

Marramarra murru

(creating pathways)

First Nations Economic Development Symposium
Symposium Background Paper



Australian
National
University

First Nations
Portfolio



Marramarra murru

Marramarra murru is a local Ngambri, Ngunnawal and Wiradjuri term that describes the creation of pathways. The pathways were created by Biyaami, the creator and protector who gifted and shared them with our ancestors. Passed on from generation to generation, these pathways serve to ensure survival and wellbeing by maintaining and transferring knowledge, lore, custom and cultural authority, as well as facilitating trade.

Like these ancient pathways, the Marramarra murru First Nations Economic Development Symposium will lead to contemporary pathways to economic self-determination for Australia's First Nations peoples.

— Paul Girrawah House



Crow and Eagle

The members of the Walgalu (Ngambri and Ngurmal) and Ngarigu Nations belonged within the Nation to one of two classes or sections, which were inherited through their mothers. The Walgalu were divided into Eagle-hawk people and Crow people. The people of each of these groups were blood relatives and were not allowed to marry another member of the same group. Legends concerning Eagle-hawk and Crow are widespread in south-eastern Australia. The basic story concerned Kannua (the Eagle man), who was short, thickset and dark-haired, and Waaku (the Crow man), who was tall and light-haired. As well as belonging to one class or section of a society, each person inherited a totem. This meant that each person or group had a special bond with a specific landscape, natural species such as a bird, animal, plant or even a star (dindima / dyurra).

Reference
ngambri.org/about.html

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Art by Rohit Rao
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Foreword



Peter Yu

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The 2022 Federal Election campaign focussed the attention of Australians on the Nation's challenges and how they should be addressed. There was much debate about priorities such as the cost of living, affordable housing, climate change and strengthening our national security. While the challenge of achieving equity and justice for Australia's First Nations people was largely absent across party campaigning, it was immediately elevated by the incoming Labor Government.

Our Federal Parliament has acknowledged this challenge particularly over the past decade. Whatever the reasons for Indigenous equity and justice not being a prominent part of the 2022 Federal election campaign, and regardless of the fact First Australians still have an uncertain road to travel, the rapidly escalating prominence given to the issue by Australia's new Prime Minister, The Hon. Anthony Albanese, MP and Minister for Indigenous Affairs, The Hon. Linda Burney, MP, is well overdue and very welcome.

The nation continues to shoulder a massive burden for the poor social and economic status of First Nations people and the lack of a formal settlement for the brutal dispossession of our people and colonisation of our Country. That burden includes the growing expenditure of the Australian Government's response to disadvantage, the opportunity cost associated with not optimising economic development of the Indigenous estate, the fraught relationship between First Nations people and the Australian Governments and negative international attention.

A critical part of achieving equity and justice is reforming policy of Australian Governments with respect to economic development for First Nations. In my view, there is no more important national policy requiring structural reform than First Nations economic development. More than anything else, the objective of the Marramarra murru First Nations Economic

Development Symposium is to promote reform in this vital area.

A critical objective of the Marramarra murru is to promote reformation of the Australian Government's policies relating to equity and justice of First Nations' economic development: this is the most important national policy requiring structural reform.

The **Marramarra murru** and its related events focus on opportunities for Australia's First Nations people to develop a truly self-determined First Nations' economy — one that leverages from the legal interests in land, water, sea country and cultural and intellectual property (IP) that our people have reclaimed, and continue to reclaim. The optimal economic activation of these rights will require not only the development of new capabilities in our emerging First Nations' economy, but also a pivot in First Nations' economic development policy that facilitates the creation of wealth from the rights and asset base that is unique to Australian Aboriginal and Torres Strait Islander people through economic activity that is aligned with our aspirations.

Driven largely by the resilience and determination of our people, the Australian First Nations economy has progressed from an almost non-existent status 50 years ago. However, from the perspective of reaching its potential, or providing economic equality for Australia's First Nations people, it still has a long road to travel.

Self-determination, including economic self-determination, is a fundamental right of all peoples. It is recognised by the United Nations and various international conventions to which Australia is party.

Whilst in most instances not understanding the full, detailed history and its implications, most Australians now accept that the Australian continent was taken from our ancestors and that First Nations resistance was suppressed in many instances by incarceration, violence and murder and in more recent times, by means of insidious and subversive racist policy. As a result, national and international empathy toward the plight of Australia's First Nations peoples and the lack of progress by Australian governments in addressing significant socio-economic inequality is at an all-time high.

However, it is less widely appreciated that this lack of progress is mainly attributable to policy and legislative frameworks that have been implemented by Australian governments over the past 30 years. Those frameworks, while intended to create opportunity, rectify past injustices and provide for economic equality have, in effect, created a form of economic apartheid, whereby at a most fundamental structural level, First Nations Australians have less opportunity to determine their economic destiny than other Australians.

At best, Government policy has focused on creating training and employment pathways for First Nations people, better enabling them to engage in the mainstream economy. Recently, and far later than in other nations with a similar colonial heritage such as Canada and the United States, Australian governments have also started to focus on policies to enable First Nations businesses to access government procurement opportunities. These are important pathways for many and help build a baseline skills capacity among First Nations people, providing the programs are jointly designed with us through shared decision making, which has typically not been the case.

However, to a large extent, activating the rights and assets of First Nations which have been reclaimed or will continue to be reclaimed,

to support our economic development has not featured to a significant extent in Australian public policy. Consequently, many First Nations people who are outside of the mainstream economy have limited avenues for economic development, and even those who are engaged find the ability to activate those assets and rights substantively fettered. As a result, the Australian First Nations economy is notably smaller than that which exists in comparable nations.

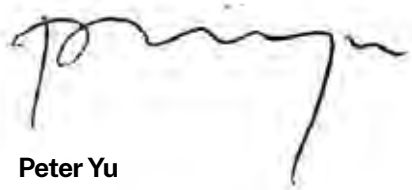
Unless this changes, First Nations Australians will continue to be second class citizens in their own country, destined to manage a portfolio of rights and assets that are the subject of deliberate development constraints, working only in the mainstream economy in mainly mainstream jobs for which, in most circumstances, they are not the ultimate or main beneficiary.

Rectifying this manifestly unfair circumstance will require a strategic and national approach, combining innovative business models with progressive and significant change to government policy and legislation. I believe this is the challenge of our generation. We must stand on the shoulders of the many who came before us and substantially advance this cause, ensuring that our children live in an Australia where they walk in two worlds, prospering equally from a status of economic self-determination.

With a mandate to make a leading contribution to national policy on the relationship between Australia and its First Nations people, there is no more pressing an issue facing the University's First Nations Portfolio than that of not only creating the pathway but advancing down the pathway toward full self-determination.

The **Marramarra murru** Symposium is a major step on this journey, a journey which I hope you will join us on to the end.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Peter Yu', with a stylized, flowing script.

Peter Yu


Vice President
First Nations Portfolio





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Executive summary

The disastrous economic impact of colonisation on Australian First Nations is immeasurable...

Prior to European settlement, the societies and economies that characterised Australia's First Nations people were not materially different to many across the world. Britain's claim to sovereignty and subsequent colonisation of the Australian continent (an act that has been determined by Australia's highest law as unjust), together with the two centuries of discriminatory and oppressive colonial and later State and Federal governments' policies, directly and deliberately prevented First Nations Australians from participating in the economy.

For most of the past 234 years (equivalent to 0.4 percent of Australian First Nations civilisation), Australia's First peoples have barely been citizens in their own country, let alone participants in the economy.

Because this period of Australian First Nations history coincided with the largest global economic expansion in human history, the cost incurred by First Nations Australians in terms of lost opportunity for prosperity is immeasurable.

The economic injustice is recognised, but the current policy framework is not delivering adequately...

The past 55 years have been characterised by a relatively sustained policy reform process that has reinstated civil rights for Australia's First Nations people and begun to restore some legal interests in lands, water, sea country and cultural and intellectual property. By international standards, this has occurred at glacial pace and as a result, a majority of First Nations people remain, from an economic perspective, 'second-class' citizens.

By virtue of the dire socioeconomic circumstances that are endured by significant sections of the First Nations community in Australia, the cost associated with servicing this disadvantage and increasing domestic and international community and market attention, the need to develop economic capacity among First Nations Australians is not lost on Australian governments. However, most First Nations economic development policy across Australia focuses on fostering education-training-employment pathways for First Nations people and preferred procurement programs for First Nations businesses in the mainstream economy.

To the extent these programs create some opportunity and build capacity among First Nations people and businesses they are valuable. However, this framework falls significantly short of that which is required to build sustained, substantial and meaningful wealth for First Nations people which delivers economic equality, let alone a level of wealth that is remotely comparable to that which has been foregone as a result of colonisation and its structural legacy.

In other words, the existing policy framework will not facilitate economic equality or restorative economic justice for First Nations people.

The policy framework must pivot to an economic self-determination focus...

It is a fundamental tenet of the **Marramarra murru** Symposium that the contemporary socioeconomic circumstances Australia's First people face and restorative economic justice, can only be addressed through a framework of First Nations economic self-determination and that the barriers to this in Australia are largely structural — a form of 'economic apartheid'.

This perspective is consistent with the trajectory of international conventions pertaining to First Nations, Australian jurisprudence and increasingly, the settlement and compensation outcomes between First Nations interests and governments and developers.

Economic self-determination refers to a United Nations' sanctioned right of all peoples to generate wealth from their own assets in ways that they deem fit. This right is intrinsically linked to the right of self-determination more generally, and it is not coincidental that nation states which provide a stronger constitutional, legislative, treaty or parliamentary basis for self-determination for their First peoples are typically characterised by stronger First Nations economies and improved socioeconomic status.

The evidence is compelling – socio-economic disadvantage persists...

The identified contemporary First Nations' population of Australia has increased dramatically to be at least eight times its size 45 years ago and currently represents 3.5 percent of Australia's population. Just under 90 percent of this typically younger section of the Australian population reside in four jurisdictions: Queensland, New South Wales, Western Australia and the Northern Territory, and comprise a significantly higher portion of the regional and remote population.

On average, the Australian First Nations population clearly faces substantial socio-economic disadvantage:

- **Poorer health outcomes**—with First Nations Australians more likely to die from one of the top 20 causes of mortality in Australia, the average First Nations life

expectancy is, for males, 8.6 years and, for females, 7.8 years less than other Australians. A First Nations person is twice as likely to be admitted to hospital than another Australian.

- **Lower levels of educational attainment** - approximately 40 percent of all First Nations children entering school are considered to be vulnerable or at risk as a result of physical health and wellbeing, social competence, emotional maturity, language skills, cognitive skills or general knowledge issues. School attendance rates are below those of Australian children in all years, and dramatically so in later school years. As a result, substantially fewer First Nations Australians hold high school, vocational or higher education qualifications.
- **Lower levels of employment and wealth** - the employment rate for First Nations people is 49 percent, compared to 75 percent for all Australians and median income is 40 percent less than other Australians, with 45 percent of First Nations people between 18 and 64 years reliant on social security as their main source of income.
- **Greater instance of imprisonment** – across all Australian correction facilities, First Nations people account for 30 percent of all inmates and, in youth detention facilities, approximately half of the inmates.

A self-determined economy is so vital to addressing this circumstance primarily by virtue of the socioeconomic multipliers First Nations businesses deliver. They are substantially more likely to return social, cultural and economic value directly to the community through a much higher propensity to employ First Nations people, provide First Nations employees with a culturally safe working

environment, invest in the development of First Nations staff, conduct business activities that are meaningful to First Nations people, procure from other First Nations businesses and direct investment back into local communities.

The evidence is compelling: there most certainly is an emerging Australian First Nations economy, but by international comparisons, it has a long way to go...

While reliable data is challenging, all indications are that a modern First Nations economy is emerging in Australia. It is comprised of entrepreneurs and organisations with economic aspirations in the for-profit and not-for-profit sectors, operating under conventional business structures as well as structures that are unique to the sector, and across most sectors of the economy.

While some First Nations businesses, for all intents and purposes, deploy mainstream business models, many operate business models that leverage unique competitive advantage that is derived from traditional intellectual and cultural property or rights in land and water, often blending traditional knowledge and practice with conventional processes and business systems. There is also an emerging export interest among First Nations businesses, including in the form of First Nations to First Nations trade.

However, compared to contemporary jurisdictions, the Australian First Nations economy remains small. For example, New Zealand, a nation five times smaller than Australia with fewer resources, has almost twice as many First Nations businesses and Canada, a more structurally comparable nation has five times as many. Again, a framework that supports self-determination has likely performed a fundamental role in the New Zealand and Canadian First Nations economic outcomes.

Structural constraints over reclaimed rights over land and water and associated assets...

First Nations legal rights and interests of varying nature are now recognised over approximately 57 percent of Australia's landmass and are expected to reach 65 percent over the next decade as native title claims progress to determination. While significantly less in quantum, rights over sea country are also increasing, while there is a significant need for enhancement of inland water rights.

In only a few instances have First Nations interests in their land and water estate been able to develop economic projects on that estate for their own benefit. In some instances, First Nations interests have been able to negotiate financial return from third party developers who are active on that estate.

However, while the regulatory constraints that apply to much of the land and water estate may be designed to protect ownership in perpetuity, the reality is that it substantially constrains the ability of First Nations interests to undertake economic development on that estate for their benefit, including using the estate for financing purposes. In a similarly paternalistic context, in a vast majority of cases where First Nations interests have been able to negotiate a substantial income from third party developers, most of that income is 'locked-up' under trust deeds that include significant constraint as to how much of, and on what, that revenue can be expended.

These conditions are not conducive to economic self-determination.

Structural constraints over cultural and intellectual property...

The inability of Australian First Nations interests to be able to protect and leverage economic benefit from the competitive advantage that is encapsulated in their unique intellectual property — traditional knowledge (including ecological knowledge), cultural expression and particularly, genetic resources — is a major constraint to the development of a self-determined Australian First Nations economy.

This is a global issue, because Western-centric derived intellectual property frameworks provide limited protection for First Nations' people. However, while international conventions have made some progress toward a suitable framework, Australia has been slow to adopt world's best practice.

The fact that it is largely legal for non-First Nations interests to appropriate economic value from First Nations cultural and intellectual property — a circumstance that is commonplace — is not just manifestly inequitable and abhorrent to most First Nations people. The absence of adequate protection also has a compounding economic impact whereby the absence of a suitable First Nations cultural and intellectual property framework means that many First Nations custodians of intellectual property understandably guard it fiercely, often to an extent that is beyond cultural requirements.

This represents a significant opportunity cost, whereas, with an appropriate protection framework and in accordance with cultural protocols, this cultural and intellectual property could potentially underpin significant sectors of a self-determined First Nations economy.

The current skills development framework is useful, but it's not enough...

Building a self-determined First Nations economy certainly requires the development of vocational, technical, professional, business and entrepreneurial skills, albeit in the context of a self-determined First Nations economy, much of this capability needs to be nuanced for the unique cultural and social context the First Nations economy.

However, developing a strong self-determined First Nations economy is akin to developing any new, relatively unfamiliar sector of an economy that requires structural reform to facilitate its growth. Industry leadership needs to be aligned with respect to the reform required and be effective in the advocacy necessary to give effect to that reform.

Furthermore, while Australian First Nations notions of sovereignty will, for the foreseeable future, at best co-exist with the Crown, that sovereignty has limited value without at least a degree of economic independence. At its core, the objective of a self-determined First Nations economy is to economically empower a people. As such, there are also elements of 'nation-building' to this effort.

Given the challenges, more than investing in rudimentary vocational, professional and business skills is required. Industry building and to some extent, national building, capability must also be developed at a world-class level.

Constrained market access...

The challenges that Australian First Nations businesses face with respect to accessing markets for their products and establishing and participating in supply chains are closely aligned and interwoven with the challenges that First Nations businesses face more generally—limited markets for what are often niche products, limited human resources markets, limited supply chain partners, constrained negotiating power and limited access to finance. Further, First Nations business is often located in regional or remote areas which are characterised by small local markets, significant distance to larger markets, limited access to specialist services, severe constraints on infrastructure and social and cultural issues that need to be navigated.

The growth of a self-determined First Nations economy will need to find solutions to these structural challenges and have a significant focus on growing markets and market access for the products and services of First Nations businesses.

Access to financial markets is a particular challenge...

Globally, debt and equity capital is highly mobile, seeking out opportunities and returns that meet its financing or investment objectives.

Access to finance is a particular challenge for Australian First Nations enterprises. A full one-third of the Australian First Nations population is either unable to access, or faces significant challenges with respect to accessing, financial services. This circumstance is the result of generally lower levels of employment, particularly among the higher paid vocations and professions, limited inter-generational wealth transfer, limited personal assets and institutional biases.

However, with the right policy framework there is opportunity to use tried-and-tested private capital incentivisation policies to increase the flow of private capital into the emerging Australian First Nations economy, particularly from the growing USD 700 billion global social impact asset subclass, and potentially ESG aligned investment more generally.

One certainty: a prospering, self-determined First Nations economy will be operating in a different environment than today...

Business operating models and market opportunities across the globe are rapidly evolving as a result of the complex interaction between global megatrends such as:

- ***Imbalance, scarcity and growing pressures*** – changes in climate; resource and energy access, scarcity and security; urbanisation; geopolitical conflict; humanitarian pressures; and a focus on sustainable development goals and the green economy.
- ***Shifting consumer identities and preferences*** – changes in population demographics; urbanisation; valued product attributes; growth of the fourth estate; green economy; developing nations; and the progress of globalisation.
- ***Technological empowerment and disruption*** – rapidly accelerating advances in science and technology; digital connectivity; remote work; cybersecurity; artificial intelligence; machine learning; big data; and fourth industrial revolution.

These megatrends will present opportunities and challenges to a self-determined First Nations economy—whether predictable or not.

However, with a shift from the current First Nations economic development policy framework –one that is focused primarily on training and jobs and procurement in the mainstream economy –to one that removes the constraints that First Nations people face with respect to realising economic dividends from their reclaimed rights and assets and unique cultural and intellectual property, combined with an eagle's eye on the challenges and opportunities created by these

global megatrends and the determination and resilience of Australian First Nations people, it is an economy that is sure to prosper.

This is the journey we are embarking on.





Introduction

The Australian National University

The Australian National University (ANU) campus is firmly nestled within the ancestral land of the Ngambri (Kamberri) and Ngunnawal. The name of the capital city, 'Canberra', was a corruption of the earlier anglicised version, 'Canberry', of the original name for this territory: Ngambri. The name, Canberra, formerly rendered as 'Canburry' or 'Canberry' from the many renditions including Ngambri, Kamberri, Kemberry, Ngambra, etc by the earliest non-Aboriginal settlers in Ngambri country, is derived from the name of the Aboriginal ancestral people and country, the Ngambri.¹

JJ Moore's 'Canberry Station', now the site of the National Museum of Australia, the Australian Institute of Aboriginal and Torres Strait Islander Studies and the ANU were built on the Ngambri's main corroboree ground, much of which is now under the waters of Lake Burley-Griffin. This name for the district, 'Canberry', was proclaimed as such in the Government Gazette, 22 January 1834.

The names 'Canberry' or 'Canberra' or 'Ngambri' were also used by early non-Aboriginal settlers to refer to other geographical features in the district, such as the Canberry Plains, Canberry Creek, Canberry Ranges and so on. The Ngambri referred to the 'Molonglo River' as the Ngambri River, and to the stream now referred to as 'Sullivan's Creek' as Ngambri Creek, the source of which is near Gooroo Hill (Goorooyaroo). The Ngambri referred to the Limestone Plains as the 'Ngambri Plains'. 'Black Mountain', which was part of the Canberra (Ngambri) Ranges, appears on the earliest maps as 'Black Hill', named as such because

it was also a favourite traditional gathering place of Ngambri families and their visitors.

A mountain of historical evidence overwhelmingly supports the assertion that the ancestral custodial group of this territory at the time the first 'European settlers' arrived between 1820 and 1821 took their name from their ancestral country: these were the Ngambri people.

Being the only university to be established by the Parliament of Australia, ANU is a unique institution in the Australian higher education sector. Founded in 1946 in a spirit of postwar optimism, its role was to help realise Australia's potential as the world recovered from a global crisis. The mission to support the development of national unity and identity, to improve Australians' understanding of themselves and their neighbours, and provide Australia with a research capacity that is amongst the best in the world, as well as education in fields that are vital to the Nation's future, has seen ANU perform a key role in informing Australian public policy for 75 years.

ANU is both a national and globally relevant institution. In 2022, ANU was ranked 1st in Australia and =27th in the world by QS World University Rankings and 2nd in Australia and =54th in the World by Times Higher Education Rankings².

Operating primarily from its main campus in Canberra, the ANU academy is organised according to the Senior Management structure, see **Figure 1**.

¹<https://www.topuniversities.com/university-rankings/world-university-rankings/2022>

²<https://www.timeshighereducation.com/world-university-rankings/australian-national-university>

ANU Senior Management Structure

Updated: 08/02/21

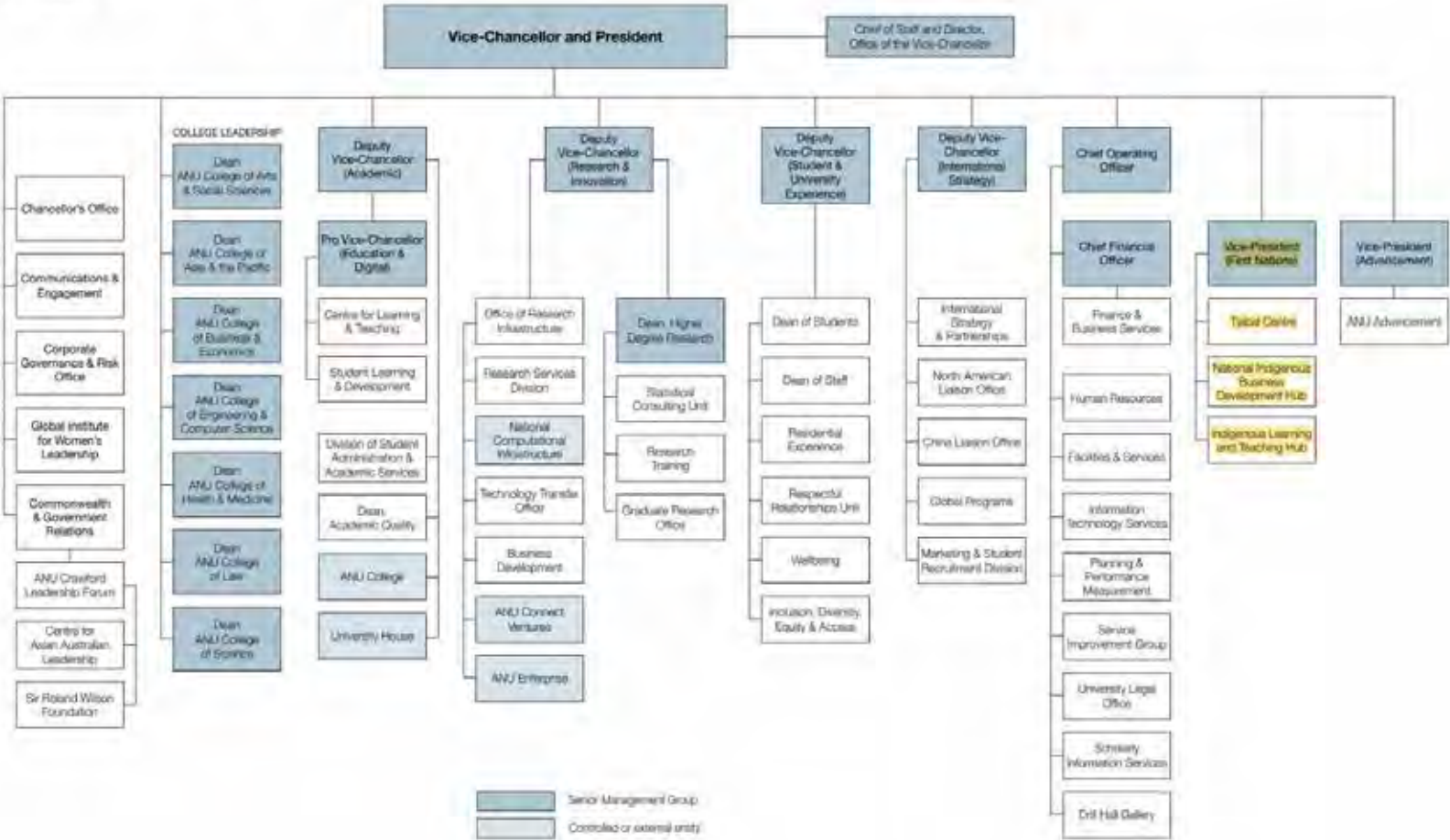


Figure 1-Senior Management Structure of the Australian National University Academy

The First Nations Portfolio at the Australian National University

Established in 2020, the ANU First Nations Portfolio is a branch of the University's executive, reporting directly to the Vice-Chancellor (University President), who is charged with ensuring that ANU makes a leading contribution to national policy in the relationship between Australia's First Nations people and the whole Nation.

The ANU First Nations Portfolio gives effect to this remit both by:

- Working in collaboration with the colleges, schools and institutes of the University to ensure that concepts of First Nations equity and engagement are embedded in ANU's

research and teaching endeavours and that those research endeavours inform the ANU First Nations Portfolio's external advocacy efforts; and

- Reaching outside the University, interfacing with First Nations communities, leadership, organisations and businesses, mainstream industry, Australian governments and the not-for-profit sector to advocate for progress in the relationship between First Nations Australians and the whole nation.

This is illustrated conceptually in the following **Figure 2**.

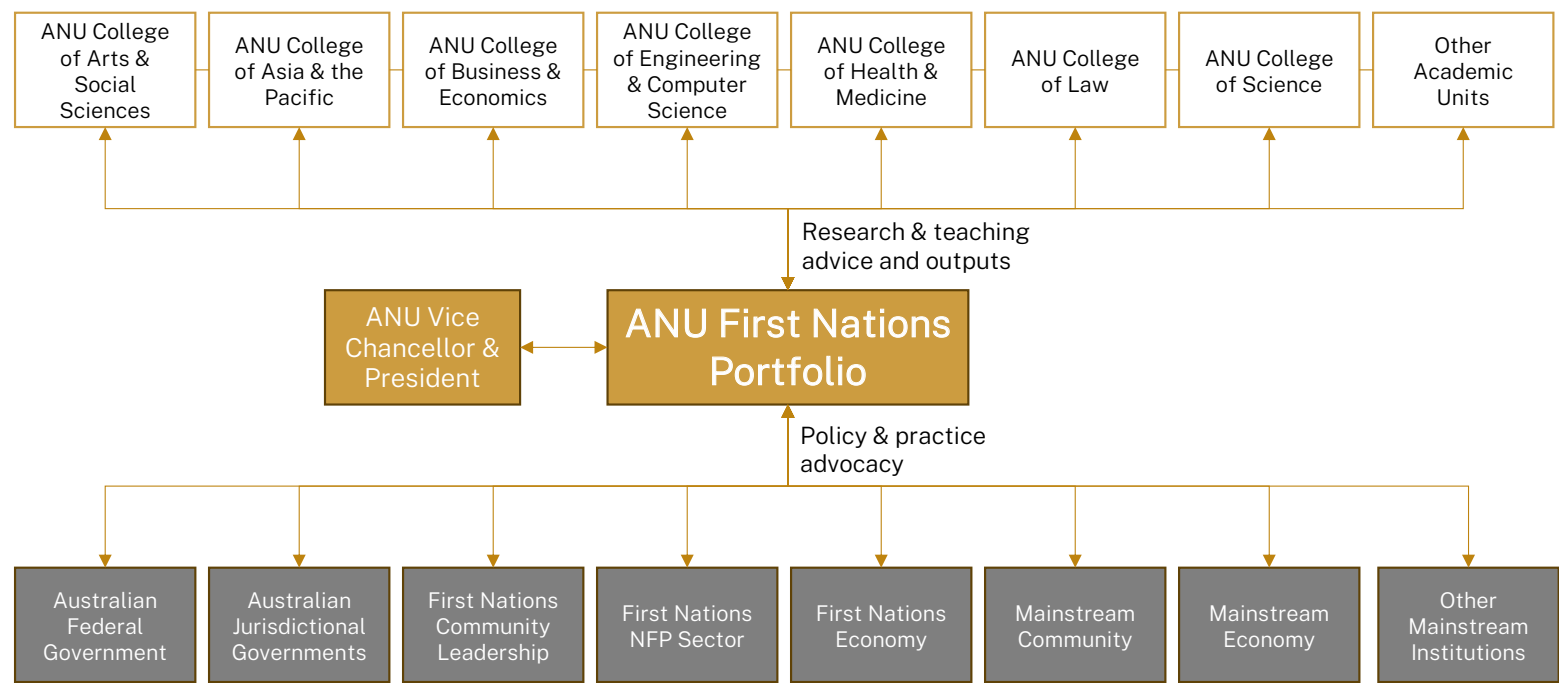


Figure 2 –Function of the Australian National University First Nations Portfolio in relation to college, school and institute structure.

Of highest priority to the remit of the First Nations Portfolio is enhancing the ability of First Nations Australians to meaningfully engage in economic development on their terms. In other words, the advancement of Australia's First Nations economic self-determination.

What do we mean by self-determination?

Self-determination refers to the process by which a group of people, typically possessing a sense of sovereignty, determine their own governance in order to meet their specific social, cultural and economic requirements.

The right to self-determination is a fundamental human right and is contained in Article 1 of both the International Covenant on Civil and Political Rights³ and the International Covenant on Economic, Social and Cultural Rights⁴:

1. "All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its means of subsistence.
3. The State's Parties to the present Covenant, including those having responsibility for the administration of

non-self-governing and trust territories, shall promote the realisation of the right of self-determination and shall respect that right, in conformity with the provisions of the Charter of the United Nations."

Australia is a signatory to both of these treaties and has endorsed the United Nations Declaration on the Rights of Indigenous Peoples which, in Article 3 states: "Indigenous peoples have the right to self-determination."⁵ This guarantees the right to freely determine their political status and the right to freely pursue their form of economic, social, and cultural development.

A transformative approach to Australian First Nations economic development

Much of the discourse and resulting policy initiatives targeting the improvement of economic circumstances for Australian First Nations people beyond social and health programs over the past several decades have been developed by governments, particularly the Commonwealth, and have been focused on job creation pathways into the mainstream economy such as training programs, remote employment schemes built around income support payments like the Community Development Program (CDP), employer incentives and mandates, as well as enterprise support and targeted government procurement policies to stimulate the development and growth of First Nations-owned businesses operating primarily in the mainstream economy.

The ANU First Nations Portfolio recognises that these efforts by governments can be an important component of economic

participation for Australia's First Nations people, if they are jointly developed with First Nations representatives through shared decision making which will hopefully increase as a result of the 2020 National Agreement on Closing the Gap. Even so, they fall short of what is required to achieve economic self-determination through the sustainable and culturally appropriate generation of wealth from the growing portfolio of Australian First Nations rights and assets.

This symposium will focus on the opportunities for First Nations people to develop a truly self-determined Australian First Nations economy that leverages from the rights and assets pertaining to land, seas, inland waters and intellectual property that have been, and continue to be, reclaimed by First Nations people through the progress of international conventions, Australian jurisprudence and the evolving policies and legislation of Australian governments.

Whereas the current policy frameworks seek to enable First Nations economic actors to service the mainstream economy, this Symposium is seeking reform to enable First Nations economic actors to also build wealth from a rights and asset base that is unique to Australian Aboriginal and Torres Strait Islander peoples through economic activity that is aligned with the cultural, social and wealth aspirations of those people.

This approach reflects world-best-practice in First Nations economic development.

Symposium and seminar process

The Symposium and its subsequent seminar series are designed to illuminate the rights and assets that First Nations Australians have reclaimed and will continue to reclaim, understand in detail the economic opportunities presented by these rights and assets, the challenges that are presented with respect to realising the value of those rights and assets and apply

multidisciplinary expertise to developing an Australian First Nations economic development policy framework and initiatives that delivers solutions for those opportunities and challenges.

Driven and informed by leaders in First Nations economic development and public policy, the Symposium and its subsequent seminar series is intended to develop a coalition for action and an evidence-based platform which will increase public policy focus on frameworks to facilitate and support First Nations Australians building their own economy. These actions will align with their cultural, social and wealth priorities — an approach that is consistent with world's best practice and the foundational principles of self-determination.

The Symposium will commence with an introductory event on the evening of 21 June 2022 and be conducted over the course of two days, comprising seven sessions which will discuss the key aspects underpinning the realisation of the Symposium's objectives. Each session will involve the facilitator framing the specific topic, an expert speaker(s) or discussion panel of experts discussing key aspects of the topic, and then break-out participant working groups that will be required to:

- Validate and refine key issues
- Determine what needs to be achieved
- Determine the challenges and obstacles that need to be overcome
- Discuss possible solutions
- Set terms of reference that identify issues that need to be investigated more deeply by specific and subsequent executive seminars.

Drawing on their established terms of reference, the seminars will apply domain-specific expert knowledge to identify aspects of the policy framework and specific initiatives that will capitalise on opportunities and resolve challenges and obstacles. This overall process is illustrated in Figure 3.

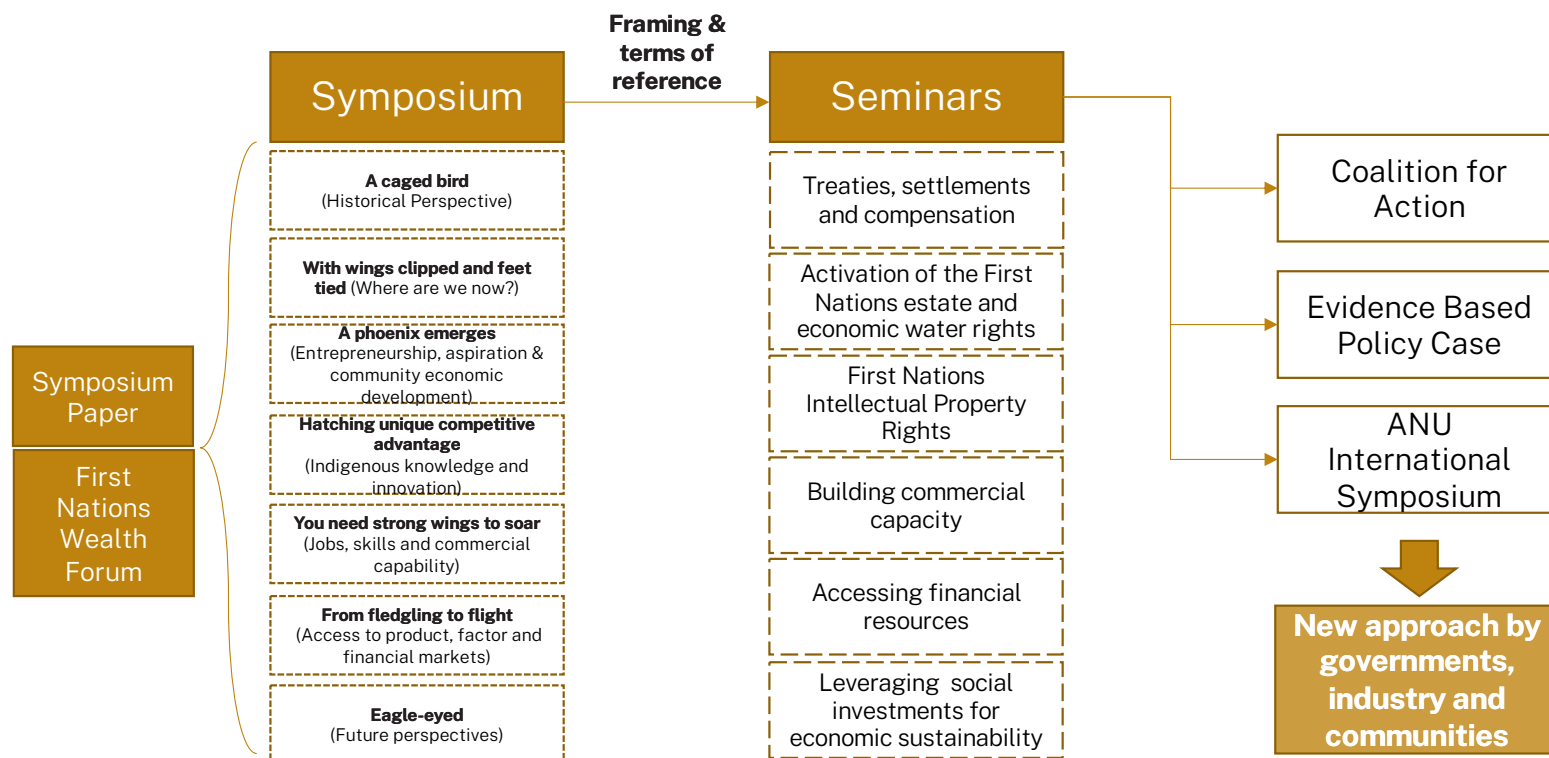


Figure 3: Symposium and seminar process

The specific seminar topics will be determined as a result of the outcomes from the Symposium.

³<https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>

⁴<https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>

⁵https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf

This Symposium Paper

The purpose of this Symposium Paper is to provide participants with background information to frame and support the discussion and deliberations for each of the Symposium sessions. During the Symposium it will be assumed that participants are familiar with this Paper and are able to access it during the course of the Symposium, with most information provided by the facilitator, speakers and panellists being additive to the content contained in the Paper.

This Symposium Paper and the corresponding Symposium sessions follow a theme of ‘Budyaan’ — a south-eastern Australian First Nations term used as the general name for all avian species, including the key local totems — the Crow and Eagle.

Table 1 provides a summary of each section to assist the reader with navigating this Symposium Paper.



Table 1–Symposium Paper overview

Session	Overview	Page No.
<p>Ngunba-ngidyala budyann (gaol, closed place, shut place): a historical perspective</p> <p>A caged bird: a historical perspective</p>	<p>This section provides an overview of the impact of British settlement of Australia on the ability of Australian First Nations people to participate in the economy over the past 234 years, the evolution of the Australian policy framework as far as it pertains to facilitating a First Nations economy, how that policy framework compares to other nations and the overall conduciveness of the current policy environment to a self-determined Australian First Nations economy.</p>	24
<p>Dibalany barraan-dirra (wings clipped/cut): where are we now?</p> <p>With wings clipped and feet tied: where are we now?</p>	<p>This section examines the socioeconomic outcomes achieved by the contemporary First Nations affairs policy approach of Australian Governments and explains why substantive progress will not be made until there is a greater focus on addressing the barriers to economic self-determination of Australia's First Nations people and facilitation of the development of a truly self-determined First Nations economy.</p>	60
<p>Yibai Maliyan bunbunha (eagle emerging/moving away, escaping): entrepreneurship, aspirations and community economic development</p> <p>A phoenix emerges: entrepreneurship, aspirations & community economic development</p>	<p>This section discusses the different dimensions of First Nations economic aspirations, participation of their interests in the mainstream, and uniquely First Nations economies, relatively recent growth in the Australian First Nations economy and the factors that continue to constrain that growth.</p>	82
<p>Bawalganha (Hatching): Indigenous knowledge and innovation</p> <p>Hatching unique competitive advantage: Indigenous knowledge and innovation</p>	<p>Building on the preliminary discussion in the first section of this Paper, this section identifies challenges associated with protecting, and therefore, appropriating value from First Nations intellectual property in the interests of Australian First Nations people—a significant constraint on the development of a First Nations self-determined economy.</p>	96
<p>Walanbang dibalany: (strong wings): jobs, skills and commercial capability</p> <p>You need strong wings to soar: jobs, skills and commercial capability</p>	<p>This section identifies the specific skills and expertise that are required to optimally activate an economically sustainable self-determined Australian First Nations economy, assesses the current framework of programs that are designed to support First Nations business and identifies gaps in that framework.</p>	106
<p>Wawinha (fly, move with wings): access to product, factor and financial markets</p> <p>From fledgling to flight: access to product, factor and financial markets</p>	<p>This section identifies some of the challenges that First Nations businesses face in terms of accessing the key inputs to commerce—product, factor and financial markets—and identifies potential solutions pathways.</p>	118
<p>Maliyan miil (eagle-eyed)</p> <p>Eagle-eyed: future perspectives</p>	<p>The self-determined Australian First Nations economy has its foundations in the current global and domestic economic dynamics. However, its growth and the prosperity of future generations of First Nations Australians will very much be driven by future economic dynamics. This section discusses global megatrends and their implications for a future self-determined Australian First Nations economy.</p>	134



Ngunba-ngidyala budyaan (gaol, closed place, shut place): a historical perspective

(A caged bird: a historical perspective)



'You are also with the Consent of Natives to take Possession of Convenient Situations in the Country in the Name of the King of Great Britain: Or: if you find the Country uninhabited take Possession for his Majesty by setting up Proper Marks and Inscriptions, as first discoverers and possessors.'

Orders issued to Lt. James Cook, Commanding Officer, His Majesty's Bark, the Endeavour, by the Office of the Lord High Admiral of Great Britain, 30 June 1768

The 'caged' history is now a matter of fact...

Accurate estimation of the population of the Australian continent prior to British settlement is a near impossible task. Recent archaeological research suggests that a population of at least 750,000 could have been sustained, with some estimates based on the observation of settlers suggesting the total First Nations population was well in excess of 1 million people at the time of British settlement. This is broadly equivalent to 15 percent of the population of Britain at the time and 5 percent of the current total Australian population. These Aboriginal and Torres Strait Islander First peoples were citizens of around 500 First Nations.⁴

These interrelated sovereign First Nations were characterised by sophisticated systems of governance and justice. They applied what we know as 'natural resource management' (NRM) practices to maintain, improve and sustainably harvest foods and materials. They manufactured tools and equipment that facilitated harvests and preparation of food, instruments of warfare that were used to protect and prosecute sovereign rights under traditional laws and customs, and constructed shelter and watercraft. They had developed extensive knowledge through both experimentation and observation and sophisticated systems for communicating, maintaining, transferring and enhancing this knowledge from generation to generation.

Trade in produce, manufactured goods and services occurred along trade routes that transect the Australian continent,

passing through a myriad of local markets and converging in established inter-First Nations trade centres such as those that existed at Lake Nash, Camooweal, Fitzroy Valley, Koppermana, Goyder's Lagoon, Birdsville, Bedourie and Toko. In Northern Australia, First Nations Australians also traded internationally with Makassan Trepong traders from what is now the Sulawesi Region of Indonesia and the First Nations of what is now Papua New Guinea and Indonesian New Guinea.^{5,6 & 7}

This Australian First Nations society and economy developed over at least 60,000 years and by all measures, at the time of British settlement, was not vastly different to many across the globe. The culture underpinning this society and economy survives today as the longest continually practised culture in the world.

The Australian continent was not uninhabited at the time of colonisation and Australian First Nations have never ceded their lands, waters, natural resources or knowledge assets.

Accordingly, the illegitimacy of Britain's claim to the Australian continent under the doctrine of *terra nullius* is a matter of historical fact that is beyond dispute. It has been recognised in Australian legal doctrine since the High Court's Mabo decision of 1992⁸, three decades ago.

Since British settlement, generations of Australia's First Nations people have known and continued to promote the

⁴Australian Government (2022), 'Our People' (<https://info.australia.gov.au/about-australia/our-country/our-people>) Accessed 11 April 2022

⁵McBryde, I. (1984), 'Exchange in south eastern Australia: an ethnohistorical perspective', *Aboriginal History*, Vol (8)2

⁶Gammage, B. (2011), *The Biggest Estate on Earth: How Aborigines Made Australia*, Allen and Unwin, Sydney

⁷Pascoe, B. (2014), *Dark Emu: Aboriginal Australia and the Birth of Agriculture*, Magabala Books Aboriginal Corporation

⁸*Mabo v Queensland (No. 2)* [1992] HCA -23 175 CLR 1

fact that their sovereignty was taken, initially by means of subversion, force and conquest, and subsequently by the policies of consecutive Australian Governments which both overtly and insidiously fettered the ability of First Nations people to prosecute their sovereignty. Meanwhile, Britain and 'new Australians' systematically and fraudulently continued to portray the colony and subsequent nation, both among themselves and to the world, as one whose foundation was characterised by peaceful capitulation on the part of its First Peoples to British occupation.

As a result of decades of evidence-based advocacy by Australian First Nations leaders and greater capability among Western historians, the true circumstances of British settlement of Australia and its impact on its First Nations society and economy is becoming increasingly understood by the broader Australian populous and the world.

'...Our Aboriginal and Torres Strait Islander Tribes were the first sovereign Nations of the Australian continent and its adjacent islands and possessed it under our own laws and customs...It has never been ceded or extinguished and co-exists with the sovereignty of the Crown.

How could it be otherwise? That people possessed a land for sixty millennia and this sacred link disappears from world history in merely the last 200 years...'

Uluru Statement from the Heart (2017)

Australian First Nations have paid an immeasurable price for this brief period in their history...

Sustained and significant economic growth and distributed prosperity is a relatively recent phenomenon⁹. It has been estimated that from 10,000 BC to 1750 AD, global Gross Domestic Product (GDP) per capita grew at a compound annual growth rate of 0.006 percent, taking almost 12,000 years to double to USD\$178¹⁰. Over the 270 years since 1750, global GDP per capita has grown at an average of 1.6 percent per annum (or 267 times faster than in the previous 12,000 years). The current global GDP per capita of USD \$11,500 represents a 64-fold increase since 1750¹¹. In terms of material wealth, a man (and it was primarily males who held or controlled measurable wealth at the time) in Great Britain in 1750 was likely to have more in common with a legionnaire in ancient Rome, than his own great grandchildren¹².

