

Commissioner Tony McAvoy SC
The Hon Justice Mordecai Bromberg
Australian Law Reform Commission
PO Box 209 Flinders Lane Victoria 8009

Via email: nativetitle@alrc.gov.au

24 July 2025

The Mabo Centre & The National Native Title Council
Submission to the Australian Law Reform Commission
Review of the Future Act Regime – Discussion Paper

Executive Summary	2
Part 1 Introduction	8
1 National Native Title Council	8
2 The Mabo Centre	9
3 Future Acts and the Native Title Regime – Where to Now?	9
Part 2 Proceedings of the Symposium	11
4 Structure	11
5 Native Title Management Plans	11
6 Impact Procedures (Right to Consult and Right to Negotiate)	15
7 Agreement Making	19
8 Compensation and Other Statutory Procedures	21
Part 3 Additional Matters	22
9 Meeting the Expectations of International Law	22
10 PBCs - Resourcing, Costs and Implementation	25
11 Discrete Issues	30
12 Conclusion and next steps	36
Glossary	37

Executive Summary

This submission, jointly prepared by the Mabo Centre and the National Native Title Council (NNTC), responds to the Review of the Future Acts Regime – Discussion Paper. It draws on insights from the Future Acts Symposium held on 27 June 2025, which brought together over 40 representatives from across the Traditional Owner sector, including Prescribed Body Corporates (PBCs), Native Title Representative Bodies (NTRBs), Native Title Service Providers (NTSPs), legal experts, and academics.

The submission is grounded in the lived experience of Traditional Owners navigating the current Future Acts Regime. It highlights the profound power imbalance that persists between Traditional Owners and proponents, and the failure of the current system to uphold Free, Prior and Informed Consent (FPIC). While native title is recognised in law, the mechanisms that govern its application continue to prioritise development interests over cultural authority and self-determination.

Key themes from the Symposium and the broader submission include:

- The systemic failure of the Right to Negotiate (RTN) process to deliver equitable outcomes.
- The need for legislative reforms that explicitly enshrine FPIC principles.
- The inadequacy of procedural rights, timeframes, and negotiation supports for PBCs.
- The importance of supporting Traditional Owner-led governance, legal capacity, and cultural decision-making.
- Concerns about the Ministerial override powers and discretionary approvals under section 24MD(6B) and section 29 notices.
- A call for the regime to reflect the spirit and intent of the Native Title Act, and not reduce it to a series of procedural hurdles for Traditional Owners.

This submission proposes a suite of targeted reforms to restore trust and integrity to the regime, including stronger accountability for proponents, independent oversight of negotiations, and enhanced support for Traditional Owner institutions. It also includes community-generated recommendations for how government can create a more culturally safe and just regulatory environment for decision-making on Country.

We thank the Commission for the opportunity to contribute and stand ready to work collaboratively on future reform processes.

SUMMARY OF RECOMMENDATIONS

Part 2: Proceedings of the Symposium (Sections 4–8)

[5. Native Title Management Plans \(NTMPs\)](#)

Discussion Themes:

- Broad support for NTMPs as proactive, community-led land use mechanisms.
- Concern that optional application of NTMPs would undermine their authority.
- Discussion of registration procedures, state objections, and enforceability.
- Need for quality personnel, sufficient resourcing, and cultural authority.
- Desire for flexibility in reviewing and updating NTMPs without triggering full re-registration.

Recommendations:

- NTMPs should apply mandatorily once registered.
- Clear registration and objection pathways should be defined and handled by the NNTT.
- Proponents should not be able to bypass NTMPs via alternative pathways under the Act.
- Ensure effective enforcement mechanisms, potentially including sanctions.
- Develop panels of accredited practitioners to support PBCs.
- NTMP development must uphold cultural governance and be adequately funded.

[6. Impact Procedures \(Right to Consult and Right to Negotiate\)](#)

Discussion Themes:

- General support for shifting to an **impact-based model**.
- Deep concern over **state authority** to determine impact levels (low vs high).
- Worry that Traditional Owner definitions of impact (esp. cultural/spiritual) will be discounted.
- Demand for improved **transparency, accountability, and enforceability**.
- Strong view that determinations about project approvals should shift the **burden of proof** to proponents.

Recommendations:

- NNTT should oversee **impact classifications**, not just state governments.

- Develop **objection and appeal processes** for impact level assessments.
- Adopt the principle that acts should **not proceed without consent**, unless clearly justified.
- Reform s 39 criteria to ensure **rights-based, evidence-based assessments**.
- Ensure “adjustment obligations” by proponents/states are **legally enforceable**.

7. Agreement Making

Discussion Themes:

- Need for clearer standards of **good faith negotiation**, including obligations to disclose information and respond to proposals.
- Desire for mandatory content standards in agreements (e.g. no gag clauses, dispute resolution).
- Mixed views on **disclosure of agreement terms** and whether it supports or undermines Traditional Owner interests.
- Caution about setting **minimum payment standards** — could backfire.
- Calls for incentives, such as tying government funding to agreement standards.

Recommendations:

- Strengthen **good faith negotiation obligations** in s 31 using the *Njama! indicia*.
- Require **dispute resolution clauses**, and prohibit **gag clauses** in all agreements.
- Consider incentivising agreement quality through **government funding eligibility**.
- Support PBCs to engage **independent, culturally safe legal and commercial advisors**.

8. Compensation and Other Statutory Procedures

Discussion Themes:

- Current system of seeking compensation via s 61 is **inaccessible** and ineffective.
- Strong support for **upfront formula-based payments** as practical and just.
- Desire to distinguish between **compensation and benefits** — both are necessary.
- Interest in adapting models like Victoria's **TOSA “community benefits” payments**.

Recommendations:

- Introduce a **formula-based upfront compensation model** for future acts.
- Allow this to be reconciled against future s 61 claims.
- Ensure compensation can also apply where **FPIC was not obtained**.
- Promote further exploration of **community benefits models** for broader adoption.

Part 3: Additional Matters (Sections 9–11)

9. Meeting the Expectations of International Law

Discussion Themes:

- FAR and NNTT structures do not align with **UNDRIP**, especially Articles 32, 40, and 46.
- RDA protections are **suspended by s 7 NTA**, violating non-discrimination principles.
- Human rights obligations must be embedded in both processes and outcomes.
- Native title processes are **re-traumatising** and need healing and justice components.

Recommendations:

- Reform NNTT and FAR processes to comply with **international human rights law**.
- Reinstate the **application of the RDA** to the NTA.
- Resource **community-led healing and cultural governance initiatives**.
- Embed a rights-based lens in all legislative amendments and decision-making structures.

10. PBC Resourcing, Costs and Implementation

Discussion Themes:

- PBCs face **chronic underfunding** despite holding responsibilities over 50% of Australian land/waters.
- Basic Support Funding is inadequate; many PBCs operate **without staff or income**.
- Strong economic case exists for increased PBC funding (KPMG modelling).
- Interest in establishing **perpetual or regional future funds**.
- Calls to **remunerate unpaid cultural labour** and improve proponent funding models.

Recommendations:

- Establish a new **Native Title Sector funding program** with operational, establishment, and strategic support streams.
- Create **direct-to-PBC funding pathways**, not just through NTRBs/NTSPs.
- Consider a **national perpetual capital fund** and explore good standing agreements.
- Fund culturally restorative activities and **professionalisation of governance roles**.

11. Discrete Issues

Discussion Themes:

- **Clean energy projects** must only proceed with Traditional Owner consent.
- Native title rights to water should trigger **high-impact assessment** pathways.
- **Subdivision F** facilitates extinguishment without full process and should be repealed.
- Need stronger protections for **offshore cultural heritage** and recognition of **ICIP**.
- Recognition that ICIP use in agreements must be governed by consent, attribution, and benefit sharing.

Recommendations:

- Clean energy approvals must require **binding agreements** with Traditional Owners.
- Treat impacts to water rights as **high impact future acts**.
- **Repeal Subdivision F** and tighten controls on non-claimant applications.
- Legislate protections for **ICIP and intangible heritage**, aligned with UNDRIP Article 31.

12. Conclusion and Final Recommendation (Section 12)

Discussion Themes:

- The ALRC's work is a significant and welcome step, but far-reaching reform is still required.
- A coordinated, First Nations-led reform process must continue beyond this review.

Recommendation:

- Establish a **First Nations Native Title Reform Council (FNNTRC)** to guide long-term reform across the Native Title Act and associated legislation.

Part 1 Introduction

This submission is made by the National Native Title Council (NNTC) in collaboration with the Mabo Centre to the Australian Law Reform Commission's Review of the Future Acts Regime.

Following this introductory part, the submission precedes two main parts. Part 2 provides a summary of the proceedings of the Future Acts and the Native Title Regime – Where to Now? symposium jointly hosted by the Mabo Centre and the National Native Title Council on Friday 27 June 2025. Part 3 provides an examination of several significant issues that the Symposium did not have the opportunity to consider.

To commence however with a brief description of the organisations that brings forward this submission and the Symposium that provided the basis of the submission.

