there is any inconsistency between the local government interest and native title rights and interests, the local government interest prevails to the extent of the inconsistency. Annexure 3 contains examples of the standard wording of such provisions. Determinations have both declaratory affect and take effect *in rem*. Currently there is uncertainty about whether acts which are covered by such determination provisions (so as to resolve inconsistency in favour of the local government interest), are still to be considered future acts.

Submission 3

The uncertainty should be resolved by inclusion of a new section in the NTA along the following lines:

Section 227A Acts covered by determinations

Where a determination of native title determines, for purposes of Section 225 (d), that an act done in the exercise of an interest determined for purposes of Section 225 (c) prevails over native title rights and interests, that act does not affect native title rights and interests.

PART 2 – FUTURE ACTS OPERATING SYSTEM

- 2.1** In developing reforms, it is important to understand the means by which Queensland local governments, and other proponents of large numbers of public service related future acts, endeavour to comply with the current laws. Because of the nature and extent of their affect on major users of the system, such as local government, the laws need to be accompanied by practices and procedures (“operating systems”).
- 2.2** The ALRC should recommend Commonwealth/State support and assistance in the development of local government and perhaps other industry specific operating systems.
- 2.3** For example, the State of Queensland has developed its own *Native Title Work Procedures* understood to have the status of Queensland Government policy. They are geared to the State’s application of the current future act regime for purposes of its own future acts. That operating system includes dedicated compliance officers, electronic tools for making and recording compliance assessments and other administrative practices to help optimise efficiency and consistency across State agencies and line departments.
- 2.4** Nothing similar is understood to exist uniformly across the local government sector. Each individual Council must establish its own operating system – or is left with none at all. This gives rise to substantial risk of accidental omission. The consequences could be severe if reforms such as those in Proposal 10 and Proposal 13 in the Discussion Paper, were to be adopted.
- 2.5** Key features of IRC’s current operating system are as follows:
- a) *Compliance assessments* – Every activity involving either or both potential future acts and Aboriginal cultural heritage compliance is sought to be identified at the planning stage. The compliance identification and assessment task falls on each Council officer with responsibility for the activity and is on top of their other operational roles. Even with occasional training, future act and cultural heritage compliance knowledge levels simply can not match the complexity of the current laws. There is a constant risk of compliance being accidentally overlooked or misunderstood. Capacity and capability limitations are a drag throughout the native title system.
 - b) *Compliance tools* – Although Council officers often have regard to the NTWP, they are not designed for local government future acts. IRC has sought to develop its own assessment tools involving flow charts and other officer assessment guidance both for native title future acts and Aboriginal cultural heritage. Although these assist for relatively simple acts where associated process requirements are not complex (e.g. future acts covered by Sections 24JB and 24KA), others that are more complex often require specialist external expertise.
 - c) *Extinguishment assessments* – Where a potential need for future act compliance is identified, Council officers assess the extent of the future act area against the potential for past native title extinguishment. In the local government context, a vast array of historical land use activities may have constituted public work *previous exclusive possession acts* (“PEPA”) (Section 23B (7) NTA). Because of resource, capacity and capability limitations in native title claim resolution, local governments often rely on so-called “*public work PEPA catch-all provisions*” in determinations. Annexure 4 contains a typical example. At the future act assessment stage, a local government

officer must then make a complex assessment about the extent of extinguishment (including the extent of the associated so-called “Section 251D area” and any application of the so-called “Section 47 suite” under which historical extinguishment may have to be disregarded. Absent a sophisticated operating system regularly updated to reflect Court decisions on aspects of public works PEPA extinguishment law, these assessments can be very difficult to make.

- d) *Local government ILUAs* – Shortly after the 1998 amendments to the NTA, which introduced *Indigenous land use agreements* (ILUA) as a compliance measure, a number of Councils working under the auspices of the Local Government Association of Queensland participated in a working group with native title claimants, to develop a *template local government ILUA*. The local government involvement in the template and its subsequent implementation claim-by-claim, was resourced by financial assistance from the Commonwealth Attorney-General (Section 213A NTA). IRC was able to utilise that assistance in negotiating [Council to insert] ILUAs with some claim groups in its LGA using the template. The ILUAs contained coordinated and streamlined compliance measures for both future acts and Aboriginal cultural heritage. The way in which they are intended to operate parallels in some ways the impact assessment approach proposed in the ALRC Discussion Paper – but in a way specific to local government. Their operation also involves elements similar to the Native Title Management Plan proposal in the Discussion Paper. The local government ILUAs which IRC was able to complete have at times been vital. For example, the ILUA provisions have sometimes been the only effective way IRC has to address future act compliance for critical Sales Permit renewals (refer to the case study in Annexure 2). It is IRC’s understanding that few, if any, local government ILUAs utilising the template, are now being negotiated. Changes to guidelines mean Commonwealth Attorney-General financial assistance can now be rarely obtained. Human resourcing and other capacity constraints – on both the local government and the native title party side – have also substantially diminished ILUA use. This leaves some IRC future acts able to readily proceed and others not. In the case of Sales Permit renewals not covered by such ILUAs, IRC has had to cease gravel pit operations as the State seeks to negotiate its own Sales Permit specific ILUAs – so far with few results.

Submission 4

Following are comments and suggestions about practices and procedures (operating systems), that need to be developed in conjunction with any statutory reforms to help the effective functioning of a future acts regime:

- Develop a wholistic and detailed operational flowchart illustrating pathways to validity under the totality of the reform proposals. The Discussion Paper seems to segment the proposed pathways through two separate illustrations in Figure 2 and Figure 4 – each containing limited detail.
- To assess industry specific compliance implications, then produce an assessment pathway illustrating how a new future acts regime would apply to local government and perhaps others industry users. For example, under the current future acts regime, the Queensland Government’s NTWP operate under a *native title assessment pathway* flowchart specifically geared to State agencies. A similar assessment pathway for local government under the reform proposals should identify timeframes, costs and other practical pressure points.

