



National
Native Title
Council

*spirit
of
Change*

ABN 32 122 833 158

Submission to the Senate Economics Legislation Committee: Future Made in Australia Bills

The submission is made by the National Native Title Council (NNTC) to the Senate Economics Legislation Committee for inquiry into the provisions of Future Made in Australia Bill 2024 and the Future Made in Australia (Omnibus Amendments No. 1) Bill 2024.

The NNTC makes this submission in its capacity as the peak body for Australia's Native Title Organisations representing Native Title Representative Bodies and Service Providers (NTRB/SPs) and Registered Native Title Prescribed Bodies Corporate (PBCs) recognised under the Native Title Act 1993 (Cth) (NTA) and other comparable legal entities such as Traditional Owner Corporations recognised under the Victorian Traditional Owner Settlement Act 2010 (Vic) (TOSA).

The NNTC supports and advocates for First Nations people's right to true self-determination – their right to speak for and manage their own Country, to govern their own communities, to participate fully in decision-making and to self-determine their own social, cultural and economic development.

While the NNTC welcomes the opportunity to provide a submission to the Senate Economics Legislation Committee inquiry, the NNTC is concerned that the proposed Future Made in Australia legislation has not been properly consulted on with First Nations people and the Traditional Owner sector.

The scale of clean energy projects, transmission infrastructure, and critical minerals projects on native title and other Traditional Owners' land calls for deep consultation with First Nations communities. The Net Zero Australia study predicts that approximately 43% or an area of 50,000 square kilometres of new renewable energy and transmission infrastructure would need to be sited on the Indigenous Estate for Australia to get to net zero emissions by 2060.¹ Meanwhile, the Centre for Social Responsibility in Mining has found that 57.8% of critical minerals projects will be located in areas where First Nations communities have a legal right to negotiate (and 79.2% if native title claims are included).²

The proposed Future Made in Australia legislation presents a unique opportunity to set benchmarks for First Nations leadership of, participation in, and economic benefit from clean

¹ A Pascale et al, *Downscaling – Net-zero transitions, Australian communities, the land and sea*, Net Zero Australia, 2023.

² J Burton et al, *Mapping critical minerals projects and their intersection with Indigenous peoples' land rights in Australia*, Energy Research & Social Science 113 (2024) 103556.

energy projects. However, as currently framed, the legislation will not achieve robust economic development outcomes for First Nations people.

In addition to a proper consultation process on the legislation, the NNTC makes the following four recommendations:

1. Fund Traditional Owners to engage with project proponents

The NNTC recommends that Traditional Owners be provided funding to engage with project proponents.

While billions of dollars have been allocated to Future Made in Australia support, no funding has been earmarked to support Traditional Owners to engage with project proponents. Resourcing Traditional Owners, through their representative institutions, is crucial for the investment certainty needed for the myriad renewable energy and critical minerals projects Australia needs to achieve its net zero targets.

Proponents and investors currently face considerable delays and various legal, financial and reputational risks due to Traditional Owners' inability to meaningfully engage. This includes risks to cultural heritage and environmental destruction and a project's social licence to operate.

Prescribed Bodies Corporate (PBCs) are the representative corporations through which native title holders do business with governments and project proponents on matters concerning their Country. PBCs hold legal rights and interests to almost 50 percent of Australia's land and waters – there are currently over 269 PBCs across Australia and by 2026 this number is expected to exceed 300. The majority of PBCs are severely undercapitalised. 60% of PBCs are classified as small (less than \$100,000 in gross operating income) with many having little to no income, assets, and employees. As such, the majority of PBCs do not have the capacity to effectively engage with project proponents, including to access legal, financial and technical expertise needed to participate in negotiations about their Country, protect cultural heritage and environmental values, and ultimately provide their Free, Prior and Informed Consent (FPIC).

2. Include a separate community benefit principle focussed on First Nations communities, Traditional Owners, and the right to Free, Prior and Informed Consent

The NNTC recommends that the following point must be included in clause 10(3) of the Future Made in Australia Bill:

“seeking the consent of, engaging collaboratively with, and achieving positive outcomes for First Nations communities and Traditional Owners”

As presently framed, the community benefit principles do not adequately prioritise and focus decision-makers and proponents on achieving First Nations outcomes. Instead, the Bill combines local communities and First Nations communities in one principle. This does not reflect the unique circumstances facing First Nations communities and Traditional Owners that speak for Country.