1 National Native Title Council

Established in 2006, the NNTC is the peak body for Australia's Native Title and other Traditional Owner organisations. The NNTC represents Native Title Representative Bodies and Service Providers as well as Prescribed Bodies Corporate recognised under the Native Title Act 1993 (Cth.) and other equivalent Traditional Owner Representative Institutions (TORIs) established under Traditional Owner land rights legislation such as the Traditional Owner Settlement Act 2010 (Vic) (TOSA), the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) and the Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981 (SA).

The NNTC's work is guided by a rights-based approach rooted in best practice standards, such as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and Free, Prior, and Informed Consent (FPIC). It is a regular participant in a range of United Nations (UN) and regional international fora for addressing issues associated with the interaction between the resources sector and Indigenous Peoples across the globe.

In addition to representing the interests of our members the NNTC is a signatory to the National Agreement on Closing the Gap, the secretariat for the First Nations Heritage Protection Alliance (FNHPA) and Sea Country Alliance (SCA), the PBC Steering Group, and a member of both the First Nations Economic Empowerment Alliance with the Australian National University and the Coalition of the Peaks. This national leadership role of the NNTC is recognised by the Australian Commonwealth, state governments, and by key resources sector peak bodies.

2 The Mabo Centre

Launched in February 2025, the Mabo Centre is a newly formed First Nations-led partnership between the NNTC and The University of Melbourne. The Mabo Centre builds on the extensive and ongoing engagement with Traditional Owners undertaken by the NNTC.

Based on the University's Parkville campus, and working closely with Traditional Owners and communities, the Mabo Centre undertakes research to identify best practices, deliver training to strengthen and share knowledge, and develop local leadership skills to maximise economic outcomes through leveraging land and sea rights. Overtime, this will ensure strong principles of self-determination are embedded into native title agreements, better supporting community aspirations and provide greater opportunities for economic development and

entrepreneurship on Country. Through this work, the Mabo Centre will provide that the benefits of land and sea rights are fully realised.

The Mabo Centre aims to achieve these outcomes through four focus areas:

- Research informing national policy development that will support Traditional Owners achieving the best possible outcomes from the resources they control and influence.
- Training working with Traditional Owners and their leadership to strengthen their capacities in crucial policy areas and skills.
- Exchange sharing knowledge through networked learning to support stronger Traditional Owner connections and effective agreement making.
- Acceleration driving entrepreneurship and leadership for Traditional Owner developed economies.

The Mabo Centre is guided by a Board of First Nations leaders and economic experts, Co-Chair Jamie Lowe and alternate Co-Chairs Professor Marcia Langton and Professor Paul Kofman; and newly appointed Director, Professor Eddie Cubillo.

3 Future Acts and the Native Title Regime – Where to Now?

On Friday 27th June 2025, the Mabo Centre hosted a symposium titled Future Acts and the Native Title Regime – Where to Now? (Symposium) at the Woodward Conference Centre, University of Melbourne, Naarm. The Symposium brought together the Australian Law Reform Commission (ALRC) and First Nations leaders from across the country to discuss the ongoing Review of the Future Acts Regime.

The Future Acts regime (FAR), part of the Native Title Act 1993 (Cth) (NTA), has not been reviewed for almost three decades. The Symposium provided an opportunity for over fifty Traditional Owner organisations, selected expert practitioners, and academics to explore and consider the proposals contained in the Discussion Paper. Participants came from across the whole of Australia to engage in an important and insightful conversation about how the FAR can be amended to better serve the interests of Traditional Owners.

Wurundjeri elder Tony Garvey welcomed the participants to his people's traditional lands before the Symposium got underway. The day was divided into four broad sessions, each covering one of the more significant proposals from the Discussion Paper. These proposals and the associated debates and discussions are considered in more detail below.

This diverse cohort, representing a wide interdisciplinary knowledge base, is uniquely placed to provide feedback and propose any additional matters that should be considered important in the ALRC review.

The Australian legal structures around recognition of the rights of Indigenous Peoples to decision making over their traditional lands, natural resources and cultural heritage are complex, and, relative to many other jurisdictions, quite evolved. The Mabo Centre and the NNTC thanks all those who participated and provided their thoughts and insights. Similarly, the NNTC and the Mabo Centre welcome this opportunity to make this submission to the Australian Law Reform Commission to inform the ongoing of the review of the FAR.

4 Structure

As explained in the previous section, the Future Acts and the Native Title Regime – Where to Now? symposium explored the issues contained in the ALRC 2025 Review of the Future Acts Regime Discussion Paper (Discussion Paper) in four sessions. These were:

- Native Title Management Plans (NTMPs);
- Impact Procedures (Right to Consult and Right to Negotiate);
- Agreement Making; and
- (Future Act) compensation and other statutory procedures.

This section of the submission will follow the structure of the Symposium. The substance of the proposals under each of these headings is well described in the Discussion Paper and will not be repeated, except in broadest summary, in this submission.

5 Native Title Management Plans

The key elements of this proposal are that a Prescribed Body Corporate (PBC) is empowered to develop a NTMP in relation to its determination area. The NTMP will specify relevant future act procedures that apply to different types of activity within the determination area. The specified procedures may vary across differing zones within the determination area. The ALRC suggests that, through this mechanism, PBCs would be empowered not only to prevent or restrict activity in particularly sensitive areas but also to encourage particular types of activity or industry (for example solar or wind) in appropriate locations through the development of light hand approval processes.

The issues explored in relation to this proposal covered were:

- i) The question of whether the relevant provisions of a NTMP would provide a mandatory FAR (subject to its terms) in the determination area or if a proponent could elect to adopt the FAR set out in the Act in lieu of the regime under the NTMP;
- ii) What the registration requirements of a NTMP would entail. In particular:
 - whether there would be a process of objection to registration of a NTMP and, if so, by what parties; and
 - on what basis and against what criteria would such objections be considered, and, by what authority;
- iii) Whether, if a NTMP provided that a particular activity was either completely prohibited or could only proceed with the consent of the PBC, whether this decision could be overturned by the National Native Title Tribunal (NNTT) and what the processes attached to such an application may be. Under this heading was also considered matters associated with the enforceability of the terms of a NTMP; and
- iv) Consideration of issues associated with the development of NTMPs. This was in respect of four matters:
 - the financial resources required, and the considerations associated with the adoption of a proponent pays model for securing resources;
 - the suitability of personnel engaged to assist with development of NTMPs, which reflected a recurring discussion around ensuring PBCs had access to consultant personnel of assured capacity;

- the need to ensure the cultural authority of native title holders in the development and final content of the NTMP; and
- the need for, and frequency of, revision of NTMPs.

5.1 Mandatory application of registered NTMP?

Discussion on this point was fairly brief. There was a strong view expressed by participants that where a NTMP was in place, having its application as “optional” would undermine the proposed process. It was broadly agreed that if a PBC spent the effort and resources to develop and have registered a NTMP, it would be pointless if a proponent could “elect” to adopt the regular procedures under the Act.

The discussion around this issue also identified that the proposal of a PBC’s NTMP being limited to its determination area may require some variation to accommodate areas of sea country. This particularly regarded where pursuit of a formal determination was not considered worthwhile but there was existing statutory and regulatory recognition of the status of the littoral PBC as having responsibility for the adjacent sea country.

5.2 Registration of NTMPs

The discussion at this point explored whether the registration requirements of a NTMP would be merely “formal”. By this it was meant that registration would be automatic consequent upon a PBC having complied with the formal requirements of the specified elements of a NTMP (content, specified adoption procedures, any specified notice procedures etc.).

The alternative explored was that there would be some avenue for a party to object to the provisions of a NTMP. Given the prospective nature of a NTMP, the most obvious party to seek to object would be a state (or territory) government¹, with the likely grounds of objection being that the proposed NTMP was inconsistent with the land management aspirations of the state (or territory).

It was noted that incorporating such an objection procedure would make the NTMP proposal more likely to eventually be legislated. It was also noted that the incorporation of such an objection to a NTMP registration procedure also highlighted the need for clarity around the issues of the criteria by which such objections would be assessed, and the authority that would be considering objection applications.

As to this last point there was consensus that such a function (if it existed) would be performed by the NNTT. As to the first point (criteria), this was not explored fully on the day. However, it was the first of many references to the need to review the current s 39 “criteria for the making of arbitral body determinations” both in the NTMP context and the broader context of disposal of Future Act Determination Applications (FADA).

5.3 Objections to Application of NTMP and Enforcement of NTMPs

Under this heading was considered matters associated with the operation of a NTMP after its registration. The first matter discussed went to the circumstances where, under the terms of a NTMP, an activity was:

- prohibited;

¹ In this document state governments and territory governments will be referred to by the abbreviated term “state”. The term is also apt to describe the Commonwealth in those instances where the Commonwealth is the “government party”.

- authorised only with project-specific PBC consent; or,
- authorised only in accordance with specified conditions and a proponent sought to object to this outcome.

