

Brief submission in response to the Australian Law Reform Commission's Discussion Paper 88: Review of the Future Acts Regime

By Ewan Raeside*

Summary

This brief submission responds to the Australian Law Reform Commission's Discussion Paper 88 on reforming the future acts regime under the *Native Title Act 1993* (Cth) (**NTA**).

It calls for a framework that aligns with Australia's international obligations under the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**). It further proposes that all future acts be subject to enforceable conditions regarding how a future act may be done (**Native Title Conditions**), analogous to condition models imposed under environmental, planning, mining and other land-use approval regimes.

Australia's obligations under international law

United Nations Declaration on the Rights of Indigenous Peoples

1. The future acts regime in the NTA must be compatible with Australia's obligations under international law and fundamental principles of human rights, and any amendments to the future acts regime in the NTA must reflect UNDRIP principles, including the need to obtain the Free, Prior and Informed Consent (**FPIC**) of First Nations Peoples for future acts which affect Country.¹
2. Crucially, FPIC is derived from First Nations' right to self-determination and includes the right to say "No".² Gamilaraay man Jared Field provides an evocative example:³

I do, however, have one small gift: gamil. It is the word, as in many east coast First Nations, that my mob take our namesake from: gamil means no. Otherwise put, the word we use to describe ourselves – Gamilaraay – teaches others how we decline to give consent. It also, to my mind, teaches others how to do the same: you too can say gamil.

* Senior Lawyer, Queensland South Native Title Services. The views expressed in this brief submission are my own.

¹ In performing its functions, the ALRC must aim at ensuring that the laws, proposals and recommendations it reviews, considers or makes are, as far as practicable, consistent with Australia's international obligations that are relevant to the matter: *Australian Law Reform Commission Act 1996* (Cth) s 24(1)(b). The ALRC was also asked in its Terms of Reference for the inquiry to consider the rights and obligations recognised in the international instruments to which Australia is a party or which it has pledged to support, including UNDRIP.

² See *What is Free, Prior and Informed Consent (FPIC)?*, Institute for Human Rights and Business (2012), accessed at: <https://www.ihrb.org/resources/what-is-free-prior-and-informed-consent-fpic>.

³ See *Gamil means no: don't be quiet while mining threatens our collective future*, Jared Field (2021), The Guardian, accessed at: <https://www.theguardian.com/commentisfree/2020/dec/03/gamil-means-no-dont-be-quiet-while-mining-threatens-our-collective-future>

So the next time our land, our waters and therefore our collective future is threatened, please do not be quiet. Instead, with your words and your actions, accept this gift. Instead, firmly and with certainty say gamil.

Gamil means no.

3. Although Australia endorsed UNDRIP in 2009, its principles are yet to be enshrined in Australian domestic law as at 2025, over 13 years after their endorsement. In its current state, the future acts regime of the NTA falls far short of what is required by UNDRIP and contemplates that parties proceed with future acts without the need to even comply with the procedural requirements set out in the NTA⁴ in a manner that has been described as “undermining the objects” of the NTA.⁵
4. In its October 2021 Final Report *A Way Forward - Final report into the destruction of Indigenous heritage sites at Juukan Gorge (A Way Forward)*, the Joint Standing Committee on Northern Australia made the following recommendation (added my emphasis):

Recommendation 4

7.89 The Committee recommends that the Australian Government review the *Native Title Act 1993* with the aim of addressing inequalities in the negotiating position of Aboriginal and Torres Strait Islander peoples in the context of the future act regime. This review should address:

...

- developing standards for the negotiation of agreements that **require** proponents to adhere to the principle of Free, Prior and Informed Consent as set out in the UN Convention [sic] of the Rights of Indigenous People (UNDRIP)

...

5. While the ALRC’s Discussion Paper has discussed “*promoting* fair and equitable agreements”, none of the proposals discussed appear to recommend adopting FPIC into Australia’s domestic legislation. Absent a right to say no, it is not clear proponents will adhere to FPIC principles, especially where a proponent may be able to use extensive resources to seek administrative or judicial recourse to obtain a determination allowing a future act to be done.⁶

International Court of Justice’s Advisory Opinion on Climate Change

6. The ALRC should also give serious consideration to the International Court of Justice’s Advisory Opinion on Climate Change handed down on 23 July 2025 (the **Opinion**) in finalising its review of the future acts regime, particularly given that many proposed future acts may involve resource extraction with significant climate impacts. Failure to take appropriate action by amending the NTA to require a different assessment of potential significant harm to the climate system may mean Australia is in breach of its obligations under international law.

⁴ See *BHP Billiton Nickel West Pty Ltd v KN (deceased) (TJIWARL and TJIWARL #2)* [2018] FCAFC 8.

⁵ See more generally Richard Bartlett, ‘*Undermining the Objects of the Native Title Act: The Debasing of the Future Act Process by the Federal Court*’ (2019) 46(1) University of Western Australia Law Review 161.

