

STATE ABORIGINAL HERITAGE COMMITTEE

By email only: nativetitle@alrc.gov.au

Submission – Review of the Future Acts Regime

To the Australian Law Reform Commission

To whom it may concern

Members of the State Aboriginal Heritage Committee (Committee) appreciate the opportunity to make submission on the Australian Law Reform Commission's (ALRC's) Discussion Paper (Paper).

Who we are

The Committee is established under section 7 of the *Aboriginal Heritage Act 1988* (SA) (Heritage Act), which protects all Aboriginal sites, objects and remains (together, heritage) in South Australia.

Members of the Committee are Aboriginal people resident in South Australia. To the extent practicable, members must be drawn from all parts of the state to represent the interests of all South Australian Aboriginal people in the protection of their Aboriginal cultural heritage. Membership is gender balanced to the extent possible, so that matters of gender-based cultural sensitivity may be considered appropriately.

What we do

The Committee is an advisory body to the Minister for Aboriginal Affairs (Minister) who is responsible for the Heritage Act.

The Committee's advice relates to the functions of the Minister under the Act, such as where the Minister is considering giving a determination or an authorisation (to impact Aboriginal cultural heritage). The Committee may also advise the Minister of its own volition about matters concerning the protection of Aboriginal heritage.

The Committee is also a decision maker, approving the appointment of Recognised Aboriginal Representative Bodies (RARBs) under the Heritage Act.

A RARB is generally a registered native title body corporate (PBC) which is committed to protecting Aboriginal heritage within its determined lands, not least by enfranchising all Traditional Owners for the Aboriginal heritage, including those who are not its members but Aboriginal people who assert traditional interests in the Aboriginal heritage to ensure that all relevant voices and knowledge are brought to bear when agreements to potentially impact Aboriginal heritage are being negotiated.

Native title in South Australia

For a long time now, native title has been determined on the basis of agreement rather than litigation. Overlapping claims, of which there have been many, have been resolved by parties

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withdrawing claims to agreed boundaries or by agreed outcomes that merge overlapping claims into group determinations.

Within some group determinations, primacy of certain cultural interests is recognised for groups within the collective over certain areas within the broader determination area. When PBCs were incorporated, rule books established that board representation would reflect the groups equally. This continues to be variously observed.

In some instances where a claimant party was required to reduce a claim area, they have not forgone their interests in the cultural heritage that they asserted in the areas they ceded.

Those traditional interests have been recognised under 'good neighbour' agreements or memoranda of understanding (MOUs) between the native title claimant party who succeeded over that Country and the ceding party. Such agreements or MOUs afford non-native title Traditional Owners rights such as the right to be notified of intended developments or agreements; the right to be scoped into surveys and/or heritage monitoring regimes and other entitlements on the native title land. In some instances, a right to share in any benefits derived from agreement making have been legally acknowledged.

The Committee's submission

As Committee members are focussed on the protection of Aboriginal cultural heritage, this submission is limited to the opportunities that the proposed reforms to the future act regime do or do not, in our view, present to enhance the protection of cultural heritage.

Q 6 Should the NTA 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?

The Committee notes that resourcing would be a key consideration for the introduction of Native Title Management Plans (NTMPs).

Such resourcing considerations would come within the context of many others, as the Paper notes that PBCs are already under significant pressure to meet the procedural requirements/opportunities of the *Native Title Act 1993* (Cth) (NTA).

Further, the Committee notes:

- no Aboriginal person with traditional interests in the cultural heritage is intended to be enfranchised
- it is proposed that general mapping may be included for areas "where native title parties wish to withhold their consent to the doing of particular future acts."

Mapping does not appear to be a proposition for areas where native title parties may consent to the doing of particular future acts.

