TITLE RICH, DIRT POOR:

How land justice since Mabo delivered the cultural dimension to title and deprived Aboriginal and Torres Strait Islander peoples of its economic dimension.

Submission to the Australian Law Reform Commission Review of the Future Acts Regime of the Native Title Act 1993 (Cth)

Cape York Regional Organisations
March 2025

Foreword

Properly understood, and consistent with the rejection of racial discrimination in the determination of whether or not certain human societies are acknowledged as holding title to their homelands, native title under the common law of Australia as first acknowledged in *Mabo & Ors v The State of Queensland (Mabo No. 2)*[1] by the High Court of Australia on 3 June 1992, accorded the Aboriginal and Torres Strait Islander Native Title Holders "possession, occupation, use and enjoyment of the land".[2] This communal title was held "as against the whole world".[3]

This communal title included every conceivable cultural and economic entitlement which flows from possession, possession being a conclusion of law arising from the occupation of land by the native landowners.[4] The title as against the world was a common and universally described possession, and the title *inter se* (that is the title within the community of Native Title Holders) was subject to the extant traditional laws and customs of that community.

Properly understood, the communal native title constituted an estate commensurate with possession at common law: the equivalent of a fee simple, being the largest beneficial estate known to the English law of which native title is an institution.

Whether or not a communal title has had any incident of the possession reserved to the Crown or otherwise regulated or extinguished by a subsequent act of the Crown or legislature, is a matter to be determined by reference to the validity of any such derogation. If there is a contemporary successor to the communal title, the communal title continues as a possession of the contemporary community. That title "crystalised" at the time the Crown acquired sovereignty and became the owner of the "radical title" of the land subject to communal title.

Possession includes all economic rights and interests – except valid derogations by the Crown or legislature. The beneficiary of an adverse possession – a wrongdoer in the first instance – is entitled to fee simple. Native Title Holders are entitled to the equivalent: an allodial fee simple, rather than one dependent upon the fiction of a lost grant under feudal tenure.[5]

So has Australian native title law since *Mabo (No. 2)*, having rejected racial discrimination on the question of whether Aboriginal and Torres Strait Islander peoples' titles to land survived Crown sovereignty, revived racial discrimination in respect of the nature and content of the surviving title? How could the communal title of Aboriginal and Torres Strait Islander people amount to less than the title of an adverse possessor, and any other beneficial owner of land under the common law? How could the "traditional laws and customs" of the Aboriginal and Torres Strait Islander peoples be used to erase the title of those who were entitled to

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[1] *Mabo & Ors v The State of Queensland (No.2)* (1992) 175 CLR 1(*Mabo No.2)*

[2] Ibid 97 (Brennan J).

[3] Ibid.

[4] *The Wik Peoples v State of Queensland & Ors; The Thayorre People v State of Queensland & Ors* [1996] 187 CLR 1. (*Wik)*

[5] As proposed by Professor McNeil in his book *Common Law Aboriginal* Title (Clarendon Press, Oxford 1989).

possession by virtue of occupation because of the supposed effect of something called the "tide of history"? Tides of history do not wash away other entitlement to fee simples – it would not erase the title acquired from adverse possession – why is communal native title susceptible to disappearance?

Crucially for this review, why is the nature and content of communal native title to be determined by "traditional laws and customs" when no other equivalent fee simple titles depend for their content upon the state of the "traditional" laws and customs of the social or cultural group so entitled?

Even as a fundamental racial discrimination was rejected in *Mabo (No. 2)*, it was reintroduced in the subsequent jurisprudence of native title in Australian law, starting with the High Court's decisions in the *Mirriuwong-Gajerrong*[6] and *Yorta Yorta*[7] cases. It is this discriminatory jurisprudence that explains why Australian conceptions of native title have left Aboriginal and Torres Strait Islander Native Title Holders the owners of a cultural title, with its economic dimension severely impaired because of its unprincipled conception.

The *Native Title Act 1993 (Cth*) (NTA) and its subsequent interpretation by the High Court, compounded this stripping of economic rights from native title. In *Yorta Yorta* the High Court went against the hitherto universally agreed interpretation of the meaning of section 223 of the NTA – holding that native title is now a creature of statute rather than the common law, a conclusion completely at odds with the intent of parliament at the time of the passage of the NTA.[8] This sealed a second racial discrimination.

The first racial discrimination concerned the High Court's assumption in *Mabo (No.2)* itself that the Crown's extinguishment of native title by executive action was not compensable at common law – a position at odds with the common law's treatment of other property rights. This point was made early in the wake of *Mabo (No.2)* by the leading Canadian jurist, Professor McNeil.[9]

This discriminatory jurisprudence together with an Act that, notwithstanding its important benefits, explicitly weakened the economic rights of Native Title Holders, explains why the regional organisations of Cape York Peninsula, after 33 long years and on the eve of completing terrestrial land claims in the region, say that Native Title Holders in Cape York are "title rich and dirt poor".

Commonwealth of Australia v Yunupingu[10] ("the Gumatj decision")

This week's High Court decision in favour of the Gumatj affirming that native title constitutes "property" under Australian law, provides an important clarification of the law on native title.

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[6] *Western Australia v Ward* [2002] HCA 28 (*Mirriuwong-Gajerrong)*.
[7] *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58.
[8] Noel Pearson, 'Land is Suscptible of Ownership' (Essay, High Court Centenerary Conference, 9 October 2003).
[9] Kent McNeil, 'Racial Discrimination and Unilateral Extinguishment of Native Title Australian' (1996) 1(2) *Indigenous Law Report* 181.
[10] *Commonwealth of Australia v. Yunupingu (on behalf of the Gumatj Clan or Estate Group) & Ors*. [2025] HCA 6. (*The Gumatj Decision*)

That it has taken 33 years for this fundamental issue to be settled of course reflects the parlous state of the jurisprudence as native title has played out over the three decades. That native title is property should have been clear from *Mabo (No. 2)* and a proper interpretation of the interplay of the common law and the NTA. There hasn't been a proper interpretation, such that the Commonwealth of Australia advanced arguments before the High Court that native title was inherently defeasible and not a property right. Arguments advanced on behalf of the Albanese Labor Government, the successors to the Keating Labor Government that expressed lofty statements about "justice" for Indigenous Australians in the Preamble to the NTA, extracted below.

The Gumatj decision is an important and welcome correction. Its full implications for the purpose of this inquiry by the Australian Law Reform Commission are still to be carefully analysed and understood. At the end of this submission, we make the case that this inquiry should not attempt to include a response to the implications of *The Gumatj Case.* This we believe would be improper and inappropriate. The terms of reference for this inquiry should not be extended to include responding to *The Gumatj Case.* As we argue, this should be a matter for the Gumatj to determine and not the ALRC and this inquiry.

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Introduction

Cape York Regional Organisations

This submission is made jointly by the Cape York Land Council (CYLC), Balkanu Cape York Development Corporation (Balkanu) and Cape York Institute for Policy and Leadership (Cape York Institute) an entity of Cape York Partnership.

- **CYLC** was established by *Pama* leaders in 1990 as a land council representing and advocating the land rights of the Aboriginal people of Cape York Peninsula. One of its functions, which it gained following the commencement of the Native Title Act 1993 (Cth) (NTA), is that of Native Title Representative Body (NTRB) under the NTA. It has performed NTRB functions ever since.[11] It is important to recognise that NTRB is one of the functions of CYLC: it was established by *Pama* leaders to advocate for land rights as an organisation created by and representing *Pama* of Cape York. CYLC has either directly managed or been jointly responsible for facilitating almost all the Indigenous land acquisitions, transfers, claims and settlements in the region during the past 35 years. It has either led or supported most transactions involving mining tenures; local and State projects and dealings impacting Aboriginal land and native title[12].

- **Balkanu** (meaning 'to build' or 'lift up' in *Guugu Yimithirr*, a Paman language) was established in 1996 by *Pama* leaders. Balkanu works to build capability of Native Title Holders of Cape York to obtain land rights and manage their assets. Balkanu provides services in a broad range of negotiations including joint management of environmental tenures; economic, social and cultural enterprise development[13].

- **Cape York Institute for Policy and Leadership** was established in 2005 and is a subsidiary of Cape York Partnership, established in 1999. For almost 20 years, the Institute has worked with and for *Pama* leaders and supporters of reform across Cape York communities. The Institute works with governments, philanthropists and the private sector, to approach contemporary issues affecting Native Title Holders of Cape York with an informed and progressive approach, with a view to disrupting entrenched disadvantage[14].

Cape York's representative organisations work together to facilitate opportunities for Native Title Holders to negotiate equitably with governments and stakeholders when proposals require the use of traditional lands. It is the mission of the representative organisations to ensure the voices of Native Title Holders are heard and rights are respected; providing a platform for *Pama* to control and manage their own land and cultural heritage.

[11] *The Native Title Act 1993* (Cth), s203B (NTA).
[12] Cape York Land Council, https://www.cylc.org.au/.
[13] Balkanu Cape York Development Corporation, https://www.balkanu.com.au/
[14] Cape York Institute for Policy and Leadership, https://capeyorkpartnership.org.au/our-partnership/cape-york-institute/.

Reflecting on Native Title after three decades

The Preamble of the NTA set out the following context:

> The people whose descendants are now known as Aboriginal peoples and Torres Strait Islanders were the inhabitants of Australia before European settlement.
>
> They have been progressively dispossessed of their lands. This dispossession occurred largely without compensation, and successive governments have failed to reach a lasting and equitable agreement with Aboriginal peoples and Torres Strait Islanders concerning the use of their lands. As a consequence, Aboriginal peoples and Torres Strait Islanders have become, as a group, the most disadvantaged in Australian society.[15]

The Preamble went on to state the intention of the legislation:

> The people of Australia intend:
>
> (a) to rectify the consequences of past injustices by the special measures contained in this Act, announced at the time of introduction of this Act into the Parliament, or agreed on by the Parliament from time to time, for securing the adequate advancement and protection of Aboriginal peoples and Torres Strait Islanders; and
>
> (b) to ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire.[16]

The Preamble referred to the need for validation of non-indigenous titles as a consequence of native title:

> The needs of the broader Australian community require certainty and the enforceability of acts potentially made invalid because of the existence of native title. It is important to provide for the validation of those acts.[17]

This was achieved by legislative fiat on 1 January 1994 when the NTA came into effect. The "broader Australian community" obtained security of their titles on the first day the legislation was proclaimed.

