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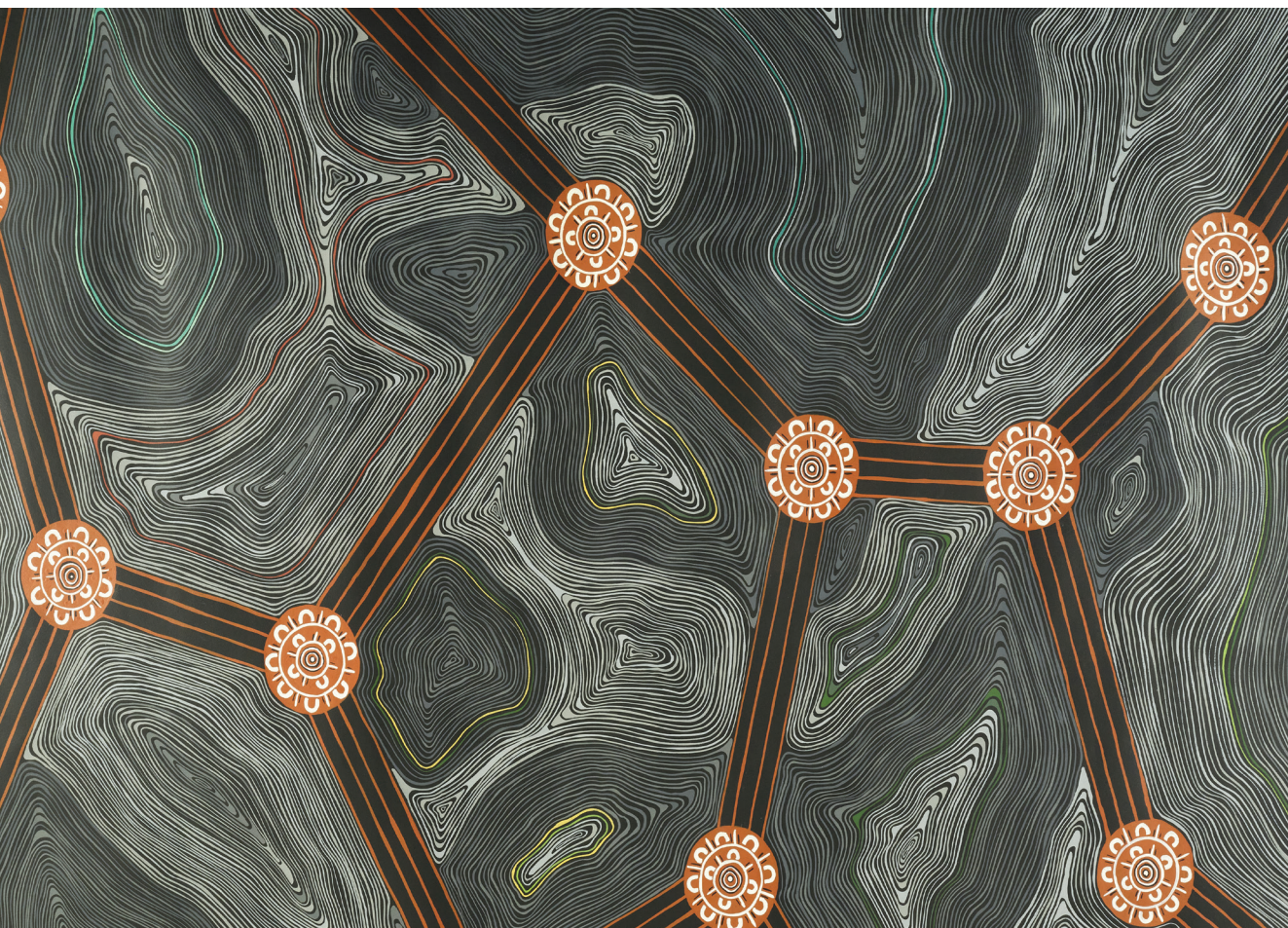
Australian Law Reform Commission

FINAL REPORT

FULFILLING THE PROMISE OF *MABO*: REFORMING THE FUTURE ACTS REGIME IN THE *NATIVE TITLE ACT 1993* (CTH)

ALRC Report 144

March 2026





Australian Government

Australian Law Reform Commission

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FULFILLING THE PROMISE OF *MABO*: REFORMING THE FUTURE ACTS REGIME IN THE *NATIVE TITLE ACT 1993* (CTH)

**Unless otherwise stated, this Report reflects the law as at
31 January 2026.**

The Australian Law Reform Commission (ALRC) was established on 1 January 1975 and operates in accordance with the *Australian Law Reform Commission Act 1996* (Cth).

The office of the ALRC is at Level 14, 300 Flinders Street, Melbourne VIC 3000.

Postal Address: PO Box 209, Flinders Lane VIC 8009

Telephone: +61 03 9959 5300

Email: info@alrc.gov.au

Website: www.alrc.gov.au

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ISBN: 978-1-7637876-8-1

Commission Reference: ALRC Report 144, 2026

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Printed by Fineline Print & Copy Service, NSW

Typeset by Post Pre-press Group

Cover artwork: Tupun Wultatinyeri (Ngarrindjeri/Kukabarak),
Duwatyin;ap nunkeri, 2026, acrylic on canvas.



This artwork was created through The Torch, a not-for-profit organisation that provides art, cultural and arts industry support to First Nations people currently in, or recently released, from Victorian prisons.

Note on content

Aboriginal and Torres Strait Islander peoples should be aware that this Report (and other publications and documents of the Inquiry) may contain the names or stories of deceased persons.

Acknowledgement of Country

We acknowledge the Traditional Custodians of Country throughout Australia and their continuing connection to land, waters, skies, and community. We pay our respects to their Elders past and present, and to their community leaders, and extend that respect to all Aboriginal and Torres Strait Islander peoples.

We also acknowledge the distinct cultural identity of Aboriginal and Torres Strait Islander peoples. In this report, we use the terms 'Aboriginal and Torres Strait Islander peoples' and 'First Nations people' synonymously. The term 'Indigenous' is used in reference to original source materials, such as the United Nations Declaration on the Rights of Indigenous Peoples. All terms are used with the utmost respect.

The ALRC also acknowledges the generosity of time, effort, and input we have received from First Nations communities, organisations, and individuals. We recognise the fatigue that intensive consultation can create, and we offer our appreciation to all those who have shared their experiences and contributed to the Inquiry.



Australian Government

Australian Law Reform Commission

The Hon Michelle Rowland MP
Attorney-General of Australia
Parliament House
Canberra ACT 2600

31 March 2026

Dear Attorney-General

Review of the Future Acts Regime

On 4 June 2024, the Australian Law Reform Commission received Terms of Reference to undertake an inquiry into the future acts regime in the *Native Title Act 1993* (Cth). On behalf of the Members of the Commission involved in this Inquiry, and in accordance with the *Australian Law Reform Commission Act 1996* (Cth), I am pleased to present you with the Final Report on this reference (ALRC Report 144, 2026).

Yours sincerely

A handwritten signature in blue ink, appearing to read 'M Bromberg', with a long horizontal flourish extending to the right.

The Hon Justice Mordecai Bromberg

President

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Terms of Reference

Review of the Future Acts Regime

I, the Hon Mark Dreyfus KC, Attorney-General of Australia, having regard to:

- the operation of the *Native Title Act 1993* (Cth) (*Native Title Act*) and the future acts regime for over 30 years
- the passage of almost a decade since the last review of the *Native Title Act* (*Connection to Country: Review of the Native Title Act 1993* (ALRC Report 126))
- the significance of the *Native Title Act*, with native title having now been determined to exist in exclusive and non-exclusive form over a substantial proportion of the Australian land mass, with almost 500 claims determined and more than 100 claims ongoing
- the deep connections of First Nations Australians to Country that are recognised through a determination of native title, and the considerable processes that native title holders have undergone to achieve this legal recognition
- the opportunity for the native title system to contribute significantly to social, cultural, environmental and economic outcomes for First Nations people, businesses, organisations and communities
- the role of the future acts regime as a precursor to economic and other activities on native title land
- the importance of the future acts regime being appropriately designed for Australia's current and future social and economic development, in a way that respects the rights and interests of native title holders
- the Australian Government's agreement in principle with Recommendation 4 of the former Joint Standing Committee on Northern Australia in its report, "*A Way Forward*", released in October 2021

refer to the Australian Law Reform Commission (ALRC) for inquiry and report, pursuant to s 20(1) of the *Australian Law Reform Commission Act 1996* (Cth), a review of the future acts regime in the *Native Title Act* (Part 2, Division 3 of the *Native Title Act*).

In particular, the ALRC is asked to consider:

- the intention of the *Native Title Act*, as stated in its preamble, to be a special measure for the advancement of First Nations peoples, and to ensure native title holders are able to fully enjoy their rights and interests
- the current operation of the future acts regime, including Indigenous land use agreements (ILUAs), and related parts of the *Native Title Act*, with the aim of rectifying any inefficacy, inequality or unfairness

- options for efficiencies in the future acts regime to reduce the time and cost of compliance for all parties
- the rights and obligations recognised in the international instruments to which Australia is a party or which it has pledged to support, including the United Nations Declaration on the Rights of Indigenous Peoples
- options within laws and legal frameworks to support native title groups to effectively engage with the future acts regime and to support consensus within groups in relation to proposed future acts
- options to support native title groups, project proponents and governments to share in the benefits of development on native title land, including opportunities for native title groups to lead or co-lead development, and for ensuring native title groups receive commensurate and timely compensation for the diminution of native title rights and interests caused by future acts
- options for how the future acts regime can support fair negotiations and encourage proponents and native title groups to work collaboratively in relation to future acts
- the different levels of procedural rights of native title groups in relation to different types of future acts and whether these are appropriately aligned with the impacts on native title rights and interests
- whether the *Native Title Act* appropriately provides for new and emerging industries engaging in future acts
- the National Native Title Tribunal's role in relation to future acts
- how the rights in the future acts regime compare with other land rights regimes, such as the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), and any relevant international approaches
- options to strengthen data collection and appropriate data transparency to support the operation of the future acts regime.

The ALRC is asked to conduct the review with regard to the Socio-economic Outcomes and Priority Reforms of the National Agreement on Closing the Gap.

In undertaking its review, the ALRC should consider any findings and recommendations of inquiries, review processes and reports that the ALRC considers relevant, including other work underway to address recommendations arising from the *A Way Forward* report.

Consultation

The ALRC should identify and consult key users of the native title system, including native title holders, future acts proponents, relevant government departments and agencies and other non-government stakeholders.

Timeframe

The ALRC should provide its final report to the Attorney-General by 8 December 2025.

The Terms of Reference were amended on 3 November 2025 by the Attorney-General, extending the deadline to 31 March 2026.

Participants

Australian Law Reform Commission

President

The Hon Justice Mordecai Bromberg

Part-time Commissioner

Tony McAvoy SC

Assistant Commissioner

Nick Testro

Executive Director

Ruth Barson

Principal Legal Officer

Christopher Ash

Senior Legal Officers

Mark Evenhuis (until January 2025)

Shanti Fatchen (from March 2025)

Jane Hall (including as Acting Principal Legal Officer from February 2026)

Legal Officers

Christopher Alexander (from July 2025)

Hannah Coffey (from February 2026)

Ellie Filkin (from February until May 2025)

Billie Hook (including as Acting Senior Legal Officer from February 2026)

Research Officers

Aidan Mansfield (from January until June 2025)

Elli Murphy (from November 2025)

Additional review and support

Eliza Drake
Emma Felman
Ellie Filkin
Dr Vannessa Ho
Dakota Lamont
Dr Emma Larking
Aiden Morton
Jacinth Pathmanathan
Eva Squire
Isadora Vadasz
Sam Warner
Celene Wong

Communications and Media

Jez Hunghanfoo

Operations and Executive Support

Andrea Compston (until December 2024)
Dakota Lamont (from August 2025)
Nicole Sechler (from May 2025)
Madeleine Stewart (until May 2025)

Advisory Committee

Sheila Begg, State Solicitor's Office (WA)	Tim Goodwin, Victorian Bar
Jason Behrendt, Chalk & Behrendt	Professor Marcia Langton AO, University of Melbourne
Leah Cameron, Marrawah Law	Jamie Lowe, National Native Title Council
Ann Daniel, Federal Court of Australia	Elly Patira, Essential Services Commission (Vic)
Professor Megan Davis AC, University of New South Wales	Brad Welsh, Energy Resources of Australia
Matt Denyer, Minerals Council of Australia	Professor Peter Yu AM, Australian National University

Expert Readers

Megan Brayne, Comhar Group
Emily Gerrard, Comhar Group
Sturt Glacken KC, Victorian Bar
Professor Lee Godden, University of Melbourne
Dayne Kingsford, Victorian Bar
David Knobel, P&E Law
Sarah McBratney, Jigsaw Legal
Michael Pagsanjan, MPS Law
Matt Patterson, P&E Law
Gavin Scott, Norton Rose Fulbright
Melissa Watts, M Watts Legal
Stephen Wright SC, Western Australian Bar
Ben Zillmann, Allens

Law Students

Monash University

Jessie Jones	Elli Murphy
Gabriella Kazenbroot-Phillips	Violet O'Connor
Amy Li	Sinali Ratnayake
Anna Litchen	Alison Richards
Andrew Lou	Prudence Spencer
Aiden Morton	

University of Melbourne

Mara Antic	Tian Ai Pang
Celina Chear	Freya Psarras
Charlotte Conroy	Shinjini Shrivastava
Ally Huang	Angela Stevens
Amelia Joseph	Jeannine Taleyratne
Ali Lo Giudice	Victoria Tischenko
Susan Malikoff	Sam Warner
Aidan Mansfield	

Recommendations

Chapter 3

Recommendation 1

The *Native Title Act 1993* (Cth) be amended to require that all parties negotiating any future act agreement must negotiate in good faith, with good faith to be informed by conduct standards set out in the Act.

Recommendation 2

The *Native Title Act 1993* (Cth) be amended to identify standards of conduct to be followed in order to meet the obligation to negotiate in good faith referred to in Recommendation 1. These standards should promote the obtaining of free, prior, and informed consent of the native title parties to a future act agreement and should address the following matters:

- a. to enable informed consent and the informed agreement of each party, including within a reasonable time of any request, each negotiation party provide to each other party access to relevant and sufficient information, other than confidential information including the native title party's culturally sensitive information, relating to the future act and the activities likely to be undertaken pursuant to it;
- b. a negotiation party in a position to, or under an obligation to, facilitate the effective participation of another party, take such action (including by providing resources) as is reasonable to do in the circumstances;
- c. no negotiation party engage in dishonesty, coercion, duress, or fraud, exert undue influence over another party or disrespect the internal protocols of another party, including as to the person or persons through which negotiations for that party are to be conducted;
- d. each negotiation party communicate with, and respond to, each other negotiation party within a reasonable time;
- e. each negotiation party be open-minded to proposals made by another party, genuinely consider any such proposals, and be willing to make compromises where compromise is appropriate;
- f. each negotiation party should ensure that substantive matters for negotiation are able to be addressed and endeavour to avoid the deadlocking or preventing of negotiations about those matters by procedural disagreements; and
- g. negotiation parties should do what a reasonable person would do in the circumstances and act in accordance with the *Native Title Act 1993* (Cth).

Recommendation 3

The Australian Government develop guidelines, in consultation with the National Native Title Tribunal, in relation to the good faith standards outlined in Recommendation 2 to assist negotiation parties in operationalising the standards in the *Native Title Act 1993* (Cth) by providing examples of behaviour or indicia that may or may not amount to negotiating in good faith. These guidelines should be publicly available.

Recommendation 4

The *Native Title Act 1993* (Cth) be amended to consolidate, clarify, and expand the functions available to the National Native Title Tribunal to assist parties in negotiating future act agreements, implementing agreements, and resolving disputes under agreements. The Tribunal's functions should extend to conducting, as appropriate in each case:

- a. conferences;
- b. mediation;
- c. conciliation; and
- d. consent arbitration of disputes under a future act agreement, including pursuant to a dispute resolution clause of the kind contemplated by Recommendation 14.

Recommendation 5

1. The *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) be amended to allow Prescribed Bodies Corporate to use standing instructions to enter into future act agreements (subject to compliance with any conditions imposed by the common law holders), provided that the future act agreed to under such agreements is not an act that extinguishes native title.
2. These amendments be accompanied by further amendments to either or both of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) which the Australian Government, in consultation with relevant stakeholders, determines for the purpose of identifying appropriate mechanisms for providing common law holders with oversight over the exercise of standing instructions by the Prescribed Body Corporate.

Recommendation 6

The *Native Title Act 1993* (Cth) be amended to provide that, for a future act where the Prescribed Body Corporate for the land and waters of the future act is the proponent, and where the future act does not require as a procedural right either negotiation or agreement by the Prescribed Body Corporate, the future act is valid (with the Prescribed Body Corporate remaining subject to the obligations to native title holders under the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth)).

Recommendation 7

The *Native Title Act 1993* (Cth) be amended to provide that, for a future act where the Prescribed Body Corporate for the land and waters of the future act is the proponent, where the future act requires as a procedural right either negotiation or agreement by the Prescribed Body Corporate, including an indigenous land use agreement, then consistently with the approach taken by the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth), the Prescribed Body Corporate be required to:

- a. where the common law holders have provided standing instructions as currently permitted under the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth), comply with those standing instructions;
- b. where there are no standing instructions in place, consult with and obtain the consent of the common law holders; and
- c. provide a certificate to the Native Title Registrar certifying that it has complied with the applicable process in either (a) or (b) of this Recommendation, and such certificate is recorded in accordance with Recommendation 8.

Recommendation 8

Where a Prescribed Body Corporate lodges a certificate with the Native Title Registrar in line with Recommendation 7, the Registrar must place details about the certificate on a publicly available record. The record should confirm the Prescribed Body Corporate details, a description of the area covered by the certificate, and the future act or class of acts covered by the certificate.

Recommendation 9

Regulation 9 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) be amended to require that when:

- a. a Prescribed Body Corporate prepares a Regulation 9 Certificate under the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) certifying that it has consulted and obtained consent in relation to a native title decision;
- b. the native title decision subject to consultation and consent is the decision to enter an indigenous land use agreement or agreement under section 31 of the *Native Title Act 1993* (Cth); and
- c. an ancillary agreement has been negotiated,

the Regulation 9 certificate must specify that the Prescribed Body Corporate has also discharged its consultation and consent obligations in relation to that ancillary agreement.

Recommendation 10

Part 2 Division 3 Subdivision C of the *Native Title Act 1993* (Cth) be amended to require that where the native title party to an area agreement indigenous land use agreement is a registered native title claimant or a group as defined by s 24CD, the native title group must consider the terms of any ancillary agreement to that area agreement indigenous land use agreement when authorising it.

Chapter 4**Recommendation 11**

The *Native Title Act 1993* (Cth) be amended to provide that:

1. Subject to the exemptions in (2)–(5) below, any term or clause in a future act agreement which has the effect of limiting or restricting a native title party from:
 - a. raising a grievance relating to the making or operation of the agreement, or the conduct of any party to it;
 - b. exercising rights and accessing remedies under the law, including under cultural heritage legislation; or
 - c. disclosing information about or in relation to the agreement to a governmental authority, any court, or tribunal;is prohibited from inclusion in an agreement and is void and unenforceable to the extent it has that effect.
2. The prohibition not apply to the raising of a grievance where a grievance is not raised to protect a legitimate interest or is raised vexatiously.
3. The prohibition not apply to a term in so far as that term would limit or restrict the disclosure of commercially sensitive and confidential information which is recognised as such by the agreement and where the public interest in the non-disclosure of the information is not outweighed by the public interest in the information being disclosed in furtherance of a purpose identified in (1).
4. The prohibition not apply in relation to a dispute resolution process under the agreement.
5. The prohibition not apply to existing agreements but offending clauses in existing agreements should be rendered void and unenforceable.

Recommendation 12

1. The *Native Title Act 1993* (Cth) be amended to provide that any term of a future act agreement which has the effect of limiting or restricting how native title parties administer or manage payments under agreements is prohibited, and void and unenforceable to the extent it has that effect.
2. This recommendation is not intended to apply to existing agreements.

Recommendation 13

A model periodic review clause be developed for inclusion in future act agreements. The model periodic review clause should be developed through a consultative process and the *Native Title Act 1993* (Cth) amended to provide that the model clause will be deemed to apply in any future act agreement with an unspecified duration, or a duration of longer than five years, unless the parties agree an alternative form of review clause. This recommendation is not intended to apply to existing agreements.

Recommendation 14

1. The *Native Title Act 1993* (Cth):
 - a. require that any future act agreement contain a dispute resolution clause for dealing with disputes under the agreement. The dispute resolution clause should include a process for consultation, mediation, or conciliation (which may incorporate traditional processes of the native title parties as well as access to mediation or conciliation before the National Native Title Tribunal) and, should those processes fail to resolve a dispute, provide for resolution by arbitration conducted by the National Native Title Tribunal or an agreed arbitrator;
 - b. prohibit any provision in a dispute resolution clause which limits access to the courts in relation to any issue which may be the subject of arbitration under the clause but provide that, other than for an application for urgent interlocutory or injunctive relief, courts may, on the application of a party to the agreement, stay a proceeding where it is in the interests of justice to do so; and
 - c. provide for an appeal on a question of law to the Federal Court of Australia.
2. Should the parties to the agreement not include in their agreement a dispute resolution clause of the kind required by the *Native Title Act 1993* (Cth), a model dispute resolution clause (drafted by the Australian Government in consultation with the National Native Title Tribunal and embodied in a regulation) containing the features identified above, be deemed by the Act to be included in the agreement.
3. This recommendation is not intended to apply to existing agreements.

Recommendation 15

Sections 24EB(4), (5), and (6) and s 24EBA(5) of the *Native Title Act 1993* (Cth) be amended to provide that statutory compensation payable under an indigenous land use agreement is full and final for any future act the subject of an indigenous land use agreement only where the agreement expressly provides as such.

Recommendation 16

The *Native Title Act 1993* (Cth) be amended to provide that:

- a. for any future act for which statutory compensation is payable by a state, territory, or the Commonwealth (to whom the act is attributable), the laws of a state, territory, or the Commonwealth may provide that a person other than the state, territory, or Commonwealth is liable to pay the statutory compensation; and
- b. if, when the statutory compensation for a future act is required to be paid it is not reasonably practicable for the native title holders to recover compensation from that other person, the relevant state, territory, or Commonwealth (to whom the act is attributable) remains liable to pay the statutory compensation.

Chapter 5

Recommendation 17

The *Native Title Act 1993* (Cth) be amended to require that there be published:

- a. on the Register of Indigenous Land Use Agreements, information as to whether or not the indigenous land use agreement recorded on the Register has an associated ancillary agreement; and
- b. on the record of agreements made under section 31 of the Act, a statement to the effect that the parties consent to the doing of the future act or class of act in which the act is included, and if this consent is subject to conditions.

This Recommendation operates prospectively.

Recommendation 18

The *Native Title Act 1993* (Cth) be amended to provide that:

- a. under s 199A, the Native Title Registrar's functions include an own motion power to maintain the Register of Indigenous Land Use Agreements, including by requesting information from the agreement parties in relation to an indigenous land use agreement; and
- b. in addition to the matters already set out in s 199C(1), include an additional ground for the removal from the Register of Indigenous Land Use Agreements of the details of an agreement that, having provided all the parties to the agreement with a reasonable opportunity to comment, the Registrar believes, on reasonable grounds, that the agreement has expired or been terminated, or has otherwise come to an end.

Recommendation 19

The *Native Title Act 1993* (Cth) be amended to:

- a. require the creation of a record of expired indigenous land use agreements that expire on or after the implementation of this Recommendation, to be established and kept by the Native Title Registrar; and

- b. provide that when an indigenous land use agreement is removed from the Register of Indigenous Land Use Agreements for any reason, it is to be placed on the record of expired indigenous land use agreements.

Recommendation 20

The *Native Title Act 1993* (Cth) be amended to provide that:

- a. the Prescribed Body Corporate for a determined area has a prima facie right to access all registered indigenous land use agreements, agreements under section 31 of the Act, and any ancillary agreement (to an indigenous land use agreement or agreement under section 31 of the Act) in so far as such an agreement deals with the determination area of the Prescribed Body Corporate;
- b. the right to access is exercisable against any person who has access to such an agreement on the making of a written request by the Prescribed Body Corporate (including the Native Title Registrar) and on the giving of notice to every party to the agreement (in so far as they are known or reasonably discoverable to the Prescribed Body Corporate);
- c. where, following a reasonable time after the giving of notice, no dispute about access has arisen, the Native Title Registrar be empowered to provide the Prescribed Body Corporate with a copy of the relevant registered indigenous land use agreements or agreements under section 31 of the Act; and
- d. where there is any dispute about access, the parties may seek resolution by the Federal Court of Australia (preferably by a Registrar of that court at first instance) and specify that, in resolving any dispute about access to information which is confidential, the Court have regard to whether the public interest in refusing access is outweighed by the public interest in the Prescribed Body Corporate obtaining access for the purposes for which access has been sought.

Recommendation 21

The *Native Title Act 1993* (Cth) provide that where any difficulty or substantial unfairness arises for a Prescribed Body Corporate or the native title holders for a determined area, and the difficulty or unfairness arises in part or in whole because the determined area, or part of it, is subject to a pre-determination future act agreement which was not made or authorised by the same persons as those who are the native title holders:

- a. the Federal Court of Australia be empowered to make such orders as the Court considers appropriate to resolve the difficulty or substantial unfairness;
- b. specify that in doing so, the Federal Court of Australia have regard to any difficulty or substantial unfairness that may be occasioned on a party or a beneficiary to the pre-determination agreement by the making of an order or orders; and

- c. provide that an order made in accordance with this Recommendation has effect despite anything contained in the pre-determination agreement, the Act, or any other Commonwealth law or any State or Territory law.

In this Recommendation 'pre-determination future act agreement' means either a registered indigenous land use agreement or an agreement under section 31 of the *Native Title Act 1993* (Cth), or any ancillary agreement to that indigenous land use agreement or agreement under section 31 of the Act, made before a native title determination was made for the relevant area.

Recommendation 22

The *Native Title Act 1993* (Cth) be amended to empower the Federal Court of Australia to construe and make a declaration as to the meaning of a future act agreement. The declaration would be binding on all parties to the agreement.

Recommendation 23

Either or both of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) be amended to require that Prescribed Bodies Corporate:

- a. keep a copy of all future act agreements, made on or after the implementation of this Recommendation, at their registered office. This includes agreements that have been amended without a reauthorisation process, and agreements entered into using standing instructions;
- b. make copies of those future act agreements, and an accessible high-level summary of the agreement, available to common law holders who request it; and
- c. include an accessible high-level summary of each future act agreement negotiated during the financial year in the Prescribed Body Corporate's annual report.

Chapter 6

Recommendation 24

Part 2 Division 3 Subdivisions G–N of the *Native Title Act 1993* (Cth) be repealed and replaced with a scheme for validating any infringement made by a future act to native title rights and interests which better aligns the nature and extent of the procedural rights to native title rights and interests, with the nature and extent of the infringement upon those rights and interests and the capacity of native title parties to enjoy and exercise them. The impact-based scheme should be based on the reforms outlined in Recommendations 25 to 38.

Recommendation 25

The impact-based scheme provide for five groups of future act categories with the following applicable procedural rights for each respective group:

- a. Group A ‘assessed limited impact acts’, which require that affected native title parties be notified of the future act and provided an opportunity to comment (see Recommendation 30);
- b. Group B ‘assessed lower impact acts’, which require that affected native title parties be afforded an opportunity to engage in consultation with the relevant government party and/or future act proponent (see Recommendation 31);
- c. Group C ‘negotiated lower impact acts’, which require that affected native title holders be afforded the procedural rights and other conditions as agreed by the relevant Prescribed Body Corporate and the relevant government party and/or future act proponent (see Recommendation 33);
- d. Group D ‘right to negotiate higher impact acts’, which require that affected native title parties be afforded the right to negotiate in accordance with the right to negotiate provisions (see Recommendation 34); and
- e. Group E ‘equivalency future acts’, which require that affected native title parties be afforded the same procedural rights, including the capacity to avoid an infringement upon their native title rights and interests, as would be afforded to a holder of freehold title in the same circumstances (see Recommendation 35).

Recommendation 26

The *Native Title Act 1993* (Cth) provide that:

- a. regulations may prescribe the categories of future acts that are included in each of Group A and Group B;
- b. the regulations may not prescribe for inclusion in Groups A or B any category of future act or any future act which is included in Group E or future acts involving compulsory acquisition for a non-governmental purpose;
- c. the regulations are to be made upon, and be consistent with, a recommendation of the National Native Title Tribunal (‘NNTT Recommendation’) made in accordance with the impact-based assessment process outlined in Recommendation 27; and
- d. the regulations be legislative instruments subject to the requirements of the *Legislation Act 2003* (Cth), including Parliamentary disallowance, but excluding the sunseting regime in Part 4 of that Act.

Recommendation 27

The *Native Title Act 1993* (Cth) provide that:

- a. the National Native Title Tribunal be empowered to make NNTT Recommendations which identify and define the nature and scope of a category, or categories, of future acts to be included by regulation in either Group A or Group B; and
- b. the President of the Tribunal or, at his or her election, another Presidential member of the Tribunal or a panel of members of the Tribunal presided over by a Presidential member, carry out the functions of assessing and making a NNTT Recommendation.

The *Native Title Act 1993* (Cth) and/or delegated legislation (akin to rules) made by the Tribunal provide for a process for a category, or categories, of future acts to be assessed by the Tribunal as appropriate for inclusion in either Group A or Group B:

- c. the process shall include the following features:
 - i. initiation by the President, or on the application of an interested person (interested persons to include government, future act proponents or their representative bodies, and native title parties or their representative bodies);
 - ii. the capacity for the President to call for applications to be made in relation to future act categories relevant to a particular industry or industry sector;
 - iii. the capacity for the Tribunal to, at the discretion of the President, deal with multiple applications in a single process;
 - iv. the capacity for the Tribunal to amend, adjust, or reformulate the nature and scope of a future act category the subject of any application;
 - v. the capacity for the Tribunal to notify interested persons of the initiation of a process and for interested persons to apply to be included as 'participating parties';
 - vi. the capacity of the Tribunal to determine the 'participating parties' for each process; and
 - vii. subject to any requirements made by the Act, the provision to the Tribunal of a broad discretionary power to fairly determine its procedures and the manner by which it will carry out its assessment function, including a capacity to conduct the process, or part of it, in an inquisitorial manner by making its own investigations and utilising its own experts or referees.

The *Native Title Act 1993* (Cth) require that:

- d. participating parties be given the opportunity to be consulted by the Tribunal and for their views to be fairly considered, including, at the discretion of the Tribunal, by providing evidence and/or submissions; and
- e. in making its assessment, the Tribunal be satisfied that the category of future acts meets the 'lower-impact criteria' (see Recommendation 28) for inclusion in Group B and that criteria as well as the 'limited-impact criteria' (see Recommendation 29) for inclusion in Group A.

The *Native Title Act 1993* (Cth) provide that:

- f. in order for a category of future acts to satisfy the 'limited-impact criteria' or 'lower-impact criteria', the Tribunal be empowered to determine and specify conditions applicable to a future act falling within the scope of the category;
- g. the Tribunal be empowered to determine and specify the conditions necessary to provide the native title parties affected by the future act, fair and just redress within a reasonable time; and
- h. the Tribunal may designate a condition to be a 'validating condition', non-compliance with which would result in the future act being invalid from the time the future act is done, unless the invalidity is rectified by a court (see Recommendation 75).

The *Native Title Act 1993* (Cth) provide that a NNTT Recommendation be a decision amenable to review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

Recommendation 28

The *Native Title Act 1993* (Cth) provide that:

- a. a category of future acts may be recommended by the National Native Title Tribunal for inclusion in Group A or B where the future acts within that category do not consist of, authorise, or otherwise involve:
 - i. 'major disturbance' to any land or waters the subject of the native title rights and interests concerned;
 - ii. material impact on the cultural rights and interests of the native title parties, including on their capacity to enjoy or exercise those rights and interests, in relation to their freedom to carry out rights, ceremonies, or other activities of cultural significance on the land or waters in accordance with their traditions or by interfering with areas or sites recognised by their traditional laws and customs as culturally significant;
 - iii. substantial interference with the carrying on, or the enjoyment of, the community or social activities or facilities of the native title parties; and
 - iv. economic loss or detriment to the native title parties other than where the loss or detriment likely to be caused is negated by a contemporaneous payment or the provision of a benefit.

For the purposes of (i), 'major disturbance' does not include a significant change or alteration to the land or waters which is transitory and where, within a reasonable time of completion of the activity undertaken pursuant to the future act which has caused the change or alteration, the land or waters will be substantially restored to their condition prior to the activity being done. It does not include the taking and use of water in an amount which regulations require that the right to negotiate be afforded to native title parties.

- b. impact shall be assessed having regard to the impact of the future act within the category on the native title rights and interests including the impact of the activities likely to occur in pursuance of the future act; and
- c. impact will be assessed contextually, taking into account the surrounding circumstances in which the activities, likely to be undertaken under a future act within the category, are likely to occur.

Recommendation 29

The *Native Title Act 1993* (Cth) provide that a future acts category may be recommended by the National Native Title Tribunal for inclusion in Group A where the Tribunal is satisfied that it meets the 'lower-impact criteria' (see Recommendation 28) and is also satisfied that, by reason of the limited impact on native title rights and interests and the capacity of the native title parties to enjoy and exercise those rights and interests, of the future acts falling within the category, consultation of the kind provided for in Recommendation 31 with affected native title parties for the purpose of mitigating any such impact is unnecessary.

Recommendation 30

The *Native Title Act 1993* (Cth) provide that when a future act falls within Group A, before the future act is done, the government party must:

- a. notify, in the way determined by legislative instrument, any representative Aboriginal or Torres Strait Islander bodies, and native title parties in relation to the land or waters that will be affected by the future act, that the future act is proposed to be done; and
- b. provide an opportunity to comment, within a reasonable time, as follows:
 - i. to any registered Prescribed Body Corporate in relation to the land or waters that will be affected by the future act;
 - ii. if there is no Prescribed Body Corporate, to any registered native title claimants in relation to the land or waters that will be affected by the future act; or
 - iii. if there is no registered Prescribed Body Corporate or registered native title claimant in relation to the land or waters that will be affected by the future act, to any representative Aboriginal or Torres Strait Islander bodies; and
 - iv. consider any comments made by those parties and provide any comments made to the proponent for its consideration.

Recommendation 31

The *Native Title Act 1993* (Cth) provide that when a future act falls within Group B, before the future act is done and before a final decision is made about whether (or how) activities likely to be undertaken in the pursuance of the future act are to be done, the government party must:

- a. notify, in the way determined by legislative instrument, any representative Aboriginal or Torres Strait Islander bodies, and native title parties in relation to the land or waters that will be affected by the future act, that the future act is proposed to be done; and
- b. provide an opportunity to be consulted in relation to the future act as follows:
 - i. to any registered Prescribed Bodies Corporate in relation to the land or waters that will be affected by the future act;
 - ii. if there is no Prescribed Body Corporate, to any registered native title claimants in relation to the land or waters that will be affected by the future act; or
 - iii. if there is no registered Prescribed Body Corporate or registered native title claimant in relation to the land or waters that will be affected by the future act, to any representative Aboriginal or Torres Strait Islander bodies.

The *Native Title Act 1993* (Cth) provide that the notification must identify:

- c. a reasonable timeframe within which the native title party or any representative Aboriginal or Torres Strait Islander bodies may request consultation;
- d. how that party may request consultation; and
- e. that the party may request consultation with either or both of the government party proposing to do the future act and any proponent.

The *Native Title Act 1993* (Cth) provide that if consultation is not requested by the native title party or any representative Aboriginal or Torres Strait Islander bodies, then the future act may be done after the expiry of the reasonable timeframe notified for requesting consultation.

The *Native Title Act 1993* (Cth) provide that if consultation is requested, then:

- f. sufficient information about the future act is to be provided to the native title party or any representative Aboriginal or Torres Strait Islander bodies to ensure that consultation is properly informed;
- g. the parties must consult with a view to ascertaining any reasonably practicable measures to avoid or mitigate any adverse impact of the future act on native title rights and interests; and
- h. the government party and/or future act proponent must give genuine consideration to adopting any measures requested by the native title party or any representative Aboriginal or Torres Strait Islander bodies.

The *Native Title Act 1993* (Cth) provide that after consultation occurs, the person doing the future act is, on request of the native title party or any representative Aboriginal or Torres Strait Islander bodies, to prepare and provide to that native title party a consultation report which includes:

- i. details of the consultation undertaken;
- j. details of any measures to avoid or mitigate the adverse impact of the future act agreed to be done by the future act proponent; and
- k. where avoidance or mitigatory measures requested by the native title parties or any representative Aboriginal or Torres Strait Islander bodies have not been adopted, an explanation as to why they have not adopted.

The *Native Title Act 1993* (Cth) provide that any measures raised in consultation which a future act proponent has agreed to do, shall constitute conditions for the doing of the future act.

Recommendation 32

The *Native Title Act 1993* (Cth) provide that when the procedural right associated with a future act is notification and opportunity to comment or opportunity to be consulted, utilising those opportunities does not amount to a 'native title decision' for the purposes of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth).

Recommendation 33

The *Native Title Act 1993* (Cth) provide that in order for a future act to be validated in accordance with the provisions applicable to Group C:

- a. the proposed future act must relate to land or waters where native title has been determined to exist;
- b. the person proposing to do the future act must:
 - i. notify the relevant Prescribed Body Corporate that it wishes for the future act to be validated in accordance with Group C; and
 - ii. enter into a 'low impact agreement' with the relevant Prescribed Body Corporate which may include the conditions upon which the future act is to be done and conditions providing for the redress to be provided to the affected native title holders;
- c. before making a 'low impact agreement' the relevant Prescribed Body Corporate must:
 - i. be satisfied that the future act is one that meets the 'lower-impact criteria' (see Recommendation 28). In reaching its satisfaction, the Prescribed Body Corporate may have regard to any conditions to be agreed to with the future act proponent which specify measures that a future act

proponent must take to avoid or to mitigate the physical, economic, cultural, and community or social impacts on native title rights and the capacity for native title parties to enjoy those rights; and

- ii. have, and comply with, standing instructions from the common law holders to enter such an agreement.

The *Native Title Act 1993* (Cth) provide that:

- d. the 'low impact agreement' is enforceable in the same manner as other future act agreements;
- e. where a 'low impact agreement' specifies a condition to be a 'validating condition', non-compliance with that condition would result in the future act being invalid from the time the future act is done, unless the invalidity is rectified by a court (see Recommendation 75); and
- f. a future act that falls within a category in Group A or Group B may nevertheless be the subject of validation in accordance with the provisions for Group C.

Recommendation 34

The *Native Title Act 1993* (Cth) provide that the following future acts fall within Group D:

- a. the creation or variation of a right to mine (unless allocated to Groups A or B);
- b. compulsory acquisition (whether by legislative act or otherwise) for a non-governmental purpose; and
- c. future acts that are not Group A, B, C, or E future acts.

The *Native Title Act 1993* (Cth) provide that in relation to a future act that falls within Group D:

- d. the government party must give notice of the proposed future act to the native title parties and any representative Aboriginal or Torres Strait Islander bodies pursuant to s 29 of the Act; and
- e. the affected native title parties be afforded the right to negotiate in accordance with the right to negotiate provisions of the Act.

The *Native Title Act 1993* (Cth) provide that in relation to a future act that falls within Group D in an area that is unclaimed and undetermined, the future act may be validly done (without further compliance with the applicable procedural rights) provided that a native title determination application is not:

- f. made before the end of three months after the notification day; and
- g. placed on the Register of Native Title Claims before the end of four months after the notification day.

Recommendation 35

The *Native Title Act 1993* (Cth) provide that the following future acts fall within Group E:

- a. legislative acts (other than the creation or variation of a right to mine, or compulsory acquisition for non-governmental purpose);
- b. compulsory acquisition for a governmental purpose;
- c. emergency acts; and
- d. acts that would require the agreement of the freehold title holder, except future acts falling within s 24JAA made prior to 1 January 2030.

The *Native Title Act 1993* (Cth) provide that in relation to a future act that falls within Group E:

- e. the government party must give notice of the proposed future act to the native title parties and any representative Aboriginal or Torres Strait Islander bodies; and
- f. the affected native title parties be afforded the same procedural rights, including the capacity to avoid an infringement upon their native title rights and interests, as would be afforded to a holder of freehold title in the same circumstances.

The *Native Title Act 1993* (Cth) provide that in relation to a future act that falls within Group E in an area that is unclaimed and undetermined, the future act may be validly done (without further compliance with the applicable procedural rights) provided that a native title determination application is not:

- g. made before the end of three months after the notification day; and
- h. placed on the Register of Native Title Claims before the end of four months after the notification day.

Recommendation 36

The *Native Title Act 1993* (Cth) provide that the non-extinguishment principle applies to all categories of future acts within Groups A, B, C, D, and E except compulsory acquisition.

Recommendation 37

The *Native Title Act 1993* (Cth) provide that:

- a. in relation to all categories of future acts within Groups A, B, C, D, and E, the native title holders are entitled to statutory compensation for the future act in accordance with Part 2 Division 5 of the Act;
- b. the statutory compensation pass-through contemplated in Recommendation 16 applies to the entitlement to statutory compensation mentioned in (a); and

- c. when determining statutory compensation under Part 2 Division 5, the court, person, or body determining statutory compensation may take into consideration any redress provided by any conditions imposed through Groups A, B, or C processes.

Recommendation 38

Having regard to the time likely to be required for the National Native Title Tribunal to undertake its assessment process and make the NNTT Recommendations for Groups A and B (see Recommendation 27) and, having in mind that the time required is currently uncertain and dependent upon the resourcing which the Tribunal may be provided with, transitional provisions be enacted in conjunction with the enactment of the reforms recommended to the *Native Title Act 1993* (Cth), which:

- a. preserve the capacity of a future act, which currently requires affected native title parties to be afforded either notice of a future act, an opportunity to comment or consultation, to be dealt with in accordance with the statutory procedures currently in force; and
- b. provide that the preservation:
 - i. not apply to a future act that falls within Group E;
 - ii. in relation to a future act which falls into a category of future acts included in Group A or Group B, lapse on the day such a category is included in those Groups; and
 - iii. end on a date to be determined (by reference to the time likely to be required by the Tribunal), which date shall not exceed 24 months from the date of enactment of the proposed reforms.

Recommendation 39

Sections 32 and 237 of the *Native Title Act 1993* (Cth) be repealed and related provisions amended to repeal the expedited procedure.

Chapter 7

Recommendation 40

Part 2 Division 3 Subdivision G of the *Native Title Act 1993* (Cth), which provides for future acts concerning primary production, be repealed in its entirety.

Recommendation 41

Section 24HA of the *Native Title Act 1993* (Cth), which provides for the management or regulation of water, aquatic resources, and airspace, be amended to:

- a. amend ss 24HA(1) and 24HA(2) to clarify that ‘water’ and ‘management or regulation of water’ does not include ‘the bed or subsoil under, or airspace over, any sea, river, lake, tidal inlet, bay, estuary, harbour, subterranean waters or other watercourse or water body, or the shore, or subsoil under or airspace over the shore, between high water and low water’;

- b. provide in s 24HA(7) that the procedural rights for future acts covered by s 24HA that confer a right for the taking or use of water or aquatic resources at deemed significant impact quantities (see paragraph (d) of this recommendation) are subject to the right to negotiate in Part 2 Division 3 Subdivision P, and all other future acts concerning water and aquatic resources are subject to the procedural right to provide the native title parties the opportunity to be consulted;
- c. provide that the procedural rights for future acts concerning airspace is to provide notice and an opportunity to comment (see Recommendation 30 relating to the new notice and comment procedure); and
- d. enable the Minister to make delegated legislation to prescribe the amounts of water and aquatic resources that will constitute a deemed significant impact quantity, such regulations to be a legislative instrument and subject to the requirements of the *Legislation Act 2003* (Cth), including Parliamentary disallowance, but excluding the sunseting regime in Part 4 of that Act.

Recommendation 42

Part 2 Division 3 Subdivision I of the *Native Title Act 1993* (Cth), which provides for pre-existing right-based acts, renewals, and extensions, be amended to provide that all renewals, re-grants, and extensions of non-native title rights and interests be subject to the equivalency principle, so that the procedural rights afforded to native title parties are no less favourable than the rights afforded to ordinary title holders for such acts.

Recommendation 43

Section 24JA(1)(e)(ii) of the *Native Title Act 1993* (Cth), which enables a future act in the area of a reservation granted prior to 23 December 1996 to be done where the act's impact on native title is no greater than the impact that any act that could have been done under or in accordance with the reservation would have had, be repealed.

Recommendation 44

Section 24JA(2) of the *Native Title Act 1993* (Cth), which provides that a future act that consists of the use by a statutory authority or any person in good faith of an area subject to a lease that was granted to the statutory authority for a particular purpose, be repealed.

Recommendation 45

Section 24JB of the *Native Title Act 1993* (Cth) be amended to:

- a. repeal s 24JB(2), which provides that if a future act is the construction or establishment of public works, native title is extinguished; and
- b. provide that the non-extinguishment principle applies to all future acts that are covered by Part 2 Division 3 Subdivision J.

Recommendation 46

Part 2 Division 3 Subdivision J of the *Native Title Act 1993* (Cth), which provides for future acts done in the area of a reservation that was granted prior to 23 December 1996, be amended to provide that the procedural right to be followed before the act can be done is to provide an opportunity to be consulted to the native title parties.

Recommendation 47

Part 2 Division 3 Subdivision K of the *Native Title Act 1993* (Cth), which provides for the construction of facilities that provide services to the general public, be amended to:

- a. provide in ss 24KA(1)(b)(i) and (ii) that one of the criteria for s 24KA to apply to a future act is that the purpose of the facility listed in s 24KA(2) must be ‘an essential service, or to facilitate the delivery of an essential service, to the general public’ in place of the existing requirement that the facility be ‘operated for the general public’;
- b. clarify in s 24KA(1)(c) that, for s 24KA to apply to a future act, the effect of the act on native title rights and interests must be minimal, in addition to the existing requirement that reasonable access by the native title holders to the area in the vicinity of the facility is not prevented;
- c. clarify that a future act that requires or confers a right of exclusive possession on any person in relation to the facility (whether practically or as a term of the grant of an interest) cannot be covered by s 24KA; and
- d. replace ss 24KA(7)–(9), which set out procedural rights where s 24KA applies, with a requirement that: if the future act could be done on ordinary title, the procedural rights that must be afforded to the native title parties are the same rights as the ordinary title holder; or, if the future act could not be done on ordinary title (in which case, there are no procedural rights afforded to ordinary title holders), the opportunity to be consulted applies.

Recommendation 48

Part 2 Division 3 Subdivision L of the *Native Title Act 1993* (Cth), which provides for low impact future acts, be amended to:

- a. amend s 24LA(1)(b) to exclude Subdivision L from applying to acts that are the making, amendment, or repeal of legislation and the making or conferring of a reservation, proclamation, dedication, condition, permission, or authority;
- b. insert a new paragraph that provides that, where a future act that is covered by Subdivision L is in relation to land or waters where an approved determination that native title exists in relation to the land or waters has not been made, before the act is done, the procedural rights are that the person proposing to do the act must notify and provide an opportunity to comment to:
 - i. if there is a registered native title claim over the land or waters where the act will be done, the registered native title claimants; or

- ii. if there is no registered native title claim over the land or waters where the future act will be done, the native title representative body for the area;
- c. amend s 24LA(1)(a), which provides that a future act covered by Subdivision L must take place before and cannot continue after an approved determination of native title that native title exists is made in relation to the land and waters, to be subject to there being a low impact agreement in place with the Prescribed Body Corporate for the act;
- d. insert a new paragraph into s 24LA that provides that, where a future act that is covered by Subdivision L is in relation to land or waters where an approved determination that native title exists has been made, before the act is done, the person proposing to do the act must enter into a low impact agreement with the Prescribed Body Corporate;
- e. insert a new definition for 'low impact agreement' into s 24LA as 'an agreement that a Prescribed Body Corporate can enter into with a proponent or government party in which the Prescribed Body Corporate consents to a future act that is covered by Subdivision L, provided that the Prescribed Body Corporate is satisfied the act is one that is covered by Subdivision L, and the Prescribed Body Corporate has and complies with standing instructions from the common law holders to enter such agreements'; and
- f. provide that the native title holders are entitled to statutory compensation for acts covered by Subdivision L in accordance with Part 2 Division 5.

Recommendation 49

Part 2 Division 3 Subdivision M of the *Native Title Act 1993* (Cth), which provides for the freehold test, and associated provisions in Part 2 Division 3 Subdivision P, be amended to:

- a. provide in s 24MD(2A) that statutory compensation payable under an agreement for the surrender of native title by compulsory acquisition is full and final only if this is provided for in the agreement;
- b. provide in s 24MD(6A) that the procedural rights of the native title parties in relation to the future act, which are the same procedural rights as they would have on the assumption that they instead held ordinary title to any land concerned and to land adjoining or surrounding any waters concerned, include the same procedural rights that are afforded to ordinary title holders following the grant of an interest that is a future act to which Subdivision M applies;
- c. repeal s 24MD(6B), which contains procedural rights for compulsory acquisitions for the purpose of conferring rights on persons other than the government party undertaking the acquisition and the creation or variation of a right to mine for the sole purpose of the construction of an infrastructure facility associated with mining;

- d. repeal s 26(2)(f) entirely, which provides that compulsory acquisition of native title rights and interests that relates solely to land or waters wholly within a town or city is not subject to Part 2 Division 3 Subdivision P of the Act; and
- e. repeal s 26(1)(c)(iii)(B), which provides that compulsory acquisition for an infrastructure facility is not subject to Part 2 Division 3 Subdivision P of the Act.

Recommendation 50

Part 2 Division 3 Subdivision N of the *Native Title Act 1993* (Cth), which provides for future acts in offshore places, be amended to:

- a. amend s 24NA to be subject to the right to negotiate in Part 2 Division 3 Subdivision P of the Act;
- b. amend s 24NA to provide that, if a future act would be covered by Subdivision K or Subdivision M on the assumption the future act was to be done in an onshore place, the same future act done in an offshore place can be covered by s 24NA and, subject to Part 2 Division 3 Subdivision P, the procedural rights in ss 24NA(8)–(10) apply;
- c. amend s 24NA to provide that, if a future act would not be covered by Subdivision K or Subdivision M on the assumption the future act was to be done in an onshore place, the same future act done in an offshore place cannot be covered by s 24NA; and
- d. repeal and replace ss 24NA(8)–(10) to require that, subject to Part 2 Division 3 Subdivision P, the procedural right for future acts that are covered by Subdivision N is to provide the native title holders and registered native title claimants with an opportunity to be consulted.

Recommendation 51

Section 26D of the *Native Title Act 1993* (Cth) be amended to repeal s 26D(1) so the renewal, re-granting, re-making, or extension of a right to mine is subject to the procedures and requirements for renewal, re-making, and extensions of non-native title rights and interests in Subdivision I.

Recommendation 52

The *Native Title Act 1993* (Cth) be amended to provide that:

- a. a government party must not include the expedited procedure statement unless it is satisfied, with reference to s 237 of the Act, that the future act is an act attracting the expedited procedure;
- b. a government party must not include the expedited procedure statement unless it is satisfied that the future act is not a project act;

- c. if one or more native title parties lodges an expedited procedure objection application, the government party must establish the act is an act attracting the expedited procedure; and
- d. where the expedited procedure applies, the affected native title party must be afforded an opportunity to be consulted.

Recommendation 53

Section 237 of the *Native Title Act 1993* (Cth) be amended to:

- a. substitute 'particular significance' in s 237(b) with 'significance'; and
- b. substitute 'major disturbance' in s 237(c) with 'more than minimal impact'.

Chapter 8

Recommendation 54

Sections 26A, 26B, 26C, 43, and 43A of the *Native Title Act 1993* (Cth) be repealed to remove the Commonwealth Minister's power to approve state and territory arrangements to exclude or modify the application of the right to negotiate in Part 2 Division 3 Subdivision P of the Act.

Recommendation 55

Section 26(3) of the *Native Title Act 1993* (Cth) be repealed to extend the right to negotiate to future acts in areas beyond the landward side of the mean high-water mark of the sea.

Recommendation 56

The *Native Title Act 1993* (Cth) be amended to empower the Federal Court of Australia to extend the time specified in ss 24FB(c) and 24FC(d) of the Act to up to 12 months, in order to provide time for the filing of a native title determination application on the application of a representative Aboriginal or Torres Strait Islander body for the area or person claiming to hold native title in relation to any of the land or waters in the area of a non-claimant application.

Recommendation 57

- 1. Form 2 contained in *Native Title (Federal Court) Regulations 2024* (Cth) be amended to require an applicant to indicate whether the applicant will continue to seek a determination that native title does not exist, if s 24FA protection is obtained.
- 2. Section 66 of the *Native Title Act 1993* (Cth) be amended to provide that where an application has been notified on the basis that the applicant will discontinue if s 24FA protection is obtained and despite obtaining s 24FA protection the applicant seeks to continue, the application must be re-notified and notice of the renewed basis for it, be given.

Recommendation 58

The *Native Title Act 1993* (Cth) be amended to:

- a. provide for a record of future act notices that is to be established and maintained by the National Native Title Tribunal; and
- b. require that a copy of all future act notices be provided to the Tribunal for inclusion on the record at the time of notification to native title parties.

Recommendation 59

The *Native Title (Notices) Determination 2024* (Cth) be amended to insert a new schedule consisting of a template future act notice, intended to be used when a party is required to provide notification of a future act under Part 2 Division 3 of the *Native Title Act 1993* (Cth).

Chapter 9

Recommendation 60

The provisions of Part 2 Division 3 Subdivision P of the *Native Title Act 1993* (Cth) that comprise the right to negotiate be amended to create a process which operates as follows:

- a. The negotiation parties must negotiate in accordance with the good faith conduct standard outlined in Recommendations 1 and 2.
- b. After three months have elapsed since the notification day of a future act, a native title party may apply to the National Native Title Tribunal seeking a determination that the future act cannot be done (see Recommendation 69). If the Tribunal does not determine that the future act cannot be done, the parties must continue to negotiate in accordance with the good faith conduct standard outlined in Recommendations 1 and 2.
- c. At any stage, the negotiation parties may jointly seek a binding determination of issues referred to the National Native Title Tribunal, or an independent third party, during negotiations (see Recommendation 64). The time between the referral and determination of the separate question should not count towards the minimum negotiation period. The parties may also access Tribunal facilitation services (conferences, mediation, and conciliation) throughout agreement negotiations (see Recommendations 4 and 61).
- d. If the parties reach agreement, the agreement would be formalised in the same manner as agreements presently made under section 31 of the *Native Title Act 1993* (Cth).
- e. If the parties do not reach agreement within 12 months of the notification day of a future act, any party may apply to the National Native Title Tribunal, or another independent third party agreed between the negotiation parties (see Recommendation 72), for a determination as to whether the future act can be done (see Recommendation 65).

- f. If the National Native Title Tribunal or other independent third party determines that the future act can be done subject to conditions, it may determine both financial and non-financial conditions (see Recommendations 66 and 67).

Recommendation 61

In exercising the functions referred to in Recommendation 4, the National Native Title Tribunal should have access to the case management functions of conferences, mediation, and conciliation in relation to negotiations under section 31 of the *Native Title Act 1993* (Cth). These functions may be accessed in the following ways:

- a. Prior to a future act determination application being made, any party may request the Tribunal's assistance by way of conferences, mediation, or conciliation, and the Tribunal may, at its discretion, direct attendance of some or all of the negotiation parties and direct the type of assistance to be provided to the parties.
- b. Following the making of a future act determination application, the National Native Title Tribunal may, upon a party's request or on the Tribunal's own motion, compel the attendance of some or all of the negotiating parties at a conference, mediation, or conciliation.
- c. In any conciliation in relation to negotiations under section 31 of the *Native Title Act 1993* (Cth), the National Native Title Tribunal may make recommendations either in writing or informally about steps that negotiation parties should take towards meeting their obligations to negotiate in good faith.

Recommendation 62

Section 36 of the *Native Title Act 1993* (Cth) be amended to provide that where an allegation of failure to negotiate in good faith is raised by a negotiation party under s 31 of the Act, the negotiation party against whom the allegation has been raised must establish that it has negotiated in good faith.

Recommendation 63

The *Native Title Act 1993* (Cth) be amended to provide that, if the National Native Title Tribunal is satisfied, pursuant to s 36(2) of the Act, that a negotiation party has twice failed to negotiate in good faith with respect to a particular future act, the Tribunal may, in its discretion, relieve other negotiating parties of their obligation to further negotiate in relation to that future act.

Recommendation 64

The *Native Title Act 1993* (Cth) be amended to provide the National Native Title Tribunal, or an independent third party, with a discretionary power to determine, by arbitration, issues referred to it by agreement of the negotiation parties.

Chapter 10

Recommendation 65

Section 39 of the *Native Title Act 1993* (Cth) be amended to provide that:

1. Subject to paragraph (2), an arbitral body must not determine that a future act can be done without agreement of the native title parties, unless it is satisfied that the environmental, economic, social, or cultural impact or effect of the act on:
 - a. the capacity of the native title parties to enjoy their registered native title rights and interests;
 - b. the way of life, culture, and traditions of those parties;
 - c. the development and enjoyment of the social, cultural, and economic structures of any of those parties;
 - d. the freedom of access by any of those parties to the land or waters concerned and their freedom to carry out rites, ceremonies, or other activities of cultural significance on the land or waters in accordance with their traditions; and
 - e. any area or site, on the land or waters concerned, of significance to the native title parties in accordance with their traditions,will be effectively addressed by the determination of s 38(1)(c) conditions or other available measures which, fairly and justly and within a reasonable time, redress the effect of the future act, including where appropriate, by mitigating its effect.
2. An arbitral body unable to reach the state of satisfaction required by paragraph (1), may determine that the future act can be done if satisfied that, having regard to the nature and extent of the inability to effectively remediate the effect of the future act, the doing of the future act is nevertheless necessary to meet the just and most compelling requirements of the nation.
3. In making its determination, the arbitral body must give due consideration to:
 - a. the traditional laws and customs of the native title parties; and
 - b. Australia's obligations towards Aboriginal and Torres Strait Islander peoples under international law.

Recommendation 66

The *Native Title Act 1993* (Cth) be amended to provide that in exercising its discretion to determine conditions that apply to a future act, an arbitral body:

- a. must have regard to the matters in s 39 of the Act as reformed in accordance with Recommendation 65, and consider conditions that would provide fair and just redress, including measures to mitigate the adverse impacts of the act, including any environmental, economic, social, or cultural impacts of the act; and
- b. may consider any other matter that the arbitral body considers relevant.

Recommendation 67

Section 38(2) of the *Native Title Act 1993* (Cth) be repealed.

Recommendation 68

Part 2 Division 5 of the *Native Title Act 1993* (Cth) be amended to provide that when determining compensation under that Division, the court, person, or body determining compensation may take into consideration any payments made pursuant to a s 38(1)(c) condition determined by an arbitral body for the relevant compensable future act.

Recommendation 69

The *Native Title Act 1993* (Cth) be amended to provide that, in effect, when the National Native Title Tribunal is considering whether a future act can be done at the early determination stage, it must determine that the future act cannot be done if it is satisfied that there is no reasonable prospect that on a final hearing, the arbitral body will be satisfied of the criteria in s 39 of the Act, as reformed in accordance with Recommendation 65.

If the Tribunal does not determine that the future act cannot be done, then the parties must continue to negotiate in good faith under the right to negotiate provisions.

Recommendation 70

Sections 36(3), 36(4), 36A, 36B, and 36C of the *Native Title Act 1993* (Cth) be repealed.

Recommendation 71

Section 29 of the *Native Title Act 1993* (Cth) be amended to provide that if an arbitral body has determined that a future act cannot be done, a government party may not issue a notice under this section relating to the same or substantially similar future act without first obtaining leave of the National Native Title Tribunal, or unless five years has elapsed since the determination. In determining whether to grant leave, the Tribunal may consider:

- a. the identity of the proponent;
- b. whether there has been a material change of circumstances since the determination was made; and
- c. any other matter the Tribunal considers relevant.

Recommendation 72

The *Native Title Act 1993* (Cth) be amended to provide that as an alternative to the National Native Title Tribunal, negotiation parties may, jointly and by consent, refer to an agreed private arbitrator for consent arbitration and determination:

- a. a future act determination application for a determination as to whether a future act may be done, and, if so, on what conditions; and
- b. a separate issue that has arisen in negotiations.

The *Native Title Act 1993* (Cth) should set out a framework for the appointment of private arbitrators and making of determinations by them. The framework should include the following elements:

- c. Negotiation parties may refer a future act determination application to a private arbitrator only after the parties have participated in mediation or conciliation, or sought the assistance of the National Native Title Tribunal during negotiations.
- d. Private consent arbitration is only available where all negotiation parties consent to arbitration and jointly appoint an independent arbitrator.
- e. In making determinations, arbitrators exercise the same functions as the National Native Title Tribunal, including the power to make all of the same determinations as the Tribunal, necessary to decide the matters referred for arbitration.
- f. Private arbitrators must carry out their functions consistently with s 109 of the *Native Title Act 1993* (Cth), and must afford procedural fairness to the parties and provide written reasons for decisions.
- g. Eligibility criteria for a private arbitrator should be the same or similar to the criteria for appointing non-Presidential members of the National Native Title Tribunal set out in the *Native Title Act 1993* (Cth).
- h. In making a determination as to whether a future act can be done, a private arbitrator must apply the same criteria and be empowered to exercise the same powers as the National Native Title Tribunal would as an arbitral body if it were making the same determination (see Recommendation 65).
- i. Determinations made by the private arbitrator should have the same legal effect as a determination made by an arbitral body under Part 2 Division 3 of the *Native Title Act 1993* (Cth).
- j. A right of appeal to the Federal Court of Australia on questions of law.
- k. A mechanism for lodging and registering determinations made by a private arbitrator with the National Native Title Tribunal for the purpose of recording outcomes on the publicly accessible database maintained by the Tribunal.

Chapter 11

Recommendation 73

The *Native Title Act 1993* (Cth) be amended, in so far as necessary, to expressly impose corresponding obligations for each procedural right (either existing or proposed) and for each entitlement conferred by conditions that may be imposed through any of the processes of the impact-based scheme proposed by Recommendation 24. The amendment should identify, as appropriate, the person or persons upon whom the obligation is imposed.

Recommendation 74

The *Native Title Act 1993* (Cth) be amended to provide that:

- a. where the applicable procedural right for a future act is the right to negotiate or a process that requires the consent of a native title party, a failure to comply with any corresponding obligation results in a future act being invalid from the time the future act is done, unless the invalidity is rectified by an eligible court; and
- b. subject to Recommendation 75, for all other procedural rights arising under the statutory procedures, such as notification, comment, or consultation, non-compliance with the corresponding obligation does not result in invalidity at the time that the future act is done, but invalidity may be declared by an eligible court.

In all cases, non-compliance with obligations which correspond to a procedural right should be subject to the civil remedy regime outlined in Recommendation 76.

Recommendation 75

The *Native Title Act 1993* (Cth) be amended to provide that where a validating condition is attached to a future act by regulations as contemplated by Recommendation 27 or by an agreement in relation to a Group C future act as contemplated by Recommendation 33, failure to comply with the validating condition results in a future act being invalid from the time the future act is done, unless the invalidity is rectified by an eligible court.

Non-compliance with validating conditions should also be subject to the civil remedy regime outlined in Recommendation 76.

Recommendation 76

The *Native Title Act 1993* (Cth) be amended to implement a civil remedy regime to address non-compliance with obligations either directly or indirectly imposed by the Act in relation to the validation of future acts. Eligible state, territory, and federal courts identified by the Act should be empowered to provide wide remedial and compliance powers including:

- a. injunctive relief on an interlocutory or final basis;
- b. declarations that a future act has been done invalidly;
- c. where a future act is done invalidly or declared to be done invalidly, an order rectifying invalidity, including on conditions as determined by the court;
- d. to award compensation and make any order the court considers appropriate to address the non-compliance and its consequences; and
- e. to impose a pecuniary penalty.

The statutory civil remedy regime should apply to the enforcement of:

- f. the procedural rights of the future acts regime;

- g. conditions in regulations relating to the categorisation of future acts under the impact-based scheme as contemplated by Recommendation 27;
- h. conditions in a consultation report relating to a Group B future act under the impact-based scheme as contemplated by Recommendation 31;
- i. conditions in an agreement relating to a Group C future act as contemplated by Recommendation 33;
- j. conditions placed upon the doing of a future act by a determination of an arbitral body;
- k. the obligation to pay reasonable costs pursuant to s 60AB of the Act, as reformed by Recommendation 78;
- l. entitlements and obligations in future act agreements; and
- m. determinations made pursuant to a dispute resolution clause in a future act agreement.

Recommendation 77

The *Native Title Act 1993* (Cth) be amended to introduce a 'modified asymmetrical costs' framework, modelled upon s 46PSA of the *Australian Human Rights Commission Act 1986* (Cth), for proceedings brought in relation to future acts in eligible courts identified by the *Native Title Act 1993* (Cth).

Chapter 12

Recommendation 78

Section 60AB of the *Native Title Act 1993* (Cth) and Part 4 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) be amended to provide that:

- a. in addition to Prescribed Bodies Corporate, a registered native title claimant may charge fees for costs incurred for any of the purposes referred to in s 60AB and Part 4 of the Regulations;
- b. only costs that are reasonably incurred may be charged by native title parties; and
- c. a person who has been charged a fee under s 60AB is obligated to pay that fee.

Recommendation 79

Section 60AB(1) of the *Native Title Act 1993* (Cth) be amended to apply to the negotiation and implementation of any agreement related to, or in connection with, the doing of a future act pursuant to the Act.

Recommendation 80

Section 60AB of the *Native Title Act 1993* (Cth) and Part 4 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) be amended to provide that a native title party may charge a fee for costs reasonably incurred when performing

functions as a party in any mediation, conciliation, arbitration, or an inquiry or proceeding related to a future act or acts.

Recommendation 81

Section 60AC of the *Native Title Act 1993* (Cth) and related provisions in Part 4 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) be repealed.

Chapter 13

Recommendation 82

The *Native Title Act 1993* (Cth) be amended to provide for Native Title Plans as a self-determined pathway to validity for future acts. A Native Title Plan would provide a non-mandatory pathway to validity, unless the Plan was approved by the relevant state or territory, in which case, other than for an indigenous land use agreement, the Native Title Plan would be the sole and therefore mandatory pathway to validity. Additionally, the Act should provide that Native Title Plans:

- a. may be developed by a Prescribed Body Corporate for the whole or part of the relevant determined area;
- b. may set out processes and conditions for how future acts may be validated in the relevant determined area;
- c. must be registered with the National Native Title Tribunal, subject to a simple registration test;
- d. must be approved by the common law holders before registration, and subject to a review by the common law holders every five years, or such shorter period as they should determine; and
- e. may deal with matters that do not relate to future acts validity, but not in a manner that would be legally binding or that would displace state or territory laws.

The *Native Title Act 1993* (Cth) should also provide a mechanism for certifying that the terms of a Native Title Plan have been complied with for the purposes of confirming validity. Such certificates should be lodged with the National Native Title Tribunal and maintained on a public record.

Recommendation 83

To aid in the uptake and implementation of Native Title Plans, the Australian Government provide specific resourcing, support, and evaluation mechanisms for Native Title Plan pilot projects, with a view to providing ongoing resourcing for the development of Native Title Plans by all interested Prescribed Bodies Corporate.

Chapter 14

Recommendation 84

The Australian Government substantially increase funding for Prescribed Bodies Corporate to ensure they and native title holders are able to meaningfully participate in the future acts regime.

Recommendation 85

The Australian Government substantially increase funding for the National Native Title Tribunal to fulfil its existing functions, including facilitation and mediation support to the users of the native title system, and the additional functions contemplated by the reforms in this Report.

Recommendation 86

The *Native Title Act 1993* (Cth) be amended to provide that when considering appointments to the National Native Title Tribunal, as part of a merits-based process and before making a recommendation to the Governor-General, the Minister must consider the need for a diversity of skills, expertise, lived experience, and knowledge within the Tribunal. Lived experience and knowledge may be gained through being, or through working with and representing, Aboriginal or Torres Strait Islander peoples.

Glossary and Key Terms

ALRC	Australian Law Reform Commission
alternative procedure ILUA	An ILUA under Part 2 Div 3 Subdivision D of the <i>NTA</i> . An alternative procedure ILUA cannot be used where there are registered native title bodies corporate for the whole of the agreement area and cannot provide for the extinguishment of native title rights or interests
ancillary agreement	Any other written agreement made in connection with the doing of the future act to which an ILUA or section 31 agreement relates: see ss 41A(1)(c) and 41B(2)(d) of the <i>NTA</i>
area agreement ILUA	An ILUA under Part 2 Div 3 Subdivision C of the <i>NTA</i> . An area agreement ILUA cannot be used where there are registered native title bodies corporate for the whole of the agreement area. An area agreement ILUA can be made with all registered native title claimants for the agreement area, all registered native title bodies corporate for the agreement area, and (where there is an unclaimed or undetermined area) any person who claims to hold native title and/or the NTRB/SP for the unclaimed or undetermined area
body corporate ILUA	An ILUA under Part 2 Div 3 Subdivision B of the <i>NTA</i> . A body corporate ILUA can only be used where there are registered native title bodies corporate for the whole of the agreement area, which may include areas where a determination that native title does not exist has been made or areas that have been excluded from a determination due to native title being extinguished
CATSI Act	<i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i> (Cth)

common law holders	The people who hold native title for an area where native title has been determined by the Federal Court to exist: see s 56 of the <i>NTA</i>
Country or Sea Country	Country and Sea Country are terms often used by Aboriginal and Torres Strait Islander peoples to refer to the lands, waterways, and seas to which they are connected. The terms are used to signify complex ideas and encompass both physical and non-physical connection. For the purposes of this Report, Country refers to areas of land where native title parties hold or assert to hold native title. Similarly, Sea Country refers to areas of sea where native title parties hold or assert to hold native title
Crown land	Land owned by a state, territory, or Commonwealth government (excluding freehold title)
Discussion Paper	Australian Law Reform Commission, <i>Review of the Future Acts Regime</i> (Discussion Paper No 88, 2025)
expedited procedure	The procedure under s 32 of the <i>NTA</i> that applies to the grant of certain mining interests (mainly exploration and prospecting licences and permits) where the criteria in s 237 of the <i>NTA</i> are met
freehold title	See the definition for ordinary title below
future act	An act that affects native title, being an act that is wholly or partly inconsistent with the continued existence, enjoyment, or exercise of native title rights and interests. A future act may be: the making, amendment, or repeal of legislation; the grant, issue, variation, extension, renewal, revocation, or suspension of a licence, permit, authority, or instrument; the creation, variation, extension, renewal, or extinguishment of any interests in relation to land or waters; or the exercise of any executive power of the Crown: see ss 226, 227, and 233 of the <i>NTA</i>

future act agreement	Any agreement related to the doing of a future act pursuant to the <i>NTA</i> . For example, the term is used in this Report to include agreements such as an ILUA, section 31 agreement, ancillary agreement, low impact agreement (as recommended by the ALRC in Chapters 6 and 7 : see the definition for low impact agreement below), or agreement made pursuant to s 24MD of the <i>NTA</i>
future act determination	A determination made by the NNTT under the right to negotiate as to whether a future act may be done, may be done subject to conditions, or must not be done: see s 38 of the <i>NTA</i>
future act determination application	An application made to the NNTT under the right to negotiate by a negotiation party seeking a determination as to whether a future act may be done: see s 35 of the <i>NTA</i>
ILUA	Indigenous Land Use Agreement, being an agreement under Part 2 Div 3 Subdivision B, C, or D of the <i>NTA</i>
impact-based scheme	A term used to describe the model recommended by the ALRC to replace Subdivisions G–N of the <i>NTA</i> in which procedural rights afforded to native title parties are informed by the impact of the act on native title rights and interests, as outlined in Chapter 6
Issues Paper	Australian Law Reform Commission, <i>Review of the Future Acts Regime</i> (Issues Paper No 50, 2024)
Juukan Gorge Inquiry	Inquiry conducted by the Parliamentary Joint Standing Committee on Northern Australia into the destruction of 46,000 year old caves at Juukan Gorge in the Pilbara region of Western Australia. The Juukan Gorge Inquiry was referred by the Senate to the Committee on 11 June 2020 and the Committee delivered its final report in October 2021

low impact agreement	An agreement that a proponent can enter into with a PBC for future acts that the PBC assesses as having a low impact on native title and for which the PBC has standing instructions from the common law holders to be able to enter: see Recommendation 33 in Chapter 6 and Recommendation 48 in Chapter 7
National Agreement on Closing the Gap	Coalition of Peaks and Council of Australian Governments, <i>National Agreement on Closing the Gap</i> (2020)
native title claim group or claim group	In relation to an application for a determination of native title made in the Federal Court, the persons who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed: see ss 61(1) and 253 of the <i>NTA</i>
native title determination	A determination by the Federal Court under s 225 of the <i>NTA</i> as to whether or not native title rights and interests are recognised as existing in relation to a particular area of land or waters
native title holders	The term native title holders is used in this Report to refer to PBCs and common law holders, being those who have been determined to hold native title. Native title holders is a subset of the broader term native title parties When native title holders is used in discussion concerning the preamble of the <i>NTA</i>, this also includes a reference to those who may hold native title, where a determination of native title has not yet been made

native title parties	The term native title party is used in this Report to refer to registered native title claimants, PBCs, and common law holders, being the people to whom procedural rights under the future acts regime are afforded In relation to agreement-making and NNTT inquiries specifically, native title party is a reference to the party to the agreement or that proceeding that represents the native title interests
native title rights and interests or native title	The communal, group, or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where: (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and (c) the rights and interests are recognised by the common law of Australia: see s 223(1) of the <i>NTA</i>
NNTT	National Native Title Tribunal
NTA	<i>Native Title Act 1993</i> (Cth)
NTAA 1998	<i>Native Title Amendment Act 1998</i> (Cth)
NTRB/SP	Native Title Representative Body or Native Title Service Provider, being a representative Aboriginal or Torres Strait Islander body recognised as such by the Commonwealth Minister under the <i>NTA</i> . NTRB/SPs have various functions under the <i>NTA</i> in relation to a specified region, including exercising facilitation and assistance functions for native title parties: see ss 203AD and 253 of the <i>NTA</i>

ordinary title	For land outside of the Australian Capital Territory and Jervis Bay — an estate in fee simple (freehold title). For land within the Australian Capital Territory or Jervis Bay — a lease granted by or on behalf of the Commonwealth: see s 253 of the <i>NTA</i> Ordinary title excludes estates or leases granted under a law to or for the benefit of Aboriginal peoples or Torres Strait Islanders This term is used interchangeably with freehold title in this Report
pastoral lease	A lease granted under state or territory legislation for pastoral purposes (for example, sheep or cattle grazing)
PBC or Prescribed Body Corporate	A corporation incorporated under the <i>CATS/Act</i> that is determined by the Federal Court to hold the determined native title rights and interests on trust or as agent for the common law holders under the <i>NTA</i> When a PBC is registered on the National Native Title Register, it becomes a registered native title body corporate: see ss 56(2) and 253 of the <i>NTA</i> Alternatively referred to as the registered native title body corporate or RNTBC
PBC Regulations	<i>Native Title (Prescribed Bodies Corporate) Regulations 1999</i> (Cth)
procedural rights	The rights afforded to native title parties in relation to future acts pursuant to the <i>NTA</i>. For example, the right to notification and comment, the opportunity to be consulted See also the definition included in s 253 of the <i>NTA</i> Alternatively referred to in this Report as procedural protections
proponent	The person or entity who obtains (or seeks to obtain) the grant and benefit of a future act. Alternatively referred to as the future act proponent

RDA	<i>Racial Discrimination Act 1975 (Cth)</i>
registered native title claimant	A person or group of persons whose name or names appear in an entry on the Register of Native Title Claims as 'the applicant' in relation to an application in the Federal Court for a determination of native title in relation to particular land or waters: see s 253 of the <i>NTA</i>
right to negotiate	The process by which native title parties are afforded the right to negotiate an agreement about the doing of a future act and, if agreement cannot be reached, any negotiation party can apply to the NNTT for a future act determination: see Part 2 Div 3 Subdivision P of the <i>NTA</i>
s 38(1)(c) condition	A condition placed on the doing of a future act by the NNTT as part of a future act determination when it determines that a future act can be done subject to conditions under s 38(1)(c) of the <i>NTA</i>
section 31 agreement	An agreement made under the right to negotiate: see s 31 and, more broadly, Part 2 Div 3 Subdivision P, of the <i>NTA</i>
standing instructions	A native title decision that can be made by a PBC if the PBC has the approval of the common law holders (or applicable common law holders) to make decisions of that kind without needing to consult with and obtain the further consent of such common law holders, and any conditions imposed by the common law holders have been met in relation to the decision: see regs 3 and 8 of the <i>PBC Regulations</i>
statutory compensation	Compensation awarded by the Federal Court to native title holders by determination of an application made under Part 2 Div 5 of the <i>NTA</i>
statutory procedures	The procedures contained in the <i>NTA</i> for future acts to be valid. Generally, this is used as a collective term referencing Subdivisions G–N contained in Part 2 Div 3 of the <i>NTA</i>

tenement	A right or interest for mineral or petroleum exploration or production granted by a state or territory government over a particular area of land or waters. Tenements are granted by governments in accordance with legislation that provides for the processes and requirements for such grants. For example, a mining tenement can be the grant of a lease or licence to extract minerals from a specified area of land
Traditional Owners	The Aboriginal or Torres Strait Islander peoples who are associated with or have connection to a particular area of land or waters that predates British settlement, which does not necessarily require recognition of native title
UNDRIP	<i>United Nations Declaration on the Rights of Indigenous Peoples</i> , GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007)
valid or validity	To have full force or effect: see s 251 of the <i>NTA</i> . Future acts will be valid if done pursuant to the <i>NTA</i> as well as the applicable non-native title law under which a grant is made or the act is otherwise authorised. See Chapter 11 for discussion of the concept of ‘validity’
validation pathways or pathways to validity	The avenues for future acts to be done validly, as provided in the <i>NTA</i>

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About this Inquiry

1.1 The *Native Title Act 1993* (Cth) ('NTA') provides for the recognition and protection by Australian law of native title. Native title is a form of property.¹ The common law recognises native title as the communal, group, or individual rights and interests of Aboriginal or Torres Strait Islander peoples in relation to land or waters where: those rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by such peoples; and, by those laws and customs, those peoples have a connection with the land and waters.²

1 *Commonwealth v Yunupingu on behalf of the Gumatj Clan or Estate Group* (2025) 421 ALR 604 [143].

2 *Native Title Act 1993* (Cth) s 223(1). See also Australian Law Reform Commission, *Review of the Future Acts Regime* (Issues Paper No 50, 2024) [16]–[26].

1.2 The *NTA* provides general protection for native title. It also provides for a regime — the future acts regime — through which exceptions to the general protection may be legally authorised, or in the language of the *NTA*, are made ‘valid’.

1.3 This Inquiry is about the future acts regime. The future acts regime is the system within the *NTA* that regulates when native title property rights and interests can be lawfully infringed by (broadly stated) acts of government or by acts permitted by government.³

1.4 The ALRC has found that wholesale reform of the future acts regime is required to provide:

- equality of treatment before the law for First Nations peoples so that native title holders have access to fairer processes and better outcomes when their native title rights and interests (that is, their property rights) are infringed;
- a more efficient and streamlined future acts regime, which promotes economic development, including by delivering better socio-economic outcomes for First Nations peoples; and
- better compliance with Australia’s international obligations.

1.5 The ALRC’s key findings and recommendations are discussed below at paragraphs [1.15]–[1.29]. To provide necessary context to those findings and recommendations, this part sets out a brief explanation of the future acts regime.

1.6 In broad terms, a future act is an act done after the commencement of the *NTA* (thus the label ‘future act’). A future act is an act that deals with lands or waters in a way that impacts native title rights and interests. A future act usually involves a government itself doing something, or a government giving someone else permission to do something (such as granting a permit or licence), which adversely affects (or infringes⁴) native title rights and interests.⁵

1.7 Some examples of future acts include:

- granting a mining tenement,⁶ such as a prospecting licence, exploration licence, or mining lease;
- granting an irrigation licence;
- granting a fishing licence or making a fisheries management plan;
- issuing a permit for operating a tourist boat in a marine park;

3 See generally Australian Law Reform Commission (n 2) [32]–[68]. The word ‘government’ here generally refers to state or territory governments, but can also include the Australian Government.

4 The word ‘infringe’, when used in relation to property rights, is used in this Report to refer to an impairment as well as the extinguishment of a property right (including native title rights and interests). ‘Extinguishment’ refers to the permanent removal or termination of native title: *Native Title Act 1993* (Cth) s 237A.

5 See further discussion at paragraphs [1.33]–[1.34]. See also Australian Law Reform Commission (n 2) [36]–[39].

6 A tenement is a right over a particular parcel of land granted by a government that permits particular activities. A tenement is generally granted by a government under particular legislation.

- building facilities for public services, such as a road, powerline, or mobile phone transmission tower; and
- the compulsory acquisition of land.⁷

1.8 Tens of thousands of future acts are done in any year. They are often connected to activities required by the mining industry, the pastoral industry, various utilities providing essential public services, and local governments.

1.9 Only a ‘valid’ future act has legal effect. A future act is validated (that is, legally authorised) when it satisfies the requirements of the future acts regime. The regime provides for various processes for the validation of a future act. In this Report, those processes are called ‘validation pathways’ or ‘pathways to validity’. These pathways are discussed further below. Broadly stated, they consist of the following pathways:

- **Agreement-making — Indigenous Land Use Agreements:** a pathway that can validate any kind of future act but only if all parties (either or both the government and future act proponent, such as a mining company, and the affected native title parties) agree to pursue this pathway. The parties can negotiate an Indigenous Land Use Agreement (‘ILUA’). The future act is validated upon registration of the ILUA.
- **Agreement-making — Right to Negotiate:** a pathway where the right to negotiate applies (essentially, the right to negotiate applies to mining industry related future acts, and some compulsory acquisition). The parties negotiate an agreement under s 31(1)(b) of the *NTA*, commonly referred to as a ‘section 31 agreement’. Where an agreement is reached, the future act is validated upon the making of the section 31 agreement. Where agreement is not reached, an arbitrated future act determination by an arbitral body, usually the National Native Title Tribunal (‘NNTT’), can validate the future act.
- **Statutory procedures:** the statutory procedures set out in Part 2 Div 3 Subdivisions G–N of the *NTA* (the ‘statutory procedures validation pathways’) are used to validate the vast majority of future acts.⁸ Each of the nine subdivisions provides a validation pathway for the particular type of future act (usually categorised by industry, sector, or tenure) dealt with by that subdivision.

1.10 In various ways, each of the validation pathways may provide a measure of protection to the native title parties whose property rights and interests will be affected, if the future act is validated. There are two kinds of protections provided.

⁷ The Commonwealth, state, and territory governments have compulsory acquisition powers which may be used to acquire and extinguish native title rights and interests. These powers have, for example, been used on various occasions in New South Wales for road construction purposes: see, eg, *Bandjalang Aboriginal Corporation Prescribed Body Corporate RNTBC on behalf of the Bandjalang People v Transport for NSW* [2020] NSWLEC 1008.

⁸ Future acts may also be validly done under Part 2 Div 3 Subdivision F of the *NTA*. In summary, this subdivision provides an avenue for future acts to validly occur in areas that are not the subject of a registered native title claim or determination, after following certain processes. Subdivision F and reforms to it are discussed in [Chapter 8](#).

1.11 The first (which the *NTA* calls ‘**procedural rights**’) is concerned with the opportunity for native title parties to participate in or influence whether the future act should be validated and, if it is, how the future act might be done in a way that avoids or diminishes the impacts on the native title rights and interests of the native title parties. Subdivisions G–N provide for different procedural rights to be provided to native title parties, including:

- a notice;
- an opportunity to comment;
- an opportunity to be consulted;
- a right to object; or
- the right to negotiate an agreement in which the validation of the future act depends upon the consent of the native title parties or, alternatively, an arbitrated determination.

1.12 The other kind of protection provided (referred to in this Report as ‘**substantive right**’) is a mechanism (either agreement-making or the statutory compensation scheme provided for by the *NTA*) through which some form of redress or compensation is made available to address the harm caused by the infringing future act on the native title rights and interests of the affected native title parties.

The Inquiry’s task

1.13 On 4 June 2024, the Attorney-General asked the ALRC to review the future acts regime in the *NTA*, to consult widely, and to develop recommendations for how it could be improved. In conducting the Inquiry, the ALRC was asked to consider, among other things:

- the intention of the *NTA* as stated in its preamble;
- how to rectify any inefficacy, inequality, or unfairness in how the regime currently works, as well as ways to make it work more efficiently;
- Australia’s international law obligations, including in relation to the United Nations Declaration on the Rights of Indigenous Peoples (‘UNDRIP’);
- how to support fair negotiations, benefit-sharing, and native title groups’ effective engagement with the future acts regime;
- other comparable land rights regimes; and
- the NNTT’s role in relation to future acts.

1.14 The task set by the Terms of Reference aligns with the ALRC’s functions as set out in the ALRC’s constituting legislation, namely, to remove defects in the law, to simplify the law, to improve access to justice, and to ensure consistency with Australia’s international obligations.⁹

9 *Australian Law Reform Commission Act 1996* (Cth) s 21.

Overview of main findings and recommendations

1.15 The ALRC considers that all laws which authorise the infringement of a person's property rights should provide the following two fundamental protections:

- **procedural rights:** a reasonable opportunity to participate in and influence decisions regarding whether the infringement should be allowed to proceed and, if so, how the infringement could be done in a manner which avoids or diminishes its effects on the property rights infringed; and
- **substantive rights:** an entitlement to effective, timely, fair, and just redress or compensation for any harm or injury caused by the infringement.¹⁰

1.16 The ALRC has found that the future acts regime generally fails to ensure native title holders are provided with both of these fundamental protections when it comes to the infringement of their rights and interests by future acts. That means that First Nations people who are native title holders are generally not provided with a reasonable opportunity to avoid or reduce the harm caused by the infringement of their native title rights and interests (which are well-understood to be a form of property right) and are not provided access to effective and fair compensation or other redress.

1.17 It is for this reason that the ALRC has found that the future acts regime is not only unfair and inequitable but key aspects of it are also discriminatory because they deny to native title holders equality before the law.¹¹ That denial is in breach of Australia's international obligations;¹² is out of alignment with s 10(1) of the *Racial Discrimination Act 1975* (Cth) ('RDA'); is contrary to the 'motivating rationale'¹³ of the High Court's decisions in *Mabo v Queensland (No 1)* ('*Mabo (No 1)*')¹⁴ and *Mabo v Queensland (No 2)* ('*Mabo (No 2)*')¹⁵ and is out of accord with the intention of the NTA, as stated in the preamble.¹⁶

1.18 Further, the ALRC has found that the validating pathways are, to varying degrees:

- inefficient, costly, and can cause delay by reason of complexity, ambiguity, and unnecessary duplication. Rather than fostering co-operation, good relations and benefit-sharing between parties, they tend to encourage disengagement and disputes; and

10 The provision of these fundamental protections to freehold title is discussed at paragraphs [1.87]–[1.88].

11 In particular, the most heavily utilised of the validation pathways: the statutory procedures validation pathways.

12 See, eg, *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 5 ('ICERD').

13 *Commonwealth v Yunupingu on behalf of the Gumatj Clan or Estate Group* (2025) 421 ALR 604 [80] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).

14 *Mabo v Queensland (No 1)* (1988) 166 CLR 186.

15 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

16 *Native Title Act 1993* (Cth) preamble.

- inflexible and unable to accommodate new and emerging industries and development priorities, as well as best-practice approaches for delivering sustainable and empowering socio-economic outcomes for First Nations peoples.

1.19 The ALRC has found that the future acts regime has failed to provide effective, timely, fair, and just redress. This is a significant failure. While agreement-making has provided some redress for the harm of validated future acts, for the vast majority of future acts validated over the 32 years of the operation of the future acts regime, not a single dollar of compensation for a future act has yet been awarded to native title holders through the statutory compensation scheme created by the *NTA*.¹⁷

1.20 The unfairness and discrimination in the future acts regime is contrary to the main objects of the *NTA*: to recognise and protect native title.¹⁸ The unfairness and discrimination has enduring consequences for Australia's social and economic development. Treating native title rights and interests unfairly and unequally compromises First Nations peoples' ability to practice and protect their culture, lore, and spirituality. Native title parties also miss out on income, compensation, and opportunities for benefit-sharing and equity in projects that affect their native title rights and interests. Governments and proponents seeking to carry out future acts face increased delays, increased transaction costs arising from disengagement and opposition, the risk of litigation, and a mounting and uncertain compensation liability. Broadly speaking, the consequences of this unfairness and discrimination is that productivity suffers and disadvantage is entrenched.

1.21 The ALRC's reforms are directed to addressing those problems. The implementation of the recommendations made in this Report would provide for equality before the law for native title holders. In the words of the High Court in *Western Australia v Commonwealth* ('*Native Title Act Case*') — which reflects the motivating rationale of *Mabo (No 1)* and *Mabo (No 2)* — the recommendations would allow native title holders 'security in the enjoyment of their title to property to the same extent as the holders of titles granted by the Crown are secure in the enjoyment of their titles'.¹⁹ To provide that security would help to fulfill the promise of the decisions of the High Court in *Mabo (No 1)* and *Mabo (No 2)*, and is the clarion call made by this Report.

1.22 The anticipated benefits of the recommended reforms include:

- increased opportunities for economic development and benefit-sharing;

17 There is a current statutory compensation matter seeking compensation for future acts before the Federal Court. At the time of publication of this Report, judgment is pending: *Yindjibarndi Ngurra Aboriginal Corporation RNTBC v Western Australia* (Federal Court of Australia, WAD37/2022, commenced 16 February 2022).

18 *Native Title Act 1993* (Cth) s 3(a). Section 3(b) provides that a further object of the *NTA* is to 'establish ways in which future dealings affecting native title may proceed and to set the standards for those dealings'.

19 *Western Australia v Commonwealth* (1995) 183 CLR 373, 437 (Mason CJ, Brennan, Deane, Toohey, Gaudron, McHugh JJ).

- a more efficient and streamlined future acts regime with lower transactional costs;
- a future acts regime that supports fair negotiations, promotes relationship-building, and facilitates equitable outcomes; and
- a future acts regime that reflects Australia's international law obligations.

1.23 The most significant reforms the ALRC recommends are directed at the statutory procedures validation pathways.²⁰ The ALRC recommends the repeal of the statutory provisions and the adoption of a scheme which takes an impact-based and holistic approach to assessing and determining the reasonable procedural protection that should be provided to native title parties for a particular future act (the 'impact-based scheme'). It would also enable timely, fair, and just redress or compensation to accompany the doing of the future act. Through the application of the impact-based scheme the level of protection or security of native title rights and interests provided to native title holders would be lifted to a level equivalent to that provided to ordinary title holders.

1.24 The proposed reforms would replace the adversarial and inefficient 'expedited procedure' process with the impact-based scheme which, by category rather than on a case-by-case basis, would assess the level of protection required to be provided to native title parties for various categories of future acts. It is expected that this will substantially reduce the current transactional costs and significant delays in the validation of future acts in the mining industry caused by the 'expedited procedure'. The proposed impact-based scheme would retain and amend the 'right to negotiate' or section 31 agreements validation pathway, which includes arbitration if the parties cannot reach agreement.

1.25 The ALRC's recommendations also would improve upon the current agreement-making validation pathways.²¹ The ALRC's recommendations seek to substantially enhance both of these agreement-making pathways. They would facilitate fair and efficient negotiations by providing access to mediation and other dispute resolution processes, and by imposing conduct and agreement content standards. This would include content standards designed to ensure that injustices, such as the destruction of Juukan Gorge, can never happen again.²²

1.26 The reforms in this Report would amend the right to negotiate process, and the arbitration criteria, to better ensure fairness.²³

1.27 The recommendations seek to address the capacity, power, and structural imbalances which impede fair negotiations, and just and equitable outcomes. The recommendations seek to remove significant structural imbalances caused by the option for arbitration under the right to negotiate validation pathway, which can

20 See [Chapters 6](#) and [8](#). See also [Chapter 7](#).

21 See [Chapters 3](#), [4](#), and [5](#).

22 See generally Joint Standing Committee on Northern Australia, Parliament of Australia, *A Way Forward: Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge* (2021).

23 See [Chapters 9](#) and [10](#).

seriously disadvantage native title parties. Several of the ALRC's recommendations are directed to ensuring that the arbitral body (usually the NNTT) is able to provide timely redress, including by way of benefit-sharing. The recommendations also seek to ensure that, other than where compelling requirements of the nation should deny it, a future act not be done unless its effects are able to be effectively addressed by fair, just, and timely redress. That change, apart from better providing for fairness and equity, would convert a process that is currently not compliant with UNDRIP to one that is compliant.

1.28 The ALRC's recommendations would also create an enforcement and compliance regime for future acts. Currently, obligations and entitlements imposed or provided either directly by the future acts regime or by agreements made under it are either not legally enforceable or there are significant difficulties in accessing appropriate relief for non-compliance. The ALRC's recommendations would remedy this.²⁴

1.29 A more detailed pathway by pathway assessment, including the creation of a new validation pathway to enable native title parties to establish Native Title Plans, is further discussed below at paragraphs [1.50]–[1.77].

1.30 Ultimately, the implementation of the ALRC's recommendations would enable equality before the law and economic development to operate as mutually reinforcing objectives within an efficient, fair, and non-discriminatory future acts regime. A reformed future acts regime can both protect the native title rights and interests (to the same extent as other forms of property rights are protected), and provide all parties, including First Nations peoples who hold native title, with fair access to the economic and social opportunities that native title rights and interests can unlock. It is only through the Australian Government taking up the mantle of substantial reform that the promise of *Mabo (No 1)* and *Mabo (No 2)* and the intentions stated in the preamble to the *NTA* to 'rectify the consequences of past injustices' and of 'reconciliation among all Australians' might better be able to be realised.

1.31 This Inquiry is the first substantial review of the future acts regime since the *NTA* was amended in 1998 following the High Court's decision in *Wik Peoples v Queensland* ('*Wik*') in 1996. Much has changed over the past nearly 30 years. The Australian Government has endorsed UNDRIP,²⁵ entered into the National Agreement on Closing the Gap,²⁶ and embraced benefit-sharing and self-determination as guiding policy principles. Decades of jurisprudence has confirmed that native title is a valuable, distinctive form of property.²⁷ Over 50 percent of Australia's landmass is now subject to determined (formally recognised) native title rights and interests.

24 See **Chapter 11**.

25 The Hon Jenny Macklin MP, 'Federal Government Formally Endorses the Declaration on the Rights of Indigenous Peoples' (Media Release, 3 April 2009).

26 Coalition of Peaks and Council of Australian Governments, *National Agreement on Closing the Gap* (2020).

27 See generally *Commonwealth v Yunupingu on behalf of the Gumatj Clan or Estate Group* (2025) 421 ALR 604.

Australia is moving into a ‘post-determination phase’, where fewer native title determinations remain unresolved and the future acts regime is being increasingly relied upon. Against this changed context, the future acts regime is ripe for reform and improvement. As Professor Altman observed in a submission to a previous reform project, reform should focus on the ‘underlying systemic and structural shortcomings of the *NTA*’.²⁸ There has been a sustained call for reform that addresses these shortcomings as opposed to further incremental amendments.²⁹ Reforms to the *NTA* to date — particularly those since 1998 — have been described as reactionary in nature (often in response to a political or legal *problem* arising due to decisions of courts),³⁰ piecemeal,³¹ or amounting to ‘tinkering’.³² As Altman noted in 2018:

in Australia there is ‘path dependency’ seeking a ‘frozen in time’ (the *NTA* of 1993 and then 1998 as amended) approach to reform. So, we see the continuing and stubborn attempts to band aid an architecture with evident structural flaws that favour a diversity of interest groups other than the holders of native title.³³

Overview of the future acts regime

1.32 This part explains what a future act is and sets out how the future acts regime currently functions. It also provides a brief summary of the legislative history of the *NTA* to contextualise the discussion of reforms and guiding principles below.

1.33 As outlined above, the future acts regime sets out the processes to be followed for future acts to be done ‘validly’ (that is, lawfully).³⁴ ‘Future acts’ are proposed grants of non-native title rights or interests (such as a permit or licence), dedication of land or waters for a particular use (such as creating a national park), public works by government (such as building a road), or the making of laws that affect native title. An act ‘affects’ native title if it:

- extinguishes native title; or
- is wholly or partly inconsistent with the continued existence, enjoyment, or exercise of native title rights and interests.³⁵

28 Jon Altman, Submission to Attorney-General's Department (Cth), *Reforms to the Native Title Act 1993 (Cth) (Options Paper, 2017)* (2018).

29 See, eg, National Native Title Council, *Submission 20*.

30 See, eg, MC Dillon, *Systemic Innovation in Native Title*, vol 294 (CAEPR Discussion Paper No 294, 2018).

31 See, eg, Altman (n 28); AIATSIS, Submission to Attorney-General's Department (Cth), *Reforms to the Native Title Act 1993 (Cth) (Options Paper, 2017)* (28 February 2018); Australian Human Rights Commission, Submission to Attorney-General's Department (Cth), *Reforms to the Native Title Act 1993 (Cth) (Options Paper, 2017)* (28 February 2018).

32 Patricia Lane, *Warming up Cold Porridge — Amending the Native Title Act* (Sydney Law School Legal Studies Research Paper No 10/13, University of Sydney, January 2010) 2. This has led to an observation that the *NTA* has generated much law reform *activity* without a corresponding amount of actual reform: see generally Nick Duff, ‘Reforming the Native Title Act: Baby Steps or Dancing the Running Man?’ (2013) 17(1) *Australian Indigenous Law Reporter* 56.

33 Altman (n 28) [24].

34 See below at paragraph [1.126] for discussion of ‘valid’ and ‘invalid’ future acts.

35 *Native Title Act 1993* (Cth) s 227.

1.34 A ‘future act’ does not refer to a ‘prospective’ act (something to be done in the future) at a particular point in time.³⁶ Rather, a future act refers to an act other than the passing of a law (such as granting a permit) *after* 1 January 1994, or an act that is the passing of a law after 1 July 1993. If an act is not a ‘future act’, the future acts regime does not apply. The future acts regime does not apply where there is no native title or where native title has been extinguished.

1.35 The future acts regime sets out how future acts can be done validly.

1.36 First, ILUAs can be used to validate any future acts (as well as to agree other non-native title matters), even if the future act could be done through another validation pathway. However, where no other provision in the future acts regime applies, a future act *can only* be validated by way of a registered ILUA. ILUAs are voluntary agreements reached between native title parties, proponents, and government parties about the doing of future acts. The future acts regime sets out the legislative framework for making ILUAs and registering them with the NNTT.

1.37 Secondly, where the right to negotiate applies, future acts may be validly done pursuant to a section 31 agreement or where a future act determination is made by an arbitral body (usually the NNTT). The right to negotiate provides for a minimum six-month negotiation period before any party can apply to the arbitral body for a future act determination, as long as the requirements to negotiate in good faith during that time have been met. The right to negotiate generally only applies to future acts concerning mining and exploration, and some compulsory acquisition.

1.38 Future act determinations can be made by an arbitral body where the right to negotiate applies and the negotiation parties have not reached agreement after six months. The arbitral body may determine that a future act can be done, with or without conditions, or that a future act cannot be done. If the arbitral body determines the future act can be done with conditions, the conditions take effect as if they were an agreement between the parties.³⁷

1.39 Thirdly, future acts may be done using the statutory procedures set out in Part 2 Div 3 Subdivisions G–N of the *NTA*.³⁸ Statutory procedures have been a feature of the *NTA* since it was enacted, but the current subdivisions were introduced by the *Native Title Amendment Act 1998* (Cth) (*NTAA 1998*).³⁹ The *NTAA 1998* inserted a ‘hierarchy’ of future acts into the *NTA*, largely categorised by sector, industry, or non-native title tenure.⁴⁰ If a future act does not meet the criteria to be covered by any of the subdivisions, it can only be validated by an ILUA. In terms of volume, the vast majority of future acts proceed by way of the statutory procedures.

36 *Lardil Peoples v Queensland* (2001) 108 FCR 453 [89].

37 *Native Title Act 1993* (Cth) s 41.

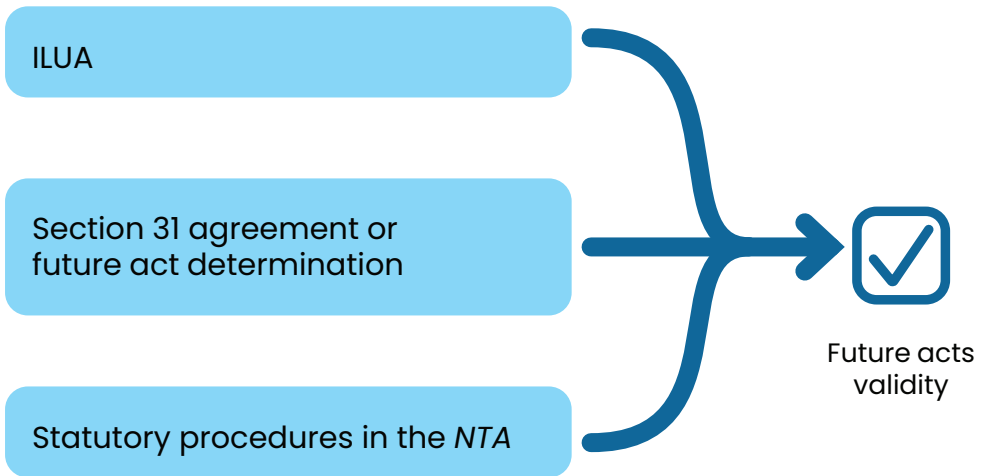
38 As noted above, future acts may also be validly done under Part 2 Div 3 Subdivision F of the *NTA*, which provides an avenue for future acts to validly occur in areas that are not the subject of a registered native title claim or determination. Subdivision F and reforms to it are discussed in **Chapter 8**.

39 See **Chapter 2**.

40 *Native Title Act 1993* (Cth) ss 24AB, 24OA. See further discussion in **Chapter 2**.

1.40 **Figure 1.1** below illustrates the current pathways to validity.⁴¹

Figure 1.1: Current pathways to validity under the future acts regime



Legislative history

1.41 The *NTA* was enacted in 1993 following the landmark decisions in *Mabo (No 1)* and *Mabo (No 2)*.⁴² Its primary purpose was to 'to recognise and protect native title'.⁴³ The preamble to the *NTA* makes it clear that the Act was intended to 'ensure that native title holders are now able to enjoy fully their rights and interests' and that this would require their common law rights to be 'significantly supplemented' by the protections in the Act.⁴⁴

1.42 In the originally enacted *NTA*, the statutory procedures validation pathways reflected an 'equivalency principle'. That is, the default procedural rights afforded to native title parties were the same procedural rights that would be afforded to a freehold title holder for the same act. This was a form of formal equality and sought to address the discriminatory effect of infringements on native title rights and interests principally identified in *Mabo (No 1)*. Put another way, the originally enacted *NTA* was largely based on the principle that native title rights and interests should not be

41 While **Figure 1.1** shows the statutory procedures as one 'pathway', in reality, the detailed statutory procedures establish several pathways involving different procedures for different future acts. The relevant procedural rights set out in Subdivisions G–N include: a right to notice and opportunity to comment, an opportunity to be consulted, a right to object, and a right to negotiate (the right to negotiate is separately outlined above).

42 **Chapter 2** sets out a detailed legislative history of the *NTA*.

43 Explanatory Memorandum Part A, Native Title Bill 1993 (Cth) 1.

44 *Native Title Act 1993* (Cth) preamble.

treated in a discriminatory or less favourable manner as compared to the treatment of freehold title rights for the same act.⁴⁵

1.43 In addition to native title parties being granted generally equivalent procedural rights, the *NTA* also provided native title parties with a right to negotiate for certain future acts. The right to negotiate applied to the creation and variation of rights to mine, compulsory acquisition for the purpose of conferring rights or interests on a person other than the acquiring government, and other acts approved by the Minister.⁴⁶ The right to negotiate recognised that the equivalency principle would not always produce a fair outcome because it could not account for the ‘special attachment that Aboriginal peoples and Torres Strait Islanders have to their land’.⁴⁷ For future acts relating to mining and some compulsory acquisition, the right to negotiate provided a form of substantive equality, allowing native title holders greater participatory rights that were commensurate with the rights typically afforded to the holders of ordinary title under state and territory resources laws. In this way, the *NTA* as enacted provided both substantive and formal equality to native title parties, depending on the nature of the future act.

1.44 In 1998, the *NTA* was amended by the *NTAA 1998* following the Australian Government’s ‘Ten Point Plan’ (which was stated to have been formulated in response to the High Court’s decision in *Wik*).⁴⁸

1.45 The *NTAA 1998* brought two critical developments to the future acts regime:

- introducing ILUAs; and
- amending the statutory procedures validation pathways.

1.46 As discussed further in **Chapter 3**, the introduction of ILUAs addressed deficiencies in pre-existing agreement-making mechanisms under the future acts regime. Generally, the ILUA framework is viewed as having made a positive contribution to the future acts regime, and was one of the reforms to the *NTA* in 1998 that was largely supported by national Indigenous bodies.⁴⁹

1.47 The current statutory procedures validation pathways in Subdivisions F–N reflect the amendments made by the *NTAA 1998*. The subdivisions created new, or reformulated existing, categories of future acts and procedural rights for specific kinds of future acts. The *NTAA 1998* fundamentally altered the structure of the *NTA* by categorising future acts into different subdivisions based on industry, sector, or the pre-existing non-native title tenure. As is discussed further in **Chapters 6 and 7**, the resulting procedural rights (which remain in the current *NTA*) are generally not

45 This is reflected in the preamble to the *NTA*, which provides that ‘[i]n future, acts that affect native title should only be able to be validly done if, typically, they can also be done to freehold land’: *ibid.*

46 *Ibid* s 26(2), as enacted.

47 Explanatory Memorandum Part A, Native Title Bill 1993 (Cth) 5.

48 The Hon John Howard MP, ‘Wik 10 Point Plan’ (Media Release, 1 March 1997).

49 National Indigenous Working Group, *Coexistence — Negotiation and Certainty: Indigenous Position in Response to the Wik Decision and the Government’s Proposed Amendments to the Native Title Act, 1993* (1997) 13.

based on the equivalency principle or an assessment of impact of the future act on native title rights and interests. That has meant that many subdivisions only afford native title parties the right to notice of the future act and an opportunity to comment. This is regardless of whether the future act is high impact and the fact that, in the same or similar circumstance, the act could not be done on freehold title without the consent of the holder of that title. Further, non-compliance with the procedural rights for most subdivisions does not result in the future act being invalid.⁵⁰

1.48 The *NTAA 1998* also resulted in fewer categories of future acts being subject to the more protective right to negotiate validation pathway.⁵¹

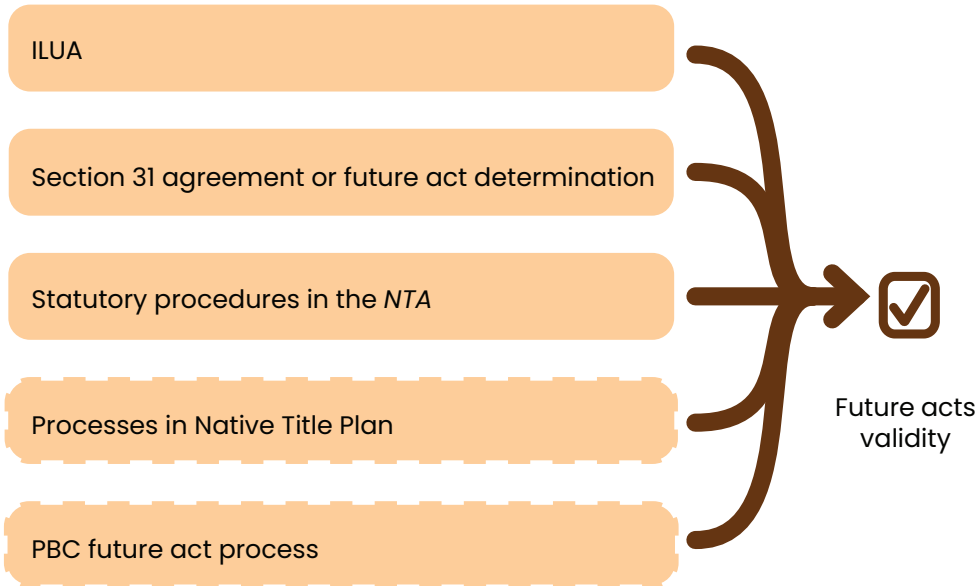
1.49 In sum, the *NTAA 1998* represented a significant deviation from the equivalency principle, entrenching discriminatory treatment of native title in the future acts regime. The ALRC has found that the future acts regime as amended in 1998 fails to provide equality of treatment before the law for native title holders and strays from the objects of the *NTA* and the principles in its preamble — namely, to provide for the protection of native title so that native holders can enjoy fully their rights and interests.

Pathway by pathway overview

1.50 This part summarises how the ALRC's recommendations, detailed in **Chapters 3–14**, would address problems in the existing pathways to validity in the future acts regime. It also discusses recommendations to create new pathways aimed at facilitating self-determined approaches to regulating and doing future acts, and recommendations for reform that relate to all pathways. **Figure 1.2** illustrates the pathways to validity that would be available if the reforms in this Report were implemented. The pathways with a dotted border are pathways that would only be available if the Prescribed Body Corporate ('PBC') chose to use them.

50 See discussion in **Chapter 11**.

51 See discussion in **Chapter 2**.

Figure 1.2: Reformed pathways to validity

1.51 This part provides an overview only. It does not touch upon each of the ALRC's 86 recommendations, which are detailed in [Chapters 3–14](#) of this Report.

Indigenous Land Use Agreements

1.52 The ALRC recognises the importance of ILUAs (and agreement-making more generally) within the future acts regime. Consultees and submissions have consistently expressed a preference for negotiating agreements about future acts over other validation pathways as a means of achieving better outcomes for all users of the future acts regime.⁵² Many of the ALRC's reforms relating to ILUAs apply to agreement-making more generally, including section 31 agreements which are discussed further below.

1.53 Agreement-making offers the opportunity for parties to work together and build ongoing relationships. It allows parties to amicably agree upon reasonable procedural and substantive protections which are to be provided in respect of a future act. As highlighted by the Minerals Council of Australia,

when relationships are grounded in mutual respect, cultural competency, and open communication, the process of negotiating native title agreements, for example Indigenous Land Use Agreements (ILUAs), becomes more constructive and less transactional.⁵³

52 See further discussion in [Chapter 3](#).

53 Minerals Council of Australia, *Submission 113*.

1.54 Similarly, the Kimberley Land Council observed that agreement-making

has the potential to embody FPIC [free, prior, and informed consent] and deliver substantial economic development opportunities to native title holders. However, for this potential to be realised, it is imperative that current issues with the agreement-making processes under the NTA be rectified.⁵⁴

1.55 Inequality in bargaining power is a key problem confronting agreement-making in the future acts regime. Inequality may result from differences in resourcing and capability between parties.⁵⁵ This imbalance is particularly pronounced in relation to native title parties.⁵⁶ Productive negotiations may depend more on the ‘goodwill’ of proponent and government parties, rather than the NTA supporting good faith engagement from all parties.⁵⁷ Reforms to introduce negotiation conduct standards, as well as reforms to expand the NNTT’s ability to assist parties to negotiate agreements and resolve any roadblocks, aim to address these issues.⁵⁸

1.56 Reforms to introduce content standards — both by prohibiting certain terms and mandating others — are intended to address the issues the ALRC has found with the substance of agreements, such as the use of clauses that restrict native title parties from exercising rights, raising grievances, or accessing remedies under the law.⁵⁹ These findings echo findings in the Juukan Gorge Inquiry, which strongly criticised the use of clauses in agreements that, among other things, prevented native title parties from accessing legal rights and remedies to prevent the destruction of the Juukan Gorge rock shelters.⁶⁰ That Inquiry also made recommendations about reforming both the negotiation process and substance of agreements.⁶¹

1.57 Consultees and submissions have consistently highlighted that agreement-making, and particularly the making of ILUAs, can be inefficient and costly. This can act as a disincentive for parties to pursue agreement for the doing of a future act, and instead follow a validation pathway that does not require agreement.

1.58 Many of the ALRC’s reforms aim to improve the efficiency of agreement-making and provide opportunities for reducing costs. These include the ability for PBCs to make greater use of standing instructions, subject to appropriate safeguards for common law holders, to facilitate the making of agreements in a less costly manner and in a wider range of circumstances than is currently possible. Other reforms, such as the conduct standards and NNTT assistance functions noted above, would also improve the efficiency of agreement-making.

54 Kimberley Land Council, *Submission 26*.

55 See Australian Law Reform Commission, *Review of the Future Acts Regime* (Discussion Paper No 88, 2025) [33].

56 Central Land Council, *Submission 31*; First Nations Legal and Research Services, *Submission 42*; ANTAR, *Submission 80*; Norman Waterhouse Lawyers, *Submission 102*.

57 Kimberley Land Council, *Submission 26*.

58 See **Chapter 3**.

59 See further discussion in **Chapter 4**.

60 See **Chapter 4**.

61 Joint Standing Committee on Northern Australia, Parliament of Australia (n 22) rec 4.

1.59 The ALRC also recommends reforms to promote transparency for common law holders in the future acts regime, to improve the publicly available information about agreements, and measures to address unfairness and difficulties that may arise as a result of future act agreements being made before native title is determined.⁶²

Right to negotiate — Section 31 agreements and future act determinations

1.60 Like ILUAs, the capacity for section 31 agreements to provide fair and equitable outcomes is compromised by inequality in the bargaining position of native title parties relative to other negotiating parties. The reforms discussed above in the context of ILUAs — such as reformed conduct standards, content standards, and expanded NNTT assistance functions — would apply equally to section 31 agreements and help to improve both the efficiency and the quality of negotiations and the content of agreements. However, the ALRC has found that more extensive reform is needed to address problems in the negotiation of section 31 agreements, which are caused by the difficulties created by the fact that under the right to negotiate validation pathway, arbitration is available when the negotiating parties are unable to reach an agreement. Parties can make a future act determination application after the minimum negotiating period has expired.

1.61 The arbitral body (usually the NNTT) determines whether the future act is to be validated by determining whether the future act may be done, must not be done, or may be done subject to conditions determined by the arbitral body. Arbitral determinations under the right to negotiate have predominately been made in favour of future acts being done.⁶³ The ALRC has found that there are several reasons for this, including the disproportionately high evidential burden that the existing s 39 criteria place on native title parties where they seek a determination that a future act must not be done, or may be done subject to conditions. A consequence of this and other aspects of the right to negotiate — such as the perceived bar on the NNTT's capacity to impose any financial conditions and an actual bar on the NNTT imposing benefit-sharing conditions,⁶⁴ as well as the insufficient minimum negotiation period before a future act determination application can be made⁶⁵ — is that native title parties are placed under significant structural pressure to reach agreement.⁶⁶ Put differently, the right to negotiate process puts substantial pressure on native title parties to accept the offer on the table because the alternative, arbitration, is perceived as likely to lead to a worse outcome.

62 See **Chapter 5**.

63 According to the NNTT, as at 30 June 2024, the NNTT had made determinations in relation to 200 contested future acts since 1 January 1994. In three determinations, the NNTT determined that six out of those 200 future acts could not be done: National Native Title Tribunal, *Submission 23*. See further discussion in **Chapter 10**.

64 See discussion in **Chapter 10**.

65 See discussion in **Chapter 9**.

66 See, eg, MPS Law, *Submission 17*; Central Land Council, *Submission 31*; First Nations Legal and Research Services, *Submission 42*; Law Council of Australia, *Submission 47*.

1.62 The ALRC's reforms in **Chapters 9** and **10** seek to address these issues, and other related issues with the right to negotiate process. The reforms seek to recalibrate the negotiation conditions and arbitration process to reflect the fundamental rationale of the right to negotiate as a measure to promote the doing of future acts with the *agreement* of native title parties.

1.63 Two reforms discussed in **Chapter 10** are particularly important: the repeal of s 38(2) of the *NTA*; and, reform to the criteria for deciding future act determinations in s 39 of the *NTA*. Repealing s 38(2), as well as clarifying that the NNTT can impose financial conditions when making a future act determination, would improve equality of bargaining power and facilitate the just resolution of future act determinations. The reform ensures that redress would be available within a reasonable time of the doing of a future act. This would address an existing problem: native title holders are often left without redress when a future act is done and have only an ability to pursue redress through the statutory compensation scheme at some later time. This reform is also consistent with the policy intent of the right to negotiate as a means for equitable benefit-sharing. It is also consistent with UNDRIP, which requires effective, fair, and just redress where Indigenous peoples' rights are impacted.⁶⁷

1.64 Reform to the future act determination criteria in s 39 of the *NTA* is required because the criteria do not currently require that native title parties are provided with fair and just redress (including benefit-sharing), as well as measures to mitigate adverse environmental, economic, social, cultural, or spiritual impacts, if a future act is to be done without the consent of native title parties. As discussed in **Chapter 10**, this is inconsistent with the provisions of UNDRIP. The reformed future act determination criteria discussed in **Chapter 10** would also align the decision-making criteria that an arbitral body uses when deciding a future act determination application with the procedural rights protected in UNDRIP.

Statutory procedures

1.65 The ALRC has found that there is misalignment between the procedural rights provided by the statutory procedures validation pathways and the potential effect of a future act's impact on native title rights and interests. This misalignment can result in a failure to provide native title parties with appropriate protection of their native title rights and interests. It creates unfairness both in process and outcome. The nature and extent of the procedural rights should be proportionate with the impact of the act on native title rights and interests.

1.66 In particular, the procedural rights in the future acts regime do not adequately contemplate or account for the impact future acts may have on the unique rights and interests of native title parties, such as cultural rights. The current pathways provide procedural rights to future acts largely according to the industry or type of future

67 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) art 32(3) ('UNDRIP'). As discussed in **Chapters 2** and **10**, 'redress' in this context may include benefit-sharing.

act, rather than by reference to the impact of a future act on native title rights and interests (or by reference to the equivalency principle). This means that the distinctive nature of native title parties' rights and interests is not a factor in determining the appropriate procedural rights that should be afforded for different future acts. This makes the future acts regime discriminatory against native title parties because it does not provide for equality in the treatment of native title rights and interests relative to other property rights.⁶⁸ The following examples illustrate this point:

- Under s 24GB of the *NTA*, the grant of an interest that enables a new primary production activity to be conducted on a non-exclusive pastoral lease or non-exclusive agricultural lease requires only notice and opportunity to comment to be afforded to the native title parties. In reality, the impact of this type of future act can amount to practical extinguishment of native title rights and interests where, for example, the future act entitles a pastoral leaseholder to conduct intensive cultivation on the lease (such as a cotton plantation) or conduct forest operations, both of which are entirely incompatible with the continued exercise of native title rights and interests. No such rights could be granted over land subject to ordinary title without the consent of the ordinary title holder.
- Section 24GD of the *NTA* covers future acts that are the grant of a right to a holder of a freehold, pastoral leasehold, or agricultural lease, which was granted prior to 23 December 1996, to graze or gain access to water after 23 December 1996 in an area of Crown land that adjoins or is near the titleholder's leasehold or freehold property (that is, the future act is done on Crown land that is outside and not part of the landholder's pre-23 December 1996 leasehold or freehold grant). Procedural rights afforded to native title parties under s 24GD are notice and opportunity to comment. No such grazing or water rights could be granted over land subject to freehold title without the consent of the freehold title holder. Section 24GD therefore treats native title in a discriminatory manner as compared to the rights of freehold title.
- Subdivision I of the *NTA* covers renewals of mining leases. Subject to Subdivision P, such renewals will be valid. Renewals of mining leases that were originally granted prior to 23 December 1996 or were originally granted after complying with the right to negotiate procedures are excluded from having to again comply with the right to negotiate (other than some minor exceptions). This can be contrasted with the procedural rights afforded to the ordinary title holders in at least some jurisdictions. For example, under the *Mineral Resources Act 1989* (Qld), an agreement or determination of the Land Court as to compensation for the owner of the land must be in place before a mining lease can be renewed.⁶⁹ If an agreement provides for the terms of renewal of the mining lease, then a new agreement or determination is not required.⁷⁰ If the agreement does not provide for renewal, then a new

68 This is a theme discussed throughout this whole Report, particularly in [Chapters 2, 6, and 7](#).

69 *Mineral Resources Act 1989* (Qld) s 85.

70 See generally Department of Natural Resources and Mines, Manufacturing, and Regional and Rural Development (Qld), *A Guide to Landholder Compensation for Mining Claims and Mining Leases* (v 1.3, 2025).

agreement or determination of the Land Court is required. This affords to ordinary title holders, in effect, a right to negotiate a new agreement at the time of renewal.

- A renewal or extension of a pastoral lease can be validated under Subdivision I where the original instrument of grant is not required to have conferred any right to renew. Subdivision I does not afford procedural rights to native title parties for such renewals, except in limited circumstances. A renewal of an interest over land subject to ordinary title, by contrast, would normally require either the consent of the ordinary title holder or otherwise procedural rights to be afforded to the ordinary title holder that are commensurate with the impact of the renewal on their rights.

1.67 Another fundamental problem with the existing statutory procedures validating pathway is that they do not provide an effective mechanism for the payment of timely compensation or the provision of other timely redress for the harm done by future acts. As discussed below, it is difficult for native title parties to access statutory compensation for future acts.⁷¹ The absence of a single compensation award in the 32 years of the operation of the statutory compensation scheme would seem to indicate a failure of the future acts regime to provide substantive outcomes to native title holders. These outcomes are discriminatory because holders of other property rights are typically provided with contemporaneous compensation when those rights are infringed. It is also inconsistent with the requirements of UNDRIP that effective, fair, and just redress be available when native title rights and interests are infringed.

1.68 The ALRC seeks to address this unfairness in process and outcome through reforms to the statutory procedures discussed in **Chapter 6**. The ALRC recommends an ‘impact-based’ approach whereby the effects of a future act determine, and are reflected in, the extent of protections provided by the future acts regime. As discussed further in **Chapter 6**, impact assessment is a commonly used mechanism in several contexts. It is one which enables the unique characteristics of native title rights and interests to be taken into account. This provides a means of ensuring substantive equality in the treatment of native title rights and interests relative to other property interests. An impact-based approach is also consistent with the leading understanding of consultation and free, prior, and informed consent at international law.⁷² The recommended impact-based scheme also provides a means for imposing conditions relating to upfront compensation or financial redress to be applied as part of the impact categorisation process, thereby addressing the problem outlined above.

1.69 Within the existing statutory procedures, the ALRC has found there are significant issues with the expedited procedure.⁷³ The expedited procedure is an exception to the right to negotiate. It is generally for the grant of exploration permits

71 See discussion at paragraph [1.110].

72 See further **Chapters 2** and **6**.

73 See, eg, M Lucas, *Submission 7*; Kimberley Land Council, *Submission 26*; Dambimangari Aboriginal Corporation, *Submission 35*; Cape York Regional Organisations, *Submission 44*; Queensland South Native Title Services, *Submission 45*.

or licences. If a future act notice contains an ‘expedited procedure statement’, native title parties are given a period of four months to lodge an objection, which, if upheld, would result in the future act being subject to the right to negotiate process. If no objection is lodged, or the objection is not upheld, the future act may be done without negotiations or access to any other procedural right.⁷⁴

1.70 The ALRC has identified several problems with the expedited procedure, including that:

- it is not a truly ‘expedited’ process and it operates inefficiently;⁷⁵
- it produces a significant resourcing burden for native title parties who are required to consider, and possibly object to, a large volume of expedited procedure notices;⁷⁶
- there is a lack of a consistent national approach;⁷⁷ and
- objections to the expedited procedure currently represent a significant proportion of the NNTT’s total workload.⁷⁸

1.71 As with the future acts determination outcomes discussed above, the operation of the expedited procedure reflects structural unfairness in the future acts regime. It produces unfair outcomes for native title parties that undermine the intent and beneficial nature of the *NTA*, as well as a high degree of inefficiency. The ALRC’s reforms in this Report recommend repealing the expedited procedure as part of implementing the impact-based scheme outlined above (discussed further in **Chapter 6**), or amending the expedited procedure process to address critical problems identified if the impact-based scheme were not adopted (discussed further in **Chapter 7**).

1.72 Beyond the complexity of the existing statutory procedures themselves, the ALRC has found that there is a general issue with the complexity of the future acts regime as a whole. This finding is supported by judicial commentary. For example, Jackson J of the Federal Court described the regime as possessing ‘byzantine complexity’.⁷⁹ Master Sanderson of the Supreme Court of Western Australia observed that ‘it must be open to question whether a regime this complex is in anyone’s interests’.⁸⁰

74 *Native Title Act 1993* (Cth) ss 32(2)–(3).

75 See, eg, Central Land Council, *Submission 121*.

76 See, eg, MPS Law, *Submission 17*; Robe River Kuruma Aboriginal Corporation, *Submission 25*; Kimberley Land Council, *Submission 26*.

77 See, eg, M Lucas, *Submission 7*.

78 See, eg, National Native Title Tribunal, *Submission 23*; National Native Title Tribunal, *Submission 86*.

79 *Forrest on behalf of the Nangaanya-ku Native Title Claim Group (Part B) v Western Australia* (No 2) [2024] FCA 729 [141].

80 *Citic Pacific Mining Management Pty Ltd v Yaburara & Coastal Mardudhunera Aboriginal Corporation* [2020] WASC 332 [58].

1.73 The current statutory procedures validation pathways are hard to navigate, meaning it is difficult to correctly categorise future acts and determine the correct procedural rights. Complexity can lead to confusion, disputes, and increased costs because of the need for specialist legal advice.⁸¹ The complexity and cost of the future acts regime can also act as a barrier to development.⁸² The reshaped statutory procedures discussed in [Chapter 6](#) address these issues by providing for a simple and clear regulatory framework which, once fully operational, could better avoid misclassification problems and other inefficiencies that arise from the current statutory procedures validation pathways.

1.74 The current statutory procedures are inflexible. This is particularly the case for future acts from new or emerging industries that are not dealt with by the statutory procedures, because an ILUA is required. This can result in higher transactional costs and delays. For example, a number of future acts in the renewable energy sector currently can only be validated through ILUAs. The impact-based scheme proposed is far more flexible because it enables future acts to be linked to a procedural right by reference to the impact of the act and generally not by reference to its industry, sector, or tenure.

1.75 [Chapter 7](#) outlines an alternative approach to reforming the statutory procedures if the recommendations in [Chapter 6](#) were not adopted. The reforms discussed in [Chapter 7](#) would represent an improvement to the existing future acts regime. However, because these alternative reforms are based on the equivalency principle, the reforms in [Chapter 7](#) would be capable of providing formal but not necessarily substantive equality of treatment to native title holders as compared to freehold title holders. That means that not all of the discriminatory treatment currently suffered by native title parties under the statutory procedures validation pathways would be eradicated by the reforms to the statutory procedures recommended in [Chapter 7](#).

New pathways to validity

1.76 The future acts regime currently lacks any pathway to validity where native title holders are able to proactively express their wishes and aspirations for development on their Country. The Native Title Plans recommended by the ALRC present an opportunity for native title holders to proactively document and register their aspirations and guidelines for if, how, and where development can occur on Country.⁸³ This pathway operationalises the autonomy and self-governance aspects of self-determination. For proponents and government parties, Native Title Plans could provide an efficient avenue to future acts validity on terms that are acceptable to native title holders, including potentially expedited pathways. Native Title Plans

81 See discussion in Australian Law Reform Commission (n 55) [27]–[29]. See also Law Council of Australia, *Submission 47*.

82 Association of Mining and Exploration Companies, *Submission 32*; State of Queensland, *Submission 43*.

83 See [Chapter 13](#).

could be an informed starting point for engagement by enabling native title holders to be proactive, rather than reactive, participants in the future acts regime.

1.77 The future acts regime also lacks an efficient pathway for native title holders to undertake future acts where they wish to do so. This can inhibit economic development by native title holders. The ALRC's recommended PBC future act validation processes would provide PBCs with a streamlined pathway to validity for future acts that the PBC itself is seeking to carry out on its own native title area.⁸⁴ This pathway reflects the autonomy and self-governance elements of self-determination, and also reflects the rights of native title holders to freely pursue their own economic development.

Guiding principles and approaches

1.78 The principles and approaches to the reforms in this Report are underpinned by the Terms of Reference. The following sections give an overview of how each guiding principle or approach has contributed to the main reforms recommended by this Report.

Ensuring equality before the law and avoiding discrimination

1.79 These international law principles are discussed in detail in **Chapter 2**. International human rights law is premised on the idea that all persons are inherently equal and that the right to equality before, and equal protection of, the law requires that the law neither discriminates against, nor fails to protect from discrimination, any person or people.⁸⁵ Discrimination on the basis of race has assumed a particularly prominent position at international law, with the prohibition on racial discrimination emerging as a peremptory (*jus cogens*) norm (that is, a norm from which derogation is never permitted).⁸⁶

1.80 The International Convention on the Elimination of All Forms of Racial Discrimination ('ICERD') is the predominant international law instrument concerned with discrimination on racial grounds. Amongst other things, art 5 of ICERD guarantees, without distinction as to race, the right to equality before the law in relation to the enjoyment of a number of enumerated rights, including the right 'to own property alone as well as in association with others'.⁸⁷

84 See **Chapter 3**.

85 Article 1 of the Universal Declaration of Human Rights states that '[a]ll human beings are born free and equal in dignity and rights': *Universal Declaration of Human Rights*, GA Res 217A(III), UN GAOR, UN Doc A/810 (10 December 1948).

86 International Law Commission, *Report of the International Law Commission*, 73rd sess, UN GAOR, 77th sess, Supp No 10, UN Doc A/77/10 (2022) 16.

87 *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 5(d)(v). See generally arts 5(a)–(e).

1.81 Australia is a party to ICERD and has incorporated its obligations into domestic law by way of the *RDA*. In particular, s 10(1) of the *RDA* enshrines the right to equality before the law including in relation to the right to own and enjoy property without discrimination. In relation to native title, the High Court has construed the obligation in s 10 as requiring that native title holders be provided ‘security in the enjoyment of their title to property to the same extent’ as the holders of other titles to property.⁸⁸

1.82 In both international and domestic law, two primary conceptualisations of ‘equality’ have emerged in theory and practice: **formal equality** and **substantive equality**. Substantive equality requires equality of *outcome*, while formal equality can be achieved by uniformity of *treatment*. Substantive equality is the leading standard at international law,⁸⁹ and some domestic judicial commentary recognises it as the preferred standard in Australian law.⁹⁰ Substantive equality is the preferred approach because the application of formal equality may lead to inequality of outcome by failing to account for the differences that exist between persons or peoples.

1.83 For this reason, the ALRC has chosen to adopt a substantive equality approach, which entails providing native title holders with the same level of protection from the infringement of their property rights as is provided to ordinary title holders. This approach enables the differences between the rights and interests of native title holders and ordinary title holders to be considered in providing for equality of outcome. Formal equality largely ignores those differences.

1.84 Cultural rights provide an illustrative example of this. Cultural rights do not attach to ordinary title as they do to native title. Providing the same mechanism (such as notice or consultation) as that provided to ordinary title holders, to protect against a particular kind of infringement would tend to provide native title holders with no protection at all in relation to cultural rights. That is so because the mechanism of protection chosen for ordinary title is attuned to deal with the nature of the rights attached to ordinary title and will not be attuned to deal with native title cultural rights.

1.85 However, a consideration of the level of protection provided, rather than the mechanism of protection, enables all relevant rights and interests for each kind of title to be holistically considered and a substantively equal outcome can be achieved.

1.86 In practical terms, substantive equality can only be provided on a global or broad basis. By way of example, the ALRC’s reforms to the statutory procedures validation pathways (see **Chapter 6**) seek to introduce an impact-based approach for providing to native title parties a level of protection for infringement of their property rights which is reasonable because it is reasonably proportionate to the likely injurious effect of the infringement. That approach aims to provide, on a global

88 *Western Australia v Commonwealth* (1995) 183 CLR 373, 437.

89 See, eg, Titia Loenen, *The Conceptualization of Equality and Non-Discrimination as Legal Standards: From Formal to More Substantive Equality: From Formal to More Substantive Equality* (Brill, 2024) 40.

90 See, eg, *Mabo v Queensland (No 1)* (1988) 166 CLR 186, 206; *Gerhardy v Brown* (1985) 159 CLR 70, 128–9.

basis, the same level of protection to native title parties as is generally provided to ordinary title holders.

1.87 In developing this approach, the ALRC has not had the opportunity to undertake an extensive review of all of the regulatory schemes of relevance in order to state, in each case, the level of protection that is afforded to freehold title holders. However, a number of regulatory schemes demonstrate an impact-based approach to impact on interests in land. By way of example:

- The *Telecommunications Act 1997* (Cth) permits carriers to enter onto land and do an array of activities.⁹¹ The Act provides procedural protections for property owners and occupiers, with an impact-based approach taken to identify the appropriate protection. For example, an inspection of land (that is, a lower impact activity) requires that owners and occupiers be given notice,⁹² as well as a right to object to the infringement which, if engaged, triggers an obligation on the carrier to consult with the objector and try to resolve the objection by agreement.⁹³ The installation of a facility⁹⁴ (that is, a higher impact activity), on the other hand, attracts additional protection, including that the carrier has made reasonable efforts to negotiate in good faith with the proprietor whose approval is required.⁹⁵
- The *Mining Act 1978* (WA) authorises mining activities on ‘private land’.⁹⁶ Where an application is made for a mining tenement that relates to private land, owners and occupiers are provided with procedural protections including notice of an application and a right to be heard in relation to any such application.⁹⁷ Additionally, the consent of the owner and the occupier is required if mining activities are to occur on or within 100 metres of certain types of private land (above 30 metres below the surface of the land) — including land under cultivation; the site of a cemetery; the site of a dam, bore, well, or spring; or land where a substantial improvement has been erected.⁹⁸ The approach taken to the need for reasonable procedural protections under this Act is impact-based and attuned not only to the nature of the mining activity but also to the nature (and consequentially the value or importance) of the land concerned to the owner and occupier.⁹⁹

91 These include the inspection of land, the installation of a facility, and the maintenance of a facility: *Telecommunications Act 1997* (Cth) sch 3, cls 5–7.

92 Ibid sch 3, cl 17(1). There are, however, some exceptions to this notice requirement, including where the activity in question must be carried out without delay: sch 3, cl 17(6).

93 *Telecommunications Code of Practice 2021* (Cth) regs 2.28, 2.32.

94 Other than a low-impact or temporary facility used for defence purposes.

95 *Telecommunications Act 1997* (Cth) sch 3, cls 27(1)(e)–(f), (2)(a)(i), (2A)(a).

96 *Mining Act 1978* (WA) ss 27(1), 29(1).

97 Ibid ss 33(1)–(2).

98 Ibid s 29(2).

99 The determination of procedural safeguards by reference to the utility of land and consequential implication of interferences is also demonstrated by the fact that the consent of owners and occupiers is *not* required for the abovementioned categories of land where the mining tenement is granted in respect of particular land — presumably where the land is of lesser utility to the owner or occupier: *ibid*.

- The *Mineral Resources (Sustainable Development) Act 1990* (Vic) provides rights to object to and comment on mining licences,¹⁰⁰ and obliges the relevant Minister to consider any objections and comments before granting or refusing a licence.¹⁰¹ Additional protections are afforded in relation to agricultural land: if an owner or occupier of agricultural land applies to have their land excised from the area covered by a mining licence, the Minister must so excise the land if convinced that there would be a greater economic benefit to Victoria in continuing the agricultural use of the land than in carrying out the work subject to the licence.¹⁰²

1.88 Each of these legislative examples also deal with the substantive protections required to be provided to the owner of the freehold title. Each provide for compensation for loss or damage suffered by reason of the infringement of the owner's property rights.

1.89 Another example is the approach taken by courts where, pursuant to legislation, a court is called upon to determine whether an easement over freehold title should be created because it is 'reasonably necessary'. In that context, courts take an impact-based approach in applying the principle that the greater the burden of the imposition (on the freehold title) should the sought easement be granted, the stronger the case needed to justify a finding of reasonable necessity.¹⁰³

1.90 All of these examples reflect a form of impact-based approach to reconciling legitimate competing rights and interests in an attempt to reasonably accommodate both. This same impact-based approach grounds the ALRC's reforms to the statutory procedures in the future acts regime.

1.91 The ALRC notes that providing substantive equality to native title holders does not necessarily involve providing a 'special measure'. There is no positive discrimination involved. It does not require native title to be treated as superior to freehold title. It would, however, lead to native title being respected by the law, and treated by the law, on an equal footing with freehold title.

Compliance with other international obligations

1.92 Beyond ICERD, other international legal obligations which have provided guidance and direction are also discussed in detail in **Chapter 2**. There are three international law rights or standards which have been of particular significance in guiding the ALRC's recommendations:

100 *Mineral Resources (Sustainable Development) Act 1990* (Vic) ss 24, 24A.

101 *Ibid* s 25(2).

102 *Ibid* s 26B(1). An alternate pathway mandating the Minister's excision of agricultural land from a mining licence is where the licensee consents to such excision.

103 See, eg, *Peulen v Agius* [2015] QSC 137. For an example of a case where the court identified various factors relevant to a determination of what is 'reasonably necessary' (including the effect of an easement on freehold title): see *Shi v ABI-K Pty Ltd* [2014] NSWCA 293.

- the **substantive standard** emanating from art 32(3) of UNDRIP that, to address the effect of acts which adversely affect the lands, territories, or other resources of Indigenous peoples, states shall provide ‘effective mechanisms for just and fair redress for any such effects’ and ‘appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural, or spiritual impact’;¹⁰⁴
- the **procedural standard** (often referred to as ‘free, prior, and informed consent’) that accompanies that substantive standard and emanates from art 32(2) of UNDRIP, which provides that states ‘shall consult and cooperate in good faith with Indigenous peoples ... in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources’;¹⁰⁵ and
- the **right to self-determination** as provided for by art 3 of UNDRIP,¹⁰⁶ which entails the right of Indigenous peoples to pursue their own destinies under conditions of equality.¹⁰⁷ This right is limited by art 46(1) of UNDRIP, which provides that the rights in UNDRIP should not be interpreted as encouraging any undermining of the sovereignty or territorial integrity of states.

1.93 Consistently with leading international interpretations, the ALRC has not applied these rights or standards in an absolute or unqualified way in this Report. As discussed below, one of those rights — the right to self-determination — has only been applied in an aspirational way to inform many of the recommendations. A second right or standard — free, prior, and informed consent — has been applied as a qualified, rather than an absolute, standard applicable to all future acts.

Self-determination

1.94 The right to self-determination has informed many of the reforms in this Report in an aspirational way. At a high level, the right to self-determination is the qualified right of Indigenous peoples to freely determine their political status and freely pursue their economic, social, and cultural development. This is a ‘qualified right’ because this conception of self-determination does not contemplate undermining the sovereignty or integrity of Australia as a state.¹⁰⁸ The concept of self-determination and its interactions with other human rights concepts is discussed further in [Chapter 2](#).

1.95 The ALRC’s recommendations reflect four of the elements of self-determination, as provided for by UNDRIP: autonomy and self-government,¹⁰⁹ culture,¹¹⁰ traditional

104 UNDRIP art 32(3).

105 Ibid art 32(2).

106 Ibid art 3.

107 James Anaya, *Rights of Indigenous Peoples: Report of the Special Rapporteur on the Rights of Indigenous Peoples*, 68th sess, UN Doc A/68/317 (14 August 2013) [77].

108 See UNDRIP art 46(1).

109 See ibid art 4.

110 See ibid art 3; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 27 (‘ICCPR’).

lands,¹¹¹ and participation in decision-making.¹¹² These have informed the ALRC's reforms in the following ways:

- **Autonomy and self-government**, which means that First Nations peoples should have the power to 'organise and direct their lives, according to their own values, institutions and mechanisms' within the Australian legal framework.¹¹³ This principle is particularly relevant for the reform related to Native Title Plans discussed in [Chapter 13](#). Native Title Plans would facilitate self-determination but not mandate it. Additionally, self-determination would be facilitated by the PBC future act processes discussed in [Chapter 3](#) which would provide a validation pathway for future acts where a PBC is the future act proponent.
- **Cultural self-determination**, which includes the positive duty on Australia to protect First Nations peoples' cultural rights and 'to interpret the right to culture consistently with the right to self-determination in the context of indigenous peoples' issues'.¹¹⁴ 'Culture' in this sense is 'a broad, inclusive concept encompassing all manifestations of human existence'.¹¹⁵ Cultural self-determination is reflected in a broad range of the reforms in this Report, including the reformed statutory procedures validation pathways which, in contrast to the existing statutory procedures validation pathways, will enable cultural rights to be taken into account ([Chapter 6](#)). Cultural considerations are also more appropriately accounted for by the reformed arbitral criteria for the right to negotiate validating pathway ([Chapter 10](#)) and in Native Title Plans ([Chapter 13](#)).
- **Rights to traditional lands**, which recognise the spiritual connection between First Nations peoples and their lands, and that for First Nations peoples, land is a 'defining element of their identity and culture and their relationship to their ancestors and future generations'.¹¹⁶ This element of self-determination is broadly reflected in all of the reforms in this Report, and particularly in the Native Title Plans discussed in [Chapter 13](#) as well as the PBC future act processes discussed in [Chapter 3](#).
- **Rights to participate** in decision-making and to **free, prior, and informed consent** in matters affecting First Nations peoples are designed to restore First

111 See UNDRIP arts 25–28, 30, 32.

112 See Expert Mechanism on the Rights of Indigenous Peoples, *Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: Indigenous peoples and the right to self-determination*, 48th sess, UN Doc A/HRC/48/75 (4 August 2021) [14].

113 Ibid [12].

114 Ibid [10]. See also Human Rights Committee, *Views: Communication No 547/1993*, 70th sess, UN Doc CCPR/C/70/D/547/1993 (10 December 1992, adopted 27 October 2000) ('*Mahuika v New Zealand*') [9.5].

115 Expert Mechanism on the Rights of Indigenous Peoples, *Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: Indigenous peoples and the right to self-determination*, 48th sess, UN Doc A/HRC/48/75 (4 August 2021) [10].

116 Expert Mechanism on the Rights of Indigenous Peoples, *Right to land under the United Nations Declaration on the Rights of Indigenous Peoples: a human rights focus*, 45th sess, UN Doc A/HRC/45/38 (15 July 2020) [5].

Nations peoples' control over their territories and resources.¹¹⁷ They are also designed to restore 'cultural integrity, pride and self-esteem', and recalibrate the power relationship between First Nations peoples and the state.¹¹⁸ This element of self-determination has informed many of the reforms in this report, particularly the reforms to agreement-making and content ([Chapters 3 and 4](#)), the reformed statutory procedures validation pathways ([Chapter 6](#)), reformed right to negotiate ([Chapters 9 and 10](#)), Native Title Plans ([Chapter 13](#)), and resourcing ([Chapter 14](#)).

1.96 The ALRC's approach to self-determination in this Report has also been informed by the evidence base, which shows that self-determination is now understood as the best approach for delivering sustainable socio-economic outcomes for Indigenous people.¹¹⁹ The reforms in this Report seek to further the objectives of self-determination, recognising that without self-determination, Closing the Gap targets are less likely to be met, equity and First Nations peoples' economic empowerment are less likely to be achieved, and other human rights of Indigenous peoples are less likely to be fulfilled.¹²⁰

Participatory protections and free, prior, and informed consent

1.97 The right to participate in decision-making and to free, prior, and informed consent emanates from art 32(2) of UNDRIP.¹²¹ That standard forms the first of two safeguards or protections that every regime for authorising an infringement of property rights should provide to those whose property rights are infringed.¹²²

1.98 The ALRC has sought to ensure that every validation pathway recommended by this Report provides for the procedural participatory protection required by free, prior, and informed consent, as provided for in art 32(2) of UNDRIP. However, as further discussed in [Chapter 2](#), the degree of participation that must be guaranteed to Indigenous peoples is dictated by the nature of the decision-making in question and the potential impact of the adverse effects upon rights and interests.

1.99 That the participation of native title parties be 'free', 'prior', and 'informed' is reflected in a large number of the recommendations made, including those dealing with conduct and content standards for the agreement-making validation pathways.¹²³ It is also reflected in the statutory procedures validating pathways for lower-level future acts including the specific consultation requirements required when the opportunity to be consulted is the applicable procedural right.¹²⁴

117 Expert Mechanism on the Rights of Indigenous Peoples, *Free, prior and informed consent: a human rights-based approach*, 39th sess, UN Doc A/HRC/39/62 (10 August 2018) [11].

118 Ibid.

119 See discussion in [Chapter 13](#).

120 Expert Mechanism on the Rights of Indigenous Peoples, *Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: Indigenous peoples and the right to self-determination*, 48th sess, UN Doc A/HRC/48/75 (4 August 2021) [8].

121 See also UNDRIP art 18.

122 See above at paragraph [\[1.15\]](#).

123 See [Chapters 3 and 4](#).

124 See [Chapter 6](#). See also [Chapter 7](#) in relation to consultation.

1.100 In relation to the ‘consent’ element of free, prior, and informed consent, some commentators and stakeholders consider this to provide a universal veto to Indigenous peoples but others consider consent to be only an aspirational objective.¹²⁵ Despite divergent opinions on the scope of free, prior, and informed consent, leading international law authorities have reached some consensus as to when free, prior, and informed consent will be mandated. The current position, reflected in the decisions of international legal courts and bodies, and endorsed by leading commentators, is that consent must be obtained in relation to projects that pose a significant enough risk to the human rights of Indigenous peoples. This has been referred to as a ‘sliding scale’ approach, whereby ‘the level of effective participation that must be guaranteed to indigenous peoples is essentially a function of the nature and content of the rights and activities in question’.¹²⁶ As the Special Rapporteur on the Rights of Indigenous Peoples has explained,

under the principles of progressive realization and non-regression of human rights, obtaining free, prior and informed consent should be understood as the objective of consultations and as an obligation in cases of significant impacts on the rights of indigenous peoples.¹²⁷

1.101 In short, there appears to be some consensus to the view that there should be an impact-based approach when determining whether the consent of the Indigenous peoples affected by a proposed infringement must be obtained prior to the infringement being done. The approach taken by the ALRC’s recommendations reflects that position.

1.102 Accordingly, for example, for the reformed statutory procedures validation pathways, consent is not obligatory for future acts which have been assessed as of lower impact.

1.103 For the ILUA validation pathway, consent is required by the very nature of the process. While under the right to negotiate validation pathway arbitration is available, where the parties agree and execute a section 31 agreement, that process similarly demonstrates that consent has been provided. The ALRC’s reforms seek to have more higher impact future acts (which attract the right to negotiate) be resolved by agreement. Where validation in the right to negotiate validation pathway depends upon a future act determination being made by the arbitral body, the ALRC’s recommendation to reform the s 39(1) criteria is designed as the tool for determining

125 As Professors Papillon, Leclair, and Leydet have noted: ‘FPIC’s uncertain legal meaning and scope allow for very different interpretations, themselves leading to a broad range of institutional responses. Between definitions of consent as a preferable but not necessarily mandatory outcome of consultation procedures and more substantive/robust conceptions of FPIC as a right to say “yes” or “no” to a given project, the gap is significant and the implications very real’: Martin Papillon, Jean Leclair and Dominique Leydet, ‘Free, Prior and Informed Consent: Between Legal Ambiguity and Political Agency’ (2020) 27(2) *International Journal on Minority and Group Rights* 223, 224.

126 Expert Mechanism on the Rights of Indigenous Peoples, *Free, prior and informed consent: a human rights-based approach*, 39th sess, UN Doc A/HRC/39/62 (10 August 2018) [35].

127 Victoria Tauli-Corpuz, *Rights of Indigenous Peoples: Report of the Special Rapporteur on the Rights of Indigenous Peoples*, 45th sess, UN Doc A/HRC/45/34 (18 June 2020) [60].

whether, in line with the sliding scale approach to free, prior, and informed consent, the consent of the native title parties should be obligatory for the validation of the future act.

1.104 As discussed in **Chapter 10**, the reformed s 39(1) criteria focus on whether, subject to the most compelling requirements of the nation, the arbitral body can be positively satisfied that the effects of the future act on native title rights and interests can be effectively addressed by measures which fairly and justly and within a reasonable time, redress the effect of the future act. If the arbitral body is not satisfied that there are effective measures and redress available, that would demonstrate that the future act is of such significance that the consent of the native title parties should be obtained (that is, that an agreement must be reached), if the future act is to be done.

1.105 The ALRC considers that each of those recommended reforms to the validation pathways is compliant with art 32(2) of UNDRIP.

Substantive protection — fair, just, and timely redress

1.106 Article 32(3) of UNDRIP contains a substantive standard: just and fair redress must be provided in relation to activities affecting the lands, territories, or resources of Indigenous peoples. In the ALRC's view, art 32(3) reflects what fairness and equity would require in any event.

1.107 All of the current validating pathways provide, at least in theory, an opportunity for redress to be fair and just. In relation to agreement-making as a validation pathway, many of the ALRC's recommendations aim to better ensure timely, fair, and just redress. This includes the recommendations that seek to facilitate fair and efficient negotiations by providing access to mediation and other dispute resolution processes and by imposing conduct and agreement content standards (see **Chapters 3** and **4**). Additionally, the recommendations which seek to address parties' capacity and negotiating power, and structural imbalances which impede fair negotiations, are designed to better ensure fair and just outcomes (see **Chapters 3, 4, and 14**). In relation to the right to negotiate, and arbitration as a validation pathway, there is a structural imbalance that is a significant impediment to achieving fair, just, and timely redress for native title parties (see **Chapter 10**). Several of the recommendations in this Report aim to address these structural issues, and are directed to better ensuring that the arbitral body (usually the NNTT) is able to provide timely redress by determining financial conditions including conditions which provide for benefit-sharing.

1.108 Article 32(3) of UNDRIP requires the state to provide 'effective mechanisms' for just and fair redress. For a mechanism to be effective, it must be timely. That is, it must be provided within a reasonable time of the adverse effects of the infringement being experienced by the holders of the property rights affected. The recommendations in this Report about the provision of redress also focus on redress being provided in a timely way.

1.109 The consent agreement-making validation pathways have enabled redress to be provided through agreements made between the parties, and such redress can be timely. However, the only available mechanism for obtaining redress in relation to future acts validated through the statutory procedures validating pathway is the statutory compensation scheme created by Part 2 Div 5 of the *NTA*.

1.110 As earlier stated, in the 32 years since the enactment of the *NTA*, not a single dollar of compensation in respect of future acts has yet been awarded to native title holders through the statutory compensation scheme created by the *NTA*. That scheme cannot be regarded as an 'effective mechanism'. To date, it has proved to be incapable of providing timely redress. It is likely that, by reason of its design and practical operation, this mechanism will rarely provide for timely redress in the future. The mechanism requires an application to the Federal Court in every instance, including for compensation for future acts which tend to occur frequently and where for the vast bulk of such acts the compensation payable is relatively small. An application to the Federal Court (and possible trial) is unlikely to provide an efficient and timely mechanism for dealing with frequently occurring, smaller future acts. It is likely that the only feasible way of pursuing such claims through a proceeding in the Federal Court is to do so in bulk rather than on a case-by-case basis and that the resource and logistical challenges faced by bulk applications, probably explains the dearth of future acts compensation applications made to date.

1.111 In contrast to the current statutory compensation mechanism, the recommended impact-based scheme would provide a mechanism for assessing the extent of redress which should accompany each kind of future act assessed through the assessments to be conducted by the NNTT. This would enable redress (even if not full redress) to be provided within a reasonable time of the future act being done.

1.112 The ALRC considers that these reforms will bring those validation pathways into compliance with art 32(3) of UNDRIP.

Remedying unfairness

1.113 The Terms of Reference ask the ALRC to consider rectifying inequality or unfairness. Inequality and unfairness are, for the purposes of this Inquiry, two peas in the same pod. Inequality of treatment by the law in a country governed by the rule of law most obviously manifests in unfairness for those the subject of the unequal or discriminatory treatment.

1.114 Rectifying that discrimination by no longer treating native title rights and interests as inferior to freehold title (and thus warranting a lower level of protection from infringement than is generally the case for freehold title) would address the unfairness present in the current statutory procedures validation pathways.

1.115 As already discussed, the agreement-making validation pathways, including outcomes in future act determinations under the right to negotiate pathway, can be improved by reducing inequality in bargaining capacity and power and unfairness

generated by poor negotiation processes. The recommendations directed at those improvements will serve to rectify the unfairness in the agreement-making pathways.

Rectifying inefficacy by providing effective rights and remedies

1.116 The Terms of Reference ask the ALRC to consider rectifying inefficacy in the future acts regime. The ALRC's recommendations relating to compliance and enforcement (see **Chapter 11**) address a significant shortcoming in the current legislation by providing an accessible avenue for enforcing compliance across the future acts regime, deterring non-compliance, and providing effective remedies where non-compliance does occur.

1.117 The ALRC's reforms also address inefficacy by ensuring that parties are able to meaningfully and effectively participate in the future acts regime. The ALRC's recommendations relating to improved resourcing for PBCs (see **Chapter 14**) would help ensure native title holders can effectively exercise the rights afforded to them by the future acts regime. Additionally, the expanded ability of the NNTT to assist parties in negotiating agreements (see **Chapters 3** and **9**) would help agreement-making pathways operate more effectively.

Promoting efficiency, engagement, and economic development

1.118 In conjunction with rectifying inefficacy, the Terms of Reference also ask the ALRC to consider options in the future acts regime to reduce the time and cost of compliance for all parties. The Terms of Reference also recognise the role of the future acts regime as a precursor to economic and other activities on native title land.

1.119 The ALRC's recommendations identify a number of ways that the future acts regime can operate more efficiently and in doing so promote better engagement with the regime and economic development more broadly. Inefficiencies largely arise due to legislative complexity, unfairness (which leads to disengagement, relationship break down, and lack of collaboration), inadequate system resourcing, and process uncertainty.

1.120 As outlined above, one of the principal ways that the reforms address inefficiency and legislative complexity is through repealing the statutory procedures regime — including the expedited procedure — and replacing it with a streamlined, impact-based scheme (see **Chapter 6**). The recommended impact-based scheme provides for a principled and simpler framework, which will increase efficiencies across the board, and in particular when it comes to future acts characterised as limited or lower impact. By focusing on impact rather than industry, the impact-based scheme is additionally designed to be capable of responding to new and emerging industries.

1.121 Where possible, the ALRC's reforms have also sought to increase streamlining across the board, give all system users process certainty, and to minimise unnecessary delay and costs (see, for example, reforms to the right to

negotiate process in **Chapters 9** and **10**, and the proposed introduction of Native Title Plans in **Chapter 13**. The ALRC has also recommended reforms to enable the NNTT and Federal Court to offer greater assistance to parties to negotiate and interpret future act agreements (see **Chapters 3** and **9**); and recommended standing instruction reforms would provide greater flexibility and significant efficiencies in agreement-making (see **Chapter 3**).

1.122 Inefficiency in the future acts regime can also be linked to systemic under-resourcing of parties, which is present in the future acts regime. If any party is under-resourced, they cannot participate or develop the necessary capacity to meaningfully engage with the future acts regime.¹²⁸ When parties cannot engage, processes can take longer and there can be significant uncertainty about future act validity. Lack of engagement can also lead to reduced opportunities for development. These findings echo findings made in a number of other reports into the future acts regime.¹²⁹ The reforms in **Chapter 14** are intended to improve PBC resourcing and also address other system capacity issues. Overall, the ALRC agrees with the premise in the Terms of Reference that equity and economic development can be mutually reinforcing, and the reforms support this direction.

Aligning the future acts regime with the intent of the *Native Title Act 1993* (Cth)

1.123 The Terms of Reference ask the ALRC to consider the intention of the *NTA*, as stated in its preamble, to be a special measure for the advancement of First Nations peoples, and to ensure native title holders are able to fully enjoy their rights and interests. In respect of future acts, the preamble also records that:

In future, acts that affect native title should only be able to be validly done if, typically, they can also be done to freehold land and if, whenever appropriate, every reasonable effort has been made to secure the agreement of the native title holders through a special right to negotiate. It is also important that the broader Australian community be provided with certainty that such acts may be validly done.

1.124 The ALRC has also had regard to the objects provision in s 3 of the *NTA*, which provides that ‘the recognition and protection of native title’ is one of the main objects of the Act. The Explanatory Memorandum to the *NTA* as originally enacted acknowledges this as a ‘major purpose’ of the *NTA*,¹³⁰ and that the Act aims to protect native title ‘to the maximum extent practicable’.¹³¹ The protection of native title rights and interests is clearly necessary so that they may be fully enjoyed, as contemplated by the preamble.

¹²⁸ See, eg, Mabo Centre and National Native Title Council, *Submission 130*.

¹²⁹ See **Chapter 14** for a list of previous reports that have made recommendations about improving resourcing in the future acts regime.

¹³⁰ Explanatory Memorandum Part A, Native Title Bill 1993 (Cth) 1.

¹³¹ *Ibid*.

1.125 The ALRC's reforms seek to bring the future acts regime into alignment with the intention of the *NTA* in the manner detailed above.

Key concepts and terminology

1.126 This Report deals with certain concepts and terminology, which have particular meanings in a native title context. This section briefly outlines some of the key concepts used in this Report.

- **Native title rights and interests** are recognised by the common law as the rights and interests flowing from traditional laws and customs that have existed since time immemorial. Native title is a distinctive form of property.
- A **future act** is an act (a grant of a tenement, licence, or similar) that will affect native title rights and interests.¹³² Future acts must be done validly. The *NTA* sets out various pathways to achieve validity.
- **Validity** has two aspects: native title validity and non-native title validity. For a future act to be 'valid', it must be valid both for native title purposes and non-native title purposes. This means that the law that allows the government to grant the interest (for example, mining legislation) must be complied with, and the future acts provisions in the *NTA* must also be complied with. If only the non-native title law is followed (but not the *NTA*), the act will be an 'invalid future act'. If the non-native law is not followed, the act will not be a valid act, even if there is an attempt to follow the processes in the *NTA*.
- **Procedural rights** refer to the statutory procedures currently set out in Part 2 Div 3 Subdivisions G–N of the *NTA*. A future act done in compliance with the statutory procedures will be a 'valid' future act if such compliance is required. A future act not done in compliance with applicable procedures may still be valid if such compliance is not required for validity. If the ALRC's reforms are implemented, the statutory procedures would be replaced with the impact-based scheme discussed in **Chapter 6**. The ALRC has also made alternative recommendations in **Chapter 7** which would retain the existing subdivisions and amend the correlating procedural rights to better reflect the equivalency principle.
- The **right to negotiate** is one of the procedural rights within the *NTA*. After the future act is notified, the parties (the native title parties, government party, and proponent) must negotiate in good faith and if after six months no agreement has been reached, then any party may apply to the NNTT to make a future act determination (that is, to decide if the future act can be done, can be done subject to conditions, or must not be done). Currently the right to negotiate is available generally for mining and exploration future acts (some of which may be carved out and subject to an 'expedited procedure').

132 See further at paragraphs [1.33]–[1.34]. See also Australian Law Reform Commission (n 2) [36]–[39].

- **ILUAs** are agreements between native title parties and proponents negotiated under Subdivision B, C, or D of Part 2 Div 3 of the *NTA*. A future act done in reliance on a registered ILUA will be a ‘valid’ future act. Often ILUAs will provide for matters in addition to native title validation.
- **Section 31 agreements** are agreements between native title parties, government parties, and proponents as part of the right to negotiate process under Part 2 Div 3 Subdivision P.
- **Future act agreements** include ILUAs, section 31 agreements, written ancillary agreements (which often accompany an ILUA or section 31 agreement), low impact agreements (a new form of agreement discussed in [Chapters 6 and 7](#)), and agreements negotiated under s 24MD of the *NTA*.
- **Formal equality** provides that the equality of all persons means uniform or equal *treatment*. Formal equality does not account for differences that may exist between persons or peoples, with the consequence that equality of treatment may lead to inequality in outcome.¹³³
- **Substantive equality** accounts for the specific circumstances of particular groups, permitting differential treatment where necessary to achieve equality of *outcome*.¹³⁴

1.127 These concepts are explored in greater detail in [Chapter 2](#) and in other chapters of this Report. The Glossary sets out other key terminology used in this Report.