- If the reform proposals do proceed, they will involve a substantial re-shaping of native title compliance measures. Transitional arrangements will be necessary, including Commonwealth assistance to key industry sectors such as local government, to facilitate corresponding changes to their existing operating systems.
- Training, skills development and capacity building will be crucial to the longer-term implementation of the statutory reforms. There is scope here to add value in terms of the vital relationship foundations on which effective operating systems are built. For example, shared training sessions at the local level between PBCs/native title parties and adjoining/similarly affected local governments. A collaborative approach might also be possible for the shared native title party/local government development of tools and templates and other implementation resources.
- Relationships building around longer-term implementation of the statutory reforms, needs to be a focus of the reform agenda. Rhetoric arounds the benefits of agreement-making count for little where much of the underlying system dynamic is adversarial (see Submission 17). Given the nature and extent of local government responsibilities across entire claim/determination areas, and the synergy between land use related native title rights and interests and local government land management functions, arguably the key practical relationship within the system should be that between native title parties and local government. Commonwealth and States need to play a supporting role.
- Effective relationships of that kind, given the corporate character of local governments and PBCs, can only be developed at the person-to-person level. For example, between elected Council representatives and PBC directors and between key Council officers and native title party management personnel. This requires time and effort on both sides – itself difficult when capacity constraints already put the whole system under strain. Locally focussed, practical strategies and resourcing are needed to help foster relationship building.
- Where direct and indirect costs fall on local governments and native title parties, strategies are also needed to help address the cost burden. From a statutory reform perspective, ideas such as those in Submission 2 must be considered. However, Commonwealth/State/local government/native title party collaboration is also needed to help explore more innovative possibilities such as resource sharing, joint venture revenue raising and collaborative administrative arrangements at a local or regional level.

PART 3 – DISCUSSION PAPER SUBMISSIONS

- 3.1** Parts 1 and 2 of this submission contain context for the comments IRC makes to some of the specific questions raised in the Discussion Paper. Given the information provided in those parts, IRC's responses below have been kept as succinct as possible.
- 3.2** IRC only provides responses to questions particularly relevant to its circumstances. For many proposals in the Discussion Paper, the devil is likely to be in the detail. A full assessment of implications may not be possible until the proposed drafting of particular amendments is available.

Question 6

Should the Native Title Act 1993 (Cth) be amended to enable Prescribed Bodies Corporate to develop management plans (subject to a registration process) that provide alternative procedures for how future acts can be validated in the relevant determined area?

Submission 5

- Native Title Management Plans ("NTMP") may only be practicable if relevant proponents or industry groups (e.g. local government), are directly involved in their development.
- It is understood that the NTMP proposal currently involves the unilateral making of a plan by a PBC subject only to the consent of common law holders and registration by the NNTT. There is a high risk that this would not generate practicable compliance content from a proponent perspective. The Discussion Paper notes that *"better outcomes can be achieved through specific or tailored future act processes... able to account for regional or jurisdictional differences."* Especially for local government, a full understanding of the wide range and complexity of future acts and the operational and financial limitations, necessitates direct local government involvement.
- The law must not provide for a NTMP to have mandatory application to any proposed future act it ostensibly covers. A proponent must have the choice of alternative compliance measures where a NTMP outcome is not practicable.
- Experience with the development of the local government template ILUA, which has some characteristics in common with the NTMP proposal, shows that even unilateral NTMP development by a PBC would likely require a substantial dedication of time and resources by the PBC. Given existing PBC capacity and resourcing constraints, developing what may end up being impracticable NTMP outcomes runs the risk of diverting already limited capacity away from other compliance imperatives.
- The opportunities that a NTMP might give rise to (set out in paragraph 50 of the Discussion Paper), are likely to be more effectively achieved through other less time and resource intensive means. Submission 4 contains examples.

Question 7

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

Submission 6

- Although there is some potential for mandatory conduct standards to be helpful, perhaps the greater risk is that such standards will add process complexity and provide greater scope for interpretational disputes and legal challenges. That would only contribute to the already long timeframes and cost burden involved in agreement-making. The plethora of Court cases surrounding the interpretation of negotiation in good faith standards for existing RTN processes, points to a “pandora’s box” risk.
- In IRC’s experience, any current lack of conduct and content standards are not a significant impediment to compliance outcomes. They seem unlikely to diminish the much bigger problems involving complexity, timeframes and the cost burden.
- A more effective way of addressing the underlying issue, particularly from a local government perspective, is for there to be properly resourced communications and relationship building mechanisms. Submission 4 contains suggestions.
- Any “...requirement that proponents contribute to funding a native title party’s participation in negotiations” requires extremely careful handling. Cost associated with negotiating agreement-making outcomes for both future acts and Aboriginal cultural heritage (ILUAs, Cultural Heritage Management Plans and Cultural Heritage Agreements), already renders such options impracticable for most small to medium local government projects. Submission 2 is relevant.

Question 8

Should the Native Title Act 1993 (Cth) expressly regulate ancillary agreements and other common law contracts as part of agreement-making frameworks under the future acts regime?

Submission 7

- The use of ancillary agreements should be engineered into all agreement-making frameworks. They can contribute flexibility in extending compliance outcomes under a “head agreement”.
- The NTA should not expressly regulate ancillary agreements or other common law contracts. If there are to be limitations, whether procedural or substantive, they should be matters for negotiation and inclusion in the head agreement.
- A critical focus for all reforms should be on reducing regulatory complexity and increasing the scope and flexibility of compliance options. There needs to be an emphasis on practical ways for improving the way the system works. Submission 4 contains suggestions.