The Preamble stated:

> Justice requires that, if acts that extinguish native title are to be validated or to be allowed, compensation on just terms, and with a special right to negotiate its form, must be provided to the holders of the native title.[18]

This submission deals with the right to negotiate. With respect to compensation on just terms for the validation of past acts, no "special right to negotiate its form" was "provided to the

[15] NTA (n 11), preamble.
[16] Ibid.
[17] Ibid.
[18] Ibid.

holders of native title". The High Court's decision in the *Timber Creek Case*[19] occurred 26 years after the NTA first validated the titles of the "broader Australian community". No special procedure for the timely, efficient and fair determination of just terms was ever developed, other than the procedures of the NTA which are as onerous as a claim that might have been advanced regardless of the legislation. *Timber Creek* remains one of very few compensation decisions or settlements declared under the NTA, preceded by, for example, *De Rose v State of South Australia*.[20] Currently only six compensation applications have been determined either by consent or through judicial determination. Since 1994, over 30 compensation applications either been dismissed or discontinued.

The Preamble further stated:

> It is particularly important to ensure that native title holders are now able to enjoy fully their rights and interests.[21]

It is now 33 years later, and the final native title claims in Cape York are near conclusion. Cape York Native Title Holders are in a better position than many other Aboriginal peoples across the country, but three and half decades to receive land justice must be compared to the instantaneous validation of the titles of "the broader Australian community" on 1 January 1994.

This submission shows that even with the impending final settlement of terrestrial native title claims, Native Title Holders are not, "now able to enjoy fully their rights and interests".

Reflecting on the past three decades it is our submission that the native title system has failed to deliver on the NTA Preamble's intended commitments.

Cape York terrestrial land claims are near completion

On 30 June 1993, preceding the NTA, the first native title claim in the Cape York region was filed. *Wik Peoples v The State of Queensland*[22] was delivered by the High Court on 23 December 1996, the first native title case on the Australian mainland. Subsequently the Federal Court of Australia confirmed a determination of native title in favour of the Wik and Wik Way People.[23] This was followed by a series of determinations that were settled under the NTA.

Twenty years after the NTA the largest native title claim in Australia was filed on 11 December 2014, covering 14.6 million hectares of land across Cape York. The objective of the *Cape York United #1 Claim (CYU#1)* was to resolve all outstanding native title claims in Cape York not previously the subject of a determination. At that time, 45% of Cape York had been determined over a period of 20 years. In conceiving the *CYU#1* Claim, CYLC was motivated to find the most expedient way to secure the unresolved land rights for *Pama* of Cape York.

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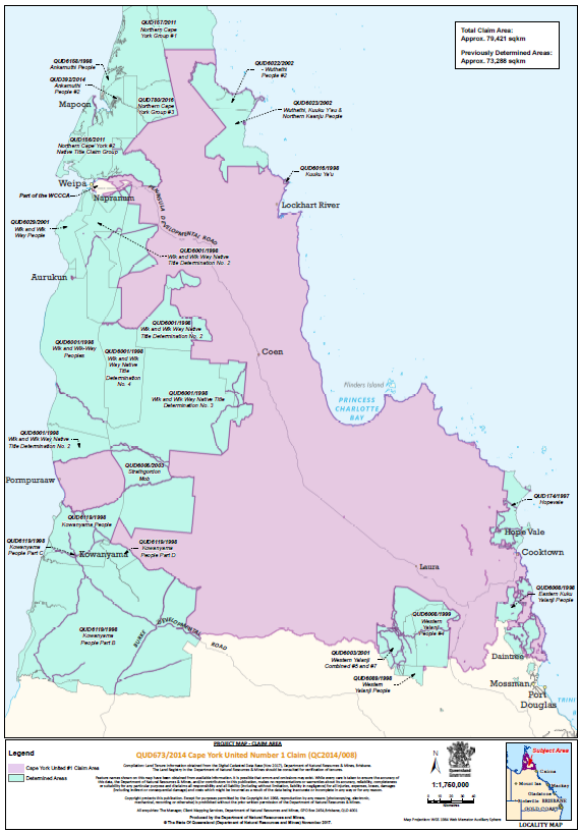
[19] *Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples [No 2]* [2019] HCA 19.
[20] [2013] FCA 988.
[21] NTA (n 11).
[22] *Wik* (n 4).
[23] *Wik Peoples v Queensland* [2000] FCA 1443.

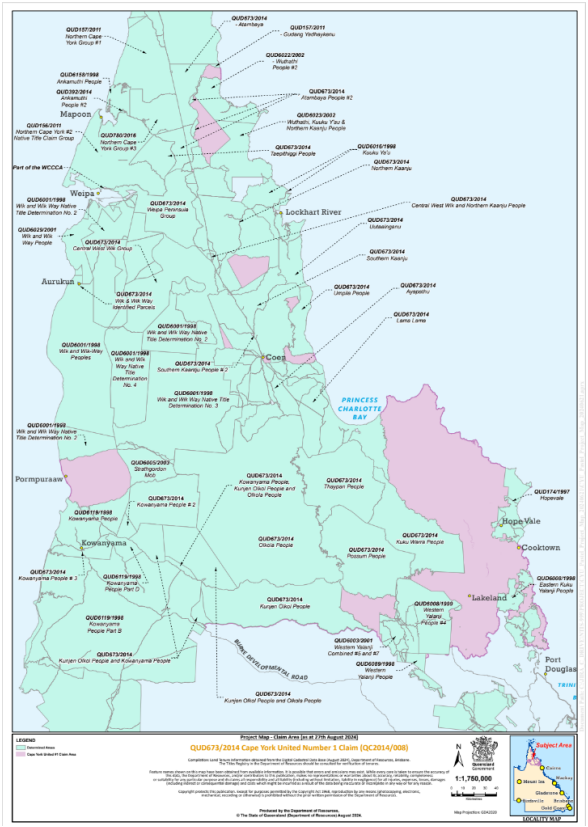
In 2021, the first two native title claims as part of *CYU#1* were realised.[24] In 2022, a further seven determinations were made, followed by nine in 2023 and nine in 2024. As it stands, approximately 80% of Cape York is determined and it is expected that the final 20% of undetermined country will be prosecuted by the end of 2026.

The map below left shows the *CYU#1* Claim Area in purple at the date of lodgement of the claim (2014), whilst the areas in turquoise are those that were already determined, accounting for 45% of Cape York. The map below right is testament to the progress made in the *CYU#1* Claim. Areas in purple are those which still await determinations of native title. The turquoise areas, accounting for approximately 80% of Cape York, are those that are now determined.

As at the date of claim: 2014



10 years on: August 2024



The success of *CYU#1* is a reflection of the commitment of CYLC, with the support of regional organisations, to advocate for *Pama* in their pursuit of land rights. The success belongs to Cape York *Pama*. They have fought long and hard and continue to fight for what they have always known to be theirs.

[24] *Ross on behalf of the Cape York United #1 Claim Group v State of Queensland (No 3) (Uutaalnganu (Night Island) determination)* [2021] FCA 1465; *Ross on behalf of the Cape York United #1 Claim Group v State of Queensland (No 2) (Kuuku Ya'u determination)* [2021] FCA 1464

A Cultural Title stripped of Economic Use

It is over three decades since the NTA was enacted, and over that time, a disheartening realisation has emerged: while we have settled nearly all land claims, our economic position remains unchanged. Why is it that despite Australia experiencing a massive resources boom and robust economic growth over these three decades, the economic standing of Aboriginal and Torres Strait Islander people has seen no improvement?

Why have our people not shared in this prosperity?

The NTA came into effect just as Australia's resource industries began their most significant expansion. The potential was there for Indigenous communities to benefit significantly from this growth. It is what could and should have happened. It didn't.

The stark reality is that except for the iron ore industry in Western Australia – where the immense scale of operations and volume of resources extracted translates even modest agreements into substantial royalty payments – the economic benefits for Native Title Holders in other sectors, like coal, are minimal.

The parliamentary speeches accompanying the NTA spoke to the hopes and dreams of Aboriginal people, envisioning a new era of prosperity that would lift communities out of poverty. The High Court's decisions and subsequent legislation promised to be vehicles towards this new future. Yet, what we have today is a native title stripped of its economic potential, providing cultural recognition without the means to leverage it into tangible economic benefits.

This leads us to a sobering conclusion: after 30 years, the envisioned prosperity has not materialised. In places like Cape York, where native title claims are nearly resolved, and indeed across other regions that are progressing similarly, economic participation by Native Title Holders remains minimal. It seems that while recognition of title has increased, economic participation has stagnated.

At this juncture, it is clear: while cultural title holds immense importance, the lack of an economic dimension to the framework of native title means Indigenous Australians remain locked out of the mainstream economic prosperity that Australia has enjoyed. This is not merely an expression of regret for a missed opportunity—it is a call to action for revisiting and reinvigorating the frameworks that were supposed to ensure not just recognition but real economic participation and upliftment.

Native Title Holders Remain Title Rich but Dirt Poor

Cape York *Pama* are advocates for progressive empowerment policy, having long recognised the essential link between land rights and welfare reform. We advocate for unfettered access to our land through systems like native title as the foundation for escaping welfare dependency. Yet, despite these efforts in the remote communities of Cape York there has been no economic advancement.

Pama find ourselves “title rich but dirt poor.” While land is a substantial asset, leveraging it to generate wealth is restrictive and opportunities are limited. Land alone does not equate to wealth. True wealth encompasses culture, country, and kinship—it's about securing a future for coming generations, not merely surviving.

The communal nature of Indigenous land ownership complicates development, as aligning private and communal interests involve intricate intra-group dynamics, which can stifle individual enterprise and broader economic development. Statutory land rights schemes and native title determinations have created a patchwork of titles. This complexity is mirrored in the extensive network of landholding bodies, such as Prescribed Bodies Corporate (PBCs) under the NTA and Land Trusts under the *Aboriginal Land Act 1991* (Qld) (ALA). With over 70 land holding bodies across Cape York, many are small and under-resourced, struggling to help *Pama* effectively manage and utilise their land. Often, different organisations are tasked with managing different titles over the same area, embedding structural conflict and adding layers of administrative and legal complexity.

These challenges make transactions costly, slow, and uncertain, deterring investment and stifling entrepreneurial initiatives. Vast tracts of land remain underutilised, lying dormant outside the real economy, contributing to the persistent socioeconomic disadvantage faced by Indigenous landowners.

As the era of terrestrial claims winds down, the focus must shift from securing rights to effectively utilising and managing our lands. The complexities that hinder social, economic, and cultural development must be streamlined, and landowners need resources to leverage their land for economic development.

Decisions to simplify the existing system and explore innovative solutions must be made with the consent and participation of the landowners. There is substantial work ahead to empower individuals, families, and land-owning groups to strategically plan and make these decisions. This necessitates structural reforms, including modifications to the roles and structures of NTRBs and titleholding structures, to ensure they support this new phase of empowerment and development.

