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Dear Sir/Madam

Issues paper – Review of the future act regime in the *Native Title Act 1993* (Cth)

Thank you for the opportunity to contribute submission addressing the ALRC's discussion paper 88, 'Review of the future acts regime' in the *Native Title Act 1993* (Cth) (Native Title Act).

Characterisation of the problems arising out of the current 'future act' regime by the ALRC

The ALRC has identified the overall problem associated with the 'future act' regime as, that it does not:

further the intention of the Native Title Act to be a means for:

'rectifying the consequences of past injustices';

'securing the adequate advancement and protection' of First Nations people;
and

ensuring that native title holders are able to 'enjoy fully their rights and interests'

Apart from the fact that the '18 Proposals and 23 Questions' don't actually address these issues in any meaningful way, the problem with the future act regime is more fundamental than that. The future act regime exists within the Native Title Act and is affected by the provisions in the Act. As it is now, the Native Title Act has the potential to destroy all native title, whether recognised under the Native Title Act or not. The reason for this is due to the construction of the Native Title Act. We will set out the argument in full because there is a common misconception that the Native Title Act accords Indigenous communities rights in their native title lands. In fact, it only accords Indigenous communities rights in their native title lands, as long as no-one else wants it. If someone else wanted title to native title land

in the past, the Native Title Act gives it to them, no matter how they acquired the title. If someone else wants title to native title land in the future the Native Title Act gives it to them although now there are procedural requirements that must be met. This is because there are no constraints on the government's power to compulsorily acquire native title lands. Once native title lands have been acquired Native Title is permanently extinguished because of the operation of section 237A, which provides:

The word extinguish, in relation to native title, means permanently extinguish the native title. To avoid any doubt, this means that after the extinguishment the native title rights and interests cannot revive, even if the act that caused the extinguishment ceases to have effect.

Where native title land has been claimed by non-Indigenous interests, other than the Crown, the Native Title Act prioritises non-Indigenous rights over Indigenous rights without any exploration of 'just entitlement' or negotiated occupation. This is made glaringly apparent by section 44H, which provides:

To avoid doubt, if:

- (a) the grant, issue or creation of a lease, licence, permit or authority is valid (including because of any provision of this Act); and
- (b) the lease, licence, permit or authority requires or permits the doing of any activity (whether or not subject to any conditions); and
- (ba) an activity is done in accordance with the lease, licence, permit or authority and any such conditions;

then:

- (c) the requirement or permission, and the doing of the activity, prevail over any native title rights and interests *and any exercise of those rights and interests*, but do not extinguish them (emphasis added); and
- (d) the existence and exercise of the native title rights and interests do not prevent the doing of the activity; and
- (e) native title holders *are not entitled to compensation under this Act* for the doing of the activity (emphasis added).

This outcome is, in part, because of the 'past' and 'intermediate period act' regime.

The past and intermediate period act regime under the Native Title Act

Past acts were introduced in the Native Title Act as passed. The 1998 Native Title Act introduced intermediate period acts. Divisions 2, 2A, 2AA and 2B of Part 1 of the current Native Title Act provide a comprehensive regime for validating past and intermediate period acts. Section 13A in Division 2 describes Division 2 as follows:

- (1) In summary, this Division validates, or allows States and Territories to validate, certain acts that:

(a) took place before 1 January 1994; and

(b) would otherwise be invalid because of native title.

This Division also covers certain acts done after that day consisting of an extension or renewal etc. of an act done before that day.

(2) The acts validated are called past acts; they are defined in section 228.

(3) This Division also sets out the effect of such validation on native title. The effect varies depending on the nature of the act. For this purpose, different categories of past act are defined by sections 229 to 232.

Section 14 validates past acts effected by the Commonwealth so that:

If a past act is an act attributable to the Commonwealth, the act is valid and is taken always to have been valid.

Section 15 describes the effect of validation for acts 'attributable to the Commonwealth', in terms of the category they come within, identifying four categories as categories A – D. Category A past acts extinguish native title; category B past acts extinguish native title to the extent that the acts are inconsistent with native title; and categories C and D do not, of themselves, extinguish native title.¹ Therefore, the outcome of a past act for native title depends on the 'type' of past act it is which determines the category it falls into. Sections 229 – 232 describe the categories for past acts.²

Category A past acts, include granting of: freehold estates;³ commercial, agricultural, pastoral or residential leases; and land that has been excised from mining leases⁴ for the purposes of residential infrastructure. Category A past acts extinguish native title and, because of the operation of section 237A, extinguish it permanently. Section 237A was introduced in the 1998 Native Title Act and, as set out above, defines 'extinguish in relation to native title' to mean 'permanently extinguish' so that the native title 'cannot revive'.

Category B past acts, includes the grant of a lease, other than a lease that is a Category A past act or a mining lease. Category B past acts extinguish native title to the extent of any conflict between the lease and native title and, because of the operation of section 237A, extinguish it permanently.

Categories C and D refer to mining leases and any act that does not come within categories A or B respectively. They do not, of themselves, extinguish native title but the result can be to effectively, although not permanently, extinguish native title.

Division 2A makes the same provisions for intermediate period acts as Division 2 makes for past acts. However, legislative acts are excluded from the category of 'intermediate period acts' unless they:

(i) (create) a freehold estate, lease or licence over ... land or waters; or

¹ There are further provisions in sections 14 and 15 but they are not relevant for present purposes

² The sections and categories are the same in the legislation as passed and the current legislation.

³ Grants by the Crown to the Crown or a statutory authority; grants to Indigenous people or communities; or grants for the benefit of Indigenous communities are excluded from Category A past acts.

⁴ In these submissions the term 'mining lease' will be used to refer to all forms of mining permit.

- (ii) (contain, make or confer) a reservation, proclamation or dedication under which the whole or part of the land or waters is to be used for a particular purpose

Sections 232B- 232E of the current Act describe the categories for intermediate period acts in the same terms as the categories for past acts. Therefore, if legislative acts are involved, for the most part, they are past acts if they occurred before 1 July 1993 and future acts if they occurred after 30 June 1993. For 'other acts', they are effectively past acts if they occurred before 23 December 1996, which is the date the 'Wik peoples' judgement was handed down.⁵ If they are Category A intermediate period acts, they permanently extinguish native title. For category B intermediate period acts, native title is permanently extinguished to the extent that the intermediate period acts are inconsistent with native title. Category C and D intermediate period acts do not, of themselves, extinguish native title.

