Law Council
OF AUSTRALIA

Review of the Future Acts Regime: Issues Paper

Australian Law Reform Commission

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- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
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The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.au.

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Introduction

1. The Law Council of Australia is pleased to make this submission in response to the Issues Paper released by the Australian Law Reform Commission (**ALRC**) as part of the *Review of the Future Acts Regime* (**Review**).

2. The Law Council understands that, through the Issues Paper, the ALRC is seeking to identify the issues that it should examine over the course of the Review. This submission briefly provides some legislative background and relevant contextual considerations in relation to the future acts regime and then, in response to Questions 1 and 2 of the Issues Paper, sets out a number of issues at a high level for consideration as part of the Review.

Legislative background and context

3. As identified in the Issues Paper, the future acts regime provides the legal framework for dealings that affect native title rights and interests after the commencement of the *Native Title Act 1993* (Cth) (**NTA**).[1]

4. The future acts regime is contained in Part 2, Division 3 of the NTA. Its current form was shaped by the *Native Title Amendment Act 1998* (Cth) (**1998 Amendment Act**) as a response to the High Court's decision in *Wik Peoples v Queensland*, which concerned the co-existence of native title with pastoral leases.[2]

5. The 1998 Amendment Act legislated the then Government's 'Ten Point Plan', in which the stated intention was 'to strike a fair balance between respect for native title and security for pastoralists, farmers and miners'.[3] In the Law Council's view, the 1998 amendments subordinated native title rights to a wide range of other interests and curtailed to a significant extent the procedural rights of native title owners, in particular the right to negotiate.

6. Professor Mick Dodson AM, for example, suggested at the time that the 1998 amendments did not allow 'sufficient time to integrate the belated recognition of native title into Australia's land management system'.[4] Other scholars have since criticised the amendments from a substantive and procedural perspective. As set out by Richard Bartlett in *Native Title in Australia*:

> *The 1998 amendments to the Act enabled the denial of the application of the right to negotiate over much of the area of Australia where native title might be established, and removed many forms of grant from its ambit, substantially reducing its significance, and greatly limiting access by native title holders.*[5]

7. The 1998 Amendment Act had far-reaching implications for the future acts regime, including from a procedural perspective. Concerns with the regime were raised most recently in the final report of the Joint Standing Committee on Northern Australia's *Inquiry into the destruction of the Juukan Gorge* (**Juukan Gorge**

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[1] Australian Law Reform Commission, Review of the Future Acts Regime (Issues Paper 50, November 2024) 1 (**Issues Paper**). See also, Richard Bartlett, *Native Title in Australia* (LexisNexis, 5th ed, 2023) 563.
[2] *Wik Peoples v Queensland* (1996) 187 CLR 1.
[3] Hon John Howard MP, Prime Minister of Australia, Amended Wik 10 Point Plan (Media Release, 8 May 1997).
[4] Mick Dodson quoted in Paul Keating, '10-point plan that undid the good done on native title', *Sydney Morning Herald* (online, 1 June 2011).
[5] Richard Bartlett, *Native Title in Australia* (LexisNexis, 5th ed, 2023) 64, [5.22].

Report). The Juukan Gorge Report recommended a review of the NTA to inquire into the future acts regime to address:

- standards for the negotiation of agreements that require proponents to adhere to the principle of Free, Prior and Informed Consent as set out in the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**);
- 'gag clauses' and clauses restricting Aboriginal and Torres Strait Islander peoples' access to Commonwealth heritage protections; and
- the authority and responsibilities of Prescribed Bodies Corporate (**PBCs**) and representative bodies in relation to cultural heritage.[6]

8. The Law Council emphasises the importance of addressing the Joint Committee's recommendations, and we suggest that the ALRC consider the following issues as part of its Review.

Question 1

What are the most important issues to consider for reform in the future acts regime? If you have had negative experiences, we would like to hear about them and what did not work well.

Implementation of the UN Declaration on the Rights of Indigenous Peoples

9. The Review's Terms of Reference ask the ALRC to consider 'the rights and obligations recognised in the international instruments to which Australia is a party or which it has pledged to support', including, specifically, the UNDRIP.[7] The Issues Paper also outlines that the ALRC will consider whether the future acts regime 'adequately reflects internationally recognised principles of human rights' including the right to Free, Prior and Informed Consent (**FPIC**) and the right to self-determination.[8]

10. The UNDRIP is the authoritative international standard informing the way governments should engage with, and protect, the rights of Indigenous Peoples. It does not directly impose legally binding obligations and does not create new rights for Indigenous peoples. Rather, it collates human rights relevant to Indigenous people contained in legally binding international human rights conventions into a single, clear framework of principles relevant to Indigenous people.[9]

11. Australia formally announced its support for the UNDRIP on 3 April 2009. However, Australian governments and parliaments are yet to recognise and implement its standards and protections domestically in a formal and comprehensive manner.

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[6] Joint Standing Committee on Northern Australia, Parliament of Australia, *A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge* (Final Report, October 2021) rec 4 ('**Juukan Gorge Report**').
[7] Australian Law Reform Commission, Terms of Reference, Review of the Future Acts Regime (Web Page, 04 June 2024).
[8] Issues Paper, 3.
[9] See Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, Inquiry into the application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia (Final Report, November 2023) 11-13.

12. The UNDRIP is not a treaty and therefore does not itself create legally binding obligations. However, its articles reflect customary international law[10] and rights articulated in legally binding human rights treaties.[11] The UNDRIP relies on and articulates well-established human rights obligations in treaties and customary international law that are binding on Australia.

13. The Law Council strongly supports the domestic implementation of the UNDRIP in Australia to ensure that the rights of First Nations peoples are a primary consideration when developing reforms to law, policy and practice. Our *Policy Statement on Indigenous Australians and the Legal Profession*, released in 2010, commits the Law Council, working in partnership with First Nations peoples, to promoting implementation of the UNDRIP.[12] The Law Council has previously advocated for the Australian Government to engage with First Nations peoples to develop a 'National Action Plan' to implement the UNDRIP which might consider how the key principles of the UNDRIP (such as FPIC) are reflected in legislation such as the NTA and the *Corporations (Aboriginal and Torres Strait islander) Act 2006* (Cth).[13]

Free, Prior, and Informed Consent

14. The Law Council submits that the UNDRIP's principles, in particular, the principle of FPIC, must be implemented within the NTA and have specific application to the future acts regime.

