

Submission

Submission in Response to the Australian Law Reform Commission Review of the Future Acts Regime Discussion Paper No 88 dated May 2025

Dr Ivan J Ingram

Contents

Executive Summary	2
1. Introduction and Author Positioning.....	3
2. Applying the First Nations Autonomy Framework	4
The Four Domains	4
Application to Future Acts	5
Why This Framework Matters	7
3. Assessment of ARLC's Proposals	8
Native Title Management Plans.....	8
Impact-Based Assessment Model.....	10
Reformed Right to Negotiate.....	12
Agreement-Making Focus.....	12
System Capacity Concerns.....	14
4. National Native Title Tribunal Independence.....	15
5. Conclusion	16

Executive Summary

This submission responds to the Australian Law Reform Commission's Discussion Paper on the Review of the Future Acts Regime by applying my First Nations Autonomy framework to evaluate whether proposed reforms advance Indigenous self-determination.

My analysis applies a human rights framework developed through doctoral research, examining self-determination through four interconnected domains: Autonomy of People, Autonomy of Territory, Autonomy of Institutions, and Autonomy of Diplomacy. This external measure, grounded in UNDRIP, reveals whether legal systems recognise inherent Indigenous rights or merely manage Indigenous participation within colonial boundaries. The current future acts regime functions as an “architecture of constraint” that inverts the proper relationship between rights and development, manufacturing consent through procedural exhaustion while positioning native title holders as stakeholders rather than authorities whose consent is required. The right to negotiate has become a process for managing inevitable development rather than enabling genuine choice about whether development proceeds.

Native Title Management Plans represent significant potential if implemented with adequate resources. I propose differentiated registration where no-go zones undergo rigorous testing to create legally robust areas of Aboriginal and Torres Strait Islander authority to determine development on Country. However, impact-based assessment risks relocating rather than resolving expedited procedure problems. Reform should focus on managing impact through multiple pathways to procedural compliance and future act validity, rather than focusing on administrative categorisation. The right to negotiate must be reconceived from a defensive procedural right into a framework for relationship development, avoiding proliferation of dispute entry points that encourage adversarial positioning. I support a strong focus on agreement making rather than multiple entry points of applications to the National Native Title Tribunal, with the Tribunal's adjudicative function reserved for genuine impasses where parties cannot agree whether a future act should proceed. True Free, Prior and Informed Consent exists only where Indigenous Peoples can refuse developments, such as my suggestion of ILUAs as the only mechanism for validity in registered no-go zones. The NNTT also needs broad facilitation and assistance powers and functions throughout negotiation lifecycles, transforming from reactive arbitrator to proactive facilitator.

System capacity faces critical strain with over 250 RNTBCs operating with minimal funding while facing expanding obligations. The NNTT's potential is constrained by its position within the Federal Court Entity. Independence of the NNTT would enable operational flexibility, facilitate any expanded dispute resolution powers, and strategic development capacity suited to native title practice.

This review presents a real opportunity to transform a system that has facilitated dispossession under the guise of protection. Success must be measured by whether Aboriginal and Torres Strait Islander Peoples can exercise meaningful authority over their territories. Transformative change demands legislative embedding of human rights principles, genuine consent mechanisms where Indigenous authority is determinative, institutional independence and resource enhancement for the NNTT, guaranteed funding for native title holders enabling equal participation, and treating native title as perpetual property right carrying governance authority over Country.

This submission calls for the transformative action necessary to honour First Nations Peoples' inherent rights as a fundamental requirement of law, justice, and human rights.

Dr Ivan J Ingram

24 July 2025

1. Introduction and Author Positioning

- 1.1. This submission responds to the Australian Law Reform Commission's **Discussion Paper** on the Review of the Future Acts Regime by applying my First Nations Autonomy framework to assess whether proposed reforms enable genuine self-determination and meet the outcomes of achieving a fairer and more efficient system. As a *Wiradjuri* and *Filipino* man and experienced native title practitioner, I write from both professional expertise and lived experience of how the future acts regime shapes Aboriginal and Torres Strait Islander Peoples' ability to govern their traditional lands and waters.
- 1.2. I write in my personal capacity, drawing upon my doctoral research at the University of Arizona's Indigenous Peoples Law and Policy Program, where I developed the First Nations Autonomy framework specifically to assess how legal regimes, and in this case, the native title regime enable or constrain self-determination. My professional experience in various roles across the sector in the past decade has provided direct insight into how the future acts regime operates in practice, its procedural complexities, power imbalances, and the gap between statutory objectives and lived outcomes for native title holders. This submission is also informed by my experience from various governance and leadership roles I have held across my career. These positions have reinforced my understanding that native title is not merely a legal construct but a living relationship between Aboriginal and Torres Strait Islander Peoples and Country that demands recognition, protection, and the space for its full expression according to their own traditional laws and customs.
- 1.3. This submission moves beyond technical amendments and procedural refinements to examine whether the proposed reforms align with Australia's international human rights obligations, particularly under the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**). Using the First Nations Autonomy framework, I assess the proposals generally against objective criteria that measure not merely procedural compliance but substantive enablement of self-determination. The critical question is not whether the system works more efficiently, but whether it recognises and respects First Nations Peoples' governance authority over their territories.
- 1.4. This analysis proceeds from a fundamental premise: that native title represents an *in-rem* property interest of perpetual duration, carrying with it not just cultural connections but governance authority that must be respected in any system that purports to regulate its interaction with other interests. The legitimacy of the future acts regime, and any reforms to it, depends on its fidelity to this understanding and its capacity to facilitate Aboriginal and Torres Strait Islander Peoples' exercise of their inherent human rights and freedoms.
- 1.5. The native title system stands at a crossroads. After three decades of managing Indigenous disadvantage through procedural complexity, this review presents a real opportunity for transformative change. This submission argues that genuine reform requires recognition of native title as carrying governance authority; genuine consent mechanisms where Indigenous decisions are determinative; institutional independence for specialist bodies like the National Native Title Tribunal (**NNTT**), native title representative bodies, and perhaps most importantly, the registered native title bodies corporates (**RNTBCs**); a reformed right to negotiate process

