

Australian Law Reform Commission Review of the Future Acts Regime

Submission from the South Australian Government
July 2025



Submission to ALRC Review of the Future Acts Regime - Discussion Paper

Native title in South Australia

To date over 50 per cent of South Australia's total geographical area of around 983,482 square kilometres has been determined to be subject to native title.¹

The South Australian Government recognises the considerable processes that native title holders undertook to achieve this widespread legal recognition in South Australia.

The South Australian Government recognises the capacity of the native title system to contribute significantly to social, cultural, environmental and economic outcomes for First Nations people and, within that system, for the future acts regime to facilitate economic and social activities on native title land for the benefit of First Nations people and the South Australian community at-large.

In South Australia there has been a longstanding commitment to resolve native title through negotiation and consent rather than litigation. To date there have been 39 native title claim determinations made under that policy, 31 of which been accompanied by an agreement resolving the issue of compensation and many of which have included agreed alternative processes for undertaking future acts on native title land.

South Australia is the only state to currently have alternative right to negotiate provisions approved under section 43 of the *Native Title Act 1993* (NTA) and to have an alternative body, other than the National Native Title Tribunal (Tribunal), recognised for arbitral decisions in relation to negotiations under the *Mining Act 1971* (SA), *Opal Mining Act 1995* (SA) and *Land Acquisition Act 1969* (SA).

Resourcing and capability

In South Australia's experience, inadequate resourcing of parties, but particularly of Prescribed Bodies Corporate (PBCs), impedes the efficient operation of the future acts regime and the full realisation of its objectives.

The South Australian Government agrees that resourcing and capability of parties are critical for the future acts regime to operate fairly, effectively, and efficiently and for the regime to achieve its objectives of protecting the rights and interests of native title holders and facilitating future activities on native title land. It is important that PBCs are adequately resourced to achieve these objectives regardless of any compensation outcomes. South Australia continues to advocate for the Australian Government to contribute greater funding for PBCs to bolster PBC capacity and capability to interact with the future acts

¹ Comprising over 544,000 square kilometres, or about 56%, of the State's total geographic area. This excludes areas of Aboriginal lands, not within the scope of the future acts regime, which areas taken together contribute to a total over 74 per cent of South Australia's area being subject to Aboriginal rights and interests.

regime. South Australia supports the Discussion Paper proposal for adequate Commonwealth funding of the Tribunal to ensure the efficient operation of the regime.

Proposed reforms to the NTA future acts regime – General comment

To facilitate economic and social activities on native title land, and protect the rights and interests of native title holders, it is important for all stakeholders that the future acts regime in the NTA promotes certainty and efficiency in relation to future land use in areas of determined native title.

Standing instructions

The Discussion Paper proposal to expand the use of standing instructions given by common law holders to PBCs for entering into agreements for more types of future acts would be a welcome improvement and should reduce costs and increase efficiency in agreement-making.

Conduct and content standards

South Australia generally supports the proposed inclusion of conduct and content standards to apply to negotiations and agreements, including a standard to negotiate in good faith. The proposal that proponents fund native title parties in negotiations (including funding the native title parties' independent advice) may be problematic in some circumstances, however, and should not be framed as a requirement.

Mandatory standards for agreements to prohibit unfair clauses, such as 'gag clauses', as well as robust dispute resolution mechanisms, as outlined in the Discussion Paper will provide for fairer and more equitable agreement-making. The inclusion of such requirements into native title agreements could be a means of more closely aligning the requirements of the NTA with those of approvable agreements under Division A2 of the *Aboriginal Heritage Act 1988* (SA) (AHA). The interaction with the AHA is discussed further below.

Native title management plans

The Discussion Paper asks whether the NTA should be amended to enable PBCs to develop management plans (subject to a registration process) that provide alternative procedures for how future acts can be validated in the relevant determined area. Referred to as 'Native Title Management Plans' (NTMPs), these arrangements are intended to operate alongside Indigenous Land Use Agreements (ILUAs) and the generally applicable statutory procedures. An NTMP would override the usual statutory procedures in relation to the future acts it covers.