Section 19 allows the States and Territories to make provision for past and intermediate period acts to the same effect as legislation made by the Commonwealth, for native title land over which they have jurisdiction. Division 2AA validates 'transfers under New South Wales land rights legislation'⁶ and Division 2B provides for 'previous exclusive possession' and 'non-exclusive possession' acts. Section 23B sets out a number of interests in land that were granted or vested before 23 December 1996 that, if valid, constitute 'previous exclusive possession acts'. For present purposes it is only necessary to know that Division 23B identifies further categories of land for which native title has been extinguished and, because of the operation of section 237A, has been extinguished permanently.

Past acts

Section 226(2) defines 'act', in so far as the act relates to native title, as follows:

An act includes any of the following acts:

- (a) the making, amendment or repeal of any legislation;
- (b) the grant, issue, variation, extension, renewal, revocation or suspension of a licence, permit, authority or instrument;
- (c) the creation, variation, extension, renewal or extinguishment of any interest in relation to land or waters;
- (d) the creation, variation, extension, renewal or extinguishment of any legal or equitable right, whether under legislation, a contract, a trust or otherwise;
- (e) the exercise of any executive power of the Crown in any of its capacities, whether or not under legislation;
- (f) an act having any effect at common law or in equity.

Under subsection 226(3) an act can be done 'by the Crown ... or by any person' and an under section 227 an act affects native title if:

⁵ *Wik Peoples v Queensland* (1996) 187 CLR 1, (discussed below).

⁶ Division 2AA is not relevant for present purposes and will not be discussed any further.

it extinguishes the native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise.

The term 'past act' is defined in section 228. Section 228(2)(a)(i) refers to 'making, amendment or repeal of legislation' (legislative acts) occurring before 1 July 1993 and section 228(2)(a)(ii) refers to 'any other act' occurring before 1 January 1994. Sections 228(3)-(9) expand the time frame for past acts so that in certain circumstances, acts occurring after 1 January 1994 are included in the definition of 'past act'. Legislative acts are specifically excluded from the operation of these provisions. Section 228(3) applies to obligations that were made before 1 January 1994 that were to come into effect after 1 January 1994. The obligations include those arising out of 'a legally enforceable right' or 'any other act done before 1 January 1994' or 'giving effect to, or otherwise because of, an offer, commitment, arrangement or undertaking made at the time'.

Section 228(4) refers to a later act that is authorised by an earlier act that came within the definition of 'past act' and that was evidenced in writing. Each act must create an interest in the same person, their heirs or assigns, for the same land or waters, with the later act following immediately on from the earlier act and must permit similar activities. There may be some justification for section 228(3), for example, if the obligation arose because a person provided a benefit for which they are to receive a benefit in return, at a future date, there is a valid argument that they should have access to the promised benefit when it falls due. However, the provision in 228(4) is not easily reconciled with respecting native title rights.

An example, explaining section 228(4) is given in section 228(5) of the Act. If a mining lease allows mining for a particular mineral and the subsequent mining lease is granted to the same person, their heirs or assigns, applies to the same land and allows mining in a similar way but for a different mineral, it comes within section 228(4). Why the expectation of lessees that their lease will continue, should be accorded greater consideration than the expectation of Indigenous communities that their native title rights will be restored or that they will be compensated for the continuing loss of the use of their lands, is not addressed. Indigenous communities did not have an opportunity to negotiate the terms of leases, granted before the Native Title Act came into effect. Nor were they paid compensation. The Preamble to the Native Title Act states:

The people of Australia intend:

(a) to rectify the consequences of past injustices by the special measures contained in this Act ...

Section 228(4) expressly perpetuates the consequences of past injustices. In a submission to the Pastoral Lands Inquiry,⁷ submitted in 2013, the Department of Lands wrote that:

All pastoral leases in Western Australia were granted under the repealed Land Act 1933. While the (Land Administration Act) contains provisions in enabling the

⁷ Government of Western Australia, Department of Lands, (2013, September 27), *Department of Lands submission to the inquiry into pastoral leases in Western Australia*, p. 2, retrieved 25 June 2025 from the Parliament of Western Australian website: [https://www.parliament.wa.gov.au/Parliament/commit.nsf/lulnquiryPublicSubmissions/8EE0EA8D938D455048257CAE00158C09/\\$file/pc.pal.130927.sub.029.%20Mike%20Bradford.pdf](https://www.parliament.wa.gov.au/Parliament/commit.nsf/lulnquiryPublicSubmissions/8EE0EA8D938D455048257CAE00158C09/$file/pc.pal.130927.sub.029.%20Mike%20Bradford.pdf)

Minister to issue new leases, in recent times the terms of trade facing the pastoral industry have been such that no proponent has been prepared to make the initial investment in time and resources to negotiate the required administrative processes of the (Land Administration Act) and the (Native Title Act). As such, no pastoral leases have been granted under the (Land Administration Act).⁸

The *Land Administration Act 1997* (WA) (1997 land Act) came into effect on 30 March 1998 so that all pastoral leases that existed in September 2013, when the submission was made, had existed since, at the latest, 30 March 1998, when the 1997 Land Act came into effect. Most had existed for a much longer period and continued to exist until 2015, when the leases were due to be renewed. This means that, as at September 2013, and probably on 1 July 2015, no compensation for the loss of their land, had been paid to Indigenous communities in Western Australia, as a result of the Native Title Act coming into effect.