that promotes relationship-building over adversarial positioning; and comprehensive resourcing that enables rather than exhausts participation. Without these structural changes, reforms risk creating more sophisticated mechanisms for the same unjust and inefficient outcomes.

- 1.6. In offering this analysis, I am mindful that reform processes themselves can perpetuate colonial dynamics if they proceed without genuine partnership with Aboriginal and Torres Strait Islander Peoples. The ALRC's review provides an opportunity to address longstanding injustices, but only if it is willing to confront the deeper structural issues that limit First Nations Autonomy. This submission aims to contribute to that essential conversation by contributing a brief rights-based assessment and commentary that centres First Nations Peoples' rights in the aims of genuine implementation of self-determination.
- 1.7. This submission proceeds in five parts. First, I explain the First Nations Autonomy framework and its application to the future acts regime as the baseline understanding of how the framework can be applied. Second, I assess key ALRC proposals through this lens, focusing on critical infrastructure elements. Third, I examine the need for NNTT independence as essential institutional reform. Throughout, I highlight how resourcing, consent mechanisms, and institutional arrangements must work synergistically to achieve genuine transformation. I conclude with reflections on what successful reform requires and why this opportunity must not be wasted.

2. Applying the First Nations Autonomy Framework

- 2.1. The First Nations Autonomy framework applied throughout this submission was developed through my doctoral research examining how legal regimes, particularly, the native title regime, enables or constrains Aboriginal and Torres Strait Islander Peoples self-determination.¹ This framework provides an external, rights-based measure, grounded in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)² and broader international human rights law, moving beyond procedural compliance to assess whether systems enable genuine self-determination in practice.

The Four Domains

- 2.2. The framework operates by examining self-determination through four interconnected domains that together constitute meaningful autonomy. These domains are not merely theoretical categories but practical measures of whether Indigenous Peoples can exercise genuine authority over their own affairs. Each domain represents an essential aspect of self-determination recognised in international law, and true autonomy requires all four to function together. A system may appear to support Indigenous rights in one domain while undermining

¹ Ivan Ingram, "Developing a Framework for Assessing First Nations Autonomy and Examining Native Title" (Unpublished SJD Dissertation, University of Arizona, 2025).

² United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007).

them in others, the framework reveals these contradictions and assesses whether the system as a whole enables or constrains self-determination.

- (a) **Autonomy of People** encompasses the right of Indigenous Peoples to determine their own identity and membership in accordance with their customs and traditions (UNDRIP, art 33), their right to belong to an Indigenous community or nation (UNDRIP, art 9), and their collective right to live in freedom, peace and security as distinct peoples (UNDRIP, art 7). This domain examines whether legal regimes recognise Indigenous Peoples as self-determining collectives with authority over their own membership and identity, or whether they impose external definitions and controls.
- (b) **Autonomy of Territory** addresses Indigenous Peoples' rights to lands, territories and resources they have traditionally owned, occupied or used (UNDRIP, art 26), their right to participate in decision-making in matters affecting their rights (UNDRIP, art 18), and crucially, their right to determine and develop priorities and strategies for the development or use of their territories and resources (UNDRIP, art 32). This domain assesses whether native title holders possess genuine governance authority over their Country or merely cultural rights subject to others' economic interests.
- (c) **Autonomy of Institutions** recognises Indigenous Peoples' right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions (UNDRIP, art 5), their right to participate in decision-making through representatives chosen by themselves (UNDRIP, art 18), and their right to promote, develop and maintain their institutional structures and juridical systems or customs (UNDRIP, art 34). This domain evaluates whether Indigenous governance structures are recognised and empowered or subordinated to imposed administrative frameworks.
- (d) **Autonomy of Diplomacy** encompasses Indigenous Peoples' rights to maintain and develop contacts, relations and cooperation across borders (UNDRIP, art 36), their right to the recognition, observance and enforcement of treaties and other agreements (UNDRIP, art 37), and their capacity to engage as collective entities in relationships with states and third parties. This domain examines whether Indigenous Peoples can engage in nation-to-nation relationships or are positioned merely as stakeholders within state processes.