The first point noted was that if registration of a NTMP was the subject of a state objection process, a proponent objecting to the application of a NTMP in a particular project context would (presumably) be doing so without the support of the state. This fact may impact on either (or both) the criteria against which a project-based objection would be assessed or the nature of assessment against common criteria.²

Beyond this, discussion moved to the importance of revision of the s 39 arbitral criteria to ensure fairer outcomes for native title holders. The Symposium had noted in this regard that by mid-2025, there were only three out of 156 future act determinations by the NNTT, which found that the future act must not be done. This represents less than 2 per cent of determinations. Further, 90 of the determinations found that the future act may be done without any specified conditions.³ These figures noted, there was also preliminary discussion as to how criteria for an objection against application of NTMP procedures may differ (if at all) from the general FADA criteria.

The potential for a proponent to seek to pursue an objection against the application of NTMP procedures to a particular project also raised the procedural question as to a requirement to negotiate with the PBC in these circumstances. There was a strong view that a proponent should not be able to “jump” directly to the NNTT if they sought (for example) to object to the application of a “no go zone” provision of a NTMP. This raised the ancillary issue of the potential mediation role of the NNTT in these circumstances. This last matter was not pursued in detail, but it was noted as one of the many additional functions under consideration for the NNTT.

A further matter discussed was that of the enforceability of the proposed NTMP. The discussion at this point also expressed frustration at the existing jurisprudence⁴ to the effect that there was no real consequence if a state failed to comply with right to comment or right to consult provision under the Act. In the context of NTMPs, the discussion went to the need to develop mechanisms, which enabled PBCs to effectively, cheaply and expeditiously compel compliance by proponents within the terms of a NTMP. There was suggestion that mechanisms leading to some sanction against a proponent’s title or interest (forfeiture) were the most effective.

5.4 Issues Associated with NTMP Development

5.4.1 Financial Resourcing and Proponent Pays

The Symposium was of the view that the development and registration of a NTMP would involve a significant resource allocation from a PBC and that most PBCs had no resources for this or any other purpose for that matter. This prefaced a later discussion surrounding the proposal in the Discussion Paper going to an independent “fund” for PBC funding purposes.

² That is if the assessment criteria specified, for example, “the project is in the overwhelming interest of the state”, would these criteria apply at all to objections to the application of a registered NTMP or would they apply but be unlikely to be satisfied.

³ Statistics sourced at Native Title Tribunal, [Search Future Act Applications and Determinations](#). [Accessed 7/7/2025]

⁴ *Harris v Great Barrier Reef Marine Park Authority* [2000] FCA 603

In the context of the NTMP it was agreed that, in some circumstances, there would be a single (or small group) of significant proponents that would support (financially) a PBC developing a NTMP. This was likely particularly to be in the context of mining or significant infrastructure development.

However, many PBCs would not be in this situation. The disadvantage of the prospective nature of the NTMP was that there was (generally) no identifiable proponent at the time of NTMP development that could be subject to the user pays principle. It was considered unlikely that a proponent (compelled) to follow the procedures under a NTMP could be made to pay a levy for the (historical) development of that NTMP.

The only apparent alternative was for government to bear the cost of NTMP development. Given the historic refusal to fund native title organisations generally, this was considered unlikely except in occasional cases of “national significance”.

5.4.2 Suitable Personnel

The discussion around this point commenced with the identification of the need to ensure that consultants, engaged for the purposes of assisting with the technical aspects of preparation of a NTMP, were engaged directly by the PBC. Reference in this context was made to the undesirable outcomes experienced in environmental impact assessment and some state Aboriginal and Torres Strait Islander cultural heritage regimes where consultants are engaged by proponents.

The discussion around personnel also led to comment regarding the shortage of experienced, competent, trustworthy personnel across a range of disciplines in the native title sector. The outcome of this conversation was a broad consensus around the desirability of the development and maintenance of panels of ‘accredited’ practitioners of various disciplines. The tentative notion was that access to available funding, (for example) for NTMP development, would require engagement of an accredited practitioner. The same model it was thought could be adopted in relation to other functions, such as compensation applications.

5.4.3 Cultural Authority

There was valuable comment from several participants around the need for, and methods to, ensure that, NTMPs maintained and enhanced the cultural authority of Native Title Holders. In this regard PBC participants expressed support for the concept of NTMPs as a tool to enable proactive, community led decision making about land use, heritage protection, and development priorities. They saw that PBCs with a clear vision for land activation and tenure reform would view NTMPs as an opportunity to embed cultural governance at the centre of statutory processes and to ensure that Traditional Owners have a genuine say in how their Country is managed.

It was stated that native title, while legally recognised, has not yet translated into functional control or meaningful use of land for many PBCs. Native title recognition is often hollowed out by procedural red tape, with Traditional Owners often remaining “renters on their own land” due to outdated tenure systems and limited procedural rights under the current FAR. It was suggested that NTMPs might present an opportunity to break through this current reality.

5.4.4 Amendment and Revision of NTMPs

A matter raised in the Discussion Paper but only briefly discussed at the Symposium was the desirability of having a mandatory review period for NTMPs. There was a mixed view on this point with participants noting the desire to ensure a NTMP was kept “up to date”. Against this was a reluctance to require a PBC to go through the additional expense of NTMP review and re-registration if the PBC was of the view that there were no changed circumstances to warrant this. There was general agreement that amendment or revision of a NTMP of a minor character should not necessarily warrant a full re-registration process, especially if this involved the possibility of re-litigating state objections.

6 Impact Procedures (Right to Consult and Right to Negotiate)

The Discussion Paper proposal on this matter was to move the FAR away from the current specification of activity or industry with mandated associated future act procedures. Rather the model would involve an assessment of the impact of a proposed action on native title rights and interests. An action that was assessed as “low impact” would attract a uniform “right to consult”. An action assessed as high impact would attract a uniform “right to negotiate”. The ALRC suggested the (initial) assessment of impact would be undertaken by the state.

Discussion on this topic initially focussed on the “right to consult” issues, which broadly included matters associated with the assessment of impact process. The subsequent discussion focussed on issues associated with the proposed “right to negotiate process”.

6.1 Right to Consult and (low) Impact Assessment

The ALRC opened discussion by noting the right to consult would involve an obligation on the proponent to provide a base level of information. It would also require any comments made by the native title parties to be taken into account and for decision makers to have to reference these when reaching a decision as to whether the action should proceed. There would be an accompanying obligation to adjust the proposed action to minimise impact on native title rights and interests as far as possible. In this respect, it was noted the proposal was similar to consideration by the offshore regulator of environment plans and management plans under the offshore gas and wind energy regulatory regimes.

The first issue discussed under this heading went to the question of whether the state would inappropriately classify actions as low impact in an effort to avoid right to negotiate implications. It was noted that often under existing future act and similar (Victorian TOSA) arrangements, decisions as to classification of future acts were made by Local Government Authority personnel with little training or experience in native title matters. This often led to inappropriate classification decisions that required challenge.

A related concern was whether the obligation to adjust the proposed action to minimise impact on native title rights and interests would be adhered to by the state. This inevitably led to a discussion about the mechanism for and practicality of enforcing the state’s legal obligations in this regard.

In regard to the first matter, the ALRC suggested that the publication (by the NNTT) of “guidelines” for the appropriate classification of future acts as “low impact” (and therefore not “high impact”). This proposal was generally well received, however the lack of legal enforceability of “guidelines” raised the question of the need for an “objection to classification” process. This was identified as a further additional function for the NNTT.

There was some concern expressed at the potential resource implications for native title organisations of having to continually object to classification decisions by recalcitrant states.

A related and somewhat more nuanced concern went to the difference in perception of “impact” from proponents and states as opposed to Traditional Owners. The example explored in this regard was an offshore seismic testing program that impacted a site of cultural significance. In this instance the seismic testing would have no ongoing tangible effect and would be relatively short in duration. This may suggest a “low impact” classification. However, to Traditional Owners the disturbance of a culturally significant location may be completely unacceptable.

A further nuance on this issue arose in the context of “project developments” where the nature of impact could alter over the life of the project. It was clear that the existing future act structures considered the impact of native title rights and interests that may be affected through the exercise of the rights created under the contemplated future act. The same was true of the consideration of the impact of rights under the proposed reforms. It was not limited to a property assessment of how they (currently) intended to exercise those rights.

The question as to the enforceability of the state’s obligation to adjust the proposed action, to minimise impact on native title rights and interests in light of the outcomes of the consultation, was also the subject of discussion. The concern expressed in this regard was that if (for example) a state minister failed to adjust the conditions of a licence to reflect the outcomes of consultation with native title holders, there were few available enforceability options. At first blush the only available remedy would be a (somewhat precarious) judicial review of administrative action proceeding. This led to the possibility of a further additional function coming within the jurisdiction of the NNTT being considered.

6.2 Right to Negotiate and (high) Impact Assessment

The second component of the impacts assessment process was the management of those future acts deemed “high impact”. In this regard the Discussion Paper was suggesting an approach that allowed native title holders (subsequent to the mandatory receipt of necessary project information) in the first instance to challenge whether a proposal deemed “high impact” could proceed at all. This challenge would be determined by the NNTT.

In the event the NNTT determined that the “high impact” future act could proceed, a period of “good faith” negotiations of up to nine months would commence. Alternatively the parties could request the Tribunal, or the Tribunal could itself determine, to proceed and decide on what conditions the future act could proceed.

