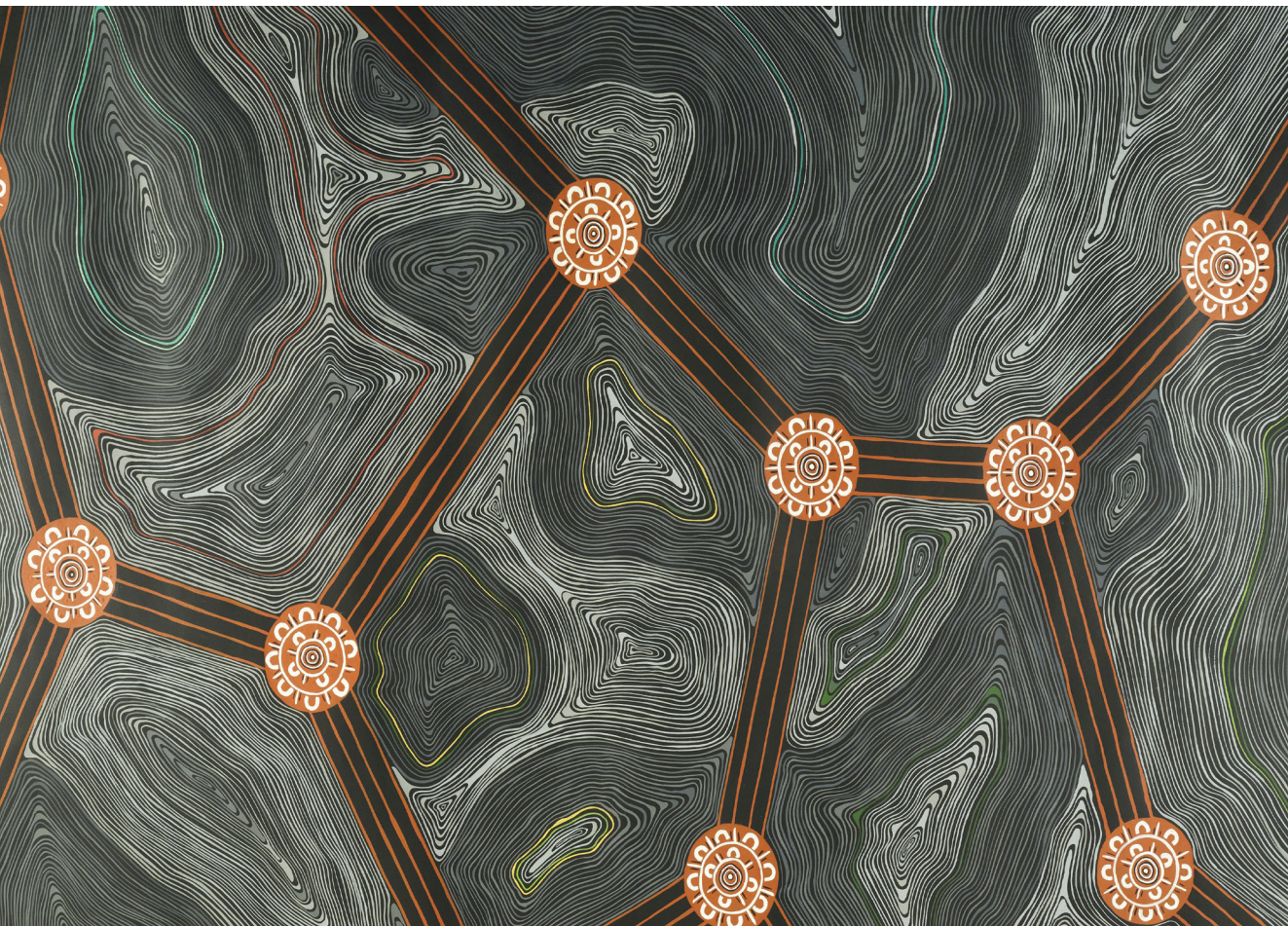
Australian Government

Australian Law Reform Commission

SUMMARY REPORT

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

ALRC Report 144
March 2026



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.

