

To: Australian Law Reform Commission

Re: Review of the Future Acts Regime (2025)

14 July 2025

Introduction

AMEC appreciates the opportunity to provide industry feedback to the Australian Law Reform Commission's Discussion Paper on the Review of the Future Acts Regime.

How the Native Title Act's legislative framework regulates Future Acts is critically important for the mineral exploration and mining industry. It has been noted by Industry that many find fault with the current arrangement and implementation of the Act. It has also been noted that the judiciary has firmly assumed the mantle for expanding the remit and interpretation of the Native Title Act and rights.

This Discussion Paper could have provided a sensible path to address how the States make decisions regarding land use. However, what is proposed in the Discussion Paper and proposed a raft of radical changes that are simply unworkable. Regrettably, the discussion paper and the follow-up meeting demonstrate the ALRC's lack of understanding as how the current Native Title system currently operates in practice.

This Discussion Paper can be summarised as a missed opportunity to find workable improvements to the current legislative framework, and regrettably AMEC cannot support these proposed changes.

About AMEC

The Association of Mining and Exploration Companies (AMEC) is a national industry association representing over 590 member companies across Australia. Our members are mineral explorers, emerging miners, producers, and a wide range of businesses working in and for the industry. Collectively, AMEC's member companies account for over \$100 billion of the mineral exploration and mining sector's capital value.

Mineral exploration and mining make a critical contribution to Australia's economy, directly employing over 289,000 people. In 2022/23 Industry generated a record-high \$454 billion in resources exports, invested \$4.27 billion in exploration expenditure to discover the mines of the future, and collectively paid over \$74 billion in royalties and taxes.

General Remarks

AMEC is supportive of undertaking reform to the Native Title Act and improving the operations and efficiency of this critical piece of legislation. What is proposed by the ALRC calls for a reworking of the entire regime. What is proposed will lead to upheaval in the industry and poor outcomes for all involved. It is unclear how it is anticipated that the proposed reforms will lead to an improvement in outcomes. The ALRC has also overstepped regarding the powers of the Native Title Act compared to the Constitution, and the right of States.

AMEC has a long-standing objective for increased clarity, certainty, efficiency and effectiveness of native title and cultural heritage processes to:

- ensure fair, equitable and quality negotiated outcomes and benefits for Aboriginal people, governments, and industry;
- reduce delays and costs for all stakeholders;
- provide increased trust, integrity and confidence in decision making; and
- ensure compliance.

These objectives are intended to enhance and not diminish native title or cultural heritage values.

The Discussion paper poses 18 proposals and 17 questions, which are answered below, mirroring the numbering of the Discussion paper. The Proposals and the questions are separated.

Proposals

Proposal 1 The Native Title Act 1993 (Cth) and Native Title (Prescribed Bodies Corporate) Regulations 1999 (Cth) should be amended to allow for the expanded use of standing instructions given by common law holders to Prescribed Bodies Corporate for certain purposes.

The most recent reforms to the *Native Title (Prescribed Bodies Corporate) Regulations 1999* allow common law holders to supply PBC standing instructions for ILUAs in relation to an act by or for the benefit of the PBC, or a section 31 agreement in relation to which the PBC is the only grantee party. This proposal expands this further.

Greater detail is needed on what this expansion would mean in practice. In Queensland, the Government has sought and secured leases for extractives, gemstone and extractive miners. Streamlining the approvals process for those style ILUAs would be welcome.

Proposal 2 The Native Title Act 1993 (Cth) should be amended to provide that: the Prescribed Body Corporate for a determined area has an automatic right to access all registered agreements involving any part of the relevant determination area; and b. when a native title claim is determined, the Native Title Registrar is required to identify registered agreements involving any part of the relevant determination area and provide copies to the Prescribed Body Corporate

The transparency of agreements is a key concern for Industry. This proposal would lower the current barriers to sharing of documentation with the Prescribed Body Corporate would improve outcomes. However, there may be unintended consequences when a claim area (and related agreement) cover more than one determined Prescribed Body Corporate. A neighbouring PBC may not want a new PBC to have agreement.

Proposal 3 Section 199C of the Native Title Act 1993 (Cth) should be amended to provide that, unless an Indigenous Land Use Agreement specifies otherwise, the agreement should be removed from the Register of Indigenous Land Use Agreements when: the relevant interest in property has expired or been surrendered; the agreement has expired or been terminated; or the agreement otherwise comes to an end.

Section 199C of the *Native Title Act 1993* (Cth) would be amended to provide that Indigenous Land Use Agreements (ILUAs) should be removed from the register when certain conditions are met, such as the expiration of the relevant interest in property or the termination of the agreement. While this proposal is not opposed, there are practical concerns about its implementation. The National Native Title Tribunal (NNTT) would play a crucial role in discerning which agreements should be deregistered, but the lack of clear, detailed guidance on the exact process introduces risks of inconsistency. Mining companies may face delays in accessing accurate, up-to-date registers, as the deregistration process could involve complex verification of the status of agreements, particularly in cases where disputes or ambiguities exist about the agreement's terms or scope. Moreover, the proposal presupposes that agreements are always clear-cut, which may not be the case in practice, especially where agreements are renegotiated or extended informally. This lack of clarity around deregistration could result in unforeseen legal complications, potentially jeopardizing ongoing projects or creating disputes about land use and access. As a result, industry stakeholders would call for a more streamlined, transparent process with clear guidelines to prevent delays and ensure timely deregistration in cases of expired agreements.

