

## **THE NATIONAL NATIVE TITLE COUNCIL SUBMISSION TO THE AUSTRALIAN HUMAN RIGHTS COMMISSION'S *INFORMING THE AGENDA* PROJECT**

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The National Native Title Council (NNTC) is the peak body for Australia's native title sector. The NNTC's membership is comprised of Native Title Representative Bodies and Service Providers (NTRB/SPs) and Registered Native Title Prescribed Bodies Corporate (PBCs) recognised under the *Native Title Act 1993* (Cth) (NTA) and other comparable legal entities such as Traditional Owner Corporations recognised under the *Victorian Traditional Owner Settlement Act 2010* (Vic). In addition to representing the interests of our members the NNTC hosts the First Nations Heritage Protection Alliance and is a signatory to the National Agreement on Closing the Gap.

The NNTC welcomes the opportunity to make this submission to the Australian Human Rights Commission to inform the agenda of the Social Justice Commissioner. The six high-level goals identified are broadly aligned with the goals and aspirations of the NNTC and its members. There are three we address in this submission:

**1. To promote the implementation of UNDRIP (goal 1). We recommend:**

- a. Supporting the full implementation of all 6 recommendations outlined in the *Inquiry into the application of UNDRIP in Australia*,
- b. Supporting the enshrining of UNDRIP in Australian law,
- c. Promoting the existing work of organisations like the NNTC to realise UNDRIP, including through initiatives like *Dhawura Ngilan*.

**2. To provide advocacy and guidance to progress land justice reform (goal 5).**

**We recommend:**

- a. Advocating for negotiated compensation settlements for native title parties,
- b. Participating in the future acts inquiry and advocating for changes that strengthen the position of Traditional Owners,
- c. Supporting existing NNTC work to progress reforms that give Traditional Owners greater decision-making power over their own cultural heritage,
- d. Advocating for PBC capacity building initiatives including funding reform,
- e. Meeting with the NNTC to discuss its land justice reform work.

**3. To build the capacity of the First Nations human rights network (goal 6). We recommend:**

- a. Investing in a First Nations youth human rights network.

## 1. To promote the implementation of UNDRIP

*We recommend:*

- *Supporting the full implementation of all 6 recommendations outlined in the Inquiry into the application of UNDRIP in Australia,*
- *Supporting the enshrining UNDRIP in Australian law,*
- *Promoting existing work of organisations like the NNTC to realise UNDRIP, including through initiatives like Dhawura Ngilan.*

The NNTC advocates for the embedding of UNDRIP into Australian law. The NNTC has formally articulated its position previously via a [submission to the 2022 Senate Inquiry into the UN Declaration on the Rights of Indigenous Peoples](#) on 17 April 2024, and by way of a written intervention presented at the 23rd Session of the UN Permanent Forum on Indigenous Issues.

The NNTC argues that Australia, as a Federation, needs to implement UNDRIP at a national level in accordance with international standards to ensure there is a minimum national baseline of First Nations peoples' rights that any state legislation must adhere to. State and local adoption of the UNDRIP has limited effectiveness without national implementation into legislation.

The process for enacting and incorporating UNDRIP in Australian law needs to be underpinned by the development of a First Nations-led national roadmap. Core considerations of this roadmap include:

- giving primacy to earlier drafts of UNDRIP (pre-settler state member amendments) as well as local understandings and interpretations of the Declaration by Australian First Nations peoples;
- ensuring minimum standards are not framed by governments as aspirational goals but rather as enforceable rights in which First Nations peoples are able to build upon through negotiation;
- following international precedent in the implementation of UNDRIP into laws, policies, and institutions.

It could be argued that the private, rather than public, sector in Australia is leading the way in making incremental changes to adhere to UNDRIP (including a better understanding of the Declaration, self-determination and Free, Prior and Informed Consent (FPIC)).

The NNTC has been front and centre in driving this change, one example being, our leadership in developing the [Dhawura Ngilan Business and Investment Initiative](#), an action to support the business and investment community in practicing and

demonstrating best-practice in Indigenous cultural heritage, particularly embedding the principles of FPIC.

However, complete implementation of initiatives such as *Dhawura Ngilan* require the implementation of UNDRIP into Australian laws and policies to ensure widespread adoption of the Declaration by the business community.

The concept of a roadmap is supported by Recommendations 2 and 3 of the 2023 Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs [\*Inquiry into the application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia\*](#) calling for the development of a National Action Plan, in consultation with Aboriginal and Torres Strait Islander peoples. The NNTC supports the full implementation of all 6 recommendations of the Inquiry.

At a more granular level, the NNTC acknowledges that although there has been incremental implementation of key articles of UNDRIP within the legislative and policy frameworks that form the native title sector, this is insufficient. Native title legislation, policies and institutions require urgent reform to deliver on the minimum standards articulated in the Declaration, which will also support the Commissioner's goal of progressing land justice reform.

