

# FIRST NATIONS PEOPLES' RIGHTS WORKING GROUP



Responsible Investment  
Association Australasia

## Pre-Meeting Papers

### First Nations Peoples' Rights Working Group Meeting #3-25

31 July 2025 | 12pm-1:30pm AEST / 2pm-3:30pm NZST

**By Zoom** – Those registered to attend will receive a unique login from Zoom at least 24 hours prior to the meeting – please see your email inbox.

#### Agenda

Time (AEST)	Item	Action required
12 - 12:03	<b>1. Welcome (3 min)</b> <ul style="list-style-type: none"><li>○ Opening</li><li>○ Acknowledgement of Country</li><li>○ Minutes from last meeting</li><li>○ Principles of Participation</li></ul>	For information
12:03 – 12:33	<b>2. Special presentation and Q&amp;A – Perspectives on Indigenous Land, Sea, and Development (30 min)</b> <ul style="list-style-type: none"><li>○ Joe Morrison, CEO of Indigenous Land and Sea Corporation (20 min presentation, 10 min Q&amp;A)</li></ul>	For information and discussion
12:33 – 12:58	<b>3. Industry and subgroup updates (25 min)</b> <ul style="list-style-type: none"><li>• Aotearoa New Zealand (Temuera Hall, TAHITO) (10 min)</li><li>• Policy and Advocacy updates (Nayanisha Samarakoon, RIAA) (5 min)</li><li>• Dhawura Ngilan Business and Investor Initiative (Alan Dayeh, ERM) (10 min)</li></ul>	For information and discussion
12:58 – 1:28	<b>4. Workplan Updates (30 min)</b> <ul style="list-style-type: none"><li>• Workplan for 2025 progress update (15 min)</li><li>• Workplan for 2026 development (5 min)</li></ul>	For approval
1:28-1:30	<b>5. Closing (2 min)</b> <ul style="list-style-type: none"><li>• Key upcoming dates:<ul style="list-style-type: none"><li>○ For Aotearoa New Zealand<ul style="list-style-type: none"><li>- 15 - 21 September - Māori Language Week</li></ul></li><li>○ For Australia</li></ul></li></ul>	For noting

	<ul style="list-style-type: none"> <li>- 4 August - National Aboriginal and Torres Strait Islander Children's Day               <ul style="list-style-type: none"> <li>o International</li> </ul> </li> <li>- 9 August - International Day of the World's Indigenous People</li> <li>• Next meeting:               <ul style="list-style-type: none"> <li>o Thursday 14 October 12-1.30pm AEDT / 2-3.30pm NZDT – Register <a href="#">here</a></li> </ul> </li> </ul>	
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If you have any questions about this meeting, please contact [Shelina Fernando, RIAA's Working Groups Officer](#).

## Previous meeting's minutes

### Meeting #2 – 1 May 2025

Item	Action required
<b>1. Welcome - Co-Chair – Will Leak</b> <ul style="list-style-type: none"> <li>o Opening</li> <li>o Acknowledgement of Country</li> <li>o Minutes from last meeting</li> <li>o Principles of Participation</li> </ul>	Submit any amendments to the Minutes to <a href="#">Shelina Fernando (RIAA's Working Groups Officer)</a>
<b>2. Special presentation and Q&amp;A – First-Nations Clean Energy Network update (35 min)</b>  An update from the First Nations Clean Energy Network including on the First Nations Clean Energy Strategy - Chris Croker, Steering Committee Member and Jonathan Kneebone, Head of Policy and Engagement (First Nations Clean Energy Network)  <b>Purpose of the First Nations Clean Energy Network:</b> <ul style="list-style-type: none"> <li>• The First Nations Clean Energy Network was established to ensure First Nations peoples are front and centre in Australia's energy transition, with a focus on clean energy, economic independence, and self-determination.</li> <li>• The energy transition requires extensive access to land, water, critical minerals, and transmission infrastructure – all of which intersect with indigenous rights and country.</li> <li>• While rapid action on clean energy is urgent, the network stresses that this must not override the rights or participation of Indigenous communities.</li> </ul> <b>Reason for the launch of the Network:</b> <ul style="list-style-type: none"> <li>• A collective effort by advocates and community leaders who recognised a gap: First Nations people were not adequately represented in the planning or benefits of energy projects. In US and Canada, Indigenous ownership and participation occurred in utility-scale energy projects and in South Africa, black economic participation in renewable energy tenders was encouraged so the Network aimed to draw inspiration from these global initiatives.</li> <li>• The goal is to support communities from micro-scale solar installations that alleviate household energy poverty, to Gigawatt-scale projects that First Nations co-design, co-own and benefit from.</li> </ul> <b>Network membership and governance:</b>	To access the meeting papers, go on the <a href="#">RIAA website</a> and select; <ol style="list-style-type: none"> <li>1. “<b>Membership</b>” (top bar),</li> <li>2. “<b>Working Groups</b>” (bottom of drop-down menu),</li> <li>3. “<b>First Nations Peoples' Rights Working Group</b>”</li> <li>4. “<b>FNPRWG 2025 Meeting #2 - First Nations Clean Energy Network update</b>” (Scroll down to ‘Past meeting papers and presentations’)</li> </ol> If you require any assistance, please contact <a href="#">Shelina Fernando (RIAA's Working Groups Officer)</a>

- Governed by a steering group made up of members from across Australia, including strong representation from the Torres Strait Islands. It actively listens, consults and supports its broader membership.
- Represents a constituency of 1200-1400 individuals, corporations, and influential First Nations entities, from grassroots organisations to major land councils.

#### **Pillars:**

#### **Community:**

- **PowerMakers Program:**  
Now in its third year, PowerMakers program delivers practical training on energy development and First Nations rights. The 2023 cohort was from Queensland who addressed cases where large-scale renewable projects were being developed without proper community engagement. The 2024 cohort were the Whadjuk people from Fremantle, WA who focused on regulatory literacy, technology comprehension and negotiation skills for clean energy products.
- **Community Energy Planning toolkit:**  
Offers step-by-step guidance for First Nations communities to plan energy projects aligned with their priorities. The toolkit was developed in response to members asking why they are not benefitting from these energy projects. This can be accessed through the Network's website [here](#).
- **First Nations Project tracker:**  
This is an ongoing database of clean energy projects with significant Indigenous ownership or partnership. It tracks projects across Australia from community-led solar in Northern Territory to large-scale wind farms in Western Australia and Queensland. The current projects pipeline includes 10-20 early-stage projects; some utility-scale efforts exceeding 1 GW capacity.

