



Submission to the Australian Law Reform Commission on the Review of the Future Acts Regime Discussion Paper (2025)

Dr Katie O'Bryan

Senior Lecturer, Faculty of Law, Monash University

Member, Castan Centre for Human Rights Law

10 July 2025

Dear Australian Law Reform Commission

Thank you for the opportunity to make a submission on the Review of the Future Acts Regime Discussion Paper.

I am a senior lecturer in the Faculty of Law at Monash University and a member of the Castan Centre for Human Rights law. Prior to becoming an academic, I was a native title practitioner, working for native title claim groups in both Western Australia and Victoria.

I make this submission as a legal academic of settler origin and in that respect, I do not attempt to speak for any First Nations peoples or organisations. Rather, I speak concerning the capacity of the Australian (colonial) legal system to deliver justice for First Nations peoples. I acknowledge that First Nations peoples hold the cultural authority, expertise and responsibility to speak for and care for Country.

I also acknowledge that I live, work and research on the unceded lands of the Wurundjeri and Boonwurrung/Bunurong people of the Kulin Nation and pay my respects to their Elders, past and present. I thank them for their continuing custodianship of Naarm.

My submission will be largely focused on the questions and proposals relevant to water, as my academic research to date has focussed on First Nations water rights.

The Future Act Regime and Water

I begin by noting that the 2015 ALRC Native Title Report¹ had very little to say about native title and water and was overt in making no specific recommendations in relation to

¹ Connection to Country: Review of the *Native Title Act 1993* (Cth) (ALRC Report 126).

water.² This Review therefore provides an opportunity to remedy that omission, as far as possible within its terms of reference.

The significance of water to First Nations people is well established; it has spiritual, cultural and relational dimensions which are at odds with the emphasis in western water law and policy, including Australia's, on water as a resource.³ It is also well established that the treatment of First Nations water rights in the *Native Title Act 1993* (Cth) ('NTA') is (as I have described elsewhere) 'woefully inadequate'.⁴

The treatment of water in the future act provisions of the NTA, and in particular s 24HA, ignores the significance of water to First Nations people by providing for a very limited form of engagement before a future act relating to the management of water can proceed, namely a right to be notified and an opportunity to comment. However, this minimal right to be notified and opportunity to comment is also rendered meaningless given that there are no consequences if the procedure is not followed. Additionally, legislative measures are excluded from even this limited engagement. As such, the NTA in its current form perpetuates the myth of 'aqua nullius', a term used to describe the systemic disregard for the sovereign water rights and obligations of First Nations people in colonial-settler states.⁵

Accordingly, the future act regime should be amended so that native title rights and interests in water are appropriately recognised and protected, in accordance with the main object of the NTA, being 'to provide for the recognition and protection of native title'.⁶ Native title holders and claimants should also participate meaningfully in determining how those rights and interests should be recognised and protected, including rights to participate in the management of water. This would be consistent with articles 19 and 21 of the United Nations Declaration on the Rights of Indigenous Peoples ('UNDRIP').

I now turn to some of the specific questions posed in the discussion paper.

Question 14

This question proposes repealing Part 2 Division 3 Subdivisions G – N of the NTA and replacing it with an impact-based model. Subject to my comments below, I support replacing the current model with an impact-based model.

As set out in the discussion paper, the impact-based model has many advantages, not least being that the lowest form of engagement in the model proposed is the right to consultation, thus removing the ineffectual 'right to be notified and opportunity to

² ALRC Report 126, pp 248 – 249 and in particular para 8.105 in which the ALRC notes that 'In light of the many considerations around native title rights and interests in water, the ALRC makes no specific recommendation.'

³ See, eg, Virginia Marshall, *Overtaking Aqua Nullius: Securing Aboriginal Water Rights* (Aboriginal Studies Press, 2017) Chapter 2: 'We Belong to Water: Aboriginal Identity and Cultural Authority'.

⁴ Katie O'Bryan, *Indigenous Rights and Water Resource Management: Not Just Another Stakeholder* (Routledge, 2019) 88.