Note on content

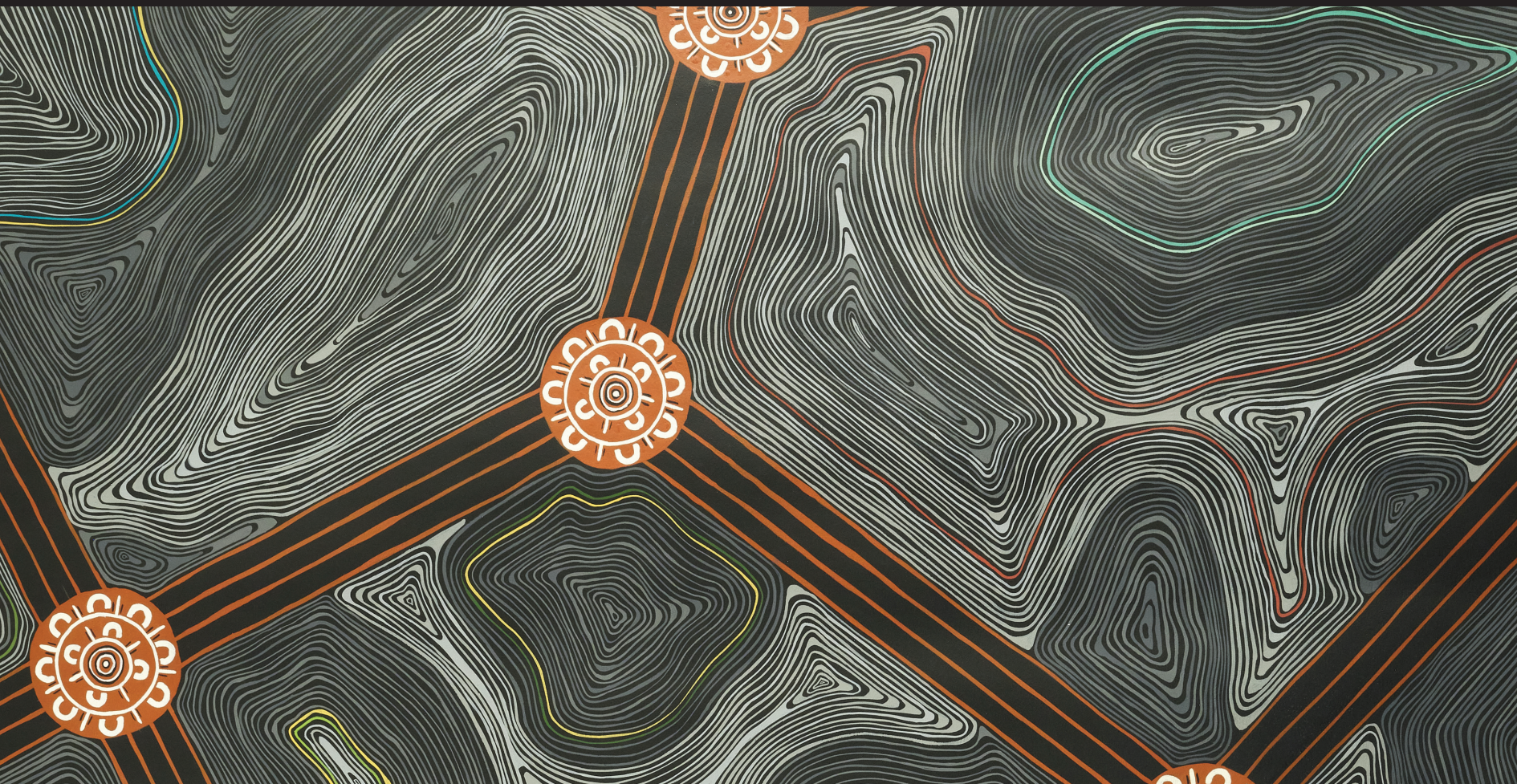
Aboriginal and Torres Strait Islander peoples should be aware that this Report (and other publications and documents of the Inquiry) may contain the names or stories of deceased persons.

Cover artwork: Tupun Wultatinyeri (Ngarrindjeri/Kukabrak), *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.

CONTENTS

ABOUT THIS INQUIRY



About this Inquiry

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]

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'.

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]

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.

5. The ALRC's key findings and recommendations are discussed below at paragraphs [**15**]–[**29**]. To provide necessary context to those findings and recommendations, this part sets out a brief explanation of the future acts regime.

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

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].

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.

to do something (such as granting a permit or licence), which adversely affects (or infringes[4]) native title rights and interests.[5]

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

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.

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 the Final 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

4 The word 'infringe', when used in relation to property rights, is used in the Final 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 [**33**]–[**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.

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.

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.

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.

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.

12. The other kind of protection provided (referred to in the Final 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

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

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**.

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.

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.