Proposal 4 The Native Title Act 1993 (Cth) should be amended to require the Native Title Registrar to periodically audit the Register of Indigenous Land Use Agreements and remove agreements that have expired from the Register.

The proposal that the Native Title Registrar periodically audit the Register of Indigenous Land Use Agreements (ILUAs) and remove expired agreements is not opposed, but it also raises important practical concerns. From an industry perspective, while periodic audits would improve the accuracy and currency of the register, the frequency and scope of these audits could affect the overall efficiency of the system. The mining industry relies heavily on the register to track active agreements and ensure compliance with land use terms. If agreements are removed without clear communication or adequate consultation with relevant stakeholders, such as proponents, it could lead to operational confusion. Proponents would be concerned that unexpected removals could disrupt ongoing land access arrangements or project timelines, especially in complex areas where the status of multiple agreements may need to be confirmed. Furthermore, mining companies would want assurances that the audits do not add unnecessary administrative burdens or delays. The industry would support a system where updates are frequent and well-managed but would urge for a consultation process to minimize risks and ensure transparency in the audit results.

Proposal 5 The Native Title Act 1993 (Cth) should be amended to provide that the parties to an existing agreement may, by consent, seek a binding determination from the National Native Title Tribunal in relation to disputes arising under the agreement.

The proposal that parties to an existing agreement can, by consent, seek a binding determination from the National Native Title Tribunal (NNTT) to resolve disputes arising under the agreement is, on its face, a positive suggestion. This proposal could streamline dispute resolution, offering a quicker, less costly alternative to court proceedings. However, the key challenge here lies in the practicalities of such a system. For mining companies, the efficiency of the NNTT as a dispute resolution body is important, but they are cautious about the Tribunal's capacity to handle potentially complex and high-stakes issues promptly. The resource sector often deals with multi-party agreements involving considerable financial stakes and intricate technical details. There is a risk that the NNTT, even with good intentions, may not have the specialized expertise required to handle the breadth of disputes that may arise. While the NNTT has a vital role in native title matters, its resourcing and capacity limitations could result in significant delays and inefficiencies. In addition, there needs to be clarity on the procedural mechanisms: how would consent for binding determinations be granted? What safeguards would be in place to ensure that such determinations are fair and consistent? The mining sector, while supportive of resolving disputes efficiently, would seek detailed provisions regarding the practical implementation of this proposal, ensuring that it doesn't introduce unforeseen delays or uncertainty into the operational timeline.

Proposal 6: The provisions of Part 2 Division 3 Subdivision P of the Native Title Act 1993 (Cth) that comprise the right to negotiate should be amended to create a process ...

Proposal 6 suggests a comprehensive reform of the *Right to Negotiate* process under the *Native Title Act*, including shifting the consideration of native title from the grant of tenure to the grant of an activity notice. This shift represents a fundamental change in the way native title is considered in relation to resource projects, and the industry has significant concerns.

It is unreasonable for the ALRC to expect support for this comprehensive reform of the Future Act process, when scant written detail has been provided as to how it will operate in practice.

A concern is that the proposed reform shifts when Native Title Act is considered, from the grant of tenure to being considered at the grant of an activity notice. This a fundamental shift. The activities on tenure, and their interaction is managed through the respective State jurisdictions Aboriginal Cultural Heritage legislation.

Native title rights are considered at the point of tenure grant, rather than as specific activities, because Native Title is recognised as a pre-existing right derived from Indigenous laws and customs, not as a new right created by the government.

However, there are concerns with what is proposed, even though there is no basis for it. Industry has noted parallels between what is proposed and the failed Western Australian *Aboriginal Cultural Heritage Act 2021* that encountered issues similar to what is outlined below regarding definitions and internal consistency.

A concern for Industry are the examples provided in Appendix A.

Example 2 is unclear. The majority of mineral exploration occurs in Western Australia, then Queensland, Northern Territory and South Australia. These jurisdictions do not differentiate between low impact and high impact mineral exploration licences. None of the licences (or leases as they're

correctly known) are granted for two years. It is unclear what the low impact exploration licences this example refers to.

The consistency of the examples provided are also questioned, as the construction of a jetty (Example 1) will require a track for equipment to use to enter the area, clearing of vegetation, a lay down area, and then eventually pile driving and consequential ground disturbance from a drill rig. This is deemed to be a Category A activity. Whereas (Example 3) most mineral exploration drilling, such as RC and Air core drilling, has a similar level of ground disturbance to jetty construction, but is identified as demanding the Right to Negotiate process. The minimal level of environmental disturbance of most mineral exploration has been acknowledged in both Western Australia (Eligible Mining Activity licencing) and in the Northern Territory (through the new environmental risk criteria, which allows 10 hectare of disturbance).

