MINERALS COUNCIL OF AUSTRALIA

SUBMISSION: FUTURE ACTS REGIME DISCUSSION PAPER

23 JULY 2025

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1. EXECUTIVE SUMMARY

The Minerals Council of Australia (MCA) appreciates the opportunity to provide some comments relating to the future acts regime discussion paper for the consideration of the Australian Law Reform Commission (ALRC).

This submission has been developed with input from MCA member companies who are interacting with host communities daily, along with state minerals chambers who interact with their state regulatory bodies and peak national Aboriginal and Torres Strait Islander community partners.

Aboriginal and Torres Strait Islander people are a core partner in mining and industry is a major stakeholder in transforming not just the national economic prosperity but the economic prosperity of the individuals across the industry.

Without a regulatory environment that supports investment in mining, minerals processing and enabling mining infrastructure, the industry's support for the national economy and the economic prosperity of individuals will diminish. Australia must remain an attractive mining investment jurisdiction; this will support governments and local communities to close the gap.

The MCA has provided detailed and considered responses to the questions and proposals outlined in the ALRC discussion paper, these are at Section 2 of this submission.

Effective local decision-making supports stability, clarity and predictability for both Aboriginal and Torres Strait Islander communities and industry on all matters associated with self-determination, reconciliation and co-design. This most often occurs where Traditional Custodian representative bodies have well developed governance and consultation structures and positive, trusted relationships with native title service providers. Access to advice, systems and capability to jointly implement, monitor and review agreements is another success factor. Clarity and consensus within each community about who speaks for Country is a crucial element.

The MCA has strong reservations regarding the proposals to increase the powers of the National Native Title Tribunal as these proposals appear to be counterintuitive to Traditional Custodians and industry building strong and sustainable relationships. Furthermore, the MCA believes that the proposed interventions of the National Native Title Tribunal could create an opportunity for activists with an anti-mining agenda to publicly twist the narrative that the National Native Title Tribunal is siding with industry and bring unjust and unwarranted focus on industry removing the self-determination rights of Traditional Custodians.

It is the opinion of the MCA that the proposed reforms around impact assessment will not provide sufficient certainty and is likely to result in a greater number of disputes about the categorisation of acts – similar to the experiences faced by industry in a state jurisdiction where the proposed reforms to cultural heritage sought to codify low and high impact activities. The proposed impact assessment approach may also create complexity and uncertainty, including for ensuring validity, as it elevates the future act to the equal status of being the grant of a tenure when the future act is a rights-based exercise.

The proposed reform to the objection process, while focus on this area is welcomed, causes greater concerns by allowing the National Native Title Tribunal to override the right of the State to the mineral resource for a period of five years. When considering the government's agenda to increase productivity and investment, this one proposal will have the effect of signalling that Australia is not an attractive jurisdiction for investment.

While viewed as a potential opportunity for streamlining engagement opportunities between industry and Traditional Custodians, the MCA considers the proposal regarding Native Title Management Plans to be limited in their scope of operation and unlikely to provide the efficiencies that the Discussion Paper outlines. The MCA believes that greater use and encouragement of the existing alternative state procedures regime will ensure local benefits to optimise agreement making.

In addition to responding to ALRC reform proposals, the MCA provides a range of proposals on practical changes to improve the operation of the future acts regime. These focus on enhancing investment, productivity and promoting fairness in the current future acts regime. The proposals are offered to the ALRC and government as the adoption of these administrative and operational changes will contribute to the outcomes sought by the review, irrespective of which reforms are progressed.

These proposals are summarised in Section 3, and centre on:

- Sufficient and sustainable funding, resources and governance support to enable Traditional Custodian representative bodies to fulfil their obligations and optimise outcomes for native title holders
- Enhancing availability, oversight and quality of third-party services afforded to Traditional Custodian representative bodies and industry stakeholders
- Addressing cost and other barriers that support investment
- Reviewing alternative models for managing benefits from native title agreements to better support sustainable economic outcomes
- Improving coordination of cultural heritage laws to avoid duplication between state and Commonwealth frameworks
- Streamlining agreement making and flexibility for state regimes.

Additional detail is also provided in sections 4 to 8.

The proposals outlined by the MCA support a rights-based approach to ensuring fairness in the native title regime and have been guided by the MCA's support for the Towards Sustainable Mining Framework and Dhawura Ngilan business and investor initiative.

The Australian minerals industry is committed to working in partnership with governments and Traditional Custodians to reinforce the Australian mining industry's role is creating intergenerational wealth opportunities. Accordingly, the MCA looks forward to continued collaboration with the ALRC through the future acts advisory panel.

For further information regarding this submission, please contact Matthew Denyer, Principal Adviser – Indigenous Partnerships and Communities via email: matthew.denyer@minerals.org.au or telephone: 0428 605 143.

Yours sincerely

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2. MCA RESPONSE TO DISCUSSION PAPER

This section outlines the responses from the MCA to the series of questions and proposals that have been put forward by the ALRC in the Discussion Paper. In responding the MCA has followed the same numbering sequence that the ALRC Discussion Paper introduces.

ALRC Question 6

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?

MCA Response

The MCA considers that Native Title Management Plans are untested in the current regulatory regime that appears to act as an alternative to jurisdictional land use planning regimes and appears to override State's rights to the mineral resource.

Further clarity is required as to the permissible content of a Native Title Management Plan to determine whether the new mechanisms will maintain an appropriate balance.

The MCA does not support the proposal to introduce Native Title Management Plans as detailed in the Discussion Paper as the proposed content is too broad.

ALRC Question 7

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?

MCA Response

The MCA provides in-principle support for the introduction of mandatory conduct standards and content requirements for agreements and will require industry co-design. Proposals 7, 8 and 9 discussed at Section 6 of this submission discusses agreement-making.

ALRC Proposal 1

The *Native Title Act 1993 (Cth)* and Native Title (Prescribed Bodies Corporate) Regulations 1999 (Cth) should be amended to allow for the expanded use of standing instructions given by common law holders to Prescribed Bodies Corporate for certain purposes.

MCA Response

The MCA supports expanding the use of standing instructions to reduce unnecessary costs while improving efficiency. The MCA would support options to integrate standing instructions to native title claimant groups, lands councils (NT, Qld and NSW) and Registered Aboriginal Parties (Vic).

ALRC Question 8

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?

MCA Response

The MCA supports a native title party and industry having the flexibility to enter into common law agreements and ancillary agreements, noting that certain aspects of these agreements may go beyond the scope of the future acts regime and parties will require flexibility regarding terms and conditions. The MCA supports these agreements being registered with the National Native Title Tribunal, however flexibility is paramount in being able to amend, vary or conclude the agreement and support the legal principle surrounding freedom of contract.

ALRC Proposal 2

The *Native Title Act 1993 (Cth)* should be amended to provide that:

(a) the Prescribed Body Corporate for a determined area has an automatic right to access all registered agreements involving any part of the relevant determination area; and

(b) When a native title claim is determined, the Native Title Registrar is required to identify registered agreements involving any part of the relevant determination area and provide copies to the Prescribed Body Corporate

MCA Response

The MCA agrees with the structural reform to the *Native Title Act 1993 (Cth)* to allow for automatic statutory assignment of pre-determination agreements to the post-determination Registered Native Title Body Corporate. The MCA further suggests that the necessary amendments to the *Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)* will also be required to ensure that any funds held in pre-determination trust accounts are also transferred.

The MCA notes that a separate process will require development to manage the release of agreements that cover areas of more than one claim, or where a partial determination has been made by the National Native Title Tribunal.

ALRC Question 9

Should the *Native Title Act 1993 (Cth)* be amended to provide a mechanism for the assignment of agreements entered into before a positive native title determination is made and which do not contain an express clause relating to succession and assignment?

MCA Response

The MCA agrees with the structural reform to the *Native Title Act 1993 (Cth)* to allow for automatic statutory assignment of pre-determination agreements to the post-determination Registered Native Title Body Corporate. The MCA further suggests that the necessary amendments to the *Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)* will also be required to ensure that any funds held in pre-determination trust accounts are also transferred.

ALRC Proposal 3

Section 199C of the *Native Title Act 1993 (Cth)* should be amended to provide that, unless an Indigenous Land Use Agreement specifies otherwise, the agreement should be removed from the Register of Indigenous Land Use Agreements when:

(a) the relevant interest in property has expired or been surrendered;

(b) the agreement has expired or been terminated; or

(c) the agreement otherwise comes to an end.