Navigating this Report

1.128 This Report consists of 14 chapters, including this introduction and executive summary. [Chapters 3–14](#) contain recommendations for reform.

1.129 **Context:** [Chapter 2](#) provides a historical background to the Inquiry, the *NTA*, and the future acts regime. It also discusses the key human rights principles that have guided the reforms in this Inquiry.

1.130 **Agreement making:** [Chapters 3, 4, and 5](#) introduce reforms to future acts agreements. [Chapter 3](#) discusses reforms to improve the fairness, efficacy, and equity of future act agreement-making. [Chapter 4](#) discusses reforms to improve the fairness and equity of the content of future act agreements. [Chapter 5](#) discusses reforms to the processes following the execution of future act agreements.

1.131 **Statutory procedures:** [Chapters 6, 7, and 8](#) introduce reforms to the statutory procedures in the future acts regime. [Chapter 6](#) introduces a new impact-based scheme that would reshape the existing statutory procedures contained within Subdivisions G–N of Part 2 Div 3 of the *NTA* to more appropriately align the impact of a future act on native title rights and interests with the procedural rights provided to native title parties. [Chapter 7](#) presents an alternative set of reforms, which

¹³³ See further at paragraphs [\[1.82\]–\[1.91\]](#).

¹³⁴ See further at paragraphs [\[1.82\]–\[1.91\]](#).

would reform the existing statutory procedures using the ‘equivalency principle’ as a guiding principle. **Chapter 8** introduces discrete reforms to the statutory procedures and future acts regime that may be implemented alongside, or independently of, the impact-based scheme outlined in **Chapter 6** or the alternative reforms outlined in **Chapter 7**.

1.132 Right to Negotiate: **Chapters 9** and **10** introduce reforms to the right to negotiate process. **Chapter 9** focuses on reforms to the negotiation process. **Chapter 10** discusses reforms to the arbitration process that occurs where parties do not reach agreement.

1.133 Compliance and Enforcement: **Chapter 11** discusses reforms to the compliance and enforcement frameworks in the future acts regime that are intended to improve compliance with the future acts regime, and increase fairness and access to justice in circumstances of non-compliance.

1.134 Costs Recovery: **Chapter 12** discusses reforms to the costs recovery regime in the future acts regime to make those mechanisms fairer and promote access to justice for all parties.

1.135 Native Title Plans: **Chapter 13** introduces Native Title Plans as a self-determined pathway to future acts validity. Developed by PBCs, Native Title Plans would provide a means of proactively documenting and registering native title holders’ aspirations and guidelines for if, how, and where development can occur on Country.

1.136 The Bigger Picture: **Chapter 14** discusses issues that have been identified during this Inquiry as relevant to the fair and efficient operation of the future acts regime. Some of these issues are the subject of recommendations or discussed in order to aid the implementation of reforms. Others are highlighted as potential areas for further reform which the ALRC has not had the opportunity to deal with to finality, but where further consideration of reform may be warranted.

The Inquiry’s process

Advisory Committee

1.137 The Inquiry was expertly informed by the Advisory Committee. The Advisory Committee consisted of native title holders, native title experts, representatives of industry, academics, and lawyers (see **Participants**). The ALRC formally met with the Advisory Committee on three occasions during the Inquiry.

1.138 The ALRC sincerely thanks the Advisory Committee for their expertise, commitment, and guidance during the Inquiry. The reforms in this Report have benefited greatly from their advice and input.

Consultation, submissions, and webinar

1.139 The ALRC has consulted broadly during the entire Inquiry, including conducting consultations in regional and remote locations in Australia. The ALRC team has conducted in-person consultations in Adelaide, Alice Springs, Brisbane, Burketown, Cairns, Camooweal, Coffin Bay, Darwin, Emerald, Kalgoorlie, Katherine, Kununurra, Melbourne, Mount Isa, Perth, Ross River, and Sydney.

1.140 The ALRC ran two major consultation phases with native title holders and their representatives, peak First Nations organisations, lawyers, NNTT members and staff, industry representatives, government, and academics. The two consultation phases coincided with the release of two public consultation documents. In November 2024, the ALRC released an Issues Paper and started a conversation by asking people to share their thoughts about the Inquiry and the key issues for reform to the future acts regime. The ALRC received 50 submissions in response to the Issues Paper.

1.141 In May 2025, the ALRC released a Discussion Paper, which continued the conversation started in the Issues Paper. The Discussion Paper contained 18 Proposals and 23 Questions relating to potential reforms to the future acts regime. The ALRC received 111 submissions in response to the Discussion Paper. Some of these submissions also responded to the Issues Paper.

1.142 In addition to formal consultation and submissions, the ALRC team presented a public webinar in July 2025 to invite engagement on the proposals for reform in the Discussion Paper.

1.143 The ALRC team has also attended and presented at several conferences and events, including the 2024 and 2025 AIATSIS Summits, the 2025 AIATSIS Legal Workshop, and the 2024 National Indigenous Legal Conference.

Research and expert review

1.144 The recommendations in this Report reflect the ALRC's own analysis and conclusions, based on the totality of the evidence base. This includes the evidence collected through consultations and submissions, research about Australian laws and practice (legislation, case law, academic research, evaluations, and reports of previous inquiries or reviews), as well as international comparative law. The ALRC also considered publicly available quantitative data.

1.145 Some chapters of this Report were read by expert reviewers, who provided valuable feedback based on their experience and expertise (see [Participants](#)).

1.146 The ALRC sincerely thanks the hundreds of organisations, government bodies, and individuals who have contributed to this Inquiry, including the participants and other contributors recognised in the acknowledgement at the front of this Report. The ALRC has benefited enormously from their experience, expertise, and enthusiasm for reform.

2. Context

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Introduction

2.1 The *Native Title Act 1993* (Cth) (*‘NTA’*) creates a legislative regime for recognising native title rights and interests — distinctive property rights that have existed for thousands of years before British settlement. The future acts regime that sits within the *NTA* establishes a system for determining when infringement of native title property rights is valid. This chapter contextualises the *NTA* and future acts regime within the legal, political, and international context in which they emerged, and in which they now operate. Understanding this context provides an important foundation for the reforms discussed in this Report.

2.2 This chapter is in five parts. The first part examines the history of the *NTA*, and the development of jurisprudence considering the concept of native title. The second part discusses the development and amendment of the future acts regime. The third part explores the concept of equality before the law, which is a central concept for this Inquiry. The fourth part discusses key international human rights instruments that guide how the future acts regime should be reformed. The final part briefly discusses other domestic and international legal frameworks that relate to Indigenous rights.

History and development of the *NTA* and the concept of native title

2.3 The rights and interests in lands and waters that today are recognised as 'native title' predate British sovereignty in Australia, though they were not recognised as such until 1992 when native title in Australia was first formally recognised by the High Court in *Mabo v Queensland (No 2)*.¹ As explained further below, native title is not an institution of, but is recognised by, the common law. Native title 'has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory'.² This part provides an overview of the evolution of the native title framework and the developing jurisprudence surrounding the concept of native title.

British settlement and the concept of *terra nullius*

2.4 At the time that British settlers arrived in Australia, international law recognised various ways by which sovereignty could be acquired over territory, including occupation of a land deemed *terra nullius* (or 'a territory belonging to no-one'³).⁴ Parallel concepts reflected in British Imperial law determined the extent to which British law was inherited by a territory over which the British acquired sovereignty. In cases of conquest or cession, local laws remained intact unless repugnant to the common law; in settled colonies, however, the laws of England were inherited if not inconsistent with local circumstances.⁵ British sovereignty in Australia was

1 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

2 *Ibid* 58 (Brennan J).

3 *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12 [79].

4 See *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 32 (Brennan J). Secher identifies annexation as a fourth potential means of acquiring sovereignty over a new territory at international law: Ulla Secher, 'The Reception of Land Law into the Australian Colonies Post-Mabo: The Continuity and Recognition Doctrines Revisited and the Emergence of the Doctrine of Continuity Pro-Tempore' (2004) 27(3) *UNSW Law Journal* 703, 705.

5 See generally Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)* (Report No 126, 2015) [2.17]–[2.19].

founded and asserted on the doctrine of ‘settlement’, the common law equivalent of occupying *terra nullius*.⁶

2.5 The idea of Australia as being ‘practically unoccupied, without settled inhabitants or settled law’ persisted in Australian law until *Mabo v Queensland (No 2)*, where it was expressly rejected by some members of the High Court. For example, Brennan J explained that the common law of Australia

would perpetuate injustice if it were to continue to embrace the enlarged notion of *terra nullius* and to persist in characterising the Indigenous inhabitants of the Australian colonies as people too low in the scale of social organisation to be acknowledged as possessing rights and interests in land. Moreover, to reject the theory that the Crown acquired absolute beneficial ownership of land is to bring the law into conformity with Australian history. The dispossession of indigenous inhabitants of Australia was not worked by a transfer of beneficial ownership when sovereignty was acquired by the Crown, but by the recurrent exercise of a paramount power to exclude the indigenous inhabitants from their traditional lands as colonial settlement expanded and land was granted to the colonists. Dispossession is attributable not to a failure of native title to survive the acquisition of sovereignty, but to its subsequent extinction by a paramount power.⁷

The *Mabo* Decisions and a rejection of *terra nullius*

2.6 In 1982, members of the Meriam people instituted proceedings before the High Court seeking legal recognition and protection of traditional land rights claimed in and over the Murray Islands in the Torres Strait.⁸ It was contended that the rights in question had existed from time immemorial and persisted despite the Crown’s annexation of the Murray Islands.⁹ The parties to the litigation agreed that the Islands were part of Queensland, and although Queensland conceded that the Murray

6 See generally Secher (n 4). For discussion of the enlarged notion of *terra nullius* that was adopted in the Australian colonies, see: *Cooper v Stuart* (App Cas, 1889) 286, as discussed in Eddie Synot and Roshan de Silva-Wijeyeratne, ‘Constitutional Foundations: The Persistent Myth of Cooper v Stuart’ in Nicole Watson and Heather Douglas (eds), *Indigenous Legal Judgments: Bringing Indigenous Voices into Judicial Decision Making* (Routledge, 2021) 36, 38.

7 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 58.

8 These proceedings were not the first claim for customary rights to land in Australia, the first case being *Milirrpum v Nabalco*. In that case, the Yolŋu people, aggrieved by mining on their traditional lands, sought a declaration from the Supreme Court of the Northern Territory that they were entitled to the occupation and enjoyment of those lands without interference. Although the Court recognised that as a matter of fact the Yolŋu people had ‘a subtle and elaborate system’ of ‘social rules and customs’, the Court concluded that native title did not form part of the Australian common law. The matter was heard by a single judge of the Supreme Court of the Northern Territory. In his decision, Blackburn J said that the Court considered itself bound by *Cooper v Stuart* (1889) 14 App Cas 286, which stood as a clear authority that Australia was a ‘settled or occupied colony’: *Milirrpum v Nabalco* (1971) 17 FLR 141, 242, 244–5, 267. The ALRC notes that the mining operations the subject of *Milirrpum v Nabalco*, and their effect on the Yolŋu people’s native title rights and interests, have been more recently considered in the High Court’s decision in *Commonwealth v Yunupingu on behalf of the Gumatj Clan or Estate Group*: see *Commonwealth v Yunupingu on behalf of the Gumatj Clan or Estate Group* (2025) 421 ALR 604 [103].

9 The islands of Mer (also known as Murray Island), Erub, and Ugar are known as the Murray Islands, and are situated approximately 800 km north of Cairns in the Torres Strait.

Islands had been inhabited since time immemorial, it refuted the existence of the land rights claimed by the plaintiffs.¹⁰

2.7 In 1985, following the commencement of proceedings, Queensland enacted the *Queensland Coast Islands Declaratory Act 1985* (Qld), which purported to confirm that, upon the Murray Islands being annexed to and becoming part of Queensland, ‘all other rights, interests and claims of any kind whatsoever’ in the Islands had been extinguished.¹¹

2.8 In 1988, a majority of six justices of the High Court in *Mabo v Queensland (No 1)* found that, apart from the *Racial Discrimination Act 1975* (Cth) (‘RDA’), the effect of the *Queensland Coast Islands Declaratory Act 1985* (Qld) was to extinguish native title.¹² A majority of four justices found such extinguishment of native title to be inconsistent with s 10 of the RDA (which enshrines the right to equality before the law) and therefore invalid by operation of s 109 of the *Australian Constitution* (which provides that a Commonwealth law will prevail over a State law to the extent of any inconsistency therebetween).¹³ The significance of the right to equality before the law is discussed further below from paragraph [2.118]. The High Court did not decide whether the Meriam people had any rights over the impugned lands, nor whether the common law recognised native title.¹⁴

2.9 In sum, although it fell short of recognising the existence of native title at common law, *Mabo v Queensland (No 1)* confirmed that native title, if it existed, enjoyed some constitutional protection against extinguishment by state legislatures.¹⁵

2.10 In 1992, the High Court delivered its landmark decision in *Mabo v Queensland (No 2)*. A majority of six justices confirmed for the first time that native title was recognised at common law in Australia:

the common law of this country recognises a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands.¹⁶

2.11 The majority concluded that the Crown had acquired sovereignty and radical title (as opposed to absolute beneficial ownership of land) on settlement, and that native title existed as a burden on the Crown’s radical title. As Brennan J explained:

the common law of Australia rejects the notion that, when the Crown acquired sovereignty over territory which is now part of Australia it thereby acquired the absolute beneficial ownership of the land therein, and accepts that the antecedent rights and interests in land possessed by the indigenous inhabitants

10 *Mabo v Queensland (No 1)* (1988) 166 CLR 186, 199.

11 *Queensland Coast Islands Declaratory Act 1985* (Qld) s 3(a).

12 *Mabo v Queensland (No 1)* (1988) 166 CLR 186.

13 *Ibid* 219 (Brennan, Toohey, Gaudron JJ), 233 (Deane J).

14 Richard Bartlett, *Native Title in Australia* (LexisNexis, 5th edn, 2023) 20.

15 See, eg, *ibid* 21–4.

16 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 15.

of the territory survived the change in sovereignty. Those antecedent rights and interests thus constitute a burden on the radical title of the Crown.¹⁷

2.12 The importance of the *Mabo v Queensland (No 2)* decision cannot be overstated. Then-Prime Minister Keating said in 1992:

Mabo is a historic decision — we can make it an historic turning point, the basis of a new relationship between Indigenous and non-Aboriginal Australians.¹⁸

2.13 Patrick Dodson, Chairman of the Council for Aboriginal Reconciliation said in 1993 that

the *Mabo* decision, which is a win, gives impetus to Aboriginal and Torres Strait Islander calls for a new deal. Through the process of reconciliation, the new found rights of Aboriginal and Torres Strait Islanders give all Australians a critical opportunity to heal old sores whilst being constructive about the nature of the future of indigenous affairs.¹⁹

2.14 Aboriginal and Torres Strait Islander Social Justice Commissioner, Michael Dodson, reflected that

the deepest significance of the judgment is its potential to hold a mirror to the face of contemporary Australia. In the background is the history of this country. In the foreground is a nation with a choice. There is no possibility to look away. The recognition of native title is not merely a recognition of rights at law. It is a recognition of basic human rights and realities about the origins of this nation: the values which informed its past and the values which will inform its future.²⁰

2.15 In 1993, the Australian Government described *Mabo v Queensland (No 2)* as ‘an opportunity’ and recognised that ‘there would be serious consequences for reconciliation if there was an inadequate response to *Mabo*’.²¹ The initial government response was to develop a justice and economic package of reforms. One element of this package of reforms was legislation to codify native title: this became the *NTA*.

17 Ibid 57.

18 The Hon Paul Keating MP, ‘Speech by the Honourable Prime Minister, PJ Keating MP, Australian Launch of the International Year of the World’s Indigenous Peoples, Redfern, 10 December 1992’ (1993) 3(61) *Aboriginal Law Bulletin* 4.

19 Patrick Dodson, ‘Reconciliation and the High Court’s Decision on Native Title’ (1993) 61(3) *Aboriginal Law Bulletin* 6.

20 Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Native Title Report (July 1995 – June 1996)* (1996) 1.

21 Australian Government, *Mabo: The High Court Decision on Native Title* (Discussion Paper, June 1993) 106.

Codifying native title rights and interests — the *Native Title Act 1993* (Cth)

2.16 The *Native Title Act 1993* (Cth) was adopted in late 1993 following a period of intense negotiations and political manoeuvring between the states and territories, industry stakeholders, and Aboriginal and Torres Strait Islander organisations.²²

2.17 The ‘major purpose’ of the *NTA* was ‘to recognise and protect native title’.²³ The Explanatory Memorandum for the Native Title Bill 1993 explained that ‘recognition of native title is one thing, protection is another. The Bill aims to protect native title to the maximum extent practicable’.²⁴ Sections 10 and 11 of the *NTA* provided a general protection for native title rights and interests by clearly stating that the Act intended to recognise and protect native title rights and interests, and that native title rights and interests were not to be extinguished, except in accordance with the Act.²⁵ Broadly speaking, the originally enacted *NTA* pursued this objective in several ways.

2.18 First, and most relevantly for this Inquiry, the *NTA* created the future acts regime. A corollary to the *NTA*’s validation of past acts, the future acts regime was enacted to regulate acts other than past acts — ‘future acts’ — affecting native title. The Explanatory Memorandum to the *NTA* underscored the necessity of the regime:

It is crucial that there be a process to allow for grants and actions over native title land and land that could be native title land to continue in the future. To provide for such a process it is necessary for native title to be accommodated into the national land management system.²⁶

2.19 The original future acts regime was intended to provide exceptions from the general protections expressed in ss 10 and 11. As the High Court explained in *Western Australia v Commonwealth* (*‘Native Title Act Case’*):

the *Native Title Act* ... protects native title holders against any extinction or impairment of native title subject to the specific and detailed exceptions which that Act prescribes or permits.²⁷

2.20 The High Court explained that the provisions that comprised the original future acts regime were ‘for the most part, merely regulatory’, and that that the statutory procedures in the future acts regime (which prescribed the procedure to be followed and the conditions that must be satisfied) ‘simply define[d] the scope of certain exceptions to the general protections of native title declared by s 11(1)’.²⁸

2.21 ‘Future acts’ are defined as acts — either the passing of a law after 1 July 1993 or any other act after 1 January 1994 — that dealt with land or waters in

22 See Bartlett, *Native Title in Australia* (n 14) ch 3.

23 Explanatory Memorandum Part A, Native Title Bill 1993 (Cth) 1.

24 Ibid.

25 *Native Title Act 1993* (Cth) ss 10, 11 (as enacted).

26 Explanatory Memorandum Part A, Native Title Bill 1993 (Cth) 5.

27 *Western Australia v Commonwealth* (1995) 183 CLR 373, 463 (emphasis in original).

28 Ibid 471.

a way that affected native title rights and interests.²⁹ For these purposes, an act was deemed to ‘affect’ native title if it extinguished native title or was otherwise wholly or partly inconsistent with the continued existence, enjoyment, or exercise of native title rights and interests.³⁰ Whereas the validation of past acts might have entailed the extinguishment of native title, future acts were generally bound by the non-extinguishment principle, which provides that an act may affect native title without extinguishing it.³¹

2.22 The future acts regime was structured around the concept of ‘permissible future acts’. Permissible future acts were defined in s 235 as, in summary:

- legislative acts in relation to an onshore place that applies in the same way to native title holders as it would if they instead held freehold title to the land and the effect on native title is not such as to cause the native title holders to be in a more disadvantageous position at law than they would be if they instead held freehold title to the land;
- non-legislative acts in relation to an onshore place where the act could be done if the native title holders held freehold title to the land concerned or the act could be done in relation to the waters if the native title holders instead held freehold title to the land adjoining or surrounding the waters concerned;
- renewal, re-grants, or extensions of a commercial, agricultural, pastoral, or residential lease (subject to certain conditions concerning the terms of the renewal);
- future acts in relation to an offshore place;
- low impact future acts; and
- agreements under s 21 or future acts authorised by such an agreement.

2.23 Acts that were not permissible future acts were ‘impermissible future acts’ and, under s 22, were invalid to the extent they affected native title.

2.24 The future acts regime as enacted in 1993 was, in the main, underpinned by an ‘equivalency’ principle. The equivalency principle was the primary means of determining the procedural rights that were to be afforded to the native title parties before a future act can be undertaken. For example, s 23(6) provided that, other than low impact future acts or acts to which Subdivision B (of Part 2 Div 3) applied, for acts in an ‘onshore place’,³² the native title holders had the same procedural rights as they would have in relation to the act on the assumption they instead held freehold title to the land concerned and to the land adjoining or surrounding any waters concerned. For acts in an ‘offshore place’,³³ the rights to be afforded to the native title holders were any corresponding rights and interests in relation to the offshore place that were not native title rights and interests. This was reflected in

29 *Native Title Act 1993* (Cth) s 233, as enacted.

30 *Ibid* s 227.

31 *Ibid* ss 23(3)–(4), as enacted. The non-extinguishment principle is set out at s 238 of the *NTA*.

32 See [Chapter 7](#) for further detail of what is meant by ‘onshore place’.

33 See [Chapter 7](#) for further detail of what is meant by ‘offshore place’.

the *NTA*'s preamble, which provides that 'in future, acts that affect native title should only be able to be validly done if, typically, they can also be done to freehold land ...'

2.25 Affording to native title holders the same procedural rights that are afforded to ordinary title holders aimed to promote formal equality before the law by providing native title holders with procedural rights similar to those rights that protect other property interests from infringement.³⁴ However, the equivalency principle does not seek to equate native title rights and interests with non-native title rights and interests because as discussed below, native title rights and interests are *sui generis*. Indeed, in providing native title holders with the same procedural rights as other title holders, these provisions did not account for the uniqueness of native title as a distinct form of property interests.³⁵ Put differently, affording the same procedural rights will not, however, necessarily afford native title holders with substantive equality because the equivalency principle does not account for the 'cultural, spiritual or metaphysical aspect [of native title] that has no analogue in European law'.³⁶ That is, where native title rights and interests are *sui generis*, affording to native title holders the same procedural rights as freehold title holders may be inappropriate or insufficient to achieve the objective of the procedural rights where the content of each of freehold title and native title is fundamentally different.

2.26 The *NTA*, as enacted, specified a number of classes of acts that were exceptions to the equivalency principle. One of those exceptions was for acts that could *not* be done to freehold title, but because of the *sui generis* nature of native title rights and interests, that act would affect native title rights and interests. If the equivalency principle were to apply in these situations, the native title holders would be afforded no procedural rights because a freehold title holder would receive no such procedural rights. In those circumstances, it would not be practically possible to apply the equivalency principle while also ensuring native title parties are afforded appropriate procedural rights for a proposed future act.

2.27 Another exception to the equivalency approach in the original *NTA* was the right to negotiate process. The right to negotiate process applied to the following future acts:

- the creation of a right to mine, whether by the grant of a mining lease or otherwise;
- the variation of such a right, to extend the area to which it relates;
- the extension of the period for which such a right has effect, other than under an option or right of extension or renewal created by the lease, contract, or other thing whose grant or making created the right to mine;

34 See generally Bartlett, *Native Title in Australia* (n 14) 561–3.

35 See further discussion in [Chapter 7](#).

36 *Commonwealth v Yunupingu on behalf of the Gumatj Clan or Estate Group* (2025) 421 ALR 604 [142].

- the compulsory acquisition of native title under a 'Compulsory Acquisition Act', where the purpose of the acquisition is to confer rights or interests in relation to the land or waters concerned on persons other than the government party (undertaking the acquisition); and
- any other act approved in writing by the Commonwealth Minister.³⁷

2.28 Under the right to negotiate process, the proponent, native title party, and government party would negotiate for a minimum period of time, with a view to reaching agreement about the future act. If agreement was not reached, the parties could apply to an arbitral body for a determination about whether the future act could be done.

2.29 As discussed further in [Chapters 9](#) and [10](#), the right to negotiate was intended to recognise the 'special attachment of Aboriginal and Torres Strait Islander people to their land'.³⁸ In other words, the right to negotiate process recognised that there were some classes of future acts where the procedural rights afforded by application of the equivalency principle would not adequately account for the impact of the act on native title to reflect the special attachment of Aboriginal and Torres Strait Islander peoples to their lands and waters. In these cases, the *NTA* departed from a formal equality approach and instead pursued substantive equality.³⁹

2.30 Within the right to negotiate process, there was an exception called the 'expedited procedure'. The expedited procedure excluded from the right to negotiate certain classes of future acts that had 'minimal effect on native title' from the right to negotiate process.⁴⁰ If the government party considered the future act was an act attracting the expedited procedure, it would include a statement to that effect on the future act notice. The native title parties would generally have two months to lodge an objection.⁴¹ If no objection were lodged, or if an arbitral body determined that the act did attract the expedited procedure, then the future act could be done after the two months. In this way, the expedited procedure took an impact-based approach to the procedural protections afforded to native title parties.

2.31 A further exception to the equivalency approach was in the treatment of 'low impact future acts'. 'Low impact future acts' referred to a narrow category of pre-determination future acts.⁴² Rather than providing native title parties with the same rights as an ordinary title holder, the *NTA* provided native title parties with no corresponding procedural rights or statutory compensation for 'low impact future acts'.⁴³

37 *Native Title Act 1993* (Cth) s 26(2), as enacted.

38 Australian Government (n 21) Appendix, [17]. See also Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Native Title Report 1998* (1998) 3.

39 The concepts of formal and substantive equality are discussed further below at paragraphs [\[2.110\]](#)–[\[2.117\]](#).

40 Explanatory Memorandum Part A, *Native Title Bill 1993* (Cth) 6.

41 *Native Title Act 1993* (Cth) s 32(3), as enacted. This period is now 4 months: *ibid* s 32(3).

42 *Native Title Act 1993* (Cth) s 234, as enacted.

43 *Ibid* ss 23(4), (6), 234, as enacted. See further discussion in [Chapter 7](#).

2.32 Secondly, the *NTA* provided for statutory compensation for the extinguishment or impairment of native title rights and interests, and a mechanism for determining statutory compensation applications (sometimes known as 'Division 5 compensation' or 'statutory compensation').⁴⁴ The preamble states that where an act has the effect of extinguishing native title rights and interests, statutory compensation is to be paid on just terms:

Justice requires that, if acts that extinguish native title are to be validated or to be allowed, compensation on just terms ... must be provided to the holders of the native title.⁴⁵

2.33 Thirdly, the *NTA* established the NNTT,⁴⁶ and vested power to determine certain native title-related matters in the NNTT,⁴⁷ and the Federal Court.⁴⁸ Fourthly, and relatedly, the *NTA* gave effect to state and territory jurisdiction by providing that a recognised state or territory body may carry out certain functions of the NNTT, or Federal Court, under the *NTA*.⁴⁹

2.34 Fifthly, the *NTA* validated certain 'past acts' — namely, Crown grants made prior to 1 January 1994 and legislation made prior to 1 July 1993 — that were otherwise invalid due to the existence of native title over the land or waters affected by the act in question.⁵⁰ Depending on the categorisation of past act, validation could result in native title being extinguished, compensation being payable to native title holders, or both.⁵¹ The *NTA* explicitly provided that the validation of such past acts was excluded from the operation of the *RDA*.⁵²

44 See *ibid* pt 2 div 5. As discussed below, the *NTA* as originally enacted provided for statutory compensation applications to be made to the Native Title Registrar. Following the High Court's decision in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, amendments were made to ensure that statutory compensation applications were heard by the Federal Court: Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) [3.28]–[3.30].

45 *Native Title Act 1993* (Cth) preamble. The Explanatory Memorandum to the *NTA* (as originally enacted) states that where an act does not extinguish but impairs native title rights and interests, then if 'such an act takes place and ordinary title holders would be entitled to compensation if the grant were made over their land ... then the holders of native title are entitled to compensation under this legislation': Explanatory Memorandum Part B, Native Title Bill 1993 (Cth) 17. See criteria for statutory compensation as set out at *Native Title Act 1993* (Cth) s 51.

46 *Native Title Act 1993* (Cth) s 107.

47 *Ibid* pts 3, 6, as enacted.

48 *Ibid* pts 3, 4, 6, as enacted. In relation to the powers vested in the Federal Court and the NNTT in relation to determinations of native title, Bartlett explains that the 'the powers of the NNTT to determine native title were grounded in consensual or mediative conduct. It could not determine native title except by agreement. Since the negotiation positions of the parties depend on the future acts regime ... it is the administrative role of the NNTT in that regime which is much more significant. The Federal Court was the body empowered to make determinations of native title where the parties could not agree': Bartlett, *Native Title in Australia* (n 14) 44.

49 *Native Title Act 1993* (Cth) s 27, as enacted. See generally Bartlett, *Native Title in Australia* (n 14) 45–6.

50 *Native Title Act 1993* (Cth) s 14. 'Past act' is defined in s 228.

51 *Ibid* ss 15, 17. Section 15 was amended by the *Native Title Amendment Act 1998* (Cth) to include a note excluding this section if the relevant provisions relating to intermediate period acts (namely ss 23C and 23G) apply to the act.

52 *Ibid* s 7(2), as enacted.

2.35 Finally, the *NTA* established a mechanism for applications to be made seeking a determination that native title exists. This is commonly known as the native title claims process, and was the subject of review by the ALRC in 2015.⁵³ To date, there have been more than 500 native title claims determined, covering a substantial proportion of the Australian land mass.

Recognising and protecting native title rights and interests

2.36 The preamble to the *NTA* demonstrates Parliament's acknowledgement that Aboriginal and Torres Strait Islander peoples 'have been progressively dispossessed of their lands', such dispossession occurring 'largely without compensation', and that 'successive governments have failed to reach a lasting and equitable agreement with Aboriginal peoples and Torres Strait Islanders concerning the use of their lands'.⁵⁴ The preamble recognises that this dispossession is a cause of significant disadvantage for Aboriginal and Torres Strait Islander peoples, and records Parliament's intentions to:

- 'rectify the consequences of past injustices by the special measures contained in this Act, announced at the time of introduction of this Act into the Parliament, or agreed on by the Parliament from time to time, for securing the adequate advancement and protection of Aboriginal peoples and Torres Strait Islanders'; and
- 'ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire'.⁵⁵

2.37 As to the future acts regime specifically, the preamble declares:

It is particularly important to ensure that native title holders are now able to enjoy fully their rights and interests. Their rights and interests under the common law of Australia need to be significantly supplemented. In future, acts that affect native title should only be able to be validly done if, typically, they can also be done to freehold land and if, whenever appropriate, every reasonable effort has been made to secure the agreement of the native title holders through a special right to negotiate. It is also important that the broader Australian community be provided with certainty that such acts may be validly done.⁵⁶

2.38 The preamble sets out important context for discerning the Parliament's intention in enacting the *NTA*. As Mason J has observed, a statute 'must be read as a whole and recourse to the preamble may throw light on the statutory purpose and

53 See Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)* (n 5).

54 *Native Title Act 1993 (Cth)* preamble.

55 *Ibid.*

56 *Ibid.*

object'.⁵⁷ The Federal Court has described the preamble as the 'moral foundation' of the *NTA*,⁵⁸ and Associate Professor Brennan has highlighted the 'normative significance' embodied in terms of the preamble chosen by the Parliament.⁵⁹

2.39 In addition to the preamble, s 3 of the *NTA* sets out the Act's objects. Of the four objects enumerated, the first two are of particular significance to the future acts regime:

- 'to provide for the recognition and protection of native title'; and
- 'to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings'.⁶⁰

2.40 Though the *NTA* does not indicate any hierarchy between these objects, the 1993 Explanatory Memorandum identifies the recognition and protection of native title as the Commonwealth's 'major purpose in enacting this legislation'.⁶¹

2.41 Reading together the *NTA*'s objects provision and preamble, the ALRC has previously identified the Act as having a beneficial purpose.⁶² Where a statute is beneficial or remedial in nature, the idea of construing that statute liberally in accordance with that purpose is well recognised at common law,⁶³ including in the context of the *NTA*:

in the second reading speech on the Native Title Bill 1993, the then Prime Minister, Mr Keating, saw *Mabo (No 2)* as giving Australians the opportunity to rectify the consequences of past injustices. The Act should therefore be read as having a legislative purpose of wiping away or at all events ameliorating the 'national legacy of unutterable shame' that in the eyes of many has haunted the nation for decades. Where the Act is capable of a construction that would ameliorate any of those injustices or redeem that legacy, it should be given that construction.⁶⁴

57 *Wacando v Commonwealth* (1981) 148 CLR 1, 23. The preamble to the *NTA* has provided a contextual aid to interpretation in numerous cases: see, eg, *Northern Territory v Griffiths* (2019) 269 CLR 1 [26]; *Karajarri Traditional Lands Association (Aboriginal Corporation) RNTBC v State of Western Australia* (2024) 307 FCR 122 [117]–[118]. See also *Acts Interpretation Act 1901* (Cth) s 15AA.

58 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442 [63].

59 Sean Brennan, 'Statutory Interpretation and Indigenous Property Rights' (2010) 21 *Public Law Review* 239, 252.

60 *Native Title Act 1993* (Cth) s 3(a)–(b).

61 Explanatory Memorandum Part A, Native Title Bill 1993 (Cth) 1.

62 Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993* (Cth) (n 5) [1.4].

63 See, eg, *La Perouse Local Aboriginal Land Council v Quarry Street Pty Ltd* [2025] HCA 32 [139]; *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2016) 260 CLR 232 [92]; *IW v City of Perth* (1997) 191 CLR 1, 12, 52.

64 *Commonwealth v Yarmirr* (2001) 208 CLR 1 [124] (citations omitted). See also *Forrest on behalf of the Nangaanya-ku Native Title Claim Group (Part B) v Western Australia (No 2)* [2024] FCA 729 [81], [156].

2.42 While this is a principle of statutory construction rather than design, it illustrates the weight accorded by the common law to upholding the objects of a statute. It also helps to highlight that the future acts regime should be reformed consistently with the intention and objectives of the *NTA*, and having regard to the Act's normative foundations and beneficial purposes.⁶⁵

The developing understanding of the nature of native title

2.43 Native title is not *created* by the common law, but rather the common law *recognises* native title as the rights and interests flowing from traditional laws and customs that have existed since time immemorial.⁶⁶

2.44 The *NTA* defines 'native title' as

the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

(a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and

(c) the rights and interests are recognised by the common law of Australia.⁶⁷

2.45 While *Mabo v Queensland (No 2)* confirmed that native title 'is not an institution of the common law', subsequent commentary has emphasised that native title, as it has developed under the *NTA* and associated jurisprudence, is not an institution purely of traditional Indigenous laws either. Describing native title as a 'recognition concept', Pearson notes that native title is neither a common law title nor an Aboriginal law title but rather 'the space between the two systems, where there is recognition'.⁶⁸

65 This is consistent with the ALRC's 2015 review of the *NTA*, which examined connection requirements (as distinct from the future acts regime), alignment with the *NTA*'s beneficial purpose emerged as a recurring theme and formed a throughline of our final report, guiding several of the reforms proposed: see generally Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)* (n 5).

66 For example, the High Court in *Fejo* explained that native title 'is neither an institution of the common law nor a form of common law tenure but it is recognised by the common law': *Fejo v Northern Territory* (1998) 195 CLR 96 [46]. See also Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)* (n 5) [4.15].

67 *Native Title Act 1993* (Cth) s 223(1). The first two parts of the definition are based on the judgment of Brennan J in *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 57: 'The term "native title" conveniently describes the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants'.

68 Noel Pearson, 'The Concept of Native Title at Common Law' in Galarwuy Yunupingu (ed), *Our Land Is Our Life, Land Rights — Past Present and Future* (University of Queensland Press, 1997) 150, 154.

The High Court has previously adopted a similar framing, describing native title as the ‘intersection of traditional laws and customs with the common law’.⁶⁹

2.46 More recently, both the Full Court of the Federal Court and the High Court in the *Yunupingu* litigation have considered the ‘recognition concept’ and the nature of native title.⁷⁰ The Full Court of the Federal Court observed that

The inception of native title is in pre-colonisation times, in ‘time immemorial’. Native title did not arise or originate on colonisation. The colonisers brought their own legal system and imposed it. Before they arrived in Australia, there were normative systems already in place and in use, and those systems provided, amongst other matters, for the existence and allocation of rights and interests in land and waters. The legal system brought by the colonisers, the common law, was able to recognise the normative systems already in place. That is what *Mabo* (No 2) establishes.⁷¹

2.47 In the High Court, the plurality referred to observations in *Wik Peoples v Queensland* (‘*Wik*’),⁷² and *Queensland v Congoo*,⁷³ and explained that

to say that native title rights and interests are ‘recognised’ at common law is to mean that ‘those rights, although ascertained by reference to traditional laws and customs are enforceable as common law rights [and interests]. In other words, the concept of ‘recognition’ ‘translates’ native title rights and interests existing under traditional laws and customs into ‘a set of rights and interests existing at common law’.⁷⁴

2.48 The High Court has also repeatedly affirmed that non-recognition of native title does not mean that the rights and interests constituting native title are extinguished at traditional law.⁷⁵ As Gordon J explained in *Commonwealth v Yunupingu on behalf of the Gumatj Clan or Estate Group* (‘*Yunupingu*’),

native title may continue to exist at traditional law, even once those rights and interests have been extinguished by the common law. The metaphor of ‘recognition’ reflects the proposition that the common law cannot and does not transform traditional laws and customs, and cannot and does not transform or alter the relationships to country which they define, or the rights and interests

69 *Fejo v Northern Territory* (1998) 195 CLR 96 [46]. The Court has also noted that this ‘intersection’ is sometimes expressed as the radical title of the Crown being ‘burdened’ by native title: *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 [38].

70 *Yunupingu v Commonwealth* (2023) 298 FCR 160; *Commonwealth v Yunupingu on behalf of the Gumatj Clan or Estate Group* (2025) 421 ALR 604.

71 *Yunupingu v Commonwealth* (2023) 298 FCR 160 [469].

72 *Wik Peoples v Queensland* (1996) 187 CLR 1.

73 *Queensland v Congoo* (2015) 256 CLR 239.

74 *Commonwealth v Yunupingu on behalf of the Gumatj Clan or Estate Group* (2025) 421 ALR 604 [61] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ) (citations omitted). See also *Wik Peoples v Queensland* (1996) 187 CLR 1, 84; *Queensland v Congoo* (2015) 256 CLR 239 [31].

75 See, eg, *Yanner v Eaton* (1999) 201 CLR 351 [38]; *Akiba v Commonwealth* (2013) 250 CLR 209 [10].

which native title holders would recognise as continuing to exist under traditional laws and customs.⁷⁶

2.49 Native title has been described as *sui generis* (that is, ‘of its own kind’ or ‘unique’).⁷⁷ The unique source of native title does not, however, impede its full recognition or protection by the law. As Professor Bartlett explains,

such unique origins do not dictate a treatment of native title that would deny native title equality or full respect ... They merely contemplate a distinct range of interests to that encountered in the common law.⁷⁸

Native title as property

2.50 In 2025, the High Court in *Yunupingu* confirmed that native title is legally recognised and protected as a distinctive form of property within the meaning of s 51(xxxi) of the *Australian Constitution*.⁷⁹ While affirming its previous jurisprudence that native title ‘is different from what common lawyers identify as property rights’,⁸⁰ the Court characterised native title as

property which is enduring, substantial and significant. To hold otherwise would be contrary to the characterisation of native title in *Mabo (No 2)*, which has been affirmed by many subsequent decisions of this Court ...⁸¹

2.51 As discussed above, native title is recognised, rather than created, by the common law. This idea of recognition should not, however, be construed as rendering native title more fragile than, or inferior to, other property interests. On the contrary, the Court’s characterisation of native title in *Yunupingu* affirms its nature as a fully-fledged, albeit distinctive, property right.⁸² There are significant implications of finding native title to be proprietary in nature, including the ‘degree of protection and enforceability’ available.⁸³

76 *Commonwealth v Yunupingu on behalf of the Gumatj Clan or Estate Group* (2025) 421 ALR 604 [139] (citations omitted).

77 See, eg, *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 133 (Dawson J).

78 Bartlett, *Native Title in Australia* (n 14) 145.

79 The High Court held that the extinguishment of native title is therefore an ‘acquisition of property’ as understood by s 51(xxxi) of the *Australian Constitution* and as such attracts the ‘just terms guarantee’ for statutory compensation: *Commonwealth v Yunupingu on behalf of the Gumatj Clan or Estate Group* (2025) 421 ALR 604 [236].

80 *Ibid* [138].

81 *Ibid* [143].

82 For further discussion of the proprietary nature of native title (published prior to the High Court’s decision in *Yunupingu* but after the decision of the Full Court of the Federal Court): see, eg, Daniel Lavery, ‘Native Title as Property: *Yunupingu v Commonwealth*’ 29 *James Cook University Law Review* 125; Bartlett, *Native Title in Australia* (n 14) ch 17.

83 These include the protection and enforcement of native title at common law against Crown extinguishment and expropriation; under the *NTA* in making determinations of native title and awarding compensation; under s 51(xxxi) of the *Australian Constitution*; under the *RDA*; as a burden on the Crown’s radical title; and against interference by third parties: Bartlett, *Native Title in Australia* (n 14) 350.

The content of native title

2.52 Native title in every instance is determined by reference to the traditional laws and customs of the specific group and the specific land and waters in question.⁸⁴ There are several kinds of rights and interests that may comprise native title, and that in any given instance, native title may comprise of multiple rights and interests in lands and waters.⁸⁵

2.53 The kinds of rights and interests that may comprise native title are manifold. These can include:

- rights similar to full beneficial ownership of land,⁸⁶ and exclusive possession;⁸⁷
- rights to hunt and kill estuarine crocodiles;⁸⁸
- rights to take fish and other aquatic life for any (including commercial) purposes;⁸⁹
- rights to access an area to hunt or gather food;⁹⁰
- rights to access an area to perform traditional ceremonies;⁹¹
- rights to maintain and protect places of importance and areas of significance under traditional laws and customs;⁹² and
- rights to use the area to teach about the area's physical and spiritual attributes.⁹³

2.54 These rights and interests, and their variability, reflect First Nations perspectives on and relationships with land, which in many respects are fundamentally different to western understandings of property.⁹⁴ As Gordon J explained in *Yunupingu*,

native title has a cultural, spiritual or metaphysical aspect that has no analogue in European law: it is something over and above and separate from 'enjoyment' in the sense of the ability to engage in activity or use; it refers to a defining element in a view of life and living. It is a connection with land where the land 'owns' the people and the people are responsible for the land. It is a two-way

84 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 70, 88. See also *Wik Peoples v Queensland* (1996) 187 CLR 1, 126–7; *Commonwealth v Yunupingu on behalf of the Gumatj Clan or Estate Group* (2025) 421 ALR 604 [140].

85 *Western Australia v Ward* (2002) 213 CLR 1 [95].

86 See, eg, *Mabo v Queensland (No 2)* (1992) 175 CLR 1. Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ held that, aside from land that had been validly appropriated (the use of which being inconsistent with the continued enjoyment of the Meriam people of their native title rights and interests), the Meriam people were entitled as against the whole world to possession, occupation, use, and enjoyment of the lands of the Murray Islands.

87 See, eg, *Warrie (on behalf of the Yindjibarndi People) v Western Australia (No 2)* (2017) 366 ALR 467; *Fortescue Metals Group v Warrie* (2019) 273 FCR 350; *Anderson v Western Australia* [2000] FCA 1717; *James on behalf of the Martu People v Western Australia* [2002] FCA 1208.

88 See, eg, *Yanner v Eaton* (1999) 201 CLR 351.

89 See, eg, *Akiba v Commonwealth* (2013) 250 CLR 209.

90 See, eg, *Wik Peoples v Queensland* (1996) 187 CLR 1.

91 See, eg, *Yindjibarndi Aboriginal Corporation RNTBC v Western Australia* [2020] FCA 1416.

92 See, eg, *Hippi on behalf of the Gamilaraay People v Queensland (No 2)* [2025] FCA 1580.

93 See, eg, *ibid*.

94 See, eg, Mary Graham, 'Some Thoughts about the Philosophical Underpinnings of Aboriginal Worldviews' (2008) 45 *Australian Humanities Review* 181.

connectedness the law has tried to capture by speaking of spiritual connection. It is a religious relationship ... the people of the clan, particular land and everything that exists on and in it, are organic parts of one indissoluble whole.⁹⁵

2.55 Some native title rights and interests resemble proprietary rights as conceived by the common law (or western legal thought generally), while others are sometimes characterised as usufructuary in nature (that is, rights to use and benefit from property that is owned by another).⁹⁶ However, commentators have cautioned against drawing strict analogies between native title and common law rights and interests, given the unique nature and content of the former. The High Court has itself identified the ‘inappropriateness of forcing ... native title to conform to traditional common law concepts’,⁹⁷ and rejected arguments analogising native title to the common law.⁹⁸ As the High Court has explained:

Because native title has its origin in traditional laws and customs, and is neither an institution of the common law nor a form of common law tenure, it is necessary to curb the tendency (perhaps inevitable and natural) to conduct an inquiry about the existence of native title rights and interests in the language of the common law property lawyer.⁹⁹

While native title may be characterised as rights and interests with respect to land and waters, *equating* native title with proprietary rights in relation to land and waters is artificial and capable of misleading.¹⁰⁰

2.56 This should not, however, be interpreted as the Court suggesting that native title is not proprietary, nor that it is somehow lesser than other proprietary interests. On the contrary, the High Court has confirmed that native title is both *sui generis* and proprietary; that is, a distinctive form of property right.¹⁰¹

Development of the future acts regime

2.57 The ALRC’s enabling legislation provides that one of the functions of the Commission is to review laws by ‘bringing the law into line with current conditions and ensuring that it meets current needs’ and by ‘removing defects in the law’.¹⁰² The Terms of Reference for the present Inquiry similarly ask the ALRC to:

- consider the intention of the *NTA*, as stated in its preamble, and to ensure native title holders are able to fully enjoy their rights and interests; and

95 *Commonwealth v Yunupingu on behalf of the Gumatj Clan or Estate Group* (2025) 421 ALR 604 [142] (citations omitted).

96 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 70.

97 *Ibid* 89.

98 *Fejo v Northern Territory* (1998) 195 CLR 96 [53], [107]–[108].

99 *Commonwealth v Yarmirr* (2001) 208 CLR 1 [11].

100 *Commonwealth v Yunupingu on behalf of the Gumatj Clan or Estate Group* (2025) 421 ALR 604 [138] (emphasis in original, citations omitted).

101 Australian Law Reform Commission, *Review of the Future Acts Regime* (Discussion Paper No 88, 2025) [41]–[42]. For example, the Federal Court in 2017 described native title to comprise of ‘enduring legal rights, proprietary in nature’: *Freddie v Northern Territory* [2017] FCA 867 [18].

102 *Australian Law Reform Commission Act 1996* (Cth) ss 21(a)(i)–(ii).

- have regard to the role of the future acts regime as a precursor to economic and other activities on native title land.

2.58 As outlined in this section, the future acts regime in its current form was introduced by the *Native Title Amendment Act 1998* ('NTAA 1998'), which was both the result of the Australian Government's stated aim in 1996 to bring 'workability' to the NTA and a direct response by the Australian Government to the High Court's decision in *Wik*, in which the Court held native title could co-exist with other non-exclusive interests in land.¹⁰³ The development of the NTAA 1998 was the subject of extensive public and political debate.

2.59 The NTAA 1998 made significant changes to the original future acts regime. As outlined below, these changes included:

- introducing a number of subdivisions that validate different kinds of future acts, categorised largely by the sector or industry in which the future act would be done;
- providing for specific procedural rights to be available to native title parties under a number of these subdivisions, therefore displacing the equivalency approach of the original NTA's approach which had provided where an act was not a low impact act or an act to which the right to negotiate applied, then a native title party had the same rights as if they held freehold title;
- limiting the future acts to which the right to negotiate applied; and
- introducing ILUAs as a way of making agreements about the doing of future acts.

Wik and the Ten Point Plan

2.60 In May 1996, the Australian Government released *Towards a More Workable Native Title Act*, an outline paper canvassing various proposed amendments to the NTA to 'improve its workability'.¹⁰⁴ These included amendments to the future acts regime, such as amendments to the right to negotiate process, introduction of a new agreement mechanism, and amendments to the non-claimant application process.¹⁰⁵

2.61 The proposals were described by Michael Dodson, the Aboriginal and Torres Strait Islander Social Justice Commissioner at the time, as a 'radical interference' with the 'social compact based on justice' that the original NTA represented, which had 'fatal implications regarding respect for the RDA'.¹⁰⁶ Dodson likened the

103 *Wik Peoples v Queensland* (1996) 187 CLR 1.

104 Department of the Prime Minister and Cabinet (Cth), *Towards a More Workable Native Title Act: An Outline of Proposed Amendments* (Outline Paper, May 1996) [1].

105 Ibid pt 2. Non-claimant applications can be made by persons with an interest in a particular area to apply for a determination that there is no native title in that area: ibid [54]–[61]. For further discussion, see [Chapter 8](#).

106 Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Native Title Report (July 1995 – June 1996)* (n 20) 3.

‘workability’ proposal to a Trojan horse ‘concealing amendments to erode the rights of Indigenous Australians’.¹⁰⁷

2.62 The Native Title Amendment Bill 1996, which made only limited amendments to the future acts regime, was read in the House of Representatives for the first time on 27 June 1996. The stated intention for the amendments was to reduce the impact of uncertainty about co-existence, clarifying the NNTT’s role in light of recent decisions about judicial and administrative power, and improving efficiency (including to ‘lessen the adverse impact of the right to negotiate on mineral exploration and mining’).¹⁰⁸

2.63 In October 1996, the Australian Government released an Exposure Draft of proposed additional amendments to the *NTA*, which included limiting the right to negotiate and the introduction of ILUAs as a new agreement type to validate future acts.¹⁰⁹ The 1996 Bill and Exposure Draft did not proceed following the High Court’s decision in *Wik* which was handed down on 23 December 1996.¹¹⁰

2.64 In *Wik*, the High Court considered the question of whether the granting of a pastoral lease would extinguish native title, concluding that the grant of the pastoral leases under examination had not extinguished ‘all incidents of Aboriginal title’ over the land in question.¹¹¹ The High Court held that native title rights and interests could co-exist with other, non-exclusive, rights and interests in land.

2.65 The *Wik* decision sparked ‘political furore’.¹¹² Following the *Wik* decision, the Australian Government cited estimates from the Bureau of Resource Sciences that the proportion of Australia potentially subject to native title rose from 35% to 78%.¹¹³ While a number of responses to the *Wik* decision focused on the Court’s finding that native title rights and interests could co-exist with other land rights and interests (rather than being extinguished),¹¹⁴ many others, including the Australian Government and pastoralists, characterised the decision as likely leading to large-scale diminution of

107 Ibid 4.

108 Department of the Prime Minister and Cabinet (Cth) (n 104) [18]. Most relevantly to the future acts regime, amendments were proposed to address inefficient dealing with future acts, particularly on land where native title had been claimed but not determined and acts done on areas over which a pastoral lease was held, as there was uncertainty over whether pastoral leases and native title rights and interests could coexist: Department of the Prime Minister and Cabinet (Cth) (n 104) [5].

109 Simeon Beckett, ‘But Wait ... There’s More! Federal Government Releases More Amendments to the Native Title Act’ (1996) 3(87) *Aboriginal Law Bulletin* 8.

110 *Wik Peoples v Queensland* (1996) 187 CLR 1.

111 Ibid 134. See also Bartlett, *Native Title in Australia* (n 14) 49–50.

112 Maureen Tehan, ‘The Wik Peoples v Queensland and the Thayorre People v Queensland’ (1997) 21(1) *Melbourne University Law Review* 343, 358.

113 Senator Nick Minchin, *The Ten Point Plan: Federal Government’s Response to the Wik Decision* (1998) [6.2].

114 Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Native Title Report July 1996 – June 1997* (1997) 35.

the rights of pastoral lease holders.¹¹⁵ This interpretation was despite the majority in *Wik* confirming that where pastoral lease holders and native title holders have rights and interests over the same land, the rights of pastoral lease holders will prevail to the extent of any inconsistency with native title.¹¹⁶ The Aboriginal and Torres Strait Islander Social Justice Commissioner labelled the Australian Government's and pastoral sector's characterisation of *Wik* as 'profoundly misleading'.¹¹⁷

2.66 The Government undertook stakeholder consultation following the *Wik* decision, including with State and Territory governments, the National Farmers Federation and pastoralists, the mining and resources industry, representatives of the tourism and commercial fishing industries, the land valuation and planning professions, and local governments.¹¹⁸

2.67 The Government also established and consulted with the National Indigenous Working Group ('NIWG'). The NIWG brought together Native Title Representative Bodies and Service Providers, the Aboriginal and Torres Strait Islander Commission, the Indigenous Land Corporation, the Aboriginal and Torres Strait Islander Social Justice Commissioner, and the National Aboriginal and Islander Legal Services Secretariat.¹¹⁹ The NIWG was appointed to represent the wider group of organisations and given a 'mandate to develop a position on proposed amendments to the Native Title Act'.¹²⁰

2.68 In May 1997 the Australian Government published its 'Ten Point Plan' for the reform of the *NTA*. Most relevantly for the future acts regime, Points 3, 4, 6, 7, 8, and 10 of the Ten Point Plan proposed the following:

- 'Impediments to the provision of government services in relation to the land on which native may exist would be removed' (Point 3).
- 'All activities pursuant to, or incidental to, "primary production" would be allowed on pastoral leases ... even if native title exists' and that 'the right to negotiate in relation to such activities would be completely removed' (Point 4).
- Reforming the right to negotiate regime for mining and vacant crown land by introducing a 'higher registration test for claimants seeking the right to negotiate', and for future mining activity, providing for 'only one right to negotiate per project' and providing for 'no negotiations on exploration'.

115 Maureen Tehan, 'A Hope Disillusioned, an Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the Native Title Act' (2003) 27(2) *Melbourne University Law Review* 523, 553–4; The Hon John Howard MP, 'Wik Judgment' (Media Release, 24 December 1996); 'Wik Decision Disappointing', *Australian Financial Review* (online, 24 December 1996) <www.afr.com/politics/wik-decision-disappointing-19961224-k7a49v>.

116 See *Wik Peoples v Queensland* (1996) 187 CLR 1, 133 (Toohey J), 166 (Gaudron J), 186 (Gummow J), 243 (Kirby J).

117 Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Native Title Report July 1996 – June 1997* (n 114) 6.

118 Minchin (n 113) [E], [F].

119 A full list of organisations can be found in National Indigenous Working Group, *Coexistence — Negotiation and Certainty: Indigenous Position in Response to the Wik Decision and the Government's Proposed Amendments to the Native Title Act, 1993* (1997) 1.

120 Ibid.

Provision was also made for state and territory governments to introduce their own statutory negotiation regimes (Points 4, 6, and 7).

- The right to negotiate 'would be removed in relation to the acquisition of land for third parties in towns and cities' and 'would be removed in relation to the acquisition of native title rights for third parties for the purpose of government-type infrastructure' (Point 7).
- Provision for governments to 'regulate and manage' subsurface water, offshore resources and airspace (Point 8).
- Introduction of 'voluntary but binding' agreements (Point 10).¹²¹

2.69 The Australian Government described the policy rationale behind the Ten Point Plan as follows:

the government has sought, through its 10-point plan, to put in place a fair and equitable process for dealing with native title which balances the interests and objectives of all parties, in the overall interests of the Australian community.¹²²

2.70 The Australian Government stated that the Ten Point Plan intended to achieve, among other matters, 'certainty' and 'workability' for users of the native title system, and 'respect for native title'.¹²³ The Plan was heavily criticised by First Nations leaders. For example, the Aboriginal and Torres Strait Islander Social Justice Commissioner, Michael Dodson, described the proposed amendments as unjust and unnecessary:

Whichever way you look at these proposals it is impossible to find a just and fair framework which seeks to balance Australian property rights. You see bias. You see gross infringements of the human rights of Aboriginal and Torres Strait Islander peoples.¹²⁴

Native Title Amendment Act 1998 (Cth)

2.71 The *NTAA 1998* came into effect on 30 September 1998 and introduced the future acts regime in its current form.

2.72 The *NTAA 1998* was first introduced as the Native Title Amendment Bill 1997 (Cth) (the 'Amendment Bill') in September 1997 and was passed in July 1998. The Bill was subject to a considerable amount of political and public debate.

2.73 A draft of the Amendment Bill, which largely gave effect to the Ten Point Plan,¹²⁵ was read for the first time in the House of Representatives on 4 September 1997. In his Second Reading Speech, the then-Attorney-General Daryl Williams stated

121 The Hon John Howard MP, 'Wik 10 Point Plan' (Media Release, 1 March 1997); The Hon John Howard MP, 'Amended Wik 10 Point Plan' (Media Release, 8 March 1997); Minchin (n 113) 1–3.

122 Commonwealth, *Parliamentary Debates*, House of Representatives, 4 September 1997, 7887 (Daryl Williams, Attorney-General).

123 Minchin (n 113) [H].

124 Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Native Title Report July 1996 – June 1997* (n 114) 37.

125 Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) ch 2.

the aims of the Government included the 'efficient, fair and timely' resolution of native title issues, respecting native title rights and interests, 'encouraging economic development across Australia', and delivering 'certainty' for pastoralists and reduced complexity for the resource industries.¹²⁶

2.74 Between 1997 and mid-1998, the Amendment Bill was the subject of significant debate in both the House of Representatives and Senate.¹²⁷ To date, the Amendment Bill remains the longest Senate debate on a single bill in Australian history, totalling 105 hours and 56 minutes.¹²⁸

2.75 In June 1998, the Government reached agreement with Tasmanian Senator Brian Harradine to support the Amendment Bill with a number of amendments. The agreement was negotiated over the course of two weeks.¹²⁹

2.76 The Amendment Bill was reintroduced with the agreed amendments and passed in the House of Representatives on 3 July 1998 and the Senate on 8 July 1998. The Bill received royal assent on 27 July 1998 and came into effect on 30 September 1998.

2.77 The *NTAA 1998* made a series of significant revisions to the *NTA*, including the introduction of a 'substantially more comprehensive' future acts regime which specifically implemented the Ten Point Plan.¹³⁰ The following sections outline some of the key elements of the *NTAA 1998*.

2.78 One of the key conceptual differences between the originally enacted *NTA* and the *NTA* as amended in 1998 is the approach to equality. Equality before the law is a key theme in this Inquiry, and has guided reforms discussed throughout this Report (in particular in **Chapters 6** and **7**). The Explanatory Memorandum to the Amendment Bill stated that

the Government has been concerned to ensure that its amendments to the *NTA* are consistent with the principles of the *Racial Discrimination Act 1975* (RDA). This is not a legal requirement, but flows from Government policy. The amendments to the right to negotiate are particularly relevant to this policy.

126 Commonwealth, *Parliamentary Debates*, House of Representatives, 4 September 1997, 7887 (Daryl Williams, Attorney-General).

127 After the Bill passed in the House of Representatives, in December 1997 the Senate passed the Bill with 217 amendments. It was then laid aside by the Government, which did not agree with a substantial number of Senate amendments. The Amendment Bill was reintroduced in the House of Representatives in March 1998 and was passed in the House. In the Senate, the Amendment Bill was again amended before it was passed. The Amendment Bill therefore became a trigger for the double dissolution of Parliament: see Paul Burke, 'The Native Title Amendment Bill: What Happened in the Senate' (1998) 4(9) *Indigenous Law Bulletin* 4; Commonwealth, *Parliamentary Debates*, Senate, 3 April 1998, 1959 (Nick Minchin, Special Minister of State).

128 The Native Title Amendment Bill, for 56 hours and 8 minutes; and the Native Title Amendment Bill 1997 [No 2], for 49 hours and 48 minutes: Parliament of Australia, 'Bills Debated for More than 20 Hours' <www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_debated_for_more_than_20_hours>.

129 Commonwealth, *Parliamentary Debates*, Senate, 6 July 1998, 4961 (Brian Harradine).

130 Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) [6.1].

Some provisions of the NTA provide formal equality to native title holders. The RDA generally requires such formal equality, that is, equal treatment of all groups under law without distinction on the basis of race (see *Gerhardy v. Brown* (1985) 159 CLR 70). Other provisions of the NTA provide 'special measures' within the meaning of the Convention on the Elimination of all Forms of Racial Discrimination and the RDA. Special measures are allowed as an exception to the general principle of formal equality because they are designed to advance the human rights and freedoms of persons, such as Aboriginal people and Torres Strait Islanders, who have been historically disadvantaged groups. The right to negotiate provisions have been generally considered a 'special measure'. This understanding of the NTA and the right to negotiate provisions appears in the Preamble to the Act, and the Second Reading Speech and Explanatory Memorandum to the Native Title Bill 1993.

In amending the right to negotiate provisions, the Government is exercising the discretion it has in relation to instituting, maintaining and re-formulating such special measures.

In the amendments to the procedural rights of native title holders in the right to negotiate (for example in relation to the urgent Ministerial intervention or the power of Ministerial exclusion of 'approved exploration etc. acts'), care has generally been taken to ensure that native title holders enjoy special rights or rights similar to those enjoyed by non-native title holders ...

Consultations in relation to the proposals contained in these amendments revealed that some parties take a different view of the 'equality' standard under the RDA, preferring what is often termed a substantive equality approach. 'Substantive equality' allows relevant differences between groups, and their interests, to be taken into account. It allows for laws which appropriately take into account such differences in providing for equality of outcome. In applying this test, it is apparent that the Parliament enjoys a discretion in fashioning appropriate measures to take account of the perceived differences between groups. In these amendments to the right to negotiate, the Government is of the view that appropriate measures for the protection of native title have been maintained.¹³¹

2.79 The concepts of substantive and formal equality, and racial non-discrimination are discussed below at paragraphs [\[2.104\]](#)–[\[2.132\]](#).

2.80 Alongside the amendments outlined below, the *NTAA 1998* also reflected the implications of the High Court's decisions in *Brandy v Human Rights and Equal Opportunity Commission*, namely, that bodies that are not Chapter III courts (which includes the NNTT) cannot be vested with Commonwealth judicial power.¹³² Relevantly, the *NTAA 1998* amended the compensation provisions to provide that statutory compensation applications were to be made to and heard by the Federal Court (and not, as was provided when the *NTA* was enacted, to be made to the Native Title Registrar).¹³³ This amendment was expressly made 'to address the

131 Ibid [18.23]–[18.27].

132 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 267.

133 *Native Title Act 1993* (Cth) pt 2 div 5.

implications of the *Brandy* decision'.¹³⁴ As a consequence, statutory compensation applications are now made to the Federal Court.

2.81 The future acts regime has not been substantially amended since the *NTAA 1998*,¹³⁵ nor has it been subject to comprehensive review until the present Inquiry.

Introducing the 'hierarchy' of validating subdivisions

2.82 The *NTAA 1998* introduced a range of subdivisions to validate different kinds of future acts, categorising these acts largely by relevant sector or industry. The subdivisions created new procedural rights, or reformulated existing procedural rights, for specific kinds of future acts based on industry (for example, primary production activities), pre-existing tenure (for example, reservations created prior to 23 December 1996), or subject matter (for example, water, aquatic resources, and airspace and public infrastructure). In summary, it provided the following structure for Part 2 Div 3:

- Subdivision A addressed preliminary matters. In conjunction with Subdivision O, it also established the 'hierarchical' application of the subdivisions, explained below.
- Subdivisions B–E addressed ILUAs, introduced as a new agreement mechanism to validate future acts, replacing the section 21 agreements provided for under the original *NTA*. ILUAs are discussed in further detail in **Chapters 3–5** of this Report.
- Subdivision F addressed future acts to be done on areas where procedures indicate an absence of native title. As discussed further in **Chapter 8**, this was justified as necessary to give certainty over the doing of future acts over areas where native title has not been claimed and to encourage potential native title holders to make a native title claim.¹³⁶
- Subdivisions G–N set out the procedural rights to be afforded to native title parties for different types of future acts. Generally speaking, these subdivisions categorise future acts by sector, industry, or subject matter: primary production,¹³⁷ water and airspace,¹³⁸ renewals and extensions of specified interests (such as leases or licences),¹³⁹ acts involving reservations and leases of land or waters for a particular purpose,¹⁴⁰ acts relating to facilities for services to the public,¹⁴¹ 'low impact' future acts (though only before a

134 Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) [3.30]. The amendments also provided that native title determination applications were to be made to and determined by the Federal Court.

135 See summary of subsequent amendments at **Appendix D**.

136 Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) [8.2], [8.4].

137 *Native Title Act 1993* (Cth) pt 2 div 3 subdiv G.

138 *Ibid* pt 2 div 3 subdiv H.

139 *Ibid* pt 2 div 3 subdiv I.

140 *Ibid* pt 2 div 3 subdiv J.

141 *Ibid* pt 2 div 3 subdiv K.

native title determination is made),¹⁴² and acts affecting offshore places.¹⁴³ Subdivision M relates to future acts that pass ‘the freehold test’ — that is, where the act could be done validly over freehold areas (subject to satisfying the right to negotiate provisions for acts to which the right to negotiate applies) — and was intended to reflect provisions of the *NTA* as originally enacted.¹⁴⁴ In practice, these acts are usually the grant of mining tenements and petroleum titles (as well as renewals of these grants). Subdivisions G–N are the subject of reforms discussed in **Chapters 6** and **7** in this Report, with **Chapter 7** containing a more detailed discussion of each subdivision.

- Subdivision P sets out provisions relating to the right to negotiate, including the determination of whether a future act can be done where agreement is not reached. These provisions are the focus of reforms discussed in **Chapters 9** and **10** of this Report.

2.83 The current *NTA* retains these subdivisions in Part 2 Div 3. The only addition is Subdivision JA, which was inserted by the *Native Title Amendment (No. 1) Act 2010* (Cth) and set out provisions relating to public housing in Aboriginal and Torres Strait Islander communities.

2.84 The *NTA* provides that these subdivisions effectively apply in a ‘hierarchical’ order.¹⁴⁵ That is, a future act may be done validly by complying with the first subdivision which the future act falls within in the alphabetical order of subdivisions. This design appears to be in pursuit of the principles outlined above at paragraph [2.70]: balancing certainty and workability with ‘respect for native title’, and was explained to be

necessary because different consequences may flow from the application of different provisions (e.g. different procedural or compensation arrangements may apply).¹⁴⁶

2.85 The hierarchy of subdivisions means that the agreement of an ILUA take ‘precedence over any other provisions of the *NTA* which would otherwise apply to the future acts covered by the agreement’.¹⁴⁷ By virtue of s 24OA of the *NTA*, if a future act does not fall within one of the specific subdivisions from Subdivision F to N, then it may be validated by ILUA.¹⁴⁸

Amended procedural rights

2.86 The future acts regime introduced by the *NTAA 1998* substantially diminished the equivalency principle which underpinned much of the regime as enacted in 1993. As discussed above, under the original *NTA*, where an act was not a low impact

142 Ibid pt 2 div 3 subdiv L.

143 Ibid pt 2 div 3 subdiv N.

144 Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) [15.1]–[15.3].

145 *Native Title Act 1993* (Cth) ss 24AB, 24OA.

146 Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) (n 104) [6.18].

147 Ibid [6.7]. However: ‘there is no requirement for parties wishing to use land to enter into, or attempt to enter into, such an agreement’: *ibid*.

148 See Australian Law Reform Commission, *Review of the Future Acts Regime* (Issues Paper No 50, 2024) [41].

act,¹⁴⁹ or an act to which the right to negotiate applied, then a native title party had the same rights as if they held freehold title. However, the introduction of the hierarchy of subdivisions into the *NTAA 1998* provided for specific procedural rights in relation to specified categories of future acts and identified acts to which the right to negotiate applied. The equivalency principle was retained for the procedural rights for some future acts in Subdivision K, and the 'freehold test' in the new Subdivision M. Future acts that pass the freehold test are acts which could be done over land subject to freehold title if the native title rights and interests were instead freehold title rights. The location of Subdivision M at the end of the hierarchy (apart from acts in offshore places, which were covered by Subdivision N) means that the freehold test acts as a catch-all if none of the earlier subdivisions apply.

2.87 Non-compliance with the procedural rights for most subdivisions, including where the procedural rights are equivalent to the rights of freehold title holders, has been held not to result in the future act being invalid.¹⁵⁰

2.88 Bartlett observes that many of the new subdivisions enacted by *NTAA 1998* conferred preferential treatment on non-native title interest holders to the detriment of native title, where the new subdivisions afforded favourable pathways for obtaining new rights, rather than simply ensuring security of tenure or existing rights. In relation to s 24IC, Bartlett noted as follows:

The significance of the provision for the validation of renewals and extensions is the *absence* of any requirement of an existing *right* to such renewal or extension. The validation protects the aspirations of non-native title interest holders over the rights of native title holders. The most significant future acts subject to such validation will be the renewal and extension of mining leases and pastoral leases.¹⁵¹

2.89 Amendments to procedural rights were justified by the Australian Government at the time on the basis that the *Wik* decision meant that native title rights and interests could be recognised over a far greater proportion of Australia and co-exist with other interest in land and waters.¹⁵² Because these rights and interests co-existed with Crown-derived interests, the policy position advanced was that those native title rights and interests did not need to attract the same procedural rights as freehold title holders, justified by the Australian Government drawing a distinction between what it characterised as 'high level' native title rights and interests, and other (co-existing) native title rights and interests:

149 As noted at paragraph [2.31] 'low impact future acts' consisted of a narrow category of pre-determination future acts.

150 See **Chapter 11** for further discussion of compliance with, and enforcement of, the future acts regime.

151 Bartlett, *Native Title in Australia* (n 14) 590 (emphasis in original).

152 Following the *Wik* decision, the Australian Government cited the Bureau of Resource Sciences in support of a claim that up to 78% of Australian land mass would be subject to native title claims: Minchin (n 113) [6.2].

The assumption in the NTA that all native title rights will be high level rights is rendered false by the *Wik* decision. It is inappropriate therefore that the NTA should continue to give effect to that false assumption.¹⁵³

Amended right to negotiate

2.90 The *NTAA 1998* also limited the future acts to which the right to negotiate applied. In his second reading speech on 4 September 1997, Attorney-General Daryl Williams explained that:

The government proposes to remove the right to negotiate where it is inappropriate because of the nature of the rights to be granted, the minimal impact on the land, or the limited native title rights that can exist. However, the basic procedural rights of native title holders are protected.¹⁵⁴

2.91 Under the original *NTA*, the right to negotiate applied to the creation of a mining right (or the extension or variation of that right) and compulsory acquisition, where the purpose of the acquisition was to confer rights and interests on persons other than the Government party. The *NTAA 1998* removed the right to negotiate — insofar as the right to negotiate would have been enlivened under the original *NTA* — for any future acts that could fall within Subdivisions G–N outlined above at paragraph [2.82], aside from acts falling under Subdivision M. The *NTAA 1998* also set out specific exceptions to the right to negotiate. This means that the *NTAA 1998* ultimately excluded the right to negotiate from applying to:

- primary production future acts and non-exclusive pastoral and agricultural lease land (because primary production future acts are validated under subdivision G and so the right to negotiate is never enlivened);
- reserved land including Aboriginal and Torres Strait Islander reserves;
- acts relating to land or waters within a town or city;
- acts involving the construction of public infrastructure;
- compulsory acquisition for privately built infrastructure facilities;
- some low impact or small scale mining (including exploration, prospecting, fossicking and quarrying, opal or gem mining, and alluvial mining);¹⁵⁵
- ‘project acts’ — such that any future act only attracts the right to negotiate once, for the overall act, and not for any intermediate acts; and
- renewal, regrant, or extension of rights to mine or explore (irrespective of whether there is a right to such renewal) where the original tenement was granted after complying with the right to negotiate.

153 Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) [9.9].

154 Commonwealth, *Parliamentary Debates*, House of Representatives, 4 September 1997, 7891 (Daryl Williams, Attorney-General).

155 On the exclusion of exploration, see Department of the Prime Minister and Cabinet (Cth) (n 104) [28].

2.92 The Government explained that the amendments to the right to negotiate were compliant with the *RDA* because, in its view, the right to negotiate should be considered a ‘special measure’, and in

amending the right to negotiate provisions, the Government is exercising the discretion it has in relation to instituting, maintaining and reformulating such special measures.¹⁵⁶

2.93 The *NTAA 1998* also amended the definition of expedited procedure in s 237 to provide that a future act attracts the expedited procedure if it is ‘not likely to’ interfere (rather than ‘does not’ interfere) with native title holders’ carrying out of activities or particular areas or sites; and is ‘not likely to’ create a major disturbance. This amendment arguably lowered the threshold required for a future act to attract the expedited procedure. This amendment was justified on the basis that

it is not possible for the arbitral body to know the actual effect of a future act in deciding whether it attracts the expedited procedure, the arbitral body must undertake a predictive assessment, and look at what is likely to occur.¹⁵⁷

Reactions to the *NTAA 1998*

2.94 The development, negotiation, and passage of the *NTAA 1998* was publicly and politically controversial, and attracted significant criticism.

2.95 Most of the amendments proposed and then enacted as the *NTAA 1998*, with the exception of the introduction of ILUA provisions, were opposed by First Nations representatives.¹⁵⁸ A model for agreement-making was first submitted to the Australian Government in 1996 by the NIWG on behalf of national Indigenous bodies,¹⁵⁹ and that model was partially implemented into the ILUA provisions of the *NTAA 1998*.

2.96 In a 1997 position paper, the NIWG stated, in relation to the then proposed right to negotiate amendments:

The current amendments severely limit the right to negotiate and, in some cases, remove it all together. This contravenes the agreement embodied in the Native Title Act negotiated between Indigenous people and the Commonwealth Government. They contradict previous agreements with Australia’s Indigenous peoples and international human rights principles and obligations.

The changes significantly reduce the rights of Indigenous people to control activity on their land, undermines common law principles of native title and go well beyond any requirements for workability.¹⁶⁰

¹⁵⁶ Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) (n 104) [18.25].

¹⁵⁷ *Ibid* [20.39].

¹⁵⁸ See Tehan (n 115) 555–6.

¹⁵⁹ National Indigenous Working Group (n 119) 13.

¹⁶⁰ *Ibid* 12.

2.97 In relation to the new definition and validation of primary production activities, the NIWG said:

The proposal to broaden permitted land uses on pastoral leases under a definition of primary production will effectively upgrade leases while blocking and extinguishing native title.¹⁶¹

2.98 The process of the *NTAA 1998* finally being passed — that is, negotiation between the Government and Senator Harradine — was also criticised on the basis that First Nations people and other stakeholders were not adequately consulted on the substance of the negotiated amendments. On 7 July 1998, the day that the Native Title Amendment Bill 1998 was read for the final time in the Senate, a number of Australian Labor Party and Greens Senators read a statement by the NIWG into Hansard. In part, the NIWG stated

we, the members of the National Indigenous Working Group, reject entirely the Native Title Amendment Bill as currently presented before the Australian Parliament. We confirm that we have not been consulted in relation to the contents of the current Bill, particularly in regard to the agreement negotiated between the Prime Minister and Senator Harradine, and that we have not given consent to the Bill in any form which might be construed as sanction to its passage into Australian law...

Our participation has not been given the legitimacy by the Australian Government that we expected, and we remain disadvantaged and aggrieved by the failure of the Australian Government to properly integrate our expert counsel into the lawmaking procedures of government. We are of the opinion that the Bill will amend the Native Title Act 1993 to the effect that the Native Title Act can no longer be regarded as a fair law or a law which is of benefit to the Aboriginal and Torres Strait Islander Peoples.¹⁶²

2.99 The Explanatory Memorandum for the *NTAA 1998* asserted that it was the Government's position that the amendments to the *NTA* were 'consistent with the principles' of the *RDA*, and that this was 'not a legal requirement, but flows from government policy'.¹⁶³

2.100 This assertion has been widely criticised. For example, Bartlett argues that 'examination of the substance of the *NTAA 1998* reveal that it is a substantial, complex and specific disapplication of the protection' of the *RDA*, because the *NTAA 1998* provides for the subordination of native title to other interests, particularly the elevation and expansion of rights on pastoral leases, and the winding back of the right to negotiate.¹⁶⁴

2.101 At an international level, the United Nations Committee on the Elimination of Racial Discrimination ('CERD') expressed concerns about the *NTAA 1998* in a

161 Ibid 3.

162 Commonwealth, *Parliamentary Debates*, Senate, 7 July 1998, 5179–82 (Nick Bolkus, Dee Margetts, Bob Brown, John Woodley and Meg Lees).

163 Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) [18.23].

164 Bartlett, *Native Title in Australia* (n 14) 60.

decision under its early warning procedure. As discussed below, CERD expressed particular concern about aspects of the amended future acts regime, which it opined were inconsistent with the *International Convention on the Elimination of All Forms of Racial Discrimination* ('ICERD').¹⁶⁵

Subsequent amendments to the future acts regime

2.102 As outlined above, the future acts regime has not been substantially amended since *NTAA 1998*, aside from the introduction of Subdivision JA (see paragraph [2.83]). A table outlining legislation that has made amendments the future acts regime since 1998 appears in [Appendix D](#).

2.103 In addition, a number of Bills have been introduced to amend the future acts regime, but ultimately were not passed by Parliament.¹⁶⁶

Equality before the law

2.104 International human rights law is premised on the idea that all persons are inherently equal.¹⁶⁷ This is operationalised through the principles of equality and non-discrimination, which the Human Rights Committee has explained as being at the heart of international human rights law:

Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights.¹⁶⁸

2.105 The right to equality before and equal protection of the law requires that the law neither discriminate against, nor fail to protect from discrimination, any person or people.¹⁶⁹ Relatedly, the principle of non-discrimination is a safeguard (or accessory

165 Committee on the Elimination of Racial Discrimination, *Decision No 2 (54) on Australia*, 54th sess, 1331st mtg, UN Doc A/54/18 (18 March 1999) paras [6]–[9].

166 Native Title Amendment Bill 2012 (Cth); Native Title Amendment (Reform) Bill (No. 1) 2012 (Cth); Native Title Amendment (Reform) Bill 2014 (Cth).

167 Article 1 of the Universal Declaration of Human Rights states that '[a]ll human beings are born free and equal in dignity and rights': *Universal Declaration of Human Rights*, GA Res 217A(III), UN GAOR, UN Doc A/810 (10 December 1948) ('UDHR').

168 Human Rights Committee, *General Comment No 18: Non-Discrimination*, 37th sess, UN Doc HRI/GEN/1/Rev.9 (vol 1) (compiled 27 May 2008, adopted 10 November 1989) [1].

169 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 26 ('ICCPR'); *UDHR* art 7. While the ICCPR frames equality before the law as a right of individual persons, UNDRIP extends this right to Indigenous peoples: *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) art 1 ('UNDRIP').

right) that guarantees the enjoyment by all persons and peoples of other human rights without distinction on protected grounds.¹⁷⁰

2.106 Discrimination on the basis of race has assumed a particularly prominent position at international law, with the prohibition on racial discrimination emerging as a peremptory (*jus cogens*) norm — that is, a norm from which derogation is never permitted.¹⁷¹ The ICERD is the predominant international law instrument concerned with the issue of discrimination on racial grounds. Article 5 of the Convention states that

States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights ...¹⁷²

2.107 The rights subsequently enumerated include various civil, political, economic, social, and cultural rights, including the right ‘to own property alone as well as in association with others’.¹⁷³

2.108 Australia is a party to the ICERD and has incorporated its obligations under the Convention into domestic law by way of the *RDA*. Section 10(1) of the *RDA* enshrines the right to equality before the law:

If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.¹⁷⁴

2.109 The *RDA* confirms that the ‘rights’ referred to in s 10(1) include those rights referred to in the art 5 of the ICERD, including (as mentioned above) the right to own property.¹⁷⁵

170 ICCPR art 2(1); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 2(2) (‘ICESCR’); UNDRIP art 2. On the relationship between the standalone right of equality before the law and the accessory right of non-discrimination, see, eg, Human Rights Committee, *General Comment No 18: Non-Discrimination*, 37th sess, UN Doc HRI/GEN/1/Rev.9 (vol 1) (compiled 27 May 2008, adopted 10 November 1989) [12]; Australian Law Reform Commission, *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws* (Report No 142, 2023) [11.7]–[11.9].

171 International Law Commission, *Report of the International Law Commission*, 73rd sess, UN GAOR, 77th sess, Supp No 10, UN Doc A/77/10 (2022) 16, 85–9.

172 *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 5 (‘ICERD’).

173 Ibid art 5(d)(v). See generally arts 5(a)–(e).

174 *Racial Discrimination Act 1975* (Cth) s 10(1).

175 Ibid s 10(2).

The meaning of 'equality'

2.110 As to the meaning of 'equality', two primary conceptualisations have emerged in theory and practice: formal equality and substantive equality.

2.111 'Formal equality' envisages the equality of all persons as requiring equality of treatment; that is, that everyone must be treated uniformly.¹⁷⁶ In line with such an understanding, discriminatory treatment of a particular person or people will amount to a denial of equality before the law.

2.112 However, by denying the differences that exist between persons or peoples, equality of treatment may lead to inequality of outcome. This may perpetuate or even exacerbate inequality in fact. In *Gerhardy v Brown*, Brennan J observed that 'formal equality before the law is insufficient to eliminate all forms of racial discrimination' and that by entrenching inequalities in fact, formal equality can be 'an engine of oppression destructive of human dignity'.¹⁷⁷ Similarly, in *Mabo v Queensland (No 1)*, Wilson J observed that even where there is formal equality, 'a deep sense of injustice may remain':

[F]ormal equality before the law does not always achieve effective and genuine equality. The latter will only be achieved by reason of the former when the factual circumstances in which the different groups are placed are comparable. The extension of formal equality in law to a disadvantaged group may have the effect of entrenching inequality in fact ...¹⁷⁸

2.113 'Substantive equality', on the other hand, accounts for the specific circumstances of particular groups, permitting differential treatment where necessary to achieve equality of outcome.¹⁷⁹ In practice, this may be achieved through the adoption of 'special measures' (or 'positive discrimination') taken to rectify persistent inequalities.

2.114 Substantive equality has emerged as the leading standard at international law.¹⁸⁰ As the Permanent Court of International Justice explained in 1935:

Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations.

176 See, eg, Titia Loenen, *The Conceptualization of Equality and Non-Discrimination as Legal Standards: From Formal to More Substantive Equality: From Formal to More Substantive Equality* (Brill, 2024) 38.

177 *Gerhardy v Brown* (1985) 159 CLR 70, 128–9.

178 *Mabo v Queensland (No 1)* (1988) 166 CLR 186, 206. As Post explains, '[l]egal equality can be reconciled with indigenous rights. However, it can also be reconciled with significant human rights abuses. For this reason, a strict interpretation of equality before the law has been rejected in favour of a more substantive approach': Savannah Post, 'One Law for All: Reconciling Indigenous Rights and the Right to Equality Before the Law' (2016) 22 *Auckland University Law Review* 42, 49.

179 Loenen (n 176) 38–9. While this is the most common framing of substantive equality, it is not the only approach: see generally Sandra Fredman, 'Substantive Equality Revisited' (2016) 14(3) *International Journal of Constitutional Law* 712.

180 See, eg, Loenen (n 176) 40.

It is easy to imagine cases in which equality of treatment of the majority and of the minority, whose situation and requirements are different, would result in inequality in fact ... The equality between members of the majority and of the minority must be an effective, genuine equality ...¹⁸¹

2.115 In 1966, Tanaka J of the International Court of Justice explained that 'treat[ing] different matters equally in a mechanical way would be as unjust as to treat equal matters differently'.¹⁸² Justice Tanaka's enunciation of the principle 'pervades today's international law on the subject',¹⁸³ and was endorsed by Brennan J in *Gerhardy v Brown*.¹⁸⁴

2.116 The *International Covenant on Civil and Political Rights* ('ICCPR') and *International Covenant on Economic, Social and Cultural Rights* ('ICESCR') have been interpreted as requiring substantive equality.¹⁸⁵ The ICERD and other treaties explicitly recognise special measures in their text, in line with a substantive equality approach.¹⁸⁶ The *RDA*, as the domestic enactment of the ICERD, and similarly permits special measures, and in doing so recognises the importance of a substantive understanding of equality.¹⁸⁷

2.117 In the present context, substantive equality demands that native title be afforded the same level of *protection* as freehold title. The recommendations made in this Report have been guided by such a substantive understanding of equality.

Equality before the law and native title

2.118 Equality before the law has played a pivotal role in the recognition and protection of native title in Australia to date.

2.119 In *Mabo v Queensland (No 1)*, a majority of the High Court found that Queensland legislation purporting to extinguish traditional interests in land while

181 *Minority Schools in Albania (Advisory Opinion)* [1935] PCIJ (Ser A/B) No 64 1935, 19.

182 *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa) (Second Phase) (Judgment)* [1966] ICJ Rep 6, 305 (Tanaka J). See generally, 304–6 (Tanaka J).

183 Stephanie Farrior, 'Introduction' in Stephanie Farrior (ed), *Equality and Non-Discrimination under International Law: Volume II* (Taylor & Francis, 2015) xi, xi.

184 Citing Tanaka J, Brennan J concluded that formal equality 'must yield on occasions to achieve' substantive equality: *Gerhardy v Brown* (1985) 159 CLR 70, 129.

185 Human Rights Committee, *General Comment No 18: Non-Discrimination*, 37th sess, UN Doc HRI/GEN/1/Rev.9 (vol 1) (compiled 27 May 2008, adopted 10 November 1989) [8], [10], [13]; Committee on Economic, Social and Cultural Rights, *General Comment No 20: Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 42nd sess, UN Doc E/C.12/GC/20 (2 July 2009) [8].

186 See, eg, ICERD arts 1(4), 2(2); *Convention on the Elimination of all Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) art 4 ('CEDAW'); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 5(4). It has also been recognised that special measures (as an exception to the prohibition on discrimination) are a part of customary international law: Australian Human Rights Commission, *The Declaration Dialogue Series: Paper No 5 — Equality and Non-Discrimination* (2013) 9.

187 *Racial Discrimination Act 1975* (Cth) s 8(1).

leaving equivalent ordinary titles untouched had violated the principle of equality before the law:

By extinguishing the traditional legal rights characteristically vested in the Miriam people, the 1985 [Queensland] Act abrogated the immunity of the Miriam people from arbitrary deprivation of their legal rights in and over the Murray Islands. The Act thus impaired their human rights while leaving unimpaired the corresponding human rights of those whose rights in and over the Murray Islands did not take their origin from the laws and customs of the Miriam people ... Accordingly, the Miriam people enjoy their human right of the ownership and inheritance of property to a 'more limited' extent than others who enjoy the same human right.

In practical terms, this means that if traditional native title was not extinguished before the *Racial Discrimination Act* came into force, a State law which seeks to extinguish it now will fail. It will fail because s 10(1) of the *Racial Discrimination Act* [which enshrines the right to equality before the law] clothes the holders of traditional native title who are of the native ethnic group with the same immunity from legislative interference with their enjoyment of their human right to own and inherit property as it clothes other persons in the community.¹⁸⁸

2.120 In *Mabo v Queensland (No 2)*, the Court again engaged with the notion of equality before the law.¹⁸⁹ Justice Brennan identified human rights — and equality before the law in particular — as 'aspirations of the contemporary Australian legal system',¹⁹⁰ and underscored that continued embrace of the enlarged notion of terra nullius 'would destroy the equality of all Australian citizens before the law'.¹⁹¹

Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted ... The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organization of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.¹⁹²

2.121 In the *Native Title Act Case*, the majority of the High Court considered the relationship between equality before the law and native title. While the *RDA*

188 *Mabo v Queensland (No 1)* (1988) 166 CLR 186, 218–219 (Brennan, Toohey and Gaudron JJ). See also at 231–3 (Deane J). For subsequent judicial commentary on the Court's engagement with equality before the law in *Mabo (No 1)*, see, eg, *Western Australia v Commonwealth* (1995) 183 CLR 373, 418.

189 For example, a majority of six (of seven) justices affirmed that extinguishment of native title is subject to compliance with the *RDA*: Bartlett, *Native Title in Australia* (n 14) 34.

190 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 30.

191 *Ibid* 58.

192 *Ibid* 42.

does not constrain the *NTA* (as will be discussed below), this commentary affirms the importance of native title being afforded equivalent respect and protection as freehold title:

The *Racial Discrimination Act* does not alter the characteristics of native title, but it confers on protected persons rights or immunities which ... allow protected persons security in the enjoyment of their title to property to the same extent as the holders of titles granted by the Crown are secure in the enjoyment of their titles.¹⁹³

At common law ... native title can be extinguished or impaired by a valid exercise of sovereign power inconsistent with the continued enjoyment or unimpaired enjoyment of native title ... But the *Racial Discrimination Act* is superimposed on the common law and it enhances the enjoyment of those human rights ... which affect native title so that Aboriginal holders are secure in the possession and enjoyment of native title to the same extent as the holders of other forms of title are secure in the possession and enjoyment of those titles.¹⁹⁴

2.122 In 2025, the High Court in *Yunupingu* reiterated that equality before the law is the ‘motivating rationale’ underpinning its decision decades earlier in *Mabo v Queensland (No 2)*.¹⁹⁵

Equality before the law and the *NTA*

2.123 As set out above, the *RDA* and the principle of equality before the law it enshrines played a pivotal role in the recognition of native title in the *Mabo* decisions. Accordingly, during the drafting of the *NTA*, the question of the interaction between the *NTA* and *RDA* arose. In 1993, the Senate Standing Committee on Legal and Constitutional Affairs considered whether the *NTA* should be expressly subject to the provisions of the *RDA*.¹⁹⁶ The Committee noted evidence in support of this position, as well as evidence which suggested that it would ‘prejudice the certainty of the validation provisions of the Bill and the validity of future grants’.¹⁹⁷ The Committee did not recommend that the *NTA* be expressly subject to the *RDA*, but recommended instead that the Bill ‘make it absolutely clear that it is the intention of the Parliament that the Bill is consistent with the *RDA* and constitutes a special measure for the advancement of Aboriginal peoples and Torres Strait Islanders’.¹⁹⁸

193 *Western Australia v Commonwealth* (1995) 183 CLR 373, 437.

194 *Ibid* 439.

195 *Commonwealth v Yunupingu on behalf of the Gumatj Clan or Estate Group* (2025) 421 ALR 604 [80]. Bartlett has similarly identified equality before the law as ‘the fundamental rationale’ for the High Court’s recognition of native title in *Mabo (No 2)*: Richard H Bartlett, ‘The Content of Aboriginal Title and Equality Before the Law’ (1998) 61(2) *Saskatchewan Law Review* 377, 380–1.

196 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Native Title Bill 1993* (1993) [1.44].

197 *Ibid* [1.28].

198 *Ibid* [1.47].

2.124 When enacted, the *NTA* did indeed profess to be consistent with human rights standards.¹⁹⁹ Moreover, equality before the law appears to have been particularly influential in the drafting of the *NTA*. As Bartlett observes, the Commonwealth ‘structured the Act in accordance with its perception of the requirements of equality before the law’.²⁰⁰ This includes the future acts regime, wherein the validating criteria for future acts (that is, the notion of a ‘permissible future act’) was influenced by equality as between native and ordinary titles.²⁰¹ As the preamble to the *NTA* explains:

It is particularly important to ensure that native title holders are now able to enjoy fully their rights and interests. Their rights and interests under the common law of Australia need to be significantly supplemented. In future, acts that affect native title should only be able to be validly done if, typically, they can also be done to freehold land and if, whenever appropriate, every reasonable effort has been made to secure the agreement of the native title holders through a special right to negotiate. It is also important that the broader Australian community be provided with certainty that such acts may be validly done.²⁰²

2.125 In the *Native Title Act Case*, the *NTA* was deemed by the High Court to be consistent with both the *RDA* and the ICERD.²⁰³ CERD similarly welcomed the *NTA* as originally enacted,²⁰⁴ which it considered to be ‘delicately balanced between the rights of indigenous and non-indigenous title holders’ and thus compliant with the ICERD.²⁰⁵ As explained by the Committee’s Country Rapporteur on Australia:

199 *Native Title Act 1993* (Cth) preamble; Explanatory Memorandum Part A, Native Title Bill 1993 (Cth) 2.

200 Richard Bartlett, ‘Native Title: From Pragmatism to Equality Before the Law’ (1995) 20(2) *Melbourne University Law Review* 282, 298. See also Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, *Sixteenth Report: CERD and the Native Title Amendment Act 1998* (2000) [5.13]–[5.16].

201 *Native Title Act 1993* (Cth) s 235, as enacted. See also Explanatory Memorandum Part A, Native Title Bill 1993 (Cth) 5.

202 *Native Title Act 1993* (Cth) preamble.

203 In that case, the plurality of the High Court said: ‘[I]t is not easy to detect any inconsistency between the *Native Title Act* and the *Racial Discrimination Act*. The *Native Title Act* provides the mechanism for regulating the competing rights and obligations of those who are concerned to exercise, resist, extinguish or impair the rights and interests of the holders of native title. In regulating those competing rights and obligations, the *Native Title Act* adopts the legal rights and interests of persons holding other forms of title as the benchmarks for the treatment of the holders of native title. But if there were any discrepancy in the operation of the two Acts, the *Native Title Act* can be regarded either as a special measure under s 8 of the *Racial Discrimination Act* or as a law which, though it makes racial distinctions, is not racially discriminatory so as to offend the *Racial Discrimination Act* or the International Convention on the Elimination of All Forms of [Racial] Discrimination.’: *Western Australia v Commonwealth* (1995) 183 CLR 373, 483–4 (citations omitted). See also Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund (n 200) [5.17]–[5.18].

204 Committee on the Elimination of Racial Discrimination, *Report of the Committee on the Elimination of Racial Discrimination*, 49th sess, UN Doc A/49/18 (6 January 1995) [540].

205 Committee on the Elimination of Racial Discrimination, *Decision No 2 (54) on Australia*, 54th sess, 1331st mtg, UN Doc A/54/18 (18 March 1999) para 6. See also Gay McDougall, Country Rapporteur on Australia, *Report to the Committee on the Elimination of Racial Discrimination*, 1323rd mtg (12 March 1999), as reproduced in Shane Hoffman, ‘United Nations Committee on the Elimination of Racial Discrimination: Consideration of Australia under Its Early Warning Measures and Urgent Action Procedures’ (2000) 6(1) *Australian Journal of Human Rights* 13, 18.

The original *Native Title Act* was delicately balanced between the interests of non-indigenous people and the interests of indigenous peoples. The original Act allowed validation of prior land dealings that might have been invalid because of the *Racial Discrimination Act* of 1975.

These validation provisions were racially discriminatory but to balance this discrimination, the original Act provided two key forms of protection for native title with respect to future land dealings. First, the freehold standard which required native title to be treated in the same way as freehold title and secondly, the right to negotiate about certain land use in the future, particularly interestingly, including mining. Significantly, the original 1993 Act was the subject of extensive negotiations with indigenous groups and attracted support from key members of some of those groups. Indigenous groups have made it clear that they would not have supported the discriminatory provisions of the Act relating to the past, had the Act not been balanced by the beneficial provisions of the freehold standard and the right to negotiate in the future.²⁰⁶

2.126 The *NTA* no longer strikes this balance. As outlined above, this balance was disrupted most significantly by the *NTAA 1998*.²⁰⁷

2.127 On 18 March 1999, CERD adopted a decision expressing concern that these amendments 'wind back the protections of indigenous title offered in the *Mabo* decision of the High Court of Australia and the 1993 Native Title Act',²⁰⁸ raising concern as to Australia's compliance under the ICERD:

While the original Native Title Act recognizes and seeks to protect indigenous title, provisions that extinguish or impair the exercise of indigenous title rights and interests pervade the amended Act. While the original 1993 Native Title Act was delicately balanced between the rights of indigenous and non-indigenous title holders, the amended Act appears to create legal certainty for Governments and third parties at the expense of indigenous title.²⁰⁹

2.128 The Committee also identified the 'lack of effective participation by indigenous communities in the formulation of the amendments' as raising concerns under the ICERD,²¹⁰ and urged Australia

to suspend implementation of the 1998 amendments and reopen discussions with the representatives of the Aboriginal and Torres Strait Islander peoples with a view to finding solutions acceptable to the indigenous peoples and which would comply with Australia's obligations under the Convention.²¹¹

206 Gay McDougall, Country Rapporteur on Australia, *Report to the Committee on the Elimination of Racial Discrimination*, 1323rd mtg (12 March 1999), as reproduced in Hoffman (n 205) 18.

207 The ALRC notes, however, that the Australian delegation to CERD was of the opinion that the *NTA* as amended in 1998 remained compliant with the ICERD: see Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund (n 200) [4.7]–[4.11].

208 Committee on the Elimination of Racial Discrimination, *Decision No 2 (54) on Australia*, 54th sess, 1331st mtg, UN Doc A/54/18 (18 March 1999) para 8.

209 Ibid para 6.

210 Ibid para 9.

211 Ibid para 11.

2.129 The Committee affirmed its concerns as to the 1998 amendments to the *NTA* on 16 August 1999,²¹² and again in 2000.²¹³

Realigning the *NTA* with equality before the law

2.130 By providing inferior protection to native title rights and interests relative to other property interests, the current future acts regime denies native title holders equality before the law.

2.131 At domestic law, this inequality is not necessarily unlawful. By virtue of its status as a subsequent and more specific piece of legislation enacted by the same legislature, the *NTA* (and the future acts regime as part thereof) overrides, and is therefore *technically* consistent with, the *RDA*.²¹⁴ Section 7 of the *NTA* (as amended in 1998 following the *Native Title Act Case*) confirms this.²¹⁵ This means that at present, if a future act is done validly under (that is, done in compliance with the requirements of) the *NTA*, it is not open to subsequent challenge on the basis that it is inconsistent with the provisions of the *RDA*.²¹⁶

2.132 This does not, however, mean that the *NTA* is *in principle* consistent with the equality before the law as enshrined in the *RDA*, nor compliant with Australia's

212 Committee on the Elimination of Racial Discrimination, *Decision No 2 (55) on Australia*, 54th sess, 1353rd mtg, UN Doc A/54/18 (16 August 1999) para 1.

213 See Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, 56th sess, UN Doc CERD/C/304/Add.101 (19 April 2000) para 9.

214 In the *Native Title Act Case*, the High Court found the *NTA* to be consistent with the *RDA* (prior to the 1998 amendments). However, it proceeded to note that even if there were an inconsistency between the Acts, 'both Acts emanate from the same legislature and must be construed so as to avoid absurdity and to give to each of the provisions a scope for operation'. The Court said that the 'general provisions' of the *RDA* 'must yield to the specific provisions' of the *NTA*. The Court also confirmed that s 7(1) of the *NTA*, which stated that nothing in the *NTA* 'affects the operation' of the *RDA*, 'provides no basis for interpreting the *Native Title Act* as subject to the *Racial Discrimination Act*. The *Native Title Act* prescribes specific rules governing the adjustment of rights and obligations over land subject to native title and s 7(1) cannot be construed as intending to nullify those provisions': *Western Australia v Commonwealth* (1995) 183 CLR 373, 484. The Federal Court reached a similar conclusion in relation to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), which had been enacted subsequently to the *RDA* and was thus determined to be unconstrained by it: *Pareroutja v Tickner* (1993) 42 FCR 32, 46.

215 The Supplementary Explanatory Memorandum to the Amendment Bill confirmed that amendments to s 7 were 'intended to replicate in legislation the High Court's comments' in the *Native Title Act Case*. It explained that the *RDA* 'cannot interfere with the validity of an act affecting native title ... that is valid under the *NTA*'. On the future acts regime, it explained that the *NTA* 'imposes conditions on the doing of future acts, that if complied with, will be valid'. It noted that 'if the *NTA* states that an act can be done, or enables such an act, then even though this may affect native title rights differently to the way it affects other rights, or even if it only affects native title rights, the *RDA* cannot restrict or invalidate such acts': Supplementary Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) [No 2] 3–4.

216 This is consistent with the preamble to the *NTA*, which recognises the importance of 'the broader Australian community be[ing] provided with certainty that [future acts] may be validly done': *Native Title Act 1993* (Cth) preamble.

international commitments.²¹⁷ Although it appears that Parliament has never intended for the *NTA* to be expressly subject to the *RDA*, it seems to have intended that the *NTA* be consistent with the right to equality before the law, while also ensuring certainty as to the doing of future acts.

International law and human rights

2.133 The ALRC's enabling legislation requires that the Commission ensure its proposals and recommendations for reform 'are, as far as practicable, consistent with Australia's international obligations'.²¹⁸ The Terms of Reference ask the ALRC to consider

the rights and obligations recognised in the international instruments to which Australia is a party or which it has pledged to support, including the United Nations Declaration on the rights of Indigenous Peoples.

2.134 The preamble to the *NTA* also affirms Australia's commitment to protecting 'the rights of all of its citizens, and in particular its Indigenous peoples, by recognising international standards for the protection of universal human rights and fundamental freedoms'.²¹⁹

2.135 This is the first substantive review of the future acts regime since Australia endorsed the United Nations Declaration on the Rights of Indigenous Peoples ('UNDRIP'). This review presents an important opportunity to align reforms to the future acts regime with Australia's international human rights obligations.

2.136 This part is in three sections. The first section outlines the sources of Australia's relevant obligations under international law. The second section discusses the key human rights concepts that have informed the reforms made in this Report. The third section discusses the concept of safeguarding human rights.

217 As Triggs notes, '[w]hatever the impact of domestic law, it has no bearing on the conformity of the amended *Native Title Act* to the *Racial Discrimination Convention* as a matter of international law.' Gillian Triggs, 'Australia's Indigenous Peoples and International Law: Validity of the Native Title Amendment Act 1998 (Cth)' (1999) 23(2) *Melbourne University Law Review* 372, 378.

218 *Australian Law Reform Commission Act 1996* (Cth) s 24(1)(b).

219 *Native Title Act 1993* (Cth) preamble. The preamble expressly refers to Australia's ratification of the International Convention on the Elimination of All Forms of Racial Discrimination, International Covenant on Civil and Political Rights, and International Covenant on Economic, Social and Cultural Rights, as well as its endorsement of the Universal Declaration of Human Rights. At the time of the *NTA*'s enactment, UNDRIP had not yet been adopted.

Australia's obligations under international law

2.137 Australia has a wide range of obligations under international law.²²⁰ In the context of the present Inquiry, the most relevant obligations are contained in international treaties to which Australia is a state party, including the:

- ICCPR;²²¹
- ICESCR;²²² and
- ICERD.²²³

2.138 The 2024 *Women in Native Title* Report also acknowledged the relevance of the *Convention on the Elimination of All Forms of Discrimination Against Women* ('CEDAW') in the native title space.²²⁴

2.139 Under international human rights treaties, state parties have the obligation to ensure that all persons enjoy all their human rights. Australia's obligations under international human rights law are threefold:

- to respect human rights — requiring government not to unduly interfere with or limit human rights;
- to protect human rights — requiring government to take measures to prevent others from interfering with human rights; and
- to fulfil human rights — requiring government to take positive measures to fully realise human rights.²²⁵

2.140 Where human rights have been violated, states have an obligation to ensure accessible and effective remedies are available to the persons or peoples affected.²²⁶

220 The sources of international law are set out in *Statute of the International Court of Justice* art 38(1). These sources include international treaties, customary international law, general principles of law, and, as a subsidiary means for determining the rules of law, judicial decisions and the writings of eminent jurists.

221 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

222 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

223 *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

224 See generally Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Women in Native Title: Native Title Report 2024* (2024).

225 See, eg, Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004, adopted 29 March 2004) [5]–[9]. On the obligations to respect, protect, and fulfil in the context of rights to and relating to land, see Committee on Economic, Social and Cultural Rights, *General Comment No 26 (2022) on land and economic, social and cultural rights*, 72nd sess, UN Doc E/C.12/GC/26 (24 January 2023) [22]–[39].

226 See generally UNDRIP art 40; UDHR art 8; ICCPR art 2(3); ICERD art 6; *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res 60/147, UN Doc A/RES/60/147 (21 March 2006, adopted 16 December 2005) principle 11.

Such remedies may include one or more of restitution, compensation, rehabilitation, satisfaction, or guarantees of non-repetition.²²⁷

2.141 Australia is required to comply with these obligations under international law. However, it has discretion as to how it implements these obligations within its domestic legal system. Unlike some other countries, international law does not automatically become part of domestic law in Australia.²²⁸ Instead, international law only becomes part of Australia's domestic law when expressly incorporated as such (for example, when adopted by statute). Additionally, common law requires that

statutes should be interpreted and applied, so far as their language permits, so as not to be inconsistent with international law or conventions to which Australia is a party.²²⁹

2.142 Despite ratifying the human rights treaties referred to above, Australia has not fully adopted the rights they enumerate into domestic legislation. To date, the ICERD is the only one of these that has been transformed into domestic law, by way of the *RDA*.²³⁰ Accordingly, only some of the rights embodied in these treaties are directly justiciable in Australian courts.

International law and Indigenous peoples — UNDRIP

2.143 Recent decades have seen increasing recognition by international law of Indigenous peoples as distinct cultural groups. A particularly important development occurred in 2007, with the adoption of UNDRIP, the landmark statement of rights of Indigenous persons and peoples at international law.²³¹

2.144 The Terms of Reference specifically ask the ALRC to consider UNDRIP, which Australia endorsed in 2009.²³² UNDRIP was not in existence when the *NTA* was enacted in 1993 or when the future acts regime was last substantially amended in 1998. This Inquiry, therefore, represents the first time the future acts regime has been assessed against UNDRIP. It also takes place in a social political context where

227 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res 60/147, UN Doc A/RES/60/147 (21 March 2006, adopted 16 December 2005) principles 18–23.

228 See *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 224–5; *Dietrich v R* (1992) 177 CLR 292, 305. See also Australian Law Reform Commission, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws* (Report No 129, 2015) [2.38].

229 *Momcilovic v The Queen* (2011) 245 CLR 1 [18] (citations omitted). See also *Coleman v Power* (2004) 220 CLR 1 [19]; *Kartinyeri v Commonwealth* (1998) 195 CLR 337 [97]; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287.

230 CEDAW has also been partially implemented into domestic law by the *Sex Discrimination Act 1984* (Cth).

231 Despite UNDRIP's undeniable significance and legitimacy, the negotiation of UNDRIP did involve some significant compromises: see generally Karen Engle, 'On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights' (2011) 22(1) *The European Journal of International Law* 141.

232 Jenny Macklin MP, 'Federal Government Formally Endorses the Declaration on the Rights of Indigenous Peoples' (Media Release, 3 April 2009).

the foundational UNDRIP right of self-determination is broadly understood to be a critical policy lever for delivering better socioeconomic outcomes.

2.145 As a Declaration, UNDRIP is not legally binding on states.²³³ However, commentators have affirmed that UNDRIP is an expression of, and is grounded in, existing rights and obligations in the international human rights law canon,²³⁴ offering 'a contextualised elaboration of general human rights principles and rights as they relate to the specific historical, cultural and social circumstances of indigenous peoples'.²³⁵ As the Law Council of Australia has summarised,

many of [UNDRIP's] articles have been recognised as reflecting customary international law. Its articles also echo many of the rights articulated in legally binding human rights treaties, but with a specific focus on indigenous peoples. Insofar as the UNDRIP relies on and elaborates well-established human rights obligations in international treaty and customary law, it is binding on Australia.²³⁶

2.146 While UNDRIP speaks specifically to the rights of Indigenous persons and peoples, it is 'not aimed at transforming indigenous peoples into a privileged category of international law'.²³⁷ Rather, it has 'an essentially remedial character, seeking to redress the systemic obstacles and discrimination that indigenous peoples have faced in their enjoyment of basic human rights'.²³⁸ Article 43 of UNDRIP explicitly characterises the Declaration as enshrining 'minimum standards for the survival, dignity and well-being of the indigenous peoples of the world'.

233 The Special Rapporteur has stressed that 'whatever its legal significance, the Declaration has a significant normative weight grounded in its high degree of legitimacy': James Anaya, Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *Situation of Human Rights and Fundamental Freedoms of Indigenous People*, 65th sess, UN Doc A/65/264 (9 August 2010) [60].

234 See, eg, *ibid* [62]; Expert Mechanism on the Rights of Indigenous Peoples, *Free, prior and informed consent: a human rights-based approach*, 39th sess, UN Doc A/HRC/39/62 (10 August 2018) [3]; Mauro Barelli, 'The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 58 *International and Comparative Law Quarterly* 957, 962; Megan Davis, 'To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On' (2012) 19 *Australian International Law Journal* 17, 26–7. The International Law Association has also concluded that UNDRIP 'includes several key provisions which correspond to existing State obligations under customary international law': International Law Association, *Rights of Indigenous Peoples*, Resolution No 5/2012, 75th conference (30 August 2012) [2].

235 James Anaya, Special Rapporteur on the Rights of Indigenous Peoples, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, 9th sess, UN Doc A/HRC/9/9 (11 August 2008) [86].

236 Law Council of Australia, Submission No 60 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Inquiry into the Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia* (2022) [8] (citations omitted).

237 Barelli (n 234) 960.

238 James Anaya, Special Rapporteur on the Rights of Indigenous Peoples, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, 9th sess, UN Doc A/HRC/9/9 (11 August 2008) [86].

2.147 UNDRIP's significance, legitimacy, and influence are confirmed in its widespread endorsement and uptake by the international community:

Irrespective of the uncertain legal nature of the UNDRIP *per se*, one can conclude that it has become an unavoidable parameter of reference when dealing with indigenous peoples' rights. The recent experience of UN bodies, specialised agencies, human rights treaty bodies, regional human rights courts and commissions, and some domestic courts, clearly shows the strong persuasive authority and the interpretive function of the UNDRIP.²³⁹

2.148 Australia has not enshrined UNDRIP into domestic law, though there have been several calls and attempts to do so.²⁴⁰ In 2023, the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs published the report of its *Inquiry into the Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia*. The Committee concluded that UNDRIP reflects international consensus on the rights of Indigenous peoples and is consistent with and reinforces existing universal human rights instruments.²⁴¹ The Committee recommended that the Australian Government

ensure its approach to developing legislation and policy on matters relating to Aboriginal and Torres Strait Islander people (including, but not limited to, Closing the Gap initiatives) be consistent with the Articles outlined in [UNDRIP].²⁴²

Key human rights concepts

2.149 Underpinning international human rights law is the notion that all human rights are interdependent and indivisible, meaning that one's enjoyment of their human rights requires respect and protection of all their human rights.²⁴³ In addition to equality before the law (see discussion above), of particular importance to the future acts regime are the following human rights concepts:

- the right to self-determination;
- rights to, and relating to, lands and waters;
- cultural rights;
- participation and consultation;
- free, prior, and informed consent; and
- redress and remedies.

239 Felipe Gómez Isa, 'The UNDRIP: An Increasingly Robust Legal Parameter' (2019) 23(1–2) *International Journal of Human Rights* 7, 16 (emphasis in original).

240 See, eg, Law Council of Australia, 'Australia must formally adopt UN Declaration on Rights of Indigenous People' (Media Release, 8 July 2022); United Nations Declaration on the Rights of Indigenous Peoples Bill 2022 (Cth); Human Rights (Parliamentary Scrutiny) Amendment (Consideration of UNDRIP) Bill 2023 (Cth).

241 Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Inquiry into the Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia* (2023) [1.48], [1.50].

242 Ibid rec 1.

243 See, eg, Office of the High Commissioner for Human Rights, 'What Are Human Rights?' <www.ohchr.org/en/what-are-human-rights>.

2.150 This section discusses each of these concepts, and how they relate to the future acts regime.

The right to self-determination

2.151 Considered a ‘centrepiece’ of UNDRIP, the right to self-determination is a ‘foundational principle that anchors the constellation of indigenous peoples’ rights’.²⁴⁴ Self-determination refers to the right of peoples ‘to pursue their own destinies in all spheres of life, under conditions of equality, and to live within governing institutional orders that are devised accordingly’.²⁴⁵

2.152 The right to self-determination is well-entrenched in international law, recognised in the Charter of the United Nations and both the ICCPR and ICESCR, as well as having attained peremptory status.²⁴⁶ As discussed in **Chapter 1**, where we refer to the right to self-determination, we refer to the concept as framed in UNDRIP. Article 3 of UNDRIP provides that

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.²⁴⁷

2.153 This is qualified by art 46(1), which makes it clear that UNDRIP does not envisage the right to self-determination (or any other right) as undermining the sovereignty or integrity of States. On the contrary, art 46(1) explicitly provides that nothing in the text of the Declaration authorises or encourages actions that would ‘dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States’.²⁴⁸ Such a framing of self-determination is widely

244 James Anaya, *Rights of Indigenous Peoples: Report of the Special Rapporteur on the Rights of Indigenous Peoples*, 68th sess, UN Doc A/68/317 (14 August 2013) [73].

245 Ibid [77].

246 See *Charter of the United Nations* art 1(2); ICCPR art 1; ICESCR art 1; International Law Commission, *Report of the International Law Commission*, 73rd sess, UN GAOR, 77th sess, Supp No 10, UN Doc A/77/10 (2022) 16.

247 On the right to self-determination in UNDRIP, see generally Expert Mechanism on the Rights of Indigenous Peoples, *Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: Indigenous peoples and the right to self-determination*, 48th sess, UN Doc A/HRC/48/75 (4 August 2021).

248 On the evolution of the right of Indigenous peoples to self-determination and the impact of art 46(1), see, eg, Mauro Barelli, ‘Shaping Indigenous Self-Determination: Promising or Unsatisfactory Solutions?’ (2011) 13(4) *International Community Law Review* 413, 416–23; Expert Mechanism on the Rights of Indigenous Peoples, *Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: Indigenous peoples and the right to self-determination*, 48th sess, UN Doc A/HRC/48/75 (4 August 2021) [3]–[7].

accepted and mirrored elsewhere in international law.²⁴⁹ The Special Rapporteur on the Rights of Indigenous Peoples has affirmed that the right to self-determination as enshrined in UNDRIP is the same as that enjoyed by all peoples under international law.²⁵⁰

2.154 Without self-determination, the individual and collective rights of Indigenous peoples cannot be fully enjoyed. This is because the right to self-determination 'is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights'.²⁵¹ In the specific context of UNDRIP, the Expert Mechanism explains the significance of the right to self-determination as follows:

All the rights in [UNDRIP] are indivisible, interdependent and grounded in the overarching right to self-determination. The exercise of self-determination is therefore indispensable for indigenous peoples' enjoyment of all their other rights, including, importantly, land rights ...²⁵²

Rights to lands and waters

2.155 Recent decades have seen the emergence of more robust recognition and protection of Indigenous peoples' rights under international human rights law. Integral to this development has been increasing recognition of the special

249 The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, adopted in 1970, similarly provides that the right to self-determination does not authorise or encourage any action that would 'dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States': *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, GA Res 2625 (XXV), 25th sess, 1883rd plen mtg, UN Doc A/RES/2625(XXV) (adopted 24 October 1970) 124. See also *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23 (12 July 1993, adopted 25 June 1993 by the World Conference on Human Rights) para 2; Committee on the Elimination of Racial Discrimination, *General Recommendation No 21 (48)*, 48th sess, 1147th mtg, UN Doc CERD/48/Misc.7/Rev.3 (adopted 8 March 1996) [6]; Committee on Economic, Social and Cultural Rights, *General Comment No 26 (2022) on land and economic, social and cultural rights*, 72nd sess, UN Doc E/C.12/GC/26 (24 January 2023) [11]. The Australian Government has affirmed that the right to self-determination 'is widely understood to be exercised in a manner that preserves the territorial integrity, political unity and sovereignty of a country': Attorney General's Department, 'Right to Self-Determination' <www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/right-self-determination>.

250 James Anaya, *Rights of Indigenous Peoples: Report of the Special Rapporteur on the Rights of Indigenous Peoples*, 68th sess, UN Doc A/68/317 (14 August 2013) [75]. See also Dorothee Cambou, 'The UNDRIP and the Legal Significance of the Right of Indigenous Peoples to Self-Determination: A Human Rights Approach with a Multidimensional Perspective' (2019) 23(1–2) *International Journal of Human Rights* 34, 35–7.

251 Human Rights Committee, *General Comment No 12: Article 1 (Right to Self-determination)*, 21st sess, UN Doc HRI/GEN/1/Rev.9 (Vol. I) (13 March 1984) [1].

252 Expert Mechanism on the Rights of Indigenous Peoples, *Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: Indigenous peoples and the right to self-determination*, 48th sess, UN Doc A/HRC/48/75 (4 August 2021) [14].

and significant relationship of Indigenous peoples to their lands, and relatedly the relationship between land and human rights.²⁵³

2.156 Indigenous rights to, and relationships with, lands and waters form the backbone of UNDRIP. UNDRIP's preamble underscores

the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, *especially their rights to their lands, territories and resources* ...²⁵⁴

2.157 Article 25 of UNDRIP enshrines the right of Indigenous peoples

to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

2.158 Article 26 protects the right of Indigenous peoples to those lands, territories, and resources:

- (1) Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
- (2) Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
- (3) States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

2.159 UNDRIP also enshrines various rights informed by Indigenous peoples' relationships with land. These include the right to determine and develop priorities and strategies for the development or use of Indigenous peoples' lands or territories and other resources;²⁵⁵ the right to maintain, protect, and have access in privacy to religious and cultural sites;²⁵⁶ and the right to the conservation and protection of the environment and productive capacity of their lands or territories and resources.²⁵⁷

253 See, eg, Expert Mechanism on the Rights of Indigenous Peoples, *Right to land under the United Nations Declaration on the Rights of Indigenous Peoples: a human rights focus*, 45th sess, UN Doc A/HRC/45/38 (15 July 2020); Committee on Economic, Social and Cultural Rights, *General Comment No 26 (2022) on land and economic, social and cultural rights*, 72nd sess, UN Doc E/C.12/GC/26 (24 January 2023).

254 UNDRIP preamble (emphasis added).

255 Ibid art 32(1).

256 Ibid art 12(1).

257 Ibid art 29(1).

2.160 Alongside Indigenous peoples' rights relating to land, UNDRIP incorporates several safeguards for the protection of such rights,²⁵⁸ including those discussed below.²⁵⁹

2.161 **Chapter 1** discusses how we apply the concept of self-determination in this Report.

Cultural rights

2.162 As explained above, the emergence of land rights in international law has followed from growing recognition of the cultural significance of land to Indigenous peoples.²⁶⁰ By virtue of this cultural relationship to land, land is integral to the enjoyment by Indigenous peoples of cultural rights:

land is closely and often intrinsically related to the enjoyment of the right to take part in cultural life owing to the particular spiritual or religious significance of land to many communities, for example, when land serves as a basis for social, cultural and religious practices or the expression of cultural identity.²⁶¹

2.163 While land rights are not explicitly enshrined in the core United Nations human rights treaties,²⁶² cultural rights are so enshrined.²⁶³ For example, art 27 of the ICCPR provides:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.²⁶⁴

258 See, eg, *ibid* arts 27–28, 32(2)–(3), 39–40.

259 See paragraphs [2.165]–[2.198].

260 See paragraphs [2.155]–[2.159].

261 Committee on Economic, Social and Cultural Rights, *General Comment No 26 (2022) on land and economic, social and cultural rights*, 72nd sess, UN Doc E/C.12/GC/26 (24 January 2023) [10].

262 Land rights are, however, recognised in Convention No 169 of the International Labour Organization, though Australia is not a party to this instrument: *Indigenous and Tribal Peoples Convention*, adopted 27 June 1989, 1650 UNTS 383, ILO No 169 (entered into force 5 September 1991) arts 13–19. See also International Law Association, *Rights of Indigenous Peoples*, Resolution No 5/2012, 75th conference (30 August 2012) para 7.

263 See, eg, ICCPR art 27; ICESCR art 15(1)(a). See also *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, GA Res 47/135, 47th sess, UN Doc A/RES/47/135 (3 February 1993, adopted 18 December 1992) art 2(1).

264 Article 27 of the ICCPR has been an integral part of the Human Rights Committee's jurisprudence concerning Indigenous peoples' rights relating to land: see, eg, Human Rights Committee, *Views: Communication No 1457/2006*, 95th sess, UN Doc CCPR/C/95/D/1457/2006 (24 April 2009, adopted 27 March 2009) ('*Poma Poma v Peru*') [7.1]–[8]; Human Rights Committee, *Views: Communication No 2552/2015*, 132nd sess, UN Doc CCPR/C/132/D/2552/2015 (21 September 2022, adopted 14 July 2021) ('*Pereira v Paraguay*') [8.5]–[9]; Human Rights Committee, *Views: Communication No 3585/2019*, 137th sess, UN Doc CCPR/C/137/D/3585/2019 (13 March 2024, adopted 15 March 2023) ('*Roy v Australia*') [8.1]–[8.7].

2.164 Cultural rights are also enshrined in UNDRIP. These include, among other rights, the right to practise and revitalise cultural traditions and customs,²⁶⁵ and the right to maintain, control, protect, and develop cultural heritage, traditional knowledge, and traditional cultural expressions.²⁶⁶

The right to participate in decision-making and the duty to consult

2.165 Article 18 of UNDRIP enshrines the right of Indigenous peoples to participate in decision-making:

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

2.166 Though procedural in nature, this is a full and standalone right.²⁶⁷ The Expert Mechanism has explained that the right to participate in decision-making

is indivisible from and interrelated with other rights of indigenous peoples, such as their right to self-determination and their rights to their lands, territories and resources.²⁶⁸

2.167 As set out below, the degree of participation that must be guaranteed to Indigenous peoples is dictated by the nature of the decision-making in question and potential impacts.

2.168 A key corollary of this right is the duty to consult with Indigenous peoples. This duty, which is firmly rooted in international human rights law,²⁶⁹ is enshrined in art 19 of UNDRIP:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

265 UNDRIP art 11(1).

266 Ibid art 31(1).

267 See, eg, Expert Mechanism on the Rights of Indigenous Peoples, *Final Report of the Study on Indigenous Peoples and the Right to Participate in Decision-Making*, 18th sess, Agenda Item 5, UN Doc A/HRC/18/42 (17 August 2011) Annex.

268 Expert Mechanism on the Rights of Indigenous Peoples, *Follow-up report on indigenous peoples and the right to participate in decision-making, with a focus on extractive industries*, 5th sess, UN Doc A/HRC/EMRIP/2012/2 (30 April 2012) [8].

269 See, eg, James Anaya, Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, 12th sess, UN Doc A/HRC/12/34 (15 July 2009) [36]–[57]; James Anaya, *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, 66th sess, UN Doc A/66/288 (10 August 2011) [77]–[91]; Victoria Tauli-Corpuz, *Rights of Indigenous Peoples: Report of the Special Rapporteur on the Rights of Indigenous Peoples*, 45th sess, UN Doc A/HRC/45/34 (18 June 2020) [47]–[71].

2.169 Other articles of the Declaration affirm this duty in specific circumstances.²⁷⁰ Of particular importance to the future acts regime is art 32(2):

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

2.170 The Special Rapporteur and the Expert Mechanism have affirmed that UNDRIP envisages consultation as a process of dialogue conducted with consent (discussed further below) as the objective, in which Indigenous peoples are capable of influencing the outcome.²⁷¹ Consultations must be rigorous, conducted in accordance with stringent standards.²⁷²

2.171 The Special Rapporteur has explained that the duty to consult arises ‘whenever a State decision may affect Indigenous peoples in ways not felt by others in society’.²⁷³ Moreover, a State’s duty to consult extends to situations where third parties will carry out the proposed activity, and cannot be ‘avoided through delegation to a private company or other entity’.²⁷⁴

2.172 Beyond UNDRIP, the duty to consult is grounded in various international and regional human rights treaties, and has been found to flow from and safeguard various rights.²⁷⁵

Free, prior, and informed consent

2.173 As part of the right to participate and the duty to consult, UNDRIP enshrines the concept of free, prior, and informed consent. While free, prior, and informed

²⁷⁰ UNDRIP arts 15, 17, 30, 36.

²⁷¹ James Anaya, Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, 12th sess, UN Doc A/HRC/12/34 (15 July 2009) [46]; James Anaya, *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, 66th sess, UN Doc A/66/288 (10 August 2011) [85]; Expert Mechanism on the Rights of Indigenous Peoples, *Free, prior and informed consent: a human rights-based approach*, 39th sess, UN Doc A/HRC/39/62 (10 August 2018) [15].

²⁷² For an overview of the various standards with which consultations must comply, see, eg, Victoria Tauli-Corpuz, *Rights of Indigenous Peoples: Report of the Special Rapporteur on the Rights of Indigenous Peoples*, 45th sess, UN Doc A/HRC/45/34 (18 June 2020) [48]–[57].

²⁷³ *Indigenous and Tribal Peoples Convention*, adopted 27 June 1989, 1650 UNTS 383, ILO No 169 (entered into force 5 September 1991) 169; James Anaya, Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, 12th sess, UN Doc A/HRC/12/34 (15 July 2009) [43].

²⁷⁴ James Anaya, Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, 12th sess, UN Doc A/HRC/12/34 (15 July 2009) [54].

²⁷⁵ See, eg, *ibid* [40]–[41]; Victoria Tauli-Corpuz, *Rights of Indigenous Peoples: Report of the Special Rapporteur on the Rights of Indigenous Peoples*, 45th sess, UN Doc A/HRC/45/34 (18 June 2020) [49].

consent has emerged as one of the most contested features of UNDRIP, it is not an innovation of the Declaration, having been enshrined years earlier in International Labour Organization Convention No 169 of 1989.²⁷⁶

2.174 The term ‘free’ refers to Indigenous peoples’ free will remaining unconstrained in the consultation process that precedes any consent given. This requires, among other things, that the consultation process be free from intimidation, coercion, manipulation, and harassment, and that the relationship between the negotiating parties be characterised by trust and good faith.²⁷⁷ Moreover, Indigenous peoples must be given the freedom to be represented as traditionally required under their own laws, customs, and protocols, and to guide and direct the process of consultation.²⁷⁸

2.175 The ‘prior’ component of free, prior, and informed consent requires that the consultation process begin as early as possible in the formulation of a proposal for an activity, preferably in the conceptualisation and design phases, before crucial details have already been decided.²⁷⁹ Consultation should also provide Indigenous peoples with the time necessary to understand and analyse information and to undertake their own decision-making processes.²⁸⁰

2.176 Consultations and any consent granted must also be ‘informed’. This requires that Indigenous peoples be given objective, accurate, and clear information concerning the proposed activity in a manner, form, and language they understand.²⁸¹

2.177 Finally, UNDRIP frames free, prior, and informed consent by reference to Indigenous *peoples*, meaning the giving or withholding of consent with respect to a proposed activity is a decision to be made by an Indigenous community.²⁸² In practice, collective consent must be sought through consultation with Indigenous peoples ‘through their own representative institutions’.²⁸³

2.178 As noted above, free, prior, and informed consent is mentioned in both arts 19 and 32(2) of UNDRIP, which refer to the obligation to consult ‘in order to obtain’

276 Free, prior, and informed consent was also recognised within the UN human rights system many years before UNDRIP was adopted: see, eg, Committee on the Elimination of Racial Discrimination, *General Recommendation No 23: Indigenous Peoples*, 51st sess, UN Doc A/52/18, annex V (18 August 1997); Rodolfo Stavenhagen, Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, 59th sess, UN Doc E/CN.4/2003/90 (21 January 2003) [66].

277 Expert Mechanism on the Rights of Indigenous Peoples, *Free, prior and informed consent: a human rights-based approach*, 39th sess, UN Doc A/HRC/39/62 (10 August 2018) [20].

278 Ibid.

279 Ibid [21].

280 Ibid.

281 Ibid [22]. The information provided should include the nature, size, pace, reversibility, and scope of any proposed activity; the reasons for the activity; the areas to be affected; social, environmental, and cultural impact assessments; the kind of compensation or benefit-sharing schemes involved; and all the potential harm and impacts that could result from the proposed activity: *ibid*.

282 Expert Mechanism on the Rights of Indigenous Peoples, *Free, prior and informed consent: a human rights-based approach*, 39th sess, UN Doc A/HRC/39/62 (10 August 2018) [12]–[13].

283 UNDRIP arts 19, 32(2).

free, prior, and informed consent. This reveals arguably the most contentious aspect of debates around free, prior, and informed consent: the circumstances in which consent must be *obtained*. This debate persists because the scope of the obligation to obtain consent determines the circumstances in which Indigenous communities may, by refusing consent, restrain proposed activities from being carried out in a manner affecting their lands, territories, or resources.

2.179 Free, prior, and informed consent has been read into various international human rights instruments, including the ICCPR,²⁸⁴ ICESCR,²⁸⁵ ICERD,²⁸⁶ and CEDAW,²⁸⁷ as well as regional human rights instruments,²⁸⁸ in each case flowing from and safeguarding different rights. In its 2018 study on free, prior, and informed consent, the Expert Mechanism confirmed that the safeguard is rooted in the right to self-determination and the prohibition on racial discrimination.²⁸⁹

2.180 Some commentators and stakeholders consider free, prior, and informed consent to provide a universal veto, while others consider consent to be only an aspirational goal of the consultation process.²⁹⁰ Some provisions of UNDRIP use language that makes it clear that consent is mandatory. For example, UNDRIP confirms that decisions to relocate Indigenous peoples and to store or dispose

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- 284 See, eg, Human Rights Committee, *Views: Communication No 1457/2006*, 95th sess, UN Doc CCPR/C/95/D/1457/2006 (24 April 2009, adopted 27 March 2009) ('*Poma Poma v Peru*') [7.6]; Human Rights Committee, *Views: Communication No 2552/2015*, 132nd sess, UN Doc CCPR/C/132/D/2552/2015 (21 September 2022, adopted 14 July 2021) ('*Pereira v Paraguay*') [8.7]; Human Rights Committee, *Views: Communication No 3585/2019*, 137th sess, UN Doc CCPR/C/137/D/3585/2019 (13 March 2024, adopted 15 March 2023) ('*Roy v Australia*') [8.5].
- 285 See, eg, Committee on Economic, Social and Cultural Rights, *General Comment No 21: Right of everyone to take part in cultural life*, 43rd sess, UN Doc E/C.12/GC/21 (21 December 2009) [37], [55(e)]; Committee on Economic, Social and Cultural Rights, *General Comment No 26 (2022) on land and economic, social and cultural rights*, 72nd sess, UN Doc E/C.12/GC/26 (24 January 2023) [16], [21].
- 286 See, eg, Committee on the Elimination of Racial Discrimination, *Opinion: Communication No 54/2013*, 102nd sess, UN Doc CERD/C/102/D/54/2013 (18 December 2020, adopted 18 November 2020) ('*Ágren v Sweden*') [6.16]. See also Committee on the Elimination of Racial Discrimination, *General Recommendation No 23: Indigenous Peoples*, 51st sess, UN Doc A/52/18, annex V (18 August 1997).
- 287 See, eg, Committee on the Elimination of Discrimination against Women, *General Recommendation No 39: The rights of Indigenous women and girls*, xth sess, UN Doc CEDAW/C/GC/39 (31 October 2022) [6].
- 288 See, eg, *Saramaka People v Suriname (Preliminary Objections, Merits, Reparations, and Costs)* (Inter-American Court of Human Rights, Series C No 172, 28 November 2007) [134], [137]; *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya (Decision)* (African Commission on Human and Peoples' Rights, Case No 276/2003, 25 November 2009) [291].
- 289 Expert Mechanism on the Rights of Indigenous Peoples, *Free, prior and informed consent: a human rights-based approach*, 39th sess, UN Doc A/HRC/39/62 (10 August 2018) [3].
- 290 'FPIC's uncertain legal meaning and scope allow for very different interpretations, themselves leading to a broad range of institutional responses. Between definitions of consent as a preferable but not necessarily mandatory outcome of consultation procedures and more substantive/robust conceptions of FPIC as a right to say 'yes' or 'no' to a given project, the gap is significant and the implications very real': Martin Papillon, Jean Leclair and Dominique Leydet, 'Free, Prior and Informed Consent: Between Legal Ambiguity and Political Agency' (2020) 27(2) *International Journal on Minority and Group Rights* 223, 224.

of hazardous materials on Indigenous lands meet the requisite impact threshold, and must therefore not proceed without the consent of the Indigenous peoples affected.²⁹¹ The Special Rapporteur (cited with approval by the Expert Mechanism) has also identified a general rule that extractive projects carried out in Indigenous lands also attract a mandatory free, prior, and informed consent requirement, by virtue of the invasive nature of such projects and their likely implications on the rights of Indigenous communities.²⁹²

2.181 In its submission to the Expert Mechanism's 2018 study on free, prior, and informed consent, the Australian Government expressed the view that free, prior, and informed consent 'is a concept that is unique to the Declaration' and that its 'scope and content remain unsettled'.²⁹³

2.182 Despite divergent opinions on the scope of free, prior, and informed consent, leading international law authorities have reached some consensus as to when free, prior, and informed consent will be mandated. The current position, reflected in the decisions of international legal courts and endorsed by leading commentators, is that consent must be obtained in relation to projects that pose a significant enough risk to the human rights of Indigenous peoples. This has been referred to as a 'sliding scale' approach, whereby 'the level of effective participation that must be guaranteed to indigenous peoples is essentially a function of the nature and content of the rights and activities in question'.²⁹⁴ As the Special Rapporteur explains:

Under the principles of progressive realization and non-regression of human rights, obtaining free, prior and informed consent should be understood as the objective of consultations and as an obligation in cases of significant impacts on the rights of indigenous peoples.²⁹⁵

291 UNDRIP arts 10, 29(2). Unlike arts 19 and 32(2), which speak of consultation 'in order to obtain' consent, arts 10 and 29(2) are phrased in mandatory language, confirming that consent must be obtained in order for such a decision to proceed. Such an interpretation has been affirmed in, for example, James Anaya, *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, 66th sess, UN Doc A/66/288 (10 August 2011) [84]; Expert Mechanism on the Rights of Indigenous Peoples, *Free, prior and informed consent: a human rights-based approach*, 39th sess, UN Doc A/HRC/39/62 (10 August 2018) [31].

292 James Anaya, Special Rapporteur on the Rights of Indigenous Peoples, *Extractive Industries and Indigenous Peoples*, 24th sess, UN Doc A/HRC/24/41 (1 July 2013) [27]–[40]; Expert Mechanism on the Rights of Indigenous Peoples, *Free, prior and informed consent: a human rights-based approach*, 39th sess, UN Doc A/HRC/39/62 (10 August 2018) [32].

293 Australian Government, *Submission to United Nations Expert Mechanism on the Right of Indigenous Peoples (EMRIP) – study on free, prior and informed consent* (2018).

294 Expert Mechanism on the Rights of Indigenous Peoples, *Free, prior and informed consent: a human rights-based approach*, 39th sess, UN Doc A/HRC/39/62 (10 August 2018) [35].

295 Victoria Tauli-Corpuz, *Rights of Indigenous Peoples: Report of the Special Rapporteur on the Rights of Indigenous Peoples*, 45th sess, UN Doc A/HRC/45/34 (18 June 2020) [60].

2.183 This is an impact-based model, whereby projects with greater potential impact on the rights of Indigenous peoples will require that a greater level of participation be afforded. In some cases, the degree of impact may be such that the project may not proceed unless and until the free, prior, and informed consent of the Indigenous peoples affected is obtained. As the Special Rapporteur explains:

The character of the consultation procedure and its object are ... shaped by the nature of the right or interest at stake of the indigenous peoples concerned and the anticipated impact of the proposed measure. Necessarily, the strength of the objective of achieving consent varies according to the circumstances, the indigenous peoples' rights and the interests involved. A significant, direct impact on indigenous peoples' lives establishes a strong presumption that the proposed measure should not go forward without indigenous peoples' consent. In certain contexts, that presumption may harden into a prohibition of the measure or project in the absence of Indigenous consent.²⁹⁶

2.184 The Expert Mechanism has echoed this, noting that consent is required when a proposed project 'is likely to have a significant, direct impact on indigenous peoples' lives or land, territories or resources', assessed by reference to 'the nature, scale, duration and long-term impact of the action, such as damage to community lands or harm to the community's cultural integrity'.²⁹⁷

2.185 Alongside the Special Rapporteur and the Expert Mechanism, such an impact-based model has been endorsed by the Human Rights Committee,²⁹⁸ Inter-American Court of Human Rights,²⁹⁹ and African Commission on Human and Peoples' Rights,³⁰⁰ with Assistant Professor Rombouts terming it representative of

296 James Anaya, *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, 66th sess, UN Doc A/66/288 (10 August 2011) [83]. See also James Anaya, Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, 12th sess, UN Doc A/HRC/12/34 (15 July 2009) [47].

297 Expert Mechanism on the Rights of Indigenous Peoples, *Free, prior and informed consent: a human rights-based approach*, 39th sess, UN Doc A/HRC/39/62 (10 August 2018) [35].

298 Human Rights Committee, *Views: Communication No 1457/2006*, 95th sess, UN Doc CCPR/C/95/D/1457/2006 (24 April 2009, adopted 27 March 2009) ('*Poma Poma v Peru*') [7.6]; Human Rights Committee, *Views: Communication No 2552/2015*, 132nd sess, UN Doc CCPR/C/132/D/2552/2015 (21 September 2022, adopted 14 July 2021) ('*Pereira v Paraguay*') [8.7]; Human Rights Committee, *Views: Communication No 3585/2019*, 137th sess, UN Doc CCPR/C/137/D/3585/2019 (13 March 2024, adopted 15 March 2023) ('*Roy v Australia*') [8.5].

299 *Saramaka People v Suriname (Preliminary Objections, Merits, Reparations, and Costs)* (Inter-American Court of Human Rights, Series C No 172, 28 November 2007) [134], [137].

300 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya (Decision)* (African Commission on Human and Peoples' Rights, Case No 276/2003, 25 November 2009) [291].

‘an emerging consensus in broader international law’.³⁰¹ In its 2025 guidance relating to best practice engagement with First Nations peoples, the Department of Climate Change, Energy, the Environment and Water (Cth) indicated support of this ‘sliding scale’ approach.³⁰²

2.186 The ALRC’s recommendations aim to accord with the ‘sliding scale’ conception of participatory rights outlined above. Recognising that different types of future acts have different impacts on native title rights and interests, the recommendations in **Chapter 6** adopt an impact-based model, with different categories of future acts attracting different levels of procedural rights and protections. The greater the potential impact of a future act on the rights of native title holders, the greater the opportunity to participate in decision-making.

2.187 In sum, free, prior, and informed consent must be the objective of all consultations, and in certain circumstances must be obtained. The Special Rapporteur has set out the consequences of a decision to proceed without having obtained free, prior, and informed consent:

Any restrictions on these rights [of Indigenous peoples], such as a decision to proceed without the free, prior and informed consent of an indigenous people, imposes on the State a burden to prove the permissibility of the said restrictions under the international criteria of legality, necessity and proportionality in relation to a valid public purpose.

The Special Rapporteur ... has highlighted the need for review mechanisms through a judicial or other impartial and competent body in order to ensure that any decision by a State entity that does not have the consent of the indigenous peoples affected complies with these criteria and does not affect the physical and cultural survival of the indigenous peoples concerned. If these requirements

301 SJ Rombouts, ‘The Evolution of Indigenous People’s Consultation Rights under the ILO and UN Regimes’ (2017) 53(2) *Stanford Journal of International Law* 169, 197. See also Cambou (n 250) 43. The Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Racial Discrimination have unequivocally endorsed the concept of FPIC and appear to have endorsed at least an impact-based model: see, eg, Committee on Economic, Social and Cultural Rights, *General Comment No 21: Right of everyone to take part in cultural life*, 43rd sess, UN Doc E/C.12/GC/21 (21 December 2009) [37], [55(e)]; Committee on Economic, Social and Cultural Rights, *General Comment No 26 (2022) on land and economic, social and cultural rights*, 72nd sess, UN Doc E/C.12/GC/26 (24 January 2023) [16], [21]; Committee on the Elimination of Racial Discrimination, *General Recommendation No 23: Indigenous Peoples*, 51st sess, UN Doc A/52/18, annex V (18 August 1997); Committee on the Elimination of Racial Discrimination, *Opinion: Communication No 54/2013*, 102nd sess, UN Doc CERD/C/102/D/54/2013 (18 December 2020, adopted 18 November 2020) (‘*Ågren v Sweden*’) [6.18].

302 ‘At a minimum, FPIC requires that engagement is conducted in good faith with the objective of finding common agreement, and not as a mere formality. However, FPIC can be interpreted as requiring that certain measures or projects should only be implemented with the consent of the First Nations people concerned’: Department of Climate Change, Energy, the Environment and Water (Cth), *First Nations Engagement: The Principles of Free, Prior and Informed Consent* (2025) 2.

are not met, it ought to be concluded that the measure or activity should not proceed without indigenous consent.³⁰³

Redress, mitigation, and remedies

2.188 Article 32(3) of UNDRIP provides that ‘States shall provide effective mechanisms for just and fair redress’ for projects affecting the lands or territories and other resources of Indigenous peoples, particularly in connection with the development, utilisation, or exploitation of mineral, water, or other resources. In addition, art 32(3) provides that ‘appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact’ of such projects. As discussed in **Chapter 10**, this requirement is significant when it comes to determining whether a future act may proceed where agreement has not been reached under the right to negotiate.

2.189 Presently, little commentary or jurisprudence has engaged with art 32(3). The ALRC understands ‘redress’ as including benefit-sharing.³⁰⁴

2.190 The idea of benefit-sharing is not new to international human rights law,³⁰⁵ and has emerged as an important safeguard of Indigenous land rights.³⁰⁶ Like the duty to consult, the obligation to share in benefits is owed wherever the rights of Indigenous

303 Victoria Tauli-Corpuz, *Rights of Indigenous Peoples: Report of the Special Rapporteur on the Rights of Indigenous Peoples*, 45th sess, UN Doc A/HRC/45/34 (18 June 2020) [61]–[62] (citations omitted). See also James Anaya, Special Rapporteur on the Rights of Indigenous Peoples, *Extractive Industries and Indigenous Peoples*, 24th sess, UN Doc A/HRC/24/41 (1 July 2013) [37]–[40]; Expert Mechanism on the Rights of Indigenous Peoples, *Free, prior and informed consent: a human rights-based approach*, 39th sess, UN Doc A/HRC/39/62 (10 August 2018) [39]–[41].

304 Dalee Sambo Dorough, former Chairperson and Expert Member of the United Nations Permanent Forum on Indigenous Issues, has confirmed that the ‘redress’ contemplated by art 32(3) is benefit-sharing: Dalee Sambo Dorough, ‘Indigenous Peoples and the Right to Remedy: The Need for a Distinct Cultural Context’ in Cathal M Doyle (ed), *Business and Human Rights: Indigenous Peoples’ Experiences with Access to Remedy: Case Studies from Africa, Asia and Latin America* (AIPP, ALMACIGA, IWGIA, 2015) 13, 22. The Terms of Reference for this Inquiry ask the ALRC to consider ‘options to support native title groups, project proponents and governments to share in the benefits of development on native title land’.

305 UDHR art 27(1); ICESCR art 15(1)(b); *Universal Declaration on the Right to Development*, GA Res 41/128, UN GAOR, 41st sess, UN Doc A/RES/41/128 (4 December 1986) art 2(3). Beyond international human rights law, benefit sharing is also a feature of international environmental law, international law of the sea, and World Health Organization frameworks: Elisa Morgera, *Fair and Equitable Benefit-Sharing in International Law* (Oxford University Press, 2024) 5–12.

306 See, eg, *Indigenous and Tribal Peoples Convention*, adopted 27 June 1989, 1650 UNTS 383, ILO No 169 (entered into force 5 September 1991) art 15(2); *Saramaka People v Suriname (Preliminary Objections, Merits, Reparations, and Costs)* (Inter-American Court of Human Rights, Series C No 172, 28 November 2007) [129]; James Anaya, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, 15th sess, UN Doc A/HRC/15/37 (19 July 2010) [76]–[80], [91]; John H Knox, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relation to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, 37th sess, UN Doc A/HRC/37/59 (24 January 2018) [53]. See also Morgera (n 305) 6–7, 140–4.

peoples are being intruded upon.³⁰⁷ The international standard is that of 'fair and equitable' benefit-sharing.³⁰⁸ The framing of art 32(3) affirms that redress must be provided in relation to *any* project affecting the lands, territories, or resources of Indigenous peoples, not just those projects that constitute a rights violation.³⁰⁹

2.191 Effective mechanisms for just and fair redress are required where rights are *restricted*. Where the rights of Indigenous peoples are *violated*, UNDRIP provides that there must be an effective remedy. The right to an effective remedy is universally recognised under international human rights law,³¹⁰ and is enshrined in art 40 of UNDRIP:

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the Indigenous peoples concerned and international human rights.

2.192 The distinction between arts 32(3) and 40 is relevant to the future acts regime.³¹¹ Where future acts are done validly, they nonetheless infringe on native title parties' rights and, accordingly, effective, fair, and just redress (including benefit sharing) is owed. Moreover, where a future act is invalid, or is valid but implemented in such a way that entails a rights violation, compliance with international human rights law would require adherence to the right to an effective remedy for that violation.

2.193 An additional safeguard, though not expressly acknowledged in the text of UNDRIP, is that of impact assessment. At international law, impact assessment has

307 It is important, however, that benefit-sharing be operationalised properly. As Parks and Morgera observe, 'benefit-sharing can be and has been used as a semantic sticking plaster for harmful practices, as a superficial means to garner social acceptability for certain natural resource developments or regulations, and even to rubber stamp inequitable and non-participatory outcomes that benefit 'stronger' parties ...': Louisa Parks and Elisa Morgera, 'The Need for an Interdisciplinary Approach to Norm Diffusion: The Case of Fair and Equitable Benefit-Sharing' (2015) 24(3) *Review of European Community and International Environmental Law* 353, 356.

308 James Anaya, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, 15th sess, UN Doc A/HRC/15/37 (19 July 2010) [78].

309 Dorrough affirms this interpretation: Dorrough (n 304) 22.

310 See, eg, UDHR art 8; ICCPR art 2(3); ICERD art 6.

311 As the Special Rapporteur explains, benefit-sharing and remedies are distinct concepts. 'Aside from their entitlement to compensation for damages, Indigenous peoples have the right to share in the benefits arising from activities taking place on their traditional territories, especially in relation to natural resource exploitation': James Anaya, Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people*, 15th sess, UN Doc A/HRC/15/37 (19 July 2010) [76].

emerged as an integral safeguard of Indigenous peoples' rights.³¹² The determination of a proposed project's impacts will determine where on the 'sliding scale' it falls — and, accordingly, the procedural safeguards it attracts (namely, whether free, prior, and informed consent is an objective or an obligation).³¹³ Impact assessments are also a crucial element of the consultation process, ensuring that consultations and any consent derived therefrom are adequately informed.³¹⁴ Moreover, impact assessments may guide the design of measures taken to mitigate potential harms of a proposed project.³¹⁵ Assessment of impact requires a holistic consideration of the social, cultural, environmental, and economic implications of a project.³¹⁶ The ALRC's recommendations in **Chapter 6** aim to implement impact assessment to support each of these objectives.

Restrictions and safeguards

2.194 While some rights are 'absolute' and may never be lawfully interfered with,³¹⁷ most rights — including land and cultural rights — are qualified, meaning that certain restrictions of such rights are permissible.³¹⁸ This is expressly recognised in UNDRIP, art 46(2) of which provides:

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- 312 See, eg, Human Rights Committee, *Views: Communication No 1457/2006*, 95th sess, UN Doc CCPR/C/95/D/1457/2006 (24 April 2009, adopted 27 March 2009) ('*Poma Poma v Peru*') [7.7]; Committee on the Elimination of Racial Discrimination, *Opinion: Communication No 54/2013*, 102nd sess, UN Doc CERD/C/102/D/54/2013 (18 December 2020, adopted 18 November 2020) ('*Ågren v Sweden*') [6.18]; *Saramaka People v Suriname (Preliminary Objections, Merits, Reparations, and Costs)* (Inter-American Court of Human Rights, Series C No 172, 28 November 2007) [129]; *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya (Decision)* (African Commission on Human and Peoples' Rights, Case No 276/2003, 25 November 2009) [227]–[228]; Expert Mechanism on the Rights of Indigenous Peoples, *Free, prior and informed consent: a human rights-based approach*, 39th sess, UN Doc A/HRC/39/62 (10 August 2018) [40].
- 313 Expert Mechanism on the Rights of Indigenous Peoples, *Free, prior and informed consent: a human rights-based approach*, 39th sess, UN Doc A/HRC/39/62 (10 August 2018) [35].
- 314 See, eg, *ibid* [22]; Victoria Tauli-Corpuz, *Rights of Indigenous Peoples: Report of the Special Rapporteur on the Rights of Indigenous Peoples*, 45th sess, UN Doc A/HRC/45/34 (18 June 2020) [58].
- 315 See, eg, James Anaya, Special Rapporteur on the rights of indigenous peoples, *Report of the Special Rapporteur on the rights of indigenous peoples*, 21st sess, UN Doc A/HRC/21/47 (6 July 2012) [52].
- 316 See, eg, Expert Mechanism on the Rights of Indigenous Peoples, *Free, prior and informed consent: a human rights-based approach*, 39th sess, UN Doc A/HRC/39/62 (10 August 2018) [22], Annex [15]; Victoria Tauli-Corpuz, *Rights of Indigenous Peoples: Report of the Special Rapporteur on the Rights of Indigenous Peoples*, 45th sess, UN Doc A/HRC/45/34 (18 June 2020) [58]; UNDRIP art 32(3).
- 317 For example, the ICCPR contains only five absolute rights, including the freedom from torture (art 7) and the freedom from slavery and servitude (arts 8(1)–(2)): Australian Government Attorney-General's Department, 'Absolute Rights', *Attorney-General's Department* <www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/absolute-rights>.
- 318 International human rights law distinguishes between the restriction and violation of human rights; the former being lawful, the latter not. Whether an interference amounts to a restriction or violation turns on the nature of both the interference and the right(s) it intrudes upon.

In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

2.195 While international law (including UNDRIP) recognises that some human rights may be lawfully restricted, it also sets limits on such restriction to restrain undue interference with human rights.³¹⁹ As the Expert Mechanism explains:

[a]ny restrictions on indigenous rights must be established by law and must be necessary, proportionate, non-discriminatory, have the aim of attaining a legitimate goal in a democratic society and defined within an overall framework of respect for human rights ... Given the significance of land rights to a range of human rights and to the survival of indigenous peoples, it would be difficult to establish valid limitations on rights that would have the effect of impairing indigenous peoples' use of their lands, territories and resources.³²⁰

2.196 In the context of the rights of Indigenous peoples, various safeguards have emerged at international law to ensure that a potentially lawful interference with such rights does not devolve into a violation. As discussed, these safeguards include the duty to consult with and seek consent from Indigenous peoples in relation to proposals affecting their land rights; the obligation to provide fair and just redress, including to share in the benefits obtained through such projects; and the taking of measures to mitigate potential harms of such projects.³²¹ Where such safeguards are not complied with the substantive rights of Indigenous peoples may be violated.

2.197 Despite the procedural nature of these safeguards, they must be understood by reference to the substantive rights that they protect. As the Expert Mechanism has cautioned,

Indigenous peoples' rights to participate in decision-making in relation to extractive enterprises that affect them must not be understood as a trade-off

319 See generally Australian Law Reform Commission, *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws* (n 170) [10.12]–[10.19].

320 Expert Mechanism on the Rights of Indigenous Peoples, *Right to land under the United Nations Declaration on the Rights of Indigenous Peoples: a human rights focus*, 45th sess, UN Doc A/HRC/45/38 (15 July 2020) [30]. See also James Anaya, Special Rapporteur on the Rights of Indigenous Peoples, *Extractive Industries and Indigenous Peoples*, 24th sess, UN Doc A/HRC/24/41 (1 July 2013) [31]–[40]; Rombouts (n 301) 223; Victoria Tauli-Corpuz, *Rights of Indigenous Peoples: Report of the Special Rapporteur on the Rights of Indigenous Peoples*, 45th sess, UN Doc A/HRC/45/34 (18 June 2020) [61]–[62]; Expert Mechanism on the Rights of Indigenous Peoples, *Free, prior and informed consent: a human rights-based approach*, 39th sess, UN Doc A/HRC/39/62 (10 August 2018) [38]–[41].

321 Additional safeguards include the redressing of power imbalances and the carrying out of impact assessments: see, eg, Expert Mechanism on the Rights of Indigenous Peoples, *Free, Prior and Informed Consent: A Human Rights-Based Approach*, 39th sess, UN Doc A/HRC/39/62 (10 August 2018) [40].

for or exchangeable with indigenous peoples' substantive rights to their lands, territories and resources. Rather, the procedural aspects of the right (such as consultation) exist to promote the substantive right (such as self-determination and underlying rights relating to lands, territories and resources).³²²

2.198 Accordingly, while many of the reforms set out in this Report involve the incorporation of procedural safeguards into the future acts regime, they must be understood as upholding, rather than diminishing, the substantive rights of Indigenous peoples and their associated entitlements. These rights — including the right to self-determination, land and cultural rights, and the right to equality before the law — have guided the recommendations made in this Report.

Other legal frameworks

2.199 This part briefly outlines other legal frameworks that provide context for the future acts regime. It provides a brief overview of other domestic land rights models, as well as approaches to land rights in foreign jurisdictions; cultural heritage frameworks.

Land rights models

2.200 The *NTA* is not the only statute regulating, nor is native title the only framework for the protection of, Indigenous rights to land in Australia. As a piece of Commonwealth legislation, the *NTA* applies to Australia as a whole. However, its operation is affected by the land rights models and arrangements in place across each state and territory.³²³

2.201 A number of states and territories have legislation that are alternatives to native title (and, by extension, are alternatives to the future acts regime or intersect with the regime). Legislation establishing alternative land rights or settlement regimes include:

- *Aboriginal Land Rights (Northern Territory) Act 1975* (Cth);
- *Aboriginal Land Rights Act 1983* (NSW);
- *Aboriginal Land Act 1991* (Qld) and *Torres Strait Islander Land Act 1991* (Qld);
- *Aboriginal Lands Trust Act 2013* (SA);
- *Pitjantjatjara Land Rights Act 1981* (SA) and *Maralinga Tjarutja Land Rights Act 1984* (SA); and
- *Traditional Owner Settlement Act 2010* (Vic) (which establishes an alternative future acts regime by the negotiation of agreements).

322 Expert Mechanism on the Rights of Indigenous Peoples, *Follow-up report on indigenous peoples and the right to participate in decision-making, with a focus on extractive industries*, 5th sess, UN Doc A/HRC/EMRIP/2012/2 (30 April 2012) [36].

323 For an overview of the various land rights frameworks across the country, see Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)* (n 5) [3.19]–[3.40]; Australian Law Reform Commission, *Review of the Future Acts Regime* (n 148) [71].

2.202 Internationally, legal approaches to the recognition and protection of Indigenous land rights differ across jurisdictions, influenced by various factors including a country's history and legal tradition. For instance, Australia's common law recognition of Indigenous customary rights to land is shared with Canada and New Zealand; however, the specific circumstances and legal infrastructure of each country have produced varied responses to the protection of Indigenous land rights.³²⁴

2.203 Whereas native title in Australia is regulated by statute, Aboriginal title in Canada has developed through the common law, equity, and its enshrinement in the country's Constitution. As Alexander Mowbray observes, this means that Aboriginal title in Canada remains within the purview of the courts as an exercise of common law and constitutional interpretation, while the recognition and protection of native title in Australia is 'primarily a legislative and political decision'.³²⁵ Moreover, alongside the Aboriginal title framework, the land rights of Indigenous peoples in Canada are protected under several treaties,³²⁶ as well as the State's establishment of more than 3,000 Indigenous reserves.³²⁷ Another difference is that Canada has implemented UNDRIP into domestic law: in 2021, Canada's Parliament passed the *United Nations Declaration on the Rights of Indigenous Peoples Act*, requiring Canadian laws to be consistent with UNDRIP.³²⁸

2.204 In New Zealand, the law recognises several forms of Māori land tenure and land rights protection: these include Māori customary land, Māori freehold land, and Māori general land, as well as Crown land reserved for Māori communities.³²⁹ But despite court decisions confirming that Māori customary rights to land may be recognised at common law, there has been since the late 19th century effectively no onshore land remaining to be claimed as such.³³⁰ Today, almost all Māori land is held as freehold; accordingly, the establishment of management systems for Māori freehold land has been prioritised.³³¹ The Treaty of Waitangi, New Zealand's 'founding document', informs the relationship between Māori and the Crown,

324 For an overview of the land rights models adopted in Canada and New Zealand, see, eg, Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)* (n 5) ch 9.

325 Alexander Mowbray, 'Lessons from Canada: A Comparative Analysis of Canadian Aboriginal Title and Australia's Future Acts Regime' [2025] (12) *University of New South Wales Law Journal Student Series*.

326 A number of 'historic treaties' were entered into between the 18th and 20th century which cover nearly 50% of Canada, and since 1973 a number of 'modern treaties' have been and continue to be negotiated between Indigenous groups and the Crown: see *ibid*.

327 For a comparison of the NTA's future acts regime with its Canadian equivalent, see *ibid*.

328 *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14.

329 *Te Ture Whenua Māori Act 1993* (NZ) s 129(1).

330 Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)* (n 5) [9.51]–[9.76].

331 In 2008, King observed that almost 98% of Māori land is held as freehold: Tanira King, 'Maori Landownership and Land Management in New Zealand' in Australian Agency for International Development (ed), *Making Land Work: Volume Two* (2008) 138.

including in the context of land rights and issues.³³² There is a system of redress for Māori grievances against the Crown, including in relation to lands, through the Waitangi Tribunal system.³³³

2.205 Elsewhere, different models have been adopted. In the United States, Indigenous land rights are preserved through either trust land, where the federal government holds legal title while Indigenous persons or communities enjoy beneficial interests in land, or the purchasing by Indigenous communities of land, thereby acquiring legal title thereto. There are large reserves held as historic treaty lands and governed by tribes. Natural resources are similarly held in trust for, or are owned by, Indigenous communities.³³⁴ Throughout Latin America, several countries have enshrined Indigenous rights to land and self-determination in their constitutions,³³⁵ as well as having ratified Convention No 169 of the International Labour Organization.

Aboriginal and Torres Strait Islander cultural heritage frameworks

2.206 Alongside the NTA and other land rights models, legal frameworks for the protection of cultural heritage exist at both Commonwealth and state and territory levels. In the present context, cultural heritage refers to ‘objects, places, and practices significant to Aboriginal and Torres Strait Islander peoples under their traditions’.³³⁶

2.207 Cultural heritage laws exist to protect sites and objects of cultural significance, rather than land rights per se. They apply regardless of whether native title exists in a particular area or not. However, the cultural significance of a site or object often turns on the same connection of Indigenous peoples to land as that which underpins native title.

2.208 Commonly determined native title rights and interests include the right to maintain and protect culturally important sites and rights to conduct ceremonies or cultural activities. Such rights reflect the notion that ‘any form of native title which

332 Manatū Taonga Ministry for Culture & Heritage (NZ), ‘The Treaty in Brief’ <<https://nzhistory.govt.nz/politics/treaty/the-treaty-in-brief>>.

333 See generally *Treaty of Waitangi Act 1975* (NZ).

334 See, eg, Office of Natural Resources Revenue, ‘Native American Ownership and Governance of Natural Resources’, *Natural Resources Revenue Data* <<https://revenuedata.onrr.gov/how-revenue-works/native-american-ownership-governance/>>.

335 See, eg, *Constitución Política de La República de Panamá* [Political Constitution of the Republic of Panama] (Panama) art 127; *Constitución Política Del Estado* [State Political Constitution] (Bolivia) arts 2, 289–296, 403; *Constitución de La República Del Ecuador 2008* [Constitution of the Republic of Ecuador 2008] (Ecuador) art 57. See also *Constitución Nacional* [National Constitution] (Argentina) s 17; *Constitución Política de La Republica Federativa Del Brasil, 1988* [Political Constitution of the Federal Republic of Brazil, 1988] (Brazil) art 231; *Constitución Política 1 de 1991* [Political Constitution 1 of 1991] (Colombia) art 330; *Constitución Política de La República de Nicaragua* [Political Constitution of Nicaragua] (Nicaragua) arts 5, 107, 181.

