Norman Waterhouse

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By Email: nativetitle@alrc.gov.au

Australian Law Reform Commission
PO Box 209
Flinders Lane
VICTORIA 8009

Submissions to ALRC — Response to Discussion Paper
'Review of the Future Acts Regime'

Introduction to Submission

Who we are and why we are making this submission?

1. The Native Title, Resources and Renewable Energy practice at Norman Waterhouse is a nationally recognised practice which represents both native title holders, Local Government, and corporate proponents. Currently, it has the privilege of being nationally recognised as a leading law firm for Traditional Owners and simultaneously for project proponents. We have a significant specialisation in both commercial and native title negotiations for native title holders, having conducted over:

    1.1 12 Indigenous Land Use Agreements (**ILUA**), including for commercial developments;

    1.2 10 major commercial Native Title Agreements, which were not ILUAs – including two which received Premier's Energy Awards;

    1.3 30 RTN mining agreements for exploration, retention leases and production mining leases; and

    1.4 50 smaller heritage protection agreements or minor commercial agreements.

Law Reform process addresses multiple policy issues

2. The Future Acts Regime involves a number of key policy considerations, many of which are important to proponents and government. Notable among these are cost, security of tenure and viability of achieving financial close.

3. However, notwithstanding these important broader considerations, it remains our view as experienced practitioners in this field that the overwhelming issue affecting the Future Act Regime is the prospect of native title holders missing out on serious economic engagement and financial benefits under the Regime. To date, there has been a lack of robust and formal economic analysis undertaken by public policy makers in respect of how various pressures on native title holders reduces the level of benefits they receive. Further, by and large, broader policy considerations (such as certainty of tenure or timely resolution) are assisted, are supported rather than hindered, by placing native title holders in a stronger position. This is particularly true when adequate processes and funding are provided to enable a native title party to properly respond to future act requests.

4. Further, a number of reforms which would considerably assist corporate proponents – such as the requirement that native title be recorded in land title offices around Australia for ease of property analysis and due diligence, and guarantees of State tenure after ILUAs are undertaken – are not matters that can be managed in this Federal review, but would rather require action by the respective State Governments.

5. Accordingly, while recognising the importance of issues facing private companies and Government, these submissions primarily towards focusing on issues of importance to native title holders. This is because, the level of outcome for native title holders under the current regime has the greatest level of divergence and requires the greater level of analysis. Some RNTBCs operate very successfully under the current regime, others do not. Without a clear understanding of these divergent experiences, it remains difficult to properly understand the Future Act Regime as a whole or otherwise consider the broader impact of the Regime on other participants in the corporate or Government entities. Accordingly, our submissions focus on issues relevant to native title holders, many of whom we have represented.

6. We do, however, note that **Proposal 1**, **Proposal 11**, and **Question 10** all outline reforms, which if done properly, would significantly benefit companies and private proponents as well as native title holders.

ILUA process provides greater rights to native title holders than RTN process

7. As noted above, there are additional policy considerations which will ultimately need to be taken into account – such as efficiencies in land access, and project certainty for proponents. However, policy makers cannot effectively balance these competing interests without a clear understanding of how the Regime impacts native title holders. In this respect, it is necessary examine the effects of the right to negotiate (**RTN**) Scheme on native title holders from the outset, so that clear and accurate understanding of its implications can be reached.

8. The reason why the above matters is that all available economic literature shows that negotiations which happen where there is a risk of compulsory acquisition leads to significant disadvantage to the landholding party. Accordingly, although there may be considerable policy reasons to support efficiency of land access, in balancing these policy considerations an accurate assessment of the impact these processes have on negotiation outcomes needs to occur.

9. To put this directly, almost all economic literature shows that a regime which allows for a project to be forced on property holders (such as the RTN Scheme) means that where any negotiation occurs the parties would be aware of that ‘risk’. This awareness changes the behaviour of the parties in the negotiation. The property owners – who feel vulnerable – will be more likely to agree to substandard commercial terms. This change in bargaining behaviour happens even if the risk of a forced process never occurs. The effect of this is that, even if all RTN Scheme processes were settled by negotiations rather than reliance on resolution through the National Native Title Tribunal (**NNTT**), the very fact that there is a risk that the project could be forced on native title holders means they will settle for worse commercial terms than they would have where such a risk did not exist (in effect, any agreement is only quasi-voluntary). Accordingly, the RTN Scheme will almost always produce worse outcomes for native title holders than the ILUA process, as the ILUA process does not contain the equivalent risk of an order by the NNTT and therefore does not distort negotiation outcomes.

10. We address this issue below in more detail in our “Up and Out Approach” diagram (see: **Diagram 1**).

Avoiding technical legal analysis where possible

11. As this submission responds to a policy document, we have sought to avoid complex legal analysis where it is not essential.

12. There are various outstanding legal issues which apply to a number of the proposals and questions. For example, the impact based approach could lead to complex issues to do with ‘just terms compensation’. The question of what part of a transaction is a compensation payment relating to an increase in tenurial value of land arising from change in use, versus what is a commercial payment, and – to the extent that there is such a distinction – which payments are Constitutionally protected forms of payment, is also a complex factual as well as legal issue. The impact of how section 53 of the *Native Title Act 1993* (Cth) may intersect with these issues remains largely untested. Further, we appreciate that there are technical ways of describing the orders of the NNTT under the RTN Scheme, such as grants of rights whereas we use the term ‘compulsory acquisition’ (and in economic contexts ‘eminent domain’) in these submissions deliberately, as the grant of any tenure via the RTN Scheme amounts to an acquisition, even if it is only partial. This also brings it into line with the broader economic modelling, which uses terms like compulsory acquisition or eminent domain.

13. In that respect, we have adopted the language of public policy, rather than legal analysis.

14. To be clear, not discussing the legal issues does not mean we do not have views on them – we do. However, where possible we have sought to avoid discussing technical legal analysis to allow these submissions to be more accessible. We can provide a more detailed legal analysis of the actual legislative processes to the ALRC if required.

Robust Economic Analysis and Modelling should occur

15. One final issue that we raise is our continued concern over the significant lack of formal and robust economic analysis (particularly in the fields of externalities, game/bargaining theory and the impact of price formation under eminent domain/compulsory acquisition) that have been applied to any analysis of the *Native Title Act 1993* (Cth) generally and the Future Act Regime more specifically. We consider that this analytical work is essential and should be undertaken, prior to any further Parliamentary intervention on these issues.

16. With this in mind, we note our recent involvement in facilitating the production of the first significant economic report on the impact of monopsony powers under the *Hydrogen and Renewable Energy Act 2023* (SA) on native title holders. This report, using formal economic methodology, shows the detrimental impact on native title holders when dealing with corporate parties conferred exclusive rights by State Government (technically what economists call a monopsony). This report deals with the impact of a State Government providing exclusive rights to a company negotiating ILUAs, thus removing the competitive force which would apply if multiple parties were simultaneously negotiating ILUAs with native title holders. It also, relevant to the ALRC, deals with the impact of compulsory acquisition on bargaining outcomes. However, as the economic report is relevant to State legislation, rather than Federal legislation, we have not commissioned it for this ALRC review. Notwithstanding this, given its indirect relevance, when this report is released in August, we will provide a copy to the ALRC.

Submission Overview — the "Up and Out Approach" Guiding These Submissions

This Submission is provided in two parts and is guided by the overarching principle of what we refer to as the "Up and Out Approach." As raised in the ALRC's material on the review of the Future Acts Regime, this submission acknowledges the Regime's present limitations and/or defects, which result in inefficiencies, unfairness, and ineffectiveness. These issues, as noted by the ALRC in its Discussion Paper, stem from a fundamental misalignment between the legislative framework set out in Part 2, Division 3, Subdivision P of the *Native Title Act 1993* (Cth) and the practical realities experienced by parties engaging with the Future Acts Regime.

Part 1 – The "Up and Out Approach" as a Guiding Framework for Reform

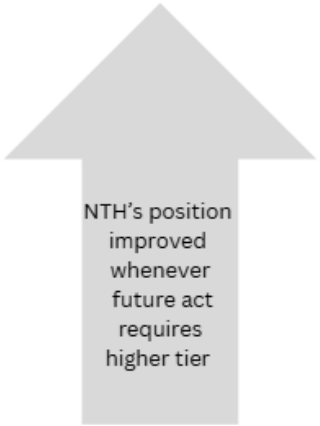
Part 1 introduces and explains the "Up and Out Approach" — a model proposed as a framework for evaluating and improving the current Future Acts Regime. This model is visually represented in **Diagram 1**. The "Up and Out Approach" encompasses both vertical and lateral improvements to the future act processes. Vertically, the approach acknowledges the three tiers that future acts can currently be done under, and that native title holders benefit when they are engaging with Government and companies who need to undertake processes in the higher tiers. Acknowledging that native title holders will always be in a better position if a future act requires a higher tier approach, then Diagram 1 illustrates progression of future acts into higher tier processes that can provide greater protection and procedural rights to native title holders. Laterally, the "Up and Out Approach" focuses on reforms within each tier to address existing deficiencies and effectively improve each tier so it provides greater benefits to native title holders. The objective of the "Up and Out Approach" is a reformed system that strengthens native title rights and delivers improved outcomes for native title holders across Australia.

