SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION

Future Acts Regime Inquiry, Issues Paper

Introduction

This submission is made by the National Native Title Council (NNTC) to the Australian Law Reform Commission (ALRC) in response to its Issues Paper on the Inquiry into the future acts regime under the *Native Title Act 1993* (Cth) (NTA).

The NNTC makes this submission in its capacity as the peak body for Australia's Native Title Organisations representing Native Title Representative Bodies and Service Providers (NTRB/SPs) and Registered Native Title Prescribed Bodies Corporate (PBCs) recognised under the NTA and other comparable legal entities such as Traditional Owner Corporations recognised under the *Victorian Traditional Owner Settlement Act 2010* (Vic) (TOSA).

The NNTC supports and advocates for First Nations people's right to true self-determination – their right to speak for and manage their own Country, to govern their own communities, to participate fully in decision-making and to self-determine their own social, cultural and economic development.

The NNTC welcomes the Issues Paper released by the ALRC in November 2024 and its articulation of many of the key issues to be reformed.

This submission identifies five issues that were either not identified or fully explored in the ALRC's issues paper, namely:

1. Scope and process for reforming the future acts regime;
2. Resourcing for PBCs;
3. Emerging industries;
4. The relationship between the future acts regime and cultural heritage legislation; and
5. Ensuring the ALRC's recommendations are implemented.

This paper does not seek to discuss substantive reforms at this stage of the ALRC's Inquiry.

The NNTC is aware that the First Nations Heritage Protection Alliance (FNHPA) will also be making a submission to the Review focussed on the interaction of future acts with cultural heritage and the implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). The NNTC is the Secretariat for the FNHPA and supports and adopts the FNHPA submission.

1. Scope and process for reforming the future acts regime

The NNTC submits that the future acts regime should be amended to align with the relevant provisions under the UNDRIP, particularly the right to free, prior and informed consent (FPIC).

In November 2023, the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs handed down its Final Report from The Inquiry into the application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia.[1] The Committee recommended that governments ensure their approach to developing policy and legislation affecting Aboriginal and Torres Strait Islander peoples be consistent with UNDRIP.

The scope of reform that should be undertaken is an important consideration. The last paragraph of the ALRC's issues paper lists reform suggestions that have been made in numerous earlier reports and inquiries about ways to reform the future acts regime. While incremental reform of the regime is one option, it is the NNTC's view that the future acts regime needs wholesale reform to bring it in line with UNDRIP and the central right of self-determination. Fundamental to adherence of the principles defined in UNDRIP is implementation of FPIC. Doing so enables rights-based agreement making and self-determination in managing Country, Culture and economic rights.

In addition to being unnecessarily complex and difficult to understand, various features of the regime currently undermine FPIC by failing to put native title holders on an equal footing with government and the private sector. The regime entrenches power imbalances by providing native title holders with only weak procedural rights that result in diminished bargaining power and unjust agreements, including projects going ahead without native title holder consent, and suboptimal compensation and benefit sharing outcomes.

Respecting FPIC would mean the primary pathway to validating future acts would be through agreement-making - if there is no agreement, the project should not proceed. It would also mean that agreement-making happens on a more equal basis, particularly by addressing structural inequalities, including poor resourcing of PBCs and the threat of an arbitrated outcome which currently favours proponents almost always.

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[1] Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, Inquiry into the application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, 2023, available at: https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/RB000083/toc_pdf/InquiryintotheapplicationoftheUnitedNationsDeclarationontheRightsofIndigenousPeoplesinAustralia.pdf

It is notable that key industry stakeholders in Australia are leading calls for FPIC to be respected. Led by the FNHPA, the Dhawura Ngilan Business and Investor Initiative published guidance for businesses and investors in March 2024 outlining principles of engagement with Traditional Owners in line with FPIC.[2] Now, key business and investor leaders are implementing the Guides, with investors measuring companies on how holistically they apply FPIC, including in cultural heritage matters.

The expectation to give effect to FPIC is also part of key international frameworks, such as the International Finance Corporation's Performance Standards, and the Australian minerals' industry's Towards Sustainable Mining framework. Whilst the future acts regime continues to be insufficient in respecting FPIC, PBCs require support from industry adherence to Standards.

Whether a new regime is developed or the current regime is amended, the process for reform should itself respect the right to FPIC. The NNTC submits that this must happen through a process of co-design with native title holders that is adequately funded.