This unprecedented expansion in relatively shared economic prosperity (see Figure 4) was enabled by: advanced scientific endeavour and resulting technological innovation; increased prevalence of democratic systems of government across the globe; asset and liability securitisation; and, relatively free trade. However, the prosperity itself has been driven by the emergence of an 'entrepreneurial class' that has produced wealth by marshalling resources and taking advantage of these factors in pursuit of enterprise. This has been the case through the first industrial revolution (mechanical production, railroads and steam power), the second industrial revolution (mass production, electrical power and assembly lines), the third industrial revolution (automated production, electronics and computing) and the current fourth industrial revolution (artificial intelligence, big data and robotics)¹³.

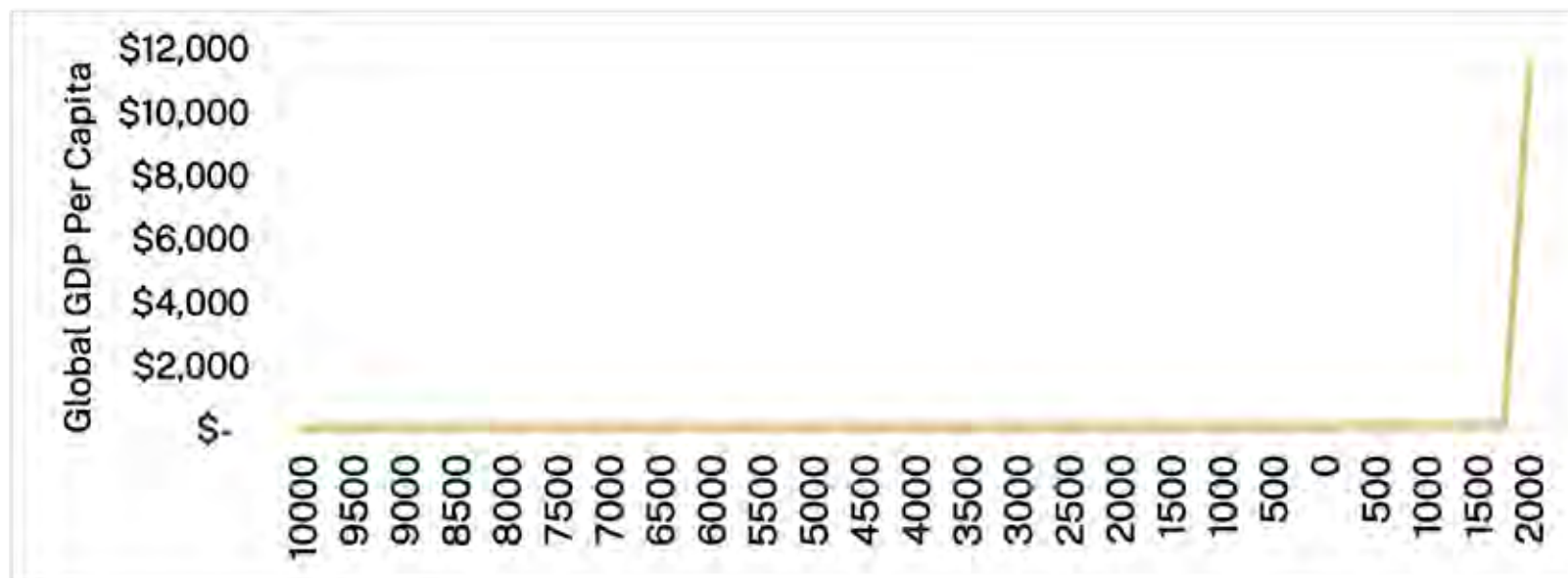


Figure 4 – Global GDP per capita – 10,000BC to 2000 AD

A common Western portrayal of Indigenous Australians is that prior to British settlement they were, on the whole, nomadic peoples who lived unsophisticated hunter-gatherer lifestyles and whose culture, particularly the communal ownership aspects of that culture¹⁴, is the antithesis of that which is conducive to entrepreneurship^{15,16}. As discussed in the previous subsection, this betrayal is almost equivalent in its deception to that of Britain's claim of *terra nullius*.

The fact is that the policies of European settlers, colonial and subsequent Australian Governments that resulted directly in dispossession of lands, waters and seas, significant reduction of population that was the result of extensive massacres¹⁷ and incarceration¹⁸, forced labour and discriminatory employment¹⁹, as well as infamous eugenics programs²⁰, have rendered the possibility of fair and reasonable employment, let alone participation in entrepreneurship, an impossibility for the

overwhelming majority of First Nations Australians for the past 234 years.

In the case of Australian First Nations people, the price paid by them in terms of foregone opportunity is particularly severe. 'New' Australians have enjoyed some of the greatest prosperity in the world over the past 200 years. Driven principally by the appropriation and commercialisation of the Australian continent's vast and relatively virgin natural resources, since 1820 the Australian economy has grown at an average annual rate of 2.1 percent, almost 1.5 percent faster than the global average over the same period, rendering it currently among the world's most wealthy nations (see Figure 5²¹). Prior to British settlement, the natural resources that facilitated this growth were the exclusive possession of Australian First Nations.

⁹Roser, M. (2016), 'Economic growth', *Our World in Data*, University of Oxford

¹⁰Beinhocker, E. (2006), *The Origin of Wealth: Evolution, Complexity and the Radical Remaking of Economics*, Harvard Business School Press, Massachusetts

¹¹The World Bank

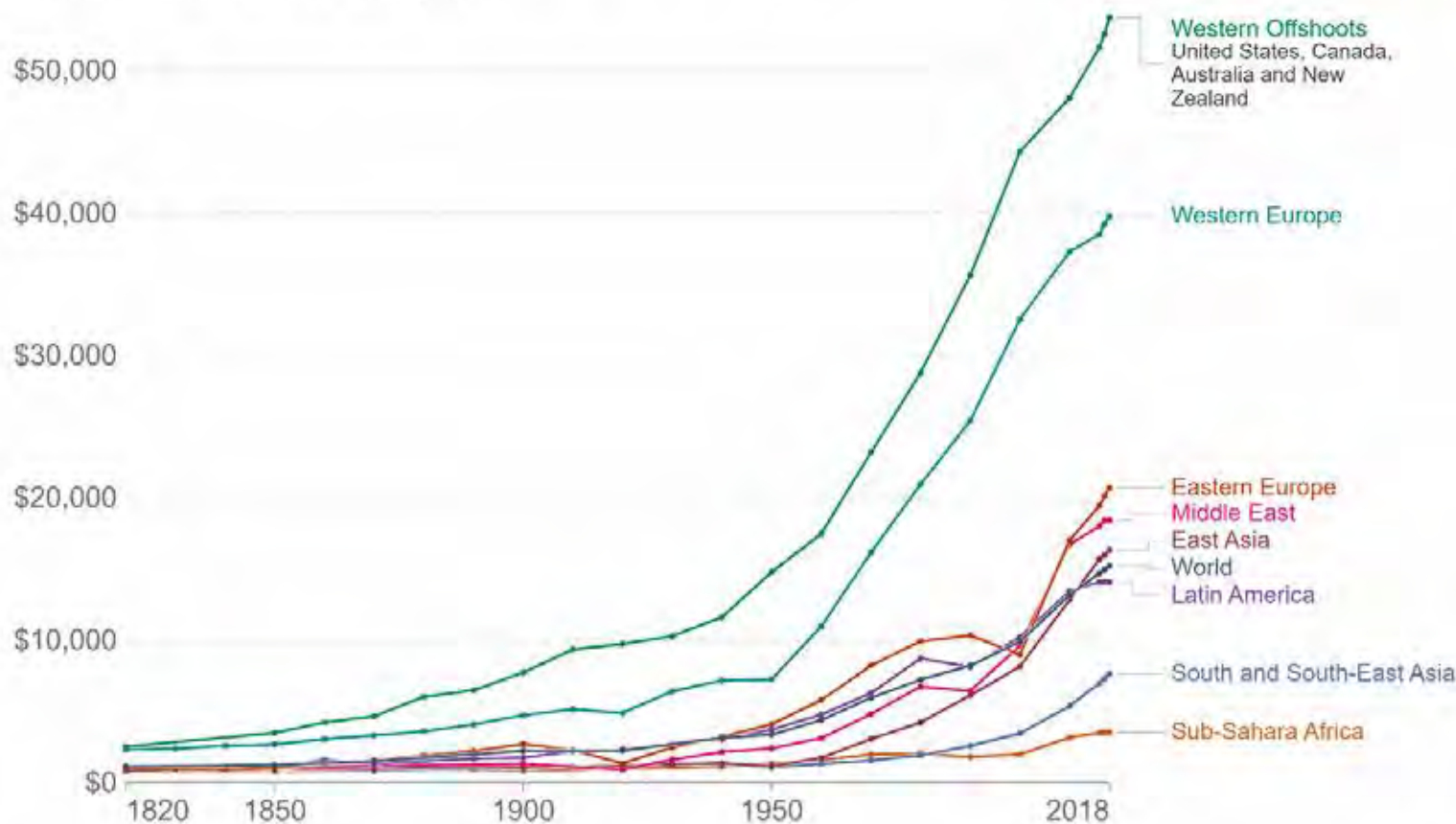
¹²Landes, D. (1969), *Prometheus Unbound: Technological Change and Industrial Development in Western Europe from 1750 to Present*, Cambridge Press, Cambridge

¹³Schwab, K. (2016), 'The fourth industrial revolution: what it means, how to respond', *World Economic Forum*

GDP per capita, 1820 to 2018

GDP per capita adjusted for price changes over time (inflation) and price differences between countries – it is measured in international-\$ in 2011 prices.

Our World
in Data



Source: Maddison Project Database 2020 (Bolt and van Zanden (2020))

OurWorldInData.org/economic-growth • CC BY

Figure 5 – Growth in Global GDP per Capita – 1820 to 2020

¹⁴Stacy, H. and Lavarch, M. (1999), *Beyond the Adversarial System*, Federation Press, Sydney

¹⁵House of Representative Standing Committee on Aboriginal and Torres Strait Islander Affairs (2008), *Open for Business: Developing Indigenous Enterprises in Australia*, Parliament of the Commonwealth of Australia

¹⁶Keen, I. (2010), 'Indigenous Participation in Australian Economies', Australian National University Press, Canberra

¹⁷Reynolds, H. (2013), *Forgotten War*, New South Publishing, Sydney

¹⁸Australian Law Reform Commission (2018), 'History of contact with the criminal justice system', *Pathways to Justice Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, ALRC Report 133, Australian Government, Canberra

¹⁹Anthony, T. (2013), 'Indigenous stolen wages: historical exploitation and contemporary justice', *Precedent*, Issue 118, pp.43-46

²⁰For example, *Aborigines Act 1905 (WA)*

²¹Our World in Data

²²United Nations Declaration on the Rights of Indigenous Peoples ('UNDRIP'), GA Res 61/295, UN GAOR, 61st Sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295

While the period since British settlement of Australia represents a mere 0.4 percent of the 60,000 years that First Nations people are understood to have lived on the Australian continent, this period has had a dramatic impact on Australian First Nations people, and the price that First Nations people have paid in terms of lost economic opportunity is immeasurable.

Like the rest of the modern world, Australia has signed up to a framework of contemporary rights of First Nations people...

Across the globe, national governments recognise that

Indigenous peoples and First Nations hold ethical, moral and traditional customary and spiritual rights to control or influence their ancestral lands and are entitled to recompense for the inequitable appropriation of those lands by other sovereign powers.

While Australia was one of only four nations to initially vote against its passage, Australia subsequently adopted the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)²² two years after it was formally adopted by the General Assembly of the United Nations.

Although UNDRIP is not legally binding on the Australian Federal or State Governments, by endorsing UNDRIP, Australia has at the very least acknowledged certain First Nations rights that are particularly relevant to the subject matter of this Symposium Paper. These are summarised in Table 2.

Table 2–Relevant Articles of the United Nations Declaration on the Rights of Indigenous Peoples

UNDRIP Article	Relevant Text
Article 3	...the right to self-determination...[to] freely determine their political status and freely pursue their economic, social and cultural development.
Article 4	...in exercising their right to self-determination...the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.
Article 5	...right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining the right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.
Article 8(2)	States shall provide effective mechanisms for prevention of, and redress for... any action which has the aim or effect of dispossessing them of their lands, territories or resources...
Article 20(2)	Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.
Article 26(2)	...the right to own, use, develop and control the lands, territories and resources that they possess by reason of Traditional Ownership...
Article 28(1)	...the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

Further arising out of UNDRIP and other mechanisms is the concepts of Free, Prior and Informed Consent (FPIC) and Access and Benefits Sharing (ABS). At their base level, these concepts require genuine inclusion, disclosure and respect for the traditional decision-making processes of Indigenous peoples, requiring effective and meaningful participation, with an end-goal of ensuring sustainable outcomes over time and across generations²³.

However, while the cage door has been opening in Australia, it has been doing so at a glacial pace...

Despite that acknowledgement and recognition, and in contrast to comparable developed world nations²⁴, Australian Governments have been both relatively slow and constrained in giving effect to restorative justice — recognition of First Nation's rights, restoration of equity and recompense for past actions.

For the first 180 years of British settlement in Australia, Australian First Nations people were initially the dominion of the various British colonies and then the States of Australia. Indeed, until the 1967 Referendum, the Australian Government was constitutionally barred from legislating for Australia's First Nations people²⁵ and First Nations Australians were not counted in the Australian population²⁶.

The period from British settlement to well into the 1970s was characterised by colonial and then State policies and

legislation that was extraordinarily discriminatory toward First Nations people. These frameworks facilitated:

- Dispossession of First Nations' lands
- State sanctioned and State tolerated massacres of First Nations communities, currently totalling an estimated 304 such events resulting in the death of an estimated 8,140 First Nations people²⁷
- Employment inequality (including slavery)
- Systematic social segregation
- Discriminatory treatment by the justice system that required less onus of proof when prosecuting First Nations people
- Infamous eugenics programs that forcibly removed and endeavoured to permanently disconnect First Nations children from their families and communities as a way of 'assimilating' First Nations people. It has been estimated that between one in ten and one in three First Nations children, known as the 'Stolen Generation', were affected by these programs from 1910 to the mid-1970s²⁸

While on the whole discriminatory, specific rights of First Nations people varied across the colonies and subsequent States. For example, the original constitutions of the states of Victoria, New South Wales and South Australia provided Aboriginal men with the same right to vote as other male²⁹ British subjects aged over 21 years, as did early revisions of the Tasmanian Constitution. By contrast, laws that specifically denied First Nations Australians the right to vote were proclaimed by Queensland (1885), Western Australia (1893) and the Northern Territory administered by the Commonwealth (1922). Further, the first Federal electoral legislation, the *Commonwealth Franchise Act 1902* (Cth), specifically excluded First Nations people from the right to vote unless they already had the right to vote before 1901 by virtue of the jurisdiction of specific State legislation.³⁰

²³Australian Institute of Aboriginal and Torres Strait Islander Studies (2021), *Engaging with Traditional Owners, fact sheet published May 2021*

²⁴The circumstances pertaining to British settlement of Canada and New Zealand, and subsequent First Nations to Government relations, are discussed in a subsequent section of this paper.

While some concessions were made (for example, First Nations people who had been members of the defence forces, and lived in states other than Queensland, Western Australia and Northern Territory, became entitled to vote in 1949), it wasn't until the Native Welfare Conference in 1961 and amendments to the Commonwealth Electoral Act in 1962 when all First Nations Australians were awarded the right to vote in Australian elections and not until the 1967 Referendum when First Nations Australians were counted in the Australian population and the Federal Government acquired the constitutional capacity to legislate for First Nations Australians

From a labour market perspective, there were certainly instances of slavery and remunerating First Nations workers at levels substantially below non-First Nations workers was standard practice until the late 1960s, when, as the result of organised industrial action by First Nations workers over the course of some 30 years³¹, the Australian Conciliation and Arbitration Commission finally put into force equal pay regulation.

What was historically effectively a 'non-citizen' status, also excluded First Nations people from accessing many government services, including income support. For example, *The Invalid and Old Age Pension Act 1908* (Cth)⁶ benefited all Australians with the express exception of Aboriginal Australians. By virtue of changes to Commonwealth social security legislation, First Nations people first became entitled to income support in 1968. As foreshadowed by industry submissions to the Conciliation and Arbitration Commission in 1966, equal pay, whilst of itself obviously of unquestionable necessity, resulted in many First Nations people being laid off and turning to income support. Commonly referred to

as the 'welfare crisis', this resulted in intergenerational welfare dependency among many First Nations families and communities, further distancing those people from economic participation. As a result of the 1968 decision, an internal refugee situation occurred whereby Traditional Owners were forcibly removed from their traditional lands to the outskirts of small pastoral and other service towns across the country, particularly so in northern Australia.

The late 1960s was followed by a period of what was, by Australia's slow standards, relatively intense State and Commonwealth Governments designing legislation to partly redress historical wrongs including anti-discrimination legislation and various systems of First Nations land rights. While First Nations reserves had been proclaimed earlier³², from the mid-1960s to the mid-1980s, the States implemented legislation that established mechanisms for the creation of First Nations' land rights, albeit with limited rights and typically held in trust by State statutory bodies. While the South Australian Government was the first State to recognise First Nations' land rights³³, it is the framework facilitated by the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) that is generally regarded as the most robust and geographically extensive jurisdictional framework.

The early 1990s marked a significant turning point in First Nations rights in Australia. Effectively overturning Britain's claim to Australia on the basis of *terra nullius*, the High Court's decision in the Mabo case³⁴, triggered a significant response by the Australian Government that included:

²⁵Section 51 (xxxvi) of the Australian Constitution prior to amendment in 1968

²⁶Former Section 127 of the Australian Constitution

²⁷University of Newcastle (2022), *Colonial Frontier Massacres in Australia: 1788-1930*, Australian Research Council Project ID 104100399

²⁸Australian Institute of Aboriginal and Torres Strait Islander Studies (2022), *The Stolen Generations*

²⁹Female British subjects did not have rights to vote at the time.

³⁰National Museum Australia, *Indigenous Australian's rights to vote*

³¹Skull Springs meeting (1942) and subsequent pastoral workers strike in 1946, Wave Hill Walk Off (1967)

⁶<https://www.legislation.gov.au/Details/C1908A00017>

- The establishment of a new form of national First Nations land tenure facilitated by the *Native Title Act 1993* (Cth), which provides an additional national framework for delivering some rights over traditional lands, as well as a basis for compensatory payments.
- The establishment of the now Indigenous Land and Sea Corporation to provide for the contemporary and future land needs of Indigenous Australians, particularly those unlikely to benefit from Native Title or Land Rights.

The then Keating-led Labor Government also contemplated a *Native Title social justice package* as part of the Australian Government's response to the Mabo decision that envisaged further measures being implemented by the Commonwealth to address the dispossession of First Nations people. The former Aboriginal and Torres Strait Islander Commission and the Council for Aboriginal Reconciliation were asked by the Commonwealth to consult widely and submit public reports that, among other things, proposed constitutional reform and compensation. However, the *Native Title social justice package* was abandoned by the subsequent Howard-led Liberal-National Coalition Government.

Subsequent jurisprudence has further developed and clarified First Nations' rights under the native title and other First Nations tenure frameworks. This is a complex area of law that is beyond the scope of this paper. But for the purposes of the subject matter, the following jurisprudence is important to note:

- **Wik determination**³⁵
The Wik determination pertains to two native title claims in Queensland by the Wik and Thayorre peoples. These claims were over large areas which included a number of pastoral leases, as well as two special mining leases granted under ratified State Government agreements. The Wik

and Thayorre people asserted that their native title rights had survived the grant of the pastoral leases and that the mining leases were invalid. The respondents asserted that, based on the principles stated by the High Court in the Mabo case, any native title that might have existed was extinguished by the grant of pastoral leases. The main outcome of this case, was judicial determination that native title rights can co-exist with some other forms of tenure, albeit typically at a subordinated level, with the High Court holding that:

- Pastoral leases do not necessarily confer rights of exclusive possession
- The rights and obligations of the holder of a pastoral lease depend on the terms of the specific lease and the law under which it was granted
- The mere grant of a pastoral lease does not necessarily extinguish any remaining native title rights
- If there is any inconsistency between the rights of the native title holders and the rights of the holder of the pastoral lease, the rights of the pastoral lease holder prevail.

- **Ward determination**³⁶

The Ward determination pertains to the native title applications of the Miriuwung Gajerrong, Balangarra peoples and others over 7,900 square kilometres of land and waters in the East Kimberley Region of Western Australia and extending into the Northern Territory, which includes two significant pieces of infrastructure that pre-date native title – the Ord River Irrigation Area and Argyle Diamond mine. The key outcomes of the Ward determination were a concurrence with previous High Court decisions that native title can co-exist with other forms of title, that the concept of extinguishment can be measured in terms of total or partial extinguishment and

³²*Cherbourg Aboriginal Community (1904) and Arnhem Land Reserve (1934)*

³³*Aboriginal Land Trust Act 1966* (SA)

³⁴*Mabo and Ors. v Queensland (No.2) [1992] 175 CLR*

³⁵*The Wik Peoples v The State of Queensland & Ors; The Thayorre People v The State of Queensland & Ors [1996] HCA 40*

that proof of native title does not require occupation of traditional lands, with the High Court upholding that:

- Native title rights can co-exist with other rights, such as pastoral leases
 - Native title legislation allows for partial and total extinguishment of native title
 - Proof of native title is based in traditional laws and custom, not mere occupation of lands
- **Blue Mud Bay determination**³⁷
- Under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), deeds of grant of lands were made that included the Blue Mud Bay area (a shallow bay on the east coast of Arnhem Land in the Northern Territory that is incorporated in the traditional lands of the Yolngu People) that extends to the low water mark and includes river mouths and estuaries. Substantively different to the framework of tenure under the *Native Title Act 1993* (Cth), the land granted under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) includes inalienable freehold title, conferring similar rights as freehold title such as ownership at the exclusion of others and rights under trespass law.

The key outcome of the Blue Mud Bay determination is that it provided a legal basis by which First Nations people could potentially assert a high degree of control over certain marine-based resources and industries, with the High Court upholding that:

- Granted Aboriginal land includes the intertidal zone; and
- The holder of a licence to fish, cannot enter and take fish from that intertidal zone without the express permission of the First Nations owners of those intertidal zones.³⁸

- **Akiba determination**³⁹
- The Akiba determination determined that Commonwealth and Queensland legislation, which prohibited taking of fish and other aquatic life for commercial purposes without a licence, did not extinguish the native title right of certain island communities in the Torres Strait to take resources from defined areas of water and trade catches in accordance with custom and tradition. While the commercial opportunity that stems from this decision is constrained, it sets a pathway for native title rights to potentially include commercial rights.
- **Timber Creek determination**⁴⁰
- While there have been previous court determinations of compensation, the Timber Creek series of cases represented the first High Court determination that included specific guidelines as to how compensation for the impairment of native title rights and interests should be calculated. Incorporating components of economic and cultural loss and recognition of the monetary value of time.



³⁶*Western Australia v Ward* (2002) 213 CLR 1

³⁷*Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24

The resulting Australian First Nations estate is vast and subject to variable tenure...

As a result of the developments already discussed, Australian First Nations legal rights and interests are formally recognised

for over approximately 57 per cent of the Australian landmass. This estate will continue to grow as native title claims progress to full determination over the course of this decade and is likely to reach 65 per cent by 2030. The geographical expanse of the current Australian First Nations estate is illustrated in Figure 6⁴¹, with a brief description of the main forms of tenure.

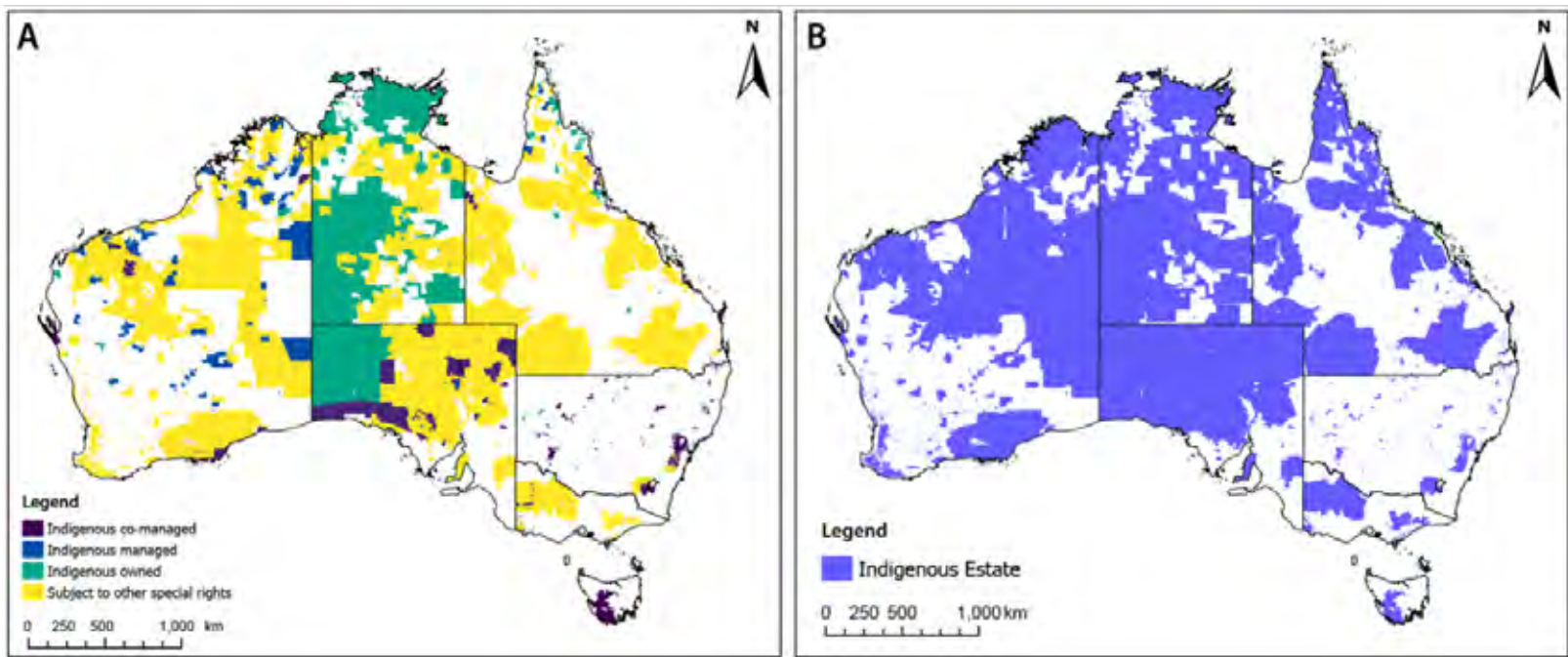


Figure 6: Australian First Nations estate

³⁸Butterly, L. (2017), ‘A decade on: what happened in the historic Blue Mud Bay case, and why is it in the news again?’, AUSPUBLAW

³⁹Akiba v Commonwealth (2013) 250 CLR 209

⁴⁰Griffiths v Northern Territory of Australia (No 3) [2016] FCA 900; Northern Territory of Australia v Griffiths [2017] 256 FCR 478; Northern Territory v Griffiths (2019) 269 CLR 1

⁴¹Barnett, R., Doran, B., McArthur, L., Normyle, A., Vardon, M. (2022), Baseline study – agricultural capacity of the Indigenous Estate, Cooperative Research Centre for Developing Northern Australia and Australian National University (Unpublished)

State Aboriginal Land Trust estate

Enabled by seven pieces of State legislation⁴², State Aboriginal Land Trusts are appropriated with land within the State jurisdiction, usually former missions or reserves, and hold it on behalf of First Nations people. It is understood that only Western Australia and South Australia still have statutory Aboriginal Land Trusts. The tenure is usually inalienable but sometimes includes pastoral or general-purpose leases. However, significant caveats mostly apply that constrain permitted uses of the land, including development restrictions.

Northern Territory Aboriginal Land Rights Act estate

The First Nations tenure created by the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) is unique among other Australian jurisdictions in its geographical reach and rights associated with the tenure. A full description of tenure created under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) is beyond the scope of this paper. However, aspects that are worthy of note include:

- All of the tenure, Aboriginal land, is established in the form of inalienable freehold;
- Aboriginal land covers over 50 percent of the Northern Territory including approximately 85 percent of the coastline;
- A mechanism is established in the form of the Aboriginal Benefits Account (ABA), whereby the Commonwealth makes payments into the ABA generally equivalent to the royalties paid by mining companies operating on those lands which are to be used for the benefit of Aboriginal people in the Northern Territory including directing 30 percent to Traditional Owners affected by mining;
- Four Land Councils funded by the ABA–Northern Land

Council, Central Land Council, Tiwi Land Council and Anindilyakwa Land Council—are established and afforded effective powers under the legislation including consent to leasing and mineral exploration on Aboriginal land in accordance with the instructions of Traditional Owners; and

- Amendments were passed in 2021 to establish a Northern Territory Aboriginal Investment Corporation, with a Board comprising a majority of Land Council representatives and which will receive approximately half (\$680 million) of the current accumulated balance of the ABA to use for economic development.

Indigenous Land and Sea Corporation facilitated estate

Initially established in accordance with the *Land Fund and Indigenous Corporation (ATSIC Amendment) Act 1995* (Cth), the original Indigenous Land Corporation (ILC) was a component of the Commonwealth's response to the Mabo High Court decision. Its principal purpose was to provide a mechanism for land to be acquired for Indigenous interests who would have been unlikely to benefit from the *Native Title Act 1993* (Cth). Since 2005, the ILC operated as a statutory authority under Part 4A of the *Aboriginal and Torres Strait Islander Act 2005* (Cth) and was charged with the specific responsibility for assisting Aboriginal and Torres Strait Islander persons to acquire land and manage and improve Indigenous-held land so as to provide economic, environmental, social or cultural benefits to Aboriginal and Torres Strait Islander persons.

Legislative changes that came into effect in early 2019⁴³, resulted in:

- The Indigenous Land Corporation (ILC) changing its name to the Indigenous Land and Sea Corporation (ILSC)
- The ILSC's remit being extended beyond the land estate to

⁴²*Aboriginal Land Trust Act 1966* (SA), *Aboriginal Affairs Planning Authority Act 1972* (WA), *Aboriginal Land Rights Act 1983* (NSW), *Aboriginal Lands Act 1970* (Vic), *Aboriginal Lands Act 1995* (Tas), *Aboriginal Land Act 1991* (QLD) and *Torres Strait Islander Act 1991* (QLD)

- include interests in the fresh and seawater estate
- The previous Land Account becoming the Aboriginal and Torres Strait Islander Land and Sea Future Fund, now managed by the Future Fund Board of Guardians, resulting in an increase in the funds being held in perpetuity for all First Nations Australians and to now grow in line with mainstream long-term investments managed by the Future Fund.

Since 1995, the ILSC has invested A\$1.24 billion, acquiring 268 land and water interests and adding 6.2 million hectares to the Indigenous estate. It has also invested A\$666 million in 830 projects to manage and protect Country.⁴⁴ There are caveats as to what divested ILSC properties can be used for.

New South Wales Land Rights estate

Differing significantly from the Commonwealth's Land Rights legislation for the Northern Territory and the Native Title regime the *Aboriginal Land Rights Act 1983* (NSW), co-designed with the original New South Wales Aboriginal Land Council (NSWALC), provides for a self-funded and self-regulated network of independent Aboriginal bodies corporate known as Local Aboriginal Land Councils. Aspects worthy of note include:

- The establishment of a NSWALC Statutory Investment Fund. For 15 years this Fund provided for guaranteed funding through the payment of an amount equivalent to 7.5 percent of NSW Land Tax (on non-residential land) to NSWALC as compensation for land lost by the Aboriginal people of NSW
- During the 15-year period, half of the funds were available for land acquisitions and administration and half was deposited into a statutory account to build a capital fund to

provide ongoing funding.

- Since 1998, NSWALC and the land council network have been self-supporting.
- In 2018, NSWALC approved a new strategy under which it is assuming a strong focus and taking a lead role in the areas of: employment services, training and brokerage; Aboriginal housing; and, land development and construction.
- Local Aboriginal Land Councils, of which there are 120, can claim land as compensation for historic dispossession of land in order to support Aboriginal communities' social and economic development.

Native Title estate

The national tenure framework facilitated by the *Native Title Act 1993* (Cth) is the most expansive in terms of size but, with the exception of 'exclusive' native title, is mostly the weakest form of tenure. Famously characterised by Chief Justice Gleeson as a 'bundle of rights', native title tenure is not directly comparable with any common law or Torrens system land rights such as freehold or leasehold tenure.

Since proclamation of the *Native Title Act 1993* (Cth) and largely as a result of jurisprudence (particularly the *Mabo*⁴⁵, *Wik*⁴⁶, *Ward*⁴⁷, *Blue Mud Bay*⁴⁸ and *Akiba*⁴⁹ cases and in some cases subsequent amendments to the legislation, the operation, rights and conveyed interest associated with the native title framework have become reasonably established. Again, a full analysis of this area of law is beyond the scope of this paper, but for the current purpose, it is useful to note the following key features of native title:

⁴³*Aboriginal and Torres Strait Islander Land and Sea Future Fund Bill 2018, Aboriginal and Torres Strait Islander Land and Sea Future Fund (Consequential Amendments) Bill 2018 and Aboriginal and Torres Strait Islander Amendments (Indigenous Land Corporation) Bill 2018*

⁴⁴*Indigenous Land and Sea Corporation (2021), Welcome to the Indigenous Land and Sea Corporation: Connecting People, Country and Opportunity, Australian Government, Canberra*

- **Native title rights are extinguished by pre-existing exclusive possession**

Where the Crown has made a grant of land that conveys exclusive possession, rights to native title are extinguished. Determining the specific nature of tenure that extinguishes native title on this basis depends on the terms of the grant, but in most cases it includes grants of freehold tenure. As a result of the Wik determination, pastoral leases do not extinguish native title, but other forms of leases, licenses and other rights to land need to be considered on a case-by-case basis.

- **Specific details of native title rights vary from case-to-case**

Because the nature of native title is determined from the traditional laws and customs observed by specific First Nations people who have claim to the native title, the specific nature of native title rights will differ depending on the specific traditional laws, customs and practices of the First Nations people making the claim. These can be highly variable and include rights to access, resource usage, fishing, hunting, erecting structures, practising traditional ceremonies, conducting practices to pass-on knowledge and cultural authority and other traditional practices. Of particular relevance is that they may (or may not) include exclusive access to, and usage of, land (exclusive possession), and the commercialisation (or otherwise) of the natural resources upon it.

- **In most instances native title rights are subordinate to other rights pertaining to the land**

With the exception of cases where exclusive native title has been determined, the native title rights granted over a specific area of land may coexist with the other non-native title rights such as rights granted under a pastoral lease.

In a majority of cases, courts have determined native title rights as subordinate or secondary to other forms of rights and interests over land granted by the Crown. For example, since 1993 in only 2 percent of cases was a litigant able to secure positive determination over their ancestral land without the consent of developers, government and others holding interests in the land that was the subject of the determination.⁵⁰

- **States constitutional rights to mineral and petroleum resources prevail**

In accordance with the Australian Constitution, the States own all rights to *in situ* minerals, petroleum and geothermal resources within their jurisdiction. These rights do not ordinarily transfer with a grant of freehold title and similarly, native title rights are not recognised over such resources.

- **Native title rights are held by a special purpose vehicle acting as trustee or agent**

In accordance with Division 6 of the *Native Title Act 1993* (Cth) and the *Native Title (Prescribed Bodies Corporate) Regulation 1999* (Cth), when the Federal Court makes a determination of native title under the Act, the associated native title rights and interests must be held in a special purpose vehicle known as a Prescribed Body Corporate (PBC) either on trust for, or as an agent of, the common law holders of those rights and interests. In addition to administering the native title rights, PBCs may also perform a range of community governance, service delivery, cultural and economic development functions associated with those native title rights. There are currently around 200 PBCs in Australia, 70 percent of which are located in the northern half of the continent.

⁴⁵ *Mabo v Queensland (No. 2)* (1992) 175 CLR 1

⁴⁶ *Wik Peoples v Queensland* (1996) 187 CLR 1

⁴⁷ *Western Australia v Ward* (2002) 213 CLR 1

⁴⁸ *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24

⁴⁹ *Akiba v Commonwealth* (2013) 250 CLR 209





Other components of the Australian First Nations asset base

Rights to water

Water resources across Australia are of fundamental importance to First Nations people for cultural, subsistence, recreational and commercial purposes. Across Australia, water allocations to First Nations groups and communities have historically been extremely limited.

The National Water Initiative (NWI)⁵¹, which was agreed to by the Council of Australian Governments (COAG) in 2004, is a shared commitment by Australian governments to increase the efficiency of Australia's water use, leading to greater certainty for investment and productivity, for rural and urban communities and for the environment. The NWI requires all jurisdictions to provide for First Nations access to water resources and inclusion of First Nations people in water planning and policy.

In 2010 it was estimated that water allocations to First Nations groups were less than 0.01 percent of the total diversions⁵². While there has been some improvement over the past decade, First Nations interests in Australian water resources, remain dismal. For example, across the 10 catchments that comprise the Murray-Darling Basin within the jurisdiction of New South Wales, First Nations entities collectively hold entitlements equivalent to 0.2 percent of the available surface water.⁵³

Furthermore, where First Nations water allocations exist they

are mostly categorised as 'cultural' flows, with limited ability for First Nations water rights holders to use those rights for commercial purposes.

Despite providing a new opportunity to address this challenge, the National Agreement on Closing the Gap between the Coalition of Aboriginal and Torres Strait Islander Peak Organisations and all Australian Governments has failed. The Agreement includes a commitment to negotiating, within 12 months of the Agreement taking effect in July 2020, a new target to measure progress towards securing Aboriginal and Torres Strait Islander interests in inland waters. The deadline passed without action. Following its meeting in December 2021, the Joint Council on Closing the Gap (which governs the National Agreement on Closing the Gap) announced, that it would defer consideration of the Inland Waters target to the next Joint Council meeting. It would then consider the finalised statistical baselining exercise to improve an understanding of existing levels of Indigenous corporations' water ownership.⁵⁴

First Nations cultural and intellectual property rights

Broadly speaking, First Nations cultural and intellectual property can be categorised as:

- Traditional Knowledge, which refers to the practices, capabilities, skills and innovations developed by First Nations understanding, including knowledge about the

⁵⁰Hunter, P. (2018), *The Native Title Act – the first 25 years – old and new challenges*, Richard Cooper Memorial Lecture, Federal Court of Australia

⁵¹Commonwealth Government (2004), *Intergovernmental Agreement On A National Water Initiative*

⁵²Jackson, S, Langton, M. (2011), 'Trends in the Recognition of Indigenous water needs in Australian water reform: the limitations of 'cultural' entitlements in achieving equity', *Journal of Water Law* 22 pp.109

⁵³Hartwig, L., Jackson, S. and Osborne, N. (2020), 'Trends in Aboriginal water ownership in New South Wales, Australia: the continuities between colonial and neoliberal forms of dispossession', *Land Use Policy*, December Issue

properties and uses of native genetic resources, and

- Traditional Cultural Expressions, such as stories, designs and symbols, literature, language, music, dance and art.

First Nations cultural and intellectual property is an important asset belonging to First Nations people, their organisations or businesses and presents a unique competitive advantage to these interests. . For example, the total Australian First Nations art market is estimated at hundreds of millions of dollars per annum⁵⁵. The traditional knowledge that First Nations people hold with respect to Australia's immense and significantly endemic biodiversity has significant potential value in a range of industries such as agriculture and traditional foods, pharmaceuticals, nutraceuticals and advanced materials manufacture.

Article 31 of the United Nations' Declaration on the Rights of Indigenous Peoples recognises that First Nations people have a universal right to maintain, control, protect and develop the intellectual property they hold over their cultural heritage, traditional knowledge and traditional cultural expressions. Graphic expressions such as art can be protected to an extent by copyright law. Yet, where intellectual property is in the form of traditional knowledge, Australian legislative mechanisms for protecting that intellectual property and ensuring its rightful owners are able to appropriate value from it, are fraught. An underlying issue is that traditional knowledge and cultural expression are typically communally owned in perpetuity, while the legal framework is based on individual and corporate ownership of invention.

Domestic and international debate continues about how intellectual property frameworks can or should recognise and protect First Nations Intellectual Property. This ongoing

process has implications for domestic law reform and policy. In addition to long-running reform processes through the United Nations' World Intellectual Property Organisation (WIPO), the Commonwealth agency responsible for administering the Australian intellectual property system, IP Australia, is conducting a parallel 'Indigenous Knowledge Project' exploring options for protecting Indigenous knowledge domestically.

Despite international obligations under treaties to which Australia is a signatory, there is still no formal recognition and protection of unique First Nations Intellectual Property under Australian law. As a result, conventional intellectual property regimes remain the primary mechanism available to Indigenous persons. While offering some protection for Traditional Cultural Expressions of art, song, dance and similar creative works, those intellectual property regimes have been ineffective for protecting the less artistic aspects of First Nations Intellectual Property which are so critical to the competitive advantage of many Aboriginal businesses.

Australian First Nations intellectual property rights are discussed in detail in a subsequent section of this paper.

Trusts from private land access agreements

While the 1960s marked the first significant recognition of First Nations' land rights by industry⁵⁶, formal arrangements did not start to become common practice until the second decade of the 21st Century. A practice that is particularly prevalent in the Australian resources industry is for companies to enter into private, often confidential arrangements directly with traditional owners, where monetary compensation is paid into trusts for the benefit of those traditional owners as compensation for the right to conduct certain activities on their traditional lands.

⁵⁴*Seventh Meeting of the Joint Council on Closing the Gap 3 December 2021, Communiqué (Joint Council on Closing the Gap | Closing the Gap)*

⁵⁵*Standing Committee on Environment, Communications, Information Technology and the Arts (2007), Indigenous art –securing the future: Australia's Indigenous visual arts and craft sector, The Senate, Australian Government, Canberra*

Compensation companies pay can include lump sum and periodic royalty payments and, in many cases, significant sums have accumulated in trust accounts. This is particularly so in the Pilbara Region of Western Australia, where billions of dollars exist in such structures. In most, if not all cases, the appointed trustee is an independent professional trustee and while the Traditional Owners have some input to how distributions from the trust are made and for what purposes they can be applied, this is typically subject to significant constraints under the trust deed. These arrangements are discussed in greater detail in a latter section of this paper.

Opportunity to appropriate value from these assets is significantly constrained...

On face value, the Australian First Nations estate and other asset base appears significant, comprised of large areas of land, unique intellectual property and trusts holding billions of dollars. However, its economic utility is highly constrained:

- First Nations land tenure lacks fungibility, whereby almost all grants of land are subject to caveats that restrict their use to mostly non-commercial purposes, including inalienability. This hampers the ability of First Nations people to trade their lands or use their land as collateral for financing. Even in the case of lands divested from the ILSC, similar caveats apply, albeit the ILSC will use internal resources to help landowners access debt finance. Furthermore, in the case of native title lands, the requirement for the land to be held by a PBC as trustee or agent means that any commercial decisions pertaining to that land are subject to communal decision-making processes within the PBC, which can be protracted and

sub-commercial in nature.

- Where First Nations water rights exist, they are typically defined as cultural flows that cannot be used for economic purposes and where they can be, the volumes allocated are typically so small that they are of limited commercial use.
- First Nations intellectual property, particularly that which pertains to traditional knowledge, is not adequately protected under Australian law.
- While distributions from trusts that hold financial resources accrued under private commercial arrangements can often be used to support economic endeavours, the opportunity to deploy capital at scale is undermined by what beneficiaries may perceive as paternalistic control over financial resources that belong to them.

This is not an asset base conducive to economic self-determination. Alternatively, it promotes a form of economic apartheid, whereby First Nations' Australians are unable to use their rights and assets for economic development with the same protections and flexibility as other Australians.

The compensation pathway: is this an opportunity to increase and improve the Australian First Nations' estate and asset base?

The Federal Framework

As mentioned previously, the *Native Title Act 1993* (Cth) creates a compensation regime, whereby the Traditional Owners of ancestral lands may apply to the Federal Court to be compensated for certain past acts of Government which have had the effect of damaging or diminishing their native

⁵⁶In 1963, BHP signed an agreement providing a lump sum payment and royalties to access land on Groote Eylandt (Anindilyakwa Country)

title rights and interests⁵⁷. This represents another economic asset of Australian First Nations people that is only just beginning to accrue benefits.

In accordance with Division 5 of the *Native Title Act 1993* (Cth), compensation is payable for actions taken by the Crown in the right of the States or the Commonwealth that have impaired or extinguished⁵⁸ native title rights. This compensation is payable on 'just terms'⁵⁹ and unless explicitly requested by the entitled party (a request which can be refused), may only be comprised of monetary payments.

The method for calculating a monetary consideration that is considered to represent 'just terms' is an evolving area of law that has been the subject of considerable jurisprudence since the seminal Timber Creek series of cases⁶⁰ discussed briefly in a previous subsection. This is a complex area of law, the intricate details of which are beyond the scope of this paper. However, for the purposes of this paper it is sufficient to note that courts seem to have determined that 'just terms' has three important elements with respect to this context:

1. **Economic loss** – representing the market value of the land affected by the act of extinguishment or impairment at the date of extinguishment or impairment that is adjusted according to the similarity of the specific native title interest to freehold title. Exclusive native title is valued at freehold market value, whereas non-exclusive native title will be discounted to the extent it differs in rights to freehold title.
2. **Cultural loss** – is similar to the common law principle of *solatium* in compulsory acquisition of freehold tenure. It represents the spiritual or religious loss that has been caused by the extinguishment, diminishment or impairment of the native title. Jurisprudence relating to this matter demonstrates that the quantum of compensation for

cultural loss may exceed the amount determined for economic loss by many orders of magnitude. Furthermore, to be compensable, the harm caused to culture need not be absolute.