#### **Industry:**

- The Network developed a Clean Energy Negotiations Guide to help First Nations organisations understand legal agreements, project financing and stakeholder engagement.
- They also authored the 10 best practice principles for Indigenous involvement in renewable projects. The principles covered free, prior, and informed consent, equity participation, revenue sharing, and community benefit. These principles have been endorsed by the Clean Energy Council; now commonly referenced in project development. This is a collaboration with industry to integrate principles into development protocol and soft regulation tools.

#### **Policy:**

- Policy and advocacy is instrumental in shaping the First Nations Clean Energy Strategy which was approved by the Department of Climate Change, Energy, Environment and Water in 2024, followed by \$70 million in funding.
- The Strategy outlines 24 clear actions to embed First Nations leadership in energy transition and work is underway to ensure implementation.
- In Ontario, Canada, renewable energy tenders required 25% First Nations equity participation while in British Columbia, Canada, new framework is under consultation to mandate Indigenous equity in clean energy tender and in South Africa, since 2012, there was a minimum requirement of Black ownership for renewable energy project bids.
- The Network will continue to work with the National Native Title Council on community benefit principles aligned with the 'future Made Australia' framework.

<ul style="list-style-type: none"> <li>Investors and developers should assess their capacity for genuine First Nations participation in energy projects and the promotion of demonstration projects, Indigenous co-ownership, and real-time problems solving should happen.</li> </ul> <p><b>Summary of discussion points:</b></p> <ul style="list-style-type: none"> <li>While the Network is regularly approached by industry players, seeking introductions to Indigenous groups, it guides stakeholders to appropriate contacts or support pathways where relevant, ensuring all engagement remains community-led and values-driven.</li> <li>A recent member gathering in Adelaide highlighted the importance of energy security, reliability and affordability in First Nations communities. Solutions discussed included localise infrastructure such as community batteries, and strategies for improving energy service delivery and ensuring tangible benefits from renewable projects.</li> <li>The Network is also exploring solutions to help First Nations groups leverage existing land and asset ownership into equity stakes in large-scale clean energy developments, addressing challenges at both the grassroots and utility scale levels. Through its project tracking database, the Network is mapping existing and emerging First Nations energy projects, helping to identify where interest lies and where support is most needed to bring projects to life.</li> </ul>	
<p><b>3. Industry and Working Group updates (30 min)</b></p> <ul style="list-style-type: none"> <li>First Nations Heritage Protection Alliance (Anirudha Nagar, NNTC)</li> </ul> <p>1. Future Acts Regime:</p> <ul style="list-style-type: none"> <li>Part of the Native Title Act 1993, outlining the procedural rights native title holders and registered claimants have when governments or companies seek to undertake activities on native title land.</li> <li>These procedural rights vary based on the type of act, include the 'right to comment', 'right to be consulted', and the strongest form, the 'right to negotiate', which may allow native title holders to veto certain proposals. However, the system has been widely criticised for prioritising development and investment over meaningful protection of native title rights. In practice, it is rare for native title holders to be able to stop a project.</li> <li>The process is resource-intensive and complex, placing significant strain on Prescribed Bodies Corporate (PBCs), many of which are under-resourced and based in remote areas. Often, native title holders have no meaningful power to prevent projects, with some describing the 'right to comment' as equivalent to a mailbox submission that may never be acknowledged.</li> <li>There is no legal obligation for government decision-makers to incorporate or act upon the comments made by native title holders under this system.</li> <li>In 2022, the Australian Parliament's Joint Standing Committee on Northern Australia recommended a review of the <a href="#">Future Acts regime</a>. This led to a law reform process led by the Australian Law Reform Commission.</li> <li>An issues paper was released in 2024, and submissions were made by the Network and others highlighting systemic flaws and calling for legislative reform.</li> <li>A discussion paper is expected in May 2025, with a seven-week consultation window, and submissions due by 10 July 2025. The final report will be submitted to the Attorney-General.</li> </ul>	<p>To refer to the slides shared by Anirudha Nagar during this presentation, please see the slides attached with the post meeting papers on <a href="#">the member portal</a>.</p>

- A major theme in submissions is the need for Free, Prior and Informed Consent (FPIC) to be respected and legally embedded In native title processes. Legislative recognition of FPIC is seen as the most effective way to honour First Nations rights and avoid repeating historical injustices.

## 2. Native Title Compensation

- In March 2025, the High Court of Australia handed down a significant decision involving native title compensation for actions taken by the Commonwealth Government in the Northern Territory between 1911 and 1978, a time before the Mabo period.
- The case centred on whether traditional owners were entitled to compensation for mining and other activities authorised by the Commonwealth during its administration of the Northern Territory, which occurred without the consent of native title holders.
- The High Court found that:
  1. Native title constitutes a form of property under the Constitution, and therefore, if extinguished by the Commonwealth, compensation is payable under Section 51 (“just times”)
  2. The “just terms” requirement applies to actions taken by the Commonwealth even when acting in its capacity as a territory administrator.
  3. A past release of land issued by the Governor of South Australia did not negate compensation rights and was rejected by the Court.

While the decision applied only to actions by the Commonwealth, not by State governments, it is expected to influence future cases and compensation mechanisms, particularly with several related High Court cases pending (e.g. the Indjilandji-Dhidhanu case concerning the mining activities by McArthur River Mining in the NT).

This case is expected to return to the Federal Court, where constitutional and evidentiary issues will continue to be examined.

## 3. Implications and further actions on compensation and consent

- The case has broader implications for how compensation is handled and how First Nations rights are respected in project planning.
- The NNTC and others are advocating for the Commonwealth to create an alternative compensation framework outside the court system-reducing costs, complexity, and delays for native title holders seeking restitution.
- The current system requires communities to spend millions in legal fees to access compensation, highlighting the need for a simpler, fairer process.
- The case also underscores the longstanding failure to secure proper consent from Traditional Owners for projects, particularly those launched in the 1950s – 1970s under economic development rationales that overlook cultural heritage and land rights.
- Investors should not rely solely on corporate disclosures. Instead, they should “look under the hood” to assess whether consent was genuinely obtained, whether Traditional Owners fully understood the proposals, and whether the process aligned with FPIC standards.
- The impact of poor consent processes extends beyond legal inability to include delays, reputational risks, and potential project disruption,

