

21 October 2024

*spirit of  
Change*

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The Hon Warren Snowdon  
Chair, The Independent Expert Panel  
Review of the North Australia Infrastructure Facility  
NAIF Act Review Secretariat  
Department of Infrastructure, Transport, Regional Development, Communications  
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**Via email:** [NAIFactReview@infrastructure.gov.au](mailto:NAIFactReview@infrastructure.gov.au).

Dear Mr Snowdon

## ***Review of the North Australia Infrastructure Facility***

### **1. Introduction**

On behalf of the National Native Title Council (**NNTC**), I am pleased to put forward the following submission.

The NNTC is the peak body for Australia's Native Title and other Traditional Owner organisations. The NNTC represents Native Title Representative Bodies and Service Providers (**NTRB/SPs**) as well as Prescribed Bodies Corporate (**PBCs**) recognised under the *Native Title Act 1993 (NTA)* and other equivalent Traditional Owner Representative Institutions (**TORIs**) established under Traditional Owner land rights legislation such as the Victorian *Traditional Owner Settlement Act 2010*, the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and the *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA).

Our submission focuses on the Term of Reference specifically going to the issues affecting our constituency, namely "opportunities to support greater engagement and inclusion of First Nations people and organisations in NAIF projects, including procurement and employment, and as project proponents" However while this is the focus of our submission in addressing this issue, the submission is relevant to the Terms of Reference more broadly. Quite clearly, in addressing matters going to First Nations Peoples and the North Australia Infrastructure Facility (NAIF), the submission also addresses matters such as "the need for, and effectiveness of, the NAIF in

facilitating and supporting the development of economic infrastructure across northern Australia.”

In this submission reference will be made to Traditional Owners, rather than “First Nations peoples”. This terminology change is significant. It underscores the particular place of the Traditional Owners of northern Australia. Traditional Owners are not just a population group; they are those people who from time immemorial have owned and controlled the lands that are the subject of the Review. The significance of this simple fact must not be underestimated.

The submission suggests that with Traditional Owners representing 17.4% of the total population of northern Australia (30% of the total Australian Indigenous population) and holding some form of (Commonwealth recognised) legal tenure over 78% of northern Australia<sup>1</sup>, Traditional Owners must be central to the work of NAIF, not ancillary. The submission suggests that Traditional Owners have not been central to the work of the NAIF since its establishment in 2016.

The submission proposes several ways that Traditional Owners can become central to the work of NAIF into the future. These are contained in the four recommendations of the Submission, which are:

**Recommendation 1**

*The Review should recommend the NAIF engage with the National Native Title Council and key TORI bodies to participate in the design of a new product aimed specifically at the needs of TORIs.*

**Recommendation 2**

*The IM should be amended to require a proponent to provide evidence of a concluded ILUA (or where appropriate comprehensive non-native title agreement) with the relevant TORI as a requirement of any funding proposal.*

**Recommendation 3**

*The IM should be amended to require a project IES to specify employment and procurement targets comparable at a minimum to those contained in the Commonwealth IPPP. Ongoing access to the project facility should be dependent on the achievement of these targets. Achievement against targets should be reported annually on a project and whole of facility basis.*

**Recommendation 4**

*Working with the First Nations Economic Empowerment Alliance, that the NAIF legislation be amended to include an Indigenous inclusion on the fund of 20 percent, considering the population of First Nations Australians in the Northern Territory.*

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<sup>1</sup> North Australia Infrastructure Facility Discussion Paper, DITRDCA, 2024. (Discussion Paper)

## 2. Background and Structure of NAIF

The 2015 *Our North, Our Future: White Paper on Developing Northern Australia*<sup>2</sup> is generally regarded as the policy foundation for NAIF.<sup>3</sup> Following the release of the Discussion Paper NIAF was established through the commencement of the *Northern Australia Infrastructure Facility Act 2016 (Cth) (NAIF Act)*.

### ***The North Australia White Paper***

The White Paper itself dealt extensively with issues confronting Traditional Owners and had a particular focus (pages 15-34) on analysis and proposals to facilitate the ability of Traditional Owners to use their extensive land estate to simply improve investment opportunities for the benefit both Traditional Owners of that land and for the benefit of investors and the broader Australian community.