The discussion under this topic went to four main matters:

- The timeframes in which the overall process, and the negotiation timeframes in particular, took place;
- The potential procedural burden imposed on native title organisations by the volume of future act notifications;
- Issues associated with future act compensation; and
- The criteria by which the NNTT was making the various types of determinations proposed in the Discussion Paper.

In relation to the timeframes issue, it was appreciated there was a balance necessary between the practicalities of project approval and the need to ensure adequate, accessible information was presented to Traditional Owners; and, that they had the necessary

opportunity to consider and respond to the progress of negotiations. In this regard it was noted that the existing timeframes under the NTA were wholly inadequate and that the timeframes proposed in the Discussion Paper were an improvement.

As to the procedural burden, the ALRC stated it was aware that in some Native Title Representative Body (NTRB) areas there were of the order of 300-400 future act notifications in a single month. This created an impossible burden for both PBCs as well as their supporting NTRB or Native Title Service Provider (NTSP). The discussion on this point revolved around both the desirability of ensuring systems that were as efficient as possible but also the fundamental need for appropriate funding for native title organisations. There was also reference to the earlier discussion regarding improved mechanisms to ensure appropriately trained and qualified staff for native title organisations.

The contents of the discussion around compensation are reported under a separate heading below (8 Compensation and Other Statutory Procedures) in conjunction with the discussion held separately on this matter later in the day.

The discussion around determination criteria constituted the major part of the deliberations under this heading. The first aspect of this discussion went to the criteria by which the NNTT would determine the preliminary question of “whether the act could proceed”. The ALRC was proposing in this respect the test be whether native title holders had “unreasonably withheld consent” to progressing the proposal. This was seen as important as it ensured the evidential onus was placed on proponents/the state to demonstrate why Traditional Owner objection to the project should be overridden. In turn, this approach was seen to give greater effect to the concept of “consent” within FPIC than if the evidential onus was on the Traditional Owners to demonstrate why the project should not proceed. There was a general agreement with this approach.

There was also a more general discussion around the existing s 39 criteria. The frustration with current FADA outcomes (reported above) was reiterated. There was a broad consensus that current future act determinations assume (explicitly or implicitly) that there is a public interest in granting the licence (or other relevant interest) and it is inferred that there is an economic benefit to the state - even when there is no direct evidence given in support of this. This process of imputation would need to be specifically addressed in any revised criteria with proponents/states required to put on project specific evidence to demonstrate this.

There was some view expressed that this approach could be encapsulated in criteria structured such that it was taken as a starting point that the state should not interfere with the existing property and cultural rights of Traditional Owners. With this as a starting point, the responsibility would then be for the state/proponent to demonstrate that the benefit of the proposal, to both the broader society and the relevant Traditional Owners, outweighed the necessarily consequential violation of Traditional Owners’ rights arising from the grant of the interest. This, it was suggested, accorded with the current jurisprudence regarding FPIC in the context of UNDRIP.

There was also some consequent consideration of the structure and nature of the NNTT itself. In this context there was reference to the bipartisan models of other specialist tribunals

such as those in the industrial relations sector. There was also reference to the relevant provisions of UNDRIP.⁵

In the specific context of where the NNTT is making a determination that a future act can proceed with conditions, there was an unanimous view that the current s 38(2) should be amended. The current s 38(2) prevents the NNTT imposing a condition relating to the payment of royalties (or royalty equivalents) as a condition imposed on a future act determination.

7 Agreement Making

The first session after the luncheon adjournment went to the issue of “Agreement Making”. The Discussion Paper under this heading posed questions around whether there should be regulation of the content of native title agreements and the conduct of the parties leading to these agreements. It was noted that, in the context of the discussion, “native title agreements” primarily referred to the current s 31 agreements, but that the topic may have a broader application in light of any accepted reform proposals. It was also noted the Discussion Paper included Indigenous Land Use Agreements (ILUAs) within the term native title agreements, however discussion at the Symposium focussed on the s 31 (type) agreements. It was noted that due to their “voluntary” nature different issues arose in the context of ILUAs.

7.1 Conduct Requirements

The Symposium noted that the proposal to incorporate the Njamal indicia⁶ into the requirements of “good faith negotiations”, under s 31(2), had been considered in the process of development of the 2019 amendments to the NTA but not progressed. It was noted that the Njamal indicia could be strengthened by a clear obligation to seriously “negotiate” – to put offers on the table and respond to alternative proposals. Beyond reconsideration of this possibility, what was also being considered were requirements around provision of project information and provision of resources to native title parties to support the negotiation process. There was general support for these matters which were considered unconscientious.

7.2 Content Requirements and Agreement Disclosure

Some matters proposed for mandatory inclusion in native title agreements, that were considered unconscientious, were:

- A prohibition on gag clauses or provisions seeking to limit access to cultural heritage legislation or civil remedies;

⁵ **Article 46(2)** “In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.”

Article 40: “Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights”.

⁶ *Western Australia v Taylor* [1996] NNTTA 34.

- Requirement for dispute resolution clauses; and
- (Potentially) a review and amendment mechanism (there was some question regarding universal mandatory application of this aspect).

Concern was expressed that (the Commonwealth) Government may seek to broaden the scope of mandatory content requirements, to attempt to insert requirements alleged to advance government policy positions, in spite of the essentially private nature of native title agreements.

There was also discussion regarding any requirements for disclosure of (aspects of) the content of native title agreements. In this respect it was noted there was balance between the desirability of knowledge of “the market” in the negotiation against the possibility of this information being used to undermine the position of Traditional Owners. It was also noted that public access to information of this nature could be used by third parties to support extraneous political objectives. There was no broad consensus on this matter.

There was also unresolved discussion regarding the imposition of “minimum rates” in agreements that would be enforceable at the stage of registration. There was no conclusive view as to whether this would provide a “safeguard” or a “bottom” to be raced to.

The discussion at this point also traversed (again) the issue of competency standards across relevant practitioners and methods to resource PBCs so that they may engage capable consultants.

A final point that was made in the context of the discussion around standards of agreement content went to methods of enforcement. It was noted that these usually went to some regulatory requirement around registration of the agreement. In discussion it was identified that a further useful mechanism was to have content requirements enforced through conditions of proponent access to (state or Commonwealth) project funding. Under this approach a project would not be eligible for government funding unless it has concluded (to an acceptable standard) an agreement with the relevant Traditional Owner group.

8 Compensation and Other Statutory Procedures

The fundamental issue raised in the future acts and compensation context goes to the lack of practical access for native title holders. To illustrate this point - a future act, valid under the processes of the NTA, will be authorised to occur and “affect” native title rights and interests. Inevitably a right to compensation for the effect on native title rights and interests will arise. However, the only method to realise this right (unless provision is made in an ILUA or s 31 agreement) is to bring a compensation application under s 61 of the NTA.

There is an immense logistical, legal and temporal burden in bringing a compensation application such that it would only ever be undertaken (if at all) in the context of an application for compensation for all acts affecting native title rights since 1975 (commencement of the Racial Discrimination Act 1975 (Cth) (RDA)).

The practical outcome of this situation is that native title holders receive no compensation for the impacts of future acts until an unspecified (and potentially unattainable) date in the future. The Discussion Paper investigates avenues to overcome this shortcoming.

One proposal that had very broad support in principle is for there to be a formula based upfront payment of compensation for future acts going forward. This payment would be offset or discounted) from any future payment of compensation following a formal s 61 compensation application.

Much of the discussion around this topic focussed on the practicalities of implementing this broadly agreed proposal. One issue that was explored was the extent to which payment relating to future acts was compensatory in nature or payment for services rendered. The likely outcome of this issue, it was noted, may depend on the terms of any individual future agreement.

It was also noted that the Land Use Activity Agreements under the Victorian TOSA included “community benefits” payments of a nature similar to that proposed in respect to future act compensation “pre-payments”. It was agreed this may provide a useful model to further investigate.

8.1 Cultural Heritage Matters

The Symposium concluded with a brief consideration of the issue raised in the Discussion Paper as to the interaction of cultural heritage issues and native title, particularly agreement making. Most of the Symposium participants were also involved in the development of reforms to the existing Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) (ATSIHPA) through the FNHPA and its partnership agreement around this issue with the Commonwealth Minister for Environment and Heritage.

A synopsis of the proposals under development was provided to the Symposium. It was noted that the proposals to reform ATSIHPA had proceeded on the basis that there was no need to (substantively) reform the NTA in order to give effect to them. However, the reforms contemplated a much greater emphasis on agreement making between Traditional Owners (native title holders their organisation) and proponents. In this context it was envisaged that a native title agreement could constitute an agreement for the purposes of ATSIHPA but would not necessarily have to.

The far broader application of the provisions of ATSIHPA, though not being confined to matters that may have an impact on extant native title rights and interests, was also identified.

Part 3 Additional Matters

Part 2 of this submission reported on the proceedings of the Symposium Future Acts and the Native Title Regime – Where to Now?. It explored many of the key proposals contained in the Discussion Paper as these were discussed at the Symposium.

In this Part of the submission a range of additional matters are examined. These matters are of significance to Traditional Owners. However, there was inadequate time in the one-day Symposium to investigate issues beyond the key procedural reforms contained in the Discussion Paper.

