



Australian
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First Nations
Portfolio

Murru waaruu

(On Track)

Economic Development Seminar Series



FNP
FIRST NATIONS PORTFOLIO

Seminar 3

What has the Past 235 Years of Policy cost Australia's First Peoples,
the Nation and its Economy

Background Paper

The purpose of this paper is to provide background information and to promote dialogue and debate at a seminar to be held on 14 June 2023 that will focus on the subject matter.

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

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

We speak to each other in many different ways such **widyung** (which way?), **widyundhu** (which way you?) or **widyunggandhu** (how you?). First Nation languages can be described as free word order languages which have a different foundational principle from that of English, a fixed word language. In fixed word order European languages such as English, everything is based on one framework or another of continuum (linear) logic. In the free word order of Australian Indigenous languages, it appears that the foundational frame is one of an unchanging (although manipulative) network of relationships. Behind these two different systems of logic is a different basic assumption about the nature of the cosmos.¹¹

Australian Indigenous people place a very high value on relationships and identity and constantly think about relationships with other people, with the spiritual world, with place, and with the things in the living and spiritual world. The identity of all things (and people) is defined by their relationships with, or to, all 'identities' in the social, the spiritual and the physical environment.²¹

Our identity, relationship, actions, focus and transformation help keep our people 'on track'. A Ngambri, Ngunnawal and Wiradyuri term for this is **murru waaruu**.

Foreshadowed by the **Marramarra murru** Symposium, the **Murru waaruu** First Nations Economic Development Seminar Series, the subject of this document, will comprise a series of topic-specific seminars that are designed to bring together leading scholars and practitioners to develop solutions for

specific relevant issues, ensuring we remain on track to deliver a compelling, evidence-based case to transition the existing First Nations economic development policy paradigm in Australia to one that supports economic self-determination.

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¹¹ Grant, S. and Rudder, J. 2014, *A Grammar of Wiradjuri Language*, Restoration House, Canberra, page 4.

²¹ Ibid.

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Introduction

The impact of colonisation on First Nations peoples of the Australian continent and surrounding islands is immeasurable. It has caused immense and unquantifiable human suffering that continues today. We know this has included large scale loss of life caused by murder, State sanctioned and tolerated massacres, disease, and the manifestations of persistently dire socio-economic conditions; the destruction of culture, including language, knowledge, spiritual connection to country, as well as sites and artefacts; separation of families and communities; dispossession of lands and natural resources; and legislated and systemic institutionalised oppression and exclusion. The remnants and legacy of this history largely frames the economic and social status of First Nations Australians – much of which continues to varying degrees today. It is unlikely that any measurement could capture the scale of this harm, and it certainly goes beyond any question of monetary compensation.

Notwithstanding this, efforts that seek to explore quantifying aspects of the impact of colonisation can provide a useful basis for discussions about charting a new, more equitable path into the future. They can also assist in the consideration of matters such as redress and compensation. This Background Paper and the seminar it informs, seek to interrogate the cost to First Nations and the Australian nation that has resulted from the deliberate exclusion of First Nations people from economic participation. It undertakes this exercise for the purpose of developing a key component of the case for change in the policy approach taken by the Australian Government with respect to First Nations economic development.

This Background Paper and the seminar it informs attempts to do this by gauging an appreciation of the dimensions and order of magnitude and scale of economic cost that is associated with the economic exclusion of First Nations. Whilst the paper acknowledges the enormity of cultural loss and its vital importance, it only assesses cultural loss to the extent that it can be directly attributed to economic loss.

Even within this refined scope, the task of estimating with precision is insurmountable. Nevertheless, clearer identification of the dimensions of cost incurred and some evidence-based sense of scale of that cost can be established and is instructive. This Seminar Background Paper examines the following dimensions:

- **The cost incurred by Australian First Nations as a result of exclusion from economic participation**
Colonial, state and Australian government policies and laws have, and to an extent continue to, deliberately and systematically prevent First Nations Australians from participating in the economy. In some instances,

this has been on absolute terms and others on comparatively discriminatory terms. Regardless, First Nations people have not had the same opportunity as other Australians to create and accumulate personal, family or community wealth.

- **The cost incurred by the nation by virtue of servicing First Nations socio-economic disadvantage**
Exclusion from the economy over the course of generations of First Australians has contributed significantly to a large deficit in socio-economic status compared to other Australians. Low income earning capacity that is the result of under-representation in employment markets (and where there is employment, over-representation in lower remunerated vocations), low participation in enterprise and (as a consequence) limited intergenerational wealth transfer continues to drive low socio-economic status among a significant portion of the Australian First Nations community. The housing, health, education, justice, income support and other social service cost incurred by Australian Governments (and therefore, the Australian taxpayer) that is a result of this circumstance is significant and most likely on a growth trajectory.
- **The cost incurred by the Australian economy by virtue of bureaucratic process and the transactional nature of the relationship between First Nations and the mainstream economy**
Statutory and other frameworks that provide for First Nations rights over land, water, sea country, intellectual property and financial assets typically subordinate those rights to other interests and convey limited control to First Nations interests over those rights. As a result, commerce between First Nations and non-First Nations parties, and even between First Nations parties, typically involves navigating highly regulated administrative, financial and judicial processes. Further, the systematic and prolonged economic exclusion and the resultant lower socio-economic status of First Nations Australians has resulted in demonstrably reduced financial, technical, entrepreneurial and governance capacity of many First Nations entities. These factors contribute to a commercial framework that is transactional (rather than partnership) based and that is the subject of significant third party regulated processes. This likely presents the Australian economy with a significant productivity penalty.

The cumulative costs related to these three dimensions are significant and can only be averted and reversed under a policy framework that is more conducive to economic self-determination for Australia's First Nations peoples.

Economic exclusion

Colonisation and economic exclusion

There are a number of factors that have historically motivated nation states to colonise the lands of Indigenous peoples. The vague nature of the written orders provided to Lieutenant James Cook has led to speculation as to the main factors that motivated Britain to colonise Australia. Regardless, of the initial motivations, from the outset, First Nations Australians were deliberately excluded from participating in the economies of the colonies, subsequent states and the Nation. Appendix 1 provides a brief synopsis of these circumstances from the event of colonisation through to Federation.

Britain's acquisition of Australian land and waters into its Empire in the late 18th and early 19th centuries occurred at a time of global transformation fuelled by the industrial revolution. Rapidly expanding food, clothing and textile production for enlarged urban populations became the basis of global trade and commerce.

Australian lands for growing crops and pasturing livestock drove western occupation and dispossession of First Nations people whose traditional title was not recognised. The 1992 Mabo High Court judgment described this history as, *“Aborigines were dispossessed of their land parcel by parcel, to make way for expanding colonial settlement. Their dispossession underwrote the development of the nation.”*

There is extensive literature on the violent dispossession of First Nations people throughout Australia and the exploitation of those who survived the “frontier wars” for their labour in the pastoral and pearling industries in large areas of regional and remote Australia. The unpaid or grossly underpaid labour of First Nations people was an important factor in the viability of the pastoral industry in northern Australia until the 1960s and early 1970s.

The exploitation of First Nations people for their labour was not completely unfettered. The British Colonial Office had become strongly influenced by the anti-slavery movement which imposed limited legislative protections regarding labour relations between Settlers and First Nations people. However, equal wages in the pastoral industry were not formalised until 1968 through a ruling by the Commonwealth Conciliation and Arbitration Commission.

The destruction of First Nations societies in developing the six Settler Colonies was formalised in the Constitution that federated the Australian Nation State in 1901. As detailed in the Background Paper for *Murru waaruu* Seminar 1 (Treaty and

Settlement), up until 1967 (see below), the only references in the Australian Constitution to Australian First Nations people were:

- Section 51 (xxvi) which specifically mentioned the ‘native race’ in stating that the Commonwealth did not have power to make laws over them, leaving the States with jurisdiction over First Nations people within their borders; and
- Section 127 which precluded the Commonwealth or States from counting ‘Aboriginal natives’ as part of their populations.

Following federation and in the absence of political interference from Britain, all Australian States enacted legislation to segregate and control First Nations people depriving them of basic human rights of movement, to marry and have secure families and to attend school and participate in the economy. Examples of this legislation are contained in Appendix 2. Importantly for the subject matter of this Background Paper, Federation also saw continuance of legislation that had the effect of excluding First Nations Australians from participating in the economy. Examples of this legislation are contained in the following Table 1.

Table 1 – Commonwealth legislation and regulation that excluded First Nations people from economic participation (1901 to 1967)

Commonwealth legislation and regulation	Implications for First Nations economic participation
Legislation	
1. <i>Post and Telegraph Act (1901)</i>	Provided that no contract or arrangement for the carriage of mails shall be entered into on behalf of the Commonwealth unless it contains a condition that only white labour shall be employed.
2. <i>Sugar Bounty Act (1903)</i>	Provided for a bounty on sugar-cane or beet produced by white labour only.
3. <i>Invalid and Old Age Pension Act (1908)</i>	<p>Excluded First Nations people from the allowances. These were progressive financial and social security benefits to the injured, retired and mothers (i.e., First Nations people did not receive a pay-out if injured or any retirement payments).</p> <p>In 1960, Commonwealth pensions became available to First Nations people. However, in practice, welfare payments, pensions and benefits were often still made to State and Territory Aboriginal welfare authorities. Authorities were allowed to retain the greater proportion of the payments for expenditure on the welfare of their First Nations charges, only having to pass in 'pocket money' component to individuals.</p>
4. <i>Maternity Allowance Act (1912)</i> 5. <i>Maternity Allowance (amended) Act (1942)</i> 6. <i>Maternity Allowance (amended) Act (1947)</i> 7. <i>Maternity Allowance (amended) Act (1960)</i> 8. <i>Maternity Allowance (amended) Act (1966)</i>	<p>Excluded First Nations people from the allowances - mothers were paid between 5 and 7 pounds per child. The Maternity payment was considered eugenically-oriented to incentivise Anglo-Saxon women to have children and expand the white population¹.</p> <p>In 1942, the <i>Maternity Allowance Act 1942 (Cth)</i> enabled First Nations mothers to receive the allowance, but still with conditions including the mother's 'character' and if they were 'exempt' from other State or Territory legislation for the control of First Nations people.</p> <p>1960 saw these further restrictions removed, except for reference to nomadic or 'primitive' mothers and allowed for indirect payment. 1966 saw the removal of the last of these restrictions.</p>
9. <i>Child Endowment Act 1941 (Cth)</i> 10. <i>Child Endowment Act (amended) 1942 (Cth)</i> 11. <i>Child Endowment Act (amended) 1947 (Cth)</i>	<p>Provided for a non-means tested benefit of 5 shillings per week, paid directly to mothers for each child under the age of 16 years.</p> <p>First Nations mothers were excluded from this payment where they were nomadic or the child was wholly or mainly dependent on Commonwealth of State support.</p> <p>Payment of child endowment to a third party was authorised and the 1942 amendment allowed for Aboriginal missions to receive the child endowment payments.</p> <p>The 1947 Act allowed for payments to First Nations mothers where they were not nomadic or dependent on the state for support.</p>
12. <i>Widows Pension Act 1942 (Cth)</i>	First Nations women were entitled to a widow's pension if they were exempt from the operation of state or territory legislation for the control of Aboriginal persons, held an exemption certificate under state legislation and could demonstrate 'character, standard and intelligence and social development.'
13. <i>Unemployment and Sickness Benefits Act 1944 (Cth)</i>	First Nations people were disqualified unless they were satisfied that the person has 'character, standard of intelligence and development.'
Regulation and Policy	
Harvester Judgement (1907)	<p>The Harvester Judgement (1907) determined the minimum wage of 42 shillings a week. This was not extended to First Nations people. First Nations people were viewed as wards of the state, so Indigenous workers were given government employment at sub-award rates and Indigenous employers were excluded from pastoral awards.</p> <p>Regulation of wages and conditions of employment also had exclusionary provisions.</p>
World War I service provisions	The approximate 1,000 First Nations men that served in WWI were excluded from the soldier settlement scheme repatriation benefits. Applications of First Nations veterans to land allotment grants under the scheme were often refused – only two were granted.

¹ <https://chariotjournal.wordpress.com/2021/08/30/a-history-of-political-exclusion-the-first-nations-struggle-for-constitutional-rights/>

1967 to Mabo

As mentioned above and detailed in the Seminar Background Paper for the *Murru waaruu* Seminar 1 (Treaty and Settlement), the 1967 constitutional amendments enabled the Commonwealth to make laws about First Nations people and allowed First Nations people to be counted in the Australian population.

