NATIONAL NATIVE TITLE COUNCIL

Senator Jana Stewart
Chair, Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs

Via email: rhvinquiry@aph.gov.au

Thursday, 30 April 2026

Dear Senator Stewart,

Submission to the Inquiry into racism, hate and violence directed at Aboriginal and Torres Strait Islander people

The National Native Title Council (**NNTC**) is the peak body for the native title sector. Native title is the recognition in Australian law that Aboriginal and Torres Strait Islander people continue to hold unbroken rights and interests in land and water. NNTC members are made up of the Traditional Owners of Australia's lands, waters and resources, and their representative bodies, representing those First Nations communities with statutory land and cultural rights. It supports and advocates for First Nations people's right to true self-determination, including their rights to:

- speak for and manage their own Country,
- govern their own communities,
- participate fully in decision-making, and
- self-determine their own social, cultural and economic empowerment.

In keeping with the NNTC's advocacy and leadership role in the native title and cultural rights sector, we will examine the systemic statutory racism that affects Prescribed Body Corporate and similar Aboriginal and Torres Strait islander statutory entities.

We understand the deep complexities of the assertion of rights by First Nations communities, shaped by a history in which Australia's laws and policies excluded First Nations people from their lands and decision-making. While the legislative native title system has returned some rights and country to First Nations people, much more needs to be done to achieve genuine equity and recognition as significant gaps remain between formal recognition and the practical realisation of those rights.

The NNTC believes that UNDRIP and broader human rights instruments have the potential to act as the framework that underpins the development of legislation, policies, and institutions in Australia.

Regards,

Jamie Lowe

Chief Executive Office
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Introduction

There is a broad understanding that the imposed and colonising laws brought to Australia by the British are not the same as those preexisting systems of governance and law recognised in *Mabo v Queensland (No 2)* [1992] HCA 23. Such an understanding though does not extend to the specifics of the ongoing trauma and racism imposed by these laws, as progressive as we may feel contemporary laws are. In this submission, we will examine the prejudice in the *Racial Discrimination Act 1975* (Cth) (**RD Act**), the Native Title Act 1993 (Cth) (**NT Act**) and Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth) (**CATSI Act**).

This submission makes no formal recommendations but does highlight the ways in which existing regulatory processes for managing native title and cultural rights are failing Traditional Owners.

1 Racial Discrimination Act

1.1 Operation of s10 RD ACT

The RD ACT was enacted to implement the International Convention on the Elimination of Racial Discrimination (**ICERD**) into Australian Law, and it is to be construed accordingly.

Section 10 provides:

> (1) If by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force, enjoy that right to the same extent as person of that other race, colour or national or ethnic origin.

(2) A reference in subsection (1) to a right includes a reference to a right of a kind referred to in article 5 of the Convention [ICERD].

(3) Where a law coNT Actins a provision that:

a. authorises property owned by an Aboriginal or a Torres Strait Islander to be managed by another person without the consent of the Aboriginal or Torres Strait Islander; or

b. prevents or restricts an Aboriginal or a Torres Strait Islander from terminating the management by another person of property owned by the Aboriginal or Torres Strait Islander; not being a provision that applies to persons generally without regard to their race, colour or national or ethnic origin, that provision shall be deemed to be a provision in relation to which subsection (1) applies and a reference in that subsection to a right includes a reference to a right of a person to manage property owned by the person.

This provision has three effects as set out by the Federal Court in *Fisher v Commonwealth of Australia* (**Fisher**):[1]

(a) Where a law limits a pre-existing domestic law right resulting in unequal enjoyment of a human right as between members of different race, it is inconsistent with s10 and is therefore rendered inoperative by s109 of the Constitution.[2]
(b) If a law of the Commonwealth enacted after 1975 is said to abrogate or restrict a right inconsistently with s10, issues will arise as to whether it thereby effects an implied partial repeal.[3] (This is referred to as the doctrine of implied repeal, discussed further in section 0 below).
(c) Where a law confers or expands a right which gives effect to a relevant human right, but omits to do so universally, s10(1) has the effect of extending or augmenting that conferral to the extent necessary to eliminate the inequality of its enjoyment between people of different races.[4]

We note in passing that there is no comparative provision to s10 applying to laws discriminating on bases other than race.