336 Australian Law Reform Commission, *Review of the Future Acts Regime* (n 101) [328].

did not recognise the need to protect sacred and significant sites would debase the whole concept of recognition of traditional rights in relation to land'.³³⁷ In some instances — such as where native title has been extinguished or determined to not exist — cultural heritage laws may offer protection where native title cannot.³³⁸

2.209 The level of protection afforded by the current cultural heritage legislation has been strongly criticised. The *A Way Forward* report found that 'there are serious deficiencies across Australia's Aboriginal and Torres Strait Islander cultural heritage legislative framework, in all state and territories and the Commonwealth'.³³⁹ As discussed above, that Report recommended new national legislation, developed through a co-design process with Aboriginal and Torres Strait Islander peoples, for the protection of cultural heritage.³⁴⁰ **Chapter 14** discusses how the reforms in this Report seek to complement those ongoing reform efforts.

337 *Hayes v Northern Territory* (1999) 97 FCR 32 [56].

338 Australian Law Reform Commission, *Review of the Future Acts Regime* (n 101) [330].

339 Joint Standing Committee on Northern Australia, Parliament of Australia, *A Way Forward: Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge* (2021) xi.

340 *Ibid* rec 3.

3. Future Act Agreement-Making

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Introduction

3.1 This chapter is the first of three chapters in this Report containing recommendations for reform relating to future act agreements. This chapter focuses on reforms to the process of agreement-making, while the subsequent chapters focus on reforms relating to the content of agreements, and processes following the execution of agreements.

3.2 Making an agreement is one of the three current pathways to validity under the future acts regime, alongside future act determinations made by the National Native Title Tribunal ('NNTT') under the right to negotiate (see [Chapters 9](#) and [10](#)) and the statutory procedures contained within Part 2 Div 3 Subdivisions G to N of the *Native Title Act 1993* (Cth) ('NTA') (see [Chapters 6](#) and [7](#)). [Chapter 1](#) of this Report gives an overview of how these pathways constitute the future acts regime and introduces key concepts relating to future act agreements.¹

3.3 If implemented, the ten recommendations in this chapter would improve the fairness, efficacy, and equity of future act agreement-making. This reflects the task

¹ As explained in [Chapter 1](#), the ALRC uses the term 'future act agreement' as a catch-all term to describe ILUAs, section 31 agreements, ancillary agreements, agreements negotiated under s 24MD(2A), and any new form of 'low impact agreement' contemplated by [Recommendation 33](#) in [Chapter 6](#) and [Recommendation 48](#) in [Chapter 7](#).

that the Terms of Reference set the ALRC. That is, to ‘support fair negotiations and encourage proponents and native title groups to work collaboratively in relation to future acts’ and to rectify ‘any inefficacy, inequality or unfairness’ in the operation of ILUAs.

3.4 This chapter is in six parts. The first part discusses the purpose and policy of future act agreement-making, and why reform is necessary. The second part discusses reforms to introduce negotiation conduct standards and how this furthers the goals of future act agreement-making. The third part discusses reforms to the functions of the NNTT, which would enable it to play a more proactive role in assisting parties to make agreements. The fourth part discusses reforms to standing instructions, which are intended to improve flexibility and efficiency in agreement-making while affording appropriate protections to common law holders of native title. The fifth part introduces a new process for PBCs seeking to carry out future acts on their own determination area, in place of effectively being required to make an agreement with itself. The final part discusses reforms related to the making of ancillary agreements.

Context

3.5 The ability to negotiate agreements about the doing of future acts has been part of the *NTA* since enactment. In addition to agreements reached under the right to negotiate, under s 21 of the *NTA* as originally enacted parties could also negotiate voluntary agreements to validate future acts. However, parties were ‘reluctant’ to use this provision for a number of reasons.² In 2001, the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund identified that:

- these agreements ‘only applied to the native title holders who were party to the agreement’, leaving open subsequent disputes or claims from other native title holders;
- there was no express provision that allowed these agreements to be made in place of using the right to negotiate provisions; and
- state or territory governments were required to be parties.³

3.6 Expanding agreement-making as a way ‘to facilitate the negotiation of voluntary but binding agreements as an alternative to more formal native title machinery’ was identified as a potential reform in 1996.⁴ Subsequently, the *Native Title Amendment Act 1998* (*NTAA 1998*) introduced ILUAs as a key feature of the reformed future acts regime.

2 Department of the Prime Minister and Cabinet (Cth), *Towards a More Workable Native Title Act: An Outline of Proposed Amendments* (Outline Paper, May 1996) [44].

3 Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Parliament of Australia, *Second Interim Report for the Section 206(d) Inquiry: Indigenous Land Use Agreements* (2001) [2.12]–[2.14].

4 John Howard MP, ‘Wik 10 Point Plan’ (Media Release, 1 March 1997) [10].

3.7 The ILUA provisions made it possible for parties to have certainty and security to make agreements prior to a final determination of native title.⁵ They also addressed each of the three issues identified above:

- ILUAs, once registered in accordance with the *NTA*, bind all native title holders in the agreement area regardless of whether they were an agreement party, including future generations, for the term of the agreement.
- ILUAs can expressly be used for future acts attracting the right to negotiate to the exclusion of the right to negotiate provisions.
- Commonwealth, state, and territory governments are only required to be a party to the ILUA where it involves the surrender of native title to that government or where the ILUA retrospectively validates an invalid future act.

3.8 The introduction of ILUAs was broadly supported in the consultation process leading up to the *NTAA 1998*. The National Indigenous Working Group had developed proposals on the ILUA provisions and supported their inclusion.⁶ The Aboriginal and Torres Strait Islander Social Justice Commissioner, while critical of many provisions of the *NTAA 1998*, said that ILUAs represented a

positive feature of the amendments. They offer an effective foundation to move beyond reconciliation as an abstract concept: to set about the real task of working out a fair and durable balance between the interests of Indigenous and non-Indigenous Australians.⁷

3.9 Agreement-making is used often to validate future acts. There are currently 1,531 ILUAs on the Register of ILUAs, and 344 section 31 agreements on the publicly available record (which has only been kept since 2021).⁸ The NNTT has observed that their

experience indicates that the majority of future acts notified under s 29 (and not subject to the expedited procedure statement) are resolved by agreement, without the need for recourse to a determination by the Tribunal.⁹

5 Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) [7.2]. This period is generally referred to throughout this Report as 'pre-determination'.

6 National Indigenous Working Group, *Coexistence — Negotiation and Certainty: Indigenous Position in Response to the Wik Decision and the Government's Proposed Amendments to the Native Title Act, 1993* (1997) 13–15.

7 Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Native Title Report 1998* (1998) 10.

8 Data obtained from the NNTT's database: National Native Title Tribunal, 'Search Register of Indigenous Land Use Agreements' <www.nntt.gov.au/searchRegApps/NativeTitleRegisters/Pages/Search-Register-of-Indigenous-Land-Use-Agreements.aspx>; National Native Title Tribunal, 'Search Records of Section 31 Agreements' <www.nntt.gov.au/searchRegApps/NativeTitleRegisters/Pages/Search-Register-of-s31-Agreements.aspx>.

9 National Native Title Tribunal, *Submission 23*.

Why make agreements?

3.10 The preamble to the *NTA* emphasises the importance of agreement-making, providing that

acts that affect native title should only be able to be validly done if, typically, they can also be done to freehold land and if, whenever appropriate, every reasonable effort has been made to secure the agreement of the native title holders through a special right to negotiate.

3.11 Agreement-making furthers the intention of the *NTA* to protect native title rights and interests by providing native title parties an opportunity to understand and explain the potential impacts of a proposed future act on native title rights and interests, leading to 'mutually acceptable arrangements under which the interests of those wishing to use the land are reconciled with the interests of the native title holder'.¹⁰

3.12 In their work evaluating future act agreements, Professor O'Faircheallaigh and Thierry Rodon identified historical context for why agreement-making is important:

In the past, extractive industries located on Indigenous lands imposed huge costs and generated few benefits for affected Indigenous Peoples. Costs included environmental degradation, destruction of Indigenous heritage, loss of livelihoods, negative cultural and social impacts associated with large-scale in-migration of non-Indigenous populations, and loss of self-esteem due to the inability of Indigenous Peoples to influence the exploitation of their ancestral lands.

...

Negotiated agreements have the potential to change this situation by 1) providing measures to protect the environment and cultural heritage in addition to those available in general legislation; 2) generating revenues for Indigenous governments and affected communities; 3) allowing Indigenous Peoples access to income-earning opportunities; and 4) restoring to them a measure of influence over how development occurs.¹¹

3.13 O'Faircheallaigh has added that support for agreement-making derives from

a conviction that in comparison to the alternatives (essentially litigation or a resolution involving political conflict), negotiation of agreements is less time consuming, less costly, and more likely to permit 'win-win' situations.¹²

10 Australian Government, *Mabo: The High Court Decision on Native Title* (Discussion Paper, June 1993) [7.3].

11 Ciaran O'Faircheallaigh and Thierry Rodon, 'Realizing Indigenous Rights: Effective Implementation of Agreements between Indigenous Peoples and the Extractive Industry' in *Mining and Indigenous Livelihoods* (Routledge, 2024) 153, 153–4.

12 Ciaran O'Faircheallaigh, 'Evaluating Agreements between Indigenous Peoples and Resource Developers' in Marcia Langton et al (eds), *Honour Among Nations? Treaties and Agreements with Indigenous Peoples* (Melbourne University Press, 2004) 303, 304.

3.14 Agreement-making is the validation pathway that best supports Australia's international human rights obligations. Because future act agreements — particularly ILUAs — seek to obtain a negotiated and consensual outcome between the parties as to the doing of future acts, agreements are the validation pathway that most closely aligns with the concept of free, prior, and informed consent.¹³

3.15 However, as discussed in more detail in **Chapters 9** and **10**, the negotiation of section 31 agreements in particular is subject to structural pressures. Most clearly, the potential for an arbitrated outcome in the absence of agreement, meaning that the right to negotiate does not amount to a requirement that native title parties provide their consent to a future act.

3.16 Feedback and research have highlighted that there are many reasons why users of the native title system prefer to validate future acts by agreement:

- Agreement-making is widely seen to be (or to have the potential to be) best-practice First Nations engagement.¹⁴
- Agreements can pave the way for constructive and ongoing partnerships between native title parties and project proponents, which can support economic and other participation opportunities.¹⁵ For example, in its submission the Minerals Council of Australia observed that

industry, governments and Aboriginal and Torres Strait Islander people have shown that working together, in partnership, will create opportunities to support closing the gap at the same time allowing for significant wealth sharing opportunities. These opportunities set the foundations for creating intergenerational wealth outcomes amongst Aboriginal and Torres Strait Islander people.¹⁶
- Agreements can be used to validate a diverse range of future acts and include a broad range of terms,¹⁷ meaning agreements can be adapted to the unique circumstances of a particular project or parties.

13 See generally, the discussion in **Chapter 2**.

14 Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission (n 7) 72–89; Attorney-General (Cth) and Minister for Families, Housing, Community Services and Indigenous Affairs (Cth), *Leading Practice Agreements: Maximising Outcomes from Native Title Benefits* (Discussion Paper, 2010) 4; O'Faircheallaigh and Rodon (n 11) 153–4. The benefits (potential and realised) of agreement-making were discussed in submissions: see, eg, Kimberley Land Council, *Submission 26*; First Nations Legal and Research Services, *Submission 42*; I Ingram, *Submission 119*.

15 Ciaran O'Faircheallaigh, 'Negotiating First Peoples' Rights: Regional and Local Initiatives' 42(4) *Social Alternatives* 6, 9–10.

16 Minerals Council of Australia, *Submission 6*.

17 M Lucas, *Submission 7*.

- Agreement-making supports proponents in establishing a ‘social licence to operate’.¹⁸
- Agreements support project certainty. First Nations Legal and Research Services observed that

First Peoples’ agreement-making is an important mechanism for de-risking and future-proofing major projects and investments that might otherwise be delayed or obstructed as a result of a lack of proper engagement with Traditional Owners.¹⁹

- Agreement-making may also attract or unlock investment in particular projects. There are several commercial motivations for international companies seeking to undertake future acts in Australia to negotiate agreements, including policies and standards developed by international financial institutions. For example, since 2012 the International Finance Corporation has published Performance Standard 7 setting out how borrowers should engage with Indigenous peoples. The Standard provides that there are particular projects located on, or that use the resources from, land traditionally owned by or under the customary use of Indigenous peoples for which borrowers should obtain the free, prior, and informed consent of those Indigenous peoples.²⁰
- Similarly, the International Council on Mining and Metal’s Position Statement on Indigenous Peoples commits to obtaining agreement with affected Indigenous peoples, so as to demonstrate those Indigenous peoples’

consent to anticipated impacts to their land or other rights, and setting out the terms by which impacts may occur and be managed. In accordance with the principles of [free, prior, and informed consent], agreement should be achieved through informed and meaningful engagement and good faith negotiation, through means that advance intercultural understanding and that facilitate freely giving or withholding agreement.²¹

Why reform agreement-making?

3.17 Most relevantly, the Terms of Reference ask the ALRC to consider:

- the current operation of the future acts regime, including ILUAs, and related parts of the Native Title Act, with the aim of rectifying any inefficacy, inequality, or unfairness;

18 See, eg, Mining, Minerals and Sustainable Development, *Breaking New Ground* (Final Report, 2002). While ‘social licence to operate’ has emerged from the mining sector, it may be relevant and applicable across a number of industries. The premise of the ‘social licence’ is that projects should seek to obtain an ‘informal’ licence signalling ‘a critical mass of public consent’: John R Owen and Deanna Kemp, ‘Social Licence and Mining: A Critical Perspective’ (2013) 38(1) *Resources Policy* 29, 31.

19 First Nations Legal and Research Services, *Submission 42*.

20 International Finance Corporation, *Performance Standard 7: Indigenous Peoples* (2012) [11], [13]–[17]. See also European Bank for Reconstruction and Development, *Environmental and Social Policy* (2024) Environment and Social Requirement 7 [13]–[16].

21 ICMM, *Indigenous Peoples and Mining: Position Statement* (2024) commitment 4.

- options for efficiencies in the future acts regime to reduce the time and cost of compliance for all parties;
- the rights and obligations recognised in the international instruments to which Australia is a party or which it has pledged to support, including the United Nations Declaration on the Rights of Indigenous Peoples ('UNDRIP');
- options to support native title groups, project proponents, and governments to share in the benefits of development on native title land, including opportunities for native title groups to lead or co-lead development, and for ensuring native title groups receive commensurate and timely compensation for the diminution of native title rights and interests caused by future acts; and
- options for how the future acts regime can support fair negotiations and encourage proponents and native title groups to work collaboratively in relation to future acts.

3.18 Feedback to this Inquiry has confirmed that many stakeholders place great importance on agreement-making as the preferred way to validate future acts. However, feedback has also highlighted issues that currently undermine the potential of agreement-making to promote free, prior, and informed consent; unlock significant economic opportunities; provide proponents with their 'social licence to operate'; and deliver certainty for all parties.

3.19 Key problems confronting future act agreement-making include the following:

- There can be inequality of bargaining power as a consequence both of the underlying legislative framework in the future acts regime and of a lack of resourcing available to parties — in particular, native title parties.²²
- Parties have reported significant transaction costs in agreement-making (particularly ILUAs) that can make negotiating agreements cost-prohibitive both for native title parties and other parties.²³ Some parties have said that the time it takes to negotiate an agreement and for it to then be authorised by native title holders or claim group,²⁴ presents a significant barrier to making agreements.²⁵
- Agreement confidentiality, though consistently identified as important to agreement parties, can apply to the exclusion of native title holders or the claim group, such that there is not sufficient transparency for native title holders or

22 See, eg, Joint Standing Committee on Northern Australia, Parliament of Australia, *A Way Forward: Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge* (2021) [7.85]–[7.89], rec 4. The Kimberley Land Council characterise these reasons as 'structural coercion on native title parties to reach agreement with proponents': Kimberley Land Council, *Submission* 26.

23 State of Queensland, *Submission* 43.

24 In these chapters, 'native title holders or claim group' refers to the persons who must authorise the making of an ILUA. For area agreement ILUAs and alternative procedure ILUAs, this may include persons who may hold native title: see *Native Title Act 1993* (Cth) ss 24CD(2)–(2A), (3)–(4), 24DE(4)–(5).

25 See, eg, Kimberley Land Council, *Submission* 26; State of Queensland, *Submission* 43.

the claim group to understand what future acts have been negotiated, and what benefits and obligations are provided for in an agreement.

- The potential for agreement-making under the *NTA* to support free, prior, and informed consent is undermined by the fact that adherence to these principles largely depends on ‘the goodwill of the proponent and the government party’.²⁶ Current standards of conduct for negotiations do not adequately promote the obtaining of free, prior, and informed consent.
- There can be difficulties in enforcing agreements, which undermines the agreement-making process.

3.20 Agreement-making provisions under the *NTA* have been described as ‘a seat at the table’ with ‘no guarantee’ of success.²⁷ O’Faircheallaigh has described agreement outcomes as ‘highly variable’:

in some cases, Indigenous groups are achieving substantial economic benefits and innovative provisions to minimise the impact of commercial activities on their traditional lands. In other cases the benefits gained by Indigenous groups are negligible, impact minimisation provisions are similar to those already provided in general legislation, while in some cases restrictions are placed on the exercise of rights that Indigenous parties possess under general legislation.²⁸

3.21 Many of the recommendations in this Report are directed towards improving the conditions for agreement-making and promoting fair and more efficient negotiations, in respect of all future act agreements. For future acts to be validated by an agreement, the consent of all parties participating in negotiations is required. This can make accessing agreement-making as a validation pathway difficult. The recommendations in this chapter aim to facilitate obtaining the consent of all negotiating parties, meaning agreement-making could be the validation pathway for a greater number of future acts. These reforms should assist parties in reaching agreement in a wider range of circumstances than at present, leading to efficiencies for the system as a whole, and make it more likely that the agreements reached by parties are fair and equitable.

Defining ‘future act agreements’

3.22 The recommendations in this and the following two chapters are generally intended to apply to all future act agreements, unless expressed otherwise. As outlined in **Chapter 1**, there are currently two primary types of agreements provided for in the *NTA* that can validate a future act: the first is an ILUA and the

26 Kimberley Land Council, *Submission* 26.

27 Ciaran O’Faircheallaigh, ‘Native Title and Mining Negotiations: A Seat at the Table, But No Guarantee of Success’ (2007) 6(26) *Indigenous Law Bulletin* 18, 20.

28 O’Faircheallaigh (n 12) 304.

second is a section 31 agreement.²⁹ **Recommendation 33** in **Chapter 6** of this Report contemplates the creation of a new type of agreement, presently labelled a 'low impact agreement', that may be employed within the impact-based scheme recommended in **Chapter 6. Recommendation 48** in **Chapter 7** also recommends adoption of a 'low impact agreement' as part of the recommended reforms to Part 2 Div 3 Subdivision L. If implemented, these 'low impact agreements' are generally intended to be captured by the ALRC's recommendations relating to future act agreements.³⁰

3.23 Many ILUAs and section 31 agreements have an 'ancillary agreement' negotiated alongside the head agreement. The *NTA* uses the following language to describe ancillary agreements: 'any other written agreement made in connection with the doing of the future act to which the agreement relates'.³¹ For ease of reference, we use 'ancillary agreements' to describe these types of agreements. As discussed further below, many ancillary agreements are ancillary in name only and often address substantive aspects of the overall agreement between the parties.

3.24 Agreements that are not section 31 agreements or ILUAs cannot validate future acts.³² The ALRC has heard that agreements sometimes referred to as 'common law agreements' or 'claim-wide' agreements — that is, agreements negotiated between the parties that are not ILUAs, section 31 agreements, or ancillary agreements — are used in some parts of Australia as a way of purportedly validating future acts, despite there being no provision in the *NTA* for this as a pathway to validity. The NNTT has previously explained that agreements must meet the requirements of the *NTA* if they are to provide future act validity under the Act.³³ The recommendations below do not include these types of agreements in the 'future act agreements' class because such agreements do not meet any of the validation requirements of the *NTA*.

Conduct standards

Recommendation 1

The *Native Title Act 1993* (Cth) be amended to require that all parties negotiating any future act agreement must negotiate in good faith, with good faith to be informed by conduct standards set out in the Act.

29 Agreements can also validate future acts under s 24MD(2A) of the *NTA*, which refers to agreements that have arisen in the right to negotiate process for the proposed compulsory acquisition of native title rights and interests. These agreements are also included generally in the definition of future act agreement for this Report.

30 Note that for negotiations for a 'low impact agreement' to commence, certain criteria must first be met: see **Chapters 6** and **7**.

31 See *Native Title Act 1993* (Cth) ss 41A(1)(c), 41B(2)(d).

32 As discussed above, future acts can also be validated by agreements under s 24MD(2A) of the *NTA*.

33 See, eg, *Norwest Sand & Gravel Pty Ltd v Ngarluma Aboriginal Corporation RNTBC* [2020] NNTA 68 [114]–[118].

Recommendation 2

The *Native Title Act 1993* (Cth) be amended to identify standards of conduct to be followed in order to meet the obligation to negotiate in good faith referred to in Recommendation 1. These standards should promote the obtaining of free, prior, and informed consent of the native title parties to a future act agreement and should address the following matters:

- a. to enable informed consent and the informed agreement of each party, including within a reasonable time of any request, each negotiation party provide to each other party access to relevant and sufficient information, other than for confidential information including the native title party's culturally sensitive information, relating to the future act and the activities likely to be undertaken pursuant to it;
- b. a negotiation party in a position to, or under an obligation to, facilitate the effective participation of another party, take such action (including by providing resources) as is reasonable to do in the circumstances;
- c. no negotiation party engage in dishonesty, coercion, duress, or fraud, exert undue influence over another party or disrespect the internal protocols of another party, including as to the person or persons through which negotiations for that party are to be conducted;
- d. each negotiation party communicate with, and respond to, each other negotiation party within a reasonable time;
- e. each negotiation party be open-minded to proposals made by another party, genuinely consider any such proposals, and be willing to make compromises where compromise is appropriate;
- f. each negotiation party should ensure that substantive matters for negotiation are able to be addressed and endeavour to avoid the deadlocking or preventing of negotiations about those matters by procedural disagreements; and
- g. negotiation parties should do what a reasonable person would do in the circumstances and act in accordance with the *Native Title Act 1993* (Cth).

Recommendation 3

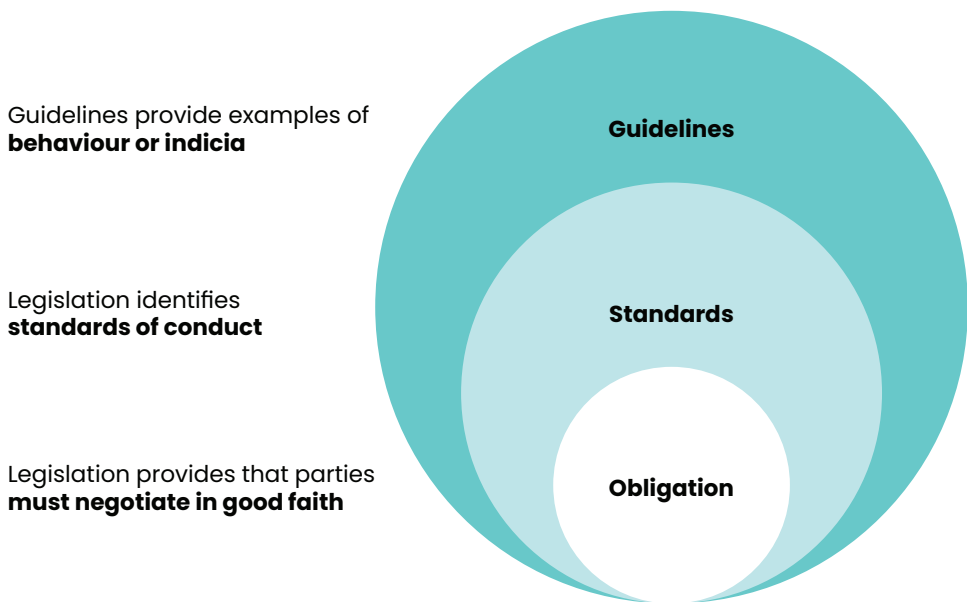
The Australian Government develop guidelines, in consultation with the National Native Title Tribunal, in relation to the good faith standards outlined in Recommendation 2 to assist negotiation parties in operationalising the standards in the *Native Title Act 1993* (Cth) by providing examples of behaviour or indicia that may or may not amount to negotiating in good faith. These guidelines should be publicly available.

3.25 **Recommendation 1** introduces a requirement that all parties negotiating a future act agreement must negotiate in good faith. **Recommendations 2** and **3** support this by providing for the *NTA* to specify what the duty to negotiate in good faith entails by enshrining conduct standards in the legislation and providing for the development of guidelines that provide more specific examples for each conduct standard.

3.26 The reforms are justified as measures to better support good faith negotiations and to promote best-practice agreement-making. They seek to implement clear standards of conduct that should apply across all future act agreement negotiations.

3.27 **Figure 3.1** demonstrates how the three recommendations work together.

Figure 3.1: Conduct standard reforms



Why reform conduct standards?

3.28 The development of negotiation standards formed part of Recommendation 4 in the Juukan Gorge Inquiry's Final Report. The Committee recommended that a review of the future acts regime 'with the aim of addressing inequalities in the negotiating position of Aboriginal and Torres Strait Islander peoples' consider the development of

standards for the negotiation of agreements that require proponents to adhere to the principle of Free, Prior and Informed Consent as set out in [UNDRIP].³⁴

34 Joint Standing Committee on Northern Australia, Parliament of Australia (n 22) rec 4.

3.29 The current duty to negotiate in good faith only applies to the negotiation of section 31 agreements under the right to negotiate. It does not currently apply to the negotiation of ILUAs or ancillary agreements. In *Western Australia v Taylor*, the NNTT developed a list of 18 indicia that ‘may be useful’ in assessing whether a party has negotiated in good faith.³⁵ These indicia have become known as the *Njama*l indicia and are commonly used by the NNTT when it considers whether parties have negotiated in good faith. The NNTT does not consider all indicia in every case.

3.30 The ALRC has heard that there are two key problems with the current operation of good faith (which currently only applies in the context of negotiations for a section 31 agreement):

- There is not sufficient clarity or detail about expected behaviour in negotiations, even where that behaviour is captured in the *Njama*l indicia. **Recommendations 1, 2, and 3** address this issue.
- As it is currently operating, the good faith standard is not consistently resulting in productive negotiations nor, where applicable, changing poor behaviour. The good faith standard is therefore not achieving its key objective, discussed below, of ensuring that the right to negotiate operates in a way that protects native title parties’ interests. **Recommendation 4** (below) and additional recommendations discussed in **Chapter 9** are directed at this problem.

3.31 On the first issue, the ALRC has noted that even where behaviours are specifically part of the *Njama*l indicia, matters before the NNTT demonstrate that some negotiation parties nonetheless display those behaviours. For example:

- In *Sunstate Sands Bundaberg Pty Ltd v First Nations Bailai, Gurang, Gooreng Gooreng, Taribelang Bunda People Aboriginal Corporation RNTBC*, during negotiations the proponent had ignored multiple requests to provide its existing Cultural Heritage Management Plan to the native title party, providing it only after the lodgement of the future act determination application. Separately, the proponent said it was unable to provide financial information to the native title party. This is despite the *Njama*l indicia providing that a party may not have negotiated in good faith if it fails to ‘respond to reasonable requests for relevant information within a reasonable time’. The NNTT ultimately found the proponent did not negotiate in good faith.³⁶
- In *John William Withers v Ewamian People Aboriginal Corporation RNTBC*,³⁷ the NNTT made a second finding of a failure to negotiate in good faith against the proponent in relation to the same negotiation.³⁸ It was clear from the original NNTT decision that the proponent had failed to negotiate in good faith because the proponent had adopted a rigid non-negotiable position and

35 *Western Australia v Taylor* (1996) 134 FLR 211, 224–5.

36 *Sunstate Sands Bundaberg Pty Ltd v First Nations Bailai, Gurang, Gooreng Gooreng, Taribelang Bunda People Aboriginal Corporation RNTBC* [2021] NNTTA 44.

37 *John William Withers v Ewamian People Aboriginal Corporation RNTBC* [2025] NNTTA 25.

38 The first good faith decision is: *John William Withers v Ewamian People Aboriginal Corporation RNTBC* [2023] NNTTA 34.

harmed the negotiation process by making 'offensive' comments that refused to acknowledge the native title party's native title rights and interests. The conduct nevertheless continued. The NNTT remarked:

Unfortunately, it appears [the proponent] has still not understood the concerns with his conduct raised in earlier Tribunal decisions ... The conduct of [the proponent] was antithetical to reaching agreement with the native title party.³⁹

3.32 These cases illustrate that negotiation parties may not always be aware that the *Njama!* indicia inform the obligation to negotiate in good faith. This suggests that the indicia alone are not sufficient to promote good conduct in negotiations.

3.33 In her submission, Anne English noted that many parties now seek to implement more rigorous standards of behaviour through establishing a negotiation protocol but highlighted the limits of such an approach:

Often the rules of negotiations are set out in Negotiation Protocols or similar between the parties but these are voluntary documents and negotiated in a vacuum. It would be preferable to have some enforceable basic standards that will guide the process.⁴⁰

3.34 The ALRC has also heard that where some negotiation parties do not have experience with the future acts regime, it may fall on native title parties or their representatives to spend a considerable amount of time explaining the regime's requirements.⁴¹

Good faith negotiations for all future act agreements

3.35 **Recommendation 1** applies the obligation to negotiate in good faith to all future act agreements. This obligation already exists in relation to the negotiation of section 31 agreements. **Recommendation 1** also confirms that the obligation extends to the negotiation of ILUAs and any ancillary agreements negotiated in connection with an ILUA or section 31 agreement as well as the other types of future act agreements discussed above.⁴² The ALRC notes that there is no statutory onus for parties to negotiate an ILUA (and any ancillary agreement connected to it) in good faith, unlike the negotiation of section 31 agreements. Where a party applies for a future act determination by the NNTT, the conduct of the section 31 agreement negotiations (that is, whether they have been conducted in good faith) acts as a limit on the NNTT's power to determine the application.⁴³ ILUAs do not give rise to this option for arbitration: all parties must agree to negotiate an agreement.

39 *John William Withers v Ewamian People Aboriginal Corporation RNTBC* [2025] NNTTA 25 [100]–[102].

40 A English, *Submission 15*.

41 See, eg, Kimberley Land Council, *Submission 26*; Queensland South Native Title Services, *Submission 45*; Parallax Legal, *Submission 157*.

42 See paragraph [3.22]. For 'low impact agreements', as discussed in **Chapters 6 and 7**, the obligation to negotiate in good faith would only arise once the criteria for the availability of a 'low impact agreement' had been met.

43 See discussion in **Chapter 9**.

3.36 However, the ALRC considers that, as a matter of principle, parties should be obliged to negotiate in good faith for all future act agreements because conduct should be consistent across all future act agreement negotiations. In relation to ILUAs, the obligation to negotiate in good faith would not compel parties to negotiate or result in the matter being subject to the arbitration process for a future act determination. It simply sets an expectation of how negotiations should be conducted.

3.37 In developing **Recommendation 1**, the ALRC has considered the rationale underpinning the obligation to negotiate in good faith that currently exists under the right to negotiate. The ALRC has identified two primary rationales for the obligation to negotiate in good faith.

The obligation to negotiate in good faith is a protective measure

3.38 The first rationale for good faith negotiations is to protect the interests of native title parties and support the effectiveness of the right to negotiate. In *Western Australia v Taylor*, the NNTT stated (in relation to the pre-1998 NTA, which placed the obligation to negotiate in good faith only on the government party):

The negotiation process is at the core of the future act regime. This is emphasised by the fact that the obligation to negotiate in good faith is imposed on the Government party. The Government party can ensure that the right which is given to Aboriginal people can be effectively utilised and not be a right which exists in name only. The imposition of the obligation on the Government party will help to ensure that the 'right to be asked' and the 'special right to negotiate' which is given to Aboriginal people by the Act is effective. A Government party is a special position to have regard to the public interest in ensuring that the beneficial intentions of parliament are realised.⁴⁴

3.39 In *Brownley v Western Australia*, the Federal Court considered the obligation as contained in the pre-1998 NTA and highlighted why such protection is necessary:

A government exercising sovereign power and a claimant to native title are not on equal terms and, under s 31, they are not engaged in making a contract for purposes of trade or commerce. The negotiation under s 31 is directed to obtaining an accord between a government and a native title claimant for the exercise of a power of a government in respect of the use of land in a manner that respects the connection with that land of indigenous people.

It is a moral conception involving a moral duty owed by a government party to a registered native title claimant: see *Maclay v Dixon* [1944] 1 All ER 22. The moral duty of the government party is to properly engage in a process of negotiation with a native title claimant. The obligation placed on a government by the Act may be a statutory recognition of a duty already understood under the general law.⁴⁵

3.40 The NTA 1998 extended the obligation to negotiate in good faith to all parties and introduced a limitation on the NNTT's power to determine a future act

44 *Western Australia v Taylor* (1996) 134 FLR 211, 218.

45 *Brownley v Western Australia* (1999) 95 FCR 152 [21]–[22].

determination application so that if the NNTT is satisfied that a party (other than a native title party) has failed to negotiate in good faith, then the NNTT cannot determine the future act determination application.

3.41 Proponents are not in an identical position to government parties, because the government party is the grantor of future acts (and the associated rights), while proponents carry out activities in accordance with the future act once those rights are granted. However, the effective practice in negotiations under the right to negotiate, which largely occur between proponents and native title parties, means that the conduct of proponents is similarly fundamental to realising the objectives of the right to negotiate.

3.42 In *FMG Pilbara Pty Ltd v Cox*, the Full Court of the Federal Court observed that the requirement for good faith negotiations is an ‘ongoing protection’ which continues beyond the minimum negotiation period.⁴⁶ While this protection applies to all negotiation parties — for example, a grantee party may argue that a government party has not negotiated in good faith — in practice, it operates principally for the benefit of native title parties.

3.43 In *Charles v Sheffield Resources Ltd*, the Full Court of the Federal Court expanded on the obligation to negotiate in good faith as a protective measure for native title parties. Justices North and Griffiths stated that

although the obligation to negotiate in good faith is imposed on all the negotiation parties, it is explicitly stated to be directed to obtaining the agreement of each of the native title parties to the specified matters. It is evident that the object of the obligation is directed to protecting the native title parties. This is further reflected in the fact that the s 36(2) prohibition on the arbitral body making a s 35 determination operates by reference to any negotiation party (i.e. Government party, grantee party or native title party) satisfying the arbitral body that any other negotiation party, other than a native title party, did not negotiate in good faith as mentioned in s 31(1)(b). Thus, while a native title party has an obligation to negotiate in good faith pursuant to s 31(1)(b), this is a matter of imperfect obligation and appears not to carry any relevant consequences under the NT Act if the native title party fails to discharge that obligation. This stands in sharp contrast to the statutory consequences for the other two categories of negotiation party.⁴⁷

The obligation to negotiate in good faith promotes fair and effective negotiations

3.44 A second rationale for good faith negotiations is that good faith can promote fair and effective negotiations. Because the requirement to negotiate in good faith sets out mutual obligations for all negotiation parties, good faith can set standards of behaviour. Where parties each adhere to these standards of behaviour, the negotiations are more likely to be fair and effective, and in turn promote equitable agreements.

46 *FMG Pilbara Pty Ltd v Cox* (2009) 175 FCR 141 [21].

47 *Charles v Sheffield Resources Ltd* (2017) 257 FCR 29 [57].

3.45 Fairness of negotiations, in the native title context, must necessarily also address inequality in bargaining power. Several other reforms in this Report are directed at addressing that issue.⁴⁸ Good faith negotiations may also help to address inequality, including by ensuring that all parties are able to effectively participate in negotiations.

Extending the rationales to the negotiation of all future act agreements

3.46 These same rationales can be extended to ILUAs, ancillary agreements, agreements negotiated under s 24MD(2A) of the NTA, and ‘low impact agreements’ recommended in **Chapters 6** and **7**.

3.47 Like an agreement under the right to negotiate, the negotiation of an ILUA can similarly be described as being directed to ‘obtaining an accord’ — that is, an agreement — with a native title party for the exercise of government power in respect of native title in a manner that respects the native title holders’ rights and interests. Though negotiations are not part of a compulsory process as they are in the right to negotiate, the substance of the negotiation remains focused on the grant of rights over native title land that affect native title rights and interests (a future act) and how that future act can be done with the consent of the native title holders or claim group. Parties negotiating in good faith, then, is similarly important to realising the objectives of the ILUA provisions.

3.48 The same rationales also apply to the negotiation of ancillary agreements, which are necessarily linked to the head agreement and therefore the doing of a future act with the consent of the native title holders. The same rationale extends to agreements under s 24MD(2A) and the ‘low impact agreements’ recommended in **Chapters 6** and **7** as agreements that seek to carry out a future act in a manner consented to by the native title holders.

3.49 **Recommendation 1** therefore extends the obligation to negotiate in good faith to all future act agreements — ILUAs, section 31 agreements, ancillary agreements, s 24MD(2A) agreements and the ‘low impact agreements’ recommended in **Chapters 6** and **7**. Extending good faith to the negotiation of all future act agreements promotes best practice engagement and clarifies expectations.

3.50 A further benefit of extending the obligation to negotiate in good faith to ILUAs is that, in addition to ILUAs being used for future acts (including in relation to tenure upgrades described in **Chapter 8**), ILUAs can be negotiated for a range of circumstances including:

- in the lead up to a native title determination (to manage ‘other interests’ or to resolve tenure issues);⁴⁹

48 For example, **Recommendation 84** in relation to PBC resourcing.

49 See, eg, Indigenous Land Use Agreement, *Mitakoodi and Mayi People Tenure Resolution ILUA* (registered 26 March 2025). According to the entry on the Register of ILUAs, the agreement took effect on 9 August 2024, and the relevant consent determination is *Kum Sing on behalf of the Mitakoodi and Mayi People #5 v Queensland (No 3)* [2024] FCA 935.

- settling of a native title claim;⁵⁰ or
- settling a statutory compensation claim or establishing an alternative future acts regime.⁵¹

3.51 In some circumstances, there is a risk that non-native title parties will use their consent to a native title determination or statutory compensation settlement as leverage in negotiations to require the native title party to enter into an ILUA, without an ability for there to be genuine negotiations.⁵² Where the alternative is contested litigation, this may create pressure on native title parties to agree to ILUAs, including to template agreement terms, that overly favour non-native title parties. The ALRC considers that by extending the good faith obligation to ILUA negotiations, an additional benefit is that all parties will have a better opportunity to genuinely negotiate agreement terms, where coercion and like conduct is prohibited.

3.52 As discussed in [Chapter 2](#), applying the obligation to negotiate in good faith to all future act agreements is also consistent with the international human rights concept of free, prior, and informed consent as a process (rather than an outcome) to protect native title rights and interests. Reforming good faith also aligns with obligations under UNDRIP for States' engagement with Indigenous peoples in relation to decisions affecting their lands, territories, or resources to be guided by good faith.⁵³ This good faith requirement applies mutually to States and Indigenous peoples.⁵⁴

3.53 Avenues to promote good faith negotiations for section 31 agreements under the right to negotiate are discussed in [Chapter 9](#). In relation to ILUAs, ancillary agreements, s 24MD(2A) agreements, and 'low impact agreements' recommended

50 See, eg, Indigenous Land Use Agreement, *Mardigan People Claim Resolution ILUA* (registered 1 October 2019). The negotiation and execution of this ILUA led to the parties consenting to a negative determination of native title, with the ILUA providing the Mardigan people with 'certain benefits' in 'consideration for the surrender of any native title rights and interests that they may hold' in the area: *Anderson on behalf of the Mardigan People v Queensland* [2019] FCA 2140 [10]–[13]. See also the discussion of consent determination ILUAs in State of Queensland, *Submission 43*.

51 See, eg, Indigenous Land Use Agreement, *Tjiwarl Palyakuwa: Tiiwa Kuwarri Yampa Ngula* (registered 21 February 2023).

52 See, eg, the allegations raised by the applicant (a registered native title claimant) in *Widjabul Wia-Bal v Attorney-General (NSW)* (2020) 274 FCR 577. See also North Queensland Land Council, *Submission 96*; South Australian Native Title Services, *Submission 104*; Ross Mackay, *Submission No 13* to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into Native Title Legislation Amendment Bill 2019* (28 November 2019).

53 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) art 32(2) ('UNDRIP'). See also art 19. Article 46(3) provides that all its provisions shall be interpreted in accordance with several guiding principles, including good faith. UNDRIP's preamble also affirms 'that the recognition of the rights of indigenous peoples' will 'enhance harmonious and cooperative relations between the State and indigenous peoples', guided by principles including good faith.

54 James Anaya, Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, 12th sess, UN Doc A/HRC/12/34 (15 July 2009) [66]; James Anaya, *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, 66th Sess, UN Doc A/66/288 (10 August 2011) [85].

in **Chapters 6** and **7**, the *NTA* would expressly state parties have an obligation to comply with the conduct standard of negotiating in good faith. Though strictly not enforceable, this express obligation should assist in improving behaviour by clearly setting out expectations and giving the parties a reference point when negotiation behaviour is not appropriate. **Recommendation 4** below envisages the NNTT having the ability to assist parties during negotiation, including through conciliation. This may include the capacity to make recommendations to the parties including in relation to the good faith negotiating requirements.⁵⁵

Substance of good faith negotiations

3.54 **Recommendations 2** and **3** address the problem of insufficient clarity and detail about expected behaviour by providing for:

- clear legal standards of conduct for good faith negotiations in the *NTA*; and
- the development of guidelines with more specific guidance on relevant behaviour under each standard.

3.55 The rationale for placing broad standards within legislation, and more specific guidance outside legislation, is to ensure that negotiating in good faith does not become a ‘tick-box’ exercise. Rather, the standards set out in the legislation can guide a holistic assessment of conduct. In its submission, the NNTT observed that prescriptive requirements for good faith may not be productive.⁵⁶ Over-prescription may exacerbate what the NNTT has observed as a ‘present and arguably excessive focus on micro-actions’ during negotiations, which can ‘detract from the overall objective, and focus on, reaching agreement’.⁵⁷ The ALRC agrees with the NNTT’s observation that clear standards of conduct may be more effective at promoting good faith negotiations than prescriptive requirements.

3.56 This is supported by other feedback. For example, the Association for Minerals and Exploration Companies observed that

the mining and exploration industry is concerned that overly prescriptive standards might slow dealmaking or reduce flexibility, but it also sees benefit in clearer rules that reduce disputes about bad conduct.⁵⁸

3.57 Guidelines would be intended to aid parties in meeting the legislated standards. Matters to be addressed by guidelines may demonstrate that a party is negotiating in good faith, but would not be determinative of whether good faith is satisfied. For example, contributing to a native title party’s reasonable negotiation costs is likely to be an indicator of good faith, but not be required in every negotiation due to the differing financial position of proponents. Each of the matters suggested

⁵⁵ See discussion below at paragraph [3.75].

⁵⁶ National Native Title Tribunal, *Submission 86*.

⁵⁷ *Ibid.*

⁵⁸ Association of Mining and Exploration Companies, *Submission 97*. See also AgForce Queensland Farmers Ltd, *Submission 111*.

for inclusion in guidelines are intended to act as guidance only and not determine — in isolation — whether a party has negotiated in good faith or not.

3.58 A number of submissions and consultees supported the introduction of conduct standards.⁵⁹ Submissions recognised the importance of raising the standards of behaviour across the entire system.⁶⁰ The support for conduct standards highlighted that clearer and meaningful standards for negotiation conduct may ‘incentivise efficiency of negotiations’,⁶¹ support an ‘even floor’ in negotiations as between the parties,⁶² and embed free, prior, and informed consent as a process within agreement negotiations.⁶³ Some stakeholders noted that many industries have already widely adopted a good faith approach to all future act agreement negotiations.⁶⁴ Some feedback provided qualified support, highlighting that in introducing any conduct standards, caution should be taken to ensure that conduct standards do not become a checklist or place a ‘ceiling’ on conduct.⁶⁵

The current content of good faith obligations

3.59 The duty to negotiate in good faith was first introduced in Australia through industrial relations legislation. Professor Bartlett has highlighted that the introduction of the duty to negotiate in good faith in the *NTA* occurred around the same time.⁶⁶ The duty to negotiate in good faith developed from ‘long-standing US jurisprudence in the industrial relations area’.⁶⁷

3.60 In *Western Australia v Taylor*,⁶⁸ in which the *Njama!* indicia were developed, the NNTT considered for the first time the meaning of the duty to negotiate in good faith under the *NTA* as originally enacted. The NNTT noted that industrial relations authorities could only ‘provide assistance’, and the NNTT’s task was

59 See, eg, Department of Agriculture, Fisheries and Forestry (Cth), *Submission 61*; Maddocks, *Submission 62*; National Native Title Tribunal, *Submission 86*; North Queensland Land Council, *Submission 96*; South Australian Native Title Services, *Submission 104*; Minerals Council of Australia, *Submission 113*; Western Australian Government, *Submission 115*; Australian Human Rights Commission, *Submission 118*; Law Council of Australia, *Submission 120*; Mabo Centre and National Native Title Council, *Submission 130*; Local Government Association of the Northern Territory, *Submission 143*; First Nations Legal and Research Services, *Submission 146*; First Nations Bailai, Gurang, Gooreng Gooreng, Taribelang Bunda People Aboriginal Corporation RNTBC, *Submission 147*; Yamatji Marpa Aboriginal Corporation, *Submission 148*; Kimberley Land Council, *Submission 151*; Northern Land Council, *Submission 153*.

60 See, eg, I Ingram, *Submission 119*.

61 Department of Agriculture, Fisheries and Forestry (Cth), *Submission 61*.

62 I Ingram, *Submission 119*.

63 Indigenous Land and Sea Corporation, *Submission 68*; Local Government Association of the Northern Territory, *Submission 143*. See generally Department of Agriculture, Fisheries and Forestry (Cth), *Submission 61*.

64 See, eg, National Farmers’ Federation, *Submission 114*.

65 See, eg, Central Land Council, *Submission 121*; Northern Land Council, *Submission 153*.

66 Section 31 of the *Industrial Relations Reform Act 1993* (Cth) ‘introduced such a duty in amendments regarding enterprise bargaining provisions commencing 30 March 1994. The amendments introduced for the first time into industrial law in Australia the concept of negotiation in good faith’: Richard Bartlett, *Native Title in Australia* (LexisNexis, 5th ed, 2023) 640–1.

67 *Ibid* 641.

68 *Western Australia v Taylor* (1996) 134 FLR 211.

to give the phrase content in the unique circumstances of native title and the future act negotiations which are required under this Act.⁶⁹

3.61 The Federal Court confirmed this position and highlighted the importance of good faith being interpreted in the specific context of native title:

Only limited assistance is obtained from considering the meaning ascribed to negotiation in good faith under the general law, in particular, in the field of contract. Parties engaged in negotiating the terms of a contract are assumed to be on equal terms, free to make whatever bargain they choose ...

A government exercising sovereign power and a claimant to native title are not on equal terms and, under s 31, they are not engaged in making a contract for purposes of trade or commerce.⁷⁰

3.62 As discussed above, the NNTT commonly uses the *Njamal* indicia when it considers whether parties have negotiated in good faith, but it does not consider all indicia in every case. In summary, the following principles emerge from native title good faith case law:

- Whether a party has negotiated in good faith is judged by the quality of the party's conduct and involves both objective and subjective elements. It should be assessed by looking at what a party has done or failed to do, and by the state of a party's mind.⁷¹
- Negotiating in good faith involves parties acting honestly and with an open mind, demonstrating a willingness to listen and to compromise, and making every reasonable effort to reach an agreement.⁷²
- 'Delay, obfuscation, intransigence, and pettifoggery' can be indicia of a failure of good faith, as can conduct where a party purports to be engaging in good faith but in truth serves an 'ulterior and undisclosed purpose antithetical to the making of an agreement'.⁷³
- The standard of good faith does not import an obligation to make reasonable offers,⁷⁴ however in some circumstances, there can be an assessment about whether the position adopted by a party (and the offers it has made) was objectively reasonable. In *Gomeri People v Santos NSW Pty Ltd*, Mortimer CJ observed that

the Tribunal is after all doing no more at the good faith constraint stage than assessing the course of a negotiation, and measuring it objectively against a standard of honesty, open mindedness and willingness to

69 Ibid 222.

70 *Brownley v Western Australia* (1999) 95 FCR 152 [19], [21].

71 Ibid [24]–[25]; *FMG Pilbara Pty Ltd v Cox* (2009) 175 FCR 141 [20]; *Gomeri People v Santos NSW Pty Ltd* (2024) 303 FCR 153 [96], [406].

72 *Brownley v Western Australia* (1999) 95 FCR 152 [23]–[24]; *Walley v Western Australia* (1999) 87 FCR 565 [7]; *Charles v Sheffield Resources Ltd* (2017) 257 FCR 29 [94].

73 *Brownley v Western Australia* (1999) 95 FCR 152 [25], cited with approval in *Charles v Sheffield Resources Ltd* (2017) 257 FCR 29 [68], [94].

74 *Gomeri People v Santos NSW Pty Ltd* (2024) 303 FCR 153 [406] (O'Bryan J).

listen. The fact of the making of a patently unreasonable offer in particular circumstances might be one indicia of a lack of honesty and fair dealing. It might indicate an ulterior motive. Or it may not. All will depend on the evidence and the circumstances.⁷⁵

Stage of negotiations

3.63 The interpretation of the requirement to negotiate in good faith arising out of the 2009 decision in *FMG Pilbara Pty Ltd v Cox* has been the subject of attention and criticism.⁷⁶ The parties in that case had negotiated a negotiating protocol, but had not concluded negotiations on the Land Access Agreement nor negotiated specifically on the terms of the draft mining lease to be included in that agreement prior to the grantee party applying to the NNTT for a future act determination. The Court overturned the NNTT's decision which found that negotiations must have proceeded beyond an 'embryonic' stage in order to meet the requirement to negotiate in good faith. While the Court held that it is not sufficient for the parties to merely 'go through the motions', the Court said it did not agree

that there is a requirement for negotiations to have reached a certain stage. The Act makes no reference to the parties reaching any particular stage in their negotiations. The interpretation adopted by the Tribunal and contended for by PKKP is an additional requirement which is not to be found in the Act. It puts a gloss on the statutory provisions and places a fetter on a negotiation party's entitlement to make an application under s 35 in order to obtain an arbitral determination.⁷⁷

3.64 In practical terms, this means that a negotiation party could lodge a future act determination application after the expiry of the minimum negotiation period under the right to negotiate without having engaged in substantive negotiations about the doing of the future act, so long as there have been some negotiations between the parties connected to the future act.

Previous attempts to reform good faith negotiations

3.65 In 2010, the Commonwealth Attorney-General and Minister for Families, Housing, Community Services and Indigenous Affairs released a discussion paper on potential reforms to native title agreements.⁷⁸ The paper outlined that the government intended to introduce reforms to respond to criticism of the good faith obligation following the decision in *FMG Pilbara Pty Ltd v Cox*:

This decision has been criticised on the basis that it could enable parties to approach the NNTT for a determination that a particular future act proceed, even if there have been no substantive negotiations about the doing of that act. It has therefore been suggested that the decision could discourage parties to actively engage in negotiations to reach broad and practical agreements.

⁷⁵ Ibid [96] (Mortimer CJ). See also *Walley v Western Australia* (1999) 87 FCR 565 [15].

⁷⁶ *FMG Pilbara Pty Ltd v Cox* (2009) 175 FCR 141.

⁷⁷ Ibid [23]–[24].

⁷⁸ Attorney-General (Cth) and Minister for Families, Housing, Community Services and Indigenous Affairs (Cth) (n 14).

The Government has decided to amend the Act to provide clarification for parties on what negotiation in good faith entails and to encourage parties to engage in meaningful discussions about future acts under the right to negotiate provisions.⁷⁹

3.66 Three Bills to amend the *NTA* were introduced to Parliament between 2010 and 2012: two by Senator Rachel Siewert of the Australian Greens and one by the Labor Government. Each of these Bills expressly addressed *FMG Pilbara Pty Ltd v Cox* and proposed the introduction of statutory criteria or requirements for the duty to negotiate in good faith.⁸⁰ None of these Bills were passed by Parliament, and each lapsed at the conclusion of Parliament in late 2013.⁸¹

3.67 The Native Title Amendment (Reform) Bill 2011 was a Private Senator's Bill introduced by Senator Siewert in March 2011. It proposed reforming the requirement to negotiate in good faith to require all parties to use 'all reasonable efforts' to come to an agreement about the doing of the future act or the conditions under which the native title party might agree to the doing of the future act. It also inserted a non-exhaustive definition of 'negotiate in good faith using all reasonable efforts'.⁸² The Bill was referred to the Senate Legal and Constitutional Affairs Committee for inquiry and report, who recommended that the Bill not be passed on the basis that the Australian Government's stated commitment to 'practical, considered and targeted native title reforms' as commenced by the process discussed above, including reform of good faith provisions.⁸³

3.68 In February 2012, Senator Siewert introduced the Native Title Amendment (Reform) Bill (No 1) 2012, which responded to a number of the criticisms of the 2011 Bill. This Bill included similar provisions to provide a definition of negotiate in good faith.

3.69 The Australian Government introduced the Native Title Amendment Bill 2012 in November 2012. In relation to good faith, the Bill sought to codify the meaning of 'negotiate in good faith' by developing codified 'good faith negotiation requirements' based on both s 228 of the *Fair Work Act 2009* (Cth) and the *Njama!* indicia, and requiring negotiating parties to use 'all reasonable efforts' to reach agreements.⁸⁴ The

79 Ibid 14.

80 Explanatory Memorandum, Native Title Amendment (Reform) Bill 2011 (Cth) [12]; Explanatory Memorandum, Native Title Amendment (Reform) Bill (No. 1) 2012 [9]; Explanatory Memorandum, Native Title Amendment Bill 2012 (Cth) [58]–[73].

81 The Native Title Amendment Bill 2012 lapsed at the dissolution of the House of Representatives on 5 August 2013, while the Native Title Amendment (Reform) Bill 2011 and the Native Title Amendment (Reform) Bill (No 1) 2012 lapsed at the end of Parliament on 12 November 2013 (the date of the opening of the newly elected 44th Parliament of Australia).

82 Explanatory Memorandum, Native Title Amendment (Reform) Bill 2011 (Cth) [12].

83 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Native Title Amendment (Reform) Bill 2011* (2011) [3.88]–[3.90].

84 Native Title Amendment Bill 2012 (Cth) sch 2. See Explanatory Memorandum, Native Title Amendment Bill 2012 (Cth) [69].

Bill also provided that negotiations must include ‘consideration of the effect of the doing of the act on the registered native title rights and interests of the native title parties’.⁸⁵

3.70 The Bill was referred to the Senate Legal and Constitutional Affairs Committee which ultimately recommended that the codification of good faith should be based only on the *Njama* indicia and not introduce new concepts to a ‘settled’ area of law.⁸⁶ The Committee’s conclusion was that

evidence to the committee indicates that the *Njama* Indicia are widely understood by all interested parties, are working well, and have been extensively tested in the NNTT and the courts.⁸⁷

3.71 As outlined below the ALRC has heard that the *Njama* indicia are insufficient,⁸⁸ and that codifying these indicia would not lead to any meaningful change to the current operation of good faith.⁸⁹ Therefore, the Senate Legal and Constitutional Affairs Committee’s conclusion in 2012 that the *Njama* indicia are ‘working well’ is, in 2026, not supported by feedback received by the ALRC.

Why reform the substance of good faith?

3.72 The current interpretation of good faith focuses, by virtue of the phrasing of the *Njama* indicia, only on prohibiting active negotiation in bad faith. Sarah Burnside has observed that

the understanding that has emerged from Tribunal decisions is generally phrased in the negative: negotiation in good faith is negotiation that is not in bad faith.⁹⁰

3.73 Aside from expressing it in the negative, the current indicia do not identify conduct that amounts to good faith negotiation. In its submission, MPS Law said:

Framing good faith standards in the negative sets a higher threshold for establishing a failure to negotiate in good faith. Native title parties will often have to establish actions demonstrating an active or intentional failure to negotiate in good faith. This standard provides scope for grantee parties to comply with the standards at a procedural level, while never engaging with native title parties in a substantive or meaningful way.⁹¹

85 Native Title Amendment Bill 2012 (Cth) sch 2, items 3, 8.

86 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Native Title Amendment Bill 2012 [Provisions]* (2013) [3.87]–[3.88].

87 Ibid [3.85].

88 See, eg, Central Land Council, *Submission 121*; First Nations Bailai, Gurang, Gooreng Gooreng, Taribelang Bunda People Aboriginal Corporation RNTBC, *Submission 147*.

89 See, eg, National Native Title Tribunal, *Submission 86*; I Ingram, *Submission 119*; Northern Territory Government, *Submission 149*.

90 Sarah Burnside, ‘Negotiation in Good Faith under the Native Title Act: A Critical Analysis’ (2009) 4(3) *Land, Rights, Laws: Issues of Native Title* 1, 4.

91 MPS Law, *Submission 17*.

3.74 This means that the current interpretation of good faith does not meet its objectives, outlined above, as effectively as it could. Good faith standards that more clearly address what is positively required to negotiate in good faith (in addition to ensuring negotiation in bad faith is prohibited) would better promote those objectives. This is consistent with feedback to the ALRC which has suggested that standards of good faith, if codified, should go beyond the current *Njama!* indicia, because those indicia are generally understood and there would be no real benefit in legislating the indicia alone.⁹²

3.75 **Recommendations 1, 2 and 3** are intended to work in tandem with the ALRC's recommendations that reform the NNTT's assistance functions (see **Recommendation 4**, below). In particular, and as discussed in more detail below and in **Chapter 9**, in exercising its conciliation function it is envisaged that the NNTT would have the capacity to make recommendations to the parties, including in relation to the good faith negotiating requirements. The ALRC considers that these recommendations, working together, will greatly assist in promoting good faith negotiations.

Proposed good faith conduct standards and matters for guidelines

3.76 **Table 3.1** below summarises the recommended standards for inclusion in the *NTA* under **Recommendation 2** and matters to be considered for inclusion in guidelines developed under **Recommendation 3**. The following sections then provide further detail.

3.77 In developing the conduct standards and suggested matters for guidelines, the ALRC has had regard to case law on the obligation to negotiate in good faith under the right to negotiate, the existing *Njama!* indicia, good faith requirements in the *Fair Work Act 2009* (Cth), feedback from stakeholders, and previous attempts to reform the obligation to negotiate in good faith. The ALRC has had regard both to conduct standards that are positive requirements for negotiating in good faith as well as conduct standards that prohibit particular behaviour that is likely to amount to bad faith. When developing the guidelines, the Australian Government should consult with the NNTT.

92 See, eg, Central Land Council, *Submission 121*. See also Northern Land Council, *Submission 153*.

Table 3.1: Good faith conduct standards and guidelines

	Legislative standard	Matters for consideration in guidelines
a.	To enable informed consent and the informed agreement of each party, including within a reasonable time of any request, each negotiation party provide to each other party access to relevant and sufficient information, other than for confidential information including the native title party's culturally sensitive information, relating to the future act and the activities likely to be undertaken pursuant to it.	• Parties provide relevant information about the future act to native title parties in a timely manner. • Information should be provided in a way that is as accessible and comprehensible as possible. • In relation to commercially sensitive information, parties should consider providing relevant information by using a mechanism to provide the information on a confidential basis. • Native title parties are not obliged to disclose culturally sensitive information.
b.	A negotiation party in a position to, or under an obligation to, facilitate the effective participation of another party, take such action (including by providing resources) as is reasonable to do in the circumstances.	• Parties contribute to (or agree to contribute to) native title parties' reasonable costs of negotiation. • Parties should give genuine consideration to conducting negotiations with reasonable accommodations for cultural considerations. • Parties pay upfront (or in a timely manner) a native title party's reasonable costs incurred and payable under s 60AB of the <i>NTA</i>.

	Legislative standard	Matters for consideration in guidelines
c.	No negotiation party engage in dishonesty, coercion, duress, or fraud, exert undue influence over another party or disrespect the internal protocols of another party, including as to the person or persons through which negotiations for that party are to be conducted.	• Parties should not engage in coercive behaviour in negotiations. • Parties should not engage in fraud, undue influence, or duress in negotiations. • Parties should not act for an improper purpose. • Parties should not engage in misleading or deceptive conduct in negotiations. • A party should not conduct negotiations with people other than the registered native title claimant, Prescribed Body Corporate ('PBC'), or authorised representative of the native title parties.
d.	Each negotiation party communicate with, and respond to, each negotiating party within a reasonable time.	• Parties actively engage with other parties and follow up in the event there is no initial response. • Parties take reasonable steps to facilitate discussions and organise meetings. • Parties should not stall negotiations by unexplained delays.
e.	Each negotiation party be open-minded to proposals made by another party, genuinely consider any such proposals, and be willing to make compromises where compromise is appropriate.	• Parties should not adopt a rigid non-negotiable position. • Parties should not engage in unilateral conduct in the negotiation which harms the negotiating process. • Parties give genuine consideration to reasonable offers made and give reasons for their responses to those offers. • Parties demonstrate a willingness to compromise in appropriate circumstances.

	Legislative standard	Matters for consideration in guidelines
f.	Each negotiation party should ensure that substantive matters for negotiation are able to be addressed and endeavour to avoid the deadlocking or preventing of negotiations about those matters by procedural disagreements.	• Parties put forward proposals. • Parties progress negotiations beyond an ‘embryonic’ stage to include consideration of the substantive issues for negotiation — that is, negotiating about the doing of the future act and its effect on native title rights and interests.
g.	Negotiation parties should do what a reasonable person would do in the circumstances and act in accordance with the <i>Native Title Act 1993</i> (Cth).	• Parties should not act in a way that ignores the rights recognised by the <i>NTA</i>, for example, by denying the existence of native title rights and interests.

a. Relevant and sufficient information relating to the future act

3.78 Without relevant and sufficient information about the proposed future act, it is difficult for parties to be fully informed and able to negotiate. In particular, a lack of relevant and sufficient information means a native title party will be unable to provide informed consent to the future act. Despite the provision of information falling expressly within the *Njama!* indicia, case law highlights some negotiating parties resist providing relevant and useful information or provide inconsistent information.⁹³

3.79 The ALRC has heard that there can be difficulties in obtaining disclosure of relevant information about the proposed future act. Submissions and consultees have identified that an ‘information asymmetry’ can form between parties.⁹⁴

3.80 The requirement for native title parties, in particular, to have access to sufficient information relevant to the future act negotiations fulfils an important element of free, prior, and informed consent. The element of ‘informed’ requires that affected communities are given sufficient information about the project and their own rights in order to negotiate with equality of information.⁹⁵ Information must be accurate and provided in a way that is accessible and understandable. The United Nations Permanent Forum on Indigenous Issues has suggested that for consent to

93 See, eg, *Western Australia v Dimer* (2000) 163 FLR 426 [125], [131]–[132]; *Muccan Minerals Pty Ltd v Taylor on behalf of Njama!* [2014] NNTA 74 [46]–[52], [94]; *Michael Dowse Collins v Nguddaboolgan Native Title Aboriginal Corporation RNTBC* [2015] NNTA 13 [58]–[68], [97]; *Sunstate Sands Bundaberg Pty Ltd v First Nations Bailai, Gurang, Gooreng Gooreng, Taribelang Bunda People Aboriginal Corporation RNTBC* [2021] NNTA 44 [45]–[48].

94 See, eg, Norman Waterhouse Lawyers, *Submission 102*.

95 Expert Mechanism on the Rights of Indigenous Peoples, *Free, prior and informed consent: a human rights-based approach*, 39th sess, UN Doc A/HRC/39/62 (10 August 2018) [22].

be 'informed', Indigenous peoples must have been given information about at least the following aspects of a project:

- the 'nature, size, pace, reversibility and scope of any proposed project or activity';
- the reasons for or purposes of the activity;
- the duration of the activity;
- the areas that will be affected;
- a 'preliminary assessment of the likely economic, social, cultural and environmental impact', including all potential harm and impacts, and the kind of benefit-sharing schemes or compensation involved;
- 'personnel likely to be involved in the execution of the proposed project (including Indigenous peoples, private sector staff, research institutions, government employees and others)'; and
- 'procedures that the project may entail'.⁹⁶

3.81 Relevant information should also include the scope and extent of the rights afforded under the proposed future act, in addition to the activities proposed by the particular project.

3.82 These matters could form the basis of a standard request for information issued by a native title party.

3.83 The ALRC has heard generally supportive feedback regarding the introduction of a conduct standard that requires the disclosure of information,⁹⁷ subject to qualifications around the nature of information that should or should not be disclosed.⁹⁸ Guidelines may helpfully address these matters.

3.84 In relation to commercially sensitive information, the NNTT has previously suggested that such information could be provided where a mechanism can reasonably be used to provide such information on a confidential basis.⁹⁹ Parties should have regard to whether such a mechanism could be established to share commercially sensitive information that is relevant.

96 Permanent Forum on Indigenous Issues, *Report of the International Workshop on Methodologies Regarding Free, Prior and Informed Consent and Indigenous Peoples*, 4th sess, UN Doc E/C.19/2005/3 (17 February 2005) [46]. See also Expert Mechanism on the Rights of Indigenous Peoples, *Free, prior and informed consent: a human rights-based approach*, 39th sess, UN Doc A/HRC/39/62 (10 August 2018) [22].

97 State Aboriginal Heritage Committee (SA), *Submission 82*; Norman Waterhouse Lawyers, *Submission 102*; South Australian Native Title Services, *Submission 104*; Australian Human Rights Commission, *Submission 118*; Mabo Centre and National Native Title Council, *Submission 130*; NSW Bar Association, *Submission 140*; Kyburra Munda Yalga Aboriginal Corporation RNTBC, *Submission 154*.

98 Norman Waterhouse Lawyers, *Submission 102*; Central Land Council, *Submission 121*; Kimberley Land Council, *Submission 151*.

99 *David Trow and Trojon Enterprises Pty Ltd v Aaron Banderson on behalf of the Wagiman People* [2021] NNTA 68 [50].

3.85 This conduct standard does not require native title parties to provide culturally sensitive information. There is a concern that a requirement to disclose cultural information can undermine a native title party's ability to effectively protect their cultural heritage. It is generally in the interests of the native title party to disclose information about areas of cultural significance in a negotiation (though not necessarily the basis of the significance) particularly where arbitration is available, as the NNTT would require evidence on this point in any case. To require disclosure of cultural information in every circumstance would be inconsistent with international law, which protects Aboriginal and Torres Strait Islander peoples' right to maintain, control, and protect their cultural heritage and traditional knowledge.¹⁰⁰ In many cases, a native title party would be able to disclose information that provides the gist of what needs to be understood in a negotiation in a manner that does not undermine cultural sensitivities. There is other information that a native title party can helpfully disclose to assist in negotiations, for example, availability for meetings and preferred processes for matters such as cultural heritage surveys.

b. Effective participation in negotiations

3.86 Ensuring the effective participation of parties is essential for a negotiation to uphold the principles of free, prior, and informed consent. Without participation, there cannot be meaningful negotiations. Without meaningful negotiations, a native title party is unable to provide free, prior, and informed consent.

3.87 This conduct standard is directed at two issues identified during this Inquiry:

- first, resourcing to enable parties to participate in agreement negotiations, an issue that predominantly (but not only) affects native title parties; and
- secondly, ensuring negotiations can accommodate, to the extent possible, cultural considerations around the conduct of the negotiation.

3.88 On the first issue, the Discussion Paper sought feedback on whether conduct standards should include a requirement for a proponent to contribute to a native title party's costs of participating in the negotiation. This received mixed feedback. A number of submissions and consultees supported a requirement for proponents to contribute to a native title party's costs of negotiating an agreement. Several noted that providing such a contribution should be part of the 'cost of doing business' and would be a significant way to address current power imbalances in negotiations.¹⁰¹

3.89 However, a number of stakeholders pointed out that proponents that are not large mining companies (including pastoralists, farmers, local government, or small miners) may not always have the financial resources to make such a contribution.¹⁰²

¹⁰⁰ See UNDRIP art 31(1).

¹⁰¹ See, eg, Houston Legal & Consultants, *Submission 95*; Central Land Council, *Submission 121*; First Nations Legal and Research Services, *Submission 146*.

¹⁰² See, eg, Amalgamated Prospectors and Leaseholders Association of WA Inc, *Submission 64*; Isaac Regional Council, *Submission 70*; Queensland Small Miners Council, *Submission 105*; AgForce Queensland Farmers Ltd, *Submission 111*; National Farmers' Federation, *Submission 114*.

A requirement to contribute to a native title party's negotiation costs in every case may produce unfairness.¹⁰³

3.90 In recent good faith decisions, the NNTT has observed that while the obligation to negotiate in good faith 'does not extend to providing the native title party with financial assistance to conduct negotiations', s 60AB of the *NTA* expressly contemplates PBCs being able to recover their costs in negotiating an agreement (among other matters). Member Kelly said

in this post-determination landscape, and with s 60AB of the *NTA* available to PBCs ... a new light is cast on the principle that the obligation to negotiate in good faith does not extend to providing financial assistance to a native title party to conduct negotiations.¹⁰⁴

3.91 International law commentary highlights that, in seeking the free, prior, and informed consent of Indigenous peoples, adequate resources and capacity should be provided for Indigenous peoples' representative institutions or decision-making mechanisms, enabling them to meet technical challenges but without compromising their independence.¹⁰⁵

3.92 The question of whether a party has contributed or agreed to contribute to a native title party's reasonable costs of negotiating a future act agreement should be dealt with in guidelines. This would not be determinative of whether a party has negotiated in good faith or not, in recognition of the wide range of circumstances and parties involved in the future acts regime. Guidelines may also address what may constitute 'reasonable costs' for a native title party negotiating an agreement.

3.93 It is also relevant to observe that s 60AB of the *NTA* currently provides PBCs with the ability to charge a fee for its negotiation costs. Reforms relating to s 60AB are discussed in [Chapter 12](#). Making consideration of funding during negotiations a factor relevant to good faith is consistent with this provision and the reforms outlined in [Chapter 12](#).¹⁰⁶ This may, in part, help to address one of the deficiencies in s 60AB in its current form, which is that fees may be recovered after negotiations have taken place, potentially creating cashflow problems during negotiations.

3.94 On the second issue, a relevant matter for inclusion in guidelines is whether a party has given genuine consideration to conducting negotiations with reasonable accommodations for cultural considerations. International commentary on effective participation by Indigenous communities highlights the importance of culturally appropriate design of participation. In a 2020 report on consultation practices under UNDRIP, the Special Rapporteur on the Rights of Indigenous Peoples noted that

103 See, eg, AgForce Queensland Farmers Ltd, *Submission 111*.

104 *Kevin Alfred De Roma v Western Yalanji Aboriginal Corporation RNTBC* [2022] NNTTA 40 [165].

105 Expert Mechanism on the Rights of Indigenous Peoples, *Free, prior and informed consent: a human rights-based approach*, 39th sess, UN Doc A/HRC/39/62 (10 August 2018) [22]. See also Central Land Council, *Submission 121*.

106 See also *Kevin Alfred De Roma v Western Yalanji Aboriginal Corporation RNTBC* [2022] NNTTA 40 [165].

consultation should be ‘culturally appropriate and accessible’.¹⁰⁷ The requirement that consultation under UNDRIP should be designed to be culturally appropriate has been recognised in a number of international cases.¹⁰⁸

3.95 Further, a number of non-binding international standards within the mining industry highlight industry acceptance of conducting negotiations in a culturally appropriate manner. For example, the International Finance Corporation’s Performance Standard 7 requires engagement with Indigenous communities to include ‘stakeholder analysis and engagement planning, disclosure of information, consultation, and participation, in a culturally appropriate manner’.¹⁰⁹

3.96 This has also been supported in feedback to the ALRC.¹¹⁰

c. Negotiating parties do not engage in dishonesty, coercion, duress, fraud, or undue influence

3.97 This conduct standard reflects wording already present in the *NTA*, good faith case law, and international law.¹¹¹ It is aimed at ensuring that parties do not engage in coercive or fraudulent behaviour. This standard also promotes the ‘free’ element of free, prior, and informed consent. Consensus on the ‘free’ element is that it requires the consultation process (and any consent flowing therefrom) be free from ‘intimidation, coercion, manipulation, and harassment’.¹¹²

3.98 A prohibition on such behaviour is present in good faith standards in other areas of the law. For example, s 228(e) of the *Fair Work Act 2009* (Cth) requires parties to refrain from ‘capricious or unfair conduct’. Conduct standard (c) is aimed at the same behaviour but uses wording well understood in the native title context. It is well accepted that negotiating in good faith requires parties to act with honesty.¹¹³

3.99 Several submissions supported conduct standards including a requirement that negotiations be free from coercion.¹¹⁴

107 Victoria Tauli-Corpus, *Rights of Indigenous Peoples: Report of the Special Rapporteur on the Rights of Indigenous Peoples*, 45th Sess, UN Doc A/HRC/45/34 (18 June 2020) [51]–[57].

108 See, eg, *Saramaka People v Suriname (Preliminary Objections, Merits, Reparations, and Costs)* (Inter-American Court of Human Rights, Series C No 172, 28 November 2007) [133]; *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya (Decision)* (African Commission on Human and Peoples’ Rights, Case No 276/2003, 25 November 2009) [289]; *African Commission on Human and Peoples’ Rights v Republic of Kenya (Reparations)* (African Court on Human and Peoples’ Rights, App No 6/2012, 23 June 2022) [142]–[143].

109 International Finance Corporation (n 20) [10]. See also ICMM (n 21).

110 See, eg, Law Council of Australia, *Submission 120*; Yamatji Marlpa Aboriginal Corporation, *Submission 148*.

111 See *Native Title Act 1993* (Cth) s 199C(3).

112 Expert Mechanism on the Rights of Indigenous Peoples, *Free, prior and informed consent: a human rights-based approach*, 39th sess, UN Doc A/HRC/39/62 (10 August 2018) [20(a)].

113 *Brownley v Western Australia* (1999) 95 FCR 152 [23]; *Gomeri People v Santos NSW Pty Ltd* (2024) 303 FCR 153 [96] (Mortimer CJ).

114 See, eg, Maddocks, *Submission 62*; Law Council of Australia, *Submission 120*; Local Government Association of the Northern Territory, *Submission 143*; Yamatji Marlpa Aboriginal Corporation, *Submission 148*.

3.100 Guidelines should also address acting for an improper purpose, which is adopted from current good faith case law.¹¹⁵ In *Charles v Sheffield Resources Ltd*, it was held that good faith case law requires that parties act ‘without ulterior motive or purpose’.¹¹⁶ In *Brownley v Western Australia*, the Court outlined that if a party

purports to engage in negotiation, but, in truth, its conduct serves an ulterior and undisclosed purpose antithetical to the making of an agreement with a native title claimant, it will not be negotiating in good faith.¹¹⁷

3.101 A final matter for the guidelines is that no negotiating party should disrespect the internal protocols of another party, including as to the negotiating representatives. This guideline is aimed, in part, at ensuring that parties do not conduct negotiations with a ‘native title party’ other than the registered native title claimant, PBC, or authorised representative. Where this occurs, it is problematic and potentially unfair because native title holders (or the registered native title claim group, pre-determination) have authorised a particular body or particular persons to deal with native title as required under the *NTA*, which may undermine the group’s legitimate decision-making processes and structures. For example, as the Central Land Council submitted,

direct contact with native title holders is not consistent with the communal nature of native title, or with the representative structures (PBCs and Applicants) established by the Native Title Act. Allowing direct contact can create enormous conflict within groups, to the benefit of those proponents who choose to act unscrupulously and pursue ‘divide and conquer’ tactics.¹¹⁸

3.102 Other areas of law also recognise the importance of conducting negotiations with appropriately authorised representatives. For example, the good faith bargaining requirements in the *Fair Work Act 2009* (Cth) require that parties must recognise and bargain with the other bargaining representatives for the agreement.¹¹⁹ Engaging with legitimate representatives is also required by arts 19 and 32 of UNDRIP, which say that States and third parties should consult and cooperate with Indigenous peoples ‘through their own representative institutions’.

d. Communicate and respond within a reasonable time

3.103 This conduct standard is based on a number of *Njamal* indicia that focus on the need for engagement between the parties. The specific *Njamal* indicia on this point may be considered for inclusion in the guidelines to support this conduct standard (which is expressed at a more general level).

3.104 This conduct standard advances the objectives of good faith by clearly stating that good faith negotiations require communication between the parties. Parties

¹¹⁵ See above at paragraph [3.62].

¹¹⁶ *Charles v Sheffield Resources Ltd* (2017) 257 FCR 29 [94].

¹¹⁷ *Brownley v Western Australia* (1999) 95 FCR 152 [25], cited with approval in *Charles v Sheffield Resources Ltd* (2017) 257 FCR 29.

¹¹⁸ Central Land Council, *Submission 121*. See also Yamatji Marlpa Aboriginal Corporation, *Submission 148*; Kimberley Land Council, *Submission 151*.

¹¹⁹ *Fair Work Act 2009* (Cth) s 228(f).

seeking to negotiate an agreement for the doing of the future act should take active steps to organise and facilitate discussions with native title parties.

3.105 A number of good faith cases deal with delays in responses by parties. Delay can, in some circumstances, be an indicator of a ‘want of good faith’.¹²⁰ Sometimes, these delays can be due to resourcing constraints. All a party should be required to demonstrate, therefore, is an active attempt to engage, a follow up if there is no initial response, and, where delay has been caused by a particular factor, an explanation for that delay. A party should avoid exacerbating another party’s delay; for example, by continuously sending another party requests and follow-ups before the party has had an opportunity to respond to the first communication.

3.106 There is likely to be a difference in views about what constitutes a ‘reasonable’ time. Relevant factors for consideration of what might be ‘reasonable’ could include whether there have been difficulties in obtaining instructions, expert availability and business periods, and cultural considerations and obligations.

3.107 Some submissions supported the inclusion of a conduct standard around ensuring meaningful engagement and communication between the parties.¹²¹

e. Open-mindedness, willingness to listen, and willingness to compromise in appropriate circumstances

3.108 This standard reflects the existing case law on good faith outlined above, in which it is well-accepted that negotiating in good faith requires parties to be open-minded, demonstrate a willingness to listen, and demonstrate a willingness to compromise.¹²²

3.109 Guidelines may usefully provide that a party may satisfy this conduct standard where it gives genuine consideration to reasonable offers made and gives reasons for their responses to those offers. Guidelines of this nature would develop two of the current *Njama!* indicia ((ii) failure to make proposals in the first place and (xv) failure to make counterproposals) and add to it a requirement that parties give genuine consideration to these offers and provide reasons. This would clarify that parties should engage with reasonable offers and explain their reasons for accepting or rejecting such offers. In doing so, this guideline would support behaviour that advances negotiations, without prescribing a particular outcome.

3.110 This conduct standard would also provide that, in appropriate circumstances, parties should be willing to compromise. This is not intended to require a party to compromise its position, including where the position that may be taken by a native

120 *Charles v Sheffield Resources Ltd* (2017) 257 FCR 29 [94], citing *Brownley v Western Australia* (1999) 95 FCR 152 [25].

121 See, eg, Kimberley Land Council, *Submission 151*; Kyburra Munda Yalga Aboriginal Corporation RNTBC, *Submission 154*.

122 *Brownley v Western Australia* (1999) 95 FCR 152 [23]–[24]; *Charles v Sheffield Resources Ltd* (2017) 257 FCR 29 [94].

title party that the future act should not be done. What is intended is that there be a willingness to compromise, where compromise is appropriate.

f. Negotiations about substantive issues

3.111 As outlined above, the *NTA* does not currently require that substantive negotiations about the doing of a future take place in order to satisfy the good faith requirement. As discussed, this position has been subject to criticism and the Australian Government has previously committed to reform, with the relevant Bill lapsing in Parliament.

3.112 This conduct standard is aimed at requiring the parties to ensure that there are substantive negotiations about the doing of the future act, including the potential effect the future act may have on native title rights and interests. It would do this by making clear that it is a relevant consideration in determining good faith. It would also provide that parties should not deadlock or prevent negotiations about these substantive matters through a disagreement about a procedural matter.

3.113 The ALRC heard some support for this reform.¹²³ The substantive matters for negotiations would necessarily include the scope and terms of the future act and the effect that it may have on native title rights and interests.

3.114 In considering the objective of good faith negotiations, guidelines may usefully focus on parties putting forward proposals. The ALRC heard support for good faith requiring the parties to 'put offers on the table'.¹²⁴

g. What a reasonable person would do in the circumstances and act in accordance with the *NTA*

3.115 The final conduct standard has two purposes:

- it adopts the final *Njama!* indicia, which is 'a failure to do what a reasonable person would do in the circumstances' to ensure that good faith remains an open-ended standard constrained only by the requirement of reasonableness; and
- it aims to ensure that all negotiation parties respect the recognition of native title under Australian law and the requirements of the *NTA*.

3.116 The second purpose of this conduct standard is aimed specifically at ensuring parties respect the existence of native title rights and interests and act in accordance with the *NTA*. Some determinations of the NNTT have highlighted engagement by negotiation parties that deny the existence of a registered claim or determination of native title rights and interests.¹²⁵ In its submission, Maddocks highlighted that it

123 See, eg, Central Land Council, *Submission 121*; First Nations Legal and Research Services, *Submission 146*; Yamatji Marpa Aboriginal Corporation, *Submission 148*.

124 See, eg, Mabo Centre and National Native Title Council, *Submission 130*; First Nations Legal and Research Services, *Submission 146*; Kimberley Land Council, *Submission 151*.

125 See, eg, *John William Withers v Ewamian People Aboriginal Corporation RNTBC* [2023] NNTTA 34 [91]; *Western Yalanji Aboriginal Corporation RNTBC v Edmund James Fitzgerald* [2023] NNTTA 41 [60]–[62], [87], [141].

is important that parties acknowledge and consult with the right people for Country (for example, where a claim has been registered).¹²⁶ The conduct standard and guidelines may helpfully clarify this requirement as well as the need for the parties to conduct negotiations in a way that recognises that they are bound by the *NTA*.

Matters not included in the good faith standards

3.117 Some submissions suggested that parties should be required to make reasonable substantive offers and counteroffers.¹²⁷ This element was included in the Native Title Amendment Bill 2012, which required as part of good faith criteria that parties make reasonable proposals and counter proposals. Some stakeholders criticised this addition, arguing that requiring ‘reasonable’ proposals and counter proposals would be inconsistent with the current case law and would require the NNTT to undertake a difficult analysis regarding ‘reasonableness’.¹²⁸

3.118 Importing such a requirement for reasonable offers and counteroffers into the current duty to negotiate in good faith has been rejected by the NNTT and Federal Court on several occasions.¹²⁹ Those decisions highlight that the duty to negotiate in good faith focuses on the *process* of negotiations, rather than the *outcome*. In *Gomeri People v Santos NSW Pty Ltd*, O’Byrne J noted that

the difficulty with any attempted assessment of the reasonableness of an offer is the absence of any standard or criteria by which to measure reasonableness.¹³⁰

3.119 While the reasonableness of offers may be relevant in considering a party’s total conduct, it cannot, in isolation, be an indication that the party has failed to negotiate in good faith. For example, in *Brownley v Western Australia*, Lee J noted

in the context of conduct as a whole, failure to advance reasonable proposals may be shown to be part of a pattern from which an inference may be drawn that a government has not engaged in a genuine attempt to negotiate.¹³¹

3.120 In *Drake Coal Pty Ltd v Smallwood*, Sosso DP indicated that the NNTT may in some circumstances consider the fairness of a party’s offers:

First, if the offer of the grantee party is so manifestly and obviously unfair that any reasonable person would regard it as a ‘sham’ or ‘unrealistic’ offer. Second, if independent material is produced to the Tribunal which indicates that an offer

¹²⁶ Maddocks, *Submission 62*.

¹²⁷ See, eg, Central Land Council, *Submission 121*; First Nations Legal and Research Services, *Submission 146*.

¹²⁸ See discussion in Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia (n 86) [3.30], [3.39], [3.88].

¹²⁹ *Gomeri People v Santos NSW Pty Ltd* (2024) 303 FCR 153 [414]. See also *Strickland (on behalf of Maduwongga People) v Minister for Lands (WA)* (1998) 85 FCR 303, 321.

¹³⁰ *Gomeri People v Santos NSW Pty Ltd* (2024) 303 FCR 153 [414] (O’Byrne J).

¹³¹ *Brownley v Western Australia* (1999) 95 FCR 152 [35]. However, see *Gomeri People v Santos NSW Pty Ltd* (2024) 303 FCR 153 [414].

is potentially unfair or unrealistic, such that the party put that proposal forward is not negotiating in good faith.¹³²

3.121 The ALRC has therefore not included this as a matter for the conduct standards or guidelines contemplated by **Recommendations 2** and **3**.

Assistance by the National Native Title Tribunal

Recommendation 4

The *Native Title Act 1993* (Cth) be amended to consolidate, clarify, and expand the functions available to the National Native Title Tribunal to assist parties in negotiating future act agreements, implementing agreements, and resolving disputes under agreements. The Tribunal's functions should extend to conducting, as appropriate in each case:

- a. conferences;
- b. mediation;
- c. conciliation; and
- d. consent arbitration of disputes under a future act agreement, including pursuant to a dispute resolution clause of the kind contemplated by Recommendation 14.

3.122 **Recommendation 4** would provide the NNTT with a broad suite of facilitation functions to assist parties in making agreements and resolving disputes under agreements. As a specialist tribunal, the NNTT appears to be well-placed to assist parties in negotiations and in implementing future act agreements. **Recommendation 4** is designed to broaden the NNTT's powers and facilitation functions, so that it can be of greater assistance to the parties.

3.123 The *NTA* currently provides the NNTT with some functions to provide assistance or facilitate dispute resolution in specific circumstances. These include:

- assisting parties negotiating ILUAs;¹³³
- assisting PBCs and common law holders to promote agreement about matters relating to native title or the operation of the *NTA*;¹³⁴

132 *Drake Coal Pty Ltd, Byerwen Coal Pty Ltd/Grace Smallwood & Ors (Birri People)/Queensland* [2012] NNTTA 9, [201], cited with approval in *Rusa Resources (Australia) Pty Ltd v Sharon Crowe on behalf of Gnulli* [2015] NNTTA 26 [26]; *Vandeleur Superannuation Pty Ltd v Gwen Peck on behalf of the Gnulli People* [2019] NNTTA 73 [99]–[100]; *Kevin Alfred De Roma v Western Yalanji Aboriginal Corporation RNTBC* [2022] NNTTA 40 [138].

133 *Native Title Act 1993* (Cth) ss 24BF, 24CF, 24DG.

134 *Ibid* ss 60AAA(1)–(2).

- mediating in relation to negotiations under the right to negotiate;¹³⁵ and
- conducting conferences to resolve any issues relevant to an inquiry, including objections to the expedited procedure and future act determination applications.¹³⁶

3.124 These existing functions are typically specific and available in only a limited set of circumstances. As the NNTT observed in its submission, many of the NNTT's 'assistance functions lack sufficient flexibility to enable [it] to assist parties in all cases which arise'.¹³⁷ To address this, the NNTT suggested 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.¹³⁸

3.125 Expanding the NNTT's existing conference, assistance, mediation, and review functions, and adding conciliation functions, would allow the NNTT to play a more direct role in providing assistance, direction, and recommendations to all parties, in all circumstances where such assistance is required.

3.126 The functions proposed by **Recommendation 4** provide for the NNTT to conduct conferences, mediation, conciliation, and consent arbitration. These functions would operate in the following manner:

- **Conferences** are facilitated meetings which allow parties the opportunity to collaboratively work through outstanding issues involved in an inquiry.¹³⁹ An NNTT representative acts as convenor and the parties discuss their perspectives with the aim of reaching agreement about an appropriate resolution.¹⁴⁰ In this way, conferences can promote the efficiency of inquiries and satisfaction of the parties.¹⁴¹
- **Mediation** is similar to a conference but involves a mediator, who plays a facilitative role to assist the parties to explore issues and develop options for agreement.¹⁴² As a mediator is responsible for leading the discussion between the parties, mediation may be more appropriate than a conference where the parties require assistance to develop a constructive dialogue.
- **Conciliation** retains the non-determinative, discussion-based nature of conferences and mediation. However, unlike a conference convenor or mediator, a conciliator may take a more direct role in assisting the parties

135 Ibid ss 31(3), 44F.

136 Ibid s 150.

137 National Native Title Tribunal, *Submission 86*.

138 Ibid.

139 National Native Title Tribunal, 'Section 150 Conferences' <www.nntt.gov.au/futureacts/Pages/Section-150-conferences.aspx>. See also Laurence Boulle and Rachael Field, *Mediation in Australia* (LexisNexis Butterworths, 2018) 144–5.

140 National Native Title Tribunal, *Section 150 Conferences* (n 139).

141 Ibid.

142 National Native Title Tribunal, 'Future Act Mediation' <www.nntt.gov.au/futureacts/Pages/Future-act-mediation.aspx>.

to arrive at a well-informed understanding of the issues in dispute and making non-binding recommendations to the parties.¹⁴³ This would include making recommendations about good faith negotiations, discussed further in [Chapter 9](#).

- **Consent arbitration** may be available where all parties consent to seeking a determination from the NNTT in relation to a dispute arising under an agreement. The outcome of consent arbitration would bind the parties because they have consented to be so bound. Consent arbitration under agreements would be a separate function from the NNTT's current future act determination functions. Consent arbitration would include dispute resolution of the kind contemplated by [Recommendation 14](#) discussed in [Chapter 4](#).

3.127 The functions outlined in [Recommendation 4](#) have been developed from feedback to the ALRC, including functions specifically highlighted by the NNTT,¹⁴⁴ and reflect feedback that an important and highly useful function to provide the NNTT with would be greater scope to facilitate and assist parties negotiating an agreement or in agreement implementation.¹⁴⁵

3.128 These functions may be accessed by request of some or all of the parties to negotiations or an agreement, and, in appropriate circumstances, the NNTT should have an own motion power (for example, in relation to section 31 agreement negotiations — see [Recommendation 61](#)). Where one party requests assistance from the NNTT, the NNTT should be empowered to compel attendance by the other parties where it considers it appropriate to do so.

3.129 The NNTT's dispute resolution functions should be conducted subject to confidentiality obligations and be without prejudice where they relate to a process that may result in NNTT future act arbitration (for example, negotiations under s 31 of the *NTA*). The rationale for this is that parties should be able to speak freely with a view to reaching agreement.

3.130 These functions should be available online, by telephone, or in person, as appropriate, which could increase their accessibility. Native title parties may be able to recover their costs for accessing such functions in line with s 60AB of the *NTA* (see [Chapter 12](#)). As discussed in [Chapter 14](#), the NNTT should be properly resourced in order to undertake the functions discussed here and in [Chapter 9](#).

143 Australian Dispute Resolution Advisory Council, *Conciliation: Connecting the Dots* (Final Report, 2003); Boule and Field (n 139) 150–1.

144 National Native Title Tribunal, *Submission 86*.

145 I Ingram, *Submission 119*. However, the Minerals Council of Australia did not support the NNTT being given more 'interventionist' powers: Minerals Council of Australia, *Submission 113*.

Standing instructions

3.131 This part discusses the potential for reform directed at making it possible for PBCs to enter future act agreements utilising standing instructions from common law holders in a wider range of circumstances than is presently possible. As outlined below, these reforms, if implemented, could increase efficiency and reduce the transaction costs of making future act agreements, while also preserving the importance of common law holders giving their free, prior, and informed consent to agreements affecting their native title rights and interests.

Context

3.132 PBCs have statutory responsibilities under the *NTA* and the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) ('*PBC Regulations*') to consult with and obtain consent from common law holders before entering into agreements for future acts ('consultation and consent'). These obligations reflect that native title rights and interests are communal and are held by the PBC on behalf of the broader group of common law holders.¹⁴⁶ The obligations highlight the importance of common law holders giving (or having the opportunity to give) informed consent to a native title decision. This importance is underscored by free, prior, and informed consent being required as a *process* (not outcome) in international human rights law when a proposed measure or project may affect Indigenous peoples.

3.133 Amendments to the *PBC Regulations* over time have illustrated that an intent of the regulations is to provide a mechanism for streamlining native title processes while ensuring that decision-making is ultimately controlled by the common law holders.¹⁴⁷ These include amendments directed at making it possible for PBCs to rely on 'standing instructions' to make particular types of native title decisions.

3.134 In summary, standing instructions can currently be given to a PBC by common law holders in relation to certain native title decisions. Once standing instructions have been given, the PBC does not have to consult and obtain further consent in

146 Note that sometimes consultation and consent obligations are only in relation to an identified class or classes of common law holders, rather than the common law holders generally. This is the case where that class or classes of common holders are identified in the determination and the proposed native title decision has an effect on that class or classes: see generally *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) regs 8(3)(a), (4)(a).

147 See, eg, Explanatory Statement, *Native Title (Prescribed Bodies Corporate) Amendment Regulations 2011* (No. 1) (Cth), which introduced reg 8A (alternate consultation procedure) for some native title decisions. This relevantly excludes a decision to enter an ILUA or section 31 agreement. The decision to enter an ILUA or section 31 agreement was excluded because PBCs had 'a non-derogable requirement to consult and obtain the consent of common law native title holders' for such decisions.

relation to each individual decision of that kind, subject to the PBC's compliance with any conditions imposed by the common law holders.¹⁴⁸

3.135 Most relevantly, the *PBC Regulations* define 'native title decision' as a decision:

- (a) to surrender native title rights and interests in relation to land or waters; or
- (b) to enter an indigenous land use agreement under Subdivision B, C or D of Division 3 of Part 2 of the Act or an agreement under Subdivision P (right to negotiate) of that Division;
- ...; or
- (e) to do, or to agree to, any act that would otherwise affect the native title rights or interests of the common law holders (other than a decision to make a compensation application).¹⁴⁹

3.136 A native title decision can be a 'high level decision' or a 'low level decision'.¹⁵⁰ Standing instructions can currently be used only for 'low level decisions' and decisions to enter into ILUAs or section 31 agreements for the doing of an act by or for the benefit of the PBC.¹⁵¹ Standing instructions cannot otherwise be used for a decision to enter into an ILUA or section 31 agreement. A PBC must therefore undertake individual consultation and consent with the common law holders for each ILUA and section 31 agreement, with limited opportunities to streamline these processes. The restricted availability of standing instructions means that there is a lack of flexibility offered to a PBC in entering into ILUAs or section 31 agreements, even where the PBC may be dealing with a high volume of similar future acts.

3.137 Each time a PBC proposes to enter into an ILUA or section 31 agreement (aside from those agreements for the benefit of the PBC) it must undertake consultation and consent processes. Currently, there is no difference in the obligations that a PBC must discharge in relation to entering an ILUA or section 31 agreement depending on the type of future act subject to that agreement. For example, the Law Council of Australia observed that ILUAs are used

to validate a range of interests which have considerably less impact on native title, including interests akin to licenses. The current approach imposes the

148 *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) regs 3, 8(8). As outlined above, in some circumstances consultation and consent obligations are only in relation to an identified class or classes of common law holders, rather than the common law holders generally. Where this is the case, it is that identified class or classes of common law holders that must give standing instructions.

149 Ibid reg 3(1). Note that sub-paragraphs (c) and (d) are not relevant definitions for this recommendation.

150 Ibid. A 'high level decision' is defined as a decision covered by (a), (b), (c) or (d) of the definition of 'native title decision' and a 'low level decision' is any decision other than a high level decision.

151 Specifically, for section 31 agreements, where the PBC is the sole grantee party. A PBC can also make a standing instructions decision covered by an 'approval' under reg 8(8) of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth), subject to any conditions imposed by the common law holders on the approval have been met in relation to the making of the decision.

same onerous processes and, therefore, the same time impacts and costs, on an ILUA to surrender native title and an ILUA to validate the grant of a licence for an asset protection zone.¹⁵²

3.138 The problem that the ALRC has identified is that the consultation and consent processes require PBCs to invest significant time and resources and involve significant costs. This can in turn delay future act validation and have costs implications for any grantee party that has agreed to contribute to the native title party's negotiation costs.¹⁵³ First Nations Bailai, Gurang, Gooreng Gooreng, Taribelang Bunda People Aboriginal Corporation RNTBC reflected:

The cost associated with authorisation meetings is an onerous burden on PBCs and limits their ability to communicate with common law holders effectively. Further, the time associated with organising such meetings means delays in providing consent in a timely manner to time sensitive commercial projects.¹⁵⁴

3.139 This means that the process of agreement-making has the potential to be costly and time-intensive regardless of the nature of the future act in question.¹⁵⁵ For lower-impact future acts in particular, the time and cost can discourage agreement-making.

Expanding the availability of standing instructions

Recommendation 5

1. The *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) be amended to allow Prescribed Bodies Corporate to use standing instructions to enter into future act agreements (subject to compliance with any conditions imposed by the common law holders), provided that the future act agreed to under such agreements is not an act that extinguishes native title.
2. These amendments be accompanied by further amendments to either or both of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) which the Australian Government, in consultation with relevant stakeholders, determines for the purpose of identifying appropriate mechanisms for providing common law holders with oversight over the exercise of standing instructions by the Prescribed Body Corporate.

¹⁵² Law Council of Australia, *Submission 47*.

¹⁵³ See, eg, Kimberley Land Council, *Submission 26*; State of Queensland, *Submission 43*.

¹⁵⁴ First Nations Bailai, Gurang, Gooreng Gooreng, Taribelang Bunda People Aboriginal Corporation RNTBC, *Submission 147*. See also Minerals Council of Australia, *Submission 113*.

¹⁵⁵ See, eg, Kimberley Land Council, *Submission 26*; Law Council of Australia, *Submission 47*.

3.140 **Recommendation 5** provides that *PBC Regulations* should be amended to expand the use of standing instructions to allow a PBC to rely on standing instructions to enter into a future act agreement. **Recommendation 5** then provides that this amendment to the *PBC Regulations* must be accompanied by a further set of amendments, to either the *PBC Regulations* or the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) ('CATSI Act'), or both, that set out an appropriate oversight regime to protect the native title rights and interests of common law holders where these standing instructions are used. In relation to potential further amendments, the ALRC recommends that the Australian Government develop recommendations for reform in consultation with relevant stakeholders, which should include PBCs, common law holders, and Native Title Representative Bodies and Service Providers ('NTRB/SPs').

3.141 **Recommendation 5** aims to address an issue identified in relation to consultation and consent, which is that the process can be costly and inefficient, to the detriment of agreement-making. The ALRC acknowledges that this recommendation deals with complex questions as to the extent to which a PBC can act on behalf of common law holders while ensuring that common law holders are consulted with, and consent to, decisions that affect their native title rights and interests.

3.142 As discussed below, implementing **Recommendation 5** carries risk in striking the right balance between greater efficiency and ensuring proper protection of native rights and interests. This recommendation aims to ensure that any reform to standing instructions that may offer lower costs and improved efficiencies must also ensure the native title rights and interests of common law holders are appropriately protected. **Recommendation 5** should only proceed if an appropriate oversight mechanism that provides sufficient safeguards for common law holders can be developed and implemented (some options for which are discussed further below).

3.143 **Recommendation 5** has been developed from Proposal 1 in the Discussion Paper. Feedback to Proposal 1 was generally supportive, with submissions citing that benefits may include increased flexibility and reduced cost and time associated with negotiating an agreement.¹⁵⁶ A large proportion of feedback provided qualified support to the proposal, supporting the proposal in principle but highlighting that adequate safeguards must accompany any expansion of standing instructions in order to protect the fundamental need for consultation and consent regarding the

156 See, eg, M Lucas, *Submission 57*; Houston Legal & Consultants, *Submission 95*; North Queensland Land Council, *Submission 96*; AgForce Queensland Farmers Ltd, *Submission 111*; Minerals Council of Australia, *Submission 113*; National Farmers' Federation, *Submission 114*; Western Australian Government, *Submission 115*; First Nations Legal and Research Services, *Submission 146*; First Nations Bailai, Gurang, Gooreng Gooreng, Taribelang Bunda People Aboriginal Corporation RNTBC, *Submission 147*; Yamatji Marlpa Aboriginal Corporation, *Submission 148*; Northern Territory Government, *Submission 149*; Kimberley Land Council, *Submission 151*; State of Queensland, *Submission 152*; Parallax Legal, *Submission 157*.

decision to enter into an ILUA or section 31 agreement.¹⁵⁷ This feedback has been taken into consideration in developing the matters that could be included in an oversight mechanism outlined below.

3.144 Other concerns included the limits of the ability for a PBC to speak for the common law holders, and in particular the risk of excluding some native title holders' views.¹⁵⁸ These concerns are best resolved by each group of native title holders that seek to implement standing instructions, as different groups are likely to have different approaches.

Availability of standing instructions

3.145 The current limitations of standing instructions have previously been criticised by the Law Council of Australia:

The benefit of standing instructions is that they can set out a consultation mechanism for seeking the consent of the common law holders for all types of decisions. The limitation to low level decisions and decisions benefiting the PBC is, in the Law Council's view, unnecessary.¹⁵⁹

3.146 Broader availability of standing instructions could reduce time and cost because, for a future act agreement for which standing instructions have been given by the common law holders, a PBC would not need to undertake and fund (or find a source, generally the proponent, to fund) an individual consultation and consent process. This could allow PBCs and common law holders to make decisions in a shorter timeframe and for less cost in appropriate circumstances.

3.147 In its submission, Houston Legal & Consultants observed that the consultation and consent obligation necessarily intersects with resourcing pressures:

[T]here should be an acceptance by Government as part of their consideration of reform that by imposing very strict consultation and consent requirements on RNTBCs on top of the other factors such as lack of funding for RNTBC, weak and significantly time constrained procedural rights and the cultural and logistical complexity around collective decision making are factored in, they are putting a substantial and often unreasonable burden on native title parties and placing them in a close to impossible position to comply. This needs to be recognised and addressed as one of major barriers inhibiting the application of the future act provisions for native title parties and proponents.¹⁶⁰

157 See, eg, M Lucas, *Submission 57*; Maddocks, *Submission 62*; National Native Title Tribunal, *Submission 86*; Western Australian Government, *Submission 115*; Australian Human Rights Commission, *Submission 118*; Law Council of Australia, *Submission 120*; Queensland South Native Title Services, *Submission 124*; NSW Bar Association, *Submission 140*; Local Government Association of the Northern Territory, *Submission 143*.

158 Local Government Association of Queensland, *Submission 108*.

159 Law Council of Australia, Submission to Attorney-General's Department (Cth), *Exposure Drafts of the Native Title Legislation Amendment Bill 2018 and the Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018* (19 December 2018) [62].

160 Houston Legal & Consultants, *Submission 95*.

3.148 Yamatji Marlpa Aboriginal Corporation observed in its submission that

any amendment to the NTA and the Native Title (Prescribed Bodies Corporate) Regulations 1999 (Cth) (Regulations) must carefully balance the need for streamlined PBC operations against the essential requirement to protect common law holders' rights. The challenge lies in reducing the 'excessive red tape' that burdens PBCs especially those with limited resources, without compromising the authority and comfort of common law holders.¹⁶¹

3.149 As discussed below, **Recommendation 5** provides that any amendment of the *PBC Regulations* to broaden the use standing instructions must be accompanied by further amendments that establish an appropriate oversight mechanism in order to strike this balance.

3.150 In providing standing instructions, common law holders should be able to place conditions both on the use of instructions (for example, that the instructions can only be relied on in particular circumstances or for a future act of a particular class or size) and also on the future act agreement that is the subject of the instructions (for example, terms that the agreement must contain).

3.151 Guidelines may usefully be developed by the Australian Government, or a body such as the National Native Title Council, to aid common law holders in making an informed decision about the content of standing instructions. These guidelines might include matters that should be considered for inclusion, such as instructions and important information about safeguards.

3.152 The ALRC considers that there is an opportunity for even greater efficiencies where the standing instructions provided by the common law holders includes a template agreement. Where a template agreement has been authorised by the common law holders, parties would not need to expend substantial negotiation costs. Such template agreements could be used for future acts where the activities proposed, impact on native title rights and interests, and the conditions to be included in the agreement are relatively standard.

3.153 When a PBC uses standing instructions for an ILUA or a section 31 agreement, it should be required to certify, as part of the Regulation 9 certificate it must already prepare,¹⁶² that the decision to enter that agreement has been made in accordance with standing instructions. Where an ILUA or section 31 agreement has been entered into using standing instructions, then that use should be noted in the entry of that agreement on either the Register of ILUAs or record of section 31 agreements. It may be useful to capture this information in the way that the record of section 31 agreements captures the existence of ancillary agreements in connection with the head agreement, which is by answering the question of whether there is an ancillary agreement either in the affirmative or negative. This requirement would

¹⁶¹ Yamatji Marlpa Aboriginal Corporation, *Submission 148*.

¹⁶² A Regulation 9 certificate is prepared by a PBC to certify that it has discharged its consultation and consent obligations in relation to a particular native title decision: *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) reg 9.

promote transparency for both the common law holders and the users of the native title system more generally regarding the use of standing instructions. This may require amendment to the standard form Regulation 9 certificate.

3.154 In developing **Recommendation 5**, the ALRC has considered what safeguards would be a justified intervention on an otherwise unlimited exercise of the right to self-determination by common law holders in deciding the scope of standing instructions. As Nick Duff observes,

a general desire to protect a group (particularly a group without much familiarity with the details of the Australian legal system) does not explain why a group's explicit and informed decision to ... pre-decide certain categories of decision should not be respected.¹⁶³

3.155 The ALRC considers that standing instructions should not be used for future act agreements that have the effect of extinguishing native title. This is a justified limitation on the common law holders' right to self-determination because it protects native title rights and interests from being extinguished without the protections that currently apply when making an ILUA. The ALRC considered whether it would be appropriate to further limit the types of acts for which standing instructions could be given, however we were unable to identify a principled basis for doing so. Aside from those acts that would extinguish the native title rights and interests, the ALRC is of the view that the types of future acts for which standing instructions can be given is a matter best decided by the particular native title holders in furtherance of their right to self-determination.

Oversight and safeguards

3.156 **Recommendation 5** also provides that amendments to expand the use of standing instructions must be accompanied by further amendments to either or both of the *PBC Regulations* and *CATSI Act* that provide common law holders with appropriate oversight of the use of standing instructions by their PBC. An appropriate oversight mechanism is important to protect the native title rights and interests of common law holders, but also to ensure that PBCs can rely on the standing instructions given and other parties to the agreement have certainty about the scope and veracity of standing instructions. As discussed above, these further amendments should be developed by the Australian Government in consultation with PBCs, common law holders, NTRB/SPs, and any other relevant stakeholders. Appropriate measures should ensure that:

- standing instructions remain current and continue to enjoy the support and consent of common law holders;
- common law holders have transparency about the use of standing instructions and are informed about the future act agreements that are entered into on their behalf; and

163 Nick Duff, *Authorisation and Decision-Making in Native Title* (AIATSIS Research Publications, 2017) 232.

- common law holders have appropriate opportunities to revoke or place conditions on standing instructions.

3.157 The ALRC considers that the oversight mechanism may include some of the following elements:

- A requirement that standing instructions are reviewed by common law holders on a regular basis.¹⁶⁴ This review could be undertaken annually or at some other regular interval. In circumstances where all common law holders are PBC members and attend the PBC's Annual General Meeting, this review could be carried out at that meeting. However, there is no requirement for common law holders to be PBC members and so reviewing and affirming standing instructions at Annual General Meetings would not be appropriate in all circumstances. In reviewing standing instructions, common law holders should have the opportunity to revoke or place conditions on the standing instructions. The justification for requiring regular review is to ensure that standing instructions are current and continue to reflect the consent of the common law holders.
- A requirement that common law holders are notified about the proposed use of standing instructions prior to the PBC entering into a future act agreement, as well as being provided with details about that agreement, to the extent that this is reasonable. The justification for requiring notification is to ensure that common law holders, as the providers of standing instructions, are informed of the proposed use of such instructions. This would ensure that common law holders know what future acts are proposed to be done on their determination area, and that they have oversight over whether standing instructions are being correctly used for appropriate future acts. Such a requirement may be qualified so that it only applies in relation to certain future act agreements.
- The opportunity for common law holders to, following receipt of notice of the proposed use of standing instructions, have a reasonable period of time in which they may take action to prevent the PBC from relying on the standing instructions in certain circumstances, and instead requiring the PBC to undertake consultation and consent for a particular agreement.¹⁶⁵ The justification for this is to provide common law holders with the opportunity to prevent or condition the use of standing instructions where the future act agreement proposed by the PBC does not align with common law holders' views on the correct use of the standing instructions.
- A requirement for the PBC to report on the use of standing instructions on a regular basis, for example, in its annual report. The justification for requiring the PBC to report on the use of standing instructions is to promote transparency

¹⁶⁴ Some submissions expressly supported time-limiting standing instructions: see, eg, M Lucas, *Submission 57*; Queensland South Native Title Services, *Submission 124*.

¹⁶⁵ The need for a trigger to bring particular future acts back before the common law holders was highlighted in some submissions: see, eg, Law Council of Australia, *Submission 120*; NSW Bar Association, *Submission 140*; First Nations Bailai, Gurang, Gooreng Gooreng, Taribelang Bunda People Aboriginal Corporation RNTBC, *Submission 147*.

for common law holders about the use of standing instructions and the nature of the agreements entered into in reliance on those instructions.

3.158 Transparency for common law holders as to the use of standing instructions is also further addressed in **Recommendation 23** by requiring PBCs to keep copies of future act agreements, including those entered into using standing instructions, at their registered office and to make copies of these agreements (and an accessible summary) available to common law holders.

PBC future acts

Recommendation 6

The *Native Title Act 1993* (Cth) be amended to provide that, for a future act where the Prescribed Body Corporate for the land and waters of the future act is the proponent, and where the future act does not require as a procedural right either negotiation or agreement by the Prescribed Body Corporate, the future act is valid (with the Prescribed Body Corporate remaining subject to the obligations to native title holders under the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth)).

Recommendation 7

The *Native Title Act 1993* (Cth) be amended to provide that, for a future act where the Prescribed Body Corporate for the land and waters of the future act is the proponent, where the future act requires as a procedural right either negotiation or agreement by the Prescribed Body Corporate, including an indigenous land use agreement, then consistently with the approach taken by the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth), the Prescribed Body Corporate be required to:

- a. where the common law holders have provided standing instructions as currently permitted under the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth), comply with those standing instructions;
- b. where there are no standing instructions in place, consult with and obtain the consent of the native title holders; and
- c. provide a certificate to the Native Title Registrar certifying that it has complied with the applicable process in either (a) or (b) of this Recommendation, and such certificate is recorded in accordance with Recommendation 8.

Recommendation 8

Where a Prescribed Body Corporate lodges a certificate with the Native Title Registrar in line with Recommendation 7, the Registrar must place details about the certificate on a publicly available record. The record should confirm the Prescribed Body Corporate details, a description of the area covered by the certificate, and the future act or class of acts covered by the certificate.

3.159 The *NTA* currently requires that all future acts must be validated in accordance with the future acts regime, even where the proponent of the future act is the native title holders for the area through their authorised representative (the PBC). This is an oddity and the ALRC does not consider it to be an appropriate feature of the *NTA*. In effect, it means the *NTA* is contemplating that the common law holders are infringing their own native title rights and interests and that such infringement must be validated in the same way as infringements on native title by governments and other proponents. There is no equivalent requirement or process in relation to freehold title.

3.160 The *NTA* does not currently provide for any streamlined or bespoke opportunities for PBCs to carry out future acts. The ALRC has heard that there is a need for amendments to recognise the special circumstances where a PBC on behalf of native title holders proposes to do or benefit from a future act in the relevant determination area.¹⁶⁶ Further, international law recognises the rights of Indigenous peoples ‘to determine and develop priorities and strategies for the development or use of their lands or territories or other resources’.¹⁶⁷

3.161 The objective of these reforms is to address the oddity identified, as well as to increase economic development opportunities for native title holders by removing obstacles for PBCs to undertake future acts. Relevantly, the Terms of Reference ask the ALRC to consider:

- ‘options for efficiencies in the future acts regime to reduce the time and cost of compliance for all parties’; and
- ‘options to support native title groups, project proponents and governments to share in the benefits of development on native title land, including opportunities for native title groups to lead or co-lead development’.

3.162 This feature of the *NTA* identified above has led to difficulties in practice. In particular, it has led to a requirement that the procedural rights attaching to future acts and the obligations that are imposed on the proponent (and afforded to the PBC) are obligations which are also effectively required to be imposed on the PBC.

¹⁶⁶ See, eg, Kimberley Land Council, *Submission 26*; National Native Title Tribunal, *Submission 86*; North Queensland Land Council, *Submission 96*; Kimberley Land Council, *Submission 151*; State of Queensland, *Submission 152*.

¹⁶⁷ UNDRIP art 32.

In other words, the proponent must afford to itself the procedural rights. This is both irrational and unnecessary and should not be a requirement.

3.163 **Recommendation 6** provides that the *NTA* should simply validate any future act where the PBC is the proponent and the procedural rights for the future act do not, under the *NTA*, require either negotiation with or agreement of the native title holders. The framework for decision-making in relation to low level decisions in the *PBC Regulations* would provide an appropriate safeguard mechanism for the common law holders to control whether their PBC can propose a future act that does not require negotiation or an agreement, and the terms on which such future act can be done.¹⁶⁸

3.164 For future acts that require an ILUA, part of the problem in practice is that where an ILUA applies to an area where native title has been determined to exist, the PBC is a mandatory party to the ILUA. The counterparty to the ILUA is normally the proponent or government party, or both. However, where the proponent of the future act is the PBC and the government party is not party to the ILUA, the PBC must fulfil two roles: the representative of the common law holders (with the accompanying statutory and regulatory obligations) as well as the future act proponent.

3.165 Making ILUAs in this way can be cumbersome for PBCs.¹⁶⁹ It may also be invalid. We have heard concerns that a PBC, as a single entity, cannot contract with itself (in the absence of there being another party to the agreement).¹⁷⁰ This means that currently, if a PBC executes an agreement as party and counterparty, the Native Title Registrar may decline to register the agreement, meaning the PBC cannot proceed with the future act.

3.166 For these reasons, for future acts that require negotiation or agreement, **Recommendation 7** sets out an amended procedure. The ALRC considers that this procedure should have an appropriate safeguard to protect common law holders. The 'high level decisions' provisions of the *PBC Regulations* provide such an appropriate safeguard, which is the requirement for the PBC to consult with and obtain the consent of the common law holders.¹⁷¹ This provides the common law holders with the opportunity to override the PBC in undertaking the future act. To ensure that the PBC complies with the prescribed requirements, the PBC should certify that the consultation and consent process has been completed, and such certification should then be required to be provided to the Native Title Registrar for record keeping.

168 The framework for low level native title decisions is set out at *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) regs 8, 8A.

169 See, eg, North Queensland Land Council, *Submission 96*; Gunggandji-Mandingalbay Yidinji Peoples Prescribed Body Corporate Aboriginal Corporation RNTBC, *Submission 161*.

170 Gunggandji-Mandingalbay Yidinji Peoples Prescribed Body Corporate Aboriginal Corporation RNTBC, *Submission 161*.

171 The framework for high level native title decisions is set out at *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) reg 8.

3.167 Currently, body corporate ILUAs require the NTRB/SP for the area to be a party to the ILUA or to be informed about the ILUA before it is entered into.¹⁷² The apparent purpose of this provision is a safeguard to ensure a level of oversight as to whether proper processes have been followed by the PBC.¹⁷³ Similar requirements could be replicated for the certificates discussed above so as to require that PBC notify the NTRB/SP of its intention to lodge a certificate.

3.168 The ALRC has been unable to assess the effectiveness of the notice requirement for body corporate ILUAs as an oversight measure, and so has not included this as part of the recommendation. If it were thought necessary, such a notice requirement could provide an additional layer of oversight of a PBC's conduct and be a potential means of obtaining assistance to ensure compliance with statutory and regulatory requirements in the interests of common law holders.

3.169 Once the certificates are lodged with the NNTT, **Recommendation 8** requires the Registrar to place details of the certificate on a newly created record of PBC future act certificates. The reason for using a record, and not a register, is that these certificates should not need to undergo a registration test. The details to be placed on the record listed at **Recommendation 8** have been drawn from the relevant information that is currently placed on the Register of ILUAs.¹⁷⁴ The rationale for this requirement is to provide a publicly available record of the existence of the certificate and some limited information about the future act, thereby promoting transparency and accountability. It is consistent with other mechanisms across the *NTA* that create public records and registers about native title and future acts, including the Register of ILUAs and record of section 31 agreements.¹⁷⁵

3.170 The ALRC has also considered whether there may be a streamlined mechanism to facilitate future acts — distinct from the exercise of particular native title rights and interests — by an individual native title holder. One of the difficulties with granting streamlined rights to individuals within a native title holding group is a risk that the aspirations of an individual native title holder acting as a proponent could encumber or encroach on the native title rights and interests of the native title holders as a collective. The ALRC has not presently been able to identify appropriate safeguards and so has not made a recommendation about this. This may be a matter for future consideration, keeping in mind the collective nature of native title rights and interests and the importance of common law holders providing informed consent to future acts.

172 *Native Title Act 1993* (Cth) s 24BD(4).

173 Commonwealth, *Parliamentary Debates*, Senate, 28 November 1997, 9782 (Dee Margetts).

174 *Native Title Act 1993* (Cth) s 199B(1). The requirement to specify the period of the agreement has not been carried over to this record, as a certificate will not operate for a period of time.

175 It is also consistent with other recommendations of this Report that seek to create other public records of future acts in order for greater transparency about the system: see **Recommendations 19** and **58**.

Ancillary agreements

Recommendation 9

Regulation 9 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) be amended to require that when:

- a. a Prescribed Body Corporate prepares a Regulation 9 Certificate under the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) certifying that it has consulted and obtained consent in relation to a native title decision;
- b. the native title decision subject to consultation and consent is the decision to enter an indigenous land use agreement or agreement under section 31 of the *Native Title Act 1993* (Cth); and
- c. an ancillary agreement has been negotiated,

the Regulation 9 certificate must specify that the Prescribed Body Corporate has also discharged its consultation and consent obligations in relation to that ancillary agreement.

Recommendation 10

Part 2 Division 3 Subdivision C of the *Native Title Act 1993* (Cth) be amended to require that where the native title party to an area agreement indigenous land use agreement is a registered native title claimant or a group as defined by s 24CD, the native title group must consider the terms of any ancillary agreement to that area agreement indigenous land use agreement when authorising it.

3.171 Ancillary agreements have been described as a ‘key feature of the agreement-making landscape’,¹⁷⁶ and are often negotiated alongside an ILUA or section 31 agreement. The ability to negotiate such an agreement is expressly contemplated in the *NTA*, which requires agreement parties to identify to the Registrar whether there is any ancillary agreement when they are providing an ILUA for registration or a section 31 agreement for placing on the record.¹⁷⁷

3.172 Ancillary agreements are, in many cases, ancillary in name only. These agreements are not necessarily insignificant or subsidiary. They often contain substantive terms, such as financial benefits and other forms of consideration for the consent provided by native title parties for the doing of the future act that is the

176 Miranda Stewart, Maureen Tehan and Emille Boulot, *Transparency in Resource Agreements with Indigenous People in Australia* (Agreements, Treaties and Negotiated Settlements Project Working Paper No 4, 2015) 27.

177 *Native Title (Indigenous Land Use Agreements) Regulations 2024* (Cth) reg 7(2)(e); *Native Title Act 1993* (Cth) s 41A(1)(c).

subject of the head agreement (being the ILUA or section 31 agreement). The terms of these ancillary agreements are terms of the same negotiation as that dealt with by the head agreement.

3.173 The ALRC has heard that there are a number of reasons why parties may use an ancillary agreement, including:

- Ancillary agreements are used by parties for flexibility to include matters that may require review and amendment after the agreement has been registered (for example, project plans). This flexibility is desired because re-registering an ILUA for amendments beyond those provided for in s 24ED(1) of the *NTA* may be overly onerous and expensive.
- For section 31 agreements, the nature of the head agreement (and approach by some states or territories) sometimes necessitates ancillary agreements. Section 31 agreements are signed by the relevant state or territory, the grantee party, and the native title party. John Southalan, Kat Perincek and Raelene Webb explain that the 'typical scenario' for section 31 agreements leads to the execution of two contracts, because of the involvement of the state (and the fact that some states insist that parties sign a template deed):

Where there is agreement, the usual contracts are:

(a) a short deed between the group, the company and the government - documenting the group's consent to the government's grant and various actions of the company pursuant to that grant (these are known as a 's 31 deed', 'state deed' or similar); and

(b) an ancillary agreement – between the company and the group – with more about the arrangements between them, such as heritage management, compensation and other benefits, and which requires the execution of the relevant s 31 agreements.¹⁷⁸

- Ancillary agreements are often confidential between the parties to that agreement. This is seen as advantageous by many native title parties and proponents.

3.174 Despite these benefits, there is a lack of transparency around ancillary agreements. Unlike ILUAs and section 31 agreements, the existence of ancillary agreements made in relation to ILUAs is not on a public record.¹⁷⁹ This gives rise to two potential risks for native title holders or claimants: first, that they are not aware of the existence of an ancillary agreement, and second, that they may not be aware of the terms of the agreement.

¹⁷⁸ John Southalan, Kat Perincek and Raelene Webb, 'Contracts and Native Title' (2024) 43(2) *Australian Resources and Energy Law Journal* 1, 7.

¹⁷⁹ The existence of ancillary agreements negotiated in connection with a section 31 agreement appears on the record of section 31 agreements.

3.175 To some extent, this lack of transparency is dealt with by **Recommendation 17** in **Chapter 5** which requires information about the existence of ancillary agreements to be placed on both the Register of ILUAs and record of section 31 agreements. This issue is also dealt with by **Recommendation 23** which requires the PBC to keep copies of ancillary agreements at their registered office and make a high-level summary of agreements available to common law holders while remaining in compliance with any confidentiality obligations under the agreement.

3.176 However, a second and significant issue is the lack of informed consent. If, when the consent of native title holders or claimants is sought, those persons are only provided with the details of the head agreement (whether an ILUA or section 31 agreement), their consent is not informed by reference to the entirety of the agreement reached.

3.177 **Recommendations 9** and **10** deal with this issue by ensuring that the consent provided by the broader native title claim group or native title holders to the registered native title claimant or PBC to enter an ILUA or section 31 agreement extends to considering the terms of any ancillary agreement. The recommendations cover, to the extent possible, agreements pre- and post- determination:

- **Recommendation 9** deals with how PBCs must ensure that common law holders provide informed consent to ancillary agreements to both ILUAs and section 31 agreements by amending the *PBC Regulations*.
- **Recommendation 10** deals with how members of a native title claim group can provide informed consent to a pre-determination ILUA.

3.178 These recommendations do not deal with section 31 agreements negotiated pre-determination. This is because in relation to these agreements, s 62A of the *NTA* provides that an applicant ‘may deal with all matters arising under this Act’ in relation to the native title claim once authorised by the broader group.

3.179 The broader group of native title holders or claim group (whether the common law holders in the case of a PBC, or the group represented by the registered native title claimant pre-determination) should have the opportunity to give their informed consent to entering into an ILUA or section 31 agreement. Where there is an ancillary agreement to that head agreement, and it includes substantive terms, it follows that this consent can only be properly informed when all of the terms upon which the consent for the doing of the future act is to be given, are known and understood by the common law holders or the members of the claim group.

3.180 Though ancillary agreements often deal with matters beyond native title,¹⁸⁰ by their definition in the *NTA* they are negotiated in connection with the doing of the future act to which the head agreement relates. Therefore, it is important in upholding free, prior, and informed consent that common law holders have awareness of the entirety of the proposed agreement.

180 Association of Mining and Exploration Companies, *Submission 97*.

4. Future Act Agreement Content

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Introduction

4.1 This chapter is the second of three chapters in this Report containing recommendations for reform relating to future act agreements. This chapter focuses on reforms that relate to the content of agreements. It builds on the recommendations relating to agreement-making discussed in [Chapter 3](#).

4.2 If implemented, the six recommendations in this chapter would improve the fairness and equity of future act agreements and clarify the interaction between agreements and statutory compensation. This reflects the task that the Terms of Reference set the ALRC. That is, to ‘support fair negotiations and encourage proponents and native title groups to work collaboratively in relation to future acts’ and to consider the operation of the future acts regime ‘with the aim of rectifying any inefficacy, inequality or unfairness’ in the operation of ILUAs and related provisions. In relation to the statutory compensation recommendations in this chapter, the ALRC has been asked to consider options ‘for ensuring native title groups receive commensurate and timely compensation’.

4.3 This chapter is in four parts. The first part provides context for the reforms contained in this chapter. The second part introduces content standards, and discusses how the content standards recommended by the ALRC further the goals of future act agreement-making. The third and fourth parts discuss reforms relating to statutory compensation, including the interaction between ILUAs and compensation as well as which party is liable for that compensation.

This chapter in context

4.4 **Chapter 3** outlined the background to future act agreement-making and focused on reforms relating to the process of reaching agreement. This chapter focuses on reforms that more closely relate to the content of the agreements themselves. Clearly, the nature of negotiations and the content of agreements are interrelated.

4.5 Freedom to contract is a fundamental part of the consensual nature of contractual relations. The concept consists of two limbs: first, parties are generally free to decide whether to contract with each other; and secondly, parties are generally free to negotiate the terms on which they contract.

4.6 It is relatively common for the law to place limitations on the second limb by prohibiting certain terms or providing that agreements must address particular matters. This is because contractual theories are predicated on an assumption that the parties enter contracts for business purposes, are happy to litigate disputes in court, and have equal bargaining strength.¹ Where this is not the case, remedial legislation often steps in to provide protection. For example, consumer law provides protections against certain exclusion clauses, as well as unconscionable and unfair contract terms.² The High Court has observed that

this pattern of remedial legislation suggests the need for caution in dealing with the unwritten law as if laissez faire notions of an untrammelled ‘freedom of contract’ provide a universal legal value.³

4.7 Freedom to contract is also a concept that usually applies to common law contracts. Future act agreements are statutory contracts.⁴ Statutory contracts are commonly subject to limitations imposed by the relevant statute.⁵

4.8 This chapter discusses reforms that would impact parties’ freedom to contract in relation to five matters in future act agreements. In summary, they would do this by:

- prohibiting clauses which have the effect of limiting or restricting native title parties from raising grievances, exercising rights, accessing remedies under the law, or disclosing information to authorities, being clauses sometimes referred to as ‘gag clauses’ (**Recommendation 11**);
- prohibiting clauses that limit or restrict how native title parties can administer or manage payments received under agreements (**Recommendation 12**);

1 See LexisNexis, *Halsbury’s Laws of Australia* (at 24 April 2025) [110–25]. See also JW Carter, *Contract Law in Australia* (LexisNexis Butterworths, 6th ed, 2013) 11–13.

2 See, eg, *Competition and Consumer Act 2010* (Cth) sch 2 ss 23–28A, 64, 64A (‘*Australian Consumer Law*’).

3 *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205 [5].

4 See further discussion of future act agreements as statutory contracts in **Chapter 11**.

5 For example, the *Fair Work Act 2009* (Cth) imposes limitations on the content of enterprise agreements, another form of statutory contract: see *Fair Work Act 2009* (Cth) pts 2–4.

- requiring that certain future act agreements contain a periodic review clause ([Recommendation 13](#));
- requiring that future act agreements contain a dispute resolution clause ([Recommendation 14](#)); and
- affecting the ways that parties can deal with compensation liabilities in future act agreements ([Recommendations 15 and 16](#)).

4.9 The recommendations in this chapter are generally intended to apply to all future act agreements (including ancillary agreements), unless expressed otherwise. As outlined in [Chapter 1](#), there are currently two main types of agreements provided for in the *Native Title Act 1993* (Cth) ('NTA') that can validate a future act: the first is an ILUA and the second is a section 31 agreement.⁶ [Recommendation 33](#) in [Chapter 6](#) of this Report contemplates the creation of a new type of agreement, presently labelled a 'low impact agreement', that may be employed within the impact-based scheme recommended in [Chapter 6](#). [Recommendation 48](#) in [Chapter 7](#) also recommends adoption of a 'low impact agreement' as part of the recommended reforms to Part 2 Div 3 Subdivision L of the NTA. If implemented, 'low impact agreements' are generally intended to be captured by the ALRC's recommendations relating to future act agreements.

Content standards

4.10 By prohibiting and mandating certain content in future act agreements, the recommendations in this part are intended to achieve various goals: addressing some harsh or unconscionable effects that may arise from an inequality in bargaining positions between parties; facilitating dispute resolution; and better aligning future act agreements with the objectives of the future acts regime and the NTA.

4.11 Through the Discussion Paper, the ALRC sought feedback on several potential content standards for agreements.⁷ Much of the feedback through submissions and consultations recognised the potential for content standards to further the goals outlined above. However, feedback also consistently expressed a concern that overly prescriptive content standards reduce flexibility in negotiations.⁸ As Yamatji Marlpa Aboriginal Corporation explained in its submission, mandatory content standards should not 'be so rigid that they restrict native title parties from making their own commercial decisions'.⁹ Similarly, the Central Land Council explained that it supported some of the proposed content standards, but not those 'where parties

6 As outlined in [Chapter 3](#), ILUAs are provided for under *Native Title Act 1993* (Cth) pt 2 div 3 subdivs B, C, D, and agreements pursuant to s 31. The NTA also provides for other forms of agreements, such as in s 24MD(2A).

7 Australian Law Reform Commission, *Review of the Future Acts Regime* (Discussion Paper No 88, 2025) [74]–[76], [85]–[89].

8 See, eg, Association of Mining and Exploration Companies, *Submission 97*; Local Government Association of Queensland, *Submission 108*; AgForce Queensland Farmers Ltd, *Submission 111*; New South Wales Government, *Submission 159*.

9 Yamatji Marlpa Aboriginal Corporation, *Submission 148*.

can agree legitimate and useful terms' because 'imposing constraints would make it more difficult for mutually workable agreements to be negotiated'.¹⁰

4.12 We heard in consultations and submissions that, if too rigid or prescriptive, content standards could lead to over-standardisation, or even a 'race to the bottom', rather than allowing parties to reach creative or lateral solutions to meet native title parties' needs and promote best practice negotiation.¹¹ Restricting the parties' ability in this way would disadvantage native title parties, and undermine efforts to support fair negotiations. Reform should therefore balance a desire to create protective mechanisms against a desire for flexibility when conducting commercial negotiations.¹²

4.13 Overprescription also risks putting an undue focus on compliance with standards at the expense of seeking mutually beneficial outcomes.¹³ As the New South Wales Government explained in its submission, there is

a risk that mandatory content and conduct standards under the *NTA* could be overly prescriptive, such that they focus resources on compliance rather than outcomes, and may not be sufficiently flexible to facilitate diverse negotiations. Standards would need to be sufficiently inclusive and flexible to be able to recognise the unique rights, interests, aspirations and location of each native title group.¹⁴

4.14 The recommendations in this part aim to balance the importance of preserving flexibility and the capacity for parties to freely contract against the importance of providing protective measures to address inequality in bargaining positions, improving the efficacy of agreements, and enhancing the objects of the future acts regime and the *NTA*.

10 Central Land Council, *Submission 121*.

11 See, eg, M Boge, *Submission 76*; North Queensland Land Council, *Submission 96*; Association of Mining and Exploration Companies, *Submission 97*; Local Government Association of Queensland, *Submission 108*; AgForce Queensland Farmers Ltd, *Submission 111*; Queensland South Native Title Services, *Submission 124*.

12 See, eg, Central Land Council, *Submission 121*; P&E Law, *Submission 128*.

13 New South Wales Government, *Submission 159*.

14 Ibid.

Clauses that limit or restrict rights and remedies

Recommendation 11

The *Native Title Act 1993* (Cth) be amended to provide that:

1. Subject to the exemptions in (2)–(5) below, any term or clause in a future act agreement which has the effect of limiting or restricting a native title party from:
 - a. raising a grievance relating to the making or operation of the agreement, or the conduct of any party to it;
 - b. exercising rights and accessing remedies under the law, including under cultural heritage legislation; or
 - c. disclosing information about or in relation to the agreement to a governmental authority, any court, or tribunal;

is prohibited from inclusion in an agreement and is void and unenforceable to the extent it has that effect.

2. The prohibition not apply to the raising of a grievance where a grievance is not raised to protect a legitimate interest or is raised vexatiously.
3. The prohibition not apply to a term in so far as that term would limit or restrict the disclosure of commercially sensitive and confidential information which is recognised as such by the agreement and where the public interest in the non-disclosure of the information is not outweighed by the public interest in the information being disclosed in furtherance of a purpose identified in (1).
4. The prohibition not apply in relation to a dispute resolution process under the agreement.
5. The prohibition not apply to existing agreements but offending clauses in existing agreements should be rendered void and unenforceable.

4.15 If implemented, **Recommendation 11** would, in summary, prohibit the use of clauses in future act agreements that have the following effects:

- limit or restrict native title parties from exercising rights, raising grievances, or accessing remedies under the law, including under cultural heritage legislation; or
- prevent a native title party from disclosing information about or in relation to the agreement to a governmental authority, court, or tribunal.

4.16 **Recommendation 11** is a justified interference with freedom of contract in order to protect the fundamental rights of access to justice and freedom of expression of native title parties, in circumstances where inequality in bargaining positions may result in agreements containing terms that limit those rights. The experience of Juukan Gorge, outlined in **Chapter 2** and briefly below, highlights the irreparable harm that gag clauses are capable of causing, as well as the unconscionable character of their content.

4.17 It may not be uncommon for commercial contracts to contain clauses which restrict a party from accessing their legal rights, although there may be good public policy reasons why restrictions imposed on a person exercising their statutory rights or entitlements should be unlawful. Non-disparagement clauses are also not uncommon in commercial contracts, and such clauses can remove or restrict a party's capacity to raise a grievance in order to protect their legitimate interests.

4.18 Restrictions on a person's capacity to protect or assert their interests may well be defensible in a purely commercial setting and where the parties to the commercial contract are equally capable of protecting their legitimate interests. Public policy considerations, such as facilitating access to justice and freedom of expression, have a stronger role to play in non-commercial settings and where unconscionable or harsh outcomes can be a product of inequality in bargaining power.

4.19 The subject matter of future act agreements is commonly not purely commercial or economic in nature. Future acts may infringe economic rights, but may also infringe cultural and social rights and the capacity of native title parties to enjoy them. Inequality of bargaining power is a common feature of future act agreement negotiations, and may impede on the ability of native title parties to protect their economic, social, and cultural rights.

4.20 All of those features, as well as the important public policy considerations of access to justice and freedom of expression, justify a balance being struck between the objective of providing parties with freedom to arrive at their own contract and that of achieving fair outcomes consistent with the purposes of the future acts regime in the *NTA*.

4.21 This recommendation seeks to strike that balance. While such a balance may be better struck on a case-by-case basis, there is no practical mechanism by which that can be achieved. Accordingly, it is necessary for the law to strike the appropriate balance in a general way and apply it to all relevant cases.

4.22 The ALRC recognises that this recommendation may result in imposing a prohibition on clauses that were arrived at with informed consent, and free of coercion. The ALRC's view is that for the prohibition to be effective, the law must establish a clearly defined rule. However, the ALRC recognises that the prohibition may have consequences for how, and whether, agreements are reached, particularly future act agreements that contain terms addressing cultural heritage matters. In implementing this reform, the Australian Government should consult with state and territory governments (as well as native title parties) to determine how to ensure

that this reform does not have unintended consequences, such as disincentivising the making of agreements that may be made pursuant to the *NTA* that also satisfy the requirements of certain state and territory legislation, such as cultural heritage legislation.

Focusing on the effect of the clause

4.23 The ALRC heard strong support for prohibiting ‘gag clauses’ in submissions and consultations.¹⁵

4.24 **Recommendation 11** does not use the label ‘gag clauses’, and instead focuses on the effect of particular terms. This is because the expression ‘gag clause’ has no fixed meaning and is often used differently by different people. **Recommendation 11** captures three types of clauses identified during the Inquiry.

4.25 First, clauses in agreements can have the effect of restricting native title parties’ ability to access protections under other legislative regimes, such as cultural heritage legislation.¹⁶ This was a central issue in the two reports of the Joint Standing Committee on Northern Australia’s Inquiry into the destruction of 46,000-year-old caves at Juukan Gorge in the Pilbara region of Western Australia.¹⁷ In that Inquiry, the Claim Wide Participation Agreement between Puutu Kunti Kurrama and Pinikura Aboriginal Corporation (‘PKKP AC’) and Rio Tinto contained clauses that prevented PKKP AC from opposing any government approval that would result in Aboriginal sites being impacted, and from seeking protections under state and Commonwealth cultural heritage legislation to prevent damage to or destruction of cultural sites, unless PKKP AC first obtained Rio Tinto’s consent to do so.¹⁸ Submissions to that Inquiry from other native title holders in the Pilbara reported the existence of similar terms in their own agreements.¹⁹

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- 15 See, eg, ANTAR, *Submission 80*; Mabo Centre and National Native Title Council, *Submission 130*; First Nations Legal and Research Services, *Submission 146*; First Nations Bailai, Gurang, Gooreng Gooreng, Taribelang Bunda People Aboriginal Corporation RNTBC, *Submission 147*; Kimberley Land Council, *Submission 151*; Kyburra Munda Yalga Aboriginal Corporation RNTBC, *Submission 154*; South Australian Government, *Submission 156*; Parallax Legal, *Submission 157*.
 - 16 See generally Joint Standing Committee on Northern Australia, Parliament of Australia, *A Way Forward: Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge* (2021) [7.54]–[7.55].
 - 17 See, eg, Joint Standing Committee on Northern Australia, Parliament of Australia, *Never Again: Inquiry into the Destruction of 46,000 Year Old Caves at the Juukan Gorge in the Pilbara Region of Western Australia - Interim Report* (2020) [1.30], [1.38]; Joint Standing Committee on Northern Australia, Parliament of Australia (n 16) [3.66], [7.54]–[7.55], [7.87]–[7.89].
 - 18 Puutu Kunti Kurrama and Pinikura people, Submission No 129 to Joint Standing Committee on Northern Australia, Parliament of Australia, *Inquiry into the Destruction of 46,000 Year Old Caves at the Juukan Gorge in the Pilbara Region of Western Australia* (25 September 2020) 88–9; Joint Standing Committee on Northern Australia, Parliament of Australia (n 16) [2.118].
 - 19 See, eg, Wintawari Guruma Aboriginal Corporation, Submission No 50 to Joint Standing Committee on Northern Australia, Parliament of Australia, *Inquiry into the Destruction of 46,000 Year Old Caves at the Juukan Gorge in the Pilbara Region of Western Australia*; Banjima Native Title Aboriginal Corporation RNTBC, Submission No 89 to Joint Standing Committee on Northern Australia, Parliament of Australia, *Inquiry into the Destruction of 46,000 Year Old Caves at the Juukan Gorge in the Pilbara Region of Western Australia* (14 August 2020).

4.26 The Joint Standing Committee found that there had been 'systematic use' of this type of clause.²⁰ The Committee noted that

it is understood that this industry practice has been re-evaluated and a commitment made not to use these clauses as a general approach. This, however, is not the case across all jurisdictions and it is also not clear that this will be a certainty. As such, 'gag clauses' — which amount to prohibiting the exercise of right without the express consent of the proponent — should be prohibited at a Commonwealth, state and territory level.²¹

4.27 Recommendation 1 of the Committee's *Never Again* Interim Report recommended that Rio Tinto 'remove any gag clauses or restrictions on Traditional Owner rights under heritage and other laws'.²² Recommendation 3 of that report recommended that all mining companies operating in Western Australia, including those not operating on native title land,

issue public confirmation that they will not rely on gag clauses or clauses preventing Traditional Owners from exercising their rights under state and Commonwealth heritage laws and remove these clauses from their agreements with Traditional Owners.²³

4.28 The Committee's *A Way Forward* Final Report recommended that a review of the future acts regime specifically address whether 'clauses restricting Aboriginal and Torres Strait Islander peoples' access to Commonwealth heritage protections should be prohibited'.²⁴

4.29 Secondly, clauses may restrict native title holders' ability to raise grievances about an agreement, a project, or conduct of a party. This was another key issue in the Juukan Gorge Inquiry.²⁵ The Claim Wide Participation Agreement contained a series of clauses that restricted the type of comments PKKP AC could make, including comments that indicated that the PKKP AC opposed, did not support, or had not been adequately consulted by Rio Tinto about particular matters, and also prohibited PKKP AC from making adverse public comments about the project and Rio Tinto's business.²⁶

20 Joint Standing Committee on Northern Australia, Parliament of Australia (n 16) [7.87].

21 Ibid [7.55].

22 Joint Standing Committee on Northern Australia, Parliament of Australia (n 17) rec 1.

23 Ibid rec 3.

24 Joint Standing Committee on Northern Australia, Parliament of Australia (n 16) rec 4.

25 See, eg, Joint Standing Committee on Northern Australia, Parliament of Australia (n 17) [1.30], [1.38]; Joint Standing Committee on Northern Australia, Parliament of Australia (n 16) [3.66], [7.54]–[7.55], [7.87]–[7.89].

26 Puutu Kunti Kurrama and Pinikura people (n 18) [440]–[441].

4.30 Thirdly, clauses may have the effect of preventing native title parties from responding to requests for information by statutory bodies and government departments. First Nations Legal and Research Services explained in its submission to this Inquiry that these clauses

restrict the ability of the native title party to respond to requests for information by statutory bodies performing statutory functions, thereby frustrating the ability of the body to properly perform its function.²⁷

4.31 **Figure 4.1** below illustrates these three effects.

Figure 4.1: The effect of ‘gag clauses’ on native title parties

‘Gag clauses’ prevent native title parties from ...



4.32 Feedback to the ALRC indicated strong support for prohibiting clauses that would prevent native title parties from accessing protections or remedies under cultural heritage or other laws.²⁸

Interaction with other common agreement terms

4.33 By focusing on the effect of a contractual term, **Recommendation 11** is intended not to unreasonably interfere with parties’ ability to agree other commonly used and legitimate terms. **Recommendation 11** would not apply to dispute resolution processes established under future act agreements (see **Recommendation 14**). The processes established under dispute resolution clauses may act as a limit on accessing remedies. Dispute resolution clauses serve other important purposes, discussed further below.²⁹

27 First Nations Legal and Research Services, *Submission 42*.

28 See, eg, W Santo, *Submission 51*; Queensland South Native Title Services, *Submission 124*; Mabo Centre and National Native Title Council, *Submission 130*; First Nations Legal and Research Services, *Submission 146*; First Nations Bailai, Gurang, Gooreng Gooreng, Taribelang Bunda People Aboriginal Corporation RNTBC, *Submission 147*; Kimberley Land Council, *Submission 151*; Kyburra Munda Yalga Aboriginal Corporation RNTBC, *Submission 154*; Parallax Legal, *Submission 157*.

29 See discussion at paragraphs [4.61]–[4.70].

4.34 Confidentiality clauses are a standard element of future act agreements, and can play a role in protecting the interests of all agreement parties.³⁰

Recommendation 11 would not prevent the use of confidentiality clauses, but would act as a limitation on, or ‘carve out’ from, such clauses. It would do this by ensuring that a confidentiality clause, which would otherwise have the effect of preventing a native title party from raising a grievance, exercising rights, or accessing remedies (because to do so would require the disclosure of otherwise confidential information), does not have that effect. Confidentiality clauses may otherwise be used to protect legitimate confidentiality needs.

4.35 **Recommendation 11(3)** acknowledges that parties should be able to prevent the disclosure of commercially sensitive and confidential information. However, it also recognises a limitation on that ability where the public interest in disclosing information in furtherance of the purposes outlined in **Recommendation 11(3)** outweighs the public interest in maintaining confidentiality. This strikes a balance between maintaining confidentiality in the ordinary course but not preventing disclosure where it is necessary to protect other rights and interests.

4.36 **Recommendation 11(2)** also acknowledges that only grievances raised in furtherance of a legitimate interest, and not vexatiously, justify the protection that the proposed prohibition is intended to serve. The recommendation is not directed at prohibiting all forms of non-disparagement clauses. The recommendation recognises that non-disparagement clauses may have a legitimate purpose and can support the amicable resolution of disagreements directly between the parties.

Consent to prospective future acts

4.37 Many future act agreements contain clauses which provide for the unqualified consent of the native title parties to specific types of prospective future acts. That is, future acts that are not the subject of any extant application for governmental grant or other approval, but which a proponent contemplates may be raised for application and validation at a later time, as part of the same project or development as that to which the extant future acts relate. Consent clauses in relation to prospective future acts may well address the legitimate needs of a proponent. However, they also raise issues as to whether native title parties are being unfairly induced into providing consent to future acts without being properly informed as to the nature and potential effect upon native title rights and interests of the prospective acts.

4.38 The ALRC has not had the opportunity to consult on and fully consider this issue. We make no recommendation for reform, but suggest that the Australian Government give further consideration to the issue.

30 Minerals Council of Australia, *Submission 113*.

Clauses relating to the administration or management of payments

Recommendation 12

1. The *Native Title Act 1993* (Cth) be amended to provide that any term of a future act agreement which has the effect of limiting or restricting how native title parties administer or manage payments under agreements is prohibited, and void and unenforceable to the extent it has that effect.
2. This recommendation is not intended to apply to existing agreements.

4.39 **Recommendation 12** prohibits clauses that dictate how compensation or other payments under agreements will be managed or administered by native title parties. This prohibition is justified on the basis that clauses with that effect impermissibly impose restrictions on native title parties' governance arrangements, which are an important element of the right to self-determination. Management and administration of monetary consideration provided to native title parties is an internal matter for them. It is not apparent why a proponent or a government party would have any legitimate interest in those internal arrangements. In its submission, the State of Queensland explained that this is particularly an issue for older agreements:

[W]here compensation structures, such as trusts, are utilised for the purpose of managing compensation under an agreement, there may be overly restrictive conditions on the native title holders' access to compensation thereby limiting the right to self-determination.

...

Where trusts remain independent, transparency should be introduced to allow native title groups to better make decisions about their own monies and benefits.³¹

4.40 This is also consistent with findings from the literature. In a 2025 study of impact and benefit agreements in the Pilbara, Dr Benkert, Professor Eversole, and Dr Dembek interviewed the First Nations agreement parties about their experiences with the negotiation. In one case study, the contract prescribed a specific governance structure for interactions between the parties, and for managing trust funds. The study found that

this governance structure is comfortable and familiar for the Western organizations involved, but it is gravely misaligned with the long-standing and culturally binding governance structures and principles of Aboriginal communities.³²

³¹ State of Queensland, *Submission 43*.

³² Julia Benkert, Robyn Eversole and Krzysztof Dembek, 'Towards Authentic Engagement with Indigenous Peoples: Lessons from Negotiated Agreements in the Pilbara, Western Australia' [2025] *Business & Society* 1, 20.

4.41 Feedback from native title parties and other stakeholders generally supported the type of prohibition contemplated by **Recommendation 12**.³³

4.42 This recommendation is only intended to apply prospectively. While there may be utility in some parties revisiting terms which have the effect of limiting how payments may be managed or administered, to mandate it in every instance may impose significant burdens and create uncertainty under existing agreements.

4.43 In the Discussion Paper, the ALRC sought feedback on a prohibition on clauses that limit or restrict how compensation or other payments are to be *expended*, administered, or managed by native title parties. **Recommendation 12** only prohibits restrictions or limitations on the administration and management of such payments. That is because, as outlined above, those matters go to governance. Through consultation, we have heard examples whereby native title parties value the ability to agree to terms relating to how payments under an agreement are expended as a means of incentivising counterparties to reach agreement.

Periodic review

Recommendation 13

A model periodic review clause be developed for inclusion in future act agreements. The model periodic review clause should be developed through a consultative process and the *Native Title Act 1993* (Cth) amended to provide that the model clause will be deemed to apply in any future act agreement with an unspecified duration, or a duration of longer than five years, unless the parties agree an alternative form of review clause. This recommendation is not intended to apply to existing agreements.

4.44 **Recommendation 13** seeks to ensure that all future act agreements with an unspecified duration or a duration of longer than five years contain a process for periodic review. If an agreement did not contain such a process, the *NTA* would mandate that the substantive obligations contained in the agreement be reviewed.

Rationale for reform

4.45 The periodic review of contracts is important for a number of reasons. First, it provides the agreement parties with an opportunity to reflect on how the agreement is operating. The parties have an opportunity to address ambiguities or differences in interpretations that have arisen during the operation of the contract, as well as discuss anticipated implementation issues before such matters become disputes. As noted by Parallax Legal, review clauses should facilitate ‘amendments

33 See, eg, Law Council of Australia, *Submission 120*; Queensland South Native Title Services, *Submission 124*; Kimberley Land Council, *Submission 151*.

to be made where clauses are not functioning appropriately or have unintended consequences'.³⁴ Secondly, it presents an opportunity to address any circumstances that have changed since the agreement was executed, which may need to be dealt with in the terms of the agreement. Periodic contractual review better enables changed circumstances to be fairly addressed in an informed way. Many changed circumstances are unforeseen, or their nature or effect is not sufficiently predicted or predictable to enable informed negotiations to occur on the making of a contract. As MPS Law explained in its submission, robust review clauses are needed 'to ensure the terms agreed can be modernised and remain consistent with preferred practices and legislative amendments'.³⁵ Thirdly, it can provide a convenient 'touch point' for the parties to discuss upcoming obligations, such as upcoming payments.

4.46 Informed agreement-making, as well as the importance of native title parties providing informed consent, justify the periodic review of future act agreements. The need for periodic review is likely to be greater for contracts of long or indeterminate duration as more unforeseen circumstances tend to arise in contracts of that kind.

4.47 Despite that rationale and despite periodic contractual review being the standard practice in some industries, we have heard that many future act agreements do not include substantive periodic review clauses.

4.48 In the Discussion Paper, we sought feedback on the mandatory inclusion and operation of a mechanism for the periodic review of agreements. Submissions, particularly from native title parties' representatives, were generally supportive of mandatory periodic review clauses.³⁶

Review every five years, unless otherwise agreed

4.49 **Recommendation 13** contemplates the development of a model periodic review clause which would be deemed to form part of a future act agreement that did not otherwise provide for a periodic review. Parties would be free to agree a different type of review clause provided it facilitated review at least every five years. **Recommendation 13** would apply prospectively and would not alter existing agreements.

4.50 By way of example, there are at least three types of periodic review clauses that are used in resource contracts:

- periodic review clauses — which require the parties to meet at regular intervals to discuss the operation of the contract;
- 'automatic-at-request-review' clauses — which require the parties to meet to review the contract at the request of either party; and

34 Parallax Legal, *Submission 157*.

35 MPS Law, *Submission 17*.

36 See, eg, South Australian Native Title Services, *Submission 104*; Law Council of Australia, *Submission 120*; Mabo Centre and National Native Title Council, *Submission 130*; First Nations Legal and Research Services, *Submission 146*; Kimberley Land Council, *Submission 151*.

- ‘trigger-at-request-review’ clauses — which enable either party to request a review of the contract when a particular event occurs.³⁷

4.51 **Recommendation 13** contemplates that the default position would be akin to the first type of clause outlined here, although it is not intended to preclude parties agreeing other types of review clauses. Incorporating a review clause should not represent a substantial change in practice for many negotiation parties. Guidance from the resources industry suggests that review clauses are standard industry practice.³⁸ **Recommendation 13** is intended to ensure that this becomes standard practice for all parties.

4.52 In practice, the statutory default mechanism would only apply to future act agreements that will be in effect for five or more years. For shorter agreements, the content standard may still have practical impact by acting as a signal of best practice agreement-making.

4.53 The requirement to include a periodic review clause and subsequently undertake a review may impose some resource burden on parties.³⁹ Requiring parties to consider periodic review when negotiating an agreement, however, provides an opportunity to address resourcing as part of the agreement terms. The ALRC’s recommendations in **Chapter 12** relating to costs recovery would assist native title parties to engage in review processes, and the recommendations in **Chapter 14** relating to increased resourcing for PBCs would further assist. On balance, the benefits of periodic review, and potential efficiencies gained through review, justify the resources that may be directed towards reviewing an agreement.

Agreement implementation

4.54 An important dimension of agreement-making, related to the periodic review of agreements, is agreement implementation. Agreement implementation has been described as a ‘forgotten dimension of agreement making’,⁴⁰ and can fail due to ‘weaknesses in agreements themselves and to capacity limitations’ of agreement parties.⁴¹ Professor O’Faircheallaigh and Thierry Rodon have observed that the

37 See generally Jacky Mandelbaum, Salli Anne Swartz and John Hauert, ‘Periodic Review in Natural Resource Contracts’ (2016) 7(1) *Journal of Sustainable Development Law and Policy* 116. The three types of periodic review clauses used in resource contracts are discussed at 119.

38 Rio Tinto, *Why Agreements Matter: A Resource Guide for Integrating Agreements into Communities and Social Performance Work at Rio Tinto* (2016) 105, 143–8.

39 Professor Ciaran O’Faircheallaigh has said that failing to ‘provide separate funding to support review processes’ or setting out how a review is to take place are ‘significant obstacles to the maintenance of an effective implementation effort’ for an agreement: Ciaran O’Faircheallaigh, ‘Implementation: The Forgotten Dimension of Agreement Making in Australia and Canada’ (2002) 5(20) *Indigenous Law Bulletin* 14, 16.

40 O’Faircheallaigh (n 39).

41 Ciaran O’Faircheallaigh and Thierry Rodon, ‘Realizing Indigenous Rights: Effective Implementation of Agreements between Indigenous Peoples and the Extractive Industry’ in *Mining and Indigenous Livelihoods* (Routledge, 2024) 153, 154.

signing of an agreement does not of itself allow these benefits to be realized. Numerous activities must be undertaken and maintained over time to ensure that agreements are effectively implemented.⁴²

4.55 Literature on agreements suggests that implementation is more likely to be effective:

- when it is properly resourced;
- where obligations under the agreement can be clearly interpreted;
- where there is cooperation and support for implementation from all parties involved; and
- where the agreement can be responsive to unanticipated events.⁴³

4.56 Periodic review provides an opportunity for agreement parties to assess how effectively agreements have been implemented and are operating. Where agreements have not been implemented effectively or disputes arise about implementation, mandatory dispute resolution clauses (discussed in the following section) and the availability of assistance from the National Native Title Tribunal ('NNTT') (as discussed in the context of **Recommendation 4** in **Chapter 3**) may help agreement parties improve agreement implementation.

Dispute resolution

Recommendation 14

1. The *Native Title Act 1993* (Cth):
 - a. require that any future act agreement contain a dispute resolution clause for dealing with disputes under the agreement. The dispute resolution clause should include a process for consultation, mediation, or conciliation (which may incorporate traditional processes of the native title parties as well as access to mediation or conciliation before the National Native Title Tribunal) and, should those processes fail to resolve a dispute, provide for resolution by arbitration conducted by the National Native Title Tribunal or an agreed arbitrator;

42 Ibid.

43 Ibid 155–7.

- b. prohibit any provision in a dispute resolution clause which limits access to the courts in relation to any issue which may be the subject of arbitration under the clause but provide that, other than for an application for urgent interlocutory or injunctive relief, courts may, on the application of a party to the agreement, stay a proceeding where it is in the interests of justice to do so; and
 - c. provide for an appeal on a question of law to the Federal Court of Australia.
- 2. Should the parties to the agreement not include in their agreement a dispute resolution clause of the kind required by the *Native Title Act 1993* (Cth), a model dispute resolution clause (drafted by the Australian Government in consultation with the National Native Title Tribunal and embodied in a regulation) containing the features identified above, be deemed by the Act to be included in the agreement.
- 3. This recommendation is not intended to apply to existing agreements.

4.57 **Recommendation 14** is directed at ensuring that future act agreements contain a dispute resolution process which would facilitate the resolution of disputes that arise under a future act agreement through consultation between the parties and, where necessary, mediation or conciliation and, ultimately, arbitration. With appropriate adjustment this recommendation is modelled on the dispute resolution mechanisms made available under the *Fair Work Act 2009* (Cth) for resolving disputes that arise under enterprise agreements made pursuant to that Act.

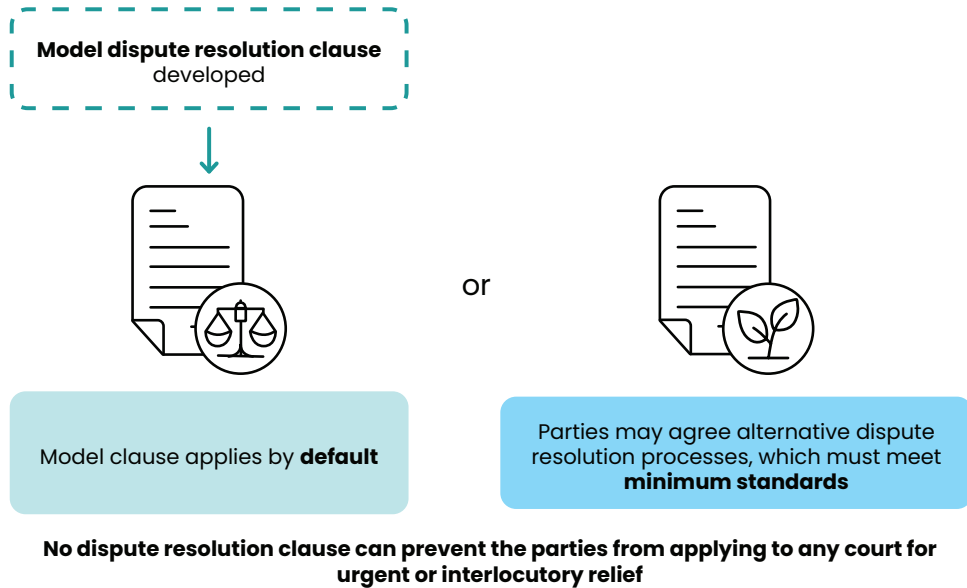
4.58 **Recommendation 14** contemplates that the parties could agree to the terms of a dispute resolution clause. The scope of an agreed clause would need to allow for any dispute under the agreement to be resolved through the process of consultation, mediation or conciliation or, ultimately, consent arbitration. So long as those elements are included, the parties would be able to tailor the detail and will have the capacity to choose an agreed private mediator, conciliator, or arbitrator. Alternatively, the parties could simply adopt the model dispute resolution clause that this recommendation contemplates will be developed and prescribed in a regulation. Should an agreed clause not conform with the requirements made by the *NTA* or should a dispute resolution clause not be included by the parties in the future act agreement, the Act will deem the model clause to be included in the agreement.

4.59 It is not intended that the availability of consent arbitration for resolving a dispute arising under a future act agreement should necessarily deny access to the courts. This is further discussed below.

4.60 **Recommendation 14** is intended to be implemented alongside **Recommendation 4** discussed in **Chapter 3**, which expands the NNTT's functions

to include assisting parties to resolve disputes that arise under agreements and undertaking consent arbitration.

Figure 4.2: How dispute resolution clauses for future act agreements could work



Providing for effective dispute resolution processes in future act agreements

4.61 By ensuring that every future act agreement contains a dispute resolution clause, **Recommendation 14** will facilitate dispute resolution through cost-effective and well-proven processes which provide an alternative to potentially less accessible and more expensive resolution through the courts. Direct consultation between the parties is sensible and accessible, and a low cost pathway to the resolution of a dispute. If not effective, the assistance of a mediator or conciliator may help the parties to reach a resolution.

4.62 If an arbitrated determination is required to resolve the dispute, a consent arbitration can provide a number of advantages over a determination by a court. Arbitration will generally be cheaper and quicker than a resolution through a court. It will not necessarily require parties to engage lawyers. Arbitration processes are less formal, there are no technical pleadings, and the rules of evidence are not applied. As the arbitrator will be either the NNTT or an agreed private arbitrator, the dispute is more likely to be effectively resolved by someone with relevant skill and with experience of resolving future act disputes.

4.63 Feedback to the ALRC has highlighted that if a future act agreement is breached, it can be difficult to enforce the agreement, or to access an appropriate remedy for the breach. This issue is particularly pressing for native title parties for whom the cost of civil litigation can be prohibitive.⁴⁴ Feedback has also suggested that as a result, native title parties may tolerate repeated breaches of future act agreements because it is not feasible to bring an action for breach of contract.⁴⁵ **Recommendation 14** addresses these problems by ensuring that agreements contain less formal and less costly mechanisms for resolving disputes compared to litigation.⁴⁶

4.64 In the Discussion Paper, the ALRC sought feedback on several interrelated issues, including the substance of a dispute resolution clause, whether the NNTT would be a suitable forum for resolving disputes, and how a dispute resolution clause should interact with access to the Federal Court. In response, we heard that it would be useful for agreements to contain fair, effective, and streamlined dispute resolution procedures.⁴⁷

4.65 There was general support for the availability of lower-cost, efficient, and accessible dispute resolution mechanisms in submissions and consultations.⁴⁸ The ALRC consistently heard that parties want to have the flexibility to agree their own dispute resolution clauses, and should have a choice of forum rather than being required to use the NNTT.⁴⁹

4.66 We are also aware that it is important for parties to have the flexibility to agree culturally specific dispute resolution mechanisms. In their submission to the Juukan Gorge Inquiry, for example, HESTA described one example of a culturally specific process:

[W]e heard about one community that signals that there is an issue that needs to be discussed by placing a branch of a specific tree across a doorway/pathway.