Question 10

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

Submission 8

- Yes. There should be an overall emphasis on the flexibility and practicability of the system.
- The scope of “permissible” amendments should be broad. Re-authorisation and re-registration of an ILUA should only be required where the amendments relate to the inclusion of an entirely different or unrelated future act or class of future acts.

Question 11

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

Submission 9

- Yes, but only if the parties have not proposed a dispute resolution clause of their own and the practical effect of a mandatory dispute resolution clause is appropriate and practicable to the circumstances of particular agreements.
- Any mandatory clause should provide for the dispute parties to bear their own costs and involve reasonable timeframes for each step in the process.
- Given what should be the policy objectives of reducing complexity, timeframes and cost, it would not be appropriate for the Federal Court to have exclusive jurisdiction for dispute resolution purposes.

Supplementary technical IRC submission about certain native title agreements

Section 24EBA(1) NTA includes a specific registration requirement for some ILUAs which the Commonwealth or a relevant State or Territory are parties to and which, among other things, “change the effects” provided for by Section 22B or similar provisions in a State or Territory law. Changing the effects could include providing that native title extinguishment over particular areas is to be disregarded. However, Section 22B only relates to *intermediate period acts* (“IPA”); those done between 1 January 1994 and 23 December 1996. Should Section 24BB(ab) and Section 24CB(ab), along with Section 24EBA(1)(iii), be amended to:

- (a) also provide for an ILUA to change the effects that are provided for by Section 23(B) which relates to *previous exclusive possession acts* (“PEPA”) and Section 23F which relates to *previous non-exclusive possession acts* (“PNEPA”); and
- (b) expressly say that references to “changing the effects” in Section 24BB(ab) and Section 24CB(ab) include disregarding the complete or partial extinguishing effects of an IPA, a PEPA or a PNEPA?

Submission 10

- Yes, such an amendment would be a positive addition to the utility and flexibility of agreement-making from both proponent and native title party perspectives. The existing statutory requirement for the Commonwealth, State or Territory to be a party, ensures oversight.
- These amendments would enable “extinguishment swap” deals to be done – removing “previous” extinguishment from some areas in return for “new” extinguishment (using the existing surrender provisions) over other areas.
- From a native title party perspective, the disregarding of “previous” extinguishment over culturally, historically, socially or environmentally important areas will be a beneficial outcome. For proponents like local governments, new extinguishment over other strategically important areas (e.g. land adjoining a township for expansion purposes and other areas where grants of ordinary freehold are required), would also be beneficial.
- Government party participation will ensure the public interest is always considered.
- The amendments would enable parties greater scope for innovation in addressing compensation.
- The concept of legal mechanisms providing for extinguishment to be disregarded is already a feature of the law – Sections 47, 47A, 47B and 47C NTA.

Question 14

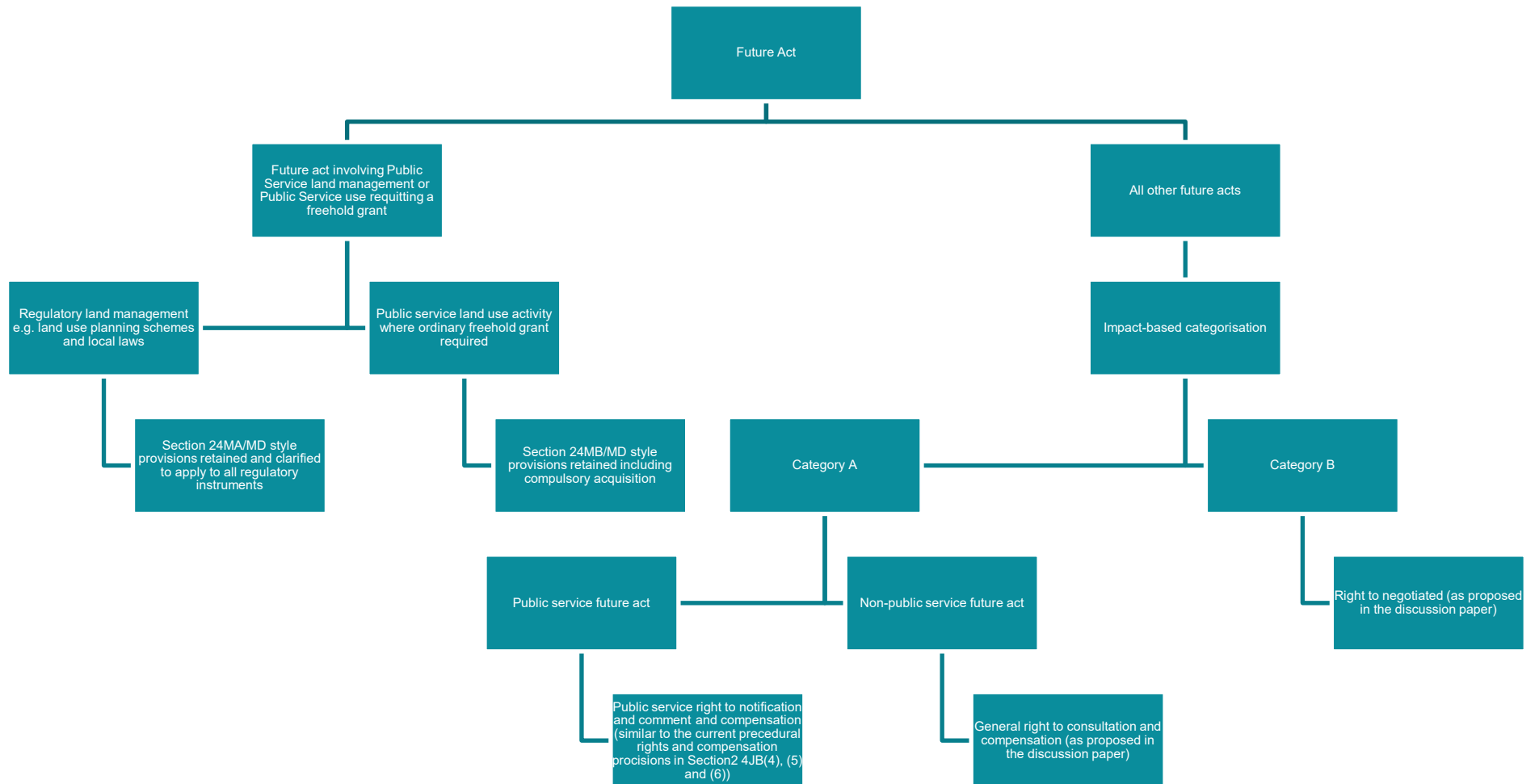
Should Part 2 Division 3 Subdivisions G–N of the Native Title Act 1993 (Cth) be repealed and replaced with a revised system for identifying the rights and obligations of all parties in relation to all future acts, which:

- a. categorises future acts according to the impact of a future act on native title rights and interests;*
- 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?*

Submission 11

- From IRC's perspective, this question goes to the heart of the proposed reforms. The existing compliance provisions in Part 2 Division 3 Subdivisions G-N (particularly Subdivisions H, I, J, K and M), currently cover the great majority of compliance outcomes for future acts not covered by an existing local government ILUA.
- If those provisions were to be repealed without being replaced with a revised system involving the same or less "impact" from a local government compliance perspective, this proposal should not proceed. It would be better to retain the existing provisions.
- Although an impact-based model makes some sense, it must have regard to two-way impacts – that is both the impact of a future act on native title and the impact of future act compliance requirements from a proponent and public interest perspective. This is essential where the future act involves the provision of public services and the proponent is a government party or other public service provider.
- The policy considerations – including a proper balance of "fairness" – require practicable compliance outcomes that enable public services to be realised on a reasonably efficient and cost-effective basis. At the same time, the native title party should have an opportunity for input where it so chooses. For public service future acts, the native title party should be compensated by Commonwealth or State commensurate with the actual affects of the future act on native title.
- If Part 2 Division 3 Subdivisions G-N were to be repealed and be replaced with an impact-based model, an illustration of a more appropriate alternative model is as follows:

Alternative impact-based model making appropriate provision for public service future acts



- Section 24MB/BD enables the compulsory acquisition of native title in certain circumstances so as to give rise to extinguishment. Local governments rely on this provision in limited circumstances – almost only where a new grant of ordinary freehold from the State is required for public service provision or land release for township expansion. It is understood the State currently requires extinguishment before an ordinary freehold grant will be made. Commonwealth and/or State laws could perhaps provide for the co-existence of ordinary freehold and native title with public service-related land uses to prevail in the event of inconsistency. This would avoid the need for native title extinguishment in such cases.
- There should be a corresponding new statutory definition for public service future acts. The NTA currently applies different public service-related concepts/definitions in different regulatory circumstances. For example, the definition of “public work” in the context of Section 23B(7) and Section 24JB(2), a prescribed list of public service facilities in Section 24JAA(3), a different prescribed list of public service facilities in Section 24KA(2), a separate definition of “infrastructure facility” in connection with Section 26(1) etc. The distinctions add substantially to overall complexity. A single new public service definition covering both acts which “permit or require” public service activities and facilities (e.g. Section 24KA(1)(b)(i)) and which “consist of the construction, operation, use, maintenance or repair” of public service activities and facilities (e.g. Section 24KA(1)(b)(ii)), should be incorporated.
- The public service-related compliance provisions in the alternative impact-based model, should not be limited to a *prescribed list* of public service facilities such as that contained in Section 24KA(2). That gives rise to anomalies – for example, the prescribed list in that provision doesn’t cover some low native title impact facilities such as recreation but does cover much higher native title impact facilities such as roads and railways. A new public service future acts definition should cover both “facilities” and broader “activities”.
- The concept of providing particular statutory procedures for the provision of public services features in other legal regimes. It considers the need to fairly and appropriately balance the public interest with native title as a private interest. This approach could include an accessible avenue for native title parties to challenge the categorisation of a public service future act. However, if the new definition is appropriately drafted, there should not be great scope for challenges.
- The procedural rights for public service future acts under Category A in the alternative model would involve a right to be notified and an opportunity to comment such as that contained in Section 24JB(6) for “public works”. However, there would not be an extinguishment outcome such as contained in Section 24JB(2). The non-extinguishment principle would instead apply.
- There should be provisions which enable a single public service future act notice for separate but related future acts. In addition, an amendment to the definition of “future act” could prescribe that a future act that involves the grant, issue or creation of a lease, licence, permit or authority includes all acts done in accordance with the lease, licence, permit or authority. This could be styled on the current provisions in Section 44H which are presumably intended to have similar effect. If Commonwealth and/or State laws were to provide that a freehold grant for public services can co-exist with native title, reference to such freehold grants should also be included in the provision.