<p>with some delayed projects already costing hundreds of millions of dollars.</p> <ul style="list-style-type: none"> <li>• Policy and Advocacy updates (Nayanisha Samarakoon, RIAA) <ul style="list-style-type: none"> <li>○ RIAA's policy platform Australia 2025 can be accessed on their <a href="#">website</a> now which outline specific national priorities which is independent of any single political party and is intended to guide the priorities of whichever government takes office next.</li> <li>○ RIAA advocates for stronger frameworks and initiatives that support long-term financial sustainability, aligned with climate and social objectives.</li> <li>○ RIAA also has a collaborative partnership with the First Nations Clean Energy Network, which has served as a key contact in shaping First Nations-related policy. This collaboration if especially focused on the development of the First Nations Clean Energy Strategy, which supports a vision of sustainable energy future that is 'Made in Australia'.</li> <li>○ Feedback from partners such as Dhawura Ngilan on ensuring First Nations communities are leaders in the decision-making stages has reinforced the need for policy to go beyond providing resources; it must also uphold Indigenous leadership and self-determined approaches.</li> <li>○ RIAA is balancing its efforts between influencing current policy and preparing to respond to the priorities of the next government.</li> </ul> </li> <li>• Dhawura Ngilan Business and Investor Initiative (Jess Rowe, RIAA) <ul style="list-style-type: none"> <li>○ Work is ongoing across the three key pillars: Piloting, Awareness and Education.</li> <li>○ Updates on the Education pillar are expected soon, particularly regarding initiatives aimed at increasing industry engagement and uptake of the guiding documents.</li> <li>○ The Piloting stream is progressing, and further updates on specific activities and outcomes are anticipated.</li> <li>○ Efforts to integrate the Dhawura Ngilan initiatives with existing industry and business are under way. This integration will be a feature of an upcoming special presentation of a working group meeting, which will explore how existing standards can be assessed through the lens of Dhawura Ngilan - emphasising the initiatives should inform the standards, not the other way around. Supporting materials, such as imagery or a table mapping this alignment, will be released shortly to aid understanding and communication.</li> </ul> </li> </ul>	<p>To access RIAA's Policy Platform Australia 2025, go on the <a href="#">RIAA website</a> and select;</p> <ol style="list-style-type: none"> <li>1. <b>"Policy &amp; Advocacy"</b> (top bar),</li> <li>2. <b>"AU Policy Platform"</b> (top of drop-down menu)</li> </ol>
<p><b>4. Workstream and Subgroup updates (13 min)</b></p> <ul style="list-style-type: none"> <li>• Future Directors Concept subgroup update (Nikitha Kariyawasam, Regnan) <p>Nikitha Kariyawasam sent his apologies.</p> </li> <li>• Update by Jess Rowe, Manager of Working Groups <ul style="list-style-type: none"> <li>○ Regarding the Future Directors Subgroup, A diverse group of individuals have come together to explore ways to improve and strengthen the pathway for emerging directors, focusing on addressing challenges and identifying gaps in the current system. <ul style="list-style-type: none"> <li>○ Adam Davids, CEO of Career Trackers has been invited to the next subgroup meeting to share his insights. In addition, we will be reaching out to the Future Directors Program in New Zealand,</li> </ul> </li> </ul> </li> </ul>	<p>Any feedback on the workplan can be provided to <a href="#">Jess Rowe, (RIAA Manager of Working Groups)</a>.</p> <p>To join a subgroup, go on the <a href="#">RIAA website</a> and select;</p> <ol style="list-style-type: none"> <li>1. <b>"Membership"</b> (top bar),</li> </ol>

<p>to understand key challenges faced in implementing such programs and the gaps observed in the director development process.</p> <ul style="list-style-type: none"> <li>Other subgroup updates (Jess Rowe, Manager of Working Groups) <ul style="list-style-type: none"> <li>As discussed in the first meeting of the year, a number of subgroups have kicked off.</li> <li>Additionally, the DNBII Information Sharing subgroup has now also been launched. Those who have volunteers for these subgroups will receive invitations to the relevant meetings.</li> <li>For core policy standards development, co-chair Will Leak will continue to monitor submission opportunities related to core policy standards due to lack of volunteers. He will coordinate with Jess Rowe, Manager of Working Groups, to share these opportunities with the relevant teams when applicable.</li> <li>If you want to volunteer for a subgroup but haven't yet, please fill in the volunteering form available via the QR code in the meeting slides in the post meeting papers that will be up on the portal after the meeting or by visiting RIAA's website by going under 'Events' &gt; 'Memberships' &gt; 'First Nations Peoples' Rights Working Group' &gt; selecting the 'Join a subgroup' option.</li> </ul> </li> <li>RIAA Australia Conference 2025 on the 28 and 29 May 2025 <ul style="list-style-type: none"> <li>Highlighting the two working group sessions: <ul style="list-style-type: none"> <li>Catalysing Capital for First Nations investments moderated by Caleb Adams</li> <li>First Nations considerations: What responsible investment analysts need to know moderated by Will Leak</li> </ul> </li> </ul> </li> </ul>	<p>2. <b>"Working Groups"</b> (bottom of drop-down menu),</p> <p>3. <b>"First Nations Peoples' Rights Working Group"</b></p> <p>4. <b>"Join a subgroup"</b></p> <p>To register for RIAA Australia Conference 2025, go on the <a href="#">RIAA website</a> and select:</p> <p>1. <b>"Events and News"</b> (top bar),</p> <p>2. <b>"Australia Conference 2025"</b> (top of drop-down menu)</p>
<p><b>5. Closing (7 min)</b></p> <p>Key upcoming dates:</p> <ul style="list-style-type: none"> <li>For Aotearoa New Zealand <ul style="list-style-type: none"> <li>20 June – Matariki (The Māori New Year)</li> </ul> </li> <li>For Australia <ul style="list-style-type: none"> <li>26 May National Sorry Day</li> <li>From 27 May to 3 June – National Reconciliation Week <ul style="list-style-type: none"> <li>27 May – Anniversary of the 1967 Referendum</li> <li>28 May – Anniversary of the Sydney Harbour Bridge Walk for Reconciliation</li> <li>29 May – Anniversary of the Torres Strait Islander Flag</li> <li>3 June – Mabo Day</li> </ul> </li> </ul> </li> </ul> <p>RIAA Conference panels on First Nations Peoples' Rights</p> <p>Next Meeting:</p> <p>Thursday 31 July 12pm-1:30pm AEST / 2pm-3:30pm NZST – Register <a href="#">here</a></p>	<p><a href="#">Register here</a> for the next meeting</p>

# Action Register

Last Updated: 31 July 2025

Ref	Action	Delegation	Status
Previous			
6/25	To register for RIAA Australia Conference 2025, visit <a href="#">RIAA's website</a> .	All	Closed
5/25	To access RIAA's Policy Platform Australia 2025, visit <a href="#">RIAA's website</a> .	All	Ongoing
4/25	<b>Next Meeting</b> - Thursday 1 May 12-1.30pm AEST / 2-3.30pm NZST – <a href="#">Register here</a>	All	Closed
3/25	To volunteer for a subgroup, please fill in <a href="#">this volunteering form</a>	All	Ongoing
2/25	Any feedback on the workplan can be provided to <a href="#">Jess Rowe, Manager of Working Groups</a> .	All	Ongoing
1/25	Submit any amendments to the Minutes to <a href="#">Shelina Fernando, RIAA Working Groups Officer</a> .	All	Closed



# Engaging on Country and Native Title Policy

## Introduction

The *Aboriginal and Torres Strait Islander Act 2005* (Cth) (the ATSI Act) states that the purpose of the ILSC is to assist Aboriginal persons and Torres Strait Islanders to acquire land and water-related rights so as to provide economic, environmental, social or cultural benefits for Aboriginal persons and Torres Strait Islanders.