With respect to FPIC, in November 2023, the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs published a report recommending the Commonwealth

Government ensure its policies and legislation on matters relating to Aboriginal and Torres Strait Islander people be consistent with the Articles of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which enshrines the right to Free, Prior and Informed Consent (FPIC), among other things.

FPIC refers to the right of Traditional Owners to participate in decision-making, and to give or withhold consent through their representative institutions to any project that would affect them their lands or resources. In the case of native title lands and waters, the relevant institutions are Prescribed Bodies Corporate (PBCs).

Various investor frameworks require businesses to obtain the FPIC of project-affected communities, including the IFC Performance Standards and the Equator Principles.

Including an FPIC requirement into the community benefit principles will help to create an enabling environment to attract better investments. FPIC mitigates legal, reputational and financial risks arising from the risk of First Nations cultural heritage destruction, environmental damage, and disputes around a project's social licence to operate, leading to delays and stranded assets. Left unmitigated, these risks undermine the Future Made in Australia economic development strategy to create jobs and infrastructure in the clean energy transition.

3. Ensure First Nations expertise and outcomes are part of Future Made in Australia decision-making, including at ARENA and EFA

The NNTC recommends that the Future Made in Australia (Omnibus Amendments No. 1) Bill include amendments to the Australian Renewable Energy Agency Act 2011 and Export Finance and Insurance Corporation Act 1991 to include a statutory requirement for First Nations representation on the Board.

Furthermore, the NNTC recommends that, given EFA's mandate is proposed to be widened to include domestic transactions, the following text must be inserted into sub-section 8(2)(b) of the Export Finance and Insurance Corporation Act 1991 to clarify what EFIC must have regard to in performing its functions:

"the need to ensure First Nations participation in and benefit from EFIC's national economy and net zero transformation functions."

Under the proposed legislation, Future Made in Australia plans will be developed on a project-by-project basis, including by the Boards of ARENA and Export Finance Australia, which will be referred to the Government for assessment. Without First Nations expertise on the Board and a clear institutional mandate, this process does not embed First Nations input at the crucial stages of Future Made in Australia decision-making.

To ensure more robust project plans, the statutes of both organisations should require First Nations people on their boards. There are various such examples of statutory requirements for First Nations members where statutory functions include both non-Indigenous-specific and Indigenous-specific matters. For example:

- The Australian Heritage Council is required to include 2 Indigenous persons with substantial experience or expertise in Indigenous heritage, at least one of whom must represent the interests of Indigenous people.

- The Murray Darling Basin Authority is required to include an Indigenous member with a high level of expertise in Indigenous matters relevant to Murray-Darling Basin water resources.
- The Wet Tropics Management Authority includes 2 Commonwealth-nominated directors at least one of which is required to be an Indigenous person with appropriate knowledge of, and experience in, the protection of cultural and natural heritage.

4. Extend the Guarantee of Origin Scheme to certify First Nations outcomes and FPIC

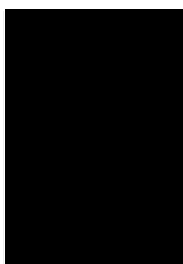
The NNTC recommends that a Guarantee of Origin Scheme include certifying projects against First Nations outcomes and FPIC.

The preamble to the Future Made in Australia Bill mentions a Guarantee of Origin Scheme that will certify renewable electricity and the emissions content of key industrial products and supports to create green product standards. This does not go far enough and needs to also be a tool for verifying whether First Nations outcomes and the right to FPIC is being achieved.

Launched in March 2024 by the First Nations Heritage Protection Alliance, the *Dhawura Ngilan* (Remembering Country) Business and Investor Guides are an example of a First Nations-led tool that could support in the verification of whether FPIC has been achieved.³

I look forward to discussing this advice with the Senate Economics Legislation Committee further, including in person.

Sincerely,



Jamie Lowe
CEO, National Native Title Council

³ Terri Jenke and Company Pty Ltd, 2024, *A Guide for Businesses and Investors - Dhawura Ngilan (Remembering Country): A Vision for Aboriginal and Torres Strait Islander Heritage*, Dhawura Ngilan Business and Investor Initiative, accessible at: https://culturalheritage.org.au/wp-content/uploads/2024/03/DNBII_BusinessesInvestorsGuide.pdf.