1.2 Scope and limitation of s10 in matters relating to First Nations peoples

The effectiveness of relying on s10 is diminished for three main reasons:

1.2.1 Strict interpretation of s 10(1)

Section 10 requires an applicant to identify a relevant “right” enjoyed by persons of another race, identify the impugned law and establish that, *by reason of that law*, persons of the applicant’s race do not enjoy the right or enjoy it to a more limited extent.[5]

In practice, the Court has taken a strict approach in assessing whether the lesser enjoyment of a right arises by reason of the law. For example, in *Fisher*, the Court held that the lesser enjoyment of age pension by Aboriginal men due to their lower life expectancy was not a result of pension age requirements under a State Act but rather an unfortunate result of social marginalisation.

This demonstrates the limitations of s 10 to remedy the discriminatory effects of legislation on First Nations peoples. As First Nations peoples have experienced an overwhelming history of

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[1] [2023] FCAFC 106 at [15].
[2] *Fisher v Commonwealth of Australia* [2023] FCAFC 106 at [15]; *Gerhardy v Brown* [1985] HCA 11; 159 CLR 70 at 98-99.
[3] *Fisher v Commonwealth of Australia* [2023] FCAFC 106; *Western Australia v Ward* (2002) 213 CLR 1 (HCA) at [99].
[4] *Fisher v Commonwealth of Australia* [2023] FCAFC 106 at [15]; *Gerhardy v Brown* 159 CLR 70 at 98.
[5] *Fisher v Commonwealth of Australia* [2023] FCAFC 106 [6].

marginalisation, as acknowledged by the Court in Fisher, it is a severe limitation that s 10 would not be applied in a manner that recognises discriminatory effects of laws that seem, on their face, to confer equal enjoyment of a right.

1.2.2 Special measure exemption under s 8 RD ACT

Another recurring limitation in the practical operation of s10 is its interoperation with s 8 of the RD ACT. Section 8 provides "This Part does not apply to, or in relation to the application of, special measures to which paragraph 4 of Article 1 of the Convention applies except measures in relation to which subsection 10(1) applies by virtue of subsection 10(3)."

Consequently, even if s10 is engaged, s8 operates as an exception in circumstances where the law can be deemed a 'special measure' and so that law will not be inconsistent with the RD ACT.[6]

The special measure exception has been used on multiple occasions by the Courts to validate laws that have been deemed discriminatory against First Nations peoples. For example, in *Maloney v R*, the Queensland alcohol restrictions applying to Palm Island were held to engage s 10 as the impugned law targeted a geographical area with an overwhelmingly Aboriginal population. The majority ultimately upheld the law on the basis that it was a 'special measure'.[7]

Thus, where governments enact regimes with an articulated purpose of protection or benefit of First Nations peoples (such as the *CATSI Act*), it can have the practical effect of shifting the Court's presumption that it is valid under s8.

Further, in *Gerhardy v Brown,*[8] Murphy J presumed that in enacting laws captured by s 10(1), parliament intended them to be special measures under s8(1).[9] This puts an onus on Applicants to rebut the presumption that a discriminatory law is a valid special measure. As Courts have frequently applied the special measure exception to allow laws predominantly affecting First Nations rights, the onus disproportionately burdens First Nations peoples.

1.2.3 Case law only deals with statutes that abrogated pre-existing rights

Finally, as set out below, applicants who have brought actions in reliance on s10 RD ACT have succeeded in only a small number of cases involving State laws that have abrogated rights. There are limited successful cases based on s10.[10] The Courts have not had to deal with how s10 would operate where a statute gives effect to a right by creating rights in a way that results in unequal enjoyment.