⁶ See, for example, *Santos NSW Pty Ltd and Another v Gomeroi People and Another* [2025] NNTTA 12, which relates to Santos’ Narrabri Gas Project and has had an extensive litigation history that is still unfolding.

7. In *Santos NSW Pty Ltd and Another v Gomeroi People and Another* [2025] NNTTA 12, extensive evidence about the detrimental impact of the Project through the contribution of GHG emissions and climate change was led. However, while the panel did acknowledge those detrimental impacts (at [410]) it placed significant weight on energy reliability to find that the Narrabri Gas Project the subject of the inquiry offered a net public benefit (at [400]) such that the future acts could be done subject to a suite of conditions (at [419]). Such an assessment may be contrary to Australia's obligations set out in the Opinion.

Responses to certain matters in the Discussion Paper

Comments on Native Title Management Plans

8. Native Title Management Plans (**NTMPs**) should not be used to validate future acts in determined areas. Indigenous Land Use Agreements already provide a pathway for agreement-making with government parties and appear to be sufficient. Introducing NTMPs as a parallel mechanism for validity risks adding unnecessary complexity to an already complex future acts regime.
9. Instead, NTMPs could serve as internal planning tools for Registered Native Title Bodies Corporate (**RNTBCs**). NTMPs might include cadastral mapping of significant cultural sites or areas, as well as processes for reporting to the RNTBC and specific native title holders as required. The NNTT could assist RNTBCs in maintaining and updating these plans.

Comments on the proposed impact-based model

10. The proposed impact-based model does not address the need to secure FPIC before any future act proceeds, contrary to what is contemplated by UNDRIP.
11. However, an impact-based model may present some improvements on the current future acts regime if that model:
 - (a) adopted the following hierarchy:
 - (i) firstly, set out those types of future acts where in all circumstances, the native title party has a right to say no (and that "no" would forbid a government compulsorily acquiring native title that would have otherwise been affected for that purpose);
 - (ii) next, set out those types of future acts where the legislature says compulsory acquisition of native title is appropriate; and
 - (iii) finally, for remaining proposed future acts, use an impact-based model where those future acts are categorised as either:
 1. high-impact future acts, for which a native title party has a right to negotiate Native Title Conditions; and
 2. low-impact future acts, for which a native title party has a right to be consulted about Native Title Conditions, with proper safeguards to ensure that consultation has in fact occurred.

- (b) to address the fact that incorrect categorisations may still occur, included amendments to the NTA noting a presumption that all proposed future acts are high-impact future acts unless the person proposing the future act be done can establish otherwise by reference to stringent criteria set out in the NTA, or a native title party otherwise agreeing that the proposed future act is a low-impact future act;
 - (c) to address the fact that future act notifications are poorly prepared, included amendments to the NTA requiring the person proposing the future act to provide, as a prerequisite to validity:
 - (i) clear and concise information about the nature and extent of the proposed future act;⁷
 - (ii) a set of proposed Native Title Conditions for the doing of the future act;
 - (d) prescribed that non-compliance with a Native Title Condition would be an offence under the NTA;
 - (e) to address resourcing issues, included amendments to section 60AB of the NTA to clearly capture costs associated with necessary and reasonably incurred negotiation and preparation costs by any native title party (not just RNTBCs) in relation to settling any Native Title Conditions;⁸ and
 - (f) include amendments to the NTA expanding the role of the NNTT to include a jurisdiction to undertake conciliation with respect to negotiations on Native Title Conditions, or otherwise decide that:
 - (i) the future act may be done, **and** on what Native Title Conditions (which may all, some or none proposed by a party, and may include compensation); or
 - (ii) refuse the future act.⁹
12. The NTA should be amended to expressly provide that non-compliance with procedural requirements would result in a future act being invalid, and the NTA should expressly address the consequences of invalidity. Under the above model, Proponents will be incentivised to provide better information and reasonable Native Title Conditions early to avoid invalidity. As to invalidity, new statutory remedies that in addition to, but not necessarily replacing, those existing remedies which may be available at common law, could be added to the NTA.

⁷ This could include clear mapping and cadastral information, along with a description of any proposed activities proposed to be done in accordance with the proposed future act, and their impacts. In many cases, these details are already available so that Proponents can comply with mining, planning or environmental impact assessment requirements. Proponents are best placed to harmonise the various approvals and relevant conditions for their own projects. Certain information could be contained in a publicly accessible register maintained by the NNTT.

⁸ See, for example, *Mineral and Energy Resources (Common Provisions) Act 2014* (Qld) s 91, which allows an eligible claimant that has incurred necessary and reasonable “negotiation and preparation costs” from a resource authority holder in entering or seeking to enter into a conduct and compensation agreement or deferral agreement. Such costs expressly include accounting costs, legal costs, valuation costs or the costs of an agronomist.

⁹ It should be noted that under the current regime, the NNTT rarely exercises its power to refuse a future act.