

24 July 2025

Australian Law Reform Commission
By email: nativetitle@alrc.gov.au

Dear Commissioners,

Submission in Response to the ALRC Discussion Paper 2025 - Review of the Future Acts Regime in the *Native Title Act 1993 (Cth)*.

Gur A Baradharaw Kod Torres Strait Sea and Land Council Torres Strait Islander and Aboriginal Corporation (GBK) welcomes the opportunity to provide this submission to the Australian Law Reform Commission (ALRC) as part of its review of the future acts regime under the *Native Title Act 1993 (Cth)* (NTA).

Overview and Background

The ALRC has been tasked by the Attorney-General to examine the future acts regime within the NTA. The terms of reference for this review are broad and aim to identify measures that address inefficacy, inequality, and unfairness. Importantly, the review is guided by the intention expressed in the NTA's preamble—that the Act serves as a special measure for the advancement of First Nations peoples and ensures native title holders are able to fully enjoy their rights and interests.

About GBK

GBK is a community-led organisation governed by the vision and leadership of Traditional Owners. In 2022, GBK was formally recognised as the Native Title Service Provider (NTSP) for the Torres Strait and Endeavour Strait region.

GBK represents the collective interests of all twenty-one (21) Registered Native Title Bodies Corporate (RNTBCs) and two (2) Torres Strait Islander land trusts across the region, encompassing five nation groups —Kemer Kemer Meriam, Gudamaluilgal, Maluilgal, Kulkalgal, and Kaiwalagal.

As the peak body for RNTBCs in the region, GBK provides a unified voice to advocate for Traditional Owners, influence policy development, and shape programs that reflect the unique needs and priorities of our communities.

GBK appreciates the opportunity to contribute to this important review and looks forward to engaging with the ALRC's final report and recommendations later this year.

Yours sincerely,



Lui Ned David
Chairperson

Gur A Baradharaw Kod Torres Strait Sea and Land Council Torres Strait Islander and
Aboriginal Corporation



Strengthening Procedural Rights Over Sea Country

Introduction

GBK operates in a region with a high proportion of native title determinations over sea country. Despite this recognition, procedural rights under the Native Title Act 1993 (NTA) remain limited, inequitable, and often ineffective. GBK advocates for reforms that enhance these rights to ensure native title holders can meaningfully exercise and protect their interests.

Future Acts in the Torres Strait: Nature and Impact

Overview of Future Acts

In the Torres Strait, future acts commonly include:

- Tourism activities, such as cruise ship visits;
- Commercial fishing, including changes to permit conditions and setting seasonal catch conditions for fishers;
- Research and environmental monitoring;
- Construction and replacement of infrastructure, including public works (including social housing) and offshore fixed equipment.

While these activities may appear to have a low impact when considered individually, the vast expanse of determined native title over ocean and intertidal zones—between the high and low water marks—means that their cumulative effect is significant. This cumulative impact poses a serious threat to the rights and interests of native title holders in the region.

Cumulative Impact and Procedural Gaps

Despite the scale and frequency of future acts in the Torres Strait, the NTA does not recognise or account for their cumulative effect. Procedural rights under the NTA remain extremely limited, offering little protection to native title holders even in areas with expansive and positive native title determinations.

GBK acknowledges the Australian Law Reform Commission's (ALRC) proposal to categorise future acts as either high or low impact (as set out in the [Discussion Paper](#)). However, this binary classification does not adequately address the cumulative nature of these activities. A series of low-impact acts can collectively result in substantial disruption to native title rights, yet this reality is not reflected in the proposal to improve current legal frameworks.

Ongoing Abrogation of Rights

The minimal procedural rights afforded to Torres Strait Islander and Aboriginal native title holders under the NTA, result in ongoing abrogation of their rights and interests. Despite formal recognition of native title, the lack of meaningful procedural safeguards means that native title holders are routinely excluded from decisions that affect their sea country.

This situation underscores the urgent need for reform. GBK has identified several key issues and concerns that warrant attention, which are outlined in the following sections.

Reforming Subdivision N of the NTA

One key reform supported by GBK is the removal of the distinction between offshore and onshore areas under Subdivision N of the NTA. This distinction currently limits procedural rights over sea country. Abolishing Subdivision N would provide native title holders—particularly in regions like the Torres Strait—with stronger procedural protections and more equitable treatment under the law. Such measures are essential to uphold the rights and interests of native title holders in accordance with the spirit and intent of the NTA.

Limitations of the Right to Comment and Administrative Review

Procedural rights for native title holders affected by proposed future acts on sea country remain extremely limited. The right to comment carries minimal legal weight, and avenues for challenging government decisions—beyond requesting a statement of reasons—are restricted to administrative review processes within a costs jurisdiction. This means that native title holders risk having costs awarded against them if their challenge is unsuccessful, creating a significant barrier to access.

As a result, the process is largely inaccessible to native title holders and Prescribed Bodies Corporate (PBCs). GBK recommends reforming this area to enable cost-free administrative review. Additionally, existing mechanisms within administrative law may offer pathways to greater equity and should be further explored.

Deficiencies in Future Act Notices (FANs)

While Future Act Notices (FANs) may technically comply with the NTA, they often fall short in practice. Native title holders frequently report that FANs lack essential information, including:

- Detailed maps and clear descriptions of the exact locations of proposed activity areas within the native title determination or registered native title claim area.