To genuinely “close the gap” there is an urgent need for Native Title reforms that prioritise economic development. Reforms should empower communities to leverage their land for economic development by simplifying the current legal morass that severely limits their economic options. It is critical that our communities are afforded the same opportunities to use, develop, and benefit from their land as other Australians, however complexities from the intersections of PBC jurisdictions, Commonwealth laws and State laws make it prohibitive for Native Title Holders. Figure 1 shows an example of a ‘development process’ for someone seeking a development opportunity in one sub-regional area in Cape York, where lands are held under both the NTA and ALA.

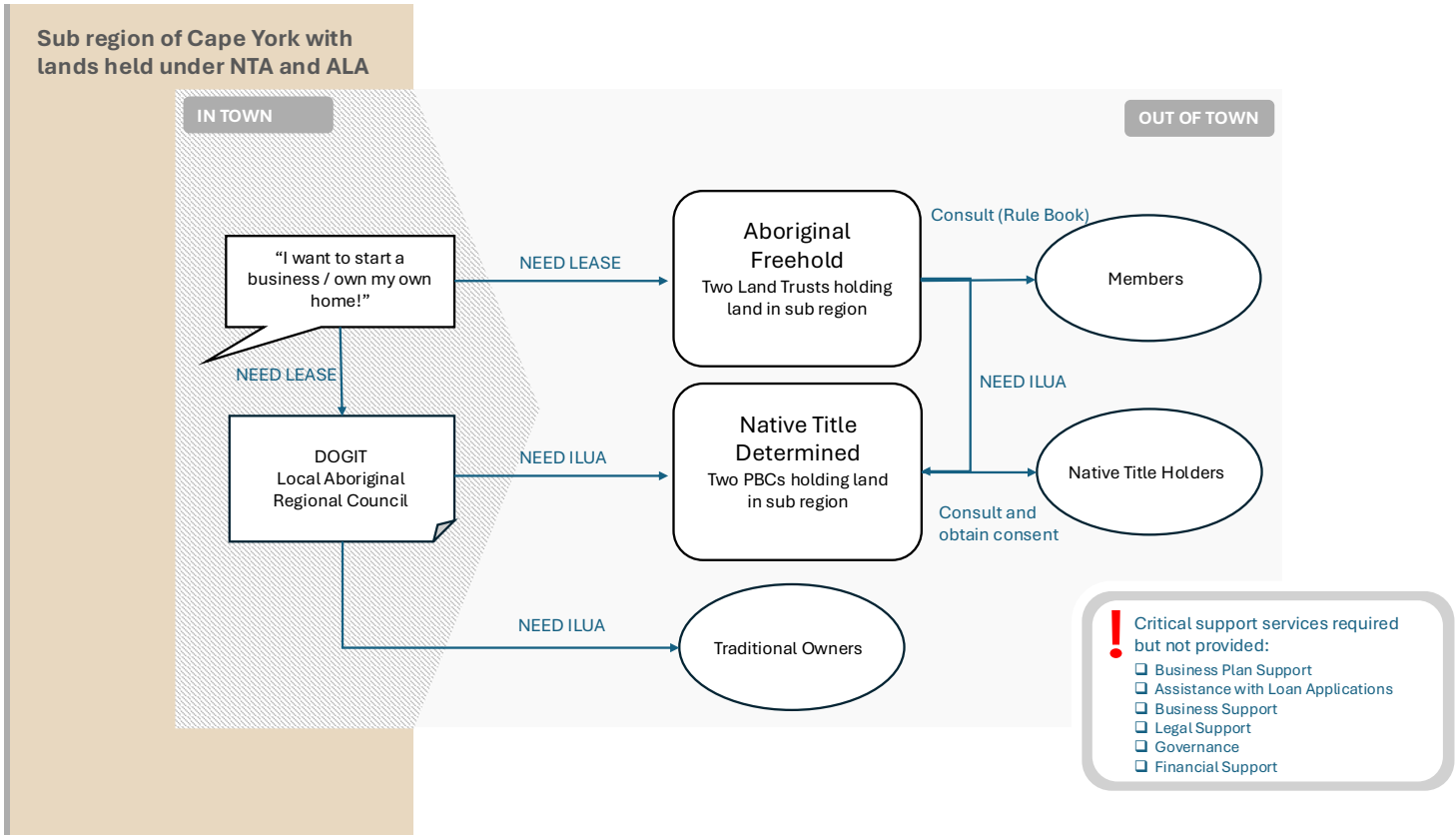


Figure 1: Development process for one Cape York sub-region.

Dead Capital

Following Hernando de Soto's thesis in *The Mystery of Capital*[25] Cape York Institute focused on the consequences of the quagmire of land titles that *Pama* Native Title Holders were increasingly confronted with in Cape York. The overlapping patchwork of titles and their forms of tenure and governing structures was the consequence of the legal differences between tenures, and the complex regulatory regimes that governed each of them. It was also the consequence of the haphazard and opportunistic way in which land claims, transfers and acquisitions occurred. It was the current tenures that dictated everything, and this affected the way traditional claims were framed, prosecuted and settled. This was an unavoidable and necessary reality. However, the lack of any policy anticipation and planning for the future made this reality much more of a quagmire than it could have been.

We tried. But we needed governments, Queensland and Commonwealth, to work with us to anticipate the future and ensure the best outcomes were achieved for the cultural and economic development of *Pama.* This didn't happen. Governments were intransigent and simply didn't have the policy competence to understand the problems and work with us on solutions.

[25] Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (Basic Books, 2000).

In 2001 Noel Pearson published a review of de Soto's book, applying its analysis to Cape York.[26] Subsequently a research project was conceived between CYLC and the National Native Title Tribunal (NNTT) to explore the issues raised and to articulate a way forward.

Paul Memmott and Scott MacDougall of the Aboriginal Environments Research Centre at the University of Queensland were engaged to produce a research report *Holding Title and Managing Land in Cape York* in 2003.[27] This report described the very problems that mire *Pama* in Cape York Peninsula in "title rich, dirt poor" conditions today.

In 2004 Noel Pearson and Lara Kostakidis-Lianos published a paper, *Building Indigenous Capital – Removing obstacles to participation in the real economy*[28] that highlighted the complex relationship between the Indigenous land asset base and the mainstream economy, describing the majority of Indigenous assets – that lay outside the mainstream economy – as "dead capital" within de Soto's analysis.

No policy response was received from government to this work. It is 20 years later.

"Dead capital" is widespread in *Pama* communities, where restrictive land tenures and legal barriers prevent property from being leveraged for economic development. Native Title Holders are left with assets they cannot use for investment, enterprise or home ownership. These restrictions trap communities in poverty and welfare dependence, with government transfer investments effectively turning into dead capital. The **text box** below provides an example of these barriers.

[26]Noel Pearson, 'Feature Review of Hernando de Soto's 'The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else' (Bantam, London, 2001).
[27] Paul Memmott and Scott McDougall, *Holding Title and Managing Land in Cape York: Indigenous Land Management and Native Title* (National Native Title Tribunal, 2003).
[28] Noel Pearson & Lara Kostakidis-Lianos, *Building Indigenous Capital: Removing Obstacles to Participation in the Real Economy* (Cape York institute, 2004).

Barriers to Home Ownership – Constrained by complexities of communal land tenure

In the paper *Indigenous Home Ownership and Community Title Land: A Preliminary Household Survey* by Moran et al identify the deep frustrations of Indigenous community members who aspire to own a home but find themselves constrained by the complexities of communal land tenure. Conducted in Palm Island, Cherbourg, Kowanyama, and Lockhart River the study captures the perspectives of Indigenous Australians who see home ownership as a path to economic independence, family security, and generational wealth—yet are continuously thwarted by the legal and structural limitations of community-titled land.

For many respondents to the survey, the dream of home ownership is not just about having a house—it represents stability, autonomy, and financial security. However, the reality of inalienable land tenure in these communities means that land cannot be bought, sold, or used as collateral for loans, making traditional pathways to home ownership nearly impossible. Without individual land titles, families cannot secure mortgages or access home finance, leaving them dependent on social housing systems that offer little room for personal investment or long-term economic benefits.

The survey also captured a strong sense of frustration and disillusionment. Many aspiring homeowners feel that despite their best efforts—whether through employment, saving, or community involvement—they remain locked out of opportunities that non-Indigenous Australians take for granted. The bureaucratic hurdles, unclear policies, and lack of financial instruments remain adapted to the realities of community-titled land further compounding their difficulties to this day.

At the heart of this frustration is a tension between cultural identity and economic opportunity. While many deeply value the communal nature of land ownership, they also seek practical solutions that would allow them to invest in their homes, build equity, and pass wealth onto future generations. The findings suggest that without meaningful reforms—such as long-term, transferable leases or culturally sensitive financial models—home ownership will remain an unattainable goal for many Indigenous Australians living on community-titled land.

Source: Mark Moran, Paul Memmott, Steve Long, Rachael Stacy and John Holt, 'Indigenous Home Ownership and Community Title Land: A Preliminary Household Survey' (2002) 20(4) *Urban Policy and Research* 357

The inalienable nature of returned land further blocks access to finance, while underutilised land with clear economic potential—such as for agriculture or tourism—remains locked away, reinforcing reliance on government transfers.

The solution involves innovative rethinking of legislation and policy to make *Pama* land more fungible within the constraints of inalienability, through simplified requirements for long-term leases or licences and the effective use of Indigenous Land Use Agreements (ILUAs) respecting both the cultural significance of land and the economic potential it holds.

The causes of the economic disenfranchisement of Native Title Holders

We now turn to the drivers of the situation we find in Cape York, *Pama* Native Title Holders remaining "title rich, dirt poor" and locked out of economic development.

1. Jurisprudence that does not meet international standards

The interpretation of native title in Australia, rather than being grounded in the broader jurisprudence of the common law world, has developed a local version grounded in an interpretation of the NTA – at odds with comparable law in North America and other like jurisdictions. This local Australian version of native title falls significantly short of the international jurisprudence of the United States and Canada.

When the NTA was conceived following *Mabo (No.2)*, it was universally understood among Indigenous advocates and legislators that the Act was meant to protect—not redefine or restrict—native title as recognised by common law.

Mabo (No. 2) overturned *terra nullius* and recognised the existence of native title rights by the common law, acknowledging that these rights, grounded in traditional laws and customs, survived the assertion of British sovereignty. The NTA was not intended to create a new form of quasi-statutory title through "transmogrification"[29] but to acknowledge and protect rights that already existed under the common law.