Established to partially redress the dispossession of First Nations peoples through colonisation, the ILSC provides for the contemporary and future land and water needs of Aboriginal and Torres Strait Islander people, particularly those unlikely to benefit from Native Title or land rights. However, after three decades and as the Native Title regime approaches full determination across Australia, the ILSC recognises that with increasingly settled Native Title claims, we must engage with Country under Native Title. We must change our approach and acknowledge that all Country has Traditional Owners, irrespective of Native Title status, so that we can become a better instrument through which First Nations peoples may achieve their aspirations for Country.

The ATSI Act does not limit or provide guidance on how we reach decisions on acquisition, divestment, or management over Native Title Country. However, to act in good faith and to maintain respect across First Nations communities, we must consider how our decisions affect Native Title rights.

This policy defines the ILSC's role in the Native Title sector, and provides clarity on the ILSC's approach to engaging on Country, including how we navigate consent, consistent with the *Native Title Act 1993* (Cth) (NT Act) and informed by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) principle of Free, Prior and Informed Consent (FPIC).

In implementing its functions, the ILSC:

- Acknowledges the Traditional Owners of Country throughout Australia and their continuing connection to land, sea, fresh water and community.
- Recognises that all Country holds this connection to Traditional Owners, irrespective of the formal recognition or otherwise of the rights and interests of Aboriginal persons and Torres Strait Islanders in particular Country
- Supports the right of Traditional Owners to make determinations about the legal ownership, use and management of their Country.
- Acknowledges the cumulative/perpetual nature of its purpose in the restoration of control over Country through the ownership of rights and interests by Aboriginal and Torres Strait Islander Corporations and that this purpose seeks to be a pathway for the partial address of dispossession.

## 1. Scope

This policy applies to all ILSC staff. Special consideration should be given to this policy when staff are undertaking the ILSC's acquisition, divestment and management functions.

This policy does not intend to provide guidance on the myriad of circumstances that could apply when the ILSC is carrying out its acquisition, management, and divestment functions, rather, it seeks to provide a principles-based framework to support robust and defensible decision-making.

## 2. Legislative and Policy Context

Relevant commonwealth legislation:

- *Native Title Act 1993* (Cth)
- *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth)
- *Aboriginal and Torres Strait Islander Act 2005* (Cth)
- *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)
- *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth)
- *Public Governance, Performance, and Accountability Act 2013* (Cth)

Relevant state and territory legislation:

- *Traditional Owner Settlement Act 2010* (Vic)
- *Aboriginal Land Rights Act 1976* (NT)
- *The Aboriginal Land Rights Act 1983* (NSW)
- *Acquisition of Land Act 1967* (QLD)
- *Aboriginal Lands Trust Act 1966* (SA)
- *Aboriginal Lands Act 1995* (Tas)
- *Aboriginal Affairs Planning Authority Act 1972* (WA)

## 3. Policy Context

- ILSC Service Charter
- ILSC Divestment Policy
- ILSC Consent and Caveat Policy
- ILSC Default PBC Policy

## 4. Guiding Principle

Country represents the lands, waterways, seas, skies to which Indigenous people are connected. It is so much more than a physical place, containing complex ideas and meaning about lore, place, custom, language, economy, spiritual belief, cultural practice, wellbeing, family, and identity. It is inseparable from people, community, and self, and cannot be separated into land, water and sea – it is all one.

This policy is intended to operate in a complementary manner to the three guiding principles of the National Indigenous Land and Sea Strategy (NILSS): Caring for Country, self-determination, and partnership. These principles also reflect the aspirations of First Nations communities that we heard through our national consultation.

It is recognised that all three principles are interrelated and vital to achieving the ILSC's vision for First Nations peoples to enjoy the rightful entitlements, opportunities and benefits that the return and management of Country brings.

## 5. The ILSC's approach to engaging on Country

The UNDRIP emphasises two key principles for ensuring First Nations peoples' rights and interests are protected; being engagement and consent.

- Engagement refers to a good-faith consultation process between interested parties and Indigenous peoples. This consultation should be conducted with the objective of reaching a mutually agreed-upon way forward.
- Consent, specifically FPIC, signifies First Nation Peoples' right to agree to or reject decisions affecting them and their Country. Consent must be freely given, without coercion or pressure, and based on a full understanding of the potential consequences of a project.

The following sections outline the ILSC's approach to fulfilling these UNDRIP principles.

## 5.1 Free, prior and informed consent

The ILSC recognises and commits to supporting the realisation of rights of First Nations peoples to self-determination and to freely pursue their economic, social, and cultural development. In doing so, the ILSC also recognises the right of Indigenous Peoples to give or deny their FPIC for projects that materially affect their land and their natural resources (as protected in UNDRIP).

FPIC means that consent is obtained:

- **free** from force, intimidation, manipulation, coercion or pressure and self-directed by the community from whom consent is being sought;
- **prior** to the project starting and before key decisions are made; and
- after Indigenous people are fully **informed** about the costs, benefits, risks and any other implications of the project, and have the opportunity to seek independent advice.

The ILSC is committed to conducting its activities in manner informed by and aligned to FPIC principles, and to the achievement of its statutory purpose. To this end, the ILSC will prioritise its efforts to uphold the principles of FPIC per the scope of this policy and proceed with projects and activities where consent has been withheld only in circumstances where the ILSC considers the outcome of not proceeding to be perverse, or demonstrably inconsistent with the purposes of the ILSC.

In doing so, the ILSC seeks to balance upholding FPIC principles with:

- recognition that FPIC is a standard that is emerging in contemporary policy dialogue, and is not embedded within current legislative frameworks; and
- the silence of the ATSI Act on the matter of consent, meaning that there may arise occasions where it is not practical, or within the intended purpose of the ILSC to only progress projects with Traditional Owner consent.

## 5.2 Determining consent

This section builds on the principles of FPIC outlined above. It explains how the ILSC determines consent from Traditional Owners, Native Title claimants, and Common Law Holders, particularly regarding acquisition, divestment, and management functions.