It is notable that the effect of section 228(4) is not time limited. As long as the provisions of subsection (4) are met, a lease can continue in perpetuity without the need to compensate Indigenous communities. The Western Australian Government deliberately sought to take advantage of this provision in implementing the provisions of the 1997 Land Act. In their submissions to the Pastoral Lands Inquiry, the Department of Lands wrote:

The 2015 Lease Renewal Project is an important project that is both large and complex. The Department has drafted post 2015 leases in accordance with Section 241C of the *Native Title Act 1993* (Cth) (NTA). *In order to minimise the implications of native title, a pastoral lease will be granted over the same land, to the same lessee, for the same term, permitting the same activities and commencing immediately on expiration of the prior lease ...* (emphasis added)⁹

Section 241C provides for: 'Future acts that are permissible lease etc. renewals', and section 241D provides that:

If this Subdivision applies to a future act:

- (d) in any case - the native title holders are entitled to compensation for the act in accordance with Division 5

The outcome of structuring the '2015 Lease Renewal Project' so that the provisions of section 241C did not apply, was that Indigenous communities were prevented from obtaining compensation for the loss of their land when the pastoral leases were renewed in 2015. Extending the term of 'past acts' for pastoral leases benefits the Western Australian Government, to the detriment of Indigenous communities. However, in a 2024 presentation, the Department of Planning Lands and Heritage recorded that:

The State carries the native title compensation liability for the 2015 renewals.¹⁰

⁸ Government of Western Australia, Department of Lands, above n. 4.

⁹ Government of Western Australia, Department of Lands, above n. 4, p. 2.

¹⁰ Eringa, K., (2024, November 18), *Pastoral leases renewals: New Standard Terms & Conditions - Southern Rangelands Pastoral Alliance*, retrieved 25 June 2025 from the Department of Planning, Lands and Heritage website: <https://haveyoursay.dplh.wa.gov.au › documents>. Although the WA Government has indicated that it has taken responsibility for the payment of compensation for renewal of pastoral leases in 2015, it appears to be seeking to transfer responsibility for payment of compensation to pastoralists.

Of course, it is egregious that the Western Australian Government would seek to deprive Indigenous communities of their compensation entitlements to benefit themselves, but it is equally egregious that the Native Title Act facilitates this.

From 1 January 1994, acts that were not past acts were future acts. However, the *Native Title Amendment Act 1998* (Cth) (1998 NT Act amendments) introduced 'intermediate period acts', which extended the term for which 'other acts' automatically extinguished native title for 2 years. As indicated above, 'intermediate period acts' are treated in substantially the same way as past acts. The amendments were expressly introduced as a result of the High Court decision in the Wik peoples' case.¹¹ Clause 2 of Schedule 1 replaced section 4. The new section 4(5) provides:

... for certain acts (called intermediate period acts) done mainly before the judgment of the High Court in *Wik Peoples v Queensland* (1996) 187 CLR 1, that would be invalid because they fail to pass any of the future act tests in Division 3 of Part 2, or for any other reason because of native title, this Act provides for similar consequences to past acts.

In summary, the Wik peoples case decided that leases do not extinguish native title unless the lease transfers title in the leased land from the Crown to the lessee. The 1998 Native Title Act amendments further reduced the rights of Indigenous communities by introducing changes to the 'future act' regime to offset the decision in the Wik peoples' case. This clearly demonstrated that the intention was to minimise the impact of the Native Title Act. Clause 9 of Schedule 1 repealed Division 3 of Part 2 and substituted a new Division 3.¹² The new Division 3, which deals with 'future acts' is substantially the same as the earlier Division 3, but differs in some important respects. It is the subject of the current ALRC inquiry.

The future act regime under the Native Title Act

The future act regime comes in two versions, the 1993 version and the 1998 version as subsequently amended. The definition of future act, set out in section 233(1) is the same in both versions of the Act and is the following terms:

Subject to this section, an act is a future act in relation to land or waters if:

(a) either:

- (i) it consists of the making, amendment or repeal of legislation and takes place on or after 1 July 1993; or
- (ii) it is any other act that takes place on or after 1 January 1994; and

(b) it is not a past act; and

(c) apart from this Act, either:

- (i) it validly affects native title in relation to the land or waters to any extent;
or

¹¹ *Wik Peoples v Queensland* above n. 4.

¹² Clause 9 of Schedule 1 also inserted Divisions 2A, 2AA and 2B.

(ii) the following apply:

(A) it is to any extent invalid; and

(B) it would be valid to that extent if any native title in relation to the land or waters did not exist; and

(C) if it were valid to that extent, it would affect the native title.

The Preamble to the Native Title Act sets out:

considerations taken into account by the Parliament of Australia in enacting the (Native Title Act)

In the Preamble the Parliament of Australia recognised that:

(Indigenous communities) have been progressively dispossessed of their lands. This dispossession occurred largely without compensation, and *successive governments have failed to reach a lasting and equitable agreement with Aboriginal peoples and Torres Strait Islanders concerning the use of their lands* (emphasis added) ...

Justice requires that, if acts that extinguish native title are to be validated or to be allowed, compensation on just terms, and with a special right to negotiate its form, must be provided to the holders of the native title. However, *where appropriate, the native title should not be extinguished but revive after a validated act ceases to have effect* (emphasis added).

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

These provisions are still part of the current Native Title Act. Section 13 of the *Acts Interpretation Act 1901* (Cth) provides that the Preamble to an Act is part of the Act. This means that the provisions referred to above are a part of the Native Title Act and are intended to inform the content and interpretation of provisions in the Act. In 1993 the Australian Parliament made a promise to Indigenous communities, that they would be able to 'enjoy fully their rights and interests', a promise they have failed to live up to.

In the 1993 Native Title Act, legislative acts that occurred after 30 June 1993, and 'other acts' that occurred after 31 December 1993 were future acts. The only qualification on this was those 'other acts' that were, and are, past acts within the terms of sections 228(4) and (6), discussed above. The 1998 Native Title Act introduced intermediate period acts and redefined past acts. 'Other acts' that had not been covered by the past acts regime between 1 January 1994 and 23 December 1996 were now covered by it and, therefore were no longer subject to the 'future acts' regime.

The principle right afforded by the future act regime between 1 July 1993 and 23 December 1996 was the right to negotiate mining proposals that affected native title lands. This is because, before the Wik peoples' decision, all pastoral leases were considered to fall into category A past acts. After the Wik People's case the federal government introduced legislation, the 1998 Native Title Act, to constrain its effect on pastoral leases and other similar leases.¹³ The governing criterion in the Native Title Act as passed, for determining the status of activities carried out on native title lands, was 'permissible future acts'. Section 235(2)¹⁴ defined 'permissible future act' for 'legislative acts', as:

... the making, amendment or repeal of legislation and:

- (a) the act applies in the same way to the native title holders concerned as it would if they instead held ordinary title to the land (or to the land adjoining, or surrounding, the waters) affected; or
- (a) the effect of the act on the native title in relation to the land or the waters is not such as to cause the native title holders to be in a more disadvantageous position at law than they would be if they instead held ordinary title to the land (or to the land adjoining, or surrounding, the waters).