The post referendum environment was one of significant change, marked by a public policy approach that sought to address some aspects of First Nation people's exclusion and disadvantage. Examples include:

- The 1968 amendments to the Pastoral Award which mandated equal pay for First Nations pastoral workers; and
- Significant reforms under the Whitlam Government (1972 to 1975) which included substantially increasing resources for First Nations needs (particularly in remote Australia); creation of a federal Department of Aboriginal Affairs; and significant legislative reform including the *Racial Discrimination Act 1975*, *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975* (which superseded existing racially prejudice State laws) and the *Aboriginal Land Rights (Northern Territory) Act 1976* (which established vast areas of Aboriginal freehold land in the Northern Territory based on traditional ownership).

Despite this progress, economic exclusion remained a characteristic of policy during this period, including that which was direct consequence of the abovementioned reforms. For example, the 1968 amendments to the Pastoral Award, whilst obviously necessary and overdue, resulted in the well documented welfare refugee crisis throughout much of northern and central Australia as First Nations workers were laid off at wholesale scale. However, even the reforms themselves continued to exclude and limit economic participation. For example, while the Northern Territory land rights legislation provided freehold tenure over vast areas of the Northern Territory, rights in that land are still constrained by a number of caveats and limitations including inalienability. The *Aboriginal Land Rights Act 1983* (NSW) was also enacted around this period, providing resources for First Nations people to re-acquire traditional land in New South Wales and other States established Aboriginal Land Trust Mechanisms—all of which significantly constrain the extent to which land can be used for economic purposes. This tenure and its constraints are detailed in the Background Paper for *Murru waaruu* Seminar 2 (Using the Acquired Assets).

Mabo to present day

Over the three decades since proclamation of the *Native Title Act 1993* (Cth), around 40 percent of the Australian landmass has been determined as either exclusive or non-exclusive native title rights totalling the largest geography of any First Nations land rights framework in Australia. However, this is a relatively weak form of tenure, and in most instances native title rights are subordinate to any co-existing rights, rendering them of little economic value.

The principal barrier to capital access over the native title estate is section 56(5) of the *Native Title Act*, which provides that:

“...native title rights and interests held by the body corporate are not able to be: a) assigned, restrained, garnished, seized or sold; or b) made subject to any charge or interest; or c) otherwise affected...as a result of d) the incurring, creation or enforcement of any debt or other liability by the body corporate, or e) any act done by the body corporate.”

As a result, First Nations land under the Native Title Act cannot be used as security for borrowing. However, this does not entirely sterilise it from being used for economic gain—section 56(4) of the *Native Title Act* gives PBCs powers to deal with native title interests held on trust as authorised by the *Native Title (Prescribed Bodies Corporate) Regulations 1999*. As such, PBCs may, with the consent of the trustees, hold money, invest and apply funds, enter into agreements and otherwise manage the land under their care. While this does not overcome the absolute bar on security interests, where particular rules are followed and the common law native title holders consent, First Nations land may still be utilised for or to enable business or commercial purposes through mechanisms such as leases or tied grants.

The second response by the Australian Government to the Mabo High Court decision relevant to this discussion was the establishment of the Indigenous Land Corporation, initially under the *Land Fund and Indigenous Corporation (ATSIC Amendment) Act 1995* (Cth). It now operates as the Indigenous Land and Sea Corporation (ILSC) under the *Aboriginal and Torres Strait Islander Act 2005* (Cth). The ILSC (and the ILC before it) receives an annual appropriation from the Australian Government for the purpose of acquiring lands for First Nations beneficiaries and supporting those beneficiaries in improving those lands. While ILSC lands that are divested to a First Nations beneficiary may be used for some economic purpose, and improvements may include improvements that create economic value, inalienability together with government control as to what these lands are specifically used for is still a common theme.

In terms of water, as discussed in detail in the Background

Paper for Murru waaruu Seminar 2 (Using the Acquired Assets), allocations to First Nations interests are miniscule. For the most, they are defined as ‘cultural flows’ which cannot be used for economic purpose. In terms of Sea Country, while significant areas of the Northern Territory coastline are the subject of Aboriginal Freehold in accordance with the *Aboriginal Land Rights (Northern Territory) Act 1976* and, since 2001,² Australian courts have recognised native title rights may be asserted by Traditional Owners over Sea Country, these rights are limited in number, geography and scope for creating economic value.

Jurisprudence

While the contemporary legislative framework continues to seek to constrain economic participation, as discussed in the Background Paper for Murru waaruu Seminar 2 (Using the Acquired Assets), the trajectory of jurisprudence over the course of the three decades since the Mabo High Court decision has increasingly recognised First Nations economic rights. For example:

- **The Wik Peoples v The State of Queensland & Ors; The Thayorre People v The State of Queensland & Ors [1996] HCA 40** –referred to as the ‘Wik Case’, the High Court of Australia held that the mere granting of a pastoral lease does not confer exclusive possession, with the rights and obligations of the holder of a pastoral lease dependent on the specific lease terms and the law under which it was granted and does not necessarily extinguish native title rights. However, if there is any inconsistency between the rights of the native title holders and the rights of the holder of the pastoral lease, the pastoral lease prevails.
- **Western Australia v Ward (2002) 213 CLR 1** –referred to as the ‘Ward Case’, the High Court of Australia confirmed that proof of native title does not require occupation of lands but is based on traditional laws and custom, that native title can co-exist with other land rights (such as pastoral leases) and that the native title cannot be extinguished outside of the *Native Title Act*.
- **Northern Territory v Arnhem Land Aboriginal Land Trust (2008) 236 CLR 24** –referred to as the ‘Blue Mud Bay Case’, the High Court determined that coastal Aboriginal land granted under the *Aboriginal Land Rights (Northern Territory) Act 1976* includes the intertidal zone and that the holder of a licence to fish cannot enter and take fish from the intertidal zone on Aboriginal land without the permission of the traditional owners.
- **Akiba v Commonwealth (2013) 250 CLR 209** –referred to as the ‘Akiba Case’, the High Court of Australia determined

that Commonwealth and Queensland legislation, which prohibited taking of fish and other aquatic life for commercial purposes without a commercial fishing licence did not extinguish native title rights of certain communities in the Torres Strait to take resources from defined areas of water and trade those catches in accordance with custom and tradition.

- **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** –referred to as the ‘Timber Creek Cases’, the High Court established detailed guidance as to how compensation for the impairment of native title rights and interests should be calculated which includes economic and cultural loss elements as well as compensation for the time value of money.

First Nations economic exclusion in the international context

Whilst wholly inadequate in both scale and nature and occurring at glacial pace, the post 1967 referendum and post-Mabo periods delivered some improvement in the scope for economic participation by Australian First Nations. However, as discussed in the Background Paper to the Murru waaruu Seminar 1 (Treaty and Settlement), the framework in Australia is far less advanced than that of comparable former British colonies and, in the context of both international expectations and Australia’s commitment under the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP), is materially deficient.

Together with around three-quarters of the world’s nation states, Australia is a signatory to UNDRIP. Whilst not a formally legally binding instrument of international law, many of its articles have binding effect as international customary law. By signing UNDRIP, Australia has made an acknowledgement to the international community that its laws will be consistent with the principles outlined in the 46 Articles of UNDRIP.

Fundamentally, UNDRIP promotes a policy environment that provides for the expression of Indigenous self-determination and free, prior and informed consent. That includes economic self-determination, a dimension clear throughout the Declaration. Indeed, no fewer than 11 articles promote aspects of economic self-determination (see Table 2 below) and so it is unsurprising that UNDRIP has been identified as effectively an economic empowerment instrument.³

² *Commonwealth v Yarmirr* (2001) 208 CLR 1

³ Borrows, J. *Indigenous Diversities in International Trade*, Cambridge University Press, Cambridge

Table 2 – UNDRIP Articles that pertain to economic self-determination

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 10	...No relocation shall take place...[without] agreement on just and fair compensation...
Article 11(2)	States shall provide redress...with respect to cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent...
Article 17(3)	Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour, and <i>inter alia</i> , employment or salary
Article 20(2)	Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.
Article 23	...have the right to determine and develop priorities and strategies for exercising their right to development. In particular...the right to be actively involved in developing and determining...economic and...programs affecting them, and as far as possible, to administer such programs through their own institutions.
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.

While Australian laws continue to place constraints on First Nations economic self-determination, other jurisdictions are moving to legislate for implementation of UNDRIP principles. For example, the Canadian *Implementing the United Nations Declaration on the Rights of Indigenous Peoples Act 2021* provides a statutory roadmap for the Canadian Government and First Nations, Inuit and Metis people to work collaboratively to ensure Canadian laws are consistent with UNDRIP.

The price paid by Australia's First Peoples for economic exclusion

Estimates of Australian economic output at the time of colonisation



Placing an estimated monetary value on the Australian First Nations economy prior to colonisation is difficult. However, one preeminent economic historian estimates the arrival of the First Fleet in 1788 led to an immediate decline in Australia's GDP.⁴ Firstly, dispossession of more productive lands where the first colonies were established, combined with large numbers of First Nations deaths that resulted from disease and conflict would most likely have delivered a significant productivity penalty to the existing First Nations economy. Secondly, the nature of the early settler economy wasn't one that led itself to significant productivity growth. For all intents and purposes, the first few decades of colonisation focused on establishing penal institutions in a resourcing environment where, by virtue of the Anglo-French War (1778-1783), Australian colonies weren't a priority for the British Government.

⁴ Butlin, N. (1995), *Economics and the Dreamtime: A Hypothetical History*

⁵ Bernard, A. *The Economic History of Australia from 1788: An introduction*, The Economic History Association

⁶ Roser, M. (2016), 'Economic growth', *Our World in Data*, University of Oxford

⁷ Beinhocker, E. (2006), *The Origin of Wealth: Evolution, Complexity and the Radical Remaking of Economics*, Harvard Business School Press, Massachusetts

⁸ The World Bank

⁹ Landes, D. (1969), *Prometheus Unbound: Technological Change and Industrial Development in Western Europe from 1750 to Present*, Cambridge Press, Cambridge

¹⁰ Schwab, K. (2016), 'The fourth industrial revolution: what it means, how to respond', *World Economic Forum*

However, this neglect by the Crown served to catalyse a local service economy to support the penal sector with a particular focus on agricultural production as settlers and released convicts were provided with land grants. Further, as convict transportation numbers increased so did the diversity of skills in released convicts, ultimately providing the skills base for a western-oriented economy.⁵

Excluded from the greatest global economic expansion in the history of humankind

Sustained and significant economic growth and distributed prosperity is a relatively recent phenomenon.⁶ It has been estimated that over the period 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 \$178.⁷ Whereas 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 the previous 12,000 years). Indeed, the current global GDP per capita of USD \$11,500 represents a 64-fold increase since 1750,⁸ -in terms of material wealth, a man (and it was primarily males that held or controlled measurable wealth at the time) in Britain in 1750 was likely to have more in common with a legionnaire in ancient Rome, than his own great grandchildren.⁹

This unprecedented expansion in relatively shared economic prosperity (see Figure 1 below) was enabled by a number of factors including an explosion in 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 was 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), second industrial revolution (mass production, electrical power and assembly lines), third industrial revolution (automated production, electronics and computing) and the current fourth industrial revolution (artificial intelligence, big data and robotics).¹⁰