44 The ALRC's recommended modified asymmetrical costs regime may alleviate some of the costs pressures: see **Recommendation 77** in **Chapter 11**.

45 See, eg, First Nations Legal and Research Services, *Submission 42*. See generally Lee Godden and Shaunnagh Dorsett, 'The Contractual Status of Indigenous Land Use Agreements' (2000) 2(1) *Land, Rights, Laws: Issues of Native Title* 1, 8.

46 For further discussion of enforcement mechanisms in the future acts regime, see **Chapter 11**.

47 See, eg, Association of Mining and Exploration Companies, *Submission 97*; AgForce Queensland Farmers Ltd, *Submission 111*; National Farmers' Federation, *Submission 114*; First Nations Legal and Research Services, *Submission 146*.

48 See, eg, Houston Legal & Consultants, *Submission 95*; South Australian Native Title Services, *Submission 104*; NSW Minerals Council, *Submission 117*; NSW Bar Association, *Submission 140*; Yamatji Marpa Aboriginal Corporation, *Submission 148*; Northern Land Council, *Submission 153*.

49 See, eg, Isaac Regional Council, *Submission 70*; AgForce Queensland Farmers Ltd, *Submission 111*; NSW Minerals Council, *Submission 117*; Law Council of Australia, *Submission 120*; Central Land Council, *Submission 121*; NSW Bar Association, *Submission 140*; Yamatji Marpa Aboriginal Corporation, *Submission 148*; Kimberley Land Council, *Submission 151*.

The company that works with this community has learnt about this process and recognises it as a legitimate way for the community to raise a grievance.⁵⁰

4.67 In the present Inquiry, the Martuwarra Fitzroy River Council noted that

dispute resolution using western dispute resolution mechanisms may be inappropriate for indigenous communities. If agreements are being negotiated in relation to the use of native title land, the party seeking to use the land has to have representatives in the area for at least some of the time. Therefore, it would be far more appropriate to utilise mechanisms that are accessible to Indigenous communities and to have the resolution proceedings on country.⁵¹

4.68 Culturally specific processes may also consider the appropriate language. As Parallax Legal observed in its submission, for example, it

should not be assumed that mediation or dispute resolution must be done in English. There needs to be flexibility that allows the NTP or the Proponent to communicate in the language that they are most comfortable using.⁵²

4.69 **Recommendation 14** recognises this feedback by providing that an agreed dispute resolution may incorporate traditional processes of the native title parties. This recommendation also contemplates that parties will be able to use an arbitrator chosen by them.

4.70 Submissions also highlighted that the fairness and efficacy of any dispute resolution mechanism would be contingent on the parties having adequate resources to engage with the process.⁵³ Resourcing is discussed in **Chapter 14** of this Report.

Dispute resolution clause content

4.71 The intention of **Recommendation 14** is to provide negotiation parties with ready access to a default model dispute resolution clause while retaining flexibility to agree their own processes.

4.72 Similar approaches can be found in other legislative regimes, such as the *Fair Work Act 2009* (Cth).⁵⁴ Section 186(6) of that Act provides that enterprise agreements must include a term that requires or allows the Fair Work Commission or another independent person to settle disputes.⁵⁵ Section 737 provides for the Fair Work Commission to develop a model dispute resolution term (as it has now done), taking into account several relevant factors including best practice, the

50 HESTA, Attachment 2 to Submission No 35 to Joint Standing Committee on Northern Australia, Parliament of Australia, *Inquiry into the Destruction of 46,000 Year Old Caves at the Juukan Gorge in the Pilbara Region of Western Australia* (2020).

51 Martuwarra Fitzroy River Council, *Submission 81*.

52 Parallax Legal, *Submission 157*.

53 See, eg, Maddocks, *Submission 62*; North Queensland Land Council, *Submission 96*.

54 See Australian Law Reform Commission (n 7) [128]–[129].

55 See also *Fair Work Act 2009* (Cth) s 146.

objects of that Act, and whether relevant stakeholders have had an opportunity to provide feedback on the term.⁵⁶

4.73 The model clause should address the features outlined in **Recommendation 14** for agreed dispute resolution clauses. These are common features of dispute resolution processes which, in summary, address the following processes:

- Informal discussions, conducted with a view to resolution without recourse to more formal processes. This aligns with the goal of resolving disputes in the simplest and most cost-effective way, and in a way that minimises damage to relationships.
- Facilitated processes, such as mediation or conciliation, take place before more formal proceedings. Mediation can be a valuable part of the dispute resolution process in native title matters,⁵⁷ and experience from other fields, including workplace law, indicates that conciliation can also aid parties in resolving disputes. Other facilitated processes, such as expert determinations by an agreed referee, may also be considered in developing the model clause. **Recommendation 14** recognises that in the native title context it is important for parties to have the flexibility to consider culturally specific processes.
- Where disputes are not resolved informally, a capacity for binding arbitration. As discussed above, arbitration provides parties with access to a formal resolution of disputes which is often lower-cost and more efficient than court proceedings.

4.74 Agreed clauses and the model dispute resolution clause should also provide for a right of appeal to the Federal Court on questions of law. This provides an important safeguard to protect the integrity of the arbitration process. This requirement was supported in some feedback to the ALRC.⁵⁸

4.75 **Recommendation 14** provides that a dispute resolution clause may not limit access to courts for judicial resolution of a dispute. This would include the civil remedy regime relating to compliance with the future acts regime, including entitlements and obligations in agreements, discussed in **Chapter 11** of this Report. **Recommendation 14** recognises, however, that a court may stay such proceedings if it is in the interests of justice to do so. This ensures that parties to the agreement are not prevented from accessing the courts, while also providing a mechanism for the court to manage issues such as duplication of proceedings by ordering a stay. As contemplated by **Recommendation 14**, courts will not grant a stay if the proceeding seeks urgent interlocutory or injunctive relief. Courts are generally best able to deal with claims for relief of that kind, including because duty judges are available to deal immediately with urgent applications.

56 The model term is found in *Fair Work (Model Terms) Determination 2025* (Cth) sch 3.

57 See, eg, Queensland Small Miners Council, *Submission 105*; Queensland South Native Title Services, *Submission 124*.

58 See, eg, Houston Legal & Consultants, *Submission 95*.

4.76 The general law position is that agreed dispute resolution clauses cannot completely oust the jurisdiction of the courts and that courts may hear disputes that might otherwise fall within a dispute resolution clause ‘if it would be unjust to deprive a party of its right to have its claim determined judicially’.⁵⁹ Courts retain a wide discretion in this respect and may have regard to a wide range of matters.⁶⁰ These include, for example, where ‘the agreed procedures are inappropriate or inadequate for the nature of the dispute’,⁶¹ and ‘circumstances where there is a wider public interest in the dispute being dealt with in the courts’.⁶²

4.77 It may prove to be the case that consent arbitration pursuant to the dispute resolution clause will be well suited and more utilised than the courts for resolving disputes about how an agreement is operating and how the obligations it imposes are being implemented. Disputes involving claims to redress contraventions which raise constructional or other legal issues may best be dealt with by the courts. Where a claim is made for a civil penalty for a contravention of an agreement, the dispute will need to be dealt with by an eligible court (see **Recommendation 76** in **Chapter 11**), as the court will be the only venue capable of dealing with the entirety of the dispute. Parties may be expected to choose the most appropriate venue for resolving their disputes. If that has not occurred, courts will have the capacity to stay a legal proceeding where the interests of justice suggest that the dispute is better dealt with under the dispute resolution process.⁶³

4.78 Feedback to the ALRC has highlighted the importance of parties being able to access judicial processes where appropriate.⁶⁴

59 *Onslow Salt Pty Ltd v Buurabalayji Thalanyji Aboriginal Corp* [2018] FCAFC 118 [16].

60 *Ibid* [16].

61 *Ibid*.

62 *Ibid* [17].

63 For example, the Federal Court has considered whether a stay would be appropriate in circumstances where the dispute was being dealt with (or could be dealt with) via the dispute resolution processes in an enterprise agreement: see, eg, *Civil Air Operations Officers Association of Australia v Airservices Australia* [2020] FCA 1665; *Energy Australia Yallourn Pty Ltd v Automotive, Food, Metal, Engineering, Printing and Kindred Industries Union* (2018) 264 FCR 342; *Tays Australia Beenleigh Pty Ltd v Australasian Meat Industry Employees Union* [2015] FCA 1033.

64 See, eg, Norman Waterhouse Lawyers, *Submission 102*; Northern Territory Government, *Submission 149*.

Statutory compensation under ILUAs

Recommendation 15

Sections 24EB(4), (5), and (6) and 24EBA(5) of the *Native Title Act 1993* (Cth) be amended to provide that statutory compensation payable under an indigenous land use agreement is full and final for any future act the subject of an indigenous land use agreement only where the agreement expressly provides as such.

4.79 Sections 24EB and 24EBA of the *NTA* currently provide that the only statutory compensation payable for a future act that is validated by an ILUA is the compensation payable under that ILUA.⁶⁵ Implicit in ss 24EB and 24EBA is an assumption that the impact of a future act can be known at the time that an ILUA is signed, meaning that where the impact or damage of a future act is ultimately more substantial, or beyond the scope of what was initially contemplated, the *NTA* does not expressly provide for native title holders to access statutory compensation by way of a Part 2 Div 5 application for those further effects. In contrast, freehold title holders may, under some mining laws for example, seek additional compensation after mining commences if the harm the landholder suffers was not contemplated when the terms of compensation were first negotiated.⁶⁶

4.80 The original intention of ss 24EB and 24EBA was to provide parties with certainty by settling statutory compensation for that future act at the time that an agreement was reached about the doing of the future act.⁶⁷ The Explanatory Memorandum highlighted that the only exception may be that a person ‘who is later proved to have native title but was not entitled to any of the benefits of the agreement’ could access later statutory compensation.⁶⁸

4.81 The Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Island Land Fund’s 2001 second interim report (which focused on ILUAs) noted that there were significant benefits to all parties in this certainty.⁶⁹ The Committee also highlighted that stakeholders — and in particular, native title parties — had expressed ‘confusion about the requirements of the Act in relation to the preservation of their compensation entitlements under an ILUA’.⁷⁰

65 See *Native Title Act 1993* (Cth) ss 24EB(4), (5), (6), 24EBA(5).

66 See, eg, *Mineral Resources Act 1989* (Qld) ss 283A, 283B; *Mining Act 1992* (NSW) s 276.

67 Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) [7.28]; Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Parliament of Australia, *Second Interim Report for the Section 206(d) Inquiry: Indigenous Land Use Agreements* (2001) [3.49]–[3.69].

68 Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) [7.7].

69 Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Parliament of Australia (n 67) [3.49]–[3.62].

70 Ibid [3.58].

4.82 In the years since this report, the apparent benefits of certainty provided by ss 24EB and 24EBA have been undermined by issues arising from the requirement that compensation be full and final. First, it can be difficult for parties to properly assess the appropriate statutory compensation payable at the point before a future act is done. As the Kimberley Land Council explained, it is

often not possible to calculate the full compensation payable at the time of making the agreement or upon the grant of a future act, as the full impact of the act on native title rights and interests is not known until the activities undertaken pursuant to it are completed.⁷¹

4.83 This can lead to unfairness: native title holders may not be properly compensated for the actual effects of future acts on their native title rights and interests, because the amount agreed under an ILUA is, ultimately, insufficient. This potential unfairness acts as a disincentive to agreement-making. The ALRC has also heard that ss 24EB and 24EBA can limit the flexibility and commercial freedom of the parties to negotiate and can therefore be a ‘significant barrier’ in reaching a negotiated outcome.⁷²

4.84 Second, where a native title party is not paid the amounts agreed under the ILUA (for example, because the proponent has become insolvent or has breached the agreement), one interpretation of ss 24EB and 24EBA suggests that native title holders would be prevented from recovering the amount owed under a Part 2 Div 5 compensation application.⁷³

4.85 The ALRC has heard that it would be helpful for parties to ILUAs to agree, in appropriate circumstances, to defer the question of statutory compensation for the future act to a Part 2 Div 5 compensation application.⁷⁴ However, this would seem to be contrary to the current ss 24EB or 24EBA.

4.86 **Recommendation 15** addresses the identified potential unfairness in ss 24EB and 24EBA. The rationale for this recommendation is both principled and practical:

- A key principle underpinning the future acts regime is that native title holders are entitled to statutory compensation for effects on their native title rights and interests. The current operation of ss 24EB and 24EBA does not appear to be properly giving effect to the right to statutory compensation.

71 Kimberley Land Council, *Submission 151*. See also the 2015 Investigation into Indigenous Administration and Land Use Report to the Council of Australian Governments, which recognised this problem and recommended that the Government ‘amend section 24EB of the Native Title Act to allow parties to an ILUA to agree that the ILUA does not provide compensation for a future act’: Senior Officers Working Group, *Investigation into Indigenous Land Administration and Use: Report to the Council of Australian Governments* (2015) 15 (Proposal 13).

72 State of Queensland, *Submission 152*. See also Central Land Council, *Submission 121*; Queensland South Native Title Services, *Submission 124*.

73 The ALRC notes that this, however, would appear to be potentially contrary to Part 2 Div 5, and compensation needing to be paid on just terms.

74 See, eg, Law Council of Australia, *Submission 120*.

- On a practical level, this recommendation recognises that the effect of ss 24EB and 24EBA can be a disincentive to agreement-making.

4.87 This recommendation would require the parties to expressly negotiate and agree that payments in an agreement are in full and final satisfaction of statutory compensation for that future act. Otherwise, the presumed position would be that native title holders can make a Part 2 Div 5 application for statutory compensation in relation to the future act that is the subject of the agreement. If parties seek the certainty as to statutory compensation outlined above, then it can be a matter for negotiation between the parties. The ALRC considers that it is appropriate, given the importance of native title holders receiving statutory compensation for impacts on their native title rights and interests, that parties must expressly consider whether payments in the agreement are intended to be in full and final satisfaction of statutory compensation.

4.88 A matter for further consideration is whether the entry on the Register of Indigenous Land Use Agreements for a particular ILUA should include a statement as to whether the ILUA is said to provide full and final compensation pursuant to ss 24EB and 24EBA. The ALRC considers that including this information on the Register would be helpful in supporting transparency about whether the parties to a registered ILUA have expressly agreed that the ILUA is intended to be in full and final satisfaction of statutory compensation.

4.89 **Recommendation 15** means that an ILUA would not limit the statutory compensation payable by the relevant government for the impact of a future act on native title rights and interests, unless the parties agree. This recommendation may create residual statutory compensation liabilities for the relevant government. The Western Australian Government's submission flagged this as a concern, particularly in relation to ILUAs to which the relevant government is not a party.⁷⁵ However:

- the separate recommendation to expand the ability of governments to pass through their statutory compensation liabilities to third parties may address this concern in part (see **Recommendation 16** below); and
- residual compensation liabilities are already an issue for future acts validated under other provisions of the *NTA* that do not presently require compensation to be paid upfront.

4.90 **Recommendation 15** formalises Proposal 12 in the Discussion Paper. The submissions that responded to Proposal 12 were largely supportive of the proposal and the underlying principle.⁷⁶

⁷⁵ Western Australian Government, *Submission 115*.

⁷⁶ See, eg, Maddocks, *Submission 62*; Houston Legal & Consultants, *Submission 95*; North Queensland Land Council, *Submission 96*; Australian Human Rights Commission, *Submission 118*; Law Council of Australia, *Submission 120*; Central Land Council, *Submission 121*; Queensland South Native Title Services, *Submission 124*; First Nations Legal and Research Services, *Submission 146*; Yamatji Marlpa Aboriginal Corporation, *Submission 148*; Kimberley Land Council, *Submission 151*; State of Queensland, *Submission 152*; Northern Land Council, *Submission 153*; New South Wales Government, *Submission 159*.

4.91 Feedback that was not supportive was largely concerned with the uncertainty that this may bring, including that proponents may be liable for future Part 2 Div 5 compensation claims for what they thought were settled matters.⁷⁷

Recommendation 15 is not intended to have retrospective application — that is, it is not intended to apply to ILUAs that have already been agreed and registered. ILUAs reached to date reflect the current law on statutory compensation.

4.92 However, as noted above, where parties do seek certainty around statutory compensation, they should still be free to negotiate that the ILUA is in full and final compensation for that future act.⁷⁸ Additionally, any amount agreed and paid under an ILUA would be set off against any future statutory compensation claim.

Statutory compensation ‘pass-through’ by legislation

Recommendation 16

The *Native Title Act 1993* (Cth) be amended to provide that:

- a. for any future act for which statutory compensation is payable by a state, territory, or the Commonwealth (to whom the act is attributable), the laws of a state, territory, or the Commonwealth may provide that a person other than the state, territory, or Commonwealth is liable to pay the statutory compensation; and
- b. if, when the statutory compensation for a future act is required to be paid it is not reasonably practicable for the native title holders to recover compensation from that other person, the relevant state, territory, or Commonwealth (to whom the act is attributable) remains liable to pay the statutory compensation.

4.93 Currently, specific provisions in most subdivisions of the future acts regime specify whether statutory compensation is payable and by whom. Statutory compensation is generally payable by the Commonwealth, state, or territory to whom an act is attributable. Some provisions, however, expressly recognise the ability for other laws to ‘pass through’ statutory compensation liability.⁷⁹ Put differently, some provisions expressly enable the laws of a state, territory, or the Commonwealth to provide that a person other than the state, territory, or Commonwealth is liable to pay statutory compensation for the relevant future acts. Other provisions are silent as to whether statutory compensation may be legislatively ‘passed through’.

⁷⁷ See, eg, Association of Mining and Exploration Companies, *Submission 97*.

⁷⁸ Yamatji Marlpa Aboriginal Corporation, *Submission 148*.

⁷⁹ *Native Title Act 1993* (Cth) ss 24JAA(9), 24KA(6), 24MD(4), 24NA(7).

4.94 Where legislative pass-through is not permitted, the *NTA* potentially misaligns the incentive to minimise effects on native title rights and interests, and the obligation to pay statutory compensation for those effects.⁸⁰ As Dr Isdale has observed, the

ability to control the extent of many effects on native title holders (by choosing how rights are exercised) is in the hands of grantees, while the liabilities for those effects are largely in the hands of government.⁸¹

4.95 Similarly in its submission, the Central Land Council reflected that:

The liability for any compensation rests with the Crown unless the relevant government has entered into an arrangement with the proponent. Because compensation is payable by the Crown, there is no incentive for a proponent to enter into negotiations with native title holders to obtain their consent.⁸²

4.96 This means that there is 'little incentive for grantees to use their rights in a manner that is least disruptive to native title holders as possible'.⁸³ This position does not further the object of the *NTA* to protect native title rights and interests. By permitting state, territory, and Commonwealth laws to 'pass through' statutory compensation in a wider range of circumstances than at present, the *NTA* may better pursue this object.

4.97 **Recommendation 16** is intended to apply to all future acts, whether validated under the statutory procedures discussed in **Chapters 6** and **7** or under a future act agreement.⁸⁴ It is particularly relevant to agreement-making, however, because parties should be able to contract with clarity and certainty about where statutory compensation liability rests.

4.98 Legislative reform may also address the differential treatment of future acts that fall within different provisions of the future acts regime but may form part of a larger project or state tenure scheme. For example, mining tenements under some state legislation may fall within different provisions of the future acts regime which do or do not permit legislative pass-through of statutory compensation. This is illustrated in a statutory compensation matter currently before the Federal Court, in which statutory compensation is claimed in relation to future acts covered by s 24MD of the *NTA*, which expressly allows legislative pass-through, and s 24HA, which does not expressly allow legislative pass-through.⁸⁵ In this situation, statutory compensation may be payable by two different respondents despite the acts forming part of one larger project. This case has also given rise to a dispute about the constitutional validity of the state legislation that seeks to pass through statutory compensation,

80 See, eg, Central Land Council, *Submission 31*; Western Australian Government, *Submission 115*.

81 William Isdale, *Compensation for Native Title* (Federation Press, 2022) 35.

82 Central Land Council, *Submission 31*.

83 Isdale (n 81) 35.

84 The statutory compensation pass-through provided for in **Recommendation 16** above has been replicated for the purposes of the reforms proposed in **Chapter 6**: see **Recommendation 37**.

85 *Yindjibarndi Ngurra Aboriginal Corporation RNTBC v Western Australia* (Federal Court of Australia, WAD37/2022, commenced 16 February 2022).

producing further uncertainty as to how and from whom the native title holders may seek their entitlement to compensation.⁸⁶

4.99 Reform to enable legislative pass-through should be accompanied by a requirement that if native title holders are unable to recover statutory compensation from the person to whom the liability has been passed, residual liability should rest with the state or territory, or the Commonwealth, to whom the act is attributable. Section 144(3C) of the *Native Title (Queensland) Act 1993* (Qld) illustrates this by providing that, despite passing through liability, the State

is liable to pay the compensation if, when the compensation is required to be paid, it is not reasonably practicable for the holders to otherwise recover the compensation.

4.100 In the absence of such residual liability, native title holders may otherwise be left with only an entitlement to a 'top up' award of statutory compensation under s 53 of the *NTA*, where a future act amounts to an acquisition of property, because of a failure to provide compensation on 'just terms' as required by the *Australian Constitution*.⁸⁷ In all cases that do not amount to an acquisition, however, native title holders may be left without compensation. The *NTA* should therefore ensure that residual liability exists.

86 See FMG Pilbara Pty Ltd, 'FMG Respondents' Submissions', Submission in *Yindjibarndi Ngurra Aboriginal Corporation RNTBC v Western Australia*, WAD 37/2022, 24 July 2023 [118]–[122]; State of Western Australia, 'First Respondent's Written Opening', Submission in *Yindjibarndi Ngurra Aboriginal Corporation RNTBC v Western Australia*, WAD 37/2022, 24 July 2023 [92]–[96].

87 Isdale (n 81) 35.

5. Future Act Agreements: Post-Agreement

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Introduction

5.1 This chapter is the third of three chapters in this Report containing recommendations for reform relating to future act agreements. This chapter recommends reforms to processes following the execution of future act agreements. If implemented, the seven recommendations in this chapter would improve efficiency, fairness, and transparency in the management and implementation of future act agreements. This chapter builds on the recommendations relating to agreement-making and agreement content discussed in [Chapters 3](#) and [4](#) of this Report.

5.2 These recommendations align with the task set by the Terms of Reference, which ask the ALRC to consider:

- the current operation of the future acts regime, including ILUAs, and related parts of the *Native Title Act 1993* (Cth) ('NTA'), with the aim of rectifying any inefficacy, inequality or unfairness; and
- options to strengthen data collection and appropriate data transparency to support the operation of the future acts regime.

5.3 This chapter is in three parts. The first part discusses recommendations relating to the management of the Register of Indigenous Land Use Agreements and record of section 31 agreements. The second part deals with difficulties and unfairness with agreements negotiated by a registered native title claimant prior to a determination of native title, and makes recommendations to support post-determination access and support PBCs to deal with agreements negotiated over their determination area. The third part discusses a recommendation to improve agreement transparency for common law holders.

This chapter in context

5.4 **Chapter 3** of this Report outlines the background to future act agreement-making and focuses on reforms relating to the process of reaching agreement. **Chapter 4** of this Report discusses reforms more closely relating to the content of agreements themselves.

5.5 The reforms in this chapter focus on reforms to processes once an agreement has been made. Some of the reforms in this chapter are technical in nature but have the potential to support efficiency, productivity, fairness, and transparency in relation to future act agreements.

5.6 In a 2010 paper on potential reforms to agreement-making, the Attorney-General's Department (Cth) noted the importance of 'sustainability' in future act agreements:

Agreements should be sustainable, both in terms of workability and providing for native title holders into the future. Sustainability means ensuring that the interests of all current and future native title holders are represented and protected in decision-making. It means ensuring that native title holders understand agreements under which they are entitled to benefits, and are provided with the information required to understand and make informed decisions about how those benefits are deployed. It means incorporating mechanisms to ensure that benefits received are adequately preserved. Most importantly, it means ensuring that benefits are deployed for the benefit of both current and future generations.¹

5.7 In developing these recommendations, the ALRC has had regard to how best to support the goal of agreement sustainability. Whether an agreement, once made, is sustainable will depend in large part on whether the agreement and the legislative structure around it operates efficiently and fairly. The recommendations in this chapter support this goal.

5.8 Most recommendations in this chapter are expressly intended to apply to ILUAs and section 31 agreements. As outlined in **Chapter 1** of this Report, ILUAs and section 31 agreements can confer future acts validity and are often negotiated

1 Attorney-General (Cth) and Minister for Families, Housing, Community Services and Indigenous Affairs (Cth), *Leading Practice Agreements: Maximising Outcomes from Native Title Benefits* (Discussion Paper, 2010) 4.

alongside ancillary agreements. Where the recommendations in this chapter refer to ‘future act agreements’, this refers to ILUAs, section 31 agreements, agreements negotiated under s 24MD(2A), and ‘low impact agreements’ (if introduced as recommended in [Chapter 6](#) and [Chapter 7](#) of this Report).²

Registration and records of agreements

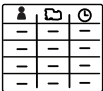
5.9 This part introduces the Register of ILUAs (the ‘Register’) and record of section 31 agreements (the ‘Record’) before discussing recommendations about how ILUAs and section 31 agreements are dealt with on the Register and Record, respectively. The Register and Record are managed by the Native Title Registrar (the ‘Registrar’).

5.10 In summary, the recommendations in this part aim to improve the quality, consistency, accuracy, and currency of publicly available information about agreements. [Figure 5.1](#) illustrates how the recommendations are intended to achieve this.

Figure 5.1: Recommendations to facilitate currency and accuracy of publicly available information

Now

Limited ability for Registrar to proactively maintain the Register, and limited information available on the Register



-	-	-	-
-	-	-	-
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Limited information on Register and Record



Registrar has unclear and limited powers to maintain the Register



Registrar has limited power to remove expired or terminated ILUAs from the Register

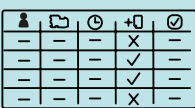


No record of expired ILUAs



Reforms

Clear and **expanded** powers to **maintain** the currency and accuracy of the Register of ILUAs and **more publicly available information**



-	-	-	X	-
-	-	-	✓	-
-	-	-	✓	-
-	-	-	X	-

Register and Record contain information about **ancillary agreements** and **what has been consented to**



Registrar has **clear powers** to proactively **maintain** the Register



Expanded powers to **remove expired or terminated ILUAs** from the Register



Record of expired ILUAs

2 See [Chapter 3](#) for further discussion of ‘future act agreements’.

Register of ILUAs

5.11 Once an ILUA has been authorised by the common law holders (post-determination) or the registered native title claim group or persons who hold or may hold native title rights and interests (pre-determination),³ any party to the ILUA may apply in writing to the Registrar to have the ILUA registered on the Register. The registration application includes a copy of the ILUA as well as other prescribed documents and information.⁴ The Registrar must give notice of the agreement proposed for registration to certain people and the public at large. Notice does not include a copy of the ILUA. For body corporate ILUAs,⁵ there is no right of objection, but the Registrar must not register the ILUA if there is a Native Title Representative Body or Native Title Service Provider ('NTRB/SP') for the area who is not a party to the ILUA and has not been informed of the PBC's intention to enter into the ILUA or if one of the ILUA parties advises it does not wish the ILUA to be registered.⁶ For area agreement ILUAs,⁷ there is a period of three months in which an objection to registration can be lodged by a person who claims to hold native title in the ILUA area.⁸ There are a limited number of bases on which an objection to registration can be lodged.⁹

5.12 Registration has two important consequences for an ILUA: first, it imposes a statutory contractual effect on the ILUA that binds all persons holding native title in relation to any of the land or waters in the area that is the subject of the ILUA.¹⁰ Secondly, it validates the future acts that are the subject of the ILUA.¹¹

5.13 An ILUA is registered when the Registrar enters details about the ILUA onto the Register. The Register must contain the following details about the ILUA (as well as any other details that the Registrar considers appropriate):

- a description of the area covered by the ILUA, the names of the parties (and their contact details), and the duration of the ILUA (if such a period is specified); and
- any statements that:
 - the parties consent to the doing of a future act (or class of future acts), including whether the consent is subject to conditions;
 - a surrender is intended to extinguish native title rights and interests;

3 In accordance with *Native Title Act 1993* (Cth) s 251A.

4 Ibid ss 24BG(2), 24CG(2), 24DH(2). The prescribed documents are set out in the *Native Title (Indigenous Land Use Agreements) Regulations 2024* (Cth) reg 7.

5 Body corporate ILUAs can only be made where there are PBCs in relation to the entire agreement area: *Native Title Act 1993* (Cth) pt 2 div 3 subdiv B.

6 Ibid s 24BI.

7 Area agreement ILUAs cannot be made if there are PBCs in relation to all of the agreement area (instead, a body corporate ILUA is required). They can be made with PBCs, registered native title claimants, and, for any non-claimed or non-determined area, any person who claims to hold native title or the relevant Native Title Representative Body or Service Provider: ibid pt 2 div 3 subdiv C.

8 Ibid ss 24CH(2), 24CI, 24CK(2).

9 See ibid s 24CI(1).

10 Ibid s 24EA.

11 Ibid ss 24EB, 24EBA.

- the right to negotiate under Part 2 Div 3 Subdivision P is not intended to apply; and
- the parties agree to changing the effect of an intermediate period act.¹²

5.14 Once an ILUA is registered, it cannot be removed from the Register unless one of the circumstances set out in s 199C of the *NTA* is met. In summary, the reasons for removal provided by s 199C are:

- an approved determination of native title is made over any of the area covered by the ILUA, and either:
 - the persons determined to hold native title are not those who were previously determined to hold it (for body corporate ILUAs); or
 - any of the persons who are determined to hold native title is not a person who authorised the making of the ILUA (for area agreement ILUAs);¹³
- a party advises the Registrar in writing that the ILUA has expired and the Registrar believes on reasonable grounds this to be the case;¹⁴
- the parties advise the Registrar in writing that they wish to terminate the ILUA;¹⁵ or
- the Federal Court orders the removal of the ILUA on the ground that a party would not have entered into the ILUA were it not for fraud, undue influence, or duress by any person.¹⁶

5.15 When an ILUA is removed from the Register, it no longer has the effect of validating the future act. Amendments made by the *Native Title Legislation Amendment Act 2021* (Cth) confirm that so long as the future act was done while an ILUA was on the Register, subsequent removal of the ILUA will not invalidate the future act.¹⁷

5.16 The Register of ILUAs serves an important role because, as outlined above, it is entry onto the Register that allows an ILUA to:

- bind all those who hold native title in the area; and
- validate the future act or acts that are dealt with in the ILUA.¹⁸

12 Ibid s 199B.

13 Ibid ss 199C(1)(a), (b). However, the native title holders can apply to the Federal Court for an order that the agreement is not to be removed from the Register. The Federal Court may make the order if it is satisfied that those persons accept the terms of the agreement, in accordance with the process by which they would authorise the making of such an agreement: *ibid* s 199C(1A).

14 *Native Title Act 1993* (Cth) s 199C(1)(c)(i).

15 Ibid s 199C(1)(c)(ii).

16 Ibid ss 199C(1)(c)(iii), (2)–(3). This subsection has never been used successfully, but was raised (and dismissed) as a ground for removal in *Johnson v Native Title Registrar* (2014) 218 FCR 415.

17 *Native Title Act 1993* (Cth) ss 24EB(2A), 24EBA(7). The ALRC notes that the Central Land Council's submission observed that 'ILUA de-registration does not have any real consequences. For example, de-registration does not appear to affect the validity of activities done pursuant to the future act that was originally validated by the ILUA registration, but which occur after deregistration. De-registration offers little more than symbolic recourse': Central Land Council, *Submission 121*.

18 Explanatory Memorandum, *Native Title Amendment Bill 1997* (Cth) [23.7].

5.17 When an ILUA is removed from the Register, it no longer has these effects for any future acts done after its removal from the Register.

5.18 The overarching purpose and policy of the Register of ILUAs is twofold:

- The Register and registration provide ILUAs with their special legislative effect. Therefore, the Register and registration give parties legal certainty as to the status of the ILUA and future acts to be done under that ILUA.
- The Register serves as a publicly available source of information about ILUAs — the parties, area, and nature of the future acts agreed. The Register, therefore, promotes transparency about ILUAs for users of the native title system (including the native title holders or claim group) and the general public.¹⁹ The ALRC has heard that users of the native title system want to be able to rely on the Register as an accurate and current reflection of land use.²⁰

Record of section 31 agreements

5.19 Since 2021, once a section 31 agreement has been executed by the parties, a copy of the agreement must be given to the National Native Title Tribunal ('NNTT').²¹ The Registrar then enters a record of the agreement on the Record. Unlike ILUA registration, the placing of a section 31 agreement on the Record does not give rise to future act validity or have any other effect under the *NTA*. Validity instead derives from the execution of the section 31 agreement.

5.20 The Record must contain the following information:

- a description of the area covered by the section 31 agreement, the names of the parties (and their contact details), and the duration of the agreement (if such a period is specified); and
- whether or not there is any other written agreement made between some or all of the parties to the agreement in connection with the doing of the future act to which the section 31 agreement relates — that is, an ancillary agreement.²²

5.21 The purpose and policy of the Record is to provide greater visibility and transparency around the making of section 31 agreements.²³ This visibility is particularly important for the native title holders or claim group, to ensure they know what agreements have been entered into on their behalf. It is also useful more broadly for all users of the native title system to have information about current future act agreements.

19 In **Chapters 3–5** of this Report, 'native title holders or claim group' refers to the persons who must authorise the making of an ILUA. For area agreement ILUAs and alternative procedure ILUAs, this may include persons who may hold native title: see *Native Title Act 1993* (Cth) ss 24CD(2), (2A), (3)–(4), 24DE(4)–(5).

20 See, eg, Minerals Council of Australia, *Submission 113*; National Farmers' Federation, *Submission 114*.

21 *Native Title Act 1993* (Cth) s 41A(1)(a).

22 *Ibid* s 41B(2).

23 Commonwealth, *Parliamentary Debates*, House of Representatives, 17 October 2019, 4485 (Christian Porter, Attorney-General); Replacement Revised Explanatory Memorandum, Native Title Legislation Amendment Bill 2020 (Cth) [69].

Publicly available information about agreements

Recommendation 17

The *Native Title Act 1993* (Cth) be amended to require that there be published:

- a. on the Register of Indigenous Land Use Agreements, information as to whether or not the indigenous land use agreement recorded on the Register has an associated ancillary agreement; and
- b. on the record of agreements made under section 31 of the Act, a statement to the effect that the parties consent to the doing of the future act or class of act in which the act is included, and if this consent is subject to conditions.

This Recommendation operates prospectively.

5.22 Currently, the Record and the Register both contain:

- a description of the area covered by the agreement;
- the name and contact details of each of the agreement parties; and
- the period during which the agreement will operate (if specified).

5.23 The Record contains information about whether or not there is an ancillary agreement in connection with the section 31 agreement recorded,²⁴ but the Register does not contain the same detail in relation to ILUAs. The Register contains a statement about the parties' consent to the doing of the future act under an ILUA,²⁵ but the Record does not contain the same detail in relation to section 31 agreements.

5.24 **Recommendation 17** would require the Register and Record to both contain the following information:

- whether or not there is any ancillary agreement; and
- a statement to the effect that the parties consent to the doing of the future act or class of act in which the act is included. Consistent with the current requirement in relation to the statement about consent on the Register of ILUAs,²⁶ this statement should also include whether the consent is subject to conditions.

5.25 If implemented, **Recommendation 17** would harmonise the information on the Record and Register and ensure consistency of publicly available information about

²⁴ *Native Title Act 1993* (Cth) s 41B(2)(d).

²⁵ The Register of ILUAs also must contain statements to the effect that, if the future act is one to which the right to negotiate would otherwise apply, the right to negotiate is not intended to apply; and if the act is the surrender of native title under an ILUA, that the surrender is intended to extinguish native title rights and interests. See *ibid* s 24EB(1).

²⁶ *Ibid*.

ILUAs and section 31 agreements. This consistency would support the overarching purpose of the Register and the Record to provide a central record of information about ILUAs and section 31 agreements. It would also support transparency in relation to what agreements have been entered into and where, what kinds of future acts have been consented to under the agreements, and whether an ancillary agreement has been negotiated in connection with the head agreement.

5.26 As discussed in **Chapter 4**, it may also be useful if ILUAs on the Register contained a statement as to whether the ILUA is said to provide full and final compensation pursuant to ss 24EB or 24EBA of the *NTA*. This has not been included in a recommendation in this Report but may be the subject of future consideration.

5.27 The ALRC has heard that users of the future acts regime can face significant difficulty in knowing whether an ancillary agreement has been negotiated in connection with an ILUA or a section 31 agreement. This issue is discussed further in **Chapter 3**.

5.28 In developing **Recommendation 17**, the ALRC was mindful of the need to balance the benefits of transparency against the need for confidentiality. There have been previous reform proposals to increase the available information on the Register.²⁷ Feedback to those proposals has highlighted that any proposed increase to information made publicly available needs to balance the benefit of such transparency with the parties' right to confidentiality.²⁸

5.29 The *Native Title Legislation Amendment Act 2021* (Cth) introduced the Record. The ALRC has noted the policy choice to create a Record, and not a Register, of section 31 agreements. The substance of the section 31 agreement reform was developed through a number of consultation rounds conducted by the Attorney-General's Department (Cth) between 2017 and 2019.²⁹

27 Attorney-General (Cth) and Minister for Families, Housing, Community Services and Indigenous Affairs (Cth) (n 1) 12–13. This paper was released before the establishment of the record of section 31 agreements.

28 Cape York Land Council Aboriginal Corporation, Submission to Attorney-General (Cth) and Minister for Families, Housing, Community Services and Indigenous Affairs (Cth), *Leading Practice Agreements: Maximising Outcomes from Native Title Benefits (Discussion Paper, 2010)* (30 November 2010); Law Council of Australia, Submission to Attorney-General (Cth) and Minister for Families, Housing, Community Services and Indigenous Affairs (Cth), *Leading Practice Agreements: Maximising Outcomes from Native Title Benefits (Discussion Paper, 2010)* (3 December 2010); NTSCORP, Submission to Attorney-General (Cth) and Minister for Families, Housing, Community Services and Indigenous Affairs (Cth), *Leading Practice Agreements: Maximising Outcomes from Native Title Benefits (Discussion Paper, 2010)* (4 January 2011).

29 Attorney-General's Department (Cth), *Reforms to the Native Title Act 1993 (Cth)* (Options Paper, 2017); Attorney-General's Department (Cth), *Exposure Draft of Native Title Legislation Amendment Bill 2018 and Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018* (Public Consultation Paper, 2018).

5.30 Submissions received by the Attorney-General's Department (Cth) over that period identified that the key goal sought by stakeholders in reforming the processes applying to section 31 agreements was greater transparency about their existence.³⁰

5.31 The Explanatory Memorandum to the *Native Title Legislation Amendment Act 2021* (Cth) identified that it was unnecessary to introduce a registration test and criteria for section 31 agreements because of differences in how section 31 agreements, as compared to ILUAs, bind the native title holders and how these agreements are agreed to by native title holders or claim group.³¹ The ALRC agrees with this reasoning and has not identified a reason to require registration of section 31 agreements. **Recommendation 17** therefore focuses on transparency and consistency in information as between the Register and Record.

Maintaining the Register of Indigenous Land Use Agreements

Recommendation 18

The *Native Title Act 1993* (Cth) be amended to provide that:

- a. under s 199A, the Native Title Registrar's functions include an own motion power to maintain the Register of Indigenous Land Use Agreements, including by requesting information from the agreement parties in relation to an indigenous land use agreement; and
- b. in addition to the matters already set out in s 199C(1), include an additional ground for the removal from the Register of Indigenous Land Use Agreements of the details of an agreement that, having provided all the parties to the agreement with a reasonable opportunity to comment, the Registrar believes, on reasonable grounds, that the agreement has expired or been terminated, or has otherwise come to an end.

30 See, eg, First Nations Legal & Research Services, Submission to Attorney-General's Department (Cth), *Reforms to the Native Title Act 1993 (Cth) (Options Paper, 2017)* (2018); Angus Frith, Submission to Attorney-General's Department (Cth), *Reforms to the Native Title Act 1993 (Cth) (Options Paper, 2017)* (1 March 2018); Law Council of Australia, Submission to Attorney-General's Department (Cth), *Reforms to the Native Title Act 1993 (Cth) (Options Paper, 2017)* (27 February 2018); Minerals Council of Australia, Submission to Attorney-General's Department (Cth), *Reforms to the Native Title Act 1993 (Cth) (Options Paper, 2017)* (February 2018).

31 See generally Replacement Revised Explanatory Memorandum, *Native Title Legislation Amendment Bill 2020* (Cth) [230]–[236]; Commonwealth, *Parliamentary Debates*, House of Representatives, 17 October 2019, 4485–6 (Christian Porter, Attorney-General).

5.32 Currently, the Registrar's powers with respect to the Register of ILUAs are to:

- register ILUAs, a process initiated by the parties lodging an ILUA for registration; and
- remove ILUAs under s 199C (see above at paragraph [5.14]), a process initiated either by a determination of native title being made or by a party in writing, subject to an order being made by the Federal Court that the ILUA stay on the Register.³²

5.33 Further, where the parties notify the Registrar in writing of amendments to the agreement that meet the criteria set out in s 24ED(1), those amendments take effect without requiring the ILUA to be further registration tested.³³

5.34 Where an ILUA has expired, absent the parties requesting its removal, the Registrar does not have a power to remove the ILUA from the Register. The result is that an unknown number of expired ILUAs remain registered on the Register. This means the Register does not accurately reflect current ILUAs and the future acts that are validated under them.

5.35 Some older ILUAs on the Register relate to projects that have ceased operation or future acts that have been completed, but the Registrar's power to remove these ILUAs is dependent on receiving a written request from all parties to the ILUA under s 199C(1)(c) of the *NTA*.

5.36 As outlined above at paragraph [5.18], the Register serves a dual purpose: to provide the parties legal certainty by conferring certain effects on an ILUA once it is placed on the Register; and to provide transparency about current ILUAs and the use of areas subject to native title.

5.37 The rationale for **Recommendation 18** is that the Register of ILUAs should be an accurate and current record of future acts that can be relied on by governments, native title parties, other users of the native title system, and the general public. An accurate and current Register supports transparency and provides accurate and reliable information to those who may need it.

5.38 **Recommendation 18** gives the Registrar the ability to actively maintain the Register of ILUAs, and to do so with greater flexibility than at present. It does this in two ways:

³² *Native Title Act 1993* (Cth) s 199C(1A).

³³ The matters in a registered ILUA that can be amended without requiring further registration testing are contained in s 24ED(1) of the *NTA* and include updating property descriptions (but not where this update includes any new area of land or waters) and updating a description identifying a party to the ILUA (including where a party has assigned or transferred its rights and liabilities under an ILUA). If such amendments have been agreed by the parties to the ILUA and are notified to the Registrar in writing by the parties, s 24ED(1) provides for the amendments to take effect for the purpose of the *NTA*. If an amendment changes any detail of the ILUA that is entered in the Register, the Registrar must update the Register to reflect the change: *ibid* s 199B(5).

- First, by clarifying in the *NTA* that the Registrar has a discretionary power to maintain the Register, which could include being able to amend details on the Register or update the Register pursuant to the *NTA*.
- Secondly, by amending s 199C to add to the reasons for which the Registrar can remove ILUAs from the Register. This is to ensure that the Registrar has the power to remove expired and terminated ILUAs after affording the parties a reasonable opportunity to comment, but without the parties having to initiate the process.

5.39 By giving the Registrar the ability to initiate amendments to the Register, keeping an accurate and current Register of ILUAs will not depend on the parties informing the Registrar that an ILUA has terminated or expired. The agreement parties would, however, retain their current ability to request the Registrar to remove the details of an ILUA on the basis that it has terminated or expired.

5.40 In all cases in which the Registrar, acting on their own motion, contemplates removing an ILUA from the Register, the Registrar would be required to give all agreement parties an opportunity to be notified and provide information about the ILUA to the Registrar within a certain timeframe.

5.41 Providing the parties with notice and an opportunity to comment on the proposed removal is important because of the possible consequences of the Registrar exercising this power. As discussed earlier, both the statutory contractual effect of an ILUA (binding all persons who hold native title) and the validation of future acts consented to under the ILUA are linked to the ILUA being on the Register. A change to the status of an ILUA's registration may have serious consequences for the ILUA and agreement parties. On a practical level, the Registrar is not generally privy to details about the status of agreements (for example, whether the agreement has terminated) and so obtaining information and submissions from the parties will be essential to the effective exercise of the power by the Registrar.

5.42 **Recommendation 18** does not displace the existing reasons set out in s 199C in relation to which the Registrar must remove the details of an agreement from the Register. This means that the Registrar must still remove agreements for the reasons set out at paragraph [\[5.14\]](#).

5.43 As discussed below, when ILUAs are removed from the Register, they should then be placed on a newly created record of expired agreements as proposed by **Recommendation 19**.

5.44 The Registrar's decision to remove an ILUA under s 199C appears to be an administrative decision. The Registrar's decision to remove ILUAs on the basis proposed by **Recommendation 18** would, as now, be a reviewable decision.

5.45 **Recommendation 18** focuses on ILUAs and the Register, because removal of an ILUA from the Register has particular effects (see [\[5.15\]](#)–[\[5.17\]](#)). In relation to section 31 agreements, removal of the agreement from the Record does not have the same effect as the removal of an ILUA from the Register, because section 31

agreements do not have the same effect as a registered ILUA in binding all persons who hold native title. The Registrar is not required to keep a record, or provide information, in relation to an expired section 31 agreement.³⁴

5.46 **Recommendation 18** develops Proposals 3 and 4 outlined in the Discussion Paper. Proposal 3 suggested that s 199C be amended and Proposal 4 suggested that the Registrar should be given a mandatory audit power — that is, that the Registrar would be required to exercise the power periodically in relation to a certain number of ILUAs.

5.47 Feedback on these proposals was generally supportive.³⁵ Identified benefits included that by keeping the Register up to date, the accuracy and currency of publicly available information could be improved, making the Register more reliable.³⁶

5.48 A number of submissions were concerned with the mandatory nature of the power and suggested that it should instead be discretionary. Feedback suggested that:

- given the current resources of the NNTT, resourcing the NNTT to perform a new function may be an issue that would limit its effectiveness;³⁷
- an audit could create an unwelcome and unnecessary administrative burden for the agreement parties;³⁸ and
- the Registrar is not necessarily privy to information about agreement implementation, expiry, or termination, and so there would be practical difficulties in exercising this power as expressed in the Discussion Paper.³⁹

5.49 Feedback also highlighted the need to ensure that agreement parties are notified that the Registrar was exercising the audit power, and that the parties have the opportunity to provide the Registrar with relevant information about the ILUA.⁴⁰

5.50 **Recommendation 18** responds to this feedback by providing that the Registrar's maintenance power is discretionary and ensuring that, where the

34 Ibid s 41B(8).

35 See, eg, Houston Legal & Consultants, *Submission 95*; North Queensland Land Council, *Submission 96*; South Australian Native Title Services, *Submission 104*; AgForce Queensland Farmers Ltd, *Submission 111*; Minerals Council of Australia, *Submission 113*; National Farmers' Federation, *Submission 114*; NSW Minerals Council, *Submission 117*; Australian Human Rights Commission, *Submission 118*; Law Council of Australia, *Submission 120*; NSW Bar Association, *Submission 140*; First Nations Legal and Research Services, *Submission 146*; Kimberley Land Council, *Submission 151*.

36 See, eg, AgForce Queensland Farmers Ltd, *Submission 111*; National Farmers' Federation, *Submission 114*; Western Australian Government, *Submission 115*.

37 North Queensland Land Council, *Submission 96*; National Farmers' Federation, *Submission 114*; Western Australian Government, *Submission 115*.

38 Central Land Council, *Submission 121*.

39 National Native Title Tribunal, *Submission 86*.

40 See, eg, *ibid*; Association of Mining and Exploration Companies, *Submission 97*; Local Government Association of Queensland, *Submission 108*; Law Council of Australia, *Submission 120*; NSW Bar Association, *Submission 140*; Yamatji Marlpa Aboriginal Corporation, *Submission 148*; Northern Territory Government, *Submission 149*.

Registrar, acting on their own motion, is considering the removal of an ILUA from the Register, parties are notified that the Registrar intends to exercise the power and afforded a reasonable opportunity to comment.

5.51 Proposal 3 suggested amending s 199C to allow the Registrar to remove an ILUA from the Register on the basis that the relevant property interest has expired or been surrendered. However, feedback highlighted that obligations in ILUAs can outlive a property interest. This can include remediation and payment obligations.⁴¹ For this reason, **Recommendation 18** does not include an ability to remove agreements under s 199C on the basis that the relevant property interest has expired or been surrendered.

Record of expired agreements

Recommendation 19

The *Native Title Act 1993* (Cth) be amended to:

- a. require the creation of a record of expired indigenous land use agreements that expire on or after the implementation of this Recommendation, to be established and kept by the Native Title Registrar; and
- b. provide that when an indigenous land use agreement is removed from the Register of Indigenous Land Use Agreements for any reason, it is to be placed on the record of expired indigenous land use agreements.

5.52 Currently, when ILUAs are removed from the Register, there is no longer a publicly available record of that agreement.

5.53 The ALRC has heard suggestions from stakeholders that when ILUAs are removed pursuant to s 199C, those ILUAs should not be removed from the Register, but rather, reclassified as ‘expired’ or ‘inactive’ or placed on a separate record.⁴²

5.54 **Recommendation 19** provides for a new record of expired ILUAs. A historical record of future acts done provides a record for all parties to refer to and builds an archive for governments and current and future generations of native title holders. Enabling native title holders (among other parties) access to a historical record of future acts done on their Country supports native title holders to uphold their rights, including by assisting PBCs to identify future acts that have been done in the past for the purposes of potential statutory compensation applications. It also provides governments with an easily accessible record of future acts consented to under

41 See, eg, Law Council of Australia, *Submission 120*; Central Land Council, *Submission 121*.

42 See, eg, Maddocks, *Submission 62*; Australian Human Rights Commission, *Submission 118*; Queensland South Native Title Services, *Submission 124*; Kimberley Land Council, *Submission 151*; State of Queensland, *Submission 152*.

ILUA for administrative purposes, as well as for the purpose of assessing statutory compensation applications made by native title holders (including whether the ILUA is intended to be in full and final satisfaction of statutory compensation pursuant to ss 24EB and 24EBA).

5.55 The record of expired ILUAs would only be able to provide an archive of ILUAs from the date of implementation of **Recommendation 19**. It is not realistic to require ILUAs that have already been removed from the Register to be included in the record prior to it being established. This means ILUAs that have already been removed from the Register would not appear on the newly created record.

Amending indigenous land use agreements

5.56 In the Discussion Paper, the ALRC asked (at Question 10) whether the *NTA* should be amended to broaden the scope of permitted amendments to ILUAs that do not require reauthorisation and reregistration.

5.57 The Attorney-General's Department (Cth) has recently undertaken an evaluation of the *Native Title Legislation Amendment Act 2021* (Cth) and the amendments to the *Native Title Act 1993* (Cth) introduced by that Act. This evaluation includes s 24ED of the *NTA* (which provides for minor amendments to be made to ILUAs).

5.58 The ALRC received submissions in response to the Discussion Paper about this issue, which are summarised below. Given the timing of the Department's evaluation and this Report, the ALRC has not been able to consider the results of the evaluation, which should inform any reforms to s 24ED. The ALRC therefore has not made a recommendation for reform to s 24ED of the *NTA* in this Report, but suggests that the feedback outlined below should be taken into account by the Attorney-General's Department (Cth) alongside the results of the evaluation.

5.59 Feedback to Question 10 in the Discussion Paper indicated broad support for more flexibility in amendments permitted without reregistration.⁴³ However, there were significant differences in the feedback in relation to the extent to which the categories of permitted amendments should expand. A number of submissions highlighted that careful consideration of expanded permissible amendments would be necessary.

43 See, eg, Department of Agriculture, Fisheries and Forestry (Cth), *Submission 61*; Maddocks, *Submission 62*; Isaac Regional Council, *Submission 70*; National Native Title Tribunal, *Submission 86*; Houston Legal & Consultants, *Submission 95*; Association of Mining and Exploration Companies, *Submission 97*; Norman Waterhouse Lawyers, *Submission 102*; Western Australian Government, *Submission 115*; Law Council of Australia, *Submission 120*; Queensland South Native Title Services, *Submission 124*; Great Barrier Reef Marine Park Authority, *Submission 129*; First Nations Legal and Research Services, *Submission 146*; Northern Territory Government, *Submission 149*; State of Queensland, *Submission 152*.

5.60 Some feedback suggested that amendments that increase or improve benefits for the common law holders under the agreement — but not an amendment that would decrease the benefits — should be permitted.⁴⁴

5.61 Some feedback proposed that amendments should relate only to non-substantive changes, which might include: updating contact details; administrative adjustments to agreement implementation like timeframes, payment schedules, or procedural steps; and other amendments that do not affect substantive rights and obligations or relate to the native title decision.⁴⁵

5.62 There was a small amount of support for a broader range of permissible amendments, for example:

- re-authorisation and re-registration of an ILUA should only be required where the amendments relate to the inclusion of an entirely different or unrelated future act or class of future acts;⁴⁶ and
- permissible amendments should include: those that lie within the same industry type as the originally registered project; amendments that positively contribute to national or global issues; or amendments shown to enhance productivity, industry growth, or increased efficiency.⁴⁷

5.63 The Central Land Council observed that one problem is that s 24ED(2)

currently requires the existing agreement to be de-registered (presumably by agreement under s 199C(1)(c)(ii)) and then the amended agreement to be the subject of a fresh application for registration. There should be a simple and direct process for the registration of an amended agreement, to replace the existing registration.⁴⁸

5.64 In the ALRC's view, any gains in flexibility and efficiency should be balanced against the fundamental requirement that common law holders have been consulted and consented to a decision that affects native title.⁴⁹

Difficulties and substantial unfairness arising from pre-determination agreements

5.65 This part discusses recommendations relating to how agreements negotiated prior to a final determination of native title should be dealt with following determination,

44 See, eg, North Queensland Land Council, *Submission 96*.

45 See, eg, Houston Legal & Consultants, *Submission 95*; Norman Waterhouse Lawyers, *Submission 102*; NSW Minerals Council, *Submission 117*; Australian Human Rights Commission, *Submission 118*.

46 Isaac Regional Council, *Submission 70*.

47 Department of Agriculture, Fisheries and Forestry (Cth), *Submission 61*.

48 Central Land Council, *Submission 121*. See also Northern Territory Government, *Submission 149*.

49 This also includes that any amendments to agreement benefits should be put to the common law holders, as that is a matter related to their consent to decisions affecting their native title rights and interests.

particularly where an agreement has been negotiated with a registered native title claimant who is not ultimately determined to hold native title.

5.66 The aim of these recommendations is to ensure that determined native title holders (whose native title rights and interests are managed on their behalf by a Prescribed Body Corporate ('PBC')) have access to information about pre-determination agreements negotiated over their determination area and, in appropriate circumstances, can have the obligations and benefits of that agreement assigned to them. More broadly, the aim of these recommendations is to provide a mechanism to rectify any difficulty or substantial unfairness for native title holders which has arisen because the determined area (or part of it) is subject to a pre-determination agreement which was not made or authorised by the same persons as those who are determined to be the native title holders.

Issues arising in relation to pre-determination agreements

Context

5.67 Native title determinations (which are made by the Federal Court) can take many years to resolve. Native title claims are predominantly resolved by consent of the parties (commonly called a consent determination). A number of areas are subject to overlapping or competing claims for the recognition of native title, which adds complexity to the Federal Court's task. This is because the Federal Court must ensure that overlapping applications are dealt with in the same proceeding, to the extent that they cover the same area.⁵⁰

5.68 The *NTA* sets out two processes by which persons who hold or may hold native title are given statutory procedural rights under the Act, one preliminary, and one final:

- The first process is preliminary and provides for the exercise of procedural rights in the future acts regime, pending a final determination of native title. This process provides that where a native title determination application is filed with the Federal Court by an applicant representing a claim group, notice of the application will be provided to the Native Title Registrar. The claim will then be registered on the Register of Native Title Claims, provided the Registrar is satisfied there is a *prima facie* case that the native title rights and interests claimed can be established.⁵¹ If the claim is registered, then the group becomes a registered native title claim group, and the members of the registered native title claim group authorised by the group become the applicant and are the registered native title claimant,⁵² and are afforded procedural rights in the future acts regime.

50 *Native Title Act 1993* (Cth) s 67.

51 *Ibid* s 190B. Generally, pt 7 of the *NTA* deals with the Register of Native Title Claims.

52 *Ibid* ss 61(2), 253.

- The second process is the final determination of native title made by the Federal Court in which the Court identifies the native title holders as well as the native title rights and interests that they hold.

5.69 Registered native title claimants have a statutory right to negotiate section 31 agreements and must be a party to an area agreement ILUA (under s 24CD(2)). This chapter refers to these agreements as ‘pre-determination agreements’. Registered native title claimants will be the named party or parties to a pre-determination agreement and will have negotiated the terms of such an agreement. Pre-determination ILUAs must be authorised pursuant to ss 24CG and 251A of the *NTA*.⁵³

5.70 The *NTA* therefore expressly deals with the doing of future acts prior to a determination of native title being made by conferring procedural rights upon a group of people who are recognised, only on a preliminary basis, as holding native title rights and interests. Numerous future acts have been validated by these pre-determination agreements.

Why does the Native Title Act permit agreements to be made before a determination of native title?

5.71 The Federal Court has recognised the ‘complex and unique cultural and legal environment’ in which pre-determination agreements exist:

This mixture of common law principles with other concepts that are quite foreign to the common law, serves to highlight the uniqueness of the Act within which the ILUA process operates. At the centre of the Act is a distinctive set of native title rights and interests which, while they are recognised by the common law and by the Act itself, do not originate from either of them. Furthermore, these rights and interests are generally communal rights and interests, which are usually held by a large group of indigenous people who together make up a community or society, where the membership of that community or society is constantly fluctuating as births and deaths occur within its population. And, the native title rights and interests concerned usually relate to large areas of land or waters and are dependent on the laws and customs of that community or society and the nature and extent of their continuing connection to the land or waters concerned. Added to all this is the fact that, in many cases, the existence of these rights and interests have yet to be determined under the Act. And finally, there is the factor that most ILUAs can be expected to operate for a long period.⁵⁴

5.72 The preamble to the *NTA* evidences an intention for the Act to recognise and protect native title rights and interests while also facilitating the doing of future acts.

53 See also *ibid* s 203BE. There is no corresponding authorisation requirement for section 31 agreements. Where an area agreement ILUA covers an area where there is not a registered native title claim, any person who claims to hold native title or the relevant Native Title Representative Body or Service Provider can be a party to the agreement.

54 *QGC Pty Ltd v Bygrave (No 2)* [2010] FCA 1019 [64].

The preamble also states that, wherever appropriate, future acts should be done by making every reasonable effort to secure the agreement of native title holders.

5.73 The preamble highlights that the right to negotiate is an important statutory protection for native title rights and interests. The High Court has observed that the right to negotiate

is a valuable right that may be exercised before the validity of an accepted claim has been determined. That the right may be exercised before a claim is determined is clear from the procedures that the Act establishes ... It is also clear from the requirement in s 31 that the Government party negotiate with, among others, the 'native title parties', which expression is defined in s 29(1) to include any registered native title claimant.⁵⁵

5.74 A similar rationale applies to the negotiation of ILUAs. The *NTA* expressly provides that ILUAs can be negotiated with registered native title claimants. In 1996 the Australian Government published *Towards a More Workable Native Title Act*, which led to the development of the *Native Title Amendment Act 1998* (Cth) including the introduction of ILUAs. The paper expressly proposed 'a new mechanism for agreements with registered native title claimants' in the absence of a final determination of native title:

As a practical alternative and to facilitate agreements about future acts, the Government is proposing to provide a new mechanism for the recognition of agreements with registered native title claimants about future acts on land on which they claim native title subsists. The new mechanism would ensure the validity of acts authorised by such agreements but only if the procedures set out in the new provisions are followed.⁵⁶

5.75 The basis for the provision of rights to registered native title claimants to negotiate section 31 agreements and the requirement that they be a party to any area agreement ILUA is that it is a procedurally necessary interim measure, to both provide for the protection of subsisting native title rights and interests and facilitate the doing of future acts pending a determination of native title.

5.76 In *Weribone on behalf of the Mandandanji People v State of Queensland (No 2)*, Rares J observed that it is

notorious that native title litigation often takes many years to resolve. The ability of persons who make native title claims over lands and waters to negotiate ILUAs or s 31 agreements with third parties provides a very important mechanism to enable the community at large as well as commercial interests to undertake activities on those lands and waters while the Court proceeds to determine the question of whether those claimants, in fact, have the native title rights and interests that they assert.⁵⁷

55 *Fejo v Northern Territory* (1998) 195 CLR 96 [25].

56 Department of the Prime Minister and Cabinet (Cth), *Towards a More Workable Native Title Act: An Outline of Proposed Amendments* (Outline Paper, May 1996) [44].

57 *Weribone v Queensland (No 2)* (2013) 217 FCR 189 [32].

5.77 In that case, Rares J examined the role of a registered native title claimant and concluded that although a registered native title claimant is not a 'trustee for a reward', it nonetheless has a 'duty to act on behalf of not only the claim group which that party represents but also all the persons who hold native title'.⁵⁸

5.78 Rares J also noted that registered native title claimants are entitled to 'appropriate and reasonable benefit' in recognition of their work in negotiating agreements:

The Act contemplates that the party's work involved in the negotiation, and the potential compromise of rights or interests that the party claimed in good faith cannot be left uncompensated. Thus, subject to observing the fiduciary duties the party owes to the true native title holders, it is entitled to bargain for and obtain an appropriate and reasonable benefit in all the circumstances which can be enjoyed pending the result of the final hearing.

Claimants for native title have rights and powers under Div 3 of Pt 2 of the Act to negotiate some reasonable and proportionate benefit for themselves as a stopgap until the identity of the actual holders of native title is determined by the Court. Those rights and powers must not be used by those claimants in a way that ignores or defeats the rights and interests of the true native title holders.⁵⁹

5.79 Though an important mechanism in the future acts regime, the making of pre-determination agreements necessarily means that, sometimes, agreements are made with registered native title claimants who are not ultimately determined to be the native title holders. The mechanism means that there are two stages of identifying who should be a native title party to an agreement: a preliminary stage, pre-determination; and a final stage, post-determination.

What has the ALRC heard about pre-determination agreements?

5.80 While there are benefits to the preliminary process for recognition that gives procedural rights to registered native title claimants, this process also has the potential to cause difficulty or unfairness to the persons ultimately determined to be the native title holders. This potential arises because the preliminary process for recognition may not correctly identify those persons who will ultimately be recognised on a native title determination as the native title holders.

5.81 There is therefore a potential for disparity between those persons who are the registered native title claimant who negotiated and made a pre-determination agreement, and the native title holders whose rights and interests are the subject of the pre-determination agreement. The *NTA* does not provide sufficient means for dealing with the difficulties that arise as a result of that disparity.

5.82 The ALRC has heard numerous issues in relation to pre-determination agreements. The ALRC has identified difficulties that arise because of the disparity referred to above, which are addressed by the recommendations in this section:

58 Ibid [46]. See also *Lampton on behalf of the Juru People v Queensland* [2014] FCA 736 [34].

59 *Weribone v Queensland (No 2)* (2013) 217 FCR 189 [46]–[47].

- The first is access by determined native title holders to pre-determination agreements. Currently, PBCs who hold a positive native title determination on behalf of the common law holders over an area are not a party to the pre-determination agreement and are not currently entitled to access pre-determination agreements that have been negotiated over that area. **Recommendation 20** is directed to this issue.
- The second is that a wide range of difficulties or substantial unfairness may arise including where the terms of an agreement do not expressly or adequately set out what is to happen to the agreement on determination of native title. This can include difficulties in assigning pre-determination agreements and dealing with agreement benefits and obligations. **Recommendation 21** is directed to this issue.

5.83 Other issues, which are outside the scope of these recommendations, are outlined further below.

Access to pre-determination agreements by PBCs

Recommendation 20

The *Native Title Act 1993* (Cth) be amended to provide that:

- a. the Prescribed Body Corporate for a determined area has a prima facie right to access all registered indigenous land use agreements, agreements under section 31 of the Act, and any ancillary agreement (to an indigenous land use agreement or agreement under section 31 of the Act) in so far as such an agreement deals with the determination area of the Prescribed Body Corporate;
- b. the right to access is exercisable against any person who has access to such an agreement on the making of a written request by the Prescribed Body Corporate (including the Native Title Registrar) and on the giving of notice to every party to the agreement (in so far as they are known or reasonably discoverable to the Prescribed Body Corporate);
- c. where, following a reasonable time after the giving of notice, no dispute about access has arisen, the Native Title Registrar be empowered to provide the Prescribed Body Corporate with a copy of the relevant registered indigenous land use agreements or agreements under section 31 of the Act; and

- d. where there is any dispute about access, the parties may seek resolution by the Federal Court of Australia (preferably by a Registrar of that court at first instance) and specify that, in resolving any dispute about access to information which is confidential, the Court have regard to whether the public interest in refusing access is outweighed by the public interest in the Prescribed Body Corporate obtaining access for the purposes for which access has been sought.

5.84 The rationale for **Recommendation 20** is that the PBC, as the entity for the native title holders, should be able to access information in agreements about the future acts that have been negotiated over its determination area prior to the determination and identify obligations and benefits that may be ongoing. This information includes ILUAs, section 31 agreements, and ancillary agreements that have been negotiated in connection with the doing of the future act. **Recommendation 20** confers a qualified (rather than unqualified) right of access to agreements, on the basis that access may raise particular complexities that are best dealt with by the Federal Court.

5.85 The intent of **Recommendation 20** includes the objective of ensuring that where there are ongoing obligations or impacts under pre-determination agreements, the PBC can properly assess whether that agreement should appropriately be assigned to it or otherwise be removed from the Register or Record.

5.86 As South Australian Native Title Services observed in its submission, it is difficult to think of another area of law where a pre-existing agreement or instrument that affects the rights of a person's interest in land are not made available to them.⁶⁰

5.87 Where a PBC does not have a copy of a pre-determination agreement that relates to its determination area and is not informed of its contents, it is not possible for the PBC to monitor compliance with the ongoing obligations and delivery of benefits contained in the agreement. This can mean that a PBC cannot, on behalf of the common law holders, enforce obligations under the agreement and benefits under the agreement may not be realised.⁶¹ It also means that the benefits may be being delivered to the native title party to the agreement, rather than to the native title holders (via the PBC who has subsequently been determined to hold native title rights and interests on behalf of the common law holders).⁶² A PBC may also be unaware of future acts that are occurring or will occur over its determination area.

5.88 The NTA does not currently provide for an effective mechanism for resolving access issues. **Recommendation 20** is directed to providing that mechanism. It

60 South Australian Native Title Services, *Submission 104*.

61 Australian Human Rights Commission, *Submission 118*.

62 See paragraph [\[5.113\]](#) below for further discussion of this issue.

aims to enhance fairness and efficiency for all parties by removing unnecessary and ineffective processes, while maintaining fairness for the agreement parties.

Right of access

5.89 **Recommendation 20** provides that the PBC for a determined area has the right to access all ILUAs, section 31 agreements, and ancillary agreements (to an ILUA or section 31 agreement) that intersect with the determination area.

5.90 This right of access should be available for all PBCs and apply retrospectively, rather than only being prospectively available to a PBC at the time of determination of native title (that is, for future determinations after this reform is implemented).⁶³ This ensures that current PBCs, which have already had their native title determined but continue to face access issues, can benefit from **Recommendation 20** if necessary.

5.91 A PBC can exercise the right by making a written request to any person who has access to the agreement and providing notice to every party to the agreement (to the extent those parties are known to the PBC or are reasonably discoverable). A PBC may exercise the right as against any person who has access to the agreement. This includes, among others, the agreement parties, and for ILUAs and section 31 agreements, the Native Title Registrar who holds copies of both. The NNTT may facilitate this right of access by assisting the PBC with the identity and contact details to provide notice to the agreement parties. The NNTT may also be able to assist by providing the PBC with a list of registered ILUAs and section 31 agreements on the record that intersect with its determination area.

5.92 Where there is no dispute about access, **Recommendation 20** gives the Registrar a role in providing access to these agreements on determination of native title, because the NNTT holds copies of registered ILUAs and section 31 agreements that are on the record. A PBC would need to obtain access to an ancillary agreement from one of the agreement parties, as the NNTT does not hold copies of ancillary agreements.

5.93 Currently, where a PBC does not have a copy of an ILUA, it may request a copy from the NNTT. The NNTT's practice is to direct the persons who request access to the parties to the ILUA.⁶⁴ In its submission, Parallax Legal outlined the problems that can arise in seeking access to pre-determination agreements:

In our experience, legal representatives often refuse or cause significant delays in providing agreements to former clients or their new representatives for varying reasons. Agreements may have been negotiated by a previous Applicant and not formally assigned, leading to the assertion that the current Applicant or PBC is not a party. Alternatively, some argue the claim group is the true client, and without instructions from the entire group, disclosure is not permitted. This is

63 M Lucas, *Submission 57*.

64 The NNTT has recently consulted on options to 'facilitate more streamlined access to ILUAs by some groups and provide clear procedures for all requestors, to [the] extent that the NNTT is lawfully able to provide access': National Native Title Tribunal, *Accessing Indigenous Land Use Agreements* (Consultation Paper, 2025).

impractical. Small law firms and former Applicants rarely have the resources to convene a claim group meeting to obtain such instructions.⁶⁵

5.94 As discussed above at paragraphs [5.71]–[5.79], the *NTA* provides for the negotiation of pre-determination agreements in order to facilitate the doing of future acts while protecting native title pending a final determination. As discussed, the registered native title claimant likely has some duty towards the determined native title holders.⁶⁶ This supports a PBC obtaining access to extant pre-determination agreements.

5.95 Obtaining copies of agreements (including ancillary agreements) would assist a PBC in assessing whether there are any agreements that should be assigned to it. If necessary, a PBC may then apply to the Federal Court in line with **Recommendation 21** to deal with the agreement.

5.96 The ALRC has considered whether the approach to access should be different as between ILUAs and section 31 agreements. ILUAs and section 31 agreements have different implications for a PBC and common law holders:

- The *NTA* provides that ILUAs (once registered) are binding on all persons who hold native title. This includes current and future native title holders, meaning that ILUAs bind the common law holders on determination (subject to s 199C).
- Section 31 agreements, on the other hand, bind parties as in a regular contractual arrangement.

5.97 However, the ALRC has not found a reason to differentiate access as between these agreement types to displace the principle that a PBC (on behalf of the common law holders) should be able to access information about future acts in the determination area agreed to under a pre-determination agreement. The same rationale supports access to ancillary agreements.

Efficient resolution of complexities relating to access

5.98 There may be circumstances in which the PBC's right to access is complex. Queensland South Native Title Services said that access may raise complicated questions,

for example in circumstances where the agreement negotiated was for a subgroup of the claim area or some restrictions were put in the agreements. Further, if the registered agreement relates to a claim that was dismissed before the current claim, the NNTT should assess whether that agreement is still extant and whether it is appropriate to provide it to the later claim group or RNTBC, which may not be comprised of the same people.⁶⁷

5.99 Similarly, the NNTT noted that different considerations

⁶⁵ Parallax Legal, *Submission 157*.

⁶⁶ *Weribone v Queensland (No 2)* (2013) 217 FCR 189 [46]. See also *Lampton on behalf of the Juru People v Queensland* [2014] FCA 736 [34].

⁶⁷ Queensland South Native Title Services, *Submission 124*.

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.⁶⁸

5.100 Following the provision of notice to the agreement parties, those parties would then have an opportunity to raise whether there are any issues that should be considered before access is provided. These issues may include that the agreement parties wish to keep the agreement (or parts of the agreement) confidential; or may be issues around the identity or composition of the parties, such as outlined in paragraph [5.98] above.

5.101 Where the factual circumstances raise particular complexity that cannot be resolved easily between the parties, parties may apply to the Federal Court for resolution of the issue. Where possible, a Registrar of the Federal Court should deal with access disputes in the first instance.

5.102 When the Federal Court considers an application for access to an ILUA or section 31 agreement where confidentiality is in issue, the Court should have regard to the public interest in providing access, as against the public interest in refusing access. This will require the Federal Court to balance the public interest in ensuring that the native title holders have access to agreements that affect their native title rights and interests with the public interest in maintaining confidentiality in a particular case.

5.103 The rationale for providing a pathway to deal with disputes about access in this way is that there may be complex factual circumstances around a particular agreement that are most appropriately dealt with by a court. However, PBCs should not be required to apply to the Federal Court in every instance where issues are raised by the pre-determination agreement parties. This would be inefficient and costly, and could replicate current issues with access by presenting a barrier each time a PBC seeks access to pre-determination agreements. Parties may be able to resolve disputes over access amongst themselves, for example, by providing the agreement on a confidential basis.

5.104 **Recommendation 20** has developed from Proposal 2 in the Discussion Paper, which sought feedback on access to agreements. Feedback was broadly supportive of Proposal 2, highlighting that the potential benefits would be enhanced transparency and greater empowerment of PBCs in supporting knowledge and record-keeping, connection to Country, and ongoing cultural heritage management.⁶⁹

68 National Native Title Tribunal, *Submission 86*.

69 See, eg, M Lucas, *Submission 57*; Indigenous Land and Sea Corporation, *Submission 68*; National Native Title Tribunal, *Submission 86*; South Australian Native Title Services, *Submission 104*; Minerals Council of Australia, *Submission 113*; NSW Minerals Council, *Submission 117*; Law Council of Australia, *Submission 120*; NSW Bar Association, *Submission 140*; Kimberley Land Council, *Submission 151*; Parallax Legal, *Submission 157*.

5.105 Yamatji Marlpa Aboriginal Corporation noted that s 29 notices (which provide the basis for a section 31 agreement) can often cover multiple determinations such that a section 31 agreement appears to be registered to the entire notice area, but only actually applies to a particular determination.⁷⁰ **Recommendation 20** therefore links access with agreements that actually include part of a PBC's determination area.

5.106 Some submissions cautioned against automatic access where an agreement covers the area of more than one determined PBC.⁷¹ Other submissions sought clarity about how access rights might work where there are overlapping or competing claims of native title. Another concern raised was whether confidentiality could be maintained over agreements when access is given (for example, if commercial conditions could be kept confidential between the agreement parties).⁷² Some feedback expressly supported access to ancillary agreements.⁷³

5.107 These issues are dealt with in **Recommendation 20** by providing that, where such complexities arise, a PBC may apply to the Federal Court for an order about access (including confidentiality provisions) in circumstances where the parties cannot agree a resolution or, in relation to ILUAs and section 31 agreements, the Registrar cannot resolve the issue. However, for the reasons outlined above, access should be a right set out in the legislation.

5.108 The ALRC also heard that common law holders should be able to access agreements that have been negotiated over their determination area. This issue is discussed further below in the context of **Recommendation 23**.

Federal Court power relating to pre-determination agreements

Recommendation 21

The *Native Title Act 1993* (Cth) provide that where any difficulty or substantial unfairness arises for a Prescribed Body Corporate or the native title holders for a determined area, and the difficulty or unfairness arises in part or in whole because the determined area, or part of it, is subject to a pre-determination future act agreement which was not made or authorised by the same persons as those who are the native title holders:

- a. the Federal Court of Australia be empowered to make such orders as the Court considers appropriate to resolve the difficulty or substantial unfairness;

70 Yamatji Marlpa Aboriginal Corporation, *Submission 148*. See also Maddocks, *Submission 62*.

71 See, eg, Association of Mining and Exploration Companies, *Submission 97*.

72 See, eg, NSW Minerals Council, *Submission 117*.

73 See, eg, Parallax Legal, *Submission 157*.

- b. specify that in doing so, the Federal Court of Australia have regard to any difficulty or substantial unfairness that may be occasioned on a party or a beneficiary to the pre-determination agreement by the making of an order or orders; and
- c. provide that an order made in accordance with this Recommendation has effect despite anything contained in the pre-determination agreement, the Act, or any other Commonwealth law or any State or Territory law.

In this Recommendation 'pre-determination future act agreement' means either a registered indigenous land use agreement or an agreement under section 31 of the *Native Title Act 1993* (Cth), or any ancillary agreement to that indigenous land use agreement or agreement under section 31 of the Act, made before a native title determination was made for the relevant area.

5.109 As discussed above, the process to reach a final determination recognising native title rights and interests is a complex process that can take a number of years. Pre-determination agreements are a mechanism to ensure that future acts can be done and that native title is protected pending final determination.

5.110 As outlined above at paragraph [5.14], the Registrar is required to remove the details of a pre-determination ILUA from the Register where a determination of native title is made in relation to any of the area covered by the agreement, and

any of the persons who, under the determination, hold native title in relation to the area is not a person who authorised the making of the agreement.⁷⁴

5.111 The Federal Court can currently order that the details of the ILUA not be removed provided that the Court is satisfied that the determined native title holders

accept the terms of the agreement, in accordance with the process by which they would authorise the making of such an agreement.⁷⁵

5.112 The problem is that aside from outlining when the details of an ILUA should be removed from the Register under s 199C — which applies only to ILUAs and only provides for the removal of agreements — the *NTA* does not expressly provide for what is to happen to pre-determination agreements once a determination of native title is made, where the agreement itself does not address the situation by including, for example, a succession or assignment clause.

5.113 On determination of native title, those persons determined to hold native title rights and interests are not the native title party to a pre-determination agreement and are therefore not entitled to benefits under that agreement. This can lead to unfairness where a registered native title claimant has acted 'in a way that ignores

⁷⁴ *Native Title Act 1993* (Cth) s 199C(1)(b).

⁷⁵ *Ibid* s 199C(1A).

or defeats the rights and interests of the true native title holders'.⁷⁶ It can also lead to difficulties for the PBC where it has no clear pathway to have a pre-determination agreement assigned.

5.114 **Recommendation 21** would allow the Federal Court to deal with this substantial unfairness or difficulty. The Federal Court should be given broad powers to redress or cure any difficulty or any substantial unfairness in a manner that the Court thinks appropriate. The purpose of **Recommendation 21** is to provide a pathway to deal with pre-determination agreements once a determination of native title has been made. This is appropriate because:

- pre-determination agreements may bind the native title holders (if the agreement is an ILUA);
- pre-determination agreements may deal with future acts that are continuing or are to commence post-determination (including continuing obligations to be performed by agreement parties); and
- pre-determination agreements deal with the rights and interests of native title holders, and can be made by persons who are ultimately not determined to be native title holders, significant unfairness can arise for the native title holders including by reason of their rights or interests having been ignored or defeated.

5.115 Therefore, **Recommendation 21** provides a mechanism to ensure that, following a determination of native title, the PBC may assume or otherwise deal with pre-determination agreements.

5.116 The Federal Court's power to deal with pre-determination agreements would be available in particular circumstances, namely, where any difficulty or substantial unfairness to the PBC or native title holders arises due to the existence of a pre-determination agreement which was not made or authorised by the same persons as those who are the native title holders.

5.117 The Federal Court could make orders, among other things, in relation to the following matters:

- whether a pre-determination agreement should be assigned to a PBC where the agreement does not contemplate what is to occur on determination of native title;⁷⁷
- what is to happen to benefits or compensation held on trust, or where agreement payments are to continue post-determination; and
- where it is unclear how the NNTT is to exercise its power under s 199C to remove an ILUA from the Register (see discussion below at paragraph **[5.125]**).

⁷⁶ *Weribone v Queensland (No 2)* (2013) 217 FCR 189 [47].

⁷⁷ In a decision interpreting whether a compensation deed had transferred on determination of native title, the Supreme Court of Western Australia held that there was an automatic transfer of the representation and authority of the applicant to the PBC: *Citic Pacific Mining Management Pty Ltd v Yaburara & Coastal Mardudhunera Aboriginal Corporation* [2020] WASC 332.

5.118 The Federal Court would have a broad discretion to make whatever orders it considers appropriate in the circumstances. The orders that should be made will depend on the particular agreement and determination. By way of illustration only, orders may include:

- an order to assign an agreement to the PBC (provided that the Federal Court is satisfied the common law holders agree to the assignment);
- an order to keep an ILUA on the Register of ILUAs under s 199C(1A); or
- an order to direct payments under an agreement to the PBC.

5.119 Where agreements contain clauses providing for what happens to the agreement on determination of native title, then generally that clause should be given effect unless the effect of that clause is unfair or unjust.

5.120 The Federal Court already deals with issues of contractual interpretation of ILUAs on an ad hoc basis. While there is no express provision in the *NTA* expressly empowering that the Federal Court to determine disputes arising under ILUAs, the Federal Court's jurisdiction is sufficiently broad to do so.⁷⁸ A number of cases demonstrate that the Court has accepted its jurisdiction to determine disputes about the negotiation and registration of ILUAs, as well as disputes arising under the terms of ILUAs.⁷⁹

5.121 For example, the Federal Court has previously implied a term into an ILUA in accordance with usual contractual principles.⁸⁰ While the Court recognised that an 'ILUA is not, strictly speaking, a commercial contract' but is instead 'a statutory contract created by force of its registration and the requirements of s 24EA of the Act', it nonetheless took the view that the law around implying terms into a contract to give business efficacy was relevant.⁸¹

5.122 The Federal Court has also considered matters under an ILUA such as:

- whether an amendment deed was a valid variation of an ILUA, which included consideration of ILUA provisions;⁸² and
- interpretation of terms relating to payments made under an ILUA and the nominated entity to whom payments should be made.⁸³

78 The Federal Court has jurisdiction to determination all non-criminal matters arising under any Commonwealth Statute: *Judiciary Act 1903* (Cth) s 39B(1A)(c). The Federal Court has original jurisdiction 'as vested in it by laws made by the Parliament' and 'has power, in relation to matters in which it has jurisdiction, to make orders of such kinds, including interlocutory orders, and to issue, or direct the issue of, writs of such kinds, as the Court thinks appropriate': *Federal Court of Australia Act 1976* (Cth) ss 19, 23.

79 See, eg, *QGC Pty Ltd v Bygrave (No 2)* [2010] FCA 1019; *Weribone v Queensland (No 2)* (2013) 217 FCR 189; *QGC Pty Ltd v Alberts (No 2)* [2021] FCA 540; *Malone v B&M Aboriginal Corporation* (2025) 309 FCR 1.

80 *QGC Pty Ltd v Alberts (No 2)* [2021] FCA 540 [66].

81 *Ibid* [62]–[64].

82 *Conlon v QGC Pty Ltd (No 2)* (2017) 359 ALR 460.

83 *Malone v B&M Aboriginal Corporation* (2025) 309 FCR 1.

5.123 The Court's ability to construe and make declarations as to the meaning of future act agreements would be expressly confirmed by **Recommendation 22**.

5.124 Currently, ss 199C(1)(b) and 199C(1A) (in so far as it deals with s 199C(1)(b)) go some way to address the potential unfairness or difficulty arising from the disparity between the pre-determination agreement party and the native title holders post-determination. The solution offered by s 199C(1)(b) is removal of ILUA details from the Register.⁸⁴ Section 199C(1)(b) therefore allows native title holders to be relieved of agreement obligations, to the extent they are bound by them, by removal of the ILUA from the Register.

5.125 The ALRC has heard about issues concerning the interpretation of s 199C(1)(b) of the *NTA*. Broadly, those issues relate to:

- uncertainty about how the NNTT is to exercise its obligations under s 199C(1)(b), and in particular how to interpret the phrase 'not a person who authorised the making of the agreement' and whether this requires the personal participation of every native title holder;⁸⁵ and
- how s 199C(1)(b) should operate where the persons that authorised the making of the agreement overlap with, but are not identical to, the persons who are determined to hold native title.⁸⁶

5.126 Consideration should be given, when implementing **Recommendation 21**, to whether there is a need to retain ss 199C(1)(b) and 199C(1A) (in so far as it deals with s 199C(1)(b)) in circumstances where the problem that these sections address could also be addressed by **Recommendation 21**. It may be appropriate to retain these subsections because they provide a potentially simpler pathway for native title holders to deal with the problem by recourse to the NNTT, without the need to go to the Federal Court. This may be suitable in some cases, particularly where the solution that the native title holders seek is the removal of the agreement details from the Register and it is clear that the conditions of s 199C(1)(c) are met.

5.127 **Recommendation 21** has developed in response to feedback to Question 9 in the Discussion Paper, which asked whether the *NTA* should contain a mechanism for the assignment of pre-determination agreements following a positive determination of native title, where the agreement itself did not deal with the matter.

84 Section 199C(1A) of the *NTA* provides for the Federal Court to order that the agreement details remain on the Register, should the Federal Court be satisfied the determined native title holders accept the agreement.

85 National Native Title Tribunal, *Submission 23*.

86 In *Ross v Queensland (No 11)* [2022] FCA 1176, Mortimer J (as her Honour then was) noted that s 199C of the *NTA* is intended to allow for the 'continuity of obligations assumed' under an ILUA, both where the native title holders agree to continue to be bound by that ILUA, and 'where there is sufficient overlap between those native title holders who authorised an ILUA and those who are recognised in a determination': *Ross v Queensland (No 11)* [2022] FCA 1176 [78]. South Australian Native Title Services took a different view in its submission: South Australian Native Title Services, *Submission 104*.

5.128 Submissions that responded to Question 9 were generally supportive of some kind of statutory assignment mechanism.⁸⁷ However, there were varied views on whether this assignment should be automatic, whether the PBC should have to consent to the assignment, or whether there should be some opportunity to renegotiate the terms of the agreement before assignment occurs. Feedback also highlighted complexity where agreements have multiple native title parties — some registered native title claimants and some determined native title holders — or where the relevant NTRB/SP is the native title party for an agreement.⁸⁸

5.129 Submissions also highlighted the complicated factual circumstances that can arise in relation to pre-determination agreements that warrant a case-by-case approach. For example, Yamatji Marlpa Aboriginal Corporation said:

There have been many occasions where overlapping claim groups or sub-groups have agreed to reduce or withdraw their native title claims or agreed to have those claims combined or replaced by new claims on the express basis that the prior groups could retain the benefits of agreements that they have already made. These changes to configuration of claims and groups would often not have occurred by agreement if not for ability of those groups to retain the benefits of their agreements made to that date. Legislating changes to those agreements would be likely to have the effect of hindering inter-Indigenous agreements and causing more litigation and delay.⁸⁹

5.130 Because the issues that can arise with pre-determination agreements can be complex and specific to the facts of the case, the ALRC considers it is more appropriate for these issues to be dealt with by application to the Federal Court, rather than for the *NTA* to provide an automatic assignment mechanism.

Federal Court power to declare meaning of agreements

Recommendation 22

The *Native Title Act 1993* (Cth) be amended to empower the Federal Court of Australia to construe and make a declaration as to the meaning of a future act agreement. The declaration would be binding on all parties to the agreement.

87 See, eg, Maddocks, *Submission 62*; National Native Title Tribunal, *Submission 86*; North Queensland Land Council, *Submission 96*; Association of Mining and Exploration Companies, *Submission 97*; Minerals Council of Australia, *Submission 113*; Australian Human Rights Commission, *Submission 118*; Queensland South Native Title Services, *Submission 124*; First Nations Legal and Research Services, *Submission 146*; Yamatji Marlpa Aboriginal Corporation, *Submission 148*; Kimberley Land Council, *Submission 151*. See also State of Queensland, *Submission 43*.

88 See, eg, Central Land Council, *Submission 121*.

89 Yamatji Marlpa Aboriginal Corporation, *Submission 148*. See also Norman Waterhouse Lawyers, *Submission 102*.

5.131 As outlined above at paragraphs [5.120]–[5.122], the Federal Court has made a number of decisions in relation to the interpretation of ILUAs, and though there is currently no express provision in the *NTA* conferring jurisdiction, the Federal Court has a sufficiently broad jurisdiction to hear such matters. Similarly, it is probable that the Court already has jurisdiction to construe section 31 agreements and ancillary agreements, but an express conferral of jurisdiction would usefully clarify the position. Implementing **Recommendation 22** would amend the *NTA* to expressly empower the Federal Court to hear applications in relation to the interpretation of ILUAs, section 31 agreements, and ancillary agreements, and to make declarations as to their meaning or the meaning of provisions within them. It would also be beneficial for a declaration to bind all parties to the agreement construed, rather than simply the persons who were parties to the proceeding. That needs to be provided for by the *NTA*.

5.132 **Recommendation 22** is intended to provide a mechanism to assist the resolution of disputes about the meaning of an agreement and to do so in a way that binds all parties. The rules of the Federal Court may need to oblige an applicant for a declaration to notify all parties to an agreement of the application. Once that is done the intention is that all parties to the agreement are bound by any declaration made, irrespective of whether the party participated in the proceeding. Given that future act agreements involve multiple parties, it is appropriate that a dispute as to the meaning of a future act agreement be able to be resolved once, for all purposes and in relation to all parties. This may assist with more effective implementation of agreements.

5.133 **Recommendations 73 to 76** in **Chapter 11** of this Report discuss reforms relating to compliance and enforcement with the requirements of the future acts regime generally, including the entitlements and obligations in agreements. **Recommendation 14** in **Chapter 4** provides for the inclusion of a dispute resolution clause in future act agreements. Disputes as to the meaning of an agreement could also be dealt with through the mechanism established by that clause.

Other issues with pre-determination agreements

5.134 As discussed above, the use of pre-determination agreements is a procedurally necessary interim measure to facilitate the doing of future acts. When there is uncertainty as to who the native title party or parties to such agreements should be, the use of agreements to validate future acts pre-determination can be problematic. The ALRC heard about a number of issues in relation to pre-determination agreements including:

- It can be difficult for proponents to identify persons who hold or may hold native title in order to identify the correct native title party with which to negotiate.⁹⁰
- Traditional Owners with an ongoing connection to the land are sometimes not included in the registered native title claim group and subsequent PBC,

90 National Farmers' Federation, *Submission 41*.

but the future acts regime provides rights largely only to registered native title claimants and PBCs.⁹¹ Relatedly, there may sometimes be a tension between the *NTA*'s recognition of a registered native title claimant (and subsequent PBC) to represent the broader group of native title holders or claimants, and traditional law and custom, which sets out that particular people or groups have authority in relation to particular parts of the land.

5.135 It may be more appropriate for something other than an agreement-making process to provide for the validation of future acts pre-determination. In this Inquiry the ALRC has not had the time or resources to properly consider options, but this may warrant consideration in the future.

Transparency and oversight of agreements for common law holders

Recommendation 23

Either or both of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) be amended to require that Prescribed Bodies Corporate:

- a. keep a copy of all future act agreements, made on or after the implementation of this Recommendation, at their registered office. This includes agreements that have been amended without a reauthorisation process, and agreements entered into using standing instructions;
- b. make copies of those future act agreements, and an accessible high-level summary of the agreement, available to common law holders who request it; and
- c. include an accessible high-level summary of each future act agreement negotiated during the financial year in the Prescribed Body Corporate's annual report.

5.136 **Recommendation 23** is primarily intended to enhance transparency and oversight to common law holders in relation to future act agreements made on their behalf by a PBC. This is intended to help common law holders understand agreements made which affect their rights. It is also intended to give common law holders oversight over the use of standing instructions by the PBC, as a safeguard to better ensure that standing instructions are used consistently with the will of the common law holders.

91 See, eg, F Powell, *Submission 16*.

Enhancing transparency for common law holders

5.137 **Recommendation 23** places an obligation on PBCs to report to common law holders about the agreements that have been entered into in its annual report each financial year, and to make those agreements (as well as a high-level summary) available to common law holders. This would ensure that common law holders know that agreements exist, and would have access to the terms of those agreements. **Recommendation 23** is a relatively simple, practical solution that could produce tangible benefits for common law holders, without imposing a significant compliance burden on PBCs.

5.138 PBCs would be required to keep copies of all future act agreements — ILUAs, section 31 agreements, ancillary agreements, agreements negotiated under s 24MD(2A), and ‘low impact agreements’ discussed in **Chapters 6** and **7** — at their registered address. This would include any agreements that have been amended without reauthorisation and reregistration (see discussion above at paragraphs [5.56]–[5.64]), and agreements entered into using standing instructions should **Recommendation 5** be implemented (see **Chapter 3**). Those agreements must be made available to common law holders, along with an accessible high-level summary of the agreements. The ALRC envisages that this high-level summary would include matters such as a map of the area affected, a statement about the type of activity that has been consented to, and a description of the type of benefits agreed. The information would be subject to any confidentiality clauses in the agreement. The intention of the provision of a high-level summary is to provide common law holders with enough general information about the agreements that have been entered into or amended, so that they know whether they would like to inspect a copy of the agreement.

5.139 PBCs would also be required to include in their annual reports a high-level summary of each agreement entered into, or amended, in that financial year.

5.140 The ALRC is aware that resourcing and capacity are significant issues in the PBC sector. While some PBCs have access to significant resources, this is not the case for all PBCs.⁹² **Recommendation 23** has been designed with this in mind. It is not intended to impose an impossible burden on any PBC, particularly those with lower levels of resourcing. **Recommendation 23** would impose minimal, but effective, obligations on PBCs designed to enhance transparency for common law holders without exacerbating the existing pressure on PBCs.

Alternative or additional measures not the subject of recommendations

5.141 **Recommendation 23** differs from the measures on which the ALRC sought feedback in the Discussion Paper. Question 12 in the Discussion Paper sought feedback on a publicly accessible, opt-in register, with an option to redact and de-identify certain details. The Discussion Paper also sought feedback on a potential

92 Noting that **Recommendation 84** is intended to raise the overall level of resourcing for PBCs.

mandatory ‘commitments register’, which would identify the types of matters that have been agreed, without detailing the content of the actual agreement.

5.142 Feedback in response to the Discussion Paper highlighted that ‘agreement transparency’ is a concept that has different meanings to different people. At a high level, there may be at least three main ‘goals’ for transparency measures:

- First, transparency for common law holders, to ensure common law holders have knowledge of the existence and content of agreements that have been entered into on their behalf. This may support intergenerational governance, and help native title parties to better enforce agreement terms.⁹³ **Recommendation 23** is directed at this goal.
- Secondly, to provide benchmarking information to native title parties, which may help correct current information asymmetries.⁹⁴
- Thirdly, to provide benchmarking information to all negotiation parties, which may lead to more informed negotiations and help parties make better informed decisions.⁹⁵

5.143 No single solution can address all three goals. **Recommendation 23** aims to address the first — transparency for common law holders — which has been identified as a priority during this Inquiry. Through consultations and submissions, the ALRC heard several other ideas about enhancing agreement transparency. These are not expressly addressed in this Report, but may warrant consideration in the future:

- A publicly accessible, opt-in register, with an option to redact and de-identify certain details, similar to that outlined in Question 12 in the Discussion Paper.
- A mandatory ‘commitments register’, which may identify the types of matters that have been agreed, without detailing the content of the actual agreement. For example, a commitments register could record whether the agreement includes clauses about compensation (and whether this was expressed as full and final compensation), employment, or cultural heritage processes. However, the register would not record the quantum of compensation agreed, the details of the employment clauses, or the cultural heritage processes.
- An opt-in database for native title parties to share redacted agreements or agreement terms among each other to build a collective understanding of agreement-making practice, maintained by a central service such as the Australian Institute of Aboriginal and Torres Strait Islander Studies. The ALRC understands that a similar service was available in the past.

93 Indigenous Land and Sea Corporation, *Submission 68*.

94 Norman Waterhouse Lawyers, *Submission 102*; Queensland South Native Title Services, *Submission 124*.

95 M Lucas, *Submission 57*; Amalgamated Prospectors and Leaseholders Association of WA Inc, *Submission 64*; Association of Mining and Exploration Companies, *Submission 97*; National Farmers' Federation, *Submission 114*.

6. Reshaping the Statutory Procedures: Impact-based Scheme

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Introduction

6.1 In this chapter, the ALRC recommends reshaping the existing statutory procedures contained within Part 2 Div 3 Subdivisions G–N of the *Native Title Act 1993* (Cth) ('NTA') to more appropriately align the participatory protections known as procedural rights provided to native title parties with the impact a future act has

on native title rights and interests.¹ Secondly, the ALRC recommends that effective, timely, fair, and just redress be provided to native title parties to ensure they are not worse off by the infringements of their native title rights and interests which the validation of a future act authorises.

6.2 The 16 recommendations in this chapter aim to rectify identified inefficacies, inequalities, and unfairness, as well as promote effective engagement with the future acts regime — all of which are relevant considerations for this Inquiry as contained in the Terms of Reference.

6.3 The reforms in this chapter are intended to be implemented as a package along with the ancillary reforms contained in [Chapter 8](#). Where the recommendations in this chapter are relevant to alternative reforms (such as those contained in [Chapter 7](#)) this will be indicated in those later chapters.

6.4 Additionally, the obligations created by the reforms in this chapter are intended to be enforceable and are therefore relevant to [Chapter 11](#) relating to statutory obligations and effective remedies.

Context

6.5 As outlined in [Chapter 2](#), the *NTA* as originally enacted provided validation pathways for ‘permissible future acts’. As originally enacted, the future acts regime provided that where an act could be done over freehold title land, that act could be permitted over native title land.² Native title parties were provided with ‘special rights’ for the negotiation of certain permissible future acts, and were otherwise ‘entitled to the same procedural rights as holders of ordinary title’.³

6.6 The reliance on the ‘equivalency principle’ — that native title parties should have the same procedural rights as a holder of ordinary or freehold title — was supported by a non-discrimination objective. That objective was that native title parties should not be treated differently or in a way that would disadvantage them as compared to the holders of other non-native title interests. The importance of this concept is still reflected in the preamble of the *NTA*, which frames the future acts regime as follows:

in future, acts that affect native title should only be able to be validly done if, typically, they can also be done to freehold land and if, whenever appropriate, every reasonable effort has been made to secure the agreement of the native title holders through a special right to negotiate.⁴

6.7 However, the equivalency principle only resulted in formal equality and not necessarily substantive equality between native title rights and interests and ordinary

1 Future acts may also be validly done under Part 2 Div 3 Subdivision F of the *NTA*, which is discussed in [Chapter 8](#).

2 Explanatory Memorandum Part A, Native Title Bill 1993 (Cth) 5.

3 Ibid.

4 *Native Title Act 1993* (Cth) preamble.

title property rights.⁵ In 1998, the Australian Government's 'Ten Point Plan' and the *Native Title Amendment Act 1998* (Cth) ('NTAA 1998') represented a significant departure from the equivalency principle and resulted in further and substantial discriminatory treatment of native title rights and interests. The future acts regime, which had purportedly been designed to protect native title to 'the maximum extent practicable',⁶ turned out to be deficient in its application. As a result of the *NTAA 1998*, native title rights and interests were substantially eroded in favour of some non-native title interests holders, and other land users given preferential treatment.

6.8 A statutory compensation scheme was established with the aim of providing just compensation — that is, an entitlement 'on just terms to compensate the native title holders for any loss, diminution, impairment or other effect' on their native title rights and interests as a result of the validation of future acts through Part 2 Div 3 of the *NTA*.⁷ In over 30 years, the statutory compensation scheme, which requires an application to and a determination of compensation by the Federal Court, has not delivered any compensation to native title parties in respect of any loss, diminution, or impairment of their native title rights and interests by reason of the validation of future acts. As discussed later in this chapter, this too represents discriminatory treatment of native title rights and interests as compared to the treatment of freehold property rights.

The need for reform

6.9 The current future act validation pathways provided for in the *NTA* by Subdivisions G–N fall short of what the ALRC considers is an appropriate regime for regulating the infringement of native title rights and interests for the following reasons:

- they do not provide for timely, just, and fair redress;
- most of the procedural rights afforded to native title parties have no corresponding legally enforceable obligation or other legal consequence; and
- the participatory protections provided by the procedural rights afforded to native title parties are not aligned with the effect of the infringement on native title inflicted by a future act.

Lack of timely, just, and fair redress

6.10 While compensation is payable under the future acts regime for most future acts, the only means by which the *NTA* enables the recovery of such compensation, other than when the right to negotiate applies or an ILUA is negotiated, is by way of later application made under Part 2 Div 5 of the *NTA*. This means that for the vast majority of future acts, compensation follows the doing of the act, and that this is at some indeterminate future point, when the native title holders make an application

5 See discussion of the equivalency principle in [Chapter 2](#).

6 Explanatory Memorandum Part A, Native Title Bill 1993 (Cth) 1.

7 *Native Title Act 1993* (Cth) s 51(1).

for it. It is then payable only in accordance with a determination of the Federal Court.⁸ There is yet to be a successful litigated compensation application in relation to a future act, which leaves 'a significant gap in legal precedent and guidance'.⁹

6.11 The entitlement only to statutory compensation pursuant to Part 2 Div 5 of the *NTA* for most future acts does not amount to effective redress for the infringement of native title rights and interests. Compensation is not timely or accessible for most native title parties,¹⁰ and the ultimate compensation liability is growing with each future act done. As Norman Waterhouse Lawyers noted:

the expectation that native title holders should litigate to get compensation for future acts that are carried out under notices is onerous and should be removed.¹¹

6.12 The framework for compensation is also in direct contrast with the requirement for compensation for non-native title rights and interests holders under Commonwealth, state, and territory laws for acts giving rise to a compensation entitlement. Examples were provided in the Discussion Paper relating to laws in Victoria and Western Australia,¹² with similar provisions in Queensland legislation raised by stakeholders.¹³ Several responses received in relation to the Discussion Paper recognised this disparity.¹⁴ For example, the Local Government Association for the Northern Territory noted that:

considering the existing framework for compensation under the *NTA*, whereby compensation is only payable once, for acts that are essentially the same, the relevant provisions must be amended to be, at very least, in line with the rights of landowners under other legislation.¹⁵

6.13 As outlined in the Discussion Paper, this differential treatment of native title appears on its face to be racially discriminatory.¹⁶ As such, it cannot be considered to be timely, just, or fair redress.

6.14 Finally, the validation of a future act under Subdivisions G–N is not conditional upon the payment of compensation, whether at the time of doing of the future act or

8 Ibid ss 50(1)–(2). However, compensation can otherwise be settled through an ILUA (negotiated in order to avoid initiating court proceedings or in settling such proceedings).

9 National Farmers' Federation, *Submission 114*. See also State of Queensland, *Submission 43*.

10 Central Land Council, *Submission 31*. See also Kimberley Land Council, *Submission 26*; Department of Agriculture, Fisheries and Forestry (Cth), *Submission 39*; First Nations Legal and Research Services, *Submission 42*; State of Queensland, *Submission 43*; Queensland South Native Title Services, *Submission 45*; Yamatji Marpa Aboriginal Corporation, *Submission 148*.

11 Norman Waterhouse Lawyers, *Submission 102*.

12 *Land Acquisition and Compensation Act 1986* (Vic) s 31; *Mining Act 1978* (WA) s 20.

13 National Native Title Tribunal, *Submission 23*.

14 See, eg, Local Government Association of the Northern Territory, *Submission 143*; Yamatji Marpa Aboriginal Corporation, *Submission 148*.

15 Local Government Association of the Northern Territory, *Submission 143*.

16 Australian Law Reform Commission, *Review of the Future Acts Regime* (Discussion Paper No 88, 2025) [279].

otherwise. In other words, whether or not compensation is ever paid has no bearing on whether the future act is valid or not under the *NTA*.

6.15 The existing validation pathways under Subdivisions G–N contemplate that, for most future acts, statutory compensation:

- is payable after-the-fact when a proponent has already enjoyed the benefit of the future act being validated;
- is available only upon application to a court (requiring substantial resources which, to date, have been elusive for native title holders); and
- unless and until an application for compensation is made and determined, there are no consequences for ignoring the growing compensatory liability, which has largely been the approach to date.

No obligation to comply with procedural rights

6.16 As discussed in detail in **Chapter 11**, for most future acts, if the future act meets the criteria to fall within a particular subdivision, then it will be valid regardless of whether the statutory procedures are followed or not. Various described as ‘unfair and unreasonable’,¹⁷ ‘undermining’ and ‘strikingly flawed’,¹⁸ and ‘deeply concerning’,¹⁹ this means that the relevant procedural rights are, in effect, empty and meaningless, and therefore not *rights* at all.

6.17 Furthermore, the existing regime does not include an obligation to comply or consequences for not doing so, resulting in a perverse incentive for non-compliance. As First Nations Legal and Research Services summarised, if

lack of compliance with the future acts regime has no impact on the validity of an act, then government parties are disincentivised to comply with the regime.²⁰

6.18 The limited consequences for not complying with the procedures contained in the future acts regime also makes enforcement of the regime or procedural rights challenging.²¹ As a result, native title parties are left with ‘no practical recourse’ other than a future compensation claim.²²

6.19 These issues regarding compliance and enforcement are discussed in more detail in **Chapter 11**.

17 First Nations Clean Energy Network, *Submission 30*.

18 Richard Bartlett, ‘Undermining the Objects of the Native Title Act: The Debasing of the Future Act Process by the Federal Court’ (2019) 46(1) *University of Western Australia Law Review* 161, 161, 173.

19 Law Council of Australia, *Submission 47*.

20 First Nations Legal and Research Services, *Submission 42*.

21 MPS Law, *Submission 17*. See also North Queensland Land Council, *Submission 96*.

22 Central Land Council, *Submission 31*.

Failure to align with impact

6.20 As outlined in the Discussion Paper, a fundamental flaw of the existing future acts regime is its failure to align the procedural rights afforded to native title parties with the impact of a future act on their native title rights and interests. In short, the procedural rights afforded by the current future acts regime are not reflective of, and thus fail to adequately account for, the impacts of different types of future acts on native title rights and interests.

6.21 Some procedural rights, like the right to notice and opportunity to comment, provide little engagement with the native title parties. Others, like the right to negotiate, provide for extensive and deep involvement of native title parties.

6.22 The different procedural rights in the future acts regime offer different levels of protection of native title rights and interests. The procedural right that is most appropriate for a particular future act should be informed by the potential impact of the future act on native title rights and interests. This is a logical and appropriate approach for aligning the extent of procedural protection given to the holders of property rights with the extent of injury or harm that an infringement upon those rights is likely to cause.

6.23 The ALRC has heard from numerous stakeholders about the lack of alignment between procedural rights and the impacts of future acts on native title rights and interests.²³ This failure of the existing regime undermines the concept of equality before the law as the *NTA* does not afford native title rights and interests (which are a form of property right) the same level of protection from incursion or impairment as that afforded to non-native title property rights.

6.24 For example, being afforded an opportunity to comment for future acts relating to water under Subdivision H is inadequate in light of the significant impact such acts may have on native title.²⁴ Professor O'Bryan observed that the

treatment of water in the future act provisions of the *NTA*, and in particular s 24HA, ignores the significance of water to First Nations people by providing for a very limited form of engagement before a future act relating to the management of water can proceed, namely a right to be notified and an opportunity to comment. However, this minimal right to be notified and opportunity to comment is also rendered meaningless given that there are no consequences if the procedure is not followed. Additionally, legislative measures are excluded from even this limited engagement.²⁵

23 See, eg, MPS Law, *Submission 17*; Kimberley Land Council, *Submission 26*; First Nations Clean Energy Network, *Submission 30*; Central Land Council, *Submission 31*; First Nations Legal and Research Services, *Submission 42*; State of Queensland, *Submission 43*; Queensland South Native Title Services, *Submission 45*.

24 Kimberley Land Council, *Submission 26*; First Nations Legal and Research Services, *Submission 42*.

25 K O'Bryan, *Submission 94*.

6.25 Additionally, future acts of an identical or similar impact are not treated equally by the *NTA*.²⁶ Instead, compromises and concessions have been made (to the detriment of the protection and recognition of native title rights and interests) in perpetuating concepts developed through Western common law ideals or in giving preferential treatment to certain sectors. For example, the grant of an interest that enables a new primary production activity to be conducted on a non-exclusive pastoral lease or non-exclusive agricultural lease under s 24GB only requires notice and opportunity to comment to be afforded to the native title parties. In reality, the impact of this type of future act can amount to practical extinguishment of native title rights and interests where, for example, the future act entitles a pastoral leaseholder to conduct intensive cultivation on the lease (such as a cotton plantation) or conduct forest operations, both of which are entirely incompatible with the continued exercise of native title rights and interests. Further detail about the existing operation of Subdivision G is provided in [Chapter 7](#).

6.26 For some existing validation pathways, no procedural rights are afforded to native title parties at all, despite applicable future acts having the potential for a high impact on native title. For example, Subdivision K applies to facilities operated for the general public. There are some future acts that are covered by Subdivision K — for example, the dedication of a road — for which native title parties are afforded no procedural rights, despite the possibility that a road dedication will result in the practical extinguishment of native title rights and interests.

6.27 Another example of future acts for which no procedural rights are afforded to native title parties are those under Subdivision I, which relates to the renewal or extension of interests like certain pastoral leases. A renewal or extension can be validated under Subdivision I despite the fact that the original instrument of grant did not confer any right to renew and no right to extend otherwise existed at the time of grant. This ongoing capacity to renew or extend enables serious and ongoing infringements of native title rights and interests. This is a discriminatory departure from the usual requirement for the renewal or extension of rights and interests over land subject to freehold title, which either requires the consent of the freehold title holder or affords procedural rights that are proportionate with the impact of the renewal or extension.

6.28 In the ALRC's view, the failure of many of the existing validation pathways to align procedural rights with the extent of the impact on native title arises due to the absence of an appropriate underlying principle. This is evident in the unprincipled considerations that have been used to regulate the validation pathways for particular

26 See, eg, I Ingram, *Submission 119*; State of Queensland, *Submission 152*.

future acts.²⁷ It is also evident in what has been described as the ‘mismatch’ between the effect of those acts and the rights afforded to native title parties.²⁸

6.29 The ALRC’s approach to reforming procedural rights is fundamentally one based on logic: aligning protection of native title rights and interests with impact of future acts requires that greater protection (and therefore higher procedural rights) be afforded for higher impact acts and less protection (and therefore lower procedural rights) be afforded for lower impact acts. This rationale is consistent with the approach to procedural rights that are afforded to non-native title rights and interests holders for acts that affect their rights and interests. The lack of alignment between impact and procedural rights in the existing future acts regime is a significant flaw: the unfairness and discrimination resulting from this require addressing.

Impact-based

Context

6.30 The protection of native title rights and interests requires a future acts regime that provides robust safeguards that are appropriately adapted to the realities of future acts and the harms they may cause to native title parties. Accordingly, the ALRC’s recommended approach to reshaping the statutory procedures — that is, Subdivisions G–N of the *NTA* — is founded upon an impact-based approach, whereby the effects of a future act determine, and are reflected in, the extent of the protections provided by the future acts regime.

6.31 The proposed impact-based assessment is centred on three core concepts:

- the legitimate use of impact assessment (as a concept) and assessments (as tools) in legal and regulatory settings;
- ‘impact’ as a broad concept beyond purely physical effect; and
- an impact-based approach results in a fairer and more just attribution of associated rights and responsibilities.

6.32 Each of these concepts is outlined below.

Impact assessment: a common concept and tool

6.33 Impact assessment as a concept, and impact assessments as a tool, have been the subject of extensive academic commentary and guidance publications. Impact assessment has been defined as the ‘process of identifying the future consequences of a current or proposed action’.²⁹

27 The existing *NTA* assigns procedural rights based on, for example: the related industry of the future act (see Subdivision G), the underlying tenure (see Subdivision J), the location of the future act (see Subdivision N), the purpose of the future act (see Subdivision K), whether the future act could be done on freehold title (see Subdivision M), or whether the future act is a renewal or extension of an earlier act (see Subdivision I).

28 Queensland South Native Title Services, *Submission 45*.

29 International Association for Impact Assessment, *Fact Sheet: What Is Impact Assessment* (2009) 1.

6.34 Accurate and rigorous impact assessments are particularly important for, and relied upon by, two key groups. For decision-makers, a balanced assessment of options and clarity of solutions are critical.³⁰ For stakeholders, a right to accurate and accessible information about decisions affecting them is crucial.³¹ As highlighted by the International Association for Impact Assessment, impact assessments can serve various purposes, including:

- the provision of information to guide decision-making;
- the promotion of transparency of decision-making and facilitation of the participation of affected populations therein; and
- the identification of ways in which the adverse implications of a decision may be mitigated.³²

6.35 Impact assessments relating to the environment first emerged in the United States of America in the 1960s and were quickly adopted as a legally based decision-support instruments.³³ The use of impact assessments has since expanded to include social impact assessments and, more recently, human rights impact assessments.³⁴

6.36 Each type of impact assessment has its own methodology and elements, with resulting assessments varying considerably in focus and detail. In Australia, impact assessments are a tool used in a wide range of legislative and regulatory settings. A few examples at the Commonwealth level include:

- environmental impact assessments, required to determine whether an action is likely to have a significant impact on a matter of national environmental significance pursuant to the *Environment Protection and Biodiversity Conservation Act 1999* (Cth);
- regulatory or policy impact analysis, required to determine how government proposals may drive a change in behaviour or impact the community;³⁵ and
- privacy impact assessments, required to be conducted for high risk projects pursuant to the *Privacy Act 1988* (Cth).

Indigenous impact assessment

6.37 In relation to projects that may affect Indigenous peoples, the International Association for Impact Assessment describes the importance of impact assessment as follows:

30 Department of the Prime Minister and Cabinet (Cth), *Regulatory Impact Analysis Guide for Ministers' Meetings and National Standard Setting Bodies* (June 2023) 6.

31 Ibid.

32 International Association for Impact Assessment (n 29) 1.

33 Ibid 1–2.

34 Gillian MacNaughton, 'Human Rights Impact Assessment: A Method for Healthy Policymaking' (2015) 17(1) *Health and Human Rights Journal* 63, 64.

35 Department of the Prime Minister and Cabinet (Cth) (n 30); Department of the Prime Minister and Cabinet (Cth), *Australian Government Guide to Policy Impact Analysis* (March 2023).

Indigenous peoples have unique relationships with the land, requiring distinct consideration in impact assessment (IA). Development projects often occur on or near Indigenous territories and can significantly affect their cultural, spiritual, economic, and social well-being. Effective IA must fully consider these impacts and ensure that Indigenous communities are meaningfully involved from the outset.³⁶

6.38 Indigenous impact assessment has recently developed because of:

- environmental impact assessments excluding or marginalising the unique ways in which Indigenous communities and their rights may experience impact;
- the growing recognition of the rights of Indigenous persons and peoples both in domestic and international jurisdictions; and
- the increasing acceptance of corporate social responsibility for long-term development sustainability.³⁷

6.39 It is this concept and tool that is most relevant to the impact-based scheme proposed. Indigenous impact assessment aims to give Indigenous peoples greater control over decisions that affect them. Ideally, this control is built into the scope of the assessment, the identity of the assessor, how the assessment is done, and how findings and recommendations of the assessment are prepared and presented.³⁸ Arguably, Indigenous impact assessments should provide Indigenous peoples with total control over decisions, not merely greater control. However, there is a tension between this ideal and the practical realities of decision-making. As Professor O’Faircheallaigh and Alistair MacDonald reflect,

this aspiration [of ultimate control] needs to be reconciled against the reality that in almost all impact assessment regimes, it remains the responsibility of other parties to make the ultimate decision on these issues.³⁹

Considering ‘impact’ holistically

6.40 As discussed above, the unique ways in which projects may affect Indigenous communities and their rights means that ‘impact’ must be viewed holistically. As Dr Ingram noted,

impacts on native title rights extend far beyond physical disturbance to encompass effects on cultural practice, intergenerational transmission of knowledge, and the ability to fulfil obligations under particular law and custom.⁴⁰

36 International Association for Impact Assessment, ‘Indigenous Peoples and Impact Assessment’ <iaia.org/indigenous-peoples/indigenous-peoples-and-impact-assessment/>.

37 Ciaran O’Faircheallaigh and Alistair MacDonald, ‘Indigenous Impact Assessment: A Quiet Revolution in EIA?’ in Kevin Hanna (ed), *Routledge Handbook of Environmental Impact Assessment* (Routledge, 2022) 221, 222.

38 Ibid 225–8.

39 Ibid 228.

40 I Ingram, *Submission 119*.

6.41 Similarly, in their submission, Yamatji Marlpa Aboriginal Corporation noted that:

The only party who knows the impact is the native title party. ... The definition of impact must be broad and consistent with native title parties' understanding of 'impact' so that it includes their broader environmental and cultural heritage values. The definition must not prescribe particular acts that are considered 'low impact' because they are not ground disturbing as that does not take into account the spiritual aspect of Aboriginal culture.⁴¹

6.42 International human rights standards also recognise that impact includes the human rights, social, cultural, environmental, and economic implications of a project.⁴² Looking through a human rights lens, the importance of adopting such a holistic assessment of impact is underscored by the fact that land 'plays an essential role' in the enjoyment of an array of human rights.⁴³ This is particularly pronounced with respect to Indigenous peoples,⁴⁴ whose

close ties ... to the land must be recognized and understood as the fundamental basis of their cultures, spiritual life, integrity and economic survival.⁴⁵

6.43 As such, protection of the full range of Indigenous peoples' rights mandates impact assessment that looks beyond the physical effects of a proposed project to lands. The assessment of such impacts should consider, among other things, the nature, scale, duration, and long-term effects of the proposed act.⁴⁶

Procedural rights determined by impact assessment

6.44 The proposed impact-based scheme envisages a framework where future acts are assessed, and procedural rights are afforded to native title parties, by reference to the potential impacts of the future acts upon native title rights and interests. In practice, this means that greater protections will be provided (in the form of more

41 Yamatji Marlpa Aboriginal Corporation, *Submission 148*.

42 Expert Mechanism on the Rights of Indigenous Peoples, *Free, prior and informed consent: a human rights-based approach*, 39th sess, UN Doc A/HRC/39/62 (10 August 2018) [22], [40], Annex [15]; Victoria Tauli-Corpuz, *Rights of Indigenous Peoples: Report of the Special Rapporteur on the Rights of Indigenous Peoples*, 45th Sess, UN Doc A/HRC/45/34 (18 June 2020) [58]; *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) art 32(3) ('UNDRIP').

43 Committee on Economic, Social and Cultural Rights, *General Comment No 26 (2022) on land and economic, social and cultural rights*, 72nd sess, UN Doc E/C.12/GC/26 (24 January 2023) [1]. See also at [5]–[11].

44 See, eg, Expert Mechanism on the Rights of Indigenous Peoples, *Right to land under the United Nations Declaration on the Rights of Indigenous Peoples: a human rights focus*, 45th sess, UN Doc A/HRC/45/38 (15 July 2020) [11]; Committee on Economic, Social and Cultural Rights, *General Comment No 26 (2022) on land and economic, social and cultural rights*, 72nd sess, UN Doc E/C.12/GC/26 (24 January 2023) [10], [16]–[17].

45 Human Rights Committee, *Views: Communication No 3585/2019*, 137th sess, UN Doc CCPR/C/137/D/3585/2019 (13 March 2024, adopted 15 March 2023) ('*Roy v Australia*') [8.3]. See also Human Rights Committee, *Views: Communication No 2552/2015*, 132nd sess, UN Doc CCPR/C/132/D/2552/2015 (21 September 2022, adopted 14 July 2021) ('*Pereira v Paraguay*') [8.6].

46 Expert Mechanism on the Rights of Indigenous Peoples, *Free, prior and informed consent: a human rights-based approach*, 39th sess, UN Doc A/HRC/39/62 (10 August 2018) [35].

robust procedural rights) in circumstances where the impact of a future act on native title rights and interests would be greater. Several stakeholders supported this in principle.⁴⁷

6.45 The proposed impact-based scheme has been informed by international human rights law, which sets out that

the level of effective participation that must be guaranteed to indigenous peoples is essentially a function of the nature and content of the rights and activities in question⁴⁸

6.46 International law recognises Indigenous peoples' right to participate, through their chosen representatives and in accordance with their own procedures, in any decision-making that affects their rights.⁴⁹

6.47 An impact-based model, sometimes referred to as the 'sliding scale' approach,⁵⁰ has emerged as the leading understanding of consultation and free, prior, and informed consent at international law.⁵¹ The sliding scale model provides that the greater the potential intrusion of the project upon the rights of Indigenous peoples, the more likely that free, prior, and informed consent will be required. While consultations aimed at achieving consent with Indigenous peoples are always

47 See, eg, M Lucas, *Submission 57*; Jigsaw Legal, *Submission 77*; J Marrell, *Submission 93*; Houston Legal & Consultants, *Submission 95*; National Farmers' Federation, *Submission 114*.

48 Expert Mechanism on the Rights of Indigenous Peoples, *Free, prior and informed consent: a human rights-based approach*, 39th sess, UN Doc A/HRC/39/62 (10 August 2018) [35].

49 UNDRIP art 18. On Indigenous peoples and the right to participate in decision-making, see, eg, Expert Mechanism on the Rights of Indigenous Peoples, *Final Report of the Study on Indigenous Peoples and the Right to Participate in Decision-Making*, 18th sess, Agenda Item 5, UN Doc A/HRC/18/42 (17 August 2011) annex 'Expert Mechanism advice No. 2 (2011): Indigenous peoples and the right to participate in decision making'.

50 Expert Mechanism on the Rights of Indigenous Peoples, *Free, prior and informed consent: a human rights-based approach*, 39th sess, UN Doc A/HRC/39/62 (10 August 2018) [35].

51 See, eg, James Anaya, Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, 12th sess, UN Doc A/HRC/12/34 (15 July 2009) [47]; Human Rights Committee, *Views: Communication No 1457/2006*, 95th sess, UN Doc CCPR/C/95/D/1457/2006 (24 April 2009, adopted 27 March 2009) ('*Poma Poma v Peru*') [7.6]; Human Rights Committee, *Views: Communication No 2552/2015*, 132nd sess, UN Doc CCPR/C/132/D/2552/2015 (21 September 2022, adopted 14 July 2021) ('*Pereira v Paraguay*') [8.7]; Human Rights Committee, *Views: Communication No 3585/2019*, 137th sess, UN Doc CCPR/C/137/D/3585/2019 (13 March 2024, adopted 15 March 2023) ('*Roy v Australia*') [8.5]; *Saramaka People v Suriname (Preliminary Objections, Merits, Reparations, and Costs)* (Inter-American Court of Human Rights, Series C No 172, 28 November 2007) [133]–[137]; *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya (Decision)* (African Commission on Human and Peoples' Rights, Case No 276/2003, 25 November 2009) [291]; Committee on Economic, Social and Cultural Rights, *General Comment No 21: Right of everyone to take part in cultural life*, 43rd sess, UN Doc E/C.12/GC/21 (21 December 2009) [37], [55(e)]. The impact-based model of consultation and free, prior, and informed consent is discussed in more detail in [Chapter 2](#).

required,⁵² certain projects will also require the free, prior, and informed consent of Indigenous peoples to proceed in accordance with human rights standards.⁵³

6.48 The United Nations Declaration on the Rights of Indigenous Peoples affirms that free, prior, and informed consent is a necessary precondition for any decision to relocate Indigenous peoples or to store or dispose of hazardous materials on Indigenous lands or territories.⁵⁴ The Special Rapporteur on the Rights of Indigenous Peoples has also identified a general (though rebuttable) rule that extractive projects carried out on Indigenous lands trigger a mandatory free, prior, and informed consent requirement, by virtue of the invasive nature of such projects and the likely implications on the rights of Indigenous communities.⁵⁵ Other types of projects will require free, prior, and informed consent where they meet the requisite impact threshold.

6.49 As noted in the Discussion Paper, the concept of attributing rights or responsibilities based on the impact of an act features in other domestic legal regimes.⁵⁶

6.50 The recommendations set out in this chapter similarly adopt an impact-based model, whereby future acts are grouped by reference to their potential impacts upon native title rights and interests. By replacing the current future acts regime with an impact-based scheme, the proposed framework would recognise the importance of, and facilitate, the safeguarding of the rights of Indigenous peoples.

52 UNDRIP art 32(2). See also UNDRIP art 19.

53 James Anaya, Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, 12th sess, UN Doc A/HRC/12/34 (15 July 2009) [47]. On the duty to consult with Indigenous peoples generally, see discussion in **Chapter 2**.

54 UNDRIP arts 10, 29(2).

55 James Anaya, Special Rapporteur on the Rights of Indigenous Peoples, *Extractive Industries and Indigenous Peoples*, 24th Sess, UN Doc A/HRC/24/41 (1 July 2013) [27]–[40]. See also James Anaya, *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, 66th Sess, UN Doc A/66/288 (10 August 2011) [84]; Expert Mechanism on the Rights of Indigenous Peoples, *Free, prior and informed consent: a human rights-based approach*, 39th sess, UN Doc A/HRC/39/62 (10 August 2018) [32].

56 See, eg, legislation and regulations relating to: the protection and management of Aboriginal and Torres Strait Islander cultural heritage, such as the *National Parks and Wildlife Act 1974* (NSW) and *Aboriginal Heritage Act 2006* (Vic); Land Use Activity Agreements under the *Traditional Owner Settlement Act 2010* (Vic); mining laws, such as the *Mineral and Energy Resources (Common Provisions) Act 2014* (Qld); and water laws such as the *Water Act 2000* (Qld). See also **Chapter 1**.

Recommended reform

Recommendation 24

Part 2 Division 3 Subdivisions G–N of the *Native Title Act 1993* (Cth) be repealed and replaced with a scheme for validating any infringement made by a future act to native title rights and interests which better aligns the nature and extent of the procedural rights to native title rights and interests, with the nature and extent of the infringement upon those rights and interests and the capacity of native title parties to enjoy and exercise them. The impact-based scheme should be based on the reforms outlined in Recommendations 25 to 38.

6.51 **Recommendation 24**, if implemented, would repeal the existing validation pathways contained in Subdivisions G–N of the *NTA* and replace them with a scheme that, in short, takes a holistic approach to impact and aligns the infringement made by a future act to native title rights and interests with the nature of procedural rights afforded. An overview of the scheme is provided below.

Overview of impact-based scheme

6.52 The concept of an impact-based assessment scheme was supported, broadly, by several stakeholders.⁵⁷ For example, First Nations Legal and Research Services submitted:

We believe that the proposed impact assessment method for categorisation of future acts will deliver a more just regime. Further, we anticipate that this will provide greater clarity and ease of navigation for parties which in turn may lead to greater compliance and greater efficiencies.⁵⁸

6.53 However, the ALRC is aware that issues could arise when the concept of an impact-based assessment is applied in practice. For context, it is likely that tens of thousands of future acts go through a validation pathway each year, and the vast bulk of these utilise the statutory procedures validation pathway. Consequently, this part explores the different ways an impact-based assessment may be applied in practice. In doing so, it is important to consider the best available model to achieve the appropriate procedural and substantive outcomes that each validation pathway should provide for.

6.54 An individual assessment of each future act — made to align procedural rights with impact and to align its effect with the redress that should be provided — is likely

57 See, eg, M Lucas, *Submission 57*; Jigsaw Legal, *Submission 77*; J Marrell, *Submission 93*; Houston Legal & Consultants, *Submission 95*; National Farmers' Federation, *Submission 114*.

58 First Nations Legal and Research Services, *Submission 146*.

to provide the best result. However, that approach may present practical difficulties, as observed in several submissions.⁵⁹

6.55 Putting aside the administrative burden, the main practical problem with an individual assessment stems from the fact that some capacity to review the initial assessment must be provided.⁶⁰ As the experience of a similar individual assessment process (the inquiry process for deciding objections to the application of the expedited procedure) shows, that would likely lead to disputes and delay, and risks consuming the majority of the resources of the National Native Title Tribunal ('NNTT').⁶¹

6.56 This suggests that the impact-based assessment should be done by category of future act, rather than individually. Where the existing validation pathways in the *NTA* take an impact-based approach, this is already done by category (for example, low impact acts contemplated by Subdivision L and the treatment of certain rights to mine through the expedited procedure). The problem with such an approach is that the categories of future acts selected must inevitably be broad, meaning that broad-based generalisations would be made about the ordinary or usual impact of a future act within the category. The broader the category, the more generalised and the less accurate the assessment is likely to be.

6.57 Reform should strike a balance between accuracy and practicality. This means that an assessment must be made about the scope of each category. That would help identify who should make the following two assessments. The first assessment concerns the scope of each of the categories. The second assessment relates to the impact assessment of that category of future acts.

6.58 Those assessments should be made by Parliament (that is, they should not appear in the *NTA* itself). They should rather be made at a lower, more flexible level of regulatory decision-making. To avoid disputes, the two assessments would be best made in consultation with (but by a person independent of) those who have an interest in the assessments. This would ensure that the assessments are as appropriate and accurate as possible in the circumstances. The independent person should also have access to expert advice as required.

6.59 It is for these reasons that the recommended scheme includes a capacity for assessment of future acts by category. The ALRC's scheme also suggests that the assessment of both the scope of each category, and the future acts that should fall

59 See, eg, Martuwarra Fitzroy River Council, *Submission 81*; National Native Title Tribunal, *Submission 86*; Association of Mining and Exploration Companies, *Submission 97*; Minerals Council of Australia, *Submission 113*; Western Australian Government, *Submission 115*; I Ingram, *Submission 119*; Law Council of Australia, *Submission 120*; Great Barrier Reef Marine Park Authority, *Submission 129*; State of Queensland, *Submission 152*; New South Wales Government, *Submission 159*.

60 In the Discussion Paper, this was described as the ability for a native title party to 'challenge' the decision about characterisation.

61 See discussion below at paragraphs [6.197]–[6.221] regarding the repeal of the expedited procedure.

within a particular category, should be undertaken by the NNTT in consultation with relevant stakeholders and with access to expert advice.

6.60 As provided in **Recommendation 25**, the recommended impact-based scheme envisages that the *NTA* would provide five further validation pathways (in addition to the ILUA validation pathway). These five validation pathways would be supported by specific provisions applicable to five groups of future acts as follows:

- Group A (assessed limited impact acts);
- Group B (assessed lower impact acts);
- Group C (negotiated lower impact acts);
- Group D (right to negotiate higher impact acts); and
- Group E (equivalency future acts).

Groups A, B, and D — in overview

6.61 The impact-based scheme intends to achieve the alignment it seeks by attaching higher levels of participatory protections for the native title parties affected to higher levels of impact, as follows:

- Group A (assessed limited impact acts): notice and opportunity to comment.
- Group B (assessed lower impact acts): opportunity to be consulted.
- Group D (right to negotiate higher impact acts): right to negotiate.

6.62 While Group D would operate as the default group, at least initially (other than for Group E acts), the impact-based assessments made by the NNTT would provide recommended composition of Groups A and B. That recommended composition would form the basis for regulations that would prescribe which categories of future acts fall within Groups A and B.

Group C — in overview

6.63 Group C (negotiated lower impact acts) would be an exception in part to the assessment process proposed. Although Group C calls for an assessment to be made, it is not proposed that the NNTT would do the assessment, or that the assessment would be made on a category-by-category basis. Rather, Group C would allow for future acts to be assessed by the Prescribed Body Corporate ('PBC'), by reference to the same criteria as applied by the NNTT, and at the individual level through an agreement-based process.

6.64 Group C contemplates that a simpler form of agreement-making be made available to affected parties for determining both the conditions (including mitigating and remediating conditions) which should regulate the doing of the future act and the redress that should be provided to native title holders. The agreement-making contemplated is simpler in form and complexity than the right to negotiate or ILUA processes. That is because this validation pathway is confined to lower-impact acts. The pathway is also confined to areas where native title has been determined,

and a responsible entity (a PBC) is available to assess whether a future act is a lower-impact future act.

6.65 The scheme envisages that a future act assessed as falling into a category within Group A or Group B can be validated by a Group C agreement. Group C has been included to provide the scheme with the flexibility and efficiency that agreement-making brings to the future acts regime more generally.

Group E — in overview

6.66 Group E (equivalency future acts) would also not form part of the proposed impact-based assessment process. It would comprise future act categories which, largely for public interest reasons, are not appropriate for an impact-based assessment. In other words, Group E would be a group of categories of future acts that are exempted from the assessment process.⁶²

How the impact-based scheme could operate

6.67 Putting to one side the effect of the transitional provisions proposed (see **Recommendation 38**), what is envisaged, broadly and conceptually, is as follows.

6.68 On day one, apart from those future act categories constituting Group E, all future act categories would fall into Group D. However, all such future acts (aside from compulsory acquisition for a non-governmental purpose) are capable of being moved by category or sub-category into Group A or Group B, or as individual future acts into Group C.

6.69 The removal of a future act category or sub-category from Group D into Groups A or B will be subject to the assessments that will be made by the NNTT on application to the NNTT or on the NNTT's own motion.

6.70 By reference to the 'lower-impact criteria' (see **Recommendation 28**) to be specified by the NTA and, informed by consultation with relevant stakeholders and access to any necessary expert advice, the NNTT will determine whether the future acts in the category being assessed meet the 'lower-impact criteria'. The NNTT's satisfaction that the criteria are satisfied may be subject to the NNTT attaching conditions upon the future acts within the category being assessed (see **Recommendation 27(f)–(g)**). Those conditions will be designed to address, by mitigatory or remedial measures, either the avoidance, or the remediation, of the likely effect or impact of the activities likely to be undertaken under the future act on the affected native title parties.

6.71 The NNTT would also be tasked with considering the effect of the future act on the native title parties for the purpose of attaching conditions to the future act within the category. Those conditions would be designed to address the substantive

62 See further discussion below at paragraphs [6.164]–[6.175].

outcome of the validation process for the affected native title parties: namely, that they are provided timely, fair, and just redress for the infringement of their native title rights and interests.

6.72 Additionally, where the NNTT is satisfied that the category of future acts being assessed meets the 'lower-impact criteria', the NNTT will determine whether the category should fall into Group A or Group B. The *NTA* will provide the criteria ('limited-impact criteria') to guide that task (see **Recommendation 29**). Simply stated, where the NNTT is satisfied that consultation of the kind required for Group B will have little or no utility, the NNTT will determine that the category fall into Group A. If not so satisfied, the category will be allocated to Group B.

6.73 The assessments made, including any conditions determined, will then be subject to a recommendation made by the NNTT for inclusion in a regulation made by the applicable Minister (see **Recommendation 26**). The assessments take effect on the making of the regulation.

6.74 The following examples are given to assist understanding. They are only illustrative because they are not based on a sufficient understanding of the nature of the activities exemplified or the likely effect of those activities. The examples should not be taken to suggest the assessment outcomes likely to be made by the NNTT, which will be informed by further consultation.

6.75 **Example 6.1** illustrates how the impact-based scheme in relation to 'mining industry exploration licences involving disturbance to land' might operate. **Example 6.2** illustrates how the impact-based scheme in relation to 'mining industry exploration licences involving disturbance to land but no clearing of established vegetation' might operate. **Example 6.3** illustrates how the impact-based scheme in relation to 'local government grading of existing gravel roads' might operate.

Example 6.1: Mining industry exploration licences involving disturbance to land

A mining industry body makes an application to the NNTT for a future act category constituted by 'Mining Industry Exploration Licences Involving Disturbance to Land' to be allocated into Group B. With the benefit of consultation and/or expert advice, the NNTT determines that the category is too broad and decides to assess two categories: the first involving the clearing of established vegetation and the second not.

The NNTT then, again with the benefit of consultation and/or expert advice, assesses whether the 'lower-impact criteria' is satisfied for a future act category of 'Mining Industry Exploration Licences Involving Disturbance to Land but No Clearing of Vegetation'. The NNTT determines that the 'lower-impact criteria' is satisfied on the basis of the following conditions attached to each future act within the category:

- that all applicable cultural heritage and environmental laws be complied with;
- that prior to the commencement of any activity involving disturbance, a cultural heritage assessment is conducted, or the written confirmation of the affected native title party is obtained, which confirms that the activities to be conducted under the future act will not have any material impact on any area or site recognised as culturally significant by the traditional laws and customs of the affected native title parties. This condition is designated by the NNTT as a 'validating condition' (see [Recommendation 27\(h\)](#));
- that, subject to specified exceptions allowing for minor clearing, the activities do not involve the clearing of established vegetation;
- that the activities not be conducted within five kilometres of any residential dwelling or community facility;
- that the activities not be conducted on or within 100 metres of any waterhole or watercourse containing, or likely to contain, water during the period of the activities;
- that all reasonable measures be taken to avoid significant disruption to traditional or cultural activities (such as hunting or gathering) ordinarily conducted in the area of disturbance; and
- that any drilling or other disturbance to land be remediated to a specified standard within a specified period.

Additionally, and to address the timely, fair, and just redress to be provided to the affected native title parties:

- that a payment be made to the affected native title parties within a specified time and in accordance with the formula specified.

Having considered the utility of consultation, the NNTT determines that the category be allocated to Group B.

Example 6.2: Mining industry exploration licences involving disturbance to land but no clearing of established vegetation

A proponent seeks validation of a future act in relation to a mining industry exploration licence involving disturbance to land but no clearing of established vegetation. The future act cannot be validated as a future act within the Group B category created under **Example 6.1**, because the proposed licence would allow activities to be conducted within two kilometres of a residential dwelling contrary to the fourth condition in **Example 6.1**.

The affected PBC is approached and, following an assessment by the PBC in accordance with the 'lower-impact criteria', the future act is validated through a Group C 'lower impact agreement' with the PBC. The agreement includes each of the conditions in **Example 6.1**, save that the five kilometre limit in the fourth condition is varied to one kilometre. An additional condition is included requiring that a specified payment be made to the resident of the residential dwelling affected.

Example 6.3: Local government grading of existing gravel roads

Following the same process as set out in **Example 6.1**, the NNTT has determined that a 'Local Government Grading of Existing Gravel Roads' category satisfies the 'lower-impact criteria' on the basis of attached conditions that require the grading to be confined to existing gravel roads and not involve any disturbance to other land or to waters or any vegetation. Having determined in accordance with the 'lower-impact criteria' that there would be no utility in affected native title parties being consulted in relation to a future act within the category, the NNTT allocates the category to Group A.

6.76 The ALRC envisages that a large number of future act categories will be the subject of application and will be assessed as appropriate to be placed into Groups A or B. It is recognised that the task of assessing all applications likely to be made will be highly resource intensive for the NNTT (as well as many stakeholders) and will require significant time. On the basis that priority is given to those three or four industries or industry sectors likely to account for the vast bulk of validation exercises, and that sufficient resources are provided to the NNTT so that it may conduct multiple assessments at the same time, the transitional provisions proposed by **Recommendation 38** have allowed 24 months for the processing of applications which may be expected to be made on or shortly after the implementation of the scheme.

Impact-based scheme in detail

6.77 The following sections outline the impact-based scheme in detail. The scheme has evolved substantially since the model provided in the Discussion Paper, including as a result of stakeholder responses to the previous model.

6.78 In developing the scheme, the ALRC had regard to the recent experience in Western Australia, which saw an impact-based scheme introduced through amendments made to the *Aboriginal Cultural Heritage Act 2021* (WA). The Western Australian scheme was perceived as problematic and was ultimately short-lived. The scheme proposed in this Report has been designed to avoid the difficulties experienced with the Western Australia amendments.

Future act groupings

Recommendation 25

The impact-based scheme provide for five groups of future act categories with the following applicable procedural rights for each respective group:

- a. Group A ‘assessed limited impact acts’, which require that affected native title parties be notified of the future act and provided an opportunity to comment (see Recommendation 30);
- b. Group B ‘assessed lower impact acts’, which require that affected native title parties be afforded an opportunity to engage in consultation with the relevant government party and/or future act proponent (see Recommendation 31);
- c. Group C ‘negotiated lower impact acts’, which require that affected native title holders be afforded the procedural rights and other conditions as agreed by the relevant Prescribed Body Corporate and the relevant government party and/or future act proponent (see Recommendation 33);
- d. Group D ‘right to negotiate higher impact acts’, which require that affected native title parties be afforded the right to negotiate in accordance with the right to negotiate provisions (see Recommendation 34); and
- e. Group E ‘equivalency future acts’, which require that affected native title parties be afforded the same procedural rights, including the capacity to avoid an infringement upon their native title rights and interests, as would be afforded to a holder of freehold title in the same circumstances (see Recommendation 35).

6.79 **Recommendation 25** provides for the fundamental structure of the impact-based scheme. It provides five validation pathways for future acts. For each validation pathway, corresponding participatory protections are afforded to native title parties. The validation pathways are largely tailored to accommodate an impact-based approach that seeks to align the extent of the infringement affected by the future act with the extent of procedural protection required. Three of the validation pathways (Groups A, B, and C) provide for the validation of lower or limited-impact future acts, whilst a fourth (Group D) provides for the validation of higher-impact future acts. Group E provides a validation pathway where the validation of future acts is better addressed by the application of the equivalency principle. Each group and associated procedural right will be in detail below.

Groups A and B — assessed limited and lower impact future acts

6.80 As mentioned above, the heart of the impact-based scheme lies in the impact assessments contemplated in order for categories of future acts to be included in Groups A and B. As is further outlined below, the key features of those Groups and their establishment include:

- the development of regulations that prescribe the categories of future acts that have been assessed to be limited or lower-impact future acts;
- those regulations are to be made upon, and consistent with, the recommendation of the NNTT following an impact assessment of categories of future acts;
- that impact assessment is to consider all aspects of impact (physical, cultural, economic, social) and is to be conducted in consultation with relevant parties; and
- in completing the impact assessment, the NNTT will set conditions that attach to the future act in the category assessed in order for the future acts within the category to be validated as limited (Group A) or lower (Group B) impact future acts.

Recommendation 26

The *Native Title Act 1993* (Cth) provide that:

- a. regulations may prescribe the categories of future acts that are included in each of Group A and Group B;
- b. the regulations may not prescribe for inclusion in Groups A or B any category of future act or any future act which is included in Group E or future acts involving compulsory acquisition for a non-governmental purpose;

- c. the regulations are to be made upon, and be consistent with, a recommendation of the National Native Title Tribunal ('NNTT Recommendation') made in accordance with the impact-based assessment process outlined in Recommendation 27; and
- d. the regulations be legislative instruments subject to the requirements of the *Legislation Act 2003* (Cth), including Parliamentary disallowance, but excluding the sunset regime in Part 4 of that Act.

6.81 **Recommendation 26** proposes the categories of future acts to be included in Group A and Group B be established by the making of regulations. Those regulations would be made upon, and be consistent with, recommendations by the NNTT, the NNTT having followed the process described in **Recommendation 27** and applied the low impact criteria described in **Recommendation 28**.

Using delegated legislation

6.82 Regulations provide a far more flexible means by which the assessments to be made by the NNTT can be reflected in the regulatory scheme. It is not practicable for the *NTA* to be amended each time a category of future act is assessed as appropriate for inclusion in either Group A or Group B.

6.83 The flexibility provided by the use of regulations will extend beyond the 24-month period envisaged for the bulk of the assessments to be made. Using regulations will also provide a flexible means for dealing with changed circumstances, including the emergence of new types of future acts. Additionally, regulations provide a flexible means by which adjustments can be made to determinations previously made by the NNTT, including the variation of conditions attached to particular categories of future acts previously determined for inclusion in Group A or B.

NNTT Recommendation

6.84 As provided in **Recommendation 26**, the regulations contemplated would be made upon, and consistent with, a recommendation made by the NNTT ('NNTT Recommendation'), with this being explicit in the *NTA* as an appropriate constraint on the authority to make delegated legislation. In effect, that requirement would ensure that the allocation of a future act category into Group A or B can only occur when the NNTT so determines.

6.85 The NNTT has been identified for this role due to its expertise in native title and its independence from government. As has been highlighted in **Chapter 2** in more detail, 'the palpable air of political compromise' permeates the *NTA*.⁶³ It would be preferable that the important allocative decisions to be made under the reformed scheme be made by a body with specialist expertise which cannot be influenced

63 *Forrest on behalf of the Nangaanya-ku Native Title Claim Group (Part B) v Western Australia (No 2)* [2024] FCA 729 [141].

by political pressure. That, of course, will not impede the ultimate power of the Parliament to intervene if it so wishes.

6.86 The independence required for the task conforms with international standards that require that impact assessments be independent and impartial.⁶⁴

6.87 It is also important that all stakeholders should have confidence in the proposed assessment process. The response from native title parties and their representatives to a government party conducting impact-based assessments was one of concern or opposition.⁶⁵ Reasons expressed to the ALRC included lack of capability, distrust, and unmanaged conflicts of interest. For example, with reference to the current future acts regime, South Australian Native Title Services observed that

the complexities inherent in Subdivisions G–N create frustration and promote a culture of ‘rough enough is near enough’ amongst some governments and their advisors.⁶⁶

6.88 Submissions raised concerns that government parties may inappropriately classify acts as low impact due to inexperience or to avoid higher procedural rights.⁶⁷ The Mabo Centre and National Native Title Council, citing experience with this issue, reflected that

often under existing future act and similar (*Traditional Owner Settlement Act 2010* (Vic)) arrangements, decisions as to classification of future acts were made by Local Government Authority personnel with little training or experience in native title matters. This often led to inappropriate classification decisions that required challenge.⁶⁸

6.89 Substantial concern has also been expressed about the task currently completed by government of assessing which of the subdivisions is the appropriate one for a particular future act.⁶⁹

Exclusions

6.90 The purpose and importance of the exclusions in [Recommendation 26\(b\)](#) is discussed below.

64 Victoria Tauli-Corpuz, *Rights of Indigenous Peoples: Report of the Special Rapporteur on the Rights of Indigenous Peoples*, 45th Sess, UN Doc A/HRC/45/34 (18 June 2020) [58]; Expert Mechanism on the Rights of Indigenous Peoples, *Free, prior and informed consent: a human rights-based approach*, 39th sess, UN Doc A/HRC/39/62 (10 August 2018) Annex [15].

65 See, eg, K O'Bryan, *Submission 94*; South Australian Native Title Services, *Submission 104*; Mabo Centre and National Native Title Council, *Submission 130*; Kimberley Land Council, *Submission 151*.

66 South Australian Native Title Services, *Submission 104*.

67 Mabo Centre and National Native Title Council, *Submission 130*; Kimberley Land Council, *Submission 151*.

68 Mabo Centre and National Native Title Council, *Submission 130*.

69 For examples of the issues raised about the current process of categorising future acts, see, eg, Kimberley Land Council, *Submission 26*; Queensland South Native Title Services, *Submission 45*. See also South Australian Native Title Services, *Submission 104*.

Exempt from sunseting

6.91 Legislative instruments subject to the sunseting provisions in Part 4 of the *Legislation Act 2003* (Cth) are repealed after the ten year anniversary of their commencement. As provided in **Recommendation 26(d)**, the regulations to be made under the impact-based scheme are proposed to be exempt from sunseting requirements due to:

- the need for consistency and certainty of the provisions over time, particularly when related to interests in land span many years or decades;
- the significant resources associated with developing the regulations (discussed below); and
- the unlikely need to revisit many assessments resulting in the regulations once established.

6.92 Parliamentary oversight of the regulations would be maintained through the disallowance process as well as the ultimate capacity of Parliament to override any regulations made.

Assessment process

Recommendation 27

The *Native Title Act 1993* (Cth) provide that:

- a. the National Native Title Tribunal be empowered to make NNTT Recommendations which identify and define the nature and scope of a category, or categories, of future acts to be included by regulation in either Group A or Group B; and
- b. the President of the Tribunal or, at his or her election, another Presidential member of the Tribunal or a panel of members of the Tribunal presided over by a Presidential member, carry out the functions of assessing and making a NNTT Recommendation.

The *Native Title Act 1993* (Cth) and/or delegated legislation (akin to rules) made by the Tribunal provide for a process for a category, or categories, of future acts to be assessed by the Tribunal as appropriate for inclusion in either Group A or Group B:

- c. the process shall include the following features:
 - i. initiation by the President, or on the application of an interested person (interested persons to include government, future act proponents or their representative bodies, and native title parties or their representative bodies);

- ii. the capacity for the President to call for applications to be made in relation to future act categories relevant to a particular industry or industry sector;
- iii. the capacity for the Tribunal to, at the discretion of the President, deal with multiple applications in a single process;
- iv. the capacity for the Tribunal to amend, adjust, or reformulate the nature and scope of a future act category the subject of any application;
- v. the capacity for the Tribunal to notify interested persons of the initiation of a process and for interested persons to apply to be included as 'participating parties';
- vi. the capacity of the Tribunal to determine the 'participating parties' for each process; and
- vii. subject to any requirements made by the Act, the provision to the Tribunal of a broad discretionary power to fairly determine its procedures and the manner by which it will carry out its assessment function, including a capacity to conduct the process, or part of it, in an inquisitorial manner by making its own investigations and utilising its own experts or referees.

The *Native Title Act 1993* (Cth) require that:

- d. participating parties be given the opportunity to be consulted by the Tribunal and for their views to be fairly considered, including, at the discretion of the Tribunal, by providing evidence and/or submissions; and
- e. in making its assessment, the Tribunal be satisfied that the category of future acts meets the 'lower-impact criteria' (see Recommendation 28) for inclusion in Group B and that criteria as well as the 'limited-impact criteria' (see Recommendation 29) for inclusion in Group A.

The *Native Title Act 1993* (Cth) provide that:

- f. in order for a category of future acts to satisfy the 'limited-impact criteria' or 'lower-impact criteria', the Tribunal be empowered to determine and specify conditions applicable to a future act falling within the scope of the category;
- g. the Tribunal be empowered to determine and specify the conditions necessary to provide the native title parties affected by the future act, fair and just redress within a reasonable time; and

- h. the Tribunal may designate a condition to be a 'validating condition', non-compliance with which would result in the future act being invalid from the time the future act is done, unless the invalidity is rectified by a court (see Recommendation 75).

The *Native Title Act 1993* (Cth) provide that a NNTT Recommendation be a decision amenable to review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

The process and its objectives

6.93 The process envisaged by [Recommendation 27](#) is obviously designed to ensure that the NNTT is sufficiently well-informed to properly and appropriately apply the 'lower-impact' criteria, in determining whether or not a category of future act should be allocated to Group A or Group B. However, another underlying objective of the various features of the process referred to in the recommendation, including the NNTT's capacity to determine conditions, is the need for clarity and certainty in the operation of the scheme.

6.94 Confusion and ambiguity in the practical operation of the scheme may well have been responsible for the failure of the impact-based scheme enacted by the *Aboriginal Cultural Heritage Act 2021* (WA).

6.95 With that in mind, but with the need for clarity to be provided as a general proposition, the ALRC has proceeded on the basis that the operation of the reformed scheme requires that all categories of future acts included by regulations in either Group A or Group B be clearly defined.

6.96 What is intended is that the NNTT utilise its capacity to describe the category (for instance and by reference to [Example 6.1](#)), as well as its power to impose conditions (for instance, and by reference to the same example, condition three), to clearly define what future acts fall within the category assessed for inclusion in Group A or Group B.

6.97 Further, because there will need to be clarity as to what must be done or what cannot be done by the proponent under the authority provided by the validation of the future act, the NNTT should utilise its capacity to determine conditions to specify those matters with as much clarity as is possible.

6.98 Various features of the assessment process in [Recommendation 27](#) have been proposed, not only to ensure that the NNTT is sufficiently informed and assisted in properly applying the 'lower-impact criteria' (see [Recommendation 28](#)), but also to help ensure the clarity and precision required for the practical operation of the scheme.

6.99 An important feature of the proposed process is the capacity given to the NNTT to amend, adjust, or reformulate the nature and scope of a future acts category the

subject of any application. Setting the granularity or scope of the category should be done by the NNTT with an eye to avoiding lack of particularity and broad-based generalisations.

6.100 Features of the assessment process, like the requirement for consultation and the capacity to seek expert assistance, are intended to ensure the NNTT's determination (including by setting conditions) is sufficiently well informed to be appropriate, but also that the NNTT be in a position to provide the particularity necessary to provide clarity and avoid operational ambiguity or complexity.

6.101 Other features are directed to making the process accessible to persons interested whose views should be taken into account. Those persons would be identified through a notification process. 'Participating parties' would then be given opportunity to be consulted and for their views to be fairly considered.

6.102 Further features of the proposed process are directed to providing the flexibility the NNTT it needs to conduct the process with efficiency.

Conditions

6.103 The conditions which the NNTT will be empowered to make fall into two categories. The first has already been partly addressed and referred to in **Recommendation 27(f)**. Those conditions will help to define the category but, more fundamentally, will specify the limitations on what can be done under a future act within the category, as well as the mitigatory and remediating measures which must be done, to ensure that the future act satisfies the 'lower-impact criteria'.

6.104 The other category of conditions the NNTT will be empowered to determine are those conditions necessary to provide the native title parties affected by the future acts within the category timely, fair, and just redress for the adverse effect of a future act.

6.105 The flawed approach to providing redress under the current *NTA*, where for future acts validated through Subdivisions G–N the only available redress is that provided by the statutory compensation scheme, has already been discussed. Empowering the NNTT to deal with redress is intended to overcome that flaw.

6.106 It is appreciated that providing for fair and just redress for harm not yet suffered may be a difficult exercise. The ALRC acknowledges that such an exercise will be better performed on a case-by-case basis, rather than by category. However, this exercise is to be performed by reference to future acts which, by definition, will be low impact and thus likely to have low effect. Additionally, the ability to make a later application for statutory compensation would remain available. That will provide an opportunity to adjust the extent of upfront redress received by way of conditions.

6.107 Whilst that process for providing fair and just redress is less than perfect, the opportunity for providing timely redress (even if only redress in part) is regarded as critical to providing fairness to native title parties, as well as for encouraging

reasonable cooperation and engagement by them in order to best provide an efficacious validation process.

6.108 Furthermore, the NNTT would have the ability to designate certain conditions as ‘validating conditions’. Validating conditions are conditions which the NNTT characterises as sufficiently critical to the validation provided to the future act, as to warrant compliance with them being treated as a pre-condition to validity. A condition requiring that a heritage plan, obtained before works commence, confirming that the future act will not materially affect cultural rights, may be an example of a condition that the NNTT would be minded to designate as a ‘validating’ condition.

6.109 As provided in **Chapter 11**, any failure to provide the conditions imposed by the NNTT is enforceable and may be subject to the relief or the sanction provided for by **Recommendation 76**.

Judicial review

6.110 Finally, **Recommendation 27** provides for the judicial review of determinations made by the NNTT in the assessment process. That review will not consider the merit of any decision made but can set aside a decision based on an error of law.

Lower-impact criteria

Recommendation 28

The *Native Title Act 1993* (Cth) provide that:

- a. a category of future acts may be recommended by the National Native Title Tribunal for inclusion in Group A or B where the future acts within that category do not consist of, authorise, or otherwise involve:
 - i. ‘major disturbance’ to any land or waters the subject of the native title rights and interests concerned;
 - ii. material impact on the cultural rights and interests of the native title parties, including on their capacity to enjoy or exercise those rights and interests, in relation to their freedom to carry out rights, ceremonies, or other activities of cultural significance on the land or waters in accordance with their traditions or by interfering with areas or sites recognised by their traditional laws and customs as culturally significant;
 - iii. substantial interference with the carrying on, or the enjoyment of, the community or social activities or facilities of the native title parties; and
 - iv. economic loss or detriment to the native title parties other than where the loss or detriment likely to be caused is negated by a contemporaneous payment or the provision of a benefit.

For the purposes of (i), 'major disturbance' does not include a significant change or alteration to the land or waters which is transitory and where, within a reasonable time of completion of the activity undertaken pursuant to the future act which has caused the change or alteration, the land or waters will be substantially restored to their condition prior to the activity being done. It does not include the taking and use of water in an amount which regulations require that the right to negotiate be afforded to native title parties.

- b. impact shall be assessed having regard to the impact of the future act within the category on the native title rights and interests including the impact of the activities likely to occur in pursuance of the future act; and
- c. impact will be assessed contextually, taking into account the surrounding circumstances in which the activities, likely to be undertaken under a future act within the category, are likely to occur.

6.111 The purpose of the 'lower-impact criteria', as provided in **Recommendation 28**, is to provide the NNTT with the statutory criteria it must apply in assessing as to whether a category of future acts should be recommended for inclusion in Group A or Group B. Having made an assessment that the category should be included in Groups A or B, the NNTT will then differentiate between those two groups by applying the 'limited-impact criteria' in **Recommendation 29** and, by that process, the category will be allocated into either Group A or Group B.

6.112 The 'lower-impact criteria' are also the criteria a PBC must apply in the Group C validation process (see **Recommendation 33** and the discussion below).

6.113 The criteria have been fashioned, in part, by reference to the terms and content of s 237 of the *NTA*. That provision describes the future acts which attract the expedited procedure and thus do not warrant the protection conferred on affected native title parties by the right to negotiate. Although not referred to as 'low', or 'lower-impact' future acts, the intent of s 237 is similarly to identify acts of 'minimal effect'.⁷⁰ Like s 237, the 'lower-impact criteria' require that the physical, cultural, and community impacts of the future act be taken into account. Unlike s 237, the criteria require that any economic impact also be taken into account. The 'lower-impact criteria' are broader than the criteria in s 237, in the sense that far more categories of future acts are able to be designated as lower-impact future acts under the criteria, than the future acts that can fall within the scope of s 237 (even if s 237 was open to all manner of future acts and not limited, as it currently is, to certain future acts involving a right to mine). That observation is made by reference to the terms of s 237 and not by reference to the way the criteria have been applied. The 'lower-impact criteria' are also substantially broader than the criteria in Subdivision L which, in s 24LA, defines, by exclusion, what is a 'low impact future act' for the purposes of that subdivision.

70 Explanatory Memorandum Part A, Native Title Bill 1993 (Cth) 6.

6.114 The 'lower-impact criteria' can be enabled without loss of protection for affected native title parties for two reasons. First, the criteria take a holistic approach to impact and, in particular, enables cultural rights to be well protected. Secondly, impact can be better avoided or diminished by allowing the NNTT to set conditions that mitigate adverse impact and provide for remediation.

6.115 There is no current capacity for mitigatory or remediating conditions to be imposed on a future act under the *NTA* in conjunction with the application of either the expedited procedure or Subdivision L. That capacity, together with the requirement that the economic impact be taken into account and then addressed through the NNTT determining conditions which provide timely, fair, and just redress, opens the door to substantial opportunities to streamline validation pathways, reduce transactional costs, increase engagement with native title parties, diminish their potential opposition, and enhance economic development.

6.116 The criteria are particularly protective of cultural impacts because, if there is potential for a future act to materially adversely affect cultural rights, that potential is better addressed through negotiations which can take into account the bespoke circumstances likely to attend cultural considerations. The criteria properly focuses in on adverse impacts that are likely to arise from the activities likely to be undertaken pursuant to a future act within the category. They also require a contextual assessment, insofar as a category-based assessment can consider context.

Limited-impact criteria

Recommendation 29

The *Native Title Act 1993* (Cth) provide that a future acts category may be recommended by the National Native Title Tribunal for inclusion in Group A where the Tribunal is satisfied that it meets the 'lower-impact criteria' (see Recommendation 28) and is also satisfied that, by reason of the limited impact on native title rights and interests and the capacity of the native title parties to enjoy and exercise those rights and interests, of the future acts falling within the category, consultation of the kind provided for in Recommendation 31 with affected native title parties for the purpose of mitigating any such impact is unnecessary.

6.117 **Recommendation 29** is intended to assist the NNTT in differentiating the category of future acts that may fall within Group A rather than Group B, noting that the 'lower-impact criteria' applies to both Groups. The 'limited-impact criteria' above would achieve this differentiation with reference to the utility, as assessed by the NNTT, of the applicable procedural rights. This recognises that, in the ALRC's view, for some future acts, an opportunity for consultation of the kind contemplated in **Recommendation 31** may be of no practical utility in mitigating the impact of certain types of future acts. Or, in other words, the robustness of the process is not

warranted when considering the limited impact of the future act, in circumstances where the opportunity to comment (which includes a requirement for any comment to be considered) provides at least some capacity for mitigation.

6.118 For example, the replacement of an existing fence is likely to meet the ‘lower-impact criteria’, notionally attracting an opportunity to be consulted in the manner contemplated by **Recommendation 31**. However, the NNTT may determine that it is unclear what additional purpose this opportunity to be consulted would serve in mitigating the impact of an act of such marginal effect on native title rights and interests. As such, the NNTT may be satisfied that providing an opportunity to comment would offer sufficient protection for the native title rights and interests. **Example 6.3** above provides another illustrative example.