It is proposed that the State would have a right to make submissions on the NTMP to the Tribunal on whether the NTMP should be registered. However, it is unclear what weight would be given to such submissions or what test the Tribunal would apply in considering registration of an NTMP.

South Australia acknowledges that NTMPs could allow procedures to be tailored to suit particular areas or groups and may address existing gaps in the future act regime. South Australia supports agreement making and, with appropriate design, NTMPs could serve a beneficial purpose to set out a PBCs'

interests in exploring certain development opportunities and proposed streamlined processes for agreement-making that could improve the efficiency of the future act regime.

However, depending on design, they could result in additional costs and procedural requirements for State agencies and others undertaking activities on native title land. How NTMPs operate in practice would appear to depend on the conditions that PBCs choose to set, and how any legislation is ultimately framed. Further, as NTMPs will be voluntary and potentially resource intensive, they may not provide the certainty intended unless PBCs are supported adequately, as discussed above in this submission.

As currently proposed, the NTMPs would appear to allow PBCs to withhold consent to certain future acts, with developers (or in most cases the State as the grantee of rights in respect of the future acts) required to apply to the Tribunal to seek a determination to allow that future act. This is likely to lead to greater uncertainty than is currently the case with negotiating or engaging with PBCs.

Any scheme that impacts the ability of the State to provide core public infrastructure and services would require careful consideration. Similarly, if it is proposed that PBCs could impose conditions on (or withhold consent to) legislative acts of general application, this could constrain the State's capacity to perform its legislative functions in a timely and effective manner and would not be supported.

New impact-based statutory procedure

Where a future act is not covered by an ILUA or NTMP, the Discussion Paper proposes replacing the existing future act procedures with a new impact-based approach. Under this approach, the party proposing the act must assess its impact on native title to determine which procedural right applies, either a right to consultation or a right to negotiate.

The Discussion Paper acknowledges that guidance would be required to assist parties in considering the impact of a future act and suggests some criteria that might be used to inform such assessments. To ensure process certainty, a clear, objective and consistently applicable framework would need to be developed for making such determinations.

Changes to right to negotiate

If enacted, the proposed model would broaden the scope of the right to negotiate, which currently only applies to mining and certain compulsory acquisitions. Although the Discussion Paper contemplates the possibility of carve outs for some acts (such as public infrastructure and facilities, or acts involving compulsory acquisition of native title rights and interests), any proposed reforms of the right to negotiate procedures will need to strike a balance between expanding the regime and minimising procedural complexity for all stakeholders. The proposal appears to contemplate protracted processes of up to 18 months' duration.

Impacts on State Aboriginal heritage legislation

The Discussion Paper proposals would appear to have impacts on the AHA.

Under the AHA, South Australia's Minister for Aboriginal Affairs has functions including, under section 24 of the AHA, to issue directions for the protection or preservation of Aboriginal heritage and also to

approve certain agreements that ‘satisfactorily deal with Aboriginal heritage’ under AHA Division A1 and Division A2 (certain native title agreements).

The Discussion Paper argues that the proposed NTMPs may incorporate a means to address cultural heritage law in addition to native title, which would displace otherwise applicable state or territory legislation. This suggests PBCs could preclude in their NTMPs certain future acts impacting on Aboriginal heritage, seemingly without input from the State or the development proponent, or potentially without input from other traditional owners with interest in the relevant heritage. State processes and guidelines may be overridden by this new NTMP instrument.

The Discussion Paper also canvases options for amendments to the NTA to give native title holders a primary role in heritage decision-making, including requiring native title holder consent where a future act will significantly impact on a culturally sensitive site and protection of heritage is a recognised native title right. Again, the intention appears to be that the operation of the AHA would be displaced in such cases, impacting not only on the State’s power to grant authorisations allowing developers to interfere with Aboriginal heritage, but also potentially preventing Ministerial directions aimed at protecting heritage, with this potentially leading to inconsistent heritage protection across the State.