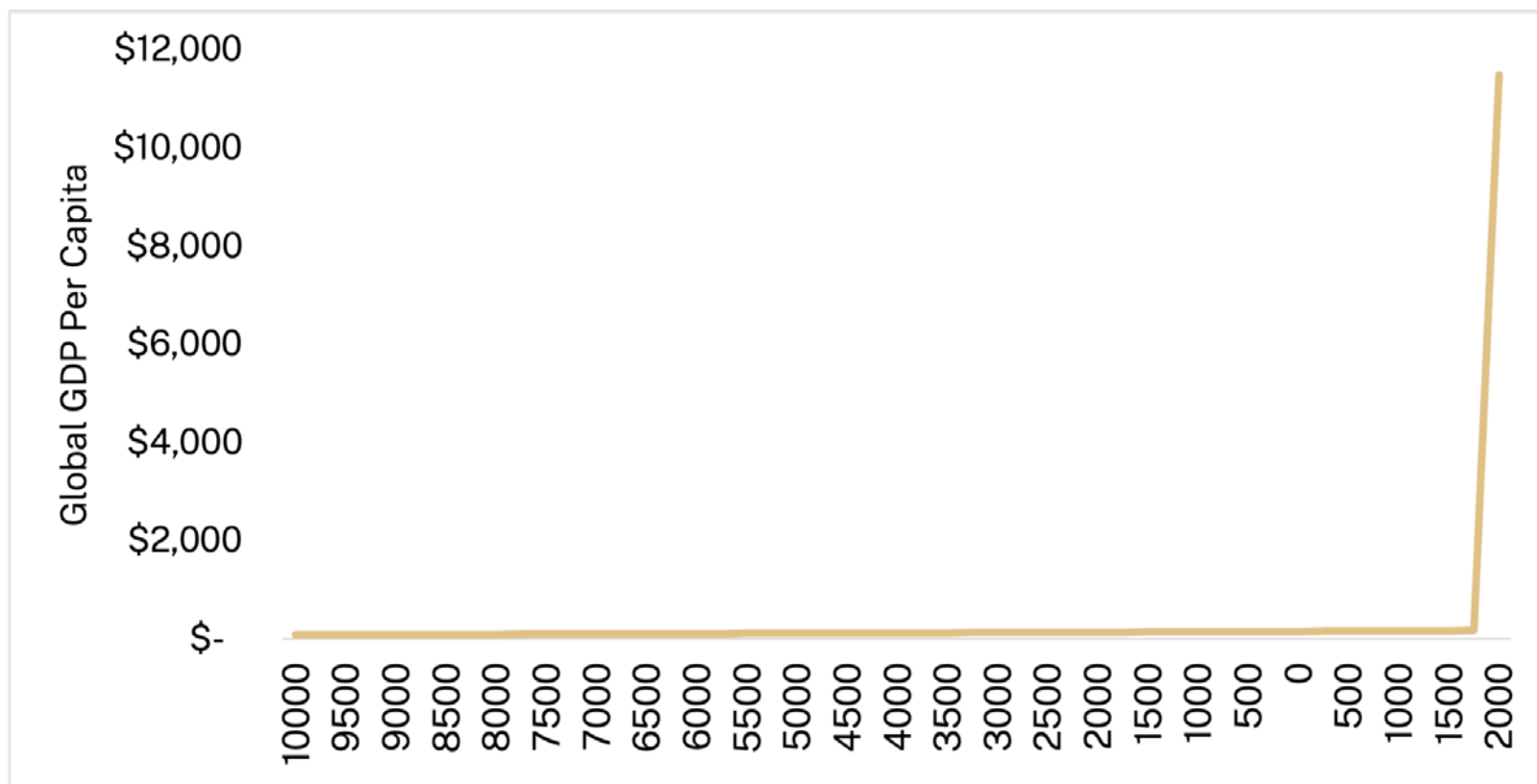


Figure 1 – Global GDP per capital – 10,000BC to 2000 AD

It is also worthy of note that whilst not measured, wealth created from natural resources disposed from Indigenous peoples as a result of colonisation also performed a role in this economic expansion.

The policies and activities of settlers, colonial governments and subsequent Australian Governments have precluded First Nations Australians from participating in this phenomenal and unprecedented economic expansion.

Excluded from economic expansion facilitated by First Nations' lands and resources

From around 1820 (or three decades following the arrival of

the First Fleet), a stronger natural resources-based economy started to emerge from the Australian colonies. This included the production of fine wool and various agricultural products for European markets, followed by minerals production, particularly the 'gold rushes' in New South Wales (1851 to 1880), Victoria (1851 to late 1860s) and Western Australia (1890 to 1910). Growing industry and opportunity then led to increased international migration to Australia and a growing services economy. While growth was periodically interrupted by three depressions (1840s, 1890s and 1930s) as well as two world wars (1914 to 1918 and 1939 to 1945), it is estimated that between 1820 and 1967, the Australian economy produced a total GDP of USD \$ 5.7 trillion, representing a Compound Annual Growth Rate (CAGR) of 4.6 percent.¹¹

Over the period 1967 to 2021 the Australian economy increased

¹¹ Bolt, Jutta and Jan Luiten van Zanden (2020), Maddison style estimates of the evolution of the world economy: a new 2020 update; AND Australian Bureau of Statistics

7.5-fold to a total annual GDP of \$1.5 trillion and generated total GDP of \$35.4 trillion. The services sector is by far the largest sector of the Australian economy accounting for around 65 percent of total Gross Value Add (GVA) generated over the period 1975 to 2018, or 75 percent including the construction sector. The manufacturing sector is relatively small accounting for 11 percent of the GVA generated over the period 1975 to 2018, but declining in contribution, whereby in 2018 it accounted for just 7 percent of GVA.

The primary and extractive industries – the industries that work directly from the traditional lands and waters of Australia’s First Nations and which harvest the natural resources contained therein – are second only to the services sector, accounting for 14 percent of GVA generated over the period 1975 to 2018 and increasing in representation. In 2018, the primary and extractive industries accounted for 16 percent of GVA. It has also been the fastest growing sector, increasing its contribution to GVA at a CAGR of 3.8 percent compared to the services sectors (3.5 percent), construction (3.3 percent) and manufacturing (1.1 percent) and since 1975 has contributed a total of \$5.5 trillion in GVA to the Australian economy.

The trends in GVA from the extractive and primary industries, manufacturing, construction and other services are illustrated in the following Figure 2.¹²

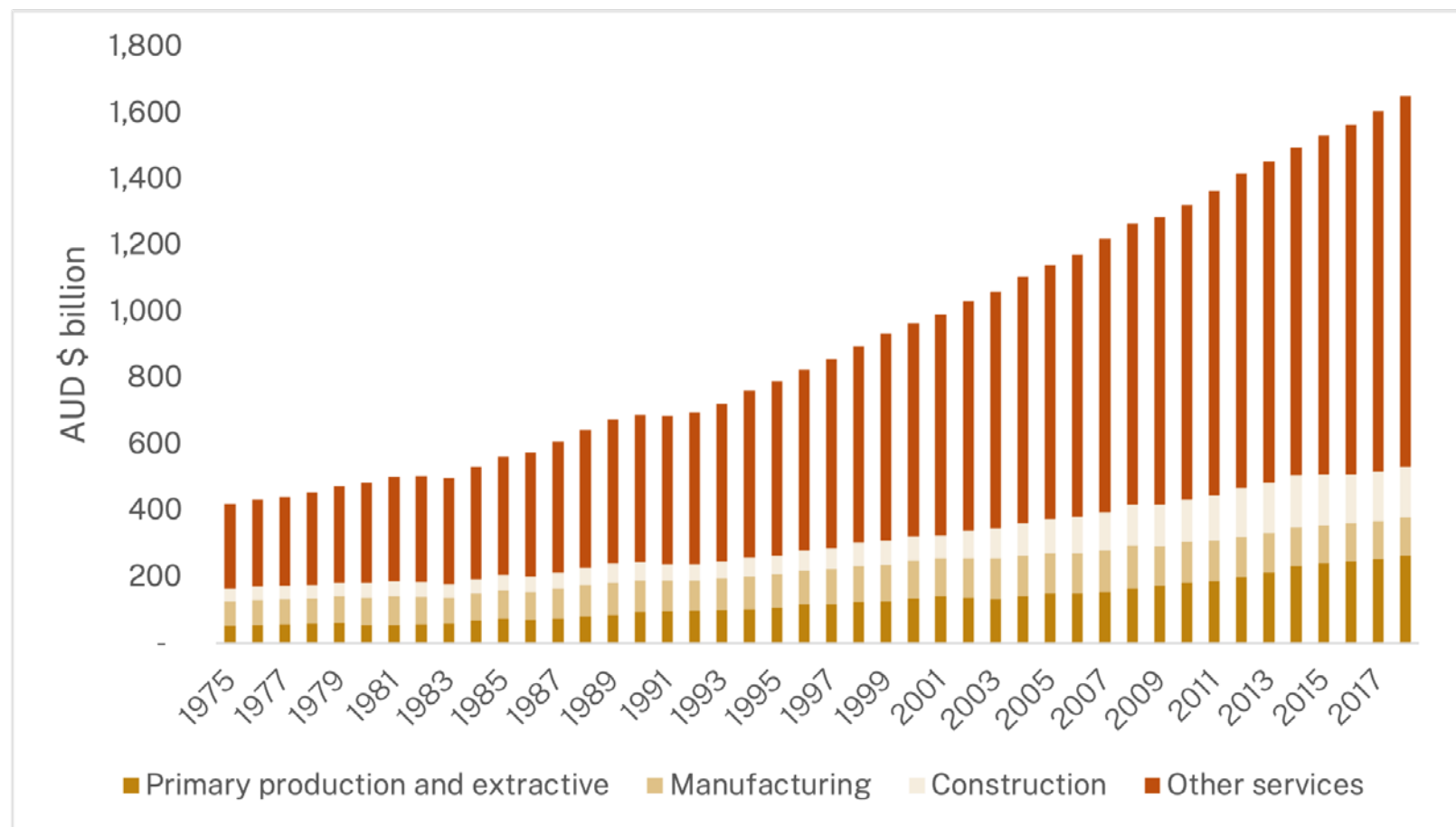


Figure 2 – Sector contributions to Australian GVA (1975 to 2018) – Excluding dwellings

¹² Australian Bureau of Statistics (2022), *Australian National Accounts: National Income, Expenditure and Product Gross Value Added by Industry, Chain Volume Measures*, Australian Government, Canberra

It is important to note that a significant, but unmeasurable portion of the manufacturing, construction and other services sectors exists by virtue of derived demand or downstream relationship with the primary and particularly extractive sectors.

Another important aspect of the economy is the value of dwellings that have been constructed on the traditional lands of Australian First Nations. As of December 2022, the total value of all dwellings in Australia was approximately AUD \$9.6 trillion. As illustrated in Figure 3 below, the eastern states of New South Wales, Victoria and Queensland account for over 80 percent of the total value of dwellings in Australia.¹³

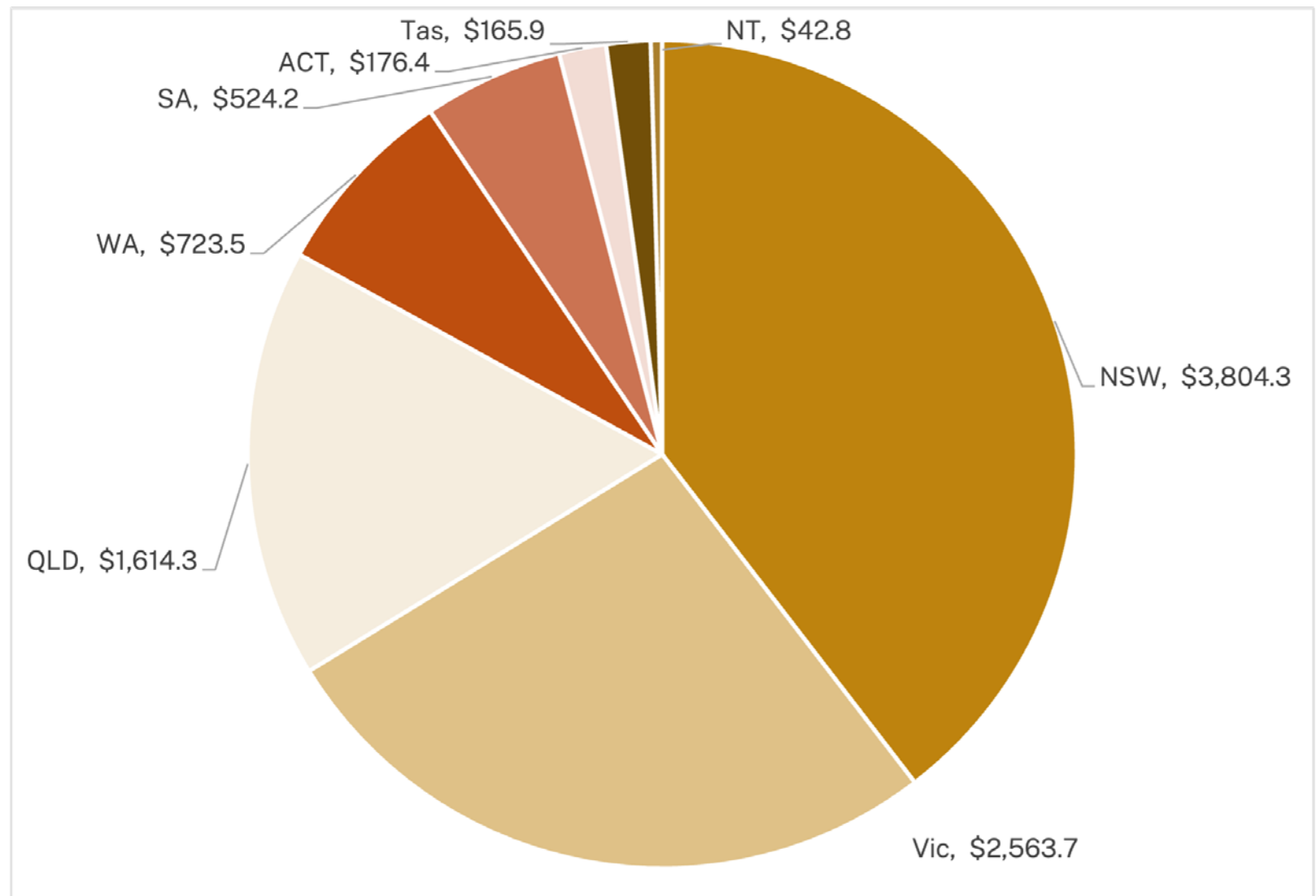


Figure 3 – Geographic distribution of Australian dwellings by value (AUD \$ billion) (2022)

¹³ Australian Bureau of Statistics (2023), *Total Value of Dwellings*, Australian Government, Canberra

In other words, a significant portion of the Australian economy is derived directly from the traditional lands of Australia's First Nations.

