

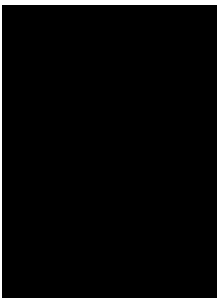


National
Native Title
Tribunal

**Submission of the National Native Title Tribunal in response to
Discussion Paper 88 dated May 2025**

To the Australian Law Reform Commission

Review of the Future Acts Regime



Mr Kevin Smith

President

10 July 2025

Contents

Executive Summary.....	3
1. Introduction.....	5
2. Reshaping statutory procedures – Impact-based model.....	6
Comments on the ALRC’s proposed impact-based model	6
Tribunal’s suggested modifications to the impact-based model.....	8
Outline of Tribunal’s modifications to impact-based model.....	8
Advantages of Tribunal’s modifications to the impact-based model	9
Managing challenges for small-scale prospecting, exploration and mining.....	10
3. Reshaping statutory procedures – Right to negotiate.....	10
Future acts register	11
Objection process.....	11
Separate issues referral.....	11
Conditions	11
Suggested removal of the 6-month date in s 36(3) of the NTA.....	12
Expedited procedure reform.....	12
4. Native Title Management Plans.....	13
5. Agreement-making reforms	14
Standing instructions and authorisation.....	14
Agreement access and transparency	14
Maintaining the ILUA Register	15
Removal of ILUAs and periodic audits	15
Section 199C of the NTA.....	16
RNTBC as successor in agreements	16
Amendment flexibility	16
Enhanced dispute resolution functions	17
Agreement standards.....	17
Future acts payment	18
6. Resourcing for the Tribunal and the sector	18
Adequate funding for the Tribunal	18
Cost recovery and capacity building	19
System efficiencies	19

Executive Summary

This submission sets out the National Native Title **Tribunal**'s response to the questions and proposals raised in **Discussion Paper 88** (May 2025).

In the Discussion Paper, the Australian Law Reform Commission (**ALRC**) identifies a number of important themes drawn from its consultation on **Issues Paper 50** (November 2024). A number of these themes echo the matters outlined in the Tribunal's Submission dated 21 February 2025 in response to the Issues Paper (**Issues Paper Submission**).¹ In particular, the importance of respectful relationships and agreement-making, and the challenges of resourcing and capability are reflected in the Tribunal's experience and records since the commencement of the *Native Title Act 1993* (Cth) (**NTA**). We support reforms which align with and respond to those themes.

As with our Issues Paper Submission, the Tribunal has focussed primarily on those aspects of the Discussion Paper which directly concern the powers and functions of the Tribunal and the Native Title **Registrar**.

In relation to the proposed reformed statutory procedures, the Tribunal's primary concerns relate to the risk of increased litigation or dispute between parties and repeating some of the weaknesses of the current procedures. Our concern is that this will place additional strain on the parties' limited resources and divert attention from agreement-making. We have suggested some modifications to the proposed impact-based model and reformed right to negotiate (**RTN**) to address these concerns. The Tribunal is otherwise generally supportive of a number of the proposed reforms related to the RTN process.

Based on our experience as reflected in our Issues Paper Submission, the Tribunal supports the repeal of the expedited procedure. The current use of the expedited procedure shows that its requirements do not address matters of concern to native title parties and is misaligned with all parties' focus on agreement-making. In that context, the resource impost of the expedited procedure on both the Tribunal and the parties is disproportionate to any benefit arising. If the expedited procedure is to be retained, further consideration should be given to reforms to address those issues and we have made one suggestion in that respect.

The Tribunal is supportive of the proposed agreement-making reforms, including in relation to standing instructions and improved access to and transparency of agreements. However, we note that different considerations may arise depending on the type of agreement, as is the case with statutory succession. We also broadly support the notion of conduct and content standards for agreements but, based on our experience, we do not support further

¹ National Native Title Tribunal, Submission No 23 to Australian Law Reform Commission, *Review of the Future Acts Regime* (Issues Paper 50, 21 February 2025) <<https://www.alrc.gov.au/inquiry/review-of-the-future-acts-regime/submissions/>>.

prescription of the requirements for 'good faith' as we do not consider that would be productive.

