

NATIONAL NATIVE TITLE COUNCIL

# PBC FUTURES: ROADMAP TO REFORM

## FINAL REPORT



National  
Native Title  
Council

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## ABBREVIATION

<b>ACA Act</b>	<i>Aboriginal Councils and Associations Act 1976</i>
<b>AIATSIS</b>	Australian Institute of Aboriginal and Torres Strait Islander Studies
<b>ALGA</b>	Australian Local Government Association
<b>ALRC</b>	Australian Law Reform Commission
<b>BSF</b>	Basic Support Funding
<b>CA</b>	<i>Corporations Act 2001</i>
<b>CAEPR</b>	Centre of Aboriginal Economic Policy Research
<b>CATSI Act</b>	<i>Commonwealth (Aboriginal and Torres Strait Islander) Corporations 2006 Act</i>
<b>CERD</b>	International Convention on the Elimination of all forms of Racial Discrimination
<b>CLC</b>	Central Land Council
<b>COAG</b>	Council of Australian Governments
<b>FNHPA</b>	First Nations Heritage Protection Alliance
<b>FNLRS</b>	First Nations Legal and Research Service
<b>FPIC</b>	Free, Prior and Informed Consent
<b>GBK</b>	Gur A Baradharaw Kod
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>ICIP</b>	Indigenous Cultural and Intellectual Property
<b>ILUA</b>	Indigenous Land Use Agreement
<b>IP</b>	Intellectual Property
<b>IPAs</b>	Indigenous Protected Areas
<b>IST</b>	Indigenous Standpoint Theory
<b>KLC</b>	Kimberley Land Council
<b>LPP</b>	Legal Professional Privilege
<b>NIAA</b>	National Indigenous Australians Agency
<b>NNTT</b>	National Native Title Tribunal
<b>NRA</b>	Ngarrindjeri Regional Authority
<b>NTA</b>	<i>Native Title Act 1993</i>
<b>NTRBs</b>	Native Title Representative Bodies and Service Providers
<b>ORIC</b>	Office of the Registrar of Indigenous Corporations
<b>PBC EVS</b>	Prescribed Body Corporate Economic Vehicle Status
<b>PBC Regs</b>	<i>Native Title (Prescribed Bodies Corporate) Regulations 1999</i>
<b>PBCs</b>	Prescribed Bodies Corporate
<b>PGPA</b>	<i>Public Governance, Performance and Accountability Act 2013</i>
<b>SANTS</b>	South Australia Native Title Services
<b>TOC</b>	Traditional Owner Corporations
<b>TSRA</b>	Torres Strait Regional Authority
<b>UNDRIP</b>	<i>United Nations Declaration on the Rights of Indigenous Peoples</i>
<b>YMAC</b>	Yamatji Marlpa Aboriginal Corporation

## ACKNOWLEDGEMENTS

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*Most importantly, we thank the Prescribed Bodies Corporate (PBCs) who continue to generously provide their time, effort and information to the PBC Futures project, working with the National Native Title Council (NNTC) to ensure national policy design best fits the local reality PBCs face every day.*

*In particular, the NNTC would like to thank our PBC and Native Title Representative Body and Service Provider (NTRB) members who have provided valuable information, insight and guidance to the development of the report. Special thanks must go to our chairperson, Kado Muir, chief executive officer, Jamie Lowe, and director, Kevin Smith for their advice and guidance throughout the project. Additionally, special thanks must go to the Central Land Council, Jamukurnu-Yapalikunu Aboriginal Corporation, Gur A Baradharaw Kod Sea and Land Council (GBK), Northern Land Council, North Queensland Land Council, First Nations Legal and Research Service (FNLRs), and Kimberley Land Council (KLC) for generously lending their time and experience to the project.*

*We acknowledge that it always was, and always will be, Aboriginal and Torres Strait Islanders lands and waters.*



# PART 1: VISION FOR REFORM

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## A RIGHTS-BASED FRAMEWORK

In any discussion of a rights-based framework for Australian native title Prescribed Bodies Corporate (PBCs) there is temptation to look immediately to Article 1 of the *International Covenant on Civil and Political Rights*<sup>1</sup> and the *International Covenant on Economic and Social Rights (ICESR)*<sup>2</sup>. Article 1 is the same in both covenants.

*All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*

The article is reflected in the context of Indigenous peoples in the terms of Article 3 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) which provides:

*Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*<sup>3</sup>

The specific provisions of various international legal instruments, and the duties and obligations with respect to PBCs are outlined below to provide the necessary background to why a rights-based framework for PBC policy and legislative reform is essential in moving forward.

Before doing that, it is critical to remember that international law merely articulates the contemporary understanding of the rights of First Nations peoples<sup>4</sup> and their representative institutions. These rights have always existed, whatever the state of international law.

As we strive to develop a national policy framework for PBCs, there is one inescapable truth that must be accepted. Legal recognition, by the non-Indigenous state of Australia, of First Nations ownership of and rights to land, via native title and other forms of land rights, only exists because there was a brutal dispossession of country by the English Crown, resulting in the colonial present. While we can debate the legality

of that dispossession at law, as it stood in the late eighteenth century, it is inarguable that the dispossession was based fundamentally on societal, biological, and structural racism and that as the law stands in the 21<sup>st</sup> century, particularly since the *Racial Discrimination Act 1975*, that dispossession would have been unlawful.<sup>5</sup>

The *right* of First Nations peoples in Australia to the lands, territories, and resources which they have traditionally owned has existed since those lands were taken and resistance commenced. Landmarks, such as *Mabo* in 1993 or UNDRIP in 2007, only affirmed a right which has always existed and always will. This is a truth that needs to be central for the Australian Government to move forward in its relationships with First Nations peoples.

Despite the relative contemporary nature of UNDRIP it does provide a valuable articulation of the land related rights of Australia's First Nations peoples in a manner that can be contextualised to the specific position of PBCs. However, two matters should be remembered before undertaking such an analysis. First, the UNDRIP, as a General Assembly resolution, is not by virtue of its status, binding.<sup>6</sup> It is broadly recognised that UNDRIP does not impose new international legal obligations on states. Rather, it restates existing international legal obligations, framed in the specific context of Indigenous peoples.<sup>7</sup>

Second, the UNDRIP overwhelmingly sets out the rights of Indigenous *Peoples*. This is illustrated by the fact that several UNDRIP articles make specific reference to Indigenous individuals.<sup>8</sup> These articles aside, the rights set out in UNDRIP are, 'collective rights.' That is, rights held by 'Indigenous communities themselves' not by 'individuals in community with others.'<sup>9</sup>

The significance of the collective nature of many of the rights under UNDRIP can be understood when it is appreciated that rights under UNDRIP that can be characterised as a right to enjoy culture and cultural heritage and rights involving a requirement for free prior and informed consent (FPIC) are collective rights. In combination, these rights are described by Articles 2, 4, 10, 11, 12, 13, 14, 15, 19, 20, 25, 29, 31, and 32.

The critical Article 32.2 illustrates the point:

*32.2. States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.*

It is clear, from the terms of Article 32.2, that the FPIC necessary for the approval of any project is that of the representative institution of the affected Indigenous peoples, not the approval of 'Individual Indigenous people in community with others.'<sup>10</sup> Article 18 provides some illumination of the matter.

*Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.*

In the context of cultural heritage, land and related economic development matters, it is beyond argument that a PBC is a representative institution for the purposes of Article 18. Accordingly, in the development of a policy framework for PBCs, it is necessary to give effect to the collective rights of Australian First Nations peoples as represented by the relevant PBC.

The vision for the PBC Futures national reform process is to support PBCs to hold, strengthen and leverage the rights that everyone is entitled to, as outlined in the UNDRIP.

More specifically for PBCs, the vision is for a national policy framework that will recognise the following.

1. Individual First Nations people are the *self* in self-determination. They are the owners and rights holders of their lands, waters and resources and PBCs are the representative vehicle through which self-determination can be enacted.
2. PBCs and Traditional Owner Corporations are the decision-makers for matters affecting their countries and communities at local, regional and national levels.
3. The Australian Government has an obligation to adequately fund and resource PBCs for their statutory obligations.
4. Investing in and supporting PBC-led economic development will build strong First Nations as well as strong regional economies for all Australia.





## DRAFT REPORT STRUCTURE

This report is structured in three main sections:

<b>PART 1: VISION FOR REFORM</b>	<p><b>Part 1</b> establishes a rights-based framework based on the concept of self-determination as it is captured in the UNDRIP and principles of Nation Rebuilding which is the First Nations expression of self-determination. The rights-based framework of Nation Rebuilding is central to all aspects of the work in the PBC Futures project. This includes the project planning and design, engagement, proposed partnership agreement, and subprojects or future work that have been developed from the reform agenda. The rights-based framework of Nation Rebuilding is a useful structure for future policy design and development and at the heart of the NNTC's values and work programs. Part 1 also includes background information on self-determination and the UNDRIP, native title and PBCs, and Nation Rebuilding.</p>
<b>PART 2: PBC FUTURES PARTNERSHIP AGREEMENT</b>	<p><b>Part 2</b> outlines a proposed <i>PBC Futures Partnership Agreement</i>, including an interim partnership, suggested as immediate action, and a longer-term partnership to be developed over a period of 18-24 months. While the details of a proposed partnership would be developed jointly by the NNTC and the NIAA, Part 2 includes suggested infrastructure that is working well for both parties in the cultural heritage space.</p>
<b>PART 3: REFORM AGENDA</b>	<p><b>Part 3</b> is the reform agenda that is to be developed from previous and current engagement with the native title sector and implemented by the proposed Partnership Agreement. Part 3 includes eight distinct, yet sometimes overlapping, sections for reform:</p> <ol style="list-style-type: none"> <li>1. PBC investment;</li> <li>2. PBC statutory obligations and business on country;</li> <li>3. PBC strengthening;</li> <li>4. Local nations, regional networks and national representation;</li> <li>5. Ethical engagement, consultation and free, prior and informed consent (FPIC) protocols;</li> <li>6. National leadership on agreement making;</li> <li>7. Legislative reform of the NTA; and</li> <li>8. Indigenous data sovereignty in native title.</li> </ol>

Each section of the reform agenda aims to address a different challenge experienced by PBCs. It is ordered from the most significant to least significant challenge. However, it is important to note that this order is from a general, national perspective and was developed from the NNTC's interpretation of the most pressing or urgent concerns, based on sector engagement. The order may vary for individual native title organisations.

Each reform agenda section in Part 3 includes:

- identification and explanation of the challenge or reason;
- summary of previous and existing work;
- required legislative or policy reform; and
- recommendations for the implementation of policy reform.

The recommendations are structured with an overarching medium-long term recommendation followed by sub-recommendations, which are interim or shorter-term steps that can be undertaken to progress the overarching recommendation.

## NATION REBUILDING

Nation Rebuilding is a First Nations expression and practice of self-determination and the rights outlined in the UNDRIP, as Kevin Smith, CEO of Queensland South Native Title Services, recently spoke about at the AIATSIS Summit.

*UNDRIP however is more than bricks and mortar, it is a roadmap, a blue-print and a scorecard for nation building. As stated earlier, native title is not a pre-requisite to access and activate the right to self-determination – that right is inherent and comes from our own traditional laws and customs but native title can be bonded with UNDRIP because they have common compatible active ingredients.<sup>11</sup>*

It is part of a broader policy shift in Australia that recognises First Nations as autonomous strong communities with sovereign rights, including the right to treaty and self-government, as demonstrated through the local Victorian treaty process.<sup>12</sup>

First Nations peoples have successfully governed their communities for many thousands of years and there is consistent and robust evidence in Australia and internationally that legitimate and effective Indigenous governance that is culturally relevant is an essential part of achieving self-determination aspirations for Indigenous nations.<sup>13</sup> Indigenous Nation Rebuilding is the process through which an Indigenous nation ‘strengthens its own capacity for effective and culturally relevant self-government and for self-determined and sustainable community development.’<sup>14</sup>

Nation Rebuilding processes are happening among First Nations communities internationally and across Australia. The five core principles of nation rebuilding, as understood from over 30 years of research by the Harvard Project on American Indian Economic Development and the University of Arizona Native Nations Institute, are:

1. Sovereignty: The nation makes the major decisions;
2. Capable Governing Institutions: The nation backs up authority with competence;
3. Cultural Match: Governing institutions match community beliefs about how authority should be organised;

4. Strategic Direction: Decisions are made with long-term priorities in mind; and
5. Public-Spirited Leadership: By individuals who recognise the need for fundamental change and can engage with community to make that happen.<sup>15</sup>

In the context of reservations in the United States of America, Cornell and Kalt observe that while jobs and income are critical for getting Indigenous peoples out of poverty, they are insufficient on their own and rarely produce businesses that last.<sup>16</sup> A Nation Rebuilding approach towards development focusses on solid institutional foundations, strategic thinking, and informed action.

This proactive approach emphasises the community’s agenda, long-term benefits, and an environment where businesses last. Development is the job of community leadership who set the vision, policy and guidelines. Success is measured by political, social, cultural and economic impacts.<sup>17</sup>

While Nation Rebuilding has a dual focus on governance and economic development, it is key that local communities or PBCs have the autonomy to determine their own priorities and be empowered and supported in their chosen pathways. It is in this support that lies the role of non-Indigenous governments, that is, supporting First Nations with resources, policy and legislative frameworks that empower local communities, rather than making decisions for them.

Across Australia, there are several Nation Rebuilding projects, often involving community, government and research partnerships.

- The Indigenous Community Governance Project (ICG) is a partnership between the Centre for Aboriginal Economic Policy Research, ANU and Reconciliation Australia. The project examined Indigenous community governance ‘with participating Indigenous communities, regional Indigenous organisations, and leaders throughout Australia’ between 2004 to 2008.<sup>18</sup>
- The Ngarrindjeri Regional Authority is a peak governance body, developed in 2007 through resistance and strategic transformation by the Ngarrindjeri people. The Ngarrindjeri Regional Authority has since developed a unique agreement-making strategy, Kungun Ngarrindjeri Yunnan Agreement (Listen to what Ngarrindjeri people have to say) and Ngarrindjeri Nation (Re)building.<sup>19</sup>

- The Umunna Institute Discovery Project developed a nation building research partnership with both the Ngarrindjeri Regional Authority and the Gunditjmarra People.<sup>20</sup>

The actual framework and steps taken toward Nation Rebuilding will be different for each community, even if they are based around the five core principles identified by the Harvard Project. Available resources include Nation Rebuilding toolboxes, like those developed by the Harvard Project and the Native Nations Institute, and the Indigenous Governance Toolkit, developed by the Australian Indigenous Governance Institute (AIGI). They are based on the real-world experiences of many nations and can provide guidance on best practice in community self-governance.

The U.S. Environmental Protection Agency and Environment Canada requested First Nation and Tribal input in the early 2000s on a trans-boundary planning agreement. The Coast Salish elders and leaders decided that they no longer wanted to be ‘talked to’ and would not engage in a non-native type of consultation. Instead, they proposed a gathering of elders, leaders and officials on environmental policy in the traditional style of decision-making for the Coast Salish to work together to build a ‘consensus on environmental policy for the Coast Salish Sea area’.<sup>21</sup> The first of these gatherings was held in 2005 and further gatherings continued to be held until at least 2017.<sup>22</sup> The result of these gatherings has been to develop a mission statement for participants to work together to protect the Salish Sea ecosystem and to sustain sacred and inherent rights and values, develop policy recommendations, identify long and short term goals, and produce an environmental action plan. Issues, such as adequate water quantity and quality, access to non-toxic traditional foods, and collective policies on climate change, have been prioritised.

The Akwesasne Cultural Restoration program, among the Mohawk community, is an example of community led nation building from agreement making that builds the capacity of youth. The Akwesasne Cultural Restoration program, piloted in 2014, was a cultural apprenticeship program that gave the learners the opportunity to apprentice to ‘master knowledge-holders to learn traditional, land-based, cultural practices, including hunting and trapping, medicinal plants and healing, fishing and water use, and horticulture and black ash

basket making’.<sup>23</sup> The program was developed to address cultural restoration, following ten years of research and community planning. It was funded as part of a legal agreement, with an \$8.4 million settlement fund.

The cultural restoration model is based on the community’s own conceptual framework for trying to reverse the environmental and cultural harm from environmental pollution and contamination from colonisation. The plan relies upon Indigenous learning and teaching models, mentoring and strong personal relationships and supports the enhancement of existing programs and institutions.

## GOVERNMENT SUPPORT FOR NATION REBUILDING

The Canadian Government has committed to a transformative and forward-looking agenda to renew relationships with First Nations peoples, including through the Nation Rebuilding Program.<sup>24</sup> The experience of First Nations peoples in Canada is distinct from the context in Australia as they have treaties, comprehensive land claims, some self-governing nations and the ‘Honour of the Crown’, owed to First Nations under section 35 of the *Constitution Act 1982*. However, there are similarities in the contexts, including First Nations being self-governed for many thousands of years on their territories before being colonised by the British and often removed from their homelands, languages and children.<sup>25</sup>

The Royal Commission on Aboriginal Peoples in Canada (1996) made the recommendation for Indigenous nations to reorganise themselves as nations, and to create institutions that could exercise their rights, including self-government.<sup>26</sup>

The renewal of nation-to-nation relationships between Indigenous peoples has been prioritised based on the recognition of co-operation, rights, respect and partnerships.

## NATION REBUILDING PRINCIPLES FOR THE NIAA

Nation Rebuilding is typically understood as the actions of an Indigenous nation, but there are approaches, such as those steps outlined by

Cornell and Kalt, that non-Indigenous governments can take to support nation building, ones that are highly relevant to PBCs and the role the NIAA can play in better supporting the sector.<sup>27</sup> This involves the NIAA acknowledging and learning from a Nation Rebuilding approach and developing a policy framework that embraces First Nations' knowledge and advice, relinquishes a little control, takes a little more risk and embraces a shift to decentralise decision-making power to the First Nations community.

*Indigenous self-determination is defined and implemented internally but is reinforced externally. This is the duality recognised in international law where self-determining Nation States reinforce each other by respecting the territorial integrity of their counterparts. Because First Nations co-exist within a Federation involving three other levels of government, we need to appreciate and flexibly work with this duality, if we are to see ourselves and, they in turn us, as the fourth level of government.<sup>28</sup>*

For too long, there has been a false dichotomy in policy between rigour, risk mitigation, defensibility and accountability in the centralised control of power and resources, on one side and on the other, decentralisation, high risk, lack of accountability and reporting. The result of this dichotomy has been stagnation with very minor sector changes, which leads, 'in the long run, to more poverty, more problems, and larger taxpayer burdens.'<sup>29</sup>

Instead, we propose a Nation Rebuilding approach to government-led economic development, which begins with self-determination, that is, practical decision-making power in the hands of nations.<sup>30</sup> A key step is the review of funding programs and cycles, as outlined in *Section 3: 1. PBC Investment*. A government cannot claim to be supporting local decision-making and empowering communities, while being the decision-makers for all financial matters, including what projects or programs will be funded and how.

## DRAFT PRINCIPLES

The following draft principles, outline a nation rebuilding policy approach that could be workshopped with the PBC Steering Group and subsequently adopted by the NIAA.

- A long term, strategic approach is needed, with planning beyond the four-year election cycle.
- Project or program funding should be replaced by ongoing and secure funding.
- The PBC must set the development agenda with a culturally appropriate, strengths-based planning approach.
- Economic development is not a problem to be solved. It is a long-term strategic agenda, set by the PBC, about what kind of society the nation wants to be.
- Culture is a strength, not an obstacle to economic development.
- Partnerships that include co-design and joint decision-making should be developed on First Nations terms.
- Funding evaluation should reflect the needs and goals of the nation, not just the funding body.
- Mistakes will be made by First Nations will make mistakes, like any other nation. This should be accepted as a learning mechanism that is free of blame.



## NATIVE TITLE AND PRESCRIBED BODIES CORPORATE

Under the *Native Title Act 1993* (NTA), native title holders are legally forced to form a PBC to hold their native title rights and interests. Every PBC in Australia:

- is unique, as First Nations laws and customs and communities are different around Australia; and
- exists in perpetuity, as their native title rights and interests exist forever.

Native title rights are inalienable, meaning that they cannot be sold. Because native title is forever, PBCs are established in perpetuity, having no legal or regulatory end date.<sup>31</sup>

PBCs and Traditional Owners Corporations are not simply land holding bodies or regular corporations under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act). They are the 'self' in self-determination. They represent the nations that hold rights, own and speak for country and have the cultural authenticity to act as nations. While a PBC is not an Indigenous creation, rather one of the NTA, First Nations use the PBC structure to enact their First Nations rights, interests and practices.

PBCs are culturally and legally complex bodies that have been forced to incorporate under CATSI to be able to hold and manage their native title rights and interests under the NTA. They have a range of statutory obligations and, unlike other CATSI corporations, have a fiduciary duty to both their members and current and future common law holders.

At the time of writing this report, there are almost 250 PBCs that hold a mix of exclusive and non-exclusive native title rights to over 40 per cent of Australia's land and sea mass.<sup>32</sup>

Due to this cultural, legal and political complexity, PBCs require a unique and tailored policy approach that is co-designed by the PBC and its NTRB, falls within a framework of self-determination and nation-building, and realistically addresses the challenges faced and aspirations held by PBCs.

Funded and supported by the NIAA, the NNTC has been tasked with developing an overarching national policy framework for PBCs.<sup>33</sup> A key part of this framework is a roadmap for four main purposes identified by the NIAA:

1. PBC development;
2. Commonwealth and sector wide coordination and support;
3. Required policy and legislative reform; and
4. Identified areas of future research and work required.



## PART 1: VISION FOR REFORM

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### RECOMMENDATIONS

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The NNTC recommends:

1. **That the NIAA adopts and incorporates a national policy approach that follows the principles of nation rebuilding and a framework for PBC related policy that encompasses all the statutory obligations and subsequent business of PBCs and related entities.**
  - a) That First Nations people from the native title sector co-design the policy approach.
  - b) That the NIAA incorporates the nation rebuilding principles into program and policy evaluation methodologies, including those undertaken by external consultants.
  - c) That the NIAA use the nation rebuilding principles to work collaboratively with the NNTC to develop FPIC protocols for establishing a best-practice model for engaging and consulting with the PBC sector.



## PART 1: FOOTNOTES

- 1 UN General Assembly, (16 December 1966) *International Covenant on Civil and Political Rights* New York
- 2 UN General Assembly, (16 December 1966) *International Covenant on Economic, Social and Cultural Rights* New York
- 3 UN General Assembly, *United Nations Declaration of the Rights of Indigenous Peoples* 13 September 2007 New York
- 4 In this report, the terminology First Nations peoples is used to mean Aboriginal and Torres Strait Islander peoples from Australia. The term Indigenous is not used, with exception to specific references relating the UNDRIP and other source materials. While we employ the terms 'Aboriginal' and 'First Nations' interchangeably throughout this paper, we also acknowledge Indigenous people from the Torres Strait Islands. Furthermore, we recognise the limitations of these terms in accounting for the complexity and diversity of Indigenous identities and experiences within Australia. Wherever possible we will refer to individuals/groups by their specific ancestral country of origin. We will also make it explicit when referring to Indigenous groups that belong to places other than Australia.
- 5 *Mabo & Ors v Queensland & Ors (No 2)* (1992) 175 CLR 1: *Advisory Opinion on Western Sahara* [1975] ICJR 12
- 6 On the general issue and the desirability of affording the UNDRIP binding status see: Davis, M (2012) 'To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On', *19 Australian International Law Journal* 17.
- 7 Anaya S (2008) *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, UN Doc A/HRC/9/9 (11 August 2008) 24 [86].  
See also the discussion in Davis, M. To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On' p 26-30.
- 8 Specifically, Articles 6, 7.1, 8.1, 14.2, 17.1, 17.3 and 24.2.
- 9 Newman D (2007) 'Theorizing collective Indigenous rights', (2007) Vol 31(2) *American Indian Law Review*, 273 – 289, 276.
- 10 Newman, D (2007) p.276.
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- 12 For further information on the treaty process in Victoria, see the First Peoples of Assembly of Victoria <https://www.firstpeoplesvic.org/>
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# PART 2: PARTNERSHIP FRAMEWORK

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## BACKGROUND: NATIONAL AGREEMENT ON CLOSING THE GAP

The July 2020 *National Agreement on Closing the Gap*, between the Coalition of Aboriginal and Torres Strait Islander Peak Organisations, and all Australian governments and the Australian Local Government Association (ALGA), represented a fundamental change in the approach of Australian governments to engaging with First Nations peoples. The objective of the Agreement is 'to overcome the entrenched inequality faced by too many Aboriginal and Torres Strait Islander peoples so that their life outcomes are equal to all Australians.'<sup>33</sup>

The preamble to the Agreement states:

*This Agreement also stems from the belief that when Aboriginal and Torres Strait Islander people have a genuine say in the design and delivery of services that affect them, better life outcomes are achieved. It recognises that structural change in the way Governments work with Aboriginal and Torres Strait Islander people is needed to close the gap.*

*In response, all Australian Governments are now sharing decision-making with Aboriginal and Torres Strait Islander people represented by their community-controlled peak organisations...*<sup>35</sup>

Building on this basis of shared decision making, the Agreement aims to represent 'a commitment from all Parties to set out a future where policy making that impacts on the lives of Aboriginal and Torres Strait Islander people is done in full and genuine partnership.'<sup>36</sup> To achieve this goal, the Agreement identifies a number of specific priority reform areas. The first of these is 'formal partnerships and shared decision making'. Consistent with this priority reform area, the Agreement commits the Parties to 'building and strengthening structures that empower Aboriginal and Torres Strait Islander people to share decision-making authority with governments to accelerate policy and place-based progress'.<sup>37</sup>

The structures contemplated are a combination of policy and place-based partnerships.<sup>38</sup> Policy partnerships 'are partnerships created for the purpose of working on discrete policy areas, such as education, health or housing'.<sup>39</sup> The Agreement specifies that each partnership is formalised

through a written agreement between the parties that sets out, amongst other things, equitable and transparent processes and necessary funding provision. The Agreement also states that the policy partnership processes must support self-determination.