Snapshot: key statistics

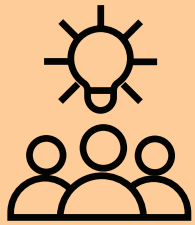
1 Issues Paper

1 Discussion Paper

86 Recommendations

1 Final Report

7 Information sheets



2 Commissioners

11 Commission staff

12 Advisory Committee members

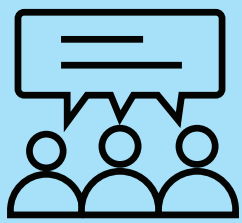
13 Expert Readers

26 Law students

160+ Submissions

300+ Consultees

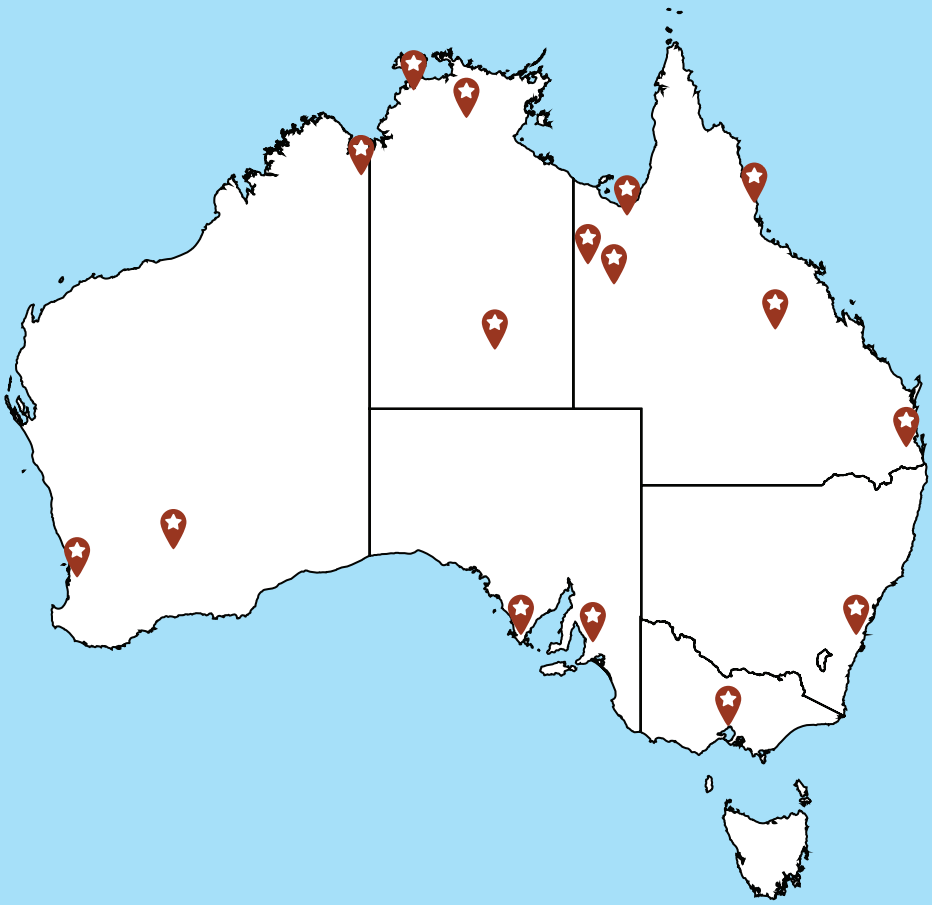
115 Consultations



24 Presentations

1 Webinar

The Inquiry team consulted in ...