3. **Interest** – reflecting the impact of the passage of time on the value of money, simple interest is payable on the economic loss (but not the cultural loss) between the date the compensable act occurred and the date of the judgement, typically at the Federal Court Pre-judgement interest rate.

The acts of governments on which compensation is payable may be categorised as:

- **Past Acts** – those which occurred before 1 July 1993 (if legislation) or before 1 January 1994 (if any other act) that because of the *Racial Discrimination Act 1975* (Cth) may have been invalid by virtue of their discriminatory effect on native title rights.
- **Intermediate Period Acts** – those which involved the granting of freehold or leasehold by the State between 1 January 1994 and 23 December 1996, as per the date of the Wik decision, and which affect native title lands⁶¹.
- **Future Acts** – prospective acts of the State which will affect native title rights and interests, typically of development or for the declaration of a conservation estate.

Where past and intermediate period acts are the subject of court determined compensation, the compensation payable for future acts is negotiated as part of an Indigenous Land Use Agreement (ILUA) or other agreement that provides a third party with access to First Nations lands. An ILUA is essentially an agreement made between willing signatories under which each party agrees to perform (or not perform) certain actions that has many characteristics of and subject to many of

⁵⁷Division 5, *Native Title Act 1993* (Cth)

⁵⁸s227, *Native Title Act 1993* (Cth)

⁵⁹ss51, 53, *Native Title Act 1993* (Cth)

⁶⁰*Griffiths v Northern Territory of Australia* (No 3) [2016] FCA 900; *Northern Territory of Australia v Griffiths* [2017] 256 FCR 478; *Northern Territory v Griffiths* (2019) 269 CLR 1

the same assumptions and principles of interpretation and operation as a contract made under common law.⁶²

However, with immediate relevance to compensation, there are two aspects of ILUAs that differ to common law contract:

- **Doctrine of privity of contract does not apply**

The doctrine of privity of contract states that only those who voluntarily agree to a contract can be bound by its terms. However, an ILUA is not only binding on the parties that sign it, but also on all successors who may hold native title over the lands or waters subject to the agreement.⁶³ Therefore Traditional Owners who agree to the terms of an ILUA, bind their descendants into perpetuity to those terms for as long as the ILUA remains in force. This means that Traditional Owners and PBCs executing an ILUA, need to consider the impact of the agreement on future generations, particularly where the impact on lands might be long term, but economic benefits may not be. Furthermore, the operations of an ILUA will represent the interpretations of the laws and traditional customs at the time of signing, which may create challenges for future generations as laws and customs evolve.

- **ILUAs provide less certainty than intended**

Most certainly, ILUA's improve certainty, but that certainty is heavily skewed in favour of the non-First Nations parties to the ILUA. Firstly, under subsection 34EA of the **Native Title Act 1993** (Cth), while the doctrine of privity does not apply to the First Nations party (therefore binding future traditional owners), it still applies to the non-First Nations parties. This means that any subsequent entity that acquires privately owned land that is covered by an ILUA from the original ILUA signatory is not bound by the terms of the ILUA, but any rights to compensation or similar given up by the First Nations party are lost, unless

the ILUA drafting includes assignment or novation clauses. Secondly, once registered with the National Native Title Tribunal, an ILUA confers Native Title Act validity on all acts covered under it.

In the context of a settlement agreement, once the statutory right to compensation for past acts is given up, First Nations parties have lost that right forever. Similarly any future acts authorised by the ILUA will also remain valid under the Native Title Act into perpetuity. However, while entering into the ILUA validates all past and future acts ratified under it forever, the remedies available for any breach of the ILUA terms are contractual only. Finally, unlike contracts more broadly, which may be amended to any extent as parties mutually agree, once registered, ILUAs are relatively immutable. Amendments to an ILUA are limited to matters permitted under Section 24ED of the Native Title Act, relating to minor boundary updates (but not including new areas of land or water) or updating described parties to an agreement where rights or liabilities have been assigned, novated or otherwise transferred. Once again, this can be navigated by including specific obligations or agreed processes, or use of a companion agreement.

State settlement and compensation regimes: Victoria

Having had force of law since September 2010, the *Traditional Owners Settlement Act 2010* (Vic) provides traditional owners within the jurisdiction of Victoria an alternative settlement framework to that prescribed by the *Native Title Act 1993* (Cth).

In effect, the Victorian legislation provides a legal framework for negotiation of a comprehensive out-of-court settlement package between the State of Victoria and a 'Traditional Owner Group Entity' (TOGE) which represents a traditional

⁶¹*Wik Peoples v Queensland* (1996) 187 CLR 1

⁶²s24EA, *Native Title Act 1993* (Cth)

⁶³s24EA(1)(b), *Native Title Act 1993* (Cth)

owner or a native title group who, at their discretion, have elected to pursue settlement through the framework created by the Victorian legislation rather than via the processes contained within the *Native Title Act 1993* (Cth)

In exchange for a traditional owner group agreement to withdraw any native title claims and to not lodge any future claims, the comprehensive settlement package negotiated under the Victorian framework revolves around an overarching Recognition and Settlement Agreement (RSA) that recognises the traditional owner group and their rights⁶⁴ over a settlement area and can include other more specific agreements including⁶⁵:

- **Land Agreement** that provides for the transfer of freehold land to the TOGE for economic or cultural purposes and grants of 'Aboriginal Title' to parks and reserves (subject to specific provisions of the State's primary conservation estate legislation, the *Conservation, Forests and Lands Act 1987* (Vic));
- **Funding Agreement** that provides financial resources to the TOGE to support its core operations, implement initiatives prescribed by the RSA and other economic development initiatives;
- **Participation Agreement** that prescribes how funds determined under the Funding Agreement are held and managed;
- **Land Use Activity Agreement** that specifically replaces the future acts regime under the Native Title legislation and governs activities that take place on Crown land, considering Traditional Owners' rights and interests. It also contains a schedule of 'community benefits', or compensation for activities undertaken by the State;

- **Natural Resource Agreement** which provides for access to and sustainable use of natural resources, as well as traditional owner participation in natural resources management;
- **Traditional Owners' land management agreement** which provides for joint management of parks and reserves held under Aboriginal title, including the establishment of traditional owner land management boards; and
- **Indigenous Land Use Agreement** whereby the agreement package may also include an ILUA between the TOGE and the Victorian Government, and is registered under the National native title legislation to ensure that the agreed settlement complies with the National legislation and, in accordance with the *Native Title Act 1993* (Cth), is binding on all native title holders.

At the traditional owner's discretion, financial compensation paid by the Victorian Government in accordance with the framework may be paid into a charitable trust approved by the Minister⁶⁶.

Following the 2019 Timber Creek High Court decision⁶⁷, the Victorian Government recently announced a first principles review of the framework prescribed by the Victorian legislation to ensure that it is facilitating adequate compensation for cultural loss as per the precedent set by the Timber Creek High Court determination.

As highlighted by the following Victorian settlement arrangements, the framework provided by this legislation has been used to both facilitate significant contemporary settlements and to revisit historical arrangements that are considered inadequate compared to modern agreements between the State and First Nations groups.

⁶⁴Traditional owner rights are listed in s9 of the Act. Unlike native title, TOSA enables a traditional owner group to be recognised as the traditional owners over all public land within the settlement area whether or not native title has been extinguished.

⁶⁵Division 1, Part 2 Traditional Owner Settlement Act 2010 (Vic)

The Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk consent determinations

The Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk (collectively referred to as the Wimmera Clans) consent determination of 2005 was the first determination recognising native title in the jurisdiction of Victoria⁶⁸. The determination of non-exclusive native title provided rights to hunt, fish, and to gather and camp for personal, domestic and non-commercial communal needs over traditional lands along the Wimmera River⁶⁹.

As a pre-condition to the consent determination, an ILUA was executed between the Barengi Gadjin Land Council (BGLC) (as representative of the Wimmera Clans) and the Victorian and Commonwealth Governments. That provided for the surrender of native title rights and interest in exchange for the transfer, by private treaty, of freehold title to three parcels of culturally significant Crown land, as well as some recognition, cash and some cooperative management over conservation estate.

Predating the *Traditional Owners Settlement Act 2010* (Vic), the settlement terms were reviewed by the Victorian Government in 2013, whereby it was recommended that the Wimmera Clans consider enhancement of the 2005 agreements by entering into a new arrangement with the Victorian Government under the framework prescribed by the *Traditional Owners Settlement Act 2010* (Vic). This process commenced in 2017.

The Gunaikurnai consent determination

The Gunaikurnai consent determination⁷⁰ and associated ILUA⁷¹ between the State of Victoria the Gunaikurnai Land and Waters

Aboriginal Corporation (GLWAC) was made in 2010 recognising native title over an area in the Gippsland Region. . The Gunaikurnai Settlement Agreement was the first settlement made under the framework established by the *Traditional Owners Settlement Act 2010* (Vic), with key components including:

- **The recognition of traditional owner rights** for the Gunaikurnai people to access and use Crown land within the consent determination area for traditional purposes, including hunting, fishing, camping and gathering.
- A **Funding Agreement** prescribing \$12 million in funding, comprised of:
 - \$10 million to be held in trust by the Victorian Traditional Owners Trust to be disbursed to GLWAC over time, and
 - \$2 million in establishment and operational funding for GLWAC.
- A **Land Agreement** granting Aboriginal title over 10 National Parks and Reserves (totalling approximately 46,000 hectares) to be jointly managed by the Victorian Government and a Gunaikurnai Traditional Owner Land Management Board established under a Traditional Owner Land Management Agreement.
- A **Natural Resource Agreement** providing rights to access and use of Crown land for traditional purposes, including hunting, fishing, camping and gathering.
- A **Traditional Owner Land Natural Resource Agreement** including strategies for increased participation in natural resources management.
- Various **cultural strengthening** commitments including an undertaking from the Victorian Government to develop protocols to recognise the Gunaikurnai people and to strengthen their culture.

⁶⁶s78(2), *Traditional Owner Settlement Act 2010* (Vic)

⁶⁷Per **Northern Territory v Griffiths** (2019) 269 CLR 1 the High Court awarded compensation for both economic and cultural loss.

⁶⁸**Clarke on behalf of the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk Peoples v State of Victoria** [2005] FCA 1795; **Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk Peoples No. 1** (VCD2005/001); No. 2 (VCD2005/002); No. 3 (VCD2005/003)

⁶⁹However native title was found not to exist in 'any waters within Determination Area A': Order 4 (a), **Clarke on behalf of the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk Peoples v State of Victoria** [2005] FCA 1795

⁷⁰**Mullett on behalf of the Gunaikurnai People v Victoria** [2010] FCA 1144

⁷¹Gunaikurnai Settlement ILUA (VI2010/003)

Since the 2010 Gunaikurnai Settlement Agreement was penned, several amendments have been given effect, including:

- In 2018, approval of a Joint Management Plan⁷² providing a strategic joint management strategy and individual plans for the 10 jointly managed parks and reserves, superseding the 2010 Plan.
- In 2020, an agreement between the GLWAC and Victorian Government whereby the GLWAC will receive two gigalitres of unallocated water in the Mitchell River, representing the first time Traditional Owners have been allocated water ownership in a river system.

It is understood that further re-negotiation of the Gunaikurnai Settlement Agreement is currently underway.

The Dja Dja Wurrung Recognition and Settlement Agreement

Agreed in 2013, the Dja Dja Wurrung Settlement Agreement was the second RSA to be negotiated under the *Traditional Owners Settlement Act 2010* (Vic).

Key elements of the negotiated package include:

- **Recognition statement** -acknowledging historical injustices carried out by the State and recognising the Dja Dja Wurrung as the Traditional Owners of the settlement area.
- **Cultural recognition measures** –including a protocol on acknowledgements and welcomes to country, a local government engagement strategy and a protocol on interpretative information relating to the Dja Dja Wurrung People.
- **Funding agreement** –for a total amount of \$9.65 million⁷³, comprised of:
 - \$5 million to be transferred to the Victorian Traditional Owners Trust⁷⁴ and distributed to the Dja Dja Wurrung Aboriginal Corporation (DDWAC) at a rate of at least

\$250 000 per annum over a minimum of 20 years to support the Corporation's core operations;

- \$3.25 million in economic development funding, to be provided in three instalments from mid-2014, subject to the Corporation achieving specified milestones;
- \$900,000 grant funding for the core operations of the Corporation for the first two years after settlement, and salaries towards two key positions for the first two to four years after settlement; and,
- \$500,000 in guaranteed contracts for works on public lands for the Dja Dja Wurrung Enterprises Pty Ltd entity.
- **Land agreement** -providing for the transfer of freehold title of two culturally significant properties at Carisbrook and Frankford (approximately 56.2 hectares) and the transfer of six parks and reserves as Aboriginal title (approximately 47,523 hectares).
- **A Traditional Owner Land Management Agreement** establishing the Dhelkunya Dja Land Management Board to jointly manage six parks and reserves with the State.
- **Land Use Activity Agreement**⁷⁵ (LUAA) -recognising Dja Dja Wurrung Peoples' rights when the State considers proposed activities on Crown land within the settlement area. The LUAA sets out procedural requirements for each of the four categories of land use activity-routine, advisory, negotiation and agreement. The LUAA entitles the DDWAC to 'community benefits'⁷⁶ or compensation for certain land use activities, including the sale of Crown land, mining exploration and production, the construction of public works, and other activities.
- **Natural Resource Agreement** –provides for access and use by the Dja Dja Wurrung People to flora and fauna, game, forest products, water, inland fisheries and camping on Crown land; the exercise of Traditional Owner rights; and strategies to promote greater Dja Dja Wurrung participation in natural resource management.

⁷²Gunaikurnai and Victorian Government Joint Management Plan, September 2018, Gunaikurnai Traditional Owner Land Management Board and State of Victoria

⁷³Native Title Services Victoria (2013), **Fact Sheet: Settlement Between the Dja Dja Wurrung Traditional Owner Group and the State of Victoria**, March 2013, Victorian State Government, Melbourne, Vic

⁷⁴With effect from 1 July 2018 the 'Victorian Traditional Owners Trust -Dja Dja Wurrung' was established replacing the Victorian Traditional Owners Trust (VTOT).

Taungurung Recognition and Settlement Agreement

The most recent RSA completed under the *Traditional Owners Settlement Act 2010* (Vic), is the Taungurung Agreement which was completed in October 2018 and commenced in August 2020. The Taungurung people, represented by the Taungurung Land & Waters Council (TLaWC) are the traditional owners of an area stretching from Rochester and Kyneton in the west to Bright in the east, Euroa in the north and Kinglake in the south.

The key features of the Taungurung RSA include:

- **Recognition and Settlement Agreement** –whereby the overarching RSA recognises the Taungurung peoples' Traditional Owner rights and provides for other cultural recognition measures, including a protocol on acknowledgements and welcomes to country, a local government engagement strategy and a protocol on interpretative information⁷⁷.
- **Funding agreement** –whereby the total financial value of the settlement package is approximately \$34 million⁷⁸. Of this amount:
 - TLaWC received \$320,000 in start-up grant funding in 2019;
 - \$25.6 million will be deposited into the Victorian Traditional Owners Trust to be disbursed to TLaWC over time; and
 - \$7.9 million in the settlement's first four years is committed for joint management planning and operations, including the establishment of a Traditional Owner Land Management Board with TLaWC and the employment of Taungurung people as rangers.
- A **land agreement** provides for the transfer of freehold title for up to five surplus public land parcels and the transfer of nine parks and reserves to the TLaWC as Aboriginal title.

- **Land Use Agreement** – whereby the Consolidated Agreement provides for the procedures that apply to land use activities specified in the agreement. It sets out the payments made pursuant to interests granted under the *Mineral Resources (Sustainable Development) Act 1990* (Vic)⁷⁹ and formulae for calculating the community benefit or compensation payable for each category of land use activity⁸⁰.
- **Natural Resource Agreement** –that recognises Traditional Owner rights to access Crown land within the settlement area to hunt, fish, camp, and gather natural resources.
- **A Traditional Owner Land Management Agreement** – that establishes a Traditional Owner Land Management Board to jointly manage the parks and reserves granted as Aboriginal title with the State.
- **ILUA** –registered on 30 April 2020⁸¹ that validates and gives consent to State actions and also provides for the negotiated surrender of the Taungurung people's native title rights and interests over the areas affected by the State's actions, except where a grant of freehold title is made to the TCAC. (The full details are not publicly available).

However, the ILUA, which forms a key component of the Taungurung RSA as well as the RSA itself are currently the subject of contention^{82,83}.

⁷⁵*Land Use Activity Agreement between Dja Dja Wurrung Clans Aboriginal Corporation and the State of Victoria* (28 March 2013)

⁷⁶Defined as 'an economic, cultural or social benefit provided to a traditional owner group entity', s27 **Traditional Owner Settlement Act 2010** (Vic).

⁷⁷*Ibid*, Schedules 4 and 5

⁷⁸Department of Justice, **Fact Sheet 1: What is the Taungurung settlement agreement?**, Victorian State Government, Melbourne, Vic

State settlement and compensation regimes: Western Australia

South West Native Title Settlement

Following extensive negotiations between the Western Australian Government and the South West Aboriginal Land and Sea Council (SWALSC) on behalf of the Noongar peoples, the Noongar Southwest settlement and compensation package was legislated in 2016⁸⁴.

Initially delayed by the resolution of outstanding legal matters, the Settlement commenced implementation in February 2021. The compensation package covers an area of approximately 200,000 square kilometres and directly or indirectly benefits around 30,000 people of the Noongar Nation.

Key elements of the settlement and compensation package include:

- **Statutory recognition** - The *Noongar (Koorah, Nitja Boordahwan) (Past, Present, Future) Recognition Act 2016* (WA) formally recognises the Noongar people as the Traditional Owners of the south west region of Western Australia.
- **Noongar Boodja Trust** (NBT) – established to receive, hold and manage all benefits and assets arising from the settlement.
 - The NBT is a special purpose charitable trust that will be managed by an independent professional Trustee. The six Noongar Regional Corporations and

the Central Services Corporation are the only direct beneficiaries of the NBT⁸⁵.

- The Western Australian Government will contribute \$50 million annually for 12 years to the NBT Future Fund and \$10 million annually for 12 years for the operation of the Noongar Regional Corporations.
- **Noongar Land Estate** (NLE) – the NLE will be administered by the NBT and will receive up to 300,000 hectares of land allocated as reserve or leasehold and up to 20,000 hectares of land allocated as freehold for cultural or economic development use. The first land transfers were made on 14 July 2021.
- **Noongar Land Fund** – up to \$46.6 million over 10 years will be made available to the Regional Corporations to support land purchases, joint management and heritage objectives.
- **Noongar housing program** – the Western Australian Department of Communities will transfer freehold title of 121 properties to the NBT. Funds will be made available for upgrade and maintenance purposes.
- **Capital Works Program** - the Western Australian Government will provide:
 - Up to \$6.5 million to establish offices for the Central Services Corporation and six Noongar Regional Corporations; and
 - Conditional funds of up to \$5 million and up to 2 hectares of land will be provided to establish a Noongar Cultural Centre in the metropolitan area.
- **Co-operative and joint management** - the Department of Biodiversity Conservation and Attractions (DBCA) and the six Noongar Regional Corporations will enter into co-

⁷⁹Department of Justice (2020), *Schedule 4 in Consolidated Land Use Agreement (incorporating 16 March 2020 variations) between the Taungurung Clans Aboriginal Corporation and the State of Victoria*, Victorian State Government, Melbourne, Vic

⁸⁰*Ibid*, Schedule 7

⁸¹Taungurung Settlement ILUA (VI2018/002)

⁸²*Gardiner v Taungurung Land and Waters Council* [2021] FCA 80; *Gardiner v Taungurung Land and Waters Council* (No. 2) [2021] FCA 253

⁸³Reported eg. Dunstan, J. (2021), *Federal Court orders native title tribunal to revisit decision on Taungurung Aboriginal corporation land agreement*, ABC News, 20 March 2021

⁸⁴*Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016* (WA)

⁸⁵Department of the Premier and Cabinet (2021), *The South West Native Title Settlement: Noongar Boodja Trust*, Western Australian State Government, Perth, WA

operative and joint management agreements for the care and protection of the South West Conservation Estate, including State forests, National Parks and Reserves, Marine Parks and other areas set aside for conservation.

- **Land access**-land access licenses⁸⁶ will be provided to the six Noongar Regional Corporations to enable lawful access to certain Crown lands for defined customary activities.
- **Community Development Framework**⁸⁷-a commitment between the Western Australian Government and the Noongar People to a set of principles and priorities aimed at improving Noongar community development.
- **Noongar Economic Participation Framework**—a framework established to support the Western Australian Government and Noongar partnerships to assist developing Noongar business capacity and interests towards improving participation in the wider economy.

The total value of the compensation package is estimated at \$1.3 billion, rendering it one of the largest native title settlements concluded in Australia to date.

Yamatji Nations Settlement

Commencing in July 2020, the Yamatji Nation Southern Regional Agreement ended the long-running, overlapping and complex native title claims of four groups—the Mullwa Wadjari, the Southern Yamatji, the Hutt River, and the Widi Mob. Following formal negotiation between the claim groups commencing in March 2018, the combined single Yamatji Nation Southern Regional Agreement is comprised of a consent determination⁸⁸ and accompanying ILUA⁸⁹. The first native title settlement to utilise such a process, the Agreement sees the Yamatji Nation groups consent to the extinguishment of native title over more than 99 percent of their former 4.8

million hectare claim area, in exchange for the consent of the State to a grant of non-exclusive native title over remnant culturally important sites and a broader settlement and compensation package.

Key elements of the Yamatji Nations Settlement include:

- **Yamatji Charitable Trust**—established along similar lines to the Noongar Boodja Trust, the Yamatji Charitable Trust will hold approximately \$325 million in benefits. The sole beneficiaries are the Bundi Yamatji Aboriginal Corporation and Yamatji Southern Regional Corporation. Benefits held in trust include:
 - \$195 million set aside for a Future Fund, to benefit future generations of Yamatji peoples;
 - \$65 million for the Economic Development Fund to pursue community and economic development opportunities;
 - \$48.8 million for the Administration Fund, to meet operating and ongoing expenses;
 - \$16.3 million for the Land Fund, to support property acquisitions and development; and
 - \$5 million over five years for the Business Development Unit, to provide enterprise incubation and business support.
- **Ongoing revenue stream** for the Yamatji Southern Regional Corporation from on-country activities including 35 percent of annual rental revenue collected by the State from mining tenure the Agreement area for 10 years and 5 percent of annual rental revenue from industrial leases in the Oakajee Industrial Precinct.
- **Yamatji Land Estate (YLE)**—created through the transfer of approximately 134,000 hectares of Crown reserve land, 14,500 hectares of Crown land in freehold, eight Aboriginal Lands Trust properties and financial support for land

⁸⁶The Department of Planning, Lands and Heritage will administer land access licences under the **Land Administration Act 1997** (WA). In addition, amendments to the water by-laws provide Noongar peoples access to Public Drinking Water Source Areas for certain customary purposes.

⁸⁷Annexure T

⁸⁸Taylor on behalf of the Yamatji Nation Claim v State of Western Australia [2020] FCA 42

⁸⁹Yamatji Nation Agreement, WI2020/002

holding costs.

- **Commercial and industrial land** – transfer of commercial and industrial land valued at \$8.7 million with options to participate in development and development joint ventures.
- **Conservation estate** – \$22 million over 10 years to fund creation and management of the Yamatji Conservation Estate, for joint management of Conservation and National Parks over 470, 000 hectares, and to fund the creation of a Yamatji Ranger Program.
- **Heritage and culture** – funding set aside to provide for the recognition, protection and preservation of Aboriginal heritage, including:
 - \$312,000 for the restoration of culturally significant water sites;
 - \$100,000 for a cultural heritage advisor; and
 - \$100,000 for management and storage of cultural materials and records.
- **Housing** – a \$15 million housing package that includes:
 - \$13.4 million for social housing;
 - \$2.2 million for government employee housing; and
 - Up to a 49 percent interest in the proposed Beachlands and Karloo Developments and joint venture opportunities.
- **Tourism** – \$8.92 million to foster Yamatji ventures in Geraldton and the Mid-West region.
- **Water** – \$21.3 million for creation of a Strategic Aboriginal Water Reserve of 25 gegalitres per year for domestic or commercial use or trade.

National Guiding Principles for Native Title Compensation Agreement-making: a nationwide shift in approach?

In the context of the significant agreements that have been negotiated in Victoria and Western Australia and reflecting the renewed interest and advocacy regarding compensation for past dispossession, the States and Commonwealth governments have resumed previous Ministerial-level dialogue aimed at reaching consensus on best practice in First Nations land rights.

At the Native Title Ministers' Meeting of October 2021 (the first since 2017), renewed focus was placed on the evolving landscape of land rights, particularly reflecting the step-change from a climate in which significant new claims were being brought to an increasingly 'post determination' phase, in which arguably a higher priority should be placed on supporting native title holders to manage and use their native title rights, and on resolving outstanding liabilities via native title compensation⁹⁰.

In particular, Ministers endorsed in principle draft *National Guiding Principles for Native Title Compensation Agreement-Making*, which, while not binding, reaffirm that all Australian governments will utilise best endeavours to settle compensation claims by negotiation and agreement, act in good faith, and take into account the aspirations of native title parties⁹¹. More concretely, the Guiding Principles require governments to work together to ensure consistency within and across jurisdictions in assessing, valuing and resolving native title compensation, with an ongoing Native Title Senior Officers Meeting – Compensation Working Group established under the Commonwealth Department of the Attorney-General to continue to work across jurisdictions and agencies to formulate options and suggest funding arrangements. This Working Group





is due to report by the next Ministers Meeting in 2022.

How have Australia's contemporaries responded to the call for self-determination?

There are differences in the nature of European settlement and the terms thereof, as well as the extent of self-determination that is underpinned by constitutional rights and legislation and structure of the modern-day Indigenous populations. The jurisdictions of New Zealand, and particularly Canada, arguably bear the greatest semblance to Australia. They were proclaimed as colonies of the British Empire in a similar era, have similar structures of government, are members of the Commonwealth and have broadly similar economic structures, albeit New Zealand is much smaller than Australia and Canada.

Across almost all categories of Indigenous socioeconomic measure — education, employment and life expectancy — New Zealand and Canada outperform Australia and do so from a lower level of per capita government investment. The key difference is that Indigenous affairs in both New Zealand and Canada are characterised by much higher degrees of self-determination in governance, service delivery, economic participation and wealth creation.

Canada

The relationship between Indigenous (First Nations, Inuit and Metis) peoples of Canada and the Canadian Government is grounded in historical arrangements between colonial powers — mainly Britain and France — and specific Indigenous bands.

⁹⁰National Indigenous Australians Agency (2021), *Communiqué-Native Title Ministers' Meeting, 15 October 2021, Commonwealth Government, Canberra, ACT*

⁹¹National Indigenous Australians Agency (2021), *National Guiding Principles for Native Title Compensation Agreement-Making, 15 October 2021, Commonwealth Government, Canberra, ACT*

Over the course of the 16th and 17th centuries, treaties, alliances and commercial arrangements were entered into between colonial and Indigenous peoples, predominately to facilitate the harvesting of furs. While the details of the important (and very complex) subsequent history of Indigenous-colonial relations are beyond the scope of this paper, the most pertinent artefacts are the Treaty of Paris, Royal Proclamation (1763), Indian Act 1876 and the Constitution Act.

Proclaimed in early 1763, the Treaty of Paris, followed seven years of war between Britain, France and Spain and resulted in France ceding all of its colonial territories throughout modern Canada to Britain. In recognition of the notion that the future success of these colonies would rely on positive relations with Canada's Indigenous peoples, in late 1763 a Royal Proclamation was made by King George III which specified a firm boundary for the new colonies and declared that all lands external to these boundaries were 'Indian Territories' where no settlement or trade was permitted without the permission of the Indian Department.

In order to expand westward from the original settlements, both the Crown and individual provinces were, as a result of the Royal Proclamation, required to secure permission from the bands that held title in the Indian Territories. This, in turn, led to individual treaties being agreed to over the course of the 18th, 19th and early 20th centuries, whereby individual bands ceded territory in return for compensation, typically in the form of money, protected reserves and perpetual rights for activities such as hunting and fishing.

As is the case with Australia, over the course of the 19th century, the Canadian Government enacted various legislation that allowed the Crown to regulate and control the lives of the Canadian Indigenous peoples based on similar themes as the

early Australian legislative framework such as 'guardianship' of and 'civilising' the Indigenous population. This paternalistic legislative framework culminated in the proclamation of the *Indian Act 1876* and formation of the Department of Indian Affairs, which was vested with significant powers to manage 'Indian' lands, resources and internal governance. Over time, these powers were used to restrict cultural expression and the ability of Indigenous Canadians to pursue land claims.

Following sustained activism by Canadian Indigenous peoples, shifting mainstream values and a series of jurisprudence that affirmed and upheld Indigenous land rights, four changes to the relevant legislative framework were given effect:

- **New policy for the settlement of land claims and modern treaties**

In 1973, the Federal Government, responding to the claims of the Nisga'a and the James Bay Cree and Inuit, and wishing to clear the way for industrial development of the North, announced a new policy for the settlement of land claims. The policy confirmed the responsibility of the government to meet its lawful obligations through fulfillment of the terms of the treaties and to negotiate comprehensive settlements with Indigenous groups in those areas of Canada where Indigenous rights based on traditional use and occupancy of the land had not been dealt with by treaty or had been superseded by law.

- **Canada Act (1982) and Constitution Act (1982)**

Enacted to patriate Canada's constitution, the framework established by this legislation included amendments to the Canadian Constitution that make specific reference to and guarantee of 'existing Aboriginal and treaty rights'.

- **Amendments to the Indian Act**

In 1985, significant amendments to the Indian Act were passed, terminating discriminatory provisions and

allowing for the reinstatement of ‘Indian Status’ for many Indigenous Canadians who had been disenfranchised by previous regulations.

- **Inherent Right Policy**

Following constitutional recognition that resulted from the *Canada Act* (1982) and *Constitution Act* (1982), a significant ‘self-governance’ movement gained momentum. In 1995, the Canadian Government enacted the Inherent Right Policy — self-government is an inherent right of all First Nations and should be entrenched in the Constitution — and adopted a policy position that the Government would enter into partnerships with Indigenous peoples to implement a right to self-governance.

Implementation of these partnership agreements is given effect through a modern treaty between the Crown and an Indigenous band or group of bands, delegating certain powers of the Crown to that group by mutual consent. While health, safety, criminal code, human rights and environmental laws are utterly reserved for the Federal and Provincial Governments, delegated powers can include other areas of law-making, taxation and service delivery.

Given the position of the Canadian Government that Indigenous bands and communities have a Constitutional right to self-government, Indigenous programs and support schemes are split between partnership agreements with self-governing First Nations, and specific government programs, which are typically smaller in scope, but with broader application.

As a result of a Memorandum of Understanding signed in 2016 between the Canadian Government and the Assembly of First Nations, the way the Canadian Government approaches Indigenous relations has changed. The Canadian Government has been progressively transitioning to a ‘nation-to-nation’

model of improving economic and social outcomes through what are termed Intergovernmental Fiscal Relations.⁹² Under these arrangements 10-year grants are made directly to self-governing First Nations which are paired with targeted grants and governance and compliance training to assist self-governing First Nations to build fiscal and administrative capacity.

As of 2021, 25 self-government agreements involving 43 Indigenous communities have been concluded, with more under negotiation. These agreements have involved transfers of over 60 million hectares of land, capital transfers of approximately CAD \$3.2 billion (AUD \$3.56 billion), and the creation of varying degrees of land rights over approximately 40 percent of the total land mass of Canada.⁹³

Canada, in a very important international development, also passed legislation in 2021 that provides a roadmap for its Federal Government and Indigenous peoples to work together to implement the United Nations Declaration on the Rights of Indigenous Peoples.⁹⁴

Canada has also developed innovative financial institutions that are led and managed by Indigenous people, offering financial products that are tailored for their needs.

New Zealand

Maori tribes had early contact, initially with European explorers and later whalers, escaped convicts and traders from as early as the mid-17th Century. However, mainly as a result of significant inter-tribal warfare and the particularly hostile and aggressive approach adopted by the Maori to ‘invaders’, no significant attempt was made to settle or annex the New Zealand islands until the mid-19th Century.

⁹²Memorandum of Understanding between the Assembly of First Nations and Indigenous and Northern Affairs Canada (2016)

⁹³Crown-Indigenous Affairs (2020), *Treaties and Agreements*, July 2020, Canadian Government

⁹⁴Implementing the United Nations Declaration on the Rights of Indigenous Peoples Act

<https://www.justice.gc.ca/eng/declaration/index.html>

As with Canada, the full extent of the history between Maori peoples and colonisers is beyond the scope of this paper. However, modern-day relations between the Maori people and the New Zealand Government are primarily founded in the Treaty of Waitangi (1840) and the Waitangi Tribunal (1975).

As colonisation of the New Zealand islands and resulting conflict increased during the 1830s, both the Crown and Maori tribes expressed interest in formalising future relationships. The negotiations in this regard resulted in approximately 500 tribal chiefs signing the Waitangi Treaty in 1840, which guaranteed Maori property rights and tribal autonomy, as well as the right to British citizenship in exchange for accepting British sovereignty.

Agitation from Chiefs who did not sign the treaty who gained increasing empathy from signatories who were later unsatisfied with conflicting interpretations of the terms of the Treaty, ultimately resulted in a resumption of sustained conflict from the 1860s to the 1880s. During this period, Maori lands (estimated at 63 million acres, or 95 percent of the New Zealand landmass) was either confiscated by Britain as retribution for the rebellion or converted from communal ownership to individual title through the Native Land Court and encouraged to be sold to European migrants, with many of these sales later disputed with allegations that compensation was never fully delivered.

Despite this post Waitangi Treaty history, the Treaty provided the basis for the relationship between the Government and Maori people, with both acknowledging the underlying land rights of the Maori tribes and their right to both tribal autonomy and representation in the new Parliament. Four Maori seats were instated in the New Zealand Parliament in 1867 and all land-owning Maori men were granted universal suffrage, making New Zealand the first colonised country to grant Indigenous peoples the right to vote.

Parliamentary representation ensured Maori people remained highly engaged in the politics and policies of New Zealand Governments, with Maori parties and voting blocs key to several historical New Zealand Governments and cabinet positions in

those governments.

From the mid-1960s, Maori activism and growing political power of Maori parties resulted in a willingness on the part of the New Zealand Government to revisit and redress for past injustices and treaty breaches. Established in 1975, the Waitangi Tribunal is a permanent commission of inquiry charged with hearing, investigating and making recommendations on claims brought by Maori interests relating to breaches of the terms of the Treaty of Waitangi. Originally limited to hearing contemporary matters, the terms of reference for this Inquiry were extended in 1985 to hear any breach dating back to 1840.

Reports from the Tribunal are then provided to the Office of Maori-Crown Relations (Te Arawhiti), which is then able to offer a treaty settlement with the affected peoples or communities. Settlement packages may incorporate a range of redress pathways including a formal apology by the Crown, financial redress (including interest), cultural redress, the transfer of and/or the option to purchase significant properties, recognition of ownership or control over natural resources, and changes to geographical names. After negotiation and agreement between the parties, these settlement treaties are enacted through legislation.

‘We seek constitutional reforms to empower our people and take a rightful place in our own country. When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country.

We call for the establishment of a First Nations voice enshrined in the Constitution....

In 1967 we were counted. In 2017, we seek to be heard.’

Uluru Statement from the Heart (2017)

How has Australia responded to the call for self-determination?

The Australian Constitution is the founding document of the Australian federation, establishing the legal framework for how Australia is governed. Among other things, it provides the Commonwealth and State jurisdictions with the heads of power to make laws and sets boundaries around issues for which they may legislate. It prescribes the composition and powers of the Australian Parliament, the relationship between the Australian Parliament and the monarch, provides for the creation of the Federal and High Courts and covers specific matters of Government finance and trade.

Any amendments to the Australian Constitution must be determined by a Referendum of the people of Australia. Since its proclamation in 1901 there have been eight amendments to the Constitution, including the 1967 Referendum allowing First Nations people to be counted in the Census and for the

Commonwealth to make legislation for Australia's First Nations people.

Today, in 2022, apart from the outcome of the Referendum, the Australian Constitution does not make any mention of Australia's First Nations people, let alone provide First Nations people with specified function in the governance of the Nation or themselves.

A central tenet of the Uluru Statement from the Heart (see Appendix 1), a proposed 'First Nations voice enshrined in the Constitution' was rejected by the former Turnbull-led Liberal-National Government on the notion that the Government considered it would create a third chamber of Parliament and would not garner adequate support from the Australian electorate for a referendum to be successful. This was a position maintained by the subsequent Morrison-led Liberal-National Government up to the 2022 general election, despite a series of polls over the course of the past four years indicating a majority of Australians are in favour of constitutional reform that supports a strong Australian First Nations voice.⁹⁵

Instead, the former Liberal-National Government established an Indigenous Voice codesign process to develop models to enhance local and regional decision making and options to provide a voice for Indigenous Australians to government. Extensive consultations were conducted across the Nation about the design of this new Voice which resulted in a final report to Government that was released in December 2021. Consistent with that report, the Liberal-National Government included \$31.8 million for the first year to support the required preparatory work to design Local and Regional Voice structures in its 2022-2023 Budget.

Figure 7⁹⁶ illustrates the proposed final report framework that comprises a series of regional voices which provide advice

⁹⁵Omnipoll (2017); The Australia Institute (2018); Essential (2019); From the Heart Campaign (2020);

⁹⁶National Indigenous Australians Agency (2021), *Indigenous Voice Co-design Process: Final Report to the Australian Government*, Australian Government, Canberra

from First Nations constituents to all levels of government on co-design of policies and programs that impact First Nations people, as well as a national voice that is informed by the regions and provides non-binding advice to the Australian Government and the Australian parliament.

In his victory speech, Australia's 43rd Prime Minister, The Hon. Anthony Albanese, announced that the new government would implement the Uluru Statement from the Heart 'in full'.

Still a caged bird?

Compared to the economic environment for First Nations people created by the British colonies and subsequent Australian Governments right up to the later 20th Century, the Australian First Nations economy is not as caged as it once was. The practices and policies of the British colonies and earlier Australian Governments systematically stripped Australian First Nations of their economic assets, precluded them from developing economic capacity and prevented them from participating in employment or entrepreneurship, thereby depriving them of the opportunity to participate in the greatest global economic expansion in the history of humankind.

Most certainly, some rights and assets have been restored. It could be said that the cage door is now ajar, arguably half open. However, the ability of Australia's First Nations people to use these rights and assets for economic development remains substantively constrained. It is an environment that is a long way from being conducive to economic self-determination.

While the cage door might be opening, the emerging self-determined Australian First Nations economy still has its wings clipped and feet tied.

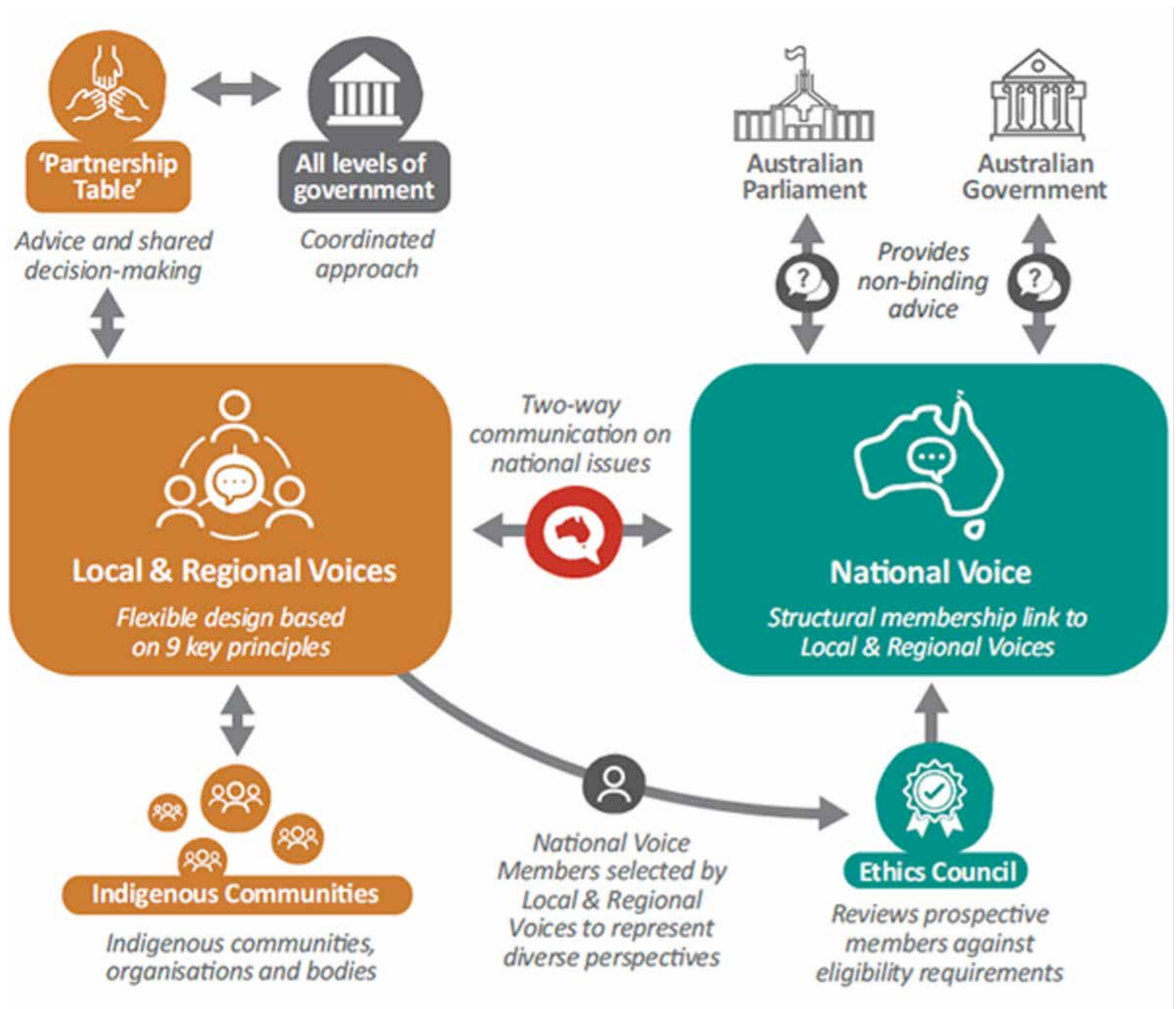


Figure 7–Structure of the National Indigenous Voice to Government





Dibalany barraan-dirra (wings clipped/cut): where are we now?

(With wings clipped and feet tied: where are we now?)

As discussed previously, for over half a century the First Nations policies of Australian Governments have sought to restore some rights and assets for First Nations people. These efforts have been slow and fall short of creating circumstances that promote economic self-determination. While these policies may have slightly opened the cage door, they have left the emerging First Nations economy with its wings clipped and its feet tied.

Unqualified criticism of contemporary policy efforts to address restoration and equality for Australia's First Nations people is as unfair as it is overly simplistic. In addition to the many dedicated, professional people who have committed their careers to addressing this issue, the reversal of historical injustices and rapid restoration of equal socioeconomic circumstances for First Nations people are challenges that governments from across the globe have struggled with for decades as it is a complex, multidimensional challenge that requires a mix of responsive and proactive initiatives and sustained and adequate resourcing.

Nonetheless, the Australian policy framework has not only continued to stifle much First Nations entrepreneurship but has also mostly failed to address its priority objective — to improve the socioeconomic status of Australia's First Nations people. This section demonstrates that the current policy approach is not achieving its objectives and justifies a shift in approach that is underpinned by the fundamental principles of economic self-determination.



Today's Australian First Nations community

Acquiring a clear demographic profile of today's Australian First Nations population is challenged by notoriously unreliable data. As such, the discussion in this section should be considered only to the extent that the data on which it is based is, in most instances, broadly indicative of the reality.

The Australian First Nations population prior to British colonisation.

From the first Australian Bureau of Statistics Census following the 1967 Referendum that permitted First Nations people to be counted as part of the Australian population, the 1971 Census reported that the Australian First Nations population was just under 116,000 people, or around 0.9 percent Australia's total population.

Over the course of the subsequent nine censuses — 1976, 1981, 1986, 1991, 1996, 2001, 2006, 2011 and 2016 — the Australian First Nations population has expanded eight-fold to just below 800,000 people and is currently estimated at 864,000. This population is approximately commensurate with the estimated pre-British settlement numbers as illustrated in Figure 8.