Application to Future Acts

- 2.3. When applied to the future acts regime, this framework reveals fundamental gaps between procedural compliance and genuine autonomy. The deficiencies of the current regime have been extensively documented by the Australian Human Rights Commission, native title representative bodies, prescribed bodies corporate, and decades of lived experience.³ These

³ See, for example, submissions made in response to Australian Law Reform Commission, *Review of the Future Acts Regime* (Issues Paper 50, November 2024): Australian Human Rights Commission, Submission 48; Queensland South Native Title Services, Submission 45; National Native Title Tribunal, Submission 23.

submissions collectively demonstrate how structural design choices perpetuate colonial relationships under the guise of procedural regulation.

- 2.4. The regime's architecture inverts the proper relationship between rights and development. Rather than requiring proponents to demonstrate why their activities should be permitted to interfere with pre-existing Indigenous rights, it requires Indigenous Peoples to navigate complex procedures to achieve minimal protections. As numerous submissions have noted, the regime treats Indigenous governance authority as non-existent, recognising only cultural connections, while denying political authority over territory.
- 2.5. Critical structural flaws manifest across multiple dimensions. The systematic undermining of free, prior and informed consent occurs through what might be termed "procedural exhaustion", where native title holders face impossible timeframes, chronic under-resourcing, and negotiations conducted under fundamental power imbalances where saying "no" is not a genuine option. The expedited procedure, originally intended to streamline low-impact activities, has become a mechanism for bypassing meaningful engagement based on assumptions about impact that fail to recognise Indigenous relationships to Country. As QSNTS notes, the Queensland government's approach to categorising impact relies on limited cultural heritage data and fails to consult with native title parties about potential impacts on their specific Country.⁴
- 2.6. The right to negotiate, ostensibly the regime's strongest protection, functions primarily as a process for determining compensation for inevitable impacts rather than a mechanism for Indigenous Peoples to protect their territories. The requirement to negotiate in "good faith" has been interpreted so narrowly that it requires little more than attendance at meetings, while the arbitral process overwhelmingly favours development proceeding regardless of native title holder objections.⁵
- 2.7. The NNTT, despite its specialist expertise and commitment to supporting all parties, operates within structural constraints that could limit its potential and its effectiveness. Positioned within the Federal Court Entity, the Tribunal lacks the institutional and resource independence. The Tribunal's capacity to provide proactive assistance, develop customised processes, or be engaged by parties to assist with prevent disputes or implementation of agreements, is constrained by both its statutory limitations and institutional arrangements. This is not a criticism of the Tribunal's dedication or expertise, but recognition that even a specialists institution with the statutory mandate, cannot transcend structural limitations that prioritise administrative efficiency over substantive justice.

⁴ See Queensland South Native Title Services, Submission 45.

⁵ See MPS Law, Submission 17, noting that "current good faith case law principles frame the definition of good faith in the negative" and that "FADA determinations overwhelmingly find in favour of the future act being done" with only three determinations where the NNTT has determined a future act "must not be done" compared to 93 determinations that a future act "may be done"; Queensland South Native Title Services, Submission 45, observing that "NNTT decisions statistically favour the doing of future acts" giving "more commercial leverage to the proponents in negotiations with Native Title Parties and is a disincentive to engage in those negotiations in good faith"; First Nations Legal and Research Services, Submission 42, stating that "bargaining power is often uneven and weighted in favour of proponents."

- 2.8. These systemic issues create cascading effects throughout the regime. RTNBCs are chronically underfunded and overwhelmed by future act notifications, and cannot meaningfully represent or implement native title common law holders and their members' interests. The inequality between well-resourced proponents and native title parties transforms negotiations into exercises in damage limitation rather than genuine dialogue about development on Country. The cumulative impact of multiple future acts on native title is never assessed, allowing death by a thousand cuts as each individual act is deemed to have minimal impact while collectively, they fundamentally impair native title rights.

Why This Framework Matters

- 2.9. Each ALRC proposal must therefore be assessed not merely for its procedural improvements but for whether it addresses these fundamental structural issues. Does it recognise Indigenous Peoples as self-determining peoples with governance authority (autonomy of people and territory), or continue to position them as cultural groups to be consulted? Does it empower Indigenous institutions and enable nation-to-nation engagement (autonomy of institutions and diplomacy), or maintain colonial power structures? Does it provide the institutional support and resourcing necessary for meaningful participation, or perpetuate the current inequality of arms?
- 2.10. The framework reveals whether proposed reforms genuinely transform the regime from one that manages Indigenous disadvantage within predetermined boundaries to one that recognises and enables Indigenous authority. Technical amendments cannot remedy fundamental injustice, only structural transformation that repositions Indigenous Peoples from stakeholders to be managed to authorities whose consent is required can align the system with Australia's international human rights obligations and the promise of native title recognition.
- 2.11. Native title represents more than cultural connection—it embodies a perpetual property right carrying governance authority that predates and survives the Crown's assertion of sovereignty.⁶ The future acts regime's legitimacy depends on its recognition of this fundamental reality. An external human rights framework is essential because internal system logic tends to normalise colonial assumptions about whose interests take priority.⁷ This framework reveals whether proposed reforms genuinely enable First Nations peoples to exercise their inherent rights or merely refine mechanisms for managing their dispossession. The distinction is not academic

⁶ See *Mabo v Queensland (No 2)* (1992) 175 CLR 1, recognising that native title survived the Crown's acquisition of sovereignty and reflects Indigenous peoples' entitlement to land under their own laws and customs; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, acknowledging that native title rights originate from a normative system other than that of the new sovereign; *Coe v Commonwealth* (1979) 53 ALJR 403; *Coe v Commonwealth (No 2)* (1993) 68 ALJR 110 on the non-justiciability of sovereignty. While Australian courts treat the acquisition of sovereignty as non-justiciable, this legal position does not negate the historical reality that Indigenous peoples' systems of law and governance pre-existed and continue alongside the common law system. See also *Wik Peoples v Queensland* (1996) 187 CLR 1, noting that native title exists as a recognition of rights under Indigenous legal systems rather than as a creature of common law.