While the Committee appreciates that, ideally, cultural mapping should underpin the preservation of knowledge of heritage sites, objects, landscapes and stories, it is standard cultural heritage protection practice that surveys are undertaken in the context of proposed developments in order to understand the cultural heritage landscape, including the risk of discoveries, and coupling this with an understanding of

the intersection(s) between the cultural heritage and risk and any proposed activity footprint. This understanding facilitates wherever possible efforts to avoid impacts to the cultural heritage. Where there is no flexibility, then approval or authorisation under the Heritage Act to impact heritage must be sought

- it appears to the Committee that the proposal to limit cultural heritage mapping to areas where a PBC may seek to withhold consent is not concerned with cultural heritage protection but is intended to provide evidence should a proponent party seek a determination from the National Native Title Tribunal (NNTT) to overturn the PBC's position.

At paragraph 63, the Paper presents the following proposition:

Legislation establishing NTMPs may incorporate a means to address cultural heritage law in addition to native title, such as through Commonwealth legislation to displace applicable state or territory legislation. From a proponent's perspective, following the processes set out in an NTMP could address both native title and cultural heritage law compliance.

The Committee is mindful that cultural heritage legislation across jurisdictions varies widely, and protections are often inadequate.

The Committee also acknowledges that the proposed NTMP model has an element of First Nations Peoples' self-determination informing it.

However, the NTMP model still appears to be development centric and, at least in part, is a proposition to ease compliance requirements for proponents.

NTMPs do not appear to be mandated, sitting alongside indigenous land use agreements (ILUAs) where an NTMP has not been developed and registered.

Is it possible that this may create an unworkable patchwork for proponents to navigate where they seek to implement an activity that crosses multiple native title boundaries?

The Committee notes that, under the proposed impact assessed model (Q 14), it may only apply where visitation and protection of cultural heritage sites is a determined native title right and interest. No such caveat appears to be proposed for NTMPs.

While current cultural heritage protection legislation does not require the desired early engagement, or adequate heritage protection management procedures, or the agreement of the Traditional Owners for the cultural heritage to impacts, the laws of the states and territories nevertheless generally provide that

- a) cultural heritage is protected
- b) permission, approval or authorisation is required to impact cultural heritage
- c) alleged breaches of legislated protections are available to be prosecuted, generally attracting substantial fines.

The Heritage Act was amended in January 2025, including the following enhancements:

- substantially increased penalties
- a new offence with a lower standard of evidence required for successful prosecution

- the requirement to report new information about cultural heritage in authorisation contexts
- new powers for inspectors appointed under the Heritage Act.

The NTMP model as proposed contains no compliance provisions beyond the potential for a compliance certificate from a PBC which would be a party to any agreement struck to validate a future act.

The NTMP model proposes no penalties for breaches. While a review schedule is anticipated, there is no proposal for immediate action under an NTMP where new information (about the known heritage or a discovery) becomes available that may alter the position of the native title holders on development taking place within a certain area.

Under amendments to the Heritage Act enacted earlier this year, in addition to the ability of the Minister to issue directions to protect cultural heritage, there is now a requirement to immediately report new information within authorisation contexts so the Minister may consider appropriate actions in response.

Maintenance of state and territory heritage protection regimes is also a form of insurance. The Committee is mindful that Australia is a vast continent and no entity has a lens over what is happening within its farthest or innermost reaches.

At least the maintenance of state and territory heritage legislation and its compliance and penalty regimes may give pause to proponents who may believe that native title agreements, absent a right of veto by First Nations People, may afford an opportunity to impact cultural heritage without detection or censure.

The Paper proposes that NTMPs would require to be registered, with the NNTT the potential registering authority. Considerations for registrability put forward include an examination of whether “an NTMP is consistent with, and faithful to, the objectives of the future acts regime and the NTA as a whole.” The proposed assessment criteria does not include an examination of whether cultural heritage is adequately protected or even considered in line with the traditions of the relevant group.

The *A Way Forward* report¹ stated that:

6.50 Native title law does not inherently protect Aboriginal cultural heritage in an enforceable way which would prevent the destruction that occurred at Juukan Gorge.

The *A Way Forward* report acknowledged the primacy status of native title holders within their determined lands. It nevertheless called for substantive review of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (ATSIPH Act) to establish a framework of principles for the protection of First Nations Peoples’ cultural heritage, and the formulation of standards of cultural heritage protections that all state and territory heritage protection legislation must incorporate and meet.