Section 235(5) defined 'permissible future act' for 'non-legislative acts as:

- (a) ... an act other than the making, amendment or repeal of legislation; and
- (b) either:
 - (i) the act could be done in relation to the land concerned if the native title holders concerned instead held ordinary title to it; or
 - (ii) the act could be done in relation to the waters concerned if the native title holders concerned held ordinary title to the land adjoining, or surrounding, the waters.

As they applied to onshore acts, 'permissible future acts' were valid, but certain acts, mostly mining related acts, were subject to the right to negotiate as provided for in Part 2, Division 3 Subdivision B. In so far as it is relevant for present purposes, section 26(1) and (2) identify the acts subject to negotiation as:

... (acts by the) Commonwealth, a State or Territory ... (that) proposes, at any time after the commencement of ... Subdivision (B), to do any permissible future act ... in relation to an onshore place.

(2) ... (including):

- (a) the creation of a right to mine, whether by the grant of a mining lease or otherwise;
- (b) the variation of such a right, to extend the area to which it relates:

¹³ There is a good argument that this was discriminatory because it prioritised the interests of pastoralists over those of Indigenous communities. However, that is not an argument to be developed here.

¹⁴ Sections 234-236 were repealed by the 1998 Native Title Act. Section 234 referred to 'Low impact future acts', which are now addressed in section 24LA, and section 236 to 'Impermissible future acts'.

- (c) the extension of the period for which such a right has effect, other than under an option or right of extension or renewal created by the lease, contract or other thing whose grant or making created the right to mine;
- (d) the compulsory acquisition of native title rights and interests under a Compulsory Acquisition Act, where the purpose of the acquisition is to confer rights or interests in relation to the land or waters concerned on persons other than the Government party;
- (e) any other act approved by the Commonwealth Minister, in writing, for the purposes of this paragraph.

The equivalent provision to section 235, in the current Native Title Act, is in Part 2, Division 3, subdivision M. Section 24MA refers to legislative acts and is in similar terms to section 235(2). Section 24MB defines 'freehold test' and is in similar terms to section 235(5), except that section 24MB includes a requirement that Indigenous heritage is protected. Subject to subsection P, which provides for negotiation, future acts that 'pass the freehold test', as defined in section 24MD, are valid. Thus, the overall intent of 'permissible future acts' and the 'freehold test' are the same. However, the current Native Title Act is more specific about what constitutes a valid act, than the Native Title Act as passed. Section 24AA(3) introduces Indigenous Land Use Agreements (ILUAs) and identifies them as constituting valid acts. Section 24AA(4) lists other acts that constitute valid acts, as follows:

- future acts where procedures indicate absence of native title (section 24FA);
- acts permitting primary production on non-exclusive agricultural or pastoral leases (section 24GB);
- acts permitting off-farm activities directly connected to primary production activities (section 24GD);
- granting rights to third parties etc. on non-exclusive agricultural or pastoral leases (section 24GE);
- management of water and airspace (section 24HA);
- acts involving renewals and extensions etc. of acts (section 24IA);
- public housing etc. (section 24JAA);
- acts involving reservations, leases etc. (section 24JA);
- acts involving facilities for services to the public (section 24KA);
- low impact future acts (section 24LA);
- acts that pass the freehold test (section 24MD);
- acts affecting offshore places (section 24NA).

Of the acts nominated above, only acts that pass the freehold test as set out in section 24MD must comply with the requirement in the Preamble, that

acts that affect native title should only be able to be validly done if, typically, they can also be done to freehold land.

The current Native Title Act allows negotiation of the terms of ILUAs. It also provides for negotiation for acts set out in section 24IC (permissible lease etc. renewals) and section 24MD (acts that pass the freehold test). The provisions that establish the terms for negotiation for matters referred to in sections 24IC and Division M are set out in subdivision P. Section 26(1A)(c) limits the types of leases to which subdivision P applies because of section 24IC, as follows:

the renewal, re-grant, re-making or extension of the term of the lease, licence, permit or authority concerned *creates a right to mine* (emphasis added).

In so far as it is relevant, section 26(1) constrains Division M, which includes section 24MD, so that it applies to acts done by the 'Commonwealth, a State or a Territory' that: create a 'right to mine';¹⁵ vary the right to mine, by extending the area to which it relates; or is the 'compulsory acquisition of native title rights and interests' ...¹⁶. Division P further constrains the capacity of Indigenous communities to negotiate the terms of the use of their land by mining interests, by designating the parties who can participate in the negotiation.

Section 29 sets out the parties that must be notified of a proposed act. For Indigenous communities the parties are: any registered native title body corporate; any registered native title claimant; and any representative Aboriginal/Torres Strait Islander body. Registered native title bodies corporate and registered native title claimant parties are identified as 'native title parties'. Section 30A identifies 'negotiation parties' as: the Government party; any native title party; and any grantee party. Any Indigenous person or community that does not fall into the two categories of 'native title party' are not able to participate in negotiations, initiated pursuant to Divisions I and M.

Thus, the types of activity on native title land for which negotiation is required is limited to mining leases and compulsory acquisitions. The parties to the negotiation are limited to representative bodies or registered claimants. A compulsory acquisition extinguishes native title and, once again, because of the operation of section 237A, extinguishes it permanently. Therefore, somewhat obviously, the only feature that can be negotiated is compensation. A further provision in the Preamble to the Native Title Act addresses negotiation. In so far as it is relevant it provides:

A special procedure needs to be available for the just and proper ascertainment of native title rights and interests which will ensure that, if possible, this is done by conciliation and, if not, in a manner that has due regard to their unique character.

Governments should, where appropriate, facilitate negotiation on a regional basis between the parties concerned in relation to:

¹⁵ It does not include a right to mine 'except one created for the sole purpose of the construction of an infrastructure facility associated with mining'.

¹⁶ There are exceptions, not relevant here, so they are not discussed further.

- (a) claims to land, or aspirations in relation to land, by Aboriginal peoples and Torres Strait Islanders; and
- (b) proposals for the use of such land for economic purposes.