This subject matter considered in this Part goes to:

- The expectations of international law – particularly UNDRIP but also the question of the application of the RDA and questions of social justice (section 9);
- As an aspect of giving genuine effect to UNDRIP the requirements for and models around adequate resourcing of PBCs (section 10); and
- Several specific matters not otherwise addressed. These are considered in section 11 and include:
 - NTMPs in the specific context of clean energy proposals;
 - compensation (in the broader context); and
 - some broader considerations regarding cultural heritage: offshore cultural heritage and Indigenous Cultural and Intellectual Property (ICIP).

This Part, and the submission overall, concludes with a recommendation designed to facilitate the ongoing process of reform to the NTA and its FAR.

9 Meeting the Expectations of International Law

9.1 UNDRIP

Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia states:⁷

As a foundational principle, Australia's Indigenous Peoples are entitled to expect that Indigenous Cultural Heritage legislation will uphold the international legal norms contained in the UNDRIP.

The Discussion Paper identifies the significance of UNDRIP⁸ in the reform of the FAR. The NTA was passed in to law many years prior to the adoption of UNDRIP by the UN General Assembly in 2007. Not surprisingly the NTA does not reflect in its language or structure the contemporary human rights-based framework of UNDRIP. However, many of the recommendation of the Discussion Paper would work towards this end. The proposed amendments to the FAR provide a valuable opportunity to commence the process of modernising the language and structure of the NTA overall to reflect that of UNDRIP,

Given this broad acceptance of the contemporary application of the rights of Indigenous Peoples, as contained within UNDRIP, it is clearly essential that any review of the FAR

⁷ Heritage Chairs of Australia and New Zealand, *Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia*, (Government Policy Document, 2020) (*Dhawura Ngilan*), 24.

⁸ *United Nations Declaration of the Rights on Indigenous Peoples* GA/res/61/295 Ann. 1 (Sept 13, 2007).

ensures that these processes are now explicitly in accordance with international human rights-based expectations.

Without the need to undertake a comprehensive mapping exercise, it is clear that most of the current provisions of the FAR do not align with the expectations under UNDRIP. While many of the proposals contained in the Discussion Paper and explored in Part 2 would bring the FAR into closer alignment with UNDRIP, this alignment should be made more explicit in language and key provisions.

A number of the objectionable provisions of the current FAR were explored in Part 2. Significant amongst these is the existing s 33. Under the NTA s 33, negotiations at this stage can contemplate the ultimate agreement including the payment of “royalties” to the native title holding/claiming community. If an agreement is reached, the title can be granted.⁹ At the conclusion of the period, if no agreement is reached, the state or the putative miner can seek arbitration of the matter.¹⁰

This illustrates the point that the key provisions of the FAR, that need amendment to bring the legislation in accord with UNDRIP and therefore international expectations, go to the NNTT and the criteria by which it makes FAR determinations.

The relevant provisions of UNDRIP are Articles 46(2) and 40. These were referred to in the Symposium. They warrant restatement in full at this point.

Article 46(2): “In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.”

Article 40: “Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights”.

The reforms to the NNTT and the criteria by which it makes FAR determinations must conform to these provisions. A determination that a future act may proceed in the absence of consent by Traditional Owners must conform to the human rights assessment described in Article 46(2). The NNTT making such a determination must “give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights”.

Unless these reforms are in place, other commendable existing (ILUAs) or proposed (NTMPs) non-arbitral processes within the FAR are undermined.

Reform of the NNTT to bring it into conformity with the expectations of these provisions is important. So too are other proposed reforms such as requirements for information and ensuring adequate timeframes to bring overall alignment to the FPIC requirements of Article 32(2). The proposed future act compensation reforms are necessary to bring alignment with Article 32(2).

⁹ NTA, s 31.

¹⁰ NTA, s 35.

Three other significant reforms require attention to more fully bring the NTA into accord with UNDRIP and the expectations of international law. These go to:

- The recognition and resourcing of “representative institutions”, the application of one of the primary international human rights instruments;
- The International Convention on the Elimination of All forms of Racial Discrimination (ICERD), given domestic effect in Australia through the RDA; and
- The broader requirements of social justice in the NTA FAR.

These several matters are explored more fully in the following sections.

9.2 FPIC and Representative Institutions

The management of collective rights by the Representative Institutions must be adequately resourced to appropriately recognise FPIC.

As a collective right, the exercise of the right to FPIC (or the management of cultural heritage) can only occur through operation of the appropriate Representative Institution (per Article 18). Within the NTA, the PBC satisfies the definition of Representative Institution for the purposes of UNDRIP. So too do the NTRBs recognised under the NTA.

While this fact satisfies an essential component of the exercise of a right to FPIC with the FAR, it also points to the desperate need to ensure adequate resourcing of PBCs to undertake these functions. Without these operational resources, any legal structural satisfaction of the requirements of FPIC is meaningless.

The fact that without adequate resources no amount of legislative reform will operate to genuinely give effect to the expectations of UNDRIP, suggests this matter warrants closer examination. It is noted that the Discussion Paper raises the prospect of a perpetual capital fund for the purposes of providing core operations funding for PBCs. A detailed exploration of the funding requirements of PBCs is contained in section 10. That section also examines models for a perpetual capital fund through consideration of examples from overseas jurisdictions. This work was proposed by the Sea Country Alliance (SCA), a body of Traditional Owner organisations also affiliated to the NNTC, working for reforms to the offshore future act regimes under various legislative frameworks.

Before moving to that examination though, two other general considerations of the interaction of the FAR with human rights expectations warrant identification.

9.3 Racial Discrimination Act

The exemption of the RDA through s 7 of the NTA needs be reversed. The removal of protections afforded by the RDA, regarding standards of equality and non-discrimination, was confirmed in *Western Australia v Commonwealth*. Here the court stated that ‘the general provisions of the Racial Discrimination Act must yield to the specific provisions of the Native Title Act in order to allow those provisions a scope for operation’.¹¹

The cessation acknowledges that the effect of the NTA on those protections would be deleterious. To this point is that specific provisions within the FAR, enacted in 1998, ensured that:

¹¹ [1995] 183 CLR 373, 483-484.

Future pastoral and agricultural grants, and grants of water and fishing rights; aspirations of existing non-native title holders to additional rights and to additional periods of tenure were given effect over native title; the ambit and significance of the right to negotiate was severely reduced; and other procedural rights of native title holders were diminished.¹²

Such suspension of the RDA does not meet the expectations of international law. Both within UNDRIP and the ICERD.

9.4 Human Rights and Social Justice

The native title system and processes are unnecessarily traumatic for Traditional Owners. The trauma of justifying connection through a Western legal system is compounded by the inter-generational trauma from that original dispossession, often manifesting in lateral violence within communities.

The Australian Human Rights Commission *Women in Native Title: Native Title Report 2024* goes on to describe how absences in native title process participation assist this trauma:

Our young people are often ignored, our women are often not recognised for their knowledges, and our traditions are often excluded from the process. The system has thus created disrespect and distrust for customary governance and decision-making.¹³

Any FAR processes must recognise (re)traumatisation of native title processes and address embedded prejudices. As recommended in the above report, the FAR should “resource and support bespoke community initiatives for healing, educating and empowering communities in the wake of native title.”

Such ‘culturally restorative and supportive community led’ initiatives must be identified by PBCs and funded by government.¹⁴ Broadly, such initiatives might include embedding gender equality at all stages of the native title process, culturally safe and inclusive governance development, and creating gender equity throughout knowledge mapping, protection and ICIP processes.

Often the trauma to Traditional Owners arising from interaction with FAR processes is caused or intensified by an absence of resources in the relevant TORI (PBC). The need for adequate resourcing of TORIs to give any genuine effect to the principle of FPIC was also explored in section 9.2 above. The following section 10 explores this matter in greater detail.

10 PBCs - Resourcing, Costs and Implementation

10.1 Existing Chronic Underfunding

There are currently 284 PBCs¹⁵ across Australia undertaking statutory and cultural responsibilities and this number is expected to exceed 300 by 2026.¹⁶ PBCs currently hold legal rights and interests to almost 50 percent of Australia’s land and waters. They are typically very small, volunteer-led organisations with few non-land assets or income. In 2021, the Centre for Aboriginal Economic Policy Research (CAEPR) found that 78 per cent of

¹² Bartlett, R. (2023) *Native Title in Australia* (LexisNexis, 5th ed) 562-563. See also, *Issues Paper*, 7 [32]-[33].

¹³ Australian Human Rights Commission (AHRC) (2024), *Women in Native Title: Native Title Report 2024*, (12).

¹⁴ Ibid AHRC (333).

¹⁵ As of 18 June 2025.

¹⁶ National Native Title Council (NNTC) (2024), *State of the Sector – short report*, 5.

PBCs reported annual income of less than \$1 million (36 per cent having nil income).¹⁷ A similar proportion of PBCs reported no assets or assets valued under \$1 million, and 58 per cent reported having no employees. PBCs and their members are often then unable to engage meaningfully with opportunities that arise across their native title land, or their statutory roles imposed by government.