Procedural rights — opportunity to comment

Recommendation 30

The *Native Title Act 1993* (Cth) provide that when a future act falls within Group A, before the future act is done, the government party must:

- a. notify, in the way determined by legislative instrument, any representative Aboriginal or Torres Strait Islander bodies, and native title parties in relation to the land or waters that will be affected by the future act, that the future act is proposed to be done; and
- b. provide an opportunity to comment, within a reasonable time, as follows:
 - i. to any registered Prescribed Body Corporate in relation to the land or waters that will be affected by the future act;
 - ii. if there is no Prescribed Body Corporate, to any registered native title claimants in relation to the land or waters that will be affected by the future act; or
 - iii. if there is no Prescribed Body Corporate or registered native title claimant in relation to the land or waters that will be affected by the future act, to any representative Aboriginal or Torres Strait Islander bodies; and
 - iv. consider any comments made by those parties and provide any comments made to the proponent for its consideration.

6.119 **Recommendation 30** outlines the procedural right of the opportunity to comment, applicable to any category of future acts in Group A (‘assessed limited impact acts’). **Recommendation 30** would amend the existing opportunity to comment mechanism to provide that, in addition to requiring that a proponent notify the native title parties of a proposed future act and provide an opportunity to comment

within a reasonable time, the government party must also consider any comments made and provide the comments to the proponent for its consideration.

6.120 **Recommendation 30(b)(iv)** responds to an issue the ALRC heard repeatedly during this Inquiry: currently, native title parties may be provided with an opportunity to comment, but there is no corresponding obligation for those comments to be considered.⁷¹ As Queensland South Native Title Services explained,

no part of the NTA requires proponents nor the government issuing authority to take the comments of affected Native Title Parties into account when undertaking a future act or the activities that it permits. This renders the procedural right to comment a particularly weak protection of native title rights and interests.⁷²

6.121 Many submissions to this Inquiry have expressed similar concerns about the inadequacy and weakness of the existing procedural right,⁷³ particularly in the context of being a commonly afforded procedural right under the existing regime. It has been described as the 'right to be ignored' and the 'right to squeak'.⁷⁴ In effect, the current procedural right provides no, or very little, opportunity for a native title party to participate in decision-making, being solely reliant on the proponent's voluntary consideration of the views expressed by a native title party.

6.122 In light of this feedback, many submissions suggested or supported an amendment to the NTA to require any comments made by a native title party are to be considered by the proponent.⁷⁵ This would enhance a native title party's participatory rights in decision-making in that, having exercised the opportunity to comment, those views are to be considered. As explained by Queensland South Native Title Services, a more robust obligation encouraging mutual understanding between the parties could provide crucial opportunities to mitigate the impact of a future act or allay concerns about it.⁷⁶

6.123 Paired with the requirements imposed on the government party is a recommendation that those requirements be legally enforceable (see the recommendations in **Chapter 11**).

71 See, eg, Kimberley Land Council, *Submission 26*; Cape York Regional Organisations, *Submission 44*; Queensland South Native Title Services, *Submission 45*.

72 Queensland South Native Title Services, *Submission 45*.

73 See, eg, Kimberley Land Council, *Submission 26*; Queensland South Native Title Services, *Submission 45*; Indigenous Land and Sea Corporation, *Submission 68*; Gur A Baradharaw Kod Torres Strait Sea and Land Council Torres Strait Islander and Aboriginal Corporation, *Submission 125*.

74 Kimberley Land Council, *Submission 26*; Queensland South Native Title Services, *Submission 45*.

75 See, eg, P&E Law, *Submission 10*; Kimberley Land Council, *Submission 26*; Queensland South Native Title Services, *Submission 45*; State Aboriginal Heritage Committee (SA), *Submission 82*; Local Government Association of the Northern Territory, *Submission 143*; First Nations Bailai, Gurang, Gooreng Gooreng, Taribelang Bunda People Aboriginal Corporation RNTBC, *Submission 147*.

76 Queensland South Native Title Services, *Submission 45*.

Misclassification

6.124 As stated at the outset of this recommendation, its requirements are only engaged ‘when the future act falls within Group A’. In the context of significant concerns detailed above about the classification of decisions made by governments as to which validation pathway is engaged by a future act, two observations need to be made. Whether a future act falls within Group A is a question of fact and is not a matter left to the opinion or satisfaction of the government with responsibility for providing the notice required by the recommendation. Whilst the government will need to form an opinion, its opinion is not determinative of whether the requirements in the recommendation are engaged. The same observations are applicable in relation to the engagement of the requirement of Group B future acts.

6.125 In sum, the misclassification of a future act into the wrong group will have legal consequences, including that the purportedly valid future act could be declared invalid.

6.126 However, the ALRC’s recommendations seek to avoid the misclassification problem at the outset. As discussed above, the ALRC’s objective is that there be clarity in the designation and definition of future act categories.

Uplifting the minimum procedural right

6.127 Under the existing future acts regime, some future acts attract no procedural rights.⁷⁷ As explained by the Kimberley Land Council, this can result in a native title party being in the ‘challenging position’ of advocating for a proponent to protect native title rights and interests,⁷⁸ without a legislative backing to actually require it.

6.128 By making the opportunity to comment the ‘lowest’ applicable procedural right, the impact-based scheme would, in effect, raise the minimum or baseline procedural rights afforded in relation to future acts. This is significant as it would ensure that under the impact-based scheme, native title parties have a participatory right which is capable of being characterised as providing for consultation, albeit at a low level. This would result in better alignment with international human rights standards, as discussed above.⁷⁹

77 See, eg, *Native Title Act 1993* (Cth) s 24LA.

78 Kimberley Land Council, *Submission 26*.

79 See paragraphs [\[6.44\]](#)–[\[6.50\]](#).

Procedural rights — opportunity to be consulted**Recommendation 31**

The *Native Title Act 1993* (Cth) provide that when a future act falls within Group B, before the future act is done and before a final decision is made about whether (or how) activities likely to be undertaken in the pursuance of the future act are to be done, the government party must:

- a. notify, in the way determined by legislative instrument, any representative Aboriginal or Torres Strait Islander bodies and native title parties in relation to the land or waters that will be affected by the future act, that the future act is proposed to be done; and
- b. provide an opportunity to be consulted in relation to the future act as follows:
 - i. to any registered Prescribed Body Corporate in relation to the land or waters that will be affected by the future act;
 - ii. if there is no Prescribed Body Corporate, to any registered native title claimants in relation to the land or waters that will be affected by the future act; or
 - iii. if there is no Prescribed Body Corporate or registered native title claimant in relation to the land or waters that will be affected by the future act, to any representative Aboriginal or Torres Strait Islander bodies.

The *Native Title Act 1993* (Cth) provide that the notification must identify:

- c. a reasonable timeframe within which the native title party or any representative Aboriginal or Torres Strait Islander bodies may request consultation;
- d. how that party may request consultation; and
- e. that the party may request consultation with either or both of the government party proposing to do the future act and any proponent.

The *Native Title Act 1993* (Cth) provide that if consultation is not requested by the native title party or any representative Aboriginal or Torres Strait Islander bodies, then the future act may be done after the expiry of the reasonable timeframe notified for requesting consultation.

The *Native Title Act 1993* (Cth) provide that if consultation is requested, then:

- f. sufficient information about the future act is to be provided to the native title party or any representative Aboriginal or Torres Strait Islander bodies to ensure that consultation is properly informed;
- g. the parties must consult with a view to ascertaining any reasonably practicable measures to avoid or mitigate any adverse impact of the future act on native title rights and interests; and
- h. the government party and/or future act proponent must give genuine consideration to adopting any measures requested by the native title party or any representative Aboriginal or Torres Strait Islander bodies.

The *Native Title Act 1993* (Cth) provide that after consultation occurs, the person doing the future act is, on request of the native title party or any representative Aboriginal or Torres Strait Islander bodies, to prepare and provide to that native title party a consultation report which includes:

- i. details of the consultation undertaken;
- j. details of any measures to avoid or mitigate the adverse impact of the future act agreed to be done by the future act proponent; and
- k. where avoidance or mitigatory measures requested by the native title parties or any representative Aboriginal or Torres Strait Islander bodies have not been adopted, an explanation as to why they have not adopted.

The *Native Title Act 1993* (Cth) provide that any measures raised in consultation which a future act proponent has agreed to do, shall constitute conditions for the doing of the future act.

6.129 **Recommendation 31** outlines the content of, and process to be followed for, the proposed opportunity to be consulted. As outlined above, this procedural right would be applicable to those future acts falling within Group B.

6.130 This procedural right has been framed as an *opportunity* to be consulted with, so that native title parties have the choice on which future acts to engage in consultation about. The ALRC is mindful not to *require* consultation when consultation is not regarded by native title parties as necessary and where such consultation may increase the risk of further compounding the current consultation fatigue in the sector.⁸⁰

80 See, eg, State of Queensland, *Submission 43*; K O'Bryan, *Submission 94*; Kimberley Land Council, *Submission 151*.

6.131 The consultation process outlined above is modelled upon the existing consultation procedural right and process contained in Subdivision JA,⁸¹ with key improvements (outlined below).

Consultation with government or proponent

6.132 The opportunity to be consulted outlined in **Recommendation 31** would enable a native title party to request consultation with the government party or proponent or both. The existing right to consultation, contained in Subdivision JA, provides an opportunity for consultation with the government party or authority proposing the act only.

6.133 This change has been recommended because, often, the government party may simply be granting an interest to a third-party proponent and, in practical terms, engaging directly with that third party may be more likely to result in a meaningful discussion about impact avoidance or mitigation measures. Furthermore, it would ensure that the participatory rights afforded to native title parties are directed towards the party with the ability to implement such measures and adjust the relevant act or activities if reasonably practicable.

Robust consultation

6.134 **Recommendation 31(f)–(h)** represents a more robust form of consultation, the purpose of which is much clearer than that which is currently provided for in the *NTA* and, ultimately, would allow for more effective participatory rights in decision-making for native title parties.

6.135 The purpose of the existing consultation mechanism is on ‘minimising’ the impact of the future act as well as any relevant access to the land issues.⁸² As detailed in **Recommendation 31(f)–(h)**, the purpose of the process would be to ascertain any reasonably practicable measures for *avoiding* or *mitigating* any adverse impact of the future act. Furthermore, the parties would be required to give genuine consideration to adopting any reasonably practicable measures requested.

6.136 Each of these elements represents an enhancement on the consultation provisions currently provided for in the *NTA*, which have been described as ‘minimal’,⁸³ by increasing the participatory rights of native title parties in decision-making. Put another way, these elements would enable affected native title parties to better influence the outcome of a decision-making process that would affect them.

Detailed consultation report

6.137 **Recommendation 31(i)–(k)** contemplates a more thorough and meaningful consultation report than is currently required in s 24JAA of the *NTA*.⁸⁴ The existing requirement is to provide a report to the Commonwealth Minister who may

81 See *Native Title Act 1993* (Cth) ss 24JAA(13)–(16).

82 Ibid s 24JAA(14).

83 Bardi Jawi Niimidiman Aboriginal Corporation RNTBC, *Submission 53*.

84 *Native Title Act 1993* (Cth) s 24JAA(16).

publish it.⁸⁵ The ALRC has not been able to locate any such published report and has not heard whether the existing requirements are being broadly complied with.

6.138 Additionally, it appears the existing reporting mechanism is focused on ensuring that a consultation *process* occurred.⁸⁶ It is not focused on what that process revealed or what the outcome of that process was. As Cape York Regional Organisations expressed:

Consultation must be imbedded into the section so that the views of the affected Native Title Holders are not dismissed from the report required ...⁸⁷

6.139 If implemented, **Recommendation 31(i)–(k)**, would result in a more detailed consultation report aimed at detailing the outcomes of the consultation process, including any measures agreed to the proponent to mitigate or avoid the impact of the future act.

Enforceability

6.140 As with the opportunity to comment (outlined above), the requirements inherent in the opportunity to be consulted is paired with a recommendation that those requirements be legally enforceable (see **Chapter 11**).

‘Native title decisions’

Recommendation 32

The *Native Title Act 1993* (Cth) provide that when the procedural right associated with a future act is notification and opportunity to comment or opportunity to be consulted, utilising those opportunities does not amount to a ‘native title decision’ for the purposes of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth).

6.141 **Recommendation 32** would provide that, when taking up either the opportunity to comment or to be consulted, that action is not one that would trigger the need for a PBC to comply with the ‘consultation and consent’ requirements contained in the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth). Further detail about these requirements is contained in **Chapter 3**.

6.142 As the Kimberley Land Council explained, complying with the consultation and consent requirements, where they do not relate to an economically significant project, can be ‘inflexible, and compliance ... can be expensive, time consuming,

⁸⁵ Ibid ss 24JAA(16)(a)–(b).

⁸⁶ See especially ibid s 24JAA(16) and the reference to the ‘things done’ under other subsections of the provision.

⁸⁷ Cape York Regional Organisations, *Submission 44*.

impractical, and uncommercial'.⁸⁸ Further, as Norman Waterhouse Lawyers explained,

often the costs for native title holders' proper participation may be as much as undertaking a full negotiation, as the native title holder PBC may need to consult with the common law holders in order to meaningfully respond to any consultation.⁸⁹

6.143 If implemented, **Recommendation 32** would exempt the utilisation of the opportunity to comment as well as the opportunity to be consulted to ensure that the desired cost-effectiveness and efficiency for all parties is achieved for those acts assessed as limited or lower impact. This recommendation would result in the removal of what has been described as a 'substantial and often unreasonable burden' on PBCs.⁹⁰

Group C — negotiated lower impact future acts

Recommendation 33

The *Native Title Act 1993* (Cth) provide that in order for a future act to be validated in accordance with the provisions applicable to Group C:

- a. the proposed future act must relate to land or waters where native title has been determined to exist;
- b. the person proposing to do the future act must:
 - i. notify the relevant Prescribed Body Corporate that it wishes for the future act to be validated in accordance with Group C; and
 - ii. enter into a 'low impact agreement' with the relevant Prescribed Body Corporate which may include the conditions upon which the future act is to be done and conditions providing for the redress to be provided to the affected native title holders;

88 Kimberley Land Council, *Submission 26*.

89 Norman Waterhouse Lawyers, *Submission 102*.

90 Houston Legal & Consultants, *Submission 95*.

- c. before making a 'low impact agreement' the relevant Prescribed Body Corporate must:
 - i. be satisfied that the future act is one that meets the 'lower-impact criteria' (see Recommendation 28). In reaching its satisfaction, the Prescribed Body Corporate may have regard to any conditions to be agreed to with the future act proponent which specify measures that a future act proponent must take to avoid or to mitigate the physical, economic, cultural, and community or social impacts on native title rights and the capacity for native title parties to enjoy those rights; and
 - ii. have, and comply with, standing instructions from the common law holders to enter such an agreement.

The *Native Title Act 1993* (Cth) provide that:

- d. the 'low impact agreement' is enforceable in the same manner as other future act agreements;
- e. where a 'low impact agreement' specifies a condition to be a 'validating condition', non-compliance with that condition would result in the future act being invalid from the time the future act is done, unless the invalidity is rectified by a court (see Recommendation 75); and
- f. a future act that falls within a category in Group A or Group B may nevertheless be the subject of validation in accordance with the provisions for Group C.

6.144 **Recommendation 33** provides for an additional validation pathway available to in relation to areas where native title has been determined and an agreement has been made with the relevant PBC.

6.145 In order for a future act to be validated, a PBC would need to be satisfied that the future act meets the 'lower-impact criteria' (see **Recommendation 28**) and make a 'low impact agreement' in accordance with standing instructions from the common law holders to enter such an agreement.⁹¹

6.146 As explained above,⁹² Group C (negotiated lower impact acts) is an exception to the impact-based assessment model, in that the PBC will be conducting the relevant assessment. In making this assessment, the negotiated agreement may provide for conditions aimed at measures to avoid or mitigate the impact of the future act, as well as any conditions designated as 'validating conditions'. Conditions can be agreed to as 'validating conditions' in order to facilitate the same objective as

91 See **Chapter 3** for a detailed discussion of standing instructions.

92 See paragraphs [6.63]–[6.65].

that pursued by the NNTT when it designates conditions as ‘validating conditions’ (discussed above).

6.147 Group C has been included in the impact-based scheme to provide the flexibility and efficiency that agreement-making provides, as well as supporting the broader aims of enhancing self-determination. Additionally, it provides all parties the ability to tailor, through negotiations, bespoke conditions applicable to a specific future act. This might enable for a more Country-specific and nuanced assessment taking into account the area of the future act, its particular impact, and relevant cumulative effects.

6.148 It also represents a key improvement to the existing low impact act validation pathway provided in s 24LA of the *NTA*, in that it specifically operates *after* native title is determined. By comparison, s 24LA provides that certain low impact future acts may only occur prior to, and not continue after, a determination being made.⁹³ In order for many of those low impact future acts to occur after a determination, an ILUA is required, which has been noted by a number of government stakeholders as significantly challenging.⁹⁴ By comparison, a Group C agreement would not involve the high cost authorisation and registration requirements inherent in making an ILUA because, provided that the safeguards mentioned above are met, it could be negotiated efficiently based on standing instructions provided by the common law holders to the PBC.

6.149 It is recognised that negotiating an agreement in relation to an act that may otherwise attract, for example, an opportunity for comment (pursuant to Group A) or to be consulted (pursuant to Group B) may appear counterintuitive for government parties or proponents wishing to minimise the statutory obligations placed upon them. However, as outlined in [Chapter 3](#), the benefits inherent in negotiating an agreement in the context of Group C future acts include:

- enhanced flexibility and the ability to better tailor the conditions for the doing of the future act to the specific future act in question, as is illustrated in [Example 6.2](#) above;
- encouraging constructive and ongoing partnerships, particularly relevant when considering projects involving multiple future acts or acts that may span many years; and
- obtaining the social licence to operate, which is increasingly viewed as necessary when operating on native title lands.

6.150 The Group C validation process should also be more attractive to native title parties than the Group A or B process, because it provides superior participatory protections and allows for a more accurate and bespoke assessment to be made of the timely, fair, and just redress which should be provided.

93 *Native Title Act 1993* (Cth) s 24LA(1)(a).

94 See, eg, State of Queensland, *Submission 43*; Western Australian Government, *Submission 115*; Northern Territory Government, *Submission 149*.

6.151 The Group C process has been confined to land and waters where native title has been determined because the ALRC considers that the important assessment required as to whether the 'lower-impact criteria' is satisfied should be conducted by a PBC, as earlier discussed.

Group D — negotiated higher impact future acts

Recommendation 34

The *Native Title Act 1993* (Cth) provide that the following future acts fall within Group D:

- a. the creation or variation of a right to mine (unless allocated to Groups A or B);
- b. compulsory acquisition (whether by legislative act or otherwise) for a non-governmental purpose; and
- c. future acts that are not Group A, B, C, or E future acts.

The *Native Title Act 1993* (Cth) provide that in relation to a future act that falls within Group D:

- d. the government party must give notice of the proposed future act to the native title parties and any representative Aboriginal or Torres Strait Islander bodies pursuant to s 29 of the Act; and
- e. the affected native title parties be afforded the right to negotiate in accordance with the right to negotiate provisions of the Act.

The *Native Title Act 1993* (Cth) provide that in relation to a future act that falls within Group D in an area that is unclaimed and undetermined, the future act may be validly done (without further compliance with the applicable procedural rights) provided that a native title determination application is not:

- f. made before the end of three months after the notification day; and
- g. placed on the Register of Native Title Claims before the end of four months after the notification day.

6.152 **Recommendation 34** outlines the acts subject to Group D, the procedure to be followed when proposing a Group D act, and the procedural right afforded to the native title party. As outlined above, certain acts would be deemed as being Group D acts as the 'catch all' for all other acts that do not fall within the other groups (including in Group E).

Right to mine

6.153 **Recommendation 34(a)** identifies that the right to mine future acts are subject to Group D. As acknowledged in the recommendation, certain categories of right to mine future acts would be subject to an impact-based assessment potentially resulting in them being recommended for inclusion in Group B, or possibly even Group A.

6.154 As provided for in **Recommendation 34(d)–(e)**, the proposed process for the notification and the content of the right to negotiate would be replicated from the existing regime (albeit reformed in accordance with the ALRC's recommendation throughout this Report). In relation to areas not subject to a registered native title claim or determination, the existing process in s 30 of the *NTA* is also intended to be retained and applicable to Group D. Specifically, s 30 of the *NTA* provides that, following notification of a future act, a would-be native title party has three months to prepare a native title determination application and then have it registered in order to be afforded the right to negotiate in relation to the future act.

6.155 **Chapter 8** details why this three-month period is insufficient to prepare a native title determination application. However, unlike the context discussed in **Chapter 8** — specifically, that it relates to a validation pathway for future acts that can have an extinguishing effect on native title rights and interests — the future acts that are the subject of Group D, other than compulsory acquisition, would have the benefit of the non-extinguishment principle (see **Recommendation 36**).

Compulsory acquisition

6.156 Compulsory acquisition, being a future act of the highest impact given that native title cannot be replaced or revived once extinguished, is, depending on the purpose of the act in question, to fall into Group D or E.

6.157 Currently, most compulsory acquisitions are validated through Subdivision M.⁹⁵ That validation pathway only applies to compulsory acquisitions which satisfy the provisions contained in ss 24MD(2)(a)–(ba) of the *NTA*. In short, the relevant effects of those provisions are:

- the compulsory acquisition of native title rights and interests must occur under a law that permits both the acquisition of native title and non-native title rights and interests;⁹⁶
- the non-native title rights and interests are also acquired; and
- the practices and procedures adopted in acquiring the native title rights and interests are not to cause native title parties any greater disadvantage than

⁹⁵ See also *Native Title Act 1993* (Cth) s 24NA(3).

⁹⁶ Noting that if the legislation related only to the acquisition of native title rights and interests, this would not comply with s 24MA of the *NTA*. Accordingly, the compulsory acquisition must only occur under a law that permits the acquisition of both native title and non-native rights and interests.

caused to the holders of non-native title rights and interests when their rights are acquired.

6.158 **Recommendation 34(b)** (as well as **Recommendation 35(a)** discussed below) is directed to ensuring that only compulsory acquisitions that comply with the requirements of the *Racial Discrimination Act 1975* (Cth) ('*RDA*') can be validated. **Recommendation 34(b)** (as well as **Recommendation 35(a)**) is premised on the continuation of the same restriction represented by ss 24MD(2)(a)–(ba) of the *NTA*.

6.159 While the impact of such a future act is the same regardless of the purpose for which the acquisition is occurring, the ALRC recognises that, as a means of last resort,⁹⁷ governments must be able to acquire land that is genuinely needed for public purposes.

6.160 As such, compulsory acquisition for a governmental purpose (whether done by legislative act or otherwise) is proposed to fall within Group E and afford native title parties with the same rights as freehold title owners. Compulsory acquisition for a purpose other than a governmental purpose are to be included in Group D. As such acts may occur to facilitate a private purpose without a public purpose, the right to negotiate should attach to a compulsory acquisition of that kind. It is not intended that compulsory acquisition of that kind should be the subject of a lower-level procedural rights. Those acts are therefore Group D future acts and cannot be allocated to Groups A or B.

6.161 In making this distinction, the ALRC acknowledges the general views of stakeholders both for,⁹⁸ and against,⁹⁹ the concept of attributing differing levels of procedural rights based on whether or not the act is for a public purpose. For example, the Australian Human Rights Commission submitted that

public works and infrastructure should not be excluded from the impacts-based model. Governments should be required to present evidence to establish that the 'public good' created by each future act outweighs the limitations they impose on native title holders' rights and interests.¹⁰⁰

6.162 Ultimately, the ALRC recognises that the collective public interest in doing some acts will outweigh private interests, with native title rights and interests proposed to be treated as equal to freehold title in this regard.

97 The Australian Government has previously acknowledged this approach, stating that 'compulsory acquisition would rarely if ever be preferred on Indigenous held land': Attorney-General's Department (Cth) and Department of Families, Housing, Community Services and Indigenous Affairs (Cth), Submission No 7 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Native Title Amendment Bill (No.2) 2009*.

98 See, eg, Local Government Association of Queensland, *Submission 108*.

99 See, eg, Norman Waterhouse Lawyers, *Submission 102*; South Australian Native Title Services, *Submission 104*.

100 Australian Human Rights Commission, *Submission 118*.

Enforceability

6.163 As provided in [Chapter 11](#), [Recommendation 34](#) is paired with a recommendation that the procedural requirement is legally enforceable.

Group E — equivalency future acts

Recommendation 35

The *Native Title Act 1993* (Cth) provide that the following future acts fall within Group E:

- a. legislative acts (other than the creation or variation of a right to mine, or compulsory acquisition for non-governmental purpose);
- b. compulsory acquisition for a governmental purpose;
- c. emergency acts; and
- d. acts that would require the agreement of the freehold title holder, except future acts falling within s 24JAA made prior to 1 January 2030.

The *Native Title Act 1993* (Cth) provide that in relation to a future act that falls within Group E:

- e. the government party must give notice of the proposed future act to the native title parties and any representative Aboriginal or Torres Strait Islander bodies; and
- f. the affected native title parties be afforded the same procedural rights, including the capacity to avoid an infringement upon their native title rights and interests, as would be afforded to a holder of freehold title in the same circumstances.

The *Native Title Act 1993* (Cth) provide that in relation to a future act that falls within Group E in an area that is unclaimed and undetermined, the future act may be validly done (without further compliance with the applicable procedural rights) provided that a native title determination application is not:

- g. made before the end of three months after the notification day; and
- h. placed on the Register of Native Title Claims before the end of four months after the notification day.

6.164 [Recommendation 35](#) outlines the content of Group E (or the acts subject to Group E), the procedure to be followed when proposing a Group E act, and the procedural rights afforded to the native title party. In sum, Group E comprises categories of future acts which are exempted from the impact-based assessment

inherent in the impact-based scheme. The justification for each of these categories being exempted is included below.

Legislative acts

6.165 With the limited qualification provided for in **Recommendation 35(a)**, most legislative acts, including the making, amendment, and repeal of legislation, will fall within Group E. In this way, legislative acts would be an exemption from the impact-based assessment considered in the scheme so as to not unduly fetter the role of the legislature.

6.166 Currently, most legislative acts are validated through Subdivision M.¹⁰¹ That validation pathway only applies to legislative acts which satisfy the requirements contained in s 24MA of the *NTA*. Those requirements are:

- the act applies in the same way to the native title parties concerned as it would if they instead held freehold title to the land affected; and
- the effect of the act on native title is not such as to cause the native title parties to be in a more disadvantageous position at law than they would be if they instead held freehold title to the land.

6.167 **Recommendation 35(a)** is directed to ensuring that only legislative acts compliant with the requirements of the *RDA* are able to be validated. **Recommendation 35(a)** is premised on the continuance of the same restriction as currently provided by s 24MA of the *NTA*. With that safeguard in place, the ALRC takes the view that it would be an inappropriate fetter on the plenary powers of state and territory legislatures to restrict their capacity to determine the appropriate procedural rights for a legislative future act. This is why legislative acts have been exempted from the impact-based assessment criteria.

6.168 As noted in parathesis in **Recommendation 35(a)**, legislative acts are excluded from Group E where they amount to a right or variation of a right to mine and compulsory acquisition (for non-governmental purposes). These have been expressly excluded from the category of 'legislative acts' to avoid the creation of 'a loophole' where legislative acts could be used as a means to avoid the right to negotiate.¹⁰²

Compulsory acquisition for governmental purposes and emergency acts

6.169 As outlined above, compulsory acquisition for governmental purposes would be included in Group E as per **Recommendation 35(b)**. Those compulsory acquisitions would remain subject to the requirements outlined above.¹⁰³

101 See also *Native Title Act 1993* (Cth) s 24HA(1).

102 See, eg, South Australian Native Title Services, *Submission 104*.

103 See paragraphs [6.157]–[6.158].

6.170 Additionally, emergency acts would also be included in Group E, as per **Recommendation 35(c)**.

6.171 It is appropriate that future acts of this kind, which are likely to be undertaken for a compelling public purpose, be subject to the equivalency principle. In the circumstances, the equivalency principle will likely provide sufficient and appropriate protections to affected native title parties. Additionally, and in relation to emergency acts, it would not be appropriate for emergency services to be subject to different rules or requirements when attending to emergencies on native title land or waters, than when attending emergencies elsewhere.

6.172 These two exemptions from the impact-based assessment of the scheme are provided on the basis that the collective public interest of such acts outweighs the private property interests. As such, it is proposed that native title rights and interests be treated equally to freehold title.

Consent/agreement acts

6.173 **Recommendation 35(d)** would exempt from the impact-based assessment scheme, and instead apply the equivalency principle to, future acts that require the consent of a freehold title holder — or put another way, acts that do not pass the freehold test. The importance of retaining the freehold test has been highlighted by stakeholders.¹⁰⁴

6.174 Where the law does not qualify or restrict the capacity of a freehold title holder to resist an infringement of their property right, it would be discriminatory for the law to deny that capacity to native title parties. The avoidance of that kind of potential for serious discrimination justifies this category of future acts being dealt with in accordance with the equivalency principle and not by the impact-based assessment criteria.

6.175 An exception to such acts has been included in relation to s 24JAA future acts. As outlined in greater detail in **Chapter 7**, the ALRC recommends that the provision be allowed to sunset at the date currently set, without further extensions.

Enforceability

6.176 As provided in **Chapter 11**, **Recommendation 35** is paired with a recommendation that the procedural requirement is legally enforceable.

Reach of procedural rights

6.177 Reforming the level of procedural rights appropriate for a particular category of future acts raises an issue as to the scope of the persons to whom those procedural rights ought to extend. Given that, by definition, a future act is an act that affects native title rights and interests, the extent to which procedural rights are provided

104 See, eg, Central Land Council, *Submission 121*.

should be determined by reference to the extent of persons or groups of persons whose native title rights and interests are affected by the future act.

6.178 Most of the categories of future acts only affect native title rights and interests within the immediate vicinity of the area in which the activities undertaken pursuant to the future act occur. However, some categories of future acts have the potential to affect native title rights and interests over vast areas. For example, the taking of water from a river by a large mining operation, though taken in the vicinity of the mine, may not only affect native title rights and interests within the vicinity of the mine. Rather, native title rights and interests many hundreds of kilometres downstream may be affected.

6.179 The ALRC understands that the common practice under the current future acts regime is that procedural rights are only afforded to native title parties within the immediate proximity of the area where the activities under the future act are to be undertaken. In the Discussion Paper, the ALRC referred to this as the ‘immediate footprint of the future act’. It seems doubtful that this common practice is supported by the requirements of the *NTA*.

6.180 The existing future acts regime provides procedural rights to native title parties on a varied basis: at times, the *NTA* describes procedural rights being afforded to native title parties ‘in relation to land or waters in the area concerned’¹⁰⁵ and, in relation to other subdivisions, rights are provided to native title parties whose ‘land or waters ... will be affected by the act’.¹⁰⁶

6.181 Both of those formulations appear to be conferring procedural rights on the persons who have native title rights and interests in the area where such interests are affected. Neither formulation suggests that what was intended was some confinement of the rights to an area immediately proximate to where future act activities are to be undertaken.

6.182 The common practice may, however, be supported by practical considerations including the need to be able to identify, with some certainty, the group or groups of native title parties to whom procedural rights are afforded.¹⁰⁷

6.183 The recommended reformed statutory procedures scheme will need to specify the persons to whom procedural rights are afforded by the scheme. If the approach taken by the current *NTA* is to be continued, the approach will need to recognise that the common practice (which seems to be out of accord with the *NTA*) will likely continue.

6.184 The ALRC considers that it is better to try to resolve the problem and do so in a way that balances practical considerations with the need to provide appropriate

105 See, eg, *Native Title Act 1993* (Cth) ss 24KA(7), 24NA(8).

106 See, eg, *ibid* ss 24GD(6), 24HA(7), 24ID(3)–(4), 29(2).

107 See, eg, the complex scenarios provided in Norman Waterhouse Lawyers, *Submission 102*.

protections. Stakeholders have identified this as a complex and significant issue.¹⁰⁸ The ALRC has not had an opportunity during this Inquiry to conduct consultations that would enable the making of a well-reasoned recommendation to address this issue. However, we suggest that this be the subject of further consideration.

Non-extinguishment principle

Recommendation 36

The *Native Title Act 1993* (Cth) provide that the non-extinguishment principle applies to all categories of future acts within Groups A, B, C, D, and E except compulsory acquisition.

6.185 Under the existing future acts regime, the non-extinguishment principle applies to most, but not all, future acts and is contained in provisions within the various subdivisions of Part 2 Div 3 of the *NTA*. With the proposed repeal of those subdivisions (as contemplated by [Recommendation 24](#)), [Recommendation 36](#) would ensure that the non-extinguishment principle is retained and applicable to the impact-based scheme.

6.186 Where the non-extinguishment principle applies, a future act will not extinguish native title rights and interests, but will suppress native title rights and interests for the time the future act operates.¹⁰⁹ When the future act expires, the native title rights and interests which were suppressed will again have full effect.¹¹⁰

6.187 The non-extinguishment principle is a 'statutory modification of the common law process' of extinguishment,¹¹¹ intended to protect native title rights and interests from being extinguished by temporary legislative grants.¹¹² Repealing the non-extinguishment principle would leave native title rights and interests open to a greater level of extinguishment, where they conflict with the rights and interests granted to support a future act, as a result of the operation of the common law process.

6.188 The non-extinguishment principle does not currently apply to all future acts, including in cases where there is a compulsory acquisition of native title rights and interests. A compulsory acquisition will have the effect of extinguishing the relevant

108 See, eg, *ibid*; South Australian Native Title Services, *Submission 104*; Central Land Council, *Submission 121*.

109 *Native Title Act 1993* (Cth) ss 238(2)–(4).

110 *Ibid* ss 238(6)–(7). See also Explanatory Memorandum Part A, Native Title Bill 1993 (Cth) 1; Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) [4.29].

111 Samantha Hepburn, 'Statutory Interpretation and Native Title Extinguishment: Expanding Constructional Choices' (2015) 38(2) *University of New South Wales Law Journal* 587, 598.

112 Explanatory Memorandum Part A, Native Title Bill 1993 (Cth) 1; Hepburn (n 111) 598.

native title rights and interests.¹¹³ For this reason, the ALRC considers that compulsory acquisition should be the only exception to the non-extinguishment principle.

Compensation entitlement

Recommendation 37

The *Native Title Act 1993* (Cth) provide that:

- a. in relation to all categories of future acts within Groups A, B, C, D, and E, the native title holders are entitled to statutory compensation for the future act in accordance with Part 2 Division 5 of the Act;
- b. the statutory compensation pass-through contemplated in Recommendation 16 applies to the entitlement to statutory compensation mentioned in (a); and
- c. when determining statutory compensation under Part 2 Division 5, the court, person, or body determining statutory compensation may take into consideration any redress provided by any conditions imposed through Groups A, B, or C processes.

6.189 With the proposed repeal of Subdivisions G–N (as contemplated by **Recommendation 24**), **Recommendation 37** would ensure the entitlement to statutory compensation would be retained.

6.190 Specifically, **Recommendation 37** would provide that native title holders are entitled to statutory compensation for the future acts validated under the impact-based scheme, in accordance with existing Part 2 Div 5 of the *NTA*. It would also allow for statutory compensation liability to be passed onto the future act proponent, in the manner contemplated in **Recommendation 16**. Finally, any redress provided by any conditions imposed through Group A, B, or C processes could be taken into consideration when determining compensation.¹¹⁴

6.191 As outlined in **Chapter 4**, many of the existing subdivisions of the future acts regime specify whether statutory compensation is payable and by whom. If, as contemplated by **Recommendation 24**, those subdivisions are repealed and replaced with the impact-based scheme, the above recommendation would re-establish the necessary statutory compensation entitlement of native title holders.

¹¹³ *Native Title Act 1993* (Cth) ss 24MD(2), 24NA(3).

¹¹⁴ This would ensure that the entitlement to redress is not exceeded: see, eg, Western Australian Government, *Submission 115*.

Transitional provisions

Recommendation 38

Having regard to the time likely to be required for the National Native Title Tribunal to undertake its assessment process and make the NNTT Recommendations for Groups A and B (see Recommendation 27) and, having in mind that the time required is currently uncertain and dependent upon the resourcing which the Tribunal may be provided with, transitional provisions be enacted in conjunction with the enactment of the reforms recommended to the *Native Title Act 1993* (Cth), which:

- a. preserve the capacity of a future act, which currently requires affected native title parties to be afforded either notice of a future act, an opportunity to comment or consultation, to be dealt with in accordance with the statutory procedures currently in force; and
- b. provide that the preservation:
 - i. not apply to a future act that falls within Group E;
 - ii. in relation to a future act which falls into a category of future acts included in Group A or Group B, lapse on the day such a category is included in those Groups; and
 - iii. end on a date to be determined (by reference to the time likely to be required by the Tribunal), which date shall not exceed 24 months from the date of enactment of the proposed reforms.

6.192 The need for transitional provisions has been briefly addressed in the overview given above.¹¹⁵

6.193 As per **Recommendation 38**, the ALRC is hopeful that, with the provision of appropriate resources to the NNTT, the proposed assessment process by the NNTT will take no longer than 24 months for the majority of applications to be determined.

6.194 It is envisaged that the process will prioritise, for assessment, future act categories which are the most heavily utilised under the statutory procedures.

6.195 As discussed above, Group D will be the nominal starting point for all future act categories (other than those in Group E). However, transitional provisions would preserve the current procedural right unless or until the matters in **Recommendation 38(b)** occur. This means that for future act categories where the procedural rights consist of notice and opportunity to comment, or a right to consultation, those procedural rights would continue to apply unless or until:

115 See paragraph [6.76].

- the future act category is included in Group A or Group B, at which point the applicable procedural right will then apply; or
- the category is not allocated to Groups A or B, or the preservation period (not to exceed 24 months) has lapsed, at which time the Group D procedural right will then apply.

6.196 If it were determined that the system needed more time to transition, that could be accommodated by extending the preservation period or re-setting the operative date for any procedural right applicable to a future category allocated to Group A or Group B accordingly.

Repeal of the expedited procedure

6.197 A feature of the initial *NTA*, the ‘expedited process’ as it was then referred to, was contextualised in the following manner:

Certain grants or classes of grants which have minimal effect on native title can be excluded from this right to negotiate by the Commonwealth Minister (clause 25). Further, an act which does not directly interfere with the community life of native title holders or involve major disturbance to their land can proceed through an expedited process (clauses 31 and 222).¹¹⁶

6.198 As an exclusion to the right to negotiate, the *NTA* provides that the expedited procedure operates as follows:

- a government party, having considered a future act is one that attracts the expedited procedure, includes a statement as such in the future act notification;¹¹⁷
- native title parties have four months to object to the inclusion of that statement;¹¹⁸
- if no objection is received, the government party may do the act;¹¹⁹ and
- if an objection is received, the arbitral body (that is, the NNTT) is to determine the objection application with reference to the criteria provided in s 237 of the *NTA*.¹²⁰

116 Explanatory Memorandum Part A, Native Title Bill 1993 (Cth) 6.

117 *Native Title Act 1993* (Cth) ss 29(7), 29(10).

118 *Ibid* s 32(3).

119 *Ibid* s 32(2).

120 *Ibid* s 32(4).

Recommended reform

Recommendation 39

Sections 32 and 237 of the *Native Title Act 1993* (Cth) be repealed and related provisions amended to repeal the expedited procedure.

6.199 For reasons outlined below, the ALRC recommends the expedited procedure be repealed in its entirety, which is the intent of **Recommendation 39**.

6.200 The primary reason for repeal of the expedited procedure is that, if the impact-based scheme discussed in this chapter is implemented, the expedited procedure would be redundant.

6.201 Additionally, repeal of expedited procedure is also necessary as it:

- is resource-intensive and not truly expedited;
- undermines relationships; and
- is marked by disappointment, distress, and re-traumatisation.

The expedited procedure is redundant

6.202 If the impact-based scheme recommended is enacted, the expedited procedure should be repealed because it will be redundant. The impact-based process of the expedited procedure will be replaced by an improved facility for assessing and determining those future acts relating to the right to mine, which need not be subject of the right to negotiate and can be dealt with as lower impact future acts. The ALRC considers that the reformed scheme would have greater utility for the reasons outlined below.

6.203 The broader nature of the criteria applicable for assessing future acts (including mining-related future acts) under the proposed reform, relative to the criteria applicable to the expedited procedure, is discussed above.¹²¹ That provides one basis for characterising the reformed assessment process as more appropriate.

6.204 Secondly, the proposed reform streamlines assessments (through the assessment of a *category* of future acts), while the impact-based assessments under the expedited procedure must be done for each future act. The impact-based scheme will allow a single assessment for what would have otherwise required potentially thousands of assessments pursuant to the expedited procedure. The potential efficiency gains for the mining industry are likely to be substantial. That is particularly so given the problematic way in which the expedited procedure has operated, as is reflected upon in the discussion below.

121 See paragraphs [6.113]–[6.114].

6.205 Thirdly, the expedited procedure takes an ‘all or nothing approach’: if a future act is assessed as properly falling within the expedited procedure, there are no procedural rights afforded to the affected native title parties at all. That is so despite the fact that an opportunity to comment or be consulted may be warranted (for further discussion about this, see [Chapter 7](#)). In contrast, the approach proposed is able to fully align impact with the extent of the protection necessary.

The expedited procedure is resource-intensive and not truly expedited

6.206 In an early examination of the expedited procedure, the Federal Court held that it

is not the intention of the Act that in respect of the determination of whether an ‘act is an act attracting the expedited procedure’... that the costs that would be incurred in additional and unnecessary proceedings be wasted on what is intended to be a ‘screening’ procedure.¹²²

6.207 Despite this observation regarding the intention of the *NTA*, the expedited procedure has proven to be a costly drain on the resources of an already constrained sector. As explained by the Northern Territory Government, the expedited procedure is not working as intended:

The processes can be time and resource intensive for all parties, and there can be very long periods between the closing of an inquiry and a determination by the NNTT.¹²³

6.208 The NNTT has noted the application of the expedited procedure occupies a disproportionate amount of its resources,¹²⁴ explaining that

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.¹²⁵

6.209 Native title parties have described the expedited procedure as ‘oppressive’,¹²⁶ both in terms of the volume of notices where the expedited procedure statement is included and then the volume of work associated with progressing an objection application.¹²⁷ Further, resources are wasted in the process, as described by Robe River Kuruma Aboriginal Corporation:

The progression of an Expedited Procedure objection to Inquiry places a strong burden of proof on Native Title Parties, often requiring lengthy and

122 *Western Australia v Ward* (1996) 70 FCR 265 [62].

123 Northern Territory Government, *Submission* 149.

124 National Native Title Tribunal, *Submission* 23; National Native Title Tribunal, *Submission* 86.

125 National Native Title Tribunal, *Submission* 86.

126 Nyamba Buru Yawuru, Submission to Attorney-General's Department (Cth), *Exposure Drafts of the Native Title Legislation Amendment Bill 2018 and the Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018* (10 December 2018).

127 MPS Law, *Submission* 17.

costly evidence gathering by the Native Title Party. The process is structured so that tenement applicants can lodge an application, require the native title party to lodge all its evidence at great expense, and then withdraw with no consequence.¹²⁸

6.210 Similarly, the Commonwealth-funded Native Title Representative Bodies or Service Providers are heavily burdened by the expedited procedure and its associated processes. It has been noted that responding to expedited procedure notices cost the Kimberley Land Council \$2 million in a 12-month period, amounting to 23% of its annual allocated funding.¹²⁹ Additionally, as observed by Marcia Langton and Lisa Palmer, it

is clear that the Native Title Representative Bodies have no alternative but to respond to the avalanche of applications for expedited procedures with standardised responses, such as template affidavits of the kind that the Tribunal Members have found problematic.¹³⁰

6.211 On the other hand, native title parties giving instructions to object to every application of the expedited procedure is a practice noted with frustration by some proponents.¹³¹ For them, objections can be used as a vexatious tool designed to delay and be a point of leverage by native title parties.¹³²

6.212 Other proponents are less critical of the expedited procedure. For example, the Queensland Small Miners Council stated that while

the expedited procedure process in Queensland is not perfect, it is far from a lame duck, (albeit the naming of the procedure is an 'oxymoron'), at least resolve can be made for some types of tenures ... at least until something better can be realised to be affordable expeditious.¹³³

6.213 Contrary to the name, the expedited procedure does not provide a truly expedited validation pathway for future acts.¹³⁴ As outlined in the Discussion Paper, where a native title party objects to the expedited procedure, it can take between 12 and 18 months for the NNTT to determine that objection.¹³⁵ Many submissions described the expedited procedure as an inefficient process, and one which creates enormous burdens for all participants.¹³⁶

128 Robe River Kuruma Aboriginal Corporation, *Submission 25*.

129 Kimberley Land Council, *Submission No 16 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Inquiry into Native Title Legislation Amendment Bill 2019* (29 November 2019).

130 Marcia Langton and Lisa Palmer, 'Modern Agreement Making and Indigenous People in Australia: Issues and Trends' (2003) 8 *Australian Indigenous Law Reporter* 1, 11.

131 See, eg, Association of Mining and Exploration Companies, *Submission 32*.

132 *Ibid*.

133 Queensland Small Miners Council, *Submission 105*.

134 See discussion in Australian Law Reform Commission (n 16) [237].

135 *Ibid* [236].

136 See, eg, National Native Title Tribunal, *Submission 86*; Central Land Council, *Submission 121*; Northern Territory Government, *Submission 149*; Kimberley Land Council, *Submission 151*; Northern Land Council, *Submission 153*. See also Productivity Commission, *Resources Sector Regulation* (Study Report, 2020) 141.

6.214 There are many factors that appear to be contributing this issue. These include:

- the expedited procedure is ‘so heavily utilised’ by the states and territories;¹³⁷
- the expedited procedure statement is applied without regard to the specific future act in question;¹³⁸
- the number of objection applications is increasing over time;¹³⁹ and
- a large proportion of objection applications appear to result in an agreement being reached by the parties, including through processes requiring time such as case management and mediation.¹⁴⁰

6.215 Several of these issues are described in further detail in [Chapter 7](#).

The expedited procedure undermines relationships

6.216 As an adversarial process, the expedited procedure undermines the negotiation process and can produce a relationship of mutual distrust between the parties.¹⁴¹ The ‘high level of distrust and animosity’ that surrounds the expedited procedure provides a poor platform to support relationship-building.¹⁴² As Dr Ingram explained in his submission, the expedited procedure

has become a mechanism for bypassing meaningful engagement based on assumptions about impact that fail to recognise Indigenous relationships to Country.¹⁴³

6.217 Further, it has been noted that native title parties are provided with limited recourse should a proponent proceed with activities without engaging with native title parties.¹⁴⁴ In fact, it has been suggested to the ALRC that this appears to be encouraged by the design of the expedited procedure.

6.218 This is a particularly significant failing of the process because exploration licences are often the first step in a long-term relationship (particularly in jurisdictions

137 National Native Title Tribunal, *Submission 23*. In its submission, the NNTT indicates that as at 30 June 2024, states and territories had included the expedited procedure statement on 86.5% of all future acts notified under s 29 of the *NTA*.

138 See, eg, *ibid*; Central Land Council, *Submission 31*; Dambimangari Aboriginal Corporation, *Submission 35*; Queensland South Native Title Services, *Submission 45*. See also [Chapter 7](#) for a detailed discussion about this issue.

139 M Lucas, *Submission 57*.

140 See, eg, National Native Title Tribunal, *Submission 23*.

141 NSW Bar Association, *Submission 140*. See also Kimberley Land Council, *Submission 26*; Kyburra Munda Yalga Aboriginal Corporation RNTBC, *Submission 154*.

142 NSW Bar Association, *Submission 140*.

143 I Ingram, *Submission 119*. See also J Marrell, *Submission 93*; Northern Land Council, *Submission 153*.

144 Robe River Kuruma Aboriginal Corporation, *Submission 25*.

where exploration licences are issued conjunctively with mining tenements).¹⁴⁵ As the Northern Land Council explained,

it is significantly prejudicial that such a critical point of reference excludes native title parties from the initial discussions and decision-making process regarding what is happening on country, and native title parties are relegated to the status of barriers to be overcome. From the outset, proponents thus have little incentive to engage with native title holders, foregoing the opportunity for quality early engagement, resulting in relationship building and economic development, transactional, time-pressured engagements.¹⁴⁶

The expedited procedure results in disappointment, distress, and re-traumatisation

6.219 There is often disappointment for native title parties when the expedited procedure is applied to a proposed future act, due to the realisation that they have limited protection for their native title rights and interests.¹⁴⁷ There are flow on effects of this disappointment, as described by Queensland South Native Title Services, in that it

can lead to a loss of faith in the native title system and the aims of the NTA, as well as disengagement from other opportunities to negotiate better outcomes from other future act processes. The lack of protection afforded under the regime can also undermine the dignity and spiritual wellbeing of Native Title Parties.¹⁴⁸

6.220 Objecting to an expedited procedure statement is not a merely a time-consuming and costly administrative process; it can place a significant emotional and psychological toll on native title parties who are required to provide detailed evidence in support of their objection.¹⁴⁹

6.221 In its submission, the Kimberley Land Council described that there are 'several Kimberley native title holders who have given evidence more than 15 times to support objections to the expedited procedure'.¹⁵⁰ The submission quotes one Kimberley native title holder who explained that

old people are getting tired of being asked about these areas. I'm getting tired of it – we already proved native title, and objecting to the expedited procedure feels like we have to prove it again every time, again and again.

It makes me sad and angry to talk about it over and over. I am frustrated that we are not being understood. I'm sad and angry that old people gave stories

145 Northern Land Council, *Submission 153*. See also Graeme Neate, 'Native Title Agreement-Making: Law and Practice and Learning from Experience' (2006) 142 *Australian Mining and Petroleum Law Association Yearbook*.

146 Northern Land Council, *Submission 153*.

147 Queensland South Native Title Services, *Submission 45*.

148 Ibid.

149 See, eg, Kimberley Land Council, *Submission 26*; Cape York Regional Organisations, *Submission 44*; Law Council of Australia, *Submission 120*.

150 Kimberley Land Council, *Submission 26*.

and evidence and that we are following in their footsteps and still not being heard. ... The Government give us our land through native title – and then they want to take it away in those tricky ways like the expedited procedure.¹⁵¹

Response to proposed repeal of the expedited procedure

6.222 **Recommendation 39** reflects Proposal 9 in the Discussion Paper. The majority of submissions received in response to Proposal 9 expressed strong support for it.¹⁵² MPS Law said in its submission that

removing the expedited procedure process from the NTA, or at the very least substantially limiting use of the expedited procedure process, will significantly improve functionality of the NTA, reduce resource strain, lead to better relationships between grantee and native title parties and promote informed participation in the native title process by native title holders.¹⁵³

6.223 Submissions that did not support Proposal 9 expressed concerns about the effect that repealing the expedited procedure could have on the resources industry. These concerns were generally about the potential for increased costs, uncertainty, and delays in approvals processes.¹⁵⁴ For example, the Minerals of Council of Australia considered that repeal was ‘shortsighted’, noting when

exploration and mining projects are held up by prolonged native title processes often due to procedural complexity, under-resourced Traditional Custodian representative bodies, or unresolved disputes; investments are stalled, job creation is deferred, and infrastructure development is delayed.¹⁵⁵

6.224 Importantly, repealing the expedited procedure does not mean removing expeditious pathways to validity from the future acts regime. The reforms in this

¹⁵¹ Ibid.

¹⁵² See, eg, Bardi Jawi Niimidiman Aboriginal Corporation RNTBC, *Submission 53*; Maddocks, *Submission 62*; Jigsaw Legal, *Submission 77*; ANTAR, *Submission 80*; National Native Title Tribunal, *Submission 86*; J Marrell, *Submission 93*; Houston Legal & Consultants, *Submission 95*; Norman Waterhouse Lawyers, *Submission 102*; South Australian Native Title Services, *Submission 104*; Australian Human Rights Commission, *Submission 118*; I Ingram, *Submission 119*; Law Council of Australia, *Submission 120*; Central Land Council, *Submission 121*; Queensland South Native Title Services, *Submission 124*; Gur A Baradharaw Kod Torres Strait Sea and Land Council Torres Strait Islander and Aboriginal Corporation, *Submission 125*; NSW Bar Association, *Submission 140*; Dambimangari Aboriginal Corporation, *Submission 142*; PKKP Aboriginal Corporation, *Submission 144*; First Nations Legal and Research Services, *Submission 146*; Yamatji Marlpa Aboriginal Corporation, *Submission 148*; Kimberley Land Council, *Submission 151*; Northern Land Council, *Submission 153*; Kyburra Munda Yalga Aboriginal Corporation RNTBC, *Submission 154*; Parallax Legal, *Submission 157*. See also First Nations Heritage Protection Alliance, *Submission 14*; MPS Law, *Submission 17*; Central Land Council, *Submission 31*.

¹⁵³ MPS Law, *Submission 17*.

¹⁵⁴ See, eg, Amalgamated Prospectors and Leaseholders Association of WA Inc, *Submission 64*; Association of Mining and Exploration Companies, *Submission 97*; Minerals Council of Australia, *Submission 113*; Western Australian Government, *Submission 115*; S Munro, *Submission 131*; S Lawes, *Submission 133*.

¹⁵⁵ Minerals Council of Australia, *Submission 113*.

Report establish three alternative 'expedited' pathways to validity for future acts. Under the impact-based scheme, there would still be an 'expedited' pathway for validity for certain lower impact future acts through Groups A, B, and C. Parties could also enter into agreements using standing instructions (see **Recommendation 5**) or via the processes in a Native Title Plan (see **Recommendation 82**).

7. Statutory Procedures: Alternative Reforms

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Introduction

7.1 This chapter recommends reforms to the procedural rights afforded to native title parties in Subdivisions G–N of Part 2 Div 3 of the *Native Title Act 1993* (Cth) ('NTA').¹ It does so using the 'equivalency principle' as a core guiding principle. It also recommends reforms to Subdivision P, including the expedited procedure.

7.2 The reforms in this chapter are presented as alternatives to the impact-based scheme discussed in **Chapter 6**. They are alternatives because the ALRC considers that the impact-based scheme should be implemented as the best available option for producing statutory procedures that are fair, non-discriminatory, and compliant with the United Nations Declaration on the Rights of Indigenous Peoples. As discussed in **Chapter 6**, the impact-based scheme provides a nuanced mechanism for providing appropriate procedural rights to native title parties in a fair and effective manner. The scheme also provides a mechanism for providing timely, fair, and just redress to native title parties for the infringement on native title rights and interests by future

¹ Future acts may also be validly done under Part 2 Div 3 Subdivision F of the *NTA*. For further discussion, see **Chapter 8**.

acts. These matters are not easily replicated if reforms are made within the existing statutory framework.

7.3 This chapter highlights that the equivalency principle is capable of providing formal, but not necessarily substantive, equality of treatment to native title parties as compared to freehold title holders. That incapacity means that not all of the discriminatory treatment currently suffered by native title parties under the statutory procedures validation pathways would be eliminated if the reforms recommended in this chapter were implemented.

7.4 The ALRC has been motivated to provide the alternative reforms set out in this chapter for two reasons. First, a concern that the resources required to implement the impact-based scheme may not be made available. The significant resources required for the assessment process under that scheme are discussed in [Chapter 6](#). Secondly, a number of submissions responding to the ALRC's Discussion Paper indicated a strong preference for retaining or reforming the existing statutory procedures, rather than repealing and replacing the regime as contemplated in [Chapter 6](#).² Various reasons were provided for this, including that the structure of the existing regime is familiar and that a new system risks unnecessary complexity, that there may be unintended consequences in introducing an entirely new structure and approach to categorising future acts, and that a new model may give rise to substantially higher costs for users of the future acts system.

7.5 Feedback in response to the Discussion Paper was based on a necessarily incomplete understanding of the proposed impact-based scheme as outlined at the time. For this reason, some concerns about an impact-based scheme were, understandably, misplaced. Furthermore, the impact-based scheme has been substantially developed since publishing the Discussion Paper, taking into account feedback from consultees and submissions. Nonetheless, familiarity with the existing statutory framework and concerns about change may themselves provide a basis for opposition to the wholesale reform contemplated by [Chapter 6](#) of this Report, even if some concerns may be misplaced. While it is hoped that this would not be an obstacle to implementing the impact-based scheme, if it were, the alternative reforms recommended in this chapter would provide a means of significantly improving the existing future acts regime.

7.6 This chapter proceeds in four parts. The first part explains the approach taken to developing the recommendations in this chapter. The second part discusses each of Subdivisions G–N and reforms to those subdivisions. The third part discusses reforms relating to Subdivision P, including the expedited procedure. The final part discusses how reforms to the existing future acts regime may help provide effective, fair, and just redress.

2 See, eg, M Boge, *Submission 76*; Eastern Goldfields Prospectors Association, *Submission 79*; Association of Mining and Exploration Companies, *Submission 97*; Local Government Association of Queensland, *Submission 108*; AgForce Queensland Farmers Ltd, *Submission 111*; Minerals Council of Australia, *Submission 113*; NSW Minerals Council, *Submission 117*; I Ingram, *Submission 119*; New South Wales Government, *Submission 159*.

An alternative approach to reforming the future acts regime

7.7 As outlined above, the recommendations in this chapter are alternatives to the impact-based scheme recommended in [Chapter 6](#). If the reforms in [Chapter 6](#) are not implemented, including because establishing the impact-based scheme could not be properly resourced, then the alternative reforms in this chapter could be implemented in their place.

7.8 The reforms in this chapter respond to the task set by the Terms of Reference by considering:

- the intention of the *NTA*, as stated in its preamble, and to ensure native title holders are able to fully enjoy their rights and interests;
- the current operation of the future acts regime, including *ILUAs*, and related parts of the *NTA*, with the aim of rectifying any inefficacy, inequality or unfairness; and
- the different levels of procedural rights of native title groups in relation to different types of future acts and whether these are appropriately aligned with the impacts on native title rights and interests.

7.9 The equivalency principle underpins the recommendations in this chapter. As discussed in [Chapter 2](#), the equivalency principle aims to promote formal equality before the law by providing native title holders with procedural rights similar to those rights that protect other property interests from infringement. Affording the same procedural rights will not, however, necessarily afford substantive equality because doing so does not account for the ‘cultural, spiritual or metaphysical aspect [of native title] that has no analogue in European law’.³

7.10 In summary, where native title rights and interests are *sui generis* (unique), affording to native title holders the same procedural rights as freehold title holders may be inappropriate or insufficient to achieve the objective of the procedural rights where the content of each of freehold title and native title is fundamentally different. The procedural rights of ordinary title holders will often therefore fall short where afforded to native title parties without any ability to account for the difference in the content of native title as compared to ordinary title. As discussed in [Chapter 1](#), substantive equality is better achieved by aligning the level of protection of rights and interests, rather than the mechanism of protection.

7.11 It is for this reason that equivalency alone is flawed for the purpose of identifying appropriate procedural rights for the doing of future acts. However, in the event the recommended reforms in [Chapter 6](#) are not implemented, the ALRC considers the equivalency principle is the most useful and appropriate guiding principle for reforming the future acts regime.

3 *Commonwealth v Yunupingu on behalf of the Gumatj Clan or Estate Group* (2025) 421 ALR 604 [142].

7.12 As native title is a *sui generis* property right, some kinds of future acts can affect native title in circumstances where there are no equivalent or comparable rights held by ordinary title holders, and so no procedural rights are afforded to the ordinary title holders for such future acts. In those cases, it is not possible to apply the equivalency principle while also ensuring native title parties are afforded appropriate procedural rights for a proposed future act. For future acts for which the equivalency principle cannot operate, our recommendations seek to ensure fairness and, secondarily, efficiency, in the procedural rights afforded to native title parties.

7.13 Where a recommendation in this chapter refers to the right to negotiate, the opportunity to be consulted, or the right to notice and opportunity to comment, these are references to the reformed procedural rights as recommended in [Chapter 6](#), and not the procedural rights in the existing (and unreformed) *NTA*.

7.14 The reforms in this chapter are intended to be standalone alternatives to the impact-based scheme recommended in [Chapter 6](#). For this reason, they are able to complement all other recommendations in this Report.

The approach to procedural rights in 1993 and 1998

7.15 The historical development of the future acts regime, which is outlined in [Chapter 2](#), provides important context for the reforms discussed in this chapter.

7.16 Critically, the preamble to the *NTA* — which has remained unchanged since the *NTA* was first enacted — sets ordinary title as a benchmark for the procedural rights afforded to native title parties: ‘[i]n future, acts that affect native title should only be able to be validly done if, typically, they can also be done to freehold land ...’ (giving effect to formal equality). However, the preamble also recognises that some future acts should only be able to be validly done if ‘every reasonable effort has been made to secure the agreement of the native title holders through a special right to negotiate’ (giving effect to substantive equality). The Full Court of the Federal Court has held that the preamble ‘declares the moral foundation upon which the [*NTA*] rests’ and ‘makes explicit the legislative intention to recognise, support and protect native title’.⁴ The preamble therefore provides important guidance when developing reforms.

7.17 The application of the equivalency principle in the *NTA* as enacted in 1993 produced misalignment between impact and procedural rights. This misalignment was made more pronounced by the *Native Title Amendment Act 1998* (Cth) (*‘NTAA 1998’*). In general terms, the *NTAA 1998* relegated the role of equivalency to secondary importance and replaced it with a scheme aimed at facilitating certainty of access and use of native title land.⁵

4 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442 [63].

5 See the Hon John Howard MP, ‘Wik 10 Point Plan’ (Media Release, 1 March 1997). See also Richard Bartlett, *Native Title in Australia* (LexisNexis, 5th ed, 2023) ch 5.

7.18 Generally speaking, the design of procedural rights in the future acts regime in 1993 and 1998 was underpinned by one of three approaches: the equivalency principle (designed to afford formal equality, such as in the case of compulsory acquisition for the purpose of conferring rights on the acquiring government); a recognition of the special attachment of Aboriginal and Torres Strait Islander Peoples to their lands and waters (designed to afford substantive equality, through measures such as the right to negotiate); or processes designed for specific classes of future act (which, as a general statement, relied on either equivalency or something less than equivalency).

7.19 It could not be said that any of these three approaches led to procedural rights that exceeded those afforded to ordinary title holders. The procedural rights that sought to afford substantive equality to native title parties (primarily the right to negotiate) afforded the same level of rights as ordinary title holders for the same act, but accounted for the different content of the two different kinds of rights.

The approach in this chapter

7.20 In summary, the following matters have guided the recommendations in this chapter:

- For the grant of new rights and interests, native title parties should be afforded procedural rights that are aligned with or cognisant of the effect of a future act on native title rights and interests. Consistently with the equivalency principle, those rights should not be less than those afforded to the holders of ordinary title, where such rights are available.
- Efficiency (through the grant of preferential pathways for validity to third party land users or other rights and interest holders) should not be at the expense of fairness to native title parties, in circumstances where native title rights and interests are a form of property right that is not inherently inferior to non-native title property rights and interests.
- Where no procedural rights are afforded to ordinary title holders for a particular act or where the subject matter of particular future acts requires the special attachment of Aboriginal and Torres Strait Islander peoples to lands and waters to properly account for the impact of the future act on native title, the procedural rights should reflect that special attachment, so as to afford substantive equality.

7.21 The approach of this chapter is underpinned by the fundamental principle that native title must be understood and treated as a valuable property right in the same way as any other property right recognised under Australian law. Treatment of native title rights and interests as anything less amounts to discriminatory treatment of one class of property rights holders relative to another class of property rights holders.

7.22 To be clear, the reforms in this chapter would not guarantee native title parties anything more than formal equality or substantive equality with freehold title holders. They would not result in preferential treatment of native title parties, but would

address the discriminatory treatment of native title as compared to freehold title that has been in place since at least 1998. To the extent possible, the recommendations in this chapter would enable the distinct character of native title — including its vulnerability to irreversible cultural harm — to be appropriately recognised by the procedural rights afforded under the future acts regime.

Reforms to Subdivisions G–N

7.23 This part outlines reforms to Subdivisions G–N of Part 2 Div 3 of the *NTA*. Each section focuses on a specific subdivision by explaining the subdivision and relevant context, why reform is needed, and the ALRC’s recommended reform.

Subdivision G — Future acts and primary production

7.24 Subdivision G was enacted as part of the Australian Government’s response to the High Court’s decision in *Wik Peoples v Queensland* (*‘Wik’*).⁶ Prior to *Wik*, it had been assumed that native title had been extinguished by the grant of both freehold and leasehold title, including pastoral leasehold. In *Wik*, the High Court held that native title rights and interests could, in fact, co-exist with pastoral leases that did not confer a right of exclusive possession on the leaseholder.⁷ However, the High Court also found that to the extent of any inconsistency between the rights of a pastoral leaseholder and the rights of native title parties, the rights of the pastoral leaseholder would prevail.

7.25 Subdivision G, in summary, provides for future acts relating to:

- primary production activities undertaken on non-exclusive agricultural leases or non-exclusive pastoral leases;
- off-farm activities that are directly connected to primary production activities; and
- the grant of rights to third parties on non-exclusive agricultural or non-exclusive pastoral leases.

7.26 ‘Primary production activity’ is defined in s 24GA as: cultivating land; maintaining, breeding, or agisting animals; taking or catching fish or shellfish; forest operations; horticultural activities; aquacultural activities; and leaving fallow or de-stocking any land in connection with the doing of any thing that is a primary production activity. Future acts that permit or require farm tourism on non-exclusive pastoral leases and non-exclusive agricultural leases granted prior to 23 December 1996 are also covered by s 24GB.

7.27 Section 24GB contains procedures and requirements for the grant of new rights and interests for primary production activities to the holders of non-exclusive pastoral leases and non-exclusive agricultural leases that were validly granted prior to 23 December 1996. This entitles a leaseholder to obtain the grant of a *new* permit

⁶ *Wik Peoples v Queensland* (1996) 187 CLR 1.

⁷ See [Chapter 2](#) for further discussion.

or the like to enable the use of the non-exclusive pastoral or agricultural lease land for purposes not conferred in the original grant made prior to 23 December 1996.

7.28 Section 24GC applies to *activities* that are permitted under an existing validly granted interest (which could itself be a validly granted future act), rather than the grant of a new interest. The acts to which s 24GC applies are not future acts.⁸ Section 44H was also enacted to ensure there was no doubt that any activities undertaken in accordance with a validly granted lease, licence, permit, or authority would not separately affect native title over and above the grant of the lease, licence, permit, or authority. Section 44H confirms that activities of leaseholders undertaken in accordance with their existing lease terms will not be separately required to be validated by the NTA.⁹

7.29 Section 24GD covers future acts that are the grant of a right to holders of a freehold, pastoral leasehold, or agricultural leasehold granted prior to 23 December 1996, to graze or gain access to water after that date in an area that adjoins or is near the titleholder's leasehold or freehold property (that is, the future act is done on Crown land that is *outside and not part of* the landholder's pre-23 December 1996 leasehold or freehold grant). For a future act to be covered by s 24GD, the grazing or gaining access to water must also be directly connected to the carrying on of *any* primary production activity on the leasehold or freehold property and must not prevent native title holders from having reasonable access to the area.

7.30 Section 24GE provides for future acts that are the grant to any person of a right to cut and remove timber or extract sand, gravel, rocks, soil, or other resources from non-exclusive pastoral leases and non-exclusive agricultural leases validly granted prior to 23 December 1996.

7.31 Procedural rights for specified future acts under s 24GB, and all future acts under ss 24GD and 24GE, are notice and opportunity to comment.¹⁰ Statutory compensation is payable to native title holders for all future acts under ss 24GB, 24GD, and 24GE. There are no procedural rights, and no statutory compensation is payable, for acts covered by s 24GC.

7.32 The Explanatory Memorandum to the NTAA 1998 stated that, in light of the High Court's decision in *Wik*, 'it is inappropriate ... that the NTA should continue to give effect to [the] false assumption' that native title rights and interests will only be high level rights approaching full ownership in circumstances where native title

8 See also Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) [9.19].

9 See also *Native Title Act 1993* (Cth) s 24AA(7).

10 The procedural rights in s 24GE are unusual, in that one of the criteria that applies for a future act to be covered by that provision is that the person proposing to do the act must issue a notice and opportunity to comment to the native title parties. Where a future act can only be covered by s 24GE if future act meets the specified criteria, compliance with the procedural requirements for s 24GE is a requirement that conditions validity. This is unusual, as all other future acts subdivisions that afford only notice and opportunity to comment do not require compliance with the procedural rights for a future act to be valid if it is covered by the subdivision (see [Chapter 11](#) for further detail).

can co-exist with pastoral leasehold.¹¹ In other words, it had been assumed prior to *Wik* that native title would primarily be held exclusively (that is, 'full ownership') and would not ordinarily co-exist with other rights. Consequently, according to the Explanatory Memorandum, 'the amendments to the future act regime put in place more appropriate arrangements to deal with native title rights on pastoral lease land'.¹² There is no further explanation as to the rationale underpinning the statement that Subdivision G would be 'more appropriate' than the procedures in the *NTA*, as enacted.

7.33 Further context for the enactment of Subdivision G can be gleaned from statements of then-Prime Minister John Howard in relation to the 'Ten Point Plan':

The third very important guarantee I give you my friends is that no pastoral leaseholder can have their conduct or their activities in any way connected with the carrying out of a pastoral or a primary production activity interfered with by a native title claim. We've had all of this talk over the last few months that you'll need the permission of native title claimants to put in a fence, to sink a dam, or to do anything that is incidental to the carrying on of your business. Could I say no, no, no that cannot happen. Because under the guarantees that will be contained in this legislation, the right to negotiate, that stupid property right that was given to native title claimants alone, unlike other title holders in Australia, that native title right will be completely abolished and removed for all time in relation to the activities of pastoralists carrying on not only strictly defined pastoral activities, but also the full extent of primary production activities which you can possibly imagine and which are contained in the definition under the Taxation Act and as we all know unfortunately, definitions in the Taxation Act are very widely couched indeed.¹³

7.34 As observed, the definition for 'primary production activities' was drawn from the definition for the same term provided in the *Income Tax Assessment Act 1997* (Cth). The rationale for the adoption of this term in Subdivision G was as follows:

This broad definition was considered necessary to ensure that the full range of activities that pastoralists are currently authorised to undertake under the various State legislative regimes are covered under the *NTA*, as in some states the terms of pastoral leases were worded in a general way, for example 'for pastoral purposes'.¹⁴

7.35 The justification for this approach was that activities incidental to carrying out the purpose of pastoral lease (that is, grazing) were not necessarily expressed in the lease itself, and so the *NTA* needed to be sufficiently broad to avoid hampering pastoralists' usual activities due to co-existent native title. The Parliamentary Joint

11 Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) [9.9].

12 Ibid [9.10].

13 The Hon John Howard MP, 'Address to Participants at the Longreach Community Meeting to Discuss the Wik 10 Point Plan, Longreach, Qld' (Speech, Longreach, 17 May 1997).

14 Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, *Sixteenth Report: CERD and the Native Title Amendment Act 1998* (2000) [6.77].

Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund made the following observation:

Following the decision in *Wik*, it became clear that these provisions were not adequate to deal with the practical issues relating to the coexistence of native title. There were no mechanisms in the Act to recognise and provide for coexistence [of native title with pastoral leases], and to govern which rights and interests would prevail, in what circumstances, and to what extent.¹⁵

7.36 Furthermore, according to the Committee:

In introducing the primary production provisions into the Native Title Act, the Government faced the difficult task of balancing competing interests in land title in Australia. It was required to deal with the unique situation of coexisting rights in a manner that was reasonable and not arbitrary. Balancing the competing rights of native title holders and pastoral lessees was a legitimate objective, given that the original Act had not been drafted to address the possibility of coexistence.¹⁶

7.37 It was also noted that the primary production provisions in Subdivision G were designed to achieve 'their objective in a manner that was not arbitrary and had as little impact on native title rights and interests as possible'.¹⁷ Finally, the Joint Parliamentary Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund concluded that

the provisions were necessary in order to provide a level of certainty and to clarify the relationship between pastoral leaseholders and native title holders. The Committee believes that the provisions strike an appropriate balance in achieving those ends.¹⁸

7.38 The consequence of the enactment of Subdivision G was to displace the 'freehold test' (see Subdivision M below) for future acts over non-exclusive pastoral and non-exclusive agricultural leases and replace it with a set of bespoke procedures. The application of the freehold test prior to the enactment of Subdivision G (in the brief period between *Wik* and enactment of the *NTAA 1998*) meant that most, if not all, future acts now covered by Subdivision G would have required agreement of the native title parties to be valid (by way of an agreement under s 21 of the original *NTA*), because the act could not be done if the native title parties instead held ordinary title. Acts that were within the terms of an existing pastoral or agricultural lease would not be future acts and would not be subject to the future act compliance requirements of the *NTA*.

The need for reform

7.39 Subdivision G of the *NTA* represents a substantial departure from the equivalency principle discussed earlier in this chapter, resulting in discriminatory

15 Ibid [6.79].

16 Ibid [6.81].

17 Ibid [6.84].

18 Ibid [6.87].

treatment of native title rights and interests. Subdivision G grants preferential treatment to the property interests of one class of rights holders (pastoral leaseholders) over those of another class of rights holders (native title holders).

7.40 The preferential treatment created by Subdivision G amounts to an unprincipled trading off of the property interests of two different classes of property rights holders without meaningful procedural rights afforded to the affected rights holders. The retention of Subdivision G in the future acts regime would perpetuate the discrimination.

7.41 Although one of the key justifications given for the enactment of Subdivision G was to provide certainty, it exceeds what would be expected if it were designed only to clarify pastoralist leaseholders' rights against native title. Subdivision G grants to pastoral leaseholders special privileges for grants of new interests without meaningful procedural rights.

7.42 One of the criteria for a future act to be covered by s 24GB is that the future act must have been able to be validly done or authorised at some time before 31 March 1998, if any native title in relation to the area covered by the lease had not then existed. In other words, s 24GB applies to rights that could have been granted to the holder of a non-exclusive pastoral lease or non-exclusive agricultural lease under legislation of a state or territory if that legislation was in place at 31 March 1998. For example, s 116 of the *Land Administration Act 1997* (WA) (which commenced on 30 March 1998) provides that

a permit under this Division [which includes a permit for non-pastoral purposes under s 122] authorises the activity specified in the permit, despite any provision to the contrary contained in a lease granted under the repealed Act.

7.43 The grant of non-pastoral use permits over pastoral leases under legislation that existed prior to 31 March 1998 (and prior to enactment of Subdivision G) may not be the grant of a new interest as such, where they entitle a leaseholder to vary the purpose for which an existing right can be used. However, the fact remains that acts covered by s 24GB, including the grant of non-pastoral use permits, are still future acts, as they 'affect' native title. If they were not, there would be no need for s 24GB.

7.44 The highest procedural rights afforded to native title parties under Subdivision G are the right to notice and opportunity to comment. As discussed in [Chapter 6](#), the ALRC has heard particular concerns about the inadequacy of these procedural rights to enable native title parties to have a say in and manage impacts on their native title rights and interests.

7.45 In giving evidence to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Noel Pearson made the following statement in relation to the proposed reforms to primary production on pastoral leasehold coexisting with native title:

In January this year, our position on the Aboriginal side was to clarify and confirm, if necessary, the common law formula laid out in *Wik* – that is, the right to construct the bore hole, or the fence or the yard is a prevailing right. If there is a need to clarify that legislatively, our position in January this year was in support of it. But you are putting to me ... that certainty requires the pastoral leaseholder to have potentially an aquaculture right, a forestry right, a right to factory production on the lease – a full range of primary production activities – that the leaseholders never in their wildest dreams imagined that they held. Do you see the narrow exercise of clarification and the huge increase in the rights of the leaseholder that you are proposing in this amending legislation? Do you see the difference?¹⁹

7.46 Professor Bartlett has also made the following observation in relation to the stated justification for the enactment of Subdivision G:

The explanation [that Subdivision G was enacted in response to *Wik*] does not ... explain why residual native title *rights* are subordinate to pastoral *aspirations*. In declaring the paramountcy of pastoral aspirations, the principle of validation of acts in order to assure security of *existing* rights is abandoned. Subdivision G declares that the *expansion* of rights to engage in, and the carrying on of, *any* primary production activity or any associated or incidental activity on non-exclusive agricultural or pastoral leases overrides native title, *irrespective* of the rights originally granted ...²⁰

7.47 The non-extinguishment principle applies to all Subdivision G future acts.²¹ However, where 'primary production activities' is defined broadly, the consequence of a new interest being granted under Subdivision G may be practical extinguishment.

7.48 A pastoral lease allows for grazing of stock and activities associated with or incidental to grazing. Where pastoral leases are typically thousands or tens of thousands of hectares, this means that native title parties can, without difficulty, exercise their rights and interests in parts of the pastoral lease simultaneously while the leaseholder undertakes activities under the lease (on the basis that holders of non-exclusive pastoral leases are not entitled to exclude native title parties).

7.49 If a future act was the grant of an entitlement to a pastoral leaseholder to conduct intensive cultivation of the lease or forest operations or aquaculture, for example, it would be covered by s 24GB and would afford only notice and opportunity to comment to native title parties. The act would on its face be entirely incompatible with the exercise of native title rights and interests.²² Subdivision G could not therefore

19 Evidence to Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Native Title Amendment Bill 1997, Parliament of Australia, Cairns, 8 October 1997 (Noel Pearson).

20 Bartlett (n 5) 580.

21 Where the non-extinguishment principle applies, native title will be suspended to the extent of inconsistency with the non-native title right or interest for the duration of the act: *Native Title Act 1993* (Cth) s 238.

22 While other future acts that afford the non-extinguishment principle can also facilitate future acts that are incompatible with the exercise of native title, they are subject to higher procedural rights. For example, the right to negotiate for the grant of mining leases.

be said to accommodate the coexistence of two different classes of property right. Rather, it subordinates one group's existing rights in favour of the grant of new rights to another group by way of a preferential and discriminatory procedural framework.

7.50 Section 24GB(4) limits the application of s 24GB to primary production activities that are non-pastoral uses on non-exclusive pastoral leases. Where the pastoral lease covers an area greater than 5,000 hectares, a future act will not be covered by s 24GB where it would result in a majority of the lease area being used for a purpose other than pastoral purposes. The substantial size of many pastoral leases means that the maximum area that can be used for non-pastoral uses, 49%, could still amount to tens of thousands of hectares. The practical extinguishment that may result would be possible by affording, at most, only notice and opportunity to comment to the native title parties.

7.51 There is also an assumption that 'less than a majority of the lease' means the size of the footprint of the primary production activity, so a development could be done across the breadth of a pastoral lease in sections, provided in total they do not exceed 49%. However, that would in practice have the consequence that the lease is no longer used for the dominant purpose of pastoral and also interfere with access and exercise of native title rights by native title parties, while still being technically compliant with s 24GB.

7.52 The ALRC has not identified any principle to inform the minimum area (5,000 hectares) a pastoral lease is required to be for the rule in s 24GB(4) to apply. This appears to be an arbitrary figure.

7.53 This serves as another example of the discriminatory treatment of native title as an inferior and less valuable property right as compared to other non-native title property rights. Such discrimination would not be tolerated if the property right in question was ordinary title.

Recommended reform

Recommendation 40

Part 2 Division 3 Subdivision G of the *Native Title Act 1993* (Cth), which provides for future acts concerning primary production, be repealed in its entirety.

7.54 **Recommendation 40** would repeal Subdivision G of the *NTA* in its entirety. This would mean that future acts that currently fall within Subdivision G would require the agreement of the native title parties (excluding activities currently covered by s 24GC, which are not future acts). If other recommended reforms concerning agreement-making and standing instructions are also adopted (see **Chapter 3**), pastoral leaseholders would have more accessible pathways for securing *NTA* compliance for the grant of new interests that they may wish to seek.

7.55 This reform is not intended to affect the entitlement of leaseholders to continue business as usual activities permitted in accordance with their validly granted and existing interests. It would only change the *NTA* compliance procedures for the grant of new rights that are future acts that would permit a variation of the use of the land for which the tenure was granted, including using pastoral leases for non-pastoral purposes. Put differently, it is only where a leaseholder seeks new rights that are future acts that are currently facilitated by Subdivision G that additional costs would be incurred.

7.56 In recommending the repeal of Subdivision G, the ALRC is not proposing to vary or interfere with the principles established by the High Court in *Wik*. The repeal of Subdivision G would not alter the status quo with respect to pastoral leases that were validly granted prior to 23 December 1996 — such interests would remain valid and would continue to prevail over native title rights and interests to the extent of any inconsistency. What this recommended reform seeks to do is to remove the prejudicial treatment of one class of property holders in favour of another. **Recommendation 40** would amend the *NTA* to apply the equivalency principle.

7.57 To understand the rationale for the recommendation, the nature of a pastoral lease as a property right must be borne in mind. Pastoral leases are not equivalent to freehold title. They are creatures of statute. The interests, rights, and obligations which they confer on leaseholders are therefore derived from statute and the terms of the lease itself. Pastoral leases are not a form of common law tenure, and so common law concepts do not form a basis for the interests, rights, and obligations of a pastoral lease.²³

7.58 Pastoral leases do not implicitly confer on a lessee a right to *exclusive possession* over the relevant land, and the interests granted by a pastoral lease will not necessarily extinguish native title.²⁴ Grant of a pastoral lease does, however, confer on the lessee the *exclusive right to conduct pastoral activities* on the leased area for the time and purpose specified in the lease.²⁵ Where the statute and the lease do not confer a right of exclusive possession on the leaseholder, native title rights and interests will not have been extinguished by the grant of the lease and the two interests can co-exist (albeit the rights of the pastoral leaseholder prevail over the native title to the extent of inconsistency).

7.59 In comparison to freehold title, pastoral leasehold tenure provides a more restrictive range of rights.²⁶ The holder of freehold title possesses unfettered (exclusive) possession in perpetuity, subject only to the right of the state to legislate in a manner affecting the property's use or resuming possession of the land.²⁷

23 *Wik Peoples v Queensland* (1996) 187 CLR 1, 112 (Toohey J), 242 (Kirby J).

24 *Ibid* 122, 131 (Toohey J), 155 (Gaudron J), 171 (Gummow J), 233, 242–243, 246–247, 250 (Kirby J).

25 Productivity Commission, *Pastoral Leases and Non-Pastoral Land Use* (Commission Research Paper, 2002) xii.

26 *Ibid*.

27 Michael J Hefferan, *Real Property in Australia: Foundations and Applications* (CRC Press, 2020) 120–1.

A pastoral lease is a product of a contractual arrangement between a state or territory government and a lessee, which provides the leaseholder with possession of land (which may or may not be exclusive) for a specified time and purpose.

7.60 The certainty that pastoral leaseholders enjoy is limited to the duration and terms of the lease itself.²⁸ As a pastoral lease's character is determined by reference to the statute under which it is granted (which varies from jurisdiction to jurisdiction), pastoral leases are, like native title, a form of *sui generis* property right (though this is not to say that they are otherwise in any way equal or the same).²⁹

7.61 There is no basis in law, then, for treating rights under pastoral leases preferentially to other co-existent rights. Both pastoral leasehold and native title are *sui generis*, and both are valuable property rights. The approach to determining procedural rights for native title parties, as co-existent property rights holders, should not therefore be informed by the characterisation of the pastoral leasehold as an inherently superior form of property right to native title. An approach that treats one class of rights as superior or inferior to the other (by reference to the procedural rights) is discriminatory.

7.62 Once reasonable security of pre-23 December 1996 tenure has been afforded to existing non-native title rights holders, it is fair and appropriate for native title parties to be given meaningful procedural and substantive rights to protect their interests for the grant of new rights and interests. Substantive rights require the affording of fair and just redress (namely, by the provision of timely and appropriate compensation and the implementation of measures to mitigate the impact of the future act on native title).

7.63 The recognition of native title over non-exclusive pastoral leases in *Wik* may have created legitimate uncertainty in the minds of pastoral leaseholders. However, such uncertainty does not arise due to native title. The *NTA* need not have been amended, or be further amended, to expressly specify each activity covered under an existing pastoral lease (activities which would not be future acts) where the pastoral lease itself is silent. Assessments of the rights that will be conferred by the grant of a future act must be undertaken for all manner of other non-native title interests on a daily basis (to ascertain which subdivision covers the future act).

7.64 If a particular pastoral leaseholder has any doubt about whether their lease entitles them to undertake certain activities, they are able to seek agreement with the native title parties (by ILUA) or otherwise seek declaratory relief through an appropriate court process. A court would need to consider the terms of the lease as well as the statutory regime under which the lease was granted to ascertain the activities permitted under the lease.

28 Damien Short, *Reconciliation and Colonial Power: Indigenous Rights in Australia* (Taylor and Francis, 2016) 78, citing Mark Horstman, 'The Dead Heart of the Wik Backlash' (1997) 25(3) *Habitat Australia* 34.

29 *Wik Peoples v Queensland* (1996) 187 CLR 1, 59 (Toohey J), 104 (Gaudron J), 163 (Gummow J), 198 (Kirby J).

7.65 The scope of a pastoral lease (and any uncertainty about what activities it permits) is not a native title issue. It is a matter that arises under the non-native title law under which a lease is granted. If a leaseholder was to conduct activities that are not in accordance with their lease, this would be unlawful separately to and outside of the *NTA*. It would therefore not be correct to attribute to native title any uncertainty that may arise for pastoral leaseholders as to the activities their pastoral lease may permit.

7.66 To the extent it is considered desirable for the *NTA* itself to address any purported uncertainty of rights, the National Indigenous Working Group issued a position paper in 1997 in response to the *Wik* decision, which detailed a proposal for managing the coexistence of native title with pastoral leasehold.³⁰ This proposal offers one approach for addressing this issue. However, further consultation with native title parties and pastoral leaseholders, and their representatives would be necessary before adopting this or any other proposal to ensure it is fit for purpose.

7.67 While the ALRC has heard concerns about the additional costs that may be borne by pastoral leaseholders as a result of any winding back of their current rights under the *NTA*,³¹ this is not a sufficient basis for not proceeding with reform. It is common (if not universal) in Australian law that the party that is seeking to encroach on or infringe the rights of another party must bear the costs of that other party. If the encroaching party (whether they are the native title party or another kind of rights holder) is not able to afford such costs, then the encroachment or infringement will not be possible. This principle is consistent, for example, with the entitlement typically afforded to landholders, including pastoral leaseholders, for payment of their costs associated with the grant of mining tenure over their property. This is a necessary consequence of removing the discriminatory treatment of one class of property holders in favour of another.

Subdivision H — Management of water and airspace

7.68 The objective of Subdivision H, as stated in the Explanatory Memorandum to the *NTAA 1998*, was to ensure ‘that legislation and other future acts dealing with surface and sub-surface water, living aquatic resources and airspace will be valid’ and that ‘[a]ny rights or obligations created by the acts will prevail over inconsistent native title rights and interests’.³²

7.69 Procedural rights of notice and opportunity to comment are afforded to the native title parties, though only for non-legislative future acts.³³ The non-extinguishment principle applies to future acts that are covered by Subdivision H and statutory compensation is payable to the native title holders.

30 National Indigenous Working Group, *Coexistence — Negotiation and Certainty: Indigenous Position in Response to the Wik Decision and the Government’s Proposed Amendments to the Native Title Act, 1993* (1997).

31 M Boge, *Submission 76*.

32 Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) [10.1].

33 *Native Title Act 1993* (Cth) s 24HA(7).

The need for reform

7.70 Water is vital for sustaining life and culture of Aboriginal and Torres Strait Islander peoples, including for the exercise of native title rights and interests. For traditional owners, water sources and flows have significant spiritual meaning and are ‘a central part of life, law and custom’.³⁴ Water is also critical for mining, agriculture and other industry, and for domestic use in towns and cities.

7.71 The common law recognises use or extraction of water as a public right held in common by all who access it.³⁵ Statutory regimes then vest proprietorship or rights of control in water in state and territory governments to enable regulation of water as a resource for management and exploitation,³⁶ which is confirmed by s 212(1)(b) of the *NTA*. The taking and use of water is highly regulated by state, territory, and Commonwealth governments. Subdivision H prioritises the regulation and access to and use of water for non-native title purposes over ensuring availability of water to Aboriginal and Torres Strait Islander peoples for the exercise and enjoyment of their native title rights and interests.

7.72 The ALRC understands Subdivision H can be misinterpreted in the scope of future acts to which it applies. In particular, Subdivision H does not extend to future acts that concern the bed or banks under any sea, river, lake, tidal inlet, bay, estuary, harbour, subterranean waters or other watercourse or water body, or the intertidal zone.³⁷ The confusion likely arises between the overlapping definitions of ‘water’ in s 24HA and ‘waters’ in s 253. Clarifying the operation of Subdivision H may also assist in resolving confusion that may arise as between the operation of Subdivision H or Subdivision K, which applies to ‘onshore acts’.³⁸

7.73 At the time of enactment of Subdivision H in 1998, the prevailing policy objective was to create a tradeable water market, departing from the pre-existing and ancient system of common law riparian rights.³⁹ In approximately 2000, following amendment of the *NTA*, states and territories introduced water management legislation which allowed the issuing of water extraction permits.

7.74 No procedural rights are afforded to the native title parties for legislative future acts covered by Subdivision H, while non-legislative future acts confer only the minimal rights of notice and opportunity to comment.

34 Kimberley Land Council, *Submission 26*. See also Committee on Aboriginal and Torres Strait Islander Water Interests, *Submission 22*.

35 *Mason v Hill* (1833) 5 B & Ad 1; *Embrey v Owen* (1851) 6 Exch 353; *Chasemore v Richards* (1859) 7 HL Cas 349; *Rugby Joint Water Board v Walters* [1967] Ch 397.

36 See, eg, *Water Resources Act 2007* (ACT) s 7; *Water Act 1992* (NT) s 9(2); *Water Management Act 2000* (NSW) s 392(2); *Water Management Act 1999* (Tas) s 7(2); *Water Act 1989* (Vic) s 7; *Rights in Water and Irrigation Act 1914* (WA) s 5A.

37 Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) [10.2]; *Lardil Peoples v Queensland* (2001) 108 FCR 453 [94].

38 See, eg, Queensland South Native Title Services, *Submission 45*.

39 Common law riparian rights describe the right of a landowner to use water from a river, lake, or estuary on riparian land that flows through their property. In simple terms, riparian land refers to the edge of a body of water.

7.75 Where legislative acts concerning water and aquatic resources in particular may have a significant impact on native title rights and interests, the absence of any procedural rights for such future acts represents another deficiency in the future acts regime. It is not possible to afford the equivalency principle to future acts covered by Subdivision H as there is no ordinary title as such, and where there is a multitude of entitlements that can be granted in relation to the matters covered under Subdivision H.

7.76 Where Subdivision H does provide procedural rights, the ALRC has heard that the rights afforded under s 24HA are so inadequate as to deliver no procedural benefit in recognising and protecting native title rights and interests in water.⁴⁰ As outlined above, the right to notice and opportunity to comment in practice does not provide native title parties with any meaningful procedural rights, because comments do not have to be taken into account by the decision-maker. Section 24HA (with its minimal procedural rights) has been relied on for future acts concerning rights to extract water in mining production, despite the potentially significant impact this may have.⁴¹

7.77 In 2009, the Aboriginal and Torres Strait Islander Social Justice Commissioner recommended that the right to negotiate should apply to particular future acts that deal with water resources, including ‘development and extraction applications, and water management planning’.⁴²

Recommended reform

Recommendation 41

Section 24HA of the *Native Title Act 1993* (Cth), which provides for the management or regulation of water, aquatic resources, and airspace, be amended to:

- a. amend ss 24HA(1) and 24HA(2) to clarify that ‘water’ and ‘management or regulation of water’ does not include ‘the bed or subsoil under, or airspace over, any sea, river, lake, tidal inlet, bay, estuary, harbour, subterranean waters or other watercourse or water body, or the shore, or subsoil under or airspace over the shore, between high water and low water’;

40 See, eg, Kimberley Land Council, *Submission 26*; First Nations Legal and Research Services, *Submission 42*; Indigenous Land and Sea Corporation, *Submission 68*; K O'Bryan, *Submission 94*; Dambimangari Aboriginal Corporation, *Submission 142*.

41 *BHP Billiton Nickel West Pty Ltd v KN (Deceased) (Tjiwarl and Tjiwarl #2)* (2018) 258 FCR 521 [54]–[64].

42 Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Native Title Report 2008* (Report No 2/2009, 2009) rec 6.3.

- b. provide in s 24HA(7) that the procedural rights for future acts covered by s 24HA that confer a right for the taking or use of water or aquatic resources at deemed significant impact quantities (see paragraph (d) of this recommendation) are subject to the right to negotiate in Part 2 Division 3 Subdivision P, and all other future acts concerning water and aquatic resources are subject to the procedural right to provide the native title parties the opportunity to be consulted;
- c. provide that the procedural rights for future acts concerning airspace is to provide notice and an opportunity to comment (see Recommendation 30 relating to the new notice and comment procedure); and
- d. enable the Minister to make delegated legislation to prescribe the amounts of water and aquatic resources that will constitute a deemed significant impact quantity, such regulations to be a legislative instrument and subject to the requirements of the *Legislation Act 2003* (Cth), including Parliamentary disallowance, but excluding the sunseting regime in Part 4 of that Act.

7.78 **Recommendation 41** would make clear that s 24HA does not cover future acts concerning the land underlying the watercourse or waterbody (such as the beds and banks of a river). Instead, it relates to the grant of rights over and use of or access to the water itself. Any future act concerning the beds, banks, or land where water is located is subject to a different subdivision. This is consistent with the intended application of Subdivision H as stated in the Explanatory Memorandum to the *NTAA 1998*:

Subdivision H does not deal with the management and regulation of the bed or subsoil under onshore and offshore waters (which includes the regulation of off-shore mining such as the petroleum and gas industries). These matters are generally dealt with in proposed Subdivisions M and N, respectively, of Division 3 ... It is for this reason that the term 'water' is used rather than the term 'waters' (which is defined in section 253 to include the bed or subsoil).⁴³

7.79 This recommendation would provide clarity and certainty in the scope of future acts covered by Subdivision H for the benefit of all users of the *NTA*.

7.80 **Recommendations 41(b)–(d)** would better align the effects of the different kinds of future acts covered by Subdivision H on the native title rights and interests, and the procedural rights afforded to the native title parties for those kinds of future acts.

7.81 As contemplated by **Recommendation 41(d)**, the 'deemed significant impact quantities' of water and aquatic resources would best be prescribed in delegated legislation. The extent of resource extraction that will constitute a significant impact

43 Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) [10.2] (emphasis in original).

on native title will vary substantially from region to region, which will need to be reflected in the assessment of what is a deemed significant impact quantity.

7.82 For example, the impacts on native title rights and interests of extracting a particular volume of water in tropical north Queensland or East Gippsland in Victoria may be less than extracting the same volume of water from the typically much drier Goldfields region of Western Australia. In this way, the right to negotiate may be afforded to the native title parties for the grant of a water entitlement for a specified volume in the Goldfields, whereas a grant for an entitlement of the same volume in tropical north Queensland or East Gippsland might afford a lower procedural right, and vice versa.

7.83 Determining the volumes at which different procedural requirements would apply for different regions would best be the subject of investigations undertaken by specialists with relevant technical expertise. Such expertise is already required to develop regulatory frameworks for taking and use of publicly available resources, like water and aquatic resources. The ALRC is not equipped with the expertise or resources to conduct investigations and make assessments of this kind. Where the equivalency principle cannot be applied to this class of future acts, the recommended reform seeks to recognise the differential impact this class of future acts can have on native title and provide procedural rights that are appropriate for such impact. This reform also seeks to recognise the special attachment native title parties have with water and aquatic resources as integral to native title.

7.84 This approach for differential procedural rights is appropriate and necessary where the available water and aquatic resources vary significantly across and between different regions of Australia, and from year to year. This is also consistent with resource allocation frameworks, such as water planning, which seek to manage varying resource availability in different regions over time.⁴⁴ The delegated legislation should be reviewed periodically for the volumes and amounts that are deemed significant impact to be re-assessed and recalibrated if necessary.

7.85 Where regulations are not prescribed for any reason, the reform should be implemented in the *NTA*, by providing that future acts covered by Subdivision H of significant impact be subject to the right to negotiate. Guidelines could be developed by the Australian Government to assist with interpretation of what may constitute a 'significant impact'. Alternatively, future acts covered by Subdivision H granted for a 'commercial purpose' could be subject to the right to negotiate. However, this is a less desirable approach where the purpose of the future act is not necessarily determinative of the extent of its impact on native title.

7.86 For future acts that are covered by s 24HA that do not constitute the grant of an entitlement to a deemed significant impact quantity, other than future acts in relation to airspace, the opportunity to be consulted is the recommended procedural right (refer to **Chapter 6** for further details regarding the opportunity to be consulted).

44 See, eg, water resource planning in the Murray Darling Basin Plan: Murray-Darling Basin Authority (Cth), 'Basin Plan' <www.mdba.gov.au/water-management/basin-plan/>.

This elevated procedural right (compared to notice and opportunity to comment) is appropriate where any future act in relation to water and aquatic resources will affect native title rights and interests in one way or another.

7.87 As explained in **Chapter 6**, for future acts which native title parties consider will not materially affect their native title rights and interests, the native title parties may choose not to avail themselves of the opportunity to be consulted. For example, the proposed grant of a single short-term aquatic fauna research permit in relation to a specified area may be considered insufficiently material to the native title parties to justify invoking the consultation procedure. The proposed grant of a batch of 500 research permits over multiple years covering an entire claim or determination area, however, may be considered by the native title parties to justify consultation.

7.88 For future acts concerning airspace, the ALRC recommends the procedural rights of notice and opportunity to comment, as the effects on native title of such future acts would not normally warrant the opportunity to be consulted. However, the ALRC has not had the opportunity to consider this class of future acts in any detail, so further consultation should be conducted with native title parties and relevant stakeholders to confirm this approach is appropriate.

7.89 The recommended reforms to procedural rights apply equally to both legislative as well as non-legislative future acts.

7.90 As noted in the introduction to this chapter generally, the ALRC considers these recommended reforms to be a useful starting point for reforming Subdivision H. However, given the complex and technical nature of the regulatory frameworks for water and aquatic resources, the ALRC considers more work is required to reform the *NTA* and other laws to ensure proper management of these resources both for native title parties, industry, and the broader community.

Subdivision I — Renewals and extensions

7.91 Section 26(2)(c) of the *NTA*, as enacted, provided that renewals of a right to mine were subject to the right to negotiate, in the following terms:

the extension of the period for which such a right has effect, other than under an option or right of extension or renewal created by the lease, contract or other thing whose grant or making created the right to mine ...

7.92 Section 26 excluded acts covered by s 25(1), which were renewals of interests in exercise of a legally enforceable right granted prior to 1 January 1994. Renewals, re-grants, or extensions of a commercial, agricultural, pastoral, or residential lease were otherwise permissible future acts under s 235(7), provided the renewal, re-grant, or extension took place at the end of the term of the lease or at the time of any earlier termination of the lease. Additionally, the lease could not create a proprietary interest where the previous term created a non-proprietary interest or granted a larger proprietary interest. The procedural rights under s 23 for permissible

future acts (which included renewals, other than those covered by ss 25 and 26) were the same procedural rights as the holders of ordinary title.

7.93 Subdivision I was enacted as part of the 1998 amendments to the *NTA*. It partly draws from s 25(1) of the *NTA* as originally enacted, which provided for legally enforceable rights created prior to 1 January 1994 to be renewed after that date. It is also partly drawn from the definition of ‘permissible future acts’ in s 235(7) of the original *NTA*. Subdivision I applies to two classes of future acts called ‘pre-existing right-based acts’ (‘PERBA’) and ‘permissible lease-etc. renewals’.

7.94 A future act will be a PERBA where the act takes place:

- in exercise of a legally enforceable right created by any act done on or before 23 December 1996 that is valid; or
- in good faith in giving effect to, or otherwise because of, an offer, commitment, arrangement or undertaking made or given in good faith on or before 23 December 1996, and of which there is written evidence created at or about the time the offer, commitment, arrangement, or undertaking was made.⁴⁵

7.95 Subdivision I also applies to ‘permissible lease etc. renewals’, being the renewal, re-grant, re-making, or extension of the term of a valid lease, licence, permit, or authority, where:

- the original lease (or other interest) was granted on or before 23 December 1996;
- the original lease was a PERBA; or
- the original lease (or other right) was created by an act covered by any of ss 24GB, 24GD, 24GE or 24HA.⁴⁶

7.96 Subdivision I also provides for the replacement of two or more leases, licences, permits, or authorities with, respectively, a single lease, licence, permit, or authority; and the replacement of a single lease, licence, permit, or other authority with, respectively, two or more leases, licences, permits, or authorities.

7.97 Where Subdivision I applies to a future act, subject to Part 2 Div 3 Subdivision P (which provides for the right to negotiate) applying to some acts covered by Subdivision I (certain renewals of mining leases), the act is valid. The non-extinguishment applies, unless the future act consists of the grant of a freehold estate or conferral of a right of exclusive possession (within s 24IB), in which case, native title is extinguished (under s 24ID).

7.98 For the grant of a freehold estate or other right of exclusive possession (within s 24IB), the procedural rights of notice and opportunity to comment are provided to the native title parties. The right to object procedure in s 24MD(6B) also applies to future acts concerning the renewal of a non-exclusive agricultural or non-exclusive

45 *Native Title Act 1993* (Cth) s 24IB.

46 There are various other criteria that must be met for an act to be covered by Subdivision I that are not repeated here.

pastoral lease, and the term of the new lease is longer than the old lease, or the new lease is a perpetual lease (excluding a mining lease). Aside from these instances, there are otherwise no other procedural rights afforded to native title parties. Statutory compensation is payable to the native title holders for future acts covered by Subdivision I.

7.99 The Explanatory Memorandum to the *NTAA 1998* states that Subdivision I

broadly reproduces the content of current sections 25 and 235 of the *NTA* ... while ensuring that all leases, licences, permits and authorities are treated in a consistent manner.⁴⁷

7.100 It also states that the objective of Subdivision I is 'to ensure that certain renewals, extensions and re-grants are valid'⁴⁸ and that 'the Bill includes provisions that clarify what matters renewed, re-granted, re-made and extended leases etc. can deal with ... These provisions are intended to remove doubt'.⁴⁹ There is otherwise no further guidance from the Explanatory Memorandum regarding the purpose or basis for which Subdivision I was enacted.

The need for reform

7.101 Subdivision I contains a technical and complex set of provisions.

7.102 The ALRC has heard that some projects in both the public and private sector rely on Subdivision I to carry out operational activities under legislation pre-dating the *NTA* or for decades-long projects that require renewals of approvals and tenements. The consultees and submissions highlight that amending Subdivision I may have an impact on how these projects operate, including because amendment may require a greater level of engagement with native title parties.

7.103 Some consultees and submissions identified that the lack or quality of procedural rights attaching to Subdivision I is problematic for the protection and enjoyment of native title rights and interests.⁵⁰ *Yamatji Marlpa Aboriginal Corporation* supported amendments to Subdivision I that limit its operation and to apply the non-extinguishment principle:

Section 24IB(1)(b) of the *NTA* should be removed so that only pre-existing rights-based acts that are legally enforceable rights that can be done, not future acts based on other vague commitments or undertakings.

Sections 24IC(2)-(4) of the *NTA* (i.e. permissible lease renewals) should be restricted to situations where the new authority is no larger, longer or contains any more rights than the authority it replaces. In other words, if a ten (10) year

47 Explanatory Memorandum, *Native Title Amendment Bill 1997* (Cth) [11.1].

48 Ibid.

49 Ibid [11.20].

50 For example, see the discussion of licence and lease renewals in *Environmental Equity, Submission 19*.

lease and a five (5) year lease are combined, the new replacement lease should not be able to be for more than five (5) years.⁵¹

7.104 Subdivision I affords preferential treatment to non-native title rights and interest holders for the kinds of acts covered by Subdivision I to the detriment of native title parties. In particular, the ability for a PERBA as well as a permissible lease renewal to continue in effect in perpetuity by virtue of Subdivision I without affording any meaningful procedural rights to the native title parties for renewals would constitute a departure from the equivalency principle. This amounts to discriminatory treatment of native title rights and interests.

7.105 For Subdivision I to apply to a future act, the right to renew (without having to afford any procedural rights to native title parties) is embedded within the *NTA* and not within an agreement or the original instrument of grant. This represents a departure from the equivalency principle, which would ordinarily require the consent of the ordinary title holder or procedural rights to be afforded to the ordinary title holder at the time of renewal.

Recommended reform

Recommendation 42

Part 2 Division 3 Subdivision I of the *Native Title Act 1993* (Cth), which provides for pre-existing right-based acts, renewals, and extensions, be amended to provide that all renewals, re-grants, and extensions of non-native title rights and interests be subject to the equivalency principle, so that the procedural rights afforded to native title parties are no less favourable than the rights afforded to ordinary title holders for such acts.

7.106 **Recommendation 42** would mean that non-native title rights and interests could be renewed, re-granted, and extended in the following circumstances:

- where the future act agreement for the original grant affords a right of renewal, re-grant, or re-making, future act validation would not require further procedural rights be afforded to native title parties, provided that any procedures or obligations in the agreement that must be complied with for the renewal, re-grant, or re-making are complied with; or
- where there is no right of renewal, re-grant, or re-making of an interest under the future act agreement for the original grant, future act validation would require the procedural rights that would apply if the renewal, re-grant, or re-making was the original grant of the interest to be complied with (for example, the right to negotiate would apply to the renewal of a mining lease).

51 Yamatji Marlpa Aboriginal Corporation, *Submission 148*.

7.107 **Recommendation 42** would, in effect, apply the equivalency principle to the interests referred in Subdivision I. Applying the equivalency principle to renewals would mean that where there is an agreement that validated the future act for the original grant (such as an ILUA or a section 31 agreement), if such agreement provides for renewal of the right or interest, then no procedural rights under the *NTA* would apply to the renewal. This would be subject to the interest holder complying with any terms and conditions specified in the agreement for the renewal. To qualify for this exception, the agreement could also be required to expressly provide that the procedural rights that would otherwise apply to the renewal are not intended to apply.

7.108 Some jurisdictions already have in place policies that require the negotiation of an ILUA for the renewal or extension of some kinds of leases for which there may be an alternative and less onerous validation pathway under Subdivision I.⁵² Policies that require negotiation of an ILUA are appropriate given the renewal of a lease that covered freehold title land would similarly require the agreement of the freehold title holder. The requirement for an ILUA is therefore consistent with the equivalency principle. It also demonstrates that the recommended reform to Subdivision I is workable in practice.

7.109 If the treatment afforded to the holders of pre-23 December 1996 rights and interests was to continue unchanged, the unfairness to native title parties and discriminatory treatment of native title rights and interests implicit in Subdivision I would be permitted to continue. The ALRC does not consider there to be any reasonable basis for such unfairness and discrimination to continue.

7.110 The ALRC has identified requirements in some non-native title laws that must be satisfied as a pre-condition to renewal. For example, under the *Queensland Mineral Resources Act 1989* (Qld), a compensation agreement or determination of the Land Court must be in place before a mining lease can be renewed. If a compensation agreement provides for the terms of renewal of the mining lease, then a new agreement or determination is not required. If the compensation agreement does not provide for renewal, then a new compensation agreement or determination is required. The Queensland Government's policy for renewal of mining leases notes the following:

Once you [a landowner] have been notified that a renewal application has been made, you should think about whether your existing compensation agreement is working for you and if you'd be happy to continue with the same level of compensation for the next term of the mining claim or mining lease. This may involve contacting the miner to discuss your future plans for the property and their future plans for mining.

If you're happy with your existing compensation agreement you should notify the miner that you don't wish to negotiate a new agreement. The miner should give you a new agreement to sign on the same terms.

52 Department of Planning, Lands and Heritage (WA), *Pastoral Lands Board Guideline: Pastoral Lease Extensions* (2024).

If you want to negotiate a new compensation agreement, then start thinking about what compensation you think is suitable. If the miner hasn't contacted you, it would be a good idea to contact the miner as soon as possible to start discussions and negotiations.

There is no time limit by which compensation must be finalised. You and the miner can continue negotiating until an agreement is reached. Alternatively, either of you may apply to the Land Court to determine compensation.⁵³

7.111 The procedural rights afforded to ordinary title holders for a renewal (right to negotiate an agreement or determination by a lower court) outlined here resemble the right to negotiate under the *NTA*. The difference is that the procedural rights afforded to the ordinary title holders apply at both the grant and renewal stages, unlike the right to negotiate under the current *NTA* (although there are exceptions where the right to negotiate can apply to a renewal, this is not common in practice). This is inconsistent with the equivalency principle.

7.112 The affording of rights to ordinary title holders for the renewal of a mining tenement or other interest is reasonable and appropriate for the reasons set out in the Queensland policy cited above. The ALRC is not able to discern any reason why the same approach should not be taken in the procedural rights afforded to native title parties.

7.113 Some submissions suggested that the renewal of an existing interest (whether originally granted prior to or after 23 December 1996) does not have any additional impact on native title over and above the impact of the original grant.⁵⁴ However, a renewed interest denies the interest holder (whether they are a native title or non-native title interest holder) access to and use of the land over which they hold an interest for the term of the renewed interest. Where an interest (such as a lease) can have a term of several decades, matters may arise during the term of the interest that justify a revisiting of the arrangements made to govern the interest holder's interest in and use of the land. An opportunity to review and consider the arrangements originally agreed would be fair and reasonable.

7.114 For any sectors that may experience particular hardship arising from the repeal of the special renewal rights in Subdivision I, alternative procedural rights could potentially be considered on an interim and limited basis (that is, to be contained in transitional provisions). For example, if the equivalency principle would mean that an ILUA is required for a renewal, then the right to negotiate could be considered as an alternative procedural right (which would enable the interest holder to seek a determination from the National Native Title Tribunal ('NNTT') if an agreement cannot be reached).

53 Department of Natural Resources and Mines, Manufacturing, and Regional and Rural Development (Qld), *A Guide to Landholder Compensation for Mining Claims and Mining Leases* (v 1.3, 2025) 11–12.

54 See, eg, State of Queensland, *Submission* 152.

7.115 However, as a general principle, the ALRC considers it would be unfair to require native title parties to bear the costs of others' hardships at the expense of equal and non-discriminatory treatment with other classes of property rights. This is particularly the case where some jurisdictions already require rights holders to negotiate an ILUA with native title parties to validate certain lease renewals, as noted above, indicating that it is a viable mechanism for validating future acts of this kind.

Subdivision JA — Public housing etc

7.116 Subdivision JA commenced in 2010 and was enacted for the purpose of providing a streamlined procedure to enable governments to construct, on native title land, public housing for Aboriginal and Torres Strait Islander peoples, public education, health, police, and emergency facilities that primarily benefit Aboriginal and Torres Strait Islander peoples living in the area, and other facilities connected to such public housing and facilities.⁵⁵ Subdivision JA was initially subject to a sunset date of 10 years following its commencement. The sunset date has been extended once, with Subdivision JA now due to expire in 2030.⁵⁶

7.117 The procedural rights that apply to future acts covered by Subdivision JA can be summarised as requiring consultation (though this varies from the opportunity to be consulted procedure recommended elsewhere in this Report). The non-extinguishment principle applies to future acts that are covered by Subdivision JA and statutory compensation is payable to the native title holders.

7.118 The rationale for enactment of Subdivision JA was to address a shortfall of housing in remote Aboriginal and Torres Strait Islander communities on native title land through a specific program of funding. The shortfall was said to arise due to historical government underfunding and delays in housing construction. The second reading speech noted as follows:

To ensure the new delivery model for Indigenous housing avoids the pitfalls of the past, secure tenure arrangements are now a requirement of all major investment in housing and other infrastructure.

This makes government responsible and accountable for effective management and maintenance of these assets.

However, some state governments have indicated that uncertainty in relation to native title can be a barrier to meeting housing and service delivery targets. This is creating delays.

...

55 Native Title Amendment Bill (No. 2) 2009 (Cth).

56 Native Title Amendment (Infrastructure and Public Facilities) Bill 2020 (Cth).

The new process strikes a balance between the urgent need for these services and the need to engage meaningfully with native title parties and protect native title rights and interests.⁵⁷

The need for reform

7.119 Prior to the enactment of Subdivision JA, the only options for validating future acts covered by this subdivision were through an ILUA or compulsory acquisition. Compulsory acquisition is unlikely to have ever been a practical alternative where the purpose of the public housing and other facilities is to benefit Aboriginal and Torres Strait Islander peoples, some of whom are likely to be native title holders.⁵⁸ This meant negotiating an ILUA was the most viable option. As discussed in **Chapter 3**, the negotiation and registration of an ILUA will generally be time- and cost-intensive. ILUAs must provide for statutory compensation in exchange for native title parties giving their consent to a future act, which may act as another disincentive to governments seeking agreement in relation to these future acts where program funding may be limited.

7.120 The State of Queensland submitted that s 24JAA provides an alternative avenue to enable it to deliver critical public housing and certain infrastructure to remote Aboriginal and Torres Strait Islander communities. The State submitted that ILUAs are complex and can take years to finalise, and applicable timeframes may mean an ILUA is not possible.⁵⁹ The State of Queensland also submitted that s 24JAA has a legitimate place in the future acts regime and should be retained to deliver projects beneficial to remote Indigenous communities.⁶⁰

7.121 Native title parties and their representatives, on the other hand, expressed concerns that s 24JAA circumvents the right of native title holders to self-determination and the right to consent to the future acts that are covered by this provision.⁶¹ Submissions and consultees suggested that consent of native title parties by way of an ILUA is the appropriate manner for these acts to be validated.

7.122 Submissions also highlighted that s 24JAA was ‘intended as a temporary measure’ and supported the sunset clause being honoured.⁶² Gur A Baradharaw Kod

57 Commonwealth, *Parliamentary Debates*, House of Representatives, 21 October 2009, 10468 (Robert McClelland, Attorney-General).

58 The Australian Government has previously acknowledged this approach, stating ‘that compulsory acquisition would rarely if ever be preferred on Indigenous held land’: Attorney-General’s Department (Cth) and Department of Families, Housing, Community Services and Indigenous Affairs (Cth), Submission No 7 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Native Title Amendment Bill (No.2) 2009* (November 2009), 4.

59 See **Chapter 3** for further discussion about the practical difficulties associated with ILUAs, and discussion of potential reforms.

60 State of Queensland, *Submission 43*.

61 See, eg, Bardi Jawi Niimidiman Aboriginal Corporation RNTBC, *Submission 53*; Gur A Baradharaw Kod Torres Strait Sea and Land Council Torres Strait Islander and Aboriginal Corporation, *Submission 125*.

62 Bardi Jawi Niimidiman Aboriginal Corporation RNTBC, *Submission 53*. See also Gur A Baradharaw Kod Torres Strait Sea and Land Council Torres Strait Islander and Aboriginal Corporation, *Submission 125*; Yamatji Marlpa Aboriginal Corporation, *Submission 148*.

Torres Strait Sea and Land Council Torres Strait Islander and Aboriginal Corporation said that s 24JAA

is not an appropriate vehicle in the Torres Strait region for social housing and other public works infrastructure. Governments and social housing providers should instead develop policy responses to social need for housing and other infrastructure that enshrines the fundamental rights of Torres Strait Islander Traditional Landowners.⁶³

7.123 Bardi Jawi Niimidiman Aboriginal Corporation RNTBC similarly characterised s 24JAA as

a key example of statutory overreach that fails to respect PBC authority. Originally designed as a transitional mechanism to expedite public housing and associated infrastructure delivery, it now functions as a permanent workaround that allows Governments to override native title rights under the guise of urgency. It removes meaningful consultation and prevents PBCs from using statutory procedures like ILUAs to negotiate land use outcomes.⁶⁴

7.124 Subdivision JA represents a departure from the equivalency principle. If a government sought to construct public housing or other facilities on land subject to ordinary title, the government would need to obtain the agreement of the title holder or otherwise compulsorily acquire their rights. As there are no bespoke, streamlined procedures that allow government to construct public housing on ordinary title, the ALRC can see no justification for native title being treated differently. To do so would unjustifiably discriminate between the holders of native title and the holders of freehold title.

Recommended reform

7.125 The ALRC does not recommend reform to Subdivision JA and considers that the existing position — specifically, that the provision is automatically repealed upon the sunseting date in 2030 — be maintained.

7.126 While the ALRC understands the broadly beneficial purpose for which Subdivision JA was enacted, it is unfair to native title parties in comparison to the rights of the holders of ordinary title if the same kind of act was proposed over ordinary title. The ALRC does not consider the benefits of Subdivision JA outweigh the unfairness to native title parties where an alternative and preferable mechanism, an ILUA, is available.

7.127 The ALRC considers this to be a reasonable position where Subdivision JA was intended to provide a temporary solution for a specific program of funding by the Australian Government at a point in time, and where Subdivision JA is otherwise discriminatory. Additionally, if the reason for the introduction of s 24JAA was that the ILUA process is not an efficient validation mechanism for these acts, reform to ILUA

63 Gur A Baradharaw Kod Torres Strait Sea and Land Council Torres Strait Islander and Aboriginal Corporation, *Submission 125*.

64 Bardi Jawi Niimidiman Aboriginal Corporation RNTBC, *Submission 53*.

provisions to address the inefficiencies — including those discussed in **Chapter 3** — could provide a more direct and justified solution. For example, the recommended reforms to extend the ability of common law holders to give their Prescribed Body Corporate ('PBC') standing instructions concerning certain future acts may go some way to alleviating challenges with ILUA negotiations highlighted by stakeholders, such as the State of Queensland as outlined above.⁶⁵

7.128 ILUAs are the appropriate mechanism for validation of this class of future acts, as they enable native title parties to give their free, prior, and informed consent to the act, where native title parties and other Aboriginal or Torres Strait Islander peoples are the intended beneficiaries of the future act. ILUAs will allow native title parties to influence how the future act is done, including where facilities are best constructed and who may be culturally permitted to access and use the facilities in consultation and agreement with government.

7.129 Governments that may be affected by the repeal of Subdivision JA when the sunset date in s 24JAA(1)(d) takes effect in 2030 would have time to prepare for the repeal of Subdivision JA from the future acts regime. This time will enable governments to plan, and refine or develop new policies and procedures for the negotiation of ILUAs.

Subdivision J — Reservations, leases etc

7.130 Subdivision J was enacted to provide specific procedures for land reserved or set aside for a particular purpose prior to 23 December 1996. The Explanatory Memorandum to the *NTAA 1998* stated that the purpose of Subdivision J was to reflect the policy in s 228(9) in the *NTA* as originally enacted, as well as

making grants to third parties in the past, governments also reserved or set aside land for a broad range of public purposes. The Government is of the view that land reserved or set aside in the past should be able to be used, in the future, even if native title exists in relation to that land. Consistent with *Mabo (No. 2)* the reservation should not extinguish native title; the act may in limited circumstances do so.⁶⁶

7.131 Future acts covered by Subdivision J are subject to the non-extinguishment principle, except where the future act is the construction of public works, in which case, native title is extinguished. Subdivision J contains procedural rights only in relation to future acts that are the construction of public works and the creation of plans for the management of a national, state, or territory park for preservation of the environment.

7.132 Section 24JA(1) can apply in two circumstances:

- where the future act is done in good faith under or in accordance with the pre-23 December 1996 reservation (s 24JA(1)(e)(i)); or

⁶⁵ See **Recommendation 5** discussed in **Chapter 3**.

⁶⁶ Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) [12.1].

- where the future act is done in good faith in the area covered by the reservation and the impact of the future act is no greater than the impact that any act that could have been done under or in accordance with the reservation would have had (s 24JA(1)(e)(ii)).

7.133 An example of the second limb provided in the note to s 24JA(1) is where a site was reserved as a hospital prior to 23 December 1996, but a school is built on the land after that date.⁶⁷

7.134 Section 24JA(2) also covers future acts where a lease was validly granted to a statutory authority prior to 23 December 1996 for the use of land or waters for a particular purpose, and the future act is done in good faith and consists of the use by the statutory authority or any person of the land or waters for the particular purpose.

7.135 Section 228(9) of the *NTA* as originally enacted (and still in effect) provided only for acts done after 1 January 1994 that are under or in accordance with the reservation that was granted prior to 1 January 1994 (equivalent to now s 24JA(1)(e)(i)). Such acts are classified as 'past acts'. Past acts that the *NTA* enables to be done after 1 January 1994 are sometimes referred to as 'grandfathered past acts'.⁶⁸ As the creation of the reservation was also required to be a past act (created between 31 October 1975 and 1 January 1994), the scope of s 228(9) in the original *NTA* was much narrower than the class of acts covered by Subdivision J. The requirement under Subdivision J is that the reservation must have been created *any time* prior to 23 December 1996.

7.136 Subdivision J is also much broader in scope than s 228(9) where Subdivision J covers the class of future acts provided for by s 24JA(1)(e)(ii) and leases to statutory authorities in s 24JA(2). The statement in the Explanatory Memorandum that Subdivision J reflected the policy in s 228(9) does not therefore provide a full explanation and justification for the enactment of these provisions.

The need for reform

7.137 The first limb of s 24JA(1)(e)(i), which applies to acts that are done in good faith under or in accordance with the reservation, is consistent with the principle that activities done under or in accordance with a validly granted or created right or interest will not separately affect native title above and beyond the grant itself. It is also consistent with the corresponding past act provision in s 228(9) (other than the period of operation).

7.138 The ALRC has not identified any principle to justify the second limb in s 24JA(1)(e)(ii), namely, acts that have no greater impact on native title than if the act had been done under or in accordance with the reservation. The note to this provision gives the example of a site reserved for a hospital but a school is built.

⁶⁷ See Native Title Act 1993 (Cth) s 24JA(1) (example 3).

⁶⁸ The ALRC acknowledges that while this is a gendered term and not in accordance with current community standards, it is the term that has been commonly used and is recognised and understood by users of the legislation.

However, the issue is that how land is used is not the test as to whether an act will 'affect' native title or not, it is inconsistency of rights.

7.139 An assessment of whether an act will have no greater impact on native title than an act done under or in accordance with the reservation in circumstances where there are no clearly defined criteria or assessment by an independent body (as contemplated in relation to the impact-based assessment recommended in **Chapter 6**), is likely to result in a range of different interpretations. This is a risk, particularly where the only alternative compliance mechanism under the *NTA* for a future act that could be covered by Subdivision J would have more onerous procedural rights (such as an *ILUA*), thereby incentivising a more expansive interpretation and application of the provision.

7.140 If a right or interest was granted to a holder of freehold title, the title holder would be permitted to undertake activities only in accordance with the terms of the right or interest granted. The holder would not be permitted to undertake activities at their own discretion based on a self-assessment that the impact of those activities would be no greater than those permitted under the granted right or interest. Section 24JA(1)(e)(ii) therefore represents a departure from the equivalency principle.

7.141 The Explanatory Memorandum to the *NTAA 1998* provides the following explanation for enacting of s 24JA(2):

Instead of reserving land, some governments have granted it to statutory authorities to be used by those authorities for particular purposes. This category treats those grants in the same way as reservations.⁶⁹

7.142 It is an established principle that activities that are in accordance with a validly granted right or interest will not separately affect native title over and above the grant (which is confirmed by s 44H), and so such acts are not future acts. As such, s 24JA(2) serves no discernible purpose in the future acts regime.

7.143 Section 24JB currently provides that the non-extinguishment principle applies only to future acts covered by Subdivision J that are not the construction or establishment of a public work. Future acts that consist of the construction or establishment of a public work result in the extinguishment of native title from the time when construction or establishment of the work commences.

7.144 There are only limited circumstances in which the future acts regime provides for extinguishment of native title, and such provisions are accompanied by more robust procedural rights. Subdivision J is therefore anomalous. The intent of the future acts regime (as reflected in the preamble) is to apply the non-extinguishment as far as possible, which is consistent with the approach taken for facilities operated for the general public under Subdivision K.

69 Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) [12.7].

7.145 There have been instances of government parties negotiating an ILUA in order to ensure that the non-extinguishment principle applies to a s 24JA future act, in spite of the intended extinguishing effect provided in the provision.⁷⁰ In its submission, the State of Victoria supported amending Subdivision J so that all future acts covered by that provision are subject to the non-extinguishment principle.⁷¹ This was also supported in a number of other submissions.⁷²

7.146 Subdivision J applies to future acts that are the construction or establishment of public works or the creation of a management plan for a national, state, or territory park for preservation of the environment. The relevant procedural rights only for these discrete classes of future acts covered by Subdivision J are the giving of notice and opportunity to comment to the affected native title parties. These procedural rights do not sufficiently provide for the potentially significant impact of this class of future acts on native title.

Recommended reform

Recommendation 43

Section 24JA(1)(e)(ii) of the *Native Title Act 1993* (Cth), which enables a future act in the area of a reservation granted prior to 23 December 1996 to be done where the act's impact on native title is no greater than the impact that any act that could have been done under or in accordance with the reservation would have had, be repealed.

Recommendation 44

Section 24JA(2) of the *Native Title Act 1993* (Cth), which provides that a future act that consists of the use by a statutory authority or any person in good faith of an area subject to a lease that was granted to the statutory authority for a particular purpose, be repealed.

Recommendation 45

Section 24JB of the *Native Title Act 1993* (Cth) be amended to:

- a. repeal s 24JB(2), which provides that if a future act is the construction or establishment of public works, native title is extinguished; and
- b. provide that the non-extinguishment principle applies to all future acts that are covered by Part 2 Division 3 Subdivision J.

70 See, eg, Indigenous Land Use Agreement, *Gariwerd Non-Extinguishment Principle ILUA* (registered 3 December 2018).

71 Victorian Government, *Submission 160*.

72 See, eg, First Nations Clean Energy Network, *Submission 30*; First Nations Bailai, Gurang, Gooreng Gooreng, Taribelang Bunda People Aboriginal Corporation RNTBC, *Submission 147*; Yamatji Marlpa Aboriginal Corporation, *Submission 148*. The Law Council of Australia supported amendments that would allow a proponent to elect to apply the non-extinguishment principle to future acts under Subdivision J: Law Council of Australia, *Submission 47*.

Recommendation 46

Part 2 Division 3 Subdivision J of the *Native Title Act 1993* (Cth), which provides for future acts done in the area of a reservation that was granted prior to 23 December 1996, be amended to provide that the procedural rights to be followed before the act can be done is to provide an opportunity to be consulted to the native title parties.

7.147 The range of public works future acts covered by Subdivision J is broad. The public works may be relatively small scale, such as the construction of a telecommunications tower on a reserve for telecommunications purposes, or they may be large scale, such as the construction of a hospital on a reserve for health purposes. Some future acts covered by Subdivision J may be in place for many decades or longer. If a future act covered by Subdivision J could be done over land subject to ordinary title, it would require compulsory acquisition or agreement of the ordinary title holder, and appropriate procedural rights afforded for the act.⁷³

7.148 The ALRC has not identified any justifiable basis on which the equivalency principle should not apply in relation to future acts covered by s 24JA(1)(e)(ii). Section 24JA(1)(e)(ii) broadens the scope of operation of Subdivision J in ways that go beyond the policy rationale of ensuring security of tenure for interests granted prior to 23 December 1996. It also disregards the scope of the rights conferred under the reservation, providing a pathway for valid use of land for a purpose for which it was not reserved. Like Subdivision G, it affords to governments preferential rights at the expense of native title as a valuable co-existent property right. Accordingly, **Recommendation 43** recommends the repeal of s 24JA(1)(e)(ii).

7.149 As there is no apparent field of operation for s 24JA(2), **Recommendation 44** recommends it be repealed in the interests of simplification.

7.150 As there is no reasonable basis or need for future acts covered by Subdivision J to extinguish native title and for consistency with other future act provisions, **Recommendation 45** recommends that the non-extinguishment principle be extended to all future acts covered by Subdivision J, including public works.

7.151 **Recommendation 46** recommends that the procedural rights for future acts covered by Subdivision J should be the opportunity to be consulted, as outlined in **Chapter 6**, is on the basis that notice and opportunity to comment are insufficient for the potential impact of this class of future acts on native title. If extinguishment was to remain the consequence for public works future acts covered by Subdivision J (if the recommended reform was not adopted), the right to negotiate should be afforded to native title parties. This would ensure a better alignment of procedural right with the impact of the future act on native title.

73 This is also the case for some future acts covered by Subdivision K, to which the non-extinguishment principle applies.

Subdivision K — Facilities for services to the public

7.152 The objective of Subdivision K as stated in the Explanatory Memorandum to the *NTAA 1998*, was to

ensure that services to the general public can be provided unimpeded by native title. The provision of basic services to rural communities, in particular remote Aboriginal communities, is a key concern of the Government. In its view, native title should not inhibit the provision of these services where they are for the general public, including native title holders, no matter who provides them, provided that the effect on native title is minimal.⁷⁴

7.153 Future acts are covered by Subdivision K where:

- the facility to be constructed which is the subject of the future act is ‘operated for the general public’; and
- the native title holders in relation to the land and waters on which the thing is located must not be prevented from having reasonable access to the land and waters, except while the thing is being constructed or for reasons of health and safety.

7.154 The ‘things’ that can be a future act covered by Subdivision K are listed in s 24KA(2). They include, for example: roads; railways; bridges or other transport facilities; electricity transmission or distribution facilities; pipelines for water supply; telecommunications cables and towers; and ‘any other thing that is similar to any one or more of the things mentioned’ in the list.⁷⁵ Subdivision K is limited to applying to future acts in onshore places (see Subdivision N below for an explanation of ‘onshore places’ and ‘offshore places’). The non-extinguishment principle applies to future acts done under Subdivision K and statutory compensation is payable to the native title holders.

7.155 ‘Other transport facilities’ expressly excludes airports and ports.⁷⁶ The Explanatory Memorandum indicated that the basis for this exclusion was that large scale works were not intended to be covered by Subdivision K.⁷⁷ Further, the Explanatory Memorandum noted that large scale works are ‘either likely to require exclusive possession or significantly impede access by native title holders’ and that ‘native title should be acquired for such works’.⁷⁸

7.156 The procedural rights afforded to native title parties are the same procedural rights as the holders of a non-exclusive pastoral lease or non-exclusive agricultural lease (if the land where the future act will be done is covered by one of these tenures) or, otherwise, the same rights as the holders of ordinary title.

74 Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) [13.1].

75 *Native Title Act 1993* (Cth) s 24KA(2).

76 *Ibid* s 24KA(2)(a).

77 Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) [13.7].

78 *Ibid*.

The need for reform

7.157 As outlined above, the objective of Subdivision K was to ensure the provision of basic services unimpeded by native title. There are benefits in having a specific pathway for validation of future acts concerning basic services subject to the non-extinguishment principle (to avoid the need for native title to be compulsorily acquired and extinguished). However, the scope of future acts currently covered by Subdivision K is overly broad and the procedural rights do not appropriately reflect the significant impact such future acts can have on native title rights and interests.

7.158 Subdivision K is given a broad scope by virtue of the expression ‘operated for the general public’ in s 24KA(1). The expression is not defined in the *NTA* and has not, to the ALRC’s knowledge, been the subject of judicial consideration. Module K of the Queensland Native Title Works Procedures notes the Queensland Government’s interpretation of this expression is as follows:

General public means the public at large, including native title parties, as opposed to one particular individual or company.

The fact that a private person or company is constructing a facility, does not stop it from being a facility for services to the general public.

Further, the requirement for payment by the public to use or benefit from the facility does not prevent the facility being operated for the general public.⁷⁹

7.159 Assessing whether a facility will be operated for the general public can be problematic. Where a facility is constructed or operated by a private entity, it can be difficult to identify the line between, on the one hand, a facility operated for the general public by the private entity and, on the other hand, a facility operated for the benefit of and by the private entity, but where the general public may be the end user or consumer of a product or service offered by the private entity. The examples given in the Queensland Native Title Works Procedures for future acts that are and are not covered by Subdivision K are useful to illustrate the problem:

- A communication facility operated by Optus is given as an example of a facility operated for the general public.
- A radio communication facility for ‘Billy’s Taxi Cabs’ is also given as an example of a facility operated for the general public.
- A railway line to a coal mine that is not for use by the general public is given as an example of a facility that is not operated for the general public.

7.160 In the case of the first example, members of the general public may access the services made available by the telecommunication facility, upon payment of the applicable fee. This is clearly operated for the general public.

7.161 It is less clear, however, in the second example: a radio communication facility for a taxi company. The taxis themselves may be operated for the general public, but

79 Department of Resources (Qld), Queensland Government Native Title Work Procedures: Module K: Facilities for Services to the Public (2022).

could not fall under s 24KA as taxis are not one of the facilities listed in s 24KA(2). The taxi company is a private entity that requires certain infrastructure to operate, including radiocommunications facilities. It is not clear that a radiocommunication facility that itself is not directly operated for the general public, but facilitates operation of a business that offers services to the general public, could be said to meet the s 24KA criteria. Put differently, the facility (radiocommunication facility) is one step removed from the service (being taxi services) that is in fact offered to the general public.

7.162 The third example illustrates a facility that is not operated for the general public. The railway line is used by private operators to transport coal. However, applying a similar approach to the second example, if the purpose of the private railway line was to transport coal to a coal fired power station and the power station generated electricity for the general public, it may be argued that the railway line is operated for the general public.

7.163 Consultees and submissions highlighted that Subdivision K does not clearly define the circumstances in which a future act is operated 'for the general public'. Norman Waterhouse explained that

much infrastructure that is (or may be) captured by s 24KA(2) is constructed for both public and private purposes. Joint venture and public/private partnership models are becoming increasingly common for large scale government infrastructure projects. Equally, government is increasingly electing to install 'common user' infrastructure that is entirely (or predominantly) for the benefit of private commercial operators in order to encourage commercial development in specific locations and of particular industries. Therefore, even infrastructure that is entirely government funded may be characterised as being for the benefit of private industry. We do not suggest anything illegitimate about such projects, however determining whether such projects are being undertaken 'for the public' in the true meaning of the phrase is complex.⁸⁰

7.164 Consultees and submissions also expressed concern that Subdivision K provides no means of differentiating between future acts on the basis of the scale or scope of the infrastructure or facilities.⁸¹ For example, First Nations Clean Energy Network submitted that large scale public works, for example transmission lines, do not fit the rationale of Subdivision K, stating that

section 24KA was only ever intended to apply to essential public works and infrastructure that only restrict/interfere with native title rights while the infrastructure was being built. Developments like large scale transmission lines were never intended to fall under s.24KA, as their large footprint means there

⁸⁰ Norman Waterhouse Lawyers, *Submission 102*.

⁸¹ First Nations Clean Energy Network, *Submission 30*; Norman Waterhouse Lawyers, *Submission 102*; First Nations Bailai, Gurang, Gooreng Gooreng, Taribelang Bunda People Aboriginal Corporation RNTBC, *Submission 147*.

are areas where native title rights cannot be exercised while the infrastructure is in place.⁸²

7.165 Where the procedural rights that apply to a particular future act in Subdivision K are the same rights as the holder of a non-exclusive pastoral or non-exclusive agricultural lease, such rights will typically be inferior to those afforded to an ordinary title holder. This is on the basis that Crown leaseholds generally confer a lower level of procedural rights than those afforded to freehold title holders. Where no procedural rights are afforded to the holders of leasehold title, no procedural rights will be afforded to native title parties. Consequently, native title parties' procedural rights under Subdivision K may be greater or lesser, depending on the type of non-native title tenure of the area where the future act is to be done.

7.166 Some future acts covered by Subdivision K could not be done on land subject to ordinary title without the consent of the ordinary title holder or by compulsory acquisition. Although ordinary title holders might be afforded certain rights where their rights are compulsorily acquired, Subdivision K expressly excludes future acts that are the compulsory acquisition of native title rights and interests. This means the procedural rights afforded to ordinary title holders for such acts are not the applicable procedural rights for future acts covered by Subdivision K. Consequently, for some kinds of future acts covered by Subdivision K, there are no applicable procedural rights to afford to native title parties.

7.167 The State of Queensland observed that many

dealings under section 24KA lack procedural rights as the dealing could not be done on ordinary freehold land, with the procedural rights being based upon what would be provided to an ordinary freeholder or leaseholder (if on leasehold land) even though the test for section 24KA is not the freehold test. Whilst the non-extinguishment principle applies, significant infrastructure is able to proceed without notification. This is also in contrast to section 24JA where public works are required to be notified.⁸³

7.168 Similarly, MPS Law observed that future acts covered by Subdivision K

predominantly relate to infrastructure being built on Crown land. Under most Crown Lands legislation there are no procedural rights attaching to such activities. This applies for instance to the construction of infrastructure such as roads and jetties. In these instances, the requirement of s 24KA that the procedural rights would be the same as if the native title holders held ordinary title is meaningless, as the act could not be done on freehold land without the government acquiring it.⁸⁴

82 First Nations Clean Energy Network, *Submission 30*. See also National Native Title Council, *Submission 20*.

83 State of Queensland, *Submission 43*. See also MPS Law, *Submission 17*.

84 MPS Law, *Submission 17*.

Recommended reform

Recommendation 47

Part 2 Division 3 Subdivision K of the *Native Title Act 1993* (Cth), which provides for the construction of facilities that provide services to the general public, be amended to:

- a. provide in ss 24KA(1)(b)(i) and (ii) that one of the criteria for s 24KA to apply to a future act is that the purpose of the facility listed in s 24KA(2) must be ‘an essential service, or to facilitate the delivery of an essential service, to the general public’ in place of the existing requirement that the facility be ‘operated for the general public’;
- b. clarify in s 24KA(1)(c) that, for s 24KA to apply to a future act, the effect of the act on native title rights and interests must be minimal, in addition to the existing requirement that reasonable access by the native title holders to the area in the vicinity of the facility is not prevented;
- c. clarify that a future act that requires or confers a right of exclusive possession on any person in relation to the facility (whether practically or as a term of the grant of an interest) cannot be covered by s 24KA; and
- d. replace ss 24KA(7)–(9), which set out procedural rights where s 24KA applies, with a requirement that: if the future act could be done on ordinary title, the procedural rights that must be afforded to the native title parties are the same rights as the ordinary title holder; or, if the future act could not be done on ordinary title (in which case, there are no procedural rights afforded to ordinary title holders), the opportunity to be consulted applies.

7.169 The reforms to s 24KA(1)(b) in **Recommendation 47(a)** would better align the community’s need for access to essential services while affording to native title holders the right to be consulted about the impact of future acts on their native title rights and interests. Replacing ‘operated for the general public’ with ‘an essential service, or to facilitate the delivery of an essential service, to the general public’ would provide greater clarity and certainty, where ‘essential service’ is a well-established and understood term.

7.170 While reframing the purpose for which facilities must be will help to clarify the scope of Subdivision K, further consideration and refinement of this aspect of s 24KA may be required to ensure the provision is operating as intended. In particular, further consideration of facilities constructed and operated by private entities may be required to ensure Subdivision K is directed to the intended future acts and is not being used for future acts that should properly be validated under other parts of the *NTA*.

7.171 **Recommendation 47(b)** would clarify that future acts that have more than a minimal effect on native title rights and interests cannot be covered by s 24KA. This better reflects the intention of Subdivision K as stated in the Explanatory Memorandum and clarifies that s 24KA does not cover future acts that will entail large scale and high impact works. As noted in the Explanatory Memorandum and also consistent with the exclusion of ports and airports in s 24KA(2)(a), facilities of this kind will require validation under another part of the *NTA* (likely to be either Subdivision M or an ILUA).

7.172 As recognised in **Recommendation 47(b)**, the exclusion of future acts that would significantly impede access by the native title holders is a criterion of s 24KA at present. Although the exclusion of acts requiring exclusive possession was stated as the intended scope of Subdivision K in the Explanatory Memorandum, it was not expressly included as a requirement in s 24KA. **Recommendation 47(c)** would clarify that acts requiring or involving exclusive possession would be subject to other subdivisions. This further assists to clarify the scope of Subdivision K in the same way as the recommended reform in paragraph (b).

7.173 **Recommendation 47(d)** seeks to rectify the situation where native title holders are not afforded any procedural rights by applying a combined freehold test and modified equivalency principle. This would ensure native title parties would be afforded procedural rights for all future acts that are covered by Subdivision K, regardless of the nature of the future act and regardless of the non-native title tenure of the land where the future act is done.

7.174 The recommended procedural rights are as follows:

- if the future act could be done on ordinary title and procedural rights are afforded to the ordinary title holders, the native title parties have the same procedural rights as the ordinary title holders; or
- if the future act could not be done on ordinary title (without compulsory acquisition) and so no procedural rights are afforded to the ordinary title holders, the native title parties would have the opportunity to be consulted.

7.175 Where the procedural rights afforded to ordinary title holders for acts that do not require compulsory acquisition (such as acts undertaken by telecommunications and other utilities), the procedural rights are commonly a right to be consulted. To meet the equivalency principle, the rights afforded to native title parties for future acts covered by Subdivision K for which there are no procedural rights afforded to the ordinary title holders should be the opportunity to be consulted.

7.176 Native title can be (and has been) determined to co-exist with an array of different classes of tenure granted over Crown land (not just pastoral or agricultural leasehold). Yet it is only non-exclusive pastoral leases and non-exclusive agricultural leases (together with ordinary title) that are used to determine the applicable procedural rights, and thereby creating a two-track procedural rights framework. Subdivision K is the only subdivision in the future acts regime that contains a two-track procedural rights framework of this kind.

7.177 For the reasons noted above, the ALRC has not identified any rational principle for this differential approach where native title rights and interests cannot be equated with any other non-native title right or interest (including where the native title rights and interests are held on a non-exclusive basis). **Recommendation 47** would remove this distinction, and ensure a consistent level of procedural rights for all Subdivision K future acts, which also meets the equivalency principle (where the applicable standard is the rights of the ordinary title holder).

7.178 In addition to the recommended reforms directed at clarifying the scope of Subdivision K, further consideration may be required as to whether more robust procedural rights are appropriate for some kinds of future acts. For example, it may be reasonable and appropriate for large scale future acts that otherwise satisfy the applicable criteria to be subject to the right to negotiate.

Subdivision L — Low impact future acts

7.179 The Explanatory Memorandum to the *NTAA 1998* states that Subdivision L

allows a range of acts to happen without cumbersome procedures where the act has little effect on any native title, and before there is an approved determination that any native title exists. The non-extinguishment principle applies to low impact future acts.⁸⁵

7.180 Subdivision L largely replicates s 234 of the *NTA* as originally enacted, with some exclusions. The Explanatory Memorandum to the *NTA* as originally enacted provides little further guidance on the original rationale for Subdivision L. It notes that the kinds of acts it is intended to apply to may include ‘a licence or permit to hold a cultural or sporting event, a beekeeping licence or a camping permit’.⁸⁶

7.181 There are no procedural rights, and no statutory compensation is payable, for future acts covered by Subdivision L.

The need for reform

7.182 Subdivision L permits certain future acts to be done on land where native title has not yet been determined and where such acts could not also be done if the native title rights were instead ordinary title rights. In other words, Subdivision L is another exception to the freehold test and therefore a departure from the equivalency principle. The ALRC has not identified the rationale for future acts covered by Subdivision L not being able to extend past a determination that native title exists being made. Where the future acts regime otherwise confers the same rights on registered native title claimants as determined native title holders, this differential approach in Subdivision is unusual.

7.183 The ALRC has heard that Subdivision L is relied upon by governments for the dedication of reservations, such as reserves for environmental, beach

85 Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) [14.1].

86 Explanatory Memorandum Part B, Native Title Bill 1993 (Cth) 89.

protection, coastal management, and natural resource management purposes.⁸⁷ Any reservations dedicated by relying on Subdivision L must be removed prior to a determination that native title exists. The dedication of such reservations will be future acts where they impose limitations or restrictions on how the lands and waters can be used (and thereby 'affect' native title). The application of the non-extinguishment principle means native title is suspended to the extent of inconsistency with the reservation.

7.184 The Western Australian Government submitted that it can be challenging for the grant of some future acts in post-determination areas where Subdivision L only covers future acts that do not continue after a determination that native title exists is made.⁸⁸ In such circumstances, the only option for enabling a future act to be done validly is by registered ILUA. Consequently,

proponents are drawn into substantive negotiations with PBCs at a very early stage (often before the project scope or benefits can be clearly articulated) leading to delays, increased costs and misaligned expectations, frustrating efforts to secure free, prior and informed consent.⁸⁹

7.185 The Western Australian Government in its submission gives the examples of feasibility studies, geological surveys, and other scoping activities as future acts covered by Subdivision L prior to a determination.⁹⁰ These activities are normally permitted under a non-exclusive statutory licence 'akin to a *profit à prendre*'.⁹¹ If the same interests were being granted over ordinary title, the consent of the title holder would be required (or the required interest would need to be compulsorily acquired).

7.186 The Western Australian Government made various suggestions for improving the operation of Subdivision L, including extending its coverage to future acts in areas where a determination that native title exists has been made. This reform was also proposed by the Attorney-General's Department in its 2017 Options Paper on NTA reform.⁹² The proposal about Subdivision L in that report was not supported by the Expert Indigenous Working Group.⁹³ The reform was supported by some

87 See Department of Natural Resources, Mines and Energy (Qld), Queensland Government Native Title Work Procedures: Module L: Low Impact Future Acts (2020).

88 Western Australian Government, *Submission 115*.

89 Ibid.

90 Ibid.

91 Ibid.

92 Attorney-General's Department (Cth), *Reforms to the Native Title Act 1993 (Cth)* (Options Paper, 2017) proposal B4.

93 Senior Officers Working Group, *Investigation into Indigenous Land Administration and Use: Report to the Council of Australian Governments* (2015) 17.

stakeholders who made submissions to the Options Paper and subsequent exposure drafts,⁹⁴ and opposed by others.⁹⁵

Recommended reform

Recommendation 48

Part 2 Division 3 Subdivision L of the *Native Title Act 1993* (Cth), which provides for low impact future acts, be amended to:

- a. amend s 24LA(1)(b) to exclude Subdivision L from applying to acts that are the making, amendment, or repeal of legislation and the making or conferring of a reservation, proclamation, dedication, condition, permission, or authority;
- b. insert a new paragraph that provides that, where a future act that is covered by Subdivision L is in relation to land or waters where an approved determination that native title exists in relation to the land or waters has not been made, before the act is done, the procedural rights are that the person proposing to do the act must notify and provide an opportunity to comment to:
 - i. if there is a registered native title claim over the land or waters where the act will be done, the registered native title claimants; or
 - ii. if there is no registered native title claim over the land or waters where the future act will be done, the native title representative body for the area;
- c. amend s 24LA(1)(a), which provides that a future act covered by Subdivision L must take place before and cannot continue after an approved determination of native title that native title exists is made in relation to the land and waters, to be subject to there being a low impact agreement in place with the Prescribed Body Corporate for the act;

94 Bee Industry Council of Western Australia, Submission to Attorney-General's Department (Cth), *Reforms to the Native Title Act 1993 (Cth) (Options Paper, 2017)* (28 February 2018); Western Australian Government, Submission to Attorney-General's Department (Cth), *Exposure Drafts of the Native Title Legislation Amendment Bill 2018 and the Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018* (December 2018).

95 Angus Frith, Submission to Attorney-General's Department (Cth), *Reforms to the Native Title Act 1993 (Cth) (Options Paper, 2017)* (1 March 2018); Cape York Land Council Aboriginal Corporation, Submission to Attorney-General's Department (Cth), *Reforms to the Native Title Act 1993 (Cth) (Options Paper, 2017)* (2 March 2018); Goldfields Land and Sea Council Aboriginal Corporation (Representative Body), Submission to Attorney-General's Department (Cth), *Reforms to the Native Title Act 1993 (Cth) (Options Paper, 2017)* (28 February 2018).

- d. insert a new paragraph into s 24LA that provides that, where a future act that is covered by Subdivision L is in relation to land or waters where an approved determination that native title exists has been made, before the act is done, the person proposing to do the act must enter into a low impact agreement with the Prescribed Body Corporate; and
- e. insert a new definition for 'low impact agreement' into s 24LA as 'an agreement that a Prescribed Body Corporate can enter into with a proponent or government party in which the Prescribed Body Corporate consents to a future act that is covered by Subdivision L, provided that the Prescribed Body Corporate is satisfied the act is one that is covered by Subdivision L, and the Prescribed Body Corporate has and complies with standing instructions from the common law holders to enter such agreements'; and
- f. provide that the native title holders are entitled to statutory compensation for acts covered by Subdivision L in accordance with Part 2 Division 5.

7.187 **Recommendation 48(a)** would expressly exclude the making, amendment, or repeal of legislation from Subdivision L. Legislative acts are generally not temporary and should properly be subject to the freehold test in Subdivision M. Where acts that continue past a determination that native title exists are already excluded from Subdivision L, it may be implicit in the existing provision that legislative acts cannot be covered by Subdivision L (where legislation typically applies across entire jurisdictions and cannot distinguish between areas where native title has been determined and where it has not been determined). However, for clarity and certainty, this should be made express and added to the list of other excluding criteria in s 24LA(1)(b).

7.188 Similar to legislative acts, the dedication of reservations, as typically long-term interests, should not be able to be validated under Subdivision L where they cannot continue past a determination that native title exists. While reservations are typically limited in the area they cover, they can have impacts on native title rights and interests that go beyond the types of 'low impacts' contemplated by Subdivision L.

7.189 The rationale for the recommended reform in paragraph (b) is to afford a basic level of procedural rights to the registered native title claimants for future acts covered by Subdivision L. Notice and opportunity to comment would enable registered native title claimants or the Native Title Representative Body or Service Provider to evaluate whether future acts notified under Subdivision L are properly categorised. Notices can also be retained as a record to check that any future acts notified under Subdivision L will not continue past a determination (or to otherwise seek to negotiate a 'low impact agreement', discussed below).

7.190 The rationale for the recommended reforms in paragraphs (c), (d), and (e) is to provide a new pathway for acts covered by Subdivision L to be done over land

and waters where a determination that native title exists has been made. The ALRC heard from various government stakeholders that the inability to apply Subdivision L in post-determination areas can raise significant challenges for future acts that are not covered by any other subdivision and the only available option is to negotiate an ILUA.⁹⁶

7.191 The ALRC recognises the potential challenges and difficulties in requiring an ILUA for future acts in these circumstances. For this reason, the ALRC recommends s 24LA be amended to enable a proponent or government party to negotiate a 'low impact agreement' with the PBC to enable future acts covered by Subdivision L to be done validly post-determination. The low impact agreement would not be subject to the same registration or authorisation requirements as an ILUA. However, other requirements would apply to act as safeguards of the native title holders' right to make decisions concerning acts that affect their rights and interests. This includes that the PBC must have, and comply with, standing instructions from the common law holders to enter into such agreements. The PBC must also be satisfied that the future act is covered by Subdivision L to prevent such agreements being used for purposes beyond their intended scope.

7.192 Consideration will need to be given as to how low impact agreements can best be designed to enable low impact acts done prior to a determination to transition past the date a positive determination is made. This issue arises where a corporation will not formally become a PBC until after a positive determination has been made and appointed by order of the Federal Court. A corporation that is constituted for the purpose of being appointed PBC would therefore be prevented from entering a low impact agreement prior to a determination.

7.193 An act that is a future act necessarily encroaches on native title rights and interests. Where an act affects native title and is a future act, statutory compensation is invariably payable to the native title holders for the doing of the act. The unavailability of compensation under Subdivision L represents a departure from the equivalency principle that has no reasonable basis — if the same act was to be undertaken on land subject to ordinary title, compensation would be payable to the ordinary title holder. Statutory compensation should be payable for acts covered by Subdivision L.

7.194 Finally, some consultees and submissions highlighted that the basis for assessing a future act as 'low impact' is unclear.⁹⁷ This is because the criteria for a future act to be covered by Subdivision L specifies the characteristics the act *cannot* have, rather than the characteristics that it must have. The ALRC considers further consideration of appropriate reforms to Subdivision L would be warranted to ensure its scope is sufficiently clear and certain.

96 See, eg, State of Queensland, *Submission 43*; Western Australian Government, *Submission 115*; Northern Territory Government, *Submission 149*. See also New South Wales Government, *Submission 159*.

97 Queensland South Native Title Services, *Submission 45*. See also First Nations Bailai, Gurang, Gooreng Gooreng, Taribelang Bunda People Aboriginal Corporation RNTBC, *Submission 147*.

Subdivision M — Acts passing the freehold test

7.195 Subdivision M contains the ‘freehold test’. It applies generally to future acts in an ‘onshore place’⁹⁸ that could be done if the native title rights and interests in relation to the land and waters where the future act will be done were instead ordinary title. In other words, future acts will be covered by Subdivision M if they could also be done over land subject to freehold title. Subdivision M applies to legislative and non-legislative future acts.

7.196 Due to the hierarchy of the subdivisions in Part 2 Div 3 (by operation of s 24AB(2)), Subdivision M acts in many respects as a ‘catch-all’, so that any future act that is not covered by an earlier provision in the future acts regime may still be covered by Subdivision M (provided the act passes the freehold test). The only option for validation of a future act in an onshore place that does not fall under Subdivision M (and where no earlier provision applies) is an ILUA.

7.197 The Explanatory Memorandum to the *NTAA 1998* stated that Subdivision M

means that legislation will be valid to the extent it relates to an onshore place if it affects native title areas in the same way as, or no less beneficially than, it affects freehold areas. It also means that a non-legislative act can be done validly over native title areas if that act could be done validly over freehold areas or if it is the creation or variation of a right to mine for opals or gems.⁹⁹

7.198 Acts that are the creation of a right to mine are generally covered by Subdivision M and are then subject to the procedural rights in either Subdivision M or Subdivision P (depending on the nature and purpose for which the interest is granted).¹⁰⁰ One of the other main classes of future act covered by Subdivision M is compulsory acquisition.

7.199 The *NTAA 1998* introduced s 24MD(6B) of the *NTA*. Section 24MD(6B) identifies procedural rights for certain future acts that are covered by Subdivision M, namely:

- the compulsory acquisition of native title rights and interests for the purpose of conferring rights or interests in relation to land or waters on persons other than the acquiring government; and
- the creation or variation of a right to mine for the sole purpose of the construction of an infrastructure facility associated with mining.

7.200 The procedural rights for these two classes of future act are exempt from the right to negotiate in Subdivision P (compulsory acquisition for the purpose of conferring rights in the acquiring government is also exempt from Subdivision P).

98 See Subdivision N below for an explanation of the meaning of this term.

99 Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) [15.1].

100 However, the expedited procedure, discussed further below, can disapply the procedural rights afforded to native title parties under both Subdivision M and Subdivision P by operation of s 24MD(6)(a) of the *NTA*.

7.201 Other than future acts subject to Subdivision P, the procedural rights for future acts covered by Subdivision M are contained in s 24MD(6A). Future acts to which s 24MD(6B) applies must comply with both ss 24MD(6A) and 24MD(6B).¹⁰¹ Section 24MD(6A) provides that the native title parties have the same procedural rights as they would have in relation to the act on the assumption that they instead held ordinary title to the land or the land surrounding or adjoining the waters.

7.202 Section 24MD(6B) contains additional procedural rights only for the specific classes of future act noted above. Section 24MD(6B) provides native title parties a right to object to the future act and to be consulted about ways of minimising the impact of the act on native title rights and interests. The Supplementary Explanatory Memorandum to the *NTAA 1998* states the rationale for enactment of s 24MD(6B) as follows:

The Government believes that it is not appropriate to subject future acts of this kind to the right to negotiate. They include the provision of infrastructure, such as roads, gas pipelines and the like. Such infrastructure is increasingly being provided by non-Government entities, especially in remote and regional Australia. It is appropriate however that in relation to acts of this kind, which may have the result of extinguishing native title altogether, native title holders be given procedural rights essentially the same as others but which ensure that the special nature of their rights can be taken into account.¹⁰²

7.203 The non-extinguishment principle applies to acts that are covered by Subdivision M, unless it is the compulsory acquisition under a non-discriminatory law of native title rights and interests, and any non-native title rights and interests are also acquired. In other words, the acquisition power must be exercised in a way that does not treat native title rights and interests any less favourably or in a more discriminatory way than non-native title rights and interests.

7.204 Native title holders are entitled to statutory compensation for future acts covered by Subdivision M in the same way as holders of ordinary title. For compulsory acquisition, if the law under which the compulsory acquisition is undertaken does not provide for just terms compensation, statutory compensation is payable to the native title holders under Part 2 Div 5 of the *NTA*.¹⁰³ For compensation payable under an agreement that is entered into in response to a notice under s 29 of the *NTA* for compulsory acquisition, the only compensation payable for the act is the compensation payable under the agreement.¹⁰⁴ The terms of this provision are consistent with the compensation provisions that apply to ILUAs in ss 24EB and 24EBA.

101 *Native Title Act 1993* (Cth) s 24MD(6); *Harvey v Minister for Primary Industry and Resources* (2024) 278 CLR 116.

102 Supplementary Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) [No 2] 19.

103 *Native Title Act 1993* (Cth) s 24MD(2)(e).

104 *Ibid* s 24MD(2A)(e). However, if a native title holder is not entitled to any benefit provided under the agreement, then that native title holder may be entitled to compensation under Part 2 Div 5: *ibid* s 24MD(2A)(f).

The need for reform

7.205 For future acts that are the creation or variation of a right to mine for the sole purpose of an infrastructure facility associated with mining, the ALRC has heard that such future acts can result in impacts on native title rights and interests that are as significant as mining tenements themselves.

7.206 The ALRC does not consider the procedural rights in s 24MD(6B) to be adequately aligned with the effects of the relevant classes of future acts on native title rights and interests. The ALRC has heard during consultations about the construction of infrastructure facilities associated with mining that have significantly impacted native title rights and interests.

7.207 The explanation in the Explanatory Memorandum that the right to negotiate was ‘not appropriate’ for future acts of the kind now subject to s 24MD(6B) does not provide a sufficient justification for this exemption where it is a departure from the equivalency principle.¹⁰⁵ Laws that regulate mining, including the grant of exploration and mining tenements, do not typically distinguish between the procedural rights afforded to ordinary title holders for the grant of tenements for production and the grant of tenements for infrastructure purposes associated with mining.

7.208 For example, s 29 of the *Mining Act 1978* (WA) provides that a mining tenement cannot be granted over ‘private land’ between the surface and 30 metres below the surface without the written consent of the landowner. The definition of ‘mining tenement’ includes a miscellaneous purpose licence, which is intended specifically for infrastructure associated with mining, as prescribed (for example, roads, pipelines, power lines, water management facility, power generation, or transmission facility).¹⁰⁶ While the right to negotiate does not confer an equivalent right to veto on native title parties, the *Mining Act 1978* (WA) confers the same procedural rights on the owners of private land irrespective of whether the tenement is for mineral production or for infrastructure purposes. Put differently, there are not two separate processes and two sets of procedural rights.

7.209 It is for this reason that the current procedural rights under s 24MD(6B) for future acts that relate to infrastructure facilities associated with mining are inconsistent with the equivalency principle.

7.210 Other issues also arise in the operation of s 24MD(6B). The ‘independent person’ who is required to hear objections of the native title parties under the s 24MD(6B) procedure must be nominated by each state and territory. The Central Land Council submitted that the

rights provided under s 24MD(6A) and (6B) of the Native Title Act create a significant increase in complexity with no real gain for miners or native title

105 Supplementary Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) [No 2] 19.

106 *Mining Regulations 1981* (WA) reg 42B.

holders. It is inefficient to duplicate the NNTT's role by involving State/Territory tribunals in decision-making on these issues ...¹⁰⁷

7.211 It has been held by the Western Australian 'independent person' that s 24MD(6B) does not require that the obligation to undertake consultation in s 24MD(6B)(e) is a prerequisite to referral of the objection to the independent person or for the independent person to rule on the objection.¹⁰⁸ This finding renders the consultation requirement largely worthless. Yamatji Marlpa Aboriginal Corporation submitted that 'adequate consultation' should be a precondition to referral of an objection to the independent person.¹⁰⁹ The ALRC has also heard there is a lack of clarity in the applicable timeframes under s 24MD(6B). In particular, the timeframe for referral to an independent person of an objection under this provision and whether the referral can be made prior to expiry of the 8-month period.¹¹⁰

7.212 In relation to the payment of compensation, statutory limitations on compensation like those in s 24MD(2A) represent a departure from the equivalency principle. The ALRC does not consider such limitations are reasonable or necessary for the same reasons set out in **Chapter 4** in relation to ss 24EB and 24EBA of the NTA.