As the White Paper states (p 16):

*Land is of fundamental importance to Indigenous Australians for cultural, social and economic purposes. However, in many cases, Indigenous Australians do not have the same opportunities as other Australians to leverage their land assets to generate wealth. The Government is determined that native title holders and Indigenous businesses and communities should have this opportunity. While the focus of this paper is on northern Australia, any changes to native title would benefit Indigenous Australians across the whole nation.*

Specifically, the White Paper identified the crucial role of Traditional Owner Representatives Institutions (TORIs) especially Prescribed Bodies Corporate (PBCs). The White Paper stated (p 22):

*Native title corporations are registered following native title determinations. The primary duty of these corporations is to properly represent native title holders in decisions affecting their land. Investors who want to undertake developments on land where native title exists must deal with native title holders through these corporations. Stronger native title corporations can improve business confidence by reducing the delays and costs caused by drawn out negotiations in making an agreement. When they are working well, these bodies ensure that when potential investors ring, there is someone to answer the call.*

Notably, while the number of PBCs has increased since the (2015) publication of the White Paper there are currently over 270 PBCs across the continent.

On the issues of the fungibility of exclusive native title rights which are particularly prominent features of the WA native title landscape, the White Paper noted (p 24):

*Indigenous Australians should be able to use their exclusive native title to attract capital necessary for economic development. But banks do not lend against native title*

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<sup>2</sup> Commonwealth of Australia 2015 [www.infrastructure.gov.au/sites/default/files/documents/nawp-fullreport](http://www.infrastructure.gov.au/sites/default/files/documents/nawp-fullreport) (White Paper)

<sup>3</sup> Discussion Paper, 6.

*because native title is not transferable in the event of a default. Even though they have native title rights, Indigenous people cannot use them as financial security.*

The recommendations and actions to achieve this end were various. They included that:

- The Government will invest \$10.6 million to support pilot land projects which will be developed in partnership with business and Indigenous Australians, including land owners, to provide simpler and more efficient ways of investing in a wider range of activities.
- The Government will therefore progress options, in consultation with stakeholders, to support the use of exclusive native title rights for commercial purposes, including where they co-exist with an Indigenous pastoral lease (p 24).
- [T]he Commonwealth Government will consider options for managing and investing land related payments and other income to better support Indigenous economic independence. (p 25).
- The Commonwealth Government will provide \$20.4 million to better support native title holders to effectively engage with potential investors. This includes direct funding for native title corporations to manage native title on behalf of native title holders, and measures to improve the long-term capacity of the bodies. The funding will ensure corporations move beyond basic compliance to active engagement in development (p 23).
- More efficient native title processes that create more certainty for investors and opportunities for native title claimants and holders (p 10).

Excluding the recommitment of the ongoing native title sector claims funding contained in the Paper, the total financial commitment to Indigenous land tenure issues identified in the White Paper was \$47m. A further \$12.4m was identified to expand Indigenous Ranger programs.

The only other recommendation specific to Traditional Owners (in fact First Nations people generally across the continent) was found on p 12 which committed government to the establishment of “employment targets for Indigenous Australians, reflecting local Indigenous working age population, for **road projects** (and other relevant expenditure) funded through this White Paper.” (Emphasis added).

Outside of issues specifically affecting Traditional Owners the financial commitments in the White Paper include:

- \$6 billion to establish the NAIF
- \$600 million for roads
- \$200 million for water infrastructure
- \$100 million for Beef Roads
- \$75 million for a new Cooperative Research Centre
- \$40 million for airstrips

The list above only identifies commitments in the White Paper above \$30 million.

### ***The NAIF Act and the Investment Mandate***

Section 4 of the *Northern Australia Infrastructure Facility Act 2016 (Cth)* provides a summary of the operation of the Act in the following terms:

*This Act establishes the Northern Australia Infrastructure Facility to provide financial assistance to the States and Territories and to other entities for the development of Northern Australia economic infrastructure.*

*The Facility may determine terms and conditions for the provision of financial assistance. The Board of the Facility must act in accordance with directions given by the responsible Ministers (the Finance Minister and the Minister for Northern Australia). The directions are known as the Investment Mandate.*

*The Minister for Northern Australia has the opportunity to consider proposals to provide financial assistance for the development of Northern Australia economic infrastructure and may decide that particular financial assistance should not be provided.*

The s 4 summary of the Act however overlooks noting the objects provisions of s 3(1A) which specifies that:

*An additional object of this Act is to facilitate the provision of financial assistance for the development of Northern Australia economic infrastructure that meets the particular needs of Indigenous persons.*

Within the current Investment Mandate made under the NAIF Act there are two references to “Indigenous People”. Clause 20 requires a report on benefits to Indigenous people arising from the work of the facility as a part of the Governance Reporting and publication of a Projects Indigenous Engagement Strategy — after the making of an investment decision.

