THE LAW SOCIETY
OF NEW SOUTH WALES

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Dear Dr Popple,

REVIEW OF THE FUTURE ACTS REGIME

The Law Society of NSW is grateful for the opportunity to inform the Law Council's submission to the Australian Law Reform Commission (**ALRC**) in respect of the Discussion Paper released as part of its Review of the Future Acts Regime (**Discussion Paper**). The Law Society's Indigenous Issues Committee contributed to this submission.

This submission does not attend to each proposal and question set forth in the Discussion Paper; rather, specific questions and proposals from the Discussion Paper are addressed below in turn.

Legislative background and context

The future acts regime is contained in Part 2, Division 3 of the *Native Title Act 1993* (Cth) (**NTA**). It was introduced in its current form by the *Native Title Amendment Act 1998* (Cth) (**1998 Amendment Act**) as a response to the High Court decision in *Wik Peoples v Queensland*, which concerned the co-existence of native title with pastoral leases.[1]

The 1998 Amendment Act legislated the Government's 'Ten Point Plan', where the stated intention was 'to strike a fair balance between respect for native title and security for pastoralists, farmers and miners'.[2] In our 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.

Professor Mick Dodson AM FASSA, 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'.[3] Other scholars have since criticised them from a substantive and procedural perspective. As set out by Richard Bartlett in *Native Title in Australia*:

[1] *Wik Peoples v Queensland* (1996) 187 CLR 1.
[2] Australian Government, Department of Prime Minister and Cabinet, *Transcripts from the Prime Ministers of Australia*, "Amended Wik 10 Point Plan", media release, 8 May 1997: https://pmtranscripts.pmc.gov.au/release/transcript-10333.
[3] Mick Dodson quoted in Paul Keating, "10-point plan that undid the good done on native title", *Sydney Morning Herald*, 1 June 2011: https://www.smh.com.au/politics/federal/the-10-point-plan-that-undid-the-good-done-on-native-title-20110531-1feec.html.

> '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.'[4]

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 Report**), which 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 UN Convention of the Rights of Indigenous People (**UNDRIP**).
- 'Gag clauses' and clauses restricting Aboriginal and Torres Strait Islander peoples' access to Commonwealth heritage protections.
- The authority and responsibilities of Prescribed Bodies Corporates (**PBCs**) and representative bodies in relation to cultural heritage.[5]

The Law Society endorses the importance of addressing these recommendations, and we suggest that the ALRC include consideration of the following issues as part of this review.

Native Title Management Plans (Question 6)

The Law Society supports the concept of Native Title Management Plans (**NTMPs**) as an alternative way of approving future acts. Such plans have the potential to be empowering for native title holders and a conduit to a greater level of self-determination in relation to how future acts can take place on their land. However, to be effective, NTMPs will need to form an attractive alternative to proponents. Otherwise, it is likely that the existing regime will be reverted to.

As proposed in the Discussion Paper, NTMPs could be used for any class of future acts, or large projects. This has the potential to remove substantial procedural rights and entitlements to compensation which currently exist under the NTA if the NTMP adopted has a lower level of procedural rights compared to the current regime. The scope of NTMPs needs to be carefully considered, including whether there are some classes of future act which cannot be approved under an NTMP. At the very least, the approval processes for native title holders to an NTMP should be commensurate with the future acts potentially approved under the NTMP, and there should be a requirement to ensure that PBCs have access to legal advice and representation before an NTMP is approved.

In preparing NTMPs, native title groups will need to be cognisant that in relation to most future acts, it will be a government party which has to authorise the act. The act will, in any event, need to be lawful under general law. The involvement of government may be unavoidable and might be desirable if it is intended that any interest granted by the Crown to permit the future act is in fact consistent with the NTMP.