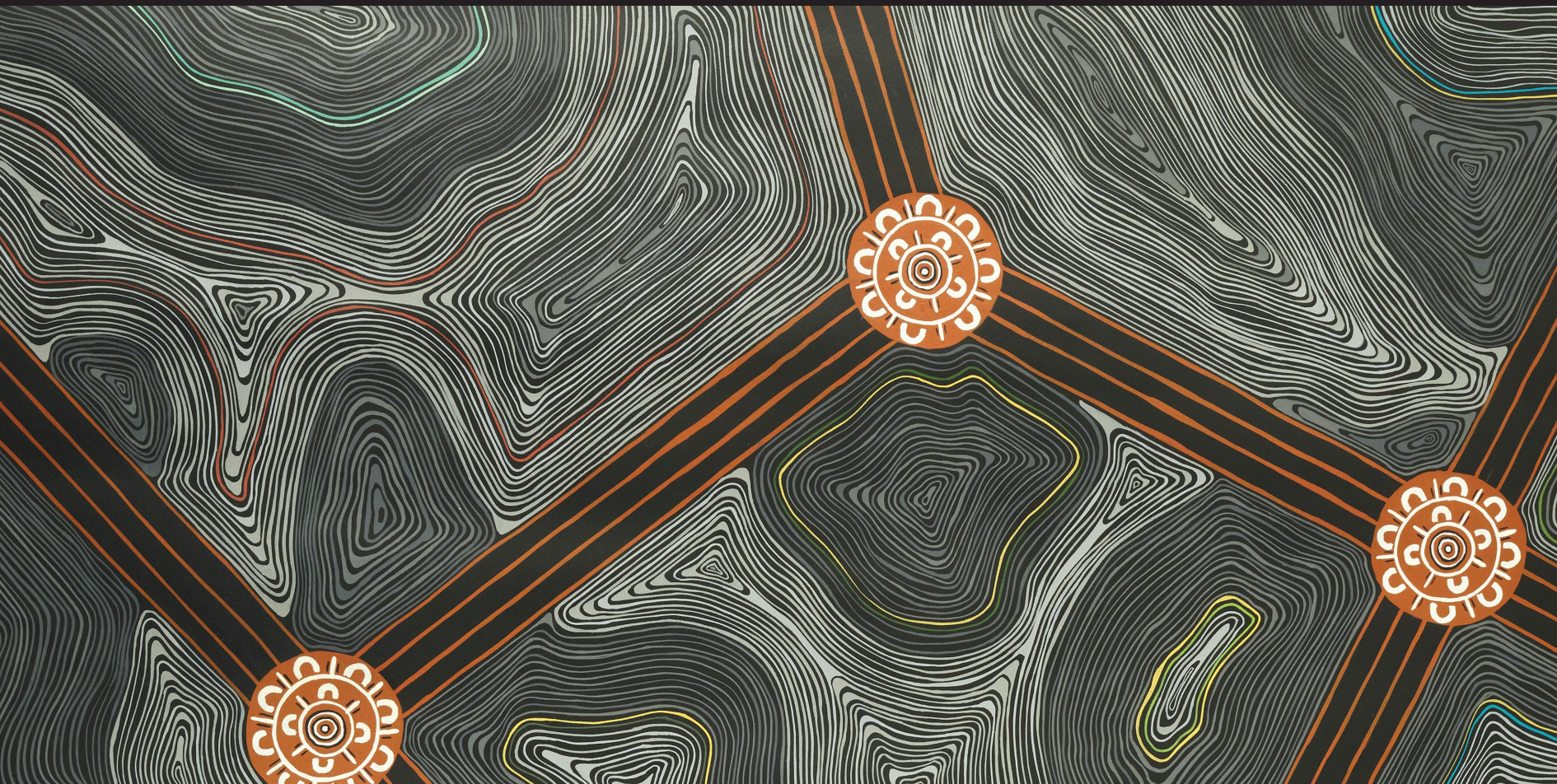


Adelaide, Alice Springs, Brisbane, Burketown, Cairns, Camooweal, Coffin Bay, Darwin, Emerald, Kalgoorlie, Katherine, Kununurra, Melbourne, Mount Isa, Perth, Ross River, and Sydney.

> The future act regime is often characterised as a fetter on development and economic growth. However, our experience as native title practitioners is that meaningful engagement with native title holders by future act proponents often adds significant value to proposed projects, such as by providing an impetus to look at their project in new and innovative ways, by de-risking and future-proofing their projects, and by opening new investment and market opportunities. Recognising that the future act regime is a potential driver of growth, rather than just a hurdle to be overcome, is an important consideration in analysis of potential reforms to the regime.

Submission 42, First Nations Legal and Research Services

OVERVIEW



Overview of main findings and recommendations

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]

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.

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]

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

10 The provision of these fundamental protections to freehold title is discussed at paragraphs [**87**]–[**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.

and benefit-sharing between parties, they tend to encourage disengagement and disputes; and

- 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.

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]

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.

21. The ALRC's reforms are directed to addressing those problems. The implementation of the recommendations made in the Final 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 the Final Report.

---

17 There is a current statutory compensation matter seeking compensation for future acts before the Federal Court. At the time of publication of the Final 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).

22. The anticipated benefits of the recommended reforms include:

- increased opportunities for economic development and benefit-sharing;
- 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.

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.

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.

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]

26. The reforms in the Final Report would amend the right to negotiate process, and the arbitration criteria, to better ensure fairness.[23]

---

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**.

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 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.

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]

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 [**55**]–[**77**].

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.

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

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).

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. 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

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.

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

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

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 **Chapter 1** for discussion of 'valid' and 'invalid' future acts.

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]

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.

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

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.

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.

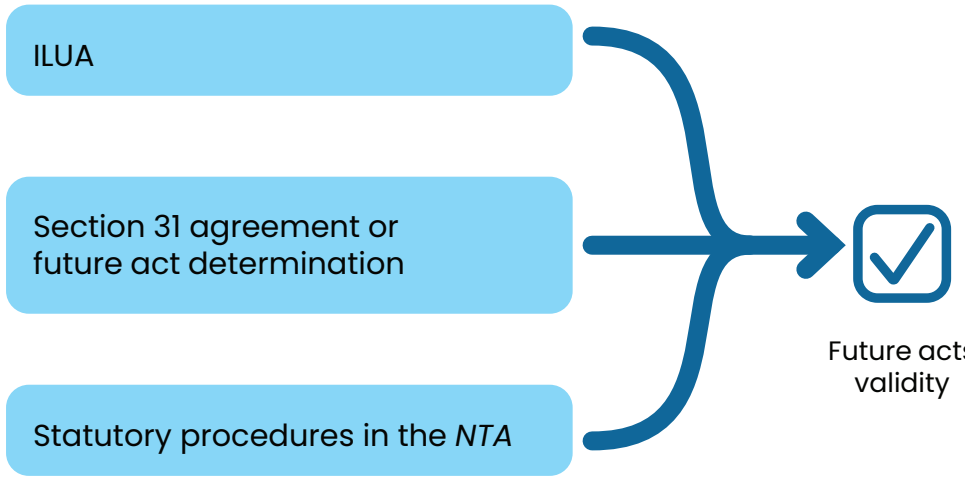
38. Future act determinations can be made by an arbitral body where the right to negotiate applies and the negotiation parties have not reached agreement after six months. The arbitral body may determine that a future act can be done, with or without conditions, or that a future act cannot be done. If 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]

35 *Native Title Act 1993* (Cth) s 227.
36 *Lardil Peoples v Queensland* (2001) 108 FCR 453 [89].
37 *Native Title Act 1993* (Cth) s 41.

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.

40. **Figure 1** below illustrates the current pathways to validity.[41]

Figure 1: Current pathways to validity under the future acts regime



Legislative history

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

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**.

41 While **Figure 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*.

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]

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

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.

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]

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

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

---

43 Explanatory Memorandum Part A, Native Title Bill 1993 (Cth) 1.
44 *Native Title Act 1993* (Cth) preamble.
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).

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]

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 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]

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

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.

