

NATIONAL NATIVE TITLE COUNCIL

PBC FUTURES: ROADMAP TO REFORM



EXECUTIVE SUMMARY



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Native Title
Council

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PART 1

VISION FOR REFORM

Native title holders and Prescribed Bodies Corporate (PBCs) are the rights holders to determined land and sea country across Australia. Previous

and current policy approaches intended to facilitate PBC growth and decision-making capacity have experienced limitations and resulted in limited autonomy and self-determination for many PBCs across Australia. Native title rights holders, represented by almost 250 PBCs, hold the rights to over 40 per cent of Australia's lands and waters and need to be respected as autonomous nations that are responsible for place-based decision making and in control of their own funding and resources.

Policy approaches are traditionally designed by non-Indigenous governments with a desire for portability. A policy framework which does not consider the unique rights, as set out under the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP), maintains an imbalance of power, and fails to respond to ongoing

recommendations for genuine reform and governance. This report presents an opportunity to rethink the power dynamics, partnerships, funding and consultation between the government and PBCs, and provide a vision for a national policy framework.

The report proposes a rights-based framework with a nation building policy approach. The approach intends to address the slow progress of self-determination and decision-making capacity building under the current framework, which is conservative and does not meet the needs and aspirations of PBCs.

This report is the result of a project, funded and supported by the National Indigenous Australians Agency (NIAA) to develop a national policy framework for PBCs that includes development, sector wide coordination, policy and legislative reform, and future work required.

The following draft principles outline a nation rebuilding policy approach.

- Long-term strategic planning, irrespective of the four-year election cycle
- Ongoing and secure funding
- A development agenda driven by PBCs with a culturally appropriate, strengths-based planning approach
- Rethinking of economic development as a long-term strategic agenda to be determined by PBCs Indigenous nation rebuilding approach
- Culture is a strength, not an obstacle to economic development
- Co-designed partnerships and joint decision-making centred on Indigenous knowledges and perspectives
- Funding evaluation should reflect the needs and goals of the nation, not just the funding body
- Appreciation for new ways of thinking being met with new challenges and allowing room for error as a mechanism for learning that is free of blame.



PART 2

PARTNERSHIP FRAMEWORK

The 2020 National Agreement on Closing the Gap, the Cultural Heritage Partnerships Agreement and the proposed Voice to Parliament all demonstrate a recent shift in the approach by Australian Governments to one of co-designing formal partnership agreements with First Nations peoples.

Those partnerships are built on principles of respect, co-design and shared decision-making.

However, they also need to centre native title holders and PBCs, as the rights holders with autonomy and power over their lands, waters, and resources. In the report, the NNTC proposes a new kind of partnership, built on the principles of Nation Rebuilding and self-determination between the Australian Government and PBCs, via the NNTC.

The objective of a new agreement in this report is to grow and strengthen the existing in rem

PBC infrastructure, which will enhance place-based decision making and support the rights of native title holders. By committing resources to a genuine co-design process, the new partnership agreement proposes the implementation of national policy reform to the PBC sector to maintain PBCs as the manifestation of local, place-based self-determination.