However subsequent interpretations of native title within Australian jurisprudence, particularly the High Court's decisions in *Mirriuwung Gajerrong* and *Yorta Yorta*, marked a significant departure from the principles of the common law. This divergence primarily centred on the High Court's interpretation of section 223 of the NTA which has shifted the foundational understanding of native title from a common law perspective to a statutory construct, undermining the original meaning of *Mabo (No.2).*

Comparatively, jurisdictions like Canada and the United States have approached indigenous title through what former Chief Justice McLachlin of the Supreme Court of Canada called "the time-honoured methodology of the common law", which is grounded in two centuries of precedent.[30]

In Australia the High Court has not only narrowed the scope but also fundamentally altered the trajectory of native title recognition by placing undue emphasis on the statutory definitions of the NTA, rather than broader and more common law principles. This shift has had significant implications for justice for Indigenous Australians.

This poor jurisprudence, positions native title as a lesser right, subservient to other land interests, contradicting the supposed equitable foundations of Australian law.

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[29] Noel Pearson, 'Land is Susceptible of Ownership' (Paper presented at the High Court Centenary Conference, Canberra, 9–11 October 2003) citing *Ward* (High Court Transcripts, P59/2000, 6 March 2001).
[30] R v Van de Peet (1996) 2 SCR 507, 216. McLauchlin CJ).

Given the profound implications of the Australian jurisprudence, there is a pressing need for legislative reform to realign the interpretation of native title with its common law roots. Amending section 223(1) of the NTA to reflect that native title and its associated rights are recognised and protected under the common law would restore the original intent of the NTA. This amendment would ensure that native title is treated not as a quasi-statutory title, but as a pre-existing legal right that the NTA aims to protect rather than re-define.

The protection of native title as envisioned in *Mabo (No.2)* is integral to the "justice" expressed in the Preamble to the NTA. Correcting section 223 of the NTA to reflect its common law foundations is imperative.

2. Procedural inadequacies of Native Title Protection

The procedural rights enshrined in the NTA were supposed to protect the interests of Native Title Holders. However, the decision in *Narrier v State of Western Australia*[31] marked a pivotal moment by ruling on the ramifications of non-compliance with these procedural requirements. Overturning the precedent set by *The Lardil Peoples v Queensland*[32], the *Narrier* ruling established that if procedural obligations are not met, any resulting future act does not legally impact native title rights, rendering the act ineffective against them. This decision underscores a significant injustice facing Native Title Holders — the absence of adequate judicial remedies when their rights are bypassed.

Although courts have generally agreed that non-compliance with procedural obligations does not halt the progression of Future Acts, they acknowledge that such acts carry "no force against native title" signifying that these actions proceed without lawful authority over native title interests. This reveals a weakness in the NTA: it does not provide Native Title Holders with the right to challenge the execution of an act once it has begun, despite procedural non-compliance.

This gap means that breaches of procedural rights are taken as seriously as direct infringements on native title. For instance, if an interest such as a lease or a savannah burning project is created without informing the Native Title Party, the only recourse is to file a compensation claim. Yet, this reactive measure overlooks the fact that the procedural rights originally intended to provide a platform to object to the act.

The current legal framework encourages a disregard for these crucial procedural obligations. This situation places Native Title Holders at a disadvantage, where their legal rights can be overlooked without significant repercussions.

To rectify this systemic flaw, a more robust mechanism is needed – one that holds parties accountable for disregarding procedural rights and providing Native Title Holders with proactive measures to safeguard their interests.

[31] [2016] FCA 1519
[32] [2001] FCA 414

3. The Failure of the Right to Negotiate

After more than three decades, it has become clear that the Right to Negotiate (RTN), as set out in Subdivision P of the NTA is fundamentally flawed. From as early as the 1990s, the CYLC recognised that the RTN failed to provide Native Title Holders the means to protect their title and engage in land use on equitable terms. The intention of the RTN provisions versus the practical reality of its application have starkly diverged.

The RTN has been an abject failure.

This is starkly illustrated by the fact that the post-*Mabo* era from 1993 to the present, corresponded with one of the largest and longest mining and resources booms in world history, let alone Australia. Tremendous economic development and wealth creation has taken place in the native title era, and royalties and taxation incomes have flowed for the benefit of all Australians for these three decades.

And yet, Australia has made scant progress in closing the wealth gap between Indigenous Australians and the rest of the country. Instead, levels of poverty, particularly among remote communities that live most often in the shadows of this resources boom – remain unchanged, and in many cases are worsening.

It became clear to *Pama* leaders of Cape York regional organisations in the 1990s that the RTN was not delivering on its promise. In the ructions of the Howard Government's 10 Point Plan response to the *Wik Case*, CYLC attempted to propose ideas to address the emerging and glaring failures of the RTN – within five years of the NTA – but no reforms ensued.

When you look at the returns to Indigenous Australians from the RTN and compare them to what accrued to shareholders, governments and enterprise owners from the same projects – Native Title Holders received minuscule returns. Service providers (like law firms acting for resource companies) get more benefits from transaction fees paid by proponents than Native titleholding groups for the impacts on their land.

This egregious disparity in returns from the resources boom was very apparent over the course of these past three decades, and little noticed and discussed. People are deceived by the returns obtained by Native Title Holders affected by iron ore mines in the Pilbara of Western Australia. Though royalty rates may be minimal, the huge volumes and the value of iron ore mean that returns to affected Native Title Holders are substantial. While the iron of the Pilbara is exceptional, it does not reflect what has happened with respect to other commodities and in other parts of the country.

The problem is that the RTN is fundamentally flawed and is highly disadvantageous to Native Title Holders. The problem is in the provisions of the RTN, but the discernment of the problem is obscured in the wording of the provisions.

Section 33 of the NTA provides:

> **Negotiations to include certain things**
>
> Profits, income etc.
>
> (1) Without limiting the scope of any negotiations, they may, if relevant, include the possibility of including a condition that has the effect that native title parties are to be entitled to payments worked out by reference to:
>
> (a) the amount of profits made; or
>
> (b) any income derived; or
>
> (c) any things produced;
>
> by any grantee party as a result of doing anything in relation to the land or waters concerned after the act is done.

This is the deception of the RTN. It apparently enables negotiations that refer to real economic benefits that could be secured by Native Title Holders: reference to "amount of profits made", "income derived" and "things produced" by the proposed activity on native title land.

But section 33 is a charade. The operative provision is section 38 which governs the arbitration phase of the RTN, in the event that the negotiations under section 33 do not produce an agreement. Subsection (3) provides:

> Profit - sharing conditions not to be determined
>
> (2) The arbitral body must not determine a condition under paragraph (1)(c) that has the effect that native title parties are to be entitled to payments worked out by reference to:
>
> (a) the amount of profits made; or
>
> (b) any income derived; or
>
> (c) any things produced;
>
> by any grantee party as a result of doing anything in relation to the land or waters concerned after the act is done.

This provision rips the teeth out of the RTN. It made the RTN useless for Native Title Holders, denying them the ability to share in the economic development of the country, taking place on, and in the case of mining, by definition destroying their lands in the process.

This is the core injustice of the RTN which strips the economic dimension from native title and leaves Native Title Holders with the cultural remnants – if it isn't destroyed. Without a solution to the effect of section 38 of the NTA none of the other problems identified in this submission and no doubt in other submissions to this Inquiry, will count for much, and will not solve the problem of economic exclusion. These other aspects of native title reforms are trivial compared to section 38. Unless this is solved, there will be no progress and native title will remain largely a cultural title, with its economic dimension severely curtailed if not extinguished.

This is a significant barrier for Indigenous communities seeking to leverage their land for economic development. The systemic exclusion embedded within the NTA underscores a critical flaw. The framework ensures that while extensive profits are generated for shareholders and corporations from mining on native title land, the traditional custodians of these lands see minimal economic benefits.

Furthermore, the historical performance of the NNTT under the RTN procedures demonstrates a troubling bias. With 61 determinations allowing acts with conditions, 91 without conditions, and only 3 determinations where acts were not allowed, it is evident that the NNTT overwhelmingly favours proponents over Native Title Holders. This stark disparity in outcomes reveals that the RTN operates more as a procedural formality than a substantive right, effectively precluding Native Title parties from economic empowerment.

The failure of the RTN calls for a significant overhaul. It is not enough to tweak minor procedural issues; a profound reform is necessary to ensure that Native Title Holders can truly benefit from their lands. As we reflect on the past three decades and look towards future opportunities in critical minerals and renewable energy as highlighted by the Prime Minister, without a framework that ensures equitable economic benefits for Indigenous Australians, then the injustice and disparity of the current RTN will continue.

4. Fundamental Flaw in Indigenous Land Use Agreements

The ILUA process has its strengths and weaknesses. Where there are dealings between the State and Aboriginal Parties, for the purpose of enshrining land rights and ownership, the ILUA process has proven highly effective. This is not the case when the State is not a party. Area ILUAs and alternative procedure ILUAs that do not have the State as a party are highly uncertain, because Native Title Holders entering into ILUAs are not assured that the State will not enter into conflicting arrangements with third parties in respect of the same land. This is a major commercial uncertainty for Native Title Holders: the State ignoring ILUAs entered into by Native Title Holders, even though these ILUAs have been executed under the rigorous procedures of the NTA.

There is also a problem that arises on occasions where ILUAs provide for alternative procedures or commitments from the prescribed Future Act procedures (under Part 2 Division 3 Subdivision G – P). In these cases, the terms of the ILUA run parallel to the Future Acts regime. There is no express provision in the NTA to make clear that only one procedure is available when managing interference with native title where an ILUA has been entered into for that purpose. This needs to be addressed.

As above, a more fundamental problem occurs where the State is not a party to an ILUA. Because of the special procedural requirements of ILUAs, they are resource intensive, requiring NTRBs and PBCs to undertake procedures that go beyond ordinary contract law. This form of statutory contract is highly valuable to governments and third parties as well as Native Title Holders. This is because of their statutory nature and the fact that the NNTT supervises the procedures and registers the ILUAs.

For the State to be able to disregard any ILUA to which it is not a party to, would be highly disadvantageous to Native Title Holders and disrespects their decision-making rights as landowners, removing their ability to utilise ILUAs to make agreements with third parties about access to their land.

It means that the only ILUAs Native Title Holders can confidently enter into are those where the State has chosen the preferred developer. So, a commercial development on Aboriginal land is forced to follow government and can never precede it. This confines Aboriginal development to a reactive rather than a proactive stance.

There is uncertainty about the State's ability to grant rights to develop land that are inconsistent with registered ILUAs. This legal uncertainty means commercial uncertainty and it is unlikely that bank lenders will invest in these circumstances.