MCA Response

The MCA supports a process to remove native title agreements from the register when the terms of the agreements have lapsed. Any agreement that has been identified for removal should be by mutual consent of the parties signatory to an agreement.

ALRC Proposal 4

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.

MCA Response

The MCA supports ongoing and regular reviews ensuring the accuracy and currency of the agreements registered with the National Native Title Tribunal. Any agreements to be removed, that are not expired or terminated, should be by mutual consent of the parties signatory to an agreement.

ALRC Question 10

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, and if so, what types of amendments should be permissible?

MCA Response

The MCA supports Traditional Custodians and industry in exercising their rights to vary an agreement. Native title agreements have been negotiated in good faith and should be allowed to be varied using the same good faith negotiation principles.

ALRC Proposal 5

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.

MCA Response

The MCA supports measures that make more cost effective and efficient dispute resolution processes provided any referral is only by mutual consent and the provisions of the dispute resolution clause in the agreement remain in force if there is not mutual consent.

ALRC Question 11

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?

MCA Response

Whilst the MCA supports the addition of dispute resolution procedures and processes, the MCA does not support the National Native Title Tribunal being the exclusive jurisdiction for dispute resolution. The MCA does not support the expansion in the role of the National Native Title Tribunal.

ALRC Question 12

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?

MCA Response

The MCA would be supportive of reforms that enable better benchmarking of information that is not commercially or culturally sensitive, without impacting rights to confidentiality.

ALRC Question 13

What reforms, if any, should be made in respect of agreements entered into 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?

MCA Response

The MCA agrees with the structural reform to the *Native Title Act 1993 (Cth)* to allow for statutory assignment of pre-determination agreements to the post-determination Registered Native Title Body Corporate. The MCA further suggests that the necessary amendments to the *Corporations (Aboriginal*

and Torres Strait Islander) Act 2006 (Cth) will also be required to ensure that any funds held in pre-determination trust accounts are also transferred.

ALRC Question 14

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;

(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?

MCA Response

The MCA does not support the measures outlined in this question with the MCA providing alternative approaches which have been outlined in sections 3 to 8. The MCA proposals are being recommended to streamline the existing future acts regime with minimal legislative reform. The MCA has strong reservations regarding any proposal to increase the powers of the National Native Title Tribunal as a more interventionist approach appears to be counterintuitive to Traditional Custodians and industry building strong and sustainable relationships, while providing Traditional Custodians with self-determination as native title rights holders.

The current future act regime is grounded in the interaction between native title rights and interest and the effect that the grant of the proposed interests in land would have on those native title rights and interests. The current future act regime provides procedural rights relevant to the grant of the rights, not whether or how the rights will be exercised. The MCA believes that an impact-based regime would give greater emphasis to the effect of the proposed exercise of rights, rather than the effect of the grant itself and may operate to afford native title holders more extensive procedural rights than ordinary title holders in many cases.

The MCA has further concerns regarding any ‘grandfathering’ provisions and how these proposed ‘new’ future acts processes will be applied to existing lease renewals and extensions. This represents a significant risk to ongoing projects and future investment.

ALRC Question 15

If an impact-based model contemplated by Question 14 were implemented, should there be exclusions from that model to provide 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?

MCA Response

The MCA considers the proposed reforms around impact assessment will not provide sufficient certainty and is likely to result in a greater number of disputes about the categorisation of acts – similar to the experiences faced by industry in a state jurisdiction where the proposed reforms to cultural heritage sought to codify low and high impact activities. The proposed impact assessment approach may also create complexity and uncertainty, including for ensuring validity, as it elevates the future act to the equal status of being the grant of a tenure when the future act is a rights-based exercise.

Furthermore, the MCA considered that the Commonwealth should encourage states and territories to expand their use of alternative state procedures in native title agreements and negotiations, to complement and enhance the existing Commonwealth framework under the *Native Title Act 1993 (Cth).* This will provide jurisdictions with flexibility to accommodate their individual circumstances, while aligning with the outcomes sought by the *Native Title Act 1993 (Cth)*.

ALRC Question 16

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?

MCA Response

Similar to Question 15, the MCA considers the proposed reforms around impact assessment will not provide sufficient certainty and is likely to result in a greater number of disputes about the categorisation of acts – similar to the experiences faced by industry in a state jurisdiction where the proposed reforms to cultural heritage sought to codify low and high impact activities. The proposed impact assessment approach may also create complexity and uncertainty, including for ensuring validity, as it elevates the future act to the equal status of being the grant of a tenure when the future act is a rights-based exercise.

What is and is not a future act must be clearly defined and referable to the relevant area covered by the future act. This is consistent with the management of the rights and interests of non-native title land title holders.

ALRC Question 17

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?

MCA Response

The MCA considers the proposed reforms around impact assessment will not provide sufficient certainty and is not supported. An impacts-based model is likely to result in a greater number of disputes about the categorisation of acts – similar to the experiences faced by industry in a state jurisdiction where the proposed reforms to cultural heritage sought to codify low and high impact activities. The proposed impact assessment approach may also create complexity and uncertainty, including for ensuring validity, as it elevates the future act to the equal status of being the grant of a tenure when the future act is a rights-based exercise.

Furthermore, the MCA considers if an impacts-based regime is adopted, then supportive of applying a non-impacts based tailored approach for legislative acts that are future acts.

ALRC Proposal 6

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 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:

- 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.

(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

MCA Response

The MCA supports amendments to the right to negotiate that would bring up front certainty as to whether the native title party objects or not to the relevant future act. This would be a positive reform

that would give certainty to industry earlier in the process. However significant safeguards would be required to avoid vexatious objection claims; including but not limited to the option to pursue costs.

While focus on objection processes is welcomed, the MCA considers that the proposed reform causes greater concerns by allowing the National Native Title Tribunal to override the right of the state to the mineral resource for a period of five years. When considering the government's agenda to increase productivity and investment, this one proposal will have the effect of signalling that Australia is not an attractive jurisdiction for investment and the overall process may have unintended consequences for Traditional Custodians.

Whilst it's acknowledged the current form of the right to negotiate principle can be improved, it is otherwise a fundamentally sound process that does not require wholesale change. The MCA would encourage the adoption of the proposals in this submission (Sections 4, 5 and 6) to increase productivity in the existing right to negotiate process, expanded use of the alternative state procedures provision and supporting a reasonable right to negotiate timeframe that aligns with other jurisdictional regulatory approval consideration timeframes.

ALRC Proposal 7

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.

MCA Response

Any proposal must not appear to be counterintuitive to Traditional Custodians and industry building strong and sustainable relationships, while providing Traditional Custodians with self-determination as native title rights holders. The MCA supports the retention of the National Native Title Tribunal's role in assisting native title holders and industry in mediation during negotiations. This role is more appropriate for the National Native Title Tribunal and removes a potential conflict by having a decision-making function.

ALRC Question 18

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?

MCA Response

The MCA considers that the current process to determine a future act must not be amended. The MCA considers that any approach to amend an existing determination process may create unnecessary complexity and uncertainty as it elevates the rights-based exercise of a future act to the equal status of the granting of tenure by the respective state or territory jurisdiction. The MCA has concerns that any amendment may impinge on the mineral ownership rights of the jurisdiction.

ALRC Question 19

What criteria should guide the National Native Title Tribunal when determining the conditions (if any) that attach to the doing of a future act?

MCA Response

As above, the MCA considers that the current process to determine a future act must not be amended. The MCA considers that any approach to amend an existing determination process may create unnecessary complexity and uncertainty as it elevates the rights-based exercise of a future act to the equal status of the granting of tenure by the respective state or territory jurisdiction. The MCA has concerns that the any amendment may impinge on the mineral ownership rights of the jurisdiction.

ALRC Proposal 8

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.

MCA Response

Any future act compensation payment must continue to be commensurate with the loss of the native title right, not the size of the land mass applicable to the area of the future act. The MCA strenuously objects to any future act compensation that is linked to a percentage of the royalty for the commodity; the state or territory jurisdiction has ownership of the mineral reserve, a rights-based exercise (the future act) cannot be elevated to the similar or equal status of granting tenure.

A non-native title landowner is not entitled to a royalty or a share of profits when mining tenure is granted. The compensation entitlement is for the loss arising from the effect of the grant on native title rights and interests.

