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National Native Title Council
Submission to the Joint Standing Committee on Northern Australia

Inquiry into the Opportunities and Challenges of the Engagement of Traditional Owners in the Economic Development of Northern Australia

Introduction

The National Native Title Council (NNTC) welcomes the Committee's Inquiry and the opportunity to make a submission to it. The NNTC is a company limited by guarantee under the *Corporations Act*. Since 2007 it has operated as the peak body of Native Title Representative Bodies (NTRBs) and Native Title Service Providers (NTSPs) (collectively - NTRB/SPs) recognised under the *Native Title Act* (ss203AD and 203FE). At present 12 of the 15 NTRB/SPs are members of the NNTC.

In 2017 the NNTC altered its constitution to provide for direct membership of Prescribed Bodies Corporate established under s 55 of the *Native Title Act* and other equivalent Traditional Owner Corporations (TOC) established under parallel legislation such as the Victorian *Traditional Owner Settlement Act*. Currently there are 20 PBC and TOC members of the NNTC. This figure includes the *Gur A Baradharaw Kod Torres Strait Sea and Land Council* the peak body for the 21 Torres Strait PBCs.

The NNTC is then Australia's peak Native Title Organisation.

To the NNTC an efficient and effective native title system can make a vital contribution to Australia's community and economy, particularly in Northern Australia. The native title system is an important component of the nation's land management processes and a vital component in the minerals and petroleum exploration and production industries. Crucially, the native title system can create an opportunity for both a resurgence of Indigenous culture and also opportunities to create economic advancement and independence for Australia's

Indigenous Peoples. The facilitation of Indigenous economic development that can arise through native title creates important opportunities particularly for remote and regional communities.

The NNTC has recently released a Discussion Paper entitled "*Realising the Promise of Native Title*". The Discussion Paper identifies many key reforms that are needed to both legislation and structural arrangements affecting the native title system in order to ensure that native title can fulfil its maximum potential in delivering real economic, social and cultural benefits to Traditional Owners. Many of the matters addressed in this submission are also discussed in the Discussion Paper. A copy of the Discussion Paper is available here: http://nntc.com.au/discussion-paper-realising-the-promise-of-native-title/

At the outset of this submission, before specifically addressing the Inquiry's Terms of Reference, it is worth repeating the opening sentences from that Discussion Paper:

> *Native title is a part of the redress for 200 years of dispossession endured by Indigenous Peoples throughout Australia; it is the result of the meeting of two systems of law - the ancient laws of Indigenous people and the Common Law of modern Australia; and it is a shift in the scales of justice towards a more balanced relationship between these two systems.*
>
> *Native title outcomes create an opportunity for a resurgence of Indigenous culture and also opportunities for the political, social and economic advancement of native title holders.*
>
> *While it is commonly accepted that in the 27 years since the Mabo decision, native title has had some success in delivering on its promise, the commitment of Indigenous people for healing and self-determination has not waned.*

Responses to Terms of Reference

1. *The current engagement, structure and funding of representative bodies, including land councils and native title bodies such as prescribed body corporates.*

The NNTC assumes the Committee is aware of the basic institutional architecture of the current native title system. In summary there are 15 Native Title Representative Bodies and Native Title Service Providers recognised under the *Native Title Act* (ss203AD and 203FE). Three of these (the Central Land Council, the Northern Land Council and the Torres Strait Regional Authority) are also statutory authorities performing functions under other legislation. In addition, there are currently approximately 190 Prescribed Bodies Corporate

(PBCs) established under s 55 of the *Native Title Act*. It is estimated that once existing and anticipated native title determination applications are concluded there will be approximately 300 PBCs across the country. The Land Program Budget under which all of these organisations are funded amounts to somewhat less than $100 million per annum.

With these basic institutional arrangements in mind, the response to this term of reference will address the following issues: funding arrangements for NTRB/SPs; matters related to future native title compensation applications; and, funding arrangements for PBCs.

1.1 Funding arrangements for NTRB/SPs

Native Title Representative Bodies and Native Title Service Providers (NTRB/SPs) are crucial to the effective functioning of the native title system now and into the future. NTRB/SPs provide the experienced, professional representation native title holders and claimants need to effectively pursue native title determination and compensation claims and conduct future act negotiations.

The *Native Title Act* (in ss 203C and 203FE) contemplates that NTRB/SPs will be funded independently of the political cycle to determine with their clients their own native title objectives and have the resources to pursue these. Recent years have seen the effective reduction of the resources available to NTRB/SPs to fulfil their function. However, the call on these resources does not diminish. Native title claim work continues and, in many instances, it is the most difficult claims that remain to be resolved: claims that require intensive research, mediation and negotiation. Further, PBCs need to be supported and the coming onset of compensation claims will create an additional burden on NTRB/SPs.

Recent funding structure changes have meant NTRB/SPs and their clients have had the ability to freely determine their own priorities diminished through abrupt changes in funding levels and departmental interference.

Finally, The NNTC itself plays an important role as a central point of contact and advocates for both NTRB/SPs and PBCs. It provides crucial information and training services to PBCs in particular. The NNTC is currently forced to undertake its work through insecure short-term IAS project grants. The NNTC should receive stable ongoing funding as the peak body for native title organisations.