⁷ Ivan Ingram, "Developing a Framework for Assessing First Nations Autonomy and Examining Native Title" (Unpublished SJD Dissertation, University of Arizona, 2025) 78, arguing that "reform cannot continue to rely on internal metrics to assess its own adequacy. To evaluate a system from within is to accept its assumptions."

but goes to the heart of whether Australia's native title system fulfils its promise of recognition or perpetuates historical injustices through contemporary legal mechanisms.

3. Assessment of ARLC's Proposals

- 3.1. The Discussion Paper represents the most comprehensive examination of the future acts regime in three decades, proposing fundamental reforms across agreement-making, statutory procedures, compensation, and institutional arrangements. While acknowledging the breadth of proposals warranting consideration, this submission focuses on key infrastructure elements that will determine whether reforms enable genuine transformation or merely refine existing mechanisms, there are also those better placed to provide comments on specific application of the proposals from their respective perspectives and experience. My assessment adopts a whole-of-system perspective while examining critical components through the First Nations Autonomy framework, recognising that technical amendments without structural change cannot remedy fundamental injustices embedded in the current regime.

Native Title Management Plans

- 3.2. The proposal for Native Title Management Plans represents significant potential for advancing the autonomy of territory, offering native title holders a mechanism to proactively articulate their vision for Country rather than merely react to development proposals.
- 3.3. If properly implemented, NTMPs could shift the dynamic from “defensive response” to “assertive governance”, enabling traditional owners to map their aspirations, identify areas requiring protection, and signal opportunities for development opportunities and partnership. This aligns with international recognition of Indigenous Peoples’ right to determine development priorities for their territories (UNDRIP, art 32).
- 3.4. However, the proposal’s transformative potential is undermined by critical gaps in design and resourcing. Asking already overwhelmed RNTBCs to develop comprehensive territorial management plans without guaranteed funding or technical support risks creating another unfunded mandate. Current evidence indicates RNTBCs operate with minimal operational funding, with many unable to employ sufficient staff to manage existing obligations.⁸ Adding

⁸ Belinda Burbidge et al, ‘Report on the 2019 Survey of Prescribed Bodies Corporate (PBCs)’ (Research Report, Australian Institute of Aboriginal and Torres Strait Islander Studies, 2 February 2021) 28, 30-31, finding that 67% of RNTBCs identified “lack of resources” as their primary operational challenge, with only 31% having paid staff and many operating without permanent staff or adequate administrative infrastructure. See, for example, MPS Law, Submission 17, 4, noting the gap between NIAA basic support funding of “\$50,000 to \$80,000 per PBC” and the Centre for Aboriginal Economic Policy Research calculation that “the indicative annual cost for a PBC to meet its core functions is \$621,075”; Kimberley Land Council, Submission 26, 9, observing that “Directors of PBCs are often not paid for their time” and that for “PBCs with no staff, dealing with future acts and engaging with native title holders falls entirely on to the (often unpaid) directors – a situation that is unsustainable, inefficient, and unfair”; see also Deloitte Access Economics, *Review of the Roles and Functions of Native Title Organisations* (Report, Department of the Prime Minister and Cabinet, March 2014) 19-21.

planning responsibilities without corresponding resources guarantees failure—a failure that will inevitably be attributed to Indigenous incapacity rather than systemic under-resourcing.