MOVING FORWARD: A CO-DESIGN PROCESS

CO-DESIGNED PBC FUTURES PARTNERSHIP FRAMEWORK

PRINCIPLES

Recognition of rights holders

Redistribution of power

Long term, strengths based

Respect of cultural strength and diversity

Financial security

METHODOLOGY

First Nations knowledges and autonomy

Nation rebuilding

First Nations led codesign

Indigenous Standpoint Theory



PART 3

REFORM AGENDA

SECTION 1: PBC INVESTMENT

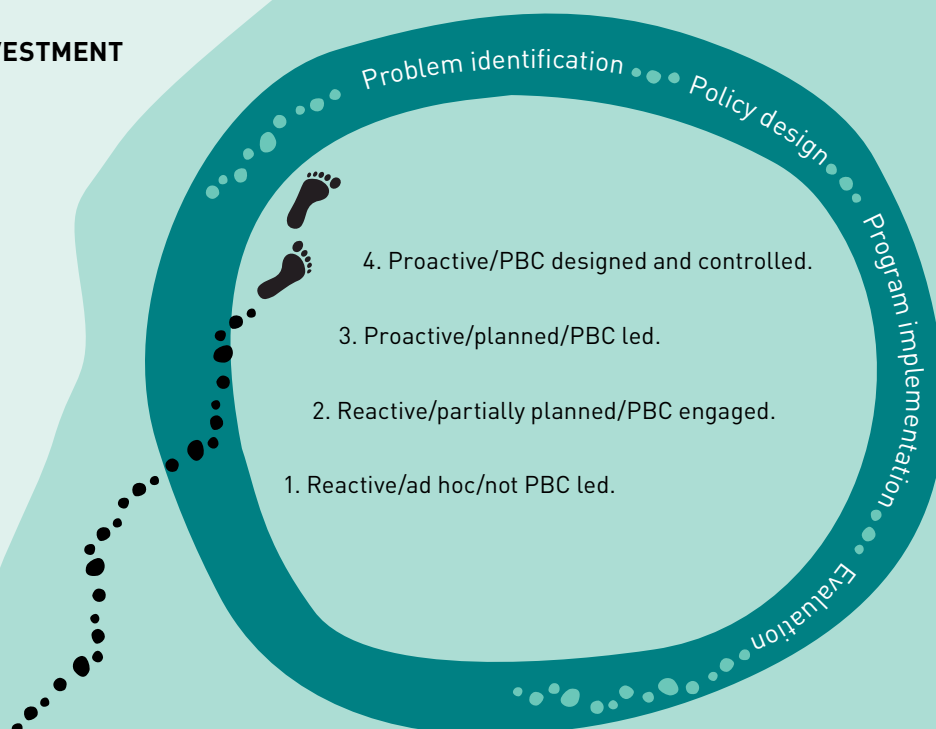
A relevant framework for the PBC sector will involve the consideration of the principles outlined in Part 1 for Australian governments to support Nation Rebuilding, through long-term, sustainable programs that centre PBC knowledges, control and management.

PBC FUNDING REVIEW AND MODELS

PBC engagement over the past 15 years has consistently demonstrated that the single most important challenge and priority for PBCs is the lack of adequate funding and resourcing.

According to the publicly available, financial reports that PBCs submit to the Office for the Registrar of Indigenous Corporations (ORIC), around 70 per cent of PBCs continue to have little or no income. This is an entrenched problem.

PBC INVESTMENT



The PBC sector has been chronically underfunded for over two decades and the lack of funding has led some PBCs to feel that they have been set up to fail and that their time and labour is not valued. There is an immediate need for a First Nations led review of current NIAA funding programs, such as the Basic Support Funding and the PBC Capacity Building Fund, with the intention of implementing a new model that will deliver secure and ongoing funding to PBCs and increase the transparency of funding distribution.

A NEW FUNDING MODEL: THE PBC FUTURE FUND

Almost a decade ago, Social Justice Commissioner June Oscar AO, Bunuba Dawangarri Aboriginal Corporation called

for the establishment of an independent fund for PBCs under the Native Title Act (NTA) that would be supported by all Australian governments. She had previously called for the establishment of a national fund, and more recently, Recommendation 7 of the report: A Way Forward, which was agreed to in principle by the Australian Government in November 2022.

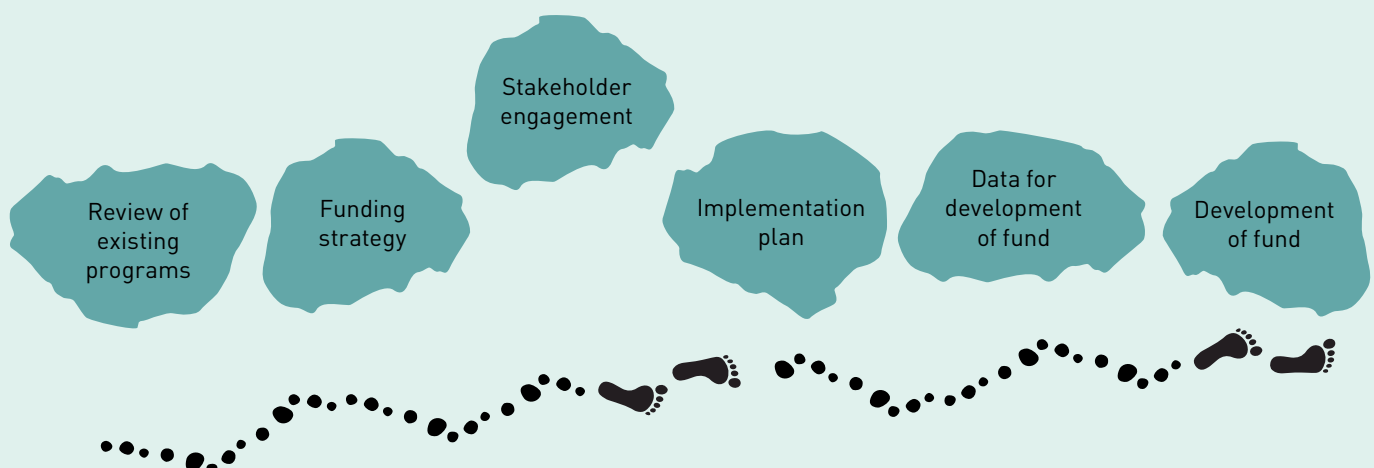
In 2021, the NNTC proposed the development of a PBC Future Fund, a perpetual sovereign wealth fund model guided by the Indigenous Investment Principles and Santiago Principles.

