



Australian Government
Productivity Commission

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Unlocking the economic potential of native title

Productivity Commission submission

Submission to the
Australian Law Reform
Commission's Review of the
Future Acts Regime

July 2025



The Productivity Commission acknowledges the Traditional Owners of Country throughout Australia and their continuing connection to land, waters and community. We pay our respects to their Cultures, Country and Elders past and present.

The Productivity Commission

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Publication enquiries:
Phone 03 9653 2244 | Email publications@pc.gov.au

Introduction

The Productivity Commission welcomes the opportunity to make this submission to the Australian Law Reform Commission's (ALRC) Review of the Future Acts Regime (Review).

Native title holds significant potential as a vehicle for self-determined Aboriginal and Torres Strait Islander development. As of April 2025, Aboriginal and Torres Strait Islander peoples' native title rights cover 55.2% of Australia's land mass (NNTT 2025, p. 1). This figure is expected to increase to 65% by 2030 (JSCATSIA 2024, p. 57), which highlights the considerable expansion of the Aboriginal estate since the commencement of native title.

Yet, Aboriginal and Torres Strait Islander people widely agree that native title has not delivered the sustainable outcomes envisioned by the legislation's architects (AHRC 2015, p. 70). This view is supported by data that highlights the disparity of economic outcomes between Aboriginal and Torres Strait Islander people and non-Aboriginal and Torres Strait Islander people in areas such as home ownership, homelessness and employment (ABS 2021).

The ALRC's Review is to be guided by a key term of reference to have regard to the opportunity of the native title system to contribute significantly to economic outcomes for Aboriginal and Torres Strait Islander people. The PC submits that under the current system such contributions are not being realised. Of concern to the PC are the systemic barriers – overlooked in the ALRC's discussion paper – that prevent Traditional Owners from effectively accessing and leveraging native title rights for economic investment, enterprise development and community empowerment.

Drawing on a previous finding that accessing capital is the greatest barrier to Aboriginal and Torres Strait Islander economic development (JSCATSIA 2024, p. xii), this submission highlights barriers to accessing capital that are currently experienced through the native title system – the inability to leverage the true liquid value¹ of native title within conventional financial institutions and the use of charitable trust structures. Additionally, this submission points out the fundamental barriers and necessary reforms for recognising Aboriginal and Torres Strait Islander interests in water management, access and entitlements.

The PC recommends the ALRC consider legislative and regulatory reform that removes these barriers, thereby expanding options for Traditional Owners to deploy native title capital in a way that aligns with their own aspirations for economic self-determination.

Title to land should catalyse Aboriginal-led development

Title to land is a significant asset for Aboriginal and Torres Strait Islander people. It is also an asset that offers a platform for Aboriginal and Torres Strait Islander people's participation in business.

Traditional Owners want to use native title as means of Aboriginal and Torres Strait Islander-led production, not just for passive participation in land use and development (JSTNA 2022, p. 69). Communities are brimming with ideas on how they can best advance sustainable economic, social and cultural outcomes for current and future generations. However, for Traditional Owners, title to land by itself is not enough to secure

¹ Liquid value refers to the ease with which an asset can be converted into cash, close to its assessed market value. It's a measure of how readily available an asset is to be used for spending or investments.

investment and finance for community-led development projects. One reason for this is due to the restrictions and complexities Traditional Owners face in leveraging the liquid value of native title.

Native title land is difficult to value in liquid terms due to its unique legal status and deep cultural significance. Traditional valuation methods may not adequately capture the non-economic value associated with native title, such as the spiritual and cultural connections to the land. Further, native title land, due to its inalienable and communal nature, cannot be used as collateral for borrowing amongst most conventional financial institutions. This has the effect of locking Traditional Owners out of mainstream capital markets.

The inability of Traditional Owners to leverage native title land for commercial purposes is a significant barrier to economic self-determination (JSCATSIA 2024, p. 57). The PC notes that the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs has recommended that the Australian Government 'strengthen existing, and develop new, instruments to enhance and fast track Aboriginal and Torres Strait Islander people's access to finance and capital' (JSCATSIA 2024, p. 156).

The PC supports the recommendation of the Joint Standing Committee. The recommendation emphasises the importance of providing Traditional Owners with broader financial mechanisms and choices to pursue economic development opportunities and outcomes aligned with their community aspirations and priorities. The PC suggests the Government should consider instruments that help recognise the value of native title and allow Traditional Owners to secure investment and finance for community-led development despite the title's unique legal status. Any such instrument must protect underlying native title rights while empowering Traditional Owners to use their assets to achieve cultural, social and economic aspirations.