If we look to international examples, in March 2024, the Government of British Columbia announced a process for modernising the Province's Mineral Tenure Act (MTA) following a decision by the British Columbia Supreme Court in September 2023, which found the Crown owes a constitutional duty to consult First Nations prior to issuing mineral claims under the MTA.[3] The Provincial Government announced it will co-develop changes to the mineral tenure regime with the First Nations Leadership Council while also conducting a broad engagement process with industry, local governments, and other interested British Columbians.[4]

2. Resourcing for PBCs

After a native title determination is made, native title holders are compelled to establish a PBC, triggering an onerous set of obligations under both the NTA and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth).

PBCs are the representative corporations through which native title holders do business with project proponents on matters concerning their Country, which is governed by the future acts regime.

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[2] Dhawura Ngilan Business and Investor Initiative, Dhawura Ngilan Business and Investor Guide, 2024, available at: https://culturalheritage.org.au/business-investor-guides.

[3] The Government of Canada has a duty to consult and, where appropriate, accommodate Indigenous groups when it considers conduct that might adversely impact potential or established Aboriginal or treaty rights. This duty is derived from section 35 of Canada's Constitution Act, 1982, which recognises and affirms Aboriginal and treaty rights.

[4] British Columbia Government, Mineral Tenure Act Reform website, available at: https://engage.gov.bc.ca/mtareform.

Due to inadequate funding, most PBCs find themselves stuck in a cycle of barely operational compliance, rather than being able to enact and leverage their native title rights and interests, including many challenges faced with the operation of the future act regime.[5]

There are currently 281 PBCs across Australia. This number is expected to exceed 300 by 2026. As demand for Traditional Owner engagement, consultation, and consent continues to grow, so too does the importance of understanding the capacity challenges that PBCs face in making informed decisions about proposed activity across their lands and waters.

The current funding of PBCs does not reflect the recurring annual costs of operation and compliance, explaining why we continue to see many PBCs without the capacity, income or resources to hire staff and establish efficient processes, including managing future act notifications, agreements and cost recovery. A cost recovery mechanism is only effective if there is basic operational capacity to manage the administration.

Strong and capable PBCs are key to Australia's clean energy transition, providing investment certainty for the myriad renewable energy and critical minerals projects Australia needs to achieve its net zero targets. Without sufficient funding and capacity, proponents and investors face considerable delays and various legal, financial and reputational risks due to PBCs' inability to meaningfully engage. This includes risks to cultural heritage and environmental destruction and a project's social licence to operate.

3. Emerging industries

It is important that the future acts regime is coherent with projects that have emerged in the clean energy transition. For the most part, these industries have centred agreement-making through ILUAs and a consent-based approach however the future acts regime does not currently legislate that approach. As mentioned above, adherence to Industry Standards is a stakeholder ethics driven approach when it should be enforced through the NTA.

(i) Clean energy projects

The general experience of native title holders with clean energy projects is that they can say no to clean energy agreements. As there is no approvals pathway under the future acts regime designed for clean energy projects, agreements that deal with native title consents take the form of an ILUA. In fact, the Western Australian government explicitly requires an ILUA for renewable energy development in most circumstances, while South Australia has this requirement in legislation.[6]

[5] National Native title Council, PBC Futures: Roadmap to Reform, 2023, available at: https://nntc.com.au/wp-content/uploads/2023/09/1540_NNTC-PBC-Exec-Summary.%C6%92.LRpages.pdf.

[6] See the WA government's website on Diversification Leases available here: https://www.wa.gov.au/government/publications/diversification-leases, and South Australia's *Hydrogen and Renewable Energy Act 2023* (SA).

In some circumstances existing tenure is being used to include clean energy projects without seeking the consent of native title holders through an ILUA. For instance, mining legislation and existing ILUAs allow for further infrastructure to be built without further consent from native title holders if the clean energy project is used solely for the purpose of powering the mine and not provided to any third parties.

(ii) Transmission infrastructure

New transmission infrastructure is essential in the clean energy transition. A key learning from transmission developments internationally, including in Canada and the US, is that co-ownership (equity) and consent underpin successful transmission infrastructure.

However, state governments in Australia have notified transmission lines under section 24KA of the NTA, which relates to acts involving the construction and use of facilities for services to the public. This provides weak procedural rights to native title holders, including only the right to be notified and to comment on the proposed act. This does not respect the right to FPIC.

Where transmission lines are being developed for private use, section 24KA of the NTA will not apply, and the development will require an Indigenous Land Use Agreement, allowing greater leverage for Traditional Owners in terms of cultural heritage protection provisions and negotiated benefits.