- 3.5. The scope limitations implicit in the proposal raise fundamental questions about equity and access. If NTMPs are restricted to exclusive possession determinations, the vast majority of native title holders, those who achieved only non-exclusive recognition through the compromise of negotiation or litigation, would be excluded from this governance mechanism. This would perpetuate the cruel irony where those who retained the strongest tenure receive the most authority, while groups whose territories were most impacted by colonisation remain marginalised. The artificial separation between native title and cultural heritage management fragments governance of native title rights (which are often tenure-based systems in practical reality) and cultural heritage rights (that are “tenure blind”), forcing traditional owners to navigate multiple regulatory frameworks for what is, from an Indigenous perspective, the indivisible whole of Country.
- 3.6. A more effective approach would position NTMPs as registered planning instruments with differentiated testing requirements. While the entire plan could be registered as a comprehensive planning tool, and specific elements (particularly areas identified for restriction and enhanced procedural rights) would undergo rigorous registration testing by the Native Title Registrar. This focused approach would ensure that where traditional owners assert no-go zones (highest levels of protection) or areas requiring other procedural rights for validity (such as right to consultation, or negotiation, depending on whether the impact is managed in a particular way in those zones), these restrictions have been thoroughly examined and can withstand challenge. The registration process would test the factual and legal basis for restrictions, including their grounding in native title rights and cultural law, by reference to known and surveyed cultural heritage sites and places that require protection, creating legally robust zones of enhanced Indigenous authority and protection.
- 3.7. The development process for NTMPs could be significantly strengthened through institutional support and collaborative frameworks. The NNTT, with appropriate power, functions, and resourcing, could facilitate the development of these plans through facilitated models that bring together traditional owners and relevant governments to ensure a robust process is applied. This collaborative approach would ensure mapping is accurate, comprehensive, and reflects both Indigenous knowledge and administrative requirements. By investing in robust development processes upfront, the resulting plans would carry greater legitimacy and legal weight, reducing subsequent disputes, and creating genuine certainty for all parties.
- 3.8. Critically, NTMPs should apply across the entire external boundary of native title determinations, functioning as comprehensive planning tools regardless of the specific tenure within those boundaries. While native title may not exist over freehold or certain public works, traditional owners remain the culturally authoritative group for that Country (particularly in circumstances where there may be state or territory based cultural heritage regimes operating). The NTMP could thus identify planning approaches for all land within determination boundaries: areas of exclusive possession might contain strong restriction zones, non-exclusive areas could specify consultation and agreement protocols, and even extinguished areas could be included in cultural heritage management frameworks, or

signalling areas for partnership and collaboration interests. This recognises that traditional ownership and cultural responsibility transcend the patchwork of tenure created by colonisation, allowing Indigenous governance to operate coherently across Country rather than being fragmented by imposed property boundaries.

Impact-Based Assessment Model

- 3.9. The ALRC proposes shifting from the current industry-based categorisation of future acts to an impact-based model, where procedural rights would be determined by assessing the likely impact on native title rights and interests rather than the type of industry or activity involved. This appears to address longstanding criticisms that identical impacts receive different treatment based solely on industry classification. Under the proposed model, future acts would be categorised as either “lower impact” (attracting consultation rights) or “higher impact” (attracting negotiation rights), with the expedited procedure abolished in favour of this new framework.
- 3.10. While the proposed shift from industry-based to impact-based categorisation appears logical, it risks relocating, rather than resolving, fundamental problems with the expedited procedure. The core issue is not the basis for categorisation but the assumption that impacts can be predetermined through administrative assessment rather than understood through engagement with traditional owners. The proposal that governments and proponents are the ones determining whether their future act has “low” or “high” impact on native title presents a conundrum where the party doing the impact gets to determine, based on some criteria, the level of impact they will have on native title rights and interests, and at this point of the process, without necessarily having regard to native title holders’ input. This leaves the first engagement point as potential disputation with the NNTT determining whether the categorisation has been appropriately applied in the circumstances.
- 3.11. The spiritual significance of Country cannot be mapped through desktop assessment, and impacts on native title rights extend far beyond physical disturbance to encompass effects on cultural practice, intergenerational transmission of knowledge, and the ability to fulfil obligations under particular law and custom. The categorisation approach fundamentally misunderstands the nature of impact on native title and the expectations of native title holders in the management of not just strict technical native title impacts, but the cultural heritage impacts and the cumulative impact on the practice of culture in a way that western ideologies do not fully understand or grasp. A single drill hole may devastate a sacred site, the intrusion on country with surveying or imagery could offend sacred site or ceremonial restrictions, while extensive works in another area may be accommodated within the responsibility to country. These determinations cannot be made in the abstract but require deep engagement with appropriate traditional owners who hold the knowledge and authority to assess compatibility with their law and culture.
- 3.12. The fundamental flaw in categorisation approaches is that impact is impact, regardless of whether administrators label it high or low. From the perspective of traditional owners, any interference with Country requires appropriate management according to cultural law and governance protocols. Rather than creating new categories (that replicate expedited procedure

problems at a different scale), reform could focus on processes that managing impact through agreement-making and defining avenues for procedural compliance for future act validity, that respects Indigenous authority to determine what can and cannot occur on their Country.

- 3.13. An example could be, reform could emphasise managing impact through flexible pathways that reflect the diversity of future acts and relationships on Country. Multiple validity pathways could accommodate different circumstances: extractive industries with significant impacts would follow robust negotiation processes; future acts by traditional owner groups for the benefit of the native title holders might follow streamlined pathways; low-impact research or conservation activities could proceed through modified consultation processes; the rewarding of relationship building and agreement making to gain consent and partnership should be foundational. The key is not predetermining impact categories but creating processes that enable appropriate management of whatever impacts may occur. It may be sensible in that case to retain the understanding of categories of future acts and place them in more robust procedural requirements for validity than what currently exists (i.e. not retaining the right to notification, the minimum should be the right to consultation as contemplated by the ARLC's Discussion Paper).
- 3.14. This approach would also create opportunities to harmonise the currently fragmented landscape of cultural heritage protection across states and territories. By focusing on impact management rather than impact categorisation, the future acts regime could incorporate cultural heritage considerations as an integral part of the process rather than a separate regulatory hurdle. This would create genuine efficiencies while respecting the holistic nature of Indigenous relationships to Country, where native title rights and cultural heritage obligations are inseparable aspects of the same responsibility.
- 3.15. The risk of over-engineering impact categorisation processes cannot be overstated. Each new assessment point and categorisation decision creates another opportunity for dispute, requiring traditional owners to repeatedly defend their position against well-resourced governments and proponents. For chronically under-resourced native title parties, this proliferation of process points threatens to transform the system from complex to unnavigable. A cautionary approach would recognise that the best outcomes emerge when traditional owner concerns are accommodated through agreement rather than contested through categorisation disputes.
- 3.16. Ultimately, system effectiveness depends on orienting all parties, groups, governments, proponents, and facilitating institutions, toward agreement-making rather than dispute resolution. When the system incentivises collaborative impact management rather than adversarial impact categorisation, it creates space for nuanced solutions that respect both development needs and cultural obligations. The measure of success should not be how accurately impacts are categorised but how effectively they are managed to achieve outcomes that all parties can support. This requires investment in mediation and facilitation capacity, support for traditional owner participation, and recognition that managing impact is fundamentally about managing relationships between people and Country, not about administrative classification exercises