## OPERATION OF THE NATIONAL AGREEMENT ON CLOSING THE GAP – THE PARTNERSHIP AGREEMENT

The 2020 *National Agreement on Closing the Gap* was preceded by a more operations-focussed agreement that concluded in 2019. This was the 2019-2029 *Partnership Agreement on Closing the Gap*. This agreement, also between the Coalition of Aboriginal and Torres Strait Islander Peak Organisations and all Australian governments and ALGA establishes the Joint Council on Closing the Gap. The Joint Council comprises ministerial level representation from each Australian government and a majority from the Coalition of Aboriginal and Torres Strait Islander Peak Organisations.

The Joint Council provides coordination and policy direction and monitors performance and implementation of the work of all parties under the *National Agreement on Closing the Gap*.

Notably, the Partnership Agreement also provides (at clause 31):

*The Coalition of Peaks will submit a single three yearly budget proposal to the Commonwealth for consideration. The first budget proposal will be submitted immediately when the Partnership Agreement comes into effect. The budget proposal will cover the costs of the Coalition of Peaks participating in this Partnership Agreement and the Joint Council including policy and administration secretariat support, and travel costs.*

Outcome 15 of the *National Agreement on Closing the Gap* relates to land rights and specifies 'Aboriginal and Torres Strait Islander people maintain a distinctive cultural, physical spiritual and economic relationship with their land and waters.' The outcome specifies a target to increase legal recognition of land and sea country under Aboriginal and Torres Strait Islander laws and customs. Other specified outcomes go to matters such as language use and social and emotional well-being. Clearly, *Closing the Gap*, and the partnership structures it is founded upon, are of vital importance in any consideration of a

contemporary approach to PBC self-determination and development going forward.

## LEARNINGS FROM EXISTING AGREEMENTS

While the *Closing the Gap* partnership is an invaluable structure for overcoming inequality and improving services to First Nations peoples in Australia, the infrastructure is one of peak and service organisations, not PBCs or other traditional owner organisations. It has an objective to 'close the gap' or eliminate inequality, rather than an objective of self-determination and enacting existing rights to country.

It is not appropriate to automatically apply the *Closing the Gap* structure to the PBC sector as the rights holders to country. Facilitating PBC self-determination and development is a process with a foundation in the internationally recognised rights of Indigenous peoples as peoples, not as disadvantaged citizens of a post-colonial nation state. This philosophical disjuncture has practical implications relating to who supports self-determination and who enacts self-determination. The structures created by *Closing the Gap* support self-determination, whereas the PBCs themselves are the manifestation of local, place-based self-determination.

There is a need for a new partnership agreement that places PBCs and other First Nations land holding groups at its core. The agreement and subsequent structure needs to work closely with, or be a subsidiary of, the *Closing the Gap Agreement* and should focus on land and water matters, such as Target 15. However, it should be independent from *Closing the Gap* to undertake additional policy work that falls outside the scope of the existing agreement, such as the work outlined in Part 3 of this report.

The proposed agreement could learn from the *Cultural Heritage Partnership Agreement* between the Australian Government and the First Nations Heritage Protection Alliance.<sup>40</sup> This agreement aims to establish and implement structures and processes to identify options for the modernisation of Aboriginal and Torres Strait Islander cultural heritage protections. The *Cultural Heritage Partnership Agreement* is a policy partnership agreement under the *Closing the Gap Agreement*.

The *Cultural Heritage Partnership Agreement* is an agreement between the First Nations Heritage Protection Alliance and the Australian Government, only. By contrast, the *National Agreement on Closing the Gap* includes all Australian governments and ALGA. As the objective of the *Cultural Heritage Partnership Agreement* is to provide advice to the commonwealth minister, there is a rationale for only including the Federal Government. The inevitable delay caused by negotiation with all Australian governments and the rather urgent time frame of the *Cultural Heritage Partnership Agreement* was an additional practical consideration.

The *Cultural Heritage Partnership Agreement* was developed for a specific and defined policy development purpose. Any partnership agreement regarding PBC self-determination and development would likely require a longer period and traverse a greater scope of policy matters. The specifications of the *Cultural Heritage Partnership Agreement* provide a useful starting point for the development of a PBC self-determination and development (or *Futures*) partnership agreement.

Further information about the structure, governance and operation of the Cultural Heritage Partnership Agreement can be found on the First Nations Heritage Protection Alliance website<sup>41</sup>.

While the structure of the *Cultural Heritage Partnership Agreement* provides a guide to a *PBC Futures Partnership Agreement*, the text is inappropriate and would need to be specifically drafted.

## PBC FUTURES PARTNERSHIP AGREEMENT AND THE VOICE

The NNTC firmly supports the principle of authorising First Nations people and communities to advise on matters which directly affect them. However, without an infrastructure for governing a Voice to Parliament, it cannot be assumed that a Voice to Parliament will centre on PBCs or other First Nations land holding groups, as is proposed through a new partnership agreement. The current Voice campaign strategy is focused on educating the public on the referendum process and what is required to achieve a successful referendum. A successful referendum will be followed by an appropriately lengthy consultation process with First Nations people and communities to decide



on the structure, membership and matters of priority for a Voice to Parliament.

## STRUCTURE

Proposals for the design of a national Voice to Parliament have been provided by influential First Nations academics, including Marcia Langton and Tom Calma, in the Indigenous Voice Co-design Interim Report<sup>42</sup>.

*'A National Voice would have a broad scope to advise on nationally significant matters of critical importance to the social, spiritual and economic wellbeing of Aboriginal and Torres Strait Islander peoples across Australia', and;*

*'... advise on the matters it decides are the most important to Aboriginal and Torres Strait Islander peoples'.<sup>43</sup>*

In this approach, the determination of matters of significance would be placed in the hands of consensus, which is likely to see sectors relating to the health, education and economic sectors take priority. Whilst this approach is appropriate for the general First Nations population in addressing the Empowered Communities principles<sup>44</sup>, it would inadvertently undermine the significance of the rights afforded to Aboriginal and Torres Strait Islander groups under the NTA.

This conflict of interest would be compounded by the issue of membership, where a National Voice:

*'Would be comprised of 24 members, with 2 drawn from each of the states and territories, 2 from the Torres Strait Islands, 5 additional remote representatives drawn from the Northern Territory, Western Australia, Queensland, South Australia and New South Wales, and one member representing Torres Strait Islanders on the mainland.'<sup>45</sup>*

Whilst this is a standard structure, given the intended broad scope of a national Voice, it would be inappropriate to reduce the population of those with rights to protect and manage land to a group that does not represent the local rights holders to speak on matters relating to country. Decisions of this nature require place-based decision-making. This concept is central to the proposed agreement framework in this report.



Previous agreements between First Nations people and communities, and the Australian Government, such as the *Closing the Gap* partnership, have demonstrated the risk that broad objectives pose to the progression of national reform in the PBC sector. The proposed Voice to Parliament structure is better suited to addressing matters which relate more broadly to Australian First Nations and can be addressed on the consensus of priority. Those matters relating to native title rights holders and other First Nations land holding groups are unlikely to attract the same level of reform urgency in places where rights are not held by an entire population or able to be transferred. Whereas this proposed agreement framework centres on PBCs and Traditional Owner Corporations, as decision-making bodies with respect to their rights to country and resources, and without the conflation of broader First Nations matters.

The intent of a new agreement is to elevate self-determination and nation rebuilding through meaningful reform and avoid any potential for monopolisation in the native title sector. Diversity remains the strength for PBCs' self-determination, which has the potential to generate genuine reform if it is sufficiently resourced, as recommended throughout this report. It is noted in the Indigenous Voice Co-design Interim Report that there is 'no flexibility in this model to accommodate the vast diversity of cultures and ways in which cultural authority works in Aboriginal and Torres Strait Islander communities'.

It is possible that when the Labor Government decides on the Voice to Parliament structure, it could have the potential to foster the progression of the PBC sector through resourcing and consultation processes. However, at the time of writing this report, there remains uncertainty around the impending referendum and the subsequent lengthy consultation process to decide on a structure. It is likely that the eventual structure will vary from the one proposed by Marcia Langton and Tom Calma. Once a Voice to Parliament structure and its processes have been established, it may be appropriate to consider the collaborative relationship between the proposed agreement and the Voice as a referral mechanism for matters relating to land and water use.

## VARIABILITY OF STRUCTURE

Whilst there are already several proposed designs for a Voice to Parliament, the structure will not be decided until after a successful referendum. So, there is no certainty of whether that structure will be the one drawn on above. However, it is confirmed that legislation will be able to change the structure of a Voice despite its permanency. In an interview on and ABC Radio on January 18, 2023, Prime Minister Anthony Albanese explained why the structure of a Voice would be incompatible for the PBC sector.

*'The detail of the functioning of the Voice, how it would operate, all of that will be subservient to the Parliament, it will be the subject of legislation. So, over a period of time, for example, that might change just like other legislation changes. All that a constitutional enshrinement will do is make sure that there must be a body. It doesn't characterise the detail of how that body should operate, that level of detail. That's not the job of the Constitution. The Constitution is just to set out the principles of the way that Australia functions.'*<sup>46</sup>

Emphasis has been placed on the Parliament determining the detail of the Voice through legislation. Whilst this may be necessary to ensure a Voice to Parliament is efficient and able to evolve without requiring additional referendums, it also introduces a risk that future legislation may leverage party politics or preferences. When decision-making power ultimately remains with the government, it creates a conflict with the principle of self-determination and nation building. The proposed partnership agreement is one that will position PBC self-determination at its centre, through decision-making and nation rebuilding, regardless of changing legislation that relates to the Voice or government appointment. The agreement framework demands an ongoing, reciprocal relationship of consultation and support on matters relating to country. If the agreement was to be renewed and/or require amendments, those amendments would be directly related to maintaining the principle of PBC capacity building and decision-making, as a reflection of the specific needs of PBCs and Traditional Owner Corporations.

## FUNDING

The Indigenous Voice Co-design Interim Report notes that a 'Local and Regional Voice would not manage government programs or funding...' <sup>47</sup> and that the Australian Government would have this responsibility, making the Voice to Parliament simply an advisory body that has no decision-making powers.

*'A Voice to Parliament will not be a funding body. It will not run programs. It will simply be a source of advice to government.'* <sup>48</sup>

Funding, as it relates to the PBC sector, is discussed in great depth in Part 3 of this report. Part 3 will also consider the historical relationship between PBCs, the government and funding, and analyse why the PBC sector requires direct investment in order to enable self-determination and autonomous decision-making.

## CO-DESIGNING A PBC PARTNERSHIP AGREEMENT

The NNTC proposes a process for the NIAA to work closely with the PBC Steering Group to co-design a partnership agreement to implement national policy reform for the PBC sector.

The co-design process would need to workshop the concepts identified below.

### PARTIES AND REPRESENTATION OF PBCS

Design of the agreement would involve workshoping several aspects with the PBC Steering Group, including:

#### 1. Parties

The *National Agreement on Closing the Gap* and the *Cultural Heritage Partnership Agreement* provide two approaches to deciding the parties to a *PBC Futures Partnership Agreement*.

The issue is reflective of the historically characteristic government 'push me – pull you' approach to PBC policy. In one approach, PBCs discharge Australian Government statutory obligations in the management of lands, which constitutionally are the responsibility of state and territory governments.

In addition, state and territory governments are parties to the *National Agreement on Closing the Gap* which includes specific land rights targets. As such, an appropriate response would be for a *PBC Futures Partnership Agreement* to include First Nations representatives and all Australian governments. It would also be reasonable to include ALGA, given local government's role in land management.

A staged approach could also be considered, whereby an initial policy development partnership agreement is established solely with the Australian Government. This agreement would act as a precursor to a greater PBC futures partnership agreement to which all Australian governments would be party and would involve both policy development and implementation.

#### 2. Preamble

The preamble should acknowledge the sovereign status and original ownership by First Nations people. It should ground the *PBC Futures Partnership Agreement* in the *National Agreement on Closing the Gap* and note the dual objectives of the elimination of inequality and the facilitation of self-determination.

#### 3. Term of Agreement

The very specific and time-bound outputs of the *Cultural Heritage Partnership Agreement* dictated a one-year term for the agreement. The ongoing nature of the objectives under the *National Agreement on Closing the Gap* led to there being an unspecified term on that agreement. Two options present themselves in respect of a *PBC Futures Partnership Agreement*.

1. The agreement's outcomes, at least in its first iteration, are the development of policy. In this case, 24 months may be an appropriate timeframe.
2. If it is contemplated that a *PBC Futures Partnership Agreement* would lead to both the development and implementation of policy, then it would be appropriate for the agreement to have a specific term that is subject to renegotiation and renewal. A five-year term is frequently set to provide some longevity but remove the processes from the electoral cycle.

## 4. Outcomes

Regardless of whether parties agree, the Term of Agreement is solely the development of policy or the development and implementation of policy. The outcomes should incorporate satisfaction of both objectives.

## 5. Operational structures

Under the *Cultural Heritage Partnership Agreement* there are two levels of operational structure: the Joint Working Group and the Implementation Working Group. The Joint Working Group comprises six senior appointments and is a governance/policy approval forum. The Implementation Working Group is an eight-person officer-level forum, charged with developing the relevant papers and programs for approval by the Joint Working Group. In this model, First Nations' regional and cultural representation is provided in the governance structures of the First Nations Heritage Protection Alliance, thus allowing the Joint Working Group and Implementation Working Group to maintain a relatively tight membership.

In addition to factors of representativeness and workability, the operational structures of a *PBC Futures Partnership Agreement* would involve an additional dimension: subject area expertise.

The *National Closing the Gap Partnership Agreement* structure allows for subject area expertise through the scope of membership of the Coalition of Peaks and the seniority of Joint Council membership. In the *Cultural Heritage Partnership Agreement*, the limited scope of the agreement ensures all participants have the necessary subject area expertise.

A *PBC Futures Partnership Agreement* sits somewhere between these two examples. As previously identified, PBC futures policy development and implementation requires expertise in:

- natural resource management, including where relevant extractive resources;
- governance;
- business development;
- cultural heritage management;
- native title law;
- culture; and
- community development.

## 6. Governance

A review of the *Cultural Heritage Partnership Agreement* and the *National Agreement on Closing the Gap* will reveal that the governance provisions are largely administrative and are close to being a template. It is unlikely a *PBC Futures Partnership Agreement* would require any extraordinary governance provisions.

## MOVING FORWARD: A CO-DESIGN PROCESS

The NNTC proposes the following process to co-design a *PBC Futures Partnership Agreement*. Co-design is forward step in policy development. However, this term has been overused and has too many associated principles and methodologies attached. There is a risk that the term has lost its meaningful association with its original principles, which are distribution of power, amelioration of the human experience and positive social impact.<sup>49</sup>

In the proposed co-design partnership framework, the methodology should consider principles from three theoretical frameworks:

1. Nation Rebuilding, for which the draft principles are outlined above;
2. First Nations led co-design, where First Nations people through their PBCs, are involved early on in the design and included in the decision-making process for scope and structure of the partnership; and
3. Indigenous Standpoint Theory (IST). IST, while borrowed from academia and the production of academic knowledge, can be applied to policy design. This is because IST is 'a distinct form of analysis and is itself both a discursive construction and an intellectual device to persuade others and elevate what might not have been a focus of attention by others.'<sup>50</sup> This means that by giving primacy to First Nations agency and knowledge in the process and being challenged by ideas and information that might disrupt the regular paradigms of policy development, the partnership, will be more culturally inclusive and relevant, and more likely to succeed in a meaningful way that engages and positively impacts PBCs and native title holders.

A central theme of all three frameworks is the value of First Nations' knowledge across the entire process, not just at specific consultation points. 'Entire process' means throughout the design, implementation, conduct and evaluation stages of the project or program. This point will be discussed further in Part 3 when considering the evaluation of PBC funding.

A second theme of the three frameworks is the autonomy of the First Nations community, through the PBC, to be the ultimate decision-makers for their own affairs. This means that support for PBCs needs to be less focused on controlling and making decisions about resources, and more focused on providing support to PBCs in a way that allows for PBCs to make their own decisions. This includes allowing PBCs to make decisions that do not work, as it is from these mistakes that lessons are learned. Mistakes are not failure. Rather, they are an essential part of the learning process. This needs to be recognised in policy design and program implementation.

#### CONSIDERATION OF EXISTING PBC STEERING GROUP SIZE AND REPRESENTATION

The PBC Steering Group currently consists of 24 members from 14 PBCs. The NNTC has divided the membership to be loosely representative of PBC numbers and jurisdictions across Australia. However, limitations with this configuration, and additional PBCs who have expressed interest in being part of the group need to be considered in the future.

#### WORKSHOPPING PARTNERSHIP AGREEMENT FRAMEWORK

The NNTC would develop papers to workshop at a PBC Steering Group meeting in the first half of 2023. The materials would include a series of questions with example models for discussion. Questions could include the following.

- Who should be party to the agreement?
- How are PBCs best represented in an agreement structure?
- How involved and how much time would your PBC have to contribute?
- What should the key objectives or functions of a partnership be?
- What changes or areas of reform should the partnership cover?

#### ADDITIONAL CONSULTATION

Additional discussion with other NNTC members, such as NTRBs or non-member PBCs may also be required. This could be achieved through online NNTC member workshops and discussions at PBC regional forums.

#### DRAFTING OF AGREEMENT AND ESTABLISHMENT OF INFRASTRUCTURE

A draft agreement should be prepared, including the establishment of governance structures and associated budgets.

It is proposed that the NNTC and the NIAA work with the PBC Steering Group and other NNTC members over 2023 to develop an agreement model between the minister and PBC sector that could be executed in early 2024. Timeframes for the development of the model are dependent on other policy matters at the NIAA.

## PART 2: PARTNERSHIP FRAMEWORK

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### RECOMMENDATIONS

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The NNTC recommends:

**2. That the NIAA and the NNTC develop and enter into a partnership agreement to advance future national policy work in the PBC sector.**

- a) That the NIAA and the NNTC prepare a draft set of principles for PBC sector policy design and program implementation that is workshopped with the PBC Steering Group and NNTC members.
- b) That the NIAA and the NNTC prepare an agreed timeline and co-design workplan for 2023 to progress a partnership framework, between the Commonwealth, states and territories and PBC sector, with the PBC Steering Group.
- c) That the NNTC and the NIAA hold a workshop to agree on the scope of information provided in the materials to be part of the co-design process.
- d) That the NNTC develop a series of short papers with discussion questions and models for consultation with the PBC Steering Group and other NNTC members or non-member PBCs.



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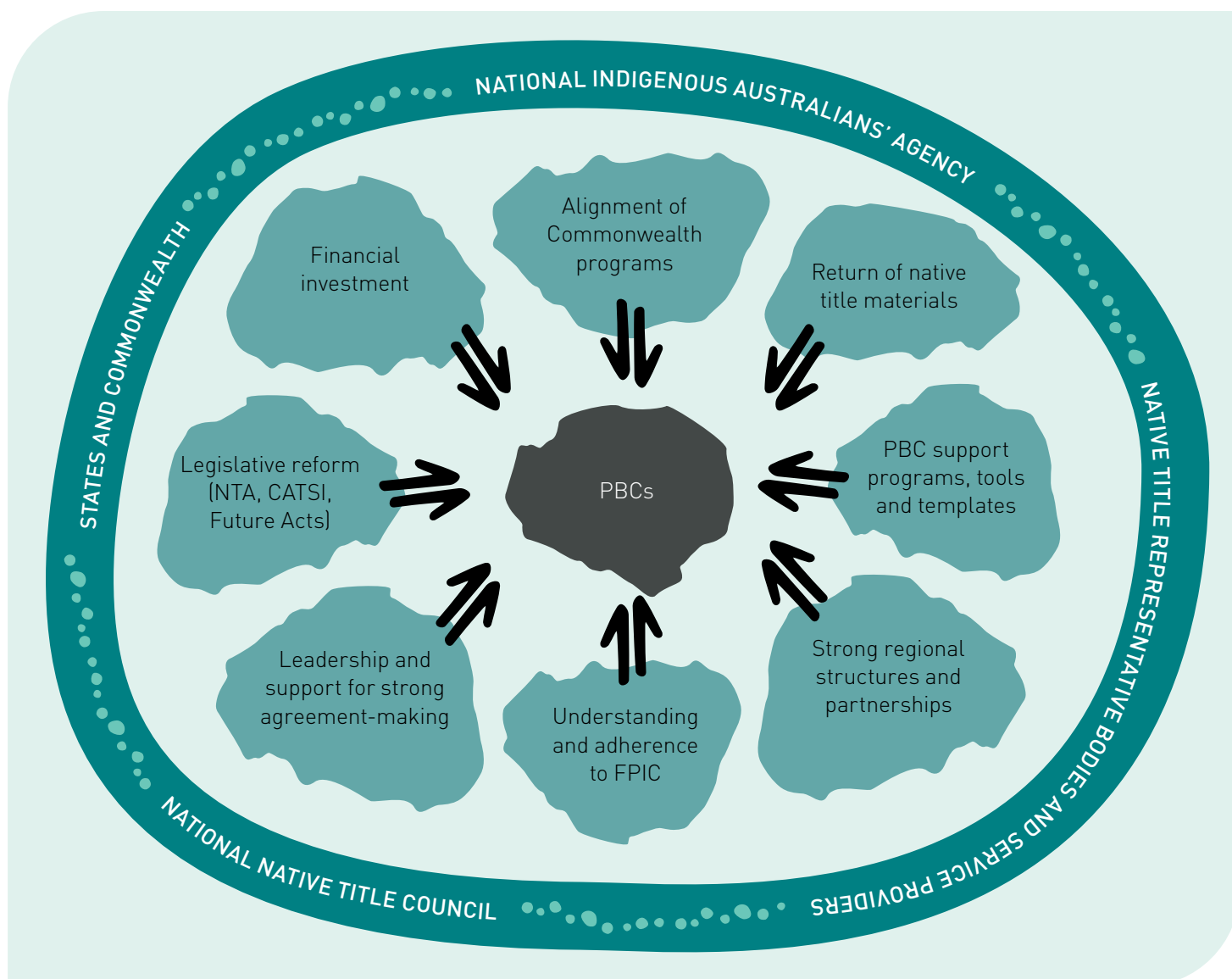
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The following reform agenda has been developed in consultation with PBCs and NTRBs, as outlined in the PBC engagement section below. The reform agenda includes eight distinct, but overlapping, sections that form the basis of an overarching national framework for reform in the PBC sector.

1. PBC investment: funding, resourcing and economic opportunities for PBCs
2. Statutory obligations and business on country: statutory obligations including cultural heritage, land management and Future Acts
3. PBC strengthening: sector coordination for PBC-led capacity development
4. Local nations, regional networks and national representation: the future of PBCs
5. Ethical engagement, consultation and FPIC protocols
6. National leadership on agreement-making: compensation, clean energy, regional settlements and treaties
7. Legislative reform: review of the NTA
8. Indigenous data sovereignty in native title: return of native title and other materials to the PBC.