A royalty or profits-based payment is a matter that can be voluntarily agreed by the parties through the agreement-making process but should not be something that can be imposed by the National Native Title Tribunal. The *Native Title Act 1993 (Cth)* is designed to regulate the impact of future acts on native title rights and interests and ensure the payment of compensation for that impact. There is no place for Commonwealth, State or Territory legislation to dictate the subject matter of commercial arrangements between parties to an agreement.

ALRC Proposal 9

Section 32 of the *Native Title Act 1993 (Cth)* should be repealed.

MCA Response

The MCA considers that the removal of the expedited procedure is shortsighted as native title law has historically positioned Aboriginal and Torres Strait Islander peoples as consultees or respondents in resource development processes. However, a transformative shift is emerging: Traditional Custodians are increasingly taking on the role of project proponents, driving economic, cultural, and environmental initiatives on their own terms and reinvesting native title benefits into projects where they have financial ownership.

Furthermore, delays in native title approvals present significant challenges not only for mining proponents but also for the broader communities that stand to benefit from associated economic activity. When exploration and mining projects are held up by prolonged native title processes often due to procedural complexity, under-resourced Traditional Custodian representative bodies, or unresolved disputes; investments are stalled, job creation is deferred, and infrastructure development is delayed.

Providing the state and territory jurisdictions with use of the alternative states' procedure provisions would enable the jurisdictions to tailor the expedited procedure regime to their individual approval processes.

ALRC Question 20

Should a reformed future acts regime retain the ability for states and territories to legislate alternative procedures, subject to approval by the Commonwealth Minister, as currently permitted by ss 43 and 43A of the *Native Title Act 1993 (Cth)*?

MCA Response

The MCA supports the use of alternative state procedures as indicated by MCA Proposal 5 of this submission. Similar to the state and territory jurisdictions being accredited under the commonwealth's environmental laws, the MCA considers that accrediting states and territories under the *Native Title*

Act 1993 (Cth) would provide for streamlined engagement and collaboration processes with Traditional Custodians. This provides states and territories with flexibility to accommodate their individual circumstances, while aligning with the outcomes sought by the *Native Title Act 1993 (Cth)*.

ALRC Question 21

Should Part 2 Division 3 Subdivision F of the *Native Title Act 1993 (Cth)* be amended:

(a) to provide that non-claimant applications can only be made where they are made by, or for the benefit of, Aboriginal or Torres Strait Islander peoples;

(b) for non-claimant applications made by a government party or proponent, to extend to 12 months the timeframe in which a native title claimant application can be lodged in response;

(c) for non-claimant applications in which the future act proposed to be done would extinguish native title, to require the government party or proponent to establish that, on the balance of probabilities, there are no native title holders; or

(d) in some other way?

MCA Response

The MCA considers that, although rarely used, the ability should be retained. Although the MCA strongly supports engagement, collaboration and agreement-making with the recognised Traditional Custodians, there may well be instances where no existing native title claimant or determination can be identified. This is the only option available to proponents to ensure authorisation and validity of the future act in these circumstances

The MCA does not support extending non-claimant application timeframes to 12 months. Retaining efficiency in consideration and approval timeframes are paramount to ensuring continued investment in the Australian minerals industry, including associated infrastructure and processing facilities.

ALRC Proposal 10

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.

MCA Response

The MCA considers that any invalidity of procedural obligations may impinge on the mineral ownership rights of the jurisdiction, which will create unnecessary complexities and uncertainty as it elevates the rights-based exercise of a future act to the equal status of the granting of tenure by the respective state or territory jurisdiction.

ALRC Question 22

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?

MCA Response

The MCA considers that any invalidity of procedural obligations may impinge on the mineral ownership rights of the jurisdiction, which will create unnecessary complexities and uncertainty as it elevates the rights-based exercise of a future act to the equal status of the granting of tenure by the respective state or territory jurisdiction.

ALRC Question 23

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?

MCA Response

The MCA considers that the current process relating to future act notices is sufficient and should the proposal be accepted any amendment must not create any unnecessary complexity or uncertainty for industry.

However, the MCA provides in-principle support for a template future act notice which could be co-developed with industry. Any information requirements for a notice must be manageable and succinct to enable publication of the proposed future act. Should the template future act notice be adopted, it must not be made so complicated that would introduce a risk of inadvertent technical non-compliance.

ALRC Proposal 11

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.

MCA Response

The MCA supports this proposal subject to the register being available online and as a searchable tool that is available to the public, government, industry and native title holders free of charge.

ALRC Question 24

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?

MCA Response

The MCA strongly objects to this proposal. While compensation for loss and enjoyment of the boundary that encompasses the future act area is accepted by the industry, commercial outcomes are agreed between industry and native title holders through good faith agreement making principles. The nexus of when and how compensation payments should be incorporated into native title agreements, or proposed ancillary native title agreements, should align with the statutory approval timelines within the respective state and territory jurisdiction.

Any future act compensation payment must continue to be commensurate with the loss of the native title right, not the size of the land mass applicable to the area of the future act. The MCA objects to any future act compensation that is linked to a percentage of the royalty for the commodity; the state or territory jurisdiction has ownership of the mineral reserve, a rights-based exercise (the future act) cannot be elevated to the similar or equal status of granting tenure.

Calculating the value of lost native title rights is a complex, and largely untested, area of law and must remain the jurisdiction of the Court.

ALRC Question 25

How should 'future act payments' interact with compensation that is payable under Part 2 Division 5 of the *Native Title Act 1993 (Cth)*?

MCA Response

Any future act compensation payment must continue to be commensurate with the loss of the native title right, not the size of the land mass applicable to the area of the future act. The MCA objects to any future act compensation that is linked to a percentage of the royalty for the commodity; the state or territory jurisdiction has ownership of the mineral reserve, a rights-based exercise (the future act) cannot be elevated to a similar or equal status of granting tenure.

ALRC Proposal 12

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.

MCA Response

The MCA provides qualified support for this proposal and would seek to explore the option further. The legislative amendment must not be retrospective, in altering current or expired agreements. There must be clarity in how staged (milestone) payments are considered in this regime. Further, this amendment would need to consider how native title parties and industry consider any future act that has been suspended due to commodity price index, overseas conflicts or commodity / currency market indicators.

ALRC Question 26

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?

MCA Response

The MCA supports a native title party and industry having the flexibility to enter into common law agreements and ancillary agreements. Flexibility is paramount in supporting the legal principle surrounding freedom of contract.

ALRC Proposal 13

The *Native Title Act 1993 (Cth)* should be amended to provide a statutory entitlement to compensation for invalid future acts.

MCA Response

The MCA does not support this proposal, as the state has provided the lease to extract the minerals resource. If compensation was to be sought for invalid future acts, any claim cannot be passed through to the mining proponent. If a future act is deemed to be invalid, the judiciary is responsible for determining costs.

ALRC Proposal 14

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.

MCA Response

The MCA believes that sustained baseline funding would allow Traditional Custodian organisations to establish robust internal governance, retain qualified staff, participate meaningfully in decision-making processes, and deliver intergenerational economic benefits to their communities. Adequate

government investment in these institutions is not only a matter of equity it is essential to the integrity, functionality, and fairness of the broader native title system.

The MCA has reservations regarding a perpetual fund type arrangement. MCA Proposal 11 of this submission encourages the Commonwealth to engage with the Mabo Centre to explore the proposed Indigenous Community Development Corporation model as fit-for-purpose entity that can focus solely on managing economic benefits derived from native title agreements, investments, and partnerships, therefore reducing ongoing investment from government.

ALRC Proposal 15

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.

MCA Response

The MCA believes that sustained baseline funding would allow Traditional Custodian organisations to establish robust internal governance, retain qualified staff, participate meaningfully in decision-making processes, and deliver intergenerational economic benefits to their communities. Adequate government investment in these institutions is not only a matter of equity it is essential to the integrity, functionality, and fairness of the broader native title system.

ALRC Proposal 16

The Australian Government should adequately fund the National Native Title Tribunal to fulfil the functions contemplated by the reforms in this Discussion Paper, and to provide greater facilitation and mediation support to users of the native title system.

MCA Response

The MCA considers that adequate and sustained baseline funding to all organisations participating in the native title regime is paramount to ensuring equity, integrity, functionality and fairness within the native title system.

ALRC Proposal 17

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;

(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).

MCA Response

While the MCA provides in-principle support for this proposal, there is an alternative approach at MCA Proposal 2 of this submission.