It is not a solution to make the State party to all ILUAs if facilitating commercial development on native title land is the goal. Expecting and waiting for the State to be a party to all commerce, is socialism rather than being conducive to market capitalism. No enterprise is possible except where the State initiates or is party.

Rather, the position should be that the State respects the self determination of the Native Title Holders in choosing the commercial development they desire and the developers with whom they wish to contract. In the case of the State preferring another developer, then there needs to be procedures available to resolve this conflict, without the State having pre-emptive power to contradict the ILUAs that are entered into in good faith by Native Title Holders.

ILUAs, while intended to secure mutual benefits through agreement, lack the necessary legal force to hold State and federal governments accountable when they choose to disregard these agreements. The current legal framework allows for the circumvention of ILUAs, leading to significant disparities in power and benefits, invariably to the detriment of Native Title Holders.

Wik excluded from bauxite opportunity on their doorstep

The Wik have lived in the shadow of vast wealth production from mining of their ancestral lands in Western Cape York since the 1950s but have been unjustly denied the opportunity to have their consent count or to be an active proponent in mining development. The Wik RA315 example demonstrates the shocking and capricious State Party power wielded over the Wik lives and futures.

In 1975 the State Party legislated to grant vast swathes of land that were part of the Aurukun Aboriginal Reserve, to a French aluminium company, Pechiney. As with previous miners, the people of Aurukun were ignored. No consent or other compensation was provided. (The Reserve Mission engaged lawyers to represent the Wik in court challenge that went to the Privy Council in London. This raised the ire of the State Party who took over the Mission.)

After 30 years of the Pechiney failing to develop the mine, in 2004 the State Party compulsorily took the lease back. Local Wik leaders continued to see RA315 as an opportunity to turn their community around, and to support the economic viability of Aurukun. In 2008, Aurukun leaders, with the agreement of the State Party, nominated the development of the bauxite resource as a 'lighthouse' economic development project under the Cape York Welfare Reform trial, for example.

However, in the latest tender process for RA315 the State Party granted development rights to mining giant Glencore. The State Party used extraordinary executive power to do as they pleased in awarding the lease to Glencore* disregarding a bid backed by the Native Title Holders which would have provided Australia's first equity deal for local Indigenous people, giving them a 15% stake in the mine and meaningful decision-making authority. This would have made a real difference to the people in Aurukun.** In Glencore's global empire these Aurukun bauxite fields are just a speck. For the Wik this mine represents their future, and a critical pathway away from a socioeconomic and cultural crisis.

* In 2006 amendments to the *Mineral Resources Act 1989* (Qld) introduced special measures only applicable to Aurukun bauxite. These provisions suspend notification and objection processes otherwise applicable under law and via these special measures the State Party was able to unilaterally reopen the tender process for 24 hours to allow and accept Glencore's bid, circumventing the standard processes or protections that would ordinarily be afforded to the Indigenous landholders.

** Ngan Aak-Kunch Aboriginal Corporation (NAK) is the registered native title body corporate for the Wik people. In 2015 NAK signed a joint venture with Aurukun Bauxite Development (ABD) with the sole purpose of exploring, developing and rehabilitating the RA315 deposit. This was supported under Australian law by Indigenous Land Use Agreement (ILUA) signed and lodged with the National Native Title Tribunal. Other proponents, including Glencore, did not have the support of the Native Title Holders .

The consequences of this situation

1. Environmental Impacts on Native Title

As Cape York *Pama* have fought for our land rights, we have faced significant hurdles, not just from legislative inadequacies but also from environmental policies that restrict the full enjoyment of native title rights and interests. In Cape York, environmental groups and State interests too often override Native Title Holders rights, viewing environmental conservation in a way that does not align with land rights.

Environmental regulations and conservation initiatives, while ostensibly aimed at protecting natural resources, limit the ability of Native Title Holders to manage, use, and benefit from their lands.

When the NTA was negotiated in 1993, the potential for environmental regimes to adversely impact native title was not fully anticipated. The legislation was primarily focused on the impact of mining and resource development, without sufficient foresight into how emerging environmental laws might intersect with newly recognised native title rights.

This oversight became a significant concern for *Pama* in the early 2000s. As environmental awareness and related legislation expanded, so too did the constraints on native title lands. The actions taken by State governments and environmental groups often failed to recognise or respect the rights of Native Title Holders, treating native title lands as part of the country's part of the national reserve rather than as the homes and heritage sites of living cultures.

Pama find ourselves constantly defending these rights—rights to self-determination, participation in decision-making, development, Free, Prior, and Informed Consent (FPIC), cultural heritage, and redress—against encroachments from both environmental and mining interests backed by the government. This relentless struggle diverts crucial resources and focus from vital community development areas such as education, health, economic, and cultural advancement.

Moreover, *Pama* are compelled to shoulder environmental responsibilities not of our making, at a time when environmental concerns are highly prioritised in Australia and globally. Under the 2022 commitment to the Kunming-Montreal Global Biodiversity Framework, Australia aims to increase protected areas from around 20% to at least 30% of its lands and oceans by 2030.[33] The enforcement of these environmental protections disproportionately impacts

[33] Since 1997, protected areas across Australia have increased from around 13 per cent to 20 per cent and this expansion has occurred almost entirely through the declaration of protected areas on First Nations land owned under inalienable freehold title or over which there have been successful native title determinations. A strong case can be made that Indigenous Australians are inequitably bearing the need for environmental protection. See: Australian Bureau of Statistics, 'Protected Areas' (Web Page, 2023) https://www.abs.gov.au/statistics/measuring-what-matters/measuring-what-matters-themes-and-indicators/sustainable/protected-areas#:~:text=the%20marine%20environment.-,Progress,accordance%20with%20Traditional%20Owners%20objectives**;** Convention on Biological Diversity, *Kunming-Montreal Global Biodiversity Framework* (Report, 2022) https://www.cbd.int/article/kunming-montreal-global-biodiversity-framework.

Indigenous landholders, who are least responsible for the environmental degradation being addressed.

In 1999 the Queensland State Government introduced Vegetation Management legislation to curtail tree clearing as a climate change abatement measure. These laws were critical to Australia meeting its Kyoto Protocol greenhouse gas emissions reduction target, but it was *Pama* who were forced to pay the price. Following an election deal by the Beattie Labor government with environmental groups in the content of the 2001 state election the tree clearing restrictions were imposed across Cape York primarily over Indigenous lands, without the consent of *Pama* for lost economic development opportunities.[34]

In contrast, compensation was provided to farmers, although farmers had already reaped the benefit of unsustainable tree clearing practices in the old economy. Vegetation restrictions now applied to native title lands even though there was no tree clearing issue on Aboriginal lands in Cape York.

In 2005 the Queensland State Government introduced Wild Rivers legislation to preserve natural values of rivers. These laws sought to satisfy secretive election deals politicians had done with green groups such as The Wilderness Society during Queensland's 2004 election campaign.[35] This was the second election that such environmental deals were made by Labor politicians and environmental groups, where native title lands were subjected to environmental restrictions in return for preference allocations recommended by environmental groups to their voters in marginal seats.[36]

The Archer, Stewart and Lockhart Rivers in Cape York were subsequently declared as Wild Rivers under the legislation, without the consent of the *Pama* landowners, and with no compensation for lost economic development opportunities.

Pama, supported by Balkanu and Cape York Land Council, had a long fight against this injustice. *Pama* Native Title Holders won the Wild Rivers case in the Federal Court in 2014, eventually resulting in the repeal of the legislation.[37] This struggle on the part of *Pama* took six years of legal and political struggle costing hundreds of thousands of dollars and diverting leaders and organisations from pressing problems of disadvantage and poverty.

In 2014-15, the Queensland Government obliged huge swathes (27,200 square kms) of privately owned Indigenous land across Cape York to be managed as 'Strategic Environmental Areas' to protect environmental values for 'public good' by introducing regional planning legislation and the Cape York Regional Plan.[38] The areas included extend well

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[34] Forcibly retiring Indigenous land clearing opportunities also limits our ability put land into carbon and biodiversity sinks given we have no right to clear that can be traded and retired in the new economy, See e.g. s. 57 *Vegetation Management Act 1999* (Qld).

[35] Marcia Langton "Bligh's Callous Land Grab" (*The Australian*, 11 April 2009).

[36] Noel Pearson, 'Let Them Eat Feral Cat' (Speech, Ronald and Catherine Berndt Lecture, Berndt Foundation, University of Western Australia, 13 October 2014).

[37] *Koowarta v State of Queensland* [2014] FCA 627.

[38] *Regional Planning Interests Act 2014* (Qld); Department of State Development, Infrastructure and Planning (Qld), *Cape York Regional Plan* (Report, August 2014) https://dsdmipprd.blob.core.windows.net/general/cape-york-regional-plan.pdf..

beyond the Wild Rivers declarations Pama had just successfully fought against. Yet again no consent was obtained, and no fair deal struck before imposing obligations on Indigenous land holders' private property rights. There was no compensation and not a single dollar was provided to create jobs or fund conservation and land management activities.

While the private property rights and future opportunities of *Pama* have been extensively impacted under the plan, this was not true for any other category of land holders. Indeed, the Queensland Government concurrently acted to wind back land clearing controls to strengthen the rights of pastoral lease holders on Cape York. For example, it allowed clearing of remnant vegetation on the pastoral lease at Olive Vale Station in Cape York, which was outside the Strategic Environmental Area.[39] On the other hand, the State Party forcibly retired Indigenous agricultural opportunities even though outside the Strategic Environmental Area and on land held by the Hope Vale Congress, disallowing land clearing - again without consent, compensation or provision for any job opportunities and conservation activities.

2. Mining and resource development impacts on Native Title

Cape York has experienced a surge in exploration tenements, putting enormous pressure on CYLC and Prescribed Bodies Corporate (PBCs), which are struggling to keep up with the demand. This influx underscores significant shortcomings in the Future Acts process established by the NTA which ostensibly aims to protect Native Titleholder interests but in practice, fails to provide adequate recognition and protection.

The Future Acts regime of the NTA fails to provide the necessary protection and recognition for the reasons outlined earlier in this submission. There absence of a coherent system to manage the flood of exploration applications effectively is glaring. The current resourcing is insufficient, leaving PBCs and CYLC overwhelmed and unable to advocate effectively on behalf of Native Title Holders. This systemic deficiency highlights the need for a robust overhaul of how Future Acts are managed, ensuring that Native Title Holders have a meaningful say in the exploration and development activities on their lands.