Despite their statutory roles, PBCs receive very little direct operational funding from governments. The majority of PBCs are eligible for Basic Support Funding (generally \$50,000–\$80,000 per year) through an NTRB or NTSP. However, this funding is limited to basic administration and compliance activities and is largely provided by the NTRB/NTSP as in-kind support, rather than directly funding the PBC. Additional to these functions, as member-based organisations, they must also have the appropriate capacity and resources to uphold common law holders' rights and interests, maintain cultural obligations, and develop in a sustainable fashion.

PBCs undertake statutory functions based on the cultural knowledge and connection of their members. It is because of this cultural knowledge and authority that PBCs are charged with considering land-based statutory approvals. Accordingly, to effectively undertake their statutory functions PBCs must also be supported to maintain and develop the cultural capacity of their members.

PBCs are required by legislation to undertake specific functions. The NTA preamble clearly identifies the importance of rights holders being able to 'enjoy fully their rights and interests' and that those rights and interests 'need to be significantly supplemented' and that the 'appropriate bodies be recognised and funded to represent Aboriginal and Torres Strait Islanders'.¹⁸

The current funding of PBCs does not reflect the recurring annual costs of operation and compliance, thereby explaining why we continue to see PBCs without the capacity, income or resources to hire staff, establish efficient processes, and progress to development as they choose. These deficiencies are highlighted by the following data:

- Basic Support Funding is only provided to 62% of PBCs at an average of \$70,000 (extended to 75% in 2021-22 budget);
- Small-sized PBCs comprise over 60% of the total native title corporations in Australia, yet account for just 1% of total income and a little over 3% of grant income;¹⁹
- Large native title corporations make up less than 10% of all native title corporations but represent over two-thirds of the total income;²⁰
- Compensation funds are used to finance corporate compliance;
- PBC capacity demonstrably impacts efficiency and effectiveness of future act dealings;
- Despite small PBCs making up 60% of native title corporations, they account for just 1% of total income and 3% of grant income;²¹

¹⁷ Woods K., Markham F., Smith D., Taylor J., Burbidge B. and Dinku Y. (2021) *Towards a Perpetual Funding Model for Native Title Prescribed Bodies Corporate*, Commissioned Report No. 7, Centre for Aboriginal Economic Policy Research, Australian National University. <https://doi.org/10.25911/6FPY-AV98>

¹⁸ Preamble NTA, cited in Woods et al. above n17, (2021).

¹⁹ Lucas, M. (2024) 'The Future Act Regime in Australian Native Title: Data Analysis, Trends, And Insights', *University of Western Australia Law Review* 51.2, 249

²⁰ Ibid Lucas.

- The three highest income PBCs are in Western Australia with a combined income of \$100 million (26.6%) of the national total. Likely attributable to mining activity; and
- Government funding for core compliance of PBCs covers around 10% of the costs of obligations.²²

PBCs need to have the appropriate capacity and resources to fulfil statutory obligations, uphold common law holders' rights and interests, and sustainably develop.²³ This means being able at least to afford:²⁴

- CEO;
- Administration staff;
- Future Act Coordinator;
- Bookkeeping;
- Insurance;
- Office;
- Energy bills;
- Office equipment and supplies;
- Vehicle and transport;
- Postage;
- Communications;
- Basic IT;
- Legal support;
- Board meetings; and
- AGMs

and

SGM

²¹ Ibid Lucas.

²² NNTC above n16, 7.

²³ Woods et al. above n17.

²⁴ NNTC above n16, 7.

In an effort to achieve this basic level of capacity for the nations PBCs since 2021, the NNTC has been advocating to and working with Government to reform their approach to funding the native title sector, particularly PBCs. The NNTC and PBC Steering Group have developed a new funding program that could be implemented in this term of Government and provide the sector with instant funding relief.

The PBC Steering Group was initially formed to advocate for and provide advice on the recommendations of the 2022 Juukan Gorge Senate Inquiry report, in particular recommendations 7-8 which are concerned with PBC funding.

The NNTC, supported by the advice of its PBC Steering Group, has advocated for the replacement of the current PBC Basic Support Funding and PBC Capacity Building Grant Funding delivered via the IAS with a new Native Title program centred on three streams of PBC support – Operational Support; Establishment Support; and Strategic Projects Support; and an increase in the current annual spend on the native title sector by 40 – 60% (\$60 – \$90 million).

Initial modelling by KPMG found that the economic benefits of this recurrent funding increase would greatly offset the costs as indicated below:

- An annual \$30 million increase in Commonwealth operational funding to PBCs would see a \$19.8 million annual increase in GDP and create 90 additional full-time equivalent jobs.
- A one-off \$30.2 million grant that enables each small PBC to procure professional services could unlock \$151 million in business investments with ongoing returns. This would lead to a \$30.2 million annual increase in GDP and generate 83 additional full-time equivalent jobs.
- Modelling indicates that regional Queensland, regional Western Australia and the Northern Territory would receive the lion's share of these benefits, for each scenario.

KPMG also found that, if PBCs were not constrained by their financial resources, there would be up to \$585.2 million in benefits for traditional owners, industry and government. This includes:

- Up to \$265.0 million from avoiding delays and their associated costs, as well as benefits from projects being realised earlier.
- Up to \$294.6 million from improved PBC negotiating power, because PBCs could train, attract and retain more board members with better skills and qualifications.
- Up to \$25.6 million from appropriately financially compensating PBC board members for their work, enabling greater professionalisation of PBCs.

The new funding program would provide a direct to PBC option, improving the fiscal relationship between PBCs the Australian Government and allowing PBCs to increase staffing.

In addition to this advocacy for direct government funding is the development of innovative approaches to proponent resourcing of the sector. Some of these are explored below.

10.2 PBC Regional Future Fund – early exploration from the Sea Country Alliance (SCA)

The SCA has undertaken conceptual development of a Future Fund to support Traditional Owner communities within offshore environments that may be affected (EMBA) under the Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth). This structure would operate to ensure that Traditional Owner communities beyond those that are directly impacted by a future act would derive benefit from regional development. In the context of onshore mineral development (for example), where a mine or other infrastructure is very specifically geographically located, a proponent negotiates the future act agreement with the Traditional Owners directly affected by the development. However, the broader regions may also experience impacts. The extraordinary increase in housing cost in the mining active regions of Western Australia is an example. The proposal explored by the SCA would also have application in these circumstances.

Many Indigenous and non-Indigenous communities across the world have developed financial structures to secure long term economic development. Long term economic stability for Traditional Owner entities, facilitating connection to Country and protection of culture, and community prosperity outcomes form the basis of many of these funds. Whilst there is not a single example of such a Fund that would translate effectively to an Australian Traditional Owner environment, two international funds were examined: the Canadian Indigenous Growth Fund and Norwegian Sovereign Wealth Fund (Statens Pensjonsfond).

10.2.1 Canada's Indigenous Growth Fund

The Indigenous Growth Fund is built around social principles, providing access to capital for Indigenous business and seeking philanthropic support to establish its own \$150m capital base. Developed as an evergreen model in 2021, the fund was established to ensure social investment supports Indigenous businesses.²⁵ Structured to accept investments from Accredited Investors. The \$150m investment fund provides access to capital for Indigenous small- and medium-sized enterprises. Once fully utilised, the Fund will increase lending by \$75m annually with loans to roughly 500 businesses.

10.2.2 The Norwegian Sovereign Wealth Fund

The Statens Pensjonsfond provides a significant contribution to the government's net cash flow. It also now has an ethical investment framework that has moved away from the initial fossil fuel investment at its establishment, but is not tied particular social targets. The Fund is entirely owned by the Government of Norway and is administered by the Ministry of Finance and the Norwegian Central Bank (Norges Bank)²⁶. The Government Pension Fund Act stipulates the Government's entire net cash flow from the petroleum industry shall be

²⁵ Indigenous Growth Fund <https://nacca.ca/igf/> [Accessed 7/7/2025]

²⁶ Özgül, H. B. (2019) *Sovereign Wealth Funds: The Case of Norway*, Conference paper DOI: 10.26650/PB/SS10.2019.001.037

transferred to the Fund²⁷, currently valued at NOK 11.6 trillion (A\$1.7 trillion). The fund is so large that this contributes almost 20% of the Norwegian government budget.²⁸

10.2.3 Good Standing Agreements

Like the “Good Standing Agreement” arrangements that have been under the Australian Petroleum (Submerged Lands) Act 1967 (Cth) and the Petroleum (Submerged Lands) Acts 1982 (SA, WA, NT, Qld, NSW, Vic, Tas), the structure of a new Fund would still be “a voluntary policy mechanism available for the titleholder and their directors, to maintain ‘good standing’ with the Joint Authority.”²⁹ However, unlike the current Good Standing Agreements arrangements, payments would not necessarily be dependent upon default of expenditure under a work bid.

10.3 Unpaid Participation

The 2024 Australian Human Rights Commission report succinctly called for an imposition of human rights standards regarding the unpaid contributions of Traditional Owners that underpins the native title system.

All Australian governments take steps to alleviate the burden of unpaid labour absorbed by First Nations individuals and communities in the land justice and cultural heritage systems, including that driven by planning and development initiatives for which responses are necessary to defend rights to Country and culture. Such steps should include fair remuneration for all work undertaken.³⁰

This addresses the frequently encountered understanding, by both regulatory systems and the broader community, that cultural heritage is managed in an environment devoid of time or economy.