Self-determination is central to native title, but current funding arrangements work against this.

1.1 Recommendations

- That resources allocated to NTRB/SPs should be increased to allow the efficient management of compensation claims in addition to resolving outstanding determination applications and supporting existing PBCs.

- That NTRB/SPs be provided with secure triennial funding as contemplated under NTA ss 203C and 203FE.

1.2 Management of Compensation Claims

1.2.1 Compensation Application Procedures

The NTA provides that all "acts" that have "affected" native title rights and interests since the commencement of the *Racial Discrimination Act* in October 1975 accrue a liability of compensation on the part of the party doing the act (most commonly state and territory governments) to native title holders. Section 227 NTA defines an "affect on native title" as any act that extinguishes native title (in whole or in part) or "is otherwise wholly or partly inconsistent with their [the native title rights and interests] continued existence, enjoyment or exercise". By way of example of the scope of the definition contained in s 227, the unanimous decision of the High Court in *Western Australia v Brown* [2014] HCA 8 ("*Brown*") makes clear that both the grant of *and exercise* of rights pursuant to, for example, a mineral lease will operate to "affect" native title rights and that the *exercise* of rights may have an "affect" in addition to the original grant (*Brown* at [64]).

As the foregoing indicates, the compensation provisions of the NTA operate to create a state (or territory) government native title compensation liability in respect of potentially every grant of an interest in land were native title may exist (or may have existed) that has occurred since 1975. In Western Australian uniquely it has been sought to shift the compensation liability to the holder of a mining tenement (s125A Mining Act 1978).

On 4 September 2018 the High Court sat in Darwin for the first time to hear appeals in the matter of *Northern Territory v Griffiths* (the Timber Creek Compensation Case - *Griffiths*). The decision was delivered on 13 March 2019. The case is significant because, after 25 years of operation of the *Native Title Act*, *Griffiths* is the first litigated native title compensation application.

The High Court decision confirms the approach to determining compensation applications taken by Justice Mansfield of the Federal Court at first instance. Under this approach, evidentially establishing the elements in a compensation application will require the taking of evidence regarding traditional laws and customs from applicants. It would also involve issues of extinguishment and therefore tenure histories as a step in establishing the original existence of native title. These are the matters that are also involved in a native title determination application.

A compensation application would, in addition, involve evidence as to the areas of particular significance to the compensation applicants and of the scope of operations undertaken by the grantee during the currency of the title. Often of course the land the subject of a compensation application may have been the subject of the grant of various successive titles

(particularly minerals titles). Evidence regarding the operation (not merely existence) of each of these titles would need to be led.

These matters established, it would then be necessary for the parties to lead evidence regarding the appropriate valuation method for the subject land. As the first instance decision *Griffiths* (*Griffiths v Northern Territory (No 3)* [2016] FCA 900) suggests (and confirmed by the High Court), the appropriate method for the valuation of remote land where there have been little relevant market dealings can be a complex and contentious issue. This experience is supported from that of other contexts such as the valuation of land the subject of "Township Leases" under the provisions of the *Aboriginal Land Rights (Northern Territory) Act.*

In short, the process of litigating a native title compensation application is significantly more complex than that involved in litigating a native title determination application. Absent the adoption of alternative processes, this litigation process would need to be repeated across all lands that may have been the subject of native title rights in 1975 but have since been the subject of the grant of any interest.

1.2.2 Management of Compensation Applications

The complexity and volume of future compensation applications that will emerge subsequent to the decision of the High Court in *Griffiths* raises questions around the management of the compensation application process. The NNTC has urged Government to investigate the establishment of policies and procedures that will ensure the efficient and orderly management of these applications. These policies go to matters such as the encouragement of optional comprehensive native title settlements where the existence of native title, the adoption of tailored future act procedures and issues associated with compensation can be resolved, through negotiation, at one time. Other potential policies go to the establishment of voluntary administrative tribunal structures designed to reduce transaction costs.

While the development of these policies and procedures holds great promise for the future, there will be an inevitable time lag until the applicable jurisprudence is settled and the relevant structures are established and functional. This suggests there will be an inevitable surge in the demand from native title holding communities for resolution of compensation issues that will need to be dealt with through existing Federal Court structures.

Native title holding communities will need to be satisfied that this demand can be reasonably met. The undesirable alternative is that compensation applicants will be enticed to pursue poorly prepared applications in an *ad hoc* fashion. The consequences of this scenario would be Courts clogged with the management of poorly prepared applications and the benefits of compensation likely consumed by excessive and unnecessary legal and other litigation costs. This scenario must be avoided.

Existing Native Title Representative Bodies and Native Title Service Providers (NTRBs/SPs) system must be resourced to address the demand that will stem from native title

compensation applications. There are currently 15 NTRBs/SPs across the country. They are funded by the Commonwealth government to undertake a range of functions in particular the prosecution of native title determination applications, supporting native title holders and claimants in the management of future act proposals and the support of PBCs within their relevant regions. The existing NTRBs/SDPs receive funding under the Native Title and land Rights Program of approximately $100m. Although efficiently managed by NTRB/SPs, these funds are inadequate for the discharge of all statutory functions and certainly inadequate to, *in addition*, undertake the extensive work associated with native title compensation applications.