To further develop the model to include a staged approach with potential state government and private sector contributions, the report outlines the following steps.

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;
- ensuring a high level of compliance, and building and sustaining their capacity to deliver on a developmental agenda;
- having flow on economic effects that will help to develop strong and resilient regional and transitioning Australian economies; and
- achieving broader policy benefits for capable PBCs at federal, state and local levels, such as responses to Juukan Gorge, Voice to Government and Closing the Gap.

STAGED PROCESS OF RECOMMENDATIONS



MANAGING NATIVE TITLE MONIES: ECONOMIC VEHICLE STATUS

One reform agenda concern is improving funding programs and access to capital. Another is addressing the long-term issues of PBCs being forced into the trust system. To provide PBCs with greater autonomy in decision-making over their own financial affairs, the report details the Prescribed Body Corporate Economic Vehicle Status (PBC EVS), whereby PBCs directly manage native title monies as a fit-for-purpose option to enable Indigenous communities to 'close the gap' through their own investments in economic development. The report outlines how the status could work with existing legislation.

COMMERCIAL OPPORTUNITIES: RIGHTS, BUSINESS AND CAPITAL

PBCs require access to commercial opportunities and developments of their choosing. PBCs need to be at the centre of 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. The report details the focus of proposed roundtables to coordinate the sector's approach to supporting PBCs to grow commercial opportunities.



SECTION 2: PBC STATUTORY OBLIGATIONS AND BUSINESS ON COUNTRY

PBCs have statutory obligations to speak for, manage and protect country. The expression of these legal obligations and rights is through the management of Future Acts and cultural heritage, and land management programs, such as rangers and Indigenous Protected Areas (IPAs).

This report considers the three regimes of 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.

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 done. A Future Act will be valid if the parties to an Indigenous Land Use Agreement (ILUA) agree 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. The procedural rights include the right to comment, the right to be consulted, the right to object to, and the right to negotiate, but not

the right to veto. Management of these procedures is resource intensive in many parts of Australia and many PBCs do not have adequate resources or cost recovery mechanisms to leverage their native title rights and interests through this regime.

The NNTC is undertaking a comprehensive national review of the practical experience of native title holders, PBCs, and NTRBs, with respect to the Future Acts regime, to suggest specific policy reforms that will help to address imbalances of power, cost recovery, negotiation, renewables and the challenges faced by PBCs and NTRBs in managing the regime.

NATIONAL REFORM TO CULTURAL HERITAGE PROTECTIONS

Even though all PBCs have a statutory native title right to protect country, not all PBCs are part of the cultural heritage system or even recognised and resourced as the right bodies to carry out cultural heritage business on their country.