While charitable trusts protect the integrity of funds, they act as a barrier to economic self-determination

Under Australia's current native title system, registered native title body corporate organisations commonly establish charitable trusts to manage native title benefits on behalf of the Traditional Owners for taxation and governance related purposes. While the charitable trust structure is intentionally designed to ensure integrity and accountability by limiting distributions to purposes deemed 'charitable' under Australian law, the PC has found this structure to inadvertently hinder the opportunity of Aboriginal and Torres Strait Islander economic empowerment through native title benefits (PC 2020, p. 30).

Under the use of charitable trusts, native title benefits are distributed for activities providing short-term individual benefit – such as scholarships, funeral expenses, white goods, to meet emergent health care costs and provide living necessities for vulnerable families – rather than activities enabling collective sustained community benefit.

As a result, substantial amounts of native title funds remain locked in conservative income trusts, rather than being used for active investment and development. This not only results in the underutilisation of native title capital but also diminishes its value over time. For example, data from 2023 outlines that in Western Australia's Pilbara Region, six of the wealthiest native title groups collectively held over \$1.4 billion in income within charitable trusts over the past decade. As of June 2023, 40% of that income had been distributed over the past decade (National Indigenous Times 2024). Census data from the Pilbara region shows this

substantial amount of native title capital has not equated to strong economic outcomes for Aboriginal and Torres Strait Islander people living in this region (ABS 2021).²

The PC notes that the use of charitable trusts for native title benefits undermines the policy intent of Closing the Gap. It creates a system that blocks long-term economic, social and cultural progress, and fails to deliver intergenerational change for Aboriginal and Torres Strait Islander people. Reform is needed to provide Traditional Owners with greater flexibility and choice in the pathways available for the deployment of native title capital, including enabling investment options beyond those currently limited by charitable law.

Access to capital must be enhanced for economic outcomes to be achieved and future productivity gains to be realised

The Aboriginal business sector is seeing significant growth. In 2022 the sector generated \$16.1 billion in revenue, employed 116,795 people and paid \$4.2 billion in wages (The University of Melbourne 2024, p. 5).

The PC acknowledges that the contribution of the Aboriginal business sector goes beyond the financial benefits it has on the Australian economy. Aboriginal businesses are 40 to 100 times more likely to employ Aboriginal and Torres Strait Islander people than non-Aboriginal owned businesses (Supply Nation 2022, p. 1), more likely to use other Aboriginal businesses in their supply chain, offer more Aboriginal training opportunities and create the provision of culturally sensitive services to communities (PWC 2018, p. 18). A multiplier effect is created by the sector that inspires further Aboriginal and Torres Strait Islander entrepreneurship and fosters greater economic, social and cultural development for Aboriginal and Torres Strait Islander people.

There is the potential for significant expansion within the Aboriginal business sector (PWC 2018). However, Aboriginal and Torres Strait Islander owned businesses report increased barriers accessing mainstream finance and business advisory services to start and grow a business (JSCATSIA 2024, p. 15). Such barriers exist due to the complexities in leveraging land to access commercial finance for economic purposes, a lack of institutional trust and negative risk stereotypes. Additionally, government practices have left Aboriginal and Torres Strait Islander communities with low rates of intergenerational wealth transfer. This has limited the avenue of lending finance from family and friends, a widely used tool for economic advancement available to non-Aboriginal and Torres Strait Islander people.

The continued growth of the sector presents a powerful opportunity to advance economic outcomes for Aboriginal and Torres Strait Islander people. In 2023 the PC identified improved access to capital as a key driver of increased productivity (PC 2023, p. 15), and that productivity and prosperity go hand in hand (PC 2023, p. 1). Considering this, and the barrier to finance commonly reported by Aboriginal and Torres Strait Islander owned businesses, this submission recommends the ALRC to consider reforms that enable Traditional Owners to freely explore and make informed decisions regarding the investment of native title capital in Aboriginal and Torres Strait Islander owned enterprises.

² Only 12.4% of Aboriginal and Torres Strait Islander people living in the East Pilbara region and 13.6% of Aboriginal and Torres Strait Islander people living in the West Pilbara region own their own home with or without a mortgage. This is compared to the non-Aboriginal and Torres Strait Islander national percentage of 68%. In the East Pilbara region of the 465 people that were identified as homeless or likely to be homeless, 365 (78%) of these individuals identified as Aboriginal and Torres Strait Islander people. In this region, Aboriginal and Torres Strait Islander people make up only 24.9% of the total population. Further, the employment rate for Aboriginal and Torres Strait Islander people in the Pilbara region continues to be below the national non-Aboriginal and Torres Strait Islander rate of 78%, with only 55.4% of Aboriginal and Torres Strait Islander people aged 25–64 employed in the East Pilbara region and 56.3% in the West Pilbara region.