This provision contemplates a process where balancing the respective rights of Indigenous communities and economic interests is the objective. The future Act regime does not meet this objective.

The 1998 Native Title Act introduced ILUAs which, in theory at least, were to allow Indigenous communities and proponents of economic activities to negotiate outcomes. ILUAs are based on the assumption that the parties negotiating them will meet on an equal playing field. This is clearly a wildly optimistic assumption, manifestly evident with the least scrutiny.

ILUAs

To be valid under the current Act, a future act must come within Division 3. Sections 24BA – 24ED introduce and provide for Indigenous Land Use Agreements (ILUA). Essentially an ILUA is an agreement between native title holders, generally through their representative PBC, and proponents of activities to be carried out on native title lands. Section 24AB provides that, if an ILUA exists, its provisions take precedence over any other provision in Division 3 of Part 2 of the Native Title Act. ILUAs govern those matters addressed in the ILUA. Section 24EA prescribes the ‘contractual effect’ of ILUAs that are registered by the National Native Title Tribunal, as follows:

- (1) While details of an agreement are entered on the Register of Indigenous Land Use Agreements, the agreement has effect, in addition to any effect that it may have apart from this subsection, as if:
 - (a) it were a contract among the parties to the agreement; and
 - (b) all persons holding native title in relation to any of the land or waters in the area covered by the agreement, who are not already parties to the agreement, were bound by the agreement in the same way as the registered native title bodies corporate, or the native title group, as the case may be.

ILUA’s are deemed to be ‘contracts’ between the parties except, unlike most contracts which only bind parties to the contract, ILUA’s bind all native title parties associated with the land or waters covered by the ILUA. This is true whether they agreed with the ILUA, or even whether they knew of its existence. Pastoral leases can be granted for up to 50 years in Western Australia. This means that an adult person may not have been born when their prescribed body corporate (PBC) entered into an ILUA that is binding on them. There is no provision for future affirmation of the contract. That ILUAs can be binding on Indigenous people who are not a party to it, goes against the principles inherent in contract law. Julie Clarke, an academic in the Melbourne University Law School, describes a contract in the following terms:

The first requirement for a valid contract is an agreement. An agreement is usually broken down into two parts: an offer and an acceptance and *involves a 'meeting of the minds' (a consensus)* between two or more parties (emphasis added).¹⁷

ILUA's violate the principles governing contract law. The provision in section 24EA assumes that Indigenous communities are homogenous and therefore, all hold the same opinion. Section 24EA is manifestly unfair to those people who were not party to the agreement or who hold a different opinion, and is arguably discriminatory. This is not the worst possible outcome. An ILUA can include agreement that native title is extinguished. It is true that, for the most part, Indigenous communities will not willingly agree to being stripped of their native title rights. However, again this assumes that the community is homogenous. This is by no means a safe assumption. PBCs are the nominated party to negotiate ILUAs (although, unlike Division P negotiations, there can be other parties). It is assumed that PBCs operate in the interests of the community they represent. Again, this is by no means a safe assumption. A 2024 report found that the Chief Executive Officer (a non-Indigenous man) had syphoned off millions of dollars in mining royalties to his own benefit.¹⁸ This assumption of control of PBCs by vested interests, is not uncommon and should be anticipated when substantial amounts of money are involved. It is not inconceivable that a person, such as the man referred to above, could enter into an agreement that native title would be extinguished if it was to their benefit. Once extinguished, native title cannot be revived because of the operation of section 237A.¹⁹

There is a substantial power imbalance between economic interests who want, or want to maintain, access to native title lands, and Indigenous communities. This power imbalance is not effectively dealt with in the Native Title Act. ILUAs shift responsibility from the government to Indigenous communities but have failed to adequately address the issue of resources for either the negotiating process, or for the internal management of PBCs. In a 2021 paper, 'Framework for working with native title groups in establishing and managing socially and culturally sustainable Prescribed Bodies Corporate', David Martin of Anthropos Consulting, discussed several issues that arise out of the negotiating process for indigenous communities. Referring to 'working for the native title group' Martin says:

It is important to put considerable work into establishing and supporting effective and sustainable governance of all aspects of a PBC's relationship with the native title group ... this is a very complex arena which includes legal requirements (arising from the NTA as well as other statutes, trust law, the PBC's Rules, the common law, etc), as well as aspects of the relevant body of traditional laws and customs, and customary practice ... *Some of the most important matters ... concern 'native title decisions' - defined in the (Native Title Act) as decisions to surrender native title, or to do something (or agree to do it) that would affect the native title.* A key issue for a PBC is how best to implement 'informed consent' in both native title dealings (as required by the PBC Regulations) and in other land-related activities (such as

¹⁷ Clarke, J. (2019, March) *Australian Contract Law: Agreement overview*, retrieved 08 July 2025 from the Australian Contract Law website: <https://www.australiancontractlaw.info/law/agreement>

¹⁸ Torre, G., (2024, 19 October), 'Anindilyakwa Land Council sacks CEO as office raided over corruption allegations', *National Indigenous Times*, retrieved 19 June 2025 from the National Indigenous Times website: <https://nit.com.au/19-10-2024/14370/anindilyakwa-land-council-sacks-ceo-as-office-raided-over-corruption-allegations>.

¹⁹ It could be argued that, if fraud was involved the ILUA could be overturned. This is a thin argument. The indigenous community would have to be in a position to identify the fraud and to be able to take it to court. Even if they managed to surmount those obstacles, the court might decide that the proponent had acted on the agreement in good faith, so that it is too late to rescind the agreement.

cultural heritage management), and how to maintain good communications with the native title group (emphasis added).²⁰

Mr Martin assumes goodwill and, in general there will be goodwill. However, as in the case of the fraudulent CEO referred to above, goodwill is not always the driving factor. The resources required to allow Indigenous communities to recognise and deal with bad faith actors²¹ and to effectively negotiate ILUAs have never been forthcoming. This has allowed self-interested parties to manipulate and control PBCs to the detriment of the community.

The Preamble to the Native Title Act refers to extinguishing of native title in the following terms:

The Australian Government has acted to protect the rights of all of its citizens, and in particular its indigenous peoples, by recognising international standards for the protection of universal human rights and fundamental freedoms ... :

The High Court has: ...