Schedule One to the Mandate sets out the eligibility criteria for financial assistance. It requires that the Facility must be satisfied there are benefits to a project, which *could* include Indigenous employment and procurement targets. It requires a project to have an Indigenous Engagement Strategy (IES) (clause 5) setting out objectives going to matters such as employment, procurement and training. The clause provides

*These objectives should be designed in partnership with local Indigenous people, where feasible and where agreement can reasonably be reached.* (Emphasis added)

The clause goes on to require a proponent to provide reports against the IES.

Schedule 2 to the Mandate requires that a project must align with one or more of the specified 21 “government policy priorities”.

Three of these policy priorities are specified as:

- *Projects which demonstrate alignment with Priority Reforms of the National Agreement on Closing the Gap.*
- *Indigenous-led projects, including verified Indigenous controlled and owned businesses.*

- *Projects which would produce material improvements in the lives of Indigenous people.*

In short, despite the specific terms of s 3(1A) of the NAIF Act, a project need not demonstrate any benefit to Traditional Owners but it may be desirable that it demonstrate some ‘employment, procurement or training’ benefit to First Nations people generally across the continent and that these benefits are designed with local Traditional Owners “*where feasible and where agreement can reasonably be reached*”.

Of relevance, and discussed further below, is the NAIF policy regarding minimum facilities. This is described in the Discussion Paper (p 11):

*NAIF’s website states that “because of the high level of work required to carry out due diligence, assess public benefit, complete all documentation, and develop Indigenous Engagement Strategies, we primarily focus on providing loans above \$10 million.” These obligations may in practice enforce a floor for loan size under which it becomes untenable for proponents to seek NAIF financing. The [NT Local Jobs Fund] has different due diligence processes and a clear mandate to make small loans, but the low demand to date has meant no small loan agreements have yet (as at 31 July 2024) been entered into.*

As the Discussion Paper also notes, in practice the size of loan facilities has increased over time.

With this operational issue identified it is worth restating the general point regarding the NAIF structural arrangements. Traditional Owners constitute 17.4% of the total population of northern Australia (30% of the total Australian Indigenous population) and hold legal tenure over 78% of northern Australia. The 2015 commitments totalling \$60m (over apparently four years) in the White Paper and provisions set about above of the NAIF Act are the way the existing structures address the concerns of this most significant section of northern Australia.

The NAIF legislation needs amendment to allow for greater access of the fund to Indigenous owned and led infrastructure projects via an Indigenous inclusion mechanism of 20 percent to either an Indigenous owned fund or Indigenous owned project financing (**Recommendation 4**). The details of the amendments should be worked out in greater detail with the First Nations Economic Empowerment Alliance.

#### **Recommendation 4**

***Working with the First Nations Economic Empowerment Alliance, that the NAIF legislation be amended to include an Indigenous inclusion on the fund of 20 percent, considering the population of First Nations Australians in the Northern Territory.***

### 3. Traditional Owners and the Operation of the NAIF

Given the limited opportunity to prepare this submission, for the purposes of assessing the impact of NAIF projects on Traditional Owners a random selection of 10 projects was made from the thirty-three projects listed on the NAIF website. A summary of the listed IES commitments and reported outcomes (where available) was made. Inevitably this summary and reporting is somewhat lacking in detail.

Project	Investment (\$m)	IES Commitment	IES Outcome (ID Date)
Chichester Solar	90	3% project hours Undertake cross cultural training	Procurement spend of \$4.7 m 87 staff undertaken cultural heritage training (2019)
Nolans Bore Rare Earths	200	Indigenous employment target of up to 20% over the life of the project. Sub-contractors to have Indigenous Engagement Plan	Not yet reported (2024)
Yangibana Rare Earths	220	Aims for 10% Aboriginal employment rate within 5 years Entering into Native Title Agreement* Will rehabilitate land* (*legal obligations)	Not yet reported (2022)
Mardi Salt	490	Seek to achieve and maintain 10% employment after three years. Introduce Indigenous Procurement Policy (% unspecified) Deploy a cultural heritage management plan* (* legal obligations)	Not yet reported (2020)
Kimberley Cotton Gin Project	34	10% direct and indirect Indigenous employment target across construction and operation phases of the Project.	Not yet reported (2021)
Thunderbird Mineral Sands	160	Aspirational 40% Indigenous employment by year 8 \$10m p.a. operational procurement spend	17% employment (avg) \$2.2 m p.a. spend. (2022)