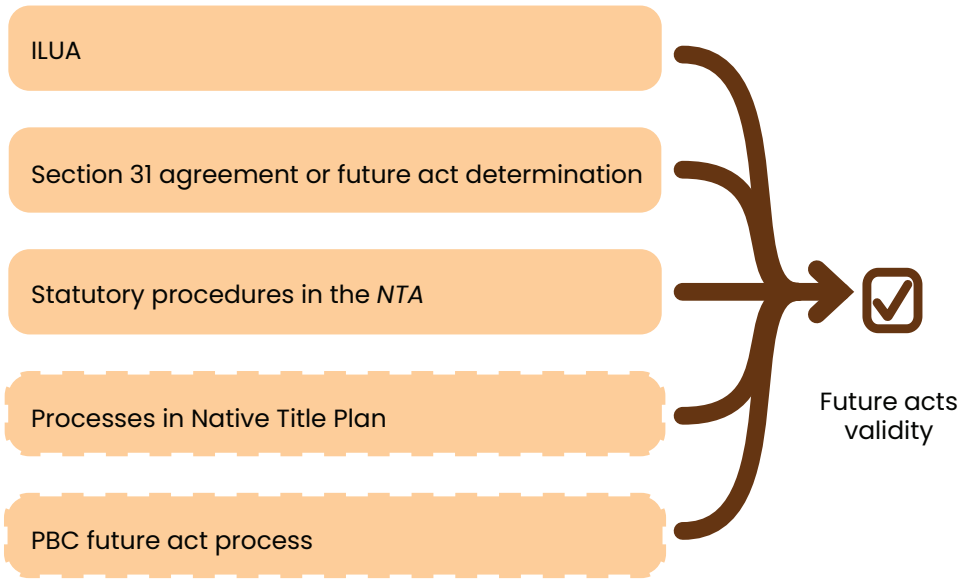
Pathway by pathway overview

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 2** illustrates the pathways to validity that would be available if the reforms in the Final Report were

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.
50 See discussion in **Chapter 11**.
51 See discussion in **Chapter 2**.

implemented. The pathways with a dotted border are pathways that would only be available if the PBC chose to use them.

Figure 2: Reformed pathways to validity



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 the Final Report.

Indigenous Land Use Agreements

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.

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,

52 See further discussion in **Chapter 3**.

> for example Indigenous Land Use Agreements (ILUAs), becomes more constructive and less transactional.[53]

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]

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]

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]

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.

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 Prescribed Bodies Corporate ('PBC') to make greater use of standing

---

53 Minerals Council of Australia, *Submission 113*.
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.

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.

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

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.

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 made[65] — is that native

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**.

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. 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.

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]

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

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

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*.

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.

and extent of the procedural rights should be proportionate with the impact of the act on native title rights and interests.

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 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

68 This is a theme discussed throughout the whole Final Report, particularly in **Chapters 2**, **6**, and **7**.

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 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.

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.

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

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).

71 See discussion at paragraph [**110**].

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

conditions relating to upfront compensation or financial redress to be applied as part of the impact categorisation process, thereby addressing the problem outlined above.

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 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]

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]

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 the Final 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**).

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

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*.
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*.

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]

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.

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.

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

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

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].

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*.

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 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.

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.

83 See **Chapter 13**.
84 See **Chapter 3**.

What We Heard

For most proponents, future act compliance may be a one-off proposition — involving a particular project, a single or a small number of land dealings or future acts limited in area, type and scope. Local governments are affected in a different way. Local government future acts are large in number, diverse in character, may cover large areas, involve multiple native title parties, often involve third parties (grantors and grantees of interests in land and third-party contractors) and are subject to tight time and budget constraints. Almost all involve the provision of public services to which vital public interests apply.

Submission 70, Isaac Regional Council

The minimal procedural rights afforded to Torres Strait Islander and Aboriginal native title holders under the *NTA*, result in ongoing abrogation of their rights and interests. 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.

Submission 125, Gur A Baradharaw Kod Torres Strait Sea and Land Council Torres Strait Islander and Aboriginal Corporation

The two most important concerns with the future act regime that are raised consistently are the cost to undertake the process and the lengthy timeframes.
The cost of doing the negotiations, less for expedited procedure agreements, but certainly for [the right to negotiate] the costs are increasingly prohibitive.

Submission 32, Association of Mining and Exploration Companies

It is the consequence of a legal and policy architecture that failed to guarantee economic opportunity and participation for native title holders. Nothing ensured that development on native title land delivered more than symbolic recognition. The result is a landscape where native title holders are routinely out-resourced, out-manoeuvred and over-powered — recognised in law, yet disadvantaged in practice.

Submission 137, Cape York Regional Organisations

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.

Submission 6, Minerals Council of Australia

In stark contrast to the ideal, the current future acts regime discriminates against Indigenous Australians and puts Australia in breach of its international human rights obligations. Its design prioritises non-Indigenous interests and creates structural barriers to the enforcement and exercise of native title rights and interests. It is difficult to understand and overly complex, and has produced much uncertainty in its application, while requiring little accountability of governments and proponents.

Submission 26, Kimberley Land Council

We see negotiated agreements as an opportunity, not an obligation, to enable Traditional Owners to drive development that aligns with their values and long term goals. However, this is only possible when the negotiation environment is properly supported, funded and grounded in principles of equity, respect, and informed decision making.

Submission 53, Bardi Jawi Niimidiman Aboriginal Corporation RNTBC

Too many proponents see native title holders as a regulatory hurdle to clear. By contrast, the cultural precepts of central Australian Aboriginal people mean that they seek respectful, long-term, person-to-person relationships with visitors to their country.