- (b) held that the common law of Australia recognises a form of native title that reflects the entitlement of the indigenous inhabitants of Australia, in accordance with their laws and customs, to their traditional lands; and
- (c) *held that native title is extinguished by valid government acts* that are inconsistent with the continued existence of native title rights and interests, such as the grant of freehold or leasehold estates.

The people of Australia intend:

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

The Preamble recognises that governments can extinguish native title but the capacity for governments to do so is couched within the context of the application of human rights and recognition and protection of Indigenous rights. The Native Title Act does not honour this commitment.

Section 11(1) provides that native title 'is not able to be extinguished contrary to (the Native Title) Act'. For future acts section 11(2) provides:

²⁰ Martin, D. (2021, February 22), *Framework for working with native title groups in establishing and managing socially and culturally sustainable Prescribed Bodies Corporate*, Anthopos Consulting, retrieved 09 July 2025 from the Australian National University website: <https://archanth.cass.anu.edu.au/files/cnta/uploads/simple-file-list/Prescribed-Bodies-Corporate-materials/PBC-governance-framework-issues.pdf>.

²¹ In this case it was the Indigenous community that uncovered the fraudulent behaviour and acted to remove the CEO.

An act that consists of the making, amendment or repeal of legislation on or after 1 July 1993 by the Commonwealth, a State or a Territory is only able to extinguish native title:

- (a) in accordance with Division 3 of Part 2 ... ; or
- (b) by validating past acts or intermediate period acts in relation to the native title.

As indicated above, every past act that extinguished native title was validated by the Native Title Act. Because of section 237A, inserted by amendment of the 1998 Native Title Act, native title was permanently extinguished. When the Wik People's case made it apparent that certain types of leases, including pastoral leases, did not extinguish native title, the Native Title Act was extensively amended to offset as much as possible, the consequences that flowed from the Wik people's case. Section 44H, also inserted by amendment of the 1998 Native Title Act, removed any rights to, or control over their land that Indigenous people had for the duration of the permitted activity.

As already indicated, in Western Australia pastoral leases can be granted for 50 years. While subsection (c) provides that native title is not extinguished, to all intents and purposes native title is extinguished. This is because the lease can be immediately renewed for a further 50 years ad infinitum. Some pastoral leases have operated continuously in Western Australia since the mid 1800's, that is, for nearly 200 years. Most mining leases do not extend for such lengthy periods but some have been held for long periods for example the Mt Tom Price licence has been held since 1966 or almost 60 years. Rio Tinto, who holds the licence, has an agreement with the Western Australian government, the *Iron Ore (Hamersley Range) Agreement Act 1963*, that the licence will continue for the life of the mine. Thus, while on paper Indigenous communities retain native title for their lands their right to use the land is severely curtailed for very long periods of time. This is not the end of the story, however. In 2018 the NSW Government introduced legislation that:

simplified the process for leaseholders to buy the Crown land they currently lease. The new streamlined process for converting leasehold land to freehold gives a financial return to the state where the land is sold.²²

The legislation includes pastoral leases. The Western Australian Government also allows leases to be converted to freehold title. Conversion of pastoral leases to freehold title will permanently extinguish native title for those leasehold estates.²³ In Western Australia and probably elsewhere, freehold estates can be surrendered to the Crown. However, once native title is extinguished it cannot revive so that over time, if section 237A is not repealed the area of land subject to native title will be eroded and may be substantially eroded.

The Discussion paper has set out a number of proposals and questions to be addressed. That is all very well but until there is honest recognition that the Native Title Act is inherently unfair because it overtly favours economic interests over the interests of Indigenous communities and actively erodes native title, the reform process will fail.

²² NSW Government, (2025), *Crown Lands: Buying your lease*, retrieved 9 July 2025, from the NSW Government website: <https://www.crownland.nsw.gov.au/licences-leases-and-permits/apply-or-manage-lease/buying-your-lease>.

²³ Some pastoral leases in western NSW had already been held to extinguish native title because of the terms of the leases involved - *Wilson v Anderson* [2002] HCA 29

Response to the ALRC's questions

Preliminary view

With all due respect, the questions and proposals simply do not address the ALRC's expressed objectives, or the issues raised in the Issues Paper or the Discussion Paper. They very superficially address the problems associated with the Native Title Act and in particular the future act scheme. They address the form of the Act not the substance. However, we have set out answers below

Native Title Management Plans

Question 6 Should the Native Title Act 1993 (Cth) be amended to enable Prescribed Bodies Corporate to develop management plans (subject to a registration process) that provide alternative procedures for how future acts can be validated in the relevant determined area?

Answer 6 No. This will just add another layer of agreements to be negotiated. There are real problems with ILUAs being identified as contracts (outlined above) and this needs to be comprehensively addressed. ILUAs could be assessed to see what works and what does not work and, if necessary, expanded to cover areas that are not now covered. They could also be drafted so that other participants are expressly included, to ensure that the diverse views of communities are fully represented. They could be characterised in such a way that, if circumstances change there is an opportunity for Indigenous communities to be fully informed of the change and of its effect. They could allow further input and, if necessary, negotiation of the terms if this is deemed necessary.

Prescribed bodies corporate are, in many cases, dysfunctional. This is because they are under resourced both materially and functionally. The Office of the Registrar of Indigenous Corporations does not meet its obligations to PBCs, as set out in the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) and there are very few comprehensive programs set up to allow Directors to acquire the skills they need be able to effectively manage the PBCs and to resist the encroachment of vested interests. There are also many indigenous people and communities who are not party to a PBC. Establishing PBCs as the sole negotiating body will disenfranchise those people more than they already have been.

Promoting fair and equitable agreements

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?

Answer 7 No. One of the objectives of any reform should be to create a negotiating framework that is conducive to as comprehensive participation by members of Indigenous communities in the negotiation process as possible. The more formal and formulaic the negotiation process is and the more founded on non-indigenous forms of governance the less accessible it is for the Indigenous communities involved.

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?

Answer 8 No. See the answer to question 7 above.

Question 9 Should the Native Title Act 1993 (Cth) be amended to provide a mechanism for the assignment of agreements entered into before a positive native title determination is made and which do not contain an express clause relating to succession and assignment?