In Appendix A, Example 9 is for a water licence for agricultural activity. While the Native Title Act includes water rights as a part of native title rights, only rights to use water for domestic and personal purposes have been recognised by the judiciary so far. The drafting of the Native Title Act does not provide for a right to negotiate over water, so it is unclear what legislative grounding this example has.

Industry is concerned that such a broad and untested reform would exacerbate existing delays in obtaining land access. It would also increase the risk of disputes between parties especially as jurisdictional complexities across States may lead to confusion over what activities fall under the new framework.

Proposal 6 is not supported.

Proposal 7: The Native Title Act 1993 (Cth) should be amended to empower the National Native Title Tribunal to determine issues referred to it by agreement of the negotiation parties.

The ALRC must acknowledge the NNTT is not adequately resourced to undertake this role, as it is lacking the staffing to meet the anticipated demand to determine issues. The assumption in the Discussion Paper is that the NNTT process would be quicker and cheaper than pursuing the matter through the Courts. This may be true but will also face challenges of timeframes.

Proposal 8: Section 38(2) of the Native Title Act 1993 (Cth) should be repealed or amended to empower the National Native Title Tribunal to impose conditions on the doing of a future act which have the effect that a native title party is entitled to payments calculated by reference to the royalties, profits, or other income generated as a result of the future act.

The proposal to amend Section 38(2) of the *Native Title Act* to empower the NNTT to impose conditions on future acts, including payments based on royalties or other income generated, extends the scope of the Native Title Act. This proposal has been questioned as it oversteps the Constitution which delineates the mineral right to the State and the whole Australian community, not those of Aboriginal descent alone.

Whether the Tribunal is able to, constitutionally, exercising such powers has been raised by Industry as an open question. Tribunals are generally prohibited from being a part of the judiciary.

This will have a material impact on the financial model of existing and developing resource projects. Such a proposal will add a layer of financial uncertainty.

Additionally, this proposal appears to open the door to conditions being imposed on a broad range of future acts, which could lead to a patchwork of different obligations being imposed across various jurisdictions. There is also concern that this could introduce significant delays into the process, as projects would now be subject to additional layers of regulatory scrutiny and negotiation.

Proposal 9 Section 32 of the Native Title Act 1993 (Cth) should be repealed.

Section 32 of the Native Title Act currently governs the expedited procedure, which allows certain types of future acts, such as low-impact exploration activities, to bypass the full Right to Negotiate process.

The proposal to repeal this section would significantly impact the mineral exploration industry. The effect of this proposal would be damaging for the Western Australian economy where the majority of mineral exploration occurs.

Removing this procedure will result in considerable delays for projects, particularly for small explorers who rely on the expedited process to maintain project timelines and financial viability.

If this provision is repealed, mining companies will face prolonged and uncertain approval processes, potentially stalling projects that are critical to the sector's development.

Industry strongly opposes this change, as it undermines the principle of allowing timely, low-impact activities to proceed without unnecessary regulatory burdens. Maintaining the expedited procedure is vital for the continued growth of the Australian mining sector, ensuring that exploration and early-stage projects can move forward efficiently.

Proposal 10 The Native Title Act 1993 (Cth) should be amended to expressly provide that a government party's or proponent's compliance with procedural requirements is necessary for a future act to be valid.

If procedural compliance becomes a strict condition of validity, any administrative slip, such as a late notice or a missed step, could render a grant invalid. This would create significant uncertainty for companies, who will likely face project delays and legal challenges over technicalities. It will also incentivise litigation, as opponents of a development will scrutinise the procedural minutia for any flaw to overturn approvals. To attempt to manage these risks, clear guidance would be needed defining what constitutes "compliance" and clarify whether the amendment would apply only prospectively.

Seeking procedural rigor is commendable, however, an absolute validity requirement will materially increase project risk. This amendment will directly discourage investment in mining projects due to the possibility of approvals being voided for minor error in an already complex approval.

This proposal is opposed by Industry as being utterly unworkable.

Proposal 11 All future act notices should be required to be lodged with the National Native Title Tribunal. The Tribunal should be empowered to maintain a public register of notices containing specified information about each notified future act.

In principle, a central, transparent notification system would be of benefit to the public and all stakeholders. A central notification system would ensure that Native Title parties and the public can easily access information about proposed activities. Industry feedback has identified several potential practical challenges.

Requiring lodgement of every notice with the Tribunal adds an extra administrative step for proponents. It also adds another step that could lead to validity questions. As detailed above in response to Proposal 10 concern, this effectively raising the stakes of a minor clerical error that is identified late in the process.

A public register may mean a wider expectation that details of proposed operations are easily accessible. This could attract legal action, objections or other activism from vexatious third parties. This also could create challenges as it is normal for mine site design to evolve with regulator expectations, geological discovery, commodity price and new environmental information. These understandings are often not known as the approvals process follows tenure grant.

What is expected to be published needs to be clarified. Proponents have commercially sensitive data that will be of interest to competitors, and only necessary information is published on the register.