## SECTORAL SUPPORT FOR PBC NATION REBUILDING



## PBC ENGAGEMENT

The PBC Futures project began in December 2019 and intended to include consultation with PBCs and NTRBs via Phase 2 of the PBC regional forums, which commenced in 2020 and continued into 2021. The PBC regional forums are held in NTRB jurisdictions, co-hosted by the NNTC and the NIAA, in close collaboration with the local NTRB. However, due to COVID 19, no regional forums were held in 2020 and only two were held in 2021: Alice Springs, with Central Land Council (CLC) and Torres Strait Islands, held with GBK. The regional forums project was extended into 2022 and three further regional forums were held in time for this report:

- South Australia, with South Australia Native Title Services (SANTS);
- Northern Western Australia, with the KLC;
- Pilbara, with Yamatji Marlpa Aboriginal Corporation (YMAC); and
- Victoria, with FNLRS.

The regional forum agendas included sessions where delegates discussed specific PBC Futures project questions.

- What successes has your PBC achieved recently?
- What challenges is your PBC facing?
- What support does your PBC have?
- What long-term and short-term aspirations does your PBC have?

The consultation format was adapted to suit individual regional jurisdictions and the needs and preferences of the PBCs that were present. At some regional forums, PBCs preferred to hold closed discussions and report back on their most important responses. These conversations were valuable as they provided unbiased feedback from PBCs about the most pressing challenges experienced in their own regions.

For the purposes of this report, information has been drawn from both phase 1 and phase 2 of the PBC regional forums, using the NNTC notes and forum reports. Qualitative data has been collated for each region, rather than identifying individual PBCs.

## THE IMPACT OF COVID 19 ON THE PROJECT

COVID 19 stopped face-to-face PBC engagement and forced the NNTC's interaction with PBCs into online forums. This impacted the project team's ability to conduct meaningful consultation with the PBC sector outside of the regional forums for three main reasons.

First, the project team was mostly located in Melbourne, which experienced four extended lockdown periods. In addition, the NNTC was, and continues to be, guided by the First Nations community or the regional NTRB about when it is safe to travel into that community, thus limiting face-to-face engagement further.

Second, the PBC Futures project did not include a consultation budget as it was expected that any consultation would be carried out at the regional forums. Consultation outside of the regional forums was technically outside the scope of the project, though the project team continued to engage with native title organisations where possible.

Third, online forums are not preferred communication modes for PBCs. Attempts at online forums or workshops were taken up by very few PBCs. Online forums generally only work for active NNTC members who have sufficient resourcing for staff and capacity to engage. Online engagement does not work well for PBCs that are not NNTC members, or who have limited access to, or skills to use the technology.

To overcome the limitations caused by COVID 19 the project team relied on their extensive experience with, and knowledge of PBC and NTRB members and senior practitioners, including staff, to inform the report. They drew on a collection of previous and current engagement materials including the following.

## PREVIOUS ENGAGEMENT

- reports and notes from national PBC meetings held by AIATSIS from 2007-2015, immediately prior to the National Native Title Conference
- 2013 AIATSIS PBC Survey Report
- 2020 AIATSIS PBC Survey Report
- notes and reports from Phase 1 PBC Regional Forums
- previous submissions and reports.

## CURRENT ENGAGEMENT

- notes and reports from Phase 2 PBC Regional Forums
- discussions at the 2021 and 2022 AIATSIS Summits
- discussions from individual engagement with NNTC members
- A Way Forward: Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge<sup>51</sup>
- advice from the PBC Futures Committee.<sup>52</sup>

## FUTURE ENGAGEMENT

While the level of research and engagement conducted throughout the PBC Futures project is sufficient to determine the draft reform agenda outlined in Part 3, it is likely that additional engagement and consultation will be required.

To ensure the reform agenda remains relevant and targeted to PBC needs nationally, the NNTC and the NIAA must continue to engage with PBCs nationally, regionally, and locally. Engagement for policy reform, evaluation and review needs to be ongoing, rather than one-off or ad hoc consultation sessions or phases. Ongoing sector engagement is vital for building sector and corporate knowledge and data but, more importantly, it is key for building trust and strong working relationships with PBCs and First Nations communities. Ongoing engagement also offers professional development opportunities and supports staff retention in the sector, through the creation of a PBC support industry.

A current gap in the engagement process, which has been highlighted by PBCs at regional forums, is the need for a national forum of PBCs. While this would likely not include every PBC, there could be options to sponsor many PBCs from the regional forums to attend. The AIATSIS Summit, previously the National Native Title Conference and Indigenous Research Conference, provides one forum for PBCs to meet and share experiences. However, the summit is costly and is not a PBC-focused event. A national PBC forum would provide PBCs with an opportunity to discuss how major developments, such as the Voice, could engage specifically with the PBC sector. A national forum could also provide the opportunity for the PBC Steering Group to engage more broadly, and perhaps expand and nominate members.



## SECTION 1: PBC INVESTMENT

The preamble to the UNDRIP notes concerns that historic injustices have prevented First Nations peoples from fully exercising their right to development but welcomes the fact that Indigenous peoples are organising themselves for economic enhancement.

Certainly, Australia's First Nations peoples do not enjoy the right to an adequate standard of living, as provided in ICESCR, Article 11.1. In a country as affluent as Australia this denial can only be understood to be based on race, contrary to the requirements of Article 2.2 of ICESCR.

The consideration of First Nations peoples' opportunities for economic development in the UNDRIP extends beyond statements in the preamble. Provisions, such as Article 23, refer to self-determination in exercising the right to development. Article 21.1 refers to the right to improvement in economic and social conditions and Article 21.2 imposes an obligation on states to implement special measures to do so, if needed. In this respect, the UNDRIP is merely restating, in the context of Indigenous peoples, the obligation of economic rights, created under Articles 5(e) and 2.2 of the *International Convention on the Elimination of all forms of Racial Discrimination* (CERD).<sup>53</sup>

The UNDRIP also points to opportunities for economic development to occur through provisions, such as Article 26.2, regarding the right to development of natural resources on Indigenous lands, and Article 32.2, which invites opportunities to participate in development of resources initiated by others, as part of the FPIC process. As discussed in Section 1.1 of this report, the PBC is the representative institution that has the authority to make decisions about the development of natural resources on First Nations lands, whether this development be undertaken by the traditional owners or by others with the consent of the traditional owners.

However, notably, the UNDRIP does not require the representative institution, the PBC, to be the vehicle for economic development. It merely states that the PBC should play a role in the approval process for land-based resource developments.

When discussing self-determination in the right to development, Article 23 of the UNDRIP leaves it to traditional owners to identify the vehicle(s) to facilitate economic development. This noted, Article 21.2 of the UNDRIP and CERD create an obligation on the state to support the First Nations chosen economic vehicle in these endeavours through appropriate special measures.

The rights-based discourse then identifies four key elements in the necessary policy paradigm:

1. a right to economic development to overcoming current standard of living deficiencies;
2. a right of First Nations communities to determine what vehicle(s) to utilise to pursue this right;
3. a role for the PBC, in relation to approval of land-based resource developments; and
4. an obligation on the state to support these endeavours.

While the Commonwealth has an obligation to fund PBCs, the economic and commercial success of PBCs is not just a special measure. It is an opportunity for the Commonwealth and the states to invest in the future of Australia by supporting the development of strong First Nations regional, domestic, and international industries. The economic future of Australia cannot rely solely upon the extractive industry exports and should be focused on local renewables rather than a gamble on the export of green hydrogen. A more secure and ethical economic future for Australia lies within the establishment and support of strong First Nation industries with secure and commercial Intellectual Property rights and access to international markets and free trade agreements.<sup>54</sup>

For too long, non-Indigenous government and private sector proponents have seen native title and engagement with native title holders as an impediment to economic development, due to difficulties engaging with PBCs. These difficulties usually stem from a lack of finance and resourcing.<sup>55</sup> Governments and the private sector perceive the PBC to be the obstacle to development, rather than the Australian Government, which forced a PBC sector without providing adequate funding for it to operate.

In the past 30 years, the policy framework for PBCs has assumed that PBCs can magically improve their situation without outside help, despite decades

of chronic underfunding and spiralling incapacity. Society and the government do not expect this of other sectors, such as agriculture, manufacturing or even sports. It is generally understood that those industries need substantial investment to flourish, and that this investment subsequently contributes to community and regional benefits. Yet, First Nations, particularly PBCs, are blamed through discourses of deficit, focusing on governance, culture, a few individuals, or anything else that hides the failure of policy cycles that do not provide for adequate funding and resourcing.

Under the NTA, native title holders are legally forced to form a PBC to hold their native title rights and interest. PBCs are culturally and legally complex organisations with a broad range of functions and obligations. In advice to NNTC, native title barrister Angus Frith provides a detailed explanation of the following PBC obligations.

- Fiduciary obligations to native title holders arising at common law from their trust or agency relationship with them;
- Statutory obligations in performing their functions as trustee or agent, arising under the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (PBC Regs);
- Corporate obligations to their members, to the Registrar of Aboriginal and Torres Strait Islander Corporations (ORIC) and to native title holders, which arise under the CATSI Act; and
- Obligations to native title holders arising under their traditional laws and customs.

The Australian Government has an obligation to sufficiently fund PBCs, for several reasons.

- To hold native title rights and interests under the NTA, native title holders are forced to incorporate as PBCs.
- PBCs are each unique corporations as they stem from the unique laws and customs of each native title group.
- The objects of the NTA require functioning PBCs, for example: the Future Act regime.
- PBCs are culturally and legally complex corporations that have a range of statutory obligations under the NTA, CATSI Act and PBC Regulations, including the capacity to engage with native title holders, other parties and proponents.

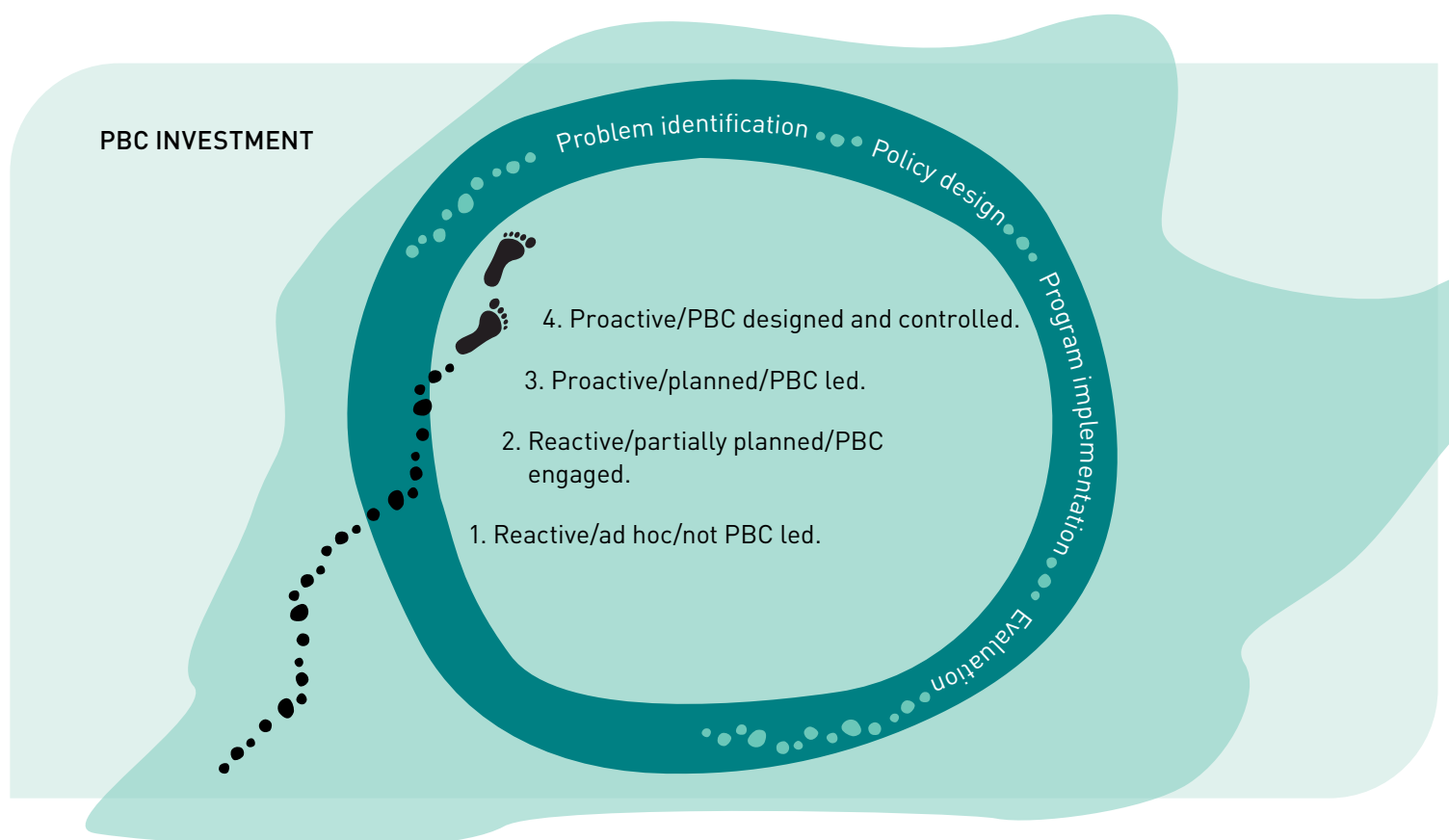
- For the Australian Government to give full effect to the recognition of native title rights and interest and uphold the NTA, PBCs must have the capacity to function.
- Recognising rights carries with it an obligation for their existence; the existence of rights necessitates the continued and sustainable existence of the object in relation to which the right exists.
- The Australian Government has obligations to protect all its citizens, including First Nations. Its role as *parens patriae*, or 'parent of the nation', requires it to 'seek to protect the interests of the whole community that it represents'.

## FRAMEWORK TO SCALE THE REFORM PROCESS

In this report, particularly Part 3, Sections 1-3, there are a number of short and long term policy reform recommendations to provide national support for PBCs.

In a business maturity model, organisational progress is scaled and measured in a series of levels ranging from ad hoc, or reactive, to strategic and continuously improved. There are many maturity model frameworks available, however they are all based on a non-Indigenous philosophy and understanding of what progress entails. A more relevant framework for the PBC sector would consider the principles, outlined in Part 1, that have been developed by First Nations scholars for governments supporting nation rebuilding. A central theme of these principles is the development of culturally, co-designed, long-term programs that relinquish centralised control over decision-making, and resources to develop programs that are PBC designed, controlled and managed.

The approach of this section on PBC investment is to move from older policy approaches that have not been First Nations or PBC led, to shorter-term options that involve PBC engagement and planning, then to longer-term options that value PBC autonomy and independence.



## PBC FUNDING REVIEW AND MODELS

The single most important challenge and priority for PBCs is the lack of adequate funding and resourcing. In the Phase 1 regional forum in Brisbane, Queensland PBCs asked why PBCs do not receive funding direct from the Australian Government. Whilst recognising that funding is vital for NTRB service provision to PBCs, PBCs have long been calling for their own direct secure and ongoing funding. At all regional forums during this project, PBCs have raised the lack of adequate government funding as a major issue. This is not a new concern. For 20 years, PBCs have expressed frustration at the lack of funding, at national meetings, the AIATSIS summits and conferences, and regional forums, through submissions, during consultations and via individual discussions with the NNTC. The 2019 PBC Survey found that 67 per cent of PBCs reported a lack of funding to be their biggest challenge, only down by 6 per cent from the 2013 PBC survey.<sup>56</sup> This is an entrenched problem. The PBC sector has been chronically underfunded for over two decades and this has led some PBCs to feel that they have been set up to fail and that their time and labour is not valued.

An urgent review of funding, with the intention of implementing a new model that delivers secure and ongoing funding to PBCs is essential. 83 per cent of PBCs that participated in the 2019 PBC Survey, responded that more funding is necessary to help them overcome the challenges they experience.<sup>57</sup> The Australian Government is yet to address the single largest challenge with PBCs in a way that will provide positive results.

Social Justice Commissioner June Oscar AO, Bunuba Dawangarri Aboriginal Corporation, previously called for a,

*partnership model between native title holding corporations, industry and government to establish a national fund which could be called something like a Native Title Corporations Foundation which native title holding groups could draw on to help fund their governance and operational responsibilities in their start up development phase.*<sup>58</sup>

It is not only PBCs calling for a secure and ongoing funding model. Many submissions, to the Joint Standing Committee on Northern Australia, including one from the Human Rights Commission, stressed the need for adequate funding for PBCs:

*The Commission supports the role of PBCs and recommends the Government support native title holders to effectively govern their lands, territories and resources through their PBCs, including by providing PBCs with adequate technical and financial resources to meet their administrative, legal and financial functions.<sup>59</sup>*

In regard to resource sector regulation, the Australian Productivity Commission noted that PBCs need to be able to represent native title holders in negotiations with resource companies; however, they found that,

*resourcing and capacity constraints mean that many PBCs are unable to carry out this function effectively. Both government and resources companies have a role in resourcing and building the capacity of PBCs.<sup>60</sup>*

## EXISTING FUNDING FOR PBCS

The Australian Government has made small scale changes to the funding policy regime. In 2015, it increased the Basic Support Funding (BSF) slightly, from \$50,000 per annum to up to \$70,000 and introduced the PBC Capacity Building Fund as part of the Indigenous Advancement Strategy (IAS). In 2021, the outgoing government further increased the PBC Capacity Building Fund in the budget.

The first problem with the PBC Capacity Building Fund is that PBCs need capacity to be able to successfully complete the application process. The PBCs with the greatest needs do not have the capacity to compile a strong application.<sup>61</sup>

The second problem regards transparency around the PBC Capacity Building Fund and other related NIAA funding for PBCs. It is unclear who receives the funding and what it achieves. PBCs in the Kimberley remarked that they did not know what third parties were receiving funding on their behalf, how much they received and what it was achieving.<sup>62</sup> This may be more of a concern with the BSF than the Capacity Building Fund, which requires board authorisation.

The final, and most significant problem is that the NIAA funding is insufficient and does not work: 70 per cent of PBCs continue to have little or no income. Approximately 62 per cent of PBCs receive Basic Support Funding of approximately \$70,000 per annum. There is also limited project funding available, such as the PBC Capacity Building Scheme, which provided 48 PBCs with project grants between 2016 and 2021.<sup>63</sup>

Information from ORIC demonstrates that PBCs still experience the same frustrations as 15 years ago. At the 2007 National Meeting of PBCs, hosted by AIATSIS, it was found that,

*the majority of PBCs at the meeting lacked the resources to carry out their basic statutory functions, let alone engage in long term projects. Support and resources are particularly needed early on to ensure that the native title holders have the capacity to make informed decisions about how they will use and manage their land, their short, medium and long term aims and goals, and how any decisions will be implemented.<sup>64</sup>*

## EVALUATION OF EXSITING FUNDING PROGRAM

One possible immediate action to improve PBC access to Commonwealth funding is a critical First Nations-led review of the two existing funding programs, BSF and the PBC Capacity Building Fund. Often, previous policy evaluations in the native title sector have been confusing, disjointed, overly focused on success stories or conducted at a distance from First Nations organisations and communities.<sup>65</sup>

The UNDRIP provides clear and specific standards for the objectives or aims for a review of any policy or funding program. The Nation Rebuilding principles should inform any review of current native title programs.

While it is vital the review is First Nations-led, it is insufficient to simply engage First Nations consultants. The evaluation criteria for the consultants undertaking the review needs to address their awareness and willingness to engage with:

- the UNDRIP
- knowledge of the PBC sector, particularly the challenges faced by many PBCs

- decolonising and Indigenous methodologies
- qualitative and participatory approaches
- Culturally appropriate models.<sup>66</sup>

Finally, the evaluation report must be made publicly available.

*Publicly available evaluation reports are important for transparency and accountability of government spending, but also to build the knowledge and evidence base upon which Indigenous peoples and organisations can make decisions.*<sup>67</sup>

A key element of Indigenous Data Sovereignty<sup>68</sup> is ensuring that information about First Nations people is clear and accessible, including the decision-making processes that sit behind the information. For an evaluation, the report should include a clear summary, the process, rationale and criteria for the evaluation.

## A NEW FUNDING MODEL: THE PBC FUTURE FUND

The need for a funding review and the implementation of a new model is now urgent. Recommendation 7 of the report, *A Way Forward*, that was agreed to in principle by the Australian Government in November 2022, states,

*The Australian Government is committed to working in partnership with native title holders, their Prescribed Bodies Corporate (PBCs), state and territory governments and other key stakeholders to consider a range of options to reform funding of PBCs and build PBC capacity.*

To adequately fund PBCs, providing a secure and ongoing income, the NNTC recommends the development of a PBC Future Fund. The PBC Future Fund was the focus of the 2021 report, *Toward a Perpetual Funding Model for Native Title Prescribed Bodies Corporate*, a collaboration between the NNTC and the Centre of Aboriginal Economic Policy Research (CAEPR).<sup>69</sup> The fund should adopt a perpetual Sovereign Wealth Fund model that would be guided by the 2015-16 Indigenous Investment Principles and Santiago Principles.<sup>70</sup> The PBC Future Fund should be created through legislation

and governed by the Australian Future Fund Board of Guardians.<sup>71</sup> This board would report annually to PBCs and the Australian Government.

Australia is lagging behind other nations, such as Canada, the United States of America and New Zealand, who have been investing in First Nations Sovereign Wealth Funds and Sovereign Development Funds for some time. New Zealand has provided NZD 495 million to support the Māori economy through the Provincial Growth Fund. They found that this support had far reaching effects, including the creation of 1,257 jobs and increases in capital and land value, which equated to an extra NZD87 million for New Zealand's households. The New Zealand Institute of Economic Research found PM Capital Global Opportunities Fund Limited investment is expected to increase New Zealand's overall Gross Domestic Product by nearly NZD 250 million.<sup>72</sup> While international examples may have distinct legal frameworks of treaties and legislated self-determination and self-government, there is nothing that legally prevents the establishment of a Future Fund for First Nations in Australia, as other Australian Future Funds demonstrate.

The Future Funds model was published prior to the release of the report *A Way Forward*. It was initially modelled as a sovereign wealth fund, where capital would be provided only by the Australian Government. In light of Recommendation 7 from *A Way Forward*, the NNTC and CAEPR are working on a more flexible stage 2 model that allows for input from all Australian governments. The stage 2 model addresses a range of other challenges, such as how the Future Fund would relate to other potential funding or sources of income for PBCs, agreement-making, and variations in access between PBCs, regional groups of PBCs and other related bodies. This new model will help to inform future work in this space.

The costs of the model are unlikely to vary significantly from the original costings, which were carried out by the NNTC, in collaboration with members, and provided to CAEPR; however additional future research is required to finalise the costings. The NNTC and CAEPR estimated annual costs for compliance to non-Indigenous legislation. The estimates were derived from NNTC members' knowledge of the costs involved in complying with statutory obligations, such as: staff costs for a chief executive officer, administrative staff and a Future Act coordinator, bookkeeping, insurance, office rent,

energy bills, office equipment and supplies, vehicles and transport, postage, communications, basic information technology services, legal support, board meetings, annual general meetings and special general meetings.<sup>73</sup>

Table 3, from CAEPR, estimates costs for each PBC.<sup>74</sup>

ITEM	COST (PER ANNUM)
CATSI compliance	\$275,000
NTA/PBC Regs compliance	\$346,000
<b>Total</b>	<b>\$621,075</b>
Total annual shortfall	\$557,870

There are additional cost estimates, such as enabling cultural heritage at \$219,000 and working on nation building and sustainable development at \$380,000 per annum, were not included in the model, but are crucial for developing strong First Nations and PBCs.<sup>75</sup> Additional research on costs is necessary to ensure that they are nationally representative.

The model for the initial Australian Government investment would need to cover basic compliance with the NTA, PBC Regs and CATSI Act, and management fees to be recovered by the Future Fund Management Agency. The base capital required for a target return of 2.5 percent per annum is \$8,601 million.<sup>76</sup> This would provide all PBCs with a secure and ongoing income in perpetuity.

The flow on effects of funding First Nations can be grouped into the following themes:

- Nation building: a rights-based approach to (re)building and supporting independent but co-existing First Nations;
- Sustainability: developing capability and self-governance;
- Place-based integration: a local, strengths-based approach to *Closing the Gap* and addressing other initiatives; and
- Adaption: acknowledging that First Nations are here forever and can be strengthened through a range of mechanisms, such as the Voice, truth-telling and reconciliation.