To emphasise the interrelatedness of engagement and consent in the context of UNDRIP principles, engagement in the Declaration refers to a good-faith consultation process. Consent, specifically FPIC, signifies Indigenous Peoples' right to agree to or reject decisions affecting them, after receiving full information.

It is the ILSC's preferred approach that Traditional Owner Groups manage their own engagement and consent activities with other affected Traditional Owners in forming a proposal to present to the ILSC under our acquisition, divestment and management functions.

In undertaking its acquisition, divestment, and management functions, the ILSC must consider how FPIC applies in instances where:

- the project involves a joint venture arrangement where the third-party partner is not the holder of Country on which the joint venture arrangement relies; and

- the ILSC is a project proponent, initiator or where the ILSC identifies an opportunity for a 'strategic' acquisition or management activity that may materially affect First Nations peoples' land and/or their natural resources.

### **5.2.1 Who should be engaged with?**

Where activities are proposed by the Traditional Owner Group, the ILSC will seek assurance that the approach to the ILSC in relation to the activity is duly authorised by the broader Traditional Owner Group.

Where acquisition, divestment or management activities are proposed by an eligible Aboriginal and Torres Strait Islander Corporation which the ILSC judges is not representative of the Traditional Owners of relevant Country, the ILSC will require the Corporation to formally engage with the Traditional Owners of the Country where the right or interest is located.

### **5.2.2 Where Traditional Ownership is undefined or contested**

Where Traditional Owners are not defined by a statutory regime, the ILSC will seek the advice of the Native Title Representative Body or service provider with jurisdiction in the relevant area as to the appropriate party/parties.

If ownership is contested, the ILSC will prioritise equitable engagement across all parties and have regard to the potential to impede the enjoyment of Native Title rights in the case of a future determination over the project area.

Where Country is contested, or Native Title claims have not been settled, the ILSC must consider the following in reaching its decision on how to proceed:

- the need to balance the achievement of outcomes supporting the purpose of the ILSC to assist Aboriginal persons and Torres Strait Islanders to acquire land and water-related rights so as to provide economic, environmental, social or cultural benefits for Aboriginal persons and Torres Strait Islanders and the realities of more comprehensive engagement practices;
- the ILSC's consideration of section 47A of the NT Act in relation to its acquisition function and divestment activities;
- the role of the ILSC in the settlement of Native Title claims, both by litigation under the NT Act and through the function of an alternative settlement regime;
- the management of the ILSC's role as a default PBC;
- the risks of diverting funds from the Aboriginal and Torres Strait Islander Land and Sea Future Fund into the resolution of Native Title matters and the management of these risks; and
- the role of the ILSC in the promotion of policy reform within the Native Title sector, specifically in Nation building and the securing of sustainable incomes for PBCs.

### **5.2.3 Consent**

The ILSC recognises the rights of First Nations peoples to self-determination and to freely pursue their economic, social, and cultural development. In doing so, the ILSC also recognises the right of Indigenous Peoples to give or deny their FPIC for projects that materially affect their land and their natural resources.

Activities where consent is required includes, but is not limited to:

- acquisitions and divestments;
- any activity that involves in perpetuity or permanence arrangements - e.g., biodiversity offsets, carbon sequestration, renewable energy, mining, infrastructure establishment;
- any activity that may have a long-term, material impact (> 20 years) on the care, use and management of Country; and
- any activity that may be defined as a future act as per the NT Act.

Where Traditional Owners (or identified parties) consent to an acquisition or divestment activity proposed by an alternate eligible Aboriginal and Torres Strait Islander Corporation, the ILSC will undertake to, to the extent practicable:

- maximise the extent to which Traditional Owners rights to determine the use, care and management of their Country are maintained;
- maximise the benefit to Traditional Owners from the activity;
- ensure that the activity is conducted to minimise any effect of reducing the enjoyment of rights and interests existing on behalf of Traditional Owners (through a statutory regime);
- ensure that the activity promotes the aspirations of Traditional Owners for Country; and
- the achievement of items above will form a component of the evaluation of the impact of the acquisition or divestment activity.

The ILSC must not approve its participation in a project until it is satisfied an appropriate and proportional FPIC process has been resolved, is underway or is planned for, whichever is relevant for the stage of the project. When deciding to participate in a project that may affect First Nations peoples' land and/or their natural resources and therefore long-term use, care, or management of Country, the ILSC will:

- where the ILSC is the initiator of the project, be responsible for undertaking or commissioning a process of FPIC based agreement making involving all Relevant Parties; and
- where the project is a relevant joint venture arrangement, require a demonstration that an appropriate and proportional process of FPIC involving all Relevant Parties has been undertaken, is underway or planned, consistent with the lifecycle stage of the project.

The ILSC will review its participation, promotion, or support of an activity where the consent of any Relevant Party is not given, is withdrawn or the process is found to be inappropriate.

The ILSC reserves the right to continue its participation in projects where consent has been withheld through an FPIC process in the following instances:

- where the impact on Country is considered immaterial by virtue of it being neither a significant change to the 'state' of Country nor enduring;
- the project does not impact the cultural and/or environmental values of the Country on which it is proposed to occur;
- where doing so is demonstrably consistent with achieving the purposes of the ILSC as set out in the ATSI Act;
- where not pursuing a project constitutes a significant opportunity cost either in terms of outcomes forgone or the realisation of perverse outcomes; and
- where this option is exercised, the consideration of FPIC by the delegate will be clearly documented as part of the decision record.

## 6. The ILSC's approach to Native Title when carrying out acquisition and divestment functions

The full scope of First Nations land interests is determined by no fewer than 25 separate pieces of Commonwealth and State legislation, with most rights and interests determined under the NT Act and *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) – making this a complex legal and policy area to navigate.

For more information on Native Title generally, please visit the website of the [National Native Title Council](#).

Please refer to the definitions section of this policy for descriptions of Native Title Representative Bodies (NTRBs), Prescribed Bodies Corporate (PBCs), and Registered Native Title Bodies Corporate (RNTBCs).

## 6.1 Minimum statutory requirements, and consideration of Native Title in relation to the ILSC's acquisition and management functions

[Section 191D](#) of the ATSI Act sets out the provisions of the Act in relation to the acquisition function of the ILSC. This section details how the ILSC is empowered to acquire for the purposes of making a divestment, and to make grants of money and/or guarantee loans for the purposes of acquisition.

In all instances, the ATSI Act stipulates that the grant (of money or interest) can only be made to Aboriginal or Torres Strait Islander Corporations. There is no requirement that these Corporations be representative of Traditional Owners of the right or interest to which the grant applies.