Appropriation of First Nations cultural and intellectual property

Another key aspect of economic exclusion, as detailed in the Background Paper for the Murru waaruu Seminar 2 (Using the Acquired Assets), are the inadequacies of Australian intellectual property law with respect to protecting First Nations cultural and intellectual property. This has resulted in significant appropriation of the economic value of First Nations culture by non-First Nations interests. For example:

- **First Nations Art** - it has been estimated that in 2019-20 at least \$250 million in Australian First Nations visual arts and crafts were sold, including approximately \$35 million in artwork sales through art centres and at least \$80 million in sales of merchandise and consumer products, mainly in the form of souvenirs. However, products created by non-First Nations parties accounted for an estimated \$54 million of spending, equivalent to over half of total spending on merchandise and consumer products.¹⁴
- **Bush foods** - recent research,^{15, 16} suggests that only around 1 to 2 percent of the native foods and botanicals sector's produce and value is generated by First Nations owned operations even though almost all Traditional Owners want to be leaders in the industry.
- **Licensing of First Nations genetic resources to third parties** - for example, specimens of species of smokebush (*Conospermum*), found along the south west coast of Western Australia and nurtured by First Nations of the region for their value as traditional medicine for thousands of years had been collected by the United States National Cancer Institute for research into cancer treatments since the late 1960s. While this research did not result in new cancer treatments, in the 1980s re-screening of the specimens identified Western Australian species of *Conospermum* as being one of only four of the 7,000 species screened that contained the active property *conocurovone*, which laboratory tests indicated could destroy the HIV virus

in small concentrations. These results led to the United States Government successfully filing for patents in the United States and Australia, providing the United States Department of Health and Human Services exclusive rights to use compounds from smokebush for the purpose of developing HIV treatments and to provide third parties with licenses to this effect. Using its powers under state legislation to license access to the species, the Western Australian Government then negotiated with the United States Government a transaction whereby the rights were licensed to an Australian pharmaceutical company. First Nations who held the traditional knowledge pertaining to the smokebush's medicinal properties were not party to any of these arrangements or negotiations.¹⁷

¹⁴ Productivity Commission (2022), Aboriginal and Torres Strait Islander Visual Arts and Crafts, Australian Government, Canberra

¹⁵ Bushfood Sensations IN: Mitchell, R. and Becker, J. (2019) 'Bushfood industry booms, but only 1 percent is produced by Indigenous people', 19 January, Australian Broadcasting Corporation

¹⁶ National Indigenous Bushfoods Symposium IN: Federation of Victorian Traditional Owners (2021), *Victorian Traditional Owner Bushfoods Strategy*

¹⁷ Janke, T. (2018), 'From smokebush to spinifex: towards recognition of Indigenous knowledge in the commercialisation of plants', *International Journal of Rural Law and Policy*, 1: 1-37

The largest economic loss has occurred in times of supposed enlightenment?

Perhaps the most galling aspect of economic exclusion for Australia's First Nations is that by far the greatest loss of economic opportunity has occurred in more recent times.

The following Figure 4,¹⁸ illustrates an estimate of cumulative Australian GDP since 1820, which now totals approximately USD \$40.1 trillion. Over 85 percent of this wealth has been generated since the 1967 referendum and 65 percent since the Mabo High Court decision.

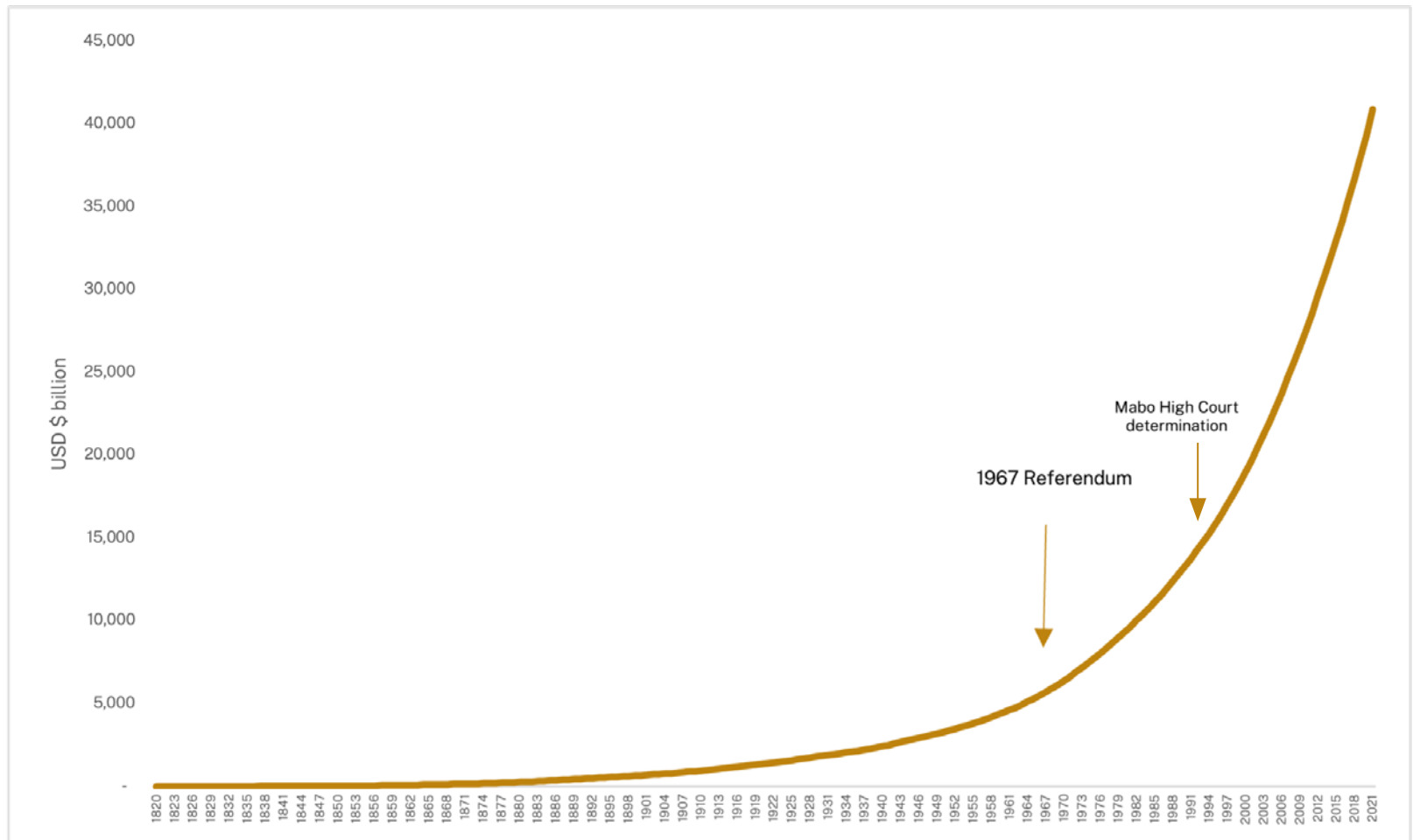


Figure 4 – Australian GDP cumulative (1820 to 2021)

It is cruelly ironic that despite some of Australia's more progressive reform taking place since the 1967 Referendum and particularly the Mabo High Court decision, proportionately, Australian First Nations are paying an increasingly higher price for ongoing economic exclusion.

¹⁸ Adapted from: Bolt, Jutta and Jan Luiten van Zanden (2020), Maddison style estimates of the evolution of the world economy: a new 2020 update; AND Australian Bureau of Statistics

What has been the value-add of colonisers and other Australians?

It could be argued that despite the extent of relatively under-exploited natural resources that were, prior to British colonisation the subject of the sovereignty of Australian First Nations, without the value-add provided by Britain in terms of technology (including equipment and genetics), models of enterprise, market regulation, military protection and particularly market access (at its peak in the late 1800s and early 1900s the British Empire was the largest in history), the aforementioned economic growth may never have eventuated.

Given Britain's global technological, industrial, market access and military superiority during much of this period, by a measure of western economics, one conclusion is that British colonisation optimised the economic potential of Australia's relatively untapped natural resources. This pursuit has depended critically on the dispossession and subjugation of First Nations peoples and their rights. Economic expansion and opportunity created by the dispossession of First Nations peoples from their lands and waters has been a motivating factor in the expansion of the colonial project across Australian history. The path taken though was surely not the only pathway for economic growth and prosperity in Australia.

For example, while Australian First Nations would have most likely struggled to repel determined colonisation from any of the world's super-powers at the time, the question as to whether they may have achieved more favourable terms or even treaty from other potential colonising nations remains. Further, other colonisers may have decolonised earlier as was the case with the Spanish in the Philippines, leaving Australian First Nations with acquired Western industrial and commercial capabilities as well as relatively preserved natural resources.

Finally, the Australian continent may never have been colonised, leaving Australian First Nations to acquire capabilities through trade and diplomatic relations and develop their natural resources in ways that are in accordance with their custom. Albeit, given regional geopolitical and strategic environment characteristic of the world and the Indo-Pacific Region over the past 250 years, this is probably an unlikely scenario.

Whatever the case, with the necessary value-adding capability acquirable from other sources, the economic development of the Australian continent was not dependent on British colonisation.

Other vectors of economic loss

It is perhaps ironic that two sources of economic loss that Western commercial frameworks have at least historically discounted – cultural and environmental loss – are, for many First Nations people, by far the greatest source of loss. Their economic impact is also the most difficult to assess.

Cultural loss

As discussed in the introduction to this Seminar Background Paper, the focus of the seminar is economic loss. However, it is important to recognise three important issues with respect to the relationship between cultural and economic loss:

- **In many ways it is more important than the economic loss**
The human condition – the characteristics, key events and situations essential to human life – is determined by biology and culture, or the beliefs, values, customs and social behaviours of a particular people or society. In other words, without culture, human beings do not have frameworks to regulate behaviour, interactions with other humans, economic activity and safety. It is for this reason that colonial destruction of Australian First Nations culture is a main factor that has contributed to widespread socio-economic disadvantage and its manifestations.
- **There are several key links between First Nations culture and economic self-determination**
At a very crude level and as discussed above there are aspects of Australian First Nations culture such as artistic expression, traditional knowledge (particularly ecological knowledge) and genetic resources that have significant economic value in the context of the Western economy.
- **Jurisprudence to date has placed significant monetary value on cultural loss**
The Timber Creek cases,¹⁹ represented the first instance where an Australian Court awarded compensation to a First Nations claimant for cultural loss. The majority judgement explained the purpose of compensation for cultural loss as *'Compensation for non-economic effect of compensable acts is compensation for that aspect of the value of the land to native title holders which is inherent in the thing that*

¹⁹ [2019] HCA 7

has been lost, diminished, impaired or otherwise affected by the compensable acts. It is not just about hurt feelings, although the strength of feeling may have evidentiary value in determining the extent of it. The trial judge described the nature of this by likening it to a single large painting, whereby earlier acts such as the grant of the pastoral lease (which in itself is not compensable) punched holes in the painting. The subsequent compensable acts ‘punched further holes in separate parts of the one painting’ and therefore the ‘damage was not to be measured by reference to the holes created by the compensable act alone, but by reference to the effect of those holes in the context of the wider area’.²⁰

It is important to note that while the Timber Creek determination was based on a formula, the circumstances pertaining to cultural loss will be specific to each case. However, it is equally worthy of note that modelling undertaken by MinterEllison that applied the Timber Creek award of \$20,000 per hectare to just 1 percent of the area of determined native title in 2019, estimated a total compensation amount of \$56 billion. If the area of native title that was deemed eligible for compensation increased to 5 percent, the amount of compensation would be an estimated \$280 billion.²¹

Loss of biodiversity and ecosystem services

Australian First Nations culture and spirituality has an intrinsic and irreplaceable link to land, sea country, water natural resources and the ecosystems they support. These environmental resources also underpinned subsistence and the traditional economy of Australian First Nations. In other words, ecosystems services are fundamental to every aspect of First Nations life.