Answer 9 No. We think the argument here is that, if native title holders enter into an agreement before they form a PBC, should the Native Title Act provide that the PBC is bound by the agreement entered into by the native title holders. If this is the question, the answer is no. See the arguments above relating to the inappropriateness of ILUAs being characterised as contracts and the answer to question 1

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?

Answer 10 Yes. see the answer to question 1 above and question 14 below

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?

Answer 11 No. Many Indigenous people live on country and do not have access to resources that would allow them to participate in dispute resolution through the NNTT. Dispute resolution using western dispute resolution mechanisms may be inappropriate for indigenous communities. If agreements are being negotiated in relation to the use of native title land, the party seeking to use the land has to have representatives in the area for at least some of the time. Therefore, it would be far more appropriate to utilise mechanisms that are accessible to Indigenous communities and to have the resolution proceedings on country.

Question 12 Should some terms of native title agreements be published on a publicly accessible opt-in register, with the option to redact and de-identify certain details?

Answer 12 Whether the terms of native title agreements are published on a publicly accessible register should be a matter for the parties themselves. However, as matters now stand, all native title holders subject to a proposal, are parties to an agreement whether they participated in making the agreement or not. While we think characterising ILUAs as contracts is inappropriate (see above), if this characterisation is not going to be changed, we consider that it must be a requirement that all affected Indigenous people must be provided with a copy of the agreement they are bound by.

Question 13 What reforms, if any, should be made in respect of agreements entered into before a native title determination is made, in recognition of the possibility that the ultimately determined native title holders may be different to the native title parties to a pre-determination agreement.

Answer 13 With all due respect, if you propose to make changes to the provisions for agreements entered into before a PBC is formed, on the basis that the Indigenous parties have changed, then this must be applied across the board. Of course, applying it across the board so that it is in conformity with contract law, that is, that only parties to the agreement are bound by it, is sound practice. We understand that proponents are concerned that they will make investments and then the terms of the agreement will change if the parties change. However, this quite clearly ‘picks’ economic considerations over native title rights and might be considered to be discriminatory. Perhaps proponents need to trust that, if the agreement is an equitable agreement and there are only small changes since the agreement was entered into, the new native title parties will not seek to change it. If there are major changes it is only fair that the agreement should be changed and it is very likely that the proponent will want to change the agreement anyway.

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?

Answer 14 With all due respect, the current provisions in Divisions G – N are heavily weighted in favour of the proponents both in the legislation and procedurally (see the discussion above). This is why outcomes favour proponents. Only Divisions I and M allow negotiation of the terms of an agreement and Division M is governed by the ‘freehold test’. Acts that come within Division M extinguish native title so the only thing to negotiate is compensation. The difference between Division M and Divisions G, H, J, K, L and N is that, if compensation is not negotiated for an act under Division M, it is invalid, but for the other Divisions it is not invalid.

The ALRC has identified the ‘key problem’ as follows:

existing provisions have insufficient regard to the impacts that different categories of future acts may have on native title rights and interests, or where they do have regard to impact, they are based on erroneous or outdated assumptions about the extent of those impacts.

Again, with all due respect, an impact-based system would be incredibly complex. Initially the impact must be categorised, so what features do you take into account. For a mining

activity, is it the number of wells that the proponent intends to drill, or the depth to which they will be drilled. Does it depend on the extent of surface damage which for open cut mines is extensive and for fracking is much less extensive. Does it depend in the extent of underground damage which for open cut mines may be very limited, depending how deep they go but for fracking can be very extensive.

There is no obvious reason why any activity that a proponent wants to carry out on native title land should not be brought before the native title holders. Equally there is no reason why native title holders would not be reasonable in negotiating the terms under which the proposal is to be implemented, taking into account the impact of the proposal on their native title lands. There may be occasions on which a proposal, or the extent of it, will be rejected but that is only to be expected. The proponent may be able to modify the proposal or modify their offer, so that the proposal and/or the offer are acceptable. If not, the Act can provide for arbitration of the dispute. If arbitration is provided for, the arbitrator must be able to find for the Indigenous community if this is appropriate, unlike the current system where there is no right of veto. This approach would have the added benefit of encouraging proponents to make fairer offers because they would not be the automatic winners, as is the case now.

This approach would entail repealing section 44H which gives a proponent better title to the native title land during the term of the proposal. It would become unnecessary because access could be negotiated as part of the agreement.

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?

Answer 15 An impact model is not appropriate. See the answer to question 14 above.

Question 16 Should the Native Title Act 1993 (Cth) be amended to account for the impacts that future acts may have on native title rights and interests in areas outside of the immediate footprint of the future act?

Answer 16 An impact model is not appropriate. See the answer to question 14 above. The current act already allows for inclusion of affected parties 'outside of the immediate footprint of the future act', for example, section 24HA provides for: 'Management or regulation of water and airspace'. Subsection (7) provides:

Before an act covered by subsection (2) is done, the person proposing to do the act must:

- (a) notify, ... any representative Aboriginal/Torres Strait Islander bodies, registered native title bodies corporate and registered native title claimants in relation to the land or waters *that will be affected by the act*, or acts of that class, that the act, or acts of that class, are to be done (emphasis added); and
- (b) *give them an opportunity to comment on the act or class of acts.* (emphasis added)

The problem here isn't that those 'outside of the immediate footprint of the future act' are not included. It is that the proposal will be implemented whether or not Indigenous communities agree with it and irrespective of the damage done as a result of implementing the proposal. The act is declared to be valid and allows affected parties to 'comment' and claim compensation. However, the Courts have decided that it is not a fatal flaw to proceedings if the person fails to notify affected parties. If parties 'outside of the immediate footprint of the future act' are not notified no consequences flow from this for the person who failed to notify them of the act to be done. The future act regime needs to be amended so that the respective rights of the parties are balanced and Indigenous people can fully participate in decisions that affect their land and waters, whether inside or outside of the immediate footprint. There must be real consequences if Indigenous rights are not respected.

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?

Answer 17

- a. An impact model is not appropriate. See the answer to question 14 above.
- b. Yes. It is entirely likely that the activities referred to come within the definition of 'act' in section 226, which provides in part:
 - (2) An act includes any of the following acts:
 - (a) the making, amendment or repeal of any legislation; ...
 - (e) the exercise of any executive power of the Crown in any of its capacities, whether or not under legislation;
 - (f) an act having any effect at common law or in equity.