Section 191D(4) requires the ILSC to “*search any relevant Registers of the National Native Title Tribunal to ascertain whether any claims have been lodged or accepted or determined*” in relation to land and/or water/s under consideration for acquisition. There is no prescription for the treatment or consideration of the findings of this search.

[Section 191E](#), which sets out provisions in relation to the ILSC's management functions makes no consideration of Native Title.

The silence on these matters in the ATSI Act gives the ILSC the ability to take a principles-based approach to management and acquisition on Native Title land.

Each project is unique, therefore the ILSC must be flexible in its approach, balancing the principles of FPIC with our statutory purpose and strategic goals. The National Assessment Panel and Quality Assurance Committee operate to interrogate and determine whether the balance is sufficient, risks have been adequately mitigated to then proceed with endorsing the proposal for decision by the delegate.

## 6.2 The ILSC's position in relation to section 47A of the NT Act

When carrying out its acquisition and divestment functions, the ILSC must consider implications arising from [section 47A](#) of the NT Act, under which the actions of the ILSC may be seen to overturn the extinguishment or suppress Native Title rights.

The ILSC must have regard to the likely operation of [section 47A](#) when acquiring and/or divesting land where Native Title claims and determinations exist, in the pursuit of its statutory function of achieving economic, environmental, social and cultural benefits for Indigenous people. However, recognising the ILSC's statutory purpose is the pursuit of benefits for First Nations peoples, not the resolution, revival, or suppression of Native Title rights, [section 47A](#) must not be a primary consideration in approving or declining a proposal.

[Section 47A](#) usually applies to Country which would otherwise be excluded from a Native Title claim (ie freehold land) and may serve to 'revive' Native Title rights in this area. The critical issue for the ILSC is consideration that the rights created by the 'vesting' for Indigenous benefit can override the revived Native Title rights.

The ILSC must be cognisant of the opportunity to revive these rights, whilst understanding the risk of creating conflict and secondary dispossession through the 'vesting' of rights to non-Native Title holders (or a sub-set of) and balance these matters against the 'benefit' of the project.

The ILSC does not have a fixed position on acquiring or divesting Country that would trigger [section 47A](#), rather it is important that this is a consideration and balanced advice is provided to National Assessment Panel and Quality Assurance Committee on potential ramifications. It is likely that the Legal Team will be required to provide this advice.

See Annexure 1 for more detailed information on [section 47A](#) of the NT Act.

## 6.3 Native Title compensation claims

Along with determining where Native Title exists and does not exist, the NT Act allows parties to claim compensation for cultural loss and for the impairment and extinguishment of Native Title rights and interests. The ILSC has no statutory responsibility in relation to compensation for the impairment and extinguishment of Native Title rights and interests.

The Aboriginal and Torres Strait Islander Land and Sea Future Fund is not a source for such compensation, as essentially the fund is already a compensation fund held in trust for Indigenous peoples for purposes as outlined in the ATSI Act and in response to the Mabo judgement.

The ILSC may need to contribute to a claim where the ILSC has performed the compensable act, however generally, a State or Territory government or the Commonwealth government would be liable to pay any compensation. There may be circumstances, such as where provided for in State or Territory legislation, where compensation is payable by persons other than the State, Territory or Commonwealth.

The ILSC must consider whether compensation claims may be triggered through its acquisition and divestment activities potentially suppressing Native Title rights under [section 47A](#) of the NT Act.

#### **6.4 In-kind support to PBCs, NTRBs and other agents within the Native Title sector**

The ILSC may provide in-kind support to Traditional Owners/PBCs/NTRBs/other agents in the Native Title sector in a range of circumstances, including pre, throughout, and post determination phases.

The nature of in-kind support that the ILSC can offer includes advice and support to improve capability and capacity to own, substantially manage and improve land and waters. The following are examples of the in-kind support that the ILSC is able to provide, however other situations may arise from time to time that will be assessed on a case-by-case basis:

- Support with planning and utilising benefits of land and water - the land received or intended to be received through Native Title settlements are not 'acquisitions' by the ILSC in the ordinary context of our work however this does not preclude the ILSC from being able to support the Traditional Owners/PBC/NTRB/other agent.
- Advice in areas of development or management of land and water use.
- Support with navigating the government systems that the Traditional Owners/PBCs/NTRBs may need before, during or after Native Title negotiations/settlements, as it relates to capability and capacity to own, substantially manage and improve land and waters.
- Governance support.
- Advocacy, networking and facilitating capability, operating and investment partnerships.

If an ILSC divisional office decides that the ILSC can provide in-kind support and it is considered an OCOF project, such a recommendation must be provided to the National Assessment Panel for final endorsement to maintain consistency across the ILSC. The criteria on which in-kind support can be provided is based on the following:

- Whether there was a written request from the PBC/NTRB/other agent to the ILSC for support, outlining the current circumstances, parties involved, and the type of support sought.
- Whether there is a link to improved capability and capacity to own, sustainably manage and improve land and waters.
- The cost of providing the support (i.e. whether further staffing needs to be considered).
- Whether the request meets any or all of the four OCOF criteria.

Upon approving in-kind support, the relevant Office (WDO/CDO/EDO) must provide a summary report of the OCOF assessment scoring chart relating to the five criteria for consideration to the National Assessment Panel.

##### **6.4.1 The ILSC's contributions to 'other' settlements (including Treaty)**

The purpose of the ILSC is to assist Aboriginal persons and Torres Strait Islanders to acquire land and water-related rights so as to provide economic, environmental, social or cultural benefits for Aboriginal persons and Torres Strait Islanders. Consistent with OCOF guidance and the ILSC's existing eligibility criteria, there may be the opportunity for the ILSC to contribute to 'other' settlements through:

- **Land acquisition** – if the parties identify a need to acquire freehold land as part of the settlement, the ILSC may assist either through acquiring and granting the land or by granting money to Indigenous corporations to assist in the acquisition of interests in land. The ILSC can assist with the costs of the property, settlement costs associated with the acquisition, and immediate costs needed to bring the property into a suitable condition (examples may include essential property maintenance and repairs, limited capital development and purchase of land management-related plant and equipment).
- **Land management** – the ILSC can provide assistance for the managed-use, care or improvement of Indigenous-held land. Funding for land management activities includes development of property infrastructure or conducting land management activities (examples may include construction of fences or land management related infrastructure, weed or pest eradications, purchase of land management-related equipment).
- **Capacity building** – assisting Native Title Groups (NTGs) to identify the capacities they will require to manage and derive benefits from their land. This is generally undertaken through the engagement of consultants to work with groups to build governance skills and property management plans. These plans will set out landowning responsibilities and costs and will include key activities and a budget to guide the future management and care of the property. It will also identify the skills required to manage the property and identify the governance and other training needed to achieve benefits from management activities on Indigenous-held land.