The advantages of a PBC Future Fund include:

- directly improving the efficiency and effectiveness of the native title system;
- buffering small PBCs from their susceptibility to the damaging cycle of erratic income variations;<sup>77</sup>
- ensuring a high-level of compliance, and building and sustaining PBCs' capacity to deliver on a developmental agenda;<sup>78</sup>
- flow on economic effects that will help to develop strong and resilient regional and transitioning Australian economies; and
- broader policy benefits at federal, state and local levels (as per responses to Juukan Gorge, Voice to Parliament, Closing the Gap) due to PBCs being more capable.

## INTERIM STEPS FOR FUND DEVELOPMENT

While a Future Fund may be considered a long-term policy development, there are interim steps required to ensure that the development of the fund is proactive, planned and First Nations led.

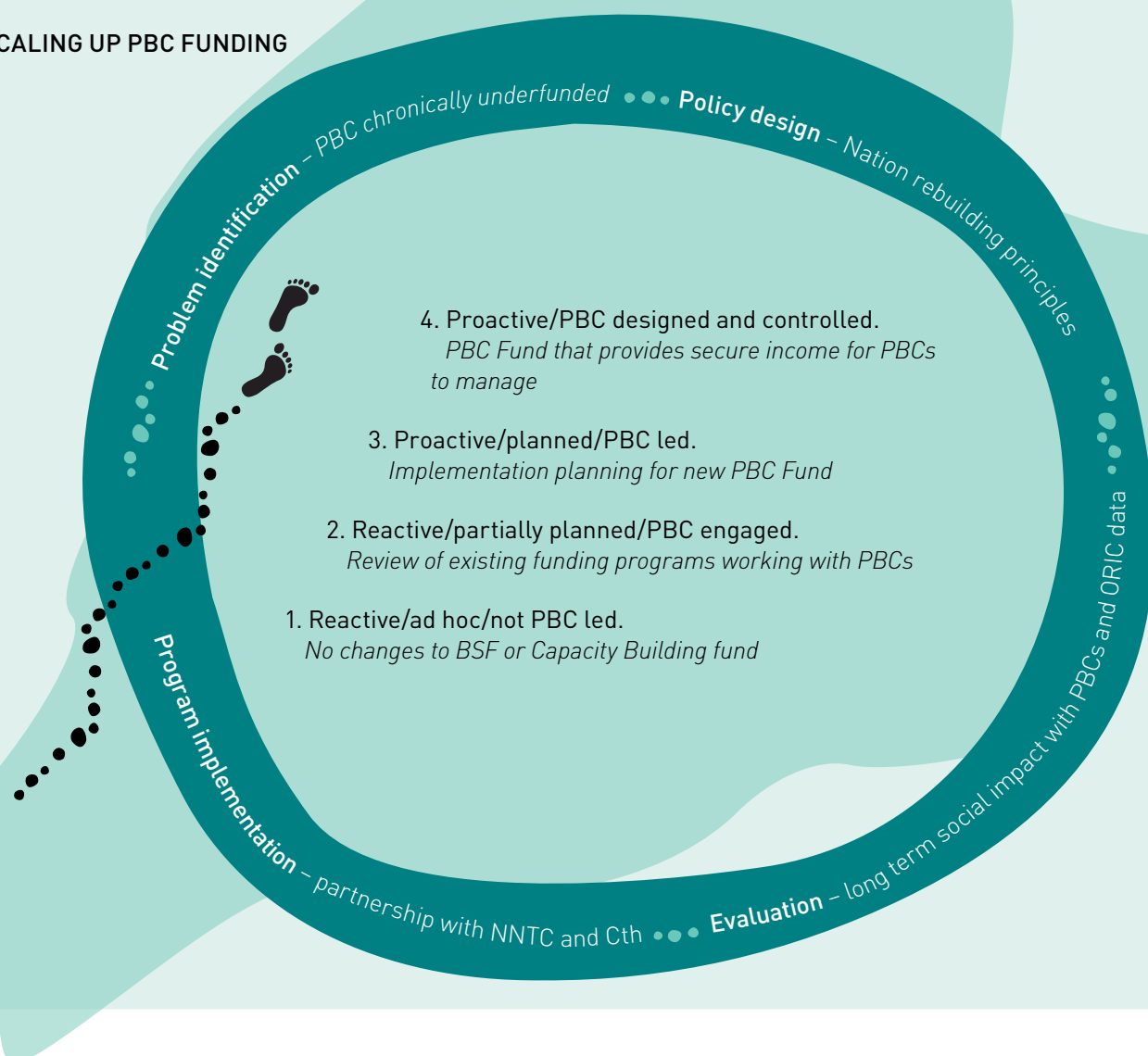
These interim steps need to begin now, and this work would ideally be conducted within the infrastructure of a PBC Futures Partnership Agreement.

**Step 1:** The NIAA and the NNTC map out a long-term implementation plan that addresses the challenges at each step. Mapping a strategy and implementation plan does not require any further government commitment to the proposed fund, other than what has already been publicly committed in principle in the Australian Government's November 2022 response to the Juukan Gorge Inquiry.

**Step 2:** Identify what resources are required for the implementation strategy.

The NIAA Ministerial Roundtable on PBC policy reform held in October 2021 and subsequent communications with the NIAA made clear that a second paper on the proposed fund is needed to address the following concerns:

## SCALING UP PBC FUNDING



- Pros and cons of a sovereign wealth fund as an appropriate instrument for funding, in comparison with a legislated special appropriation or a sovereign development fund
- Potential methods to formally recognise the eligibility of First Nations to receive core administrative funding (for example, native title, reconciliation action plans, Anangu Pitjantjatjara Yankunytjatjara (APY) Land Rights Act, etc.) and the relationship with groups that are not formally recognised;
- Updated estimates needed in the sovereign wealth fund;
- Options to build the model over time;
- Detailed options for financing the sovereign wealth fund;
- Sources of capital:
  - consolidated revenue — general taxation (such as the ILC model)
  - hypothecated taxation (for example, the NSW Aboriginal Land Council Account or a mineral and gas levy)
  - debt financing;
- A mechanism for enabling contributions from:
  - states and territories
  - the private sector.

**Step 3:** Present the refined model to the states and territories for further discussion and refinement.

**Step 4:** Employ financial sector consultants to engage the corporate and philanthropic sectors and complete a scan on likely private sector investment options for the fund.

With adequate resourcing, the NNTC, in collaboration with the NIAA, could begin immediately these interim steps, and any others identified during the development of a strategy.

## MANAGING NATIVE TITLE MONIES: ECONOMIC VEHICLE STATUS

In 2020, as part of the PBC Futures project and the NNTC response to the CATSI Act review, the NNTC proposed, to the Australian Government, a draft model for alternative means for PBCs to hold and manage native title monies as an option alongside the current trust system.<sup>79</sup>

Under this model, PBCs, directly managing native title monies, would have access to the current taxation advantages enjoyed by charitable trusts. However, to gain these benefits the PBC would need to comply with greater financial transparency and reporting. This model was named 'the PBC Economic Vehicle Status' (PBC EVS). Bringing financial management of native title monies into the PBC is a key aspect of nation rebuilding, as the PBC and common law holders become the sole decision-makers for native title financial decisions.

A PBC EVS would provide a targeted, fit-for-purpose option to enable Indigenous communities to 'close the gap' through their own investments in economic development. Critically, a PBC EVS would represent a clear break from the notion that native title monies represent charitable welfare while applying similar tax concessions as for other entities focused on the self-determination of Indigenous peoples. Having autonomy and choice, the right to determine one's own economic development and to manage their own internal affairs, including financing, is a key principle of the UNDRIP.

The PBC EVS adheres to the UNDRIP by providing native title groups and corporations options for managing their own financial affairs that go beyond the charitable trust system. The following section outlines the background and reasoning of the PBC

EVS and details the model for implementation as part of the PBC Futures Policy project. It was included in the NNTC's submission to the 2021 CATSI Act review.

The PBC EVS model was developed by the NNTC and Associate Professor Ian Murray, University of Western Australia,<sup>80</sup> with the assistance of the Minerals Council of Australia.

The PBC EVS model details the:

- history and relatedness to the previous Indigenous Community Development Corporation model;
- timing and need for the model;
- principles of the model;
- criteria for the model;
- structure and governance; and
- accountability and transparency to members.<sup>81</sup>

There is outstanding work to be completed on the model, particularly around federal and state tax reforms.

The Australian Government needs to conduct a targeted CATSI Act review for the sections that most impact PBCs or are PBC specific. This includes a section for PBC EVS to support PBC autonomy in financial decision-making, as well improving transparency and accountability in decision-making, as per recommendation 7 of the response to the Juukan Gorge Inquiry.

The NNTC's submission to the previous CATSI Act review, stressed the need for a separate chapter or section for PBCs, for reasons relating to the special nature of PBCs. That is, the fiduciary obligations to native title holders. This PBC section would better support PBC governance, enabling consideration of the PBC EVS. It would also streamline future targeted reviews of the CATSI Act for PBCs.<sup>82</sup> While the recommendation was not implemented, the NNTC was advised that the government would further investigate the option of a separate chapter relating to PBCs.

The NNTC has emphasised in previous submissions to reviews of the CATSI Act, that for the CATSI Act to justify its continuing existence as a special measure that is consistent with CERD and the UNDRIP it must advance the interests of traditional owners. It can do this most effectively by supporting the effective governance and operation of their relevant representative institutions, the PBCs.

The discriminatory nature of some provisions in the CATSI Act is a particular concern for native title holders, as the NTA makes it mandatory after a determination of native title, for native title holders to establish a prescribed body corporate under the CATSI Act to hold native title in trust or represent them in matters regarding their native title rights.

The NNTC highlighted some of these discriminatory provisions, such as Section 453, in its submission to the CATSI Act review, undertaken by the previous government, as did several other organisations, including the Kimberley Land Council, the National Aboriginal Community Controlled Health Organisation, the Victorian Aboriginal Heritage Council, the New South Wales Aboriginal Land Council, and the Law Council of Australia.

A targeted PBC focused review of the CATSI Act (and NTA) needs to consider whether the CATSI Act is indeed acting as a special measure, whether amendments need to be made in line with the *Corporations Act 2001* (CA) or whether PBCs should have the option to incorporate under the CA.

Further information about reform to the NTA and CATSI Act can be found in Part 3, Section 7 of this report.

## COMMERCIAL OPPORTUNITIES: RIGHTS, BUSINESS AND CAPITAL

While ongoing and secure funding for PBCs is key, PBCs also require access to commercial opportunities and developments of their choosing. For some PBCs, their business is, and needs to be supported on country. During their Phase 2 regional forum, Central Australian PBCs stressed the importance of being able to take children onto country, to have ranger programs and land management opportunities and to be able to develop on-country commercial businesses, such as tourism or bush foods. However for other PBCs commercial business opportunities may not be on country. During Phase 1 of the regional forums, a Queensland PBC explained that PBCs in that state do not always have access to their country or might only be able to access a small portion of it, as the rest is pastoral, agricultural or other land excluded from the determination. They need commercial business opportunities that do not necessarily include land to be able to provide the economic means for the PBC to get people back to country.

For coastal PBCs, such as GBK, commercial business opportunities rely on having commercial native title rights to the sea, that is to take for any purpose, as found in *Akiba v Commonwealth*.<sup>83</sup> The High Court of Australia recognised that a native title right to access and take resources could be exercised for any purpose: commercial or non-commercial, and native title agreement-making from which economic benefits to native title holders may flow. It is important to remember that economic benefits from agreements, particularly compensation, belong to the native title holders. They have the right to choose what their benefits may or may not be used for, including economic development, but agreement benefits should not be consumed entirely by legislative compliance.

Even with the *Akiba* ruling, or the right to take for any purpose, there is considerable work for PBCs to determine and get agreement on sea boundaries between local groups, as well as to obtain fishing licenses and infrastructure and set up those businesses.<sup>84</sup>

Key components of PBC commercial development are accessing capital and investment and dealing with the challenge of equity models that do not rely on inalienable native title land as the main asset. In 2014, the Council of Australian Governments (COAG) announced an urgent investigation into Indigenous land administration and use, to enable traditional owners to readily attract private sector investment and finance to develop their own land with new industries and businesses to provide jobs and economic advancement for Indigenous people. A Senior Officers Working Group was established to advance the investigation.<sup>85</sup> The report found that even with inalienable land, that is land that cannot be transferred, sold or mortgaged, there are still existing mechanisms to support the creation of bankable interests under various statutory regimes, such as leasing, as a way of preserving the underlying communal title whilst creating a sufficiently transferable interest to be used as collateral for a loan.<sup>86</sup> However, these mechanisms are best suited to land rights regimes and do not deal with native title rights and interests directly.

There is still considerable work in the native title sector to develop suitable investment models for native title lands and to ensure PBCs have access to appropriate investment models, capital, and partners.

The NIAA is currently developing an Economic Empowerment Division and a strategy for a new First Nations economic empowerment policy and subsequent partnership between the Commonwealth, Coalition of Peaks, and the Australian National University. Because economic development is based on rights to lands, waters and resources, which are held by PBCs and native title holders, PBCs need to be at the centre of these discussions. Special consideration needs to be given to the specific context of the native title determinations and how to best unlock the economic and commercial potential of native title lands and waters.

An initial step in the development of a First Nations economic empowerment strategy is to hold a series of workshops or roundtables focused on the specific native title and land rights matters affecting economic development, particularly commercial. The workshops would be PBC and NTRB led and involve national bodies, such as Indigenous Business Australia and First Nations Portfolio, ANU, and would identify barriers and pathways forward in:

- ensuring commercial rights across all determinations;
- accessing capital for PBCs; and
- investment models suitable for PBCs and native title inalienable rights.

## PART 3: SECTION 1: REFORM AGENDA

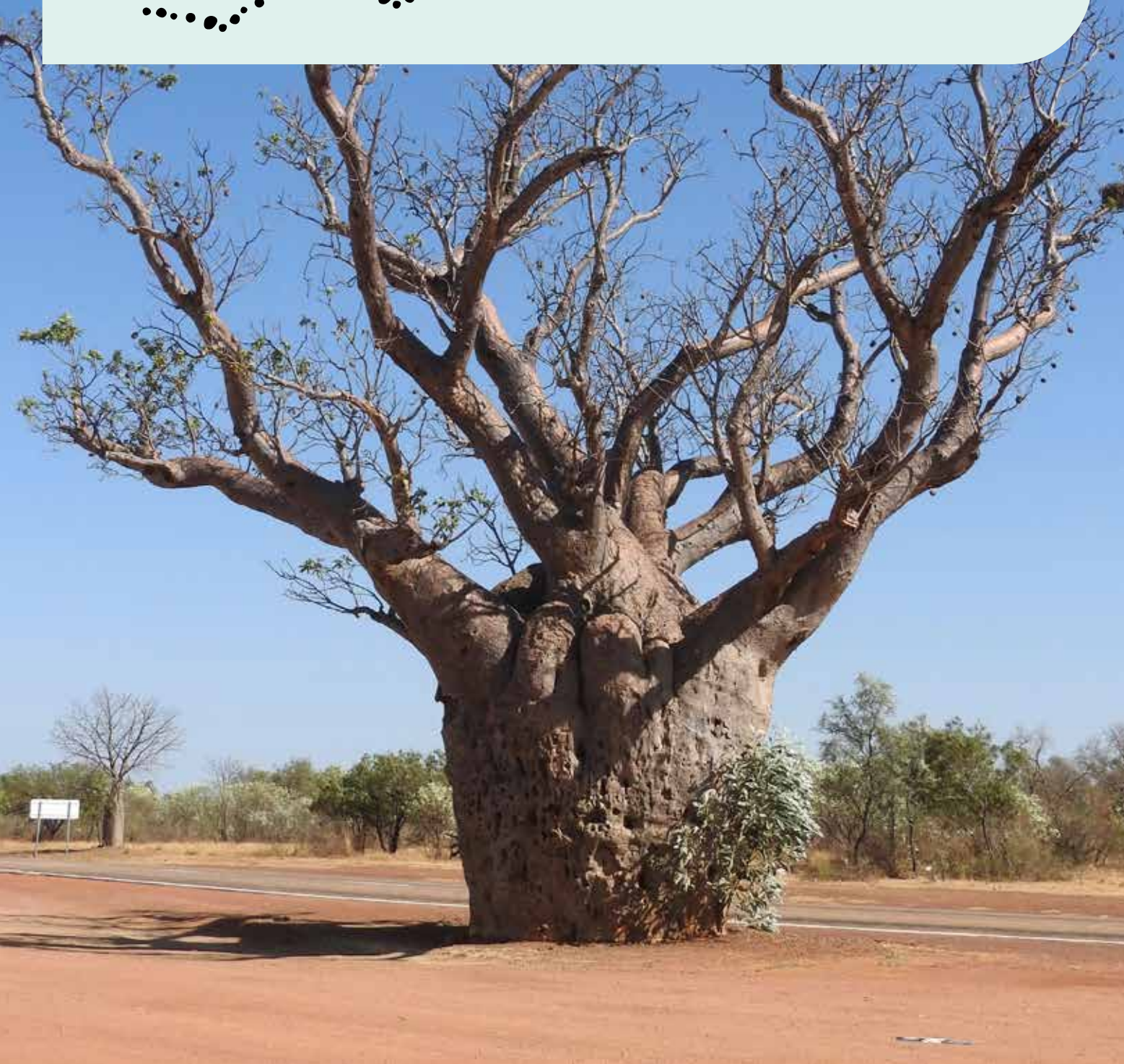
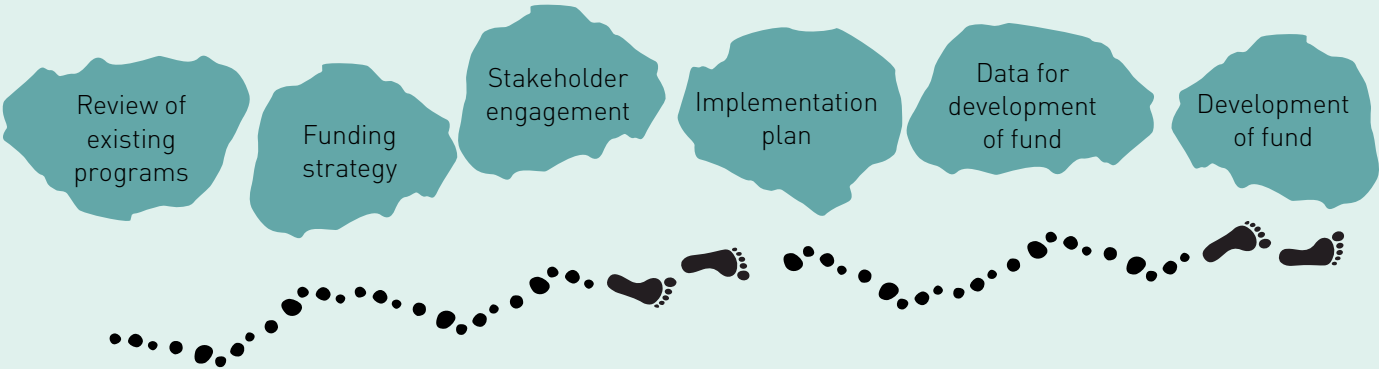
### RECOMMENDATIONS

The NNTC recommends:

**3. That in adherence with the agreed Recommendation 7 from the Juukan Gorge Inquiry, a PBC Future Fund is developed to ensure long term and secure funding for PBCs and to invest in the regional economic development of Australia.**

- That the NIAA and the NNTC develop a criteria for meaningful, critical and independent review of the existing funding programs, Basic Support Funding and PBC Capacity Building Fund, using the draft principles from Part 2, Recommendation 1.
- That the NIAA and the NNTC should develop a PBC funding strategy and implementation plan that addresses the potential risks and challenges and work required to overcome those challenges in the development of a PBC Future Fund.
- In collaboration with NIAA, the NNTC research the nuances of a fund, including:
  - determination of how the fund would be managed and to whom it would be distributed
  - models of financing the fund
  - sources of capital, including growth over time
  - a mechanism for enabling contributions from states and territories and the private sector.

STAGED PROCESS OF RECOMMENDATIONS



## SECTION 2: PBC STATUTORY OBLIGATIONS AND BUSINESS ON COUNTRY

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### PBCS AND STATUTORY FUNCTIONS

A PBC participating in a consultation, negotiation or decision-making process under native title, cultural heritage or other legislation is exercising a statutory function. The legislative process the PBC is participating in, may or may not be considered by a court to be beneficial, but it is not gratuitous. The relevant law is enacted by the legislature because it serves a public purpose, regardless of whether that public purpose is also of benefit to the traditional owners.

To illustrate this point, First Nations cultural heritage is important to both traditional owners and to the non-Indigenous state. This is the basis of statutory protection around First Nations cultural heritage. Such legislation is not a favour to traditional owners, but a manifestation of state priority. Thus, when a traditional owner organisation participates in a cultural heritage assessment, it is carrying out a statutory function on behalf of the state and should be resourced, as would any other state apparatus. The same principles apply in the discharge of functions under the NTA or any other legislation.

The provision of funding or the ability to impose fees for the delivery of a service by a PBC does not constitute state support or a special measure in support of traditional owners. It is merely an aspect of the implementation of legislation. This point is particularly relevant to any suggestion that a PBC surplus from business activities should, either immediately or over time, financially support the performance of statutory functions. As has been demonstrated, such a suggestion is tantamount to utilising legislation to impose a monetary burden on a PBC. It does not constitute support for economic activity.

In addition to the international legal expectations and consideration of the implications of the discharge of statutory functions, the legislative framework around PBCs has a significant impact

on a PBC's capacity to act as a vehicle for economic development. Section 55 of the NTA provides that at the same time that the Federal Court makes a determination finding the existence of native title, it also must make the determinations in Section 56, which addresses holding the native title on trust or Section 57 which addresses non-trust functions of PBCs.

### PBC BUSINESS ON COUNTRY

A PBC, as a representative institution of a First Nation, is at liberty to directly engage in a range of economic activities, or alternatively/additionally support other community or privately controlled vehicles to do so. While not wanting to preclude PBCs from engaging or supporting business development activities unrelated to a native title determination area, the complex regulatory framework of PBCs means that they have a range of rights and statutory obligations that manifest in various regimes and programs of business on country.

In this report we consider three regimes: Future Acts, Cultural Heritage, and Land Management, that require significant reform to bring them in line with a nation rebuilding approach and up to a standard of self-determination, as outlined in the UNDRIP.

PBCs have statutory obligations to speak for, manage and protect country. In the 2019 PBC Survey, 81 per cent of contributing PBCs reported that their second main purpose, after compliance, is to look after and manage country.<sup>87</sup> They express these legal obligations and rights through land management programs, such as rangers programs and Indigenous Protected Areas (IPAs), and cultural heritage. The manifestation of enacting native title rights on country is reflected in the aspirations of PBCs. In the 2019 PBC survey, 84 per cent of PBCs wanted or planned to carry out cultural services, including cultural heritage, cultural programs and art production, and 78 per cent wanted or planned to carry out environmental services, such as land and sea management, carbon and biodiversity.<sup>88</sup>

Supporting PBC business on country, whether via Future Act developments and agreements, cultural heritage protection or land management, is another way that the Australian Government and states can support Nation Rebuilding via the rights holders, that is, the PBCs. Focusing programs and

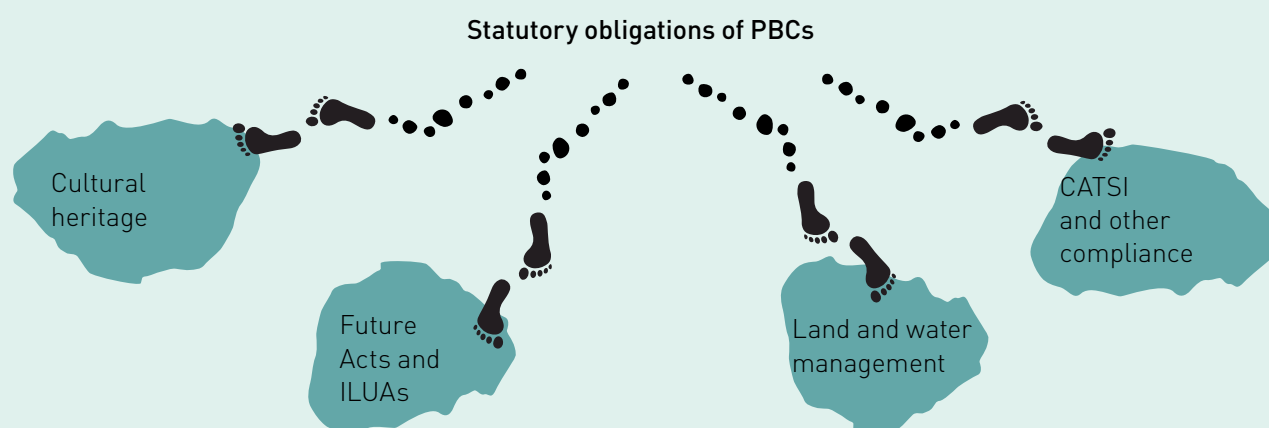
resources within these regimes directly into the PBC will achieve several benefits for both the PBC and proponents looking to do business on native title lands and waters.