15. The UNDRIP is underpinned by the principle of FPIC of indigenous peoples when making decisions or activities that directly impacts their interests,[14] reflected in Articles 19 and 32:

> ***Article 19***
>
> *States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.*
>
> ***Article 32***
>
> *1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.*
>
> *2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in*

[10] International Law Association, *Rights of Indigenous Peoples*, 75th Conference, ILA Resolution No 5/2012 (30 August 2012); Federico Lenzerini, 'Implementation of the UNDRIP Around the World: Achievements and Future Perspectives' (2019) 23 *International Journal of Human Rights* 51. See also Adam McBeth, Justine Nolan and Simon Rice, *The International Law of Human Rights* (Oxford University Press, 2011) 456.
[11] Including, among others, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).
[12] Law Council of Australia, Indigenous Australians and the Legal Profession (Policy Statement, February 2010) [16].
[13] See, eg, Law Council of Australia, Submission to the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Inquiry into the application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia* (24 June 2022) 5, 18-19.
[14] See, eg, United Nations Office of the High Commission of Human Rights, Free, Prior and Informed Consent of Indigenous Peoples (Factsheet, September 2013).

order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. *States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.*

16. The requirement that there be consultation with Indigenous peoples to obtain their FPIC has been elaborated on by international jurisprudence (some of which is extracted in the **Appendix** to this submission). A summary of the key principles from the relevant jurisprudence is set out below, and demonstrates that the international law requirements underpinning the duty to consult are extensive:

- The duty to actively consult with the community, according to their customs and traditions.
- The duty to accept and disseminate information through constant communication.
- The duty to negotiate in good faith, with culturally appropriate procedures and with the objective of reaching an agreement.
- The importance of consultation at the early stages of a development or investment plan.
- Communication of possible risks from a proposed development or investment plan.
- The duty to obtain free, prior and informed consent of the community, according to their customs and traditions, in cases of large-scale developments, to ensure the safeguard of effective participation.
- The onus is on the State, not on Indigenous people, to provide guarantees around consultation. This cannot be delegated to a private company or third party.
- The need for the consultation to be conceived as a 'true instrument for participation'.
- The need for a climate of mutual trust and the absence of coercion.
- Respect for the principle of proportionality so as not to endanger the survival of the community.[15]

17. From a rule of law perspective, these international law requirements should apply to all the future acts provisions in the NTA. However, the procedural rights around some future acts are currently limited to providing a right to notice, opportunity to comment and rights to object.

18. The right to negotiate set out in section 31 of the NTA (discussed further below beginning at paragraph [32]) should provide adequate procedural protections to native title holders. In this regard, the Law Council suggests that the ALRC consider

[15] See further the cases summarised in the Appendix.

how the requirement of good faith negotiation under paragraph 31(1)(b) of the NTA has been interpreted by the Australian courts,[16] whether this requirement adequately supports the principle of FPIC in practice, and whether what constitutes good faith is sufficiently clear to the parties involved in negotiations.[17]

19. According to the National Native Title Council, the future acts regime does not accord with the principle of FPIC because it entrenches power imbalances, leaving native title holders with 'weak procedural rights that result in diminished bargaining power and unjust agreements'.[18]

20. It is important to acknowledge that many companies operating in Australia are endeavouring to implement the principle of FPIC when negotiating with Indigenous communities and Traditional Owners and, in some cases, have requested greater clarity on the application of UNDRIP.[19] However, this is no substitute for a properly established formal legal framework.

21. The National Native Title Council's views are also supported by the Concluding Observations of the UN Committee on the Elimination of Racial Discrimination (**CERD**) in 2017, which urged Australia 'to ensure that the principle of Free, Prior and Informed Consent is incorporated into the NTA and into other legislation, as appropriate, and fully implemented in practice'.[20] The Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs subsequently recommended that the Australian Government ensure its approach to developing legislation and policy on matters relating to Aboriginal and Torres Strait Islander people be consistent with UNDRIP.[21]

22. Indeed, some Australian legislation has been amended to implement UNDRIP. As examples, the *Nature Repair Act 2023* (Cth) and the *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) both require consent to be obtained from native title holders, which must be demonstrated when providing an application for relevant projects.[22] Consent is also required from similar eligible interest holders. This requirement places Traditional Owners on an equal footing with other interested shareholders. Both of these statutes could inform the crafting of provisions implementing FPIC in the context of the future acts regime.

23. Given the significant inconsistency between the international law requirements and the procedural rights available under the NTA, the Law Council suggests that the ALRC consider ways to improve the robustness of the procedural protections in the

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[16] See, eg, *Western Australia v Taylor* (1996) 134 FLR 211; *Strickland v Minister for Lands (WA)* (1998) 85 FCR 303; *Brownley v State of Western Australia (No 1)* (1999) 95 FCR 152; *Walley v Western Australia* (1999) 87 FCR 565; *FMG Pilbara Pty Ltd v Cox* (2009) 175 FCR 141; *Gomeroi People v Santos NSW Pty Ltd* [2024] FCAFC 26. See also, Richard Bartlett, *Native Title in Australia* (LexisNexis, 5th ed, 2023) 640-648.

[17] In 2012, the then-Labor Government introduced the Native Title Amendment Bill 2012 (Cth) which included proposed amendments to 'clarify the meaning of good faith in the Act, and the conduct and effort expected of parties in seeking to reach agreement': Explanatory Memorandum, Native Title Amendment Bill 2012 (Cth) 2. The Bill lapsed on the prorogation of the Australian Parliament in August 2013.

[18] National Native Title Council, Submission to the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Inquiry into the application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia* (2022) 4.

[19] See, eg, Woodside Energy Group Ltd, Submission to the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, Inquiry into the Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia (18 October 2022) 2.

[20] Committee on the Elimination of Racial Discrimination, Concluding observations on the eighteenth to twentieth periodic reports of Australia (CERD/C/AUS/CO/18-20, 26 December 2017) [22].

[21] Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, Inquiry into the application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia (Final Report, November 2023) rec 1.

[22] *Nature Repair Act 2023* (Cth) s 18A; *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) s 28A.

future acts regime to conform more fully with contemporary accepted legal standards at international law, in particular, the UNDRIP.

Effective participation

24. The UNDRIP embeds the principles of effective participation and consultation. It requires States to consult and cooperate in good faith with the Indigenous Peoples concerned, through their own representative institutions, in order to obtain their FPIC before adopting and implementing legislative or administrative measures that may affect them. As such, consultation and participation, and the provision of necessary resources, are considered crucial components of the consent process.[23] These principles are reflected in Articles 19 and 32.1 (as set out at paragraph [15] above), as well as Articles 31.1, 38 and 39:

> ***Article 31.1***
>
> *Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.*
>
> ***Article 38***
>
> *States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.*
>
> ***Article 39***
>
> *Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.*

Participation duty

25. As part of its 'Free & Equal' project to inquire into Australia's national protections for human rights and anti-discrimination laws, the Australian Human Rights Commission (**AHRC**) proposed a comprehensive Human Rights Act model.[24] The AHRC model includes a proposed positive duty on public authorities to act compatibly with human rights. As part of this duty, the AHRC suggests that there should be a 'participation duty' component—i.e. a procedural obligation to engage in participation processes where a decision disproportionately affects the rights of Aboriginal or Torres Strait Islander people, people with disability, or children.[25]

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[23] *Human Rights Council, Study of the Expert Mechanism on the Rights of Indigenous Peoples*, Free, prior and informed consent: a human rights-based approach, UN Doc A/HRC/39/62 (10 August 2018).
[24] See Australian Human Rights Commission, Free & Equal Position Paper: A Human Rights Act for Australia (December 2022) 161–242; Australian Human Rights Commission, Revitalising Australia's Commitment to Human Rights: Free & Equal Final Report (November 2023).
[25] Ibid.

26. The AHRC describes its proposed participation duty in the following terms:

> *The participation duty would require public authorities to ensure the participation of certain groups and individuals in relation to policies and decisions that directly or disproportionately affect their rights. The participation duty addresses a fundamental problem in the development of federal policies and decisions—inadequate engagement with the very people to whom those policies and decisions directly apply.*
>
> *The Commission's proposal for a participation duty draws on international human rights law standards and common law procedural fairness principles. It would synthesise procedures concerning consultations and set clear standards, fleshing out what participation means in relation to certain groups that are often overlooked in policy formulation and decision-making processes.*

27. The AHRC's proposed participation duty was considered by the Parliamentary Joint Committee on Human Rights (**PJCHR**) in the Final Report of its Inquiry into Australia's Human Rights Framework.[26] The PJCHR ultimately recommended that the Australian Government should:

> *… consult with Aboriginal and Torres Strait Islander people, people with disability, children's groups, civil society and other experts on how the proposed participation duty and equal access to justice duty should operate, including whether it adequately captures the principle of free, prior and informed consent. Following this, the committee recommends the government develop detailed guidance material to assist public authorities to understand their specific obligations under these duties.*[27]

28. The Law Council does not have a formal position on the AHRC's proposed participation duty.[28] However, we suggest that the ALRC examine this proposed duty, as discussed in the reports of the AHRC and PJCHR, as part of considering how effective participation and consultation might be better supported in the context of the future acts regime.