The ILSC does not provide ongoing program funding for First Nations groups. Rather it seeks projects to be viable and sustainable, including from income derived from the property or through accessing ongoing program funding from responsible Commonwealth and State/Territory agencies or other sources.

#### 6.4.2 Advice to government parties and NTGs

If the ILSC decides not to provide assistance to a proposed settlement, the ILSC will provide written reasons to the government parties, NTRB and NTG.

In assessing a request for assistance, the ILSC may provide government parties and the NTG with written advice on adjustments to any settlement package that could be made to satisfy ILSC criteria and allow a reasonable opportunity for government parties, the NTRB and the NTG to implement such adjustments.

### 6.5 The ILSC's role as a default Prescribed Body Corporate

The ILSC's functions as a default agent Prescribed Body Corporate (PBC) are contained within the NT Act and the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (PBC Regulations). These functions are rarely required, and are compatible with the ILSC's existing functions under the ATSI Act. However, the ILSC's default PBC functions are sourced in separate laws, as outlined above, and as such managed separately from the ILSC's usual land and sea functions.

The ILSC acknowledges that each instance of its appointment as a default PBC will be based on specific circumstances. Whilst the ILSC will generally pursue an approach which outsources the day to day functions of a PBC to an alternative entity to the extent to which such a delegation is statutorily possible, the ILSC will focus its efforts as a PBC on statutory compliance and the effective transition to a nominated alternative PBC.

For more detailed information on the ILSC's role as a default PBC, please refer to the ILSC Default PBC Policy. The ILSC's Prescribed Body Unit may be contacted on free call 1800 818 490 or email [pbu@ilsc.gov.au](mailto:pbu@ilsc.gov.au)

#### 6.5.1 Key functions

The key functions of the ILSC as a default PBC are as follows:

- being an agent of Native Title holders in respect of matters relating to Native Title;
- managing rights and interests as authorised by Native Title holders;
- holding money in trust and investing or applying it as directed by Native Title holders;
- consulting with and obtaining consent of Native Title holders;

- certifying Indigenous Land Use Agreements (Body Corporate Agreements); and
- responding to future acts.

The ILSC has a strict PBC function and operates differently to an ordinary PBC, the key differences include:

- Native Title holders cannot be members of the ILSC PBC;
- the Directors are appointed by and responsible to the Minister responsible for administering the NT Act;
- there is no traditional Rule Book to govern the PBC, it is instead governed by the ILSC PBC Operational Guidelines that have been developed by the ILSC; and
- the ILSC PBC cannot create subsidiary corporations for matters such as heritage, business or other purposes.

In its role as agent PBC the ILSC will partner with Native Title Representative Bodies (NTRB) which have statutory functions under the NT Act in respect of specific regions across Australia. Further information on current NTRBs can be found listed on the National Native Title Tribunal website. NTRBs have statutory functions in relation to future acts, which means the role of NTRBs may sometimes interact with ILSC as the agent PBC. An example of this is in relation to Indigenous Land Use Agreements (ILUAs).

### **6.5.2 The fiduciary relationship**

The relationship between a PBC and Native Title holders is a fiduciary relationship. This means that when performing default PBC functions the ILSC must act in the interests of Native Title holders, not its own interests. The relationship between the Default PBC and the Native Title holders is also one of partnership where the ILSC will be open, transparent, accountable and respectful in delivering its default PBC functions. In this way, the ILSC aims to ensure that the Native Title holders can influence their own political, economic, social and cultural development until they are able to form a PBC in their own right.

Although ILSC may be an appointed PBC it strongly advocates for Indigenous self-determination and will work with Native Title holders to transfer its PBC functions to a PBC of the Native Title holders choosing (and preferably returning the management of Native Title interests to Native Title holders) as soon as practicable.

### **6.5.3 Conflicts of interest and feedback**

Specific guidelines have been developed to assist ILSC with carrying out its agent PBC functions, these are internal working documents only.

All those connecting with the ILSC are entitled to professional and competent service, delivered in an efficient and timely manner and we encourage stakeholders to contact us if expectations are not being met. Further information about expectations can be found in the Indigenous Land and Sea Corporation Service Charter.

## **7. Roles and responsibilities**

### **7.1 Group Chief Executive Officer**

The GCEO is responsible for:

- ensuring the implementation of this policy;
- having regard to this policy and advice received from NAP and/or QAC when approving ILSC participation in an activity;
- ensuring staff are aware of this policy and their associated responsibilities;
- ensuring the ILSC maintains adequate internal capacity and capability to implement the policy; and
- providing a mechanism for complaints and grievances.

### **7.2 Quality Assessment Committee**

The primary role of the QAC is to provide quality assurance to projects valued at greater than \$400,000 (Per ILSC Delegations Schedule – Version 2.3) to ensure a proposal's capacity to meet program criteria and deliver outcomes under the OCOF program.

The QAC does not hold a formal delegation within the ILSCs delegation's matrix, and thus is not a decision-making committee. It provides quality assurance to the appropriate delegate that key legislative, legal, financial, policy and strategy matters have been considered and addressed in acquisition, management and divestment project proposals.

QAC therefore has a key responsibility to ensure this policy has been complied with in considering proposals that come within its scope, and to provide advice to the relevant decision-making delegate.

### **7.3 National Assessment Panel**

The primary role of the NAP is to ensure national consistency in the assessment of proposals capacity to meet program criteria and deliver outcomes under the OCOF program.

The NAP does not hold a formal delegation within the ILSCs delegation's matrix, it makes recommendations to appropriate delegates regarding their endorsement or otherwise of proposed projects, including the referral of projects valued at greater than \$400,000 to the mechanisms of the ILSC's Management or Investment Committee.

As part of considering capacity to meet program criteria and deliver outcomes under OCOF, the NAP has responsibility to ensure this policy has been complied with in considering proposals that come within its scope.

### **7.4 Chief Operating Officer**

The COO is responsible for:

- endorsing supporting procedures to direct implementation;
- having regard to the Policy in when approving ILSC participation in an activity; and
- ensuring Divisional Managers implement the policy when carrying out their responsibilities.

### **7.5 General Manager, Policy, Strategy, Performance and Communications**

The GM, PSP&C is responsible for:

- monitoring, evaluating and reviewing the policy.

### **7.6 Divisional Managers**

Divisional Managers are responsible for:

- having regard to the policy in when approving ILSC participation in an activity; and
- ensuring staff implement the policy when carrying out their responsibilities.