⁵ Virginia Marshall, *Overtaking Aqua Nullius: Securing Aboriginal Water Rights* (Aboriginal Studies Press, 2017).

⁶ Section 3(a).

comment’ procedural right noted above. Including future acts relating to water in this impact-based model raises the engagement level to one of consultation as a minimum requirement, an immediate improvement on the current s 24HA.

However, the discussion paper also notes that ‘the party proposing to do the future act – usually the government party – would determine the impact category’. This is problematic because the government party is likely to downplay the impact on native title rights and interests, or simply lacks the relevant knowledge to be able to make a proper assessment of the impact. In the case of a non-government party determining the impact category, this would be even more acute. It is only native title parties who have the requisite knowledge to assess the extent to which a future act will impact on their native title rights and interests and therefore to which impact category it should be assigned.

Question 14 does contemplate the ability for a native title party to go to the National Native Title Tribunal (‘NNTT’) to challenge the impact-based categorisation, however this, too, is problematic – the NNTT’s record in relation to future act determinations is indicative of how the system weighs heavily against native title parties, contrary to the main object of the NTA.⁷

To alleviate some of these issues, the discussion paper notes that guidelines relating to the categorisation of future acts as category A or category B ‘should be developed in consultation with key users of the native title system’. This presumably includes native title parties (for whom the term ‘users’ is, I suggest, an inadequate description of their role in the future act regime).

For guidelines to be effective, however, it is important that native title parties have a significant input into their development and will need to be adequately resourced for their participation. The First Nations advisory group contemplated by **Proposal 18** could potentially perform this role and should therefore be progressed as part of the reforms.

One of the factors in ‘Table 1: Impact categorisation’ to which particular attention will need to be paid in developing any guidelines is the concept of substantial impact. Whether a future act does, or does not, substantially impact native title rights and interests will likely have differing interpretations. Non-native title parties are more likely to seek a higher threshold for what amounts to a substantial impact, in order to limit the number of future acts falling into the more onerous Category B (right to negotiate) procedure.

The discussion paper also identified some potential challenges of an impact-based model, one being that a significant shift from the current model will mean a lack of familiarity for current users of the native title system. However, given that impact-based models exist in other legal regimes that users of the native title system are also likely to

⁷ A search on 07/07/2025 of the NNTT register of future act determinations (excluding objections to the expedited procedure) which were resolved by a hearing (excluding, eg, consent determinations) with the outcome that the future act must not be done returned 3 results, the most recent result being in 2011. In contrast, 61 determinations resulted in the outcome that the future act could be done subject to conditions, and 94 could be done with no conditions.

be required to follow (eg cultural heritage), unfamiliarity may not be as big an issue as suggested. Therefore, this challenge could likely be overcome with a staged transition, combined with educational resources.

Any new regime will take time for users of that regime to become acquainted with it. Accordingly, a lack of familiarity should not be a reason for not adopting a reform of the future act regime that has the potential to deliver more certainty and better outcomes for all participants in future act processes.

Another potential challenge identified is the increase in time and resource-intensive consultation or negotiation processes leading to capacity issues and practical challenges, particularly for native title parties. In relation to consultation, this could be addressed by having guidelines regarding the sufficiency of consultation, and in that respect, the discussion paper also notes that a national framework containing various consultation principles could be developed. Again, this national framework would need to be developed with significant input from First Nations people. And as above, the First Nations advisory group contemplated by **Proposal 18** could potentially perform this role and should therefore be progressed as part of the reforms.

As noted in the discussion paper, consultation fatigue is a real concern, as is the under-resourcing of NTRBs/SPs, as well as RNTBC/PBCs. In relation to RNTBC/PBCs, **Proposal 14** for a perpetual capital fund for the purposes of providing core operations funding to PBCs would go some way to alleviating these issues and should therefore be a core element of the reforms. Such funding could potentially be used by RNTBCs/PBCs to develop their own consultation protocols which could help to streamline consultations and therefore help in reducing consultation fatigue. More flexibility in the use of allocated funding by NTRBs/SPs, as contemplated by **Proposal 15**, may also assist and should therefore also be part of the reforms.