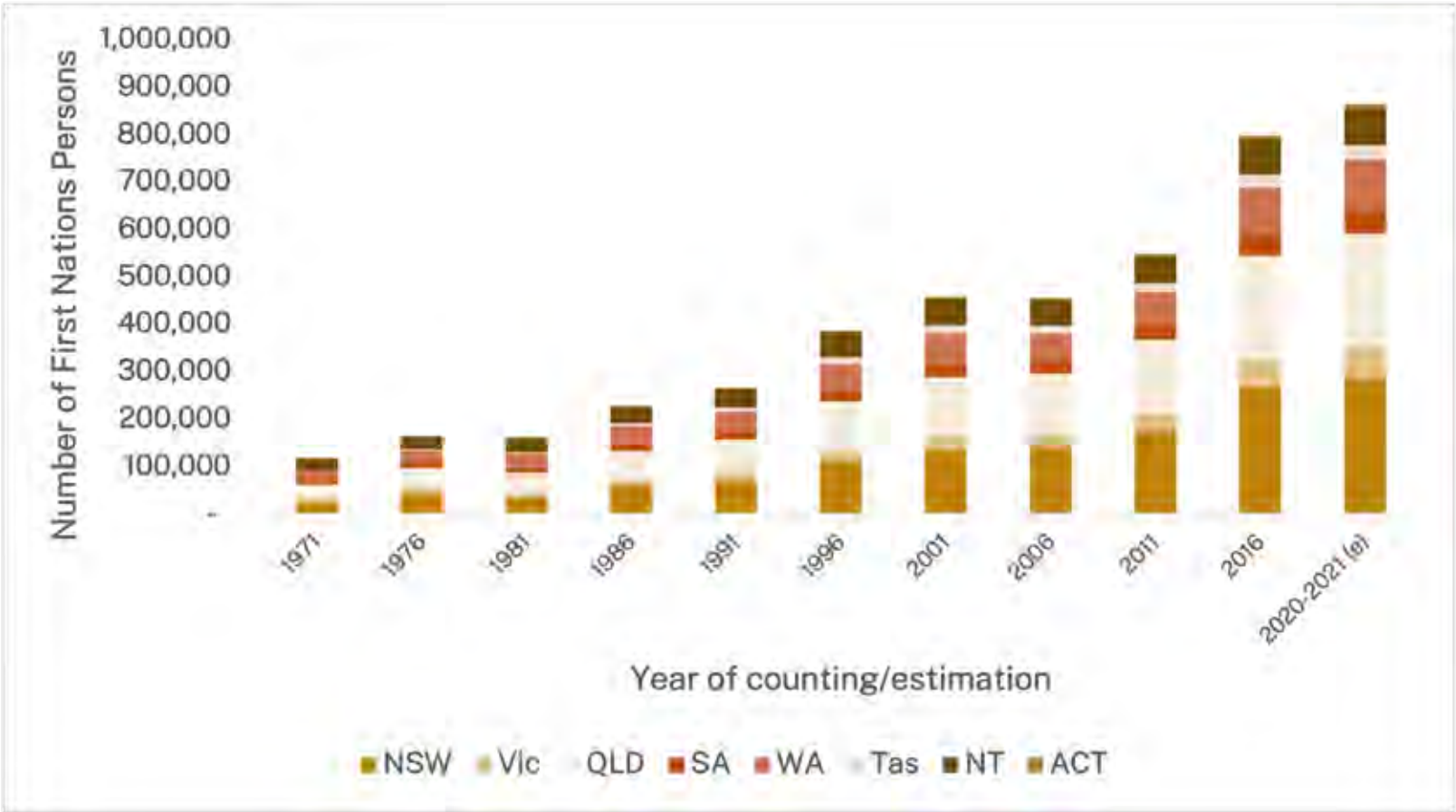


Figure 8 – Australian First Nations population: 1971 to 2020-21

According to Australian Bureau of Statistics, Australia's First Nations population has grown at an average rate that is three times that of the rest of the Australian population, with some

States' First Nations populations demonstrating significantly higher rates of growth compared to the rest of their population. See Figure 9.

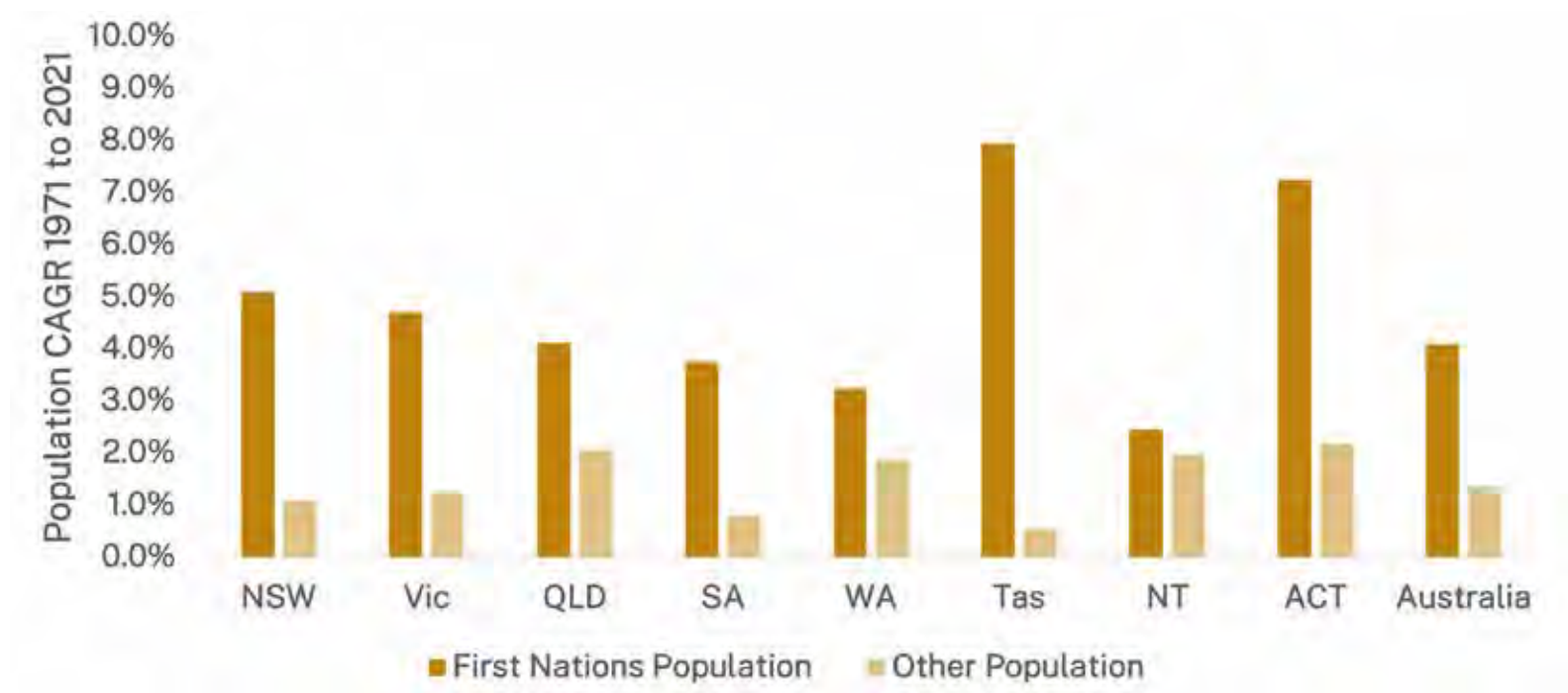


Figure 9 – First Nations and Other Australian population growth rates: 1971 to 2020-21

This pace of growth in the First Nations population, has resulted in First Nations people currently representing 3.4 percent of the total Australian population, up from a mere 1 percent in 1971. See Figure 10.

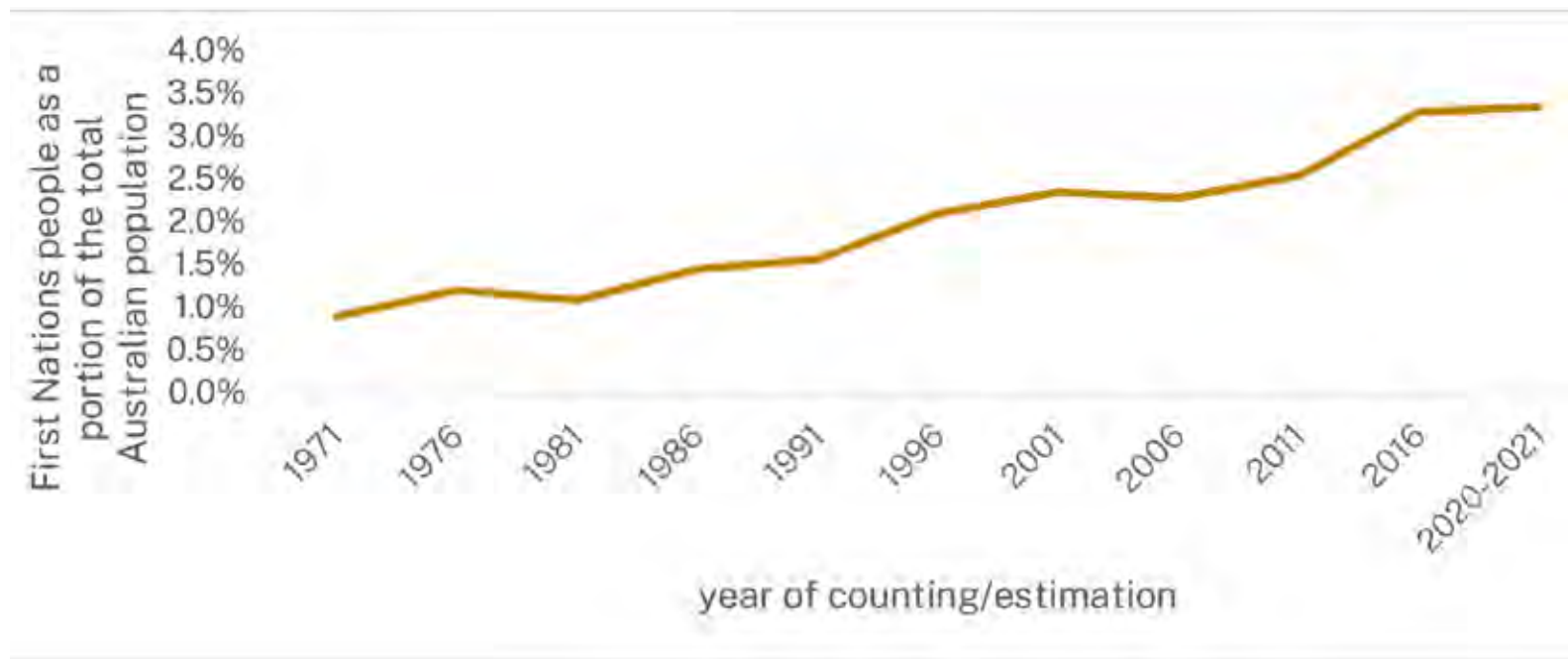


Figure 10 – First Nations people as a portion of the total Australian population

This rapid expansion of the Australian First Nations population has occurred despite the substantially lower socioeconomic status of much of Australia’s First Nations community. This somewhat counterintuitive circumstance has been attributed to the following phenomena:

- **High birth rates that outstrip a comparatively high death rate.** This is because: there is a relatively large number of First Nations births each year which is a result of higher than average fertility rates among First Nations women, a young population age structure resulting in a relatively large portion of the population being at child bearing age and intergenerational transmission of Indigeneity whereby around half of partnered First Nations adults partner with a non-Indigenous partner and around nine out of every 10 children from these relationships are identified by their parents as First Nations people.
- **Increasing rates of self-identification.** It is estimated that the Australian First Nations population grew by around

80,000 between 2011 and 2016 simply because of an increasing number of people identifying as First Nations people. This phenomenon is greater in New South Wales, Melbourne, Hobart and the Australian Capital Territory, but comparatively low in much of remote Australia.⁹⁷ According to the Australian Bureau of Statistics, in 1971 87 percent of First Nations people lived in just four states or territories: Queensland (27.5 percent), New South Wales (20.6 percent), Western Australia (19.1 percent) and Northern Territory (20.2 percent). Today, a majority of First Nations people still live in New South Wales (33.2 percent) and Queensland (27.9 percent), with the remaining 39 percent more evenly distributed across the other States and Territories. As illustrated in Figure 11, this is the result of both interstate migration of First Nations people and, more recently, higher rates of self-identification in certain States.

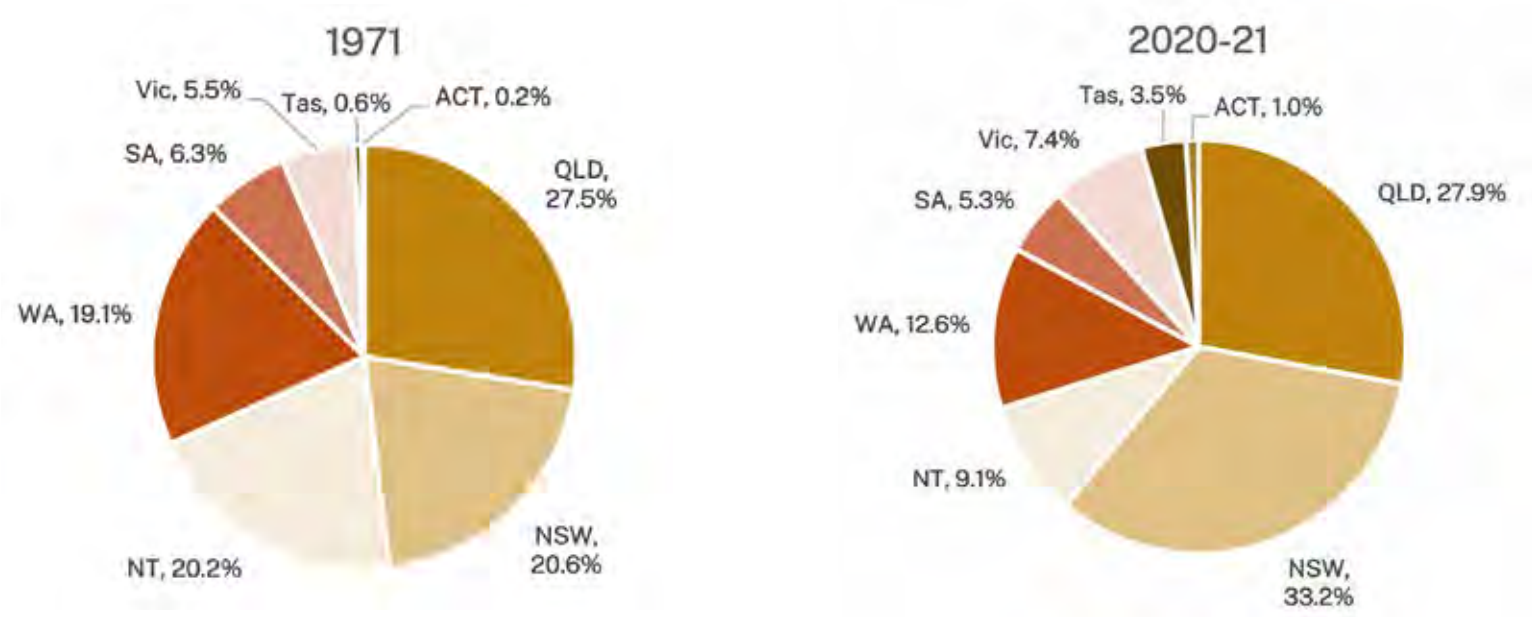


Figure 11 –State and Territory distribution of Australia’s First Nations population: 1971 and 2020-21

As illustrated in Figure 12⁹⁸, the Australian First Nations population is much younger than the remainder of the Australian population.

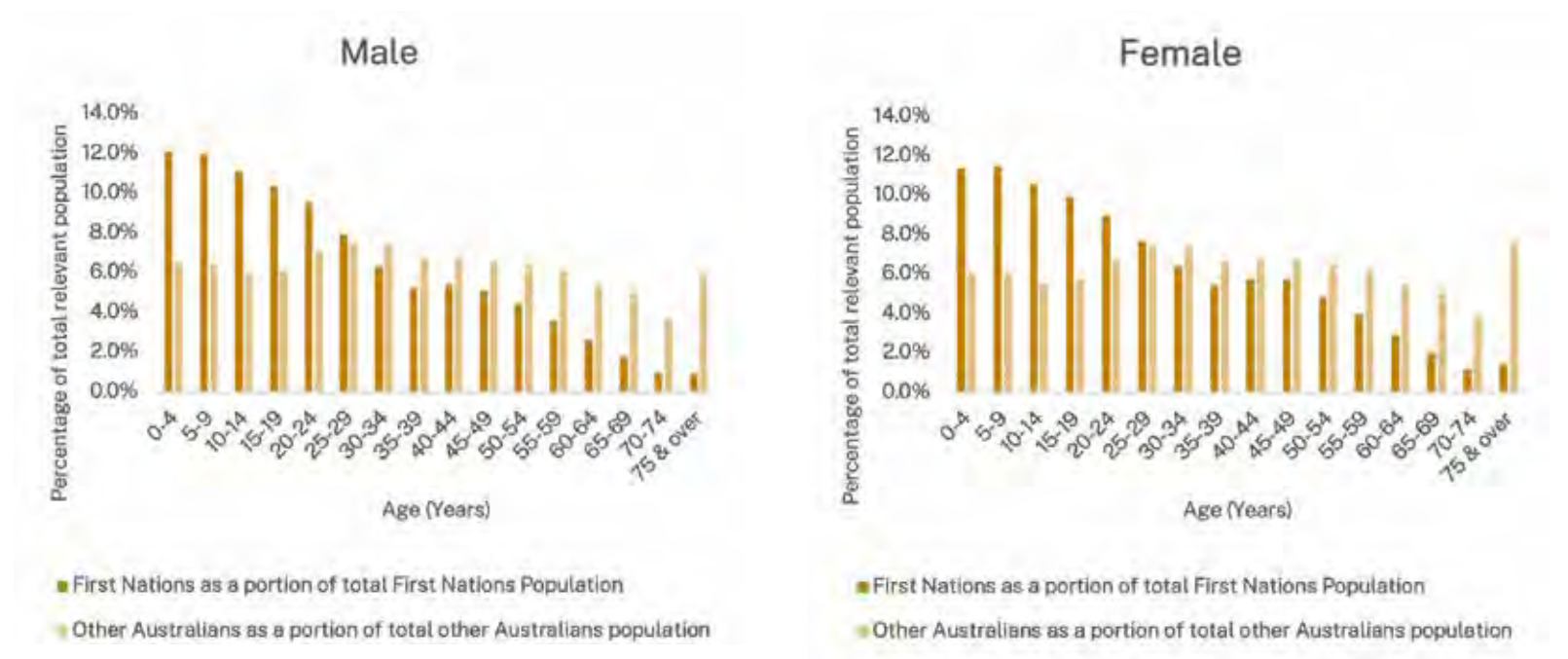


Figure 12 –Age structure of the Australian First Nations population compared to the Australian non-First Nations population

On average, 35 percent of Australian First Nations people live in Australian capital cities, with the balance living in regional or remote Australia. However, as shown in Figure 13⁹⁹, the extent to which First Nations people are urbanised varies significantly across the Australian jurisdictions.

While only 20 percent of First Nations people live in remote areas of Australia, they make up 25 percent of the remote Australian population compared with around 2 percent of the non-remote Australian population.

⁹⁷Taylor, A., Wilson, T., Temple, J., Kelaher, M. and Eades, S. (2020), 'The future growth and spatial shift of Australia's Aboriginal and Torres Strait Islander population 2016-2051', Wiley

⁹⁸ Australian Bureau of Statistics (2018), Estimates of Aboriginal and Torres Strait Islander Australians: Age 2016, Australian Government, Canberra

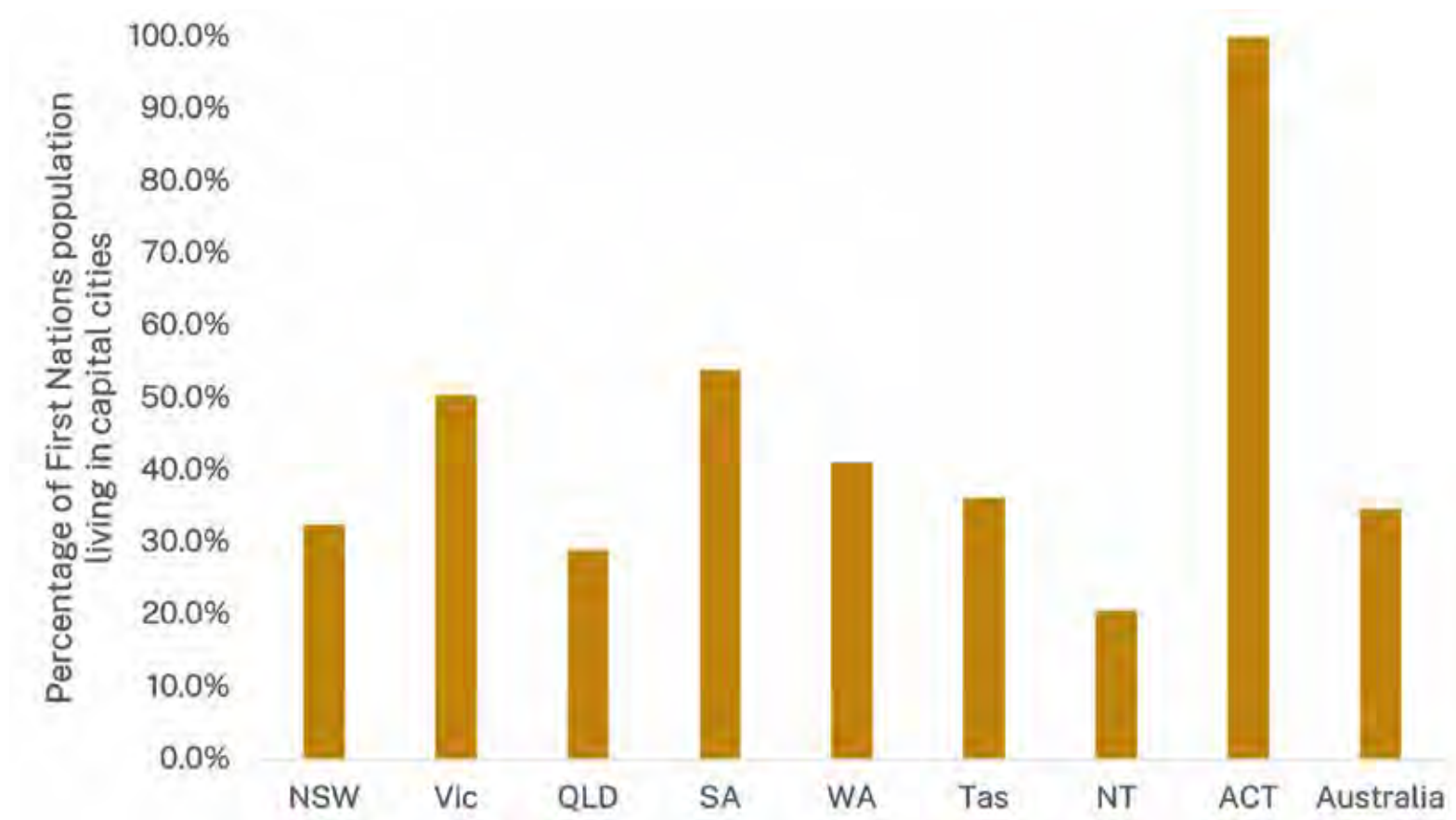


Figure 13 – Percentage of First Nations people living in capital cities

Socio-economic status of today's Australian First Nations people

Health and wellbeing

For Australian First Nations children born in the period 2015 to 2017, male life expectancy was 71.6 years, or 8.6 years less than other Australian males and for First Nations females,

life expectancy was 75.6 years, or 7.8 years less than other Australian females. As shown in Figure 14, with the exception of people aged 75 years and older, the death rate (deaths per 100,000 people) for First Nations Australians is at least twice that of other Australians in all age groups and in mid-life (25 to 54 years of age), up to four times higher.

⁹⁹Australian Bureau of Statistics (2017), *Census of Population and Housing – Counts of Aboriginal and Torres Strait Islander Australians -2016*, Australian Bureau of Statistics

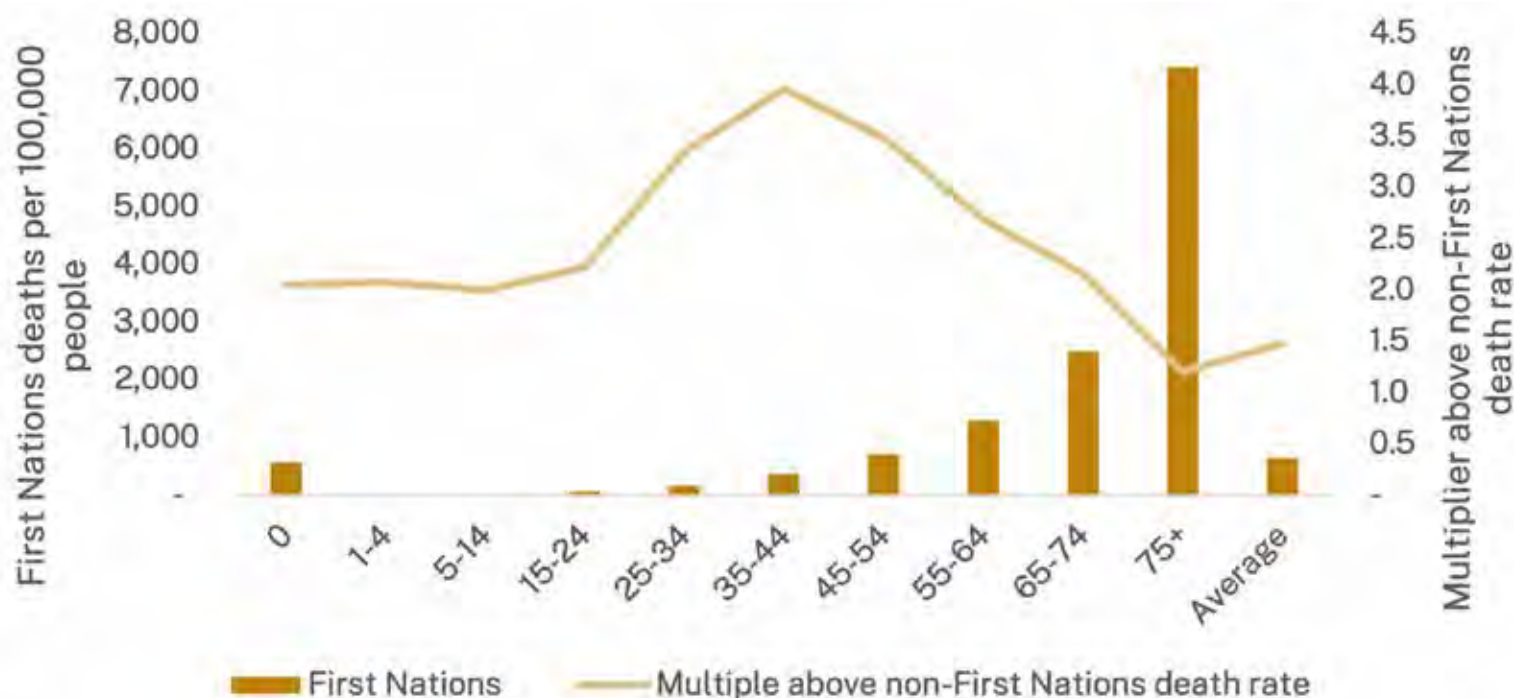


Figure 14 – Australian First Nations death rates compared to non-First Nations Australians

In 2020, with the exception of malignant neoplasms of lymphoid, haematopoietic and related tissue (cancers of the blood, bone marrow and lymphatics system such as leukaemia and lymphoma), First Nations Australians were more likely to die from each of the top 20 causes of mortality in the Australian First Nations population than other Australians. See Figure 15¹⁰⁰.

Between 2015 and 2017 approximately 1 million First Nations Australians were admitted to hospital, representing an age adjusted rate that is 2.3 times higher than for other Australians. However, 46 percent of First Nations hospital admissions over this period were for kidney dialysis therapy and First Nations people are admitted to hospital for dialysis treatment at a rate that is 11 times that of non-First Nations people. Excluding dialysis, First Nations people are admitted to hospital at a rate of 1.3 times that of non-First Nations people. Figure 16¹⁰¹ summarises reasons for hospitalisation of First Nations people.

¹⁰⁰Australian Bureau of Statistics (2021), *Causes of death, Australia: underlying causes by Aboriginal and Torres Strait Islander origin (all persons, NSW, QLD, WA and NT 2020)*, Australian Government Canberra

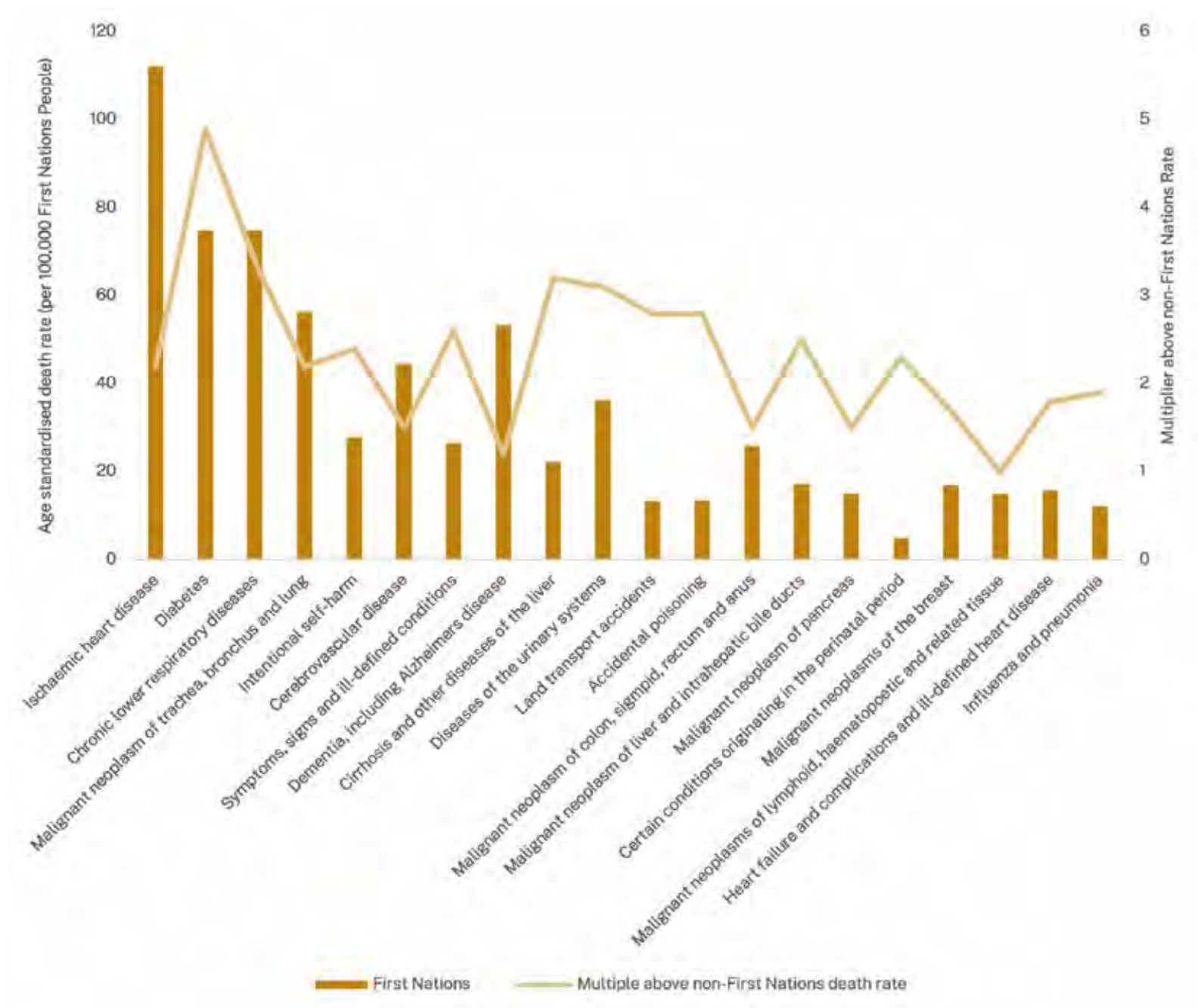


Figure 15 – Australian First Nations death rates associated with common diseases compared to non-First Nations death rates (2020)

¹⁰¹ Australian Institute of Health and Welfare & National Indigenous Australians Agency (2020), *Aboriginal and Torres Strait Islander Health Performance Framework: Top Reasons for Hospitalisation*, Australian Government, Canberra

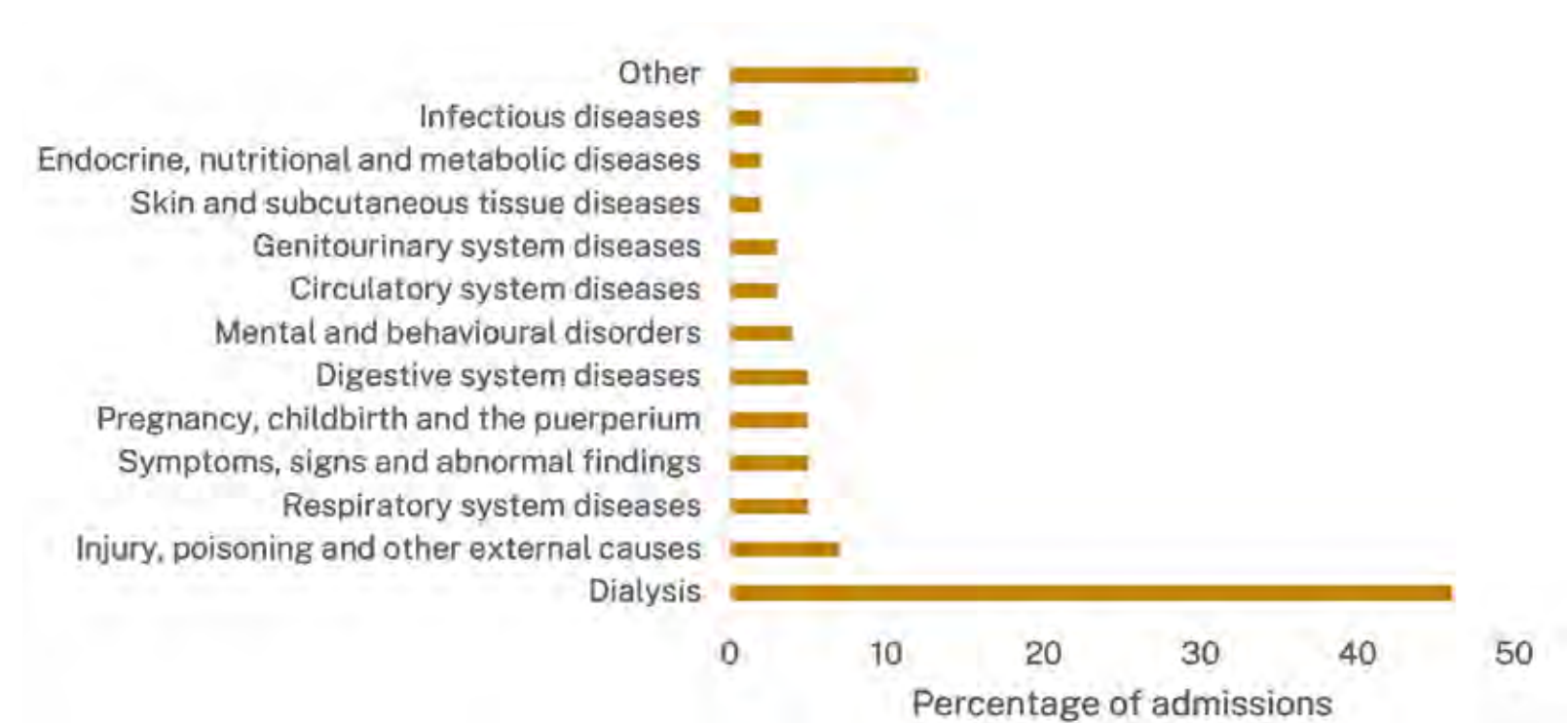


Figure 16 – Major reasons for admission of First Nations people to hospital (2015 to 2017)

Justice, law and order

As at 30 June 2021, there were 13,000 First Nations people in Australian correctional facilities accounting for 30 percent of all inmates. Approximately 90 percent of First Nations inmates were male, 78 percent had experienced prior adult imprisonment and 37 percent were in prison for acts intended to cause injury. The median age of a First Nations inmate was 32.8 years.¹⁰²

On an average night in the June Quarter of 2020 there were 798 people in youth detention with 91 percent being male and 80 percent aged between 10 and 17 years. Approximately two-thirds of these detainees had not been sentenced (i.e. detained pending the outcome of their court matter or sentencing). Just under half of all youth detainees (48 percent) were First Nations Australians. A First Nations person aged 10 to 17 years is 17 times more likely to be imprisoned than other Australian youth.¹⁰³

Education

In major cities and inner regional areas First Nations children who are enrolled in a preschool program in the year immediately prior to commencing full-time schooling attend at the same rate as other Australian children. However, rate of attendance declines consistently from outer-regional, to remote and very remote.¹⁰⁴

In terms of being developmentally ready to commence full time primary school across dimensions such as physical health and wellbeing, social competence, emotional maturity, language skills, cognitive skills, communication skills and general knowledge, around 40 percent of First Nations children entering school are considered to be vulnerable or at risk, a rate which is twice that of other Australian children.^{105, 109}

While average school attendance rates for First Nations children are consistently around 85 percent or 10 percent less than for other Australian students from Years 1 through to Year 6, attendance declines once secondary school commences, reaching an attendance rate of around 70 percent by Year 10, or around 20 percent less than other students.¹⁰⁶

In 2019, the portion of First Nations students meeting national minimum standards in reading and numeracy in Year 3 was 83 percent, compared to 97 percent for other Australian students. For Year 5 and Year 7 students, this had declined to 78 percent, and for Year 9 students, 72 percent, while for other Australian students, over 90 percent achieved national minimum standards in all year cohorts.¹⁰⁷

In 2018-2019, 66 percent of Australian First Nations people aged between 20 and 24 years had either attained Year 12 or Certificate II or above qualifications, compared to 90 percent of other Australians between the ages of 20 and 24.¹⁰⁸ In terms of post-secondary school or equivalent (Certificate III or higher), 42 percent of First Nations Australians hold qualifications, compared to 72 percent of other Australians.¹⁰⁹

Labour force participation and employment

In 2018, the First Nations employment rate was 49 percent, compared to 75 percent for other Australians, a trend that has persisted for over a decade. Further, while the employment rate for First Nations people in New South Wales and Northern Territory has increased over the past decade, it has declined in all other Australian jurisdictions. There is also a stark distinction between First Nations employment in major cities, where it averages 59 percent, and remote areas, where it averages 35 percent. The following Figure 17¹¹⁰, illustrates First Nations employment rates by remoteness.

¹⁰² Australian Bureau of Statistics (2021), *Prisoners in Australia: key statistics*, Australian Government, Canberra

¹⁰³ Australian Institute of Health and Welfare (2021), *Youth detention population in Australia: 2020*, Australian Government, Canberra

¹⁰⁴ Steering Committee for the Review of Government Service Provision (2020), *National Early Childhood Education and Care Collection 2019*

¹⁰⁵ Department of Education and Training (2019), *Australian Early Development Census 2018*

¹⁰⁶ Australian Curriculum, Assessment and Reporting Authority (2021), *National Student Data Collection*

¹⁰⁷ Australian Curriculum, Assessment and Reporting Authority (2019), *National Assessment Program – Literacy and Numeracy*

¹⁰⁸ National Aboriginal and Torres Strait Islander Health Survey 2018-19

¹⁰⁹ Productivity Commission 2021 (*Census of Population and Housing*)

¹¹⁰ Australian Bureau of Statistics (2019), *Australian Aboriginal and Torres Strait Islander Health Survey 2018-19*, Australian Government, Canberra

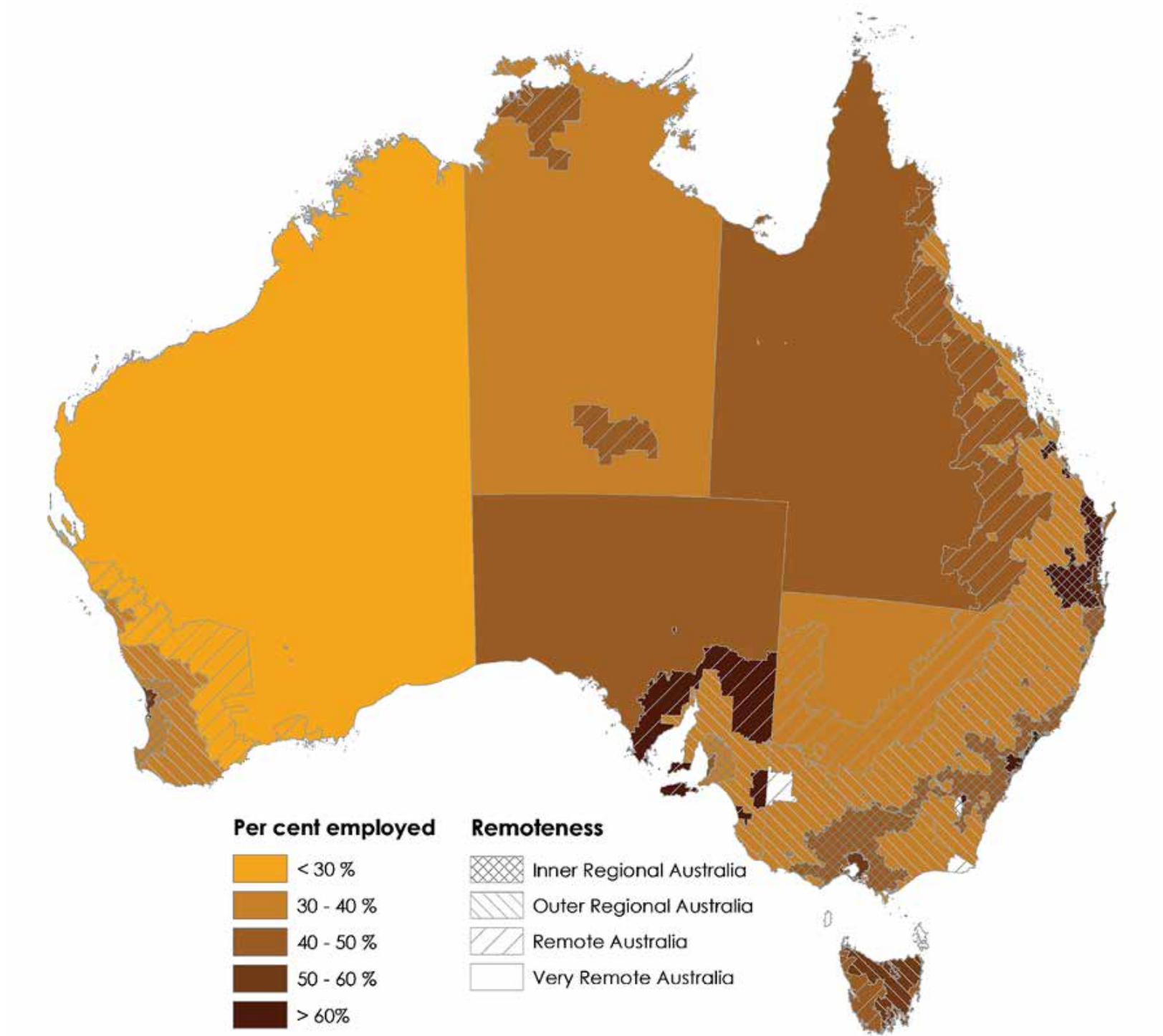


Figure 17 – Australian First Nations employment rate by remoteness: 2018-19

Income

Over the period from 2017 to 2019, the median gross equivalised weekly household income for First Nations people aged 18 years and over was \$553, or 40 percent less than that of other Australians aged 18 years or over.¹¹¹ Further, 40 percent of Australian First Nations people are in the bottom quintile of Australian household income distribution and only eight percent of First Nations people are in the top quintile of Australian household income distribution.

In 2018-19, 45 percent of Australian First Nations people aged 18 to 64 years relied on government welfare payments as their main source of income, 44 percent on income from employment, with only 6 percent reporting a main income from other sources such as investment returns.

As with other socioeconomic indicators there is a significant difference in First Nations personal income between cities and regional and remote areas. Welfare was the main source of income for 57 percent of First Nations people living in outer regional areas, whereas 36 percent of First Nations people living in major cities relied on welfare as their main source of income. Similarly, whereas 56 percent of First Nations people living in major cities relied on employment as their main source of income, in very remote regions, only 32 percent of First Nations people received salaries and wages as their main source of income.

Home ownership

In 2018-19 it was estimated that approximately 485,000 First Nations Australian adults were living in First Nations households¹¹². Approximately 31 percent of these people were homeowners including 10 percent who owned their home

outright and 21 percent who had a mortgage. A further 68 percent rented their dwelling, split equally between those renting social housing¹¹³ and those renting in the private market.

Again, there are significant differences between First Nations people living in remote and non-remote areas whereby, a First Nations person living in a non-remote area is almost four times as likely to be a homeowner or renting from the private market, whereas a First Nations person living in a remote area is three times as likely to be living in social housing.¹¹⁴

Persons per home

On average Australian First Nations households are larger than other Australian households comprising 3.2 people compared to 2.6 people. This is a result of larger First Nations families, a higher propensity of First Nations people to live communally than alone and a higher incidence of more than one First Nations family living in a household.¹¹⁵

Enterprise

It is estimated that in 2016, there were between 8,600 and 11,900 Australian First Nations businesses contributing between \$2.2 and \$6.6 billion to the Australian GDP, comprised of:

- 7,200 self-employed First Nations individuals contributing \$309 million to the National economy
- Between 1,000 and 4,300 First Nations enterprises that employ people contributing between \$1.5 and \$5.9 billion to the National economy; and,
- 400 trusts established to benefit First Nations communities contributing \$4.06 million.¹¹⁶

On the basis that most Australian First Nations businesses are

¹¹¹Steering Committee for the Review of Government Service Provision

¹¹²A 'First Nations household' is defined as a household where at least one of its usual residents is a First Nations person.