Question 15

If an impact-based model contemplated by Question 14 were implemented, should there be exclusions from that model to provide tailored provisions and specific procedural requirements in relation to:

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

Submission 12

- In respect of paragraph (a) and (b) of the question, the answer is yes. The alternative impact-based model flowchart illustrates how this would work.
- From a local government perspective, this should extend to clearly cover other types of future acts in the nature of legislative acts that pass the freehold test in the way provided for in Section 24MA – expressly including the making, amendment or repeal of regulatory land use planning schemes and local laws.
- The reforms in this respect should include a technical amendment to the NTA of the kind suggested in Submission 3.
- With regard to RTN as it applies to some compulsory acquisitions, from a local government perspective the RTN requirement generally does not apply because of the exceptions in Section 26(1)(c)(iii)(A) or (B). This should be simplified by an express provision that RTN does not apply where the entity undertaking a compulsory acquisition is the Commonwealth, State or Territory or a local government body (i.e. a “government party”) and the purpose of the compulsory acquisition relates to the provision of a public service.
- The phrase “government party” as currently used in the NTA is defined in Section 26(1)(b) and is limited in its application to the current RTN provisions. The Discussion Paper uses the phrase in a broader context. The statutory definition should be extended to include a local government body.
- With regard to paragraph 174 in the discussion paper, this submission proposes that statutory procedures for public service future acts include procedural rights based on a Section 24JB(6) style right to be notified and opportunity to comment. Government parties, including local governments, are subject to general administrative law obligations to take account of all relevant considerations in their decision-making. This would include any native title party comments. Hence, it does not seem accurate to say that a statutory “...right to comment is not accompanied by an obligation on government parties... to consider the comments received.” Drafting along the lines of that contained in Section 24JB(6) is sufficient for public service future act related procedural rights and provides adequate clarity. The current mechanism in that provision involving a legislative instrument by the Commonwealth Minister to specify any further level of detail is sufficient.
- Although not requiring any statutory underpinning, practical measures of the kind in Submission 4 may add to the effectiveness of the proposed procedural rights for public service future acts.

Question 17

Should the Native Title Act 1993 (Cth) be amended to:

- a. *exclude legislative acts that are future acts from an impact-based model as contemplated by Question 14, and apply tailored provisions and specific procedural requirements instead; and*
- b. *clarify that planning activities conducted under legislation (such as those related to water management) can constitute future acts?*

Submission 13

- Yes. Some of the comments included in Submissions 11 and 12, apply.

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?

Submission 14

- A right to object and RTN should not apply to public service future acts.
- Where there is a native title compulsory acquisition for public service purposes by a government party (including local government), the standard compulsory acquisition procedures (including rights to object) under resumption legislation would apply. This includes existing legislative provisions for resumption by agreement (i.e. following negotiations). A separate native title specific RTN is not needed for native title compulsory acquisitions limited to public service purposes.

Question 21

Should Part 2 Division 3 Subdivision F of the Native Title Act 1993 (Cth) be amended:

- a. *to provide that non-claimant applications can only be made where they are made by, or for the benefit of, Aboriginal or Torres Strait Islander peoples;*
- b. *for non-claimant applications made by a government party or proponent, to extend to 12 months the timeframe in which a native title claimant application can be lodged in response;*
- c. *for non-claimant applications in which the future act proposed to be done would extinguish native title, to require the government party or proponent to establish that, on the balance of probabilities, there are no native title holders; or*
- d. *in some other way?*

Submission 15

- Non-claimant applications (whether for the purpose of seeking a negative determination – currently used in Queensland where the objective is to facilitate a freehold grant, or for the purpose of obtaining Section 24FA Protection), are not commonly utilised by Queensland local governments. This, in part, is because ILUAs and compulsory acquisitions can be used instead for most freehold grants and because the cost, timeframes and complexity of the non-claimant application process usually makes it impracticable for public service future acts.
- Regional and remote local governments in Queensland are reliant on Sales Permits for much of their public service infrastructure. Particular problems have emerged in recent years in the way the State interprets and applies future act requirements for Sales Permit grants and renewals. Unless future act reforms address that problem, local governments need the non-claimant application/Section 24FA Protection option as a fall-back for areas not subject to registered claims or positive determinations. The Case Study in Annexure 2 explains the problem.
- In respect of Question 21(d), it may be appropriate to place a time limit of perhaps 18 months on the Section 24FA Protection rather than it applying until a non-claimant application is discontinued, determined or otherwise resolved. It may also be that the Section 24FA Protection should only apply to any future acts specifically nominated and described in the non-claimant application.

Question 22

If the Native Title Act 1993 (Cth) is amended to expressly provide that non-compliance with procedural obligations would result in a future act being invalid, should the Act expressly address the consequences of invalidity?

Submission 16

- Yes, in the event that such amendment is made.
- However, any such amendment and the legislating of legal consequences requires very careful consideration.
- On balance, it is submitted that any non-compliance with express procedural rights should only render a public service future act invalid if the proponent made no effort to comply. Invalidity should not arise from technical error or oversight.

Question 23

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

Submission 17

- As with Submission 11, for purposes of notices in respect of public service future acts, a legislative instrument determined by the Commonwealth Minister is the best way of prescribing any additional notification details.
- More importantly, future act operating systems involving industry/future act specific tools and templates are the most practical way of addressing the issue. Template notices, for example, already feature in the Queensland Government's NTWP and the template local government ILUA.

Question 24

Should the Native Title Act 1993 (Cth) be amended to provide that for specified future acts, an amount which may be known as a 'future act payment' is payable to the relevant native title party prior to or contemporaneously with the doing of a future act:

- a. as agreed between the native title party and relevant government party or proponent;*
- b. in accordance with a determination of the National Native Title Tribunal where a matter is before the Tribunal;*
- c. in accordance with an amount or formula prescribed by regulations made under the Native Title Act 1993 (Cth); or*
- d. in accordance with an alternative method?*

Proposal 17 – Section 60AB of the Native Title Act 1993 (Cth) should be amended to:

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

Question 27

Should the Native Title Act 1993 (Cth) be amended to expressly address the awarding of costs in Federal Court of Australia proceedings relating to the future acts regime, and if so, how?