Resourcing constraints

29. The Law Council understands that First Nations groups and their support bodies often experience resourcing and capacity restraints when engaging with the future acts regime, which has the tendency to result in disparities in power and equity between parties and reduces the efficacy of participation for under-resourced groups.[29] We recognise that such constraints may also be experienced by certain proponents, such as small businesses, in certain circumstances.

30. The Law Council notes the existence of support mechanisms, such as those provided by the National Indigenous Australians Agency, which funds a network of 14 'native title representative bodies' (**NTRBs**) and 'native title service providers' (**NTSPs**), which assist native title claimants and holders to ensure adequate representation and participation in future acts matters. However, funding for these

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[26] 176-181.
[27] Parliamentary Joint Committee on Human Rights, Inquiry into Australia's Human Rights Framework (Final Report, May 2024) rec 4.
[28] See Law Council of Australia, Submission No 120 to the Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Inquiry into Australia's Human Rights Framework* (3 July 2023) 30.
[29] See further discussion on the right to negotiate and imbalances in bargaining power at paragraph [39] below.

organisations is often inadequate, which places First Nations peoples at a disadvantage in terms of protecting their native title interests and rights in respect of future acts.[30] This is particularly the case where NTSPs may have exhausted their designated annual funding at the time such acts occur and subsequently lack the resources to provide support to native title holders for future acts that arise throughout the year.

31. On a separate note, practitioners working in such organisations are often based remotely, receive little support, and often experience burnout given the frequently significant workload in proportion to available resources. As a result, there tends to be a relatively high turnover and a shortage of experience and expertise in the area, thus impacting access to justice for native title holders. The Law Council submits that the proposed reforms to the future acts regime should provide for sufficient funding for service providers and representative bodies, and ensure effective mechanisms are available, to support parties' capacity to enter into fair and equitable negotiations, particularly for native title holders given the potential impacts on their native title rights. Such mechanisms must ensure that procedural requirements are implemented.

The right to negotiate

32. A second important issue to be considered in seeking to reform the future acts regime is the extension of the right to negotiate.

33. The right to negotiate is set out in Division 3, **Subdivision P** of the NTA at sections 25 to 44. It applies to the 'creation of a right to mine, whether by the grant of a mining lease or otherwise', or the 'variation of such a right, to extend the area to which it relates' as well as to the renewal, re-grant, re-making or extension of a mining tenement which constitutes a 'permissible lease etc renewal'.[31]

34. The right to negotiate is a procedural right under the NTA which is intended to ensure that future acts are carried out validly and ensures that native title holders have a say about activities that impact them.

35. Section 31 imposes a duty on all parties to negotiate in good faith. Importantly, the right to negotiate is more than a mere right to object.[32] The importance of a 'special right to negotiate' is reinforced in the preamble to the NTA, which is set out as follows:

> *Justice requires that, if acts that extinguish native title are to be validated or to be allowed, compensation on just terms, and with a special right to negotiate its form, must be provided to the holders of the native title. However, where appropriate, the native title should not be extinguished but revive after a validated act ceases to have effect.*
>
> *It is particularly important to ensure that native title holders are now able to enjoy fully their rights and interests. Their rights and interests under the common law of Australia need to be significantly supplemented. In future, acts that affect native title should only be able to be validly done if, typically, they can also be done to freehold land and if, whenever appropriate, every reasonable effort has been made to secure the*

[30] Issues Paper, [79].
[31] *Native Title Act 1993* (Cth) ss 26(1)(c) and 26D.
[32] See, eg, *Native Title Act 1993* (Cth) s 24MD(6B) in relation to the right to mine for the sole purpose of constructing an infrastructure facility.

agreement of the native title holders through a special right to negotiate.[33]

36. The right to negotiate is not a right to stop a future act from going ahead, but rather it provides native title parties a right to be involved in discussions and have their say about proposals. It also provides native title holders with an opportunity to highlight culturally important sites on lands and waters that may be impacted by the proposed development as part of the future act, and thus reduces the risk of damage to such sites.

37. Following the enactment of the 1998 Amendment Act, the right to negotiate was restricted from a large range of future acts pursuant to Subdivision P. The acts excluded from the right to negotiate included such things as the compulsory acquisition of native title rights and interests that relates solely to land or waters wholly within a town or city, approved gold or tin mining and acts comprising primary production, management of water and airspace.[34] As such, the right to negotiate for First Nations groups only applies to certain future acts.

38. Where the right to negotiate is available, it is limited to a six-month negotiation window during which both parties must reach an agreement. Where an agreement is not met within the timeframe, the parties must rely on a determination by the National Native Title Tribunal (**NNTT**).[35]

Imbalance in bargaining power

39. There exists significant unequal bargaining power where the right to negotiate applies with respect to mining activity. This may arise for several reasons, including the fact that, in contrast to many native title holders, proponents of future acts are typically commercially sophisticated and well-resourced parties. We note that, according to the National Native Title Council, most PBCs 'operate on a median income of less than $7000 per annum and struggle to meet even basic corporate functions'.[36] Recommendation 7 of the Juukan Gorge Report addresses the critical issue of underfunding of PBCs and the resulting power imbalances with project proponents. Extracted below are relevant aspects of recommendation 7:

> *7.120 The Committee recommends that the Australian Government establish an independent fund to administer funding for prescribed body corporates (PBCs) under the Native Title Act 1999.*
>
> *7.121 Revenue for this fund should come from all Australian governments and proponents negotiating with PBCs.*
>
> *7.122 Alongside an increase in funding for PBCs, the Committee is of the view that there needs to be greater transparency and accountability in PBC proceedings within communities. Like all statutory bodies, PBCs are required corporate reporting responsibilities like conducting directors' meetings, AGMs and special general meetings. However, the Committee heard*

[33] *Native Title Act 1993* (Cth), 'Preamble'.
[34] Ibid s 26(2).
[35] The majority of NNTT determinations have been in favour of future acts being done, with the Tribunal having only made three determinations that a future act may not be done since the commencement of the *Native Title Act 1993* (Cth) in 1994.
[36] National Native Title Council, 'Calls for review of native title corporations are misdirected and out of touch' (Media Release, 11 September 2024).

concerning reports that some PBCs are not transparent in their decision-making with respect to their local community resulting in decisions being taken to allow the destruction of cultural heritage sites, against the wishes of community members…

7.123 Therefore, the Committee considers that PBCs should, as part of funding agreements, be required to demonstrate transparency and accountability in their decision-making processes with respect to their local community [37]

40. While the Government has provided in-principle agreement to these aspects of recommendation 7,[38] there is currently no effective mechanism to address this imbalance of power.[39]

41. The majority of future act determinations that have been contested in the NNTT have found in favour of the government/grantee party. As at March 2025, there were only three out of 156 future act determinations by the NNTT which found that the future act must not be done, representing less than 2 per cent of determinations. Further, 93 of the determinations found that the future act may be done without conditions.[40] Similarly, a substantive number of determinations have raised issues as to whether the parties have negotiated in good faith, and members of the legal profession report that there is an underlying concern among First Nations people about the fairness of the process.