The most evident benefit is the revenue potential for the PBC involved. As noted previously, the government is obligated to adequately fund a PBC to discharge its statutory functions. The PBC should not be expected to generate a commercial return to subsidise the statutory functions of government. However, discharging statutory land-related functions has the potential to provide legitimate revenue generation. The funding provided in discharging statutory functions creates the necessity for administrative infrastructure. This infrastructure can also be used to encompass non-statutory revenue generation activities far more cost effectively than creating new infrastructure for this second purpose. Funding a PBC to carry out its statutory functions also has the potential to support a PBC to expand its revenue generating activities into related, but non-statutory, areas of activity. An example of such activity is the delivery of environmental-cultural tourism or art production services, based on the experience and capacity developed through the provision of statutory cultural heritage or land management activities. Through mechanisms such as these, a PBC can use on-country statutory functions as a foundation for revenue generation activities that are not dependent upon exploitation of a statutory monopoly.

A second benefit, derived from supporting business on country, relates to development of PBC capacity outside of revenue generation activities. A PBC, discharging statutory functions and undertaking activities pursuant to the terms of a native title agreement, provides an invaluable platform to undertake a range of other funded and unfunded activities. The PBC will gain the administrative capacity to discharge governance responsibilities as well as the capacity to undertake a range of community development activities. In the circumstances where such community development activities are funded, the return on investment is maximised by eliminating the need to create this administrative capacity anew.

The third benefit relates to the role of the PBC in facilitating external actors to develop business activities in regional and remote areas. In this context, the PBC operates as an easily identifiable and legitimate point of contact for proponents, stakeholders, and potential business partners in the development of diverse business development opportunities, either identified by the external actor or proposed by the PBC itself. The logic of this proposition is clear. Many proponents and other external actors interested in facilitating business development or other activities with First Nations people in regional or remote areas, will not have the local knowledge to confidently collaborate with the appropriate First Nations organisation. The PBC could be an easily identifiable point of

## REFORM AREAS REQUIRED TO SUPPORT PBC STATUTORY OBLIGATIONS



contact. Perhaps more significantly, an investor can have confidence that the PBC represents the appropriate traditional owners and is subject to a process of externally accredited governance regulation.

## REFORM TO THE FUTURE ACTS REGIME

The NTA seeks to protect native title rights by requiring that governments comply with certain procedures before any activity, which affects native title lands and waters, can be validly undertaken. A Future Act will be valid if the parties to an Indigenous Land Use Agreement (ILUA) have agreed to the act being done and the ILUA is registered. Otherwise, the Future Acts regime provides native title holders and registered native title applicants with procedural rights when a development is proposed. The procedural rights that apply depend on the nature of the proposed Future Act and include the right to comment, be consulted, object to, and negotiate.

In *A way Forward*: the final report into the destruction of Indigenous heritage sites at Juukan Gorge, the Joint Standing Committee recommended that the Australian Government review the NTA in order to address inequalities in the negotiating position of Aboriginal and Torres Strait Islander peoples in the context of the Future Act regime:

*This review should address the current operation of the future act regime and other relevant parts of the Act including s31 (right to negotiate)... and Part 6 (the operation of the NNTT).*

To ensure this reform effort is anchored in an appropriate evidence base, the NNTC is working on a comprehensive national-level report on the Future Acts regime.

## NATIONAL SNAPSHOT OF THE FUTURE ACTS REGIME

While there is significant commentary on how the Future Acts regime places significant burden on various stakeholders in the native title system, this burden has not been systematically documented. For instance, we know through anecdotal evidence that PBCs are required to deal with large numbers of Future Act notifications. They often cannot process notifications in time and they do not have the capacity to understand lengthy and technical

documents. However, we do not have thorough data points on these matters.<sup>89</sup> During engagement for the PBC Futures project, the PBC Futures Committee noted the absence of, and raised the importance of including, a review of, and reform to the Future Acts regime in the reform agenda. This was supported by other NNTC members, who are also experiencing considerable difficulties in the management of Future Acts.

The NNTC aims to build a comprehensive national picture of the practical experience with the Future Acts regime of native title holders, PBCs, and NTRBs, and to suggest policy reforms that will help to address imbalances of power, including what resources and substantive legal reforms are needed to better protect native title rights.<sup>90</sup>

The snapshot will document the following elements:

- the experiences of PBCs and native title holders with the Future Acts regime;
- the experiences of NTRBs in assisting PBCs and native title holders with Future Acts (NTRBs have a statutory function under Section 203BB to provide facilitation and assistance to PBCs in relation to Future Acts and ILUAs, amongst other matters);
- the cost and time involved in asserting procedural rights, including the right to negotiate and the associated expedited procedure (Section 237), and what is involved in negotiating ILUAs to deal with Future Acts (a vast majority of Future Acts in Western Australia involve exploration licences that the state claims is subject to the expedited procedure under Section 29(7) of the NTA);
- the cost and burden that the Future Acts regime currently places on native title holders, PBCs, and NTRBs; and
- the operation and structure of the NNTT, which administers Future Act processes that attract the right to negotiate and expedited procedures, including mediating between parties, making future act determinations when parties cannot reach agreement and the question of good faith negotiation.

The first stage of the research will involve gathering and analysing quantitative data on the Future Acts regime, based on information in the public domain. This will include reviewing annual reports of NTRBs and data on Future Act notifications for which NTRBs have provided facilitation and assistance. The research will look at the number of Future Act

determination applications, expedited procedure objections and Future Act determinations, as cited in NNTT annual reports. Freedom of Information applications may also be filed with relevant state and territory government departments. The second stage of the research will involve semi-structured interviews with NTRBs and a national sample of PBCs for a qualitative understanding of the regime.

## RESOURCING: PBC CHARGING OF FEES

Whether there is adequate resourcing currently in place to effectively respond to Future Act notices will be an important focus of the review. This will include consideration of Section 60AB which appears to have had limited effectiveness, to date, in easing the considerable burden of responding to Future Acts on native title parties.

Section 60AB allows PBCs to charge a proponent for costs incurred when performing certain functions associated with negotiating a Future Act agreement, under Section 31(1)(b) or alternative state or territory provisions,<sup>91</sup> an ILUA, or the limited category of Future Acts in the PBC regs. These functions may require PBCs to consult with individual native title holders, arrange community meetings, participate in meetings, and facilitate access to lands and waters for inspection.

The right to charge a fee for service when responding to Future Act Notices was only legislated in 2007 and the NTA neither details how to charge a fee, nor provides a standard for what is reasonable. Furthermore, there is no link to any obligation on a proponent to pay the fee, nor are there any consequences for the Future Act in the event of a failure to pay.<sup>92</sup>

Many PBCs are unaware of the changes or how to assert their right to charge.<sup>93</sup> Other PBCs, who are aware of their right to charge, and NTRBs report that they can only charge a cost to recover outlays rather than a commercial rate.

A large majority of Future Acts in Western Australia involve exploration licences that the state claims are subject to the expedited procedure under Section 29(7) of the NTA. Section 60AB does not provide for cost recovery for these notices, creating uncertainty as to whether fees for these functions can be charged.

A streamlined charging model, that allows PBCs to concentrate on responding to notices, rather than logging time and administration costs, is needed. Such a model will provide transparency between

PBCs, government and proponents. One model that is being trialed in some jurisdictions involves an upfront lump sum fee. In 2017, the Queensland Representative Body Alliance developed a PBC Schedule of Fees for upfront charges for a 'right to comment'. This model will be further reviewed in the subsequent Future Acts report.

## MINING AND EXPLORATION: RIGHT TO NEGOTIATE IN GOOD FAITH

The proposed Future Acts report will seek to understand how the right to negotiate, which is central to mining and exploration activities, operates in practice. The right to negotiate applies to a limited number of Future Acts, such as the granting of a mining lease or the compulsory acquisition of native title rights. The parties must negotiate 'in good faith' and can ask the NNTT to mediate. If an agreement is not reached after six months, the parties can ask the NNTT for a determination as to whether the Future Act should proceed, and on what conditions. It is rare that the NNTT will determine that a Future Act should not proceed. To date, this has only occurred in three determinations.

Several features of the right to negotiate system put native title holders at a disadvantage and undermine their right to FPIC.

First, the standard of good faith negotiation is very low. The NNTT applies the principle, set out in a 2015 decision *Rusa v Gnulli*, that 'good faith requires the parties to act with honesty of intention and sincerity.'<sup>94</sup>

Second, the six-month timeframe is particularly onerous where there may be issues of remoteness, logistical challenges, cultural protocols, cultural responsibilities, and other factors that impact on timing.

Third, the NNTT is not empowered to award compensation, royalties, or other arrangements for financial settlement in deciding Future Act determinations.

Finally, the right to negotiate does not apply to all Future Acts, even when the Future Act will significantly affect native title rights.<sup>95</sup>

## RENEWABLE ENERGY AND ANCILLARY INFRASTRUCTURE

As Australia's economy responds to climate change and works towards net zero emissions, renewable energy projects and transmission lines are being

developed and rolled out rapidly. These projects will have serious implications for native title holders. While mining activities are generally subject to the right to negotiate provisions of the Future Acts regime, and other major activities require an ILUA to be valid under the NTA, it is unclear what the requirements are for renewable projects under the Future Acts regime.

Some companies appear to be negotiating ILUAs, however there are anecdotes of others attempting to argue that renewable energy generation projects fall under Section 24KA of the NTA,<sup>96</sup> which triggers very few procedural rights. Without reform, there is a chance that renewable projects and ancillary infrastructure, which will have profound and generational impacts on native title holders, will attract fewer and lesser procedural rights, such as a right to comment, if any. As such, this topic will be a key focus area in the research.

## NATIONAL REFORM TO CULTURAL HERITAGE PROTECTIONS

The PBC is the body to look after cultural heritage as the right to look after country is one of the rights recognised in native title determinations. Even though all PBCs have a statutory native title right to protect country, not all PBCs are part of the cultural heritage system or recognised and resourced as the right bodies to carry out heritage business on their country. For example, in South Australia, PBCs do not automatically become Recognised Aboriginal Representative Bodies for cultural heritage and the process to achieve this status is lengthy. In addition, there is inequality in cultural heritage payments. In South Australia traditional owners receive as little as \$50 per hour, because archaeologist and other professional knowledge is valued higher than expert First Nations knowledge.<sup>97</sup> Whereas in Victoria, PBCs automatically become Registered Aboriginal Parties, receive funding, and have a higher payment standard of \$1,000 per day per monitor, including admin fees. The inequality within Australia's cultural heritage system needs to be addressed to ensure that all PBCs automatically become the representative body for cultural heritage and are adequately resourced to carry out a successful cultural heritage business, with commercially viable fees that recognise and respect the value of First Nations knowledge.

This section outlines the reform work that the NNTC and First Nations Heritage Protection

Alliance (FNHPA) are conducting in partnership with the Australian Government, and the role that the NIAA could have in national reform.

The Cultural Heritage reform work comprises two main elements: legislative reform and work with the private sector. As the NNTC is working within the auspices of the FNHPA, it is useful to commence with a brief description of the FNHPA.

## FIRST NATIONS HERITAGE PROTECTION ALLIANCE (FNHPA)

The FNHPA is an unincorporated association of First Nations groups that are concerned with promoting improvement in current Indigenous cultural heritage protections. The FNHPA comprises the NNTC, National Aboriginal Community Controlled Health Organisation, some smaller national organisations and a range of state and local organisations. Members of the FNHPA include several NNTC members, some non-NNTC native title organisations, Tasmanian representatives, non-traditional owner organisations, and Indigenous statutory authorities, including the Northern Territory Aboriginal Areas Protection Authority and the Victorian Aboriginal Heritage Council.<sup>98</sup>

## LEGISLATIVE REFORM

The legislative reform work is based on the September 2020 Ministerial Round Table on Protection of Indigenous Cultural Heritage<sup>99</sup>. This Roundtable followed the desecration of Juukan Gorge, and the Samuel Report recommendation regarding the need for co-design of new national Indigenous cultural heritage legislation and the establishment of the parliamentary inquiry into the Juukan desecration.<sup>100</sup> The Roundtable committed the federal government to establishing a co-design process for legislative reform.

The Australian Government and the FNHPA codesigned a Partnership Agreement, which concluded in late November 2021. The process of co-design, adopted by the partnership, involves a two-stage consultation process followed by the development of an options paper that will be agreed to by the FNHPA and presented to the Minister for the Environment and Water.

The model the NNTC is working towards is set out in its submission<sup>101</sup> to the Juukan Inquiry. In summary, it proposes that new national legislation would establish standards that are based on the UNDRIP provisions for state and territory

Indigenous cultural heritage legislation. These standards would resemble the standards in the *Dhawura Ngilan National Vision for Aboriginal and Torres Strait Islander Heritage*, which are consistent with the recommendations of the Juukan Inquiry and endorsed by the NNTC and the FNHPA.

Under the model, if state or territory Indigenous cultural heritage legislation satisfied the standards, the national legislation would have little use. If the state or territory Indigenous cultural heritage legislation did not satisfy the standards, a default Commonwealth regime would apply as well as the state or territory legislation. This creates a motivation for states and territories to improve their legislation. It is hoped that this approach will provide momentum to effect amendment to the worst aspects of the new West Australian legislation.

Within this general framework, there are many details that need exploration and clarification. The legislative reform work will likely also consider amendments to the *Environment Protection and Biodiversity Conservation Act* and NTA, as recommended in the Juukan Inquiry report and Samuel Report.

#### PRIVATE SECTOR: DHAWURA NGILAN BUSINESS AND INVESTOR INITIATIVE

Private sector cultural heritage work is being undertaken by the FNHPA in partnership with the Responsible Investment Association of Australasia and the United Nations Global Compact on Business and Human Rights Network Australia. The work is led by a steering committee, comprising representatives of all three organisations and the NNTC acts as secretariat.

The objective of this work, is to transform the *Dhawura Ngilan National Vision for Aboriginal and Torres Strait Islander Heritage*, including the best practice standards, into a set of standards or commitments that businesses and investors can sign up to, available from early 2023. An anticipated strategic benefit stemming from this work is the creation of evidence of considerable private sector acceptance of the need for legislative reform.

#### THE NIAA ROLE IN CULTURAL HERITAGE REFORM

The process of modernisation and reform of Australia's Indigenous cultural heritage is one of dynamic co-design between the FNHPA and the Australian Government, represented by the Minister for the Environment and Water and the Department

of Climate Change, Energy, the Environment and Water. Despite the fluidity of this reform process, the following key elements are known or can be reasonably inferred, for the purposes of future policy development.

- The Minister for Environment has committed to enacting standalone Indigenous cultural heritage legislation and this commitment has been applauded by the FNHPA.
- All parties engaged in the current reform co-design process have acknowledged the UNDRIP as the applicable international standard for any reform, as articulated in the Heritage Chairs and Officials of Australia and New Zealand *Dhawura Ngilan Best Practice Standards in Indigenous Cultural Heritage Legislation and Management*.
- Under the UNDRIP, a PBC is the relevant representative institution for the purposes of managing land-based Indigenous cultural heritage, including the authorisation of any interference with this cultural heritage.
- Performing these functions will therefore become a further statutory function of PBCs that will require funding to be discharged.
- While it is possible that the funding for this will be the responsibility of states and territories, it is highly likely that, at least in a number of jurisdictions, they will be functions discharged under federal legislation.

Whether formally discharged under federal or state legislation, the common connection between native title Future Act procedures and cultural heritage approvals, in conjunction with the desirability of unified funding and reporting obligations, compels a conclusion that funding cultural heritage functions of PBCs would be managed most effectively through the existing Australian Government agency that delivers funding and support to PBCs, that is the NIAA.

Some groups may see this conclusion as a further burden on Commonwealth resources. However, ensuring the NIAA oversee the PBC cultural heritage management function will avoid the division of statutory obligations.

A PBC engaged in cultural heritage management has unique opportunities to:

- coordinate native title and cultural heritage approvals;
- develop employment, training and education opportunities for PBC members and other native title holders; and

- consolidate economic opportunities around land and other natural resource management, cultural heritage management and, where appropriate, tourism.

## LAND MANAGEMENT PROGRAMS AND PBCS

Native title holders, represented by PBCs, have rights to speak for, make decisions about, protect, use and access their country, laws and practices that manifest through land management programs, such as ranger programs, Indigenous Protected Areas (IPAs) and fire management.

The NIAA has developed and funded successful ranger and IPA programs in many areas of Australia, however, these programs are not always directed through the PBC and are heavily focused in central and northern Australia.

In the first phase of regional forums, a PBC from southern Queensland noted the importance of funded ranger programs across the country. They stressed that ranger programs would deliver the same opportunities for PBCs in eastern and southern areas as they have in central and northern Australia.<sup>102</sup>

Despite PBCs being pivotal to caring for country programs, the 2022-released consultation draft for the Australian Government's Indigenous Ranger Sector Strategy does not refer to PBCs and the rights of native title holders within ranger work. This omission highlights the policy siloing that exists within government. However, the consultation draft calls for the establishment of a national ranger peak body as 'one way to facilitate Indigenous leadership of the sector and development of integrated and collaborative partnerships.'<sup>103</sup> There is potential for the government to rationalise internal costs and redirect funds to existing First Nations organisations by employing existing bodies to take on this role. In this example, the NNTC could assume the role of a peak body for ranger groups, especially if ranger programs were merged into the PBC structure, thereby avoiding the cost of setting up an additional peak body.

## PART 3: SECTION 2: REFORM AGENDA

### RECOMMENDATIONS

The NNTC recommends:

**4. That state and Commonwealth programs relating to the rights of native title holders, such as cultural heritage, ranger programs, IPAs, and economic development on country are designed, developed, and directed through the relevant PBCs.**

- (a) That an accurate data set of the operational costs of PBCs to carry out their statutory obligations, including compliance, cultural heritage and land management, consultation and Future Acts management be developed.
- (b) That a plan to address the policy and engagement siloing of the NIAA programs that fall within a PBC's jurisdiction be developed.
- (c) That the NIAA and AGD support the NNTC to conduct a national review of the native title Future Acts regime, which would be part of the response to Recommendation 4 from A way forward and feed into the limited review of the NTA.

## SECTION 3: PBC STRENGTHENING

It is crucial to acknowledge the cultural and organisational diversity of PBCs across Australia. However, the shared aspirations of PBCs have remained much the same since the *First National Prescribed Bodies Corporate Meeting*, held in Canberra, in April 2007.

PBC aspirations consist of both meeting their statutory obligations under the NTA, and acting as 'agents for social, cultural and economic change'.<sup>104</sup> PBCs at the meeting shared a range of core aspirations relating to improved governance, natural resource management, language and cultural maintenance, capacity building, economic development, social and emotional wellbeing, community relations, improved health, housing and education and opportunities for networking with other PBCs.<sup>105</sup> These aspirations were echoed in the 2019 PBC survey, in which PBCs stated their desire to be able to effectively care for country, culture and people and implement economic and commercial business developments.

PBCs have often struggled to both meet their statutory obligations under the NTA, and work towards their long-term aspirations, relying on support models and initiatives that are largely based upon short term funding cycles. This means that the responsibilities and expectations placed on PBCs are often prioritised over delivery on the aspirations of native title holders. Strengthening of PBCs is critical. By moving beyond short-term planning, and working closely with PBCs to implement longer-term initiatives, the Australian Government could better support PBCs to successfully realise their aspirations.

The limited resourcing and capability constraints on PBCs have been well documented and are reiterated in Part 3, Section 1 of this report. Despite these limitations, PBCs continue to work towards, and are committed to achieving their aspirations. Some have had some remarkable success. Through the 2019 PBC survey, PBCs identified that after meeting their statutory obligations under the NTA, their most common successes were improving governance, looking after country and culture and bringing people together.<sup>106</sup> Moreover, the PBC survey re-emphasised the importance of strong PBCs, particularly as 'PBCs are crucial managers

of Indigenous rights and interests in country, play a key role in strengthening culture, and are essential for Indigenous social and economic development aspirations'.<sup>107</sup> Recently, there have been renewed calls for the Australian Government to provide increased support for PBCs, in acknowledgment of the fact that stronger PBCs will result in stronger Indigenous rights and interests across the country, including the protection of country and culture through cultural heritage and enhanced decision making frameworks and economic participation for First Nations peoples.<sup>108</sup>

### A NATION REBUILDING APPROACH TO STRENGTHENING CAPACITY

Due to their cultural, legal, and political complexities, PBCs require a unique and tailored policy approach that is co-designed with traditional owners and relevant NTRBs, to realistically address the challenges faced, and support the aspirations held, by native title holders.

Consequently, PBCs and traditional owner corporations must be recognised and supported as governing institutions, through which self-determination and nationhood for First Nations peoples can fully be expressed, as discussed in Part 1 and Part 3, Section 4 of this report.

To strengthen PBCs on their own terms, a PBC strengthening framework will need to be developed, based upon the principles of Nation Rebuilding and self-determination, as outlined in Part 1 of this report. The framework needs to draw upon First Nations philosophies and principles self-determination, as outlined in the UNDRIP, in particular Article 3, the right for First Nations to be the ultimate decision-makers of their country, communities and cultures, and Articles 4 and 5, the right and autonomy to choose what their economic, social and cultural futures will look like.

A Nation Rebuilding approach to PBC strengthening or capacity and capability development means different things to each PBC and region around Australia, but it is essentially the community driven process through which the First Nation 'strengthens its own capacity for effective and culturally relevant self-government and for self-determined and sustainable community development'.<sup>109</sup> By implementing the Nation Rebuilding principles and a rights-based approach outlined in Part 1 of this report, PBC strengthening

should support the rights of PBCs to choose their own development pathways, including the right to make decisions about governance, cultural heritage, funding and economic development.

As Kevin Smith, CEO of QSNTS, recently outlined in a keynote address at the 2022 AIATSIS Summit,

*Together, native title and the UNDRIP can assist with nation building; they are pillars set deep in a foundation of traditional law and custom that in turn build a strong house for a First Nation to sustain itself and interact with a broader community.*

The current PBC Capacity Building Fund, under the IAS has three elements:

1. Direct support to increase the capacity of PBCs to take advantage of economic opportunities;
2. Support for training to build long-term organisational capacity within PBCs, such as projects to amend a PBCs rulebook and governance structure or receive training or professional expertise (for example, business consultancies, accountancy or legal services); and
3. Direct support for effective native title agreement-making.<sup>110</sup>

PBCs have stated that although the PBC Capacity Building Fund, IAS or other forms of project funding may result in successful one-off projects, project funding does not result in a sustained increase to a PBC's capacity. At the Phase 1 North Queensland regional forum, PBCs noted that the lack of funding from state and federal governments was their biggest challenge. The Capacity Building Fund does not support economic activities over the long term and is particularly problematic for retaining staff. PBCs asserted that without the ability to retain staff through secure, ongoing funding, it is not possible to develop and maintain capacity.

Therefore, a Capacity Building Fund that is based solely on project funding cannot meet the needs and aspirations of PBCs because it does not achieve sustainable PBCs. Yet sustainable PBCs are exactly what the funding program is aiming to achieve.

Long term staff retention is vital for sustainable capacity building. Funding models and support programs need to support PBCs' abilities to hire and retain experienced staff who have an appropriate level of cultural awareness and knowledge.

Moreover, to strengthen the capacity of PBCs and support them to realise their aspirations it is important to understand what PBCs consider capacity building to mean. Whilst noting the diversity of PBCs across the country, many PBCs have emphasised the need to support capacity building in cultural initiatives as a priority, which, given the resources and opportunities, they may do themselves.<sup>111</sup> Such initiatives include, but are not limited to, teaching of local languages in schools, on-country cultural practices, cultural heritage and protection, development of cultural protocols for engagements, training relating to governance, financial skills, and economic development as well as succession planning.