¹ *A Way Forward* – Final report into the destruction of Indigenous heritage sites at Juukan Gorge, Joint Standing Committee on Northern Australia

Several years have passed since the Commonwealth last engaged with us on any proposal to reform the ATSIPH Act and establish standards.

Q 7 Should the NTA be amended to provide for mandatory conduct standards applicable to negotiations and content standards for agreements, and if so, what should those standards be?

The Committee supports in principle all the proposed conduct and content standards proposed within the Paper.

With respect to conduct standards, the Committee seeks that the proposal around standards of information to be shared with First Nations People be expanded to include that:

- a) translation services be provided where English is not their first language
- b) highly technical concepts within the information provided are made accessible and comprehensible
- c) the information is comprehensive and relevant to satisfy the standard of 'Free Prior and Informed Consent'.

The Committee supports that satisfaction of the standards, rather than their "inclusion" be a "precondition for registration of an agreement with the NNTT." This will require some form of statement, either from the native title party or an individual evaluation, attesting to the fair and equitable treatment of the First Nations party.

Q 8 Should the NTA expressly regulate ancillary agreements and other common law contracts as part of agreement-making frameworks under the future acts regime?

It is the view of the Committee that transparency is essential so that trust in the future acts regime may be built, if not restored, particularly where ancillary and other common law agreements may have historically dealt with such matters as cultural heritage and have remained "confidential to the exclusion of common law holders."

Further, should it be argued successfully that such agreements are required, then certain matters, including how cultural heritage is to be protected and managed, should be dealt with in "a 'head agreement'".

The Paper also references "common law contracts or agreements that are neither agreements under the NTA nor ancillary agreements that may be used to agree native title matters, including 'claim-wide agreements' that provide for...consent to all future acts within the determination area without the need for compliance with NTA requirements (such as the right to negotiate); and exploration 'side or top-up agreements' in exchange for...consent to the expedited procedure applying."

It is the Committee's view that such agreements where they exist must be viewed as further evidence of the unequal bargaining position of First Nations People under the NTA and that they may be disguising treatment of cultural heritage that is not adequate or appropriate.

Q 14 – Should Part 2 Division 3 Subdivisions G-N of the NTA be repealed and replaced with a revised system for identifying the rights and obligations of all parties in relation to all future acts, which:

a. categorises future acts according to the impact of a future act on native title rights and interests

d. provides that the categorisation determines the rights that must be afforded to native title parties...

The proposals under this question are generally beyond the remit of the Committee. As a result the Committee is limiting its comments to points a) and d) above.

The Committee supports the consideration of the following:

147. ...An impact-based model would also address several practical issues, including:

- the desirability of procedural requirements applying whether a future act is done onshore or offshore, or on different kinds of land tenure.

163. Specific changes could be made to Part 2 Division 3 Subdivisions G-N of the NTA, including that:

- as a minimum, the right to comment be accompanied by an obligation for those comments to be considered (or responded to) by the government party and provided to the proponent.

167. If an impact-based model was adopted, it may be necessary to provide exclusions in relation to:

- infrastructure and facilities for the public;
- compulsory acquisitions;
- existing provisions that provide for/enable special procedures for certain kinds of mining rights (ss 26A-26D)
- acts proposed by, or for the benefit of, native title holders in their determination area.

Q 16 Should the NTA be amended to account for the impacts that future acts may have on native title rights and interests in areas outside of the immediate footprint of the future act?

The Paper proposes that the impacts referred to under this question relate most often to future acts relating to water, in that the grant of a water entitlement may affect the native title rights and interests of First Nations People in areas that are both in the primary location of the future act or further away.

The Committee is mindful of those Aboriginal people in South Australia for whom the flow of water has significant cultural value. It is generally the flow, rather than the actual existence of water, which enlivens the spirit bodies and the stories that inform the cultural landscapes e.g. the Murray River and the Basin; the mound springs and 'bubblers' of the Far North.

The Committee supports this proposal.

Q 18 What test should be applied by the National Native Title Tribunal when determining whether a future act can be done if a native title party objects to the doing of the future act?