The Tribunal is not currently equipped or staffed to manage the influx of notices efficiently. As given the volume, the lack of Tribunal capacity is likely to lead to significant delays. Delays create potential for inadvertent non-compliance. If this were implemented, it would demand sufficient resourcing to create a central registry could improve confidence in the notification process without unduly burdening or introducing further risk for proponent.

Proposal 12 Sections 24EB and 24EBA of the Native Title Act 1993 (Cth) should be amended to provide that compensation payable under an agreement is full and final for future acts that are the subject of the agreement only where the agreement expressly provides as such, and where the amounts payable under the agreement are in fact paid.

Amending sections 24EB and 24EBA of the Native Title Act so that compensation paid under an agreement is only “full and final” for the future acts covered by that agreement if the agreement expressly says so and the agreed amounts are actually paid is not supported.

This proposal raises a real potential risk of reopening what were considered settled matters. Proponents will face unexpected compensation claims for activities they thought had been fully resolved by a prior agreement.

Industry feedback focused on the concern of whether this reform would or could be interpreted retrospectively. As it is implied that it would apply to past agreements, but is it only for new agreements?

This amendment ignores that the Western Australian South West Settlement, which was full and final, (and registered) has been reopened with further compensation sought. This is despite Native Title

rights being extinguished via agreement. This has increased the cost of doing business being borne, despite the Western Australian State Government's multi-year effort to seek compensation.

This proposal, if implemented, would further undermine the confidence that industry and Native Title groups have in existing agreements, which could damage trust.

Proposal 13 The Native Title Act 1993 (Cth) should be amended to provide a statutory entitlement to compensation for invalid future acts.

Proposal 13 is opposed by Industry. Amending the Native Title Act to create an automatic statutory entitlement for compensation when a Future Act is invalid will have unintended consequences. Similar to the anticipated response to the above proposals if implemented this amendment will monetise and incentivise legal opportunism to seek out the invalidity with a guarantee of reward.

It is also unclear how the compensation burden will be apportioned. The ALRC remains silent as to *who* pays. Would it be the Commonwealth Government? As if this amendment progresses, which AMEC does not support, it would be the Government that should guarantee payment.

Industry has noted that if a future act is invalid and the project stops, that any compensation should account for the fact that Native Title rights remain intact. It has also been noted that what the quantum and definition of compensation is, remains a very open question that is being resolved through the courts.

This proposal is opposed.

Proposal 14 The Native Title Act 1993 (Cth) should be amended to provide for and establish a perpetual capital fund, overseen by the Australian Future Fund Board of Guardians, for the purposes of providing core operations funding to Prescribed Bodies Corporate.

This proposal creates a different funding mechanism, a Perpetual Fund, much like a Sovereign Wealth Fund. This suggestion is rich in inherent complications such as unanswered questions regarding the operation, oversight, governance and the transparency of expenditure.

This proposal is opposed as it remains the firm view of industry, that the simplest, cleanest method is for the Commonwealth Government to fund the Prescribed Bodies Corporate. The Commonwealth Government funds most instruments created under Commonwealth legislation; it should do so for the PBCs.

No one denies that the PBCs need their capacity strengthened. Greater resources mean that the PBC could negotiate more efficiently, and it is one of the easiest ways the Government could make an outsized and immediate impact on improving Native Title outcomes.

A perpetual fund is a complicated concept to alleviate a lack of resourcing for PBCs. There is a real possibility that the burden of funding this fund will be levied directly on the mining and mineral exploration sector.

Proposal 15 Native Title Representative Bodies and Native Title Service Providers should be permitted to use a portion of the funding disbursed by the National Indigenous Australians Agency to support Prescribed Bodies Corporate in responding to future act notices and participating in future acts processes.

Permitting the use a portion of the PBC's funding provided by the National Indigenous Australians Agency to assist a PBC administer future act notices and processes is supported. It addresses a known gap in institutional support, which drops immediately after registration compared to what was available during the claim.

This support role must be adequately funded. However, allowing for a further division of funding, without an increase in overall funding could mean other functions are starved.

Greater support for Future Act matters is seen by industry as a constructive proposal, provided it is implemented with sufficient resources and does not slow down other activities and responsibilities of the PBC.

Proposal 16 The Australian Government should adequately fund the National Native Title Tribunal to fulfil the functions contemplated by the reforms in this Discussion Paper, and to provide greater facilitation and mediation support to users of the native title system.

The Tribunal should receive more funding and more staff resources, irrelevant of whether the functions in this Discussion paper occur. Even if it is the only proposal implemented, this is supported.

Proposal 17 Section 60AB of the Native Title Act 1993 (Cth) should be amended to: a. entitle registered native title claimants to charge fees for costs incurred for any of the purposes referred to in s 60AB of the Act; b. enable delegated legislation to prescribe a minimum scale of costs that native title parties can charge under s 60AB of the Act; c. prohibit the imposition of a cap on costs below this scale; d. impose an express obligation on a party liable to pay costs to a native title party under s 60AB of the Act to pay the fees owed to the native title party; and e. specify that fees charged by a native title party under s 60AB can be charged to the government party doing the future act, subject to the government party being able to pass through the liability to a proponent (if any).