Consultation with NTRBs/SPs indicates that in order to adequately respond to the expected demand for the initiation and prosecution of native title compensation applications likely to arise in 2019-20, an additional $50m is required from that financial year and the subsequent two years. A review of funding arrangements is recommended as greater utilisation of alternative negotiating/resolution structures takes place.

1.2 Recommendations

- The Commonwealth encourage the adoption of an option for a 'comprehensive regional settlement' approach to the settlement of native title applications and explore, in partnership with native title organisations and other stake-holders, the development of alternative procedures for the resolution of native title compensation applications.
- Funding under the Native Title and Land Rights Program be increased by $50m annually for the next three years to allow Native Title Representative Body and Native Title Service Providers to adequately manage future native title compensation applications.

1.3 Support for PBCs

Prescribed Bodies Corporate are the key structure for the management of native title rights. PBCs have statutory obligations to consult with many thousands of native title holders in relation to a broad range of major and less significant land use proposals.

PBCs also have the potential to be the organisational foundation for sustained community benefit economic development activities cultural maintenance and social outcomes for native title holders, particularly in remote locations. There are currently 187 PBCs across the country. The number is expected to rise to over 300 in the coming years.

Although efficient and effective PBCs are crucial to a viable land management system across Australia, they currently have no guarantee of any resources to undertake their important task. In regions such as Central Australia, PBC members and directors face a number of

barriers to building an understanding of 'western' corporate governance frameworks, such as low English literacy and numeracy skills, difficulties balancing statutory obligations with traditional and family obligations, and remoteness.

A PBC can apply for funding to undertake economic development programs and charge proponents' fees in some limited circumstances. Often the revenue raised by a PBC from its business activities must be used to fund its statutory obligations under the *Native Title Act.* Further, in regions such as Central Australia, the vast majority of PBCs do not have the administrative structures or capabilities to access funding without external support, which is currently provided by the Central Land Council's PBC Support Unit. Other NTRBs/NTSPs have varying degrees of capacity to assist with funding applications on behalf of PBCs and the application process itself can often be costly to meet the requirements of an application through Indigenous Business Australia (IBA) or the Indigenous Advancement Strategy (IAS) which PBCs do not have the seed funding to engage the necessary expertise to proceed with successful applications.

Obliging native title holders to raise their own funds to discharge obligations under Commonwealth and State law makes a mockery of the recognition of traditional ownership in the *Native Title Act and fails to harness the opportunity for economic development inherent in a PBC.*

However, if a PBC and/or supporting land council were allocated resources enough to undertake its core statutory functions this potential could be realized, and the objectives of the *Native Title Act* fulfilled. The NNTC estimates that this goal could be achieved if each PBC were allocated a three-year recurrent funding at a level of $300,000 pa. To ensure that a PBC can effectively discharge its statutory and social obligations from the time of the determination of native title by the Federal Court, this funding should be made available some months ahead of the date of the determination.

Further, in Central Australia, where PBC capacity and self-generated income is relatively low, the NNTC supports the approach advocated by the Central Land Council, to enable land councils to apply for 'combined basic support funding' for PBC clusters to employ PBC support officers to deliver capacity-building, administrative and governance support to PBCs.

Assuming there are 200 PBCs in existence as at 2019, this proposal would involve a maximum first-year expenditure of $60m. However, this amount is likely to be significantly reduced through the development of regionally based PBC support services (essentially a services 'hub' that can be utilised by a number of PBCs in a specific region) in areas such as Torres Strait and elsewhere. While this is a not insignificant expenditure, given the role this funding could have in giving real effect to native title rights and facilitating economic development in remote communities it is a worthwhile and just investment.

In addition, providing PBCs with the appropriate tools to undertake meaningful participatory community development processes can assist these organisations to realise long term benefits from compensation revenues. Currently, a number of Native Title Representative

Bodies work with a number of Aboriginal communities to support their community planning and development process. This work could be expanded if Native Title Representative Bodies were funded to support PBCs to undertake a community planning process in order to maximise benefits from their compensation revenue.

1.3 Recommendations

- That each PBC be allocated three-year recurrent funding at a level of $300,000 pa and that this funding be made available six months prior to the expected date of a determination of the existence of native title by the Federal Court.
- That Native Title Representative Bodies are appropriately funded annually to support PBCs in community planning and development process to derive from their compensation revenue long term benefits from economic development, cultural maintenance and social outcomes.

1.4 Support for land councils to drive Aboriginal economic development

The NNTC notes that across Northern Australia, the six land councils perform a range of functions outside their defined statutory responsibilities under the *Native Title Act* and *Aboriginal Land Rights (Northern Territory) Act 1976*.

Land councils are uniquely placed to support Aboriginal-driven development. In their respective regions, they possess unequalled relationships with communities and traditional owners, multi-disciplinary expertise in Aboriginal governance, land tenure, agreement-making, land management, and a vast footprint built up on decades of experience working with and for Aboriginal constituents in the region.

If the Government is committed to supporting structures which enable Aboriginal economic development in Northern Australia, it is vital that land councils are resourced to provide the holistic support required to ensure that economic activities are Aboriginal-led and sustainable, in regions which face unique barriers such as remoteness, sparse populations, harsh climactic conditions, poor access to capital, poor access to training and employment, reliance on government finance, and inability to achieve savings through economies of scale.