¹¹³Social housing includes public housing, community housing, state owned and managed Indigenous housing and Indigenous community housing

¹¹⁴Australian Bureau of Statistics (2020), National Aboriginal and Torres Strait Islander Health Survey 2018-19

¹¹⁵Australian Bureau of Statistics (2017), Census of population and housing: Aboriginal and Torres Strait Islander Population, Australian Government, Canberra

¹¹⁶PwC Indigenous Consulting (2018), The Contribution of the Indigenous Business Sector to Australia's Economy

small businesses –self-employed or fewer than 20 employees -this estimate equates to a business ownership rate of one business for every 67 to 93 First Nations Australians. This compares to a business ownership rate for other Australians of one business for every 5 persons. In other words, a First Nations Australian is between around 13 and 19 times less likely to own a business than other Australians. A key focus of this Symposium, participation in enterprise is discussed in more detail in a later section.

Implications of the COVID-19 pandemic

The threat presented by the COVID-19 pandemic to Australia's First Nations communities cannot be understated. Generally speaking, First Nations Australians, particularly those living in more remote areas, are among the Nation's most vulnerable to communicable disease. By way of example, compared to the general Australian population, First Nations Australians were found to be substantially more vulnerable to the H1N1 virus ('Swine Flu') pandemic of 2009, with a disproportionately high incidence of complication and a mortality rate six-fold above that of the non-First Nations population¹¹⁷. In remote Australia, circumstances associated with severe socioeconomic disadvantage, entrenched overcrowded housing and limited access to particularly culturally accessible healthcare, create conditions for more severe impact.

This vulnerability combined with the high rates of mortality from COVID-19 among people over 60 years of age (noting the already relatively low life expectancy of First Nations Australians) presents a threat to the cultural and social fabric of First Nations Australia. First Nations custom and lore continues to perform an important role in the lives of many First Nations Australians, regulating individuals, families and communities. In accordance with traditional custom, much of the knowledge that underpins customary law and practice is

held exclusively by the cultural authority, comprised almost entirely of Elders who are in the most vulnerable age brackets. Loss of the cultural authority would not only set back gains made in revitalisation of First Nations culture over the past several decades but would also risk undermining the social fabric of many First Nations families and communities.

Given these circumstances, it is not surprising that several jurisdictions with Indigenous populations (particularly remote Indigenous populations) implemented strict travel and quarantine restrictions as part of early responses to COVID-19. As early as 27th March 2020, the Commonwealth Government, under the *Biosecurity Act 2015* (Cth), restricted access to Aboriginal and Torres Strait Islander communities in the Northern Territory, Western Australia, Queensland and South Australia to essential services and supplies, with service providers required to demonstrate adherence to a biosecurity plan.

Over the course of the past two years, vaccination rates among the Australian First Nations population have been persistently lower than the non-First Nations population. As at the commencement of 2022, when the Omicron variant of the COVID-19 virus spread, 92.3 percent of the wider Australian population aged 16 years or over were fully vaccinated (defined as having received two doses of a registered vaccine), whereas only 73.2 percent of First Nations people in the same age category were fully vaccinated. Across the State of Western Australia only just over 50 percent of First Nations people were fully vaccinated and in some regional and remote areas across the Nation the rate was less than 50 percent.¹¹⁸

COVID-19 restrictions have had a profound impact on commerce globally, and Australia is no exception. While data is not readily available, these general restrictions combined with restrictions pertaining specifically to some First

Nations communities, whilst likely necessary, must have had a devastating impact on the nascent First Nations economy, particularly on those exposed to travel dependent industries (such as cultural tourism) or on the hospitality sector more broadly (such as traditional produce).

You need to be safe, healthy and educated to participate in the economy

In any discussion focused on policy designed to grow the Australian First Nations economy, there is a natural, and given the preceding analysis, understandable sensitivity that resources required to pursue enhancement of the First Nations economy may be appropriated from health, education and social programs. Such an approach to the fiscal arrangements pertaining to First Nations affairs is a nonsense that would without doubt prove counterproductive for the simple fact that people who do not have adequate health, accommodation, personal safety and a base level of education cannot realistically engage in further education, employment or entrepreneurship. Conversely, without a clear pathway to economic self-determination, outcomes from investments in health, education and social programs will be constrained—the two policy areas must co-exist, be integrated and designed with representatives of First Nations people on a shared decision-making basis.

Closing the Gap

Largely as a result of the historical constitutional bar on the Commonwealth legislating for First Nations people, the National policy approach to improving their socioeconomic circumstances has been historically inconsistent and fragmented across the States. This circumstance persists to some degree.

In 2005, the Aboriginal and Torres Strait Islander Social Justice Commissioner recommended that Australian governments commit to achieving equality in health and life expectancy for Australian First Nations people within 25 years (or by 2030)¹¹⁹. Following two years of advocacy in the form of the Health Equality Campaign (2006) and the Close the Gap Campaign (2007), the Council of Australian Governments (COAG) implemented the National Indigenous Reform Agreement (NIRA), whereby Australian Governments committed to the following six 'Closing the Gap' targets:

1. To close the life expectancy gap within a generation
2. To halve the gap in mortality rates for First Nations children under five years of age within a decade
3. To ensure access to early childhood education for all First Nations children of four years of age, and for children in remote communities, within five years
4. To halve the gap in reading, writing and numeracy achievements for children within a decade
5. To halve the gap for Indigenous students in year 12 attainment rates by 2020
6. To halve the gap in employment outcomes between First Nations and non-First Nations Australians within a decade

The main mechanism that was used to pursue these targets was a framework of Indigenous specific national partnership agreements which facilitated new investment of about \$4.6 billion.

¹¹⁷Department of Health and Ageing (2011), *Review of Australia's Health Sector Response to Pandemic (H1N1) 2009: Lessons Identified*, Australian Government, Canberra

¹¹⁸Australian Government Department of Health IN: Woodley, M (2022), 'Vaccination gap: vulnerable communities left exposed as Omnicron threatens', NewsGP, 14 January

As a result of limited progress in achieving the targets, Closing the Gap was reformed in 2020 under a new national agreement that replaced NIRA. Importantly, for the first time ever, the new National Agreement on Closing the Gap was developed and negotiated by COAG with national representatives of Aboriginal and Torres Strait Islander communities, the Coalition of Aboriginal and Torres Strait Islander Community-controlled Peak Organisations. The National Agreement also sought to change the focus away from targets to priority reforms designed by the Coalition of Peaks to change the way Governments work with First Nations people. Those four priority reforms are:

- **Formal partnerships and shared decision making** whereby there will be formal partnership arrangements to support Closing the Gap between First Nations people and governments in place in each State and Territory, enshrining agreed joint decision-making roles and responsibilities and where First Nations people have

chosen their own representatives.

- **Building the community-controlled sector** whereby the amount of government funding for First Nations programs and services going through First Nations community-controlled organisations will increase.
- **Transforming government organisations** in order to make a much bigger contribution to Closing the Gap including combating racism.
- **Shared access to data and information at a regional level** whereby there will be an increase in the number of regional data projects to support First Nations communities to make decisions about Closing the Gap and their development.

Meanwhile, the number of socioeconomic targets has increased to 17. Table 3 summarises progress to date against these targets.



¹¹⁹Aboriginal & Torres Strait Islander Social Justice Commissioner (2005), *Social Justice Report 2005* 1) 2009: *Lessons Identified*, Australian Government, Canberra
 Australian Government Department of Health IN: Woodley, M (2022), 'Vaccination gap: vulnerable communities left exposed as Omnicron threatens', *NewsGP*, 14 January

Table 3 – Progress against the Closing the Gap Targets

Socio-economic outcome	Target	Outcome trajectory
1. First Nations people enjoy long and healthy lives	Close the gap in life expectancy within a generation, by 2031.	Not on track to be met
2. First Nations children are born healthy and strong	By 2031, increase the proportion of First Nations babies with a healthy birth weight to 91 percent.	Potentially on track to be met
3. First Nations children are engaged in high quality, culturally appropriate early childhood education in their early years	By 2025, increase the proportion of First Nations children enrolled in the year before schooling into early childhood education to 95 percent.	On track to be met
4. First Nations children thrive in their early years	By 2031, increase the proportion of First Nations children assessed as developmentally on track in all five domains of the Australian Early Development Census to 55 percent.	Inadequate current data to assess
5. First Nation students achieve their full learning potential	By 2031, increase the proportion of First Nations people (20 to 24) attaining year 12 or equivalent qualifications to 96 percent.	Inadequate current data to assess
6. First Nations students reach their full potential through further education pathways	By 2031, increase the proportion of First Nations people aged 25 to 34 years who have completed a tertiary qualification (Certificate III and above) to 70 percent.	Inadequate current data to assess
7. First Nations youth are engaged in employment or education	By 2031, increase the proportion of First Nations youth (15 to 24 years) who are in employment, education or training to 67 percent.	Inadequate current data to assess
8. Strong economic participation and development of First Nations people and communities	By 2031, increase the proportion of First Nations people aged 25 to 64 who are employed to 62 percent.	Inadequate current data to assess
9. First Nations people secure appropriate, affordable housing that is aligned with their priorities and need	By 2031, increase the proportion of First Nations people living in appropriately sized (not overcrowded) housing to 88 percent.	Inadequate current data to assess
10. First Nations adults are not overrepresented in the criminal justice system	By 2031, reduce the rate of First Nations adults held in incarceration by at least 15 percent.	Not on track to be met
11. First Nations young people are not overrepresented in the criminal justice system	By 2031, reduce the rate of First Nations young people (10 to 17 years) in detention by at least 30 percent.	On track to be met
12. First Nations children are not overrepresented in the child protection system	By 2031, reduce the rate of overrepresentation of First Nations children (0 to 17 years of age) in out-of-home care by 45 percent.	Not on track to be met
13. First Nations families and households are safe	By 2031, the rate of all forms of family violence and abuse against First Nations women and children is reduced by at least 50 percent, as progress towards zero.	Inadequate current data to assess

Socioeconomic outcome	Target	Outcome trajectory
14. First Nations people enjoy high levels of social and emotional wellbeing	Significant and sustained reduction in suicide of First Nations people towards zero	Not on track to be met
15. First Nations people maintain a distinctive cultural, spiritual, physical and economic relationship with their land and waters	By 2030, a 15 percent increase in Australia's landmass subject to First Nations legal rights or interests By 2030, a 15 percent increase in areas covered by First Nations legal rights or interests in the sea	Inadequate current data to assess
16. First Nations cultures and languages are strong, supported and flourishing	By 2031, a sustained increase in the number and strength of First Nations languages being spoken	Inadequate current data to assess
17. First Nations people have access to information and services enabling participation in informed decision-making regarding their own lives	By 2026, First Nations people have equal levels of digital inclusion	Inadequate current data to assess

The National Agreement on Closing the Gap is a positive development that could contribute to achieving greater economic participation by First Nations people, particularly if Governments fulfil their commitments to develop policies and programs through shared decision making with their representatives. Whether, however, it can facilitate a shift to economic self-determination remains to be seen. Indeed, a companion piece that is negotiated with First Nations organisations and businesses who are leading economic development may be required.

National Roadmap to Boost Indigenous Skills, Jobs and Wealth

To complement and help realise the National Agreement on Closing the Gap, in December 2021 the Commonwealth Minister for Indigenous Affairs launched a National Roadmap, designed to boost Indigenous skills, jobs and wealth. According to the Minister, “the Roadmap will support

the achievement of Closing the Gap targets on tertiary qualifications (Outcome 6), youth in employment or education (Outcome 7), economic participation (Outcome 8) and relationship with land and waters (Outcome 15), as well as contributing to the Priority Reforms which lie at the heart of the National Agreement”.¹²⁰

The Roadmap document confirms with respect to economic participation that while there have been some gains made in Indigenous skills, jobs and participation, there is still much work that needs to be done. While an action plan is still to be developed with an Indigenous Reference Group, the policy pillars in the Roadmap include some useful areas to take forward such as activating land, water, sea and cultural resource rights. However, the focus of the Roadmap remains on participation in the mainstream economy and improving the delivery of employment services to First Nations people. It is not an agenda built on economic self-determination.

In fact, there is little evidence that employment services have responded to the needs of First Nations people and outcomes have been poor with respect to the Community Development Program which is undergoing further restructure. There has

been a litany of changes to remote employment services over the past decade since the former Community Development Employment Program (CDEP) was abolished by the Commonwealth without the support of First Nations people. Instead of designing yet another iteration of an employment services model, a serious policy rethink is required which starts from the premise that there are considerable benefits to the Nation of having First Nations communities remaining on their country and people being able to live a decent life in remote environments.

First Nations policy efficacy is an issue that should be of paramount national concern

In addition to the obvious issues of humanity and moral and ethical concerns that Australians should have for the Nation's First peoples, their circumstances should also be of primary concern to Australian citizens from a more selfish perspective—their persistence will result in growing public expenditure, increased negative international attention and potentially undermine Australia's competitiveness as a Foreign Direct Investment (FDI) destination and exporter of products and services.

Increasing government expenditure

Estimates for the total of Australian Government expenditure on First Nations policy initiatives have been controversial. The Productivity Commission estimates that in 2015-2016, Australian Governments spent AUD \$33.4 billion on programs accessed by First Nations Australians, representing 6.0 percent of all Australian Government expenditure¹²¹ and

equivalent to, or greater than, the annual budgets of each of the Western Australian, South Australian, Northern Territory and Tasmanian Governments. This includes AUD \$6.0 billion (1 percent of total Australian Government expenditure) spent on programs specifically targeting First Nations people and entities, with the balance (AUD \$27.4 billion) an estimate of First Nations' usage of government programmes targeting the wider Australian population.

Given the growth in First Nations population and persisting lower socioeconomic status among much of that population, it is likely that Government expenditure on First Nations people has continued to grow over the past five years and is unlikely to abate. This not only carries an opportunity cost but has to be funded through either government debt or (in any event ultimately) government revenues, including taxation.

International community pressure

Increasingly, the global community is focusing on historical and contemporary circumstances of First Nations peoples and governments' remedial responses.

In accordance with the Universal Periodic Review of each member of the United Nations, Australia was the subject of its five-yearly review in early 2021. Under this most recent review, 122-member nations made 250 recommendations to Australia, primarily highlighting a need for Australia to better protect people's rights. Of particular note, was a recognition of Australia's high (primarily First Nations) childhood imprisonment rate, with 31-member nations recommending that Australia raise the age of criminal responsibility. Over-representation of Aboriginal and Torres Strait Islander peoples across all negative social indicators was also identified by the Review.

As a result of international governance processes such as the

¹²⁰Launch of New National Roadmap to Boost Indigenous Skills, Jobs and Wealth (2021) Available at:<https://ministers.pmc.gov.au/wyatt/2021/launch-new-national-roadmap-boost-indigenous-skills-jobs-and-wealth> (accessed 14 April 2022)

¹²¹Productivity Commission (2017), *Indigenous Expenditure Report 2017*, Australian Government, Canberra

Universal Periodic Review, the global community will become increasingly aware of the plight of Australia's First Nations people, resulting in inter-governmental pressure to respond and, as discussed in the next subsection, potentially have commercial consequences.

Capital and product markets: the rise of ESG

Assessment of Environmental and Social Governance (ESG) is an increasingly important input to decisions made by professional financiers (debt and equity), as well as everyday consumers of goods and services. A continuation of the circumstances faced by Australia's First Nations people as discussed in this section of the Symposium Paper will potentially undermine the competitiveness of Australia as a source of Foreign Direct Investment (FDI) and as an exporter of goods and services, particularly the primary produce that is sourced from First Nations lands.

'...Proportionately, we are the most incarcerated people on the planet. We are not an innately criminal people. Our children are alienated from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future.

These dimensions of our crisis tell plainly the structural nature of our problem. This is the torment of our powerlessness...

Uluru Statement from the Heart (2017)

Why is the current policy framework not delivering - because wings are clipped and feet are tied?

While the cage door is at least ajar, the Australian First Nations economy's wings are clipped and its feet tied from two perspectives.

Firstly, the socioeconomic circumstances in which many First Nations Australians find themselves (as discussed in this section) at best renders it very difficult for them to participate or be competitive in the economy and at worst, prevents meaningful economic participation. A continued primary focus of policy on facilitating participation in the mainstream economy will at best result in a very slow-burn outcome.

Secondly, and of particular relevance to this Symposium, is the absence of a First Nations economic development policy framework that adequately supports and promotes economic self-determination. Economic self-determination refers to an ability of a people to take control over their economic assets and resources and use those assets and resources for their own ends. The economic repression of Australia's First Nations people has been so severe over the past 234 years that it is near impossible for them to achieve economic equality with the rest of Australia without being able to capitalise on a unique competitive advantage. For a vast majority of First Nations Australian's this unique competitive advantage lies in their traditional lands, the natural resources on those lands and the economic value that is encapsulated in their unique intellectual property.

Without self-determination it is not possible for First Nations Australians to fully overcome the legacy of colonisation.¹²² Self-determination not only restores a sense of sovereignty,

value, purpose and pride in First Nations individuals and organisations, but provides a fundamental platform for a First Nations economy that is characterised by a greater number of more diverse and unique First Nations owned and operated businesses which they want to own, operate and work in and that hold a relatively unique competitive advantage.

Another important dimension to the challenge of moving to a policy of economic self-determination is the institutional structures that have been established to specifically support economic development of Australia's First Nations. The primary ones, discussed elsewhere in this paper, are those established by the Federal Government: Indigenous Business Australia and the Indigenous Land and Sea Corporation. Both are Commonwealth statutory authorities accountable to the Minister who, controversially, appoints their Board members. Neither organisation has been established with a focused purpose of promoting economic self-determination and their future is an important part of reforming national policy in this space.

Meanwhile, the socioeconomic multipliers of First Nations owned and operated business are well understood:

- **Employment of First Nations People**

First Nations owned and operated enterprise and organisations are between 30¹²³ and 100¹²⁴ times more likely to employ First Nations people than other businesses, providing a critical vector to growing First Nations employment opportunities.

- **High propensity to invest in internal and external First Nations capacity**

First Nations owned and operated businesses invest in training for their typically proportionately larger First Nations workforce and have a higher propensity to invest in factor sources, production capacity and social infrastructure located in their relevant First Nations communities.

- **Second-order benefits**

In many instances First Nations owned and operated businesses strengthen First Nations employee connections to culture and provide a sense of self and belonging that underpins mental health, provides a 'safe place' for employees who face challenging family or community circumstances outside of the workplace and instil a sense of pride among First Nations employees and the First Nations community that hosts the enterprise^{125, 126}.

Furthermore, as employing First Nations organisations, First Nations owned not-for-profit enterprises that deliver services such as healthcare (including mental healthcare), childcare, education and training, employment support, substance abuse support, land care, conservation management and cultural rebuilding deliver the same benefits. They also provide First Nations communities with control over how important human and community services are delivered within their communities and create local jobs and career pathways for local First Nations people in highly skilled areas relevant to their lives, substantially increasing the likelihood of sustained employment within the community.

Most importantly, human service delivery organisations that are owned and operated by local First Nations community

¹²² Australian Human Rights Commission (2003), *Social Justice and Human Rights for Aboriginal and Torres Strait Islander Peoples*

¹²³ PwC Indigenous Consulting (2018), *The Contribution of the Indigenous Business Sector to Australia's Economy*

¹²⁴ Shirodkar, S., Hunter, B. and Foley, D. (2018), 'Ongoing growth in number of Indigenous Australians in business', Centre for Aboriginal Economic Policy Research, Australian National University

¹²⁵ Burton, R. and Tomkinson, E. (2017), *The Sleeping Giant – A Social Return on Investment Report on Supply Nation Certified Suppliers*, Supply Nation

¹²⁶ PwC's Indigenous Consulting (2018), *The Contribution of the Indigenous Business Sector to Australia's Economy*, PricewaterhouseCoopers, Sydney

organisations often deliver those services more effectively and efficiently than government instrumentalities. In fact, in areas such as land care and conservation management, in many remote locations across Northern Australia, deploying the unique capability of Indigenous land and sea ranger groups is the only economically feasible solution.

Finally, where these First Nations owned not-for-profit businesses are communally owned and based on recognised and awarded ownership and legal rights to traditional lands under Commonwealth, state or territory legislation, these organisations further build resilience and pride in communities by serving as a catalyst for reinstating cultural authority and responsibility, healing the effects of historical forced removal and relocation, and requiring the re-establishment of cultural

governance and collective decision-making processes that benefit families and communities¹²⁷.

Until First Nations economic development policy focuses on frameworks that allow First Nations Australians to activate the economic value in the rights and assets they have, and continue to reclaim, and the policy works to provide First Nations economic rights and asset holders with the capacity to activate that economic value, the socioeconomic circumstances outlined in this section will persist.

Identifying opportunities and means to achieve activation in this respect is the focus of the remainder of this Symposium paper.



¹²⁷PwC's Indigenous Consulting (2018), *The Contribution of the Indigenous Business Sector to Australia's Economy*, PricewaterhouseCoopers, Sydney





Yibai Maliyan bunbunha (eagle emerge/moving away, escaping): entrepreneurship, aspirations and community economic development

(A phoenix emerges: entrepreneurship, aspirations and community economic development)

From the ashes of 234 years of oppressive and discriminatory policy, a phoenix is rising. To the extent that reliable data exists, there is evidence that a self-determined Australian First Nations economy has, whilst still very small, established itself in both mainstream sectors and sectors that are uniquely First Nations oriented.

This section of the Symposium Paper discusses the breadth of contemporary economic aspirations among Australia’s First Nations people, as well as the dimensions of the contemporary Australian First Nations economy.

Australian First Nations enterprise aspirations

As with all peoples, Australian First Nations people and organisations have a variety of economic aspirations. At a personal level these range from modest subsistence to maximisation of personal financial gain. At an organisational level, they range from generating incomes and surplus to fund social or cultural objectives, to maximisation of profits for distribution to various beneficiaries for private reasons.

There are most certainly First Nations people who start businesses with a sole objective of enhancing personal wealth, as happens in any society. However, research indicates that there is a greater propensity among First Nations entrepreneurs to be more motivated by community benefits than non-First Nations entrepreneurs. This is summarised in Table 4.¹²⁸

Table 4 – Top 5 reasons for starting a business: First Nations and non-First Nations entrepreneurs

First Nations Entrepreneurs	
1.	To contribute to the community by providing a needed service
2.	To contribute to the community by increasing employment
3.	To create employment for themselves and their family
4.	To improve lifestyle
5.	To improve income
Non-First Nations Entrepreneurs	
1.	To improve income
2.	To become your own boss
3.	To improve lifestyle
4.	To become wealthy
5.	To create employment for themselves or family

It is these community-oriented motivations that are a major driver of the significant economic and social multipliers discussed in the previous section of this Symposium Paper and which in turn, further underpin the critical importance of a self-determined First Nations economy in overcoming the socioeconomic disadvantage also discussed in the previous section. As illustrated in Figure 21, a majority of Australian First Nations owner-manager businesses are located in rural, regional and remote Australia, and the growth of First Nations owner-manager businesses has been similar between urban and rural, regional and remote areas.

¹²⁸Rola-Rubzen, M. (2011) ‘The anatomy of the Australian Entrepreneur: understanding micro, small and medium business entrepreneurs in Australia’, Ninti One

The dimensions of the Australian First Nations economy

The landscape of First Nations economic entities across Australia can be described according to several dimensions:

- The extent to which the economic entity operates on a for-profit or not-for-profit basis
- Whether the economic entity operates in mainstream

- sectors, or in sectors that are more uniquely First Nations oriented
- The extent to which the economic entity is based on First Nations rights to either land or water
- The extent to which the economic entity is based on knowledge, know-how and intellectual property that is mainstream, or unique to First Nations interests.

The sectors that comprise this landscape are displayed in Figure 18 and described in the following subsections.

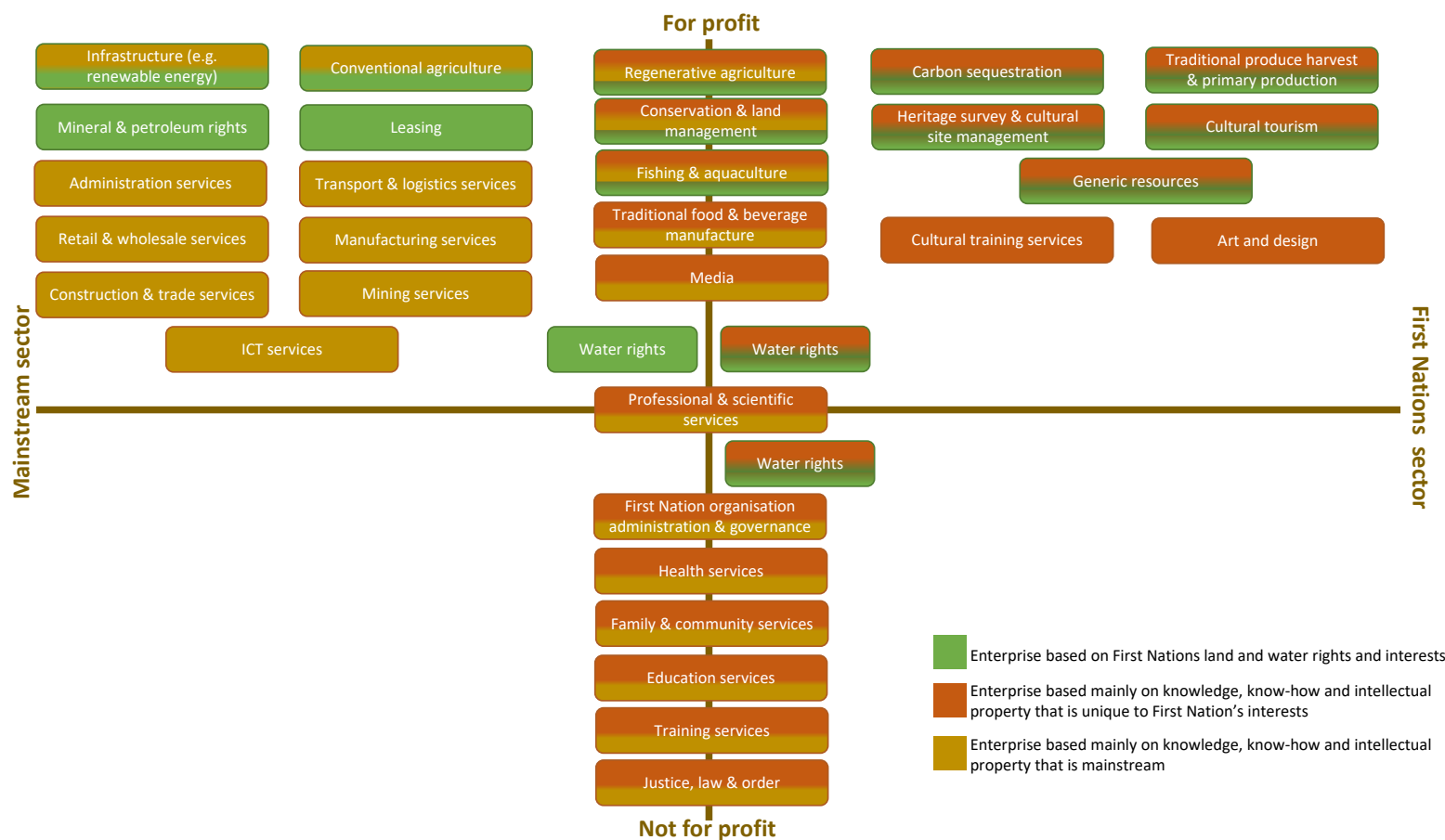


Figure 18 – The landscape of First Nations enterprise

Quadrant 1: For profit businesses based on mainstream capabilities

First Nations people own and operate businesses in all sectors of the mainstream economy including administration, transport and logistics, retail and wholesale, manufacturing, construction and trade, mining and ICT services. These businesses service both mainstream and First Nations markets and are based principally on knowledge, know-how and intellectual property that is not unique to First Nations people. Some of these businesses operate as any other mainstream business, some have training and employment pathways targeting First Nations people and some benefit from market advantage created by government and corporate First Nations procurement programs.

Some First Nations holders of land interests generate profits using their land assets in the mainstream market. This typically takes the form of providing access to lands for the purposes of infrastructure such as renewable energy generation, tourism, extraction of minerals or general leasing in return for a lease income, royalty or other financial compensation. Similarly, First Nations people may use their lands to conduct a conventional livestock, cropping or horticulture-based agricultural enterprise, or may lease water rights to a third party.

Quadrant 1.5: For profit businesses that blend mainstream and First Nations capabilities

In some instances, First Nations land interests can be combined with traditional First Nations and mainstream knowledge, know-how and intellectual property to create relatively unique businesses in areas such as regenerative agriculture, conservation and land management and fishing and aquaculture. Furthermore, manufacture of food and beverages based on traditional produce and First Nations media businesses can be operated by combining traditional First Nations and mainstream knowledge, know-how and intellectual property.

Quadrant 2: For profit businesses based on First nations capabilities

The competitive advantage of some First Nations businesses is founded in the uniqueness of their heritage. This includes combining First Nations land interests with traditional ecological knowledge to offer unique carbon sequestration products; the harvesting and primary production of traditional produce; First Nations heritage survey and site management services; cultural tourism; and, the commercialisation of First Nations knowledge pertaining to genetic resources.

Businesses that leverage from unique First Nations knowledge, know-how and intellectual property exclusively, include cultural training services and art and design fields.

Quadrant 3.5: Not for profit entities that blend First Nations and mainstream capabilities

A vitally important sector of the First Nations economy is the not-for-profit sector that delivers administrative and human services to the First Nations population including the administration and governance of First Nations organisations such as PBCs and Land Councils, health, family and community, education, training and justice, law and order services. These organisations perform a vital role in the socioeconomic advancement of First Nations by combining mainstream administrative practices and human services technical expertise with knowledge of First Nations communities, customs and practices to more effectively deliver services to Australian First Nations people.

All Quadrants: First Nations professional and scientific services

Providing services to both First Nations and non-First Nations government, industry and not-for-profit markets are a range of First Nations owned financial, professional and other technical services businesses.

First Nations business structures



First Nations enterprise can adopt structures that are available to all businesses in Australia, as well as depending on specific circumstances, unique structures that are only available to First Nations organisations.

Mainstream structures

First Nations businesses utilise the full framework of legal entities available to other Australian businesses, including:

- **Sole proprietorship**
Also known as a sole trader, sole proprietorship is a structure whereby from the perspective of a legal entity, there is no distinction between the owner and the business entity. Sole proprietorships can be employing entities.
- **Entities enabled under Corporations Law**
This includes private and public companies and companies limited by guarantee that are incorporated in accordance with the *Corporations Act 2001* (Cth), separating ownership from the business entity. Generally speaking, private companies are used to facilitate small-to-medium enterprise with fewer shareholders, public companies for larger enterprises with a larger number of shareholders and companies limited by guarantee for not-for-profit enterprise.
- **Partnerships and joint ventures**
Two or more First Nations and/or Non-First Nations businesses, however structured, that agree to formally cooperate on a specific commercial project or more broadly can enter into a joint venture or partnership arrangement under a contractual agreement or under the provisions of various state partnership legislation.
- **Incorporated Associations**
Incorporated Associations are incorporated under specific state or territory legislation¹²⁹ that separate ownership from the business entity, but which cannot distribute surpluses to members and are therefore used for not-for-profit purposes only.
- **Cooperatives**
Cooperatives are regulated under state and territory legislation and are legally incorporated entities designed to

serve the interests of a membership base. They are typically established to share infrastructure and capability such as logistics and marketing among separate enterprises.

- **Trusts**

Where a First Nations entity has entered into an arrangement whereby their interests are entitled to a revenue stream that is intended for communal benefit or multiple beneficiaries, trust structures are frequently used to receive, accumulate, manage and disperse those revenue streams.

First Nations entities can also be established under special purpose vehicles such as Venture Capital Limited Partnership Structures.

Structures unique to the First Nations economy

In addition to the structures that are available to all Australian enterprise, the First Nations economy also has access to legal structures that are unique to the sector.

Aboriginal and Torres Strait Islander Corporations

The *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) enables a unique incorporated vehicle known as an Aboriginal and Torres Strait Islander Corporation (ATSI Corporation) for not-for-profit purposes only. ATSI Corporations sit outside of the jurisdiction of the *Corporations Act 2001* (Cth), with the regulatory framework provided by their enabling legislation facilitating a simpler, more flexible but progressively rigorous process for First Nations interests to establish and manage a corporation for not-for-profit purposes.

The *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) achieves this by reflecting key aspects of the *Corporations Act 2001* (Cth) and provisions that are similar to the incorporated association legislation of the states and territories, but also

provides flexibility that reflects the cultural nuances and unique governance circumstances that First Nations organisations face. Regulations are generally more flexible in terms of issues such as the required frequency of member meetings, the extent of reporting and frequency of reporting requirements. Generally speaking, the requirements in this regard become more stringent the larger the ATSI Corporation is in terms of revenue, assets (excluding any Native Title Assets that may be vested with the ATSI Corporation) and the number of employees according to size categories prescribed by the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) and the *Corporations (Aboriginal and Torres Strait Islander) Regulations 2017* (Cth).

Furthermore, ATSI Corporations are subject to the jurisdiction of a unique regulator which supports them. The Office of the Registrar of Indigenous Corporations (ORIC), operating within the National Indigenous Australians Agency, gives effect to the functions of the Registrar of Indigenous Corporations, a statutory office established under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) with statutory powers to administer the Act and its Regulations. While ORIC has enforcement and administration powers, these tend to be used sparingly.

Native Title Representative Bodies

Native Title Representative Bodies (NTRBs) are legally recognised in accordance with Part 11 of the *Native Title Act 1993* (Cth), by the Minister for Indigenous Australians, for the primary purpose of prosecuting native title claims, and for continuing to represent the Native Title rights of native title holders within a prescribed geographical area of Australia (see Figure 19¹³⁰). NTRBs, always First Nations organisations, have been, and continue to be, instrumental in securing and giving effect to Native Title determinations across Australia.

¹²⁹ *Associations Incorporation Act 1991 (ACT)*, *Associations Incorporation Act 1984 (NSW)*, *Associations Act 2003 (NT)*, *Associations Incorporation Act 1981 (QLD)*, *Associations*

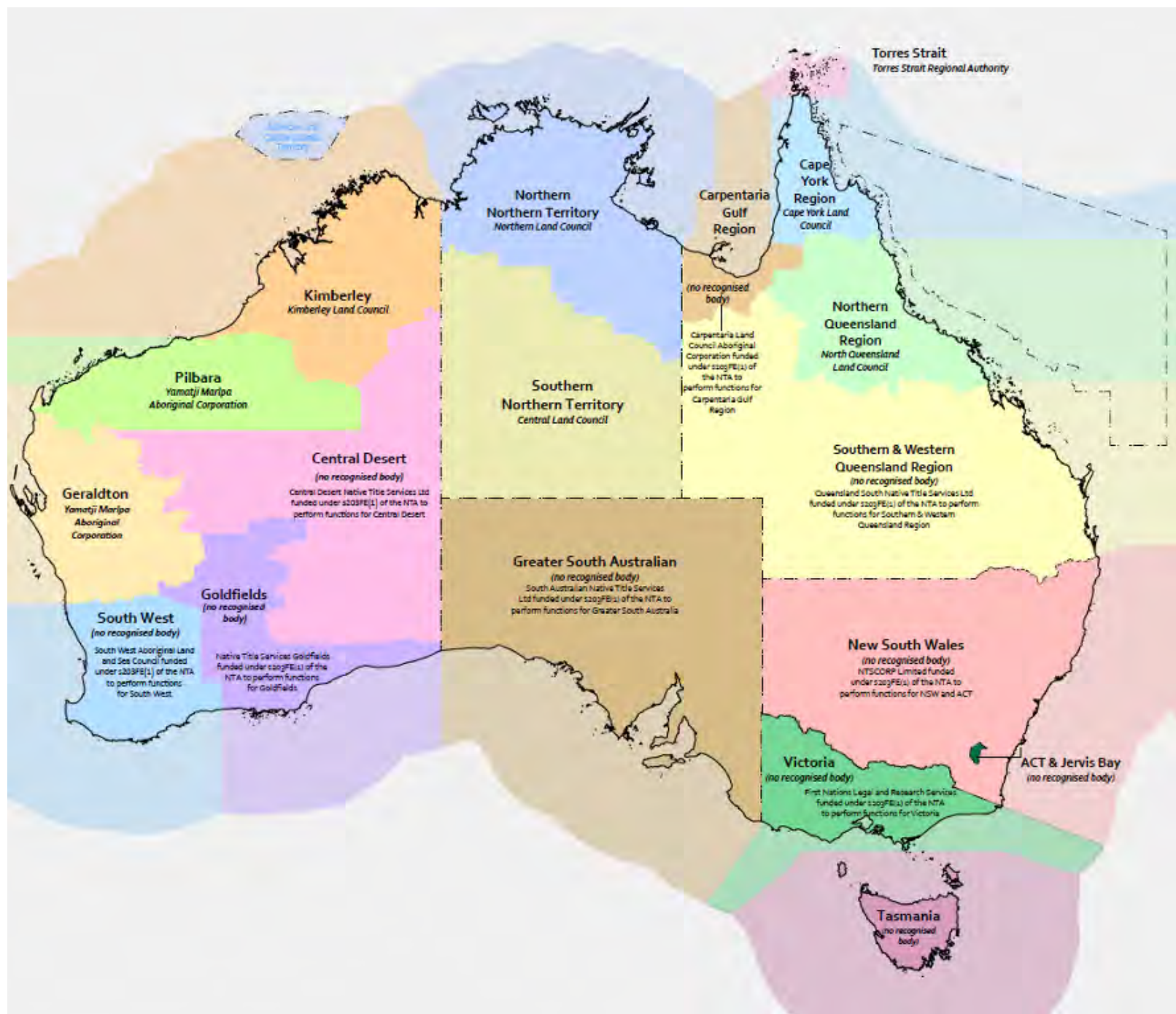


Figure 19 – Geographical jurisdiction of Native Title Representative Bodies

Beyond the functions prescribed by the *Native Title Act 1993* (Cth), a NTRB may have functions conferred on it by the laws of the state or territory in which its prescribed geographical area is located. It may also undertake additional functions that its members and board instruct it to perform. These are typically functions which revolve around supporting land-care, social, cultural and economic development of Native Title lands or other Indigenous lands within the specific NTRB's geographical area, or support the operations of smaller Prescribed Body Corporates that hold determined Native Title rights and interests in trust or as agent for successful claimants within their geographic area.

Part 12A of the *Native Title Act 1993* (Cth) allows established state or territory bodies that have a similar function to the NTRB established under Section Part 11 to adopt the functions of a Part 11 NTRB. For example, NTRBs in the Northern Territory, namely the Northern Land Council and Central Land Council existed prior to the *Native Title Act 1993* (Cth), initially as Aboriginal land rights advocacy organisations and then, in the case of the Northern Land Council and Central Land Council, as Commonwealth statutory bodies under the *Aboriginal Land Rights (Northern Territory) Act 1976*.

Prescribed Bodies Corporate

In accordance with Division 6 of the *Native Title Act 1993* (Cth) and the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth), when the Federal Court makes a determination of Native Title under the *Native Title Act 1993* (Cth), the associated Native Title rights and interests must be held in a special purpose vehicle known as a Prescribed Body Corporate (PBC) either as trust for, or as agent of, the common law holders of those rights and interests.

In accordance with the *Native Title Act 1993* (Cth) and *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth), a PBC must be an ATSI Corporation, and, therefore, is subject to the regulation and support of ORIC. Once registered with the National Native Title Tribunal, the PBC becomes the first point of contact for government, industry and any other entity wishing to undertake activities on land that is the subject of a Native Title determination, unless the specific PBC has appointed an NTRB to represent it (see previous subsection).

The powers and functions of a PBC as prescribed by the legislation and regulations broadly reflect those of a trustee or agent at common law, with the PBC owing a fiduciary duty to the common law native title holders. In order to leverage value from Native Title interests and rights held by a PBC for the community, the PBC board and its members may, at their discretion, decide to broaden the PBC's activities beyond the management of Native Title interests and rights. This may include activities such as cultural projects, training and employment programs and economic development.

There are currently around 200 PBCs in Australia responsible for some 3.3 million square kilometres of native title interests, representing 43 percent of the Australian landmass. Because different Native Title groups have different aspirations for their lands, and those lands have varying degrees of economic value, there is naturally variability across the resources, functions and activities of individual PBCs, with relatively few being able to demonstrate economic self-reliance.

Nonetheless, there is evidence that Australian Government funding for PBCs to function properly including meeting their compliance requirements is inadequate, even if its 2022-23 Budget included \$37.5 million toward strengthening the governance of PBCs. The Centre for Aboriginal Economic

¹³⁰National Native Title Tribunal (2022), *Representative Aboriginal/Torres Strait Islander Body Areas*, Australian Government, Canberra

¹³¹Woods, K., Markham, F., Smith, D., Taylor, J., Burbidge, B. and Dinku, Y. (2021), *Toward a Perpetual Funding Model for Native Title Prescribed Bodies Corporate*, Australian National University Centre for Aboriginal Economic Policy Research

Policy Research commissioned by the National Native Title Council estimated that Australian Government funding for core compliance functions meets only 10 percent of the actual cost of compliance. Its report also shows that the majority of PBCs are not currently on a trajectory to become financially self-sustaining. Accordingly, CAEPR concludes that significant ongoing government resourcing of the PBC sector is, and will continue to be, necessary to ensure an effective native title system, something that benefits not only native title holders but also non-Indigenous stakeholders engaged in economic activities on native title lands. CAEPR also argues that a PBC Future Fund is the most appropriate and cost-effective mechanism to secure ongoing PBC funding in perpetuity.¹³¹ Unquestionably this is an important issue that needs to be responded to in a new First Nations economic development policy that is based on self-determination.

Growth of the Australian First Nations economy

Owner-manager businesses

From 2006 to 2016, the number of First Nations owner-operator businesses in Australia grew at a CAGR of 5.6 percent. Over this period, the number of owner-manager First Nations businesses grew in every Australian jurisdiction with the greatest growth in New South Wales, which in 2016 accounted for just under 40 percent of all First Nations owner-manager businesses. See Figure 20¹³².

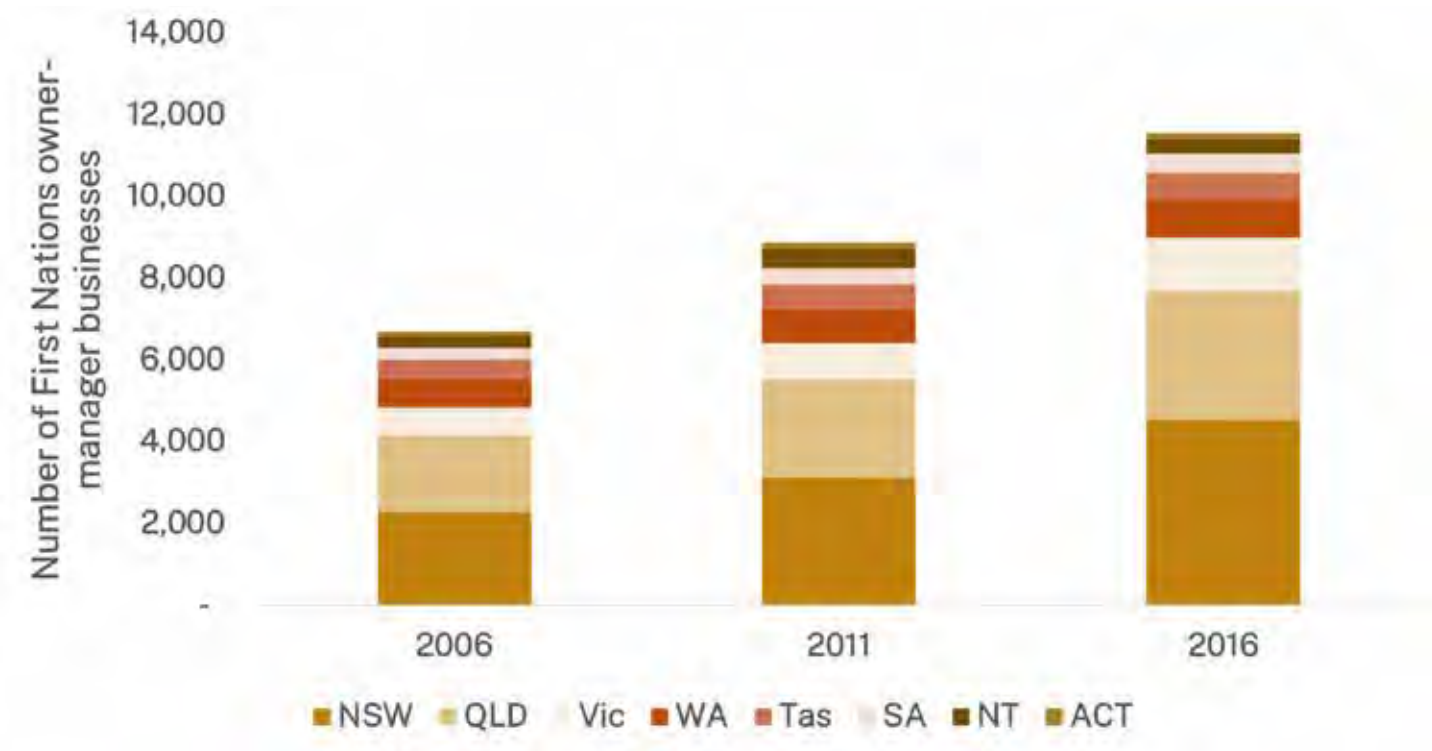


Figure 20 – Number of Australian First Nations owner-manager businesses

¹³²Australian Bureau of Statistics IN: Shirodkar, S., Hunter, B. and Foley, D. (2018), *Ongoing growth in the number of Indigenous Australians in business*, Centre for Aboriginal Economic Research, Australian National University

As illustrated in Figure 21 below, most Australian First Nations owner-manager businesses are located in rural, regional and remote Australia, and the growth of First Nations owner-manager businesses has been similar between urban and rural, regional and remote areas.