This proposal is opposed as it directly increases the cost(s) of engaging in negotiations or consultations with Native Title groups. Currently, under s 60AB, only registered native title bodies corporate (PBCs) can charge fees for certain tasks.

Industry has noted that they currently already pay these "fee for service" costs as part of doing business. Industry routinely covers the Native Title party's legal fees, travel expenses, meeting costs, and so on during negotiations. Currently there is no mechanism for regulating these costs or increasing their transparency.

The Commonwealth Government's failure to fund PBC operations means that the proponent bears the burden of their operational cost.

It is disappointing that the ALRC did not consider the outrageous scale of costs charged by legal, archaeological and anthropological representation and consultation to the sector. This gouging of the

system by interested third parties is damaging to relationships between proponents and Traditional Owners but has largely been ignored in the Discussion paper.

Proposal 18 The Australian Government should establish a specifically resourced First Nations advisory group to advise on implementing reforms to the Native Title Act 1993 (Cth).

This is a decision for the Commonwealth Government. However, broader representation from the across the entire Australian community would be reflective of the importance of this issue for the modern Australia, rather than only being comprised of indigenous representation.

Questions

The Discussion Paper details questions, beginning at number six. The first five were in the Options Paper. AMEC has sought to answer each question, despite their duplication of the proposals above.

Question 6

Should the Native Title Act 1993 (Cth) be amended to enable Prescribed Bodies Corporate (PBCs) 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?

Allowing PBCs to create Native Title Management Plans (NTMPs) may offer a proactive, tailored framework for future acts, potentially giving mining proponents and governments greater upfront certainty and streamlined processes. A key concern is whether PBCs have the capacity and resources to develop and implement such plans effectively, since successful NTMPs would depend on adequate funding and expertise. Industry also raised questions regarding enforceability, transparency and transferability for NTMPs.

The introduction of NTMPs may in theory, improve efficiency by accounting for local conditions and specifying procedures (e.g. notification timelines, no-go zones, minimum payments). However, it is likely to introduce complexity if, and when, different areas adopt different rules. This is the most likely outcome given the differences across Australia, and that the ancillary agreements that already exist do differ.

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?

The Discussion Paper suggests there is a broad recognition that power imbalances in native title negotiations can lead to unfair outcomes, so mandatory conduct standards (e.g. good faith requirements, transparency in information-sharing) were proposed to improve the quality and fairness of negotiations.

Industry has noted with disappointment that the Discussion paper persisted with the framing of the Issues Paper, which implied a “David versus Goliath” relationship. The tiny Prescribed Body Corporate tackling a “mining” behemoth. This is inaccurate and mischaracterises the realities of the mining and mineral exploration sector. While there are a few globally large companies, the vast

majority of companies in the mining and metals space are mineral exploration companies. These companies are a handful of people who are keen to engage with Traditional Owners and PBC in a light touch, but respectful manner.

The Discussion Paper ignores the reality that Native Title negotiations are unique in the commercial sphere – with proponents funding the Native Title party's legal representation.

The mining and exploration industry is concerned that overly prescriptive standards might slow deal-making or reduce flexibility, but it also sees benefit in clearer rules that reduce disputes about bad conduct. However, the fundamental concern is that there is no Government organ that would enforce compliance.

The Registered Standard Heritage Agreement in Western Australia attempted to detail a standard agreement. This has largely been a failure, reduced to being a symbolic first step before proponent and Native Title party engages legal counsel and draft an agreement.

The lack of enforceability of these mandatory conduct standards, combined with issues of resourcing and the lack of willingness for Government to enforce normal contractual expectations undercut the potential effectiveness of such reforms.

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?

No. The Native Title Act focus is the recognition and protection of native title rights and interests. An attempt to regulate ancillary agreements would blur this focus, it will lead to unintended complexities in legal interpretation and questions regarding the practicality of enforcement. Ancillary agreements are commonly commercially confidential, with content cover a wide range of activities and rights beyond Native Title.

Ancillary agreements provide a path to address commercial matters and issues of mutual interest flexibly. However, there is a lack of oversight, and this means outcomes can vary widely and sometimes. Industry suggests that these ancillary agreements sometimes include contentious provisions that ultimately erode the intended benefits of the process, but directly benefit the third-party legal representation.

It has been noted that the Discussion Paper does not provide any evidence of market failure or malpractice that suggests ancillary agreements should be incorporated in the Native Title Act. However, Industry has highlighted repetitively the challenges of enforcing Ancillary Agreements when Native Title parties may not have honoured their agreement.

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?

Agreements made with native title claimants before a determination can become problematic if the ultimately determined native title holders are a different group, or a different PBC assumes control, since there may be no clause allowing transfer of obligations.

A statutory mechanism for assignment or succession would ensure that benefits and obligations of such agreements carry over to the PBC or new native title holders, provides certainty to all parties. Greater clarity on how this mechanism would be enforceable is needed, as if the assignment is not legally binding on both parties it will be ineffective.

Without an assignment mechanism, companies face the risk that their pre-determination agreements will have to be entirely renegotiated. This is commonly the outcome at the moment.

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?