Reformed Right to Negotiate

- 3.17. The ALRC's proposals for reforming the right to negotiate process must grapple with a fundamental tension: expanding procedural rights while avoiding system paralysis. If many future acts shift from expedited procedures to full negotiation rights under the impact-based model, the system risks becoming overwhelmed unless the right to negotiate is carefully considered and the different ways of seeking future act validity clearly defined. Complementary to this, is the need for ensuring the system is resourced to be able to take on this shift in approach. The current process, designed for occasional high-impact projects, cannot simply be scaled up without creating bottlenecks that impact all parties. Reform must transform the right to negotiate from a defensive procedural right into a framework for relationship development and sustainable agreement-making.
- 3.18. Central to this transformation is enhancing the NNTT's capacity to facilitate rather than adjudicate. The NNTT should receive expanded powers and functions enabling it to assist parties throughout the negotiation lifecycle, not merely when formal disputes arise. The proliferation of dispute entry points proposed in the reforms risks creating a system where procedural skirmishes replace substantive engagement. Rather than multiple opportunities for adversarial applications, the NNTT's adjudicative function should be reserved for genuine impasses where parties cannot agree whether a future act should proceed. This "last resort" approach would focus party energy on negotiation rather than posturing for litigation.
- 3.19. The proposal to further codify good faith requirements appears unnecessary and potentially counterproductive. The existing case law has established clear parameters for good faith negotiations in native title contexts, requiring genuine engagement while recognising parties need not act against their own interests. Additional legislative prescription risks creating new grounds for technical disputes about compliance rather than encouraging substantive engagement. The focus should remain on outcomes, whether parties are working toward mutually acceptable solutions, rather than ticking procedural boxes that may satisfy legal requirements while undermining relationships.
- 3.20. This reformed approach recognises that the right to negotiate is fundamentally about managing ongoing relationships on Country. By reducing adversarial entry points, enhancing facilitation capacity, and maintaining flexibility in good faith standards, the system can evolve from managing conflict to building partnerships. The measure of success should not be how many disputes are resolved but how many are prevented through early engagement, mutual understanding, and recognition that native title creates perpetual relationships requiring ongoing attention rather than one-off transactions.

Agreement-Making Focus

- 3.21. The emphasis on enhancing agreement-making over adversarial processes represents a positive shift that aligns with current industry practice for negotiated outcomes that can accommodate both development and maintain cultural obligations. When functioning properly, agreement-making enables nuanced solutions impossible through rigid statutory procedures, allowing parties to craft arrangements that reflect the specific characteristics of

Country and the particular needs of all involved. This approach respects the autonomy of diplomacy, recognising native title holders as negotiating partners rather than obstacles to be overcome.

- 3.22. However, agreement-making requires genuine equality of means to achieve just outcomes. The current reality, where mining companies deploy teams of lawyers and negotiators against RNTBCs operating with volunteer directors and minimal support, this makes mockery of negotiation as a meeting of equals. The power imbalance is not merely financial but structural: proponents negotiate knowing that refusal to agree triggers statutory procedures where the power of compulsory acquisition is sometimes a trump card that can be used, while native title holders negotiate knowing that their only real choice is the terms of their potential re-dispossession, not whether it occurs.
- 3.23. The ALRC's proposal for negotiation conduct and agreement content standards represents an important step toward establishing minimum benchmarks that safeguard relationships and contribute to risk mitigation across the system. Setting clear standards for both how parties negotiate and what agreements must contain creates an even floor from which all native title groups can work, preventing the exploitation that occurs when desperation meets opportunism. This aligns with human rights principles requiring that Indigenous Peoples participate in decisions affecting them through fair processes that respect their dignity and autonomy (UNDRIP, arts 18-19). Rather than calibrating the system to accommodate the lowest common denominator of conduct, where bad faith tactics and unconscionable terms become normalised, mandatory standards elevate practice across the sector. Such standards should encompass not merely procedural requirements but substantive protections: minimum compensation benchmarks, cultural heritage safeguards, and ongoing relationship frameworks that recognise the perpetual nature of native title. Implementation may require complementary mechanisms such as independent review of agreements, standard-form precedents developed with native title holder input, and capacity building to ensure all parties understand their rights and obligations. By establishing what constitutes acceptable conduct and fair terms, the system moves from managing conflict after relationships fracture to preventing exploitation before it occurs. This is a shift that will benefit all parties through greater certainty, reduced disputes, and sustainable long-term relationships built on mutual respect rather than structural coercion.
- 3.24. The ALRC's attempt to weave Free, Prior and Informed Consent principles into the agreement-making framework represents progress, but must not conflate procedural improvements with genuine consent rights. True FPIC exists where Indigenous Peoples can say no and have that decision respected, such as through mandatory ILUA requirements for registered no-go zones within NTMPs that have passed registration thresholds. This creates authentic consent mechanisms where Traditional Owners' decisions are determinative. Everything else represents "FPIC-lite", and partial consent is not consent at all. While incremental improvements in negotiation processes are welcome, we should not mistake a lighter implementation of rights for their full realisation. The distinction matters: genuine FPIC requires that Indigenous Peoples have actual authority to refuse developments incompatible with their obligations to Country, consistent with their rights and interests that have been recognised.