Consequently, the operation of the s10 is uncertain in circumstances where an impugned law confers onto others, a right that creates a lesser enjoyment of that right by First Nations people.

1.3 Limitations illustrated by case law

The cases below illustrate the limitations of s10 RD ACT.[11]

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[6] Section 10(3) is an exception to this, as acknowledged in *Bropho v Western Australia* [2007] FCA 519, s8 RD ACT does not apply to provisions in a law authorizing property owned by Aboriginal persons to be managed by another without their consent or preventing or restricting an Aboriginal from terminating such a management.
[7] (2013) 252 CLR 168 (HCA).
[8] (1985) 159 CLR 70 (HCA).
[9] [1985] HCA 11; 159 CLR 70 at 98-99.
[10] *Fisher v Commonwealth of Australia* [2023] FCAFC 106 [27].
[11] Note that there are some other cases that apply s10 to First Nations people, for example, see *Mabo v Queensland (No 1)* (1988) 166 CLR 186 (HCA).

Maloney v R (2013) 252 CLR 168 (HCA)

This was a unanimous decision of the High Court that the declaration of Palm Island as a restricted area under the *Liquor Act 1992* (Qld) (**Liquor Act**) was allowable as a special measure even though it had the effect that Indigenous persons in the Palm Island community could not enjoy a right of ownership of property (alcohol) to the same extent as non-Indigenous people outside that community. Even though the Liquor Act was found to be inconsistent with s10 RD ACT, then, s10 did not apply as the restriction ws held to be a valid special measure for the Indigenous community.

A controversial aspect of this decision was the unwillingness of the Court to accept the current international consensus of the United Nations ICERD Committee as having any bearing on the classification of laws as special measures. The Court found that the prior informed consent or consultation of an affected community, a requirement adopted by the ICERD Committee, was unnecessary for a law to be a special measure. While the majority referred to Brennan J's remark in *Gerhardy*, that the wishes of the beneficiaries of special measures 'are of great importance (perhaps essential)', the Court considered this not to be an essential feature in determining a special measure's legitimacy.

As such, the effect of Maloney was to vest greater power and discretion in the Parliament and the Government in determining whether a special measure was for an affected community's benefit and of ongoing necessity.

Fisher v Commonwealth of Australia [2023] FCAFC 106

In Fisher, the Applicant argued that the operation of s10 RD ACT required that Aboriginal people, if they otherwise meet the relevant criteria in the *Social Security Act 1991* (**SSA**), receive the age pension for the same duration as other people. The Applicant argued that, because Aboriginal men have a shorter life expectancy compared to other men, the RD ACT should have the effect of lowering their pension age under the SSA from 67 to 64.

The Court rejected this argument finding the applicant did not demonstrate any lesser enjoyment of the right to social security. The Court's view was that Indigenous men's lower life expectancy leading to around 3 years less enjoyment of age pension was 'a tragic consequence of two centuries of dispossession, marginalisation and destruction of social structures', rather than a result of the operation of the SSA. Thus, the argument failed because the unequal enjoyment was not seen to arise by reason of the law.

Gerhardy v Brown (1985) 159 CLR 70 (HCA)

In this case, the defendant was charged under s19(1) of the *Pitjantjatjara Land Rights Act* (**PLRA**) with entering Pitjantjatjara lands without the permission of Anangu Pitjantjatjaraku. Section 19 of the PLRA provided that no persons other than Pitjantjatjara people may enter the lands without the permission of Anangu Pitjantjatjaraku. On appeal to the High Court, it was held that although s10 of the RD ACT did render s19 of the PLRA ineffective, it was a special measure and therefore s10 did not apply.

The Court made this determination despite there being no express statement in the PLRA that confirmed the Act was a special measure. In fact, Murphy J reasoned that the general presumption is that legislation is valid and thus that, in effect, s10 did not apply unless there was evidence to displace the presumption that the Act was a special measure.[12]

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[12] (1985) 57 ALR 472 at 500.