Maintenance of the Register of Indigenous Land Use Agreements (**ILUA Register**) is an important function of the Registrar. The Registrar is not supportive of any requirement for mandatory audits but supports the introduction of a discretion to remove an expired indigenous land use agreement (**ILUA**). We make a number of suggestions and comments about that aspect of the proposed reforms.

The operation of s 199C of the NTA raises a number of significant issues which we have outlined based on our recent experience. We also support greater flexibility for ILUA amendments, subject to maintaining the Registrar's oversight.

As noted, agreement-making is central to the NTA and the proposed reforms. In our experience, the Tribunal's existing dispute resolution powers are too narrow and do not uniformly apply to all stages of the making, implementation, and review of the various types of agreements and Tribunal imposed conditions. We have also suggested that our assistance powers should be significantly expanded, including in relation to the timing and types of dispute resolution processes available.

The reforms outlined in the Discussion Paper contemplate significant changes to and expansion of the Tribunal's functions. Any of these reforms will require detailed consideration of the resourcing and implementation requirements. We have commented on two of the specific proposals in relation to funding but otherwise welcome further discussion on resourcing issues as the reforms develop.

1. Introduction

- 1.1. The Tribunal is an independent body established under the NTA. In keeping with the preamble to the NTA and the Tribunal's continuing work, our vision statement is '*A Reconciled Future – where Country thrives on recognised native title rights and respectful relationships*'. Operating nationally, the Tribunal serves as a practical interface between native title parties, governments, industry, and the Australian community generally.
- 1.2. The Tribunal welcomes the opportunity to provide this submission in response to the Discussion Paper. Reform of the NTA presents an opportunity to reflect on three decades of experience to create a more responsive and effective future acts regime that better serves native title parties, governments, and proponents alike.
- 1.3. The Discussion Paper proposes significant reforms that would fundamentally reshape how future acts are categorised, negotiated, and determined, with the Tribunal identified to take on expanded assistance, facilitation, dispute resolution, and administrative functions. These proposals recognise both the Tribunal's expertise and the potential for enhanced services to better support all parties in achieving timely, fair, equitable, and sustainable outcomes. Our Issues Paper Submission provided comprehensive data on our statutory functions and operational context.
- 1.4. This submission primarily focuses on the reform proposals and questions as they affect the Tribunal's operations and functions. Drawing on our extensive operational experience, we provide observations on the proposed reforms, noting both opportunities and challenges. Our submission is structured thematically, addressing reformed statutory procedures, Native Title Management Plans (**NTMPs**), agreement-making reforms, and the critical need for enhanced resources system wide.
- 1.5. At this juncture our comments are necessarily high-level. We acknowledge that further detailed consideration would need to be given to any specific proposals, particularly as they relate to the powers and functions of the Tribunal and the Registrar. In addition, successful implementation of any reforms will require not just legislative change but also careful transition planning, systems development, and significant additional resources. Support for stakeholders, including education about any reforms, will also be essential.

2. Reshaping statutory procedures – Impact-based model

- 2.1. Apart from acts subject to the RTN, the Tribunal does not have any specific functions with respect to acts falling within Part 2, Division 3, **Subdivisions G-N** of the NTA. However, the Tribunal understands the concerns raised regarding the misalignment between the impact of future acts and the applicable procedural requirements.
- 2.2. In this section, we have made a number of observations about the proposed impact-based model, which includes a role for the Tribunal in deciding a challenge to the categorisation of a future act. Our comments with respect to the reformed RTN are in section 3 and those on ILUAs are in section 5.

Comments on the ALRC's proposed impact-based model

- 2.3. Having regard to the impact-based model and the proposed role of the Tribunal, we consider there may be a number of challenges and issues which arise as follows:
 - (a) **need for guidance on categorisation** – the Tribunal's view is that categorisation would require clear statutory guidance to minimise disputation. While the Tribunal understands the reasoning behind removing Subdivisions G-N, we expect this will present challenges for sector capability and capacity during the transition. The categorisation guidelines would also need to take account of future acts that may not have a physical impact but may otherwise affect native title. Subdivisions G-N may provide a useful reference point for the scope of future acts which should be considered. Unless the categorisation is very clear, we question whether this model will lead to greater process certainty as anticipated by the ALRC;
 - (b) **proposed role of the Tribunal in developing guidelines** – given the degree of certainty which will be required for categorisation and the proposed role for the Tribunal in determining categorisation disputes, we suggest it would be preferable for the guidelines to be made by statutory instrument;
 - (c) **categorisation disputes** – the Tribunal is concerned that the proposed categorisation model will generate a significant number of disputes around the correct categorisation of future acts and require the development of jurisprudence. In any event, the procedures, timeframes, and grounds for such challenges would need to be clear;
 - (d) **most acts likely higher impact (Category B)** – we appreciate that delineation of the categorisation factors is at a preliminary stage. However, based on the factors outlined and the examples given, the Tribunal anticipates that the