The benefit of such an approach lies in its clear contrast with reforms that produce a "down and out" impact (see **Diagram 3**). Those reforms are to be avoided, as although they may appear to strengthen each tier, the very act of dragging down various future acts into a lower tier, overall prejudices native title holders. In that respect, much of the analysis in our responses can be better understood by comparing **Diagrams 1 – 3**.

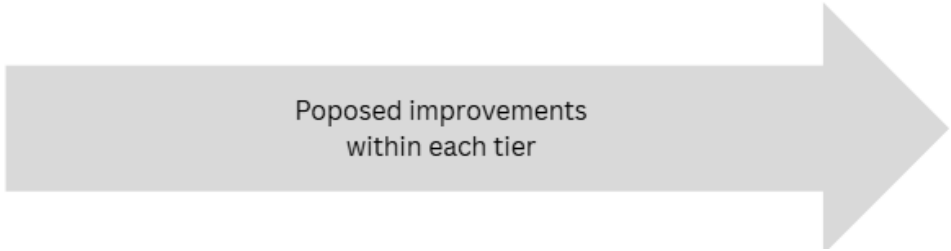
Explanation of Diagram 1 —Applying the "Up and Out Approach"

The three coloured tiers illustrated in Diagram 1 represent the categories of the processes currently operating under the Future Acts Regime: future acts notified under the notice provisions (red); future acts subject to the RTN process (yellow); and future acts governed by ILUAs (green). Each tier contains deficiencies that require some reform. However, native title parties are generally in a stronger position when a proposed future act is subject to more robust procedural and substantive protections such as those offered in the higher tiers of the Regime. Accordingly, if the reform is to benefit native title holders, a reformed Future Acts Regime should seek, wherever possible, to elevate proposed future acts into these higher tiers. This approach would improve the bargaining power of native title parties and achieve fairer outcomes. The "Up and Out Approach" should be adopted as a guiding principle for reform, with the aim of improving outcomes and ensuring the highest possible protection of native title rights and interests.

Diagram 1: A Tier Based Understanding of the Future Acts Regime
Native Title Holders (NTHs) receive better outcomes from Future Act Regime when 'Up and Out' Approach applied.



Negotiation but with insufficient resources / data hidden in ancillary agreement	ILUA system but with better funding (Prop 14, 15 & 17) and other methods to ensure power dynamic between parties addressed	ILUA system with more funding (Prop 14, 15 & 17) , no auxiliary agreements containing financial terms (Q8) and with transparent ILUA data (Q12).	Tier 1 - ILUA Strongest option
Highest Tier as provides greatest rights but requires NTHs to be effective at ILUA negotiations			
			Diminished Protection
Current RTN process with limitations on information exchange and compensation payable by NNTT	RTN which requires exchange of information - (Prop 6)	RTN which requires exchange of information - (Prop 6) AND with no section 38 (2) restriction - (Prop 8)	Tier 2 - RTN Intermediate Option
Intermediate Tier as system creates easily accessible threat of compulsory acquisition			
			Diminished Protection
Future Act Notice - requirement to make separate claim for compensation	Notice provision which requires compliance for validity (Prop 10)	Proposal 10 AND a version of the system in (Q24) - i.e. a more streamlined system for compensation	Tier 3 - Notices Weakest Option
Weakest Tier and option as NTH have no say and cannot negotiate at all			



Key Points:

- Future acts conducted under ILUA process, where the risk of compulsory acquisition is minimal will consistently offer a stronger framework than the RTN process, even with enhancements to the Notices system.
- Future acts conducted under the Notices system will always remain the weakest mechanism for protecting native title rights, regardless of any procedural improvements.
- Any point on a higher tier will always be equal or better for NTHs than any point on a lower tier (pushing out will never be better than pushing up).

Tier 1: Future acts carried out under the ILUA process offers the highest level of protection for agreement-making where there are sufficient resources for native title parties as well as sufficient information provided by the proponent regarding the proposed future act. In this tier, native title holders can negotiate fairer and broader benefits. To implement the “Up and Out Approach” at this tier, it is essential to ensure proper funding for negotiations and greater information transparency by reducing the use of ancillary agreements that obscure compensation/benefits provisions. These measures would promote fairer outcomes for native title parties. Where future acts can be elevated into this tier and ILUAs are adequately funded, this process represents the preferred pathway for native title parties to consent to future acts.

Tier 2: Future acts under the RTN process are represented in the middle tier as they offer slightly higher protection than Tier 3 given the requirement for negotiation of an agreement between proponents and native title parties e.g., the grant of a mining lease. However, this tier provides lower protection than Tier 1, given that private parties can compulsorily acquire native title through orders of the Tribunal. While the RTN process can lead to tangible benefits (in comparison with future acts in Tier 3) it remains undermined by significant structural and procedural weaknesses. To implement the “Up and Out Approach” at this tier, proposed amendments should address key issues including the removal of the threat of compulsory acquisition of native title rights where agreement is not reached; the asymmetry of information between parties which undermines informed negotiations and erodes the ability of the native title party to provide genuine consent; and the repeal of section 38(2) of the *Native Title Act 1993* (Cth), which restricts native title holders from seeking just terms financial compensation through the NNTT.

Tier 3: Future acts under the current Notices process fall within the lowest tier of the Future Acts Regime. This system offers the weakest level of protection and affords native title parties only minimal procedural rights. Compensation for impacts on native title rights requires native title holders to pursue a separate claim for compensation. To implement the “Up and Out Approach” at this tier, two key reforms would include inserting an upfront compensation provision and a requirement for financial information disclosure within Notices. These changes would seek to correct and elevate the practical effectiveness of this tier. However, consistent with the “Up and Out Approach” Tier 3 is the lowest tier. Therefore, regardless of any improvements made in this tier shifting any future acts currently subject to higher tiers down into Tier 3 would ultimately undermine the rights of native title holders.

<u>Good Reforms vs Bad Reforms</u>

Diagram 2 shows an example of a ‘good reform’, as it pushes Tier 3 out further, thus improving the system for native title holders. It does not, however, damage the higher tiers and preserves the already superior rights of native title holders under those higher tiers. In contrast, **Diagram 3** shows a ‘bad reform’ as it shifts future acts down into lower tiers. Even if the lower tier is improved in this process, it is unlikely to compensate for the loss of protections created by the future act being dragged into the lower tier. This would be particularly clear in the case of an act which required an ILUA. If the reform then allowed that future act to be done merely with Notices, any change to the Notices system (Tier 3) is likely to sufficiently rebalance the loss of legal rights suffered by the native title holders through the future act no longer requiring an ILUA. Such a reform in **Diagram 3**, therefore, would overall create a “Down and Out Impact”.

Diagram 2: Tier 3 (Notices) has been extended, improving Tier 3 without negatively affecting the higher rated Tier 1 or Tier 2 - NTHs better off overall