A call for a new vehicle of benefit management and investment

There is broad recognition across government, business stakeholders and Aboriginal and Torres Strait Islander people that native title has not created sufficient progress towards the economic self-determination of Aboriginal and Torres Strait Islander people. The PC acknowledges that alongside such recognition has been the call for a new vehicle of benefit management and investment.

Reports, such as the Taxation of Native Title and Traditional Owner Benefits and Governance Report, and the Resources Sector Regulation Report, have acknowledged the current charitable trust structure as a significant barrier to unlocking the economic potential of native title capital (Treasury Working Group 2013, p. 15; PC 2020, p. 30). Both reports have identified the need for a new vehicle that will enable Traditional Owners to use native title benefits for broader economic and community development purposes beyond what is currently permitted under charitable law.

The 2013 Treasury Working Group Report recommended the establishment of Indigenous Community Development Corporation (ICDC). The proposal for the ICDC was developed in conjunction by the National Native Title Council (NNTC), the Minerals Council of Australia, native title tax experts and Indigenous leaders. Proposed to be established as a not-for-profit corporation, the ICDC would enable native title benefits to be invested in Aboriginal owned businesses and associated initiatives established for community benefit (Treasury Working Group 2013, p. 7).

In 2019, the NNTC and the Minerals Council of Australia developed an updated proposal to the ICDC – the Prescribed Body Corporate (PBC) Economic Vehicle Status (EVS) (NNTC 2019, p. 3). The PBC EVS proposal involves the establishment of an optional ‘economic vehicle status’ designation available to PBCs. Such a status would allow PBCs to undertake economic development activities while still accessing tax concessions that apply where an organisation is seeking to address disadvantage (NNTC 2019, p. 3). The principles behind the PBC EVS have been endorsed by the 2013 Treasury Taxation of Native Title and Traditional Owner Benefits and Governance Working Group, and by the Our North, Our Future, White Paper on Developing Northern Australia (NNTC 2019, p. 3).

The PC notes that despite being recommended to Government through numerous reviews and submissions (Treasury Working Group 2013, p. 7; NNTC 2019, p. 3; NNTC 2020, p. 1; NNTC 2023, p. 33), neither the ICDC nor the PBC EVS proposals have been implemented by the Government. The PC submits the benefit such proposals would have on broadening the range of options available to Traditional Owners to effectively leverage native title for investment, enterprise development and economic and community development.

In considering options for a new vehicle of benefit management and investment, the PC recommends the ALRC also look to the example of New Zealand’s post-Treaty settlement framework – particularly the role of Post-Settlement Governance Entities (PGSEs). PGSEs are designed to empower Māori iwi with the autonomy to manage settlement assets for intergenerational benefit, offering flexibility to invest in enterprise development, property, education, and environment initiatives, among others, in ways that align with community values and aspirations.

Similarly, Aboriginal Investment NT provides a compelling domestic precedent. An Aboriginal-led financial institution, the organisation provides a platform for Traditional Owners in the Northern Territory to make informed investment decisions with royalties derived from mining on Aboriginal land. Providing grants to support community-led projects and Aboriginal enterprise development on the ground today, through to long term investments that build inter-generational wealth, Aboriginal Investment NT’s dual fund model ensures that capital is not only around for future generations, but actively used in line with community-driven

aspirations and priorities. Such a model enables choice, flexibility and self-determination in economic development for Traditional Owners in the Northern Territory.

The establishment of a new vehicle of benefit management and investment has the potential to open the door for intergenerational wealth creation for Aboriginal and Torres Strait Islander people, directly supporting the government's economic empowerment agenda and the policy objective embodied in the National Agreement on Closing the Gap.

Further reform is needed to recognise interests in water management, access and entitlements

Opportunities for Aboriginal and Torres Strait Islander people to determine when, where and how they use and access water also holds significant potential for economic development and for emotional, cultural and spiritual wellbeing.³

The proposed reforms aim to address some of the specific shortcomings relating to water in the Future Acts Regime. As the discussion paper recognises, most common future acts impacting water only attract a right to comment, not a right to negotiate, and this right to comment is inadequate for mitigating the impacts of future acts on water. The proposed impact-based model to categorise future acts (question 14) aims to address this inadequacy. The ALRC is also proposing amendments (question 16), recognising that the interconnected nature of water systems means that the impact of an act may occur in a location beyond, and a time later, than that which at the act occurred. Beyond these proposals, the ALRC should clarify how baselines will be developed to assess impact, including depending on what hydrogeological and other information is available, collected and monitored. In aiming to address ongoing and cumulative impacts, it is also important for the ALRC to clarify how it will reconcile the impact-based model for future acts with past water management and allocation decisions that caused (or are continuing to cause) negative impacts.⁴