11 Discrete Issues

11.1 Clean Energy Projects and Native Title Management Plans

Currently, the FAR does not provide an approvals pathway for clean energy projects, so agreements that deal with native title consents often take the form of an ILUA. It is anticipated that the new provision NTMPs will provide an avenue to also address matters associated with clean energy projects. Within this broad framework, several principles should be always maintained:

- Clean energy projects should only ever proceed with the consent of affect native title holders – as such an ILUA or NTMP are the only appropriate future act process for these projects;
- Consideration must also be made to the full footprint of transmission projects, including impacts on road widening, intangible cultural heritage (ICH) impacts and primary sites. This extended footprint may be beyond the scope of any single NTMP

²⁷ Norwegian Ministry of Finance (2022) *The Norwegian Fiscal Policy Framework*, <https://www.regjeringen.no/en/topics/the-economy/economic-policy/economic-policy/id418083/> [Accessed 7/7/2025]

²⁸ Norges Bank (2019) *About the Fund*, <https://www.nbim.no/en/the-fund/about-the-fund/> [Accessed 7/7/2025]

²⁹ NOPTA, Offshore-Petroleum-Exploration-Permit-Guideline at 8.1: <https://www.nopta.gov.au/application-processes/good-standing-agreement.html> [Accessed 7/7/2025]

³⁰ AHRC above n13, (334).

or ILUA. Consideration need be given for ensuring appropriate management of projects of this nature; and

- Legislative requirements aside, Australian Government policy should demand that proponent funding for clean energy projects should be dependent upon the existence of a concluded agreement with relevant Traditional Owners.

11.2 Further Consideration of FAR and Compensation

11.2.1 National Framework

Supporting both transparency and a fair negotiation starting position for Traditional Owners, more information should be available benchmarking agreements. We note that the Bardi Jawi Niimidiman Aboriginal Corporation submission in response to the Discussion Paper calls for the establishment of “a clear national framework for calculating and negotiating compensation, including valuation principles for cultural loss and community impacts”.

11.2.2 Non-Extinguishment

PBCs are often negotiating from a position of relative disadvantage, without the resources or technical support to ensure realisation of FPIC. Currently, there is a commonly held negotiation to “trade away” rights in order to enact any benefit agreement. Compensation should not require extinguishment as a precondition, rather there should be support for non-extinguishing development agreements.

11.2.3 Projects authorised without consent

The current FAR compensation provisions do not provide effective redress for projects that have proceeded without the FPIC of relevant Traditional Owners. To the extent a project has not obtained the FPIC of relevant Traditional Owners, adequate and timely redress for the effect of projects on their traditional lands must be incorporated into any amended FAR structures.

11.3 Rights in Inland Water and Native Title

The Discussion Paper at Question 16 asks if the NTA should be amended to account for the impacts that future acts may have on native title rights and interests in areas outside of the immediate footprint of the future act. Currently, impacts on water are only considered in the NTA in a direct sense (immediate footprint) and only attract the right to comment under s24HA. This is insufficient in terms of:

- the nature of water systems, which are interconnected across vast areas above and below the surface;
- how the common law considers proprietary rights to water, particularly riparian rights and the right to take groundwater; and
- how Traditional Owners conceive of water and its significance, being both inextricably connected with the land, and of immense cultural and spiritual significance both in place and in flow.

We submit that the NTA should be amended so that impacts on water, including impacts on ground water systems and the flow of water over the native title area should be automatically

considered a high impact future act under the proposed reform model, or attract the right to negotiate and right to compensation under the current model.

In relation to the general issue highlighted regarding “impacts that future acts may have in areas outside of the immediate footprint of the future act”. The immediate response is that if a future act is having impacts on native title rights outside of the footprint of the future act” then the “footprint of the future act” is being mischaracterised. The definition of “future act” in s 233 does not constrain the land or waters in which an “affect on native title” may occur to the geographic area contained in the grant of the right or interest which is the executive act constituting the future act. To illustrate this point, if the rights associated with grant of a grazing tenure included the right to depasture cattle on adjacent crown land, s 233 does not suggest that the area of the grazing tenure is the area of the future act. Section 29(2) is clear that notice of the future act must be given to [native title bodies corporate, registered claimants] of “land or waters that will be affected by the act”. In the case of the hypothetical grazing tenure this would include the adjacent crown land.

The same construction will apply to riparian and groundwater native title rights. The common law does not recognise property in flowing water. Accordingly, the common law cannot recognise a native title right to property in the flowing water.³¹ However native title is a recognised proprietary right in land accompanied with all the attributes that would attach to such an interest at common law.³² Two of these attributes are riparian rights and a right to take ground water. These common law rights were not extinguished by the various state and territory legislation regarding a crown right to “the use flow and control of water”³³

At common law these rights may be protected by the tortious actions of trespass and nuisance. The acquisition of these rights by the crown on its own behalf or for the benefit of a third party would, at common law, amount to an acquisition of property. Such an acquisition would be subject to the provisions of s 51 (xxxix) of the Constitution if it was an action of the Commonwealth and would constitute an interference with a property right for the purposes of the Racial Discrimination Act 1975 (Cth) if undertaken by a state or territory.

From this foundation, it is apparent that under the NTA at present, an action that had the consequence of affecting riparian or groundwater rights is a future act. However, the relevant processes associated with such future are not commensurate with the significance of the imposition of native title holders’ proprietary interests. It is our submission that an interference with riparian or ground water native title rights should be automatically considered a high impact future act under the proposed model.

11.4 Non-Claimant application – Subdivision F

The consequences for Traditional Owners of either a negative determination of native title or extinguishment of native title by inconsistent grant facilitated by the operation of subdivision F arising are dire. An ethereal prospect of compensation at some point is not an effective mitigation of these consequences. Consequent upon the operation of subdivision F, Traditional Owners would be denied the ability under the NTA to speak for and protect the

³¹ *Griffiths v Northern Territory of Australia* (2007) 165 FCR 391.

³² *Commonwealth of Australia v Yunupingu* [2025] HCA 6.

³³ For example, the *Water Administration Act 1986* (NSW) s 12(1), *Water Resources Act 1989* (Qld) s 3,

Water Act 1989 (Vic) s 7, *Rights to Water and Irrigation Act 1914* (WA) s 26, and the *Groundwater Act 1985* (Tas) s 6. The position in South Australia may be somewhat different.

country affected by the relevant future act. If the subdivision F inspired non-claimant application proceeded to determination, Traditional Owners would be denied their property and cultural rights in respect of the entire determination area. They would be denied the opportunity to participate in negotiations to derive any benefits from the exploitation of their Traditional Lands and Waters.

Subdivision F was inserted as part of the infamous “ten-point plan” amendments imposed by the Howard Government. The purpose and consequences of subdivision F was stated in the explanatory memorandum as being as follows:

“[ensuring] the validity of future acts which are done over areas where steps taken under the Native Title Act indicate that native title does not exist in those areas...

Subdivision F is included to allow people with interests in land to ascertain whether native title exists in order to give them certainty when doing acts in relation to that land. This will encourage potential native title holders to make native title claims. However, the mere fact that a future act gains section 24FA protection does not prevent a native title claim being made or determined in the future³⁴

However, the purpose of the overall future act regime of the NTA is to provide “certainty” and “ensure validity”. Except in the very limited circumstances discussed below, subdivision F adds nothing to the scheme of the FAR except a short cut method to achieve extinguishment of native title in the absence of due process at the initiation of either government or private interest. In our submission the desired approach is to repeal subdivision F altogether.

It is from this perspective that the matters posed in Question 21 are considered. The question asks (at b) whether the timeframe for a claimant native title determination application to be lodged should be extended to 12 (from 3) months and whether a test of balance of probabilities should be applied to determining a non-claimant application.

Although cast in the context of a consideration of subdivision F, the question is posed in relation to non-claimant applications (per s 61 (1) and s 253). The answer to both questions is clearly “yes”. This stated, it should also be noted that the current jurisprudence regarding the evidential test to be applied to non-claimant applications is as stated in Mace v State of Queensland [2019] FCAFC 233. At [66] – [67] the Full Court stated:

“...given that a negative determination is ...a determination in rem, it is important that the Court carefully consider such matters before it can be satisfied, on the balance of probabilities, that no native title rights or interests exist in relation to a particular area”.

It is presumed question 21(c) is therefore suggesting that this jurisprudence be explicated incorporated into the NTA. This suggestion is supported.

Noting this support for the additional restrictions being placed around non-claimant applications generally, in our submission subdivision F (even with the provisions regarding non-claimant applications amended as suggested) still serves no beneficial purpose and should be repealed. This brings us to consideration of the matters raised through question 21(a).

³⁴ *Explanatory Memorandum, Native Title Amendment Bill 1998*, s 8.1, 8.3. Note the portion of the Ex Mem underlined would appear inconsistent with the actual provisions of s 24FA(1)(b) in that while a claimant native title application may be brought subsequent to the operation of the s 24FA protection any extinguishment effected by the operation of s 24FA will continue in perpetuity.