One area where NTMPs may be of particular benefit is in relation to land which is held by non-government bodies as freehold 'subject to' native title rights and interests.[6] To be effective, a proponent would need to

[4] Richard Bartlett, *Native Title in Australia*, 5th edition, 2023, 64 at [5.22].
[5] Joint Standing Committee on Northern Australia, *A Way Forward Final report into the destruction of Indigenous heritage sites at Juukan Gorge* (**Juukan Gorge Report**), October 2021, Recommendation 4: https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024757/toc_pdf/AWayForward.pdf;fileType=application%2Fpdf.
[6] See, for example, s 36(9), *Aboriginal Land Rights Act 1983* (NSW) (**ALRA**).

have certainty that an act done under an NTMP is valid in the same way that the NTA does.[7] That validity will continue regardless of compliance with procedural rights or non-compliance with conditions. The capacity of a PBC to provide a certificate to achieve that is an option worth exploring. To achieve certainty, it may be useful for certificates to be in a prescribed form and registered.

At [61] of the Discussion Paper, it is suggested that NTMPs could set out how compensation pursuant to that NTMP may be dealt with. This requires careful consideration and the appropriateness of that outcome may depend on the nature of the activity approved. It may be useful in facilitating compensation for small scale future acts, but may be problematic in relation to substantive activities.

Conduct and Content Standards (Question 7)

Setting conduct and content standards is a difficult matter. As with trying to determine what constitutes 'good faith', it invariably depends on the subject matter and circumstances. The difficulty in setting conduct and content standards is alluded to in the Discussion Paper at paragraph [74], where it asks whether the standards, 'if introduced, should be tailored according to the scale of a future act, or whether standards should be expressed at such a level of generality that they could apply across all agreements'.

Given that the majority of future act determinations that have been contested in the National Native Title Tribunal (**NNTT**) have been in favour of the government/grantee party,[8] we support the implementation of conduct and content standards in principle.

Conduct standards and the duty to negotiate in good faith

The Discussion Paper notes at paragraph [81] that the NTA provides a requirement to negotiate in good faith in relation to s 31 Agreements, but not in relation to Indigenous Land Use Agreements (**ILUAs**). This is in part a product of the fact that negotiations in relation to s 31 Agreements have limited timeframes,[9] and the proponent has the right to seek a determination from the NNTT if the negotiations for a s 31 Agreement fail. We do not have an in-principle objection to requiring any party to a negotiation with Indigenous people to negotiate in good faith, particularly government parties and proponents of future acts. In our view, the requirement to negotiate in good faith in the context of s 31 Agreements is not in itself the key factor affecting the bargaining position of native title holders. In comparison, there are, for example, no timeframe constraints on negotiation of ILUAs, and critically, native title holders have a veto power as to whether to enter into an ILUA negotiation or not.

Defining good faith too prescriptively or by reference to indicia is undesirable and would likely give rise to further disputes and uncertainty. Any definition of good faith should require consideration of the subject matter and circumstances of any given case. However, there should be prohibition on "stonewalling" by the proponent, which has been previously permitted in the case law given Australian courts' narrow interpretation of the requirement to negotiate in good faith.[10]

[7] See, for example, ss 24EB(2), 24GB(5), 24GD(2), 24HA(3), 24ID(1), 24JAA(4) *Native Title Act 1993* (Cth)('NTA').
[8] 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% of determinations. Statistics sourced at Native Title Tribunal, Search Future Act Applications and Determinations: https://www.nntt.gov.au/searchRegApps/FutureActs/Pages/default.aspx.
[9] Section 35, NTA.
[10] See *Gomeroi People v Santos NSW Pty Ltd and Santos NSW (Narrabri Gas) Pty Ltd* [2024] FCAFC 26 per Mortimer CJ at [76]-[98].

Ensuring native title groups have independent legal advice should also be a minimum requirement. In this respect, it should be observed that, post-determination, PBCs are entitled to have their reasonable legal costs paid for by the proponent under s 60AB of the NTA, but only where the parties ultimately enter into an agreement. As a result, under the current regime, PBCs have no right to recover their negotiation costs for a negotiation that breaks down, creating a risk that PBCs may feel pressured to finalise an agreement where they otherwise may not, in order to avoid losing the benefit of s 60AB and being required to pay their own costs. Further, registered native title claimants have no right to recover their legal costs when negotiating with a proponent that is seeking an agreement.[11]

Content standards

The Law Society supports the introduction of mandatory content standards for agreements, particularly the following:

- prohibiting clauses which would be regarded as inappropriate on public policy grounds;
- unreasonably prohibiting or restricting terms that limit how compensation or other payments are expended, administered, or managed by native title parties;[12]
- sunset dates for particular clauses such as non-disparagement clauses;
- application of the non-extinguishment principle, as far as practicable; and
- a requirement that particular matters be dealt with in the 'head agreement' and not in ancillary agreements.