## COORDINATION OF THE PBC SECTOR

Initiatives to support and strengthen PBCs are currently undertaken at a local, regional, and national levels, but those initiatives are generally developed in isolation of each other. PBCs would benefit more from a coordinated approach. Coordination of stakeholders and programs would further strengthen PBCs and the native title sector throughout all regions of Australia.

As PBCs hold a mix of exclusive and non-exclusive native title rights to over 40 per cent of Australia's land and sea mass, coordination across the PBC sector is vital. This includes coordination of partnership programs, training, information and templates, and technologies. Part 3: Section 1 of this report discusses the benefits of adequately funding the PBC sector.

Strengthened PBCs will result in a strong and functional sector that will support resilient regional economies and First Nations communities. By supporting PBCs to actively engage in a coordinated approach to broader political and policy areas, 'capability is built, opportunities identified, efficiencies are gained, and the respective systems are improved by lived experiences.'<sup>112</sup> Moreover, a better coordinated sector that builds on previous sector knowledge will improve efficiencies and result in savings for both state and federal governments.

As Kevin Smith explains,

*there is significant sectoral capability that already exists within the PBC sector and by coordinating and drawing upon 'almost three decades of complex, multi-party negotiation experience and expertise' PBCs could substantially contribute to and enhance the 'design, process and outcomes' of truth telling, the voice to parliament and future treaty developments.<sup>113</sup>*

## TOOLS FOR PBCS

Adequate funding and sector coordination are the most significant barriers for PBC strengthening. In contrast, the development of information and tools, for PBCs to make use of as they choose, will provide for substantial PBC strengthening.

This section will discuss a variety of PBC strengthening tools that could be made available for little or no cost to all PBCs. These tools could be provided through the regional NTRB, where appropriate, or directly to the PBC.

## WHOLE OF COUNTRY PLANNING

Kevin Smith asserts that PBCs and Native Title holders engaged in broader Indigenous politics and policy should harness these experiences and outcomes and apply them on a whole-of-country basis.<sup>114</sup> Whole of country planning processes for PBCs would encompass everything from cultural mapping to healthy country planning, cultural heritage protection management and revitalisation, Future Act processes, and strategies for economic development and native title compensation. Often, these processes are undertaken separately, by different stakeholders and agencies, so they are not integrated to deliver on the fundamental priorities and aspirations of the PBC.

## DECISION MAKING GUIDES

In conjunction with whole of country planning, PBCs would benefit greatly from decision making guides that both focus on the PBC's rule book and obligations under the CATSI Act and integrate cultural governance and ways of approaching decisions to give prominence to priorities and principles articulated in the whole of country planning process. This approach would empower

and strengthen PBCs to use their own, culturally appropriate decision-making process to confidently respond to development activities, research proposals and economic opportunities. An example of such a guide is the Taungurung Decision-Making Guide.<sup>115</sup>

## CENTRALISED DATABASE

At native title forums, including the recent NTRB PBC Support Forum, hosted by the CLC in December 2022, the need for an actively managed centralised database that provides online access for NTRBs to share PBC related tools, templates and processes has been raised.

AIATSIS could support NTRBs and the PBC Support industry by redeveloping their website to include a secure, password-accessed section to share resources. Online databases pose a range of security issues, that would need to be carefully resolved and monitored. Website maintenance could be tasked to a committee of NTRB representatives. The committee could hold an annual workshop for NTRBs to share tools and templates and maintain currency of the website.

## YOUTH ENGAGEMENT PROGRAMS

PBCs have stressed that succession planning is a critical need for the future success of First Nations communities.

The sustainability of native title relies on the ability of younger generations of First Nations people to carry forward the rights and interests hard-won by their elders.<sup>116</sup> First Nations communities are demographically young, with more than half (53 per cent) of First Nations people under the age of 25. As a comparison, only 31 per cent of the non-Indigenous population are in the same age bracket.<sup>117</sup> The PBC sector needs to support and service young and developing leaders more effectively in the years ahead. It would be worthwhile tracking the impact of succession development activities for PBCs, specifically, whether these activities support an increase in the number of younger PBC members and directors.

Bhiamie Williamson and Stacey Little (2019) suggest that a significant barrier to the participation of younger people in PBC business relates to an 'absence of active and ongoing support and mentorship'.<sup>118</sup>

Furthermore, Williamson and Little's research reinforces the views, shared by many PBCs, that if 'native title rights and interests can act as the foundation that promotes sustainable economic growth' then younger generations of First Nations people will seek out those opportunities, which will ultimately strengthen both their communities and the wider regions.<sup>119</sup>

This contrasts with common narratives of 'disengagement and disinterest amongst young First Nations people' and instead positions them as an asset for both PBCs and the wider community. With long term investments, such as active mentoring, over time, these young people will 'grow into the leaders of tomorrow and bring with them fresh ideas, knowledge and confidence.'<sup>120</sup>

Both the research and PBCs seek a 'genuine commitment from government to transform native title into a regime that allows young leaders to develop economic opportunities' and suggest that to do so would be of great long-term benefit not only to PBCs and First Nations people, but to all Australians.

## PART 3: SECTION 3: REFORM AGENDA

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### RECOMMENDATIONS

The NNTC recommends:

5. **That the NIAA support the growth and development of NTRB PBC support units and the regional and local programs they manage, which are essential for new PBCs and more experienced PBCs who maintain service agreements.**
  - a. That the NIAA provide national forums and online mechanisms for NTRB support units to collaborate and share materials.

## SECTION 4: LOCAL NATIONS, REGIONAL NETWORKS AND NATIONAL REPRESENTATION

*Self-determination in the Indigenous case is about the right and authority of Indigenous nations or communities to determine their own futures and their own forms of government. Self-government is the exercise of that right, recognized or not. Self-government, in a sense, is doing it.*<sup>121</sup>

A longer-term policy consideration is the role and functions of PBCs in nation rebuilding, and whether PBCs are fit for purpose. A body corporate may not be the best fit for a body that must incorporate two sets of laws, while fulfilling their statutory obligations, managing native title rights and interests, and meeting the aspirations and expectations of the First Nations community. Another structure, such as an authority or council may be a better model to accommodate a polity that has *in rem* rights. At the very least, that polity is deserving of a separate division in the CATSI Act that regulates the entity charged with the unique duty to manage those rights and interests on its behalf, technically forever.<sup>122</sup>

In 2016, the Social Justice Commissioner, Mick Gooda recommended that the Australian Government support legislative and policy measures to allow PBCs to freely choose the best incorporation method for their purposes and support the regulators to assist PBCs in governance and incorporation matters.<sup>123</sup> Just as businesses are able to choose a corporate structure tailored to their requirements, PBCs are self-determining organisations engaged in business and land management and should have the option of choosing the incorporation method that best suits their aims and needs. This includes incorporation under the Corporations Act and regulation by the Australian Securities and Investments Commission, instead of ORIC.<sup>124</sup>

First Nations corporations operate within a realm between two laws: First Nations laws and Australian laws. They operate between public and private worlds and between state regulation and

society's expectations of corporate behaviour.<sup>125</sup> PBCs have additional complexities and compliance obligations due to the fiduciary duty they hold to both members and present and future common law holders. More specifically, the fiduciary duty arises from their role as trustee or agent and their statutory obligation to consult native title holders and obtain their consent for acts that affect native title.<sup>126</sup>

Although PBCs have achieved many successes, often with limited resources, there are issues that concern governance, with the conflation of First Nations laws into a body corporate structure, particularly membership, cultural authority, and compliance.<sup>127</sup>

Additionally, PBCs do not provide the vital function of self-government, which is a right under the UNDRIP, and essential for Nation Rebuilding. Under a Nation Rebuilding approach there are various ways of arranging Indigenous autonomy and self-government.

- Indigenous autonomy can be achieved through contemporary Indigenous political institutions, such as the Sami Parliaments in the Nordic countries.
  - Finnish Constitution and the Sámi Act established the legal framework for the Indigenous Sámi peoples within their homeland.<sup>128</sup>
- Indigenous autonomy can be based on the concept of an Indigenous territorial base, such as the Comarca arrangement in Panama.<sup>129</sup>
- There can be regional autonomy within the state, such as the Nunavut territory in Canada and the Indigenous autonomous regions in the Philippines (Indigenous Peoples Rights Act 1997).
- Indigenous overseas autonomy can be achieved, such as the Greenland Home Rule arrangement<sup>130</sup>
  - Greenland Home Rule Act 1979 and Act on Greenland Self-Government 1979

A governing function comes with the ability to raise revenue via taxes or rates, which could be another mechanism by which PBCs are able to self-fund. A government function, be it local, sub-national or national and whether it is territorially based or based on portfolio responsibilities within a shared territorial base, such as the Australian federation, will necessarily involve a revenue raising power.



In Australia, local councils levy rates and charges in addition to receiving transfer payments. States levy charges and taxes and receive royalty payments as well as transfer payments, and the Australian Government imposes charges, taxes and customs and excise duties. In reconsidering PBCs within a Nation Rebuilding framework, it is also necessary to consider revenue raising options.

In this section, some local and regional options are introduced that may be explored in further research as options for local or regional structures for PBCs.

## LOCAL NATIONS

### STATUTORY AUTHORITY

A Commonwealth statutory authority is established by its constituting statute and is regulated under the *Public Governance, Performance and Accountability Act 2013* (PGPA Act). In general terms, a statutory authority is a generic term for an authorisation by parliament given to a person or corporation, or group of people to exercise specific powers. A statutory authority can be established as a corporate Commonwealth entity or a non-corporate Commonwealth entity. For example, AIATSIS is a statutory authority regulated under the PGPA Act and constituted and bestowed statutory obligations to fulfil under the *Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989* and the *Australian Institute of Aboriginal and Torres Strait Islander Studies Amendment Act 2016*.

The Torres Strait Regional Authority (TSRA) was a statutory authority under the *Aboriginal and Torres Strait Islander Act 2005*, providing regional governance in the Torres Strait Islands.

Under legislation, the TSRA were responsible for designing and delivering programs for Indigenous Australians in the Torres Strait, monitoring the effectiveness of service delivery and providing advice to the Minister for Indigenous Australians on policy and service delivery in the region.

AIATSIS is, and the TSRA was funded directly by the Australian Government to fulfil their statutory obligations. Like AIATSIS and the TSRA, PBCs have statutory functions under the NTA, as outlined in the following section. However, PBCs are not set up or funded in the same way. A statutory authority may be a more suitable structure for native title

holders or regional groups of native title holders to fulfil their obligations and manage their native title rights and interests. This should be explored further with more consultation.

A potential statutory authority structure for native title holders could involve a mixture of features from Australian and First Nations legal systems. The authority would have obligations under the NTA and PBC Regs, but may also have features from First Nations bodies, such as Dilak Provincial Authority: Federation of Clan Nations of Northeast Arnhem Land.

### LOCAL COUNCIL

Another possibility for providing existing PBCs with additional options to grow is a local council model.

*The model of the local council is a useful one as it is a regulatory entity that covers a distinct territory that also falls under the jurisdiction of state and federal powers but allows the community the power to make regulations and set up institutions.<sup>131</sup>*

Not positioned in the native title context, but as an option for Indigenous self-determination more broadly, Behrendt notes that a local council:

- could develop culturally appropriate local by-laws;
- could have the power, delegated by national or state governments, to allow First Nations to establish institutions and infrastructure with greater community autonomy;
- would require state legislation to enable the establishment of First Nations administered schools, health and other services; and
- could be delegated some federal family law and other legal matters.<sup>132</sup>

Behrendt also cautions against simply reproducing the institution of the colonisers into the community without considering how it needs to be modified to work for the community.<sup>133</sup> Doing so could result in similar issues to those already experienced by PBCs.

Future research and exploration of the statutory authority and local council models is required, particularly looking at international examples, such as those below.

## REGIONAL STRUCTURES AND PARTNERSHIPS

Developing strong regional networks and partnerships is part of PBC development. The 2019 PBC Survey found that the most common external partnerships are with NTRBs.<sup>134</sup> This demonstrates that NTRBs continue to be the most used service providers by PBCs, providing ongoing in-kind support for many PBCs following successful determinations. This outcome is consistent with previous findings. In 2013, 85 per cent of PBCs reported that they received support from their NTRB.<sup>135</sup>

Alongside NTRB relationships, PBCs frequently work and communicate with other PBCs. PBC-to-PBC communication and collaboration is an area of activity that is not well understood or documented in the sector. These relationships may be expected, where smaller regional clusters exist, such as in the Torres Strait Islands. But the sector does not yet have formal data on the purposes, mechanisms, intensities, or durations for PBC-to-PBC engagement.

Although PBCs are constituted under Federal legislation, they engage extensively with state and territory governments. This is the second most frequently reported interaction. This finding is consistent with PBCs' stated purposes and activities that are focused on country and cultural issues, as states and territories are primarily responsible for issues such as land and water law, planning, and cultural heritage.<sup>136</sup>

Regional nation building may be based on older cultural blocs or nations' cultural similarities, such as shared philosophies of cosmography and cosmogony, laws, beliefs and practices. A cultural or regional bloc is typically a multi-level entity, 'with particular cultural repertoires, language-based identity groupings, locality-based groupings and patterns of social interaction (such as the trade, ceremony and marriage networks that cross-cut them).'<sup>137</sup> For example, the Wiradjuri nation has a shared cultural system and shared environment, the riverine catchment system of NSW, locally known as country of three rivers.<sup>138</sup>

The people within a cultural or regional bloc do not all hold the same rights and interests in land across the region. It is common for a smaller, proximate group of people to own, speak for and manage particular areas of country within the

region.<sup>139</sup> Models of regionalisation must represent the relationships between the local land owning and decision-making group with the broader cultural bloc and this has implications for native title and regional agreements, such as the South West Settlement.

Not all areas of Australia may be suitable for regional models. Some regions have experienced displacements and forced relocations, so First Nations communities may no longer know each other or have a shared, recent history. In other areas, political or other disputes impact communities' willingness to work together, even if culturally, they are closely connected. It is important that cultural blocs are not forced or created by colonial processes, as they will not have the cultural authority or long-term sustainability as First Nations determined regions.

Examples of regional models among Australian First Nations include:

- South-West Native Title Settlement, Western Australia;
- Lhere Artepe RNTBC, Northern Territory;
- Dilak Council, Northern Territory;
- GBK, Torres Strait Islands, Queensland;
- First Peoples' Assembly of Victoria, Victoria;
- Ngarrindjeri Regional Authority (NRA), South Australia; and
- Cape York Partnership (CYP), Queensland.

International examples include:

- Assembly of First Nations (Canada)
- Haudenosaunee confederacy (US).

## CANADA

First Nations in Canada function as municipalities. They are managed by elected band councils according to the laws of the Indian Act. Canadian First Nations are governed by elected chiefs and councillors. Elections for chiefs and councillors are held every two years. Some First Nations, such as the Haida, have additional leadership structures that are not recognised by the *Indian Act*, but work alongside it.<sup>140</sup> Australia could adopt a local council model that provides sufficient flexibility in the governing legislation to allow for local forms of governance, yet still produce enough unity to form regional bodies, such as the regional tribal councils in Canada.

Like PBCs, First Nations in Canada, are responsible for governing their land and waters. They can hold benefits from agreements in trust and other structures, and distribute monies to members.<sup>141</sup> Unlike PBCs in their current form, band councils are also responsible for the governance and administration of band affairs, including education, band schools, housing, water and sewer, roads, and other community businesses and services.<sup>142</sup> Band councils have a local self-governing role that is more in line with the UNDRIP than the current PBC structure. Some First Nations have won the right to self-govern, such as the Vuntut Gwitchin First Nation in Yukon. The right to self-govern means they can generally direct their own affairs, manage their own land and provide services to their citizens.<sup>143</sup>

It is important to note the critiques of models to understand what may or may not work in Australia. For example, while First Nations band councils in Canada are an example of a local council model, they have also been criticised within Canada as not being sovereign. That is, not following ancestral law and customs and not being able to govern outside of reserves.

As of 2020, the Government of Canada recognised 619 First Nations in Canada.<sup>144</sup> While some First Nations have funding from agreements and their own source revenue, there are numerous Canadian government funding programs to support First Nations in Canada, such as annual contribution agreements or Band Support Funding, which far exceeds what is available for PBCs in Australia, as discussed further in the section below. More recently, the Canadian Government has launched a new Nation Rebuilding funding program for Indigenous groups who are seeking to rebuild their nations in a manner that prioritises the needs of each community. The program provides CAD 100 million over five years. While preference is given to regional nations, each nation, with or without formal recognition, can apply.<sup>145</sup>

## INDIGENOUS POLITICS OF SELF-GOVERNMENT

Other regional models in Canada have developed due to the 'Indigenous politics of self-government', which is a political effort, carried out primarily by First Nations peoples, that has arisen from

community action in contrast to a 'politics of Indigenous self-government' that is more to do with the policies and legislation of non-Indigenous governments toward First Nations peoples.<sup>146</sup> An example of the Indigenous politics of self-government in Canada can be found in the,

*Northwest Territories where four First Nations, populated by those formerly known as Dogrib Indians, likewise have joined together to form the Tlicho Government, redrawing the political boundaries imposed by Canada and claiming a comprehensive nationhood.<sup>147</sup>*

There are also local regional examples of First Nations politics we can learn from.

In South Australia, following lessons learned from the Hindmarsh Island Bridge Royal Commission (HIBRC), the Ngarrindjeri, South Australia, entered into a contract agreement with several organisations rather than relying on current legislation and policy to facilitate Ngarrindjeri rights and interests to country.<sup>148</sup> The NRA was established as a peak organisation to represent the communities and organisations that make up the Ngarrindjeri Nation. The NRA's responsibilities include native title and cultural heritage management, and developing stakeholder engagement, particularly with the South Australian Government. NRA also established an economic development arm and became involved in regional management. This was all undertaken under the Ngarrindjeri Yarluywa-Ruwe Plan.<sup>149</sup> As the peak representative self-governing structure for the Ngarrindjeri, the NRA has evolved over time in an attempt to be inclusive. Its members include the Ngarrindjeri Nation community members and organisations as well as the Ngarrindjeri native title claimants. The NRA board is made up of sixteen members: the chairpersons, or a nominated representative from organisations, and four elected community members.<sup>150</sup> The NRA governing system is based on Ngarrindjeri culture and values that are informed by the ethics of responsibility to Ruwe/Ruwar or body/land/spirit. The traditional governing body of the Ngarrindjeri is the Tendi, which operates in conjunction with the NRA and is a member organisation of the NRA. The NRA has both political and corporate (strategic) governance mechanisms.<sup>151</sup>

In the Torres Strait, GBK represents traditional owners in the Torres Strait and comprises a board

of 21 chairs from each of the PBCs. GBK is the peak body, representing the collective interests of the traditional owners, and providing an avenue to respond to, and have input into policy and program development.

GBK is,

*driven by traditional owners. Our aim is to drive initiatives in a strengths-based, community-led approach to enable positive change, improve national statistics of inequality and build sustainable communities.*<sup>152</sup>

In 2022, GBK took over from the TSRA as the statutory body, recognised by the Australian Government as the NTRB for the Torres Strait region.

## LEGISLATIVE AMENDMENTS

Any new structure available for First Nations to hold native title rights and interests would require the amendment of the NTA and CATSI, as well as the development of potential new national and/or state legislation. This would be a long-term reform option, requiring a gradual process over a period of years. Immediate steps to pave the way for long-term reform in this area include creating a separate division in the CATSI Act. A separate division of the CATSI Act would both improve efficiencies for PBCs and the Registrar, and provide a mechanism for streamlining future amendments that only affect PBCs, such as additional structures.<sup>153</sup> This is not a new concept: the predecessor to CATSI, the *Aboriginal Councils and Associations Act 1976* (Cth) (ACA Act) provided two quick and flexible modes for incorporation, including a council's division.<sup>154</sup>

In addition to reforms to the CATSI Act, it would be desirable for the forthcoming review of the NTA to adopt the recommendations of the Juukan Gorge Joint Standing Committee Inquiry and considered the provisions relating to PBCs and the context of Nation Rebuilding. Amendments worthy of consideration are those that may facilitate the amalgamation of PBCs and determination areas, where this is sought by affected native title holders.

In a similar vein, there may be instances where governance and accountability can be improved by allowing separate PBCs to be created with respect to portions of an original determination area.

## NATIONAL REPRESENTATION OF PBCs

As early as 2007, PBCs identified the need for 'advocacy and representation at local, state and national levels and community relations work'.<sup>155</sup> While the NTRBs provide representation and service provision at a regional level and the NNTC provides advocacy, representation and coordination at a national level, there remains a need to address the representation of First Nations at the Commonwealth level, as part of the Voice structure, while noting local and regional cultural and political variations.

The centrality of PBCs to the Uluru Statement of the Heart and Voice Design process has been called for by PBCs around various regions in Australia.<sup>156</sup> This is the process that could provide First Nations with a voice for the first time since ATSIC was abolished.

Part 2 of this report highlights the importance of PBCs in national representation, as described in the NNTC's response to the Indigenous Voice Co-Design Interim Report. In that report, the NNTC argued that PBCs, as nations with systems of governance through which self-determination and nationhood are expressed, are an existing infrastructure, in some areas of Australia, that could be utilised in the Voice design.<sup>157</sup>

## PART 3: SECTION 4 REFORM AGENDA

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### RECOMMENDATIONS

The NNTC recommends:

6. **That the NIAA support existing and new PBC regional structures through a nation building approach, as outlined in Part 1 of this report.**
  - (a) That the NIAA continues to fund the NNTC to hold regional PBC forums.
  - (b) That the NIAA considers funding a national PBC forum.
  - (c) That the NIAA works with the NNTC to focus on local engagement in parts of Australia that have had limited engagement.
7. **That the NIAA considers how the right to self-government (Article 4 from the UNDRIP) can be incorporated into long-term reform options in PBC structures.**
  - (a) That a national discussion be initiated about the long-term options for PBCs and regional groups of PBCs through a series of thought leadership papers.



## SECTION 5: ETHICAL ENGAGEMENT, CONSULTATION AND FPIC PROTOCOLS

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Too often, governments and companies across Australia fall short in their engagement with First Nations people. In the 2009 National Meeting of PBCs, PBCs commented that ‘their decisions and suggestions are often not taken seriously by governments, other Aboriginal organisations and authorities and the broader community’.

One state government, for example, ‘ignored a review undertaken by an RNTBC and its recommendations.’<sup>158</sup> Furthermore, at the PBC regional forums in Alice Springs in 2021 and Carnarvon in 2022, PBCs repeatedly expressed the need to have a seat at the table: to be included, not just in consultations, but in decisions.<sup>159</sup> Of course, this comes in a context where, for generations, First Nations peoples were not consulted or allowed to make decisions about their own or their children’s lives.

FPIC is rapidly becoming the expected standard of engagement with First Nations peoples, however the practical steps required to achieve FPIC are not well understood. The NNTC is developing protocols to articulate what FPIC means in practice, beginning with the NNTC’s own engagements, to be followed by protocols for the private sector and government.

### WHAT IS FPIC?

FPIC is an international legal standard that empowers Indigenous peoples to give or withhold consent prior to approval of any project affecting their lands or territories and cultural heritage. This right is crucial to self-determination and is enshrined in the UNDRIP and the International Labour Organisation’s *Indigenous and Tribal Peoples Convention 169* (ILO 169)<sup>160</sup>. The investment community also increasingly requires FPIC, which is included in the International Finance Corporation’s<sup>161</sup> Performance Standards, and the Equator Principles<sup>162</sup>.

FPIC is a process that needs to be defined by First Nations peoples and respected by states and project proponents when engaging on matters affecting First Nations people and throughout a project’s lifecycle, including in due diligence processes, social and environmental impact assessments, agreement-making, and project implementation. It is crucial to acknowledge that FPIC includes the right to say ‘no’, otherwise known as the right to veto, which is not a right under the NTA but is included under the Aboriginal Land Rights Act in the Northern Territory since the 1970s.

There is a very strong business case for robust engagement by companies with First Nations people. Achieving FPIC is an effective risk management tool, failing which, companies and their investors are exposed to material financial, reputational and legal risks. First Nations communities and the broader public are increasingly rejecting company activities that breach international standards. This community opposition and unrest results in project delays, stranded assets, indirect costs from staff time being diverted to managing conflicts, and legal costs, including potentially large native title compensation liability.