To mitigate these barriers and leverage the unique knowledge and strengths of Aboriginal people, land councils have built capacity in intensive employment and training, enterprise development, administrative and management support. This approach has led to significant, positive results in areas such as carbon farming, tourism, and ranger employment. Ranger work provides people in remote communities with meaningful employment, training and development opportunities in natural and cultural resource management, and opportunities for intergenerational knowledge transfer and the maintenance of connection to country. A number of studies have reported the economic, environmental and social

benefits associated with ranger employment – amongst them the proven net reduction in government support.

These outcomes have only been achieved with significant, stable resourcing for land councils. Similar resourcing will be required to achieve outcomes in other areas, including:

- Environmental services (carbon abatement, weed and feral animal management, quarantine services, water resource management, coastal surveillance, wildlife and fire management).
- Aboriginal enterprise (carbon farming, bushfoods, tourism, pastoral, agricultural).
- Mining-related employment, training and service delivery.

1.4 Recommendation

Provide land councils with adequate, stable, long-term funding to ensure that they can perform their vital roles as land councils, NTRBs, and Aboriginal representative bodies, and to drive Aboriginal economic development in their respective regions.

2. The role, structure, performance and resourcing of Government entities (such as Supply Nation and Indigenous Business Australia).

2.1 Indigenous Land and Sea Corporation and Indigenous Business Australia

The NNTC believes the statutory authorities, the Indigenous Land and Sea Corporation (ILSC) and Indigenous Business Australia (IBA) play an important role in developing economic opportunities for Traditional Owners and in providing some measure of redress for historical dispossession of traditional lands.

In relation to the ILSC and IBA two related issues are most commonly articulated by Traditional Owners and their organisations to the NNTC. The first of these is that both organisations lack the organisational capacity to respond in a timely fashion to funding applications that are often (usually) occurring within a commercial timeframe inconsistent with the ability of the agency to respond. The second issue most frequently reported is that both agencies lack sufficient resources to adequately undertake their respective functions.

Strengthening the Indigenous business sector is critical to ensuring economic benefits are accessible to and leveraged by Aboriginal people in Northern Australia.

The IBA and ILSC have been identified as key institutions for the promotion of economic outcomes for Aboriginal people – including in recent negotiations for the renewed Closing the

Gap Strategy.[1] It is vital that these bodies are adequately resourced to direct resources to priorities identified by Aboriginal people, including through:

- Assistance with initial funding and other applications
- Capital investment
- Microfinance
- Loan guarantee programs
- Regional/local business hubs
- Partnerships and joint ventures
- Business networking

The CLC notes that the 2014 review of the IBA and ILSC concluded that both organisations were highly effective and had the capacity to expand their scope of activities with additional resourcing.[2]

2.1 Recommendations:

- Resource the IBA to adopt a more active role as a facilitator of commercial enterprises-through partnerships with the private sector, as a broker with capital investors, and involvement in public infrastructure projects.
- Resource the IBA to establish a national professional services panel, with capacity to support local hubs, to provide entrepreneurial advice and support to Indigenous organisations.
- Facilitate structural reform to enable the ILSC to work with IBA to identify commercial opportunities arising from land acquisition and management activity that IBA can facilitate and support.

2.2 Supply Nation

In a similar way to ILSC and IBA, the non-government organisation, Supply Nation, has played a valuable role in facilitating the development of the Indigenous business sector, especially in conjunction with the current Indigenous Procurement Policy (IPP).

Strengthening the Indigenous business sector is critical to ensuring economic benefits are accessible to and leveraged by Aboriginal people in Northern Australia.

Government procurement initiatives for Indigenous peoples and other minorities have demonstrated in Australia and overseas that they can contribute to positive social and

[1] Commonwealth Department of Prime Minister and Cabinet, 2019 'Closing the Gap Report 2019', accessed on 5 March 2019, < https://ctgreport.pmc.gov.au/sites/default/files/ctg-report-2019.pdf?a=1>.
[2] Commonwealth Department of Prime Minister and Cabinet (Ernst & Young), 2014, Review of Indigenous Business Australia and the Indigenous Land Corporation, accessed on 5 March, <https://www.pmc.gov.au/sites/default/files/publications/EY_final_report_review_of_ILC_IBA_0.PDF>.

economic outcomes. The NNTC welcomes the Government's steps to strengthen its Indigenous Procurement Policy in 2018, by increasing mandatory targets and providing additional funding to Supply Nation, but more needs to be done to ensure that these resources are accessible to Aboriginal people and enterprises in regional and remote areas.

Supply Nation plays a significant role in the development of the Indigenous business sector through two related functions. The first is the maintenance of the Indigenous Business Register – the foundation of the IPP and the basis upon which many other public and private sector corporation as can with confidence ensure the increasing role of Indigenous businesses in their supply chain. The second function that Supply Nation undertakes that enhances the Register is the staging of various 'showcase' events that highlight the existence and diversity of Indigenous businesses. The work of Supply Nation is appreciated and supported.