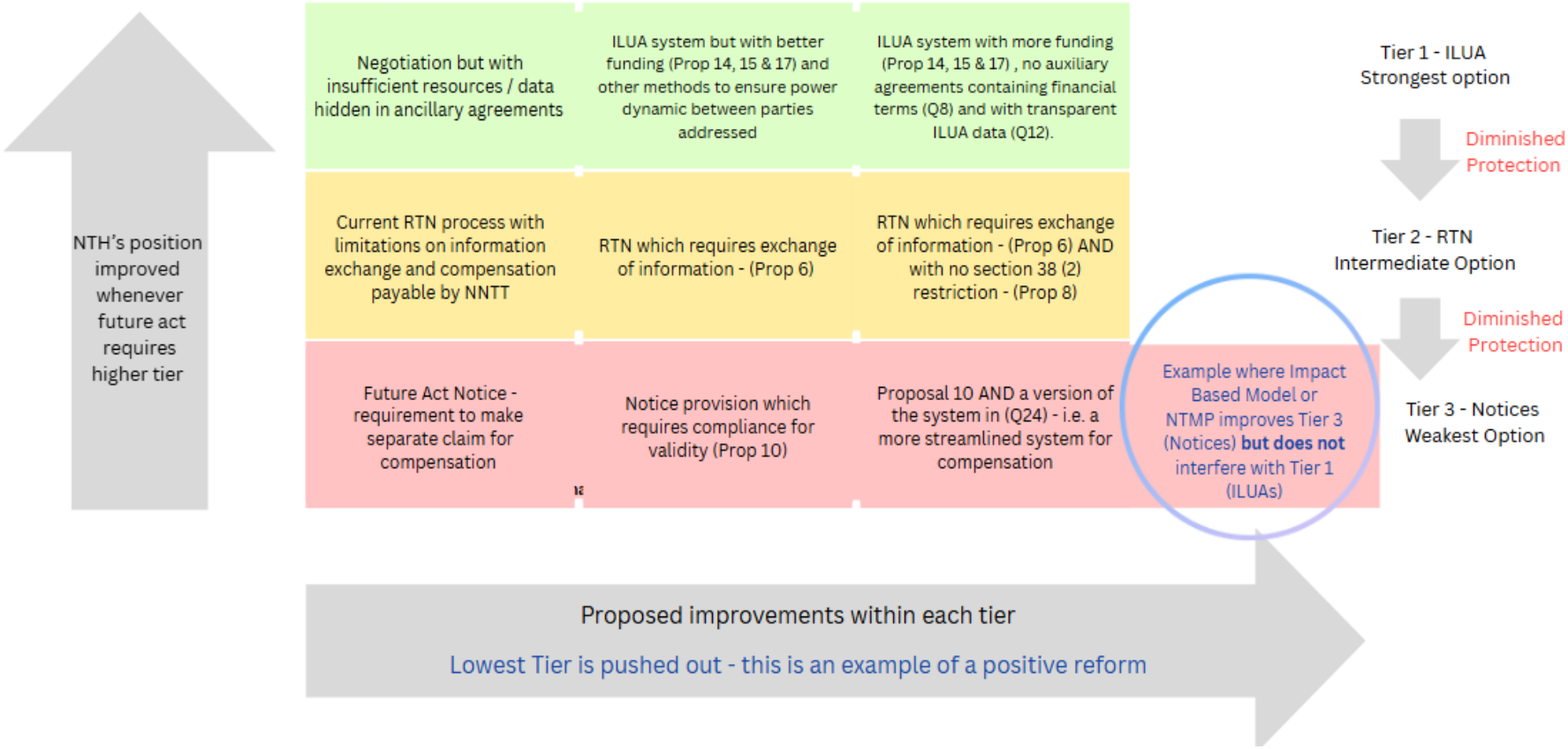
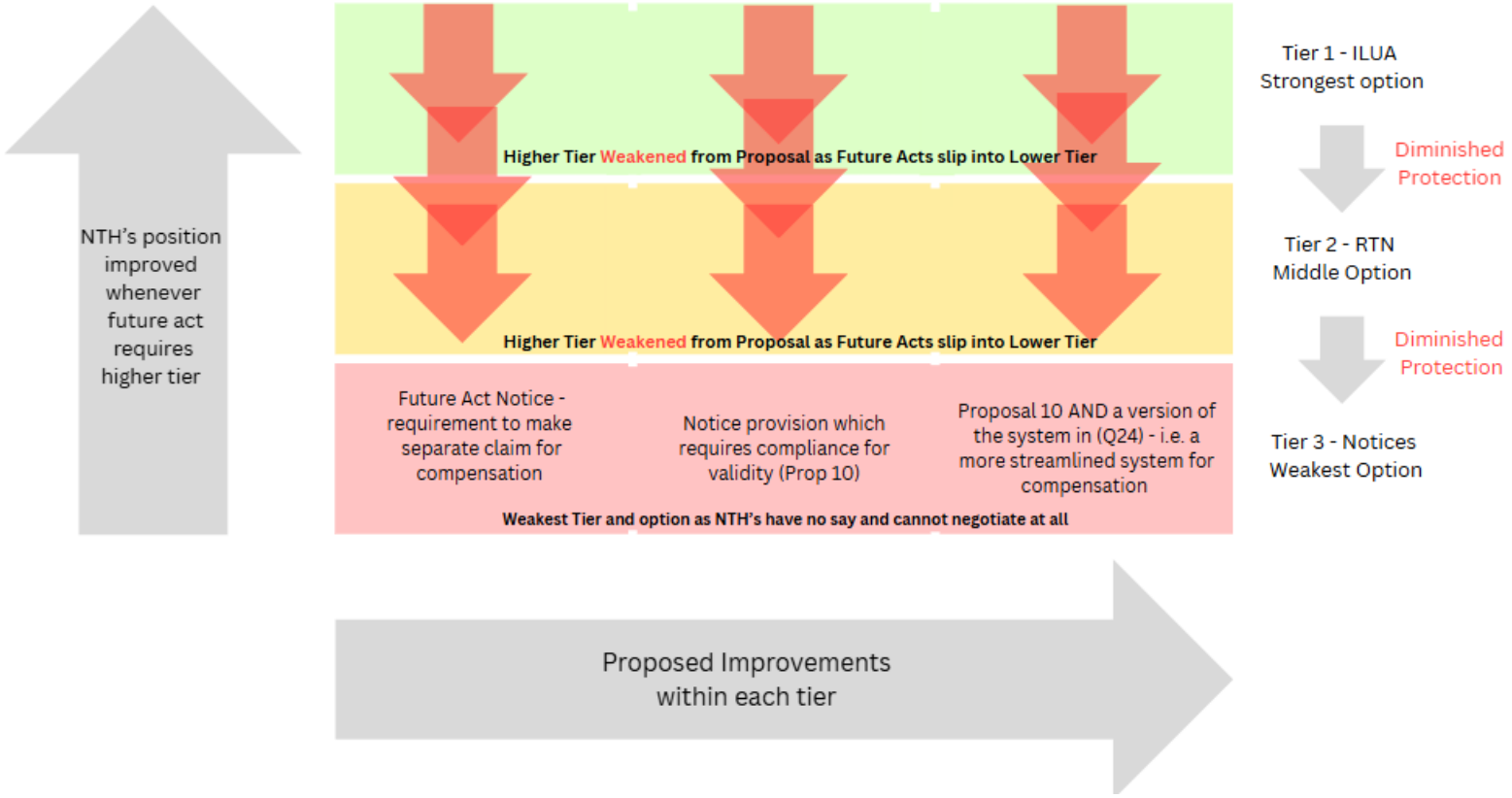


Diagram 3: Example of a Proposal that Negatively Impacts NTHs - where Future Acts slip into Lower Tiers from Higher Tiers, leading to worse outcomes For NTHs



Part 2 – Response to Specific Proposals and Questions

Part 2 of this submission addresses selected proposals and questions which are raised in the ALRC's Discussion Paper. These responses are categorised into two separate tables, one addressing proposals and the other addressing questions. In general, this submission supports proposed reforms that are consistent with or seek to promote the principles of the "Up and Out Approach". Conversely, proposed reforms that risk undermining the integrity or operation of any tier of the current Future Acts Regime, particularly where such reforms risk producing a "Down and Out Impact," are not supported. Such actions to diminish existing rights and protections would, in our view, would entrench systemic inequities and further disadvantage native title parties. For instance, future acts which require an ILUA should not be downgraded into a category of future acts that would attract only a right to negotiate or a right to be consulted by notice. Such weakening would represent a significant erosion of procedural fairness and substantive protection.

ALRC Future Act Review – Table 1: Response to Proposals

ALRC DISCUSSION PAPER — PROPOSALS				
	Proposal	**Report Reference**	**Submission on ALRC Remarks**	**Submission — New Issues**
P4	The *Native Title Act 1993* (Cth) should be amended to require the Native Title Registrar to periodically audit the Register of Indigenous Land Use Agreements and remove agreements that have expired from the Register.	Page 24	Yes	
P5	The *Native Title Act 1993* (Cth) should be amended to provide that the parties to an existing agreement may, by consent, seek a binding determination from the National Native Title Tribunal in relation to disputes arising under the agreement.	Page 25	An amendment to *the Native Title Act 1993* (Cth) to permit parties to an existing agreement, to seek a binding determination from the NNTT in relation to disputes arising under that agreement would be appropriate provided there is consent from native title holders. However, due to varying levels of operational capacity among RNTBCs, native title holders should be able to elect how they seek to resolve a dispute arising under the agreement. It is essential that such amendment does not preclude or limit access to judicial processes for dispute resolution. Therefore, any legislative reform must ensure that the rights of RNTBCs are preserved and that their ability to choose the most appropriate form of dispute resolution remains unimpaired.	the ALRC may seek to explore the value of establishing an independent ILUA Ombudsman, modelled on the Fair Work Ombudsman. Such a body could provide an additional mechanism to support fair and transparent compliance with ILUAs, particularly where there may be significant power imbalances between negotiating parties. The functions of an ILUA Ombudsman could include: 1. Receiving and responding to complaints from parties to an ILUA; and 2. Undertaking investigations into ILUA compliance, independent of formal dispute resolution or litigation processes.