The ALRC is also seeking input relating to whether water management planning frameworks should be classified as future acts (question 17). To address this question, the ALRC should clarify how the model will be operationalised in a range of water plan contexts. Under the National Water Initiative (NWI) (COAG 2004), jurisdictions are required to prepare statutory water plans for surface water and groundwater management systems in which entitlements are issued. The NWI also allows jurisdictions to determine the need for water plans for specific areas based on an assessment of the level of development, projected future consumptive demand, and the risks of not having a detailed plan.⁵ Depending on the water system, across Australia plans are variously in place, in development, undergoing or scheduled for review, or have not been developed. The ALRC should also consider how proposed reforms will interact with water planning processes, and affect the

³ There is now greater recognition by Australian governments of the impacts on Aboriginal and Torres Strait Islander people from the dispossession of their lands and waters (PC 2024, p. 67). However, currently Aboriginal and Torres Strait Islander people own and control less than 0.2% of water nationally (DCCEE 2025).

⁴ For example, the Murray–Darling Basin Plan requires Basin States to have regard to the views of Indigenous Australians across matters such as cultural values and uses, native title rights and claims, Indigenous Land Use Agreements, Aboriginal heritage, risks and cultural flows. Whilst native title rights were recognised for the Barkandji people over a large section of the Darling river in 2015, the PC has heard in successive inquiries of the impacts on Aboriginal people of poor outcomes from water resource management along the Darling/Baaka River (PC 2018, pp. 208–209, 2023, p. 268). The Murray–Darling Basin Plan will be reviewed in 2026.

⁵ In 2024 water plans areas covered 67%, 31% and 27% of water entitlement volumes in Western Australia, Northern Territory and Tasmania respectively (PC 2024, p. 131).

aims of water planning, in contexts where concerns have been expressed about: whether or not a water plan is needed, delays to water plan development, and/or the quality of governments' engagement processes.

Moreover, the discussion paper overlooks many fundamental barriers and necessary reforms for recognising Aboriginal and Torres Strait Islander interests in water management, access and entitlements – including those outlined in successive PC inquiries into national water reform and implementation of the Murray–Darling Basin Plan (PC 2018, 2021, 2023, 2024).

Under the NWI (COAG 2004), all jurisdictions committed to taking into account the possible existence of native title rights to water. However, native title does not automatically provide access to water in the form of statutory entitlements (i.e. secure property rights, that would foster investment confidence). Native title determinations can include rights to access and use water for domestic, social or cultural purposes, but the right to use water for commercial or economic purposes in native title determinations are rare.⁶

Some states have created alternative ways for Traditional Owners to access water based on native title rights, such as strategic Aboriginal Water Reserves (SAWRs) in NT, Queensland and Western Australia. However, there are a number of barriers to accessing this water, and at the time of the PC assessment of national water reform in 2024, governments had provided no or limited information about the application processes. There are very few examples of the use of native title rights by Traditional Owners to access water through SAWRs (PC 2021, p. 44, 2024, p. 81).

There is also significant need for governments to continue to enhance the role of Aboriginal and Torres Strait Islander people in water governance and management, to transparently report on how engagement informs water planning, and to provide funding and capacity strengthening to support water management partnerships (PC 2024, p. 71, 2023, pp.164, 171–172).

The PC recommends that the ALRC further explore opportunities for meaningful reform to recognise Aboriginal and Torres Strait Islander interests in water management, access and entitlements.

Unlocking the potential of native title requires urgent reform

A recent inquiry found that accessing capital is the greatest barrier to Aboriginal and Torres Strait Islander economic development (JSCATSIA 2024, p. xii). This submission has highlighted areas within Australia's native title system where significant barriers to accessing capital exist for Traditional Owners and Aboriginal and Torres Strait Islander people, as well as the fundamental barriers in recognising Aboriginal and Torres Strait Islander interests in water management, access and entitlements.

The PC recommends the ALRC to further explore the barriers highlighted in this submission and consider options for reform developed in partnership with Traditional Owners. Without meaningful reform in these areas, Traditional Owners will not be able to fully unlock the economic potential of native title and create sustainable social, cultural and economic development aligned with their communities' aspirations.

⁶ Three examples are documented on the Prescribed Body Corporate website: 1. *Akiba v Commonwealth* (2013), 2. *Rrumburriya Borroloola Claim Group v Northern Territory* (2016) and 3. *Wills on behalf of the Pilki People v Western Australia* (2014) (Prescribed Body Corporate 2023).

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