Under this proposal, a number of options are put that involve cultural heritage considerations.

In the Committee's experience, where First Nations People object to an activity on their land, they do so in the interests of protecting cultural values of landscape or specific cultural sites. This is not an unreasonable position to be taken by First Nations People where their cultural responsibilities include that they protect and care for Country and its significance to them.

One option proposes an assessment of whether the doing of a future act presents "a real risk of substantial and irreparable harm."

The Committee seeks to understand how you may repair a cultural landscape or significant cultural site.

Paragraph 220 proposes the closest approximation to a 'veto' power for First Nations People within the Paper in that, where the NNTT may determine that a future act cannot be done, a PBC "would not be required to negotiate about the same or a substantially similar future act in the same location until five years after the date of the NNTT decision..."

The Committee notes that the proposed amendment does not call for a proponent to have learned anything within the five-year period, including that they may have engaged meaningfully with First Nations People to understand the basis for their objection, and to, where practicable, have taken all reasonable steps to respond to the reasons why Traditional Owners objected to the future act being done in the first place.

Forever, First Nations People have sought that it be understood that 'no' means 'no'. Absent the right of veto, recommended in the *A Way Forward* report, it appears to be intended that reasonable positions taken by First Nations People to object to certain developments in certain places on Country will continue to either be contested or ignored.

Q 28 Should the Native Title Act 1993 (Cth) be amended to provide for requirements and processes to manage the impacts of future acts on Aboriginal and Torres Strait Islander cultural heritage, and if so, how?

Paragraph 329 proposes that "...reforms to the future acts' regime arising out of this Inquiry present an opportunity to better align the legal regimes relating to native title and cultural heritage."

The Paper continues at paragraph 332 that:

Presently, the potential impacts of future acts on First Nations' cultural heritage are often managed through future acts agreements or acknowledged through processes such as the expedited procedure. However, these agreements / processes do not necessarily address the requirements of heritage legislation. This can have negative consequences such as duplication, uncertainty, conflict, and increased costs / delays for all parties. Better aligning the future acts regime and cultural heritage laws could help to ameliorate these issues.

The Paper appears to suggest that what is happening on Country is the management of "potential impacts" and not, as may be the case, that First Nations cultural heritage and cultural values are being irreparably damaged with impunity. The Committee is aware that some proponents may view that native title agreements licence them to impact cultural values and, with their operations occurring remotely, the risk of detection is low.

The proposition put at Q 14 does not note that most state and territory legislative regimes are intended to protect cultural heritage, where the future acts regime concerns itself with agreement making to validate acts that may impact cultural heritage and that the proposal only references the management of impacts, not protection.

For decades, the momentum of development has been increasing. For decades, First Nations People have called for investment in their communities, so that they may establish new pathways for their futures through opportunities other than reliance on development and its meagre offerings.

While ever the imbalance holds, First Nations People and the cultural heritage that many of them value will be collateral damage from the contest for Country.

The options for reform proposed at paragraph 333 include that, where native title is determined, a statutory right would be enlivened for “the relevant PBC to have a primary role in making decisions with respect to cultural heritage for the determination area”

This is self-determination, but without guardrails.

Paragraph 333 does not propose an alternative where care for or protection of cultural heritage is not a determined right or interest.

PBCs are not homogenous. They aspire to futures according to their own visions. Some seek to cohere around their cultural traditions that inform their collective identity. They appoint directors who have cultural knowledge or establish cultural sub-committees of Elders to provide relevant advice. Other PBCs hold visions and aspirations for the future they see for their communities, which may be more aligned towards business or entrepreneurial activity.

A PBC will be a party to any agreement or author of an NTMP that validates the doing of any future act. How will any real or perceived conflicts of interest be managed?

As Committee members, even where we are providing advice rather than being decision-makers, we declare all perceived and real interests, along with those of family and associates.

As the Committee commented earlier, absent comprehensive cultural mapping, decisions about cultural heritage may be made in ignorance.

Comprehensive cultural mapping has proven to be beyond the will and resources of all jurisdictions until relatively recently. The Western Australian Government has embarked on a 10-year *Aboriginal Heritage Survey Program* of unsurveyed areas in high priority areas in WA at a proposed cost of millions of dollars.