Question 21 (a) asks whether non-claimant applications should be restricted to applications made “by or for the benefit of Aboriginal or Torres Strait Islander peoples”. The restriction of the ability to make a non-claimant application is, of course, supported.

However, as a general principle of national application the proposal in question 21(a) may be seen to confuse the issue of “Traditional Ownership” – the foundation of native title rights and interests - with one of some ill-defined “pan-Indigeneity”. The extinguishment of native title rights may be said to be “for the benefit” of an undefined group of Aboriginal or Torres Strait Islander people. This extinguishment still has the consequence of denying Traditional Owners their fundamental property and cultural rights. The question is one of Traditional Ownership, not racial identity.

This noted there may be circumstances where land is held for “by or for the benefit of Aboriginal or Torres Strait Islander peoples” and the potential existence of underlying native title rights and interests constrains dealing in this land. It may be appropriate in these circumstances for a mechanism similar to that contained in s 24FA to be available. Circumstances such as these do arise in the context of the Aboriginal Land Rights Act 1983 (NSW) (NSW ALRA). An appropriate approach to them is discussed further below

At a more general level if it was thought that the proposal to prevent non-claimant applications altogether (other than in the circumstances outlined in question 21 (a)) was unlikely to gain the necessary broad support, a more contained approach may be to repeal subdivision F as suggested above. This would operate to remove much of the incentive to initiate a non—claimant application. In addition (or in the alternative) the “non-native title interest” necessary to have standing to bring a non-claimant application could be specifically defined in terms that restricts the current broad jurisprudence on this point.

In the specific context of the NSW ALRA the relevant provision is s 42(1) which provides:

42 Restrictions on dealing with land subject to native title

(1) An Aboriginal Land Council must not deal with land vested in it subject to native title rights and interests under section 36 (9) or (9A) unless the land is the subject of an approved determination of native title (within the meaning of the Commonwealth Native Title Act).” (Emphasis added)

Section 40(1) of the ALRA defines the expression ‘deal with land’ very broadly. It includes the sale, exchange, lease, mortgage, disposal of, or other creation of or passing of a legal or equitable interest in the land, the grant of an easement, and even the making of a development application. A Local Aboriginal Land Council is therefore constrained significantly in its ability to make decisions about land vested in it prior to a determination of native title, either positive or negative. The Federal Court has noted the consequence of the terms of the NSW ALRA s 42 on the frequency of non-claimant applications in that state.³⁵

In our submission, an appropriate approach to this situation would be to consider developing provisions similar to s 24JAA of the NTA that would allow a (NSW ALRA) Aboriginal Land Council to “deal” in land for the purposes of proposals for the community benefit without the need to obtain a determination of native title. In the event that a (NSW ALRA) Aboriginal Land Council sought to “deal in land” for purposes other than community benefit, access to

³⁵ *Local Aboriginal Land Council v Premier of New South Wales in his capacity as the State Minister pursuant to the Native Title Act 1993 (Cth)* [2012] FCA 792 at [15]. See also *Reeves J CG (dec’d) (on behalf of the Badimia People) v Western Australia* [2016] 332 ALR 368 at [110].

subdivision F protection should also be available without the need to obtain a determination.

In each case the suggested procedure would be that the (NSW ALRA) Aboriginal Land Council would give notice of the proposed dealing. If Traditional Owners responded to this notice either an ILUA would be concluded or a right to negotiate process in line with the normal (reformed) procedure would ensue. If there were no relevant Traditional Owners that responded to the notice the “dealing” could proceed with the benefit of a 24FA (type) protection.

A provision of this nature could have general (i.e. national) application. In the specific context of NSW, it would be necessary to support the proposal by the necessary amendments to the NSW ALRA.

11.5 Cultural Heritage Legislative Reform

A broad summary of the legislative reforms proposed as a result of the work undertaken by the partnership between the FNHPA and the Minister for Environment and Heritage is contained in Part 2 (section 8.2). This section briefly notes some specific manifestations of the need to ensure protection and management of Traditional Owners’ cultural heritage that extend beyond, but may interact with, the NTA.

11.5.1 Offshore Cultural Heritage

Currently, when areas are considered offshore the right to negotiate does not apply which inhibits native title holders from negotiating benefits and mitigating impacts of offshore development.

The scope of interests may exceed those potentially identified as native title rights pursuant to the provisions of the NTA. The significance of this is that mere satisfaction of the future act provisions of the NTA will not ensure adequate consideration of the full suite of Traditional Owner interests.

A feature unique to the offshore energy environment stems from the relatively recent focus on the specifics of the interests of Traditional Owners in their sea country. In the Australian context, many decades of land claims under the specific regime of the NTA, has meant that there is a significant body of knowledge regarding Traditional Owners’ cultural and other interests, particularly in areas of high minerals prospectivity. In large part the resources necessary to develop this body of knowledge have been provided over time through the Commonwealth Government’s resourcing of the native title system.

The level of accessible knowledge relating to the interests of Traditional Owners in their sea country is not yet anywhere near this level. This accessible knowledge deficit inevitably leads to project approval delays stemming from the need to acquire the necessary information on a project-by-project basis. These project approval delays carry negative cost consequences for both proponents and governments.

To remedy this situation, it is important that Government provide project funding, delivered over several years, to PBCs. This funding would support them to develop the level of accessible knowledge relating to the cultural and other interests in their sea country and could usefully be targeted to areas of current or potential future high offshore energy project prospectivity.

11.5.2 Indigenous Cultural and Intellectual Property

On 30 January 2023, the Australian Government released its landmark National Cultural Policy, *Revive: a place for every story, a story for every place*. Central to the Policy's support of First Nations participation, is the introduction of stand-alone legislation to protect First Nations knowledge and cultural expressions.

In March 2024, it was announced that the Government was taking a staged approach to developing the legislation. The first stage, currently being drafted, addresses the harm caused by fake First Nations style art, merchandise and souvenirs. Later stages will address the broader rights relating to ICIP.

It is essential that this second tranche of legislation protects all ICIP, including that resting in native foods and botanicals, cultural knowledge, art, intangible cultural heritage, environmental knowledge and bioprospecting. It is through this ICH that manifest on Country that the relationship with the FAR and NTA exists.

Consideration of both the proposed legislation and how protections and management can be embedded within the NTA is essential and meets expectations under UNDRIP Article 31. In particular, it is recommended that such NTA protections include mandatory consent, attribution, and benefit sharing when cultural knowledge or materials are accessed or used.

12 Conclusion and next steps

It is now over thirty years since the High Court decision in *Mabo & Ors v Queensland & Ors* (No 2) and nearly twenty years since the adoption of UNDRIP by the General Assembly. The need to reform the NTA's FAR is clear, urgent and overdue. The Mabo Centre and the NNTC are confident the work of the ALRC in the current inquiry will contribute to this process. The final recommendation we make goes to the establishment of a mechanism to assist in advancing this project over time.

Recommendation 12.2 of the Native Title Report 2024 stated in part (at [6]) that:

That the Australian Government establish and resource a First Nations Native Title Reform Council (FNNTRC) to drive a comprehensive reform process ('reform process') in relation to the Native Title Act 1993 (Cth) and all related legislation and policy, from a person-centred, human rights perspective, with a view to creating a system for land justice that is coherent, consistent, just, sustainable and gender-responsive.

The Mabo Centre and the NNTC would recommend to the ALRC that consideration is given to putting forward a similar recommendation in order to ensure that the current excellent work of the Commission is not concluded but rather commenced with publication of the final report of the current inquiry.

In closing, the Mabo Centre and the NNTC would like to extend our thanks to the ALRC, in particular President Bromberg and Commissioner McAvoy and to all of the participants at the Symposium that gave up their valuable time and contributed to a discussion that was both informative and productive.

Glossary

ALRC	Australian Law Reform Commission
ATSIHPA	Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)
CAEPR	Centre for Aboriginal Economic Policy Research
Discussion Paper	Review of the Future Acts Regime Discussion Paper
EMBA	Environments that may be affected
FADA	Future Act Determination Applications
FAR	Future Acts regime
FNHPA	First Nations Heritage Protection Alliance
FPIC	Free, Prior, and Informed Consent
ICERD	International Convention on the Elimination of all forms of Racial Discrimination
ICH	Intangible Cultural Heritage
ICIP	Indigenous Cultural and Intellectual Property
ILUA	Indigenous Land Use Agreements
NNTC	National Native Title Council
NNTT	National Native Title Tribunal
NTA	Native Title Act 1993 (Cth)
NTMP	Native Title Management Plans
NTRB	Native Title Representative Body
NTSP	Native Title Service Provider
PBC	Prescribed Body Corporate
RDA	Racial Discrimination Act 1975 (Cth)
SCA	Sea Country Alliance
Symposium	Future Acts and the Native Title Regime – Where to Now?
TORI	Traditional Owner Representative Institutions
TOSA	Traditional Owner Settlement Act 2010 (Vic)
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

THE MABO CENTRE

Faculty of Business and Economics
University of Melbourne
Parkville VIC 3010
info@mabocentre.com
mabocentre.com

NATIONAL NATIVE TITLE COUNCIL

19B/513 Hay Street
Subiaco WA 6008
info@nntc.com.au
nntc.com.au