Economically, *Pama* often find themselves on the losing end of negotiations. While the Western Cape Communities Coexistence Agreement (WCCCA) ILUA (2001) and the Alcan Agreement (1999) were considered national benchmarks for how resource development can coexist with Indigenous interests, these agreements primarily revisited old bauxite mining leases rather than addressing new Future Acts. The companies involved pursued these agreements as part of a broader strategy of corporate responsibility and community relationship building, following years of profit-making that excluded economic benefits to *Pama* and their communities. These agreements were not driven by the provisions of the NTA, which played a minimal role in the negotiation processes.

In terms of benefits sharing, the best example of a precedent beneficial agreement for *Pama* in Cape York remains the Cape Flattery Agreement with Mitsubishi, which was negotiated by the CYLC and the Hope Vale community prior to the enactment of the NTA. Reflecting on this

[39] Mark Willacy and Mark Solomons, 'Olive Vale: Queensland Government Asks Commonwealth to Stop Bulldozers Clearing Land on Cape York Property' (News Article, National Reporting Team, ABC News, 4 June 2015) https://www.abc.net.au/news/2015-06-04/queensland-government-steps-in-to-stop-olive-vale-land-clearing/6521928.

35 years later, it is shocking that the most economically advantageous deal for *Pama* was secured before *Mabo (No.2) and* the NTA came into effect.

The experiences of *Pama* with mining and resource development agreements post-NTA starkly illustrate the limitations of the current legislative framework in ensuring equitable economic benefits for Indigenous communities. The contrast between the outcomes of agreements negotiated independently of the NTA and those influenced by it underscores the urgent need for reforms. These reforms should aim to enhance the bargaining power of Native Title Holders and ensure that they receive a fair share of the benefits arising from the use of their lands, aligning with principles of equity and justice in resource development negotiations.

Remedying section 38 of the NTA is the key.

3. Unfair exclusion from Australia's carbon markets

In the old economy, while Indigenous Australians were excluded and dispossessed of our land rights, pastoral lease holders and other farmers were able to benefit from wholesale land clearing and other environmentally destructive practices. While Indigenous Australians were initially optimistic the carbon offset market would represent a significant opportunity in the new economy to drive sustainable poverty alleviation in *Pama* communities, the reality is Indigenous people have continued to be unfairly excluded by State and Commonwealth governments.

In 2011 the Australian Government legislated to create a discriminatory carbon offset market, severely curtailing the opportunity for Indigenous people to benefit from the carbon economy. The scheme allows pastoral lease holders to benefit from Australia's Emission Reduction Fund for re-foresting activities, without any involvement or consent of Native Title Holders.[40] The Native Title Holders for the same parcel of land are unable to benefit.[41] We are aware that some pastoralists in Cape York have been making more than $1million per year under the carbon scheme since 2011, while not a cent has been made by the Native Title Holders for these same land areas in which they are the putative Native Title Holders.

Again, this was the connivance of environmental group advocates of carbon offset markets working with Labor and Lober-National governments alike. Indigenous Australians dispossessed in the old economy, were dispossessed in the so-called new economy.

4. Risk of a repeated exclusion from Australia's Biodiversity Certificates scheme

In the old economy, while Indigenous Australians were excluded and dispossessed of our land rights, many others benefited from a wide range of practices that depleted biodiversity in our waterways, destroyed habitat for native species, caused soil erosion, and reduced drought

[40] The Australian Government legislated opportunities for the land sector, which produces approximately 18% of total greenhouse gases in Australia, to participate in carbon markets under the *Carbon Credits (Carbon Farming Initiative) Act 2011 (*Cth), which gives access to Australia's Emission Reduction Fund.
[41] Despite historic opposition including from government, *Pama* won recognition of our native title rights over large areas of pastoral lease land in Cape York for example in *Wik*. This native title does not confer any right to exclusive possession, but nor does a pastoral leaseholder have such a right, so there is no basis for the discriminatory treatment embedded in the new carbon market.

resilience. There are risks Indigenous Australians will again be unfairly excluded as the "the State Party" – yes, the Albanese Labor Government under Environment Minister Tanya Plibersek– legislates to create new nature repair markets so Australia can meet its commitment to increased protections under the Kunming-Montreal Global Biodiversity Framework.[42]

Proposed laws will create a new market, like the carbon credit market, with tradable Biodiversity Certificates issued to those that invest in approved "biodiversity projects" which enhance or protect biodiversity in native species. Biodiversity Certificates issued to Australian land holders will be able to be on-sold to a wide array of entities including companies, governments and individuals. The scheme intends to make it easier for businesses, organisations and individuals to invest in landscape restoration and management.

While the proposed scheme provides a clear pathway for farmers to benefit, it is unclear whether Pama with native title and other land rights will be able to access this new market on an equitable basis compared to other categories of land holders.[43] If existing examples of biodiversity markets in Australia such as in New South Wales are indicative, this new market will likely not compensate Indigenous people equitably for their stewardship to the degree that is provided for farmers.

5. Flaws in the Future Acts Process

The current structure of the Future Acts process under the NTA is flawed. These flaws significantly impact the ability of Native Title Holders to manage and negotiate the use of their land effectively.

5.1 Exploration Permits in Queensland

Under s.29 of the NTA, exploration permits are notified, allowing the permit holder the right to explore for minerals but not explicitly granting rights to access the land for such activities. This necessitates a bifurcated process under the Land Access Code, which outlines procedures for entering and transiting through the land. Consequently, two separate Future Acts processes are triggered:

1. **Access to Minerals**: This process, attributed to the State, involves the granting of permits that authorise the exploration of minerals beneath the land.
2. **Access to Land**: Attributed to the proponent, this requires negotiation directly with the landholder to secure permission to physically access the land. This step is necessary even after the State has granted exploration rights, creating a disjointed and often cumbersome regulatory path.

This two part process means is onerous for PBCs. They are both necessary, but an approach that streamlines the two processes and preserves the rights of Native Title Holders to make

[42] *Nature Repair Market Bill 2023* (Cth); *Nature Repair Market (Consequential Amendments)* Bill 2023 (Cth).

[43] See various submissions made on the proposed Nature Repair Market laws highlighted the inequitable impact for First Nations, available: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/NatureRepairMarket/Submissions

decisions about access to their land, needs to found. At this point we do not propose what such a solution might be, only to identify this as a major source of transactional headache when it comes to dealing with the tsunami of exploration permits that are being issue in Cape York.

Crocodile egg collecting

Similarly, the issuance of research permits by the State of Queensland for the collection of crocodile eggs under s.24HA of the NTA illustrates another instance of this piecemeal approach. These permits focus solely on the right to access the natural resource (crocodile eggs) without addressing the right to access the land where these resources are located. Consequently, proponents must negotiate land access agreements separately with the landholders to legally enter the land to access crocodile eggs, triggering yet another two-fold Future Acts process:

1. **Access to Aquatic Resources**: Managed by the State, this process governs the legal right to harvest crocodile eggs from specific locations.
2. **Access to Land**: Requires proponents to secure agreements with landowners for physical entry onto the land, independent of the resource extraction permissions granted by the State.

This separation not only adds an additional layer of negotiation and potential conflict between the landholders and proponents but also places an undue burden on Native Title Holders. They are compelled to navigate through two parallel regulatory frameworks that could be more efficiently managed as a unified process.

5.2 Expedited procedure and the normal negotiation procedure

The NTA allows the Government Party to notify a right to mine under the expedited procedure, meaning certain exploration tenements can be granted without the full RTN process. This can occur if the exploration meets the criteria of section 237 of the NTA, which requires that activities do not cause significant disturbance to native title rights.

Under Queensland's exploration permits, activities such as hand sampling, aerial and geophysical surveys, trenching, core drilling and establishing work camps are allowed. These permits are classified as mining activities under the NTA.

The Queensland Government's Critical Mineral Strategy, which includes incentives like zero rent on exploration tenements, has increased pressure on Native Title Holders to manage the impacts of exploration activities on their traditional land and waters.

Including the expedited statement in a mining notification removes the Native Title Party's right to the normal negotiation process. Once included, the burden shifts to the Native Title Party to object within four months without which the mining interest's right is automatically granted by the State.

The objecting Native Title Party must then provide evidence to the NNTT to meet the criteria of section 237 of the NTA. This places distress on Native Title Holders, who must disclose sensitive cultural information to justify their objection to the expedited statement and substantiate their right to negotiate.

It is increasingly common for cases to be withdrawn under section 31(7), meaning the Government Party removes the expedited statement before a formal NNTT determination. This prevents the NNTT from assessing the State's regime and the effectiveness of the expedited procedure.

In one Cape York example, *Pama* were notified of five joint exploration tenements, through the expedited procedure, within a registered native title claim.

The matter progressed to the full inquiry proceedings before the NNTT. Prior to the NNTT providing a determination on the matter, the Government Party withdrew the expedited statement, and the tenements progressed under the normal negotiation procedure.

During negotiations for a native title agreement over the five exploration tenements, the proponent withdrew its tenements. The Native Title party was not notified of these withdrawals.

Within several months a new proponent had applied for tenements over the same area.

The Future Acts regime in its current form has created an incentive for proponents and the State to notify acts under the incorrect process and "hope" that the Native Title Party does not take resource-intensive steps to have the procedural issues resolved. Addressing these issues is resource intensive and places the burden of rectifying the incorrect notification on the Native Title Party.

Reform to the NTA must introduce an obligation on the Government Party to justify its decision to proceed with the expedited procedure and provide reasons as to why it has determined that a Native Title Party should not have the right to access the normal negotiation procedure.

5.3 Right to Comment

The procedural right to comment creates an obligation on a Native Title Party to provide its view by way of comment, within a prescribed timeframe, on particular acts contemplated under the NTA (ie s.24HA, s.24JB, s.24MD, s.24JA).

Upon providing its comment, there is no obligation on the issuing Party to provide confirmation of receipt of the comment or a response to the comment.

Compensation is generally attached to the acts subject to the right to comment, however this compensation is usually dealt with later and the right to comment has no effect to obligate a proponent to settle compensation before the act is done. For example, a permit to allow a mooring buoy to be installed in a river attracts the right to comment. The mooring buoy is for the purpose of anchoring a houseboat which will become someone's residence. Native Title

Holders with exclusive native title over that area of the river do not have the right to object to the proposed grant.

5.4 Section 24JAA

Notification of section 24JAA should not be permitted if there is no Native Title Party. In the event that the legislation requires native title to be dealt with, even though there is not a Native Title Party, the proponent should be obligated to notify the NTRB about the proposal and the representative body should assist with the facilitation of consultation. The costs of this consultation must be borne by the proponent.