majority of future acts may fall into the higher impact category (Category B) or draw objections. Relatedly, we note that the factor regarding the future act being located in proximity to “culturally sensitive areas or sites” (paragraph 155 of the Discussion Paper) may suffer from the same misalignment as s 237(b);

- (e) **replicating issues which arise with the current expedited procedure** – in the Tribunal’s experience of the current system, a native title party may lodge an objection application as a means of engaging with a grantee party to ensure heritage protection and impact management. Our experience with respect to the operation and use of the expedited procedure is discussed in our Issues Paper Submission (see, in particular, 3.41–3.56). Based on this experience, the Tribunal is concerned that categorisation disputes will become commonplace for the same reason, and divert parties from agreement-making to disputes;
- (f) **misalignment with current agreement-making practice** – the Tribunal’s experience, as reflected in our Issues Paper Submission and consistent with the themes in the Discussion Paper, is that, in most cases, native title parties and grantee parties seek to manage impact (particularly with respect to cultural heritage) through the negotiation of an agreement. Our experience and feedback from parties is that this occurs despite the expedited procedure process. While our experience is predominantly in relation to acts to which Subdivision P applies, we understand proponents across a range of sectors take a similar approach in order to meet cultural heritage protection requirements and manage the impact of a proposed future act. Our view is that any revised process should incentivise and prioritise agreement-making consistent with the Preamble to the NTA;
- (g) **removal of the safety net of the freehold test (Subdivision M)** – currently acts which do not fall within Subdivisions G-N would require an ILUA to be validly done. We note the proposed impact-based model would remove this safeguard; and
- (h) **exclusions for particular acts** – the Tribunal agrees that further consideration should be given to how certain types of future acts, such as legislative acts, would fit within the impact-based model. Some legislative acts may have a direct impact, and others may be legislation of general application which would currently fall within s 24MA.

2.4. The Tribunal is aware that there are challenges which arise when a registered native title body corporate (**RNTBC**) seeks to do a future act for its own benefit or for the benefit of the common law holders. The present future acts regime does not provide a

streamlined process for these types of acts. The Tribunal supports different treatment for such acts to facilitate their validity.

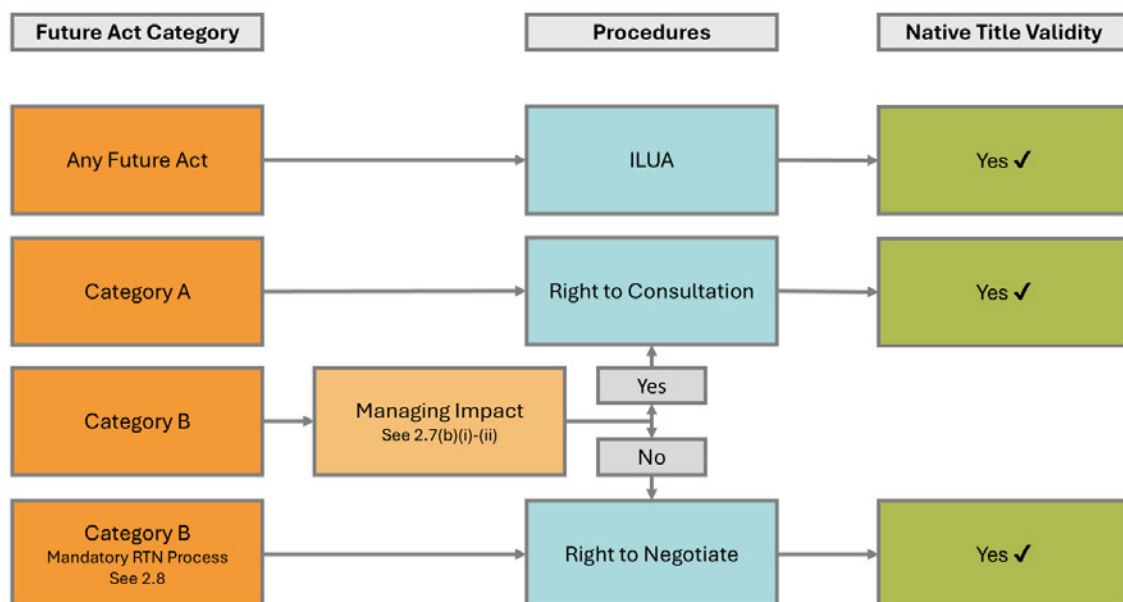
Tribunal's suggested modifications to the impact-based model