2.2 Recommendations

- Resource Supply Nation to conduct training workshops focused on building business awareness of Supply Nation's services and options for engaging in joint ventures with Indigenous enterprises.
- Resource local business hubs, such as the Industry Capability Network, to provide advice to local businesses about upcoming procurement opportunities, options for entering into partnerships and joint ventures, core business support, and build networks between Indigenous and non-Indigenous people and enterprises, including labour hire companies.
- Resource land councils/Aboriginal Peak Organisations to conduct pilot projects on partnerships joint ventures between Indigenous and non-Indigenous businesses and/or government, noting that there are few cases of partnerships and transition working well in remote communities.

3. Legislative, administrative and funding constraints, and capacity for improving economic development engagement.

The primary issue that the NNTC wishes to raise in response to this term of reference is the *Corporations (Aboriginal and Torres Strait Islander) Act 2006.* (CATSI).

PBCs are *required* pursuant to the NTA to be incorporated under CATSI. In addition, under various other pieces of legislation (such as the Victorian *Aboriginal Heritage Act*) relevant Indigenous organisations are also *required* to be incorporated under CATSI. Further, Indigenous organisations in receipt of funding under the Commonwealth Government's Indigenous Advancement Strategy are (generally) also *required* to be incorporated under CATSI. For many of the nation's approximately 3,300 CATSI corporations then, incorporation under the CATSI Act is not voluntary.

CATSI is necessarily racially discriminatory. It is saved from offending the *International Convention for the Elimination of All Forms of Racial Discrimination* (and therefore the *Racial Discrimination Act 1975 Cth* (the RDA)) only if it can be characterised as a legitimate "special measure" under the Convention. This fact is acknowledged in the CATSI Preamble. To satisfy the definition of a special measure it is necessary for a measure be "appropriate and adapted" to facilitate the advancement of the relevant disadvantaged group.

Particularly after 12 years of operation, it is time that CATSI be the subject of a comprehensive review to ensure that it is in operation "appropriate and adapted" to facilitate the advancement of Australia's Indigenous Peoples.

A number of obvious CATSI matters are in need of review:

- there needs to be a comprehensive analysis of the areas where the provisions of CATSI impose obligations that are divergent from those contained in the *Corporations Act 2001* (Cth) and each such divergence needs to be justified as a "special measure";
- the appropriateness of the fundamental equation between a CATSI corporation and a company limited by guarantee under the *Corporations Act 2001* (Cth) particularly in the context of a rapidly expanding Indigenous private sector needs to be assessed;
- areas where legitimate additional special measures are desirable should be considered. The PBC- EVS is one example of such an initiative.

Unlike the processes that led to the current *Corporations (Aboriginal and Torres Strait Islander) Amendment (Strengthening Governance and Transparency) Bill 2018* it is essential that a broad review of CATSI include representatives of affected Indigenous communities and that any resulting proposals for reform are supported by those representatives. Absent such engagement and support, the NNTC considers it obvious that no proposal can legitimately be characterised as a "special measure".

In addition to legislative reform, the NNTC supports continued efforts to improve coordination between the Federal Court, the National Native Title Tribunal, government agencies and parties in native title claims, including:

- The National Native Title Tribunal (NNTT) project to consolidate land rights data across states and territories and provide a central access point.
- Publication of a list of unfinalised claims according to land council region.

Strong working relationships and communication will assist parties to identify and resolve issues relating to claims resolution, agreement-making and compensation more efficiently.

3. Recommendations

- That the *Corporations (Aboriginal and Torres Strait Islander) Act* be subject to a comprehensive review including representatives of affected Indigenous communities

and that any resulting proposals are supported by those representatives.

- Support the passage of the Native Title Amendment Bill, including amendments to streamline native title claims resolution processes, to assist NTRBs and NTSPs to meet the demands of forthcoming claim and compensation applications with additional funding (see recs 1.1, 1.2).
- Support measures to improve coordination between the Federal Court, the National Native Title Tribunal, government agencies and parties in native title claims.

4. ***Strategies for the enhancement of economic development opportunities and capacity building for Traditional Owners of land and sea owner entities.***

The NNTC in conjunction with the Minerals Council of Australia have long advocated that the existing structures for the management of revenues derived from native title rights are not appropriate to encourage and facilitate economic development being undertaken by Traditional Owners.

It is generally accepted the current structures around the management of native title monies by PBCs are complicated, confusing and often lack transparency. They involve a complex combination of native title, charitable trust and taxation law. The current arrangements often provide a positive *dis*incentive for native title holders to utilise native title monies for long term economic development in favour of restrictive charitable trust or immediate disbursement.

The NNTC in conjunction with the Minerals Council of Australia has developed a proposal to overcome these shortcomings. The PBC – Economic Vehicle Status (PBC-EVS) proposal involve establishment of an optional 'economic vehicle status' (EVS) designation available to PBCs. This would enable the PBC-EVS to undertake a broader range of economic development activities, such as providing finance for private businesses, while accessing tax concessions that apply where an organisation is seeking to address disadvantage. Importantly the model would also enable existing trusts established for the management of native title monies but constrained by restrictive charitable trust rules to be rolled into the PBC EVS. The model would also include additional transparency and reporting requirements.