Colonisation has had and continues to have a significant detrimental impact on Australian ecosystems and the various services those ecosystems provide, particularly to Australian First Nations. Since the late 1700s Australia has lost more mammal species than any other continent and continues to have one of the highest rates of species decline among Organisation for Economic Cooperation and Development (OECD) countries. To date, at least 100 Australian species,²² are listed as ‘Extinct’ or ‘Extinct in the Wild’ in accordance with definitions provided by Australian, state or territory legislation. A further approximate 1,900 Australian species and ecological communities are known to be threatened or at risk of extinction.²³

Moreover, the pressures that have caused the most extinction of Australian terrestrial species since colonisation – introduced species of flora and fauna and habitat loss – are direct products of colonisation. In terms of threatened terrestrial and aquatic species and ecological communities, more recent causes have expanded to also include similar derivatives of colonisation such as habitat fragmentation and degradation, invasive disease and sea level rise.^{24,25}

The spiritual, cultural and economic cost associated with impact of colonisation on the natural environment is incalculable.

²⁰ Debenham, M. (2019), A methodology for the calculation of native title compensation’, Australia Legal Briefings, Herbert Smith Freehills

²¹ Abraham, R. and Isdale, W. (2019), Timber Creek: the most significant native title decision since Mabo, MinterEllison (<https://www.minterellison.com/articles/timber-creek>)

²² This number is likely to be substantially higher given limitations of biodiversity survey in Australia

²³ Department of Climate Change, Energy, the Environment and Water (2021), *Australia: State of the Environment*, Australian Government, Canberra

²⁴ Ward, M. Carwardine, J., Yong, C., Watson, J., Silcock, J. and Taylor, G. (2021) ‘A national-scale dataset for threats impacting Australia’s imperilled flora and fauna’, *Ecology and Evolution*, 11: 11749-11761

²⁵ Woinarski, J., Braby, M., Burbidge, A., Coates, D., Garnett, S., Fensham, R., Legge, S., McKenzie, N., Silcock, J. and Murphy, B. (2019) ‘Reading the black book: the number, timing, distribution and causes of listing extinctions in Australia’, *Biological Conservation*, 239:108261

The fiscal cost of servicing the resultant socio-economic disadvantage

Overview of Australian First Nations socio-economic disadvantage

As a result of dispossession and the policies of colonial, state/territory and Commonwealth Governments that have resulted in economic exclusion, the gap in socio-economic status has always been persistently vast. The following Table 3,²⁶ is illustrative of the extent of this gap.

Table 3 – Selected Socio-economic indicators – First Nations Australians versus the average Australian (2021)

Socio-economic measure	First Nations Australians	All Australians
Secondary school as highest level of qualification	26.2%	14.9%
VET as highest level of qualification	6.7%	25.5%
Higher education as highest level of qualification	6.6%	26.3%
Unemployment rate	12.3%	5.15%
Medium household income (\$ per week)	\$1,507	\$1,746
Long term health condition	35.0%	31.7%
Average number of people per household	3.1	2.5

This issue was escalated by the Aboriginal and Torres Strait Islander Social Justice Commissioner in 2005, when it recommended that Australian governments commit to achieving equality in health and life expectancy for Australian First Nations people within 25 years (or by 2030)²⁷. Following two years of advocacy in the form of initially the Health Equality Campaign (2006) and then 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 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

As will be explored in a future Marra waaruu seminar, closing this socio-economic gap under current policy paradigms is proving challenging.

Estimates of the cost incurred by Australian Governments in servicing First Nations economic socio-economic disadvantage

It is fair to say that Australian Governments do not have a full grasp on what servicing sustained First Nations socio-economic disadvantage that is the manifestation of a long history of injustice and exploitation and public policy failure now costs Australian Governments (and thereby the Australian taxpayer) each year. To their defence, estimating this is not a straight-forward process and attempts to do so have been controversial.

In 2009, the Council of Australian Governments commissioned the Productivity Commission to initiate a time series of Indigenous Expenditure Reports that are designed to contribute to better policy making and improved outcomes for First Nations Australians. The Terms of Reference

²⁶ Australian Bureau of Statistics (2021), 2021 Census, Australian Government, Canberra

²⁷ Aboriginal & Torres Strait Islander Social Justice Commissioner (2005), Social Justice Report 2005

for these studies is contained in Appendix 3 and include assessment of:

- Commonwealth, State, Territory and (where possible) local government expenditure;
- Expenditure on First Nations specific and key mainstream programs; and
- On-ground services in areas such as education, justice, health, housing, community services, employment and other areas of significant expenditure.

The first assessment was conducted in 2008-09 (published in 2010) as an initial stocktake of available data, principles, methodology and framework, with subsequent assessments undertaken in 2010-11, 2012-13 and 2015-16.

Assessment methodology

The following Figure 5, summarises the methodology used by the Productivity Commission to estimate Australian Commonwealth, State, Territory and (where available) local government expenditure on Australian First Nations people.

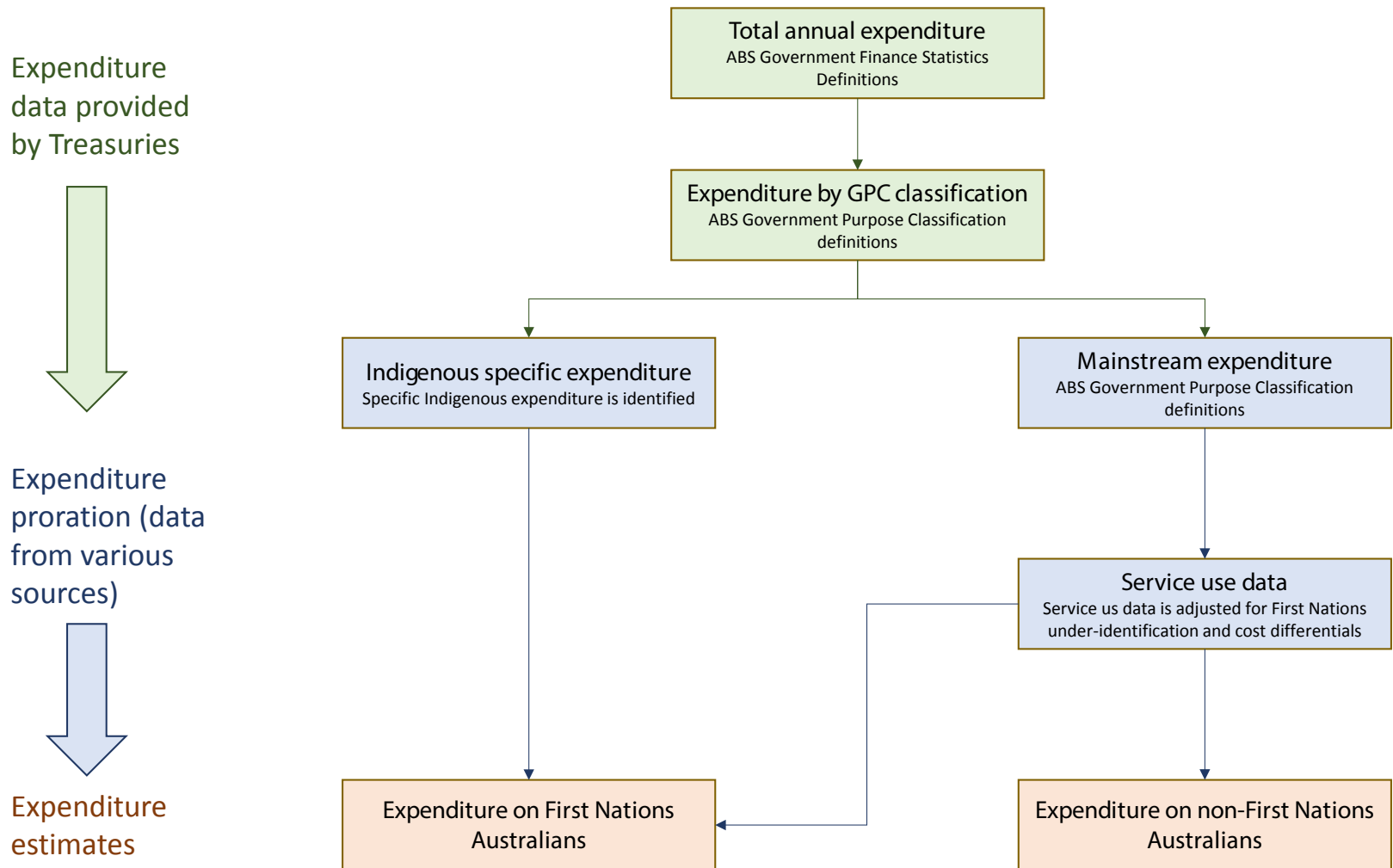


Figure 5 – Productivity Commission methodology for estimating Government expenditure on First Nations Australians

The following Table 4 summarises key elements of the Productivity Commissions estimate methodology.

Table 4 – Key components of the Productivity Commission methodology for estimating expenditure on First Nations.

Methodology Component	Description
Total annual expenditure	All transactions undertaken by the general government sector of the Australian Government and State and Territory Governments in accordance with the ABS Government Finance Statistics framework excluding capital expenditure but incorporating depreciation and asset maintenance and capital grants made outside the general government sector.
Expenditure allocation	In accordance with the ABS Government Purpose Classification (GPC)
Direct and indirect expenditure	Incorporates both direct and indirect expenditure. Direct expenditure is deemed to be expenditure on services and payments provided directly to individuals, non-government service providers and local governments. Indirect expenditure refers to the transfer of monies between Australian governments through mechanisms such as Specific Purpose Payments and the Goods and Services Tax (GST) redistribution.
Indigenous specific and mainstream expenditure	Indigenous specific expenditure is expenditure on services and programs that are provided to the First Nations community specifically and that can be directly identified and do not need to be estimated. First Nations share of mainstream expenditure is provided to all Australians and the First Nations component of this is estimated using service use measure.
Service use measure	Two methods are used to estimate the First Nations share of mainstream service expenditure. Where there is a close relationship between First Nations as service users and the cost of providing services, First Nations usage of mainstream expenditure is estimated on the basis of actual service use. In circumstances where there is no direct relationship between individual First Nations Australians and the cost of providing services, First Nations usage of mainstream expenditure is estimated on the basis of share of population.

Using this methodology, the Productivity Commission estimated that in 2015-16, Australian governments spent AUD\$33.4 billion on First Nations Australians, representing 6.0 percent of total expenditure. Of this, \$6.0 billion (18 percent) was First Nations specific expenditure and \$27.4 billion (82 percent) was First Nations share of mainstream expenditure.

Of the total \$33.4 billion that is estimated to have been spent on Australian First Nations in 2015-16, it is estimated that a full half of that expenditure was on social security support (17 percent), public order and safety (12 percent), school education (12 percent) and general government (11 percent). Approximately a further quarter was spent on community support and welfare (11 percent), hospital services (10 percent) and public community health (5 percent). The remaining quarter of expenditure was allocated across tertiary education, housing, health care subsidies and support, community and environment, transport and communications, recreation and culture, labour and employment, early childhood and support to industry. This is illustrated in the following Figure 6.