				An ILUA Ombudsman could operate in conjunction with the NNTT to complement its existing functions. This model would reflect the approach taken under Australia's industrial relations framework, where the Fair Work Ombudsman monitors and enforces compliance with Enterprise Agreements. such a role could be particularly useful in relation to future acts, where regulatory oversight is limited and structural inequalities can affect the ability of native title parties to assert their rights effectively.
P6	The provisions of Part 2 Division 3 Subdivision P of the *Native Title Act 1993* (Cth) that comprise the right to negotiate should be amended to create a process which operates as follows: a. As soon as practicable, and no later than two months after a future act attracting the right to negotiate is notified to a native title party, a proponent must provide the native title party with certain information about the proposed future act. b. Native title parties would be entitled to withhold their consent to the future act and communicate	Page 40	The right to negotiate (RTN) under Part 2 Division 3 Subdivision P of the *Native Title Act 1993 (Cth)* currently provides limited protection for native title holders as the RTN framework **allows for the proponent party to seek the compulsory acquisition of native title rights and interests,** thereby undermining the principle of negotiated agreement and weakening the substantive bargaining position of native title holders.[1] Accordingly, this process should **not be expanded to include emerging industries**, such as renewable energy without first addressing its existing deficiencies. Any reform of the RTN process	

[1] See previous ALRC submission of Norman Waterhouse of 26 February 2025.

	their objection to the doing of the future act to the government party and proponent within six months of being notified. From the time of notification, the parties must negotiate in accordance with negotiation conduct standards (see Question 7). The requirement to negotiate would be suspended if the native title party objects to the doing of the future act. c. If the native title party objects to the doing of the future act, the government party or proponent may apply to the National Native Title Tribunal for a determination as to whether the future act can be done (see Question 18). d. If the National Native Title Tribunal determines that the future act cannot be done, the native title party would not be obliged to negotiate in response to any notice of the same or a substantially similar future act in the same location until five years after the Tribunal's determination. e. If the National Native Title Tribunal determines that the future act can be done, the Tribunal may:		should occur only under the following conditions: 1. **Preservation of the ILUA process:** Consent to future acts which are more appropriately suited under ILUAs should not be inadvertently redirected into the RTN process. As outlined in the Submission Overview (see **Diagram 1**), ILUAs provide a stronger framework for agreement-making and should remain the preferred vehicle for securing consent to acts affecting native title. 2. **Repeal of Section 38(2):** Critically, any amendment to the RTN process must be accompanied by the repeal of section 38(2) of the *Native Title Act 1993* (Cth), as proposed in Proposal 8. Currently, this provision prevents the NNTT, in the event of arbitration, from making determinations on the provision of economic or compensatory payments to native title parties. This restriction, combined with the availability of compulsory acquisition, significantly weakens the negotiating position of native title holders. The result is a process	

	• require the parties to continue negotiating in accordance with the negotiation conduct standards to seek agreement about conditions that should attach to the doing of the future act; • at the parties' joint request, proceed to determine the conditions (if any) that should attach to the doing of the future act; or • if the Tribunal is of the opinion that it would be inappropriate or futile for the parties to continue negotiating, after taking into account the parties' views, proceed to determine the conditions (if any) that should attach to the doing of the future act. f. At any stage, the parties may jointly seek a binding determination from the National Native Title Tribunal on issues referred to the Tribunal during negotiations (see Proposal 7). The parties may also access National Native Title Tribunal facilitation services throughout agreement negotiations.		that enables proponents to bypass genuine negotiation and also contributes to less favourable outcomes for the more vulnerable party.[2] In its current form, the RTN process fails to provide adequate procedural fairness or safeguards for native title holders. Meaningful reform must prioritise structural improvements that enhance the integrity of the negotiation process, rather than expand its application to additional sectors.	

[2] As raised in our submissions of 26 February 2025, there is comprehensive economic research published on the threat on compulsory acquisition or 'eminent domain' which is relevant to this issue.

	g. If the parties reach agreement, the agreement would be formalised in the same manner as agreements presently made under s 31 of the *Native Title Act 1993* (Cth). h. If the parties do not reach agreement within 18 months of the future act being notified, or within nine months of the National Native Title Tribunal determining that a future act can be done following an objection, any party may apply to the National Native Title Tribunal for a determination of the conditions that should apply to the doing of the future act (see Question 19). The parties may make a joint application to the Tribunal for a determination of conditions at any time.			
P7	The *Native Title Act 1993* (Cth) should be amended to empower the National Native Title Tribunal to determine issues referred to it by agreement of the negotiation parties.	Page 42	Yes, this proposal is supported but only where there is a requirement for native title parties to provide consent for such referral to the NNTT. Significant problems would arise where a proponent may unilaterally refer a matter to the NNTT, thus prematurely ending negotiations and potentially undermining genuine efforts to reach agreement. The risk is made worse by unequal access to	

			technical expert advice which can result in decisions that favour the better-resourced party, i.e. the proponents. Forced arbitration could undermine negotiation outcomes for native title parties and ultimately weaken the protection of native title rights. For example, if a proponent seeks to construct an access road for a mine through an area that impacts native title and relies on expert geo-technical reports to justify a specific route, then opposition by native title holders—who may not have equivalent access to expert advice—could be taken as a failure to negotiate in good faith. In such cases, the ability of the NNTT to make binding determinations risks entrenching power asymmetries and compromising the protection of native title rights and interests.	
P8	Section 38(2) of the *Native Title Act 1993* (Cth) should be repealed or amended to empower the National Native Title Tribunal to impose conditions on the doing of a future act which have the effect that a native title party is entitled to payments calculated by reference to the royalties, profits, or other income generated as a result of the future act.	Page 46	Yes, section 38(2) of the *Native Title Act 1993* (Cth) should be repealed as a priority to ensure a more effective RTN process. The current limitation under this provision significantly weakens the bargaining position of the native title party and undermines their ability to secure fair economic outcomes by entrenching the structural imbalance between the parties.	Section 38 (2) of the *Native Title Act 1993* (Cth) may also arguably breach section 51(xxxi) of the Constitution given it precludes the consideration of factors which may be potentially relevant to determining just terms values.

P9	Section 32 of the *Native Title Act 1993* (Cth) should be repealed.	Page 49	Yes	
P10	The *Native Title Act 1993* (Cth) should be amended to expressly provide that a government party's or proponent's compliance with procedural requirements is necessary for a future act to be valid.	Page 52	Yes	
P11	All future act notices should be required to be lodged with the National Native Title Tribunal. The Tribunal should be empowered to maintain a public register of notices containing specified information about each notified future act.	Page 54	Yes	
P12	Sections 24EB and 24EBA of the *Native Title Act 1993* (Cth) should be amended to provide that compensation payable under an agreement is full and final for future acts that are the subject of the agreement only where the agreement expressly provides as such, and where the amounts payable under the agreement are in fact paid.	Page 57	The issues raised in the ALRC's Discussion Paper on this issue are unclear. The proposal as presently formulated appears unnecessary given that any compensation entitlements would be preserved under section 53 of the *Native Title Act 1993* (Cth).	The proposal does not address the issues which arise from deferred payment of compensation, rather than seeking amendments to sections 24EB and 24EBA of the *Native Title Act 1993* (Cth) to address issues related to this proposal, a more useful proposition would be that validation under sections 24EB and 24EBA should only occur once full payment under the ILUA has been made. Where an ILUA provides for ongoing or annual payments, and a party fails to meet those obligations, the Future Act Regime should allow for the suspension or retrospective invalidation of the validated acts. This may

				encourage the reinstating of those annual payments rather than limiting any recourse to enforcing the recovery of the debt. More or generally such a mechanism would incentivise continued compliance with payment terms under the agreement. Alternatively, requiring that compensation provisions be directly included into the ILUA itself, would also address the issue of ancillary agreements as raised in Question 8.
P13	The *Native Title Act 1993* (Cth) should be amended to provide a statutory entitlement to compensation for invalid future acts.	Page 59	Possibly yes, possibly no. There is inherent risk in this proposal. **This proposal represents the <u>single greatest risk</u> in the proposals listed by the ALRC.**	The main risk of this proposal is that such legislation could also allow for the validation of invalid acts without an ILUA. This could occur by accident at the legislative phase in Parliament, irrespective of what the ALRC advise. For example, such a critical change could occur with the addition of five or less words via Office of Parliamentary Counsel. If a statutory entitlement scheme for invalid future acts were to also validate the act, then this could lead to a system of indulgences (e.g. Martin Luther criticised a system undertaken by the Catholic Church where people would pay in advance of committing sins, so as to avoid the consequence of that conduct).

				The negative consequence of such a "***pay-per-breach***" system should be obvious. Government and proponents could completely ignore the need to enter into agreement under the ILUA system or the RTN system, grant unlawful tenure and then be sued under the statutory compensation scheme. If such a scheme also allowed for validation once statutory compensation was paid, then the company or Government could make payment and effectively **sidestep compliance with the entirety of the Future Acts Regime**, merely through paying off invalid tenure. We again reiterate, that even if the ALRC is clear on this issue in its report, such a proposal creates significant risk of Parliamentary drafting accidentally bringing validity into this proposal. In any event, whatever proposal the ALRC makes, it should remain clear that **payment must be separate to validation – validation should still require formal agreement such as an ILUA.** Finally, we note that paragraph [435] of *Northern Territory v Griffiths (2017)* 256 FCR 478 does not support the proposition made in the ALRC paper. The legal barrier that the ALRC may consider exists, is not clear on the current case law. What is clear, however,

				is that if this proposal were mishandled it would systematically destroy the entire Future Acts Regime to the detriment of all native title holders.
P14	The *Native Title Act 1993* (Cth) should be amended to provide for and establish a perpetual capital fund, overseen by the Australian Future Fund Board of Guardians, for the purposes of providing core operations funding to Prescribed Bodies Corporate.	Page 60	See standalone response (under heading "amalgamated response") of this submission which provides an amalgamated response to Proposals 14, 15 and 17.	
P15	Native Title Representative Bodies and Native Title Service Providers should be permitted to use a portion of the funding disbursed by the National Indigenous Australians Agency to support Prescribed Bodies Corporate in responding to future act notices and participating in future acts processes.	Page 61	See above	
P17	Section 60AB of the *Native Title Act 1993* (Cth) should be amended to: a. entitle registered native title claimants to charge fees for costs incurred for any of the purposes referred to in s 60AB of the Act; b. enable delegated legislation to prescribe a minimum scale of costs that native title parties can charge under s 60AB of the Act; c. prohibit the imposition of a cap on costs below this scale;	Page 62	See above	

	d. impose an express obligation on a party liable to pay costs to a native title party under s 60AB of the Act to pay the fees owed to the native title party; and e. specify that fees charged by a native title party under s 60AB can be charged to the government party doing the future act, subject to the government party being able to pass through the liability to a proponent (if any).			