7.213 Where s 24MD(6A) applies to a future act, the procedural rights afforded to the native title parties are the same procedural rights that are afforded to the ordinary title holders. The ALRC has heard there are some kinds of future acts that are covered by Subdivision M that do not give rise to any (or any meaningful) procedural rights prior to the grant of the interest that constitutes the future act. It is only once the interest has been granted when the interest holder seeks to commence activities in the area of the interest that the substantive procedural rights for ordinary title holders arise.¹¹¹

7.214 By the time an interest has been granted, however, the future act has been done and procedural obligations to native title parties in complying with the NTA have been fully discharged. There is therefore no obligation to afford to native title parties the same post-grant procedural rights that are afforded to ordinary title holders. The right or interest can therefore be granted without the full suite of procedural rights that are afforded to ordinary title holders being afforded to native title parties.

7.215 Although this has been raised with the ALRC as a problem that arises in practice, our consideration of this issue has been limited. However, where legislation *does* incorporate processes of this kind that work in this way, it may be contrary to the intended objective of Subdivision M to afford to native title parties procedural rights that are the same as those afforded to ordinary title holders. This issue appears

107 Central Land Council, *Submission 31*.

108 *Young v Kariyarra Aboriginal Corporation* (Independent Person (WA), Steven Heath, 18 February 2025) [6].

109 Yamatji Marlpa Aboriginal Corporation, *Submission 148*.

110 State of Queensland, *Submission 43*.

111 Yamatji Marlpa Aboriginal Corporation, *Submission 148*.

to arise due to the way in which procedural rights afforded to ordinary title holders under some laws are structured in relevant legislation. That is, such procedures are not imposed as a precondition to the doing of an act.

Recommended reform

Recommendation 49

Part 2 Division 3 Subdivision M of the *Native Title Act 1993* (Cth), which provides for the freehold test, and associated provisions in Part 2 Division 3 Subdivision P, be amended to:

- a. provide in s 24MD(2A) that statutory compensation payable under an agreement for the surrender of native title by compulsory acquisition is full and final only if this is provided for in the agreement;
- b. provide in s 24MD(6A) that the procedural rights of the native title parties in relation to the future act, which are the same procedural rights as they would have on the assumption that they instead held ordinary title to any land concerned and to land adjoining or surrounding any waters concerned, include the same procedural rights that are afforded to ordinary title holders following the grant of an interest that is a future act to which Subdivision M applies;
- c. repeal s 24MD(6B), which contains procedural rights for compulsory acquisitions for the purpose of conferring rights on persons other than the government party undertaking the acquisition and the creation or variation of a right to mine for the sole purpose of the construction of an infrastructure facility associated with mining;
- d. repeal s 26(2)(f) entirely, which provides that compulsory acquisition of native title rights and interests that relates solely to land or waters wholly within a town or city is not subject to Part 2 Division 3 Subdivision P of the Act; and
- e. repeal s 26(1)(c)(iii)(B), which provides that compulsory acquisition for an infrastructure facility is not subject to Part 2 Division 3 Subdivision P of the Act.

7.216 **Recommendation 49(a)** would ensure that compensation negotiated by agreement should be full and final only if this is expressly provided for in the agreement. This reform is consistent with, and supported by the same reasons as, the recommended reform to ss 24EB and 24EBA of the *NTA* contemplated by **Recommendation 15** in **Chapter 4**.

7.217 **Recommendation 49(b)** seeks to address a potential gap in the application of s 24MD(6A) of the *NTA*. Where the intended application of s 24MD(6A) is being

circumvented, such that the native title parties are not being afforded all of the procedural rights afforded to the holders of ordinary title (including the rights afforded to ordinary title holders after a grant has been made), the ALRC recommends amendment to s 24MD(6A) to address the loophole. Allowing such a loophole to continue undermines the objective of Subdivision M to afford at least formal equality to native title parties.

7.218 The ALRC acknowledges there may be some practical complexities in the procedural requirements for validation of a future act extending to after the future act is done (for example, after an interest is granted). Further consideration would need to be given to the issue if **Recommendation 49(b)** is implemented.

7.219 **Recommendation 49(c)** would repeal the special procedure for the two classes of future acts in s 24MD(6B).¹¹² The ALRC has not identified any rational or reasonable basis for infrastructure facilities associated with mining or compulsory acquisition for the benefit of third parties being exempted from the right to negotiate, where the right to negotiate must already be undertaken for the grant of a mining production tenement.

7.220 As noted elsewhere in this chapter, the right to negotiate is the procedural right that seeks to afford substantive equality to native title parties (as it is designed specifically with reference to the content of native title) for the grant of mining interests. It is this right that is the appropriate and proper procedural right that should be afforded to native title parties for the creation of rights to mine for infrastructure facilities associated with mining.

7.221 The ALRC does not recommend reform to the procedural rights for compulsory acquisitions for a governmental purpose on the basis that such rights are already consistent with the equivalency principle. For the compulsory acquisition of native title rights and interests for a non-governmental purpose, however, the ALRC considers such future acts should properly be subject to the right to negotiate.¹¹³

7.222 The ALRC considers there to be a case for all compulsory acquisitions to be subject to the right to negotiate, given it is the most significant impact a future act can have on native title rights and interests and where native title cannot be replaced or revived once extinguished. If the right to negotiate applied in these circumstances, the acquiring government would need to negotiate in good faith with the native title parties to seek their consent to the acquisition or otherwise try to find an alternative to extinguishing native title (such as a non-extinguishing ILUA).

7.223 However, the ALRC understands that compulsory acquisition is in practice utilised predominantly as a last resort. In addition, governments must be free to acquire rights in land and waters that are genuinely needed for public purposes (in

112 This recommendation would also require a consequential amendment to s 26(1)(c) of the *NTA* so that the two classes of acts currently subject to s 24MD(6B) are not exempt from the right to negotiate in Subdivision P.

113 For further discussion, see **Chapter 6**.

the same way as freehold title and other non-native title rights and interests can be compulsorily acquired for such purposes). This is consistent with the equivalency principle. Where the compulsory acquisition is for the purpose of conferring rights in third parties (or for non-governmental purposes), a more robust process is required.

7.224 The *NTA* provides various mechanisms for future acts to be done validly without having to extinguish native title. Where a non-government proponent is seeking the grant of rights or interests from a government where native title exists and there are no available pathways in the future acts regime, a proponent is able to seek to negotiate an ILUA. It is through these means that the proponent can engage directly with the native title parties and seek their free, prior, and informed consent to the future act, which can include consents to the grant of long-term and secure, non-extinguishing, interests.

7.225 Where a government or proponent is not able to negotiate an ILUA for the surrender and extinguishment of native title, the ALRC considers the right to negotiate to be the appropriate fallback option for compulsory acquisition for the purpose of conferring rights in third parties — as opposed the right to object under s 24MD(6B). This places third party proponents for these purposes in the same position as other classes of proponent who seek an interest over or to deal with native title land, such as miners.

7.226 There are several other problems with the existing procedure in s 24MD(6B) that have been identified that would need to be addressed if it were retained. For example, the independent person nominated by states and territories should be replaced with the NNTT, as the repository of native title expertise. Local courts of states and territories do not hold any meaningful knowledge or expertise in native title and so are not best placed to make decisions on these matters.

7.227 **Recommendations 49(d)–(e)** would remove the exceptions for specific classes of compulsory acquisition from Subdivision P. These are compulsory acquisitions where the purpose of the acquisition is to provide an infrastructure facility, and compulsory acquisitions wholly within a town or city. Where a compulsory acquisition is undertaken to confer rights in a third party, there is no rational basis on which to further limit the application of the right to negotiate to compulsory acquisitions outside of towns or cities, or for purposes excluding infrastructure facilities.

Subdivision N — Acts affecting offshore places

7.228 Subdivision N applies to future acts in ‘offshore places’. ‘Offshore place’ is defined in s 253 as any land or waters to which the *NTA* extends other than land or waters in an onshore place. ‘Onshore place’ is defined as land or waters within the limits of a state or territory to which the *NTA* extends. The effect of these two definitions is that an ‘offshore place’ means land or waters below the low water mark that are outside of the territorial boundaries of states and territories.¹¹⁴

114 For example, intertidal zones and embayments are ‘onshore places’ for the purpose of the *NTA*.

7.229 The enactment of Subdivision N was essentially a reformulation of ss 23 and 235(8) of the *NTA* as originally enacted. The Explanatory Memorandum to the *NTA* as originally enacted stated, in relation to ss 23 and 235(8), that the provisions 'will ensure the validity of legislative regimes governing economic activities offshore' and that 'different circumstances' applying offshore justified different procedural rights.¹¹⁵ It also clarified that the 'different circumstances' included that there can be no exclusive possession native title offshore.¹¹⁶

7.230 The Explanatory Memorandum to the *NTAA 1998* stated that Subdivision N reflected the policy of the existing provisions and otherwise provided no further explanation of the basis for establishing a separate procedure for offshore places.¹¹⁷

7.231 The procedural rights that apply to future acts covered by Subdivision N are the same procedural rights the native title parties would have on the assumption that they instead held any corresponding rights and interests in relation to the offshore place that are not native title rights and interests. The example given in the Explanatory Memorandum is where a government proposes to permit mining and restrict fishing in an offshore area. The native title holders with native title fishing rights for the area have the same rights as the holders of fishing licences, which may include to be notified of the proposed act.

7.232 Future acts covered by Subdivision N are subject to the non-extinguishment principle, unless the future act is compulsory acquisition, in which case, native title is extinguished. However, compulsory acquisition of native title rights and interests is only permitted where the equivalent non-native title rights and interests are also acquired, and the practices and procedures adopted in acquiring the native title are not such as to cause the native title holders any greater disadvantage than is caused to the holders of non-native title rights and interests. In other words, native title rights and interests cannot be treated in a discriminatory manner as compared with the equivalent non-native title rights and interests.

7.233 Statutory compensation is payable for future acts covered by Subdivision N.

The need for reform

7.234 Bartlett has observed that the application of the procedural rights in Subdivision N

is uncertain because there are no 'corresponding rights and interests'. Offshore common law native title rights and interests are unique and not necessarily subject to the degree of reservation, restriction and limited duration attaching to other offshore rights and interests.¹¹⁸

115 Explanatory Memorandum Part A, Native Title Bill 1993 (Cth) 7. See further discussion in [Chapter 8](#).

116 *Ibid.*

117 Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) [16.1].

118 Bartlett (n 5) 600.

7.235 This observation is consistent with the High Court's findings in *Commonwealth v Yunupingu* that native title rights and interests should not be considered to 'correspond to any right or interest known to the common law or equity to be capable of being created by grant'.¹¹⁹

7.236 Many consultees and submissions highlighted the disconnect within Subdivision N between the limited procedural rights to native title holders over offshore areas and the potential impacts on native title rights and interests offshore.¹²⁰ They observed that there appear to be no principled reasons for the distinction between onshore places and offshore places.¹²¹ According to Yamatji Marlpa Aboriginal Corporation, for example, 'inter-tidal zones and offshore determined areas ... are just as significant to native title holders as onshore areas'.¹²²

7.237 A number of submissions supported repealing Subdivision N.¹²³ This is not the first time this suggestion has been raised: a number of submissions to previous inquiries into the *NTA* have recommended the repeal of Subdivision N or otherwise for the right to negotiate to be extended to future acts in offshore places.¹²⁴

119 *Commonwealth v Yunupingu on behalf of the Gumatj Clan or Estate Group* (2025) 421 ALR 604 [58].

120 See, eg, First Nations Clean Energy Network, *Submission 30*; First Nations Legal and Research Services, *Submission 42*; Gur A Baradharaw Kod Torres Strait Sea and Land Council Torres Strait Islander and Aboriginal Corporation, *Submission 125*; Dambimangari Aboriginal Corporation, *Submission 142*; Yamatji Marlpa Aboriginal Corporation, *Submission 148*.

121 See, eg, First Nations Clean Energy Network, *Submission 30*.

122 Yamatji Marlpa Aboriginal Corporation, *Submission 148*. For further discussion, see [Chapter 8](#).

123 See, eg, First Nations Clean Energy Network, *Submission 30*; Gur A Baradharaw Kod Torres Strait Sea and Land Council Torres Strait Islander and Aboriginal Corporation, *Submission 125*.

124 See, eg, Cape York Land Council Aboriginal Corporation, Submission to Attorney-General's Department (Cth), *Exposure Drafts of the Native Title Legislation Amendment Bill 2018 and the Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018* (10 December 2018); Australian Human Rights Commission, Submission to Attorney-General's Department (Cth), *Reforms to the Native Title Act 1993 (Cth) (Options Paper, 2017)* (28 February 2018). The reform was also proposed by the Australian Greens in 2012 in Native Title Amendment (Reform) Bill (No. 1) 2012 (Cth).

Recommended reform

Recommendation 50

Part 2 Division 3 Subdivision N of the *Native Title Act 1993* (Cth), which provides for future acts in offshore places, be amended to:

- a. amend s 24NA to be subject to the right to negotiate in Part 2 Division 3 Subdivision P of the Act;
- b. amend s 24NA to provide that, if a future act would be covered by Subdivision K or Subdivision M on the assumption the future act was to be done in an onshore place, the same future act done in an offshore place can be covered by s 24NA and, subject to Part 2 Division 3 Subdivision P, the procedural rights in ss 24NA(8)–(10) apply;
- c. amend s 24NA to provide that, if a future act would not be covered by Subdivision K or Subdivision M on the assumption the future act was to be done in an onshore place, the same future act done in an offshore place cannot be covered by s 24NA; and
- d. repeal and replace ss 24NA(8)–(10) to require that, subject to Part 2 Division 3 Subdivision P, the procedural rights for future acts that are covered by Subdivision N is to provide the native title holders and registered native title claimants with an opportunity to be consulted.

7.238 **Recommendation 50** would address, at least in part, the false equivalency of offshore native title rights and interests with equivalent non-native title rights and interests observed by Bartlett, for the purpose of informing the applicable procedural rights.

7.239 The reforms in paragraphs (a) and (d) of **Recommendation 50** enable the extension of the right to negotiate in Subdivision P to offshore places, particularly in relation to the creation or variation of a right to mine.¹²⁵ The recommended reform in paragraph (a) is accompanied by the recommended reform in **Chapter 8** to repeal s 26(3) (which limits the right to negotiate to the landward side of the mean high-water mark of the sea). The rationale for extending the right to negotiate to offshore places is discussed in further detail in **Chapter 8**.

7.240 Where Subdivision P does not apply to a future act covered by Subdivision N, **Recommendation 50** provides that the applicable procedural right would be the opportunity to be consulted. Extending the opportunity to be consulted to offshore places is a critical reform where the ALRC has heard that offshore native title rights and interests can be indistinguishable from onshore native title rights and interests,

¹²⁵ Implementing **Recommendation 50** would require consequential amendments to provisions in Subdivision P, including s 26(1) of the *NTA*.

and where the existing procedures in Subdivision N may not afford any rights to native title holders at all if no equivalent non-native title rights and interests exist or are identified (in the same way as Subdivision K).

7.241 **Recommendations 50(b)–(c)** would ensure that, where a future act could not be done validly in any onshore place under the statutory procedures, then the same future act could not be validly done under Subdivision N. Subdivisions K and M are the main two subdivisions in the future acts regime that are limited to onshore places. The reference to Subdivisions K and M is to ensure that the native title parties are treated no more disadvantageously in relation to offshore places than they would be in onshore places for the same classes of future acts.

7.242 What this would mean is that if a future act would be covered by Subdivisions K or M in an onshore place, then under the reformed Subdivision N, the same future act in an offshore place would be covered by Subdivision N. The applicable procedural rights would be right to negotiate (where Subdivision P applies) or opportunity to be consulted (for all other future acts covered by Subdivision N). The reform would also mean that if an ILUA is required for a future act in an onshore place, an ILUA would also be required for the same future act in an offshore place.

7.243 The ALRC has not identified any basis for requiring an ILUA for some kinds of future acts in onshore places, but not requiring an ILUA in offshore places for the same or a similar future act. This is a critical reform to afford native title rights and interests in offshore places to reflect the special attachment of native title parties to all of their Country, including Sea Country.

Reforms to Subdivision P — Right to negotiate

7.244 This part discusses reforms to two aspects of Part 2 Div 3 Subdivision P of the *NTA*, which concerns the right to negotiate. The recommendations in this part are alternatives only to those discussed in **Chapter 6**. The recommendations discussed here are complementary, and may be implemented alongside, the broader reforms to the right to negotiate discussed in **Chapters 9** and **10**.

Section 26D

7.245 Section 26D provides for the circumstances in which the renewal, re-making, re-grant, or extension of a right to mine will be exempt from the right to negotiate in Subdivision P. The criteria that must be met for the exemption in s 26D to apply are as follows:

- the earlier right (the original grant) was created on or before 23 December 1996 by an act that is valid or the earlier right was created by an act to which Subdivision P applied that was not invalid to any extent under s 28;
- the area to which the earlier right relates is not extended;
- the term of the new right is not longer than the term of the earlier right; and

- no rights are created in connection with the new right that were not created in connection with the earlier right.

7.246 Section 28 provides that an act to which Subdivision P applies will be invalid to the extent it affects native title unless before the act is done the requirements of one of the paragraphs in s 28 have been satisfied, as follows:

- there is no native title party for the area four months after notification of the act or immediately before the act is done;
- the expedited procedure applies to the act and no objection is lodged, all objections to the expedited procedure are withdrawn or a determination that the expedited procedure applies is made;
- a section 31 agreement is made;
- a determination by the NNTT that the act can be done is made; or
- a determination that the act must not be done is declared to be overruled in accordance with s 42.

7.247 The Explanatory Memorandum to the *NTAA 1998* noted the following in relation to the exemption of a renewal of a right to mine from the right to negotiate:

The grant of a right to mine that is valid or has gone through the right to negotiate process will not have to go through the process again when the right is renewed, re-granted or re-made or when its term is extended.¹²⁶

7.248 The Explanatory Memorandum further explained the application of s 28:

Proposed section 28 ... says when an act covered by the right to negotiate provisions will be invalid because the necessary procedures have not been followed.

An example would be a mining lease granted after 23 December 1996 that was valid under Subdivision M because it met the freehold test and for which the right to negotiate procedures in Subdivision P were completed. The lease could be renewed, or its term extended, without the right to negotiate procedures having to be met again.¹²⁷

The need for reform

7.249 As was the case for Subdivision I, the enactment of s 26D in 1998 represented a substantial expansion of the rights of mining interest holders to renew their interests at the expense of the right of native title parties to be afforded fair and reasonable procedural rights. The *NTA*, as enacted, had required the extension of a right to mine to undergo the right to negotiate, except where this was by way of a renewal under an option or right created by the lease, contract or other thing whose grant or making created the right to mine.¹²⁸ The other exception to the right to negotiate for the renewal of an interest in the *NTA* as enacted was where the original grant was made

126 Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) Table 19.1.

127 Ibid Table 19.6.

128 *Native Title Act 1993* (Cth) s 26(2)(c), as enacted.

prior to 1 January 1994 and the renewal was in exercise of a legally enforceable right.¹²⁹

7.250 In other words, the *NTA*, as enacted, exempted renewals from the right to negotiate only where the original grant conferred a right to renewal. The *NTA* did not confer a right to renew a mining interest without affording procedural rights to native title parties where the original grant itself did not confer a right to renew, including grants originally made prior to 1 January 1994 (unless this was pursuant to a legally enforceable right created prior to that date).¹³⁰

7.251 The enactment of s 26D in 1998 varied this, so that the *NTA* itself conferred a statutory right of renewal of all mining tenements that had either been granted prior to 23 December 1996 or had already gone through the right to negotiate. This was regardless of whether the original grant contemplated and permitted such renewal or not or whether the tenement held any other legally enforceable right. The enactment of s 26D meant that, from 1998, native title parties were not afforded any procedural rights to renew at all, other than where one of the narrowly defined exceptions applied.

7.252 Stakeholders in the resources industry have suggested that s 26D should be amended to confirm that the right to negotiate process is a 'once-only' process: if a tenement is granted after following the right to negotiate, it should not apply again for the life of the project, including in respect any renewals of the tenement.¹³¹ The ALRC understands that participants in the resources industry are concerned that requiring the right to negotiate to be completed for a renewed term would generate uncertainty and risk, and would act as an investment deterrent.

7.253 The ALRC has heard from native title parties that as some tenements have a life of many decades, it is not reasonable for the renewal of a tenement to not undergo the right to negotiate for each renewal. The renewal or extension of the term of a tenement has at least a temporal impact on native title rights and interests, where the non-extinguishment principle applies for the duration of the tenement and is revived once the tenement expires. For this reason, native title parties have submitted that it is reasonable they be afforded a further opportunity to negotiate an agreement for the terms of the renewal with the tenement holder.

7.254 In giving evidence to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Noel Pearson (then-Chair of the Cape York Land Council), made the following comments:

In Cape York, for example, there is a massive bauxite lease on the Wik lands held by a French aluminium company called Pechiney. That lease has been sitting there dormant for 30 years now and may not be activated for another 20 or 30 years. But when the town is constructed to build that mine in 10 or 20

129 Ibid s 25(1).

130 Ibid.

131 Association of Mining and Exploration Companies, *Submission 32*; Association of Mining and Exploration Companies, *Submission 97*.

years time, we believe the Aurukun people and the Wik people should be able to negotiate the terms of that mining. It is not to say that they do not have a valid mining right, but they should be able to negotiate the terms of that mining.¹³²

7.255 The Aboriginal and Torres Strait Islander Social Justice Commissioner also made the following observation at the time s 26D was enacted in 1998:

In relation to ... renewal of a right to mine which extends the area or the term of the lease, or creates new rights ... the amendment fails to recognise that mining titles are often of extremely long duration, with renewal periods of a similar length. Also, a mine may have a greater or different impact on native title rights than was envisaged at the initial negotiation stage. These factors make it essential for native titleholders and applicants to have an opportunity to negotiate the terms on which such titles are extended or renewed.

In many jurisdictions mining titles do not contain legally enforceable rights of renewal, re-grant, or extension leaving the grant of such rights to the exercise of the Minister's discretion in any particular situation. The amendments give rise to a situation in which the mere expectations of mining companies are clearly favoured above the protection of native title rights.¹³³

Recommendation 51

Section 26D of the *Native Title Act 1993* (Cth) be amended to repeal s 26D(1) so the renewal, re-granting, re-making, or extension of a right to mine is subject to the procedures and requirements for renewal, re-making, and extensions of non-native title rights and interests in Subdivision I.

7.256 **Recommendation 51** intends to ensure that the procedural rights afforded to native title parties for renewals are no less than the procedural rights afforded to the holders of freehold title. The ALRC has not identified any principled basis on which the renewal of mining interests should be treated any differently to the renewal of other interests over native title land. The recommended reform is to repeal s 26D(1) and for renewals of mining interests to be subject to Subdivision I, which apply to the renewal of mining interests in the same way as for the renewal of other types of rights and interests.

7.257 Mining laws, in at least some jurisdictions, afford significant procedural rights to ordinary title holders for renewals. For example, s 279 of the *Mineral Resources Act 1989* (Qld) provides as follows:

132 Evidence to Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Native Title Amendment Bill 1997, Parliament of Australia, Cairns, 8 October 1997 (Noel Pearson), cited in Third Minority Report to Parliamentary Joint Committee on Native Title and Aboriginal and Torres Strait Islander Land Fund, *Tenth Report* (1997) 117.

133 Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Native Title Report 1998* (1998) 56.

A mining lease shall not be granted or renewed, and an application under section 275A must not be granted for the surface of restricted land to be included in a mining lease, unless—

(a) compensation has been determined (whether by agreement or by determination of the Land Court) between the applicant and each person who is the owner of land the surface of which is the subject of the application and of any surface access to the mining lease land; or

(b) there is no person (other than the applicant) who is the owner of any of the land referred to in paragraph (a);

and the conditions of the agreement or determination have been or are being complied with by the applicant.

7.258 The right to negotiate is afforded to native title parties to address the high impact of some future acts, including mining, on native title rights and interests in light of the special attachment that native title parties have with their lands and waters.

7.259 Where mining laws confer rights on ordinary title holders that are aimed at mitigating the impact of the mining on their use and enjoyment of the land, the right to negotiate aims to afford the same level of rights to native title parties as ordinary title holders on a substantive (rather than formal) basis that reflect the *sui generis* nature of native title rights and interests.

7.260 For example, s 29 of the *Mining Act 1978* (WA) requires the consent of a landowner to the grant of a mining tenement over ‘private land’ between the surface and 30 metres below the surface that is used for certain purposes (such as yard, stockyard, garden, orchard, vineyard, plant nursery, or plantation, is land under cultivation or on which substantial improvements are located). Affording this same procedural right to native title parties would clearly not align with the content of native title rights and interests. The right to negotiate is a bespoke process that accounts for the special attachment of native title parties with their lands and waters by affording procedural rights designed specifically for this purpose.

7.261 In relation to impact of renewals on native title and the risk of uncertainty for mining tenement holders, the Central Land Council observed that

section 26D applies to renewals of certain mining leases. If parties have already entered into agreements which give consent to renewals, then removing this provision has no adverse impact. If parties have not, then a renewal is a Government decision with a very substantial impact on native title rights. It is appropriate that the right to negotiate apply, particularly as native title rights and interests pre-date all mining in Australia. We note, however, that it might be safely assumed that only in very exceptional circumstances would the NNTT refuse a FADA in relation to an existing mine.¹³⁴

134 Central Land Council, *Submission 121*.

7.262 If the liability to pay statutory compensation to the native title parties is the concern, the *NTA* already provides that the renewal of an interest is compensable. This demonstrates that it is recognised, through the *NTA*, that the renewal of an interest, including a mining interest, is a future act that will affect native title. In some jurisdictions, legislation is in place to enable the government to pass through the liability to proponents. Compensation would be payable either through the right to negotiate process or by way of a determination of an application of the native title holders under Part 2 Div 5. This would be no different to the compensation obligations that mining companies have to the holders of ordinary title.

7.263 Where the *NTA* recognises that the renewal of a mining interest affects native title rights and interests, where ordinary title holders are conferred with procedural rights for renewals, and where the right to negotiate is the bespoke procedural rights for native title parties for the grant of mining interests, it is appropriate that renewals of mining interests be subject to the right to negotiate. The exception (as noted in relation to **Recommendation 42**) would be where there is an agreement in place that permits the mining interest to be renewed, subject to compliance with any conditions in such agreements that must be met for renewal.

7.264 Where an interest is granted where there are no registered native title claimants or PBC at the time of grant, it is reasonable that if subsequently, at the time of renewal, there is a registered native title claimant or PBC, that the right to negotiate should apply to the renewal. This is to afford the native title parties an opportunity to negotiate an agreement for the continuation of the mining interest. Such an agreement could also provide for the payment of statutory compensation for the original term and any subsequent terms of the grant for which the right to negotiate was not followed due to there being no native title party at the time of grant.

7.265 Some stakeholders expressed concern that requiring the right to negotiate to be afforded in the case of renewals would produce uncertainty and risk for resources interest holders. As noted in the example from Queensland above however, at least some jurisdictions afford robust procedural rights to ordinary title holders for renewals. Any potential uncertainty that that would be caused by affording procedural rights for renewals to native title parties is a situation that must already exist where a mining lease is granted over ordinary title.

7.266 Certainty does not provide a proper basis on which to deny the holders of ordinary title appropriate procedural rights for any act that impacts upon their rights. The same principle applies to native title rights and interests. Addressing potential or perceived uncertainty cannot come at the cost of discrimination.

Expedited procedure

7.267 As outlined in greater detail in **Chapter 6**, the expedited procedure in Subdivision P of the *NTA* is not operating effectively or efficiently. In **Chapter 6**, the ALRC recommends that the expedited procedure be repealed as part of implementing the impact-based scheme. This part discusses two recommendations

aimed at addressing ineffectiveness and unfairness in the expedited procedure if the expedited procedure is not repealed in accordance with **Recommendation 39** in **Chapter 6**.

7.268 A fundamental problem with the expedited procedure is that it may be applied without sufficient regard to its suitability in particular cases. Often, the expedited procedure has been applied by government parties using what has been described as a ‘blanket approach’,¹³⁵ rather than on a case-by-case basis.¹³⁶ **Recommendation 52** is directed at reforming how the expedited procedure is applied, as well as the evidential burden in objection inquiries and procedural rights when the expedited procedure is applied.

7.269 **Recommendation 53** relates to the criteria for determining if a future act is an ‘act attracting the expedited procedure’. As outlined below, this recommendation aims to address the disproportionately high evidential burden placed on native title parties and to give better effect to the intention of the expedited procedure as a fast-track process for certain future acts of minimal impact.

7.270 In addition to the majority of stakeholders who supported the repeal of the expedited procedure (see **Chapter 6**),¹³⁷ consultations and submissions indicated considerable support for reforming the expedited procedure if it were not repealed.¹³⁸

135 See, eg, National Native Title Tribunal, *Submission 23*; Kimberley Land Council, *Submission 26*; NSW Bar Association, *Submission 140*. See also Queensland South Native Title Services, *Submission 45*; Northern Land Council, *Submission 153*.

136 As noted by the NNTT, the State of Western Australia — the most prolific user of the expedited procedure — adopted a new policy for applying the expedited procedure statement on 1 June 2022. However, as the NNTT also notes, the change in policy ‘does not appear to have had any material effect on the proportion of notices which include the expedited procedure’, with the proportion remaining at 91% since: National Native Title Tribunal, *Submission 23*.

137 See, eg, Central Land Council, *Submission 121*; NSW Bar Association, *Submission 140*; PKKP Aboriginal Corporation, *Submission 144*; Kimberley Land Council, *Submission 151*; Northern Land Council, *Submission 153*. This is discussed in more detail in **Chapter 6**.

138 See, eg, Dambimangari Aboriginal Corporation, *Submission 35*; Bardi Jawi Niimidiman Aboriginal Corporation RNTBC, *Submission 53*; M Lucas, *Submission 57*; Gur A Baradharaw Kod Torres Strait Sea and Land Council Torres Strait Islander and Aboriginal Corporation, *Submission 125*; NSW Bar Association, *Submission 140*; PKKP Aboriginal Corporation, *Submission 144*; Northern Territory Government, *Submission 149*; Kimberley Land Council, *Submission 151*. See also NSW Minerals Council, *Submission 117*; State of Queensland, *Submission 152*.

Application and process

Recommendation 52

The *Native Title Act 1993* (Cth) be amended to provide that:

- a. a government party must not include the expedited procedure statement unless it is satisfied, with reference to s 237 of the Act, that the future act is an act attracting the expedited procedure;
- b. a government party must not include the expedited procedure statement unless it is satisfied that the future act is not a project act;
- c. if one or more native title parties lodges an expedited procedure objection application, the government party must establish the act is an act attracting the expedited procedure; and
- d. where the expedited procedure applies, the affected native title party must be afforded an opportunity to be consulted.

7.271 **Recommendation 52** would amend the application of the expedited procedure and the process after it is applied or an objection is lodged. Implementing **Recommendation 52(a)** would mean that:

- a government party must not apply an expedited procedure statement to a notice under s 29 of the *NTA* unless satisfied that the future act is an act attracting the expedited procedure;
- a government party must not apply the expedited procedure statement unless satisfied that the future act is not a project act;
- if a native title party lodges an objection to the inclusion of an expedited procedure statement, the government party must satisfy the NNTT that the future act is an act that attracts the expedited procedure; and
- native title parties must be afforded an opportunity to be consulted when the expedited procedure applies.

Government party's consideration

7.272 **Recommendation 52(a)** would require that a government party have regard to s 237 of the *NTA* and satisfy itself that a future act is an act attracting the expedited procedure before including an expedited procedure statement.

7.273 Section 29(7) of the *NTA* currently confers an 'entirely unfettered' discretion on government parties when considering whether to include an expedited procedure statement.¹³⁹ As the Full Court of the Federal Court has recently held

¹³⁹ *Holt v Manzie* (2001) 114 FCR 282 [25].

the text, context and purpose of s 29(7) do not suggest that the inclusion of an expedited procedure statement involves or depends on a substantive determination. Section 29(7) is not expressed in terms that are conditional upon the formation of an opinion by the Government party. The provision does not, for example, state that 'if the Government party is satisfied' that an act is one attracting the expedited procedure, it may include a statement to that effect in the s 29 notice.¹⁴⁰

7.274 **Recommendation 52** would not involve the government party making a 'decision' that could be subject to judicial review. That is, the recommendation retains the current position that including an expedited procedure statement is not a reviewable decision under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).¹⁴¹ To do may risk introducing fragmentation and uncertainty of the kind discussed in *Yanunijarra Aboriginal Corporation RNTBC v Western Australia*.¹⁴² **Recommendation 52** retains the existing objection procedure as the means for examining the government party's inclusion of the expedited procedure statement.

7.275 An approach which allows the expedited procedure to be applied without considering its suitability in particular cases, including in a 'blanket' manner, does not further the purpose of the expedited procedure and contributes to many of the problems with the expedited procedure outlined in **Chapter 6**. For example, because the expedited procedure can be applied without consideration of its suitability in particular cases, the objections process takes on a greater role in identifying circumstances where the expedited procedure should not apply (having regard to the criteria in s 237). This, in turn, takes up resources, contributes to delay, and can undermine relationship-building. These are issues outlined in **Chapter 6**.

7.276 **Recommendation 52(a)** is consistent with Finding 5.5 of the Productivity Commission's *Resources Sector Regulations Study Report* in 2020. Finding 5.5 recognised that exploration activities have varying impacts on native title land and, as such, a case-by-case approach is necessary.¹⁴³ In reaching this view, the Productivity Commission noted that

by asserting the expedited procedure as a matter of course, objections that could easily have been anticipated put the matter before the NNTT. Somewhat perversely, in these instances the expedited procedure leads to more delay than the ordinary process of negotiating an agreement.¹⁴⁴

7.277 A concern that may be raised is whether a government party *could* be in a position to reach a necessary state of satisfaction after having regard to the criteria in s 237 of the NTA. This may be a concern because at least some of the information relating to the criteria may be known by a native title party alone. However, the

140 *Yanunijarra Aboriginal Corporation RNTBC v Western Australia* [2026] FCAFC 7 [63].

141 Ibid [71]. The court discussed whether the inclusion of an expedited procedure statement could be subject to judicial review at general law, but did not decide the point: see ibid [72]–[75].

142 *Yanunijarra Aboriginal Corporation RNTBC v Western Australia* [2026] FCAFC 7 [67]–[68].

143 Productivity Commission, *Resources Sector Regulation* (Study Report, 2020) 142.

144 Ibid 141.

ALRC notes that government parties generally have a range of relevant information available to them, including:

- evidence relevant to establishing a native title party's traditional connection to land and waters, provided to a state or territory through its role as the primary respondent to any native title determination application; and
- information collected or registered through the administration of state or territory cultural heritage legislation.

7.278 Additionally, as the recipient of a proponent's tenement application and the ultimate grantor of a future act pursuant to state or territory legislation, the government party is in a unique position to understand and consider the nature of the future act by reference to the rights and interests it would confer if the future act were done, and any conditions on the doing of the future act.

7.279 The reform contemplated by **Recommendation 52(a)** was raised by several consultees and submissions during the Inquiry.¹⁴⁵

7.280 If implemented, consequential amendments to ss 32(3) and 75 of the *NTA* may be required to support **Recommendation 52(a)**.

Project acts

7.281 **Recommendation 52(b)** is intended to give effect to the intention of the *NTA* by ensuring that the expedited procedure is not applied to project acts.

7.282 A future act will be a 'project act' where there are two or more future acts that form part of a single project.¹⁴⁶ The *NTA* currently provides that if a notice identifies that acts are project acts, a government party cannot include a statement that any of the acts are acts attracting the expedited procedure.¹⁴⁷ The ALRC has heard that this provision is not widely used. Consultees highlighted that multiple future act notices including an expedited procedure statement have been issued for acts that appear to form part of the same project.

7.283 Presently, the *NTA* allows, but does not require, government parties to identify in a notice that a project is to be carried out and that the future acts included in the notice form part of that project. Government parties and proponents may have an interest in the notified acts proceeding by way of the expedited procedure, as an exception to the right to negotiate, because the expedited procedure is perceived as a less burdensome pathway to validity.

7.284 However, failing to utilise the project acts provision has broader implications for all parties. For example, issuing separate future act notices in relation to individual future acts relating to the same project can result in:

145 See, eg, Cape York Regional Organisations, *Submission 44*; Dambimangari Aboriginal Corporation, *Submission 142*; PKKP Aboriginal Corporation, *Submission 144*; Yamatji Marlpa Aboriginal Corporation, *Submission 148*; Kimberley Land Council, *Submission 151*.

146 See *Native Title Act 1993* (Cth) ss 29(8)–(9), 42A.

147 Ibid ss 29(9)–(10).

- an increased administrative burden for the government party to process separate tenement application, prepare and advertise separate future act notices, and manage separate future act processes (including on potentially different timeframes);
- an administrative burden for native title parties and their representatives in reviewing multiple future act notices, as well as having to piece together those notices to gain a complete appreciation for the full scope of a project and its impacts; and
- uncertainty for proponents as to whether or how all parts of a project may be done validly.

7.285 Regarding project acts, the Explanatory Memorandum to the *NTAA 1998* observed a need to ensure native title processes to operate effectively and that right to negotiate processes will only have to be applied once for all acts in the same project.¹⁴⁸ **Recommendation 52(b)** supports this and aims to avoid the ineffectiveness and inefficiency that may occur when acts forming part of a project are notified and proceed through the statutory procedures separately. **Recommendation 52(b)** also recognises the potential that multiple future acts may, taken together, have more than the minimal impact otherwise contemplated by acts subject to the expedited procedure.

7.286 Some consultees and submissions indicated support for ensuring that multiple future acts relating to a common project are treated as ‘project acts’ for the purposes of the *NTA*.¹⁴⁹ Some concern was raised regarding a need to retain flexibility, particularly noting the ‘staged’ nature of some projects and that additional future acts may be required at a later time.¹⁵⁰

7.287 While the intent of **Recommendation 52(b)** is to place a prohibition on the use of the expedited procedure for project acts, it is based upon the government party’s satisfaction of whether an act is a project act. That satisfaction is to be reached at the point at which a future act is notified, and does not restrict the ability for subsequent future acts to be notified if necessary. Government parties may draw upon a range of information already held or collected by them to reach a view about whether an act forms part of a project, including a proponent’s tenement application documentation or surrounding tenements held by the same proponent.

7.288 As with **Recommendation 52(a)**, **Recommendation 52(b)** would not involve the government party making a ‘decision’ that could be subject to judicial review.¹⁵¹

148 Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) [18.12].

149 See, eg, Australian Human Rights Commission, *Submission 118*; First Nations Bailai, Gurang, Gooreng Gooreng, Taribelang Bunda People Aboriginal Corporation RNTBC, *Submission 147*.

150 See, eg, Central Land Council, *Submission 121*; Great Barrier Reef Marine Park Authority, *Submission 129*; Seqwater, *Submission 135*; NSW Bar Association, *Submission 140*; State of Queensland, *Submission 152*.

151 See above at paragraph [7.274].

Objections to the expedited procedure

7.289 **Recommendation 52(c)** provides that where an objection is lodged in relation to the application of the expedited procedure, the government party must satisfy the NNTT that the future act is one that attracts the expedited procedure in accordance with s 237 of the *NTA*.

7.290 While the *NTA* is not presently explicit about which party must satisfy the NNTT that the expedited procedure does or does not apply, in practice it is incumbent on native title parties — as those objecting to the application of the expedited procedure — to provide evidence in relation to the matters in s 237 of the *NTA*. In the absence of such evidence being provided, the NNTT may conclude that the future act sufficiently meets the criteria in s 237.¹⁵²

7.291 **Recommendation 52(c)** is consistent with **Recommendation 52(a)** above: having satisfied itself that the expedited procedure applies, the government party should be in a position to provide justification to the NNTT when determining an objection. Furthermore, it is appropriate that a government party, as the party seeking to rely on the expedited procedure as an exception to right to negotiate, justify the application of the exception.

7.292 Several consultees and submissions indicated support for this reform.¹⁵³

Procedural rights

7.293 **Recommendation 52(d)** would require that native title parties to be afforded an opportunity to be consulted in relation to future acts that attract the expedited procedure.

7.294 As outlined in the Explanatory Memorandum to the *NTA* as originally enacted, the expedited procedure is intended to operate as an exclusion to the right to negotiate process for certain acts that would otherwise be subject to that right.¹⁵⁴ In effect, however, the expedited procedure operates as an exclusion to all other procedural rights, except notice, because if the expedited procedure applies then the act may simply be done.¹⁵⁵

7.295 A common concern expressed to the ALRC about the expedited procedure is that acts may proceed without any opportunity for engagement with native title parties (beyond notice).¹⁵⁶ The issue also highlights a difference between rights afforded

152 See, eg, *Tarlka Matuwa Piarku (Aboriginal Corporation) RNTBC v Odette Two Pty Ltd* [2025] NNTTA 17 [23]–[25].

153 MPS Law, *Submission 17*; Yamatji Marlpa Aboriginal Corporation, *Submission 148*; Kimberley Land Council, *Submission 151*.

154 Explanatory Memorandum Part A, Native Title Bill 1993 (Cth) 6.

155 *Native Title Act 1993* (Cth) ss 32(2), (4)–(5). Where the expedited procedure applies to a future act, the procedural rights afforded to native title parties under Subdivisions M and P can be disapplied by operation of ss 24MD(6)(a), 26(1)(a), and 28(1)(c) of the *NTA*. If native title parties do not object to the expedited procedure applying, they are afforded no procedural rights at all, not even the same rights as the holders of freehold title under Subdivision M.

156 Central Land Council, *Submission 31*.

under the *NTA* and the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), as explained by the Central Land Council:

The combined effect of the NT Government's blanket expedited procedure policy and the provisions of the Native Title Act is that the government grants most exploration licences without any engagement with native title holders or claimants.

By contrast, the regime under Part IV of the [*Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)] recognises the significance of exploration as the gateway to mining. Notably, under the Land Rights Act, traditional Aboriginal owners have a veto in relation to exploration, but not in relation to subsequent mining if they have allowed exploration to occur.¹⁵⁷

7.296 Incorporating an opportunity to be consulted as part of the expedited procedure provides an opportunity for engagement between native title parties and other parties. As discussed in **Chapter 6**, consultation is a means for all parties to better understand a future act, its impacts on native title rights and interests, and ways to mitigate those impacts. In the context of mining exploration, it provides an opportunity for relatively 'early' engagement in the lifecycle of a mining project, and the potential development of relationships. The introduction of an opportunity to be consulted may also help reduce the need for objections to the expedited procedure, and resultant delay and expense.¹⁵⁸

Criteria

Recommendation 53

Section 237 of the *Native Title Act 1993* (Cth) be amended to:

- a. substitute 'particular significance' in s 237(b) with 'significance'; and
- b. substitute 'major disturbance' in s 237(c) with 'more than minimal impact'.

7.297 **Recommendation 53** would amend the criteria for a future act to attract the expedited procedure. The phrase 'particular significance' in s 237(b) of the *NTA* would be replaced with 'significance', and the phrase 'major disturbance' in s 237(c) would be replaced with the phrase 'more than minimal impact'.

7.298 **Recommendation 53** seeks to address two issues with the existing criteria. Specifically, **Recommendation 53(a)** addresses a disproportionately high evidential burden in requiring native title parties to establish the *particular* significance of an

¹⁵⁷ Ibid.

¹⁵⁸ For the avoidance of doubt, the opportunity to be consulted would not be in relation to whether the expedited procedure should be applied or not but at the option of native title parties if they did not lodge an objection, if the NNTT dismissed the objection, or the NNTT determined the expedited procedure does apply, in which case, the lesser procedure would apply.

area or site. **Recommendation 53(b)** aims to correct a misalignment between the stated intention of the *NTA* and the current expression of s 237(c).

‘Particular significance’

7.299 The phrase ‘particular significance’ in s 237(b) of the *NTA* has been held to refer to an area or site ‘which is of special or more than ordinary significance’.¹⁵⁹ While an explanation of an area or site’s particular significance is not required,¹⁶⁰ area or site of particular significance must be ‘able to be located and the nature of its significance explained to the Tribunal’.¹⁶¹

7.300 Submissions have variously described the notion of what constitutes ‘particular’ significance as, in practical terms, ‘vague’,¹⁶² ‘elusive’,¹⁶³ and, regarding the totality of s 237, as involving ‘a series of subjective and probabilistic judgements’.¹⁶⁴ As explained by the NSW Bar Association, a lack of clarity in the expression ‘results in considerable inefficiency’.¹⁶⁵

7.301 Putting aside ambiguity, however, the requirement regarding ‘particular significance’ has in practice placed a high evidentiary burden on native title parties during objection inquiries.¹⁶⁶ For example, Kyburra Munda Yalga Aboriginal Corporation has highlighted the need ‘to prepare witness statements from Juru Elders and prepare expert reports from an anthropologist and archaeologist’.¹⁶⁷ As discussed in **Chapter 10**, in the context of future act determinations, native title parties may often lack the resources to effectively discharge a high evidentiary burden.

7.302 Implementing **Recommendation 52(c)**, discussed above, may partially address this issue by requiring government parties to satisfy the NNTT that the criteria in s 237 are met if there is an objection to an expedited procedure statement. However, native title parties may nonetheless seek to provide evidence in response and for the NNTT’s consideration. Removing the word ‘particular’ would still require evidence of the cultural significance of a site or area, but without the additional requirement that the significance is greater than that of other significant sites.

7.303 Several consultees and submissions indicated support for removing the word ‘particular’,¹⁶⁸ as is contemplated by **Recommendation 53**.

159 *Cheinmora v Striker Resources NL; Dann v Western Australia* (1996) 142 ALR 21, 34–5.

160 *Top End (Default PBC/CLA) Aboriginal Corporation v Northern Territory of Australia* [2025] FCA 22.

161 *Silver v Ashton Exploration Australia Pty Ltd* (2002) 169 FLR 1 [91].

162 M Lucas, *Submission 7*.

163 Kimberley Land Council, *Submission 26*.

164 NSW Bar Association, *Submission 140*.

165 *Ibid.* In addition, if a place is recorded or registered under state or territory sacred sites or cultural heritage laws, this could arguably be prima facie evidence of the existence of sites of significance and then the question becomes whether there is not likely to be interference with such sites.

166 See, eg, Kyburra Munda Yalga Aboriginal Corporation, *Submission 37*.

167 *Ibid.*

168 See, eg, M Lucas, *Submission 57*; Kimberley Land Council, *Submission 151*.

7.304 Implementing **Recommendation 53** may also assist in mitigating the cultural dilemma inherent in the existing criterion for native title parties to reveal the location and nature of *particularly* significant sites. As explained by the Kimberley Land Council, ‘often it may be culturally inappropriate to reveal or talk about such sites and areas with persons outside the native title group such as the NNTT’.¹⁶⁹ The implementation of **Recommendation 53** would also ensure consistency with the recommended revised criteria for deciding future act determination applications (see **Chapter 10**).

‘Major disturbance’

7.305 The Explanatory Memorandum to the *NTA* as originally enacted explained the context for the expedited procedure as follows:

Certain grants or classes of grants *which have a minimal effect* on native title can be excluded from this right to negotiate by the Commonwealth Minister (clause 25). Further, an act which does not directly interfere with the community life of native title holders or involve major disturbance to their land can proceed through an expedited process.¹⁷⁰

7.306 Currently, s 237(c) the *NTA* provides that a future act is an act attracting the expedited procedure if the act

is not likely to involve major disturbance to any land or waters concerned or create rights whose exercise is likely to involve major disturbance to any land or waters concerned.¹⁷¹

7.307 The phrase ‘major disturbance’ has been held to be given its ordinary meaning as understood by the whole Australian community, including First Nations people.¹⁷² It has been recognised that s 237(c) requires the NNTT to make a value judgement.¹⁷³ However, the use of the expression ‘major disturbance’ in a criterion aimed at distinguishing between what are already intended to be lower or limited impact acts — as contemplated by ss 237(a) and (b) — renders s 237(c) ineffectual as a restricting criteria.

7.308 From a practical perspective, it has been noted that some future acts proceeding through the expedited procedure may not be of minimal impact. For example, as observed in a submission by John Marrell:

As a heritage consultant that routinely undertakes surveys in a range of development areas, it’s evident that many exploration activities undertaken on licences granted using the expedited procedure are not actually so low impact as to be in keeping with the intent of the *NTA* provisions under s 237.

...

169 Kimberley Land Council, *Submission 26*.

170 Explanatory Memorandum Part A, Native Title Bill 1993 (Cth) 6 (emphasis added).

171 *Native Title Act 1993* (Cth) s 237(c).

172 *Little on behalf of the Badimia People v Oriole Resources Pty Ltd* (2005) 146 FCR 576 [52]–[54].

173 *Ibid.*

The expedited procedure allows for a range of activities with varying disturbance and impact levels at a scale that may not have been contemplated when the NTA was first introduced.¹⁷⁴

7.309 To address these issues, this **Recommendation 53** provides that the phrase ‘major disturbance’ be replaced ‘more than minimal impact’ in order to more accurately align the criteria with the intention underpinning the expedited procedure.

Fair and just redress

7.310 In **Chapter 1**, we noted one of the fundamental flaws with the existing future acts regime: the fact that compensation or other fair and just redress does not need to be provided to native title parties prior to or contemporaneously with the doing of a future act. This has been demonstrated where the only means by which compensation is payable for future acts other than future acts that require negotiation or agreement is under the statutory scheme in Part 2 Div 5 of the *NTA*. However, no determinations of statutory compensation have been made for these kinds of future acts to date.

7.311 If the recommended reforms in this chapter were to be implemented, then the only opportunity for timely redress that would be available would continue to be limited to those future acts that require negotiation (whether negotiation is required either through the right to negotiate or where agreement of native title parties is required). However, for the remaining future acts, which do not require negotiation, there will be no mechanism other than an ILUA for providing timely redress.

7.312 Further consideration needs to be given to whether or not a realistic solution can be found to deal with that problem. It is possible that a mechanism of the kind recommended for upfront payment of financial redress as part of the impact-based scheme in **Chapter 6** could be employed. However, this would require the NNTT or another body to undertake further work to assess and determine the appropriate financial redress for different kinds of future acts (which would be done as part of a broader reform process under the impact-based scheme reforms in **Chapter 6** if those reforms were implemented).

7.313 While this is a significant flaw in the *NTA* for which it is critical a solution be found, the ALRC has not had the opportunity to consider in detail what solutions might be suitable. One option could be for governments to determine an appropriate amount which should be paid to native title parties upfront for particular future acts without any need for negotiation. This is the approach used in Victoria to calculate ‘community benefits’ for some ‘land use activities’ under ‘Land Use Activity Agreements’ to which a formula applies. Land Use Activity Agreements provide an alternative future acts regime under the *Traditional Owner Settlement Act 2010* (Vic). In addition, the Native Title Protection Conditions, which the State of Queensland applies to grants of exploration tenements under the expedited procedure, requires

174 J Marrell, *Submission 93*.

certain payments to be made to native title parties during the life of the tenement. These amounts are not negotiable by either native title parties or proponents (though native title parties retain a right to seek statutory compensation under Part 2 Div 5 of the *NTA*).

7.314 Whatever approach is taken, it should be one that limits the risk of dispute to avoid perpetuating the same flaw as exists with the current regime (that is, where compensation can only be determined through an application to the Federal Court).

8. Statutory Procedures: Ancillary Reforms

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Introduction

8.1 In this chapter, the ALRC recommends several discrete reforms to the statutory procedures and future acts regime that may be implemented alongside, or independently of, the impact-based scheme (outlined in [Chapter 6](#)) or the alternative reforms (outlined in [Chapter 7](#)).

8.2 This chapter proceeds in three parts, discussing reforms relating to the following topics:

- the existing exclusions or modifications of the application of the right to negotiate (Subdivision P);
- future acts if procedures indicate an absence of native title (Subdivision F and non-claimant applications); and
- establishing a centralised record of future act notices, as well as addressing the prescribed content of such notices.

8.3 The six recommendations in this chapter, if implemented, would collectively address the following considerations outlined in the Terms of Reference:

- rectifying any inefficacy, inequality, or unfairness as well as options for efficiencies to reduce time and costs of compliance for all parties;
- supporting native title groups to effectively engage with the regime; and
- strengthening data collection and appropriate data transparency.

8.4 In relation to each reform, this chapter first outlines the purpose and policy background of the existing provision. It then discusses the current operation of

each provision, and demonstrates why reform is necessary. Finally, it outlines the recommendation and explains how each recommendation would respond to the matters outlined in the Terms of Reference.

Subdivision P – Exclusions and modifications

8.5 As discussed further in **Chapter 9**, the right to negotiate is an important mechanism for achieving the *Native Title Act 1993* (Cth) ('NTA') object of protecting native title and is provided in recognition of the special relationship of Aboriginal and Torres Strait Islander peoples to lands and waters.¹ While providing for this right, the *NTA* also contains, or provides for, several ways in which the right can be modified or restricted, including through alternative regimes.

8.6 While some of these mechanisms were included in the *NTA* as enacted, it has been observed that amendments made by the *Native Title Amendment Act 1998* (Cth) ('NTAA 1998'), in particular, 'narrowed the scope of the future acts to which the right to negotiate procedure applies'.²

8.7 In this section, the ALRC outlines two recommendations, in addition to those provided in **Chapters 6** and **7**, aimed at addressing inequality and unfairness resulting from the altering or restricting of the right to negotiate. In short, these alterations and restrictions relate to:

- alternative state or territory regimes, authorised by the Commonwealth Minister, put forward by states or territories; and
- the territorial limit of the right to negotiate, being that it does not extend to the sea.

Alternative state or territory regimes

Context

8.8 In summary, ss 26A, 26B, 26C, 43, and 43A of the *NTA* currently provide mechanisms for the Commonwealth Minister to authorise, by legislative instrument, for a state or territory to effectively modify, or provide exceptions and exclusions to, the right to negotiate provisions of the *NTA*.³ While there are some differences in

1 *Native Title Act 1993* (Cth) preamble, s 3.

2 *Forrest on behalf of the Nangaanya-ku Native Title Claim Group (Part B) v Western Australia* (2025) 313 FCR 71 [34].

3 When the Commonwealth Minister makes a legislative instrument pursuant to these sections, 'the Commonwealth law ... is withdrawn pro tanto and the State law is left with a corresponding field of effective operation': *Western Australia v Commonwealth* (1995) 183 CLR 373, 473. In this way, the Commonwealth Minister is disengaging the operation of s 109 of the Constitution to the extent of any inconsistent operation between the two laws: at 473. See generally *Queensland v Central Queensland Land Council Aboriginal Corporation* (2002) 125 FCR 89.

the mechanisms,⁴ they are referred to collectively as ‘alternative state or territory regimes’ for the purposes of this section.

8.9 The history of alternative state or territory regimes (or attempts to establish them) is marked by Parliamentary disallowance, challenges regarding their validity, appeals, and refusals by the Commonwealth Minister. All of these circumstances were cited by Queensland when it ultimately abandoned its alternative regime and adopted the right to negotiate process under the *NTA*.⁵

8.10 Additionally, all three of the attempts by the Northern Territory, Western Australia, and Queensland to provide alternative provision areas pursuant to s 43A of the *NTA* were disallowed by the Commonwealth Parliament.⁶

8.11 While the ALRC recognises that such mechanisms continue to be used only in New South Wales and South Australia,⁷ the following matters, discussed below, are relevant to the recommended repeal of these provisions:

- the *NTA* provides other mechanisms for the provision of alternatives to the right to negotiate scheme and, importantly, mechanisms which are focused on agreement-making;
- alternative state or territory regimes risk eroding the equality and fairness inherent in a right afforded to all native title parties established in Commonwealth legislation; and
- the measures for ensuring oversight of alternative state or territory regimes are deficient.

8.12 Each of these matters is discussed below.

4 The alternative state or territory regime mechanisms provided for the *NTA* vary slightly. For example, ss 26A and 26B result in specific ‘approved’ future acts or classes of acts being excluded from the right to negotiate. Section 26C enables an ‘approved’ area to be excluded from the right to negotiate provided that the future acts meet certain conditions provided in the *NTA* and the Commonwealth Minister makes the required legislative instrument. Section 43 enables the complete replacement of the right to negotiate with ‘satisfactory’ state or territory provisions. Despite these differences, the effect is the same: excluding or amending how the right to negotiate would otherwise apply.

5 Explanatory Notes, Natural Resources and Other Legislation Amendment Bill 2003 (Qld) 2–7.

6 Richard Bartlett, *Native Title in Australia* (LexisNexis, 5th ed, 2023) 712–15.

7 In 2025, South Australia conducted a review of its mining legislation, including the provisions comprising its alternative legislative regime for the purposes of the *NTA*: see Department for Energy & Mining (SA), ‘Statutes Amendment (Energy and Mining Reforms) Bill 2025’ <www.energymining.sa.gov.au/public-consultations/recent-consultations/statutes-amendment-energy-and-mining-reforms-bill-2025>. There was mixed feedback received as part of that review, including some support for national alignment. Similar feedback was received in this Inquiry: see, eg, Law Council of Australia, *Submission 47*; Association of Mining and Exploration Companies, *Submission 97*; Gawler Ranges Aboriginal Corporation RNTBC, *Submission 98*; South Australian Native Title Services, *Submission 104*. South Australia, having progressed other reforms, has indicated it may consider further reforms after the outcome of the next State election in March 2026: Department for Energy & Mining (SA), ‘Statutes Amendment (Energy and Mining Reforms) Bill 2025’.

The need for reform

Alternative regimes by ILUA

8.13 Alternative future acts regimes may, rather than being legislated, also be established through the negotiation of an ILUA with the specific native title party or parties for an area. The reasons why agreement-making is a superior mechanism in the native title context are discussed in detail in [Chapter 3](#). While those reasons are primarily focused on agreements which validate future acts, they are also relevant to whether it is better for an alternative future acts regime to be created via agreement-making with native title parties rather than imposed through legislation made by state or territory governments, with the Commonwealth's endorsement. Agreement-making in this context better enshrines the principle of self-determination and better ensures that native title parties have a genuine say in developing alternative future acts processes where such processes may affect their ability to protect their rights and interests.⁸

8.14 The ability to provide for alternative processes for the doing of particular future acts is specifically contemplated in the provisions regarding alternative procedure agreement ILUAs,⁹ a mechanism in the *NTA* to which several stakeholders have referred.¹⁰ Despite the *NTA* making provisions for this type of ILUA, none have been negotiated and registered to date. The reasons for this are unknown.

8.15 However, there are many instances of alternative processes for future acts having been established through area agreement ILUAs and body corporate ILUAs. In Queensland, for example, small-scale mining and exploration ILUAs were agreed between several native title parties, the State, and North Queensland Miners Association Incorporated.¹¹ These ILUAs were negotiated for the types of future acts that ss 26A to 26C of the *NTA* contemplate as well as those that would normally be subject to the right to negotiate. As required by the *NTA*, these ILUAs expressly provided that the right to negotiate did not apply to the acts contemplated by the ILUA.¹² While these ILUAs have since expired and not been renewed, they serve as examples of how alternative regimes can be established through agreement with affected native title parties. Through consultation, the ALRC has heard positive feedback about these ILUAs.

8.16 Another example is the Tjiwarl Palyakuwa ILUA in Western Australia. Schedule 4 of that ILUA provides a specific future act process for the grant of mining

8 For discussion on the principle of self-determination see [Chapter 2](#). See also Central Land Council, *Submission 121*.

9 *Native Title Act 1993* (Cth) pt 2 div 3 sub-div D.

10 Houston Legal & Consultants, *Submission 95*; Central Land Council, *Submission 121*; New South Wales Government, *Submission 159*.

11 Queensland Government, 'State Indigenous Land Use Agreements' <www.business.qld.gov.au/industries/mining-energy-water/resources/minerals-coal/authorities-permits/applying/native-title/agreements/state>.

12 See, eg, Indigenous Land Use Agreement, *Small Scale Mining and Exploration Activities, North Queensland Area — Wakaman People* (registered 25 August 2008) 16. This is a requirement provided for in s 24EB(1)(c) of the *Native Title Act 1993* (Cth).

and petroleum interests in Tjiwarl Country, as well as a process for future acts concerning water.¹³ Importantly, it provides a pathway to validity when an agreement is reached between the Tjiwarl PBC and a proponent without needing to undertake the applicable processes under the *NTA*.

8.17 Additionally, the *Traditional Owner Settlement Act 2010* (Vic) provides a framework for traditional owner groups to agree an alternative state-based regime to the future acts regime with the State of Victoria. This mechanism must be underpinned by an ILUA under the *NTA* (unless native title has been extinguished in or a negative determination made over the entirety of the area). The alternative regime is negotiated by the native title parties with the State, thereby giving effect to the principles of free, prior, and informed consent — the alternative regime is not unilaterally imposed by the State on native title parties.

8.18 In response to the Discussion Paper, a number of stakeholders highlighted the importance of alternative processes being negotiated.¹⁴ For example, although it did not express support for repealing the provisions outlined in **Recommendation 54**, the Minerals Council of Australia suggested

the Commonwealth should encourage states in an expanded use of alternative state procedures in native title agreements and negotiations, to complement and enhance the existing Commonwealth framework under the [*NTA*].¹⁵

Native Title Plans

8.19 The ALRC also recommends an option, in Native Title Plans, which adopts a similar logic to that which underpins the alternative state or territory regime: they provide an alternative pathway to validity. However, they represent the ALRC's preferred avenue as they are a native title holders-led process for establishing Country and group-specific processes. Native Title Plans would reflect an important shift in the dynamics of the future acts regime: native title holders leading the conversation about the management and development of their Country, rather than being in a responsive and reactive role in relation to the proposed interests of other parties. Native Title Plans are discussed in greater detail in **Chapter 13**.

A national approach

8.20 As noted above and discussed further in **Chapter 9**, the right to negotiate is an important component of the future acts regime. Permitting a state or territory

13 Indigenous Land Use Agreement, *Tjiwarl Palyakuwa: Tiiwa Kuwarri Yampa Ngula* (registered 21 February 2023) sch 4.

14 See, eg, Australian Human Rights Commission, *Submission 118*; Queensland South Native Title Services, *Submission 124*.

15 Minerals Council of Australia, *Submission 113*. See also MC Dillon, *Emerging Strategic Issues in Native Title: Future Political and Policy Challenges* (Discussion Paper No 292, Centre for Aboriginal Economic Policy Research, Australian National University, 2017) 7–8.

to make modifications or exceptions from the generally applicable scheme could substantially undermine fairness and equality of treatment on the basis of location.¹⁶

8.21 As South Australian Native Title Services explained:

It has long been our view that First Nations South Australians should have the same rights as all other Aboriginal people in Australia in relation to mining and explorations. Our State's provisions do not provide for the same rights and those inconsistencies have resulted in severe prejudice to our clients when seeking to protect and enjoy their native title rights and interests.¹⁷

8.22 The importance of a single, generally applicable process across Australia is also apparent when considering that traditional concepts of Country were not cognisant of state or territory boundaries that followed later, as several active native title claims continue to demonstrate.¹⁸ For example, the Yandruwandha Yawarrawarrka People Part C (QUD431/2025) native title claim spans three states, being Queensland, New South Wales, and South Australia.¹⁹ Each of these jurisdictions has its own version of, or exclusions to, the right to negotiate. Similarly, the Malyangapa Combined Proceedings (NSD525/2021) crosses two states with alternative state or territory regimes in place,²⁰ being New South Wales and South Australia. Similar situations may arise elsewhere.

8.23 It has also been highlighted to the ALRC that there is no requirement for the alternative state or territory regimes to otherwise maintain consistency with changes made to the *NTA*,²¹ which would include any reforms made implementing the ALRC's recommendations in this report. As South Australian Native Title Services observed, there 'is and has been significant variance (or inconsistencies) between our State's provisions and subdivision P' of the *NTA*.²²

8.24 While the *NTA* obliges the Commonwealth Minister to ensure that the alternative state or territory regimes continue to comply with requirements set out in the *NTA* (discussed in greater detail below), this does not equate to ensuring that consistency with the *NTA*, as a whole, is achieved.

16 It is acknowledged that a similar concern could be raised in relation to alternative procedure ILUAs and Native Title Plans. However, the critical difference is that a native title party is either providing consent for this (in the case of an ILUA) or proactively seeking it (in the case of Native Title Plans) in relation to a right that the statute affords to them. It is not a right afforded to states or territories.

17 South Australian Native Title Services, *Submission 104*.

18 See, eg, *Banjima People v Western Australia (No 2)* (2013) 305 ALR 1 [176]–[360] for a detailed expert anthropologist-led analysis of the concept of 'boundaries' as it interacts with native title.

19 National Native Title Tribunal, 'QC2025/003 - Yandruwandha Yawarrawarrka People Part C' <www.nntt.gov.au/searchRegApps/NativeTitleRegisters/Pages/RNTC_details.aspx?NNTT_Fileno=QC2025/003>.

20 National Native Title Tribunal, 'Malyangapa Combined Proceedings (NC2022/002)' <www.nntt.gov.au/searchRegApps/NativeTitleClaims/Pages/details.aspx?NTDA_Fileno=NC2022/002>.

21 Gawler Ranges Aboriginal Corporation RNTBC, *Submission 98*; South Australian Native Title Services, *Submission 104*.

22 South Australian Native Title Services, *Submission 104*.

Insufficient oversight

8.25 Legislative instruments made under ss 26A, 26B, 26C, 43, and 43A of the *NTA*, which authorise alternative legislative regimes, are exempt from the sunset provisions provided for in the *Legislation Act 2003* (Cth).²³

8.26 Legislative instruments subject to sunset are repealed after the ten year anniversary of their commencement. The effect of alternative state or territory regimes being exempt from such provisions has been described by the Law Council of Australia as meaning that

the current generation of native title holders have not been consulted on the arrangements and there is no effective oversight or public scrutiny of whether these arrangements, which continue to constrain the procedural rights of native title holders, continue to be appropriate.²⁴

8.27 The existing provisions require the Commonwealth Minister to revoke an authorisation if, at any time, the Minister is of the opinion the alternative state or territory regimes no longer meet the conditions which enabled their operation pursuant to the *NTA*.²⁵ However, there is no express obligation to periodically consider whether the authorisation should be revoked by, for example, assessing the current operation of the alternative state or territory regimes. The *NTA* also does not impose a requirement on states or territories to review or revisit the alternative legislative regimes enacted by them.²⁶

8.28 Overall, in addition to the problems observed by the Law Council of Australia above, alternative state or territory regimes may fall out of step with amendments to the *NTA* and not be adequately maintained over time. If **Recommendation 54** is not adopted, a comprehensive and open review of the relevant legislative instruments and alternative regimes, in conjunction with the affected native title parties, should be completed in order to satisfy the Commonwealth Minister as to whether the instruments continue to be an appropriate use of the power vested in the Minister (as well as meeting the conditions specified in the *NTA*).

23 *Legislation (Exemptions and Other Matters) Regulation 2015* (Cth) s 12, item 45.

24 Law Council of Australia, *Submission 47*.

25 *Native Title Act 1993* (Cth) ss 26A(8), 26B(9), 26C(6), 43(3), and 43A(9).

26 See also Law Council of Australia, *Submission 47*, which noted that the alternative state or territory regime in New South Wales has not been amended or reviewed since it commenced between 1996 and 2000.

Recommended reform

Recommendation 54

Sections 26A, 26B, 26C, 43, and 43A of the *Native Title Act 1993* (Cth) be repealed to remove the Commonwealth Minister's power to approve state and territory arrangements to exclude or modify the application of the right to negotiate in Part 2 Division 3 Subdivision P of the Act.

8.29 If implemented, [Recommendation 54](#) would remove the ability for the Commonwealth Minister to authorise states and territories to exclude or modify the application of the right to negotiate. Repealing these enabling provisions would restore a single and consistent legislative right to negotiate process, subject only to modification by the Commonwealth legislation (or otherwise by agreement with the affected native title parties). Appropriate transitional arrangements would be necessary for those few jurisdictions where these provisions currently have effect to manage the impacts for those operating under the current alternative state or territory regimes.

Sea and intertidal zone exclusion

Context

8.30 Despite the law's clear recognition of offshore or 'Sea Country' native title rights and interests, the future acts regime imposes limits upon the procedural rights available to native title parties to protect their Sea Country from future act infringements. There does not appear to be a reason or identifiable principle grounding this restriction. [Recommendation 55](#) seeks to remove one such limit and, instead, extend the application of the right to negotiate beyond the landward side of the mean high-water mark of the sea.

8.31 The future acts regime provides a clear limit on the extent of certain procedural rights of native title parties, where those rights relate to the sea and 'offshore places'.²⁷ As has been detailed in [Chapter 7](#), native title is subordinate to offshore acts, with Professor Bartlett noting this is

irrespective of the significance of the native title rights and interests. Considerations of equality and protection of property rights were not considered sufficient to resist such subordination.²⁸

27 See s 253 of the *NTA* for definition of 'offshore place'. See also discussion of this definition in [Chapter 7](#).

28 Bartlett (n 6) 598.

8.32 In giving effect to this subordination, the *NTA* also provides that the right to negotiate only applies to the landward side of the mean high-water mark of the sea.²⁹

8.33 If implemented, **Recommendation 55** would extend the right to negotiate to the full extent of the application of the *NTA*,³⁰ resulting in some future acts, such as offshore mining, attracting the right to negotiate. As outlined below, an examination of the reasons for the present distinction between procedural rights in ‘onshore places’ and ‘offshore places’, and a better developed understanding of native title rights and interests (after more than 30 years since the *NTA* was enacted), reveal no rational basis for maintaining the differential application of the right to negotiate in onshore and offshore places.

The need for reform

8.34 When first enacted, the *NTA*’s Explanatory Memorandum noted the right to negotiate was a mechanism in ‘recognition of the special attachment that Aboriginal peoples and Torres Strait Islanders have to their *land*’.³¹ Critically, this right to negotiate was not extended to ‘waters’, despite native title being described, in the same document, as ‘rights and interests that are possessed under the traditional laws and customs of Aboriginal people and Torres Strait Islanders in land *and waters*’.³²

8.35 The Explanatory Memorandum provided the following explanation in relation to the omission of waters (referred to as ‘offshore places’):

The Bill will ensure the validity of legislative regimes governing economic activities offshore – those relating to commercial fisheries and petroleum extraction operations being of particular note. However, recognising the different circumstances applying offshore, while any future grants or interests will have to be issued in a non-discriminatory manner, they will not be subject to the freehold test or to the associated negotiation and arbitration procedures applying onshore.³³

8.36 The ‘different circumstances’ referred to in the above extract were elaborated in the Explanatory Memorandum of the 1998 amendments as follows:

These areas are excluded from the right to negotiate because native title holders will not have the equivalent of exclusive possession over them.³⁴

8.37 While the ALRC acknowledges the difficulties associated with attempting to apply the freehold test or equivalency principle to waters,³⁵ the explanation provided in the 1998 Explanatory Memorandum is flawed. Where the right to negotiate applies

29 *Native Title Act 1993* (Cth) s 26(3).

30 See *ibid* s 6.

31 Explanatory Memorandum Part A, *Native Title Bill 1993* (Cth) 5 (emphasis added).

32 *Ibid* 1 (emphasis added).

33 *Ibid* 6–7.

34 Explanatory Memorandum, *Native Title Amendment Bill 1997* (Cth) [19.4].

35 Discussed in greater detail in **Chapter 7**. On the other hand, Merkel J has noted ‘there is nothing about the nature of an estate in fee simple that makes it inapplicable to the seabed’: *Risk v Northern Territory* (2000) 105 FCR 109 [63].

to land, it does so irrespective of whether exclusive or non-exclusive rights and interests exist, as is also the case for the future acts regime generally.

8.38 Inherent in the distinction, and perhaps the basis for it, is ‘the difference between indigenous and western perspectives of property and sea rights’.³⁶ This difference is evident in the Commonwealth’s submissions in *Yarmirr v Northern Territory* [No 2]:

This distinction is rooted in the physical nature of sea territory which distinguishes it from land territory and materially affects people’s relationship with the sea. Whereas the land is capable of being fenced off, of being cultivated and improved, and of being occupied and lived upon by people, our relationship with the sea is primarily limited to the taking of fish and other sea life from and the traversing of the sea.³⁷

8.39 Along with the purported limited cultivation utility of the sea described above, is the legal concept that ‘sea cannot and should not be ‘owned’ ...; that it belongs to all’.³⁸ With this in mind, it is conceivable that when the *NTA* and *NTAA 1998* were enacted, some doubt existed as to whether native title could be recognised offshore. However, any lingering uncertainty was ultimately put to rest by the Federal Court’s decision in *Yarmirr v Northern Territory* [No 2],³⁹ which noted that

in confirming the application of the [*NTA*] in relation to the coastal sea and extending its effect to all waters over which Australia asserts sovereign rights Parliament has indicated a specific intention to recognise that native title rights, if proved, are capable of recognition in relation to those seas and waters.⁴⁰

8.40 Time has shown that this recognition of offshore native title rights and interests was not an outlier, with many other determinations subsequently recognising offshore rights and interests.⁴¹ Additionally, the basis for division in the *NTA* between

36 Raelene Webb, ‘The 2016 Sir Frank Kitto Lecture: Whither Native Title?’ (2015) 19(2) *Australian Indigenous Law Review* 114, 121. See also Katie Glaskin, *Limitations to the Recognition and Protection of Native Title Offshore: The Current ‘Accident Of History’* (Issues Paper No 5(2), Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, June 2000); Alexandra Grey, ‘Offshore Native Title: Currents in Sea Claims Jurisprudence’ (2007) 11(2) *Australian Indigenous Law Review* 55.

37 *Yarmirr v Northern Territory* [No 2] (1998) 82 FCR 533, 542, quoted in Webb (n 36) 120.

38 Glaskin (n 36) 1.

39 *Yarmirr v Northern Territory* [No 2] (1998) 82 FCR 533, as upheld in *Commonwealth v Yarmirr* (2001) 208 CLR 1.

40 *Yarmirr v Northern Territory* [No 2] (1998) 82 FCR 533, 550. See also *Commonwealth v Yarmirr* (2001) 208 CLR 1 [8].

41 See, eg, *Lardil Peoples v Queensland* [2004] FCA 298; *Gawirrin Gumana v Northern Territory* (No 2) [2005] FCA 1425; *Moses v Western Australia* (2007) 160 FCR 148; *Sampi v Western Australia* (2010) 266 ALR 537; *Akiba v Queensland* (No 3) (2010) 204 FCR 1; *Barunga v Western Australia* [2011] FCA 518; *Lampton on behalf of the Juru People v Queensland* [2014] FCA 736; *Rumburriya Borroloola Claim Group v Northern Territory* (No 2) [2016] FCA 908; *Yaegl People #2 v Attorney-General (NSW)* [2017] FCA 993; *Manado (on behalf of the Bindunbur Native Title Claim Group) v Western Australia* [2018] FCA 854; *David on behalf of the Torres Strait Regional Seas Claim v Queensland* [2022] FCA 1430; *Wyles on behalf of the Gurambilbarra Wulgurukaba People for the GW Mada Claim v State Minister for Queensland* [2025] FCA 833.

native title over land and sea, in terms of both claims and acts affecting them, ‘has been largely dispelled at common law’.⁴² As Finn J observed in *Akiba v Queensland (No 3)*, ‘to the Islanders, land and sea are seamlessly and culturally associated: there is no “sea-land dichotomy”’.⁴³

8.41 In addition to the support from submissions to this Inquiry for **Recommendation 55**,⁴⁴ the call for this reform dates to, at least, 2000 when the following was noted by the Aboriginal and Torres Strait Islander Social Justice Commissioner:

The right to negotiate was seen by Indigenous negotiators as extremely important to the overall acceptance of the original [NTA] despite the validation of past acts ... The decision not to extend the right to negotiate offshore has denied Indigenous people the possibility of any meaningful negotiation about future offshore petroleum developments. It has also denied them a right to participate in the development and management of their country.⁴⁵

8.42 In 2011, a reform aimed at addressing the issue was considered by the Senate Legal and Constitutional Affairs Legislative Committee.⁴⁶ In response to that Committee’s inquiry, native title party representatives indicated strong support for applying the right to negotiate to offshore areas,⁴⁷ as did a range of related

42 Law Council of Australia, Submission No 21 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011* (5 August 2011).

43 *Akiba v Queensland (No 3)* (2010) 204 FCR 1 [8].

44 See, eg, First Nations Clean Energy Network, *Submission 30*; First Nations Legal and Research Services, *Submission 42*; Law Council of Australia, *Submission 120*; Mabo Centre and National Native Title Council, *Submission 130*; Yamatji Marlpa Aboriginal Corporation, *Submission 148*.

45 Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Native Title Report 2000* (2001) 107–8.

46 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Native Title Amendment (Reform) Bill 2011* (2011) [2.14]–[2.15].

47 Cape York Land Council Aboriginal Corporation, Submission No 5 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011* (29 July 2011); Torres Strait Regional Authority, Submission No 11 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011* (27 July 2010); South Australian Native Title Services, Submission No 12 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011* (29 July 2011); National Native Title Council, Submission No 14 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*.

representative bodies.⁴⁸ Consistently with the analysis above, submissions noted the:

- inconsistency or anomaly in recognising native title rights and interests offshore and not extending the accompanying procedural rights accordingly;⁴⁹
- direct impact, and increase, of activities occurring in offshore areas;⁵⁰ and
- distinction does not appropriately reflect the connection of Aboriginal and Torres Strait Islander people to both lands and waters.⁵¹

8.43 Concerns expressed at the time included that reform may increase the cost of offshore exploration,⁵² and introduce a level of uncertainty.⁵³

8.44 Implementing **Recommendation 55** may, however, reduce existing uncertainty and complexity. For example, the right to negotiate applying only to future acts onshore has resulted in circumstances where only part of a future act, or an extent of it, is relevant to application of the expedited procedure, right to negotiate, or the NNTT's jurisdiction.⁵⁴ As noted by the National Native Title Tribunal ('NNTT'),

a future act that relates to both onshore and offshore areas will require different procedures (and presumably give rise to different compensation arrangements) to the extent that it covers each area.⁵⁵

48 Australians for Native Title and Reconciliation, Submission No 6 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011* (July 2011); Jon Altman, Submission No 16 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011* (1 August 2011); Law Council of Australia (n 42); Australian Human Rights Commission, Submission No 24 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011* (12 August 2011); National Congress of Australia's First Peoples Ltd, Submission No 35 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011* (October 2011).

49 South Australian Native Title Services (n 47); National Native Title Council (n 47); Australian Human Rights Commission (n 48); National Congress of Australia's First Peoples Ltd (n 48).

50 South Australian Native Title Services (n 47); Cape York Land Council Aboriginal Corporation (n 47).

51 Australians for Native Title and Reconciliation (n 48); Altman (n 48); South Australian Native Title Services (n 47); National Congress of Australia's First Peoples Ltd (n 48).

52 Northern Territory Government, Submission No 36 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011* (1 November 2011).

53 Western Australian Government, Submission No 18 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011* (August 2011).

54 See, eg, *Victor Barunga on behalf of Dambimangari/Western Australia/FMG Resources Pty Ltd* [2007] NNTTA 82; *FMG Pilbara Pty Ltd/NC (deceased) on behalf of the Yindjibarndi People/Western Australia* [2012] NNTTA 103; *Wanjina-Wunggurr (Native Title) Aboriginal Corporation RNTBC v Argyle Corridor Resources Pty Ltd and Another* [2020] NNTTA 26; *Rosita Shaw & Others on behalf of Booroolo Moorool Moorool v Rand Mining & Another* [2020] NNTTA 51.

55 *FMG Pilbara Pty Ltd/NC (deceased) on behalf of the Yindjibarndi People/Western Australia* [2012] NNTTA 103 [55].

8.45 Further calls for this reform were made in 2013,⁵⁶ in response to the Attorney-General's Department *Options Paper: Reform to the Native Title Act 1993 (Cth)* released in 2017,⁵⁷ and in 2019.⁵⁸

Recommended reform

Recommendation 55

Section 26(3) of the *Native Title Act 1993 (Cth)* be repealed to extend the right to negotiate to future acts in areas beyond the landward side of the mean high-water mark of the sea.

8.46 Extending the right to negotiate as contemplated by **Recommendation 55** would provide native title parties with a meaningful opportunity for input into future acts that infringe their rights and interests in offshore areas,⁵⁹ as well as an opportunity to share in the benefits of such development.

8.47 Implementing **Recommendation 55** would represent progress towards addressing the unfairness associated with the 'limited', 'inadequate', and 'meaningless' procedural rights of native title rights and interests relating to waters,⁶⁰ and respond to the persistent call to do so. As Gur A Baradharaw Kod Torres Strait Sea and Land Council Torres Strait Islander and Aboriginal Corporation explained:

Despite formal recognition of native title, the lack of meaningful procedural safeguards means that native title holders are routinely excluded from decisions that affect their sea country. This situation underscores the urgent need for reform.⁶¹

56 See, eg, Australian Human Rights Commission, Submission No 3 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into Native Title Amendment Bill 2012* (25 January 2013); National Congress of Australia's First Peoples, Submission No 24 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into Native Title Amendment Bill 2012* (February 2013).

57 Australian Human Rights Commission, Submission to Attorney-General's Department (Cth), *Reforms to the Native Title Act 1993 (Cth) (Options Paper, 2017)* (28 February 2018).

58 Australian Human Rights Commission, Submission No 3 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into Native Title Legislation Amendment Bill 2019* (27 November 2019); Australian Lawyers Alliance, Submission No 9 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into Native Title Legislation Amendment Bill 2019* (28 November 2019).

59 See, eg, First Nations Clean Energy Network, *Submission 30*. See also Glaskin (n 36) 6, which notes: 'The absence of formal negotiating rights with respect to the sea minimises claimants' ability to intervene in contexts where their marine rights are at risk, such as in the issue of pearling leases, aquacultural leases, the declaration of marine parks and offshore mineral exploration'.

60 See, eg, Indigenous Land and Sea Corporation, *Submission 68*; Gur A Baradharaw Kod Torres Strait Sea and Land Council Torres Strait Islander and Aboriginal Corporation, *Submission 125*; Dambimangari Aboriginal Corporation, *Submission 142*. See also Glaskin (n 36).

61 Gur A Baradharaw Kod Torres Strait Sea and Land Council Torres Strait Islander and Aboriginal Corporation, *Submission 125*.

Considerations for implementation

8.48 If implemented, **Recommendation 55** would necessitate consequential amendments. If the reforms contemplated in **Chapter 6** were adopted, an amendment to s 26(1)(a) of the *NTA* would be necessary. If the reforms in **Chapter 7** were adopted, amendments to ss 24NA and 26(1)(a) of the *NTA* would operate as amended.⁶² As noted above, appropriate transitional arrangements would also be required where alternative state or territory regimes are currently in operation.

Subdivision F and non-claimant applications

Context

8.49 This part discusses two recommendations relating to Subdivision F of the *NTA* and the associated use of non-claimant applications. It first explains Subdivision F and its current operation, before discussing how it should be reformed.

8.50 Subdivision F of the *NTA* provides an avenue for future acts to validly occur in areas that are not the subject of a registered native title claim or determination, after following certain processes (summarised below). If followed, the person doing the future act obtains 'section 24FA protection', in that if native title is later determined to exist the future act is not invalidated; however, a right of compensation is provided for future acts validated under this subdivision in accordance with ss 24FA(1)(b) and (c).⁶³

8.51 Section 24FA protection arises after the following process occurs:

- a 'non-claimant application' is made in relation to an area;
- a period of three months has elapsed since the non-claimant application is notified; and
- there is no native title determination application in relation to the area of the non-claimant application within that period (that is later registered after that period); or
- a determination has been made that no native title exists in relation to the area.⁶⁴

8.52 As the name suggests, a 'non-claimant application' is a native title determination application made by a person who is not claiming that native title exists. It can be made by a government party over any area within its jurisdiction or a non-government party who holds a non-native title interest in the area the subject of their application.⁶⁵

62 For example, a carve out may be required in s 24NA of the *NTA* for the right to negotiate. Subsequently, an amendment to s 26(1)(a) may then be required to include reference to Subdivision N, which would address the concerns raised in the Senate Legal and Constitutional Affairs Legislation Committee's *Inquiry into the Native Title Amendment (Reform) Bill 2011*.

63 *Native Title Act 1993* (Cth) s 24FA.

64 *Ibid* ss 24FB, 24FC, 24FD.

65 *Ibid* s 61(1).

8.53 If a native title determination application has not been made in relation to the area the subject of a non-claimant application after the expiry of the three-month notification period or, if made, that native title claim is not subsequently registered, the non-claimant applicant will have obtained section 24FA protection. The non-claimant applicant may validly undertake the future act and withdraw their application without seeking a determination about whether native title exists or does not exist. Alternatively, an applicant may proceed with the application in order to obtain a determination that native title does not exist in the area (commonly referred to as a 'negative determination').

8.54 As explained in the Explanatory Memorandum, the purpose of non-claimant applications is to allow governments and other future act proponents to do future acts validly 'before a final determination as to whether or not native title exists has been made'.⁶⁶ In practice, they may also be used as a means to seek confirmation and certainty regarding the prior extinguishment of native title before a subsequent future act is done.⁶⁷ Put another way, they may be used to obtain clarity 'where native title has clearly been extinguished',⁶⁸ but the area has not (yet) been subject to a native title determination application.

8.55 The primary issue for reform is reducing the prospect that potential native title holders may be denied an opportunity to assert their native title rights and interests because of the relatively short timeframe in which they have to lodge a native title determination application in response to a non-claimant application.⁶⁹ This is an important issue because in many, if not most, cases the current three-month period to respond to a non-claimant application is insufficient. The main reason for that insufficiency is the significant effort, time, and resources which are required to investigate whether there is a proper foundation for making a native title claim as well as the effort and time involved in making the application.

8.56 **Recommendation 56** aims to improve the capacity for potential native title holders who may be unfairly prejudiced by the current, relatively short time within which to prepare an application for native title in response to a non-claimant application.

8.57 An additional issue, discussed under **Recommendation 57** below, is an identified deficiency with the template form for non-claimant applications, as contained in the *Native Title (Federal Court) Regulations 2024* (Cth) ('*Federal Court Regulations*').

66 Explanatory Memorandum Part B, Native Title Bill 1993 (Cth) 17.

67 New South Wales Aboriginal Land Council, *Submission 101*; Law Council of Australia, *Submission 120*.

68 New South Wales Aboriginal Land Council, *Submission 101*.

69 It is acknowledged that there is an assumption inherent in this process. That is, that the notification process, primarily through advertisements in newspapers and/or through direct notification to the relevant Native Title Representative Body or Service Provider ('NTRB/SP'), will necessarily and sufficiently alert would-be native title parties of its existence. This has been described as requiring a 'leap of faith' on behalf of the court: *Mace v Queensland* (2019) 274 FCR 41 [89].

Current use of non-claimant applications

8.58 Courts have noted that non-claimant applications, used as the means to obtain section 24FA protection, are more frequently made in New South Wales and Queensland.⁷⁰ This can be explained, in part, with reference to certain laws or policies of those states.

8.59 In relation to New South Wales, non-claimant applications are regularly made by land-holding Local Aboriginal Land Councils, established pursuant to the *Aboriginal Land Rights Act 1983* (NSW). Prior to a dealing with the land held by those Councils can occur, that Act requires a determination of native title to be made.⁷¹

8.60 In Queensland, the use of non-claimant applications has been described as follows:

The state's current policy ... is that whilst section 24FA protection can be theoretically relied upon to grant freehold where no claim has been filed in time, it requires a lessee to obtain a determination that native title does not exist in relation to the non-claimant application area.⁷²

8.61 This is confirmed by several judgments which indicate that the use of non-claimant applications in Queensland largely stems from:

- an explicit condition on a state's offer of a renewal of an existing interest;⁷³ or
- seeking a conversion or upgrade of an existing land tenure.⁷⁴

8.62 As stakeholders have highlighted,⁷⁵ non-claimant applications may also be made where native title cannot be established: either due to the extinguishing effect of a previous act or a finding that is incompatible with native title being recognised.⁷⁶ As mentioned above, this is typically used to provide certainty.⁷⁷

70 Ibid [42].

71 See, eg, *ibid* [8]–[11], referring to the *Aboriginal Land Rights Act 1983* (NSW). See also New South Wales Aboriginal Land Council, *Submission 101*; Law Council of Australia, *Submission 120*; Mabo Centre and National Native Title Council, *Submission 130*; New South Wales Government, *Submission 159*.

72 North Queensland Land Council, *Submission 96*.

73 *Queensland Rifle Association Inc v Queensland* [2021] FCA 110 [10].

74 *Mace v Queensland* (2019) 274 FCR 41 [19]–[20].

75 See, eg, New South Wales Aboriginal Land Council, *Submission 101*; Law Council of Australia, *Submission 120*.

76 See, eg, *Awabakal Local Aboriginal Land Council v New South Wales* [2020] FCA 1507; *Dungog Shire Council v New South Wales* [2024] FCA 166; *Appleton v State of Queensland* [2023] FCA 45; *Russell Estates Pty Ltd v State Minister for the State of Queensland* [2023] FCA 1588; *James Speed Company Pty Ltd v State of Queensland* [2022] FCA 626.

77 See, eg, New South Wales Aboriginal Land Council, *Submission 101*; Law Council of Australia, *Submission 120*.

8.63 As an alternative to non-claimant applications and seeking section 24FA protection, feedback to the ALRC has also indicated that parties may also consider resolving issues relating to native title through an ILUA.⁷⁸

The need for reform

Inadequate period for response

8.64 Currently, a representative Aboriginal or Torres Strait Islander body or a person claiming to hold native title in relation to the area subject of a non-claimant application has three months from the notification date of the non-claimant application⁷⁹ within which to file a native title determination application and/or to become a party to the non-claimant application.⁸⁰

8.65 As provided in the Explanatory Memorandum, the mechanism was said to 'encourage potential native title holders to make native title claims'.⁸¹ However, the three-month timeframe for doing so has been variously described as 'very short',⁸² 'completely unreasonable and insufficient',⁸³ 'unnecessarily onerous',⁸⁴ and 'grossly inadequate'.⁸⁵ As the ALRC has previously highlighted, the pressure created by responding within the timeframe of a future act notice often results in the 'hasty lodgement of claims'.⁸⁶

78 See, eg, North Queensland Land Council, *Submission 96*. The ILUA referred to here is an area agreement ILUA provided for in Subdivision C of the *NTA*, which provides an avenue to reaching agreement even where there is no registered claimant or PBC: see *Native Title Act 1993* (Cth) s 24CD(3). However, stakeholders have noted the difficulties in negotiating such ILUAs: see, eg, M Boge, *Submission 76*. On the other hand, the costs, timeframes, and complexities of the non-claimant application process has resulted in such applications being less preferable for some stakeholders, particularly for public service future acts: Isaac Regional Council, *Submission 70*.

79 See Part 2 Div 3 Subdivision F of the *NTA* and the reference to the 'period specified in the notice given under section 66'.

80 *Pate v Queensland* [2019] FCA 25. For completeness, becoming a respondent party to a non-claimant application proceeding enables the party to adduce evidence, perhaps contrary to that of the non-claimant, which may result a finding that a non-claimant applicant has not discharged their burden of proof: see, eg, *Mace v Queensland* (2019) 274 FCR 41 [51]–[52].

81 Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) [8.3].

82 State of Queensland, *Submission 43*.

83 Kimberley Land Council, *Submission 151*.

84 Maddocks, *Submission 62*.

85 North Queensland Land Council, *Submission 96*.

86 Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993* (Cth) (Report No 126, 2015) 317.

8.66 The main reason for this is that the processes involved in preparing and lodging a native title determination application (particularly with the view to having it successfully registered) are usually onerous, requiring a 'significant amount of time and resources'.⁸⁷ The extent of these processes and requirements can be summarised with reference to the following stages:

- processes involved in preparing to lodge a native title determination application; and
- requirements of lodging a native title determination application.

8.67 Each of these stages is briefly summarised below.

Preparing to lodge a native title determination application

8.68 Inherent in making a native title determination application is the need to identify:

- the 'native title claim group', or all the persons who claim to hold native title in a particular area. This usually requires the identification of the claimants' ancestors at (or close to) effective sovereignty or other means for the transmission of rights and interests of the area claimed;
- the traditional laws and customs of the group;
- the rights and interests possessed by that group under their traditional laws and customs; and
- that the group has maintained a continuing connection with the land and waters in accordance with their traditional laws and customs.

8.69 Detailed research is usually required to accurately identify these matters. Such research usually needs to be done by an expert anthropologist through processes such as fieldwork involving interviewing potential native title claimants, reviewing archival documents, and analysing the work of other expert anthropologists.⁸⁸ This process frequently draws upon the expertise of other professionals such as genealogists or historians. It is not uncommon for that research to take 'months or years',⁸⁹ including because there is a limited pool of such experts.⁹⁰ As McGrath explained, this 'identified shortage of suitably qualified and experienced anthropologists' is reportedly 'contributing to delays in the processing of native title

87 Vance Hughston SC, 'A Practitioner's Perspective of Native Title' (2009) (93) *Reform: Native Title* 2009 28, 28.

88 See, eg, Julie Finlayson, *Anthropology and Connection Reports in Native Title Claim Applications* (Issues Paper No 9(2), Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, August 2001); Kingsley Palmer, *Australian Native Title Anthropology: Strategic Practice, the Law and the State* (ANU Press, 2018).

89 *Jango v Northern Territory* (2006) 152 FCR 150 [316], quoting the evidence of Professor Sutton.

90 For general discussion of the limited pool of consultants and experts within the native title sector (including its implications for the future acts regime), see, eg, MPS Law, *Submission 17*; Mabo Centre and National Native Title Council, *Submission 130*. See also Hughston (n 87) 28.

claims'.⁹¹ Additionally, the costs involved in engaging such experts is also relevant to acknowledge.⁹²

8.70 Additionally, an applicant must be authorised by that native title claim group to make the application on its behalf.⁹³ This requires holding an authorisation meeting,⁹⁴ where all members of the proposed native title claim group are invited to attend.⁹⁵ Advance notice of the authorisation meeting must be given, including through circulating a notice in local newspapers. A notice of an authorisation meeting should give fair notice of the matters to be considered, amongst other things.⁹⁶

Requirements of the native title determination application form

8.71 The template form for a native title determination application is contained in the *Federal Court Regulations*.⁹⁷ The form requires a series of details of the native title claim as per requirements of the *NTA*, some requiring their own separate and distinct processes. For example:

- Schedules B and C of the form require a written description and map of the area covered by the application.⁹⁸ The written description, in particular, is a dense and technical document describing, with reference to geographic coordinates, the boundary of the claim and any areas excluded from it.⁹⁹ Typically its preparation requires the involvement of a geospatial specialist. Additionally, the map may necessitate the expertise of a cartographer to prepare. As Brazenor notes, these requirements rely on the 'assumption of scientific cartographic knowledge' and 'presumption of access to spatial information resources' by an applicant or its representatives,¹⁰⁰ and
- Schedule D requires the details and results of all searches carried out regarding the existence of any non-native title rights and interests in the area.¹⁰¹ This could be a land tenure search in relation to the area claimed, a tenure history report, or relevant tenure documents.

91 Pamela McGrath, 'A Recent History of the Professionalisation of Australian Applied Anthropology and Its Relevance to Native Title Practice' (2012) 1 *Australian Aboriginal Studies* 63, 63.

92 For example, in 2001, the previous average estimate of between \$25,000 to \$50,000 was cited as the relevant cost to prepare a connection report, which included hiring 'a consultant, the consultant's travel and accommodation, salary, time in the field, consultation and meetings with claimants, archival research and report writing': Finlayson (n 88) 9.

93 *Native Title Act 1993* (Cth) s 251B.

94 For this process, anthropological research may also be required to determine where there is a traditional decision-making process to be followed at the authorisation: see *ibid* s 251B(a).

95 It is also common for this authorisation meeting to be preceded by community meetings where the possible making of a claim is discussed.

96 *Weribone on behalf of the Mandandanji People v Queensland* [2013] FCA 255.

97 *Native Title (Federal Court) Regulations 2024* (Cth) sch 1 (Form 1).

98 See also *Native Title Act 1993* (Cth) ss 62(2)(a), (b).

99 See, eg, *ibid* ss 62, 190B, 190C.

100 Clare Brazenor, 'The Spatial Dimensions of Native Title' (Masters Thesis, University of Melbourne, 2000) 42.

101 See also *Native Title Act 1993* (Cth) s 62(2)(c).

8.72 The application is also required to be accompanied by an affidavit sworn by the applicant addressing the matters provided in s 62(1A) of the *NTA*. In some cases, the applicant can be comprised of a large number of individuals from the native title claimant group. An affidavit from each member is required.

8.73 Following the preparation and authorisation of the native title determination application, the application must pass the registration test and be entered on the Register of Native Title Claims in order for it to successfully prevent a non-claimant applicant benefitting from section 24FA protection.¹⁰²

8.74 While noted as not being a formal requirement of a native title determination application,¹⁰³ sections of the form provide the opportunity to address the following matters for the purposes of the registration test:

- any traditional physical connection by any member of the claim group, and the circumstances in which any member of the claim group has been prevented from gaining access to the area;¹⁰⁴
- any other applications made in the area to which the application or claim group were part of;¹⁰⁵
- any claim of exclusive possession of all or part of an offshore place;¹⁰⁶ and
- any claim by the claim group of ownership of minerals, petroleum, or gas wholly owned by the Crown.¹⁰⁷

8.75 Given the importance of satisfying the registration test, the NNTT encourages a native title determination application to be submitted to the Registrar of the NNTT for a 'preliminary assessment' to identify any issues relevant for the registration test.¹⁰⁸ This, again, requires sufficient time.

8.76 The process also requires that the native title determination application be certified by the relevant Native Title Representative Body or Service Provider ('NTRB/SP') for the area and a copy of that certification be provided with the native title determination application.¹⁰⁹ Alternatively, if the application has not

102 The registration test requires that the Registrar of the NNTT consider the 'claim made in the application', and, in particular, whether or not the claim satisfies all of the conditions prescribed in ss 190B and 190C: *ibid* s 190A.

103 *Native Title (Federal Court) Regulations 2024* (Cth) sch 1 (Form 1). Specifically, the form includes the following statement: 'The following items are not required, but will be relevant when the Native Title Registrar considers the claim for registration under section 190A of the Act'.

104 *Ibid*. See also *Native Title Act 1993* (Cth) ss 62(1)(c)(i)–(ii).

105 *Native Title (Federal Court) Regulations 2024* (Cth) sch 1 (Form 1). See also *Native Title Act 1993* (Cth) s 190C.

106 *Native Title (Federal Court) Regulations 2024* (Cth) sch 1 (Form 1). See also *Native Title Act 1993* (Cth) s 190B.

107 *Ibid*.

108 National Native Title Tribunal, 'Claimant Applications' <www.nntt.gov.au/native-title-applications/Pages/Claimant-applications.aspx>.

109 See also *Native Title Act 1993* (Cth) s 190C(4)(a).

been certified, statements from the applicant regarding their authorisation and the grounds for those statements.¹¹⁰

8.77 It is within the context of the above processes and requirements, that the three-month timeframe has been described as ‘grossly inadequate’. Recently, the Federal Court has commented on the burdens of bringing an application under the NTA being more burdensome than other areas of federal law:

As I said more than once during the hearing of this application, the burdens imposed on First Nations people as moving parties in NTA proceedings, in terms of simply being able to *commence* a proceeding, are much higher under this legislative regime than in other commensurate practice areas of this Court.¹¹¹

8.78 Further compounding the onerous nature of the process is that, often, no prior preparation of these steps may have occurred when a non-claimant application is notified, and additional funding may need to be sought.¹¹² As NTSCORP, in submissions filed in the *Mace v Queensland* proceedings, noted:

NTSCORP’s funding is limited in nature and for that reason the anthropological research undertaken by NTSCORP is prioritised and has to date primarily been directed towards proceedings which are or were before the Federal Court of Australia.¹¹³

8.79 Issues stemming from funding issues have been acknowledged, by the Federal Court, as potentially being relevant to non-claimant application proceedings if, for example:

- potential native title holders were asserting native title rights and interests in the area, but materials were not able to be prepared; or
- there was insufficient funding to carry out research to identify potential native title holders.¹¹⁴

8.80 The reactive nature of responding to non-claimant applications within such a limited period has broader implications, as explained by the North Queensland Land Council:

This process places undue strain on [North Queensland Land Council]’s planning and resources and disrupts prioritisation of existing claims. The limited timeframe in which to respond to protect native title from permanent extinguishment forces the [North Queensland Land Council] to act immediately and redirect its resources that are already under strain.¹¹⁵

¹¹⁰ See also *ibid* ss 190C, 251B.

¹¹¹ *Karajarri Traditional Lands Association (Aboriginal Corporation) RNTBC v State of Western Australia* (2024) 307 FCR 122 [44] (emphasis in original).

¹¹² For general discussion of how funding may influence the progressing of native title claims, see *Nona on behalf of the Badulgal, Mualgal and Kaurareg Peoples (Warral & Ului) v Queensland (No 4)* [2022] FCA 566 [13].

¹¹³ *Mace v Queensland* (2019) 274 FCR 41 [91].

¹¹⁴ *Ibid* [178]–[179].

¹¹⁵ North Queensland Land Council, *Submission* 96. See also NTSCORP’s submissions and evidence in *Mace v Queensland* (2019) 274 FCR 41 [90]–[91].

Recommended reform**Recommendation 56**

The *Native Title Act 1993* (Cth) be amended to empower the Federal Court of Australia to extend the time specified in ss 24FB(c) and 24FC(d) of the Act to up to 12 months, in order to provide time for the filing of a native title determination application on the application of a representative Aboriginal or Torres Strait Islander body for the area or person claiming to hold native title in relation to any of the land or waters in the area of a non-claimant application.

8.81 **Recommendation 56** seeks to provide an avenue for extending the period within which a native title determination application can be made in response to a non-claimant application. The rationale for **Recommendation 56** is to improve the capacity for would-be native title parties seeking to respond to a non-claimant application in order to avoid section 24FA protection being conferred on a non-claimant applicant, simply for the reason that native title parties were not given a reasonable opportunity to make a native title application.

8.82 In the Discussion Paper, the ALRC proposed to extend the time within which a native title determination application could be lodged from three months to twelve months in response to *any* non-claimant application. Several submissions highlighted that introducing this measure may result in inefficiencies and cause unnecessary delays for non-claimant applications.¹¹⁶

8.83 In particular, extending the time would be of no utility in relation to applications that are unopposed or are unlikely to be opposed, potentially operating unfairly to those applicants and resulting in inefficiencies.¹¹⁷

8.84 As such, a more flexible approach is provided for in **Recommendation 56**, in that it retains the default three-month period but allows the capacity for an extension on application to the Federal Court. This means that:

- those non-claimant applications that are not contentious, or not opposed, would not be unnecessarily delayed and can proceed according to the existing timeframe; and
- where a would-be native title party or an NTRB/SP does wish to pursue a native title determination application in response, they could apply for the period to be extended in order to complete the process and requirements of doing so.

¹¹⁶ See, eg, M Boge, *Submission 76*; AgForce Queensland Farmers Ltd, *Submission 111*, and the Energy and Resources Committee of the Queensland Law Society's submissions in Law Council of Australia, *Submission 120*. See also *CG (Deceased) on behalf of the Badimia People v Western Australia* (2016) 240 FCR 466 [110] regarding the proportion of non-claimant applications proceeding to determination, unopposed, pursuant to s 86G of the *NTA*.

¹¹⁷ See, eg, M Boge, *Submission 76*; AgForce Queensland Farmers Ltd, *Submission 111*.

8.85 In making **Recommendation 56**, the ALRC acknowledges that the same three-month timeframe is provided for the lodgement of a native title determination in relation to future acts attracting the right to negotiate.¹¹⁸ The justification for recommending an inconsistent timeframe in these circumstances, lies in the fact that, unlike the future acts attracting the right to negotiate,¹¹⁹ the non-extinguishment principle does not necessarily apply to future acts validated by Subdivision F. In other words, Subdivision F enables the doing of future acts that may extinguish native title in unclaimed areas. Given this, there is increased importance in ensuring there is reasonable opportunity to make a native title determination application in response to a proponent seeking section 24FA protection.

Non-claimant application form

Context

8.86 The current template non-claimant application, contained in the *Federal Court Regulations*, does not require the applicant to identify whether the 'type' of application being sought is for:

- section 24FA protection only (so the application is intended to be discontinued, withdrawn, or dismissed after the future act has been done); or
- a determination that native title does not exist, either because it is not currently claimed or cannot be established, or that native title has otherwise been extinguished by prior inconsistent grant or public works.

8.87 The absence of this information means that, when notified, the resulting notice does not indicate whether a determination that native title does not exist is sought. For would-be native title parties, it may be that knowing if the non-claimant is *only* seeking section 24FA protection would be relevant in deciding whether or not to lodge a native title determination application in response (particularly if the proposed future act is non-extinguishing). In turn, this would assist in the efficient use of the option to apply for an extension of time as contemplated by **Recommendation 56**.

118 *Native Title Act 1993* (Cth) s 30(1)(a).

119 Other than those noted in ss 24MD(2) and (2A), as per s 24MD(3) of the *Native Title Act 1993* (Cth).

Recommended reform**Recommendation 57**

1. Form 2 contained in *Native Title (Federal Court) Regulations 2024* (Cth) be amended to require an applicant to indicate whether the applicant will continue to seek a determination that native title does not exist, if s 24FA protection is obtained.
2. Section 66 of the *Native Title Act 1993* (Cth) be amended to provide that where an application has been notified on the basis that the applicant will discontinue if s 24FA protection is obtained and despite obtaining s 24FA protection the applicant seeks to continue, the application must be re-notified and notice of the renewed basis for it, be given.

8.88 **Recommendation 57(1)** would require a non-claimant applicant to indicate whether they will continue to seek a determination that native title does not exist, if the future act can be validated under section 24FA protection. If implemented, this recommendation would provide the court and parties to the proceedings (or would-be parties to the proceedings) with important information regarding the purpose of the application. For the avoidance of doubt, it is not intended to require the non-claimant applicant provide detailed pleadings at the point of making the application.

8.89 With the clarity that would be gained through implementation of **Recommendation 57(1)**, if the non-claimant applicant indicates it is only seeking section 24FA protection, should the non-claimant applicant change their mind and instead wish to continue to seek a determination that native title does not exist, then **Recommendation 57(2)** would require that non-claimant application be re-notified.

8.90 As mentioned earlier, if combined with **Recommendation 56**, **Recommendation 57** would assist would-be native title parties to be better informed when deciding whether and how to respond to a non-claimant application, including whether to seek an extension of time in order to lodge a native title determination application.

8.91 Additionally, the ALRC notes that Schedule C of the template non-claimant application may contain an error that should be reviewed. Schedule C of the template currently requires the non-claimant applicant to provide details and any results of searches carried out to determine the existence of any 'non-native title rights and interests',¹²⁰ which appears to be modelled on the similar requirement for a native title determination application. However, it may be that Schedule C should instead require a non-claimant application, which is already made in relation to non-native title rights

120 *Native Title (Federal Court) Regulations 2024* (Cth) sch 1 (Form 2).

and interests, to provide details and results of searches carried out to determine the existence of any native title rights and interests.¹²¹

8.92 While it is unclear if this is an error, it is nonetheless more relevant that a non-claimant applicant provides the details and results of any searches carried out to determine the existence of any native title rights and interests. As outlined by the State of Queensland, such a requirement

supports the outcome that the non-claimant application should have some further responsibility, such as being required to do some due diligence before being able to make a non-claimant application.¹²²

8.93 Given that the court considers the presence of any previous native title claims or agreements in determining a non-claimant application,¹²³ providing greater clarity may be of assistance to the court and other parties to the proceedings.

Future act notices

8.94 This part discusses two recommendations aimed at better capturing the data contained in future act notices in a centralised way and improving the consistency of notices provided to native title parties. Together, these reforms seek to address the following matters outlined in the Terms of Reference to:

- strengthen data collection and appropriate data transparency; and
- support native title groups to effectively engage with the regime.

Record of future act notices

Context

8.95 As outlined in the Discussion Paper, the ALRC is not aware of any central record of future acts notices at a Commonwealth or state and territory level.¹²⁴ Although some data about future acts is being collected by the NTRB/SPs, the process has been noted as ‘ad hoc and burdensome’.¹²⁵

8.96 The lack of a centralised register makes it difficult to gain a comprehensive understanding of how the future acts regime is operating and how to identify and analyse trends over time. Further, it represents a missed opportunity for transparent information to be available to all parties in the sector including, and especially, native title common law holders.

121 Such searches of previous (or unregistered) native title claims and relevant agreements are easily obtained through the NNTT’s website, registers, and databases free of charge.

122 State of Queensland, *Submission 152*.

123 *Mace v Queensland* (2019) 274 FCR 41 [48].

124 See also Department of Agriculture, Fisheries and Forestry (Cth), *Submission 39*.

125 Kimberley Land Council, *Submission 151*.

Recommended reform

Recommendation 58

The *Native Title Act 1993* (Cth) be amended to:

- a. provide for a record of future act notices that is to be established and maintained by the National Native Title Tribunal; and
- b. require that a copy of all future act notices be provided to the Tribunal for inclusion on the record at the time of notification to native title parties.

8.97 In response to these issues, **Recommendation 58** would establish a centralised record, maintained by the NNTT, of all future act notices issued across the country. Government parties — as the parties responsible for notifying future acts — would be required to provide a copy of the future act notice at the same time as providing it to the relevant native title party or NTRB/SP.

8.98 The benefits of establishing a central record include:

- a greater ability to analyse trends of future acts over time and improved access for native title parties (including common law holders) to information about future acts impacting their country;¹²⁶
- equipped with information about the frequency and volume of future act notices (including from multiple government agencies), parties may be able to identify opportunities for future act-specific ILUAs, and improved coordination of future acts occurring on country,¹²⁷ leading to efficiencies for all parties;
- an accessible record may assist government parties in improving consistency in relation to their interpretation of the *NTA*, as well as improving the quality of the notices through seeing examples of other notices issued previously; and
- by shedding light on the frequency, volume, and variety of future acts notices received by native title parties, the competing demands of native title parties' attention, time, and resources may be more easily appreciated. Additionally, an accurate record of impact of statutory obligations on native title parties may assist in demonstrating, in a quantitative way, the need for additional and consistent funding.

¹²⁶ See, eg, P&E Law, *Submission 128*; Yamatji Marlpa Aboriginal Corporation, *Submission 148*.

¹²⁷ Northern Territory Government, *Submission 149*.

8.99 Feedback to the ALRC on the proposal to develop a centralised register of future act notices indicated considerable support.¹²⁸ Submissions and consultees acknowledged some of the benefits outlined above. Additionally, the Northern Territory Government expressed a view that such a record ‘could assist program planning, [and] monitoring [of] cumulative impacts’.¹²⁹

Considerations for implementation

8.100 It is acknowledged that this reform will place an administrative burden on the NNTT in establishing and maintaining the record. As observed by the NNTT and some government parties, implementing the recommendation would likely necessitate new systems infrastructure, a portal-like data system, and systems to capture the data spatially.¹³⁰ Given this, the adoption of this recommendation by government should be accompanied by adequate funding earmarked for effective implementation.

8.101 Implementation of **Recommendation 58** should happen alongside, and may be greatly assisted by, the recommended development of a template future act notice, discussed below.

Template future act notice

Context

8.102 Future act notices importantly alert native title parties as to a proposed future act, providing them with crucial information and the opportunity to consider how that act may impact them and their native title rights and interests.¹³¹ As outlined in a relevant Explanatory Statement, notification ‘gives those affected the chance to avail themselves of relevant procedural rights or other opportunities under the Act’ and ‘should enable people to consider whether they will be affected by the proposed act or activity’.¹³²

128 See, eg, Maddocks, *Submission 62*; National Native Title Tribunal, *Submission 86*; K O'Bryan, *Submission 94*; Houston Legal & Consultants, *Submission 95*; North Queensland Land Council, *Submission 96*; Norman Waterhouse Lawyers, *Submission 102*; South Australian Native Title Services, *Submission 104*; Local Government Association of Queensland, *Submission 108*; AgForce Queensland Farmers Ltd, *Submission 111*; Minerals Council of Australia, *Submission 113*; Western Australian Government, *Submission 115*; NSW Minerals Council, *Submission 117*; Australian Human Rights Commission, *Submission 118*; Law Council of Australia, *Submission 120*; Queensland South Native Title Services, *Submission 124*; P&E Law, *Submission 128*; NSW Bar Association, *Submission 140*; E Raeside, *Submission 145*; First Nations Legal and Research Services, *Submission 146*; Yamatji Marlpa Aboriginal Corporation, *Submission 148*; Northern Territory Government, *Submission 149*; Kimberley Land Council, *Submission 151*; Northern Land Council, *Submission 153*.

129 Northern Territory Government, *Submission 149*.

130 National Native Title Tribunal, *Submission 86*; Western Australian Government, *Submission 115*; State of Queensland, *Submission 152*.

131 Explanatory Statement, Native Title (Notices) Determination 2011 (No. 1) (Cth).

132 Ibid 2.

8.103 The Terms of Reference ask the ALRC to consider ‘options within laws and legal frameworks to support native title groups to effectively engage with the future acts regime’. A potential barrier to the engagement of, and by, native title groups is the quality of future act notices received by native title parties. Feedback to the ALRC has indicated that there may be a lack of specific information about the proposed future act, including where it is proposed to be or what the impacts may be.¹³³

8.104 Currently, the *Native Title (Notices) Determination 2024* (Cth) outlines the required content of future act notices and specifies that a notice must include:

- a clear description — whether by map or description, allowing the recipient to work out the general location and appropriate boundaries — of the area of the proposed future act;
- a description of the nature of the future act;
- a statement of the procedural rights afforded (for example, the right to comment or consultation) and the timeframe for the exercise of those rights; and
- the name and contact details of the person to whom comments or requests for consultation must be given.¹³⁴

8.105 When the ALRC asked what additional requirements should be prescribed in order to improve the quality of notices, two main sentiments emerged:

- the need for comprehensive and detailed information about the proposed project (potentially additional to information relating to the future act itself where the act is a grant of tenure, for example);¹³⁵ and
- a need to balance the requirement of detailed information against the administrative burden and increased risk of inadvertent non-compliance with notice requirements.¹³⁶

8.106 The ALRC recognises that future act notices are primarily procedural in nature. They are aimed at alerting native title parties to a proposed future act, outlining the relevant statutory rights, and providing contact information for which further information about the future act can be obtained.

8.107 In relation to future act notices relating to the right to negotiate, detailed project information appears to be typically shared through direct engagement between proponents and native title parties, rather than through the future act notice itself. In addition to the administrative burden involved in, instead, requiring such information to be included in a future act notice, considerations such as confidentiality and commercial sensitivities have been noted as important.¹³⁷ In relation to future acts

133 See, eg, Queensland South Native Title Services, *Submission 45*.

134 *Native Title (Notices) Determination 2024* (Cth) ss 8(4)–(5).

135 Norman Waterhouse Lawyers, *Submission 102*; E Raeside, *Submission 145*; First Nations Legal and Research Services, *Submission 146*; Kimberley Land Council, *Submission 151*.

136 Association of Mining and Exploration Companies, *Submission 97*; Minerals Council of Australia, *Submission 113*; Western Australian Government, *Submission 115*; Law Council of Australia, *Submission 120*.

137 See, eg, Western Australian Government, *Submission 115*.

that would attract the opportunity to consult, the consultation process recommended by the ALRC, discussed in [Chapter 6](#), provides a means for native title parties to obtain and discuss further project-specific and more detailed information.

Recommended reform

Recommendation 59

The *Native Title (Notices) Determination 2024* (Cth) be amended to insert a new schedule consisting of a template future act notice, intended to be used when a party is required to provide notification of a future act under Part 2 Division 3 of the *Native Title Act 1993* (Cth).

8.108 Feedback to the ALRC also recognised the importance of prescribed minimum standards,¹³⁸ and a ‘standardised’ approach in relation to future act notices.¹³⁹ Such aims could be achieved through the development of a template — an option noted in the Discussion Paper and, subsequently, supported in several submissions.¹⁴⁰ While some states have either developed a template or are in the process of doing so,¹⁴¹ this does not appear to be the case across all states and does not appear to be contemplated at a Commonwealth level.

8.109 In light of this, [Recommendation 59](#) would introduce a template future act notice to provide when notification is required under the *NTA*. As noted above, the development of such a template would also greatly assist with the establishment of a future act record (see [Recommendation 58](#)).

8.110 The benefits of developing a template, at a Commonwealth level, include:

- uniformity and consistency, which may improve efficiency for native title parties in reviewing notices and enable them to more readily identify the future acts that may be more significant than others;
- certainty of form and content for all parties, which should lead to efficiencies for agencies, and may contribute to building better relationships between parties;¹⁴² and
- decreased risk of any inadvertent non-compliance, discussed further in [Chapter 11](#).

138 Australian Human Rights Commission, *Submission 118*. See also Northern Territory Government, *Submission 149*.

139 Houston Legal & Consultants, *Submission 95*; Northern Territory Government, *Submission 149*.

140 Maddocks, *Submission 62*; K O'Bryan, *Submission 94*; Minerals Council of Australia, *Submission 113*; Western Australian Government, *Submission 115*; Law Council of Australia, *Submission 120*.

141 See Queensland Government, 'Native Title Work Procedures' <www.qld.gov.au/firstnations/environment-land-use-native-title/native-title-work-procedures>; Western Australian Government, *Submission 115*, respectively.

142 K O'Bryan, *Submission 94*.

Template contents

8.111 As noted above, future act notice templates already exist in some jurisdictions, such as Queensland.¹⁴³ These templates could be utilised to inform the proposed development of a template at a Commonwealth level.

8.112 In addition to the existing future act notice content requirements,¹⁴⁴ it is suggested that any template notice should provide an indication regarding the entitlement of the native title party to recover the costs associated with performing a function contained in s 60AB of the *NTA* (and *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth)). It is envisaged that doing so may not only promote enhanced engagement by the native title parties with the future acts regime, but also increase awareness of the entitlement to recover costs associated with exercising statutory rights under the future acts regime, including the expansion of those cost recovery mechanisms as contemplated in [Chapter 11](#).

Consideration of ‘class’ notifications

8.113 If [Recommendation 59](#) above is implemented, additional consideration may be given to whether a separate template future act notice should be developed for ‘class’ notifications — that is, the notification of multiple future acts (or a class of future acts) in a single future act notice.¹⁴⁵ Creating a separate template for such notifications may also provide an opportunity to address some of the issues that have been recounted to the ALRC regarding the content of such notices.

8.114 While intended to act as an efficiency mechanism for the person proposing to do the class of the acts as well as a means to reduce the volume of notices (particularly those with lower procedural rights),¹⁴⁶ the ALRC has heard that these types of future act notices have been problematic from native title parties’ perspective, particularly class notifications issued under s 24HA(7) of the *NTA* relating to future acts such as fishing licences, tourism permits, or marine research permits.¹⁴⁷

8.115 Class notifications can be very broad, applying to an unspecified number of future acts within that class as well as applying to an entire state. The North Queensland Land Council explained two examples of such scenarios. First, the submission observed that

a single notice that it [the issuing authority] intends to grant multiple permits (sometimes up to 100) for education, recreational or research purposes and if granted, may be exercised in *all zones and locations* within the Great Barrier

143 See Queensland Government (n 141); Isaac Regional Council, *Submission 70*.

144 *Native Title (Notices) Determination 2024* (Cth).

145 For examples of sections of the *NTA* enabling the notification of classes of acts: see, eg, *Native Title Act 1993* (Cth) ss 24GB, 24GE, 24HA, 24ID, 24JB.

146 See, eg, Kyburra Munda Yalga Aboriginal Corporation, *Submission 37*. As explained by this PBC, every year, it receives several hundred s 24HA notices from one government agency.

147 Ibid; Cape York Regional Organisations, *Submission 44*; Queensland South Native Title Services, *Submission 45*; North Queensland Land Council, *Submission 96*.

Reef Marine Park Section and the Great Barrier Reef Coast Marine Park. Permits may be up to six years.¹⁴⁸

8.116 Secondly, the submission observed that

a State-wide notice to issue up to 150 general fisheries permits ... which may be exercised in *all Queensland waters* ... within a 12-month period. Permits may be up to three years.¹⁴⁹

8.117 As the North Queensland Land Council explained, the information provided may be

so generic that [native title parties] are in no position to provide any sort of informed or meaningful comment on how their native title rights or interests may be impacted, or to even understand whether they need to make a comment at all. Nor can they understand if there is a threat posed to their cultural heritage.¹⁵⁰

8.118 Putting aside the administrative convenience of being able to issue class notifications, this practice appears to make it difficult for native title parties to effectively engage with the future acts regime. In many respects, it is anticipated that this issue may also be addressed through the proposed uplift of procedural rights relevant to these types of future acts,¹⁵¹ combined with the introduction of low impact agreements for PBCs (as described in [Chapter 6](#)).

8.119 The implementation of **Recommendation 59** also provides the opportunity to consider whether a separate template future act notice should be developed for class notifications and, if so, how it may help native title parties to be sufficiently informed to determine whether to exercise their procedural rights.

Further implementation considerations

8.120 As noted, some states have already developed a template future act notice. Additionally, the ALRC has been advised that a template future act notice has been included in some local government ILUAs,¹⁵² as well as 'global agreements' which incorporate notices into existing agreements.¹⁵³ As such, consideration should be given to whether the template considered in **Recommendation 59** should supersede other templates.

148 North Queensland Land Council, *Submission 96* (emphasis in original).

149 Ibid (emphasis in original). See also Queensland South Native Title Services, *Submission 45*.

150 North Queensland Land Council, *Submission 96*. See also *Harris v Great Barrier Reef Marine Park Authority* (2000) 98 FCR 60, where a similarly described approach was held to be consistent with an authority's obligations under the NTA.

151 Either with reference to impact as described in [Chapter 6](#) or directly in relation to the existing subdivisions as described in [Chapter 7](#).

152 Isaac Regional Council, *Submission 70*.

153 Kimberley Land Council, *Submission 151*.

9. Right to Negotiate: Negotiations

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Introduction

9.1 In this chapter and the following **Chapter 10**, the ALRC recommends structural changes to the right to negotiate process. This chapter focuses on reforms that most closely relate to negotiations, while the subsequent chapter focuses on reforms that relate to arbitrated outcomes in the absence of agreement.

9.2 If implemented, the 13 recommendations in this chapter and **Chapter 10** would reform the right to negotiate process to better align with the intentions of the *Native Title Act 1993* (Cth) ('NTA') and to reflect the task set by the Terms of Reference. That is, to 'support fair negotiations and encourage proponents and native title groups to work collaboratively in relation to future acts'. The reforms in these two chapters would help ensure that the future acts regime provides for sufficient procedural rights to safeguard native title holders' substantive rights.

9.3 This chapter is in six parts. The first part discusses the purpose and policy of the right to negotiate, and why reform is necessary. The second part outlines the reformed right to negotiate process. The third, fourth, and fifth parts discuss reforms to particular aspects of the right to negotiate — minimum negotiation timeframe, good faith negotiations, and separate issue referral — and how those reforms further the goals of the right to negotiate.

9.4 The final part identifies how the reformed right to negotiate interacts with other reforms recommended in this Report. The recommendations in this chapter and

Chapter 10 are intended to form part of a broader package of reforms. For example, while this chapter and **Chapter 10** focus on the right to negotiate process, the scope of future acts which attract the right to negotiate is discussed in **Chapters 6, 7, and 8**. However, the reforms in this chapter and **Chapter 10** may be implemented independently of other reforms and still have a significant positive impact.

Purpose and policy of the right to negotiate

9.5 The right to negotiate was designed to be a core component of the future acts regime. This is recognised in the preamble to the *NTA*, which provides that future acts should

only be able to be validly done if, typically, they can also be done to freehold land and if, whenever appropriate, every reasonable effort has been made to secure the agreement of the native title holders through a special right to negotiate.¹

9.6 Under the right to negotiate process, when a future act notice is issued it specifies the ‘notification day’. The parties (generally the native title party, a proponent, and the relevant state or territory party) then negotiate in good faith for a minimum of six months from the notification day with a view to reaching agreement. Agreements are formalised in the form set out in s 31 of the *NTA* and are generally known as ‘section 31 agreements’. If, after the six months have elapsed, the parties have not reached an agreement, any of the parties may apply to the National Native Title Tribunal (‘NNTT’) for a future act determination (see **Chapter 10**).

9.7 The right to negotiate recognises the ‘special attachment of Aboriginal and Torres Strait Islander people to their land’.² It does this by providing specific processes that may not apply in the case of ordinary title, and which give native title parties an opportunity to protect their interests or have them accommodated through agreement or conditions imposed through arbitration. The right to negotiate provides a means for recognising the distinctive nature of native title as property compared to ‘what common lawyers identify as property rights’.³ It is therefore an important means of achieving substantive, and not merely formal, equality in the treatment of native title rights and interests.

9.8 The right to negotiate process ‘is an element of the protection of native title which is one of the main objects of the Act’.⁴ One of its purposes is to provide native title parties an opportunity to understand and explain the potential impacts of a proposed future act on native title rights and interests, and an opportunity to protect

1 *Native Title Act 1993* (Cth) preamble.

2 Australian Government, *Mabo: The High Court Decision on Native Title* (Discussion Paper, June 1993) Appendix [17]. See also Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Native Title Report 1998* (1998) 3.

3 *Commonwealth v Yunupingu on behalf of the Gumatj Clan or Estate Group* (2025) 421 ALR 604 [138].

4 *FMG Pilbara Pty Ltd v Cox* (2009) 175 FCR 141 [18], citing *Smith on behalf of the Gnaala Karla Booja People v Western Australia* (2001) 108 FCR 442 [23].

those rights and interests through negotiations. An ability to protect native title rights and interests is necessary to ensure that native title parties are able to 'enjoy fully their rights and interests'.⁵ As the Australian Government noted in 1993, negotiations

should be aimed at undertaking mutually acceptable arrangements under which the interests of those wishing to use the land are reconciled with the interests of the native title holder.⁶

9.9 The right to negotiate also provides an opportunity for native title parties to share in the benefits of development on native title land and waters. As the Australian Government observed when considering reforms to the right to negotiate in 1996,

profit sharing arrangements, employment opportunities or other social or infrastructure benefits ... were intended to flow to native title holders and their communities from the right to negotiate process.⁷

9.10 The High Court has acknowledged that through the right to negotiate, the *NTA* has given native title an 'economic as well as a spiritual and physical dimension' and established a procedural right 'of economic value'.⁸ This economic dimension stands apart from the general entitlement to compensation for the effects of future acts on native title rights and interests. As a result, when negotiations occur under the right to negotiate, parties are generally not 'attempting to agree the "value" of the land or the likely compensation' that may be payable in relation to a future act, but they are 'negotiating the terms upon which [native title parties] are prepared to give their statutory right of consent to the proposed future act'.⁹ This often means that although payments or other benefits agreed between parties are often characterised as 'compensation', they may contain both compensatory and non-compensatory components that are not distinguished from each other.¹⁰

9.11 While the focus of the right to negotiate is facilitating agreement, the *NTA* recognises that agreement about future acts may not always be reached and provides for arbitration by an independent arbitral body. Presently, that independent body is the NNTT, unless an alternative state or territory regime is in place.¹¹ The NNTT must pursue the objective of carrying out its functions, including arbitration, in a 'fair, just, economical, informal and prompt way'.¹²

5 *Native Title Act 1993* (Cth) preamble.

6 Australian Government (n 2) [7.3].

7 Department of the Prime Minister and Cabinet (Cth), *Towards a More Workable Native Title Act: An Outline of Proposed Amendments* (Outline Paper, May 1996) [28].

8 *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595, 644 (McHugh J), 668 (Kirby J).

9 Chris Humphry, 'Compensation for Native Title: The Theory and the Reality' (1998) 5(1) *Murdoch University Electronic Journal of Law* 2 [50]–[51].

10 See, eg, JC Altman and DP Pollack, *Native Title Compensation: Historic and Policy Perspectives for an Effective and Fair Regime* (Discussion Paper No 152/1998, Centre for Aboriginal Economic Policy Research, Australian National University, 1998) 1.

11 *Native Title Act 1993* (Cth) s 27.

12 *Ibid* s 109.

9.12 Arbitration provides a means for determining whether future acts can be done in the absence of agreement between the parties by applying the test in s 39 of the *NTA*. In broad terms, this test sets out the criteria that the arbitral body is to consider when determining whether a future act can be done, including subject to conditions.¹³ Where it is determined that a future act can be done subject to conditions, the arbitrated outcome and conditions effectively take the place of an agreement between the negotiation parties. This is because determined conditions take effect as if they were ‘terms of a contract among the negotiation parties’.¹⁴

Why reform the right to negotiate

9.13 Most relevantly, the Terms of Reference for this Inquiry ask the ALRC to consider reforms that would:

- ‘support fair negotiations and encourage proponents and native title groups to work collaboratively in relation to future acts’;
- rectify ‘any inefficacy, inequality or unfairness’ in the future acts regime;
- identify ‘options to support native title groups, project proponents and governments to share in the benefits of development on native title land, including opportunities for native title groups to lead or co-lead development’; and
- reflect ‘the rights and obligations recognised in the international instruments to which Australia is a party or which it has pledged to support, including the United Nations Declaration on the Rights of Indigenous Peoples’.

9.14 We have also been asked to conduct the Inquiry with regard to the Socio-economic Outcomes and Priority Reforms of the National Agreement on Closing the Gap. The reforms in this chapter and **Chapter 10** further efforts to achieve strong economic participation and development of people and their communities (Target 8) and to ensure Aboriginal and Torres Strait Islander peoples maintain a distinctive cultural, spiritual, physical, and economic relationship with their land and waters (Target 15).

9.15 During this Inquiry, we have heard that several aspects of the right to negotiate place native title parties in a disadvantageous bargaining position relative to other parties,¹⁵ with the consequence that negotiations are not always fair and outcomes not always equitable. Many of the reforms in this chapter are aimed at addressing these sources of inequality and unfairness, with the goal of supporting fair negotiations and equitable agreements. This goal aligns with the preamble to the *NTA*, which requires reasonable efforts to be made to secure the agreement of the native title parties. Fairer negotiations and equitable agreements also further

13 Ibid s 38(1).

14 Ibid s 41(1).

15 See, eg, MPS Law, *Submission 17*; Kimberley Land Council, *Submission 26*; Central Land Council, *Submission 31*; Law Council of Australia, *Submission 47*. Cf Minerals Council of Australia, *Submission 113*.

the goal of ensuring strong economic participation for First Nations people, which is in line with socio-economic Target 8 of the National Agreement on Closing the Gap.

9.16 The following parts discuss specific feedback from submissions and consultations about different aspects of the right to negotiate process. At a high level, the general themes that we have heard about include:

- The minimum negotiation period is too short, and the prospect of a future act determination application being available after six months does not facilitate fair negotiations and equitable agreements.¹⁶
- The criteria for deciding future act determination applications do not appropriately balance the interests of native title parties against the interests of proponents and government parties when it comes to deciding whether future acts should proceed in the absence of agreement between the parties.¹⁷
- The prohibition on the NNTT determining financial conditions places native title parties in a position of diminished bargaining power during negotiations and it can prevent the NNTT from determining terms and conditions that are fair and reasonable.¹⁸
- The quality of negotiations could be improved and more assistance made available to parties to support them in reaching agreement about future acts.¹⁹

Reformed right to negotiate in overview

Recommendation 60

The provisions of Part 2 Division 3 Subdivision P of the *Native Title Act 1993* (Cth) that comprise the right to negotiate be amended to create a process which operates as follows:

- a. The negotiation parties must negotiate in accordance with the good faith conduct standard outlined in Recommendations 1 and 2.

16 See, eg, Kimberley Land Council, *Submission 26*; First Nations Legal and Research Services, *Submission 42*; Law Council of Australia, *Submission 47*.

17 Australian Law Reform Commission, *Review of the Future Acts Regime* (Discussion Paper No 88, 2025) [217].

18 *Ibid* [231].

19 See, eg, North Queensland Land Council, *Submission 96*; Western Australian Government, *Submission 115*; Northern Territory Government, *Submission 149*. Some submissions indicated support for native title parties' negotiation costs being contributed to by proponents or government parties: see Kimberley Land Council, *Submission 26*; Houston Legal & Consultants, *Submission 95*; Yamatji Marlpa Aboriginal Corporation, *Submission 148*. This is discussed further in [Chapter 3](#).

- b. After three months have elapsed since the notification day of a future act, a native title party may apply to the National Native Title Tribunal seeking a determination that the future act cannot be done (see Recommendation 69). If the Tribunal does not determine that the future act cannot be done, the parties must continue to negotiate in accordance with the good faith conduct standard outlined in Recommendations 1 and 2.
- c. At any stage, the negotiation parties may jointly seek a binding determination of issues referred to the National Native Title Tribunal, or an independent third party, during negotiations (see Recommendation 64). The time between the referral and determination of the separate question should not count towards the minimum negotiation period. The parties may also access Tribunal facilitation services (conferences, mediation, and conciliation) throughout agreement negotiations (see Recommendations 4 and 61).
- d. If the parties reach agreement, the agreement would be formalised in the same manner as agreements presently made under section 31 of the *Native Title Act 1993* (Cth).
- e. If the parties do not reach agreement within 12 months of the notification day of a future act, any party may apply to the National Native Title Tribunal, or another independent third party agreed between the negotiation parties (see Recommendation 72), for a determination as to whether the future act can be done (see Recommendation 65).
- f. If the National Native Title Tribunal or other independent third party determines that the future act can be done subject to conditions, it may determine both financial and non-financial conditions (see Recommendations 66 and 67).

9.17 The ALRC's recommendations retain the fundamental character of the right to negotiate as a process based on notice, good faith negotiations, and arbitration if agreement cannot be reached.

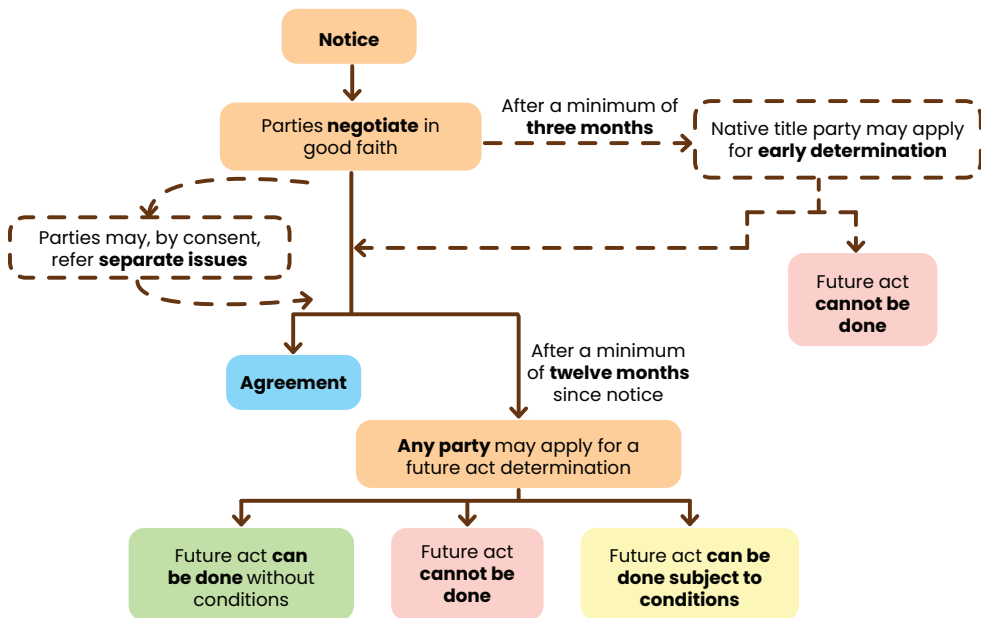
9.18 **Recommendation 60** summarises the reformed right to negotiate process. Other specific recommendations are directed at different aspects of the process. In summary, the reformed right to negotiate would consist of the following elements:

- A requirement to negotiate in good faith, in accordance with the conduct standard outlined in **Recommendations 1** and **2** and discussed in **Chapter 3**.
- An early determination procedure, which would enable a native title party to apply to the NNTT to determine, on a summary basis, whether the future act cannot be done or whether the parties must continue to negotiate (see **Recommendation 69**). This is discussed further in **Chapter 10**.

- An option for parties to refer separate issues for resolution by the NNTT or an independent third party during the course of negotiations (see [Recommendation 64](#)).
- A minimum negotiation period of 12 months before a future act determination application may be made.
- A reformed test for determining future act determination applications (see [Recommendation 65](#)). This is discussed further in [Chapter 10](#).
- An ability for the NNTT to determine financial conditions including of the benefit-sharing kind currently precluded by s 38(2) of the *NTA*, and general guidance about determining both financial and non-financial conditions (see [Recommendations 66](#) and [67](#)). These are discussed further in [Chapter 10](#).
- An option for the parties to agree to a future act determination application being determined by consent arbitration conducted by an agreed arbitrator (see [Recommendation 72](#)). This is discussed further in [Chapter 10](#).

9.19 [Figure 9.1](#) illustrates how the reformed right to negotiate process would operate.

Figure 9.1: The reformed right to negotiate process



Minimum timeframe for negotiations

9.20 Implementing **Recommendation 60** would extend the minimum period during which parties must negotiate in good faith before a non-native title party can seek a future act determination from six months to 12 months. The goal of this reform is to set a realistic minimum negotiation period that facilitates good faith negotiation between the parties.

9.21 We have consistently heard that the current six-month minimum negotiation period is too short, and that this undermines the effectiveness of the right to negotiate process.²⁰ Six months is not enough time for meaningful negotiations to occur, particularly in remote areas and in areas where seasonal changes may make it difficult to arrange meetings at particular times of the year.²¹ Representatives of native title parties have explained that the six-month minimum negotiation period can mean that negotiations feel rushed, and that native title parties may feel pressured into agreeing to terms that they consider to be unreasonable.²² The Central Land Council explained in its submission that in

Central Australia, with weather conditions and ceremony obligations, meetings generally cannot be held between November and March. With the remoteness of certain locations, proponents often do not appreciate the logistical efforts involved in organising an authorisation meeting and often request that meetings be held in too short a timeframe.²³

9.22 The submission continued by observing that

proponents have previously used the threat of seeking a determination at the NNTT to rush the negotiation process and force native title holders to consider and accept terms that they feel are unreasonable. This is an ever-present reality of negotiations under the right to negotiate. Native title holders are placed in an invidious position where they may prefer not to consent to a project but knowing that failure to consent will likely not prevent a project from proceeding with no benefits given to native title holders.²⁴

9.23 Similarly, the Law Council of Australia observed that

the timeframe in which parties are required to come to an agreement is often too short for genuine consultation and negotiation to occur, and may result in parties rushing into an inequitable agreement. This is particularly the case when considering that the alternative is for matters to be heard by the NNTT, which, perhaps due to the constraints of the legislative framework, has historically found in favour of future acts being allowed to proceed. As a result, parties may

20 Kimberley Land Council, *Submission 26*; First Nations Legal and Research Services, *Submission 42*; Law Council of Australia, *Submission 47*.

21 Kimberley Land Council, *Submission 26*; Central Land Council, *Submission 31*.

22 First Nations Legal and Research Services, *Submission 42*; Law Council of Australia, *Submission 47*.

23 Central Land Council, *Submission 31*.

24 Ibid.

therefore feel pressured to accede to negotiations, perhaps with unfair terms, prior to the six-month deadline.²⁵

9.24 The State of Queensland summarised the need for reform in its submission, observing that the

six month time period to allow parties to negotiate an agreement before being able to seek a determination from the NNTT is insufficient. This time period should be extended to enable a sufficient and reasonable period for negotiations. Such a measure would assist in removing pressure on parties to reach agreement in the currently short timeframe, and time to negotiate a fair agreement.²⁶

9.25 The pressurised negotiation environment and resulting unfair agreements caused by the short negotiation period also undermines the socio-economic targets and outcomes in the National Agreement on Closing the Gap, noted above at paragraph [9.14].

9.26 The problems posed by the short minimum timeframe are compounded by the effect of the decision in *FMG Pilbara Pty Ltd v Cox*, in which the Full Court of the Federal Court held that the NTA does not require negotiations to have progressed past an 'embryonic' stage before a party can seek a future act determination from the NNTT.²⁷ In that case, the court held that the statutory scheme simply required that negotiations had been carried out in good faith, and that a period of no less than six months had passed since the future act was notified.²⁸ As outlined in [Chapter 3](#), there was particular criticism of the obligation to negotiate in good faith following this decision of the court, on the basis that it could enable parties to apply for a future act determination without undertaking any substantive negotiations about the future act.

9.27 In the Discussion Paper, the ALRC sought feedback on a minimum negotiation period of 18 months.²⁹ Some submissions supported this proposal.³⁰ Others indicated support for an extension to twelve months, or another period.³¹

9.28 In general, industry, some state and territory governments, and statutory authorities were not supportive of an 18-month minimum negotiation period.³² The main concern was that such an extended period would result in delays and inefficiencies. The Western Australian Government explained in its submission that

by requiring a longer minimum negotiation period, the proposal risks significant delays for the mining and exploration sector, particularly in circumstances where

25 Law Council of Australia, *Submission 47*.

26 State of Queensland, *Submission 43*.

27 *FMG Pilbara Pty Ltd v Cox* (2009) 175 FCR 141 [23], [27], [29].

28 *Ibid* [21].

29 Australian Law Reform Commission (n 17) proposal 6.

30 See, eg, M Lucas, *Submission 57*; First Nations Legal and Research Services, *Submission 146*; Kimberley Land Council, *Submission 151*; State of Queensland, *Submission 152*.

31 See, eg, Mabo Centre and National Native Title Council, *Submission 130*.

32 See, eg, Queensland Small Miners Council, *Submission 105*; Western Australian Government, *Submission 115*; Bureau of Meteorology, *Submission 123*; Northern Territory Government, *Submission 149*.

the inability to reach agreement is unconnected to the impact of the future act on native title rights and interests, or where a determination is required because parties have been unable to meet the formal requirements of a section 31 agreement.³³

Previous attempts at reform

9.29 Previous attempts to reform the right to negotiate process have considered extending the minimum negotiation period.³⁴ In 2011, the Senate Legal and Constitutional Affairs Legislation Committee considered the Native Title Amendment (Reform) Bill 2011, a private member's Bill, which would have required parties to negotiate in good faith for a period of at least six months and to use all reasonable efforts to come to an agreement.³⁵ The Explanatory Memorandum for the 2011 Bill noted that these reforms were intended to reverse the effects of *FMG Pilbara Pty Ltd v Cox*.³⁶ The proposed reform was generally supported by the native title sector.³⁷ The Senate Committee did not recommend that the Senate pass the Bill.³⁸

9.30 In 2013, the Senate Legal and Constitutional Affairs Legislation Committee supported an amendment to s 35(1)(a) of the *NTA* that would have extended the negotiation period from six to eight months.³⁹ This reform received support from the native title sector.⁴⁰ Many of these submissions noted that an extension alone would not solve the problem, and also supported the proposed introduction of a new s 31A, which would have set out good faith criteria that negotiating parties would have

33 Western Australian Government, *Submission 115*.

34 See, eg, Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Native Title Amendment Bill 2012 [Provisions]* (2013) [2.19], [3.42]–[3.46]. See also Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Native Title Report 2009* (Report No 2/2010, 2010) 106–7; National Native Title Council, *Realising the Promise of Native Title: A National Native Title Council Position Paper* (2019) 2.

35 Native Title Amendment (Reform) Bill 2011 (Cth) cls 5, 6.

36 Explanatory Memorandum, Native Title Amendment (Reform) Bill 2011 (Cth) [12].

37 A large number of submissions expressed support, including Australians for Native Title and Reconciliation, Submission No 6 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011* (July 2011); National Native Title Council, Submission No 14 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*; Law Council of Australia, Submission No 21 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011* (5 August 2011).

38 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Native Title Amendment (Reform) Bill 2011* (2011) rec 1.

39 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia (n 34).

40 See, eg, Agreements, Treaties and Negotiated Settlements Project, Submission No 12 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into Native Title Amendment Bill 2012* (31 January 2013); Australians for Native Title and Reconciliation, Submission No 19 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into Native Title Amendment Bill 2012* (January 2013); Central Desert Native Title Services, Submission No 23 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into Native Title Amendment Bill 2012* (31 January 2013).

had to establish before seeking a future act determination.⁴¹ The Bill lapsed at the dissolution of the 43rd Parliament.

How long do negotiations usually take?

9.31 Some submissions to this Inquiry, as well as submissions to previous inquiries, referenced average and median negotiation periods.⁴² Some cited statistics to support arguments for extending the negotiation period.⁴³ For example, Dr Lucas said in his submission that

the extended timeframes acknowledge that the current six-month period is insufficient for fair negotiations, particularly given the resource constraints facing most PBCs and that the median time to reach agreement is approximately two years.⁴⁴

9.32 Others have suggested that this is evidence that the six-month period works well.⁴⁵

9.33 The ALRC has analysed the publicly available datasets that record information about future act notices, future act determinations, and section 31 agreements.⁴⁶ Similar analysis was published by Lucas in his 2024 paper,⁴⁷ with further detail available in his PhD thesis and submissions to this Inquiry.⁴⁸ Lucas's analysis was current to 6 November 2023. The ALRC's analysis is current to 31 January 2026.

41 See, eg, Australian Human Rights Commission, Submission No 3 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into Native Title Amendment Bill 2012* (25 January 2013); Yamatji Marlpa Aboriginal Corporation, Submission No 9 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into Native Title Amendment Bill 2012* (31 January 2013); Goldfields Land and Sea Council Aboriginal Corporation (Representative Body), Submission No 11 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into Native Title Amendment Bill 2012* (January 2013); Carpentaria Land Council Aboriginal Corporation, Submission No 15 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into Native Title Amendment Bill 2012* (January 2013); National Congress of Australia's First Peoples, Submission No 24 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into Native Title Amendment Bill 2012* (February 2013).

42 See, eg, M Lucas, *Submission 57*; Minerals Council of Australia, Submission No 13 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into Native Title Amendment Bill 2012* (January 2013).

43 M Lucas, *Submission 57*.

44 Ibid. See also Michael Lucas, 'The Future Act Regime in Australian Native Title: Data Analysis, Trends, and Insights' (2024) 51(2) *University of Western Australia Law Review* 248; Michael Lucas, 'Governing the Gap: Data-Driven Insights for Reforming Native Title Corporations and Indigenous Development' (PhD Thesis, University of Arizona, 2024); M Lucas, *Submission 7*.

45 See, eg, Minerals Council of Australia (n 42).

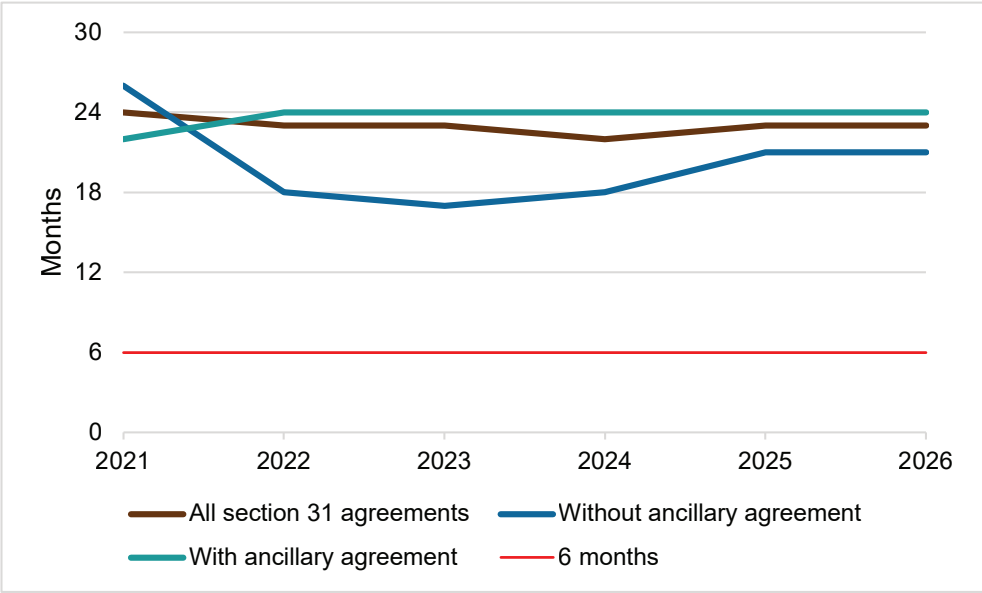
46 National Native Title Tribunal, 'Data Downloads' <www.nntt.gov.au/assistance/Geospatial/Pages/DataDownload.aspx>.

47 Lucas, 'The Future Act Regime in Australian Native Title: Data Analysis, Trends, and Insights' (n 44).

48 Lucas, 'Governing the Gap: Data-Driven Insights for Reforming Native Title Corporations and Indigenous Development' (n 44); M Lucas, *Submission 7*; M Lucas, *Submission 57*.

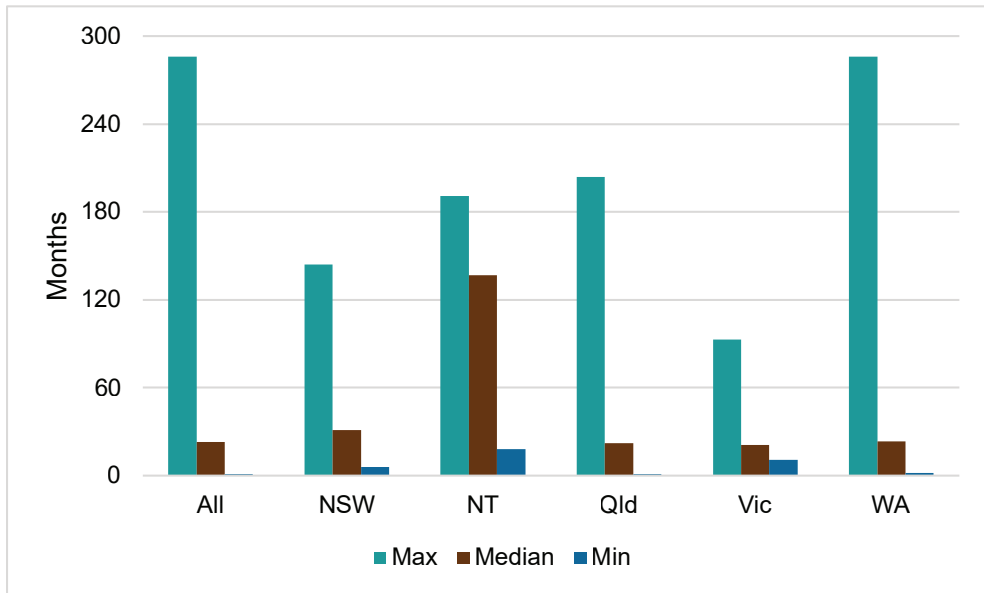
9.34 The ALRC’s analysis of section 31 agreements indicates that the median time between a future act being notified and a section 31 agreement commencing is approximately two years (see Table A in [Appendix E](#)).⁴⁹ This figure has remained relatively consistent since 25 March 2021 when the NNTT began recording information about section 31 agreements. There is some difference between the median time to reach agreement where there is a written ancillary agreement, but this is not a statistically significant difference (see [Figure 9.2](#) below and Table B in [Appendix E](#)). In most jurisdictions in Australia where the right to negotiate operates, there is at least one section 31 agreement that took more than 10 years to negotiate (see [Figure 9.3](#) below and Table B in [Appendix E](#)).

Figure 9.2: Median number of months between future act notification date and section 31 agreement start date (21 March 2021 to 31 January 2026)



49 This figure is consistent with analysis by Lucas: see Lucas, ‘The Future Act Regime in Australian Native Title: Data Analysis, Trends, and Insights’ (n 44) 265.

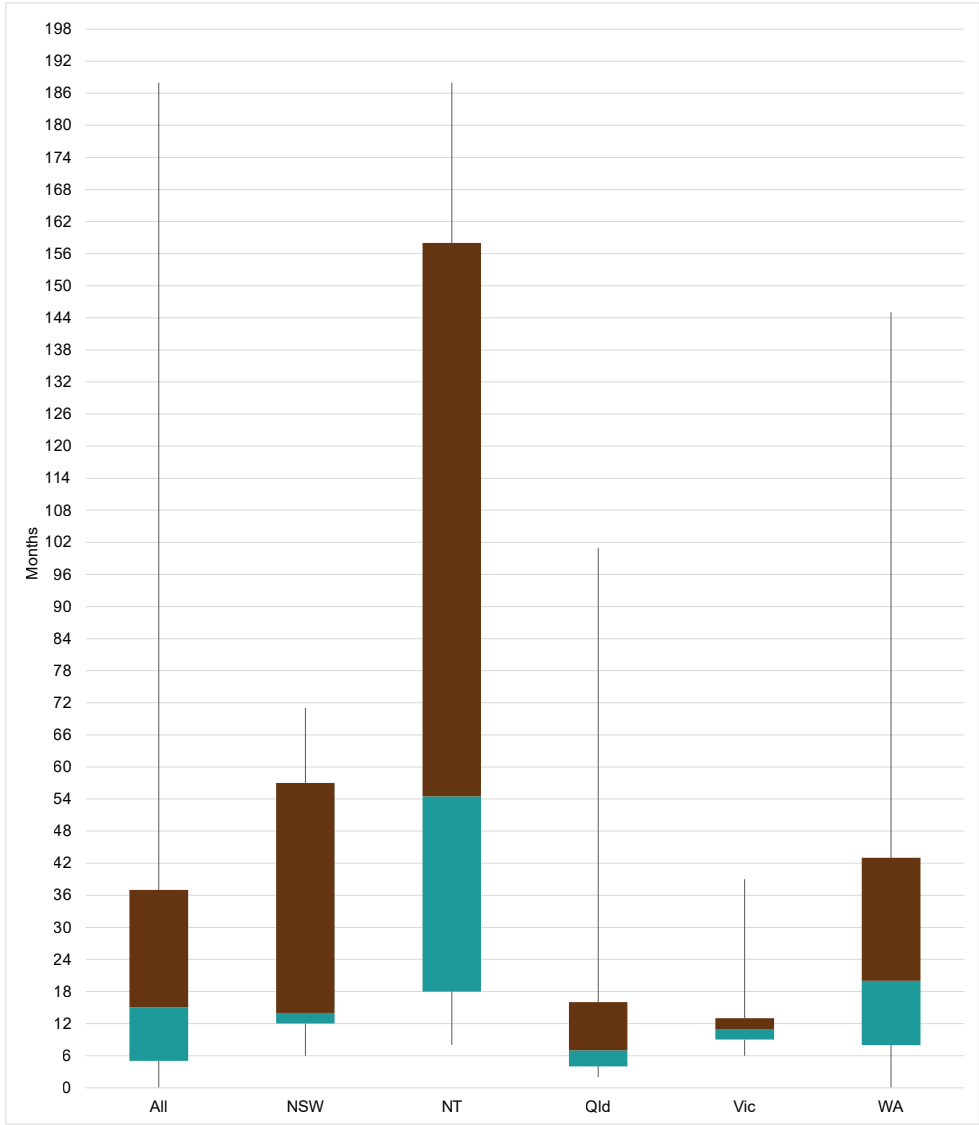
Figure 9.3: Number of months between future act notification date and section 31 agreement start date in jurisdictions where the right to negotiate operates (21 March 2021 to 31 January 2026)



9.35 The ALRC's analysis of future act notices and future act determinations indicates that the median time between a future act notice being issued and a future act determination application being lodged is approximately 21 months (Table C in **Appendix E**). This figure includes the six-month negotiation period, meaning that parties generally do not apply for a future act determination until 15 months after the six-month negotiation period. In the past five years, the median time between a future act notice being issued and a future act determination application being lodged has increased to 35 months (29 months after the six-month negotiation period) (see Table D in **Appendix E**).

9.36 In the majority of jurisdictions where the right to negotiate operates, approximately 75% of future act determinations are not lodged until at least six months has elapsed after the six-month negotiation period (see **Figure 9.4** below). A very small number of future act determinations (3%) are lodged within one week of the six-month period ending (see Table E in **Appendix E**).

Figure 9.4: Months from end of six-month negotiation period to future act determination application lodged⁵⁰



50 In this chart, the line at the bottom of each 'box and whisker plot' represents the lowest 25% of values (that is, the minimum to the first quartile). The lower aqua box represents the next 25% of values (that is, from the first quartile to the median value). The upper brown box represents the next 25% of values (that is, from the median to the third quartile). The upper line represents the next 25% of values (that is, from the third quartile to the maximum value). This means that we can say that 50% of future act determination applications in all jurisdictions are lodged more than six months after the minimum negotiation period ends. We can also say that almost 75% of future act determination applications are lodged more than six months after the minimum negotiation period ends.

9.37 This analysis is intended to be illustrative only. A variety of factors may influence the duration of negotiations, such as: the complexity of the proposed project; the location of the negotiating parties, particularly whether parties are in remote locations; any existing relationship between the parties; the effects of wet and dry seasons — as well as the COVID-19 pandemic — on parties' ability to travel to meet; and the parties' familiarity with the future acts regime and right to negotiate process.

9.38 There are also several limitations to consider when drawing conclusions from the statistical analysis. This analysis measured the negotiation period as commencing on the notification date and as ending on the 'start date' of the section 31 agreement. However, parties with a pre-existing relationship may have commenced negotiations before a future act notice was issued, and therefore may appear to have negotiated for a relatively brief period if the negotiation period is measured from the date the future act notice was issued. The notification date is not necessarily the same as the date that the parties were *notified* of the future act, and may not be the same as the date that the future act notice was actually issued. Another limitation is that the section 31 agreement register has only been kept since 2021, and therefore it is not possible to analyse trends in agreement-making over time. A further limitation is that the ALRC's analysis has not considered which section 31 agreements were entered into after a future act determination application was lodged with the NNTT. Similarly, the ALRC's analysis does not identify future act determination applications that were made in circumstances where the parties had reached substantive agreement, but were not able to execute the agreement. Finally, the ALRC has not excluded from this dataset any time that the parties may have spent engaging with the expedited procedure objection process, where relevant.

9.39 With those caveats, the data indicates the following:

- Negotiating a section 31 agreement usually takes around two years.
- Most parties do not lodge a future act determination application for at least six months after the minimum negotiation period has passed, but some parties lodge future act determination applications soon after the six-month negotiation period ends.

A 12-month negotiation period

9.40 **Recommendation 60** would extend the six-month minimum negotiation period to 12 months. This is a shorter extension than the 18-month negotiation period contemplated in the Discussion Paper. However, for the reasons that follow, 12 months is recommended as an appropriate minimum negotiation period.

9.41 In recommending a 12-month negotiation period, we have considered the policy intent of the right to negotiate process, the need to encourage active engagement in negotiations, the realities of negotiations, and the feedback we received in response to the Discussion Paper.

9.42 Setting a minimum negotiation period reflects the importance of process certainty in the right to negotiate process. It ensures that there is a degree of structure to the process, which would be absent if the *NTA* prescribed no minimum timeframe. More than just providing process certainty, a minimum timeframe, combined with an obligation to negotiate in good faith, encourages the parties to actively negotiate. Incentivising good faith negotiations between parties is in line with the purpose of the *NTA* and the Socio-economic Targets and Outcomes of the National Agreement on Closing the Gap (see above at paragraph [\[9.14\]](#)).

9.43 However, the policy intent of providing process certainty and encouraging active negotiations will be compromised if the minimum negotiation period is not set by reference to the time reasonably required to negotiate a section 31 agreement. If, as the analysis above shows, negotiating a section 31 agreement usually takes around two years, the six-month minimum negotiating period which currently applies is an unrealistic timeframe to negotiate a section 31 agreement.

9.44 Any extension to the statutory minimum timeframe must be realistic. Setting the minimum period too high would also undermine the utility of having a minimum period because it could incentivise parties to focus on compliance (that is, waiting until the period has ended), rather than genuine engagement. A focus on strict compliance would fail to achieve the goal of the reforms in this chapter: that is, to effect positive behaviour change and incentivise good faith negotiations between parties.

9.45 A 12-month minimum negotiation period takes account of the practical realities of negotiating section 31 agreements. As the data analysis in this chapter demonstrates, a 12-month negotiation period may not significantly affect most proponents' ordinary practice, as most applicants do not lodge a future act determination until at least 12 months after a future act is notified. It would, however, affect the behaviour of the minority of parties who lodge a future act determination shortly after the six-month negotiation period ends.