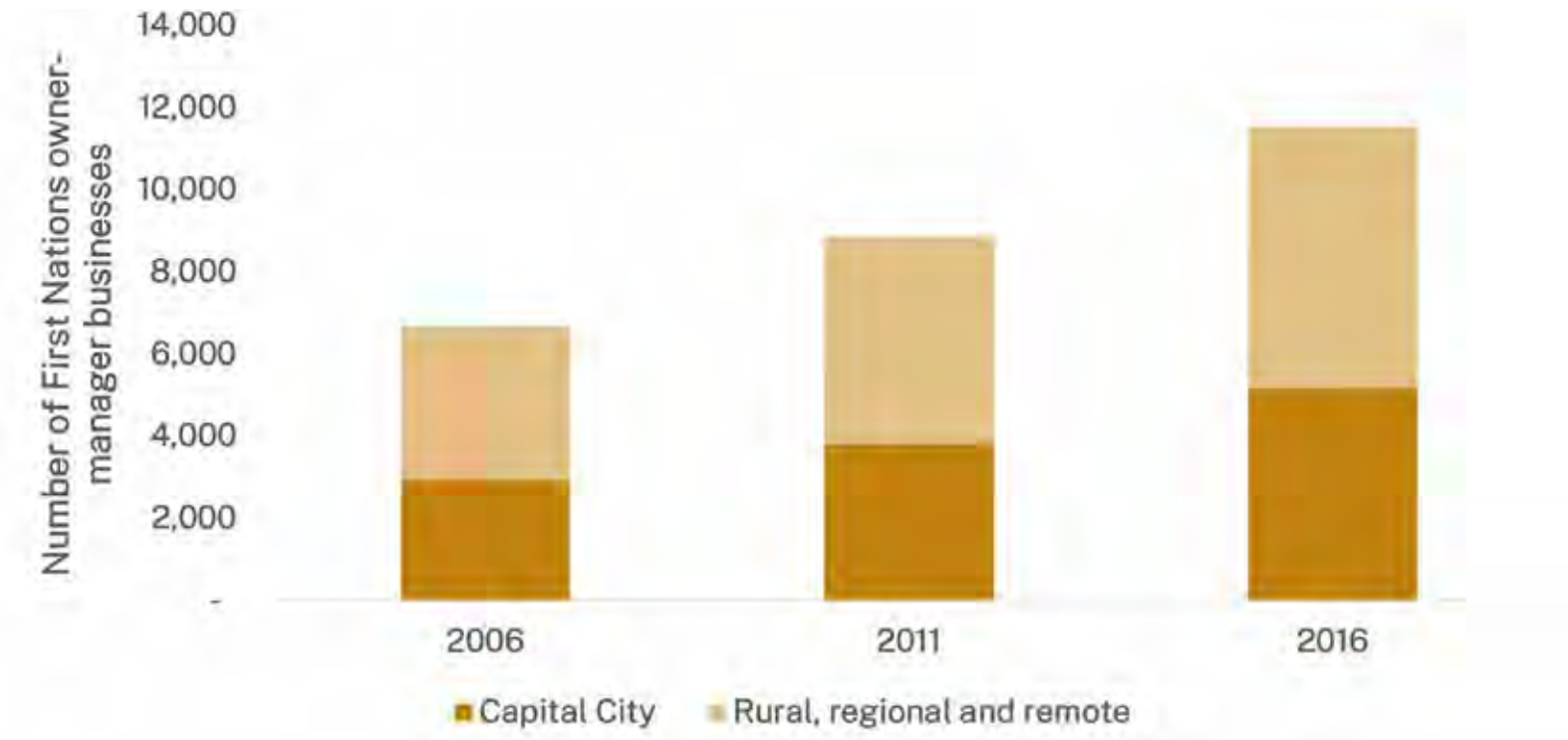


Figure 21 – Australian First Nations owner-manager business by capital city and rural, regional and remote location

However, rural, regional and remote First Nations businesses are dominant in New South Wales (60 percent rural, regional and remote), Queensland (64 percent rural, regional and remote) and Tasmania (65 percent rural regional and remote). New South Wales and Queensland have been major drivers of the First Nations economy collectively accounting for 67 percent of First Nations owner-operator businesses in 2016 and just over half of the growth in First Nations owner-operator businesses from 2011 to 2012.

However, despite this growth, Australia compares poorly against both New Zealand and Canada with respect to First

Nations business ownership. New Zealand, a nation five times smaller with significantly fewer resources than Australia, has almost twice as many First Nations businesses as Australia. Canada, a nation in many ways more comparable in terms of scale, has five times as many. On a per capita basis, while Australia, New Zealand and Canada are broadly comparable in the mainstream economy (between 0.10 and 0.13 non-First Nations persons per non-First Nations’ business), New Zealand has twice as many and Canada four times as many First Nations’ businesses per First Nations person (see Figure 22).

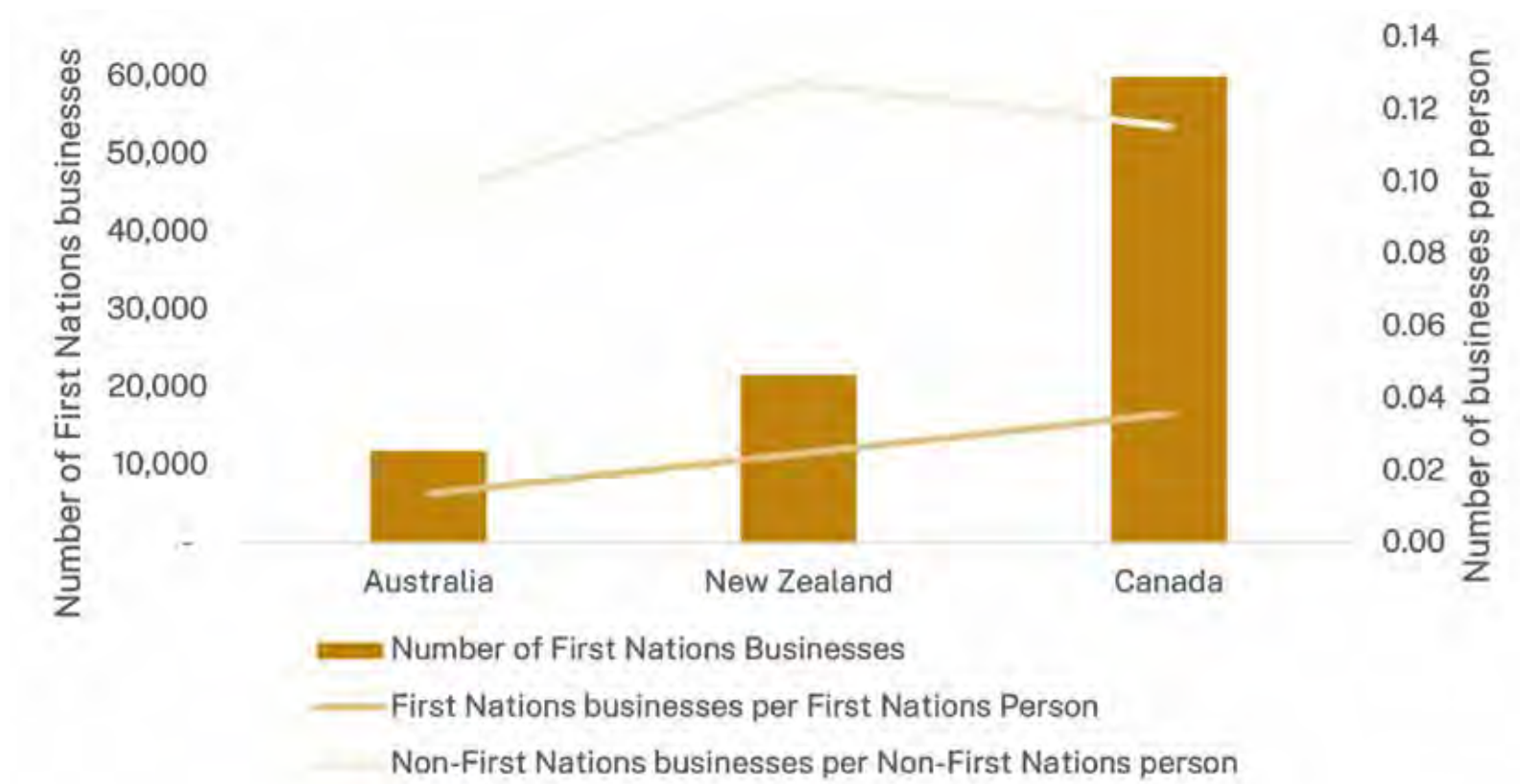


Figure 22 – First Nations Businesses: Australia, New Zealand and Canada

Aboriginal and Torres Strait Islander Corporations

Since 2009-2010, the number of ATSI Corporations registered with ORIC has grown a CAGR of 3.5 percent, with an average of 175 new registrations each year, somewhat offset by deregistered ATSI Corporations. See Figure 23¹³³.

This growth is driven by both increasing native title determinations (and therefore the mandatory incorporation of PBCs) as well as increasing numbers of other First Nations not-for-profit organisations.

Four states and territories: Queensland (29.1 percent), Western Australia (24.8 percent), New South Wales (20.9 percent) and

the Northern Territory (20.6 percent), account for over 95 percent of all ATSI Corporations in Australia.

Supply Nation

In 2008, a House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs held an inquiry into First Nations Economic Development, resulting in a report titled Open for Business. One of the recommendations of this report was that an Australian Indigenous Minority Supplier Council (AIMSC) be established. Based largely on a similar initiative implemented by the President Richard Nixon administration in the United States in the 1960s, Supply Nation's predecessor organisation, the Australian Indigenous



Figure 23–Registration of Aboriginal and Torres Strait Islander Corporations with the Office of the Registrar of Indigenous Corporations

Minority Supplier Council, was established as a three-year pilot program. Following a successful pilot, the AIMSC was rebranded as Supply Nation in 2013 and in 2015, the Federal Government launched its Indigenous procurement policy, with Supply Nation mandated as the first port of call for Federal Government procurement teams to search for First Nations businesses to fulfil procurement targets.

Today Supply Nation has approximately 2,900 verified Aboriginal and Torres Strait Islander businesses on its database, Indigenous Business Direct, that are either registered (at least 50 percent First Nations owned) or certified (at least 51 percent First Nations owned and therefore First Nations controlled). This

represents approximately one quarter of the estimated total First Nations businesses in Australia.

In addition to the database of suppliers, Supply Nation has approximately 600 paying government and corporate members who use the service’s database to identify potential First Nations suppliers of goods and services in order to meet procurement targets.

¹³³Office of the Registrar of Indigenous Corporations Yearbooks: 1990-91 to 2020-21

A re-emerging export orientation

As discussed in the section of this Symposium paper titled ‘A caged bird: an historical perspective’, Australia’s First Nations people engaged in trade with adjacent countries for thousands of years prior to British settlement. Across the globe there has been a renewed focus on international trade for First Nations businesses, including First Nations to First Nations international trade relationships facilitated through forums such as the World Indigenous Business Forum and agreements such as the Australia and Aotearoa-New Zealand Indigenous Collaboration Arrangement.

A recent study¹³⁴ identified at least 24 First Nations businesses that are currently exporting and a further 50 that either had export ambitions or were curious about export opportunities. Half of identified First Nations exporting businesses were exporting to New Zealand, with other common markets including the United Kingdom, United States and Indonesia and as diverse as Canada, Papua New Guinea, Singapore, Germany, Denmark, Hong Kong, Japan, Kenya, Sweden, Switzerland and Timor Leste.

The business of trusts

In circumstances where third parties negotiate access to First Nations lands for the purposes of extracting natural resources or installing productive infrastructure, it is not uncommon for the terms of that arrangement to include the payment of a lump sum amount and/or annual royalty to the Traditional Owner interests. Where large payments are involved, it is common practice for the terms of the negotiation to include a requirement that these payments are made to a trust structure that provides for accumulation of wealth to the benefit of the First Nations interests and governance around the management and disbursement of that wealth.

These structures are particularly common in the Australian

minerals and petroleum resources industry, and particularly in Western Australia. However, they are also increasingly being used in modified form as components of compensation settlements pertaining to past acts.

In most instances, the structure involves revenue being distributed between a charitable trust and a direct benefits trust. In accordance with the law, distributions from a charitable trust can only be made for prescribed charitable purposes such as education, health, sport, community and culture and are intended to benefit the wider local First Nations community. Subject to the rules and processes prescribed by the Trust Deed, distributions from the Direct Benefits trust can typically be used for legitimate expenditure purposes, with the beneficiaries typically being individual Traditional Owners, their families and interests.

The governance structure associated with these trusts will usually include Traditional Owners beneficiaries and a professional trustee, whose governance function is constrained to ensuring compliance with the trust deed. Figure 24 illustrates a typical trust structure.

It has been reliably estimated that there are multiple billions of dollars under management in these structures across Australia, with a significant concentration of that wealth in the Pilbara region of Western Australia.

A phoenix is clearly emerging, but will it fly?

From an almost non-existent independent economic base 50 years ago, an Australian First Nations self-determined economy, like the mythical phoenix, is clearly rising from

¹³⁴i2i Development Global (2021), *Inclusive Trade: Unlocking the Export Potential of Australia’s Indigenous SMEs*, Department of Foreign Affairs and Trade, Australian Government, Canberra

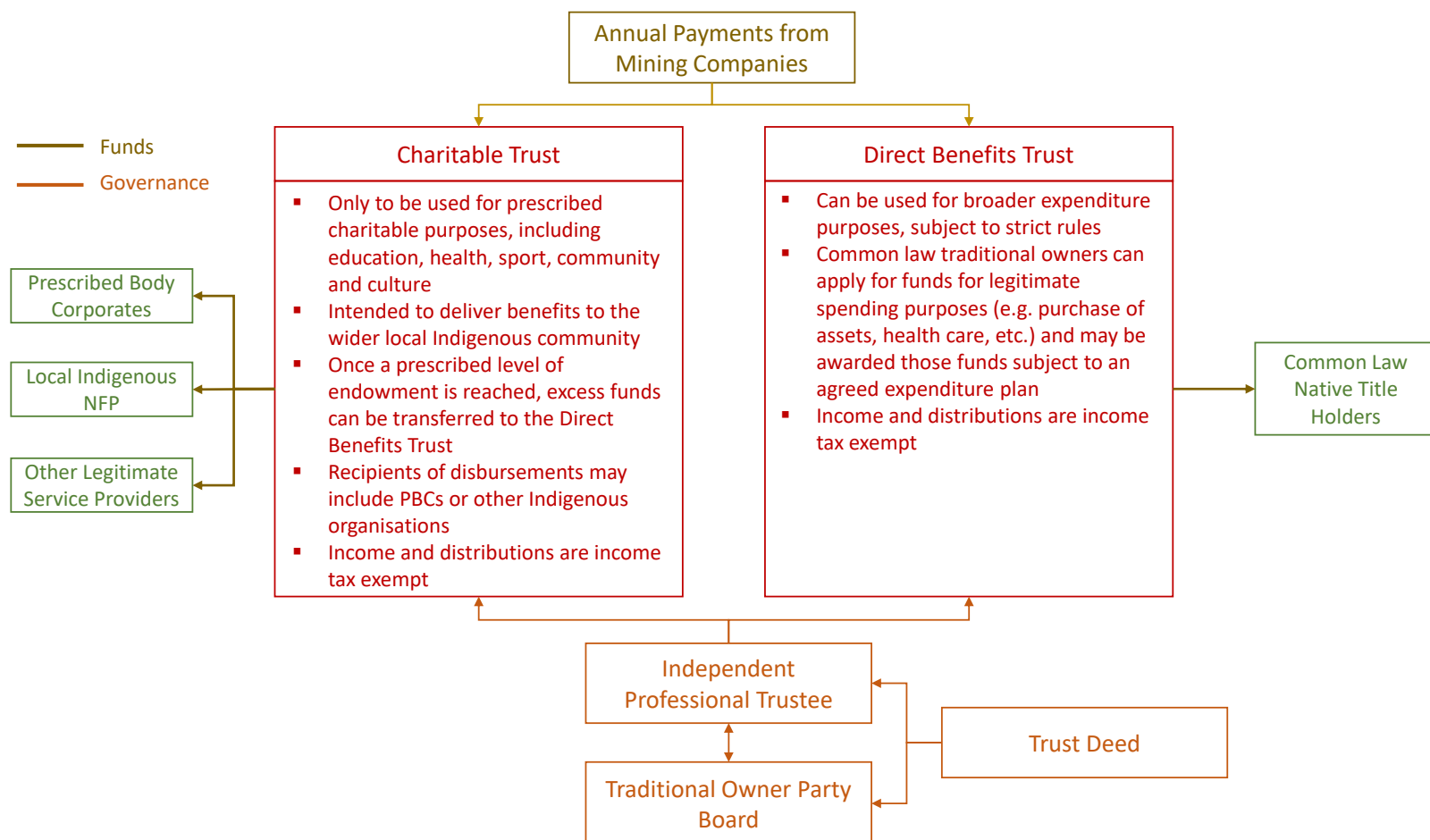


Figure 24 – A typical Australian First Nations Trust Structure

the ashes. However, while not insignificant, economic assets and rights have been reclaimed, paternalistic caveats and restrictions pertaining to the use of those assets and rights remain, fundamentally constraining the ability of Australia's First Nations people to fulfil their right to economic self-determination.

The extent to which these restrictions apply to land, water and financial assets is discussed in earlier sections of this Symposium Paper. While the caveats over these tangible assets are constraints at the most fundamental level, there is at least a legislative framework through which improvement can be achieved. The circumstance for First Nations intangible

assets is very different. Economic value is encapsulated in both traditional knowledge and cultural expression, and without substantive improvement in the ability of First Nations Australians to protect and appropriate such economic value from this intellectual property, the sector's ability to 'hatch' unique competitive advantage will continue to be fettered and opportunity for non-First Nations interests to misappropriate those 'eggs' will continue.

It is also clear that the quality of data pertaining to First Nations economic participation requires improvement.





Bawalganha (Hatching): Indigenous knowledge and innovation

(Hatching unique competitive advantage: Indigenous knowledge and innovation)

It should be clear from the discussion in this Symposium Paper that the development of a sustainable and prosperous Australian First Nations self-determined economy will be dependent on First Nations interests being able to capitalise on every possible competitive advantage that they can garner.

While in recent years at least, Australian governments and industry have been quick to provide First Nations businesses operating in the mainstream economy with competitive advantage through procurement targets and preferred tenderer conditions, they have been less so with respect to the rights and assets that First Nations Australians were originally defrauded from, and have been reclaiming over the past half century. As discussed throughout this Symposium paper, Australian First Nations interests in land, water and financial assets lack fungibility, placing First Nations interests at a competitive disadvantage with respect to land and water-oriented enterprise and in the deployment of capital.

The same applies to Australian First Nations intellectual property, whereby deficiencies in Australian intellectual property law limit the ability of First Nations interests to use that intellectual property for the purposes of innovation and to appropriate the economic value from that innovation. As with land, water and financial assets, these constraints must be addressed if the First Nations self-determined economy is able to hatch its competitive advantage.

There is a trend toward recognition, but it has a way to go

Intellectual property law in Australia is a product of both domestic action and obligations imposed under international instruments to which Australia is party. Traditionally, the ‘foundation agreements’ have related to a Western-centric framework for the development, commercialisation and protection of intellectual property. However, in the context of an international push for recognition and protection of the rights of First Nations peoples, there is scope for alternate mechanisms and methods to protect the unique interests that First Nations interests hold.

Basis of Australian Intellectual Property Law

The basis for much of Australia’s intellectual property framework is grounded in three international conventions relating to intellectual property law:

- **The Paris Convention**
The Paris Convention for the Protection of Industrial Property (1883)¹³⁵, was originally opened for signature in 1883 but only entered into force in 1970. Establishing an international regime for reciprocal recognition and enforcement of the principal Western intellectual property protection instruments such as trademarks, patents and business names, the Paris Convention primarily pertains to intellectual property in the context of commerce and industry. Australia has been a signatory to the Paris Convention since 1925.

- **The Berne and Rome Conventions**



The Berne Convention for the Protection of Literary and Artistic Works (1886)¹³⁶ and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1961)¹³⁷ together establish and protect the rights of the creators, performers and broadcasters of ‘literary and artistic works’. In addition to the concept of copyright, these include a guaranteed minimum standard of rights such as attribution, authorship and derivation, and establish exceptions for private use, teaching or scientific research. Australia has been a signatory to the Berne Convention since 1928, and to the Rome Convention since 1992.

None of the Paris, Rome or Berne Conventions, specifically recognise or cater to the rights of First Nations peoples. Arguably, some aspects of First Nations activities could fit within the existing frameworks, with the Paris Convention specifically recognising agricultural or extractive industries and natural produce as being capable of protection through trademark, while the Berne and Rome Conventions would capture recorded or transcribed cultural expressions such as dance or song. The Berne Convention particularly attempts to avoid the difficulties posed to an individual-centric, private-ownership Westernised system of protection (reliant on an identifiable individual or individuals claiming a particular work) by cultural works or practices that are a collective achievement, through allowing local authorities to be deemed as the responsible entity.¹³⁸

Administering, overseeing and shepherding the ongoing development of the principles underpinning the Paris, Berne and Rome Conventions is the World Intellectual Property Organisation (WIPO), a self-funded United Nations entity established under the Convention Establishing the World Intellectual Property Organization (1967).¹³⁹ In addition to the yearly WIPO Assembly meetings, WIPO and participant member states develop global intellectual policy and best practice through an array of committees and working groups. The bodies that are most relevant to the subject matter of this Symposium Paper are the Inter-Governmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC).

The nature of First Nations Intellectual Property

The relationships between the natural environment and First Nations peoples, their custodianship and guardianship activities, and expression of spiritual and cultural identity are often qualitatively different from the commercial/ industrial or individualistic artistic endeavours more commonly protected by intellectual property law. Under the conventional intellectual property system, these practices are usually regarded as ‘public domain’, and hence free for anyone to use and appropriate, First Nations or not. This is a state of affairs that many First Nations people reject, and which leaves their interests open to misappropriation or misuse.

In recognition of this, through its IGC process (inaugurated in 2000), WIPO has attempted to form a consensus view on the best way to ensure First Nations interests are protected by, and brought within, the existing international order. In particular, the IGC has defined three broad areas of focus, summarised in Table 5¹⁴⁰:

¹³⁵828 UNTS 305

¹³⁶1161 UNTS 30

¹³⁷496 UNTS 43

¹³⁸*Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights (Final Report) (1998)*, Australian Institute of Aboriginal and Torres Strait Islander Studies

Table 5 –Key Indigenous Intellectual Property Focus of the Inter-Governmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore

Definition	Challenges to the Existing Framework
TRADITIONAL KNOWLEDGE	
Knowledge resulting from intellectual activity in traditional context, including know-how, practices, skills and innovations.	<p>Traditional Knowledge in its purest form, which frequently has ancient roots and is passed down usually in oral form, is generally not protected by traditional methods such as patent or trademark.</p> <p>Specific practices or innovations may be protectable but determining the ‘owner’ within the understanding of Western individual-centric IP protection practices is difficult and may disenfranchise other entitled Indigenous interests.</p>
CULTURAL EXPRESSION	
Also known as ‘folklore’ this includes music, dance, art, designs, names, signs and symbols, performances, narratives and architecture.	<p>Traditional Cultural Expressions are more amenable to protection under existing systems, usually under the Berne or Rome Conventions. However, Traditional Cultural Expressions are usually bound and integrated in a single heritage that also encompasses Traditional Knowledge and Genetic Resources. They are integral to the cultural and social identify of the community, and hence protection through existing channels may lead to artificial segregation and disenfranchisement.</p> <p>In particular, the obligations placed on copyright holders to enforce their rights against all other parties or lose control to the public domain is difficult to reconcile with the generally communal nature of Traditional Cultural Expression practices.</p>
GENETIC RESOURCES	
Biological materials that contain genetic information of value, and are capable of reproducing or being reproduced, including medicinal plants, agricultural crops and products of animal husbandry.	<p>Genetic Resources as encountered in nature are not creations of the human mind and thus cannot be directly protected as intellectual property. However, innovations based on or developed from Genetic Resources may be protected by mechanisms such as a patent or a plant breeder’s rights.</p> <p>In many communities, Traditional Knowledge is closely associated with Genetic Resources through the utilisation, protection and conservation of that resource over many generations. In a modern context, Traditional Knowledge often provides researchers with insights to isolate valuable active compounds within Genetic Resources.</p>

¹³⁹828 UNTS 1846

¹⁴⁰Derived from *Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources*, published World Intellectual Property Organisation, accessed 01/09/18

Protection of First Nations intellectual property:

Limited capability within the IGC framework

Generally speaking, protection strategies promoted by the IGC follow the following themes:

- **Defensive Protection** – which are strategies designed to ensure third parties do not gain illegitimate or unfounded intellectual property rights over Traditional Knowledge, Traditional Cultural Expressions or Genetic Resources.
- **Positive Protection** – which are strategies designed to facilitate active exploitation of Traditional Knowledge and commercialisation of Traditional Cultural Expression and Genetic Resources by the originating First Nations interests in that intellectual property.

With a mandate to “ensure the balanced and effective protection of genetic resources, traditional knowledge and traditional cultural expressions”¹⁴¹, since 2004 the IGC published Draft Articles for consideration and review by the IGC and the wider WIPO Assembly. These have been updated steadily over the years since, with the latest drafts presented at the 32nd IGC meeting in 2016, albeit they have not been approved or subject to any final decision and have no formal status beyond as a point of reference.¹⁴²

While the Draft Articles are in flux and contain multiple proposed definitions and optional clauses, reflecting the lack of any broad consensus view, some common themes may be discerned¹⁴³:

- **Definition of ‘misappropriation’ of Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources derived from Traditional Knowledge**
Multiple alternative options have been proposed, with a general unifying factor being a lack of consent from First Nations peoples. The threshold for determining consent or absence of consent is a live question, with suggestions including violation of customary law, requirements for ‘prior informed consent’ and ‘mutually agreed terms’, or as established by national laws.
- **Identification of beneficiaries**
Requirements on non-First Nations parties to obtain prior informed consent and mutually agreed terms can be complicated when it is not clear with whom they should be negotiating. The Draft Articles present two models for this, one based on local national law and one based on traditional customary law.
- **Scope of Protection**
Little consensus has been reached as to what degree of protection States should implement. Broadly, the Draft Articles see a ‘sliding scale’, with the highest levels of protection given to sacred or secret Traditional Knowledge and Traditional Cultural Expressions, while Traditional Knowledge and Traditional Customary Expression widely known or not commonly expressed would merely be required to be used ‘respectfully’ by non-First Nations people. Genetic Resources are addressed through a disclosure regime to support ‘access and benefit sharing’, in which patent applicants are required to disclose the source of their knowledge regarding the Genetic Resources.

¹⁴¹Decision: Matters Concerning the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Assemblies of Member States of World Intellectual Property Organisation, 55th session (October 2015)

¹⁴²Draft Provisions/Articles for the Protection of Traditional Knowledge and Traditional Cultural Expressions, and IP & Genetic Resources, published World Intellectual Property Organisation, accessed 01/09/18

¹⁴³Technical Review of Key Intellectual Property-Related Issues of the WIPO Draft Instruments on Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions, Anaya, J, published Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 34th session (March 2017)

With significant ambiguity and disagreement on the Draft Articles, the pathway forwards for these reforms appears fraught, and no agreement is likely in the short to medium term.

Convention on Biological Diversity, Bonn Guidelines and Nagoya Convention

Parallel attempts to accord recognition for First Nations intellectual property rights within the ‘traditional’ WIPO structure has been a limited but generally more successful program to ensure First Nations interests benefit equally from natural resources, rooted in the Convention on Biological Diversity and more recently its companion Nagoya Protocol and the Bonn Guidelines.

The Convention on Biological Diversity (1992)¹⁴⁴ (CBD), which was signed by Australia and entered into force in 1993, is primarily concerned with environmental conservation, sustainable development, and equal access to the benefits stemming from the natural environment, including Genetic Resources. In particular, the CBD explicitly recognises the close and special relationship First Nations communities and peoples have with the biological resources of their home area, their Traditional Knowledge and their role in safeguarding and sustaining those resources, as well as their rights to use, enjoy and benefit from them.

Some criticism and resulting advocacy around the involvement of First Nations interests in the development of these frameworks, led to the creation of the Bonn Guidelines.¹⁴⁵ These guidelines were adopted unanimously by 180 States at the COP6. While non-binding and of no legal force, the Guidelines aim to assist

and guide First Nations peoples, nation states, business and interested parties in allowing equitable access to Genetic Resources in which First Nations peoples and communities have an interest. Among other matters, the Guidelines address requirements for mutually agreed terms and prior informed consent, define the roles and responsibilities of users and providers, discuss incentives, accountability, means for verification and dispute settlement, and suggest precedents for both monetary and non-monetary benefits.

Working from the Guidelines as a base, continued advocacy towards a formal resolution which would provide legal certainty and an approved framework resulted in the Nagoya Protocol¹⁴⁶, presented at the COP 11, 2010, in Nagoya, Japan, and finally entering into force in 2014. An attempt to rectify the lack of any substantial progress on implementing the CBD’s aim of ABS regarding Genetic Resources since it was first enacted nearly two decades previously, the Protocol goes significantly beyond the voluntary Bonn Guidelines and prescribes requirements on signature States, including to implement and fund the operation of compliance and audit mechanisms. Provisions of particular note are as follows:

- **Linkages between Traditional Knowledge and Genetic Research**

Contrary to the vague and generalised language relating to Genetic Resources in the CBD, the Protocol explicitly recognises that Genetic Resources are linked with Traditional Knowledge, and that Genetic Resources may be ‘held by’ First Nation peoples and communities through their unique knowledge and experience of biological organisms.

¹⁴⁴1760 UNTS 79

¹⁴⁵Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising Out of Their Utilization - Conference of the Parties to the Convention (6), 2002, The Hague, Netherlands

¹⁴⁶Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from the Utilization of Genetic Resources of the Convention on Biological Diversity, registered UNTC 12 October 2014, No. 30619

- **Prescriptive and Specific Obligations**

In order to meet the ABS requirements of the CBD, the Protocol requires States Party to provide for specific actions and outcomes 'via legislative, administrative or policy measures'. These include to:

- Require that benefits stemming from utilising Genetic Resources be shared with the First Nations interests whose Traditional Knowledge led to their discovery.
- Require that prior informed consent is obtained before the use and exploitation of Genetic Resources stemming from Traditional Knowledge, and that access occurs on mutually agreed terms.
- Establish a body to coordinate the process of obtaining prior informed consent, issue a compliance certificate stating the mutually agreed terms, and register the decision with the Access and Benefit Sharing Clearinghouse¹⁴⁷;
- Encourage all parties to an agreement to comply with the mutually agreed terms reached and facilitate dispute resolution.

- **Government Involvement**

To ensure the Protocol is rooted within and informs State policy and actions, it requires State parties to designate:

- A National Focal Point which must make information on prior informed consent, mutually agreed terms and the process available to interested parties, and direct parties to the appropriate First Nation peoples or communities to approach.
- A Competent National Authority responsible for granting access to and issuing written evidence that access requirements have been met, and register those instruments with the ABSCH.

- **Compliance and Monitoring**

To ensure compliance, State parties are required to implement 'checkpoints' as oversight mechanisms, gathering data on compliance and reporting instances of non-compliance to the ABSCH. Further, State parties are required: (a) to ensure that Genetic Resources traded within their territory have been appropriately permitted; (b) the First Nations peoples or communities with whom that Traditional Knowledge is associated have given prior informed consent; and (c) that the mutually agreed to terms are being complied with.

Only 106 of the 196 State parties to the CBD have ratified the Protocol. Australia signed the Protocol when it first opened for signatures in 2012. However, Australia has not as yet ratified the Protocol and hence is not a party to it. Indeed, Australia's only tangible step towards compliance has been to designate a National Focal Point.¹⁴⁸

The contemporary Australian intellectual property framework and First Nations interests

While Australia lacks an adequate comprehensive framework for protection of the intellectual property rights of its First Nations people, several specific pieces of legislation and standards at a regional, national and jurisdictional level indicate some progress, albeit limited. These specific instruments are now discussed.

¹⁴⁷ An international entity established by the UN to facilitate the operation of the Nagoya Protocol, presently implemented through an online portal <https://absch.cbd.int>

¹⁴⁸ Presently Ms. Jaime Grubb, Director, Biodiversity Policy Section, Commonwealth Department of the Environment and Energy, Canberra

The Commonwealth: Environmental Protection and Biodiversity Conservation Act 1999

Under the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) and its Regulations¹⁴⁹, access to biological resources found on Commonwealth-controlled areas is managed via a permitting system. Section 301 of the Act, together with Part 8A of the Regulations, establish that the permission of an ‘access provider’ is required before access to biological resources is permitted. Where the land is subject to native title, or owned by an Indigenous corporation, that entity will become an ‘access provider’ and their consent is required. Whether consent has been given or not is determined by the Minister, in their own judgement.¹⁵⁰

Where the access is sought for commercial purposes, parties must enter into a formal benefit-sharing agreement. There is no prescribed form, but the agreement must contain at a minimum a statement detailing the use of, and attributing the source of, any Traditional Knowledge relied upon, and sufficiently detailed statements of the management and benefits to be shared in return for its use¹⁵¹.

The degree to which this system is capable of protecting and advancing the interests of First Nations peoples and communities, and their Traditional Knowledge and linked Genetic Resources, is unclear. Since the permitting process commenced in 2006, only three commercial permits have been issued, all to the Australian Institute of Marine Science¹⁵².

Northern Territory: Biological Resources Act 2006

Functioning in a similar way to the Commonwealth legislation, the *Biological Resources Act 2006* (NT) has as a stated aim to increase and facilitate ‘bioprospecting’ within the Northern Territory, defined as “research in relation to any genetic resources, or biochemical compounds, comprising or contained in the biological resources.”¹⁵³ The Act further specifically states that it wishes to protect and recognise the ‘special knowledge’ held by First Nations persons about those biological resources, and establish a framework to share the benefits arising from their use.¹⁵⁴

This is achieved through a permitting system, whereby the ‘resource access provider’ (including Land Trusts, native title holders, and Aboriginal associations) must agree to allow access to, and enter into, a benefit sharing agreement before the permitting authority can issue a permit.¹⁵⁵ Where Indigenous Knowledge is involved, the agreement must include a statement of the source of the knowledge and the benefits given in exchange.¹⁵⁶

However, the definition of Indigenous Knowledge is somewhat more restricted than Traditional Knowledge in the international sense, as it is stated to be knowledge that is ‘obtained from an Indigenous person or...persons’, but does not include information ‘obtained from scientific or other public documents, or otherwise from the public domain’.¹⁵⁷ This is problematic, as a large amount of what would otherwise be

¹⁴⁹ *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth)

¹⁵⁰ Regulation 8A.10(2)

¹⁵¹ Regulation 8A.07-10.

¹⁵² List of Permits Issued, in *Australia's Biological Resources, 2006-07 to 2018*, published Commonwealth Department of the Environment and Energy.

¹⁵³ s5 BRA

¹⁵⁴ s3(2) BRA

¹⁵⁵ s11, 19, Part 4.

¹⁵⁶ s29

¹⁵⁷ s29(2)

Traditional Knowledge, having been recorded in the past and therefore entered into the scientific record, is now not open to protection. Similarly, knowledge that is common to one or more groups may be deemed ‘public domain’, and indeed, under the existing intellectual property law regime operating within Australia, most Traditional Cultural Expressions and Traditional Knowledge not rigorously guarded from outsiders would fall within this category.

Queensland: Biodiscovery Act 2004

The *Biodiscovery Act 2004* (QLD) makes no mention of First Nations peoples or communities. The objects and purposes of the Act are stated purely to ensure that benefit sharing, and control of biological resources should accrue to the State of Queensland from material collected from State lands, and controls this through similar permitting processes.

However, the Queensland Government has, in addition to the Act, issued a policy statement binding upon all government agencies, entities and public bodies: the Biotechnology Code of Ethics.¹⁵⁸ The Code is currently under review, and was last updated in 2014. The 2014 version recognises the culturally significant aspects of the knowledge of traditional owners and commits to negotiating a ‘reasonable’ benefit-sharing arrangement where Traditional Knowledge is used.¹⁵⁹ No enforcement mechanisms or further details are provided as to the practical implementation of this broadly worded commitment.

Further, the Act itself has also recently undergone review, with 45 recommendations made. While initially reviewed in 2009, with no amendments viewed as necessary, the signing (but not ratification) of the Nagoya Protocol by Australia in 2012 served as a catalyst for a further review, with terms of reference

specifically addressing ABS and use of Traditional Knowledge in relation to genetic and biological resources. In September 2020, the *Biodiscovery and Other Legislation Amendment Act 2020* (QLD) reformed the *Biodiscovery Act 2004* (QLD) to include protections for the use of First Nations peoples’ traditional knowledge in biodiscovery to improve alignment with the Nagoya Protocol.¹⁶⁰

Now under the Act, a person is required to take all reasonable and practical steps to only use traditional knowledge for biodiscovery with the agreement of the custodians of the knowledge. This reform represents a key step in recognising First Nation peoples’ traditional knowledge and supporting them to decide how their knowledge is used, and to gain fair benefits from its use in biodiscovery.

Food Standards Australia New Zealand

Food Standards Australia New Zealand (FSANZ) develops standards that regulate the use of ingredients for food products, product label requirements and food business licensing conditions. The Food Standards Code classifies bush foods as ‘novel food’, the ingredients of which are regulated by Standard 1.5.1: Novel Foods. While recognising their First Nations heritage, the standard makes no substantive provisions for the knowledge or interests of First Nations peoples in the development of bush food products, requiring only that a social scientist give advice on traditional food uses. Recent developments have seen calls for government to provide for the meaningful involvement of Aboriginal and Torres Strait Islander peoples in the governance processes of the bush food commercialisation system.¹⁶¹

¹⁵⁸Queensland Biotechnology Code of Ethics in Scientific research regulation and ethics, State of Queensland, published Business Queensland

¹⁵⁹10: Biodiscovery in Queensland Biotechnology Code of Ethics

¹⁶⁰Reform of the Biodiscovery Act 2004, Queensland Government Department of Environment and Science.

¹⁶¹Lingard, K. (2015), *An inclusive governance framework for bush food commercialisation*, Policy Briefing, Ninti One, Alice Springs

Will Australian First Nations intellectual property remain an incubating egg ?

The inability of Australian First Nations interests to be able to protect and leverage economic benefit from the competitive advantage that is encapsulated in their unique intellectual property is a major constraint to the development of a self-determined Australian First Nations economy. The fact that it is largely legal for non-First Nations interests to appropriate the economic value from that intellectual property — a circumstance that is commonplace — is manifestly inequitable and abhorrent to most First Nations people.

Further, the absence of a suitable First Nations intellectual property framework means that many custodians understandably guard it fiercely, often to an extent that is beyond cultural requirements. This represents a significant opportunity cost; whereby, with an appropriate protection framework and in accordance with cultural protocols, this intellectual property could potentially underpin significant sectors of a self-determined First Nations economy.

This is not a new issue. For example, in its report on a Native Title Social Justice Package in 1995, following Australia-wide consultations with First Nations people, the former Aboriginal and Torres Strait Islander Commission recommended that the Commonwealth Government should amend statutes relevant to intellectual property rights to safeguard the integrity and ownership of Indigenous cultural property in a manner which recognises the particular features of Aboriginal and Torres Strait Islander ownership, including perpetual and communal

rights. Despite taking some initiatives to improve respect for Indigenous knowledge, such as Australia's Indigenous Knowledge IP Hub, the Commonwealth does not seem to be any closer to implementing legislative reform.

Notwithstanding cultural protocols, it is likely that the full competitive advantage encapsulated in Australian First Nations intellectual property will not hatch but remain incubating under nondisclosure until there is adequate protection under the Australian intellectual property legal framework.

The constraints on extracting economic value from land, water, financial capital and intellectual property rights that Australian First Nations people face, highlight a clear need for a shift in support program offerings. If a self-determined Australian First Nations economy is to soar it will need strong wings. Transfer of basic business skills and access to small amounts of concessionary finance will not achieve this alone. Strong wings will come from a combination of world-class entrepreneurial capability and coordinated industry and to an extent, nation building capacity among Australian First Nations community and business leaders. Only this can achieve the change that is required for the self-determined Australian First Nations economy to truly soar.





Walanbang dibalany (strong wings): jobs, skills and commercial capability

(You need strong wings to soar: jobs, skills and commercial capability)

The development of any enterprise in a rules-based, free-market economy requires the ability to identify and critically assess market opportunities, develop a risk-mitigated plan to capitalise on those opportunities, marshal the financial, capital and human resources required to implement that plan, and successfully manage its implementation to achieve the desired commercial and investment objectives. These are the skills of the entrepreneur—skills that, as discussed in an earlier section of this Symposium Paper have been a fundamental driver of the unprecedented global economic expansion of the past 234 years. They are also the skills that are required to expand a self-determined Australian First Nations economy.

However, entrepreneurial skills on their own are unlikely to achieve the desired outcome. It is clear from the preceding discussion in this Symposium Paper that structural change, if not a condition precedent to the viability of a self-determined First Nations economy in Australia, is a necessity if it is to thrive. In this sense, we are talking about the capabilities that are needed to create a new, somewhat unfamiliar industry and like other contemporary new industries, such as the noncarbon energy sector, a new industry that is in the economic, social, cultural and environmental interests of the Nation, but to be given effect, requires some structural change.

While Australian First Nations sovereignty will, for the foreseeable future, co-exist with the Crown, that sovereignty has limited value without at least a degree of economic independence. At its core, the objective of a self-determined First Nations economy is to economically empower a people.

As such, there are also elements of ‘nation-building’ to this effort.

The obstacles facing a self-determined Australian First Nations economy are such that the entrepreneurial and industrial, if not nation building, skills must be world-class.

Much of the existing government and not-for-profit First Nations economic, capacity-building program framework is focused on training to job pathways and basic business skills, preferential procurement and microfinance for First Nations businesses. While this support is important for developing a First Nations workforce, basic business management capabilities and small First Nations enterprises, it will not lead to a self-determined First Nations economy unless it is adequately complemented by the aforementioned entrepreneurial and industry/nation building capability.



The necessary skillset

The skillset that is required to drive a successful and sustainable self-determined First Nations economy is a combination of mainstream entrepreneurial skills, nuanced First-Nations entrepreneurial skills and industry-building skills and to an extent, nation building skills. This is illustrated conceptually in Figure 25.

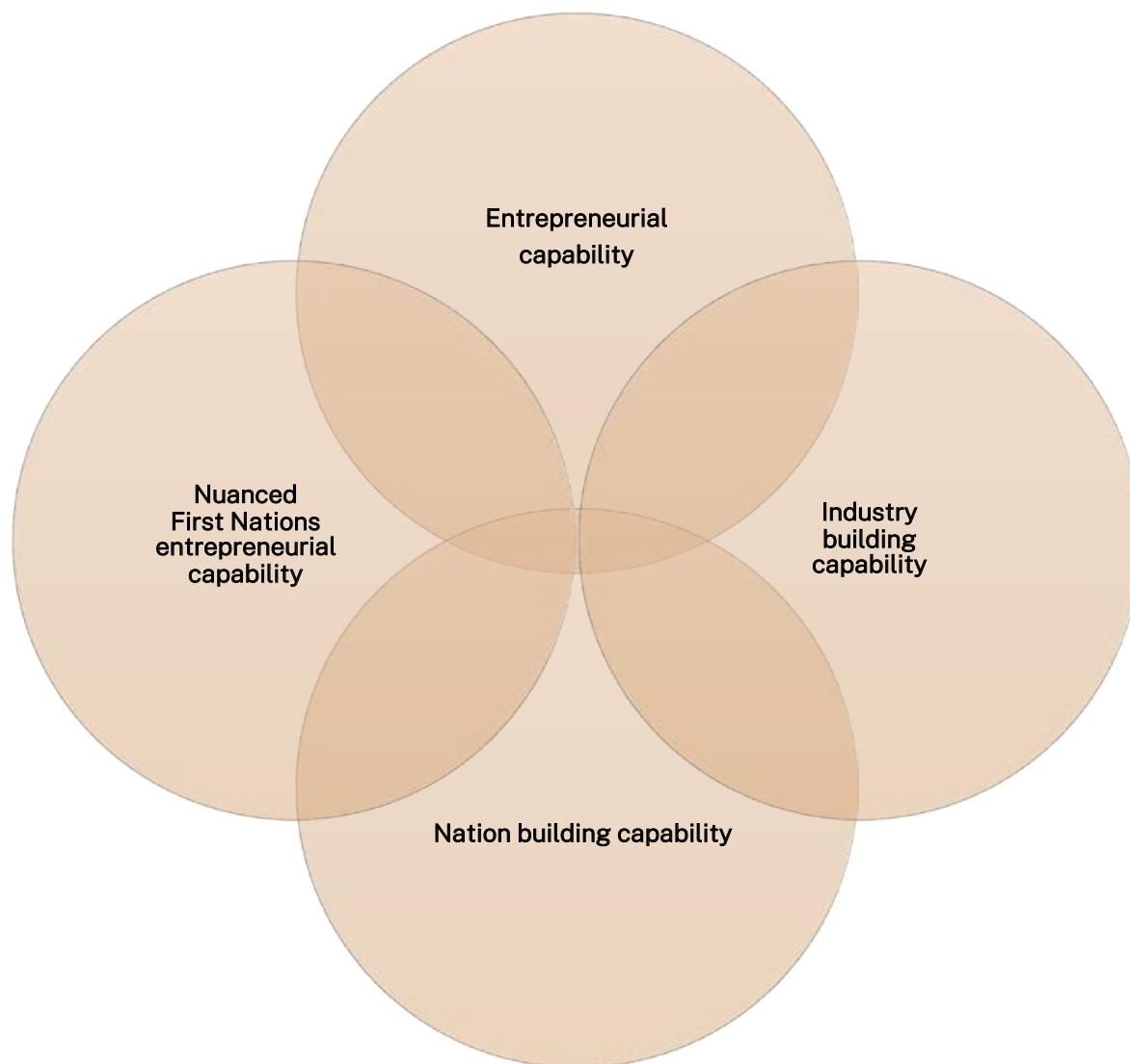


Figure 25 – Capabilities required to build a self-determined First Nations economy

The entrepreneurial skillset

The importance of the entrepreneurial skillset has risen to such significance in the global economy that its unique attributes are now widely recognised in both the for-profit and not-for-profit sectors, small and large organisations, and as an important stand-alone discipline at most leading business schools.

