



6 August 2025

Australian Law Reform Commission
PO Box 209
Flinders Lane
Victoria 8009

By email only

Submissions to the ALRC Reforms to the Future Act Regime Discussion Paper

Introduction

1. These submissions are made for and on behalf of the Kyburra Munda Yalga Aboriginal Corporation RNTBC (ICN 7581) (**KMY**) who are pleased to put forward these further submissions. We apologise for providing these submissions late and trust they will be considered.
2. We again strongly encourage the ALRC to carefully consider proposed reforms to the future act regime and we reiterate that any ALRC report and recommendations accurately reflects the interests of native title holders and Prescribed Bodies Corporate (**PBCs**) who are determined to, among other things, hold, manage and protect native title on behalf of the native title holders. *A fortiori* post **Yunupingu** High Court decision that native title is recognised as a proprietary right.¹

The expedited procedure, the rule of law and equality before the law

3. As explained in the KMY submissions dated 6 March 2025² the expedited procedure is an inadequate and unfair process which has created a power imbalance.
4. KMY notes and adopts the issues raised in the Cape York Land Council (**CYLC**) submissions namely:
 - a. “This poor jurisprudence, positions native title as a lesser right, subservient to other land interests, contradicting the supposed equitable foundations of Australian law”; and

¹ *Commonwealth of Australia v Yunupingu* [2025] HCA 6.

² Paras. [1]-[30].

- b. “Given the profound implications of the Australian jurisprudence, there is a pressing need for legislative reform to realign the interpretation of native title with its common law roots. Amending section 223(1) of the NTA to reflect that native title and its associated rights are recognised and protected under the common law would restore the original intent of the NTA. This amendment would ensure that native title is treated not as a quasi-statutory title, but as a pre-existing legal right that the NTA aims to protect rather than re-define. The protection of native title as envisioned in *Mabo (No.2)* is integral to the “justice” expressed in the Preamble to the NTA. Correcting section 223 of the NTA to reflect its common law foundations is imperative”.
5. KMY now questions whether paragraphs [41] and [42] of the Discussion Paper adequately address the issues raised by CYLC.
6. In *Yunupingu*, four High Court judges said:

“... to attribute such a characteristic to a native title right or interest as translated by the common law rule of recognition in the absence of constitutional necessity for doing so would run counter to the fundamental consideration which impelled the formulation of the common law rule of recognition explained in *Mabo [No 2]*. The fundamental consideration was there explained to have been to bring the common law into conformity with “the values of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system”. The reference to “human rights” in this explanation must be understood as encompassing “the human right to own and inherit property (including ... to be immune from arbitrary deprivation of property)” identified in *Mabo [No 1]*. (footnotes omitted).
7. The land tenure in which native title is recognised under Australian law is largely over Crown Land, such as unallocated State land, reserves and the like. However, while native title can survive the Crown’s assertion of sovereignty, no right of veto is afforded by the future act regime to PBCs or native title holders for any activities proposed to occur on lands or waters where native title has been determined to exist.

Fair and Just Negotiations

8. Securing a fair and just negotiation process is paramount when considering reforms to the future act regime. There is an argument that the State has a fiduciary obligation, which is similar to the State having trust responsibilities, to act in the best interests of Aboriginal and Torres Strait Islander people.³ This is an important principle because if for example the State is issuing exploration permits (EPs) which may affect Aboriginal and Torres Strait peoples native title

³ See Susan Burton Phillips, ‘A Note: Eddie Mabo v The State of Queensland’ 26(3) Sydney Law Review Vol.14:121 at pp.135-137.

rights and interests, negotiations with proponents should be transparent and conducted through a process of engaging in good faith, trust and openness. The fiduciary duty obligation will prevent the State from acting in their own self-interests by issuing expedited procedure notices under the current Queensland process.

9. Further, there is an important characteristic of the rule of law which is that the law must operate to constrain the arbitrary and unfair exercise of power. Therefore, the State must not use its powers and resources to unfairly remove native title holders rights to enter into fair negotiations with a proponent.
10. Former Justice JJ Spigelman has made extrajudicial comments about the administration of law as an important characteristic of the rule of law and said:

“The administration of justice is a core function of government, developed precisely in order to prevent violence or the exercise of any form of coercion by the strong, the powerful or the wealthy against others, less powerful or less well-off or less well-organised. The proper exercise of governmental authority is, I repeat, an essential aspect of the rule of law”.⁴
11. JJ Spigelman also said, “... those with power, especially governments, operate within and are subject to a comprehensive legal framework”.⁵
12. Fair and open engagement and negotiations with proponents is an appropriate future act process. A genuine engagement and negotiation process allows PBC and claim groups to put relevant information and perspectives on the table. Importantly, engagement and negotiations should not follow a rigid legal framework, and the process should be a flexible and dynamic forum for working out acceptable outcomes and building relationships based on trust and communication. Negotiations must also be respectful of the parties equality of standing and acknowledging that native title holders are the Traditional Owners and custodians of their country.
13. The *UNDRIP* principles also sets the standards for future act negotiations in that the State must allow the parties to undertake effective engagement or to consult and cooperate with native title holders before adopting and implementing measures that may affect them and their country.
14. Because native title holders are made up of their own diverse communities and societies, future act negotiations should not follow a defined and rigid approach in what outcomes and benefits are appropriate for a particular group.