9.46 Twelve months strikes a balance between the views expressed by some that an extended negotiation period may result in delays and additional costs, and the evidence the ALRC has heard that the current six-month negotiation period creates a pressurised environment for native title parties. It reflects the policy intent of the right to negotiate process as designed to ensure fair negotiations and facilitate equitable agreements.

9.47 Extending the current minimum negotiation period enhances another policy intent of the right to negotiate process by providing native title parties with an opportunity to protect their interests, and negotiate fair and equitable benefit-sharing arrangements. Additionally, it provides proponents and government parties with greater process certainty.

9.48 The extended negotiation period is one element of a package of reforms to the right to negotiate process. Taken together with other reforms — specifically, the removal of the prohibition in s 38(2) (see [Recommendation 67](#)), the amended

decision-making criteria (see [Recommendation 65](#)), negotiation conduct standards (see [Recommendations 1–3](#)), and adequate resourcing for PBCs (see [Recommendation 84](#)) — this reform is intended to create a process that supports fair negotiations and creates better conditions for reaching fair and equitable agreements.

Good faith negotiations

Recommendation 61

In exercising the functions referred to at Recommendation 4, the National Native Title Tribunal should have access to the case management functions of conferences, mediation, and conciliation in relation to negotiations under section 31 of the *Native Title Act 1993* (Cth). These functions may be accessed in the following ways:

- a. Prior to a future act determination application being made, any party may request the Tribunal's assistance by way of conferences, mediation, or conciliation, and the Tribunal may, at its discretion, direct attendance of some or all of the negotiation parties and direct the type of assistance to be provided to the parties.
- b. Following the making of a future act determination application, the National Native Title Tribunal may, upon a party's request or on the Tribunal's own motion, compel the attendance of some or all of the negotiating parties at a conference, mediation, or conciliation.
- c. In any conciliation in relation to negotiations under section 31 of the *Native Title Act 1993* (Cth), the National Native Title Tribunal may make recommendations either in writing or informally about steps that negotiation parties should take towards meeting their obligations to negotiate in good faith.

Recommendation 62

Section 36 of the *Native Title Act 1993* (Cth) be amended to provide that where an allegation of failure to negotiate in good faith is raised by a negotiation party under s 31 of the Act, the negotiation party against whom the allegation has been raised must establish that it has negotiated in good faith.

Recommendation 63

The *Native Title Act 1993* (Cth) be amended to provide that, if the National Native Title Tribunal is satisfied, pursuant to s 36(2) of the Act, that a negotiation party has twice failed to negotiate in good faith with respect to a particular future act, the Tribunal may, in its discretion, relieve other negotiating parties of their obligation to further negotiate in relation to that future act.

9.49 As outlined in **Chapter 3**, the obligation to negotiate in good faith is not consistently resulting in productive negotiations nor, where necessary, improving poor negotiation conduct. It is therefore not achieving its key objective of protecting native title parties' interests in the right to negotiate process and not promoting agreement-making as effectively as it should. **Recommendations 61, 62, and 63** address these problems.

9.50 **Recommendations 61, 62, and 63** deal specifically with the obligation to negotiate in good faith under the right to negotiate. **Recommendation 61** aims to better support good faith negotiations — that is, ensuring that a greater number of negotiations under the right to negotiate are conducted in good faith, with the goal of facilitating agreement and avoiding arbitration wherever possible. **Recommendations 62 and 63** aim to align the NNTT's assessment of whether there has been good faith negotiation with the objective of the obligation to negotiate in good faith by ensuring the evidential burden sits with the appropriate party, and by providing options to the NNTT should there be multiple failures to negotiate in good faith.

9.51 These recommendations are intended to work alongside **Recommendations 1, 2, and 3** in **Chapter 3**, which aim to clarify expectations around what it means to negotiate in good faith. This suite of recommendations aims to lift the minimum standards of conduct in negotiations; clarify the obligations of negotiating parties; and under the right to negotiate, provide pathways to better encourage parties to negotiate in good faith with a view to reaching a fair and equitable agreement.

Current operation of good faith negotiations

9.52 The obligation to negotiate in good faith applies to all negotiation parties. Presently, if any negotiation party satisfies the NNTT that another negotiation party (other than the native title party) has failed to negotiate in good faith, then the NNTT does not have power to determine the future act determination application.⁵¹ In *Walley v Western Australia*, which interpreted the obligation to negotiate in good faith in the NTA as enacted,⁵² the Federal Court held that the obligation to negotiate in good faith was a condition precedent to the making of a future act determination application.⁵³

9.53 Section 36(2) in its current form was introduced into the NTA by the *Native Title Amendment Act 1998* (Cth). It provides that if any negotiation party satisfies the NNTT that any other negotiation party (other than a native title party) did not negotiate in good faith, then the NNTT 'must not' determine the future act determination

51 *Native Title Act 1993* (Cth) s 36(2). See also *FMG Pilbara Pty Ltd v Cox* (2009) 175 FCR 141 [10]–[11].

52 The NTA as originally enacted imposed the obligation only on the government party to 'negotiate in good faith with the native title parties and the grantee parties with a view to obtaining the agreement of the native title parties' to the doing of the future act: *Native Title Act 1993* (Cth) s 31(1)(b), as enacted.

53 *Walley v Western Australia* (1996) 67 FCR 366, 381–2.

application. This amendment was justified on the basis that the party applying for a future act determination should not be able to “sit on their hands” ... waiting to apply to the arbitral body’,⁵⁴ and further that

the arbitral body will only have to consider whether it has jurisdiction to make a determination if one of the parties raises the issue of whether one of the other parties did not negotiate in good faith. The exclusion of native title parties from this ensures that the arbitral body cannot be deprived of jurisdiction to make a determination just because the native title party (or one of the native title parties) failed to negotiate in good faith.⁵⁵

9.54 In *FMG Pilbara Pty Ltd v Cox*, the Full Court of the Federal Court described how the obligation to negotiate in good faith affects the NNTT’s ability to exercise its powers and highlighted that the allegation must, in fact, be raised for the NNTT to consider it:

the statutory prohibition at s 36(2) affects the ‘power’ of the Tribunal to make an arbitral determination rather than its ‘jurisdiction’. The prohibition on exercise of the power only arises when the good faith point is both taken and taken successfully by a negotiation party. If there were no good faith but the point were not taken, the Tribunal would still have jurisdiction and power.⁵⁶

9.55 While the *NTA* is silent on which party must prove negotiations have been in good faith, the ALRC understands that in practice, it is generally the native title party that raises whether there has been a failure to negotiate in good faith.⁵⁷ In practical terms, s 36(2) of the *NTA* has been interpreted as placing the evidentiary burden on the party alleging that there has been a failure to negotiate in good faith. In *Gulliver Pty Ltd v Western Lands Aboriginal Corporation*, Deputy President Sumner observed that

the Tribunal has said that the practical effect of s 36(2) is to place an ‘evidential burden’ on the party alleging lack of good faith negotiations which would normally require it to produce evidence to support its allegations. The Tribunal is not required to adopt strict rules on burden of proof but any party alleging a lack of good faith negotiations must provide contentions and documents which specify in detail the matters it relies on.⁵⁸

54 Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) [20.48].

55 Supplementary Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) [No 2] 25–6.

56 *FMG Pilbara Pty Ltd v Cox* (2009) 175 FCR 141 [11], cited with approval in *Gomerioi People v Santos NSW Pty Ltd* (2024) 303 FCR 153 [81] (Mortimer CJ).

57 See, eg, Minerals Council of Australia (n 42).

58 *Gulliver Pty Ltd v Western Desert Lands Aboriginal Corporation* (2005) 196 FLR 52 [10] (citations omitted), cited with approval in *Eureka Petroleum Pty Ltd and Bularnu Waluwarra Wangkayujuru Aboriginal Corporation RNTBC* [2022] NNTTA 3 [22]. See also *Dempster on behalf of Southern Noongar Families/Bayside Abalone Farms Pty Ltd; WA Abalone Farming Pty Ltd/Western Australia* [1999] NNTTA 235, 4; *Placer (Granny Smith) Pty Ltd v Western Australia* (1999) 163 FLR 87 [28]. Section 36(2) of the *NTA* has been described as ‘tantamount to a presumption that negotiation in good faith has occurred’: Richard Bartlett, *Native Title in Australia* (LexisNexis, 5th ed, 2023) 650.

9.56 Under s 36(2), where the NNTT makes a finding that it is satisfied that a negotiation party (other than a native title party) has not negotiated in good faith, the only possible outcome is that the NNTT must not decide the future act determination application.

9.57 All parties' conduct is relevant in the NNTT's assessment of whether the obligation to negotiate in good faith has been met, which must be a 'contextual evaluation' taking into account the particular negotiation parties.⁵⁹ The NNTT has explained:

The approach taken by one party is normally influenced by the approach taken by, or the conduct and actions of, another. The obligation to negotiate in good faith applies to all parties, so the Tribunal will not ignore the relevant actions of others when assessing the negotiation conduct of the party being challenged.⁶⁰

9.58 This means that a refusal or failure of any party (including the native title party) to negotiate in good faith will not prevent another party being able to demonstrate that it has negotiated in good faith.⁶¹

9.59 The Federal Court has held that the obligation to negotiate in good faith is not 'explicitly subject to any particular point in time or cut-off date'.⁶² As such, while there is no obligation to continue to negotiate after a future act determination is lodged, further negotiations are not prevented by the *NTA*, and so the obligation to negotiate in good faith continues to apply to any negotiations that occur after a future act determination application is made.⁶³

Effectively promoting good faith negotiations

9.60 The ALRC considers that there is no need to change the operation of good faith as a limit on the NNTT's power to determine a future act determination application. Consistent with the underlying policy rationale, the NNTT should only exercise its power to make a determination — in the absence of agreement between the parties — where the parties have attempted, in good faith, to negotiate an agreement about the doing of a future act.

9.61 The problem that **Recommendation 61** is directed to is the lack of available avenues for negotiation parties to access assistance from the NNTT that encourages

59 *Xstrata Coal Queensland Pty Ltd/Mark Albury (Karingbal #2); Brendan Wyman (Bidjara People)/Queensland* [2012] NNTTA 93 [65]. See also *Placer (Granny Smith) Pty Ltd v Western Australia* (1999) 163 FLR 87 [30].

60 *Xstrata Coal Queensland Pty Ltd/Mark Albury (Karingbal #2); Brendan Wyman (Bidjara People)/Queensland* [2012] NNTTA 93 [65].

61 *Placer (Granny Smith) Pty Ltd v Western Australia* (1999) 163 FLR 87 [30]. See, eg, *Minister for Lands (WA)/Marjorie May Strickland and Anne Joyce Nudding on behalf of the Maduwongga People/Brian and Dave Champion, Cadley and Dennis Sambo, George Wilson and Clem Donaldson for their respective (Gubrun) families/Dorothy Dimer, Ollan Dimer and Henry Richard Dimer on behalf of Mingarwee (Maduwongga) People* [1997] NNTTA 31, 12, 36–7.

62 *Charles v Sheffield Resources Ltd* (2017) 257 FCR 29 [56]–[71].

63 See also Bartlett (n 58) 639.

better compliance with good faith negotiation obligations, with a view to realising more fair and equitable agreements. Currently, aside from the ability to conduct mediation at the request of the parties,⁶⁴ the NNTT is not able to assess parties' conduct during negotiations. The NNTT is only able to make assessments about parties' conduct after a future act determination application has been made, when it considers whether it has the power to make a future act determination (and only in cases where an allegation of a failure to negotiate in good faith has been made by one of the parties). Providing the NNTT with the opportunity to intervene earlier in relation to the parties' conduct could enhance the NNTT's capacity to facilitate efficient good faith negotiations.

9.62 **Recommendation 61** seeks to proactively address deficiencies in good faith negotiations *during* negotiations, rather than problems only being brought before the NNTT once a future act determination application has been made. Dealing with deficiencies in good faith during negotiations may resolve issues with poor conduct earlier, which could save the parties time and resources and create a greater opportunity for the negotiation and finalisation of an agreement between the parties.

9.63 In negotiations under s 31 of the *NTA*, the NNTT must conduct mediation on request from the negotiation parties.⁶⁵ However, mediation does not necessarily encompass an ability for the NNTT to make recommendations about the kinds of things that the parties should do to progress negotiations or meet their obligations to negotiate in good faith.

9.64 The Terms of Reference ask the ALRC to consider the NNTT's role in relation to future acts. **Recommendation 61** would therefore expand the NNTT's ability to support parties negotiating agreements under the right to negotiate. It builds on **Recommendation 4** which recommends the NNTT should have a greater suite of functions than it presently has to support negotiation and agreement-making. This includes, relevantly, conciliation.⁶⁶ As discussed in **Chapter 3**, conciliation generally describes an informal conference between parties where the conciliator may take a role in providing advice, direction, and recommendations to the parties. Generally, conciliation is conducted on a without prejudice basis. By clarifying that the NNTT's functions include conciliation, the NNTT would have discretion to make recommendations to the parties about conduct to support good faith negotiations.

9.65 The benefit of the NNTT being able to make recommendations is that the NNTT, as an independent conciliator, can clarify what a party should do to comply with its obligation to negotiate in good faith. The NNTT's recommendations made during conciliation would not be determinative should the NNTT later be asked to decide, under s 36(2) of the *NTA*, whether a particular party has failed to negotiate

64 *Native Title Act 1993* (Cth) s 31(3).

65 *Ibid.*

66 **Recommendation 4** recommends that the functions available to the NNTT to assist parties in negotiating future act agreements, implementing agreements, and resolving disputes under agreements should include conferences, mediation, conciliation, and consent arbitration of disputes under a future act agreement.

in good faith, however, a failure to comply with the NNTT's recommendation could be taken into account.

9.66 **Recommendation 61** draws on the experience of conciliation conducted by the Fair Work Commission as part of its functions under the *Fair Work Act 2009* (Cth) ('*Fair Work Act*'). The Fair Work Commission, as part of its conciliation function, is able to make recommendations to the parties about their conduct with regard to the good faith bargaining requirements under s 228 of the *Fair Work Act*.⁶⁷ These recommendations focus on the process and not the outcome of negotiations. The Commission's recommendations are not formal orders and can be made in writing or orally to the parties.

9.67 The ALRC understands that conciliation is a useful tool to resolve disputes under the *Fair Work Act* and that parties are likely to abide by recommendations that the Commission makes. In particular, the ability to make recommendations as to parties' conduct leads to a greater degree of conciliated outcomes or withdrawn applications, rather than arbitrated outcomes. This, in turn, saves the parties time and money in no longer being required to prepare for and attend arbitration, as well as the NNTT's resources that may otherwise have been required for arbitration.

9.68 Informed by the success of conciliation and the associated ability to make recommendations in the *Fair Work Act* context, **Recommendation 61** proposes the implementation of a similar ability for the NNTT, as part of conciliation, to make recommendations to the parties about good faith conduct during negotiations.

9.69 **Recommendation 61** also outlines how the NNTT's assistance functions may be accessed during the right to negotiate process. Prior to a future act determination application being made, one or more parties may request the NNTT's assistance by way of conferences, mediation, or conciliation. The NNTT may, at its discretion, direct attendance of some or all of the other negotiation parties following receipt of this request. It would likely be beneficial for the NNTT to have the discretion to compel attendance of some or all negotiating parties where it has received a request from one party in order to best facilitate good faith negotiations and otherwise assist the parties in reaching agreement.

9.70 Following the making of a future act determination application, the NNTT would have an own motion power to compel the attendance of some or all of the negotiation parties at a conference, mediation, or conciliation. The NNTT's discretion should be broad, including as to which mode of assistance should be adopted. As is the case before a future act determination application is made, a party may also request that the NNTT provide assistance. In implementing this reform, consideration may be given to the appropriate consequences should a party refuse to attend a conference, mediation, or conciliation. **Recommendation 70**, discussed in **Chapter 10**, is

67 The Fair Work Commission has a power to deal with bargaining disputes in enterprise agreement bargaining on request of the parties including by mediation and conciliation, and by making a recommendation or expressing an opinion: *Fair Work Act 2009* (Cth) ss 240, 595.

intended to complement **Recommendation 61** by removing an impediment to the NNTT facilitating agreement after a future act determination application is made.

Establishing whether a party has negotiated in good faith

9.71 As outlined above, s 36(2) of the *NTA* provides that where a negotiation party satisfies the NNTT that another negotiation party (other than the native title party) has not negotiated in good faith, then the NNTT must not determine a future act determination application. The practical consequence of the current operation of s 36(2) is that native title parties, who are often the party to raise allegations that another party has failed to negotiate in good faith,⁶⁸ can bear a resourcing burden in having to prove that another party has failed to negotiate in good faith if they raise such an allegation.⁶⁹

9.72 The rationale for **Recommendation 62** is that future acts subject to the right to negotiate should not go ahead in the absence of a native title party's consent unless there has been a genuine and good faith attempt to negotiate an agreement for that consent. This furthers the intention of the right to negotiate process as one directed at protecting native title rights and interests, and supports the stated goal of the *NTA* that future acts proceed by agreement wherever possible. It fixes a source of unfairness in the regime, which is that currently, it is the party whose interests the good faith threshold in s 36(2) of the *NTA* is intended to protect that bears the evidentiary and resourcing burden of establishing a failure to negotiate in good faith. The ALRC's reforms aimed at clarifying good faith obligations and other reforms aimed at ensuring fair negotiations also decrease the prospect of good faith concerns being raised without merit, because the behaviour that demonstrates that a party has negotiated in good faith (and conversely, the conduct that demonstrates a failure to do so) will be clearer to all parties.

9.73 Implementing **Recommendation 62** would mean that once an allegation of failure to negotiate in good faith is raised by a negotiation party, the party against whom the allegation has been made must satisfy the NNTT that it has negotiated in good faith. It is not intended that an applicant for a future act determination would need to establish it has negotiated in good faith in every instance. As now, a negotiation party would first have to raise a failure to negotiate in good faith as an issue. That party should be required to particularise the allegation in order to set out at least a prima facie case to which the other party must respond. Once this prima facie case is set out, the party against whom the allegation has been made would bear the legal and evidentiary burden to satisfy the NNTT that it has negotiated in good faith. **Recommendation 62** would also still require all parties to make submissions and provide evidence in relation to any good faith allegations raised.

68 See, eg, Bartlett (n 58) 649; Yamatji Marpa Aboriginal Corporation (n 41); MPS Law, *Submission 17*.

69 See, eg, Yamatji Marpa Aboriginal Corporation (n 41). On the resources involved in good faith proceedings, see, eg, National Native Title Tribunal, *Native Title Amendment Bill 2012: Comments on Exposure Draft* (2012).

9.74 Under a reformed s 36, the NNTT would, as now, undertake a global assessment of the parties' conduct in deciding whether the party against whom an allegation of failure to negotiate in good faith has been made has, in fact, negotiated in good faith.⁷⁰

9.75 This means that if an allegation about the native title party's conduct is raised, then the native title party would, in line with **Recommendation 62**, bear the evidentiary burden of establishing that it has negotiated in good faith. However, the native title party's conduct must be understood in context: that is, that the native title party may not wish for the future act to be done. In such circumstances, the native title party should not be required to demonstrate a willingness to compromise on that position, and the NNTT should take these circumstances into account if good faith is in issue.

9.76 Though not the subject of a specific proposal in the Discussion Paper, some submissions to this Inquiry expressed support for shifting the onus of satisfying the NNTT that a party has negotiated in good faith.⁷¹ Submissions in relation to previous reform attempts that considered amending s 36 of the *NTA* to 'shift the onus' of proving good faith,⁷² such as the Senate Legislative and Constitutional Affairs Committee inquiry into the Native Title Amendment Bill 2012, have also expressed support for reform akin to **Recommendation 62**.⁷³ In the *Native Title Report 2009*, the Aboriginal and Torres Strait Islander Social Justice Commissioner recommended 'shifting the onus' on the basis that

shifting the onus onto the proponents of development, to positively show their good faith, is likely to alter their behaviour during negotiations and alleviate some of the current unfairness embedded in the right to negotiate process. It may improve the quality of the offers made by miners and discourage conduct such as bringing negotiations to an end mid-stream and seeking arbitration without notice to the native title parties.

Revisiting the onus of proof offers another means for improving the fairness of the right to negotiate procedure and is likely to encourage agreement-making.⁷⁴

70 See discussion at paragraphs [9.56]–[9.57].

71 See, eg, Australian Human Rights Commission, *Submission 48*; Central Land Council, *Submission 121*; P&E Law, *Submission 128*; NSW Bar Association, *Submission 140*; Yamatji Marlpa Aboriginal Corporation, *Submission 148*.

72 See, eg, Native Title Amendment (Reform) Bill 2011 (Cth) sch 1 cl 7; Native Title Amendment (Reform) Bill (No. 1) 2012 (Cth) sch 1 cl 7; Native Title Amendment Bill 2012 (Cth) sch 2 cl 8.

73 See, eg, Australian Human Rights Commission (n 41); Native Title Services Victoria, *Submission No 4* to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into Native Title Amendment Bill 2012* (January 2013); Yamatji Marlpa Aboriginal Corporation (n 41); Agreements, Treaties and Negotiated Settlements Project (n 40). See also Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission (n 34) rec 3.15.

74 Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission (n 34) 107.

9.77 Similarly, the explanatory memorandum to the Native Title Amendment Bill 2012 proposed amending s 36 on the basis that the proposed amendments would require

a party to positively show good faith will improve the quality of offers made by negotiating parties, discourage opportunistic conduct and encourage agreement-making.⁷⁵

Options available where there are multiple findings of failure to negotiate in good faith

9.78 Presently, where the NNTT is satisfied that a non-native title party has failed to negotiate in good faith then the only permitted outcome is that the NNTT must not determine the future act determination application. In practical terms, this means parties are required to continue to negotiate.

9.79 The NNTT has on three occasions been satisfied of a failure to negotiate in good faith by the same grantee party relating to the negotiations regarding the same future act twice (that is, six decisions of a failure to negotiate in good faith over three separate negotiations).⁷⁶ Despite the NNTT's finding of failure to negotiate in good faith twice in these cases, the native title parties had no option under the *NTA* to be excused from further negotiations.

9.80 These outcomes demonstrate a potential problem: native title parties may be required to continue to negotiate with a non-native title party that has on multiple occasions failed to negotiate in good faith, with no option for the native title party to otherwise exit the negotiations. This undermines the effectiveness of good faith as intended to protect the integrity of the right to negotiate process and may lead to resources being spent on otherwise futile negotiations.

9.81 **Recommendation 63** provides the NNTT discretion to determine, following a second finding under s 36(2) of the *NTA* that a party has not negotiated in good faith in relation to the same future act, that the other negotiation parties can be relieved of their obligation to negotiate.

9.82 The rationale for this recommendation is to incentivise negotiation parties to meet their good faith obligations by attaching consequences to a second finding of a failure to negotiate in good faith and to avoid imposing unreasonable burdens on native title parties. The recommended mechanism provides parties with the opportunity to correct their conduct following a first finding of a failure to negotiate in good faith. If, after further negotiations, the NNTT is again satisfied that the party has

⁷⁵ Explanatory Memorandum, Native Title Amendment Bill 2012 (Cth) [76].

⁷⁶ *Muccan Minerals Pty Ltd v Taylor on behalf of Njamal* [2014] NNTTA 74; *Muccan Minerals Pty Ltd v Taylor on behalf of Njamal* [2016] NNTTA 28; *Kevin Alfred De Roma v Western Yalanji Aboriginal Corporation RNTBC* [2022] NNTTA 40; *Western Yalanji Aboriginal Corporation RNTBC v Edmund James Fitzgerald* [2023] NNTTA 41; *John William Withers v Ewamian People Aboriginal Corporation RNTBC* [2023] NNTTA 34; *John William Withers v Ewamian People Aboriginal Corporation RNTBC* [2025] NNTTA 25.

failed to negotiate in good faith, then it would be open to the NNTT to determine that the other negotiation parties should not be required to continue to negotiate. This would ensure negotiation parties do not have to unnecessarily expend resources on negotiations that continue to not be conducted in good faith.

9.83 A matter for further consideration in implementing this recommendation is whether the *NTA* should be amended to require a negotiation party that has twice failed to negotiate in good faith to obtain the leave of the NNTT to recommence any negotiations about the same future act. Such a provision may support **Recommendation 63**.

9.84 **Recommendation 63** would not change the current operation of s 36(2) as a limit on the NNTT's power to make a future act determination.

9.85 As discussed above and in **Chapter 3**, while s 36(2) of the *NTA* provides that it is only non-native title parties against which the NNTT can make a finding of failure to negotiate in good faith, the conduct of a native title party is nonetheless an important part of the assessment of other parties' conduct. This means that the NNTT may be satisfied that a non-native title party has negotiated in good faith in the context of a native title party's conduct. **Recommendation 63** would not alter this position.

Separate issue referral

Recommendation 64

The *Native Title Act 1993* (Cth) be amended to provide the National Native Title Tribunal, or an independent third party, with a discretionary power to determine, by arbitration, issues referred to it by agreement of the negotiation parties.

9.86 This recommendation would introduce a separate issue referral mechanism, which would provide parties with the ability to seek assistance from an arbitral body for resolving deadlocks while negotiating. For example, an arbitral body may assist the parties to resolve a discrete issue, which may be preventing negotiations from progressing.

9.87 **Recommendation 64** gives effect to Proposal 7 in the Discussion Paper. Proposal 7 received broad support from a variety of stakeholders,⁷⁷ including state and territory governments.⁷⁸

77 See, eg, M Lucas, *Submission 57*; Norman Waterhouse Lawyers, *Submission 102*; Australian Human Rights Commission, *Submission 118*; Central Land Council, *Submission 121*; P&E Law, *Submission 128*; NSW Bar Association, *Submission 140*; First Nations Legal and Research Services, *Submission 146*.

78 Northern Territory Government, *Submission 149*; State of Queensland, *Submission 152*.

9.88 The rationale for this recommendation is to provide a mechanism for the arbitral resolution of an issue or issues which have deadlocked negotiations and allow the parties to continue to negotiate remaining issues. The availability of this mechanism will promote negotiated outcomes because, without it, the determination of deadlocked negotiations will usually require an arbitral resolution of all or most of the issues in dispute.

9.89 If the parties refer an issue to the NNTT for a separate issue referral, the time between the referral and the NNTT resolving the issue would not count towards the minimum negotiation period (see **Recommendation 60**). This would mean that the parties would not be able to apply for a future act determination while a separate issue is referred. The rationale for this 'pause' to the negotiation period is that it would undermine the separate issue referral process, which is designed to assist the parties to break deadlocks during negotiations, if one party could seek a future act determination after jointly agreeing to refer a separate issue. This does not affect the ability of the parties to jointly make a future act determination at any time during negotiations.

9.90 This recommendation would require the NNTT to be appropriately resourced so as to provide the parties with an efficient resolution of the referred issue (see **Recommendation 85**). This was a particular concern expressed by stakeholders in the resources industry.⁷⁹

9.91 This anticipated resourcing issue is addressed in three ways. First, the power is discretionary. If the NNTT considered that the separate issue referral was not a good use of its resources, in the context of the particular negotiations, it may decline the referral. Secondly, the parties may, by consent, approach an independent third party to determine the separate issue. Private arbitration in the right to negotiate process is discussed further in **Chapter 10**. Thirdly, we have discussed the potential for the NNTT President to be empowered to appoint casual members to the NNTT who may be subject matter specialists (see **Chapter 14**).

Right to negotiate reforms in context

9.92 The recommendations in this chapter and the following **Chapter 10** form part of a broader package of reforms. **Figure 9.5** below illustrates how the right to negotiate reforms are supported by, and connected to, other reforms.

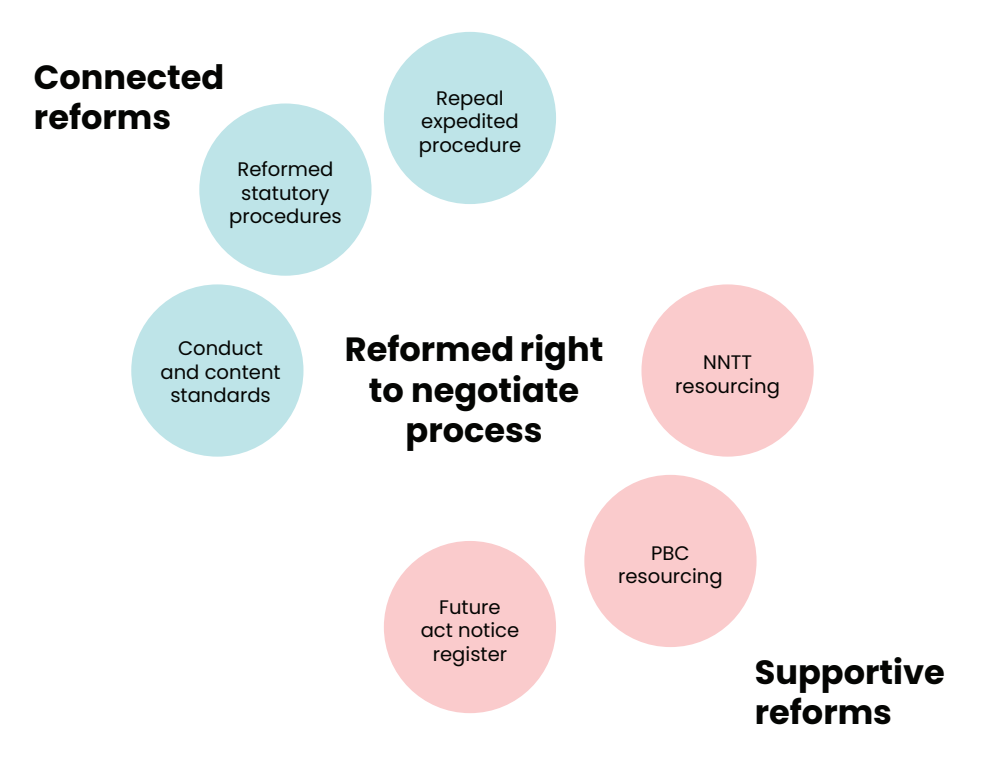
9.93 Reforms to the right to negotiate process are connected to the development of conduct and content standards for agreements (see **Chapters 3** and **4**), as well as reformed statutory procedures (including ancillary reforms to the statutory procedures) (see **Chapters 6** and **8**) and the repeal of the expedited procedure (see **Recommendation 39**).

79 See, eg, Association of Mining and Exploration Companies, *Submission 97*.

9.94 The reforms in this chapter would also be supported by an increase in NNTT resourcing (see [Recommendation 85](#)), the development of a future act notice record (see [Recommendation 58](#)), and increased funding for PBCs (see [Recommendation 84](#)).

9.95 However, the recommendations in this chapter could be implemented as a set of standalone reforms. Feedback to the ALRC has suggested that particular reforms to the right to negotiate process — extending the minimum timeframe for negotiations as discussed above, as well as amending s 39 and repealing s 38(2) of the *NTA*, which are discussed in [Chapter 10](#) — could have a significant positive impact independently of other reforms.

Figure 9.5: Supportive and connected reforms for the reformed right to negotiate process



10. Right to Negotiate: Arbitration

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Introduction

10.1 This chapter is the second of two chapters in this Report containing recommendations for reform relating to the right to negotiate process. This chapter builds on [Chapter 9](#) by detailing recommendations relating to arbitration under the right to negotiate process. It should be read together with [Chapter 9](#), which discusses the purpose of the right to negotiate and makes recommendations closely related to the negotiation process.

10.2 This chapter is in seven parts. The first part briefly outlines the context for reforms relating to arbitration under the right to negotiate. The second part discusses a reform to the criteria for determining whether a future act should be done. The third part discusses guidance for determining conditions when it is decided that a future act can be done subject to conditions. It also discusses the recommended repeal of s 38(2) of the *Native Title Act 1993* (Cth) ('NTA') and guidance for determining non-compensatory financial conditions. The fourth part introduces a new early determination process that native title parties can access by making a formal application after three months of negotiations. The fifth part discusses reforms designed to increase the prospect of parties reaching an agreed outcome after arbitration is commenced. The sixth part discusses a reform to protect the integrity

of the right to negotiate process where a subsequent future act notice proposes the same or a substantially similar future act to one which it has been determined cannot be done. The final part discusses consensual private arbitration for the resolution of future act determination applications.

Context

10.3 A relatively small proportion of negotiations under the right to negotiate result in an arbitrated outcome. In its submission, the National Native Title Tribunal ('NNTT') observed that between 1 January 1994 and 30 June 2024 approximately 6.6% of future acts attracting the right to negotiate had been the subject of a determination by the NNTT.¹ The NNTT also noted that the majority (79% as at 30 June 2024) were 'either at the outset, or by the end of the process, uncontested'.² According to the NNTT, this may be because the parties have 'reached agreement on the bulk of matters for negotiation but are unable to conclude an agreement' under s 31 of the *NTA*, including because, in some cases, not all parties could agree on the terms of the section 31 agreement.³ According to the NNTT, as at 30 June 2024, the NNTT had made determinations in relation to 200 contested future acts since 1 January 1994.⁴ In three determinations,⁵ the NNTT determined that six out of those 200 future acts could not be done.⁶ In all other instances, it has been determined that the future act can be done, either with or without conditions.

10.4 Notwithstanding the relatively small number of arbitrated outcomes under the right to negotiate process, the availability of an arbitrated outcome if agreement is not reached and the nature of any arbitrated outcome clearly influence how negotiations are conducted and the substance of agreements reached.⁷ Three aspects of the existing arbitration scheme have been identified as being particularly significant in this regard:

- the criteria for determining whether a future act can be done in s 39 of the *NTA*;
- section 38(2) of the *NTA*, which prevents the arbitral body from determining conditions that would have the effect of providing for payments to a native title party calculated by reference to the amount of profits, any income derived, or things produced by a proponent as a result of doing anything in relation to the land or waters where a future act is done; and

1 National Native Title Tribunal, *Submission 23*. The NNTT notes that this figure 'does not include those matters where the expedited procedure has been found not to apply which would lower the percentage'. The NNTT also observed that some future acts within this data would have been subject to ongoing negotiations or current future act determination applications.

2 *Ibid.*

3 *Ibid.* See also Kimberley Land Council, *Submission 26*.

4 National Native Title Tribunal, *Submission 23*.

5 *Re Western Desert Lands Aboriginal Corporation (Jamukurnu-Yapalikunu)* (2009) 232 FLR 169; *Weld Range Metals Ltd v Western Australia* (2011) 258 FLR 9; *Seven Star Investments Group Pty Ltd v Western Australia* (2011) 257 FLR 175.

6 National Native Title Tribunal, *Submission 23*.

7 See discussion in [Chapter 9](#).

- what appears to be a widespread understanding (or misunderstanding), that the NNTT cannot or will not determine conditions requiring a financial payment to be made to native title parties.

10.5 As discussed throughout this Report, recommended reforms to the future acts regime may place increased demand on the resources of the NNTT.⁸ This chapter discusses the opportunity for negotiation parties to consensually appoint an independent arbitrator to decide a future act determination application as one way of potentially alleviating demand on the NNTT's resources.

The need for reform

10.6 The fundamental rationale of the right to negotiate is to promote the doing of future acts with the *agreement* of native title parties, with arbitration commencing from the position that agreement has not been reached. The arbitration settings, which involve the application of a criteria for determining whether the future act can be done, are activated where the parties fail to reach agreement and lodge an application for a future act determination with the NNTT.⁹ The importance of the arbitral mechanism provided by the *NTA* in relation to section 31 agreement-making should not be understated. It is not only a mechanism for facilitating the resolution of disputes in order that an agreement can be made. It is also a mechanism which must have been intended to facilitate fair agreements.¹⁰ Arbitration permits what is fair and just to determine the terms of an agreement, rather than the agreement being fashioned by the negotiating party with the superior bargaining capacity.

10.7 This section first sets out some contextual observations about the s 39 criteria, before then explaining why the current criteria is not fit for purpose.

10.8 Section 38(1) of the *NTA* empowers the arbitral body to make one of the following determinations:

- a determination that the act must not be done;
- a determination that the act may be done; or
- a determination that the act may be done subject to conditions to be complied with by any of the parties.

10.9 In making any one of those determinations, including a determination that the future act may be done, the arbitral body must apply the criteria set out in s 39.

⁸ See **Chapter 14** for discussion of the reforms intended to address NNTT resourcing.

⁹ See *Native Title Act 1993* (Cth) s 35(1). Section 39(1) of the *NTA* sets out the criteria for the making of future act determinations.

¹⁰ See **Chapter 9** for discussion of the policy rationale behind the right to negotiate process.

10.10 Section 39(1) provides that:

1. In making its determination, the arbitral body must take into account the following:
 - a. the effect of the act on:
 - i. the enjoyment by the native title parties of their registered native title rights and interests; and
 - ii. the way of life, culture and traditions of any of those parties; and
 - iii. the development of the social, cultural and economic structures of any of those parties; and
 - iv. the freedom of access by any of those parties to the land or waters concerned and their freedom to carry out rites, ceremonies or other activities of cultural significance on the land or waters in accordance with their traditions; and
 - v. any area or site, on the land or waters concerned, of particular significance to the native title parties in accordance with their traditions;
 - b. the interests, proposals, opinions or wishes of the native title parties in relation to the management, use or control of land or waters in relation to which there are registered native title rights and interests, of the native title parties, that will be affected by the act;
 - c. the economic or other significance of the act to Australia, the State or Territory concerned, the area in which the land or waters concerned are located and Aboriginal peoples and Torres Strait Islanders who live in that area;
 - e. any public interest in the doing of the act;
 - f. any other matter that the arbitral body considers relevant.

10.11 Broadly stated, those considerations suggest that the arbitral body should weigh the effect of the future act on the capacity of the native title parties to enjoy their native title rights and interests against the economic significance of the future act to Australia and the public interest in the doing of the future act.¹¹

10.12 The s 39(1) criteria do not indicate the extent of the weight that should be given to the competing considerations set out in that provision. The criteria requires consideration of the effect of the act on the enjoyment and utilisation by native title parties of their native title rights and interests, but a number of other matters

11 In *Gomeroi People v Santos NSW Pty Ltd*, Rangiah J described the s 39(1) criteria as providing a broad discretion which, in substance, required the balancing of the ‘interest of the public or a section of the public in the doing of the [future] act against the interests of the public and the native title parties in protecting native title from non-consensual interference’: *Gomeroi People v Santos NSW Pty Ltd* (2024) 303 FCR 153 [275].

unconnected to that effect may be taken into account.¹² Importantly, the criteria does not directly raise for consideration any requirement that, if a determination is to be made that the future act can be done, the native title parties who will be affected will be justly, fairly, and effectively remediated.

10.13 In any rational and fair assessment of whether a future act should be done, the extent to which native title parties will be effectively remediated for the impact of the infringement of their rights and interests brought about by the arbitral body's determination that the future act can be done should be a critical consideration. That consideration would likely be the central issue in the underlying failed negotiations, which the arbitral body is seeking to resolve. In doing so, the NNTT may consider any matters it deems relevant. However the s 39(1) criteria does not specifically designate consideration of remedies to be central and, as a matter of historical experience of the practical application of those criteria, it has not been given that central role.

10.14 Effective remediation of an adverse effect usually requires that the remediation be timely. That is, whether the remedy is financial or mitigatory, it should be delivered within a reasonable time of when the adverse effect is experienced by the persons harmed.

10.15 As a consequence of both the operation of s 38(2) of the *NTA*, and understandings about the NNTT's capacity to determine s 38(1) conditions requiring financial payments, future act determination applications have generally not resulted in the determination of conditions that provide for financial payments as a form of remediation. Similarly, there have not generally been conditions determined that would require timely remediation. As discussed further below, although s 38(2) of the *NTA* does not prohibit financial payments being determined, it has largely operated in this way, and this reflects a common understanding of the provision.¹³

10.16 The perceived unavailability of timely financial payments through arbitration has placed native title parties in a significantly weakened bargaining position during negotiations and, understandably, may have disincentivised their engagement with future acts regime. In the right to negotiate process, native title parties can be put in the difficult position of feeling obliged to accept an uncommercial offer because the alternative would be to receive no financial benefit in the arbitration process. As the Kimberley Land Council observed, 'it is often better to have a poor agreement than no agreement at all'.¹⁴

10.17 The failure of the arbitral process to deliver timely financial remediation, in the way that successful negotiations can, is a major flaw, which in part may be attributed to each of the three aspects of the existing scheme identified above at paragraph [\[10.4\]](#).

12 Ibid [276] (Rangiah J).

13 Law Council of Australia, *Submission 47*. Several submissions raised this as an issue: see, eg, Kimberley Land Council, *Submission 26*; Central Land Council, *Submission 31*.

14 Kimberley Land Council, *Submission 26*.

10.18 A related problem is that there is a widely held perception among native title parties that a future act determination application will, more likely than not, result in a determination that a future act can be done.¹⁵ As the Kimberley Land Council said in its submission:

the high proportion of determinations in favour of the act being done, or being done subject to conditions, increases pressure on native title holders to reach agreements as to the doing of the act.¹⁶

10.19 This arises because, as noted above, only three future act determinations have resulted in a determination that a future act cannot be done.¹⁷

10.20 This perception affects the relative bargaining power of parties and undermines native title parties' confidence in the arbitration process.¹⁸ As MPS Law explained in their submission:

the threat of a FADA being made to the NNTT after six months of negotiations, and the likely reality of the outcome of the FADA, places native title parties in a weak negotiation position and places immense pressure on native title holders to agree to terms that may not align with their values or cultural obligations, or to accept negotiation positions that are inconsistent with best practice or market standards.¹⁹

10.21 Professor Ciaran O'Faircheallaigh has argued that the trend of determinations 'does not just affect the relative negotiating positions of companies and native title parties' but the

motivations and incentives facing all parties participating in RTN negotiations are likely to be influenced by their understanding of what is likely to happen in the arbitration process if they fail to reach agreement.²⁰

10.22 O'Faircheallaigh has explained that this translates into poorer negotiation outcomes for native title parties because

mining companies know they can go to the NNTT and obtain the interests they require and so face little pressure to negotiate agreements acceptable to native title groups. In contrast, native title groups know that if they fail to reach agreement and accept the limited benefits on offer, they may end up with no benefits at all. This fundamental inequality in bargaining power helps

15 See MPS Law, *Submission 17*; Kimberley Land Council, *Submission 26*; Queensland South Native Title Services, *Submission 45*. See also Cape York Regional Organisations, *Submission 44*.

16 Kimberley Land Council, *Submission 26*.

17 See above at paragraph [\[10.3\]](#). Those determinations are: *Re Western Desert Lands Aboriginal Corporation (Jamukurnu-Yapalikunu)* (2009) 232 FLR 169; *Weld Range Metals Ltd v Western Australia* (2011) 258 FLR 9; *Seven Star Investments Group Pty Ltd v Western Australia* (2011) 257 FLR 175.

18 M Lucas, *Submission 7*.

19 MPS Law, *Submission 17*.

20 Ciaran O'Faircheallaigh, "Unreasonable and Extraordinary Restraints": Native Title, Markets and Australia's Resources Boom' (2007) 11(3) *Australian Indigenous Law Review* 28, 32.

explain the limited benefits achieved from mining agreements by many native title groups.²¹

10.23 A further problem in relation to the s 39(1) criteria is the failure of that criteria to comply with the requirements of the United Nations Declaration on the Rights of Indigenous Peoples ('UNDRIP'). As discussed in [Chapter 1](#), to be compliant with UNDRIP, a validating exercise such as the arbitral body's determination that the future act can be done must result in effective, fair, and just redress being provided to the affected native title parties, unless the doing of the future act is necessary to meet the just and most compelling requirements of the nation.²²

10.24 The current criteria in s 39(1) does not ensure such an outcome. That is because, while it is an available outcome, the discretion given to the arbitral body by the criteria means that 'no one consideration or combination of considerations is necessarily determinative of the result'.²³

10.25 Furthermore, the current criteria impose a higher practical evidentiary burden on native title parties who may wish to argue that the future act should not be done or should be done subject to conditions, than the evidentiary burden imposed on those who wish to argue that the future act should be done. This disproportionate burden is a consequence of the fact that the matters that the arbitral body must have regard to which may support a determination that the future act cannot be done — that is, the matters set out in ss 39(1)(a) and (b) of the *NTA* — are matters that require a native title party to provide significant and specific evidence in order to demonstrate the effects of a future act on native title rights and interests. The NNTT's determinations tend to affirm the extent of the burden by generally requiring specific evidence in support of those matters. For example, the word 'enjoyment' in s 39(1)(a)(i) requires a native title party to 'produce evidence of how these registered rights and interests are enjoyed and exercised so that the Tribunal can consider the likely impact of the future act'.²⁴ That is, evidence is required not just of the existence of native title rights and interests, but of their *actual enjoyment*.²⁵ Further, where no native title determination has yet been made, it is a burdensome task to prove the existence of native title rights and interests, the nature of the native title rights and interests, and the persons who hold those native title rights and interests. Put differently, it would be difficult for native title claimants to put forward evidence relating to the matters set out in ss 39(1)(a) and (b) of the *NTA*.

21 Ciaran O'Faircheallaigh, 'Native Title and Mining Negotiations: A Seat at the Table, But No Guarantee of Success' (2007) 6(26) *Indigenous Law Bulletin* 18, 18.

22 See further discussion of these concepts in [Chapter 2](#).

23 *Gomeri People v Santos NSW Pty Ltd* (2024) 303 FCR 153 [275] (Rangiah J).

24 *Western Australia v Jidi Jidi Aboriginal Corporation* (2002) 169 FLR 470 [27]. See also *WMC Resources Ltd v Western Australia* (1999) 163 FLR 333 [30].

25 See, eg, *Tully v Boonthamurra Native Title Aboriginal Corporation RNTBC* [2025] NNTTA 21 [84]–[86]; *FMG Pilbara Pty Ltd v Yindjibarndi Ngurra Aboriginal Corporation RNTBC* [2020] NNTTA 8 [47]–[48]; *Western Australia v Jidi Jidi Aboriginal Corporation* (2002) 169 FLR 470 [27]. See also *Seven Star Investments Group Pty Ltd v Western Australia* (2011) 257 FLR 175 [38].

10.26 In contrast, the burden on other parties is comparatively lighter because the types of evidence contemplated by ss 39(1)(c) and (e) — matters which may support the doing of a future act — are less burdensome to prepare. The NNTT is often able to accept general evidence in support of these matters, and at times may be able to accept limited supportive evidence as long as that evidence is uncontested.²⁶ For example, the NNTT is generally able to accept that there is public interest in the continuing development of the mining industry in Australia without requiring significant or specific evidence in support of the proposition.²⁷

10.27 The disproportionate evidentiary burden that the current criteria imposes on native title parties is particularly problematic because, in many cases, the native title party will be the less well-resourced party to the proceedings. The criteria effectively impose a higher burden on the party that has the lower capacity to discharge that burden.

10.28 A further problem with the right to negotiate process is that there is currently no avenue for native title parties to seek to end negotiations summarily where it is clear that there would be no prospect of fair and just remediation of the impact of the proposed future act on their native title rights and interests. This undermines the intention of the right to negotiate as a measure intended to provide an avenue for fair negotiations and the protection of native title rights and interests.

10.29 The reforms in this chapter are designed to reform the arbitration elements of the right to negotiate to better meet its purpose. That is, by recalibrating the arbitration settings, the reforms will make both the negotiation and arbitration process fairer, thereby improving the conditions for fair and equitable agreements, and in combination with other reforms in this Report, gaining efficiencies by reducing the need for arbitration. The reforms are also intended to be UNDRIP compliant.

Criteria for determining arbitrated outcomes

10.30 This part discusses reform to the criteria in s 39 of the *NTA* for determining whether a future act can be done in the absence of agreement between negotiation parties. It also discusses the early determination procedure introduced in **Recommendation 60** in **Chapter 9**, and the criteria for determining an early determination application made by a native title party. As discussed below, those criteria are closely related to the reformed criteria for deciding future act determination applications.

26 See, eg, *Coronet Resources Limited v Wanjina-Wunggurr (Native Title) Aboriginal Corporation RNTBC* [2025] NNTTA 3, [30].

27 See, eg, *Australian Manganese Pty Ltd v Western Australia* (2008) 218 FLR 387 [59]; *Evans v Western Australia* (1997) 77 FCR 193, 176, 214–16. The Full Court of the Federal Court has clarified that while it accepts the general proposition that mining developments are in the public interest, when considering s 39(1)(e), it may be necessary for the Tribunal to consider the economic value of the specific mining proposal, rather than the mining industry at large: see *Cheedy v Western Australia* (2011) 194 FCR 562 [138]. However, arguments that mining and exploration are generally in the public interest continue to be raised in future act determination applications: see, eg, *Tully v Boonthamurra Native Title Aboriginal Corporation RNTBC* [2025] NNTTA 21 [107].

Future act determination applications

Recommendation 65

Section 39 of the *Native Title Act 1993* (Cth) be amended to provide that:

1. Subject to paragraph (2), an arbitral body must not determine that a future act can be done without agreement of the native title parties, unless it is satisfied that the environmental, economic, social, or cultural impact or effect of the act on:
 - a. the capacity of the native title parties to enjoy their registered native title rights and interests;
 - b. the way of life, culture, and traditions of those parties;
 - c. the development and enjoyment of the social, cultural, and economic structures of any of those parties;
 - d. the freedom of access by any of those parties to the land or waters concerned and their freedom to carry out rites, ceremonies, or other activities of cultural significance on the land or waters in accordance with their traditions; and
 - e. any area or site, on the land or waters concerned, of significance to the native title parties in accordance with their traditions,

will be effectively addressed by the determination of s 38(1)(c) conditions or other available measures which, fairly and justly and within a reasonable time, redress the effect of the future act, including where appropriate, by mitigating its effect.
2. An arbitral body unable to reach the state of satisfaction required by paragraph (1), may determine that the future act can be done if satisfied that, having regard to the nature and extent of the inability to effectively remediate the effect of the future act, the doing of the future act is nevertheless necessary to meet the just and most compelling requirements of the nation.
3. In making its determination, the arbitral body must give due consideration to:
 - a. the traditional laws and customs of the native title parties; and
 - b. Australia's obligations towards Aboriginal and Torres Strait Islander peoples under international law.

10.31 **Recommendation 65** introduces reformed criteria for an arbitral body to apply when determining future act determination applications. The reformed criteria have been crafted to address each of the problems with the arbitration stage and the

consequential problems created for the negotiation stage of the right to negotiate process, discussed above.

10.32 In summary, the reformed criteria would provide that an arbitral body cannot determine that a future act can be done without the agreement of the native title parties unless it is satisfied that fair and just redress, provided within a reasonable time of the future act being done, will effectively remediate the impact or effect of the act on:

- the capacity of the native title parties to enjoy their registered native title rights and interests;
- the way of life, culture, and traditions of those parties;
- the development and enjoyment of the social, cultural, and economic structures of any of those parties;
- the freedom of access by any of those parties to the land or waters concerned and their freedom to carry out rites, ceremonies, or other activities of cultural significance on the land or waters in accordance with their traditions; and
- any area or site, on the land or waters concerned, of significance to the native title parties in accordance with their traditions.

10.33 **Recommendation 65** contemplates a significant change from the current criteria. Whereas the existing s 39 criteria merely requires the arbitral body to take into account the effects of a future act on the matters outlined in s 39(1)(a), the reformed criteria would require the arbitral body to be positively satisfied that those effects can be effectively remediated by fair and just redress.

10.34 In making its assessment, the arbitral body would consider whether the impact or effect of the future act could be remediated by applying s 38(1)(c) conditions, including conditions requiring that appropriate measures be taken to mitigate the adverse impacts of the future act and the activities likely to be undertaken pursuant to it. The assessment could also consider the financial or other remedial measures which, as s 38(1)(c) conditions, could be determined as well as any other available measures, and determine whether all of those measures would provide fair and just redress within a reasonable time that would effectively remediate the infringing effect of the future act.

10.35 If so satisfied, the arbitral body would determine that the future act can be done with the s 38(1)(c) conditions it had identified as necessary to provide effective remediation.

10.36 If not so satisfied, the arbitral body would consider whether, given the nature and extent of the potential adverse effect that will remain un-remediated, there is a just and most compelling national interest which requires that, despite the adverse effect, the future act should be done.

10.37 The reformed criteria centre the issue of what timely and effective financial or other benefits, and what mitigatory measures, need to be taken or provided in order

to justly and fairly redress the impairment of native title rights and interests caused by the future act.

10.38 **Recommendation 65** seeks to ensure that s 39 of the *NTA* is consistent with international human rights standards. As outlined in **Chapter 2**, UNDRIP is the leading authority on the rights of Indigenous peoples in international law. Article 32 of UNDRIP requires states to provide ‘effective mechanisms for just and fair redress’ for any projects that affect the lands, territories, or other resources of Indigenous peoples, and must take ‘appropriate measures’ to ‘mitigate adverse environmental, economic, social, cultural or spiritual impact’.²⁸

10.39 Deriving from art 32(3), the language of **Recommendation 65** is intended to safeguard the rights of native title parties, as Indigenous peoples. The reformed criteria provide two important safeguards: a requirement of fair and just redress, and appropriate measures to mitigate against the adverse environmental, economic, social, cultural, or spiritual impacts. Under art 32(3), redress is to be available for ‘any’ interference with land rights, irrespective of the nature or impacts of the project in question. The matters described in the reformed s 39(1)(a) in **Recommendation 65** largely reflect the existing matters in s 39(1)(a) and are regarded as sufficiently broad to cover all relevant impacts, including environmental, economic, social, cultural, or spiritual impacts.

10.40 Under art 32(3) of UNDRIP, ‘redress’ is due ‘when any one of the stated activities is performed on indigenous lands’, including with respect to those projects to which the affected Indigenous peoples have consented.²⁹ In other words, the requirement for fair and just redress does not turn on such projects amounting to a violation of rights. Instead, art 32 recognises that certain encroachments on the land rights of Indigenous peoples are lawful (that is, restrictions or impairments rather than violations), and that ‘redress’ is not compensation or a remedy for a wrong but is remediation for the adverse impact of the activities adversely affecting the lands, territories, or resources of Indigenous peoples. The word ‘redress’ is used with the same meaning in the reformed criteria.

10.41 There is currently little specific guidance as to the interpretation of ‘redress’ in art 32 of UNDRIP.³⁰ It has been suggested, however, that redress contemplated by art 32 includes benefit-sharing.³¹ Such an interpretation is consistent with the emergence, in international human rights law, of an obligation to share in the benefits

28 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) art 32(3) (‘UNDRIP’).

29 Dalee Sambo Dorough, ‘Indigenous Peoples and the Right to Remedy: The Need for a Distinct Cultural Context’ in Cathal M Doyle (ed), *Business and Human Rights: Indigenous Peoples’ Experiences with Access to Remedy: Case Studies from Africa, Asia and Latin America* (AIPP, ALMACIGA, IWGIA, 2015) 13, 22.

30 Analysis is also made more complex by a general lack of uniformity in the language of ‘remedies’ at international law: see, eg, S Haasdijk, ‘The Lack of Uniformity in the Terminology of the International Law of Remedies’ (1992) 5(2) *Leiden Journal of International Law* 245.

31 Dorough (n 29) 22.

of certain projects, including those affecting the lands of Indigenous peoples.³² More generally, the Expert Mechanism on the Rights of Indigenous Peoples has observed that decisions to lawfully limit the rights of Indigenous peoples must be accompanied by 'necessary safeguards, including redressing balance-of-power issues, impact assessments, mitigation measures, compensation and benefit-sharing'.³³

10.42 The reformed criteria are also framed to strike a balance, if necessary, between the national or public interest and other considerations. First, it requires the arbitrator to weigh the nature and extent of the potential adverse effects on native title parties which will not be remediated if the future act is done. Second, it identifies the weight that is to be given to the national interest in the balancing exercise. Weight will not be given to any public interest at all, but only to a just and most compelling requirement necessary in the national interest. That weighting reflects and applies art 46 of UNDRIP.

10.43 By reflecting the elements of art 32(3) as read with art 46(2), the reformed criteria for s 39(1) seeks to align with UNDRIP. That is, the intention of **Recommendation 65** is to provide a mechanism for the arbitral body to make a determination as to whether or not a future act can be done that is compliant with UNDRIP. It also seeks to ensure that the arbitral body's determination of any conditions is compliant with UNDRIP.

10.44 The requirement in art 32(2) that free and informed consent of the Indigenous peoples be facilitated should be read with art 40, dealing with the right of access to dispute resolution. When so read and, in the context of the negotiation process required to precede the arbitration, the fact that the relevant decision-making is by an arbitrator, does not involve non-compliance.

10.45 The reformed criteria would require an arbitral body to be positively satisfied that the effect of the future act can be effectively remediated through fair and just redress including considering measures taken to mitigate the adverse impact of the future act.

10.46 By reframing the criteria to require the arbitral body to be positively satisfied that the effect of the future act can be effectively remediated, this reform also aims to ensure a fairer distribution of the practical evidentiary burden, discussed above. It would be for the party seeking a determination that the future act be done to satisfy the arbitral body that effective, fair, and just redress will be provided.

32 See, eg, James Anaya, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, 15th sess, UN Doc A/HRC/15/37 (19 July 2010) [76]–[80], [91]; Elisa Morgera, *Fair and Equitable Benefit-Sharing in International Law* (Oxford University Press, 2024) 5–12, ch 3. See also *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*, opened for signature 29 October 2010, 3008 UNTS 3 (entered into force 12 October 2014) art 5.

33 Expert Mechanism on the Rights of Indigenous Peoples, *Free, prior and informed consent: a human rights-based approach*, 39th sess, UN Doc A/HRC/39/62 (10 August 2018) [40].

10.47 Furthermore, the reformed criteria seeks to address the problem discussed above whereby the perception of the likely outcome of the future act determination process and the perception that it will not result in a requirement that a timely financial payment will be required, has resulted in native title parties being put in a weaker negotiating position and disincentivised from engaging with future acts activity. If the reformed criteria ensure fair and just redress to native title parties for the impact of the proposed future act, native title parties may feel less pressure during negotiations to agree to unfair agreements — including because it is made clear that an arbitral body may impose conditions requiring timely financial payments. By facilitating fairer negotiations, the reformed criteria may, in combination with other reforms related to agreement-making, result in fewer negotiations ending in arbitration, which may also result in a more efficient system.

10.48 The reformed criteria refers to *registered* native title rights and interests. This adopts the existing definition of ‘registered native title rights and interests’ in s 30(3) of the *NTA* which, together with the definition of ‘native title party’, ensures the right to negotiate is afforded to registered native title claimants and native title holders.³⁴

10.49 The reformed criteria removes the word ‘particular’ in the phrase ‘areas or sites of significance’. The word ‘particular’ has created a disproportionately high evidential burden for native title parties.³⁵ By removing the word ‘particular’, the native title party would still be required to provide evidence of the cultural significance of a particular site or area, but will not need to prove the ‘particular’ significance of the site or area.

Determining conditions

10.50 This part discusses reforms relating to how an arbitral body may determine conditions to be placed on the doing of a future act where it decides that a future act may proceed under the reformed criteria discussed above. It first discusses conditions generally, before discussing the repeal of s 38(2) of the *NTA* and to clarify the ability of the NNTT to determine a broad range of non-compensatory financial conditions.

³⁴ See *Native Title Act 1993* (Cth) ss 29, 30, 253 (definition of ‘native title party’).

³⁵ See, eg, *Minister for Lands (WA) v Buurabalayji Thalanyji Aboriginal Corporation RNTBC* [2014] NNTTA 85 [215]; *WF on behalf of the Wiluna Native Title Claimants v Western Australia* [2012] NNTTA 17 [39].

Conditions generally

Recommendation 66

The *Native Title Act 1993* (Cth) be amended to provide that in exercising its discretion to determine conditions that apply to a future act, an arbitral body:

- a. must have regard to the matters in s 39 of the Act as reformed in accordance with Recommendation 65, and consider conditions that would provide fair and just redress, including measures to mitigate the adverse impacts of the act, including any environmental, economic, social, or cultural impacts of the act; and
- b. may consider any matter that the arbitral body considers relevant.

10.51 **Recommendation 66** would provide further guidance for the NNTT when determining the specific conditions to be applied when the NNTT has determined that the act can be done subject to conditions. **Recommendation 66** expressly refers to the object of the s 39 criteria, which is to ensure fair and just redress, and appropriate measures to mitigate the adverse impacts of the act. As with the reformed criteria for future act determination applications above, this guidance reflects the intention of art 32(3) of UNDRIP, by directing attention to conditions that would effectively address the effect of the future act upon the native title parties concerned.

10.52 Section 38(1)(c) currently gives the NNTT a broad discretion to determine conditions when making determination that the future act can be done subject to conditions.³⁶ The only express limit on the discretion is the prohibition in s 38(2) discussed below. Whilst the discretion is broad, there is no express guidance given as to the object or purpose of the determination of conditions. **Recommendation 66** provides that guidance and does so without limiting the broad discretion provided to identify the appropriate conditions for meeting the object or purpose of the exercise.

10.53 We have heard that a broad discretion to determine conditions is useful and enables the NNTT to develop conditions that are appropriate in the particular circumstances of individual cases. This recommendation aims to clarify that the direction must be exercised consistently with the reformed s 39 criteria.

10.54 **Recommendation 66** is also directed to clarifying that the conditions determined as appropriate may include conditions providing for financial entitlements, including equitable benefit-sharing. **Recommendation 67** complements that objective.

36 See *Evans v Western Australia* (1997) 77 FCR 193, 213; *Wherritt v Boonthamurra Native Title Aboriginal Corporation RNTBC* [2018] NNTTA 19 [41].

Financial conditions

Recommendation 67

Section 38(2) of the *Native Title Act 1993* (Cth) be repealed.

10.55 Section 38(2) of the *NTA* currently prevents the arbitral body from determining conditions for payments worked out by reference to ‘profits made’, ‘income derived’, or ‘things produced’ by a grantee party as a result of doing a future act.

10.56 Although s 38(2) does not expressly prohibit the imposition of *any* non-compensatory financial conditions, it has largely been regarded as operating in this way. The NNTT is expressly empowered under s 41(3) to impose a bank guarantee condition requiring a grantee party to secure a specified amount of money by bank guarantee.³⁷ Beyond this power, the NNTT’s stated view is that it does not have the power to determine compensation, including by imposing a condition for the payment of compensation to a native title party.³⁸ The basis for this view is not entirely clear, but in general, the NNTT has referred to the limitation presented by s 38(2), its express power under s 41(3) to impose a bank guarantee condition, and the fact that the *NTA* does not provide for the NNTT to determine and award statutory compensation under Part 2 Div 5.³⁹ The NNTT therefore does not impose payment conditions which are compensatory in character, and with limited exceptions,⁴⁰ neither parties nor the NNTT have acknowledged a capacity to determine non-compensatory financial conditions. This may be due to a number of factors, including because parties to agreements tend to characterise payments as ‘compensation’,

37 *Native Title Act 1993* (Cth) s 41(3). The Tribunal’s ability to impose such conditions is discussed in a number of determinations: see, eg, *Re Western Desert Lands Aboriginal Corporation (Jamukurnu-Yapalikunu)* (2009) 232 FLR 169 [196]; *Australian Manganese Pty Ltd v Western Australia* (2008) 218 FLR 387 [66]–[68]. See also *Western Australia v Evans* (1999) 165 FLR 354 [24]–[43].

38 See, eg, *Jax Coal Pty Ltd v Smallwood* (2011) 260 FLR 99 [45], [47]; *Re Western Desert Lands Aboriginal Corporation (Jamukurnu-Yapalikunu)* (2009) 232 FLR 169 [196]; *Australian Manganese Pty Ltd v Western Australia* (2008) 218 FLR 387 [66]. However, the ALRC notes that in an earlier Tribunal decision Member Sosso expressed the view that ‘as I read the Act there is no limitation on the Tribunal making a determination conditioned on the payment of money to a native title party other than into trust, provided that it does not infringe section 38(2)’: *Bissett v Mineral Deposits (Operations) Pty Ltd* (2001) 166 FLR 46 [157]. In expressing this view, Member Sosso cited *Evans v Western Australia* (1997) 77 FCR 193, a decision of the Federal Court made prior to the enactment of the *NTAA 1998*. Member Sosso’s views do not appear to have been adopted in subsequent NNTT decisions.

39 See, eg, *Xstrata Coal Queensland Pty Ltd/Mark Albury (Karingbal #2); Brendan Wyman (Bidjara People)/Queensland* [2012] NNTTA 101 [205], citing *Australian Manganese Pty Ltd v Western Australia* (2008) 218 FLR 387 [64], [66]–[67]; *Re Western Desert Lands Aboriginal Corporation (Jamukurnu-Yapalikunu)* (2009) 232 FLR 169 [194]–[199].

40 See, eg, *Jax Coal Pty Ltd v Smallwood* (2011) 260 FLR 99 [50]–[55]. In that case, the NNTT made a conditional determination endorsing an agreed ‘financial and employment package’ between a grantee party and native title party on the basis that it was not ‘agreed to primarily or calculated solely’ on the basis that it was compensation for the effects of the future act.

even though those payments may typically be calculated by reference to the matters identified in s 38(2) which cannot be addressed through arbitration. As outlined above, this creates a disparity in bargaining power and inhibits equitable agreement-making. It also effectively renders the 'arbitral jurisdiction a one-way risk rather than as a fair and balanced risk that the parties, as it were, share equally'.⁴¹

10.57 This section first discusses the background to s 38(2) of the *NTA* before addressing key issues relating to its repeal. It includes a discussion of why and how financial conditions may be determined and how payments under such conditions may be taken into account in a later compensation application (dealt with in **Recommendation 68** below).

10.58 In summary, the repeal of s 38(2) furthers the benefit-sharing objective that underpins the right to negotiate by clarifying that benefit-sharing payments are available during negotiations and through arbitration. Critically, it makes clear that contemporaneous financial payments are to be available through arbitrated conditions as one means of providing effective, fair, and just redress, consistently with the reformed s 39 criteria discussed above.

10.59 Repealing s 38(2) would improve the conditions for fair and equitable agreement-making by addressing the disparity in bargaining positions between native title parties and other parties as outlined above. It also addresses 'inefficiency and inequity' in the future acts determination process which arises because the NNTT is prevented by s 38(2) from deciding what may be the primary (or potentially only) issue in dispute between the parties.⁴²

10.60 Numerous submissions and consultees supported the repeal,⁴³ or amendment of s 38(2) of the *NTA*.⁴⁴ Several identified it as critical reform.⁴⁵ The NNTT has previously observed that the repeal of s 38(2) may better promote agreement-making and the effective arbitration of disputes by:

- making it less likely that objections to future act determinations are made based on failure to negotiate in good faith because a disadvantage to native title parties in the future act determination process is removed; and

41 Evidence to Senate Legal and Constitutional Affairs Legislation Committee, *Native Title Amendment Bill 2012*, Parliament of Australia, Canberra, 6 March 2013, 12 (Mark Rumler); O'Faircheallaigh (n 21).

42 See *Gomeri People v Santos NSW Pty Ltd* (2024) 303 FCR 153 [310]. See also First Nations Legal and Research Services, *Submission 42*.

43 See, eg, Norman Waterhouse Lawyers, *Submission 102*; Yamatji Marpa Aboriginal Corporation, *Submission 148*.

44 See, eg, Bardi Jawi Niimidiman Aboriginal Corporation RNTBC, *Submission 53*; Houston Legal & Consultants, *Submission 95*; South Australian Native Title Services, *Submission 104*; Australian Human Rights Commission, *Submission 118*; Central Land Council, *Submission 121*; Mabo Centre and National Native Title Council, *Submission 130*; NSW Bar Association, *Submission 140*; First Nations Legal and Research Services, *Submission 146*.

45 M Lucas, *Submission 57*; Norman Waterhouse Lawyers, *Submission 102*; Central Land Council, *Submission 121*.

- providing less motivation for proponents to make a future act determination application shortly after the minimum negotiation period has expired, and instead continue negotiations in pursuit of agreement, because a perceived advantage of the future act determination process is removed.⁴⁶

Background

10.61 Without limiting the scope of negotiations, s 33(1) of the *NTA* provides that parties to negotiations under Subdivision P of the *NTA* may, if relevant, negotiate about payments to a native title party worked out by reference to the amount of profits, any income derived, or things produced by a proponent as a result of doing anything in relation to the land or waters where a future act is done. However, s 38(2) of the *NTA* prohibits the determination of a condition relating to such payments when making a future act determination.

10.62 Section 33(1) of the *NTA* effectively recognises that in considering what is an appropriate consideration for consent in relation to a future act, a mechanism which allows the parties to calibrate the consideration by reference, at least in part, to the value or profitability of the economic activity is a useful and rational mechanism. The fact that negotiated agreements often determine payments in this matter confirms this is a useful and rational mechanism for reaching consent. Consideration calculated by reference to profit or other benefits represents a rational way of sharing in both the risk (if a project is not profitable) and benefits of economic activity. Section 38(2) of the *NTA*, however, does not recognise this in the context of arbitration.

10.63 Section 38(2) has been the subject of debate since enactment of the *NTA*. In outlining the Government's view in 1993 that 'while the parties are free to negotiate profit-sharing arrangements, such arrangements should not be imposed by tribunals',⁴⁷ Senator Evans identified several relevant considerations, including:

- potential unfairness if arbitrated payments of this nature were made available to native title parties in circumstances where they are not available to holders of other kinds of property interests;
- potential difficulties for a tribunal in making 'a commercial assessment as to whether a percentage of projected profits would amount to greater or lesser compensation than was otherwise available' under other provisions relating to upfront payment of compensation;⁴⁸ and
- the possibility that the then 'proposed social justice package could provide for royalty equivalent payments to be made by government in certain

46 National Native Title Tribunal, Submission No 15 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011* (29 July 2011) [102]. See also Houston Legal & Consultants, *Submission 95*.

47 Commonwealth, *Parliamentary Debates*, Senate, 20 December 1993, 5264 (Gareth Evans).

48 Ibid 5264 (Gareth Evans). The provisions referred to here include, for example, those that provide an ability for the NNTT to impose a condition which has the effect of requiring a payment into trust pending a later compensation claim, presently s 41(5) of the *NTA*.

circumstances, rather than have royalty or profit-based payments imposed on mining companies'.⁴⁹

10.64 In rejecting a proposed amendment to reverse the position in s 38(2), Senator Evans observed that it was 'not because of any instant dismissal of the ideas behind it', but 'really because of [a] rather careful balance of considerations'.⁵⁰

10.65 This Inquiry is not the first occasion that the 'careful balance of considerations' identified by Senator Evans has been revisited. In 1996, the Australian Government consulted on whether s 38(2) should be repealed to provide 'further encouragement to successful negotiation'.⁵¹ As the Government observed, doing so

would merely give the arbitral body a discretion to determine such a payment, not oblige it to do so. Such a change could give parties a stronger incentive to reach a negotiated agreement and it would not impact on the obligations of miners to make payments under State and Territory royalty regimes.⁵²

10.66 In Parliamentary debate, Senator Minchin explained that the Government was 'persuaded on a variety of grounds' to retain s 38(2) of the *NTA*, including legal uncertainty over whether an administrative tribunal could make such a determination.⁵³ This issue is discussed further below in relation to the potential exercise of judicial power.

10.67 The Native Title Amendment (Reform) Bill 2011, a private senator's bill introduced by Senator Siewert of the Australian Greens, also contemplated repealing and replacing s 38(2) of the *NTA*. In summarising feedback on the Bill, the Senate Legal and Constitutional Affairs Legislation Committee observed that

a significant number of submitters supported the proposal to enable the arbitral body to determine profit-sharing conditions (proposed new subsection 38(2)). These submitters considered it important for native title parties to be able to negotiate with future act proponents, without the latter being able to circumvent profit-sharing negotiations (and payments) by applying to the arbitral body for a determination.⁵⁴

10.68 The Committee also noted that some submissions did not support the proposed amendment and there 'were a variety of reasons for this lack of support'.⁵⁵ Many of those reasons reflect issues raised by submissions in response to the Discussion Paper.⁵⁶ These include:

49 Ibid.

50 Ibid 5265 (Gareth Evans).

51 Department of the Prime Minister and Cabinet (Cth), *Towards a More Workable Native Title Act: An Outline of Proposed Amendments* (Outline Paper, May 1996) [38].

52 Ibid.

53 Commonwealth, *Parliamentary Debates*, Senate, 4 December 1997, 10470–3 (Nick Minchin).

54 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Native Title Amendment (Reform) Bill 2011* (2011) [3.43].

55 Ibid [3.45].

56 See Australian Law Reform Commission, *Review of the Future Acts Regime* (Discussion Paper No 88, 2025) proposal 8.

- a possibility of ‘overcompensation’ for native title parties relative to ordinary title holders, for whom non-compensatory payments cannot be determined through an arbitrated process, creating unfairness;⁵⁷
- the appropriateness of a third-party arbiter determining what are otherwise perceived as commercial arrangements between negotiating parties;⁵⁸
- potential difficulties for the NNTT in determining non-compensatory payments,⁵⁹ and the need for guidance as to how they may be determined;⁶⁰ and
- how any arbitrated payments should relate to any later claim for statutory compensation under Part 2 Div 5 of the *NTA*.⁶¹

10.69 Each of these issues is discussed in the following section.

Addressing key issues and reasons for reform

Fairness and availability of benefit-sharing arrangements

10.70 As outlined above, s 38(2) of the *NTA* was partially justified on the basis that it may be unfair for arbitrated benefit-sharing to be available to native title parties in circumstances where it is not generally available to other property holders. This comparison is not appropriate, including because an assessment of relative fairness would require all conditions to be compared. It would not involve an isolated comparison of one feature going to the manner in which an entitlement may be calculated. In any event, there now appears to be a trend in government policy to encourage benefit-sharing arrangements for all property owners (see discussion below at paragraph [10.73]).

10.71 The availability of benefit-sharing in the context of the right to negotiate is justified in light of the underlying policy outlined in **Chapter 9**. In particular, the availability of benefit-sharing payments through arbitration means that disagreements about such payments are capable of being resolved and the pressure upon native title parties to accept a poor benefit-sharing outcome in negotiations, because they cannot get any benefit-sharing outcome at arbitration, is removed.

10.72 The repeal of s 38(2) of the *NTA* is consistent with the requirements of art 32 of UNDRIP to provide fair and just redress. As noted above, it has been suggested that the redress contemplated by art 32 of UNDRIP includes benefit-sharing, such interpretation being consistent with the emergence in international human rights law

57 See, eg, Minerals Council of Australia, *Submission 113*; Western Australian Government, *Submission 115*.

58 See, eg, Association of Mining and Exploration Companies, *Submission 97*.

59 See, eg, Western Australian Government, *Submission 115*.

60 See, eg, National Native Title Tribunal, *Submission 86*, which suggested that ‘consideration may need to be given to appropriate guidelines and mechanisms for calculating and determining these amounts’. See also Law Council of Australia, *Submission 75*, which supported the repeal of s 38(2) of the *NTA* but noted the importance of guidelines and mechanisms for determining relevant conditions.

61 See National Native Title Tribunal (n 46) [99].

of an obligation to share in the benefits of certain projects, including those affecting the lands of Indigenous peoples.⁶²

10.73 Recent government policy statements emphasise the importance of benefit-sharing where communities, not limited to native title parties, are impacted by development. For example, the Western Australian Government Draft Guideline on Community Benefits for Renewable Energy Projects notes that while the ‘energy transition will have significant benefits and opportunities for regional communities hosting this infrastructure’, benefits ‘are not always experienced in proportion to the impact these projects have on hosting communities’.⁶³ The Draft Guideline, when finalised, is intended to support negotiations and provide guidance about benchmark values.⁶⁴ While in these cases there may not be an arbitrated avenue for the determination of payments, policy statements clearly contemplate the appropriateness of benefit-sharing for any affected community.

10.74 State, territory, and Commonwealth government policy statements also emphasise the importance of benefit-sharing arrangements for First Nations peoples, including native title parties. These statements recognise that because of the location of many large projects in regional areas, First Nations people and native title parties may be disproportionately impacted. For example, the Australian Government’s Critical Minerals Strategy 2023–2030 notes:

The benefits to be gained from the growth of Australia’s critical minerals sector, now and into the future, must be shared with and driven by the strengths and aspirations of the First Nations communities in which projects take place. Governments and industry are responsible for progressing meaningful engagement, agreement making and benefit sharing with First Nations communities.⁶⁵

Legality

10.75 Previous debates about repealing s 38(2) of the *NTA* have identified two main concerns about the legality of an administrative body, such as the NNTT, determining financial conditions. These concerns relate to:

- the potential exercise of judicial power by an administrative body, in violation of the separation of powers in the *Australian Constitution*; and
- whether such conditions may amount to the imposition of a ‘tax’.

10.76 While the ALRC does not discourage further advice being sought to ensure constitutional compliance, the ALRC’s view is that **Recommendations 66** and **67** are compliant with the *Australian Constitution*.

62 See further discussion in **Chapter 2**.

63 Department of Energy, Mines, Industry Regulation and Safety (Western Australia), *Draft Guideline on Community Benefits for Renewable Energy Projects (Consultation Paper)* (2025) 5. See also Department of Environment, Land, Water and Planning (Vic), *Community Engagement and Benefit Sharing in Renewable Energy Development in Victoria: A Guide for Renewable Energy Developers* (2021).

64 Department of Energy, Mines, Industry Regulation and Safety (Western Australia) (n 63) 5, 10.

65 Australian Government, *Critical Minerals Strategy 2023-2030* (June 2023) 31.

10.77 Chapter III of the *Australian Constitution* is an exhaustive provision of judicial power in Australia.⁶⁶ Parliament may therefore only vest the Commonwealth's judicial power in a court constituted in accordance with Chapter III.⁶⁷ While Chapter III may be an exhaustive *provision* of judicial power, it is not possible to exhaustively and exclusively *define* judicial power. Not only does judicial power consist of a number of factors, but those factors may be present in different combinations.⁶⁸ Some factors will form an exercise of judicial power when done by a court, but will not be an exercise of judicial power where done by another body.⁶⁹ A power may also have a 'double aspect', meaning that it 'may take its character from the repository of the power — whether judicial or administrative — so long as the power, of its nature, is not forbidden to either'.⁷⁰ Put differently, 'some functions may, chameleon-like, take their colour from their legislative surroundings or their recipient'.⁷¹

10.78 The High Court has 'said many times that it is impossible to give an exhaustive definition of judicial power'.⁷² The High Court has recently described a judicial decision as a

'binding and authoritative decision of controversies between subjects or between subjects and the Crown made by a tribunal which is called upon to take action'; 'determines existing rights and duties and does so according to law', that is, 'by the application of a pre-existing standard rather than by the formulation of policy or the exercise of an administrative discretion'; and is an 'authoritative determination by means of the judicial method, that is, an enforceable decision reached by applying the relevant principles of law to the facts as found'.⁷³

10.79 To assess whether determining a s 38(1)(c) condition requiring a financial payment is an exercise of judicial power, it is useful to contrast this exercise with the exercise of the power given to the Federal Court to determine a compensation application under Part 2 Div 5 of the *NTA*.

10.80 Compensation under Part 2 Div 5 is a statutory form of compensation defined as compensation for 'native title holders for any loss, diminution, impairment, or other effect of the act on their native title rights and interests'.⁷⁴ The assessment called for by that definition is not made in the application of a discretionary power, but is made by reference to existing rights⁷⁵ and, in particular, by reference to the extent of loss, diminution, impairment, or other effect upon the native title rights and

66 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 272.

67 *Ibid* 270.

68 *New South Wales v Wojciechowska* [2025] HCA 27 [15].

69 *Ibid*.

70 *Ibid* [17].

71 *R v Quinn; Ex parte Consolidated Food Corporation* (1977) 138 CLR 1, 18, cited in *New South Wales v Wojciechowska* [2025] HCA 27 [17].

72 *Luton v Lessels* (2002) 210 CLR 333 [124].

73 *New South Wales v Wojciechowska* [2025] HCA 27 [16] (citations omitted).

74 *Native Title Act 1993* (Cth) s 51(1).

75 The High Court has opined that assessments of such a nature may be an indicator of judicial power: *New South Wales v Wojciechowska* [2025] HCA 27 [16].

interests themselves.⁷⁶ An assessment of that kind clearly involves the determination of existing rights and duties according to law.⁷⁷ That determination does not entail the creation of new rights.⁷⁸ The decision is made by a court constituted by lawyers and bound to observe the rules of evidence,⁷⁹ and it is directly enforceable by the court.⁸⁰

10.81 In contrast, the determination of a s 38(1)(c) condition requiring a financial payment is made by a tribunal whose membership may include non-lawyers,⁸¹ and which is not bound by legal forms or the rules of evidence.⁸² The decision is a discretionary decision, which requires the exercise of a broad and evaluative power in applying a statutory criteria, namely that set out by s 39(1) of the *NTA*.⁸³ That criteria includes consideration of policy such as the public interest.⁸⁴ The decision is not a determination of an existing right according to the law.⁸⁵ The purpose of the decision is to create new rights and obligations, which then form part of a deemed agreement between the parties.⁸⁶ The decision only has effect as a condition of the agreement.⁸⁷

10.82 There is one aspect of these two, otherwise very different exercises of power, which may be regarded as somewhat common and which may fairly be characterised as compensatory in nature because the aspect involves a consideration of loss. The assessment made in relation to a s 38(1)(c) condition must have regard to the adverse effect of the future act on the native title parties. That, in part, involves a prospective assessment of any lost capacity to enjoy or utilise native title rights and interests. While the Part 2 Div 5 compensation assessment is retrospective and directed to

76 *Native Title Act 1993* (Cth) s 51.

77 Therefore meeting the description of a judicial decision as described by the High Court in *New South Wales v Wojciechowska* [2025] HCA 27 [16].

78 *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 190–1.

79 *Native Title Act 1993* (Cth) s 50. The High Court of Australia recently cited Dixon CJ and McTiernan J's comments in *R v Davison* (1954) 90 CLR 353 with approval in *New South Wales v Wojciechowska* [2025] HCA 27. In that case, their Honours said 'how a particular act or thing of this kind is treated by legislation may determine its character. If the legislature prescribes a judicial process, it may mean that an exercise of the judicial power is indispensable': *New South Wales v Wojciechowska* [2025] HCA 27 [17], citing *R v Davison* (1954) 90 CLR 353, 370.

80 *Native Title Act 1993* (Cth) s 50(2). The High Court has held that such enforceability directly by a court speaks to the power being an exercise of judicial power: *New South Wales v Wojciechowska* [2025] HCA 27 [16]; *Brandy v Human Rights & Equal Opportunity Commission* (1995) 183 CLR 245, 268–9.

81 *Native Title Act 1993* (Cth) s 110.

82 *Ibid* s 109. The High Court recently held that legislation that gave power to a Tribunal where the Tribunal need not be composed of lawyers nor bound by the rules of evidence spoke against that exercise of power being judicial power: *New South Wales v Wojciechowska* [2025] HCA 27 [26].

83 The High Court has held that exercising a 'broad and evaluative power which must give effect to any relevant Government policy in force' is unlikely to be judicial in nature: *New South Wales v Wojciechowska* [2025] HCA 27 [31]. See also *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 189, 191.

84 *Native Title Act 1993* (Cth) s 39(1)(e).

85 A determination of an existing right according to the law is likely to be an exercise of judicial power: *New South Wales v Wojciechowska* [2025] HCA 27 [16].

86 *Native Title Act 1993* (Cth) s 41(1).

87 *Ibid*.

valuing the loss inflicted on the native title rights and interests themselves,⁸⁸ such an assessment can consider and take into account any lost capacity to enjoy or utilise the right lost or diminished.⁸⁹

10.83 However, given the other features of the exercise of the s 38(1)(c) determination power, their significance to the legislative scheme, and their distinctively non-judicial character, the existence of the somewhat common feature just identified (even if it is regarded as indicative of judicial power) is unlikely to lead to the conclusion that the exercise of that power involves the exercise of judicial power.⁹⁰

10.84 Concern about the exercise of judicial power would not be relevant in the case of a future act determination decided by an arbitrator appointed in accordance with **Recommendation 72**, discussed below. This is because the basis of the arbitrator's jurisdiction to make the determination would be the consent of the parties.⁹¹

10.85 The question of whether payment conditions may amount to the imposition of a 'tax' was raised in Parliamentary debate during the passage of the Native Title Amendment Bill 1998, and in particular by reference to royalties for mineral extraction.⁹² It has not otherwise been widely considered. The main implication of something being considered a 'tax' is to attract special requirements for passage through Parliament as set out in s 55 of the *Australian Constitution*.

10.86 The concept of a 'tax' has been the subject of considerable judicial consideration. In broad summary, 'taxation' has been characterised as 'a compulsory exaction of money by a public authority for public purposes enforceable by law'.⁹³ It has also been described as 'raising money for the purposes of government by means of contributions from individual persons'.⁹⁴ Taxes can also be a compulsory exaction of money raised for government purposes, which is not a payment for services, not a penalty, and is not incontestable.⁹⁵

10.87 Conditions requiring financial payments imposed by an arbitral body do not meet the definition of a 'tax'. This is because although in the broadest sense they

88 *Northern Territory v Griffiths* (2019) 269 CLR 1 [42], [46].

89 *Ibid* [216]–[231].

90 See especially *New South Wales v Wojciechowska*, where despite the fact that the impugned power of an administrative tribunal involved an assessment of damage by way of compensation for any loss or damage suffered (regarded by the Court as 'evocative of judicial power'), the High Court determined that key aspects of the legislative scheme indicated against any exercise of judicial power: *New South Wales v Wojciechowska* [2025] HCA 27 [31].

91 See, eg, *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 [28]–[29]; *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (2001) 203 CLR 645 [31]; *One Tree Community Service Inc v United Workers' Union* (2021) 284 FCR 489.

92 See, eg, Commonwealth, *Parliamentary Debates*, Senate, 4 December 1997, 10470, 10473 (Nick Minchin).

93 *Matthews v Chicory Marketing Board (Vic)* (1938) 60 CLR 263, 276.

94 *R v Barger* (1908) 6 CLR 41, 68.

95 *MacCormick v Commissioner of Taxation (Cth)* (1984) 158 CLR 622, 638–41.

may relate to public policy goals, the payments would not be raised as revenue for the purposes of government.

Relationship with statutory compensation applications

Recommendation 68

Part 2 Division 5 of the *Native Title Act 1993* (Cth) be amended to provide that when determining compensation under that Division, the court, person, or body determining compensation may take into consideration any payments made pursuant to a s 38(1)(c) condition determined by an arbitral body for the relevant compensable future act.

10.88 As outlined above and in **Chapter 9**, payments negotiated under the right to negotiate may incorporate both compensatory and non-compensatory elements. This reflects the fact that non-compensatory payments serve ‘a different and wider purpose’ from the ability to seek compensation, ‘although the two purposes are not mutually exclusive and there may be some overlap’.⁹⁶ Because arbitrated financial conditions may be determined by reference to similar agreed payments, it is possible that they may reflect both non-compensatory and compensatory elements. This gives rise to a question as to how any payments made under a determined condition should be taken into account in any subsequent application for compensation under Part 2 Div 5 of the *NTA*.

10.89 **Recommendation 68** is designed to prevent ‘double dipping’ in relation to compensation. It is not, however, intended to request that arbitrated payments necessarily offset, dollar for dollar, a later compensation claim. Rather, each case should be addressed according to its circumstances.

The early determination procedure

10.90 **Recommendation 60** in **Chapter 9** contemplates an ‘early determination procedure’ forming part of the right to negotiate process. This procedure would enable a native title party to seek a determination from the NNTT after three months have elapsed since the notification date for the future act. The procedure would require a formal application to the NNTT.

10.91 The early determination procedure would be a summary procedure by which the NNTT would either determine that the future act cannot be done, or the parties must continue to negotiate. The decision-making criteria for an early determination application would be an adaptation of the criteria used for a future act determination application, discussed above.

96 *Gomerai People v Santos NSW Pty Ltd* (2024) 303 FCR 153 [112].

10.92 The rationale for the early determination procedure is the same as that which underpins rules in civil litigation relating to summary judgment, namely, that a party should not be burdened with responding to a case that has no reasonable prospects of success.⁹⁷ This is a particularly relevant consideration in the native title context. As discussed in **Chapter 14**, PBCs are often under significant resourcing and capacity constraints. The early determination procedure would alleviate some of this pressure by removing the obligation to negotiate in circumstances where there is no prospect of fair and just redress for the impact of a future act on the native title rights and interests.

10.93 The early determination procedure is intended to respond to an issue that has been identified by many native title parties during this Inquiry: there are circumstances in which a native title party may wish to withhold its consent to a future act, but is obliged to negotiate because the present alternative is to respond to a future act determination application, with the widely held perception noted above that a future act will be allowed to proceed under s 39 of the *NTA*.⁹⁸

Recommendation 69

The *Native Title Act 1993* (Cth) be amended to provide that, in effect, when the National Native Title Tribunal is considering whether a future act can be done at the early determination stage, it must determine that the future act cannot be done if it is satisfied that there is no reasonable prospect that on a final hearing, the arbitral body will be satisfied of the criteria in s 39 of the Act, as reformed in accordance with Recommendation 65.

If the Tribunal does not determine that the future act cannot be done, then the parties must continue to negotiate in good faith under the right to negotiate provisions.

10.94 The criteria for determining early determination applications are based on the criteria for determining future act determination applications (see **Recommendation 65** above). In deciding an early determination, the NNTT would consider the reformed s 39 criteria, and, in particular, whether there is a reasonable prospect of the impact on native title being remediated by fair and just redress. If there is no reasonable prospect of fair and just redress, the NNTT would determine that the future act cannot be done. If the NNTT were not satisfied that there is no reasonable prospect of just redress, then the parties would be required to continue negotiating in good faith under the right to negotiate provisions.

10.95 Consistent with the reforms to s 39 discussed above, the early determination criteria focuses on whether the impacts on native title can be appropriately

97 See, eg, *Federal Court of Australia Act 1976* (Cth) s 31A; *Spencer v Commonwealth* (2010) 241 CLR 118; *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62, 84.

98 See Australian Law Reform Commission (n 56) [208]–[210].

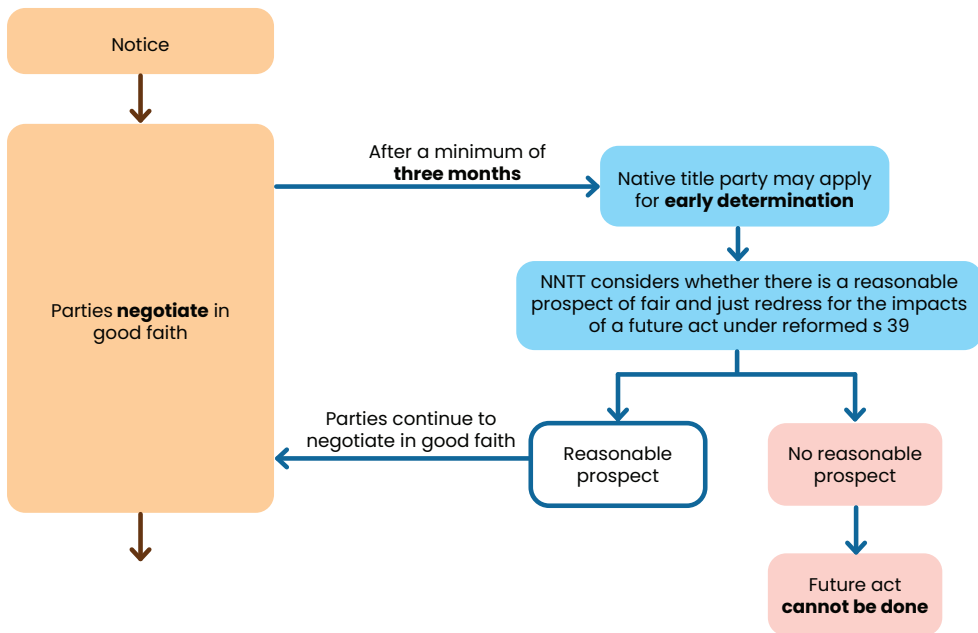
remediated. This is consistent with the requirements under international law that Indigenous peoples have access to just and fair redress for projects affecting their lands, territories, or other resources.⁹⁹ If there is no reasonable prospect that the impact of the future act on native title can be appropriately remediated, then the NNTT must determine that the future act cannot be done. In this way, the early determination procedure acts a safeguard to ensure that native title parties will have access to effective remedies, either negotiated or determined, for infringements of their native title rights and interests.

10.96 Naturally, individual native title holders may hold different opinions about the best way to manage native title — a collectively held property right — and as a result there may be disagreement among native title parties about how to approach negotiations relating to future acts. Some native title holders may be in favour of a proposed future act, while others may oppose the future act and may wish not to negotiate at all. In these circumstances, it is possible that an unsuccessful early determination may itself assist the native title party to resolve disagreements and approach subsequent negotiation in a more unified manner.

10.97 The early determination procedure aims to create a negotiating environment where all parties are incentivised to engage, while providing native title parties with an ‘exit pathway’ from the obligation to negotiate in circumstances where there is no reasonable prospect of just redress.

10.98 **Figure 10.1** illustrates how the early determination procedure is intended to operate.

99 See, eg, UNDRIP art 32(3).

Figure 10.1: The early determination procedure

10.99 Negotiations prior to any early determination application being made would be subject to the usual negotiation conduct standards.¹⁰⁰ The ALRC does not, however, suggest that the requirement to negotiate in good faith act as a limitation on the NNTT's power to decide an early determination application, as it does in relation to the negotiation conduct of non-native title parties under s 36(2) when a future act determination application is made.¹⁰¹

10.100 The rationale for the limitation on the NNTT's power under s 36(2) is that future acts subject to the right to negotiate should not be done in the absence of a native title party's consent unless there has been a good faith attempt to negotiate an agreement for that consent. There is no such agreement or consent in the early determination procedure, because this pathway is available where the native title part does not consent to the doing of the future act. Rather, the early determination procedure is aimed at identifying the circumstances in which native title parties should not be obliged to negotiate because there is no reasonable prospect of fair and just redress in accordance with the reforms to s 39 of the *NTA*.

¹⁰⁰ See [Recommendations 1–3](#) in [Chapter 3](#).

¹⁰¹ For discussion of s 36(2) of the *NTA* and the limitation it places on the NNTT's power to determine a future act determination application, see [Chapter 9](#).

Feedback in response to an early objection process in the Discussion Paper

10.101 The recommended early determination procedure is substantively different to the ‘early objection procedure’ in Proposal 6 in the Discussion Paper. The ‘early objection procedure’ would have enabled native title parties to withhold their consent to a future act within six months of being notified and communicate that to other parties. If this was done, then any party could apply to the NNTT for a determination as to whether the future act could be done with conditions, or not at all. If the NNTT determined that the future act could be done with conditions the parties would be required to negotiate the conditions for a minimum of nine months before the parties could apply to the NNTT to determine the conditions.

10.102 The ALRC heard some support for the early objection procedure.¹⁰² One of the key concerns expressed was that the early objection procedure would create an adversarial process and discourage the parties from engaging in negotiations, which would undermine the core objectives of the right to negotiate process.¹⁰³ This concern was raised by a broad cross-section of stakeholders and native title holders. We also heard concerns that the early objection procedure may give rise to ‘vexatious objections’ — that is, that some native title parties may exercise their objection right in a blanket fashion — which would result in additional delay and cost,¹⁰⁴ and foreclose meaningful engagement.¹⁰⁵

10.103 We have addressed these concerns by replacing the immediate ‘right to object’ with an early determination procedure that only becomes available after three months since notification of the future act and requires a native title party to bring the application. This incentivises the parties to engage in negotiations from the outset, including about any concerns the native title parties may have about the future act. That engagement would be subject to the negotiation conduct standards. The concerns are also addressed because the early determination procedure provides for a summary, rather than final, procedure.

10.104 Once the three-month period has elapsed, native title parties would be able to seek an early determination from the NNTT at any time during the rest of the negotiation period. This would address the concern raised about native title parties having a finite period within which to object, under the previously proposed right to object process.¹⁰⁶ This would remove pressure on native title parties to object before the parties have had an opportunity to commence genuine engagement. Native

102 See, eg, Houston Legal & Consultants, *Submission 95*; Gawler Ranges Aboriginal Corporation RNTBC, *Submission 98*; NSW Bar Association, *Submission 140*.

103 See, eg, Yamatji Marlpa Aboriginal Corporation, *Submission 148*; State of Queensland, *Submission 152*; New South Wales Government, *Submission 159*.

104 See, eg, Amalgamated Prospectors and Leaseholders Association of WA Inc, *Submission 64*; Minerals Council of Australia, *Submission 113*; State of Queensland, *Submission 152*.

105 See, eg, Seqwater, *Submission 135*.

106 Yamatji Marlpa Aboriginal Corporation, *Submission 148*. See also Kimberley Land Council, *Submission 151*.

title parties would have an opportunity to reflect on their position, and potentially change their position in relation to the future act as further details emerge. The early determination procedure also ensures that dialogue and negotiations are not foreclosed if the application is unsuccessful, and that native title parties would not lose the ability to seek a determination that a future act cannot be done after six months.

Facilitating agreement after arbitration is commenced

Recommendation 70

Sections 36(3), 36(4), 36A, 36B, and 36C of the *Native Title Act 1993* (Cth) be repealed.

10.105 **Recommendation 70** is intended to provide the parties and the NNTT a greater opportunity to explore whether an agreed outcome can be reached after a future act determination application is made. Combined with other recommendations relating to the NNTT's functions discussed in **Chapters 3** and **9**, it would enable the NNTT to take a more proactive and facilitative role in the resolution of the dispute than is currently possible.

10.106 This recommendation does this by, first, repealing s 36(3) to remove the requirement for the NNTT to advise the Minister when it has not decided a future act determination application within 6 months of the application being made. The reporting requirement imposes an unhelpful administrative burden on the NNTT and fails to recognise that parties may wish to explore consensual resolution (with the assistance of the NNTT) after a future act determination application has been lodged, rather than progress straight to arbitration. Removing the administrative requirement to advise the Minister would enable the NNTT to focus its time and resources on facilitating the resolution of future act disputes between the parties.

10.107 Secondly, **Recommendation 70** would remove the process that empowers the Minister to 'step in' and make a determination in circumstances where the NNTT has not made a determination within six months.¹⁰⁷ This power has never been exercised since it was introduced to the *NTA* in 1998, which demonstrates its lack of utility.

10.108 During debates in the Senate, the power was criticised as 'seeking to destroy the right to negotiate process'.¹⁰⁸ During the Joint Committee on Native Title

107 *Native Title Act 1993* (Cth) s 36A. Implementing this recommendation would require consequential amendments to sections of the *NTA* that cross-reference the Ministerial power: see, eg, *ibid* ss 28(1)(g), (2)(a), 34, 35(2), (3), 37(b), 41A(2), 43(2)(k), 52(1)(a), 94C(1D)(e), (f), (4)(b), 207B(5)(b).

108 Commonwealth, *Parliamentary Debates*, Senate, 29 October 1997, 8297 (Dee Margetts).

and the Aboriginal and Torres Strait Islander Land Fund hearings, John Basten QC cautioned that

the question of ministerial intervention seems to me not to be severable because the possibility of ministerial intervention at any stage, assuming that the minister will intervene on the side of the government party — and it is unlikely that he or she would do otherwise — inherently weights the balance against the negotiating process for the native title party, because the native title party knows that immediately the minister is dissatisfied and can bring himself or herself within the terms of section 34A or 36A, that is an end of it. So to give extensive powers of intervention colours the whole of the process even if the right to intervene has not yet arisen.¹⁰⁹

10.109 Repealing ss 36(4), 36A, 36B, and 36C would have the additional effect of removing this dynamic from the negotiation process. The recommendations in this Report do not completely remove the opportunity for Ministerial intervention after a future act determination is decided. The Minister would retain the power to overturn a future act determination where it is in the national interest (or interests of the state or territory concerned) to do so.¹¹⁰

Leave required to issue subsequent future act notice

Recommendation 71

Section 29 of the *Native Title Act 1993* (Cth) be amended to provide that if an arbitral body has determined that a future act cannot be done, a government party may not issue a notice under this section relating to the same or substantially similar future act without first obtaining leave of the National Native Title Tribunal, or unless five years has elapsed since the determination. In determining whether to grant leave, the Tribunal may consider:

- a. the identity of the proponent;
- b. whether there has been a material change of circumstances since the determination was made; and
- c. any other matter the Tribunal considers relevant.

109 Evidence to Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Native Title Amendment Bill 1996, Parliament of Australia, Canberra, 27 November 1996 (John Basten).

110 *Native Title Act 1993* (Cth) s 42. The breadth of this power (expressed as ‘the national interest’ or ‘the interests of the State or Territory’) can be contrasted with the terms of art 46(2) of UNDRIP, which provides that the rights protected by the Declaration should only be subject to limitations that are ‘non-discriminatory and *strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society*’ (emphasis added).

10.110 **Recommendation 71** would require a government party to seek leave of the NNTT before issuing a notice under s 29 of the *NTA* for a future act that is the same or substantially similar to a future act that an arbitral body has determined cannot be done.

Rationale for reform

10.111 The goal of this reform is to protect the integrity of the future acts regime by reducing the risk that there would be repeated future act notices about the same or similar future acts over an area where the arbitral body has determined that a future act cannot be done.

10.112 The policy underlying this recommendation is the public interest in finality to disputes. It is the same policy that underlies *res judicata* and various forms of estoppel: where an action has been brought, and the action has been determined, no future proceedings can be brought on the same action.¹¹¹ There is a strong public interest in finality in litigation. It is also in the interests of the parties to not have to reargue issues that have been previously decided. A similar rationale underlies s 40 of the *NTA*, which provides that the parties must seek leave before reopening issues that have been previously decided by the NNTT.

10.113 Because there have only been three future act determinations that the future act cannot be done, there is no evidence of this specific problem arising to date. However, it is nonetheless reasonable to provide a means of addressing the risk and ensuring that the need for finality is able to be considered in relation to determinations that may be made in future.

The same or substantially similar future act

10.114 The ALRC has heard some concern that the meaning of ‘substantially similar future act’ would be open to interpretation disputes.¹¹² While test litigation may result from the introduction of this mechanism (as is the case for any legislative amendment), the phrase ‘same or substantially similar’ is one used in other areas of the law.¹¹³ It embodies a concept that appears in legislation and rules designed to prevent abuse of process.¹¹⁴ For example, uniform civil procedure rules permit the grant of a stay of subsequent proceedings on ‘the same or substantially the same’

111 *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589, 597, 605, 609.

112 See, eg, New South Wales Government, *Submission 159*.

113 See, eg, *Local Government Act 1999* (SA) s 29(3)(c) (which allows the South Australian Local Government Boundaries Commission to refuse to inquire into a proposal if ‘the proposal is the same or substantially similar to a proposal that has already been inquired into’); *Broadcasting Services Act 1992* (Cth) ss 103P, 103Q, 103V, 103W (in relation to the regulation of ‘the same or substantially similar’ television channels or package of programs); *Competition and Consumer Act 2010* (Cth) ss 95N, 95Z (in relation to price restrictions on goods or services supplied on ‘the same or substantially similar’ terms and conditions); *Australian Securities and Investments Commission Act 2001* (Cth) s 12BK (in relation to standard form contracts that contain ‘the same or substantially similar terms’).

114 See discussion in *CGU Insurance Ltd v Watson* [2007] NSWCA 301 [40]–[43].

grounds as proceedings that have been discontinued or withdrawn until the costs of the first proceeding have been paid.¹¹⁵ Similarly, the *Fair Work Act 2009* (Cth) permits the grant of a stay of pecuniary penalty proceedings where criminal proceedings are on foot for an offence that consists of conduct that is 'substantially the same' as the conduct about which the pecuniary penalty order would be made.¹¹⁶

Factors to consider when granting leave

10.115 **Recommendation 71** would direct the NNTT to consider three broad factors when determining whether to grant leave. The first factor is the identity of the proponent. If the proponent is the same as that in the original dispute, the basis for refusing leave would likely be stronger.

10.116 The second factor is whether there has been a material change of circumstances since the determination was made. Changed circumstances may justify the same or similar issue being re-agitated.

10.117 The third factor gives the NNTT a broad discretion to take into account any other matter that it considers relevant. This allows the discretion to be exercised flexibly, in order that the circumstances raised by particular cases can be considered and weighed.

A potential system capacity issue

10.118 If implemented, **Recommendation 71** has the potential to create a system capacity issue for government parties, who would be required to verify whether leave of the NNTT is required before issuing future act notices. However, this is unlikely to be an issue in the short- to medium-term, as there have only been three determinations that the future act cannot be done to date. While this number may increase over time, government parties would be assisted by the development of the future act notice record recommended in **Chapter 8** of this Report.

115 See, eg, *Uniform Civil Procedure Rules 1999* (Qld) r 310.

116 *Fair Work Act 2009* (Cth) s 553.

Consent private arbitration

Recommendation 72

The *Native Title Act 1993* (Cth) be amended to provide that as an alternative to the National Native Title Tribunal, negotiation parties may, jointly and by consent, refer to an agreed private arbitrator for consent arbitration and determination:

- a. a future act determination application for a determination as to whether a future act may be done, and, if so, on what conditions; and
- b. a separate issue that has arisen in negotiations.

The *Native Title Act 1993* (Cth) should set out a framework for the appointment of private arbitrators and making of determinations by them. The framework should include the following elements:

- c. Negotiation parties may refer a future act determination application to a private arbitrator only after the parties have participated in mediation or conciliation, or sought the assistance of the National Native Title Tribunal during negotiations.
- d. Private consent arbitration is only available where all negotiation parties consent to arbitration and jointly appoint an independent arbitrator.
- e. In making determinations, arbitrators exercise the same functions as the National Native Title Tribunal, including the power to make all of the same determinations as the Tribunal, necessary to decide the matters referred for arbitration.
- f. Private arbitrators must carry out their functions consistently with s 109 of the *Native Title Act 1993* (Cth), and must afford procedural fairness to the parties and provide written reasons for decisions.
- g. Eligibility criteria for a private arbitrator should be the same or similar to the criteria for appointing non-Presidential members of the National Native Title Tribunal set out in the *Native Title Act 1993* (Cth).
- h. In making a determination as to whether a future act can be done, a private arbitrator must apply the same criteria and be empowered to exercise the same powers as the National Native Title Tribunal would as an arbitral body if it were making the same determination (see Recommendation 65).
- i. Determinations made by the private arbitrator should have the same legal effect as a determination made by an arbitral body under Part 2 Division 3 of the *Native Title Act 1993* (Cth).

- j. A right of appeal to the Federal Court of Australia on questions of law.
- k. A mechanism for lodging and registering determinations made by a private arbitrator with the National Native Title Tribunal for the purpose of recording outcomes on the publicly accessible database maintained by the Tribunal.

10.119 **Recommendation 72** would introduce an option for parties to use private arbitration for future act determination applications and separate issue referrals.¹¹⁷ Private arbitrators would be an alternative to the NNTT where the parties all consent to the relevant matter being heard by an agreed independent arbitrator.

10.120 Private consent arbitration has the advantage of providing parties with flexibility to appoint an adjudicator of their choice and may allow parties to tailor the procedures to their circumstances. Private arbitration presents parties with an opportunity to have their disputes resolved in a more expedited manner. Private arbitration also offers a means of alleviating a potentially increased demand on the NNTT's resources. A limitation is that access to private arbitration will likely be confined to situations where at least one well-resourced party is willing to meet the extra costs associated with consent arbitrations.

10.121 It should also be recognised that private arbitration has the potential to disrupt the precedential value of NNTT determinations over time.¹¹⁸ Private arbitration may also add complexity to the administration of the future act determination process. **Recommendation 72** seeks to mitigate against the potential for disruption to the precedential value of NNTT determinations by requiring written reasons to be provided by the private arbitrator to the NNTT and available on a publicly accessible database maintained by the Tribunal. This recommendation also requires that arbitrators be suitably qualified consistent with the eligibility requirements of a member of the NNTT.

10.122 While **Recommendation 72** is designed to create choice for parties and potentially alleviate pressure on the NNTT, this recommendation is not intended as an alternative to **Recommendation 85**. The NNTT will require sustained, additional funding to support the future acts system in line with **Recommendation 85**.

10.123 **Recommendation 72** sets out a number of matters that should form part of the legislative framework enabling parties to access private arbitration. In general terms, these matters are designed to ensure that the private arbitration process operates fairly and consistently with arbitration conducted by the NNTT.

¹¹⁷ Separate issue referral during negotiations is discussed in **Chapter 9**.

¹¹⁸ Noting that the NNTT is not generally bound by its own decisions, but may be guided by them: see *Mt Gingee Munjje Resources Pty Ltd v Victoria* (2003) 182 FLR 375 [20]; *Karajarri Traditional Lands Association (Aboriginal Corporation)/Western Australia/ASJ Resources Pty Ltd* [2012] NNTTA 18 [12].

10.124 **Recommendation 72** provides that negotiation parties must have first explored assistance, such as mediation or conciliation assistance by the NNTT, before referring a future act determination application for private arbitration. The purpose of this requirement is to ensure that negotiation parties have explored avenues other than arbitration for the resolution of matters in dispute before proceeding to arbitration. This requirement does not apply to arbitrations where the NNTT is the arbitral body, however it is consistent with the reforms discussed in **Chapter 9** which give the NNTT the ability to compel parties to a future act determination application to participate in a process aimed at resolving disputes and facilitating agreement. The requirement is a reasonable one aimed at facilitating the fundamental purpose of the right to negotiate as directed towards parties reaching agreement about future acts, rather than their disagreement being resolved by arbitration.

10.125 **Recommendation 72** contemplates that private arbitrators must carry out their functions consistently with s 109 of the *NTA*, which relates to the NNTT's way of operating. This means that in carrying out its functions, a private arbitrator:

- must do so in a fair, just, economical, informal, and prompt way;
- may take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islander peoples, but not so as to unduly prejudice any party to the arbitration; and
- is not bound by technicalities, legal forms, or rules of evidence.

10.126 Section 41 of the *NTA* sets out the legal effect of a determination made by NNTT or other arbitral body in a future act determination application. It is intended that the *NTA* should provide that determinations made by a private arbitrator have the same legal effect.

10.127 **Recommendation 72** also provides for appeals to the Federal Court on questions of law. This is consistent with the process that applies to the NNTT,¹¹⁹ and provides an important safeguard for the integrity of the arbitration process.

119 *Native Title Act 1993* (Cth) s 169.

11. Statutory Obligations and Effective Remedies

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Introduction

11.1 This chapter deals with the need for the future acts regime to clearly and effectively impose statutory obligations in relation to relevant provisions of the *Native Title Act 1993* (Cth) ('NTA') and provide effective remedies when those obligations are not met. It includes six recommendations, which would amend the *NTA* to clearly express the requirements for each future act as statutory obligations, clarify when non-compliance with a statutory obligation will result in future act 'invalidity', and provide for a civil remedy regime to effectively enforce certain obligations and entitlements that arise under the *NTA* and future act agreements.

11.2 The reforms in this chapter seek to respond to the task set by the Terms of Reference, namely, to consider:

- the intention of the *NTA*, as stated in its preamble, to be a special measure for the advancement of First Nations peoples, and to ensure native title holders are able to fully enjoy their rights and interests;
- the current operation of the future acts regime, including ILUAs and related parts of the *NTA*, with the aim of rectifying any inefficacy, inequality, or unfairness;

- options for efficiencies in the future acts regime to reduce the time and cost of compliance for all parties; and
- options to support native title groups, project proponents, and governments to share in the benefits of development on native title land, including opportunities for native title groups to lead or co-lead development, and for ensuring native title groups receive commensurate and timely compensation for the diminution of native title rights and interests caused by future acts.

11.3 The reforms also engage with the ALRC's functions as set out in the ALRC's establishing legislation, namely, to remove defects in the law, adopt new or more effective methods for administering the law, and simplify the law.¹

11.4 In this chapter, the ALRC makes recommendations to:

- include an express obligation to comply with the procedural requirements of the future acts regime (**Recommendation 73**);
- clarify the consequences of non-compliance with the requirements for different kinds of future acts, conditions, and agreements under the future acts regime (**Recommendations 74** and **75**); and
- provide effective mechanisms for incentivising compliance with the future acts regime and obtaining a remedy for non-compliance or breach, thus acting as a deterrence measure (**Recommendation 76**).

11.5 The recommendations in this chapter form a package of reforms that are intended to be implemented together. This package of reforms is intended to bring clarity to the law, rectify deficiencies in the existing regime, incentivise and enhance compliance with the future acts regime, and provide for effective remedies that reflect the requirements of international law.

Existing compliance and enforcement mechanisms

11.6 Future acts are acts that adversely 'affect' — or infringe — native title rights and interests in the manner specified by s 227 of the *NTA*.² The future acts regime in the *NTA* provides a pathway for future acts to be done 'validly'; that is, future acts that *lawfully* infringe on native title rights and interests.

11.7 Currently, the main pathways to validity under the *NTA* are agreements, the statutory procedures set out in Subdivisions G–N, and arbitral determinations by the National Native Title Tribunal ('NNTT').³ The current pathways are illustrated in **Figure 11.1** below. The pathway in blue represent pathways to validity based on

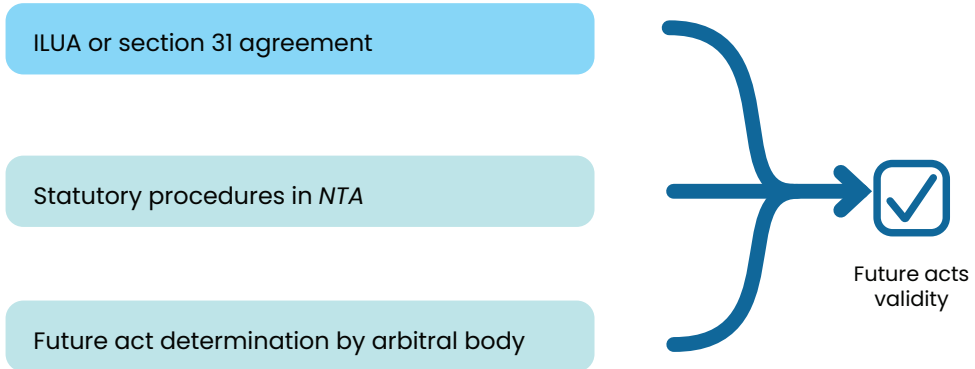
¹ See *Australian Law Reform Commission Act 1996* (Cth) s 21.

² *Native Title Act 1993* (Cth) s 233 (definition of 'future act'). Section 227 of the *NTA* provides that an 'act affects native title if it extinguishes the native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise'.

³ Future acts may also be validly done under pt 2 div 3 subdiv F of the *NTA*: see **Chapter 8**.

agreement-making. The pathways in aqua represent pathways to validity based on statutory procedures or arbitral determinations.

Figure 11.1: Current pathways to validity under the future acts regime



The need for reform

11.8 For each of the validation pathways provided by procedures set out in Subdivisions G–N, the *NTA* provides that unless a future act is ‘covered’ by a provision of the *NTA*, it will be invalid ‘to the extent that it affects native title’.⁴

11.9 The procedural rights in each of the validation pathways provided by Subdivisions G–N are usually expressed as an obligation. For example: ‘before the future act is done, the person proposing to do the act *must* ...’.⁵ However, despite procedural requirements being expressed as obligations, the courts have held, in effect, that unless a subdivision states expressly that the procedural requirement is a pre-condition of validity, validity is not dependent upon the procedural requirement being satisfied. Validity depends only on whether the future act is ‘covered’ by the subdivisions — in other words, if the future act is the type of future act that the subdivision deals with, it will be valid because it falls within the scope of that subdivision.⁶

11.10 There are no consequences for non-compliance with the procedural requirements. That means that for most of these validating pathways, a future act that is ‘covered’ by the pathway will be valid, even if the procedural requirements have not been followed. Furthermore, the *NTA* does not contain a process for native title parties to enforce their procedural rights, meaning that they must seek relief under the Federal Court’s general jurisdiction, with all associated risks and costs.

⁴ *Native Title Act 1993* (Cth) ss 24AA(2), 24OA.

⁵ See, eg, *ibid* ss 24GB(9), 24GD(6), 24GE(1)(f), 24HA(7), 24ID(3), 24JB(6)–(7).

⁶ *BHP Billiton Nickel West Pty Ltd v KN (Deceased) (Tjiwarl and Tjiwarl #2)* (2018) 258 FCR 521 [29]; *Lardil Peoples v Queensland* (2001) 108 FCR 453 [58], [117].

11.11 The ALRC considers that consequences should flow from non-compliance with procedural obligations. Rights that cannot be enforced cannot be said to be rights at all. An effective right needs to be supported by a corresponding legal obligation and a capacity for that obligation to be effectively enforced.

11.12 The Law Council of Australia commented that the absence of effective enforcement options for most provisions of the future acts regime

is deeply concerning, as it essentially establishes that there are no consequences if Government fails to comply with important procedural steps required by the future acts regime.⁷

11.13 The Law Council of Australia submitted that reform was required to ensure that

there is compliance with procedural requirements in the *NTA* and that access to an effective remedy is afforded where those requirements are not met.⁸

11.14 Principally due to inadequate data and difficulty identifying non-compliance, it is not possible to accurately quantify the volume of future acts that may have been done invalidly or in non-compliance with the procedural rights, or instances of non-compliance with agreement or arbitral determination conditions. However, submissions and consultations disclosed reliable anecdotal evidence of mischaracterisation and other non-compliance. For example, we have heard that future acts will ‘quite often’ be mischaracterised,⁹ that it is ‘not uncommon’ for future acts to be invalidly notified,¹⁰ and that non-compliance is ‘semi-regular’.¹¹ The lack of consequences for non-compliance creates a perception that compliance is not viewed as a necessity.¹² First Nations Legal and Research Services observed in its submission that

if lack of compliance with the future acts regime has no impact on the validity of an act, then government parties are disincentivised to comply with the regime. Indeed, we understand anecdotally that it is commonplace for State agencies to ignore the future acts regime, or to apply or misapply it in an ad hoc way.¹³

11.15 Cape York Regional Organisations similarly observed that ‘the current legal framework encourages a disregard for these crucial procedural obligations’.¹⁴

7 Law Council of Australia, *Submission 47*.

8 *Ibid.*

9 Queensland South Native Title Services, *Submission 45*.

10 North Queensland Land Council, *Submission 96*.

11 First Nations Legal and Research Services, *Submission 146*.

12 See, eg, First Nations Legal and Research Services, *Submission 42*; Cape York Regional Organisations, *Submission 44*.

13 First Nations Legal and Research Services, *Submission 42*.

14 Cape York Regional Organisations, *Submission 44*.

The North Queensland Land Council explained in its submission that where future acts are invalidly notified,

our clients are powerless to respond and demand compliance because regardless of whether the government party has complied with the future act regime or not, the act is considered valid.¹⁵

11.16 Some consultees and submissions expressed a view that where non-compliance has occurred, they consider it a 'likely result of administrative oversight, or ambiguity in the Act, rather than deliberate avoidance'.¹⁶

11.17 The lack of legal consequence for non-compliance with the obligations that correspond to the procedural rights conferred by the *NTA* means that native title parties do not have access to an effective remedy where their rights are infringed. Effective remedies need to be sufficiently broad to provide appropriate redress, including but not limited to compensation. Additionally, there may be a need for specific and general deterrence. The lack of a remedy for native title parties in cases of non-compliance is inconsistent with art 40 of the United Nations Declaration on the Rights of Indigenous Peoples ('UNDRIP'), which obliges states to provide effective remedies where Indigenous peoples' rights unlawfully are infringed.¹⁷ Similar guarantees are found in other international law instruments.¹⁸ Effective remedies in this context may include restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.¹⁹

11.18 In the native title context, the assessment of damages can be complex and may require considering competing worldviews and values systems. As Sweeney has explained, the court

must attempt to balance the harm to commercial interests against the harm that may be done to an Aboriginal community's ancestral lands (with which the Aboriginal community will often have spiritual connections and obligations).²⁰

15 North Queensland Land Council, *Submission 96*.

16 Law Council of Australia, *Submission 120*.

17 For further discussion of the safeguards contained in UNDRIP, see discussion in **Chapter 2**.

18 See *Universal Declaration of Human Rights*, GA Res 217A(III), UN GAOR, UN Doc A/810 (10 December 1948) art 8 ('UDHR'); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 2(3) ('ICCPR'); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 6 ('ICERD').

19 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res 60/147, UN Doc A/RES/60/147 (21 March 2006, adopted 16 December 2005) Annex [18]–[23].

20 Desmond Sweeney, 'Interlocutory Injunctions to Restrain Interference with Aboriginal Title — The Balance of Convenience' (1993) 17(2) *University of Queensland Law Journal* 141, 145. Sweeney was discussing the difficulties of this task in the context of Aboriginal title under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and comparative title under Canadian law; however, the principles apply equally to a native title context.

11.19 In the context of providing redress for the infringement of native title rights and interests, the capacity of courts under the general law to award damages or impose injunctions may not suffice to provide appropriate relief and deterrence. Appropriate relief may require that corrective measures be taken by the persons who have not complied with procedural obligations, such as a requirement to undergo cultural training or the provision of an apology or other appropriate demonstration of sorrow. Furthermore, the tools necessary to deal with the need for deterrence, such as the imposition of a penalty, are not readily available under the general law. This is discussed further below.

Compliance with statutory procedures and impact-based scheme conditions

Statutory obligation to comply

Recommendation 73

The *Native Title Act 1993* (Cth) be amended, in so far as necessary, to expressly impose corresponding obligations for each procedural right (either existing or proposed) and for each entitlement conferred by conditions that may be imposed through any of the processes of the impact-based scheme proposed by Recommendation 24. The amendment should identify, as appropriate, the person or persons upon whom the obligation is imposed.

11.20 **Recommendation 73** would amend the *NTA* to specify that the following are legal obligations under the *NTA* and must be complied with:

- procedural rights in the statutory procedures (meaning the current procedural rights in Subdivisions G–N (if they are retained), or the recommended reforms in **Chapter 6**, or the alternative reforms in **Chapter 7**) and Subdivision F; and
- conditions imposed through any of the proposed processes under the impact-based scheme recommended in **Chapter 6**.

11.21 Clarifying that the procedural rights (whether existing or proposed) give rise to corresponding legal obligations in the *NTA* will, in combination with the civil remedy regime (discussed below), ensure that procedural requirements are enforceable and resolve some of the problems identified above.

11.22 In relation to Groups B and C of the impact-based scheme discussed in **Chapter 6**, **Recommendation 73** contemplates that the *NTA* should make clear the ALRC's intent that conditions imposed or agreed (as applicable) are legal obligations that must be complied with.

Consequences of non-compliance with procedural rights and conditions

Recommendation 74

The *Native Title Act 1993* (Cth) be amended to provide that:

- a. where the applicable procedural right for a future act is the right to negotiate or a process that requires the consent of a native title party, a failure to comply with any corresponding obligation results in a future act being invalid from the time the future act is done, unless the invalidity is rectified by an eligible court; and
- b. subject to Recommendation 75, for all other procedural rights arising under the statutory procedures, such as notification, comment, or consultation, non-compliance with the corresponding obligation does not result in invalidity at the time that the future act is done, but invalidity may be declared by an eligible court.

In all cases, non-compliance with obligations which correspond to a procedural right should be subject to the civil remedy regime outlined in Recommendation 76.

Recommendation 75

The *Native Title Act 1993* (Cth) be amended to provide that where a validating condition is attached to a future act by regulations as contemplated by Recommendation 27 or by an agreement in relation to a Group C future act as contemplated by Recommendation 33, failure to comply with the validating condition results in a future act being invalid from the time the future act is done, unless the invalidity is rectified by an eligible court.

Non-compliance with validating conditions should also be subject to the civil remedy regime outlined in Recommendation 76.

11.23 The reforms in [Recommendations 74](#) and [75](#), in conjunction with the statutory enforcement regime discussed below (see [Recommendation 76](#)), would amend the *NTA* to clearly set out how failure to comply with an obligation, either directly or indirectly imposed by the *NTA* in respect of the future acts regime, will impact the validity of a future act.

11.24 [Recommendations 74](#) and [75](#) are intended to provide additional consequences, in the form of invalidity or the potential for a declaration of invalidity of the future act, for a failure to abide by certain obligations or conditions, and thus incentivise compliance.

11.25 [Recommendation 74](#) specifies that for future acts covered by the right to negotiate or requiring consent (by ILUA or other future act agreement), failure

to comply with the associated procedural obligations will mean that a future act is deemed invalid from the time it is done. As is the case now, such a future act would not affect (that is, extinguish or impair) native title rights and interests. This recommendation confirms the existing consequences of non-compliance with the right to negotiate in the *NTA*.

11.26 **Recommendation 74** also provides that for all other future acts — that is, those not covered by the right to negotiate or requiring consent — failure to comply with procedural obligations will not automatically result in invalidity. However, in such a case, the native title parties may apply to a court for a declaration of invalidity.

11.27 In summary, if **Recommendation 74** were implemented, non-compliance with the statutory procedures contained in the *NTA* would, in effect, result in:

- a presumption of validity where the relevant procedural right is an opportunity to comment or be consulted, with a court empowered to declare invalidity; or
- a presumption of invalidity where the relevant procedural right is the right to negotiate or requires the consent of the native title party, with a court empowered to ‘cure’ or rectify the invalidity.

11.28 **Recommendation 75** provides for an additional invalidating consequence in respect of non-compliance with a validating condition in an agreement for Group C future acts or those attached by regulations to a future act under the impact-based scheme in **Chapter 6**.

11.29 Accordingly, if **Recommendation 75** were implemented, non-compliance with a validating condition would result in a presumption of invalidity, with a court empowered to cure invalidity. By providing for invalidity, **Recommendation 75** acknowledges the significance of validating conditions. The purpose of validating conditions is discussed in **Chapter 6**.

11.30 The approach in **Recommendations 74** and **75** is intended to reflect the relative seriousness of the consequences of non-compliance with the lower-level procedural rights as compared to higher-level procedural rights. It recognises that, generally, non-compliance with right to negotiate or consent processes will have more serious adverse consequences upon native title rights and interests than non-compliance with lower-level procedural rights (like opportunity to comment or be consulted). That said, it leaves open the possibility of a future act subject to lower-level procedural rights being declared invalid by a court where such procedural rights are not complied with. This allows for the possibility that the consequences of non-compliance are so serious as to justify invalidity. Conversely, in situations of non-compliance with higher-level procedural rights, where the consequences of a contravention for a contravener (that is, invalidity) are out of proportion with the consequences of the contravention on native title parties or with the nature of the contravention, a court may rectify an invalidity.

11.31 These reforms should be considered alongside the impact-based scheme discussed in **Chapter 6**, which seeks to align procedural rights with the anticipated

impacts of future acts on native title rights and interests. That is, future acts subject to negotiation or consent processes (such as ILUAs) are generally assumed to produce a higher impact on native title rights and interests than future acts subject to consultation or notification processes.

11.32 The differential approach to invalidity also recognises that, for lower-level procedural rights, non-compliance may more often arise from inadvertent or technical breaches. This was a concern raised in numerous submissions to the ALRC.²¹

11.33 **Recommendation 74** is expressed in general terms to enable the reforms to be implemented under either the existing future acts regime, the impact-based scheme recommended in **Chapter 6**, or the future acts regime reformed in accordance with the recommendations in **Chapter 7**.

Curing invalidity

11.34 Where a future act or other act is invalid — either because it is deemed invalid or because it is declared invalid by an eligible court — the court may make an order that would retrospectively cure the invalidity. This order may be accompanied by conditions.

11.35 The power for a court to retrospectively address invalidity would be a new power. Currently, the only way to cure invalidity is via an ILUA,²² which requires the consent of the affected native title parties in circumstances where the required consent is capable of being refused or, otherwise, not practical to obtain. If **Recommendation 74** were implemented, a court may, for example, determine that it is appropriate and just to retrospectively cure invalidity where the invalidity arose because of administrative or technical non-compliance, or where a third party has acted in good faith on the basis that the future act was done validly.

11.36 **Recommendation 74** refers to an ‘eligible court’, which is intended to include both state and territory courts as well as federal courts. Reasons why state or territory courts may provide a more accessible or otherwise appropriate avenue for parties are discussed below. However, noting the seriousness of either declaring invalidity or curing invalidity, as the case may be, consideration should be given to whether these powers are only given to the federal courts.

11.37 When deciding to retrospectively cure invalidity, it would be relevant for a court to consider the importance of protecting the integrity of the future acts regime and promoting compliance with the regime’s procedural requirements. In doing so, it may be relevant for the court to consider, for example, whether the parties have attempted to, or should attempt to, reach a consensual resolution, in recognition of the importance of agreement-making and self-determination in the future acts regime.

21 See, eg, Association of Mining and Exploration Companies, *Submission 97*; Local Government Association of Queensland, *Submission 108*; NSW Minerals Council, *Submission 117*; Law Council of Australia, *Submission 120*; New South Wales Government, *Submission 159*.

22 See, eg, *Native Title Act 1993* (Cth) s 24AA(3).

Remedies, relief, and enforcement

11.38 Currently, there are no legal consequences for failure to comply with the procedural requirements of most validation pathways.

Future act agreements and arbitral determinations

11.39 Future act agreements are statutory creatures of the *NTA*. Despite this, the *NTA* does not provide a mechanism to ensure they are complied with or capable of being enforced. Instead, the terms, conditions, or obligations imposed by future act agreements (primarily ILUAs or section 31 agreements) are legally enforceable under the general law as contractual conditions. Similarly, while the *NTA* refers to the existence of ancillary agreements,²³ compliance and enforcement of these agreements are not provided for in the *NTA*.

11.40 Section 38(1)(c) conditions determined by an arbitral body are made legally enforceable as contractual conditions of an imputed agreement made by the parties to the arbitration.²⁴ Although these conditions are authorised by the *NTA*, the *NTA* does not address non-compliance with them.²⁵ The only recourse for non-compliance with a future act agreement or arbitral determination is, therefore, a remedy in contract under the general law.

11.41 Native title parties often encounter difficulties accessing remedies for breach of future act agreements. It is not always practical for native title parties to pursue common law remedies to enforce their rights due to the time, expense, and uncertainty associated with litigation, where there is no statutory framework or precedent to provide a clear pathway to a remedy.²⁶

11.42 First Nations Legal and Research Services observed that a

proponent's non-compliance with a native title agreement does not generally have any consequences for the ongoing validity of the proponent's tenure. This is often in distinction to other conditions that attach to the proponent's leases or licences. For example, in many jurisdictions breach of a particular condition on a mining lease can result in loss or forfeit of the lease.²⁷

11.43 Furthermore, as Godden and Dorsett have observed, in a range of situations, the common law contractual remedy of monetary damages may be an inappropriate

23 Ibid ss 41A(1)(c), 41B(2)(d). See also *Native Title (Indigenous Land Use Agreements) Regulations 2024* (Cth) reg 7(2)(e).

24 *Native Title Act 1993* (Cth) s 41(1).

25 While s 177 of the *NTA* provides for a contempt of Tribunal provision, it is unclear if this would extend to non-compliance with an NNTT-imposed condition. This has been a feature of the *NTA* since its enactment; however, it is not clear if it has been utilised for this purpose.

26 See, eg, First Nations Legal and Research Services, *Submission 42*; Yamatji Marlpa Aboriginal Corporation, *Submission 148*.

27 First Nations Legal and Research Services, *Submission 42*.

or inadequate remedy for breaches of some obligations in native title agreements.²⁸ As Young J explained in *Carriage v Duke Australia Operations Pty Ltd*, one reason for this is ‘the cultural significance of what might be lost cannot be assessed in money by way of damages’.²⁹

11.44 **Recommendation 76** would bring the obligations imposed by future acts agreements and arbitral determinations within the scope of the compliance regime provided by the *NTA* itself.

Statutory procedures

11.45 Where the *NTA* expressly provides that the consequence of non-compliance is that the future act will be invalid, the practical consequences of such invalidity are unclear. Additionally, there is no mechanism for invalidity to be rectified (other than by an ILUA).³⁰ There are also no remedies or compliance mechanisms (including mechanisms that address deterrence) for non-compliance with obligations directly or indirectly imposed by the *NTA*.

11.46 The *NTA* does provide a remedy for injury following the validation of a future act through the statutory compensation regime in Part 2 Div 5 of the *NTA*. Beyond that, and in so far as the *NTA* contemplates the availability of a remedy in relation to any aspect of the future acts regime, the only remedies provided for are general law remedies.³¹

11.47 For the reasons later discussed, the ALRC is of the view that in order to provide effective remedies for the contravention of obligations directly or indirectly imposed by the *NTA* — meaning obligations imposed by the *NTA* or by agreements made under the *NTA* — the *NTA* should provide its own remedial regime. Further, in order to provide for both the specific and general deterrence of the contravention of *NTA* obligations, and maintain the integrity of the future acts regime, a civil remedy regime should be available.

28 Lee Godden and Shaunnagh Dorsett, ‘The Contractual Status of Indigenous Land Use Agreements’ (2000) 2(1) *Land, Rights, Laws: Issues of Native Title* 1, 8.

29 *Carriage v Duke Australia Operations Pty Ltd* [2000] NSWSC 239 [15].

30 See, eg, *Native Title Act 1993* (Cth) s 24AA(3).

31 It should be noted, however, that s 213(2) provides that, subject to the *NTA*, the Federal Court has jurisdiction in relation to matters arising under the *NTA*. The scope of that provision is not clear but it is possible (as the Note to s 50(1) contemplates) this provision could be used to deal with invalid future acts.

Recommended reform

Recommendation 76

The *Native Title Act 1993* (Cth) be amended to implement a civil remedy regime to address non-compliance with obligations either directly or indirectly imposed by the Act in relation to the validation of future acts. Eligible state, territory, and federal courts identified by the Act should be empowered to provide wide remedial and compliance powers including:

- a. injunctive relief on an interlocutory or final basis;
- b. declarations that a future act has been done invalidly;
- c. where a future act is done invalidly or declared to be done invalidly, an order rectifying invalidity, including on conditions as determined by the court;
- d. to award compensation and make any order the Court considers appropriate to address the non-compliance and its consequences; and
- e. to impose a pecuniary penalty.

The statutory civil remedy regime should apply to the enforcement of:

- a. the procedural rights of the future acts regime;
- b. conditions in regulations relating to the categorisation of future acts under the impact-based scheme as contemplated by Recommendation 27;
- c. conditions in a consultation report relating to a Group B future act under the impact-based scheme as contemplated by Recommendation 31;
- d. conditions in an agreement relating to a Group C future act as contemplated by Recommendation 33;
- e. conditions placed upon the doing of a future act by a determination of an arbitral body;
- f. the obligation to pay reasonable costs pursuant to s 60AB of the Act, as reformed by Recommendation 78;
- g. entitlements and obligations in future act agreements; and
- h. determinations made pursuant to a dispute resolution clause in a future act agreement.

11.48 **Recommendation 76** would introduce a statutory civil remedy regime, which is designed to provide an accessible and effective mechanism for the broad range of redress and other relief necessary to respond to, and effectively deter, the contravention of obligations directly or indirectly imposed by the *NTA* in relation to

future acts. Any interested party — native title parties, proponents, and government parties — would be able to seek a remedy in an eligible court.

11.49 **Recommendation 76** would have broad application. It would apply to the enforcement of:

- procedural rights to be afforded to native title parties;
- conditions that relate to the categorisation of future acts under the impact-based scheme discussed in **Chapter 6**;
- conditions in a consultation report relating to a Group B future act under the impact-based scheme as contemplated by **Recommendation 31**;
- conditions in an agreement relating to a Group C future act as contemplated by **Recommendation 33**;
- conditions imposed by an arbitral body when making a future act determination for future acts subject to the right to negotiate (see **Chapter 10**);
- the recovery of costs under s 60AB of the *NTA*, discussed further in **Chapter 12**;
- the entitlements and obligations contained in future act agreements (that is, ILUAs, section 31 agreements, ancillary agreements, and Group C agreements contemplated by reforms to the statutory procedures discussed in **Chapter 6**); and
- determinations made pursuant to a dispute resolution clause in a future act agreement.

11.50 **Recommendation 76** would allow parties to seek relief from ‘eligible state, territory, and federal courts’, which would be identified in the *NTA*. The rationale for providing a variety of avenues for enforcement is to increase access to justice. While applicants using the enforcement regime would have the benefit of the asymmetrical costs framework regardless of which eligible court they approach (see **Recommendation 77**), there may be other circumstances that make one or other court more appropriate or accessible in the circumstances (for example, location of registries and courthouses) or reduced costs where a dispute may be heard by a lower court (such as in a District or County Court relative to a Supreme Court).

11.51 Eligible courts would be granted broad powers to provide for a wide range of relief. This may include the power to:

- grant interlocutory or final injunctive relief;
- make declarations that a future act has been done invalidly;
- an order that would ‘cure’ the invalidity of a future act;
- award compensation; or
- impose a pecuniary (financial) penalty.

11.52 Possible remedies should be expressed as a non-exhaustive list of illustrative orders and should otherwise provide the court with the discretion to make any order that it considers appropriate or just in the circumstances. This may include remedies that are not ordinarily available under the common law, such as culturally specific

remedies. The discretion would also allow the court to consider the circumstances of each particular case, including the purpose of the future act, and the degree or impact of the non-compliance.³² This discretion would help address concerns that a failure to strictly comply with the procedural requirements may have disproportionate consequences for proponents providing essential public services, for example.³³

11.53 **Recommendation 76** contemplates remedies being available in any court; however, given the seriousness of a declaration of invalidity and any order ‘curing’ invalidity, consideration should be given to whether these should be reserved for the federal courts. Additionally, it may also be appropriate to empower state or territory courts to transfer proceedings to a federal court where requisite expertise in native title matters warrants transfer or where issues raised are of such importance that a transfer would better serve the interests of justice. Appeals from eligible state or territory courts would be exclusively dealt with by the Federal Court.³⁴ This is designed to ensure a degree of consistency in the operation of the civil remedy regime and the uniform application of the law guided by the specialist expertise in native title matters of the Federal Court.

11.54 **Recommendation 76** would also introduce pecuniary penalties to the future acts regime. The discretion to award and determine a pecuniary penalty would be wide. In exercising its discretion, the court may, for example, consider whether a breach of the procedural requirements was deliberate, wilfully negligent, or intended to frustrate the future acts regime,³⁵ or if it was inadvertent and unintentional. The court should have the discretion to calculate the penalty appropriately to ensure that the sanction is not perceived as a ‘licence fee’ or simply a cost of doing business.³⁶ This will help to address concerns that a compliance regime that permitted validity to be cured by a court may encourage ‘pay per breach’ conduct.³⁷

11.55 The civil remedy regime would adopt a ‘common informer’ framework, similar to other legislative regimes such as the *Fair Work Act 2009* (Cth). In the context of the *NTA* — a statute without a regulator — this would mean that native title parties or Native Title Representative Bodies and Service Providers (‘NTRB/SPs’) may bring enforcement proceedings. The usual position in common informer proceedings is that if the court awards a financial penalty as part of the civil remedy, that financial penalty would be paid to the common informer to encourage enforcement of the law.³⁸ In addition

32 See, eg, NSW Minerals Council, *Submission 117*; New South Wales Government, *Submission 159*.

33 See, eg, Isaac Regional Council, *Submission 70*; Local Government Association of Queensland, *Submission 108*.

34 Appeals would generally be heard by a single judge of the Federal Court. However, in the case of appeals from a state or territory Supreme Court, it may be appropriate for an appeal to be heard by the Full Court of the Federal Court.

35 See, eg, First Nations Legal and Research Services, *Submission 42*.

36 Laura J Kerrigan et al, ‘Project: The Decriminalization of Administrative Law Penalties: Civil Remedies, Alternatives, Policy, and Constitutional Implications’ (1993) 45(4) *Administrative Law Review* 367, 388.

37 See, eg, Norman Waterhouse Lawyers, *Submission 102*.

38 See *Transport Workers’ Union of Australia v Qantas Airways Ltd (Penalty)* [2025] FCA 971 [280]–[299].

to the costs framework outlined further below, this would help to address the issue that native title parties are often under-resourced and lack the capacity to bring court proceedings to enforce their rights and uphold the integrity of the future acts regime.³⁹ It reflects the general rationale that the receipt of a penalty by the common informer is intended to encourage common informers to bring proceedings where necessary.⁴⁰

11.56 The ALRC understands there may be some concern that the civil penalty regime may be subject to abuse through the use of strategic or repeated litigation of minor breaches, particularly against native title parties. The courts will need to, as with all legal proceedings, be vigilant to ensure that any such attempts to use the civil penalty regime for an improper purpose of this kind are dealt with appropriately and in the usual way.

Rationale for reform

11.57 Article 40 of UNDRIP requires that Indigenous peoples have access to effective remedies where their rights are unlawfully infringed. As discussed above, the current future acts regime does not provide for adequate remedies, therefore requiring reform that both facilitates access to appropriate remedies and deters non-compliance. The civil remedy regime reflects the requirements of art 40 of UNDRIP by providing that native title parties will have access to effective remedies where their native title rights and interests are unlawfully infringed.

11.58 Establishing a regime within the *NTA* to enforce compliance with statutory obligations imposed by the Act is the only way to provide effective remedies. Otherwise, the *NTA* would not, for example, be able to ensure that the failure of a proponent to comply with the obligations that correspond to procedural rights has a legal consequence.

11.59 It may be possible for common law causes of action, such as trespass and nuisance, to provide an indirect pathway for addressing the contravention of statutory obligations imposed by the *NTA*. However, that pathway is riddled with complexity, uncertainty, and litigation risk.

11.60 Further, common law remedies may be appropriate for addressing the breach of economic-related obligations. However, the obligations in question are not so limited in subject matter. The subject matter of contractual obligations in ILUAs and section 31 agreements can extend to the protection of cultural rights and addressing cultural sensitivities, among a range of non-economic considerations. It is necessary that a broad range of potential relief be available to deal with the contravention of such obligations. That facility is not readily available through common law remedies but can be effectively accessible through a statutory compliance regime, which provides to the courts broad remedial powers.

39 See discussion in **Chapter 14**.

40 See, eg, *Transport Workers' Union of Australia v Qantas Airways Ltd (Penalty)* [2025] FCA 971 [256], citing *Woodside Burrup Pty Ltd v Construction, Forestry, Mining and Energy Union* (2011) 220 FCR 551 [133]–[134].

11.61 Furthermore, common law remedies are, broadly speaking, directed to addressing injury and not deterrence. While an award of damages may have a practical deterrent effect, the purpose of such an award will not have been deterrence, and damages will not usually, even in a practical sense, provide the extent of deterrence necessary to discourage future contravention. That is particularly so in relation to the breach of obligations with a non-economic subject matter, such as cultural loss. The breach of that kind of obligation will usually not cause economic loss and result in damages. Accordingly, there will be no consequence for the contravener and no effective enforcement of the obligation.

11.62 This analysis demonstrates that a specific mechanism for addressing deterrence is required for the future acts regime. As the High Court has stated, the ‘primary’, if not ‘sole’, purpose of pecuniary penalties is deterrence.⁴¹ Put differently, pecuniary penalties are ‘primarily if not wholly protective in promoting the public interest in compliance’.⁴²

11.63 As observed, pecuniary penalties have a protective purpose: their availability as an enforcement mechanism may be necessary to protect the integrity of a statutory regime. The obligations which are recommended in this chapter and those currently imposed, either directly or indirectly, by the *NTA* in relation to the future acts regime, are important for achieving the purposes of a reformed regime. The integrity of that regime needs the support of a civil remedy compliance regime to ensure that the intent and purposes of the future acts regime are effectively realised.

Costs in court proceedings

11.64 Section 85A of the *NTA* provides that parties generally bear their own costs in particular native title proceedings, with the court retaining discretion to order a party to pay some or all of the other party’s costs if satisfied that the costs were incurred ‘by any unreasonable act or omission’. This provision is intended to remove the expectation that costs will be awarded following the completion of proceedings.⁴³ The discretion to award costs is not intended to be used to punish a successful or unsuccessful party, or to be ‘a deterrent to other would-be applicants’.⁴⁴

The need for reform

11.65 Section 85A of the *NTA* may be regarded as a measure designed to improve access to justice. However, s 85A does not directly apply to proceedings concerning future acts,⁴⁵ except for proceedings brought under the *Administrative Decisions*

41 *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450 [15].

42 *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 [55], citing *Trade Practices Commission v CSR Ltd* [1990] FCA 762, 43–4.

43 For an explanation of the principles underlying s 85A, see *Cheedy v Western Australia (No 2)* (2011) 199 FCR 23 [9].

44 *Reid v South Australia* [2007] FCA 1479 [54]. See also *Fagan on behalf of the Wadawurrung Native Title Claim v Victoria (No 2)* [2026] FCA 11 [14].

45 *Yanunijarra Aboriginal Corporation RNTBC v Western Australia* [2025] FCA 490 [185]–[189].

(*Judicial Review*) Act 1977 (Cth) that involve questions about the construction of the NTA.⁴⁶

11.66 The cost of civil litigation can be prohibitive, particularly for native title parties. Justice SC Derrington acknowledged the extent of this issue in *QGC v Alberts (No 5)*, observing

the sad consequence of the conduct of these proceedings is that most of the funds that should be available to the family members for whose benefit the ILUA was established will be consumed by the fees of lawyers and corporate administrators.⁴⁷

11.67 The prohibitive costs of civil litigation can result in native title parties tolerating repeated breaches of native title agreements because it is not feasible to bring an action for breach of contract.⁴⁸ The ALRC also heard that the risk of an adverse costs order being made is a significant barrier faced by native title parties wanting to challenge government decisions relating to future acts in court.⁴⁹

11.68 Feedback also suggested that the current lack of clarity around costs in future act litigation has a ‘freezing effect’ on native title parties who may wish to bring actions in the Federal Court.⁵⁰

Recommended reform

Recommendation 77

The *Native Title Act 1993* (Cth) be amended to introduce a ‘modified asymmetrical costs’ framework, modelled upon s 46PSA of the *Australian Human Rights Commission Act 1986* (Cth), for proceedings brought in relation to future acts in eligible courts identified by the *Native Title Act 1993* (Cth).

11.69 **Recommendation 77** would introduce a ‘modified asymmetrical costs’ framework to the NTA in relation to proceedings relating to future acts. The framework would be based on s 46PSA of the *Australian Human Rights Commission Act 1986* (Cth). This recommendation is intended to make initiating proceedings more accessible for all persons who seek to enforce compliance with the legal obligations imposed through the future acts regime.

46 *Burragebba v Queensland* [2016] FCA 1525 [7]–[8], citing *Burragebba v Queensland* (2015) 236 FCR 160 [27], [30].

47 *QGC Pty Ltd v Alberts (No 5)* [2024] FCA 139 [20].

48 See, eg, First Nations Legal and Research Services, *Submission 42*.

49 See, eg, Kimberley Land Council, *Submission 26*; Gur A Baradharaw Kod Torres Strait Sea and Land Council Torres Strait Islander and Aboriginal Corporation, *Submission 125*.

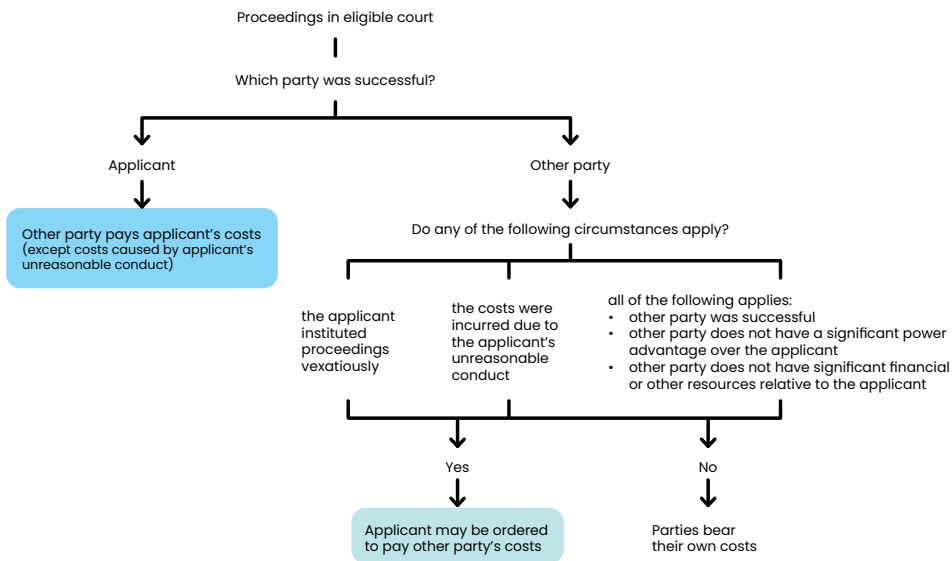
50 See, eg, Yamatji Marlpa Aboriginal Corporation, *Submission 148*. See also Martuwarra Fitzroy River Council, *Submission 81*.

11.70 Under a 'modified asymmetrical costs' framework, if an applicant were successful in proceedings brought in relation to future acts, the other (unsuccessful) party would be ordered to pay costs (not including any costs that were incurred by the applicant's unreasonable conduct). The applicant would only be ordered to pay costs incurred by another party in confined circumstances. Drawing on s 46PSA of the *Australian Human Rights Commission Act 1986* (Cth), those circumstances may include:

- where the court is satisfied that the applicant instituted the proceedings vexatiously or without reasonable cause;
- where the court is satisfied that the applicant's unreasonable act or omission caused the other party to incur the costs; and
- where the other party was successful in the proceedings, and that other party does not have a significant power advantage over the applicant and does not have significant financial or other resources relative to the applicant.

11.71 **Figure 11.2** below illustrates how the modified asymmetrical costs framework could operate.

Figure 11.2: A modified asymmetrical costs framework for future acts proceedings in eligible courts



11.72 The model contained in s 46PSA of the *Australian Human Rights Commission Act 1986* (Cth) was introduced in 2024 as part of the reforms arising out of the

Respect@Work Report.⁵¹ The ALRC recommended a similar model be introduced to the *Fair Work Act 2009* (Cth) in the Justice Responses to Sexual Violence Inquiry.⁵²

11.73 The ALRC contemplated several costs protection models when considering how to address the significant financial barriers to accessing civil litigation identified above. These included:

- An asymmetrical or equal access cost model based on whistleblower legislation.⁵³ Asymmetrical costs models provide that an applicant must not be ordered to pay another party's costs unless the proceedings were instituted vexatiously or without reasonable cause, or if the costs were caused by the applicant acting unreasonably.
- A 'soft' costs neutrality model, often found in administrative tribunal legislation.⁵⁴ Under a soft costs neutrality model, the general rule is that each party bears their own costs and the decision-maker can only award costs in specific circumstances.
- A 'hard' costs neutrality model, usually found in industrial relations legislation.⁵⁵ Hard costs neutrality models provide that parties must bear their own costs unless the proceedings were instituted vexatiously or without reasonable cause, or if the costs were caused by one party acting unreasonably.

11.74 Each of these models is generally designed to improve access to justice by mitigating the costs of proceedings. The ALRC has recommended the modified asymmetrical costs model because it most effectively removes the potentially prohibitive cost barrier to commencing litigation by providing an applicant with a measure of confidence that the applicant will not be 'out of pocket' if they are successful.

11.75 This approach is particularly effective as an access to justice measure where the relief likely to be obtained by an applicant through the legal proceedings will not be monetary, or where the monetary relief likely to be obtained is out of proportion with the legal costs incurred by an applicant to obtain it. Enforcement proceedings

51 Attorney-General's Department (Cth), *Review into an Appropriate Cost Model for Commonwealth Anti-Discrimination Laws* (Consultation Paper, 2023). The Respect@Work Report had recommended a hard costs neutrality model based on s 570 of the *Fair Work Act 2009* (Cth): Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) rec 25. However, in a further report, the Commission suggested a soft costs neutrality model: Australian Human Rights Commission, *Free & Equal: A Reform Agenda for Federal Discrimination Laws* (Position Paper, 2021) 196, 337. Further consultation was undertaken, and the result was the adoption of the modified asymmetrical costs model that is now in s 46PSA of the *Australian Human Rights Commission Act 1986* (Cth).

52 Australian Law Reform Commission, *Safe, Informed, Supported: Reforming Justice Responses to Sexual Violence* (Final Report No 143, 2025) rec 52.

53 See *Public Interest Disclosure Act 2013* (Cth) s 18.

54 *Civil and Administrative Tribunal Act 2013* (NSW) s 60; *Northern Territory Civil and Administrative Tribunal Act 2014* (NT) ss 131, 132; *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 100, 102; *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 57; *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 109; *State Administrative Tribunal Act 2004* (WA) s 87.

55 *Fair Work Act 2009* (Cth) s 570.

in relation to future acts obligations will, not uncommonly, lead to small monetary relief including because, as earlier discussed, the obligations being enforced may not have an economic or monetary character.

11.76 **Recommendation 77** would not apply to actions brought in the NNTT. Costs incurred in NNTT inquiries are the subject of separate recommendations (see **Recommendations 79** and **80**).

11.77 Reforms to costs provisions form one part of the ALRC's broader reform package intended to increase access to justice and improve systemic capacity issues. As the Australian Human Rights Commission observed in its submission,

while helpful, measures such as NTRB and NTSP support, payment of fees, and awarding of costs in litigation proceedings do not constitute an adequate nor sustainable solution to the systemic resource deficit faced by PBCs.⁵⁶

11.78 **Recommendation 77** is intended to complement other related reforms discussed in other chapters of this Report, such as **Recommendation 84** relating to Prescribed Body Corporate resourcing.

Statutory compensation for invalid future acts and other invalid acts

11.79 This section discusses the uncertainty as to whether redress for invalid future acts is available through the statutory compensation regime in Part 2 Div 5 of the NTA. The ALRC considered recommending reforms to address this uncertainty but ultimately decided that the problem would be better addressed by consideration of the broader issue.

11.80 Invalid future acts are only one type of unlawful infringement of native title rights and interests.⁵⁷ The issue of access to redress in relation to invalid future acts should be considered in the context of the wider problem of access to redress for all forms of unlawful infringements on native title rights and interests. Despite this, the ALRC does propose a solution that could be implemented in the absence of consideration of that broader issue.

11.81 Addressing the broader problem may provide a better solution to that proposed below. However, consideration of the broader problem would go beyond the scope of this Inquiry and has not been done. The ALRC strongly suggests that this be done through a law reform process. If not, then the proposal below should be considered for implementation.

56 Australian Human Rights Commission, *Submission 118*.

57 See generally First Nations Legal and Research Services, *Submission 42*.

The need for reform

11.82 Statutory compensation is available under the *NTA* for valid future acts. That is, native title holders may make an application under Part 2 Div 5 for compensation for acts affecting native title. The note to s 50(1) of the *NTA* indicates that

such compensation is generally for acts that are validated or valid. Native title holders would ordinarily be entitled to compensation or damages for invalid acts under the general law. The Federal Court may be able to award such compensation or damages in proceedings in relation to the invalidity of the act: see subsection 213(2).

11.83 Despite the indication that native title holders would not be entitled to statutory compensation for invalid future acts, the legal position is unsettled. To date, the only case to test this position is the *Timber Creek* litigation. At first instance, Mansfield J granted damages to the native title party 'for trespass for grants made and actions taken by the respondent' in relation to the grant of certain freehold lots, which were invalid future acts.⁵⁸

11.84 This was overturned on appeal to the Full Court of the Federal Court. The Full Court took issue with both the articulation of the issues by the native title party and the reasoning of the judge at first instance.⁵⁹ The Full Court found that although 'there may be good sense in the result arrived at by the primary judge', there was no 'sound legal basis' for the approach taken at first instance.⁶⁰ The Full Court observed that

the issues raised by the damages claim are complex. They are novel. It is important that principles are established to deal with such circumstances.⁶¹

11.85 The Full Court noted that because it did not rule on the merits of the claim, it was open to the native title party to agitate the matter in future proceedings.⁶² However, this has not happened. The ultimate result of the *Timber Creek* litigation was that the native title holders received an award of compensation for various kinds of acts that had been done validly but not for invalid future acts.⁶³

11.86 In addition to the legal uncertainty, claiming damages under general law may be difficult for native title parties because of the associated litigation risk. Actions under the general law are also typically subject to limitation periods, meaning an entitlement to compensation may be lost if action is not taken within the relevant time. This can be contrasted with the position under the *NTA*, which does not impose a limitation period on compensation applications under Part 2 Div 5.

58 *Griffiths v Northern Territory (No 3)* (2016) 337 ALR 362 [454].

59 *Northern Territory v Griffiths* (2017) 256 FCR 478 [440].

60 *Ibid* [448].

61 *Ibid*.

62 *Ibid* [449].

63 *Ibid* [435]–[448].

11.87 The result of this is that currently:

- native title holders can access statutory compensation under the *NTA* where a future act is done validly;
- it is not clear whether native title holders can access statutory compensation under the *NTA* where a future act is done invalidly; and
- native title holders may be able to seek compensation or damages at general law for invalid future acts; however, the legal position is unclear, and the uncertainty imposes significant practical barriers to doing so.

11.88 The ALRC does not consider there to be any reason why native title holders should have a more difficult path to attaining statutory compensation for invalid future acts, where an entitlement to compensation for the same future act done validly is clearly laid out in Part 2 Div 5.

11.89 While an invalid future act or other invalid act does not *legally* affect native title rights and interests, it will likely have a *practical* impact on those rights and interests.⁶⁴ Indeed, the *practical* impact of a future act or other act on the exercise and enjoyment of native title rights and interests is likely to be the same regardless of whether the act is valid or invalid.

11.90 The current position reflects an anomaly or a gap in the statutory compensation regime.⁶⁵

Potential solution

11.91 In light of this, the ALRC considers that a statutory entitlement to compensation for invalid future acts could be expressly provided for by the *NTA*. The statutory entitlement to compensation should be extended to historical invalid future acts and other invalid acts.

11.92 Such reform may require that a framework for calculating compensation for invalid future acts be inserted into the *NTA*. One way to calculate the entitlement may be to assess compensation as if the future act were done validly. A statutory entitlement to compensation for invalid future acts was discussed in Proposal 13 of the Discussion Paper.⁶⁶ Submissions were largely supportive of this proposal.⁶⁷

64 See also William Isdale, *Compensation for Native Title* (Federation Press, 2022) 210–11.

65 See Central Land Council, *Submission 121*.

66 See Australian Law Reform Commission, *Review of the Future Acts Regime* (Discussion Paper No 88, 2025) [293]–[295].

67 See, eg, Maddocks, *Submission 62*; Indigenous Land and Sea Corporation, *Submission 68*; Houston Legal & Consultants, *Submission 95*; Australian Human Rights Commission, *Submission 118*; Law Council of Australia, *Submission 120*; Central Land Council, *Submission 121*; Queensland South Native Title Services, *Submission 124*; First Nations Legal and Research Services, *Submission 146*; Yamatji Marlpa Aboriginal Corporation, *Submission 148*; Kimberley Land Council, *Submission 151*; Northern Land Council, *Submission 153*; Parallax Legal, *Submission 157*. Cf Association of Mining and Exploration Companies, *Submission 97*; Local Government Association of Queensland, *Submission 108*; Minerals Council of Australia, *Submission 113*; Great Barrier Reef Marine Park Authority, *Submission 129*.

There are several reasons a statutory entitlement to compensation for invalid future acts could be an appropriate solution. These include:

- It would rectify the differential treatment of acts done validly and invalidly discussed above. It would do this by clarifying that native title holders have a right to compensation under the *NTA* in respect of invalid future acts. This would help give effect to the purpose of the *NTA* as a special measure for the advancement of First Nations peoples, and to ensure native title holders are able to fully enjoy their rights and interests.⁶⁸
- It would better reflect art 40 of UNDRIP, as it better ensures that native title holders will be afforded an effective remedy where their native title rights and interests are infringed, regardless of whether that is done validly or invalidly.
- It would increase access to justice for native title holders by providing an effective entitlement to compensation for invalid future acts. This recognises that while damages at general law may be available to native title holders for invalid future acts, pursuing such damages may not be a practical option due to the complexity, uncertainty, and litigation risk associated with the enforcement of native title rights and interests through causes of action provided by the common law. A compensation regime more accessible to native title parties for invalid future acts would also incentivise governments and proponents to be more diligent in ensuring compliance with the *NTA*.

68 *Native Title Act 1993* (Cth) preamble.

12. Costs Recovery

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Introduction

12.1 This chapter discusses reforms to the costs recovery mechanisms relevant to the future acts regime, as provided for in s 60AB of the *Native Title Act 1993* (Cth) ('NTA') and the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) ('PBC Regulations'). This chapter contains four recommendations, which are designed to address issues associated with fairness and access to justice, and which would also modernise the costs recovery framework. Taken together, the reforms in this chapter would provide for a cohesive, effective, and fair costs recovery framework for all stakeholders.