Consideration must also be made to the full footprint of transmission projects, including impacts on road widening, intangible cultural heritage impacts and primary sites. Their large footprint means there are areas where native title rights cannot be exercised while the infrastructure is in place.

(iii) Carbon farming projects

Under the *Carbon Credits (Carbon Farming Initiative) Act* 2011, the Clean Energy Regulator requires proponents to seek consent for carbon farming projects from native title holders.

(iv) Critical minerals projects

Critical minerals mining can be quite different in terms of scale, impact and physical intervention than other mining. The relative geographic complexity of critical minerals mining stems largely from the mineral traces themselves – deposits are smaller than conventional mineral and ore seams and across an area larger to the relative gross extraction amount.

(v) Offshore infrastructure

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

In the context of considering the existence of native title rights and interests in offshore areas, the majority of the Court in Commonwealth v Yarmirr[7]stated:

> *What has been established is the existence of traditional laws acknowledged, and traditional customs observed, whereby the applicant community has continuously since prior to any non-Aboriginal intervention used the waters of the claimed area for the purpose of hunting, fishing and gathering to provide for the sustenance of the members of the community and for other purposes associated with the community's ritual and spiritual obligations and practices. Members of the community have also used, and continue to use, the waters for the purpose of passage from place to place and for the preservation of their cultural and spiritual beliefs and practices.*

What is clear from this review of judicial authority is that Traditional Owners have interests which include "interests arising from […] cultural association with the EMBA [Environment that May be Affected] including intangible dreaming lines, tangible manifestations of cultural heritage, […] cultural connection to the relevant marine environment, interests in coastal areas that may be affected by any environmental incident".[8] These interests have also been described (per Yarmirr) as "hunting, fishing and gathering to provide for the sustenance of the members of the community and for other purposes associated with the community's ritual and spiritual obligations and practices".

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

4. The relationship between the future acts regime and cultural heritage legislation

The protection of cultural heritage is intrinsically connected to native title and comprises a regime of State, Territory and Commonwealth laws that interact with the NTA.

While the future acts regime does, in some instances, require project proponents to consider the likely impact on cultural heritage and provides native title holders the right to negotiate cultural heritage protection measures, in circumstances where the right to negotiate is not available and where agreements cannot be reached, the NTA does not provide a right of veto over development activities.

For instance, the following classes of future act do not fall into the right to negotiate group but can still threaten cultural heritage:

- Acts for which the expedited procedure applies
- Off farm activities connected to primary production

[7] *Commonwealth v Yarmirr* [2002] HCA 56; 208 CLR 1.
[8] *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193.

- Future acts relating to management of water and airspace
- Renewals and extensions of leases
- Use of land reserved for public or particular purposes
- Facilities for the public

The Commonwealth Government and the First Nations Heritage Protection Alliance are co-designing new national legislation. Any reforms to the future acts regime will need to be consistent with this new legislation.

As the First Nations Heritage Protection Alliance's submission notes, the NTA could be amended such that a necessary consequence of any positive determination of native title rights is the enlivenment of a statutory right to manage and protect cultural heritage in accordance with the relevant provisions of UNDRIP.

5. Ensuring the ALRC's recommendations are implemented

The ALRC's "Connection to Country" report, released in 2015, made comprehensive recommendations to reform the NTA. Regrettably, most of its key recommendations were not implemented by the Australian government in terms of being enacted into law.

After the ALRC submits its report in December 2025, an inadequate allocation of resources or political commitment may result in the current future acts regime Inquiry having a similar fate.

Although the ALRC does not directly implement its recommendations – it is up to the government to adopt them – the ALRC should make recommendations to pre-empt implementation challenges and the political realities of election cycles.

The NNTC urges the ALRC to recommend a reform roadmap or implementation plan, with clear deliverables, timelines and associated resources to achieve the ultimate goal of co-designed legislative reforms within a timely period.

Convening a technical advisory group, consisting of key peak industry bodies, government and the native title sector as part of the final report development process could assist to secure buy-in.

With respect to government, a reform implementation taskforce, led by the Attorney-General's Department, drawing on expertise from across government, may be a useful approach to oversee implementation of the reforms and obtain feedback across any departmental silos.

Conclusion

The NNTC looks forward to working with the ALRC to progress the issues identified in this paper. If the NNTC can be of any further assistance, please do not hesitate to contact us.