- 2.5. The Tribunal has considered how these issues might be addressed within the impact-based model and suggested possible modifications below.

Outline of Tribunal's modifications to impact-based model

- 2.6. Our proposal is reflected in the flowchart at Figure 1 below.

Figure 1: Tribunal's suggested modifications to impact-based model



- 2.7. The key differences in the model proposed by the Tribunal are that it would provide for the right to consultation to apply to:
- (a) acts done by or for the benefit of the RNTBC (which would, by default, be regarded as Category A acts); or
 - (b) some Category B acts where certain other requirements are met, namely:

- (i) if an NTMP identifies an area as appropriate for the right to consultation;² or
- (ii) for particular acts, where impact and any other prescribed matters (such as a future act payment) are managed through an agreement.

2.8. The RTN remains the default where (a)-(b) above do not apply. In addition, productive mining and compulsory acquisition would always remain subject to the RTN.

Advantages of Tribunal's modifications to the impact-based model

2.9. We think the Tribunal's modifications may have the following advantages:

- (a) **RTN as default certainty** – establishes the RTN as the baseline process for all future acts, providing clear procedural expectations. Enables prospecting and exploration to be subject to the right to consultation where certain other requirements are met;
- (b) **minimises categorisation disputes** – by enabling parties to manage impact by agreement or in accordance with an NTMP, the potential for categorisation disputes is minimised;
- (c) **enables freehold test to be retained** – if impact assessment is confined to future acts which would otherwise fall within the current Subdivisions G-N, the safety net of the freehold test could be retained;
- (d) **manages regional and jurisdictional variations** – these distinctions could be managed through an NTMP or agreement rather than requiring detailed categorisation;
- (e) **incentivises and rewards agreement-making** – processes reward meaningful engagement with native title parties through established pathways;
- (f) **integration of cultural heritage management** – coordination between native title validity and cultural heritage management; and
- (g) **recognises and aligns with existing practices within the sector and enables resource efficiencies** – enables parties to focus on substantive issues rather than procedural disputes by aligning agreement-making practices with native title compliance.

² At 4.2, we discuss the possibility that NTMPs could be used as a planning tool in addition to a source of validity.

Managing challenges for small-scale prospecting, exploration and mining

- 2.10. As discussed at 3.55–3.56 of the Tribunal’s Issues Paper Submission, the participation of small-scale prospecting, exploration and mining operators present a range of challenges in both the application of the expedited procedure and s 31(1)(b) negotiations.
- 2.11. While these types of future acts may represent a relatively small proportion of acts to which Subdivision P applies, they place a disproportionate resource burden on the parties and the Tribunal. The Tribunal suggests that treatment of these types of acts should not drive any reform of the future acts process but separate consideration should be given to ways to better manage the grant of these types of tenements. We reiterate that there is room for leadership by State and Territory governments to manage the participation by tenement applicants in this sector.
- 2.12. Our suggested modifications to the proposed impact-based model also have the potential to free up resources for government initiatives to support this sector by minimising disputation and proceedings in the Tribunal.

3. Reshaping statutory procedures – Right to negotiate

- 3.1. Our comments on the RTN focus on the proposed reforms and initiatives but we note that a number of the proposals could improve Subdivision P. If the proposed reforms do not proceed, we would be happy to comment further on possible modifications to the procedures in Subdivision P.
- 3.2. Our comments on issues relating to agreement-making under the RTN process, including proposed conduct and content standards, are covered in section 5 of this submission.
- 3.3. As an initial observation, we note there appear to be some inconsistencies between the proposed process flowchart and the detailed provisions. The flowchart does not appear to fully reflect all options outlined in paragraph 222 of the Discussion Paper, particularly regarding the pathways after the Tribunal determines a future act can proceed.