As long as a law, declared by Parliament to be a 'special measure', may be reasonably classified as such, it is unlikely that the High Court would consider it necessary to move beyond the legislative declaration without evidence that it was not, in fact, a special measure.

Gerhardy v Brown also supports the position that such laws need not be temporary: they may be expressed to apply only in the circumstances which justify the law as a special measure, or they may be kept under review by the Parliament (or by a body established by the Parliament) to ensure that they continue to qualify as reasonable measure.

1.4 Impact of the doctrine of implied repeal on s 10 RD ACT

The doctrine of implied repeal refers to the principle that a Commonwealth law is invalid to the extent that it is inconsistent with any later Commonwealth law enacted.

1.4.1 High threshold for Implied Repeal

As a starting point when considering repeal, there is a strong presumption that the legislature does not intend to contradict itself.[13] This presumption means that, where possible, Courts must adopt construction of the laws that are consistent with one another.[14] Thus, there is a high threshold for the Courts to find that a law has been repealed by the enactment of a later law.

To establish implied repeal of an earlier act, the two laws must be so inconsistent or repugnant that they cannot stand together, such that it is necessary to imply that the later law repealed the earlier law.[15] This threshold can be met where two provisions contacin explicitly contradictory commands that cannot both be obeyed together; or where repeal of an earlier act is a necessary implication for the proper operation of a later act.

The High Court in *MIMIA v Nystrom* stated that it is a large step to read one statute as abrogated by anything other than express words.[16] Consequently, the later statute must be clearly and indisputably contradictory to the earlier statute to affect an implied repeal.[17]

1.4.2 The impact of the doctrine on the RD ACT

By virtue of the doctrine of implied repeal, the RD ACT may be impliedly repealed by later (post 31 October 1975) inconsistent Commonwealth law.[18]

The interpretation of the RD ACT with future Commonwealth laws then turns on the interpretation of the later law. As the court presumes consistency between legislation due to the principle of legality, the RD ACT will encourage the Courts to read down future legislation as consistent with the RD ACT and thus take a non-discriminatory interpretation where available in the construction of the law.[19]

Though the bar is high for implied repeal, the Commonwealth Parliament can legislate to override the RD ACT at any time by expressly repealing the act.

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[13] *Butler v A-G (Vic)* (1961) 106 CLR 268.
[14] *The India (No 2)* (1864) 33 LJ Adm 193 at 193-4.
[15] *Goodwin v Phillips* (1908) 7 CLR 1 at 7.
[16] *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566.
[17] *Butler v A-G (Vic)* (1961) 106 CLR 268 at 290.
[18] *Pareroultja v Tickner* (1993) 42 FCR 32, 42.
[19] *Vanstone v Clark* (2005) 147 FCR 299, 352 [199] cited in Chapter 3 The Racial Discrimination Act p 11.

1.4.3 The Native Title Act

The *Native Title Act 1993* (Cth) (**NT ACT**) is a Commonwealth Act enacted after the RD ACT that has raised questions of implied repeal of certain aspects of the RD ACT.

The High Court considered whether the RD ACT and the NT ACT (in its original form) were inconsistent in *Western Australia v Commonwealth*. The High Court found that although they were complementary pieces of legislation, as the NT ACT was enacted after the RD ACT, the NT ACT would impliedly repeal the protections under the RD ACT to the extent of any inconsistencies.[20] However, this decision was made in a context where s7 of the original NT ACT stated that nothing in the Act affected the operation of RD ACT. As a result of this explicit provision, it was held that the NT ACT did not override the RD ACT.