Territory Infrastructure Loans	50	Aims to establish Indigenous Advisory Group  Have staff undertake cultural awareness training	Staff undertaken cross cultural training.  MoU with Northern Territory Indigenous Business Network to support awareness raising  (2021)
James Cook University Halls of Residence	46	3% employment target  Annual \$40k scholarship	3.9% procurement and 13% employment during construction.  Full scholarship amount awarded.  (2020)
Onslow Marine Supply Base	120.5	Unspecified employment and procurement targets  Communicate with local PBC  Develop respectful communication protocol	Identified two Indigenous firms awarded (Cleaning) contracts.  (2017)
Hemi Gold	150	Develop procurement and training policies  Abide by the terms of the Native Title Agreement. *  (*legal obligation)	Not yet reported  (2024)

The total investment from NAIF across these ten projects is \$1.5605 billion.

- The projected outcomes most reported are aspirational employment targets (for Indigenous people generally) that are below the percentage of the north Australian population that are Traditional Owners. From this it can be concluded that Indigenous employment outcomes which are *below* the levels of the local Indigenous population are perpetuating discriminatory employment practices.
- The same is true of the even more limited procurement outcomes.
- Often abiding by legal obligations is specified as an IES outcome.
- Virtually all the IES outcomes reported are actually a necessary cost of business to the proponent. A project must employ some people and there will usually be a legal or contractual obligation to undertake cross cultural training.



In short it is difficult to identify that the in excess \$1.5 billion of investment under the NAIF from these ten projects has produced any discernible outcome or benefit for the Traditional Owners of the lands the projects are undertaken on. Given the structural arrangements described in section 2, this outcome is as unsurprising as it is disappointing.

#### **4. Measures to improve NAIF Outcomes for Traditional Owners**

One of the Objects of the NAIF as set out in s 3(1A) is to “*to facilitate the provision of financial assistance for the development of Northern Australia economic infrastructure that meets the particular needs of Indigenous persons.*” In addition, the White Paper that was the policy genesis of the NAIF - identified a range of measures and proposals that would assist in achieving this objective. The White Paper did not however lead to the financial resources necessary to implement these measures.

A summary of the measures proposed to improve the operation of the NAIF was contained in the introduction to this submission. These were:

- The products NAIF offers can be expanded to include products specifically crafted to assist the economic development work of Traditional Owner organisations.
- The commercial projects funded by NAIF can incorporate far more ambitious requirements around Traditional Owner consent and participation, certainly beyond mediocre aspirational employment targets.
- The social infrastructure projects funded by NAIF can similarly include far greater focus on the needs and aspirations of northern Australia’s Traditional Owner community.

The following expands on these points.

##### ***Products Crafted to the needs of Traditional Owner Organisations***

PBCs and other TORIs can lead regional and remote development in northern Australia. The TORIs are not only organisations currently discharging statutory responsibilities under Commonwealth and state (Territory) law in regional and remote locations. They are also existing First Nations businesses that serve as a vehicle for self-determination. They are, or have the capacity to, serve as a vehicle for economic ownership and empowerment.

However, in many instances this potential to serve as a vehicle for economic self-determination — as the Indigenous *business* that can facilitate employment — is thwarted by short sighted government policy. This policy myopia extends to all levels of government.

The work of Woods *et al*<sup>4</sup> illustrates that of the (at that time) 260 PBCs, around 60% of them were classified by the Office of the Registrar of Indigenous Corporations as “small”. That is (in summary) they have a total gross income of less than \$100,00.<sup>5</sup> As Woods’ table illustrates, these “small” PBCs do not have sufficient funds to be able to employ even a single staff member.

TORIs with greater capacity also provide a benefit for non-Traditional Owner Businesses. As the White Paper noted:

*Stronger native title corporations can improve business confidence by reducing the delays and costs caused by drawn out negotiations in making an agreement. When they are working well, these bodies ensure that when potential investors ring, there is someone to answer the call.*

NAIF can achieve its statutory objective and the aspiration of the White Paper if NAIF were to design a product for smaller loans, potentially below the policy imposed \$10m minimum, designed to support the business expansion aspirations of northern Australia’s TORIs.