Future acts register

- 3.4. We see benefit in there being a central location where future act notices are contained and accessible and, therefore, support Proposal 11. While we have not commented in detail on implementation issues in this submission, we do note that such a proposal would necessitate new systems infrastructure with greater automation.

Objection process

- 3.5. As with our concerns regarding the risk of a high volume of categorisation disputes, we have concerns that the proposed revisions to the RTN process will result in a large number of objections to the grant of a future act, similar to the operation of the current expedited procedure process. This would divert parties' resources and focus to a litigious process at the outset rather than facilitate agreement-making.
- 3.6. We understand, however, that the intention of this category of objections is to capture only exceptional matters where a native title party is opposed in principle to negotiating about a proposed future act, and not for the process to become commonplace. In that case, we suggest it would be preferable to require lodgement of a formal application together with supporting material in the Tribunal, rather than simply lodging an objection form as occurs currently in relation to the expedited procedure.
- 3.7. We do not make any detailed comments at this juncture on an appropriate test except to note that any test should be based on objective criteria.

Separate issues referral

- 3.8. The Tribunal supports Proposal 7, which enables parties engaged in the RTN process to refer issues the subject of dispute to the Tribunal for a determination. We note the Discussion Paper at paragraph 204 identifies that such a process would be on the basis that the parties would agree to be bound by the Tribunal's determination.

Conditions

- 3.9. We note the reforms contemplate that the final decision following negotiations is primarily focussed on deciding conditions, with an ability to decide that an act may not be done in limited circumstances where new information arises. We consider that the criteria relevant to the imposition of conditions may need to be different to the test discussed at 3.7 if it is focussed on managing the impact of the future act rather than whether it may be done.

- 3.10. The Tribunal is also generally supportive of reforms to enable conditions requiring royalty or profit-based payments as outlined in Proposal 8. Consideration may need to be given to appropriate guidelines and mechanisms for calculating and determining these amounts.
- 3.11. As already mentioned, some of the proposed reforms could also be incorporated into the current RTN process. In that event, there may also be merit in a broad review of the scope and application of the Tribunal's powers with respect to imposing conditions to ensure maximum flexibility in addressing the effect of the proposed future act.

Suggested removal of the 6-month date in s 36(3) of the NTA

- 3.12. In accordance with s 36(1) of the NTA, the Tribunal must take all reasonable steps to make a determination in relation to a future act determination application as soon as reasonably practicable. However, where a decision is not made within 6 months of the making of the initial application, s 36(3) requires the Tribunal to advise the Commonwealth Minister of the reasons why a decision has not been made and an estimated time for the decision.
- 3.13. While it is not mandatory, the Tribunal suggests that the 6-month period in s 36(3) of the NTA should be removed. In practice, it can be difficult to conduct an entire proceeding from application to determination within that timeframe, particularly where good faith is in issue and if a hearing is required.
- 3.14. However, more importantly, the Tribunal considers that the expectation of the 6-month timeframe impacts the way the parties participate in the process and can inhibit the opportunity for dispute resolution. For instance, if the Tribunal considered it appropriate to employ dispute resolution mechanisms with a view to facilitating a s 31 agreement or agreeing conditions, it should be able to do so without the parties and the Tribunal being affected by an arbitrary time period. This issue is also linked to the discussion on the Tribunal's dispute resolution powers at 5.16–5.19, including the suggestion of compulsory conferences.

Expedited procedure reform

- 3.15. There are a range of issues with the operation of the expedited procedure which contribute to the inefficiency of the process. In essence, the requirements of s 237 and the statutory process are misaligned with the contemporary understanding of the impact of the relevant tenements and with the desire of most parties to reach agreement, particularly for heritage protection. This is highlighted by the number of matters which are resolved by agreement despite the lodgement of an objection application (see generally discussion at 3.44–3.48 of our Issues Paper Submission).