42. There have been attempts in the past to reform the right to negotiate provisions, including the duty to negotiate in good faith.[41] We suggest that the Review represents an opportunity to revisit this issue, including by investigating the perspectives of native title parties and their representatives around the particular challenges for meaningful participation in negotiations.

43. The Law Council has had the benefit of reviewing the submission by NTSCORP, the native title service provider for New South Wales and the Australian Capital Territory. We note that NTSCORP has suggested a requirement for parties to a negotiation to consider expert evidence regarding comparable agreements in assessing whether compensation offers made are objectively reasonable for the purposes of meeting the requirement to negotiate in good faith. Such provisions could assist in safeguarding against abuses of power that may occur in the context of negotiations.

Extending the right to negotiate

44. The Law Council submits that the scope of the right to negotiate must be reconsidered with a view to its extension to additional future acts that relate to completely new projects that substantially impact the property and cultural rights of First Nations peoples and communities for the following reasons.

45. Firstly, the right to negotiate provides native title holders with an opportunity to highlight and seek the preservation of culturally important sites on lands and waters that may be impacted by the proposed development as part of the future act.

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[37] Juukan Gorge Report, 209.
[38] Department of Climate Change, Energy, the Environment and Water, Australian Government response to the destruction of Juukan Gorge (2022) 11-12.
[39] See, eg, *Western Australia v Daniel* [2002] NTTA 230, [146] where it was held at that the government/grantee party is not required to fund a native title party which lacks resources.
[40] Statistics sourced at Native Title Tribunal, Search Future Act Applications and Determinations.
[41] See for example, the *Native Title Amendment Bill 2012* (Cth), which subsequently lapsed, and the *Native Title Amendment (Reform) Bill 2014* (Cth).

Including native title holders in conversations from the outset is critical to ensuring that certain cultural sites are not damaged by future acts and thus reduces the chances of future compensation claims against parties for damage caused.

46. Secondly, the restrictions limit First Nations rights in a way that is inconsistent with international human rights law and UNDRIP. Notably, Article 18 of UNDRIP provides that 'Indigenous peoples have the right to participate in decision-making in matters which would affect their rights', while Article 19 provides that:

> *States shall consult and cooperate in good faith with the Indigenous peoples concerned … to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.*

47. Restricting the right to negotiate may have the effect of making it difficult for native title holders to participate in genuine consultations, and subsequently provide informed consent, on matters that impact them. Further, the CERD Committee has stated that the amendments (including the restrictions on the right to negotiate) breach CERD as they fail to ensure the 'effective participation' of Indigenous people.[42]

48. Thirdly, the timeframe in which parties are required to come to an agreement is often too short for genuine consultation and negotiation to occur, and may result in parties rushing into an inequitable agreement. This is particularly the case when considering that the alternative is for matters to be heard by the NNTT, which, perhaps due to the constraints of the legislative framework, has historically found in favour of future acts being allowed to proceed. As a result, parties may therefore feel pressured to accede to negotiations, perhaps with unfair terms, prior to the six-month deadline.

49. Finally, we note that then-Aboriginal and Torres Strait Islander Social Justice Commissioner, Dr William Jonas, asserted in the *Native Title Report 2001*, that the restricted approach to the right to negotiate introduced by the 1998 Amendment Act may be discriminatory on the grounds of race.[43] This is because, as posited by the Commissioner, it substantially reduces the protections afforded to Indigenous people's property and cultural rights in comparison to the rights of non-Indigenous people[44]—though this may be lawful at Australian domestic law, given the disapplication of the *Racial Discrimination Act 1975* (**RDA**).[45]

50. With that said, the Law Council is aware that not all future acts require negotiation, including some renewals, re-grants or extensions of mining or petroleum tenements.[46]

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[42] Committee on the Elimination of Racial Discrimination, Decision (2)54 on Australia (UN Doc CERD/C/54/Misc.40/Rev.2, 18 March 1999); Committee on the Elimination of Racial Discrimination, Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia (UN Doc CERD/C/304/Add.101, 19 April 2000).
[43] Australian Human Rights Commission, *Native Title Report* (1 July 2001).
[44] Ibid.
[45] *Native Title Act 1993* (Cth) s 7.
[46] Ibid s 26D(1). See also, Richard Bartlett, *Native Title in Australia* (LexisNexis, 5th ed, 2023) 704-705.

Current exemptions to the right to negotiate

51. As identified at paragraph [37] above, in accordance with subsection 26(2), the right to negotiate can be excluded in certain circumstances, including, for example, where:

- in accordance with section 26A of the NTA, the Commonwealth Minister has, by legislative instrument, determined that an act is an 'approved exploration etc. act'—that is, an act which creates or varies a right to mining exploration, prospecting or fossicking and the act is 'unlikely to have a significant impact on the particular land or waters concerned';[47] or
- in accordance with section 26B of the NTA, the Commonwealth Minister has, by legislative instrument, determined that that certain acts done by a State or Territory that create or vary a right to mine gold or tin in surface alluvium is an 'approved gold or tin mining act';[48] or
- the act is 'an act excluded by section 26C' (which deals with opal or gem mining) from the coverage of the right to negotiate under Subdivision P.[49]

52. Several determinations made in accordance with these provisions in relation to New South Wales remain in effect. These include:

- *Native Title (Right to Negotiate (Inclusion)—NSW Land) Approval No. 1 of 1996* (Cth) made under paragraph 26(2)(e) of the NTA;
- *Native Title (Right to Negotiate (Exclusion)—NSW Land) Determination No. 1 of 1996 (Cth)* made under paragraph 26(3)(b) of the NTA;
- *Native Title (Approved Exploration etc. Acts — New South Wales) (Mining) Determination 2000* (Cth) made under subsection 26A(1) of the NTA;
- *Native Title (Approved Exploration etc. Acts — New South Wales) (Petroleum) Determination 2000* (Cth) made under subsection 26A(1) of the NTA; and
- *Native Title (Approved Opal or Gem Mining Area — Lightning Ridge (Area 2), New South Wales) Determination 2000* (Cth) made under subsection 26C(2) of the NTA.

53. The regime under the section 26A of the NTA effectively allows the NSW Government to grant exploration titles without considering whether native title exists. It puts the onus on the exploration title holder, rather than the NSW Government, to determine where native title is extinguished, in circumstances where the exploration title holder has a vested interest in an expansive view of extinguishment and where there is no oversight by the NSW Government of the decisions that are made by the exploration title holder.

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[47] *Native Title Act 1993* (Cth) s 26(2)(b). See also, Richard Bartlett, *Native Title in Australia* (LexisNexis, 5th ed, 2023) 701-704; Human Rights and Equal Opportunity Commission, Native Title Report 2000 (February 2001) 160-162.

[48] *Native Title Act 1993* (Cth) s 26(2)(c). See also, Richard Bartlett, *Native Title in Australia* (LexisNexis, 5th ed, 2023) 701-704; Human Rights and Equal Opportunity Commission, Native Title Report 2000 (February 2001) 160-162.

[49] *Native Title Act 1993* (Cth) s 26(2)(d). See also, Richard Bartlett, *Native Title in Australia* (LexisNexis, 5th ed, 2023) 700-701; Human Rights and Equal Opportunity Commission, Native Title Report 2000 (February 2001) 160-162.