A full dissection of the entrepreneurial skillset is beyond the scope of this paper. However, such a skillset could be described as a multidisciplinary field of commerce and economics, characterised by a capacity to integrate strategic, operational, marketing, accounting, financial and managerial analysis. It would include implementation skills to identify and assess opportunities, develop options and plans to capitalise on those

opportunities, identify and harness the resources necessary to implement the plan in a deliberate risk-managed way. This would need to be variably underpinned by formal technical training in various business disciplines, significant business experience (including failures and successes), very high emotional intelligence, very high commercial acumen and leadership capabilities.

A promoter is not an entrepreneur.

The nuanced skillset of an entrepreneur in a self-determined First Nations economy.

A First Nations entrepreneur, developing and growing an enterprise in a self-determined First Nations economy that is based on an asset or right that has been reclaimed, requires the same entrepreneurial skillset as entrepreneurs in the mainstream economy. However, this is nuanced by several factors:

- Relatively limited training in commercial disciplines means importing these technical capabilities
- The range of more complex commercial investment objectives, including community and cultural factors
- Cultural factors which determine how ventures operate, the nature of their governance, the conduct of business and the marketing of products
- Constraints as to the fungibility of assets, which effects how they can be used from both an operational and financing perspective
- Constrained access to product, factor and financial markets.

The industry-building skillset

In many respects, the development of a self-determined First Nations economy is like developing a new industry. Like many other contemporary new industries, such as a noncarbon energy sector, achieving its potential in the domestic economy will deliver significant economic, environmental, social and cultural dividends to the Nation. However, achieving this will require governments to invest in structural change.

In the case of the non-carbon energy industry, governments have been forced to invest in both infrastructure and legislative change, changes which have been the direct result of a deliberate and targeted policy and advocacy effort that has worked with enterprise to advocate on an evidence-based cost-benefit basis for investment and regulatory change which both supports the new industry, and ultimately delivers wider societal economic, environmental and social benefits.

While most will now accept without question the benefits of the noncarbon energy sector, this has certainly not always been the case.

Unless, both world-class entrepreneurial and industry building capabilities can be brought to bear on the fledgling self-determined Australian First Nations economy, it will likely struggle to thrive. This is not the focus of the existing government First Nations business support framework.

The Nation building skillset

To an extent, the entrepreneurial and industry building effort must be complemented by initiatives that are nation-building in nature.

This quasi nation-building effort has two elements.

The first relates to the wider Australian nation. Structural change that is currently giving effect to the noncarbon energy sector has benefited from a global movement that is mainstream and institutionalised at a global and national level and which has motivated significant support from mainstream Australian society. While First Nations economic self-determination is an issue for many nations, and is recognised by global institutions such as the United Nations, any movement and institutionalisation are not remotely on the same scale. As such, while there is growing recognition of First Nations rights and empathy for the plight of First Nations people in Australia, this is yet to achieve a level of sophistication or critical mass that is necessary to drive change.

The second relates to Australian First Nations themselves. Partly as a result of cultural history, but largely as a result of the policies implemented by settlers, colonial and subsequent Australian governments, Australian First Nations people have, understandably, become disillusioned and disenfranchised and where there is effort to drive change, as determined as that might be, it is often fragmented and unnecessarily competitive among First Nations groups.

Collectively, these factors dilute the movement for change to a point where governments are less compelled to act. Alongside the deployment of world-class entrepreneurial and industry-building capability, there must also be a nation-building effort that wins the hearts-and-minds of the wider Australian population, and reinvigorates, coordinates and focuses the self-determination advocacy efforts of Australia's First Nations.



The current First Nations business support programme landscape

Government programmes

While governments and non-government-organisations deliver programs which are designed to support the development and growth of Australian First Nations businesses they are a relatively recent phenomenon. For as long as governments have concerned themselves with facilitating the engagement of Australian First Nations people with the economy, programs have mainly focused on training–work ready–employment frameworks, rather than on business ownership. There has certainly been a greater focus more recently on business ownership, but this has adopted a similar approach, with programs mainly designed to deliver relatively rudimentary business skills to actual and aspiring First Nations business owners, supported by access to mainly small-scale concessionary finance (grants and concessionary loans).

A brief desktop review of programs designed to support First Nations businesses in Australia delivered by State and Territory Governments identified no fewer than 90 such programs currently in operation, delivered by about 50 separate government agencies and instrumentalities. As illustrated in Figure 26, the Australian Government accounts for just over 40 percent of the programs, with the Western Australian Government (primarily through Tourism WA and Department of Primary Industries and Regional Development) being the second largest provider.

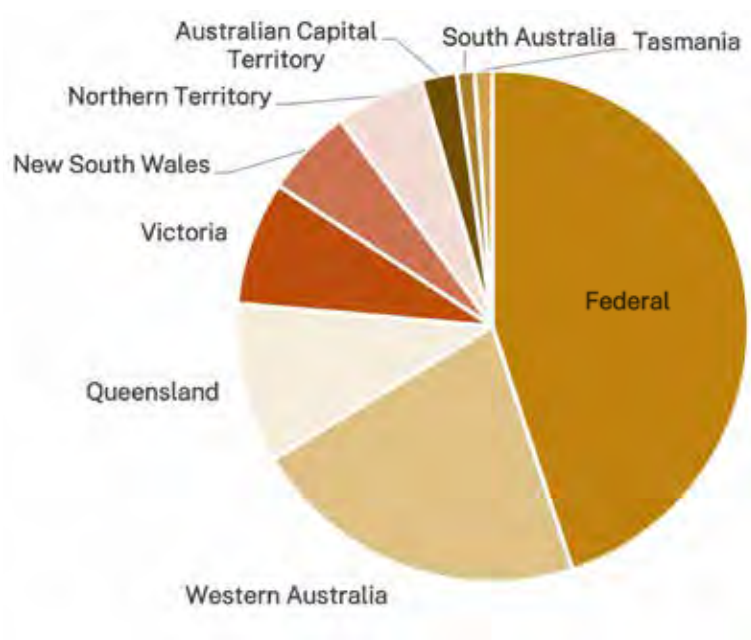


Figure 26 – First Nations business support programme provider (number of programmes)

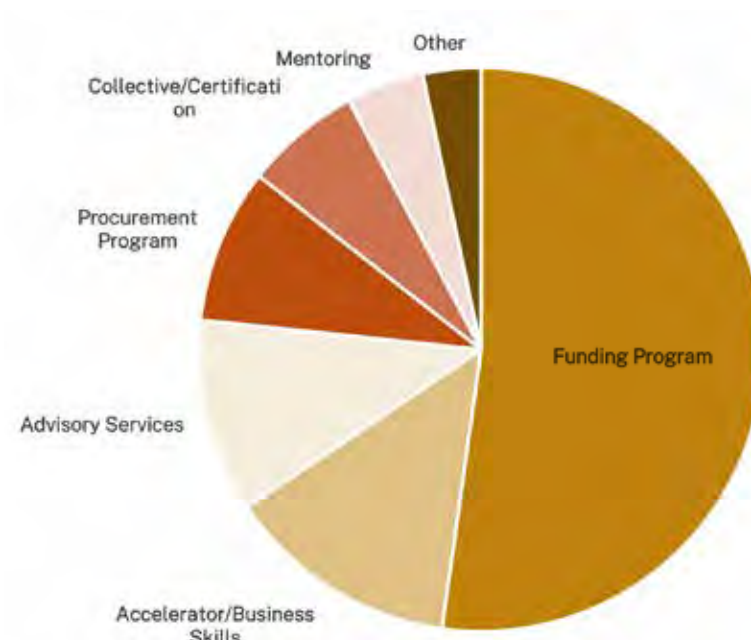


Figure 27 – Specific support offered by programmes designed to support First Nations business

The programmes that are available to First Nations businesses in a jurisdiction are generally defined by the programmes offered by the State or Territory Government of that jurisdiction, as well as Australian Government programmes, with the exception of seven Australian Government programmes that specifically target either Northern Territory, Torres Strait, Western Australia or South Australia.

Just over half of all programs are focused on providing funding support and around one-quarter focus on transferring business skills through business accelerators, training, advisory services or mentoring. See Figure 27.

Almost a quarter of programs, focused on funding, target art events and organisations, with another quarter targeting First Nations owned businesses generally. Only eight percent specifically targets small and start-up business and 17 percent target ‘self-determination’. In the context of these programs, they are focused on building governance capability in First Nations controlled community organisations. See Figure 28.

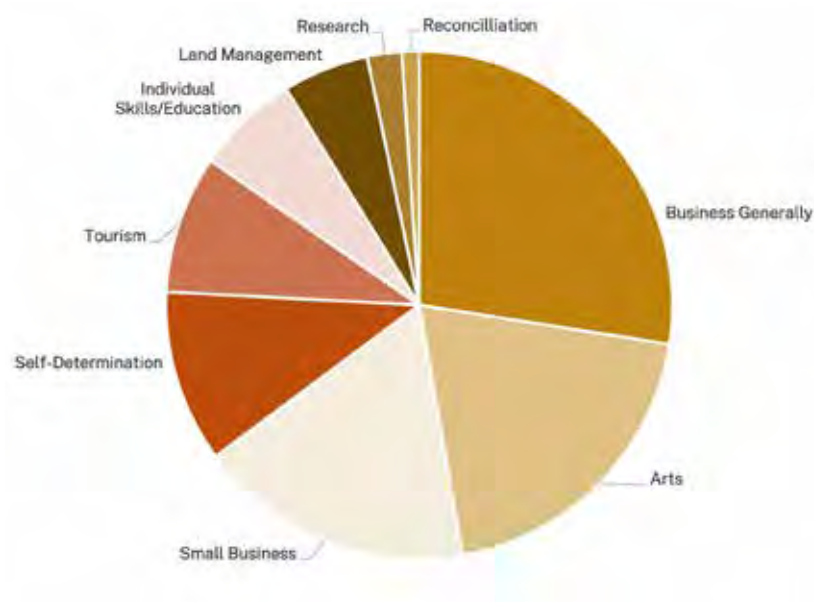


Figure 28 – Target of programmes designed to support First Nations business

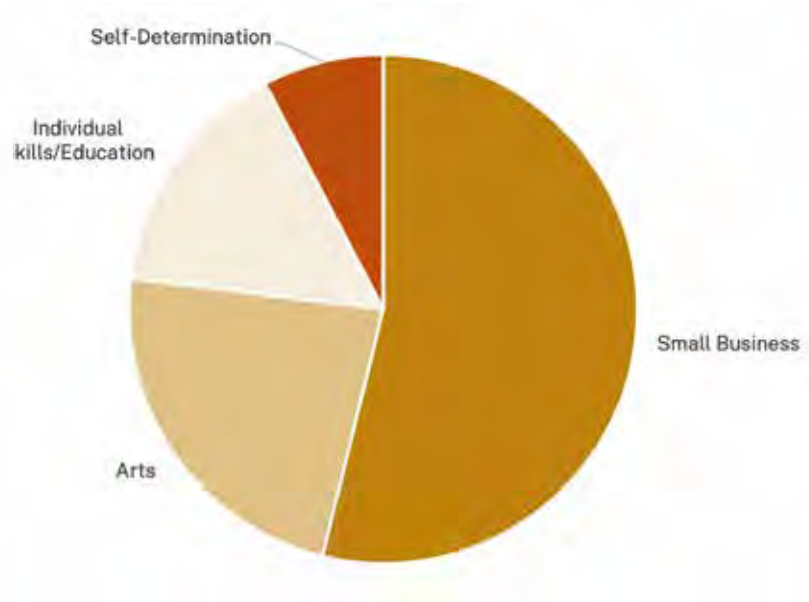


Figure 29 – Target of accelerator and business skills development programmes

An examination of the accelerator and business skills training programs, shows that more than half the current programs are intended to support First Nations entrepreneurs and small businesses in developing commercial business skills and financial literacy. See Figure 29.

Around half of the advisory services target business generally. See Figure 30.

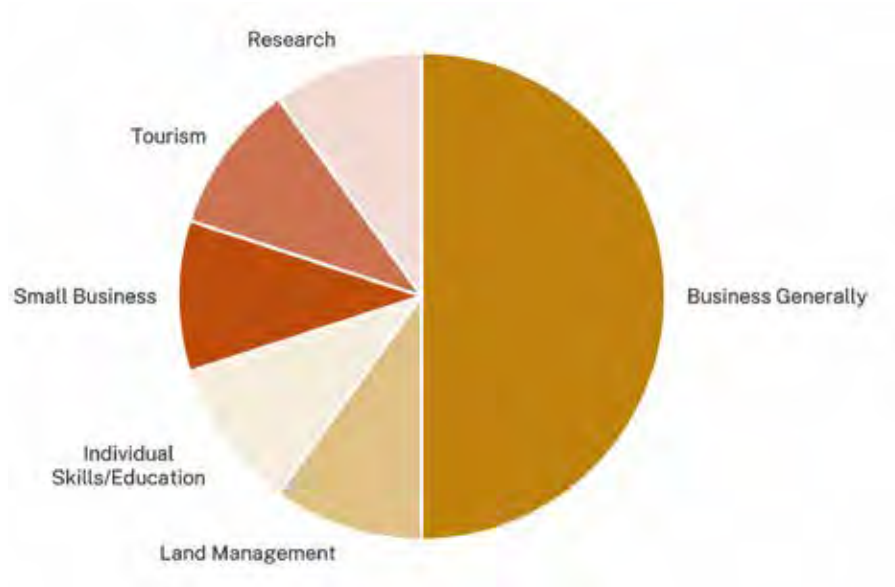


Figure 30 – Target of technical advisory service support programmes

The lead Australian Government statutory agencies responsible for First Nations economic development

Just under half of the programs delivered by the Australian Government which were identified in the desktop analysis are delivered by either the Indigenous Land and Sea Corporation (ILSC) or Indigenous Business Australia, both Commonwealth statutory corporations with specific mandates to support different aspects of First Nations economic development.

Indigenous Land and Sea Corporation

Since 2005, the Indigenous Land Corporation (ILC) has operated as a Commonwealth statutory authority, established in accordance with Part 4A of the *Aboriginal and Torres Strait Islander Act 2005* (Cth), and charged with the specific responsibility for assisting Indigenous interests to acquire land and manage land that is held by Indigenous interests through the transfer of estates held by the ILC and guaranteeing or making loans and providing grants to Indigenous interests for these purposes.

Specific amendments to the *Aboriginal and Torres Strait Islander Act 2005* (Cth) provided greater certainty to the ILC's principal source of funding, extended its remit beyond the land estate to include interests in the sea and freshwater estate. It changed its name to the Indigenous Land and Sea Corporation (ILSC).

The ILSC has two core statutory functions. The first is to acquire land, water and sea estate for the purpose of granting interests in that estate to Indigenous interests by grants

or by guaranteeing loans. The second is to support land management activities on ILSC acquired or granted lands, either directly or through financial assistance in the form of grants or loan guarantees. This later function may include economic development activities, provided those activities result in 'improvement' of the land. They may also include land-care, cultural or social activities.

Indigenous Business Australia

Indigenous Business Australia (IBA) is a Commonwealth statutory authority established and operating under Part IV of the *Aboriginal and Torres Strait Islander Act 2005* (Cth) (ATSI 2005 Act). It is a 'quasi-commercial', predominately self-funded organisation, resourcing its operations from a combination of revenues from home and business lending operations and returns from investment portfolios, as well as some appropriation from the Commonwealth to support home and business lending operations.

The statutory purpose of IBA is to assist and enhance First Nations self-management and economic self-sufficiency and to advance the commercial and economic interests of Indigenous people by accumulating and using a substantial capital asset base for the benefit of First Nations peoples. Its functions include: encouraging and facilitating First Nations participation in commercial projects and enterprise; helping secure First Nations participation in the ownership of businesses; promoting the development of industries that are likely to have a beneficial impact on First Nations interests; and, making specialist commercial expertise available to First Nations people engaged in commercial activities.

Separate to its enterprise oriented statutory functions, IBA has specific statutory functions pertaining to the provision of home loans or providing grants or guarantees that facilitate lending from commercial lenders for aspiring First Nations homeowners.

IBA Business Solutions provides financial support through loans, leasing or access to capital provided directly by IBA. Business support services provided by IBA Business Solutions include access to training and workshops delivered by IBA, consultants and other specialist third-party advisors, collectively offering skills, knowledge and other resources required to acquire or establish a business and grow that business. It also includes advising clients and potential clients as to the likely viability of business concepts.

By partnering and directly coinvesting with Indigenous organisations and businesses, IBA's Investment and Asset Management Division seeks to assist those organisations and businesses to increase their commercial capacity, grow their wealth and establish an intergenerational asset base, ultimately reducing their dependence on government assistance.

The Non-Government Sector

In addition to the programs offered by the Australian and jurisdictional governments, several not-for-profit organisations also offer, mainly micro-financing, services to First Nations businesses among other lower socioeconomic sectors. One such organisation is Many Rivers.

Many Rivers

Many Rivers Microfinance Limited (Many Rivers) is a not-for-profit organisation that supports aspiring business owners with microenterprise development support and access to finance in order to see the potential of people and communities realised. It is philanthropically supported by donors and foundations, corporate partners, Indigenous corporations and government agencies.

The Many Rivers program includes a network of 'Micro-enterprise Development Managers' who live and work in the region where they serve, and are responsible for providing development support to people wanting to establish their own micro or small business. These Microenterprise Development

Managers are supported by a network of eight Community Economic Development Offices across Australia.

Based on their analysis, Many Rivers Microenterprise Development Managers are able to recommend the approval of micro and small business loans of up to A\$5,000 for sole business owners and A\$10,000 for businesses with multiple owners to the Many Rivers Head of Microenterprise Development, who then refers an application to the Many Rivers Board for approval. Loan decisions are made on an evidence-based assessment that considers the applicant's character, capacity and cashflow. The approved loan instruments do not require collateral and larger loans can be considered as the client's business grows and demonstrates viability.

While an independent organisation, Many Rivers is a sister organisation of Opportunity International Australia which is focused on traditional microfinance and enterprise development services as a poverty alleviation tool in the international development context and was actively involved in the initial Many Rivers pilot project.

In addition to financial support provided by the corporate sector, Many Rivers also has strategic relationships. For example: a) the law firm Squire Patton Boggs, provides Many Rivers' clients with pro bono legal advice on issues such as business structures, negotiating contracts and other matters associated with small business; and, b) Westpac Banking Corporation which facilitates smooth transition for Many Rivers' loans to commercial lending products.

Reconciliation Action Plans

Led by an independent not-for-profit organisation, Reconciliation Australia, 'reconciliation' in the context of First Nations–non-First Nations relations in Australia, refers to a movement designed to reconcile this relationship at a national level along the dimensions summarised in Table 6.

Table 6 –Dimensions of Reconciliation Australia’s agenda

Dimension of reconciliation	Description	Goal and Action
Race relations	Most Australians understand and value Aboriginal and Torres Strait Islander and non-Indigenous cultures, rights and experiences, which results in stronger relationships based on trust and respect, and that are free of racism.	Goal: Positive two-way relationships built on trust and respect exist between Aboriginal and Torres Strait Islander and non-Indigenous Australians throughout society. Action: Overcome racism.
Equity & equality	Aboriginal and Torres Strait Islander people participate equally in life opportunities and the unique rights of Aboriginal and Torres Strait Islander peoples are recognised and upheld.	Goal: Aboriginal and Torres Strait Islander Australians participate equally and equitably in all areas of life –i.e. we have closed the gaps in life outcomes –and the distinctive individual and collective rights and cultures of Aboriginal and Torres Strait Islander peoples are universally recognised and respected. Aboriginal and Torres Strait Islander People are self-determining. Action: renew focus on Closing the Gap.
Institutional integrity	The active support of reconciliation by the Nation’s political, business and community structures.	Goal: Our political, business and community institutions actively support all dimensions of reconciliation. Action: capitalise on the RAP Program to create opportunities for Aboriginal and Torres Strait Islander Australians.
Unity	An Australian society that values and recognises Aboriginal and Torres Strait Islander cultures and heritage as a proud part of a shared national identity.	Goal: Aboriginal and Torres Strait Islander histories, cultures and rights are a valued and recognised part of a shared national identity and, as a result, there is national unity. Action: Achieve a process to recognise Australia’s First Peoples in our Constitution.
Historical acceptance	All Australians understand and accept the wrongs of the past and their impact on Aboriginal and Torres Strait Islander peoples. Australia makes amends for past policies and practices ensures these wrongs are never repeated.	Goal: There is widespread acceptance of our nation’s history and agreement that the wrongs of the past will never be repeated — there is truth, justice, healing and historical acceptance. Action: Acknowledge our past through education and understanding.

To address these dimensions, Reconciliation Australia’s work revolves around three work programs–Reconciliation Action Plan Program, Narragunnawali Reconciliation in Education Program and the Indigenous Governance Program. The Narragunnawali program supports schools and early learning services to foster knowledge and pride in Aboriginal and Torres Strait Islander histories, cultures and contributions and the Indigenous Governance Program seeks to support governance,

leadership and self-determination in First Nations-led organisations and communities.

Of particular relevance to this Symposium is the Reconciliation Action Plan Program. Established in 2006, Reconciliation Action Plans (RAPs) support all manner of Australian organisations to implement a strategic approach to advancing reconciliation through a framework that tailors a reconciliation program

according to an organisation's capacity and scales initiatives as capacity grows. Once a RAP has been established according to the Reconciliation Australia Framework, it is accredited.

Through RAPs in particular, Reconciliation Australia has performed a vital role in elevating the economic interests of First Nations people, with over 1,100 government, nongovernment and not-for-profit and corporate organisations across Australia having formalised RAPs. Having an accredited RAP is rapidly becoming a stakeholder expectation across government, and corporate Australia, in particular. However, as with all such things, it is the substance of the plan, the rigour with which it is implemented and its accountability that will drive fundamental organisational change. This is a variable landscape.

Is this the support framework that is needed?

Definitely important and definitely part of the solution, but...

There is no question that the program's framework has had at least some impact on improving the business capabilities of Australian First Nations people and that this is important to support First Nations people who want to start their own small business. The extent to which the program framework has made a difference is not clear.

Regardless of its impact, it is not a framework that supports the skillset required to establish and grow a self-determining First Nations economy.

Opportunity cost and perpetuation of economic apartheid?

Denying the emerging First Nations self-determined economy access to the required skills presents a significant opportunity cost. Until First Nations interests are able to create wealth from the assets and rights they have claimed, and continue to reclaim, on an equal playing field, with access to the same skills and resources available to other Australians, the Australian economy and society will be deprived of the cultural and economic richness of a self-determined First Nations economy and pay the price for an impoverished First Nations community through the welfare deficit as discussed previously.

Furthermore, the current structure of First Nations business support programs and its skewed, if not exclusive focus on rudimentary business skills, small business and microfinance, whilst well intentioned serves to support the continuation of the aforementioned economic apartheid in Australia. While other Australians enjoy the benefits of rapid growth enterprises and new industries, First Nations enterprises are constrained to small businesses serving primarily a mainstream market and are denied the opportunity to develop a new industry that leverages from their unique competitive advantage in their own country.

Towards a different pathway

Social, health and education programs are vitally important, as people can't adequately participate in the economy if they do not have a safe place to live, are not healthy or adequately educated. Similarly, the basic business skills and small business support programs are important—it is difficult for people to successfully own and operate businesses if they don't have a basic understanding of commercial issues. However, none of this will result in a self-determined economy of scale unless First Nations business and community leaders have access to world-class entrepreneurial, industry and nation building capabilities.

The concepts of 'co-design' and 'partnerships' represent globally recognised best practice for the design and implementation of First Nations economic development policy¹⁶². They have also become frequently used 'buzzwords' in the Australian First Nations economic policy lexicon, with implementation exhibiting consistency with the best-practice intention.

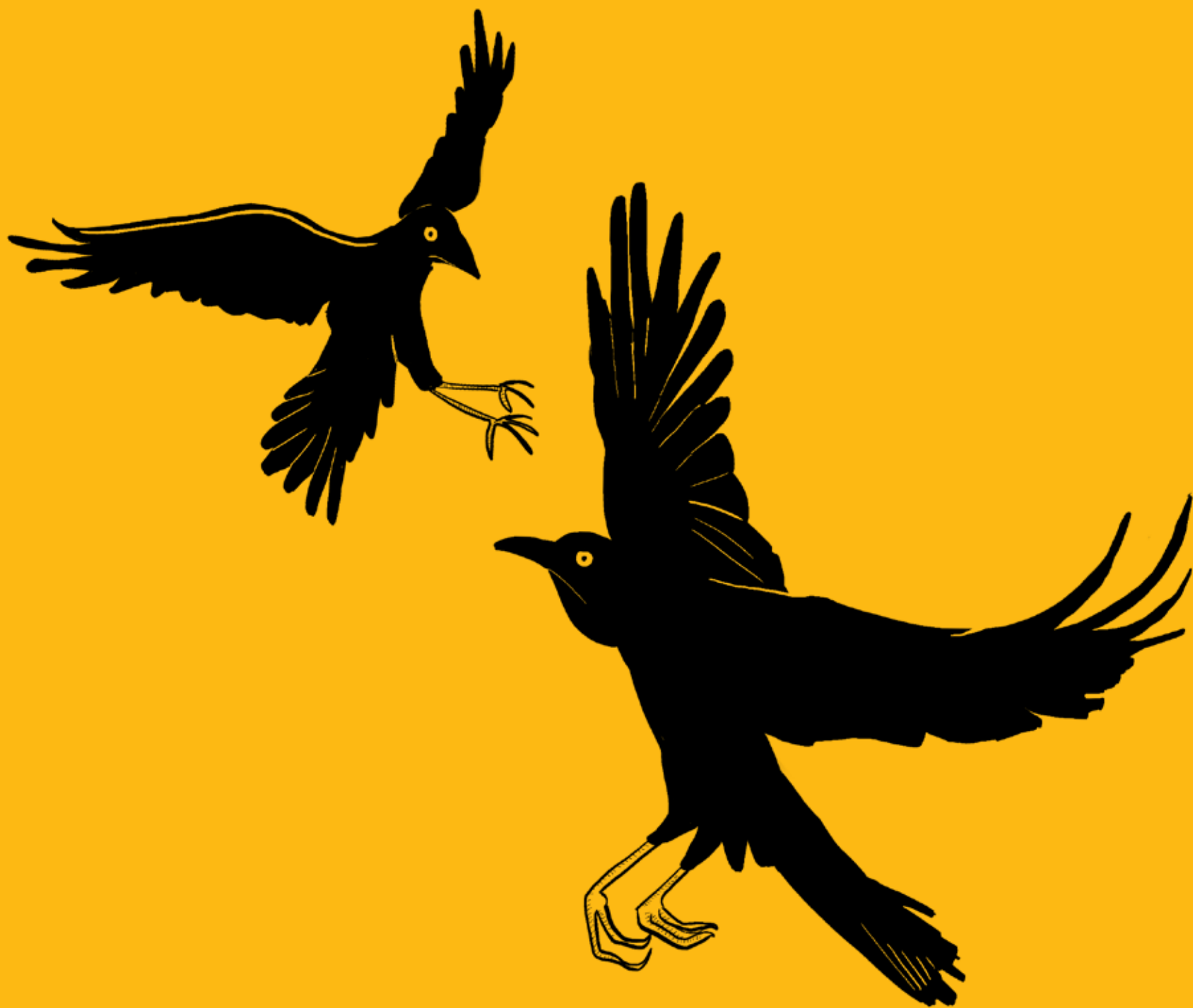
While there are most certainly world-class entrepreneurs in the Australian First Nations business community and leaders across business and community with the capacity to lead industry and nation building efforts, as a result of historical circumstance there is an absence of critical mass of these capabilities. Developing this capacity solely among the Australian First Nations community will be an intergenerational task. In the immediate and medium term, the only way these capabilities can be bought to bear are through strategic relationships ('co-design' and 'partnerships') with empathetic and aligned non-First Nations interests.

If the required structural changes can be given effect from this approach, improving access to product, factor and financial markets is all that remains for the fledgling Australian self-determined First Nations economy to turn to flight.



¹⁶²OECD (2019), *Linking Indigenous Communities with Regional Development*, OECD





Wawinha (fly, move with wings): access to product, factor and financial markets

(From fledgling to flight: access to product, factor and financial markets)

As a result of historical circumstance, current attitudes and the specific nature of many Australian First Nations businesses, they face challenges with respect to establishing competitive products in markets, forming or participating in competitive supply chains and accessing debt and equity finance. These challenges serve as further barriers to the fledgling self-determined Australian First Nations economy. Unless adequate solutions are implemented, they will limit the capacity of the Australian self-determined First Nations economy to leave the nest and achieve full flight.

Supply chains: accessing product and factor markets

The challenges that Australian First Nations businesses face with respect to accessing markets for their products, and establishing and participating in supply chains, are closely aligned and interwoven with the challenges that First Nations businesses face more generally.

Common challenges

- **Limited markets** –while awareness of and interest in First Nations businesses and products is increasing, there is still a relative lack of awareness and appreciation for First Nations culture. This limits the size of the market for some important sectors such as Traditional produce.
- **Limited First Nations human resources markets** - First Nations businesses are significantly more likely to seek to employ First Nations staff than other businesses. However, by virtue of the socioeconomic circumstance explained in a previous section, the supply of First Nations staff can be

limited.

- **Limited number of First Nations supply chain partners** –First Nations business are significantly more likely to procure from other First Nations businesses. While demonstrating a growth trajectory, the number of First Nations businesses across Australia remains low, limiting the opportunities and options for these businesses to partner with other similar businesses in supply chain arrangements.
- **Negotiating power in joint ventures and other commercial arrangements** –limited negotiating power and access to commercial expertise means that joint ventures and other arrangements that underpin supply chain contracts can often result in terms being skewed toward the benefit of the non-First Nations party¹⁶³, a factor that contributes to ‘black-cladding’ in the market for preferred First Nations tendering.
- **Access to finance** –accessing debt and equity finance is a significant challenge for most First Nations businesses.

Remote and regional business locations

Many of Australian First Nations businesses are located in rural, regional and remote areas, a function of the more non-metropolitan skewed nature of the First Nations population. The rural, regional and remote nature of many First Nations presents challenges, that aren’t necessarily unique to regional and remote First Nations businesses¹⁶⁴:

- **Small local markets** –by their nature, rural, regional and remote markets are small. This means that for most businesses to establish, let alone grow they need to rapidly reach out to larger national or international markets in order to sell their products or acquire factors of production including various process inputs, human resources and finance.

- **Distance to larger markets** – while in most cases rural, regional and remote businesses need to rapidly expand beyond local markets to sustain, let alone grow, non-metropolitan businesses also naturally incur higher costs in doing so through higher transportation, staff recruitment and other costs associated with accessing more distant markets for inputs and their products.
- **Access to specialist services** – accessing specialist factors of production such as higher-end business advisory and research and development services can be particularly problematic from rural, regional and remote locations.
- **Constraints on infrastructure access** – access to critical infrastructure such as Internet connectivity (particularly commercial grade Internet) and, in more remote areas, even basic infrastructure such as all-year-round navigable roads and reliable energy, can present significant challenges.
- **Social and cultural factors** - socio-cultural values and preferences can affect small business development and these can include specific attitudes in smaller regional centres toward certain sectors of the economy and economic expansion within their communities.

A survey conducted by the OECD of First Nations people globally, revealed that the most significant bottle necks for First Nations businesses operating in regional/remote areas are: longer distances to markets, access to finance, access to research and development, access to specialised business services and social and cultural factors.¹⁶⁵

Procurement policy enhanced market access

In Australia, the adoption of preferential procurement policies by government and the private sector is a significant, if recent,

contributor to First Nations business growth. Supply Nation estimates that increasing Indigenous procurement to one percent of all procurement across 12 important Australian industries could double revenue to the First Nations business sector, generating more than \$16 billion per annum.¹⁶⁶

However, while obviously a significant driver of demand for many First Nations businesses, Supply Nation identifies that these challenges remain, with respect to optimal deployment of preferential procurement for First Nations businesses¹⁶⁷:

- **Inconsistency across sectors of the Australian economy** – several sectors of the Australian economy are lagging with respect to establishing and implementing First Nations procurement policies.
- **Market specific limitations** – some businesses acquire inputs from sectors in which currently there are few if any First Nations businesses participating, often forcing those businesses to forgo a First Nations procurement policy.
- **Absence of scale** - many First Nations businesses lack the scale and capability required to adequately service the procurement needs of larger companies and for reasons already discussed, they struggle to achieve that scale or develop those capabilities.
- **Concentration of procurement** – there is trend among larger companies in sectors of the Australian economy toward dealing with fewer, larger suppliers. This further limits opportunities for First Nations businesses which are unable to achieve the necessary scale.
- **Non-business critical procurement** - to date, procurement from First Nations businesses has largely been limited to ‘non-core’ areas of spending such as catering, office supplies and human resources support, with little opportunity for First Nations businesses to grow their

¹⁶³Supply Nation and First Australians Capital. (2018). *Indigenous Business Growth*. PDF Online.

¹⁶⁴OECD (2018). *Linking Indigenous Communities to Regional Economic Development*. Table 2.4 on page 166.

commercial capability by supplying business critical factors of production.

- **Transaction costs** – identifying a new supplier, terminating an existing supplier and entering into new supply arrangements is a costly exercise which can be exacerbated when implementing a First Nations procurement policy by virtue of the limited supplier options and often the absence of sophisticated contracting systems.
- **Burdensome administration** – larger companies have complex administrative procedures pertaining to the implementation and operation of supply arrangements which can be beyond the administrative capacity of many First Nations businesses.

Access to financial markets

The Australian First Nations capital access challenge

In 2017, it was estimated that nationally 17 percent of Australian adults were severely or fully excluded from accessing financial services. The rate of First Nations Australians excluded is 35 percent. Thus, one-third of the Australian First Nations population is either unable to access, or faces significant challenges with respect to accessing, financial services.¹⁶⁸ Similar research identified that only one in ten First Nations Australians is financially secure.¹⁶⁹ This circumstance is the result of generally lower levels of employment, particularly among the higher paid professions, limited personal assets and inter-generational wealth transfer among First Nations people, together with institutional biases.

The challenges that First Nations enterprises face with respect to accessing debt and equity finance is recognised in the current framework of public sector support for First Nations businesses. Funding programs are common among the portfolio of First Nations business support programs offered by Australian governments yet generally take the form of smaller grants or microfinancing programs. An exception to this is the larger scale debt and equity investment offerings of IBA and ILSC. However, these are provided on commercial or close-to-commercial terms.

The regulatory and contractual limitations to the fungibility of First Nations land and financial assets renders them almost useless as collateral for debt finance. Governments, some First Nations leaders and organisations and some corporations promote these constraints in the interests of preserving First Nations interests in land in perpetuity and to protect the wealth for future generations. However well intentioned, this

¹⁶⁵OECD (2018). *Linking Indigenous Communities to Regional Economic Development*. Figure 2.6 on page 168.

¹⁶⁶Supply Nation (2020). *Driving Growth in Indigenous Business*.

¹⁶⁷Supply Nation (2020). *Driving Growth in Indigenous Business*.

perspective is increasingly a fundamental barrier to First Nations people participating equally in the economy and making the investments that need to be made now, using their assets, to secure wealth and a platform for self-determination for future generations.

Almost all forms of financial capital are highly mobile, with capital from all asset classes deployed across jurisdictions targeting competitive returns. In such an investment market, capital accumulates in jurisdictions and sectors that not only offer the best within asset class returns but also generate critical mass of 'deal-flow' for such opportunities. As a result of both its nascent status and those constraints, many Australian First Nations businesses are unable to generate the returns required and the sector as a whole is unable to generate adequate deal-flow to attract an accumulation of professional capital.

From the perspective of the many socioeconomic benefits that are derived from First Nations owned and operated business, this presents a market failure of sorts. The rapid rise of the social impact investment class can be coupled with well tested policy instruments designed to attract investment capital where market failure has been identified, and can be reasonably deployed.

The social impact investment phenomena: an opportunity?

First formalised by the Rockefeller Foundation in 2007, the social impact investment (or 'impact investment') asset sub-class has grown to meet investor demand for the alignment of social and environmental values with investment, whereby investments targeted by the asset class seek to produce both financial returns and positive and measurable social and environmental outcomes.

Impact investment has four core elements:

- **Intentional** – there is a deliberate and clear intention on the part of the investor to contribute to a social and/or environmental outcomes, rather than that outcome simply being a by-product of the investment.
- **Financial return** – impact investment is not philanthropic – it seeks a return on the capital deployed that can range from return of capital through to full competitive financial returns.
- **Investment instrument agnostic** – impact investment can be given effect through the full range of equity, equity-like and debt instruments.
- **Measurable impact** – professional impact investment typically requires the social and/or environmental outcomes of the investment to be measurable and clearly traceable to the investment.

Generally speaking, impact investment can be seen as existing on a spectrum of what is referred to as responsible and ethical investment, with its own distinct features. See Figure 31¹⁷⁰.

The relatively new impact investment sector has grown rapidly in recent years. Across the full spectrum of responsible and ethical investment (see Figure 31) there is currently USD \$35.3 trillion under management, representing over one-third of all professionally managed assets. Of this, two percent of this is characterised as impact investment, with total impact investment funds under management exceeding \$715 billion globally, representing growth of 40 percent since 2018 and expected to reach USD \$1 trillion by the middle of this decade¹⁷¹.

¹⁶⁸Financial Ombudsman Service Australia (2017) *Financial Inclusion in Access to Banking and Financial Services by Indigenous Customers*, Australian Financial Complaints Authority, Melbourne

¹⁶⁹Centre for Social Impact, First Nations Foundation (2019), *Money stories: Financial resilience among Aboriginal and Torres Strait Islander Australians*.

		Traditional Investment	Responsible and Ethical Investment					Philanthropy	
			ESG Integration (Including shareholder engagement and voting)	Negative Screening	Positive or Best-In-Class Screening	Thematic/ Sustainability Themed Investments	Impact Investing		
							Market Rate	Concessionary Rate	
Focus	Limited or no regard for environmental, social or governance (ESG) factors	Consideration & analysis of ESG factors as part of investment decision making	Industry sectors or companies excluded/divested from to avoid risk or better align with values	Investments that target companies or industries with better ESG performance	Investments that specifically target sustainability themes, E.g. clean energy or green property.	Investments that target both social and environmental impact and deliver market rate financial returns	Investments that target social and environmental impact and deliver below market rate returns	Grants that target positive social and environmental impact with no financial returns	
Impact Intention	Agnostic	Avoids Harm		Benefits stakeholders					
				Contributes to Solutions					
Features	Delivers competitive financial returns								
	Manages ESG Risks								
	Pursues ESG Opportunities								
	Intentional impact at the core of investment/asset								
	Impact of investment is measured and reported								

Figure 31 – Impact investment and the responsible and ethical investment spectrum

The instruments most commonly used to give effect to impact investment are debt-based instruments, with private equity accounting for around 16 percent of total deployed capital and 11 percent of total investment.¹⁷²

While just under half of impact investment is deployed across Europe and North America, Australia, whilst small in comparison is a growing, impact investment, market. In 2020,

impact investment in Australia totalled AUD \$29 billion, a 457 percent increase since 2017. The majority of this impact investment is focused on environmental outcomes, mainly in the form of green bonds. However, while impact investments targeting social outcomes represent only 4 percent of funds, they account for 60 percent of the number of investments and have increased 10-fold since 2017.^{173,174}

¹⁷⁰Responsible Investment Association Australasia (2018) Australian Impact Investment Activity Performance Report 2018. Online PDF.
¹⁷¹Social Impact Investment Taskforce, Impact Investment: The Invisible Heart of Markets, Social Impact Investment Taskforce, 2014, viewed September 2019, <<https://impactinvestingaustralia.com/wp-content/uploads/Social-Impact-Investment-Taskforce-Report-FINAL.pdf>>.

The trajectory of impact investing in Australia creates, *prima facie*, a significant opportunity to attract capital into a self-determined First Nations economy. By their nature, First Nations enterprise, particularly ones based on the First Nations land and water estate deliver both demonstrable social and environmental outcomes, positioning the sector to take advantage of the trends in both environmental and social oriented impact investment in Australia.

However, given the constraints pertaining to the Australian First Nations economy, it is highly probable that policy intervention will be required to catalyse the flow of impact investment into the sector at scale. Tried-and-tested policy instruments have been used in Australia and internationally to catalyse the flow of private investment capital into desired sectors of the economy as follows:

Policy to bridging the equity finance gap: a conceptual model

Australian governments have a successful track record in using co-invested fund structures as a mechanism for stimulating private equity investment in sectors where governments have deemed market failure to exist in relation to access to private investment capital. Such structures operate by skewing the return mechanism in favour of the private investors so that, while they still incur downside risk and are therefore motivated to make good investment decisions, their upside is amplified by both the deployed capital leverage achieved against the government's capital contribution and the skewed returns mechanism.

Such structures are an attractive policy instrument because the level of incentive and risk exposure can be dialled up and down by modifying the leverage ratio and return mechanism, as required. Examples include the Australian Government's

Innovation Investment Fund (IIF) Program that was established in the early 2000s. In recognition by the government of the time that it was in the interests of the nascent technology innovation sector in Australia to have access to local professional private equity venture capital, the IIF was established under such a structure, with a view to encouraging fund managers to allocate larger portions of their portfolio to a domestic venture capital investment. The IIF ran for over a decade and has been accredited with establishing Australia's private equity venture capital sector, which, in 2020 deployed USD \$1.6 billion of venture investment in Australia.¹⁷⁵

This framework is based on aspects of models used internationally¹⁷⁶, as well as the Commonwealth Government's former Innovation Investment Fund Program, and is designed to operate in conjunction with other investors (see Figure 32).

Under this conceptual framework, a fund, or fund-of-funds, is established for a specified amount (for argument's sake a pilot fund may require \$50 to \$100 million of funds under management in order to demonstrate viability and efficacy) on a closed-end basis (for argument's sake, 15 years). This means the fund manager is compelled to raise the amount, identify investments, make investments, grow those investments and exit those investments within the prescribed closed-end period.

Under this framework, the Commonwealth Government will contribute a portion of the capital on the basis of a risk profile that is required to attract impact investment to the fund. For example, it may be a risk profile such that, at the end of the fund's life, the Commonwealth receives a full return of its capital, and possibly its cost of capital, as either a priority or subordinated payment depending on the appetite of the professional impact investment market.

¹⁷²Global Impact Investment Network (2020) Annual Impact Investor Survey. Online PDF.