Any reforms to the future acts regime that displace the operation of state Aboriginal heritage laws should be considered in the context of the broader reforms to the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), and any consequential effects of those reforms on the states’ Aboriginal heritage protection legislation. This will allow a comprehensive and cohesive approach to addressing cultural heritage laws and native title, which considers the legal framework in its totality, rather than in the narrow context of the future acts regime.

Impacts on State Mining legislation

As identified on page 1 of this Submission, South Australia is the only State with an alternative right to negotiate processes in place for mining activities (pursuant to Part 9B of the *Mining Act 1971* and Part 7 of the *Opal Mining Act 1995*). Part 9B and Part 7 were subject to accreditation and determination by the Commonwealth.

The Commonwealth would need to work closely with South Australia if taking a decision to repeal section 43 of the NTA to ensure appropriate and considered impact analysis and implementation, noting the State legislative status of these alternative processes and that such a decision would directly impact mining operations in South Australia.

Proposed reforms – specific comments

Question 10 – allow parties to amend agreements - is supported.

Question 23 – prescribe in more detail information to be included in a future act notice - is supported.

Proposal 18 – Australian Government establish specifically resourced First Nations advisory group - is supported.

Discussion Paper Part 4 – Native Title Management Plans (NTMP)

- There is a high potential for inequity between PBCs in terms of those who may have the funding, time, capability and capacity (and Traditional Owner community agreement) to undertake this pathway. Many PBCs in South Australia will not be in a position to prepare NTMPs without substantial support and resourcing.
- Alignment with existing Indigenous Land Use Agreements (ILUAs) should be considered when evaluating the registration of a NTMP. Point 52 in the Discussion Paper outlines that a pre-existing or subsequent ILUA may take precedence over an NTMP. This suggests the potential for a complicated situation to arise where a NTMP and ILUA apply to different aspects or considerations of a single project.

Discussion Paper Part 5 – Promoting fair and equitable agreements

- Para 79 includes a proposal that government parties and proponents make available certain information at the outset of agreement negotiations, including environmental reports. However, the timing of initiating negotiation with the PBC may well mean that detailed environmental information is not available at the outset of those negotiations. Detailed environmental investigations are often expensive and take time to complete. As negotiations can be a lengthy process, they can be expected to commence before detailed environmental information is available.

Discussion Paper Part 6 - Reshaping the statutory procedures

- An impact-based model is a familiar model for Government in relation to Aboriginal heritage. Noting the lack of detail at this stage, this may well be a suitable path for consideration.
- The proposed exclusion of public infrastructure such as that defined under s24KA of the NTA (considered in Question 15) is supported. If concerns were raised about a total exclusion, there could be consideration of capping the scale of impact that still meets an exclusion pathway. The SA Government would wish to be involved in any further considerations relating to exclusions.
- The SA Government supports consideration for the significance of the impact of water use as a future act impacting native title rights and interests outside of the immediate footprint. Consideration of this would likely require additional modelling and risk assessment, and therefore will need detailed guidance. Use of a readily available, comprehensive geospatial mapping system would assist in determining future act impacts associated with water use. There is potential that modelling water use impact on native title interests could also have a sustainability benefit by further promoting a reduction in water use. It is expected that any change to this aspect would need to be linked into State water licensing and permitting processes.

Discussion Paper Part 8 – Resourcing, costs and implementation

- Proposed provision of a perpetual capital fund for the purposes of funding core operations of PBCs (considered in Proposal 14) is supported, including as this would assist in ensuring equity and fairness across PBCs.
- Provision of adequate funding to the Tribunal to better facilitate and support PBCs (considered in Proposal 16) is supported.

Conclusion

The South Australian Government appreciates this opportunity to provide input into the Australian Law Reform Commission's review of the future acts regime and welcomes consideration of these comments.