Currently, once an agreement (such as an ILUA or s.31 agreement) is registered, even minor changes demand a fresh registration. This is time-consuming and costly. Allowing parties to make limited or “specified” amendments (for example, updating a party’s details, extending timeframes, or correcting minor errors) without full re-registration could reduce administrative burden and increase flexibility.

Industry support this in principle, as it would enable them to adapt agreements to new information or project modifications more efficiently.

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?

Requiring a dispute resolution clause leveraging the National Native Title Tribunal (NNTT) could ensure that if conflicts occur during the life of an agreement, they may be resolved in a forum rather than through protracted court battles. The assumption underpinning the proposal that the Tribunal act as arbitrator is that they be lower cost and cheaper. This may not be the case.

The vast majority of mining and mineral exploration companies avoid engaging in any form of legal action because of the stigma and substantial ramifications for doing so. While the proponent may win

the current legal challenge, they will face the reality of having to work with the Native Title party in future agreements.

If an arbitration/mediation pathway was introduced, it is extremely unlikely mining and mineral exploration companies would use it. Doing so is likely to lead to a fundamental breakdown in the relationship with the Native Title holders, similar to legal enforcement currently. It is unclear how the ALRC thinks having the Tribunal perform this task will lead to a differing outcome.

In practice, even if introduced, the Tribunal does not currently have the capacity or the resourcing to undertake this role.

This proposed amendment does acknowledge a common Industry concern agreements do not have a clear and enforceable, transparent dispute process outside the judiciary. This reality does undermine the basic economic value of agreements for all sides and an erosion of trust.

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?

Introducing an opt-in public register of agreement terms with aims to improve transparency and information-sharing in the Native Title system would be supported by Industry. This would allow PBCs and proponents to see precedent terms such as typical compensation rates. This which could support more informed and equitable negotiations across the industry.

This initiative could streamline the compliance process by providing centralised access to critical information, thereby reducing administrative burdens and legal uncertainties. However, ensuring the ability to redact and de-identify sensitive details is crucial to protect commercial confidentiality and Indigenous cultural knowledge.

Protecting commercially sensitive or confidential cultural information. Hence the ability to redact names, dollar figures, or sacred site details is critical to making a register workable.

Introducing this reform would address the fundamental information asymmetry in the market. Despite commercial confidentiality provisions, the legal representation of PBC is believed by Industry to share data and prices.

The lack of publicly available Native Title price information distorts decision-making and leads to inefficiencies. As per an economic textbook, the lack of clear pricing signals, mean both the proponent and Native Title party face uncertainty, this can and does result in misallocation of resources. The beneficiary of the lack of data sharing is the legal fraternity for both proponents and Native Title parties.

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?

Currently, pre-determination agreements made with registered claimants do not adequately bind the group, especially if the claiming group changes or splits. Mining companies worry that without reform, that deals struck in good faith with claimants will continue to be upended or require renegotiation if the legal identity and composition of the native title party changes.

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?

This question canvasses a major overhaul of the entire operation of the Future Act regime of the Native Title Act. In essence, the ALRC suggests moving to a unified impact-based regime.

Industry does not consider this will lead to an improvement in outcomes, and it will have negative consequences.

The proposed overhaul is opposed.

The ALRC seems to have ignored all of the learnings from the recent Western Australian experience with the introduction of the *Aboriginal Cultural Heritage Act 2021*, which similarly considered an impact-based model.

The ALRC proposal has not provided detail as to what is considered impact. It does not provide detail as to what is low impact, and then how that concept impact is scaled with integrity.

The proposal also ignores that it is regressive: currently mining and mineral exploration proponents are unable to step on land adhering to the process under the Native Title Act.

The lack of clarity in the entire proposal will invite many more avenues for legal challenge as native title parties would have a right to contest the impact categorisation in the NNTT. Introducing this proposal in any form will erode Australia's economic investment attractiveness.

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 NTA); (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 NTA; and (d) future acts proposed to be done by, or for, native title holders in their determination area?

Industry does not support carve outs or exclusions, as it appears inconsistent that the nature of activity should not alter the impact of the activity on Native Title. The proposal introduces further inequity.

The question seems to propose that if the intention of those that undertake the impact is somehow related to gaining commercial gain then they have a greater impact than if the public undertake identical disturbance.

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?

Expanding the scope beyond the 'immediate' footprint creates uncertainty as to how far impacts must be assessed and negotiated. The ALRC is silent on how the bundle of rights will extrapolate beyond the boundaries of the activity. Greater detail on how the ALRC considers the bundle of rights will expand.

The lack of clarity creates far greater complications in approvals with larger potential impact zones. This scope may also be beyond the control of the proponent, for example on different tenure owned by someone else.

This proposal is not supported by Industry. Introducing this indirect impact model to Native Title would lead to unintended consequences.

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?

If the Government does not create an impact based model, then this exclusion is unnecessary. Industry is opposed to the model.

Part (b) of this question, highlights a long-standing ambiguity and suggests that planning decisions are “future acts”. Industry has questioned this and noted that water is currently not considered a part of the bundle of rights in the Native Title Act. This question reflects an expansion of the Native Title rights and would have ramifications beyond the sector and would demand much greater and detailed consultation.