- 3.25. Implementing robust FPIC principles requires equally robust institutional support. The NNTT should be empowered with broad powers to facilitate agreement-making throughout the lifecycle of negotiations and disputes. This includes board powers and functions to enable the broadest means of invoking the NNTT's assistance and support, such as general facilitation, mediation, arbitration, conciliation, and other means of being of assistance to RNTBCs, native title holders, and users of the system in the development, negotiation, and implementation of agreements and when disputes arise at any stage. While not every matter can or should go to the Tribunal, it must have the statutory power and discretion to be involved where its expertise could prevent disputes or facilitate resolution. The current limitation is not the NNTT's willingness but its restricted mandate and under-resourcing. Any enhanced powers and functions must be coupled with adequate resources – structurally, financially, and in the necessary skills and experience it attracts or develops in-house. This would transform the NNTT from a reactive arbitrator to a proactive facilitator of just agreements and ultimately enhance the native title system.

System Capacity Concerns

- 3.26. The cumulative effect of proposed reforms raises serious concerns about system capacity that could paradoxically worsen outcomes for all parties. The proliferation of new dispute resolution pathways, assessment mechanisms, and procedural requirements will significantly increase demands on already stretched institutions. The NNTT, native title representative bodies, and RNTBCs all face substantial new responsibilities without clear commitments to commensurate resourcing. This risks creating a system so complex and under-resourced that it fails to function effectively for anyone, or potentially leave open the sector or unwanted market forces that can cause damage to already vulnerable sections of our society.
- 3.27. The mathematics of dysfunction are stark. With more than 250 RNTBCs managing native title across Australia, with a majority operating with less than one full-time equivalent staff member, the addition of new planning, assessment, and agreement-making obligations without massive resource injection guarantees systemic failure. When each RNTBC must respond to multiple future act notifications monthly while developing management plans, participating in impact assessments, and negotiating agreements, the result is not improved outcomes but institutional collapse. The human cost of directors burning out, communities divided by impossible choices, and leaders and Elders exhausted by endless meetings, these aspects are rarely calculated in reform proposals but are a critical, if not the most critical aspect of these future act reforms.
- 3.28. A critical aspect of system reform must be elevating engagement standards across all sectors to meet contemporary community expectations, that is both Indigenous and non-Indigenous community expectations. The future acts regime should not be calibrated to the lowest common denominator of proponent capability, willingness, and attitude to engage with native title holders constructively. While some participants, particularly in the small-scale mining and prospecting sector, may lack the resources or inclination for meaningful engagement with traditional owners, this should not set the benchmark for the entire system. Rather than

designing a system that accommodates minimal engagement, reform should establish best practice standards and ensure all participants have the support necessary to meet them.

- 3.29. This requires a fundamental shift in how governments approach sector support, governments should invest in bringing all participants up to appropriate standards and expectations. This might include mandatory education programs for small-scale operators, subsidised access to legal and technical advice, and facilitated engagement processes that ensure even under-resourced proponents can participate respectfully and effectively. The goal should be elevating practice across the board rather than reducing expectations to match the least capable participants. Communities across Australia have made clear their expectation for respectful, informed engagement, the system should be designed to meet these expectations, not circumvent them.
- 3.30. Without substantial investment in core infrastructure the reformed system risks grinding to a halt. This would serve no one's interests, creating delays and uncertainties that harm economic development, while failing to protect native title rights and interest which is a fundamental premise of the Native Title Act. The solution is not to abandon reform but to ensure that new obligations are matched by resources and that system design prioritises efficiency through empowerment rather than complexity through proliferating process. Investment in making the system work must be understood not as a cost but as essential infrastructure for a functioning democracy that respects Indigenous rights while enabling appropriate development