⁴ JJ Spigelman AC ‘The Rule of Law and Enforcement’ (2003) UNSW Law Journal, Vol,26(1) at p. 201.

⁵ Ibid at p.203.

Native Title Management Plans

15. We note the ALRC concept of Native Title Management Plans (NTMPs) is suggested as a further means for dealing with and validating future acts. The NTMPs process adds another obstacle for PBCs and native title holders that is, it adds another system or layer of management, administration and bureaucracy without acknowledging that KMY and many other PBCs and claim groups are severely under resourced, and that the current system further erodes resources without improving risk management or preserving cultural integrity, and it's not in line with the purpose of the NTA which will further add to the power imbalance.
16. The Prime Minister recently made a statement at the Garma festival to provide \$75 million in additional funding to support native title holders to secure better deals, drive faster approvals and deliver a real and lasting economic legacy for communities.⁶ KMY recommends that some of these funds be allocated to PBCs and claim groups for the purpose of building capacity and to more effectively attend to future act matters.

Resourcing PBCs

17. Most if not all of the submissions provided to ALRC raise the issue of adequate resourcing of PBCs and native title claim groups. We note and support the KLC submissions⁷ that:

“[It] is unacceptable for native title parties to continue to bear the risk of not being able to participate in the future act processes due to lack of resources, particularly where a native title party's participation is driven by the commercial interests of a third party. The native title party's costs of performing those functions should in all cases be covered by the government party or internalised to the commercial party as part of the cost of doing business”.
18. KMY recommends that adequate funds be made available to assist PBCs and claim groups.

Recommendations

19. We adopt the following recommendations below at [19(a)-(c)] and [20(a)-(c)] made in the Juukan Gorge final report.⁸ A number of recommendations have been adjusted for the purpose of these submissions:
 - a. Future acts regime reforms should be developed through a process of co-design with NTRBs, PBCs and native title claimants;

⁶ Prime Minister's address to Garma Festival (2 August 2025).

⁷ At [41].

⁸ A Way Forward-Final report into the destruction of Indigenous heritage sites at Juukan Gorge (2021), recommendations.

- b. Reforms should set out the minimum standards consistent with relevant international law (including the United Nations Declaration on the Rights of Indigenous People UNDRIP);⁹
 - c. Mechanisms for native title holders and claimants to seek review or appeal of decisions and adequate compliance, enforcement and transparency mechanisms.¹⁰
20. The following three recommendations have also been adopted from the Juukan Gorge final report:¹¹
- a. 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 of the Rights of Indigenous People (UNDRIP);
 - b. ‘Gag clauses’ and clauses restricting Aboriginal and Torres Strait Islander peoples access to legal and other remedies should be prohibited;
 - c. Making explicit the authority and responsibilities of PBCs and claimants in relation to attending to future acts.
21. KMY further recommends:
- a. That the Commonwealth government engage with NTRBs, PBCs and claim groups through a process of co-design on proposed reforms to the future act regime;
 - b. Develop through a process of co-design with PBCs and claim groups a framework for the expenditure of the \$75 million in extra Commonwealth native title funding to support culturally appropriate governance, management of risk, and preservation of cultural integrity, along with the advancement of principles for a methodology for the quantification of compensation and cultural loss with a holistic approach for the purpose of community development and to address the concerns at paragraph [279] and onwards of the Discussion Paper;
 - c. Recognition that the Traditional Owners are the native title holders of their country and are also the Aboriginal Party of the land and waters in and around the determination area under the *Aboriginal Cultural Heritage Act 2003* (Qld);
 - d. *Free, prior and informed consent* – Legally binding processes to be agreed as to how a proponent can obtain free, prior and informed consent. The native title holders free, prior and informed consent to the proponent’s project will be demonstrated by a party’s entry into an agreement recognising the FPIC processes and its terms;
 - e. *Communication* - Information sharing, processes for ongoing communication, culturally appropriate implementation of agreement/s and notification/engagement. Processes for resolving differences. Agreements should seek to promote ongoing

⁹ Juukan Gorge Report at Recommendation [4], para. 7.79.

¹⁰ Juukan Gorge Report at Recommendation [4], para. 7.80.

¹¹ Recommendation [4], para. 7.89.

communication between the parties and the maintenance of a good working relationship;

- f. *Resourcing* - Financial support and adequate resourcing to be provided to PBC and claim groups for their participation and services including the involvement of appropriate professional advisors.

22. Thank you for the opportunity to make these submissions and KMY and Saylor Legal are willing to converse with the ALRC if requested to do so.

Yours faithfully



David Saylor
Principal
Saylor Legal