### FPIC AND THE AUSTRALIAN LAW

While FPIC is yet to be fully enshrined in Australian law, the legal landscape is evolving. The destruction of the Juukan Gorge site demonstrated the grave consequences of a legal system that does not compel proponents of projects to respect FPIC and negotiate just and fair agreements. The parliamentary inquiry into that incident established a set of strong recommendations on FPIC, including a review of the NTA to develop standards for the negotiation of agreements that require proponents to adhere to the principle of FPIC. The parliamentary inquiry also recommended reform to cultural heritage laws. It includes a recommendation that the government commit to implementing the Dhawura Ngilan Best Practice Standards in Indigenous Cultural Heritage Management and Legislation (see Part 3, Section 2), which requires the FPIC of Aboriginal and Torres Strait Islander people with an interest in heritage being protected, be it land or sea or intangible heritage, before any project is approved.

There is momentum towards the incorporation of the UNDRIP into law more generally. *The United*

*Nations Declaration on the Rights of Indigenous Peoples Bill 2022* is currently before the Senate. The Senate Committee on Legal and Constitutional Affairs is conducting an inquiry into the application of the UNDRIP.

Canada and New Zealand have recently taken steps to do the same. In June 2021, Canada enacted the *United Nations Declaration on the Rights of Indigenous Peoples Act 2021*, which requires the responsible minister to implement an action plan to achieve the objectives of the UNDRIP within the next two years. New Zealand recently committed to developing a declaration plan to guide the implementation of the UNDRIP, which is set to be released in early 2023 following consultation processes.

## FPIC PROTOCOLS FOR PBCS

Internationally, First Nations peoples across the world have codified their own protocols, defining how they wish to be consulted and their FPIC sought. These protocols typically include the stages involved, who is to be consulted and how, and how decisions are to be taken. These protocols draw from a variety of legal sources, including the community's own customary laws, national legislation and international standards.<sup>163</sup>

There are some examples of these protocols in Australia, though they largely relate to research, rather than achieving FPIC for projects affecting land and resources.<sup>164</sup> AIATSIS has developed the Code of Ethics for Aboriginal and Torres Strait Islander Research<sup>165</sup> and NintiOne has published the Aboriginal Knowledge and Intellectual Property Protocol Community Guide<sup>166</sup> for general application. At the local level, some groups have established procedures requiring FPIC when researchers wish to access country. For example, the Kimberley Land Council has several Intellectual Property (IP) and Indigenous Cultural and Intellectual Property (ICIP) policies.

External parties interested in doing research with Kimberley saltwater groups are required to follow the Kimberley Saltwater Country Research Protocol,<sup>167</sup> while other research requests are reviewed by the KLC Research Ethics and Access Committee, and approved researchers are expected to sign research agreements agreeing to the Intellectual Property and Traditional Knowledge Policy.<sup>168</sup>

There are examples where governments in Australia have attempted to engage traditional owners as equal partners in government decisions, however only some of these attempts have proven successful. Thus far, the ongoing treaty process in Victoria and co-design of a new national framework for cultural heritage protection are two successful examples.

The NNTC is developing protocols to articulate what FPIC means in practice, beginning with the NNTC's own engagements with First Nations people, followed by protocols for the private sector and government. These protocols will provide a practical framework to enable organisations to engage respectfully and sensitively with First Nations peoples and communities, and guidance on identifying who needs to be engaged, what to do when it is unclear, what information needs to be provided and how, and the key measures needed to ensure power imbalances are addressed, including necessary timelines and resources. It is envisaged the government protocol will elaborate on the approach to co-design.

The Australian Government could initiate a policy regulatory framework to ensure that FPIC, or the UNDRIP more broadly, is adhered to in Australia. This could be addressed through the Legal and Constitutional Affairs References Committee Inquiry and be reported into the application of the UNDRIP in Australia. The kinds of initiatives in Australia that encourage the use of FPIC in the private sectors, such as *The Australian Business Guide to Implementing the UN Declaration on the Rights of Indigenous Peoples* or the *Dhawura Ngilan Business and Investment Initiative* must also have the support of the Australian Government to be effective. This could be achieved through a regulatory framework, such as reform to the NTA, or by offering financial incentives for businesses who adhere to FPIC.

## REMUNERATION

PBCs have repeatedly identified that lack of respect, by governments, proponents and other stakeholders, reflected in the expectation that PBCs should be kept operational using voluntary labour of directors and members, while the rest of the sector is salaried. This year, South Australian and Western Australian PBCs noted the lack of respect and value for First Nations cultural time and expertise, including being expected to participate

in consultations, such as PBC regional forums, without payment.<sup>169</sup> The protocols will help to raise standards of engagement and create a more consistent approach. The protocols are not intended to supplant, but rather to amplify any consent or cultural processes of local communities, which take primacy.

## PART 3: SECTION 5: REFORM AGENDA

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### RECOMMENDATIONS

The NNTC recommends:

8. That the NNTC and the NIAA develop national FPIC protocols for ethical engagement and consultation with the PBC sector that adhere to international standards of FPIC, as part of the proposed Interim Partnership and by working with the PBC Steering Group.



## SECTION 6: NATIONAL LEADERSHIP ON AGREEMENT-MAKING

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### TOWARDS FAIR AND JUST AGREEMENT MAKING

In recent years, native title holders have begun to engage in agreement-making with governments and the private sector in three new areas:

1. renewable energy projects;
2. native title compensation; and
3. regional settlements and treaties.

The Australian Government has an important role to play in these areas, including to support a national framework for fair and just agreement making.

### RENEWABLE ENERGY PROJECTS

With the transition to a zero emissions future, renewable energy projects are being developed on native title lands and waters and project proponents are engaging with native title holders to reach Indigenous Land Use Agreements (ILUAs). The NNTC is focused on supporting native title holders to achieve fair and just agreements so that the poor outcomes with the resource extraction industry are not repeated.

According to research into Australian and Canadian agreements, primarily in the resource extraction industry, agreement outcomes depend on four factors:<sup>170</sup>

1. the political/strategic power of traditional owners and native title holders to insist that companies and governments meet their demands;
2. the culture of the company involved and how committed they are to First Nations people;
3. the legislative framework, including land access, environmental and cultural heritage regimes; and
4. how profitable the project will be.

The research has found the first factor to be the most significant.

Aside from work to reform the legislative framework governing renewable energy projects on native title lands and waters (see Part 3, Section 7 below), the NNTC is working to highlight two critical components of agreement making to build the negotiating position of native title holders:

1. FPIC (see Part 3, Section 5);
2. models of equity ownership: First Nations communities are increasingly looking for benefit sharing agreements and to jointly own projects, participate in operational decisions, and earn reliable financial returns to provide improved economic and social outcomes for their communities. However, they have expressed a lack of capacity and expertise on this issue.

The NNTC is researching innovative and workable models of First Nations co-ownership of both small-scale and large-scale projects. This research will examine how First Nations equity ownership in projects has been implemented in various jurisdictions internationally, including in Canada, the United States of America, and New Zealand, and what is required to ensure efficacy for First Nations groups in Australia.

These initiatives are focused on building the negotiation power of native title holders and traditional owners. As such, the NNTC will work closely with interested PBCs to build their capacity through training on these issues, including the practicalities of equity ownership.

In partnership with the First Nations Clean Energy Network, the NNTC is advocating to companies and the investment community to ensure the principles of FPIC and equity ownerships are socialised with renewable energy developers and incorporated into due diligence processes of investors, including the Australian Government's Clean Energy Finance Corporation.

### NATIVE TITLE COMPENSATION

The High Court's *Timber Creek* decision<sup>171</sup>, in 2019, brought some clarity for the first time to compensation for the loss, diminution, or impairment of native title. The court separated compensation into 3 components:

1. economic loss, to be assessed as a proportion of the land's freehold value;
2. interest on the economic loss; and
3. cultural loss, to be assessed intuitively, based on what would be considered fair and just by the Australian community.

While this decision has brought some clarity to the extinguishment scenario, it leaves several legal questions unresolved. Many native title holders may view the court's approach as problematic, given it assumes a market value can be given to native title rights, puts the onus on native title holders to prove their loss, and involves a judge deciding how much First Nations culture is worth. Following the 2019 Timber Creek compensation decision, the NNTC developed the National Native Title Compensation Strategy, which focuses on supporting native title holders to achieve just outcomes through the compensation process.<sup>172</sup> It is widely accepted that negotiated agreements provide better opportunities for a tailored process and potential outcomes than going to court. However, further test cases will help to clarify issues around valuation and, in turn, what a good deal for native title holders would be out of court.

In October 2021, the state, territory and federal governments agreed in principle to National Guiding Principles for Native Title Compensation Agreement Making.<sup>173</sup> It appears these principles will inform the development of settlement frameworks for resolving compensation with native title holders in their respective jurisdictions. Some jurisdictions are developing positions through varied modes of engagement with First Nations, including in Victoria and New South Wales. The Queensland Government has set up a Native Title Compensation Project Management Office within Queensland Treasury to manage future compensation claims and develop a native title compensation settlement framework.

Alongside the continued work the NNTC is undertaking to implement the compensation strategy, it is working to ensure any jurisdiction-specific compensation resolution frameworks are led, or at least co-designed, by First-Nations peoples and provide a just and culturally appropriate process which enables native title holders to achieve their aspirations. The NNTC is engaging with PBCs, NTRBs, native title holders, and scholars to determine what good agreements look like, what the negotiation process should look

like, and how compensation may be assessed, including in relation to cultural loss.

Furthermore, the NNTC is advocating to governments, including the Australian Government, to build and improve upon the National Guiding Principles. Suggestions include the following.

- Native title holders should have the option to define what the negotiation process looks like, including whether an independent facilitator, or body is appointed, and other healing-informed approaches.
- Native title holders should have the option to determine how compensation is conceived and addressed, including alternative approaches to cultural harm, such as those focussed on cultural redress.
- Native title holders should have access to government held native title tenure information prior to lodging a native title compensation claim or entering compensation negotiations.
- Government should remove the requirement for compensation packages to be 'full and final'. The requirement that settlements be full and final locks future generations into a settlement package irrespective of emerging experiences and impacts relating to dispossession of land and waters, or changes to the law. Native title holders should have the ability to revisit and renegotiate agreements in line with advances in law and the changing aspirations and experiences of future generations.
- Compensation should not be limited to post 30 October 1975.

## COMPREHENSIVE SETTLEMENTS AND TREATIES

As a result of the native title regime's limitations, some native title groups have seized the opportunity to negotiate broader, sometimes comprehensive, agreements to achieve the aspirations of First Nations communities. In addition to settlements under the Victorian Traditional Owner Settlement Act, such agreements include the recent Southwest Native Title Settlement and the Yamatji Southern Regional Agreement. These contain a suite of broader benefits, including a cash component, land transfers, conservation estate management,

cultural heritage protections, and community development initiatives.

Other native title holders are keen to embark on the pathway to treaty. Treaty goes beyond recognition of rights on country and compensation for past harms. It is about sovereignty and the transfer of political power, that is, the right to self-governance as an exercise of self-determination. Treaty may provide native title groups with an opportunity to reset the relationship between First Nations peoples and the people of Australia based on these principles. Treaty processes at a state and territory level are advancing in Victoria, the Northern Territory and Queensland, and with the Federal Government committed to implementing the 2017 Uluru Statement from the Heart, there is an opportunity for a meaningful conversation about treaty on a national level.

## PART 3: SECTION 6: REFORM AGENDA

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### RECOMMENDATIONS

The NNTC recommends:

9. **That the Australian Government demonstrate national leadership and adopt minimum standards for the states in advancing agreement-making in Australia through Makarrata, national and regional treaties, and restorative justice frameworks in native title compensation.**

## SECTION 7: LEGISLATIVE REFORM OF THE NTA

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At the 2022 AIATSIS Summit, Hon. Linda Burney, Minister for Indigenous Australians, committed to undertaking a review of the NTA. Previous NTA reviews have been undertaken, most notably by the Australian Law Reform Commission (ALRC) in 2015.<sup>174</sup>

However, since its inception, the NTA has not seen substantive reform or a comprehensive review that focuses on improving the NTA to deliver just outcomes for native title parties. Most amendments have been enacted to provide certainty to government and industry. As the parties most affected by the terms of the NTA, native title holders and their representative PBCs and NTRBs should be central to the review and the reform process.

### SUMMARY OF PREVIOUS AMENDMENTS TO THE NTA

Alongside technical and consequential amendments to ensure consistency with other federal legislation, the main instances of substantive reform of the NTA, since its enactment in 1993, have been the following.

- **Native Title Amendment Act 1998:**<sup>175</sup> made extensive amendments including the introduction of the registration test, and substantive changes to the Future Act regime including the provisions for ILUAs.
- **Native Title Amendment Act 2007:**<sup>176</sup> expanded of the Tribunal's powers and functions.
- **Native Title Amendment Act 2009:**<sup>177</sup> enabled the Federal Court to determine whether a matter should be mediated by the court or referred to the tribunal or other appropriate person or body for mediation.
- **Native Title Amendment Act (No. 1) 2010:**<sup>178</sup> introduced a new subdivision in the Future Acts regime to provide a process for the construction of public housing and certain public facilities in Indigenous communities.

- **Native Title Legislative Amendment Act 2021:**<sup>179</sup> introduced a range of amendments, including allowing the applicant to act by majority as the default position, disregarding historical extinguishment on parks by agreement, allowing PBCs to bring compensation claims where native title has been extinguished, and amendments related to Section 31 agreements.

### SCOPE OF REFORM AND PRIORITY AREAS

Australia formally supported the UNDRIP in 2009. Since then, the NTA, a key piece of legislation for First Nations has not been reviewed nor amended to align with the requirements of the UNDRIP. Incorporating the UNDRIP into native title laws and processes and other relevant domestic legislation would demonstrate government's commitment to upholding the rights of First Nations people and engaging in a genuine partnership. Areas for priority review and reform of the NTA could include:

- revising the ALRC review;
- presumption of continuity;
- extinguishment;
- right to take for any purpose;
- Future Act regime; and
- inland waters and subsurface rights.

Each of these will be discussed in further detail.

### REVISIT THE ALRC REVIEW

The review should be revisited, and consideration given to implementing outstanding recommendations, as appropriate. The NNTC has a separate annexure of the status of the ALRC recommendations that can be provided separately.

### PRESUMPTION OF CONTINUITY

The ALRC review makes several important and useful recommendations, including that the definition of native title in Section 223 and traditional physical requirements in Sections 62(1)(c) and 190B (7) be substantially amended to account for displacement from country and the adaption and evolving nature of traditional law and custom. However, the recommendations intentionally do not establish a presumption of continuity.

The CERD has been critical of the NTA and native title system since the 1998 amendments, particularly in relation to the high standard of proof required to demonstrate continuous observance and acknowledgement of traditional laws and customs.

A rebuttable presumption of continuity could be 'applied to presume continuity of the relevant society and the acknowledgement of its traditional laws and observance of its customs from sovereignty to the present time.'<sup>180</sup> This would ensure a more just process for traditional owners seeking recognition of their rights and interests in country. According to Tom Calma, former Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Such a shift would better reflect the indisputable fact that Indigenous peoples of this country are its traditional owners who had their own laws and customs before colonisation.'<sup>181</sup>

Recently, states and territories have become more willing to agree connection in the context of current policies that support resolution of claims by consent. To this end, a presumption of continuity would bring the NTA into line with the practical application of the native title claims process.

Further, by reversing the onus of proof, the evidential burden is placed more appropriately on the state/territory who hold the data and historical records demonstrating the ways in which it has colonised native title application areas. The state/territory is less likely to expend resources litigating continuity and connection where the basis of the assertion of broken connection is rooted in state actions, such as genocide and breaches of international law. Finally, adopting a presumption of continuity is likely to provide a more expeditious resolution of native title applications and establish a system that more closely complies with Australia's commitments under the UNDRIP and international law.

## EXTINGUISHMENT

The review should consider broadening the circumstances in which prior partial or full extinguishment of native title can be disregarded for the purposes of native title claims, and repealing processes that allow for future extinguishment. There is no need for Future Acts to extinguish native title, except with the FPIC of native title holders, and the non-extinguishment principle should apply in all other circumstances.

Sections 47, 47A, and 47B set out a processes whereby prior extinguishment may be disregarded in relation to pastoral leases held by, or in trust for, native title holders, some reserves, and some vacant crown land. Section 47C sets out a process whereby prior extinguishment over national parks, including public works, can be disregarded if there is agreement from the relevant government and the PBC. Consent should not be required from government for Section 47C to apply, particularly given other interests will prevail with respect to native title where it is determined to exist. The review should also consider expanding the scope to disregarding prior extinguishment to include all Crown land.

Further, given the availability of the non-extinguishment principle to apply to almost all Future Acts, the permanency of extinguishment is unjust and unnecessary. A review of the NTA should include consideration of how extinguishment could be curtailed. One view is that 'amendments should be made to limit extinguishment to current tenure extinguishment and repeal the provisions that validate past extinguishment...[to] do away with many substantive and procedural issues that arise when the parties come to deal with extinguishment.'<sup>182</sup>

## RIGHT TO TAKE FOR ANY PURPOSE

Early native title determinations in the Torres Strait included the native title right to trade in the natural resources within the determination area.<sup>183</sup> Later, the right to take marine resources for trading or commercial purposes was confirmed as constituting a native title right for the native title claimants in *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth* (2013) 250 CLR 209 (Akiba). While it is common for native title determinations to recognise non-commercial rights to share and exchange traditional resources, despite the confirmation in Akiba, very few native title determinations include commercial rights as part of the enumerated native title rights. Almost all consent determinations on mainland Australia recognise native title rights and interests explicitly for non-commercial purposes only.

The review should consider the barriers to native title claimants securing commercial rights as part of their determination, including the conduct of the state or territory in consent determination negotiations, and the constraints of guiding jurisprudence. In doing so, the review should revisit

whether to amend Section 223 to state that native title rights may be of a commercial nature, or whether other legislative or policy clarification is required to ensure native title claimants can take advantage of the findings in *Akiba* in relation to taking and using resources. Under Articles 25 and 26 of the UNDRIP, native title holders have the right to own, use, develop and control resources that they possess, by reason of traditional ownership. This right extends to taking resources for any purpose determined by the native title holders, including to support cultural, economic, or community development.

### FUTURE ACT REGIME

As captured in Part 3, Section 2 of this report, a comprehensive review of the NTA is needed, in relation to the Future Act and ILUA processes, to ensure that native title holders are the ultimate decision makers about development activities proposed on their country.

Depending on the type of development activity, under the NTA native title holders may have a right to comment, to be consulted, to object, or to negotiate an agreement.

The 1998 amendments substantially eroded the procedural rights of native title holders by removing many types of developments and grants from the right to negotiate provisions and replacing them with consultation procedures. Consultation procedures do not place a positive obligation on government, as compliance with the wishes of native title holders is not required to progress a proposal. The right to comment is not the same as a right to be involved in decision making about the proposed development activity or grant. Further, compliance by governments with procedural requirements are not mandatory, in that failure to comply does not invalidate the grant involved.

The right to negotiate procedure, the highest procedural right available to native title holders under the NTA, fails to meet the requisite standard under Article 32 of the UNDRIP which states that governments must obtain the FPIC of Indigenous peoples prior to the approval of any project that affects their lands and territories and other resources. The right to negotiate process set out in Subdivision P, which is largely limited to significant land use proposals including exploration and mining, does not comply with FPIC, and does not provide native title holders with the right to say 'no' to development on their country.

The process provides that a developer or resource sector proponent has six months to negotiate with native title holders to reach agreement about the proposed land use. If agreement is not reached within six months, either party can take the matter to arbitration by the NNTT to determine whether the proposed land use can proceed. The history of these arbitrations is that the NNTT has determined that the proponent may proceed with development or mining in more than 95 per cent of the matters that have come before it. Moreover, where the NNTT makes an arbitral determination, the rights of native title holders are further diminished, as the NNTT is explicitly prohibited from imposing a condition that the native title parties are to be entitled to payments in the nature of royalties or other profit-sharing arrangements, according to Section 38(2) of the NTA.

In this way, the NTA entrenches inequality. Both sides to the negotiation know that unless native title holders acquiesce to a developer or miner's suggested terms of agreement, the alternative is an arbitrated outcome that is likely to be in the favour of the developer or miner, without any provision for the awarding of compensation, royalties or other financial settlement.

For this reason, native title holders may find themselves in a position where they must choose between negotiating an agreement for a proposal they disagree with, or risk the project proceeding without adequate heritage protection or community benefits in place. These Future Act provisions entrench and amplify the inherent imbalance of power in the negotiating positions of the parties and disempower native title holders. This situation urgently needs to be remedied through appropriate amendments to the NTA.

The importance of making significant amendments to the Future Act provisions in the NTA is highlighted by recommendation 4 of the final report into the destruction of Indigenous heritage sites at Juukan Gorge, *A Way Forward*, that states:

*The Committee recommends that the Australian Government review the Native Title Act 1993 with the aim of addressing the inequalities in the negotiating position of Aboriginal and Torres Strait Islander peoples in the context of the future act regime. The review should address:*

- *The current operation of the future act regime and other relevant parts of the Act including s31 (right to negotiate), s66B (replacement of the applicant) and Part 6 (the operation of the NNTT)*
- *Developing standards for negotiation of agreements that require proponents to adhere to the principle of Free, Prior and Informed Consent as set out in the UNDRIP*
- *'gag' clauses and clauses restricting Aboriginal and Torres Strait Islander peoples access to Commonwealth heritage protections should be prohibited*
- *Making explicit the authority and responsibilities of PBCs and Representative bodies in relation to cultural heritage.*

The current Future Act regime does not operate in a way that advances and protects the interests of native title holders. Rather, since the 1998 amendments, the Future Act regime provides certainty and protects the interests of government and industry, and fails to incorporate FPIC and the other fundamental principles embodied in the UNDRIP.

Despite the concerns from government and industry, enshrining FPIC in development processes does not create a blanket prohibition on development. For example, in the Northern Territory over half of land is held as Aboriginal Land under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA). Under ALRA, traditional owners have the right to veto certain development activities such as exploration and mining. This has not prevented development from occurring in these areas. Rather, it enshrines FPIC to ensure traditional owners are the ultimate decision makers about what happens on their country. When development progresses, which it often does, traditional owners have a stronger negotiating position to ensure economic, social, and community benefits flow from the project while protecting cultural heritage and their values.

## INLAND WATERS AND SUBSURFACE RIGHTS

Inland waters often have significant cultural obligations and responsibilities for native title holders connected to ceremonial places, songlines, or dreaming stories. Despite this, native title rights to control, regulate and use water for purposes other than domestic purposes are curtailed by the NTA, and state, territory and Commonwealth

legislation. While some native title determinations include native title rights ancillary to inland water, such as fishing or using water for domestic purposes, Section 212 confirms the Crown's right to use, control, and regulate the flow of water. Native title determinations typically also contain a qualification under Section 225(b) and (e), stating native title rights do not extend to rights in waters regulated under relevant water management legislation. Consequently, native title holders' rights to inland water are extremely limited, and within the native title context, virtually non-existent. As such, the review should consider how inland waters are treated by the native title regime and its interaction with water legislation and extinguishment principles to determine possible reform avenues to address the barriers to native title groups securing rights over inland waters.

Further, pursuant to the common law and various legislation governing subsurface resources, the Crown owns those resources irrespective of the land being subject to a positive determination of native title. As with inland waters, subsurface rights are explicitly excluded from native title determinations. The review should take consideration of how ownership of subsurface rights is treated by the NTA and the states and territories in consent determination negotiations, and investigate the scope for how native title holders could benefit from, and exercise control in relation to, extractive activities. Article 26 of the UNDRIP is explicit that Indigenous peoples have the right to use, develop and control resources on their traditional country, and states have the responsibility to give legal recognition and protection to these resources, and this should be reflected in the NTA.

## ETAG PROCESS

From late 2022, the Australian Government has initiated reform discussions concerning the NTA with the Expert Technical Advisory Group (ETAG). The NNTC has developed a discussion paper for the ETAG process, which outlines a suggested scope for limited reform, with particular attention given to those areas that received less detailed attention when the legislation was first drafted. The NNTC has adopted a suggestion that the following three broad areas for reform be considered.<sup>184</sup>

1. Compensation: structured framework for resolution of agreements, preservation of evidence, applications and notifications.

2. Post-determination: PBC incorporation, Future Act processes, Indigenous Land Use Agreements, dispute resolution and management.
3. Recognition and pre-determination: ALRC and other reviews of native title.

Addressing these issues would be a productive step before embarking on a more comprehensive review, with indeterminate outcomes.