Submission 31, Central Land Council

Navigating the requirements of the Regime is a complex, challenging, and sensitive issue for Governments, Indigenous peoples, and proponents. The process to engage is often underpinned by significant procedural, legal, and administrative requirements that vary across jurisdictions and land tenure types. For the farm sector, these complexities regularly translate into practical barriers when negotiating ILUAs.

Submission 114, National Farmers' Federation

It did not matter that the Juru people fought hard to get our *in rem* determination and we thought our native title was protected and enforceable against the whole world. The expedited procedure has changed that and it is like our native title rights and interests means nothing.

Submission 37, Kyburra Munda Yalga Aboriginal Corporation

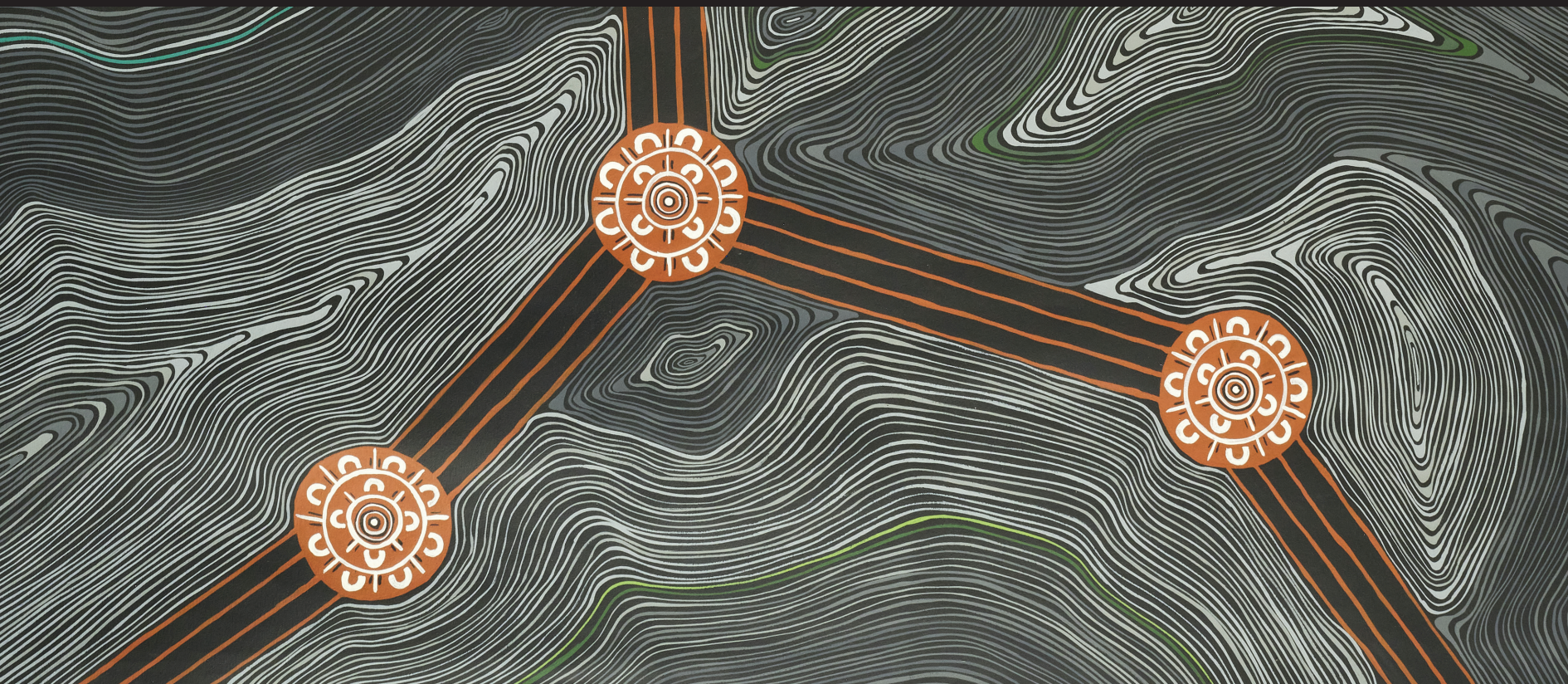
There are currently 281 PBCs across Australia. This number is expected to exceed 300 by 2026. As demand for Traditional Owner engagement, consultation, and consent continues to grow, so too does the importance of understanding the capacity challenges that PBCs face in making informed decisions about proposed activity across their lands and waters.

Submission 20, National Native Title Council

> The future acts system is in need of reform. It was conceived in a vastly different landscape, when native title was a new legal concept which governments and proponents were grappling with. In 2025, governments and proponents are comfortable with the concept of a future act and many enter into voluntary agreements with native title parties to meet their own objectives of corporate social responsibility. The time is right for a more practical, straightforward and fair future acts regime.

Submission 77, Jigsaw Legal

PRINCIPLES AND APPROACHES



Guiding principles and approaches

78. The principles and approaches to the reforms in the Final 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 in the Final Report.

Ensuring equality before the law and avoiding discrimination

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]

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]

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]

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

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).

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

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.

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.

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.

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.

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

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.

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.