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?

Under the proposed reforms, if a Native Title party lodges an objection to a notified Future Act, the NNTT would decide whether the act may proceed, essentially acting as a gatekeeper before any negotiation on conditions.

Industry has fundamental concerns with this proposal. It has been noted that the ALRC has not clarified whether it is a determined Native Title party, or an applicant, or a subset thereof.

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?

If the NNTT allows a Future Act to proceed, the ALRC seeks to impose conditions to protect native title interests or provide compensation. This substantially expands the remit of the Native Title Act. The conditions would reduce the sovereignty of States to determine what activities occur in their own jurisdiction.

The Australian Constitution, and the *Sea and Submerged Lands Act 1973*, grants States ownership of mineral resources within their boundaries, including the seabed out to three nautical miles.

The ALRC is considering expanding the Tribunal’s powers so it could set payments linked to project value (for example, royalty-style payments based on profits or production) – currently such profit-based conditions are forbidden.

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)?

At present, States can devise their own Native Title Future Act procedures if the Commonwealth minister certifies they meet Native Title Act standards.

This ability should remain, as the primary exception is the system in South Australia are currently exploring becoming nationally consistent. Amending this provision amidst long heralded reform in South Australia would be counterproductive.

In South Australia, Native Title Mining Agreements (NTMA) are an important, fundamental part of agreement making and land access. As much of the land where mineral exploration and mining occurs in South Australia is subject to Native Title. Exploration and mining companies are required to undertake consultation and to have NTMAs in place with First Nations groups to undertake mineral exploration and mining activities.

The requirement to comply with the provisions of Part 9B of the SA Mining Act before starting any operations on Native Title land, finds companies held up in negotiations or attempted agreement processes. In many areas of South Australia, proponents of mineral exploration and mining projects are currently experiencing a long wait to engage, consult and make agreements with Aboriginal groups. Wait times are expected to significantly increase as the number of mining, renewable energy and other projects grow to support national and global decarbonisation goals.

Timeframes and costs to obtain the necessary NTMA agreements for mineral exploration are escalating in South Australia and proving difficult to obtain in some cases. In some instances, companies have waited several years to negotiate agreements while the clock continues to count down on time-limited mineral exploration licences.

The 'low-level activity' permitted under 9B, is no longer viewed as acceptable, and may threaten relationships with Traditional Owners, so it is not adopted by Industry as it was once was.

Furthermore, Part 9B is not required under the new South Australian Hydrogen and Renewable Energy Act or the Petroleum and Geothermal Act, as companies operating under these Acts use the Right to Negotiate. Native Title land access requirements should be the same for mineral exploration and mining as these industries.

Right to Negotiate provides up-front certainty for explorers and miners. With an NTMA in place before a tenement is granted, companies will be able to move more quickly and achieve more on-ground exploration activities during tenure. Administration will also reduce for DEM who are having to provide expenditure compliance provisions to explorers unable to get the required access under Part 9B.

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?

Subdivision F deals with non-claimant applications, this is a mechanism often used by developers or

governments to seek a determination that Native Title does not exist if no claim is filed in time. The current system is used sparingly and should remain on the Statute.

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?

Introducing such a provision that would render a future act invalid would create uncertainty or, frankly, chaos. For example, if a mining lease is granted incorrectly and then found invalid through later legal action after multiple millions of dollar investment has been made it would undercut Australia's investment profile.

The ramifications of such a clause would be substantial, and wide-ranging beyond the mining and mineral exploration sector to the security of the entire Australian cadastral system and tenure.

If introduced, this proposal would incentivise litigation to leverage commercial operations for profit with a threat that a minor procedural failure could undercut the entire foundation upon which an investment is made.

An example of the damage invalidity can cause is clear following the High Court's decision on the *Forrest & Forrest v Wilson* case in August 2017. This case found that where a mineralisation report was not submitted concurrently with the mining application as per the legislated requirements mining leases were invalid.

The Western Australian Government and the Commonwealth Government are working on amending legislation to validate those affected leases. The High Court's interpretation of the process of granting of these mining lease applications as flawed is a risk for Western Australia. Until this legislation is passed, the Western Australian mining tenure system remains exposed to legal challenge.

As was noted in AMEC's initial submission, addressing the *Forrest & Forrest* case will demand Native Title Act reform, as it will trigger the Future Act provisions. It should be a priority for Australia economically to resolving this outstanding risk and one that demands bipartisan support.

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?

The industry is not opposed to supplying better information per se in current section 29 notices (and similar notices), but companies and governments are concerned about increased administrative load and possible delays in issuing notices if requirements are too onerous.

Furthermore, this amendment introduces potential invalidity issues if there are changes in purpose or differences in what the eventual activities undertaken following the Section 29 notice.

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 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 NTA; or (d) in accordance with an alternative method?

This proposal introduces the idea of a standard upfront “future act payment”, an immediate benefit to native title parties when certain acts, which would likely be those of significant impact, occur.

This proposal is not supported by Industry for several reasons, including that it creates a perception issue that a proponent is buying an approval. Even if it is a legislated part of the process, it will be hard for proponents to remove an inference of purchasing consent. Many proponents have to international governance standards and obligations that will be challenged by this arrangement.