### **7.7 Employees**

All ILSC staff members are responsible for abiding by the policy and any operational guidance when undertaking any activity that is within the scope of the policy.

## **8. Definitions**

For the purposes of this Policy, the following definitions apply:

**Common Law Holders:** The people the Federal Court proposes to include in a determination of Native Title as the Native Title holders (these people may or may not be formal members of the NTRB). This term may be used interchangeably with Traditional Owners.

**Country:** Country represents the lands, waterways, seas, skies to which Indigenous people are connected. It is so much more than a physical place, containing complex ideas and meaning about lore, place, custom, language, economy, spiritual belief, cultural practice, wellbeing, family, and identity. It is inseparable from people, community, and self, and cannot be separated into land, water and sea – it is all one.

**Existing Activity:** An activity that this ILSC is already participating in when this Policy came into force. This includes any project that has been to the National Assessment Panel.

**Informed Consent:** Where consent is actively (or explicitly) given in the form of a statement documenting to what the Traditional Owners are consenting to, on the basis of them being fully informed of all the possible outcomes and consequences of granting consent.

**Native Title Holders:** Means those persons who hold Native Title.

**Native Title Representative Body:** NTRBs are organisations appointed under the NT Act to assist Traditional Owners with all aspects of their Native Title claims. As defined by provisions in the NT Act, an NTRB receives government funding to support PBCs in its region with their Native Title obligations.

**Prescribed Body Corporate:** A PBC is the corporation that holds and manages the Native Title rights and interests in trust for the Common Law Holders (also known as Native Title Holders) of that area. PBCs can be established pre- or post-determination and have certain obligations under the NT Act, such as the requirement to incorporate under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth).

**Registered Native Title Body Corporate:** The NT Act states that all PBCs must be registered with the National Native Title Tribunal. When a PBC has established Native Title and becomes officially registered, it becomes an RNTBC. This makes it clear to other people and organisations that it is a corporation that manages Native Title for the Common Law Holders and creates a legal obligation for these organisations to consult with the RNTBC on various matters. Registration of a PBC is achieved through the Office of the Registrar of Indigenous Corporations.

**Relevant Parties:** Any potentially affected Indigenous people including, but not limited to Traditional Owners, exclusive and non-exclusive Native Title holders, Native Title claimants, other relevant parties identified in consultation with the Native Title Representative Body or Service Provider with jurisdiction in the relevant area, and other Indigenous parties who may be impacted by the activity, such as business owners or other eligible Aboriginal and Torres Strait Islander Corporations.

**Traditional Owners:** Traditional Owner/s will be used to indicate the group of individuals with primary connection to the relevant Country. Traditional Owners in this sense may not necessarily be formally recognised through a statutory regime.

## 9. Implementation, Monitoring and Review

The Engaging on Country and Native Title Policy will be entered into the ILSC Policies, Guidelines and Procedures Database and implemented in accordance with its implementation plan.

It will be reviewed at the time of a trigger such as a significant change in the operating environment or at the end of two (2) years following the endorsement of this Policy, whichever is sooner.

**This policy was endorsed by the ILSC Board at its 14 August 2024 meeting.**

Name	Type	Version	Owner	Approval Date	Review Date
Policy on Support for the Resolution of Native Title Claims	Policy	1.0	Policy, Strategy and Performance	2017	SUPERSEDED
Interim Traditional Owner Engagement Policy	Policy	1.0	Policy, Strategy and Performance	15/06/2022	SUPERSEDED

Free, Prior and Informed Consent Policy	Policy	1.0	Policy, Strategy and Performance	19/10/2022	SUPERSEDED
Engaging on Country and Native Title Policy	Policy	1.0	Policy, Strategy and Performance	14/08/2024	14/08/2026

## Annexure 1 - Section 47A of the NT Act

Under the NT Act, certain types of land tenure, including freehold and perpetual lease hold, extinguish Native Title. Section 47A of the Act potentially reverses extinguishment of Native Title in certain circumstances. Under section 47A, if:

- a leasehold or freehold interest exists in land; and,
- a Native Title application is made over the land; and
- one or more of the members of the Native Title applicant group occupy the land; and
- the land was either:
  - granted or vested under legislation for the purpose of creating a benefit for indigenous Australians; or,
  - the area is otherwise held for the benefit of indigenous Australians,
- then any previous extinguishment of Native Title over that land can be disregarded.

Under section 47A(3) the Native Title rights and interests revived in this manner are subject to the non-extinguishment principle. This means that the rights and interests have no impact on the interests granted in the creation of the circumstance under which the land came to be held for the benefit of Indigenous Australians.

The role of the ILSC with regard to Native Title under section 47A and the perception of this role by stakeholders (either in supporting revival or 'causing' the suppression of rights) require specific consideration and active management to ensure that the ILSC is aware of the aspirations of First Nations landholders. In practice, the ILSC often acquires and divests land for the benefit of Traditional Owners, in particular where the land acquisition is for a cultural purpose. This is not always the case however, with the ILSC also in the practice of acquiring land for dislocated groups and for the realisation of broader benefits for Aboriginal peoples.

### The 2014 Federal Court Adnyamathanha Decision<sup>1</sup>

In the Adnyamathanha Decision, Justice Mansfield treated the ATSI Act as legislation satisfying the terms of section 47A(b)(i)

*"A freehold estate exists, or a lease is in force, over the area or the area is vested in any person, if the grant of the freehold estate or the lease or the vesting took place under legislation that makes provision for the grant or vesting of such things only to, in or for the benefit of, Aboriginal peoples or Torres Strait Islanders."*

The Adnyamathanha Decision confirms that ILSC actions can potentially simultaneously revive Native Title and suppress Native Title rights.

There is no legislative requirement for the ILSC to have regard to the impact of acquisition and/or divestment decisions in relation to section 47A of the NT Act.

### Section 47A and Land Rights Acts

This issue of the suppression of interests stemming from a Section 47A determination based on ILSC land holding is substantially different to the likely outcome of a similar determination through the actions of 'Land Rights' type legislation which grants (certain types of) land to identified Traditional Owners. Based on a process of proving a traditional relationship with land, Land Rights Act (type) grants are unlikely to vest interests (for Aboriginal Benefit) to a group that is inconsistent with the Native Title party. In this sense, the Adnyamathanha Decision gives rise to a potential conflict not initially present within the operation of section 47A of the Act. This potential conflict requires that the ILSC is mindful of section 47A implications with regard to land acquisition and divestment decisions.

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<sup>1</sup> *Adnyamathanha #3 Native Title Claim v State of South Australia* [2014] FCA 101, for more information, see AIATSIS, Section 47A claim to Native Title revival, <https://aiatsis.gov.au/publication/117008>