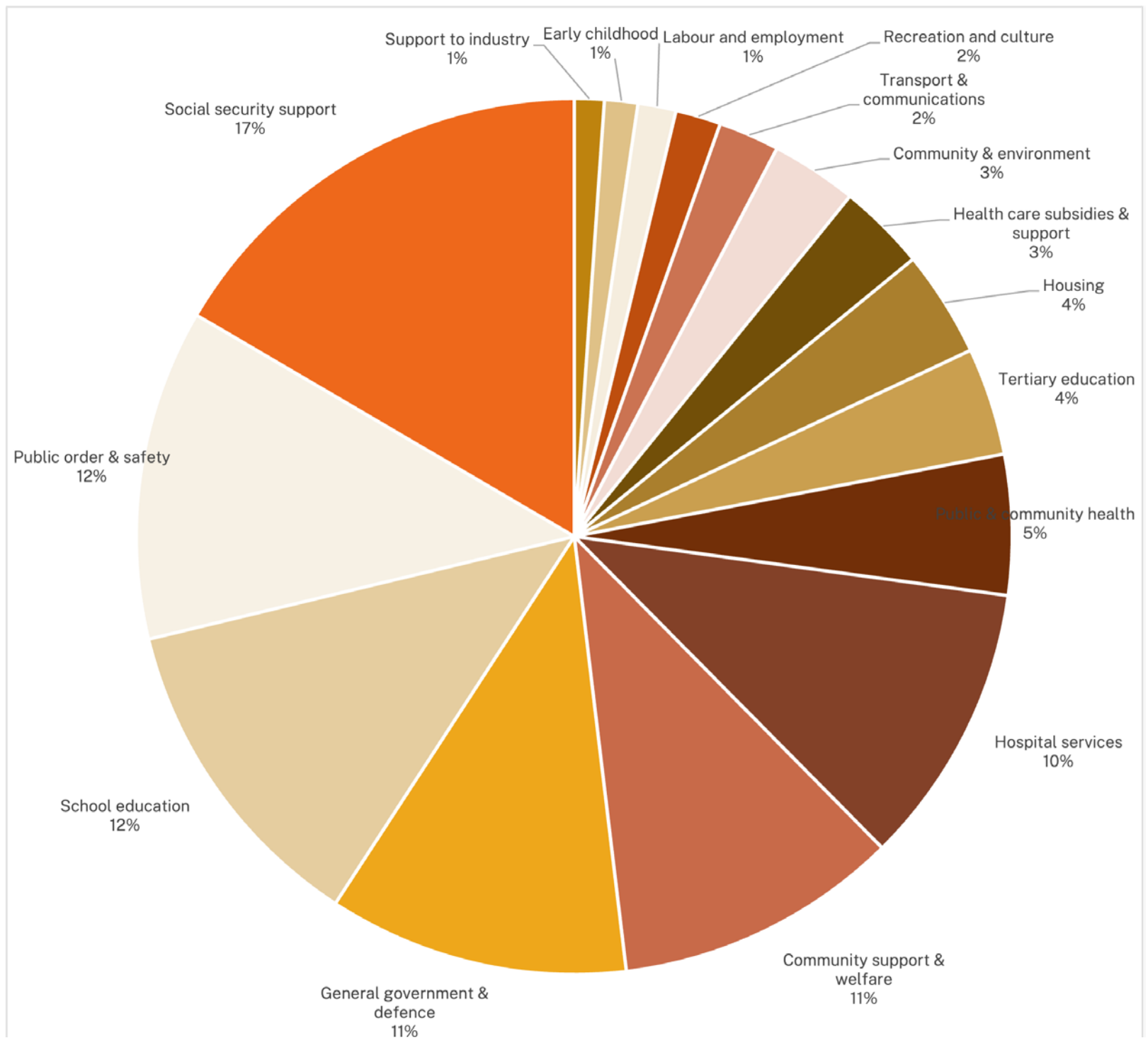


Figure 6 – Estimated allocation of Australian government expenditure of First Nations people (2015-16)

It is important to note that the reliability of these estimates varies according to how they have been determined:

- Directly identified First Nations expenditure is very reliable, albeit jurisdictions may not have been able to identify all targeted services.
- First Nations share of mainstream expenditure that has been estimated on the basis of actual service use are conceptually robust but are subject to limitations where there are gaps in data or incomplete identification of First Nations persons in administrative data collections.
- First Nations share of mainstream expenditure that has been estimated on the basis of share of population are conceptually robust but the services are less likely to have ‘on-the-ground’ significance.

As an indicator of accuracy, the following Figure 7 illustrates the portion of expenditure in each category that has been estimated according to directly identified First Nations expenditure, actual service use or share of population.

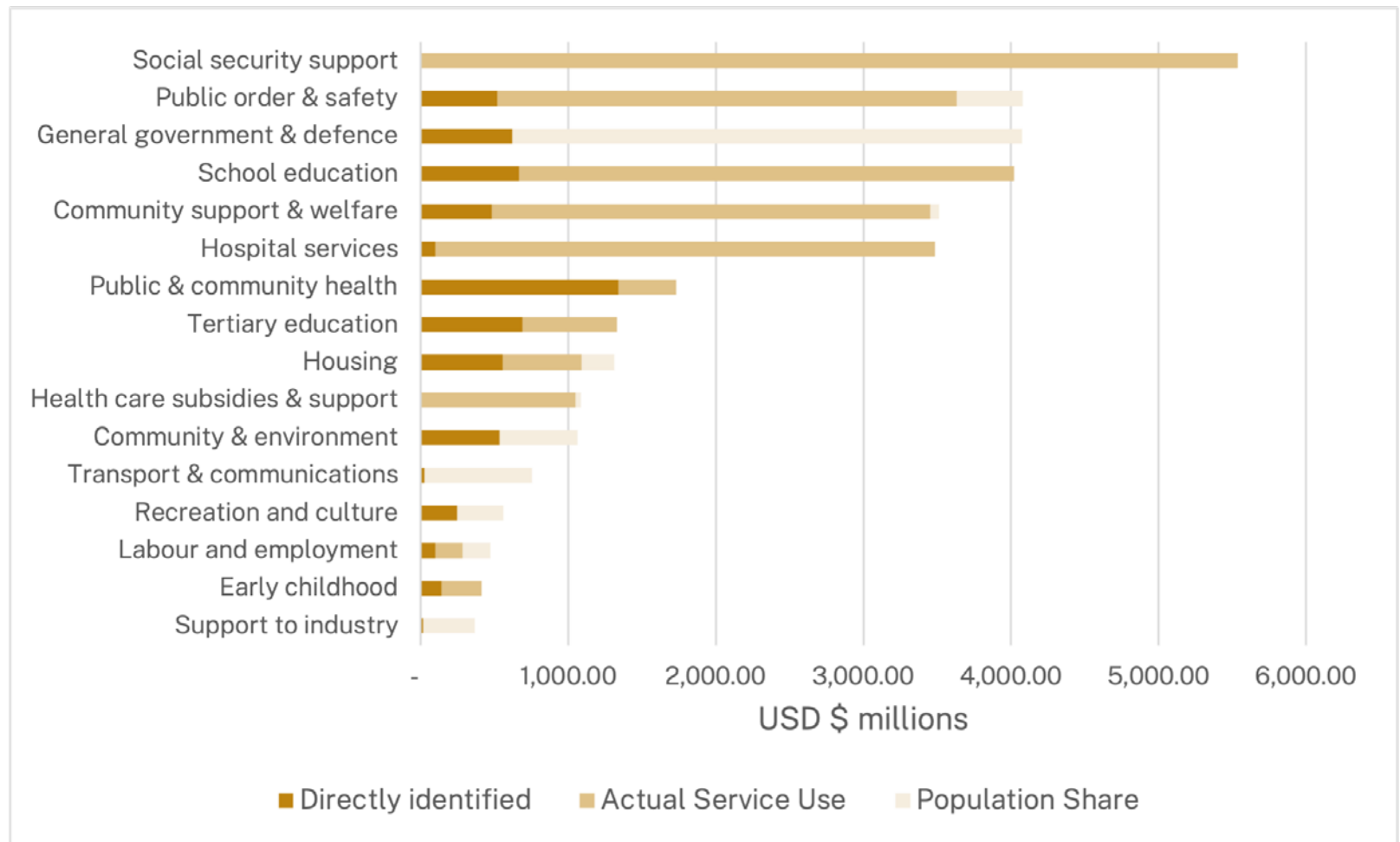


Figure 7 – Basis of Productivity Commission estimation by Government expenditure category

To put the estimated total expenditure of Australian Governments on First Nations people in context, with reference to total

Commonwealth Government expenditure in 2015-16, the amount spent on First Nations people is more than was budgeted to be spent on defence (\$26.0 billion), broadly equivalent to budgeted expenditure on education (\$32.5 billion), around half that was budgeted to be spent on health (\$69.2 billion) and 0.02 percent of the total budgeted social security and welfare expenditure.²⁸

In the context of State and Territory Governments, total expenditure by Australian governments on First Nations people in 2015-16 was more than total budgeted expenditure of the Western Australian Government (\$29.0 billion),²⁹ around double that of the South Australian Government (\$17 billion),³⁰ six times that of the Tasmanian (\$5.4 billion),³¹ and Australian Capital Territory Governments (\$5.2 billion),³² and 200 times that of the Northern Territory Government (\$166 million).³³ Whereas in comparison to budgeted total Queensland and Victorian Government expenditure it was equivalent to around two thirds (\$50.0 billion,³⁴ and \$55.5 billion,³⁵ respectively) and about half that of the New South Wales Government (\$69.6 billion).³⁶

Over the period 2008-09 to 2015-16 total expenditure on First Nations Australians by Australian Governments grew from \$22.9 billion to \$33.4 billion representing a CAGR of 6.2 percent. As illustrated in Figure 8,^{37,38,39,40} below, the period 2012-13 to 2015-16 was characterised by a decline in the growth rate of expenditure and the average amount per First Nations Australian peaked on 2010-11 at \$46,292, declining to \$41,833 in 2015-16.

²⁸ Morrison, S. and Corman, M. (2016), *Final Budget Outcome 2015-16*, Commonwealth of Australia, Canberra

²⁹ Department of Treasury (2016), *2015-16 Budget Fact Sheet*, Western Australian Government, Perth

³⁰ Government of South Australia (2016), *Budget Statements 2015-16: Budget Paper 3*, Government of South Australia, Adelaide

³¹ Tasmanian Government (2016), *2015-16 Budget: Budget Paper No 1*, Tasmanian Government, Hobart

³² Australian Capital Territory (2016), *Budget 2015-16*, Australian Capital Territory, Canberra

³³ Northern Territory Government (2016), *Budget Overview 2015-16*, Northern Territory Government

³⁴ Queensland Government (2016), *Queensland Budget 2015-16: Budget Strategy and Outlook –Paper 2*, Queensland Government, Brisbane

³⁵ Victorian Government (2016), *Victorian Budget 2015-16*, Victorian Government, Melbourne

³⁶ New South Wales Government (2016), *Budget Statement 2015-16*, New South Wales Government, Sydney

³⁷ Productivity Commission (2010), *2010 Indigenous Expenditure Report*, Australian Government, Canberra

³⁸ Productivity Commission (2012), *2012 Indigenous Expenditure Report*, Australian Government, Canberra

³⁹ Productivity Commission (2014), *2014 Indigenous Expenditure Report*, Australian Government, Canberra

⁴⁰ Productivity Commission (2014), *2014 Indigenous Expenditure Report*, Australian Government, Canberra

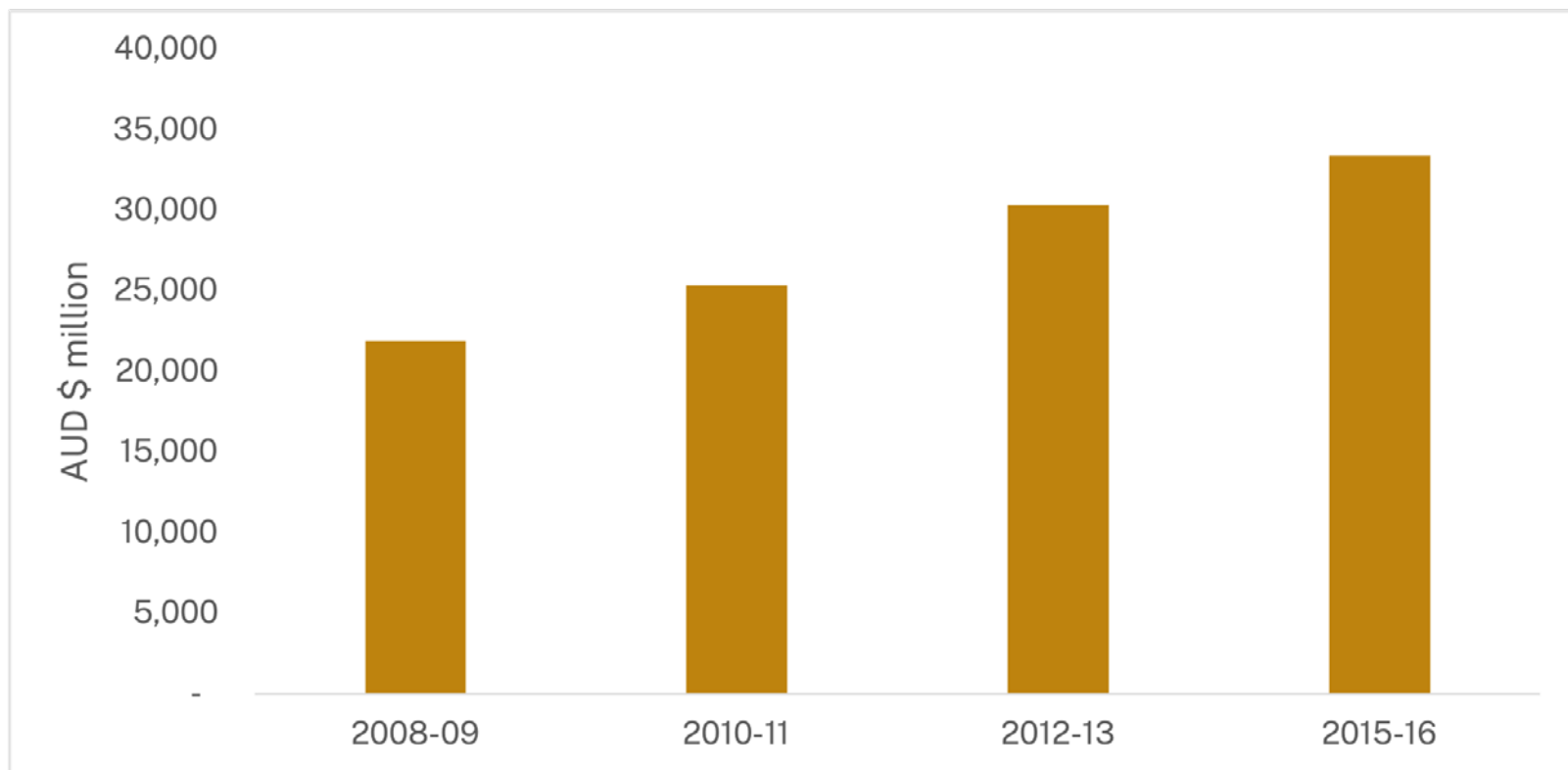


Figure 8 – Estimated expenditure by Australian governments in First Nations Australians (2008-09 to 2015-16)

The Productivity Commission is yet to provide a more recent update. However, it is reasonable to assume that the escalation of the Australian First Nations population between 2015-16 and 2020-21, together with investments supporting the Closing the Gap compact and higher cost of living, expenditure will have continued to have increased.