These reforms would be achieved through targeted amendments to the *Corporations (Aboriginal and Torres Strait Islander) Act* 2006 (Cth.), its regulations and associated legislation. The principles behind the PBC-EVS have already been endorsed by the Treasury *Taxation of Native Title and Traditional Owner Benefits and Governance Working Group* in 2013 and in the 2015 *Our North, Our Future, White Paper on Developing Northern Australia.*

Attached (at "A") to this submission is an outline of the PBC-EVS proposal.

4. Recommendation

That the *Corporations (Aboriginal and Torres Strait Islander) Act* be amended to include the proposed PBC-EVS provisions.

5. The principle of free, prior, and informed consent.

The principle of Indigenous Peoples right to free, prior and informed consent with respect to proposed developments on their traditional lands is based in international law. Its most recent and authoritative articulation is in the United Nations' Declaration on the Rights of Indigenous Peoples (UNDRIP).

The UNDRIP was passed by the UN General Assembly on September 13, 2007. One hundred and forty-four member States voted in favour of the resolution adopting UNDRIP, eleven abstained, and four (Australia, Canada, New Zealand, and the United States) voted against it. Since 2007, all four of the countries who voted against the resolution, have reversed their positions and now officially endorse it.

Article 32 of UNDRIP deals with the management of lands and natural resources and provides:

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
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.
3. States shall provide effective mechanisms for just and fair redress for any such activities and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

In Australia, aside from the provisions of statutory land rights schemes such as the *Aboriginal Land Rights (Northern Territory) Act 1976*, the legislative provision relevant to FPIC is the "future act" regime under the *Native Title Act*. It is critical to note however that the "future act" regime does not go so far as providing for *consent* of indigenous peoples to the approval of a project as contemplated by Article 32, but rather consent to an agreement to manage the effect on native title rights and interests; there is no right to veto which consent implies.

The future act regime in the *Native Title Act* is the key provision that recognises the rights of native title holders (and registered claimants) as real property rights. Under the current regime significant land use proposals (such as the grant of mining rights) enliven a 'right to negotiate' (RTN) procedure. However, under the current RTN procedure native title holders have as little as six months to reach an agreement that may include royalties or royalty equivalents (such as equity in a project) with a land use proponent. While the parties are under an obligation to negotiate "in good faith" experience suggests that this is a low standard. It would be preferable if parties were expected to "use all reasonable efforts" to reach an agreement and for any such agreement to also give consideration as to how to minimise the effect of the doing of the act on native title rights and interests.

If an agreement is not reached within that timeframe the proponent can seek arbitration before the National Native Title Tribunal (NNTT). The NNTT is prohibited from making any conditions relating to royalties (or equivalents) in its determination (NTA s 38(2)).

This timeframe and prohibition puts native title holders at a disadvantage from the outset. Both sides to the negotiation know that unless the native titleholders acquiesce to the proponent's suggested terms the alternative is an arbitrated outcome, without any provisions for the awarding of compensation, royalties or other arrangements for financial settlement.

Further, between 2009 and 2017 the NNTT dealt with over 100 applications to arbitrate the grant of a mining title because agreement could not be reached between the parties. On only two occasions has there been a determination that the grant of a mining title could not proceed.[3]

Of course, many land use proposals are dealt with under the alternative 'Indigenous Land Use Agreement' (ILUA) structure. However, even when negotiating an ILUA, both sides again know the alternative open to a proponent is an NNTT arbitrated determination. The arbitration process thus also operates to 'set the standard' for ILUA negotiations.

Under the current regime many future acts do not enliven the RTN procedure. Many land use proposals only result in native title holders having a right to be notified or consulted and sometimes a right to object in regard to a proposal.

Significantly many proposals to allow a pastoral lease to engage in non-pastoral "primary production" activities[4] will only result in a right for native title holders to be notified about proposals that may significantly affect their enjoyment of native title rights. These provisions (introduced in 1998) deny the native title rights co-existing with pastoral leases as legitimate private property rights.

Similarly, under the current future act regime the undertaking of often significant civil engineering works on land where native title has been determined to exist can be undertaken

[3] Weld Range Metals Limited/Western Australia/Ike Simpson and Others on behalf of Wajarri Yamatji, [2011] NNTTA 172 (21 September 2011); and Western Desert Lands Aboriginal Corporation (Jamukurnu - Yapalikunu)/Western Australia/Holocene Pty Ltd, [2009] NNTTA 49 (27 May 2009).
[4] See NTA s 24GA.

with only a token obligation to "notify" native title holders – even though often these works may lead to the complete extinguishment of native title rights.[5]

These structural arrangements are fundamentally unfair to native title holders and undermine the recognition of native title rights that the *Native Title Act* is founded upon.

5. Recommendations

- That s 31(1)(b) be amended to require that parties use all reasonable efforts to reach agreement about the doing of an act and that negotiations include consideration as to how to minimise the effect of the doing of the act on native title rights and interests.
- That s 35(1)(a) be amended such that the minimum negotiation period before a proponent can seek a future act determination by the NNTT be extended from six months to twelve months.
- That s 38(2) of the *Native Title Act be amended to allow conditions relating to the payment of royalty (or equivalent) to be included in NNTT determinations.*
- That the criteria for NNTT arbitral determinations contained in NTA s39 be amended to give greater weight to the views of native title holders.
- That NTA Part 2, Division 3, Subdivision G be amended such that the diversification of activities allowed on non-exclusive agricultural and pastoral leases described in that subdivision enliven the RTN procedure.
- That NTA Part 2, Division 3, Subdivision J be amended such that the undertaking of any civil engineering works that have the consequence of the extinguishment of native title rights enliven the RTN procedure.