Subsequently, the *Native Title Amendment Act 1998* (Cth) amended s7 to read:

> **Racial Discrimination Act**
>
> 1) This Act is intended to be read and construed subject to the provisions of the Racial Discrimination Act 1975.
> 2) Subsection (1) means only that:
>   a) the provisions of the Racial Discrimination Act 1975 apply to the performance of functions and the exercise of powers conferred by or authorised by this Act; and
>   b) to construe this Act, and thereby to determine its operation, ambiguous terms should be construed consistently with the Racial Discrimination Act 1975 if that construction would remove the ambiguity.
> 3) Subsections (1) and (2) do not affect the validation of past acts or intermediate period acts in accordance with this Act.

This amendment has been criticised for being narrower than the original provision and widening the possibility for implied repeal of the RD ACT under the NT ACT for the following reasons:[21]

It no longer explicitly states the intention is for the RD ACT to override the NT ACT.

The qualification under s7(2)(b) is that the RD ACT will only apply where there is ambiguity in the effect of any provision under the NT ACT. The consequence of this provision is that where the NT ACT provides unambiguous discriminatory effect, it will, to this extent, impliedly repeal the RD ACT.

This effect flows on to undermine the operation of the RD ACT in invalidating State and Territory laws by virtue of s109 of the Constitution, as any provision of the RD ACT that is impliedly repealed by the NT ACT will cease to operate against inconsistent State and Territory laws. The question will become whether the state law is inconsistent with the NT ACT rather than the RD ACT.[22]

This has the practical effect of allowing discriminatory State and Territory Laws to pass even though they are inconsistent with the RD ACT notwithstanding s109. This demonstrates how the doctrine of implied repeal has significantly weakened the effect of the RD ACT.

2 Native Title Act

2.1 The Yorta Yorta decision and the Traditional Owner Settlement Act

The 2002 High Court decision in Members of the *Yorta Yorta Aboriginal Community v State of Victoria & Ors* dismissed the Yorta Yorta people's native title claim over 2,000 square kilometres of land and water in Victoria &and NSW. The High Court appeal was dismissed by a 5/2 majority, upholding the

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[20] *Western Australia v Commonwealth* [1975] 90 HC 5 p462.
[21] Native Title Report 1998.
[22] *Western Australia v Commonwealth* [1975] 90 HC 5 p419.

decision of non-determination by Justice Olney on their Native Title application. Justice Olney had found that despite the ongoing presence in the area, the Yorta Yorta Nations had ceased to occupy the land 'in the relevant sense', that is, they had ceased to observe the traditional laws and customs observed by their ancestors. He found therefore, that native title could not be determined because the foundation of the claim had been 'washed away'.[23]

Following the Yorta Yorta decision, the Victorian Government implemented two significant pieces of legislation to realise the rights of Traditional Owners in the state. In 2006, the *Aboriginal Heritage Act 2006* (Vic) replaced the *Archaeological and Aboriginal Relics Preservation Act 1972* (Vic) and Part IIA of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) for protection of Aboriginal Cultural Heritage.

Subsequently, the *Traditional Owner Settlement Act 2010* (Vic) (**TOS Act**) was introduced as a comprehensive, non-litigated claims process that provided an alternative to native title. It was anticipated that Traditional Owners could use the TOS Act to gain rights to country and settle native title claims in Victoria that may not otherwise meet the thresholds set by the NT Act. The Victorian Government identified self-determination and partnerships as foundational to the TOS Act, and rights included recognition of Traditional Owners of Country, funding, and use and management of natural resources.[24]

The necessity for the creations of these legislations speak to the same reasons that there has not yet been a successful native title determination in Tasmania. The rigour of the process for development of an application, the revie and determination all inflict harm on the Traditional Owner applicants. When a negative decision is found it is generationally scarring. Such a systemic process of continued dispossession for Traditional Owners such as the Yorta Yorta applicants is unresolvable.

3 Corporations (Aboriginal and Torres Strait Islander) Act

The CATSI Act is necessarily racially discriminatory. It is saved from offending the International *Convention for the Elimination of All Forms of Racial Discrimination* ("the Convention" and therefore the RD Act) only if they can be characterised as a legitimate "special measure" under the Convention. This fact is acknowledged in the CATSI Act Preamble.