To ensure consistency, accountability, and fairness in the management of native title processes, the Remuneration Review Tribunal should be empowered to establish maximum allowable rates for meeting attendance and engagement-related fees charged by Registered Native Title Bodies Corporate (RNTBCs) and Prescribed Bodies Corporate (PBCs).

While it is appropriate and necessary for Traditional Custodians and their representative bodies to be fairly compensated for their time, knowledge, and cultural expertise, there is currently little transparency or standardisation in how these fees are determined. This lack of uniformity can lead to disputes, project delays, or unsustainable cost structures that may undermine trust and hinder collaboration with the minerals industry.

By establishing clear and reasonable fee-for-service benchmarks based on scope, complexity, and regional cost variations the Remuneration Review Tribunal would provide a transparent framework that supports responsible engagement while preventing cost inflation or misuse of resources. Such a measure would also protect the integrity of native title processes, ensure value for money in engagement and collaboration processes, and promote more equitable partnerships across the minerals sector.

ALRC Question 27

Should the *Native Title Act 1993 (Cth)* be amended to expressly address the awarding of costs in Federal Court of Australia proceedings relating to the future acts regime, and if so, how?

MCA Response

The MCA considers that an Act of Parliament should not bind the judiciary to a future acts costs structure when the matters may be dealt with between the native title party and industry through agreement making processes. Any awarding of costs relating to the future acts regime should be resolved on individual basis through careful consideration of the judiciary.

ALRC Proposal 18

The Australian Government should establish a specifically resourced First Nations advisory group to advise on implementing reforms to the *Native Title Act 1993 (Cth)*.

MCA Response

The MCA is supportive of an advisory group to advise on the potential reforms, however the advisory group must include representatives of the mining industry as a major stakeholder and end user of the native title regime.

ALRC Question 28

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?

MCA Response

The MCA supports in-principle a holistic management approach of native title and cultural heritage, provided there is no duplication with existing Commonwealth and state or territory jurisdictional cultural heritage protection laws or cutting across integrated and holistic environmental assessment processes. This is discussed in greater detail at Section 8 of this submission.

From a regulatory perspective, having clear frameworks that support both timely project approvals and thorough cultural heritage assessment ensures that confidence in planning does not come at the cost of cultural heritage. Instead, it builds on it demonstrating that robust development and cultural protection are not mutually exclusive but mutually reinforcing

Given the interaction with other state and Commonwealth legislation it would be more practical to deal with this matter through the industry supported review of the *Aboriginal Torres Strait Islander Heritage Protection Act 1984 (Cth)*.

3. OPERATIONAL CHANGES

In the following sections of the MCA's submission some alternative proposals are offered to the ALRC and government; the adoption of these administrative and operational changes will achieve similar outcomes to the legislative reform questions and proposals (Section 2) outlined in the ALRC Discussion Paper.

These proposed operational changes have been thoughtful in their design to provide administrative and minor regulatory amendments to the current future acts regime; thereby reducing the need for wide ranging and untested regulatory reform but achieving a similar outcome for industry and Traditional Custodians.

The MCA proposals focus on industry and Traditional Custodians building sustainable relationships through collaboration and agreement-making. Importantly, the proposals consider how the future acts regime has a direct correlation to increased investment in mining and national productivity.

Stable mining investment and national productivity is directly felt by governments, communities, households and individuals. In 2023 MCA members reported that approximately 6 per cent of the workforce identify as Aboriginal or Torres Strait Islander and over $1 billion has been procured through a business owned and operated by an Aboriginal or Torres Strait Islander person. The proposed operational changes support the ongoing growth of participation by Aboriginal and Torres Strait Islander people across all areas of mining, from the boardroom to the school based apprentice.

In developing these proposals, the MCA has actively considered the ongoing support and advocacy for a rights-based approach to ensuring fairness and transparency in the future acts regime. Although the *Native Title Act 1993 (Cth)* is a national law, there are jurisdiction variances in the tenure management and land access arrangements. The MCA's proposals highlight a need to ensure that jurisdictional variances in land, development and tenure related laws are considered.

MCA Proposals

Proposal 1

Establish a governance and support framework for Traditional Custodian representative bodies to be accountable and transparent in their operations around internal engagement and decision-making processes.

Proposal 2

The Remuneration Review Tribunal to be empowered to establish maximum meeting and engagement costs (fee for service) for Registered Native Title Bodies Corporate and Prescribed Bodies Corporate.

Proposal 3

Government to establish an adequate regulatory oversight regime of independent third-party consultants acting for or on-behalf of Registered Native Title Bodies Corporate and Prescribed Bodies Corporate and industry proponents.

Proposal 4

Government to fulfill its responsibility in providing sufficient and sustained baseline funding to enable Traditional Custodian organisations to establish foundations and undertake core activities.

Proposal 5

The Commonwealth should encourage states in an expanded use of alternative state procedures in native title agreements and negotiations, to complement and enhance the existing Commonwealth framework under the *Native Title Act 1993*.

Proposal 6

The Commonwealth to undertake a national workforce review to identify the supply and demand trends in native title legal practice, including options to support legal education and practical training pathways.

Proposal 7

Agreement making processes should be modernised and simplified to ensure that agreement negotiation is occurring with the Registered Native Title Body Corporate or Prescribed Body Corporate identified by the National Native Title Tribunal, or other equivalent recognised body.

Proposal 8

Develop and implement a common short form Indigenous Land Use Agreement template for activities that have minimum ground disturbance. For example, mineral exploration activities.

Proposal 9

That the Commonwealth undertake a Regulatory Impact Assessment to evaluate options for enhancing the productivity and effectiveness of Traditional Custodian institutions by establishing a default legal mechanism for the automatic transfer of the operation, rights, and benefits of pre-determination agreements to the appropriate post-determination Registered Native Title Body Corporate or other authorised entity, upon a determination of native title.

Proposal 10

The Commonwealth to provide more flexibility in leveraging income streams into finance for investments in economic advancement of Traditional Custodian communities, by focussing on opportunities in manufacturing, minerals processing facilities, supporting infrastructure and adjacent supply chain industries required to meet emerging industries and the needs of nearby communities.

Proposal 11

The Commonwealth in collaboration with the Mabo Centre should explore the proposed Indigenous Community Development Corporation model as fit-for-purpose entity that can focus solely on managing economic benefits derived from native title agreements, investments, and partnerships, therefore reducing ongoing investment from government.

Proposal 12

That the Commonwealth adopt an integrated approach to native title and Aboriginal cultural heritage management, aligned with existing land use and environmental assessment systems, and avoid duplication or disruption of existing Commonwealth and State frameworks.

4. RELATIONSHIPS AND COLLABORATION

Proposal 1

Establish a governance and support framework for Traditional Custodian representative bodies to be accountable and transparent in their operations around internal engagement and decision-making processes.

Proposal 2

The Remuneration Review Tribunal to be empowered to establish maximum meeting and engagement costs (fee for service) for Registered Native Title Bodies Corporate and Prescribed Bodies Corporate.

Proposal 3

Government to establish an adequate regulatory oversight regime of independent third-party consultants acting for or on-behalf of Registered Native Title Bodies Corporate and Prescribed Bodies Corporate and industry proponents.

At its core, native title is about recognising the pre-existing and ongoing rights of Aboriginal and Torres Strait Islander peoples to their land and waters. These rights are deeply embedded in cultural, spiritual, and kinship systems. Therefore, any legal or administrative engagement with native title must be built upon respectful and informed relationships.

The positive approach by minerals companies towards their relationships with Indigenous communities has fostered respect for Aboriginal culture and history and delivered tangible socio-economic impacts.[1]

When relationships are grounded in mutual respect, cultural competency, and open communication, the process of negotiating native title agreements, for example Indigenous Land Use Agreements (ILUAs), becomes more constructive and less transactional.

With Australia's mining sector intersecting significantly with Traditional Custodian land interests, a constructive and equitable framework for engagement is essential. Practical changes are needed to ensure that collaboration is not only procedural but also genuinely participatory and empowering for Traditional Custodians and the Australian minerals industry.

Engagement costs

While it is appropriate and necessary for Traditional Custodians and their representative bodies to be fairly compensated for their time, knowledge, and cultural expertise, there is currently little transparency or standardisation in how these fees are determined. This lack of uniformity can lead to disputes, project delays, or unsustainable cost structures that may undermine trust and hinder collaboration with the Australian minerals industry.