#### **Recommendation 1**

***The Review should recommend the NAIF engage with the National Native Title Council and key TORI bodies to participate in the design of a new product aimed septically at the needs of TORIs.***

#### **Enhanced Consent and Participation Requirements**

The Commonwealth Government is committed to the principle of Free Prior and Informed Consent (FPIC). This commitment is apparent from Australia’s ratification of the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP), from the fact of the Closing the Gap Policy and from a range of policy pronouncements of Government.<sup>6</sup>

The operation of the NAIF creates the opportunity to advance this policy objective through requiring proponents to give effect to the principle of FPIC in any funded project. Implementation of FPIC would require that land tenure approvals must be undertaken through an Indigenous Land Use Agreement (as opposed to non-consent

<sup>4</sup> K. Woods, F. Markham, J. Taylor, D. Smith, B. Burbidge and Y. Dinku 2021 *Toward A Perpetual Funding Model For Native Title Prescribed Bodies Corporate* (pp 6 – 7) CAEPR Commissioned Report No. 7 (Submission 55 to the JSCNA Inquiry into the Opportunities and Challenges of the Engagement of Traditional Owners in the Economic Development of Northern Australia

<sup>5</sup> <https://www.oric.gov.au/resources/factsheets>

<sup>6</sup> See for example Australian Government, 2022, Australian Government’s Response to the Joint Standing Committee on Northern Australia’s: “A Way Forward: Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge”; and “Never Again: Inquiry into the Destruction of 46,000 Year Old Caves at the Juukan Gorge in the Pilbara Region of Western Australia”

based future act mechanisms) where native title considerations arise. Even where native title considerations do not arise, project approvals should require evidence of a comprehensive negotiated agreement with the relevant TORI.

This is an important improvement from the current IM Schedule 1 clause 5 requirement that only requires (it will be recalled) that:

*These objectives should be designed in partnership with local Indigenous people, where feasible and where agreement can reasonably be reached.*

#### **Recommendation 2**

***The IM should be amended to require a proponent to provide evidence of a concluded ILUA (or where appropriate comprehensive non-native title agreement) with the relevant TORI as a requirement of any funding proposal.***

#### **Enforceable commitments in Project IES**

The extensive experience of the Commonwealth Government in the successful implementation of the Indigenous Procurement Program and associated policies has clearly demonstrated<sup>7</sup> that success requires:

- Ambitious, articulated, project targets.
- Transparency and accountability in the achievement of the targets.
- Political leadership in the desirability of achievement of targets.

The NAIF to date has lacked all of these features. Accordingly, the outcomes under NAIF are unfortunately equivalent to the early (2015–2017) outcomes of the Commonwealth IPP.<sup>8</sup> The very brief review of the outcomes under NAIF contained in section 3 of this submission illustrates this.

The recommendations arising from this are clear. These are that the IM should be amended such that the IES must contain specific employment and procurement targets that exceed a minimum established by reference to the current IPPP targets. These obligations should be *in addition* to commitments contained in the project agreement with the relevant TORI. Ongoing funding availability should be dependent on ongoing achievement of the IES commitments.

<sup>7</sup> See Storey, M Factors Affecting the Efficacy of the Australian Indigenous Business Exemption (2019) 1 Journal of Public Procurement 68-86.

<sup>8</sup> *id.*

The Government's commitment to achieving these objectives should be made an aspect of a regular public reporting process around the achievements of NAIF in advancing the s 3 (1A) objective.

**Recommendation 3**

***The IM should be amended to require a project IES to specify employment and procurement targets comparable at a minimum to those contained in the Commonwealth IPPP. Ongoing access to the project facility should be dependent on achievement of these targets. Achievement against targets should be reported annually on a project and whole of facility basis.***

## **5. Conclusion**

The current outcomes for Traditional Owners under NAIF are unsatisfactory. The NNTC believes that with these recommendations implemented, the outcomes for Traditional Owners arising from NAIF will be vastly improved. The improvement that is possible will allow the original objectives of the White Paper with respect to Traditional Owners to be achieved. Nearly ten years after the original release of the White Paper the time for action to achieve these outcomes is well and truly upon us.

The NNTC would be happy to present further in relation to this submission if this is desired by the Independent Expert Panel.

Yours sincerely



Handwritten signature of Jamie Lowe.

Jamie Lowe

Chief Executive Officer