Question 16

This question asks whether the NTA should 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.

My answer to this question is a simple yes. Water in particular does not adhere to artificial lines on a map. As noted in the discussion paper, groundwater extraction can have an impact on places not necessarily in the immediate vicinity of the primary location of the future act.

By way of example, a similar issue (albeit in reverse) was identified a number of years ago in relation to the protection of Ban Ban Springs under site specific cultural heritage legislation in Queensland.⁸

⁸ In her comprehensive review of the *ATSIHP Act* in 1996, Elizabeth Evatt cited Ban Ban Springs in central Queensland as an example of the site specific limitations of state cultural heritage legislation in relation to the extraction of groundwater and its effect on water resources. In that example, the area of Ban Ban Springs was a place of cultural heritage significance which had been registered under the Queensland

Question 17

This question asks whether the NTA should be amended to firstly, exclude legislative acts from the impact-based model and instead apply tailored provisions and procedural requirements to them, and secondly that planning activities conducted under legislation (eg water management plans) can constitute future acts.

In relation to the first part of the question, legislation (and delegated legislation) does not fit neatly into the proposed impact-based model, in light of the list of factors set out in the model used to determine the relevant impact category. So although it may be preferable for the purposes of consistency to include legislative acts in the impact-based model, this may produce illogical results. Further, if a legislative act were to fall within Category B under the impact-based model, this could potentially have implications for parliamentary sovereignty.

In relation to the second part of the question, my view is that planning activities conducted under legislation, such as those related to water management, should be classified as future acts and addressed under the future act regime. This would provide native title parties with an opportunity to have a say (eg have a right to be consulted) in water management from a more holistic perspective, and earlier in the water allocation process.

Procedural compliance and notices.

The final part of the discussion paper I'd like to address relates to procedural compliance; a key concern identified in the discussion paper.

It is important that procedural requirements are complied with by government parties and proponents. The procedural requirements provide an opportunity for native title parties to advise of how a proposed future act will impact on their native title rights and interests so that those impacts can be mitigated or avoided. If native title parties are deprived of that opportunity due to non-compliance, this has the potential to result in a significant impact on native title rights and interests, thus undermining one of the main object of the NTA, being to provide for the recognition and protection of native title (s 3(a)).

Accordingly, I support **Proposal 10** that the NTA be amended to expressly provide that a government party's or proponent's compliance with procedural requirements is necessary for a future act to be valid.

In relation to the associated issue of notices, and in response to **Question 23**, more detailed requirements in a relevant determination, or a prescribed template, would assist

cultural heritage legislation (*Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987* (Qld)). An irrigation bore on a peanut farm was drying out the Springs, but because the location of the bore was not physically on the registered area, the legislation was unable to be used to protect the Springs from the pumping: Elizabeth Evatt, *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (22 August 1996) 278–9.

parties to provide better quality information. This may also contribute towards building better relationships between native title parties and government/third party proponents.

A central public register of future act notices as contemplated by **Proposal 11**, would also be of utility (as noted in the discussion paper) and should therefore be progressed as part of the reforms.

It should be borne in mind, however, that should a future act be challenged on the grounds of procedural non-compliance, it is possible that a proponent may seek to invoke the *Project Blue Sky* principle in response, particularly for what they perceive to be a minor breach. Under this principle, the court will ascertain parliament's intention as to whether non-compliance with the procedure is intended to result in invalidity. In doing so, the court will look beyond the particular provision and will consider the language of the statute, its subject matter and objects, and the consequences for the parties of non-compliance.⁹ This can be the case even when parliament expressly sets out its intention in the statute in relation to the consequences of non-compliance.¹⁰

⁹ *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355, 388 – 9 (McHugh, Gummow, Kirby and Hayne JJ).

¹⁰ *Federal Commissioner of Taxation v Futuris* (2008) 237 CLR 146, [23]. In this case, the section at issue (s 175 of the Tax Assessment Act) specifically stated that a failure to comply would *not* affect validity, ie the opposite of what is proposed in this review: 'The validity of any assessment shall not be affected by reason that any of the provisions of this Act have not been complied with.'