To ensure consistency, accountability, and fairness in the management of native title processes, the Remuneration Review Tribunal should be empowered to establish maximum allowable rates for meeting attendance and engagement-related fees charged by Registered Native Title Bodies Corporate (RNTBCs) and Prescribed Bodies Corporate (PBCs).

By establishing clear and reasonable fee-for-service benchmarks based on scope, complexity, and regional cost variations the Remuneration Review Tribunal would provide a transparent framework that supports responsible engagement while preventing cost inflation or misuse of resources. Such a measure would also protect the integrity of native title processes, ensure value for money in engagement and collaboration processes, and promote more equitable partnerships across the minerals sector.

[1] M Langton, *From Conflict to Cooperation*, MCA, Canberra, 2015, p. 7.

Enhanced transparency

Preparation of a Consultation and Engagement Plan by Aboriginal organisations that outlines steps and timelines for identifying and engaging with relevant Traditional Owner groups is consistent with best practice in native title agreement-making and governance, supporting effective, transparent, and inclusive consultation processes.[2]

The development of plans by Traditional Custodian organisations to identify and consult relevant groups within defined timeframes when collaborating with the Australian minerals industry is a critical step in ensuring respectful engagement and equitable outcomes in resource project development. These plans uphold Aboriginal and Torres Strait Islander rights, promote effective communication, and help balance development objectives with cultural and environmental stewardship. With appropriate support and commitment from all parties, such processes can contribute to more inclusive and sustainable futures for Traditional Owner communities and the broader Australian society.

Relationships and collaboration

Relationships and collaboration are essential to the success and legitimacy of native title in Australia. The future acts regime provides the foundations for engagement and collaboration, building partnerships, creating benefits and resolving disputes for Traditional Custodians and the minerals industry. While noteworthy progress has been made, continued commitment to respectful and equitable collaboration is needed to ensure native title delivers on its promise of justice, recognition, and reconciliation.

Outright rejection of dialogue or collaboration can cede influence to independent third-party advisors, leaving Traditional Custodians without a seat at the table when decisions are made. This matter is discussed further in Section 6.

The Australian minerals sector remains a cornerstone of the Australian economy, providing jobs, royalties, and export income. Traditional Custodian communities are often located near resource-rich lands, creating a unique opportunity for place-based development.

Responsible collaboration can enable infrastructure investment such as roads, telecommunications, and healthcare facilities that supports efforts to close the gap within a generation. By refusing collaboration, communities may unintentionally limit not only their own economic potential but also regional development initiatives that could provide jobs and services.

A pragmatic approach recognises that Traditional Custodians can both protect their rights and participate in national prosperity.

[2] National Native Title Tribunal, *Indigenous Land Use Agreements: A Guide to Future Act and Agreement-Making Processes* Commonwealth of Australia, 2016.

5. TIMELY AND EFFICIENT APPROVALS

Proposal 3

Government to establish an adequate regulatory oversight regime of independent third-party consultants acting for or on-behalf of Registered Native Title Bodies Corporate and Prescribed Bodies Corporate and industry proponents.

Proposal 4

Government to fulfill its responsibility in providing sufficient and sustained baseline funding to enable Traditional Custodian organisations to establish foundations and undertake core activities.

Proposal 5

The Commonwealth should encourage states in an expanded use of alternative state procedures in native title agreements and negotiations, to complement and enhance the existing Commonwealth framework under the *Native Title Act 1993*.

Proposal 6

The Commonwealth to undertake a national workforce review to identify the supply and demand trends in native title legal practice, including options to support legal education and practical training pathways.

Sufficient and stable funding

The Australian Government must fulfil its responsibility to provide sufficient, stable, and long-term baseline funding to RNTBCs and PBCs, to ensure they can operate effectively and independently.

These organisations play a critical role in managing native title rights, protecting cultural heritage, engaging in land use negotiations, and driving community development. Yet, many operate without adequate resourcing, relying on short-term project-based funding or voluntary effort, which undermines their capacity to undertake core governance, compliance, consultation, and cultural responsibilities.

Without foundational support, these bodies face significant structural disadvantages when engaging with governments, the minerals industry, or complex legal and regulatory systems.

Sustained baseline funding would allow Traditional Custodian organisations to establish robust internal governance, retain qualified staff, participate meaningfully in decision-making processes, and deliver intergenerational economic benefits to their communities. Adequate government investment in these institutions is not only a matter of equity it is essential to the integrity, functionality, and fairness of the broader native title system.

Timely approvals

Timely and efficient approvals for minerals projects are crucial to maintaining Australia’s competitiveness in the global markets; when Australian mining does well Australia does well.

In a highly competitive and rapidly evolving global minerals market, timely and efficient approvals for mining and exploration projects are a necessity. While Australia must uphold high standards for environmental protection and Traditional Custodian engagement, these values can coexist with a streamlined regulatory system that fosters investment, innovation, and sustainable development. Failure to reform or modernise approval processes risks not only economic losses but also diminished influence in the international transition to a net zero emissions but mineral-intensive future. The challenge now is to ensure that Australia's approvals framework is not only rigorous—but also responsive and fit for purpose in a changing world.

Australia is a world leader in mineral exports, particularly in iron ore, coal, lithium, gold, and critical minerals. The position of the Australian minerals industry in the global market has been built on a

reputation for geological abundance, political stability, and strong regulatory systems. However, as international competition intensifies especially with the rise of emerging economies and the global shift toward clean energy technologies timely and efficient project approvals are becoming increasingly vital. Without a responsive and streamlined regulatory framework, Australia risks losing its competitive edge, deterring investment, and delaying critical contributions to the global supply of essential minerals.

Australian law has long recognised that ownership of minerals and petroleum is generally vested in the Crown, limiting the extent to which native title holders can claim proprietary rights in these resources.[3] The intersection of Aboriginal and Torres Strait Islander rights and resource development in Australia is complex not because the goals of development and cultural integrity are inherently incompatible, but because the systems managing these interests are structurally incomplete. Recognising and addressing the legal limitations, and governance challenges that define this space is essential for creating a more just, respectful, and sustainable policy framework.

Mining companies, governments, and Traditional Custodian organisations must invest in meaningful, culturally appropriate knowledge-sharing strategies to ensure Traditional Custodians are not just consulted but truly understood and empowered as decision-makers on their own Country as Aboriginal communities can face significant challenges in understanding the complexities of mining operations, the regulatory environment, and the commercial objectives of resource companies.[4]

Exploration and procedural pathways

The expedited procedure under the *Native Title Act 1993* is designed to streamline the approval of certain low-impact activities, such as mineral exploration. Its core purpose is to enable these activities to proceed without initiating the full Right to Negotiate (RTN) process, provided that they are unlikely to cause significant disturbance to land or interfere with the rights and interests of Traditional Custodians.

This procedural pathway recognises that not all activities on Country pose the same level of risk or intrusion.

Unlike large-scale mining or development projects, early-stage exploration typically involves minimal ground disturbance, is temporary in nature, and does not involve resource extraction. By allowing such activities to move forward more efficiently, the expedited procedure reduces regulatory burden, facilitates investment, and ensures Australia's competitiveness in exploration, all while maintaining the legal protections afforded to native title holders.

Importantly, the expedited procedure is not automatic. Native title parties retain the right to lodge an objection, and the National Native Title Tribunal must determine whether the activity meets the criteria for minimal impact. This ensures that the procedure is only applied in appropriate circumstances, with oversight and input from Traditional Custodians. When properly implemented, the expedited procedure offers a practical balance between enabling responsible resource exploration and safeguarding native title rights.

Removal of the expedited procedure is shortsighted as native title law has historically positioned Aboriginal and Torres Strait Islander peoples as consultees or respondents in resource development processes. However, a transformative shift is emerging: Traditional Custodians are increasingly taking on the role of project proponents, driving economic, cultural, and environmental initiatives on their own terms and reinvesting native title benefits into projects where they have financial ownership.

Delays in native title approvals present significant challenges not only for mining proponents but also for the broader communities that stand to benefit from associated economic activity. When exploration

[3] Australian Law Reform Commission, *Connection to country: review of the Native Title Act 1993 (Cth)*, Commonwealth of Australia, 2015, p. 71.

[4] L Behrendt & S Halcombe, *Improving Indigenous Participation in Mining: Challenges and Opportunities*, Australian Journal of Environmental Management, 2016, p. 332.

and mining projects are held up by prolonged native title processes often due to procedural complexity, under-resourced Traditional Custodian representative bodies, or unresolved disputes; investments are stalled, job creation is deferred, and infrastructure development is delayed.