- Specific details on the potential impacts of proposed activities on sea country, land, and ecosystems.
- Information on how local fisheries and marine flora and fauna may be affected.
- Measures proposed to minimise interference with native title holders' rights during the activity.

These deficiencies hinder native title holders' ability to assess and respond to FANs effectively. Even when FANs are non-compliant, enforcement options under the NTA are limited.

Cumulative Impacts and Lack of Overlap Consideration

Permits are often granted without conditions, despite comments raising objections from native title holders. The cumulative effect of multiple low-impact activities—such as cruise ship visits, research projects, and commercial fishing—can result in significant disruption. These activities are rarely considered in aggregate, leading to a substantial and ongoing impact on native title rights and interests.

Native title holders are deeply concerned about the implications of third-party actions. Although these actions may appear isolated in FANs, they collectively shape the lived experience of native title holders and their ability to exercise native title rights and interests over their sea country.

Respect for Cultural Protocols and Identity

Native title holders in GBK's region consistently request that proponents respect cultural protocols and the authority of First Nations Peoples. However, over sea country, proponents are under no obligation to comply. The sea, fishing, and marine hunting are central to personal and geographical identity, as well as subsistence livelihoods. Native title holders' sea country embodies significant custodianship, resource use, environmental and mythological values. These practices are rooted in traditional cultural heritage.

A significant portion of household food income in the region is derived from subsistence marine resource use. For these reasons, native title holders are concerned to protect traditional rights and interests as these rights are crucial to sustain the livelihood and posterity. Protecting traditional rights in sea country is vital to the wellbeing and future of native title holders.

State Decision-Making and Limited Procedural Rights

While some government departments value traditional knowledge and engage with native title holders in stewardship efforts, procedural rights under the NTA remain weak. Native title holders must often rely on the goodwill of state decision-makers, who are not legally

bound to uphold policies that recognise and protect native title rights and interests. This imbalance undermines efforts to achieve fair and informed decision-making regarding permits and future acts.

Social Housing – A Welcome but Culturally Sensitive Future Act

The provision of social housing in the Torres Strait is a welcome and necessary development. However, its implementation often undermines the cultural authority embedded in hard-won native title determinations.

While allocating government housing based on social need is not objectionable in principle, a recurring issue in the Torres Strait is the failure of social housing providers to build into their project plans the time and cost of securing native title consent via an ILUA negotiation, that both respects principles of Traditional Landownership and compensates landowners for loss of their rights.

Another recurring issue is the failure to record traditional ownership in housing leases. These omissions contribute to community disputes and confusion regarding rightful custodianship of land.

Section 24JAA of the NTA is not an appropriate vehicle in the Torres Strait region for social housing and other public works infrastructure. Governments and social housing providers should instead develop policy responses to social need for housing and other infrastructure that enshrines the fundamental rights of Torres Strait Islander Traditional Landowners.

Section 24JAA allows building on native title lands without rights of objection or proper consultation of the native title holders. Whilst compensation is contemplated, the reality is that the avenues to securing compensation are expensive and unlikely to be obtained within a reasonable timeframe or at all. Section 24JAA should either be repealed or amended to enshrine principles of proper consultation and consent and upfront compensation to landowners for the impact of development of native title lands.

To uphold cultural authority and respect native title rights, government documentation—particularly housing tenancy agreements or leases—can explicitly acknowledge the existing interests of Traditional Landowners. When leases expire or residents vacate, it should be mandatory for the relevant government agency to engage with the Prescribed Body Corporate (PBC) to ensure that future allocations align with both social need and traditional ownership, wherever possible. This interim measure would at least provide greater respect for cultural authority and native title rights than is currently afforded to native title holders.

Furthermore, housing tenancy agreements or leases should include a clear statement that they do not affect or diminish existing native title rights. This safeguard is essential to maintaining cultural authority and ensuring that infrastructure development does not erode the legal and cultural recognition of Traditional Landowners.

Free, Prior, and Informed Consent (FPIC)

The current regime falls short of meeting international human rights standards, including the right to Free, Prior, and Informed Consent (FPIC) as outlined in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), to which Australia is a signatory.

The limitations on procedural rights exemplify how the future act regime prioritises third-party interests at the expense of native title holders.

Other Procedural Amendments

The section 31 expedited process for mining future acts needs to be abolished. This process has minimal criteria and overrides First Nations peoples' self-determination, as there is no opportunity for consent, consultation, or comment.

A fallback option may be to introduce stronger criteria under which an expedited process may proceed. GBK recommends that a future act working group be appointed to consider the workability of such options.

Recommendations

- Abolish Subdivision N of the NTA to eliminate the offshore/onshore distinction.
- Mandate comprehensive FANs that include maps, impact assessments, and mitigation strategies.
- Enable cost-free administrative review for native title holders and PBCs.
- Require proponents to engage with cultural protocols and respect native title rights.
- Recognise and address cumulative impacts of multiple activities on sea country.
- Abolish or amend section 24JAA of the NTA
- Implement FPIC standards in line with UNDRIP obligations.
- Abolish s 31 expedited process

Conclusion

Agreement making and procedural rights should focus on amendments that support native title holders' bargaining power so they may:

- protect existing rights and interests; and
- use those rights and interests for economic development.