The cost of bureaucracy and the transactional relationship

The limitations associated with First Nations' rights and legal interests in land, water, sea country, intellectual property and financial assets has two significant outcomes that have a detrimental effect on productivity across the wider economy:

- **Transactional relationship** – whereby First Nations effectively trade their rights (e.g., extinguishment or suppression of native title rights or leasing on First Nation freehold) with a third-party developer such that a development may proceed in exchange for some form of monetary and/or non-monetary compensation and other terms. This is opposed to a partnership relationship whereby the First Nations interests participate as equity partners in the development or as vertical or horizontal joint venture partners. While this is not a binary circumstance (i.e., commercial arrangements can exhibit elements of both transaction and partnership relationships), the limited extent of economic rights and absence of fungibility across the First Nations asset base (see Background Paper for Seminar 2 – Using the Acquired Assets) means that most relationships between First Nations parties and third parties are transactional in nature.
- **Bureaucracy** – in order to firstly, prevent illegal or entirely inequitable appropriation of First Nations rights and secondly, to ensure that First Nations interests do not unduly constrain mainstream economic development, the aforementioned transactional relationship is heavily regulated by state, territory and Commonwealth legislation and arbitrated by Australian courts. It also requires not insignificant institutional and governance arrangements among First Nations interests to manage rights and any transaction that may impact rights. This regulatory, administrative, institutional and legal framework is characterised by significant and often protracted administrative and legal process, colloquially referred to as 'black-tape' – an adaption of the idiom 'red-tape' and typically used in a pejorative context - which refers to circumstances where regulations are excessive, rigid or redundant. In circumstances where First Nations interests held

stronger, more fungible rights they would be able to engage in commerce under normal commercial terms and legal frameworks, protecting and creating value from their assets as they see fit, resulting in substantially less 'black-tape' and a more productive economy.

Nothing in this section should be interpreted as implying that regulation and strong administration designed to protect First Nations rights is not necessary. In a framework that subordinates First Nations rights and limits the fungibility of their assets, robust frameworks in this regard are necessary. But they are only necessary because of the economic limitations of First Nations rights.

Key drivers of the productivity penalties associated with this framework are summarised in the following subsections.

Heritage surveys and assessments

A significant consequence of colonisation has been the destruction of First Nations cultural assets (which continues today) and the loss of cultural knowledge pertaining to assets. The first step in most proposals by a third party to utilise lands, waters or sea country in which First Nations have interests is to undertake a cultural heritage survey. This is done to provide the developer with confidence in claimed heritage values and to provide the First Nations party with confidence that the subject lands, waters or sea country do not incorporate heritage values, the knowledge of which may have been lost by virtue of colonisation. In other words, heritage surveys are designed to provide both parties with confidence that negotiations are based on an optimal heritage knowledge base.

Depending on the specific circumstances, heritage surveys can be expensive exercises, the cost of which is typically born by the more resourceful third-party proponent. For example, a study undertaken a decade ago in Western Australia found that the average cost of a Section 18,⁴¹ heritage application was approximately \$383,000, with around \$213,000 going to archaeological reports, \$47,800 to ethnographic studies and \$42,000 to consultation with First Nations cultural authority.⁴²

Further and perhaps more alarmingly, this process does not entirely mitigate the risk of cultural destruction.

⁴¹ Provision of the former Western Australian heritage law (*Aboriginal Heritage Act 1972 (WA)*) providing the responsible Minister the power to give consent to a heritage site being impacted.

⁴² Ernst & Young (2013)

ILUA negotiations and litigation

Indigenous Land Use Agreements (ILUAs) are agreements between First Nations with interests in land, sea country or water and a third party that wishes to access those lands, sea country or water for economic or other purposes. In the case of native title, the *Native Title Act* prescribes that an ILUA must be negotiated in all such circumstances. However, an ILUA can also be used in the context of other tenure or land rights.

An ILUA sets out how the subject lands may be used by the First Nations interests and the third party, for what purpose those lands may be used and any compensatory arrangements. In the case of native title, there is a prescribed period for negotiations in good faith before either party may apply to the Federal Court to have an outcome determined.

To date there have been 587 native title determinations across Australia with an additional 109 claims in process. There are currently 1,446 ILUAs pertaining to these determinations registered with the Native Title Tribunal and 832 Future Act Applications.⁴³

These can be very protracted and expensive exercises. For example, it was reported that in the early years of native title, (1994 to 2011) the average time for determination after litigation was seven years.⁴⁴ In these earlier years the protracted period was partly attributable to the newness and evolving nature of native title. However, even three decades in, related processes remained time consuming and expensive. Challenges in this area persist and include:

- Capacity constraints in representative bodies;
- Establishing native title;
- Availability and cost of experts;
- Tenure analysis;
- Negotiation difficulties;
- Overlapping claims and disputes;
- Capacity constraints in government bodies; and
- Novel claims.

The cost of doing nothing

Whilst for various unavoidable reasons it lacks precision, the discussion in this Seminar Background Paper clearly highlights not only the vast loss accrued by First Nations Australians that is a direct result of policies and legislation that have excluded them from economic participation, but also that the cost incurred by Australian governments (and therefore the taxpayer) and the productivity penalties that are attributable to the transactional nature of First Nations – third party developer relationships and the regulatory framework that facilitates this is escalating. Further, and more importantly this escalating cost is associated with little demonstrable improvement in the socio-economic circumstances of First Nations Australians, which not only demonstrates policy failure, but exacerbates the fiscal challenge.

These policy and fiscal dilemmas have been recognised by key stakeholders in other jurisdictions with substantial Indigenous populations decades ago.⁴⁵ Australia needs to take urgent, decisive action to implement economic justice for its First Nations and stem and reverse the likely growing cost to the nation and ongoing productivity penalties to its economy. This is a predicament that has been recognised in Canada, whereby the Financial Management Board is implementing a roadmap designed to further strengthen frameworks for economic self-determination of First Nations, Inuit and Metis peoples with a primary driver of this framework being to address the issues raised in this Background Paper.⁴⁶

⁴³ National Native Title Tribunal (2021), Statistics: current applications (<http://www.nntt.gov.au/Pages/Statistics.aspx>)

⁴⁴ National Native Title Tribunal IN: Australian Law Reform Commission (2014), Review of the Native Title Act 1993 (Cth), Australian Government, Canberra

⁴⁵ Royal Bank of Canada (1997), *The Cost of Doing Nothing: Submission to the Royal Commission on Aboriginal Peoples*, Royal Commission on Aboriginal Peoples, Canada

⁴⁶ Financial Management Board (2023), *The Roadmap Project: Creating Paths for First Nations Prosperity*

Appendix 1: Motivations for Britain's Colonisation of Australia: A Brief Synopsis

Whilst colonisation by nation states can be motivated by geopolitical-strategic and domestic administrative factors, in most cases economic expansion of the colonising state is at least a major driver, if not the single motivating factor.

By gaining cheap (or virtually free) access to what in the Western context are underexploited natural resources and other factors of production (including free labour in the many instances of colonisation that have been characterised by enslavement of Indigenous peoples) and potentially access to new markets, the typical outcome of colonisation is that the colonising state accrues significant economic dividends at the expense of the colonised Indigenous peoples. Colonising nation states achieve this outcome by virtue of the asymmetrical relationship between colonisers and Indigenous inhabitants that is the case in all successfully executed efforts to colonise. It has been proposed that in the context of today's globalised economy and its robust influential economic actors such as multinational corporations, financial institutions and well-resourced governments, a similarly asymmetrical economic relationship persists.⁴⁷

The orders given by the British Admiralty to Lieutenant James Cook '*...to take possession of convenient situations...*',⁴⁸ imply that the intent of claiming the Australian continent as British territory may have been for either a range of reasons (geopolitical-strategic, economic, administrative, etc.) or for specific reasons not formally disclosed. The precise intent has been the matter of some debate among historians.

From a geopolitical-strategic perspective, France, the Dutch Republic and Spain were each active colonisers in the region, with the Dutch having previously colonised the Indonesian archipelago and both France and Spain subsequently taking territories in the Pacific.⁴⁹ Both French and Dutch vessels certainly visited the Australian continent prior to and around

the time of colonisation, leading some historians to propose that Britain's primary intent was one of a geopolitical-strategic nature. From an economic perspective, there is some evidence that despite previous accounts of the Australian continent being '*...dry sandy and destitute of water...no animals for food, and the sea water not very plentifully stocked with fish*',⁵⁰ James Cook advocated a potential sea-based trade route from the colony.⁵¹ A further, and probably the most widely acknowledged motivation was chronic over-crowding in the British prison system at the time, requiring Britain to identify additional mechanisms to expatriate convicts to penal settlements.

There seems increasing consensus that the motivation was a most likely each of these factors, the impact of which was exacerbated by the outcome of the American War of Independence in 1775, which resulted in the loss of 13 North American British colonies:

- Prior to its defeat, Britain had a policy of transporting convicts to its North American colonies, whereby convicts were sold to plantation owners, delivering a solution to overcrowded domestic prisons as well as economic dividends;
- The loss of these colonies reduced British access to significant factors of production and markets; and
- At the time, Britain was competing with France, Spain and the Dutch Republic for territories to expand its interests, with the Indo-Pacific being the last frontier.⁵²

However, this debate is largely academic. Regardless of the initial intent and any geopolitical-strategic advantage or relief from overcrowded domestic prisons that may have been attained, Britain clearly received a significant economic benefit.

Even though transportation of convicts provided free labour to construct basic infrastructure at the colonies, establishing the Australian colonies proved challenging, with Botany Bay almost failing in its first year and struggling over its first decades. It wasn't until new settlers and released convicts began to push out into the frontiers that the prospect for significant economic gain became apparent.

Australian First Nations were stripped of their ability to

⁴⁷ Burrows, J. and Schwartz, R. (2020), *Indigenous Peoples and International Trade: Building equitable and inclusive international trade and investment agreements*, Cambridge Press, Cambridge

⁴⁸ Orders provided to Lieutenant James Cook, commanding officer of HMB Endeavour, by the Lords of the British Admiralty, 30 July 1768, National Library of Australia

⁴⁹ Lee, C. and Padron, R. (2020) *The Spanish Pacific, 1521-1851*, Amsterdam university Press, Amsterdam

⁵⁰ William Dampier, cited by Clark, M. (1971), *Sources of Australian History*, Oxford University Press, Oxford

⁵¹ Blainey, G (2001), *The Tyranny of Distance*, Macmillon Australia, Sydney

⁵² Rohleder, E. (2010), *Reasons for the British Decision to Colonise Botany Bay in 1788*

participate in the economy from the outset of colonisation. Orders given by the Crown to the first governor of Britain's first Australian Colony of New South Wales (1788), Admiral Arthur Phillip, had been to maintain peaceful and cordial relations with Australia's existing inhabitant (First Nations) and that these inhabitants were to be defined as British subjects entitled to protection under British Law,⁵³ a principle that the Colonial Office extended to all subsequent Australian colonies. To an almost full extent, this did not occur.