This proposal over complicates a fundamental issue, which is that Prescribed Bodies Corporate and Native Title bodies are underfunded. The most direct suggestion is that Commonwealth Government should directly fund them. It removes all potential unintended consequences of complications with the difference between future act payments and compensation; as well as the incentivisation of Native Title parties to commercialise and leverage Future Acts.

Question 25

How should ‘future act payments’ interact with compensation that is payable under Part 2 Division 5 of the NTA?

Industry is opposed to the introduction of future act payments as proposed by the ALRC.

If this were to be implemented there needs to be clear legislative guidance at the outset, ahead of inevitable disputes and litigation, as to whether those initial payments extinguish later compensation rights or not.

If future act payments were introduced it will create a scenario of paying twice, once upfront and again later as compensation. Any negotiated payment, if intended to cover compensation, this must be legally binding as final. However, Part 2, Division 5 is intended to operate must be considered before it is implemented as this will be subject to strenuous legal challenge.

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?

An Indigenous Land Use Agreement (ILUA) is currently the primary vehicle to cover comprehensive arrangements. Importantly ILUAs require an extensive authorisation and registration process, with a clear and broadly accepted process to demonstrate the community consent.

While Industry would welcome a flexible instrument to formalise access and record payments, the litigious reality is that such an agreement would demand similar procedural certainty as an ILUA.

There would need to be clarity on whom could sign, when it would be used, that it was binding to the group, and clarity as to how it would differ from an ILUA.

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?

The Native Title Act should not be amended to expressly address the awarding of costs in the Federal Court proceedings relating to the Federal Court of Australia. Removing the risk of payment of costs for a failed legal challenge would encourage more litigation or tactical court challenges by some groups, potentially causing delays and poor economic outcomes.

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?

The phrasing of Section 237 (b) of the Native Title Act, which defines a future act as an act attracting the expedited procedure, does not align with the practices in a single jurisdiction in Australia.

This provides two alternative pathways for the ALRC: each jurisdiction can amend their legislation so that it aligns; alternatively, the ALRC could propose amendments that clearly define 'sites of particular significance' as a site that is covered by the existing State legislative framework. The inclusion of the phrase "sites of particular significance" in the Native Title Act contributes to the confusion of Aboriginal Cultural Heritage with Native Title. This clarification could lead to streamlining the considerable conversation underway as to the adequacy of each jurisdiction's Aboriginal Heritage.

Other matters not considered

Validation legislation

AMEC urges the ALRC, and subsequently the Commonwealth Government, to prioritise the passage legislative reforms to validate Western Australian mining tenure that were identified as necessary following the High Court's decision on the *Forrest & Forrest v Wilson* case in August 2017.

A portion of the reforms were encapsulated in the Western Australian Mining Amendment (Procedures and Validation) Bill 2018, with the necessary partner Commonwealth legislation necessitating a Native Title Act Future Act.

The amending legislation is needed to validate those mining leases where a mineralisation report was not submitted concurrently with the mining application as per the legislated requirements.

Consequentially this validation process would demand Native Title Act amendments as a Future Act.

The High Court's interpretation of the process of granting of these mining lease applications as flawed is a risk for Western Australia. Until this legislation is passed, the Western Australian mining tenure system remains exposed to legal challenge.

Progressing this Bill will provide Industry with much needed confidence in the security of their mining tenure and remove a significant risk hanging over their investments.

The urgency of this legislative reform was reinforced by the 2022 Western Australian Mining Warden Court decision of *True Fella Pty Ltd v Pantoro South Pty Ltd*. This decision relied on *Forrest & Forrest* and led to invalidating all of the 3,400 mineral exploration applications that were pending. Without legislative reform, Industry fears that there will be similar cases and challenges in the future that will have ramifications for the security of Western Australian titles register.

Second renewals of Western Australian mining leases

Section 78 of the Western Australian *Mining Act 1978* (WA Mining Act) provides for the initial term of a mining lease to be 21 years and, on application, for further renewals of the lease to be granted. Under section 78(1)(b) of the Mining Act, the first renewal of a mining lease for a further term of 21 years is "as of right" where an application for renewal is made in the prescribed manner during the final year of the initial term of that lease.

Under section 78(2), all further renewals of a mining lease (each not to exceed 21 years) are at the Minister's discretion.

The WA State Government's interpretation of Section 26D of Native Title Act is that it will apply on an alternating basis. So that following two terms (42 year) of a mining lease, the mining lease holder will have to speak with the Native Title party. Then the lease will hold for a further 42 years, before again seeking confirmation via the Right to Negotiate.

This hopscotch is not the intention of the Native Title Act (or the WA Mining Act). Consideration should be given to legislate amendments to correct this unintended consequence.

Final Remarks

AMEC appreciates the opportunity to provide industry feedback regarding the draft Discussion Paper and the willingness of the ALRC to meet.

In summary, what is proposed is very difficult to implement and, if it were, we consider it would have substantial and immediate negative economic ramifications for the Australian mineral exploration and mining sector.

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