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 facility[94] (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]
- 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:

---

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 also 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.

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

101 Ibid s 25(2).

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]

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.

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]

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.

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

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:

- 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

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 private land): see *Shi v ABI-K Pty Ltd* [2014] NSWCA 293.

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.

93. Consistently with leading international interpretations, the ALRC has not applied these rights or standards in an absolute or unqualified way in the Final 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

94. The right to self-determination has informed many of the reforms in the Final 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**.

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.

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 the Final 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**).
- The **rights to traditional lands**, which recognises 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 the Final 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

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].

First 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 the Final Report, particularly the reforms to agreement-making and content (**Chapters 3** and **4**), the reformed statutory procedures validating pathways (**Chapter 6**), reformed right to negotiate (**Chapters 9** and **10**), Native Title Plans (**Chapter 13**), and resourcing (**Chapter 14**).

96. The ALRC's approach to self-determination in the Final 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 the Final 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

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]

98. The ALRC has sought to ensure that every validating pathway recommended by the Final 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.

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

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 [**15**].
123 See **Chapters 3** and **4**.

lower-level future acts including the specific consultation requirements required when the opportunity to be consulted is the applicable procedural right.[124]

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]

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.

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.

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

---

124 See **Chapter 6**, and also **Chapter 7** in relation to consultation.

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].

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 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.

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.

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

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.

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 the 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 the Final 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.

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 the Final Report about the provision of redress also focus on redress being provided in a timely way.

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*.

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.

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.

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

Remedying unfairness

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.

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.

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

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.

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

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.

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.

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.

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**).

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)

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

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.

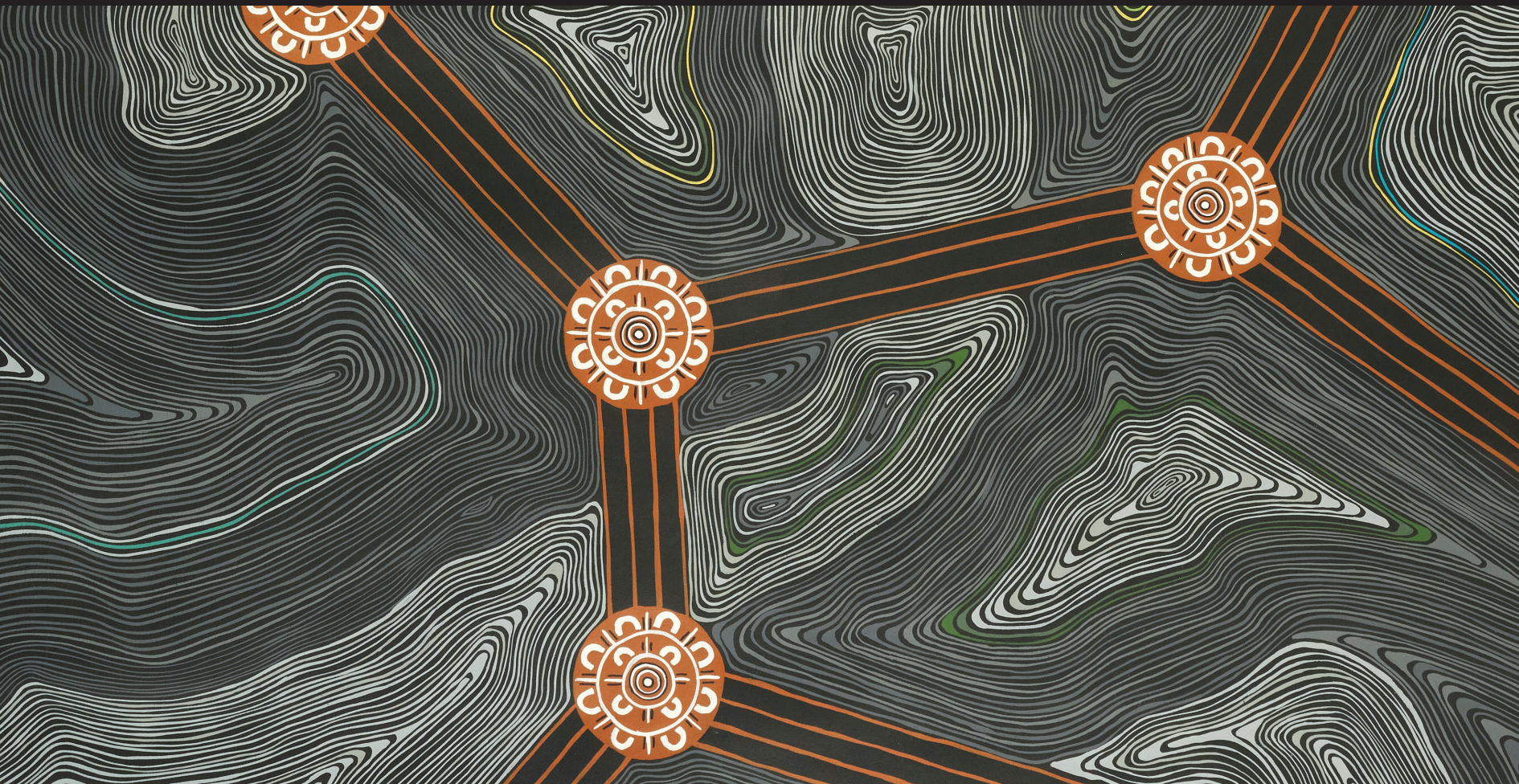
broader Australian community be provided with certainty that such acts may be validly done.