3.1 Member approval needed for related party benefit

The current CATSI Act Part 6-6 (Member approval needed for related party benefit) is an example of the racism redolent in the Act. CATSI Act s 284-1 prohibits related party transactions without approval at a general meeting except in circumstances set out in Division 287. The only equivalent provisions apply to public companies under the *Corporations Act 2001* (Cth) and to Australian Charities and Not-for-profits Commission (**ACNC**) registered corporations. In the latter case the requirements of the ACNC are that a registered charity must uphold the relevant ACNC governance standard (5) and the disclosure requirements contained in Accounting Standard AASB 124.

An appropriate mechanism for facilitating legitimate related third-party transactions by CATSI Act corporations, while still ensuring transparency and accountability would be to adopt the approach applying to corporations limited by guarantee under the *Corporations Act*. This approach permits such transactions in situations where the transaction is arm's length or legitimate remuneration for

[23] AIATSIS, *Members of the Yorta Yorta Aboriginal Community v Victoria [2002] HCA 58; 214 CLR 422*, 2002.

[24] S Canning & F Thiele, *Indigenous Cultural Heritage and History within the Metropolitan Melbourne Investigation Area – A Report to the Victorian Environmental Assessment Council*, 2010.

services provided. Such transaction must be noted in the corporation's accounts under existing Accounting Standards.[25]

3.2 PBC disadvantage under the Act

Provisions of the CATSI Act require that a corporation must at all times owned and controlled by Aboriginal and Torres Strait Islander people.

Registration under the CATSI Act is mostly voluntary. However, some corporations are required by other statute to be registered under the CATSI Act. For example:

- *Native Title Act 1993* requires that a Registered Native Title Body Corporate (**RNTBC**) is registered under the CATSI Act.
- The Victorian *Aboriginal Heritage Act 2006* requires that Recognised Aboriginal Parties (**RAP**s) are registered under the CATSI Act.[26]

As of 30 June 2025, there were 3,284 Aboriginal and Torres Strait Islander corporations registered with the Office of the Registrar of Indigenous Corporations (**ORIC**) under the CATSI Act, including 284 RNTBCs (also called **PBCs**).[27] The relationship therefore of the 8.6% of PBCs to the other entities registered is disproportionate. The effect of this disproportionality is that PBC very particular native title-based registry interests are not as well catered to as they should be.

From data analysed in 2023, 60% of PBCs were classified as small under the ORIC system (less than $100,000 in gross operating income, less than 5 employees, consolidated assets valued at less than $100,000), with a majority of these reporting no employees or just one.[28] What these figures tell us is that the nature of PBC business is unique different and requires a different style of reporting, management and assessment.

The provision within ORIC for the creation of subsidiary corporations and joint ventures would place CATSI corporations in a position of greater equivalence to *Corporations Act* corporations and facilitate economic development within Indigenous communities and the entrepreneurial activity of Indigenous people.[29]

PBCs have significant statutory responsibilities and functions in addition to their fiduciary duties to Native Title Holders to hold and manage NTRI for their benefit. At minimum, statutory obligations include substantive obligations under the NTA and corporate compliance obligations under the CATSI Act and PBC Regulations.[30]

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[25] Victorian Aboriginal Heritage Council, *Submission to the 2020 phase 1 Review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006*, 2020.
[26] Australian Government Office of the Registrar of Indigenous Corporations, *About the CATSI Act*, 2025.
[27] Office of the Registrar of Indigenous Corporations, *Annual Report 2024-25*, 2025.
[28] M Lucas, *Australian Native Title Corporations: What ORIC's big data release tells us*, 2023
[29] Victorian Aboriginal Heritage Council, *Submission to the 2020 phase 1 Review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006*, 2020.
[30] National Native Title Council, *State of the Sector Report*, 2024.