The First Nations Heritage Protection Alliance and the NNTC are working together with the Australian Government to reform national cultural heritage standards and legislation. The new national cultural heritage legislation will be based on relevant UNDRIP provisions and resemble those

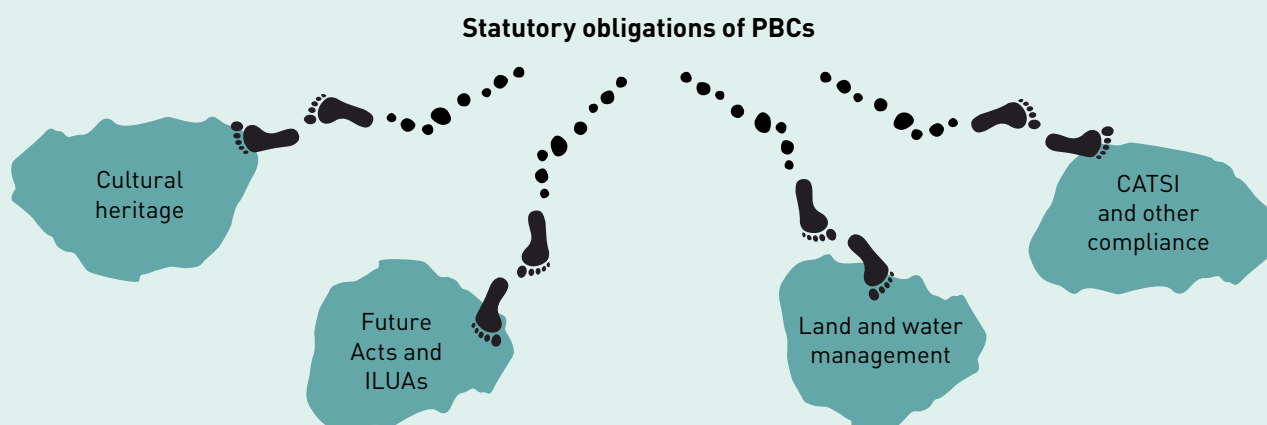
in the *Dhawura Ngilan National Vision for Aboriginal and Torres Strait Islander Heritage*.

While the reform work is being undertaken as part of a partnership agreement between the First Nations Heritage Protection Alliance, and the Minister for the Environment and Water and the Department of Climate Change, Energy, Environment and Water, there is a role for the NIAA in creating unified funding and reporting obligations for PBCs, which include cultural heritage functions.

LAND MANAGEMENT PROGRAMS AND PBCS

Native title holders, represented by PBCs, have rights to access, use, speak for, make decisions about, and protect country; rights that are held through local First Nations laws, beliefs and practices. These rights manifest through informal and formal land management programs, such as ranger programs and Indigenous Protected Areas (IPAs). However, the lack of coordination between the branches responsible for the various programs and the PBC sector has resulted in policy siloes. Under a Nation Rebuilding approach, PBCs need to be central to program design, implementation, and review with improved coordination between the internal structures of the NIAA.

REFORM AREAS REQUIRED TO SUPPORT PBC STATUTORY OBLIGATIONS



SECTION 3: PBC STRENGTHENING

PBCs have long grappled with meeting their statutory obligations under the NTA and striving towards their long-term aspirations while faced with support models and initiatives that are based on short-term funding cycles and limited resourcing. Recently, there have been renewed calls for the Australian Government to provide increased support for PBCs in acknowledgment of the fact that strengthening PBCs will result in stronger Indigenous rights and interests across the country, including the protection

of country and culture, through cultural heritage, along with enhanced decision-making frameworks and economic participation for First Nations people and communities. The strengthening of PBCs is critical. By moving beyond short-term planning to working closely with PBCs to implement longer-term initiatives, the Australian Government could support PBCs to successfully realise their aspirations on their own terms and according to Nation Rebuilding principles, outlined in Part 1 of the report.

COORDINATION OF THE PBC SECTOR

An opportunity exists to bring stakeholders and programs together to strengthen PBCs and the native title sector throughout Australia. PBC strengthening can be undertaken at regional levels by supporting PBCs directly and through NTRBs, to deliver strengthening programs, tools and templates.

SECTION 4: LOCAL NATIONS, REGIONAL NETWORKS AND NATIONAL REPRESENTATION

First Nations corporations operate within a realm between First Nations laws and Australian laws, between public and private worlds, and between state regulation and society's expectations of corporate behaviour. PBCs have additional complexities and compliance obligations due to the fiduciary duty they hold to both members and present and future common law holders. Additionally, PBCs do not provide the vital function of self-government, which is a right under the UNDRIP and essential for Nation Rebuilding.

Moving forward, national policy reform needs to address how to best support the local PBC nation as well as regional structures, networks, and national representation of PBCs.