Amalgamated response to proposals 14, 15 and 17 (the **Proposals**):

We broadly support the ALRC's proposals to improve funding arrangements for native title parties and PBC/RNTBCs. However, the effectiveness of these proposals will depend heavily on the availability of accurate data on the cost of negotiations for agreements or litigation of future act processes. Amendment of section 60B of the *Native Title Act 1993* (Cth) to appropriately address issues with costs should occur to ensure that Government or proponents pay the reasonable costs of native title parties in future act negotiations. However, it not clear that the ALRC, NIAA or other relevant body would have sufficient information regarding the legal spend of the corporate/proponent party against a native title party.

Any funding model must be informed by reliable data about the actual legal and expert costs incurred future act negotiations, particularly by proponents and governments. In practice, native title holders regularly face well-resourced corporate or government proponents. For example, in the Napandee dispute regarding the Commonwealth radioactive waste facility proposed to be built in Kimba, the relevant native title holders were significantly outspent by the Commonwealth Government, who spent $3.544 million in legal fees and had sixteen lawyers acting against the native title holders in the dispute (see Federal Hansard-Economics Legislation Committee Question on Notice A1-55). In recent negotiations for the development of other energy projects, State Government and corporate parties have committed substantial legal resources to future act negotiations, often spending hundreds of thousands of dollars, far exceeding the capacity of the native title party. In determining price points for appropriate funding reforms, the ALRC should note the significant discrepancy in the financial spend on future act negotiations occurring in Tier 1. This imbalance is the leading issue affecting the quality and outcomes achieved in ILUAs, given the substantial costs involved in negotiating these agreements. This disparity is the main cause for negative ILUAs being produced, meaning that native title holders must have access to financial resources that reflect the true complexity and expense of the negotiation process.

We have acted in multiple future act matters where native title parties were significantly outnumbered and out-resourced both in terms of legal personnel and access to expert advice. Therefore, funding models developed without information on the spending of proponent parties to determine what the level of funding should be, would ultimately lead to defective funding models. Data that remains largely inaccessible, is

nonetheless critical to informed policy making as this will help ensure parity in bargaining power between the negotiating parties and achieve more fair and reasonable outcomes. In particular for the negotiation of ILUAs, capacity building needs to occur at both a financial/economic advisor level and at a solicitor or commercial solicitor level, as these specialisations are particularly important in respect of ILUAs (in contrast to RTN disputes and other litigations more habitually funded which may rely more on litigation Solicitor/Barrister combinations).

Transparency in Negotiations

Accordingly, to ensure funding models are effective and reflect the realistic expenditure in native title agreement-making, we recommend that proponents be required to provide a transparency statement, either through the ILUA or RTN process which requires disclosure of their expenditure on legal, expert, and professional services incurred in the course of negotiations. A sample transparency clause which could be included in agreements could be:

> *The proponent agrees to provide the RNTBC with a Transparency Statement for the purposes of ensuring that the negotiations occurred in an appropriate manner, so as to be satisfied that the native title holders have been able to provide free prior and informed consent.*
>
> *The Transparency Statement will include the following information:*
>
> *(a) a summary of the proponent's costs in negotiating this ILUA; and*
>
> (b) *confirmation that reasonably equivalent resources have been provided to the RNTBC and the native title holders for the purpose of negotiating this ILUA.*

Without such data any future funding model risks undervaluing the actual costs borne by native title parties and may result in insufficient allocations of funding where that funding would only be a fraction of what is needed to effectively engage in commercial negotiations. This would result in systematic underfunding, further diminishing the bargaining power of native title parties. Effective negotiation requires parity of resources between the parties. When proponents fund the negotiation process directly, they have a greater incentive to engage in good faith and time-efficient negotiation practices. Conversely, if negotiations are publicly funded, proponents may lack the incentive to contain costs or act fairly, potentially exhausting the limited resources available to native title parties.

Obtaining Financial Data

The need to obtain data is also directly relevant to Proposal 17 b, which seeks to prescribe a minimum level of funding under section 60AB of the *Native Title Act 1993* (Cth). Prescribing a minimum scale of costs will be ineffective unless supported by detailed data on the typical range of costs which are involved in future act negotiations. Without such evidence, it will be impossible to set realistic minimums, risking further structural imbalance and unfairness for native title parties.

ALRC Future Act Review –Table of Responses to Questions

ALRC DISCUSSION PAPER — QUESTIONS				
	Question	**Report Reference**	**Submission on ALRC Remarks**	**Submission on Identified New Issues**
Q6	Should the *Native Title Act 1993* (Cth) be amended to enable Prescribed Bodies Corporate to develop management plans (subject to a registration process) that provide alternative procedures for how future acts can be validated in the relevant determined area?	Page 9	The proposal is drafted as being non-compulsory and something that various PBCs/RNTBCs could self-select to do. The critical issue is that such an approach would need protections to ensure that PBCc/RNTBCs were not coerced or coaxed into NTMPs in the course of other contract negotiations (such as a clause in an agreement which says that the RNTBC will agree an NTMP which would allow a project to be built merely by providing notices). Protections against this conduct would need to be built into any regime. Those protections should include: • Appropriate funding of RNTBCs for NTMPs; • The ability of the RNTBC to cancel the NTMP (with common law holder approval) at the RNTBC's discretion (and a	The ALRC may want to consider how Industrial Relations has historically applied the No Disadvantage Test and consider an equivalent application here in respect of NTMPs. The flexibility of the NTMPs may be good, however, protections need to be in place to ensure that they are truly voluntary and are not used as a 'backdoor' method to prejudice native title holders.

			barrier of any contractual provisions preventing this); and • The application of a "No disadvantage test" similar to what has been used in Industrial Relations with Enterprise Agreements.	
Q7	Should the *Native Title Act 1993* (Cth) be amended to provide for mandatory conduct standards applicable to negotiations and content standards for agreements, and if so, what should those standards be?	Page 15	Conduct standards, such as "good faith" can severely disadvantage the more vulnerable party by reinforcing existing information asymmetry during the negotiation process (see discussion on good faith in our submission of 26 February 2025). As such, conduct standards are only likely to be effective where there is balance of information between the parties. Any proposed amendment should focus on establishing clear standards which address the core issue - the exchange of relevant information, particularly project specific information relevant to the proponent's valuation of their project. Ensuring such disclosure would help remove or at least significantly reduce the problem of asymmetric information in negotiations, thereby strengthening the bargaining position of native title parties.	For example, a proposed standard would be: • the requirement for parties to provide relevant (financial and non-financial) project information to mitigate information asymmetry in the negotiation process; • the need to insert a Transparency Statement clause into the agreement (see discussion in response to proposals 14, 15 and 17); and • the need to ensure parity between parties regarding the legal spend for the negotiation of the agreement.

Q8	Should the *Native Title Act 1993* (Cth) expressly regulate ancillary agreements and other common law contracts as part of agreement-making frameworks under the future acts regime?	Page 18	There are largely two types of ancillary agreements which can arise in negotiations of native title agreements. As such, there should be a distinction between: • ancillary agreements that are preliminary in nature such as Memorandum of Agreements (MOAs) which provide terms regarding payment of funding for negotiations as well as warranties to prevent any liability on the RNTBC if it ceases negotiations. These types of ancillary agreements (as part of the agreement-making process) are essential and should not be regulated but remain available to parties; and • ancillary agreements that are attached to agreements, such as an ILUA, and are used to obscure financial terms including payment of any benefits arising under the agreement. We understand that the proposal relates to the latter category of ancillary agreement, which we strongly agree should not be used by proponents as a way of hiding of	The requirement for ILUAs to contain the payment provisions (specifically the full benefits package) should be expressly included in the primary agreement. The current ability of proponents to divert these financial terms and pressure native title parties to use ancillary agreements allows for proponents to hide financial information, directly removing any transparency of data and perpetuating a level of information asymmetry which only favours the proponent. This practice disproportionately benefits corporate and government proponents enabling them to keep financial data secret and which then allows for 'commercial lowballing' to occur in negotiations. This detrimentally impacts the weaker party, the native title holders/claimants. Furthermore, there is limited access to obtaining this information which prevents the development of any meaningful data sets or reliable benchmarks for valuing native title. As discussed earlier in our response to Proposal 12 of this submission, we recommend that ILUAs include mandatory provisions that require, as a condition of registration of the ILUA , that the commercial information be contained in the ILUA and also made publicly available after a defined time period. This would improve transparency, reduce strategic withholding