These bottlenecks have downstream impacts on regional economies, particularly in host communities where such projects can serve as catalysts for employment, training, procurement, and improved services. Small businesses, contractors, and local councils reliant on mining-related activity may face economic uncertainty due to stalled approvals.

While the integrity of native title rights must be upheld, it is essential that the approval system is efficient, timely, and adequately resourced to ensure both cultural protections and economic opportunities are realised. Striking this balance supports not only Traditional Custodians but also the broader regional economies seeking to benefit from responsible and inclusive resource development.

Skills to support the operation of native title law

There is an urgent and growing demand in Australia for legally trained professionals who can navigate the technical complexity of native title law while also demonstrating the cultural competency required to work respectfully and effectively with Traditional Custodian groups. As native title processes evolve from determination to post-settlement agreement-making, governance, and land management, Traditional Custodians and the Australian minerals industry increasingly rely on skilled legal practitioners to advise on negotiations, agreement making, and the protection of cultural heritage. However, the native title sector continues to face a significant shortage of appropriately trained lawyers.

This shortage is not simply a matter of supply; it is symptomatic of deeper structural and systemic barriers that limit both the entry into and retention within native title law.

The legal workforce capable of supporting this work is under strain. The number of professionals involved in the native title system is relatively small compared to other areas of law, and the number of professionals undertaking specialist training may therefore be relatively small.[5]

There is an urgent need for the Commonwealth to undertake a national workforce review to assess supply and demand trends in native title legal practice and to identify strategies for building a sustainable pipeline of skilled, culturally competent practitioners.

A national review would provide critical insight into the current and projected shortfalls in native title legal capacity, particularly in regional and remote areas where the need is greatest. It would also illuminate the barriers faced by new entrants to the sector, including the lack of formal education pathways, limited clinical and internship opportunities, and any funding constraints for native title professional development.

Importantly, the review should also explore practical options to support legal education and training. This could include funding targeted scholarships, creating structured graduate and clerkship programs, embedding native title law into university curricula, and supporting secondments or mentoring arrangements with experienced practitioners.

A well-supported legal workforce is essential to the ongoing integrity of the native title system. Through a national review, the Commonwealth can ensure that industry and Traditional Custodians have access to the legal expertise is required in this complex area of law.

The strength and integrity of the native title system depends fundamentally on the availability of skilled, culturally competent legal practitioners. These professionals play a critical role in ensuring the Australian minerals industry and Traditional Custodians can effectively navigate complex legal processes, managing native title interests alongside minerals development opportunities.

[5] Australian Law Reform Commission, *Connection to country: review of the Native Title Act 1993 (Cth)*, Commonwealth of Australia, 2015, p. 378.

Beyond technical expertise, lawyers working in this field must possess a deep understanding of cultural protocols, community dynamics, and the historical and ongoing impacts of past actions by governments. Without a strong, sustained legal workforce equipped to meet these demands, Traditional Custodians and the Australian minerals industry may face delays, and missed opportunities in advancing agreements. Ensuring access to qualified, culturally aware legal support is therefore essential to upholding the credibility, fairness, and functionality of the native title system.

Third party service providers

The complexity of native title processes and interactions with external parties, governments and project proponents, often necessitates engagement with independent third-party consultants who act for or on behalf of Traditional Custodians and the Australian minerals companies. Given the critical nature of these relationships, it is essential to ensure adequate regulatory oversight of such third-party consultants to maintain the integrity of native title system.

Despite their pivotal role, RNTBCs and PBCs often require external expertise due to the complexities of native title law, resource negotiations, funding arrangements, and governance requirements. Independent third parties such as consultants or negotiators may be engaged to support or act on behalf of Traditional Custodians. While such involvement can bring valuable skills and resources, it also introduces risks relating to accountability, conflicts of interest, and mismanagement.

A stronger role for regulation would be to operate a registration system for which native title practitioners require accreditation.[6] Otherwise without adequate oversight, independent non-legal third parties may act in ways that do not fully align with the interests or wishes of the Traditional Custodians or the industry.

Oversight of non-legal practitioners working in native title (who do not provide legal advice) are not otherwise regulated and accountable[7] will foster regulatory trust between Traditional Custodians, external advisors and the Australian minerals industry, thereby ensuring that any third parties act ethically and in the best interests of the relationship between Traditional Custodians and the mining industry.

This will enhance the credibility of native title governance, reduces the potential for exploitation or fraud, and ultimately contributes to stronger, more sustainable outcomes for Aboriginal and Torres Strait Islander peoples.

Moreover, clear oversight provides assurances and confidence to the Australian mining industry, governments and investors that third-party consultants representing native title bodies are held to high professional standards.

[6] Deloitte Access Economics, *Review of the roles and functions of native title organisations*, Commonwealth of Australia, 2014, p. 39.

[7] Australian Law Reform Commission, *Connection to country: review of the Native Title Act 1993 (Cth)*, Commonwealth of Australia, 2015, p. 377.

6. AGREEMENT MAKING

Proposal 7

Agreement making processes should be modernised and simplified to ensure that agreement negotiation is occurring with the Registered Native Title Body Corporate or Prescribed Body Corporate identified by the National Native Title Tribunal, or other equivalent recognised body.

Proposal 8

Develop and implement a common short form Indigenous Land Use Agreement template for activities that have minimum ground disturbance. For example, mineral exploration activities.

Proposal 9

That the Commonwealth undertake a Regulatory Impact Assessment to evaluate options for enhancing the productivity and effectiveness of Traditional Custodian institutions by establishing a default legal mechanism for the automatic transfer of the operation, rights, and benefits of pre-determination agreements to the appropriate post-determination Registered Native Title Body Corporate or other authorised entity, upon a determination of native title.

The Australian minerals industry supports a rights-based approach to agreement making between minerals companies and Traditional Custodians.[8] Native title agreement making is inherently complex due to the convergence of legal rigour, multiple stakeholders, cultural obligations, bureaucratic processes, and the long-term significance of agreements.

While this complexity is partly necessary to protect the rights and interests of Traditional Custodians, it can create significant barriers to timely and effective outcomes. As such, modernising and simplifying the process is strongly supported by the Australian minerals industry.

Short-form agreements

Introducing standard short form agreements for exploration activities will streamline negotiations and reduce delays associated with low-impact exploration activities. These agreements would offer a legally sound, culturally respectful, and procedurally efficient alternative to current complex processes, while preserving the rights and interests of Traditional Custodians.

Under the current system, even low-impact mineral exploration requires protracted and resource intensive agreement-making processes under the *Native Title Act 1993*.

These negotiations are often lengthy, legally complex, and expensive, creating bottlenecks for industry and placing an undue burden on native title parties especially the smaller or under-resourced PBCs.

Introducing standard short-form native title agreements for low-impact exploration is a practical and respectful reform that reduces administrative burden and supports economic development without compromising native title rights. By creating a streamlined pathway that balances efficiency with integrity and empowers Traditional Custodians in agreement-making.

The standardised short form exploration agreement template would be registered with the National Native Title Tribunal. This will allow PBCs and the Australian minerals industry to consult, agree on outcomes and publish the agreement with the National Native Title Tribunal.

A full and comprehensive agreement will be required to follow the RTN process should the exploration permit progress to a mining lease, in accordance with the relevant state or territory mining lease application process.

[8] Minerals Council of Australia, *MCA Aboriginal and Torres Strait Islander Statement*, MCA, viewed 17 June 2025

Post-determination agreement-making

Following a determination of native title, it is essential that all rights, obligations, and financial arrangements established under pre-determination agreements, such as ILUAs, ancillary benefit-sharing agreements, and associated trust accounts are formally and efficiently transferred to the RNTBC, or another authorised Traditional Custodian entity.

Pre-determination agreements which are often negotiated over many years by native title claim groups or their representative bodies frequently involve future benefits, cultural heritage protections, and land access arrangements that must remain enforceable and operational after a native title determination. Without a clear statutory pathway for their transfer, such agreements risk becoming legally uncertain or unenforceable, undermining both Traditional Custodian interests and mining industry confidence.

Establishing a default mechanism would streamline post-determination transitions, reduce administrative duplication, and prevent disruption to long-term planning and project implementation. It would also strengthen the role of RNTBCs by ensuring they are properly empowered to carry forward the rights and obligations agreed to on behalf of the recognised Traditional Custodians.