The legislation must require the notification to expire so that the Native Title Party may be consulted as to the effects the notices may have on a changing community landscape. Consultation must be imbedded into the section so that the views of the affected Native Title Holders are not dismissed from the report required to be provided to the Commonwealth Minister (s.24JAA(16)).

5.5 Expedited Procedure

Under section 29(7) of the NTA, the Government may issue a notice creating a right to mine and include the expedited statement. The expedited statement is included on notifications where the Government deems the act will be compliant with section 237 of the NTA. The Government is not required to justify its reasons as to why it has applied the expedited statement (ie. removing the right to negotiate from a Native title Party).

The expedited procedure removes the Native Title Party's right to access the normal negotiation procedure.

If a tenement is granted under the expedited procedure, it means that it is granted without reference to the Native Title Party. In Queensland a generic set of conditions are applied to authorities notified with the expedited procedure attached, the Native Title Protection Conditions (NTPCs). These conditions will exist in relation to the grant for as long as the tenement is active. These conditions are not monitored by the State and the Native Title Party has limited jurisdiction to address non-compliance with the conditions.

When comparing the rights of a landholder to those of Native Title Holders under the expedited procedure, a landholder has the right to negotiate the terms upon which an authority holder comes onto its land when it is exploring for minerals, as well as matters such as employment and compensation for the impacts of the activities on the land. The expedited procedure strips the Native Title Party of accessing negotiation concerning any of these items.

The resources involved when a Native Title Party is required to provide evidence at the full inquiry is significant. This arbitral process is created through the States notification of a matter under the expedited procedure. The inclusion of the expedited statement, removing a Native Title Party's right to access the normal negotiation procedure, is determined without reference to the Native Title Party and places minimal burden of resources on the State or a Grantee Party throughout the dispute process.

Common practice in Queensland is that a 'top-up' agreement is negotiated when a tenement is notified as an act attracting the expedited procedure. This is an agreement negotiated

without the protection of good faith obligations. Generally, a proponent will not be agreeable to funding consultations as these are considered voluntary negotiations.

Because good faith obligations are not attributed to negotiations held under the expedited process, a proponent may choose to trigger a full inquiry before the NNTT and seek a determination as to whether the expedited procedure applies. At an inquiry a Native Title Party is required to provide evidence to justify its view that it should have been afforded the right to negotiate. The costs incurred by a Native Title Party to provide evidence at a full inquiry are significant and run into the tens of thousands per inquiry.

At an inquiry a Native Title Party is required to provide evidence to justify its view that it should have been afforded the right to access the normal negotiation procedure. In Cape York there are occurrences of the expedited procedure being issued over areas subject to determination of exclusive Native Title as well as areas that have historically had the expedited procedure deemed inappropriate.

The expedited procedure should only be left in the NTA if an onus is created on the notifying party to establish that the act does not attract the right to negotiate before issuing the notice.

5.6 Piecemeal future act notification processes

The Future Act Regime should consider the whole of a proposed act. The notification of segments of an act is ineffective as there is no accountability built into the system to monitor and regulate compliance of all these 'moving parts'.

It is proposed that reform to the Future Act Regime include the creation of a register that contains the future acts processes applicable to a project and the compliance status of each future act process. This information should be self-reported to the State.

The State should be accountable to this register and only grant the final approval for an act once a proponent has afforded the affected native title parties their procedural rights for all aspects of the project.

Notices must be adequately specific so that a Native Title Party can understand the scope of the proposed activity and its location. Vague and broad notices should be expressly identified under the legislation, as invalidating the act.

Amendment to the Future Acts Regime should expand the scope of the NNTT's register so that all future act notifications are registered. That is, the validity of a future act should be tied to its registration on the National Native Title Register. Future Acts on the register should therefore be accessible by NTRBs, Service Providers and Native Title Parties.

5.7 Notification and Consultation

Native Title Parties are regularly provided vague notifications, particularly under s.24HA, triggering the right to comment and potential compensation. Although compensation and the right to comment are triggered, there is no right for the Native Title Party to access any form of consultation with the proponent. Native Title Holders should be afforded the right to consult with the proponent so that it may explain the contents of the notification.

Consultation and a report lodged about these activities would provide the issuing parties and the native title groups a record of the concerns and impacts discussed in connection to a proposed act which can be dealt with through a compensation claim.

Obvious consideration will need to be given to activities not affecting freshwater areas as affecting the sea (ie. the barging of goods). The consideration of a houseboat receiving a mooring license on a river does not have the same impact as a barge route along the coast.

5.8 The Act cannot be done / Act can be done subject to conditions

A review of the s.39 criteria is required so that the Native Title Party can more effectively access the outcome that the 'act cannot be done' pursuant to s.38(1)(a).

It is a statistical improbability that of the 155 determinations made pursuant to s.38 of the NTA, only three (3) matters could satisfy the criteria for the act to not be done. This is an indictment on the NNTT. The NTA should not allow the NNTT to refuse a Native Title Party access to this relief.

6. Local government impacts on Native Title

Within Cape York, the dynamics of local governance, resources and funding reveal a pressing issue that significantly impacts Native Title Holders and their ability to control and manage their land. Aboriginal Councils, in particular, lack a conventional rate base and are therefore heavily dependent on State and Federal government funding. This dependency places these local governments in a precarious position, often making them susceptible to the political whims of higher government bodies. This situation complicates the governance of lands under Native Title, such as Deeds of Grant in Trust (DOGIT), reserve land, or leasehold land, where the autonomy and rights of Native Title Holders can be overshadowed by broader governmental agendas.

Section 24JAA allows State and federal governments to extend or renew leases for housing projects, ensuring continuity of public housing. Unlike other provisions in the NTA, Section 24JAA does not require negotiation or agreement from Native Title Holders. Therefore, a notice under S24JAA can be issued before there is a registered native title claim or determination.

> *Case Study*
> As a live example, a local government authority in Cape York issued a s.24JAA notification during the application stage of a native title claim. This section 24JAA notice was issued in 2013 and is still being relied upon by the LGA. The notification was issued several weeks before the claim was registered. As there was no registered Native Title Party, the obligation to consult was bypassed and only the representative body could access procedural rights. The representative body's procedural rights were to provide a 'right of comment'. The activities authorised against Native Title over a decade ago are still being undertaken without reference to the Native Title Holders whilst having force against native title.

This ongoing scenario underscores a systemic failure to adequately protect the interests and rights of Native Title Holders in the face of administrative and legislative processes.

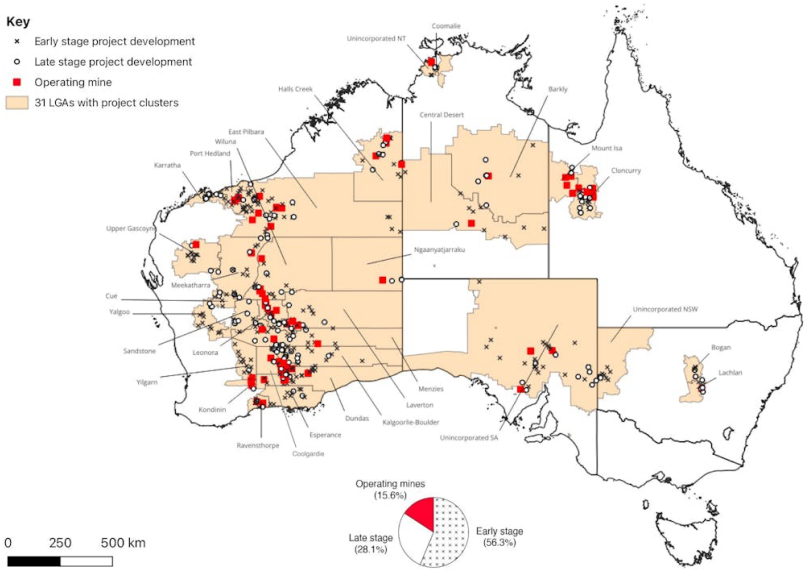
Critical Minerals and Clean Energy

1. Critical Minerals

Australia is said to be well positioned to become a key global supplier of critical minerals—such as lithium, nickel, cobalt, and silicon—essential for clean energy, technology, and defence. With growing demand for rare earths and a need for alternatives to China's supply, the Future Made in Australia initiative signals the Albanese Government's intent to invest in exploration, processing, and refining.

In his Closing the Gap Statement on 10 February 2025, Prime Minister Albanese described the renewable energy and critical minerals sector as "the best chance Australia has ever had to bring lasting economic growth and prosperity to remote communities".[44] He urged Aboriginal and Torres Strait Islander people to have a "real stake in the economic development of the land", without detailing how this would be achieved.

A University of Queensland report highlights that some of Australia's most disadvantaged communities are rich in critical minerals.[45] This makes them prime targets for mining, creating both pressure and opportunity. Historically, remote communities have not always benefited from resource extraction, reinforcing the need for strong Native Titleholder engagement and future act reforms in the critical minerals strategy.



[44] Anthony Albanese, 'Closing the Gap Speech' (Speech, Parliament House, Canberra, 10 February 2025) https://www.pm.gov.au/media/closing-gap-speech-2.