LOCAL NATIONS

A longer-term policy consideration is the role and functions of PBCs in Nation Rebuilding, including 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 a regional authority or local council, may be a better optional model to accommodate the local PBC polity that has *in rem* rights.

REGIONAL STRUCTURES

Building on existing Australian regional models, such as Dilak Council (Northern Territory), Gur A Baradharaw Kod Sea and Land Council (GBK) (Queensland) and the First Peoples' Assembly of Victoria (Victoria), as well as international examples from

Canada, the United States of America and elsewhere, the Australian Government can examine how they can best support the PBC sector in its development from Cornell's (2015) 'politics of Indigenous self-government', that is more to do with the policies and legislation of non-Indigenous governments toward First Nations peoples, to the 'Indigenous politics of self-government', where First Nations are the agents of political change and self-government at local, regional and national levels.

This support could be provided through regional and national networks and forums, legislative amendments to *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act), *Native Title Act 1993* (NTA) or other legislation that could support alternative models of incorporation or regional structures, and the role of PBCs in the proposed national Aboriginal and Torres Strait Islander Voice design.



SECTION 5: ETHICAL ENGAGEMENT, CONSULTATION AND FPIC PROTOCOLS

Too often, governments and companies across Australia fall short in their engagement with First Nations people. Free, prior and informed consent (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 working to develop protocols to articulate what FPIC means in practice, beginning with the NNTC's own engagements, and following with protocols for the private sector and government.

FPIC is an international legal standard that applies especially to Indigenous peoples. It empowers Indigenous peoples to give or withhold consent prior to approval of any project affecting

their lands or territories and cultural heritage. FPIC is also a process to be defined by First Nations peoples and respected by states and project proponents when engaging on matters affecting them and throughout a project's lifecycle, including in due diligence processes, social and environmental impact assessments, agreement-making, and project implementation.

While FPIC is yet to be fully enshrined in Australian law, the legal landscape is evolving. There is momentum towards the incorporation of the UNDRIP into law more generally, for example, the *United Nations Declaration on the Rights of Indigenous Peoples Bill 2022*.

FPIC PROTOCOLS FOR PBCS

Across the world, First Nations peoples 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. The protocols draw from a variety of legal sources, including the community's own customary laws, national legislation and international standards.

This report provides examples of existing Australian research protocols and identifies the gap of a national policy regulatory framework to ensure that FPIC, or the UNDRIP more broadly, is adhered to in Australia.



SECTION 6: NATIONAL LEADERSHIP ON 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 supporting a national framework for fair and just agreement making.

Whether it be through Indigenous Land Use Agreements (ILUAs) in resource extraction or renewable energy projects, the development of a national native title compensation settlement framework that is endorsed and used by all states and territories, or supporting PBCs to be 'treaty ready' and participate in regional and, potentially, national agreement-making, the Australian Government needs to demonstrate leadership and adopt minimum standards in agreement-making that adhere to the UNDRIP, particularly FPIC.



SECTION 7: LEGISLATIVE REFORM OF THE NATIVE TITLE ACT

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

SCOPE OF REFORM AND PRIORITY AREAS

The report provides a summary of the previous amendments to the NTA and identifies focus areas for future reform. Whether through the current Expert Technical Advisory Group (ETAG) process or a more comprehensive review process, the NTA requires significant reform to bring it in line with international standards in the following areas:

- presumption of continuity
- extinguishment
- compensation
- right to take for any purpose
- post-determination, including the Future Act regime
- inland waters and subsurface rights.

SECTION 8: INDIGENOUS DATA SOVEREIGNTY IN NATIVE TITLE

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. Indigenous data sovereignty includes the considerable volume of materials collected in the development of native title claims.

The report outlines previous research that addressed the legal challenges and considerations for the return of native title materials, seven guiding principles to move forward with returns, and recommendations for how NIAA can support a returns program.



LIST OF RECOMMENDATIONS

The following list of recommendations is a summary from the more comprehensive recommendations outlined in the report.

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.
2. That the NIAA and the NNTC develop and enter into a partnership agreement to advance future national policy work in the PBC sector.
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.
4. That state and Commonwealth programs, relating 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.
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.
6. That the NIAA support existing and new PBC regional structures through a nation building approach, as outlined in Part 1 of this report.
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.



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.
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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