Establishing consistent protocols for such transfers particularly in complex agreements involving multiple parties or layered governance structures is critical to ensuring that native title holders retain control over their resources and that agreement terms are honoured in practice. Such reform aligns with the objectives of the *Native Title Act 1993* of recognising and protecting native title and would promote consistency, fairness, and legal efficiency in the native title system.

Alternative procedures

A significant area of reform in agreement making would be greater use of the existing future acts processes that allows for alternative state approvals. This would reduce duplication of regulatory processes and consultation fatigue for PBCs and the Australian minerals industry alike.

Negotiations under the *Native Title Act 1993* often involve extensive legal processes and procedures. These processes, while protective of native title rights, have been widely criticised for their administrative complexity, cost burden, and long timelines. Both Traditional Custodians and MCA members have faced delays that hinder timely land access and the realisation of negotiated benefits.

In parallel, state and territory governments administer land tenure, mining approvals, infrastructure projects, and cultural heritage regulation, making them crucial actors in the practical implementation of native title agreements. By expanding the use of alternative state procedures that are tailored to regional circumstances, Australia can reduce friction in agreement making while upholding core native title principles.

The *Native Title Act 1993* would remain the foundational element of Aboriginal and Torres Strait Islander rights in Australia, but its procedural rigidity has contributed to delays, inefficiencies, and inequities in agreement making. By expanding and formalising alternative state procedures, the Australian minerals industry can support more pragmatic, locally responsive, and effective native title negotiations that uphold a rights-based approach within a national framework.

Third party service providers

With proper coordination from Attorneys-General across all jurisdictions, safeguards, and community leadership, a hybrid system that blends Commonwealth authority with state-based innovation could represent a new era of native title agreement making that is both respectful and responsive.

Some company representatives regard certain external advisers and consultants as obstructive, alleging they introduce political or ideological agendas that hinder the negotiation of mutually

acceptable agreements [9] this has extended to limiting access to Traditional Custodians in project development phases.

In recent years, MCA members have increasingly voiced concerns about the influence of third-party advisers who act on behalf of Traditional Custodians in these negotiations. These concerns centre on the perception that some advisers bring political agendas, such as anti-mining ideologies, sovereignty activism, or broader environmental campaigns into a space that is meant to focus on mutual benefit, legal rights, and practical outcomes. These third-party advisers are not currently accountable to any professional body or association and are primarily consultants who may not have any legal training in native title.

One of the core frustrations expressed by MCA members is the way some third-party advisers position themselves as gatekeepers between companies and Traditional Custodians. Rather than facilitating dialogue, these advisers are seen to control access, restrict communication, and filter information. This often delays the negotiation process and prevents companies from engaging directly with the people whose land and culture they are working to respect.

These third-party consultants can be politically motivated and disempowering to the very Traditional Custodian communities they claim to support. When advisers overstep their role, push political agendas, or prevent Traditional Custodians from negotiating directly, they effectively deny Traditional Custodians the right to make their own decisions about their land.

Minerals companies prefer to deal directly with Traditional Custodians, believing that respectful, person-to-person negotiation builds trust and leads to better outcomes. When that engagement is filtered or controlled by unregulated third-party advisers with their own priorities, it can undermine the opportunity of mutual benefit and reconciliation.

MCA members consider some third-party advisers breach the principle of good faith negotiation by adopting a combative or obstructionist stance, using tactics such as last-minute demands, media ambushes, or refusal to engage with existing RTN procedures.

This is particularly frustrating for the Australian minerals industry as it continues to heavily invest in Aboriginal and Torres Strait Islander collaboration and act transparently throughout the process. When advisers adopt a hostile posture on ideological grounds, it creates mistrust and hostility, even where MCA members have made genuine efforts to build positive relationships.

Legal uncertainty is a topic often raised in discussing unresolved Aboriginal land claims … Investors appear to have taken notice of these recent legal trends.[10] Respect for native title rights must go hand in hand with constructive engagement. Rather than withholding land access outright, native title holders can achieve better outcomes by negotiating terms that reflect both cultural integrity and future development goals. Withholding access as a default position risks missed opportunities, strained relationships, and diminished influence in shaping land use decisions. A fair, informed, and negotiated path forward benefits everyone, especially Traditional Custodians.

The benefit of agreements lies in the ability to link many elements such as Indigenous decision-making and expression of local aspirations to overcome levels of disadvantage.[11] Agreements between Traditional Custodians and industry should be recognised not just as legal instruments, but as powerful tools for embedding Traditional Custodian decision-making, cultural expression, and community-driven development. The real benefit of native title agreements lies in their ability to link native title outcomes with broader aspirations, helping to overcome systemic social and economic disadvantage.

[9] C O'Faircheallaigh, *Indigenous Peoples and Mining: A Global Perspective,* Oxford University Press, 2023, p. 108.
[10] M Lavoie & D Newman, *Mining and Aboriginal Rights in the Yukon: How Certainty Affects Investor Confidence,* Fraser Institute, 2015, p. 13.
[11] M Langton, *From Conflict to Cooperation*, MCA, Canberra, 2015, p. 29.

Agreements are more than instruments of engagement; they are vehicles of empowerment. By embedding localised Traditional Owner led decision-making and linking agreements to local aspirations, the Australian minerals industry can help drive meaningful, long-term change.

A holistic approach to agreement making offers one of the most effective strategies for addressing systemic Aboriginal and Torres Strait Islander disadvantage while honouring native title rights and cultural identity.

7. SUSTAINABLE ECONOMIC EMPOWERMENT

Proposal 10

The Commonwealth to provide more flexibility in leveraging income streams into finance for investments in economic advancement of Traditional Custodian communities, by focussing on opportunities in manufacturing, minerals processing facilities, supporting infrastructure and adjacent supply chain industries required to meet emerging industries and the needs of nearby communities.

Proposal 11

The Commonwealth in collaboration with the Mabo Centre should explore the proposed Indigenous Community Development Corporation model as fit-for-purpose entity that can focus solely on managing economic benefits derived from native title agreements, investments, and partnerships, therefore reducing ongoing investment from government.

With 60 percent of Australia's mineral operations neighbouring Indigenous communities, the benefits to Indigenous people through life-of-operation cooperation agreements are important for their long-term economic wellbeing.[12]

MCA members occupy a pivotal position in shaping the future of Aboriginal and Torres Strait Islander people. Rather than being a source of division, host communities present a powerful opportunity for cooperation, mutual respect, and shared prosperity. Life-of-operation cooperation agreements between mining companies and Traditional Custodian communities offer a sustainable pathway for long-term economic wellbeing, cultural recognition, and regional development.

One of the most significant benefits of life-of-operation agreements is the economic empowerment they bring to Traditional Custodian communities. These agreements can provide royalties, equity stakes, and trust funds that support community infrastructure, cultural initiatives, and capacity-building. By incorporating employment and training provisions, they also create pathways for Traditional Custodians and the people they represent to build careers in mining and related industries, reducing intergenerational unemployment and fostering economic independence. These features endure well beyond the life of a single mine.

Importantly, life-of-operation agreements help to shift the narrative from one of extraction to one of partnership. By investing in enduring partnerships that deliver tangible benefits, MCA members and the host communities work together to build a future where economic wellbeing and cultural heritage go hand in hand.

Native title supporting economic empowerment

The emergence of Traditional Custodians as project proponents marks a significant evolution in Australia's land and development landscape. It signals a move away from transactional engagement toward genuine self-determination, where Traditional Custodians can define development on their own terms. While barriers remain, the potential social, cultural, and economic gains are substantial. By investing in governance capacity, reforming outdated policies, and fostering respectful partnerships, Australia can support Aboriginal and Torres Strait Islander people to take a leading role in shaping the future of their lands, waters, and communities.

As provided in Section 5, adequate resourcing and capacity building of representative Indigenous bodies is crucial for the effective performance of communities in conducting and managing negotiations and representing the aspirations of their constituents.[13]

[12] M Langton, *From Conflict to Cooperation*, MCA, Canberra, 2015, p. 18.
[13] M Langton, *From Conflict to Cooperation*, MCA, Canberra, 2015, p. 43.

Native title alone does not guarantee economic empowerment. It is the capacity to manage, negotiate, and develop land and resources that turns legal rights into real world outcomes.