### PBC REGULATIONS

Sections 56 and 57 of the NTA require native title holders to appoint a PBC to hold native title on trust, or as the agent, for all native title holders. Regulation 4 of the PBC Regs requires PBCs to be Aboriginal and Torres Strait Islander Corporations, incorporated under the CATSI Act. Due to the regulatory framework under which PBCs exist, PBCs are often caught in a cycle of compliance, expending considerable time and resources that could otherwise be allocated to achieving the aspirations of their communities.

Article 33(2) of the UNDRIP states that, 'Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.' As such, the review should examine the current NTA requirement to appoint an Aboriginal corporation as a PBC and assess whether this corporate entity is fit for purpose, or whether some other structure, such as an authority or a council, might be more appropriate. Native title holders being able to determine the most appropriate representative structure for their group goes to the heart of the fundamental principle of self-determination, as articulated in Article 3 of the UNDRIP.

The review should also examine and propose amendments to the PBC Regs to simplify the onerous and complex compliance requirements, including those related to native title decisions, and to better support PBCs to charge fees for administering Future Acts and other services carried out as part of their native title function.

Additional areas of prioritisation for review and reform would be identified through a systematic engagement process with PBCs and NTRBs.

### CATSI ACT

If after systematic engagement with native title holders, it was agreed that an Aboriginal Corporation could provide an appropriate structure for a PBC in certain circumstances, it is important that further amendments be made to the CATSI Act to enhance the governance and operation of Aboriginal Corporations that are PBCs, streamline their management and regulation, and support future policy reform processes and legislative developments relevant to these PBCs.

In the NNTC's view, this could be achieved most effectively by creating a separate Chapter or Division within the CATSI Act to bring together all the provisions relevant to PBCs in a coherent manner, and by making a number of amendments to the CATSI Act, outlined in the NNTC submissions to the Review of the CATSI Act in 2020.

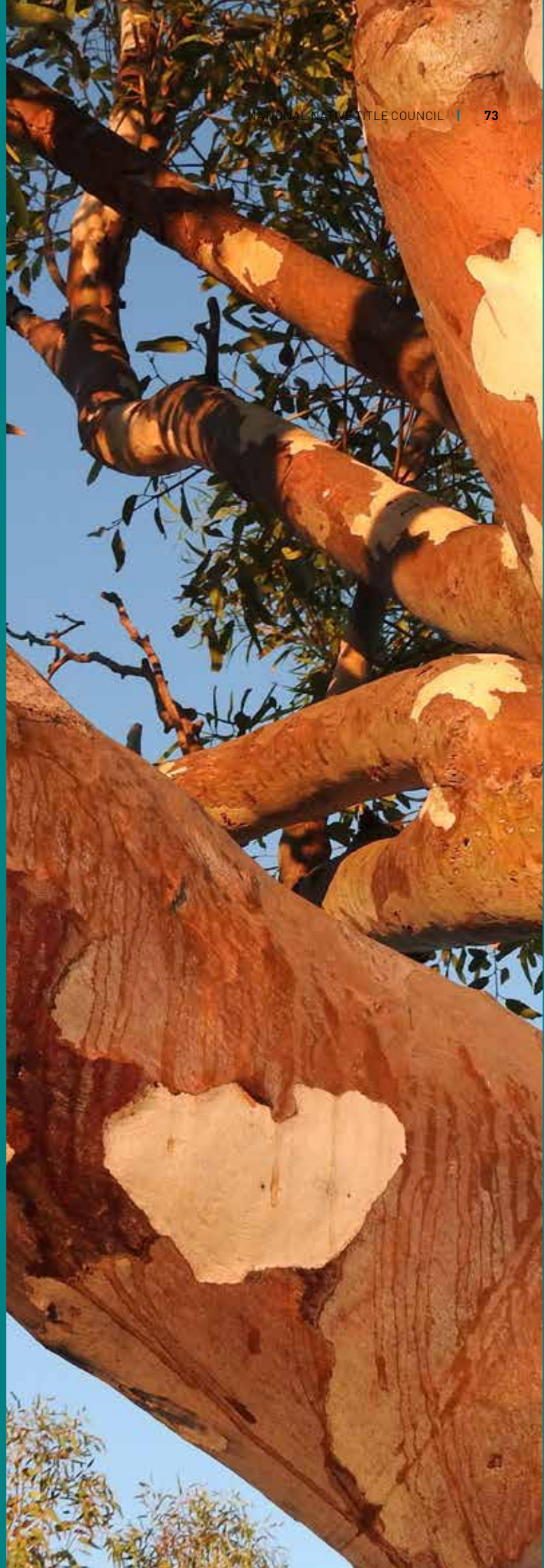
## PART 3: SECTION 7: REFORM AGENDA

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### RECOMMENDATIONS

The NNTC recommends:

11. That the NTA is reviewed to address a number of well-known and documented deficiencies with the Act and to align the NTA to developments in international law that have occurred since its inception in 1993.
  - (a) That the scope of the 2023 ETAG process is defined to include a limited review of the issues outlined in the ETAG process of this section and in the separate NNTC Discussion Paper for the ETAG.



## SECTION 8: INDIGENOUS DATA SOVEREIGNTY IN NATIVE TITLE

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Indigenous data sovereignty has become increasingly important in the development of policy and programs relating to Aboriginal and Torres Strait Islander peoples. This coincides with a better understanding of ethical ways of collecting and using data, and associated issues of privacy, consent, and ownership.

During the native title claims process, a considerable volume of material is collected and created by the legal and anthropological teams supporting native title groups to evidence their claims. Once finalised, that material often sits with the NTRB who acted on the claim, and sometimes within the private archives of anthropologists and researchers. Recognising the significance of potential utility of these native title materials, many native title groups, through their PBCs, have been calling for their return.

**Indigenous data sovereignty** is ‘the right of Indigenous peoples to govern the collection, ownership, and application of data about Indigenous communities, peoples, lands and resources.’<sup>185</sup>

**Native title materials** are all materials collected or created in preparing for and during a native title claim, including written, audio-visual, or material in other format. Examples of materials include genealogies, affidavits, historical records, witness statements, field notes and expert reports.

### AIATSIS PROJECT

AIATSIS is currently undertaking a project to address the challenges of managing native title materials and their return to native title groups.<sup>186</sup>

Work that AIATSIS has undertaken as part of the project includes:

- a pilot program with YMAC and RRKAC to develop a return of materials policy;
- development of templates for researchers to survey native title archives;

- reporting on the future of connection material; and
- various collaborations with Angus Frith on legal issues.

While mentioned in the project material, a template agreement between NTRBs and PBCs in relation to transfers has not been published. It is unclear whether it has been developed.

### LEGAL ISSUES WITH THE TRANSFER OF NATIVE TITLE MATERIALS

At the 2021 AIATSIS Summit, Angus Frith presented the legal issues in transferring research materials from NTRBs to PBCs. These are summarised below.

#### DURING THE CLAIM PROCESS

- The research material is held by either the NTRB, in exercise of the statutory functions, or the NTRB-employed solicitor, as part of the solicitor’s file.
- Solicitor-client relationship is established when the solicitor provides legal assistance to the native title applicant.
- Most documents on the solicitor’s file are owned by the client, some are owned by the solicitor, and others are jointly owned.
- Some material is subject to additional obligation of confidentiality to the individual who provided the information (restricted, sensitive, etc.).

#### AFTER THE CLAIM IS FINALISED

- Research material held by NTRB and not on the solicitor’s file belongs to NTRB, arguably on trust for benefit of the native title holders.
- Most of the documents are owned by the solicitor’s client, the native title applicant.
- Certain rights in relation to the solicitor’s file pass to the PBC on determination.
- NTRB solicitors must obey clients’ instructions on what to do with the originals of client owned documents.

## OPTIONS FOR DISPOSAL

Depending on instructions of the applicant or PBC, research material should be:

- given to the PBC;
- retained by the NTRB; or
- destroyed.

## ISSUES FOR TRANSFER TO PBCS

The following issues for transferring research material to PBCs need to be considered:

- consent from the native title holders, as a group, individuals whose information was provided with confidentiality obligation, deceased people;
- capacity for PBCs to store and manage material with limited resources and capacity;
- maintaining restrictions and conditions (LPP, confidentiality, court imposed); and
- PBC may cease to exist.

In addition to the above issues, Frith proposed seven principles to guide the return of materials.

1. Native title holders should control the storage, use of and access to the research material developed and used for the process of recognising their native title rights.
2. Research materials should only be transferred from the NTRB to the PBC if authorised by the native title holders.
3. Transfer of research materials should not affect existing:
  - a. obligations of confidentiality, privacy, privilege, IP, etc.
  - b. restrictions imposed by the court or by the group's own traditional laws and customs.
4. In order to maintain these obligations and restrictions, where possible, the NTRB should identify to the PBC any material subject to such obligations and restrictions.
5. The NTRB and PBC should both be obligated to ensure the PBC has adequate storage facilities and the capacity to properly manage the storage, use of and access to the research material in accordance with the requirements of the native title holders.
6. Consideration should be given to whether the NTRB should retain a copy of the research materials, and if so, the appropriate conditions for the storage, management, and use of that copy of materials.

7. The NTRB and PBC should agree:

- a. purposes for which the research material held by the NTRB and/or PBC will be accessed, used or disclosed;
- b. persons who can access, use or disclose the research materials held by the NTRB and/or PBC; and
- c. conditions, under which the research material held by the NTRB and/or PBC will be accessed, used or disclosed.

While several of the above principles are useful and necessary to ensure native title materials are transferred and managed in accordance with the legal obligations which attach to them, some of the principles go beyond what is required and could be characterised as gatekeeping in circumstances where the NTRB could potentially restrict the transfer if they deem the PBC does not have adequate storage or capacity to manage the material. This is not in line with the legal position that the PBC, as the successor to the applicant, owns or at least has rights to much of the material held by the NTRB on the solicitor's file. Nor is it in line with the right to self-determination and the fundamental principles of Indigenous data sovereignty which advances the rights of Indigenous nations over data about them, regardless of where it is held and by whom.<sup>187</sup>

It is important that the rights of native title holders, as represented by their PBC, to access, control and take custody of their native title material are at the core of template policies and agreements for NTRBs and PBCs to return materials. Where claims are yet to be lodged, NTRBs should seek instructions upfront from the claim group, in relation to native title materials, and categorise materials and information according to confidentiality, legal professional privilege (LPP), and so on, during the claim. Once finalised, the process of transfer could then take place almost immediately.

Gaining access and control of native title materials will have significant impacts on the ability for PBCs to grow, gain independence, embark on Nation Rebuilding and exercise their native title functions, particularly in relation to decision making and proposed development. It will enable PBCs to engage with advisers outside of the NTRB system, as they will hold relevant material evidencing culture, connection, history, and heritage.

As a peak body for the native title sector with NTRB and PBC members, the NNTC is in a unique position to support the return of materials through empowering programs of capacity building for PBCs and practical assistance to NTRBs to ensure their archival material is sorted, categorised, and transferred. Often NTRBs want to transfer material to the relevant PBCs but do not have the resources, funding or in-house expertise to do so in accordance with the legal requirements to maintain LPP etc. The NNTC is able to consult with its NTRB members to understand the barriers to returning materials and advocate to government on ways to address those issues, including issues of legal uncertainty and resourcing.

In addition to practical support, the NNTC could utilise the PBC Steering Group to direct policy development in this area, to ensure materials are being handled and returned in a way that supports the priorities of PBC members.

The return of native title materials to PBCs following the resolution of native title claims continues to stagnate. While considerable work has been achieved by AIATSIS to pilot policies and transfer processes and address uncertainties around legal issues associated with their return, there has been little progress nationally to hand back claim materials to those native title holders who are the ultimate owners of that material.

The NIAA can reprioritise this issue and pursue practical solutions to enable PBCs to take control of their data and to use that material to build their nation, develop their independence and capacity to engage with and respond to development proposals, and protect, revitalise and practice culture.

## PART 3: SECTION 8: REFORM AGENDA

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### RECOMMENDATIONS

The NNTC recommends:

- 12. That the NIAA work with the NTRBs to develop a program and funding proposal template for NTRBs to conduct the return of native title materials according to their own returns policies in adherence to First Nations cultural considerations.**

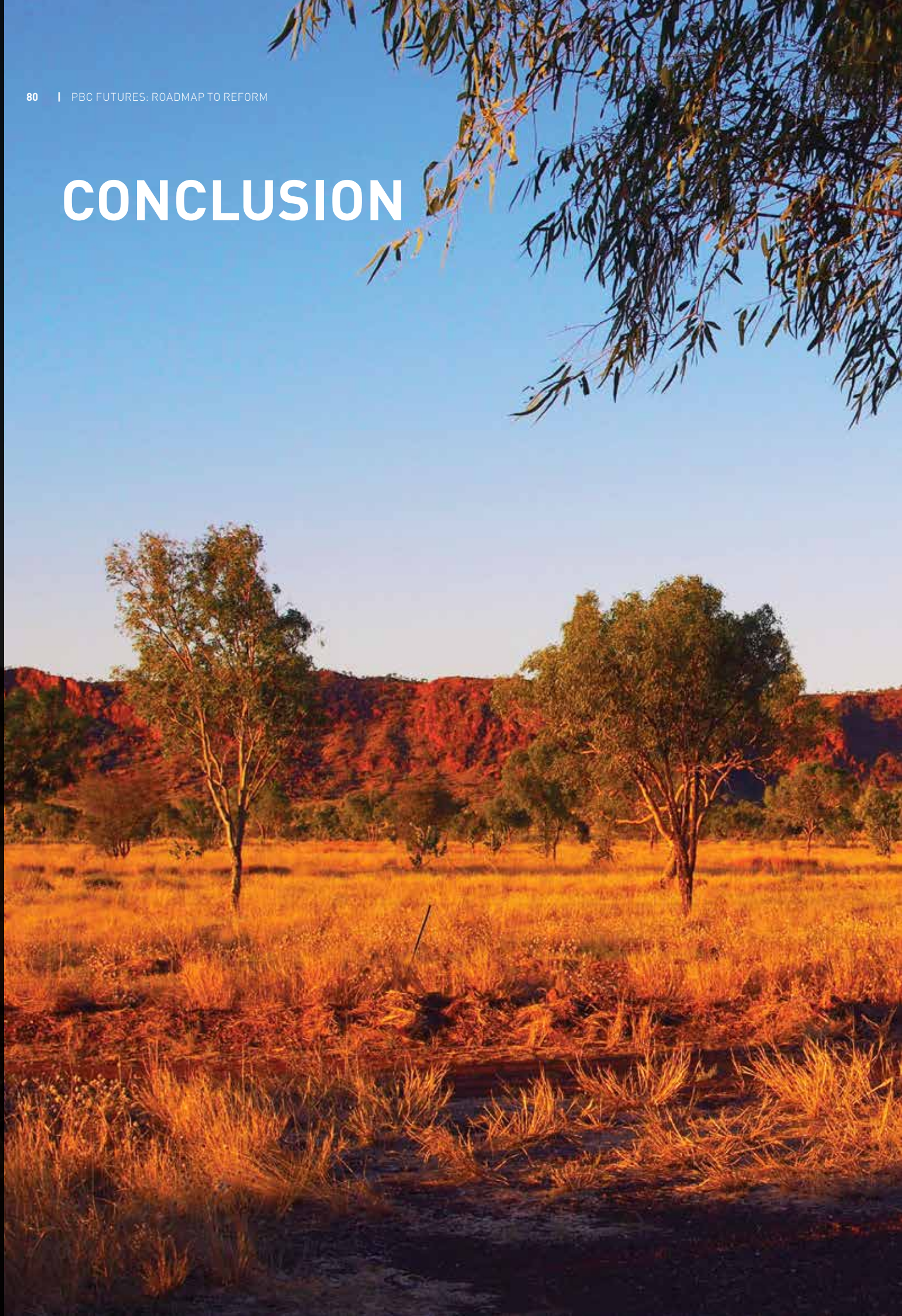
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# CONCLUSION





This report has identified that investment in major reform of the PBC sector will return a significant benefit, far greater than the level of investment. That return will be enjoyed by First Nations peoples, governments, proponents and ultimately all Australians.

The task of reform should not be underestimated, however there is a clear pathway forward by addressing three main aspects, discussed respectively in each Part of this report.

1. Vision: overarching conceptual framework for policy reform.
2. Infrastructure: interim and longer-term partnership agreements.
3. Reform agenda: significant reform to three of the eight reform areas, one of which must be funding.

#### **1. Conceptual framework: a national policy approach of self-determination through nation rebuilding**

The overarching policy approach moving forwards needs to be one of self-determination, as outlined in the UNDRIP, paying close attention to the role of FPIC within an Australian legislative framework. The key rights in the Australian context are as follows.

1. Individual First Nations people are the self in self-determination. They are the owners and rights holders of their lands, waters and resources and PBCs are the representative vehicle through which self-determination can be enacted.
2. PBCs and Traditional Owner Corporations are the decision-makers for matters affecting their countries and communities at local, regional and national levels.
3. The Australian Government has an obligation to adequately fund and resource PBCs for their statutory obligations.
4. Investment in and support for PBC led economic development will build strong First Nations as well as strong regional economies for all Australia.

In addition, a Nation Rebuilding approach, as outlined in this report, recognises First Nations as autonomous strong communities with sovereign rights, including the right to treaty and self-government. While the pathways for Nation Rebuilding will be determined by each

individual First Nations community, or PBC, non-Indigenous Australian governments, including the NIAA, can benefit from First Nations principles inherent to Nation Rebuilding and adopt these into a policy framework. The framework needs to incorporate the following concepts.

- A strategic and long-term approach: planning beyond the four-year election cycle.
- Replacement of project or program funding by ongoing and secure funding.
- NTA development agenda, set by the PBC, with a culturally appropriate, strengths-based planning approach.
- Economic development is not a problem to be solved, but a long-term strategic agenda set by the PBC about what kind of society the nation wants to be.
- Culture as a strength, not an obstacle to economic development.
- Development of partnerships that include co-design and joint decision-making on First Nations terms.
- Funding evaluation that reflects the needs and goals of the nation, not just the funding body.
- Realisation that First Nations will make mistakes, like any other nation, and allowance of this as a learning mechanism, free of blame rather than a failure.

#### **2. Infrastructure: interim and longer-term partnership agreements**

As outlined in this report, for the past 30 years in native title, there have been numerous models of funding, capacity building, governance, and economic development, but attempts to deploy these models have had limited success. The problem is not with the models, it is one of implementation. The models are rarely effectively implemented, and, if they are, long-term evaluation from a First Nations perspective is rare. The PBC sector does not need more models. It needs action and implementation that is based on the principles of PBC self-determination.

A key part of supporting the self-determination of native title holders, as the rights holders to country, is acknowledging that native title holders, via the PBCs, are the ultimate decision-makers of matters that affect their lands, waters and resources, including economic development.

On acceptance of this premise, the next logical step is to acknowledge that the relationship needs to be between the Australian Government and the rights holders, represented by PBCs locally, and the NNTC nationally. Building a strong infrastructure with First Nations peoples via a PBC Futures Partnership Agreement will ensure that the policy reform process is founded in co-design and based on self-determination. With this foundation, a partnership framework will be able to implement outcomes that work on the ground.

### 3. National policy reform agenda

Resulting from previous desktop research and sector engagement, this report traverses eight areas of policy reform areas. Within each of the eight policy areas, the report included information about what the problems are, previous work in the sector and some recommendations for progressing towards implementing the project.

While it is tempting to address the recommendations that are the easiest to progress, the sector needs to avoid this approach as more pressing issues threaten its sustainability. There are particular issues that must be progressed, such as PBC funding and resourcing, or work in other areas will be in vain. While the NNTC acknowledges that implementation of recommendations must progress as a conversation and collaboration between the Australian Government and PBC sector, serious reform to PBC funding and support, the Future Act regime, and adherence to FPIC is vital for the future of PBCs and First Nations economies in the next 30 years of their post-determination journey.

## LIST OF RECOMMENDATIONS

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1. **That the NIAA adopts and incorporates a national policy approach that follows the principles of nation rebuilding and a framework for PBC related policy that encompasses all the statutory obligations and subsequent business of PBCs and related entities.**
  - a) That First Nations people from the native title sector co-design the policy approach.
  - b) That the NIAA incorporates the nation rebuilding principles into program and policy evaluation methodologies, including those undertaken by external consultants.
  - c) That the NIAA use the nation rebuilding principles to work collaboratively with the NNTC to develop FPIC protocols for establishing a best-practice model for engaging and consulting with the PBC sector.
2. **That the NIAA and the NNTC develop and enter into a partnership agreement to advance future national policy work in the PBC sector.**
  - e) That the NIAA and the NNTC prepare a draft set of principles for PBC sector policy design and program implementation that is workshopped with the PBC Steering Group and NNTC members.
  - f) That the NIAA and the NNTC prepare an agreed timeline and co-design workplan for 2023 to progress a partnership framework, between the Commonwealth, states and territories and PBC sector, with the PBC Steering Group.
  - g) That the NNTC and the NIAA hold a workshop to agree on the scope of information provided in the materials to be part of the co-design process.
  - h) That the NNTC develop a series of short papers with discussion questions and models for consultation with the PBC Steering Group and other NNTC members or non-member PBCs.
3. **That in adherence with the agreed Recommendation 7 from the Juukan Gorge Inquiry, a PBC Future Fund is developed to ensure long term and secure funding for PBCs and to invest in the regional economic development of Australia.**
  - a) That the NIAA and the NNTC develop a criteria for meaningful, critical and independent review of the existing funding programs, Basic Support Funding and PBC Capacity Building Fund, using the draft principles from Part 2, Recommendation 1.
  - b) That the NIAA and the NNTC should develop a PBC funding strategy and implementation plan that addresses the potential risks and challenges and work required to overcome those challenges in the development of a PBC Future Fund.

- c) In collaboration with NIAA, the NNTC research the nuances of a fund, including:
  - determination of how the fund would be managed and to whom it would be distributed
  - models of financing the fund
  - sources of capital, including growth over time
  - a mechanism for enabling contributions from states and territories and the private sector.
- 4. That state and Commonwealth programs relating to the rights of native title holders, such as cultural heritage, ranger programs, IPAs, and economic development on country are designed, developed, and directed through the relevant PBCs.**
  - (d) That an accurate data set of the operational costs of PBCs to carry out their statutory obligations, including compliance, cultural heritage and land management, consultation and Future Acts management be developed.
  - (e) That a plan to address the policy and engagement siloing of the NIAA programs that fall within a PBC's jurisdiction be developed.
  - (f) That the NIAA and AGD support the NNTC to conduct a national review of the native title Future Acts regime, which would be part of the response to Recommendation 4 from A way forward and feed into the limited review of the NTA.
- 5. That the NIAA support the growth and development of NTRB PBC support units and the regional and local programs they manage, which are essential for new PBCs and more experienced PBCs who maintain service agreements.**
  - a) That the NIAA provide national forums and online mechanisms for NTRB support units to collaborate and share materials.
- 6. That the NIAA support existing and new PBC regional structures through a nation building approach, as outlined in Part 1 of this report.**
  - (a) That the NIAA continues to fund the NNTC to hold regional PBC forums.
  - (b) That the NIAA considers funding a national PBC forum.
  - (c) That the NIAA works with the NNTC to focus on local engagement in parts of Australia that have had limited engagement.
- 7. That the NIAA considers how the right to self-government (Article 4 from the UNDRIP) can be incorporated into long-term reform options in PBC structures.**
  - (a) That a national discussion be initiated about the long-term options for PBCs and regional groups of PBCs through a series of thought leadership papers.
- 8. That the NNTC and the NIAA develop national FPIC protocols for ethical engagement and consultation with the PBC sector that adhere to international standards of FPIC, as part of the proposed Interim Partnership and by working with the PBC Steering Group.**
- 9. That the Australian Government demonstrate national leadership and adopt minimum standards for the states in advancing agreement-making in Australia through Makarrata, national and regional treaties, and restorative justice frameworks in native title compensation.**
- 10. That the NTA is reviewed to address a number of well-known and documented deficiencies with the Act and to align the NTA to developments in international law that have occurred since its inception in 1993.**
  - a) That the scope of the 2023 ETAG process is defined to include a limited review of the issues outlined in the ETAG process of this section and in the separate NNTC Discussion Paper for the ETAG.
- 11. That the NIAA work with the NTRBs to develop a program and funding proposal template for NTRBs to conduct the return of native title materials according to their own returns policies in adherence to First Nations cultural considerations.**



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