54. The alternative regime in NSW was largely put in place between 1996 and 2000 and has not been amended or reviewed since commencement. The Law Council understands that alternative regimes may also be in place in other states or territories and, similarly, may not been amended, reviewed or evaluated.

55. Chapter 3, Part 4 of the *Legislation Act 2003* (Cth) provides for the staged repeal of most legislative instruments after the tenth anniversary of their commencement. However, a number of legislative instruments made under sections 26A, 26B, or 26C (including those listed in paragraph [52] above) have been exempted from sunsetting.[50] As a result, the current generation of native title holders have not been consulted on the arrangements and there is no effective oversight or public scrutiny of whether these arrangements, which continue to constrain the procedural rights of native title holders, continue to be appropriate.

56. Ideally, alternative regimes empowered under sections 26A, 26B, or 26C should be subject to the same process for staged repeal as all other Commonwealth legislative instruments. The Law Council suggests that this issue inform the ALRC's inquiry.

57. The alternative regime that operates in NSW with respect to small-scale opal or gem mining titles, as permitted under section 26C of the NTA, is discussed in NTSCORP's submission. The LSNSW endorses NTSCORP's observations on this issue.

Exempting the application of the Racial Discrimination Act

58. A third issue to be considered in reforming the future acts regime is the exempting of the application of the RDA.

59. Section 7 of the NTA has the effect of removing the application of the legal protections contained in the RDA from the NTA. In so doing, it removes the general standards of equality and non-discrimination contained in the RDA.[51] This was confirmed by the High Court of Australia in *Western Australia v Commonwealth* in which the majority 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'.[52]

60. Richard Bartlett describes the history and effect of the disapplication of the RDA as follows:

> *In the proposals developed by the Federal Government from 1996 to 1998, consistency with the principles of the RDA 1975 was an initial governmental concern.*
>
> *However, on the introduction of the Ten Point Plan in 1998, the government no longer sought to establish that the proposed amendments would satisfy equality before the law. Rather, the government sought the specific disapplication of the RDA 1975 to the substantive rights and procedures declared in the future act process, and s 7 was amended accordingly. These amendments, which were enacted in 1998 as part of the Ten Point Plan, fell short of providing equality before the law. In particular, they provided that native title was*

[50] *Legislation (Exemptions and Other Matters) Regulation 2015* (Cth) s 12, item 45.
[51] See Richard Bartlett, *Native Title in Australia* (LexisNexis, 5th ed, 2023) 831–2; *Western Australia v Ward* (2002) 213 CLR 1 [376]–[385].
[52] (1995) 183 CLR 373, 483-484.

overridden by 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. The amendments attributed an inferior tenor and nature to native title.[53]

61. The disapplication of the RDA entailed a specific acknowledgement that the enactment of legislation to extinguish native title[54] would detrimentally affect the property rights of a particular group (i.e. First Nations peoples),[55] and, therefore, would be incompatible with the RDA. Specifically, provisions of the RDA expressly provide for the protection of the rights of First Nations peoples in Australia, while certain acts permissible under the future acts regime would impair the property rights of First Nations peoples—particularly, to own and protect against deprivation of property. However, disapplying legislation that would function to protect Indigenous rights in order to facilitate the extinguishment of Indigenous rights is, clearly, inherently objectionable.

62. The High Court in *Commonwealth v Yunupingu*[56] has recently reaffirmed that the common law rule of recognition of title is absolute, and that the cessation of recognition of native title at common law can only occur by a legally authorised and legally effective exercise of legislative or executive power prevailing over the common law rule of recognition. The Court found that to attribute to native title an 'inherent defeasibility', meaning an 'inherent fragility' or 'inherent susceptibility' to extinguishment by an exercise of the Crown's sovereign power, would accord to native title holders less than they held under traditional law and would be counter to the fundamental consideration in *Mabo (No 2)* of common law recognition bringing the common law into conformity with 'the values of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system',[57] including the right to own and inherit property and be immune from arbitrary deprivation of property, as identified in *Mabo (No 1)*.[58]

63. Further, the exemption may be contrary to international law. Article 1 of the UNDRIP states that Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognised under international human rights law, which includes the right to be free from racial discrimination. Further, the CERD has consistently called on Australia to ensure that the RDA prevails over other legislation—including the NTA—that may be discriminatory on the grounds set out in the ICERD.[59]

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[53] Richard Bartlett, *Native Title in Australia* (LexisNexis, 5th ed, 2023) 562-563. See also, Issues Paper, 7 [32]-[33].
[54] For example, *Native Title Act 1993* (Cth) ss 23B, 23C, 23DA, 23E, 23F and 23G, which purport to confirm that State and Commonwealth 'previous exclusive possession acts' and 'previous non-exclusive possession acts', extinguish native title rights and interests. These provisions thus effect that extinguishment and do so without providing for any compensation or 'just terms' inconsistently with the limit on the Commonwealth's acquisitions power in s 51(xxxi) of the *Constitution* (Cth).
[55] Australian Human Rights Commission, The RDA and native title (Report, 1997).
[56] [2025] HCA 6.
[57] Ibid [79] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), quoting *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 30.
[58] Ibid [79], citing *Mabo v Queensland (No 1)* (1988) 166 CLR 186, 217.
[59] Committee on the Elimination of Racial Discrimination, Concluding observations on the eighteenth to twentieth periodic reports of Australia (CERD/C/AUS/CO/18-20, 26 December 2017) [8]; Committee on the Elimination of Racial Discrimination, Concluding observations on the fifteenth to seventeenth periodic reports of Australia (CERD/C/AUS/CO/15-17, 13 September 2010) [10].

64. For these reasons, the Law Council submits that consideration should be given to the potential benefits and impacts of removing the disapplication of the RDA (for example, through the removal of section 7 of the NTA).

Operationality issues

65. A fourth issue to be considered in reforming the future acts regime is addressing operationality issues, outlined in the following paragraphs.

Complexity of the Future Acts Regime

66. The sheer complexity of the future acts regime and the difficulty in understanding the legislative scheme is a real concern, as is its breadth. It is extremely difficult for lawyers to navigate it, let alone for lay persons to understand it. Indeed, the Law Council notes that CERD described the NTA as a 'cumbersome tool' and recommended simplifying the relevant procedures.[60]

67. The Law Council submits that efforts should be made to ensure the legislation is clear, concise, and easily understandable for those without a legal background. This would help 'level the playing field' in ensuring that native title holders can readily access the legislation to the same extent as larger well-resourced corporations.

Future acts by consent

68. Future acts can occur by consent under registered Indigenous Land Use Agreements (**ILUAs**).[61] These are complex legal documents which require parties to fulfill a range of procedural steps before they become binding, including native title decision making processes, notification and registration. Such steps are important safeguards for ILUAs which may involve the surrender of native title or the validation of non-native-title interests which may permanently affect native title rights.

69. However, ILUAs are also used to validate a range of interests which have considerably less impact on native title, including interests akin to licenses. The current approach imposes the same onerous processes and, therefore, the same time impacts and costs, on an ILUA to surrender native title and an ILUA to validate the grant of a licence for an asset protection zone.

70. The Law Council suggests the ALRC consider whether these interests could be the subject of agreements of a different kind, particularly where there has been a determination of native title. We suggest that there could be a tiered arrangement. For example, ILUAs which validate a class of interests which have less effect on the native title groups rights (whether temporally, or by nature of the impact, or by virtue of termination clauses) being able to be authorised and take effect through more streamlined processes, particularly, post-determination.