¹⁷³Responsible Investment Association Australasia (2018), *Benchmarking Australian Impact Investment Activity and Performance Report 2018*

¹⁷⁴Responsible Investment Association Australasia (2021), *Responsible Investment Benchmarking Report Australia 2020*

¹⁷⁵Pritchard, A (2021), *Record year for Australian startups with US\$16 billion VC invested*, KPMG

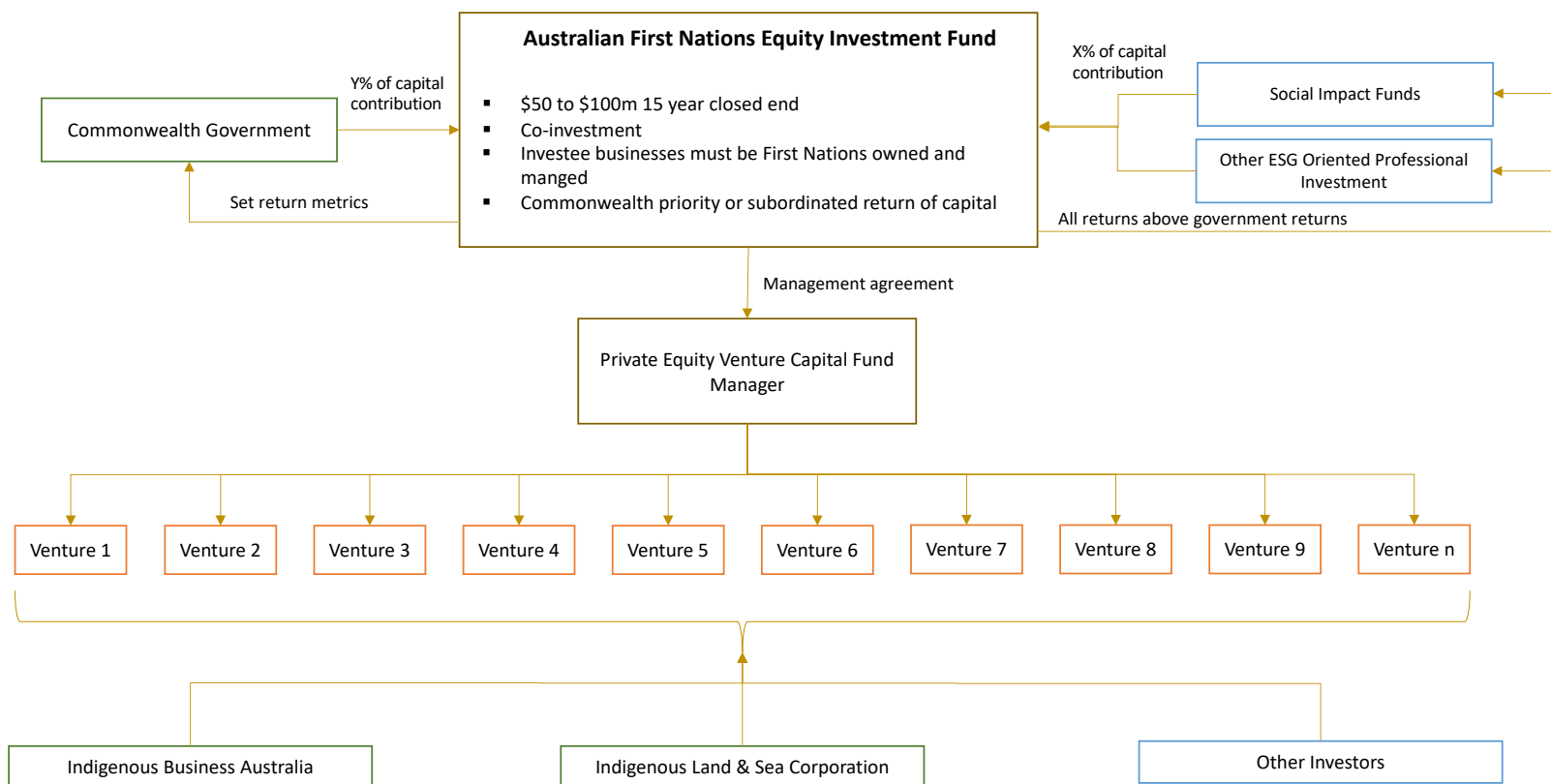


Figure 32–Bridging the private equity gap –a conceptual model

The balance of the fund is then raised from the professional impact investment market, and other ESG oriented professional investment identities such as corporate, social-responsibility budgets, or allocations from mainstream management investment funds to ESG-oriented investment.

A professional private equity investor with specific First Nations enterprise investment experience (such as potentially First Australians Capital in Australia or Raven Capital in

Canada) is appointed through a competitive tender to manage the fund. Very importantly, a major success factor in private equity funds of this nature is the ability of the fund manager to perform an active role in supporting the management of the venture, including the provision of strategic and operational advice and providing access to important business development networks. To this end, the selected manager must have a track record in supporting the development of regional Indigenous businesses.

¹⁷⁶ Australian Venture Consultants (2020), *Pathways to efficient Indigenous capital access in Northern Australia: Report to the IRG from the World Indigenous Business Forum, Indigenous Reference Group to the Ministerial Forum on Northern Development*

It is envisaged that the manager would be remunerated by way of a management fee and, for the purposes of motivation, a carried interest in the fund. Because the fund, its private sector investors and the manager can incur losses as the result of poor investment decisions (the extent of which is dependent on the return of, and return on, capital requirements of the Commonwealth Government) the manager is motivated to make sound investment decisions and drive successful outcomes at the venture level. However, because the Commonwealth does not share in profits generated in the fund, the returns associated with successful investment outcomes are amplified, thus lowering the investment hurdle rate for private investors. It should be noted that the Commonwealth's investment in the fund is also at risk. The extent to which the Commonwealth's capital is at risk is dependent on the degree to which its return of capital is discounted, prioritised or subordinated. However, in the event of a total loss, the Commonwealth's capital would also be lost.

It is envisaged that venture investments from the fund would seek to co-invest at the venture level with established investors such as IBA and ILSC, as well as other mainstream investors.

Taxation incentives

Tax incentives are any form of tax relief (i.e. a lower tax burden than would otherwise be the case) that serve as a motivation for an economic actor to undertake an activity that is desired by policy and which that economic actor would not undertake without the specified taxation relief.

Tax incentives can target corporate or shareholder tax liability, can be expenditure based, whereby they are designed to reduce the after-tax expenditure associated with a particular activity (e.g. accelerated depreciation or tax credits), or they can be profit-based (e.g. reduced tax rates, tax holidays or a capital gains tax discount).

Across the globe, governments use tax incentives to address policy goals, including:

- Addressing market failure by incentivising investment in individual jurisdictions (albeit this is prohibited under the Australian Constitution), activities such as research and development or sectors that have been determined to deliver significant socio-economic benefit into which private capital would otherwise not flow.
- Reduction of tax distortions to investment and limitation tax revenue loss such as that from mobile businesses and businesses shifting earnings offshore to avoid tax.
- To counter non-taxation impediments to investment, albeit this is generally not sound policy.¹⁷⁷

Australia has been no exception to this global phenomena, using taxation relief to encourage investment in research and development (R&D Tax Credit), investment in specific sectors, such as the Venture Capital Limited Partnership structure and most recently, tax relief from primary producers that generate revenues from the sale of Australian Carbon Credit Units, or to encourage savings (e.g. differential capital gains tax rates on longer-term investments and differential taxing of superannuation holdings).

Taxation incentives could be used to encourage equity investment in First Nations business, with the most obvious being concessionary income tax rates applied to profits made from those investments.

¹⁷⁷Clark, S. (2012), *Perspectives on tax incentives for investment*, OECD

Towards sovereign borrowing capability: Canadian case study

Principally, as a result of a Constitutionally recognised right to self-government, the current legal basis under which organisations that hold communal Indigenous assets in Canada is quite different to that in Australia. Nevertheless, mechanisms that have been developed in Canada to facilitate ‘government-to-government’ financial arrangements and to encourage First Nations ‘governments’ to generate their own revenue and leverage that revenue, are widely regarded as world-best practice. In the context of Australian First Nations–Government financial relations, the Canadian model potential presents on opportunity to consider significant innovation and reform.

Canadian First Nations Fiscal Management Act

First Nations Fiscal Management Act, the Indian Act and Self-governing Agreements

Within the jurisdiction of Canada, First Nations governments and communities operate under the *Indian Act* until they engage in negotiations with federal and provincial governments to form a Self-Governing Agreement (SGA), allowing them to be self-determining. When a First Nation is self-governing it must operate within the constraints of the Canadian Constitution and their laws must be harmonious with the federal and provincial governments. First Nations with SGAs sign Fiscal Financing Agreements (FFA) as part of the SGAs that give them authority over taxation and expenditure on their traditional lands.

First Nations without SGAs still operate under the *Indian Act* which still gives First Nations the authority to pass by-laws related to the taxation of land. However, to strengthen and

expand their authority without an SGA, the First Nation can choose to participate in the First Nations Fiscal Management Act (FMA). In order to participate in the FMA, a First Nation must submit a Band Council Resolution to the Minister of Crown-Indigenous Relations requesting to be added to the schedule of the FNFMA¹⁷⁸.

Participating in the First FNFMA gives First Nations governments authority outside of the *Indian Act* over^{179,180}:

- **Financial administration laws** –providing greater scope in financial management that allows them to strengthen their real property tax systems and financial management systems more generally.
- **Local revenues** –allowing First Nations to raise local revenues through a greater scope of revenue-raising tools, employing strong standards of accountability and providing access to capital markets that are available to other governments.
- **Financing infrastructure and economic development** –providing the ability to leverage own-source income through loans and public sector-style bond issuance.

In transitioning from the *Indian Act* to the FMA, any by-laws that the First Nation has instated in accordance with the *Indian Act* (section 83, paragraphs (1)(a)(b)(c)(g)¹⁸¹) will be transitioned into laws of the First Nation under the FMA, as long as they are consistent with the respective FMA, FMB, FNFA and FNTC’s legislation¹⁸². However, even when subscribed to the FMA, the First Nation will continue to operate within the *Indian Act* on all other matters aside from taxation and fiscal management. This includes legislation on enterprises such as the formation of Bands, healthcare and education on Reserves.

¹⁷⁸<https://www.aadnc-aandc.gc.ca/eng/1393512745390/1498849002682>

¹⁷⁹<https://fnfmb.com/en/about-fmb/about-first-nations-fiscal-management-act-fma>

¹⁸⁰<https://www.aadnc-aandc.gc.ca/eng/1393512745390/1498849002682>

¹⁸¹<https://lois-laws.justice.gc.ca/eng/acts/I-5/page-12.html#h-332720>

¹⁸²<https://lois-laws.justice.gc.ca/eng/acts/F-11.67/page-15.html#h-226099>

¹⁸³<https://fnfmb.com/en/about-fmb/about-first-nations-fiscal-management-act-fma>

¹⁸⁴<https://fnfmb.com/en>

What is the First Nations Fiscal Management Act (FMA) and what role does it serve?

The FMA is a First Nations led initiative to give First Nations Governments authority outside of the *Indian Act*.¹⁸² It is designed to help First Nations to develop the capacity and secure the money to bring to life the 7th Generation Strategy (i.e. support sustainable economic and social development)¹⁸⁴, allowing First Nations Governments to exercise fiscal jurisdiction within Canada, including:

- Being eligible to borrow at similar rates and terms to other governments in Canada; and
- Using different revenue streams like taxation, government transfers and economic development as security for borrowing.

To achieve this, the FMA creates three First Nation-led organisations that support First Nations governments:

- First Nations Financial Management Board (FMB)
- First Nations Finance Authority (FNFA)
- First Nations Tax Commission (FNTC)

To date approximately 281 First Nations participate in, or are scheduled to participate in, the FMA representing approximately half of all Canadian First Nations communities.¹⁸⁵ Of these¹⁸⁶:

- 125 collect tax under the FMA;
- 145 have financial performance certified by the First Nations FMB; and
- 89 have qualified as Borrowing Members for purposes of the FNFA.

Financial Management Board (FMB)

The FMB's primary role is to help develop and maintain good governance and financial practices in First Nations governments. The FMB is run as a not-for-profit organisation by First Nations people for First Nations people. It operates at no cost to them, only provides certification and other services when asked and is independent of the Canadian Federal Government.

The FMB has three primary objectives¹⁸⁷:

- To develop and maintain certified standards and assist First Nations to implement and uphold them to achieve FMS certification;
- To assist with capacity development in First Nations Governments and communities; and
- To facilitate the borrowing of money through the First Nations Finance Authority

The FMB provides the following services to First Nations:

- Advice, policy research and review services relating to fiscal arrangements between First Nations and other governments; and,
- Co-management and third-party management services in relation to borrowing from the FNFA or collecting local revenues through the First Nations Tax Commission.

Its role to develop and maintain standards includes providing an independent validation and certification system for First Nations' Government's governance and financial management. These standards are aligned with international best practices, in addition to First Nations culture and traditions.

¹⁸⁵FMB (2019). *Successes of the First Nations Fiscal Management Act*. PowerPoint Presentation dated October 7th.

¹⁸⁶<https://www.aadnc-aandc.gc.ca/eng/1393512745390/1498849002682>

¹⁸⁷FMB (2019). *Successes of the First Nations Fiscal Management Act*. PowerPoint Presentation dated October 7th.

FMB standards and certification include:

- **Financial Administration Laws (FALs)** –an official document that contains policies and provisions that support sound financial management. A FAL template is provided to the First Nation, and then adapted to the unique aspects of the community.
- **Financial Performance (FP) certification** -a system to understand how well a First Nation uses its resources. It demonstrates financial health and is used to determine eligibility to borrow from the FNFA. It is based on a set of six financial health ratios with five years of audited annual reports.
- **Financial Management System (FMS) Certification** - this certification is the ultimate goal. It demonstrates to First Nations councils, community members, lenders and business partners that the good practices set out in the FAL are being implemented and followed successfully. To date, 24 First Nations have achieved this certification.

The benefits of a First Nation achieving the FMS certification include:

- Demonstration of a strong financial administration and management skillset
- Comfort for First Nations membership, investors and lenders
- Access to debt financing at competitive rates and terms, including good standing with the FNFA
- General demonstration of accountability and transparency.

The FMB's role as a capacity builder includes helping to strengthen First Nations communities and establish better relationships with financial institutions, businesses and other governments in Canada. The FMB supports First Nations in the four key areas of governance, finance, human resources and information management across service areas.

The FMB has the authority to investigate, manage and resolve

any problems related to non-compliance of taxation laws and risk or actual default of debt service payment(s) to the FNFA.¹⁸⁸

Financial Management Board Pilot Projects

Pilot programs the FMB currently has underway, are designed to continually improve and advance its core functions. These are now summarised.

Indigenous Shared Services

First Nations have identified that it is difficult to attract and retain staff, particularly skilled financial management staff, due to the remoteness and small size of many communities.

The FMB intended to set up an Indigenous Shared Services platform in 2020 to address the issue of attracting and retaining skilled employees in First Nations Governments. The Indigenous Shared Services is to be a not-for-profit solution where First Nations will be able to share the staff and infrastructure needed to undertake key tasks such as financial account management and financial reporting, among others.

Default Management Prevention Pilot Scheme

As part of the FMB's capacity building programs, it has piloted the Default Management Prevention Pilot Project (DMPPP)¹⁸⁹. This is intended to help the First Nations' communities that are in full or partially under third-party management due to poor fiscal management, or risk of default. The DMPPP includes the following elements:

The DMPPP includes the following elements:

- **Community Engagement** --ensuring clear communication of the vision for the new approach, benefits of the approach and buy-in of the full First Nations' government and community.

¹⁸⁸<https://fnfmb.com/en/faq/first-nations-finance-authority-fnfa>

¹⁸⁹FMB (2019). *Successes of the First Nations Fiscal Management Act. PowerPoint Presentation dated October 7th.*

- **Capacity Gap Assessment and Plan Development** – assessment of the capacity of leadership and staff against the FMB standards, forming the basis of the Capacity Development Plan.
- **Capacity Development Implementation** - working with the First Nations' government to implement the plan and organise external training resources and programs. The FMB also assists the First Nation in any outsourcing of finance and accounting processes they need or desire.

The DMPPPP has flow-on benefits to First Nations communities, including providing better access to the low-cost loans the FNFA offers.

Five First Nations communities, which include Lake St. Martin, Roseau River and Little Saskatchewan, were involved in the pilot project and were de-escalated from any form of third-party management by the end of March 2020. An additional 20 First Nations groups have since joined the program.

Other Capital Access Programs Operated by the FMA and FMB 10 Year Grants

10-Year Grants are designed to support First Nations to build stronger communities over the long term, and were developed by Indigenous Services Canada (ISC) and the Assembly of First Nations (AFN). The intent is that a 10-year grant will provide the predictability and flexibility the First Nation needs to plan and capacity build over the longer term, facilitating transition to the FMA regime.

The amount of funding provided by the 10-year grant program is determined based upon existing funding levels. If all money is not utilised, the First Nation is entitled to retain unspent funds.

To be eligible for the grant, the First Nation must have either a Financial Administration Law (FAL) or Financial Administration Bylaw (FAB) in place. The FMB can assist the First Nation to put these in place. The First Nation must also pass a Financial Performance (FP) certification based on the past 5 years of audited financial statements¹⁹⁰.

First Nations Finance Authority

Established in 1992, the First Nations Finance Authority (FNFA) is a First Nations run, not-for-profit organisation, without share capital, operating under the *First Nations Fiscal Management Act, 2005*. The FNFA is governed solely by the First Nations communities that join as Borrowing Members.¹⁹¹ It loans to First Nations governments and invests surpluses on behalf of those First Nations. Since its creation it has provided access to more than CAD \$600 million of capital, created over 6,600 jobs and stimulated local economies by an approximated CAD \$1.38 billion.¹⁹²

Financing

The FNFA plays two critical roles to First Nations communities: firstly it provides First Nations governments with investment options and capital planning advice; and, secondly, it provides access to both short-term and long-term loans with preferable terms. It operates with a goal to provide loans to First Nations

¹⁹⁰<https://fnfmb.com/en/10-year-grant/eligibility-criteria>; <https://www.sac-isc.gc.ca/eng/1527080791657/1527080813525>

¹⁹¹<https://fnfa.ca/en/fnfa/>

¹⁹²FNFA 2019 Annual Report <https://fnfa.ca/wp-content/uploads/2019/07/FNFA-Annual-Report-2019.pdf>

¹⁹³<https://fnfa.ca/en/fnfa/>

¹⁹⁴<https://fnfa.ca/en/financing/eligible-projects/>

¹⁹⁵<https://fnfa.ca/en/financing/eligible-projects/>

¹⁹⁶<https://fnfa.ca/oldfiles/en/pdf/Eligible%20Projects.pdf>

with terms similar to those which other governments in Canada are able to access.¹⁹³

The short-term loans provide flexibility as rates are lower than commercial lending rates and only require interest payments during the construction stages of the project. Once construction is complete, the Borrowing Member will substitute the short-term loan for a long-term loan that suits their budget. Long-term loans have a maximum term of 30 years. It is possible for First Nations to lock-in the interest rate on their loan for budget certainty.¹⁹⁴ There is no borrowing limit for a First Nations' group.

The FNFA has the authority to raise capital to finance community and economic infrastructure, social and economic development and to deliver local services. The FNFA will provide loans against most stable, ongoing revenue streams supported by either Other Revenue or Property Tax revenues.^{195,196} The FNFA will also provide loans against capital projects including infrastructure, social and economic development, land purchases, independent power projects, community housing and rolling stock/heavy equipment.

The FNFA has the authority to refinance existing debt, which allows First Nations to reduce their debt-servicing payments, redirecting savings towards new developments.¹⁹⁷

Borrowing Members enjoy a number of advantages:¹⁹⁸

- Access to low rate (below bank prime) loans with repayment terms up to 30 years
- First Nations choose the repayment terms that work best for their budgets
- FNFA loans do not require collateral
- FNFA loans can be used to refinance existing debt
- FNFA's interest rates and terms parallel those available to provincial and local governments

¹⁹⁷<https://fnfa.ca/en/financing/eligible-projects/>

¹⁹⁸<https://fnfa.ca/en/fnfa/>

¹⁹⁹<https://fnfa.ca/en/financing/fnfa-borrowing-process/>

²⁰⁰<https://fnfmb.com/en/faq/first-nations-finance-authority-fnfa>

Resourcing of the First Nations Financing Authority

The FNFA receives borrowing requests from First Nations members who have been accredited as Borrowing Members¹⁹⁹. The FNFA then requests and authorises the sale of securities sufficient to meet the requests of the borrowing members, subject to market and economic conditions. The Board of Directors of the FNFA determines the terms and conditions of these securities to best suit the interests of the Borrowing Members. The securities are then underwritten and go to market at the appropriate time. It is expected that most FNFA issues are bought primarily by institutional investors in Canada. Once the issue of securities is completed, the Borrowing Members receive their loans.

The FNFA uses sinking funds to assist Borrowing Members to repay the debt. They keep the principal and interest repayments constant over the course of the term of the loan. The interest payments collected from Borrowing Members are paid directly to bond holders.

A Debt Reserve Fund is used to ensure that sufficient funds are available to meet the principal interest or sinking fund payments due to its obligations. Each Borrowing Member receiving a loan from a debenture issue is required to contribute 5 percent of the total amount borrowed to the Debt Reserve Fund. This part of the borrowing process is critical to the FNFA achieving an investment-grade credit rating, resulting in lower interest rates for Borrowing Members. This amount is invested on behalf of the Borrowing Member and returned to them at maturity.

In the case of default, the FNFA protects both the First Nation group and the bond holders against loan repayment default.²⁰⁰

Investment

In addition to offering access to loans, the FNFA invests short-term cash surpluses on behalf of Borrowing Members. By pooling these short-term cash surpluses, local and regional governments can gain access to the same high-returns, and low-commission rates that senior Canadian governments enjoy.

The FNFA do this by partnering with the Municipal Finance Authority of British Columbia to allow First Nations governments to participate in their CAD \$2.2billion investment funds. These funds are managed by independent, third-party, professional investors in low-risk, mainstream instruments.

Benefits to First Nations include:

- Competitive returns
- Free redemption, subscriptions and transfers across funds
- Flexible, unlimited, penalty free, quick access to funds
- No minimum balance, deposit or redeem amounts
- Simple and quick bank account type transactions
- Multiple accounts with detailed monthly reporting







Maliyan miil (eagle-eyed): future perspectives

(Eagle Eyed: Future perspectives)

The self-determined Australian First Nations economy is emerging at what is arguably the start of a profound transition of the Australian economy.

Whether this transition is profound or not, it is certain that the market context in which the emerging self-determined Australian Indigenous economy prospers over the course of this century will be markedly different to that which it has faced over the past 50 years. Keeping an eagle-eye on the opportunities and challenges that face the First Nations economy will be fundamental to its success.



While Australia accounts for only 0.3 percent of the World’s population, as illustrated in Figure 33, its USD \$2.1 trillion economy is the 13th largest in the world, accounting for 1.4 percent of global product.²⁰¹

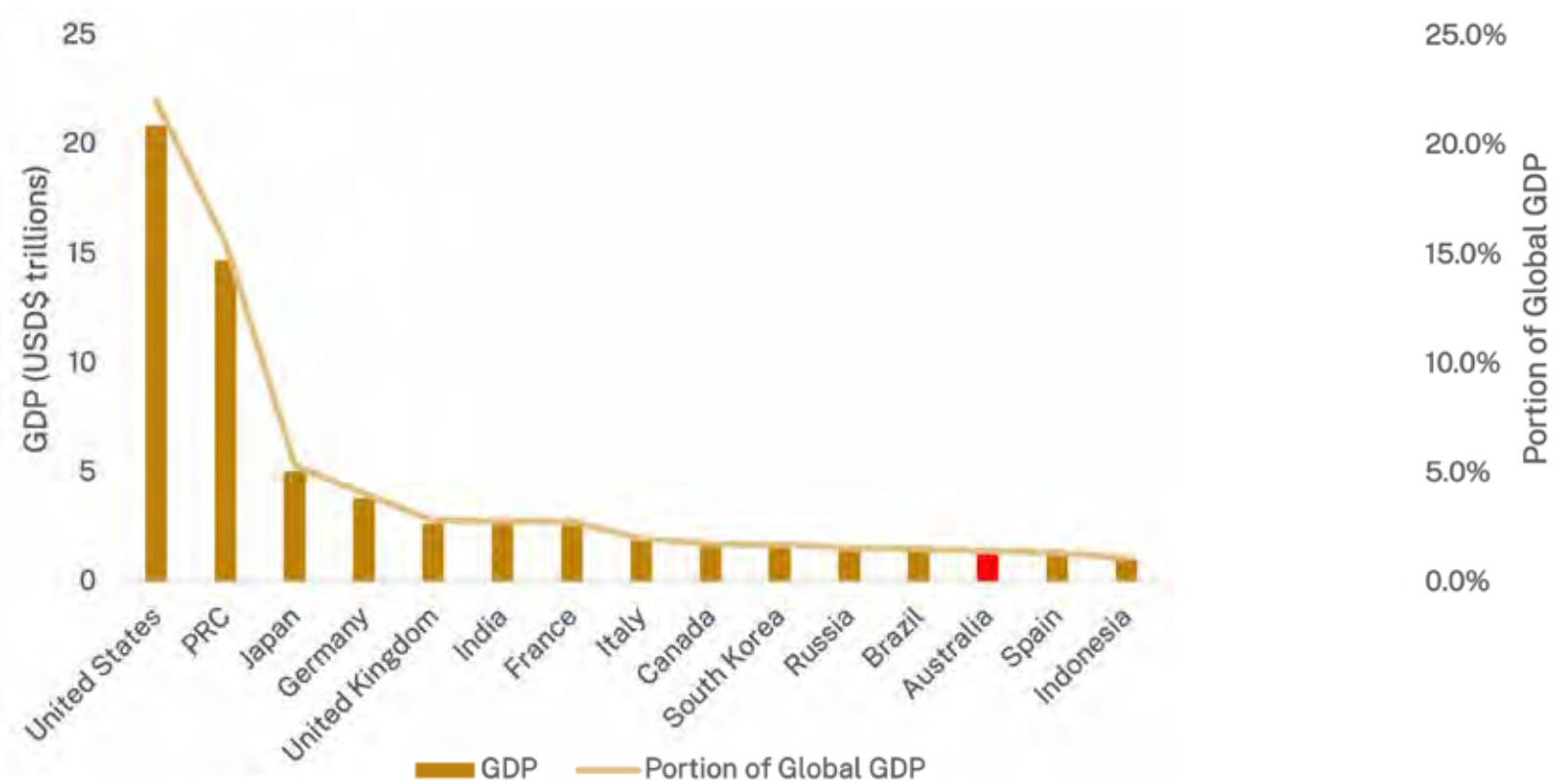


Figure 33 – Global GDP comparisons (2021)

The Australian economy can be described as a moderately diversified economy that draws on both naturally endowed and built competitive advantage, with its services sectors accounting for approximately 81 percent of real GVA, with the remaining attributable to goods and merchandise.

A relatively small domestic consumer and business market and the nature of its natural resource oriented comparative advantage (see Table 7) means that the Australian economy is naturally export-oriented and supported by a growing portfolio of free trade agreements

Table 7 – Australia’s main export-oriented industries

Industry sector	Summary
Mining and energy	Accounting for approximately 6.5 percent of global minerals and energy production, the Australian extractive industries and their associated downstream operations are the third largest in the world and Australia is among the world’s largest producers of several commodities, including iron ore, natural gas, gold, lithium, rare earth minerals and nickel.
Agriculture	AUD\$60 million of GDP Australia accounts for 1.5 percent of global agricultural production, rendering Australia as being the world’s 19th largest agricultural producer.
Funds management	Funds under management by Australia’s financial sector total USD \$2.5 trillion, rendering it the seventh largest funds management industry in the world. The Australian Stock Exchange is the ninth largest in the world and Australia’s foreign exchange and debt markets are each the ninth largest in the world.
Tertiary education	As the world’s third most popular destination for international students, Australia accounts for 8 percent of the global international tertiary education market, with 90 percent of Australia’s market being students from Asian nations.
Tourism	Australia is approximately the 10th largest tourism market in the world and growing.

²⁰¹AusTrade (2021), Why Australia Benchmark Report

²⁰²Australian Department of Foreign Affairs and Trade (2020)

²⁰³Australian Trade Commission (2019)

Australia's Asia orientation

Notwithstanding recent, regional, geopolitical tensions, Australia's close proximity to Asia is one of its key competitive advantages, a key driver of Australia's continued economic growth and support of key(major) sectors including the resources, energy, agriculture, education and tourism services markets

For decades now, Australian trade and economic prosperity has been intrinsically linked to the Asian region. Asia currently accounts for approximately two-thirds (AUD \$526 billion) of Australia's two-way trade in goods and services and 12 out of Australia's 15 largest trading nations are in the Asian region²⁰². This fundamental economic relationship is increasingly facilitated by a growing portfolio of bilateral and multilateral trade agreements that now span most of the Asian economy. (See Figure 34)²⁰³.

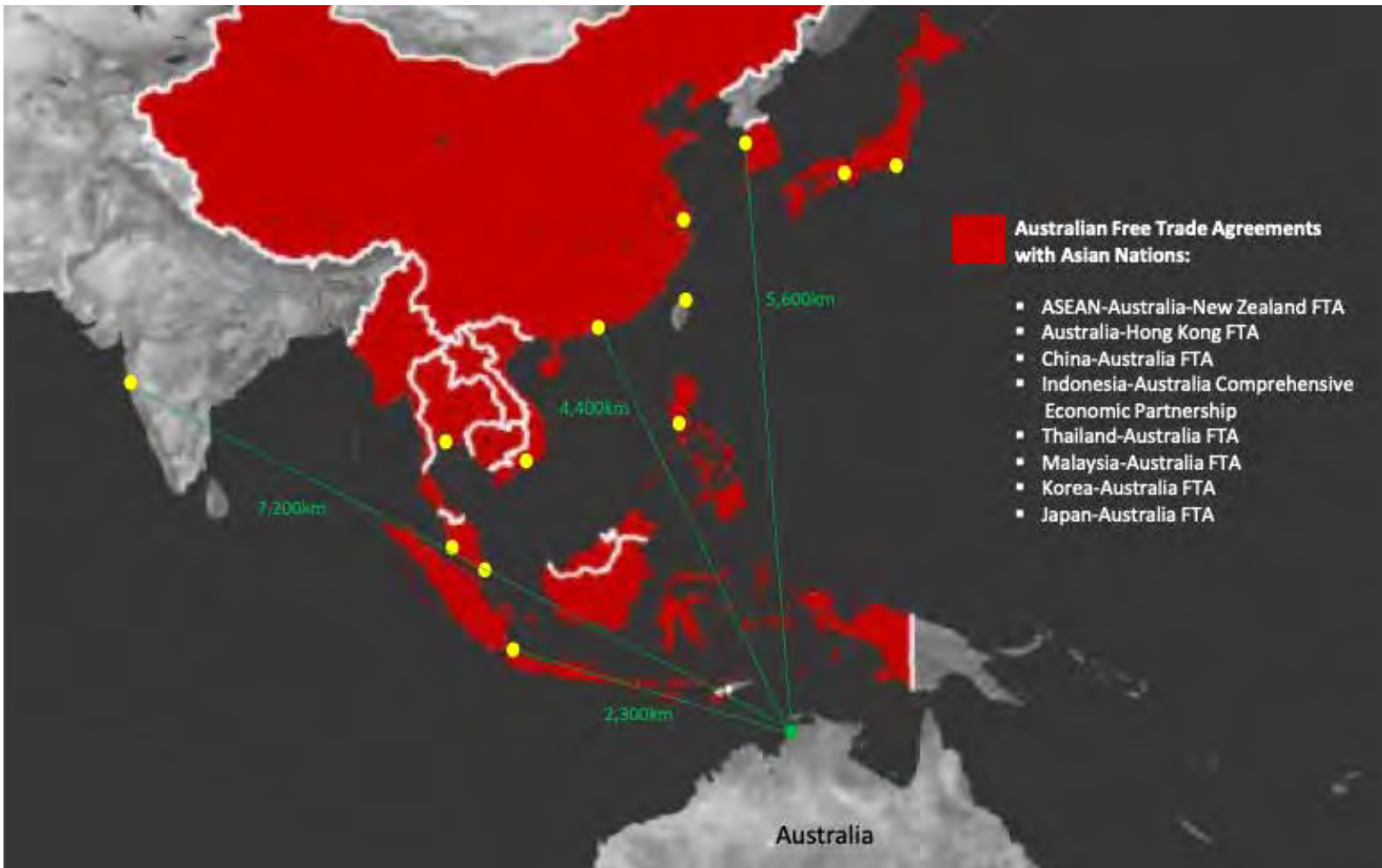


Figure 34 – Australia's Trade Relationship with the Asian Region

Regardless of recent geopolitical tensions, it is likely that the Australia–Asia economic relationship will continue to expand. The total population of the Asian region is expected to increase by 250 million people between 2019 and 2030²⁰⁴, which is equivalent to an additional country the size of present-day Indonesia. Importantly, the Asian population in 2030 will include approximately 2.3 billion, mainly urbanised middle-class consumers who will account for more than two-thirds of global middle-class purchasing power²⁰⁵.

Between 2019 and 2030, demand for food from Asian markets will double to AUD \$8.0 trillion²⁰⁶. By 2030, demand for energy will double in India, increase by 67 percent across South East Asia and by 26 percent in the People's Republic of China (PRC)²⁰⁷. This will occur in a political environment where domestic and international pressure exists on governments to expand decarbonisation policies.

The Asian region is urbanising faster than any other. By 2030, it will host all three of the world's cities expected to have populations in excess of 30 million²⁰⁸. This construction and technology boom will continue to drive demand for a range of metals, from iron ore and various base metals to speciality rare earth minerals used in the manufacture of hi-tech products. Already the world's largest supplier of iron ore, a globally significant supplier of other metals and an emerging supplier of 'technology' minerals, much of Northern Australia remains highly prospective yet under-explored.

The Global Megatrends

Global megatrends are major macroeconomic and geostrategic forces that are shaping the world in profound ways and as such, partly define the economic environment of the future. How these global megatrends will shape the Australian economy is uncertain. However, it is certain that they will create both opportunities and challenges for the emerging Australian self-determined First Nations economy.

Academies, strategic consultancies and think tanks have developed evidence-based lists of these megatrends. However, they can be summarised according to these three key themes.

Imbalance, scarcity and growing pressures

Climate change, resource and energy access, scarcity, urbanisation, conflict, humanitarian pressures, sustainable development goals and the green economy

Since the mid-20th century, global society and economies have become inexorably more populous, more urbanised, more developed and more materialistic. Within the next decade, the demand for food is expected to increase by a third, demand for water by 40 percent and energy needs by 50 percent²⁰⁹. The finite natural resources of the planet – land, food, water, minerals, energy – are under pressure like never before.

Current rates of production and consumption using existing technologies and processes are thus fundamentally unsustainable. On top of this underlying demand, human activity is changing the planet, reducing productivity of land, drying up or fouling clean water sources, increasing the frequency and severity of catastrophic weather events, affecting the health and resilience of ecosystems, and fuelling

²⁰⁴United Nations

²⁰⁵Pezzini, M (2012), *An Emerging Middle Class*, published OECD Development Centre/OECD Observer, June 2012

²⁰⁶World Bank in: Temasek, PwC and Rabobank (2019), *The Asia Food Challenge: Harvesting the Future*

²⁰⁷International Energy Agency (2019)

²⁰⁸United Nations

national and international conflicts. On current rates of warming, by the end of the century around 200 million people will be displaced by sea level rises, and some national borders will be unrecognisable²¹⁰. The impacts on First Nations peoples, with a close, deep and enduring connection to the land and the natural world, will be particularly severe. Current international energy, food production, public health and humanitarian crises over the recent months have only highlighted the fragility of existing global paradigms and the growing disruption that will result as they become increasingly pressured.

Nationally and globally, coherent and coordinated responses to this worsening crisis are only just now emerging. While scientific consensus as to the need to act was reached decades ago, it was not until the 2015 Paris Agreement²¹¹ that a clear shift was observed in the international thought consensus, with the UN's Sustainable Development Goals providing a widely recognised framework to shift economic and social progress towards a more sustainable path. More recent emerging research indicates that even this consensus may not be sufficient, with urgent action to drastically decarbonise global economies and societies required by the end of the decade.

Public responses are firming but are still subject to a degree of uncertainty, and thus in many respects the private sector has led the way towards sustainable, innovative and technologically advanced development, increasingly seeking to deliver on shareholder and investor expectations. While most visible in energy-intensive industries now shifting towards renewable generation sources, consumers are now preferentially seeking out products and services meeting desired attributes around food miles, environmental impact, local content, community participation and other similar practices.

Embracing and taking advantage of the highly significant opportunities that the global transition to sustainable pathways will offer – the new ‘green economy’ – is a clear priority for businesses of all sizes and across all industries. This transition provides First Nations businesses and entrepreneurs with significant potential commercial advantage to build on inherent and inarguable advantages that they uniquely hold.

Shifting consumer identities and preferences

Population, demographic shift, urbanisation, product attributes, fourth estate, green economy, developing nations and globalisation

Foundational to the success of any private industry is the relationship between producers and consumers. However, the nature of consumer demand – who they are, where they are located and what they want – is changing dramatically.

Within the decade, global population is expected to reach 8 billion, and approach 10 billion by 2050²¹². The overwhelming majority of this population growth is expected to occur in the ‘developing’ nations of Africa, Asia and the Middle East, where an increasingly digitally connected and better-educated middle class will emerge and congregate in fast growing urban centres, straining existing logistics, food distribution networks, public services and amenities.

At a nation-state level, this demographic shift will accompany and result in, a shifting locus of economic power. Although distorted by the COVID-19 pandemic, the traditional ‘global North’ of North America, Western Europe and Japan will likely increasingly share the global stage with contenders such as the ‘BRICs’ (Brazil, Russia, India and the People’s Republic of

²⁰⁹National Intelligence Council (2015). Referenced in PWC (2015) Megatrends – Climate change and resource scarcity

²¹⁰Climatecentral.org referenced in PWC (2015). Megatrends – Climate change and resource scarcity.

²¹¹Conference of the Parties, Adoption of the Paris Agreement, Dec. 12, 2015; U.N. Doc. FCCC/CP/2015/L.9/Rev/1 (Dec. 12, 2015).

China) or the 'E7' (China, India, Brazil, Turkey, Russia, Mexico and Indonesia), with the economies of the E7 potentially doubling the size of the G7 (US, Japan, Germany, the UK, France, Italy, Canada and the European Union) by 2040 and the economies of the PRC and India alone accounting for nearly half of total global economic activity by 2050²¹³.

In a hyper-connected, media saturated landscape, just as important as nation-states will be the accompanying rise of non-state actors, spanning from NGOs and private foundations through to social media influencers. With public opinion as easily shifted (if not more so) by a teenager's bedroom upload to TikTok than an exhaustively researched thinktank paper, the rise of a global consciousness, decline of traditional media sources and importance of appeal to emotions, beliefs and personal values has the potential to significantly affect consumer preference and purchasing behaviour.

The growing 'consumer class' in these emerging nations is expected to reach a total market size of almost 5 billion by 2050²¹⁴ which paired with e-commerce, better network connectivity and the steady march of globalisation will allow unprecedented access to choice. A wider pool of available and increasingly homogenous mass-market consumer offerings will also increasingly prompt consumers to seek out points of difference beyond quality and price: unique product attributes, such as emissions footprint, perceived brand attributes and values, community impact, local content and so on. Crucially, the value weighting placed on each of these will differ across regions, requiring producers to consider and cater for local market preferences.

Meanwhile, in the more developed nations of Europe, North America and Japan, and increasingly the domestic market in Australia, the demographic profile of the population is shifting

and growth plateauing. With access to advanced healthcare, consumers are living longer than ever before – the fastest growing demographic segment is those aged over 65, expected to add almost 400 million members by 2030²¹⁵ – but are having far fewer children, resulting in sustained and growing pressure on healthcare, pension plans and social infrastructure. Inevitably, this will lead to a growing private retirement cost burden and commensurate reduction in disposable income. In the United Kingdom, for example, estimates are that today's average 35-year-old worker will need to save 40 percent of their salary for at least 40 years to achieve the same standard of living as today's pensioners²¹⁶.

Taken together, the coming decades will likely see a radical shift in principal target markets for many products and services. New product characteristics and attributes will be seen as desirable by new regions, while traditional markets may fall away. To remain profitable and ensure future growth, businesses must carefully consider their product and service offerings and how they will align to tomorrow's customers, as well as how their overall brand and business identity is presented, managed and positioned.

Technological empowerment and disruption

Science and technology, digital connectivity, remote work, cybersecurity, Fourth revolution, artificial intelligence, machine learning and big data

Technological change has always impacted on the business of doing business, with those enterprises most adept at adopting and negotiating those changes succeeding those left behind. What is unique in modern times is the pace of that change; moving from centuries between significant upheavals to decades, and now in the 21st century marketplace change in

²¹²PWC (2015). *Megatrends – Demographic and social change*

²¹³European Commission (n.d.), *Economic Power Shifts, Knowledge for Policy* (https://knowledge4policy.ec.europa.eu/foresight/topic/expanding-influence-east-south/power-shifts_en)

²¹⁴PWC (2015). *Megatrends – Demographic and social change*

²¹⁵PWC (2015). *Megatrends – Demographic and social change*

mere years or even months²¹⁷.

With improving digital connectivity and infrastructure, all businesses are increasingly becoming digital businesses in the face of the Third (robotics and automation) and Fourth (data-empowered and autonomous systems) Industrial Revolutions. Economic activity in all spheres is rapidly shifting from the physical to the digital realms, with structural changes driven by COVID-19 responses only accelerating existing trends towards telework/presence, telehealth, online retail, education, and entertainment. Even in businesses dealing solely in physical goods, 3D printing and advanced contract manufacturing are incorporating digital elements into every transaction.

Digital technology is more abundant and cheaper than ever before, while consumers raised with smartphones expect a degree of instant access, communication and responsiveness from businesses for which no precedent exists. Existing in-person, analogue or paper-based processes are rapidly becoming obsolete, while technological breakthroughs are enabling increased productivity, lower capital and human costs, and access to a global expertise base²¹⁸.

The reduced costs, greater ease and improved accuracy of data gathering and capture of the 'data revolution' go hand-in-hand with increased connectivity. Supporting and enabling project operators to engage in analytics, visualisation, simulation and control, 'big data' at a granular level in real-time paired with ever-cheaper computational power will allow better and more profitable decisions to be made more quickly than ever before. Building on existing individual systems-based implementations, businesses may increasingly link these discrete applications together to allow whole-of-project oversight and enable artificial intelligence and other autonomous systems to respond to vast data sets to make commercial and operational decisions

with minimal human oversight.

However, these developments are not without downsides.

First, while digital optimisations, efficiencies and profitability can drive better human safety and environmental outcomes, they will also carry attendant risks and require ongoing investment to activate. Autonomous decision-making will raise operational, legal, and in the human capital sphere algorithmic accountability risks, while engaging with new systems and processes will dramatically reshape the demand and need for employee skills, including most notably an increase in demand for skilled employees with formal qualifications and training, and decreased scope for retention of semi-skilled or 'on the job' qualified human capital²¹⁹.

Second, digital infrastructure and connectivity will become more critical than ever before, as will access to capital, accelerating the impacts of the 'digital divide' already seen in Australia. While the decreasing costs of digital technology are reducing the scale advantages of large corporates over start-ups, they are not yet 'no cost', and for many First Nations and Indigenous businesses and entrepreneurs, this may dramatically reduce their ability to compete. At the same time, the connectivity issues often experienced in remote and regional Australia where a large proportion of the First Nations population reside can significantly hamper the ability of Indigenous business to benefit to the same degree as others.

²¹⁶PwC (2015). *Megatrends – Demographic and social change*

²¹⁷CSIRO, Austrade, (2020), *Global trade and investment megatrends: Exploring opportunities and risks for the Australian economy during and after the COVID-19 crisis with strategic foresight*, Brisbane, Australia

²¹⁸European Union (2021). *Accelerating technological change and hyperconnectivity*.

²¹⁹Export Council of Australia and AlphaBeta (2018), *From resource boom to digital boom: Capturing Australia's digital trade opportunity at home and abroad*, AlphaBeta, Export Council of Australia, Sydney, Australia

Eagle eyed at 1,000 feet, ready to swoop with open talons...

How these global megatrends will play out with respect to the challenges and opportunities facing the emerging self-determined Australian First Nations economy is yet to be seen.

However, with a shift from the current First Nations economic development policy framework—one that is focused primarily on training and jobs and procurement in the mainstream economy—to one that removes the constraints that First

Nations people face with respect to realising economic dividends from their reclaimed rights and assets and unique intellectual property, combined with an eagle's eye on the challenges and opportunities created by these global megatrends and the determination and resilience of Australian First Nations people, it is an economy that is sure to prosper.

As advocates for this change in policy we stand on the shoulders of giants, ready to swoop with open talons.

But effecting change will take time and as such, we must start this journey with vigour, together, now.



Appendix 1: Statement from the Heart

We, gathered at the 2017 National Constitutional Convention, coming from all points of the southern sky, make this statement from the heart:

"Our Aboriginal and Torres Strait Islander tribes were the first sovereign Nations of the Australian continent and its adjacent islands, and possessed it under our own laws and customs. This our ancestors did, according to the reckoning of our culture, from the Creation, according to the common law from 'time immemorial', and according to science more than 60,000 years ago.

This sovereignty is a spiritual notion: the ancestral tie between the land, or 'mother nature', and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty. It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown.

How could it be otherwise? That peoples possessed a land for sixty millennia and this sacred link disappears from world history in merely the last two hundred years?

With substantive constitutional change and structural reform, we believe this ancient sovereignty can shine through as a fuller expression of Australia's nationhood.

Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people. Our children are alienated from their families at unprecedented rates. This cannot

be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future.

These dimensions of our crisis tell plainly the structural nature of our problem. This is the torment of our powerlessness.

We seek constitutional reforms to empower our people and take a rightful place in our own country. When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country.

We call for the establishment of a First Nations Voice enshrined in the Constitution.

Makarrata is the culmination of our agenda: the coming together after a struggle. It captures our aspirations for a fair and truthful relationship with the people of Australia and a better future for our children based on justice and self-determination.

We seek a Makarrata Commission to supervise a process of agreement-making between governments and First Nations and truth-telling about our history.

In 1967 we were counted, in 2017 we seek to be heard. We leave base camp and start our trek across this vast country. We invite you to walk with us in a movement of the Australian people for a better future."



Artwork title: Ngambri-Kamberri-Canberra Dhaura

The artwork shows three main Ngambri (Kamberri) corroboree grounds and 'Canberry Station' depicted in purple located along the Ngambri River at Acton Peninsula (ANU, NMA, AIATSIS), St John's Church Reid, and Duntroon Dairy (Pialligo) and Ngambri Ck (Sullivan's Creek) at ANU along with Yarralumla Station (Governor General's residence). The Canberra (Ngambri) Plains depicted in yellow and Canberra (Ngambri) Ranges including Black Mountain, Mt Ainslie, Mt Pleasant, Dairy Farmers Hill, Kurrajong / Camp / Capital Hill (Parliament House) and Red Hill are depicted in green. The landscape is embedded with mallangarri yurwangu dhaura (alive and strong on country) tree scarring representing key Ngambri (Kamberri), Walgalu totems, Crow and Eagle.

Artist and Story: Paul Girrawah House, Ngambri (Kamberri) custodian



Australian
National
University

First Nations
Portfolio