			financial information. Payment for native title consent should be included in the ILUA. However, we do not consider that the *Native Title Act 1993* (Cth) could legally regulate ancillary agreements and other common law contracts. It is our view that the solution would be to require payment provisions to be in the ILUA in order for the ILUAs to be registered. By attempting to regulate ancillary agreements this could inadvertently place significant burdens on PBCs/RNTBCs, which could then be exploited by proponents and potentially allow for further commercial lowballing to occur. A more straightforward approach would be to amend the relevant sections of the *Native Title Act 1993* (Cth) to ensure that ILUAs are only capable of registration where all financial payments relating to the 'native title decision' are included in the ILUA. For example, this could be a requirement of s24BG/s42BI, s24CG/24CK/CL etc).	of information, and contribute to a fairer negotiating framework overall.
Q10	Should the *Native Title Act 1993* (Cth) be amended to allow parties to agreements to negotiate specified amendments without needing to undergo the registration process again,	Page 24	Yes, however, we would need more time to consider a detailed position on this question though as a general starting point, the following amendments should **not** be	

	and if so, what types of amendments should be permissible?		permissible without re-registration of the ILUA: • any amendment which lowers the financial benefits to the native title party, or • any amendment which would inappropriately change the beneficiaries under the agreement; or • any amendment which increases the scope of what acts are permissible on land subject to native title or the length of time, or • any amendment that allows for proponent 'piggybacking' (see response to Question 19) to occur under the agreement whereby a company allows another company to use its existing permissions/consents so that the other company does not have to negotiate and obtain consent from the native title holders; or • any amendment that would effectively reduce heritage protections under the agreement.	

Q11	Should the *Native Title Act 1993* (Cth) be amended to provide that new agreements must contain a dispute resolution clause by which the parties agree to utilise the National Native Title Tribunal's dispute resolution services, including mediation and binding arbitration, in relation to disputes arising under the agreement?	Page 25	As discussed in our response to Proposals 5, such amendment would be appropriate provided there is consent from the native title holders. Given the differing levels of operational capacity across RNTBCs, native title holders should have the flexibility to determine how disputes arising under an agreement are resolved. Therefore, any amendments should not limit or exclude access to judicial dispute resolution mechanisms.	
Q12	Should some terms of native title agreements be published on a publicly accessible opt-in register, with the option to redact and de-identify certain details?	Page 26	Yes, and we consider the issues relating to this question to be the single most important in the Discussion Paper, as the withholding of data favours the more powerful party in the negotiations and promotes information asymmetries, which systematically disadvantages native title parties. This dynamic enables the persistent practice of 'commercial lowballing' where native title parties are offered below value just terms compensation. Until such data is made publicly available, Indigenous Australians will be vulnerable to exploitation in future act negotiations.	We consider that there should be a **requirement** that deidentified data in native title agreements should be published on a publicly accessible register. However, an 'opt-in' system could be appropriate for non-deidentified data.
Q13	What reforms, if any, should be made in respect of agreements entered into	Page 27	A broad legislative approach is not possible, in respect of agreements	

	before a native title determination is made, in recognition of the possibility that the ultimately determined native title holders may be different to the native title parties to a pre-determination agreement?		as many determinations of native title (and overlaps etc.) were only resolved on the basis that shared agreements would continue. For example, a number of commercial agreements were entered into between groups as a means of then allowing the overlapping claims to be withdrawn. Legislating the impact of these agreements would acquire commercial property and would require the just terms constraint to apply; further to the extent that the agreements comprised conditions of settlement of determinations, then legislating over them creates considerable legal issues. However, although a broad resolution may not be possible, specific resolutions may be. For example, to the extent that a subset of agreements affect native title (i.e. ILUAs) and those ILUAs are not recognised as part of the settlement of the determination, then the native title holders may not be receiving their just terms entitlement. Section 53 of the NTA may provide a remedy for this. However, an improved legislative provision could do so.	

			The solution would be for agreements where all of the following applies: (a) an agreement which affects native title; (b) the determined native title holders are not a party or otherwise wholly contained within the group of parties; and, (c) Where the agreement was not part of a settlement of any determination. Then an amended *Native Title Act 1993* (Cth) could expressly indicate that the native title holders should be entitled to (a) access the agreement (b) receive compensation for any loss or diminution of native title and (c) in some circumstances cancel the agreement or substitute the party.	
Q14	Should Part 2 Division 3 Subdivisions G–N of the *Native Title Act 1993* (Cth) be repealed and replaced with a revised system for identifying the rights and obligations of all parties in relation to all future acts, which: a. categorises future acts according to the impact of a future act on native title rights and interests;	Page 30	We provisionally support this proposal, subject to certain qualifications (see comments in right column). We note that a number of the examples set out at Appendix A of the Discussion Paper are characterised as Category A (lower	We raise a number of issues that require clarification and/or further development before we could fully endorse the concept of an impact-based model. Firstly, the impact-based model should not be used to apply a lower level of procedural rights in relation to any category of future acts than is provided by the

	b. applies to all renewals, extensions, re-grants, and the re-making of future acts; c. requires that multiple future acts relating to a common project be notified as a single project; d. provides that the categorisation determines the rights that must be afforded to native title parties and the obligations of government parties or proponents that must be discharged for the future act to be done validly; and e. provides an accessible avenue for native title parties to challenge the categorisation of a future act, and for such challenge to be determined by the National Native Title Tribunal?		impact) on the basis that their impact is for a limited duration. However, we note that in many instances, even if rights are granted for a limited duration, the infrastructure or impact of works may be enduring. For instance, a private jetty construction permit, as described in Example 1, may be for a duration of three years however in practice it is likely that any such permit will be renewed over time and that any such structure will remain in place for a longer period. If such a permit was to be renewed every three years for a period of sixty years, and each renewal is categorised as a new "Category A" act, the result would be the native title holders receiving twenty separate consultation notices over time but never attracting a right to negotiate, whereas had the initial licence been for a sixty year period it may have been characterised as a "Category B" act and been subject of a right to negotiate. This leads to the possibility of proponents "gaming" to avoid having to negotiate. It is also not clear what would happen at the conclusion of any permit period in terms of removal of	current system. Acts that require an ILUA should not be dragged down by an impact-based model, into a category that would attract only a right to negotiate or a right to be consulted. This is especially the case for future act comprising commercial development and infrastructure. Secondly, any such model should be predicated on a requirement that compensation be provided at the time of the future act, (as contemplated in Question 24) rather than the current system which requires native title holders to make a claim for compensation. We note that there may be some significant difficulty in reconciling this proposal with the 'just terms' requirement of section 53 of the *Native Title Act 1993* and paragraph 51(xxxi) of the Australian Constitution. Thirdly, we have concerns as to how potential 'impacts' would be assessed in advance and over time. Fourthly, we reiterate the comments that we have made regarding the current "right to negotiate" process which are addressed separately in this submission. Finally, we note that resourcing participation in both consultation and negotiations under this proposal is of vital importance, noting the obligation on native title holder PBCs to comply with the *Native*

			the structure and rehabilitation of the site. Similarly, the grant of a quarry permit, as set out in Example 5 may be for a finite duration, however the resulting extraction of gravel would be permanent and would create irreversible changes to the landscape. It may be necessary for this proposed model to include a requirement that for a future act to be characterised as “Category A” there must be no possibility of renewal beyond the initial term or beyond a maximum set period. It should also be a requirement that any infrastructure must be removed and any environmental or landscape impacts must be rehabilitated at the conclusion of the term. Consideration would need to be given to how such rehabilitation would be funded and guaranteed in the event that a proponent became insolvent or was otherwise incapable of meeting such obligations.	*Title (Prescribed Bodies Corporate) Regulations 1999.* This means that often the costs for native title holders proper participation in consultation may be as much as undertaking a full negotiation, as the native title holder PBC may need to consult with the common law holders in order to meaningfully respond to any consultation.
Q15	If an impact-based model contemplated by Question 14 were implemented, should there be exclusions from that model to provide	Page 34	We agree that some categories of future acts may necessitate tailored procedural requirements. However, we raise the following issues in	In relation to Question 15 a., we also note that determining whether infrastructure and facilities are ‘for the public’ is not always straightforward. In particular we note that

	tailored provisions and specific procedural requirements in relation to: a. infrastructure and facilities for the public (such as those presently specified in s 24KA(2) of the *Native Title Act 1993* (Cth)); b. future acts involving the compulsory acquisition of all or part of any native title rights and interests; c. exclusions that may currently be permitted under ss 26A–26D of the *Native Title Act 1993* (Cth); and d. future acts proposed to be done by, or for, native title holders in their determination area?		regard to each of the above examples. a. We do not consider that an 'impact-based' model can be reconciled with a purposive approach to determining procedural rights, as is currently the case under s 24KA. This would lead to an outcome where the procedural rights afforded to native title holders are determined not in reference to the impact of the activity on their rights but by the purpose for which those acts are done. We acknowledge that governments have a role and responsibility to provide public facilities, however if such facilities are to be exempt from any impact-based model then native title holders should be afforded the highest level of both procedural and substantive rights that are afforded to other property holders. In many instances this would mean that governments would need to compulsorily acquire native title rights in order to undertake future acts. Section 24KA should be amended to provide that native holders are entitled to the same procedural and	much infrastructure that is (or may be) captured by s 24KA(2) is constructed for both public and private purposes. Joint venture and public/private partnership models are becoming increasingly common for large scale government infrastructure projects. Equally, government is increasingly electing to install 'common user' infrastructure that is entirely (or predominantly) for the benefit of private commercial operators in order to encourage commercial development in specific locations and of particular industries. Therefore, even infrastructure that is entirely government funded may be characterised as being for the benefit of private industry. We do not suggest anything illegitimate about such projects, however determining whether such projects are being undertaken 'for the public' in the true meaning of the phrase is complex. We consider that where government is acting essentially as a developer or for the benefit of private industry it should not be able to rely on procedures that would not be available to private developers.