The last item at paragraph [86], relating to a periodic review mechanism, is unclear. There may be good reason why an ILUA provides more limited procedural rights to a class of future act being approved in the agreement. That is likely to be the reason for the ILUA in the first place and any other agreement cannot remove the procedural rights.

Expanding Standing Instructions (Proposal 1)

The Law Society supports the expanded use of standing instructions for PBCs.

Common Law Agreements

A s 31 Agreement should be defined as both the s 31 Agreement itself, along with any ancillary agreement. Both the s 31 Agreement and any ancillary agreement should be registered with the NNTT to ensure that there is a clear record. Any amendments to the s 31 Agreement or the ancillary agreement should also be registered.

Access to ILUAs and Section 31 Agreements (Proposal 2)

A PBC for an area should be able to access an ILUA for the area for which they are the PBC or within the external boundaries of the area to which their determination for that area applies, as well as any s 31 Agreements for that area (including any ancillary agreements). This is for a minimum understanding of the nature of any future acts which may have been authorised in their area. Noting concerns regarding confidentiality of ancillary agreements and unauthorised use of the documents, procedures regarding access

[11] To the extent that an analogy is useful, the Law Society notes in commercial lease negotiations, the prospective lessee (akin to the proponent in this circumstance) would pay the legal fees of the lessor (being akin to the native title holder).
[12] Although, care will need to be taken to ensure that any such prohibition does not prevent reasonable settlement structuring, or the creation of trusts in appropriate situations (see, for example, the South West Noongar Settlement, 'Settlement Agreement', <www.noongar.org.au/about-settlement-agreement>).

and inspection of documents could be implemented.[13] For example, members of a PBC could have a right to access and inspect an ancillary agreement at the PBC's office.

Assignment (Question 9)

Any assignment of an agreement should be with the PBC's consent. The option of allowing an agreement in relation to a future act to be renegotiated or removed from the Register where parties were determined not to be the native title holders is likely to create considerable uncertainty. If a determined native title group or PBC is the successor then it can presumably renegotiate terms if the proponent is open to it.

Amending Agreements (Question 10)

The Law Society supports the proposals set out at [123] of the Discussion Paper, specifically to allow PBCs to hold standing instructions from common law holders to agree to particular categories of amendments with counterparties, and to amend s 24ED, NTA to allow for substantive amendments that have been consented to by common law holders and agreed with counterparties without requiring re-registration.

Impact-Based Model (Question 14)

Paragraph [146] of the Discussion Paper notes an underlying concern that future acts covered by Subdivisions G–N of the NTA do not necessarily reflect the impact those future acts may have on native title rights and interests and asks whether an impact-based model would address this concern. There is a deeper objection as to why future acts currently covered by Subdivisions G–N of the NTA which impact native title rights and interests should be able to occur on land where native title exists, if such acts could not occur on freehold land. This is, in effect, a reversion to the position when the NTA was originally enacted of having 'permissible future acts', defined as being acts which could only take place if they could occur on ordinary title.[14] This is consistent with the principles set out at [41] – [45] of the Discussion Paper and particularly so where the native title rights recognised are exclusive native title rights and interests.

The Law Society's position is that while the impact-based model has merit, there are likely to be challenges in its implementation, as is acknowledged in the Discussion Paper at [160].

In relation to characterisation of a future act, a challenge that may arise from the impact-based model (particularly if it is to be applied to projects) is whether an impact is to be assessed by reference to what is authorised by the relevant permit, or what is actually intended to occur. Additionally, consideration must be given to how variations in a project will be treated, although admittedly this is also a problem that exists in the current scheme. The proposed impact-based model draws attention to how the grant of interests to do a future act are framed and may encourage engagement with affected native title groups at the outset to ensure that there is agreement regarding the approach to granting the interest, which would be a positive development. The worst outcomes are more likely to occur when native title holders are dealt with as an afterthought. Indeed, under the proposed model, the proponent will be able to decide the impact of the future act – and, therefore, the level of procedural rights available to native title holders – without consulting the native title holders. This creates scope for disputes to arise and may insert uncertainty into the system for years.