However, I was unable to find any clear definition of key words included in the definition of 'act' that make this explicit. It should be made explicit.

Question 18 What test should be applied by the National Native Title Tribunal when determining whether a future act can be done if a native title party objects to the doing of the future act?

Answer 18 The reality is that the capacity to object to proposals and to negotiate terms of engagement are so limited that considering how objections should be dealt with in the National Native Title Tribunal is almost irrelevant. As indicated above, Division P provides that matters covered by Division I and M are the only matters for which the right to negotiate is available. Even then the rights are severely limited. The proposal must create 'a right to mine' for both Division I and Division M proposals and for Division M includes:

- (iii) the compulsory acquisition of native title rights and interests, unless:
 - (A) the purpose of the acquisition is to confer rights or interests in relation to the land or waters concerned on the Government party and the Government party makes a statement in writing to that effect before the acquisition takes place; or
 - (B) the purpose of the acquisition is to provide an infrastructure facility; or
- (iv) any other act approved by the Commonwealth Minister, by legislative instrument, for the purposes of this paragraph, where, *if the act is attributable to a State or Territory, the Commonwealth Minister consulted the State Minister or the Territory Minister about the approval before giving it* (emphasis added)

A far more effective approach would be to carry out a full review of the right to negotiate and to extend it to all proposals that affect native title, based on the principle of free, prior and informed consent rather than coercive control.

Question 19 What criteria should guide the National Native Title Tribunal when determining the conditions (if any) that attach to the doing of a future act?

Answer 19 See the answer to question 18 above.

Question 20 Should a reformed future acts regime retain the ability for states and territories to legislate alternative procedures, subject to approval by the Commonwealth Minister, as currently permitted by ss 43 and 43A of the Native Title Act 1993 (Cth)?

Answer 20 Yes but the alternative procedures must provide for better outcomes for Indigenous communities, than the Commonwealth procedures do. Non-claimant applications must not under any circumstances result in native title being extinguished, in particular, because the native title is permanently extinguished.

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?

Answer 21

- a. See answer 20 above.
- b. Yes. Extend the period to 12 months.
- c. See answer 20 above.
- d. See answer 20 above.

Question 22 If the Native Title Act 1993 (Cth) is amended to expressly provide that non-compliance with procedural obligations would result in a future act being invalid, should the Act expressly address the consequences of invalidity?

Answer 22

Yes. If an act is invalid it is invalid. Assuming for present purposes that section 44H (the proponent has better title) and section 237A (permanent extinction of native title) are not repealed, the consequences of a future act for Indigenous communities are severe. Given the impact on indigenous communities, proponents must be required to strictly comply with procedural obligations, and this should be explicitly stated in the Native Title Act. If sections 44H and 237A are repealed this question can be revisited.

Question 23 Should the Native Title Act 1993 (Cth), or the Native Title (Notices) Determination 2024 (Cth), be amended to prescribe in more detail the information that should be included in a future act notice, and if so, what information or what additional information should be prescribed?

Answer 23 Any notice that addresses removal of rights must fully set out the intended action, the anticipated consequences, actions the recipient is entitled to take and the time frame within which they can take it. Notices must be given in an accessible medium, for example, if the recipient has poor written language skills the notice can be given orally and, if necessary, in their language. The responsibility for ensuring that the notice is accessible must remain with the government agency concerned. They must not rely of the PBC's to inform recipients, although they can be one of the means of transmission of notices including oral notices.

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?

Answer 24 The distinction being made in questions 24 and 25 is very unclear. The Discussion Paper limits the payment of compensation to the consequences of past acts. Quite clearly, where an act for which compensation is a remedy, is anticipated, the compensation can be paid in advance or at the time the act is performed. Where an act is discrete and the consequences are known, payment up front or at the time is a realistic proposition. If the act is an ongoing act for which the consequences are not yet fully quantified, a payment in advance or at the time is inappropriate. However, a partial payment based on a preliminary assessment of anticipated damages can be made. The quantum of compensation will depend on the impact of the proposal. If an upfront compensation payment is provided for there must also be provision for adjustment, for example, it is common practice in WA, for the Department of Energy, Mines, Industry Regulation and Safety to amend and extend mining programs. The changes may well have unforeseen consequences for Indigenous communities and, if they are negative consequences, Indigenous communities should be adequately compensated.

Question 25 How should 'future act payments' interact with compensation that is payable under Part 2 Division 5 of the Native Title Act 1993 (Cth)?

Answer 25 See answer 24 above

Question 26 Should the Native Title Act 1993 (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?

Answer 26 See answer 24 above. If the effect of a written agreement is to establish a one-off payment of compensation before the consequences of the proposed act are fully quantified, then most definitely not. The opportunity to negotiate further compensation if the consequences of the proposal expand, must remain open.

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?

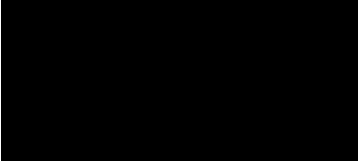
Answer 27

No – Section 85A(1) of the Native Title Act allows cost to lie. This approach should be retained. The future act regime, as it is currently written, strongly favours proponents, as discussed above. Indigenous people are already confronted with a system that is alien to their culture, have very limited access to resources and, in general, are in the position of having to assert their rights. Costs create a strong disincentive for people for whom the system is already heavily weighted against them. Subsection 2 allows the Court to award costs if they consider it is equitable to do so.

Question 28 Should the Native Title Act 1993 (Cth) be amended to provide for requirements and processes to manage the impacts of future acts on Aboriginal and Torres Strait Islander cultural heritage, and if so, how?

Answer 28 Indigenous heritage should continue to be protected under discrete legislation, which is fully supported in the Native Title Act. Proponents must be required to consult with the persons holding Indigenous knowledge not just any Indigenous person with whom they are dealing.

Thank you for this opportunity to address the issues in the Discussion Paper.



Dr Anne Poelina
Chair
Martuwarra Fitzroy River Council

Submitted by Fiona MacDonald
CEO
Environmental Equity Pty Ltd

For and behalf of the Martuwarra Fitzroy River Council