Standardised process across states and territories

71. The Law Council understands that states and territories across Australia have adopted different approaches to implementing the future acts regime, which may reflect the forms of land use in particular areas (e.g. granting leases for grazing, agriculture, mining). However, this often makes it difficult for practitioners and native

[60] Committee on the Elimination of Racial Discrimination, Concluding observations on the eighteenth to twentieth periodic reports of Australia (CERD/C/AUS/CO/18-20, 26 December 2017) [21]-[22].
[61] See *Native Title Act 1993* (Cth)pt 2, div 3, subdivs B-D..

title holders to understand fully the different complex process across states and territories.

72. To address this, consideration should be given to a standardised process for the future acts regime across states and territories, where suitable. This could include the requirement to enter negotiations and receive consent from native title holders prior to the commencement of future acts.

Consistent and integrated protections for cultural heritage

73. There are several subdivisions of the future acts regime, which require, as a precondition to their application, that there be a law of the Commonwealth, a state or a territory which makes provision in relation to the preservation or protection of areas, or sites, which may be:

- in the area in which the act is done; and
- of particular significance to Aboriginal peoples or Torres Strait Islanders in accordance with their traditions.[62]

74. The Law Council queries whether there is a principle underlying the fact that provisions to this effect do not apply to all future acts, as well as those provisions of the past acts regime which have prospective operation. The Law Council suggests that the ALRC consider this issue given the inconsistency in Aboriginal cultural heritage protection, nationally.

Independent Oversight

75. The Law Council notes reference within the Issues Paper to a suggestion of creating an independent body to review agreements under the future acts regime.[63] While this sounds positive in principle, it may result in independent bodies introducing minimum requirements within agreements which may subsequently lead to a 'race to the bottom' whereby parties are coerced to enter into substandard or 'just above the mark' agreements which may undermine the principle of self-determination, as such mechanisms removes the power from native title holders to negotiate an arrangement that works for them.

76. As such, the Law Council has some concerns about the introduction of an oversight body.

Question 2

Are there any important issues with how the future acts regime currently operates that we have not identified in this Issues Paper?

Native Title Holders' Representation and Consultation

77. In practice, the consultation process between native title holders and other stakeholders (for example, government or industry) can be deficient, particularly when the native title holders' representatives are not adequately consulted or involved. Stronger, more structured requirements may be needed to ensure that

[62] See, eg, *Native Title Act 1993 (Cth)* ss 24JAA(1)(e) and 24KA(1)(d).
[63] Issues Paper, 29.

native title holders and their representatives are meaningfully involved in the process, especially where complex decisions with long-term impact are made.

Stronger Protections for First Nations Knowledge and Cultural Heritage

78. The future acts regime could be improved to provide better protections for First Nations' knowledge and cultural heritage. In certain instances, future acts may proceed without thoroughly assessing the impact on cultural heritage and traditional knowledge. This could be addressed, for example, by entering into agreement with native title holders to provide that they may manage their own cultural heritage sites, rather than such sites being managed by state or private entities which may not have the necessary cultural knowledge. Introducing a more robust framework for evaluating cultural heritage risks and safeguarding Indigenous knowledge in future acts could be a key consideration in the review.

Government Accountability

79. The Law Council refers to *BHP Billiton Nickel West v KN (Tjiwarl and Tjiwarl 2)*, in which the Full Court of the Federal Court of Australia determined that future acts are valid, even if they are invalidly notified.[64] As a consequence, an act is valid regardless of whether the State complies with the future acts regime, unless Subdivision P applies. This decision has broad implications as the same language is used in subsection 24MD(1) and applies to several other future acts[65]—meaning that, if any of these subdivisions apply to a future act, then it is valid regardless of whether the State complies with the future acts regime. This is deeply concerning, as it essentially establishes that there are no consequences if Government fails to comply with important procedural steps required by the future acts regime.

80. The Law Council submits that the ALRC should consider this issue with a view to ensuring that there is compliance with procedural requirements in the NTA and that access to an effective remedy is afforded where those requirements are not met.

Compensation

81. The Law Council suggests that the ALRC consider the following points regarding compensation.

82. The NTA generally creates an obligation for the payment of compensation for the doing of future acts. However, the mechanism in the NTA for the recovery of that compensation is cumbersome, expensive and, in many instances, disproportionate to the compensation which might be involved. This approach risks making that entitlement illusory.

83. The Law Council is aware that, in practice, where a future act has been done, but there was no consent or agreement made with the relevant native title holders, native title holders are regularly subsequently entitled to compensation.

84. Further, the Law Council has been informed of issues arising whereby, when parties enter into compensation negotiations, the interest on compensation continues to increase while compensation negotiations are taking place, which often results in the proponent corporations or government bodies being required to pay higher rates of compensation than they would have, initially, had native title holders been

[64] [2018] FCAFC 8 (North, Dowsett and Jagot JJ).
[65] See, eg, *Native Title Act 1993 (Cth)* ss 24GB(5), 24HA(3), 24ID(1), 24JB(1) 24KA(3), 24LA(3) and 24NA(2); See also *BHP Billiton Nickel West v KN (Tjiwarl and Tjiwarl 2)* [2018] FCAFC 8 (North, Dowsett and Jagot JJ) [25]-26].

consulted. Had native title holders been consulted at the outset, they could have been afforded the opportunity to negotiate other forms of compensation, such as periodic payments throughout the lifecycle of the project or employment of the local communities, some of which would have been implemented from the commencement of the future act.

85. In circumstances where parties to negotiations seek a determination from the NNTT, the Tribunal's power under paragraph 38(1)(c) of the NTA to make a determination that the act may be done subject to conditions is limited by a prohibition in subsection 38(2) that the arbitral body not determine a condition that has the effect that native title parties are to be entitled to payments worked out by reference to profits, income or things produced by the grantee on the land. That has had the effect that there is no history of the arbitral body imposing any condition relating to compensation, it being noted that it remains open, following a future act grant, for compensation to be payable pursuant to an application under Part 3 of the NTA. This leaves the issue of compensation to the uncertain prospect of a more complex broad ranging compensation application at some time in the future.

86. The Law Council suggests the ALRC consider more efficient mechanisms in the NTA for the recovery of compensation, or a requirement that States have in place appropriate mechanisms for the recovery of compensation if it authorises an act to proceed.

Further Clarification on the meaning of 'future act'

87. While the future acts regime includes the making, amendment, or repeal of legislation and the grant or renewal of licenses and permits (for example, mining licenses), there may be some ambiguity in what constitutes a 'future act' in specific scenarios. Further clarification and refinement of this definition could ensure consistency in its application and understanding by all stakeholders, particularly in complex situations involving overlapping interests.

Possible flexibility regarding the process for new types of future acts

88. As Australia's economic and social landscape evolves, new future acts are emerging, particularly in digital infrastructure, renewable energy projects and carbon markets. The Review should consider how the future acts regime can be flexible and adaptable to emerging industries while still protecting the rights of native title holders.

Public works constructed under Subdivision J

89. Under Part 2, Division 3, **Subdivision J**, the construction of a public work will extinguish native title. This is in contrast to section 24KA (facilities for services to the public) where the non-extinguishment principle applies to the construction of roads, pipelines, railways, bridges, etc. The only other instance in the future acts regime where native title can be extinguished are ILUAs or compulsory acquisitions, in each case, being reasonable outcomes (either by agreement or where native title rights are treated as equivalent to freehold).