Additionally, it is unclear from the proposal set out in the Discussion Paper whether the mischaracterisation of a future act would lead to invalidity. If this were the case, it would create substantial uncertainty for

[13] See, for example, section 16, Schedule 1, Part 8, *Aboriginal Land Rights Regulation 2020* (NSW).
[14] Section 235, NTA (as enacted).

proponents. Allowing an act to be valid subject to any challenge, in the NNTT, to a government party's characterisation of the future act may be one way to strike a balance in this regard. Consideration will need to be given to whether any such determination by the NNTT would be taken to be an exercise of judicial power. It does not, on its face, appear to be different from a determination of the NNTT as an arbitral body in any right to negotiate procedure.

Right to Consultation

The Law Society supports replacing a right to comment with a right to consultation as contemplated by Question 14, which sets out that some future acts currently attracting the right to comment would be subject to a consultation requirement.[15]

Significance of Water (Question 16)

The Discussion Paper rightly notes at [185] that s 24HA of the NTA does not adequately reflect the importance of water to the exercise of native title rights and interests, particularly the excessive extraction of water resources.

Contrary to [187] – [189] of the Discussion Paper, it may be queried whether there has been any clear judicial opinion as to the area to which a future act relates. Section 227, NTA provides the following:

> **Act affecting native title**
>
> An act affects native title if it extinguishes the native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise.

On its terms, s 227 does not limit the future act to the footprint of any tenement.

The Discussion Paper at [189] notes that an impact-based approach would alleviate this problem. Perhaps another consideration in that analysis would be whether the impact-based approach could accommodate the cumulative effects of multiple extraction permits on a river system that is not necessarily issued concurrently and not necessarily in a small geographic area.

With regards to compensation, the Law Society's view is that situations contemplated by Question 16 are already compensable under the current scheme and any amendment would be clarifying or confirmatory in nature and should be expressly drafted in that way to avoid any inference that native title holders are not already entitled to compensation for 'off-tenure' impacts.

Alternative State and Territory Provisions (Question 20)

We suggest that the Discussion Paper at [245]–[249] does not adequately identify the problems arising from alternative State and Territory procedures. The Law Society supports the removal of the ability to enact alternative schemes and believes that the ILUA provisions are the relevant mechanism for alternative arrangements to be put in place.

Despite being raised by the Law Council[16] and NTSCorp, the Discussion Paper does not mention the fact that there are a number of variations to the right to negotiate in New South Wales made pursuant to ss 26A and 26(3) (as enacted). These include the following:

[15] Discussion Paper paragraphs [173] – [179].
[16] Law Council of Australia, *Review of the Future Acts Regime: Issues Paper*, 16 April 2025, [71]–[72].

a. *Native Title (Approved Opal or Gem Area – Lightning Ridge (Area 2) New South Wales) Determination 2000*;
b. *Native Title (Approved Exploration etc. Acts – New South Wales) (Petroleum) Determination 2000*;
c. *Native Title (Right to Negotiate (Inclusion) – NSW Land) Approval No. 1 1996*
d. *Native Title (Right to Negotiate (Exclusion) – NSW Land) Determination No. 1 1996*; and
e. *Native Title (Approved Exploration etc Acts – New South Wales) (Mining) Determination 2000*.

The effect of these schemes includes an approach which passes responsibility for compliance with the NTA on to grantees without satisfactory supervision from the Government, which grants the interest. These existing alternative schemes are now at least 25 years old and in any other context, the statutory instrument under which they were created would have lapsed. We suggest that this Review consider the impact of these schemes in New South Wales.

Sub-Division F and Non-Claimant Applications (Question 21)

The Discussion Paper at [250]-[255] does not capture all the circumstances where non-claimant applications arise. In many instances in New South Wales, non-claimant applications arise because of the requirements of s 42 of the *Aboriginal Land Rights Act 1983* (NSW) and often, but not always, in circumstances where there are clear extinguishing events. This includes applications being made over former prisons[17], police stations,[18] and land which has been freehold for over 140 years.[19] They also often occur where there are no Aboriginal and Torres Strait Islander objectors to the determination, and land which the Government has continuously dealt with without regard to native title precisely because that land has historically been extinguished. In these circumstances, and contrary to [253] of the Discussion Paper, the determination that native title does not exist is not to 'secure interests which would otherwise require negotiating or engaging with native title parties'. Where native title has clearly been extinguished, it is not clear what the requirement for negotiation with third parties would be. If there are objectors to a non-claimant application, Federal Court processes allow for mediation in appropriate circumstances.