The effects of mine closures, delayed expansions, and the ore-price variation that can follow, the priority now will be to manage our achievements to sustain Indigenous economic development, as well as progress policy reform further to address barriers and facilitate new opportunities.[14]

Historically, mining growth cycles have created important opportunities for Aboriginal and Torres Strait Islander communities, particularly in remote regions where few other economic drivers exist. Native title settlements, ILUAs and benefit-sharing arrangements have enabled Traditional Custodians to access jobs, royalties, and business contracts. In some areas, this has laid the foundation for local economic empowerment and community led development.

However, many of these native title benefits are tied to the active life of a mine, leaving Traditional Custodian communities exposed when operations scale back, close, or become economically unviable. As mine closures, delayed project expansions, and fluctuations in commodity prices become more common, the sustainability of these native title benefits is increasingly uncertain.

The key to Traditional Custodian economic empowerment is economic diversification. Traditional Custodians should be empowered to use mining era gains as a platform for broader development, including land-based industries such as tourism, renewable energy, bush foods, cultural services, conservation management, critical minerals development and minerals processing infrastructure. Partnerships with the private sector and government can help build sustainable business ecosystems that survive beyond mine shuttering or closure.

The management and distribution of benefits would be better supported by a new structure – akin to the Indigenous Community Development Corporation (ICDC) model.[15] At its core, the ICDC model aims to create a fit-for-purpose entity that can focus solely on managing economic benefits from agreements, investments, and partnerships. This allows PBCs and other Traditional Custodian governance bodies to focus on their legal and cultural responsibilities, while the ICDC takes on the operational role of investment, business development, and benefit distribution.

One of the key strengths of the ICDC model is its capacity to deliver benefits in a way that reflects the individual community's own development priorities. Rather than simply distributing royalties or compensation on an annual basis, the ICDC can manage funds strategically investing in education, housing, health services, enterprise development, cultural programs, and infrastructure that support sustainable growth.

In addition, the ICDC model supports transparency and accountability and has a clear mandate by way of development and implementation of strategic plans that countenance the aspirations of its membership base. With a dedicated governance structure and clear reporting obligations, these corporations can provide confidence to both communities and external partners that funds are being used appropriately and effectively. This is important in regions where mining or resource-related income is volatile and time-limited. A well-managed ICDC can smooth income across economic cycles, protect capital, and ensure that host communities are not left exposed when resource projects come to an end.

The Australian minerals industry has long advocated for the ICDC model as it would enable monies received from agreements to work more effectively for Indigenous communities by enabling them to maximise the long-term sustainability of the funds, while ensuring the short-term community needs are met, and that opportunities for local economic diversity are realised.[16]

[14] M Langton, *From Conflict to Cooperation*, MCA, Canberra, 2015, p. 23.
[15] M Langton, *From Conflict to Cooperation*, MCA, Canberra, 2015, p. 9.
[16] Minerals Council of Australia, *Minerals Industry: Indigenous Economic Development Strategy*, MCA, Canberra, 2011, p. 17.

8. CULTURAL HERITAGE AND NATIVE TITLE

Proposal 12

That the Commonwealth adopt an integrated approach to native title and Aboriginal cultural heritage management, aligned with existing land use and environmental assessment systems, and avoid duplication or disruption of existing Commonwealth and State frameworks

Reforms that enable clear and confident planning of exploration and development activities, provided that such activities are undertaken in ways that respect and protect Aboriginal cultural heritage is essential for industry certainty, investment attraction, and long-term resource management. [17] Importantly, this can and should occur in a way that simultaneously respects and protects sites of cultural and heritage significance.

Early collaboration between Traditional Custodians and MCA members has created opportunities for collaborative mapping and heritage assessments, ensuring culturally significant sites are identified, documented, and appropriately protected before any ground-disturbing activities commence.

From a regulatory perspective, having clear frameworks that support both timely project approvals and thorough cultural heritage assessment ensures that confidence in planning does not come at the cost of cultural heritage. Instead, it builds on it demonstrating that robust development and cultural protection are not mutually exclusive but mutually reinforcing.

The argument for reform

Current heritage protection processes frequently act as a 'red light' after extensive exploration and feasibility work, causing delays, escalating costs, and undermining investor confidence.[18] This risk is exacerbated by inconsistencies and lack of clarity in heritage legislation across jurisdictions, which can leave MCA members and Traditional Custodians uncertain about their obligations and timelines. In some cases, critical heritage sites are identified only after substantial capital has already been committed. The process can appear reactive rather than proactive, and the absence of clear, upfront heritage mapping or predictable decision-making frameworks adds to the frustration of the mining industry.

The concern is not about the importance of protecting cultural heritage, which minerals industry remains committed to, but about the timing and integration of that protection within the broader project lifecycle. Without mechanisms to identify heritage constraints earlier in the exploration phase, companies are asked to carry a high degree of project risk deep into feasibility without knowing whether those risks can be managed.

For example, an MCA member may secure exploration licenses, conduct drilling programs, and complete environmental baseline studies, only to have project viability undermined by late-stage heritage issues.

This situation creates financial losses and impacts project value. It also, undermines investor confidence and weakens the Australian minerals industry's ability to plan long-term projects, which support Traditional Custodians in their economic empowerment endeavours.

Criticism from the Australian minerals industry is also grounded in a broader policy context: if heritage legislation is to support both protection and economic development, it must be part of a clear and integrated approvals framework. Delays, duplications, or opaque requirements around heritage can unintentionally signal that investment is unwelcome or that rules may change unpredictably.

[17] Yamatji Marlpa Aboriginal Corporation, *Submission to the WA Aboriginal Cultural Heritage (Phase 2),* Government of Western Australia, 2022, p. 8.

[18] Queensland Resources Council, *Submission to the Review of the Cultural Heritage Acts,* Government of Queensland, 2019, p. 12.

Coordinated framework for cultural heritage

A coordinated national framework, with embedded consultative processes and integration into statutory decision-making, is critical for improving outcomes for all parties.[19] The minerals industry recognises that strong, clear, and consistent heritage protection processes are not only ethically important but also critical to project certainty and long-term operational success.

This also creates certainty for companies that have operations in multiple jurisdictions or are considering investment opportunities. Further, Traditional Custodians are assured of a nationally coordinated framework that encourages the protection, promotion and preservation of Aboriginal and Torres Strait Islander cultural heritage.

As such, the MCA is broadly supportive of government efforts to improve heritage protection by establishing national guidelines for consultation and negotiation with Traditional Custodians, and by integrating these processes into broader government decision-making frameworks.

Confidentiality clauses

Confidentiality clauses are a standard feature of many legal agreements, and in the context of native title agreements, they play an especially significant role in protecting the interests of Traditional Custodians. While there is growing debate around transparency and public accountability in agreement-making, especially following high-profile heritage disputes, there are several compelling arguments against the removal of confidentiality clauses.

Traditional Custodians, as parties to the agreement, are entitled to decide how and when their information is shared. Confidentiality clauses can be a tool of empowerment when used to uphold the wishes of the Traditional Custodians who may not want the terms of their agreements or internal community matters made public.

Requiring these clauses to be removed across the board would reduce the autonomy of Traditional Custodians to control their engagement collaboration with the Australian mining industry, effectively imposing a one-size-fits-all model that does not respect cultural or strategic diversity.

From a legal perspective, confidentiality is a common and accepted principle across many types of agreements, including commercial contracts, government procurement, and intellectual property licensing. To selectively remove or prohibit confidentiality in native title agreements would be inconsistent with standard legal practice and could create uncertainty about the enforceability of existing contracts. Furthermore, this would create inequality between native title holders and freehold landholders or pastoral lease landholders, where the land use agreements and compensation agreements of the later contain confidentiality clauses.

While transparency and accountability are legitimate public policy goals, requiring confidentiality clauses to be removed from native title agreements - without consideration of the desires of Traditional Custodians risks doing more harm than good, to Aboriginal and Torres Strait Islander communities, the Australian mineral industry, and the integrity of the agreement-making process itself. A more balanced approach is to promote informed consent, voluntary disclosure, and culturally safe practices that empower Traditional Custodians to determine what is shared and with whom.

Confidentiality can be used to protect culture, supports fair negotiations, and strengthens the foundation of long-term partnerships in Australia’s resource development landscape.

The MCA believes that native title holders, freehold landholders and pastoral lease landholders should be treated equally and fairly when considering matters relating to confidentiality clauses in land access agreements.

[19] M Langton & L Palmer, *Modern Agreement-Making and Indigenous People in Australia: Issues and Trends,* Australian Indigenous Law Reporter, 2003, p. 15.