6. Opportunities that are being accessed and that can be derived from Native Title and statutory titles such as the Aboriginal Land Rights (Northern Territory) Act 1976.

6.1 Indigenous Ranger Programs

One of the key opportunities that arise from rights derived through the *Native Title Act* and statutory land rights schemes such as the *Aboriginal Land Rights (Northern Territory) Act 1976* is the ability to establish Indigenous Ranger Programs. This is implicit in the current discussions around the Closing the gap Refresh process.

[5] See NTA s 24JA, 24JB(2) and 24KA.

As part of the Closing the Gap Refresh process all Australian Governments have committed to the following outcome:

> *Land and waters: Aboriginal and Torres Strait Islander people maintain distinctive spiritual, physical and economic relationship with the land and waters*.

The specific outcome sought is that: *Aboriginal and Torres Strait Islander peoples' land, water and cultural rights are realised*. COAG notes that:

> *A Land and Waters target will be developed by mid-2019 by all jurisdictions to support Aboriginal and Torres Strait Islander peoples' access to, management and ownership of, land of which they have a traditional association, or which can assist with their social, cultural and economic development.*

The NNTC is working with the Department of Prime Minister & Cabinet in order to further develop and refine this COAG Target.

In addition, for ongoing support for achieving native title (determination and compensation) outcomes the NNTC sees support for Indigenous Ranger Programs (IRPs) as a crucial aspect of achieving this COAG endorsed outcome.

There are currently 123 IRPS operating across the country employing in total more than 2,200 Indigenous people (840 FTE) usually in remote and regional areas, IRPs are a feature of the activities of many NTRBs/SPs and PBCs. IRPs employ Indigenous land and sea managers to undertake cultural and natural resource projects to improve and enhance the unique biodiversity and cultural values of an ecosystem or region.

IRPs work with local Traditional Owner Groups to realise Indigenous aspirations to look after and manage country using a combination of traditional cultural knowledge, western science and modern technologies.

IRPs are supported by the Commonwealth Government and are proving to be a successful business model through integrating ecological, social and cultural values to generate economic growth in remote Aboriginal communities.

IRPs are creating not only jobs in remote communities but long-term career paths in the conservation and land management sector. Indigenous ranger positions are real jobs that require accredited conservation and land management qualifications. Ranger work can include:

- Biodiversity monitoring and research
- Traditional knowledge transfer
- Fee-for-service contracts
- Fire management
- Cultural site management
- Feral animal and weed management

- Cultural awareness and immersion experiences
- Tourism management
- School education programs and mentoring

IRPs are underpinned by cultural values and the positive benefits of the program have been far and wide reaching. They have significantly improved community wellbeing, are working to reduce poverty through creating economic opportunities and are building leadership in communities.

IRPs generally have regional governance structures founded on Indigenous cultural values and operate in partnership with PBCs, where established. Aboriginal elders direct long-term conservation management plans, promote the transfer of traditional knowledge to younger generations and provide guidance, leadership and authority. The governance models aim to connect all of the ranger groups within a region together to ensure that not only are community goals being achieved at a local level, but efforts are being made towards achieving targets at a regional and national level.

In April 2018 the Commonwealth Government announced a funding extension of $250 million to fund IRPs until 2021. While this is a welcome addition the funding is aimed only at maintaining existing IRPs at current levels. The NNTC believes that existing IRPs should be expanded, and that new IRPs should be developed across the country.

To achieve this the existing Commonwealth funding allocation to support should be increased by an additional $100m per annum for the next three years.

6.2 Mining-related activities

Noting concerns expressed regarding RTN procedures, indigenous land use agreements continue to represent significant opportunities for Aboriginal-driven economic development.

Pursuing opportunities arising from land use agreements is a core element of land councils' work- negotiating local employment, training, and enterprise support. Income flowing from these agreements has supported significant outcomes for community development- enabling constituents to self-direct funding to community priorities.

Notwithstanding these successes and land councils' negotiation efforts, agreements often lead to limited outcomes for traditional owners and Aboriginal communities.

These poor outcomes illustrate a fundamental barrier to Aboriginal development- existing consultation and negotiation processes on matters relating to Aboriginal land entrench inequality between Aboriginal people and third parties seeking development opportunities on Aboriginal land.

Prominent Aboriginal development advocate, Peter Yu, has noted that support for 'big project development will not work unless it is accompanied by a range of structural reforms to support Indigenous economic inclusion and traditional owner's informed consent for development'.

While land councils have developed robust processes to ensure constituents are involved in any matters affecting Aboriginal land, the reality is that Aboriginal people are consulted and asked to make decisions in the context of extreme poverty, disadvantage and an economy from which they are largely excluded. As a result, proposals for development often involve an understandable level of community distrust and opposition.

Together, these factors prevent local Aboriginal people deriving benefits from large private and public activities. Statutory reform and additional resourcing is required to ensure that consultation and negotiation on matters regarding their land is conducted in an equitable manner and leads to substantive outcomes for local Aboriginal people.