- 3.16. Additionally, as noted in the Tribunal's Issues Paper Submission at 3.41–3.42, administration of the expedited procedure utilises a significant proportion of the Tribunal's resources and is inefficient.
- 3.17. For these reasons, the Tribunal supports the repeal of the expedited procedure in accordance with Proposal 9.
- 3.18. The Tribunal considers that a number of these issues would be addressed through our suggested modifications to the impact-based model. However, if the expedited procedure is to be retained, the Tribunal would welcome consideration of reform to the process to minimise the demands on the resources of the Tribunal and the parties in the inquiry process. There may be a range of ways this objective could be achieved.
- 3.19. As outlined at Table 6 in the Tribunal's Issues Paper Submission, as at 30 June 2024, only 37% of tenements notified with the expedited procedure statement were subject to an objection application. One possible adaption to the process might be to retain the objection process but require any tenement subject to an objection application to revert to the agreement-making pathway (s 31(1)(b) of the NTA). This would enable a tenement not subject to an objection to proceed to grant but would otherwise enable the parties to direct their resources to agreement-making rather than litigation before the Tribunal. No doubt there may be other amendments which would assist to streamline the current process and we would welcome further discussion of the issues in the event the expedited procedure is retained.

4. Native Title Management Plans

- 4.1. We make no comment in relation to Question 6 on whether NTMPs should create alternative procedures for future act validity.
- 4.2. However, we suggest there may be merit in NTMPs also being available as a flexible and scaleable planning tool for RNTBCs.
- 4.3. In either case, the NTMP could be registered to ensure certainty as to its area and any other prescribed requirements but only certain features of a plan need be subject to registration testing. This would include any 'no go areas' and where compliance with the processes and requirements set out in an NTMP would result in a future act being valid. In this way, NTMPs which are used as a planning tool could be regularly revised without significant regulatory burden.
- 4.4. The Tribunal also suggests that, where a 'no-go area' meets specified statutory requirements for registration, it may be appropriate for the appropriate path to validity

for future acts in that area to be an ILUA. This would avoid the need for further proceedings before the Tribunal (see Discussion Paper at paragraph 60).

- 4.5. In relation to the suggestion at paragraph 64 of the Discussion Paper, the Tribunal agrees that, because of the Registrar's existing registration responsibilities, it would be appropriate for the Registrar to have responsibility for this function and maintaining a register of NTMPs.
- 4.6. The requirements and process for registration, including any necessary consultation, would need to be prescribed and clear. We do not have any specific comments on those matters at this stage but would be happy to engage further once any concrete proposals take shape.
- 4.7. Consideration should also be given to the expansion of a power such as that under s 60AAA of the NTA to enable the Tribunal to assist an RNTBC to develop an NTMP, including any required consultation with government parties or others.

5. Agreement-making reforms

Standing instructions and authorisation

- 5.1. The Tribunal supports the intention of Proposal 1, which seeks to expand the use of standing instructions to enable RNTBCs to enter into certain types of agreements without requiring separate authorisation or consultation processes for each individual agreement. There could be efficiencies gained by allowing common law holders to provide consent and instructions for particular types of future acts and agreements.
- 5.2. The implementation of standing instructions raises questions about monitoring and compliance. Consideration will need to be given to how consent and the scope of standing instructions are evidenced for agreements that require registration with the Tribunal.

Agreement access and transparency

- 5.3. The Tribunal is generally supportive of Proposal 2 in relation to ILUAs as it is broadly consistent with the outcomes of our recent survey of stakeholders in relation to ILUA access issues³ (**ILUA survey**) (see 4.28 of our Issues Paper Submission). However, any such statutory entitlement would need to apply despite the terms of the ILUA.

³ National Native Title Tribunal, Accessing Indigenous Land Use Agreements: Consultation Paper (31 January 2025).

- 5.4. Different considerations may arise for other types of agreements, such as agreements under s 31(1)(b), in cases where the determined common law holders are unrelated to the native title party to that agreement. This circumstance would be relatively commonplace, particularly in relation to older s 31 agreements.
- 5.5. In relation to Question 12, the Tribunal generally supports clearer requirements for information recorded on the ILUA Register to enhance transparency while maintaining appropriate confidentiality protections.
- 5.6. In addition, our ILUA survey revealed that, while 60% of respondents opposed broader public access to ILUAs, there was general support for making de-identified aggregate data available. Survey respondents emphasised that such data could support benchmarking, identify best practices, and promote consistency in agreement-making, while maintaining safeguards for commercially sensitive and culturally confidential information. Providing the Registrar with enhanced data collection powers could provide valuable insights into agreement trends without compromising individual agreement confidentiality, aligning with broader transparency objectives while respecting parties' privacy interests.