12.2 Being able to recover the costs incurred when performing activities such as negotiating agreements or exercising procedural rights is important because it empowers native title parties to meaningfully engage with the future acts regime. Costs recovery is underpinned by an access to justice rationale:

[f]or the intent of the [NTA] to be realised, access to justice for native title parties must be ensured. Measures to address this should recognise that the impact of resource constraints is of far greater significance and detriment to First Nations participants than to third parties, and that Indigenous participants in the native

title system are not voluntarily entering this system. It has been imposed upon them.¹

12.3 As expressed by the Australian Human Rights Commission above, native title parties are not voluntarily choosing to engage in the future acts regime, but rather the future acts regime ‘has been imposed upon them’.² Their involvement and participation principally originates from another party seeking to do something that would affect native title rights and interests as well as the requirements placed on them by the *NTA*. Despite this, it has been highlighted to the ALRC that ‘no funding is provided for PBCs to participate in the future acts process’.³ As outlined in greater detail in **Chapter 14** the imposition of the future acts regime upon native title parties is compounded by the significant resource constraints frequently experienced. The Kimberley Land Council explained that it

is unacceptable for native title parties to continue to bear the risk of not being able to participate in the future act processes due to a lack of resources, particularly where a native title party’s participation is driven by the commercial interests of a third party.⁴

12.4 The reforms in this chapter are intended to reflect the important role that costs recovery plays in the future acts regime, through ensuring the costs recovery mechanism for performing statutory functions is effective, appropriate in scope, and fair for both native title parties and those liable to pay.

Context

12.5 Introduced as part of amendments made to the *NTA* in 2007,⁵ the existing cost recovery mechanism provides that PBCs may charge fees incurred when performing certain activities as part of performing certain statutory functions, such as negotiating agreements or exercising procedural rights.⁶ These amendments arose from recommendations made in the *Structures and Processes of Prescribed Bodies Corporate* report (*‘PBC Report’*), which recommended the establishment of a Prescribed Body Corporate (*‘PBC’*) costs recovery scheme for two reasons:

- first, that ‘it would normally be expected that NTRBs may provide the relevant assistance’ to PBCs in relation to future act agreement negotiations, however,

1 Australian Human Rights Commission, *Submission 118*.

2 Ibid.

3 As the Kimberley Land Council explains in greater detail, ‘no funding is provided for PBCs to participate in the future acts process, other than PBC Basic Support funding, or that part of the native title grant that the NTRB/SPs can prioritise to future acts in the exercise of its prioritisation responsibilities. This funding is subject to the uncertainties in the budget cycle and changes in departmental funding from year to year’: Kimberley Land Council, *Submission 26*.

4 Ibid.

5 *Native Title Amendment (Technical Amendments) Act 2007* (Cth) sch 3 s 7.

6 *Native Title Act 1993* (Cth) s 60AB. See also *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) pt 4.

it may not always be possible for Native Title Representative Bodies and Service Providers ('NTRB/SPs') to fulfill this role;⁷ and

- secondly, at the time, PBCs could not seek reimbursement from, or charge third parties for, costs and disbursements expended or incurred by the PBC in performing its functions under the *NTA* or *PBC Regulations*.⁸

12.6 The *PBC Report* concluded that it would be appropriate for the PBCs to recover costs incurred in performing their functions, recommending that the *NTA*

should be amended to authorise PBCs to charge a third party for costs and disbursements reasonably incurred in performing its statutory functions under the *NTA* or the *PBC Regulations* at the request of the third party. The amendments should also provide for an appropriate authority to investigate such arrangements on request, to ensure the costs were reasonably incurred.⁹

12.7 The ability for a PBC to charge a fee under s 60AB of the *NTA* is paired with the ability for the person being charged that fee to request an opinion as to whether the fee is one that may be charged under that section. Currently, that opinion is to be provided by the Registrar of Aboriginal and Torres Strait Islander Corporations ('ORIC').¹⁰

The need for reform

12.8 During this Inquiry, the ALRC has heard about a variety of problems with the existing costs recovery mechanism contained in the *NTA*. In summary, these issues relate to the application of the mechanism, the limited scope of activities for which costs can be recovered pursuant to it, and an apparent omission from the drafting of the provision. This section outlines the key problems with the mechanism and explains why reform is necessary.

12.9 **Figure 12.1** below illustrates how the recommendations in this chapter would reform the costs recovery framework.

7 Attorney-General (Cth) and Minister for Families, Community Services and Indigenous Affairs (Cth), *Structures and Processes of Prescribed Bodies Corporate* (2006) [8.7].

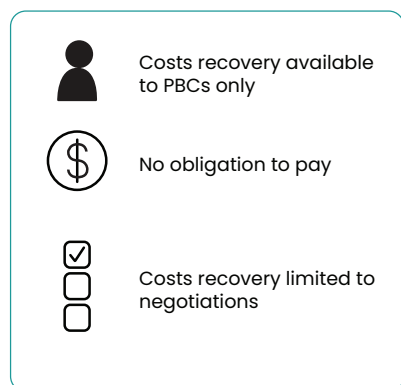
8 See *ibid* [8.8]; Explanatory Memorandum, Native Title Amendment (Technical Amendments) Bill 2007 (Cth) sch 3.

9 Attorney-General (Cth) and Minister for Families, Community Services and Indigenous Affairs (Cth) (n 7) rec 11.

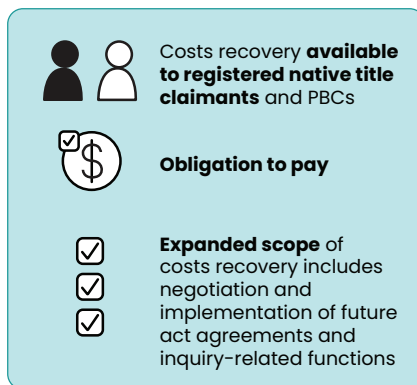
10 *Native Title Act 1993* (Cth) s 60AC.

Figure 12.1: Summary of costs recovery recommendations**Now**

Unclear costs recovery provisions with exceptions and limitations that undermine the policy objective

**Reforms**

Clear and **enforceable** costs provisions that **apply holistically** to the future acts regime



Costs recovery is only available to PBCs

12.10 Only ‘a registered native title body corporate’ (that is, a PBC) may charge fees incurred in performing certain statutory functions.¹¹ As the National Native Title Tribunal (‘NNTT’) observed in its submission, s 60AB

has several issues which limit its effectiveness. The most obvious is that s 60AB applies only to RNTBCs, however, RNTCs [registered native title claimants] also enjoy all of the rights to comment, and the procedural rights ... There is no corresponding section which applies to RNTCs, so they must either reach agreement with proponents to fund their participation or pay their own costs.¹²

12.11 The *PBC Report*, being the impetus for the introduction of the costs recovery mechanism, did not say whether fees should be recoverable in relation to the same statutory functions performed by a registered native title claimant. However, the premises relied upon — that is, it may not always be possible for NTRB/SPs to assist with future act negotiations and, previously, no reimbursement could be sought regarding fees incurred in performing functions under the *NTA* — would be equally

11 Ibid s 60AB.

12 National Native Title Tribunal, *Submission 23*.

applicable to a registered native title claimant (with the exception of a registered claimant needing to comply with the *PBC Regulations*).¹³

12.12 For example, a future act covered by s 24HA of the *NTA* requires both registered native title bodies corporate and registered native title claimants to be notified of the act and given an opportunity to comment on the act.¹⁴ Through the application of reg 20(a)(iv) of the *PBC Regulations* and operation of s 60AB of the *NTA*, a PBC may charge a fee for costs it incurs for activities related to providing comment under s 24HA(7)(b) of the *NTA*. There is currently no such similar provision regarding the registered native title claimant.

12.13 The result is that where a registered native title claimant performs the same statutory functions as a PBC, it cannot recover fees associated with performing those functions, but a PBC can.

12.14 This distinction is not consistent with international human rights standards. At international law, Indigenous peoples are recognised as having rights to self-determination and relating to land,¹⁵ as well as the right to participate in processes affecting their rights.¹⁶ Indigenous peoples must not be discriminated against in their enjoyment of these rights,¹⁷ and must be guaranteed equality before the law.¹⁸

12.15 Current legislative restrictions on which native title parties may recover such costs may amount to a denial of equality before the law, as well as discriminatory interference with native title parties' rights. For example, such restrictions may, in effect, preclude certain native title parties from exercising their right to participate in future acts processes, particularly when they are unable to bear the financial burden of participating in such processes without the possibility of being able to recover those costs. This may in turn unduly infringe upon their rights to self-determination

13 Despite not being subject to the obligations contained in the *PBC Regulations*, it has been acknowledged that registered native title claimants act on behalf of the native title claim group and have been described as having an obligation to consult with that group: *Hatfield on behalf of the Darumbal People v Queensland (No 2)* [2013] FCA 1151 [38]–[40]. Further, it has been held that registered native title claimants owe a fiduciary duty to the claim group (and the ultimate native title holders), including where exercising procedural rights on behalf of the claim group: see, eg, *Weribone v Queensland (No 2)* (2013) 217 FCR 189 [44]–[48]; *Gebadi v Woosup (No 2)* (2017) 253 FCR 310. The relevance of these principles to the discussion of extending the s 60AB ability to recover fees to registered native title claimants is in demonstrating that, in many respects, such claimants would be operating under similar obligations as those contained in the *PBC Regulations* and, thus, similar activities may be undertaken in performing statutory functions as a PBC.

14 *Native Title Act 1993* (Cth) ss 24HA(7)(a)–(b).

15 See, eg, *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) arts 3, 25, 26, 32(1) ('UNDRIP'); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 1(1) ('ICCPR'); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 1(1) ('ICESCR').

16 UNDRIP art 18. See also at arts 19, 32(2).

17 UNDRIP art 2; ICCPR art 2(1); ICESCR art 2(2).

18 ICCPR art 26; *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 5.

or to land as native title parties may, in effect, be unable to utilise the statutory protections they are otherwise afforded by the future acts regime. Accordingly, fulfilment and protection of the abovementioned human rights require that all native title parties — whether PBCs or registered native title claimants — should enjoy the same right to recover the costs of their participation in future acts processes.

12.16 Additionally, the distinction places an unfair and unjustifiable emphasis on the status of a native title claim rather than the statutory functions and activities (and their associated costs) undertaken, which is the focus of the costs recovery mechanism.¹⁹ As the Central Land Council observed in its submission, the effect of the distinction is that

the Native Title Act affords a higher quality of negotiation to native title holders compared to registered native title claimants. There is no good reason to discriminate between these two groups, who are otherwise treated identically by the future acts regime.²⁰

12.17 The issue of only PBCs being able to recover costs, as outlined above, is sought to be addressed through [**Recommendation 78\(a\)**](#) below.

Lack of clarity about the quantum of fees that can be charged

12.18 As is evident in the views expressed during this Inquiry, there is uncertainty and lack of clarity about the quantum of fees that can be charged under the s 60AB mechanism.²¹ The State of Queensland succinctly described the issue, saying there is

a lack of clarity of cost recovery provisions for responding to future act notifications and for agreement-making. State departments have noted greatly differing amounts invoiced by RNTBCs.²²

12.19 Further, as the Minerals Council of Australia highlighted, this lack of uniformity ‘can lead to disputes, project delays, or unsustainable costs structures that may undermine trust’.²³ Similarly, the NSW Minerals Council has noted that ‘unbridled costs associated with NTA processes can be prohibitive’, particularly in the context of exploration activities.²⁴

12.20 Currently, the *NTA* does not provide any restriction or qualifier on the fees that can be charged, other than they must be connected to performing certain statutory functions and activities. However, it has become apparent to the ALRC that current drafting of the cost recovery mechanism may not have closely followed the intent for only ‘reasonably’ incurred fees to be recovered.

19 See Australian Law Reform Commission, *Review of the Future Acts Regime* (Discussion Paper No 88, 2025) [313].

20 Central Land Council, *Submission 31*.

21 Australian Law Reform Commission (n 19) [313]. See also NSW Minerals Council, *Submission 117*.

22 State of Queensland, *Submission 43*.

23 Minerals Council of Australia, *Submission 113*.

24 NSW Minerals Council, *Submission 117*.

12.21 The *PBC Report*, being the basis for the introduction of the cost recovery mechanism, provided a clear recommendation that the costs incurred should be reasonable, stating that the *NTA*

should be amended to authorise PBCs to charge a third party for costs and disbursements *reasonably* incurred in performing its statutory functions under the *NTA* or the PBC Regulations at the request of a third party. The amendments should also provide for an appropriate authority to investigate such arrangements on request, to ensure the costs were *reasonably* incurred.²⁵

12.22 The Explanatory Memorandum for the relevant Bill regarding the costs recovery mechanism included this recommendation, in full, in an overview of the relevant section, and indicated that the Bill implemented this recommendation.²⁶ However, the reference to ‘reasonably’ incurred costs did not feature in the text of the Bill or the relevant parts of the Explanatory Memorandum explaining the specific provisions of the Bill.²⁷

12.23 **Recommendation 78(b)** seeks to introduce parameters to the quantum of fees that can be charged in that they must be reasonable, as recommended in the *PBC Report*.

Power to charge but no corresponding obligation to pay

12.24 While PBCs can *charge* fees, there is no corresponding obligation for those fees to be *paid*, except in very limited circumstances. This issue was highlighted by several stakeholders in response to the Issues Paper.²⁸

12.25 We have heard that native title parties have encountered frequent resistance or refusal by proponents to pay fees charged.²⁹ For example, Parallax Legal described in its submission that as practitioners representing native title parties, they

frequently face resistance from proponents regarding paying fees for the time of NTPs [native title parties] and payment of legal costs. Payments to NTPs recognise the time, expertise, and cultural authority of native title holders. They also represent one of the few opportunities for economic benefit through native title. Our clients set their own fees based on experience and efficiency. Legal fee coverage is essential to uphold FPIC and ensure informed decision-making. This is especially important where NTPs engage private lawyers without government or NTRB/NTSP support.³⁰

25 Attorney-General (Cth) and Minister for Families, Community Services and Indigenous Affairs (Cth) (n 7) rec 11 (emphasis added).

26 Explanatory Memorandum, Native Title Amendment (Technical Amendments) Bill 2007 (Cth) 75.

27 It does not appear to have been the subject of subsequent amendments by the Senate; it appears it was simply omitted from the drafting. It may have been that the drafting of the text was intended to be interpreted with a reasonableness standard in mind; however, this has also not been reflected in, for example, ORIC’s function in providing an opinion regarding the fees charged (discussed in further detail below at paragraph [12.37]).

28 See, eg, National Native Title Tribunal, *Submission 23*; Kimberley Land Council, *Submission 26*.

29 See, eg, Parallax Legal, *Submission 157*.

30 Ibid.

12.26 **Recommendation 78(c)**, if implemented, would address this through imposing an obligation on the fees charged to be paid.

Limited scope to recover fees associated with agreements

12.27 The ability to charge a fee pursuant to s 60AB(1) extends to negotiating an agreement contemplated by s 31(1)(b), pursuant to a determination under s 43(1)(B), or an ILUA. However, it is unclear whether this would extend to:

- ancillary agreements; or
- implementation activities following the negotiation of an agreement.

12.28 As **Chapter 3** outlines, ancillary agreements are a key feature of the future acts regime, for a variety of reasons. Despite this, the current costs recovery mechanism provided for in s 60AB of the *NTA* does not expressly extend to them.

12.29 Additionally, the mechanism does not contemplate activities required in implementing a negotiated agreement. The importance of such activities cannot be understated as it is implementation of an agreement that results in the realisation of the collaboration of native title parties and proponents. And yet, as outlined in greater detail in **Chapter 4**, implementation remains the ‘forgotten dimension’ to agreement-making.³¹

12.30 Critical to effective implementation is having adequate and appropriate resources specifically for implementation activities.³² Implementation activities may include activities such as those inherent in, and flowing from, a periodic review as described in **Chapter 4**. It may be that it is simply assumed that negotiated agreements will provide for such activities, including how they will be resourced. However, in his previous review of 20 agreements,³³ Professor O’Faircheallaigh noted that only three agreements allocated any resources to implementation.³⁴ An expanded cost recovery mechanism would assist in addressing the need for resources to support effective implementation of negotiated agreements.

12.31 Reform is necessary to expand the scope of this provision to cover all future act agreements and to provide for the implementation of such agreements, which is proposed in **Recommendation 79**.

Restriction on costs incurred during proceedings and inquiries

12.32 In addition, the costs recovery framework only extends to negotiating agreements. Section 60AB(5)(a) prohibits native title parties from charging a person a fee for costs incurred for performing functions as party to a future act

31 Ciaran O’Faircheallaigh, ‘Implementation: The Forgotten Dimension of Agreement Making in Australia and Canada’ (2002) 5(20) *Indigenous Law Bulletin* 14.

32 Ibid 14.

33 The review was of a total of 38 agreements, with 20 being from the Australian context: ibid 15.

34 Ibid.

determination application proceeding.³⁵ Such proceedings or inquiries are described in the relevant part of the Explanatory Memorandum as being ‘used to break a deadlock in negotiations mentioned in s 60AB(1)(a) or (b)’.³⁶ This rationale appears to oversimplify the variety of reasons why an inquiry may be initiated as well as the fact that it is, in effect, a substitute for either requiring negotiations (in the case of the expedited procedure) or an alternative to continuing negotiations (in the case of a future act determination application).

12.33 In addition to the explicit prohibition on recovery of fees relating to future act determination applications, ORIC has provided an opinion (in accordance with the statutory function under s 60AC of the *NTA*, discussed in further detail below) to the effect that a native title party cannot charge fees for activities it undertakes in response to a s 29 notice which includes the expedited procedure statement.³⁷ ORIC provided the following reason for its opinion:

such activities are most accurately described as being for the purpose of determining whether to object to that statement (or for the purpose of preparing an objection to that statement), rather than falling within the scope of the RNTBC’s functions of taking part in section 31(1)(b) negotiations.³⁸

12.34 In response to this opinion and, as explained by the National Native Title Tribunal, the distinction between an inquiry and negotiating an agreement is not always clear cut, for example

if there is a future act determination inquiry on foot, the parties may be concurrently negotiating towards a s 31 agreement. Ideally, they would reach agreement, and the FADA could be withdrawn. However, there is room for argument as to whether the negotiations in this case would fit within the allowable fees or not.³⁹

12.35 Effectively, the combination of ORIC’s opinion above and s 60AB(5)(a) results in native title parties being unable to recover a fee for performing the functions of a party in any future act-related inquiries, in circumstances where the following are not considered:

- as mentioned, such inquiries are a substitute for either requiring negotiations (in the case of the expedited procedure) or continuing negotiations (in the case of a future act determination application), in relation to which fees may be recoverable for under the existing s 60AB(1);

35 Noting that ss 60AB(5)(a)(i)–(iii) mirrors the determinations an arbitral body must make as per ss 38(1)(a)–(c).

36 Explanatory Memorandum, Native Title Amendment (Technical Amendments) Bill 2007 (Cth) [3.18].

37 Opinion issued under section 60AC(2) of the Native Title Act 1993, in response to a request for reconsideration received on 28 October 2022 (Registrar Stroud, 6 January 2023) [21(d)].

38 Ibid [21(f)].

39 National Native Title Tribunal, *Submission 23*.

- the need, or decision, to perform the function of a party in an inquiry is ultimately brought about as the result of a third party seeking the benefit of doing a future act, or doing a future act in an expedited manner; and
- the lack of any further procedural rights in relation to a future act should a native title party not perform the function of a party in an inquiry.

12.36 **Recommendation 80** seeks to address these issues by expanding the cost recovery mechanism to reasonably incurred fees when a native title party performs the functions of a party to proceedings or inquiries.

Opinions regarding fees charged: a function with limited utility

12.37 The ability for a native title party to charge a fee under s 60AB of the *NTA* is paired with the ability for the person being charged that fee to request an opinion as to whether the fee is one that may be charged under that section. This is contained within s 60AC of the *NTA*.

12.38 As noted above, the Explanatory Memorandum for the Bill that introduced the costs recovery regime appears to have intended for the opinion function to have included an investigation.⁴⁰ However, the legislation itself does not expressly reflect this intention, and, as a result, where the opinion has been provided it focuses on whether or not the fee may be charged, rather than whether or not the fee charged is appropriate or reasonable. As such, the function is of limited utility.

12.39 With the recommended introduction of a requirement of a ‘reasonableness’ standard to the ability to charge in s 60AB (**Recommendation 78(b)**), the s 60AC function, as currently drafted, will become redundant. Accordingly, **Recommendation 81** proposes the repeal of the function. Repeal has been recommended rather than amendment (including to ensure the opinion considers the reasonableness of the fees incurred) as this function is intended to be performed by the Federal Court through the compliance and enforcement framework (see **Chapter 11**).

Other issues with the costs recovery framework

12.40 A further flaw identified in the s 60AB mechanism is that a native title party must first incur the cost in order to then charge the fee to be recovered.

12.41 This may present a cash flow issue for a PBC (in particular).⁴¹ Additionally, it is noted that this mechanism is only effective if there is basic operational capacity to manage the administration of the costs recovery process,⁴² including the issuing of

40 Explanatory Memorandum, Native Title Amendment (Technical Amendments) Bill 2007 (Cth) 75, citing recommendation 11 of Attorney-General (Cth) and Minister for Families, Community Services and Indigenous Affairs (Cth) (n 7).

41 National Native Title Tribunal, *Submission 23*.

42 National Native Title Council, *Submission 20*.

invoices for responding to future act notices.⁴³ The Kimberley Land Council has also noted that this model, described as ‘a reactive and uncertain’ one, makes it difficult to plan, resource, and maintain organisational stability.⁴⁴

12.42 In sum, the current costs recovery framework is unfair to native title parties, as they ‘bear the risk of not being able to participate in the future act processes due to a lack of resources’.⁴⁵

12.43 In the ALRC’s view, the existing cost recovery mechanism does not preclude or prohibit parties from negotiating a budget or schedule of fees *before* costs are incurred, with that budgeted amount, or a portion of it, being pre-paid. The practice of negotiating a budget or schedule of fees before the costs are incurred has been noted as ‘often’ occurring.⁴⁶ The benefits of this practice were explained by the National Native Title Tribunal:

it can empower the native title party to obtain independent advice and participate fully in the negotiations. From the Government or grantee party’s perspective, it allows negotiations to progress.⁴⁷

12.44 If this was done, the costs recovery mechanism would operate to cover any additional costs incurred that were not originally budgeted for. This seems, to the ALRC, to be a fairer and more effective use of the cost recovery mechanism and would also provide enhanced cost-certainty to government parties and proponents (compared to effectively waiting for the final invoice).

12.45 However, it is also acknowledged that this practice is entirely dependent on the capacity and willingness of the government party or proponent to pay the native title party’s costs,⁴⁸ of which, as detailed earlier, it is understood that native title parties often encounter resistance.⁴⁹

43 North Queensland Land Council, *Submission 96*.

44 Kimberley Land Council, *Submission 26*.

45 Ibid.

46 National Native Title Tribunal, *Submission 23*.

47 Ibid.

48 Ibid.

49 See paragraph [\[12.25\]](#) above.

Recommended reforms

Improving application and operation

Recommendation 78

Section 60AB of the *Native Title Act 1993* (Cth) and Part 4 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) be amended to provide that:

- a. in addition to Prescribed Bodies Corporate, a registered native title claimant may charge fees for costs incurred for any of the purposes referred to in s 60AB and Part 4 of the Regulations;
- b. only costs that are reasonably incurred may be charged by native title parties; and
- c. a person who has been charged a fee under s 60AB is obligated to pay that fee.

12.46 **Recommendation 78** responds to the deficiencies described above and:

- extends the entitlement to charge fees to a registered native title claimant;
- provides that only reasonably incurred fees may be charged; and
- introduces an express obligation to pay fees charged under s 60AB.

Extending the entitlement to a registered native title claimant

12.47 **Recommendation 78(a)** would extend the entitlement to recover fees to a registered native title claimant. We consider that it is justified and reasonable to extend the entitlement to recover fees to a registered native title claimant in the circumstances where the costs were incurred while performing statutory functions or exercising procedural rights as a direct result of another party seeking the benefit of a future act. The entitlement to recover fees should not be conditioned on the status of the native title claim.

12.48 This recommendation was included as part of Proposal 17 in the Discussion Paper. Submissions that engaged with this reform highlighted it could help improve involvement and engagement,⁵⁰ as well as increasing claimant's capacity.⁵¹ It is also a reform that was proposed by stakeholders in response to the Issues Paper.⁵²

50 See, eg, National Native Title Tribunal, *Submission 86*; North Queensland Land Council, *Submission 96*; Law Council of Australia, *Submission 120*.

51 P&E Law, *Submission 128*.

52 See, eg, MPS Law, *Submission 17*; Central Land Council, *Submission 31*. The unavailability of s 60AB to registered native title claimants was raised as an issue: see, eg, National Native Title Tribunal, *Submission 23*.

Some submissions expressed concerns with certain aspects of this reform, such as potentially increased costs and other financial consequences,⁵³ and the risk of producing transactional approaches to future act administration.⁵⁴ However, these concerns do not appear to relate to why a registered native title claimant, specifically, should not also be enabled to recover its costs in performing their statutory functions.

12.49 **Recommendation 78(a)** is also consistent with international human rights standards (see **Chapter 2**), in that it removes the discrimination described above at paragraph [12.14] by guaranteeing equality before the law.

12.50 **Recommendation 78(a)** also improves access to justice. As set out in **Chapter 2**, access to justice and equality before the law are interdependent, requiring that all stakeholders be able to access and fully engage with future acts process on an equal footing.⁵⁵ Accordingly, while access to justice requires that appropriate costs incurred by participation in future acts processes be recoverable, *equal* access to justice demands that all native title parties enjoy the same such right of recovery.

Implementation considerations

12.51 Unlike a PBC, a registered native title claimant is not a corporate entity capable of invoicing (or charging) in its own right. Rather, a registered native title claimant is an individual or, more commonly, a group of individuals. This may present some complexities when implementing **Recommendation 78(a)**, as the North Queensland Land Council explained:

[a]s [registered native title claimants] are not working through a corporate structure, further consideration is needed as to who would issue invoices on behalf of the [claimants] and hold these sums.⁵⁶

12.52 In many respects, addressing these complexities could be informed by the way in which the benefits arising from pre-determination agreements are being managed currently. Some options, although there will be others, include establishing a corporation early in the claims process, which could later become the PBC upon determination of native title, or establishing a trust.

12.53 Alternatively, while acknowledging that it is ‘not ideal’, the North Queensland Land Council explained that it has

established a discretionary trust in order to temporarily hold money for a class of beneficiaries who hold native title rights within the North Queensland representative body area until the point of determination.⁵⁷

53 See, eg, Association of Mining and Exploration Companies, *Submission 97* and Great Barrier Reef Marine Park Authority, *Submission 129*, respectively.

54 Western Australian Government, *Submission 115*.

55 On access to justice and equality before the law as ‘fundamental to the rule of law of Australia’ generally, see, eg, Law Council of Australia, *The Justice Project: Overarching Themes* (Final Report, 2018) 2.

56 North Queensland Land Council, *Submission 96*.

57 Ibid.

12.54 Consideration should, therefore, be given to whether the fees charged and costs recovered could occur through a representative or agent authorised by the registered native title claimant.

12.55 The ALRC does not view this as an insurmountable issue. Further, it should not be viewed as a justifiable reason to continue to deny the costs recovery mechanism being extended to the registered native title claimant.

Reasonably incurred costs

12.56 **Recommendation 78(b)** seeks to address the need for regulation of the costs charged by including a requirement that only reasonably incurred costs are capable of being recovered. This is to implement the apparent intended inclusion of a reasonableness standard,⁵⁸ as per the full recommendation from the *PBC Report*.

12.57 The proposed reasonableness standard was referenced during the Senate inquiry regarding the introduction of the costs recovery mechanism. Specifically, it was mentioned:

- by Attorney General's Department and the Department of Families, Community Services and Indigenous Affairs, when discussing the purpose of the s 60AC opinion function;⁵⁹ and
- in the context of ensuring that PBCs are given a 'wide berth to charge fees', a reasonable standard was included as an additional recommendation in the minority report.⁶⁰

12.58 Numerous stakeholders in this Inquiry noted the importance of additional guidance or regulation of the costs recoverable under s 60AB.⁶¹ Additionally, some submissions in this Inquiry indicated support for the introduction of a reasonableness standard.⁶²

12.59 Including a reasonableness standard would involve a contextual assessment of the specific fees charged so that a scale of costs, which could ignore the critical circumstance-specific considerations, is not set. As the NNTT noted this would

58 See above at paragraph [12.22].

59 Attorney General's Department (Cth) and the Department of Families, Community Services and Indigenous Affairs (Cth), Submission No 6 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Native Title Amendment (Technical Amendments) Bill 2007* (23 April 2007) [5.4].

60 Minority Report by the Australian Labor Party to the Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Native Title Amendment (Technical Amendments) Bill 2007 [Provisions]* (2007) [1.13]–[1.17].

61 See, eg, State of Queensland, *Submission 43*; Maddocks, *Submission 62*; Isaac Regional Council, *Submission 70*; National Native Title Tribunal, *Submission 86*; Local Government Association of Queensland, *Submission 108*; Minerals Council of Australia, *Submission 113*; Western Australian Government, *Submission 115*; NSW Minerals Council, *Submission 117*.

62 See, eg, State of Queensland, *Submission 43*; Maddocks, *Submission 62*; Local Government Association of Queensland, *Submission 108*; NSW Minerals Council, *Submission 117*. See also Norman Waterhouse Lawyers, *Submission 102*; Law Council of Australia, *Submission 120*; P&E Law, *Submission 128*; Australian Energy Producers, *Submission 141*; E Raeside, *Submission 145*.

require consideration of regional context and project types,⁶³ at a minimum. The need for a nuanced approach like this was also recognised by the Law Council of Australia who noted

the significant additional expenses incurred by some Native Title holders, for example in parts of the Northern Territory, Queensland and Western Australia, because of the remoteness of their location.⁶⁴

12.60 A reasonableness standard would also address concerns we heard about the costs that may be incurred when engaging with lawyers and other professional consultants. For example, the Association of Mining and Exploration Companies expressed strong concern about what they described as a ‘gouging of the system by interested third parties’ which damages relationships between proponents and native title holders.⁶⁵

12.61 On the other side of this ‘gouging’, we have also heard about experiences where proponents have sought to pressure native title parties to minimise costs associated with consultants or legal advice.⁶⁶ For example, Queensland South Native Title Services recounted an experience with one proponent who told one of their clients ‘it [the money] can go to you, or it can go to your lawyers – it’s your choice’.⁶⁷ Ultimately, the reasonable standard might assist in both confining as well as normalising the typical costs involved performing the prescribed statutory functions, including where lawyers and consultants are engaged.

12.62 The reasonableness standard would also act as a barrier to recovering costs incurred through an unreasonable act or omission of the native title party. For example, if the native title party had not conducted itself in accordance with the requirement to negotiate in good faith, this could be an indication that the costs incurred (or some of them) are not reasonable and therefore could not be recoverable pursuant to the reformed s 60AB mechanism.

12.63 In practice, it is expected that the recommended reasonableness standard would be enforced through the statutory enforcement power outlined in **Recommendation 76** in that a person charged a fee could challenge the reasonableness of it in the Federal Court.

12.64 It is noted that this recommendation may increase the existing disputation regarding the fees charged, particularly in circumstances where the *NTA* only currently provides a review avenue of a fee on the basis of whether it can be charged.

12.65 However, for the reasons outlined above, the ALRC is of the view that the introduction of a reasonableness standard would enhance the fairness of the s 60AB function for all stakeholders.

63 National Native Title Tribunal, *Submission 86*.

64 Law Council of Australia, *Submission 120*.

65 Association of Mining and Exploration Companies, *Submission 97*.

66 See, eg, Queensland South Native Title Services, *Submission 45*.

67 *Ibid*.

Corresponding obligation to pay

12.66 **Recommendation 78(c)** would introduce an express obligation for the fee charged to be paid. This reform is necessary to make the costs recovery framework enforceable, and to address the issue we have heard about where proponents have resisted paying fees they have been charged. Existing provisions in the *NTA* and *PBC Regulations* regarding the suspension of that obligation while a s 60AC opinion is sought would not be amended.

12.67 We heard support for this proposal from several stakeholders.⁶⁸

12.68 An additional issue raised with the ALRC is that there are currently no consequences for a person for failing to pay the fee charged.⁶⁹ The statutory enforcement power (see **Recommendation 76**) would enable native title parties to enforce the charging of a fee pursuant to s 60AB.

Expanding the scope of costs recovery

Application to all agreements

Recommendation 79

Section 60AB(1) of the *Native Title Act 1993* (Cth) be amended to apply to the negotiation and implementation of any agreement related to, or in connection with, the doing of a future act pursuant to the Act.

12.69 **Recommendation 79** would address the current ambiguity discussed above regarding whether the cost recovery mechanism extends to the negotiation of an ancillary agreement. It would also extend the ability to charge a fee for costs incurred as part of negotiating *any* agreement related to, or in connection with, the doing of future acts pursuant to the *NTA*. In addition to placing all agreements on equal footing for the sake of cost recovery, this reform would also assist with the implementation of other reforms such as those relating to new types of agreements (such as that contemplated in **Chapter 6**).

12.70 Further, it would enable reasonably incurred costs for implementation of agreements, noted as being crucial for implementation of the agreements negotiated to be effective. This would also support the adoption of **Recommendation 13** regarding the development of a periodic review clause.

68 See, eg, Queensland South Native Title Services, *Submission 124*; Yamatji Marlpa Aboriginal Corporation, *Submission 148*; Kimberley Land Council, *Submission 151*; State of Queensland, *Submission 152*. See, also, Kimberley Land Council, Submission No 16 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into Native Title Legislation Amendment Bill 2019* (29 November 2019).

69 See, eg, Kimberley Land Council, *Submission 26*.

12.71 **Recommendation 79** is underpinned by the principles of access to justice and equality before the law.⁷⁰

Costs incurred during mediation, conciliation, arbitration, and inquiries

Recommendation 80

Section 60AB of the *Native Title Act 1993* (Cth) and Part 4 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) be amended to provide that a native title party may charge a fee for costs reasonably incurred when performing functions as a party in any mediation, conciliation, arbitration, or an inquiry or proceeding related to a future act or acts.

12.72 **Recommendation 80** would remove the existing prohibition on native title parties being able to charge a person fees for performing the functions of a party in proceedings or inquiries and, instead, would include a clear ability to recover the reasonably-incurred fees associated with performing such functions, including for participating in mediation, conciliation, and arbitration (including private arbitration) as well as in proceedings and inquiries.

12.73 **Recommendation 80** seeks to remedy the current deficiencies discussed above,⁷¹ by providing a fee recovery ability that appropriately considers the fundamental reason behind the inquiry (or mediation, conciliation, or arbitration).

12.74 While this proposed reform was not included in the Discussion Paper, several native title parties and their representatives have expressed support for the recovery of fees associated with expedited procedure objection inquiries,⁷² future act determination applications inquiries,⁷³ or both.⁷⁴

12.75 Additionally, the Kimberley Land Council has previously submitted that the relevant government party and grantee party should contribute to the costs of determining expedited procedure objections.⁷⁵ It has been noted that responding to expedited procedure notices cost the Commonwealth-funded Kimberley Land Council \$2 million in a 12-month period, amounting to 23% of its annual allocated funding.⁷⁶

⁷⁰ See discussion above at paragraph [12.50].

⁷¹ See paragraphs [12.32]–[12.36].

⁷² See, eg, MPS Law, *Submission 17*; Kimberley Land Council, *Submission 151*.

⁷³ North Queensland Land Council, *Submission 96*.

⁷⁴ Kimberley Land Council, *Submission 26*.

⁷⁵ Kimberley Land Council, Submission to Attorney-General's Department (Cth), *Reforms to the Native Title Act 1993 (Cth) (Options Paper, 2017)* (28 February 2018).

⁷⁶ Kimberley Land Council, Submission No 16 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into Native Title Legislation Amendment Bill 2019* (n 68).

12.76 Given the observation made by the National Native Title Tribunal that it would be ‘very unusual’ for either the proponent or government party to voluntarily pay a native title party’s costs of participation,⁷⁷ it is likely that this recommendation would be opposed by such parties. However, the suite of other reforms recommended by the ALRC would reduce the need for native title parties to rely on a fee recovery for functions performed as a party to an inquiry. These other reforms include:

- repealing the expedited procedure (**Recommendation 39**) or otherwise reforming its application (**Recommendations 52** and **53**);
- empowering the NNTT to compel the parties to attend a conference, mediation, or conciliation following the making of a future act determination application (**Recommendation 61(b)**);
- providing an early determination process (**Recommendations 60** and **69**); and
- adding powers for the NNTT in relation to conciliation (**Recommendation 4**).

12.77 Additionally, as noted by First Nations Bailai, Gurang, Gooreng Gooreng, Taribelang Bunda People Aboriginal Corporation RNTBC, making the costs associated with inquiries and proceedings recoverable will serve as a further incentive for parties to reach agreement.⁷⁸ To that end, **Recommendation 80** also seeks to ensure that the native title parties’ participation in mediation, conciliation, and arbitration, is also subject to the cost recovery mechanism in s 60AB.

12.78 Where an agreement cannot be reached and proceeding to an inquiry is considered the only viable way forward, expanding the cost recovery mechanism in relation to the native title party’s participation in such a process also acts as an enabler for parties to put their best evidence forward — an issue the NNTT identified in relation to future act determination applications:

[i]n practice, there is often a paucity of evidence presented by the native title party. For example, the evidence submitted may be very general in nature and may not address the specific requirements of s 39(1). In some cases, there is no evidence submitted.

The resourcing issues ... may also be relevant here ... [A] registered native title body corporate (RNTBC) is not entitled to charge a fee for its participation in a future act determination inquiry, and it would be a very unusual grantee or Government party which would voluntarily pay a native title party’s costs of participation. Accordingly, native title parties are left to fund their responses to a FADA.⁷⁹

77 In its submission, the NNTT made this observation in the context of future act determination proceedings: see National Native Title Tribunal, *Submission 23*. However, this equally applies in the context of the expedited procedure, noting that the parties would be seeking opposing outcomes: either that the expedited procedure applies or it does not.

78 First Nations Bailai, Gurang, Gooreng Gooreng, Taribelang Bunda People Aboriginal Corporation RNTBC, *Submission 147*.

79 National Native Title Tribunal, *Submission 23*.

12.79 Finally, it is in the intention of **Recommendation 80** that any costs reasonably incurred by the native title party during the course of an inquiry (or mediation, conciliation, or arbitration) may be recoverable, regardless of the outcome of that inquiry. This is particularly important recognising that significant costs may be incurred by a native title party in collecting evidence and preparing submissions in matters where, following those being provided to the parties, an action is taken by the government party or proponent to effectively nullify the basis for the inquiry.⁸⁰ The ALRC has heard this is particularly problematic in expedited procedure inquiries.⁸¹ For example, Robe River Kuruma Aboriginal Corporation explained in its submission that the

progression of an Expedited Procedure objection to Inquiry places a strong burden of proof on Native Title Parties, often requiring lengthy and costly evidence gathering by the Native Title Party. The process is structured so that tenement applicants can lodge an application, require the native title party to lodge all its evidence at great expense, and then withdraw with no consequence. Once an application is withdrawn, the Mining Act regime then means another application over the area will be immediately lodged.⁸²

12.80 As mentioned above, the suggested inclusion of a ‘reasonableness’ standard to the costs incurred, as initially contemplated by **Recommendation 78(b)**, has also been included in **Recommendation 80**. This would assist in ensuring that only those costs reasonably incurred, including during mediation, conciliation, arbitration, or inquiries, would be recoverable by the native title party pursuant to the reformed s 60AB mechanism.

Implementation

12.81 If **Recommendations 78–80** above were implemented, it may be useful to amend the *Native Title (Notices) Determination 2024* (Cth) to include an additional requirement that, where applicable, future act notices must also include an indication of whether fees may be recovered pursuant to the s 60AB mechanism. This matter could also be included in the recommended template future act notice (see **Recommendation 59**).

80 For an example of the withdrawal of the expedited procedure statement following the provision of the native title parties’ evidence, see, eg, Cape York Regional Organisations, *Submission 44*. See also *Parna Ngururpa (Aboriginal Corporation) RNTBC v Backreef Oil Ltd* [2016] NNTTA 32 [4]–[6], where ‘extensive submissions and affidavit materials’ were provided by the native title party in accordance with directions and, subsequently, the tenement applications were refused by the government party.

81 See, eg, Robe River Kuruma Aboriginal Corporation, *Submission 25*; Cape York Regional Organisations, *Submission 44*.

82 Robe River Kuruma Aboriginal Corporation, *Submission 25*.

Opinions regarding fees charged

Recommendation 81

Section 60AC of the *Native Title Act 1993* (Cth) and related provisions in Part 4 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) be repealed.

12.82 **Recommendation 81** would repeal ORIC's function of issuing an opinion about whether a fee can be charged pursuant to section 60AB. As discussed above, the existing function would become defunct if **Recommendation 78(b)** were implemented, because native title holders would only be able to charge fees that were reasonably incurred.

12.83 If **Recommendation 81** (regarding s 60AB) is not adopted and the s 60AC function is preserved, transfer of this function from ORIC to the Registrar of the NNTT should be considered.⁸³

83 For ORIC's reasons for supporting a proposed transfer of this function from the ORIC Registrar to the NNTT, see Registrar of Aboriginal and Torres Strait Islander Corporations, *Submission 127*. The proposed transfer to the NNTT is noted as not opposed by the NNTT itself: see National Native Title Tribunal, *Submission 86*. Consideration should also be given to amending the function to give effect to recommendation 11 of the 2006 Report, *Structures and Processes of Prescribed Bodies Corporate*, specifically, that the function include authority to investigate the reasonableness of the costs incurred: Attorney-General (Cth) and Minister for Families, Community Services and Indigenous Affairs (Cth) (n 7).

13. Native Title Plans

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Introduction

13.1 In this chapter, the ALRC recommends the introduction of Native Title Plans, developed by PBCs, as a self-determined pathway to future acts validity. For native title holders, Native Title Plans would provide a means of proactively documenting and registering their aspirations and guidelines for if, how, and where development can occur on Country. For proponents and government parties, Native Title Plans could provide an efficient avenue to future acts validity on terms that are acceptable to native title holders, including potentially expedited pathways and an informed starting point for engagement.

13.2 The recommendations preceding this chapter focus on reforming the existing *Native Title Act 1993* (Cth) ('NTA') architecture. If implemented, Native Title Plans would extend and modernise the *NTA* architecture in the context of native title entering a 'post-determination phase', where fewer determinations remain unresolved. Modernising the *NTA* to take account of contemporary contexts is consistent with how the High Court characterised the *NTA*, as seeking 'to deal with concepts and ideas which are both ancient and new; developed but also developing'.¹

13.3 Equally, while the preceding recommendations further the principle of self-determination, Native Title Plans centre it. Native Title Plans shift the role of native title parties from reactive responder to proactive designer. Accordingly, if implemented, Native Title Plans would put into effect Australia's obligations under the United Nations Declaration on the Rights of Indigenous Peoples ('UNDRIP'); its commitments under the National Agreement on Closing the Gap; and a growing understanding that

1 *Northern Territory v Griffiths* (2019) 269 CLR 1 [27].

self-determination is the best approach for delivering sustainable socio-economic outcomes for Aboriginal and Torres Strait Islander people.

13.4 This chapter proceeds in four parts. The first part outlines the relevant context. The second part discusses feedback received in response to the concept of Native Title Management Plans ('NTMPs') contained in the Discussion Paper, from which Native Title Plans have been developed. The third part introduces Native Title Plans and explains how they may operate. The final part explains how pilot projects may facilitate implementation of Native Title Plans.

Context

13.5 Under the current regime, native title parties have little input into the processes and requirements for validating future acts. The generally applicable procedures in the *NTA* were established by the Commonwealth Parliament and, before this Inquiry, were last substantially reviewed and reformed between 1996 and 1998.

13.6 While resourcing has been consistently identified as an impediment to native title holders meaningfully participating in the future acts regime and pursuing economic opportunities, the future acts regime itself does not facilitate native title holders taking an active role. Under the current *NTA* architecture, native title holders are generally required to be 'reactive' to the issuing of future act notices without an ability to be 'proactive' about how development may occur on Country.

13.7 Currently, the usual sequence is that a proponent will lodge an application for a particular licence or tenement, the government then issues a future act notice to the native title holders, and then native title holders have certain procedural rights in relation to the future act, which may include a bare right to be notified, an opportunity to comment on the future act, or a right to negotiate about the future act. Generally, future act compliance comes after other statutory approvals processes, such as environment and planning processes. As the Kimberley Land Council observed in its submission,

engagement with native title holders is often an afterthought, and proponents in ILUA and s31 negotiations frequently come to the table with a fully developed project plan, a tight time period for approval, and predetermined amount of compensation that they have budgeted for. Some PBCs refer to this as 'rubber stamping' as they feel that they have limited leverage or room to negotiate. This is particularly evident where the project is a public work or is seen to be of benefit to the broader community.²

13.8 This means that while native title holders have certain procedural rights in relation to the future act, they will likely be 'reacting' to a proposal that is well developed and has already progressed through the development and approvals processes. Katsuhiko Masaki describes this form of Indigenous consultation as

2 Kimberley Land Council, *Submission 26*.

a 'straitjacket' on Indigenous self-determination.³ As the Northern Land Council explained in its submission,

genuine self-determination and FPIC can only be realised where legal and policy frameworks promote long-term active partnerships with native title holders rather than facilitating short-term transactional engagements that treat native title holders as reactive stakeholders.⁴

13.9 While alternative future acts processes may be agreed between native title holders and states or territories via an ILUA, to date these have generally been developed only in particular contexts, such as under the *Traditional Owner Settlement Act 2010* (Vic), or as part of resolving a compensation claim which has effectively acted as an incentive for a state or territory to enter negotiations.

13.10 The lack of autonomy ascribed to native title parties in the *NTA* is symptomatic of the reality that the *NTA* reflects — and that negotiations occur in — a legal context grounded in colonial and postcolonial relations.⁵ Dr Benkert, Professor Eversole, and Dr Dembek describe how this can influence both the negotiating environment and the resulting agreement:

Guided by economic development logics that foreground Indigenous deficit, along with legalistic logics grounded in colonial relations of control, these actors create institutional spaces that reproduce power imbalances and altogether undermine authentic engagement with Indigenous groups. For such cases, Cornwall has coined the term 'invited spaces'; spaces for engagement which 'are often structured and owned by those who provide them, no matter how participatory they may seek to be.' When agreements with Indigenous communities are negotiated and established in such 'invited spaces' where ways of knowing and ways of working remain on the conceptual terrain of Western organizations, the consequences of missing 'the deep contribution that

3 Riccarda Flemmer, 'The Implementation Paradox: Ambiguities of Prior Consultation and Free, Prior, and Informed Consent (FPIC) for Indigenous Peoples' Agency in Resource Extraction in Latin America' in Nancy Postero et al (eds), *The Routledge Handbook of Indigenous Development* (Routledge, 2022) 181, 186, citing Katsuhiko Masaki, 'Recognition or Misrecognition? Pitfalls of Indigenous Peoples' Free, Prior and Informed Consent (FPIC)' in Sam Hickey and Diana Mitlin (eds), *Rights-Based Approaches to Development: Exploring the Potential and Pitfalls* (Kumarian Press, 2009) 69, 82–3.

4 Northern Land Council, *Submission 153*. See also Bardi Jawi Niimidiman Aboriginal Corporation RNTBC, *Submission 53*; M Lucas, *Submission 57*; Indigenous Land and Sea Corporation, *Submission 68*; Houston Legal & Consultants, *Submission 95*; Cape York Regional Organisations, *Submission 137*.

5 See, eg, Natalya Turkina, 'Neither Naïve Nor Fatalistic: Decolonizing Mining Partnerships With Indigenous Communities in Mongolia and Australia' (2026) 65(1) *Business & Society* 232, 236–7; Darug Ngurra et al, 'Legal Pluralism on Djarubbin: Country-as-Lore/Law in Western Sydney, Australia' (2023) 9(2) *GeoHumanities* 355, 357, 371. See also Phil Henderson, 'Federalism and Settler Imperialism: Racial Regimes, Whiteness, and Conquest in Canadian Constitutionalism' (2024) 57(2) *Canadian Journal of Political Science* 466.

Indigenous communities can make to how regional development is understood and practiced' are profound.⁶

13.11 The future acts regime was conceived in a social and political context that viewed Indigenous rights very differently to today. The *NTA* was enacted more than a decade before UNDRIP was adopted and the 1998 amendments were enacted more than a decade before Australia endorsed UNDRIP. Collective or solidarity rights — like the right of Indigenous peoples to self-determination⁷ — were still emerging concepts in international human rights law.⁸

13.12 In Australia, the policy landscape was shifting from a focus on reconciliation and self-management to a policy of 'mutual obligation' and 'practical reconciliation'.⁹ Discussion of Indigenous land rights generally focused on racial non-discrimination rather than self-determination.¹⁰ This was also a time where there was significant uncertainty about the implications of native title determinations for other forms of land tenure and economic development in Australia.¹¹ The Australian Government was still coming to terms with the legacy of colonisation and the enduring harms of governmental policies on First Nations people. In short, the current future acts regime reflects the realities of a different historical context. In contrast, the concept of Native Title Plans better reflects a modern context whereby Indigenous-led design, partnerships, profit sharing, and self-determination are central policy-making pillars.

13.13 Implementing Native Title Plans would reflect an important shift in the *NTA* away from native title holders current positioning as responsive to the interests of government and proponents, and towards a more proactive, self-determined

6 Julia Benkert, Robyn Eversole and Krzysztof Dembek, 'Towards Authentic Engagement with Indigenous Peoples: Lessons from Negotiated Agreements in the Pilbara, Western Australia' [2025] *Business & Society* 1, 25–6 (citations omitted). See also Andrea Cornwall, 'Unpacking "Participation": Models, Meanings and Practices' (2008) 43(3) *Community Development Journal* 269, 275; tebrakunna country, Emma Lee and Robyn Eversole, 'Rethinking the Regions: Indigenous Peoples and Regional Development' (2019) 53(11) *Regional Studies* 1509, 1510.

7 This concept of 'self-determination' is known as the 'internal' aspect of self-determination. The 'external' aspect has its roots in the process of decolonisation; that is, the process of transferring power from colonial powers to the local majority population. 'Internal' self-determination is instead a form of 'belated state-building', whereby economic, social, and cultural structures develop under the control and management of Indigenous people. See generally Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Native Title Report 1998* (1998) 33–4.

8 See *ibid* 33–40. See also Alexandra Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* (Cambridge University Press, 2007) ch 4.

9 See Jill Webb, 'Indigenous Peoples and the Right to Self-Determination' (2012) 13 *Journal of Indigenous Policy* 75, 96–7; Will Sanders, *Towards an Indigenous Order of Australian Government: Rethinking Self-Determination as Indigenous Affairs Policy* (Centre for Aboriginal Policy Research, Discussion Paper 230, 2002) 2–3.

10 See, eg, Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Native Title Report July 1996 - June 1997* (1997) ch 6. See also Sanders (n 9).

11 See generally Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission (n 7); Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission (n 10). For further discussion of the historical context of the future acts regime see [Chapter 2](#).

engagement with the management and development of their Country. As the Cape York Regional Organisations observed in their submission, Native Title Plans could ‘enable communities to lead planning on their own terms — moving beyond a reactive, project-by-project approach’.¹²

13.14 This shift is already underway in many other areas of law and policy. For example, the National Agreement on Closing the Gap identifies formal partnerships and shared decision-making as a priority reform. The First Nations Economic Partnership, established between the Commonwealth and Coalition of Aboriginal and Torres Strait Islander Community-Controlled Peak Organisations prioritises partnership, participation, and shared decision-making between government and local First Nations representatives.¹³ The Australian Government’s Critical Minerals Strategy 2023–2030 includes a focus on ‘genuine engagement and collaboration with First Nations communities that promotes benefit sharing and respects the land and water rights and interests of First Nations people and communities’.¹⁴ One of the key actions identified by the Strategy is working with

native title holders, their [PBCs], state and territory governments and other key stakeholders to strengthen PBC capacity, which can support improved engagement with the resources sector.¹⁵

13.15 Similar shifts are occurring at a state and territory level; most notably, the Treaty Agreement in Victoria, and the implementation of the Voice in South Australia.¹⁶

An opportunity for reform and empowerment

13.16 Native title holders wish to exercise autonomy and have input into the processes that lead to development on Country.¹⁷ As the Aboriginal and Torres Strait Islander Social Justice Commissioner observed in the 2024 *Women in Native Title Report*,

we want the ultimate right to say ‘no’ to acts on Country, because that responsibility is ours as custodians of this land. We are not interested in blocking development for the sake of it. We can also benefit from development on our land. But we must be in control of that development so the balance between damage to Country and benefits to community are properly considered, and so that we benefit to the full degree warranted. We should not be pressured by

12 Cape York Regional Organisations, *Submission* 137.

13 Australian Government, Coalition of Aboriginal and Torres Strait Islander Community-Controlled Peak Organisations, and First Nations Economic Empowerment Alliance, *First Nations Economic Partnership: An Agreement between the Commonwealth of Australia and the Coalition of Aboriginal and Torres Strait Islander Community-Controlled Peak Organisations and the First Nations Economic Empowerment Alliance 2025–2030* (2025) 5–6.

14 Department of Industry, Science and Resources (Cth), *Critical Minerals Strategy 2023–2030* (2023) 5.

15 Ibid 34.

16 See, eg, Yoorrook Justice Commission, *Yoorrook for Transformation: Third Interim Report: Volume 1* (2025) recs 3, 9; Yoorrook Justice Commission, *Yoorrook for Justice: Report into Victoria’s Child Protection and Criminal Justice Systems* (2023) recs 1, 2; *First Nations Voice Act 2023* (SA).

17 See generally Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Women in Native Title: Native Title Report 2024* (2024).

the legislative regime to accept pitiful amounts of royalties, or scraps in other forms. There are enough profits from these ventures for us to benefit too. That has been the case when First Nations groups have had sufficient clout, good professional advice, and third parties have genuinely approached negotiations in good faith.¹⁸

13.17 This desire is consistent with cultural obligations towards Country, and how the High Court has characterised Aboriginal and Torres Strait Islander peoples' relationship to Country, 'a relationship which sometimes is spoken of as having to care for, and being able to "speak for", country'.¹⁹ As discussed below, it is also consistent with the right to self-determination and the right of Indigenous peoples 'to determine and develop priorities and strategies for the development or use of their lands or territories and other resources'.²⁰

13.18 Where meaningful engagement between native title holders, government parties, and proponents has taken place, and native title holders' views have been taken into account, generally better and potentially more efficient outcomes have been possible. For example, in its submission, the Kimberley Land Council described the negotiation of ILUAs establishing the Bardi Jawi Garra, Mayala, and Maiyalam Marine Parks as a positive experience due to the

thorough and well-resourced negotiation process [that] provided for flexibility and sufficient timeframes for consultations with native title holders, and for the genuine engagement of the native title holders in the codesign of the Marine Parks.²¹

13.19 Some of the benefits resulting from this agreement include additional resources to better manage the anticipated increase in tourism and commercial opportunities for Traditional Owners, and increased employment opportunities.²² The focus on partnership, shared decision-making, and participation is reflected in the first Priority Reform in the National Agreement on Closing the Gap.

13.20 This is also consistent with the evidence that self-determination and Indigenous governance results in better outcomes for First Nations people.²³ Self-determination is inextricably linked to the health and wellbeing of First Nations

18 Ibid 326.

19 *Western Australia v Ward* (2002) 213 CLR 1 [14].

20 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) art 32 ('UNDRIP').

21 Kimberley Land Council, *Submission* 26.

22 Kimberley Land Council, 'KLC Celebrates the First Indigenous-Led Design of State Marine Parks' <www.klc.org.au/klc-celebrates-the-first-indigenously-led-design-of-state-marine-parks>.

23 See Larissa Behrendt, Miriam Jorgensen and Alison Vivian, *Self-Determination: Background Concepts: Scoping Paper 1 Prepared for the Victorian Department of Health and Human Services* (UTS: Jumbunna, Indigenous House of Learning, 2017) 12–15. See also Shin Imai, *Indigenous Self-Determination and the State* (Comparative Research in Law & Political Economy, Research Report No 25, 2008) 6–7; Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Native Title Report 2012* (2012) 61–2, 64–6.

people in Australia.²⁴ Research conducted by the Harvard Project on American Indian Economic Development has been cited and accepted as evidence that where Indigenous people ‘make their own decisions about what approaches to take and what resources to develop, they consistently out-perform [non-Indigenous] decision-makers’.²⁵ That research also demonstrated that self-determination is ‘the only strategy that has worked’ to improve the lives of Indigenous people in the USA.²⁶ The research indicated that overall economic growth, industrial performance, business performance, and program performance all improved under federal policies that promoted ‘tribal self-government’.²⁷ The researchers concluded that

after twenty years of research and work in Indian Country, we cannot find a single case of sustained economic development in which an entity other than the Native nation is making the major decisions about development strategy, resource use, or internal organization.²⁸

13.21 This is at the heart of what Native Title Plans seek to reflect and promote.

13.22 Most relevantly for this chapter, the Terms of Reference ask the ALRC to consider:

- the intention of the *NTA*, as stated in its preamble, to be a special measure for the advancement of First Nations peoples, and to ensure native title holders are able to fully enjoy their rights and interests;
- the rights and obligations recognised in the international instruments to which Australia is a party or which it has pledged to support, including UNDRIP;
- options to support native title groups to effectively engage with the future acts regime and to support consensus within groups in relation to proposed future acts; and
- options to support native title groups, project proponents, and governments to share in the benefits of development on native title land, including opportunities for native title groups to lead or co-lead development.

24 Daryle Rigney et al, *Indigenous Nation Building and the Political Determinants of Health and Wellbeing* (Lowitja Institute, Discussion Paper, 2022) 6, 9, 14–16, 27; Yoorrook Justice Commission, *Yoorrook for Transformation: Third Interim Report: Volume 1* (n 16) 138.

25 See Steering Committee for the Review of Government Service Provision, Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2009* (2009) 11.12. See also James Anaya, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People: Situation of Indigenous Peoples in Australia*, 15th sess, UN Doc A/HRC/15/37/Add.4 (1 June 2010) 14–15.

26 Stephen Cornell and Joseph P Kalt, *American Indian Self-Determination: The Political Economy of a Successful Policy* (Joint Occasional Papers on Native Affairs, Working Paper No 1, 2010) 13.

27 Ibid 11–13. See also Stephen Cornell and Joseph P Kalt, *Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations* (Joint Occasional Papers on Native Affairs, Working Paper No 2003-02, 2003).

28 Stephen Cornell and Joseph P Kalt, ‘Two Approaches to the Development of Native Nations: One Works, the Other Doesn’t’ in Miriam Jorgensen (ed), *Rebuilding Native Nations: Strategies for Governance and Development* (University of Arizona Press, 2007) 3, 22.

13.23 We have also been asked to conduct this Inquiry with regard to the Socio-economic Outcomes and Priority Reforms of the National Agreement on Closing the Gap. These include the goals of:

- achieving strong economic participation and development of people and their communities (Target 8); and
- ensuring Aboriginal and Torres Strait Islander peoples maintain a distinctive cultural, spiritual, physical and economic relationship with their land and waters (Target 15).

13.24 Taking account of the objectives outlined above, the reforms discussed in this chapter would empower native title holders to be more proactive and influential participants in the future acts regime. These reforms go beyond reforming the current architecture of the future acts regime and present a new vision for the future acts regime, which not only reflects the modern context in which the regime operates, but can also provide a platform for native title development into the future. As highlighted in the Terms of Reference for this Inquiry, it is important that the future acts regime is ‘appropriately designed for Australia’s current and future social and economic development, in a way that respects the rights and interests of native title holders’. In addition to supporting the targets and priority reforms in the National Agreement on Closing the Gap, Native Title Plans may also be implemented in a way that complements other Australian Government initiatives, such as the First Nations Economic Partnership and Critical Minerals Strategy 2023–2030.²⁹

Feedback in response to Discussion Paper

13.25 Question 6 in the Discussion Paper asked whether NTMPs should be introduced as a new mechanism for validating future acts under the future acts regime. An NTMP would be made by a Prescribed Body Corporate (‘PBC’) for its determination area, subject to the consent of common law holders, and would take effect upon being registered by the National Native Title Tribunal (‘NNTT’). For the future acts covered by a registered NTMP, the NTMP would displace the generally applicable procedures in the *NTA*, and for a future act to be valid the processes set out in the NTMP would need to be followed.

13.26 NTMPs responded to the issue discussed above of native title parties being relegated to a reactive position in the *NTA* by providing a means for PBCs and native title holders to proactively set out their wishes and aspirations for development on Country. The concept of NTMPs drew on feedback that specific or tailored future acts processes, such as those contained in ILUAs, can better incorporate native title holders’ views and account for regional or jurisdictional differences.

29 Australian Government, Coalition of Aboriginal and Torres Strait Islander Community-Controlled Peak Organisations, and First Nations Economic Empowerment Alliance (n 13); Department of Industry, Science and Resources (Cth) (n 14).

13.27 The ALRC received considerable feedback on the concept of NTMPs. Resourcing for the development and maintenance of NTMPs was almost universally identified as a critical issue for the success of NTMPs as a reform measure.³⁰

13.28 Feedback that expressed support or qualified support for NTMPs highlighted the following:

- NTMPs may reduce the costs and ‘red tape’ for both proponents and PBCs, including by promoting streamlined pathways and process certainty.³¹
- PBCs would be able to ‘exclude or restrict unwanted activity as well as to promote development deemed desirable by native title holders’.³²
- PBCs could proactively plan land use and management, including planning how they might wish to use native title rights for economic, social, cultural, and environmental outcomes.³³
- NTMPs could provide proponents and government greater certainty about process upfront, providing an ‘informed starting point for engagement’.³⁴
- NTMPs align native title and the right of First Nations people under international law to self-determination.³⁵

13.29 Feedback that was not supportive of NTMPs expressed a view that any gains in efficiency or convenience that might be produced by NTMPs would be outweighed by the complexity they would bring to an already complex system.³⁶

13.30 Feedback also indicated a wide range of views on a number of key issues, including:

- whether NTMPs should be capable of applying to any future acts, or only some categories;³⁷

30 See, eg, Amalgamated Prospectors and Leaseholders Association of WA Inc, *Submission 64*; I Ingram, *Submission 119*; Law Council of Australia, *Submission 120*; Central Land Council, *Submission 121*; Great Barrier Reef Marine Park Authority, *Submission 129*; Mabo Centre and National Native Title Council, *Submission 130*; Cape York Regional Organisations, *Submission 137*.

31 First Nations Legal and Research Services, *Submission 146*.

32 Australian Human Rights Commission, *Submission 118*.

33 Bardi Jawi Niimidiman Aboriginal Corporation RNTBC, *Submission 53*; Houston Legal & Consultants, *Submission 95*.

34 Houston Legal & Consultants, *Submission 95*. See also Australian Human Rights Commission, *Submission 118*; Kimberley Land Council, *Submission 151*.

35 First Nations Legal and Research Services, *Submission 146*.

36 See, eg, Amalgamated Prospectors and Leaseholders Association of WA Inc, *Submission 64*; Isaac Regional Council, *Submission 70*; Association of Mining and Exploration Companies, *Submission 97*; Western Australian Government, *Submission 115*; E Raeside, *Submission 145*; Northern Territory Government, *Submission 149*.

37 See, eg, Local Government Association of Queensland, *Submission 108*; Yamatji Marlpa Aboriginal Corporation, *Submission 148*.

- whether and how the views of non-native title parties, such as government parties, proponents, or members of the public, should be taken into consideration in the development and registration of an NTMP;³⁸ and
- whether the test for registering an NTMP should be formal or procedural only, or a merits-based assessment of the content of an NTMP.³⁹

13.31 **Recommendation 82** below represents a pragmatic reform that seeks to preserve the substantive benefits of the proposal in the Discussion Paper, while addressing some of the valid concerns raised in submissions.

Native Title Plans

Recommendation 82

The *Native Title Act 1993* (Cth) be amended to provide for Native Title Plans as a self-determined pathway to validity for future acts. A Native Title Plan would provide a non-mandatory pathway to validity, unless the Plan was approved by the relevant state or territory, in which case, other than for an indigenous land use agreement, the Native Title Plan would be the sole and therefore mandatory pathway to validity. Additionally, the *Native Title Act 1993* (Cth) should provide that Native Title Plans:

- may be developed by a Prescribed Body Corporate for the whole or part of the relevant determined area;
- may set out processes and conditions for how future acts may be validated in the relevant determined native title area;
- must be registered with the National Native Title Tribunal, subject to a simple registration test;
- must be approved by the common law holders before registration, and subject to a review by the common law holders every five years, or such shorter period as they should determine; and
- may deal with matters that do not relate to future acts validity, but not in a manner that would be legally binding or that would displace state or territory laws.

38 See, eg, Isaac Regional Council, *Submission 70*; National Farmers' Federation, *Submission 114*; Bureau of Meteorology, *Submission 123*; Great Barrier Reef Marine Park Authority, *Submission 129*; Yamatji Marlpa Aboriginal Corporation, *Submission 148*; Northern Territory Government, *Submission 149*; State of Queensland, *Submission 152*.

39 See, eg, National Farmers' Federation, *Submission 114*; I Ingram, *Submission 119*; Central Land Council, *Submission 121*; Queensland South Native Title Services, *Submission 124*; Mabo Centre and National Native Title Council, *Submission 130*; NSW Bar Association, *Submission 140*; First Nations Legal and Research Services, *Submission 146*; Yamatji Marlpa Aboriginal Corporation, *Submission 148*; Kimberley Land Council, *Submission 151*.

The *Native Title Act 1993* (Cth) should also provide a mechanism for certifying that the terms of a Native Title Plan have been complied with for the purposes of confirming validity. Such certificates should be lodged with the National Native Title Tribunal and maintained on a public record.

13.32 **Recommendation 82** would introduce a framework for the development of Native Title Plans to the *NTA*. Native Title Plans would be developed by PBCs in relation to areas where native title has been determined to exist, and would set out processes for the validation of future acts. In summary, the legislative framework should include the following elements:

- **Voluntary unless agreed by state or territory** — A Native Title Plan would create a voluntary, but not mandatory, pathway to future act validity, unless the Native Title Plan was agreed between native title holders and the relevant state or territory. If agreed, the Native Title Plan would be the only pathway to validity other than an ILUA.
- **Registration** — a process for the development of Native Title Plans, approval by common law holders, and registration with the NNTT.
- **Certification** — a mechanism for certifying that the terms of a Native Title Plan have been complied with, meaning a future act can be or has been done validly.
- **Not limited to future acts** — Native Title Plans are not limited to dealing only with future acts validity, but may deal with other matters relevant to the PBC and native title holders.

13.33 The sections below discuss these aspects in more detail.

A reform that centres self-determination

13.34 Enabling self-determination is at the core of **Recommendation 82**. This reflects the strong message we have heard in submissions and consultations in this Inquiry: native title holders want to shape what happens on Country. The *NTA* is part of a land rights movement that corrected the legal falsehood of *terra nullius*. However, the *NTA* cannot properly be characterised as a self-determined instrument. Rather, in reforming provisions to better reflect native title holders' aspirations, it can be seen as an enabler of self-determination. Native Title Plans are designed to give effect to self-determination, within the imperfect parameters of the existing *NTA*.

13.35 Self-determination is a fundamental human right, which gives rise to other critical concepts such as free, prior, and informed consent.⁴⁰ It is a 'foundational

40 See, eg, Expert Mechanism on the Rights of Indigenous Peoples, *Free, prior and informed consent: a human rights-based approach*, 39th sess, UN Doc A/HRC/39/62 (10 August 2018) [6]–[8]; Human Rights Committee, *General Comment No 12: Article 1 (Right to Self-determination)*, 21st sess, UN Doc HRI/GEN/1/Rev.9 (Vol. I) (13 March 1984) [1]–[2].

principle that anchors the constellation of indigenous peoples' rights',⁴¹ and is 'indispensable for indigenous people's enjoyment of all their other rights'.⁴² Article 3 of UNDRIP provides for the right to self-determination, stating

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.⁴³

13.36 This echoes the right to self-determination contained in common art 1 of the *International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights*.⁴⁴

13.37 The precise content of the right to self-determination is unsettled, and 'gives rise to different prescriptions in different contexts'.⁴⁵ However, the core meaning is generally agreed upon, namely, that

Indigenous peoples have the right to pursue their own destinies in all spheres of life, under conditions of equality, and to live within governing institutional orders that are devised accordingly.⁴⁶

13.38 One example of self-determination in Australia is Aboriginal and Torres Strait Islander community control.⁴⁷ In her statement to the Yoorrook Justice Commission, the Premier of Victoria explained self-determination as 'the transfer of resources and decision-making power from the State to First Peoples'.⁴⁸ The Yoorrook Justice Commission described four dimensions of self-determination: economic, political, social, and cultural.⁴⁹ These meanings are reflected in the concept of Native Title Plans.

13.39 More specifically, art 32 of UNDRIP provides that Indigenous peoples 'have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources'. The existing future acts regime

41 James Anaya, *Rights of Indigenous Peoples: Report of the Special Rapporteur on the Rights of Indigenous Peoples*, 68th sess, UN Doc A/68/317 (14 August 2013) [73].

42 Expert Mechanism on the Rights of Indigenous Peoples, *Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: Indigenous peoples and the right to self-determination*, 48th sess, UN Doc A/HRC/48/75 (4 August 2021) [14].

43 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) art 3.

44 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 1; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 1.

45 James Anaya, *Rights of Indigenous Peoples: Report of the Special Rapporteur on the Rights of Indigenous Peoples*, 68th sess, UN Doc A/68/317 (14 August 2013) [75].

46 *Ibid* [77].

47 Coalition of Peaks and Council of Australian Governments, *National Agreement on Closing the Gap* (2020) [44].

48 Yoorrook Justice Commission, Victoria, 29 April 2024, *Premier's Witness Statement to Yoorrook Justice Commission* (2024) [37] (Jacinta Allen MP).

49 Yoorrook Justice Commission, *Yoorrook for Transformation: Third Interim Report: Volume 1* (n 16) 136.

does not adequately enable native title holders to exercise this right. Native Title Plans would help to address this by providing native title holders with an opportunity to set out their wishes for how others may engage with them, and how future acts may be done on their determination.

13.40 Putting self-determination at the centre of Native Title Plans means empowering native title holders to not only develop a tailored framework for future act validity, but also an opportunity to articulate their aspirations for development on Country. We heard that this was seen as a ‘key strength’ of NTMPs.⁵⁰ Native title holders may have different views about what types and quantities of development are desirable. Native Title Plans would provide native title holders with an opportunity to, for example:

- specify their preferred processes that would apply for various future acts;
- set out conditions that would attach to particular kinds of future acts to address the economic, cultural, environmental, or social impacts of the future act;
- develop standard form agreements;
- identify the types of future acts that would be considered to be lower-, medium-, or higher-impact;
- publicly map Country to identify areas where development may be welcomed and to identify areas where development would not be welcomed; and
- describe the types of partnerships that the native title holders are open to, including listing the types of services that the PBC could offer to potential partners.

13.41 Native Title Plans also open up possibilities for native title processes and agreements that better reflect Indigenous worldviews and legal systems. As Bardi Jawi Niimidiman Aboriginal Corporation RNTBC explained, Native Title Plans provide ‘an opportunity to embed cultural governance at the centre of statutory processes and to ensure that Traditional Owners have a genuine say in how their Country is managed’.⁵¹

13.42 Native Title Plans would be an innovative, proactive tool for managing native title. Native title holders would be able to set the ‘ground rules’ for what happens on Country, and how it should happen. In this way, native title holders would be able to set the scene for future negotiations, and those negotiations could take place on terms set out in a Native Title Plan. Submissions and consultations highlighted that this proactive element was one of the key benefits of NTMPs.⁵²

50 See, eg, Australian Human Rights Commission, *Submission 118*; Kimberley Land Council, *Submission 151*.

51 Bardi Jawi Niimidiman Aboriginal Corporation RNTBC, *Submission 53*.

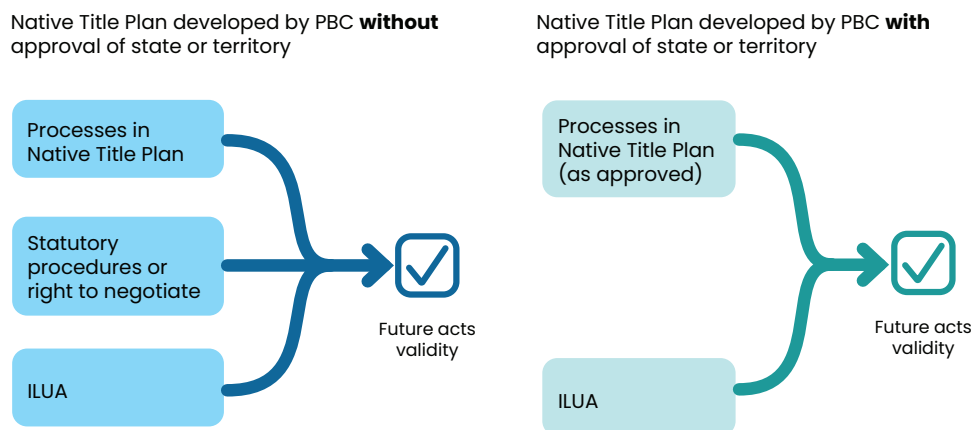
52 See, eg, *ibid*; Houston Legal & Consultants, *Submission 95*; Australian Human Rights Commission, *Submission 118*; Kimberley Land Council, *Submission 151*.

Voluntary, unless agreed by a state or territory

13.43 **Recommendation 82** would make Native Title Plans an optional pathway to future acts validity. This means that if government parties and proponents followed the procedures set out in a Native Title Plan, the relevant future act would be valid. However, failure to follow the path to validation provided by a Native Title Plan would not lead to *invalidity*. The future act could still be validated via the generally applicable procedures provided in the *NTA* or via an ILUA. The Plan would only be a mandatory pathway to validity if the state or territory has agreed to the Plan, although validity could nevertheless be effected through an ILUA.

13.44 **Figure 13.1** below illustrates how Native Title Plans would be a pathway to validity, unless approved by the state or territory, in which case they would become *the* pathway to validity. In both cases, the parties may choose to negotiate an ILUA as an alternative.

Figure 13.1: Native Title Plans as voluntary pathway to validity, unless approved by a state or territory



13.45 The ALRC recommends that Native Title Plans be capable of providing a mandatory pathway to validity that would displace the generally applicable procedures if agreed by the relevant state or territory. This adopts a similar logic to that which underpins alternative procedure ILUAs, and other state agreements that have established alternative regimes. One of the key differences between a Native Title Plan and an alternative procedure ILUA is that the Plan would be developed independently by the PBC, and then approved by the state or territory. In contrast, ILUAs are negotiated with proponents, often in response to a proposed project. As Houston Legal & Consultants explained in its submission (in relation to negotiating

future act agreements generally), this can be a process ‘driven by proponent development demands and short commercial timeframes’.⁵³

13.46 Native Title Plans as a voluntary, rather than mandatory, pathway to validity is one of the main differences to NTMPs as outlined in the Discussion Paper. We heard from native title holders’ representatives that it was important for NTMPs to be a mandatory pathway to validity. This would justify the significant investment of time and resources required to develop an NTMP. For example, First Nations Legal and Research Services argued

where an NTMP is in place, having its application as ‘optional’ would undermine the proposed process. If a PBC spent the time and resources to develop and successfully register a NTMP, it would render that process redundant if a proponent could elect to adopt the regular procedures under the Act.⁵⁴

13.47 However, we also heard compelling reasons why NTMPs should not, at this time, be mandatory in circumstances where the state or territory had not been involved in the development of the plan. The Western Australian Government highlighted that NTMPs could provide for processes that conflict with the state’s role in land use planning.⁵⁵ This concern was echoed by local governments.⁵⁶ Other stakeholders expressed concern that mandatory NTMPs could result in added layers of complexity in an already complex native title system.⁵⁷ Some feedback in response to the Discussion Paper agreed that modifying NTMPs to be a non-mandatory pathway to validity may be one means of achieving many of the same benefits while avoiding the potential risks of introducing NTMPs as only a mandatory pathway. Requiring the state or territory to agree to the Native Title Plan before it can become a mandatory pathway to validity mitigates against the risk of adding unnecessary complexity.

13.48 If all Native Title Plans were to be mandatory pathways for future acts validity, they would require stringent registration criteria. The registration process would need to be overseen by an independent body. We heard very mixed feedback about what appropriate registration criteria could consist of. Some stakeholders argued that registration should be automatic once the Native Title Plan was approved by common law holders.⁵⁸ Others advocated for a principled set of criteria, such as criteria grounded in cultural law and the objectives of the NTA.⁵⁹ To appropriately balance the interests of non-native title users of the native title system, any registration process would likely require an opportunity for other stakeholders to

53 Houston Legal & Consultants, *Submission 95*.

54 First Nations Legal and Research Services, *Submission 146*. See also Mabo Centre and National Native Title Council, *Submission 130*.

55 Western Australian Government, *Submission 115*. See also State of Queensland, *Submission 152*.

56 Local Government Association of Queensland, *Submission 108*.

57 See, eg, *ibid*; E Raeside, *Submission 145*; Northern Territory Government, *Submission 149*.

58 Yamatji Marlpa Aboriginal Corporation, *Submission 148*; Kimberley Land Council, *Submission 151*.

59 I Ingram, *Submission 119*; First Nations Legal and Research Services, *Submission 146*.

make comments or for objections to be lodged.⁶⁰ This might reasonably be limited to government parties or statutory authorities.⁶¹

13.49 The approach the ALRC has taken strikes a balance between these competing interests. It helps to preserve the self-determined character of NTMPs, while avoiding the complexities and potential inefficiencies of registration, if Native Title Plans were exclusively a mandatory pathway to validity. Native title parties can make and register a non-mandatory Native Title Plan, but must involve and get the agreement of the state or territory for the Plan to become a mandatory pathway to validity. At this preliminary stage, where Native Title Plans are yet to be piloted and evaluated, the ALRC considers the requirement for the state or territory to approve the Native Title Plan in order for it to become a mandatory pathway is an appropriate first step for the future acts regime to take at this time. The ALRC contemplates that if, with the encouragement of successful pilots, Native Title Plans become more common and their processes and benefits better appreciated, a registration process for mandatory Native Title Plans could be introduced at a later time.

13.50 In any event, non-mandatory Native Title Plans retain many of the benefits of mandatory NTMPs. By clearly setting out the aspirations and development priorities of the native title holders, Native Title Plans could act as a 'green light' to development in certain areas.⁶² That is, they provide native title holders with an ability to set out their preferred processes, and potentially provide proponents with a fast-tracked pathway to validity if they were to comply with the processes set out in the Plan. The Cape York Regional Organisations describe this as having the potential to create 'an "investment-ready" environment'.⁶³ In this way, Native Title Plans would reduce negotiation, transaction, and administrative costs for PBCs, proponents, and government parties.⁶⁴ As the National Farmers' Federation observed, the Plans have the potential to 'reduce uncertainty and facilitate stronger relationships between stakeholders'.⁶⁵

Development and registration

13.51 Native Title Plans would be developed by PBCs and would have to be approved by common law holders before they can be registered. The approval process would be a simple registration test, similar to the process for authorising an ILUA. That is, a majority of common law holders must consent to the registration of the Native Title Plan, and provide certification to evidence this. This is a safeguard to ensure that the Native Title Plan reflects the aspirations of common law holders for how future acts can be done in their determination area.⁶⁶

60 Mabo Centre and National Native Title Council, *Submission 130*.

61 Kimberley Land Council, *Submission 151*. See also Bureau of Meteorology, *Submission 123*; Great Barrier Reef Marine Park Authority, *Submission 129*; Seqwater, *Submission 135*.

62 See, eg, Kimberley Land Council, *Submission 151*.

63 Cape York Regional Organisations, *Submission 137*.

64 See First Nations Legal and Research Services, *Submission 146*.

65 National Farmers' Federation, *Submission 114*.

66 Law Council of Australia, *Submission 120*.

13.52 Similar to agreements entered into subject to standing instructions, Native Title Plans would be required to be reviewed every five years by common law holders (or a shorter period as determined by the common law holders). We heard support for mandatory reviews of NTMPs.⁶⁷ This was seen as particularly important where the Plan may be accompanied by maps. The Kimberley Land Council explained that it was important that any information in maps should not be treated as ‘fixed’ but rather should be capable of accommodating

changes to landscape (e.g. via mining, roads, natural disasters), animal populations (e.g. via new gun laws, cane toad movements) and access to Country (e.g. via economic factors, natural disasters, fencing) [which] may lead to shifts in the way people interact with Country, the cultural significance of places on Country and the values associated with different parts of Country. Examples of this include the shift in location of a law camp where a mine is established in its vicinity, and a shift in the location of hunting grounds in response to changes to the habitat of native species including because of environmental damage and the influx of pests and introduced species.⁶⁸

13.53 The approved Plan would be registered with the NNTT, along with the certification. There could only be one Native Title Plan per determination area. The Registrar would keep a copy of the certification, and would put the approved Plan on a publicly accessible record of Native Title Plans. In this way, potential future act proponents would have easy access to a Native Title Plan and be able to assess its content.

Certification

13.54 Native Title Plans would provide for a process for the PBC to certify that the processes in the Plan had been complied with, and that the future act can therefore be done validly. This would provide the proponent and government party with certainty that the future act can be done validly.

13.55 Compliance certificates would be maintained on a public record, similar to the record of section 31 agreements. This approach is consistent with other recommendations in this Report, which are designed to promote transparency and enhance data collection (see [Recommendations 7–8, 19 and 58](#)).

Broader functions

13.56 Beyond providing processes for future acts validity, Native Title Plans may give an opportunity for PBCs and native title holders to express their aspirations and wishes on a range of other matters. For example, Native Title Plans may set out the PBC’s preferred modes of engagement and contacts. Native Title Plans may act as a form of ‘service catalogue’ or prospectus, indicating to the market opportunities for joint ventures and investment in the area.

67 See, eg, First Nations Legal and Research Services, *Submission 146*.

68 Kimberley Land Council, *Submission 151*.

13.57 Recognising the interconnected nature of native title and cultural heritage, PBCs may find it useful to use a Native Title Plan to present their preferred cultural heritage management process. Such an approach may provide benefits to the PBC and proponent by streamlining approvals processes. If a PBC did choose to set out their preferred cultural heritage processes in a Native Title Plan, the Native Title Plan would not become a mandatory pathway for compliance under the cultural heritage legislative regime, and the Native Title Plan would not override any inconsistent state statutory obligations. Whilst Native Title Plans may deal with matters that do not relate to future act validity, it is not intended that Native Title Plans would do so in a manner that would be legally binding or that would displace state or territory laws.

Pilot projects

Recommendation 83

To aid in the uptake and implementation of Native Title Plans, the Australian Government provide specific resourcing, support, and evaluation mechanisms for Native Title Plan pilot projects, with a view to providing ongoing resourcing for the development of Native Title Plans by all interested Prescribed Bodies Corporate.

13.58 **Recommendation 83** would facilitate Native Title Plan pilot programs. Pilot programs would allow for a staged implementation of Native Title Plans and support those PBCs with an interest in developing a Native Title Plan to adopt one. As is the case with many of the recommendations in this Report, the success of Native Title Plans depends on adequate additional funding to PBCs and the native title sector (see **Chapter 14**).

13.59 The ALRC is conscious that Native Title Plans may require a significant investment of time and resources to develop. As Cape York Regional Organisations explained, a Plan may require ‘community consultation, cultural heritage surveys, mapping of Country, identifying economic potential and often resolving complex land tenure questions’.⁶⁹ Some PBCs may already be in a position to develop a Native Title Plan. For the reasons discussed in **Chapter 14** relating to resourcing and capacity, many would not.

13.60 Pilot programs address one of the key difficulties when introducing substantive and novel law reform: it is difficult to predict how the reform measure would affect behaviour and therefore its success as a reform measure. Writing about law reform generally, the Hon Justice David Goddard notes that ‘we should be realistic about what we do and do not know about complex social phenomena’ and that laws should be designed ‘in a way which takes account of the limited information and difficulty of

69 Cape York Regional Organisations, *Submission 137*.

making reliable predictions that are a common feature of law reform exercises'.⁷⁰ Pilot programs would allow PBCs to learn from each other's experiences of developing Native Title Plans, and progressively develop better Plans.⁷¹

70 David Goddard, *Making Laws That Work: How Laws Fail and How We Can Do Better* (Hart Publishing, 2022) 36.

71 First Nations Legal and Research Services, *Submission 146*.

14. The Bigger Picture

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Introduction

14.1 This chapter discusses issues that have been identified during this Inquiry as relevant to the fair and efficient operation of the future acts regime. Some of these issues are the subject of recommendations or discussed in order to aid the implementation of the reforms in this Report. Others are highlighted as potential areas for future reform which the ALRC has not had the opportunity to deal with to finality, but where further consideration of reform may be warranted.

14.2 This chapter is in five parts. The first part discusses Prescribed Body Corporate ('PBC') resourcing, and the systemic importance of adequate funding for PBCs. The second part discusses the importance of adequate resourcing for the National Native Title Tribunal ('NNTT'), and reforms to its constitution. The third part discusses implementation of the reforms recommended in this Report. The fourth part discusses potential future reforms related to the interaction of cultural heritage and native title legislation. The final part discusses other topics that have been identified during this Inquiry as areas that warrant further consideration for reform.

PBC resourcing

Recommendation 84

The Australian Government substantially increase funding for Prescribed Bodies Corporate to ensure they and native title holders are able to meaningfully participate in the future acts regime.

14.3 PBCs are central to the operation of the future acts regime. Their importance will only increase as more native title claims are finalised and more PBCs are established. If implemented, **Recommendation 84** would substantially increase the funding for PBCs to enable them to fulfil their statutory roles, and ensure that they and native title holders can meaningfully participate in the future acts regime. This recommendation is in line with the Terms of Reference for this Inquiry, which ask the ALRC to consider ‘options within laws and legal frameworks to support native title groups to effectively engage with the future acts regime’.

14.4 This Report is the latest in a long series of reports that have identified inadequate resourcing for PBCs as a key cause of inefficiency and inefficacy

in the future acts regime.¹ Chronic underfunding is one of the main barriers to effective engagement with the future acts regime.² Australians for Native Title and Reconciliation illustrated the issues in its submission, explaining that

due to inadequate funding and other structural barriers, most PBCs find themselves stuck in a cycle of basic administration and compliance, rather than

- 1 Other reports that have highlighted similar issues include: Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Inquiry into Economic Self-Determination and Opportunities for First Nations Australians* (2024) rec 11; Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Women in Native Title: Native Title Report 2024* (2024) rec 28; Joint Standing Committee on Northern Australia, Parliament of Australia, *The Engagement of Traditional Owners in the Economic Development of Northern Australia* (2022) rec 1; Belinda Burbidge et al, *Report on the 2019 Survey of Prescribed Bodies Corporate (PBCs)* (Australian Institute of Aboriginal and Torres Strait Islander Studies, National Native Title Council, Commonwealth Scientific and Industrial Research Organisation, January 2021) recs 9, 12; Joint Standing Committee on Northern Australia, Parliament of Australia, *A Way Forward: Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge* (2021) rec 7; Senate Select Committee on the Effectiveness of the Australian Government's Northern Australia Agenda, *Senate Select Committee on the Effectiveness of the Australian Government's Northern Australia Agenda: Final Report* (2021) [6.29]–[6.31]; Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Native Title Legislation Amendment Bill 2019 [Provisions]* (2020) [2.125]–[2.129]; Productivity Commission, *Resources Sector Regulation* (Study Report, 2020) 30; Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Social Justice and Native Title Report 2016* (2016) rec 18; Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Social Justice and Native Title Report 2013* (2013) 105; House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Advisory Report: Native Title Amendment Bill 2012* (2013) [3.13]; Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Native Title Report 2012* (2012) 112–13; Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Native Title Report 2011* (2011) 101; Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Native Title Report 2010* (Report No 2/2011, 2011) 18; Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Native Title Report 2009* (Report No 2/2010, 2010) 21–6; Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Native Title Report 2008* (Report No 2/2009, 2009) 36–9; Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Native Title Report 2007* (Report No 2/2008, 2008) 97–9; Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Native Title Amendment Bill 2006 [Provisions]* (2007) [3.94]–[3.98]; Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Native Title Report 2006* (Report No 2/2007, 2007) 34; Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account, *Report on the Operation of Native Title Representative Bodies* (2006) [5.68]; Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Native Title Report 2005* (Report No 4/2005, 2005) 45; Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Native Title Report 2004* (2005) 109; Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Native Title Report 2003* (2004) 161–5; Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Native Title Report 2001* (Report No 1/2002, 2002) 71.
- 2 See Bardi Jawi Niimidiman Aboriginal Corporation RNTBC, *Submission 53*; M Lucas, *Submission 57*; ANTAR, *Submission 80*; I Ingram, *Submission 119*; Mabo Centre and National Native Title Council, *Submission 130*. See also Australian Law Reform Commission, *Review of the Future Acts Regime* (Discussion Paper No 88, 2025) [296]–[298].

being free to proactively advance the self-determining aspirations of native title holders.³

14.5 Inadequate funding for PBCs ultimately undermines the objective and intention of the *Native Title Act 1993* (Cth) ('NTA') as a measure intended for the advancement of Aboriginal and Torres Strait Islander people. This inadequate funding can mean native title holders are prevented from effectively engaging with the future acts regime. As a result, opportunities 'for the native title system to contribute significantly to social, cultural, environmental and economic outcomes for First Nations people, businesses, organisations and communities' — as recognised by the Terms of Reference — are missed. This, in turn, undermines efforts to achieve the Socio-economic Outcomes and Priority Reforms of the National Agreement on Closing the Gap.

14.6 Submissions to this Inquiry almost universally acknowledged that PBCs require adequate funding for the future acts regime to operate effectively.⁴ The Cape York Regional Organisations described the issue in their submission, saying

at the heart of the challenge is the fact that native title has been a case of rights without support. The law handed PBCs the responsibility to manage native title lands and negotiate agreements but did not equip them with the funding or institutional power to do so effectively. As a result, many PBCs struggle just to meet basic compliance, let alone drive development outcomes for their people. This must be urgently remedied. Strengthening PBCs is not a peripheral issue – it is the central requirement for a just and functional native title system. We recognise that governance is the bridge between recognition and opportunity. Without robust Indigenous governance, native title risks being symbolic, a paper right. If native title is to mean anything in the new era of critical minerals, carbon markets and renewable energy, we must restore the authority of Native Titleholders – not only through law but through institutional power and capability.⁵

14.7 As the Australian Human Rights Commission observed,

the burden of facilitating the effective engagement of traditional owners in the native title system must lie with those responsible for administering the system

3 ANTAR, *Submission 80*.

4 See, eg, W Santo, *Submission 51*; Maddocks, *Submission 62*; M Boge, *Submission 76*; Houston Legal & Consultants, *Submission 95*; Association of Mining and Exploration Companies, *Submission 97*; Norman Waterhouse Lawyers, *Submission 102*; AgForce Queensland Farmers Ltd, *Submission 111*; Minerals Council of Australia, *Submission 113*; Western Australian Government, *Submission 115*; NSW Minerals Council, *Submission 117*; Australian Human Rights Commission, *Submission 118*; Law Council of Australia, *Submission 120*; Central Land Council, *Submission 121*; Queensland South Native Title Services, *Submission 124*; P&E Law, *Submission 128*; Mabo Centre and National Native Title Council, *Submission 130*; Powerlink Queensland, *Submission 134*; Cape York Regional Organisations, *Submission 137*; First Nations Legal and Research Services, *Submission 146*; Yamatji Marlpa Aboriginal Corporation, *Submission 148*; Northern Territory Government, *Submission 149*; Kimberley Land Council, *Submission 151*; State of Queensland, *Submission 152*; South Australian Government, *Submission 156*.

5 Cape York Regional Organisations, *Submission 137*.

(governments), and those seeking to benefit from its existence (proponents). Benefits (royalties, compensation and future act payments) received from native title determinations or agreements, should not be required to fund future engagement in the system. PBCs have an ongoing responsibility to comply with the statutory requirements and future acts processes imposed upon them.⁶

14.8 Many submissions observed that if PBCs are not adequately resourced, then the reforms recommended by the ALRC will fail to achieve the outcomes they seek.⁷

14.9 Appropriately resourcing PBCs to enable them and native title holders to meaningfully participate in the future acts regime is also consistent with art 39 of the United Nations Declaration on the Rights of Indigenous Peoples, which provides that Indigenous peoples have the right to access financial assistance from states in order to enjoy their rights.⁸ Adequate ongoing funding for PBCs is also linked to self-determination. As the Cape York Regional Organisations observed ‘only with secure, long-term resourcing can PBCs move from being reluctant gatekeepers to becoming engines of local economic development and self-determination’.⁹

14.10 **Recommendation 84** is framed in general terms, rather than recommending a specific funding model, because a reform process relating to PBC funding has been established under the First Nations Economic Partnership, announced at the Garma Festival in 2025.¹⁰ In his speech announcing the Partnership, the Prime Minister stated that

we must end the stalemate that arises when Native Title Organisations with little in the way of back of house, or legal and commercial expertise and are expected to negotiate with multinational firms.

This is why the first priority for our new economic partnership will be to reform the funding model for Prescribed Bodies Corporate, so that it delivers meaningful participation for communities and timely decision-making for investors.¹¹

6 Australian Human Rights Commission, *Submission 118*.

7 See, eg, Jigsaw Legal, *Submission 77*; Australian Human Rights Commission, *Submission 118*; I Ingram, *Submission 119*; New South Wales Government, *Submission 159*.

8 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) art 39.

9 Cape York Regional Organisations, *Submission 137*. See also Bardi Jawi Niimidiman Aboriginal Corporation RNTBC, *Submission 53*; Indigenous Land and Sea Corporation, *Submission 68*.

10 See Australian Government, Coalition of Aboriginal and Torres Strait Islander Community-Controlled Peak Organisations, and First Nations Economic Empowerment Alliance, *First Nations Economic Partnership: An Agreement between the Commonwealth of Australia and the Coalition of Aboriginal and Torres Strait Islander Community-Controlled Peak Organisations and the First Nations Economic Empowerment Alliance 2025–2030* (2025) [34(c)].

11 The Hon Anthony Albanese MP, ‘Address to Garma Festival’ (Speech, Garma Festival, Arnhem Land, 2 August 2025).

National Native Title Tribunal

14.11 The NNTT is a key institution of the future acts regime. It plays a role in many aspects of the future acts regime, through its mediation and arbitration functions, as well as its registers and records of agreements. If the reforms in this Report are implemented, the NNTT's role would expand even further.

14.12 The Terms of Reference ask the ALRC to consider the NNTT's 'role in relation to future acts'. The NNTT's functions in relation to the future acts regime and recommended expansion of those functions is discussed throughout this Report. The reforms discussed in this section are intended to ensure that the NNTT has additional and ongoing resourcing to support the NNTT's existing and additional functions, as well as to ensure that the composition of the NNTT is appropriate given the context of its work.

Additional funding for the NNTT

Recommendation 85

The Australian Government substantially increase funding for the National Native Title Tribunal to fulfil its existing functions, including facilitation and mediation support to the users of the native title system, and the additional functions contemplated by the reforms in this Report.

14.13 **Recommendation 85** would substantially increase the funding for the NNTT to enable it to fulfil its existing functions as well as its expanded functions contemplated by the reforms in this Report.

14.14 As outlined in the Discussion Paper, we have heard that the NNTT is under resourced and that this limits its capacity to offer parties assistance to reach agreements and resolve disputes.¹² In the past, the NNTT was better resourced and had up to 14 members.¹³ It currently has five members (four non-Presidential members and one President). The NNTT also previously offered a larger suite of educational and assistive functions. As Dr Ingram observed in his submission

the current limitation is not the NNTT's willingness but its restricted mandate and under-resourcing. Any enhanced powers and functions must be coupled

12 Australian Law Reform Commission, *Review of the Future Acts Regime* (n 2) [308]–[311].

13 For example, the NNTT's Annual Reports show it had 14 members in 2002–3, 2003–4, and 2004–5, 13 members in 2005–6, and 11 members in 2006–7: National Native Title Tribunal, *Annual Report 2002–2003* (2003) 15; National Native Title Tribunal, *Annual Report 2003–2004* (2004) 9; National Native Title Tribunal, *Annual Report 2004–2005* (2005) 8; National Native Title Tribunal, *Annual Report 2005–2006* (2006) 14; National Native Title Tribunal, *Annual Report 2006–2007* (2007) 17. It is worth noting that during these periods the NNTT also had additional functions relating to native title claims.

with adequate resources – structurally, financially, and in the necessary skills and experience it attracts or develops in-house. This would transform the NNTT from a reactive arbitrator to a proactive facilitator of just agreements and ultimately enhance the native title system.¹⁴

14.15 As Ingram suggests, a proactive and properly resourced NNTT could lead to efficiencies within the future acts regime as a whole.

14.16 Feedback in response to the Discussion Paper indicated very strong support for adequate funding of the NNTT.¹⁵ The Association of Mining and Exploration Companies said in its submission ‘even if it is the only proposal implemented, this is supported’.¹⁶

14.17 In the future, consideration may be given to developing a ‘costs recovery’ model for the NNTT to recover the costs of some of its services. Such a model would need to be calibrated carefully to ensure that it does not have a deterrent effect on parties seeking to use the services of the NNTT, particularly those services that facilitate agreement-making.

Membership

Recommendation 86

The *Native Title Act 1993* (Cth) be amended to provide that when considering appointments to the National Native Title Tribunal, as part of a merits-based process and before making a recommendation to the Governor-General, the Minister must consider the need for a diversity of skills, expertise, lived experience, and knowledge within the Tribunal. Lived experience and knowledge may be gained through being, or through working with and representing, Aboriginal or Torres Strait Islander peoples.

14.18 **Recommendation 86** would amend the mechanism for appointing members to the NNTT to require the Minister to consider the need for the NNTT’s membership to have a diversity of skills, expertise, lived experience, and knowledge. If implemented,

14 I Ingram, *Submission 119*.

15 Maddocks, *Submission 62*; M Boge, *Submission 76*; National Native Title Tribunal, *Submission 86*; Houston Legal & Consultants, *Submission 95*; North Queensland Land Council, *Submission 96*; Association of Mining and Exploration Companies, *Submission 97*; AgForce Queensland Farmers Ltd, *Submission 111*; Minerals Council of Australia, *Submission 113*; Western Australian Government, *Submission 115*; Law Council of Australia, *Submission 120*; Central Land Council, *Submission 121*; Queensland South Native Title Services, *Submission 124*; NSW Bar Association, *Submission 140*; First Nations Legal and Research Services, *Submission 146*; Yamatji Marlpa Aboriginal Corporation, *Submission 148*; Northern Territory Government, *Submission 149*; State of Queensland, *Submission 152*; Northern Land Council, *Submission 153*; South Australian Government, *Submission 156*; Parallax Legal, *Submission 157*.

16 Association of Mining and Exploration Companies, *Submission 97*.

this recommendation would promote permanent diversity in the NNTT's membership, while ensuring that appointments have a meritorious basis.

14.19 It is widely recognised that diversity in decision-making institutions helps to engender confidence in those institutions.¹⁷ In the context of the *NTA*, and the potential additional functions and responsibilities conferred on the NNTT through reforms to the future acts regime, it is vital that all parties involved in the native title sector, particularly native title parties, have confidence in the NNTT as an institution. In their submissions, both the Kimberley Land Council and Northern Land Council highlighted the need for the NNTT to be adequately resourced with specialist staff with strong cultural awareness and subject-matter expertise.¹⁸

14.20 The mechanism contemplated by **Recommendation 86** is based on the recently enacted criteria for appointments to the Administrative Review Tribunal, which provide for consideration of diversity as part of a merits-based appointment process.¹⁹

14.21 When considering appointments to the NNTT, diversity should be considered both over time, and at any given point in time. This is relevant given the *NTA* provides for multiple non-Presidential members, but only a single person may hold the position of President at any one time.

Other potential future reforms to the NNTT

Power to appoint supplementary members to the National Native Title Tribunal

14.22 If **Recommendation 85** is implemented, further consideration should be given to a reform that would empower the President of the NNTT to appoint supplementary members to the NNTT to alleviate capacity issues that may arise from time to time. Supplementary members would be subject to the same eligibility criteria as other non-Presidential members of the NNTT.²⁰ This may help to address the issue discussed elsewhere in this Report that may arise from the implementation of the reforms: that is, an increased demand on the NNTT's resources, which may result in delays in the services provided by the NNTT.²¹

17 In the context of the judiciary, see, eg, Kathy Mack, *Suggested Criteria for Judicial Appointment* (Australasian Institute of Judicial Administration, 2024); Brian Opeskin and Sharyn Roach Anleu, *Judicial Diversity in Australia: A Roadmap for Data Collection* (Australasian Institute of Judicial Administration, 2023).

18 Kimberley Land Council, *Submission 151*; Northern Land Council, *Submission 153*.

19 *Administrative Review Tribunal Act 2024* (Cth) ss 4, 205, 207, 208. See also the Hon Justice Emilios Kyrou, *President's Speech on Diversity and Accessibility at the Administrative Review Tribunal* (Speech, Asian Australian Lawyers Association National Cultural Diversity Summit, 8 November 2024).

20 See *Native Title Act 1993* (Cth) s 110.

21 See, eg, Western Australian Government, *Submission 115*.

14.23 The power to appoint supplementary members or judges is a relatively common feature of legislation establishing courts and tribunals in Australia. For example, the President of the Queensland Civil and Administrative Tribunal can request the Minister appoint supplementary members if it is necessary for the functioning of the tribunal.²² Similarly, the President of the Civil and Administrative Tribunal in New South Wales can appoint occasional members where necessary to enable the tribunal to be properly constituted to exercise its functions.²³ The Governor in Council can appoint reserve judges to the Supreme Court of Queensland where necessary for conducting the business of the court.²⁴ The Chief Justice of the Supreme Court of Queensland can then engage reserve judges for six months at a time.²⁵

14.24 If pursued, this reform would complement **Recommendation 72** discussed in **Chapter 10**, which is also designed to alleviate pressure on NNTT capacity and resources.

Implementation

14.25 This Inquiry forms part of a broader reform landscape in the native title and cultural heritage spaces. There are at least three other important reviews that have been conducted in parallel: the national cultural heritage reform process, which is a partnership between the First Nations Heritage Protection Alliance and the Australian Government,²⁶ the review of native title and cultural heritage processes in Western Australia,²⁷ and the evaluation of the amendments to the *NTA* introduced in 2021.²⁸ Effective implementation of the recommendations in this Report would consider this broader reform landscape, and seek to align the reforms arising from each process.²⁹ For example, the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs has recommended that, following this Inquiry into the future acts regime, the Australian Government should consider whether a full review of the *NTA* is required.³⁰

22 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 192.

23 *Civil and Administrative Tribunal Act 2013* (NSW) s 11.

24 *Supreme Court of Queensland Act 1991* (Qld) s 6A.

25 *Ibid* s 6B.

26 Department of Climate Change, Energy, the Environment and Water (Cth), 'First Nations Heritage' <www.dcceew.gov.au/parks-heritage/heritage/indigenous-heritage>.

27 Government of Western Australia, 'Terms of Reference – Native Title and Cultural Heritage Processes Review' <www.wa.gov.au/government/publications/terms-of-reference-native-title-and-cultural-heritage-processes-review>.

28 Attorney-General's Department (Cth), 'Evaluation of Amendments to the Native Title Act 1993 Made by the Native Title Legislation Amendment Act 2021' <<https://consultations.ag.gov.au/legal-system/evaluation-of-amendments-to-the-native-title-act/>>. There is also a review of the *Mining Act 1971* (SA) being conducted by the Department for Energy and Mining (SA): see Department for Energy and Mining (SA), *Mining Act 1971: Consultation on Opportunities for Improving the Regulatory Framework for Mining* (Issues Paper, 2025).

29 See Australian Human Rights Commission, *Submission 118*.

30 Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia (n 1) rec 10.

14.26 While it is important for these various reform processes to align where possible, we are not suggesting that implementation of the recommendations in this Report should wait until after all related reviews are completed.

14.27 In the Discussion Paper, we sought feedback on the establishment of a First Nations advisory group to advise on implementing reforms to the *NTA* arising from this Inquiry.³¹ This proposal received some support in submissions.³² We heard some concerns that establishing a new body may divert funds away from other parts of the system, such as the NNTT or PBCs.³³ There is also a risk of duplication and overlap if a bespoke body is established to oversee implementation of the reforms from this Inquiry alone.

14.28 A more holistic approach — which is beyond the scope of this Inquiry — may be to establish a standing advisory body, which could advise on implementation of the entire suite of reforms that may arise from the related review processes discussed above. This would be consistent with the recent work of the Australian Human Rights Commission in this space. In its 2024 *Women in Native Title Report*, the Aboriginal and Torres Strait Islander Social Justice Commissioner recommended the establishment of a First Nations Native Title Reform Council, which would drive a ‘comprehensive reform process’ in relation to the *NTA* ‘and all related legislation and policy’.³⁴ The Kimberley Land Council advocated for a similar permanent body to be established.³⁵ The body’s first step could be to report on the status of implementation of the ALRC’s 2015 *Connection to Country* Report.

14.29 As part of implementing the recommendations contained in this Report, consequential amendments to the *NTA* would need to be considered to accommodate the recommended reforms in the existing Act. The ALRC has not exhaustively identified the consequential amendments that may be necessary. Consequential amendments would need to be identified based on the specific reforms that are ultimately implemented. The ALRC proposes that when consequential amendments are identified, they be appropriately made consistently with the intention of the ALRC’s recommendations.

Post-implementation review

14.30 Implementation is not the end of the law reform story. After reforms are implemented, it is important to review the efficacy of the amended laws to ensure

31 See Australian Law Reform Commission, *Review of the Future Acts Regime* (n 2) [323]–[327].

32 See, eg, Indigenous Land and Sea Corporation, *Submission 68*; K O’Byrne, *Submission 94*; Australian Human Rights Commission, *Submission 118*; Law Council of Australia, *Submission 120*; Central Land Council, *Submission 121*; First Nations Legal and Research Services, *Submission 146*; Yamatji Marlpa Aboriginal Corporation, *Submission 148*; Kimberley Land Council, *Submission 151*.

33 M Boge, *Submission 76*; AgForce Queensland Farmers Ltd, *Submission 111*.

34 Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Women in Native Title: Native Title Report 2024* (n 1) rec 12.2. See also Mabo Centre and National Native Title Council, *Submission 130*.

35 Kimberley Land Council, *Submission 151*.

they are operating as intended. This review process is sometimes called ‘post-legislative scrutiny’, and it can take several forms.³⁶ The purpose of post-legislative scrutiny is to provide an opportunity to reflect on the amended laws, ensure that they continue to be effective and relevant, and to address any unintended consequences that may have arisen.

14.31 Amending legislation often provides for a review of the amendments, either as a one-off or regular process. This has become standard practice, and forms part of the legislative drafting guidance used by parliamentary drafters in Australia.³⁷ For example, the Attorney-General’s Department (Cth) has recently conducted a review into the amendments to the *NTA* introduced by the *Native Title Legislation Amendment Act 2021* (Cth), as provided for by that Act.³⁸

14.32 Given the breadth and depth of the reforms recommended in this Report, there would be clear benefit in a post-implementation review process to monitor and gauge the effects of the reforms. This is particularly important considering how infrequently the *NTA* has been substantively amended in the past. The review could assess whether, and to what extent, the reformed *NTA*:

- meets the intentions and aims of the Act;
- upholds the fundamental principles of human rights, including protection of native title as a property right; and
- operates fairly and effectively.

14.33 Ideally, such review would be undertaken by an independent body via a consultative process.

14.34 Post-implementation review would be aided by the improved data collection contemplated by several of the reforms recommended by the ALRC, such as the creation of a future act notice register (see [Recommendation 58](#) in [Chapter 8](#)) and other reforms aimed capturing information about agreements (see [Chapter 5](#)).

Cultural heritage

14.35 Question 28 in the Discussion Paper asked whether the *NTA* should 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 that should be done. In the Discussion Paper, we sought feedback on several options for reform, including the creation of a statutory right for the relevant PBC to have the primary role in consultations and decisions about cultural heritage, and enabling all

36 See Australian Law Reform Commission, *Post-Legislative Scrutiny* (Background Paper FSL8, May 2023) [6]–[11]. See also Australian Law Reform Commission, *Confronting Complexity: Reforming Corporations and Financial Services Legislation* (Final Report No 141, 2023) [7.95]–[7.101].

37 Department of the Prime Minister and Cabinet (Cth), *Legislation Handbook* (2025) [5.26].

38 Attorney-General’s Department (Cth) (n 28).

legal obligations relating to cultural heritage to be discharged under an ILUA or other native title agreement.³⁹

14.36 In light of the issues raised in feedback to Question 28, discussed below, the ALRC is not making a recommendation specifically about cultural heritage. Other reforms in this Report, such as the reformed statutory procedures, and reforms to compensation (see **Chapters 6 and 11**), do address certain issues relating to cultural heritage in the native title system.

14.37 We received mixed feedback in response to Question 28 from submissions and consultations. Many submissions and consultees expressed a desire to streamline the native title and cultural heritage legislative frameworks to reduce duplication across legislation, reduce complexity, and promote consistency.⁴⁰ Some submissions suggested that any reform to cultural heritage should be enacted through changes to the relevant heritage legislation, either at a state or territory level,⁴¹ or through the reforms to Commonwealth legislation.⁴²

14.38 Where there are perceived deficiencies in cultural heritage legislation, Aboriginal and Torres Strait Islander people may seek to rely on protections that may be available under the native title frameworks, and vice versa.⁴³

14.39 Some submissions noted that the separate cultural heritage and native title legislative frameworks reflect an artificial distinction between inherently related concepts. In its submission, Bardi Jawi Niimidiman Aboriginal Corporation RNTBC explained that

the failure to embed cultural authority and heritage protection into native title processes continues to erode trust, undermine cultural rights, and expose Country to irreparable damage.

For Bardi and Jawi people, culture is not separate from land and sea, it is law, story, ceremony, and responsibility, deeply embedded in both land and sea Country. Our cultural heritage is living and active, expressed not only through sites and artefacts but through governance systems, intergenerational knowledge, and the continuing performance of lore.⁴⁴

14.40 The Indigenous Land and Sea Corporation made a similar observation explaining that

39 Australian Law Reform Commission, *Review of the Future Acts Regime* (n 2) [333].

40 See, eg, M Lucas, *Submission 57*; Minerals Council of Australia, *Submission 113*; Law Council of Australia, *Submission 120*.

41 M Boge, *Submission 76*; AgForce Queensland Farmers Ltd, *Submission 111*; Northern Territory Government, *Submission 149*.

42 Minerals Council of Australia, *Submission 113*; NSW Minerals Council, *Submission 117*; Central Land Council, *Submission 121*; Queensland South Native Title Services, *Submission 124*; First Nations Legal and Research Services, *Submission 146*; South Australian Government, *Submission 156*.

43 See, eg, J Marrell, *Submission 93*; Kimberley Land Council, *Submission 151*.

44 Bardi Jawi Niimidiman Aboriginal Corporation RNTBC, *Submission 53*.

cultural heritage is inseparable from native title. It encompasses sacred sites, stories, ceremonies, and obligations that define First Nations peoples' enduring relationship with Country. The ILSC echoes the National Native Title Council's view that the current disconnect between native title and cultural heritage laws results in fragmented and inadequate protection.⁴⁵

14.41 However, other submissions supported retaining the different legislative schemes.⁴⁶ For example, the New South Wales Aboriginal Land Council noted that if cultural heritage laws are reformed through the native title system, there is a risk that bodies such as Aboriginal Land Councils, which play an important role in the New South Wales cultural heritage system, would be sidelined. In its submission, it explained the importance of the law respecting that it is not law that establishes cultural authority, and observed

cultural authority does not reside in non-Aboriginal laws, legal mechanisms or structures. It is not conferred by non-Aboriginal Parliaments or non-Aboriginal Courts. In theory, while these non-Aboriginal mechanisms can recognise culture and cultural authority; they can never create or confer it. In reality, non-Aboriginal mechanisms working in isolation of Community will never be able to accurately navigate culture and cultural authority. Culture resides in people, not in laws or structures. While that is true, our community structures can identify and access the right people who have cultural authority, they are in their membership and their local communities.⁴⁷

14.42 What is clear from this feedback is that cultural heritage is a complex area of the law. The interactions between native title and cultural heritage are nuanced and can be contested spaces. It is beyond the scope of this Inquiry to address all of the issues raised in submissions and consultations in relation to cultural heritage.

Other potential areas for reform

14.43 In this Inquiry, the ALRC received considerable feedback about how the future acts regime, or native title system generally, could be reformed. The ALRC could not make recommendations about all the issues raised, or do so in a meaningful way, within the Terms of Reference and timeframe.

14.44 This part discusses three potential areas for reform that have been raised in consultations and submissions during this Inquiry:

- an alternative corporate vehicle for benefit management and investment;
- improvements to sector capability and capacity; and
- regulation of third-party advisors in the native title system.

14.45 While these three reforms do not form part of the recommendations in this Report, we discuss them below as they may warrant further consideration.

⁴⁵ Indigenous Land and Sea Corporation, *Submission 68*.

⁴⁶ See, eg, Martuwarra Fitzroy River Council, *Submission 81*; Local Government Association of Queensland, *Submission 108*.

⁴⁷ New South Wales Aboriginal Land Council, *Submission 101*.

An alternative corporate vehicle

14.46 As part of this Inquiry, we have been asked to consider ‘options to support native title groups, project proponents and governments to share in the benefits of development on native title land, including opportunities for native title groups to lead or co-lead development’. One idea that may help achieve this goal is the development of a new corporate vehicle for benefit management and investment, as an alternative to the charitable trusts structures commonly used by native title holders.⁴⁸ The Productivity Commission’s submission to this Inquiry referred to the Australian Treasury’s 2013 *Taxation of Native Title and Traditional Owner Benefits and Governance Report*, and the Productivity Commission’s 2020 *Resources Sector Regulation Report*, which both called for the development of an alternative vehicle to overcome the limitations of charitable trust law.⁴⁹

14.47 One option for such a vehicle would be the PBC Economic Vehicle Status: an optional designation for PBCs which would enable them to continue to access tax concessions while undertaking economic development activities.⁵⁰ Another option would be the establishment of an Indigenous Community Development Corporation (‘ICDC’): ‘a not-for-profit, income tax exempt entity with [deductible gift recipient] status established by an Indigenous community with the purpose of promoting sustainable community and socio-economic development’.⁵¹ The ICDC would have broader purposes than a charity, and would ‘shift language away from concepts of charity and welfare to broader concepts of community and socio economic development and participation in the real economy’.⁵² There are also other models internationally and domestically.⁵³

14.48 A related reform that may complement the development of a corporate investment vehicle would be developing options to support the fungibility of native title without requiring its extinguishment.⁵⁴

48 Productivity Commission, *Submission 78*; Minerals Council of Australia, *Submission 113*.

49 Taxation of Native Title and Traditional Owner Benefits and Governance Working Group, *Taxation of Native Title and Traditional Owner Benefits and Governance Working Group: Report to Government* (2013) 15; Productivity Commission (n 1) 30.

50 Productivity Commission, *Submission 78*. In its Position Paper, the National Native Title Council noted that ‘the principles behind the PBC-EVS have already been endorsed by the Treasury *Taxation of Native Title and Traditional Owner Benefits and Governance Working Group* in 2013 and in the 2015 *Our North, Our Future, White Paper on Developing Northern Australia*’: National Native Title Council, *Realising the Promise of Native Title: A National Native Title Council Position Paper* (2019) 3.

51 Taxation of Native Title and Traditional Owner Benefits and Governance Working Group (n 49) 25. See also Minerals Council of Australia, *Submission 113*.

52 Taxation of Native Title and Traditional Owner Benefits and Governance Working Group (n 49) 25.

53 Productivity Commission, *Submission 78*.

54 See, eg, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Women in Native Title: Native Title Report 2024* (n 1) rec 7; Australian Human Rights Commission, *Wiyi Yani U Thangani (Women’s Voices): Securing Our Rights, Securing Our Future Report* (2020) 358–60.

14.49 Given time and resource constraints, it has not been possible during this Inquiry to consult on and evaluate the various options, or develop a new corporate investment vehicle. Future law reform projects could develop these ideas, potentially in collaboration with the Productivity Commission.

System capability and capacity

14.50 While **Recommendations 84** and **85** aim to address identified and critical resourcing issues in the native title system, the ALRC has heard that a related and important issue is capability and capacity in that system.

14.51 A number of consultations and submissions provided examples of capability and capacity issues. First, parties do not understand the future acts regime, their obligations under it, and native title more generally.⁵⁵

14.52 Secondly, PBCs need to develop internal capability to deal with native title and manage statutory obligations as well as development opportunities, rather than always being required to engage external advisors.⁵⁶ The Western Australian Government noted the ‘unique corporate, organisation and regulatory context’ that makes this difficult for PBCs, and highlighted the following issues in its submission:

Meeting perpetual and permanent obligations to manage land and fulfil cultural obligations, driven by complex cultural, social and environmental factors that are unique to each native title holding group;

Maintaining sustainable capability and organisational memory with a workforce that (in up to half of WA PBCs) is exclusively composed of volunteer directors who must balance legal obligations, community expectations, cultural protocols and their own livelihoods; and

A lack of clear guidance on the core statutory functions of PBCs.⁵⁷

14.53 Thirdly, access to legal and other expert advice can be difficult, particularly access in a timely manner due to a ‘very limited pool of suitably qualified and experienced experts and practitioners’.⁵⁸

14.54 Fourthly, there are reports of burnout and high staff turnover at a number of organisations that work in the native title sector, particularly those organisations that represent native title parties, including Native Title Representative Bodies and Service Providers (‘NTRB/SPs’).⁵⁹ The Law Council of Australia observed that

⁵⁵ See, eg, Local Government Association of Queensland, *Submission 108*.

⁵⁶ Mawal Pty Ltd, *Submission 11*; Western Australian Government, *Submission 115*; Cape York Regional Organisations, *Submission 137*.

⁵⁷ Western Australian Government, *Submission 115*.

⁵⁸ MPS Law, *Submission 17*. See also Minerals Council of Australia, *Submission 113*; Kimberley Land Council, *Submission 151*.

⁵⁹ Law Council of Australia, *Submission 47*; Parallax Legal, *Submission 157*.

practitioners working in such organisations [NTRB/NTSPs] are often based remotely, receive little support, and often experience burnout given the frequently significant workload in proportion to available resources. As a result, there tends to be a relatively high turnover and a shortage of experience and expertise in the area, thus impacting access to justice for native title holders.⁶⁰

14.55 System capacity and capability is, therefore, an issue that goes beyond resourcing alone.

14.56 One option for future reform in this area is the development of centralised training and resources for PBCs, lawyers, and other experts working in native title, industry members, and government. In a submission to the Senate Standing Committees on Finance and Public Administration on the Corporations (Aboriginal and Torres Strait Island Amendment Bill 2021, the NNTT proposed the establishment of a specialist body to provide native title training and community, fulfilling a function like the National Judicial College:

a National Native Title College would provide a point of central focus for education, training and resources currently provided by various organizations and agencies. The College would foster multi-disciplinary expertise and promote the development of networks of specialised professionals through conferences and training events. Such a College could attract investment from both government and non-government stakeholders, offering a range of courses and resources that could be tailored to suit the needs of a wide range of RNTBCs.⁶¹

14.57 Relatedly, another measure for consideration could be an increase in sector-wide training for PBC staff and directors, private lawyers, NTRB/SPs, and government representatives,⁶² and accreditation associated with this training.⁶³

14.58 A further potential measure, aimed at increasing the emphasis on First Nations land rights and native title in legal education and practice, is the inclusion of relevant subject matter within the ‘Priestley 11’ educational requirements for admission to legal practice in Australia.⁶⁴

60 Law Council of Australia, *Submission 47*.

61 National Native Title Tribunal, Submission No 10 to Senate Standing Committees on Finance and Public Administration, Parliament of Australia, *Inquiry into the Corporations (Aboriginal and Torres Strait Islander) Amendment Bill 2021* (24 September 2021) [24].

62 Isaac Regional Council, *Submission 70*; Kimberley Land Council, *Submission 151*; Parallax Legal, *Submission 157*. The ALRC is aware that the National Native Title Council, for example, currently provides training and development opportunities for PBC directors.

63 Kimberley Land Council, *Submission 151*; Parallax Legal, *Submission 157*.

64 See, eg, Indigenous Law and Justice Hub, University of Melbourne, *Submission to Yoorrook Justice Commission* (8 February 2024) 8–10.

14.59 Reform efforts may also consider measures that would support lawyers seeking to enter native title practice by providing formal education pathways that would ensure legal practitioners in the sector have appropriate training and cultural competencies.⁶⁵ As the MCA observed in its submission

ensuring access to qualified, culturally aware legal support is therefore essential to upholding the credibility, fairness, and functionality of the native title system.⁶⁶

Third-party advisers and consultants

14.60 Concerns related to the conduct and regulation of third-party advisers and consultants have been raised in consultations and submissions during the present Inquiry. These concerns may, in part, reflect the broader system capability issues noted above, and shortage of appropriately qualified or experienced participants in the system.

14.61 Similar concerns have been identified previously. For example, in the 2012 *Native Title Report*, the Aboriginal and Torres Strait Islander Social Justice Commissioner observed that

the NNTC and several NTRBs and NTSPs have raised concerns with me that some consultants, including lawyers and anthropologists are acting in an unprofessional manner when seeking to represent native title parties in future act and other native title agreement negotiations. This undermines the governance of native title groups and has negative implications for the resolution of native title agreements.

I have been advised that these consultants are taking advantage of native title groups by promising quick and financially-rewarding future act negotiations with mining companies, and charging exorbitant fees for their services. It appears these individuals are also exacerbating lateral violence in our communities by assuming a 'divide and conquer' approach to native title groups. I am aware that the NNTC, on behalf of NTRBs and NTSPs, has raised these concerns with the Government. I encourage the Government to urgently work together with the NNTC, NTRBs and NTSPs to address and eliminate behaviour by consultants that is counterproductive to positive outcomes for all involved in resolving native title agreements.⁶⁷

14.62 Engaging third-party lawyers and advisers is not inherently problematic. Native title parties may engage third-party lawyers and advisors for a variety of reasons. Reasons could include under-resourcing or lack of capacity of NTRB/SPs, the need for a specific expertise that is not available through the NTRB/SP, an existing positive relationship with a private lawyer or advisor, or a representative of their choosing.

⁶⁵ Minerals Council of Australia, *Submission 113*.

⁶⁶ *Ibid.*

⁶⁷ Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Native Title Report 2012* (n 1) 46. See also Australian Law Reform Commission, *Review of the Native Title Act 1993* (Discussion Paper No 82, 2014) [9.36]–[9.39].

14.63 However, we have heard about many issues associated with third-party advisers and consultants. From native title parties and their representatives, we have heard that it can be difficult to access appropriately qualified private advisers.⁶⁸ Proponents and their representatives have observed that some unregulated third-party advisers may charge higher fees, and that these costs may be passed on to the proponent or unreasonably deplete the financial benefits that may otherwise flow to native title parties.⁶⁹ We have also heard that the conduct of some third-party advisers may be to the detriment of positive relationship-building between proponents and native title parties.

14.64 Some stakeholders have suggested that consideration be given to a system of specialist accreditation for private lawyers and third-party consultants operating in the future acts regime.⁷⁰

14.65 In considering any reforms aimed at regulating the conduct of participants in the future acts regime, regard would need to be had to several complex and interrelated issues. These include:

- the capacity and capability problems facing the native title sector generally, as noted above — indicating that regulation which erects ‘barriers to entry’ may exacerbate existing problems;
- the importance of freedom of choice in selecting representatives or advisers; and
- cost and efficiency implications.

68 Mabo Centre and National Native Title Council, *Submission 130*; Parallax Legal, *Submission 157*. See also Minerals Council of Australia, *Submission 113*. For discussion of reforms to costs recovery provisions see **Chapter 12**.

69 Association of Mining and Exploration Companies, *Submission 32*; Amalgamated Prospectors and Leaseholders Association of WA Inc, *Submission 64*; Minerals Council of Australia, *Submission 113*.

70 Minerals Council of Australia, *Submission 113*; Mabo Centre and National Native Title Council, *Submission 130*; Parallax Legal, *Submission 157*. See also Deloitte Access Economics, *Review of the Roles and Functions of Native Title Organisations* (March 2014) 39–40.

Appendix A

Consultations and Events

Consultees

The ALRC thanks all consultees for their engagement with the Inquiry, sharing their experiences, and providing feedback that helped to shape the recommendations contained in this Report. We acknowledge that, on occasion, officers or representatives of organisations consulted with the ALRC on the basis that their views were their personal views rather than those of the organisations they represented or were affiliated with. Note that individuals are listed with the affiliation and title held at the time of consultation.

	Name	Consultation location
1.	Aboriginal Areas Protection Authority (NT)	Alice Springs
2.	Aboriginal Sea Company	Darwin
3.	Professor Alan Clough, Marrawah Law	Online
4.	Alex Romano, Chalk & Behrendt	Online
5.	Alison Summerville, Queensland Boulder Opal Association	Online
6.	Andrea Moffatt, Allens	Brisbane
7.	Angie Underwood, Jamukurnu-Yapalikurnu Aboriginal Corporation	Perth
8.	Dr Angus Frith, Barrister	Online
9.	Association of Mining and Exploration Companies	Online
10.	Avelina Tarrago, Barrister	Brisbane
11.	Ben Zilmann, Allens	Brisbane
12.	Cape York Land Council	Online
13.	Carol Graham, Queensland Sapphire Miners Association	Online

	Name	Consultation location
14.	Carpentaria Land Council Aboriginal Corporation	Burketown and online
15.	Cassie Lang, Parallax Legal	Online
16.	Central Desert Native Title Services	Perth
17.	Central Land Council	Online
18.	Professor Ciaran O'Faircheallaigh, Griffith University	Online
19.	Cobey Taggart, Barrister	Perth
20.	Crown Law (Qld)	Online
21.	Crown Solicitor's Office (SA)	Adelaide
22.	Crown Solicitor's Office (NSW)	Online
23.	Dan O'Gorman SC, Barrister	Online
24.	David Knobel, P&E Law	Burketown and online
25.	David Saylor, Saylor Legal	Online
26.	David Yarrow SC, Barrister	Online
27.	Professor Deanna Kemp, Centre for Social Responsibility in Mining, University of Queensland	Brisbane
28.	Department for Energy and Mining (SA)	Adelaide
29.	Department of Climate Change, Energy, the Environment and Water (Cth)	Online
30.	Department of Energy, Environment and Climate Action (Vic)	Melbourne
31.	Department of Energy, Mines, Industry Regulation and Safety (WA)	Perth
32.	Department for Infrastructure and Transport (SA)	Adelaide
33.	Department of Planning, Lands and Heritage (WA)	Perth
34.	Department of Premier and Cabinet (Vic)	Melbourne
35.	Department of Premier and Cabinet (WA)	Perth

	Name	Consultation location
36.	Department of Transport and Planning (Vic)	Melbourne
37.	Department of Treasury (Cth)	Online
38.	Department of Water and Environmental Regulation (WA)	Perth
39.	Dominic McGann, McCullough Robertson	Online
40.	Dr Erin O'Donnell, University of Melbourne	Online
41.	Emily Gerrard, Comhar Group	Melbourne
42.	First Nations Clean Energy Network	Burketown
43.	First Nations Legal and Research Services	Melbourne and online
44.	Dr Gary Johns, Close the Gap Research	Online
45.	Gavin Scott, Norton Rose Fulbright	Online
46.	Geeta Sidhu, Norman Waterhouse	Online
47.	Georgina Reid, MPS Law	Online
48.	Member Glen Kelly, National Native Title Tribunal	Perth
49.	Greta Bridge, Rio Tinto	Online
50.	Gur A Baradharaw Kod Torres Strait Sea and Land Council Torres Strait Islander and Aboriginal Corporation	Online
51.	Hannah Lucas, Houston Legal	Fremantle
52.	Helen Orr, MPS Law	Online
53.	Hema Hariharan, Arma Legal	Online
54.	Indigenous Land and Sea Corporation	Online
55.	James Walkley, Chalk & Behrendt	Online
56.	Jason Behrendt, Chalk & Behrendt	Online
57.	Jenny Humphris, Holding Redlich	Online
58.	Dr John Burton, Centre for Social Responsibility in Mining, University of Queensland	Brisbane
59.	John Heaney, P&E Law	Online

	Name	Consultation location
60.	John Waters SC, Barrister	Online
61.	Dr Jonathan Fulcher, HopgoodGanim Lawyers	Online
62.	Justin Edwards SC, Barrister	Perth
63.	Dr Katie O'Bryan, Monash University	Online
64.	Registrar Katie Stride, National Native Title Tribunal	Brisbane
65.	President Kevin Smith, National Native Title Tribunal	Brisbane
66.	Kimberley Land Council	Online
67.	Kirsty Bennett, Johnston Withers Lawyers	Adelaide
68.	Kevin Phillips, Queensland Small Miners Council	Online
69.	Professor Lee Godden, University of Melbourne	Online
70.	Leonora Herweijer, Camatta Lempens Pty Ltd Lawyers	Online
71.	Liam Davis, McCullough Robertson	Online
72.	Dr Lily O'Neill, University of Melbourne	Online
73.	Member Lisa Eaton, National Native Title Tribunal	Perth
74.	Malcolm McKenzie	Online
75.	Associate Professor Margaret Stephenson, Curtin University	Online
76.	Margarita Escartin, Centre for Social Responsibility in Mining, University of Queensland	Online
77.	Mark Boge, Thynne + Macartney Lawyers	Brisbane
78.	Marshall McKenna, Gilbert + Tobin	Online
79.	Matt Patterson, P&E Law	Online
80.	Matthew Storey, Storey & Ward Lawyers	Melbourne
81.	Megan Brayne, Comhar Group	Online

	Name	Consultation location
82.	Mel Watts, M Watts Legal	Online
83.	Dr Michael Lucas, Empius Pty Ltd	Brisbane
84.	Michael Neal, P&E Law	Online
85.	Michael Pagsanjan, MPS Law	Online
86.	Minerals Council of Australia	Various
87.	National Farmers' Federation	Online
88.	National Indigenous Australians Agency	Online
89.	National Native Title Council	Various
90.	National Native Title Tribunal	Brisbane
91.	Member Nerida Cooley, National Native Title Tribunal	Brisbane
92.	Nick Llewellyn-Jones, Norman Waterhouse	Online
93.	North Queensland Land Council	Online
94.	Northern Land Council	Darwin
95.	NTS Goldfields	Perth
96.	NTSCORP	Online
97.	Office of the Registrar of Indigenous Corporations	Online
98.	Oliver Gilkerson, Marrawah Law	Online
99.	Parks Victoria	Melbourne
100.	Patrick Smith	Online
101.	Pauline Mullett	Online
102.	Peter See, Kanyirninpa Jukurrpa	Brisbane
103.	Queensland Law Reform Commission	Brisbane
104.	Queensland South Native Title Services	Brisbane
105.	Professor Richard Bartlett, University of Western Australia	Perth
106.	Richard Bradshaw, Johnston Withers Lawyers	Adelaide

	Name	Consultation location
107.	Rachel McGarry, Houston Legal	Fremantle
108.	Raelene Webb KC, Barrister	Online
109.	Reade Allison, MPS Law	Online
110.	Rodger Barnes, Centre for Social Responsibility in Mining, University of Queensland	Brisbane
111.	Rob Houston, Houston Legal	Fremantle
112.	Ron Levy, Barrister	Online
113.	SA Water	Adelaide
114.	Sally Audeyev, King & Wood Mallesons	Online
115.	South Australian Chamber of Mines and Energy	Adelaide
116.	South Australian Native Title Services	Adelaide and online
117.	South West Aboriginal Land and Sea Council	Perth
118.	State Solicitor's Office (WA)	Perth
119.	Stephen Kenny, Camatta Lempens Pty Ltd Lawyers	Online
120.	Stephen Wright SC, Barrister	Perth
121.	Sturt Glacken KC, Barrister	Online
122.	Susan Phillips, Barrister	Online
123.	Taara Kennedy, Norman Waterhouse	Online
124.	Tessa Herrmann, Barrister	Perth
125.	Thomas Keely SC, Barrister	Online
126.	Timothy Goodwin, Barrister	Online
127.	Tjiwarl (Aboriginal Corporation) RNTBC	Perth
128.	Victorian Government Solicitor's Office	Online
129.	Dr William Isdale, Barrister	Brisbane
130.	William Oxby, Johnson Winter Slattery	Online
131.	Yamatji Marlpa Aboriginal Corporation	Perth and online

Events

Date	Host Organisation	Event Name	Event Location
4 June 2024	AIATSIS	AIATSIS Summit 2024 (Presented)	Melbourne
3–4 September 2024	Carpentaria Land Council	Gulf Connect (Presented and attended)	Burketown
18 September 2024	National Native Title Council	Goldfields Regional PBC Forum (Presented)	Kalgoorlie
9 October 2024	Central Land Council	Central Land Council Full Council Meeting (Presented)	Alice Springs
23 October 2024	South West Aboriginal Land and Sea Corporation	Noongar Corporations Committee Meeting (Presented)	Online
29 October 2024	National Native Title Council	National Native Title Council Council Meeting (Presented)	Alice Springs
29 October 2024	Department of Resources (Qld)	Queensland Government Native Title Contact Officers Meeting (Presented)	Online
31 October 2024	Attorney-General's Department (Cth)	National Native Title Senior Officers Meeting (Presented)	Online

Date	Host Organisation	Event Name	Event Location
21 November 2024	Law Institute of Victoria Reconciliation and Advancement Committee	Law Institute of Victoria Reconciliation and Advancement Committee Meeting (Presented)	Online
3 December 2024	Tarwirri Indigenous Law Students and Lawyers Association of Victoria	National Indigenous Legal Conference (Presented)	Melbourne
5 December 2024	National Native Title Council	South Australia Regional PBC Forum (Presented)	Coffin Bay
5 December 2024	Chamber of Minerals and Energy (WA)	Chamber of Minerals and Energy (WA), Land Access Committee Meeting (Presented)	Online
11 December 2024	Northern Land Council	Northern Land Council Full Council Meeting (Presented)	Katherine
12 December 2024	Attorney-General's Department (Cth)	Commonwealth Inter-agency Committee on Native Title Meeting (Presented)	Online
31 January 2025	Federal Court of Australia	2025 Native Title Forum (Attended)	Brisbane and online
18 February 2025	Yamatji Marlpa Aboriginal Corporation	Yamatji Marlpa Aboriginal Corporation PBC Forum (Presented)	Perth

Date	Host Organisation	Event Name	Event Location
7–8 April 2025	Commonwealth Inter-Agency Committee for Native Title	Native Title Strategic Issues Forum 2025 (Attended)	Adelaide
6 May 2025	Kimberley Land Council	Kimberley Land Council Representative Council Meeting (Presented)	Kununurra
22 May 2025	Central Land Council	Central Land Council PBC Camp (Presented)	Alice Springs
30 May 2025	South Australian Chamber of Mines & Energy	South Australian Chamber of Mines & Energy, Legislation and Regulation Committee Meeting (Presented)	Online
4–6 June 2025	AIATSIS	AIATSIS Summit 2025 (Presented and attended)	Darwin
19 June 2025	Legalwise	15th Annual Native Title Conference 2025 (Attended)	Online
24, 26 June 2025	Minerals Council of Australia	Resources Industry Representatives Roundtable (Presented)	Perth and Brisbane
27 June 2025	Mabo Centre and National Native Title Council	Symposium: Future Acts and the Native Title Regime — Where to Now? (Presented and attended)	Melbourne

Date	Host Organisation	Event Name	Event Location
2 July 2025	Australian Law Reform Commission	Webinar: ALRC’s Review of the Future Acts Regime	Online
14 July 2025	Ashurst Australia	Webinar: Australian Law Reform Commission: Review of the Future Acts Regime in the Native Title Act (Presented)	Online
2 September 2025	AIATSIS	AIATSIS NTRB/SP Legal Workshop (Presented)	Sydney

Appendix B

Submissions

	Name
1	T Sampson
2	Not published
3	Confidential
4	Confidential
5	E Wensing
6	Minerals Council of Australia
7	M Lucas
8	G Johns and W O'Chee
9	Confidential
10	P&E Law
11	Mawal Pty Ltd
12	R Lapthorne
13	Confidential
14	First Nations Heritage Protection Alliance
15	A English
16	F Powell
17	MPS Law
18	Environmental Justice Australia
19	Environmental Equity
20	National Native Title Council
21	P See, S King, T Kelly, and P Johnson
22	Committee on Aboriginal and Torres Strait Islander Water Interests
23	National Native Title Tribunal
24	Local Government Association of Queensland

	Name
25	Robe River Kuruma Aboriginal Corporation
26	Kimberley Land Council
27	Confidential
28	Confidential
29	Confidential
30	First Nations Clean Energy Network
31	Central Land Council
32	Association of Mining and Exploration Companies
33	Confidential
34	Confidential
35	Dambimangari Aboriginal Corporation
36	Australian Local Government Association
37	Kyburra Munda Yalga Aboriginal Corporation RNTBC
38	PKKP Aboriginal Corporation
39	Department of Agriculture, Fisheries and Forestry (Cth)
40	Confidential
41	National Farmers' Federation
42	First Nations Legal and Research Services
43	State of Queensland
44	Cape York Regional Organisations
45	Queensland South Native Title Services
46	Not published
47	Law Council of Australia
48	Australian Human Rights Commission
49	Confidential
50	P Mullett
51	W Santo
52	Confidential

	Name
53	Bardi Jawi Niimidiman Aboriginal Corporation RNTBC
54	Not published
55	Confidential
56	J Armstrong
57	M Lucas
58	Confidential
59	K and S Broad
60	Confidential
61	Department of Agriculture, Fisheries and Forestry (Cth)
62	Maddocks
63	Confidential
64	Amalgamated Prospectors and Leaseholders Association of WA Inc
65	T Stockwell
66	Queensland Farmers' Federation
67	Pastoral Land Board
68	Indigenous Land and Sea Corporation
69	Indigenous On Country Services
70	Isaac Regional Council
71	Gympie Regional Council
72	Lowitja Institute
73	Confidential
74	Confidential
75	Confidential
76	M Boge
77	Jigsaw Legal
78	Productivity Commission
79	Eastern Goldfields Prospectors Association
80	ANTAR

	Name
81	Martuwarra Fitzroy River Council
82	State Aboriginal Heritage Committee (SA)
83	Confidential
84	Kimberley Pilbara Cattlemen's Association
85	Confidential
86	National Native Title Tribunal
87	Confidential
88	Confidential
89	Confidential
90	A Lynch
91	Not published
92	Confidential
93	J Marrell
94	K O'Bryan
95	Houston Legal & Consultants
96	North Queensland Land Council
97	Association of Mining and Exploration Companies
98	Gawler Ranges Aboriginal Corporation RNTBC
99	L O'Neill
100	Confidential
101	New South Wales Aboriginal Land Council
102	Norman Waterhouse Lawyers
103	Confidential
104	South Australian Native Title Services
105	Queensland Small Miners Council
106	Northern Territory Cattlemen's Association
107	Confidential
108	Local Government Association of Queensland

	Name
109	Confidential
110	Federation of Victorian Traditional Owner Corporations
111	AgForce Queensland Farmers Ltd
112	Confidential
113	Minerals Council of Australia
114	National Farmers' Federation
115	Western Australian Government
116	Confidential
117	NSW Minerals Council
118	Australian Human Rights Commission
119	I Ingram
120	Law Council of Australia
121	Central Land Council
122	Confidential
123	Bureau of Meteorology
124	Queensland South Native Title Services
125	Gur A Baradharaw Kod Torres Strait Sea and Land Council Torres Strait Islander and Aboriginal Corporation
126	Confidential
127	Registrar of Aboriginal and Torres Strait Islander Corporations
128	P&E Law
129	Great Barrier Reef Marine Park Authority
130	Mabo Centre and National Native Title Council
131	S Munro
132	Confidential
133	S Lawes
134	Powerlink Queensland
135	Seqwater
136	Cattle Australia

	Name
137	Cape York Regional Organisations
138	G Wilson
139	Confidential
140	NSW Bar Association
141	Australian Energy Producers
142	Dambimangari Aboriginal Corporation
143	Local Government Association of the Northern Territory
144	PKKP Aboriginal Corporation
145	E Raeside
146	First Nations Legal and Research Services
147	First Nations Bailai, Gurang, Gooreng Gooreng, Taribelang Bunda People Aboriginal Corporation RNTBC
148	Yamatji Marlpa Aboriginal Corporation
149	Northern Territory Government
150	B Wignall
151	Kimberley Land Council
152	State of Queensland
153	Northern Land Council
154	Kyburra Munda Yalga Aboriginal Corporation RNTBC
155	Western Australian Water Users Coalition
156	South Australian Government
157	Parallax Legal
158	Jabalbina Yalanji Aboriginal Corporation RNTBC
159	New South Wales Government
160	Victorian Government
161	Gunggandji-Mandingalbay Yidinji Peoples Prescribed Body Corporate Aboriginal Corporation RNTBC
162	E Clarke

Appendix C

Primary sources

Australian legislation

Commonwealth legislation

Aboriginal Land Rights (Northern Territory) Act 1975 (Cth)

Acts Interpretation Act 1901 (Cth)

Administrative Review Tribunal Act 2024 (Cth)

Administrative Decisions (Judicial Review) Act 1977 (Cth)

Australian Constitution

Australian Human Rights Commission Act 1986 (Cth)

Australian Law Reform Commission Act 1996 (Cth)

Australian Securities and Investments Commission Act 2001 (Cth)

Broadcasting Services Act 1992 (Cth)

Competition and Consumer Act 2010 (Cth)

Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)

Environment Protection and Biodiversity Conservation Act 1999 (Cth)

Fair Work Act 2009 (Cth)

Federal Court of Australia Act 1976 (Cth)

Judiciary Act 1903 (Cth)

Legislation Act 2003 (Cth)

Native Title Act 1993 (Cth)

Native Title Amendment Act 1998 (Cth)

Native Title Amendment Act 2007 (Cth)

Native Title Amendment (Technical Amendments) Act 2007 (Cth)

Native Title Amendment Act (No. 1) 2010 (Cth)

Native Title Amendment (Indigenous Land Use Agreements) Act 2017 (Cth)

Native Title Amendment (Infrastructure and Public Facilities) Act 2020 (Cth)

Native Title Legislation Amendment Act 2021 (Cth)

Privacy Act 1988 (Cth)

Public Interest Disclosure Act 2013 (Cth)

Racial Discrimination Act 1975 (Cth)

Telecommunications Act 1997 (Cth)

Commonwealth legislative instruments

Fair Work (Model Terms) Determination 2025 (Cth)

Legislation (Exemptions and Other Matters) Regulation 2015 (Cth)

Native Title (Federal Court) Regulations 2024 (Cth)

Native Title (Indigenous Land Use Agreements) Regulations 2024 (Cth)

Native Title (Notices) Determination 2024 (Cth)

Native Title (Prescribed Bodies Corporate) Regulations 1999 (Cth)

Telecommunications Code of Practice 2021 (Cth)

State and territory legislation

Aboriginal Heritage Act 2006 (Vic)

Aboriginal Land Rights Act 1983 (NSW)

Aboriginal Land Act 1991 (Qld)

Aboriginal Lands Trust Act 2013 (SA)

Civil and Administrative Tribunal Act 2013 (NSW)

First Nations Voice Act 2023 (SA)

Land Acquisition and Compensation Act 1986 (Vic)

Local Government Act 1999 (SA)

Maralinga Tjarutja Land Rights Act 1984 (SA)

Mineral and Energy Resources (Common Provisions) Act 2014 (Qld)

Mineral Resources Act 1989 (Qld)

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Mining Act 1992 (NSW)

Mining Act 1971 (SA)

Mining Act 1978 (WA)

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Northern Territory Civil and Administrative Tribunal Act 2014 (NT)

Pitjantjatjara Land Rights Act 1981 (SA)

Queensland Civil and Administrative Tribunal Act 2009 (Qld)

Queensland Coast Islands Declaratory Act 1985 (Qld)
Rights in Water and Irrigation Act 1914 (WA)
South Australian Civil and Administrative Tribunal Act 2013 (SA)
State Administrative Tribunal Act 2004 (WA)
Supreme Court of Queensland Act 1991 (Qld)
Torres Strait Islander Land Act 1991 (Qld)
Traditional Owner Settlement Act 2010 (Vic)
Victorian Civil and Administrative Tribunal Act 1998 (Vic)
Water Act 1992 (NT)
Water Act 2000 (Qld)
Water Act 1989 (Vic)
Water Management Act 2000 (NSW)
Water Management Act 1999 (Tas)
Water Resources Act 2007 (ACT)

State and territory legislative instruments

Mining Regulations 1981 (WA)
Uniform Civil Procedure Rules 1999 (Qld)

Australian case law

Akiba v Commonwealth (2013) 250 CLR 209
Akiba v Queensland (No 3) (2010) 204 FCR 1
Anderson on behalf of the Mardigan People v Queensland [2019] FCA 2140
Anderson v Western Australia [2000] FCA 1717
Andrews v Australia and New Zealand Banking Group Ltd (2012) 247 CLR 205
Appleton v Queensland [2023] FCA 45
Australian Building and Construction Commissioner v Pattinson (2022) 274 CLR 450
Australian Manganese Pty Ltd v Western Australia (2008) 218 FLR 387
Awabakal Local Aboriginal Land Council v A-G (NSW) [2020] FCA 1507
Bandjalang Aboriginal Corporation Prescribed Body Corporate RNTBC on behalf of the Bandjalang People v Transport for NSW [2020] NSWLEC 1008
Banjima People v Western Australia (No 2) (2013) 305 ALR 1
Barunga v Western Australia [2011] FCA 518

BHP Billiton Nickel West Pty Ltd v KN (Deceased) (Tjiwarl and Tjiwarl #2) (2018) 258 FCR 521

Bissett v Mineral Deposits (Operations) Pty Ltd (2001) 166 FLR 46

Brandy v Human Rights and Equal Opportunity Commission (1995) 183 CLR 245

Brownley v Western Australia (1999) 95 FCR 152

Burragubba v Queensland (2015) 236 FCR 160

Burragubba v Queensland [2016] FCA 1525

Carriage v Duke Australia Operations Pty Ltd [2000] NSWSC 239

CG (Deceased) on behalf of the Badimia People v Western Australia (2016) 240 FCR 466

CGU Insurance Ltd v Watson [2007] NSWCA 301

Charles v Sheffield Resources Ltd (2017) 257 FCR 29

Cheedy v Western Australia (2011) 194 FCR 562

Cheedy v Western Australia (No 2) (2011) 199 FCR 23

Cheinmora v Striker Resources NL; Dann v Western Australia (1996) 142 ALR 21

Citic Pacific Mining Management Pty Ltd v Yaburara & Coastal Mardudhunera Aboriginal Corporation [2020] WASC 332

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Coleman v Power (2004) 220 CLR 1

Commonwealth v Director, Fair Work Building Industry Inspectorate (2015) 258 CLR 482

Commonwealth v Yarmirr (2001) 208 CLR 1

Commonwealth v Yunupingu on behalf of the Gumatj Clan or Estate Group (2025) 421 ALR 604

Conlon v QGC Pty Ltd (No 2) (2017) 359 ALR 460

Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission (2001) 203 CLR 645

Coronet Resources Limited v Wanjinna-Wunggurr (Native Title) Aboriginal Corporation RNTBC [2025] NNTTA 3

David on behalf of the Torres Strait Regional Seas Claim v Queensland [2022] FCA 1430

David Trow and Trojon Enterprises Pty Ltd v Aaron Banderson on behalf of the Wagiman People [2021] NNTTA 68

Dempster on behalf of Southern Noongar Families/Bayside Abalone Farms Pty Ltd; WA Abalone Farming Pty Ltd/Western Australia [1999] NNTTA 235

Dey v Victorian Railways Commissioners (1949) 78 CLR 62

Dietrich v R (1992) 177 CLR 292

Drake Coal Pty Ltd, Byerwen Coal Pty Ltd/Grace Smallwood & Ors (Birri People)/Queensland [2012] NNTTA 9

Dungog Shire Council v A-G (NSW) [2024] FCA 166

Energy Australia Yallourn Pty Ltd v Automotive, Food, Metal, Engineering, Printing and Kindred Industries Union (2018) 264 FCR 342

Eureka Petroleum Pty Ltd and Bularnu Waluwarra Wangkayujuru Aboriginal Corporation RNTBC [2022] NNTTA 3

Evans v Western Australia (1997) 77 FCR 193

Fagan on behalf of the Wadawurrung Native Title Claim v Victoria (No 2) [2026] FCA 11

Fejo v Northern Territory (1998) 195 CLR 96

FMG Pilbara Pty Ltd v Cox (2009) 175 FCR 141

FMG Pilbara Pty Ltd/NC (deceased) on behalf of the Yindjibarndi People/Western Australia [2012] NNTTA 103

FMG Pilbara Pty Ltd v Yindjibarndi Ngurra Aboriginal Corporation RNTBC [2020] NNTTA 8

Forrest on behalf of the Nangaanya-ku Native Title Claim Group (Part B) v Western Australia (2025) 313 FCR 71

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Fortescue Metals Group v Warrie (2019) 273 FCR 350

Freddie v Northern Territory [2017] FCA 867

Gawirrin Gumana v Northern Territory (No 2) [2005] FCA 1425

Gebadi v Woosup (No 2) (2017) 253 FCR 310

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Griffiths v Northern Territory (No 3) (2016) 337 ALR 362

Gulliver Pty Ltd v Western Desert Lands Aboriginal Corporation (2005) 196 FLR 52

Harris v Great Barrier Reef Marine Park Authority (2000) 98 FCR 60

Harvey v Minister for Primary Industry and Resources (2024) 278 CLR 116

- Hatfield on behalf of the Darumbal People v Queensland (No 2)* [2013] FCA 1151
- Hayes v Northern Territory* (1999) 97 FCR 32
- Hippi on behalf of the Gamilaraay People v Queensland (No 2)* [2025] FCA 1580
- Holt v Manzie* (2001) 114 FCR 282
- IW v City of Perth* (1997) 191 CLR 1
- James on behalf of the Martu People v Western Australia* [2002] FCA 1208
- James Speed Company Pty Ltd v Queensland* [2022] FCA 626
- Jango v Northern Territory* (2006) 152 FCR 150
- Jax Coal Pty Ltd v Smallwood* (2011) 260 FLR 99
- John William Withers v Ewamian People Aboriginal Corporation RNTBC* [2023] NNTTA 34
- John William Withers v Ewamian People Aboriginal Corporation RNTBC* [2025] NNTTA 25
- Johnson v Native Title Registrar* (2014) 218 FCR 415
- Karajarri Traditional Lands Association (Aboriginal Corporation) RNTBC v Western Australia* (2024) 307 FCR 122
- Karajarri Traditional Lands Association (Aboriginal Corporation)/Western Australia/ ASJ Resources Pty Ltd* [2012] NNTTA 18
- Kartinyeri v Commonwealth* (1998) 195 CLR 337
- Kevin Alfred De Roma v Western Yalanji Aboriginal Corporation RNTBC* [2022] NNTTA 40
- Koowarta v Bjelke-Petersen* (1982) 153 CLR 168
- Kum Sing on behalf of the Mitakoodi and Mayi People #5 v Queensland (No 3)* [2024] FCA 935
- Lampton on behalf of the Juru People v Queensland* [2014] FCA 736
- La Perouse Local Aboriginal Land Council v Quarry Street Pty Ltd* [2025] HCA 32
- Lardil Peoples v Queensland* (2001) 108 FCR 453
- Little on behalf of the Badimia People v Oriole Resources Pty Ltd* (2005) 146 FCR 576
- Luton v Lessels* (2002) 210 CLR 333
- Mabo v Queensland (No 1)* (1988) 166 CLR 186
- Mabo v Queensland (No 2)* (1992) 175 CLR 1
- MacCormick v Commissioner of Taxation (Cth)* (1984) 158 CLR 622
- Mace v Queensland* (2019) 274 FCR 41

- Malone v B&M Aboriginal Corporation* (2025) 309 FCR 1
- Manado (on behalf of the Bindunbur Native Title Claim Group) v Western Australia* [2018] FCA 854
- Matthews v Chicory Marketing Board (Vic)* (1938) 60 CLR 263
- Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422
- Michael Dowse Collins v Nguddaboolgan Native Title Aboriginal Corporation RNTBC* [2015] NNTTA 13
- Milirrump v Nabalco* (1971) 17 FLR 141
- Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273
- Minister for Lands (WA) v Buurabalayji Thalanyji Aboriginal Corporation RNTBC* [2014] NNTTA 85
- Minister for Lands (WA)/Marjorie May Strickland and Anne Joyce Nudding on behalf of the Maduwonga People/Brian and Dave Champion, Cadley and Dennis Sambo, George Wilson and Clem Donaldson for their respective (Gubrun) families/Dorothy Dimer, Ollan Dimer and Henry Richard Dimer on behalf of Mingarwee (Maduwongja) People* [1997] NNTTA 31
- Momcilovic v The Queen* (2011) 245 CLR 1
- Moses v Western Australia* (2007) 160 FCR 148
- Mt Gingee Munjie Resources Pty Ltd v Victoria* (2003) 182 FLR 375
- Muccan Minerals Pty Ltd v Taylor on behalf of Njamal* [2014] NNTTA 74
- Muccan Minerals Pty Ltd v Taylor on behalf of Njamal* [2016] NNTTA 28
- New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2016) 260 CLR 232
- New South Wales v Wojciechowska* [2025] HCA 27
- Nona on behalf of the Badulgal, Mualgal and Kaurareg Peoples (Warral & Ului) v Queensland (No 4)* [2022] FCA 566
- North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595
- Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442
- Northern Territory v Griffiths* (2017) 256 FCR 478
- Northern Territory v Griffiths* (2019) 269 CLR 1
- Norwest Sand & Gravel Pty Ltd v Ngarluma Aboriginal Corporation RNTBC* [2020] NNTTA 68
- One Tree Community Service Inc v United Workers' Union* (2021) 284 FCR 489
- Onslow Salt Pty Ltd v Buurabalayji Thalanyji Aboriginal Corp* [2018] FCAFC 118

- Pareroultja v Tickner* (1993) 42 FCR 32
- Parna Ngururpa (Aboriginal Corporation) RNTBC v Backreef Oil Ltd* [2016] NNTA 32
- Pate v Queensland* [2019] FCA 25
- Peulen v Agius* [2015] QSC 137
- Placer (Granny Smith) Pty Ltd v Western Australia* (1999) 163 FLR 87
- Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589
- Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167
- QGC Pty Ltd v Alberts (No 2)* [2021] FCA 540
- QGC Pty Ltd v Alberts (No 5)* [2024] FCA 139
- QGC Pty Ltd v Bygrave (No 2)* [2010] FCA 1019
- Queensland Rifle Association Inc v Queensland* [2021] FCA 110
- Queensland v Central Queensland Land Council Aboriginal Corporation* (2002) 125 FCR 89
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Appendix D

Legislative amendments to the future acts regime after 1998

Amending Act	Summary of amendments
<i>Native Title Amendment Act 2007</i>	Introduced amendments to Aboriginal and Torres Strait Islander representative bodies provisions.
<i>Native Title (Technical Amendments) Act 2007</i>	Introduced technical amendments to the ILUA processes including: • notification (including that the Registrar has discretion to include a map); • objections to registration process; • confirming an ILUA must be registered to be valid; • allowing the NNTT Registrar to assist parties in preparing their registration applications; and • in relation to body corporate agreements, providing that the Registrar is no longer required to give notice to the public. Confirmed that ILUAs could validate future acts that had already been (invalidly) done. Made amendments to acts that fall within 'services to the public' to include automatic weather stations. Made amendments to permit the combining of two or more existing leases, licences, permits, or authorities as a 'permissible renewal' under the future acts regime. Made amendments to s 94C: process for Federal Court dismissing applications relating to a future act.
<i>Native Title Amendment Act (No. 1) 2010</i>	Introduced Subdivision JA — validation of future acts that relate to the construction of public housing, staff housing, and specified types of public infrastructure on Indigenous held land for Indigenous communities.

Amending Act	Summary of amendments
<i>Native Title Amendment (Indigenous Land Use Agreements) Act 2017</i>	Introduced in light of the Federal Court decision in <i>McGlade v Native Title Registrar</i> , ¹ in which the Court held that ILUAs made without all the signatures of all members of a registered native title claimant were invalid; this Act provides that ILUAs must be signed by a majority of the members of a registered native title claimant to be valid.
<i>Native Title Amendment (Infrastructure and Public Facilities) Act 2020</i>	Introduced a minor amendment to Subdivision JA — public housing, to extend its period of application from 10 to 20 years beginning on the day that the <i>Native Title Amendment Act (No. 1) 2010</i> commenced.
<i>Native Title Legislation Amendment Act 2021</i>	Introduced amendments to ILUAs, including that body corporate ILUAs can cover areas where native title has been extinguished, allowing minor amendments to be made to an ILUA without requiring a new registration, and clarifying that the removal of an ILUA from the Register does not affect the validity of future acts subject to that ILUA. Amendments to allow historical extinguishment over areas of national and state parks to be disregarded where the parties agree. Amendments to extend the amendments made in the <i>Native Title Amendment (Indigenous Land Use Agreements) Act 2017</i> to section 31 agreements — that is, that a section 31 agreement only needs to be signed by a <i>majority</i> of the members of a registered native title claimant to be valid.

¹ *McGlade v Native Title Registrar* (2017) 251 FCR 172.

Appendix E

Negotiation Timeframe Analysis

Table A: Number of months between future act notification date and section 31 agreement start date (21 March 2021 to 31 January 2026)

	Number of section 31 agreements	Median	Maximum	Minimum
All section 31 agreements ¹	343	23 months (708 days)	286 months (8710 days)	1 month (36 days)
Agreements with a written ancillary agreement	245 (71%)	24 months (748 days)	286 months (8710 days)	1 month (36 days)
Agreements without a written ancillary agreement	59 (17%)	21 months (651 days)	191 months (5818 days)	3 months (92 days)

1 The record also shows there are 39 agreements (11%) with ‘information withheld’ about written ancillary agreements.

Table B: Number of months between future act notification date and section 31 agreement start date in jurisdictions where the right to negotiate operates (21 March 2021 to 31 January 2026)

	National	NSW	NT	Qld	Vic	WA
Number of agreements	343	19	4	161	13	146
Maximum (months)	286	144	191	204	93	286
Median (months)	23	31	137	22	21	24
Minimum (months)	1	6	18	1	11	2

Table C: Median time from future act notice to future act determination application being lodged (since 30 September 1998)²

	National	NSW	NT	Qld	Vic	WA
Number of FADAs lodged	702 ³	15	10	141	9	526
Median time from notice to FADA lodged	21 months	14 months	60.5 months	11 months	11 months	26 months

2 30 September 1998 is the date when the *Native Title Amendment Act 1998* (Cth) came into effect. Before this date, the statutory timeframes were slightly different.

3 There is also one entry for a future act determination application from South Australia. South Australia has been excluded from this dataset as the right to negotiate process in the *NTA* is no longer used in that jurisdiction.

Table D: Median time from future act notice to future act determination application being lodged (31 January 2021 to 31 January 2026)

	National	NSW	NT	Qld	Vic	WA
Number of FADAs lodged	93	8	4	18	1	62
Median time from notice to FADA lodged	35 months	43.5 months	24 months	30 months	12 months	37.5 months

Table E: Future act determination applications lodged shortly after six-month negotiation period ends

	FADA application lodged within one week of the six-month negotiation period ending ⁴	FADA application lodged within four months of the six-month negotiation period ending ⁵
Since 1998	21 (3% ⁶)	114 (16% ⁷)
Past 5 years ⁸	3 (3% ⁹)	9 (10% ¹⁰)

4 Calculated on the assumption that six months is approximately 183 days ($365 \div 12 \times 6$), so six months plus one week is 189 days.

5 Calculated on the assumption that ten months is approximately 304 days ($365 \div 12 \times 10$).

6 N=702.

7 N=702.

8 31 January 2021 to 31 January 2026.

9 N=93.

10 N=93.

Australian Law Reform Commission

www.alrc.gov.au
info@alrc.gov.au
PO Box 209
Flinders Lane VIC 8009



Australian Government

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