			substantive rights that are afforded to other property holders (including where this would amount to a compulsory acquisition of native title), as at present we do not consider that the rights provided to native title holders under this provision are clear or consistently applied. b. We are of the view that any compulsory acquisition of native title rights that results in their extinguishment must provide the highest level of procedural rights that are afforded to the holders of any other property rights. The proposed "impact-based" model could accommodate this by acknowledging that extinguishment of native title is of the highest order and ensuring that the procedural rights attached to compulsory acquisition of native title are at least equivalent to other property interests. c. These exceptions would appear to fit within to the proposed impact-based model and should be treated accordingly. d. Future acts that are done by or for native title holders should be	

			subject to the same procedural regime as any other kind of future acts, preserving the rights of the common law holders to make decisions about the use of their native title lands. This is particularly important for future acts that would require an ILUA. To create an exemption to the future acts regime for acts that are done for the benefit of native title holders risks the possibility that: • Governments will impose infrastructure and services on communities without their consent in ways that impact on their native title rights as well as their rights to self-determination; • Governments will locate infrastructure and services on native title land, rather than on other land which they might have to pay to access. This could occur where the proposed infrastructure was for the benefit of a broader community of which the native title holders are a subset. This would effectively shift the burden	

			of providing appropriate land for essential services from government onto native title holder communities; and • The provision of services to native title holder communities would be used to 'offset' compensation entitlements for the effect of infrastructure on native title land.	
Q16	Should the *Native Title Act 1993* (Cth) be amended to account for the impacts that future acts may have on native title rights and interests in areas outside of the immediate footprint of the future act?	Page 37	While this is a significant issue that we have also been grappling with, we question how this would work in practice. In particular we query how such an approach could address: • Impacts of activities that occur within one native title determination area but whose impacts may extend beyond the boundaries of that native title determination area to adjacent determination areas; or • Impacts of activities on land where native title has been determined to be extinguished on nearby native title land. Further discussion of these issues would be required before we could	

			properly address any such proposal.	
Q17	Should *the Native Title Act 1993* (Cth) be amended to: a. exclude legislative acts that are future acts from an impact-based model as contemplated by Question 14, and apply tailored provisions and specific procedural requirements instead; and b. clarify that planning activities conducted under legislation (such as those related to water management) can constitute future acts?	Page 38	Yes, legislative acts should be the subject of tailored provisions, noting that the impact of legislation will very much depend on the legislation in question. Most legislation, at both a State and a Commonwealth level, applies broadly throughout a jurisdiction and therefore may affect many native title holder groups, as well as other property holders. However, some legislation is very geographically targeted and so the level of input that directly affected native title holders have should be proportionate to how the proposed legislation affects their interests. Yes, in relation to section b. of this question, it should be clarified that planning activities and subordinate legislation relating to resource allocation and land use can constitute future acts.	
Q18	What test should be applied by the National Native Title Tribunal when determining whether a future act can be done if a native title party objects to the doing of the future act?	Page 43	We remain unconvinced that any test would ultimately have any bearing on the outcomes for native title parties objecting to the doing of the future act. Again, as discussed in our earlier submission this year, the RTN process is ostensibly just a	An appropriate test could be based on the two-fold test used for the grant of easements under section 28 (4) of the *Crown Land Management Act 2009* (SA): *(4) If the Minister believes that the consent of a person having an*

			mechanism for private property holders to force compulsory acquisition on native title holders and where native title holders are then largely forced into agreements on substandard terms. However, to the extent that there should be a test applied by the NNTT, we consider that the test should be a two-fold test, building on the first option as described in paragraph [212] of the Discussion Paper. The proposed test would be as follows: 1. whether the native title party's consent was unreasonably withheld; and 2. the NNTT is satisfied that the interests of the native title would not be prejudiced by the grant of the future act. (see comments in right column regarding section 28 of the *Crown Land Management Act 2009* (SA)).	*interest in, or rights in relation to, the land has been unreasonably withheld and is satisfied that the interests of that person would not be prejudiced by the grant of the easement, the Minister may grant the easement despite the absence of that consent*.
Q19	What criteria should guide the National Native Title Tribunal when determining the conditions (if any) that attach to the doing of a future act?	Page 45	There are a number of criteria that should be considered by the NNTT when determining any appropriate conditions which attach to the grant of a future act. The main issues which need to be addressed are those where project	

			infrastructure – once consent is granted – can be used by other companies to "sidestep" their negotiation obligations and to avoid paying benefits to native title parties. This process of using another company's infrastructure, to avoid negotiating with native title holders, is called "**piggybacking**". Accordingly, we consider that the following issues, in particular, are critical to informing conditions and should be contemplated by the NNTT: • the issue of project piggybacking (discussed in the response to Question 13 - whereby a company allows another company to use the existing permissions/consents so that the company does not have to negotiate for consent from the native title holders; • The ability of another company to effectively take over that infrastructure (effectively piggybacking but where the original party also leaves); and	

			• Circumstances where the project size could change dramatically – i.e. conditions which prevent the company from getting the native title consents based on one size of the project, paying on the basis of a smaller project and then on-selling the consent or using the consent for a much more profitable larger project and excluding the native title holders from that increased benefit. Conversely, provisions to allow adjustment if the company ends up building a smaller project.	
Q22	If the *Native Title Act 1993* (Cth) is amended to expressly provide that non-compliance with procedural obligations would result in a future act being invalid, should the Act expressly address the consequences of invalidity?	Page 52	The answer to this question is largely covered by our response to Proposal 13 of this submission. Such an amendment could provide that non-compliance with procedural obligations would result in a future act being invalid but only if the invalidity is preserved unless whatever was initially required is done. See issues with ***"pay-per-breach***" system (noting here, unlike Proposal 13, if the invalidity arose solely from the failure to provide a	

			notice, then the remedy may be providing the initial notice).	
Q23	Should the *Native Title Act 1993* (Cth), or the *Native Title (Notices) Determination 2024* (Cth), be amended to prescribe in more detail the information that should be included in a future act notice, and if so, what information or what additional information should be prescribed?	Page 53	Yes, this should be amended to address the asymmetric information problem (see above discussion on this issue at Questions 7, 8 and 12). There should be a requirement to include certain financial information regarding the project in a future act notice.	
Q24	Should the *Native Title Act 1993* (Cth) be amended to provide that for specified future acts, an amount which may be known as a 'future act payment' is payable to the relevant native title party prior to or contemporaneously with the doing of a future act: a. as agreed between the native title party and relevant government party or proponent; b. in accordance with a determination of the National Native Title Tribunal where a matter is before the Tribunal; c. in accordance with an amount or formula prescribed by regulations made under the *Native Title Act 1993* (Cth); or d. in accordance with an alternative method?	Page 55	No, not entirely – this is because the distinction made by the ALRC between compensation and 'future act payment' is not entirely accurate – part of what the ALRC has called 'future act payment' is in fact compensation and the just terms condition attaches to it (see comments in right column). More generally upfront payments, in cases where the native title holders request them, are useful for future acts undertaken under notices. The expectation that native title holders should litigate to get compensation for future acts that are carried out under notices is onerous and should be removed. Payments for future acts under notices ideally, at least in part,	See answer and example in Question 25 in standalone box on page 46 of this submission. There remains considerable issue about setting compensation value, especially given there is limited ILUA data. At present, it is unclear whether experts could resolve these issues with sufficient robustness – especially given limited data. A hypothetical tribunal, with the wrong experts and the lack of appropriate ILUA price data, could inadvertently create a series of decisions which significantly undervalue native title.

			should be made upon the act rather than being deferred to a later date. However, such an approach would need to preserve the right of the native title holders to receive the maximum amount they can receive. There is a fine balance between 'timing of payment' and 'amount of payment'. In the 'notice' scenario, one solution which would allow for payment to be due upon the future act occurring is where the amount is agreed in accordance with condition 'a'. Alternatively, if the future act payment is not agreed on then the native title party can elect for the matter to be arbitrated by the NNTT or go to Court to set a value on the future act payment. However, this should be entirely at the discretion of the native title holders. A government party should not be able to set the value, or demand an arbitration (with unequal resources to argue the arbitration in the NNTT) as this could lead to the undervaluing of the future act. This is particularly problematic, given the lack of transparent data.	