90. The Law Council suggests that consideration be given to amendments to subsections 24JB(2) and (3) to provide that a proponent can elect for the non-extinguishment principle to apply to acts covered by Subdivision J.

Goods and Services Tax on consent negotiation

91. The Law Council has received feedback from members of the legal profession noting concerns about a relatively new development whereby services provided to parties who have entered negotiations for the purposes of receiving consent for future acts have, in some cases, attracted Goods and Service Tax (**GST**).

92. The Law Council submits that this issue be considered as part of the Review, with a view that such services should not be accounted as a taxable product particularly given their importance as part of respecting the rights of Native Title holders. This appears to be linked to a relatively recent insistence by corporate parties that native title holders provide them with invoices, which presents an administrative burden, particularly, to smaller groups. Given that the production of invoices may be necessary for corporate parties to comply with business record-keeping requirements, consideration could be given to creating an alternative way to confirm such transactions that does not create an excessive burden on native title groups.

Question 3

Are there any aspects of the future acts regime that work well? If you have had positive experiences, we would like to hear about them and why they were positive.

93. The Law Council has received feedback from the LSSA regarding aspects of the alternative right to negotiate regime operating in South Australia. The Law Council provides this feedback for consideration by the ALRC in understanding what works well and what does not work well in alternative regimes.

94. The following views should be attributed to the LSSA.

Interrelationship with South Australia's alternative right to negotiate regime

Background

95. The *Mining (Native Title) Amendment Act 1995* (SA) inserted Part 9B of the *Mining Act 1971* (SA) (**SA Mining Act**) which regulates mineral exploration and production in the South Australia. It was enacted in May 1995 and commenced in June 1996, after being determined by the relevant Commonwealth Minister to comply with the requirements for alternative State provisions set out in Section 43 of the NTA. At the time, the right to 'negotiate' provisions in the NTA (including section 43) formed part of Subdivision B of Part 2 of Division 3 before, in 1998, along with significant additions and amendments, that Subdivision became Subdivision P. Since 1998, there have been a number of further changes made to Subdivision P. However, the changes which have been made since 1995 to Part 9B of the SA Mining Act have been relatively minor.[66]

[66] The most significant change being to increase timelines of '2 months' to '4 months' and in June 2003 to make Part 9B permanent, when previously it had been subject to an expiry date (see s 23ZD).

Key differences between Part 9B of the SA Mining Act and Subdivision P of the NTA

96. The key differences between Part 9B of the SA Mining Act and Subdivision P of the NTA may be summarised as follows:

    (a) Under Part 9B, the State does not initiate the negotiating process (as with section 29 of the NTA). Instead, the proponent gives notice to the native title party pursuant to section 63M of the SA Mining Act to initiate negotiations for a native title mining agreement (**NTMA**).

    (b) The State is not a negotiating party. Only the proponent and the native title party are such parties as per sections 63L(1) and 63P.

    (c) The State grants an exploration authority (for example, exploration and prospecting licences) to proponent applicants prior to any initiation of the negotiating process, without regard to when (if ever) that process will be initiated by the proponent and it is up to the proponent to decide when to initiate the process. On the face of it, section 63F allows a proponent to delay until it considers the exploration activities it proposes to carry out will '*affect native title*'. It is not until that point that section 63F requires the existence of an NTMA or a native title mining determination[67] (**NTMD**) for exploration operations thereafter to be able to be lawfully conducted. Further, until the proponent reaches the stage in its exploration when it needs to obtain the Department of Energy and Mining's (**DEM**) approval to its Program for Environmental Protection and Rehabilitation (**PEPR**), such as when drilling is proposed, the State will not require evidence of an NTMA (or NTMD).

    (d) An NTMA (or NTMD) ostensibly does not relate to 'acts' of the State (such as the grant of a mining tenement by the State) but to the carrying out of mining operations by the proponent pursuant to the mining tenement (which, in the case of an exploration authority, is granted almost always before the relevant NTMA (or NTMD)).

    (e) In lieu of the NNTT, the Environment Resources Development (**ERD**) Court is the relevant arbitral body (and also mediates among the negotiating parties, if requested).[68]

    (f) There is no equivalent in Part 9B to subsection 36(2)[69] of the NTA and so no qualification to the right for the proponent to seek a NTMD after six months from the ERD Court.

Disadvantages of Part 9B of the SA Mining Act

97. The potential disadvantages of the regime under Part 9B of the SA Mining Act include:

    (a) In the absence of the State as a notice-giver (or negotiation party)—and in light of section 63F of the SA Mining Act—ordinarily, native title parties, such as registered native title bodies corporate (**RNTBCs**) have not been aware that exploration authorities have been applied for or, indeed, granted over their native title land until receiving a section 63L notice (or a notice of entry under section 58A). Further, there is no equivalent in Part 9B to section 31(1)(a) of

[67] From the Environment Resources Development Court.
[68] Under section 63P(3).
[69] Section 36(2) prohibits the NNTT from making a NTMD where the native title party satisfies it that the proponent (or the State) has not negotiated in good faith.

the NTA (which gives native title parties the opportunity to make submissions to the State before it grants a mining tenement).

(b) There have always been a few prospectors or small operators who have sought to ignore Part 9B entirely and not given notice under section 63L (to initiate negotiations for an NTMA or, purportedly in reliance on the expedited procedure under section 63O),[70] until required by the DEM (or its predecessor) to have a registered NTMA (or NTMD), for example, in order to have a PEPR approved.

(c) The obligation to negotiate in good faith under section 31 of the NTA (to the extent a State is required to do so in light of subsection (1A)) affords an opportunity for RNTBCs (or other native title parties) to have dealings with the State prior to the grant of a mining tenement. This is substantially unavailable to them under Part 9B.

(d) The NNTT operates throughout the whole country and its focus is entirely on native title matters. As a result, it has developed specialist knowledge, expertise and experience in all aspects of native title, including in conducting mediations in relation to the negotiation of native title mining agreements and also acting as the arbitral body under Subdivision P. On the other hand, the ERD Court's jurisdiction is significantly broader in scope. As it is only rarely involved in native title matters, by comparison with the NNTT, it may fairly be said to have less expertise and experience in relation to them. Further, given the NNTT's particular expertise in this area, it is suggested that consideration be given to expanding its role, by allowing it to mediate between proponents and RNTBCs when there are disputes which arise in relation to the interpretation, implementation or administration of NTMAs.

(e) Another area of problematic interaction between the future act provisions in the NTA (not just the 'right to negotiate' regime, whether under Subdivision P or Part 9B) and State law in South Australia has been caused by the operation of Part 2B and Divisions A1 to A3 of Part 3 of the *Aboriginal Heritage Act 1988* (SA). These were inserted into that Act in 2017. On the face of it, section 19B(4) provides for an RNTBC to be 'taken to be appointed' as the Recognised Aboriginal Representative Body (**RARB**) for its native title determination area. However, it is understood that, despite there having been many applications made by RNTBCs to be appointed RARBs, to date, only one RNTBC's application for appointment as a RARB has been approved by the Aboriginal Heritage Committee in accordance with subsection 19B(5). This has resulted, to some degree at least, in the undermining of the rights, obligations and responsibilities of RNTBCs under the NTA (and Part 9B), insofar as they bear on heritage protection.