Submission 18

- A combined response is made to all the questions about compensation and fees for service. It is important to note that where a future act involves a ground disturbance activity, the native title party may also seek to recover separate additional costs involved in the development and implementation of Aboriginal cultural heritage compliance outcomes.
- In relation to future acts compensation, the NTA currently gives rise to incongruous outcomes. Where an ILUA, RTN or compulsory acquisition is used, the local government proponent effectively bears the compensation liability. In all other cases, the State bears the compensation liability unless and until the State enacts any “flow through” legislation (for example, Section 24KA(5) and (6)). This leads to an unsatisfactory three way dynamic between the native title party, the local government proponent and the State.
- As between local government and the State, where it can do so (for example, by conditioning a tenure grant or a statutory approval), the State may require the local government proponent to apply a compliance approach that involves the local government incurring the compensation liability (specifically, an ILUA or compulsory acquisition).
- As between a local government proponent and a native title party, negotiating the quantification of compensation and payment arrangements (sometimes including the establishment of a trust to receive the payment), often entails much of the negotiating time, effort and cost. Although there is now some case law on compensation quantification in the statutory compensation application context, where a future act is in issue, the resolution of agreed compensation often remains a “horse trading” exercise. Negotiation delays and cost complexity can be augmented where the NTA provides for the negotiations to consider any request for compensation in a form other than money (e.g. Section 24MD(2)(d) for compulsory acquisitions).
- Negotiations about the quantification of native title and Aboriginal cultural heritage compliance costs can be similarly protracted. Given that a native title party is the sole provider of compliance related services in any particular case, there is no competitive “market” mechanism to help control costs. There is little, if any, case law (including Section 60AC opinions), to help quantify cultural heritage process costs.
- For large commercial projects (e.g. mining and energy projects), the business case may mean that a project is still viable even with very substantial negotiated compensation and cost outcomes. This can create an expectation on the part of a native title party that similar outcomes should result from negotiations for public service projects.
- Taking account of all these considerations, it is submitted that regulatory guidance for the quantification of both compensation and costs is needed where public service future acts are involved. In relation to compensation, this may take the form of a formula that has regard to the compensation case law, the nature and extent of the affected native title and the nature and extent of the public service future act. A regulatory scale of costs for any native title party fee for service, is also needed and there should be a cap on fees where public service future acts are involved.



CLOSING COMMENTS

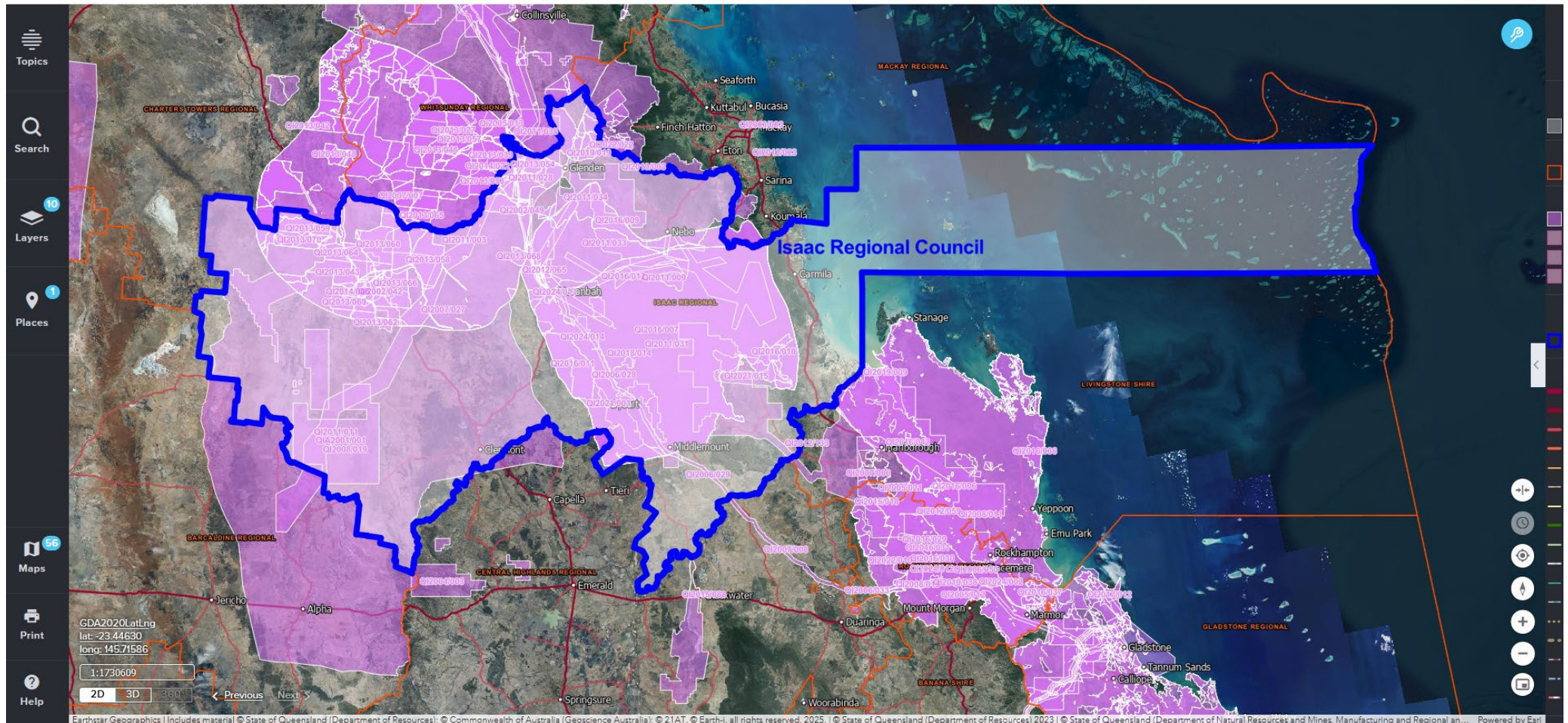
Isaac Regional Council thanks the Australian Law Reform Commission for reading its submission and considering their views on the Review of the Future Acts Regime. Should the ALRC have any questions or require further information on content contained within this submission, please do not hesitate to contact Beau Jackson, Executive Manager of Advocacy and External Affairs on [REDACTED] or [REDACTED]