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.

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.

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

TERMS OF REFERENCE



Terms of Reference

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

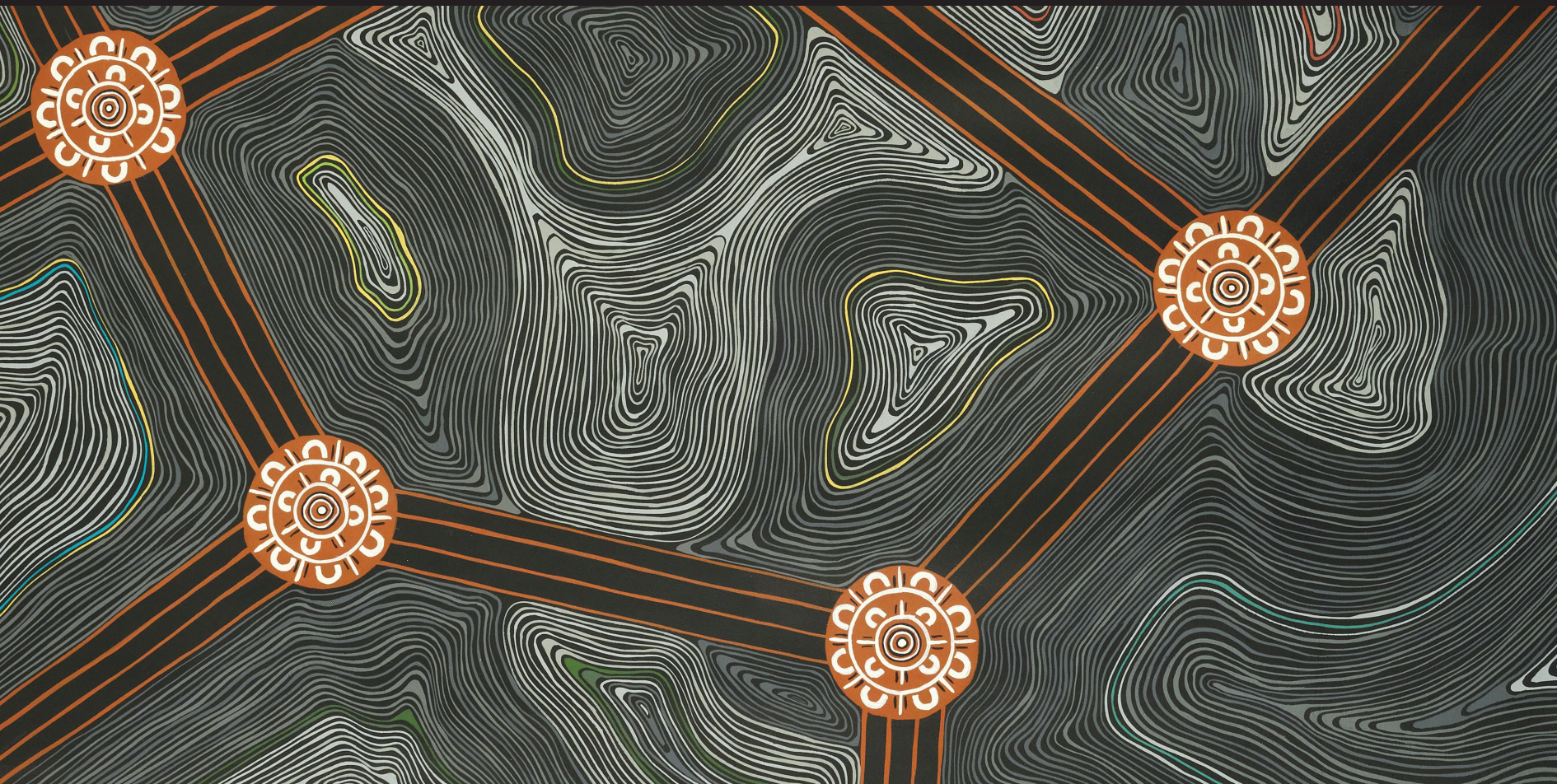
The ALRC should identify and consult key users of the native title system, including native title holders, future acts proponents, relevant government departments and agencies and other non-government stakeholders.

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.

RECOMMENDATIONS



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 sunsetting 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 sunsetting 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.

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).

ALRC publications are available to view or download free of charge on the ALRC website: **www.alrc.gov.au/publications**. If you require assistance, please contact the ALRC.

ISBN: 978-1-7637876-9-8

Commission Reference: ALRC Report 144, 2026

Printed by Fineline Print & Copy Service, NSW
Typeset by Post Pre-press Group

Australian Law Reform Commission

www.alrc.gov.au
info@alrc.gov.au
+61 03 9959 5300

PO Box 209
Flinders Lane
Melbourne VIC 8009

Australian Law Reform Commission

www.alrc.gov.au
info@alrc.gov.au
PO Box 209
Flinders Lane VIC 8009

Australian Government
Australian Law Reform Commission