We note that [225] of the Discussion Paper does not consider that where an act proceeds pursuant to "section 24FA protections" compensation is still payable for the act.[20]

In our view, the ability to make a non-claimant application is an appropriate mechanism for a determination of native title to be made and should be retained.

Furthermore, where there are historically extinguishing events there is no utility in the non-extinguishment principle applying.

Future Act Notices (Question 23, Proposal 11)

The Law Society supports measures that allow native title holders to make informed submissions and comment on acts which affect their native title interests. This is a basic measure of procedural fairness. It may not be practical to provide all relevant information in a notice, but it should be able to be provided in a timely way if requested. The notice should also provide a timeframe to respond to the future act, commencing from the time the additional information is received.

[17] See for example *Deerubbin Aboriginal Land Council v Attorney-General of New South Wales* [2017] FCA 1067
[18] See for example *Griffith Local Aboriginal Land Council v Attorney-General of New South Wales* [2017] FCA 1452
[19] *Coonamble Local Aboriginal Land Council v Attorney General of New South Wales* [2023] FCA 938.
[20] Section 24FA(2), NTA.

We support Proposal 11, which would require future act notices be provided to the NNTT and retained by it on a public register.

Invalid Future Acts (Proposal 13)

The Law Society supports Proposal 13, that the NTA provide statutory entitlement to compensation for invalid future acts. While the Law Society considers that native title holders are already entitled to compensation for invalid future acts, expressly providing for this in the NTA will clarify the cause of action and make such compensation more accessible.

We suggest that for certainty consistency in process, any such amendment should apply retrospectively. This will avoid situations where compensation for some invalid future acts are able to be commenced in the Federal Court pursuant to a statutory right, and compensation for invalid future acts that occurred prior to the amendment may be sourced in common law causes of action, such as trespass, which would be commenced in a State court and be subject to questions around limitation periods and discoverability.

Resourcing, costs, and implementation (Proposal 14)

The Law Society supports, in-principle, proposals for a fund to be established to support PBCs and to avoid the need for recurrent government funding. The Centre for Aboriginal Economic Policy Research at the Australian National University prepared a paper looking at a perpetual funding model for PBCs, which we suggest should be drawn to the ALRC's attention: 'Toward a Perpetual Funding Model for Native Title Prescribed Bodies Corporate' (2009).[21]

Indigenous governance model

We suggest that additional consideration is required of the Indigenous governance model that should apply in this regard, to deal with competing views of common law native title holders and the relevant PBC.

Impacts of future acts on Aboriginal and Torres Strait Islander cultural heritage (Question 28)

The Law Society expresses caution about the broad-brush approaches to heritage issues proposed in the Discussion Paper at [333], noting that different heritage schemes operate in different States and Territories. For example, in NSW, Aboriginal people are only permitted to provide comments on cultural heritage nominations.

Thank you for the opportunity to comment. Questions at first instance may be directed to Ursula Paetzholdt, Policy Lawyer, at (02) 9226 0130 or Ursula.Paetzholdt@lawsociety.com.au.

Yours sincerely,

Jennifer Ball

Jennifer Ball
President

[21] A copy of the paper can be downloaded at the following link: https://openresearch-repository.anu.edu.au/bitstreams/7dac3d00-f797-46ed-baab-3f5415b62e63/download. We note the Law Society of NSW submission to the Law Council on the inquiry into economic self-determination and opportunities for First Nations Australians discussed these issues in some detail: https://www.lawsociety.com.au/sites/default/files/2024-08/Letter%20to%20Law%20Council%20of%20Australia%20-%20Inquiry%20into%20economic%20self-determination%20and%20opportunities%20for%20First%20Nations%20Australians%20-%2020%20May%202024.pdf