			More generally, a ‘future act payment’ provision would be problematic as there are immediate issues which arise given that: • there is still significant divergence in respect of what appropriate compensation values should be. For example, as we submitted to the Yoorok Justice Commission and identified in our earlier submission this year, native title holder groups often initially receive approximately one-tenth of the final offer which companies will pay for affecting native title; and • not enough financial data is available to establish a range or benchmark. In the current circumstances, where there is no ILUA data available, any arbitration problem runs the risk of self-reinforcing undervalued compensation, as persons appointed to assess compensation will have inadequate data to do so; such an approach could considerably weaken the long-term economic engagement of native title holders.	

			Further, the condition listed in 'c' of this question would not likely work as we consider it would breach the just terms requirement, given that part of the just terms compensation would be based on the project value, which would be difficult to regulate given the price divergence which exists. We do not support (c) accordingly.	
Q25	How should 'future act payments' interact with compensation that is payable under Part 2 Division 5 of the *Native Title Act 1993* (Cth)?	Page 55	We note the distinction raised in the Discussion Paper between payment for the removal of the native title right (i.e. the compensation) is different to the payment received (i.e. the consideration) for the creation of the 'new' right. We understand the distinction the ALRC is attempting to draw, and it is – at least in part – accurate. However, the distinction made by the ALRC between compensation and 'future act payment' is also not entirely accurate. This is because part of what the ALRC has called 'future act payment' is in fact compensation and the just terms condition attaches to it (see comments in right column). The ALRC should not propose legislation on this issue, before the	See standalone response on page 46 of this submission.

			Court system has been able to resolve best use value compensation more accurately in this context. There are outstanding compensation claims and upcoming claims where best use value measurements will include increases in land value arising from change of tenure. If the ALRC sought to propose legislation by defining 'future act payments' the way it is now, it would likely confuse what is compensable under the 'just terms' requirement and effectively presuppose an answer (and in this case do so incorrectly) in respect of matters which are still be litigated.	
Q26	Should the *Native Title Act 1993* (Cth) be amended to provide for a form of agreement, which is not an Indigenous Land Use Agreement, capable of recording the terms of, and basis for, a future act payment and compensation payment for future acts?	Page 58	No. Although we acknowledge that the ILUA process can be costly, and the need to remove regulatory burdens we are **strongly opposed** to such an option. We do not consider that an alternative form of agreement would provide an overall benefit or offer sufficient protection to native title holders. This option would effectively allow proponent parties to use alternative agreements as a 'cheaper process' which then leads to the undervaluing native title and further	An ILUA (unless a whole of claim ILUA) still offers the highest protection to native title holders. This protection should not be diluted by a weaker form of agreement. See **Diagram 1**.

			‘commercial lowballing’ of native title holders. This also creates similar issues which arise in respect of ancillary agreements to ILUAs which contain the compensation/benefits package, favoured by proponents to maintain information asymmetry. In effect, the ALRC would remove one problem of ancillary agreements only to replace them with another provision. Despite the suggestion put forward an alternative agreement process: • would apply to specified future acts which are not subject to an RTN agreement or otherwise consented to under an ILUA; and • could be limited to circumstances where compensation or future act payment is below a prescribed amount, the above would only provide an inducement to proponents to offer below a certain amount of compensation or future act payment which would be then create a subsidy for proponents to low ball a native title party. This	

			would be contrary to the entire intention of the Future Acts Review.	
Q28	Should the *Native Title Act 1993* (Cth) be amended to provide for requirements and processes to manage the impacts of future acts on Aboriginal and Torres Strait Islander cultural heritage, and if so, how?	Page 66	Yes, an amendment to provide for requirements and processes to manage the impacts of future acts on cultural heritage would be worth exploring.	

Standalone response to Question 25

The issue of what constitutes compensation (which is protected under the 'just terms' requirement) and what may be in addition to this (the notion of 'future acts payment) is complex and potentially misunderstands the notion of tenurial appreciation during development.

In this respect, we note that Norman Waterhouse drafted the native title guidance paper for the Australian Property Institute (effectively the valuer's institute in Australia) and are aware of concerns in the valuation community regarding a number of these issues (and the broader concern regarding the lack of ILUA data for valuation).

To illustrate the issue, an example follows – please note this example does **not** include native title but by extension will hopefully make it clear the issue for native title holders (especially if a party seeks to apply the bifurcated approach):

<u>Example – Freehold Land Value</u>

There is 1000Ha of land (**Land A**) in a regional area (where there is also native title). The 1000Ha of land is near a substation but is being used for agricultural purposes. 8 Kilometres away is another piece of land, also 1000Ha (**Land B**). Land B is also being used for agricultural purposes. Land B is not near a substation, but is 8km away from a substation meaning that a powerline to the substation will cost millions to build from Land B, whereas it will cost almost nothing to build the powerline from Land A.

Apart from proximity to the substation, all other factors are equal. The issue of the substation is not relevant to their value as agricultural properties at all, so the aggregate market is indifferent between the two properties, Land A and Land B. Accordingly, as agricultural properties both properties are valued at $1M.

Likewise, the region has never had a solar farm or renewable energy project before, so all of the land sales have occurred in respect of farming or agriculture. All of these prior comparative land sales (**PCLS**) value land at $1000 per Ha, like our two other properties.

A renewables company (**Solar Farm Dev Co**) decides that it wants to build a solar farm on 1000Ha of land. It is profitable for the company to redevelop the land, as it can make more money out of a solar farm than it could maintaining a current farm (even after constructions costs etc). Solar Farm Dev Co commences looking around for land in the area.

Separate to this, the property owner of Land A also decides that they may try to build a solar farm themselves and decides to investigate approvals. They do this because they realise their land is next to a substation and they then start researching what this means for building a solar farm.

Eventually Solar Farm Dev Co approaches the owners of Land A and Land B. It purchases both Land A and Land B. It purchases Land A for $4M and Land B for $1.5M. Land A is more valuable to Solar Farm Dev Co because it is closer to the substation, and so – for the first time ever (in this hypothetical) – Land A and Land B have different values. The vendor of Land A was able to negotiate this sale price, because they became aware that their land was more valuable to the substation when they investigated building their own solar farm.

Solar Farm Dev Co, who then owns both pieces of land, then seeks approvals regarding building two solar farms (say a permit or planning approvals). They receive this approval and then decided to sell the two solar farm developments. They sell the first solar farm development (on Land A) for $15M and the second solar farm development (on Land B) for $12.5M.

In this scenario, the PCLS value is not the land value. The proposed development has also increased the land value. land value is as follows:

- Land A = $4M
- Land B = $1.5M

The value of consents and permits is:

- Land A = $11M
- Land B = $11M

This is how we obtain the final sale values of the developments:

Development A

- (Land A) $4M + (Consent) $11M = $15M

Development B

- (Land B) $1.5M + (Consent) $11M= $12.5M

The error or common misconception is to think that the appreciation in value for Land A is actually a payment of consideration for consent. ***Rather, Land A has appreciated in value also and so the development value includes both the appreciated land value and the consideration.***

Native Title Example

If we take the above example, and now apply it to native title – we may see an ILUA which provides for the following payments:

- Land A (ILUA payment) = $7M
- Land B (ILUA payment) = 4.5M

In this scenario the payments under the ILUA also include a higher land value compensation component – the additional payment is not just a 'Future Acts Payment' as defined by the ALRC.

The Erroneous Approach

The simple mistake that many people make is they assume that the prior comparative land sales (PCLS) – where the data arises from sales data prior to the change in use and therefore changed value of land based on a new "best use basis" – are still relevant to setting land value. They set this earlier data (which is no longer the correct marker of land value after the land value has appreciated) and then take the ILUA payment and subtract it from the adjusted (i.e. 50%) PCLS amount (which they erroneously confuse with land value). They then take the additional amount as some form of "Future Act Payment", missing that part of this so called "Future Act Payment" is in fact land compensation arising from the appreciated land value.

The risk in trying to artificially distinguish between compensation and "Future Act Payments" is that such a distinction in many ways is arbitrary and a question for expert valuation consideration (when is the extra payment in an ILUA reflecting the market equilibrium of Best Use Value and Cultural Loss, and therefore "*just terms*" and when is it merely additional consideration?). How could anyone prescribe this in all circumstances via legislation?

Accordingly, such an approach could damage the compensation entitlement of native title holders. To suggest that there is some payment separate to compensation, the assumption is that the "j*ust terms*" protection does not apply to this extra payment. Such questions will depend on the facts of each valuation on a case-by-case basis. However, by cutting across this unresolved factual and legal issue, the ALRC could damage compensation claims by native title holders who would seek to include some or all of what the ALRC deems a "Future Act Payment" as compensation.