The NNTC identifies the following as some of the key areas that need to be reformed in a native title system which largely predates UNDRIP:

- reform of the future acts regime in the *Native Title Act* in relation to how FPIC should be applied to agreement-making – **alignment with Article 32**
- reform of the *Native Title Act* to include a presumption of continuity of culture so the onus is not on First Nations people to 'prove' their ongoing connection – **alignment with Article 11**
- reform of the *Native Title Act* to enshrine FPIC, including through veto rights – **alignment with Article 32**
- reform the *Native Title Act* and *Native Title (Prescribed Bodies Corporate) Regulations* to allow native title holders to determine the most appropriate representative governance structure for their particular group and circumstances rather than having the CATSI Act imposed on them – **alignment with Article 18**
- reform PBC funding to enable PBCs capacity, in perpetuity, to undertake the wide-ranging statutory obligations imposed on them as well as to meaningfully participate in agreement-making with commensurate resourcing – **alignment with Article 19**
- reform of the *Native Title Act* as it relates to compensation, embedding procedural and administrative measures for a streamlined settlement process

that avoids the unnecessary expense and delay involved in litigation and allows native title holders to define what negotiation processes look like according to their unique customs – **alignment with Article 28 (1)**

- embed into the *Native Title Act* the right to inland water – **alignment with Articles 25 and 32**
- reform of the *Native Title Act* with respect to commercial native title rights so that the right to take for any purpose is recognised with retrospective application – **alignment with Article 31**
- continued reform of State, Territory and Commonwealth cultural heritage legislation – **alignment with Articles 11 and 32**

Finally, the NNTC supports, and plays a leading role in raising awareness and building capacity of First Nations people to use the Declaration to advocate for their rights and hold governments and service providers accountable for their responsibilities. One way in which we do so is via the [\*Prescribed Body Corporate Director Training Program\*](#) that we offer to our members. A core block of this 4-day training program focuses on UNDRIP and leveraging it to exercise fundamental rights.

## 2. To provide advocacy and guidance to progress land justice reform

*We recommend:*

- *Advocating for negotiated compensation settlements for native title parties,*
- *Participating in the future acts inquiry and advocating for changes that strengthen the position of Traditional Owners,*
- *Supporting existing NNTC work to progress reforms that give Traditional Owners greater decision-making power over their own cultural heritage,*
- *Advocating for PBC capacity building initiatives including funding reform,*
- *Meeting with the NNTC to discuss its land justice reform work.*

As the peak body for the native title sector the NNTC strongly supports the focus on land justice reform in the Social Justice Commissioner's agenda. The NNTC's core business is supporting and advocating for First Nations people's rights to:

- speak for and make decisions about their own lands, waters and resources
- protect and manage their own Country
- self-determine their own social and economic development.

The NNTC's current priorities are supporting efficient and effective settlement of remaining native title claims, particularly compensation claims; legislative reforms that enable Traditional Owners to exercise their rights and obligations to protect Country, including reforms to native title and cultural heritage laws; and building the capacity of PBCs to exercise their rights and share in emerging economic development opportunities.

All pieces of work related to land justice also support the implementation of UNDRIP in the Australian context by helping to realise Traditional Owners' rights to self-determination.

### *2.1. Native title compensation*

The NNTC is working on a national compensation framework. This is a coordinated approach to enabling the negotiation of native title compensation settlements by resolving a number of outstanding issues.

There is agreement among stakeholders that negotiated compensation settlements are preferable to litigated outcomes. Negotiated outcomes ensure that resources are not wasted on litigation and instead focus resources on agreements critical for securing economic development, independence and positive social outcomes for Indigenous people. It is well accepted that such outcomes benefit Australian society economically as a whole, with increased Indigenous economic participation.

The landmark [\*Northern Territory v Griffiths\*](#) (2019) 269 CLR 1 (Timber Creek Case) provided guidance about the principles which can be used to calculate native title compensation. There are many other compensation cases currently before the courts including the McArthur River case and the Yindjibarndi case, as well as the Gumatj case.

The NNTC supports the efficient settlement of these compensation cases to enable Traditional Owners to exercise their rights and take advantage of economic opportunities that will flow from receiving compensation owed to them.

In addition to supporting ongoing compensation cases in the courts, we aim to streamline litigation by working with the Federal Court, Commonwealth and State and Territory parties to achieve multi-party consent to reduce and refine the number of legal issues to be determined, and to draw on existing, and further develop cooperative arrangements to enhance court processes and efficiencies.

The NNTC is also working to develop best practice models for negotiated settlements informed by the Timber Creek Case and other emerging precedents to encourage Commonwealth, State and Territory parties to settle with native title parties out of court.

## *2.2. Inquiry into the future acts regime*

The NNTC draws your attention to the Australian Law Reform Commission's current [\*inquiry into the future acts regime\*](#) in the *Native Title Act 1993* (Cth) (NTA). The NNTC will be engaged with this process to propose key reforms which support Traditional Owner self-determination and FPIC including that:

- Section 35(1)(a) of the NTA be amended such that the minimum negotiation period before a proponent can seek a future act determination by the National Native Title Tribunal (NNTT) be extended from six months to nine months.
- Section 38(2) of the NTA be amended to allow conditions relating to the payment of royalty (or equivalent) to be included in NNTT determinations.
- The criteria for NNTT arbitral determinations contained in s30 of the NTA be amended to give greater weight to the views of native title holders.
- Part 2, Division 3, Subdivision G of the NTA be amended such that the diversification of activities allowed on non-exclusive agricultural and pastoral leases described in that subdivision enliven the Right to Negotiate (RTN) procedure.