4. National Native Title Tribunal Independence

- 4.1. When considering all the proposed reforms and the scope of work and responsibilities that the NNTT is expected to inherit, it prompts examination of whether, the current infrastructure with the NNTT operating as part of the Federal Court Entity, remains fit for purpose.
- 4.2. While I acknowledge having had the benefit of observing, to a degree, the internal operations of both the Federal Court of Australia and the NNTT through my various professional roles, I do not suggest my comments are based solely on that experience. Nor do they constitute criticism of what occurred during my involvement with these organisations. Rather, my observations are grounded in broader knowledge of organisational operational requirements, governance experience across multiple sectors, and understanding of the distinct but complementary natures of both the Federal Court and the NNTT.
- 4.3. Through this lens, I have come to understand how institutional arrangements can either enable or constrain effective practice. The NNTT possesses unique expertise and capabilities that may be currently limited by its structural and functional position within the Federal Court entity. This is not a reflection on either institution's competence or commitment, but rather recognition that different functions require different institutional architectures. The operational requirements of the Tribunal differ fundamentally from those of a court. Where courts require formal procedures and judicial distance, the Tribunal needs flexibility and accessibility. The differences between a court and a tribunal suggest that housing both institutions within a single administrative entity may not serve either optimally.

- 4.4. My experience across various governance roles has demonstrated that when organisations with distinct purposes share administrative structures, resource allocation tends to favour the primary entity's core functions. This is neither surprising nor unreasonable, it simply reflects organisational priorities. However, it can result in the secondary entity receiving less attention in areas such as technology infrastructure, administrative support, and strategic planning.
- 4.5. Structural independence would position the NNTT to better serve its intended purpose. Streamlined processes designed specifically for native title practice would reduce delays and costs. Enhanced accessibility through regional presence and flexible engagement models would better serve remote communities. Proactive intervention capabilities would prevent disputes rather than merely resolving them after escalation.
- 4.6. Most significantly, independence would enable the NNTT to fully realise its potential as a specialist institution supporting the unique requirements of native title practice. This includes capacity to administer reformed processes such as Native Title Management Plans, which require administrative capabilities beyond traditional court functions.
- 4.7. The proposal for NNTT independence reflects not criticism of current arrangements but recognition that evolving native title practice requires institutional evolution. The substantial reforms proposed in the Discussion Paper would be best supported by a Tribunal with the administrative independence and operational flexibility to implement them effectively. The question is not whether the current arrangements have served their purpose to date, but whether they remain optimal for the native title system's future needs. In my assessment, the scope and nature of proposed reforms suggest that institutional independence for the NNTT warrants serious consideration as part of comprehensive system reform.

5. Conclusion

- 5.1. This submission has examined the ALRC's reform proposals through the First Nations Autonomy framework, revealing promising elements and limitations. After three decades of operation, the future acts regime stands at a critical juncture. The comprehensive nature of this review presents a real opportunity for transformative reform, the choice made now will determine whether the native title system evolves to genuinely recognise Aboriginal and Torres Strait Islander People's place in broader Australian society and the recognition of their inherent custodianship over country, or whether we continue to manage Indigenous disadvantage within colonial structures.
- 5.2. The proposals contain positive elements: Native Title Management Plans could enable proactive territorial governance; enhanced agreement-making processes could reduce adversarial disputes; a properly designed right to negotiate could transform from defensive procedure to relationship-building framework; recognition of the resourcing crisis acknowledges a fundamental barrier to justice. However, these improvements remain constrained by an architecture that positions native title holders as stakeholders to be consulted rather than authorities whose consent is required. Without addressing this fundamental inversion of proper authority, procedural refinements risk creating more

sophisticated mechanisms for achieving the same unjust outcomes. The critical reforms identified in this submission, genuine consent mechanisms through registered no-go zones, institutional independence for the NNTT, comprehensive resourcing to elevate all participants to best practice standards, and flexible pathways for managing rather than categorising impact, work synergistically. Each element reinforces the others: NTMPs require independent institutional support to develop and implement; genuine consent requires enforceable mechanisms and resourced parties; effective agreement-making depends on equality of arms and skilled facilitation. Half-measures that implement some elements while ignoring others will perpetuate systemic failure.

- 5.3. Most fundamentally, reform must recognise native title as a perpetual property right carrying governance authority that should be treated equal to any other property interest recognised by Australian law. This is not a radical proposition but a logical consequence of recognising that native title reflects pre-existing rights that survived the Crown's acquisition of sovereignty. The future acts regime's legitimacy depends entirely on its fidelity to this recognition. A system that permits the lawful destruction of native title rights over traditional owner objections is not a protective regime, it is a mechanism for managed dispossession.
- 5.4. The measure of successful reform cannot be procedural efficiency or the speed of development approvals. Success must be measured by whether First Nations peoples can exercise meaningful authority over their traditional territories, whether their decisions about Country are respected, and whether future generations inherit strengthened rather than diminished connections to their lands and waters. Legislative reform must embed human rights principles as the primary interpretive framework, create genuine consent mechanisms where Indigenous authority is determinative, and establish institutional arrangements that support rather than constrain native title practice. This includes an independent NNTT with enhanced facilitation powers, guaranteed funding for native title institutions, and recognition that managing impact on Country requires managing relationships between people.
- 5.5. This transformation will not be easy, it will require confronting uncomfortable truths about the current system's role in perpetuating injustice, challenging vested interests that benefit from Indigenous disempowerment, and reimagining relationships between Aboriginal and Torres Strait Islander Peoples and the Australian state. International human rights obligations, domestic legitimacy, and justice demand genuine reform.

Dr Ivan J Ingram

24 July 2025