ANNEXURE 1 – ISAAC REGIONAL COUNCIL ILUA DETERMINATIONS APPLICATIONS

Annexure 1 – Isaac Regional Council – Native Title Landscape							
Applications and determinations	Tribunal No	Name	Fed Court No	Lodged	Status	Date Registered	Type
Native title determination application	QC2018/002	Jangga People #2	QUD387/2018	8-Jun-18	Active	22-Nov-19	Claimant
Native title determination application	QC2013/002	Western Kangoulou People	QUD17/2019	9-May-13	Active	13-Jun-13	Claimant

Applications and determinations	Tribunal No	Name	Fed Court No	Fed Court Name	Determined	Method	Status	Outcome
Native title determination	QCD2012/009	Jangga People	QUD6230/1998	McLennan on behalf of the Jangga People v State of Queensland	9-Oct-12	Consent	In effect - Finalised	Native title exists (exclusive and non-exclusive)
Native title determination	QCD2016/001	Birriah People	QUD6244/1998	Miller on behalf of the Birriah People v State of Queensland	23-Mar-16	Consent	In effect - Finalised	Native title exists (exclusive and non-exclusive)
Native title determination	QCD2019/004	Widi People of the Nebo Estate #1	QUD372/2006	Pegler on behalf of the Widi People of the Nebo Estate #1 v State of Queensland	31-Jul-19	Consent	In effect - Finalised	Native title exists (exclusive and non-exclusive)

Native title determination	QCD2024/018	Barada Kabalbara And Yetimarala People #1	QUD13/2019	Dallachy on behalf of the Barada Kabalbara and Yetimarala People #1 v State of Queensland (Consent Determination)	6-Dec-24	Consent	In effect - Finalised	Native title exists (exclusive and non-exclusive)
Native title determination	QCD2020/001	Yuwibara People	QUD12/2019	Mooney on behalf of the Yuwibara People and State of Queensland	25-Feb-20	Consent	In effect - Finalised	Native title exists (non-exclusive)
Native title determination	QCD2016/009	Barada Barna People And Widi People Of The Nebo Estate #2 Shared-Country	QUD380/2008, QUD492/2013	Les Budby And Cecil Brown Jnr & Ors On Behalf Of The Barada Barna People; and Eileen Beryl Pegler & Ors On Behalf Of The Widi People Of The Nebo Estate #2 v State of Queensland	29-Jun-16	Consent	In effect - Finalised	Native title exists (non-exclusive)
Native title determination	QCD2016/007	Barada Barna People	QUD380/2008	Les Budby And Cecil Brown Jnr & Ors On Behalf Of The Barada Barna People v State of Queensland	29-Jun-16	Consent	In effect - Finalised	Native title exists (non-exclusive)
Native title determination	QCD2016/008	Widi People Of The Nebo Estate #2	QUD492/2013	Eileen Beryl Pegler & Ors On Behalf Of The Widi People Of The Nebo Estate #2 v State of Queensland	29-Jun-16	Consent	In effect - Finalised	Native title exists (non-exclusive)
Native title determination	QCD2016/006	Darumbal People	QUD6131/1998	Hatfield on behalf of the Darumbal People v State of Queensland	21-Jun-16	Consent	In effect - Finalised	Native title exists (non-exclusive)
Native title determination	QCD2024/001	Gaangalu Nation People (No 4)	QUD33/2019	Blucher on behalf of the Gaangalu Nation People v State of Queensland (No 4)	30-Apr-24	Litigated	In effect - Finalised	Native title does not exist
Native title determination	QCD2022/001	Clermont-Belyando Area Native Title Claim	QUD25/2019	Patrick Malone & Ors on behalf of the Clermont-Belyando Area Native Title Claim Group	11-Mar-22	Litigated	In effect - Finalised	Native title does not exist



ANNEXURE 2

Case Study – Future Acts Compliance and Sales Permits in Queensland

1. Sales Permits

1.1 Sales Permits are issued on behalf of the State of Queensland under the *Forestry Act 1959* (Qld) and administered by the Queensland Department of Agriculture and Forestry (“DAF”).

1.2 Sales Permits are the legal authority needed for the extraction and removal of quarry materials from locations that fall outside road dedications, freehold, national parks and some other excluded areas.

1.3 A reliable supply of locally sourced quarry materials is essential to local government construction and maintenance of the full range of public service infrastructure. Quarry materials include hard rock (of the kind usually associated with quarrying), but also include gravel, sand and soil deemed owned by the State.

1.4 Sales Permits authorise extraction by a permittee, which may include regional and remote local governments, in return for payment of royalties to the State based on the type and quantity of materials.

1.5 Permittees also include the full range of commercial quarry operators and extraction businesses. Metropolitan Councils and Commonwealth and State governments typically source their quarry materials from those commercial businesses and do not undertake extraction themselves.

1.6 Extraction of quarry materials is however an essential activity for regional and remote local governments. They need their own Sales Permits to operate everything from hard rock from quarries to gravel extraction from gravel pits. Gravel pits for rural and remote road construction and maintenance are particularly vital; usually providing the only viable source of materials for a large proportion of the road network.

1.7 Sales Permits are issued for a term of years and upon expiry require renewal. A Sales Permit may extend over a broad area and usually contains conditions limiting extraction to specific locations called *endorsed quarry areas*. A Sales Permit may require the permittee to undertake *terrain surveys* and *quantity surveys* of such areas and usually contains provisions for *access roads*.