The NNTC encourages reforms to the future act regime that enable Traditional Owners sufficient time, resources and negotiating power to effectively exercise their rights and interests.

## *2.3. Cultural heritage reform*

Following the destruction of Juukan Gorge in 2020, the NNTC helped establish, and continues to host, the First Nations Heritage Protection Alliance (FNHPA). The FNHPA is a coalition of member organisations representing First Nations peoples from across Australia - including major Native Title, Land Rights, Traditional Owner, and Aboriginal and Torres Strait Islander Community-Controlled Organisations. Since 2022, the FNHPA has been in a [formal partnership](#) with successive Australian Governments to co-design cultural heritage reforms.

The NNTC's priorities in these reforms are to ensure stronger decision-making power for Traditional Owners over their cultural heritage. Only Traditional Owners have the right and authority to speak for their Country and their cultural heritage and this authority needs to be reflected in the law.

Law reforms must ensure proponents engage early and meaningfully with Traditional Owners. This means engaging at the very start of a project, rather than part-way through when it may be too late to change anything. Our members support economic development and want to share in the benefits of that development, but this cannot be done at the expense of cultural heritage and Traditional Owner rights. Early engagement is the only way to ensure projects stay on track and everyone can share in the benefits. We have already seen many industries recognise the value of this approach with major support for the *Dhawura Ngilan* initiative and other best practice standards of engagement.

Our work in the cultural heritage reform space at the national level is also relevant to State and Territory reforms as well as broader reforms related to environmental protection and management. Again, Traditional Owners and their representative institutions are the authority for how to protect and care for Country and must be empowered in decision-making processes about projects on their Country. Early and meaningful engagement is critical.

#### *2.4. PBC capacity building*

PBCs and Traditional Owner representative institutions have a range of statutory obligations for native title, cultural heritage and developments on Country for over 55% of Australia and, according to Net Zero Australia, at least 43% of clean energy infrastructure will be on land with Indigenous title. The Australian Government has invested \$126bn in the clean energy sector across critical minerals with virtually none of this funding being directed to Traditional Owners.

The majority of PBCs are severely undercapitalised, with 60% of PBCs classified as small (less than \$100,000 in gross operating income) with many having little to no income, assets, and employees. The majority cannot effectively engage with project proponents and governments, including to access the expertise needed to participate in

negotiations about their Country, build strong cultural governance and business acumen, protect cultural heritage and environmental values, and ultimately provide their FPIC.

In response, the NNTC's PBC Steering Group and the National Indigenous Australians' Agency (NIAA) have been working together to develop funding proposals to fix this. The solutions are modelled in stages: the first stage being an immediate \$90 million funding boost to the existing grant program with an opt-in direct to PBC option, streamlined access and transparent reporting and options for sustainable investment funding in the later stages.

In conclusion, the NNTC is the peak body for the native title sector and its core work focuses on land justice reform. We invite the Social Justice Commissioner to meet with us regarding this aspect of her agenda to determine further ways to support existing reform work that centres Traditional Owner rights and self-determination.



### 3. To build the capacity of the First Nations human rights network

*We recommend:*

- *Investing in a First Nations youth human rights network.*

The NNTC strongly supports the Social Justice Commissioner's focus on developing a First Nations human rights network and recommends a particular focus and investment in developing a youth network.

At the [23<sup>rd</sup> session of the Permanent Forum on Indigenous Issues in 2024](#), the Forum recommended that member states “*develop and support educational and leadership programmes tailored to the needs of Indigenous youth, enabling them to fulfil their potential as leaders and protectors of their cultures and territories*”.

First Nations youth are the future of their communities and of cultural governance in Australia. We need to ensure young people are ready to take up these roles and are prepared with the skills and experience to exercise and protect their rights into the future.

Focusing on developing a youth network is particularly important given the fact that Indigenous populations in Australia skew younger. In 2021, [the ABS reported](#) that one third (33.1%) of Aboriginal and Torres Strait Islander people are under the age of 15 (compared with only 17.9% in the non-Indigenous population).

Youth in native title have unique needs but are critical to the future of native title and the progression of self-determination through social, economic and cultural development for First Nations communities. This investment will also help to realise the rights set out in UNDRIP, because First Nations people and their representative institutions require capacity to understand and overcome barriers to exercising their rights. This includes the ability to succession plan for sustainable leadership.

The NNTC recognises the need to develop youth leadership in the advocacy and human rights space. In 2024, the NNTC took a youth delegation to the UN Permanent Forum on Indigenous Issues and is looking at other ways to support youth in native title, including through a focus on growing the next generation of Traditional Owner leaders in our member network and through our partnerships.

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