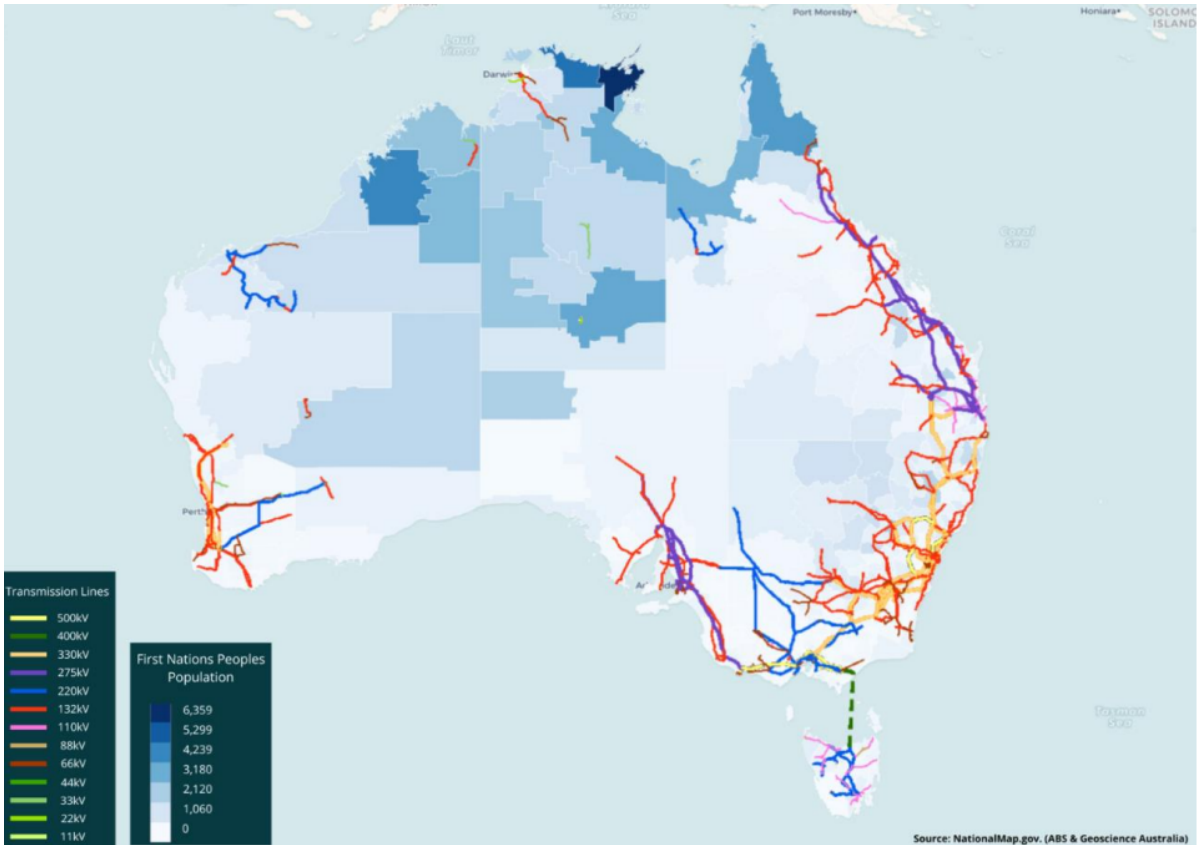
[45] John Burton, Deanna Kemp, Rodger Barnes and Joni Parmenter, 'A Socio-Spatial Analysis of Australia's Critical Minerals Endowment and Policy Implications' (2024) 88 *Resources Policy* 103330.

2. Clean Energy

Australia's clean energy transition is also said to be a pivotal opportunity for the participation of Indigenous Australians in these economic developments and wealth creation, particularly as the government aims for 82% renewable electricity by 2030 and net zero emissions by 2050.

In his Garma 2024 address, Prime Minister Albanese highlighted the potential for self-determination through economic security, emphasizing northern Australia's wealth in renewable resources and its role in making Australia a clean energy superpower. Again, details as to how this might be achieved are unclear.[46]

The First Nations Clean Energy Strategy responds to energy reliability challenges in remote communities and stresses that Native Title Holders must be fully informed and provide consent for developments on their land.[47] The strategy highlights agreement-making as the most effective mechanism for securing Indigenous participation throughout a project's lifecycle.



[46] Anthony Albanese, 'Address to Garma Festival' (Speech, Garma Festival, Gulkula, Northern Territory, 30 July 2022) https://www.pm.gov.au/media/address-garma-festival.

[47] Australian Government, *First Nations Clean Energy Strategy* (Report, Department of Industry, Science, Energy and Resources, 2023) https://www.energy.gov.au/energy-and-climate-change-ministerial-council/working-groups/first-nations-engagement-working-group/first-nations-clean-energy-strategy.

The strategy's recommendations align with the need for meaningful and respectful engagement with Native Title Holders through their representative bodies such as PBCs. Ensuring *Pama* have a significant stake in clean energy development is crucial for an equitable transition and long-term economic empowerment.

The review of the Future Acts Regime under the NTA presents a crucial opportunity to rectify long-standing issues that have historically restricted Native Title Holders from accessing substantial economic opportunities.

Prescribed Bodies Corporate (PBCs)

In Cape York, native title determinations has resulted in the establishment of 21 PBCs. Despite this considerable progress, only 13 of these PBCs receive direct support from the CYLC's under-resourced PBC Support Unit. The remaining PBCs are compelled to seek direct funding from the National Indigenous Australians Agency (NIAA) due to these limitations.

The 21 PBCs function alongside numerous Land Trusts, which are established over the same areas of land (as explained earlier in this submission). These Land Trusts operate under the *Aboriginal Land Act*, fulfilling different legislative requirements and adding another layer of governance that complicates land management and development initiatives in the region. This complex of structures underscore the need for proper resource allocations to ensure effective land management and development by Pama.

According to NIAA as at 30 June 2023 there were 258 registered native title bodies corporate (RNTBC) nationally.[48] This figure will have grown since this was released.

PBCs, especially those in remote regions, usually have the added challenge as the one-stop-shop to manage other *Pama* initiatives including land and sea management programs and community engagement. Often poorly supported and difficult to manage, programs will without significant support tend to struggle toward non-compliance placing the PBC in an "at risk" position.

In Cape York 30 RNTBC's or Prescribed Bodies Corporate (PBCs) are established. Most receive PBC Basic Support Funding from the NIAA of ~$80,000 per annum. Funding is used to support the PBCs in maintaining an office, engagement with external parties and facilitating meetings of directors and members.

Less than a quarter are involved with Indigenous Land Use Agreements connected to interests such as mining. These agreements are administratively complex especially when they consider regulatory requirements such as the distribution of royalties. Mining companies forego the challenging compliance complexities of distribution, instead deferring to the PBC –

[48] National Indigenous Australians Agency, *Annual Report 2022–23* (Report, 2023) Appendix F https://www.transparency.gov.au/publications/prime-minister-and-cabinet/national-indigenous-australians-agency/national-indigenous-australians-agency-annual-report-2022-23/section-6%3A-appendices-/appendix-f---registrar-of-indigenous-corporations-annual-report-2022%E2%80%9323.

an entity that ordinarily requires significant (usually externally sourced fee for service) support to manage.

Intersected and in many cases in conflict with PBC operations are locally based interests including land trusts and local government jurisdictions.

Considering an economy of scale that supports a number of PBCs and Pama at a sub-regional level will ensure entities are not competing for a finite pool of expertise to assist with the management of fiduciary duties, support a degree of information share and collective capability building as a way of building cohesion between PBCs.

Native Title Representative Bodies (NTRBs)

With increasing rates of native title claim determination, the traditional role of NTRBs is changing. The key challenge facing all NTRBs in a post-determination era, is how to continue to provide essential native title services to claim groups, while pivoting their operating model to support a growing number of aspirational PBCs, placing the focus on how to enable PBCs to become self-sufficient so that they are better able to secure effective and sustainable social and economic outcomes for Native Title Holders.

Although there are a growing number of successful native title determinations, it is clear that significant challenges in relation to the exercise of rights and interests in land exist, which limit the extent to which Native Title Holders have successfully leveraged economic development outcomes.

The imminent change in the demand for NTRB services also offers justification for considered changes to an NTRB's functional priorities in order to better meet the needs and to optimise operational efficiency. This means that there needs to be a shift to respond to increasing demands in other areas such as mediation and dispute resolution and commercial legal services, land tenure reform, organisational capacity-building and economic development opportunities in relation to land.

Reforms

No steps have been taken to address the unjust exclusion of Native Title Holders from carbon markets in areas under pastoral leases, nor to ensure that the planned expansion of nature repair markets through initiatives like a proposed Biodiversity Certificate scheme does not perpetuate this disparity.

Addressing the exclusion of Indigenous people from the carbon industry must be made a priority, ensuring that Native Title Holders have the opportunity to benefit equally with pastoral lease holders. Ideally, a 50:50 benefit sharing arrangement should have been established 14 years ago when these opportunities first became available, to provide equal access to both pastoralists and Native Title Holders. It is crucial that the Pama are given the chance to negotiate and consent to any proposed solutions through an ILUA process, ensuring their rightful inclusion and participation in these economically significant markets.

As we face the burgeoning agenda for critical minerals and renewable energy, a priority of both State and Federal governments, the Prime Minister has identified these sectors as golden opportunities for remote communities and Native Title Holders. However, if we merely replicate the approaches of the past 35 years, we risk looking back another three decades from now to find that Native Title Holders in remote communities have not substantially benefited from these industries. Historically, these communities have been beleaguered with suboptimal deals and marginal benefits, largely excluded from meaningful development.

The past three decades have shown that if Native Title Holders and their lands ascontinue to be treated as they have been, the outcomes in the next 30 years will likely mirror the inadequacies we contend with today. The approach to native title and its associated economic opportunities needs a fundamental transformation.

The RTN process, while intended to facilitate equitable benefits for Native Title Holders, has fallen short of delivering substantial economic advantages. Despite the significant economic benefits accruing to governments, investors, and the Australian public through developments on native title lands—from super profits for companies to royalties and taxes for governments—the only stakeholders left without guaranteed returns are *Pama*. Whether *Pama* realise economic benefits from these developments is left to the uncertainties of negotiation. As we have detailed in this submission, most negotiations have yielded minimal benefits. The framework established by the NTA, has not lived up to its promise.

This review by the ALRC presents a crucial opportunity for the future of native title rights in the context of economic development. Addressing minor procedural issues within the NTA, as highlighted in this submission and likely echoed by others, will not meet the substantial challenges we face. A deeper, more foundational reform is necessary.

At this stage our Cape York Regional Organisations can say we have more detailed thinking about how the processes of the NTA may be reformed, but we will not set them out in this submission. We wish to understand the views and ideas of our friends across Indigenous Australia, and to read the submissions to this review, before settling our thinking on reform solutions.

We propose that the ALRC convene a meeting with key stakeholders, particularly NTRBs and PBCs, to discuss these reform alternatives as part of the ALRC's mandate or as part of a separate process.

Our view about the implications of The Gumatj Case

It is the view of our regional organisations of Cape York that the ALRC should not use this review to attempt to answer the question of what should be done in the wake of this week's High Court decision in *The Gumatj Case*. That is a matter for the Gumatj to determine. They are still in the midst of a fraught legal case, and they should lead any response. Those of us

who are Native Title Holders and who are advocates for Indigenous Australian NTRBs and other organisations, should respect the Gumatj in this.

Our CYROs are particularly conscious that the Commonwealth Attorney is on the other side of the legal battle with the Gumatj, and he is responsible for commissioning this review. He allowed no quarter to the Gumatj when the Albanese Government took over their claim, and it is fair to say prosecuted the Commonwealht Government's position on the appeal with a vigorous denial of their claims, quite out of tune with the stated intentions of the NTA.

It places the Attorney and the Commonwealth in an acute conflict, which the ALRC should be conscious of, respectful of, and scrupulous in the way it deals with the active litigation in *The Gumatj Case.* This win in the High Court is theirs and we should be loathe to be propsing their win as leverage for other agendas that we may harbour, except in support of their leadership.