6. Recommendations

- Funding for Indigenous Ranger Programs should be increased by at least $100m annually for at least the next three years to allow the expansion of existing IRPs and the development of new programs in collaboration with PBCs and relevant NTRBs/SPs. Ideally funding to these programs should be doubled.
- Resource land councils to adequately assist traditional owners to negotiate, monitor and enforce agreements and compensation claims in relation to Aboriginal land.

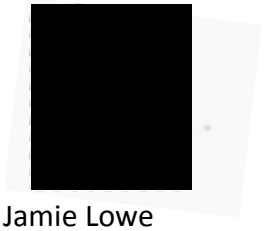
Conclusion

This submission from the NNTC has highlighted issues and concerns that are shared across all native title organisations. The NNTC notes that a number of its members also intend to make individual submissions to the Inquiry that highlight issues faced in their particular regions. The NNTC supports its members' submissions in regard to these matters.

The NNTC believes the recommendation contained in this Submission are feasible and their implementation is long overdue. The Committee is urged to adopt them in its report. They form the basis for a renewed approach to engaging Traditional Owners in the economic development of northern Australia and elsewhere in the country.

The NNTC would be pleased to assist the Committee in its inquiry in any way in which we are able.

Yours faithfully



Jamie Lowe
Chair, National Native Title Council

ATTACHMENT A

Future Generations Reform

ECONOMIC VEHICLE STATUS FOR PRESCRIBED BODIES CORPORATE

ACHIEVING INDIGENOUS COMMUNITY DEVELOPMENT CORPORATION (ICDC) CONCEPTS THROUGH PRESCRIBED BODIES CORPORATE (PBC) REFORM

PURPOSE:

Reform is needed to fully realise the potential of native title monies to support long term economic development and intergenerational benefit for Indigenous peoples. A range of fit-for-purpose management options are needed that reflect current law and support rights holders to achieve economic development. These reforms would underline the importance of economic development to 'closing the gap'.

The NNTC, supported by the MCA, proposes the creation of a new Prescribed Bodies Corporate Economic Vehicle Status (EV status). EV status would enable PBCs to better leverage native title monies to achieve improved outcomes for native title holders, while ensuring greater transparency and accountability in their management.

The proposal would be achieved through targeted reforms to the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth), its regulations and associated legislation.

WHY:

Limited structural options for Indigenous corporations

Australia's legal and regulatory framework currently provides limited structural options for Indigenous corporations to manage native title monies. As a result, native title monies are paid into an array of corporations and corporate structures which may not always be fit-for-purpose. Furthermore, some legacy structures are overly complex and costly to implement and may not be sufficiently flexible if an Indigenous group's aspirations and priorities change over time.

These structural barriers can prevent Indigenous persons and corporations from maximising economic development and future wealth creation – key drivers of opportunity and equity.

A post-determination environment

The 25 years since the Native Title Act commenced has focussed on native title claim resolution. Native title has now been determined to exist over 2.6 million square kilometres of Australia.

As PBCs are put in place and the focus shifts to a post-determination landscape, the regulatory framework must adapt to ensure PBCs are able to assist common law holders to achieve the promise that native title determinations are meant to deliver.

Native title compensation claims will dominate the landscape in coming years. This, together with increasing indications that some State and Territory governments intend to enter into treaty and settlement negotiations will present PBCs with the opportunity to establish structures, investments, and programs to benefit current and future generations of common law holders.

For some groups that have not or are unlikely to benefit from future act agreements, this one off process may present the only opportunity to put in place arrangements to support future wealth creation.

How:

Prescribed Bodies Corporate – Economic Vehicle Status (PBC-EVS)

PBC EV status would provide a targeted, fit-for-purpose option to enable Indigenous communities to 'close the gap' through their own investments in economic development. Critically, PBC EV status 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 addressing disadvantage

The PBC-EVS will be achieved through targeted reforms to the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) – CATSI Act, its regulations and associated legislation.

Key aspects of the PBC-EVS model include:

A clear economic development objective	Establish a clear focus on economic development and break away from notions that native title monies represent charitable welfare by removing need to establish a charitable trust or similar entity Recognise that native title monies are an Indigenous community's opportunity to develop private wealth and prosperity for ***current and future generations***
Position for future generations	Enable existing funds in legacy/inappropriate trust structures to be rolled over to the PBC EVS for use in economic development activities
Finance new businesses	Enable PBCs to provide finance to native title holders to establish private businesses – an option not available for charities

Standard concessions	Provide tax concessions for entities focused on addressing economic disadvantage for Aboriginal peoples (such as public benevolent institutions), including fringe benefits tax exemption Ensure grants and other distributions by the PBC-EVS that encourage economic development are not taxed in the hands of native title recipients by: • Providing tax exemptions for income on invested native title monies and allow tax exempt accumulation of income without being restricted by being a charity • Maintaining equivalent state tax concessions (payroll tax, land tax, duties and rates) to those currently accessed by PBCs that are charities
Consistent regulation	Be regulated by the Registrar of Indigenous Corporations under the CATSI Act in line with other Indigenous corporations
Governance and decision making	Enable PBCs to make decisions regarding asset management that unlock economic opportunities Include new reporting and governance requirements that encourage transparency and accountability – with full details to be developed post consultation.