98. The ALRC's Terms of Reference refer to recommendation 4 of the Juukan Gorge Report. That recommendation is for the Australian Government to review the Native Title Act 'with the aim of addressing inequalities in the negotiating position of Aboriginal and Torres Strait Islander peoples in the context of the future act regime'. The recommendation specifically provided that the review should address ,'developing standards for the negotiation of agreements,' that require proponents to adhere to the principle of FPIC as set out in the UNDRIP. The LSSA welcomes the ALRC's proposed review. This may be expected, in particular, to involve

[70] They are, admittedly, obliged to give notice of entry to 'the owner' of the relevant land before carrying out any exploration (including 'low impact exploration operations'): section 58A (under Part 9) of the SA Mining Act. The definition of 'owner' in section 6 includes 'a person who holds native title in the land'.

consideration as to possible changes to sections 26D, 31, 33, 38 and 39 of the Native Title Act.

99. Any such changes should, in addition, involve changes to sections 43 and 43A so as to ensure that those standards will also be incorporated into Part 9B (if South Australia is to retain a separate 'right to negotiate' regime). Further, changes to those sections should require the State to assume a more substantial role in any updated Part 9B, involving its taking a degree of responsibility for ensuring the standards are adhered to, including by proponents. The standards which operate in South Australia should not be different (or less stringent) in this respect to those applying elsewhere in the country under the NTA.

100. In addition to considering possible changes to Subdivision P, the ALRC is being asked to consider possible changes to other parts of the Future Acts Regime (including Subdivisions G to O). The LSSA would advocate for a review which provides for more clarity and certainty as to the extent of consultation with the native title holders and their opportunity to comment (and the timelines for these). There is concern that, for the most part, Government consultation is at best perfunctory (for example under Subdivision H in relation to the issuing of water).

101. To summarise, in the event it is to be retained as South Australia's 'alternative right to negotiate' regime, the LSSA notes that Part 9B of the Mining Act requires updating in order to bring it further into line with Subdivision P of the Native Title Act. Any changes to Subdivision P that may be ultimately recommended by the ALRC in its Final Report (particularly those with regard to FPIC) should be reflected in Part 9B.

Questions 4 and 5

Do you have any ideas for how to reform the future acts regime?

What would an ideal future acts regime look like?

102. The Law Council submits that an ideal future acts regime would reflect the issues articulated in response to Questions 1 and 2. In particular, an ideal regime would implement UNDRIP, including FPIC, to ensure the adequate and equal protection of the rights of both parties to future act negotiations.

Appendix: Extracts from international jurisprudence

The Inter-American Court of Human Rights (**IACHR**), in relation to consultation requirements arising from the American Convention on Human Rights, in the matter of *Saramaka People v Suriname,* emphasised, the following in relation to adequate consultation:

> *First, the Court has stated that in ensuring the effective participation of members of the Saramaka people in development or investment plans within their territory, the State has a duty to actively consult with said community according to their customs and traditions. This duty requires the State to both accept and disseminate information and requires constant communication between the parties. These consultations must be in good faith, through culturally appropriate procedures and with the objective of reaching agreement. Furthermore, the Saramakas must be consulted, in accordance with their own traditions, at the early stages of a development or investment plan, not only when the need arises for approval of the community, if such is the case. Early notice provides time for internal discussion within communities and for proper feedback to the State. The State must also ensure that members of the Saramaka community are aware of the possible risks, including environmental and health risks, in order that the proposed development or investment plan is accepted knowingly and voluntarily. Finally, consultation should take into account of the Saramaka people's traditional methods of decision making.*
>
> *Additionally, the Court considers that, regarding large scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior and informed consent, according to their customs and traditions. The Court considers that the difference between "consultation" and "consent" in this context requires further analysis…*
>
> *Most importantly, the State has also recognised that the "level of consultation that is required is obviously a function of the nature and content of the rights of the Tribe in question." The Court agrees with the State and, furthermore, considers that, in addition to the consultation that is always required when planning development or investment projects within traditional Saramaka territory, the safeguard of effective participation that is necessary when dealing with major development or investment plans that may have a profound impact on the property rights of the Saramaka people to a large part of their territory must be understood to additionally require the free, prior and informed consent of the Saramakas, in accordance with their traditions and customs.*[71]

This body of jurisprudence, including in relation to the burden of providing proper consultation, was expanded in *Kitchwa Indigenous People of Sarayaku v Ecuador* where the IACHR commented:

> *It should be clarified that it is the obligation of the State—and not of indigenous peoples—to prove that all aspects of the right to prior consultation were effectively guaranteed in this specific case...*

[71] *Case of the Saramaka People v Suriname (Preliminary Objections, Merits, Reparations and Costs),* Inter-American Court of Human Rights, November 28, 2007, [133]-[134], [137].

In addition, the consultation must not serve as a mere formality, but rather must be conceived as a 'true instrument for participation,' 'which should respond to the ultimate purpose of establishing a dialogue between the parties on principles of trust and mutual respect, and aimed at reaching a consensus between the parties.' Thus, it is an inherent part of every consultation with indigenous communities that a 'climate of mutual trust be established,' and good faith requires the absence of any form of coercion by the State or by agents or third parties acting with its authority or acquiescence. Furthermore, consultation in good faith is incompatible with practices such as attempts to undermine the social cohesion of the affected communities, either by bribing community leaders or by establishing parallel leaders, or by negotiating with individual members of the community, all of which are contrary to international standards.

It should be emphasised that the obligation to consult is the responsibility of the State; therefore the planning and executing of the consultation process is not an obligation that can be avoided by delegating it to a private company or to third parties, much less delegating it to the very company that is interested in exploiting the resources in the territory of the community that must be consulted.[72]

The jurisprudence of the UN Human Rights Committee draws upon and reflects the above. In *Poma Poma v Peru* the Committee remarked:

The Committee recalls its general comment No. 23, according to which article 27 establishes and recognizes a right which is conferred on individuals belonging to minority groups and which is distinct from, and additional to, the other rights which all persons are entitled to enjoy under the Covenant. Certain of the aspects of the rights of individuals protected under that article - for example, to enjoy a particular culture - may consist in a way of life which is closely associated with territory and use of its resources. This might particularly apply in the case of the members of indigenous communities which constitute a minority. This general comment also points out, with regard to the exercise of the cultural rights protected under article 27, that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.[73]

[72] *Case of the Kitchwa Indigenous People of Sarayaku* v *Ecuador* (*Merits and Reparations),* Inter-American Court of Human Rights, June 27, 2012, [179] and [186]-[187]. See also *Case of the Garifuna Community of Triunfo De La Cruz and its Members* v *Honduras* (Judgment), Inter-American Court of Human Rights, October 8, 2015, [160]; and the African Commission on Human and Peoples Rights in *Centre for Minority Rights Development (Kenya) and Minority Rights group (on behalf of the Endorois Welfare Council)/Kenya* (276/03) [291].

[73] *Poma Poma v Peru, Communication No 1457/2006*, Human Rights Committee, UN Doc CCPR/C/95/D/1457/2006, [7.2].

More recently, in *Pereira and Benega v Paraguay,* the Committee commented:

> *The Committee also recalls that measures should be taken to ensure that indigenous peoples can effectively participate in decisions of concern to them. Specifically, it is of vital importance that measures that compromise or interfere with the culturally significant economic activities of an indigenous community are taken with the free, prior and informed consent of the members of the community and respect the principle of proportionality so as not to endanger the very survival of the community*.[74]

[74] *Oliveira Pereira and Sosa Benega v. Paraguay*, Human Rights Committee, UN Doc CCPR/C/132/D/2552/2015, [8.7].