In response to Q28 the Paper further proposes that an amendment to the future acts regime could:

require the government party/proponent of any future act to obtain the consent of the relevant PBC to a significant impact to a culturally sensitive site, such consent not to be unreasonably withheld, where protection of culturally important sites is a determined native title right.

The Committee notes that the caveat *where protection of culturally important sites is a determined native title right* is not included in the first proposal providing a statutory right to

any relevant PBC to have a primary role in making decisions with respect to cultural heritage for the determination area.

The Committee seeks to understand if the caveat would require an interrogation of each determination to understand where protection of culturally important sites is a determined native title right.

In both circumstances, how will Traditional Owner interests in cultural heritage be enfranchised where they are not native title holders but have legal rights or customary/traditional interests in the cultural heritage.

Paragraph 333 proposes options to supplant state and territory legal obligations to protect cultural heritage, or to manage it appropriately through:

- an ILUA or other kind of agreement, where specified criteria are met
- prescribing a set of mandatory conditions to manage the impact of future acts on First Nations' cultural heritage (which could override the applicable state or territory cultural heritage law to the extent of inconsistency), and
- prohibiting significant impacts on significant sites without approval of the Commonwealth Minister.

In the Committee's view, these proposed options raise more questions than they answer:

- 1) What will be the specified criteria and by whom will they be set?

The Paper has already noted that state and territory cultural heritage legislative frameworks vary widely.

There have also been calls over time for the definitions of cultural heritage within those frameworks to be broadened, the definitions to be based on meanings informed by First Nations Peoples' knowledge.

In the context of legislation where the greatest procedural right afforded to First Nations Peoples is the right to negotiate agreements, is the NTA the platform for substantive reforms such as redefining cultural heritage.

- 2) ILUAs are often outdated, template agreements that inadequately provide for the adequate protection and management of cultural heritage.

This may be a result of the ongoing cautionary influence of state and territory legislation, although the Committee has previously noted circumstances where proponents rely on ILUAs and other native title agreements to impact cultural heritage.

Absent the influence of state and territory legislation, how robust would a regime solely reliant on agreements be. While the Paper proposes amendments to address in part the inequality in bargaining power suffered by First Nations People, it will nevertheless remain that the playing field will not be even, and that First Nations People may have to accept agreements they do not consider adequate.

No matter how robust any set of mandatory conditions may be, what entity exists or will be created to monitor and ensure compliance.

It is proposed that where there is an inconsistency between state and territory legislation and prescribed mandatory conditions, the mandated conditions will prevail.

Should the inconsistency be that the state/territory law is intended to protect the cultural heritage while the NTA proposes allowing impacts, how is the inconsistency to be reconciled. The Committee would argue in favour of protection.

No penalty regime is proposed.

- 3) Will First Nations Peoples' knowledge inform what is a "significant" impact to particular cultural heritage. A First Nations person's assessment may not align with the criteria of one who does not hold their cultural knowledge.

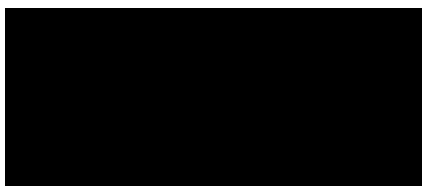
Will it be available to concerned Traditional Owners within a native title holding group to appeal to the Commonwealth Minister where their PBC has agreed to "significant impacts on significant sites" and they seek to object, or is this proposal only intended for frustrated proponents, including governments?

It has been commented upon elsewhere that applications to the Commonwealth Minister under the ATSIPH Act may take years to be decided. Centralising ultimate decision making powers with a federal entity will cause delays that Traditional Owners, governments and other proponents alike may find intolerable.

What will the Commonwealth Minister be entitled to consider in coming to a decision?

If it is the same threshold as state and territory ministers, or the NNTT, in that they are able to consider broader economic and other considerations, then ultimately, is the proposed reform meaningful?

Yours faithfully



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State Aboriginal Heritage Committee
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