As new settlements were made across the nation and mainly agricultural enterprise expanded into ever increasing areas of land (considered as 'sovereign' by First Nations) were taken by colonial governments and settlers. Consistent with instructions from the British Colonial Office, First Nations people were subject to British law and did not have any property rights recognised under British law, resulting in their lands being taken and any physical resistance quashed by colonial forces or settlers under the protection of those forces. Indeed, early conflicts between First Nations and settlers (more recently referred to as the 'Frontier Wars') arose primarily from the rapid expropriation of First Nations land from the outset of settlement and protection of colonial economic interest such as agricultural enterprise from First Nations retribution whereby settlers were assisted by soldiers and police and killing First Nations people to enforce and protect settler economic interests was not considered criminal.⁵⁴ As colonial expansion extended into the interior, violent appropriation of First Nations lands became more common, if not the norm.

It is likely that several factors including a (anecdotal) reduction in the Australian First Nations population, a need for regulation of labour markets in pastoral areas of Australia and perhaps a growing public consciousness within Australian Colonies and Britain as to the ongoing mistreatment of Australia's First Peoples, led to a change in policy approach to Australian First Nations affairs – 'protection'.⁵⁵ This was a policy trend common to other British colonies such as the United States, Canada and New Zealand.

In 1837, the British House of Commons Select Committee on Aborigines recommended encouraging missionaries for First Nations people be established and special codes of law be implemented to protect them under the directive of a 'protector'. To this end 'protectors' were appointed in the Colonies of New South Wales, South Australia and Western

Australia mainly under executive order with instruction to protect First Nations people from abuses and to provide First Nations populations around towns with rations, blankets and medicines.⁵⁶ Because protectors had limited powers, these frameworks proved largely ineffective and by the mid-1800s the colonies either terminated the office of the protector or transferred its responsibilities to the Police.⁵⁷

These initial attempts at 'protection' then evolved into more formal and extensive policies over the course of the half-century leading up to Federation, with three colonies implementing legislation to this effect – Victoria (1867), Western Australia (1886) and Queensland (1897) – over this period. Key characteristics of the frameworks under this legislation, or separate policy included:

- Segregating 'fullblood' First Nations people on reserves (typically operated by missions) and restricting contact between them and others;
- Assimilation of 'half-castes' and particularly their children by separating them from their families and communities in boarding houses and education them according to European culture; and
- Limiting various civil rights for First Nations people, including the right to marriage, free movement and discriminatory employment conditions.

Colonial Government legislation to this effect included:

- Aboriginal Protection Act 1869 (Vic)
- Aboriginal Protection Act 1886 (Vic)
- Aborigines Protection Act (amended) 1886 (WA)
- Aborigines Act 1889 (WA)
- Aborigines Act 1897 (amended) (WA)
- Aboriginal Protection and Restriction of the Sale of Opium Act 1897 (QLD)

⁵³ Instructions to Arthur Phillip Esq (25 April 1787) *Historical Records of Australia*

⁵⁴ Reece, R. (1974), *Aborigines and Colonists: Aborigines and Colonial Society in New South Wales in the 1830s and 1840s*, United Press, Sydney

⁵⁵ Law Reform Commission (1986), *Recognition of Aboriginal Customary Laws*, ALRC Report 31, Australian Government, Canberra

⁵⁶ Rowley (1978), *The Destruction of Aboriginal Society: Aboriginal Policy and Practice*, ANU Press, Canberra

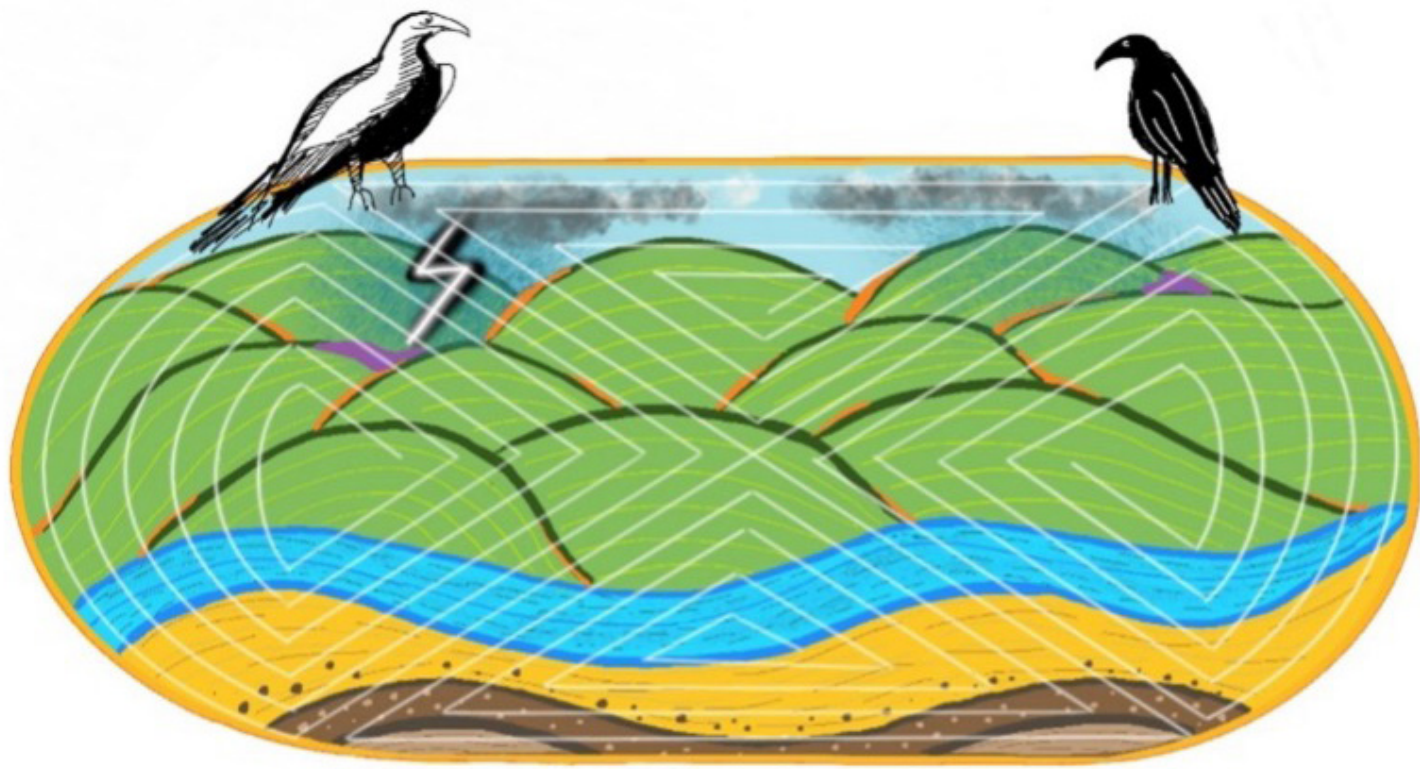
⁵⁷ Law Reform Commission (1986), *Recognition of Aboriginal Customary Laws*, ALRC Report 31, Australian Government, Canberra

Appendix 2: Post Federation Segregation, Assimilation and Control Legislation

State/Territory	Segregation, assimilation and control legislation
Victoria	1. <i>Aborigines Act 1910</i>
Western Australia	2. <i>Aborigines Act 1905</i> (repealed <i>Aborigines Protection Act 1886</i> and <i>Aborigines Act 1897</i>) 3. <i>Aborigines Act (Amended) 1911</i> 4. <i>Native Administration Act 1936</i> (Amended the <i>Aborigines Act 1911</i>) 5. <i>Native Administration (Amendment) Act 1941</i> 6. <i>Native (Citizenship Rights) Act 1944</i>
Queensland	7. <i>Aboriginal Protection and Restriction of the Sale of Opium (Amendment) Act 1934</i> 8. <i>Aboriginal Preservation and Protection Act 1939 & Torres Strait Islander Act 1939</i> (repealed the <i>Aboriginal Protection and Restriction of the Sale of Opium (Amendment) Act 1934</i>) 9. <i>Aboriginal and Torres Strait Islander Affairs Act 1965</i> (Repealed both 1939 legislations)
New South Wales	10. <i>Aborigines Protection Act 1909</i> 11. <i>Aborigines Protection (Amendment) Act 1915</i> 12. <i>Aborigines Protection (Amendment) Act 1918</i> 13. <i>Aborigines Protection (Amendment) Act 1936</i> 14. <i>Aborigines Protection (Amendment) Act 1940</i> 15. <i>Aborigines Protection (Amendment) Act 1943</i> 16. <i>Aborigines Act 1969</i> (repealed former <i>Aborigines Protection Acts</i>)
South Australia	17. <i>Aborigines Act 1911</i> 18. <i>Aborigines Act 1934</i> (repealed former Act) 19. <i>Aboriginal Affairs Act 1962</i>
Tasmania	20. <i>Cape Barren Island Reserve Act 1912</i> 21. <i>Cape Barren Island Reserve (Amendment) Act 1945</i>
Northern Territory	22. <i>Aboriginal Ordinance 1911</i> (Cth) 23. <i>Aboriginal Ordinance 1918</i> (Cth)
Australian Capital Territory	24. <i>Aborigines Welfare Ordinance 1954</i> (Cth)

Appendix 3: Terms of Reference for the Productivity Commission Indigenous Expenditure Report

1. The Indigenous Expenditure Report aims to contribute to better policy making and improved outcomes for Indigenous Australians, by:
 - a. Reporting on expenditure on services which support Indigenous Australians, including in a manner consistent with the COAG Working Group on Indigenous Reform statement of objectives, outcomes and measures and the COAG Overcoming Indigenous Disadvantage report framework.
2. Promoting the collection and reporting of robust Indigenous expenditure data through:
 - a. determining and applying consistent methodology to the collection and reporting of data;
 - b. identifying necessary improvements to the collection and availability of relevant data; and
 - c. developing and implementing strategies to address data deficiencies.
3. The Indigenous Expenditure Report will include expenditure by both Commonwealth and State/Territory governments (and local government if possible), and over time will:
 - a. allow reporting on Indigenous and non-Indigenous social status and economic status;
 - b. include expenditure on Indigenous-specific and key mainstream programs;
 - c. be reconcilable with published government financial statistics;
 - d. focus on on-the-ground services in areas such as education, justice, health, housing, community services, employment and other significant expenditure;
 - e. report on a regular basis, including:
 - completion of an initial 'stocktake' report for the first COAG meeting in 2009, setting out the reporting framework, principles, methodology, and survey of available data and strategies for data development;
 - staged reporting against the framework (having regard to considerations such as data availability, implementation requirements and costs of reporting); and
 - report on both Indigenous and non-Indigenous expenditure; and
 - f. provide governments with a better understanding of the level and patterns of expenditure on services which support Indigenous Australians and provide policy makers with an additional tool to target policies to Close the Gap in Indigenous Disadvantage.
4. The Indigenous Expenditure Report Steering Committee will:
 - a. provide regular updates to Heads of Treasuries on progress in developing the expenditure;
 - b. framework and to the Working Group on Indigenous Reform on progress on data issues;
 - c. recommend to Heads of Treasuries appropriate institutional arrangements for annual; and reporting on Indigenous expenditure once the framework for reporting has been developed.



Yukeembruk Yibaay-maliyan mayiny (The Crow and Eagle-hawk People)

Crow and Eagle-hawk men lived at opposite ends of the Brindabella (Goondawarra) mountain range. Between the two camps lived two sisters, who were under the protection of Yibaay-Maliyan because they were related to him. Yukeembruk wished to marry the sisters, but they were forbidden to him by kinship laws. Upset by Yibaay-maliyan's refusal to approve marriage, Yukeembruk decided to kill his enemy's son. While Yibaay-maliyan was out hunting he tricked the boy to eat and drink until his belly was full, then he speared him. Yibaay-maliyan returned from hunting early as he knew something was wrong. While hunting he missed two wallabies, which had never happened before. Yukeembruk tried to make Yibaay-maliyan believe that many men came to camp, killed the boy and wounded Yukeembruk himself in the leg. The two men dug a burial site, but Yibaay-maliyan who had not been deceived by the story, tricked Yukeembruk into testing the size of the grave, placed his boy's body on top of him and buried the murderer alive. Yukeembruk dug his way out like a wombat but was transformed into a Crow. Yibaay-maliyan's camp was struck by lightning and he was transformed into an Eagle.

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