Maintaining the ILUA Register

Removal of ILUAs and periodic audits

- 5.7. The Tribunal supports Proposal 3 to the extent that it enables the Registrar to remove expired or terminated ILUAs from the ILUA Register. However, the Tribunal is not in favour of a mandatory obligation on the Registrar given the practical challenges which can arise in determining whether the relevant criteria are met.
- 5.8. As an alternative, the Tribunal suggests that the Registrar should be given the power to remove the details of an agreement from the Register in circumstances where the Registrar is satisfied it has expired. In that event, the Registrar should also be empowered to require parties to provide evidence of expiry or termination. In the event of a dispute, the Tribunal's dispute resolution powers could be engaged.
- 5.9. The Registrar does not support the notion of mandatory periodic audits of the ILUA Register as outlined in Proposal 4. Instead, we suggest that maintenance of the ILUA Register could be managed through the exercise of discretionary powers, as and when information becomes available.

Section 199C of the NTA

- 5.10. The Tribunal's administration of s 199C has revealed operational challenges that warrant consideration in the context of the proposed reforms. The current requirement to assess whether "all native title holders" authorised historical ILUAs creates legal and practical difficulties.
- 5.11. A particular challenge arises from what might be termed the 'spatial conundrum' under current provisions. The current provision does not allow an ILUA to be removed from the ILUA Register over part of the ILUA area, so that even where only a small portion of the ILUA overlaps a relevant determination area, the entire ILUA must be removed. Consideration should be given for a mechanism for removal of part of an ILUA area from the ILUA Register in appropriate circumstances.
- 5.12. Several measures could address the current difficulties, including requiring the Federal Court of Australia to consider whether ILUAs in a determination area should continue on the ILUA Register as part of the determination orders; converting the mandatory requirement imposed on the Registrar in s 199C(1)(b) to a discretionary power; and empowering the Registrar to request submissions or information from parties to an agreement regarding the status of the agreement in order to form a view about removal.

RNTBC as successor in agreements

- 5.13. The Tribunal generally supports statutory succession mechanisms for RNTBCs where appropriate. However, as discussed at paragraph 108 of the Discussion Paper, complexities may arise where the common law holders are an entirely different group to that which negotiated the agreement.
- 5.14. In relation to ILUAs, we also consider there would be benefit in ensuring non-native title parties can novate the agreement without requiring re-registration. This is discussed further below at 5.15 in relation to amendments.

Amendment flexibility

- 5.15. The Tribunal generally supports the proposal in Question 10 regarding increased flexibility for amending ILUAs, particularly with respect to novation. We agree, as discussed at paragraph 122 of the Discussion Paper, that any expansion of permitted amendments would need to be carefully considered in order to maintain the Registrar's oversight.

Enhanced dispute resolution functions

- 5.16. The Tribunal supports Proposal 5 which would enable parties to existing agreements to, by consent, seeking a binding determination from the Tribunal where a dispute arises.
- 5.17. In relation to Question 11, we do not think it is necessary to require the mandatory inclusion of a dispute resolution clause by which the parties agree to utilise the Tribunal's dispute resolution services. However, as discussed below, we support the expansion of the Tribunal's dispute resolution powers to assist parties in the event they wish to include such a clause.
- 5.18. In the Tribunal's experience, many of our assistance functions lack sufficient flexibility and scope to enable us to assist parties in all cases which arise. For example, the Tribunal's current powers do not extend to mediation pursuant to a dispute resolution clause under an agreement or a condition imposed on a future act determination (which takes effect as a contract).
- 5.19. In particular, we recommend that the Tribunal's discretionary dispute resolution powers be expanded to encompass facilitation, mediation, conciliation, and arbitration throughout the life cycle of any native title agreement and proceeding in the Tribunal. This would, for example, enable us to assist parties in the implementation of any agreement or condition made by the Tribunal and in the review of any native title or related agreement. In addition, we consider expansion of the Tribunal's powers to enable compulsory conciliation or mediation during the course of proceedings would assist in securing agreed outcomes.