2. Native Title

2.1 The grant and renewal of Sales Permits are taken to be future acts unless assessed to be within an extinguishment area. The Queensland Government’s *Native Title Work Procedures* (“NTWP”) acknowledge that some extraction areas validly used before 23 December 1996 in the construction of an associated public work, may form part of the Section 251D Area of that public work for purposes of Section 23B(7) NTA. However, in practice assessments for that purpose are irregularly undertaken.

2.2 Formerly, a Native Title Assessment was undertaken by DAF resulting in the inclusion of a clause in the Sales Permit typically in the form attached to this Case Study. It provided for valid grants and renewals under NTWP Module K (Section 24KA), Module J (Section 24JA) and Module GE (Section 24GE) – as well as under Section 24FA Protection and ILUAs. Most Sales Permit grants and renewals could be done efficiently (having regard to complexity, time and cost) under Section 24KA on the basis that extracted quarry materials were used only “...for the construction, operation, use, maintenance or repair of Facilities for Services to the Public...”. This requirement could be readily satisfied by local government permittees.

2.3 In May 2023, IRC received correspondence from DAF saying that “...I am writing to you about sales permits to get state-owned quarry materials issued to local governments by the Department of Agriculture and Fisheries under the Forestry Act 1959. The Department has identified that under the Native Title Act 1993 (Cth), some quarry activities requiring Forestry Act 1959 authorisation will also **require future act consent under an indigenous land use agreement (ILUA)**” (emphasis added).

2.4 The correspondence went on to explain that the Department would work closely with local governments to identify where the Department’s new approach to assessment enabled quarry activities to proceed without an ILUA and those for which it now considers ILUA consent is required. The Department said it would engage with native title parties to lead the negotiation of ILUAs and had increased “...its capacity to progress this important work by recruiting several temporary specialist positions with a focus on engaging with native title parties.”

2.5 It is understood that DAF no longer considers that grants and renewals of Sales Permits, and associated local government quarry activities, are covered by Section 24KA. No explanation for this position has been provided. For some endorsed quarry areas, for example those covered by consents in local government ILUAs based on the Queensland template, quarry activities have been able to proceed. However, substantial numbers of others now await DAF completing new ILUAs with native title parties.

2.6 Although two years have elapsed since the problem arose and despite DAF committing additional resources to address it, it is understood that few if any new ILUAs have been completed. Quarry activities, including the operation of numerous gravel pits, have ceased in numerous locations. This is creating serious and substantial knock-on effects for public service provision in many regional and remote communities.

3. Future Acts Reform

3.1 It is essential that any proposed reforms to the future act regime, resolve the Sales Permit problem. However, it is also demonstrative of wider problems. Importantly, the situation provides a salutary warning for any repeal of current statutory procedures and their replacement with untested and more limited new compliance processes.

3.2 It is difficult for IRC to make specific submissions about resolving the Sales Permit problem without information from DAF as to the basis of its current position. Perhaps it has something to do with the inclusion of “quarry” in the definition of “mine” in Section 253 NTA.

3.3 Irrespective, quarrying and associated authorities and permits in connection with the provision of public services need to be covered by the public service future act provisions suggested as part of the Category A component of the alternative impact-based model at page 14 of IRC’s submission.

Annexure 3 – Draft Determination Orders Relating to Council’s Interests (“Other Interests”)

- # The nature and extent of any other interests in relation to the Determination Area (or respective parts thereof) are set out in Schedule **[Insert]** (the **Other Interests**).
- # The relationship between the native title rights and interests described in order **[Insert]** and the Other Interests described in Schedule **[Insert]** is that:
 - (a) the Other Interests continue to have effect, and the rights conferred by or held under the Other Interests may be exercised notwithstanding the existence of the native title rights and interests;
 - (b) to the extent the Other Interests are inconsistent with the continued existence, enjoyment or exercise of the native title rights and interests in relation to the land and waters of the Determination Area, the native title continues to exist in its entirety but the native title rights and interests have no effect in relation to the Other Interests to the extent of the inconsistency for so long as the Other Interests exist; and
 - (c) the Other Interests and any activity that is required or permitted by or under, and done in accordance with, the Other Interests, or any activity that is associated with or incidental to such an activity, prevail over the native title rights and interests and any exercise of the native title rights and interests.

ANEXURE 4

[Example of a Public Works PEPA Catch-All Exclusion Clause]

The following areas of land and waters are excluded from the determination area as described in Schedule #:

1. Those land and waters within the External Boundary which at the time the Native Title Determination Application was made were the subject of one or more Previous Exclusive Possession Acts, within the meaning of s 23B of the *Native Title Act 1993* (Cth) as they could not be claimed in accordance with s 61A of the *Native Title Act 1993* (Cth).
2. Specifically, and to avoid any doubt, the land and waters described in (1) above includes:
 - (a) the Previous Exclusive Possession Acts described in ss 23B(2) and 23B(3) of the *Native Title Act 1993* (Cth) to which s 20 of the *Native Title (Queensland) Act 1993* (Qld) applies, and to which none of ss 47, 47A or 47B of the *Native Title Act 1993* (Cth) applied;
 - (b) the land and waters on which any public work, as defined in s 253 of the *Native Title Act 1993* (Cth), is or was constructed, established or situated, and to which ss 23B(7) and 23C(2) of the *Native Title Act 1993* (Cth) and to which s 21 of the *Native Title (Queensland) Act 1993* (Qld), applies, together with any adjacent land or waters in accordance with s 251D of the *Native Title Act 1993* (Cth), including, but not limited to, land and waters described in whole immediately below and those part lots described immediately below and depicted in the maps in Schedule # as:
 - (i) **[Insert lot descriptions for any specific Public Work PEPA and associated Section 251D Areas where native title is extinguished.]**