Agreement standards

- 5.20. The Tribunal generally supports the introduction of conduct and content standards for native title agreements as proposed in Question 7.
- 5.21. However, in our view, the concept of good faith is already well established in case law and would not benefit from codification or further legislative delineation based on the *Njama!* indicia. The Tribunal has observed that the present and arguably excessive focus on micro-actions throughout negotiations can detract from the overall objective of, and focus on, reaching agreement. The desired objectives could be better achieved through clear standards of conduct rather than attempting to prescribe good faith requirements or elements.
- 5.22. The introduction of content standards as preconditions for ILUA registration would require development of assessment criteria and procedures to ensure consistency in

application. This would represent a shift from the current registration framework and would need to be carefully designed to avoid creating unnecessary barriers to agreement-making while ensuring minimum standards are met. Clarity would be required to enable the Registrar to exercise this function and in relation to transitional arrangements for existing agreements.

- 5.23. Regarding Question 8, we do not make any particular comment on the matters discussed at paragraphs 97–99 of the Discussion Paper, save to observe that any additional registration requirements would need further consideration by the Registrar. However, in relation to paragraphs 100–101 of the Discussion Paper, we agree that a future act may only be validly authorised in accordance with the NTA. To the extent that any party is seeking to avoid compliance with the NTA by way of a ‘side’ or ancillary agreement, that is not permitted. To the extent there is any confusion, this could be clarified.

Future acts payment

- 5.24. The Tribunal is also generally supportive of the requirement for future act payments as proposed in Question 24. The inconsistencies between some State and Territory regimes and the operation of the NTA with respect to compensation was an issue highlighted in our Issues Paper Submission (see 3.37).
- 5.25. At this stage we do not propose to comment on the appropriate criteria for determining such payments save to note in relation to Question 25 that s 49 of the NTA already contemplates offsets to compensation payable under the NTA.

6. Resourcing for the Tribunal and the sector

Adequate funding for the Tribunal

- 6.1. The reforms under consideration represent significant and transformative changes to the future acts regime. The Tribunal agrees that successful implementation of the proposed reforms will require substantial additional resources and systems for the Tribunal as contemplated by Proposal 16. However, as discussed below, the proposed reforms also offer opportunities to improve overall system efficiency and introduce new avenues for Tribunal facilitation and assistance functions by allowing parties to direct resources to engagement and agreement-making.

- 6.2. Further detailed consideration would need to be given to the Tribunal's resourcing requirements once specific proposals are developed, and we would welcome those discussions.

Cost recovery and capacity building

- 6.3. The Tribunal welcomes and supports the proposed amendments to s 60AB of the NTA in Proposal 17, which would strengthen cost recovery provisions for native title parties engaging with the future acts regime. The well-documented resourcing limitations and capacity constraints facing native title parties present significant barriers to effective participation in the current system.
- 6.4. Implementation of enhanced cost recovery mechanisms would require development of clear guidelines for assessing reasonable fees across regional contexts and project types, recognising the complexity of quantifying cultural impact assessments and accommodating the varying capacity of different proponent categories.
- 6.5. The proposed integration of payment obligations within conduct standards presents opportunities to ensure timely and appropriate resourcing for native title parties throughout the negotiation process. This could address longstanding concerns about power imbalances in negotiations and support more equitable outcomes. Consideration should also be given to how any proposed reforms take account of common practices in native title negotiations such as the agreement of budgets.
- 6.6. In addition, the Tribunal is not opposed to the transfer of responsibility for opinions under s 60AC of the NTA from the Registrar of Aboriginal and Torres Strait Islander Corporations to the Tribunal or perhaps, the Registrar.

System efficiencies

- 6.7. The Tribunal notes that aspects of the proposed reforms could generate system efficiencies that would allow resources to be redirected to more productive uses, such as the focus on relationship development, agreement-making, and implementation.
- 6.8. In particular, the proposed repeal of the expedited procedure would represent a significant reduction in resource demands for both the Tribunal and parties, freeing capacity that could be redirected toward facilitation and dispute resolution services. Similarly, refinements to the RTN process may assist in minimising disputes and reducing overall costs.